

# The Constitutional Validity of Abortion Legislation: A Comparative Note

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A series of recent decisions, of the highest constitutional tribunals of Canada,<sup>1</sup> the Federal Republic of Germany,<sup>2</sup> France<sup>3</sup> and the United States of America,<sup>4</sup> casts interesting light on (I) the nature of prenatal existence, (II) the duty of the state to act affirmatively for the protection of constitutionally guaranteed rights, and (III) the relation of judicial to legislative authority. Since the subject is a controversial one, and since there is considerable diversity in the constitutional structure of these jurisdictions, some division of opinion was to be expected. The extent of the division is, however, striking.

Two of the decisions — those of the courts of West Germany and the United States of America — declare legislation relating to abortion constitutionally invalid. In both cases the invalidity flowed from violation of human rights entrenched in a written constitution. In the West German decision, a federal law removing penal sanctions from abortions performed in the first trimester of pregnancy was declared unconstitutional as violating the foetus' constitutionally protected right to life.<sup>5</sup> In the United States decision, a state law

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<sup>1</sup> *Morgentaler v. The Queen* (1975) 53 D.L.R. (3d) 161 (S.C.C.).

<sup>2</sup> Decision of the Federal Constitutional Court of February 25, 1975, *Neue Juristische Wochenschrift* (NJW) 1975, 573 (First Senate). All subsequent page references are to this report. The decision has now also been published at 39 *Entscheidungen des Bundesverfassungsgerichts* (BVerfGE) 1 (1975).

<sup>3</sup> Conseil constitutionnel, January 15, 1975, *Journal Officiel* (J.O.) January 16, 1975, 671, D. 1975.2.529, note Hamon. On judicial review in France generally, see Beardsley, *The Constitutional Council and Constitutional Liberties in France* (1972) 20 Am.J. Comp.L. 431.

<sup>4</sup> *Roe v. Wade* 410 U.S. 113, 35 L. Ed. 2d 147, 93 S.Ct. 705 (1973) (United States Supreme Court). All subsequent page references are to the first of these reports. Reference should also be made to a companion case, *Doe v. Bolton* 410 U.S. 179, 35 L. Ed. 201, 93 S.Ct. 739 (1973). For Canadian comment on the decision see Cheung, *The Abortion Decision — A Qualified Constitutional Right in the United States: Whither Canada?* (1973) 51 Can.Bar Rev. 643; Slayton, "Roe v. Wade: A Canadian Perspective" in Kremer and Synan (eds.), *Death Before Birth: Canada and the Abortion Question* (1974), 167.

<sup>5</sup> Law of June 6, 1974, *Bundesgesetzblatt* (BGB1) 1, 1297, revising Articles 218-220 of the German Criminal Code.

imposing penal sanctions on the performance of abortions at any time during pregnancy was declared unconstitutional as violating the woman's constitutionally protected right to privacy.<sup>6</sup> The two remaining decisions — the Canadian and the French — conclude in favour of the constitutional validity of abortion legislation. In the French decision, a law removing penal sanctions from abortions performed in the first ten weeks of pregnancy was declared valid, as constituting no violation of the child's constitutionally protected right to health.<sup>7</sup> In the Canadian decision, a federal law imposing penal sanctions on the performance of abortions was upheld,<sup>8</sup> as constituting no violation of any rights conferred on the woman by the *Canadian Bill of Rights*.<sup>9</sup> Two of the courts would therefore dictate to the legislature opposing solutions to the problem of abortion, and two would leave the legislature free to adopt what were in the circumstances also opposing solutions. How these conclusions were reached, and any lesson that can be drawn from them, is the subject of this note. The German decision will be presented in most detail since it is the least accessible to North American readers.

## I. The Nature of Prenatal Existence

Rather surprisingly, only one of the decisions, that of the German Federal Constitutional Court of February 25, 1975, deals expressly with this seemingly fundamental issue. Citing "well-established" biological and physiological knowledge, the Court unanimously held (two dissenting judges of the eight-member court sharing this view),<sup>10</sup> that life exists at least from the fourteenth day following fertilization, on completion of the process of implantation.<sup>11</sup> The foetus therefore falls within the terms of Article 2, para. 2 of the German Basic Law (the *Grundgesetz*, or constitution), providing that "Everyone has the right to life . . .". Moreover, the Court stated that the development begun at that point is a continual process (there being no precise limits to the different stages of development),

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<sup>6</sup> Arts.1191-1194 and 1196 of the Texas Penal Code.

<sup>7</sup> Law No.75-17 of January 17, 1975, J.O. January 18, 1975, 739, Dalloz 1975.2.48.

<sup>8</sup> Criminal Code, R.S.C. 1970, c.C-34, ss.251(1), (2) and (3).

<sup>9</sup> S.C. 1960, c.44 (see R.S.C. 1970, Appendix III).

<sup>10</sup> Dissenting judgments in decisions of the Federal Constitutional Court are now authorized by Art.30, para.2, of the Law concerning the Federal Constitutional Court (*Gesetz über das Bundesverfassungsgericht*, BVerfGG) of March 12, 1951, since the passage of the Law of December 21, 1970, BGBI 1, 1765 (commented on by Rupprecht, NJW 1971, 169). For the concurrence of the dissenting judges on this point, see *supra*, f.n.2, 582.

<sup>11</sup> *Supra*, f.n.2, 574.

which continues until well after birth, the newborn child having no immediate sense of personal existence.<sup>12</sup> The existence of such life, and the continual process of its development until a point after birth, means that the protection of Article 2, para. 2 cannot be restricted to persons born, or even to persons born *and* the foetus during the third trimester, when it has acquired the capacity to survive outside the womb.<sup>13</sup> If any life short of that of a "complete" person is to be protected, it must be the totality of the developing life. Continuing its interpretation of Article 2, para. 2, the Court rejected the argument that use of the word "Everyone" implied the existence of a person born, stating that the protection of human existence from state or governmental interference would be incomplete if it did not apply as well to unborn life.<sup>14</sup> Article 2, para. 2 therefore operates to protect life developing within the mother's body as an independent legal interest (*selbständiges Rechtsgut*), though it was not necessary to determine whether the foetus is itself a subject of rights or, lacking legal capacity, is only the object of protection by objective norms of the constitution.<sup>15</sup>

Essential to this analysis is the view that the German constitution views human life in terms of its biological minimum, imposing no social or anthropological dimension as a necessary part of its definition. Having accepted this point of departure, the *Bundesverfassungsgericht* then proceeded to examine the manner of protection of such a right to life, and its reconciliation with other constitutionally guaranteed rights.<sup>16</sup>

In contrast to this reasoning, neither the French decision nor the United States decision — the first permitting and the second requiring more permissive abortion legislation — are based on an explicit denial of the existence of life before birth. The earliest decision, that of the United States Supreme Court, rendered in 1973, expressly states that it is unnecessary to deal with "the difficult question of when life begins".<sup>17</sup> The actual litigation before the Court was then resolved by deciding first of all that the woman's right to privacy, flowing from the Due Process Clause of the Fourteenth Amendment to the United States constitution, was broad enough to include the decision to abort.<sup>18</sup> Secondly, the Court held that the

<sup>12</sup> *Ibid.*, 574, 575.

<sup>13</sup> *Ibid.*, 575.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> See the discussion, *infra*, in Parts II and III.

<sup>17</sup> *Roe v. Wade*, *supra*, f.n.4, 159.

<sup>18</sup> *Ibid.*, 153.

appellee (or respondent — representing the state whose legislation was impugned) had failed to meet the ensuing burden resting upon him to show a compelling state interest in protecting the foetus which would justify the imposition of criminal sanctions on abortions performed at any time during the pregnancy.<sup>19</sup> The appellee did not succeed in this because of his failure to bring the foetus within the definition of the word "person", it being the life of a "person" which is guaranteed by the Fourteenth Amendment. In reaching this conclusion the Court relied on other "postnatal" uses of the word "person" in the constitution (in matters such as qualifications for office, migration and importation),<sup>20</sup> decisions of inferior tribunals on the question of abortion laws,<sup>21</sup> and private law cases recognizing rights of the unborn only on condition of live, and viable, birth.<sup>22</sup> In short, in the United States, regardless of whether there is, by whatever other criteria, life before birth, there is no *constitutionally* recognized life before birth.<sup>23</sup>

The same general attitude appears to have been taken by the French *Conseil Constitutionnel* in its concise judgment of January 15, 1975.<sup>24</sup> After first declaring itself incompetent to adjudicate upon an argument based on the provisions of the European Convention on Human Rights,<sup>25</sup> the *Conseil* affirmed the compatibility of the

<sup>19</sup> *Ibid.*, 156-162.

<sup>20</sup> *Ibid.*, 157.

<sup>21</sup> *Ibid.*, 158.

<sup>22</sup> *Ibid.*, 161, 162.

<sup>23</sup> This conclusion did not, however, lead the Court to authorize abortion on demand at any time during the pregnancy. The Court did recognize a "compelling" state interest in preserving the mother's health which would permit regulation of the abortion procedure in the period "subsequent to approximately the end of the first trimester", and a further "compelling" state interest in "the potentiality of human life" which would permit the prohibition of abortion during the stage subsequent to viability; *ibid.*, 163, 164. The latter is so "because the foetus *then* presumably has the capability of meaningful life outside the mother's womb" (emphasis added). As has been seen, this distinction was rejected by the German Federal Constitutional Court, on the basis that meaningful life, in a social or anthropological sense, begins only at some point well after birth, and if it is therefore only a question of potentially meaningful life, this is constantly present back to the completion of implantation. As to the notion of viability, it should perhaps be noted that physicians in the Soviet Union have recently claimed to have kept a foetus "alive" for a period of three days in an artificial environment, and plan to continue their research; *Le Devoir*, September 18, 1974, 7.

<sup>24</sup> *Supra*, f.n.3.

<sup>25</sup> The *Conseil* considered that the control of the conformity of a law with a binding treaty could not be accomplished in the same proceedings as the control of the constitutionality of a law, the two controls being subject to different conditions; *ibid.*

more permissive abortion law with the rights of individual liberty (here of the woman and the doctor) guaranteed by the 1789 Declaration of the Rights of Man and the Citizen. The *Conseil* then dealt with the main constitutional argument advanced in opposition to the abortion law, the guarantee of protection of health accorded to the infant by the constitution of 1946, incorporated by reference into the constitution of 1958. Though some evidence was advanced that this clause was intended by its proposer in 1946 to include the life and health of the foetus,<sup>26</sup> the *Conseil* concluded with the simple affirmation that none of the provisions of the questioned law in any way violated the guarantee.<sup>27</sup> By inference, the child whose health is protected by the constitution is the child who has been born.<sup>28</sup>

Finally, and for specific reasons, the least informative judgment in this regard is that of the Supreme Court of Canada in *Morgentaler v. The Queen*.<sup>29</sup> The foetus having been expressly made the object of protection through the criminal law by Parliament, it was inevitable that the attention of the Court was directed to any rights of the woman which would impede the legislative will. Finding none, for reasons to be subsequently noted, the nature of the foetus, as the object of legislative protection, required no further scrutiny (and the case turned in fact on the availability of specific criminal law defences to the charge of abortion laid against the defendant).<sup>30</sup>

<sup>26</sup> See the comments of M. J. Foyer, *Le Monde*, December 25, 1975, 8.

<sup>27</sup> The text of the "considérant" is as follows: "Considérant qu'aucune des dérogations prévues par cette loi n'est, en l'état, contraire à l'un des principes fondamentaux reconnus par les lois de la République ni ne méconnait le principe énoncé dans le préambule de la Constitution du 27 octobre 1946, selon lequel la nation garantit à l'enfant la protection de la santé, non plus qu'aucune des autres dispositions ayant valeur constitutionnelle édictées par le même texte." *Supra*, f.n.3.

<sup>28</sup> Curiously, the text of an amendment added to the law in the course of its legislation appears to recognize the existence of life from the point of conception. Article 1: "La loi garantit le respect de tout être humain dès le commencement de la vie. Il ne saurait être porté atteinte à ce principe qu'en cas de nécessité et selon les conditions définies par la présente loi." This article is cited in one of the *considérants* of the *Conseil*, suggesting the further ground of decision that even if it were the case that the foetus was recognized by the constitution, other values may be operative in some cases to permit its destruction. See the discussion *infra*, Part II.

<sup>29</sup> *Supra*, f.n.1.

<sup>30</sup> The existence of defences of necessity and reasonable care in the performance of a surgical operation (as set out in the Criminal Code, *supra*, f.n.8, s.45), was rejected by the majority of the Court, Laskin C.J.C., Judson and Spence JJ. dissenting, and the appeal from the decision of the Quebec Court of Appeal setting aside a jury verdict of not guilty and entering a verdict of guilty, was dismissed.

Such an enquiry would have arisen, in the context of the *Morgen-taler* affair, only if the Court had decided that the *Canadian Bill of Rights* did confer certain rights on the woman, in which case a balancing of her rights with any rights of the foetus might have become appropriate. In the future, the nature of prenatal life might be put in issue in Canada should a change in Canadian legislative policy towards greater freedom of abortion occur (though a challenge to existing law would also be theoretically possible). In the terminology of section 1 of the *Canadian Bill of Rights*, does the foetus enjoy "the right of the individual to life"?<sup>31</sup>

## II. The Protection of Constitutionally Guaranteed Rights

Since the French<sup>32</sup> and Canadian tribunals rejected the existence of constitutional barriers to legislative solutions, these decisions avoid the thorny problem of how best to ensure protection of rights recognized by a constitutional document. Nor is the problem fully developed in the decision of the United States Supreme Court. Since the woman's right to privacy there emerged as the only constitutionally protected individual right, its protection was assured by the well-recognized technique of striking down state laws which would constitute a violation of it. Protection of the foetus, a more difficult task, was not imposed by the constitution. The only limitation of the woman's right to terminate pregnancy was found in the interests of the state to protect maternal health (after the first trimester) and potential life (after the second trimester). But since it is a *state* interest, no obligation is imposed upon the state to ensure its protection, and it is therefore the case only that the state *may* (not shall) prohibit abortion in the last trimester, and may not even do that if the abortion is necessary to protect the life or health of the mother during that period.<sup>33</sup>

In contrast, the recognition by the German Federal Constitutional Court of the foetus' right to life led necessarily to a further decision as to how that right is to be protected, a decision of far-reaching constitutional significance. Since the protection required is against the acts of private persons, it was first necessary to decide whether the individual rights protected by the constitution have as their

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<sup>31</sup> Presumably, however, the Bill would have the same force with respect to the foetus as it does with respect to the woman. See the discussion *infra*, Part III.

<sup>32</sup> Cf., however, *supra*, f.n.28.

<sup>33</sup> *Supra*, f.n.4, 163, 164.

corollary not only the duty of the state itself not to interfere with those rights (a principle well recognized), but also the duty of the state to act *affirmatively* to protect against the acts of other parties, in effect *limiting* the freedom of private citizens because of the terms of the constitution. This latter conclusion the Court was willing to accept, affirming that the protective duty of the state becomes more intense according to the worth of the individual right in question and that human life is of the highest constitutional value.<sup>34</sup> There has been support for this position in German doctrinal writing,<sup>35</sup> but the Court itself was divided, two members stating their unwillingness to interpret a constitutional document designed essentially to ensure freedom in the exercise of basic human rights in such a way as to limit individual human activity.<sup>36</sup>

Having concluded in favour of necessary protective measures by the state, the Court had then to decide whether the protection must, or even can, be provided by criminal sanctions, or whether alternate measures are not permissible or even preferable. This question was particularly delicate in the circumstances because the German law had not simply removed penal sanctions but had provided for an elaborate system of counselling and maternal assistance, apparently based on the Scandinavian model,<sup>37</sup> which, it was urged, would be *more* effective than penal sanctions in preventing unjustifiable abortions. Here again, the Court divided.

The majority, and it is not possible to follow the detail of the debate due to its length, formulated their position as follows: Whether the criminal law must be resorted to is dependent on the worth of the interest to be protected, the existence of competing interests having constitutional significance, and the role and practical effect of criminal sanctions. Human life, as the Court had previously noted, is of the highest constitutional value, and though the woman's right to the free development of her personality also receives constitutional protection (in Article 2, para.1 of the Basic Law), it cannot be given priority over the right to life. This is so largely because the decision to abort results in the total destruction of life, while child-bearing and birth is prejudicial to, but not totally destructive of, personal development.<sup>38</sup> Moreover, the Court considered that criminal

<sup>34</sup> *Supra*, f.n.2, 575.

<sup>35</sup> See Lang-Hinrichsen, *Zeitschrift für das gesamte Familienrecht* (FamRZ) 1974, 500, 501 and the authorities cited.

<sup>36</sup> *Supra*, f.n.2, 583.

<sup>37</sup> See the description of Professor Cheung in his note, *supra*, f.n.4, 657.

<sup>38</sup> *Supra*, f.n.2, 576.

sanctions are necessary to ensure that priority is given to the right to life, since the totality of other measures proposed would still leave a gap in the protection of unborn life<sup>39</sup> and the evidence available (including foreign models) did not exclude the possibility that the rate of abortion would thereby increase.<sup>40</sup> Nor should the maintenance of criminal sanctions be put into question by the high (though imprecise) rate of illegal abortions under the previous legislation. Though the Court considered the figures disturbing, they should not obscure the generally preventive effect of criminal norms, and once penal sanctions were removed any distinction between abortions being "tolerated" as opposed to "authorized" would be without effect.<sup>41</sup> Moreover, the statistics were high because the previous legislation did not sufficiently discriminate between different grounds of abortion, and provided for penalties in almost all cases, with the result that many justifiable abortions were executed outside the law, and the authorities were reluctant to prosecute vigorously even unjustifiable cases.<sup>42</sup> The Court concluded that the old law should therefore be suspended, since it also provided inadequate protection, and replaced with intermediary norms formulated by the Court, until new legislation could be prepared.<sup>43</sup> The new rules should recognize that childbearing and birth are unreasonable demands to make of the woman in particular circumstances, and this more tolerant attitude should also have the effect of lowering the rate of illegal abortions.

Here the Court formulated four situations in which non-penal protection of the foetus — through such measures as counselling and maternal aid — would be constitutionally sufficient. In these specific cases the protection of developing life is outweighed by circumstances which give particular importance to the woman's right of personal development.<sup>44</sup> Such cases are those in which 1) there is a danger to the life of the mother, or a danger of serious prejudice to her health, 2) the child is suffering from an incurable physical condition, 3) the conception is the result of a criminal act, and 4) grave hardship would result from childbearing and birth. This last ground of justification, which would allow consideration of social circumstances, must, however, be so defined by the legislator as to allow the

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<sup>39</sup> *Ibid.*, 579.

<sup>40</sup> *Ibid.*, 580.

<sup>41</sup> *Ibid.*, 579.

<sup>42</sup> *Ibid.*, 578.

<sup>43</sup> *Ibid.*, 582. This procedure is authorized by Art.35 of the BVerfGG, *supra*, f.n.10.

<sup>44</sup> *Ibid.*, 577.

recognition only of grave social necessity.<sup>45</sup> In all other cases abortion would remain the object of penal sanction.

The two dissenting judges of the Federal Constitutional Court, while relying heavily on more abstract arguments relating to the nature of the constitution<sup>46</sup> and the limits of judicial review,<sup>47</sup> contested the necessity of criminal sanctions, affirming that the alternative measures of protection provided by the law would eventually provide greater protection, and would avoid the corruption of the legal order caused by massive disobedience. Specific exceptions to a principle of illegality were also seen as incapable of precise definition.<sup>48</sup>

In the result, the constitution of the Federal Republic was seen by the majority of the Court as necessarily imposing criminal sanctions on certain types of human conduct, where no other means of protection of constitutionally guaranteed rights could be seen as adequate. The state *must* prohibit abortion, except in specifically defined exceptional cases, and presumably would therefore be constitutionally obliged to maintain criminal sanctions in other, parallel situations as well. The constitution (and hence its interpreters) emerges not only as a specific check on governmental interference with individual rights and liberties, but as a *mandatory* source of specific forms of legislative activity.

### III. Judicial and Legislative Authority

Perhaps the most important feature of all of these decisions was the willingness of the Courts of the Federal Republic of Germany and of the United States of America to clothe with constitutional protection — and hence to remove from the legislative arena<sup>49</sup> — interests which are nowhere clearly designated by the constitutions of those countries. The two decisions are still more striking in that they reach very different results from a process of interpreting constitutional provisions which do not appear, on their face, to be particularly dissimilar. It is therefore not surprising that criticism has been voiced in both countries as to the role assumed by each Court, and such criticism appears still more significant when the

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<sup>45</sup> *Ibid.*

<sup>46</sup> See text, *supra*, at f.n.35.

<sup>47</sup> See text, *infra*, at f.n.52.

<sup>48</sup> *Supra*, f.n.2, 587.

<sup>49</sup> It should perhaps be noted that neither court is bound by its own decisions.

decisions are compared with one another. In the United States, a distinguished academic commentator has thus concluded that:

What is frightening about *Roe* is that this super-protected right [of the woman to terminate pregnancy] is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the Nation's governmental structure . . . It is . . . a very bad decision . . . because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be.<sup>50</sup>

In the Federal Republic of West Germany perhaps the most telling criticism has been that of the dissenting judgment of the Federal Constitutional Court itself. Pointing out that the Basic Law had been formulated after great controversy on the subject of abortion during the period of the Weimar Republic (when current methods of birth control were lacking), the two dissenting judges conclude that the matter was *deliberately* omitted from the constitution in order not to restrict legislative attempts at solution.<sup>51</sup> Stressing that the effect of the majority judgment is to limit individual freedom through criminal sanctions, and posing the question of whether the Court must in the future assess all criminal law rules to determine whether the legislature has *sufficiently* penalized, the dissent states openly that the notion of judicial review in Germany will clearly be endangered in the long term if the Federal Constitutional Court does not resist the temptation to usurp legislative functions.<sup>52</sup>

The reticence of the French and Canadian Courts to strike down abortion legislation should therefore best be seen not as reflecting any particular attitude towards abortion, but rather the view that it is not the role of the courts to intervene in whatever direction, in the absence of more precise constitutional imperatives. The attitude of the Supreme Court of Canada is particularly comprehensible, given the ambiguity of the *Canadian Bill of Rights* with respect to a woman's right of privacy or a foetus' right to life, and particularly given the nature of the Bill as a simple statutory instrument, not part of an entrenched constitution. This latter consideration was expressly stated by Laskin C.J.C., in expressing the opinion of the entire Court, to be "... relevant . . . in determining how far the

<sup>50</sup> Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade* (1973) 82 Yale L.J. 920, 935, 936, 947. Similar sentiments were expressed in the dissenting judgments of Justices White and Rehnquist, *supra*, f.n.4, 174, 221, 222. Professor Ely's criticism is made in spite of the fact that he "would vote for a statute very much like the one the Court ends up drafting" (at 926).

<sup>51</sup> *Supra*, f.n.2, 583, 584.

<sup>52</sup> *Ibid.*, 582.

language of the *Canadian Bill of Rights* should be taken in assessing the quality of federal enactments which are challenged under s.1(a).<sup>53</sup> The Chief Justice concluded by stating that "[t]here is as much a temptation here as there is on the question of *ultra vires* to consider the wisdom of the legislation, and I think it is our duty to resist it in the former connection as in the latter".<sup>54</sup> The Supreme Court also refused to regard the provisions of the Bill of Rights as requiring a review of the question of whether therapeutic abortions (permitted by the Canadian Criminal Code)<sup>55</sup> were equally available in areas of the country with different population densities and hospital resources. This would constitute, again in the words of Chief Justice Laskin, "... a reach for equality by judicially unmanageable standards ...".<sup>56</sup> The lack of constitutional primacy of the source of the reviewing power is therefore an important element in determining the limits of judicial review.

### **Conclusion**

Framers of constitutions have rarely, if ever, declared that the right of the foetus to life, or the right of the woman to terminate pregnancy, forms part of the constitutional structure of the state. Perhaps the issue has been seen as peripheral, or perhaps there has never been the consensus required to justify the enshrining of either principle. For whatever reason, such restraint in drafting is of constitutional significance. In the absence of any such textual base, the tribunal prepared to choose between these competing interests in a manner contrary to the expressed will of the legislature is surely acting in the outer reaches of permissible judicial activity. There can be little doubt in Canada that the Bill of Rights is not an adequate source of any such judicial authority.

What then can the decisions tell us as to the appropriate legislative response to the problem of abortion? This writer is of the view, perhaps because it is the only decision in which the underlying merits of all the competing claims are fully examined, that there is very considerable merit in the general position advanced by the German Federal Constitutional Court. As the Court indicated, foetal life is necessary to, and shares major characteristics of, complete human life, one of the highest values, if not the highest value, of the

<sup>53</sup> *Supra*, f.n.1, 173.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Supra*, f.n.8, s.251(4).

<sup>56</sup> *Supra*, f.n.1, 175.

legal order. Existence which satisfies such a biological definition of human life should, it is felt, therefore represent an interest worthy of some protection by the legal system. Moreover, attempts to distinguish different stages of embryonic life appear both imprecise and illogical,<sup>57</sup> and are therefore unsatisfactory as criteria for identifying whether the protection of the foetus or the woman should predominate.

However, since embryonic life can at no point be equated with the existence of complete human life, it is not necessarily of the same sanctity. The fundamental question is therefore one of identifying those situations in which the interests of the woman are superior, justifying withdrawal of protection from the foetus. The Canadian Criminal Code presently identifies only danger to the life or health of the mother, when ascertained prior to abortion by a committee of physicians, as justifying termination of pregnancy.<sup>58</sup> To these justifications others could be added, as has been done by the Federal Constitutional Court, in a conscious process of evaluation. The essential feature in this process is that specific, objectively ascertainable grounds are found which give supremacy to the woman's claim to the unrestricted development of her life and personality.

If one accepts that the foetus is worthy of legal protection, its continued existence should not depend, however, on the decision of an individual human being whose interests are in conflict with those of the developing life. Rather, an objective balance must be struck between these conflicting interests by the legislature, delineating clearly those circumstances in which the interests of the woman have paramourcy over those of the foetus. At the same time the legislature should ensure the provision of counselling services and maternal assistance, and the removal of inequalities in access to abortion facilities in those cases where the woman's interests prevail.

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<sup>57</sup> See text, *supra*, at f.n.12; see also f.n.23.

<sup>58</sup> *Supra*, f.n.8, s.251(4).