

Spring 1976

## West German Abortion Decision: A Contrast to Roe v. Wade: Preface, 9 J. Marshall J. Prac. & Proc. 551 (1976)

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### Recommended Citation

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# WEST GERMAN ABORTION DECISION: A CONTRAST TO *ROE v. WADE*

## PREFACE

When John Dryden said that it is incomparably more important for a translator to be the master of the language he is translating into than the language he is translating from, he was not attempting to excuse incompetence or justify amateur efforts. Rather, he was emphasizing that a translator's range of knowledge should extend beyond his ability to conjugate, parse, and understand a language other than his own.

Translation of a German legal document, *a fortiori*, requires, in addition to philological competence, a working familiarity with legal concepts both in the original context as well as in the system of Anglo-American jurisprudence. It must steer a course between adopting formulas which narrowly imitate the original without conveying the sense and merely substituting common law phrases, which although better known are hardly more accurate. Legal translation is, in short, a legal as well as a philological endeavor.

A judicial opinion which takes a strong position on a controversial issue calls for careful regard to intellectual honesty on the part of translators; when the opinion is philosophically sophisticated a high degree of accuracy is required. In striving to achieve that honesty and that fairness of representation, we have not thought ourselves at liberty to translate "freely," much less to paraphrase.

Although we have always sought to convey the inner meaning of difficult or controversial phrases, the precision of any translation of course can only asymptotically approach the content of the original. If we have erred, it has been on the side of literalness, if literalness best served fidelity to the text. Furthermore, if a term in German was precisely used, we tried to select a similarly precise term in English; on the other hand, if we encountered a vague term or ambiguous phrase, we attempted to select an English equivalent which would convey this same sense of vagueness or ambiguity. Our purpose has been to remain as faithful to the original German text as possible. To this end we attempted to explore the exact legal meaning of words in depth; agreed upon the casting of phrases only after research and discussion; and saw sentences emerge as the result of debates which had as their object the elucidation of the most appropriate rendering.

"Englishing" this opinion was a long and arduous task which encountered several specific philological problems which deserve special mention.

#### ZUMUTBARKEIT

"Zumutbarkeit," translated "exactability," posed by far the most problems. Although it is not without precedent or example in German Constitutional Law, this important concept appears to have been used by the Federal Constitutional Court in this opinion with a degree of conceptual precision and technicality which has perhaps not previously been bestowed on the word. The verbal form "zumuten" is quite common in German vernacular parlance. In the sentence, "Sie können das mir nicht zumuten," for example, it simply means to make a demand of a person, which for some reason or on the basis of some standard, right or wrong, cannot or will not be met. Hence, outside of a legal context, the verb "zumuten" might be translated "to demand" and the adjectival form "zumutbar" might be translated "demandable."

We consulted standard works of reference, legal and philological, in vain, however, and found the experts silent or ambivalent on the precise legal meaning of the word. After many hours of thought, debate, and study of the opinion, we concluded that, in a legal context, especially as here in context of constitutional law, "zumutbar" is best translated as "exactable."

We considered three English alternatives for the word: (1) "reasonably expectable," (2) "legally demandable," and (3) "exactable."

(1) Serious consideration was given to "reasonably expectable" as a translation for "zumutbar." We rejected it, first, however because there is no internal evidence to show that reasonableness is an element of the criterion of "Zumutbarkeit" (the noun form) as used in the German opinion. Rather, the dividing line between the cases which are "zumutbar" and those which are "nicht zumutbar" appears to be the existence of a constitutionally defined or recognized value which conflicts with the right to life of the unborn child, not necessarily a canon of reasonableness. Secondly, there is no indication in the use of the term by the German Court that a direct relationship exists between the concept of reason ("Vernunft") and "Zumutbarkeit." Furthermore, in vernacular usage the standard of "Zumutbarkeit" appears to be social, i.e., standards relating to the institutions, customs, mores and habits of the time and place.

(2) Briefly considered was "legally demandable." The translators rejected this term for different reasons:

Mr. Gorby: This term was rejected because "zumutbar" does not necessarily reflect a "legal" standard; furthermore, since "zumutbar" is a vague term, the selection of an equally vague term was desired so that the exact meaning could be determined by the reader from the context in which it was used in the opinion. "Legally demandable" implies a term with an already established legal meaning. Our research led to the conclusion that "zumutbar," at least in a constitutional context, did not bring with it an already established legal meaning.

Mr. Jonas: I think that whatever the advantages of the phrase, its chief disadvantage is simply its fundamental inaccuracy. The carrying of the child *en ventre sa mere* to term is demanded, the German Court holds, in every case by the constitutional value decision in favor of life. The court's point is that respect for life cannot always be compelled (*erzungen*) by the penal law.

(3) The term "exactable" was selected for different reasons by each of the translators:

Mr. Gorby: "Exactable" was ultimately chosen because it had none of the disadvantages of the other possibilities and seemed to most closely reflect the feelings developed about "zumutbar." Both "zumutbar" and "exactable" seem to imply that an adherence to some standard is required. On the other hand, neither "zumutbar" nor "exactable" indicate the nature of the standard. Consequently, to understand the precise meaning in which the Constitutional Court uses the term, one must study the context in which it is used; this is precisely what was done when "zumutbar" was encountered in the German original.

Mr. Jonas: I conclude that, in a legal context, especially as here in context of the penal law, "zumutbar" is best translated as "exactable," since it clearly implies using the penal law to enforce certain conduct. We speak of "exacting" a tax, "exacting" obedience and the meaning is clear enough. Clear reference is made to the penal law and to its limits. It reflects the Court's supposition that in some cases protection of unborn life can best be achieved by measures other than the penal law. Both the Oxford English<sup>1</sup> and Webster<sup>2</sup> definitions contain the two fold idea of demanding and enforcing performance.

#### DAS SICH ENTWICKELNDE LEBEN

The reader is perhaps immediately struck by the phrase "the life developing itself in the womb of the mother." We have

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1. OXFORD ENGLISH DICTIONARY Vol. III at 359 (1969).  
 2. WEBSTER'S THIRD DICTIONARY 790 (1971).

translated the phrase literally for two reasons: (1) the court used a great variety of phrases to describe and conceptualize unborn life and hence must be presumed to have chosen its language with care—in another instance, the Court used the term “werdendes Leben,” literally “becoming life,” which we have consistently translated as “developing” life; (2) the formulation “life developing itself” corresponds to the conclusions of modern fetology and therefore, however unusual it may sound in English, is a more accurate characterization than more familiar English terms.

#### LEIBESFRUCHT

“Leibesfrucht,” which would literally be translated “fruit of the womb,” we rendered “child *en ventre sa mere*.” Both “Leibesfrucht” and “child *en ventre sa mere*” have been used in the legal literature to express the same concept and historically came into legal usage at approximately the same period, although in different systems. Moreover, Beseler in his German-English legal dictionary gives the following three possibilities for “Leibesfrucht”: (1) child *en ventre sa mere*, (2) child in womb, (3) nasciturus.<sup>3</sup> We also carefully considered using the term “fetus” which is commonly used to describe the prenatal stage of human development. Black’s Law Dictionary<sup>4</sup> defines “foetus” as follows: “In medical jurisprudence, an unborn child. An infant *in [sic] ventre sa mere*.” Thus legally, there is very little, if any, difference between the terms. We rejected “fetus” as well as “foetus” because the same word (der Fötus) is commonly used in the German language, was readily available to the German Constitutional Court, but, for one reason or another, was not chosen to express the idea which the Court wished to convey.

#### RECHTSSTAAT

“Rechtsstaat” does not appear frequently in the opinion, although it is a very well known concept in German jurisprudence, notoriously difficult to translate with a single word or phrase. We have employed “just state” as its equivalent rather than the more frequently used and familiar “rule of law,” because this term as it appears here implies and perhaps even requires more than mere procedural integrity. “Rule of law” says little about the justice or injustice of the laws that are being “fairly” administered. Moreover, the aspect of “Rechtsstaat” which seems to be emphasized in the context in which it was

3. D. VON BESELER, *TASCHENWÖRTERBUCH DER RECHTS UND GESCHÄFTSMACHE* 198 (1947).

4. *BLACK’S LAW DICTIONARY* 771 (4th ed. 1951).

used in the opinion and which is not connoted by the term "rule of law" is justice. An example of this is found on page 646 of the *Translation* where the Court stated that the "principle of proportionality" is a principle of the "Rechtsstaat."

In addition, "just state" has ample legal justifications. At least one legal scholar has concluded that Rechtsstaat, as used in the Basic Law, denotes a connection with substantial justice. To those who ratified the Basic Law, it meant, says Hans Peters,<sup>5</sup> a state which "takes as its goal the realization, that is the developing and securing of justice; and, is willing and capable of protecting citizens against arbitrary action and force and which therefore employs its power on the side of justice."

#### RECHTSGUT

"Rechtsgut," rendered "legal value," may literally be translated "legal good" or "good of the law." The court's use of the term clearly denotes that "good" in this context means "value," and "Rechtsgut" a legally protected value. In some contexts, the term could easily and perhaps accurately have been translated "legal person."

#### ADDITIONAL PROBLEMS

Difficulties were also encountered with the Constitutional Court's use of the indirect form of speech (indirekte Rede) which was used almost exclusively in the two sections of the opinions in which the Court reviewed and paraphrased the arguments of the parties to the litigation. The English language, of course, does not have an indirect form of speech; we thus felt compelled to occasionally remind the reader that the arguments of the parties were being given rather than the reasoning and conclusions of the Constitutional Court. This we attempted to do with such phrases as "the petitioners argued further," "the Federal Government continued," or "according to this view." In any event, the reader should be aware that Section A.II. (*Translation* at 622-627) is a recitation of the arguments of the petitioners and Section A.III. (*Translation* at 627-634) is a recitation of the arguments of the responding Federal Government and Federal Parliament.

Another difficulty was the large number of German abbreviations used in the opinion. In each case we attempted to discover the source of the abbreviation and translate that source so that the reader can have a sense of the types and nature of

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5. H. PETERS, *GESCHICHTLICHE ENTWICKLUNG UND GRUNDFRAGEN DER VERFASSUNG* (1969); cf. G. DAHM, *DEUTSCHES RECHT et seq.* (2d ed. 1963); H. KRÜGER, *ALLGEMEINE STAATSLEHRE* 776-82 (2d ed. 1966).

materials used by the Court. In a few instances we gave an English abbreviation to the translated sources. The reason for this was to reproduce the German opinion as closely as possible. Those used in the opinion are as follows:

- F.C.C. - Federal Constitutional Court Cases
- 1 PLRS - 1st Statute to Reform the Penal Law
- 5 PLRS - 5th Statute to Reform the Penal Law
- SSPLR - Statute to Supplement the Penal Law Reform

Finally we wish to point out that we translated this opinion from a copy of the official typewritten version. Just recently, the opinion was published in the bound volumes.

We are grateful, above all, to Virginia Reuter whose untiring efforts made the translation possible; to Robert Bernacchi for his help with the translation; Richard Walsh, and Victoria Mannerino for clerical assistance; and Professors Max Rheinstein and Gerhard Caspar of the University of Chicago and Attorney Friedrich Weinkopf of Baker & McKenzie, Chicago, for their valuable suggestions.

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