Comparative Pragmatism versus Comparative Formalism in the Abortion Context

Author : Caroline Bettinger-Lopez

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Rachel Rebouché, *Comparative Pragmatism*, 72 **Md. L. Rev.** 85 (2012).

In recent years, with the increased internationalization of the judiciary, we have witnessed growing support from advocates, policymakers, and judges for applying international and foreign law in a domestic context. To be sure, U.S. courts have demonstrated greater reluctance toward this approach than many courts in other parts of the world. As Margaret Marshall, Chief Justice of the Supreme Judicial Court of Massachusetts, has noted, "justices of some foreign constitutional courts traverse the world of global jurisprudence with an agility that leaves an American judge breathless."[1] But what happens when judges, intending a comparative approach, incorrectly interpret foreign jurisprudence? And even when these judges get the law right, are they looking at the right thing when they focus on comparative law rather than comparative practice? Rachel Rebouché considers these complex questions concerning international and comparative law as she tracks important global developments in abortion law over the past few decades.

Rebouché starts with a challenge to the conventional wisdom that U.S. abortion law symbolizes protection of women's constitutional rights while German abortion law symbolizes protection of fetal constitutional rights. While that dichotomy may have been true when Mary Ann Glendon first described it in 1987, Rebouché argues, the United States and Germany have, in fact, moved in opposite directions concerning abortion law and practice and the availability of abortion services. Developments in the U.S. since *Roe v. Wade* have made the constitutional right to an abortion "unrealizable for many women due to restrictive state and federal laws and the absence of providers in many areas." By contrast, abortion law and practice developments in Germany have gone in the opposite direction, expanding access to abortion, rather than limiting it in the interest of protecting fetal rights. Though a 1975 decision by the Federal Constitutional Court of Germany ("FCC") supported protection for "unborn life," more recent developments have prioritized access to abortion—a position that sounds in the register of women's rights—above fetal rights. A 1993 FCC decision reiterated that abortion is an unlawful act, but eliminated criminal punishment upon demonstration of proof of counseling (which is readily available in most regions of Germany at counseling centers that tend to be pro-choice) before the twelfth week of pregnancy. Moreover, state welfare funds are available in cases of financial need, which is interpreted so generously by most regional legislatures that in some regions, the government pays for nearly every abortion. The broad availability of state-funded abortion services has led some commentators to argue that "Germany, in effect, permits abortion for any reason." While the U.S. and German legal developments have had enormous influence on the constitutional decisions of national courts in Colombia, South Africa, Portugal, and Mexico, these latter national court decisions, Rebouché argues, have stopped short of engaging with the "implications and evolution of abortion jurisprudence in the United States and Germany." More troublingly, these national court decisions have, at times, misinterpreted U.S. and German law.

Rebouché sets out to explore "how and why courts and lawyers rely on a particular formulation of comparative law as evidence of modern and universal trends in abortion law reform," and the consequences of this comparative methodology. She contends that legislative and jurisprudential developments that expand the legal grounds for abortion do not actually correspond with better or more extensive health care services, as evidenced by the U.S. and German examples. Moreover, she warns against an overly "formalist understanding of comparative constitutional law that makes it difficult to see the consequences and practices, both before and after law reform."

Instead, Rebouché offers an approach she calls "comparative pragmatism" – that is, "a comparative approach that

focuses less on constitutional case law and more on public health concerns." A focus on availability and accessibility of health care services, both state-supported and private, and on the state's power to enforce abortion laws, might serve multiple functions: to "elicit solutions that fit with diverse community needs, deter counter-movements against liberalization, … encourage flexible strategies that align with the relative power of the state at issue, [and] contradict the prevalent misconception – particularly abroad – that *Roe* currently provides U.S. women with abortion on demand."

Rebouché notes the irony of national courts, especially those in the global South, framing comparative citation to courts and scholars in the global North as exemplary of claims of universal rights. Such a focus, she claims, overlooks or marginalizes extralegal or informal conduct, with important consequences for women's health: new legislation or court decisions may result in bureaucracy, backlash, and stress on state resources.

Because "the dominant, rights-oriented approach is a model dependent on state implementation," Rebouché cautions, "the answer to implementation problems will be more law." In financially-challenged states, the result may be ample law that has no possibility of practical application. In such situations, Rebouché offers, informal regimes such as an informal sector for abortion provision could inform legal developments.

I love the premise of Rebouche's article, and her examination of the abortion law and practice landscape in various countries is fascinating. While the idea of examining legal realities alongside legal principles makes great sense, I would suggest that we need not overlook or reject a rights-based approach in order to embrace comparative pragmatism. Indeed, legal standards and progressive change often evolve side-by-side, mutually informing one another. Without an established legal principle to use as a point of departure toward implementation, practical realities can easily change with the political tides. Moreover, I would be interested to see Rebouché further explore how national courts can actually engage in reliable comparative pragmatism. Are there examples of courts that have looked to comparative practice rather than comparative law? If such examples do exist, how do such courts square that inquiry with their understanding of their function as interpreters of the law? Finally, I would be curious to see Rebouché further explore the question of whether advocates' facilitation of this pragmatic comparative inquiry could ever risk undermining a progressive agenda, and if so, what the ethical implications would be.

Rebouché's insistence that national courts, and the advocates who submit briefs to those courts, should focus their comparative inquiries on the practical realities of abortion law and practice abroad is a fresh and welcome antidote to overly formalist approaches to comparative law. Her article is a fascinating and provocative read, useful for family law, constitutional law, and international law scholars alike.

1. The Honorable Margaret H. Marshall, *"Wise Parents Do Not Hesitate to Learn From Their Children": Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 **N.Y.U. L. Rev.** 1633, 1636 (2004). [?]

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