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Abortion Laws in Transnational Perspective: Cases and Controversies REBECCA J COOK, JOANNA N ERDMAN, BERNARD M DICKENS (eds.) Philadelphia, University of Pennsylvania Press, 2014, 480 pp., hardback, £45.50, 9780812246278

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For a while at least, it seemed that proponents and opponents of decriminalisation and liberalisation of abortion laws had become entrenched in their well-known positions and that national legislators and politicians had reached a form of, usually fragile, consensus. Of course, those interested in this area of health care will know this has categorically not been the case. In their edited collection, Rebecca Cook, Joanna Erdman and Bernard Dickens invite ‘veterans’ of abortion debates, including Reva Siegel, Sally Sheldon, Charles Ngwenya and other established legal scholars to analyse recent legal developments in the area of pregnancy termination. Their main aim is to trace abortion law as it 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’ (p. 1). In so doing, the editors aim to identify new ideas that are changing the way abortion is advocated, regulated and adjudicated. However, instead of mapping the political landscapes and legislative processes, most authors in the volume focus on the rich jurisprudence of constitutional, supreme and international human rights courts across the world. As a result, the book provides a broad and in-depth analysis of the complex processes of constitutionalisation and judicialisation of abortion laws in Europe, the US, Latin America and, to a lesser extent, Africa and Asia in recent decades. In this respect, what is novel about the book is that it connects the subject of abortion directly with recent discussions on judicial activism in the area of social, economic and cultural rights.¹ It also offers a unique contribution to abortion literature, which, with some exceptions,² has focused predominantly on domestic context and individual polities.³ As such, it will be of interest to medical, constitutional, and international lawyers, sociologists and political scientists interested in reproductive rights, who are looking for an insightful up-to-date summary of recent legal developments and debates.

One of the main challenges for editors of collaborative publications is to create a volume that is conceptually and theoretically coherent. As if to pre-empt any criticism of this kind, Cook and colleagues claim that fragmentation is ‘critical’ to their project, subscribing to the view that ‘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’ (p. 8). This fragmentation is noticeable in the discrepancy between the aims,

¹ See, for eg., J Harrington and M Stuttaford (eds.), *Global Health and Human Rights* (London: Routledge, 2011); AE Yamin and S Gloppen (eds.), *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Harvard: Harvard University Press, 2011); M Lagdforde (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008); D Barak-Erez and AM Gross (eds.), *Exploring Social Rights: Between Theory and Practice* (Oxford: Hart Publishing, 2007).

² H-G Koch and A Eser, *Abortion and the Law: From International Comparison to Legal Policy* (The Hague: Asser Press, 2005); RJ Simon, *Abortion, Statutes, Policies and Public Attitudes the World Over* (Westport: Praeger Publishers, 1998).

³ See, for eg., D S. Cohen and K Connon, *Living in the Crosshairs: The Untold Stories of Anti-Abortion Terrorism and Law* (New York: OUP, 2015); SM Klausen *Abortion Under Apartheid: Nationalism, Sexuality, and Women's Reproductive Rights in South Africa* (New York: Oxford University Press, 2015); JK Mason, *The Troubled Pregnancy: Legal Wrongs and Rights in Reproduction* (Cambridge: Cambridge University Press, 2007); S Sheldon, *Beyond Control: Medical Power and Abortion Law* (London: Pluto, 1997).

geographical focus and character of different chapters, some of which are analytical in nature (Siegel, Ruth Rubio-Martin, Adrianna Lamačková, Sheldon, Erdman), others are prescriptive and propose normative solutions to interpretation and practice (Veronica Undurraga, Rachel Rebouché, Ngwena, Lisa Kelly). However, the editors' somewhat defensive stance concerning methodology seems unnecessary. Despite the variety of perspectives and backgrounds, there is continuity and a clear conceptual trajectory in the way the argument is developed across the different chapters. The analysis traces the position of women caught up in socio-political conflicts concerning abortion, starting from the more abstract review of constitutional rights (in Part I 'Constitutional Values and Regulatory Justice'), through the realisation and implementation of these rights in practice (in Parts II and III, 'Procedural Justice and Liberal Access' and 'Framing and Claiming Rights', respectively), to the consequences of different forms of conceptualising women in abortion laws as victims or criminal offenders (in Part IV, 'Narratives and Social Meaning'). In addition, and perhaps more importantly, the book's coherency stems from the fact that all authors seem to share the same liberal standpoint towards abortion laws. Implicitly or explicitly, all chapters are centred on notions of women's citizenship, agency and the idea of material and procedural rights in their struggle for decriminalisation and/or liberalisation of abortion. Acknowledging the 'decline of conflict-of-rights paradigm in abortion law' (p. 2), the contributors to this collection attempt to provide a nuanced interpretation of the recent juridical developments in the area of reproduction.

As a whole, this collection reveals three main trends in the legal regulation of abortion. The first is the increasing liberalisation of abortion laws in Europe and beyond. Siegel offers a historical overview of seminal judgments delivered by the German Constitutional Court and the US Supreme Court, which created two different frameworks of abortion laws based on the protection of unborn life and on women's autonomy and welfare, respectively.⁴ It becomes clear throughout this collection that this jurisprudence left a huge mark on a number of jurisdictions across the world, setting the basis for the development of three different models of regulation: 'periodic regimes' (where abortion is allowed on request in the first trimester, for example, in South Africa and Mexico), 'indications regimes' (where abortion is prohibited unless certain conditions are met, for example, in Spain, Colombia, and Argentina), and the more recent 'result-open dissuasive counselling regimes' (for example, in Portugal and Hungary). However, within two decades of their initial judgments, the courts in Germany and the US had modified those frameworks to mediate between competing constitutional values (p. 28). Interestingly, and contrary to common views, this evolution has had the result that today in both countries

a particular legislative regime is justified by appeal to constitutional values historically associated with an opposing form of abortion regulation: legislation that allows abortion is associated with the constitutional protection of unborn life, and legislation that restricts abortion is associated with the constitutional protection of women. (p. 34)

The consequences of this shift are visible in Europe where, as Siegel points out, '[a]fter decades of conflict, a constitutional framework is emerging [...] that allows legislators to vindicate the duty to protect unborn life by providing women dissuasive counselling and the ability to make their own decisions about abortion' (p. 35). These findings resonate, to some extent, with Sheldon's analysis of the weakness of the highly medicalised framework

⁴ 'The Constitutionalization of Abortion', Ch. 1.

for the provision of early abortion services in Britain,⁵ and they are confirmed by Rubio-Martin and Lamačková, who investigate the progressive constitutional jurisprudence in traditionally conservative and Catholic societies like Portugal and Slovakia.⁶ At the same time, however, this shift is quite recent and relatively fragile, making the achieved consensus susceptible to political and socio-economic changes which might have negative effects on women's dignity and reproductive autonomy (pp. 54-55). This is particularly true for abortion laws in other parts of the world, especially Latin America.

The second trend revealed through the analysis is the intense process of juridification, the bifurcation of different forms of legality and the perpetual tensions between them. Most contributors highlight the discrepancies between formal and informal rules, between law and other norms (for example, professional guidelines), and/or between law and medical practice. Rebouché, drawing on experiences in Colombia, Kenya, South Africa and Mexico, goes even further questioning the simple dichotomy of defining abortion practice as legal and not legal (p.109).⁷ Using what she calls a functionalist approach, she proposes a more nuanced view of the normative framework surrounding abortion, including closely interrelated formal, informal and background rules (pp. 98-117). She highlights the impact of background rules (for example, regulations and policies that govern health services) on abortion practices, but more importantly the significance of medical practice in shaping formal rules, sometimes effectively changing the meaning of the rule (pp. 109-112). Similarly, Paola Bergallo shows how informal rules fill the gaps between abstract constitutional norms and medical practice in Argentina, creating a situation where already restrictive abortion laws are interpreted in a way that denies women access to the most basic abortion healthcare services guaranteed by law.⁸ Analogous processes are depicted not only in other Latin American countries, such as Brazil,⁹ Mexico,¹⁰ Colombia, Peru and Chile,¹¹ but also in Africa¹² and, in Europe, with the most extreme examples of Poland and Ireland.¹³

It is interesting to note that most of these states have experienced democratic reorientation in recent decades. This might be the reason why human rights and constitutional courts have focused on procedural justice, ensuring that appropriate procedures are established and accepted that guarantee the full realisation of the existing material rights to legal termination. As noticed by Erdman in respect of the European Court of Human Rights:

by turning to positive obligations and to procedural rights, the European Court seeks to work *through* rather than *against* the state. It seeks to engender change by drawing on the strength of democratic forces within and by acting with rights-protecting institutions of the state, to keep the state at the centre of the system, even while seeking to transform it.' (p. 141, emphasis in original)

⁵ 'The Medical Framework and Early Medical Abortion in the UK: How Can a State Control Swallowing?', Ch 9.

⁶ 'Abortion in Portugal: New Trends in European Constitutionalism', Ch 2; 'Women's Rights in the Abortion Decision of the Slovak Constitutional Court', Ch 3, respectively.

⁷ 'A Functionalist Approach to Comparative Abortion Law', Ch 5.

⁸ 'The Struggle Against Informal Rules on Abortion in Argentina', Ch 7.

⁹ LR Barosso, 'Bringing Abortion into the Brazilian Public Debate: Legal Strategies for Anencephalic Infants', Ch 12.

¹⁰ A Madrazo, 'Narratives of Prenatal Personhood in Abortion Law', Ch 15.

¹¹ LM Kelly, 'Reckoning with Narratives of Innocent Suffering in Transnational Abortion Litigation', Ch 14.

¹² CG Ngwena, 'Reforming African Abortion Laws and Practice: The place of Transparency', Ch 8.

¹³ JN Erdman, 'The Procedural Turn: Abortion at the European Court of Human Rights', Ch 6.

In these processes, in some polities (especially in Latin America) the judiciary reaches beyond its adjudicative prerogatives and performs semi-legislative and executive functions, providing very detailed guidelines about how the existing law, if not struck down, should be interpreted and developed (for example, through government regulations, health care policies, professional guidelines) in order to fulfil state's obligations. However, as aptly concluded by Erdman, 'the passive virtue of procedural rights invites a large measure of indeterminacy in the substantive change engendered, sometimes even perverse outcomes' (p. 141).

Although these perverse and often distressing outcomes are described in detail by Luis Roberto Barroso, Kelly, Alejandro Madrazo,¹⁴ Cook¹⁵ and Melisa Upreti,¹⁶ the collection falls short of an in-depth analysis of the wider socio-political background that contributed to the changing landscape of abortion laws. It is interesting that many contributors mention political party alliances that led to a particular abortion legislation or judgment, but omit to emphasise the importance of democratisation processes that took place in recent years, the impact of structural adjustment programmes on the delivery of health care, and/or the growing significance of the middle class for human rights litigation. For instance, in Argentina some of the difficulties arising with regard to informal rules are closely linked with the weak federal state structure, the limited powers of central institutions and with the three-tier health care system, partly governed by strong trade unions still defined by the Peronist movement. An in-depth analysis of these factors is undoubtedly difficult in the limited space provided by an edited collection devoted predominantly to legal transformations. Nevertheless, it is a matter of regret that the study of these transformations has not been more closely linked to the wider societal, economic and political processes underlying the constitutionalisation of abortion.

The discussion above points indirectly toward the third notable shift that becomes obvious from reading this collection; namely, that the geographical centre of abortion controversies has shifted from the Northern Hemisphere to South America and Africa. The influence of German and US constitutional law and jurisprudence is still clearly discernable to some degree in courts' decisions across Europe; for example, as demonstrated by different contributors throughout the collection, in Portugal, Spain, Hungary, Slovakia, and Poland.¹⁷ However, it is in Latin America that the constitutionalisation and judicialisation of abortion rights are most prominent and that International Human Right Courts, Supreme Courts and Constitutional Courts issue the most innovative and progressive judgments. Most authors in the volume praise the decisions of international human rights bodies, including the Inter-American Court of Human Rights (IACtHR) in cases such as *K.L. v Peru*,¹⁸ *L.C. v Peru*,¹⁹ *L.M.R. v Argentina*,²⁰ and *Paulina Ramirez Jacinto v Mexico*,²¹ for confirming and

¹⁴ n 9, n 11, n 10 above, respectively.

¹⁵ 'Stigmatized Meanings of Criminal Abortion Law', Ch 16.

¹⁶ 'Toward Transformative Equality in Nepal: The *Lakshmi Dhikta* Decision', Ch 13.

¹⁷ See n 6 and n 13 above; also, V Undurraga, 'Proportionality in the Constitutional Review of Abortion Law', Ch. 4.

¹⁸ *K.L. v Peru*, CCPR/C/85/D/1153/2003 (3 November 2005) (HRC).

¹⁹ *L.C. v. Peru*, UN Doc. CEDAW/C/50/D/22/2009 (4 November 2011).

²⁰ *VDA (on behalf of LMR) v Argentina*, Merits, Communication No 1608/2007, UN Doc CCPR/C/101/D/1608/2007, IHRL 157 (UNHRC 2011), (29 March 2011), Human Rights Committee [UNHRC].

²¹ *Paulina del Carmen Ramirez Jacinto v. Mexico*, Case 161-02, Report No. 21/07, Inter-Am. C.H.R., OEA/Ser.L/V/II.130 Doc. 22, rev. 1 (2007).

developing women's right to access legal abortions.²² Similarly, as discussed by Rebouché, Bergallo, and Dickens, at the national level, the Colombian and Argentine Supreme Courts have led the way in liberalising abortion laws by reference to the right to health (care), the right to life, and/or the right to personality, guaranteed by the recently adopted or amended constitutions.²³ What is also very interesting, although it is not expressly addressed in this collection, is the success of the anti-discrimination framework rooted in international human rights treaties, such as the Convention on the Elimination of all Forms of Discrimination Against Women or the Convention on the Rights of Persons with Disabilities, which are used by courts to justify state obligations to provide abortion services to women.²⁴ The potency of the international and regional human rights law is also evident on the African continent and it is a shame that Africa and Asia are largely underrepresented in the book, with the notable exceptions of chapters by Ngwenya on the value of transparency on law and policy in different African polities and Upreti on the bold Supreme Court's attempts to alleviate the impact of extremely restrictive abortion laws in Nepal.²⁵ Important absentees in the volume are Russia and China, both famous for their historically permissive (if not coercive) approaches to abortion and notoriously high numbers of terminations.²⁶ However, a closer look at the socio-legal context reveals much more complex realities which remain largely under-researched.²⁷ Recent attempts by the Russian and Chinese governments to restrict existing practice through law reforms and administrative means, albeit for different reasons, would constitute an interesting subject of comparison with the European and Latin-American judicial activism.²⁸

The preceding remarks relate to a broader conceptual issue. It is striking that in this broadly intellectually stimulating and thought-provoking collection, whose title is *Abortion Laws in Transnational Perspective*, the concept of *transnational law* has not been defined and is mentioned by individual authors only in passing, often as a synonym for the term *comparative*. This would be justified if transnational law were to be understood as a method of investigating the legal consequences of globalisation that has a strong comparative dimension.²⁹ However, this interpretation is not reflected in the content of the book, which identifies the cross-fertilisation of ideas in constitutional jurisprudence but

²² See n 9, n 10, n 11 above. Also C O'Connell, 'Litigating reproductive health rights in the inter-American system: What does a winning case look like?' (2014) 16 *Health and Human Rights Journal* 116. A more skeptical view is presented in C Bates, 'Abortion and a right to health in international law: *L.C. v Peru*' (2013) 2 *Cambridge Journal of International and Comparative Law* 640.

²³ n 7 and n 8 above, BM Dickens, 'The Right to Conscience', Ch 10, respectively.

²⁴ Not least in *K.L. v Peru* and *L.C. v. Peru*, n 17 and n 18 above. Also, *María Mamérita Mestanza Chávez v. Perú*, Friendly Settlement Agreement, Inter-Am. Comm. H.R., Report No. 71/03 (2003), Part 4 at 11; *Maria da Penha Maia Fernandes v. Brazil*, Friendly Settlement Agreement, Inter-Am. Comm. H.R., Report No. 54/01 (2001), Part VIII Recommendations at 4. *María Mamérita Mestanza Chávez v. Perú* is a precedent for identifying discrimination as being a basis for women's reproductive rights violations, and in *Artavia Murillo et al. v. Costa Rica*, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 257 (November 28 2012) fertility problems were conceptualised with reference to both anti-discrimination and disability frameworks.

²⁵ n 12 and n 16 above, respectively.

²⁶ United Nations, Department of Economic and Social Affairs, Population Division (2014). *Abortion Policies and Reproductive Health around the World* (United Nations publication, Sales No. E.14.XIII.11).

²⁷ D McBride Stetson, 'Abortion policy triads and women's rights in Russia, The US, and France' in M Githens and D McBride Stetson (eds.), *Abortion Politics: Public Policy in Cross-cultural Perspective* (London: Routledge, 1996).

²⁸ An example is C Weiwei, 'Exploring 'glorious motherhood' in Chinese abortion law and policy' *Feminist Legal Studies*, 6 October 2015, DOI 10.1007/s10691-015-9291-7.

²⁹ RA Miller and PC Zumbansen (eds.), *Comparative Law as Transnational Law: A Decade of the German Law Journal* (New York: Oxford University Press, 2012).

does not really explore the factors leading to diffusion of law and ‘acculturation’ of rights.³⁰ The term ‘transnational law’ was coined by Philip Jessup in 1956, who defined it as ‘all law, which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules, which do not wholly fit into such standard categories’.³¹ Today, transnational law is often seen ‘as a myriad web and “assemblage” of intertwining, both public and private, that is hybrid, forms of regulation that can no longer be easily associated with one particular country or, for that matter, one officially mandated rule making authority’.³² Those who subscribe to this view treat transnational law as conceptually distinct from national and international law because its primary sources and addressees are neither nation state agencies nor international institutions founded on treaties or conventions, but private (individual, corporate or collective) actors involved in transnational relations.³³

If this latter understanding of transnational law were to be adopted, the collection misses the opportunity to address important transnational legal phenomena taking place in the area of abortion and reproductive health. There is no discussion of the cross-border flow of patients seeking abortion services; for example, from Ireland to the UK, Poland to Germany, or from Paraguay to Argentina, which can lead to legal transnationalism in the form of ‘peripheral governance’.³⁴ Furthermore, reference is made neither to questions of the cross-border flow of health care professionals (for example, their legal liability and rules of conduct), nor to the increasingly globalised market of early-abortion pharmaceutical products. Finally, the issue of the proliferation and growing relevance of different international non-state actors, including non-governmental international organisations, professional standard setting authorities, charities and patient groups, is not addressed. Analysis of these aspects of transnational abortion law would have aligned the title of the collection with its content.

The book, perhaps unwittingly, seems to provide evidence in support of a claim about the rise of a transnational judicial constitution, of a legal order overarching national boundaries in which, at different levels, judicial actors assume unprecedented authority to shape and conduct legislation.³⁵ It would have been fascinating to see how established experts and veterans of abortion debates engaged more directly with this claim and also with the challenge arising from this transnational legal-pluralist order, which consists in making sense of different understandings of legal rule-making, legal pluralism and the role of political authority (for example, the ‘state’) in the face of an increasingly fluid normative

³⁰ R Goodman and D Jinks, ‘Incomplete internalization and compliance with human rights law’ (2008) 19 *European Journal of International Law* 725, 1.

³¹ PC Jessup, *Transnational Law* (New Haven: Yale University Press, 1956) 2.

³² P. Zumbansen, ‘Transnational comparisons: Theory and practice of comparative law as a critique of global governance’ in M Adams and J Bomhoff (eds.), *Practice and Theory in Comparative Law* (Cambridge: Cambridge University Press, 2012) 189. See also P Zumbansen, ‘Neither ‘public’ nor ‘private’ in G Handl, J Zekoll and P Zumbansen (eds.), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Leiden and Boston: Martinus Nijhoff, 2012).

³³ See further P Zumbansen, ‘Piercing the legal veil: Commercial arbitration and transnational law’ (2002) 8 *European Law Journal* 400; R Cotterrell, ‘What is transnational law?’ (2012) 37 *Law & Social Inquiry* 2; GP Calliess, ‘The making of transnational contract law’ (2007) 14 *Indiana Journal of Global Legal Studies* 469.

³⁴ R Fletcher, ‘Peripheral governance: Administering transnational health care flows’ (2013) 9 *International Journal of Law in Context* 161, 164.

³⁵ C Thornhill, ‘A sociology of constituent power: The political code of transnational societal constitutions’ (2013) 20 *Indiana Journal of Global Legal Studies* 551.

order'.³⁶ Nevertheless, this is a valuable addition to the literature and will be of interest to, not least, scholars of law, politics, and sociology.

³⁶ Miller and Zumbansen, n 28 above, 2.