



LEGAL FRAMEWORKS OF ABORTION IN THE EUROPEAN UNION: COMPARATIVE INSIGHTS FROM SELECTED JURISDICTIONS

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SUMMARY

Authors of this article examine the evolution and current state of abortion law in two European Union Member States—Poland and Germany—placing their analyses within the broader constitutional and historical context. The study employs a dogmatic-formal method, supplemented by the historical approach, to trace legislative developments and interpret key judicial decisions that have shaped the legal framework governing the permissibility of abortion. Particular emphasis is placed on the role of constitutional interpretation and its impact on the stability—or volatility—of reproductive rights. Beyond the introduction—which succinctly outlines the importance of deliberations on the permissibility of abortion, as well as the implications of the terminology used in public discourse and the resulting terminological discrepancies—the article is divided into two main sections, each devoted to examining the issue in a specific national context.

*The first substantive section examines the development of German abortion law, beginning with the *Constitutio Criminalis Carolina* of 1532 and tracing its evolution through the nineteenth and twentieth centuries. The analysis highlights the formation and endurance of §218 of the Penal Code, the profound transformations it underwent during the Imperial, Weimar, and Nazi periods, and the divergent approaches adopted in East and West Germany after 1949, as well as the complex legal reconciliation following their reunification in 1990. Special attention is devoted to the constitutional dimension of the debate and to the Federal*

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Constitutional Court's landmark rulings, which articulated both the state's duty to protect unborn life and the woman's fundamental rights to dignity and self-determination.

The second section focuses on Poland, tracing the trajectory of its abortion law from the early twentieth century to the present. The period prior to 1932 is addressed only in general terms, primarily due to historical circumstances: the 123 years of partition which deprived Poland of the ability to enact and enforce its own criminal laws. Therefore, the analysis concentrates mainly on Polish legislation from 1932 onwards, examining key statutory reforms and constitutional interpretations. It covers, in particular, the 1932 Penal Code, the 1956 liberalization introducing the social indication, subsequent restrictions and amendments, the 1993 Family Planning Act, and the landmark Constitutional Tribunal rulings of 1997 and 2020, along with ministerial and prosecutorial interpretative guidelines issued in 2024 as a response to the ongoing abortion debate.

The comparative perspective underscores profound differences between the two systems. While both constitutional courts acknowledge the state's obligation to protect prenatal life, their interpretations of how this obligation interacts with women's rights have diverged sharply. In Germany, the principle of proportionality has guided a balanced approach that integrates the protection of life with respect for individual autonomy and legal certainty; in Poland, constitutional reasoning has led to successive restrictions and enduring instability, reflecting deep societal divisions and the subordination of reproductive rights to political interests. The authors conclude that reproductive rights, as reflected in abortion law, serve as a crucial indicator of a legal system's commitment to democratic values, legal certainty, and respect for individual autonomy. The comparison of Poland and Germany demonstrates that enduring legal stability in this area depends not only on legislative design but also on the broader constitutional culture and the capacity of legal institutions to reconcile competing fundamental values.

KEYWORDS

Termination of pregnancy, legalization of abortion, restriction of abortion rights, Germany, Poland, impact of the Constitutional Court's rulings on reproductive rights, European Union.

INTRODUCTION

Abortion continues to represent one of the most polarising and multifaceted issues in contemporary society, both within the European Union—where legal frameworks, political dynamics, cultural norms, and reproductive health practices may vary significantly across Member States—and in the broader context of global socio-ethical discourse. Although various practices of pregnancy termination can be traced as far back as antiquity, as evidenced by numerous historical sources, the status of women has undergone multiple transformations over

time, as have societal attitudes toward abortion³. This complex historical evolution of abortion laws and practices has gone hand in hand with the emergence of diverse bioethical frameworks, developed in an effort to address the enduring controversies surrounding the legitimacy of its legalisation or restriction. As a result, debates persist to this day over the moral and legal status of the embryo⁴, temporal lines establishing the boundaries of its legal protection⁵, as well as the terminology itself, which is often employed as a tool within political discourse⁶ or may even affect the quality and accessibility of comprehensive reproductive health care⁷.

The present article seeks to move beyond a mere descriptive juxtaposition of two national abortion regimes and instead addresses a more precise research question: how do different legal frameworks within the European Union shape the scope and durability of reproductive rights, and what factors possibly explain the persistence or erosion of legal norms and measures essential for upholding human rights over time? Authors aim to explore not only the content of law but also the relationship between legislative design and broader political, historical and societal forces that either stabilize or destabilize access to abortion.

The selection of Poland and Germany is deliberate and grounded in comparative legal reasoning. Each of these jurisdictions exemplifies a distinct trajectory of regulatory development, offering valuable insight into the interaction between law and socio-political context. Poland represents one of the most restrictive regimes in contemporary Europe, marked by abrupt constitutional interventions and persistent political contestation. Germany, by contrast, provides a hybrid model in which abortion remains formally unlawful, but is rendered non-punishable under specified conditions, reflecting a compromise rooted in the post-war division of the state and subsequent reunification. Together, these cases capture the spectrum of legal approaches within the European Union—from near-prohibition to conditional permissibility—thus allowing for an analysis of how legal traditions, religious influence, civil society mobilization, and supranational norms intersect to shape reproductive rights.

Methodologically, the article adopts a dogmatic-formal approach as its primary tool of inquiry, examining statutory provisions and key judicial decisions in order to identify the operative legal standards in each jurisdiction. This is complemented by the historical method,

³ J.O. DRIFE, “Historical perspective on induced abortion through the ages and its links with maternal mortality”, *Best Practice & Research Clinical Obstetrics and Gynaecology*, Vol. 24 Iss. 4, (2010), pp. 431-441.

⁴ See: B. CHYROWICZ, “Bioetyka. Anatomia sporu [Bioethics. Anatomy of a Dispute]”, *Wydawnictwo Znak*, (2015); J. STELMACH, B. BROŻEK, M. SONIEWICKA, W. ZAŁUSKI, “Paradoksy bioetyki prawniczej [Paradoxes of Legal Bioethics]”, *Wolters Kluwer*, (2010).

⁵ See: O. SITARZ, “Model prawnokarnej reakcji i jej uzasadnienie na naruszenie i narażenie dobra prawnego w postaci życia człowieka [The Model of Criminal-Law Response and Its Justification for the Violation and Endangerment of the Legal Good of Human Life]”, *Wydawnictwo Uniwersytetu Śląskiego*, (2024), pp. 125-133; H.G. KOCH, “Wann beginnt das menschliche Leben? Rechtliche Überlegungen [When does human life begin? Legal considerations]”, *Zeitschrift für ärztliche Fortbildung*, 87(10-11), (1993), pp. 797-804.

⁶ I. DESPERAK, “Antykoncepcja, aborcja i... eutanazja. O upolitycznieniu praw reprodukcyjnych w Polsce [Contraception, Abortion, and... Euthanasia: On the Politicization of Reproductive Rights in Poland]”, *Folia Sociologica*, 30, (2003), pp. 193-207.

⁷ C.C. HEUSER, K.G. SAGASER, E.A. CHRISTENSEN, C.T. JOHNSON, J.R. LAPPEN, S. HORVATH, “Society for Maternal-Fetal Medicine Special Statement: A critical examination of abortion terminology as it relates to access and quality of care”, *American Journal of Obstetrics & Gynecology*, Vol. 228 Iss. 3, (2023), pp. B2-B7.

which situates legislative changes within their socio-political context, tracing the evolution of abortion regulation from the early nineteenth century to the present. Comparative insights are drawn through a functional analysis, focusing on how different legal systems address common challenges, such as the protection of prenatal life, the autonomy of the pregnant person, and the role of the state in mediating these interests. By combining doctrinal and historical perspectives, the study aims to elucidate both the formal legal architecture and the political dynamics that underpin it. Nevertheless, in clarifying the research design at the outset, authors underscore that this paper does not merely catalogue legislative differences. Rather, it investigates the mechanisms through which abortion laws in the European Union can either safeguard or curtail fundamental rights, highlighting the conditions under which liberal reforms endure or, conversely, are reversed. This framework provides the basis for the conclusions offered later in the article, where the divergent experiences of Poland and Germany are used to draw broader lessons about the resilience—or fragility—of reproductive rights in contemporary Europe.

Finally, the authors deem it essential to address the terminological dimension of the abortion debate, which plays a pivotal role in both legal drafting and public discourse. The term *abortion* originates from Latin *aborto*, which derives from the verb *aboriri*, meaning “to perish”, “to pass away”, or “to set” (as in the sun). The word *abortion* also has numerous synonyms, and selecting appropriate terminology often proves to be a challenge for contemporary authors. English-language dictionaries offer the following definitions of this term: “the termination of a pregnancy after, accompanied by, resulting in, or closely followed by the death of the embryo or fetus”, “spontaneous expulsion of a human fetus during the first 12 weeks of gestation”, or “induced expulsion of a human fetus”⁸; “an operation or other procedure to terminate pregnancy before the fetus is viable”⁹; “the removal of an embryo or fetus from the uterus in order to end a pregnancy” or “any of various surgical methods for terminating a pregnancy, esp. during the first six months”¹⁰. Some definitions are significantly more elaborate, for instance: “the expulsion of a fetus from the uterus before it has reached the stage of viability (in human beings, usually about the 20th week of gestation). An abortion may occur spontaneously, in which case it is also called a miscarriage, or it may be brought on purposefully, in which case it is often called an induced abortion.”¹¹. Depending on the chosen linguistic definition alone, one may encounter terms such as: *termination*, *expulsion*, *removal*, *miscarriage*, *induced abortion*, *killing*, *fetus*, *embryo*, *child*, *conceived child*, *unborn baby*, *pregnant person*, *woman*, *mother*, etc. Some of these terms have been adopted in various legal instruments; others have become tools in the political struggle over the permissible scope of reproductive rights—and are thus frequently categorized as either *pro-life* or *pro-choice*. Poland is among the countries in which the choice of vocabulary appears to carry significant weight. As Agnieszka Graff writes:

Public debate is not an academic dispute; what matters is not only the strength of arguments, but also the power of voice. What is at stake is whose view and whose language becomes binding for everyone. In Poland, a way of thinking, speaking, and assigning value in the matter of abortion has become legitimized—one that is valid solely within a religious framework. Over the past few years, words such as “fetus” and “pregnancy” have practically

⁸ <<https://www.merriam-webster.com/dictionary/abortion>> [accessed 2025 07 05].

⁹ <<https://www.collinsdictionary.com/dictionary/english/abortion>> [accessed 2025 07 05].

¹⁰ Id.

¹¹ <<https://www.britannica.com/science/abortion-pregnancy>> [accessed 2025 07 05].

disappeared from public discourse. They have been replaced by “unborn children” and “protection of conceived life”. Abortion is referred to as “killing”, and a pregnant woman is now simply a “mother”.¹²

However, the situation is not necessarily binary. The type of terminology employed depends largely on who is speaking, therefore it is difficult to identify any particular terms as most common, let alone correct. One can, however, evaluate the language of legal acts addressing abortion—some of which speak volumes, while others don’t say much. This paper reviews the legislation of two countries—Poland and Germany—in order to examine, at least to a limited extent, the trajectory, nature, and scope of changes in abortion law within Europe. The terminology used hereinafter—contrary to any possible expectations of either side of the bioethical dispute over pregnancy termination, which is not the subject of this paper—corresponds either to the nomenclature adopted in the legislation under discussion or, quite simply, is incidental.

GERMANY: STABILITY THROUGH CONSTITUTIONAL COMPROMISE

Between Theology and Law: Early German Conceptions of Abortion Regulation

The first groundbreaking codification of modern law, which played a pivotal role in shaping the development of criminal law across European states, was the German *Constitutio Criminalis Carolina* (commonly referred to as the Carolina, CCC) of 1532, promulgated under Charles V in order to unify the legal system of the Holy Roman Empire (lat. *Sacrum Imperium Romanum*; ger. *Heiliges Römisches Reich*). Although the present analysis focuses primarily on the nineteenth-century law and contemporary regulations, a proper understanding of the earliest legislative decisions concerning abortion proves essential.

Early modern European thought regarding the criminalization of abortion was grounded in the Aristotelian-Thomistic doctrine of embryogenesis and delayed ensoulment¹³. While modern scholarship raises doubts about the historical interpretation of Aristotle’s texts concerning the precise moment of the ensoulment¹⁴, it was assumed for many centuries that the soul entered the developing embryo at a specific stage, meaning the 40th day after conception in the case of male fetuses, and around the 80th day for female fetuses¹⁵. Only later did the criterion of

¹² A. GRAFF, “Świat bez kobiet. Płeć w polskim życiu publicznym [A World Without Women. Gender in Polish Public Life]”, *Wydawnictwo Marginesy*, (2021); unless stated otherwise, all translations hereinafter were made by the authors of this paper.

¹³ Ł. CHODOROWSKI, “Regulacje dotyczące *nasciturusa* i aborcji w nowożytnym prawie świeckim [Regulations concerning *nasciturus* and abortion in modern secular legislation]”, *Studia Prawnicze KUL*, 1(81), (2020), pp. 52-54.

¹⁴ A. MUSZALA, “Embrion ludzki w starożytnej refleksji teologicznej [The Human Embryo in the Ancient Theological Tradition]”, *Wydawnictwo WAM*, (2009), pp. 110-112.

¹⁵ Id., pp. 109-110, 230-232.

quickening, i.e., the moment when the first movements in the womb could be felt¹⁶, gain significance as a marker of ensoulment. Both distinctions—initially the 40/80-day framework and subsequently the quickening—translated into a legal dichotomy between *animated* and *non-animated* fetuses, were explicitly reflected in the provisions of the Carolina, as well as in other European legal traditions, for instance, English law¹⁷. Article 133 of the CCC provided that anyone who intentionally caused a pregnant woman to abort a *living fetus*—whether by coercion, or by administering food or drink—was to be punished by death: men by decapitation, and women—if they induced the abortion upon themselves—by drowning or another form of capital punishment. Likewise, anyone who deliberately rendered a man or woman sterile faced the same penalty. By contrast, if the fetus was not yet considered “living” (ger. *noch nit lebendig*), the punishment was left to the discretion of the judges, acting upon the advice of legal experts¹⁸.

What is particularly noteworthy is that the medical knowledge of the time did not allow for a reliable confirmation of pregnancy, especially in its early weeks—a state of affairs that persisted well into the late nineteenth century¹⁹. For this reason, any determinations were based primarily on circumstantial evidence. This was reflected in certain provisions of the CCC, which required, among other things, that attention be paid to the body size of a woman suspected of pregnancy²⁰, her weakness and pallor after childbirth²¹, and the presence of lactation in her breasts²². Yet, if limited knowledge of the female body often prevented certainty about the existence of pregnancy, then the detection of abortion and, even more so, the demonstration that a woman had intentionally procured one, proved equally difficult. In practice, therefore, relatively few women were prosecuted for abortion as a major crime²³. Moreover, because premarital intercourse was widespread, sexual partners—typically from the same local community and of comparable social standing—would often enter into marriage if pregnancy resulted²⁴. Abortion or infanticide of an illegitimate child was more likely when women were mobile, making it difficult to establish paternity, or when, lacking kin, there was no one to mediate marriage arrangements or assist the woman in obtaining abortifacients²⁵. The enactment of laws penalizing fornication, the concealment of pregnancy, and abortion contributed to the stigmatization of illegitimate children and their mothers—most often maidservants—while the bodies of pregnant women came to be regarded as a matter of public

¹⁶ D.A. JONES, “The Soul of the Embryo: An enquiry into the status of the human embryo in the Christian tradition”, *Continuum*, (2004), p. 109.

¹⁷ *Id.*, pp. 194-200.

¹⁸ J. KOHLER, W. SCHEEL, “Die Peinliche Gerichtsordnung Kaiser Karls V: Constitutio Criminalis Carolina; Ausgabe für Studierende [The Penal Code of Emperor Charles V: Constitutio Criminalis Carolina; Student Edition]”, *Verlag Buchhandlung des Waisenhauses*, (1900), p. 60.

¹⁹ U. RUBBLACK, “Policing Abortion in Early Modern Germany”, [in:] L. ABRAMS, E. HARVEY, “Gender relations in German history: Power, agency and experience from the sixteenth to the twentieth century”, *UCL Press*, (1996), pp. 58-60.

²⁰ *Constitutio Criminalis Carolina*, (1532); Article 35.

²¹ *Id.*

²² See footnote: 20; Article 36.

²³ See footnote: 19, p. 59.

²⁴ See footnote: 19, p. 67.

²⁵ *Id.*

concern²⁶. As Rublack has pointed out, women's reproductive autonomy in early modern Germany was curtailed less by advances in medicine than by legal and communal regulation²⁷. She further notes that by the seventeenth century, mistrust and surveillance of women suspected of concealing pregnancies had intensified: the shape of their bodies, their eating and work habits, as well as real or imagined physical symptoms, were all carefully scrutinized. The urge to uncover the truth of a woman's condition, in other words, extended beyond doctors and authorities to the wider community²⁸. In light of this, and despite early ethical debates concerning the permissibility of terminating pregnancy before or after the quickening, one may ask whether the regulation of abortion was in fact less a matter of metaphysical or legal principle than of prevailing social conventions and communal norms.

Although the CCC, by virtue of its salvatory clause (lat. *clausula salvatoria*), possessed only subsidiary authority in relation to the particular laws of the Holy Roman Empire, it nevertheless served as a source of inspiration for numerous legislative acts and as a key instrument in the gradual unification of criminal law both within and beyond the Empire's borders²⁹. Moreover, for a long period, the Aristotelian–Thomistic conception of embryogenesis remained deeply embedded in European continental legislation, and the natural sciences were unable to displace it. This persistence attests to the profound influence of Christian scholastic thought on early modern legal frameworks³⁰. Thus, despite the juridical autonomy of the territories of the Holy Roman Empire, provisions reflecting the influence of the Carolina concerning the permissibility of pregnancy termination can be found in several statutes of that period. One such example is the *Codex Iuris Bavarici Criminalis* (CIBC) of 1751, which, in its First Part, Chapter Three, stipulates that a woman who intentionally terminates her pregnancy after the moment of quickening is subject to capital punishment by beheading with the sword³¹. Attempted abortion resulting in the live birth of a child was likewise punishable, although the determination of the specific sanction was left to the discretion of the court³². A similar approach was applied to abortions performed prior to quickening³³, while an individual who inflicted violent assault upon a pregnant woman with the intent to terminate her pregnancy was punished as a child-murderer, paying for the act with their life³⁴.

As illustrated by the example of the CIBC, territorial laws could both coincide with the provisions of the CCC and extend beyond the framework established by the 1532 statute. As Drage points out, “the [CCC] is the foundation of all criminal law and procedure in Germany, but does not embrace the whole of the criminal law, and rather contains directions for the right application of the legal axioms which it lays down”³⁵. While the value of the Carolina is undeniable, it nevertheless remains true that such a situation caused the abortion law in the

²⁶ See footnote: 19, p. 59, 67.

²⁷ See footnote: 19, p. 74.

²⁸ See footnote: 19, pp. 74-75.

²⁹ K. SÓJKA-ZIELINSKA, “Historia prawa”, *LexisNexis*, (2011), p. 59.

³⁰ See footnote: 13, pp. 57-58.

³¹ *Codex Iuris Bavarici Criminalis De Anno MDCCLI, Erster Theil, Drittes Kapitel: Vom Totschlagen* [Part One, Chapter Three: On Homicide], (1751), §20.

³² *Id.*

³³ *Id.*

³⁴ See footnote: 31, §22.

³⁵ G. DRAGE, “The Criminal Code of the German Empire”, *The Lawbook Exchange, Ltd.*, (2005), p. 8.

German lands to remain fragmented, reflecting the legal pluralism of the Holy Roman Empire. This changed with the unification of Germany in 1871 and the adoption of the Reich Penal Code (ger. *Strafgesetzbuch für das Deutsche Reich* or *Reichsstrafgesetzbuch*, RStGB). The Code, originally adopted for the North German Confederacy (ger. *Norddeutsche Bund*)³⁶, entered into force on 1 January 1872 and created a uniform criminal law for the newly established German Empire (ger. *Deutsches Reich*), also known as the Second Reich or Imperial Germany. Within this codified framework—which drew upon multiple sources of legal tradition, including the CCC, the Napoleonic Code of 1804, Feuerbach’s Bavarian Criminal Code of 1813, and the Prussian Penal Code of 1851—§§218–220 provided a systematic and hierarchical structure of offences relating to abortion: §218 criminalised the intentional termination of pregnancy by the pregnant woman herself and, notably, allowed for the consideration of extenuating circumstances in sentencing—a significant departure from earlier penal regimes. §219 introduced aggravated penalties for third parties who, with the woman’s consent and for remuneration, performed or assisted in the procedure. Finally, §220 prescribed even more severe sanctions for acts carried out without the woman’s knowledge or consent, particularly when such acts resulted in her death³⁷. In contrast to the CCC and the CIBC, the Reich Penal Code did not prescribe the death penalty for these offences; instead, the applicable sanctions consisted of imprisonment with hard labour (ger. *Zuchthaus*), which, in the gravest cases, could amount to life imprisonment³⁸. Taken together, these provisions show how the RStGB replaced the medieval system of draconian punishments and torture with a more structured and proportionate regime of sanctions. The inclusion of extenuating circumstances further reflected a shift towards a more individualized approach to punishment. It is therefore fair to state that the RStGB established the core legal framework for abortion regulation in Germany that, with numerous modifications, would endure well into the twentieth century and beyond.

From Birth Strikes to Biopolitics: Reproductive Regulation in Weimar Germany

By the turn of the twentieth century, abortion had become a matter of broader public concern. This transformation—„from a predominantly rural agrarian state to a highly urban industrialized society”³⁹—reflected a combination of demographic, social, and economic changes, including declining birth rates, urbanisation, and shifting gender roles, experienced by many European countries at that time⁴⁰. In Germany, these developments also fuelled intense

³⁶ The Criminal Code for the North German Confederation (ger. *Strafgesetzbuch für den Norddeutschen Bund*, *NdStGB*) was passed on 25 May 1870 and came into force a whole year earlier than the RStGB, meaning January 1st, 1871. See: footnote 35, p. 15.

³⁷ Gesetz betreffend die Redaktion des Strafgesetzbuchs für den Norddeutschen Bund als Strafgesetzbuch für das Deutsche Reich [Act concerning the redaction of the Penal Code for the North German Confederation as the Penal Code for the German Empire], *Reichs-Gesetzblatt* Nr. 24, (1871), pp. 167-168.

³⁸ Id.; §220.

³⁹ J.E. KNODEL, “The Decline of Fertility in Germany, 1871-1939”, *Princeton University Press*, (1974), p. 3.

⁴⁰ Id.

debates about population policy and reproductive control. Against this backdrop, the idea of a “birth strike” (ger. *Gebärstreik*) gained traction within radical and neo-Malthusian circles⁴¹. Berlin physicians Alfred Bernstein and Julius Moses promoted contraception as both an instrument of women’s emancipation and a tool of social reform, arguing that birth control could alleviate poverty and, from a socialist perspective, weaken capitalism by reducing the supply of cheap labour⁴². These ideas culminated in the so-called *birth-strike debate* (ger. *Gebärstreikdebatte*) of 1913, which reflected growing public anxiety over Germany’s declining birth rate and the politicisation of reproductive choice⁴³.

The outbreak of the First World War intensified demographic anxieties and gave rise to a coercive form of pronatalism coupled with eugenic undertones. As Osborne observes, “The outbreak of the war paved the way for a coercive pronatalism tinged with eugenic antinatalism; both pronatalists and eugenisists were united in their rejection of individual ‘arbitrary’ birth control, preaching instead that the common good was to be put before individual interests.”⁴⁴. The formulation of a national population policy culminated in a series of legislative proposals, the most significant of which was the Law Against Sterilisation and Abortion (ger. *Gesetz gegen Unfruchtbarmachung und Schwangerschaftsunterbrechung*), presented to the Reichstag in July 1918. The bill criminalised all forms of fertility impairment and pregnancy termination except when necessary to save the life or health of a woman and performed by an officially recognised physician⁴⁵. It also introduced strict reporting requirements and prescribed penalties for physicians who failed to comply⁴⁶. In its rationale, reproductive capacity was explicitly linked to civic duty, casting motherhood as a patriotic obligation essential to the nation’s survival⁴⁷. Although the 1918 bill never entered into force, its ideological premises reflected a broader wartime consensus: that individual reproductive choice was subordinate to national and racial vitality. The measure foreshadowed later eugenic and biopolitical legislation, while also accelerating the professionalisation of medical authority in matters of reproduction. Yet this medicalisation did not necessarily equate to safety. As Osborne notes, women’s recourse to abortion typically followed a pattern—beginning with self-induced attempts, followed by appeals to relatives or neighbours, then to “wise women” (ger. *weise Frauen*) or *Engelmacherinnen* (so-called “angel makers”)⁴⁸, and finally, if all else failed, to a physician⁴⁹. For poorer women, lay practitioners remained the most accessible and socially familiar

⁴¹ T. SHEW, “Women’s Suffrage, Political Economy, and the Transatlantic Birth Strike Movement, 1911–1920”, *The Historical Journal*, Vol. 66 Iss. 2, (2023), pp. 370-391.

⁴² R.P. NEUMAN, “Working Class Birth Control in Wilhelmine Germany”, *Comparative Studies in Society and History*, Vol. 20 No. 3, (1978), p. 412.

⁴³ Id.

⁴⁴ C. USBORNE, “Cultures of Abortion in Weimar Germany”, *Berghahn Books*, (2011), p. 65.

⁴⁵ Verhandlungen des Reichstags: XIII. Legislaturperiode, II. Session, Band 325, Anlagen zu den Stenographischen Berichten, Nr. 1701–2002 [Proceedings of the Reichstag: 13th legislative period, 2nd session, vol. 325, Annexes to the Stenographic Reports, Nos. 1701–2002], (1914/18); Entwurf eines Gesetzes gegen Unfruchtbarmachung und Schwangerschaftsunterbrechung [Draft Law Against Sterilisation and Abortion], *Reichstag Aktenstück*, Nr. 1717 [*Reichstag document*, No. 1717], (1918), §1, p 2504.

⁴⁶ Id., §2 and §4.

⁴⁷ See footnote: 45, Begründung [Rationale], pp. 2504-2508.

⁴⁸ See footnote: 44, p. 103.

⁴⁹ See footnote: 44, p. 90.

intermediaries, sharing similar class backgrounds and attitudes toward family limitation⁵⁰. Medical education also became increasingly widespread, accompanied by growing efforts to eliminate unlicensed private practitioners in what was often described as an “anti-quackery” campaign⁵¹. At the same time, however, it is important to note that medical students received little or no formal training in pregnancy termination, and serious injuries or even fatalities were by no means uncommon, even among qualified physicians⁵². The emerging view that abortion should be permitted only in exceptional cases and performed exclusively by trained medical professionals was intended to emphasize the supposed safety of relying on qualified doctors—an assumption that, in reality, did not always hold true⁵³.

In practice, the 1871 Penal Code had not clearly distinguished between medically trained abortionists and lay practitioners, though the former were afforded a certain degree of protection under §54, which exempted acts performed to avert imminent danger to life or health⁵⁴. The “anti-quackery” campaign, coupled with mounting dissatisfaction over provisional measures—including the 1917 guidelines of the Prussian Ministry of the Interior and the Reich Health Office⁵⁵—contributed to rising tensions and increasing demands for legislative revision among medical professionals⁵⁶. Legal change, however, did not materialise until several years after the end of the First World War, namely in 1926. Under the amendment of 18 May, the former punishment of *Zuchthaus* (hard labour) was replaced by the much lighter sentence of *Gefängnis* (ordinary imprisonment), effectively reclassifying abortion from a felony to a misdemeanour and consolidating §§218–220 into a single provision⁵⁷. Importantly, the hard labour imprisonment still applied to cases of commercial abortion⁵⁸. Whereas the previously mentioned lay practitioners—such as *weise Frauen* or *Engelmacherinnen*—sometimes assisted in terminating pregnancies out of compassion, for many this practice constituted a means of livelihood⁵⁹. Financial motives were not unknown among registered medical practitioners either; yet in practice, the courts readily extended mitigating circumstances to them. Grave forms of malpractice and negligence were frequently treated with remarkable leniency, while lay abortionists and their predominantly working-class female clients were prosecuted and punished with severity⁶⁰. While the reform left the fundamental prohibition intact, it marked a shift towards a more proportionate and coherent penal framework—one that reflected the contemporary medical, demographic, and ideological debates of the Weimar period. Moreover, the selective enforcement of §218 mirrored broader social hierarchies, reinforcing distinctions of class, gender, and professional authority within the ostensibly neutral framework of criminal

⁵⁰ See footnote: 44, p. 125.

⁵¹ See footnote: 44, p. 94.

⁵² See footnote: 44, p. 76.

⁵³ *Id.*

⁵⁴ See footnote: 44, p. 65; See also: footnote 37, §54.

⁵⁵ Bundesarchiv Koblenz, R 86/2379, Vol. 1, Niederschrift, Reichsgesundheitsrat [Minutes of the Reich Health Council], (1917), p. 15; Cited in: see footnote: 44, p. 65.

⁵⁶ See footnote: 44, p. 65.

⁵⁷ Gesetz zur Abänderung des Strafgesetzbuchs [Law Amending the Penal Code], *Reichsgesetzblatt*, Teil I, Nr. 29 [*Reich Law Gazette*, Part I, No. 29], (1926), p. 239.

⁵⁸ *Id.*

⁵⁹ See footnote: 44, p. 111.

⁶⁰ See footnote: 44, pp. 85, 93.

law. It was therefore no coincidence that abortion came to be regarded as a *class issue*, with §218 widely referred to as the “class paragraph” (ger. *Klassenparagraf*)⁶¹.

Nevertheless, medical professionals had long awaited the formal differentiation between themselves and lay practitioners, as well as the recognition of their right to perform abortions on medical grounds⁶². A breakthrough came only in 1927, with the decision of the Imperial Court of Justice (ger. *Reichsgericht*) of 11 March⁶³. From that moment, therapeutic abortion—that is, an abortion performed to save the mother’s life—was recognised as an act of necessity (ger. *übergesetzlicher Notstand*) and thus deemed permissible. Although this judicial ruling did not immediately deprive lay practitioners of the opportunity to continue performing terminations, it was undoubtedly a step in that direction⁶⁴. As David, Fleischhacker and Höhn observe, subsequent practice evolved accordingly. Medical societies coalesced around a procedural safeguard: a termination of pregnancy on medical grounds could be performed if a second physician provided a written attestation that the woman’s state of health rendered the continuation of pregnancy medically inadvisable⁶⁵. Even though abortion services became more accessible in larger cities, prosecutions rates remained high⁶⁶, underscoring the ongoing dissonance between medical practice, public morality, and criminal law, and efforts to reconcile these conflicting perspectives continued throughout the late Weimar years. The hardships of this period—hunger, overcrowded housing, and the burdens of numerous children in working-class households—sustained agitation for the liberalisation of abortion laws, even as professional and political bodies remained sharply divided⁶⁷. The German Medical Association’s 1930 resolution opposing abortion on any ground other than serious danger to the woman’s health or life epitomised the enduring failure to achieve consensus, as the abortion for medico-social indications seemed to be widely accepted⁶⁸. Although prosecutions of physicians declined, by 1933 the criminal police had registered over 30,000 women who had served short detention sentences for obtaining illegal abortions⁶⁹—a stark indicator of the law’s uneven and class-inflected enforcement.

Against this backdrop of unresolved tensions and competing moral claims, the National Socialist German Worker’s Party (ger. *Nationalsozialistische Deutsche Arbeiterpartei*, NSDAP), also known as the *Nazi Party*, advanced its own vision of reproductive order. Consistent with its pronatalist ideology, the NSDAP sought to reframe abortion as a form of

⁶¹ See: M.M. FERREE, “Varieties of Feminism: German Gender Politics in Global Perspective”, *Stanford University Press*, (2012).

⁶² See footnote: 44, pp. 66.

⁶³ Entscheidungen des Reichsgerichts in Strafsachen (RGSt), Bd. 61, S. 242 ff. – Entscheidung des Reichsgerichts vom 11. März 1927 (Az. I StS 105/26) [Decisions of the Imperial Court of Justice in Criminal Matters (RGSt), vol. 61, p. 242 ff. – Decision of the Imperial Court of Justice of 11 March 1927 (Case No. I StS 105/26)]; Cited in: see footnote: 44, p. 5.

⁶⁴ See footnote: 44, pp. 66.

⁶⁵ H.P. DAVID, J. FLEISCHHACKER, C. HÖHN, “Abortion and Eugenics in Nazi Germany”, *Population and Development Review*, Vol. 14 No. 1, (1988), p. 84.

⁶⁶ Id., pp. 84-85.

⁶⁷ See footnote: 65, pp. 83-86.

⁶⁸ See footnote: 65, p. 85.

⁶⁹ K.P. GIESE, “Beratung vor 1933: was ging verloren?”, *Pro Familia Informationen*, No. 2, (1985), pp. 27-28; C. VON SODEN, “Ärzte als Pioniere”, *Pro Familia*, No. 5, (1985), pp. 11-12; Cited in: see footnote: 65, p. 86.

“racial treason”. On 12 March 1930 its deputies introduced a Reichstag proposal to extend §218 and criminalise any act deemed to undermine the “natural fertility of the German Volk” (i.e. the race). It stated that:

Whoever undertakes to artificially block the natural fertility of the German *Volk* to the detriment of the German nation, or promotes such endeavors by word, publication, picture or any other means, or who by mixing with members of the Jewish blood-community or colored races contributes to the racial deterioration and decomposition of the German Volk, or threatens to contribute to such endeavors, will be punished with a penitentiary sentence for racial treason.⁷⁰

Although the bill failed to pass, it presaged the regime’s subsequent reconfiguration of reproductive law along racial-hygienic lines.

Between Ideology and Constitution: Abortion Law from the Third Reich to the Reunification of 1990

The continuous decline in birth rates during the German Empire and the Weimar Republic provided fertile ground for the rise of eugenic ideology in twentieth-century Germany⁷¹. Concepts that became emblematic of this period, such as *racial hygiene* and *the Volk*, gained prominence through the writings of scientists like Alfred Plötz and Ernst Haeckel⁷². Their radical ideas laid the intellectual foundations for the policies proposed in response to the post-war demographic crisis—among them, compulsory sterilisation, which in Adolf Hitler’s view offered a means to “cure” the German nation of what he described as a “disease”, namely “the Jew”⁷³. By the time Hitler assumed the office of Chancellor of the Third Reich (the German Reich, also referred to as Nazi Germany; ger. *nationalsozialistischer Staat*, *NS-Staat*, *NS-Deutschland* or *Nazi-Deutschland*) in January 1933, the idea of racial hygiene had become not only widely known but also institutionally entrenched, displacing genuine scientific research, leading to the closure of counselling centres, and resulting in the arrest of birth-control activists⁷⁴. At the same time, the NSDAP swiftly consolidated power, transforming Germany into a totalitarian state and establishing itself as the sole legal political party of the Third Reich. With the collapse of democratic norms, all independent social movements were systematically suppressed.

Alongside the political and social transformations of the period, legal changes followed accordingly. The first major amendment to criminal law occurred as early as 1933, when §§219 and 220 were reintroduced into the RStGB⁷⁵. The purpose of these new provisions was to restrict access to information about abortion and abortifacient methods. Pursuant to §219, publicly announcing or advertising means, objects, or procedures intended for the termination

⁷⁰ E. WOLF, K. HAMMER, „Cyankali von Friedrich Wolf: eine Dokumentation”, *Aufbau-Verlag*, (1978), p. 281; Cited in: see footnote: 65, p. 85.

⁷¹ See footnote: 65, pp. 87-88.

⁷² See footnote: 65, p. 88.

⁷³ A. HITLER, “Mein Kampf”, Houghton Mifflin, (1943); Cited in: see footnote: 65, pp. 88-89.

⁷⁴ See footnote: 65, pp. 89-90.

⁷⁵ Gesetz zur Änderung strafrechtlicher Vorschriften [Law Amending Provisions of the Criminal Code], *Reichsgesetzblatt*, Teil I, Nr. 56 [*Reich Law Gazette*, Part I, No. 56], (1933), pp. 295-298.

of pregnancy became punishable by up to two years of imprisonment or a fine, except in cases where such announcements or advertisements referred to abortions on medical grounds and were directed exclusively to authorised professionals, such as physicians⁷⁶. Under §220, the same penalties applied to anyone publicly offering their own or another person's services aimed at performing or facilitating pregnancy terminations⁷⁷. Shortly thereafter, the restrictive regime extended to physicians who, in the exercise of their professional judgment, considered the termination of pregnancy justified. In Berlin, for instance, doctors appointed by the NSDAP authorities meticulously examined the legitimacy of each such decision, leading to convictions⁷⁸.

In the following years, numerous measures were undertaken to increase the birth rate among the German population while simultaneously reducing the growth of those whose lives were considered “unworthy of life,” out of fear of the so-called “death of the race” (ger. *Volkstod*)⁷⁹. The continuous pursuit of racial purity found expression also in the legislation of the Third Reich. Merely two months after the amendment of the criminal provisions on abortion, a law was enacted that permitted the compulsory sterilisation of individuals in certain cases⁸⁰. Although the grounds for subjecting a “genetically burdened” person to sterilisation included hereditary blindness, hereditary deafness, and even severe alcoholism⁸¹, the majority of decisions were based on various mental disorders. It should be noted, however, that political behaviour was among the factors considered during diagnosis. Consequently, the eugenic premises of the law, coupled with the tendency to exercise particular restraint in the case of devoted party members, reveal the unequal and ideologically driven application of its provisions⁸². In 1935, this statute, titled the Law for the Prevention of Hereditarily Diseased Offspring (ger. *Gesetz zur Verhütung erbkranken Nachwuchses*), was amended, introducing for the first time a legal basis for eugenic abortion⁸³. At that time, §10a was added, providing that once a Hereditary Health Court (ger. *Erbgesundheitsgericht*) had issued a final order mandating the sterilisation of a pregnant woman, the pregnancy could also be terminated with her consent, provided that the fetus was not yet viable and that the procedure did not involve a serious risk to the woman's life or health. The provision effectively permitted abortion up to the sixth month of pregnancy in cases where the fetus was incapable of independent survival⁸⁴. Furthermore, under the amended §14, the law stipulated that a termination of pregnancy or sterilisation performed outside the statutory framework was permissible only if carried out by a physician, acting in accordance with recognised medical standards, in order to avert a serious danger to the woman's life or health, and with her consent⁸⁵. However, in such cases, the procedure could

⁷⁶ Id., p. 296.

⁷⁷ Id.

⁷⁸ See footnote: 65, p. 90.

⁷⁹ See footnote: 65, pp. 90-91.

⁸⁰ Gesetz zur Verhütung erbkranken Nachwuchses [Law for the Prevention of Hereditarily Diseased Offspring], *Reichsgesetzblatt*, Teil I, Nr. 86 [*Reich Law Gazette*, Part I, No. 86], (1933), pp. 529-531.

⁸¹ Id., p. 529.

⁸² See footnote: 65, pp. 91-92.

⁸³ Gesetz zur Änderung des Gesetzes zur Verhütung erbkranken Nachwuchses [Law Amending the Law for the Prevention of Hereditarily Diseased Offspring], *Reichsgesetzblatt*, Teil I, Nr. 65 [*Reich Law Gazette*, Part I, No. 65], (1935), p. 773.

⁸⁴ Id.

⁸⁵ See footnote: 83.

take place only after an expert panel had declared it necessary (unless delay would involve an immediate danger to the life or health of the pregnant woman), as further specified in the regulation issued a few weeks later, in its Article 5⁸⁶. This regulation also required—where possible—that pregnancy terminations pursuant to the new §10a be performed simultaneously with sterilisation⁸⁷.

The above regulations, however, did not mark the end of legislative developments. The Law for the Protection of the Hereditary Health of the German People of 18 October 1935⁸⁸ introduced mandatory medical certification prior to marriage (ger. *Ehegesundheitszeugnis*)⁸⁹, prohibiting unions in which either partner suffered from conditions deemed hereditarily or mentally unfit⁹⁰. Marriages involving hereditary diseases (as defined in the 1933 Law for the Prevention of Hereditarily Diseased Offspring), severe mental disorders, or other conditions considered a threat to the “racial health” (ger. *Volksgemeinschaft*) were legally prohibited, and the statute provided for imprisonment in case of violation⁹¹. The law applied where both parties to the marriage—or at least the male partner—were German citizens, while foreign nationals could be prosecuted only upon direction of the Reich Minister of Justice, issued in agreement with the Reich Minister of the Interior⁹². The statute thus extended the logic of racial hygiene from sterilisation to marital and reproductive regulation, aiming to prevent the conception of genetically “unfit” offspring. It required state health offices to assess genetic suitability for marriage, effectively transforming marriage into a eugenically controlled institution. In doing so, it complemented the sterilisation law of 1933 and the abortion-related decrees of 1935, forming a coherent legal framework linking personal health, reproduction, and racial policy to the biological and ideological objectives of the Nazi state. As Osborne rightly observes, in Nazi Germany abortion was no longer a crime against life, but a crime against the *Volk*⁹³. Unsurprisingly, Jews were subjected to entirely different standards, as exemplified by the Law for the Protection of German Blood and German Honor of August 1935, which prohibited marriages and extramarital relations between Jews and persons of “German or related blood”⁹⁴. The statute began with the following words: “Convinced that the purity of German blood is essential to the continued existence of the German people, and inspired by the unyielding will to secure the German nation for all time, the Reichstag has unanimously enacted the following law, which is hereby promulgated (...)”⁹⁵. Although the law made no explicit reference to

⁸⁶ Vierte Verordnung zur Ausführung des Gesetzes zur Verhütung erbkranken Nachwuchses [Fourth Decree for the Implementation of the Law for the Prevention of Hereditarily Diseased Offspring], *Reichsgesetzblatt*, Teil I, Nr. 105 [*Reich Law Gazette*, Part I, No. 105], (1935), pp. 1035-1037.

⁸⁷ Id., Article 1, p. 1035.

⁸⁸ Gesetz zum Schutze der Erbgesundheit des deutschen Volkes (Ehegesundheitsgesetz) [Law for the Protection of the Hereditary Health of the German People (Marriage Health Law)], *Reichsgesetzblatt*, Teil I, Nr. 114 [*Reich Law Gazette*, Part I, No. 114], (1935), p. 1246.

⁸⁹ Id., §2.

⁹⁰ See footnote: 88, §1.

⁹¹ See footnote: 88, §4.

⁹² See footnote: 88, §5.

⁹³ See footnote: 44, p. 5.

⁹⁴ Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre [Law for the Protection of German Blood and German Honour], *Reichsgesetzblatt*, Teil I, Nr. 100 [*Reich Law Gazette*, Part I, No. 100], (1935), pp. 1146–1147.

⁹⁵ Id., p. 1146.

abortion, pregnancies resulting from such unions were effectively exempted from the restrictions of §218 RStGB, as this provision “did not apply to the protection of a Jewish embryo”⁹⁶. By 1939, official policy directives confirmed that the legal prohibitions on abortion did not apply to Jews⁹⁷.

The outbreak of the Second World War did not halt the radicalisation of abortion laws, and practice shows that during this period, those responsible for terminating pregnancies were prosecuted with even greater rigour⁹⁸—still, however, in line with the principles of racial hygiene. This was reflected, among other things, in the establishment of facilities such as the Central Maternity and Abortion Camp for Eastern Female Workers (ger. *Zentrales Entbindungs- und Abtreibungslager für Ostarbeiterinnen*), created in 1943 in Waltrop, Germany, to which pregnant women of Ukrainian and Polish origin were sent⁹⁹. At the same time, certain legislative steps were taken in response to the population losses imposed by the war¹⁰⁰. On 9 March 1943, the Regulation for the Protection of Marriage, Family, and Motherhood was enacted, amending the existing abortion provisions of the RStGB¹⁰¹. Under this act, it was prohibited not only to provide a pregnant woman with “means or objects intended for the termination of pregnancy”, but also both the woman herself and the person performing the termination were liable to imprisonment—*Gefängnis* or *Zuchthaus*, depending on whether the offence was deemed more or less severe¹⁰². Interestingly, the regulation also provided that “If the offender thereby permanently impairs the vitality of the German people, the death penalty shall be imposed”¹⁰³. This way, abortion law became more severe than ever before, as the death penalty had long ceased to appear in the German abortion statutes. While abortion was permitted for those considered “racially undesirable”, the termination of pregnancy among members of the “Aryan race” was deemed unacceptable. In this sense, the 1943 regulation represented the culmination of the evolution of Nazi Germany’s legal and eugenic policy. It should nevertheless be emphasised that the restrictive laws and draconian punishments of the Nazi era were not universally accepted and encountered resistance from individuals¹⁰⁴.

On 5 June 1945, by virtue of the Berlin Declaration (ger. *Berliner Erklärung*), *supreme authority* was assumed over the entire German territory by the governments of the United States of America, the Soviet Union, the United Kingdom, and France¹⁰⁵. As contemporary literature

⁹⁶ See footnote: 65, p. 94.

⁹⁷ Id.

⁹⁸ See footnote: 65, pp. 95-101.

⁹⁹ See: <<https://przystanekhistoria.pl/pa2/tematy/zbrodnie-niemieckie/105715,Dzialalnosc-obozy-polozniczego-i-aborcynego-w-Waltrop-Holthausen-w-latach-1943-.html>> [accessed 2025 07 07].

¹⁰⁰ See footnote: 65, p. 97-98.

¹⁰¹ Verordnung zum Schutz von Ehe, Familie und Mutterschaft [Regulation for the Protection of Marriage, Family, and Motherhood], *Reichsgesetzblatt*, Teil I, Nr. 27 [*Reich Law Gazette*, Part I, No. 27], (1943), pp. 140–141.

¹⁰² Id., Article II, §5, p. 140.

¹⁰³ Id.

¹⁰⁴ See: C. USBORNE, “Social Body, Racial Body, Woman's Body. Discourses, Policies, Practices from Wilhelmine to Nazi Germany, 1912-1945”, *Historical Social Research / Historische Sozialforschung*, Vol. 26 No. 2 (136), (2011), pp. 140-161.

¹⁰⁵ Declaration regarding the defeat of Germany and the assumption of supreme authority with respect to Germany by the Governments of the United States of America, the Union of Soviet Socialist

notes, in the immediate aftermath of the war, as Germany's public institutions and civic life were being reconstituted, the question of abortion once again became a matter of public concern. Physicians, public health officials, women's organisations, political parties, the press, and church groups re-engaged in debate under conditions defined by the physical and moral devastation of warfare, the "occupation by four separate victorious powers", the displacement of millions of people from the East, and the disintegration of the former regime's political legitimacy¹⁰⁶. Given the complexity of these circumstances, an exhaustive account of the situation across all occupation zones would go beyond the scope of this study; therefore, only selected examples will be discussed below.

The first noticeable changes concerning pregnancy termination—although not yet legislative—arose from the chaos of the immediate postwar period, including the mass rapes of German women committed mostly by Red Army soldiers, which frequently resulted in unwanted pregnancies¹⁰⁷. Interestingly, for several subsequent years, abortion procedures continued to be justified on racial grounds, and the terminology inherited from the Third Reich remained in use¹⁰⁸. In the Soviet Occupation Zone (ger. *Sowjetische Besatzungszone*, SBZ), as Grossmann notes:

(...) postwar public speech for the most part recirculated—in limited and refigured form—Weimar debates about reform and legalization, as well as the easily available model of the Soviet recriminalization. In familiar language, reformers again asserted that women determined to terminate a pregnancy would do so no matter what the cost; noted the irrationality of unenforceable laws, the social health consequences of botched abortions and of unfit or unwanted offspring, the severity of the (temporary) crisis, the necessity of contraception as an alternative to abortion; and assured that under happier circumstances women would certainly revert to their maternal roles.¹⁰⁹

The steps taken in this context towards reforming abortion law were partially successful. Legal reforms abolishing §§218, 219, and 220 of the RStGB (which, through successive post-war amendments, gradually lost the prefix *Reichs*— and evolved into the present *Strafgesetzbuch*, StGB) and permitting abortions on social (e.g., poverty), medical, and ethical grounds—such as rape or incest—were introduced by separate state parliaments of the SBZ between June and December 1947 (in Saxony, Brandenburg, Mecklenburg, and Thuringia), under the supervision of the Soviet Military Administration (ger. *Sowjetische Militäradministration in Deutschland*, SMAD)¹¹⁰. However, this process was decentralised, and therefore it is not possible, based on this example, to speak of a comprehensive or uniform transformation in reproductive law. Nevertheless, in the fragmented postwar years, it was the

Republics, the United Kingdom and the Provisional Government of the French Republic (Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority by Allied Powers), (1945).

¹⁰⁶ A. GROSSMANN, "Reforming Sex: The German Movement for Birth Control and Abortion Reform, 1920-1950", *Oxford University Press*, (1995), p. 191.

¹⁰⁷ Id., p. 193.

¹⁰⁸ See footnote: 106, p. 194.

¹⁰⁹ See footnote: 106, p. 196.

¹¹⁰ A. GROSSMANN, "Pronatalism, Nationbuilding, and Socialism: Population Policy in the SBZ/DDR, 1945 to 1960", [in:] D.E. BARCLAY, E.D. WEITZ, "Between Reform and Revolution: German Socialism and Communism from 1840 to 1990", *Berghahn Books*, (2005), p. 453.

SBZ that took the most far-reaching steps towards abortion reform, whereas in some western regions, the eugenic legislation remained in force¹¹¹.

Only several years after the end of the war, in 1949, Germany was divided into the Federal Republic of Germany (ger. *Bundesrepublik Deutschland*, FRG)—comprising the three former occupation zones: American, British, and French—and the German Democratic Republic (ger. *Deutsche Demokratische Republik*, GDR), which in turn produced divergent trajectories of abortion law.

In the GDR, the liberal provisions introduced during the SBZ period were soon repealed by the Act of 27 September 1950¹¹². According to Article 11 of the Law on the Protection of Mothers and Children and the Rights of Women, pregnancy termination was permitted only when the continuation of the pregnancy posed a risk to the woman's life or health, or when there was a serious danger that the child would suffer from a severe hereditary disease¹¹³. Moreover, the entire procedure was subject to approval by a public health authority, where consent had first to be obtained from a medical commission, and the abortion itself could be performed only by an authorised practitioner in a state hospital¹¹⁴. Consequently, legal and safe terminations in cases such as poverty, single motherhood, or rape were effectively impossible. As Harsh observes, “In the 1950s, heavy promotion of childbearing was unnecessary. The vast majority of the population believed that all women wanted (multiple) children. The drone of natalism was constant: books about marriage and housekeeping, fiction, pamphlets and press articles presented maternity as fulfilling the female nature and portrayed large families as the happiest families.”¹¹⁵. In practice, however, measures intended to support mothers—such as maternity leave and child allowances—proved insufficient. Women, unable to access effective contraception freely and reliably, bore multiple children, which often prevented them from working or pursuing education for many years¹¹⁶. In 1965, in response to social pressure, the Ministry of Health issued Instructions for the Implementation of Article 11 of the aforementioned 1950 law, which expanded the range of factors that abortion commissions could consider, including social circumstances—such as a woman's age or the number of children already born—as well as cases arising from criminal acts, for example, pregnancies resulting from rape or incest¹¹⁷. Since these Instructions did not constitute a formal legislative amendment, they were intended to remain largely unnoticed by the public. However, the

¹¹¹ Id.

¹¹² Gesetz über den Mutter- und Kinderschutz und die Rechte der Frau [Law on the Protection of Mothers and Children and the Rights of Women], *Gesetzblatt der Deutschen Demokratischen Republik*, Nr. 111 [Law Gazette of the German Democratic Republic, No. 111], (1950), pp. 1037-1041.

¹¹³ Id., §11, p. 1039.

¹¹⁴ Id.

¹¹⁵ D. HARSCH, “Between state policy and private sphere: women in the GDR in the 1960s and 1970s”, *Clio. Women, Gender, History*, No. 41(1), (2015), p. 98.

¹¹⁶ Id., pp. 98-100.

¹¹⁷ D. HARSCH, “Society, the State, and Abortion in East Germany, 1950-1972”, *The American Historical Review*, Vol. 102 No. 1, (1997), p. 62; See also: Anleitung zur Durchführung der neuen Instruktionen zur Behandlung der Anträge auf Unterbrechung der Schwangerschaft [Instruction for the Implementation of the New Guidelines for the Processing of Applications for Pregnancy Termination], *Sächsisches Hauptstaatsarchiv*, Bezirksarzt des Rates des Bezirkes Leipzig, Signatur 5321, Blatt 19 [Saxon Main State Archive, District Physician of the Council of the Leipzig District, File No. 5321, Sheet 19], (1965).

opposite occurred: abortion applications increased dramatically, creating significant administrative chaos¹¹⁸. These developments, combined with the global wave of abortion law reforms during the 1960s and 1970s, ultimately led to a landmark change in the GDR's legal framework¹¹⁹. On 9 March 1972, the Law on the Interruption of Pregnancy was enacted, beginning with the words: “The equal rights of women in education and employment, marriage and family require that women be able to decide for themselves about pregnancy and its continuation.”¹²⁰. The 1972 Law granted women the full right to decide independently on the termination of a pregnancy within the first twelve weeks, framing this choice as a matter of personal responsibility (§1). After twelve weeks, an abortion could be performed only if continuation of the pregnancy endangered the woman's life or if other serious circumstances were present, with the decision resting in the hands of a medical commission (§2). The procedure was also prohibited if less than six months had elapsed since a previous abortion, unless an exception was approved by the commission (§3). Moreover, the law guaranteed women access to free, medically prescribed contraceptives (§4)¹²¹. Together with the statute, an implementing regulation entered into force, which, among other provisions, granted women the right to appeal decisions of medical commissions responsible for authorising pregnancy terminations and required that any procedure be performed only with the explicit consent of the pregnant woman¹²². Between 1972 and 1990, the GDR's *time limit model* maintained one of the most liberal abortion regimes in Europe. The 1972 law remained in force without substantive amendment, framing abortion as a matter of women's social rights and state-supported healthcare. Following reunification in 1990, this model temporarily continued to apply in the former East Germany until the adoption of a unified legal framework in 1992¹²³.

In the FRG, on the other hand, the debate on the permissibility of abortion—shaped in part by the postwar economic crisis and, unlike in the East, free from the widespread systematic rapes—took a different course¹²⁴. Eser observes that “In virtually no other country has the conflict between principle and realism been expressed with more intensity and polemics than in the Federal Republic of Germany”¹²⁵. Initially, the West restored the solutions already known from the Weimar Republic era, namely the criminalisation of abortion under §218 of the RStGB, together with the consequences of the 1927 decision of the Imperial Court of Justice¹²⁶. The issue of pregnancy termination was revisited only in 1962, in the first draft of the FRG

¹¹⁸ See footnote: 115, p. 100.

¹¹⁹ See footnote: 117, p. 53.

¹²⁰ Gesetz über die Unterbrechung der Schwangerschaft [Law on the Interruption of Pregnancy], *Gesetzblatt der Deutschen Demokratischen Republik*, Teil I, Nr. 5 [Law Gazette of the German Democratic Republic, Part I, No. 5], (1972), p. 89.

¹²¹ Id., pp. 89-90.

¹²² Durchführungsbestimmung zum Gesetz über die Unterbrechung der Schwangerschaft [Implementing Regulation to the Law on the Interruption of Pregnancy], *Gesetzblatt der Deutschen Demokratischen Republik*, Teil II, Nr. 12 [Law Gazette of the German Democratic Republic, Part II, No. 12], (1972), pp. 149–151.

¹²³ D.A.J. TELMAN, “Abortion and Women's Legal Personhood in Germany: A Contribution to the Feminist Theory of the State”, *N.Y.U. Review of Law and Social Change*, Vol. 24(91), (1998), p. 126.

¹²⁴ Id.

¹²⁵ A. ESER, “Reform of German Abortion Law: First Experiences”, *The American Journal of Comparative Law*, Vol. 34 No. 2, (1986), p. 369.

¹²⁶ See footnote: 123, p. 127.

Criminal Code. Although never entered into force, it became the basis of discussion on abortion law for years to come. The draft provided for the criminal liability of anyone who terminated a pregnancy, including the pregnant woman herself (§140)¹²⁷. More severe penalties were foreseen for commercial abortions, abortions performed without the woman's consent, or cases in which the pregnant woman suffered serious injury or death as a result of the procedure (§141)¹²⁸. The draft also prohibited the advertising of abortifacients, the supply of such substances for profit, and the offering of one's own or another's services for pregnancy termination (§§142–144)¹²⁹. Importantly, Title IV of the draft contained §157, which exempted from criminal liability under §140 any physician who terminated a pregnancy in order to avert a risk of death or serious injury to the woman's body or health¹³⁰. Although there was broad agreement on the general purpose of criminal law reform in the FRG—namely, to involve physicians in abortion practice and thereby reduce the overall number of abortions, particularly illegal and unsafe ones—consensus on the specific means of achieving this objective proved elusive for many years¹³¹. A special working group was subsequently established to prepare the so-called Alternative Draft (ger. *Alternativ-Entwurf*, AE)¹³². However, a true turning point did not occur until 1974, with the fifth reform of the Criminal Code. The Fifth Act to Reform the Criminal Law (ger. *Fünftes Strafrechtsreformgesetz*, 5. StrRG) was based on the time-limit model, providing in §218 that termination of pregnancy was punishable only if performed later than the thirteenth day after conception¹³³. This period was extended to twelve weeks in cases where the abortion was performed by a physician with the woman's consent (§218a). Furthermore, if the abortion was the only means to save the woman's life or health (i.e. was based on a *medical indication*) or if there was a significant risk of birth defects (i.e. there was an *embryopathological indication*), the physician was permitted to perform the procedure after the twelfth week (§218b), provided that the indication had been confirmed by a competent authority (§219)¹³⁴. Almost immediately, however, the new legislation was challenged by the Christian Democratic Union of Germany (ger. *Christlich Demokratische Union Deutschlands*, CDU) and the Christian Social Union in Bavaria (ger. *Christlich-Soziale Union in Bayern*, CSU), both of which had long opposed the liberalisation of abortion law. In their complaint to the Federal Constitutional Court (ger. *Bundesverfassungsgericht*, BVerfG), they argued that the permissibility of abortion during the first trimester was incompatible with the provisions of the Basic Law (ger. *Grundgesetz*, GG)¹³⁵. In its judgment of 25 February 1975, the Court held that the liberalisation of abortion law conflicted with the first sentence of Article 2(2) in conjunction with Article 1(1) GG, which enshrine the right to life and the inviolability of human dignity,

¹²⁷ Entwurf eines Strafgesetzbuches (StGB) E 1962 [Draft Criminal Code (StGB) E 1962], *Deutscher Bundestag*, Drucksache IV/650 [*German Bundestag*, Printed Matter IV/650], (1962), §140, p. 35.

¹²⁸ Id., §141, p. 36.

¹²⁹ See footnote: 127, §§142–144, p. 36.

¹³⁰ See footnote: 127, §157, p. 38.

¹³¹ See footnote: 125, pp. 371–373.

¹³² Id.

¹³³ Fünftes Gesetz zur Reform des Strafrechts (5. StrRG) [Fifth Law on the Reform of the Criminal Code (5. StrRG)], *Bundesgesetzblatt*, Teil I, Nr. 63 [*Federal Law Gazette*, Part I, No. 63], (1974), p. 1297.

¹³⁴ Id., §§218a–218b, §219, pp. 1297–1298.

¹³⁵ See footnote: 125, p. 373.

imposing a positive duty upon the state to protect human life¹³⁶—including that of the unborn¹³⁷. The Court further ruled that, until new legislation was enacted, abortion as provided for in §218b of the 5. StrRG—that is, for medical or embryopathological reasons—would be permitted only up to the twelfth week of pregnancy. It also held that termination of pregnancy performed by a physician with the woman’s consent would not be punishable when the woman had been the victim of certain sexual offences, such as rape, and if “there are compelling reasons to assume that the pregnancy is a result of that act”¹³⁸. Moreover, BVerfG stated that if a pregnant woman, “being placed in a situation of hardship”, could not avoid it in any other way, a court could refrain from imposing a penalty under §218, provided that the abortion was performed by a physician within the first twelve weeks after conception¹³⁹. Thus, two additional indications emerged: the *criminal* (or *ethical*) *indication* and the *social indication*. The BVerfG reasoned that, during deliberations on the structure of abortion law, the representative of the Federal Government presented a detailed and persuasive justification for why, in these four circumstances, continuing the pregnancy could not reasonably be expected. In each instance, a competing constitutional interest of equal significance was deemed to carry such weight that the state’s legal order could not justifiably compel the woman to subordinate her own situation to the rights of the unborn¹⁴⁰. Regarding the medical indication, the Court observed that “(...) self-sacrifice for the unborn life cannot be expected from [the pregnant woman]”¹⁴¹. In another paragraph, discussing the social indication, the Court noted: “Conflicts can arise in the general social situation of a pregnant woman and her family that are so severe that sacrifices for the benefit of the unborn life beyond a certain level cannot be coerced from the pregnant woman by the threat of criminal punishment. (...) [T]he state is expected to offer counselling and assistance with the goal of urging the pregnant woman to comply with the fundamental obligation to respect the right to life of the unborn, encouraging her to continue the pregnancy and to provide her – especially in cases of social hardship – with practical support.”¹⁴². In light of the above, it is unsurprising that the subsequent amendment to the Criminal Code, adopted in 1976, reflected the reasoning of the Court¹⁴³. Apart from minor changes in numbering, the new law maintained the general penalisation of abortion under §218, but—now in accordance with the BVerfG ruling and without any temporal limitation¹⁴⁴—excluded criminal liability for procedures performed by a physician on the basis of one of the four recognised indications:

- 1) the medical indication (encompassing not only risks to the woman’s life but also to her physical or mental health; §218a para. 1 no. 2);

¹³⁶ Grundgesetz für die Bundesrepublik Deutschland [Basic Law for the Federal Republic of Germany], *Bundesgesetzblatt*, Teil I, Nr. 1 [*Federal Law Gazette*, Part I, No. 1], (1949), p. 1.

¹³⁷ Urteil des Bundesverfassungsgerichts vom 25. Februar 1975, 1 BvF 1, 2, 3, 4, 5, 6/74 [Judgment of the Federal Constitutional Court of 25 February 1975, Case No. 1 BvF 1, 2, 3, 4, 5, 6/74], *Entscheidung des Bundesverfassungsgerichts* (BVerfGE) 39 [*Decisions of the Federal Constitutional Court* (BVerfGE) 39], (1975).

¹³⁸ Id.

¹³⁹ See footnote: 137.

¹⁴⁰ See footnote: 137, para. 166.

¹⁴¹ Id.

¹⁴² See footnote: 137, para. 167.

¹⁴³ Fünfzehntes Strafrechtsänderungsgesetz [Fifteenth Criminal Law Amendment Act], *Bundesgesetzblatt*, Teil I, Nr. 56 [*Federal Law Gazette*, Part I, No. 56], (1976), pp. 1213-1215.

¹⁴⁴ Id., p. 1213.

- 2) the embryopathological indication (§218a para. 2 no. 1);
- 3) the criminological indication (§218a para. 2 no. 2);
- 4) and the social indication (§218a para. 2 no. 3)¹⁴⁵.

Furthermore, a pregnant woman could avoid criminal liability if the procedure was performed no later than the twenty-second week of pregnancy and if counselling had taken place at least three days prior to the procedure¹⁴⁶. From that moment, counselling became compulsory, and the woman was to be advised of the available forms of assistance for mothers and children (§218b)¹⁴⁷. These provisions remained in force until the end of the existence of the FRG.

The Consulting Solution: Constitutional Foundations of Abortion Law in Post- Unification Germany

In 1990, under the Unification Treaty Act (ger. *Einigungsvertragsgesetz*)¹⁴⁸, the German Democratic Republic and the Federal Republic of Germany were reunified, necessitating a debate over the previously divergent legal frameworks. In contrast to the time-limit model that had applied in the GDR since 1972, the FRG had operated under the so-called *indication model*¹⁴⁹. Pursuant to Annex II of the Unification Treaty Act, the GDR's abortion law—specifically §1(1), which had granted women the right to decide autonomously on pregnancy termination in order to determine the number, timing, and spacing of births¹⁵⁰—was repealed¹⁵¹. Achieving consensus on a new abortion law proved difficult. As Osborne notes, some East German female critics argued that the 1972 law had been driven more by the state's interest in maintaining women's participation in the workforce than by a genuine commitment to self-determination, and at the same time Western observers often claimed that women in the GDR lacked an ethical approach; nonetheless, East German representatives resisted replacing their own legislation with that of West Germany¹⁵². Ultimately, a new legal framework for abortion

¹⁴⁵ See footnote: 143, pp. 1213-1214.

¹⁴⁶ See footnote: 143, p. 1213.

¹⁴⁷ See footnote: 143, p. 1214.

¹⁴⁸ Gesetz zu dem Vertrag vom 31. August 1990 zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands – Einigungsvertragsgesetz – und der Vereinbarung vom 18. September 1990 [Law on the Treaty of 31 August 1990 between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity – Unification Treaty Act – and the Agreement of 18 September 1990], *Bundesgesetzblatt*, Teil II, Nr. 35 [*Federal Law Gazette*, Part II, No. 35], (1990), pp. 885–1245.

¹⁴⁹ A. ESER, “Abortion law reform in Germany in international comparative perspective”, *European Journal of Health Law*, Vol. 1 No. 1, (1994), pp. 18-20.

¹⁵⁰ See footnote: 120, §1(§), p. 89.

¹⁵¹ See footnote: 148, Artikel 9 (2) [Article 9, Section 2], p. 892, in connection with Anlage II, B. Geschäftsbereiche, Kapitel III Bundesminister der Justiz, Sachgebiet C: Strafrecht und Ordnungswidrigkeitenrecht, Abschnitt I, Nr. 4 [Annex II, Section B: Areas of Responsibility, Chapter III: Federal Minister of Justice, Field C: Criminal Law and Law on Administrative Offences, Section I, No. 4], p. 1168.

¹⁵² See footnote: 44, p. 6.

was established through the Pregnancy and Family Assistance Act of 27 July 1992¹⁵³, which “prescribe[d] counselling instead of punishment, prevention instead of repression; however, it fail[ed] to grant women the final word on whether to terminate a pregnancy or not”¹⁵⁴. §218a provided that termination of pregnancy *is not unlawful* if performed by a physician within the first twelve weeks of pregnancy and if the pregnant woman produced a certificate confirming that she had received counselling at least three days prior to the procedure¹⁵⁵. In cases of medical or embryopathological indication, the permissible period was extended to twenty-two weeks¹⁵⁶. Abortion performed outside these conditions remained punishable under §218, although the pregnant woman herself was subject to more lenient treatment¹⁵⁷. She could even avoid criminal liability entirely if the procedure was performed by a physician within twenty-two weeks following counselling, or avoid punishment if she was in a particularly distressing life situation at the time of the abortion¹⁵⁸. Furthermore, §219a criminalised the public “advertising” of abortion “for material gain or in a grossly indecent manner”¹⁵⁹. It is therefore evident that the purpose of the statute was primarily to support pregnant women rather than to punish them severely. However, once again—as had occurred in 1975 in the FRG—the new provisions were brought before the Federal Constitutional Court on the grounds of incompatibility with the GG. In its 1993 judgment, BVerfG reaffirmed the principles set out in its 1975 decision, emphasising that, under the Basic Law, “the unborn is entitled to legal protection even vis-à-vis its mother. Such protection is only possible if the legislature fundamentally forbids the mother to terminate her pregnancy and thus imposes upon her the fundamental legal obligation to carry the child to term.”¹⁶⁰. The Court also acknowledged that exceptions to this rule could exist—where required by the constitutional principle of proportionality—but maintained that they must not nullify the general prohibition, and that the decision to terminate a pregnancy could not be left entirely to the woman, even for a limited period (such as the first trimester)¹⁶¹. BVerfG nevertheless accepted a model under which abortion, following mandatory counselling aimed at protecting unborn life and encouraging continuation of the pregnancy, should be treated as a responsibility of the state, provided that the law continued to recognise abortion as an unlawful act, one that remained “fundamentally

¹⁵³ Gesetz zum Schutz des vorgeburtlichen/werdenden Lebens, zur Förderung einer kinderfreundlicheren Gesellschaft, für Hilfen im Schwangerschaftskonflikt und zur Regelung des Schwangerschaftsabbruchs (Schwangeren- und Familienhilfegesetz) [Law on the Protection of Prenatal/Developing Life, the Promotion of a Child-Friendly Society, Assistance in Pregnancy Conflicts, and the Regulation of Pregnancy Termination (Pregnancy and Family Assistance Act)], *Bundesgesetzblatt*, Teil I, Nr. 37 [*Federal Law Gazette*, Part I, No. 37], (1992), pp. 1398–1404.

¹⁵⁴ See footnote: 44, p. 6.

¹⁵⁵ See footnote: 153, §218a(1), p. 1402.

¹⁵⁶ See footnote: 153, §218a(2-3), p. 1402.

¹⁵⁷ See footnote: 153, §218(1), §218(3), p. 1402.

¹⁵⁸ See footnote: 153, §218a(4), p. 1402.

¹⁵⁹ See footnote: 153, §219a, p. 1403.

¹⁶⁰ Urteil des Bundesverfassungsgerichts vom 28. Mai 1993, 2 BvF 2/90 u. a. [Judgment of the Federal Constitutional Court of 28 May 1993, Case No. 2 BvF 2/90 et al.], *Entscheidungen des Bundesverfassungsgerichts* (BVerfGE) 88 [*Decisions of the Federal Constitutional Court* (BVerfGE) 88], (1993).

¹⁶¹ Id.

wrong”¹⁶². As Telman observes, “(...) [this] decision may betray the persistence of conventional views of women as child-bearers and child-rearers that have informed debates on the regulation of reproduction since the nineteenth century.”¹⁶³. The 1995 amendment directly implemented the Court’s ruling, maintaining the general prohibition of abortion and classifying it as *unlawful, but not punishable* (ger. *Straflosigkeit, nicht Rechtmäßigkeit*) under specific circumstances—namely, within the first twelve weeks after conception, following mandatory counselling¹⁶⁴. Moreover, pursuant to the BVerfG’s decision, the provisions concerning counselling and support for pregnant women contained in the Pregnancy and Family Assistance Act of 1992 were restructured into a separate statute, the Pregnancy Conflict Act (ger. *Schwangerschaftskonfliktgesetz*, SchKG)¹⁶⁵. Although the wording of the criminal provisions changed only slightly, the most significant development during this period was constitutional in nature, marking a shift in emphasis from the concept of a *lawful abortion* to that of a *formally unlawful but (in some cases) non-punishable act*—one that still contravened the constitutional norm of protecting unborn life. Counselling, though still mandatory, ceased to be a neutral tool supporting women’s autonomous decision-making and instead became a *pro-life* instrument of state policy, aimed at encouraging women to continue their pregnancies. At the same time, the new criminal provisions imposed on physicians an obligation to provide comprehensive information about the potential physical and psychological risks and consequences of abortion¹⁶⁶.

The compromise developed during this period—known as the *consulting solution* (ger. *Beratungslösung*)—remains in force to this day. Abortion is therefore, as a rule, unlawful, yet not punishable if certain conditions are met. The only significant change in the long-established abortion provisions came with the repeal of §219a of the StGB in 2022¹⁶⁷, whose direct predecessor was §219 of the RStGB of 1933. This amendment now allows physicians to lawfully inform the public that they perform pregnancy terminations.

Despite the overall stability of German abortion law, it would be an overstatement to claim that the existing model satisfies all sides of the political debate. On 31 March 2023, the Commission on Reproductive Self-Determination and Reproductive Medicine (ger.

¹⁶² Id.

¹⁶³ See footnote: 123, p. 141.

¹⁶⁴ Schwangeren- und Familienhilfeänderungsgesetz (SFHÄndG) [Act Amending the Pregnancy and Family Assistance Act (SFHÄndG)], *Bundesgesetzblatt*, Teil I, Nr. 44 [Federal Law Gazette, Part I, No. 44], (1995), pp. 1050–1057.

¹⁶⁵ Id., Article 1, p. 1050.

¹⁶⁶ See footnote: 164, Artikel 8: Änderung des Strafgesetzbuches, 5. (§218c) [Article 8: Amendment to the Criminal Code, 5. (§218c)], p. 1056.

¹⁶⁷ Gesetz zur Änderung des Strafgesetzbuches – Aufhebung des Verbots der Werbung für den Schwangerschaftsabbruch (§ 219a StGB), zur Änderung des Heilmittelwerbegesetzes, zur Änderung des Schwangerschaftskonfliktgesetzes, zur Änderung des Einführungsgesetzes zum Strafgesetzbuch und zur Änderung des Gesetzes zur strafrechtlichen Rehabilitation der nach dem 8. Mai 1945 wegen einvernehmlicher homosexueller Handlungen verurteilten Personen [Act Amending the Criminal Code – Repeal of the Ban on Advertising for Pregnancy Termination (§ 219a StGB), Amending the Act on Advertising of Medicinal Products, the Pregnancy Conflict Act, the Introductory Act to the Criminal Code, and the Act on the Criminal Rehabilitation of Persons Convicted after 8 May 1945 for Consensual Homosexual Acts], *Bundesgesetzblatt*, Teil I, Nr. 25 [Federal Law Gazette, Part I, No. 25], (2022), pp. 1082–1083.

Kommission zur reproduktiven Selbstbestimmung und Fortpflanzungsmedizin) was established, bringing together experts tasked with assessing the possibility of regulating pregnancy termination outside of the criminal code. In its recommendations, the Commission emphasised that the prevention of abortion should be grounded in education and public health initiatives. Regarding the legal aspects of pregnancy termination, the Commission expressed the view that women should have the right to freely and safely terminate a pregnancy during the early weeks following implantation, thereby advocating for its legality. According to the Commission, only the middle and late stages of pregnancy—divided by the threshold of fetal viability *ex utero*—should be subject to greater legal control. In the case of the middle stage, exceptions should be permitted, particularly where medical or criminological indications exist. As for late-term pregnancies, the Commission suggested a general prohibition on abortion, though not an absolute one: termination should remain lawful where necessary to protect the woman's life or health. The recommendations also stressed that counselling—if deemed mandatory by the legislator—should primarily serve to ensure an informed decision, rather than to persuade women to continue the pregnancy. Accordingly, the Commission called for ideological neutrality in counselling¹⁶⁸. To date, however, the legislation remains unchanged, along with its elements that allow for interpretive flexibility or are, quite simply, ambiguous. For example, current law does not recognise *expressis verbis* the permissibility of abortion on embryopathological grounds, although it is generally understood to fall within the scope of the medical-social indication¹⁶⁹. Among the criticisms of the existing framework are concerns about inequalities in access to abortion—since the medical-social indication may be interpreted differently by individual physicians—as well as fears of an increase in early-term abortions following certain non-invasive prenatal testing results, driven by the fear of “missing” the legal time limit for termination while awaiting further diagnostic procedures¹⁷⁰. It is also worth noting that, despite the extensive history of legislative reform in Germany, broader cultural and social changes in the perception of abortion—and the reduction of its enduring stigma—are still yet to come¹⁷¹.

POLAND: FROM LIBERALIZATION TO RESTRICTION?

***Expulsion of the Fetus:* Early Examples of Abortion Regulation in Poland**

¹⁶⁸ Bericht der Kommission zur reproduktiven Selbstbestimmung und Fortpflanzungsmedizin [Report of the Commission on Reproductive Self-Determination and Reproductive Medicine], *Bundesministerium für Gesundheit [Federal Ministry of Health]*, (2023), pp. 335-337.

¹⁶⁹ C. HEMPELER, H. BOWMAN-SMART, T. NOV-KLAIMAN, R. HORN, “Reproductive self-determination and regulation of termination of pregnancy in Germany: current controversies and developments”, *Journal of Medical Ethics*, jme-2024-110457, (2025), p. 2.

¹⁷⁰ *Id.*, p. 5.

¹⁷¹ *Id.*

Without delving into the earliest periods of Polish criminal law, when customary law prevailed—a topic explored in separate scholarly works¹⁷² it is necessary to outline, even if only superficially, the complexities involved in the creation of criminal law provisions in Poland, and to recall some of the regulations that historically addressed the termination of pregnancy. A crucial turning point in Polish history, or, more precisely, in the history of the Polish–Lithuanian Commonwealth, was the loss of its territory through the partitions of 1772, 1793, and 1795, carried out by the Kingdom of Prussia, the Habsburg Monarchy, and the Russian Empire. The partitions brought changes not only to the borders of the former Commonwealth, but also to the legal systems in force¹⁷³. Given both the constraints of scope and the objective of this work, a detailed analysis of the partitioned territories’ legal frameworks seems unnecessary. However, selected examples of the evolution of abortion law before the year 1932 will be provided for contextual understanding.

In the nineteenth century, the termination of pregnancy, then referred to as “expulsion of the fetus” [pl. *spędzenie płodu*], was a phenomenon widely known and practiced regardless of the social status of the pregnant woman¹⁷⁴. Nevertheless, abortion was regarded as “a particularly dangerous pathology and a sign of profound moral corruption threatening society as a whole”¹⁷⁵. Słyszewska notes that the reasons for terminating pregnancies at that time included, among others, the wish to conceal a woman’s “sin” or the fact that pregnancy might have prevented her from continuing in prostitution¹⁷⁶. The first criminal statute in Polish history, known as the Penal Code for the Kingdom of Poland—though based on foreign legal models, chiefly the Austrian Criminal Code of 1803—was enacted in 1818 in the territory of the Kingdom of Poland (1816–1918) and was in force from 20 July 1818 until 31 December 1847¹⁷⁷. The issue of abortion was addressed in its Chapter XV, titled “On the Crime of Expulsion of the Fetus”. Article 129 of this Code provided: “Expulsion of the fetus is an act aimed at intentional abortion or the delivery of a dead child from a pregnant woman.”. Article 130 further specified that such an act was considered a felony only when the termination of pregnancy (whether completed or attempted) occurred without the woman’s knowledge and consent, thereby endangering her life or causing harm to her health, as well as when the perpetrator performed multiple abortions for, e.g., a material gain¹⁷⁸. In the latter situation, both the woman’s consent and the absence of consequences in the form of danger to her life or health

¹⁷² See: T. BOJARSKI, T. MACIEJEWSKI, W. WITKOWSKI, A. WRZYSZCZ, “Rozwój prawa karnego [The Development of Criminal Law]”, [in:] T. BOJARSKI (ed.), “Źródła prawa karnego. System prawa karnego. Tom 2 [Sources of Criminal Law. The Criminal Law System. Volume 2]”, C.H.BECK, (2011).

¹⁷³ W. WITKOWSKI, “Prawo karne na ziemiach polskich w dobie zaborów i w pierwszych latach II RP (1795-1932) [Criminal Law in the Polish Territories during the Partition Period and the Early Years of the Second Polish Republic (1795–1932)]”, [in:] T. BOJARSKI (ed.), “Źródła prawa karnego. System prawa karnego. Tom 2 [Sources of Criminal Law. The Criminal Law System. Volume 2]”, C.H.BECK, (2011).

¹⁷⁴ J. SŁYSZEWSKA, “Ochrona życia dziecka w Kodeksie Karzącym Królestwa Polskiego z 1818 r. [Protection of the Child’s Life in the Penal Code of the Kingdom of Poland of 1818]”, *Studia Prawnoustrojowe*, 49, (2020).

¹⁷⁵ Id., p. 299.

¹⁷⁶ Id.

¹⁷⁷ See footnote: 173, p. 78.

¹⁷⁸ *Kodex karzący dla Królestwa Polskiego* [Penal Code for the Kingdom of Poland], (1830).

were legally irrelevant. For these acts, the offender faced a penalty of three to ten years of severe imprisonment [pl. *ciężkie więzienie*]¹⁷⁹, whereas termination of pregnancy with the woman's consent and without resulting harm to her health or life was punishable by confinement in a house of correction [pl. *dom poprawy*]¹⁸⁰—also meaning deprivation of liberty, but under conditions significantly milder than in severe imprisonment¹⁸¹. It is worth noting that, even then, a pregnant woman bore less criminal liability than other persons involved in procuring miscarriage.

The Penal Code for the Kingdom of Poland was replaced on 1 January 1848 by the Code of Main and Correctional Penalties, based on a Russian statute of the same name, though shorter in scope. This code remained in force until 1876, when it was superseded by the Russian Criminal Code of 1866. Another significant change came with the publication of the Tagantsev Code in 1903¹⁸². A look at it reveals that both the mother and any other person involved in terminating a pregnancy were subject to imprisonment (confinement in a house of correction). Moreover, as Article 466 stated: “If the procurement of miscarriage was committed by a physician or midwife, the court may prohibit the offender from practicing for a period from one to five years and may publish the sentence.”¹⁸³. Much has changed in Polish law since then. For example, as Czerwiński wrote at the time: “Not punishable is (...) an attempt to cause the expulsion of the fetus performed on a woman who is not pregnant (in cases of so-called imaginary pregnancy). Only German jurisprudence, grounded in subjectivism and recognizing the punishability of attempts directed at an object unsuitable for the commission of the offense, supported the punishability of an attempt to cause the expulsion of the fetus from a woman who is not pregnant.”¹⁸⁴. Nevertheless, only a few years later, the punishability of *inept attempts* became the norm, and it remains so today¹⁸⁵. Moreover, contemporary Polish doctrine and case

¹⁷⁹ Id., Article 131; According to the Article 32 of this code: “Those sentenced to confinement in severe imprisonment shall bear upon their legs lighter shackles, wear garments plain and, as far as possible, uniform; they shall be fed once a day with warm, though meatless, dish, and on one day of the week, that is, on Friday, with bread and water only; their bedding shall consist of straw, without any proper bedclothes, and they shall be employed in external or internal labours, insofar as their health and strength shall permit.”

¹⁸⁰ See footnote 178, Article 132 and 321.

¹⁸¹ E. KACZYŃSKA, “Ludzie ukarani. Więzienia i system kar w Królestwie Polskim 1815-1914 [Punished People: Prisons and the Penal System in the Kingdom of Poland, 1815–1914]”, *PWN*, (1989); quoted in: see footnote 174, p. 300.

¹⁸² See footnote: 173, pp. 77-81.

¹⁸³ Kodeks karny z r. 1903 (przekład z rosyjskiego) z uwzględnieniem zmian i uzupełnień obowiązujących w Rzeczypospolitej Polskiej w dniu 1 maja 1921 r. [The Criminal Code of 1903 (translated from Russian), including amendments and supplements in force in the Republic of Poland as of 1 May 1921], (1922).

¹⁸⁴ S. CZERWIŃSKI, “Zabicie płodu i dzieciobójstwo [Fetal Killing and Infanticide]”, *Głos Sądownictwa*, No 5, (1929), p. 232.

¹⁸⁵ P. ARKUSZEWSKI, Z. WARDAK, “Różnicowanie zabójstwa od nieszczęśliwego wypadku przy upadku z wysokości w warunkach górskich na przykładzie zdarzenia z Kasprowego Wierchu – uwagi kryminalistyczne, opiniodawcze i orzecznicze [Differentiating Homicide from an Accidental Fall in Mountainous Conditions: A Case Study from Kasprowy Wierch – Forensic, Expert, and Judicial Remarks]”, *Studia Prawnoustrojowe*, 52, (2021), p. 17; See also: Wyrok Sądu Najwyższego z dnia 29 października 1934 r. [Judgment of the Supreme Court of 29 October 1934] case no. III K 1052/34, OSN 1935, no. 5, item 195, LEX no. 378763.

law also recognize, for instance, the inept attempt to incite someone to the termination of pregnancy, such as in cases where the perpetrator urges a woman to undergo an illegal abortion when she is not actually pregnant¹⁸⁶.

In the early twentieth century, attention was also given to the question of whether the law could keep pace with the changes of the contemporary world. People spoke openly about the reality of terminating pregnancies, offered assessments, searched for solutions, and presented competing worldviews on this issue. In 1929, Czerwiński observed that the criminal code lagged behind the realities of social and economic change. He noted that many women—including those who were religious and family-oriented—no longer regarded abortion as morally blameworthy, often seeking medical advice on how to avoid pregnancy. This attitude, he argued, reflected a widespread belief that early termination ended only a potential life rather than an existing one¹⁸⁷. In the same year, Fleszyński addressed the issue of the expulsion of the fetus in *Głos Sądownicwa*, reporting on the II Congress of Polish Lawyers¹⁸⁸, where the criminalization of abortion was vigorously debated in connection with the drafting of a national criminal code. The positions presented at the Congress were diverse, encompassing a broad spectrum of approaches: from complete decriminalization of abortion, through its permissibility up to the third month of pregnancy, to near-total prohibition¹⁸⁹. However, Fleszyński expressed a rather unequivocal critique of certain theses advanced during the debate. For instance, there is a well-established argument in contemporary discourse—although already articulated nearly a century ago, during the aforementioned Congress—which asserts that a woman ought to possess full autonomy over her body, including the right to terminate a pregnancy without facing any legal sanctions. Fleszyński expressed a rather critical stance toward such a position, describing it as embodying a “narrow, hedonistic, materialistic, and individualistic worldview”¹⁹⁰. He then wrote: “Complete freedom... for fantasy, even for the mere whim of fashion. / And where, in this case, does the period of impunity end as to time? (...) One small step, a very small step, and we shall arrive at the non-punishability... of taking the lives of newborns.”¹⁹¹.

¹⁸⁶ E. PLEBANEK, “Kilka uwag o odpowiedzialności karnej za nakłanianie lub udzielenie pomocy w przerwaniu ciąży za zgodą kobiety i o aborcji ze wskazań terapeutycznych [Some Remarks on Criminal Liability for Encouraging or Assisting in Pregnancy Termination with the Woman’s Consent and on Therapeutic Indications for Abortion]”, *Przegląd Prawa Medycznego*, No 1(9), (2022), pp. 13-14.

¹⁸⁷ See footnote: 184, pp. 235-236.

¹⁸⁸ The first Congress of Polish Lawyers [pl. *Zjazd Prawników Polskich*] took place in 1924. As opposed to the Congress of Polish Lawyers and Economists, the new Congress no longer pursued the earlier patriotic and political aims, but instead adopted a more organizational and practical purpose: to help unify legislation in the newly reconstituted state and improve its structure. See: E.S. RAPPAPORT, “Memorandum Informacyjne Sekretarza Generalnego Stałej Delegacji Zrzeszeń i Instytucyj Prawniczych R. P. prof. E. Stan. Rappaporta: o nowych celach, zadaniach i wymogach organizacyjnych Zjazdów Prawników Polskich [Information Memorandum of the Secretary-General of the Permanent Delegation of Polish Legal Associations and Institutions, Prof. E. Stan. Rappaport: On the New Goals, Tasks, and Organizational Requirements of the Congresses of Polish Lawyers]”, *Gazeta Sądowa Warszawska*, R. 57, nr 44, (1929), pp. 668-673.

¹⁸⁹ K. FLESZYŃSKI, “Zagadnienie spędzenia płodu [The Issue of Fetal Expulsion]”, *Głos Sądownicwa*, No 11, (1929), p. 533.

¹⁹⁰ Id., p. 534.

¹⁹¹ Id.

Glaser's position, articulated at the aforementioned Congress and subsequently referenced by Fleszyński, also merits particular attention, for although the latter ultimately dismissed the argument, it nonetheless constituted a noteworthy compromise within the legal debates of that period. Glaser argued that while it was necessary to introduce criminal liability for the expulsion of the fetus, regardless of the stage of fetal development, there were certain circumstances that could—or should—constitute exceptions to this rule: medical indications, pregnancies resulting from criminal acts (e.g., rape, seduction, incest), and even social considerations, such as parental poverty or out-of-wedlock pregnancy¹⁹².

These are but a few examples of the profound impact that 123 years of partition exerted on the development of Polish criminal law. The territories of partitioned Poland were governed by distinct legal systems, each undergoing numerous changes over the course of more than a century. Even after the restoration of independence on 11 November 1918, the criminal statutes of the partitioning powers continued to apply for another fourteen years within the territory of the Second Polish Republic—namely, alongside the aforementioned Tagantsev Code, the Austrian Criminal Code of 1852 and the German Criminal Code of 1871¹⁹³. This divergence in criminal legislation posed significant practical challenges, yet simultaneously contributed to the work of the Codification Commission, which ultimately produced the Criminal Code of 11 July 1932¹⁹⁴. Among the issues vigorously debated within legal circles at the time was, without doubt, the question of the “expulsion of the fetus”. Undoubtedly, the process of establishing the first unified criminal provisions concerning abortion, applicable across the entirety of a now-sovereign Polish state, was protracted and complex. Accordingly, the analysis hereinafter will focus on Polish legislation from 1932 onward.

Polish Abortion Law in Flux: From Makarewicz's Code to Constitutional Debate

In November 1919, the Codification Commission of the Republic of Poland was established. Its Criminal Law Division included, among others, Juliusz Makarewicz, Waław Makowski, and Emil Stanisław Rappaport¹⁹⁵. The path to drafting an independent criminal statute was long and arduous, and one of the most debated issues was the permissibility of terminating pregnancy. The first draft of the statute criminalized abortion, making it punishable by up to five years of imprisonment. However, such a solution met with significant opposition from various circles¹⁹⁶. Boy-Żeleński himself, in *The Women's Hell* [pl. *Piekło kobiet*], voiced strong objections to criminalizing the act of terminating pregnancy. He described the

¹⁹² See footnote: 189, p. 533.

¹⁹³ J. KOREDCZUK, “Zaborcze kodyfikacje prawa karnego materialnego w Polsce w okresie przejściowym w latach 1918-1932 [Partition-Era Codifications of Substantive Criminal Law in Poland during the Transitional Period, 1918–1932]”, [in:] J. PRZYGODZKI, P. JUREK [eds.], “Okresy przejściowe – ustrój i prawo [Transitional Periods – System and Law]”, *E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa. Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego*, (2019), p. 151.

¹⁹⁴ Id., pp. 161-162.

¹⁹⁵ See footnote: 173, pp. 108-109.

¹⁹⁶ K. BORKOWSKA, “Prawo aborcyjne w Polsce – rys historyczny [Abortion Law in Poland – A Historical Overview]”, *Studia Prawnoustrojowe*, 62, (2023), p. 68.

Commission's initial proposal as a "heartless and formalistic stance"¹⁹⁷. Over the years, many alternative solutions were considered, with the legislative process involving not only legal professionals, but also medical practitioners—and at times even giving voice to citizens themselves, particularly women¹⁹⁸. Boy-Żeleński's essays, written between October and December 1929, vividly illustrate the challenges faced by Polish criminal legislation at the time. As he noted toward the end of his work, over the course of just a few months, both the Codification Commission and broader public opinion had become more open to discussing abortion. What had once been a silent, even taboo subject was now debated in the press, at public meetings, and even in private homes. He regarded this newfound willingness to engage in open dialogue as an important first step, while acknowledging that the issue would require continued attention¹⁹⁹.

It was only in 1931 that the draft law was submitted to the Minister of Justice, and subsequently to the Prime Minister. In July 1932, the then-President of the Republic of Poland issued a decree by virtue of which the Penal Code was promulgated and entered into force on 1 September 1932²⁰⁰. According to the original wording of the 1932 law, commonly referred to as the Makarewicz's Code (pl. *Kodeks Makarewicza*), "A woman who expels her fetus or allows another person to expel it shall be subject to arrest for up to 3 years."²⁰¹ If the termination of pregnancy was performed by another person with the woman's consent, or if someone assisted in the procedure, the penalty was imprisonment for up to five years²⁰². Abortion performed without the pregnant woman's consent was, of course, punished more severely—with imprisonment of up to ten years²⁰³—as was the case in which the woman's death resulted from the procedure carried out by the perpetrator²⁰⁴. Importantly, under Article 233 of the new Penal Code, a lawful termination of pregnancy was possible if the procedure was performed by a physician and was either necessary to safeguard the woman's health or if the pregnancy resulted from a criminal act ("an indecent act" or incest). The detailed rules governing the procedure of a fetus' expulsion performed by a physician were specified in the Ordinance of the President of the Republic of Poland of 25 September 1932 on the Practice of Medicine [pl. *Rozporządzenie Prezydenta Rzeczypospolitej Polskiej z dnia 25 września 1932 roku o wykonywaniu praktyki lekarskiej*]²⁰⁵.

The Polish legislature's efforts to build criminal law from the ground up did not enjoy recognition for long. During the six-year period of World War II, the criminal law in force in Poland was that of the occupying powers: the German Reich and the Union of Soviet Socialist Republics (rus. *Союз Советских Социалистических Республик*, USSR), although the organs of the Polish Underground State consistently applied and enforced the provisions of prewar

¹⁹⁷ T. BOY-ŻELEŃSKI, "Piekło kobiet [Women's hell]", (1930), p. 3;
<<https://wolnelektury.pl/media/book/pdf/pieklo-kobiet.pdf>> [accessed 2025 06 12].

¹⁹⁸ Id., pp. 18-20.

¹⁹⁹ See footnote: 197, p. 35.

²⁰⁰ See footnote: 173, p. 109.

²⁰¹ Rozporządzenie Prezydenta Rzeczypospolitej z dnia 11 lipca 1932 r. - Kodeks karny [Decree of the President of the Republic of Poland of 11 July 1932 – Penal Code], *Dziennik Ustaw*, Nr. 60, Poz. 571 [*Journal of Laws*, No. 60, item 571], (1932), Article 231.

²⁰² Id., Article 232.

²⁰³ See footnote: 201, Article 234.

²⁰⁴ See footnote: 201, Article 230 §2.

²⁰⁵ See footnote: 196, pp. 69-70.

Polish criminal law, including the 1932 Penal Code²⁰⁶. As the German legal framework of this period has already been discussed in the preceding section, the present analysis will not address the wartime legal regime in detail, particularly with respect to the Soviet occupation zone.

Following the end of World War II and the establishment of a socialist state under strong Soviet influence, Poland began the gradual reconstruction of its legal order. In the sphere of criminal law, pre-war provisions remained in force for several years, until new legislation was introduced. The first major reform directly addressing abortion came with the Act of 27 April 1956 on the Conditions for the Permissibility of Terminating Pregnancy, as a result of ideological changes and liberalization tendencies in the East²⁰⁷. Under its provisions, Articles 231, 232, 233, and 234 of the 1932 Penal Code were repealed. According to the new act—whose purpose, as stated in its opening words, was to “protect the health of woman against the harmful consequences of pregnancy terminations performed in inappropriate conditions or by persons who are not physicians”²⁰⁸—a pregnancy termination (no longer referred to as “expulsion of the fetus”) could be performed only by a physician, and only in strictly defined circumstances. This was possible primarily when there were medical indications for the procedure. On the other hand, if no medical contraindications existed, other grounds for abortion permissibility included the woman’s difficult living conditions or a well-founded suspicion that the pregnancy had resulted from a criminal act²⁰⁹. The existence of these grounds was determined, respectively, by a physician, through a formal opinion, and by a prosecutor, who would issue a certificate²¹⁰. A significant change as compared to the first criminal statute of independent Poland was thus the legalization of abortion on social grounds, as well as the revocation of criminal liability for a pregnant woman who performed an abortion herself. The procedure for issuing medical opinions and the qualifications of physicians authorized to perform the procedure—as well as the possibility of appeal in the event of a negative medical assessment regarding the permissibility of abortion—were specified in the relevant regulation of the Minister of Health²¹¹. The 1956 Act remained in force for more than a decade, serving as the primary legal framework governing abortion in the People’s Republic of Poland (p. *Polska Rzeczpospolita Ludowa*). It was not until 1969 that a new Penal Code replaced the earlier provisions. By the Act of 19 April 1969 introducing the Penal Code, the previously binding Penal Code of 1932 was repealed. Pursuant to Article VII, point 12 of that Act, Articles 3–5 of the 1956 Act on the Conditions for the Permissibility of Terminating Pregnancy also lost force. These were the provisions establishing criminal liability for compelling a woman to undergo an abortion (Art. 3, punishable by up to five years of imprisonment), performing an abortion in cases other than those permitted by the act (Art. 4, up to three years of imprisonment), and

²⁰⁶ A. WRZYSZCZ, “Prawo karne materialne na ziemiach polskich w czasie II wojny światowej [Substantive Criminal Law in the Polish Territories during World War II]”, [in:] T. BOJARSKI (ed.), “Źródła prawa karnego. System prawa karnego. Tom 2 [Sources of Criminal Law. The Criminal Law System. Volume 2]”, C.H.BECK, (2011), pp. 114-115; 119-120.

²⁰⁷ A. GAŁĘSKA-ŚLIWKA, “Prawo do świadomego planowania rodziny: wybrane zagadnienia”, *Prokuratura i Prawo*, Nr. 2, (2021), p. 91.

²⁰⁸ Ustawa z dnia 27 kwietnia 1956 r. o warunkach dopuszczalności przerywania ciąży [Act of 27 April 1956 on the Conditions for the Permissibility of Terminating Pregnancy], *Dziennik Ustaw*, Nr. 12, Poz. 61 [*Journal of Laws*, No. 12, item 61], (1956).

²⁰⁹ Id., Article 1, point 1-2.

²¹⁰ See footnote: 208, Article 2, point 1.

²¹¹ See footnote: 196, p. 71.

assisting a pregnant woman in procuring an abortion (Art. 5, up to three years of imprisonment). While the latter two provisions were incorporated with nearly identical wording into the new Penal Code²¹², the content of the former Article 3 of the 1956 Act was amended. This time, Article 153 of the Penal Code provided: “Whoever causes a miscarriage in a pregnant woman by means of violence or otherwise terminates her pregnancy without her consent, or forces her to do so by violence, unlawful threat, or deceit, shall be subject to imprisonment for between 6 months and 8 years.” Interestingly, under the Ordinance of the Minister of Health and Social Welfare of 30 April 1990, physicians were, for the first time, allowed to refuse to issue such an opinion or perform the procedure. The only exception was when failure to act would expose the woman’s life to immediate danger²¹³.

Another crucial change in Polish abortion law came as a consequence of the resumption of social debates on the permissibility of abortion, which took place in the 1980s²¹⁴. The Act of 7 January 1993 on Family Planning, Protection of the Human Fetus, and the Conditions for Permissibility of Terminating Pregnancy [hereinafter referred to as: 1993 Family Planning Act] came into force, and repealed the previously binding 1956 Act²¹⁵. Article 1 of this Act began with the words: “Every human being shall have an inherent right to life from the moment of conception”²¹⁶, and further: “The life and health of a child from the moment of its conception shall be protected by law.”²¹⁷. Under this Act, specific amendments were introduced to the Penal Code, including the repeal of Articles 153 and 154. Of particular note was the newly created Article 149a, which provided that causing the death of a conceived child was punishable by up to two years of imprisonment²¹⁸; however, the mother of the conceived child was not subject to punishment²¹⁹. Furthermore, a physician did not bear criminal liability for terminating a pregnancy if the procedure was performed in a public health-care facility in one of four legally permitted situations:

- 1) if the pregnancy posed a threat to the mother’s life or health (in this case, confirmation of such a condition was required in the form of opinions from

²¹² Ustawa z dnia 19 kwietnia 1969 r. przepisy wprowadzające Kodeks karny [Act of 19 April 1969 introducing the Penal Code], *Dziennik Ustaw*, Nr. 13, Poz. 95 [*Journal of Laws*, No. 13, item 95], (1969); Article 154 §1 and §2.

²¹³ Rozporządzenie Ministra Zdrowia i Opieki Społecznej z dnia 30 kwietnia 1990 r. w sprawie kwalifikacji zawodowych, jakie powinni posiadać lekarze dokonujący zabiegu przerwania ciąży, oraz trybu wydawania orzeczeń lekarskich o dopuszczalności dokonania takiego zabiegu [Ordinance of the Minister of Health and Social Welfare of 30 April 1990 on the professional qualifications required of physicians performing pregnancy terminations and the procedure for issuing medical opinions on the permissibility of such procedures], *Dziennik Ustaw*, Nr. 29, Poz. 178 [*Journal of Laws*, No. 29, item 178], (1990); §14.

²¹⁴ See footnote: 207, p. 93.

²¹⁵ Ustawa z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży [Act of 7 January 1993 on Family Planning, Protection of the Human Fetus, and the Conditions for Permissibility of Terminating Pregnancy], *Dziennik Ustaw*, Nr. 17, Poz. 78 [*Journal of Laws*, No. 17, item 78], (1993); Article 10.

²¹⁶ Id., Article 1, section 1.

²¹⁷ Id.

²¹⁸ Ustawa z dnia 19 kwietnia 1969 r. Kodeks karny [Act of 19 April 1969 Penal Code], *Dziennik Ustaw*, Nr. 13, Poz. 94 [*Journal of Laws*, No. 13, item 94], (1969), amended by: see footnote 215; Article 149a §1.

²¹⁹ Id., Article 149a §2.

- two other physicians, unless immediate action was necessary to remove the threat to the woman's life);
- 2) if the death of the conceived child resulted from actions undertaken to save the pregnant woman's life or to prevent serious harm to her health (and the risk was confirmed by opinions from two other physicians);
 - 3) if prenatal examinations indicated a severe and irreversible fetal defect (confirmed by opinions from two other physicians);
 - 4) if there was a well-founded suspicion that the pregnancy resulted from a criminal act (confirmed by a prosecutor issuing appropriate certificate)²²⁰.

As can be seen, the “difficult living conditions”, i.e. the social indication for legal abortion, was thus eliminated. Furthermore, terminating a pregnancy without the pregnant woman's consent—by using violence or forcing her to kill the conceived child—was punishable by up to 8 years of imprisonment²²¹. The new law also provided for criminal liability for causing bodily harm to a conceived child²²² (unless this resulted from medical procedures undertaken due to danger to the life or health of the child's mother²²³). The harshest penalty—imprisonment from one to ten years—was provided for causing the death of the pregnant woman as a consequence of terminating a pregnancy (whether with or without her consent) or causing harm to the fetus that resulted in the woman's death²²⁴.

However, it did not take long for the law to change again. Less than four years later²²⁵, the Act of 30 August 1996²²⁶ entered into force. Under this amendment, the preamble received a new wording, which henceforth read: “Recognising that life is a fundamental good of the human being, and that the protection of life and health is among the basic duties of the state, society and the citizen; recognising the right of everyone to responsibly decide about having children, and the right of access to information, education, counselling and means enabling the exercise of this right, it is hereby enacted as follows (...)”. Article 1 was also amended to read from now on: “The right to life shall be protected, including in the prenatal stage, within the limits specified by the act.”. These changes have, in a sense, remained largely intact to this day. Importantly, from that point onward it was the amended 1993 Family Planning Act that was to govern the legal grounds for abortion, while the role of the Penal Code was limited to defining the rules of criminal liability for acts consisting in terminating a pregnancy with the woman's

²²⁰ See footnote: 218, Article 149a §3, point 1-4.

²²¹ See footnote: 218, Article 149b.

²²² See footnote: 218, Article 156a §1; By virtue of §3, however, the mother of the conceived child was not subject to punishment for this act.

²²³ See footnote: 218, Article 156a §2.

²²⁴ See footnote: 218, Article 157 §2.

²²⁵ The Act entered into force on 4 January 1997, except for the provision concerning the introduction by the Minister of National Education of the subject “Knowledge about Human Sexual Life” [pl. *Wiedza o życiu seksualnym człowieka*] into the school curriculum, which entered into force on 1 September 1997.

²²⁶ Ustawa z dnia 30 sierpnia 1996 o zmianie ustawy o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży oraz o zmianie niektórych innych ustaw [Act of 30 August 1996 amending the Act on Family Planning, Protection of the Human Fetus, and Conditions for the Permissibility of Terminating Pregnancy and amending certain other acts], *Dziennik Ustaw*, Nr. 139, Poz. 646 [Journal of Laws, No. 139, item 646], (1996).

consent but in breach of the statutory requirements²²⁷, as well as for the offence previously defined in Article 149b, i.e. terminating a pregnancy with the use of violence, without the pregnant woman's consent²²⁸. Interestingly, one factor resulting in more severe criminal liability was the “reaching by the fetus the ability to live independently outside the pregnant woman's body”, which raised the upper limit of the penalty for committing mentioned acts from 8 to 10 years of imprisonment in the first case and from 2 to 8 years in the latter²²⁹. As for the legal grounds for abortion, they were set out in Article 4a of the amended 1993 Family Planning Act, which at that time read: “Pregnancy termination may be performed exclusively by a physician if:

- 1) the pregnancy poses a threat to the life or health of the pregnant woman,
- 2) prenatal tests or other medical indications suggest a high probability of severe and irreversible fetal impairment or an incurable disease threatening its life,
- 3) there is a reasonable suspicion that the pregnancy resulted from an unlawful act,
- 4) the pregnant woman is in difficult living conditions or a challenging personal situation.”²³⁰.

Section 2 of the Article 4a also specified that in the first two cases, termination of pregnancy was permissible until the fetus reached the ability to live independently outside the mother's body. For pregnancies resulting from an unlawful act or in cases of difficult living conditions or a challenging personal situation, the time limit for performing the abortion was the twelfth week of pregnancy. This meant that the Act introduced a restriction in terms of the timeframe for performing an abortion, eliminating the possibility of an unlimited period for such procedures. Moreover, performing an abortion based on the social indication required for the woman to submit a written statement and undergo counselling (with someone other than the physician performing the procedure). The abortion could only be carried out if the woman confirmed her intention after a waiting period of three days following the counselling session²³¹. Remarkably, this 1996 solution incorporated certain elements resembling the later German counselling model discussed earlier—most notably the requirement of a prior consultation intended to ensure an informed and deliberate decision, combined with a twelve-week time limit for performing the procedure. Although the Polish provision applied solely to the social indication of abortion and was soon invalidated, its design reflected an attempt to balance the protection of prenatal life with respect for the woman's autonomy. This brief legislative experiment, however, proved short-lived. Already in 1997, the aforementioned amendment became the subject of the Constitutional Tribunal's analysis, following an application submitted by a group of Senators of the Republic of Poland. Among the issues examined by the Tribunal was, *inter alia*, the content of the amended Article 1 of the 1993 Family Planning Act. In its judgment, the Tribunal reasoned that conditioning protection of the *nasciturus* on ordinary legislation effectively leaves fetal life unprotected whenever the legislature omits or limits such a prohibition, thereby granting lawmakers unconstitutional

²²⁷ See footnote: 218, amended by: Id.; Article 152b §1.

²²⁸ Id., Article 152a §1.

²²⁹ See footnote: 227, Article 152a §2 and Article 152b §3.

²³⁰ See footnote: 226, Article 1, section 5.

²³¹ Id.

discretion over the scope of that protection²³². Moreover, the Tribunal noted the discrepancy between the previous and the new wording of this provision, in particular the removal of any reference to the legal protection of the child's health (including that of the conceived child) or to the inherent character of the right to life—which, under no circumstances, may be considered a change of a normative nature given that the legislator lacks the competence to grant (or withdraw) the inherent character of certain rights²³³. The Tribunal also considered Article 4a, section 1, point 4 of the amended Act, that is, the ground for permitting termination of pregnancy on account of “difficult living conditions or a challenging personal situation”. As was observed, “The recognition that human life, including life in the prenatal phase, constitutes a constitutional value does not in itself resolve the question whether, in certain exceptional situations, the protection of this value may be limited or even excluded due to the need to protect or realise other constitutional values, rights, or freedoms.”²³⁴. Nonetheless, in the course of its deliberations, the Tribunal concluded that “difficult living conditions” (encompassing, in particular, material circumstances) and “challenging personal situation” (a specific psychological state associated with the fact of pregnancy) are vague grounds which primarily protect a certain financial status, existing relationships with other persons, or the scope of satisfying certain needs, rights, and freedoms. Consequently, the judgment stressed that while a pregnant woman's interest in avoiding material hardship is constitutionally protected, it cannot prevail over the fundamental value of human life. Granting constitutional protection to prenatal life necessarily imposes duties on both parents and may limit the woman's exercise of certain rights and freedoms, but this cannot justify ending the developing life²³⁵. By virtue of the Notice of the President of the Constitutional Tribunal of 18 December 1997²³⁶, the above-mentioned provisions lost their binding force. Furthermore, shortly thereafter the Act of 6 June 1997 – Provisions Introducing the Penal Code²³⁷ entered a new penal code into force. The 1997 Penal Code, together with all subsequent amendments, remains the binding criminal statute in Poland up to the present day.

Post-2020 Poland: The Constitutional Backlash Against Reproductive Rights

Under the law currently in force, the termination of pregnancy in violation of the 1993 Family Planning Act is regulated by the 1997 Penal Code provisions. According to Article 152, anyone who commits such an act with the woman's consent is liable to imprisonment for up to three years. The same penalty applies to anyone who assists or incites a woman to undergo such

²³² Orzeczenie Trybunału Konstytucyjnego z dnia 28 maja 1997 r., Sygn. akt. K. 26/96 [Judgment of the Constitutional Tribunal of 28 May 1997, Case No. K. 26/96], (1997).

²³³ Id.

²³⁴ Id.

²³⁵ Id.

²³⁶ Obwieszczenie Prezesa Trybunału Konstytucyjnego z dnia 18 grudnia 1997 r. [Notice of the President of the Constitutional Tribunal of 18 December 1997], *Dziennik Ustaw*, Nr. 157, Poz. 1040 [Journal of Laws, No. 157, item 1040], (1997).

²³⁷ Ustawa z dnia 6 czerwca 1997 r. Przepisy wprowadzające Kodeks karny [Act of 6 June 1997 – Provisions Introducing the Penal Code], *Dziennik Ustaw*, Nr. 88, Poz. 554 [Journal of Laws, No. 88, item 554], (1997).

a procedure. Furthermore, if the fetus has reached viability (the ability to live independently outside the mother's body), both the lower and upper limits of the statutory penalty are raised. If the termination of pregnancy is carried out with the use of violence, without the woman's consent, or involves forcing her to terminate the pregnancy (including by means of threats), the penalty ranges from six months to eight years of imprisonment, and in the case of a viable fetus—from one to ten years²³⁸. According to Article 154, the perpetrator also bears liability for the consequence of the termination of pregnancy described in Articles 152 and 153, if it results in the death of the woman.

A highly significant change for the present discussion occurred in October 2020, when the Constitutional Tribunal ruled that one of the legal grounds for abortion was unconstitutional²³⁹. In its judgment, the Tribunal found that Article 4a section 1 point 2 of the 1993 Family Planning Act—which permitted a physician to terminate a pregnancy if “prenatal tests or other medical indications suggest a high probability of severe and irreversible fetal impairment or an incurable life-threatening disease”—was inconsistent with the constitutional right to life, the principle of inherent dignity, and the permissible scope of restrictions on constitutional rights and freedoms²⁴⁰. As a result of the ruling, this ground for lawful abortion was eliminated, leaving only two indications in the Act: danger to the life or health of the pregnant woman, and reasonable suspicion that the pregnancy resulted from a criminal act.

The Constitutional Tribunal's decision sparked significant reaction, not only within Poland, but also internationally. The All-Poland Women's Strike [pl. *Ogólnopolski Strajk Kobiet*, OSK] had emerged earlier, in 2016, in response to a “barbaric anti-abortion bill”²⁴¹, but it was in 2020 that it led to the largest mass protests in years²⁴², evolving into a broad anti-government movement demanding a change of power²⁴³. This public outcry is hardly surprising, especially given the data on the number and causes of legal abortions performed annually. For example, the Ministry of Health, in response to a request from the Federation for Women and Family Planning [pl. *Fundacja na Rzecz Kobiet i Planowania Rodziny*, FEDERA], provided data for 2020 showing that there were 1,074 legal abortions in Poland that year, of which 1,053 were due to detected embryopathological defects (i.e., on the basis of the embryopathological indication eliminated by the Tribunal); the previous year's figures were similar: of 1,100 abortions, 1,074 were performed on that ground²⁴⁴. Following the legislative change, the 2021 figure dropped dramatically to just 107 legal terminations nationwide, of which 75 were the last procedures based on embryopathological indication performed before

²³⁸ Ustawa z dnia 6 czerwca 1997 r. Kodeks karny [Act of 6 June 1997 the Penal Code], *Dziennik Ustaw* z 2025 r., Poz. 383 [*Journal of Laws* of 2025, item 383], (2025); Article 153.

²³⁹ Wyrok Trybunału Konstytucyjnego z dnia 22 października 2020 r., sygn. akt. K 1/20 [Judgment of the Constitutional Tribunal of 22 October 2020, Case No. K 1/20], (2020).

²⁴⁰ I.e. non-compliance with Article 38 in connection with Article 30 in connection with Article 31 section 3 of the Constitution of the Republic of Poland.

²⁴¹ <<https://strajkkobiet.eu/o-nas/>> [accessed 2025 06 24]; This refers to the citizens' bill to amend the 1993 Family Planning Act, as well as the 1997 Penal Code (Sejm Paper No. 784), more widely known as the “Stop Abortion” bill. This proposal envisaged introducing a total ban on abortion, which sparked a wave of protests known as “Black Monday” [pl. *Czarny Poniedziałek*].

²⁴² *Id.*

²⁴³ The ruling party at the time was Prawo i Sprawiedliwość (PiS).

²⁴⁴ <<https://federa.org.pl/dane-mz-aborcje-2020/>> [accessed 2025 06 24].

that provision lost force on 27 January 2021²⁴⁵. What is more, beyond the wave of protests in Poland and abroad, the Constitutional Tribunal's ruling also prompted international scrutiny, including following complaints filed in 2019-2020 with the UN Committee on the Elimination of Discrimination against Women by the Center for Reproductive Rights, FEDERA, and the Karat Coalition [pl. *Stowarzyszenie Koalicja Karat*]. An investigation into Poland's abortion law conducted in 2021–2022 found multiple violations of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)²⁴⁶.

Despite a change of government following the October 2023 parliamentary elections, the 1993 Family Planning Act remains one of the most restrictive abortion laws in Europe, running counter to the clear trend toward liberalization of abortion laws and strengthening of reproductive rights *sensu largo*. As the 2023 report by the Center for Reproductive Rights titled *European Abortion Laws: A Comparative Overview* notes, “For more than eighty years European countries have moved steadily towards the adoption of progressive abortion laws and the removal of barriers impeding access to abortion. Today almost all European countries allow abortion on request or on broad social grounds, at least in the first trimester of pregnancy, and almost all countries also ensure that abortion is legal throughout pregnancy when necessary to protect the health or life of a pregnant individual. A very small minority maintain highly restrictive laws prohibiting abortion in almost all circumstances.”²⁴⁷. According to that report, a total ban on abortion exists only in Andorra, placing Malta, Poland, Liechtenstein, and Monaco at the top of the list of European countries with the most restrictive abortion laws²⁴⁸. Among EU member states, this ranks Poland in second place, just after Malta—which, before 2023, did not permit abortion under any circumstances and still does not allow it for pregnancies resulting from criminal acts.

The actions taken so far by the Polish government formed after the 2023 elections have been limited to issuing, in 2024, guidelines from the Minister of Health regarding the legal provisions in force concerning access to abortion²⁴⁹, as well as guidelines from the Prosecutor General on the rules of conduct for common organizational units of the public prosecutor's office regarding preparatory proceedings related to refusal to perform a pregnancy termination

²⁴⁵ <<https://www.rp.pl/spoleczenstwo/art36787631-ogromny-spadek-liczby-aborcji-w-polsce>> [accessed 2025 06 25].

²⁴⁶ Center for Reproductive Rights, Foundation for Women and Family Planning, “FACT SHEET. Komitet do spraw Likwidacji Dyskryminacji Kobiet o polskiej ustawie aborcyjnej [FACT SHEET. Committee on the Elimination of Discrimination against Women on the Polish Abortion Law]”, (2024); <<https://reproductiverights.org/wp-content/uploads/2024/10/CEDAW-Poland-Factsheet-PL.pdf>> [accessed 2025 06 06]; See also: Committee on the Elimination of Discrimination against Women, “Inquiry concerning Poland conducted under article 8 of the Optional Protocol to the Convention, Report of the Committee”, UN Doc. CEDAW/C/POL/IR/1 (2024).

²⁴⁷ Center for Reproductive Rights, “European Abortion Laws: A Comparative Overview”, (2023); <<https://reproductiverights.org/wp-content/uploads/2023/09/European-Abortion-Laws-A-Comparative-Overview-new-9-13-23.pdf>> [accessed 2025 07 02].

²⁴⁸ Id.; The report did not include the Vatican; however, in this smallest city-state in the world, abortion remains completely banned.

²⁴⁹ Wytoczne Ministra Zdrowia w sprawie obowiązujących przepisów prawnych dotyczących dostępu do procedury przerwania ciąży [Guidelines of the Minister of Health regarding the legal provisions in force concerning access to abortion], (2024); <<https://www.gov.pl/web/zdrowie/wytoczne-w-sprawie-obowiazujacych-przepisow-prawnych-dotyczacych-dostepu-do-procedury-przerwania-ciazy>> [accessed 2025 06 06].

and so-called pharmacological abortion²⁵⁰. The Minister of Health's guidelines emphasize, among other things, the possibility of a broader interpretation of Article 4a section 1 point 1 of the 1993 Family Planning Act, which legalizes abortion if it poses a threat to the life or health of the pregnant woman. According to the Minister's guidelines, the Act: "(...) in no way determines which aspect of health this threat must concern. It may therefore involve any area of health, whether physical or mental."²⁵¹. What is more, the guidelines also mention the Doctors and Dentists Profession Act, which allows physicians to refuse to provide medical services that conflict with their conscience—except where a statutory duty of care applies²⁵²—provided the refusal is noted in the patient's medical records²⁵³. This reference to the so-called conscience clause [pl. *klauzula sumienia*]²⁵⁴ did not appear by accident.

Since the notorious Constitutional Tribunal ruling in 2020, public attention has focused on cases of pregnant women's deaths. A particularly shocking case for Polish society involved 30-year-old Izabela from Pszczyna, who, in 2021, was hospitalized in her 22nd week of pregnancy, but did not receive timely care despite a threat to her health or life, and died as a result. The cause of this situation is seen in doctors' fear of criminal liability for performing an illegal abortion, even when there are grounds for a legal termination of pregnancy²⁵⁵. Each subsequent case of refusal to terminate a pregnancy despite existing legal grounds attracted significant media attention²⁵⁶, especially in fatal cases. In 2023, there was another such incident, this time involving 33-year-old Dorota from Bochnia, who died in her 20th week of pregnancy²⁵⁷. This series of events sparked further protests, this time under the slogan "Not One More!" [pl. *Ani jednej więcej!*]²⁵⁸. Again, the phrase "conscience clause" gained widespread media attention,

²⁵⁰ Wytyczne Prokuratora Generalnego Nr 924 w sprawie zasad postępowania powszechnych jednostek organizacyjnych prokuratury w zakresie prowadzenia postępowań przygotowawczych dotyczących odmowy dokonania przerwania ciąży oraz tzw. aborcji farmakologicznej [Guidelines of the Prosecutor General No 924 on the rules of conduct for common organizational units of the public prosecutor's office regarding preparatory proceedings related to refusal to perform a pregnancy termination and so-called pharmacological abortion], (2024); <<https://www.gov.pl/web/prokuratura-krajowa/wytyczne-prokuratora-generalnego-w-sprawie-zasad-postepowania-powszechnych-jednostek-organizacyjnych-prokuratury-w-zakresie-prowadzenia-spraw-dotyczacych-odmowy-dokonania-przerwania-ciazy-oraz-tzw-aborcji-farmakologicznej>> [accessed 2025 06 06].

²⁵¹ See footnote: 249, p. 1.

²⁵² Ustawa z dnia 5 grudnia 1996 r. o zawodach lekarza i lekarza dentysty [Act of 5 December 1996 on Doctors and Dentists Profession], *Dziennik Ustaw* z 2024 r., Poz. 1287 [*Journal of Laws* of 2024, item 1287], (2024); Article 30 provides that: "A physician is obligated to provide medical assistance in every case where delay in providing such assistance could cause the risk of loss of life, serious bodily injury, or serious health disorder."

²⁵³ Id.; Article 39.

²⁵⁴ The conscience clause in Polish law has already been discussed in the literature, so this is neither the time nor place to consider issues related to this institution.

²⁵⁵ <<https://tvn24.pl/polska/smierc-30-letniej-ciezarnej-izabeli-w-szpitalu-w-pszczynie-relacja-pacjentki-z-sali-w-ktorej-lezala-izabela-st5478524>> [accessed 2025 07 01].

²⁵⁶ See: <<https://wiadomosci.radiozet.pl/polska/Bialystok.-Szpital-odmowil-26-latce-aborcji.-Powolal-sie-na-opinie-Ordo-Iuris>> [accessed 2025 07 01].

²⁵⁷ <<https://wiadomosci.onet.pl/krakow/nowe-fakty-w-sprawie-smierci-ciezarnej-33-latki-rodzina-wydala-oswiadczenie/re1t33p>> [accessed 2025 07 01].

²⁵⁸ <<https://www.newswweek.pl/polska/spoleczenstwo/ani-jednej-wiecej-protesty-strajku-kobiet-w-calej-polsce-po-smierci-doroty/7xdv0rs>> [accessed 2025 07 01].

provoking public opposition. Although in many instances it was not invocation of the conscience clause itself that caused the problem, but rather negligence by the medical facility or medical errors, such cases are also known. In 2023, news appeared about a 24-year-old woman with intellectual disability who became pregnant as a result of rape. Despite obtaining a prosecutor's certificate confirming the criminal origin of the pregnancy, she was refused an abortion on the grounds of conscience clause. Only with the help of a nongovernmental organization was she able to have the procedure performed in another region²⁵⁹. Moreover, the problem was not only the refusal of doctors at that hospital, but also the failure to inform the woman of her options. As the Undersecretary of State in the Ministry of Health wrote at the time: "In the case when a doctor refuses to perform an abortion on the grounds of the so-called »conscience clause«, the obligation to inform the patient about how to access this service under the contract with the National Health Fund [pl. *Narodowy Fundusz Zdrowia*, NFZ] lies with the provider, i.e. the medical facility where the doctor refrained from providing the service inconsistent with their conscience (it should be also noted that the conscience clause is a doctor's right; a medical facility itself cannot invoke it)."²⁶⁰. Another reported case of refusal to perform an abortion despite existing legal grounds involved a 23-year-old transgender man who was a victim of brutal rape. According to the Parliamentary Question No. 8968 to the Minister of Health regarding ensuring equal access to abortion and health care for transgender people, three different facilities refused to perform the abortion, invoking lack of appropriate staff, legal uncertainty, and the conscience clause²⁶¹. Given these events since 2020, steps have been taken to raise awareness among both the public and health care providers. The Minister of Health's Ordinance of 14 May 2024 amended the regulation on general terms of contracts for healthcare services by adding a provision obliging facilities contracted for obstetric and gynecological hospital care to provide legally permitted abortion services on-site, regardless of any individual physician's conscientious objection²⁶².

As for the Prosecutor General's guidelines, on the other hand, they emphasize that "The act of interviewing a woman should be conducted with respect for her dignity and in a manner that prevents victimization", and that: "Actions involving women known to the prosecuting authority to have undergone abortion should be limited to what is strictly necessary. This is particularly important in cases of sexual violence against women and girls, given the enormous stress associated with a pregnancy resulting from rape or the risk of unwanted pregnancy itself"²⁶³. Moreover, referring to European Court of Human Rights rulings, the Prosecutor

²⁵⁹ <<https://bip.brpo.gov.pl/pl/content/rpo-mz-nfz-aborcja-niepelnosprawna-dziewczynka-klauzula-sumienia-odpowiedz>> [accessed 2025 07 01].

²⁶⁰ Id.

²⁶¹ Interpelacja nr 8968 do Ministra Zdrowia w sprawie zapewnienia równego dostępu do aborcji i opieki zdrowotnej dla osób transpłciowych [Parliamentary Question No. 8968 to the Minister of Health regarding ensuring equal access to abortion and health care for transgender people], (2025); <<https://www.sejm.gov.pl/sejm10.nsf/InterpelacjaTresc.xsp?key=DFEAND&view=5>> [accessed 2025 07 03].

²⁶² Rozporządzenie Ministra Zdrowia z dnia 14 maja 2024 r. zmieniające rozporządzenie w sprawie ogólnych warunków umów o udzielanie świadczeń opieki zdrowotnej [Ordinance of Ministry of Health of 14 May 2024 amending the regulation on general terms of contracts for healthcare services], *Dziennik Ustaw* z 2024 r., Poz. 730 [Journal of Laws of 2024, item 730], (2024); Section 6 added to the §3 of the annex.

²⁶³ See footnote: 250; pp. 5-6.

General also stresses that lack of timely access to medical care exposes women to additional suffering²⁶⁴, which is especially relevant in cases of sexual assault. Similarly, unnecessary delays in issuing a certificate establishing grounds for legal abortion due to the criminal origin of the pregnancy are to be avoided, since such termination is legally allowed only up to the 12th week of pregnancy²⁶⁵. The guidelines also clarify that sharing general information on abortion not addressed to any specific recipient does not meet the criteria of the criminal offense of aiding or inciting abortion under Article 152 §2 of the 1997 Penal Code²⁶⁶.

While the points raised in the Minister of Health's and Prosecutor General's guidelines appear sound—and indeed necessary—for proper implementation of citizens' rights, it is impossible to consider them sufficient in the context of the violations of women's rights that have occurred, and likely continue to occur, in Poland. The Supreme Medical Council's [pl. *Naczelna Rada Lekarska*] statement from September 2024 underscores that, while the Minister of Health's and Prosecutor General's guidelines are welcome, they are neither sufficient nor binding, and may be amended or repealed. Given the interpretative challenges following the Constitutional Tribunal's invalidation of certain provisions of the 1993 Act, the Council reiterates the need for Parliament to establish clear statutory conditions and criteria for pregnancy termination, as leaving such determinations to individual doctors or medical institutions is unsatisfactory in a democratic state governed by the rule of law²⁶⁷.

CONCLUSION

Key findings of the study are as follows:

1. Constitutional interpretation plays a decisive role in shaping abortion law, yet nearly identical constitutional premises in Poland and Germany have produced diametrically different legal outcomes.

²⁶⁴ See footnote: 250; p. 7; See also: Case *Tysiąc v. Poland* (application no. 5410/03).

²⁶⁵ See footnote: 250, p. 10.

²⁶⁶ See footnote: 250, p. 2.

²⁶⁷ Stanowisko Nr 4/24/IX Naczelnej Rady Lekarskiej z dnia 6 września 2024 r. w sprawie wytycznych Ministra Zdrowia w sprawie obowiązujących przepisów prawnych dotyczących dostępu do procedury przerwania ciąży oraz wytycznych Prokuratora Generalnego w sprawie zasad postępowania powszechnych jednostek organizacyjnych prokuratury w zakresie prowadzenia postępowań przygotowawczych dotyczących odmowy dokonania przerwania ciąży oraz tzw. aborcji farmakologicznej [Position No. 4/24/IX of the Supreme Medical Council of 6 September 2024 on the guidelines of the Minister of Health regarding the legal provisions in force concerning access to abortion and the guidelines of the Prosecutor General on the rules of conduct for common organizational units of the public prosecutor's office regarding preparatory proceedings related to refusal to perform a pregnancy termination and so-called pharmacological abortion]; <<https://sip.lex.pl/akty-prawne/akty-korporacyjne/wytyczne-ministra-zdrowia-w-sprawie-obowiazujacych-przepisow-prawnych-290482719>> [accessed 2025 07 05].

2. Poland's abortion law exhibits no stable direction—neither a steady liberalization nor consistent restriction—but rather cyclical, politically driven fluctuations, revealing a structural absence of legal certainty and social consensus.
3. The German “counselling model” demonstrates that the protection of unborn life and women's autonomy need not be mutually exclusive, and that constitutional compromise may foster both human dignity and legislative stability.
4. Comparative analysis underscores that the protection of reproductive rights constitutes an essential measure of a constitutional system's commitment to democracy, legal certainty, and respect for individual autonomy.

The comparative analysis of Poland and Germany reveals not only distinct legal frameworks on abortion but, above all, two divergent constitutional philosophies concerning the protection of life and women's rights. In both jurisdictions, constitutional courts have played a decisive role in shaping abortion law, interpreting the protection of unborn life as a constitutional duty of the state. Yet the interpretative outcomes could hardly be more different. While the German Federal Constitutional Court acknowledged that safeguarding unborn life must coexist with respect for the woman's dignity and autonomy—affirming that self-sacrifice cannot be constitutionally required—the Polish Constitutional Tribunal has consistently advanced an absolutist conception of fetal protection, subordinating women's rights to it entirely. These contrasting readings of nearly identical constitutional premises reveal how constitutional interpretation may function not merely as a legal exercise but as a mirror of a nation's moral and political values.

Poland's legal trajectory demonstrates the absence of a coherent or stable legislative direction. Rather than following a linear path toward liberalization or restriction, Polish abortion law has oscillated for nearly a century, shaped less by principled constitutional reasoning than by shifting political agendas. Each legislative change—from the social indication of 1956 to its removal in 1969, from the partial liberalization of 1996 to the constitutional invalidations of 1997 and 2020, and even the subsequent ministerial and prosecutorial guidelines of 2024 intended to mitigate their effects—reflects not a settled social consensus but a deep and enduring division. As a result, Polish abortion law lacks both stability and legal certainty, producing a fragile framework vulnerable to political reinterpretation. In this sense, it stands apart from broader European trends toward coherent reproductive-rights regulation and demonstrates the dangers of allowing fundamental rights to fluctuate with political change.

By contrast, the German model represents a constitutional compromise—one that does not glorify abortion but recognises the moral complexity of the issue and the responsibility of the state to protect both unborn life and women's autonomy. The principle that abortion remains formally unlawful yet non-punishable under defined conditions, accompanied by mandatory counselling, embodies a deliberate balance between constitutional values rather than their mutual exclusion. Importantly, this compromise has proven durable, supported by a political culture that treats constitutional interpretation as a space for reconciliation rather than confrontation. The German experience therefore offers a lesson for Poland: the stability of reproductive rights does not depend on their absolutisation but on the willingness of the state to confront moral complexity with legal clarity and human empathy.

Ultimately, the comparison between the two systems underscores three fundamental dimensions of constitutional governance: respect for democratic deliberation, legal certainty, and individual autonomy. Where Germany has sought to reconcile these principles through a consistent constitutional compromise, Poland continues to struggle with legal volatility and moral polarization. The divergent paths of these neighbouring states thus illustrate how constitutional interpretation can either safeguard human dignity through balance—or erode it through rigidity.

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TEISINIAI ABORTŲ REGLAMENTAVIMO PAGRINDAI EUROPOS SĄJUNGOJE: LYGINAMOJI PASIRINKTŲ VALSTYBIŲ ANALIZĖ

SANTRAUKA

Straipsnio autoriai nagrinėja abortų teisinio reglamentavimo raidą ir dabartinę būklę dviejose Europos Sąjungos valstybėse narėse – Lenkijoje ir Vokietijoje, analizę pateikdami platesniame konstituciniame bei istoriniame kontekste. Tyrime taikomas dogmatinis-formalusis metodas, papildytas istoriniu požiūriu, siekiant atskleisti teisėkūros raidos kryptis ir išanalizuoti esminius teismų sprendimus, formavusius teisinį reguliavimą, nustatantį nėštumo nutraukimo leistinumą. Ypatingas dėmesys skiriamas konstitucinio aiškinimo vaidmeniui ir jo poveikiui reprodukcinų teisių stabilumui ar nepastovumui. Straipsnyje po įžangos, kurioje glaustai aptariama diskusijų dėl abortų leistinumo reikšmė bei viešojoje erdvėje vartojamų sąvokų poveikis ir dėl to kylantys terminologiniai netikslumai, pateikiamos dvi pagrindinės dalys – kiekvienoje iš jų nagrinėjamas klausimas konkrečios valstybės (Vokietijos ir Lenkijos) teisiniame kontekste.

Pirmojoje dalyje analizuojama Vokietijos abortų teisės raida, pradedant nuo Constitutio Criminalis Carolina (1532 m.) ir toliau tęsiant jos vystymąsi XIX–XX amžiais. Aptariamas Baudžiamojo kodekso §218 susiformavimas, jo išlikimas bei reikšmingi pokyčiai Vokietijos imperijos, Veimaro Respublikos ir nacių laikotarpiais. Taip pat nagrinėjami skirtingi Rytų ir Vakarų Vokietijos požiūriai po 1949 m. bei sudėtingas teisinio reguliavimo suvienodinimo procesas po 1990 m. susivienijimo. Ypatingas dėmesys skiriamas konstitucinei šios problematikos dimensijai – Vokietijos Federalinio Konstitucinio Teismo jurisprudencijai, kurioje suformuluota valstybės pareiga saugoti negimusios gyvybės teisę, kartu užtikrinant moters orumą ir teisę į savarankiškumą.

Antrojoje dalyje nagrinėjama Lenkijos teisės raida nuo XX a. pradžios iki šių dienų. Iki 1932 m. laikotarpis aptiriamas tik apibendrintai dėl istorinių aplinkybių – 123 metus trukusio valstybės padalijimo, per kurį Lenkija negalėjo savarankiškai priimti baudžiamųjų įstatymų. Daugiausia dėmesio skiriama teisiniam reguliavimui nuo 1932 m., analizuojant pagrindinius įstatymų pakeitimus ir konstitucinį aiškinimą: 1932 m. Baudžiamąjį kodeksą, 1956 m. liberalizaciją, įteisinusią socialinį pagrindą nėštumo nutraukimui, vėlesnius ribojimus ir pakeitimus, 1993 m. Šeimos planavimo įstatymą bei esminius 1997 ir 2020 m. Konstitucinio Tribunolo sprendimus, taip pat 2024 m. Teisingumo ministerijos ir prokuratūros išaiškinimus, priimtus reaguojant į tęstinę visuomeninę diskusiją dėl abortų.

Lyginamoji analizė atskleidžia esminius skirtumus tarp šių dviejų teisinių sistemų. Nors abiejų šalių konstituciniai teismai pripažįsta valstybės pareigą saugoti prenatalinę gyvybę, jų požiūriai į šios pareigos derinimą su moters teisėmis iš esmės skiriasi. Vokietijoje vadovaujama proporcingumo principu, siekiant pusiausvyros tarp gyvybės apsaugos, asmens autonomijos ir teisinio tikrumo. Tuo tarpu Lenkijoje konstitucinė doktrina vedė prie nuoseklių ribojimų ir teisinio nestabilumo, atspindinčių gilius visuomenės susiskaldymus bei reprodukcinų teisių subordinaciją politiniams interesams.

Autoriai daro išvadą, kad reprodukcinės teisės, kaip atspindi abortų teisiniame reguliavime, yra esminis teisinės sistemos įsipareigojimo demokratinėms vertybėms, teisiniam tikrumui ir asmens autonomijos apsaugai rodiklis. Lenkijos ir Vokietijos palyginimas parodo, kad ilgalaikis teisinis stabilumas šioje srityje priklauso ne tik nuo įstatymų turinio, bet ir nuo platesnės konstitucinės kultūros bei institucinių gebėjimų suderinti konkuruojančias pamatines vertybes.

REIKŠMINIAI ŽODŽIAI

Nėštumo nutraukimas, abortų teisėtumas, abortų teisės ribojimas, Vokietija, Lenkija, Konstitucinio Teismo sprendimų poveikis reprodukcinėms teisėms, Europos Sąjunga.