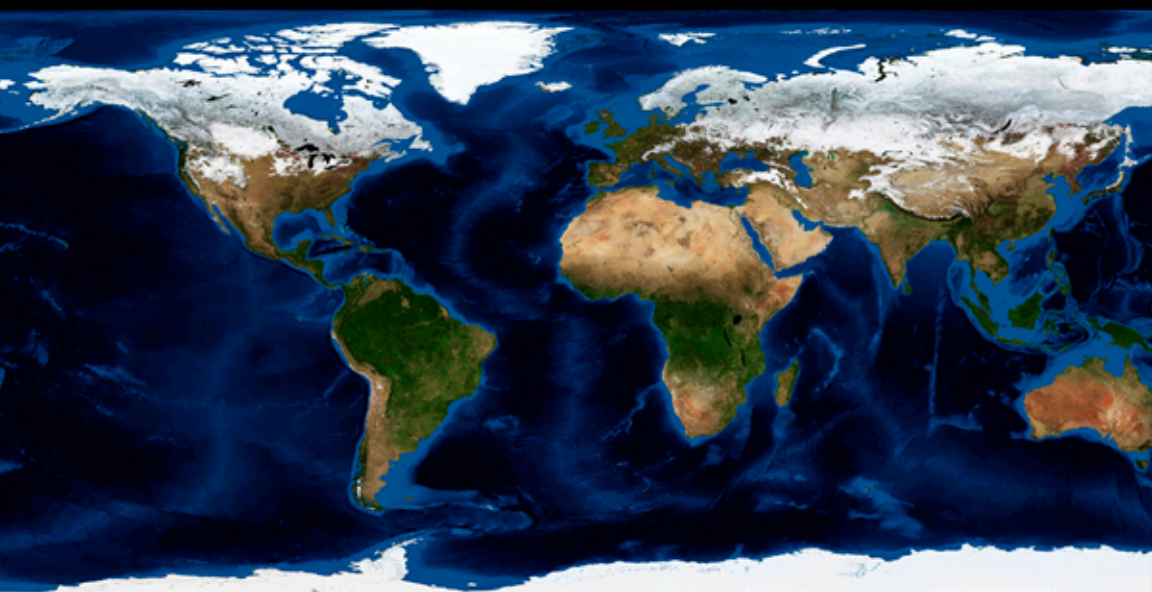


Abortion Law in Transnational Perspective

CASES AND CONTROVERSIES



Edited by

Rebecca J. Cook, Joanna N. Erdman, and Bernard M. Dickens

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PENNSYLVANIA STUDIES IN HUMAN RIGHTS

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PENN

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Introduction

Rebecca J. Cook, Joanna N. Erdman, and Bernard M. Dickens

The field of abortion law has survived several revolutions. Perhaps the greatest is the shift in focus to human rights. Although today it is exceedingly difficult to encounter any legal treatment of abortion without some comment on the rights involved, this was not always the case. Abortion law evolved “from placement within criminal or penal codes, to placement within health or public health legislation, and eventually to submergence within laws serving goals of human rights.”¹ Reflecting on historical revolutions led us to think of new transitions in hand and in prospect. With this collection, we are looking for new ideas in abortion law. We seek to take stock of the field, but in a dynamic way, to ask which ideas are changing the way we advocate, regulate, and adjudicate on abortion.

The collection builds on significant transnational legal developments in abortion law. Innovation in case strategies and an abundance of decisions from constitutional and human rights courts have produced a rich jurisprudence, which remains largely unexamined and undertheorized by legal scholars. Technological change, such as new medical methods of early abortion, has given rise to new legal controversies and rendered former legal frameworks outdated. While the United States and Western Europe may have been the vanguard in abortion law reform in the latter half of the twentieth century, Central and South America are proving the laboratories of thought and innovation in the twenty-first century, as are particular countries in Africa and Asia. Too often though, barriers of language and legal form impede the transnational flow of these developments and the thinking behind them. Country-specific case studies are published as stand-alone reviews that fail to reflect on larger global trends. Yet often, revelations about why a law has

developed in the way that it has, and how strikingly different it is from what came before or what can be, are visible only in comparison and contrast.

In this collection, we seek to build primarily on this century's legal developments—judicial decisions, constitutional amendments, and regulatory reforms—to ask about change of a larger order. We seek change in the frameworks of ideas that influence, underlie, and give meaning to these legal developments. These are the frameworks that define the relevant questions, the persuasive arguments, and the foreseeable answers in the field. By bringing together legal scholars engaged with different legal controversies, in different legal fields and national contexts, we seek to create a collaborative space for rethinking abortion and the law. The chapters are organized around four themes: constitutional values and regulatory regimes, procedural justice and liberal access, framing and claiming rights, and narratives and social meaning, recognizing that some chapters explore multiple themes.

Constitutional Values and Regulatory Regimes

The chapters in the first part of this volume focus on the evolution of constitutional values associated with women and prenatal life in various constitutional court decisions on abortion, and how these values are expressed and protected in different legal regimes. The term “legal regimes” is used to communicate the variety of legislative and policy instruments employed by legislatures and reviewed by courts in the regulation of abortion. These include criminal abortion laws, but increasingly laws that allow women to access abortion on request, albeit subject to counseling to ensure women's free and informed decisions, and even more notably, policies to facilitate family formation, such as child care and child welfare benefits. These alternative non-punitive regimes are being recognized for their unique property of protecting prenatal life, while supporting women in their reproductive decision making.

The first chapter in this part examines the decline of the conflict-of-rights paradigm in abortion law. To think of abortion as a conflict between the rights of women and the rights of the unborn seems truly of a past era. In her study on the constitutionalization of abortion, Reva Siegel tracks how, over time and across jurisdictions, courts have rejected the view of abortion as a “zero-sum game” in which more accommodation of one set of rights means proportionately less for another. Siegel explores the origin and evolution of

constitutional abortion law, and the influences of social movement that led courts increasingly to acknowledge, accommodate, and even respect women's agency in abortion—most strikingly on the constitutional ground that this provides a more expansive way to protect the right to life of the unborn. She reveals how today regulatory regimes are no longer exclusively tied to the priority of one or the other constitutional value, but vindicate competing values to the advantage of each.

Ruth Rubio-Marín and Adriana Lamačková explore this evolution with country-specific case studies. Rubio-Marín reads the 2010 decision of the Portuguese Constitutional Court validating a mandatory, open-ended abortion counseling regime as an instance of this emerging doctrine. The Court recognizes the regime as protective of unborn human life but also respectful of women's dignity and autonomy as constitutional values worthy of protection. Rubio-Marín identifies a shifting vision, underlying this evolution, of the pregnant woman, now viewed as a responsible actor who makes her own legitimate decisions informed by available means and support, suggesting an alternative, positive course of action for the state. Lamačková explores the 2007 decision of the Slovak Constitutional Court, again validating a counseling regime as consistent with the right to life of the unborn. This decision is especially noteworthy in the region because it does not consider protection of unborn life to be the sole or even primary right in constitutional abortion law. A woman's right to reproductive self-determination enjoys full and equal standing in the constitutional order. Lamačková attributes this jurisprudential shift to the Court's use of balancing as an analytical framework, according to which multiple constitutional rights and values are vindicated, none completely overruling any other, and favoring compromised rather than absolute regulation.

Verónica Undurraga expressly takes up judicial methodology in constitutional abortion law, focusing on proportionality as a reasoned analytical framework that allows courts to move beyond the abstract, intuitive decision making that characterized abortion judgments of the past. Proportionality, Undurraga explains, brings into consideration substantive issues too often neglected in abortion law adjudication and forces judges to assess not merely the rationale, but also the impact of criminalization; that is, whether the protection it affords unborn life is worth the sacrifice it demands of women.

Rachel Rebouché maintains a methodological focus but departs from constitutional law as the primary field of engagement. Her chapter questions the costs of continuing to prioritize the relationship between constitutional

values and regulatory regimes, rather than that between law and practice. She makes a compelling case that the practice of abortion is not determined by legislative form or constitutional norm, but by a complex relationship among formal, informal, and background rules, and thus she sets out an alternative functionalist methodology to capture this web of rules, and to study its impact on access to services.

Procedural Justice and Liberal Access

The chapters in the second part of the book develop the relationship between abortion law and practice introduced by Rebouché. These chapters focus on a preoccupation in abortion law with the prospects of procedural justice to secure women's access to lawful services. The claim is that legality of services is a necessary precondition to service accessibility. However, unless women are aware of their legal rights and have the means to exercise them, services to which they are lawfully entitled remain beyond their reach. The historical proposition of the Common law that substantive legal rights emerged within the interstices of procedure is relevant today. Women's access to safe, lawful abortion depends on women and service providers actually knowing the legal grounds and the conditions under which abortion services may lawfully be rendered and legal procedures of timely review and appeal in the event of disagreement on whether the grounds are met in an individual case. The authors explore the promises and uncertainties of procedural justice in abortion law from three different geographic vantage points.

Joanna Erdman explores the procedural turn at the European Court of Human Rights, asking whether and how procedural abortion rights can serve the substantive end that advocates claim for them: access to services. She begins with a complicating factor of discretion in abortion law, through which women may be denied services to which they are entitled, or granted services to which they are not. When discretion is challenged in the latter case, procedural claims for standards, review, and oversight threaten to restrict rather than enlarge access and thereby to confound the liberalizing promise of the procedural turn. Erdman looks to redeem this ambivalence by shifting focus, asking about the procedural turn from the perspective not of the advocate, but of an international court seeking to engender change on an issue of deep democratic conflict. Procedural rights may serve as a means for the European Court to respect the plurality of rights-based norms on abortion in Europe by

working through rather than against the state, enlisting its democratic forces and its institutions in the effective protection of abortion rights. In a final shift of perspective, Erdman tests this theory in practice, asking about the impact of procedural rights on access to services as mediated through the ambitions and actions of legislatures, doctors, and women themselves, using Ireland as her case study.

Paola Bergallo explores the procedural turn in Argentina through a contest between formal law and informal norms in access to abortion. She recounts how legal grounds for access to services are continually undermined through the use of informal norms by conservative opposition, leading to de facto prohibition. Bergallo explains how government ministries, through procedural guidelines and judicial rulings on implementation, struggle to ensure formal law governs practice. She explores how the struggle to implement the legal indications for abortion may help to promote a gradual change in conceptions of the rule of law, revealing a fertile terrain for moving toward decriminalization. The chapter shows that guidelines have not solved the unworkability of regulating abortion through legal grounds and concludes that the procedural turn in Argentina may ultimately show its greatest potential in reinforcing the normative claims for decriminalization.

Charles Ngwenya draws principally on decisions of United Nations treaty bodies but also references decisions of the European Court of Human Rights and national tribunals to illustrate the potential of the procedural turn for facilitating access to lawful abortion in Africa. He sets out a case for how rendering states accountable for lack of effective implementation of existing legal grounds can be an important juridical tool to secure access to safe abortion. He finds that states no longer satisfy individuals' human rights by simply legislating the difference between lawful and unlawful resort to abortion, but must actively create identifiable means by which women can access, and providers deliver, lawful services. He explores whether the promulgation of abortion guidelines by ministries of health in certain African countries meets the procedural standards. He also explains that their legitimacy would be more substantial if they had the support of ministries of justice and offices of attorneys general, and their assurances that there will be no prosecutions where abortions are done safely with due regard to the rights and dignity of women.