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THE RIGHT TO WITHDRAW CONSENT TO CONTINUING AN UNWANTED PREGNANCY

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In 1973, the US Supreme Court in *Roe v. Wade* decided that women's ability to choose whether to continue a pregnancy was protected by privacy rights derived from the US Constitution (balanced against state's interests in regulating later term pregnancies). In *Dobbs v. Jackson Women's Centre* (June 2022), the US Supreme Court overturned this precedent. The dissenting opinions of Justices Breyer, Sotomayer and Kagan in Dobbs observe that the majority decision curtails 'women's rights, and their status as free and equal citizens'. The US Constitution purportedly guarantees equality and liberty for all, but the majority in Dobbs adopted a strict, 'originalist' interpretation of a document over 200 years old, drafted at a time when women were not recognised as equal citizens. This approach is troubling as the Constitution should be viewed as a living instrument capable of responding to historical progress. In reading Roe and subsequent case law, the dissenting judges maintain that this jurisprudence was embedded in 'core constitutional concepts of individual freedom, and the equal rights of citizens to decide on the shape of their own lives'. The current chapter aligns with such views, arguing that the ability to withdraw consent to continuing an unwanted pregnancy is an essential component of autonomy for those capable of gestation. The ability to withdraw consent, in the nomenclature of the dissenting judges in Dobbs, is fundamental to a 'woman's control of her body and the path of her life'. While much of the literature on this topic refers to 'women,' the chapter employs language such as 'those capable of gestation,' or 'pregnant person,' in order to be inclusive; to include women and girls, trans men, non-binary identities, or anyone else who would need to withdraw consent to continuing an unwanted pregnancy during their lifetime.

The right of a pregnant person to withdraw consent to continuing an unwanted pregnancy needs to be universally protected for everyone capable of gestation. Only when this right is protected is social equality possible. Many other rights flow from this ability to give consent or to withdraw consent. It is

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not exactly the same as the choice paradigm, which is very familiar in the debate around reproductive rights. The consequences of protecting the right to withdraw consent in these circumstances signify making available the socio-legal, economic, and health provisions that would allow for free withdrawal of consent. While those choices occur in private, the right to withdraw consent is conceived as a public matter of socio-political justice and equality.

First, the chapter tracks through the normative developments of reproductive rights within international human rights law by analysing relevant rights, instruments, and commentary. It summarises the position in international human rights law with regards to reproductive rights and signposts possible directions for greater liberalisation. Then, to explore the right to withdraw consent ideologically, the analysis turns to frameworks on reproductive justice, liberal autonomy and reproductive autonomy, and relational autonomy.

International Human Rights Law

The potential of a right to withdraw consent was present from the outset of thinking on reproductive rights. The right to decide the number and spacing of children was first stated at the Tehran Conference in 1968, and later affirmed in the World Population Plan of Action (adopted in Budapest in 1974). Codified in the Convention on the Elimination of All Forms of Discrimination Against Women (1979), Article 16 obliges state parties to eliminate discrimination against women and ensure 'equality between men and women,' by granting them 'the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights'. As zero is a number, the only way that this provision can be realised is if the right to withdraw consent to continuing an unwanted pregnancy is protected.

A widely accepted definition of reproductive rights was developed at the International Conference on Population and Development (Cairo, 1994), which entails:

> [R]eproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.

Here the idea of being free to decide on the number of children is at the crux of reproductive rights. In addition, the ability to make decisions regarding reproduction free from coercion appears. If a person capable of carrying a pregnancy is unable to withdraw consent to continuing that pregnancy, decision-making is not 'free of discrimination, coercion and violence'. Similarly, the 1995 Beijing World Conference on Women and its resulting Declaration recognised the right of women to control all aspects of their fertility and that 'equal relationships between women and men in matters of sexual relations and reproduction including full respect for the integrity of the person requires mutual respect, consent and shared responsibility for sexual behaviour and its consequences'. Consent is explicitly framed as an issue of equality and the idea that ensuring equality between men and women requires that the consequences of sexual behaviour should not fall on women alone. The specific consequence under scrutiny here is pregnancy – holding consent to or consent not to continue the pregnancy as a sacrosanct right for the pregnant person.

Access to abortion, as a critical tool for the enjoyment of reproductive rights, has been recognised by various UN human rights bodies under the rubric of the right to life, the right to health, the right to privacy, gender equality, and the right to be free from torture, cruel, inhuman or degrading treatment (Sjöholm, 2017). The Committee on the Elimination of Discrimination Against Women's General Recommendation 19 (1992) on violence against women urged state parties to take measures to prevent coercion with respect to women's fertility and reproduction, and in General Recommendation 21 (1994) the Committee noted reports of 'coercive practices which have serious consequences for women, such as forced pregnancies, abortions or sterilisation'. Around the same time, the Vienna Declaration and Platform for Action specified that forced pregnancies in situations of armed conflict was a violation of international humanitarian law and international human rights law (Altunjan, 2021). In the latter situation it is likely that the threshold to seriousness is understood to be breached because lack of consent to the pregnancy was closely linked to lack of consent at conception in situations of utter powerlessness. From the 1990s, with the establishment of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, international criminal law started to address sexual violence that occurred during conflict and mass atrocities. Forms of sexual violence such as rape and enforced pregnancy were codified as crimes against humanity in the Rome Statute of the International Criminal Court (1998). Several years later, Dominic Ongwen, a former commander with the Ugandan Lord's Resistance Army, became the first person convicted by the International Criminal Court of committing 'forced pregnancy,' amongst other crimes (Grey, 2017).[1]

But what of forced pregnancies in non-conflict situations? Or situations where both parties consented to the sexual activity which led to conception, but the person who carries the burden of gestation wishes to withdraw consent to continuing that pregnancy? In 2017, the Committee on the Elimination of

Discrimination Against Women explicitly stated that 'forced continuation of pregnancy' is a form of gender-based violence which may amount to torture, cruel, inhuman or degrading treatment. States that do not protect the ability to withdraw consent hold a form of gender-based violence in reserve, which can have fatal and torturous results. The Committee on the Elimination of Discrimination Against Women has long comprehended the impact of reproductive restrictions on women, because reproductive labour is done by women, and in most societies the burden to raise children also falls on women. This they noted affects women's access to education, to work, and to other activities related to personal development (CEDAW, 1994). One result of the inability to withdraw consent is that disproportionate workloads fall on those forced to continue the pregnancy. This work deepens gender inequality because on the one hand it is unpaid, while on the other it creates obstacles to the benefits of paid employment. Women spend 2.5 more time doing unpaid work than men, and earn approximately 35% of global labour income (UN Women, 2022; World Inequality Report, 2022).

As such, the forced continuation of pregnancy is not prohibited by international human rights law, except in the discrete circumstances of rape, risk to life or the health of the pregnant person, or fatal foetal abnormality. This is because failing to provide for withdrawal of consent in these circumstances is recognised as leading to various socio-economic, and civil and political rights violations. While many commentators point to the aggregate effect of multiple rights being impacted, generally the terrain is conceptualised and litigated through atomised rights: the right to life, the prohibition on torture, cruel, inhumane and degrading treatment, the right to health, the right to privacy, and addressing structural and legal barriers to safe abortion. The next section will consider the latter three lenses through which reproductive rights have been advanced to better understand whether foregrounding these rights has strengthened people's capacity to withdraw consent to continuing a pregnancy.

To assure the ability to withdraw consent requires dismantling structural and legal obstacles, which has been considered at international level. For example, both the UN Human Rights Committee (General Comment 8, 1982) and the UN Committee on Economic, Social, and Cultural Rights (General Comment 22, 2016) urge states not to criminalise women or girls who need to procure abortions and the UN Committee on the Elimination of Discrimination Against Women explicitly urges states to eliminate such laws and to eradicate 'practical barriers to the full realisation of the right to sexual and reproductive health' (see also UN Special Rapporteur on the Right to Health, 2011; Parliamentary Assembly of the Council of Europe calls on states to eliminate barriers to abortion). Such procedural barriers as mandatory waiting periods, third party authorisation, unavailability of good quality medical information and trained professionals, or biased counselling ought to be abolished (Fine et al., 2017). Fine et al. summarise the relevant threads produced by UN commentary as requiring states to ensure 'that legal abortion services are available, accessible

(including affordable), acceptable, and of good quality'. While such structural reforms are of course essential to protect the right to withdraw consent, international human rights law has not settled these parameters as a result of granting a universal right to withdraw consent to everyone capable of gestation. Reproductive rights at the international level have advanced through the jurisprudence of hard cases and the prism of discrete (and this chapter argues contingent) rights, to which analysis now turns.

The modern movement for reproductive rights followed the direction set by *Roe v. Wade* whereby the US Supreme Court legalised abortion on the basis of privacy protected by the US Constitution which was deemed to be 'broad enough to encompass the right of a pregnant woman to terminate her pregnancy without state interference' (Palacios Zuloaga, 2021). Patricia Palacios Zuloaga observes that positioning access to abortion under the purview of the right to privacy took hold in a society which valued personal autonomy and state non-interference in private matters; thus, under the rubric of privacy, the right to choose to terminate a pregnancy developed. Likewise, in the European system, the determination of whether or not to reproduce stems from the right to privacy (Sjöholm, 2017). There are several issues with the normative development of reproductive rights under the right to privacy, of which two will be presented. Firstly, to invisibilise reproductive rights as a privacy right rather than an issue of social justice had the unintended consequence of limiting choice, or limiting who could exercise the choice to terminate their pregnancy. Accessing abortion became an exclusive right for those with the resources to make that choice, whereas a social justice approach to abortion rights would have recognised the need for the state to make access to abortion services widely available. The latter, as a matter of social justice, would have signified greater engagement with socio-economic and intersectional analyses of situations where people wished to withdraw consent to continuing pregnancy. This fact was highlighted by radical and critical race feminists who introduced the more comprehensive notion of reproductive justice under which access to abortion could be advanced. In fact, 20 years before the overturning of *Roe v Wade*, Melanie Lee astutely predicted that abortion as a privacy right reduced it to a privilege and this 'laid the foundation for the practical overruling of Roe' (Lee, 2000).

This leads to a second critique of abortion under the right to privacy. Under international human rights law and in many national jurisdictions the right to privacy is not absolute. Shielding the 'choices' of a section of privileged women under the thin right to privacy makes this a gift rather than a right which then is entirely contingent on the political or cultural persuasion of a particular administration at a particular point in time. Unfortunately, the contingency of this 'grant' under the privacy rubric was laid bare by the legal and political engineering of Donald Trump with the US Supreme Court, and the Court's subsequent *Dobbs v. Jackson Women's Centre* (2022) ruling, which removed and restricted reproductive rights for many across the United States. The right to privacy is an inadequate framework for reproductive rights as this is a public, societal and structural issue of equality (Palacios Zuloaga, 2021), and, in

the nomenclature of this chapter, it does not universalise the right to withdraw consent to continuing an unwanted pregnancy.

According to Article 12(1) of the International Covenant on Economic, Social and Cultural Rights everyone has the 'right to the highest attainable standard of physical and mental health.' The Committee on Economic Social and Cultural Rights has taken this to include reproductive freedom, 'such as family planning, pre-and post-natal care, and requires the decriminalization of abortion,' according to Sjöholm (2017). The right to health framework suggests that women's health and well-being is intimately connected to the promotion and protection of their reproductive well-being (Weller, 2006). Indeed, the Maputo Protocol (2003) to the African Charter on Human and Peoples' Rights specifies that the right to health of women includes their sexual and reproductive health. In 2011, the UN Special Rapporteur on the Right to Health advocated for the elimination of 'impermissible barriers to the realisation of women's right to health,' as such laws severely restrict women's decision making with respect to their sexual and reproductive health (UN Special Rapporteur on the Right to Health, 2011). However, if reproductive rights are not considered absolute in the way set out in this chapter, administrations enjoy room to argue that these are permissible barriers in their societies.

Another issue for advancing reproductive rights through the right to health is that socio-economic rights lag behind civil and political rights, the former categorised by Karel Vašák as second-generation rights requiring positive state action (Domaradzki et al., 2019). Indeed, from the outset, the conditionality of socio-economic rights was built into the International Covenant on Economic, Social and Cultural Rights – Article 2(1) calls on state parties to take steps towards the progressive realisation of this category of rights according to resources available. Of course, this is a disingenuous argument, for civil and political rights are also contingent on states actively allocating resources, such as in the fulfilment of the right to vote or the right to a fair trial. But it does point to the reality of policy choices, and if those choices are informed by conservative governments espousing anti-abortion worldviews, the threat to reproductive rights is obvious (Palacios Zuloaga, 2021). So reproductive rights under the right to health are also contingent. A more robust and irrefutable framework is needed to dismantle structural violence that prevents the withdrawal of consent to continuing an unwanted pregnancy.

This section will conclude with a summary of the current position to accessing abortion in international human rights law. Absolute bans on abortion are considered incompatible with international human rights law (Fine et al., 2017). The Maputo Protocol to the African Charter on Human and Peoples' Rights is the only multilateral human rights treaty which explicitly codifies access to abortion in limited circumstances of 'sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus' (Article XIV, 2, c). Currently the Maputo Protocol has 49 signatories of which 42 are state parties. These exceptions, in which consent to continuing an unwanted pregnancy may be withdrawn, are also

reflected in the commentary of treaty monitoring bodies, such as the UN Human Rights Committee, the UN Committee on the Elimination of Discrimination Against Women, and the commentary produced by the UN Special Rapporteur on the Right to Health. In short, at an international level, the view is that abortion may be permitted where the life or health of the pregnant person is threatened (UN Human Rights Committee, UN Committee on the Elimination of Discrimination Against Women), in cases of fatal foetal abnormality (UN Human Rights Committee), and where the pregnancy is the result of rape or incest (UN Human Rights Committee, UN Committee on the Elimination of Discrimination Against Women). Indeed, regarding the rape exception, the UN Committee on the Elimination of Discrimination Against Women was the first treaty monitoring body to explicitly instruct a state party, Peru, to liberalise its abortion laws for pregnancy resulting from rape (*LC v Peru*, 2011).

The difficulty with this position is that it relies on tentative exceptions to the rule of a general ban, rather than completely overhauling that rule to permit withdrawal of consent to continuing pregnancy. Thus, the position is not universalizable to everyone capable of gestation. Of course, this point was not lost on reproductive rights activists and human rights practitioners, who increasingly lean into the notion of reproductive autonomy to bolster and advance access to abortion (Fine et al., 2017). Amnesty International's recently updated policy on abortion (2021) notes that access to abortion is an integral part of sexual and reproductive healthcare, which is key to 'realising individual's reproductive autonomy under full range of human rights'. In 2012, the Committee on the Elimination of Discrimination Against Women advised New Zealand to review its abortion laws and practices to 'ensure women's autonomy to choose'. The UN Special Rapporteur on the Right to Health (2011) noted with concern the impact of proscriptive laws on 'women's dignity and autonomy by severely restricting decision making by women in respect of their sexual and reproductive health'. In 2018, the UN Committee on the Rights of Persons with Disabilities and the UN Committee on the Elimination of Discrimination Against Women issued a joint statement calling for states to repeal laws and policies that impede women's reproductive autonomy and choice. This turn to reproductive autonomy is significant insofar as it is a universalisable norm that could eventually crystallise on such a concept as the right to withdraw consent to continuing an unwanted pregnancy. The rest of the chapter will analyse this notion through the prism of reproductive justice, reproductive autonomy, and relational autonomy. The exceptions to the ban mentioned above also fail to capture the disproportionate impact that unwanted pregnancies have on people who are socio-economically marginalised and already face multiple forms of discrimination in the world.

Reproductive Justice

Over three decades ago, in 1994, the reproductive justice movement was established in the United States by women of colour to bring issues of reproductive

freedom within a social justice framework broad enough to contextualise the intersections of gender, race, class, and other forms of oppression (London, 2011). Historically, the mainstream reproductive rights movement had centred the experiences of white middle-class women under the right to choose umbrella without critical reflection of the relative privilege required for the enjoyment of meaningful reproductive autonomy within the pro-choice framework. Feminists, such as Angela Davis, rejected gender essentialism: the idea that a unitary set of women's experiences 'can be isolated and described independent of race, class, sexual orientation, and other realities of experience' (Denbow, 2014). A subset of relatively privileged women could not stand as a cypher for all women. Advanced by the activist SisterSong network composed of 16 groups from four different communities (African American, Native American, Asian American, and Latina), it developed into a truly inclusive movement that aimed to redefine reproductive rights so as to centre 'indigenous women, women of color, trans people, and other people marginalized by existing reproductive choice frameworks' (Johnston & Zacharias, 2017).

Essentially reproductive justice has four objectives: 1) the right to have a child; 2) the right not to have a child; 3) the right to parent a child in a safe and healthy environment; 4) reproductive autonomy and gender freedom for everyone (Roberts, 2015; Ross & Solinger, 2017). Reproductive justice provides critical analysis of how state policies can weaponise women's bodies as a form of reproductive repression. The progressive multiracial organisation, Forward Together, defined reproductive repression as

> the control and exploitation of women, girls, and individuals through our bodies, sexuality, [labor,] and reproduction. The regulation of women and individuals thus becomes a powerful strategic pathway to controlling entire communities. It involves systems of oppression that are based on race, ability, class, gender, sexuality, age, and immigration status.
>
> *(Forward Together, 2005, p. 1)*

The core argument advanced in this chapter is that the right to withdraw consent to continuing an unwanted pregnancy is essential for the enjoyment of autonomy utilises the reproductive justice framework, and aligns with Ross and Solinger who submit that the right to reproduce and not to reproduce is a fundamental right (Ross & Solinger, 2017, p. 9). The shift to reproductive autonomy – the exercise of choices around reproduction – must be contextualised against the social and cultural capital and other resources which can potentially empower and help realise those choices. Transforming reproductive repression to reproductive autonomy and true freedom in reproductive choices requires a sensitivity to context and material resources. This view of reproductive autonomy is capable of being broad enough, while critiquing the fact that traditional autonomy paradigms have excluded some people's access to reproductive options (Johnston and Zacharias, 2017). The next section will sketch out a

vision of reproductive autonomy in which the right to withdraw consent to continuing an unwanted pregnancy might be advanced. For this right to be universally applicable and available to everyone capable of gestation, it signifies engaging contextual and intersectional analyses of the ability to withdraw consent.

Reproductive Autonomy

One strand of thinking on reproductive autonomy has developed through the liberal autonomy tradition. Etymologically, the word autonomy originates from the Greek word, αυτονομία, which means 'self-rule' (Hewson, 2001). The liberal autonomy outlook is that people should be able to determine the course of their life plans without interference (Lee, 2000). Essentially people may develop their conception of the good life according to their own beliefs and invoke their plans without constraints from third parties or from the state as long as these plans are not harmful to others (Hevia & Constantin, 2018). Johnston and Zacharias note that autonomous agents are defined with reference to capacities, specifically, the 'ability to deliberate about one's personal goals and the ability to act on the basis of that deliberation' (2017). Self-determination in the absence of force, coercion or interference opens the space for free choice and control over life options (Weller, 2006; Lee, 2000). By this maxim, decisions are free and morally right if individuals can exercise self-governance free from constraint (De Proost & Coene, 2019). Non-interference signifies a restrained state and this is posited as a negative right in liberal autonomy. Of course, the right to withdraw consent to continuing an unwanted pregnancy also engages positive obligations on states to provide for procreative choices for the right to be enjoyed in practice (Lee, 2000). In essence, liberal feminists argue that the decision whether or not to carry a pregnancy to term is crucial for personal autonomy, and that reproductive autonomy is key to unlocking women's liberation (Lee, 2000).

However, there have been numerous critiques of liberal autonomy as a vehicle for women's reproductive autonomy. Penelope Weller (2006) points out that transposing these choices that women make onto a male construct of the autonomous subject divorces those choices from the social, political, and cultural contexts which in reality constrain reproductive autonomy. An even more radical challenge suggests that when patriarchal ideologies are internalised in women this is a force of invisible coercion that precludes the possibility of genuine autonomy (Sjöholm, 2017). Mostly, the critiques point to social contexts, such as structural inequalities and social circumstances, in limiting choices (Weller, 2006). Thus, liberal autonomy and neoliberal discourses fail to take account of 'contextual factors, implicit biases, and power imbalances,' that ultimately present insurmountable constraints on women, particularly poor women, women with disabilities, and women from marginalised minorities (Johnston and Zacharias, 2017).

The next section will clarify current thinking on reproductive autonomy, and marry this to the core argument advanced in this chapter, while the final section leans into the notion of relational autonomy, which is highly sensitised to the social contexts in which choice may be exercised and employs the reproductive justice framework introduced above.

In general terms, reproductive autonomy refers to the individual's ability to make choices with regards to sexuality, pregnancy and childbearing, and the foundation of families (Pereira, 2015). Altujan suggests that reproductive autonomy entails the individual's capacity and ability to make informed decisions about reproduction, including 'all aspects concerning impregnation, pregnancy, and birth. Specifically, reproductive autonomy encompasses the freedom to choose whether, how, and under what circumstances to reproduce' (Altunjan, 2021, p. 77). Decisions about whether or not to have offspring and the circumstances of conception – these choices ought to be realised through the availability of reproductive options (Lee, 2022). Through the liberal autonomy lens, reproductive autonomy signifies 'self rule over their reproductive abilities and decisions' (Lee, 2022). This dovetails the notion of bodily autonomy – that a person has a right to determine what happens to their body (Lee, 2022). As access to abortion increases the pregnant person's choices over what happens to their body, so too does it enhance their reproductive autonomy and their personal autonomy in other spheres. McCleod argues that choices in the reproductive sphere are crucial to people's well-being (McCleod, 2009). Outright abortion bans or discrete exceptions to bans inhibit reproductive autonomy 'by severely restricting decision making by the women in respect of their sexual reproductive health' (Fine et al., 2017), and in terms sustained by this chapter, they prevent the withdrawal of consent to continuing an unwanted pregnancy. The ability to such withdrawal of consent is crucial to reproductive autonomy.

Liberal notions of autonomy tend to decouple individualistic choices from the social context in which those choices occur. Lee points out that traditional liberalism assumes these choices are entirely within a person's control or that they have the resources to exercise such choices (Lee, 2022). Many feminists critique this form of individualistic autonomy unmoored from social relationships, particularly when recognising the uniqueness and complexity of reproductive choices (Laufer-Ukeles, 2011). Thus, the notion of relational autonomy has been advanced as an alternative view of autonomy that 'acknowledges the many social and contextual constraints and pressures that may be placed on choices while simultaneously recognizing that there is value in self-determination' (Laufer-Ukeles, 2011, p. 610). Relational theorists consider individuals as embedded within webs of social relationships. People's capacities and autonomy are influenced – constrained or enabled – by these relationships (Boyd, 2010). Relational theory signals the idea of degrees of autonomy and posits that autonomy is a process rather than a snapshot moment in time, 'selfhood is seen as an ongoing process, rather than something static or fixed' (Sherwin, 1998).

By focusing on and disentangling the relational web in which reproductive choices are embedded, relational theory can take into account constraining factors, such as internal or external constraints. All constraints are highly contextual, but external constraints generally refer to the political, legal, cultural, and economic contexts – and, for example, structured gender power relations in a given society that will constrain or enable reproductive autonomy. The current chapter focuses on external constraints in the realm of law, policy, and health provisions – arguing that these need to be reformed so as to enable the freedom to withdraw consent to continuing an unwanted pregnancy. Nonetheless, it recognises other external constraints and argues that the type of intersectional analyses advanced by reproductive justice needs to be engaged. Additionally, understanding how external factors manifest as internal constraints through the incorporation of certain ideologies that preclude genuine reproductive autonomy is required. The line between external constraints and internal constraints is highly fluid if we consider the way in which patriarchal ideologies, highly structured gender roles, and pro-natalism are internalised through socialisation. These ideologies manifest both as internal and external constraints to the exercise of freedom to withdraw consent to continuing a pregnancy. Different ideologies and technologies could lead to different social structures and consequent divisions of labour. Such commitments as to substantive gender equality, the assumption of equivalent childcare by parents, socio-economic redistribution of resources, degrowth policies in the context of our climate emergency, the elimination of racial hierarchies, and fairness in accessing new reproductive technologies (e.g. artificial wombs) could enhance the socio-political and cultural contexts which frame the right to withdraw consent to continuing a pregnancy.

Conclusion

This chapter argues that the right to withdraw consent to continuing an unwanted pregnancy is essential for the realisation of reproductive autonomy for people capable of gestation. First it tracks through developments in international human rights law, noting that this right is not protected, although outright abortion bans are discouraged. At international level and within regional systems the prohibition on abortion is sustained as the rule with only hard case exceptions to that rule. Perhaps this can be seen as an incrementalistic approach in the name of gradual progress and liberalisation. However, the danger of supporting a rule that only permits extreme exceptions is that these exceptions are contingent 'grants' rather than grounded in a fundamental right. Such exceptions do not protect the right to withdraw consent to continuing an unwanted pregnancy for the pregnant person, and may be taken away according to the political vagaries of the day. This may be the reason why UN commentary, treaty monitoring bodies, UN Special Rapporteurs, and NGOs working in this area are increasingly defining reproductive rights in terms of

autonomy and self-determination. While the idea of control over life plans was present in *Roe v. Wade*, it was not as an absolute personal liberty, but as a limited privacy right derived from the US Constitution. The chapter analyses the right to withdraw consent through liberal autonomy and associated feminist critiques of liberalism, settling on the notion of relational autonomy, which by giving context to decision-making can help disentangle limiting factors to reproductive autonomy.

Together with reproductive justice, which can properly assess the socio-economic, cultural, intersectional, and resource implications of being able to consent to continuing a pregnancy or to withdraw consent with dignity, these two paradigms help to identify and dismantle barriers to the right. It is necessary to universalise as a fundamental right the ability to withdraw consent to continuing an unwanted pregnancy because supporting exceptions to a ban means that conservative governments and policymakers can simply remove or reduce these exceptions. Thus, a form of gender-based violence is held in reserve. This is potentially devastating to reproductive autonomy or autonomy more generally for approximately half of the population who may need to exercise the ability to withdraw consent during their lifetime. As a result of *Dobbs v. Jackson*, 13 US states enacted 'trigger' laws designed to ban or severely restrict access to abortion if *Roe v. Wade* fell, and now abortion is illegal in 11 states meaning that one in three American women do not have reproductive autonomy. While internationally the typical trend has been towards liberalisation over the past 25 years, the US is not alone in regressive restrictions as the examples of Nicaragua, El Salvador, and Poland attest. Several UN state parties prohibit abortion entirely, while many others only tolerate limited exceptions to the ban. This signals that continued activism and advocacy is needed to ensure progress towards a universal right to withdraw consent to continuing an unwanted pregnancy for everyone capable of gestation.

Note

1 I would like to thank Carla Ferstman for her insights on this point.

References

Caselaw

Roe v. Wade, 410 U.S. 113 (1973)
Dobbs v. Jackson Women's Health Organization, 19 U.S. 1392 (2022)

UN Commentary

UN Human Rights Committee, General Comment 8 (1982)
Committee on the Elimination of Discrimination Against Women, General Recommendation 19 (1992)

Committee on the Elimination of Discrimination Against Women, General Recommendation 21 (1994)
Committee on Economic, Social, and Cultural Rights (General Comment 22, 2016)
UN Special Rapporteur on the Right to Health (2011) *Report to the General Assembly (criminalisation of sexual and reproductive health)*, A/66/254, 3 August.

Treaties

UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p.13

References

Altunjan, T. 2021. Historical Perspectives on Reproductive Violence in International Law, in *Reproductive Violence and International Criminal Law*. Springer, 77-136.
Boyd, S. B. 2010. Autonomy for Mothers? Relational Theory and Parenting Apart. *Feminist Legal Studies*, 18, 137–158.
De Proost, M. & Coene, G. 2019. Emancipation on Thin Ice: Women's Autonomy, Reproductive Justice, and Social Egg Freezing. *Tijdschrift Voor Genderstudies*, 22, 357–371.
Denbow, J. M. 2014. Reproductive Autonomy, Counter-Conduct, and the Juridical. *Constellations*, 21, 415–424.
Domaradzki, S., Khvostova, M. & Pupovac, D. 2019. Karel Vasak's Generations of Rights and the Contemporary Human Rights Discourse. *Human Rights Review*, 20, 423–443.
Fine, J. B., Mayall, K. & Sepúlveda, L. 2017. The Role of International Human Rights Norms in the Liberalization of Abortion Laws Globally. *Health and Human Rights Journal*, 19, 69–79.
Forward Together. 2005. A New Vision for Advancing our Movement for Reproductive Rights and Reproductive Justice, 1.
Grey, R. 2017. The ICC's First 'Forced Pregnancy' Case In Historical Perspective. *Journal of International Criminal Justice*, 15.
Hevia, M. & Constantin, A. 2018. Gendered Power Relations and Informed Consent: The I.V.V. Bolivia Case. *Health and Human Rights Journal*, 20, 197–203.
Hewson, B. 2001. Reproductive Autonomy and the Ethics of Abortion. *Journal of Medical Ethics*, 27, 10–14.
Johnston, J. & Zacharias, R. L. 2017. The Future of Reproductive Autonomy. *Hastings Centre Report*. Dec. 47 (Suppl 3), S6–S11.
Laufer-Ukeles, P. 2011. Reproductive Choices and Informed Consent: Fetal Interests, Women's Identity, and Relational Autonomy. *American Journal of Law & Medicine*, 37, 567–623.
Lee, J. 2022. The Limitations of Liberal Reproductive Autonomy. *Medicine, Health Care and Philosophy*, 25.
Lee, M. M. 2000. Defining the Agenda: A New Struggle for African-American Women in the Fight for Reproductive Self-Determination. *Washington and Lee Race and Ethnic Ancestry Law Journal*, 6, 87–102.
London, S. 2011. Reproductive Justice: Developing a Lawyering Model. *Berkeley Journal of African-American Law & Policy*, 13, 71–102.
McCleod, C. 2009. Rich Discussion About Reproductive Autonomy. *Bioethics*, 23, Ii–Iii.

Palacios Zuloaga, P. 2021. Pushing Past the Tipping Point: Can the Inter-American System Accommodate Abortion Rights?. *Human Rights Law Review*, 21, 899–934.
Pereira, R. 2015. Government-Sponsored Population Policies and Indigenous Peoples: Challenges for International Human Rights Law. *Netherlands Quarterly of Human Rights*, 33, 437–482.
Roberts, D. 2015. Reproductive Justice, Not Just Rights. *Dissent*, 62, 79–82.
Ross, L. J. & Solinger, R. 2017. *Reproductive Justice: An Introduction*. University of California Press.
Sherwin, S. 1998. *The Politics of Women's Health: Exploring Agency and Autonomy*. Philadelphia: Temple University Press.
Sjöholm, M. 2017. *Gender-Sensitive Norm Interpretation by Regional Human Rights Law Systems*. Leiden: Brill.
UN Women. 2022 . https://news.un.org/en/story/2022/09/1126901#:~:text=Women%20are%20concentrated%20in%20lower,more%20unpaid%20work%20than%20men.
World Inequality Report. 2022. Executive Summary, 13. https://wir2022.wid.world/www-site/uploads/2022/01/Summary_WorldInequalityReport2022_English.pdf