A Turning Point in Abortion Law

Lessons Learned From Comparative Legal Perspectives

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This blog post concludes the symposium "Comparative Legal Perspectives on Abortion". The symposium traced the regulation of abortion and accompanying activist movements in Argentina, Uruguay, Canada, Iceland, Northern Macedonia, Tunisia, South Africa, India, and South Korea. Now we want to turn our gaze from the outside back to the inside: What is to be gained for the German debate on abortion law?

First: it becomes clear that criminalising abortion is the exception to the rule, compared to the selected countries (I.). However, this does not mean that decriminalisation removes all factual access barriers. Leaving the question of decriminalisation aside, it is therefore worth looking at other countries to analyse potential pitfalls for abortion access (II.). Yet, the decriminalisation of abortion paves the way to remove structural obstacles, as the legal comparison suggests. Activist movements can play a crucial part in this (III.).

I. Law in the books

The symposium exposes three basic regulatory techniques: Either countries do not restrict abortion in any way (Cluster 1), or legal access to abortion is, as a rule, permitted within a specific gestational week, regulated either **outside** (Cluster 2) or **within** (Cluster 3) the scope of criminal law. Only those countries that do not resort to criminal law at any stage of pregnancy are placed in Cluster 2.

Cluster 1: No restrictions (Canada and South Korea)

Abortion is not legally regulated in Canada and South Korea. In **Canada**, the Supreme Court ruled as early as 1988 that abortion could not be restricted because of the fundamental rights of the pregnant person. In general, abortion is considered health care. In **South Korea**, judicial intervention was decisive, too: in 2019, the South Korean Constitutional Court declared the criminalisation of abortion unconstitutional. This is remarkable: not only because the court had found the very same law to be constitutional as recently as 2012, but also because in South Korea the right to life of the foetus is constitutionally protected.

Cluster 2: Gestational limits without recourse to criminal law (Iceland, North Macedonia, South Africa)

Iceland, North Macedonia and South Africa restrict abortion according to gestational limits, but all states renounce criminal law. **Iceland** offers a particularly progressive regulation: abortions are possible up to the end of the 22nd week of pregnancy at the pregnant person's request, and still accessible for medical reasons afterwards. Abortion access is thus comprehensively safeguarded. In **North Macedonia**, abortion services may be accessed up to the 12th week, there are no immediate access barriers for the pregnant person (no obligation for counselling, no waiting period). The right to abortion is even constitutionally guaranteed in **South Africa**, which classifies abortion as a reproductive health service. Nevertheless, a rather short limit of 12 weeks is granted, but a counselling obligation waived. An interesting paradigm shift: South Africa does not punish persons who perform or seek abortions – but persons who obstruct access to abortions.

Cluster 3: Gestational limit with recourse to criminal law (Uruguay, Tunisia, India, Argentina)

Uruguay shows the greatest similarity to Germany: Abortion is legal within the first 12 weeks of pregnancy after several mandatory consultations and a five-day waiting period. Unlike in Germany, however, abortion only becomes a criminal offence if these conditions are not met. The German regulation, on the other hand, reverses this relationship of rule and exception: Abortion is generally punishable. This also holds true for **Tunisia**: abortion is considered a crimi-

nal homicide but legal in recognised facilities until the end of the first trimester. **Argentina** regulates abortions up to the 14th week outside of criminal law; from the 15th week onwards, it is a criminal offence. However, because in federal Argentina the federal states are in charge of healthcare, there are territorial differences in enforcement. In **India**, although the law has been amended in 2021 to safeguard the dignity and autonomy of pregnant persons, abortion on demand is not possible. A pregnant person may only have an abortion performed by registered doctors who meet certain qualifications, and only if the life or mental or physical health of the pregnant person is at risk or if there are significant foetal abnormalities.

II. Law in action

However, how abortion is regulated says little about the factual situation of pregnant persons. For example, Canada, South Africa and India show that progressive laws, constitutions and constitutional interpretation do not necessarily ensure comprehensive abortion access. In general, three main problems can be identified that obstruct access to abortion across the board: Problems in the provision of health care (*problem 1*), information deficits (*problem 2*), and lack of financial security (*problem 3*). It should be emphasised that access barriers particularly affect marginalised and poor people (keyword: reproductive justice).

Problem 1: Problems in the health care situation

Problems in the provision of health care are omnipresent: lack of practising doctors/medical staff (e.g. in Tunisia, South Africa), lack of abortion clinics in rural areas (e.g. in North Macedonia, Canada, Iceland), anti-abortion protests in front of clinics (Canada, Germany). Precarious abortion access is exacerbated by doctor's right to refuse the performance of an abortion (conscientious objection) (e.g. in Uruguay, Argentina). National guidelines on how to exercise conscientious objection, however, are rare (South Africa). It is important to point out that abortion is structured by power asymmetries between doctors and patients – after all, the pregnant person is dependent on the doctor's services (Uruguay).

Problem 2: Information deficits

Furthermore, there are information deficits on two levels. On the one hand, the lack of sex education prevents pregnant persons from asserting their reproductive rights (Canada, North Macedonia, South Africa). On the other hand, doctors are uncertain about the concrete application of legal regulations (e.g. how the Choice Act is to be interpreted in South Africa) – also in Germany. Doctors may therefore be more likely to refrain from performing abortions to avoid prosecution.

Problem 3: Lack of financial security

And of course, financial questions also play an important role. Abortion often remains a private service and is not covered by health insurance (North Macedonia) or only under specific conditions (Iceland, Tunisia). This affects marginalised groups in particular: In North Macedonia, for example, many Roma cannot afford legal abortions. In other countries, abortions are covered by health insurance and are as such available free of charge (Argentina, South Africa, Iceland, Canada, India).

III. Activism in law

If pregnant persons are to be protected in the long run, abortion must be recognised as part of reproductive rights (and justice) and thus as a health service. As the legal comparison shows, the first hurdle to overcome is to decriminalise abortions. This paves the way to remove structural barriers and to push back against stereotypical notions of womanhood/motherhood. Every reform that liberalises abortion while continuing to criminalise it ultimately confirms the illegality of abortion – except under specific circumstances. And yet, if Section 218 of the German Criminal Code was repealed, gestational limits were still on the table (as Iceland, North Macedonia and South Africa show).

However, we could observe that decriminalisation does not automatically improve abortion access: abortion must rather be secured effectively and non-discriminatory, especially in rural areas. To this end, the medical conscientious objection must be balanced with the reproductive rights of the pregnant person; comprehensive information on contraception, pregnancy and abortion must be provided and the costs of

abortion must be borne by health insurance. Iceland sets a positive example.

What else can we take away for the German debate? For one thing, the symposium shows how abortion can be regulated outside of criminal law – even if the foetus is constitutionally protected (South Korea). Past decisions of the Constitutional Court do not rule out reforms either. Moreover, abortion remains intertwined with different political and religious or moral views as well as population control. We need political debate as a forum to reflect this pluralism, and to allow the questioning of seemingly neutral assumptions underlying abortion law and reproductive rights in general. The German debate proves particularly entrenched at this point; far too often, mere references to the 1993 ruling of the Federal Constitutional Court are being used to dismiss reform efforts.

South Korea offers a way forward. The historic ruling of 2019 which – in a judicial U-turn – held the criminalisation of abortion to be unconstitutional is owed to the activism of Joint Action Reproductive Justice (2017): They dismantled the opposition between pro-choice and pro-life. Because ultimately, reproduction is a social issue: the state is responsible for protecting and promoting the sexual and reproductive health of its citizens. Social pressure through mass protests and regular individual protests, lobbying and public debates changed social attitudes in South Korea, paving the way for the 2019 ruling.

Similarly, in Argentina, it is massive activist mobilisation that enabled the law reform. Activists pursued a two-pronged strategy: on the one hand, they lobbied in the legislative process, and even introduced their own bill. On the other hand, they pushed for improvements on the ground by training officials, public education and facilitating access to abortion medication. Key to the success of Argentine activists was their ability to tie diverse social groups into a single organisational structure: In over three decades, 300 interclass and intergenerational movements united across the country.

This enormous socio-political potential should be borne in mind when the German government keeps failing to set up the promised commission that is supposed to *examine* a potential decriminalisation. We hope that this symposium may serve as a tool to accompany the future work of the commission, critically and knowledgeably.

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