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Who can talk about abortion? Information, offence, freedom of speech, and the advertising ban in Germany

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Abstract

This article examines the debate in Germany on Article 219a of the criminal law, which prohibits doctors from advertising for abortions. This ban prevents advertising for abortions on the grounds that it would be offensive, while defining 'advertising' so broadly that it prevents doctors from publicly providing any information about abortions. The article offers an overview of the law, as well as the controversy following the conviction of General Practitioner Kristina Hänel, which led to a reform of the law. The curtailment of the provision of factual information by medical professionals is contrasted with the freedom of speech protection given to highly offensive speech acts by anti-abortion activists. The argument is made that there is a Christian perfectionism at the heart of the law on abortion in Germany that is shared by anti-abortion activists, leading to a situation that facilitates the mobilisation of anti-abortion sentiment while curtailing the freedom of speech of doctors.

Keywords

abortion, anti-liberalism, freedom of speech, Germany, offence

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Introduction

In November 2017, Dr Kristina Hänel, a general practitioner from Giessen in Germany, was fined 6000 euros for contravening Article 219a of the German criminal code – the article of law that regulates advertisement for abortions. As far as Dr Hänel was concerned, she had done no such thing, she had merely provided information. However, from the perspective of the law, the matter was clear. This court case ignited an intense debate in Germany around the rights of doctors and the legal status of abortions. Ultimately, this debate led to a reform of the law in 2019, although Dr Hänel is continuing to pursue her

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case to the federal constitutional court (which has since received a constitutional complaint by another doctor, see Rath, 2019). In this article, I will be providing an overview of the controversy around Article 219a, as well as engaging with the issues that it raises around freedom of speech.

Abortion is often thought of as being a hot-button topic primarily in the United States (for a classic overview of the debate in the United States, see Luker, 1984; for a more recent discussion, see Munson, 2018). However, abortion legislation has been a major flash point in various European countries over the last few years – in Ireland, Poland, Spain, Italy, and Norway – and rolling back abortion legislation has been a major part of the activities of conservative religious networks (Datta, 2018). The precise shape of these debates is heavily influenced by local institutional settings (Halfmann, 2011). Abortion has been discussed in the context of the role of religion in politics (Dworkin, 1993; Hennig, 2014), from the perspective of personhood and bioethics (Greasley and Kaczor, 2018; Habermas, 2001), in terms of sex equality rights (Siegel, 1995), and in terms of Rawlsian thought experiments (Seery, 2001).

My focus will be rather narrower, I will not be making an argument about abortion as such, but rather about the way information about abortion is disseminated by both medical practitioners and activists. My focus in this article is on a particular feature of German abortion law – the *Werbungsverbot* (advertising ban). This ban creates a situation where factual information by medical professionals is curtailed as impermissible speech, while highly hateful speech by anti-abortion activists is protected as free speech. In discussing the advertising ban, I will be addressing tensions and contradictions that emerge from abortion's legal status (one can hardly talk about advertising for abortion without talking about abortion), but principally for the purpose of understanding the context of this form of regulation of speech.

The article will start by providing an overview of the German law regarding abortion. It will then look at the controversy around Dr Hänel and the ensuing debate that led to the reform of the law. This will be followed, as a point of contrast, by a look at some of the speech acts of anti-abortion activists. Finally, I will be drawing out the implications of this case for the regulation of speech.

What I hope to show is that there is a certain type of Christian perfectionism at the heart of the law on abortion in Germany. By perfectionism I mean 'the view that some ways of life are intrinsically better than others, and that the state may appropriately act to promote these ways of life' (Koppelman, 2004: 634, n1). This does not necessarily entail enshrining a particular conception of the good in law, merely enacting decisions on the basis of a particular conception of the good. Perfectionism is not inherently illegitimate, even from a liberal perspective (see Chan, 2000), but it does contravene the idea of state neutrality. While the German state is meant to be neutral between religions and world views, its legislation on abortion – even though it allows for it in certain conditions – is built on Christian religious assumptions about the nature of life and when it begins. I use the term 'perfectionism' rather than 'fundamentalism' because it is not a matter of formulating an explicitly religious law, but of pursuing an end-goal (the administering of fewer abortions) that is informed by religious values. These are values that are shared by anti-abortion activists. This leads to a situation that facilitates the mobilisation of anti-abortion sentiment. Through curtailing the freedom of speech of doctors, the German state contributes to legitimising anti-liberal stances even as its own practice is illegitimate in the eyes of illiberal anti-abortion groups.

Abortion in Germany

While never completely gone as a debate, abortion was seen as a relatively settled topic in Germany from the mid-1990s onwards, when the merging of the restrictive West German law and the more liberal East German law provided the occasion for newly reformed legislation (even though these reforms fell far short of what feminist campaigners had been hoping for). Before then, access to abortion was a major point of contention. There has been a fair amount of discourse analysis done on West German debates on abortion: Hahn (2014) provides a general overview, Ferree (2003) provides a detailed comparison between German and US discourse, and Tichenor (2014) gives an account of the debate among Catholics. Wuerth (1999) provides an analysis of how East and West German feminist activists talked about abortion around the development of the reformed law, post-reunification. While issues of female autonomy and women's rights to their body formed an important part of the discourse of German pro-choice activists, the question of abortion was also frequently framed in terms of social and child welfare– this was strategically useful as it allowed for bringing (some) opponents of abortion on side for reform on the basis that abortions are best prevented through creating better social conditions for child rearing, rather than through legal prohibition (Ferree, 2003: 332–335, Roesch, 2019: 310).

In 1975, the Federal Constitutional Court prevented liberalisation of the abortion law in a ruling that declared foetal existence a 'protectable good', although it did not assign subjective rights to foetuses.[1] Rather unusually, this protectable good was said to trump the rights of actually existing subjects (i.e. women) (Berghahn, 2014: 174). As a result, the decision on whether abortion was permissible was placed in the hands of doctors, who had to decide if one of a number of indications applied. This shifted the question away from one of female choice and autonomy, to one of weighing up interests. Since the precise process for determining the indication was a local matter, there was considerable regional variation, with access to abortions more difficult in Catholic parts of the country – and the demand for reform persisted. However, the discursive shift to the conduct of medical professionals (rather than the choices and wishes of women) has a legacy that continued even after doctors ceased exercising gatekeeping function in the 1990s.

The current state of the law is as follows: abortion is dealt with under Articles 218 and 219 of the German criminal law (*Strafgesetzbuch*, STGB) – under section 16, 'Crimes against life', as well as through the Pregnancy Conflict Law (*Schwangerschaftskonfliktgesetz*, SchKG).[2] Article 218 of the criminal law states that terminating a pregnancy is punishable with up to three years of prison or a fine (§218 Abs. 1 Satz 1 StGB), or with prison of up to five years in severe cases (e.g. where the termination is carried out against the will of the pregnant woman) (§218 Abs. 2 Satz 1 StGB). Put simply, abortion is illegal in principle.

However, the illegality is undercut by Article 218a, which regulates those situations where terminating a pregnancy comes without punishment. This is the case when a pregnant woman requests the abortion, she attends a consultation at least three days before the procedure, the procedure is carried out by a doctor, and it has been no more than 12 weeks since conception (§218a Abs. 1 StGB). This means that abortions, while technically illegal, are formally tolerated.

The current form of the law dates from a reform process triggered by the merging of East and West German law. East German law gave much wider rights to women, making abortion legal within the first 12 weeks of pregnancy in 1972 (for an overview of the East

German debate, see Thietz, 1992). In 1992, a law was passed that retained the 12-week right-to-choice, but added the requirement of a consultation stressing the importance of unborn life. The less robust 12-week toleration of the current law goes back to a legal challenge by the conservative CDU/CSU (Christian Democratic Union/Christian Social Union) parliamentary faction. The Federal Constitutional Court in Karlsruhe ruled against several aspects of the law in 1993, demanded tighter regulations on the consultations, and, most importantly, classified abortion as *straflos* (without punishment) rather than *nicht rechtswidrig* (not contrary to law). These changes were largely put into law in 1995 (Berghahn, 2014: 164). The result is a law principally designed to discourage abortions, while allowing them in certain conditions.

It is worth noting that in 1993 the court went further than in 1975 in declaring foetuses to be not just a protectable good but the bearers of individual rights (including the basic rights to life and human dignity). This move made the condemning of abortion more plausible, but was contradictory, given that the verdict simultaneously allowed for the contravention of these rights by making abortion unpunishable in certain cases (Berghahn, 2014: 175). Also noteworthy is that the idea that embryos constitute individual life from conception is stated as a biological fact, rather than as a matter of belief – in fact, the court asserts that neutrality demands that this matter be decided without reference to a particular philosophical worldview (Berghahn, 2014: 177–179). However, claim to neutrality notwithstanding, the moment that a life becomes a life is a deeply contested matter and clearly the assertion that life begins at conception does rely on a particular worldview – it happens to be one that matches that of the Catholic Church (the Lutheran Church, while historically also expressing opposition to abortion law reform, did not do so as vehemently and did not push this view of life in the same way, see Tichenor, 2014: 616, 622).

That the discouragement of abortions remains the principal intent of the law can be seen in regard to the mandatory consultation. The law specifies that the consultation 'serves the protection of unborn life' (§219 Abs. 1 Satz 1 StGB) – it is guided by the aim of encouraging pregnant women to continue with the pregnancy. It makes explicit that the unborn child has a right to life against the wishes of the woman at all stages of the pregnancy that can only be overridden in exceptional circumstances (§219 Abs. 1 Satz 3 StGB). However, the consultants are not judges of whether an abortion should be carried out – the requirement is to receive advice, not to obtain a permit from the consultant. The consultation cannot be carried out by the same doctor that will be carrying out the procedure itself (§219 Abs. 2 Satz 3 StGB). This is important for understanding the significance of the 'advertising ban' – having had the consultation does not mean that you know where to go to have an abortion (should the consultation have been unsuccessful by its own standards).

It is worth noting that there are already severe limitations in place in Germany on how doctors can advertise. Advertising by medical practitioners was only allowed in 2002, and needs to limit itself to factual information – it cannot use praise, testimonials, superlatives, or comparisons (Bundesärztekammer, 2017). Article 219a adds an extra layer of regulations applicable only to abortions.[3] It makes it illegal to 'offer, announce, promote, or explain' the provision of services leading towards an abortion where this is done in a grossly offensive manner or for the purpose of personal enrichment (§219a Abs. 1 StGB). The same prohibition applies to the advertisement of instruments needed for carrying out abortions. The only exceptions are when a doctor or institution informs one of the recognised consultation centres (in the case of services) (§219a Abs. 2 StGB) or where the advertisement is in a medical journal or through licensed merchants directly addressing

medical staff (in the case of instruments) (§219a Abs. 3 StGB). The 2019 reform to Article 219a added a fourth clause, on which I will say more later.

The Pregnancy Conflict Law provides further specifics on access to abortions. It states that everyone is entitled to a consultation regarding the 'methods for carrying out a termination of pregnancy, the psychological and physical consequences of a termination, and the associated risks' (§2, Abs 6, SchKG). Women need to be able to access these consultations within an 'appropriate distance' to where they live (§4, Abs 1, SchKG), but what kind of distance is appropriate is not specified. It states the need for the state to provide a 'sufficient' offer of facilities that carry out terminations of pregnancies (§13, Abs 2, SchKG), but, again, does not specify what constitutes sufficiency. It also stresses that no medical professional is obligated to take part in a termination of pregnancy (§12, Abs 1, SchKG).

This points to a major contradiction in the law: the state aims to simultaneously protect unborn life and provide the necessary facilities for carrying out abortions. The state commits itself to providing the infrastructure for a procedure that it deems illegal (but not punishable). However, through Article 219a, considerable constraints are placed on the availability of information on where to have an abortion. This contributes to a situation where the state is frequently not able to ensure sufficient provision of facilities within an appropriate distance. It legislates in a way that prevents it from meeting its own commitments.

In many areas of the country, the number of doctors carrying out abortions is severely limited, in part because of doctors' unwillingness to carry out the procedure (Kulozik et al., 2019) and in part because limited availability of training on how to perform abortions has led to a shortage of qualified staff (Czilwik, 2018). Negative societal attitudes towards abortion (such as those inscribed by Articles 218 and 219) are also thought to contribute to a lack of doctors offering abortions and medical students choosing to train in the procedures (Myran et al., 2015). The prohibition of 'advertising' makes it that much more difficult for women to have access to abortions. To illustrate the impact of Article 219a in practice, I will turn now to the case of Dr Kristina Hänel and the controversy it caused, leading ultimately to the reform of Article 219a.

The advertising ban in action: Controversy and reform

When Dr Hänel was found guilty of contravening Article 219a, it triggered a national debate that continued even after the reform of the law. The advert that she was charged for was her website (Hänel, n.d.; https://www.kristinahaenel.de). Specifically, the part that you reach if you click through to a page titled 'Spektrum' which gives a list of the procedures that Dr Hänel carries out. Included on that list is the entry 'termination of pregnancy'. If you click on this you are taken to a form where you can provide your email if you want to be sent information about abortions. If you do, you are sent a PDF file with general information about abortions, the different types of abortions provided by her practice, the benefits and drawbacks of the different methods, and that the costs may be covered through a public insurance provider or privately.

The reasoning of the verdict states that Dr Hänel provides this information on a publicly accessible website, and that she does so for the purposes of carrying out abortions for payment. The court rejected Dr Hänel's contention that she was not advertising, merely providing information on patients' options. The court asserted that she was not just providing information, she was also drawing awareness to the fact that she herself

carries out the procedure. Furthermore, that even if she was simply providing information, that this would still contravene Article 219a. The court asserts that, despite Article 219a being titled 'Advertising ban', it is not necessary for information to have a particularly advertorial character to be covered by it. Moreover, the court also asserts that in placing her information on the Internet she gave herself a competitive advantage over doctors who abide by Article 219a, and that this speaks to the advertorial function of her website (Amtsgericht Giessen, 2017).

While the law is clear, and the verdict, in that sense, expected, it turned out to be a major controversy. The verdict was widely reported on, and there were calls for an abolishment or reform of Article 219a from both grassroots groups and politicians. It is hard to pinpoint why the case of Dr Hänel specifically was able to draw so much attention. Prosecutions according to Article 219a were nothing new; however, if these prosecutions courted media attention at all, it was rather niche. This time the case made waves across the mediascape: reports could be found in outlets ranging from the centre-left *Süddeutsche Zeitung* (Klasen, 2017) to the conservative *Welt* (Brause, 2017), and Hänel became famous to the extent that she would eventually even be profiled in Germany's highest circulation tabloid *Bild*, a publication hardly known for championing women's rights (Schink, 2019). Whatever the reason, there was now much more awareness of this particular oddity of abortion law among the general public – and much of public discourse seemed to find it an absurdity.

This pressure came at an opportune time in so far as, following national elections in September, a governing coalition had yet to be formed, leaving more room for potential co-operation between parties not yet on opposing sides of the house. With the only parties wholly in support of Article 219a being the conservative CDU/CSU and the far-right AfD (Alternative for Germany), there was talk of other parties co-operating to pass legislation before a new government could be formed (as this government would include the CDU/CSU) (Riese, 2017). The SPD (Social Democratic Party) even went so far as to develop a legislative proposal to abolish Article 219a wholesale. However, as time went on, it became clear that Germany was headed for another CDU/CSU-SPD coalition, and in order to not alienate their imminent partner, the SPD withdrew their proposal in March 2018 (Zeit, 2018). The Christian Democrats, meanwhile, maintained that, while there could be a reform, the principle of an advertising ban needed to be maintained. During the coalition negotiations, the parties agreed that they would work on a compromise proposal and present this in the autumn (Caspari, 2018).

After a series of delays, a proposal was eventually agreed and published in December 2018 (Seehofer et al., 2018). The compromise maintained that doctors will not be allowed to make public that they perform abortions, but commits to some information on abortions being provided by the Federal Doctors' Association and the Federal Centre for Health Education. The reformed law was passed in parliament on 21 February 2019 and came into effect on 29 March. The reform maintained the existing three clauses of Article 219a wholesale, and added a fourth. This fourth clause adds two additional exemptions from punishment for publishing information about abortion: where doctors are informing about the fact that they carry out abortions, and where certain federal or state bodies are informing about abortions (§ 219a Abs. 4 StGB). As part of the same reform package, an addition was also made to the Pregnancy Conflict Law, mandating the Federal Chamber of Doctors to compile and make available a list of doctors and hospitals that carry out abortions (§13, Abs 3, SchKG). This list is to be updated on a monthly basis and contains information about what methods of abortion are available at particular doctors.

While on the face of it, the reform would seem to address some of the criticism of the old law, the space it opens for doctors is actually quite limited: they are allowed to say that they carry out abortions, but they are not allowed to say anything about them (not even which methods of abortion they offer). The first conviction under the reformed law took issue with the fact that the website of the doctor in question not just referred to abortions being available, but also added that these could be carried out 'medically' and 'anaesthesia free' (Riese, 2019). Doctors cannot publicly provide any advice about abortions – that is reserved for institutional bodies. Any details about abortion are still seen as being too advertorial in nature.

Moreover, there are practical problems with the listing of doctors compiled by the federal medical chamber. The chamber is mandated to compile the list, but being on the list is voluntary. The chamber does not actively research where procedures are available, but rather leaves it up to doctors to be proactive. However, since doctors are still liable to be sued for advertising, they can be reluctant to put themselves forward (Clasen, 2019). The list as it stands in March 2021 contains the details of 351 doctors, but the information is sparse (contact details, languages spoken, medical abortion offered: yes/no; surgical abortion offered: yes/no) (Bundesärztekammer, 2021). The reformed law does not actually go very far in helping the state meet its commitments under the Pregnancy Conflict Law and remains more concerned with limiting information about abortions.

The reform retains the fundamental contradictions of the law. Average citizens can still say things about abortion that a medical professional cannot (since the link to profiting from talking about abortion is maintained). If anything, this contradiction is extended, where federal institutions can inform about abortions, but the doctors themselves continue to be barred from doing so. One could argue that doctors being allowed to inform about the fact that they carry out abortions, but not actually provide any information about the procedure, allows for something much closer to advertising while still limiting valuable information.

The speech acts of the life-protection movement

Before delving in more detail into the questions around speech raised by Article 219a and the debate around it, I want to briefly introduce another form of expression – one that faces far fewer restrictions than the information provision of doctors – that of anti-abortion activists. I will be going on to argue that the way the German state has legislated around abortion and expression helps to legitimise anti-abortion activism, even as anti-abortion activists chastise the state for allowing murder (as they see it).

Anti-abortion activists in Germany refer to themselves as the *Lebensschutzbewegung* – the life-defence or life-protection movement. The movement's development is closely tied up with new forms of conservative discourse and revitalised religion (Busch, 2014: 33; Knecht, 2006). There are also extensive links with groups of the German right (Sanders et al., 2018). The life-protectors are engaged with international networks such as the pan-European 'One of Us' movement that mobilised more than a million signatures for an EU-wide ban of the termination of embryos (Hennig, 2014: 95) and the 'International Organisation for the Family', known for its controversial annual World Congress (Gürgen et al., 2018). As such, their activism forms part of the broader intersection of anti-gender activism and the far-right seen across Europe (Paternotte and Kuhar, 2018).

One prominent life-protector is Klaus Günter Annen. He has sued some 170 doctors for contravening Article 219a (Hecht, 2018), making him one of the most prolific

litigators of Article 219a contraventions. Annen – besides having leading functions in Christian right-wing organisations such as *Christliche Mitte* (Christian Middle) and *Initiative nie wieder* (Initiative Never Again) – runs two websites that mobilise against abortions: *babycaust.de* and *abtreiber.com*. He also regularly pickets doctors' offices and organises protest vigils. On his website, he draws extensive parallels between the Holocaust and abortion – seeing both of these as industrialised forms of murder. While stating that he is not comparing the two, merely using the horror of the Holocaust as an illustration of an immoral act, the tone of his manifest is largely comparative. For example, he asserts that while the Holocaust 'only' cost 6 million lives in total, abortion costs 54 million lives annually (the provenance of this figure is unclear). He also claims that we live in a democratic dictatorship that is dedicated to the industrial elimination of life through sanctioning abortions (Annen, n.d.).

The websites contributes to the practice of harassment of doctors by life-protector activists. *Abtreiber.com* includes a long list of doctors that carry out abortions along with their addresses. While the advice is carefully worded to avoid the charge of incitement to violence, the intention of the list is evident. Ironically, this is information that the doctors in question would not be able to distribute, but Annen can, since he does not benefit financially from abortions. A woman seeking to find a local doctor who carries out abortions would find this information far easier to access via *abtreiber.com*'s list of 'child murderers' than through her local doctor.

In any case, Annen manages to exercise his wish to expression comparatively unconstrained. While there have been some court cases against him, the result has been a much more limited restriction of his speech (Ärztezeitung, 2018). He is no longer allowed to refer to particular doctors as 'murderers' (although he can refer to abortion in general as murder), he can no longer accuse doctors that perform abortions of breaking the law, and he has to exercise some caution in phrasing his comparisons to the Holocaust (he is no longer allowed to say that comparing the two trivialises abortion, but he can continue to use the term 'babycaust'). However, compared with doctors, this kind of speech is relatively unconstrained, even though it would seem to be infinitely more offensive (especially given the sensitivity of speech acts relating to the Holocaust in the German context). It becomes actionable only where it slanders specific individuals. Even as 'life-protectors' such as Annen decry being silenced and ignored, the state puts far fewer constraints on them. In fact, the current form of the law, through embedding a particular view of life, affords important conceptual resources to the life-protectors.

Protected speech and restricted speech

Taking a step back, what is at stake in the Article 219a debate is a question of the restriction of speech, a question of when something moves from being information to simply advertising, as well as at what point something becomes offensive to the point that it is appropriate for the state to intervene. From a traditional liberal perspective, more availability of information is a good thing, as it improves the conditions under which autonomous individuals make choices. Nonetheless, the law provides reasons for preventing medical professionals from disseminating such information about abortion, so let us examine these more closely.

While freedom of speech is never total in practice, we tend to assume that in liberal states there need to be strong reasons for restricting speech, these may emerge out of particular contingent historical factors (e.g. German rules about Holocaust denial), or

more generally applicable principles (e.g. hate speech and libel). What we are looking at here, furthermore, is a restriction of speech that applies only to a small subset of the population: medical professionals. While this might seem *prima facie* to again go against certain liberal assumptions (equal laws for everyone), the idea of holding professional communities to a stricter sense of rules than the populace at large is in itself not overly controversial (most people would be troubled if a doctor wilfully providing misinformation on medical procedures could claim that this was covered by freedom of speech). Limiting speech in this way need not go even against the kind of viewpoint absolutist argument for free speech that would take issue with measures like the ban on Holocaust denial – viewpoint absolutism too can accept certain limitations of freedom of speech, just not on the grounds of the content of that speech (Heinze, 2006: 548)

However, of the two conditions for what makes speech about abortion impermissible (enrichment and offence), only one relates to doctors' medical practice as such (the notion of enrichment), and even here the law is not concerned with the quality of the information but rather with its very existence. It is not so much a matter of protecting the public from inaccurate or misleading information, but of restricting the access to information *tout court*. It is precisely about the content of the speech.

Supporters of the advertising ban would respond that this is not about restricting information as such, but about advertising and the standards it has to adhere to. At what point is the provision of information no longer simply the provision of information, but instead an act of advertising? The law is clear – it is financial gain. That is, doctors receive payment (either directly or through insurance) for providing abortions, so that by informing about their carrying out abortions they are advertising to further their personal enrichment. However, this is of course true of all medical procedures. If the threshold for 'personal enrichment' is receiving any kind of financial recompense as has been affirmed in the court cases against Dr Hänel and others (rather than say, a notion that abortion is being misrepresented in a way that shifts more procedures and makes it primarily a money spinner, the kind of argument we might encounter when it comes to cosmetic surgeries), then any procedure carried out by a doctor (short of voluntary work) is an act of personal enrichment.

As such, any kind of information provided would be an act of advertising. And there is of course an extensive code on the ways in which medical procedures can be advertised (Bundesärztekammer, 2017). Precisely, the kind of limitation on the speech acts of medical professionals that we would expect in the name of ensuring professional standards. What is different about abortion? Why does information about it require a separate law? Why is it that for abortion any type of 'advertisement' is impermissible, while for other medical procedures, it is only excessively lurid or offensive advertising?

One argument, put forward by people such as CDU health minister Jens Spahn (2019), is about the nature of the decision to have an abortion. The decision is said to be singular in a way that other medical decisions are not (the very name of the Pregnancy Conflict Law makes this clear, it refers not just to a conflict between woman and foetus, but assumes that women are conflicted as regards their choices). If we accept this singularity, we might however think that it would be imperative to maximise the amount of information that is available on abortions, to help with this unique decision. But the law in fact does quite the opposite. As you will hear it expressed by conservative politicians, this is because allowing information on (= advertising for) abortion would normalise it and sway women to have the procedure (Dernbach, 2018).

Women considering abortions are seen as being especially vulnerable and prone to making decisions they will regret. Women with unwanted pregnancies are constructed as less autonomous, less capable of making choices, in a way that we do not extend to most recipients of medical care. This view of pregnant women's autonomy can be seen even more clearly when we consider the mandatory consultations. This type of mandatory counselling is unique in German law, and in its uniqueness suggests an exceptional need for guidance of pregnant women in making decisions (Case, 2015: 158). One other field where we do see this attitude is in the reluctance of doctors to carry out tubal ligation on childless women (Lalonde, 2017). What both attitudes share is a firm belief in (all) women's desire to have children, regardless of their own stated preferences. This is not formally codified in law, but is nonetheless an interesting feature of the debate around Article 219a.

Turning back to the law, Article 219a outlines gross offensiveness as a second criterion for rendering information about abortion impermissible, but the notion of offence is actually doing a lot more conceptual work. In the application of the law, it is abortion as such that is presented as abhorrent – and creating an equivalence of treatment with other medical procedures is offensive in and of itself. While there may be tasteful and distasteful ways of informing about chemotherapy, vasectomies, kidney stone removal, hysterectomies, circumcisions, amputations, or any other number of medical procedures, putting abortion in the same list is already seen as offensive. This is because while other procedures may cause risk, limit function, prevent the future creation of life, or be carried out without meaningful consent of the subjects, they do not deliberately end what (for opponents of abortion) is already a life.

The notion of information about abortion being offensive is rooted in the perspective that the unborn already have a life. If we think of an abortion as effectively a form of clinical murder, then it is of course highly offensive to talk about it the same way in which we talk about other medical procedures. The law does not go as far as stating this position outright, but this attitude is embedded in it. What is codified by the law is a conservative religious view that abortion is abhorrent to the degree that treating it like any other medical procedure is offensive in itself. As a result, a factual entry on a long list can be seen as offensive, through the act of creating equivalence, while the materials distributed by life protection activists are not seen as offensive in an actionable way. This is also why it is not enough to simply subject abortions to the same advertising standards as other types of medical procedures. The distinction relies on a Christian perfectionism that is embedded in the law, on an assessment of when life begins that (despite the constitutional court's claim to neutrality), relies on a Catholic understanding.

That a state does not fully live up to the ideal of neutrality is not exceptional in itself, and not unique to Germany – liberal ideas of neutrality have long been criticised as unattainable, at least in their most abstract form (Chan, 2000; Koppelman, 2004; Sinopoli, 1993). But the core neutralist concern – of preventing some citizens and power holders from showing disrespect for other citizens by forcing on them policies based on conceptions of the good these others reject – can still be maintained with the qualification that not every preference is a conception of the good on par with religious belief (Sinopoli, 1993: 652). Hence, recent formulations of the case for neutrality have argued that the neutrality principle applies more robustly to weighty interests (Patten, 2014: 136). Of course, in the case of the debate around abortion, we are looking precisely at a religious conception of the good informing a weighty interest – one that speaks directly to the autonomy and bodily integrity of the persons affected. Which is to say that even from the

perspective of a moderate perfectionist, this is an area where the state should aim to be neutral – something that is recognised by the constitutional court's claim to the neutrality of its view on life.

While reproductive rights is not the only area where the state runs afoul of its commitment to neutrality (one could think of religious symbols displayed in schools in some German states, or the strict limits placed on stem cell research, for example), it is also not the case that there is a perfectionist agenda universally felt across all practices of the German state. However, this contravention of the neutrality principle is particularly impactful not just for how it limits the autonomy of women, but also for the wider impact it has on civil society. Theoretical debates on neutrality tend to focus on the effects of state action on citizens who do not share the relevant conception of the good, but just as important is how other actors in civil society relate to the perfectionist rationales of the state. In this case it emboldens the populist right, for whom reproductive and gender rights have been a significant rallying point (Paternotte and Kuhar, 2018).

The (disavowed) perfectionism of the German state facilitates the activity of reactionary actors because the law shares fundamental assumptions with the life-protectors (which helps explain why they are not seen as being offensive in an actionable way, despite their tasteless rhetoric). In their assessment of what kind of an act abortion is (effectively murder), life-protectors are fundamentally in agreement with the law. Not because the law defines abortion as murder, but because the way in which abortion is legislated stems from the same moral perfectionism that leads to the designation of abortion as murder.

The practices of the liberal German state make it easy for right-wing activists to rally against the state – by legitimising a particular way of thinking (the sanctity of unborn life), while simultaneously contravening that principle (allowing for the provisions of abortion). The ambiguity in the law is the product of a compromise between fundamentally incommensurable assessments of the character of abortions. This leads to a legal situation that would appear untenable in principle. A set of restrictions that stem from an assessment of abortion as a singularly heinous act, but a simultaneous willingness to tolerate and provide reasonable infrastructure for it.

But retaining this contradiction has consequences far beyond inconsistency: the state lays the ground for far-right activists and provides the mechanisms for its own de-liberalisation. Anti-abortion activists can claim to be acting in the name of democracy and combating a perversion of justice and an attack on life. They are able to present current state practice as distorting a core of the law, which they are defending. They are even able to invoke the Nazi regime and position the current German state as functionally equivalent in its pursuit of injustice. The language or protecting the dignity of life is re-appropriated as a way of enacting a form of religious politics that limits the autonomy of women.

While it would be wrong to say that the views expressed by the life-protection groups have become officially endorsed, there is an interplay between this extreme rhetoric and the discourse at state level. Extreme versions of a reactionary discourse can make moderate versions seem more legitimate, even when they still do things like limit women's autonomy, or constrain the freedom of doctors to provide information. Case (2015: especially 150–156) has argued that the German state is more concerned with preventing abortions than condemning them, that is, it repudiates uncompromising fundamentalism to further a perfectionism focussed on maximum compliance. However, what she overlooks is that the fundamentalist stance is in effect outsourced to civil society groups, as a way of ensuring that the perfectionist agenda remains in place.

Conclusion

In the end, this is of course also an issue about access to abortion. When a state creates a particular legal climate that punishes informing about abortion in particular contexts, then this is something that filters into larger societal attitudes that may put undue pressure on women. When it allows anti-abortion activists more access to public discourse than it does medical professionals, this sends a sign. When the law endorses a particular moral framework that fundamentally sees unborn life as in need of protection, then we need not be surprised when that state does not live up to its duties in providing sufficient facilities for abortions, but does stringently pursue breaches of the advertising ban.

Liberal conceptual vocabulary is liable to be re-appropriated to illiberal ends. This is known when it comes to LGBT rights (Puar, 2007), women's rights (Mohanty, 1995), toleration (Brown, 2006), or multiculturalism (Ulbricht, 2015). This allows for illiberal groups to invoke progressive values. The case of the abortion law is different in that we might see the perfectionist core of the law as pre-liberal – the problem here would then not be that liberal discourse is used to illiberal ends, but rather that the state is not sufficiently liberal. However, what it shares with the discourses mentioned above is that it is an example of a liberal state paving the necessary ground (discursively and legally) for regressive right-wing populism to gain traction. Even as these groups decry corrupt mainstream politics, they can present themselves as defenders of the true values of the state – they are concerned citizens standing up for timeless values. Mainstream parties regularly distance themselves from the rhetoric of the far-right, and yet they seem unable to change those elements of their praxis that allow for the populist right's construction of themselves as defenders of true values.

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Notes

1. The court referenced the crimes of Nazism as a reason for the need to afford the highest protections to life and potential life – but the comparison is misleading in so far as Nazi-era abortion law for Aryan women was even stricter, and cases of forced sterilisation and abortion were precisely forced, and as such not really comparable to voluntary abortions (Berghahn, 2014: 176).
2. German laws are cited according to German convention: Article (§), followed by paragraph (Abs.), followed, where appropriate, by sentence (Satz), followed by law book name (in this case either StGB or SchKG).
3. Article 219a can be traced back to a 1933 reform of the law. While this has led some contemporary commentators to refer to Article 219a as a Nazi law, this is something of an oversimplification, as the reform was the result of a debate that took place throughout the 1920s (which had already led to a 1926 reform prohibiting the teaching of how to perform an abortion).

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