

Criminal prohibition of abortion “advertising” restricts information provision – Legal cases and law reform debate in Germany

Many thanks to **Stephanie Schlitt**, consultant researcher with the World Health Organisation’s Global Abortion Policies Database (<http://srhr.org/abortion-policies/>), for this enlightening comment about current legal debates in Germany.

Reprohealthlaw readers who know about relevant legal provisions and law reform discussions in other countries are encouraged to contact Stephanie Schlitt {stephanieschlitt*at*hotmail .com} who hopes to share such information with German advocates.

On 11 November 2017 Dr Kristina Hänel, a general practitioner in Giessen (a university town near Frankfurt am Main), was sentenced by a District Court to pay a Euro 6000 fine and legal costs for having violated §219a of the German Penal Code which (according to the paragraph’s title) prohibits “advertisement for abortion” [1].

Her case is neither the first nor the latest of a physician being indicted under this paragraph for providing information on their websites about their provision of abortion services. Due to the media and lobbying work undertaken by Dr Hänel and her supporters, however, her trial and conviction have prompted a law reform discussion in Germany focused on the repeal or revision of §219a. Dr Hänel is appealing against her conviction.

The relevant part of §219a (entitled “Advertisement for termination of pregnancy”) which originally dates from May 1933 states:

- 1) Whosoever publicly, in a meeting or through dissemination of written materials, for material gain or in a grossly inappropriate manner, offers, announces or commends
 1. his own services for performing terminations of pregnancy or for supporting them, or the services of another; or
 2. means, objects or procedures capable of terminating a pregnancy with reference to this capacity, or makes declarations of such a nature shall be liable to imprisonment not exceeding two years or a fine. [2]

Dr Hänel practises in her own office. Her office’s website refers to the fact that, among other services, she provides abortions. [3]. The judgment states that the website also offered access to a pdf file with information about termination of pregnancy, the methods offered by Dr Hänel and their pros and cons and about what the prospective abortion patient needs to bring to her appointment (referral, funds or proof of coverage by their health insurance, blood group information).

Dr Hänel’s defence centred on the argument that her office website merely provides information about the options patients have but does not advertise her services. In accordance with §218 and §219 of the Penal Code, for an abortion to take place, women are – in any event – legally required to receive conflict pregnancy counselling or obtain a determination of their situation falling under one of the legal indications before undergoing a pregnancy termination.

The Court found that Dr Hänel had not merely provided information but had publicly offered her services since her office website is publicly accessible and informs those accessing it of her willingness to perform abortions. To fall under §219a, the Court argued, it is not necessary for the information provided to be promotional in nature. Even explanatory information falls under §219a if provided in the context of services being offered. The impugned action by Dr Hänel constituted a means of patient acquisition and an action to her own advantage. The Court affirmed that the physician's right to provide information about his or her services may be restricted in cases where his or her right to free professional practice under paragraph 12 of the German Basic Law (Germany's Constitution) detracts from the constitutionally protected right of unborn life under paragraph 1 of the Basic Law ("Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.") The Court furthermore outlined its understanding of the current legal status quo: It is the state's duty to protect unborn life. Because human dignity is inherent in unborn life, abortion is a wrong throughout the full course of pregnancy. While abortion is not punishable in certain circumstances, it is not to be publicly portrayed as something "normal" nor to be "commercialised". Women wishing to have an abortion may access information about abortion services after having been counselled by a state-supported counselling centre which is neutral and has no interest in whether an abortion is conducted or not. This arrangement meets women's need for information about physicians providing abortion services. If promotional measures for abortion were permitted, the state's duty to protect unborn life would not be fulfilled.

Supporters of the repeal of §219a argue that it violates women's rights to access to information about a medical procedure they have decided to undergo in circumstances in which doing so is not punishable. From the start of their deliberation process, women require access to information about abortion as a medical procedure which physicians performing abortions are best-placed to provide, not counsellors without medical practice. There is a contradiction in prohibiting physicians from providing factual information about a procedure that is not punishable and in exposing them to criminal prosecution when they do. The appeal that abortion must not be "normalised" is deemed cynical because it relies on a conception of what is "normal" which stigmatises and discredits those who opt for or provide abortions within the parameters of the law [4]. If §219a was rescinded, advertisement by physicians would continue to be regulated by state-level laws on the practice of medicine: Permitting physicians to provide factual professional information, such laws prohibit advertisements which endorse, mislead or compare. The German Medical Association's model law, for instance, states that "advertising for one's own or third party commercial activities or products in connection with a medical activity is not permitted."

Minister of Health Jens Spahn (Christian Democratic Union, CDU) has weighed in on the political debate around reform or repeal in a controversial manner, stating: "When it comes to the lives of animals, some who now want to promote abortions are uncompromising. But in this debate, sometimes what is no longer taken into account is that it is about unborn human life." He has since conceded that if there is "a legitimate, as yet unmet need for objective information for women in difficult personal situations, we will seek solutions together" and has met with representatives of pregnancy conflict counselling centres to seek their views. He has indicated that women's information needs can be met without a change to §219a. Discussion currently centres on the suggestion that information about physicians offering abortions could be published online by all state-level Ministries of Health. Repeal supporters oppose this approach, arguing that this would

continue to leave physicians open to prosecution for the provision of factual information. If §219a was to persist, inclusion on a list would also expose physicians to stigmatization [5].

Minister of Justice Katharina Barley (Social Democrat Party, SPD) whose party is in favour of repealing §219a is now tasked with developing a law reform proposal acceptable to the coalition government of CDU, SPD and the Bavarian regional party Christian Social Union. In case the coalition government does not agree by the autumn of 2018 on how to reform the law, the SPD says it will call for parliamentarians to vote on reform of §219a according to their personal conscience rather than the official line set down by their political party.

Further information (English language only):

New York Times, A Hitler-Era Abortion Law Haunts Merkel, and Germany, 27 March 2018, <https://www.nytimes.com/2018/03/27/world/europe/germany-nazi-era-abortion-law.html>

The Local, The doctor battling Germany's Nazi-era abortion law, 30 March 2018, <https://www.thelocal.de/20180330/the-doctors-battling-germanys-nazi-era-abortion-law>

Xinhua, SPD sets ultimatum on reform of abortion law in Germany, 24 April 2018, http://www.xinhuanet.com/english/2018-04/24/c_137131798.htm

¹ AG Gießen, 24.11.2017 - 507 Ds 501 Js 15031/15,

http://www.lareda.hessenrecht.hessen.de/lexsoft/default/hessenrecht_lareda.html#docid:8018226, accessed 7 May 2018

² A full overview of Germany's laws and regulations on abortion can be found on the World Health Organisation's Global Abortion Policies Database: <http://srhr.org/abortion-policies/country/germany/>

³ http://www.kristinahaenel.de/page_infos.php, accessed 7 May 2018

⁴ See, for instance, Prof. Dr. Ulrike Busch, 219a – Streichen, ändern, beibehalten – Argumente und Folgerungen („219a – rescind, amend, keep it – arguments and conclusions”), Presentation to an expert conference by the Alliance for Sexual Self-determination, 23 February 2018. <https://www.profamilia.de/fileadmin/profamilia/verband/VortragU.Busch.23.02.18.pdf>, accessed 7 May 2018; German Association of Women Lawyers and German Association of Women Physicians, Deutscher Juristinnenbund und Deutscher Ärztinnenbund fordern gemeinsam die Abschaffung des Straftatbestandes „Werbung für den Schwangerschaftsabbruch“ (“German Association of Women Lawyers and German Association of Women Physicians jointly call for the abolition of the offense "advertising for abortion"”), 23 November 2017. <https://www.djb.de/verein/Kom-u-AS/K3/pm17-42/>, accessed 7 May 2018

⁵ Solidarity Group against the list compromise (“Soli-Gruppe gegen Listenkompromiss”), 2 May 2018.

<https://solidaritaetfuerkristinahaenel.wordpress.com/2018/05/02/soli-gruppe-gegen-listenkompromiss/>, accessed 7 May 2018