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# A Constitutional Conundrum: Examining the Right to Abortion

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*Molly Grain*

Abstract: This post aims to analyse the right to abortion from a human rights perspective using a feminist approach. It specifically deals with the case of the United States and touches on the consequences that the growing level of disinformation, the Covid-19 pandemic and the Ukraine war have had on access to reproductive healthcare.

Women have had their civil, political and social rights violated for centuries. Women suffer abuses such as political oppression that are similar to the abuses suffered by men, however, in these situations, the dominant image of the male political actor results in the invisibility of female victims. In addition, many violations of women's human rights are 'distinctly connected to being female – that is, women are discriminated against and abused on the basis of gender' ([Bunch, 1990](#)). Women's rights are not commonly classified as human rights; therefore, society's treatment of women is negatively impacted in a myriad of ways. Reproductive rights, in particular legislation encompassing abortion, are widely contested around the globe which results in national laws violating women's human rights to health and life. [Erin Nelson](#), in her work surrounding the notion of reproductive autonomy, reflects on the fact that the 'history of reproductive regulation is a history of attempting to enforce a traditional view of women as child rearers'. Reproductive choices, though logistically one of the most private and intimate decisions an individual can make, are among the most public. Political, ideological, socio-economic and health concerns intertwine and overlap creating a web of opposing attitudes that women are forced to stand amongst.

Abortion is governed with criminal or penal codes in the majority of countries around the world. According to a [2022 report published by the Center of Reproductive Rights](#), 23 countries prohibit abortion all together and 42 countries permit abortion only when the woman's life is at risk. Issues surrounding conscientious objection and medical practitioners' reluctance to perform abortions from anxieties concerning their involvement influence women's availability to reproductive healthcare in a number of other countries. As human rights treaties are written with broad and open language making no specific reference to abortion or reproductive health, interpretations of such treaties are up for constant debate which can lead to retrogressive measures of recriminalisation as seen recently in the overturning of [Roe v. Wade](#) in the United States. [Scholars have noted](#) that advocacy for

decriminalising abortion is becoming increasingly expansive, shifting focus from the narrow emphasis of ‘choice’ to the notion of human rights violations. As of 2021, the [World Health Organisation](#) stated that six out of ten of unintended pregnancies, and three out of ten of all pregnancies end in induced abortion. Furthermore, unsafe abortion continues to be the leading, and preventable, cause of maternal death worldwide. The public and health costs of unsafe abortions are diverse and complex; the substantial number of female deaths can affect the family income and the number of children placed in the foster system (if looking in the United States for example) as children are left without a guardian. Women’s reproductive rights then are intrinsically linked the local and national economy.

### **Why is abortion contested as a human right?**

Many hold the opinion that abortion is a private matter as reflected through the popular label of pro-choice. Others believe that reproductive capacities are a public concern meaning that they should be subject to legislation. Reproductive labour was a crucial aspect of [Marx’s so-called primitive accumulation](#) that has resulted in our reliance on a capitalist society. As Silvia Federici eloquently explains in her book [Caliban and the Witch](#), women’s bodies have been abused to reproduce the labour force necessary for capitalism to continue. In her words, women have become ‘a fragmented commodity’ split into a hand, a back and a womb. To accompany capitalist history, legislation has always been influenced by religion as sections of the Bible have previously been used to debate laws. The movement to criminalise abortion began around the time of the Civil War when male doctors, supported by the Catholic Church, began to remove authority from female midwives. This illustrates how public opinion on abortion has been contorted by a mixture of external factors throughout history. The forefront recurring argument used by those who oppose abortion is the belief that life begins at conception and so abortion constitutes murder. Others contest saying a fertilised egg only represents potential life meaning abortion does not constitute murder.

As abortion is not specifically mentioned in human rights legislation, one must look to other international instruments to infer whether abortion is a right implicit amongst others. [CESCR’s General Comment No. 14 on the right to the highest attainable standard of health](#) (Article 12), adopted at the 22<sup>nd</sup> session of the Committee on Economic, Social and Cultural Rights, states ‘Health is a fundamental right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.’ Women cannot have a life of dignity if abortion is unsafe and criminalised. The document goes on to assess the Committee’s obligations of priority, of which [paragraph 44\(a\)](#) confirms ‘to ensure reproductive, maternal (prenatal as well as post-natal) and child health care’. After reading what constitutes a violation of the right to the highest attainable standard of health, the document only includes the adoption of any retrogressive measures that are incompatible with the core obligations of [paragraph 43](#) as a violation. Therefore, retrogressive policies on abortion, under reproductive health, don’t seem to constitute a violation to the right to health. However, one could argue that [paragraph 43\(a\)](#) ‘To ensure the right of health facilities, good and services on a non-discriminatory basis, especially for

marginalised groups’ can be inferred to encompass reproductive healthcare with women as the vulnerable group.

Looking at the [ratification, reporting and documentation of International Human Rights treaties](#) in individual countries, the United Kingdom of Great Britain has a plethora of documents published up to 2023 under the treaty of CESCRC whereas the United States has presented no action in reporting cycles from ratification of the treaty on October 5<sup>th</sup>, 1977. The right to health is recognised in many other international instruments; [Article 25.1 of the Universal Declaration of Human Rights](#) affirms ‘Everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services’.

A government might be in violation of the right to equal protection from the law if they fail to put into effective operation the legal indications for providing health services that only women need. A failure of a government to provide abortion services is unfair for those entitled to the benefit of the law. Focussing on the United States, the Fifth Amendment’s Due Process Clause as well as [the Fourteenth Amendment Equal Protection Clause](#) requires the United States government to practice equal protection. Criminalising abortion may then constitute a violation of these clauses and a denial of equal protection. Alaska, Arizona, California, Iowa and New Jersey have recognised abortion restrictions as violations of equal protection, so it is a plausible argument to make when asking whether abortion is a human right. Interestingly, the [Center for Reproductive Rights](#) notes that New Mexico is the only state to recognise abortion restrictions as a form of sex discrimination.

Historically, the right to life required governments to refrain from arbitrarily taking individuals’ lives, however, the scope of the right to life has now expanded to include obligation of the state to minimise the extent of deaths resulting from socio-economic factors. [The International Covenant on Civil and Political Rights](#), adopted in 1966 by the General Assembly, recognises that for human beings to enjoy civil and political freedom and freedom from fear, conditions must be created where human beings have economic, social and cultural rights as well as civil and political rights. [Article 6](#) states ‘Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life’. The Human Rights Committee acknowledges that this is a right that should not be interpreted narrowly. [Article 6](#) lays the foundation for the obligation of States to respect and ensure the right to life, through legislation and other measures. In paragraph 9 of the [General Comment No.36](#) on article 6 on the right to life, the committee notes that ‘although States may adopt measures designed to regulate terminations of pregnancy, such measures must not result in violation of the right to life of a pregnant woman’, ‘any legal restrictions on the ability of women to seek abortion must not, inter alia, jeopardize their lives or subject them to physical or mental pain or suffering which violates article 7’ and most importantly ‘States parties may not regulate pregnancy or abortion in a manner that runs contrary to their duty to ensure that women do not have to undertake unsafe abortions. [For example, they should not take measures such as criminalizing pregnancies by

unmarried women or applying criminal sanctions against women undergoing abortion or against physicians assisting them in doing so, when taking such measures is expected to significantly increase resort to unsafe abortions].’ The comment also notes that ‘States parties should remove existing barriers to effective access by women and girls to safe and legal abortion, including barriers caused as a result of the exercise of conscientious objection by individual medical providers, and should not introduce new barriers.’

Women who choose to exercise their reproductive rights or seek legal abortions often face judgement and stigmatisation from others, including that of health professionals. As the United States has a web of state led laws on cases of conscientious objection, we can look to the United Kingdom as a case study to exemplify how the law on this topic can decrease women’s access to safe abortions. Under [section 4 of the Abortion Act 1967](#), as applicable as at the material time, a doctor may refuse to carry out a medical procedure, citing her or his objections on the ground of conscience. He or she is obliged to inform the patient where the medical procedure concerned can be obtained and to register the refusal in the patient’s medical records. Doctors employed in health-care institutions are also obliged to inform their supervisors of their refusal in writing. It seems to be a legal grey area whereby allowing medical conscientious objection can lead to women turning to unsafe abortions, going against their right to life. In countries around the world, there is reason for concern over the number of cases refusing women the performance of a legal abortion as conscientious objection, if not regulated, can significantly undermine access to safe reproductive healthcare. [The World Health Organisation](#) and the International Federation of Gynaecology and Obstetrics have further recognised that a medical professional may not invoke conscientious objection in emergency situations, such as when a woman’s life or health is in danger.

There is some concern that the objection of conscience is shifting from the individual to the institution, making it a harder right to control. To exemplify how this right can undermine access to abortion services, one can look to Complaint No.87/2012 [International Planned Parenthood Federation European Network \(IPPF EN\) v. Italy](#). Providing background, the data collected by the Italian Ministry of Health stated that approximately 70% of gynaecologists and 51% of anaesthesiologists refuse to provide legal abortion care and related reproductive health services. As a result, women are forced to travel to search for practitioners who will provide abortion services, affecting their health and harming them financially. The complaint organisation in this case alleged that the formulation of [Article 9](#) of Law No. 194 1978 (governing the conscientious objection of medical practitioners in relation to the termination of pregnancy) was in violation of [Article 11](#) (the right to health) of the European Social Charter as it did not protect the right to access termination of pregnancy procedures. This was to be read alone or in conjunction with the non-discrimination clause in Article E. There is a lack of normative framework in [Article 9](#) dealing with conscientious objection that does not precisely indicate how hospitals and regional authorities are to guarantee the adequate presence of non-objecting medical personnel to ensure women seeking an abortion have their right to life, health and self-determination. The Committee found two primary forms of discriminatory treatment in this complaint: ‘discrimination on the grounds

of territorial and/or socio-economic status between women who have relatively unimpeded access to lawful abortion facilities and those who do not; discrimination on the grounds of gender and/or health status between women seeking access to lawful termination procedures'. These two alleged grounds for discrimination are intersectional and result in a category of women in Italy subject to less favourable treatment in the form of impeded access to lawful abortion facilities. The Committee held that this situation constituted a violation of Article E of the European Social Charter read in conjunction with [Article 11](#).

The philosophical question of where life begins is highly contested around the world as well as between different professions, cultures and religions. Time conditions of legal abortions also differ between countries from these different perspectives. There are several scientific and philosophical arguments as to why a foetus should be recognised a person and many more that counteract that. Within law, while International courts and tribunals have been silent on the issue, the language of various treaties is generally understood not to include an unborn foetus in references to human beings. This being said, some physicians have advocated in the past for new foetal rights to be introduced into the legal system. Many argue that the foetus ought to have a legal right to medical care independent but parallel to the mother's right to the care provided by her physician. More novel is the proposal that 'the foetus ought to be given analogous rights holding against her parents, especially her mother, not to be subject to parental malpractice and not to be denied any medical care necessary to preserve her life or promote her health' as Carl Wellman suggests in his [2002 article](#). This puts the rights of the unborn child above those of the mother which would lead to further barriers in accessing safe abortions.

Access to safe abortion has been established as a human right by a number of international frameworks including the UN Human Rights Committee. At the 1994 International Conference on Population and Development in Cairo, 179 governments signed a [programme of action](#) that included a commitment to prevent unsafe abortion. [UN General Assembly resolution 65/234](#) recognised that this programme of action remains unfinished nearly 20 years on.

### **The United States**

[Article 4 Right to Life of the American Convention on Human Rights](#) states 'Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception'. How expansive is the language of 'in general'? Today, abortion is illegal in the majority of American states so the 'in general' comment seems to be widely encompassing, giving the right to life to fetuses. The language could also imply that a gradual or incremental protection should be given to prenatal life; this is seen in countries where one has access to a legal abortion up to a certain number of weeks, if no life or health is at risk. Under the United States constitution, according to the Supreme Court, abortion is not a constitutional right.

Though socially unacceptable, prior to the mid 1800s, abortion was mostly legal in the United States. The Civil War marked the beginnings of the movement to outlaw abortion and by 1910, abortion was illegal often with no exceptions for cases

of rape or threat to life. The road to the case of [Roe v. Wade](#) was a complex one with a number of historical [noteworthy crises](#). In the late 1950s, thousands of children were born with birth defects after their mothers took the morning sickness drug thalidomide while pregnant. Shortly after this, an epidemic of rubella spread throughout the country and fetuses that survived rubella in utero were born with a wide range of disabilities including deafness and liver damage. From these situations, physicians began publicly advocating for abortion to be treated like any other medical procedure, with a discussion and decision between doctor and patient.

In [Griswold v. Connecticut 1965](#), a seven-justice majority struck down the Barnum Act, an act which barred contraceptives and the distribution of information relating to them. The [Due Process Clause of the Fourteenth Amendment](#) ‘[no state shall] deprive any person of life, liberty, or property, without due process of law’ implies a right to privacy. Griswold’s contention that the Constitution creates a zone of privacy which government cannot enter paved the path for Roe. The majority opinion reasoned that many inexplicit rights exist within the Constitution that flow from explicitly granted protections. Contraception was found to be an inexplicit and protected right of privacy, though only within the marital context at this time. A few years later in the case of [Eisenstadt v. William Baird 1971](#), the court discerned that the [Fourteenth Amendment](#) carried equal protection under the law and so there was no reason to treat married and unmarried people differently with regard to contraception. Justice William Brennan, for the majority, wrote “If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwanted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child”.

The [Roe v. Wade](#) 1973 legal case began when ‘Jane Roe’ instituted federal action against Henry Wade, the District attorney of Dallas county. A seven - two majority ruled that unduly state regulation of abortion was unconstitutional as it violated a woman’s right to privacy, previously found implicit in the liberty guarantee of the due process clause of the [Fourteenth Amendment](#). The Supreme Court disagreed with Roe’s assertion of an absolute right to terminate the pregnancy in any way at any time and attempted to balance women’s right to privacy with the state’s interest in regulating abortion. The potential life of the foetus was taken into account in this trial with the Court locating the point of ‘capability of meaningful life outside the mother’s womb’ at 24 weeks of pregnancy.

The Court ruled six for and three against in the case of [Dobbs, State Health Officer of the Mississippi Department of Health et al. v. Jackson Women’s Health Organisation et al. 2022](#). This ruling consisted of the overruling of [Roe v. Wade](#) which guaranteed women, on the federal level, access to abortion services. The decision marks the first time in history that the Supreme Court has revoked a fundamental right. The appeal targeted the [Mississippi Gestational Age Act \(2018\)](#) that banned the abortion of an ‘unborn human being’ if the gestational age was greater than 15 weeks, an age far below the age of ‘capability of meaningful life outside the mother’s womb’ as previously discerned by the Court. By using the language of ‘unborn human being’, the problem surrounding juxtaposing ideas of when life begins came into the spotlight yet again. The Court’s majority not only upheld the state’s ban on abortion but also abandoned the constitutional right to abortion

across the country. This worrying ruling could spark a flurry of linked over-rulings, for instance regarding the right to access contraception as previously mentioned in the case of [Griswold v. Connecticut](#).

People still require access to safe abortions and reproductive healthcare, but the Supreme Court's decision means millions will no longer have a right to this. Hints of the United States revoking the right to access contraceptives can be seen in the [current battle over mifepristone](#). The drug that was approved by the FDA 20 years ago is used to facilitate abortions and in 2023, Texas' federal judges ordered the removal of FDA approval from the drug. Moving past the political and detrimental social implications of this, even the pharmaceutical industry is concerned with this ruling as it effectively inserts the judiciary into the drug approval process. The retrogressive legislation will only amass and continue with the conservative Courts in power. Furthermore, public opinion over the right to abortion is very split in the majority of states, possibly due to the growing misinformation and disinformation on reproductive healthcare in the United States and around the world.

Disinformation, the spreading of false content with the intention to deceive or secure economic or political gain which may cause public harm is much more difficult to prove in comparison to misinformation, the spreading of false content without intent even though the effects may still be harmful. In 2022, the [US Department of Homeland Security announced a plan](#) to create an advisory board to monitor threats posed by disinformation, however, the plan quickly disintegrated as the department faced attacks from both the political left and right. It could easily be used to silence dissenting opinions, however, with increasing technologies, disinformation becomes more common, especially in the digital media. In 2020, OpenDemocracy revealed that a major US anti-abortion group [Heartbeat International](#) runs 'crisis pregnancy centres' around the world. These centres, also known as 'fake clinics', provide distorted information on abortion and other reproductive healthcare needs like contraception. OpenDemocracy sent undercover reporters posing as vulnerable women with unwanted pregnancies to these clinics to understand the level of misinformation being spread. Women were told abortion increases risks of cancer and mental illness, that they need consent from a partner to access abortion and that hospitals will refuse to treat medical complications from an abortion. One can imagine the repercussions this has on a vulnerable group of women; insisting on the consent from a partner might scare domestic violence victims into looking for an unsafe abortion or keeping the foetus. Claims that abortion increases a woman's risk of abusing their other children would frighten any mother and cause unnecessary mental distress. The clinics that pose as pro-choice or abortion providers seem to violate false advertising laws that each of the countries investigated holds, however, Heartbeat International uses the protection of free speech under the [First Amendment rights](#) as a legal loophole. Since 2007, the group has spent [\\$1 million around the world supporting anti-abortion networks](#). In Latin America, crisis pregnancy centres are also supported by [Human Life International](#) which opposes contraception as well as abortion.

Popular social media platforms can also propagate misinformation. A [2022 Report on Endangering Women for Profit](#), conducted by the Centre for Countering Digital Hate, revealed that between 2020 and 2021, Facebook had accepted up-

wards of \$115,400 for 92 ads promoting or endorsing so-called abortion ‘reversal’ pills and procedures. [Heartbeat International](#) were one of the purchasers of these ads that have been viewed over 18.4 million times. The ‘reversal’ in question is unproven and potentially unsafe as it uses the administration of high doses of progesterone. This is obviously dangerous for women’s health and yet Facebook advertised this procedure for profit.

### **Note on Recent Issues**

Abortion is a time-sensitive service, with delays and denials leading to unsafe abortions. It is unsurprising then that Covid-19 had a negative impact on access to safe abortions. Providers became infected, clinics closed, the lockdown and quarantine orders restricted travel to get access to safe abortions in other regions and countries and there was a disruption in the supply-chain for abortion medication. During the pandemic, abortion services were more essential than ever as [preliminary reports](#) indicated an increase in unwanted pregnancies due to diminishing contraceptive supplies and an increase the incidences of domestic violence. Some US law and policy makers worked to ban abortion under the cover of Covid-19 by misleadingly categorising abortion as ‘non-essential’ and medically ‘non-necessary’. A [2022 report in Massachusetts](#) found a 20% drop in abortions between March 2020 and December 2020; it is unlikely that this was due to a 20% drop in pregnancies from the reasons stated above.

The [Center for Reproductive Rights](#) and national partners are undertaking a joint initiative aimed at addressing the sexual and reproductive health and rights of women and girls impacted by the war in Ukraine. 4.7 million refugees are now registered across Europe, 90% of whom are women and children. Fleeing Ukraine has created a range of serious barriers to accessing sexual and reproductive healthcare as refugees now reside in countries like Poland where abortion is nearly completely banned. Furthermore, within Ukraine, military attacks on civilian infrastructure has destroyed many health clinics, including those providing reproductive healthcare. Disruptions in distribution channels have also cut access to essential sexual and reproductive health medicines. The [list of challenges](#) faced by women and girls fleeing Ukraine goes on including a lack of appropriate referral pathways to psychological support services and clinical management of rape as well as large cost barriers. In May, 2022, the European Parliament adopted a [resolution](#) calling on EU member countries to provide access to sexual and reproductive healthcare, specifically asking countries to guarantee access to emergency contraception and abortion care.

The evidence amounts to indicate that criminalising abortion and reproductive healthcare is a form of gender-based violence, sexual discrimination and a violation of women’s reproductive rights. The right to the highest attainable standard of health, the right to life and the right to equal protection from the law should provide enough of a basis to inexplicitly prove that abortion is a human right. Freedom of expression should allow individual public opinion, but this amendment should not be used for conscientious objection or used as a justification for the spreading of disinformation. The historical footprint of reproductive rights does not provide a light at the end of this tunnel; it only illustrates the judicial power to revoke wom-

en's constitutional rights. The legal instruments previously mentioned ground safe abortion in a web of rights, proven by international bodies continually condemning restrictive abortion laws for their incompatibility with Human Rights. As shown throughout the past century, imposing legal restrictions on abortion does not result in fewer abortions, it only compels women to risk their health and their lives to seek out unsafe abortion care. The concept of foetal rights only puts potential life above women's rights, no matter which religion or culture is involved. The past 50 years has been characterised by a push towards liberalising abortion laws. Retrogressive policies and legislation such as the overruling of [Roe v. Wade](#) represent a step backwards in society and the industrialised world in its entirety. In the time of the technological revolution and war displacing millions, governments should be focussing on women's reproductive rights and women's human rights in general.

*Molly Grain, University of Exeter, UK, and student of the course in Global Governance, Peace, Security, Cooperation and Development taught by Prof. Sara De Vido at Venice International University, Spring 2023*