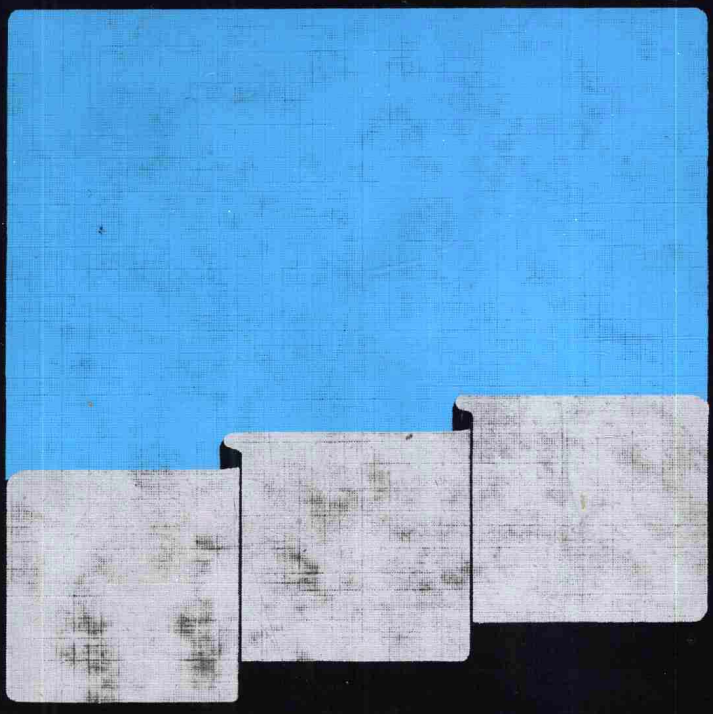
COMPARATIVE LAW YEARBOOK



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SYMPOSIUM

Abortion Law and Public Policy

Introduction

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Since the United States Supreme Court rendered its decision in the landmark abortion case *Roe* v. *Wade*[1] in 1973, the high courts of most of the leading Western countries have experienced similar constitutional debates regarding the right to seek and have an abortion. This Introduction briefly outlines the current state of the law concerning abortion in the United States, the United Kingdom, Canada, Germany (the Federal Republic), France, and Italy.

These Western democratic countries have liberalized to some extent the strict penal sanctions previously imposed upon those persons wishing to have or willing to perform abortions. All of the high courts have recognized the two ends of the spectrum on the issue of abortion – the protection of the fundamental interest of the fetus and the possibly conflicting interests of the woman. Each country, through its developing legislation, has sought to balance the protection of both.

In 1977, the European Commission of Human Rights submitted its report in the case of *Brüggemann and Scheuten* v. *the Federal Republic of Germany.*[2] The applicants complained in large part that their right to respect for private and family life was violated by the Government in that they were not free to have an abortion carried out in the event of an unwanted pregnancy. They alleged a violation of Article 8 of the European Convention on Human Rights[3] among others, as a result of the judgment of the Federal Constitutional Court in Germany on 25 February 1975.[4] The Court ruled that the Fifth Criminal Law Reform Act which had been adopted in 1974 was void insofar as it provided for the termination of pregnancy during the first twelve weeks without requiring any particular reason for it. The Commission of Human Rights interpreted the language of Article 8 as meaning 'that not every regulation of the termination of unwanted pregnancy constitutes an interference with the right to respect for the private life of the mother, in that Article 8, paragraph 1, could not be interpreted as meaning that pregnancy and its termination are, as a principle, solely a matter of the private life of the mother; and that therefore the ... legal rules in force in German law ... do not interfere with their right to respect for their private life'.[5] The Committee of Ministers on 17 March 1978 decided that there had

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been no violation of the Convention by the Federal Republic of Germany in the application submitted by Brüggemann and Scheuten.[6]

By refusing to accept abortion as a human right under the Convention, the Commission of Human Rights recognized that attitudes, political traditions, and ethical judgments concerning abortion and the rights of the unborn differ among the member states of the Council of Europe. Effective enforcement of human rights on the international level requires a commonality of values and shared ideals. With respect to abortion, no such consensus exists at the present time.

It is not the purpose of this discussion to elucidate upon the procedures of each country's constitutional courts, nor to develop in detail the history underlying the decriminalization of many abortion laws. The fact alone that more than one abortion case has been considered by the European Commission of Human Rights[7] is suggestive of the timeliness and importance of the issues surrounding the subject of privacy and correlative measures adopted for the regulation of abortion practices.

The Common Law Jurisdictions

United States

It was during the 19th century in the United States when many state legislatures enacted criminal abortion laws. The Texas statute, at issue in *Roe* v. *Wade*,[8] exemplified what was typical of the time making it a criminal offense to ' "procure an abortion", as therein defined, or to attempt one, except with respect to "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother" '.[9] The issue before the Supreme Court in *Roe* v. *Wade* was the constitutionality of the state abortion statute permitting abortions only to save the life of the mother.

Based on case precedent from *Union Pacific Railroad Co.* v. *Botsford*,[10] to *Griswold* v. *Connecticut*,[11] wherein the Court read into the Bill of Rights the right to privacy, there had been a slowly evolving right to personal privacy rooted in the First Amendment. This right, however, was not determined by the Court to be absolute. In a plurality decision, the Court stated:

> [A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute ...
>
> ...

> We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.[12]

The Court held that the 'compelling' point for the state's important and legitimate interest in the health of the mother is at the end of the first trimester, approximately the twelfth week of pregnancy. From this period through the twenty-fourth week of pregnancy or the second trimester, a state may regulate the procedures for abortion as reasonably relate to the preservation and protection of the health of the mother. During the third trimester, a state may regulate and even proscribe abortion except where it is necessary to save the life or health of the mother. It is only during the third trimester that the state has full regulatory power to prohibit abortion.

Although a woman has the right in the United States to terminate her pregnancy during the first trimester, this right is limited to some extent to those women who can afford one. In light of more recent Supreme Court decisions, *viz., Maher* v. *Roe,*[13] state legislation prohibiting the use of state and federal welfare funds for non-therapeutic abortions has been held to be a constitutionally permissible restriction. The Court held that mere governmental failure to fund abortions did not violate a substantive constitutional right.

United Kingdom

Prior to 1803, the termination of any pregnancy in England was punishable as a common law misdemeanor. In 1861, the Offences against the Person Act was passed. Sections 58 and 59 in particular formed the basic prohibitory regulation against abortion practice.[14] It was an offense to procure or attempt to procure an abortion. Anyone who violated the statute was guilty of a felony.

The Act subsequently has been the subject of various judicial decisions. Perhaps the most noteworthy of all, from an historical as well as a legal-sociological viewpoint, is the case of *R.* v. *Bourne.*[15] This 1938 case depicted the lawfullness of abortion to preserve not only the woman's life but also her mental health. The defendant, Dr. Bourne, was acquitted by a jury for terminating the pregnancy of a woman on the basis that she would become 'a mental wreck' were she required to carry out her term of pregnancy.

The post-war passion for social change succeeded in implementing the Abortion Act 1967.[16] It is a fairly permissive abortion law for it permits abortions if the risks to the physical or mental health of the woman or her children are greater than those of terminating her pregnancy. The law states that, in determining whether continuation of the pregnancy would

constitute a risk to her health, "account may be taken of the pregnant woman's actual or reasonably foreseeable environment."[17] The language of the Act thus combines both a mental health indicator with a social and economic indicator to balance the effect of another child not only on the woman but also on her children.

The more recent legislative reforms were directed with the passage of the Abortion Act 1967 applicable to England, Scotland, and Wales but not to Northern Ireland. Subsequent to its enactment, however, there was continued opposition to the Act. In June 1971, the Lane Committee[18] was established, with the primary purpose to review the operations of the 1967 Act. This Committee produced a three volume report in April 1974. Based in large part on the unanimous conclusions produced by the report, no new amendments were proposed.

Canada

The governing statute permitting therapeutic abortions in Canada is provided in Section 251 of the Criminal Code.[19] Essentially abortion is prohibited in Canada, but if specific conditions are met a legal abortion may be procured under Section 251(4). These include the obtaining of approval of a majority of the members of the therapeutic abortion committee for the approved hospital where the abortion is to occur and such approval must be in the form of a written certificate stating that the pregnancy will likely endanger the life of the woman or her health.

Although the legal statute makes provisions for abortions in certain specified circumstances, the availability for having them is limited to the means provided by the provinces. For example, what is the effect of the situation where a hospital has not made provisions for a therapeutic abortion committee? This was in part one of the issues considered by the Supreme Court in Canada in the well-known case of *Morgentaler* v. *R.*[20] The defendant in the case was acquitted on the charge of performing an illegal abortion based on the common law defense of necessity.

> This common law defence of necessity, when applied to abortion, would require two elements to be established: necessity in the sense that the operation was urgent to save the mother's life or health; and necessity in the sense that it was not possible to follow the Section 251 procedure for obtaining approval. That is, the requirements of Section 251 and the difficulty of fulfilling them may in themselves help to create the situation of necessity which justifies disregarding them.[21]

A comparable study to the Lane Committee's report in England was con-

ducted in 1975 in Canada by the Committee on the Operation of the Abortion Law. Professor Robin Badgley chaired the Committee comprised of two other female members.[22] In January 1977, the Committee presented its report, but interestingly enough, no recommendations for amending the law were given. Moreover, the report commented on the absence of due process given to applicants who had been refused an abortion by the therapeutic abortion committee.[23] There was also general acknowledgment of the discrepency in uniformity of the requirements under which the abortion committees would decide on each application. As of 1 May 1978, however, Sections 251–252 of the Criminal Code have been in force.

The Civil Law Jurisdictions

The Civil Law countries – the Federal Republic of Germany, France, and Italy – have followed a strict interpretation of each country's constitutional protections and in comparison with the common law countries have been slow to decriminalize abortion laws.

The Federal Republic of Germany

The current law regarding the termination of pregnancy is governed by Sections 218 to 220 of the German Penal Code.[24] Originally, the criminal code in Germany was based upon the Prussian Penal Code of 1851 which was then adopted by the German Reich in 1871. Similar to the history of abortion legislation in the United States, the United Kingdom, and Canada, abortion was prohibited.[25] Yet, the Supreme Court (*Reichsgericht*) in a 1927 decision held that an abortion procured for medical reasons, that is, to preserve the life and health of the mother, would not be punishable under the law.[26] During the 1950s and 1960s, a more comprehensive review of abortion laws and policies took place eventually leading to the major reform of abortion laws in the Abortion Reform Act of 1974.[27]

It is the Fifth Criminal Law Reform Act of 18 June 1974 that contains the major revisions of the penal code and above all decriminalized abortion which was carried out by a doctor with the consent of the woman within 12 weeks after conception.[28] In principle, the penalty was maintained but it was only during the second and third trimesters that special reasons were required to justify the termination of a pregnancy.

The liberalization of the criminal sanctions against abortion, however, was short-lived. Once promulgated, the statute was challenged on constitutional grounds by the governments of Baden-Württemberg, Saarland,

Bavaria, Schleswig-Holstein, and Rhineland-Pfalz. The Abortion Reform Act was declared null and void by a vote of 6 to 2 by the First Senate of the Federal Constitutional Court on 25 February 1975.[29] The Court held that the 'developing life' in the womb had independent legal value protected by Article 2 of the Basic Law of the German Constitution.[30]

Accordingly, the Court directed that the law be amended. On 12 February 1976 the West German Parliament (*Bundestag*) enacted the Fifteenth Criminal Law Amendment Act (*Fünfzehntes Strafrechtsänderungsgesetz*).[31] The Act was promulgated on 21 May 1976 and is currently in force in the Federal Republic of Germany.

France

The first section of Article 317 of the French Penal Code provides:

> Any person who causes or attempts to cause an abortion on a pregnant or putatively pregnant woman, regardless of her consent, by means of food, beverages, prescriptions, manipulations, force, or by any other means whatsoever, shall be punished by jailing from one to five years and by fine of 1,800 to 60,000 Francs.[32]

The enforcement of Article 317 was temporarily suspended on 17 January 1975 by Act Number 75–17.[33] During this five-year suspended period, there was no punishment for abortions. In France, the conditions under which abortions may be procured are governed by provisions of the Public Health Code. Prior to 1975, these legislative measures were contained in a decree issued on 5 October 1953, specifically Article L. 162–1–4.[34] Article 162–1 allowed a woman to freely seek the services of a doctor to perform an abortion until the end of the tenth week of pregnancy.[35] The new Act, L. 176, or the Voluntary Termination of Pregnancy Act, amended the provisions allowing a woman to terminate her pregnancy before the end of the tenth week but only if she is fully informed of the risks involved in the abortion procedure and the means of assistance available to her pre- and post-delivery.[36]

In a major decision of 15 January 1975, the *Conseil Constitutionnel* held that the provisions of the law regarding the voluntary termination of pregnancy were not contrary to the Constitution.[37] The tenth week remains the legal time limit after which abortions are prohibited unless there is certification by two physicians that the pregnancy is seriously endangering the woman's health or that there is a strong indication that the unborn child is suffering from a serious disease or incurable condition.

Italy

The constitutionality of Article 546 of the Italian Penal Code prohibiting all abortions was considered by the Italian Constitutional Court in the case of *Carmosina et al.*[38] Article 546 articulated the necessity elements required for a legal abortion. The legislature, however, had not adequately examined the conditions which would justify the procurement of an abortion. For example, there was no recognition of the need for an abortion to protect the life and/or health of the mother.

In its decision on 18 February 1975, the Court declared Article 546 unconstitutional as it prohibits an abortion when the continued pregnancy involves serious risk of injury or danger to the health of the mother which cannot be prevented otherwise. The vagueness of the provisions under the code could no longer be tolerated.

On 21 January 1977, a new Abortion Bill was adopted by the Chamber of Deputies. Essentially, this bill was more lenient than Article 546 by providing additional reasons for the termination of a pregnancy. Under the bill, a woman could decide to terminate her pregnancy within the first 90 days (first trimester) if there should be indications of serious danger to her physical or mental wellbeing. Such reasons include not only her health but also economic, social, or family reasons. A termination was also justified in cases of rape or incest or danger of a malformity. After the first trimester, an abortion was only justified if there was a present danger to the woman's life or health.[39] The bill was rejected by a narrow majority of the Senate in June of 1977 but subsequently introduced again in the Chamber of Deputies.

After considerable deliberation, the Italian government passed the Law on the Social Protection of Motherhood and the Voluntary Termination of Pregnancy on 22 May 1978.[40] In a referendum held in 1981, the law was overwhelmingly approved.

Conclusion

The result of a more realistic and flexible attitude towards abortion legislation and the decriminalization of previously held rigid statutes has had a profound effect in many Western countries. For example, the Badgley Committee, commenting on Canada's 1969 legislation, stated that:

> The number of deaths of women for Canada resulting from attempted self-induced or criminal abortions, which averged 12.3 each year between 1958 and 1969, dropped to 1.8 deaths annually from 1970 to 1974.[41]

There is an overriding similarity that exists in most of the abortion laws in the Western countries discussed in this article. The Constitutional Courts have identified two legitimate governmental interests which provide the foundation for abortion regulation during certain stages of pregnancy: the mother's health for the stage subsequent to the end of the first trimester and the life of the fetus for the stage subsequent to viability. Not all jurisdictions, especially in the Federal Republic of Germany as compared to the United States, recognize and accept the same definition of conception. Yet, the developing trend in the law regarding the termination of pregnancy is to balance the social, economic, and family interests of the woman with the political and legal interests of the fetus. The following chapters dealing with the United States, Austria and Germany trace developments in the abortion law and policy in those countries since the decisions of their high courts approximately a decade ago.

Notes

1. *Roe* v. *Wade*, 410 U.S. 113 (1973); see also *Doe* v. *Bolton*, 410 U.S. 179 (1973)
2. Application Number 6959/75. The European Commission of Human Rights was created as an impartial, international body to which complaints could be filed alleging that a member state had failed to secure for persons within its jurisdiction the rights set forth in the convention. For further reference see Petzold, *The European Convention on Human Rights,* 4th edn. (1981).
3. Article 8 of the Convention provides:
   (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
   (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
4. Fully published in Entscheidungen des Bundesverfassungsgerichts (BVerfGE), Volume 29, pp. 1–95.
5. Report of the European Commission of Human Rights adopted on 12 July 1977, p. 148. See also *Decisions and Reports* Number 10, p. 122.
6. Resolution DH (78) 1 of the Committee of Ministers adopted on 17 March 1978.
7. Although other applicants have submitted applications alleging a violation of the Convention based on the leniency or restrictiveness of their Government's abortion laws, the Commission has declared most applications inadmissible. *X* v. *Austria,* Application Number 7045/75 was deemed to be *ratione personae* incompatible with the provisions of the Convention. In *X* v. *Norway,* Application Number 867/60, the Commission noted that it is competent to examine the compatibility of domestic legislation with the Convention only with respect to its application in a concrete case and is, therefore, not competent to examine *in abstracto* its compatibility with the Convention. The Commission found the petition inadmissible because the Norwegian petitioner, who declared that he acted in the interest of third persons, could not claim to be himself the victim of a violation under the Convention.

8. Supra n. 1.
9. 410 U.S. 154: quoted in 'Constitutional Decisions on Abortion,' *Comparative Constitutional Law* (1976), Chapter 12, p. 564.
10. 141 U.S. 250 (1891).
11. 381 U.S. 479 (1965).
12. Supra n. 9, p. 567.
13. 432 U.S. 464 (1977). See also *Harris* v. *McRae,* 448 U.S. 297 (1980).
14. See *International Digest of Health Legislation,* Vol. 30(3), 1979, p. 401:

    Section 58 of the 1861 Act

    Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or not be with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony ...

    Section 59 prescribes that:

    Whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanor ...
15. 1 K.B. 687 (1939), 3 All E.R. 615 (1938).
16. The workings of the English abortion law are discussed in depth in the three volume *Report of the Committee on the working of the Abortion Act*, commonly referred to as the Lane Report (London: Her Majesty's Stationery Office (1974)).
17. Isaacs, 'Reproductive Rights 1983: An International Survey,' 14 *Colum. Hum. R. L. Rev.* 311 (1983), p. 346.
18. The Committee was so named because it was chaired by Mrs. Justice Lane of the English High Court. The Committee was comprised of fifteen members, ten of whom were women.
19. Section 251 provides the following:

    (1) Every one who, with intent to procure the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose of carrying out his intention is guilty of an indictable offence and is liable to imprisonment for life.

    (2) Every female person who, being pregnant, with intent to procure her own miscarriage, uses any means or permits any means to be used for the purpose of carrying out her intention is guilty of an indictable offence and is liable to imprisonment for two years ...

    (4) Subsections (1) and (2) do not apply to

    (a) a qualified medical practitioner, other than a member of a therapeutic abortion committee for any hospital, who in good faith uses in an accredited or approved hospital any means for the purpose of carrying out his intention to procure the miscarriage of a female person, or

    (b) a female person who, being pregnant, permits a qualified medical practitioner to use in an accredited or approved hospital any means described in paragraph (a) for the purpose of carrying out her intention to procure her own miscarriage, if, before the use of those means, the therapeutic abortion committee for that accredited or approved hospital, by a majority of the members of the committee at which the case of such female person has been reviewed,

(c) has by certificate in writing stated that in its opinion the continuation of the pregnancy of such female person would or would be likely to endanger her life or health, and
(d) has caused a copy of such certificate to be given to the qualified medical practitioner
...

Criminal Code, R.S.C. 1970.
See also n. 21 infra, pp. 7, 8.

20. *Morgentaler* v. *R.* (1976) 1 S.C.R. 616, (1974) C.A. 129, 42 D.L.R. (3d) 444.
21. Sommerville, 'Reflections on Canada's Abortion Law: Evacuation and Destruction – Two Separate Issues,' 31 *Univ. of Toronto L.J.* 1 (1981), p. 10.
22. As a consequence, the report has come to be known as the Badgley Report.
23. The Badgley Report is discussed further in 'Abortion Laws in Commonwealth Countries' *International Digest of Health Legislation,* Volume 30(3), 1979.
24. Sections 218 and 219 provide the following:

§218
Interruption of Pregnancy

(1) Anyone who interrupts a pregnancy after the 13th day following conception shall be punished by incarceration up to three years or fined.

(2) The punishment shall be six months to five years if the actor
1. acts against the will of the pregnant woman, or,
2. wantonly causes the danger of death or serious impairment of health to the pregnant woman.

The court can set up a supervision authority. (§68, Par. 1, No. 2).

(3) If the pregnant woman commits the act, the punishment is incarceration up to one year or a fine.

(4) The attempt is punishable. The woman shall not be punished for an attempt.

§218a
Freedom from Punishment for Interruption of Pregnancy in the First Twelve Weeks

An interruption of pregnancy performed by a physician with the consent of the pregnant woman is not punishable under §218 if no more than twelve weeks have elapsed since conception.

§218b
Indications for Interruption of Pregnancy After Twelve Weeks

An interruption of pregnancy performed by a physician with the consent of the pregnant woman after the expiration of twelve weeks after conception is not punishable under §218 if, according to the judgment of medical science:
1. The interruption of pregnancy is indicated in order to avert from the pregnant woman a danger to her life or the danger of serious impairment to the condition of her health insofar as the danger cannot be averted in a manner that is otherwise exactable (reasonably expected) from her, or
2. Compelling reasons require the assumption that the child will suffer from an impairment of its health which cannot be remedied on account of an hereditary disposition or injurious prenatal influences which is so serious that a continuation of the pregnancy cannot be exacted (reasonably expected) of the pregnant woman; and not more than 22 weeks have elapsed since conception.