Chapter 4
Germany

4.1. Constitutional framework

The relevant constitutional framework for the German law on reproductive issues relates to various provisions of the German Basic Law. Prominent and important rights that are involved in reproductive matters are the right to human dignity (Article 1(1) Basic Law), the right to free development of the personality (Article 2(1) Basic Law) and the special protection of the family (Article 6(1) Basic Law).[1] This section firstly gives a brief introduction to the first two Articles. The special protection of the family is closely intertwined with the special protection of marriage and is therefore set out elaborately in Chapter 10.[2] Subsection 4.1.3 explains how a right to procreate has been held to follow from these rights. Next, three interrelated issues concerning the rights of the (future) child are discussed, namely; the status of the unborn, the best interests of the child and the right to access to information about one's genetic origins.

4.1.1. Human dignity (Article 1(1)) as guiding principle under the German Basic Law

With the atrocities of World War II freshly in mind, the drafters of the German Basic Law (1949) wanted the new constitution to provide an answer to the totalitarian contempt of the individual by the National Socialistic regime.[3] Human dignity ('*die Würde des Menschen*') was therefore taken as the basic and guiding principle of the Basic Law.[4] It was included in its first provision, Article 1(1), which reads:

> 'Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.'[5]

Illustrative of its fundamental significance in German law is the fact that this provision is protected from amendment (the so-called eternity clause

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1 Art. 6(1) Basic Law reads: 'Marriage and the family shall enjoy the special protection of the state.'

2 The right to equal treatment as protected under Art. 3 of the German Basic Law is also discussed in Ch. 10.

3 H. Dreier, 'Art. 1', in H. Dreier (ed.), *Grundgesetz-Kommentar*, *Band 1, Präambel, Artikel 1–19* [Commentary to the Basic Law, Volume 2, Preamble, Articles 1–19], 2nd edn. (Tübingen, Mohr Siebeck 2004) p. 39 at p. 161.

4 *Idem*, at p. 154.

5 English translation by C. Tomuschat and D.P. Currie, online available at: www.gesetze-im-internet.de/englisch_gg/index.html, visited June 2014.

('*Ewigkeitsgarantie*'[6])).[7] Over the years, human dignity – interpreted by the German Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) as the supreme value ('*obersten Wert*') of the Basic Law[8] – has come to serve as an interpretative and guiding principle ('*Grundnorm*'[9]) for the other provisions of the Basic Law.[10] Next to this '*Fundierungscharakter*', human dignity is also a right of its own ('*Norm des objektiven Verfassungsrecht*'). While an exact definition is difficult to find, the Constitutional Court held in 2009 that the protection of human dignity was based '[…] on the idea of Man as a spiritual and moral being which [had] the capabilities of defining himself, and of developing, in freedom.'[11] The common denominator of the protection of Article 1(1) has accordingly been held to be to prevent the human being from being downgraded to a simple means ('*der konkrete Mensch* [*wird*] *zum Objekt, zu einem Bloßen Mittel, zur vertretbaren Größe herabgewuridgt*').[12]

Numerous individual rights have been brought under the scope of this first and fundamental provision of the German Basic Law. Authors who have been critical of the frequent invocation of human dignity in all sorts of contexts have warned against inflation ('*Trivialisierung*' and '*Inflationierung*') of the principle.[13] It is disputed in German legal scholarship whether it follows from the fundamental character of the right to human dignity of Article 1(1) Basic Law that it is absolute, i.e., that no balancing against other fundamental rights is allowed.[14]

4.1.2. Article 2: personal freedoms

Article 2 of the German Basic Law contains a number of personal freedoms that are relevant for the present case study on reproductive matters. Its first paragraph provides for a general personality right (*das allgemeine Persönlichkeitsrecht*) and reads:

> 'Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.'

6 Dreier 2004, *supra* n. 3, at p. 163.
7 On the basis of Art. 79(3) Basic Law, the principles of Arts. 1 and 20 Basic Law cannot be amended.
8 *Inter alia* BVerfG 16 January 1957, Az. 1 BvR 253/56, *NJW* 1957 p. 297 and BVerfG 16 July 1969, Az. 1 BvL 19/63, *NJW* 1969 p. 1707. See Dreier 2004, *supra* n. 3, at p. 161, footnote 125.
9 Dreier 2004, *supra* n. 3, at p. 161.
10 *Idem*, at p. 155.
11 BVerfG 30 June 2009, Az. 2 BvE 2/08 a.o., *NJW* 2009 p. 2267, para. 364.
12 Dreier 2004, *supra* n. 3, at p. 167, referring to 'G. Dürig, *AöR* 81 (1956)'.
13 Dreier 2004, *supra* n. 3, at pp. 164–166.
14 Dreier for instance argues that such balancing is not possible. Dreier 2004, *supra* n. 3, at p. 163, referring to BVerfG 10 October 1995, Az. 1 BvR 1476/91 a.o., *NJW* 1995 p. 3303 and BVerfG 11 March 2003 (dec.), Az. 1 BvR 426, *NJW* 2003 p. 1303.

This right is considered one of the most fundamental rights in the German Constitution,[15] as underlined by its position in the Basic Law, directly after the first Article on human dignity.[16] No exhaustive definition of this personality right exists,[17] but it in any case contains a right to respect for the private and intimate sphere, a right to personal autonomy, as well as a right to free development of the personality.[18] As explained further in the subsequent subsection, the latter right, *inter alia*, includes a right to procreate.

Further, on the basis of the second paragraph of Article 2, every person has the right to life and physical integrity. As explained in more detail below, the right to life has been held to apply from the moment of nidation.[19] The right to free development of the personality in combination with the right to physical integrity has also been understood as to contain a right to bio-ethical self-determination.[20]

4.1.3. The fundamental right to procreate

German legal scholarship generally accepts that a fundamental right to procreate ('*Recht auf Fortpflanzung*') exists. This right is also referred to as right to reproductive autonomy ('*Recht auf reproduktive Autonomie*') or right to have offspring ('*Recht auf Nachkommenschaft'*).[21] The foundation of the right to procreate in the German Basic Law, however, is debated. Some hold that a right to procreate can be derived from the right to free development of the personality ('*das allgemeine Persönlichkeitsrecht*') of Article 2(1) in combination with Article 1(1) Basic Law.[22] It was also Article 2(1) from which the Federal Financial Court (*Bundesfinanzhof*, BFH) derived a right for women to bear children. According to the BFH, this includes a right to make use of

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15 H. Lang, 'BeckOK GG Art. 2' ['Beck online Commentary to Art. 2 GG'], in: V. Epping and C. Hillgruber (eds.), *Beck'scher Online-Kommentar GG* [Beck Online Commentary to the German Basic Law], 22nd edn. (München, Verlag Beck 2014) Rn. 31.

16 U. Di Fabio, 'GG Art. 2' ['Art. 2 German Basic Law'], in: R. Herzorg et al. (eds.) *Maunz und Dürig Grundgesetz-Kommentar* [Maunz and Dürig Commentary to the Basic Law], 71st edn. (München, Verlag C.H. Beck 2014) Rn. 127–131.

17 *Idem*, Rn. 147–148.

18 *Idem*, Rn. 204.

19 See section 4.1.4.

20 Di Fabio 2014, *supra* n. 16, Rn. 204.

21 See R. Müller-Terpitz, 'Das Recht auf Fortpflanzung – Vorgaben der Verfassung und der EMRK' ['The right to procreate – guidelines of the German Constitution and the ECHR'], in: H. Frister and D. Olzen (eds.), *Reproduktionsmedizin, Rechtliche Fragestellungen. Dokumentation der Tagung zum 10-jährigen Bestehen des Instituts für Rechtsfragen der Medizin Düsseldorf* [Reproduction medicine, legal questions. Proceedings of the Conference for the 10 year anniversary of the Düsseldorf institute for medical legal issues] (Düsseldorf, Düsseldorf University Press 2010) p. 9 at p. 11 and M. Reinke, *Fortpflanzungsfreiheit und das Verbot der Fremdeizellspende* [Freedom of reproduction and the prohibition of egg-cell donation] (Berlin, Duncker & Humblot 2008) p. 190. Reinke refers to R. Badinter, `Menschenrechte gegenüber de Fortschritten in der Medizin, der Biologie und der Biochemie – Wie soll sich die Rechtspolitik gegenüber der Humangenetik verhalten?', *RuP* 1985, p. 196; to T. Ramm, `Die Fortpflanzung – ein Freiheitsrecht?', *JZ* 1989, p. 866 and to H. Kliemt, `Normative Probleme der künstlichen Geschlechtsbestimmung und des Klonens', *ZRP* 1979, pp. 165 and 168.

22 Reinke 2008, *supra* n. 21, at p. 190, footnote 349.

medical methods to initiate a pregnancy, to the extent to which such measures are legal:

> 'Das Recht, Kinder zu gebären, gehört bei verheirateten wie bei unverheirateten Frauen zwar zum Kernbereich des Grundrechts auf freie Entfaltung der Persönlichkeit […] und schließt das Recht ein, ärztliche Maßnahmen zur Herbeiführung einer Schwangerschaft vornehmen zu lassen, soweit diese rechtlich erlaubt sind.'[23]

Others base a right to procreate on the (right to) special protection of the family of Article 6(1) Basic Law.[24] Müller-Terpitz, for instance, argues that Article 6(1) protects a right to personal development within the family. This right, the author holds, necessarily also includes the foundation of such a family and thus the right to procreate.[25] A third view sees Article 6(1) Basic Law as a reinforcement of the right to free development of the personality.[26]

The right to procreate is not absolute and various German regulations concerning reproductive matters – as discussed more extensively in section 4.3 – have been regarded as (justified) interferences with the right to procreate.[27] Here, one may think of the prohibition on egg cell donation (see section 4.3.4.1 below) and the (former) prohibition on preimplantation genetic diagnosis (PGD, see 4.3.6 below).[28]

4.1.4. The status of the unborn under German law

The question as from what stage of development the (constitutional) protection of unborn life begins is subject to debate in German legal scholarship.[29] Views differ from a strict negation of any protection of unborn life, to a multistage ascent protection whereby the intensity of the protection is made dependent on the stage of development of the unborn life, to a full protection of all forms of human life.[30] In its abortion judgment of 1975 (see section 4.2.2 below) the Constitutional Court held that the right to life ex Article 2(2) Basic Law extends to the unborn life from the

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23 The Court held: 'The right to bear children forms part of the core essence of the right to free development of the personality of both unmarried and married women […] and includes the right to undergo medical treatment to procure a pregnancy, to the extent that such treatment is lawful.' BFH 28 July 2005, Az. III R 30/03, *NJW* 2005 p. 3517, para. 47. The BFH also held that no right to state finance or tax deduction for the costs of such AHR treatment can be derived from the right to free development of the personality.

24 As noted above, this right is discussed in more detail in Ch. 10, section 10.1.2.

25 Müller-Terpitz 2010, *supra* n. 21, at p. 12.

26 Reinke 2008, *supra* n. 21, at p. 190, footnote 350.

27 See Müller-Terpitz 2010, *supra* n. 21, at p. 15.

28 Other examples, that are not extensively discussed in this chapter are the limitation of the fertilisation of a maximum of three egg-cells per cycle (Art. 1(1)(4) ESchG) and the limitation of the implantation of embryos to a maximum of three per cycle (Art. 1(1)(3) ESchG).

29 M. Herdegen, ‚GG Art. 1 Abs 1' ['Art. 1 para. 1 GG'], in: R. Herzorg et al. (eds.), *Maunz und Dürig Grundgesetz-Kommentar* [Maunz and Dürig Commentary to the Basic Law], 55th ed (München, Verlag Beck 2011) Rn. 60.

30 Herdegen 2011, *supra* n. 29, Rn. 60.

moment of nidation, i.e., from the 14th day after conception.[31] The starting point of an entitlement to the constitutional right to life, is not, however, necessarily the same point in time, as the starting point of the protection of other constitutional rights. The more broadly defined right to human dignity may for instance extend to life before nidation, a view that is widely supported in legal scholarship.[32] In its 1975 judgment the Court left this question open,[33] and the BVerfG has never conclusively ruled on the matter. In legal scholarship, it has been argued that even if it is accepted that human dignity extends to the pre-nidative life, it cannot automatically be said that all biotechnological practices are in violation of Article 1(1) Basic Law.[34]

The question whether the embryo *in vitro* (i.e., outside the woman's body) also enjoys subjective rights to human dignity, life and physical integrity, has been subject of debate in legal scholarship.[35] In this respect again a distinction has been made between different stages of development of the *in vitro* unborn life, whereby the constitutional protection increases in force in accordance with its stage of development.[36] When drafting the Embryo Protection Act (*Embryoschutzgesetz*, ESchG) by the end of the 1980s (see 4.3.1 below), the German legislature took as a starting point that human life begins with '*Kernverschmelzung*', i.e., with the fertilisation of a human egg cell.[37] Accordingly, any processing of human embryos, even in the earliest cell stage, must be in conformity with the protection of human dignity ex Article 1(1) Basic Law, the legislature held.[38]

4.1.5. The best interests of the child

Even though the German Basic Law contains no specific Article on the rights of the child in general,[39] the best interests of the child ('*Kindeswohl*'), is also under German law an important notion. It has been held to find its constitutional foundation in

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31 BVerfG 25 February 1975, Az. 1 BvF 2/74, *NJW* 1975 p. 573, para. 136.

32 Compare Herdegen 2011, *supra* n. 29, Rn. 61 and Dreier 2004, *supra* n. 3, at pp. 173 and 181.

33 The Court held that where human life exists, it is entitled to human dignity.

34 Dreier 2004, *supra* n. 3, at p. 186.

35 See Müller-Terpitz 2010, *supra* n. 21, at pp. 16 and 18.

36 Herdegen 2011, *supra* n. 29, Rn. 60 and 68. In 2014 the Administrative Court of Appeal of Münster ruled that the protection of children under Art. 42 of the Social Act, Book VIII did not apply to a cryopreserved embryo, but only applied to children from the moment of birth. OVG Münster 15 January 2014 (dec.), Az. 12 A 2078/13, paras. 12–18.

37 *BT-Drs.* XI/5460, p. 6. See also the Explanatory memorandum to the ESchG Bill, as printed in M. Lanz-Zumstein (ed.), *Embryonenschutz und Befruchtungstechnik, Seminarbericht und Stellungnahmen aus der Arbeitsgruppe "Gentechnologie" des deutschen Juristinnenbundes* [Protection of embryos and fertilisation techniques, Seminar report and statements of the working group "Genetic Engineering" of the German Women Lawyers' Association], (München, J. Schweitzer Verlag 1986) Annex 1, p. 155.

38 Lanz-Zumstein 1986, *supra* n. 37, at p. 156. The legislature typified the protection of human dignity as one of the primary aims pursued with the introduction of the Embryoschutzgezetz (EschG) [Embryo Protection Act] and the later Stamzellgesetz (StZG) [Stemm Cell Act]. *BT-Drs.* 11/5460, p. 6 and Art. 1 StZG, *BGBl. I*, p. 2277, last amended by *BGBl. I*, p. 1708.

39 Art. 6 Basic Law contains three paragraphs that concern rights of children in particular, namely paras. 2, 3 and 5.

a combination of rights, namely the right to free development of the personality (Article 2(1) in combination with Article 1(1)) as well as the parental responsibility of Article 6(2) Basic Law.[40]

4.1.6. The right to know one's genetic origins

In 1988 the BVerfG ruled for the first time that a child has a right to know about its lineage or genetic origins ('*Recht auf Kenntnis der Abstammung*').[41] In the relevant case, which concerned a child conceived in an extramarital affair, the Court based its finding on Article 6(5) (equal treatment of children born outside marriage)[42] in combination with Article 2(1) Basic Law (the general right to personality).[43] Shortly thereafter the Court grounded a right to know about one's genetic origins on Article 2(1) in connection with Article 1(1) Basic Law (the right to human dignity).[44]

In 2008 a new Article 1598a was included in the Civil Code, on the basis of which father, mother and child may each bring proceedings to claim consent to a genetic examination to clarify natural parentage.[45] If one of the family members refuses to give such consent, the family court can substitute that consent and order acquiescence

40 Müller-Terpitz 2010, *supra* n. 21, at p. 19 and R. Müller-Terpitz, 'GG Art. 6 [Ehe, Familie, nicht eheliche Kinder]' ['Marriage, family, children born out of wedlock'], in: A. Spickhoff, *Medizinrecht* [Medical Law], 2nd edn. (München, Verlag Beck 2014) Rn. 12.

41 BVerfG 18 January 1988 (dec.), Az. 1 BvR 1589/87, *NJW* 1988 p. 3010. See also R. Ratzel ‚Beschränkung des Rechts auf Fortpflanzung durch das ärztliche Berufsrecht' ['Limitation of the right to procreate by means of the law on the medical profession'], in: H. Frister and D. Olzen (eds.), *Reproduktionsmedizin, Rechtliche Fragestellungen. Dokumentation der Tagung zum 10-jährigen Bestehen des Instituts für Rechtsfragen der Medizin Düsseldorf* [Reproduction medicine, legal questions. Proceedings of the Conference for the 10 year anniversary of the Düsseldorf institute for medical legal issues] (Düsseldorf, Düsseldorf University Press 2010) p. 43 at pp. 51–52.

42 Art. 6(5) Basic Law reads: 'Children born outside of marriage shall be provided by legislation with the same opportunities for physical and mental development and for their position in society as are enjoyed by those born within marriage.' Translation from www.gesetze-im-internet.de/englisch_gg, visited June 2014.

43 Art. 2(1) Basic Law reads: 'Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.' Translation from www.gesetze-im-internet.de/englisch_gg, visited June 2014.

44 BVerfG 31 January 1989, Az. 1 BvL 17/87, *NJW* 1989 p. 891 and BVerfG 13 February 2007, Az. 1 BvR 421/05, *NJW* 2007 p. 753. See also J. Young Lee, *Unterhaltsverpflichtungen bei Leihmutterschaft* [Maintenance obligations in the case of surrogacy] (Baden-Baden, Nomos Verlagsgesellschaft 1996) pp. 91–108.

45 Art. 1598a (1) BGB. This provision was inserted in the Civil Code following a 2007 BVerfG judgment in which the Constitutional Court found that a secret paternity test could not be used in court proceedings and commissioned the legislature to provide for proceedings in which paternity could be established. BVerfG 13 February 2007, Az. 1 BvR 421/05, *NJW* 2007 p. 753. See F. Klinkhammer, 'Der Scheinvater und sein Kind – Das Urteil des BVerfG vom 13.2.2007 und seine gesetzlichen Folgen' ['The ostensible father and his child – The judgment of the German Constitutional Court of 12 February 2007 and its legal consequences'], *Forum Familienrecht* 4/2007, pp. 128–131, online available at www.forum-familienrecht.de/neu/dateien/0407/128–131.pdf, visited March 2011. See also BGH 25 June 2008 (dec.), Az. XII ZB 163/06, *NJW* 2008 p. 3429 and BVerfG 13 October 2008 (dec.), Az. 1 BvR 1548/03, *NJW* 2009 p. 423.

in the taking of a sample.[46] The court has to suspend the proceedings '[…] if and as long as the clarification of the natural parentage would result in a considerable adverse effect on the best interests of the minor child which would be unreasonable for the child even taking into account the concerns of the person entitled to clarify.'[47]

The first case on the implications of the right to know one's genetic origins in the context of heterologous insemination was decided in 2013 by the Court of Appeal (*Oberlandesgericht*, OLG) of Hamm.[48] This Court ruled that the interests of a child conceived with donated sperm, to get information about its genetic origins had precedence over the rights of the sperm donor and the doctor involved to keep such information confidential. This implied an obligation for the doctor involved to provide information about the donor to the child.[49] The Court held that knowledge about 'constitutive factors' such as descent was important for the free development of the personality. It gave important information about one's genes, formed the personality and was a key factor in the development of the personal identity. The Court acknowledged that personal freedoms of the donor were also concerned, but ruled that the rights of the donor-conceived child were to be given more and decisive weight.[50] A year later another OLG ruled, that sperm donors in turn have a right to be informed about the birth of children following their donation.[51]

4.2. German abortion legislation

While nowadays abortion is no longer a hot topic in Germany,[52] it was definitely so in the 1970s and 1980s. In the former Federal Republic of Germany (FRG, 'West Germany') in particular, abortion was a highly controversial topic. While in the former German Democratic Republic (GDR, 'East Germany') rather liberal abortion laws were adopted and enacted, the FRG chose a considerably more restrictive path. These FRG abortion laws were, to a large extent, the result of an ongoing dialogue between the legislature and the Federal Constitutional Court. This also goes for the German abortion laws as currently in force in the unified Germany. The latest

46 Art. 1598a (2) BGB.

47 Art. 1598a (3) BGB. Translation taken from www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p5357, visited June 2014.

48 OLG Hamm 6 February 2013, Az. I-14 U 7/12, *NJW* 2013 p. 1167.

49 See also M. Wellenhoffer, 'Die Samenspende und ihre (späten) Rechtsfolgen' ['Sperm donation and its (late) legal consequences'], *Zeitschrift für das gesamte Familienrecht*, *FamRZ* (2013) p. 825 and A. Jorzig, 'Anspruch auf Kenntnis der genetischen Abstammung eines durch eine heterologe Insemination gezeugten Kindes' ['The right to information on the genetic descent of a child born through heterologous insemination'], *jurisPR-MedizinR* (2013) Anm. 1.

50 OLG Hamm 6 February 2013, Az. I-14 U 7/12, *NJW* 2013 p. 1167, para. 52.

51 OLG Karlsruhe 7 February 2014 (dec.), Az. 16 UF 274/13, *NJW* 2014 p. 2050.

52 Ulsenheimer observes that since the year 2000 the discussions about abortions have diminished considerably. Further, in legal praxis, the criminal prohibition of abortion plays at present a marginal role, with less and less, to almost no criminal convictions on the basis of this provision. K. Ulsenheimer, 'Schwangerschaftsabbruch' ['Termination of pregnancy'], in: A. Laufs and B.R. Kern (eds.), *Handbuch des Arztrechts* [Handbook of medical law], 4th edn. (München, Verlag Beck 2010) Rn. 6.

substantial amendment to the present German abortion laws dates back to 2009 and concerned so-called late abortions (see 4.2.6 below).

This section gives a – mainly chronological – overview of the coming into existence of the various abortion regimes in former West Germany, former East Germany, as well as present (unified) Germany. To the extent that these are available, relevant statistics concerning criminal prosecutions and convictions on the basis of these laws are provided.[53] This sketch of the different German abortion regimes gives an insight in the possible causes for cross-border movement for abortions from (as well as within) Germany, a topic that will be discussed in section 4.4 below.

4.2.1. Early German abortion legislation

The Prussian Criminal Code of 1851[54] and the subsequent Criminal Code of 1871 (*Reichsstrafgesetzbuch*) fully criminalised abortion.[55] A pregnant woman who wilfully terminated her pregnancy risked a penalty of a minimum of six months and a maximum of five years imprisonment.[56] These provisions remained in force for approximately 50 years. From the first decade of the 20th century onwards, several proposals for legalisation of abortion were introduced,[57] but none was followed-up by actual legislation. Only the penalties to be imposed in case of abortion were made less severe in 1926.[58] Further, in 1927, the *Reichsgericht* – at that time the highest German court – ruled that abortion in cases of grave danger to the life and health of the mother was an 'extra-statutory necessity' and accordingly could not be considered a crime.[59]

Under the national-socialist regime, abortions were regarded as 'attacks on the life force of the nation' and laws regulating the matter were held to serve the 'protection of the nation's strength'.[60] Penalties for abortions were seriously augmented and

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53 Other than in Ch. 5 and Ch. 6, these statistics on prosecutions are not discussed in a separate subsection, but are integrated in the main text. This choice has been made deliberately, because the German legal situation has been more complex, particularly because of the two separate and simultaneous regimes before the 1990 reunification.

54 Arts. 181 and 182 Strafgesetzbuch für die Preußischen Staaten [Criminal Code for the Prusian State] of 14 April 1851, as referred to in BVerfG 25 February 1975, Az. 1 BvF 2/74 a.o., *NJW* 1975 p. 573, para. 32.

55 Strafgesetzbuch für das Deutsche Reich [Criminal Code for the German Reich] of 15 May 1871, *RGBl.* p. 127, as referred to BVerfG 25 February 1975, Az. 1 BvF 2/74 a.o., *NJW* 1975 p. 573, para. 32.

56 Art. 218 StGB (*old*). See BVerfG 25 February 1975, Az. 1 BvF 2/74 a.o., *NJW* 1975 p. 573, paras. 33–35.

57 See BVerfG 25 February 1975, Az. 1 BvF 2/74 a.o., *NJW* 1975 p. 573, para. 32, where the Court referred to 'Gustav Radbruchs Entwurf eines Allgemeinen Deutschen Strafgesetzbuches (1922), Tübingen 1952, p. 28, § 225' and 'Grotjahn-Radbruch, *Die Abtreibung der Leibesfrucht*, 1921'.

58 Gesetz zur Abänderung des Strafgesetzbuchs [Act on the Amendment of the Criminal Code] of 18 May 1926, *RGBl. I* p. 239 as cited in BVerfG 25 February 1975, Az. 1 BvF 2/74 a.o., *NJW* 1975 p. 573, para. 7.

59 Reichsgericht 11 March 1927, 61 RGst 242 (1937), as cited in BVerfG 25 February 1975, Az. 1 BvF 2/74 a.o., *NJW* 1975 p. 573, para. 6.

60 BVerfG 25 February 1975, Az. 1 BvF 2/74 a.o., *NJW* 1975 p. 573, para. 9.

included even the death penalty.[61] At the same time a policy was adopted whereby 'unworthy lives' were aborted for eugenic reasons.[62]

After World War II the abortion laws of the Federal Republic of Germany (FRG, 'West Germany') and the German Democratic Republic (GDR, 'East Germany') developed in different directions. The FRG re-enacted the general prohibition on abortion of the pre Nazi era laws. Further, the Basic Law was adopted which included the rights to human dignity, the right to life and the right to bodily integrity, of which, in any case, the right to life would later be held applicable to unborn life by the Constitutional Court (see 4.2.2). In the GDR, instead, the emancipation and self-determination of the woman were central and accordingly more liberal abortion laws were enacted.[63] Initially the different states (*Länder*) of the GDR had different abortion laws, all allowing for abortion on the basis of a criminological or medical indication and some additionally allowing for abortion on social, medical-social or eugenetic grounds.[64] In 1950 an abortion regime for the entire GDR was adopted, following which abortion was allowed if a special Committee had judged that the life or the health of the pregnant women was seriously endangered.[65] As Lammich explained, some of these Committees included social grounds in their judgments. This was reason for the Minister of Health to issue an instruction in 1965, following which a serious deterioration of the woman's physical or mental health constituted legitimate ground for an abortion.[66]

In West Germany, in the 1960s, various bills seeing at the liberalisation of the abortion laws were tabled in the FRG Parliament.[67] While none of the proposals to legalise abortion under certain conditions was adopted, the sentences to be imposed were again lowered in 1969.[68] Further, a considerable decline is visible in prosecutions

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61 Verordnung zur Durchführung der Verordnung zum Schutz von Ehe, Familie und Mutterschaft [Regulation on the Introduction oft he Regulation on the Protection of Marriage, Family and Maternity] of 18 March 1943, *RGBl. I* p. 169.

62 A. Eser, 'Reform of German abortion law: first experiences', 34 *The American Journal of Comparative Law* (1986) p. 369 at p. 371, footnote 13, referring to 1935 *RGBl. I* p. 773.

63 See also A. Laufs, 'Schwangerschaftsabbruch' ['Termination of pregnancy'], in A. Laufs et al., *Arztrecht* [Medical law] 6th edn. (München, Verlag Beck 2009) Rn. 27–58. In Rn. 45, footnote 77 the author refers to Arts. 153–155 StGB-DDR, Act of 12 January 1968, revised version of 14 December 1988, *GBl. I* 1989, No. 3, p. 33 with the amendment of 29 June 1990, *GBl. I*, No. 39, p. 526; Art. 1(2) and Art. 3(1) Gesetz über die Unterbrechung der Schwangerschaft [Act on the Termination of Pregnancy] of 9 March 1972, *GBl. I*, No. 5, p. 89. Laufs explains that after 12 weeks of pregnancy an indication model applied.

64 See S. Lammich, 'Landesbericht Deutsche Demokratische Republik' ['National report German Democratic Republic'], in A. Eser and H.-G. Koch, *Schwangerschaftsabbruch im internationalen Vergleich, Rechtlichen Regelungen – Soziale Rahmenbedingungen – Empirische Grunddaten, Teil 1: Europa* [Abortion in international comparison, legal regulation – social framework – empirial basic data, part 1: Europe] (Baden-Baden, Nomos Verlagsgesellschaft 1988) p. 326 at pp. 337–338.

65 Gesetz über den Mutter- und Kinderschutz und die Rechte der Frau [Act on the protection of Mother and child and the rights of the woman] of 27 September 1950, *GBl. der DDR* 1950, p. 1037.

66 Instruction of the Minister of Health of 15 March 1965, as referred to by Lammich 1988, *supra* n. 64, at p. 339, footnote 29.

67 *BR-Drs.* 270/60, pp. 38 and 278; *BR-Drs.* 200/62, pp. 35–36 and 38 and *BT-Drs.* V/32.

68 Erste Gesetz zur Reform des Strafrechts (1. StrRG) [First Act on the Reform of the Criminal Law] Act of 25 June 1969, *BGBl. I* p. 645.

based on the abortion laws in force at that time: between 1960 and 1969 the number of registered cases dropped with approximately 75 per cent from 4,195 in 1960 to 1,150 in 1969.[69] In that same period the number of convictions dropped from 1,809 to 596. There are no reliable numbers of abortions carried out in the FRG in the 1960s, but estimates lie between 400,000 and one million abortions a year in the mid-1960s.[70] An increasing number of women in the FRG went abroad for an abortion (relevant statistics are discussed in greater detail in section 4.4 below). Under influence of the liberalisation of the abortion legislation of various West European countries, campaigns aimed at the legalisation of abortion intensified in the FRG. At the time, a group of German and Swiss professors made suggestions for improvements to the then existing Criminal Code.[71] The group agreed that some relaxation of the criminal prohibition on abortion was desirable. The group was, however, divided in respect of how to achieve this; while the majority proposed a so-called 'periodic model' or 'stipulation model'[72] (whereby the stage of the pregnancy is primarily decisive for the question whether abortion is permitted or not), a minority favoured an 'indications model' (whereby the penalisation depends on the ground ('indication') for the intended abortion).

In the meantime, in East Germany, the Pregnancy Termination Act (*Gesetz über die Unterbrechung der Schwangerschaft*) entered into force in 1972.[73] This act implemented a periodic model: women in the GDR had the right to have an abortion in an obstetric/gynaecological institution within 12 weeks from the beginning of the pregnancy.[74] At a later stage of the pregnancy an abortion could be performed only if an expert medical commission estimated that continuation of the pregnancy would endanger the life of the woman or if there were other grave reasons.[75] Abortions were prohibited where they could lead to gravely injurious or life-threatening

69 H.-G. Koch, 'Bundersrepublik Deutschland' ['Federal Republic of Germany'], in: A. Eser and H.-G. Koch, *Schwangerschaftsabbruch im internationalen Vergleich, Rechtlichen Regelungen – Soziale Rahmenbedingungen – Empirische Grunddaten, Teil 1: Europa* [Abortion in international comparison, legal regulation – social framework – empirial basic data, Part 1: Europe] (Baden-Baden, Nomos Verlagsgesellschaft 1988) p. 17 at p. 249.

70 Koch 1988, *supra* n. 69, at p. 234.

71 J.J. Darby, Alternative Draft of a Penal Code for The Federal Republic of Germany (New York, South Hackensack 1977).

72 K.L. Belew, 'Stem Cell Division: Abortion Law and Its Influence on the Adoption of Radically Different Embryonic Stem Cell Legislation in the United States, the United Kingdom and Germany', 39 *Texas international Law Journal* (2003–2004) p. 479 at p. 508.

73 Gesetz über die Unterbrechung der Schwangerschaft [Act on the Termination of Pregnancy] of 9 March 1972, *GBl. I*, No. 5, p. 89 and the related implementing regulations of the same date (*GBl. II*, p. 149). See BVerfG 28 May 1993, Az. 2 BvF 2/90 a.o., *NJW* 1993 p. 1751 and S. Halliday, 'A comparative analysis of some of the legal parameters of the right to life and the right to privacy in the regulation of abortion', in: J. MacEldowney and G. Weick, *Human rights in transition* (Frankfurt am Main, Lang 2003) p. 85 at p. 93.

74 Art. 1(2) Gesetz über die Unterbrechung der Schwangerschaft 1972 [Pregnancy Termination Act 1972] (*old*).

75 Art. 2 Gesetz über die Unterbrechung der Schwangerschaft 1972 [Pregnancy Termination Act 1972] (*old*).

complications[76] or if less than six months had elapsed since the last pregnancy termination.[77]

Two years later, in 1974, after intense debate, the Parliament of the FRG finally passed the Abortion Reform Act.[78] Similar to the abortion laws of the GDR, this Act introduced a periodic model (the so-called '*Fristenregelung*'). Abortion was not liable to punishment if it was performed in a medical clinic within the first 12 weeks of pregnancy and after the woman underwent counselling.[79] Between the 12th and the 22nd week, abortion was not punishable if the woman's life or health was seriously endangered by the pregnancy or if there was a substantial ground to believe that the child would be born with such a serious birth defect that the woman could not be expected to carry the pregnancy to full term.[80] After the 22nd week, abortion would only be permitted if the pregnancy constituted a danger to the life of the pregnant woman.[81] Further, the State was under a duty to keep statistics of abortions carried out.[82] The Act never entered into force, however, as the Christian Democrats in Parliament, together with various States,[83] successfully lodged a complaint with the Federal Constitutional Court.

4.2.2. The first BVerfG abortion judgment and subsequent legislation

By judgment of 25 February 1975, the First Senate of the Constitutional Court by a majority[84] declared the 1974 Abortion Reform Act partly unconstitutional.[85] Using historical, systematic and textual interpretation,[86] the Court considered that the right to life ex. Article 2(2) Basic Law extended to the unborn life from the moment of nidation, i.e., from the 14th day after conception.[87] The BVerfG held that

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76 Art. 3(1) Gesetz über die Unterbrechung der Schwangerschaft 1972 [Pregnancy Termination Act 1972] (*old*).

77 Art. 3(2) Gesetz über die Unterbrechung der Schwangerschaft 1972 [Pregnancy Termination Act 1972] (*old*).

78 Fünftes Gesetz zur Reform des Strafrechts (5. StrGZ) [Fifth Act on the Reform of the Criminal law], 1974 *BGBl. I*, No. 63, p. 1297.

79 Arts. 218 and 218a StGB.

80 Art. 218b StGB.

81 Art. 218b (1) StGB.

82 Art. 4 5. StrGZ, 1974 *BGBl.* I, pp. 1298–1299.

83 Namely the *Länder* Baden-Württemberg, Bavaria, Rheinland-Pfalz, Saarland and Schleswig-Holstein. BVerfG 25 February 1975, Az. 1 BvF 2/74 a.o., *NJW* 1975 p. 573, para. 18.

84 The exact voting rate falls under the secrecy of the chambers of the Court. In literature it has been presumed that the judgment was passed with a five to three vote. Koch 1988, *supra* n. 69, at p. 82, footnote 415.

85 BVerfG 25 February 1975, Az. 1 BvF 2/74 a.o., *NJW* 1975 p. 573. For a critical case note to this judgment see W. Brugger, 'Abtreibung – ein Grundrecht oder ein Verbrechen? Ein Vergleich der Urteile des United States Supreme Court und des BVerfG' ['Abortion – a fundamental right or a criminal act? A comparison of the case law of the United States Supreme Court and the German Constitutional Court'], *NJW* (1986) p. 896. See also M.A. Case 2009, 'Perfectionism and Fundamentalism in the Application of the German Abortion Laws', in S.H. Williams, *Constituting equality: gender equality and comparative constitutional rights* (New York, Cambridge University Press 2009) p. 93 at p. 95.

86 See Brugger 1986, *supra* n. 85, at p. 898.

87 BVerfG 25 February 1975, Az. 1 BvF 2/74 a.o., *NJW* 1975 p. 573, para. 136.

the constitutional right to life entailed not only a duty for the State to refrain from direct interference in the life of the unborn, but also a State obligation to protect and support such life, by guarding it against illegal interference by third parties, including the mother. The Court considered that from the Basic Law it followed that the law had to express a clear disapproval of abortion. Although the legislature was free to express such disapproval by other means than by the threat of criminal punishment, the total sum of relevant legal norms had to protect the right to life of the unborn sufficiently.[88] The Court held that the periodic model as proposed by the 1974 Act did not meet that requirement, inasmuch as it exempted pregnancy termination from punishment '[…] even if there were no grounds that were of lasting duration in the face of the order of values of the Basic Law'.[89] As Eser observed, with this 'somewhat sibylline expression' the Court in fact held that the unborn life could only be adequately protected on the basis of an indications model.[90]

The BVerfG considered that the legislature was entitled to leave abortion free of punishment in those exceptional situations where the woman was subject to burdens which demanded such a degree of sacrifice of her own existential values that one could no longer expect her to carry the pregnancy to full term. The Court mentioned four indications that could, in principle, justify an abortion: a medical indication (i.e., when the life and/or the health of the mother is endangered by the pregnancy); a criminological indication (i.e., if the pregnancy has been brought about by means of a criminal offence); an embryopathic indication (i.e., in the case that a non-curable genetic abnormality of the embryo is suspected so that a continuation of the pregnancy cannot be expected from the mother) and 'other situations of general necessity' (i.e., social reasons). While the Court did not give any further interpretation of these indications, for all of them it applied that there was an interest equally worthy of protection, which was so pressing that it could not be required under all circumstances that precedence was given to the rights of the unborn.

The Constitutional Court left it to the legislature to lay down in law the exact boundaries between indicated and non-indicated abortions. The argument in defence of the 1974 Act that other Western democratic States had recently adopted even more liberalised or 'modern' abortion laws than foreseen by the challenged Act, was rejected by the Court.[91] Not only did the Court find those laws to be 'highly controversial', but it also held that the FRG legislature was bound by fundamentally different standards than the foreign legislatures. As a response to the National Socialistic laws, the German Basic Law constituted a legal order whereby human

88 See Eser 1986, *supra* n. 62, at pp. 373–374.

89 BVerfG 25 February 1975, Az. 1 BvF 2/74 a.o., *NJW* 1975 p. 573, para. 68 and para. 21 of the English translation of this judgment as online available at www.bverfg.de, visited 23 June 2014. The original formulation in German was: 'Es ist mit der dem Gesetzgeber obliegenden Lebensschutzpflicht unvereinbar, daß Schwangerschaftsabbrüche auch dann rechtlich nicht mißbilligt und nicht unter Strafe gestellt werden, wenn sie aus Gründen erfolgen, die vor der Wertordnung des Grundgesetzes keinen Bestand haben.' Compare Eser 1986, *supra* n. 62, at p. 374.

90 Eser 1986, *supra* n. 62, at p. 374.

91 BVerfG 25 February 1975, Az. 1 BvF 2/74 a.o., *NJW* 1975 p. 573, para. 206.

dignity was the central value reference point for all legislation to be enacted by the legislature.

To the judgment a joint dissenting opinion by judges Rupp-von Brünneck and Simon was attached, who held that the Court should have displayed more judicial self-restraint.[92] They disagreed with the majority's 'rigorism'[93] that under the Basic Law the legislature was obliged to protect constitutional rights, like the unborn's right to life, by means of penalisation. The dissenting judges maintained that – despite certain deficiencies – the regulation of abortion by means of social regulations, as introduced by the challenged Act, was more in line with the spirit of the Basic Law than the model based on penalisation as advocated by the majority of the Court.[94]

The judgment, eagerly awaited by legal scholars, was received as a rejection of the '*Fristenlösung*' (the periodic model), requiring the legislature to undertake further action.[95] The FRG legislature indeed developed an indications model, which was enacted by law of 1976.[96] The new Act was intended to take sufficient account of the emergencies in which a pregnant woman may find herself as well as to prevent illegal abortions. It was further intended 'to ensure that, "in cases where the law guarantees exemption from punishment", pregnant women would not be placed at a disadvantage because of their financial situations'.[97] Abortion was criminalised, but an abortion carried out within the first 12 weeks of pregnancy was not punishable in case an indication justifying the abortion existed. Two doctors needed to certify that according to medical knowledge either a medical,[98] an embryopathic,[99] a criminological[100] or a 'general crisis'[101] indication existed. While the medical indication could exempt an abortion from penalisation throughout the entire duration of the pregnancy, for the embryopathic indication a time limit was set at 22 weeks, and for the criminological and the general crisis indications this time limit was set at 12 weeks. It was, furthermore, required that the abortion was carried out in a hospital or expressly authorised facility; that the pregnant woman had undergone counselling; that she consented to the abortion and that she had observed a three-day

92 *Idem*, para. 222.
93 *Idem*, para. 260.
94 *Idem*, para. 269.
95 Koch 1988, *supra* n. 69, at p. 82, with useful references in footnote 417. For a critical reflection upon the 1975 abortion judgment, see Brugger 1986, *supra* n. 85, at pp. 896–901.
96 Fünfzehnte Strafrechtsänderungsgesetz [Fifteenth Act on Amendment of the Criminal Law] Act of 18 May 1976, 1976 *BGBl. I*, p. 1213. Compare Case 2009, *supra* n. 85, at p. 95 and Halliday 2003, *supra* n. 73, at p. 94.
97 As quoted by the German Constitutional Court in BVerfG 28 May 1993, Az. 2 BvF 2/90 a.o., *NJW* 1993 p. 1751, para. 20.
98 The medical indication concerned both the physical and mental health of the pregnant woman. Art. 218a (1) StGB (*old*).
99 Art. 218a (2) I StGB (*old*).
100 Art. 218a (2) II StGB (*old*).
101 The German term is '*algemeine Notlagenindikation*'. Art. 218a (2) III StGB (*old*).

reflection period.[102] Doctors were not required to assist an abortion, except in case of a life-threatening or serious health-threatening situation.[103]

Statistics show that in the period 1975–1985 the number of registered prosecutions on the basis of Article 218 StGB declined from 639 to 92 per year, while the number of criminal convictions on grounds of this provision dropped from 87 to 10 per year.[104] The total number of officially registered abortions for these years rose from 19,076 in the year 1975 to 91,064 in the year 1982, and subsequently went down to 83,538 for the year 1985. It is widely accepted that due to a registration deficit, the actual abortions numbers exceed these official numbers.[105]

4.2.3. German reunification and abortion controversy

When East and West Germany reunited to form one sovereign state in 1990, the reconciliation of the two former countries' abortion laws proved to be one of the most difficult and controversial issues. For a while the abortion discussion even jeopardised the signing of the Reunification Treaty.[106] Ultimately, a compromise was reached, whereby – for a period of two years – the abortion laws of both regimes remained in effect simultaneously.[107] Hence, in the two years between reunification and the entry into force of new legislation, women from the former FRG were able to have an abortion in the former GDR without fear of criminal prosecution or punishment (see also section 4.4.1.1 below). The legislature of reunified Germany was called upon to enact, at the latest by December 31 1992, laws which ensured better protection of unborn life and provided a better solution in conformity with the Basic Law for conflict situations faced by pregnant women, than was at the time the case in both parts of Germany.[108] After two years of heated and emotional debates, this objective was fulfilled by virtue of the adoption of a compromise regime in the shape of the Pregnancy and Family Assistance Act of 1992.[109]

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102 Art. 218b StGB (*old*).

103 Art. 2 5. StrGZ.

104 Koch 1988, *supra* n. 69, at p. 249.

105 *Idem*, at p. 235, footnote 6.

106 M.G. Mattern, 'German Abortion Law: The Unwanted Child of Reunification', 13 *Loyola of Los Angeles International and Comparative Law Review* (1990–1991) p. 643 at p. 651.

107 Unification Treaty of 31 August 1990 in conjunction with the Act on the Unification Treaty of 23 September 1990, *BGBl. II*, p. 885; *cf.* Appendix II, Chapter III, Subject Area C, Section I, No. 1.

108 Art. 31(4) of the Unification Treaty of 31 August 1990, as referred to in BVerfG 28 May 1993, Az. 2 BvF 2/90 a.o., *NJW* 1993 p. 1751. See also the English translation of the text as provided on the website of the German History Institute germanhistorydocs.ghi-dc.org/pdf/eng/Unification_Treaty.pdf, visited 24 June 2014.

109 Gesetz zum Schutz des vorgeburtlichen/werdenden Lebens, zur Förderung einer kinderfreundlicheren Gesellschaft, für Hilfen im Schwangerschaftskonflikt und zur Regelung des Schwangerschaftsabbruchs (Schwangeren- und Familienhilfegesetz) [Act to Protect Unborn/Gestating Life, Promote a Society More Hospitable Toward Children, Provide Assistance in Pregnancy Conflicts and Regulate Pregnancy Termination (Pregnancy and Family Assistance Act)] Act of 27 July 1992, *BGBl. I*, p. 1398.

4.2.4. The Pregnancy and Family Assistance Act (1992)

The Pregnancy and Family Assistance Act of 1992 consisted of a package of acts, including the Pregnancy Conflict Act (*Schwangerschaftskonfliktgesetz*, SchKG),[110] which related to the counselling procedure to be followed in case an abortion was desired. The unified legislature took as a starting point that, '[…] in light of the significance of the gestating life as a legal value and the constitutional guarantee of it, penal protection [was] indispensable.'[111] Accordingly, abortion was criminalised and punishable with imprisonment of up to three years or a fine.[112] Acts of which the effects occurred before completion of the nidation of the fertilised egg in the uterus were not considered to be pregnancy terminations within the meaning of the Criminal Code. Under certain conditions abortion would be not illegal or would be exempted from punishment. Within 12 weeks of conception, an abortion was not illegal if performed by a physician with the consent of the pregnant woman and if the woman received counselling at least three days prior to the carrying out of the abortion.[113] Abortion was also not illegal if the existence of certain legal indications was ascertained. The new system differed from the old FRG regime, to the extent that the previous statutory definitions of the criminological indication and the general emergency indication were abolished. Only medical and embryopathic indications could constitute grounds for justification of a pregnancy termination. The first required that according to medical knowledge the abortion was necessary to remove a threat to the life of the pregnant woman or a threat of grave physical or mental distress on the part of the woman, inasmuch as this threat could not be removed in another way which could be exacted of the woman, the abortion was not illegal.[114] The embryopathic indication required the existence of compelling grounds for assuming that, due to heredity or detrimental influences, the child would suffer from irreversible injury to its health so grave that a continuation of the pregnancy could not be exacted of the woman.[115]

These exemptions to the criminal prohibition on abortion were based on the idea that only the pregnant woman herself could assess the conflict situation in which she found herself. The Act was considered a compromise solution taking 'both the high value of unborn life and the self-determination of the woman into account'.[116] The degree in which the Criminal Code was to be used to protect unborn life was made dependent on the existence of other provisions offering true effective

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110 Gesetz zur Vermeidung und Bewältigung von Schwangerschaftskonflikten (Schwangerschaftskonfliktgesetz – SchKG) [Act on prevention of and the overcoming of pregnancy conflicts, Pregnancy Conflict Act] of 27 July 1992, *BGBl. I*, p. 1398.

111 BVerfG 28 May 1993, Az. 2 BvF 2/90 a.o., *NJW* 1993 p. 1751, para. 38 (in the English translation of the judgment this is para. 37).

112 In aggravated cases the term of imprisonment could be increased to a maximum of five years (Art. 218(2) StGB). In case the pregnant woman committed the offence herself, she was liable to punishment up to one year or a fine.

113 Art. 218a (1) StGB.

114 Art. 218a (2) StGB.

115 Art. 218a (3) StGB.

116 BVerfG 28 May 1993, Az. 2 BvF 2/90 a.o., *NJW* 1993 p. 1751, para. 38 (in the English translation this is para. 37).

protection of gestating life. The law therefore provided for various socio-political measures to protect unborn life, such as sex education; a legal right to counselling through licensed counselling centres;[117] reimbursement for the costs of (advice about) contraceptives;[118] as well as state-funded assistance in the care for children.[119] Compulsory counselling for women considering an abortion was introduced to ensure that the woman would not make '[…] her responsible decision of conscience regarding a pregnancy termination in isolation from the fundamental decision for the protection of the gestating life that is prescribed by the Basic Law.'[120] During the counselling the woman was offered '[…] advice and assistance in her conflict as well as sufficient information about governmental assistance as the basis for thorough reflection on her situation'.[121] It was thought that '[…] preparedness to decide in favour of gestating life [was] greatest when the woman [did] not have the feeling that she [had to] subjugate herself to the verdict of others, but rather [was] able, after receiving qualified counselling and carefully considering the situation, to decide for herself whether to continue the pregnancy.'[122]

The 1992 Act did not contain an obligation on the State to keep federal statistics on abortions, as had been required until the old FRG regime.[123] It further provided for a right to benefits for insured persons in the event of a legal abortion performed by a physician in a hospital or in another institution recognised by the law.[124]

The State of Bavaria and the Christian Democrats in the German Federal Parliament, petitioned to the Federal Constitutional Court to challenge the 1992 Pregnancy and Family Assistance Act. By judgment of 4 August 1992, the Federal Constitutional Court temporarily enjoined[125] the coming into force of the substantial provisions

117 Gesetz über Aufklärung, Verhütung, Familienplanung und Beratung (BeratungsG) [Act on sex education, contraception, family planning and counselling] as introduced by Art. 1 Schwangeren- und Familienhilfegesetz. The information that the state is required to provide under this Act includes sex education, information about contraception and family planning, benefits for promoting families and assistance to children and families, social and economic assistance for pregnant women, pregnancy termination methods and the related risks as well as possible solutions for psycho-social conflicts in connection with pregnancy.

118 Art. 2 Schwangeren- und Familienhilfegesetz [Pregnancy and Family Assistance Act].

119 Art. 5 Schwangeren- und Familienhilfegesetz [Pregnancy and Family Assistance Act].

120 BVerfG 28 May 1993, Az. 2 BvF 2/90 a.o., *NJW* 1993 p. 1751, para. 38 (in the English translation this is para. 37).

121 *Idem*.

122 *Idem*.

123 Art. 4 5. StrGZ. In the GDR under the Anweisung sur Erfassung der vorzeitigen Schwangerschaftbeendigung [Instruction registration of premature pregnancy termination] of 21 March 1972 there was a duty to report legally carried out abortions, but not many statistics are available. See Lammich 1988, *supra* n. 64, at pp. 358 and 369–370.

124 Art. 2 Schwangeren- und Familienhilfegesetz [Pregnancy and Family Assistance Act], introducing the new Arts. 24a, 24b of the Sozialgesetzbuch Fünftes Buch (SGB V) [Fifth Volume of the Code of Social Security Law].

125 *Inter alia*, Art. 32 BVerfGG [Federal Constitutional Court Act].

(Articles 13(1)[126] and 16[127]) of the Act.[128] Subsequently, the State of Bavaria and the Christian Democrats petitioned the Constitutional Court for abstract judicial review[129] of the provisions on the consultation and indication ascertainment procedure and health insurance benefits in the event of pregnancy terminations on the basis of the general emergency indication.[130] Consequently, on 28 May 1993 the BVerfG delivered its second abortion judgment.[131]

4.2.5. The second BVerfG abortion judgment (1993)

By judgment of 28 May 1993, the second Senate of the BVerfG held that the concept of counselling during the first 12 weeks of pregnancy was in itself not in violation of the Basic Law, but that the counselling regulation, as foreseen by the challenged Act, did not fulfil the State's duty to effectively protect unborn life (Article 1(1) read together with Article 2(2) Basic Law). By reference to its first abortion judgment of 1974, the Court reiterated that unborn human life was accorded human dignity and that Articles 1(1) and 2(2) of the Basic Law required that the State protects human life, including that of the unborn. It held the obligation to protect unborn human life to be related to the individual life and to not human life in general. The BVerfG further reiterated that the unborn was entitled to legal protection, even *vis-à-vis* its mother.[132] Such protection was only possible if the legislature fundamentally forbade the mother to terminate her pregnancy and thus imposed on her the fundamental

126 Art. 13(1) Schwangeren- und Familienhilfegesetz [Pregnancy and Family Assistance Act] replaced the at that time existing substantial abortion provisions (Arts. 218–219d of the Criminal Code in the version promulgated on 10 March 1987, *BGBl. I,* p. 945 at p. 1160) with new Arts. 218 -219b.

127 Art. 16 Schwangeren- und Familienhilfegesetz [Pregnancy and Family Assistance Act] revoked the provisions of the laws of the GDR that were still in force on the basis of the Unification Treaty.

128 See BVerfG 28 May 1993, Az. 2 BvF 2/90 a.o., *NJW* 1993 p. 1751, para. 98.

129 Art. 93(1)(2) Basic Law and Art. 13(6) BVerfGG.

130 Art. 218b (1) first sentence and (2); Art. 219(1) first sentence StGB in the version of the Fifteenth Act on Amendment of the Criminal Law and Arts. 200f, and 200g of the Reichsversicherungsordnung (RVO) [Reich Insurance Code]. The petitioners argued that the proposed abortion provisions providing for benefits from the statutory health insurance in the event of abortions, on the basis of a general emergency indication, contravened the State's obligation to protect unborn life. The State of Bavaria held for the same reason that the obligation on States to provide for abortion facilities (Art. 15(2) Schwangeren- und Familienhilfegesetz [Pregnancy and Family Assistance Act] and the provision in Art. 24b SGB V in the version of Art. 2 Schwangeren- und Familienhilfegesetz [Pregnancy and Family Assistance Act]) was unconstitutional. Moreover, the State of Bavaria argued that the Federal government had no legislative authority in such matters as the regulation of abortion.

131 BVerfG 28 May 1993, Az. 2 BvF 2/90 a.o., *NJW* 1993 p. 1751. See G. Hermes and S. Walther, 'Schwangerschaftsabbruch zwischen Recht und Unrecht – Das zweite Abtreibungsurteil des BVerfG und seine Folge' ['Pregnancy termination between right and wrong – The second judgment on abortion of the German Constitutional Court and its consequences'], *NJW* (1993) p. 2337; A. Zimmerman, 'Verbreitung von Informationen über Schwangerschaftsunterbrechungen und Europäische Menschenrechtskonvention' ['Dissemination of information on the termination of pregnancies and the European Convention on Human Rights'], *NJW* 1993, p. 2966 and E. Deutsch, 'Neues Verfassungszivilrecht: Rechtswidriger Abtreibungsvertrag gültig – Unterhaltspflicht aber kein Schaden' ['New Constitutional civil law: unlawful abortion convention in force – Maintenance obligation but no damages'], *NJW* (1993) p. 2361.

132 The Court referred to BVerfG 25 February 1975, Az. 1 BvF 2/74 a.o., *NJW* 1975 p. 573.

legal obligation to carry the child to term.[133] The Court emphasised that the fundamental prohibition on pregnancy termination and the fundamental obligation to carry the child to term were two integrally connected elements of the protection mandated by the Basic Law. The extent of the obligation to protect unborn life had to be determined with a view to competing legal values, including the right to life and physical inviolability of the pregnant woman (Article 2(2) of the Basic Law) and her right to personal development (Article 2(1) of the Basic Law). The State had to undertake sufficient normative and practical measures to the attainment of appropriate and, as such, effective protection, thereby combining elements of preventative and repressive protection.[134]

The BVerfG accepted that in exceptional situations it would be permissible, 'perhaps even mandatory', not to impose upon a pregnant woman a legal obligation to carry the child to term.

The Court left it up to the legislature to determine in detail on the basis of the criterion of 'non-exactability' what constituted an exceptional situation. This criterion meant that the woman had to be subject to burdens which demanded such a degree of sacrifice of her own existential values that one could no longer expect her to go through with the pregnancy.[135] Abortions performed without ascertainment of the existence of an indication pursuant to the counselling regulation, could not be declared to be justified ('not illegal'). The Court held that a justification for abortion could only be considered where there was an emergency situation, which had to be ascertained and clearly defined. Because under the challenged Act no such emergency situation was required for the justification of an abortion during the first 12 weeks of pregnancy abortion, the Court declared the relevant provision of the Act (the new Article 218a (1) Criminal Code) unconstitutional and thus invalid. It held that this provision contravened Article 1(1) in conjunction with Article 2(2) of the Basic Law, inasmuch as the provision declared an abortion under the preconditions set forth in the respective provision to not be illegal.

The Court further ruled that the regulation of counselling for a pregnant woman in an emergency and conflict situation, as foreseen by the challenged Act,[136] failed to satisfy the constitutional requirements of Article 1(1) in conjunction with Article 2(2) Basic Law. The goal of counselling in pregnancy conflict situations had to be the protection of the unborn child and the counsellors had to try to encourage the woman

133 *Idem*.

134 This has also been referred to as the *Untermaßverbot* ['prohibition on too little protection']. See BVerfG 1993, para. 166 (English translation, para. 154), referring to 'Isensee in: *Handbuch des Staatsrechts*, Volume V, 1992, § 111 marginal note No. 165 et seq'. The important finding of the Court in this case (in para. 258) that characterisation in law of the existence of a child as a source of injury is excluded on constitutional grounds (Art. 1(1) Basic Law), will not be discussed in further detail here. For discussion of that matter, see *inter alia* E. Deutsch, 'Neues Verfassungszivilrecht: Rechtswidriger Abtreibungsvertrag gültig – Unterhaltspflicht aber kein Schaden', *NJW* 1993 pp. 2361–2363 and *Der Spiegel*, ‚Drama in der Kantine', 52/1997, pp. 22–25.

135 The Court referred to BVerfG 25 February 1975, Az. 1 BvF 2/74 a.o., *NJW* 1975 p. 573.

136 The new Art. 219 StGB.

to continue her pregnancy and show her opportunities for a life with the child.[137] In the Court's opinion, this goal and content of counselling did not find sufficiently clear expression in the new Article 219 Criminal Code. Further, there were not enough state powers and duties to guarantee the organisation and supervision of the counselling institutions. The legislature had failed to lay down, to a sufficient extent, the special duties of the physician whom the woman asked to perform a termination, and the special duties of the people in the pregnant woman's circle. Further, it had not made certain breaches of duty punishable.[138] The Court employed its competence to specify the method of execution of its decisions[139] and dictated alternative provisions in respect of the counselling procedure, that were to supplement the relevant provisions of the challenged Act.[140] These supplementary provisions underlined that counselling was to be '[…] guided by the effort to encourage the woman to continue the pregnancy' and had to make the woman aware of the fact that abortion could only be considered in exceptional circumstances '[…] where bearing the child to term would place the woman under a burden which […] [was] so severe and exceptional that it exceed[ed] the limits of exactable sacrifice.' The supplementary provisions further, *inter alia*, provided for more detailed regulations concerning the setting up of counselling centres and the keeping of records by counsellors.[141]

The Court further held that the legislature was under an obligation to ascertain at reasonable intervals whether the law really was having the protective effect that could be expected on the basis of its duty to protect unborn human life.[142] The Court therefore considered it essential to have reliable abortion statistics with sufficient information.[143] Accordingly, the Court declared the respective provision of the new Act, removing the obligation to keep federal abortion statistics,[144] irreconcilable with Article 1(1) read together with Article 2(2) of the Basic Law.

In respect of reimbursement for abortions, the Court held that the Basic Law did not permit the granting of a right to benefits from the statutory health insurance for an abortion whose legality had not been established according to the constitutional standards, i.e., abortions carried out without having followed the statutory counselling

137 BVerfG 28 May 1993, Az. 2 BvF 2/90 a.o., *NJW* 1993 p. 1751, para. 228 (in the English translation this is para. 217).

138 *Idem*, para. 305 (English translation, para. 294).

139 Art. 35 BVerfGG (Federal Constitutional Court Act) reads: 'In its decision the Federal Constitutional Court may state by whom it is to be executed; in individual instances it may also specify the method of execution.'

140 See BVerfG 28 May 1993, Az. 2 BvF 2/90 a.o., *NJW* 1993 p. 1751, under II.

141 *Idem*.

142 *Idem*, para. 308 (in the English translation this is para. 298b).

143 The Court considered it essential to have statistics '[…] on the total number of pregnancy terminations, on the number of pregnancy terminations as compared to the whole population, on the total number of pregnancy terminations as compared to the number of women of childbearing age, on the total number of pregnancy terminations as compared to the number of pregnancies, on the total number of pregnancy terminations as compared to the total number of live or dead births, and finally on the total number of pregnancy terminations as compared to the number of terminations not subject to punishment because of extenuating legal reasons.' BVerfG 28 May 1993, Az. 2 BvF 2/90 a.o., *NJW* 1993 p. 1751, para. 310 (in the English translation this is para. 299c).

144 Art. 15(2) Schwangeren- und Familienhilfegesetz [Pregnancy and Family Assistance Act].

procedure. In other words, the abortion had to be indicated and the counselling process that had been followed had to be in conformity with the constitutional requirements as set out by the Court.[145]

Three judges dissented. Judge Böckenforde concurred with the essential points in the majority judgment, but disagreed with the majority's ruling that ruled out social security benefits for abortions for non-indicated abortions during the first 12 weeks of pregnancy. The Judge held it to be for the legislature to decide on that point.[146] In their joint opinion, Judges Mahrenholz and Sommer claimed that the new Article 218a (1) was constitutional. In their opinion the majority judgment had failed to achieve a balance between the human dignity of the unborn on the one hand, and the dignity of the pregnant woman on the other. They felt that from a constitutional perspective the unique comparative problem raised by the 'joined twosomeness' of the pregnant woman and the unborn child could not be dealt with 'by simply juxtaposing the two'.[147] The judges were of the opinion that the developmental process of pregnancy implied a developmental element in the pregnant woman's constitutional status and required the legislature to provide different kinds of State protection during the early and late phases of pregnancy. They agreed with the majority judgment that the regulation of counselling as provided by the challenged Act contained deficiencies and was therefore unconstitutional. Lastly, they did not hold the payment of social insurance benefits for pregnancy terminations carried out by a physician during the first 12 weeks following conception, to contravene the Basic Law.

In legal scholarship, the judgment met with considerable critique. Many authors pointed out that the Court's reasoning was not entirely consistent and contained various value contradictions.[148] Tröndle argued that the protection concept, as developed by the BVerfG, contained a serious contradiction, as it on the one hand put the State under obligation to protect unborn life, but, on the other hand, left only the counselled pregnant woman answerable to the question of whether an abortion was to take place or not.[149] The author was further critical of the fact that the BVerfG had taken up the role of quasi-legislature and had exempted abortion from the criminal law domain under certain circumstances.[150] Hermes and Walther have shown themselves to be critical of the 'judicial activism' of the BVerfG, and contended that the Court's attempt to find a compromise solution for the abortion controversy had failed. The authors claimed that the legislature had yet found the necessary compromise with

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145 On the other hand, the Court considered the granting of social assistance benefits in cases of economic hardship for pregnancy terminations which are not punishable by law according to the counseling regulation, 'just as unobjectionable from a constitutional point of view as continued payment of salary or wages is.'

146 Dissenting opinion of Judge Böckenforde to BVerfG 28 May 1993, Az. 2 BvF 2/90 a.o., *NJW* 1993 p. 1751.

147 Joint dissenting opinion of Judges Mahrenholz and Sommer to BVerfG 28 May 1993, Az. 2 BvF 2/90 a.o., *NJW* 1993 p. 1751, para. I. 1.

148 See Ulsenheimer 2010, *supra* n. 52, Rn. 5.

149 H. Tröndle, 'Das Schwangeren- und Familienhilfeänderungsgesetz' [The Pregnancy and Family Assistance Revision Act'], *NJW* (1995) p. 3009 at p. 3010.

150 *Idem*, at p. 3011.

exceptional thoroughness and conscious of the competing constitutional values and moral views, after which the Court had set foot on the – avoidable – path to the '*verfassungsgerichtlichen Juridiktionsstaat*' ('a Constitutional order ruled by the judiciary').[151]

The 1993 BVerfG judgment put the difficult task before the German legislature of drafting new abortion legislation.[152] New heated parliamentary debates were the result,[153] and various bills were drafted.[154] This finally resulted in the adoption of the Pregnancy and Family Assistance Revision Act (*Schwangeren- und Familienhilfeänderungsgesetz, SFHÄndG*) in August 1995.[155] This compromise Act not only responded to the BVerfG judgment, but also finally brought an end to the discrepancies between Eastern and West German abortion laws.[156]

4.2.6. The Pregnancy and Family Assistance Revision Act (1995) and subsequent amendments

The entry into force of the Pregnancy and Family Assistance Revision Act at 1 October 1995 introduced the abortion regime that is still in force today in Germany. Basic principle of this regime is – following the 1993 BVerfG abortion decision – the criminal prohibition of abortion (Article 218 Criminal Code). Acts, the effects of which occur before the conclusion of the nidation, are not deemed to be an abortion within the meaning of the Criminal Code. Advertising for abortion[157]

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151 Hermes and Walther 1993, *supra* n. 131, at p. 2346.

152 Tröndle claimed that the judgment was of little assistance and its content unfit to offer the legislature any normative guidance in this process. Tröndle 1995, *supra* n. 149, at p. 3012. Eser spoke of the BVerfG as having left behind a 'Torso mit Reparaturvorgaben'. A Eser, 'Schwangerschaftsabbruch: Reformversuche im Umsetzung des BVerfG-Urteils', *JZ* (1994) p. 503.

153 Tröndle 1995, *supra* n. 149, at pp. 3009–3010.

154 *BT-Drs.* 12/6643; *BT-Drs.* 12/6669 and *BT-Drs.* 12/6944. A. Eser, 'Schwangerschaftsabbruch: Reformversuche im Umsetzung des BVErfG-Urteils' ['Termination of pregnancy: reform efforts in the implementation of the judgment of the German Constitutional Court'], *JZ* (1994) pp. 503–510 at p. 504; Ulsenheimer 2010, *supra* n. 52, Rn. 5 and Tröndle 1995, *supra* n. 149, at pp. 3012–3013.

155 Act of 28 August 1995 *BGBl. I* p. 1050.

156 Art. 16 of the 1992 Pregnancy and Family Assistance Act foresaw in the revocation of the provisions of the laws of the GDR that were still in force on the basis of the Unification Treaty. However, by judgment of 4 August 1992, the Federal Constitutional Court temporarily enjoined the coming into force of this provision of the Act and by judgment of 28 May 1993 the Court declared the Act invalid, for being irreconcilable with the Basic Law. The result was that until the entering into force of the 1995 Act, the former FRG and GDR abortion regimes were still in force. BVerfG 28 May 1993, Az. 2 BvF 2/90 a.o., *NJW* 1993 p. 1751. See also above.

157 Art. 219a Criminal Code reads:
'(1) Whosoever publicly, in a meeting or through dissemination of written materials (section 11(3)), for material gain or in a grossly inappropriate manner, offers, announces or commends
1. his own services for performing terminations of pregnancy or for supporting them, or the services of another; or
2. means, objects or procedures capable of terminating a pregnancy with reference to this capacity,or makes declarations of such a nature shall be liable to imprisonment of not more than two years or a fine.

and for bringing abortion means into circulation is also prohibited.[158] Nobody can be forced to assist in an abortion, except for in cases of acute and serious danger to the life or health of the pregnant woman.[159]

Following Article 218 '[w]hosoever terminates a pregnancy is liable to imprisonment of not more than three years or a fine'.[160] If the abortion is committed by the pregnant woman herself, the maximum penalty is imprisonment of one year or a fine.[161] There are, however, exceptions to liability for abortion. Under certain circumstances, the defining elements of the offence of abortion under Article 218 are considered not to be fulfilled and the abortion is accordingly not punishable ('*nicht rechtswidrig*', Article 218a Criminal Code).[162] This is the case if, during the first 12 weeks of pregnancy, an abortion is performed by a physician at the request of a pregnant woman who can show to the physician a certificate that she had counselling at least three days before the operation.[163] Further, if the requirements for a medical-social[164] or a criminological indication[165] have been fulfilled and the woman has given informed consent, an abortion may also be exempted from punishment. The medical-social indication is present if, '[…] considering the present and future living conditions of the pregnant woman, the termination of the pregnancy is medically necessary to avert a danger to the life or the danger of grave injury to the physical or mental health of the pregnant woman and if the danger cannot reasonably be averted in another

(2) Subsection (1) No 1 above shall not apply when physicians or statutorily recognised counselling agencies provide information about which physicians, hospitals or institutions are prepared to perform a termination of pregnancy under the conditions of section 218a (1) to (3).
(3) Subsection (1) No 2 above shall not apply if the offence was committed with respect to physicians or persons who are authorised to trade in the means or objects mentioned in subsection (1) No 2 or through a publication in professional medical or pharmaceutical journals.'
Translation taken from www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#StGBengl_000P219b, visited June 2014. See, *inter alia*, Ulsenheimer 2010, *supra* n. 52, Rn. 62–65.

158 Art. 219b Criminal Code reads:
'(1)Whosoever with intent to encourage unlawful acts under section 218 distributes means or objects which are capable of terminating a pregnancy shall be liable to imprisonment of not more than two years or a fine.
(2) The secondary participation by a woman preparing the termination of her own pregnancy shall not be punishable under subsection (1) above.
(3) Means or objects to which the offence relates may be subject to a deprivation order.'
Translation taken from www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#StGBengl_000P219b, visited June 2014.

159 Art. 12 SchKG. See also Ulsenheimer 2010, *supra* n. 52, Rn. 53–54.

160 In especially serious cases – e.g. if the offender acts against the will of the pregnant woman; or if the offender through gross negligence causes a risk of death or serious injury to the pregnant woman – the penalty may be increased to five years' imprisonment (Art. 218(2) StGB).

161 Art. 218(3) StGB.

162 Note the difference in formulation when compared to the 1992 version of the Act which spoke of abortions being 'not illegal' (nicht rechtswidrig') if certain conditions were met. This formulation was declared unconstitutional by the Constitutional Court in BVerfG 28 May 1993, Az. 2 BvF 2/90 a.o., *NJW* 1993 p. 1751.

163 Art. 218a (1) StGB.

164 Art. 218a (2) StGB.

165 Art. 218a (3) StGB.

way from her point of view.'[166] While an abortion on the basis of the criminological indication can only be exempted from punishment if the abortion is performed within the first 12 weeks of pregnancy, the medical-social indication is not subject to a time limitation.

Within the first 22 weeks of pregnancy the pregnant woman is, furthermore, exempted from punishment if the abortion was performed by a physician after counselling in an emergency or conflict situation. This exception to liability does not hold for the physician or any other person committing the offence of abortion.[167] If the pregnant woman was in exceptional distress, the court may also dispense with punishment under the general abortion prohibition of Article 218 Criminal Code.[168] In addition, the pregnant woman is not liable for attempt to terminate her pregnancy.[169]

The requirements for a counselling procedure for women in an emergency or conflict situation have been laid down in Articles 219ff Criminal Code, whereby the legislature aimed to put the 1993 BVerfG abortion judgment into effect. The first paragraph of Article 219 provides that:

> 'The counselling serves to protect unborn life. It should be guided by efforts to encourage the woman to continue the pregnancy and to open her to the prospects of a life with the child; it should help her to make a responsible and conscientious decision. The woman must thereby be aware, that the unborn child has its own right to life with respect to her at every stage of the pregnancy and that a termination of pregnancy can therefore only be considered under the legal order in exceptional situations, when carrying the child to term would give rise to a burden for the woman which is so serious and extraordinary that it exceeds the reasonable limits of sacrifice. The counselling should, through advice and assistance, contribute to overcoming the conflict situation which exists in connection with the pregnancy and remedying an emergency situation. […].'[170]

Hence, the primary object of counselling is the protection of unborn life and counselling must contribute to overcoming the conflict situation. The counselling must take place through a recognised pregnancy conflict counselling agency.[171] After conclusion of the counselling on the subject, the counselling agency must issue the pregnant woman a certificate. The physician who intends to perform the termination of the pregnancy is excluded from being a counsellor.[172] This counselling regulation has been criticised for being practically unusable for the attainment of the goal

166 Art. 218a (2) StGB. Translation taken from www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#StGBengl_000P218a, visited June 2014. This has been held to cover also those situations that were covered by the previously existing 'general crisis' indication of Art. 218a (2) III StGB (*old*). See Ulsenheimer 2010, *supra* n. 52, Rn. 37 and Laufs 2009, *supra* n. 63, Rn. 40.

167 Art. 218a (4) StGB.

168 *Idem*.

169 Art. 218(4) StGB.

170 Art. 219(1) StGB. Translation taken from www.iuscomp.org/gla, visited June 2014.

171 Art. 219(2) StGB.

172 *Idem*.

of effective protection of the unborn life,[173] as well as dogmatically unfortunate fashioned and not providing sufficient legal clarity.[174]

The present German abortion law no longer provides for a separate embryopathic indication. Even though such an indication was not considered unconstitutional – in fact it was even expressly suggested – by the BVerfG,[175] the legislature wanted to express in the law of 1995 that also the disabled life is worthy of constitutional protection. At the same time, the legislature accepted that this indication was in fact covered by the medical-social indication.[176] It is now required that the (future) disability of the unborn constitutes a burden which demands such a degree of sacrifice of the pregnant woman's own existential values that one could no longer expect her to go through with the pregnancy.[177] While the exemption of punishment from an abortion on the basis of a criminological indication was made subject to a time limit set at 12 weeks after conception, the medical-social indication of Article 218a (2) was not subjected to any time limit in the 1995 Act. This implied that the previously existing time limit of 22 weeks for abortions on embryopathic grounds[178] had been lifted. Further, it implied that for abortions on embryopathic grounds no longer a counselling obligation existed; abortions on grounds on a medical indication after 12 weeks of pregnancy were left to the appraisal of the medical expert.[179] Both these implications of the new regulation have been criticised in legal scholarship[180] and politics. The call for an amendment of the law on this point grew particularly after reports of allegedly increasing numbers of late abortions (i.e., after the 23rd week of

173 Tröndle 1995, *supra* n. 149, at p. 3009.

174 R. Eschelbach, 'BeckOK StGB § 218' ['Beck online Commentary to StGB § 218'], in: B. von Heintschel-Heinegg (ed.), *Beck'scher Online-Kommentar StGB* [Beck Online Commentary to the StGB], 15th ed (München, Beck Verlag 2011) Rn. 24.

175 BVerfG 25 February 1975, Az. 1 BvF 2/74 a.o., *NJW* 1975 p. 573 and BVerfG 28 May 1993, Az. 2 BvF 2/90 a.o., *NJW* 1993 p. 1751.

176 *BT-Drs.* 13/1850, p 26. See also Ulsenheimer 2010, *supra* n. 52, Rn. 37; Eschelbach 2011, *supra* n. 174, Rn.1 and Laufs 2009, *supra* n. 63, Rn. 51.

177 W. Gropp, 'StGB § 218 Schwangerschaftsabbruch' ['§ 218 StGB Termination of pregnancy'], in W. Joeks and K. Miebach (eds.), *Münchener Kommentar zum StGB* [*Münchener Commentary to the StGB*], 2nd edn. (München, Verlag C.H. Beck 2012), Rn. 61. See also Ulsenheimer 2010, *supra* n. 52, Rn. 39.

178 See 4.2.2 above. See also Ulsenheimer 2010, *supra* n. 52, Rn. 38.

179 *BT-Drs.* 16/12970, p. 5.

180 R. Beckmann, 'Der „Wegfall" der embryopathischen Indikation' ['The „abolition" of de embryopatic indication'], *MedR* (1998) p. 155; E. Deutsch, 'Die Spätabtreibung als juristisches Problem' ['Late abortions as a legal problem'], *ZRP* (2003) p. 332 and F. Czerner, ‚Reform der Reform: Wiedereinführung der embryopathischen Indikation bei Spätabtreibungen?' ['Reform of the reform: reintroduction of the embryopathic indication for late abortions?'], *ZRP* (2009) p. 233. Czerner argues for the re-introduction of a separate embryopathic indication.

pregnancy) on embryopathic grounds.[181] After long discussions,[182] by Act of 2009[183] an extra counselling obligation was introduced for abortions on the basis of the social-medical indication.[184] Under the current law, the physician who has diagnosed an abnormality (‘*Behinderung*’) with the foetus is obliged to offer the pregnant woman counselling, which includes, *inter alia*, the dissemination of information about life with a disabled child. Further, a reflection period of three days after the diagnosis has to be observed, before an abortion can be performed.[185]

Since the year 2001 the annual abortion numbers in Germany have decreased every year, in total with more than 20 per cent, to an annual number of 102,802 in 2013.[186] The number of criminal convictions for illegal abortions has for a long time been and still is very low.[187]

4.2.7. Abortion and public funding

On the basis of Article 24b (1) and (2) SGB V,[188] women who are insured under the statutory health insurance, the so-called *Gesetzliche Krankenversicherung* (*GKV*), have a right to reimbursement of the costs of an abortion if this abortion is not against the law (‘*nicht rechtswidrig*’),[189] and if it is performed by a physician in an institution that meets the requirements of Article 13(1) SchKG. Aims of this regulation are to

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181 See, *inter alia*, *BT-Drs.* 16/12664; *BT-Drs.* 16/11330; *BT-Drs.* 16/11106; *BT-Drs.* 16/11347; *BT-Drs.* 16/11377 and *BT-Drs.* 16/11342. The official numbers of the *Statistisches Bundesamt Deutschland* [German Statistics] give a multifaceted picture. While in the period 1997–2009 the number of abortions carried out after the 23rd week of pregnancy had risen from 190 to 237 (with a lowest point in the year 2000 with 154 abortions), the percentage of abortions carried out on grounds of the medical indication had dropped from 3.5 in 1997 to 2.9 in the year 2009 (with a lowest percentage of 2.5 per cent in the year 2002). Statistisches Bundesamt Deutschland, *Schwangerschaftsabbrüche – FS12 R. 3 2010*, online available at www.destatis.de, visited June 2011.

182 See *supra* n. 181. See also Ulsenheimer 2010, *supra* n. 52, Rn. 40 and Czerner 2009, *supra* n. 180, at p. 233.

183 Gesetz zur Änderung des Schwangerschaftskonfliktgesetzes (SchKGÄndG) [Act on the Amendment of the Pregnancy Conflict Act] of 26 August 2009, *BGBl. I*, No. 58, p. 2990. The Act entered into force on 1 January 2010.

184 Art. 2 SchKG. See critical C. von Dewitz, ‘Diskriminierung ungeborener Kinder mit Behinderungen durch die gesetzliche Regelung zum Schwangerschaftsabbruch’ [‘Discrimination of unborn children with disabilities by way of the regulation on termination of pregnancy’], *Zfl* (2009) p. 74.

185 In case of non-observance of the reflection period, a fine of maximum €5,000- can be imposed. See Ulsenheimer 2010, *supra* n. 52, Rn. 40.

186 Ulsenheimer 2010, *supra* n. 52, Rn. 6, footnote 18, referring to ‘*DÄBl* 2001, A 2065’. The exact figures per year are: 1996: 130,889; 1997: 130,890; 1998: 131,795; 1999: 130,471; 2000: 134,609; 2001: 134,964; 2002: 130,387; 2003: 128,030; 2004: 129,650; 2005: 124,023; 2006: 119,710; 2007: 116,781; 2008: 114,484; 2009: 110,694; 2010: 110,431, 2011: 108,867; 2012: 106,815 and 2013: 102,802. Statistisches Bundesamt Deutschland, *Schwangerschaftsabbrüche – FS12 R. 3 2010*, online available at www.destatis.de, visited June 2011.

187 For the years 1960–1985 statistics on prosecutions and criminal convictions are available. See Koch 1988, *supra* n. 69, at p. 249. For the period after 1985, the present author is only aware of a few incidental statistics, such as eight convictions in 1990 and ten in 1991. Ulsenheimer 2010, *supra* n. 52, Rn. 6, footnote 18, referring to ‘*DÄBl* 2001, A 2065’.

188 Previously Art. 200 f Reichsversicherungsordnung (RVO) [Reich Insurance Code].

189 See also BVerfG 28 May 1993, Az. 2 BvF 2/90 a.o., *NJW* 1993 p. 1751, as discussed above.

prevent illegal abortions with their inherent risks for the health and the life of the pregnant woman, to protect pregnant women from social disadvantage and to ensure their sustenance.[190] The constitutionality of this regulation and its predecessors have been questioned,[191] but the regulation has been upheld by the Constitutional Court.[192] It is safe to say that abortions on the basis of a medical or a criminological indication are not against the law and thus qualify for statutory reimbursement.[193] Whether this also counts for abortions on the basis of an embryopathic indication (that is held to be covered by the medical-social indication of Article 218a (2), see above), is more controversial.[194] Abortions that are exempted from punishment on the basis of Article 218a (1) qualify for recovery from the statutory scheme to a limited extent only.[195]

4.3. German legislation on assisted human reproduction and surrogacy

The German legal framework concerning AHR is somewhat fragmented. It consists of both the Federal Embryo Protection Act (*Embryoschutzgesetz*, ESchG),[196] as well as regulations of the German Medical Association ('*Bundesärztekammer*'). Further, for certain matters, for instance concerning public funding, provisions of the German Social Code are relevant too. Germany is no party to the CoE Biomedicine Convention.[197] Allegedly, the main reason for this is that Germany regarded the Biomedicine Convention's regulation of research on persons who cannot give consent (i.e., embryos), for the benefit of others, as ethically problematic.[198]

190 K. Höfler, ‚SGB V § 24b Schwangerschaftsabbruch und Sterilisation' [§ 24b SGB V Pregnancy Termination and Sterilisation'], in: S. Leitherer (ed.), *Kasseler Kommentar, Sozialversicherungsrecht* [Kasseler Commentary social insurance law], 69th ed (München, Verlag Beck 2011).

191 For example J. Isensee, ‚Abtreibung als Leistungstatbestand der Sozialversicherung und der grundgesetzliche Schutz des ungeborenen Lebens' ['Abortion as an element of offence under social insurance law and the constitutional protection of the life of the unborn child'], *NJW* (1986) p. 1645 and F. Hoffmann-Klein, 'Zur Verfassungsmäßigkeit der Abtreibungsfinanzierung', *ZfL* (2010) p. 82.

192 BVerfG 18 April 1984 (dec.), Az. 1 BvL 43/81, *NJW* 1984 p. 1805 and BVerfG 28 May 1993, Az. 2 BvF 2/90 a.o., *NJW* 1993 p. 1751, See also W. Esser, 'Die Rechtswidrigkeit des Aborts' ['The unlawfulness of abortions'], *MedR* (1983) p. 57.

193 See Höfler 2011, *supra* n. 190, Rn. 15b-c.

194 Generally it is accepted that such is the case if the genetic abnormality of the embryo can be expected to constitute a danger to a grave impairment of the physical or emotional state of health of the pregnant woman. See Höfler 2011, *supra* n. 190, Rn. 15 d.

195 Art. 24b (3) and (4) SGB V.

196 Gesetz zum Schutz von Embryonen (Embryonenschutzgesetz – ESchG) [Act on the Protection of Embryos (Embryo Protection Act)] of 13 December 1990, *BGBl. I* p. 2746, amended by Art. 22 Act of 23 October 2001, *BGBl. I* p. 2702.

197 Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, CETS No. 164 (entry into force 1 December 1999). Germany has signed nor ratified this Convention (state of affairs 31 July 2014).

198 Dreier 2004, *supra* n. 3, at p. 157.

Hereafter first a brief outline of the coming into force of the Embryo Protection Act is given, after which the relevant substantive legal norms concerning AHR treatment are discussed thematically in greater detail.

4.3.1. Early (legislative) developments

Rapid technical developments in the field of biomedicine in the 1970s and 1980s[199] intensified public and political debate about AHR. At the time an embryo created outside the body of the woman enjoyed no legal protection: Article 218 ff StGB (concerning abortion, see 4.1.4 above) only protected embryos that were already transferred into the woman's body.[200] In the beginning of the 1980s various advisory committees from the legal profession, such as the German Women Lawyers Association ('*Deutscher Juristinnenbund*') and the German ('*Deutscher Richterbund*'), issued studies and statements on assisted human reproduction.[201] In 1985, the so-called 'Benda Commission'[202] – a working party on genome analysis and gene therapy appointed by the Federal Minister of Justice and the Federal Minister of Research and Technology jointly – made recommendations to the legislature on AHR issues.[203] The Commission, *inter alia*, recommended prohibiting the anonymous donation of gametes and sterilising the donors of gametes after ten

199 For example the birth of the first IVF baby, Louise Brown in England in 1978.

200 Art. 218 StGB reads: 'Acts, the effects of which occur before the conclusion of the nesting of the fertilised egg in the uterus, shall not qualify as termination of pregnancy within the meaning of this law.' See R. Keller et al., *Embryonenschutsgesetz, Kommentar zum Embryonenschutzgesetz* [Embryo Protection Act, Commentary to the Embryo Protection Act] (Stuttgart, W. Kolhammer GmbH 1992) p. 57. See also Lanz-Zumstein 1986, *supra* n. 37.

201 E.g. 'Thesen einer Arbeitsgruppe des Deutschen Juristinnenbundes zu künstlichen Befruchtungen' [Statements of a working group of the German Women Lawyers Association on artificial insemination] and 'Thesen des Deutschen Richtersbundes zur Fortpflanzungsmedizin und zur Humangenetik' [Statements of the German Judges Association on reproductive medicine and on human genetics], as published in Lanz-Zumstein 1986, *supra* n. 37.

202 The Commission was named after its chair, Professor Ernst Benda. As Fuchs explains, its composition was '[…] based on the principle of interdisciplinarity, with certain important organisations and associations also being represented: it included scientists and medical experts from various learned societies and research foundations, representatives of the major churches, a philosopher, representatives of a variety of legal disciplines of the German Medical Association, the Federal Employers' Association and the German Trades Union Congress.' M. Fuchs, *National ethics councils. Their backgrounds, functions and modes of operation compared* (Berlin, German National Ethics Council 2005) p. 41, online available at: www.ethikratorg/_english/publications/Fuchs_International_Ethics_Councils.pdf, visited March 2011. See also E. Deutsch, 'Des Menschen Vater und Mutter. Die künstliche Befruchtung beim Menschen – Zulässigkeit und zivilrechtliche Folgen' ['A man's father and mother. Artificial insemination with human beings – Permissibility and civil law effects'], *NJW* (1986) p. 1971.

203 Bundesminister für Forschung und Technologie (ed.) [Federal Minister for Research and Technology], *In-vitro-Fertilisation, Genomanalyse und Gentherapie, Bericht der gemeinsamen Arbeitsgruppe des Bundesministers für Forschung und Technologie und des Bundesministers für Justiz ('Benda-Bericht')* [In vitro fertilisation, genome anlysis and gene therapy, report of the joint working group of the Federal Minister for Research and Technology and the Federal Minister of Justice] No. 6 in the series *Gentechnologie – Chancen und Risiken* [Gene technology – Opportunities and Risks] (München, Schweitzer 1985). See also Deutsch 1986, *supra* n. 202, at p. 1972 and Keller et al. 1992, *supra* n. 200, at pp. 67–68.

successful AHR treatments; prohibiting surrogacy and the donation of embryos; and prohibiting *in vitro* fertilisation for unmarried couples and single persons. That same year, the German Medical Association adopted a regulation on the matter,[204] which for years was the only existing regulatory measure in the field of reproductive care. In the meantime, various German States ('*Länder*'), drafted their own legislation concerning AHR issues.[205] All together the need for federal legislation on the matter was felt even more strongly.

Following the recommendations of the aforementioned 'Benda-Commission', the Minister of Justice tabled a 'discussion bill' ('*Diskussionsentwurf*') for an act on the protection of embryos in 1986.[206] After relevant advisory bodies had given their reaction to this discussion bill,[207] the Federal Minister for Finance issued a so-called 'work bill' ('*Arbeitsentwurf*')[208] in 1988. In the mean time, some – impatient[209] – states ('*Länder* and political parties') and political parties also tabled bills.[210] It was, however, the government bill that finally made it into law: in 1990 the Embryo Protection Act (*Embryoschutzgesetz*, ESchG) was adopted by the *Bundestag*.[211] It entered into force on 1 January 1991.[212]

4.3.2. The Embryo Protection Act (1991)

The Embryo Protection Act is first of all a penal act.[213] This has to do with the division of Federal and State competences in Germany. At the time of its coming into force there was no explicit federal competence for AHR issues. Instead, the federal legislature could only enact federal law in the field of civil and criminal law (Article 75(1) Basic Law) or with respect to diseases which posed a danger to the public or were communicable (Article 74(19) Basic Law).[214] Regulations concerning the professional medical practice fell – and still fall – within exclusive

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204 Richtlinien zur Durchführung von In-vitro Fertilisation (IVF) und Embryotransfer (ET) als Behandlungsmethode der menschlichen Sterilität [Guidelines on implementation of *in vitro* fertilisation (IVF) and Embryo transfer (ET) as treatment for human infertility] of 1985 as printed in Keller et al. 1992, *supra* n. 200, at pp. 273–282.

205 See Keller et al. 1992, *supra* n. 200, at pp. 73–76.

206 *BT-Drs.* 11/5460. For a critique on this bill see *inter alia* Deutsch 1986, *supra* n. 202, at p. 1971.

207 See Keller et al. 1992, *supra* n. 200, at pp. 69–71.

208 See Keller et al. 1992, *supra* n. 200, at pp. 76–77.

209 *Idem*, at pp. 77.

210 See Keller et al. 1992, *supra* n. 200, at pp. 77–80.

211 *BR-Drs.* 745/90.

212 Art. 13 ESchG.

213 For a discussion of the pro and cons concerning the use of penal law for the regulation of reproductive matters, see Keller et al. 1992, *supra* n. 200, at pp. 81–97.

214 See also H. Seibert, 'Gesetzgebungskompetenz und Regelungsbefugnis im Bereich der Befruchtungstechniken' ['Legislative power and regulatory power in the area of fertilization techniques'], in: M. Lanz-Zumstein, *Embryonenschutz und Befruchtungstechnik, Seminarbericht und Stellungnahmen aus der Arbeitsgruppe "Gentechnologie" des deutschen Juristinnenbundes* [Protection of embryos and fertilisation techniques, seminar report and statements from the working group "Genetic Engineering" of the German Women Lawyers Association] (München, J Schweitzer Verlag 1986) p. 142.

State competence.[215] Since 1994 a (concurrent) competence for issues concerning human artificial insemination exists,[216] although thus far this competence has not been used by the federal legislature.[217] Consequently there is no coherent legal framework concerning AHR in German law: relevant provisions can be found in the Criminal Code, in the Civil Code as well as in Regulations drawn up by the German Medical Association (see below). This fragmentary character of the ESchG and of the regulation of AHR in general has been criticised repeatedly.[218]

The ESchG aims to prevent possible abuse of new reproduction techniques and resorts to penal law only where it is considered essential for the protection of particularly fundamental rights. According to its Explanatory Memorandum, the Act aimed to protect the constitutional values of human dignity and human life and the best interests of the child in particular.[219] The ESchG, therefore, *inter alia*, prohibits gender selection in the course of AHR (section 4.3.5 below);[220] *in vitro* fertilisation of more egg cells than can be transferred into the woman's body within one cycle;[221] as well as any processing of human embryos that does not serve the purpose of the preservation ('*Erhaltung*') of the embryo.[222]

The Act was further intended to prevent 'divided motherhood', a term which refers to the situation whereby the woman giving birth to the child is different from the woman genetically related to the child. For that reason, the Act further prohibits egg cell donation (see section 4.3.4.1 below);[223] the fertilisation of human egg cells with a view to embryo donation or for the purpose of the transferral of the embryo to a surrogate mother ('*Ersatzmutter*');[224] and the fertilisation of the egg cells of a woman who has declared her intention to place her child into the care of third parties after birth (see section 4.3.9 below).[225]

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215 Ratzel 2010, *supra* n. 41, at p. 43 under reference to BVerfG 16 February 2000, Az. 1 BvR 420/97, *NJW* 2000 p. 857.

216 Art. 74 (26) Basic Law. *BT-Drs.* 16/813, p. 14, *BGBl. I* p. 3146. See also the textual amendment of this provision of 28 August 2006 (*BGBl. I* p. 2034), whereby 'künstliche Befruchtung beim Menschen' ['artificial insemination of human beings'] was replaced by 'medizinisch unterstützte Erzeugung menschlichen Lebens' ['medically assisted reproduction of human life'].

217 See Ratzel 2010, *supra* n. 41, at p. 43.

218 For example Keller et al. 1992, *supra* n. 200, at p. 89.

219 *BT-Drs.* 11/5460, p. 6. See also the previous Explanatory memorandum to the ESchG Bill, as printed in Lanz-Zumstein 1986, *supra* n. 37, Annex 1, pp. 153–164.

220 Art. 3 ESchG.

221 Art. 1(1)(3) ESchG. This was later set at a maximum of three egg cells.

222 Art. 2 ESchG. Other practices that are prohibited are: the creation of human embryos for research purposes (Art. 1(2) ESchG); gen transfers in human 'Keimbahnzellen'; the splitting of totipotent cells of a human embryo; human cloning (the purposefully creation of genetically identical human beings) (Art. 6 ESchG); any purposefully creation of hybrids ('Chimaren und Hybridwesen') of human beings and animals (Art. 7 ESchG).

223 Art. 1(1)(1) ESchG.

224 Art. 1(1)(2) ESchG.

225 Art. 1(1)(5) ESchG.

The Embryo Protection Act was not intended to concern the protection of the embryo from the moment of nidation, as from that point in time the provisions of Article 218ff of the Criminal Code (concerning abortion) apply.[226]

To date, only a few prosecutions have been instituted on the basis of the ESchG.[227] Nevertheless, the fairly rigid regulations of the Act and its chilling effect[228] have been prominent in the societal and political debate, for instance in respect of the (longtime) highly controversial topic of preimplantation genetic diagnosis (PGD, see 4.3.6 below).[229] The most substantive amendment to the Embryo Protection Act was adopted in 2011, when the prohibition on PGD was indeed mitigated (see 4.3.6 below).[230] As will become clear throughout this chapter, in respect of the controversial and sensitive AHR matters, it has often been case law that gave the impetus for further development of the law. In this regard, often a consistency of law argument – i.e., a claim that the AHR legislation was inconsistent with abortion legislation – has been made and accepted.[231]

4.3.3. Access to AHR treatment

Under German law access to AHR is regulated in professional codes and regulations, both at federal and at state level. The Medical Associations of most States follow the regulations of the Federal German Medical Association, following which the actual access to AHR treatment is limited to specific groups in society. Para. 3.1.1 of the Regulations of the German Medical Association concerning assisted human reproduction ('*(Muster-)Richtlinie zur Durchführung der assistierten Reproduktion*') restricts access to heterologous insemination,[232] to married women or women in a stable partnership with a man who has declared himself willing to accept parental responsibility for the child conceived through the AHR procedure.[233] It has been concluded that single women and women with a same-sex partner are thus excluded

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226 *BT-Drs.* 11/5460, p. 7. On the scope of the Act, see also R. Neidert, 'Das überschätzte Embryonenschutzgesetz – was es verbietet und nicht verbietet' ['The overestimated law Embryo Protection Act – what it prohibits and does not prohibit'], *ZRP* (2002) p. 467.

227 R. Müller-Terpitz, 'Gesetz zum Schutz von Embryonen (Embryonenschutzgesetz – ESchG)' [Act on the protection of embryos (Embryo Protection Act – ESchG)'], in: A. Spickhoff, *Medizinrecht* [Medical Law], 1st edn. (München, Verlag Beck 2011), no. 190, Rn. 1(4).

228 *Idem*.

229 *Idem*.

230 Art. 1 Gesetz zur Regelung der Präimplantationsdiagnostik (Präimplantationsdiagnostikgesetz – PräimpG) [Act on the Regulation of preimplantation genetic diagnosis] Act of 21 November 2011, *BGBl.* I, p. 2228. Earlier amendments were not substantive.

231 As will be explained in the various sections below, considerable critique has been issued on the alleged inconsistency between the ESchG and the German abortion laws. See for instance Keller et al. 1992, *supra* n. 200 and Ulsenheimer 2010, *supra* n. 52, Rn. 8.

232 The term 'heterologous insemination' refers to insemination with donated sperm.

233 (Muster-)Richtlinie zur Durchführung der assistierten Reproduktion [(Model) Regulations on the implementation of medically assisted reproduction] as published in *Deutsches Ärzteblatt* 103 (2006), no. 20, 19 May 2006, pp. A1392–1403, online available at www.bundesaerztekammer.de/downloads/Kuenstbefrucht_pdf.pdf, visited June 2011.

from access to such AHR treatment.[234] These restrictions have been criticised; some have pointed out that by virtue of the general right to the free development of the personality (Article 2 Basic Law) persons in a same-sex partnership also enjoy protection of their desire to have children. Since this right is an individual right, so it has been argued, its protection or implementation cannot be made dependent on the actual partnership nor the sexual orientation of the individual concerned.[235] The *Lesben- und Schwulenverbands in Deutschland* (the Gay Federation in Germany (LSVB)) has taken the viewpoint that the fact that the Regulations do not provide for access to AHR for women in a civil partnership, does not mean that access for this group is prohibited.[236] However, only the Medical Associations of the States of Berlin and Hamburg allow for access to assisted human reproduction for women in civil partnerships.[237]

4.3.4. Donation of gametes and embryos

The German law on donation of gametes and embryos is mixed. Firstly, heterologous sperm donation is not prohibited,[238] but not extensively regulated either. Article 1600(5) of the German Civil Code provides that if a child is conceived with donated sperm and the male partner of the mother has agreed to this, the mother and the man cannot challenge the man's paternity. Further, as explained in section 4.1.6 above, the OLG of Hamm ruled in 2013 that a child that has been conceived with sperm from a donor has a right to know about its genetic origins. It has been noted that sperm donation therefore implies considerable financial risks for the sperm donor, as a child conceived with his sperm and raised by a single mother or by two women in a registered partnership can in theory make a claim for maintenance and inheritance rights.[239] On the other hand, these groups are often excluded from

234 *Idem*. See also the Commentary to this Regulation as published in 103 *Deutsches Ärzteblatt* (2006) p. A 1400. In the latest version of the Regulation this limitation is no longer included in the text itself, but is still foreseen for in the Explanatory Memorandum to the Regulation.

235 Ratzel 2010, *supra* n. 41, at pp. 54–55, footnote 43.

236 See www.lsvd.de/newsletters/newsletter-2011/insemination-ist-nicht-verboten/index.html and www.lsvd.de/recht/andere-rechtsgebiete/kuenstliche-befruchtung/index.html, both visited June 2013.

237 See www.lsvd.de/recht/andere-rechtsgebiete/kuenstliche-befruchtung.html#c7732, visited June 2014. In Hamburg these women first have to consult a special committee. Richtlinien zur assistierten Reproduktion der Ärztekammer Hamburg [Guidelines on assisted reproduction of the Medical Council of Hamburg], Annex to Art.13(2) of the Berufsordnung [Professional Code], under 3.2.3, online available at www.aerztekammer-hamburg.de/berufsrecht/richtlinien_zur_assistierten_reproduktion.pdf, visited June 2014.

238 Yet in 1908 there was a case of sperm insemination before the highest Federal Court at that time, the Reichsgericht. A woman hat inseminated herself with the sperm of her husband, without his knowledge. The Court rejected the husband's claim that he could not be the father because of the self-insemination. RG JW 1908, p. 485f. See also W. Küppers, *Die zivilrechtlichen Folgen der entgeltlichen Tragemutterschaft* [The civil consequences of commercial surrogacy] (Frankfurt am Main, Peter Lang 1988) p. 8.

239 H. Kreß. 'Samenspende und Leihmutterschaft – Problemstand, Rechtsunsicherheiten, Regelungsansätze' ['Sperm donation and surrogacy – Problems, legal uncertainty, regulatory approaches'], *FPR* (2013), *supra* n. 49.

AHR treatment on the basis of the (non-binding) Regulations of the German Medical Association concerning assisted human reproduction (see above).

While sperm donation is thus allowed for under German law, egg cell donation is prohibited. This also holds for post-mortem fertilisation of an egg cell, as explained in more detail in section 4.3.4.2 below. Embryo donation is not explicitly provided for under German law. It has been held that it is therefore not outlawed, apart from in surrogacy situations (see 4.3.9 below).[240]

4.3.4.1. Prohibition on egg cell donation

By virtue of Article 1(1) ESchG the transplant of an unfertilised egg cell of another woman (in other words: heterologous donation of egg cells) is prohibited.[241] It is the act of transplantation that is punishable: the woman from whom the donated egg cell originates, and the woman into whom the donated egg cell is implanted, are explicitly exempted from punishment.[242]

The prohibition on egg cell donation first of all aims to protect the child's best interests[243] by preventing the division of motherhood between a biological and a genetic mother.[244] Pursuant to Article 1591 Civil Code, the woman who gives birth to the child, is the mother. Divided motherhood and the inherent uncertainty about the motherhood were considered by the legislature to endanger the development of the child into a responsible personality.[245] Account was also taken of the risk that the biological mother would distance herself from the child should the child be disabled or suffer from a serious hereditary disease, for which she would hold the donating woman responsible.[246] Other arguments put forward to justify the prohibition on egg cell donation were the possible commercial exploitation of women and health risks for women. In a 2010 third party intervention by the German government in an Austrian case before the European Court of Human Rights (ECtHR) concerning the donation of gametes, the German position on egg cell donation was summarised as follows:

> 'The prohibition [on egg cell donation] was supposed to protect the child's welfare by ensuring the unambiguous identity of the mother. Biologically, only women were capable of carrying a child to term. Splitting motherhood into a genetic and a biological mother

240 Müller-Terpitz 2011, *supra* n. 227, '§ 1 Mißbräuchliche Anwendung von Fortpflanzungstechniken', Rn. 8.

241 This prohibition is further laid down in a Regulation of the German Medical Association *(Muster-) Berufsordnung für die deutschen Ärztinnen und Ärzte* [(Model) regulations for German medical practitioners] (MBO-Ä 1997), Part D. IV. No. 1512. See Müller-Terpitz 2011, *supra* n. 227, Rn. 5.

242 Art. 1(3)(1) ESchG.

243 Art. 2(1) in combination with Art. 1(1) Basic Law as well as Art. 6(2) Basic Law.

244 Abschlußbericht der Bund/Länder-Arbeitsgruppe 'Fortpflanzungsmedizin' [Final report of the Federal/State working group reproductive medicine] published in the *Bundesanzeiger* [Government Gazette] of 6 January 1989. See Keller et al. 1992, *supra* n. 200, at p. 147.

245 *BT-Drs.* 11/1856, p. 9 and *BT-Drs.* 11/5460, pp. 6–7. See also Keller et al. 1992, *supra* n. 200, at pp. 121–122 and Reinke 2008, *supra* n. 21, at pp. 151–152.

246 See Keller et al. 1992, *supra* n. 200, at p. 149.

> would result in two women having a part in the creation of a child. This would be an absolute novelty in nature and in the history of mankind. In legal, historical and cultural terms, the unambiguousness of motherhood represented a fundamental and basic social consensus and, for this reason alone, was considered indispensable by German legislators. In addition, the relationship with the mother was assumed to be important for the child's discovery of identity. As a result, the child would have extreme difficulties in coping with the fact that in biological terms two women had a part in his or her existence. Split motherhood and the resulting ambiguousness of the mother's identity might jeopardise the development of the child's personality and lead to considerable problems in his or her discovery of identity. It was therefore contrary to the child's welfare. Another danger was that the biological mother, being aware of the genetic background, might hold the egg donor responsible for any illness or handicap of the child and reject him or her. A conflict of interests between the genetic and biological mother could unfold to the detriment of the child. For the donor, making ova available was a complicated and invasive procedure which might result in a physical and psychological burden and a medical risk for the donor. Another conflict which might arise and strain the genetic and biological mothers' relationships with the child was that a donated egg might result in the recipient getting pregnant while the donor herself failed to get pregnant by means of in vitro fertilisation. For the aforementioned reasons, split motherhood was considered to be a serious threat to the welfare of the child which justified the existing prohibitions under the Embryo Protection Act.'[247]

The prohibition on heterologous egg cell donation has often received considerable criticism in German legal scholarship. The provision has been considered an unjustified interference with the constitutional right to procreate.[248] Further, the child's best interests argument has been questioned, as it is in this context in fact used as an argument for not at all letting a child come into existence.[249] It was further held that the risk of exploitation of women could be reduced by a prohibition on remuneration for egg cell donation and through the monitoring of AHR clinics.[250] Besides, it has been argued that the health risks involved in egg cell donation are not considerably greater than when artificial insemination with the use of the woman's own egg cell is employed.[251]

The fact that, on the contrary, heterologous sperm donation is not illegal has increased the criticism of the egg cell donation prohibition. This discrepancy has been held to be in violation of the prohibition on discrimination (Article 3 Basic Law).[252] Others,

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247 ECtHR 4 April 2010, *S.H. a.o.* v. *Austria*, no. 57813/00, paras. 52–55. A shorter – and therefore less insightful – summary can be found in paras. 70–71 of the Grand Chamber judgment in this case, dating from 3 November 2011.

248 Art. 2 in combination with Art. 6(1) Basic Law. See also Reinke 2008, *supra* n. 21.

249 Müller-Terpitz 2011, *supra* n. 227, Rn. 7.

250 *Idem*.

251 *Idem*.

252 *Idem*. Compare the claim made by the applicants before the ECtHR in the case of *S.H. a.o.* v. *Austria* ECtHR [GC] 3 November 2011, no. 57813/00. See Ch. 2, section 2.3.3.

however, have seen relevant biological differences between divided motherhood and fatherhood that justify the difference made.[253]

4.3.4.2. Post-mortem reproduction

Following Article 5(1)(3) of the Embryo Protection Act, it is prohibited to intentionally fertilise an egg cell with the sperm of a man who has passed away. While the person carrying out the fertilisation risks a maximum punishment of three years' imprisonment or a fine, the woman who is involved in the insemination, will not be subject to punishment.[254] The Article aims both to protect the man's right to personal autonomy, including his right to procreate, as well as to serve the best interests of the child.[255] Post-mortem fertilisation of an egg cell is prohibited under Article 1(1)(2) ESchG for similar reasons. It is thus the act of post-mortem fertilisation that is outlawed. The implantation of an embryo that was created with the gametes of a man before he passed away is not prohibited under the ESchG.[256] In a case where a woman wished to have her cryopreserved egg cells implanted, the OLG Rostock held such implantation of those egg cells that had been fertilised with the semen (sperm) of her late husband before his death, not to be against the best interests of the child, because the husband had expressly informed his wife of his child wish before he died.[257]

4.3.5. Gender selection

Article 3 ESchG prohibits the artificial fertilisation of an egg cell with a sperm cell after selection of the gender chromosomes.[258] With this prohibition the legislature intended to refrain from entering into the ethically and legally unjustifiable area of positive eugenics.[259] The prohibition was held to comply with the State's positive obligation to protect human dignity (Article 1 Basic Law).[260]

The selection of gender chromosomes by a physician is exempted from punishment if it serves to prevent the child from suffering from Duchenne muscular dystrophy or

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253 D. Prütting and W. Höfling, *Fachanwaltskommentar Medizinrecht* [Lawyers' commentary to medical law], 1st edn. 2010, Rn. 10.

254 Art. 4(2) EschG.

255 R. Müller-Terpitz, 'Gesetz zum Schutz von Embryonen (Embryonenschutzgesetz – ESchG). § 4 Eigenmächtige Befruchtung, eigenmächtige Embryoübertragung und künstliche Befruchtung nach dem Tode' [Act on the protection of embryos (Embryo Protection Act – ESchG) § 4 Self-insemination, embryo transfer and artificial insemination after decease'], in: A. Spickhoff, *Medizinrecht* [Medical Law], 2nd edn. (München, Verlag Beck 2014) Rn. 1.

256 OLG Rostock 7 May 2010, Az. 7 U 67/09 and Müller-Terpitz 2014, *supra* n. 255.

257 OLG Rostock 7 May 2010, Az. 7 U 67/09. See also M. Schafhausen, 'Herausgabe von imprägnierten Eizellen nach dem Tode des Mannes' ['Release of fertilised egg cells after decease of the man'], *jurisPR-MedizinR* (9/2010) Anm. 1 and A. Prehn, 'Die Strafbarkeit der post-mortem-Befruchtung nach dem Embryonenschutzgesetz' ['The punishability of post-mortem fertilisation under the Embryo Protection Act'], *MedR* (2011) p. 559.

258 The penalty that may be imposed is imprisonment for the maximum duration of one year or a fine.

259 *BT-Drs.* 11/5460, p. 10. See also Keller et al. 1992, *supra* n. 200, at p. 215 and Müller-Terpitz 2011, *supra* n. 227, Rn. 3(1).

260 Müller-Terpitz 2011, *supra* n. 227, Rn. (3)(1).

a similar serious gender related hereditary disease.[261] With this exception, account is taken of the difficult conflict situation in which parents involved may find themselves and the exception aims to prevent the developing embryo from suffering from a serious hereditary disease.[262]

4.3.6. Preimplantation genetic diagnosis (PGD)

While prenatal genetic diagnosis is allowed under German law and can in serious cases even justify an abortion on the basis of a medical-social indication (see 4.2.6 above), preimplantation genetic diagnosis (PGD)[263] has been controversial for a long time. Only in July 2011, the *Bundestag* adopted a law allowing for PGD under strict conditions.

At the time of the entering into force of the ESchG, PGD was not yet practiced in Germany, but only abroad. It is probably for that reason that PGD was not explicitly prohibited by nor provided for in the ESchG. Consequently, from the moment PGD became technically possible, it has been heavily debated whether it was prohibited under German law.[264] Those who argued it was relied primarily on Article 2(1) ESchG (prohibition on abusive use of extra corporal embryos)[265] and – sometimes – on Article 1(1)(2) (prohibition on abusive use of AHR techniques). Article 2(1) ESchG prohibits the abusive use of and sale ('*Veraußerung*'[266]) of human embryos[267] that have been created outside the human body, or that have been taken from the woman's body before the moment of nidation. Abusive use is described as the sale ('*Abgabe*'),[268]

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261 Art. 3, second sentence ESchG.

262 Müller-Terpitz 2011, *supra* n. 227, Rn. (3)(1), referring to *BT-Drs.* 11/8057, p. 15.

263 A possible source of confusion is the fact that in the German language this practice is known under the abbreviation 'PID'.

264 See for example E. Giwer, *Rechtsfragen der Präimplantationsdiagnostik: eine Studie zum rechtlichen Schutz des Embryos im Zusammenhang mit der Präimplantationsdiagnostik unter besonderer Berücksichtigung grundrechtlicher Schutzpflichten* [Legal questions on preimplantation genetic diagnosis: a study into the protection of embryos in relation to preimplantation genetic diagnosis taking particular account of constitutional obligations to protect] (Berlin, Duncker & Humblot 2001); P. Ferdinand, *Pränatal- und Präimplantationsdiagnistik aus verfassungsrechtlicher Sicht* [Prenatal and preimplantation genetic diagnosis from a constitutional perspective] (Frankfurt am Main, Peter Lang 2010) and Neidert 2002, supra n. 226.

265 Keller et al. 1992, *supra* n. 200, at pp. 208–209.

266 For an explanation of this term, see G. Pelchen and P. Häberle, 'E 100. Gesetz zum Schutz von Embryonen (Embryonenschutzgesetz – ESchG) – § 2 Missbräuchliche Verwendung menschlicher Embryonen' [E.100. Act on the protection of embryos (Embryo Protection Act) – § 2 Abusive use of human embryos], in: G. Erbs and M. Kohlhaas, *Strafrechtliche Nebengesetze* [Ancillary criminal laws] (München: Verlag C.H. Beck 2011) Rn. 3. The autors refer to *BR-Drs.* 417/89.

267 Human embryos are defined in Art. 8(1) ESchG as: ‚[…] die befruchtete, entwicklungsfähige menschliche Eizelle vom Zeitpunkt der Kernverschmelzung an, ferner jede einem Embryo entnommene totipotente Zelle, die sich bei Vorliegen der dafür erforderlichen weiteren Voraussetzungen zu teilen und zu einem Individuum zu entwickeln vermag.' '[…] the fertilised human ovum which is capable of development after the nuclei have merged, also any totipotent cell extracted from an embryo capable – under the right circumstances – of dividing and developing into an individual.'].

268 See also Pelchen and Häberle 2011, *supra* n. 266, Rn. 4.

purchase ('*Erwerb*')[269] or use ('*Verwendung*'),[270] for a purpose that does not serve the preservation ('*Erhaltung*') of the embryo. This means, *inter alia*, that acts that deteriorate the embryo's chances of survival are prohibited.[271] Some qualified PGD as such abusive use of the embryo within the meaning of Article 2 ESchG.[272]

This discussion and legal uncertainty, in combination with the perceived prohibition on PGD, caused German women and couples to go abroad to obtain such testing (see also 4.4.2 below, for (limited) statistics). This cross-border practice in itself fuelled the discussion in Germany even more.[273] The prohibition on PGD was considered to imply a conflict of values ('*Wertungswiderspruch*') within the German legal order in various respects. In other words, the law was held to be internally inconsistent.[274] Firstly, many argued that a prohibition on PGD was inconsistent with German abortion laws: contraceptive measures before nidation were not prohibited, as a result of which the embryo *in vitro* – while at the same stage of development – enjoyed stronger protection than the embryo *in vivo*. The fact, in particular, that German law was permissive in respect of prenatal genetic diagnosis, which could, in serious cases, even justify an abortion, while PGD was prohibited, received heavy criticism in (international) legal scholarship.[275] It was claimed that access to PGD could in certain situations contribute to the prevention of abortions at a later stage of the pregnancy. Further, it was argued that the prohibition of PGD was at variance with the fact that a physician was exempted from punishment if he carried out gender

269 *Idem*, Rn. 5.

270 *Idem*, Rn. 6.

271 Keller et al. 1992, *supra* n. 200, at p. 206.

272 *Idem*, at pp. 208–209. This line of reasoning was initially also accepted by the KG which ruled by judgment of 2008 that the provision of PGD to three couples constituted an offence in violation of Art. 1(1)(2) ESchG. KG 9 October 2008 (dec.), Az. 3 Ws 139/08. This judgment was however later overruled (see below). Pelchen and Häberle also considered it controversial whether the actual diagnostic measures involved in PGD could be qualified as abusive use of the embryo. They identified two other possible ways in which PGD could be held to be in violation of Art. 2(1) ESchG. Firstly, they pointed out that if a physician wants to eliminate 'unsuitable' embryos after PGD, the question is raised whether these embryos were created for another purpose than their preservation within the meaning of Art. 2(1) ESchG. They further raised the question if the destruction of 'unsuitable' embryos after a preimplantation genetic test gave a negative result, is a punishable abuse of the embryo. Pelchen and Häberle 2011, *supra* n. 266, Rn. 6.

273 See for example S. Kunz-Schmidt, 'Präimplantationsdiagnostik (PID) – der Stand des Gesetzgebungsverfahrens und der aktuellen Diskussion' ['Preimplantation genetic diagnosis (PGD) – the current legislative procedure and debate'], *NJ* (2011) p. 231 at p. 235 and Deutsche Akademie der Naturforscher Leopoldina et al., *Ad-hoc statement Preimplantation genetic diagnosis (PGD). The effects of limited approval in Germany*, January 2011, p. 4, online available at: www.leopoldina.org/fileadmin/user_upload/Politik/Empfehlungen/Nationale_Empfehlungen/stellungnahme_PID_2011_final_a4ansicht_EN.pdf visited June 2011.

274 See T. Henking, *Wertungswidersprüche zwischen Embryonenschutzgesetz und den Regelungen des Schwangerschaftsabbruchs? Am Beispiel des Verbots der Präimplantationsdiagnostik* [Contradictory values between the Emrbyo Protection Act and the Regulations on termination of pregnancy. The prohibition on preimplantation genetic diagnosis as an example] (Baden-Baden, Nomos Verlagsgesellschaft 2010).

275 E.g. A. Coverleyn et al., *Pre-implantation Genetic Diagnosis in Europe'* (Joint Research Centre of the European Commission, January 2007) p. 80, online available at www.ftp.jrc.es/EURdoc/eur22764en.pdf, visited July 2014.

selection in order to prevent that the future child would suffer from Duchenne muscular dystrophy or a similar serious gender related hereditary disease (see above).

Based on such criticism, ever more voices advocated a (limited) legalisation of PGD. In 2000, the German Medical Association framed a discussion paper that took the lawfulness of PGD as a starting point, but also proposed to subject access to PGD to strict conditions.[276] This view was supported by a majority of the German Ethics Council.[277] Nevertheless, a bill to this effect did not meet the required majority in Parliament.[278] Finally, it was case law that gave the decisive impetus for legislative change in the field of PGD.

In May 2009 the District Court (*Landesgericht*) of Berlin acquitted a gynaecologist who stood trial for having provided PGD to three couples with a child wish, while tests had established that of each couple, one of the parents had a serious hereditary defect.[279] The Court held that PGD with the aim of discovering serious genetic deficiencies was not criminal. The Public Prosecutor appealed the case to the German Supreme Court (*Bundesgerichtshof*, BGH), which confirmed by judgment of 6 July 2010 that PGD with the aim of discovering serious genetic deficiencies was not illegal.[280] The BGH held that from Article 1(1)(2) ESchG (prohibition on abusive use of AHR techniques) and Article 2(1) ESchG (prohibition on abusive use of human embryos) no prohibition on PGD could be deduced that would be in conformity with Article 103(2) Basic Law. According to the latter constitutional provision an act may be punished only if it has been defined by a law as a criminal offence before the act was committed. Basing itself on the wording as well as the objective of the ESchG (namely the protection of the embryo against abuse), the BGH held that the acts of the accused did not constitute criminal offence. The Court considered that the ESchG did not expressly prohibit PGD and that it was not evident that the legislature would have prohibited PGD had it been yet available at the time of the drafting of the ESchG. This was, furthermore, held to be in line with the value judgment contained

276 Bundesärztekammer [German Medical Association], 'Diskussionsentwurf zu einer Richtlinie zur Präimplantationsdiagnostik of 3 March 2000, *Dtsch. Ärztebl.* (DA) 97 (2000), p. A525-A528.

277 Nationalen Ethikrat (German Ethics Council), *Stellungnahme Genetische Diagnostik vor und während der Schwangerschaft* [Position paper genetic diagnosis before and during pregnancy] (Nationaler Ethikrat, Berlin 2003) online available at www.ethikrat.org/dateien/pdf/Stellungnahme_Genetische-Diagnostik.pdf, visited June 2011. See also *BT-Drs.* 14/9020, p. 86.

278 *BT-Drs.* 15/1234.

279 In the indictment this conduct was qualified as abusive use of reproduction techniques (Art. 1(1)(2) ESchG) and abusive use of human embryos (Art. 2(1) ESchG). LG Berlin 14 May 2009, Az. (512) 1 Kap Js 1424–06 KLs (26/08), *NJW* 2010 p. 2672. See R. Beckman 'Präimplantationsdiagnostik und Embryonenschutzgesetz, Zugleich Besprechung von LG Berlin' ['Preimplantation genetic diagnosis and the Embryo Protection Act, as well as case-note to LG Berlin'], *ZfL* (2009) p. 125.

280 BGH 6 July 2010, Az. 5 StR 386/09, *NJW* 2010 p. 2672 and H.-G Dederer,' Zur Straflosigkeit der Präimplantationsdiagnostik, Anmerkungen zu BGH, Urt. v. 6.7.2010 – 5 StR 386/09' ['To the impunity of preimplantation genetic diagnosis, Commentary to the BGH judgment of 6.7.2010 – 5 StR 386/09'], *MedR* (2010) p. 819. See also 'PID Grundsatzurteil. Koalition streitet um Gentests an Embryonen', *Spiegel online* 11 July 2010, online available at: www.spiegel.de/wissenschaft/medizin/0,1518,705898,00.html, visited September 2011 and U. Bahnsen, 'Um Leid zu verhindern; Gentests an Embryonen: Die Abwehrfront im Parlament beginnt zu bröckeln', *Die Zeit* 21 October 2010, p. 37.

in Article 3 ESchG, which provided that in case of serious hereditary diseases, an exception to the prohibition on gender selection could be made. The Court pointed at the considerable risks involved in the criminalisation of the transferral of embryos into a woman's body without diagnostic testing, even in cases where the parents carried a hereditary effect. In particular in a later stage of the pregnancy, permissive prenatal diagnostic testing could lead to results that constituted grounds for an abortion. The Court again made a comparison with the exception on the prohibition of gender selection, which also aimed to prevent abortions in a later phase of the pregnancy. The press release issued by the BGH on this judgment underlined that only PGD with the aim of discovering serious genetic deficiencies was not prohibited and that the judgment had not opened the way to an unlimited selection of embryos on the basis of genetic characteristics.[281]

The BGH judgment – which to some came as a surprise[282] – evoked a heated debate in legal scholarship, politics and society in general on the question how this ruling was to be implemented in law.[283] Numerous non-governmental actors issued opinions and statements on the matter. The German Academy of Sciences Leopoldina, for example, recommended that PGD be permitted by law under restricted and defined conditions,[284] which would have the same implications for the embryo as prenatal genetic diagnosis and abortion.[285] Leopoldina judged positively the potential contribution of limited legalisation of PGD to the avoidance of abortions[286] and

281 Press release Bundesgerichtshof of 6 July 2010, no 137/2010, online available at www.juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2010&Seite=3&nr=52539&pos=112&anz=249, visited September 2011.

282 U. Schroth, 'Präimplantationsdiagnostik zur Feststellung genetischer Schäden eines extrakorporal erzeugten Embryos' ['Preimplantation genetic diagnosis to determine genetic disorders of *in vitro* embryos'], *NJW* (2010) p. 2676–2677.

283 E.g. Beckmann 2009 *supra* n. 279; Dederer 2010, *supra* n. 280; B. Ruso and M. Thöni, 'Quo vadis Präimplantationsdiagnostik*?*' ['Quo vadis preimplantation genetic diagnosis?'], *MedR* (2010) p. 74; H. Kreß, 'Präimplantationsdiagnostik und Fortpflanzungsmedizin angesichts des ethischen Pluralismus. Rechtspolitische Gesichtspunkte nach dem Urteil des BGH' ['Preimplantation genetic diagnosis in the light of ethical pluralism. Legal political considerations after the judgment of the German Federal Court of Justice'], *ZRP* (2010) p. 201 and A.B. Lungstras, 'Die Präimplantationsdiagnostik verbieten oder erlauben?' ['To allow or to prohibit preimplantation genetic diagnosis'], *NJ* (2010) p. 485.

284 Deutsche Akademie der Naturforscher Leopoldina et al. 2011, *supra* n. 273 at p. 2. The report held that the stance that PGD was prohibited under the ESchG warranted review. The authors pointed at 'new research findings and the availability of modified examination techniques' that had been developed to remove non-totipotent cells beyond the fourth day of gestation, without exposing the embryo to an increased risk of injury or a reduction in implantation frequency. The authors were further of the opinion that 'the issue of selection decision by women within the context of PGD has not yet received the necessary legal recognition in Germany.'

285 The report held that this equalisation should be restricted to limited PGD approval for non-totipotent *in vitro* embryonic cells. 'The investigation should […] only be carried out for couples whose future children have, from an objective medical view-point, a high risk of a known and serious monogenic disease, or a hereditary chromosomal aberration, or in cases where death or miscarriage is expected. No age limit for disease-onset should be specified in determining the legitimacy of PGD. PGD must not be used for legally or socially defined goals which do not directly concern the welfare of the affected couple.'

286 Deutsche Akademie der Naturforscher Leopoldina et al. 2011, *supra* n. 273, at p. 3.

the death of unaffected embryos[287] as well as cross-border medical tourism.[288] The German Medical Association pleaded for the drafting of a comprehensive act on assisted reproduction in which the regulation of PGD would be provided for.[289] The Association set itself the task of drafting a guideline on PGD (*'(Muster-)Richtlinie zur Durchführung der Präimplantationsdiagnostik'*), allowing for PGD only in cases in which the couple involved in the AHR ran an increased risk of passing on certain hereditary diseases and under strict conditions such as counselling and approval by an ethics committee.[290] The German Bar Association, on the contrary, saw no need for such a separate examination by a committee.[291] The German Ethics Council (*'Deutscher Ethikrat'*) was strongly divided on the topic;[292] only a small majority of 13 out of 24 Council members pleaded for restricted legalisation of PGD. Some saw this division in the scholarly and professional world as a reflection of opinions in society.[293]

Within Parliament, various bills were tabled, of which three were debated. In line with the public debate, the proposed regulations varied from a strict prohibition on PGD[294] to legalisation of PGD under certain (limited) circumstances.[295] During the first reading in April 2011, none of the bills received the necessary majority vote in Parliament.[296] A middle-ground solution, providing for PGD only under very restrictively defined conditions,[297] stalled during the second reading.[298] As a result, during the final vote two completely opposite solutions were on the table in July 2011, when a final decision by Parliament was expected. Opponents of legalisation of PGD in fact wanted to undo the effects of the BGH judgment. They argued that it would be difficult to define the circumstances under which PGD would be allowed and warned that the creation of exceptions carried the risk that other illnesses or genetic features would also be accepted as grounds for the selection of future life.[299] While this approach received considerable support in Parliament, the possibility of

287 *Idem*, at p. 4.

288 *Idem*.

289 *Bundesärztekamme* [German Medical Association], Memorandum of 17 February 2011, online available at www.bundesaerztekammer.de, visited September 2011.

290 *Idem*.

291 Stellungnahme des Deutschen Anwaltvereins durch den Medizinrechtsausschuss zu den Gesetzentwürfen zur Präimplantationsdiagsnostik [Position paper of the working group on medical law of the German bar association on the draft bill on preimplantation genetic diagnosis], no. 12/2011, March 2011, online available at www.anwaltverein.de, visited September 2011.

292 Deutscher Ethikrat [German Ethics Council], *Präimplantationsdiagnostik Stellungnahme* [Position on preimplantation genetic diagnosis], Berlin 8 March 2011, online available at www.ethikrat.org/dateien/pdf/stellungnahme-praeimplantationsdiagnostik.pdf, visited September 2011.

293 See also Redaktion beck-aktuell, 'Hauchdünne Mehrheit im Ethikrat für Embryonentests', *Becklink* 1011054 (Verlag C.H. Beck 2011).

294 *BT-Drs.* 17/5440.

295 *BT-Drs.* 17/5451.

296 Redaktion beck-aktuell, 'Anhörung zur Präimplantationsdiagnostik: Befürworter und Gegner des PID-Verbots untermauern ihre Ansicht jeweils unter Verweis auf Grundrechte', 26 May 2011, *Becklink* 1013490.

297 *BT-Drs.* 17/5452.

298 Redaktion beck-aktuell, 'Bundestag stimmt für begrenzte Zulassung der Präimplantationsdiagnostik', *Becklink* 1014650 (Verlag C.H. Beck 2011).

299 *Idem*.

resorting to PGD only in exceptionally serious cases received even more support. Therefore, but only after lengthy and emotive debates,[300] the Bill legalising PGD under limited conditions finally gained the required majority vote in Parliament in July 2011.[301] Subsequently, in September 2011, the Senate (*Bundesrat*) approved the Act on preimplantation genetic diagnosis (*Präimplantationsdiagnostikgesetz* (PräimpG)).[302, 303]

According to the new legislation, PGD is punishable with imprisonment of up to one year or a fine of a maximum of 50,000 euros.[304] PGD is only allowed if there is a high risk that a genetic disorder on the side of the parents will cause the embryo to suffer from a defect from which a miscarriage will follow or that implies that the future child will suffer from a serious hereditary disease.[305] Access to such lawful PGD is subject to conditions. Written consent of the woman whose egg cell is being used, medical and psychosocial counselling, as well as approval of use of the diagnosis by an interdisciplinary ethics committee, are all mandatory. Further, only licensed institutions can carry out PGD.[306]

4.3.7. Vitrification of egg cells

The Embryo Protection Act does not prohibit vitrification of gametes and embryos ('*Kryokonserviering*'). This practice has nonetheless been held to be controversial from a legal-political perspective, because it may negatively impact the quality of the egg cells or embryos and may therefore raise questions as to the rights of the unborn – *in vitro* – life.[307] Vitrification of gametes is not reimbursed under the

300 *Idem.*

301 The Bill received a 'suprisingly clear' majority of 326 votes. The Bill providing for a full prohibition obtained 260 votes. Redaktion beck-aktuell, 'Bundestag stimmt für begrenzte Zulassung der Präimplantationsdiagnostik', *Becklink* 1014650 (Verlag C.H. Beck 2011).

302 Gesetz zur Regelung der Präimplantationsdiagnostik (Präimplantationsdiagnostikgesetz – PräimpG) [Act on the Regulation of preimplantation genetic diagnosis], Art. 1 of Act of 21 November 2011, *BGBl. I*, p. 2228. The Act is complemented by a Decree of 2013, Verordnung zur Regelung der Präimplantationsdiagnostik (Präimplantationsdiagnostikverordnung – PIDV) of 21 February 2013, *BGBl. I* p. 323, which entered into force on 1 February 2014. For a critical note, see C. Pestalozza, 'Eine späte und mißliche Geburt: Die Verordnung zur Regelung der Präimplantationsdiagnostik', *MedR* 2013 pp. 343–250.

303 *BR-Drs.* 480/11. See also www.bundesrat.de/cln_171/nn_6898/DE/presse/pm/2011/132-2011.html?__nnn=true, visited September 2012.

304 The new Art. 3a (1) ESchG.

305 The new Art. 3a (2) ESchG. A high risk is defined as a 25 to 50 per cent probability. *BT-Drs.* 17/5451, p. 10.

306 The new Art. 3a (3) ESchG.

307 A. Laufs, '§ 129 Fortpflanzungs- und Genmedizin' ['§ 129 Reproduction and gene medicine'] in: A. Laufs and B.R. Kern (eds.), *Handbuch des Arztrechts* [Handbook of Medical Law], 4th edn. (München, Verlag C.H. Beck 2010) Rn. 26–27 and M. Quaas et al., '§ 68 Einzelfelder der Biomedizin, b) Kryokonservierung' ['§ 68 Individual areas of Biomedicine, b) cryopreservation'], in: M. Quaas et al., *Medizinrecht* [Medical law] 2nd edn. (München, Verlag C.H. Beck 2008) Rn. 67.

statutory health insurance (see also 4.3.8 below),[308] but it qualifies for certain tax deductions.[309]

4.3.8. AHR treatment and public funding

Since 1990, Article 27a of the German Social Act (*Socialgesetzbuch*, SGB) sets certain conditions for AHR treatment[310] to qualify for reimbursement from the statutory health insurance (*Gesetzliche Krankenversicherung*, GKV).[311] Firstly, an entitlement to reimbursement only exists for AHR treatment that is deemed medically necessary.[312] This means that the couple's desire to have children must be unfulfilled and that the cause for the infertility of the couple together cannot be cured by medical treatment.[313] A further condition is set in respect of age: only insured women between 25 and 40 years old and insured men between 25 and 50 years old may claim reimbursement for the costs of AHR treatment on the basis of the statutory insurance scheme.[314] Also, only three treatment cycles are eligible for reimbursement[315]; any further attempts to initiate a pregnancy will have to be paid for by the insured couple themselves.[316]

Further and importantly, only homologous insemination, whereby the gametes of the couple involved are used, is reimbursed.[317] The couple must, moreover, be married.

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308 BSG 22 March 2005, Az. B 1 KR 11/03 R, *NJW* 2005 p. 2476.

309 FG Niedersachsen 14 March 2013, Az. 5 K 9/11.

310 Apart from IVF treatment this may also concern other types of treatment, such as vitrification of tissue of the ovaries (BSG 17 February 2010, Az. B 1 KR 10/09 R), provided the criteria of the Article are met.

311 Art. 2(2) Act of 26 June 1990, *BGBl. I*, p. 1211. This provision was amended by Article 1 (14) Gesetz zur Modernisierung der gesetzlichen Krankenversicherung (GKV-Modernisierungsgesetz – GMG) [Act on the modernisation of the National Health Scheme] Act of 14 November 2003, *BGBl. I* p. 2190. See also Richtlinien des Bundesausschusses der Ärzte und Krankenkassen über ärztliche Maßnahmen zur künstlichen Befruchtung ('Richtlinien über künstliche Befruchtung') [Guidelines of the Federal Commission of Doctors and Health Insurance on medically assisted reproduction] of 14 August 1990, *Bundesarbeitsblatt* 1990, No. 12, and *Bundesanzeiger* 2010; No. 182, p. 4003, online available at www.kbv.de/39321.html, visited August 2011. See also B. Schmeilzl and M. Krüger, `Künstliche Befruchtung: Wer trägt die Kosten? Eine Übersicht nach Fallgruppen' ['Artificial insemination: who bears the costs? An overview according to categories of cases'], *NZS* (2006) p. 630.

312 Art. 27a (1) SGB.

313 BSG 22 March 2005, Az. B 1 KR 11/03 R, *NJW* 2005 p. 2476. See also Ulsenheimer 2010, *supra* n. 52, Rn. 63.

314 Art. 27a (3) SGB. See BSG 19 September 2007, Az. B 1 KR 6/07 R and BSG 3 March 2009, Az. B 1 KR 7/08 R, in which the Federal Social Court held these age restrictions to be legitimate. Critical were H. Kentenich and K. Pietzer, 'Überlegungen zur gesetzlichen Nachbesserung in der Reproduktionsmedizin' ['Thoughts on legislative improvements in the field of reproduction medicine'], in: H. Frister and D. Olzen, *Reproduktionsmedizin, Rechtliche Fragestellungen. Dokumentation der Tagung zum 10-jährigen Bestehen des Instituts für Rechtsfragen der Medizin Düsseldorf* [Reproduction medicine, legal questions. Proceedings of the Conference for the 10 year anniversary of the Düsseldorf institute for medical legal issues] (Düsseldorf, Düsseldorf University Press 2010) p. 59 at p. 70.

315 Before the amendments of the year 2004 (*BGBl. I*, p. 2190), this number was set at four.

316 Art. 27b (1)(2) SGB.

317 See section 4.3.4 above and BSG 9 October 2001, Az. B 1 KR 33/00 R, *NJW* 2002 p. 1517. This is different in respect of tax deduction. Since 2010 also heterologous insemination qualifies for tax deduction. BFH 16 December 2010, Az. VI R 43/10 *NJW* 2011 p. 2077.

The latter limitation has been set from the very beginning.[318] The legislature justified this limitation on grounds of its obligation to give special protection to marriage and the family under Article 6(1) Basic Law.[319] In February 2007, the Constitutional Court ruled that this limitation of reimbursement for AHR treatment to married couples was not unconstitutional.[320] The Court held that the general principle of equality of Article 3(1) Basic Law would have been violated if AHR treatment were considered to serve the purpose of curing a disease. The legislature had not, however, assigned medical treatment with the purpose of causing a pregnancy as 'treatment of a disease' ('*Krankenbehandlung*'), but as so-called 'performance' ('*Leistung*').[321] The Court considered this choice to fall within the legislature's freedom to set conditions for reimbursement on the basis of the statutory health insurance regulations, particularly in the grey area between diseases and those physical and mental affections of a person that cannot necessarily be dispelled or cured by means of medical services on the basis of the statutory health insurance.[322] The Court considered that the legislature had sufficient objective grounds to relate the reimbursement for AHR treatment to marriage, particularly as this served the child's best interests. Further, Article 6(1) was not violated: from the special protection of marriage and the family, no claim on the State could be derived to enable the creation of a family by means of State-funded AHR treatment. Although the Court saw no constitutional objection against the reimbursement of AHR treatment for unmarried couples, it saw no constitutional obligation to that effect either. Kentenich and Pietzer questioned, in 2010, whether this fixation on the marital status still would be tenable, given that in 2005 one third of all children born in Germany were born out of wedlock.[323] While unmarried women cannot have their AHR treatment reimbursed under the statutory health insurance, they may claim tax deduction.[324] Tax deduction is also available

318 Art. 27a (1)(3) SGB. As noted above (in section 4.3.3), the Regulations of the German Medical Association also provide for access to AHR for women in a stable partnership with a man who has declared to accept parental responsibility for the child conceived through the AHR procedure.

319 RegE KOV-AnpG 1990, *BR-Drs.* 65/90, p. 35. See also R. Brandts, 'Artikel 27a SGB V' ['Article 27a Social Law Act part V'] in: S. Leitherer, *Kasseler Kommentar zum Socialversicherungsrecht* [Kasseler Commentary to Social security law], 69st edn. (München Verlag H.C. Beck 2011), Rn. 27. Müller-Terpitz has argued that from Art. 6(1) Basic Law no entitlement to claim financial support for reproductive treatment follows; instead the State has a protective and stimulating role. Müller-Terpitz 2010, *supra* n. 21, at p. 13.

320 BVerfG 28 February 2007, Az. 1 BvL 5/03, *NJW* 2007 p. 1343. The judgment was adopted with a seven to one vote. The dissenting judge did however not write a dissenting opinion. This judgment is also referred to in BVerfG 21 July 2010 (dec.), Az. 1 BvR 2464/07, *NJW* 2010 p. 2783.

321 In 2009 the Constitutional Court held that the term ‚illness' did not cover the desire for successful family planning within marriage (`Vor allem kann der Begriff der Krankheit, der grundsätzlich die Leistungen der gesetzlichen Krankenversicherung auslöst, nicht durch Auslegung dahingehend erweitert werden, dass er auch den Wunsch nach einer erfolgreichen Familienplanung in einer Ehe umfasst.') BVerfG 27 February 2009 (dec.), Az. 1 BvR 2982/07, *NJW* 2009 p. 1733, para. 10. See also BSG 3 April 2001, Az. B 1 KR 40/00 R, *NJW* 2002 p. 1598. Critical on this point is S. Huster, `Die Leistungspflicht der GKV für Maßnahmen der künstlichen Befruchtung und der Krankheitsbegriff' ['The obligation of the GKV to reimburse artificial insemination and the definition of illness'], *NJW* (2009) p. 1713.

322 See also Huster 2009, *supra* n. 321, at p. 1713.

323 Kentenich and Pietzer 2010, *supra* n. 314, at p. 70.

324 BFH 10 May 2007, Az. III R 47/05, *NJW* 2007 p. 3596. See F. Grube, 'Aufwendungen einer unverheirateten Frau für künstliche Befruchtung als außergewöhnliche Belastung' ['Expenses of an

to certain other groups of recipients of AHR treatment.[325] For instance, since 2010, heterologous insemination also qualifies for tax deduction.[326]

In 2004, the full reimbursement for AHR treatment was subjected to a 50 per cent cut.[327] The legislature did not explain this reduction, but most likely it was introduced in order to cut expenses.[328] It has been reported that since this change in the law the number of AHR treatments in Germany has dropped considerably.[329] Two individuals lodged a constitutional complaint against this new rule, alleging, *inter alia*, that the 50 per cent cut violated the general principle of equality (Article 3(1) Basic Law) and the Social State principle (Article 20(1) Basic Law).[330] They were, however, unsuccessful, as the Constitutional Court in 2009 refused to accept their complaint.[331] Referring to its aforementioned 2007 ruling concerning the limitation of reimbursement for AHR treatment to married couples, the Court repeated that there was no obligation on the legislature to fund the creation of a family by means of statutory health insurance. The Court considered that reimbursement for AHR treatment concerned a 'performance' ('*Leistung*') that fell within the legislature's discretionary freedom. AHR treatment, the Court held, concerned no therapeutically necessary medical treatment, but merely the desire of the insured to live the life he or she wished to live.[332]

4.3.9. Surrogacy

German law shows – and has always shown – a clear disapproval of both commercial and altruistic surrogacy and provides for its penalisation under certain circumstances. Surrogacy is held to be against the values of the Basic Law and it is considered to

unmarried woman for artificial insemination as extraordinary financial burden'], *juris Praxis Report SteuerRecht* 45 (2007) Anm. 5.

325 There is also tax deduction for the vitrification of egg cells when after a successful first pregnancy, these are maintained for further pregnancies (FG Niedersachsen 14 March 2013, Az. 5 K 9/11). The question of whether tax deduction also applies when no fertility treatment is taking place or is actually planned, was pending before the Federal Financial Court (Az. XI R 23/13) by the time this research was concluded (i.e. 31 July 2014).

326 BFH 16 December 2010, Az. VI R 43/10, *NJW* 2011 p. 2077. In 1999 this court had ruled to the contrary (BFH 18 May 1999, Az. III R 46/97, *NJW* 1999 p. 2767).

327 Art. 1 (14) GKV-Modernisierungsgesetz – GMG. See also *BT-Drs.* 15/1525 S 83.

328 Brandts 2011, *supra* n. 319, Rn. 27.

329 Huster 2009, *supra* n. 321, p. 1713, footnote 3, under reference to 'Wilke et al., *Gesundheitsökonomie und Qualitätsmanagement*, 2008, p. 149'. See also Kentenich and Pietzer 2010, *supra* n. 314, at p. 69, footnote 18, under reference to 'Deutsches IVF-Register, *DIR-Jahrbuch Ärztekammer Schleswig-Holstein*, 2007'.

330 The complainants also (unsuccesfully) relied on Arts. 1(1); 2(1) and 6(1) Basic Law.

331 The BVerfG may refuse complaints on the basis of Art. 93b BVerfGG. BVerfG 27 February 2009 (dec.), Az. 1 BvR 2982/07, *NJW* 2009 p. 1733.

332 The Court spoke of 'die Wünsche eines Versicherten für seine individuelle Lebensgestaltung' ['the desire of an insured person for his individual way of living']. See also E. Beckhove,'Die Kostenübernahme für künstliche Befruchtungen – Fallgruppen' ['Reimbursement of artificial insemination – categories of cases'], *NJOZ* (2009) p. 1465.

result in difficult psychological and social conflicts for all parties involved.[333] As for the prohibition on heterologous egg cell donation, the legislature wanted to prevent situations of divided motherhood. Further, it is considered unethical to make a child the object of a legal act.[334] By prohibiting surrogacy the legislature aimed to protect the human dignity of both surrogate mothers and children.[335]

In respect of surrogacy, German law makes a distinction between '*Ersatzmutterschaft*' (the situation where the surrogate mother gives birth to a genetically related child) and '*Leihmutterschaft*' (the situation where the surrogate mother is not genetically related to the child).[336] In this research both situations are referred to with the English term 'surrogacy'. The difference in terminology can be explained by the fact that different regimes each with a somewhat different focus apply to surrogacy situations.[337]

Surrogacy was first prohibited in the framework of adoption legislation. This was initially the result of court rulings to that effect.[338] Later, by amendment of 1989, a prohibition on surrogacy mediation was included in the Adoption Mediation Act (1976) (*Adoptionsvermittlungsgesetz*, AdVermiG).[339] Surrogacy mediation with financial

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333 V. Wache, '§ 13a AdVermiG nr. 1' ['§ 13a AdVermiG no. 1'], in: G. Erbs and M. Kohlhaas (eds.), *Strafrechtliche Nebengesetze* [Ancillary criminal laws] (München, Verlag C.H. Beck 2011) and K. Boele-Woelki et al., *Draagmoederschap en illegale opneming van kinderen* [Surrogacy and unlawful placement of children] (Utrecht, Utrecht Centre for European research into Family Law 2011) pp. 224–225, Annex to *Kamerstukken II* 2010/11, 32500-VI no. 83 and online available at www.wodc.nl/onderzoeksdatabase/draagmoederschap.aspx?cp=44&cs=6837, visited June 2014.

334 Boele-Woelki et al. 2011, *supra* n. 333, at p. 224.

335 KG 1 August 2013, Az. 1 W 413/12, *NJW* 2015 p. 479, referring to *BT-Drs.* 11/4154, p. 6 and *BT-Drs.* 11/5460, p. 6.

336 See Boele-Woelki et al. 2011, *supra* n. 333, at p. 225. The terminoglogy is not entirely consistently applied. Other terms used are: 'Mietmutterschaft', 'Tragemutterschaft' and 'übernommene Mutterschaft'. See T. Rauscher, '§ 1591 Mutterschaft' ['§ 1591 Maternity'] in: *J. von Staudingers Kommentar zum Bürgerlichen Gezetzbuch mit Einführungsgesetz und Nebengesetzen. Buch 4. Familienrecht, §§ 1589, 1600d (Abstammung)* [J. von Staudinger's Commentary to the Civil Code, with the Introductory Act and anciliary acts, Volume 4, Family law, §§ 1589, 1600d (descent)] Rn. 6. For a general overview of German legislation concerning surrogacy, see V. Bokelmann and M. Bokelmann, *Zur Lage der für andere übernommen Mutterschaft in Deutschland, Rechtsvergleich mit Reformvorschlägen* [On the situation of surrogate motherhood in Germany, Comparitive legal research with proposals for reform] (Frankfurt am Main, Peter Lang 2003).

337 For a discussion of the difference in terminology, see Boele-Woelki et al. 2011, *supra* n. 333, at pp. 225 and 227–228, footnote 49, referring *inter alia* to S. Liermann, 'Der Begriff ‚Ersatzmutter' im Embryonenschutzgesetz' ['The notion of 'surrogate mother' in the Embryo Protecion Act'], *Zeitschrift für das gesamte Familienrecht*, *FamRZ* (1991) p. 1403.

338 E.g. OLG Hamm 7 April 1983 (dec.), Az. 3 Ss OWi 2007/82, *NJW* 1985 p. 2205; OLG Hamm 2 December 1985 (dec.), Az. 11 W 18/85, *NJW* 1986 p. 781; AG Gütersloh 17 December 1985, Az. 5 XVI 7/85 and LG Freiburg 25 March 1987, Az. 8 O 556/86, *NJW* 1987 p. 1486.

339 Since that date the Adoption Mediation Act has been called Gesetz über die Vermittlung der Annahme als Kind und über das Verbot der Vermittlung von Ersatzmüttern (Adoptionsvermittlungsgesetz – AdVermiG) [Act on adoption mediation and on the prohibition oof surrocay mediation (Adoption Mediation Act)]. See A A. Lüderitz, ‚Verbot von Kinderhandel und Ersatzmuttervermittlung durch Änderung des Adoptionsvermittlungsgesetzes' ['Prohibition of child trafficking and of surrogacy mediation by means of amendment of the German adoption Act'], *NJW* (1990) p. 1633.

gain is punishable by two years' imprisonment or a fine.[340] The intended parents and the surrogate mother are exempted from punishment.[341] Further, Articles 1(1)(6) and (7) of the subsequent Embryo Protection Act (ESchG) prohibit the use of AHR techniques with the aim of providing for a surrogacy agreement. Punishable with imprisonment up to three years or a fine is anyone who removes an embryo from a woman before the completion of implantation in the uterus, in order to transfer it to another woman or to use it for another purpose not serving its preservation.[342] This also goes for anyone who attempts to carry out an artificial insemination of a woman who is prepared to give up her child permanently after birth (surrogate mother).[343] The woman from whom the egg cell or embryo originated and the surrogate mother are exempted from punishment.[344] This also holds for the person who wishes to take long-term care of the child (the intended parent).[345]

In 1998 a new Article 1591 was included in the Civil Code that also contributes to the prevention of surrogacy.[346] It provides that the mother of a child is the woman who gave birth to them. Hence, even if a woman gives birth to a child that is not genetically related to her, she, as the birth mother, is considered the mother in terms of the law. This is based on the *mater semper certa est* principle. Motherhood cannot even be challenged by the child if it claims to be genetically related to another woman (i.e., an egg cell donor).[347] Intended parents – including the woman who donated an egg cell – can only become the legal parents of the child if they adopt the child.[348] In that case, the surrogate mother and the legal father[349] must consent to the adoption. Such adoption furthermore requires court approval and may only be approved if it is in the best interests of the child.[350] Whether surrogacy automatically stands in the way of a lawful adoption is controversial.[351] In general, both commercial and altruistic surrogacy agreements are held to be void for violating a statutory prohibition (Article 134 BGB) and/or for being contrary to public policy (Article 138(1) BGB).[352]

There have been several international surrogacy cases before the German courts in which the Courts confirmed the German prohibition on surrogacy. The relevant case

340 Art. 14b (2)(1) AdVermiG. If no financial gain is involved in the surrogacy mediation, the maximum penalty is one year imprisonment or a fine (Art. 14b (1) AdVermiG. If the mediator acts by virtue of his or her profession, the imprisonment may be three years, maximum.

341 Art. 14b (3) AdVermiG.

342 Art. 1(1)(6) ESchG.

343 Art. 1(1)(7) ESchG.

344 Art. 1(3)(1) ESchG.

345 Art. 1(3)(2) ESchG.

346 *BT-Drs.* 13/4899, p. 51 f. See Rauscher 2011, *supra* n. 336, Rn. 10 and Boele-Woelki et al. 2011, *supra* n. 333, at p. 225.

347 Rauscher 2011, *supra* n. 336, Rn. 16.

348 See, *inter alia*, Rauscher 2011, *supra* n. 336, Rn. 7 and 17.

349 If the surrogate mother was married at the time the child was born, her husband is automatically the legal father (Art. 1592(1) BGB). The husband may, however, contest his paternity on the basis of Art. 1600 ff BGB.

350 Art. 1741(1)(1) BGB.

351 See the judgment AG Hamm 19 March 2007 (dec.), Az. XVI 23/06, as discussed in section 4.5.3 below and Boele-Woelki et al. 2011, *supra* n. 333, at p. 229.

352 For a critical discussion of this matter, see Boele-Woelki et al. 2011, *supra* n. 333, at pp. 226 and 229–231.

law concerning the implications of such cross-border surrogacy agreements – *inter alia*, the question of the civil registration of children concerned – is discussed below, in section 4.5.3.

4.4. Statistics on cross-border movement

4.4.1. Statistics on cross-border abortions

4.4.1.1. Cross-border movement from Germany

The restrictive abortion laws of the FRG and the liberalisation of abortion laws in other Western European States caused West German women to go abroad for an abortion in large numbers.[353] Not surprisingly, no official statistics have been kept by the German authorities of the total number of German women who had abortions abroad. There are only limited statistics available which show the total numbers of registered abortions per year within (former West, former East and unified) Germany.

For an idea of the total number of German women who have had an abortion abroad in recent decades, one must resort to and add up the official statistics from other European States, where the State of origin of the women undergoing an abortion is registered. Not all European States keep statistics and even less break the numbers down on the basis of the country of residence of the woman. It is therefore impossible to set an exact number of abortions undergone by German women abroad. From the UK Health Department and the Dutch Health Inspection ('*Inspectie voor de Gezondheidszorg*') some statistics in this respect are available, however, giving at least some impression of the scale of cross-border movement in this respect.

For the year 1971 (i.e., at a time when in the FRG very restrictive abortion laws were in force), statistics kept by the UK Health Department show that of the total number of 126,777 abortions performed in England and Wales, 32,207 were performed on women not residing in England and Wales, with 13,560 abortions performed on women residing in (West) Germany, hence more than 10 per cent of the total abortions carried out in England and Wales in 1971.[354] The total number of abortions performed within West Germany itself in that year was 7,043. For the year 1971, there are no statistics available for the Netherlands, nor for East Germany.[355]

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353 See, *inter alia*, Eser 1986, *supra* n. 62, at p. 377. The author was critical of the fact that the law tolerated such abortion tourism '[…] which benefits only those who can afford it'.

354 The report notes: 'For the period 1971–90, figures for East Germany, West Germany and Germany NOS have been combined to produce totals for unified Germany.' Office of population censuses and surveys, *Abortion Statistics, Legal abortions carried out under the 1967 Abortion Act in England and Wales*, 1991, Series AB, no. 18 (London, HMSO 1993) p. 8, online available at www.statistics.gov.uk/downloads/theme_health/AB18_1991/ab18_1991.pdf, visited 1 April 2011.

355 For 1972, however, a total number of 114,000 is reported for the GDR. Lammich 1988, *supra* n. 64, at p. 369, footnote 93 under reference to 'Wolff, *DÄBl.* 1981, 1055'.

Not surprisingly, the more the German abortion laws were liberalised, the numbers of women in the FRG going abroad for abortions declined. Also, the figures indicate that women went to neighbouring countries more often than to other (European) countries. It was, for instance, estimated that in the 1980s annually approximately 5,000 women from South Germany had an abortion in neighbouring Austria.[356] Up until 1977, the number of women from the FRG having abortions in England and Wales and in the Netherlands exceeded the officially registered numbers of abortions within the FRG itself.[357] In 1975, for example, 19,076 abortions were registered in the FRG, while 3,404 women from the FRG had abortions in England and Wales and no less than 61,000 women from the FRG were registered as having abortions in the Netherlands. The abortion statistics for the FRG show a clear rise in the total number of abortions registered within the FRG for the following years: 21,371 for 1976; 54,309 for 1977; 73,548 for 1978; and up to 91,064 for 1982.[358] In the subsequent years this number slowly declined to an annual number of 84,274 in 1986. In the meantime, the numbers of abortions that women from the FRG had in England and Wales and the Netherlands, gradually decreased.[359] This may have been linked to the entering into force of the more liberal FRG abortions laws of 1976.[360]

The number of German women having abortions in the Netherlands decreased even further when more permissive abortion laws were adopted after reunification. In the period after reunification of East and West Germany, but before the entering into force of the Pregnancy and Family Assistance Revision Act of 1995, still considerable cross-border movement took place. For the year 1990, for example, Dutch statistics give a number of 6,517 women residing in Germany who underwent abortions in the Netherlands.[361] It must be noted that at that time West German women also had

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356 Koch 1988, *supra* n. 69, at p. 237, footnote 16, referring to E. Ketting and P. van Praag, *Schwangerschaftsabbruch, Gesetz und Praxis im internationalen Vergleich* [Termination of pregnancy, law and practice in international comparison] (Tübingen, DGVT 1985) p. 80, at. pp. 134 f. As Koch explains, exact numbers are not available as in Austria no official abortion statistics are kept.

357 It must be noted, however, that for 1973 and 1974 this cannot be concluded with certainty, as no official numbers from the Netherlands for those years are known.

358 Koch 1988, *supra* n. 69, at p. 235. For the period 1970–1986, the exact numbers are: 1970: 4,882; 1971: 7,043; 1972: 9,829; 1973:13,021; 1974: 17,814; 1975: 19,076; 1976: 21,371; 1977: 54,309; 1978: 73,548; 1979: 82,788; 1980: 87,702; 1981: 87,535; 1982: 91,064; 1983: 86,529; 1984: 86,298; 1985: 83,538; 1986: 84,274.

359 *Idem*. For England and Wales the exact numbers of abortions performed on women from the FRG are: 1970: 3,621; 1971: 13,560; 1972: 17,531; 1973: 11,326; 1974: 5,991; 1975: 3,404; 1976: 2,384; 1977: 1,705; 1978: 1,171; 1979: 722; 1980: 584; 1981: 514; 1982: 365; 1983: 298; 1984: 250. For the Netherlands statistics are available from the year 1975. According to these statistics the number of women from the FRG having an abortion in the Netherlands per year was: 1975: 61,000; 1976: 60,000; 1977: 56,500; 1978: 42,000; 1979: 32,000; 1980: 26,200; 1981: 20,900; 1982: 17,800; 1983: 14,600; 1984: 11,300 and 1985: 8,297. The number for the year 1985 comes from: Inspectie voor de Gezondheidszorg, Ministerie van Volksgezondheid, Welzijn en Sport [The Dutch Health Care Inspectorate], *Jaarrapportage 2009 van de Wet afbreking zwangerschap* [Annual Report under the Pregnancy Termination Act 2010], December 2010, Annex 2, online available at www.igz.nl/Images/2010-12percent20Jaarrapportage%20WAZ%20 2009_tcm294-292695.pdf visited June 2011.

360 Fünfzehnte Strafrechtsänderungsgesetz [Fifteenth Act on Amendment of the Criminal Law] Act of 18 May 1976, 1976 *BGBl. I*, p. 1213.

361 Inspectie voor Gezondheidszorg [The Dutch Health Care Inspectorate], *Jaarrapportage 2008 van de Wet afbreking zwangerschap* [Annual Report under the Pregnancy Termination Act 2008], The Hague

the opportunity to go to East Germany for an abortion. The present author is not, however, aware of any statistics in this respect.

In 1991 it was reported that the German Federal Frontier Police (*Bundesgrenzschutz*) obliged German women to undergo gynaecological examinations.[362] The European Parliament (EP) adopted a Resolution on the matter,[363] in which reference was made to its own Resolution on abortion of 12 March 1990 (see Chapter 3, section 3.6.1).[364] The EP shared 'the concern reportedly already expressed in German Parliament' about the behaviour of the German Federal Frontier Police[365] and called on the German authorities to cease the practice concerned. It believed that the internal borders of the (then) Community were not to be used '[...] to threaten citizens with prosecution for activities that are perfectly legal in some Member States but not in others'. The European Parliament condemned the 'humiliating practice' of the German Federal Frontier Police, which it held to be 'contrary to the aim of free movement of persons between the Member States of the Community' and a 'violation of the fundamental right of every individual to physical integrity'.[366] Later the edges were taken off these reports,[367] but it remains unclear if any criminal prosecutions were initiated following the searches.[368]

After the entry into force of the Pregnancy and Family Assistance Revision Act in 1995 for the unified Germany, the statistics kept in the Netherlands and England and

December 2009, Annex 2, p. 29, online available at www.igz.nl, visited June 2011.

362 S.F. Kreimer, 'But Whoever Treasures Freedom…: The Right to Travel and Extraterritorial Abortions', 91 *Michigan Law Review* (1993) p. 907 at p. 908, referring (in footnote 5) to 'EUR. PARL. DEB. (3–403) 202–05 (Mar. 14, 1991) (debate on resolutions condemning compulsory gynaecological examinations by German officials of returning German women at the Dutch-German border); id. at 203 (statement of Rep. Van Den Brink) (stating that over 6000 German women have had abortions in the Netherlands); id. at 204 (statement of Rep. Keppelhoff- Wiechert) (defending searches on the ground that officials 'are required by the code of criminal procedure to investigate illegal abortions of this kind carried out abroad'); Nina Bernstein, Germany Still Divided on Abortion, NEWSDAY, Mar. 11, 1991, at 5, 13 (reporting an account of a German woman returning from the Netherlands who was forced to submit to a vaginal examination at a Catholic hospital near the border and was charged with having an illegal abortion; noting that German Interior Ministry acknowledges the practice; citing a study by the Max Planck Institute in Freiburg that found such 'inquisition[s]' to be 'standard practice'); Karen Y. Crabbs, The German Abortion Debate: Stumbling Block to Unity, 6 FLA. J. INTL. L. 213, 222–23 (1991) (describing prosecutions and searches).' See also J.M. Bik, 'Duitse vrouwen na abortus verplicht tot onderzoek', *NRC Handelsblad* 4 maart 1991, p. 11 and Case 2009, *supra* n. 85, at p. 96 referring to T. Jones. 'Social Policy; Wall still divides Germany on the Abortion Question', *Los Angeles Times* 19 October 1991, p. A4.

363 Resolution of the European Parliament of 12 March 1990 on reports of gynaecological examinations by the German Federal Frontier Police [1991] OJ C106/102, pp. 103, 113 and 135.

364 Resolution of the European Parliament on artificial insemination in vivo and in vitro of 16 March 1989, [1989] OJ C96/127.

365 Para. 5 of the 1990 Resolution, *supra* n. 363. The EP Resolution does not refer to any parliamentary documents of the German *Bundestag*.

366 The present author is not aware of any follow-up of this EP Resolution in German Parliament.

367 'Duitsers doen geen abortus-onderzoek', *NRC Handelsblad* 20 March 1991, p. 7.

368 A Dutch newspaper reported that the one of the German Max Planck Institutes had statistics showing that approximately 60 per cent of the German women who had an abortion in the Netherlands was prosecuted. 'Europarlement veroordeelt 'abortuscontrole' aan grens', *NRC Handelsblad* 15 March 1991, p. 3. It has proven impossible for the present author however, to verify this report.

Wales of abortions undergone by women residing in Germany, show a considerable decrease in numbers. For instance, for 1995 a total number of 2,982 abortions performed on women residing in Germany were registered by the Dutch Health Inspection, compared to 6,517 abortions five years earlier, in 1990. Of the total number of 179,522 abortions performed in England and Wales in 1991, only 109 involved women residing in Germany.[369]

Since the year 2000, the registered number of German women having abortions abroad stabilised around an annual figure of approximately 1,100 for the Netherlands[370] and less than 20 in England and Wales.[371] In 2008, 79 per cent of those women residing in Germany who had abortions in the Netherlands were more than 12 weeks pregnant.[372] After 12 weeks of pregnancy, German law subjects access to abortion to stricter conditions (see 4.2.6 above). The introduction of an extra counselling obligation for abortions on the basis of the social-medical indication in 2009[373] may have triggered women in Germany to have abortions abroad, but the present author is not aware of any research studies or statistics in this respect.[374]

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369 Office of population censuses and surveys, *Abortion Statistics, Legal abortions carried out under the 1967 Abortion Act in England and Wales 1991*, Series AB, no. 18 (London, HMSO 1993) p. 8, online available at www.statistics.gov.uk/downloads/theme_health/AB18_1991/ab18_1991.pdf, visited April 2011. The British perspective has been described as follows by the British Medical Association: 'In the early 1970s a large number of abortions were carried out for non-residents of England and Wales reaching a peak of 56,581 in 1973 representing a third of all abortions carried out in that year. In the early 1980s the number was around 34,000 (20 per cent of the total) and from 1995 the number has been around 9,500 representing 5 per cent of the total number of abortions.' British Medical Association, *Abortion statistics and trends, a briefing paper from the BMA*, 17 June 2005, p. 5, online available at www.bma.org.uk/images/Abortiontimelimits_tcm41-20443.pdf, visited 30 March 2011.

370 The exact figures were as follows: 2000: 1,603; 2005: 1,148; 2006: 1,092; 2007: 1,193; 2008: 1,171; 2009: 1,123. Annex 2 to Inspectie voor de Gezondheidszorg, Ministerie van Volksgezondheid, Welzijn en Sport [The Dutch Health Care Inspectorate], *Jaarrapportage 2009 van de Wet afbreking zwangerschap* [Annual Report under the Pregnancy Termination Act 2010] December 2010, online available at www.igz.nl/Images/2010-12%20Jaarrapportage%20WAZ%202009_tcm294-292695.pdf, visited 30 March 2011.

371 The exact numbers for England and Wales are 2002: 46; 2003: 25; 2004: 16; 2005: 19; 2006: 18; 2007: 12; 2008: 16; 2009: 17 and 2010: 12. The annual abortion statistics for England and Wales are available at the website of the UK Department of Health. For instance, the statistics for 2010 can be found in Table 12a to UK Department of Health, *Abortion Statistics, England and Wales: 2010*, May 2011, online available at www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsStatistics/DH_126769, visited 19 July 2011.

372 See www.rutgersnissogroep.nl/productenendiensten/onderzoekspublicaties/onderzoekspublicaties-1/downloadbare-publicaties-in-pdf/rapport-lar-2008.pdf, visited 30 March 2011, p. 35.

373 Gesetz zur Änderung des Schwangerschaftskonfliktgesetzes (SchKGÄndG) [Act on the Amendment of the Pregnancy Conflict Act] of 26 August 2009, *BGBl. I*, No. 58, p. 2990. See section 4.2.6 above.

374 The number of women from Germany going to the Netherlands has not changed significantly in the subsequent years. For example in 2010, 1,112 women of the total number of 30,577 women having an abortion in the Netherlands was resident in Germany. Inspectie voor Gezondheidszorg, *Jaarrapportage 2012 van de Wet afbreking zwangerschap,* Utrecht December 2013, Annex 2, p. 37, online available at: www.igz.nl, visited June 2014.

4.4.1.2. Cross-border movement to Germany

The statistics kept on the basis of Article 15 Pregnancy Conflict Act (see 2.4.2 above)[375] show that abortions undergone by foreign women in Germany make up only a very small portion of the total number of abortions carried out in Germany. It is interesting to note, however, that while the total number of abortions performed in Germany on an annual basis dropped from 134,964 in 2001 to 102,802 in 2013, the number of abortions undergone by women residing abroad rose considerably from 501 in 2001, to 1,092 in 2013.[376] These German statistics are not, however, accompanied by any interpretation, rendering it impossible to identify any cause for this change in numbers.

4.4.2. Statistics and reported cases on cross-border reproductive care

As has been stressed repeatedly throughout this study, no reliable and exhaustive overview exists of the actual prevalence of cross-border reproductive care in Europe (see also Chapter 3, section 3.4). Nevertheless, there are strong indications that such cross-border movement takes place, also to and from Germany, as various (European) research studies and court proceedings prove.

The prohibition on PGD, which was only partly lifted in 2011, has for many years been reason for women and couples from Germany with a child wish to go abroad to have such genetic tests carried out. The 2007 study into preimplantation genetic diagnosis (PGD) across Europe of the Joint Research Centre of the European Commission reported that for German residents the main reason for going abroad for treatment was that PGD was not permitted in Germany.[377] In various news reports estimates have been reported of approximately 100 German women undergoing PGD abroad, predominantly in Belgium, Spain and the Czech Republic.[378] It is thus widely

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375 On the basis of Art. 15 SchKG the German State has an obligation to keep statistics in respect of abortions carried out in Germany.

376 The exact number of abortions undergone in Germany by women residing in a foreign country, compared to the total number of abortions undergone in Germany per year (between brackets), for the period 2001–2013 is as follows: 2013: 1,092 (102,802); 2012: 1,088 (106,815); 2011: 1,006 (108,867); 2010: 925 (110,431); 2009: 657 (110,694); 2008 720 (114,484); 2007: 556 (116,871); 2006: 509 (119,710); 2005: 517 (124 023); 2004: 483 (129 650); 2003: 531 (128,030); 2002: 462 (130,387) and 2001: 501 (134,964). Statistisches Bundesamt Deutschland, *Schwangerschaftsabbrüche – FSI2 R. 3 2008* and *FSI2 R. 3 2013*, online available at www.destatis.de, visited June 2014. See also K. Zabrzynski, 'Zur Abtreibung über die Grenze, Immer mehr Polinnen lassen einen Schwangerschaftsabbruch in Berlin, Prenzlau oder Schwedt vornehmen', *Berliner Zeitung* 30 October 2010, p. 24.

377 PGD is neither allowed in Switzerland and Italy. Also for residents of these countries the main reason to go abroad for this type of treatment is the non-availability of it in the home country. Additional reasons for travelling that this research has revealed include the quality of the treatment, test availability, financial resources and manpower. Coverleyn et al. 2007, *supra* n. 275, at p. 79.

378 W.-M. Catenhusen, 'POSITION; Mit Embryonen verantwortlich umgehen Der Gesetzgeber muss der Präimplantationsdiagnostik klare Grenzen setzen', *Der Tagesspiegel* 9 July 2010, p. 17; 'PID-Tourismus; Wenn Eltern ihre schlechten Gene fürchten müssen', *Berliner Morgenpost Online* 19 October 2010, www.morgenpost.de/web-wissen/article1426581/Wenn-Eltern-ihre-schlechten-Gene-fuerchten-muessen.htm; K. Elger and V. Hackenbroch, 'Schwere Schäden', *Der Spiegel* 25 October 2010, p. 180 and

acknowledged that this cross-border movement takes place – a phenomenon that has been referred to as '*PID-Tourismus*' ('PGD tourism').[379, 380] The 2011 PGD regulation will presumably have reduced the number of Germans going abroad for PGD. There is, however, also a possibility that because of the great stigma that surrounded the matter for many years, some couples and individuals still prefer to go abroad for PGD.

Another issue in respect of which German laws are more restrictive than the laws of certain other European states, concerns egg cell donation. A research study published in 2010 concerning six European countries (Belgium, Czech Republic, Denmark, Slovenia, Spain and Switzerland), showed that 14.4 per cent of the cross-border 'patients' participating in the study, came from Germany. For these German patients 'legal reasons' were the predominant reasons for travelling (80.2 per cent)[381] and almost half of the German women concerned (44.6 per cent) travelled abroad to obtain egg cell donation.[382] The study also showed that most of the German patients travelled to the Czech Republic (67.2 per cent).

4.4.3. Statistics on cross-border surrogacy

The case law concerning cross-border surrogacy, as discussed in section 4.5.3 below, shows that there have been – particularly over the past five years – growing numbers of cases in which couples or individuals from Germany have gone abroad with the aim of arranging a surrogacy agreement under a more permissive jurisdiction, mainly non-EU Member States, such as India, Ukraine and the USA. While such cross-border movement is thus certainly taking place, there is too little data available to draw any conclusions in respect of the actual scale of this cross-border movement.

4.5. German abortion and AHR legislation and cross-border movement

This section discusses the implications of German law for those who go abroad for an abortion, AHR treatment or surrogacy. Contrary to the other chapters in this case study, information about foreign treatment and follow-up care after treatment abroad

A Müller-Lissner, 'Eingeschränkt erlauben; Deutsche Wissenschaftsakademien befürworten Präimplantationsdiagnostik', *Der Tagesspiegel* 19 January 2011, p. 39. See, as an illustration, also the below discussed case concerning a claim for reimbursement for preimplantation genetic diagnosis (PGD) treatment obtained in Belgium (see section 4.5.2 below). SG Berlin 23 March 2007, Az. S 86 KR 660/04.

379 *Inter alia*, E. Schwinger, 'Ende einer Farce. Der Embryonenschutz soll Leben schützen, aber er kann Menschen schaden', *Der Spiegel* 12 July 2010, p. 116; Berliner Morgenpost Online 2010, *supra* n. 378; Elger and Hackenbroch, *supra* n. 378, at p. 180 and Kunz-Schmidt 2011, *supra* n. 273, at p. 235.

380 Deutsche Akademie der Naturforscher Leopoldina et al. 2011, *supra* n. 273, at p. 23. See also Deutscher Ethikrat 2011, *supra* n. 292 at pp. 93–95.

381 F. Shenfield et al., 'Cross border reproductive care in six European countries', 25 *Human Reproduction* (2010) p. 1361.

382 *Idem*, at p. 1365.

are not discussed separately here. As far as the present author is aware, German law does not provide for any particular rules in this regard, nor have these topics been the subject of extensive debate in Germany.

4.5.1. Criminal liability for abortions and AHR treatment obtained abroad

Under GDR law, the territoriality and the personality principle applied in respect of the scope of applicability of the Criminal Code. In exceptionally serious cases and only after permission had been granted by the Public Prosecutor, could proceedings be brought for illegal abortions performed abroad.[383] Besides, special internal regulations existed concerning abortions performed on foreign women on GDR territory.[384]

In the FRG the territoriality principle applied to all offences, including that of Article 218ff Criminal Code.[385] On the basis of Article 5(9) Criminal Code, an abortion performed abroad could be prosecuted in the FRG, irrespective of the law of the country in which the abortion was performed, if the perpetrator was FRG national ('*Deutscher*') at the time of the offence and if his/her livelihood fell within the scope of the FRG law. Further, Article 7(1) Criminal Code provided that crimes committed against a FRG national in a foreign state could be prosecuted in the FRG if the abortion laws of that foreign state were similar to, or stricter than, that of the FRG. The unborn life was considered to be a 'FRG national' within the meaning of this law. As Koch has explained, this meant that all pregnant women with FRG nationality who went abroad for abortions that were not allowed for under FRG law, were just as punishable abroad under FRG law, as they would have been if the abortions had taken place on FRG territory.[386] Doctors domiciled in the FRG who performed abortions that were illegal under FRG law, were punishable irrespective of the nationality of the pregnant women or the laws of the States where the abortions were performed. Further, aiding or abetting the performance of an illegal abortion – through mediation by agencies or by the financing of travel expenses – constituted an independent crime under Article 9(2) Criminal Code.

Article 5(9) Criminal Code, as currently in force in the unified Germany, still provides that abortions undergone abroad can be prosecuted in Germany, if the victim (the unborn child) is a German citizen or if the offender (the pregnant woman or the doctor involved) at the time of the abortion is German and has her or his main livelihood in the territory of the Federal Republic of Germany.[387] Hence, the

383 Lammich 1988, *supra* n. 64, at p. 347, referring to Art. 80 of the 1968 StGB. The present author is not aware of any statistics in respect of proceedings brought on the basis of this provision.

384 As Lammich explains, prosecution was possible if the woman worked in the GDR or followed education there and if diplomatic relations existed between her country of nationality and the GDR. Lammich 1988, *supra* n. 64, at pp. 352–353.

385 Koch 1988, *supra* n. 69, at pp. 108–109.

386 Compare *Idem*, at p. 109.

387 Art. 7 I StGB and Art. 5(9) StGB. See also Laufs 2009, *supra* n. 63, Rn. 30. Art. 5(9) only sees at Art. 218 StGB, Art. 218b and 219 a and b are not covered. H. Satzger et al. (eds.), *StGB, Strafgesetzbuch*

regulation is based on the passive personality principle (protection of unborn life) that is complemented with, as well as delimited by, the active personality principle and the principle of domicile.[388] This provision was included in the Criminal Code by law of 1995, as a direct response to the cross-border movement for abortions which existed at the time.[389] Two aims were to be achieved by the provision: (1) to prevent German medical practitioners living close to the border from performing abortions abroad; and (2) to prevent pregnant German women from having abortions abroad free from punishment.[390] Some argued that this provision furthermore contributed to the preservation of the German people,[391] but this idea has been strongly rejected by others.[392]

No particular arrangements were made in respect of cross-border AHR treatment. Consequently, the general principles concerning punishability of cross-border offences and crimes under Article 7 of the German Criminal Code apply. This means, *inter alia*, that a requirement of double criminality applies and that either the offender or the victim or both of them must be German nationals. The present author is not aware of cases in which prosecutions were initiated in cross-border cases on grounds of criminal prohibitions of any of the types of AHR treatment as discussed in this chapter.[393]

4.5.2. Public funding for treatment obtained abroad

Insured persons are in principle entitled to reimbursement for medical treatment received abroad, to the extent that the treatment also qualifies for reimbursement on the basis of the German statutory health insurance (*Gesetzliche Krankenversicherung*, GKV) if it would have been received in Germany.[394] The fact that the treatment is legal in the country where it is carried out is not relevant in this regard.[395] Accordingly, in 2007 the District Court Berlin rejected a woman's claim for reimbursement for preimplantation genetic diagnosis (PGD) treatment obtained in Belgium, on

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Kommentar [StGB, Commentary to the Criminal Code] (Köln, Heymann 2009) Rn. 21 and Laufs 2009, *supra* n. 63, Rn. 21.

388 M. Böse 'StGB § 5 Auslandstaten gegen inländische Rechtsgüter' ['Criminal Code § 5 Acts committed abroad against domestic legal interests'] in: U. Kindhauser, *Strafgesetzbuch: Lehr- und Praxiskommentar* [Criminal Code: Commentary for studies and legal practice] (Baden-Baden, Nomos 2010) p. 332.

389 *Idem*, at p. 332 and Müller-Terpitz 2011, *supra* n. 227, Rn. 40.

390 See G. Werle and F. Jeßberger, 'Rn 132' ['Rn. 132'], in: H.W. Laufhütte et al., *Leipziger Kommentar, Großkommentar zum Strafgesetzbuch* [Leipziger Commentary, Commentary to the Criminal Code] (Berlin, De Gruyter Recht 2007) under reference to *BR-Drs.* 200/62, p. 111 and *BT-Drs.* V/4095, p. 5.

391 Böse 2010, *supra* 388, at p. 332, referring to 'M.K.-Ambos, Rn. 29'.

392 Werle and Jeßberger 2007, *supra* n. 390, Rn. 137.

393 See also G. von Dannecker, 'Können europäische Vorgaben ein Tätigwerden des nationalen Strafgesetzgebers auf dem Gebiet des Biostrafrechts erzwingen?' ['Can European guidelines exact action of national criminal law legislatures in the area of bio criminal law?'], in: E. Hilgendorf and S. Beck, *Biomedizinische Forschung in Europa* [Biomedical research in Europe], IUS Europaeum 49 (Baden-Baden, Nomos 2010) p. 161.

394 Art. 13(4) SGB V.

395 See BSG 9 October 2001, Az. B 1 KR 33/00 R, *NJW* 2002 p. 1517, para. 12.

the ground that no entitlement to reimbursement for such treatment existed under German law at the time.[396] Tax deduction for treatment obtained abroad, that is not legally available in Germany, may also be problematic.[397]

4.5.3. Cross-border surrogacy under German law

German couples or individuals who have made surrogacy arrangements in foreign countries may encounter considerable difficulties in establishing their legal parenthood of the child in Germany. They may also encounter difficulties in obtaining travel documents for the child. The case law on the matter is, however, diverse, and it may also depend on the specific legal documents on which the intended parents rely.

As explained above in section 4.4.8, a foreign surrogacy agreement is considered void under German law because it violates a statutory prohibition and is against public policy, within the meaning of Articles 134 and 138 of the German Civil Code.[398] The fact that surrogacy is not prohibited in the country where the surrogacy agreement is concluded has no bearing on this finding.[399] Intended parents can thus not rely directly on a foreign surrogacy agreement, but they may instead apply for recognition of a foreign judgment recognising them as the child's legal parents or on a foreign birth certificate on which they are stated as the child's legal parents.

Foreign judgments in family matters are in principle recognised under German law,[400] unless such recognition is considered manifestly incompatible with fundamental principles of German law, in particular when it is incompatible with fundamental rights.[401] In a case of 2007 a German couple that had arranged a surrogacy agreement with a Turkish family, was for this reason faced with a refusal by the German Court to enforce the judgment of a Turkish court awarding the adoption rights over the child to the German intended parents. The German Court held this Turkish judgment to be against the child's best interests, as the child had only been given birth to with the aim of handing it over to the German intended parents.[402] Another example dates from 2013,[403] when the Appeals Court of Berlin refused to recognise a judgment by a Californian judge which recognised the legal parenthood of an intended co-father in a surrogacy situation, because surrogacy was considered incommensurable with

396 SG Berlin 23 March 2007, Az. S 86 KR 660/04, p. 54.

397 In respect of treatment in the course of a surrogacy arrangement in California, see FG München 21 February 2000 (dec.), Az. 16 V 5568/99 and FG Düsseldorf 9 May 2003, Az. 18 K 7931/00 E.

398 AG Hamm 22 February 2011 (dec.), Az. XVI 192/08, para. 15.

399 *Idem*, para. 20.

400 Art. 108 Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (FamFG) [Act on the Procedure in Family Matters and in Matters of Non-contentious Jurisdiction], Act of 7 December 2008, *BGBl. I* p. 2586.

401 Art. 109(4) FamFG. See also B. Heiderhoff, 'Rechtliche Abstammung im Ausland geborener Leihmutterkinder' ['The legal descent of surrogate children born abroad'], *NJW* (2014) p. 2673 at p. 2674.

402 AG Hamm 19 March 2007 (dec.), Az. XVI 23/06. See also LG Dortmund 13 August 2007 (dec.), Az. 15 T 87/07.

403 KG 1 August 2013, Az. 1 W 413/12, *NJW* 2015 p. 479.

the German legal order, in particular with the human dignity of surrogate mother and child.[404]

By contrast, there also have been German courts that have held that recognition of a foreign judgment recognising the intended parents as legal parents of the child was required with a view to the best interests of the child. In 2013 the Administrative Court of Friedberg ruled that the best interests of the child required the recognition of such a foreign judgment, where the child would otherwise become stateless and the care for the child would not be guaranteed, because the surrogate mother and her husband refused to take the child into care.[405] There have been more cases where Administrative Courts have held the recognition of a foreign judgment granting legal parenthood to an intended father in a surrogacy situation to be compatible with the fundamental principles of German law and fundamental rights in particular.[406] Also, various academic authors have held that the rights and interests of the child had to be given priority, which in most international surrogacy cases entailed that the legal parenthood of the intended parents had to be recognised.[407]

It has generally been even more difficult for intended parents to rely directly on the birth certificate of the child as proof of its descent. In this situation German Private International Law applies, as laid down in the Second Chapter of the Introductory Act to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuche*, EGBGB). The Third Section of this Chapter concerns Family Law and its Article 19 focuses on descent. The EGBGB also contains a general public order provision, namely Article 6, which provides that '[a] provision of the law of another country shall not be applied where its application would lead to a result which is manifestly incompatible with the fundamental principles of German law.' The Article adds to this that inapplicability ensues, in particular, if the application of foreign law 'would be incompatible with civil rights."[408]

Incompatibility with German public order has been a ground for some German Courts to refuse to issue a passport to a child born to a surrogate mother in a foreign country.[409] In a case of 2012 concerning the Ukraine, the Administrative Court of Berlin ruled that the relevant provision in Ukrainian family law that provided that in

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404 The Court noted that the situation would be different if the intended father had recognised the child with the consent of the surrogate mother. See C. Benicke, 'Kollisionsrechtliche Fragen der Leihmutterschaft' ['Conflict-of-laws questions in respect of surrogacy'], *StAZ* (2013) p. 101 at p. 111.

405 AG Friedberg 1 March 2013, Az. 700 F 1142/12, para. 32, as subsequently confirmed in AG Gießen 7 November 2013, Az. 22 III 9/13. See also B. Heiderhoff, 'Der gewöhnliche Aufenthalt von Säuglingen', *IPRax* (2012) p. 523 at p. 526.

406 AG Frankfurt 7 May 2013 (dec.), Az. 464 F 10402/12 (concerning intended fathers in a registered partnership) and AG Neuss 13 May 2013 (dec.), Az. 45 F 74/13 (concerning a single father).

407 Heiderhoff 2014A, *supra* n. 401, at p. 2674 and D. Baetge, 'Art. 6 EGBGB, Öffentliche Ordnung (ordre public)', in: M. Herberger et al., *Juris Praxis Kommentar BGB*, 7th edn. (Saarbrücken, juris GmbH 2014), Rn. 112. For a different point of view see Benicke 2013, *supra* n. 404, at p. 111.

408 Translation taken from www.gesetze-im-internet.de/englisch_bgbeg/index.html, visited June 2014.

409 VG Berlin 5 September 2012 (dec.), Az. 23 L 283/12. Yet in 2009 had this Court refused to issue a visum for family reunification for a child that was born abroad with a surrogate mother. See VG Berlin 26 November 2009 (dec.), Az. VG 11 L 396.09.

surrogacy cases the genetic parents were considered as the legal parents of the child, was manifestly incompatible with the fundamental principles of German law within the meaning of Article 6 EGBGB.[410]

Secondly, once arrived in Germany, intended parents who engaged in international surrogacy may encounter difficulties in establishing legal parenthood of the child. Following Article 36(1) PStG, only children with German nationality can be registered in the Register of Births. Article 19 EGBGB provides that the descent of a child is governed by the law of the place where the child has his or her habitual residence.[411] If the child has his or her habitual residence in Germany, German law thus applies. Under German law, a child may acquire German nationality if one or both of the parents have German nationality. This often does not hold, however, for a child born to a foreign surrogate mother, because, as explained above in section 4.3.9, under German law the birth mother is recognised as the legal mother (Article 1591 BGB). If she is married, her husband is the legal father of the child (Article 1592(1) BGB), and not the intended father, even if he is the child's genetic father. This may thus stand in the way of registration of a child born to a foreign surrogate mother in the German Register of Births.[412]

There are two possible courses that can be taken, nonetheless, to establish legal parenthood in cross-border surrogacy cases. The first is recognition of paternity by the intended father ('*Anerkennung*' within the meaning of Article 1592(2) BGB). Such recognition is only possible if the surrogate mother consents and if she is unmarried.[413] If the surrogate mother is married, her husband first has to contest his paternity, before the intended father can have his paternity of the child recognised. This approach has indeed been approved of by some German Courts in international surrogacy cases. For instance, in a case of 2009 the District Court of Nürnberg held the recognition of paternity by a German man in respect of a child born to a Russian citizen not to be against German public order, even while there was a suspicion of surrogacy involved in the case.[414] Heiderhoff has nonetheless called

410 VG Berlin 5 September 2012 (dec.), Az. 23 L 283/12, para. 10. See also C. Mayer, 'Sachwidrige Differenzierungen in internationalen Leihmutterschaftsfällen' ['Improper differentiations in international surrogacy cases'], *IPRax* (2014) p. 57. In an earlier Indian case where there was a suspicion of surrogacy, this same Court had held it not for the Court to decide on the child's citizenship in the course of an application for a passport. VG Berlin 15 April 2011 (dec.), Az. 23 L 79/11.

411 This Article, furthermore, provides that in relation to each parent the descent can also be determined by the law of the country of this parent's nationality. This has not, however, been applied by any German court in an international surrogacy case. For a critical note in this respect, see M. Steinbeis, 'Mater überhaupt nicht semper certa est' ['*Mater semper certa est* does not hold at all'], blog of 2 November 2012, online available at: www.verfassungsblog.de/mater-uberhaupt-nicht-semper-certa-est/#.VGDYgxYeDCF, visited 10 November 2014.

412 OLG Stuttgart 7 February 2012 (dec.), Az. 8 W 46/12, *NJW-RR* 2012 p. 389. See also J. Rieck, 'Nachbeurkunding einer Auslandsgeburt bei Leihmutterschaft', *Zeitschrift für das gesamte Familienrecht, FamFR* 2012 p. 166. This case was referred to the BVerfG but refused by this Court (see below).

413 VG Berlin 26 November 2009 (dec.), Az. 11 L 396/09; VG Berlin 15 April 2011 (dec.), Az. 23 L 79/11 and VG Köln 13 November 2013, Az. 10 K 2043/12.

414 AG Nürnberg 14 December 2009 (dec.), Az. UR III 0264/09. For another, more recent example, see OLG Düsseldorf 26 April 2013 (dec.), Az. I-3 Wx 211/12. See also Mayer 2014, *supra* n. 410.

such '*Anerkennung*' by the intended father an unsatisfactory solution, as it does not provide sufficient legal certainty for the intended parent(s). She has furthermore pointed out that this course cannot be taken by single women or women in a civil partnership.[415]

Intended parents can also become legal parents by adopting the child. Some German courts have made very explicit that adoption is the only possible way for intended parents in international surrogacy situations to be registered as the legal parents of the child under German law.[416] Article 22 EGBGB provides that the adoption of a child is governed by the law of the country of which the adopter is a national at the time of the adoption.[417] In most cases originating from Germany, this is thus German law. Further, as Heiderhoff has explained, for adoption it is required that the child is resident/present in Germany, a requirement which may not always be easily met in international surrogacy cases.[418] Further, and importantly, any adoption order can only be granted if such adoption is considered to be in the interests of the child.

There have been German courts that refused to grant an adoption order for an intended parent in a cross-border surrogacy situation, because the foreign surrogacy agreement was void (see above).[419] There have, however, also been courts that held the granting of an adoption order in international surrogacy situations to be in the interests of the child. In a case of 2012, the Frankfurt District Court held, in this regard, that considerations aiming at the general prevention of surrogacy could not outweigh the individual interests of the child, including its right not to be discriminated against.[420]

The German case law in respect of cross-border surrogacy cases is thus somewhat ambiguous, and there are still various open questions. This is particularly so now that all relevant judgments are issued by lower or regional courts; the matter has not been decided by for example the Federal Administrative Court or the Constitutional Court. In 2012 the latter Court refused to accept a constitutional complaint about a refusal to register intended (and genetic) parents who had gotten twins after entering into a surrogacy agreement under Californian law, for lack of fundamental constitutional significance (Article 93a (2)(a) BVerfGG).[421] The Constitutional Court found that the complainants should have provided the Court with more factual and

415 Heiderhoff 2014A, *supra* n. 401, at p 2676.

416 OLG Stuttgart 7 February 2012, Az. 8 W 46/12, *NJW-RR* 2012 p. 389, para. 12.

417 Art. 23 EGBGB further provides that '[t]he necessity and the granting of the consent of the child, and of a person who is related to the child under family law, to a declaration of descent, to conferring a name, or to an adoption are additionally governed by the law of the country of which the child is a national.' However, where the best interest of the child so requires, German law is applied instead.

418 Heiderhoff 2014A, *supra* n. 401, at p. 2675. As Heiderhoff explains adoption in the country where the child was born is often impossible, because under the law of that country the intended are yet automatically recognised as parents.

419 AG Hamm 22 February 2011 (dec.), Az. XVI 192/08, paras. 20 and 26. Critical in this respect: P. Friederici, 'Unzulässigkeit der Adoption auf Grund eines Leimuttervertrags' ['Inadmissibility of adoption on the basis of a surrogacy agreement'], *FamFR* (2011) p. 551.

420 LG Frankfurt a.M. 3 August 2012 (dec.), Az. 2–09 T 51/11.

421 BVerfG 22 August 2012 (dec.), Az. 1 BvR 573/12, *NJW-RR* 2013 p.1. See Steinbeis 2012, *supra* n. 411.

legally relevant information, such as the nationality of the surrogate mother, her civil status and whether the intended father had yet recognised the child.[422]

The existing legal uncertainty and the implications of some of the less permissive rulings for the intended parents and children concerned, have been reason for some to call for a change of German family law on the matter.[423] So far, however, no action has been taken by the German legislature in this respect. The German government has, furthermore, been hesitant in respect of any regulation of the matter at European or international level.[424]

4.6. Conclusions

The German legislature has been very careful in respect of the drafting of legislation concerning abortion and AHR treatment. Fear for eugenetics has been a compelling argument for the initial absolute prohibition on Prenatal Genetic Diagnosis (PGD) and for the still existing prohibition on gender selection. The protection of human dignity that extends to the unborn has also constituted a compelling argument against such practices. At the same time, the right to free development of the personality of Article 2(1) enjoys strong protection under the German Basic Law, too. From this right, a right to self-determination for the pregnant woman follows (see section 4.1.2 above). Consequently, the German legislature has constantly had to search for a careful balance between all rights and values at stake. In respect of AHR, human dignity arguments on behalf of the (future) child have often been read into the principle of the best interests of the child. The best interests of the child have, for instance, been accepted as a justification for the prohibitions on surrogacy and egg cell donation (see 4.3.3.1 and 4.3.9 above). All in all, in making decisions in this sensitive area of law, the German legislature and courts are bound by the value system of the German Basic Law, to which great significance is attached. The general reluctance to legislate on AHR matters of the German legislature can also be explained by (uncertainty over the effects of) fast-moving medical developments. For example, long lasting uncertainty about legality of PGD followed from the fact that at the time of the drafting of the Embryo Protection Act, PGD was not yet practiced in Germany.

422 *Idem*, para. 15.

423 Heiderhoff 2014A, *supra* n. 401, at p. 2677.

424 In the Public Consultation on the EU Green Paper on the recognition of the effects of civil status records (see more elaborately Ch. 3, section 3.6.3.1) the German Federal Government put forward that in respect of the filiation of a child in the case of a surrogate mother, the EU could not require a Member State's legislature 'to place its family law at the disposal of the […] other Member States without restriction, allowing the persons concerned to have a family law relationship that exists under the law of another Member State to be registered in that State even though they have no close ties with that state's legal order.' Federal Government observations on COM (2010) 747 final, pp. 12–13, online available at www.ec.europa.eu/justice/newsroom/civil/opinion/files/110510/public_authorities/germany_minjust_en.pdf, visited June 2014.

Legislative change has often been instigated by federal courts' judgments. This goes for the amendment of the abortion regimes of 1975 (in respect of the former FRG) and 1992 (in respect of the unified Germany), as well as for the lifting of the absolute prohibition on PGD in 2011. The courts have at the same time shown deference to political and societal sensitivities and have given the legislature discretion to regulate matters, for instance in respect of reimbursement for AHR treatment.

Clearly, Germany's (fairly) restrictive laws have been – and to a limited extent still are – cause for cross-border movement in respect of abortion and AHR treatment. This was certainly the case in respect of the former FRG's abortion laws, as the statistics show. For some years in the beginning of the 1970s the number of women from the FRG having abortions abroad exceeded the number of FRG resident women who had abortions in their home country. When the German abortion laws gradually became more liberal, less cross-border movement from Germany took place. German residents, furthermore, actively sought, and seek, AHR treatment abroad. The lack of exhaustive statistics in this respect makes it impossible to draw any firm conclusions, but all reports show that restrictive German legislation, for instance on PGD, has been one of the – if not the main – reason(s) for couples from Germany searching for foreign alternatives. This has been certainly the case in respect of surrogacy, as that is outlawed under German law.

For sure, this cross-border activity has fuelled the debates at the national level, to which the German legislature has responded in various ways. In some cases the debate resulted in the relaxation of national law. This was undoubtedly the case in respect of abortion in the 1970s and in respect of the more recent phenomenon of '*PGD-Tourismus*'. At the same time, German standards have also been firmly upheld cross-border situations. The unique Criminal Code Article providing for the punishability of abortions performed abroad is a clear example, although the present author is not aware of any statistics concerning prosecution on the basis of this provision. Despite the penal law character of the ESchG, there is no equivalent to Article 5(9) Criminal Code in respect of AHR treatment and surrogacy. In regard of the latter, however, German Private International Law may discourage German residents from engaging in international surrogacy agreements. The much diversified approaches of the various German courts that have ruled in such cases render it difficult to draw firm conclusions on the state of the law in this respect. There is, however, an emerging trend visible in favour of recognising yet established parental links or enabling intended parents to establish parental links with the child, because the best interests of the child are held to require this.