Abortion, asking the rights question?

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Joseph Mc Mahon believes that the debate about abortion has unproductively focussed on the battle between two individualistic rights - the right of the foetus versus the right of the woman. He suggests that a new conception of rights and of law is necessary. The focus needs to be society as the grantor of rights rather than the individual as a possessor of rights; and the purpose of law is the promotion of social individualism. To help establish his thesis, Dr. Mc Mahon examines abortion law in the Federal Republic of Germany and the Soviet Union. He then seeks to explain the stance these societies adopt as a reflection of their attitudes to the value of human life and the role of women, attitudes expressed in homicide law and matrimonial property law.

I. INTRODUCTION

> [W]ithin the never ending abortion debate, one observes that those who argue against abortion commonly do so by maintaining that foetuses have a right to life, while those who believe that abortion is morally permissible commonly stake their view on the contention either that foetuses lack a right to life or that the woman's own rights to autonomy... outweigh all foetal rights.[1]

The abortion debate is thus characterised as a conflict between two rights: the right to life of the foetus and the right of the woman/mother to personal autonomy. If the debate is viewed as if only two rights are at issue it appears uncomplicated and capable of solution. Such "one-dimensional thinking" over-simplifies the problems raised by the question of abortion and impedes the search for an effective and acceptable solution.[2] It is to be regretted that discussion of abortion concentrates, almost exclusively, on these two rights.

The purpose of this article is to examine the two rights in the context of the abortion legislation of the Federal Republic of Germany and the Soviet Union. The conclusion reached is that these two rights are not really at issue in the abortion debate. What is at issue is the values which the respective pieces of legislation are trying to promote. This article examines these values and attempts to incorporate them into a conception of law and of rights which may be capable of providing a solution to the problem of abortion.

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1 R.B. Louden "Rights Infatuation and the Impoverishment of Moral Theory" (1983) 17 J. Value Inquiry 87.

2 D. Callahan *Abortion: Law, Choice and Morality* (Macmillan, New York, 1970) 1.

II. THE LEGISLATION

A. The Federal Republic of Germany

The characterisation of the debate as a conflict between two rights results from the evolution of legislation dealing with abortion. The original legislative provisions on abortion were found in the criminal statutes/codes. These provisions made it a criminal offence to commit, or assist in the commission of, an abortion. Attempts to liberalise the severity of the law usually took the form of acknowledgements of those situations where an abortion was not punishable under the law. As these areas developed, the question of abortion was dealt with in abortion legislation rather than criminal legislation.[3] In this way the legislation sought to strike a balance between the rights at issue. German abortion legislation conforms to this development model.[4]

Germany's abortion legislation from 1871 to 1927 originated from sections 181 and 182 of the 1851 Prussian Criminal Code. This imposed a punishment of five years imprisonment of any woman who intentionally aborted a foetus. The severity of the original provisions of the Penal Code was relaxed by a 1927 *Reichsgericht* decision, which recognised that an abortion, if necessary to secure the life and health of the woman, was not punishable under section 218.[5] This relaxation of the law was removed during the Nazi era of German history.[6] During the 1960s and early 1970s there was mounting criticism of the Penal Code's provisions. This result in the introduction of four bills in the 1972 *Bundestag* which all attempted to reform section 218. Eventually, in 1974 the *Bundestag* adopted the Fifth Criminal Law Reform Act, which allowed abortions for medical, eugenic, ethical and social reasons.[7] Within forty days 193 members of the *Bundestag* had filed a complaint with the Federal Constitutional Court (FCC) that the Act was incompatible with the Basic Rights guaranteed by the Constitution.[8]

3 *Abortion Laws: A Survey of Current World Legislation* (W.H.O., Geneva, 1970) 9.

4 See M. Quaas "Federal Republic of Germany" (1983) 7 Comparative Law Yearbook 41 for an outline of the history of German legislation on abortion.

5 Ibid.42

6 Idem.

7 Medical reasons (indications) include situations where the abortion is necessary for the preservation of the life or health of the mother (health in this instance includes physical and mental health.) Eugenic indications refer to abortions permissible if the "child" when born will suffer physical or mental handicap as a result of inter-uterine damage or other toxic agents. Ethical indications relate to pregnancy resulting from criminal assaults. Finally social indications relate to the social conditions in which the pregnant woman lives.

8 Article 93(1)(2) of the Basic Law states that the FCC shall decide on the compatibility of any federal law with the Basic Law if requested by one third of the members of the *Bundestag*. Six of the German States also complained to the FCC about the Act. An outline of the competencies of the FCC is contained in the Federal Constitutional Court Act 1951. (The Basic Law only sketched the competencies of the Cout, and the 1951 Act adds flesh to this skeleton.)

The decision of the Court involved an interpretation of three of the Basic Rights and the establishment of a balance between the competing rights. The Basic Rights

> Article 1(1) The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority.
> Article 2(1) Everyone shall have the right to the free development of their personality in so far as he does not violate the rights of others or offend against the constitutional order or the moral code.
> Article 2(2) Everyone shall have the right to life and to inviolability of his person.

The protagonists in the standard abortion debate could characterise the decision of the Court as a choice between the right to life of the foetus and the right of the woman to personal autonomy. This was not the problem which confronted the Court; the question was one of balance and not one of choice. However, the Court did recognise that[9]

> [a] balance which guarantees protection of the unborn life and secures the right of the pregnant woman to secure an abortion is not possible ... since the termination of pregnancy always means the destruction of human life.

The Court regarded the foetus as human life and as such a beneficiary of the right to life guaranteed by Article 2(2). The classification of the foetus as human life, besides opening the Court to criticism, could be viewed as supporting those who argue that the paramount consideration in abortion is the right to life of the foetus. This was not the intention of the Court. The question was not one of the primacy of one right over another but the establishment of an acceptable balance between competing rights.

In those circumstances where the competing rights were the right to life of the woman and the right to life of the foetus, the Court gave primacy to the right to life of the mother. Existing life would be protected at the expense of potential life. Where the rights at issue were the right to life of the foetus and the right of the woman to personal autonomy, the Court considered that the requirements imposed by Article 1(1) indicated that primacy should be accorded to the right to life of the foetus. Potential life would be protected at the expense of quality of life. The touchstone for the decision of the Court was clearly the dignity and/or sanctity of human life as protected by Article 1(1).[10] Given the historical background of the Basic Law, the Nazi experience, it is not surprising that the Court attached great significance to the preservation of human life, thereby emphasising its sanctity and/or dignity. To view the decision of the Court as

9 39 BVerfGE 1,43. The decisions of the FCC are reported in the Entscheidungen des Bundesverfassungsgericht (1952 - date); cited as BVerfGE. For an analysis of the judgment see D. Kommers "Abortion and the Constitution: United States and West Germany" (1977) 25 A.J.C.L. 255.

10 The Court noted: "Life in the sense of the historical existence of a human individual exists according to definite biological-physiological knowledge in any case from the 14th day after conception." (39 BVerfGE 1,37.) The Court therefore rejected the trimester approach favoured by the U.S. Supreme Court in *Roe* v. *Wade* 410 U.S. 113 (1973).

support for the proposition that the right to life of the foetus is the most important right in the abortion debate is an over-simplification of the decision.

One further aspect of Article 1(1) worthy of note is the direction or duty of all state authority (including the FCC) to respect and protect the dignity of man. If a simplistic (one dimensional) approach is adopted the judgment of the Court can be seen as a direct interference with the rights of the individual (i.e. the mother). The question facing the Court was how to interpret the Basic Rights in a way that would maintain the minimum ethical consensus on which the Basic Law (and thus the Basic Rights) is based. As Friesenhahn states: [11]

> [t]he judges of the Federal Constitutional Court are not politicians thirsting for power and seeking to set aside or amend the political decisions of the government or the parliament .... They feel themselves to be servants of the law, that responsibility forces them, under certain circumstances to indicate, even in questions concerning the destiny of the nation, the road the Constitution prescribes ....

The decision of the Court is perhaps a reflection of the political nature of the debate in the *Bundestag* and as such the decision was an attempt to force the *Bundestag* to consider abortion as a national question rather than a party-political question.[12] The Court ordered the *Bundestag* to reconsider the matter and to re-establish abortion as a crime under the Penal Code. As Eser recognises:[13]

> The Court's decision required the legislature to fashion another draft. Since the verdict on the "periodic model" left the "indication model" as the only viable alternative, parliamentary debate now centered on the contours of such a model. The result was a compromise which sought to take account of both the protection of the foetus and the possible predicaments of the mother. The subtlety with which these conflicting interests were balanced, however, led to uncommon complexity.

11 Cited in W. Heyde *The Administration of Justice in the Federal Republic of Germany* (Government Press and Information Office, Bonn, 1971) 78.

12 As Kommers noted (supra n.9 at 285)" ..[in] the Abortion Case the Court seemed somewhat troubled by a series of quick votes, in the absence of meaningful parliamentary debate leading to the passage of the Abortion Reform Act in the Seventh *Bundestag* ... The constitutional ruling in the Abortion Case seems in part attributable to the Court's belief that the political will of the people had not found adequate expression in the Abortion Reform Act".

13 A. Eser "Reform of German Abortion Law: First Experiences" (1986) 34 A.J.C.L. 369, 374.

As a result of the Court's direction, the 1976 Revised Abortion Act was enacted.[14] This Act makes it an offence, punishable by a fine or imprisonment for a period of up to three years, to commit, attempt to commit, or to assist in the commission of, an abortion.[15] The act of abortion will not be punishable if the woman consents and it is considered medically advisable for a woman to have an abortion. An abortion will be medically advisable if, according to the findings of medical science, there is a danger to the mother's life or health, physical or mental, which cannot be averted by reasonable means. Provision has also been made for eugenic and ethical considerations to be taken into account. The Penal Code clearly establishes abortion as a crime against life. The new Act also strengthens the provisions on counselling, giving it a very pro-life orientation.[16]

In conclusion, the Revised Abortion Act reflects the decision of the Federal Constitutional Court by emphasising the value of life and the preservation of its sanctity. The Act does not reflect any individualistic conception of the rights but seeks to keep intact the minimum ethical consensus which binds German society together. The question involved in the abortion debate is not one concerning the primacy of the right of life of the foetus over the right of the woman to personal autonomy. Rather the fundamental issue for determination is the value society places on the preservation of the sanctity and/or dignity of human life. After all, the FCC's major concern was an effective interpretation of Article 1(1) of the Basic Law rather than of any other article of the Basic Law.

B. The Soviet Union

The history of Soviet legislation on abortion can be divided into two periods: the years of restrictions (1917-1920; 1936-1955); and, the years of liberalism (1920-1936; 1955-present). It is evident that such rapid swings in the nature of the legislation sharply differentiate the approach of the Soviet Union from the more evolutionary approach favoured in the history of developed countries.[17]

14 Ibid. 374-80. Eser goes on to outline the provisions of the new law and the criticisms of the law from both pro-life and pro-abortion groups. Quaas (supra n.4 53-57) indicates that although a number of cases since 1976 have attempted to challenge the decision of the Federal Constitutional Court, the Court has not yet reconsidered its judgment.

15 Section 218 of the Penal Code. This provision re-imposes the penalty on the woman although the court may refrain from punishing her if at the time of the act she found herself in particular distress. This accords with the judgment of the FCC.

16 Section 218b of the Penal Code: Abortion without counselling of the pregnant woman. The purpose of such counselling is to make the woman consider whether or not she really wants an abortion.

17 This approach of the Soviet Union, i.e. changing the legislation on abortion abruptly, is mirrored in the approach of other East European/Socialist countries.

In the years 1917 to 1920 all abortions, even those indicated on medical grounds, were illegal. This continued the approach of the Tsarist period of Russion legal history. In 1920, by virtue of a joint decree issued by the Commissariats of Health and Justice, the restrictive legislation of the previous period was liberalized. However, the decree did impose certain restrictions on the availability of abortion. These included:[18]

(i) Abortions had to be performed in hospitals and only by doctors. (Any doctor performing an abortion in his/her own practice for personal gain was liable to prosecution).
(ii) In the case of the woman's first pregnancy abortion was to be strongly discouraged, save those cases where medical indications were present. Indeed there was a presumption that such abortions would not be performed.
(iii) Despite the fact that doctors were not entitled to refuse to perform an abortion (save those cases where the pregnancy had lasted for more than ten weeks) they were encouraged to dissuade all women from undergoing an abortion.

The final decision rested with the woman. The legislation aimed to cure the health problems caused by the dangers of illegal abortions and to promote equality between the sexes. As Lenin stated: "Women should have the right of deciding for themselves a fundamental issue of their lives".[19] It was envisaged that the 1920 legislation would only be a temporary measure, not in the sense that it would be replaced by restrictive legislation but rather the improvement of prevailing social conditions would render the legislation otiose by obviating the need for women to have recourse to abortions.

The first era of liberalism was brought to an end in 1936 by a decree which limited legal abortions to those cases where medical or eugenic indications were present. Not unexpectedly the result of the decree was an increase in the rate of illegal abortions with a consequential flow-on effect on maternal mortality resulting from abortion. As Callahan notes:[20]

> Many doctors, it seems, continued to perform abortions even after the restrictive laws had gone into effect and many saw them as morally desirable as well as economically advantageous.

Callahan goes on to note that the danger to women's health caused by the performance of illegal abortions and the associated profiteering by abortionists were crucial factors in the decision of the Supreme Soviet in 1955 to re-liberalize the abortion

18 For a brief summary of the 1920 legislation see *Abortion Laws : A Survey of current World Legislation* (W.H.O., Geneva, 1970) 56-57 and for the entire legislation see F. Feldbrugge, G. Van Der Berg and W.B. Simons *Encyclopedia of Soviet Law* (Nijoff, Dordrecht, 1985) 1.

19 Cited in L. Lader *Abortion* (Indianapolis, Bobbs-Merills 1966) 121.

20 Callahan, supra n.2, 223.

law. As with the 1920 liberalization, the 1955 Decree lays down certain restrictions on the availability of abortions:[21]

(i) abortions are to be performed only in licensed medical institutions;[22]
(ii) a woman seeking an abortion must first receive a certificate from a doctor[23] which confirms that an indication for abortion exists;[24] and
(iii) before the operation, the reasons for the application and the possible adverse medical consequences are discussed with the woman.[25]

The purpose behind the legislation was summarised by Klinger:[26]

> Each of these measures started from the fact that it is the right of the woman to determine the size of her family and that it is the woman who is entitled to interrupt a desired pregnancy by means of an induced abortion. Besides, the basic goal of the measures taken was also the protection of the health of the woman, since in the preceding years a great number of women had undergone illegal abortions, which have often jeopardised not only the health, but in many cases also the life of the woman.

Once again, the 1955 liberalization was designed to be temporary, in the same manner as the 1920 liberalization had been so designed. However, this time the social conditions had improved, so the social equality objectives of the 1920 legislation could be realised. For example, working mothers are given eighteen weeks paid maternity leave and all medical and hospitalization expenses connected with delivery are free. Despite these incentives to carry the foetus to full term, abortion persists as a social

21 These are measures which indirectly restrict or control the granting of abortions. These contra-indications are included in the Instructions of the Ministry of Public Health of 29 November 1955 "On the Procedure for Performing Artificial Interruption of Pregnancy".

22 The performance of an abortion outside these institutions by doctors or persons having no medical qualifications is a criminal offence: see Article 116 Criminal Code RSFSR and the commentary on the provision in Nikiforov *Scientific-Political Commentary on the RSFSR Criminal Code* (Moscow 1963); cited in J.Hazard, W. Butler and O.S. Maggs *The Soviet Legal System* (Oceana Publications, New York, 1977) 491-493.

23 Certificates may also be obtained from the local medical officer or a gynaecologist.

24 These indications include: a threat to the life or health of the mother; or where a threat exists to the health of the foetus (e.g. eugenic grounds). No provision is made for ethical or social indications. (See *Survey of Laws on Fertility Control* (UN Fund for Population Activities) 92.)

25 The length of hospitalization is three days. The aim of the consultation is to discourage the woman from having an abortion. However, if she persists in her demand for an abortion, it must be given (save those cases where medical contra-indications are present, e.g. an abortion in the previous six months).

26 A. Klinger "Demographic Effects of Abortion Legislation in some European Socialist countries" in *Proceedings of the World Population Conference*, Belgrade 1965 (U.N., New York, 1967) Vol II at 89.

problem, especially in its use as a form of contraception. The legislation, far from being a temporary measure, has become a permanent feature of the legal system.

Given the history of Soviet legislation on abortion, the law seems to accord primacy to the right of the woman to personal autonomy, at the expense of the right to life of the foetus. Such an evaluation of the legislation ignores not only the social, but also more importantly, the economic background to the legislation.

Recalling the objectives of the 1920 legislation as stated by Lenin, why were women given the right to decide "this fundamental issue of their lives"? It was envisaged that the legislation would be temporary, given an improvement in the social conditions, but this did not eventuate. At this stage in Soviet history, with the Civil War ending, the task of economic reconstruction was the major concern. If women could have legal and safe abortions, their services would not be lost to the workforce, hence they could help in the process of building communism. With the advent of the 1930s and large numbers of legal abortions, the State, having brought about economic reconstruction, wished to re-emphasise the traditional role of the family. The reform of 1936 was not an effort to give primacy to the right to life of the foetus, since after all abortions were still permissible, on medical and eugenic grounds. Rather the reform was part of a "package", which was designed to re-establish the role of the family unit in Soviet society. For example, divorce was frowned on by the State, parents were held liable for the delinquent acts of their children and common law or de facto marriages, which had been accepted since the revolution, were no longer recognised as legal.[27] Callahan notes:[28]

> There was also worry about the country's rate of population growth and specifically Stalin's fear of the military threat of Nazi Germany. Stalin wanted the insurance of a higher birth-rate: more people would mean more workers and more soldiers.

While it is no doubt accurate to argue that demographic reasons were a partial justification for the 1936 measures, their influence should not be overstated. The rate of population growth had not increased significantly when the legislation was repealed in 1955.[29] Once the post-war economic reconstruction had materialised and social conditions improved, the need for strict regulation of abortion decisions was no longer strongly felt. As stated earlier, concern over maternal health and profiteering led to liberalization.

27 H.K. Geiger *The Family in Soviet Russia* (Harvard University Press, Cambridge, 1968) 92-93. Geiger notes at 96 "To sum up all these measures makes it clear that responsibility, reproduction and childrearing were in favour and that stable marriages, large families, and self-discipline were now more important to the regime than industrial freedom, sex equality and ideological consistency."

28 Callahan, supra n.2, 223.

29 Geiger, supra n.27, 106, lists three factors in the liberalization of the abortion legislation in 1955. He dismisses the first two (motherhood related) as window-dressing and gratuitous and regards the real reason to be "the recognition that legal prohibition of abortion could neither eradicate the practice nor raise the birth rate".

Overall, Soviet abortion legislation is designed to secure equality between the sexes, as Article 35 of the 1977 Constitution states:[30]

> Women and men shall have equal rights in the USSR. The realization of these rights shall be ensured by granting women opportunities equal to men to receive an education and professional training, labour, remuneration therefor and advancement in work, socio-political and cultural activity, and also special measures for the protection of the labour and health of women; the creation of conditions allowing women to combine labour with motherhood; legal protection and material and moral support for motherhood and children, including the granting of paid leaves and other privileges for pregnant women and mothers, and a gradual reduction of work hours for women who have small children.

It would be an over-simplification of the abortion legislation to claim that it is an endorsement of the right of the woman to personal autonomy. The final decision rests with the woman but the reason for this is not because of any individualistic conception of rights. One must remember the communitarian and egalitarian thrust of Soviet society and law. Abortion legislation in the Soviet Union, therefore, involves not a conflict between the rights of the foetus and the rights of the woman but an evaluation of the social and economic role of women in that society. The question is not so much what is in the best interests of the woman as an individual but what is in her best interests as a member of society.

III. A NEW APPROACH

> Our conception of the problem to which our discourse is addressed shapes both. [31]

The traditional conception of the problem involved in the abortion debate is one of establishing the primacy of one individual right over another. If this is the traditional conception of the problem then the discourse revolves around a discussion of individual rights. Whether it is natural law theories, positivism or deontological jurisprudence, the individual has consistently been the focus of the discourse. The application of any of these theories to the abortion debate is misguided, as it results in an individual focus to the debate, a focus which will never provide a totally acceptable solution.

As indicated the abortion debate in the Federal Republic of Germany and the Soviet Union has not been primarily concerned with the rights of the foetus to life or the right of the woman to personal autonomy. Yet it is these two rights which have consistently formed the core of discussion on the question of abortion. As the judgment of the FCC and the history of abortion legislation in the Soviet Union indicate, it is necessary to move beyond the rhetoric of rights to address the values which lie at the heart of these rights. Consideration of how these societies value human life and women may provide a

30 The English translation of the 1977 constitution can be found in W. Butler *The Soviet Legal System: legislation and documentation* (Oceana Publications, New York, 1978) 10.

31 R.Pound "Natural Natural Law and Positive Natural Law" (1960) 5 N.L.F. 70.

solution to the problem of abortion, for the solution may not reside in examining the nature of the individual but in an examination of that particular society with which we are concerned at any moment.

A. The Value of Human Life in a Society

A societal determination of the value of human life may be gleaned from that society's definition of the crime of homicide, that crime involving the deprivation of human life. This part of the paper examines briefly the West German and Soviet definition of homicide in an attempt to discover whether these definitions can be of assistance in finding a solution to the abortion question. For example, do they reveal a theory of life which may be applicable to the foetus? Do the definitions concentrate on the value of the human life which was destroyed or on the conduct of the person who destroyed that life?

1. The Federal Republic of Germany

Section 211 of the Penal Code defines a murderer as:[32]

> Anybody who kills a human being out of murderous lust, or to satisfy a sexual urge, or out of greed or from other base motives, maliciously or cruelly, or by means endangering the public, or in order to commit or cover up another punishable act ....

The penalty imposed is "confinement in a penitentiary for life".[33] As a definition of the crime of homicide, section 211 poses several obvious problems. What type of conduct qualifies as "murderous lust", "greed", etc? What means of committing the crime endanger the public? What type of other punishable act will bring the section into effect? Whilst recognising that these problems will be solved through judicial interpretation, what is more interesting are the defences to the crime,[34] because through an examination of such defences it will be possible to identify the parameters of the crime of murder.

32 An English translation of the German Penal Code is found in Volume 28 of the American Series of Foreign Penal Codes (Sweet & Maxwell, London, 1987) 176.

33 Idem.

34 Ibid. 53 - 60.

The defence of irresponsibility states:[35]

> A person is not criminally responsible if at the time of the act, because of a psychotic or similar mental disorder, or because of a profound interruption of consciousness or because of feeblemindedness or any other type of serious mental abnormality, he is incapable of understanding the wrongfulness of his conduct or of acting in accordance with his understanding.

The conduct in question must be unlawful, in the sense that the perpetrator must be actuated by motives inimical to law (e.g. those listed in section 211). The defence of irresponsibility further indicates that the perpetrator of the crime must have the capacity to commit the crime. If so, she is morally and personally blameworthy and so deserving of punishment. Personal blameworthiness suggests that the perpetrator intended to bring about the result which eventuated, as Schroder states:[36]

> To put it positively, in order to act intentionally, the perpetrator must know all those circumstances of which the specific offence is comprised. The real debate begins with the question whether or not, beyond this knowledge of the individual characteristics of the definition, the perpetrator also must have been aware that he was doing something unlawful.

Even if the perpetrator knew the actions were unlawful, this does not indicate that that person is automatically worthy of punishment. The action in question, although carried out with intention, may not be actuated by motives inimical to law. In other words, the conduct in question may be either justified or excused.[37] For example, the defence of necessity[38] recognises that although intending to commit the crime, other forces were involved, thus rendering the crime not worthy of punishment.

The Penal Code punishes murder or homicide in those cases where the perpetrator acts with motives declared inimical to law and without lawful excuse or justification. How can this definition be of assistance in the elaboration of a new approach to the abortion question? After all, most societies punish the perpetrators of homicide, but not every society punishes the act of abortion. Does the answer lie in the punishment, in the case of the Federal Republic confinement in a penitentiary for life? The consequences of this confinement are the loss of certain rights and consequential disqualifications from certain activities.[39] These consequences exist from the date of judgment to the end of the sentence. The punishment will depend on the gravity of the offence and will be reflective of the perpetrator's guilt.

35 Article 20 of the Penal Code.

36 *Introduction to the German Penal Code* Volume 4 American Series of Foreign Penal Codes (Sweet & Maxwell, London, 1962) 7.

37 Supra n.32, 59-60 (Title IV of Chapter II of the Penal Code, Self Defence and Necessity).

38 Ibid. Articles 34 and 35 of the Penal Code.

39 Ibid. Article 45 of the Penal Code.

2. The Soviet Union

Article 7 of the Criminal Code of the RSFSR states:[40]

> A socially dangerous act provided for by the special part of the present code which infringes the Soviet social or state system, the socialist system of economy, socialist property, the personal, or the political, labour, property or other rights of citizens, or any other socially dangerous act provided for by the special part of the present code which infringes the socialist legal order, shall be deemed a crime.

The crime of homicide is detailed in Articles 102-106,[41] each article relating to a different type of homicide, e.g. Article 104 details the crime of intentional homicide committed in a state of strong mental agitation. The basis of responsibility for all criminal acts is "intention or negligence", these expressions being defined in Articles 8 and 9 of the Code.[42] However, no definition is given of guilt. Article 3 provides only that when a socially dangerous act has been committed by intention or negligence, the perpetrator will be subject to punishment.[43] Feldbrugge states: [44]

> There is guilt where the offender, at the moment he committed the offence, should have acted differently and was in fact able to act differently.

The concentration on the conduct of the perpetrator reflects the basic conception of Soviet criminal law, the avoidance of anti-social conduct. As with the German Penal Code, the code of the RSFSR allows for various defences[45] such as necessity, the only difference between the two Codes on this defence being that the latter gives a broader definition of the defence.[46] In most respects the provisions of the Criminal Code of the RSFSR approximate to those of the German Penal Code, in relation to homicide. The significant point of departure is in the punishment of these offences. Article 20 of the RSFSR Criminal Code states:[47]

> Punishment not only constitutes a chastisement for a committed crime but also has the purpose of correcting and re-educating convicted persons in the spirit of an

40 An English Translation of the Criminal Code of the RSFSR can be found in H.J. Bermann *Soviet Criminal Law and Procedure, the RSFSR Codes* (Harvard University Press, Cambridge, 1966) 147.
41 Ibid. 191-192.
42 Ibid. 147
43 Ibid. 145.
44 Supra n. 18, 501.
45 Articles 11-14. See Bermann, supra n.40, 148-149.
46 Article 14 states "Although falling within the category of an act provided for in the special part of this code, an action shall not constitute a crime if it is committed in extreme necessity, that is, in order to eliminate a danger which threatens the interests of the Soviet state, social interests or the person or rights of the given person or of other citizens."
47 Supra n. 40, 151.

> honorable attitude toward labor, of strict compliance with the laws and of respect toward socialist communal life; it also has the purpose of preventing the commission of new crimes both by convicted persons and by others. Punishment does not have the purpose of causing physical suffering or the lowering of human dignity.

The maximum punishment for intentional homicide committed in a state of strong mental agitation is "deprivation of freedom for a term not exceeding five years or by correctional tasks for a term not exceeding one year".[48] The crime of intentional homicide with aggravating circumstances is punishable by deprivation of freedom for a term of eight to fifteen years, with or without exile, or by death.[49] Article 37 of the Criminal Code instructs the courts to assign punishment within the limits prescribed by the various articles defining the crime.[50] To help in the assignment of punishment Articles 38 and 39 of the Code list those circumstances which, respectively, mitigate and aggravate responsibility.[51] As an example of the former, Article 38(3) lists the commission of the crime under the influence of a threat or compulsion or by reason of material, occupational or other dependence. As an example of a circumstance which aggravates responsibility, Article 39(1) of the Code lists the commission of a crime connected with the utilization of a source of danger by a person in a state of intoxication.

Unlike the German Penal Code, the Criminal Code of the RSFSR includes a degree of flexibility in the assignment of punishments. For example, Article 50[52] allows relief from criminal responsibility and punishment if by the time of the investigation or of the consideration of the case in court "the person has ceased to be socially dangerous". Article 53[53] permits the conditional early release from punishment and the substitution of a milder form of punishment.

3. Evaluation

The definition of homicide in the Soviet Union does not differ significantly from that in West Germany. However the punishment of the perpetrator of this crime is significantly different under the two systems. How can this fact be of assistance in the abortion debate? It has been noted that:[54]

> Societies reflect their philosophies, goals, prejudices and problems in what they punish as crimes.

48 Ibid. 192. (Article 104).
49 Idem. (Article 102).
50 Ibid. 161.
51 Idem.
52 Ibid. 168.
53 Ibid. 170.
54 Hazard, Butler and Maggs, supra n.22, 146.

Perhaps the Soviets do not value human life as highly as the West Germans, since they do not punish to the same extent? Or, perhaps the difference in punishment may not reflect on this value but on differing conceptions of society and the role of law in that society? I shall return to this point in the conclusion.

B. The Role of Women in Society

The changing role of women in society is a result of a demand by women for equality. In some areas such equality is easily attained, whilst in others problems have emerged. For example, it has been noted that[55]

> [i]n the search for legal techniques to implement the new policy of equality, legislators have found particular difficulties in one area - that of providing for management of the family property, be it that owned in common, or that owned by the spouses separately ....

This section of the paper will briefly analyse the matrimonial property regimes of West Germany and the Soviet Union, in an attempt to discover the extent to which they implement a policy of equality.

1. The Federal Republic of Germany

Article 3 of the Basic Law states: "Men and women shall have equal rights". Article 6 states: "Marriage and family shall enjoy the special protection of the state". In the jurisprudence of the courts, especially of the Federal Constitutional Court, the former (Article 3) takes precedence over the latter.[56]

Given the provisions of the Civil Code of the German *Reich* that "[u]pon the effectuation of a marriage, the property of the wife becomes subject to the management and usufruct of the husband",[57] an obvious conflict with the provisions of the Constitution eventuated. The rules of the Civil Code on matrimonial property were reformulated by the Equality Act of 1957. This Act bases the matrimonial regime on what is called a "community of surplus". This assumes:[58]

> that at the end of married life there will be as a rule a surplus compared to what the spouses had when they started their married life. It applies whenever the parties have not agreed that one of the two other permitted types, i.e. separation or general community of goods, should apply.

55 Volume 4 International Encyclopedia of Comparative Law , Chapter 4 "Interspousal Relations", 30.

56 See 3 BVerfGE 96 (1952) and 6 BVerfGE 55 (1956).

57 Quoted in H.G. Shaffer *Women in the two Germanies* (Pergamon Press, New York, 1981) 35.

58 E.J. Cohn *Manual of German Law* (British Institute of International and Comparative Law, London, 1968)Vol 1, 237; Leyser "Equality of Spouses" (1958) 7 A.J.C.L. 276.

As á general rule, the parties are entitled to the property (or a monetary equivalent) that they brought to the marriage and the property acquired during the marriage is usually equally divided:[59]

> In the German system the spouses do not share specific assets acquired during marriage. They rather divide the arithmetical increase of their funds that has occurred during marriage, which means that each spouse also participates in that increase in the value of the other person's estate which has occurred during marriage independently of any activity.

The law, however, seeks to prevent inequitable divisions by limiting equal division where this would result in grave inequity. The text of section 1381(2) suggests that grave inequity may occur, particularly in those cases where the party with the lower increase has "for a considerable period of time failed to perform those economic duties which result from the relation of marriage". Such cases would presumably be rare.[60]

2. The Soviet Union

Article 3 of the Fundamentals of the Legislation of the USSR and the Union Republics on Marriage and the Family states:[61]

> In their family relations men and women shall enjoy equal person and property rights.

The Marriage and Family Code of the RSFSR follows these Fundamentals and in relation to matrimonial property this Code states in Article 20:[62]

> Property acquired by the spouses during their marriage shall be their jointly owned property. The spouses shall enjoy equal rights to possess, use and dispose of such property. The spouses shall also enjoy equal rights to property if one of them has been engaged in running the household, taking care of the children or has had no earnings of his own for valid reasons.

When such property is to be divided, the parties receive equal shares. This rule may be departed from to take account of the interests of minor children or the reasonable interests of either party.[63] However, property belonging to either party before marriage

59 Supra n.55, 106.
60 Idem.
61 *Soviet Legislation on Women's Rights: A Collection of Normative Acts* (Progress Publishers, Moscow, 1978) 48.
62 Ibid. 56.
63 Idem. (Article 21 states that the share of either spouse may be increased if the other spouse has avoided socially useful work or spent the jointly owned property to the detriment of the family.)

or property received during marriage as a gift or inheritance will be considered the party's personal property.[64]

In the application of this legislation, the courts are directed to take into account the rights of the mother and children and to ensure that such rights are adequately protected. The rules as to the equal division of matrimonial property do not apply when the dispute over this property is between de facto couples.[65] Soviet legislation on the question of the division of matrimonial property is "skeletal", yet it pursues the same goals as that of West Germany.

IV. A NEW CONCEPTION OF LAW AND RIGHTS

The analysis of the West German and Soviet legislation on homicide and matrimonial property provides the following results:

1. Both definitions of homicide are wide, embracing a large number of situations in which the deprivation of human life will be punished.
2. A difference emerges between the two countries in relation to the punishment of the crime of homicide. The Soviet Union legislation seems designed to rehabilitate the offender, whereas the West German legislation seems designed to punish.
3. Both countries have constitutional provisions directing that men and women should be treated equally.
4. The implementation of the legislation of the division of matrimonial property reflects the basic philosophy of the respective constitutions.

However, the abortion legislation of each country differs radically. West Germany's is viewed as restrictive and that of the Soviet Union is viewed as liberal. How is this difference to be explained in the light of each society's expression of the value of human life and the role of women in that society?

It would be possible to reflect upon the fact that whilst both countries implement the principle of equality, the punishment for the crime of homicide differs and, therefore, the Soviet Union does not actually value human life as highly as West Germany does. This dictates a more liberal abortion law in the Soviet Union than in West Germany. Such a conclusion would be dependent on the classification of foetal life as human life. In the implementation of the principle of the value of human life in the legal system, it can be expressed in the form of the right to life of the foetus. The value given to women in society is capable of transformation into the legal right of the woman to personal autonomy. The answer to the abortion debate in its legal context may lie therefore in

64 Idem. (Article 22).

65 Ibid. 68. Instructions of the Supreme Court of the RSFSR on some questions which have arisen in the practice of application by the courts of the marriage and family code of the RSFSR.

the transformation of these values, and possibly in a different understanding of the very nature of law itself. Speaking to this point Bermann concludes:[66]

> Law has been concerned primarily as a means of delimiting interests, of preventing interference by one person in the domain of another, ***of enforcing rights*** and obligations established by the voluntary acts of the parties in so far as that is compatible with the social welfare. [Emphasis added.]

Turning from the Western conception of law to an analysis of law in the Soviet Union, Bermann describes it as: [67]

> ... concerned with the whole situation and above all, with the thought and desires and attitudes of the people involved, their moral and legal conceptions, their law consciousness. Soviet law thus seeks not simply to delimit and segregate and define, but also to unite and organize and educate.

The purpose of law in the Soviet Union is to acclimatize the individual for a time when the law has withered away; it seeks to educate and establish a parental relationship between the state and the individual. This parental conception of law is not peculiar to the Soviet Union or to socialist ideology. Roscoe Pound used the term "socialization" to describe the development of the Amercian legal system in the twentieth century. Although used in the context of the American legal system, the factors listed below characterise the development of most Western legal systems this century. Pound cites the following as illustrative of this socialization process:[68]

(1) Limitations on the use of property: anti-social exercise of rights.
(2) Limitations on freedom of contract.
(3) Limitations on the *ius disponendi* (the right to dispose of property).
(4) Limitations on the power of the creditor or injured party to exact satisfaction.
(5) Liability without fault: responsibility for agencies employed.
(6) Change of *res communes* and *res nulliae* into *res publicae.*
(7) Interest of society in dependants.
(8) Tendency to hold that public funds should respond to individuals by public agencies.
(9) Replacing the purely contentious conception of litigation by one of adjustment of interests.
(10) Reading of reasonableness into the obligations of contracts - equitable-izing of the terms as fixed by the parties.
(11) Increasing legal recognition of groups and relations as legal units instead of exclusive recognition of individuals and of certain associations as their analogies.
(12) Tendency to relax the rules as to trespassers.

66 H.J. Bermann *Justice in the U.S.S.R.* (Harvard University Press, Cambridge, 1963) 283.
67 Idem.
68 Pound R. *Outlines of Lectures on Jurisprudence* (Harvard University Press, Cambridge, 1943) 43-48.

The process of socialization, according to Pound, occurs through the courts. It is, however, equally possible to argue that each of these developments is capable of being made exclusively by legislation. If this is so, the focus becomes not the decisions of the courts but the policies and principles which guide the legislature in its political functions. The purpose of law is, therefore, to equalize the inequalities imposed naturally on individuals (i.e. it promotes social individualism).

The rights recognised legally by society as adhering to individuals are not absolute rights. They clearly depend not only obviously on the continued existence of that society but also on the continued promotion of the end which that society is trying to achieve - ***social*** individualism. Rights, therefore, pursue much broader objectives than merely the protection of the individual. If rights are viewed solely or even primarily as protecting the individual, society becomes "rights infatuated" and unduly legalistic. As Solzhenitsyn has said:[69]

> ... a society with no other scale but the legal one is less than worthy of man. A society based on the letter of the law and never reaching any higher fails to take advantage of the full range of human possibilities. The letter of the law is too cold and formal to have a beneficial influence on society.

It is submitted that in relation to the endless debate on proper legal responses to abortion a solution can be found if we adopt a new conception of rights and consequently a new conception of law. The new conception of rights will focus less on the individual as possessor of those rights and more on the society as grantor of the rights. Therefore, rights will not exist as inherent in the individual, but they will be properly a reflection, in law, of a value or values which is or are considered important not only for the continuing existence of society but also as a means of promoting social individualism. So society, in an organized form, must exist before rights are adequately protected. The values which are protected, by society's legal recognition of them as rights, are twofold. Firstly, those rights which are necessary to promote social individualism, i.e. equality, in its broadest sense, and the associated right of non-discrimination. Secondly, and more importantly, those values which flow from the very nature of the individual, which can be neither entirely defined nor removed.

This reassessment of rights has a flow-on effect for the conception of law. Law will have to be concerned with more than the delimitation of interests and the enforcement of rights. It must be regarded as parental. Law will therefore be socialized. This should not be taken to indicate a preference for a society similar in structure to that of the Soviet Union, for as Pound illustrates this socialization of law also occurs in the West. Such a shift in emphasis in the conception of law reflects an attempt to weave law into the fabric of life rather than weaving the fabric of life through law. As Bermann concludes:[70]

69 "A World Split Apart" [1978] Law & Society Gazette 223, 227.
70 Supra n.66, 284.

To speak of "parental law" is therefore not so much to describe the state which proclaims and applies the law as to describe the assumptions which are made regarding the nature of the citizen and his relationship to the state.

V. CONCLUSION

The assumptions which underlie the abortion debate are that rights are individualistic and as such need to be enforced against other individuals. Such a conception of rights does not aid the process of problem solving, for although it provides one answer it ignores the role which reconciliation and mediation play in the search for an acceptable solution to the problem at hand. Solzhenitsyn comments:[71]

> Western society has chosen for itself the organization best suited to its purposes and one might call it legalistic. The limits of human rights and rightness are determined by a system of laws ... Every conflict is solved according to the letter of the law and this is considered to be the ultimate solution. If one is right from a legal point of view nothing more is required, nobody may mention that one could still not be entirely right, and urge self-restraint or renunciation of these rights, call for sacrifice and selfless risk: this would simply sound absurd. Voluntary self-restraint is almost unheard of: everybody strives towards future expansion to the extreme limit of the legal frames.

A new conception of rights and of law is necessary to solve the problems raised by abortion. The abortion debate is capable of solution under this new conception of rights, since the debate will no longer be characterised as a conflict between two rights but will be seen as a societal decision on the value of human life and the role of women, in a society.

The emphasis on the value of human life will allow a decision to be made on whether or not foetal life qualifies as human life. This decision will be consistent with the law's overall definition of human life as revealed by how the law deals with existing life, for example, by the definition of the crime of murder. The decision on the role of women in society will allow an assessment to be made of the quality of life argument and it will answer the question of how far the law can legitimately interfere with a woman's assessment of her quality of life. Indeed, a mechanism may be found to balance the value of human life and the role of women in society whenever these come into conflict, as they do in the abortion debate. By moving away from the individualistic conception of rights, it is possible that other factors or values of relevance, which up till now have been considered too remote to be of central importance in the abortion problem, may be included in the process of conflict resolution, e.g., the father, the medical profession, and, perhaps, even future generations. As all these variables are included, the law on abortion will move beyond advocating an either/or answer where only two rights are at stake to a process of conciliation, reconciliation and mediation between the various interests involved.

71 Supra n.69, 230.

The diversity of legislation will continue as no two countries/societies will have exactly identical evaluations of the value of human life and the role of women in society. These variables will be enshrined in a new concept of law and thus of society. Law, especially abortion law, will not have utilitarian motives for these are essentially individualistic. Rather law will attempt to eradicate the increasingly factional and discordant nature of society. In such a new society the prophecy of the preamble of the Soviet constitution may occur:[72]

> This is a society whose law of life is the concern of all for the good of each and the concern of each for the good of all.

72 Supra n. 30, 4.