



# BOFAXE

## EVERY DAY COUNTS (PART 1)

### On Human Rights and the Maternity Protection of Persons Suffering Miscarriages

— Globally, approximately every seventh pregnancy worldwide results miscarriage, prompting a notable gap in legal discourse. This deficiency is exemplified by a critical issue: women in Germany who suffer a miscarriage before the 24th week of pregnancy have no right to maternity protection under the German Maternity Protection Law. A 2022 petition by Natascha Sagorski to the German Federal Parliament serves as an attempt to address this problem. Additionally, in November 2022, four women filed a constitutional complaint, challenging the unequal treatment of women who suffer a miscarriage, arguing that this treatment contradicts the principles enshrined in Article 6(4) of the German Constitution (GG), which guarantees the fundamental right of a mother to community-supported protection. In the wake of this situation, we argue that international human rights law falls short in affording adequate maternity protection. While existing provisions can offer maternity protection in cases of miscarriages, states have refrained from endorsing this viewpoint. Therefore, we advocate for new and comprehensive maternity protection regulations, which also protect cases of miscarriages.

#### Current Domestic Legal Frameworks Concerning Maternity Protection and Paid Leave in Cases of Miscarriages

Currently, in Germany, the protection of women after a miscarriage depends on the status of whether it is legally considered a stillbirth (*tot geborenes Kind*) or a miscarriage (*Fehlgeburt*). According to § 31 II of the Personal Status Law (*Personenstandsverordnung*, PStV), a stillbirth occurs when the fetus is born dead after the 24th week or weighs more than 500 grams, while a miscarriage refers to births before the 24th week, see § 31 II PStV. While stillbirths are legally considered to be deliveries, miscarriages are not. This distinction is relevant as maternity protection only takes effect from the time of delivery (*Entbindung*), § 3 Maternity Protection Law (*Mutterschutzgesetz*, MuSchG). This differentiation is being justified by the difficulties that come with the act of delivery.

The missing paid leave regulations for women who suffer a miscarriage can still be found in several other domestic legal systems and in international comparison, as only a few countries grant paid leave after a miscarriage, namely India, Australia, New Zealand, Indonesia and the Philippines. In India, for instance, women are entitled to six weeks paid leave after a miscarriage. Some countries are currently debating how to approach paid leave in cases of miscarriages, including in the United Kingdom, Germany and the United States.

Conversely, there are regulations for paid leave after stillbirths, namely the acceptance of such at 20 weeks in Australia and the United States, at 24 weeks in Germany and the United Kingdom, and at 28 weeks by the WHO. This leads to the situation that the entitlement to maternity protection can sometimes hinge on chance, depending on the date of the diagnosis and time of the doctor's appointment. Overall, although various jurisdictions specify different points of time for the occurrence of miscarriages, the legal distinctions stand in contrast with the fact that the medical treatments for late miscarriages are comparable to those of stillbirths.

The missing legal discourse is a reminder that miscarriages are still a taboo subject in our society, as is often the case with topics that do not happen in the "public" but in private. The division of the public and the private sphere has long been a topic of academic exploration in social sciences. The need for action becomes clear once we consider the economic and emotional challenges. Women frequently encounter situations where they must convince doctors of their inability to work. In countries where sick pay is accessible, the regulations are often fragmented and not sufficient enough, see Belgium and Greece. Thus, the economic instability is an additional burden to the situation women find themselves in. Additionally, emotional challenges are evident. The unique obstacles linked to pregnancy and the tragedy of losing a child undeniably manifest well before the 24th week. For example, research reveals that 51% of women who had a miscarriage struggle with major depressive episodes within a timespan of three months and that 41% of women suffer from moderate to severe anxiety disorders within the first week following the miscarriage.

# BOFAXE

## EVERY DAY COUNTS (PART 2)

### On Human Rights and the Maternity Protection of Persons Suffering Miscarriages

#### **Current International Legal Framework and the Need for Including Protection in Cases of Miscarriages**

The concept of maternity protection in International Law is rooted in various conventions (e.g. CEDAW, ICCPR). It is also additionally enshrined in the International Labour Organisation (ILO) Maternity Protection Convention (No. 183), which underlines the importance of protecting mothers in the context of labour. Yet, this convention solely applies to childbirth and doesn't encompass miscarriages, creating an evident gap in protection.

Furthermore, if one takes a look at relevant provisions in the human rights treaties, Art. 4 CEDAW and especially the right to adequate working conditions according to Art. 7 International Covenant on Civil and Political Rights (ICCPR) and the right to health according to Art. 12 International Covenant on Economic, Social and Cultural Rights (ICESCR), one quickly realises that an explicit mention of maternity protection in cases of miscarriage is not given.

Therefore, while women's rights in cases of miscarriages are not explicitly mentioned, we argue that their need for protection is identical and that a broad reading of Art. 12 ICESCR could afford them protection.

Maternity protection results from relevant rights safeguarding women's reproductive rights. According to General Comment No. 22 on the right to sexual and reproductive health (Art. 12 ICESCR), which addresses privacy in healthcare settings: the obligation of states to ensure maternity protection has its roots in reproductive rights, the equal treatment of men and women, the right to work (Art. 6 ICCPR) and the right to adequate working conditions (Art. 7 ICCPR). Since maternity protection as a concept is based on several human rights, it makes sense to analyse the meaning and purpose of those rights more closely.

The relationship between maternity protection and the right to work, as delineated in Article 6 ICCPR, can be expounded. This right aligns with maternity protection as it asserts the right to work and employment without discrimination, underscoring the importance of ensuring that pregnant women, including those who have experienced miscarriages, can exercise their right to work free from discrimination, and with the necessary accommodations to protect their well-being and to safeguard a woman's bodily autonomy.

In Art. 7(b) ICCPR, the obligation of states to ensure healthy working conditions is mentioned. In this context, General Comment No. 23 states the connection of this right with other provisions, particularly Article 12 ICESCR. Nonetheless, it is important to note that the primary focus of Article 7(b) ICCPR is preventing workplace accidents and illnesses. The present discourse does not offer a direct link between Article 7(b) ICCPR and the question of paid leave after a miscarriage. Consequently, Article 7(b) ICCPR cannot be used as a legal basis here.

Yet, one may argue that Article 12(I) of the ICESCR can serve as the legal ground for providing maternity protection in the case of miscarriages. This article obliges states to acknowledge everyone's right to the highest attainable physical and mental health. Here, General Comment No. 14 states that Article 12(II)(a) ICESCR must also be understood to improve maternal health. Because it offers a non-exhaustive list, it can be argued that the scope includes not only access to health facilities during pregnancies, but also a medical aftercare following incidents such as a miscarriage. In regard to that, miscarriages that occur between the 13th and 24th week, thus categorised as "late abortions", too require surgical interventions that go beyond medication-induced abortions.

Thus, one can argue that the similarity between late miscarriages and stillbirths are present and the obligation to work directly after the miscarriage without medical aftercare is threatening the highest possible health of women, both mental and psychological. Hence, as mentioned above, we contend that a broad reading of Art. 12 ICESCR can facilitate more far-reaching maternity protection.

It is insufficient to refer women to the use of their sick days because, as mentioned above, these are either not paid at all or only fragmented and burdening women with economic insecurities in this situation is unreasonable.

#### **Conclusion: A Need for Action**

In sum, we contend that the ambit of maternity protection should be interpreted expansively under the framework of Art. 12 ICESCR for mothers to invoke the argued broad understanding of Art. 12 ICESCR in cases of miscarriages. Nonetheless, we propose that a more comprehensive approach to maternity protection should be explicitly articulated in future General Comments, enabling states to align their policies and actions accordingly and to create legal clarity.

The current legal framework of maternal health provisions additionally indicates a gendered issue that relates to broader gender inequalities prevalent in society. To successfully challenge this, we must consider maternity protection as a tool for addressing these issues to safeguard women's reproductive rights. Within this broader human rights context, we can discover a basis for advocating for more robust maternity protection which includes the cases of miscarriages. To establish this comprehensive protection, a change of understanding in the context of miscarriages is necessary. Only an open discourse and a de-stigmatisation of the taboos can ensure the long-awaited change.