Part I

FRAMEWORK

I.1 Introduction 3
I.2 System and Standard of Social Services 4
I.3 The Position of Women in Society 5
I.4 Assessment and Significance of Family Planning and Termination of Pregnancy 7
I.5 Remarks on Historical Developments 18
I.1 INTRODUCTION

The countries included in this survey differ, in part considerably, with respect to the size and composition of their populations, social systems, cultural and religious traditions, general economic conditions, systems and standards of medical care and social services, the societal roles of women, the legal systems, and other key values. Several show considerable heterogeneity within their own borders, such as, for instance, the USA with its extremely disparate ethnic demographics and the multi-ethnic (former) Soviet Union. Both countries show that termination laws need not be uniform nationwide, but rather that each administrative subdivision of a country may pass its own, locally applicable termination laws.¹

The various country reports endeavor to provide preliminary insights into the general conditions in the country under study in order to orient the reader to the current state of affairs. A systematic comparison of the data conveyed in the reports will be not be undertaken here; it would be more cumbersome than enlightening. Nevertheless, several aspects that appear significant with respect to the termination of pregnancy will be highlighted briefly, namely, the system and standard of social services (I.2), the position of women in society (I.3), as well as, most importantly, various aspects of the societal assessment and practical significance of family planning with special consideration paid to the relative importance of termination (I.4). Finally, some remarks concerning the historical development of the laws concerning the termination of pregnancy follow (I.5).

¹ This is valid regardless of whether the matter is understood as (primarily) falling under criminal or health law; see infra II.1.
I.2 SYSTEM AND STANDARD OF SOCIAL SERVICES

The foremost issue in the implementation of this study was to determine the general social conditions under which decisions for or against the termination of pregnancy are made. Both the law of termination and its practice exist – so we assume – not only in the context of specific ethically-based values and traditions but also, and probably not less importantly, in relation to the respective ‘social climate’. Thus, one goal of the study was to identify sociopolitical factors that can contribute significantly in individual cases to the acceptance or rejection of a pregnancy and that, more generally, also contribute to the societal assessment of the decision for or against a child. Of course, this does not call into question the fact that, in many cases, women with problem pregnancies may well be unresponsive to any and all offers of assistance from third parties; in any event, it was not our intention to postulate strict causal relationships between specific social factors and specific manifestations of termination. Hence, a relationship between the organization of specific social services and the frequency of termination will only seldom be established in the country reports.

It should give one pause when – as for example in the Federal Republic of Germany – in spite of the availability of numerous financial subsidies for the benefit of families, the society is accused of being ‘child-unfriendly’; this situation clearly indicates that the relationship of the older to the younger generation is not determined by monetary aspects alone. It also becomes clear that adequate social support is not merely a question of providing financial benefits: obviously, the social system that reflects, as a whole, the concerns of families, above all families with children, be a top priority. In this vein, the importance of sufficient numbers of part-time employment opportunities, a school system that provides after school care, as well as claims for unpaid leave in the interest of the family cannot be underestimated.

However, the following should also be taken into account: the less important children are for the financial well being (in the broader sense) of the family2 – for instance as a (supplementary) form of retirement planning – the more (potential) parents may become conscious of children as a ‘cost factor’. In other words, couples who are considering starting a family may be virtually forced to compare the career and earning opportunities they would have as parents with the opportunities they would have were they to remain childless.

2 On the changing functions of the family, see also infra I.4.2.
I.3 THE POSITION OF WOMEN IN SOCIETY

The countries represented in this study differ already with respect to the position of women under constitutional law. Even in western Europe, express equality of men and women cannot be taken for granted, although the lack of a corresponding regulation alone does not necessarily result in a general legal or actual discrimination against women. On the other hand, the Irish constitution, for example, ascribes to women the traditional role of mother and housewife; thus, reports from this country about discrimination against women in the workplace are not surprising. Although an anti-discrimination act has been passed in the meantime, discrimination evidently continues – and on a not insignificant scale.

In the final analysis, it can be shown that, on a legal level, the equality of men and women has, throughout the course of the 20th century, become the rule internationally. Even where equality has not yet been (fully) realized (as for example in Islamic states), a legislative trend to strengthen women’s rights is often apparent. Nevertheless, the ability of legislated equality to crack multiple traditional behavioral patterns is limited. Indeed, the effects – occasionally drastic – of some of these patterns continue to be felt. One example may be seen in the killing of newborn girls, a practice in the People’s Republic of China that – abetted by rigid policies that favor limiting the numbers of births – appears to be an undeniable part of today’s reality.

Above all, the social situation of women who are mothers is apparently highly problematic in many countries. Whereas to the extent that the practical implementation of gender equality for single women or married women without children is largely successful in the working world, the assumption of the role of mother frequently remains linked with traditional role-expectations. Thus, even more than marriage, starting a family marks a more or less far-reaching turning point, especially in the social life of a woman, and her willingness to accept this change can no longer be seen as a given. This can certainly play a role, especially in the decision to have a first child or to terminate a pregnancy.

In conclusion, the discussion concerning the assessment of the termination of pregnancy recognizes two positions that, structurally, are diametrically opposed:

3 Noteworthy in this context is the fact that in the USA it is married – not single – women who have conquered the job market.
The first position focuses on the embryo/fetus. Supporters of this position are concerned solely with the question of the exceptional conditions under which an interference with or a thwarting of the embryo’s chances of continuing to live, especially after birth, can be justified.

The second position concentrates primarily on the role of the pregnant woman. Proponents of this approach give priority to the question of what could warrant interfering in her freedoms of choice and action, requiring her to perform the feat of carrying a pregnancy to term and, through birth, giving a child the ‘gift of life’ (sic!) – not to mention the child’s care and upbringing after birth, responsibilities whose delegation is often only theoretically possible.

Ultimately, the termination controversy can be seen as a dispute between these two perspectives. For the position mentioned first, it stands to reason that the self-determination of the pregnant woman should be restricted from the beginning by means of ‘indications’ – however they may be designed; thus, the freedom of the pregnant woman to choose is viewed as an exception requiring justification. Under the second perspective, it is the prohibition of termination that requires legitimation rather than the prerequisites for permitting it. An ‘emancipated’ understanding of social roles favors the second point of view: the more the role of women in society is seen (also) in terms of functions other than that of housewife and mother alone, the harder it is to take for granted that the mere fact of an incipient pregnancy can constitute a legitimate basis for expecting the woman to agree to the aforementioned performance, i.e., carrying the pregnancy to term and giving birth.

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4 This is clearly the basis for the US Supreme Court’s position, but it is also found in the minority opinion of the second decision of the German Federal Constitutional Court (see BVerfGE 88, 203-366 at pp. 338 ff.).
I.4 ASSESSMENT AND SIGNIFICANCE OF FAMILY PLANNING AND TERMINATION OF PREGNANCY

4.1 Preliminary remarks

Presumably contributing to the fundamental framework surrounding termination and its legal regulation are the attitudes of the society under study towards termination, especially as seen in relation to other birth control measures. Of this complex of issues, the sociopolitical and individual dimensions of family planning will be addressed first (I.4.2). After a few remarks on the diversity of state measures in the area of family planning (I.4.3), the significance of terminations in relation to other methods of birth control will be discussed (I.4.4). The approaches taken by the major religions to contraception and termination of pregnancy as an aspect independent of national boundaries (I.4.5) as well as the attitude of the medical community (I.4.6) will be covered in somewhat more detail.

4.2 Sociopolitical and individual dimensions of family planning

As far as the social significance and the proliferation of family planning are concerned, many country reports describe a historic process of change: whereas previously the few initiatives dedicated to the idea of 'preventative' birth control\(^5\) were almost always subject to religious reservations and political impediments, they experienced an undreamt-of, virtually uninterrupted upswing after the pill was introduced to a nearly worldwide market at the beginning of the 1960s.

The social causes for this upturn can only be hinted at here. In addition to factors such as the 'emancipation' of women\(^6\) the 'sexual revolution',\(^7\) and the

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\(^5\) The first relevant activities reported in European countries date, for instance, in the Netherlands to the year 1881, in France to the end of the 19th century and in Great Britain to the year 1921. It is noteworthy that initiatives in Egypt date back to the year 1937.

\(^6\) See supra 1.3.

\(^7\) This catchword encompasses two phenomena: the one (more superficial) being a considerable increase in sexual relationships due to the freedom from worries about and consequences of unwanted pregnancy; the other (deeper) being a changed perception of human sexuality as having a value independent of reproduction. The one does not, of course, exclude the other.
‘changed functions of the family’, connections with medical advancements should not be taken too lightly: increased life expectancy, for example, works indirectly as a factor that should not be underestimated in support of the family planning concept. It stands to reason, but is also noteworthy, that the response to a scarcity of resources – how many people can a social system feed? – tends to be to reduce the number of births rather than to engage in a ‘selection’ of those already born.\(^8\)

The long-term consequences of these processes on the composition and age distribution of society appear frequently not to have been noticed or in any case not to have been recognized in their full significance. In interplay with other far-reaching social changes such as have taken place in many countries in recent decades – in particular: dissolution of the extended family, entry of women into the work force – the social function of providing for the next generation has changed; in addition to its traditional, intangible meaning, it has attained – and dictates – an increasingly economic character, a factor whose proper price is apparently not easy to assess and which is made up of a number of mutually complementary contributions.

According to the structure of the society, individual factors that promote or discourage a restriction on the number of children one has are of varying importance. Having a large number of children is viewed in many countries as for example in Egypt and Ghana as well as in certain cultural circles with great respect – the mother especially is highly esteemed; contributions from the children may be needed to help feed the family and in some cases they serve as the ‘best social security’, that is to say, as an important element of the provision for old age. Family planning under such auspices can only mean the optimization of the interval between births in view of the health of the family, especially the mother; however, it cannot have as its primary goal the limitation of the total number of children born to one family. But among other ‘more modern’ portents, motivational factors that work against contraception can also be influential: insofar as sexual relationships with members of the opposite sex face moral objections, these objections must also apply to those measures whose goal is to avoid the unwanted consequences of such relationships; whoever violates the socially established maxim of chastity makes him or herself even more vulnerable to moral attack if he or she also endeavors to control the consequences of such actions, as in so doing it can be demonstrated that the person is acting on the basis of long-term reflection and not out of situational weakness.\(^9\)

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\(^8\) These connections are clearly addressed, for instance, in Country Report Turkey (B/K II pp. 835-896 at p. 846).

\(^9\) Instructive in this respect is the dilemma of teenagers in the USA.
Such considerations may occasionally even affect the assessment of the termination of pregnancy: the presumably ‘isolated incident of sin’, i.e., the undergoing of a necessary termination, could be viewed as the lesser evil in comparison to a (more reliable and) permanently manifested infringement of standards, such as the daily activity of taking the pill.

Finally, several special ‘collective’ issues must be mentioned from which fodder for the rejection of the concept of birth control can be drawn: so, for instance, when – as in Australia with regard to the aborigines – a population group faces the danger of extinction or when – as contended with regard to the People’s Republic of China in the 1950s – an entire nation faces an undesirable reduction in population; when family planning activities – supported not infrequently by industrial nations, but also heavily promoted by the United Nations – are understood as an expression of a new form of colonialism; or when concern about the influences of multinational pharmaceutical companies is expressed.

4.3 Governmental measures in the area of family planning

The country reports convey an impressive picture of the variety of measures with which the attempt is made in many – above all non-European – countries to influence the family planning decisions of individual citizens or to create the conditions necessary to convert such decisions into action. The relevant activities are not infrequently coordinated by state-sponsored family planning programs and supported by the authority of leading statesmen.

In the sense of a general categorization, these diverse measures differ in two respects, one being whether they tend more to promote or to discourage births prevention of births, the other being whether they are designed to achieve their stated goals directly or indirectly.

4.4 The significance of the termination of pregnancy in relation to other methods of birth control

Even if a few countries had already liberalized their legislation on the termination of pregnancy before the pill was introduced, a milestone in the spread of ‘reliable’ contraception, the overwhelming majority of such reforms did not actually take place until after its introduction. Thus, the triumphal procession of family planning through contraception proved to be the engine for fundamental reforms in termination law. Nevertheless, the opinion that it is better to use contraception than it is to abort is held almost universally – even among those who actively advocate the decriminalization of termination: termination of pregnancy is widely understood, independent of its type of legal regulation, as an
'ultima ratio', or at least it is not considered to be 'primarily a means of birth control'.\textsuperscript{10} In family planning programs run or supported by the state, the goal of reducing the number of terminations is expressly pursued.

Empirical data on the attitude of the population towards the termination of pregnancy are available from a number of countries; of course, this information can hardly be used for comparative purposes. The data also indicate that even in places where a majority of the population supports a (more) permissive legal position, the termination of pregnancy is not viewed as just any method of birth control. The characterization of supporters of permissive regulation as 'abortion advocates'\textsuperscript{11} is hence at the very least misleading.

Thus, the concern that the use of contraception will decidedly fall off when terminations are (widely) permitted is not confirmed by the findings of our project. Even for a country with very far reaching 'license' for termination such as the USA, the available data do not permit conclusive statements to the effect that this license has negatively influenced the willingness to use effective contraception on an appreciable scale; in Tunisia a clear increase in the use of contraceptive methods along with a concurrent decline in the number of terminations has been ascertained. However, in places where a 'family planning mentality' has gained acceptance, the outlook that (avoidable or unavoidable) lapses in planning can be 'corrected' through terminations also tends to be favored.

4.5 Assessment of the termination of pregnancy from a religious perspective

In the selection of countries for this project, the world’s major religions were also taken into account. A cross-sectional analysis establishes that none of them views unborn life completely as a mere 'quantité négligeable'. Conversely – apart from the strict Catholic viewpoint – no position grants unborn life absolute preeminence over all the woman’s interests, no matter how significant. On the contrary – to put it in legal terminology – the question of ethical-religious acceptance of the termination of pregnancy is ordinarily understood as a balancing problem. Because it is seen as a significant issue of protecting life, po-

\textsuperscript{10} The 'in principle yes' to termination in the Netherlands must be interpreted in light of the empirically proven statement that there is no other country in which the use of dependable contraceptives is so widespread as in the Netherlands.

\textsuperscript{11} See, e.g., H. BAUM, \textit{Bannkreise des Tötns. Zur Kritik des utilitaristischen Standpunkts zum Schwangerschaftsabbruch} (Sankt Augustin, Academia 1995) p. 20. In comparison, the characterization 'pro-choice advocate' in the USA seems more appropriate.
political representatives in countries where new legislation is being considered tend to feel obligated to take a legal policy stance on the matter.

4.5.1 The Roman Catholic Church

Around the world, the position of the Roman Catholic Church on the issue central to the termination of pregnancy appears to be quite uniform. This is not surprising, given that Rome retains ultimate authority in questions of church doctrine. The Church’s position is characterized by the principled rejection of the termination of pregnancy: morally speaking, every intervention directed at ending unborn life is declared, without exception, to be impermissible from conception on; thus, whoever undertakes an abortion thereby excommunicates him or herself.\(^{12}\) The state is considered to be responsible for protecting\(^{13}\) unborn as well as born life, even through criminal law.\(^{14}\) At most, vital medical indications – which today are very rare – might be excepted from the threat of punishment.

Of course, one must note that such strict viewpoints appear to have reached their limits in terms of their ability to affect conduct: in various countries – such as, for example, Belgium, France, the former Yugoslavia and the USA – there are reports of resistance against the official church position from the laity and even among clergy; in other countries – namely the Federal Republic of Germany, Austria, Portugal, Spain, Australia and the USA – the results of opinion surveys show that a considerable proportion of church members, on average, favor more liberal regulations. Additionally, it has been pointed out that the attitude of someone who belongs to a religious group towards the termination of pregnancy may depend on the person’s ‘proximity to the church’. Even in countries with a large Catholic population, such as Italy, Austria and Poland, terminations – legal as well as illegal – are reported to be quite widespread.

It might be due to the rigidity of the ‘official’ church position that, in the end, attempts by the church to have a decisive political influence on modern termi-

\(^{12}\) See the encyclicals ‘Casti Connubii’ and ‘Humanae Vitae’ as well as No. 2272 ff. of the new Katechismus der Katholischen Kirche (German edition, Munich, Oldenbourg 1993) with citations to the instruction ‘Donum Vitae’ of the Kongregation für die Glaubenslehre, 22 February 1987. This official standpoint is not shared by all theologians with the same rigorosity. Even in official pronouncements, phrasing can occasionally be found that appears to tolerate certain exceptions to the prohibition of abortion.

\(^{13}\) According to the instruction mentioned supra n. 12, ‘the law must provide for the appropriate punishment for each deliberate injury of its [the unborn’s] rights’ (translated from Katechismus der Katholischen Kirche (op. cit. n. 12), No. 2273.

\(^{14}\) Yet, not only through criminal law, but also through the expansion of social assistance, especially for the support of families.