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Nine months a slave: when pregnancy is involuntary servitude to a foetus

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Abstract: *Recent globally compiled evidence suggests that one-quarter of pregnancies end in abortions. However, abortions remain illegal in many countries, resulting in unsafe practices. Debates have largely stalled with the pro-life, pro-choice epithets. To provide further arguments in support of legalising abortion services, we argue that the state cannot demand of a woman that she maintains an unwanted pregnancy because that demand places her in a state of involuntary servitude. Involuntary servitude would put states in breach of international human rights law (Article 8 of International Covenant on Civil and Political Rights). Furthermore, we argue that the fact that a life may be forfeit when a woman withdraws her service is no basis for enforcing the servitude. We draw on the 13th Amendment of the US Constitution as an example to extend the argument and highlight the need to test involuntary servitude in international human rights law through mechanisms offered in the international periodic review of member states. This could provide a robust approach to support and strengthen access to safe abortion services. DOI: 10.1080/09688080.2018.1451173*

Keywords: abortion, right to life, pro-choice, slavery, reproductive rights, pro-life

Introduction

Couples have the right to decide freely and responsibly the number, spacing and timing of their children; however, women, as the bearers, also have the right to control the decision about their bodies, free of coercion, discrimination and violence. Innovations in contraception increasingly provide methods that enable birth control decisions while supporting “pleasurable and safe sexual experiences”.¹ Notwithstanding the existence of contraceptives, recent data suggest that, globally, upwards of 40% of all pregnancies are unplanned and often unwanted; half of these result in abortion.² It is estimated that between 2010 and 2014, 25% of all pregnancies resulted in abortions.³

The ability for women to exercise the right to reproductive control, through both contraception and abortion, is fraught with obstacles.⁴ These can include, *inter alia*, lack of power to negotiate when and with whom to have intercourse, poor access to knowledge and services for contraception

and structural barriers created by unresponsive or inadequate health systems. Within the broader societal and cultural context, control over reproductive choices remains heavily contested, fuelled by multiple interests and arguments that draw on health, the law, feminism, morals and religion. Recent developments in the United States (US), for instance, have seen the withdrawal of subsidies for contraception for working women, based on protecting religious freedoms of employers. In addition, legislative challenges to the right to abortion are constant items on court agendas.⁵ While these examples fall under US jurisdiction, the US plays a major role in global health and frequently places conditionalities on aid and trade agreements that coerce the adoption of these values and restrictions.

With respect to abortion, “pro-choice”, “anti-choice”, “pro-life” and “anti-life” are epithets across the divide of the arguments that, on the one hand, support a woman’s right to choose whether to terminate a pregnancy and on the

other hand, oppose that right. Arguments against the right to choose cite the primacy of a foetal “right” to continue a path of cell division and maturation until birth. Inherent in the argument is the lower value placed on the woman’s right to self-determination, compared to the future life. At the core of this argument is an expectation that women bear the burden of pregnancy, including under coercion, in order to benefit another.

In this perspective essay, we move away from the “pro-choice”, “anti-choice”, “pro-life” and “anti-life” arguments. These arguments have become markers of a social division that has entrenched unconstructive positions. We instead argue, that without regard to where a person may lie on the divide, there is a further, strong legal argument for a woman’s right to seek an abortion that is completely consistent with being “pro-life”. Indeed, while we do not necessarily agree with the position, for argument’s sake we will stipulate that life begins at conception. We will, furthermore, stipulate that all life is sacred and worthy of saving. The alternative to the traditional “pro-choice” argument, simply put, is therefore that the state cannot demand of a woman that she maintains an unwanted pregnancy, because that demand places her in a state of involuntary servitude. We thus explore the value of involuntary servitude as a legal argument in supporting the right to safe and legal abortions.

The legal arguments

Depending on the jurisdiction, different laws have developed about the conditions under which a pregnancy may be terminated. These laws often address the age of the foetus, the viability of the life following birth, the consequences of the pregnancy for the mother’s health and the circumstances surrounding conception.

In the US, for instance, the Supreme Court case of *Roe v. Wade* ruled that a woman’s decision about whether (or not) to have a child was a legal right guaranteed under the constitution. As such, the right to have an abortion has been protected (to varying extents) under the “right to privacy”, a derivative right argued to exist under the due process clause of the 14th Amendment of the US Constitution. It is important to note, however, that in *Roe v. Wade* the court also ruled that the right to privacy in this context needs to be balanced by the state’s interests to protect women’s health and to protect the potential future life of the

foetus. Thus, while the ruling has been empowering for women who have the opportunity to exercise the right to have an abortion, the language of the ruling has left it open to moral interpretation and challenges. Attempts to overturn the Supreme Court decision are ongoing. Furthermore, the ruling allows states to regulate terminations once the foetus is deemed to be viable *ex utero*. The result, again, is a privileging of the unborn and the requirement, regardless of choice, for women to carry the pregnancy to term when the state deems it necessary.

Involuntary servitude

Involuntary servitude has been defined in law as the “control by which the personal service of one man [sic] is disposed of or coerced for another’s benefit”.⁶ If the foetus is indeed a life, then the definition of involuntary servitude applies. The mother is in service to the foetus. In the majority of cases, the service is voluntary and rewarding. If the mother does not wish to perform that service and is forced to by the state or any other body, however, she is in a state of involuntary servitude. If the foetus is not a life, then there can be no pro-life opposition to termination.

Article 8 of the International Covenant on Civil and Political Rights (ICCPR) states that “No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. No one shall be held in servitude. No one shall be required to perform forced or compulsory labour”.⁷ [Article 8: 1–3a] Of the 193 countries in the United Nations, 169 have ratified the ICCPR. Another six are signatories, although have not yet ratified it.⁸

The US example provides a poignant illustration of how apposite the application of involuntary servitude is to withholding access to safe abortion. The 13th Amendment of the US constitution which saw the end of slavery reads:

“Neither slavery nor involuntary servitude shall exist within the United States, or any place subject to their jurisdiction.”⁹

To place the 13th Amendment in its context, it important to note that Thomas Jefferson, one of the principal authors of the Declaration of Independence and a slave holder, observed that “... a woman who bears a child every two years is more profitable than the best man on the farm”.¹⁰ In this, he was noting the obvious

economics of increasing his slaveholding through breeding, and asserting his right to enforce child bearing, just as he might with a cow. The 13th Amendment does not draw a distinction between the physical, manual labour of a woman and the childbearing obligations of female slaves. With the abolition of slavery came women's right to refuse to have a child as they were no longer in involuntary servitude.

In *Forced Labor Revisited*,⁶ Koppelman provides a thorough and sustained analysis of abortion as a protected right under the 13th Amendment. He also notes that in previous attempts to apply the Amendment to support a woman's right to choose, the argument has been dismissed without due consideration.¹¹ It is either buried in legal articles and briefs or paraded as the frivolous outrage of liberals. Koppelman notes the point that we reinforce; that the prohibition of abortion is a violation of the 13th Amendment. He argues that *forced* pregnancy violates the provision of personal liberty and, given the potential application to all women, forces women into the unequal position which entrenches the duty of service to others and not themselves.⁶ While the foetus may have a right to life, that right should not guarantee the use of another's body – any more than a relative who is a compatible match for life-saving organ donation is compelled to be a donor for the terminally ill recipient.

Koppelman further argues that in the absence of the state's ability to prove the person-hood of a foetus, the mere *possibility* of person-hood alone is insufficient to justify the violation of the woman's right. This is a point that is further reinforced under international law. The Universal Declaration of Human Rights ("all human beings are *born** free and equal in dignity and rights") and the ICCPR explicitly premise human rights from birth, and not from conception. Indeed, the human rights committee of the ICCPR highlighted that lack of abortion services violated women's right to life. Similar arguments are made by Copelon et al and conclude that from an international human rights perspective, lack of access to safe abortion denies women simple control over their own lives as human beings and imposes an extreme form of discrimination and forced labour.¹²

*Author added emphasis.

Discussion

Childbearing is not only a biological function; it also embeds a range of socially constructed gendered values and obligations that go well beyond pregnancy. The (so-called) pro-life argument reduces a woman's role in pregnancy to be a mere vessel in servitude to the unborn child. The reduction of this complex, life-changing experience to a sound bite disrespects the gravity of motherhood and stonewalls the presentation of reasoned arguments and alternative perspectives. In criminalising abortion, state legislatures, almost always dominated by men, force some women into involuntary servitude for, at the very least, the nine-month duration of the pregnancy – a period that may be repeated.

The narrative presented by the "pro-life, pro-choice" debate is not only detrimental to providing solutions; it also inaccurately portrays the women who have abortions. The arguments focus almost exclusively on poor judgement and lack of responsibility in sexual relationships. It fails to recognise the importance of gender power relations and other social determinants. In a recent US study of women seeking abortions, 75% of women were from a low-income background; 49% lived below the federal poverty line.¹³ For most, choice was constrained by reality. With the resources available, they could not effectively look after both themselves and a child. It is also important to note that 59% of women seeking an abortion in 2014 had at least one previous birth. These were not women who did not understand the weight of their decision; these were mothers who were able to make a realistic assessment of the implications of motherhood for themselves and their offspring.

It is noteworthy that there are potentially uncomfortable consequences associated with the involuntary servitude argument. For one thing, the argument protects sex-selective terminations. Yet, unequivocally, involuntary servitude is illegal. A woman should not be required to have pure motives for seeking a termination (just as she does not need pure motives to leave an employer), she needs to want to withdraw her services. She can choose to withdraw those services on any basis – the weather, her appearance, or a foetal characteristic such as the presence or absence of the Y-chromosome. How society could address the determinants that result in the need for sex selection would need to be dealt with as a separate issue.

Extending beyond abortion, women’s control over their reproduction is further curtailed through policies that restrict or prevent access to contraception; through poor availability, affordability and the range of contraceptive options. While it is not made explicit, the remaining option to avoid pregnancy is therefore abstinence – an option that is manifestly unsuccessful in adolescents,¹⁴ and all but impossible for adults in intimate relationships.

The protection from involuntary servitude offered in international human rights law has not been used robustly to claim rights. Miller et al outline the often-untapped potential of human rights law as a tool to demand states’ action to ensure

sexual and reproductive health.¹⁵ “Nine months a slave” or involuntary servitude may not present an original argument, or indeed an original view. However, as a legal argument, it could provide the Human Rights Committee with a significant, underutilised tool in the Universal Periodic Review of member states in their performance of protecting the rights of women from the involuntary servitude posed by an unwanted pregnancy.

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Résumé

Des données récemment réunies au niveau mondial suggèrent qu’un quart des grossesses se terminent par un avortement. Néanmoins, les avortements restent illégaux dans beaucoup de pays, ce qui

Resumen

La evidencia reciente compilada a nivel mundial indica que una cuarta parte de los embarazos son abortados. Sin embargo, el aborto continúa siendo ilegal en muchos países, lo cual propicia

aboutit à des pratiques à risque. Les débats se sont en général enlisés avec les qualificatifs de pro-vie et pro-choix. Pour fournir de nouveaux arguments à l'appui de la légalisation des services d'avortement, nous avançons que l'État ne peut exiger d'une femme qu'elle poursuive une grossesse non désirée parce que cette exigence la place dans un état de servitude involontaire. La servitude involontaire reviendrait pour les États à violer le droit international en matière de droits de l'homme (article 8 du Pacte international relatif aux droits civils et politiques). De plus, nous estimons que le risque de perdre une vie quand une femme cesse de fournir ses services n'est pas un motif suffisant pour imposer la servitude. Nous nous inspirons du 13^e amendement de la Constitution des États-Unis comme exemple pour élargir l'argument et soulignons la nécessité de mettre à l'essai le concept de servitude involontaire dans le droit international en matière de droits de l'homme, au moyen des mécanismes offerts dans l'examen périodique universel des États membres. Cela pourrait constituer une approche solide pour soutenir et renforcer l'accès à des services d'avortement sans risque.

prácticas inseguras. Los debates con los epítetos pro-vida, pro-elección se han estancado en su mayoría. Para ofrecer más argumentos a favor de la legalización de los servicios de aborto, argumentamos que el Estado no puede exigir que una mujer continúe con un embarazo no deseado, porque esa exigencia la coloca en un estado de servidumbre involuntaria. La servidumbre involuntaria representa una violación por parte de los Estados del derecho internacional de los derechos humanos (Artículo 8 de ICCPR). Además, argumentamos que el hecho de que podría perderse una vida cuando la mujer termina su servicio no es fundamento para hacer cumplir la servidumbre. Señalamos la 13^a enmienda de la Constitución de Estados Unidos como un ejemplo para ampliar el argumento y destacar la necesidad de probar la servidumbre involuntaria bajo el derecho internacional de los derechos humanos por medio de mecanismos ofrecidos en la revisión periódica internacional de los Estados Miembros. Esto podría ser una estrategia sólida para apoyar y fortalecer el acceso a los servicios de aborto seguro.