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Dropping the ball or holding the line? Challenges to abortion laws in the Nordic countries

Heli Askola

Faculty of Law, 15 Ancora Imparo Way, Monash University VIC 3800, Australia

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ABSTRACT

This article examines recent developments regarding the legal regulation of abortion in Sweden, Finland and Norway. Ever since abortion laws in the Nordic countries were overhauled in the 1970s, largely in a response to the feminist movement, abortion has been considered to be largely non-politicised. However, recently all three countries have seen abortion re-emerge repeatedly in the political and legal arena. This article examines the various proposals to amend abortion legislation, asking whether they can be explained with reference to recent international developments in anti-abortion politics. The article argues that although the recent Nordic developments have limited immediate consequences for the availability of abortion as a public service, they suggest, perhaps more importantly, that a long-term struggle is emerging over public opinion supporting universal abortion access.

1. Introduction

Abortion continues to be legally and politically contested in many places around the world, despite a global trend towards liberalisation of abortion legislation (Finer & Fine, 2013). In the United States, attempts to undermine women's access to abortion have taken a multitude of forms and recent attempts to move towards a more restrictive abortion regimes in states such as Poland and Spain have shown that Zampas and Gher (2008, 294) were right to predict that some European states might also be moving in a more restrictive direction. In recent years, abortion has become increasingly topical also in the Nordic countries. While there are in fact many cultural, political and social differences inside what is often treated as a homogenous region, the Nordic countries have for some time shared an assumption in relation to abortion that it is a non-issue. The context of these countries, as latecomers to resurfacing abortion controversies, gives rise to questions about why abortion has suddenly re-emerged as a fresh site of debate and disagreement and whether this phenomenon is connected to global trends, including the spread of new anti-abortion strategies.

This paper examines the recent developments around abortion law in Sweden, Finland and Norway, asking whether their (what had been considered settled) legal frameworks regarding abortion provision are facing change. Abortion was legalised in the Nordic countries in the 1970s (Knudsen et al., 2003), as part of the general (Western) European trend in the direction of less restrictiveness since the 1960s (Levels, Sluiterb, & Need, 2014). Today, women in Norway and Sweden are entitled to abortion on request up to 12 and 18 weeks' gestation respectively; in Finland abortion has to be approved by two doctors following a list of broad indications, but is practically always available up to 12 weeks' gestation, as the social indication (a significant burden) is easy to meet. Abortion has been a normalised part of normal public healthcare. Abortion levels vary between the three countries (with the highest levels found in Sweden and the lowest in Finland), with well over 90% of abortions performed before gestational week 12 (Folkehelseinstituttet, 2016; Socialstyrelsen, 2016; Terveyden ja hyvinvoinnin laitos, 2016).

Challenges to abortion rights and restrictions on access to abortion have been justified in other jurisdictions with both old and new arguments, with the United States often at the forefront of these developments. Foetal-protective arguments, such as claims that the foetus is 'pain-capable' (Robertson, 2011), are increasingly combined with claims that 'abortion hurts women' by causing physical and emotional injuries (Siegel, 2007, 2008, 2014). A disability rights discourse is relied upon in campaigns to restrict access to abortion (Petersen, 2015). Conscientious objection arguments emphasise the rights of those who oppose abortion to seek exemptions from providing health-care services on religious grounds, but may also be used by those who oppose abortion but no longer wish to rely on morality-based arguments to justify their refusal to provide reproductive health services (NeJaime & Siegel, 2015). The practical effect of many of these changes, such as tighter time limits on abortion, requirements such as parental consent/notification (Sanger, 2004) and mandatory ultrasound viewings (Sanger, 2008), is to make abortion more difficult to obtain in practice.

Far from being limited to the US, contestations over abortion are

E-mail address: heli.askola@monash.edu.

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also present in many European countries. In Spain major plans to overturn the 2010 liberalisation had to be abandoned because of protests, but proposals that minors between 16 and 18 would require parental permission kept debate alive (BBC, 2014). Zampas and Andión-Ibañez (2012) have claimed that freedom of conscience is increasingly used to restrict women's access to reproductive health services. Moreover, though the law, both in terms of content and implementation, remains a lively site of disagreement, Saurette and Gordon (2013, 2015) have argued, in the Canadian context, that the new arguments and rhetorical strategies used by the anti-abortion movement also seek to shift the debate on abortion in cultural terms. By changing the discussion around abortion – for instance, through 'woman-friendly' rhetoric that frames women who have abortions as victims of a child-hostile society that sees children as inconveniences – anti-abortion advocates hope to undermine public support for current legal frameworks. The importance of the way abortion is politically framed and discussed has been noted in many jurisdictions, including Australia (O'Rourke, 2016) and Turkey (Unal & Cindoglu, 2013).

These trends raise the question of whether similar arguments and dynamics are at play also in the Nordic context, where abortion has resurfaced as a topical theme of political debate and a target for law reform proposals. After summarising the key trends, this article argues that this re-emergence of abortion in the legal and political arena has to do with both global and local trends, which have opened space for anti-abortion arguments. Though these developments must be interpreted against the background where abortion is firmly established as a public service, they do pose challenges to established assumptions about the legal frameworks regulating abortion and demonstrate why abortion continues to be an important feminist question.

2. Recent developments in three Nordic countries

2.1. Sweden

The legal framework regulating abortion was last overhauled in the 1970s when the 1938 abortion law was replaced. The feminist movement had politicised abortion from the 1960s onwards and the 1974 Abortion Act (Abortlag, SFS 1974:595) made abortion available for citizens and legal residents up until 18 weeks' gestation, initially requiring consideration of personal circumstances after 12 weeks' gestation (Freidenvall, 2015, 132; see also Linders & Bessett, 2017). Abortion is now available 'on request' up until 18 weeks' gestation (SFS 1995:660); after the end of the 18th gestational week, 'special reasons' and the approval of the National Board of Health and Welfare ('Socialstyrelsen') are required (Abortlag, s 3). Though there is no fixed cut-off point, abortions must not generally be performed once the foetus is viable (generally thought to be around 22 weeks), except when the woman's health or life is at risk (ss 3, 6). After the new legal framework was put in place, the issue lay dormant until the 1990s, when a counter-discourse first emerged, stressing the rights of the foetus (Freidenvall, 2015, 133). The most significant changes since have expanded availability on request, changed the requirements to offer counselling before some late abortions (SFS 1995:660) and removed the limitation of abortion right to citizens and residents, allowing foreign women to access abortions in Sweden (SFS 2007:998; see also Freidenvall, 2015).

Though the Swedish anti-abortion movement has been critical of the law throughout the years, in recent years its campaigning on law reform has focused on the fact that Swedish abortion rules provide for no right to conscientious objection for health care staff in the public health care sector, in other words, no right for medical practitioners and other health care workers to refuse to participate in performing abortions. This state of affairs is claimed to constitute a violation of freedom of conscience under international human rights law, in particular under article 9 of the European Convention on Human Rights (ETS No. 5), which guarantees freedom of thought, conscience and religion. The issue has been raised repeatedly by Members of Parliament (MPs) from the small Christian Democrat Party (e.g. Parliamentary Motions 2007/08:K378, 2010/11:K381, 2011/12:K281 and 2012/13:K220). Furthermore, recently Christian Democrats have been joined by MPs from the anti-immigration/populist-nationalist Sweden Democrats Party (SD), who have made several motions on legislating for a right to conscientious objection for medical staff (e.g. Parliamentary Motion 2014/15:2516).

At the same time, challenges over the issue of conscientious objection have also been launched in the courts. These have both fed further political debate and challenged Swedish courts to elaborate on the relevance of conscientious objection in abortion provision. The high-profile case of a midwife, Ellinor Grimmark, has further focused attention on the (alleged) anomaly posed by Swedish law (Sweden is one of the few countries in Europe where the law does not provide for the possibility that health care workers may wish refuse to perform or participate in abortions). Ms. Grimmark sued Jönköping County Council for discrimination in 2014. The Council rescinded an employment contract offer made to Ms. Grimmark after she made it clear that she would not participate in the provision of abortion services. The district court of Jönköping ruled in favour of the County Council on the basis that it is part of a midwife's duties to perform abortions (2015-11-12 no T 1781-14). Ms Grimmark appealed to the Court of Appeal, which refused to hear the case. Ms. Grimmark then took her case to the Swedish Labour Court ('Arbetsdomstolen'), which rejected her discrimination claim in April 2017 (Judgment no 23/17, 12 April 2017).

Ms. Grimmark's case is being championed by the *Alliance Defending Freedom*, a US-based conservative Christian organization (ADF, 2017) and the case will likely proceed to the European Court of Human Rights as a dispute over the scope of permissible limitations on freedom of thought, conscience and religion (about the Court's case law on similar cases, see Zampas & Andión-Ibañez, 2012). This would not be the first attempt to utilise European human rights law to demand the accommodation of conscientious objection for Swedish health professionals. In 2013, the Federation of Catholic Family Association in Europe (FAFCE) brought a collective complaint against Sweden to the European Committee of Social Rights, arguing that under Article 11 (the right to protection of health) of the revised European Social Charter 1996 (ETS No. 163), health care professionals in Sweden have a right to refuse to provide legal abortion services, as having to participate in abortion procedures causes stress to health care workers. The Committee rejected this argument in 2015, noting that the Charter 'does not impose on states a positive obligation to provide a right to conscientious objection for health care workers' (Federation of Catholic Family Associations in Europe (FAFCE) v. Sweden, No. 99/2013).

As well as demanding that Sweden legislate on conscientious objection, Sweden Democrats MPs have also proposed a clearer time limit on late abortions, arguing again this is necessary to align Swedish law, which puts no numerical limit on viability, with the European 'mainstream'. A motion proposing to set a limit for late abortion (Motion 2016/17:836, Ändrad praxis för sena aborter) argues that the current law does not take into account recent medical developments (which, it is claimed, can save foetuses as early as week 21) and results in healthy and viable foetuses being terminated for non-medical (social) reasons. Moreover, it states that sometimes in late abortions the foetus shows signs of life and it is 'deeply inhuman that the woman, foetus and nursing staff should be subjected to this discomfort' (ibid, 4). The proposed viability criterion would set the last authorised time for an abortion to be two weeks from the time of earliest possible foetal survival; no abortions would be approved after gestational week 19 unless the foetus is so severely damaged that it is not expected to survive; and if a pregnancy has to be terminated after week 19 because of a risk to the mother's life, the goal would be to save the life of both the child and the mother.

Some SD MPs have been very active in this area, putting forward several private member's motions, ultimately unsuccessful, to Parliament. Their recent proposals in this area have sought to lower the