Introduction
Abortion Law in Transnational Perspective: Cases and Controversies

Bernard Dickens, R.J. Cook & J.N. Erdman

Version Publisher’s Version


Publisher’s Statement All rights reserved. Except for brief quotations used for purposes of scholarly citation, none of this work may be reproduced in any form by any means without written permission from the publisher. For information address the University of Pennsylvania Press, 3905 Spruce Street, Philadelphia, Pennsylvania 19104-4112.

How to cite TSpace items

Always cite the published version, so the author(s) will receive recognition through services that track citation counts, e.g. Scopus. If you need to cite the page number of the author manuscript from TSpace because you cannot access the published version, then cite the TSpace version in addition to the published version using the permanent URI (handle) found on the record page.

This article was made openly accessible by U of T Faculty. Please tell us how this access benefits you. Your story matters.
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.” 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new medical methods of early abortion, has given rise to new legal controversies and rendered former legal frameworks outdated.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
Introduction

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
Introduction

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 Ngwena 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.
Framing and Claiming Rights

The chapters in the third section of the book address how arguments are framed and how claims are made, investigated, challenged, and may be resolved within these frames. A frame shares common reference points and parameters that determine how knowledge is constructed and debated. The authors investigate frames of argumentation, whether in public debate or judicial proceedings. They examine the origins of frames of argumentation, why they have come into use and by whom, forums in which they are used, and most notably, the plurality of competing claims within them.

This set of chapters opens with Sally Sheldon and Bernard Dickens examining frames of reasoning in public debates, and how they may accommodate an increasing cast of social actors with different policy agendas. Sheldon uses early medical (i.e., nonsurgical) abortion, a routine procedure in many countries, as a focus for exploring the strengths and weaknesses of the highly medicalized framework for the provision of abortion services in Britain. While this frame, entrenched in statute and broadly accepted, has contributed to significant depoliticization and liberalization of access to abortion, it has also obstructed other ways of conceptualizing what is at stake in the debate on abortion, notably, women’s reproductive rights. Sheldon explores the resilience of this medicalized control despite a court challenge to repeal the clinically unsupported restrictions on the use of nonsurgical abortion, and evidence from other countries regarding the safety of its home use.

Dickens explores variants of the human right to freedom of conscience in abortion debates, focusing on the claim that the human right to act lawfully according to one’s individual conscience is not a monopoly of abortion opponents. Equally conscientious may be providers’ commitment to delivery of abortion care, according to which they are entitled by conscience to participate in such lawful procedures, to advise patients about the option, and to refer patients to where appropriate services are available. Moreover, much in the same way that secular health facilities must accommodate providers’ rights of conscientious objection, religiously inspired health facilities must accommodate providers’ rights of conscientious commitment to undertake or make provision for services, and women’s conscientious rights to receive them.

Julieta Lemaitre and Luís Roberto Barroso focus on specific frames of legal argumentation. Lemaitre explores the emergence of Catholic constitutionalism in abortion law; that is, the advancement of Catholic theological
reasoning through the secular discourse of human rights. Believing that engagement with these arguments, on their own merits, is crucial for the pro-choice community, she elaborates core Catholic constitutional arguments about the legal regulation of abortion and explores the productive effects of this engagement in exposing the moral order implicit in liberal convictions and its shortcomings, and in building bridges with Catholic concerns for social justice.

Barroso recounts his advocacy before the Brazilian Supreme Court in successful arguments that the termination of an anencephalic pregnancy, a fetal condition of brain tissue deficiency incompatible with survival outside the womb, does not constitute abortion. He compares and contrasts the decision of the Brazilian Supreme Court with court decisions of other countries and with those of human rights treaty bodies. He explains how this extreme case offered a chance to bypass the most crucial moral claim against abortion—the fetus’ potentiality for life. Barroso explores how the advocacy helped to overcome the taboos around abortion in Brazil and how it benefitted the broader advocacy effort to assert women’s right to abortion.

Similarly reflecting the interaction of reasoning in public debates and advocacy before courts, Melissa Upreti addresses the shifting frames of reference through which a constitutional court analyzes abortion. She examines the decision of the Supreme Court of Nepal in the Lakshmi Dhikta case, which addressed the rights of a poor woman from rural western Nepal to have the cost of her abortion covered by the government. The Court’s decision reinforced the transition from the country’s earlier punitive repression of abortion, based on Hindu religious precepts of patriarchy and the high value that they place on women’s fertility, to guarantee economic access to safe and legal abortion services for poor women. Upreti explains how the Court, guided by a frame of transformative equality, required the government to ensure that women marginalized by poverty and geographical remoteness have timely access to free services.

Narratives and Social Meaning

The chapters in the fourth part of the book identify the recurring narratives that arise from legal debates on abortion. They explore the significance of narratives that are produced by laws, litigation, and language about abortion, and how these narratives convey social meaning. The authors encourage
readers to consider the consequences of stories told through the legal contests about abortion and the social meanings they convey about women, their sexuality, and their pregnancies and what these consequences may portend for legal strategy. Understanding the broader narratives within which legal argument resides opens opportunities to rethink strategies of old, and to reimagine new approaches of engagement.

Lisa Kelly studies narratives of adolescence and sexuality in contemporary transnational abortion rights litigation from Latin America. She identifies in these cases a recurring narrative that invokes sexual innocence, violation, and parental beneficence in the pursuit of a lawful abortion, which when denied, identifies the state as the shameful antagonist. She warns, however, that with these legal and discursive openings, reproductive rights advocates face a “knife-edge dilemma.” By narrating sympathetic cases of violated young girls, advocates risk reinforcing ideas of deservedness in abortion law. By mobilizing the cultural and legal power of the family, advocates may vest greater legal rights in parents to act against their minor daughters’ wishes and interests. By deploying tropes of youthful suffering and vulnerability, advocates may reinforce protectionist discourses to restrict adolescents’ access to lawful services they favor.

Alejandro Madrazo examines the significance of the legal debates in Mexico and beyond about prenatal personhood for women’s exercise of their reproductive rights. His concerns lie not in the narrow legal issues of interpretation, but rather their role in shaping the public debates over abortion. Leaving the fundamental question of prenatal personhood unattended can have catastrophic consequences for women’s rights in general, and their sexual and reproductive rights in particular, in part by facilitating resort to criminal rather than constitutional law as the modality of reasoning. Moreover, the protection of prenatal personhood is usually not taken self-critically by its proponents but is rather an argument for justifying restrictions on women’s sexual and reproductive rights and, more specifically, for trumping women’s right to choose. Claims of prenatal personhood enable oversimplified narratives centered on the act of abortion rather than on the circumstances of women that give rise to unwanted pregnancies.

Rebecca Cook concludes the collection with a study on the stigmatizing effects of criminal law on abortion, asking whether the negative social implications of stigma that affect women considering or resorting to abortion, and that similarly affect providers of abortion services, outweigh the reasons for regulating abortion through criminal law. The answer requires acknowledging
that stigmatization is a dehumanizing process by which power is exerted to spoil individuals’ status, dignity, and self-image, justifying their degrading treatment. Cook explains that, as a decentralized mode of social control, stigmatization has unending rippling effects. Its consequences extend well beyond the formal criminal law, which often allows abortion only as a narrow exception from criminal guilt, to facilitate the development of informal rules that misapply the formal law and ignore the background rules on patients’ rights and professional duties with impunity. As a result of the stigmatizing effects of criminally constructing women, Cook concludes that addressing abortion primarily through criminal law cannot be justified.

This book’s contributors are differently located in the world and differently situated vis-à-vis the abortion field. Some are steeped in abortion scholarship and activism. Others have written relatively little in the field and have come to the study of abortion as an incident of some other project. Fragmentation is critical to our concept for the book, which subscribes to the view that “[a]lthough to a substantial extent it is what scholars share that makes discourse possible, it is what they do not share that makes it valuable.” Too much cohesion or too much connection can be stagnating, even corrosive, for a field of study. It is the wandering of different but related ideas that generates novelty and innovation.3

It is increasingly implausible to speak of a purely domestic abortion law, if one ever existed. The chapters of this collection illustrate various dimensions of the transnational enterprise. Lemaitre and Upreti explain the influence of Catholic and Hindu religious teachings respectively on framing of abortion law and legal debates. Siegel describes the influence of transnational social movements on the constitutionalization of abortion, while Ngwena describes colonial influence on African abortion laws. Sheldon points to how women’s safe use of nonsurgical abortion in their homes in some countries inspired efforts to allow the same in Britain, and why these efforts proved unsuccessful given the British medical framework. Rubio-Marín and Lamačková address a form of cross-regime borrowing and grafting, where constitutional frameworks from afar are reimagined in new jurisdictions in a new era. Dickens explores how the debates on providers’ right of conscience to refuse to provide services have been monopolized across jurisdictions by those opposed to abortion, without regard to the equal right of conscience to provide and use services.

Undurraga examines how constitutional courts have used and could use
the principle of proportionality, a common legal doctrine in many countries, to discipline and resolve the reasoning about whether abortion regimes comply with constitutional and human rights. Recognizing the transnational phenomenon of the turn to procedural or adjective law to ensure access to lawful services, Erdman explores its promises and perils in the hands of an international court of human rights that seeks to engender change by drawing on the strength of democratic forces within, and acting in concert with, institutions of the state; that is, by integrating legal systems of rights protection. Bergallo explains how abortion guidelines of other countries and technical guidance from the World Health Organization inspired similar guidelines in Argentina to ensure women’s access in practice to lawful abortions. Barroso compares and contrasts the decision of the Supreme Court of Brazil with court decisions of other countries on the same issue. Rebouché and Kelly describe the workings of a transnational reproductive advocacy network on domestic litigation. Madrazo and Cook document social meanings of law traveling across the boundaries of legal jurisdictions, suggestive of cultural values transcending geopolitical boundaries.

This book does not represent all geographic regions equally, and we recognize that some regions are underrepresented. The intention of the book is in part to encourage more transnational engagement and to invite identification and sharing of innovative lawyering and theorizing. We hope that this book will stimulate readers to imagine alternative ways to engage with abortion in law.