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Contesting Citizenship

An intersectional feminist approach to abortion in international human rights law, with a focus on El Salvador and Ireland

Rebecca Smyth

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Declaration

I declare that this thesis was composed by myself, that the work contained herein is my own except where explicitly stated otherwise in the text, and that this work has not been submitted for any other degree or professional qualification.

Rebecca Smyth, 6 February 2021

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Abstract

In October 2012, the death of Savita Halappanavar reignited the abortion debate in the Republic of Ireland. In March 2013, 'el caso Beatriz' drew international attention to the complete criminalisation of abortion in El Salvador. Making sense of the parallels between these two tragedies was the starting point for this thesis: how did the social, political, and legal context resulting in these harms come to be, and how could it be transformed? To explore these questions, this thesis undertakes an intersectional feminist analysis of citizenship and international human rights law (IHRL) in relation to sexual and reproductive health and rights (SRHRs), specifically abortion. Focusing on El Salvador and Ireland, and undertaking a critical reading of abortion jurisprudence by the UN, European, and inter-American human rights systems, this thesis argues that feminist campaigns for the decriminalisation of abortion at the national level and the advancement of SRHRs within IHRL at the regional and international levels are best understood as interconnected, and as part of a broader, longstanding, and ongoing struggle for feminists to realise women's full citizenship and human rights. This struggle takes place through feminist engagement with the language and mechanisms of IHRL at the interconnected national, regional, international, and transnational levels of the human rights system, and as such it represents a multilevel feminist citizenship project: the contestation of women's exclusion from and oppression by traditional understandings of citizenship that deny them the right to have rights and determine the scope of those rights.

Key words: abortion, SRHRs, citizenship, El Salvador, Ireland, feminist approaches to international human rights law

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Lay summary

In October 2012, the death of Savita Halappanavar reignited the abortion debate in the Republic of Ireland. In March 2013, 'el caso Beatriz' drew international attention to the complete criminalisation of abortion in El Salvador. Making sense of the parallels between these two tragedies was the starting point for this thesis: why was such restrictive abortion legislation in place in these two countries despite its clearly negative impact on women's human rights, and how and why were feminists making use of international human rights law (IHRL) in order to change the situation?

To explore these questions, this thesis undertakes an intersectional feminist analysis of IHRL and citizenship in relation to sexual and reproductive health and rights (SRHRs), specifically abortion. It argues that restrictive abortion legislation originates in and represents women's exclusion from full citizenship on the basis of their reproduction and sexuality. It also argues that feminists have long campaigned for women's full citizenship (defined as the right to have rights and to determine the scope of those rights): while campaigns for women's right to vote might be the most famous example of feminist campaigns for women's full citizenship, this thesis argues that campaigns for abortion access and SRHRs are another example of this longstanding, ongoing process. This thesis demonstrates that this process of fighting for women's full citizenship takes place not only at the national level, but also at the regional, international, and transnational levels of the human rights system and feminist movement. All these different levels are connected by feminist activism around how best to interpret IHRL so that it represents and responds to women's lived needs and realities, and so that it takes into account not just gender inequality but also racism, socioeconomic inequality, and other structural barriers to the full enjoyment of human rights. This multilevel feminist activism has been integral to IHRL recognising the importance and legitimacy of SRHRs, including abortion access, for the full realisation of women's human rights.

While this multilevel feminist activism (described in this thesis as a multilevel feminist citizenship project) has had multiple successes – the growing legitimacy of SRHRs in IHRL and the reform of Ireland's abortion legislation in 2018 among them – it continues to face considerable challenges. As the situation in El Salvador demonstrates, there is considerable resistance to calls for the decriminalisation of abortion, largely because of the challenges to the patriarchal social order that such a change would pose. Furthermore, the very nature of

IHRL is rooted in the same intellectual tradition responsible for exclusionary, oppressive understandings of citizenship that deny women their rights. Therefore, feminists must make use of IHRL as it currently stands in order to advance women's human rights, but they must also attempt to reshape IHRL so that it is informed by women's experiences and addresses their concerns. In light of this approach to IHRL, this thesis undertakes a critical analysis of abortion legislation and its impact in El Salvador and Ireland, as well as a critical analysis of abortion jurisprudence by the UN, inter-American, and European human rights systems, in order to set out an approach to citizenship, IHRL, and SRHRs that would advance the intersectional feminist aim of ending the subordination of all historically oppressed groups and realising their liberation.

Glossary and List of Abbreviations

Glossary

acompañarse	to enter into a romantic relationship
campesino/a	usually translated as 'a poor Latin American farmer or farm labourer.' It emerged as a political identity and movement in the mid-19th century. The Salvadoran campesino movement of the 19th and 20th century consisted of indigenous, ladino, and mestizo labourers who campaigned for decent pay and conditions, land rights, and indigenous rights to collective land ownership.
compañero/a	partner
criollo/a	Latin Americans who are of solely or of mostly Spanish descent; they generally occupied positions of power and privilege in the racialised class hierarchy of colonial and postcolonial Latin American states.
ladino/a	Spanish-speakers who were not originally from the Iberian peninsula (peninsulares), criollos, or indigenous peoples. They occupied a range of positions of power and privilege within the racialised class hierarchy of colonial and postcolonial Central American states
mestizo/a	Mixed race, especially mixed Spanish and indigenous heritage. They were and are generally, but not necessarily, poor or working-class according to the racialised class hierarchy of colonial and postcolonial El Salvador

List of Abbreviations

ACHR	American Convention on Human Rights
ARC	Abortion Rights Campaign
ARENA	Alianza Republicana Nacionalista (Nationalist Republican Alliance)
BIPOC	Black, Indigenous, Person of Colour
CAT	Committee Against Torture
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CEJIL	Centro por la Justicia y el Derecho Internacional (Centre for Justice and International Law)
CEMUJER	Instituto de Estudios de la Mujer "Norma Virginia Guirola de Herrera (Norma Virginia Guirola de Herrera Institute for Women's Studies)
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee for Economic, Social and Cultural Rights
CEVI	MESECVI's Committee of Experts
CIM	Comisión Interamericana de mujeres (the Inter-American Commission of Women)
CoE	The Council of Europe
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CRR	Center for Reproductive Rights
CSW	Council for the Status of Women
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECOSOC	Economic and Social Council
ECSR	European Committee of Social Rights
ESC	European Social Charter
FMLN	Frente Farabundo Martí para la Liberación Nacional (Farabundo Martí National Liberation Front)
HRC	Human Rights Committee
HRDs	Human Rights Defenders

IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IAHRS	Inter-American Human Rights System
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICPD	International Conference on Population and Development
IFPA	Irish Family Planning Association
IHRL	International Human Rights Law
IPPF	International Planned Parenthood Federation
ISDEMU	Instituto Salvadoreño para el Desarrollo de la Mujer (Salvadoran Institute for Women's Development)
IU	Irishwomen United
IWLN	Irish Women's Liberation Movement
LGBTQ*	Lesbian, Gay, Bisexual, Trans, Queer/Questioning. The '*' represents an open-ended, inclusive understanding of sexual orientations and gender identities including but not limited to non-binary, asexual, genderqueer, two-spirit, etc.
MERJ	Migrants and Ethnic-minorities for Reproductive Justice
MESECVI	Follow-Up Mechanism to the Belém do Pará Convention
NWC	National Women's Council, formerly the National Women's Council of Ireland (NWCI)
OAS	Organization of American States
OHCHR	Office of the High Commissioner for Human Rights
ORMUSA	Organización de Mujeres Salvadoreñas por la Paz (Organisation of Salvadoran Women for Peace)
PACE	Parliamentary Assembly of the Council of Europe
PAHO	Pan American Health Organization
PFA	Programme of Action/Platform for Action
PLAC	Pro-Life Amendment Campaign
PLDPA	Protection of Life During Pregnancy Act
ROSA	For Reproductive Rights, against Oppression, Sexism and Austerity
SPUC	Society for the Protection of Unborn Children

SRHRs	Sexual and Reproductive Health and Rights
TFMR Ireland	Termination for Medical Reasons Ireland
TWAIL	Third World Approaches to International Law
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UN CSW	UN Commission on the Status of Women
UNFPA	United Nations Population Fund
UNGA	United Nations General Assembly
UNHRC	UN Human Rights Council
VDPA	Vienna Declaration and Programme of Action
WHO	World Health Organization

Table of Contents

Chapter 1

Introduction

In October 2012, the death of Savita Halappanavar reignited the abortion debate in the Republic of Ireland. In March 2013, *el caso Beatriz* drew international attention to the complete criminalisation of abortion in El Salvador. Making sense of the parallels between these two tragedies was the starting point for this thesis: how did the social, political, and legal context resulting in these harms come to be, and how could they be transformed? In addressing this question, it became apparent that women's[1] reproduction and sexuality, the concept and practice of citizenship, and the concept and practice of human rights are three interlinked sites of contestation.

These dynamics can be laid bare through a feminist analysis of the human rights implications of the criminalisation of abortion. Every year, approximately 22 million women worldwide use tree roots, overdoses, and a range of other desperate measures to end their unwanted pregnancies.[2] Forty-two percent of women of reproductive age live in one of the 125 countries where abortion is prohibited entirely or permitted only to save a woman's life or health.[3] This is despite the fact that the average rate of unsafe abortion is estimated to be over four times higher in countries with more restrictive abortion laws than in those with less restrictive legislation.[4] Between 13,865 to 38,940 women die from complications related to

[1] As has been highlighted by feminist and queer theorists such as Butler (1990) and Fineman, Jackson, and Romero (2009), the very term 'woman' is problematic because references to 'women's experiences/bodies/rights' can inadvertently perpetuate the gender binary. At the same time, it is necessary to recognise that 'women' have suffered and continue to suffer discrimination due to being ascribed or identifying with this gender identity. Therefore, 'women' in this thesis refers to anyone who identifies as a woman, and its usage is informed by an understanding of it as a category and experience that is deeply personal, as well as historically and culturally variable (see for example Bordo, 2003; Connell, 1987; Jordanova, 1989; Laqueur, 1990). 'Female bodies' and 'the female reproductive system' refer to biologically female bodies which neither define, nor necessarily correspond to, a person's gender identity. These terms serve as shorthand, and are not intended to exclude gender diverse people or trans* men.

[2] S Singh et al, *Abortion Worldwide 2017: Uneven Progress and Unequal Access* (New York, Guttmacher Institute 2018) 22

[3] ibid, 4

[4] WHO 'Increasing transparency of abortion laws and policies: launch of a new online database' (WHO, 23 June 2017) <http://www.who.int/reproductivehealth/topics/unsafe_abortion/global-abortion-policies/en/> accessed 10 August 2020; WHO, 'Women and girls continue to be at risk of unsafe abortion' (WHO, 28 September 2017) <http://www.who.int/reproductivehealth/topics/unsafe_abortion/abortion-safety-estimates/en> accessed 10 August 2020

unsafe abortion every year.[5] The impact of restrictive abortion legislation is felt most acutely by and takes particular forms for women who experience other, intersecting forms of discrimination such as racism, poverty, disability, and geographical location.[6]

While restrictive abortion legislation is often framed as being motivated by concern for "unborn life" or maternal health, this thesis argues that the real rationale behind restrictions on access to abortion is the regulation and control of women's reproduction, sexuality, and bodies to ensure the stability and continuity of a patriarchal social order.[7] In this patriarchal social order, the discourse of citizenship has historically operated to deny women's status as citizens by conceptualising women as non-citizens whose role is to bear future citizens and the nation's values.[8] Women demanding access to abortion represent a direct challenge to this patriarchal citizenship discourse for two reasons. Firstly, it represents a rejection of their assigned role as bearers of future citizens: if women can access abortion and thus decide whether or not to carry a pregnancy to term, then women, rather than men and the state, get to decide whether or not a future citizen will be born. Secondly, demanding access to abortion represents women articulating a rights claim, something which only citizens, who can only be male, are allowed to do. Therefore, women's struggle for reproductive autonomy, including abortion access, represents their struggle to assert their status as citizens, as 'moral agents who claim all political and social rights…and generally equal rights to their well-being and freedom.'[9] This thesis will demonstrate that the struggle for the recognition of women's need

[5] Estimate based on WHO, 'Maternal mortality' (WHO, 19 September 2019) <https://www.who.int/news-room/fact-sheets/detail/maternal-mortality> accessed 18 January 2021 and WHO, 'Preventing Unsafe Abortion' (WHO, 25 September 2020) <https://www.who.int/news-room/fact-sheets/detail/preventing-unsafe-abortion> accessed 18 January 2021

[6] K Ackerman et al, '"Every *Body* Has Its Own Feminism": Introducing Transcending Borders' in S Stettner et al (eds), *Transcending Borders: Abortion in the Past and Present* (Cham, Springer 2017) 2; G Sen, *Power and Decision: The Social Control of Reproduction* (Boston, MA, Harvard School of Public Health 1994) 1-2, 6

[7] K Ackerman et al, ' "Every *Body* Has Its Own Feminism"' 2; K Browne, S Calkin, 'Introduction' in K Browne, S Calkin (eds), *After Repeal: Rethinking Abortion Politics* (London, Zed Books 2020) 4; RJ Cook et al, *Reproductive Health and Human Rights: Integrating Medicine, Ethics and Law* (OUP 2011) 11, 26; RJ Cook, BM Dickens, 'Human Rights Dynamics of Abortion Law Reform' (2003) 25 HRQ 1; R Sifris, *Reproductive Freedom, Torture and International Human Rights: Challenging the Masculinisation of Torture* (London, Routledge 2014) 123-6; BS Turner, *Medical Power and Social Knowledge* (2nd edn, London, Sage 1995) 21, 87, 96

[8] M Enright, ''Involuntary Patriotism': Judgment, Women and National Identity on the Island of Ireland' in M Enright et al (eds), *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (London, Bloomsbury 2017) 38; R Lister, *Citizenship*: *Feminist Perspectives* (2nd edn, Basingstoke, Palgrave Macmillan 2003) 1, 71-2; A Phillips, *Engendering Democracy* (London, Polity Press 1991) 3; N Yuval-Davis, 'The 'Multi-Layered Citizen'' (1999) 1 International Feminist Journal of Politics, 120-1; N Yuval-Davis, P Werbner, 'Women and the New Discourse of Citizenship' in N Yuval-Davis, P Werbner (eds), *Women, Citizenship and Difference* (London, Zed Books 1999) 5

[9] H Haker, 'Reproductive Rights in the Twenty-First Century' in H Widdows, IA Idiakez, AE Cirión (eds), *Women's Reproductive Rights* (Basingstoke, Palgrave MacMillan 2006) 184

for straightforward, safe, and legal access to abortion as a human rights issue is best conceptualised as a struggle around the meaning of citizenship, understood as the right to have rights and to determine the scope of those rights.

One of the ways in which feminists contest women's longstanding exclusion from and oppression by the current understanding of citizenship is through using the language and mechanisms of human rights. This is because feminists have recognised that the language and mechanisms of human rights offer one of the most effective means currently available for challenging oppression and achieving social justice.[10] This makes international human rights law (IHRL) a prime site in which to observe women's contestation of their historical exclusion from citizenship on the basis of their reproduction and sexuality. Largely because of the efforts of transnational feminist activists, particularly from the Global South/Third World,[11] the international and regional human rights systems are increasingly willing to recognise that the criminalisation of abortion results in human rights violations. However, there is still resistance to this at the domestic, regional, and international level: this is partly because of conservative forces which wish to maintain the status quo, but it is also due to limits inherent in the system given its Western liberal conceptual foundations. This thesis argues that the Western liberal legal tradition is inherently misogynistic, and perpetuates narrow understandings of concepts such as citizenship, the public-private divide, and autonomy which ignore, misrepresent or actively work against women's lived experiences, needs and interests.[12] These problematic conceptual foundations mean that legal reform

[10] H Charlesworth, C Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000) 210-2; S Corrêa, R Petchesky, R Parker, *Sexuality, Health and Human Rights* (London, Routledge 2008) 152

[11] This thesis uses CT Mohanty's definition of 'Third World/Global South' and 'Third World peoples/Global South peoples': the Third World/Global South is defined as the nation-states of Latin America, the Caribbean, Sub-Saharan Africa, the Middle East, Africa, South and Southeast Asia, China, South Africa, and Oceania. 'Third World peoples/Global South peoples/BIPOC (Black, Indigenous, People of Colour)' refers to Black, Latinx, Arab, Asian, and indigenous peoples in the US, Europe, and Australia. Rather than being a reductive, essentialist categorisation, the concepts of the Global South/Third World/Third World peoples are understood here as a 'sociopolitical designation' which emphasises the 'common context of struggle' that these countries and peoples experience as a result of racism, imperialism and colonisation (Mohanty in Mohanty, Russo, Torres (eds), 1991: 7, 10). This thesis will use the terms interchangeably as heuristics that emphasise contemporary unequal 'geopolitical relations of power' (Dados, Connell, 2012:12) arising from 'the cumulative and continuing effects of colonization, imperialism, and Western domination' (Litonjua, 2010: 1). Using these terms also highlights the forms of resistance – including critical engagement with the language and mechanisms of human rights – that these states and peoples undertake to challenge the current social, political, and economic order. The rationale behind using these terms in this manner will be discussed in greater detail in the methodology section of this chapter.

[12] E Barkely Brown, 'To Catch the Vision of Freedom: Reconstructing Southern Black Women's Political History, 1865-1880' in AD Gordon (ed), *African American Women and the Vote 1837-1965* (Amherst, University of Massachusetts Press 1997) 86; S Corrêa et al, *Sexuality, Health and Human Rights*, 151, 161; MA

guaranteeing access to reproductive healthcare must be complemented by a critique and reformulation of the concepts from which the law derives meaning and legitimacy. In recognising the gendered and ideological nature of law as a discourse, it can be understood as a site of contestation where alternative understandings of rights and legal subjects can emerge. This is necessary because of the symbolic force of these concepts and the entire international, regional and domestic legal architecture surrounding them that can be harnessed to progressive effect. As such, the research questions to which this thesis responds are:

> **In what ways have intersectional feminists harnessed the language and mechanisms of international human rights law to advance women's citizenship in the form of sexual and reproductive health and rights?**
>
> **In what ways can they further advance the multilevel feminist citizenship project of SRHRs, as represented by the decriminalisation of abortion, through their engagement with all levels of the human rights system?**

This research project is about 'transnational multicultural feminism'[13] and the ways in which this diverse movement uses the language and mechanisms of human rights to achieve social justice in general and reproductive freedom in particular. In framing my thesis in this manner, I am making a deliberate effort to challenge hierarchies such as race, class, and gender that inform IHRL as a practice and as an academic field. To ensure that this is clear throughout to the reader, the next two sections will discuss the methodology and terminology used throughout the thesis.

Fineman, 'Feminist Legal Theory' (2005) 19; J Flax, 'Beyond Equality: Gender, Justice and Difference' in G Bock, S James (eds), *Beyond Equality and Difference: Citizenship, Feminist Politics and Female Subjectivity* (London, Routledge 1992) 189; BE Hernández-Truyol, 'Human Rights Through A Gendered Lens: Emergence, Evolution, Revolution' in KD Askin, DM Koenig (eds), *Women and International Human Rights Law Volume 1: Introduction to Women's Human Rights Issues* (New York, Transnational Publishers 1999) 31

[13] CT Mohanty, *Feminism without Borders: Decolonizing Theory, Practicing Solidarity* (Durham NC, Duke University Press 2003) 125

1.1. Methodology

This thesis employs a discursive intersectional feminist approach to IHRL. In order to understand this methodology, intersectional feminist methodology and critical approaches to IHRL will be considered in turn.

1.1.1. Intersectional feminist methodology

A minimalist definition of feminist methodology is an approach to research that is undertaken by feminists with a view to improving the status of women.[14] Intersectional feminist research emphasises the importance of recognising and challenging not just gender-based inequality, but also 'the interlocking effects of race, class, gender, and sexuality' as identity categories and structural inequalities.[15] An intersectional feminist approach to research disrupts a number of traditional approaches to scholarship in order to bring about social change. Three of these challenges are central to this research project: (1) challenging the assumption that research and existing power structures are neutral; (2) disrupting traditional boundaries between disciplines; and (3) complicating traditional accounts of phenomena by (a) charting their historical evolution and (b) centring them around the lived experience of marginalised groups.

Feminist methodology challenges the idea that research can be objective and impartial: firstly, feminist methodology makes visible and critiques the ways in which supposedly neutral, objective, and authoritative 'truths' such as the law are in fact value-laden – informed by and serving to perpetuate racism, sexism, class-based oppression, homophobia, transphobia, and other forms of oppression.[16] Secondly, feminist methodology aims to

[14] M Eichler 'Feminist Methodology' (1997) 45 Current Sociology, 9
[15] MT Berger, K Guidroz (eds), *The Intersectional Approach: Transforming the Academy through Race, Class and Gender* (Chapel Hill NC, University of North Carolina Press 2009); DW Carbado, KW Crenshaw, VM Mays, B Tomlinson, 'Intersectionality: Mapping the Movements of a Theory' (2013) 10 Du Bois Review 303; K Crenshaw 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 Stanford Law Review 1241; P Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (London, Routledge 1990); b hooks, *Feminist Theory: From Margin To Center* (Boston, South End Press 1984); CT Mohanty, 'Cartographies of Struggle: Third World Women and the Politics of Feminism' in CT Mohanty, A Russo, L Torres (eds), *Third World Women and the Politics of Feminism* (Bloomington and Indianapolis, Indiana University Press 1991) 1; KY Taylor, *How We Get Free: Black Feminism and the Combahee River Collective* (Chicago, Haymarket Books 2017); B Thornton Dill, MH Kohlman, 'Intersectionality: A Transformative Paradigm in Feminist Theory and Social Justice' in SN Hesse-Biber (ed), *Handbook of Feminist Research: Theory and Praxis* (2nd edn, London, Sage 2012) 154, 157
[16] M Hawkesworth 'Truth and Truths in Feminist Knowledge Production' in SN Hesse-Biber (ed), *Handbook of Feminist Research*, 94

dismantle these systems of oppression.[17] This thesis challenges the idea that the law is neutral by highlighting the inherently patriarchal nature of the law as evidenced by the criminalisation of abortion, and by making visible and critiquing the ongoing inability of liberal understandings of the law and human rights to address women's subordination through the criminalisation of abortion. It further challenges the idea that research should be neutral by advocating for a feminist approach to IHRL that will end women's oppression. To do so, the analysis makes use of a range of concepts and methods drawn from across disciplines.

Intersectional feminist methodologies are often inter-, multi- and/or transdisciplinary.[18] This is because these methodologies challenge the boundaries between disciplines, boundaries which are the product of androcentric knowledge production that 'universalise the experiences of a fraction of the human population' (i.e. cisgender,[19] heterosexual, middle-class, non-disabled white men).[20] They also enable feminist researchers to make use of a range of tools to identify and challenge 'sexist, racist, homophobic, and colonialist points of view.'[21] This thesis undertakes intersectional feminist research by drawing upon literature and methodology from feminist theory, critical legal studies, citizenship studies, and postcolonial theory. In synthesising their analyses of power, justice, and rights, this thesis draws attention to and interrogates the ways in which we define certain concepts that underpin the foundations of IHRL. Following on from this, it argues for a transformative approach to these concepts and to IHRL that will acknowledge the historical, systemic oppression of women, and that will ensure that IHRL represents and responds to the diversity of women's lived needs and realities. This relates to the third and final element of intersectional feminist methodologies of relevance here: charting the historical evolution of phenomena, and centring the lived experience of marginalised groups.

By charting the historical evolution of certain concepts and phenomena, and by centring the lived experience of marginalised groups, intersectional feminist methodologies uncover 'subjugated knowledge' that can be used to 'foment social change.'[22] By validating and

[17] M Eichler 'Feminist Methodology', 13
[18] S Reinharz, *Feminist Methods in Social Research* (OUP 1992) 240; B Thornton Dill, MH Kohlman, 'Intersectionality', 157
[19] A person whose gender identity corresponds to the gender they were assigned at birth.
[20] M Hawkesworth 'Truth and Truths in Feminist Knowledge Production', 93
[21] SN Hesse-Biber 'Introduction' in SN Hesse-Biber (ed), *Handbook of Feminist Research*, 5-6
[22] ibid, 1, 3

making visible the experiences of historically oppressed groups, a better understanding of structural inequalities can emerge, enabling a more effective response to the deep-seated causes and consequences of oppression.[23] This thesis charts the historical evolution of phenomena and centres the lived experiences of marginalised groups to advocate for social change in the following ways. Firstly, it undertakes a discursive analysis of citizenship to make visible women's longstanding exclusion from and oppression by it on the basis of their reproductive capacity and sexuality, as epitomised by the criminalisation of abortion. Secondly, it undertakes a discursive analysis of IHRL to make visible the limits of the current liberal legal framework in addressing the harms that arise from the criminalisation of abortion. Thirdly, by carrying out these interlinked discursive analyses, it makes visible the origins and evolution of the concept of SRHRs as an alternative intersectional feminist understanding of citizenship and rights that is grounded in the lived experiences of women in all their diversity. Naming and making visible this process of intersectional feminist struggle for a transformative vision of citizenship and rights at the domestic, regional, and international levels of the human rights system not only corrects traditional accounts of the evolution of citizenship and IHRL that fail to recognise women's exclusion from and oppression by these processes, but also provides feminists with a basis to reflect upon how best to approach the ongoing challenge of transforming political, economic, and social relations to realise women's full citizenship.

Summary

This thesis employs intersectional feminist approaches to research by challenging the assumption of neutrality, disrupting traditional disciplinary boundaries, and complicating traditional accounts of phenomena. It does so by drawing attention to the ideological nature of the law as a discourse, by taking the deliberately political stance of calling for social and political transformation to realise women's liberation, by drawing upon concepts and methods from a range of disciplines, and by contextualising contemporary feminist struggles around SRHRs-as-citizenship as part of a long process by women in all their diversity to end the oppression of what hooks terms white supremacist capitalist patriarchy.[24]

These intersectional feminist approaches to research are apparent in critical approaches to legal theory such as feminist legal theory, feminist approaches to IHRL, and Third World

[23] B Thornton Dill, MH Kohlman, 'Intersectionality', 157
[24] b hooks, *Feminist Theory*, 19, 22

Approaches to International Law (TWAIL). The next section will discuss these areas of scholarship and the ways in which this project makes use of them.

1.1.2. Critical approaches to legal theory: feminist legal theory, feminist approaches to IHRL, and TWAIL

Feminist legal theory understands the law as a discourse and power structure that upholds and perpetuates sexist, racist, and class-based assumptions about society and legal subjects.[25] Feminist legal theorists argue that since the law is a discourse, it is site of contestation over meaning and power, one where alternative understandings of the law can be articulated to achieve social justice.[26] Many feminist legal theorists have focused on the law's construction of women's bodies, reproduction, and sexuality as a key site for this contestation. Smart terms this the 'legal gaze' and argues that the legal gaze has constructed a female subject considered potentially disruptive to the social order if her sexuality and reproductive ability are left unregulated.[27] Therefore, the regulation of reproduction, sexuality, and women's bodies – for example through the criminalisation of abortion – is an important area to explore from an intersectional feminist legal theory standpoint. An intersectional feminist legal theory approach to the criminalisation of abortion argues that the underlying motives for such legislation are the control of women's reproduction and sexuality in the service of the continuity and stability of a white supremacist capitalist patriarchal social order. Therefore, it is necessary to challenge not just the legislation in question but also the social, cultural, political, and economic structures which led to its implementation and which perpetuate and exacerbate its impact.

Since the early 1990s, feminist legal theorists have analysed these issues as they manifest in IHRL.[28] They argue that law is androcentric since 'the structure of the international legal

[25] K Crenshaw 'Mapping the Margins'; MA Fineman, 'Feminist Legal Theory', 19; CA Forell, DM Matthews, *A Law of Her Own: The Reasonable Woman as a Measure of Man* (NYU Press 2000) xii, 3, 5; R Hunter, C McGlynn, E Rackley 'Feminist Judgments: An Introduction' in R Hunter, C McGlynn, E Rackley (eds), *Feminist Judgments: From Theory to Practice* (Oxford, Hart 2010) 6-7; C Smart, *Feminism and the Power of Law* (London, Routledge 1989)

[26] H Charlesworth, 'Feminist Methods in International Law' (1999) 93 AJIL 379; RJ Cook et al, *Reproductive Health and Human Rights*, 7; S Corrêa et al, *Sexuality, Health and Human Rights*, 153; DL Rhode, *Justice and Gender: Sex Discrimination and the Law* (Cambridge MA, Harvard University Press 1989) 320

[27] C Smart, *Feminism and the Power of Law*, 90-113; C Smart, *Regulating Womanhood: Historical Essays on Marriage, Motherhood and Sexuality* (London, Routledge 1992) 13, 7

[28] KD Askin, DM Koenig (eds), *Women and International Human Rights Law Vols 1, 2, 3*; G Binion, 'Human Rights: A Feminist Perspective' (1995) 17 HRQ 509; C Bunch, 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights' (1990) 12 HRQ 486; D Buss, A Manji (eds), *International Law: Modern Feminist Approaches* (Oxford, Hart 2005); H Charlesworth, C Chinkin, S Wright, 'Feminist Approaches to International

order reflects a male perspective and ensures its continued dominance'[29] through its perpetuation of the male as normative standard; the perpetuation of the public/private dichotomy and its expression in new forms; the prioritisation of civil and political rights over economic, social and cultural rights; the logic of competing rights and the ways in which it can operate to the detriment of women; and an inability or unwillingness to challenge the structural barriers to the realisation of women's human rights.[30] Many of these feminist critiques of IHRL focus on its problematic construction of women's bodies, reproduction, and sexuality, and its resultant failure to acknowledge the harms done to women through restrictive abortion legislation as human rights violations.[31] They argue for an alternative approach to IHRL and legal reasoning that is grounded in women's lived experiences and which names and responds to the historical, structural, and intersecting forms of oppression continuing to impede the full realisation of women's human rights and citizenship.

The fact that Third World women have experienced the brunt of this oppression, and the fact that Third World feminist contributions have been critical to articulating transformative approaches to IHRL such as SRHRs, means that it is crucial to engage with Third World Approaches to International Law (TWAIL). TWAIL is a critical approach to legal theory that highlights the ways in which the modern international legal system is informed by and

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Law' (1991) 85 AJIL 613; H Charlesworth, C Chinkin, 'The Gender of Jus Cogens' (1993) 15 HRQ 63; H Charlesworth, C Chinkin, *The Boundaries of International Law*; C Chinkin, 'Feminist Interventions into International Law' (1997) 19 Adelaide Law Review 13; RJ Cook, 'Women's International Human Rights Law: The Way Forward' (1993) 15 HRQ 230; CA MacKinnon, *Are Women Human? And Other International Dialogues* (London, Belknap Press 2006); D Otto, 'Holding Up Half The Sky, But For Whose Benefit?: A Critical Analysis Of The Fourth World Conference On Women' (1996) 6 Australian Feminist Law Journal 7; D Otto 'The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade' (2009) 10 Melbourne Journal of International Law 11; J Peters, A Wolper (eds), *Women's Rights, Human Rights: International Feminist Perspectives* (London, Routledge 1995)

[29] H Charlesworth, C Chinkin, S Wright 'Feminist Approaches to International Law', 621

[30] ibid, 625, 634, 635

[31] G Binion, 'Human Rights: A Feminist Perspective', 509; H Charlesworth et al, 'Feminist Approaches to International Law', 630; RJ Cook, S Howard, 'Accommodating Women's Differences under the Women's Anti-Discrimination Convention' (2007) 56 Emory Law Journal 1040; A Cornwall, A Welbourn (eds), *Realizing Rights: Transforming Approaches to Sexual & Reproductive Well-Being* (London, Zed Books 2002); S Corrêa, R Reichmann, *Population and Reproductive Rights: Feminist Perspectives from the South* (London, Zed Books 1994); MK Eriksson, 'Abortion and Reproductive Health: Making International Law more Responsive to Women's Needs' in KD Askin, DM Koenig (eds), *Women and International Human Rights Law. Volume 3: Toward Empowerment* (New York, Transnational Publishers 2001) 3; RP Petchesky, K Judd (eds), *Negotiating Reproductive Rights: Women's Perspectives Across Countries and Cultures* (London, Zed Books 2001); RP Petchesky, *Global Prescriptions: Gendering Health and Human Rights* (London, Zed Books 2003); R Rebouché, 'Abortion Rights as Human Rights' (2016) 25 Social and Legal Studies 765; G Sen et al (eds), *Population Policies Reconsidered: Health, Empowerment, and Rights* (Cambridge MA, Harvard University Press 1994); R Sifris, *Reproductive Freedom, Torture and International Human Rights: Challenging the Masculinisation of Torture* (London, Routledge 2014); H Widdows, IA Idiakez, AE Cirión (eds), *Women's Reproductive Rights*

perpetuates the same power dynamics and structures of imperialism and colonialism.[32] In keeping with an intersectional feminist methodology, it aims to transform the current political, social, and economic order through challenging liberalism's supposed neutrality, disrupting traditional disciplinary boundaries, and unearthing subjugated knowledges through charting the historical evolution of phenomena and centring the lived experiences of marginalised groups.[33]

While feminist and Third World approaches to international law acknowledge the importance of engaging with the law and human rights, they also highlight the risks inherent in doing so.[34] Given that the law and human rights are embedded in the Western liberal intellectual tradition, these discourses are liable to appropriation, misinterpretation and subversion, inhibiting or even undermining the advancement of historically oppressed groups' liberation.[35] Although 'human rights offer the most viable rhetorical structure currently available' for advancing claims for social justice, and although IHRL provides a normative and institutional system for articulating rights claims and claims for accountability and redress, 'human rights alone can never fulfil justice.'[36] Instead, human rights and IHRL must be understood as 'part of a process focused on challenging unequal power relations', a process which must include other forms of campaigning for social justice such as grassroots activism.[37] Smart terms this 'decentring': while making use of the language and mechanisms of law and human rights to advance social justice, feminists must not lose sight of the fact that these discourses are inherently limited in how much they can achieve, and so they must

[32] M Mutua, 'What is TWAIL?' (2000) 94 American Society of International Law Proceedings 31. See also BS Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 International Community Law Review 3

[33] OA Badaru, 'Examining the Utility of Third World Approaches to International Law for International Human Rights Law' (2008) 10 International Community Law Review, 380-385; GM Frisso, 'Third World Approaches to International Law: Feminists' Engagement with International Law and Decolonial Theory' in SH Rimmer, K Ogg (eds) *Research Handbook on Feminist Engagement with International Law* (Cheltenham, Elgar 2019) 479-498; M Mutua, 'What is TWAIL?' 31; P Parmar, 'TWAIL: An Epistemological Inquiry' (2008) 10 International Community Law Review 363.

[34] H Charlesworth, C Chinkin, *The Boundaries of International Law*, 201, 212; F Ní Aoláin, 'Gendered Harms and their Interface with International Criminal Law: Norms, Challenges, and Domestication' (2014) 16 International Feminist Journal of Politics 622; P Parmar, 'TWAIL: An Epistemological Inquiry' 369; L Ramina 'TWAIL - "Third World Approaches to International Law" and Human Rights: Some Considerations' (2018) 5 Journal of Constitutional Research, 263-267; C Smart, *Feminism and the Power of Law*, chapters 7, 8

[35] D Majury 'Strategizing in Equality' in MA Fineman, NS Thomadsen (eds), *At The Boundaries of the Law: Feminism and Legal Theory* (London, Routledge 1991) 331-2

[36] S Corrêa et al, *Sexuality, Health and Human Rights*, 152

[37] S Bradshaw, 'Is the Rights Focus the Right Focus? Nicaraguan Responses to the Rights Agenda' (2006) 27 Third World Quarterly, 1338. See also N Menon, *Recovering Subversion: Feminist Politics Beyond the Law* (Chicago IL, University of Illinois Press 2004) 5-6, 44-5

also make use of non-legal strategies and activism to transform the current white supremacist capitalist patriarchal social order.[38]

Methodology: Summary

This section articulated the overarching methodology for this thesis: a critical intersectional feminist approach to IHRL informed by feminist theory, feminist legal theory, feminist approaches to international law, and TWAIL. The guiding principles of this methodology are a commitment to political, economic and social transformation through (1) exposing the inherently ideological nature of supposedly neutral discourses and power structures such as the law, human rights, and citizenship (2) engaging in inter/multi/transdisciplinary research and so disrupting traditional academic boundaries, and (3) unearthing subjugated knowledges and elaborating theory through an emphasis on (a) critical historical contextualisation and (b) the lived experiences of historically oppressed groups. This approach is appropriate for this thesis because it is concerned with women's bodies, reproduction and sexuality as a site of exclusion from and oppression by the androcentric Western liberal intellectual tradition as exemplified by the discourses of law, human rights, and citizenship. Moreover, such an approach ensures a deliberate attentiveness to intersecting forms of oppression such as race, class, dis/ability, and sexuality that further exacerbate the regulation of women's bodies and sexualities in the name of these discourses. It emphasises the central role of Global South/Third World feminists in advancing transformative understandings of IHRL, rights and citizenship, something which is too often ignored by the Global North. Finally, this methodology accurately represents the origins and rationale of SRHRs in general and campaigns for the decriminalisation of abortion in particular. It understands them to be transformative counter-narratives of citizenship and human rights that contest exclusion and oppression, and that call for the language and mechanisms of IHRL to represent and respond to women's lived needs and realities.

In order to understand the methodology and theoretical framework underpinning this thesis, certain key terms must be identified and explained. The next part of this chapter will define some key terms and concepts and how they are understood for the purposes of this research project.

[38] C Smart, *Feminism and the Power of Law*, chapter 8

1.2. Defining Key Terms and Concepts

Introduction

This part of the chapter defines key concepts of relevance to this thesis. These include liberalism and its attendant concepts of citizenship, autonomy, equality, and justice. This part of the chapter also includes definitions of SRHRs as they are understood by intersectional feminists and as they are understood within IHRL.

This thesis offers an intersectional feminist critique of IHRL and, by extension, Western liberalism. It provides an alternative, transformative vision of some of the main concepts from this intellectual tradition that inform contemporary IHRL. In order to articulate this critique clearly, the first section defines Western liberalism, citizenship, autonomy, equality, and justice. It provides a brief overview of how these concepts are traditionally understood from a liberal perspective, before articulating the alternative, transformative understanding of them advocated for by this thesis. Concepts such as citizenship, equality and justice are best understood as 'momentum concepts': ideas that can be continually developed to realise their egalitarian and anti-hierarchical potential and so serve as tools for oppressed groups in their struggles for social justice.[39] While their emancipatory potential has been recognised by academics and social justice activists, they have also highlighted the long history of exclusion and the persistence of the exclusionary tendencies arising from these liberal concepts.[40] Despite this, these concepts have too much symbolic and real politico-legal power to be abandoned.[41] Therefore, feminist engagement with these liberal concepts – and by extension with the international and regional human rights systems that are based upon them – must be understood as a necessary, contested process that is just one element of the wider intersectional feminist aim of liberation for all historically oppressed groups.[42]

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[39] T Basok, S Ilcan, J Noonan, 'Citizenship, Human Rights, and Social Justice' (2006) 10 Citizenship Studies 267; N Kabeer (ed), *Inclusive Citizenship: Meanings and Expressions* (London, Zed Books 2005); R Lister, 'Inclusive Citizenship: Realizing the Potential' (2007) 11 Citizenship Studies 49; C Mouffe (ed), *Dimensions of Radical Democracy: Pluralism, Citizenship, Community* (London, Verso 1992); K Zivi, *Making Rights Claims: A Practice of Democratic Citizenship* (OUP 2012), 7-9, 68

[40] E Jelin, 'Engendering Human Rights' in E Dore (ed), *Gender Politics in Latin America: Debates in Theory and Practice* (New York, Monthly Review Press 1997), 67; R Lister, *Citizenship*, 4-5; A Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Cambridge MA, Harvard University Press 2009), 7

[41] H Charlesworth, C Chinkin, *The Boundaries of International Law,* 212; N Kabeer 'The Search for Inclusive Citizenship: Meanings and Expressions in an Interconnected World' in N Kabeer (ed), *Inclusive Citizenship*, 3, 9

[42] R Voet cited in R Lister 'Sexual Citizenship' in EF Isin, BS Turner (eds), *Handbook of Citizenship Studies* (London, Sage 2002) 197

1.2.1. Critique of Western liberalism

Liberalism

Sa'ar defines liberalism as 'an umbrella term for political orders that promote the idea of civil society, where people are entitled to certain freedoms, rights, and protection from arbitrary power.'[43] Its five central characteristics are rationality, autonomy, individualism, equality before the law, and an abstentionist state that respects a divide between public and private.[44] While liberalism presents itself as neutral and inclusive, it is in fact informed by and responsible for perpetuating racism, sexism, and other forms of oppression.[45] This is because liberalism takes the cisgender, heterosexual, white, middle-class, non-disabled male as normative standard, and constructs a political, economic, social, and legal order that is based on protecting and maintaining the power, privilege, and interests that correspond to this perspective.[46] Moreover, the liberal tradition relies heavily upon Aristotelian dichotomies such as public/private, reason/emotion, mind/body, man/woman, and independent/dependent in which the former is ascribed superior moral value over the latter.[47] As a result, the liberal legal order has constructed a legal subject and rights bearer – referred to here as the citizen – that fails to represent or respond to the lived needs and realities of the vast majority. The reductive concept of the ideal liberal citizen as rational, completely independent, cisgender, heterosexual, white, male, middle-class, and non-disabled does a disservice to the complexity of human experience, with a particularly detrimental impact on historically oppressed groups. Therefore, the liberal understanding of citizenship and rights does not speak to lived needs and realities, especially the lived needs and realities of historically oppressed groups.

In response, feminists have drawn attention to the ideological nature of the liberal tradition, including its long history of excluding women from citizenship and rights on the basis of their gender and sexuality. They have articulated alternative understandings of liberal concepts such as citizenship, individuality, autonomy, equality, and justice, recognising the need to harness the normative power of these concepts to advance an alternative vision of political, economic, social, and legal structures. This section will now articulate the

[43] A Sa'ar 'Postcolonial Feminism, The Politics of Identification, and the Liberal Bargain' (2005) 19 Gender and Society 683
[44] S Fredman, *Women and the Law* (OUP 1997) 7
[45] ibid 684-5; C Mohanty 'Cartographies of Struggle', 21
[46] Sa'ar 'Postcolonial Feminism', 684-5
[47] R Lister, *Citizenship*, 68-72

intersectional feminist understandings of citizenship, autonomy, equality, and justice that underpin this thesis's critique of IHRL.

Citizenship

Arendt conceptualised citizenship as the 'right to have rights'[48] which Balibar expanded upon to conceptualise citizenship as 'the active ability to assert rights in a public space, or better yet, dialectically, the possibility of not being excluded from the right to fight for one's rights.'[49] The dynamic and contested nature of citizenship has been a major focus of contemporary citizenship studies, with citizenship understood as a process that encompasses juridical, political, economic and cultural practices, and that determines access to opportunities and resources.[50] In this thesis, citizenship is understood not as the legal status of being a recognised national of a particular state, but as the entitlement of an individual to participate in the process of shaping the community to which they belong.[51] Being a citizen means that an individual has a voice that is considered legitimate in determining the scope and nature of rights, and in deciding who is entitled to them – it means having the right to have rights, and to define what those rights should entail. The ways in which feminists can engage with this process has been the subject of academic inquiry since the early 1990s.

The starting point for feminist critiques of citizenship was to highlight its long history of excluding and oppressing women.[52] They argued that the traditional ideals of the citizen and citizenship are rooted in Western liberalism; therefore, these liberal ideals of the citizen and citizenship takes the cisgender, heterosexual, white, middle-class, non-disabled male as normative standard, and they rely upon Aristotelian dichotomies. As a result, the traditional discourse of citizenship fails to represent or respond to the lived needs and realities of historically oppressed groups such as women, and often actively works against them. This is especially apparent in relation to women's bodies, reproduction, and sexuality. Feminist citizenship scholars argue that the traditional liberal idea of citizenship requires the control of

[48] H Arendt, *The Origins of Totalitarianism* (New York, Meridian Publishing 1958) 269
[49] É Balibar, *Citizenship* (T Scott-Railton tr, London, Polity Press 2015) 65
[50] J Clarke et al, *Disputing Citizenship* (Bristol, Policy Press 2014) 2, 29; EF Isin, GM Nielsen (eds), *Acts of Citizenship* (London, Zed Books 2008); A Shachar, *The Birthright Lottery*, 7; BS Turner, 'Contemporary Problems in the Theory of Citizenship' in BS Turner (ed), *Citizenship and Social Theory* (London, Sage, 1993) 2
[51] EF Isin, 'Theorizing Acts of Citizenship' in EF Isin, GM Nielsen (eds), *Acts of Citizenship*, 17
[52] E Jelin, 'Engendering Human Rights', 67; R Lister, *Citizenship*, 4-5; C Pateman, *The Sexual Contract* (Cambridge, Polity Press 1988); S Walby, 'Is Citizenship Gendered?' (1994) 28 Sociology 379

women's reproduction and sexuality to ensure the continuity and stability of a patriarchal social order. According to the traditional liberal understanding of citizenship, women are 'nation bearers' – non-citizens who belong in the private sphere – rather than 'rights bearers' – citizens who belong in the public sphere – whose role is to produce and educate future citizens, rather than to exercise citizenship.[53]

In regard to the domestic level of the nation-state, feminists have highlighted that the exclusionary, oppressive nature of citizenship is further exacerbated by the 'pivotal roles' that 'gendered bodies and sexuality' play in constructing the nation.[54] Nationalism and the formation of nation-states relies on particular constructs of masculinity and femininity which perpetuate the paradox that women are central to the biological reproduction of the nation but must be excluded from its social and political reproduction.[55] As will be demonstrated throughout this thesis, in the postcolonial contexts of Ireland and El Salvador, ideas about nationalism and national identity, gender, race/ethnicity, class, and religion intertwined with the gendered discourse of citizenship to result in the intense regulation of women's reproduction and sexuality, epitomised by the criminalisation of abortion.[56]

In response to the traditional liberal citizenship discourse's exclusionary, oppressive tendencies, feminists have articulated alternative understandings of citizenship. They argue that in spite of the harms that have been done to women and other oppressed groups in the name of citizenship and rights, these concepts have too much symbolic and real power to be abandoned.[57] Instead, citizenship and rights should be understood as dynamic and contested processes in which new rights can be demanded and new meanings given to those which already exist.[58] They believe that it is only by acknowledging that citizenship has a long

[53] M Enright, ''Involuntary Patriotism'', 38; AM Jaggar 'Arenas of Citizenship: Civil Society, the State, and the Global Order' in M Friedman (ed), *Women and Citizenship* (OUP 2005) 91-110; R Lister, *Citizenship*, 1, 71-2; C Pateman, *The Sexual Contract*; C Pateman, 'Equality, Difference, Subordination: The Politics of Motherhood and Women's Citizenship' in G Bock, S James (eds), *Beyond Equality and Difference*, 15; A Phillips, *Engendering Democracy*, 3; S Thompson et al, 'The Sexual Contract 30 Years On: A Conversation with Carole Pateman' (2018) 26 Feminist Legal Studies, 94-5; N Yuval-Davis, 'The 'Multi-Layered Citizen'', 120-1; N Yuval-Davis, P Werbner, 'Women and the New Discourse of Citizenship', 5

[54] N Yuval-Davis, *Gender and Nation* (London, Sage 1997) 1

[55] ibid, 1, 2, 26; T Mayer, 'Gender Ironies of Nationalism: Setting the Stage' in T Mayer (ed), *Gender Ironies of Nationalism: Sexing the Nation* (London, Routledge 2000) 1-22; C Pateman, *The Sexual Contract*, 12-3

[56] T Mayer, 'Gender Ironies of Nationalism', 7

[57] N Kabeer 'The Search for Inclusive Citizenship', 3, 9; H Charlesworth, C Chinkin, *The Boundaries of International Law,* 212

[58] R Lister, *Citizenship*, 6; R Lister et al, *Gendering Citizenship in Western Europe: New Challenges for Citizenship Research in a Cross-National Context* (OUP 2007), 72; M Molyneux, 'Justicia de género, ciudadanía y diferencia en América Latina' [2010] 28 Studia historica. Historia contemporánea 181; A Phillips,

history of exclusion and oppression, and that the full realisation of citizenship is a contested, unfinished process that women's full citizenship – their right to have rights, and to shape those rights to respond to their needs – can be realised. [59]

The need for control over one's own body, sexuality, and reproduction has been a central tenet of these feminist reformulations of citizenship. Both Lister and Yuval-Davis have emphasised the centrality of realising SRHRs to women's full citizenship.[60] They argue that SRHRs form 'the very basis of the possibility of effective participation of women in both civil society and the polity.'[61] However, realising SRHRs is arguably the most acutely contested aspect of women's struggle for full citizenship. This is because it poses a direct challenge to the stability and continuity of the patriarchal social order in two ways. Firstly, women demanding access to contraception and abortion represents women demanding the right to determine if and when to have children – this represents women articulating rights claims when only citizens (who can only be male) have the right to do so. Secondly, women demanding access to contraception and abortion represents women rejecting their assigned role in the citizenship project as non-citizens with the sole purposes of maintaining the nation's honour, and producing and educating future citizens.

Understanding of these dynamics – the exclusion and control of women on the basis of their reproduction and sexuality in the name of citizenship and nation, and feminist contestation of this exclusion and oppression – sheds new light on the intensely contested process of domestic, regional, international, and transnational campaigns for the decriminalisation of abortion and the advancement of SRHRs. The increasing importance of IHRL to this process has been recognised by feminists.

Feminist citizenship scholars have argued that citizenship should be conceptualised as a 'multi-layered construct' in which the practices and processes of citizenship take place on a

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Engendering Democracy, 3; B Siim, *Gender and Citizenship: Politics and Agency in France, Britain and Denmark* (CUP 2000); S Walby, 'Is Citizenship Gendered?'

[59] One of the most influential works on citizenship, TH Marshall's essay 'Citizenship and Social Class', conceptualises citizenship as divided into political, economic, and social citizenship. Responding to this division, the chronological ordering of these three forms of citizenship, and the assumption that it was universally applicable to all groups served as an important starting point for feminist engagement with the concept of citizenship. See TH Marshall, 'Citizenship and Social Class' in TH Marshall, *Citizenship and Social Class, And Other Essays* (CUP 1950) and S Walby, 'Is Citizenship Gendered?', 385-6

[60] N Yuval-Davis, *Gender and Nation*, 38; R Lister, *Citizenship*, 19

[61] D Held cited in R Lister, *Citizenship*, 19

range of levels: the national, transnational, and supra-national. According to this understanding of citizenship, the language and mechanisms of IHRL should 'be viewed as a specific layer of supra-national citizenship', one which is potentially more responsive to women's rights claims than the domestic level.[62] Supra-national citizenship practices take the form of political mobilisation around human rights discourse, and the use of human rights litigation in regional and international human rights fora by individuals and NGOs.[63] The language and mechanisms of IHRL are therefore being utilised as political tools 'for "outsiders" at the gates of citizenship.'[64] As such, attempts to advance SRHRs including access to abortion at the domestic, regional and international levels should be understood as interlinked layers of a multi-level feminist citizenship project: feminists are working within and across these interconnected levels to reformulate human rights in order to challenge women's historic exclusion from the right to have rights and determine the scope of those rights, and to reformulate rights so that they represent and respond to women's lived realities. In order to reformulate citizenship and rights in this manner, concepts such as autonomy, equality, and justice must also be redefined.

Autonomy

According to traditional liberal understandings of the legal subject, autonomy is afforded to individuals who demonstrate the sufficient level of rationality and ability to make decisions concerning their own life and that these decisions should be respected and protected from disproportionate, exterior interference.[65] In terms of citizenship, this entails the right to actively participate in the public sphere, and to not have one's activities in the private sphere interfered with, provided that they are not in contravention of the moral, social and political order.[66] In principle, this seems unproblematic and almost self-evident. However, as with many other cornerstones of liberalism, it is highly ideological and exclusionary: according to liberalism, only cisgender heterosexual white men have the sufficient degree of rationality required to exercise full citizenship in the public sphere; women, enslaved and colonised

[62] N Yuval-Davis, 'The 'Multi-Layered Citizen'' 122, 127, 128; H Charlesworth, C Chinkin, *The Boundaries of International Law*, 210
[63] ibid, 127
[64] R Lister, *Citizenship*, 43
[65] M Friedman, 'Autonomy, Social Disruption and Women' in C Mackenzie, N Stoljar (eds), *Relational Autonomy* (OUP 2000) 37, 40; J Herring, *Caring and the Law* (Oxford, Hart 2013) 2, 46
[66] R Bellamy, *Citizenship: A Very Short Introduction* (OUP 2008) 1-2; 591, R Bellamy 'Citizenship' in G Klosko (ed), *Oxford Handbook of the History of Political Philosophy* (OUP 2011) 593

peoples, and other groups marked as "other" by liberalism, are considered incapable of exercising the independence and rationality required for full citizenship.[67] This liberal understanding of autonomy is in turn based on a range of false dichotomies (rationality/emotionality, mind/body, man/woman, public/private) that do not accurately represent the complexity of human experience, and have been used to oppress liberalism's "others", be it through the denial of independence to colonised peoples, or refusing women control over their own bodies.[68] The traditional liberal understanding of the rational autonomous legal subject misrepresents the complexity of lived experience, creates and perpetuates false dichotomies which lead to reductive understandings of rights such as the right to privacy, and excludes and oppresses those who do not meet its narrow criteria. In response, alternative understandings of autonomy have been articulated by philosophers and political theorists.

These alternative understandings of autonomy attempt to reconcile or transcend the liberal dichotomies of independent/dependent, mind/body, public/private to better represent and respond to lived experience. The concepts of dignity, relational autonomy, and vulnerability are particularly relevant to these alternative understandings of autonomy.

According to McCrudden, dignity is a broad concept characterised by three core elements: every human being possesses intrinsic worth by virtue of being human, this intrinsic worth should be recognised and respected by others, and the state should ensure the necessary conditions for the realisation of human dignity.[69] In a similar vein, Dixon and Nussbaum argue that human dignity requires 'a reciprocal willingness, on the part of individuals, to treat others as subjects and not merely as objects'[70] and that this recognition of individuals' full subjectivity requires respect for autonomy, and the creation of conditions conducive to that autonomy, so that individuals 'can determine their own destiny in areas of central concern.'[71] They argue that restrictive abortion legislation 'may burden or violate the dignity of women' by denying them the ability to exercise decision-making autonomy, by harming their 'health, bodily integrity' and 'emotional well-being', and by impeding their ability to pursue the life

[67] R Lister, *Citizenship*, 5, 68; R Lister et al, *Gendering Citizenship in Western Europe*, 42-3; A Phillips 'Citizenship and Feminist Theory' in G Andrews (ed), *Citizenship* (London, Lawrence and Wishart, 1991) 77
[68] R Lister, *Citizenship*, 68-73
[69] C McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 EJIL, 679
[70] R Dixon, MC Nussbaum, 'Abortion, Dignity, and a Capabilities Approach' in B Baines et al (eds) *Feminist Constitutionalism: Global Perspectives* (CUP 2012) 65
[71] ibid, 65

course they had envisioned.[72] These approaches to dignity emphasise the importance of recognising individuals' as full legal subjects – in other words, as full rights-bearers or citizens – who have complex physical, emotional, and psychological needs that must be met to ensure their dignity is respected.[73] Dixon and Nussbaum also emphasise the importance of considering structural factors – such as race, class and gender – and their influence on facilitating or impeding human dignity. An awareness of the complexity of human experience, and the ways in which power structures can impede or facilitate human dignity and flourishing, is also evident in feminist approaches to relational autonomy and vulnerability.

Relational autonomy understands individuals as capable of free will and agency while simultaneously recognising that we are embedded in and formed by complex webs of both interpersonal relationships and wider societal structures such as race, class, and gender.[74] Similar themes are apparent in Fineman's work on vulnerability: she defines vulnerability as universal, constant, and inherent to the human condition; as central to the formation of our identities and relationships; and as varying among individuals on the basis of their different positions in intersecting power structures. [75] According to these approaches to dignity, relational autonomy, and vulnerability, different interpretations of the law and human rights have the potential to either facilitate or harm autonomy and dignity, and the potential to either lessen or exacerbate vulnerability.[76] By reconceptualising the liberal approach to autonomy, privacy, and integrity/security of the person in this manner, an intersectional feminist approach to IHRL allows for a fuller understanding of legal subjects. It does so by

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[72] ibid, 70

[73] ibid, 80-1; C McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' 679

[74] M Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law and Feminism, 1, 10, 16; M Friedman, 'Autonomy, Social Disruption and Women' in C Mackenzie, N Stoljar (eds), *Relational Autonomy*, 40; J Herring, *Caring and the Law*, 2; C Mackenzie, N Stoljar, 'Introduction: Autonomy Reconfigured' in C Mackenzie, N Stoljar (eds), *Relational Autonomy*, 21; J Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy and Law* (OUP 2012); CF Stychin, 'Body Talk: Rethinking Autonomy, Commodification and the Embodied Legal Self' in S Sheldon, M Thomson (eds), *Feminist Perspectives on Health Care Law* (London, Cavendish Publishing 1998) 211; J Tronto, 'An Ethic of Care' in AE Cudd, RO Andreasen (eds), *Feminist Theory: A Philosophical Anthology* (Oxford, Blackwell 2005) 255

[75] M Fineman 'The Vulnerable Subject', 1, 10, 16; A Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights' in MA Fineman, A Grear (eds), *Vulnerability : Reflections on a New Ethical Foundation for Law and Politics* (Abingdon, Routledge, 2013) 149. See also BS Turner, *The Body and Society: Explorations in Social Theory* (3rd edn, London, Sage 2008)

[76] M Fineman 'The Vulnerable Subject', 1, 10, 16; A Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights' in MA Fineman, A Grear (eds), *Vulnerability : Reflections on a New Ethical Foundation for Law and Politics* (Abingdon, Routledge, 2013) 149. See also BS Turner, *The Body and Society: Explorations in Social Theory* (3rd edn, London, Sage 2008)

recognising the validity and centrality of not just rationality but also emotions and embodiment to our subjectivity, and by drawing attention to and enabling an analysis of power structures which facilitate or impede autonomy and dignity. Such an approach to IHRL means that women's agency and deservingness of autonomy can be fully recognised, the profound personal impact and structural nature of gendered harms can be identified and addressed, and the understanding of relationships as innately antagonistic can be reformulated to better represent and respond to the complexity of pregnancy decisions.[77] The ways in which the international and regional human rights systems could adopt such an approach to address current shortcomings in their legal reasoning will be explored in Chapter 3 of this thesis in relation to the right to privacy and the right to freedom from torture and CIDT. The ways in which these bodies could approach the principles of non-discrimination and equality to better respond to women's lived realities will also be discussed, in light of the conceptualisation of equality set out below.

Equality

According to a liberal approach, equality is simply defined as treating individuals identically. This is known as formal equality.[78] As has been highlighted by feminists, liberalism's principle of equal treatment is problematic for two reasons. Firstly, it takes the male as normative standard and only recognises inequality in terms that reflect that identity and experience.[79] Secondly, it restricts its analysis to the idea of similarly-situated individuals, i.e. the idea that inequality only occurs if two individuals in the same situation are treated differently.[80] Rather than requiring a minimum standard of decent treatment, formal equality takes a narrow view of the nature of inequality and perpetuates the idea of the male as normative standard.[81]

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[77] D Cornell, *The Imaginary Domain: Abortion, Pornography and Sexual Harassment* (London, Routledge 1995) 31-91; J Herring, 'The Loneliness of Status: The Legal and Moral Significance of Birth' in F Ebtehaj et al (eds), *Birth Rites and Rights* (Oxford, Hart 2011) 98, 102, 109; E Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Oxford, Hart 2001), 3; K Savell, 'The Mother of the Legal Person' in S James, S Palmer (eds), *Visible Women: Essays on Feminist Legal Theory and Political Philosophy* (Oxford, Hart 2002) 31; CF Stychin, 'Body Talk', 225

[78] D Moeckli 'Equality and Non-Discrimination' in D Moeckli et al (eds), *International Human Rights Law* (OUP 2010) 191

[79] S Fredman, *Women and the Law*, 184-5

[80] ibid

[81] ibid

In response, feminists have proposed a substantive approach to equality. Substantive equality recognises that 'equality must go beyond consistent treatment of likes' and instead address structural causes of disadvantage and oppression.[82] While substantive equality is usually defined as being concerned with either equality of opportunity or equality of results, Fredman argues that it should be understood as a multi-faceted concept which has the four complementary and interconnected aims of redressing disadvantage; addressing stigma, stereotyping and violence; facilitating participation; and accommodating difference, including through structural change.[83] The necessity of taking this substantive, even transformative, approach to equality in regard to women's human rights is apparent: by recognising the longstanding control of women's reproduction and sexuality through the criminalisation of abortion as rooted in beliefs about women's inherent inferiority, undertaking such an approach to equality in IHRL can address not only the direct harms that arise from restrictive abortion legislation, but also address the deeper, structural forms of discrimination that inform and exacerbate such legislation. While there is evidence that the inter-American human rights system, European human rights system, and UN human rights treaty monitoring bodies are moving towards a substantive approach to equality reasoning, the idea of the similarly-situated individual test of formal equality still persists in their reasoning, thus impeding the full realisation of women's human rights and citizenship. These issues will be discussed in Chapter 3. As will be argued throughout this thesis, one of the ways that the international and regional human rights bodies could address the root causes of women's exclusion and oppression would be by moving towards this transformative understanding of equality. This requires moving from discussions of inequality/equality to ones of oppression/liberation; while the terminology of equality and non-discrimination will be used throughout this thesis since it is enshrined in IHRL, it will be argued that equality and non-discrimination need to be understood as having transformative potential that can lead to the structural changes required to end white supremacist capitalist patriarchy. The importance of embracing a transformative understanding of liberal concepts is also apparent in relation to justice.

[82] D Moeckli 'Equality and Non-Discrimination' in D Moeckli et al (eds), *International Human Rights Law*, 191
[83] S Fredman, 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights' (2016) 16 Human Rights Law Review, 10

Justice

Traditional liberal understandings of justice are limited to respect for the freedom of individuals and institutions from undue interference by others, and the utilitarian approach of guaranteeing the maximum amount of happiness to the maximum number of people.[84] Certain liberal philosophers such as Rawls recognised the limits of this approach and argued for a more expansive understanding of justice that they referred to as social justice.[85] They argued that the basic structure of society and its legal, economic and cultural practices and institutions should be grounded in the virtue of being just, and should facilitate the ability of individuals to live life according to their own wishes.[86] Feminist philosophers and activists advanced this further, arguing that social justice should mean the elimination of structural injustice and the realisation of 'social equality of groups, and mutual recognition and affirmation of group differences.'[87] Young recognised the importance of engaging with international institutions such as the human rights system to counter this domination, oppression, and exclusion.[88] Therefore, for the purposes of this thesis, social justice is understood as the process of challenging structural injustices so that everyone has the right to have rights and to determine the scope of those rights, thus guaranteeing their ability to flourish.

Reflections on justice also lead to an interrogation of traditional approaches to adjudication, and their limits in realising social justice. Contemporary legal systems, including international human rights mechanisms, are generally grounded in an adversarial and retributive approach to justice: the two parties in conflict present their versions of events, the adjudicating body determines which version is more plausible, and punishment is meted out to the wrongdoer in order to provide satisfaction for the wronged party.[89] Such an approach is not entirely conducive to social justice for the following reasons.

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[84] F Lovett, *Rawls's A Theory of Justice: A Reader's Guide* (London, Bloomsbury 2011) 4-12
[85] J Rawls, *A Theory of Justice: Revised Edition* (first published 1971, Cambridge MA, Harvard University Press 1999)
[86] F Lovett, *Rawls's A Theory of Justice*, 17-20
[87] IM Young, *Justice and the Politics of Difference* (Princeton University Press 1990) 15, 191; IM Young, *Responsibility for Justice* (OUP 2011), 52
[88] IM Young, *Responsibility for Justice*, 151
[89] D Sharp cited in R Shackel, L Fiske, 'Conclusion' in R Shackel, L Fiske (eds), *Rethinking Transitional Gender Justice: Transformative Approaches in Post-Conflict Settings* (Cham, Springer, 2019) 341; G Johnstone, 'Towards A 'Justice Agenda' for Restorative Justice' (2014) 2 Restorative Justice, 117

Firstly, given that it is grounded in the liberal intellectual tradition, it fails to recognise harms that fall outside the scope of the ideal liberal legal subject's experience. Secondly, it fails to address the root causes of harms and wrongs, such as the structural nature of white supremacist capitalist patriarchy. Thirdly, the adversarial nature of adjudication perpetuates dichotomies of right/wrong, victim/perpetrator, as well as the reductive idea that wrongdoing can only be addressed through punishment. Such an approach fails to create the space necessary for a more appropriate and sensitive treatment of individuals who have experienced trauma, for a meaningful exploration of the respective parties' positions and how if at all it is possible to reconcile them, and for the recognition and implementation of measures that can redress both the individual harms and the structural conditions that gave rise to them. Scholars and practitioners of restorative and transformative justice have highlighted three issues and some of the ways in which they can be addressed. Many of their suggestions are appropriate for an intersectional feminist approach to IHRL, as will now be discussed.

Restorative justice 'aims to restore the status and heal relationships and injuries of victims and the wider community in the wake of an ethical breach.'[90] It makes use of non-adversarial approaches such as mediation to not only deal with conflict but also contribute to social justice.[91] Transformative justice understands justice as 'a set of general principles for allocating collective benefits, opportunities and burdens' that is attuned to and determined to address the structural nature of the marginalisation and oppression of 'groups like women, children, minorities and indigenous peoples.'[92] In contrast to the procedural justice approach that characterises domestic law and IHRL, restorative and transformative justice are concerned with a substantive understanding of justice that seeks to transform the 'psychosocial, socioeconomic and political power relations in society' to ensure universal respect for, protection, and fulfilment of human rights.[93] They recognise that the legal process is just one avenue for realising the social, political and economic transformation required to

[90] SWA Dekker, H Breakey, ''Just Culture:' Improving Safety by Achieving Substantive, Procedural and Restorative Justice' (2016) 85 Safety Science, 188
[91] G Mannozzi, 'Towards a 'Humanism of Justice' through Restorative Justice: A Dialogue with History' (2017) 5 Restorative Justice 145; A Nelund, 'The Marginalised Woman: Thinking Beyond Victim/Offender in Restorative Justice' (2017) 5 Restorative Justice 408
[92] P McCauliffe, *Transformative Transitional Justice and the Malleability of Post-Conflict States* (Cheltenham, Edward Elgar, 2017) 1-3. See also M Evans, D Wilkins, 'Transformative Justice, Reparations and Transatlantic Slavery' (2019) 28 Social & Legal Studies 137; P Gready, S Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice' (2014) 8 International Journal of Transitional Justice 339
[93] W Lambourne, V Rodriguez Carreon, 'Engendering Transitional Justice: a Transformative Approach to Building Peace and Attaining Human Rights for Women' (2016) 17 Human Rights Review, 73

guarantee all individuals the potential to flourish.[94] As will be discussed in Chapter 3 of this thesis, the Inter-American Commission on Human Rights' friendly settlements procedure serves as an example of how IHRL can make use of restorative and transformative approaches to justice to better represent and respond to women's lived realities and experiences, and to acknowledge these realities and experiences as the basis for human rights interpretation and implementation.

To summarise, throughout this thesis the terms 'justice' and 'social justice' will be used to refer to the realisation of a legal, political, social and economic order in which all individuals can flourish. Framing justice in these terms foregrounds the need to address structural inequality, also referred to in this thesis as systemic inequality, oppression, or structural/systemic oppression. The use of these terms is grounded in an understanding of justice as substantive, restorative, and transformative, rather than as procedural and retributive. The need to adopt such an approach to justice in order to counter women's historical exclusion and oppression, and to realise their right to have rights and determine the scope of those rights, is a cornerstone of this thesis and the concept of SRHRs. The next section briefly defines SRHRs as they are understood by intersectional feminists and within IHRL respectively.

1.2.2. SRHRs

SRHRs in intersectional feminism

The concept of sexual and reproductive health and rights (SRHRs) is a transformative intersectional feminist challenge to traditional liberal IHRL. SRHRs combine four interrelated fields: sexual health, sexual rights, reproductive health and reproductive rights. They affirm the rights and freedoms of people of all sexual orientations and gender identities to enjoy safe, satisfying sexual relations free of coercion, discrimination and violence should they wish to engage in sexual activity, and to have the freedom to make informed decisions about their sexual and reproductive health, including if or when to have children.[95] The focus

[94] P Gready, S Robins, 'From Transitional to Transformative Justice' 339

[95] International Commission of Jurists, 'The Yogyakarta Principles: Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity' (Yogyakarta, International Commission of Jurists 2007); IPPF, 'Sexual Rights: An IPPF Declaration' (London, IPPF 2008); Reproductive Health Matters (RHM) and Asian-Pacific Resource & Research Centre for Women (ARROW),

on SRHRs in this thesis, rather than on reproductive rights only, is deliberate: as an intersectional feminist research project, it is vital to recognise the role of Global South feminists and LGBTQ* scholars and activists in developing SRHRs. It is also vital to recognise that campaigns for straightforward access to safe and legal abortion are part of a far wider movement to challenge the exclusion and oppression of women and gender-diverse people through current discourses on gender, sexuality, and reproduction.

SRHRs as a concept and movement have their origins in the theory and praxis of Global South feminists. In response to coercive, violent, and discriminatory birth control and population control programmes informed by imperialist, racist, heterosexist thinking,[96] they articulated their claims for 'the complete physical, mental, spiritual, political, social and economic well-being of women and girls, based on the full achievement and protection of women's human rights.'[97] Reproductive autonomy or reproductive freedom, defined as 'the right to have, or not to have, children with dignity and with all the necessary material conditions to make raising children a sustainable life choice',[98] is a central tenet of their approach to contesting women's historical exclusion from and oppression by the traditional discourses of citizenship and human rights. Reproductive freedom includes access to contraception, abortion, and decent education and information on sexual and reproductive health, as well as freedom from forced sterilization and other coercive, eugenic practices.[99] Intersectional feminist understandings of SRHRs-as-reproductive-freedom recognise and emphasise that the full realisation of SRHRs can only take place through structural political, economic, social and legal change: they argue that the realisation of SRHRs requires a comprehensive 'framework that promotes all people's well-being and women's full citizenship [emphasis added].'[100] As such, intersectional feminist engagement with the language and mechanisms of IHRL represents just one aspect of a wider project to transform

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Repoliticizing Sexual and Reproductive Health & Rights: A Global Meeting (Langkawi, RHM and ARROW 2011); World Association for Sexual Health (WAS), 'Declaration of Sexual Rights' (WAS, Minneapolis MN 2014) < https://worldsexualhealth.net/wp-content/uploads/2013/08/Declaration-of-Sexual-Rights-2014-plain-text.pdf> accessed 2 December 2020. Academic/activists M Berer, S Corrêa, A Germain, G Sen, and the DAWN (Development Alternatives with Women for a New Era) coalition have been integral to the development of the concept of SRHRs.

[96] A Lind 'Querying Globalization: Sexual Subjectivities, Development, and The Governance of Intimacy' in MH Marchand, A Sisson Runyan (eds), *Gender and Global Restructuring: Sightings, Sites and Resistances* (2nd edn, London, Routledge 2011) 55; C Mohanty 'Cartographies of Struggle' 12

[97] L Ross cited in K Ackerman et al 'Every Body Has Its Own Feminism', 6

[98] RP Petchesky, 'Owning and Disowning the Body: A Reflection' in R Baksh, W Harcourt (eds), *The Oxford Handbook of Transnational Feminist Movements* (OUP 2015), 255

[99] ibid

[100] DAWN cited in RP Petchesky, 'Introduction' in RP Petchesky, K Judd (eds), *Negotiating Reproductive Rights*, 4

society. Feminist efforts to ensure the recognition and legitimacy of SRHRs within IHRL is a means to an end, but not the end in itself: the language and mechanisms of IHRL represent a tool to achieve social transformation. As such, the intersectional feminist project of SRHRs can be understood as an attempt to close the gap between IHRL as it currently stands and the lived realities and experiences that should inform its interpretation and application. This process is ongoing, as evidenced by the growing recognition of SRHRs within IHRL. However, this process is limited unless IHRL adopts the intersectional feminist understanding of concepts such as justice and rights underpinning SRHRs.

SRHRs in IHRL

As will be discussed in greater detail in Chapters Two and Three, SRHRs have been recognised within IHRL by the UN, the inter-American, the European, and the African human rights systems as a legitimate family of human rights. These human rights systems have recognised that the following rights and principles are necessary for the full realisation of SRHRs:

- The principle of non-discrimination and equality
- The right to life
- The right to be free from torture
- The right to marry and found a family
- The right to seek, receive and impart information
- The right to a fair trial
- The right to privacy
- The right to freedom of thought, conscience and religion
- The right to health
- The right to enjoy the benefits of scientific progress.[101]

[101] See Annex 1 and also: African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (The Maputo Protocol) (adopted 11 July 2003, entered into force 25 November 2005) art 14; CoE Commissioner for Human Rights, *Women's Sexual and Reproductive Health and Rights in Europe* (Strasbourg, CoE 2017) 47-56; UNFPA et al, *Reproductive Rights are Human Rights: A Handbook for National Human Rights Institutions* (New York, United Nations 2014) 89-115; UNGA, 'Programme of Action Adopted at the International Conference on Population and Development, Cairo, 5-13 September 1994' (A/CONF.171/1313, September 1994) para 7.3; WHO, *Safe Abortion: Technical and Policy Guidance for Health Systems* (2nd edn, Geneva, World Health Organization 2012), 19

As will be illustrated in the next two chapters, there is evidence that the intersectional feminist approach to SRHRs is slowly being adopted by these international and regional human rights mechanisms: they are increasingly attentive to the connection between restricting access to reproductive and sexual healthcare on the one hand and discriminatory attitudes to women on the other, and they are also increasingly attentive to the intersecting, structural nature of such discrimination on the basis of gender, race, class, age, geographical location, and disability. However, the persistence of the liberal legal framework and its underlying principles continues to limit the full reach of these two necessary developments, as will be demonstrated in Chapter 3 of this thesis.

Summary

Part 2 of this introductory chapter defined the key concepts of liberalism, citizenship, autonomy, equality, and justice as they are understood for the purposes of this thesis. It also explained how SRHRs are understood within intersectional feminism, and how they are understood within IHRL. The next part of this chapter engages with the literature that has informed the development of this research project's methodology and concepts. It also highlights how this thesis's subject and approach contribute to the existing body of research on intersectional feminist approaches to IHRL.

1.3. Literature Review and Original Contribution

Introduction

While undertaking research for this thesis, the gendered and interconnected nature of citizenship, rights, and reproduction became apparent. The need to synthesise existing literature from feminist legal studies, political theory, and sociology on these discourses, and the need to articulate the connections between them in order to understand and respond better to the harmful impact of the criminalisation of abortion, was evident. This thesis makes the following original contributions to research. Firstly, it makes use of the concept of citizenship to synthesise longstanding feminist critiques of liberalism and IHRL and it applies them to an issue of critical, real-world importance: the need for straightforward, safe, and legal access to abortion. Secondly, by making use of the concept of citizenship, this thesis identifies

commonalities, parallels, and connections between domestic, regional, international, and transnational feminist human rights struggles around abortion access and SRHRs that might not otherwise be apparent, for example in relation to the case studies of El Salvador and Ireland. Thirdly, by drawing attention to the Global South feminist and inter-American human rights system contributions to the development of SRHRs in IHRL, this thesis challenges dominant forms of knowledge production that dismiss and ignore the value of Global South theory and praxis. Finally, by applying this theoretical framework to the case studies of El Salvador and Ireland, it draws attention to the situation in El Salvador – considerably less well-known than that in Ireland, at least in European academia – and provides an up-to-date account of the situation in Ireland. In regard to both case studies, applying the theoretical framework of a multilevel feminist citizenship project makes visible the multifaceted harms that restrictive abortion legislation and its underlying rationale causes, the ways in which feminists in both countries make use of the language and mechanisms of human rights to contest these harms, and the need for an intersectional feminist approach to the decriminalisation of abortion by activists and the human rights system in order to realise women's full citizenship.

This part of the chapter is divided into three sections. The first section discusses the literature on feminist approaches to citizenship. Section two considers feminist approaches to IHRL and SRHRs. Section three provides an overview of the literature on El Salvador and Ireland.

1.3.1. Feminist approaches to citizenship

One of the first and most important feminist critiques of citizenship is Pateman's 1988 *The Sexual Contract*. Its thesis is that the liberal social order simultaneously relies upon and makes invisible the patriarchal social order, which she refers to as the sexual contract.[102] The sexual contract 'establishes men's political right over women' and the 'orderly access by men to women's bodies', excluding women from rights and citizenship on the basis of their embodiment, sexuality, and reproduction.[103] Their role is to reproduce future citizens of legitimate parentage, rather than to exercise citizenship themselves.[104] Despite citizenship's claims to neutrality and inclusiveness, citizenship and the social contract are in fact ideological and exclusionary, and mean that women can never fully access citizenship and

[102] C Pateman, *The Sexual Contract*, 12-3
[103] ibid, 14
[104] ibid, 61

the public sphere on the same terms as men due to their association with the body, reproduction, and sexuality.[105] Pateman focused on marriage and employment to illustrate her thesis, but the relevance of such an approach to the legal regulation of reproduction and sexuality is evident. If women's place in the citizenship project is in the subordinate position of non-citizen and bearer of future citizen, and if men are entitled to control women's reproduction and sexuality to ensure the continuity and stability of this social order, then surely the regulation of reproduction and sexuality through legislation on abortion requires analysis.

During the 1990s, numerous feminist scholars such as Lister, Phillips, and Walby expanded upon Pateman's idea of the gendered and exclusionary nature of citizenship. They undertook feminist analyses of citizenship to articulate alternative understandings of citizenship as a contested discourse which required reformulation to better represent and respond to women's lived experiences.[106] While their work alluded to the importance of realising reproductive rights such as access to abortion to ensure women's full citizenship, it was not the main focus of their research.[107] Moreover, their work lacked an explicitly intersectional focus.

In order to ensure a more intersectional approach and in order to demonstrate the validity of applying such a framework to the relationship between abortion/SRHRs and IHRL, this thesis supplements these European feminist approaches to citizenship with feminist analyses of gender and nation, and Latin American feminist analyses of citizenship. Yuval-Davis has identified the connections between gender, reproduction, nation, citizenship and IHRL through the concept of the multi-layered citizen. She recognises that the struggle for reproductive rights 'should be seen as a vital part of the more general struggle for women's emancipation'[108] and that this struggle takes place in the interconnected arenas of domestic, regional, international and transnational feminist activism around the language and mechanisms of IHRL.[109] Moreover, her work is explicitly intersectional, highlighting and reflecting upon how power structures and identity categories such as race, nationality, and dis/ability interact with gender to create specific challenges to the realisation of women's full

[105] ibid, 278, 340. See also S Thompson et al, 'The Sexual Contract 30 Years On', 94-5
[106] A Phillips, *Engendering Democracy*; R Lister, *Citizenship*; S Walby, 'Is Citizenship Gendered?'
[107] R Lister, *Citizenship*, 125-6; A Phillips, *Engendering Democracy*, 108-9; S Walby, 'Is Citizenship Gendered?', 380
[108] N Yuval-Davis, *Gender and Nation*, 38
[109] N Yuval-Davis, 'The 'Multi-Layered' Citizen', 119

citizenship.[110] This intersectional awareness and commitment to a dynamic understanding of citizenship as a contested process which can be used to achieve social transformation is also apparent in the work of Latin American feminist scholars, and feminist scholars who specialise in Latin American studies.[111] The particular historical and political Latin American context of colonisation, inequality, dictatorship, and authoritarianism, and their ongoing impact, has given rise to an active feminist scholarship and praxis which is aware of and committed to challenging the hierarchies of race, class, gender, age, dis/ability and geographic location that oppress women.[112]

This thesis synthesises and develops these feminist approaches to the relationship between citizenship, gender, reproduction and sexuality. It uses them to provide an in-depth analysis of the struggle for abortion rights in particular and SRHRs in general. Drawing upon Yuval-Davis's idea of multilevel citizenship, this thesis demonstrates that feminist campaigns for abortion access are part of a long struggle for women's full citizenship, and that this struggle takes place domestically, regionally, internationally, and transnationally in relation to the language and mechanisms of IHRL. This thesis does so by considering the origins and evolution of SRHRs within IHRL, and by considering the origins and evolution of restrictive abortion legislation and feminist responses to it in El Salvador and Ireland. Making use of the theoretical framework of a multilevel feminist citizenship project results in a comprehensive understanding of the connections between these sites of contestation.

Drawing upon feminist analyses of citizenship also demonstrates the interconnected nature of these critiques and feminist critiques of IHRL, and the necessity of making use of both forms of critique to ensure that IHRL represents and responds to women's lived realities. It will be argued that an intersectional feminist approach to IHRL requires not just engagement with human rights as they are currently interpreted, but also engagement with and reformulation of the liberal concepts of citizenship, autonomy, equality, and justice that underpin it. The next

[110] ibid, 123-127; N Yuval-Davis, *Gender and Nation*, 7, 38, 118-9
[111] E Dagnino, 'Culture, Citizenship, and Democracy: Changing Discourses and Practices of the Latin American Left' in SE Alvarez, E Dagnino, A Escobar (eds), *Cultures of Politics, Politics of Cultures: Re-Visioning Latin American Social Movements* (Boulder CO, Westview Press 1998) 33; E Jelin 'Engendering Human Rights', 65; M Molyneux, *Women's Movements in International Perspective: Latin America and Beyond* (London, Palgrave 2001); V Vargas 'International Feminisms: The World Social Forum' in JS Jaquette, KA Staudt (eds), *Feminist Agendas and Democracy in Latin America* (London, Duke University Press 2009) 145. See also A Carosio (ed), *Feminismo y cambio social en América Latina y el Caribe* (Buenos Aires, CLACSO 2012) and F Gargallo, *Las ideas feministas latinoamericanas* (Bogotá, Ediciones desde abajo 2004)
[112] ibid

section discusses key literature on feminist approaches to IHRL and SRHRs, its commonalities with feminist critiques of liberalism and citizenship, and the ways in which this thesis synthesises these two sets of critique to develop a comprehensive intersectional feminist approach to IHRL and abortion.

1.3.2. Feminist approaches to IHRL and SRHRs

As noted in this chapter's methodology section, there was a proliferation of feminist critiques of international law and IHRL in the 1990s and early 2000s. SRHRs were also the subject of extensive feminist scholarship in the early 1990s and 2000s in response to their growing visibility and legitimacy at the international level.[113] Academics and activists working within the fields of IHRL and development reflected on the risks and benefits of engaging with IHRL, and of using the language of human rights and development.[114] They also highlighted the importance of challenging structural inequality in order to fully realise women's human rights.[115]

In drawing upon this body of literature, this thesis demonstrates that feminist approaches to IHRL in general and SRHRs in particular continue to be of relevance. As will be argued throughout this thesis, ensuring that IHRL represents and responds to women's lived realities is an ongoing process, and one which is particularly contested in relation to SRHRs such as abortion access. This thesis also contributes to this body of literature by making linkages between it and feminist critiques of liberalism and citizenship. In doing so, this thesis develops an original, comprehensive, and coherent feminist critique of liberalism and IHRL that addresses not just the limited interpretations of IHRL currently impeding the full realisation of women's human rights, but also the underlying causes of these limited interpretations. It argues that it is only by undertaking a discursive analysis of these underlying principles that an approach to IHRL that represents and responds to women's lived realities can be articulated.

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[113] See for example C Bunch, 'Beijing, Backlash and the Future of Women's Human Rights' (1995) 1 Health and Human Rights 449; RP Petchesky, *Global Prescriptions*; J Peters, A Wolper (eds), *Women's Rights, Human Rights*; H Widdows, IA Idiakez, AE Cirión (eds), *Women's Reproductive Rights*

[114] A Cornwall, 'Buzzwords and Fuzzwords: Deconstructing Development Discourse' (2007) 17 Development in Practice 471; N Kabeer, 'Tracking The Gender Politics of the Millennium Development Goals: Struggles For Interpretive Power in the International Development Agenda' (2015) 36 Third World Quarterly 377; D Otto, 'Holding Up Half The Sky, But For Whose Benefit?'

[115] S Corrêa et al, *Sexuality, Health and Human Rights*; R Petchesky, 'Human Rights, Reproductive Health and Economic Justice: Why They Are Indivisible' (2000) 8 Reproductive Health Matters 12

Since IHRL is only meaningful if it impacts upon the daily lives of individuals at the domestic level, since domestic and transnational feminism around the meaning of human rights has informed the development of IHRL and SRHRs, and since the starting point for this thesis was the impact of the criminalisation of abortion on women in Ireland and El Salvador, it is necessary to consider these two countries and existing literature on them to address this thesis's research question in full.

1.3.3. El Salvador and Ireland

While Ireland and its restrictive abortion legislation has been the focus of considerable academic research and international public attention, the situation in El Salvador has received comparatively little attention. Indeed, El Salvador has been referred to as 'Latin America's least researched nation-state.'[116] This thesis makes use of the parallels between the situation in Ireland and El Salvador to draw more attention to El Salvador in European, English-speaking academia. It does so by drawing upon the available academic literature concerning the history and politics of El Salvador and Central America,[117] as well as publications by

[116] A Lauria-Santiago, L Binford, 'Local History, Politics, and the State in El Salvador' in A Lauria-Santiago, L Binford (eds), *Landscapes of Struggle: Politics, Society, and Community in El Salvador* (University of Pittsburgh Press 2004) 2

[117] TP Anderson, *Politics in Central America: Guatemala, El Salvador, Honduras, and Nicaragua* (Westport CT, Praeger 1988); JA Booth, CJ Wade, TW Walker, *Understanding Central America: Global Forces, Rebellion, and Change* (6th edn, Boulder CO, Westview Press 2015); S Chant, N Craske, *Gender in Latin America* (New Brunswick NJ, Rutgers University Press 2003); E Ching, *Authoritarian El Salvador: Politics and the Origins of the Military Regimes, 1880-1940* (Notre Dame IN, University of Notre Dame Press 2014); E Ching, *Stories of Civil War in El Salvador: A Battle over Memory* (Chapel Hill NC, University of North Carolina Press 2016); The Commission on the Truth For El Salvador, *From Madness to Hope: The 12-Year War in El Salvador* (New York, United Nations 1993); R Crandall, *The Salvador Option: The United States in El Salvador, 1977-1992* (CUP 2016); CD Deere, M León, *Empowering Women: Land and Property Rights in Latin America* (University of Pittsburgh Press 2001); J Didion, *Salvador* (London, Granta 1983); E Galeano, *The Open Veins of Latin America: Five Centuries of the Pillage of a Continent* (C Belfrage tr, first published 1973, London, Serpent's Tail 2009); V González, K Kampwirth (eds), *Radical Women in Latin America, Left and Right* (University Park, PA, Pennsylvania State University Press 2001); JL Gould, AA Lauria-Santiago, *To Rise in Darkness: Revolution, Repression, and Memory in El Salvador, 1920–1932* (Durham NC, Duke University Press 2007); M Htun, *Sex and the State: Abortion, Divorce, and the Family under Latin American Dictatorships and Democracies* (CUP 2003); JS Jaquette, KA Staudt (eds), *Feminist Agendas and Democracy in Latin America*; K Kampwirth, *Feminism and the Legacy of Revolution: Nicaragua, El Salvador, Chiapas* (Athens OH, Ohio University Press 2004); A Lauria-Santiago, L Binford (eds), *Landscapes of Struggle*; F Martínez Castro, 'Historia del feminismo en El Salvador' (speech presented the 30th of August 2010) <http://www.uca.edu.sv/facultad/clases/chn/m100136/HISTORIA-DEL-FEMINISMO-EN-EL-SALVADOR(Ponencia).doc> accessed 18 October 2019; S Migden Socolow, *The Women of Colonial Latin America* (CUP, 2000); B Potthast, *Madres, obreras, amantes: protagonismo femenino en la historia de América Latina* (JL Acanda tr, Madrid, Iberoamericano 2010); S Rivera Berruz 'Latin American Feminism' *The Stanford Encyclopaedia of Philosophy* (Winter 2018 edition), EN Zalta (ed) <https://plato.stanford.edu/entries/feminism-latin-america/> accessed 18 October 2019; JD Shayne, *The Revolution Question: Feminisms in El Salvador, Chile, and Cuba* (London, Rutgers University Press 2004); R Sprenkels, 'Ambivalent Moderation: The FMLN's Ideological Accommodation to Post-War Politics in El Salvador' (2019) 54 Government and Opposition (2019) 536; M Thomson *Women of El Salvador: The Price of Freedom* (London, Zed Books 1986); MT Tula, *Hear My*

feminist and human rights organisations,[118] to provide a comprehensive account of the historical and political context that led to the complete criminalisation of abortion in the country and feminist responses to it. The theoretical framework highlights the parallels between the situation in Ireland and El Salvador arising from their shared experience of an exclusionary, oppressive postcolonial/post-conflict idea of citizenship that emphasised the need to control women's reproduction and sexuality through restrictive abortion legislation. The theoretical framework also highlights that the Salvadoran feminist movement has made extensive use of the language of citizenship and rights to frame their campaigns for abortion law reform, and that they have engaged with and indeed shaped the inter-American and UN human rights systems in their attempts to guarantee the full realisation of women's citizenship and rights. In keeping with the methodology and aims of this thesis, focusing on El Salvador and emphasising the important contributions that Salvadoran and Latin American feminists have made to advancing an intersectional understanding of SRHRs within IHRL challenges current Eurocentric, white supremacist narratives that discount the importance of Global South feminist research and praxis. This represents an original and vital contribution to current literature on abortion, SRHRs, and IHRL.

This desire to challenge dominant narratives and forms of knowledge production also informs the comparative study of the regional human rights systems that a comparative study of Ireland and El Salvador entails. By focusing on the three human rights systems under consideration here, it highlights the integral contributions of Latin American feminists to the development of SRHRs and their growing legitimacy within IHRL. It also highlights the fact that, of the three human rights systems under consideration, the inter-American human rights

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Testimony: María Teresa Tula, Human Rights Activist of El Salvador (L Stephen ed and tr, Boston MA, South End Press 1993); J Viterna, *Women in War: The Micro-Processes of Mobilization in El Salvador* (OUP 2014); S Wolf, *Mano Dura: The Politics of Gang Control in El Salvador* (Austin, University of Texas Press 2017); JE Wood, *Insurgent Collective Action and Civil War in El Salvador* (CUP 2003)

[118] Agrupación Ciudadana por la Despenalización del Aborto Terapéutico, Ético y Eugenésico (Agrupación Ciudadana), *Del hospital a la cárcel: consecuencias para las mujeres por la penalización sin excepciones de la interrupción del embarazo en El Salvador* (San Salvador, Agrupación Ciudadana 2013); Amnesty International, *On the Brink of Death: Violence against Women and the Abortion Ban in El Salvador* (London, Amnesty International 2014); Amnesty International, *Separated Families, Broken Ties – El Salvador: Women Imprisoned for Obstetric Emergencies and the Impact on Their Families* (London, Amnesty International 2015); Center for Reproductive Law and Policy (now the Center for Reproductive Rights, CRR), *Persecuted. Political Process and Abortion Legislation in El Salvador: A Human Rights Analysis* (New York, Center for Reproductive Law and Policy 2001); CRR, *The Total Criminalization of Abortion in El Salvador* (New York, Center for Reproductive Rights 2014); CRR and Agrupación Ciudadana, *Excluidas, perseguidas, encarceladas: El impacto de la criminalización absoluta del aborto en El Salvador* (New York, Center for Reproductive Rights 2013); MT Ochoa, S García, *¿Por qué me pasó esto a mí? La criminalización del aborto en El Salvador* (Managua, Ipas, 2013)

system has taken the approach to the interpretation of SRHRs that is most in keeping with their transformative, intersectional feminist core. Therefore, this thesis makes the original contribution of addressing the lack of attention afforded to the inter-American human rights system by European academia, a contribution that is especially important given that it addresses implicit biases that knowledge from the Global South is of lesser value, and that the Global North has little to learn from the production of knowledge there. In reality, as will be demonstrated throughout this thesis, the European human rights system and the European and Irish feminist movements could learn much from their Global South counterparts on how to advance an intersectional, transformative understanding of citizenship and rights.

In regard to Ireland the European human rights system, there have been numerous high-profile cases and controversies arising from Ireland's abortion legislation,[119] and so there is a considerable body of literature on Ireland's abortion legislation and on jurisprudence concerning its abortion legislation.[120] Many of these works, as well as studies of modern Irish history and society, identify the connection between the dominant discourses of citizenship and national identity on the one hand and restrictive abortion legislation on the other.[121] This

[119] *A and B v Eastern Health Board* [1997] IEHC 176; [1998] 1 IR 464; [1998] 1 ILRM 460 ('The C Case'); *Attorney General (SPUC) v Open Door Counselling Limited and the Well Woman Centre Ltd* [1988] 1 IR 593; *Society for the Protection of the Unborn Child v Grogan* [1989] IR 753; *Attorney General v X* [1992] 1 IR 1 ('The X Case'); *Baby Oladapo and Others v Minister for Justice, Equality and Law Reform, and the Attorney General* [2002] IESC 44 ('The O Case'); *PP v Health Service Executive* [2014] IEHC 622; ECtHR, *A, B and C v Ireland* (Application No. 25579/05) 16 December 2010; ECtHR Fourth Section, *D v Ireland* (admissibility decision) (Application No. 26499/02) 27 June 2006; ECtHR, *Open Door and Dublin Well Woman v Ireland* (Application No. 14234/88) 29 October 1992; ECJ, *SPUC v Grogan* (Case C-159/90, 11 June 1991); S Arulkumaran, 'Investigation of Incident 50278 from time of patient's self-referral to hospital on the 21st of October 2012 to the patient's death of the 28th of October, 2012' (Dublin, Health Services Executive, June 2013) (Savita Halappanavar); D McDonald, F Sheahan, 'Baby delivered as woman refused abortion under law' *Irish Independent* (Dublin, 15 August 2014) <http://www.independent.ie/irish-news/health/baby-delivered-as-woman-refused-abortion-under-law-30512513.html> accessed 6 November 2020 ('Ms Y'); L Smyth, 'From Rights to Compassion: The D Case and Contemporary Abortion Politics' in J Schweppe (ed), *The Unborn Child, Article 40.3.3º and Abortion in Ireland* 47 ('The Miss D Case', which is distinct from the ECtHR *D v Ireland* admissibility decision); UN Human Rights Committee (HRC), *Amanda Mellet v Ireland* (CCPR/C/116/D/2324/2013, 9 June 2016) (*Mellet v Ireland*); HRC, *Siobhán Whelan v Ireland* (CCPR/C/119/D/2425/2014, 12 June 2017) (*Whelan v Ireland*)

[120] See for example U Barry, 'Abortion in the Republic of Ireland' (1988) 29 Feminist Review 57; K Browne, S Calkin (eds), *After Repeal*; F de Londras, L Graham, 'Impossible Floodgates and Unworkable Analogies in the Irish Abortion Debate' (2013) 3 Irish Journal of Legal Studies 54; F de Londras, M Enright, *Repealing the 8th: Reforming Irish Abortion Law* (Bristol, Policy Press 2018); M Enright et al, 'Abortion Law Reform in Ireland: A Model for Change' (2015) feminists@law 1; M Enright et al (eds), *Northern/Irish Feminist Judgments*; R Fletcher, 'Silences: Irish Women and Abortion' (1995) 50 Feminist Review 44; R Fletcher, 'Contesting the Cruel Treatment of Abortion-Seeking Women' (2014) Reproductive Health Matters 10; J Schweppe (ed), *The Unborn Child, Article 40.3.3º and Abortion in Ireland*; A Quilty et al (eds), *The Abortion Papers Ireland: Volume 2* (Cork University Press 2016); A Smyth (ed), *The Abortion Papers: Ireland* (Dublin, Attic Press 1992)

[121] M Enright et al (eds), *Northern/Irish Feminist Judgments*; D Ferriter, *Occasions of Sin: Sex and Society in Modern Ireland* (London, Profile Books 2012); R Fletcher, 'Pro-Life Absolutes, Feminist Challenges: The Fundamentalist Narrative of Irish Abortion Law' (1998) 36 Osgoode Hall Law Journal 2; R Fletcher, 'Post-Colonial Fragments: Representations of Abortion in Irish Law and Politics' (2001) 28 Journal of Law and

thesis builds upon and contributes to this existing body of literature in two ways. Firstly, by using the theoretical framework of a multilevel feminist citizenship project, it demonstrates the interconnected nature of domestic campaigns for the decriminalisation of abortion on the one hand and the advancement of SRHRs within the international and regional human rights systems on the other. It highlights that the Irish feminists' use of the language of rights and citizenship in their domestic campaigns for the decriminalisation of abortion and Irish feminist engagement with IHRL through the ECtHR and the UN human rights treaty monitoring bodies are two interconnected processes that can be best understood through the framework of a feminist multilevel feminist citizenship project. Secondly, given that this research was conducted between 2017 and 2020, it provides an up-to-date account of a significant moment in the history of Ireland's abortion legislation. The constitutional article and legislation restricting abortion access were reformed in 2018-9, largely in response to the dual pressure of domestic civil society activism and UN human rights treaty monitoring body concluding observations and views calling for abortion law reform. Applying the theoretical framework of a multilevel feminist citizenship project highlights the fact that feminist usage of the language of citizenship and human rights and feminist engagement with IHRL mechanisms resulted in this outcome, a success for the multilevel feminist citizenship project.

Summary

In bringing together a range of feminist critiques of citizenship and human rights, this thesis constructs a comprehensive appraisal of the theoretical and real-world challenges facing the full realisation of SRHRs, and it develops a schema for overcoming these challenges. It also demonstrates the ongoing utility and importance of feminist legal theory to contemporary issues in IHRL. This thesis also demonstrates the relevance of the concept of citizenship to feminist reconfigurations of IHRL. It provides insights into the dynamics of reshaping existing rights and claiming new ones. It also offers a perspective on the relationship between domestic, regional, international and transnational activism and jurisprudence that would otherwise remain unexplored. The comparative element of this study serves three purposes.

Society 568; E Luibhéid, 'Sexual Regimes and Migration Controls: Reproducing the Irish Nation-State in Transnational Contexts (2006) 83 Feminist Review 60; S Mullally, *Gender, Culture and Human Rights: Reclaiming Universalism* (Oxford, Hart 2006); JM Smith, *Ireland's Magdalen Laundries and the Nation's Architecture of Containment* (University of Notre Dame Press 2007); L Smyth *Abortion and Nation: The Politics of Reproduction in Contemporary Ireland* (Aldershot, Ashgate 2005); MG Valiulis, 'Power, Gender, and Identity in the Irish Free State' (1995) 6 Journal of Women's History 117; MG Valiulis, 'The Politics of Gender in the Irish Free State, 1922-1937' (2011) 20 Women's History Review 569

Firstly, it highlights commonalities in the reasoning behind restrictive abortion legislation, demonstrating that such legislation is not an aberrant and isolated occurrence, but symptomatic of the deep-rooted issues in legal discourse that have been highlighted by feminists. Secondly, it also allows for a critical reading of the ways in which SRHRs are interpreted by human rights systems. Thirdly, it draws attention to under-researched states and institutions that have been neglected by Western (European) scholarship due to the power dynamics in academia that privilege certain voices and topics over others. The ways in which these ideas are presented and developed throughout this thesis will now be discussed.

1.4. Overview of Thesis Structure

The theoretical framework of this thesis, the concept of a multilevel feminist citizenship project, is the subject of Chapter 2. This chapter sets out the conceptualisation of citizenship underpinning the theoretical framework. It then illustrates how citizenship is a concept which has long been used to exclude and oppress women, including in El Salvador and Ireland, but which can be reclaimed and reformulated to advance women's needs, interests, and full personhood before the law. Applying this discursive understanding of citizenship as a contested process to the origins, evolution and legitimacy of women's human rights and SRHRs in IHRL, the chapter considers the extent to which the UN, inter-American and European human rights systems have incorporated SRHRs into their jurisprudence. In doing so, this chapter demonstrates that the liberal foundations of citizenship and rights have served to oppress women, but that they can be reworked to harness the symbolic power and emancipatory potential of these discourses. This provides general context for the close reading of their jurisprudence in Chapter 3.

Engaging in a critical reading of jurisprudence from the UN, inter-American and European human rights system pertaining to abortion access, Chapter 3 analyses the extent to which these systems have adopted the intersectional feminist approach required to fully advance SRHRs and, by extension, women's human rights/full citizenship. While acknowledging the considerable advances made in this respect, particularly by the Inter-American Commission on Human Rights (IACHR) and the UN human rights treaty monitoring bodies, it highlights the persistence of the androcentric Western liberal legal framework and its inability to represent and respond to women's lived realities, particularly in relation to understandings of

the right to privacy, freedom from torture and other forms of cruel, inhuman or degrading treatment or punishment (CIDT), and the principle of non-discrimination. The chapter argues that alternative understandings of these rights informed by an intersectional feminist approach, and that an alternative, non-adversarial approach to adjudication, would better represent and respond to women's lived needs and realities.

Chapter 4 of this thesis, concerning El Salvador, contextualises the complete criminalisation of abortion in the country and the gendered/raced/classed impact of this legislation on women in El Salvador. It highlights the ways in which Salvadoran and transnational feminist engagement with the inter-American and UN human rights systems represents feminist contestation of women's exclusion from and oppression by the traditional liberal citizenship discourse. Although abortion remains completely criminalised in El Salvador, and although women continue to be actively prosecuted for having had an abortion, Chapter 4 demonstrates that national, regional, international and transnational human rights actors are increasingly vocal and unified in their calls for the government to reform Salvadoran abortion legislation to ensure compliance with its human rights obligations, and that this is a direct result of feminist activism on the issue.

Chapter 5, concerning the Republic of Ireland, highlights the ways in which these same dynamics are evident in an ostensibly very different context. In placing these two cases in dialogue with one another, this thesis argues that their common legacy of colonialism and conservative Catholicism has created a particular national identity that is harmful to women. It also argues that placing these two case studies in dialogue highlights the shared dynamics of feminist activism in relation to the language and mechanisms of IHRL. While the situation in El Salvador regarding abortion has yet to change, the fact that Ireland's abortion legislation was considerably reformed in 2018-2019 illustrates that multilevel feminist citizenship projects can result in the changes needed to make the law better represent and respond to women's lived realities. Chapter 5 considers the origins and impact of Ireland's restrictive abortion legislation, and feminist responses to it at the national, regional, and international levels of the human rights system. It demonstrates that this feminist engagement with the language and mechanisms of IHRL resulted in the 2018-9 abortion law reform, and it argues that further feminist engagement with this process of contesting women's exclusion from and oppression by the traditional citizenship discourse is necessary to ensure full and straightforward access to safe and legal abortion in Ireland.

Chapter 6 reflects on the extent to which the language and mechanisms of IHRL can be and have been harnessed by feminists to fully realise women's status as rights-bearers with a place in the citizenship project. It will argue that this is an ongoing process that has enjoyed some success, as evidenced by the growing legitimacy of SRHRs in IHRL. In order for this process to continue successfully, however, a more coherent theoretical approach – such as the intersectional feminist one articulated in this thesis – is required by the regional and international human rights systems, and the national and transnational feminist and human rights organisations. A commitment to intersectional feminism will enable domestic, regional and international actors to recognise otherwise potentially hidden power dynamics and imbalances that inform and are perpetuated by the law, and it will ensure that they take the steps necessary to address them. The limits of this thesis, as well as potential avenues for future research, will also be discussed.

Conclusion

This chapter has set out the background, research question, methodology, definitions of key concepts, original contribution, and structure of this thesis. Undertaking a discursive intersectional feminist approach to IHRL, this thesis argues that feminist attempts to reshape the language and mechanisms of IHRL and its underlying concepts in relation to abortion access and SRHRs are a vital endeavour to counter women's historical and ongoing exclusion from and oppression by the liberal citizenship discourse. The nature of this struggle in the interrelated arenas of the UN, inter-American and European human rights systems; El Salvador and Ireland; and civil society will serve as the subject of the subsequent chapters. The utility of the concept of citizenship in understanding these dynamics is the topic of the next chapter.

Chapter 2

Theoretical Framework

SRHRs as a Multilevel Feminist Citizenship Project

This chapter develops the theoretical framework guiding this project: the idea of a multilevel feminist citizenship project. This framework understands campaigns for the decriminalisation of abortion at the national level, and campaigns for the advancement of sexual and reproductive health and rights (SRHRs) at the regional and international level of the human rights system, as interlinked processes of feminist contestation around who has the right to have rights and what those rights should entail.

Part 1 discusses the conceptualisation of citizenship and the multilevel feminist citizenship project underpinning the theoretical framework. It demonstrates that citizenship is a concept which has long been used to exclude and oppress women, but that feminists have articulated alternative understandings of it to advance an intersectional feminist approach to the law and human rights. Part 2 applies this discursive understanding of citizenship to the origins, evolution, and legitimacy of women's human rights and SRHRs in international human rights law (IHRL). Part 3 discusses the extent to which the UN, inter-American and European human rights systems have incorporated SRHRs into their jurisprudence, providing general context for the close reading of their jurisprudence in Chapter 3.

This chapter argues that SRHRs are best understood as a multilevel feminist citizenship project. A multilevel feminist citizenship project is defined as feminists working at the interconnected national, regional, and international levels of the human rights system to realise women's right to have rights, and to determine the scope of those rights. SRHRs, and specifically the decriminalisation of abortion, are particularly acute sites of contestation because they challenge the deep-rooted exclusion of women from citizenship on the basis of their role in biological and social reproduction.

2.1. Citizenship

2.1.1. What it is citizenship?

Chapter 1 explained that citizenship is understood as a dynamic, contested process over the right to have rights and to determine the scope of those rights.[1] Feminists have highlighted the long history of excluding and oppressing women within the concept of citizenship given its origins in a typically white male Western liberalism. The traditional liberal idea of citizenship requires the control of women's reproduction and sexuality to ensure the continuity and stability of a patriarchal social order. This understanding of citizenship sets up womanhood and citizenship as mutually exclusive, with women serving as 'nation bearers' (i.e., non-citizens who belong in the private sphere) whose role is to produce and educate future citizens rather than 'rights bearers' (i.e., citizens who belong in the public sphere).[2]

In response to the exclusionary, oppressive aspects of the traditional liberal citizenship discourse, feminists articulated alternative understandings of citizenship as a dynamic and contested process in which new rights can be demanded and new meanings given to those which already exist.[3] The need for women to have the freedom to make decisions about their own bodies, sexuality, and reproduction is a central tenet of these feminist reformulations of citizenship, with scholar-activists emphasising the centrality of realising SRHRs to women's full citizenship.[4] However, realising SRHRs, especially abortion access, is arguably the most acutely contested aspect of women's struggle for full citizenship because it poses a direct challenge to the patriarchal social order. Firstly, women demanding access to abortion

[1] T Basok, S Ilcan, J Noonan, 'Citizenship, Human Rights, and Social Justice' 267; J Clarke et al, *Disputing Citizenship*, 2, 29; EF Isin, GM Nielsen (eds), *Acts of Citizenship*; N Kabeer (ed), *Inclusive Citizenship*; R Lister, 'Inclusive Citizenship' 49; C Mouffe (ed), *Dimensions of Radical Democracy*; A Shachar, *The Birthright Lottery*, 7; BS Turner, 'Contemporary Problems in the Theory of Citizenship' in BS Turner (ed), *Citizenship and Social Theory*, 2; K Zivi, *Making Rights Claims*, 7-9, 68

[2] M Enright, ''Involuntary Patriotism'', 38; AM Jaggar 'Arenas of Citizenship', 91-110; R Lister, *Citizenship*, 1, 71-2; C Pateman, *The Sexual Contract*; C Pateman, 'Equality, Difference, Subordination, 15; A Phillips, *Engendering Democracy*, 3; S Thompson et al, 'The Sexual Contract 30 Years On', 94-5; N Yuval-Davis, 'The 'Multi-Layered Citizen'',120-1; N Yuval-Davis, P Werbner, 'Women and the New Discourse of Citizenship', 5

[3] R Lister, *Citizenship*, 6; R Lister et al, *Gendering Citizenship in Western Europe*, 72; M Molyneux, 'Justicia de género'; A Phillips, *Engendering Democracy*, 3; B Siim, *Gender and Citizenship*; S Walby, 'Is Citizenship Gendered?'

[4] R Lister, *Citizenship*, 19; RP Petchesky, 'Owning and Disowning the Body; N Yuval-Davis, *Gender and Nation*, 38

represents women demanding the right to determine if and when to have children – this represents women articulating rights claims when only citizens (who can only be male) have the right to do so. Secondly, women demanding access to abortion represents women rejecting their assigned role in the citizenship project as non-citizens whose sole purpose is producing and educating future citizens.

By understanding citizenship in the above manner, this thesis frames domestic, regional, international, and transnational campaigns for the decriminalisation of abortion and the advancement of SRHRs as a process of feminist contestation of women's exclusion from and oppression by the traditional citizenship discourse. The actors involved, the practices and processes of citizenship, and the challenges and opportunities presented by each of these interlinked levels – domestic, regional, international, and transnational – will now be considered.

Multilevel aspects of citizenship and their relationship to IHRL

Feminist citizenship scholars argue that citizenship should be conceptualised as a 'multi-layered construct' in which the practices and processes of citizenship take place at the interconnected national, regional, transnational, and international levels. According to this understanding of citizenship, the language and mechanisms of IHRL are a 'specific layer' of citizenship, one which is potentially more responsive to women's rights claims than the domestic level.[5] The language and mechanisms of IHRL are therefore being utilised as political tools 'for "outsiders" at the gates of citizenship.'[6] Therefore, attempts to advance SRHRs including access to abortion nationally, regionally and internationally should be understood as interconnected layers of a multi-level feminist citizenship project: feminists are working nationally, regionally, internationally, and transnationally to reformulate human rights in order to challenge women's historic exclusion from citizenship, and to reformulate citizenship so that it represents and responds to women's needs. They do so by mobilising around the discourse of human rights, gathering research and evidence, campaigning and

[5] H Charlesworth, C Chinkin, *The Boundaries of International Law*, 210; N Yuval-Davis, 'The 'Multi-Layered Citizen'', 122, 127, 128
[6] R Lister, *Citizenship*, 43

awareness raising, alliance-building with actors who share their aims, and strategic litigation in regional and international human rights fora by individuals and NGOs.[7]
The main actors at each level, the ways in which feminists contest women's exclusion from and oppression by the traditional citizenship discourse at each level, and the opportunities and challenges that each level presents for this process, will now be discussed.

Actors and processes of multilevel feminist citizenship

The UN

The international level of the human rights system consists of the United Nations (the UN). This thesis focuses on the UN Secretariat's Office of the High Commissioner for Human Rights (OHCHR), and the human rights monitoring mechanisms within it. To chart the development of SRHRs within the UN human rights system, it also refers to UN General Assembly (UNGA) Resolutions, the UN Commission on the Status of Women (UN CSW) which is within the Economic and Social Council (ECOSOC), and publications by specialised UN agencies such as the World Health Organization (WHO) and the United Nations Population Fund (UNFPA).

The OHCHR's human rights monitoring mechanisms include the human rights treaty monitoring bodies, the Charter-based bodies of the Human Rights Council (UNHRC), and the Special Procedures of the UNHRC. The Special Procedures include Special Rapporteurs and Working Groups on thematic issues such as the right to health, freedom from torture, and discrimination against women and girls.

The human rights treaty monitoring bodies are committees of experts responsible for assessing state compliance with a human rights treaty. They do so by reviewing periodic reports submitted by States Parties detailing their compliance with their treaty obligations and publishing Concluding Observations in response; issuing General Comments/Recommendations on the nature and scope of treaty provisions; and hearing individual complaints against states alleging violations of treaty provisions, on which the

[7] X Casas, 'They are Girls not Mothers: The Violence of Forcing Motherhood on Young Girls in Latin America' (2019) 21 Health and Human Rights Journal,163; N Yuval-Davis, 'The 'Multi-Layered Citizen'', 127

Committee will issue Views.[8] While these Concluding Observations, General Comments, and Views are not 'per se legally binding, they have real legal significance' because they place expectations upon states to uphold the legally-binding human rights obligations enshrined in the human rights treaties, and because they inform the jurisprudence of the ICJ and regional human rights systems.[9]

There are nine 'core' human rights treaties, each with its own treaty monitoring body.[10] Eight of these are discussed in this thesis because they have addressed SRHRs and/abortion in their work: the Human Rights Committee (HRC), which monitors implementation of the International Covenant on Civil and Political Rights (ICCPR); the Committee on Economic, Social and Cultural Rights (CESCR), which monitors implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Committee on the Elimination of Discrimination against Women (CEDAW Committee), which monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Committee against Torture (CAT) which monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT); the Committee on the Rights of the Child (CRC Committee), which monitors implementation of the Convention on the Rights of the Child (CRC); the Committee on the Rights of Persons with Disabilities (CRPD Committee) which monitors implementation of the Convention on the Rights of Persons with Disabilities (CRPD); and the Committee on the Elimination of Racial Discrimination (CERD Committee), which monitors implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).

As will be discussed in parts 2 and 3 of this chapter, the UN human rights treaty monitoring bodies and special procedures have contributed to the development of SRHRs in IHRL through their Concluding Observations, General Comments and Recommendations, Views, reports, and statements. In relation to abortion specifically, their overall position is that abortion should be permitted at a minimum in the case of a risk to the pregnant person's life or health, in the case of rape or incest, and in the case of lethal or fatal foetal abnormalities;

[8] NS Rodley, 'The Role and Impact of Treaty Bodies' in D Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 626-633
[9] ibid, 639, 641
[10] ibid 622

otherwise multiple human rights could be violated.[11] Certain treaty monitoring bodies, Special Rapporteurs, and Working Groups have gone even further, calling for complete decriminalisation of abortion or stating that waiting times, medical authorisation by multiple professionals, and similar restrictions undermine women's rights to non-discrimination and bodily autonomy/integrity.[12] Part 2 of this chapter will argue that the development of the UN position on SRHRs and abortion represents the multilevel feminist citizenship project because it is the direct result of transnational feminist activism contesting women's exclusion from and oppression by the traditional discourse of citizenship and rights. Feminists contest this exclusion and oppression in their capacity as UN staff, academics, and civil society activists. They do so by advocating for a specific focus on women's human rights issues; participating in UN conferences; submitting information to and participating in the monitoring bodies' and special procedures' periodic review sessions; and engaging with the individual complaints procedure. Feminist contestation of women's historical exclusion from and oppression by citizenship and human rights is also evident in the inter-American human rights system (IAHRS).

The IAHRS

The IAHRS consists of the Organization of American States' Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR). This thesis also considers the role of the *Comisión interamericana de mujeres* (the Inter-American Commission of Women, CIM), a specialised organisation of the Organization of American States (OAS), in the advancement of women's human rights including SRHRs.

The IACHR is a quasi-judicial body responsible for promoting the observance and protection of human rights in all OAS Member States.[13] It has the authority to examine individual complaints of human rights violations by OAS Member States.[14] The IACHR is composed of

[11] See Annexes 1-3
[12] CRC Committee, 'Concluding Observations on the combined third and fourth periodic reports of Ireland' (CRC/C/IRL/CO/3-4, 1 March 2016) paras 57-8 (CRC 2016 Ireland Concluding Observations); SR torture 2013 report, paras 46-50, para 90; SR torture 2016 report, paras 14, 42, 43-4, 51; Working Group on the issue of discrimination against women in law and in practice (WG women), 'Report of the Working Group on the issue of discrimination against women in law and practice: eliminating discrimination against women with regard to health and safety' (A/HRC/32/44, 8 April 2016) paras 76, 79, 105(d), 106(e) (WG women 2016 report)
[13] LJ Reinsberg, *Advocacy Before the Inter-American System: A Manual for Attorneys and Advocates* (San Francisco CA, International Justice Resource Center, 2014) 6-7, 13
[14] ibid, 7

seven human rights experts who meet three times a year to hold meetings and make decisions on petitions. The IACHR's three main areas of work are overseeing the individual complaints procedure, monitoring the human rights situation in OAS Member States, and addressing thematic human rights issues such as women's rights.[15] It monitors the human rights set out in the American Declaration of the Rights and Duties of Man; the American Convention on Human Rights (ACHR) and its protocols on economic, social and cultural rights (the Protocol of San Salvador) and the abolition of the death penalty; and conventions on specific human rights issues such as the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (the Belém do Pará Convention).[16] It can also issue precautionary measures, a mechanism which requires states to take urgent action to prevent irreparable harm to persons or groups in the OAS Member States.[17] The IACtHR is the other key actor for the protection and promotion of human rights in OAS Member States.

The IACtHR was established by the ACHR and it became operational in 1980.[18] The Court has contentious jurisdiction over states that have signed and ratified the ACHR and accepted its jurisdiction. It also exercises advisory jurisdiction regarding the interpretation of human rights obligations and treaty provisions; this advisory jurisdiction is available to all OAS Member States, not just those which have acceded to the ACHR and accepted the Court's adjudicatory function. The Court does not receive contentious individual cases directly – cases are only referred to it by the IACHR when a State which is party to the ACHR has failed to comply in a timely manner with the IACHR's recommendations regarding an individual petition. The IACtHR also has the power to issue provisional measures, a mechanism which requires states to take urgent action to prevent irreparable harm to individuals or groups in OAS Member States. Along with the IACHR and IACtHR, OAS specialised organisations such as CIM play an important role in developing IHRL.

CIM predates both the OAS and the UN, having been founded in 1928 by feminists from across the Americas to contest their exclusion from citizenship in the domestic and the

[15] ibid
[16] ibid. See also IACHR, 'Basic Documents in the Inter-American System' <https://www.oas.org/en/iachr/mandate/basic_documents.asp> accessed 26 November 2020
[17] OAS, American Convention on Human Rights 'Pact of San José' (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No. 36, art 41(b) (ACHR); IACHR, 'Statute of the Inter-American Commission on Human Rights' (OAS Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 88) art 18(b); OAS, 'Charter of the Organization of American States' (A-41, entered into force 13 December 1951) art 106
[18] ACHR, arts 33, 52

emerging regional political fora.[19] CIM conducted research on the legal status of women in the Americas throughout the 1930s and 1940s, and – as will be highlighted in the next part of this chapter – was integral to the UN agreeing to create the UN Commission on the Status of Women. CIM became a specialised organisation of the OAS when the OAS was established in 1948.[20] As will be argued in part 3 of this chapter as well as in Chapter 4, CIM's origins in the 20th-century transnational feminist movement, and its longstanding commitment to challenging women's exclusion from and oppression by the law, have made it an important body for the advancement of SRHRs within the IAHRS.

The current position of the IAHRS regarding abortion is the same as that of the UN, i.e. that in order to ensure that women's human rights are respected, protected, and fulfilled, abortion should be decriminalised at a minimum in the case of a risk to the pregnant person's life or health, in the case of rape or incest, and in the case of fatal foetal abnormalities. As will be detailed in part 3, certain OAS bodies have gone even further, and are involved in efforts to have an Inter-American Convention on SRHRs adopted. In contrast to this engagement with UN human rights developments and overall progressive approach to women's human rights and SRHRs, the European human rights system has been less influenced by the UN human rights system, and it has taken a more conservative, deferential approach to human rights protection in general and SRHRs in particular.

The European human rights system

The Council of Europe (CoE) was founded in 1949.[21] This thesis focuses on the European Court of Human Rights (ECtHR), the European Committee of Social Rights (ECSR), and the Commissioner for Human Rights to assess the European human rights system's approach to SRHRs. This is because the ECtHR is the main human rights body of the CoE. It hears cases brought by individuals against States Parties alleging violations of the European Convention on Human Rights (ECHR).[22] This thesis considers the ECSR, an independent body which

[19] CIM, 'A Brief History of the Inter-American Commission of Women' (Washington DC, CIM, 2001) <https://oas.org/en/cim/docs/BriefHistory[EN].pdf> accessed 3 September 2020, 7; E DuBois, L Derby, 'The Strange Case of Minerva Bernardino: Pan American and United Nations women's right activist' (2009) 32 Women's Studies International Forum, 45
[20] CIM, 'A Brief History', 4
[21] CoE, Statute of the Council of Europe, London (ETS No. 1, 3 August 1949)
[22] CoE, Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, (ETS No.155, 1 November 1998)

oversees Member State compliance with the European Social Charter (ESC), because it has heard complaints relating to SRHRs including abortion access. This thesis considers the Commissioner for Human Rights, an independent and impartial non-judicial institution that is responsible for promoting awareness of and respect for human rights in CoE Member States, because numerous Commissioners have demonstrated a commitment to SRHRs. The other reason for focusing on these three bodies is that a detailed review of the CoE's 'quadrilogue' – the Committee of Ministers, the Parliamentary Assembly (PACE), the Conference of INGOs, and the Congress of Local and Regional Authorities – indicated that there is a diversity of opinions within these bodies on SRHRs and abortion, rather than a unified stance.[23] Moreover, with the exception of the Committee of Ministers' responsibility for ensuring implementation of ECtHR judgments (see Chapter 5), the extent to which these bodies influence debates around SRHRs and abortion access in CoE Member States, rather than simply reflect them, is unclear.

In contrast to both the UN and the inter-American system, the ECtHR and ECSR have taken a far more conservative approach to SRHRs. In regard to abortion, they have adopted the position that states can determine whether or not to legalise abortion, and that violations of women's rights will only arise if, where legal, abortion is not accessible. This position falls below the minimum standard that intersectional feminists, the UN human rights treaty monitoring bodies, and the IAHRS have adopted. As Chapters 3 and 5 will argue, this position serves as a major impediment to the advancement of the multilevel feminist citizenship project that SRHRs represent. Nevertheless, the European human rights system represents an important actor and forum for feminists to contest women's exclusion of and oppression by the traditional liberal discourse of citizenship and rights. This contestation takes place primarily through individuals and NGOs bringing cases before the ECtHR or lodging collective complaints with the ECSR. The Commissioner for Human Rights – and certain judges and ECSR members – have also demonstrated a commitment to intersectional feminist approaches to IHRL in their reports, concurring, and dissenting opinions. In fact, the

[23] With the exception of some statements in support of gender equality and LGBTQ* rights, SRHRs do not feature at the Conference of INGOs or the Congress of Local and Regional Authorities (see for example CoE Congress of the Local and Regional Authorities, *Human Rights Handbook for Local and Regional Authorities Vol. 1 (Strasbourg, Congress of the Local and Regional Authorities* 2019) 9; Conference of INGOs, 'Combating discrimination on grounds of sexual orientation and gender identity' (CONF/PLE(2012)REC3, 27 January 2012); Conference of INGOs, 'Gender Equality: a universal value, principle and human right to be respected and promoted in all fields' (CONF/PLE(2012)REC5, 27 June 2012). Within PACE, there is significant divergence on SRHRs. See for example PACE Resolution 1607 (16 April 2008), which is overall reasonably progressive but opens with the statement 'Abortion must, as far as possible, be avoided.'

current Commissioner has made SRHRs a main focus of her mandate, and has called on CoE Member States to adhere to UN, rather than CoE, standards on SRHRs and abortion. Therefore, feminists should continue to engage with the European human rights system, even though intersectional feminist approaches to IHRL have yet to become as embedded in the European human rights system as they have in the UN and inter-American systems. The next section considers the nature of the multilevel feminist citizenship project at the domestic level.

The domestic level

The nation-state represents the domestic level of the multilevel citizenship. As will be argued in this chapter and in Chapters 4 and 5 of this thesis, in both El Salvador and Ireland the exclusionary, oppressive citizenship discourse interacted with similarly oppressive, exclusionary discourses of nationalism, gender, race/ethnicity, class, and religion to result in the intense regulation of women's reproduction and sexuality, epitomised by the criminalisation of abortion. Feminists contest this exclusion and oppression in their capacity as activists, academics, politicians, and individuals directly affected by the criminalisation of abortion. They do so through protesting restrictive abortion legislation, campaigning for constitutional and legislative change, and tabling legislation. These actors also engage with the regional and international human rights systems by submitting information during the UN human rights treaty monitoring body periodic reporting period; attending IACHR meetings and sessions; meeting with and providing information to Commissioners and Rapporteurs during country visits; and filing complaints, petitions, and cases. This engagement represents one of the integral ways in which the various levels of the multilevel citizenship project overlap and are interlinked. So too does the work of transnational feminist activists and organisations.

The transnational level

Transnational feminism is defined as 'the fluid coalescence of organisations, networks, coalitions, campaigns, analysis, advocacy and actions that politicise women's rights and

gender equality issues beyond the nation-state.'[24] The concept of transnational feminism was first articulated by BIPOC scholar-activists to decentre 'universalizing white, Western feminism.'[25] It emphasises the need to build feminist solidarity across and in response to unequal relations of power, and the need to draw upon local knowledge and experience to respond to context-specific manifestations of oppression such as racism, sexism, neoliberalism, and neo-colonialism.[26] Transnational feminist actors consist of informal connections among individuals and groups across borders, as well as more formalised organisations such as Development Alternatives with Women for a New Era (DAWN) and the International Planned Parenthood Federation (IPPF). Transnational feminists engage with the international and regional human rights systems through participating in UN conferences and their follow-up processes; submitting information during review sessions and country visits; filing cases, petitions, and complaints; networking within and across borders around specific issues such as SRHRs; and 'networking and movement building' with other global social justice movements.[27] As parts 1 and 2 of this chapter will demonstrate, transnational feminist activism to contest women's exclusion from and oppression by citizenship and to realise 'full and expansive citizenship' has a long history and has been central to the establishment of a global women's human rights agenda, including SRHRs.[28] Despite its considerable achievements, the transnational level of the multilevel feminist citizenship project – like the other levels of the multilevel feminist citizenship project – presents not just opportunities but also challenges for the realisation of women's full citizenship. The opportunities and challenges that characterise each of the interlinked levels of the multilevel feminist citizenship project are considered below.

The multilevel feminist citizenship project: opportunities and challenges

The international and regional human rights systems have provided an important forum for feminists to attain redress and to advance alternative understandings of citizenship and rights.

[24] R Baksh, W Harcourt, 'Introduction' in R Baksh, W Harcourt (eds), *The Oxford Handbook of Transnational Feminist Movements*, 4
[25] M Desai, 'Critical Cartography, Theories, and Praxis of Transnational Feminism' in R Baksh, W Harcourt (eds), *The Oxford Handbook of Transnational Feminist Movements*, 117
[26] ibid, 120-1. See also L Carty, CT Mohanty, 'Mapping Transnational Feminist Engagements: Neoliberalism and the Politics of Solidarity' in in R Baksh, W Harcourt (eds), *The Oxford Handbook of Transnational Feminist Movements*, 82-115
[27] R Baksh, W Harcourt 'Introduction', 4
[28] VM Moghadam 'Transnational Feminist Activism and Movement Building' in R Baksh, W Harcourt (eds), *The Oxford Handbook of Transnational Feminist Movements*, 55

As part 2 of this chapter will illustrate, transnational feminist activism around the UN human rights system resulted in SRHRs being recognised as important and legitimate within IHRL. This in turn influenced the regional human rights system's approach to abortion and SRHRs, particularly the inter-American human rights system. Furthermore, as Chapters 4 and 5 will demonstrate, feminists in both El Salvador and Ireland have engaged with the respective regional human rights systems as well as the UN human rights system to raise awareness of the negative human rights impact of restrictive abortion legislation, to obtain redress for women directly impacted by this legislation, and as a means of exerting pressure on national governments to reform legislation and so guarantee women's full human rights and citizenship.

However, these human rights systems are not without their limits. There are issues common to the international and regional human rights system as a whole such as inadequate funding and resources, the part-time nature of the IACHR and IACtHR, an increasing backlog in cases, difficulty ensuring implementation and compliance on the part of states, and, occasionally, outright opposition from states.[29] Moreover, as Chapter 3 will illustrate, each of these human rights systems continues to apply liberal legal reasoning which does not always acknowledge or meaningfully address the ways in which restrictive abortion legislation impedes the realisation of women's full citizenship.

The domestic level provides the opportunity to realise direct, real-world change through the implementation of legislation and policy guaranteeing access to abortion and SRHRs that responds to the local context. There are several states where abortion legislation ensures straightforward, safe and legal access to abortion, usually through decriminalisation and, in the case of South Africa, through an explicitly human rights-based approach. One of the most recent examples of a state where abortion has been fully decriminalised following extensive

[29] RK Goldman 'History and Action: the Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights' (2009) 31 HRQ, 883; D González-Salzberg 'Complying (Partially) with the Compulsory Jurisdiction of the Inter-American Court of Human Rights' in P Fortes et al (eds), *Law and Policy in Latin America: Transforming Courts, Institutions, and Rights* (London, Palgrave Macmillan 2017) 39-56; JM Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd edn, CUP 2012) 24-7; NS Rodley, 'The Role and Impact of Treaty Bodies', 642; D Shelton, 'The Rules and the Reality of Petitions Procedure in the Inter-American Human Rights System' (2015) 5 Notre Dame Journal of International and Comparative Law, 3-4; D Shelton 'Performance of Regional Human Rights Courts' in T Squatrito et al (eds), *The Performance of International Courts and Tribunals* (CUP 2018), 119-20, 128, 141

national deliberation is New Zealand.[30] New Zealand's Abortion Legislation Act of 2020 removed abortion from the 1961 Crimes Act and permits abortion up to 20 weeks without restriction as to reasons and after 20 weeks if two healthcare practitioners deem it clinically appropriate.[31] The Minister for Justice framed the decriminalisation of abortion as part of New Zealand's longstanding commitment to women's human rights and as a necessary corrective to legislation 'from an age when law-making and decisions were dominated by men's perspectives and an innate distrust of women.'[32] By framing abortion in these terms, the Minister for Justice recognised the decriminalisation of abortion as part of longstanding feminist struggles for women's human rights and full citizenship; through this framing he also recognised restrictive abortion legislation as denying women's right and agency and as an expression of the legal gaze, i.e., the discursive construction of a female subject whose reproductive capacity and sexuality must be strictly regulated to ensure the stability of the social order.

A similarly feminist, rights-based approach to abortion legislation is also evident in South Africa's abortion legislation, which explicitly frames access to abortion in terms of human rights. The preamble to the 1996 Choice on Termination of Pregnancy Act refers to 'the right of persons to make decisions concerning reproduction and to security in and control over their bodies' enshrined in the Constitution, situates access to abortion in the wider context of 'universal access to reproductive health care services', emphasises the state's 'responsibility to provide reproductive health to all, and also to provide safe conditions under which the right of choice can be exercised without fear or harm', and 'promotes reproductive rights and extends freedom of choice by affording every woman the right to choose whether to have an early, safe and legal termination of pregnancy according to her individual beliefs.'[33] By framing access to abortion in this manner, South African abortion legislation centres women's right to exercise agency around their reproduction and so recognises them as citizens with the ability and the right to make such decisions.

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[30] BBC News, 'New Zealand passes law decriminalising abortion' *BBC News* (London, 18 March 2020) <https://www.bbc.com/news/world-asia-51955148> accessed 5 February 2021

[31] Abortion Legislation Act 2020 (New Zealand), secs 10, 11

[32] A Little 'This week we brought New Zealand's abortion laws into the 21st century' *The Guardian* (London, 19 March 2020) <https://www.theguardian.com/world/commentisfree/2020/mar/20/this-week-we-brought-new-zealands-abortion-laws-into-the-21st-century>

[33] Choice on Termination of Pregnancy Act 1996 (South Africa). For a detailed analysis of the wider South African context, see R Hodes, Abortion Politics in a State in Transition: Contesting South Africa's 'Choice Act'' in S Stettner et al (eds), *Transcending Borders: Abortion in the Past and Present* 171

While New Zealand and South Africa's abortion legislation represent instances of the domestic level recognising and facilitating women's rights and citizenship, in other contexts the domestic level is often the least responsive of the various levels to feminist calls for an alternative understanding of citizenship. Part 2 of this chapter and Chapters 4 and 5 of this thesis elucidate the ways in which powerful actors in El Salvador and Ireland fail to acknowledge or actively work against the unfinished project of realising women's full citizenship. These actors include politicians, policy makers, and judges who evade discussions of abortion given its controversial nature. They also include members of the Catholic Church hierarchy and evangelical Protestant churches, conservative politicians and judges, and conservative lobby groups who work to maintain the patriarchal status quo. Not only that, the feminist and women's movements in El Salvador and Ireland are generally voluntary and underfunded, and they are by no means unified or a monolith. As discussed in Chapter 5, the radical and transformative aspects of intersectional feminism are often the first casualties in building consensus for modest legal reform.

Similar tensions and difficulties are apparent in the transnational feminist movement. This diffuse, under/un-funded collective faces opposition from longstanding and newly emerging coalitions of conservative actors. Furthermore, its diversity is simultaneously a strength and a weakness: power dynamics as well as 'political, cultural and linguistic diversity, economic barriers, physical distance, and local political contexts' can impede the vital work of building solidarity and recognising the commonality of struggles without erasing differences.[34] Nevertheless, the transnational feminist movement has been and continues to be an integral space and actor for developing transformative approaches to IHRL such as SRHRs. Its role in advancing SRHRs within IHRL is the subject of part 2 of this chapter, and the ways in which it has supported feminist activism in El Salvador and Ireland in their efforts to realise abortion access will be considered in Chapters 4 and 5 respectively.

Despite the considerable challenges facing the transnational feminist movement, feminist contestation of women's historical exclusion from and oppression by the citizenship and IHRL discourses is an ongoing and necessary process that is but one element of the wider feminist aim of liberation for all historically oppressed groups.[35] In applying the theoretical

[34] M Desai, 'Critical Cartography, Theories, and Praxis of Transnational Feminisms' in R Baksh, W Harcourt (eds), *The Oxford Handbook of Transnational Feminist Movements*, 124
[35] R Voet cited in R Lister 'Sexual Citizenship', 197

framework of a multilevel feminist citizenship project, the dynamics informing the growing legitimacy of SRHRs within IHRL, and the steps that must be taken to ensure their full and meaningful realisation as an intersectional feminist citizenship project, become apparent.

Summary

For the purposes of this research project, citizenship is conceptualised as a contested process around the idea of who has the right to have rights, and to determine the scope of those rights. This process takes place at the interlinked national, regional, international, and transnational levels. Citizenship is contested and dialectical in nature: it is equally capable of excluding and oppressing or including and liberating. Historically it has operated to exclude and oppress women, with their bodies, sexuality and reproduction being acute sites of this exclusion and control. Despite the risks of engaging with a dialectical concept such as citizenship, feminists have recognised the concept's potential to advance their goal of a just social, economic, political, legal order. This potential is evident in feminists' domestic, regional, international and transnational mobilisation around women's political and economic rights and – particularly since the 1970s – SRHRs. Utilising the concept of multilevel citizenship processes enables us to fully understand this process and advance it further.

In keeping with the intersectional feminist methodology articulated in Chapter 1, in particular the need to challenge assumptions of neutrality and to complicate traditional accounts of phenomena by (a) charting their historical evolution and (b) centring them around the lived experience of marginalised groups, the following section discusses the long history of exclusion that has characterised traditional understandings of citizenship, and how it influenced and eventually converged with the criminalisation of abortion. In undertaking this historical analysis, this section demonstrates the utility of employing a multilevel feminist citizenship process as the theoretical framework. This framework makes visible the ways in which contemporary feminist activism around SRHRs and specifically access to abortion is the continuation of a much older feminist project to realise women's full citizenship, and counter their exclusion from citizenship on the basis of their reproduction and sexuality.

2.1.2. Women's historical exclusion from citizenship

Focusing on El Salvador and Ireland, this section discusses the origins of the concept of citizenship in Graeco-Roman Antiquity, its evolution and "exportation" worldwide through colonisation during the early-modern period, the consolidation of the public-private divide as its conceptual foundation in the Enlightenment/Revolutionary period, and its modern expression in relation to citizen, nation and national identity from the 19th to the 21st century. Women's exclusion from citizenship on the basis of their reproduction and sexuality, and the need to control their reproduction and sexuality to ensure the survival of the patriarchal social order, remains constant throughout, and is exemplified by the criminalisation of abortion. Women's resistance to these restrictions and to the denial of their full citizenship, and feminist articulations of an alternative understanding of citizenship, are also highlighted.

Early citizenship discourses

The Western liberal legal concept of citizenship originates in the exclusionary, misogynistic Graeco-Roman understanding of citizenship. Only free, property-owning, legitimate sons of citizens could become citizens.[36] Women could not be citizens because they purported to be inherently less intelligent, moral, and rational than men; moreover, social stability required men to exercise control over women's sexuality.[37] Furthermore, children were considered the property of the paterfamilias, the male citizen head of the household.[38] Therefore, legal restrictions on abortion that were introduced during the imperial age of the Roman Empire were concerned with the fact that abortion denied a man's right to his property or, had it been a son, a potential future heir and citizen.[39] The criminalisation of abortion should therefore be understood as rooted in the belief that women are never capable of becoming citizens, and that their obligation to reproduce potential future citizens must be enforced.

[36] R Bellamy, *Citizenship*, 32; JGA Pocock, 'The Ideal of Citizenship since Classical Times' (1992) Queen's Quarterly, 39-40
[37] N Tuana, *The Less Noble Sex: Scientific, Religious, and Philosophical Conceptions of Woman's Nature* (Bloomington IN, Indiana University Press 1993) 79, 80
[38] A Clark, *Desire: A History of European Sexuality* (Abingdon, Routledge 2008) 27
[39] M Calloni 'Debates and Controversies on Abortion in Italy' in D McBride Stetson (ed), *Abortion Politics, Women's Movements and the Democratic State* (OUP 2001) 181; JM Riddle, *Eve's Herbs: A History of Contraception and Abortion in the West* (Cambridge MA, Harvard University Press 1997) 95

The Graeco-Roman understanding of citizenship persisted and found new expression in medieval and early-modern religious, legal and scientific discourses.[40] These justifications influenced the developing canon, civil and common law traditions. In regard to abortion, the Graeco-Roman belief in men's entitlement to heirs and property, and in society's need for future citizens, persisted: the Roman legal penalties against abortion for depriving the father of his property were adopted by Christian canon law.[41] This body of law also provided a new justification for criminalising abortion with the concept of ensoulment (the moment at which the soul has entered the foetus).[42] The idea that quickening, the first detected movements by the foetus, indicated that ensoulment had occurred found favour in Christian canon law, and from there passed into developing common and civil law.[43] This is of significance for the introduction of abortion legislation in colonial El Salvador and Ireland.

Colonisation

Through colonisation, the misogynistic Western legal tradition – including restrictive abortion legislation grounded in the belief that women were incapable of full citizenship and in need of control – was introduced to El Salvador and Ireland. In the civil law tradition of the Central American colonies, abortion was considered a capital offence by New Spain's criminal and canon law.[44] In medieval English common law, which applied to Ireland, the general consensus was that abortion after quickening was murder and should be tried as such.[45]

Along with restrictive abortion legislation, colonisation introduced the idea that certain groups of women required greater surveillance due to their race/ethnicity and class. This was because successful colonisation depended upon the supposed "civilisation" of indigenous peoples: Spanish/English women were conceptualised as bearers of the civilising colonial culture, while indigenous women were conceptualised as an inherent threat to this process

[40] E Berriot-Salvadore, 'The Discourse of Medicine and Science' in N Zemon Davis, A Farge (eds), *A History of Women in the West Volume III: Renaissance and Enlightenment Paradoxes* (A Goldhammer tr, London, Belknap Press, 1995) 348-388; I Maclean, *The Renaissance Notion of Woman: A Study in the Fortunes of Scholasticism and Medical Science in European Intellectual Life* (CUP 1995) 76
[41] A Sanger, *Beyond Choice: Reproductive Freedom in the 21st Century* (New York, PublicAffairs 2004) 21
[42] ibid
[43] J Keown, *Abortion, Doctors and the Law: Some Aspects of the Legal Regulation of Abortion in England from 1803-1982* (CUP 1988) 3-4
[44] NE Jaffery, 'Reconceiving Motherhood: Infanticide and Abortion in Colonial Mexico' (2012) 37 Journal of Family History, 5
[45] J Keown, *Abortion, Doctors and the Law*, 3-5; JM Riddle, *Eve's Herbs*, 95-7

due to their unruly sexuality.[46] Moreover, ideas about appropriate sexual conduct and social propriety that were promoted by the colonial elites were internalised and adapted by the local populations.[47] These mores included the importance of respectability to maintaining social order; the centrality of controlling women's reproduction and sexuality to maintaining individual, family and societal respectability and stability; and conservative Catholicism, which became influential in El Salvador and central to national identity in Ireland. Chapters 4 and 5 will highlight the recurrent themes of the interaction of restrictive abortion legislation, disproportionate surveillance of women deemed potentially disruptive to the social order, and conservative sexual mores centred on women's behaviour in the contemporary implementation of restrictive abortion legislation in both countries. These understandings of respectability and conservative Catholic morals also interacted with Enlightenment discourse on the citizen to create the interrelated discourses of women as non-citizens, women as bearers of honour, women as bearers of nation, and women as bearers of future citizens. This influenced the creation and implementation of highly restrictive abortion legislation in postcolonial El Salvador and Ireland.

Enlightenment, Revolution, Independence

Enlightenment and Revolutionary philosophers perpetuated the longstanding consensus that women were incapable of full citizenship, and that women and their reproductive ability needed to be controlled in order to maintain social stability.[48] Women were non-citizens, bearers of honour, bearers of nation, and bearers of future citizens. Their reproduction and sexuality needed to be controlled to ensure the stability of the social order, and their reproduction and sexuality were the basis for their exclusion from full citizenship. These ideas persisted and took new forms in the independent nation-states of El Salvador and Ireland, directly influencing the criminalisation of abortion in both countries.

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[46] M O'Dowd, *A History of Women in Ireland, 1500-1800* (London, Routledge 2005) 250; J Ohlmeyer 'Conquest, Civilization, Colonization: Ireland, 1540-1660' in R Bourke, I McBride (eds), *The Princeton History of Modern Ireland* (Princeton University Press 2016), 30; S Migden Socolow, *The Women of Colonial Latin America*, 53, 56

[47] V Crossman, *Poverty and the Poor Law in Ireland, 1850-1914* (Liverpool University Press 2013) 22, 26; NE Jaffery, 'Reconceiving Motherhood' 16; M O'Dowd, *A History of Women in Ireland*, 14-16; J Ohlmeyer 'Conquest, Civilization, Colonization' 23, 27; MG Valiulis 'Power, Gender, and Identity in the Irish Free State', 128

[48] C Pateman, 'Equality, Difference, Subordination', 14-16; R Perry, 'Colonizing the Breast: Sexuality and Maternity in Eighteenth-Century England' in JC Fout (ed), *Forbidden History: The State, Society, and the Regulation of Sexuality in Modern Europe* (University of Chicago Press 1992) 108; JJ Rousseau (transl B Foxley), *Émile, or On Education* (tr B Foxley, first published 1762, Project Gutenberg) <http://www.gutenberg.org/files/5427/5427-h/5427-h.htm> accessed 22 August 2020

El Salvador

El Salvador became an independent republic in 1841 following over 300 years of brutal colonisation.[49] However, independence represented a continuation of colonisation's power dynamics, with its unequal racial, political, social and economic structures remaining largely intact.[50] During the 19th century, a centralised and authoritarian state was consolidated, one which alternated between oligarchical and military rule until the outbreak of civil war in the late 1970s.[51] These regimes promoted a discourse of Salvadoran national identity which idealised a mythic pre-Colombian past while denigrating contemporary indigenous peoples and poor *ladinos*/*mestizos*, and which, until recently, erased the existence of Afro-descendant, Asian, and Middle Eastern populations.[52] Throughout the 19th and 20th century, colonial ideas about women's place in society and the centrality of their honour to familial and societal stability remained largely unchallenged. Working class/*mestiza/campesina*/indigenous women and their sexuality were viewed as potentially disruptive to the social order, while middle-to-upper-class, white/*criollo*/Spanish women were the bearers of morality. As a result, all women were subjected to regulation and control but in ways that varied depending on their place in the racial and class hierarchy: poor and rural women were (and continue to be) subjected to greater surveillance, and for Salvadoran women of any geographical location, ethnicity or social class, the social norms of honour, deference to male authority, and the strict regulation of their sexuality and reproduction were (and often still are) ever-present.[53] Women's sexuality was the source of their and their families' honour, contraception was taboo since it was believed to make women promiscuous, and women were 'morally and religiously obligated' to remain faithful to their *compañero* (partner) for life, even if their partner was abusive or abandoned them.[54] It is unsurprising that the medieval and early-modern criminalisation of abortion and its underlying rationale was

[49] VJ Giusto, R Iuliano, 'Aportes para una historia socio-económica de El Salvador. Desde la colonia hasta la crisis del mercado común centroamericano' [1989] 108 Revista de Historia de América, 22-4
[50] ibid 23; E Dore, M Molyneux (eds), *Hidden Histories of Gender and the State in Latin America* (London, Duke University Press 2000), 39
[51] J Viterna, *Women in War*, 22-4
[52] RM DeLugan, ''*Turcos'* and '*Chinos'* in El Salvador: Orientalizing Ethno-Racialization and the Transforming Dynamics of National Belonging' (2016) 11 Latin American and Caribbean Ethnic Studies 142; J Suter, 'Pernicious aliens; and the *Mestizo* Nation: Ethnicity and the shaping of collective identities in El Salvador before the Second World War' (2001) 20 Immigrants & Minorities 26. See also M Cortez, 'Las huellas de la afrodescendencia en El Salvador' *elsalvador.com* (San Salvador, 29 August 2018) <https://www.elsalvador.com/noticias/nacional/las-huellas-de-la-afrodescendencia-en-el-salvador/513773/2018/> accessed 21 January 2021
[53] ibid, 27-8
[54] ibid

maintained in 19th-century Spanish America, including El Salvador. [55] The criminalisation of abortion reflected the ongoing belief in women's role as non-citizens who were obligated to maintain familial and societal honour, and to produce future citizens.

Such thinking continued into the 20th century: under the 1956 Penal Code, abortion was illegal except where there was a risk to the pregnant woman's life.[56] In response to widespread clandestine abortion and its contribution to high rates of maternal mortality, abortion laws were liberalised under the 1973 Penal Code: abortion was legal when it was the only means of saving the life of the mother, in the case of rape, and in the case of foreseeable serious foetal deformity.[57] Reduced penalties were imposed if a 'woman of good conduct' had an abortion in order to protect her reputation.[58] This final provision is especially telling in regard to the rationale underpinning this legislation: abortion was an exceptional matter that was only acceptable if it did not disrupt the patriarchal social order and women's subordinate position in it of non-citizen, bearer of legitimate future citizens, and bearers of honour.

The civil war (c. 1979-1992) opened up new spaces for women to challenge their exclusion from citizenship.[59] This was primarily the case among left-wing actors such as political parties and guerrilla groups such as the FMLN,[60] the student and trade union movements, and human rights organisations, but right-wing women were also active as funders for conservative organisations and paramilitary groups, and as founders and supporters of the right-wing ARENA[61] party. The experiences of left-wing women during the civil war led to

[55] NE Jaffery, 'Reconceiving Motherhood', 6
[56] UN Population Division, *Abortion Policies: A Global Review Volume I* (New York, UN Population Division 2002) 136-7
[57] ibid
[58] ibid
[59] P Hipsher, 'Right and Left-Wing Women in Post-Revolutionary El Salvador: Feminist Autonomy and Cross-Political Alliance Building for Gender Equality' in V González, K Kampwirth (eds), *Radical Women in Latin America, Left and Right*, 137, 138; K Kampwirth, *Feminism and the Legacy of Revolution*, 75-111; JD Shayne, *The Revolution Question*,19-67
[60] *Frente Farabundo Martí para la Liberación Nacional* (Farabundo Martí National Liberation Front). Disparate left-wing guerrilla groups formed the FMLN in 1980, which represented 'the military component of a broader revolutionary effort' that included civilian political groups. Following the UN-brokered peace negotiations of 1991-2, the FMLN became a political party. It remains one of the two main political parties in El Salvador. (See Crandall, *The Salvador Option*, 65-67, 467-476)
[61] *Alianza Republicana Nacionalista* (Nationalist Republican Alliance). Formed in September 1981 by far-right death squad leader Roberto D'Aubuisson and businesswoman Mercedes Gloria Salguero Gross, ARENA was explicitly modelled on the Reagan-era US Republican Party and its commitment to anti-communism, neoliberalism, and conservative social values. D'Aubuisson was the leader of one of the most notorious death squads of the civil war, the White Warriors Union, and he was named in the UN Truth Commission report as having ordered the execution of Archbishop Romero. In the later years of the civil war, he was heavily involved with the Ejército Salvadoreño Anticommunista (ESA, Salvadoran Anti-Communist Army) death squad, with

the establishment of the modern Salvadoran feminist movement. These women's experiences of newfound freedom, education and training, organising and campaigning, and discussing their individual and shared experiences led activists and combatants alike 'to question the social and sexual role assigned to Salvadoran women.'[62] Many women became aware of the fact that their romantic partners, fellow trade union, party, or NGO members, and fellow guerrilleros were committed to class warfare, but not gender equality.[63] In response, existing women's organisations became more feminist in outlook and new, explicitly feminist groups were formed. [64]

It is common in post-revolutionary or post-conflict societies for the new regime to re-establish order by enacting measures against women, such as by curtailing or forbidding participation in politics or the labour force, or by restricting reproductive autonomy through the criminalisation of abortion.[65] This was evident in the immediate aftermath of the Salvadoran civil war. Following ARENA's 1994 election win, major obstacles to the advancement of women's full citizenship were implemented, including the complete criminalisation of abortion.[66] That year, the Minister for Justice proposed maintaining the 1973 legislation on abortion with some minor changes in the form of time limits.[67] In 1995, the FMLN presented a bill to permit abortion in the case of rape, risk to the pregnant woman's life, or in the case of serious foetal abnormalities.[68] Seeing these proposals for

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ARENA serving as the 'legitimate exterior' for this 'terrorist network.' ARENA remains one of the two main political parties in El Salvador. (See Crandall, *The Salvador Option*, 189-195, 482)

[61] Although beyond the geographical scope of this research project, it is important to note that the African Union has adopted the Maputo Protocol, article 14 of which requires States Parties to authorise medical abortion in certain circumstances.

[62] K Kampwirth, *Feminism and the Legacy of Revolution*, 75-111; JD Shayne, *The Revolution Question*, 19-67; MT Tula, *Hear My Testimony*, 3-4, 69; J Viterna, *Women in War*, 118, 154-156, 168

[63] K Kampwirth, *Feminism and the Legacy of Revolution*, 75-111; JD Shayne, *The Revolution Question*, 19-67; MT Tula, *Hear My Testimony*, 3-4, 69; J Viterna, *Women in War*, 118, 154-156, 168; V González, K Kampwirth 'Introduction' in V González, K Kampwirth (eds), *Radical Women in Latin America, Left and Right*, 13

[64] P Hipsher 'Right and Left-Wing Women in Post-Revolutionary El Salvador', 138; Las Dignas, 'Quienes somos' (Las Dignas, 2020) <http://www.lasdignas.org.sv/quienes-somos/> accessed 22 August 2020; Las Mélidas, 'Historia' (Las Mélidas, 2020) <https://www.lasmelidas.org.sv/index.php/historia> accessed 22 August 2020; S Pinto, 'Desafiando la prohibición total del aborto en El Salvador' (Amnesty, 21 January 2015) <https://www.amnesty.org/es/latest/campaigns/2015/01/defying-el-salvador-s-total-ban-on-abortion/> accessed 22 August 2020; IC Silber, J Viterna, 'Women in El Salvador: Continuing the Struggle' in J Gelb, M Lief Palley (eds), *Women and Politics Around the World: A Comparative History and Survey. Volume Two: Country Profiles* (Oxford, ABC Clio 2009), 333; M Thomson, *Women of El Salvador*, 94-99, 101, 102-3

[65] MG Valiulis, 'Power, Gender, and Identity in the Irish Free State', 127

[66] K Kampwirth, *Feminism and the Legacy of Revolution*, 92-5

[67] Amnesty International, *On the Brink of Death*,12; VH Mata Tobar, 'Reflexión sobre la legislación relativa en El Salvador' in Agrupación Ciudadana, *Del hospital a la cárcel,* 46

[68] K Kampwirth, *Feminism and the Legacy of Revolution*, 102-3; IC Silber, J Viterna, 'Women in El Salvador', 337

discussion and reform as a threat to 'traditional values' and the social order based upon them, the Catholic Church and anti-choice groups aligned with it mounted a campaign proposing that abortion be completely banned.[69] Given support for this proposal within the conservative ARENA government, the legitimacy of the Catholic Church as a political actor in El Salvador because of its important role as a peace broker during and after the civil war, and the reluctance of feminist organisations to adopt a clear stance on such a controversial issue, a new provision was approved in 1997.[70] Entering into force in 1998, it criminalised abortion without exception.[71] A person who performs an abortion with the woman's consent, or a woman who self-induces or consents to someone else inducing her abortion, can be imprisoned for two to eight years. A person who performs an abortion to which the woman has not consented can be sentenced to between four and ten years' imprisonment; if the person is a healthcare worker, they can be sentenced to between six and twelve years in prison.[72] In order to ensure that these new provisions were not unconstitutional, the Constitution was reformed and the 'unborn' obtained a special constitutional status: the Salvadoran constitution defines life as beginning at the moment of conception.[73]

Not only is abortion completely criminalised in El Salvador, those suspected of having had the procedure are actively prosecuted.[74] In many instances, women have had the charge of abortion changed to that of aggravated homicide – the murder of a close family member – which carries a penalty of up to 40 years in prison.[75] The women who have been prosecuted and imprisoned for abortion and aggravated homicide are mostly poor, rural, and indigenous/*mestiza*, representing a continuation of their disproportionate surveillance since colonial times.[76] The concept of aggravated homicide also represents the continuity of colonial-era attitudes and legislation: colonial Spanish legislation classed abortion and infanticide as parricide, the murder of any persons related by consanguinity.[77] This legislation in turn had been informed by civil and canon law that considered abortion a crime because it

[69] ibid
[70] CRR, *Persecuted*, 17; K Kampwirth, *Feminism and the Legacy of Revolution*, 95
[71] Agrupación Ciudadana, *Del hospital a la cárcel*, 47
[72] Asamblea Legislativa de El Salvador, Código Penal, Decreto No. 1030, Diario Oficial No. 105, Tomo 335 (10 junio 1997), arts 133-137
[73] Constitución de la República de El Salvador, Decreto No. 38, Diario Oficial No. 234, Tomo 281 (16 diciembre 1983, reformada por Decreto Legislativo No. 36, Diairio Oficial No. 102, Tomo 383, 4 junio 2009), art 1
[74] Agrupación ciudadana, *Del hospital a la cárcel,* 8, 10; Amnesty, *On the Brink of Death*, 36, 38
[75] ibid
[76] Agrupación Ciudadana*, Del hospital a la cárcel*, 16-26; CRR, *Persecuted*, 46-51; MT Ochoa, S García, *¿Por qué me pasó esto a mí?,* 7-8, 41
[77] NE Jaffery, 'Reconceiving Motherhood' 5

deprived a man of a potential heir and deprived the nation of a potential future citizen. In modern-day El Salvador, then, the complete criminalisation of abortion represents the denial of women's citizenship and the control of their sexuality and reproduction in the service of the stability and continuity of a patriarchal social order. Restrictions on their sexual behaviour and their ability to access contraception or abortion were and continue to be based on the idea that they were incapable of full citizenship because their role in society is to reproduce future citizens and maintain the family's/nation's honour. The ways in which this exclusion resulted in the denial of women's right to have rights and to determine the scope of those rights, and the ways in which feminists contested this exclusion at the domestic, regional, and international levels of the human rights system, is the subject of Chapter 4 of this thesis. Similar dynamics are apparent in the criminalisation of abortion in Ireland.

Ireland

Although independence came to Ireland in 1922, almost eighty years after El Salvador, a similar unwillingness among independence leaders to challenge the gender order was evident. In fact, efforts were redoubled to exclude women from full citizenship. The construct of national identity to which the new leaders of the Irish Free State subscribed was informed by an ideal of the Irish citizen and nation as morally distinct from and superior to that of the United Kingdom. This distinction and superiority was best realised through ensuring that conservative Catholicism, familism, and traditionalism – and their keen focus on women's respectability – permeated every aspect of law and society.[78] In this context, Irish women's role in the new nation was not to be a citizen, but rather the reproducer of citizens: a mother whose individual virtue represented the nation's virtue.[79] Therefore, women's participation in the public sphere was constructed as harmful to the nation as a whole: this resulted in constitutional provisions and legislation limiting women's rights to participate in political life

[78] C Boylan, 'Famine' in R Bourke, I McBride (eds), *The Princeton History of Modern Ireland*, 405, 408; V Crossman, *Poverty and the Poor Law in Ireland,* 34; D Ferriter, *Occasions of Sin*, 4-5; C Kennedy 'Women and Gender in Modern Ireland' in R Bourke, I McBride (eds), *The Princeton History of Modern Ireland*, 367; L Smyth, *Abortion and Nation*, 37-8, 43; MG Valiulis 'Power, Gender, and Identity in the Irish Free State', 128

[79] I Bacik, 'From Virgins and Mothers to Popstars and Presidents: Changing Roles of Women in Ireland' [2007] 35 The Irish Review, 102-3; M Enright ''Involuntary Patriotism'', 38, 41, 43; M Luddy, 'Sex and the Single Girl in 1920s and 1930s Ireland' [2007] 35 The Irish Review, 80; AK Martin 'Death of a Nation: Transnationalism, Bodies and Abortion in Late Twentieth-Century Ireland' in T Mayer (ed), *Gender Ironies of Nationalism*, 67; L Smyth, *Abortion and Nation*, 45

or work outside the home.[80] It also resulted in the passage of legislation designed to control women's reproduction and sexuality, in line with Catholic teaching and the conservative postcolonial gender order. The 1930 papal encyclical *Casti Connubii* condemned abortion, contraception and the dissemination of information about them and so the Criminal Law (Amendment) Act of 1935 prohibited the sale, importation and advertisement of contraceptives.[81] Information on contraception and abortion was prohibited through the Censorship of Publications Acts of 1929 and 1946.[82] These restrictions on women's political, economic, and reproductive freedom were also expressed through the formalisation, consolidation and expansion of Ireland's 'architecture of containment':[83] the Magdalene laundries, mother and baby homes, reform schools, and industrial schools in which thousands of women and girls were incarcerated for transgressing social mores and sexual propriety.[84] Women and girls' incarceration in these institutions 'was operating smoothly by 1933' and continued until 1996.[85] As in El Salvador, the extent to which and the ways in which this legislative context impacted upon women depended on their position in the race/class/gender hierarchy. Women and girls whose behaviour and sexuality was deemed in greater need of surveillance – the poor, the working-class, the disabled, women and girls of colour or who had a mixed-race child, and Travellers – were more likely to be incarcerated in these institutions or resort to unsafe methods of contraception and abortion.[86]

As for abortion, the colonial-era 1861 Offences Against the Person Act was maintained since it was in keeping with the newly-independent Irish state's attitude to reproduction and sexuality. Under Sections 58 and 59 of the 1861 Act, the punishment for women who had an abortion or those who assisted them was life imprisonment, while the supply of abortifacients

[80] Bunreacht na hÉireann, Article 41.2.1º, 41.2.2º; Civil Service Regulation Act 1924, s 4; Civil Service Regulation (Amendment) Act 1926, s 2(3)(3); Juries Act 1927, s5 and First Schedule, Part II; Conditions of Employment Act 1936, s 12; J Redmond, J Harford, '"One Man One Job": The Marriage Ban and the Employment of Women Teachers in Irish Primary Schools' (2010) 46 Pedagogica Historica, 639, 649
[81] Pope Pius XI, '*Casti Connubii* (On Christian Marriage). Encyclical of Pope Pius XI on Christian Marriage' (31 December 1930) <http://www.papalencyclicals.net/Pius11/P11CASTI.HTM> accessed 15 October 2020; Criminal Law Amendment Act 1935, para 17
[82] Criminal Law Amendment Act 1935, para 16; Censorship of Publications Act, 1946, Section 7(b)
[83] JM Smith, *Ireland's Magdalen Laundries*, 2
[84] C Bradley 'The Construction of Teenage Parenting in the Republic of Ireland' in A Kamp, M McSharry (eds), *Re/assembling the Pregnant and Parenting Teenager: Narratives from the Field(s)* (Oxford, Peter Lang 2018), 154-5; JM Smith, *Ireland's Magdalen Laundries*, 2, 5-17, 45-77; M Luddy, 'Sex and the Single Girl', 79; JM Smith, *Ireland's Magdalen Laundries*, 2, 5-17; N Whitty 'Law and the Regulation of Reproduction in Ireland: 1922-1992' (1993) 43 The University of Toronto Law Journal, 854
[85] JM Smith, *Ireland's Magdalen Laundries*, 53, 42
[86] D Ferriter, *Occasions of Sin*, 16, 18, 57, 108, 127, 131, 193, 202, 253-4

(substances used to induce abortion) was punishable by three years in prison.[87] The 1861 Act had been influenced by the 1803 Ellenborough Act, which framed female sexuality as a threat to public health and morality and which categorised early-term abortions ('before quickening') as a felony and later abortions ('after quickening') as murder.[88] The Ellenborough Act represented the continuity of the criminalisation of abortion in Classical, medieval and early-modern times and its underlying rationale, namely the denial of women's full citizenship, and the need to regulate women's sexuality to ensure the continuity of the patriarchal social order. The influence of the Ellenborough Act on Sections 58 and 59 of the 1861 Act represents further continuity of this discourse. These two provisions were in force in Ireland until 2013. Therefore, as in El Salvador, a direct line can be traced between contemporary Irish abortion legislation and the control of women's sexuality and reproduction to exclude them from citizenship and ensure the continuity of a patriarchal social order. The introduction of the 8th Amendment to the Constitution in 1983, the other main basis of Ireland's abortion legislation until 2018, was informed by similar exclusionary, misogynistic thinking around women, citizenship and nation.

During the late 1970s and early 1980s, anti-choice activists in Ireland mobilised in response to the perceived threat that feminism and liberal foreign influences posed to traditional, Irish, Catholic values and the patriarchal gender order they supported.[89] In 1980, the Pro-Life Amendment Campaign (PLAC) was established. Consisting of right-wing, conservative, Catholic individuals and organisations such as the Society for the Protection of Unborn Children (SPUC) and Opus Dei, PLAC argued that failing to recognise and protect the right to life of the unborn in the Irish Constitution in the face of 'secular inroads from abroad'[90] threatened the survival of the Irish, Catholic nation.[91] In 1983, a referendum to introduce an amendment to the Irish Constitution protecting the right to life of the unborn carried 66% to 33%, with an electoral turnout of 50%.[92] It became Article 40.3.3° of the Irish Constitution.

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[87] 1861 Offences Against the Person Act 24 & 25 Vict c 100, 6 August 1861, secs 58 and 59
[88] 'Power, Gender, and Identity in the Irish Free State', 128; S Gavigan 'The Criminal Sanction as it Relates to Human Reproduction: The Genesis of the Statutory Prohibition of Abortion' (1985) 5 The Journal of Legal History, 20, 21, 30, 31. P Morriss, 'The Statute Law on Abortion in Ireland' in J Schweppe (ed), *The Unborn Child, Article 40.3.3º and Abortion in Ireland*, 279
[89] U Barry 'Abortion in the Republic of Ireland'; E Mahon, 'Abortion Debates in Ireland: An Ongoing Issue' in D McBride Stetson (ed), *Abortion Politics*, 160
[90] E Mahon, 'Abortion Debates in Ireland', 161
[91] U Barry 'Abortion in the Republic of Ireland', 58; L Smyth, *Abortion and Nation*, 91; N Whitty 'Law and the Regulation of Reproduction in Ireland', 864
[92] ibid

Also known as the 8th Amendment, it was one of the fundamental constitutional rights and read:

> The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.[93]

As in El Salvador then, the criminalisation of abortion and the constitutional protection of unborn life created a legislative context in which abortion was framed as threatening to the survival of the patriarchal social order. Women were denied the status of full citizen on the basis of their reproductive function through the criminalisation of abortion. The ways in which this impacted on women in Ireland, and the ways in which they effectively utilised the language and mechanisms of human rights at the domestic, regional and international levels of the legal system to contest this exclusion, is the subject of Chapter 5 of this thesis. This section will now turn to the ways in which women and feminists have challenged this exclusion from citizenship since at least the medieval period, illustrating the contested and dynamic nature of the discourse of citizenship, and illustrating the long history of feminist engagement with it.

Feminist responses to women's exclusion from citizenship

While women were excluded from citizenship from its inception, this exclusion was not met with acquiescence. There is evidence of alternative proto-feminist and feminist understandings of citizenship from at least the medieval period, such as Cristine de Pizan's *Le Livre de la Cité des Dames* (The Book of the City of Ladies).[94] In the early-modern and Enlightenment period, proto-feminist thinking was evident in Latin America and Europe, with women advocating for marriage law reform, access to education, and the right to participate in public life.[95] During the Revolutionary period, in response to philosophers' and political actors' ongoing exclusion of women from full citizenship and the public sphere,

[93] Bunreacht na hÉireann, Article 40.3.3˚
[94] AS Fraser 'Becoming Human: The Origins and Development of Women's Human Rights' (1999) 21 HRQ, 858-60
[95] ibid, 860-1; G Meaney, M O'Dowd, B Whelan (eds), *Reading the Irish Woman: Studies in Cultural Encounter and Exchange, 1714-1960* (Liverpool University Press 2013) 13-53; S Rivera Berruz 'Latin American Feminism'

feminists articulated alternative visions for a post-Revolutionary social order in which women could realise citizenship and membership of the public, political sphere.[96]

This early feminist writing and campaigning laid the foundations for modern feminist activism in the 19th and early 20th century.[97] The ways in which the early feminist movement did so in El Salvador and Ireland will be discussed in Chapters 4 and 5 respectively. These feminist campaigns for women's inclusion in the citizenship project took place not only at the domestic level, but also transnationally. Through their involvement in the anti-slavery, women's suffrage, and labour rights movements of the mid-19th to early 20th century, feminists from all over the world met at international conferences and formed international associations.[98] These events and organisations served as useful sites for women to articulate alternative understandings of citizenship and contest the 'social, legal, and economic injustice' to which women were subjected.[99] The International Woman Suffrage Alliance, the Women's International League for Peace and Freedom, and other transnational feminist organisations campaigned for this understanding of citizenship to be brought to bear on the emerging practice of international law.

At the 1919 Paris Peace Conference, during which the decision was taken to form the League of Nations, feminists made use of the language of rights and citizenship to campaign for their needs, interests, and full citizenship to be recognised in the Covenant of the League of Nations.[100] From the emergence of the modern international law system, then, feminists used the language and mechanisms of human rights to advocate for women's full citizenship, and to contest the construction of rights and mechanisms that did not fully represent or respond to their needs. The right to regulate their own sexuality and reproduction proved to be one of the most controversial of these demands from the beginning.

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[96] AS Fraser 'Becoming Human' 862-864, 874; O de Gouges, 'Declaration des droits de la femme det de la citoyenne' <https://gallica.bnf.fr/essentiels/anthologie/declaration-droits-femme-citoyenne-0> accessed 23 August 2020; M Wollstonecraft, *A Vindication of the Rights of Woman: With Strictures on Political and Moral Subjects* (first published 1792, CUP 2012)

[97] E Crawford, *The Women's Suffrage Movement in Britain and Ireland: A Regional Survey* (Abingdon, Routledge 2006), 252-276; M Luddy, 'Feminism',474-477; S Rivera Berruz, 'Latin American Feminisms'

[98] AS Fraser, 'Becoming Human', 870-2, 877

[99] IWSA principles, cited in AS Fraser, 'Becoming Human', 878

[100] AS Fraser, 'Becoming Human 880; F Gaer 'Women, International Law and International Institutions: The Case of the United Nations' (2009) 32 Women's Studies International Forum, 60

The need for women to be able to control their own reproduction and sexuality was recognised as integral to the realisation of their full citizenship by at least some feminists as early as the 19th century.[101] Due to the taboo nature of reproduction and sexuality – especially women's – it was only in the 1920s that an early form of reproductive rights, the idea of "voluntary motherhood", became a subject for more widespread public discussion. Worldwide, feminists campaigned for access to contraception and abortion, arguing that the ability to regulate their fertility was as necessary to their full citizenship as the right to vote or the right to work.[102] During the interwar and post-war periods, there were numerous international conferences on birth control, sexuality, and voluntary motherhood. Ranging from racist, ableist eugenicists to advocates for women and LGBT rights, the disparate and often problematic strands of the birth control/family planning/voluntary motherhood movements coalesced into the International Planned Parenthood Foundation (IPPF), which was founded in 1952.[103] Birth control advocates recognised that access to contraception and abortion were necessary to guarantee reproductive health and bodily autonomy, which in turn would ensure 'women's full exercise of citizenship [emphasis added].'[104] The foundation of the UN in 1945, the OAS in 1948, and the CoE in 1949 created a new arena in which women could put forward this understanding of citizenship. The ways in which they did so are the subject of the next part of this chapter.

Summary

Part 1 of this chapter discussed how citizenship is understood for the purposes of this project: as a contested, dynamic process in which actors claim their right to have rights and determine the scope of those rights. The ways in which the Western liberal concept of citizenship excluded and oppressed women by constructing them as non-citizens, bearers of future citizens, and bearers of the nation's honour, and the ways in which this influenced legislation controlling their reproduction and sexuality such as the criminalisation of abortion, were illustrated with reference to El Salvador and Ireland. The potential for citizenship to be re-imagined as an inclusive, emancipatory process for women, feminist awareness of this

[101] M Luddy 'Feminism' 472
[102] AS Fraser, 'Becoming Human' 883-885
[103] V Claeys, 'Brave and Angry – The Creation and Development of the International Planned Parenthood Federation' (2010) 15 The European Journal of Contraception & Reproductive Health Care, S68-9; R Dose 'The World League for Sexual Reform: Some Possible Approaches' (2003) 12 Journal of the History of Sexuality 1
[104] RP Petchesky, 'Owning and Disowning the Body', 257

potential, and feminist awareness of the need for women to have reproductive autonomy in order to realise their full citizenship, was also discussed.

Part 2 of this chapter will consider feminists' continued contestation of women's exclusion from citizenship in IHRL, a process which is epitomised by the development of the concept of SRHRs from the 1970s to the present. Applying the theoretical framework of a multilevel feminist citizenship project to the development of SRHRs makes visible its connections to the earlier struggles for full citizenship considered in part 1, and the ongoing work of feminists at the international, regional, and national level to ensure that IHRL represents women's right to have rights, and their right to determine the scope of those rights.

2.2. SRHRs as a multilevel feminist citizenship project

Introduction

This part concerns the origins, evolution, and growing legitimacy of SRHRs in IHRL, demonstrating that this process can be understood as a multilevel feminist citizenship project because it exemplifies feminists reshaping the language, scope and mechanisms of human rights so that they represent and respond to women's lived realities.

The first section considers the ways in which women had to contest their exclusion from the new post-war international organisations and the idea of human rights being formulated by them, and how this resulted in issues such as "voluntary motherhood" being sidelined. The second section discusses how the process of feminists contesting women's exclusion from citizenship and rights intensified during the UN Decade for Women (1975-1985), and culminated in an important paradigm shift in UN development and human rights work in the 1990s which facilitated the development and legitimisation of SRHRs. The third section describes SRHRs' increasing legitimacy within IHRL since the 2000s, as evidenced by the UN's increasingly clear commitment to them.

2.2.1. The early years of the UN, 1945-1968

The creation of the post-war international human rights system represented a new site in which women were excluded from citizenship, but also a new site in which women could contest this exclusion.

Women's exclusion from IHRL – their exclusion from the right to have rights and to determine the scope of those rights – took several interlinked forms. Firstly, the subject of human rights was conceptualised as 'white, Anglo-Western/European, Judeo-Christian, educated, propertied, heterosexual, able-bodied' and above all 'male.'[105] This meant that these identities and experiences served as the normative standard for legal subjects, resulting in all other categories being marked as "other" – either in need of "special protection" due to their inferiority, or in need of greater surveillance and control due to their deviance.[106] Secondly, the public/private dichotomy resulted in rights being divided into the binary of civil/political versus economic/social, with civil and political rights being afforded higher priority.[107] It also resulted in distinctions being made between issues deemed the exclusive or main focus of national (domestic) law and those deemed worthy of international legal attention – more often than not, those deemed to be at the discretion of domestic state governments had a disproportionate impact on women's ability to exercise full citizenship, such as health or economic policy.[108] Thirdly, rights were defined in ways which did not represent or respond to the lived realities of women and other historically oppressed groups: specific concerns such as rights within marriage or reproductive rights that were barriers to full citizenship were either framed in ways which were unhelpful to protecting and advancing women's rights, or were not recognised as rights concerns at all.[109] As a result, human rights at best could not respond to women's needs, and at worst actively worked against them. The ways in which these three issues persist in modern IHRL will be explored in Chapter 3.

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[105] BE Hernández-Truyol 'Human Rights Through A Gendered Lens', 31. See also V Spike Peterson 'Whose Rights? A Critique of the "Givens" in Human Rights Discourse' (1990) 15 Alternatives 303

[106] ibid

[107] H Charlesworth, C Chinkin, 'The Gender of Jus Cogens'; S Wright 'Human Rights and Women's Rights: An Analysis of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women' in KE Mahoney, P Mahoney (eds), *Human Rights in the Twenty-First Century: A Global Challenge* (London, Martinus Nijhoff Publishers 1993) 77

[108] H Charlesworth, C Chinkin, 'The Gender of Jus Cogens'; V Spike Peterson 'Whose Rights?'; K Walker, 'An Exploration of Article 2(7) of the United Nations Charter as an Embodiment of the Public/Private Distinction in International Law' (1994) 26 NYU Journal of International Law and Politics 173; S Wright 'Human Rights and Women's Rights', 77

[109] C Chinkin, 'Gender Inequality and International Human Rights Law' in A Hurrell, N Woods (eds), *Inequality, Globalization, and World Politics* (OUP 2003), 107-8; H Charlesworth, C Chinkin, S Wright, 'Feminist Approaches to International Law'; R Johnstone, 'Feminist Influences on the United Nations Human Rights Treaty Bodies' (2006) 28 HRQ, 148-154

While the foundation of the modern human rights system perpetuated women's exclusion from citizenship and rights, it also established a forum in which women could contest this exclusion.[110] Latin American and South Asian feminists were integral to these efforts. For example, CIM lobbied for the creation of a body dedicated to women's human rights within the UN, resulting in the foundation of the UN Commission on the Status of Women (UN CSW) in 1946.[111] The UN CSW, along with the Third Committee on Social, Humanitarian and Cultural Affairs, enabled feminist actors to influence the drafting of the UN Charter and the Universal Declaration of Human Rights (UDHR).[112] They campaigned for explicit commitments to women's rights in both documents and as a result they both contain references to the equal rights of men and women, and to non-discrimination on the basis of sex.[113] By ensuring the establishment of the CSW and by influencing the drafting of the UN Charter and the UDHR, feminist activists planted a seed for IHRL's growing responsiveness to feminist interpretations of rights and citizenship in subsequent decades.[114] Between a change in institutional culture at the UN in the late 1960s and early 1970s on the one hand and the emergence of "second-wave feminism" in the same period on the other, these feminist gains were built upon and expanded into the revolutionary idea of SRHRs.

2.2.2. The emergence of reproductive rights at the UN, 1968-1985

In the late 1960s and early 1970s, development and human rights received more focus in the UN as a result of newly independent Third World countries joining the organisation.[115] This is significant for SRHRs because they have their origins within and in response to both the UN's development and human rights work. The UN's initial approach to human rights was largely exclusionary of historically oppressed groups, and so too was its development work, which was seen as a purely economic issue of secondary importance to the UN's political work of maintaining peace and security.[116] UN development work was also informed by the population control approach, which holds that family planning should be promoted and

[110] H Charlesworth, C Chinkin, *The Boundaries of International Law*, 14, 201
[111] E DuBois, L Derby 'The Strange Case of Minerva Bernardino', 47; ECOSOC Resolution 11(II) 'Commission on the Status of Women, Resolution adopted 21 June 1946 (document E/90 and document E/84) para 6
[112] R Adami, 'Intersectional Dialogue – Analyzing Power in Reaching a Universal Declaration of Human Rights in 1948 on Conflicting Grounds' (2018) 17 Journal of Human Rights 359
[113] ibid, 359, 361; E DuBois, L Derby, 'The Strange Case of Minerva Bernardino', 48
[114] F Gaer, 'Women, International Law and International Institutions', 61
[115] ibid, 63
[116] D Otto 'A Post-Beijing Reflection on the Limitations and Potential of Human Rights Discourse for Women' in KD Askin, DM Koenig (eds), *Women and International Human Rights Law Volume 1*, 115

practiced in order to prevent overpopulation and political instability in the Third World.[117] The need to maintain an international social order of First World dominance and Third World subordination through the control of Black/Indigenous/racialised women's bodies and sexuality permeates this approach to development, and represents the continuation of colonialist, imperialist thinking about the inherently disruptive and unruly nature of the subaltern. As with human rights, then, the UN approach to development did not reflect or respond to women's needs and women's agency; instead it actively worked against them. It was largely in response to the inability of the international politico-legal system to acknowledge women's needs and realities, and the violations of women's autonomy, dignity and personhood arising from this, that the concept of reproductive rights, which eventually became SRHRs, was formulated.

In 1968, the first UN International Conference on Human Rights was held in Tehran to mark the 20th anniversary of the UDHR's adoption and to set the agenda for the UN's future human rights work. Recognising the opportunity to bring women's specific needs and realities into the discourse of human rights, UN CSW delegates and the International Planned Parenthood Federation (IPPF) lobbied to have access to birth control recognised as a human rights issue.[118] As a result, the Final Declaration included 'the basic human right' of parents 'to decide freely and responsibly on the number and spacing of their children, and a right to adequate education and information in that respect.'[119] This served as the starting point for the development of SRHRs in subsequent decades, and represented feminist engagement with IHRL to ensure it responded to women's needs and realities.

In 1975, the Declaration of Mexico expanded upon the Proclamation of Tehran's definition of a right to family planning, referring to the right of individuals and not just couples to decide 'whether or not to have children as well as to determine their number and spacing.'[120] The 1975 Declaration of Mexico is important for these developments, and also because of the context in which it was proclaimed. The 1975 Mexico City Conference was the first of four

[117] M Goldberg, *The Means of Reproduction: Sex, Power, and the Future of the World* (New York, Penguin Press 2009) 43-68; B Hartman, *Reproductive Rights and Wrongs: The Global Politics of Population Control* (revised edn, Boston, South End Press, 1995) 23-4, 37; I Tinker, 'The Camel's Nose: Women Infiltrate the Development Project' in R Baksh, W Harcourt (eds), *The Oxford Handbook of Transnational Feminist Movements*, 136, 143
[118] Claeys, 'Brave and Angry', S73; AS Fraser, 'Becoming Human', 885
[119] ibid
[120] UNGA, 'Declaration of Mexico on the Equality of Women and their Contribution to Development and Peace' (E/CONF.66/34, 2 July 1975) para 12

UN World Conferences on Women and marked the beginning of the UN Decade for Women, an initiative for which the UN CSW had lobbied.[121] The Mexico City Conference served as 'a massive global consciousness-raising movement' for the modern transnational feminist movement.[122] The World Plan of Action (WPA) adopted at this conference called for wide-ranging social, economic and political change to advance women's human rights, and called for the drafting and adoption of a convention on the elimination of discrimination against women.[123] Their activism resulted in the drafting, adoption, and entry into force of CEDAW.[124] The development of reproductive rights, the UN Decade for Women, and CEDAW represent necessary correctives to women's initial exclusion from the multilevel citizenship project of IHRL. Antrobus states that the UN Decade for Women 'must be seen in the context of international debates around issues of citizenship.'[125] Therefore, transnational feminist activism around SRHRs at the UN should be understood as an integral part of the multilevel feminist citizenship project, one which seeks not simply to correct women's exclusion from citizenship but to transform its very nature. This process intensified in the 1980s and 1990s.

The momentum afforded the transnational feminist movement by the UN Decade for Women meant that feminist criticisms of the population control approach to development began to have an impact in the 1980s.[126] Feminists drew attention to the ways in which women in the Global South were being treated as 'targets' and 'users' of coercive family planning programmes, characterised by the use of forced sterilisation and unsafe contraceptive devices, which were focused on driving down birth rates to ensure continued provision of foreign aid and development loans.[127] In response to these issues, the growth of conservatism and neoliberalism in the 1980s, and the AIDs pandemic, the concept of reproductive rights/reproductive freedom was developed. Reproductive rights/freedom is defined as the

[121] AS Fraser, 894; UNGA Resolution 3520 (XXX), 15 December 1975
[122] P Antrobus, *The Global Women's Movement: Origins, Issues and Strategies* (London, Zed Books 2004), 33; C Bunch, 'Opening Doors for Feminism: UN World Conferences on Women' (2012) 24 Journal of Women's History, 213-4; R Connell 'Rethinking Gender from the South' (2014) 40 Feminist Studies 518; AS Fraser, 895
[123] CEDAW Committee, 'Progress Achieved in the Implementation of the Convention on the Elimination of All Forms of Discrimination against Women: Report by the Committee on the Elimination of Discrimination Against Women' (A/CONF.177/7, New York, United Nations 1995) paras 11-13
[124] ibid, paras 10-14
[125] P Antrobus, *The Global Women's Movement*, 28
[126] S Corrêa, R Petchesky, 'Reproductive and Sexual Rights: A Feminist Perspective' in G Sen et al (eds), *Population Policies Reconsidered*, 107, 108
[127] E Galeano, *The Open Veins of Latin America*, 5-6; JS Jaquette, KA Staudt, 'Politics, Population and Gender: A Feminist Analysis of US Population Policy in the Third World' in KB Jones, AG Jónasdóttir (eds), *The Political Interests of Gender: Developing Theory and Research with a Feminist Face* (London, Sage 1988) 223, 230

right of 'all women, regardless of class, race, ethnicity, sexual orientation, or physical ability…to have, or not to have, children with dignity and with all the necessary material conditions to make raising children a sustainable life choice.'[128] Black American and Global South feminists played a vital role in articulating this concept and in advocating for the transformative approach to political, legal, and economic structures necessary for its full realisation.[129] During the UN human rights conferences of the 1990s, they brought this understanding of reproductive rights/freedom to bear on the language and mechanisms of human rights. As a direct result of their efforts, the concept of SRHRs was developed within IHRL in subsequent decades.

2.2.3. From reproductive rights to sexual and reproductive health and rights: 1990s to present

The work of transnational feminist coalitions before and during the UN conferences in the 1980s and 1990s was instrumental in ensuring that women's rights, including SRHRs, were given particular attention at the 1993 Vienna World Conference on Human Rights, the 1994 International Conference on Population and Development (ICPD), and the 1995 Fourth World Conference on Women in Beijing.[130] The final documents of these three conferences are testament to the ability of transnational feminist activists to reshape the language and mechanisms of human rights to represent and respond to women's realities and so advance their full citizenship. The final documents also provided an impetus to the UN human rights system to incorporate and develop SRHRs in their jurisprudence, as evidenced by the increasing willingness of these bodies to engage with the concept since the 2000s. Therefore, as a direct result of feminist activism around human rights, SRHRs have become a recognised and legitimate family of rights within IHRL.

As a direct result of transnational feminist activism at the conference and parallel NGO forum, the Vienna Declaration and Programme of Action (VDPA) reflected their slogan,

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[128] RP Petchesky, 'Owning and Disowning the Body', 255

[129] P Antrobus, 'DAWN, the Third World Feminist Network: Upturning Hierarchies' in R Baksh, W Harcourt (eds), *The Oxford Handbook of Transnational Feminist Movements*, 159; S Corrêa, R Reichmann, *Population and Reproductive Rights*, 62-4; DAWN, 'History' (DAWN, 2019) <http://dawnnet.org/about/history/> accessed 21 May 2019; DAWN, 'Vision' (DAWN, 2019) <http://dawnnet.org/about/vision/> accessed 21 May 2019; RP Petchesky, *Reproductive and Sexual Rights: Charting the Course of Transnational Women's NGOs* (Geneva, UNRISD 2000), 4-5; J Silliman et al, *Undivided Rights: Women of Color Organize for Reproductive Justice* (Chicago, Haymarket Books 2016)

[130] R Petchesky, *Global Prescriptions*, 35

'women's rights are human rights.' [131] In regard to reproductive rights, the VDPA expanded on the 1968 Proclamation of Tehran and the 1975 Declaration of Mexico by framing access to 'the widest range of family planning services' as a woman's human rights issue, and by emphasising its centrality to the full realisation of women's equality, right to the highest attainable standard of health, the right to education, and the right to seek, receive and impart information.[132] The ability of feminist transnational activists to place women's issues on the human rights agenda, and to reshape human rights to respond to these issues, also informed the outcomes of the International Conference on Population and Development (ICPD) held in Cairo the following year. It was at this Conference that the contemporary definition of reproductive rights in IHRL was first articulated.

The ICPD's Programme of Action (ICPD PFA) represented a successful result of 'years of concerted effort by women's health movements around the world to gain recognition of women's reproductive and sexual self-determination as a basic health need and human right.'[133] It also adopted an intersectional approach to a certain extent by recognising the differential impact of not just gender but also age, race, and socioeconomic background on access to reproductive healthcare, and by recognising that a transformative approach to law, politics and economics was required to address these issues and so realise reproductive rights.[134] The ICPD PFA set out the definitions of the concepts of reproductive health, reproductive healthcare, and reproductive rights that inform IHRL today.[135] Reproductive rights are defined as 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', as well as 'the right to attain the highest standard of sexual and reproductive health', and the 'right to make decisions concerning reproduction free of discrimination,

[131] K Boyle, 'Stock-Taking on Human Rights: The World Conference on Human Rights, Vienna 1993' (1995) 43 Political Studies, 82, 91; UNGA, 'Vienna Declaration and Programme of Action' (A/CONF.157/23, 25 June 1993) section 3 'the equal status and human rights of women', sec 1 para 18
[132] Vienna Declaration and Programme of Action, sec IIB, para 41
[133] R Petchesky 'From Population Control to Reproductive Rights: Feminist Fault Lines' (1995) 3 Reproductive Health Matters, 152
[134] ibid 153, 156; W Harcourt, 'Body Politics: Revisiting the Population Question' in K Saunders (ed), *Feminist Post-Development Thought: Rethinking Modernity, Post-Colonialism and Representation* (London, Zed Books 2002), 283, 288, 296; B Osotiehin, 'Introduction' in UNFPA, *Programme of Action of the International Conference on Population Development: 20th Anniversary Edition* (New York, UNFPA 2014), x, xi; UNGA, 'Programme of Action Adopted at the International Conference on Population and Development, Cairo, 5-13 September 1994' (A/CONF.171/13, 13 September 1994) paras 1.5, 1.6, Principles 4, 8, 10, 14, paras 4.1, 4.12, 4.24, 4.25, 7.7, 7.8, 7.9, 7.11, 7.12, 7.13, 7.34, 7.36, 15.1-15.4; Chapters XIII, XIC (ICPD PFA)
[135] ICPD PFA, paras 1.8, 7.2, 7.3

coercion and violence, as expressed in human rights documents.[136] The ICPD PFA states that 'full attention should be given to the promotion of mutually respectful and equitable gender relations', and it highlights factors impeding the full realisation of reproductive health including 'discriminatory social practices; negative attitudes towards women and girls; and the limited power many women and girls have over their sexual and reproductive lives.'[137] These were significant advances, representing the recognition by IHRL of feminists' longstanding claims that the ability to control one's own reproduction and sexuality is integral to the full realisation of one's citizenship.

The need for safe, legal, straightforward abortion access as part of the realisation of reproductive rights was discussed for the first time at this Conference. It resulted in the ICPD PFA including references to the negative health and human rights impact of unsafe abortion, albeit in heavily qualified terms due to pressure from the Vatican-led conservative coalition.[138] The cautious, conservative language of the ICPD PFA concerning abortion – as well as the absence of any discussion of LGBTQ* rights – was critiqued and developed in subsequent years, including at the 1995 Fourth World Conference on Women. These dynamics illustrate the fact that feminist engagement with the language and mechanisms of human rights is a dynamic, contested and ongoing process.

The Beijing PFA restated the ICPD definitions of reproductive rights, reproductive health, and reproductive healthcare.[139] Concerning abortion specifically, paragraph 8.25 of the ICPD PFA was restated, but slightly expanded, with states agreeing to 'consider reviewing laws containing punitive measures against women who have undergone illegal abortions.'[140] The inclusion of paragraph 96 in the final document, which refers to the human rights of women 'to have control over and decide freely and responsibly on matters related to their sexuality…free of coercion, discrimination and violence' paved the way for the development of the concept of sexual rights in subsequent years. Feminist achievements at the Vienna, Cairo and Beijing Conferences served as an important starting point for further evolution in the concept and legitimacy of SRHRs from the late 1990s to the present, often in the face of

[136] ibid, para 7.3
[137] ICPD PFA, para 7.3
[138] DE Buss, 'Robes, Relics and Rights: The Vatican and the Beijing Conference on Women' (1998) 7 Social and Legal Studies, 343; ICPD PFA, paras 7.24, 8.25
[139] DE Buss, 'Robes, Relics and Rights' 344-351
[140] UNGA, 'Fourth World Conference on Women: Beijing Declaration and Platform for Action' (A/CONF.177/20, 15 September 1995) paras 94, 95, 106(k) (Beijing PFA)

concerted resistance and opposition.[141] Feminist and LGBTQ* activists, as well as responsive state governments, continued to make use of the language and mechanisms of human rights to advance their transformative understanding of human rights.

In regard to sexual health and rights, understood as LGBTQ* rights, there has been growing attention to them within the UN since the 2010s. In 2011 and 2014, the UNHRC adopted resolutions affirming the rights of LGBT people and the need to combat violence and discrimination against them.[142] In 2016 the UNHRC established an independent expert on sexual orientation and gender identity, who began their work in June 2017.[143] Sexual health and rights have thus rightly been recognised by the UN system as integral to IHRL, and are receiving increasing attention in their work.

In regard to reproductive health and rights, the UN treaty monitoring bodies have demonstrated an increasing confidence and coherence vis-à-vis the legitimacy and scope of reproductive health and rights, including abortion access. They have issued Views, Concluding Observations and General Recommendations and General Comments during the 2000s and 2010s that represent an increased confidence in challenging states' restrictive abortion legislation that builds on and asserts the understanding of women's human rights developed at the Vienna, Cairo and Beijing Conferences. In 2005, the HRC found that Peru had violated the right to be free from torture and CIDT and the right to privacy by failing to provide the applicant with access to abortion despite serious threats to her physical and mental health.[144] This was the first View concerning abortion decided upon by the treaty monitoring body. It was followed in 2011 by *LMR v Argentina*, where the HRC again found the state responsible for violations of LMR's rights to equality and non-discrimination, to be free from torture and CIDT, and to privacy, by failing to ensure access to the abortion she was legally entitled to under domestic legislation as an intellectually disabled woman who had become pregnant as the result of rape.[145]

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[141] Beijing PFA, para 96; A Garita, 'Moving toward Sexual and Reproductive Justice: A Transnational and Multigenerational Feminist Remix' in R Baksh, W Harcourt (eds), *The Oxford Handbook of Transnational Feminist Movements*, 271

[142] UNHRC, '17/19 Human rights, sexual orientation and gender identity' (A/HRC/RES/17/19, 14 July 2011) para 1; UNHRC, '27/32 Human rights, sexual orientation and gender identity' (A/HRC/RES/27/32, 2 October 2014)

[143] UNHRC, '32/2 Protection against violence and discrimination based on sexual orientation and gender identity' (A/HRC/RES/32/2, 30 June 2016)

[144] HRC, *KL v Peru* (CCPR/C/85/D/1153/2003, 22 November 2005) paras 6.1-8

[145] HRC, *LMR v Argentina* (CCPR/C/101/D/1608/2007, 28 April 2011) paras 9.1-11

In 2011, the CEDAW Committee issued two views emphasising the importance of quality obstetric care, including access to abortion, in ensuring that women's human rights are fully respected, protected, and fulfilled.[146] In 2016 and 2017, the HRC issued its views in the cases of *Mellet v Ireland* and *Whelan v Ireland*, both of which held the state responsible for violations of the right to be free from torture and CIDT, the right to privacy, and the right to equality before the law.[147] Although these Views represent an assertion of the UN's stance that abortion must be decriminalised in at least some circumstances, and although they also indicate some awareness of the need for an intersectional approach, the reasoning is characterised by inconsistencies and limitations as a result of the liberal legal framework. The need for an intersectional feminist approach to legal reasoning that adheres to the idea of SRHRs articulated by feminists is necessary to guarantee the full realisation of this ambitious multilevel feminist citizenship project.[148] This will be discussed in further detail in Chapter 3 of this thesis. Before doing so, it is first necessary to consider the current UN, inter-American and European stance on SRHRs.

Summary

Since the foundation of modern IHRL, feminists have contested their exclusion from it as part of their efforts to realise women's full citizenship. Their efforts directly led to the UN system's recognition of the legitimacy of SRHRs, and are testament to their ability to advance a transformative approach to human rights. Even if this process is unfinished and faces considerable opposition, the concept of SRHRs has evolved and grown in legitimacy throughout the international and regional human rights systems through feminist and LGBTQ* activists reshaping the language and mechanisms of human rights to reflect their right to have rights, and to determine what those rights should entail.

[146] CEDAW Committee, *Alyne da Silva Pimentel Teixeira v Brazil* (CEDAW/C/49/D/17/2008, 27 September 2011) para 7.7; CEDAW Committee, *LC v Peru* (CEDAW/C/50/D/22/2009, 25 November 2011) paras 8.6-9
[147] HRC, *Mellet v Ireland*, paras 7.2-7.11; HRC, *Whelan v Ireland* paras 7.1-7.12, 8
[148] The same is true for the UN's development work. See for example E Wangari, 'Reproductive Technologies: A Third World Feminist Perspective' in K Saunders (ed), *Feminist Post-Development Thought,* 298-312

2.3. SRHRs at the UN, OAS, and CoE today: an unfinished feminist citizenship project

This part recaps the current scope of SRHRs within the UN, and discusses their scope in the inter-American and European human rights systems. SRHRs and their intersectional feminist core have been most effectively adopted by the UN and the inter-American human rights systems, with the European human rights system lagging behind.

2.3.1. SRHRs at the UN

As demonstrated in Part 2 of this chapter, SRHRs evolved from the right to family planning into reproductive rights, and from there into SRHRs. This process came about through feminist activism within and around the UN to make human rights and development more representative of and responsive to women's lived realities with a view to realising their full citizenship. As already discussed, the UN defines SRHRs as the rights and freedoms of people of all sexual orientations and gender identities to enjoy safe, satisfying sexual relations free of coercion, discrimination, and violence, and to have the freedom to make informed decisions about their sexual and reproductive health, including if or when to have children.[149] The UN human rights system's current position on abortion is that it should be permitted at a minimum in the case of a risk to the pregnant person's life or health, in the case of rape or incest, and in the case of lethal or fatal foetal abnormalities to prevent violations of women's human rights. Certain treaty monitoring bodies or working groups have called for complete decriminalisation or have stated that waiting times, medical authorisation by multiple professionals, and similar restrictions undermine women's rights to non-discrimination and bodily autonomy/integrity.[150] The legitimacy of SRHRs including abortion has been more consistently asserted in recent years: for example, CESCR's 2016 General Comment No. 22 states that 'the right to sexual and reproductive health is an integral part of the right to health enshrined in article 12' of the ICESCR.[151] Therefore, the approach to human rights advocated for by feminist and LGBTQ* activists at UN conferences has in large part influenced the UN human rights system. However, as will be highlighted in the

[149] ICPD, para 7.3
[150] CRC 2016 Ireland Concluding Observations, paras 57-8; SR torture 2013 report, paras 46-50, para 90; SR torture 2016 report, paras 14, 42, 43-4, 51, 72; WG women 2016 report, paras 76, 79, 105(d), 106(e)
[151] CESCR, 'General Comment No. 22: the right to sexual and reproductive health' (E/C.12/GC/22, 2 May 2016) para 1

next chapter, there are still some limitations in the reasoning employed by treaty monitoring bodies in relation to SRHRs, particularly abortion.

The legitimacy of SRHRs as a family of rights in IHRL is also evident in the regional human rights systems. Of the two regional human rights systems under consideration here, the inter-American is the most committed to the protection and promotion of women's human rights, including SRHRs.[152]

2.3.2. SRHRs in the IAHRS

As discussed in Part 1 of this chapter, the transnational Latin American feminist movement and CIM were integral to women's human rights being afforded any attention in the early years of the UN. These two actors have also enabled feminists to bring their demands for women's full citizenship to bear on the IACHR and IACtHR. While issues relating to SRHRs were largely absent from the work of IAHRS until the 1990s, since then CIM, the IACHR, and the IACtHR have demonstrated an ever-increasing commitment to the protection and promotion of SRHRs in the region, and an ever-increasing commitment to the understanding of SRHRs articulated by feminists. The current IACHR and IACtHR stance on abortion is that it should be legal at a minimum where there is a risk to the pregnant person's life or health, in the case of rape, and in the case of fatal foetal abnormality.[153] The OAS's Pan American Health Organization (PAHO), CIM, and the Follow-Up Mechanism to the Belém do Pará Convention (MESECVI) have gone even further, stating that Member States' denial of SRHRs is a form of gender-based violence that can result in gross human rights violations which disproportionately impact on girls and women who experience other, intersecting forms of discrimination.[154] They also argue that 'guaranteeing the realisation and protection of SRHRs is fundamental for the realisation of women's full citizenship', with restrictions on

[152] Although beyond the geographical scope of this research project, it is important to note that the African Union has adopted the Maputo Protocol, article 14 of which requires States Parties to authorise medical abortion in certain circumstances.
[153] IACHR, 'Conclusions and Observations on the IACHR's working Visit to El Salvador' (No. 011A/18, 29 January 2018) 5-8 (IACHR 2018 El Salvador Country Visit); IACHR, 'Preliminary Observations following the IACHR *in loco* visit to El Salvador' (No. 335/19, 27 December 2019) 19, 12-3 (IACHR 2019 El Salvador Country Visit); IACHR, 'Preliminary Observations on the visit of the IACHR to Honduras' (No. 171A/18, 3 August 2018) (IACHR 2018 Honduras Country Visit)
[154] CEVI, 'First Hemispheric Report on the Implementation of the Belém do Pará Convention (Adopted at the Second Conference of States Parties, held in Caracas, Venezuela, July 9-10, 2008)' (MESECVI, 2008) 21; CIM, IDEA, *La ciudadanía de las mujeres en las democracias de las Américas* (Washington DC, CIM 2013), 141-2; PAHO, *Just Societies: Health Equity and Dignified Lives* (Washington DC, PAHO 2018), 36, 51

SRHRs representing 'the new frontier for the subordination and discrimination against women' and 'a restriction on the exercise of their citizenship and human rights.'[155] Recently, CIM and MESECVI – in conjunction with Latin American and Caribbean feminist organisations – began a campaign to have the IAHRS adopt a Convention on Sexual and Reproductive Rights.[156] In 2014 MESECVI's Committee of Experts adopted the Declaration on Violence against Women, Girls and Adolescents and their Sexual and Reproductive Rights.[157] It states that restrictions on access to safe abortion and the absolute prohibition of abortion constitute torture, and calls on states to permit access to abortion at a minimum in the case of a risk to the life or health of the pregnant person, in the case of fatal foetal abnormality, and in the case of sexual violence, incest and forced pregnancy.[158] The declaration frames the denial of women's and girls' access to sexual and reproductive information and services as based in 'stereotypes that reduce the primary role of women to motherhood and prevent them from making decisions about their sexuality and reproduction.'[159] Should the Declaration gain momentum, the IAHRS may become the first human rights system with a Convention dedicated to SRHRs that takes an explicitly intersectional feminist approach to IHRL. These developments represent the IAHRS's longstanding progressive approach to human rights, which is the result of the presence of a dedicated women's rights agency and also the result of the particular historical and political context in which the OAS evolved. In contrast to the relative stability of the Western European states that founded the CoE, the majority of OAS Member States from its foundation in 1948 to the early 1990s were ruled by brutal authoritarian regimes and/or experiencing civil war; moreover, many OAS Member States were and continue to be characterised by profound inequality and instability, and the legacy of colonialism and US interference.[160] This challenging context prompted the IAHRS to articulate an understanding

[155] CIM, IDEA, *La ciudadanía de las mujeres*, 141-2
[156] CIM, *La democracia de ciudadanía: visiones y debates desde los derechos de las mujeres en las Américas* (Washington DC, CIM 2012), 162
[157] CEVI, 'Declaration on Violence against Women, Girls and Adolescents and their Sexual and Reproductive Rights' (OEA/Ser.L/II.7.10 MESECVI/CEVI/DEC.4/14, 19 September 2014)
[158] ibid
[159] ibid
[160] D Forsythe, 'Human Rights, the United States and the Organization of American States' (1991) HRQ, 80-83, 86-7; M Herz, *The Organization of American States (OAS) (London, Routledge 2011)* 63; L Hennebel, 'The Inter-American Court of Human Rights: The Ambassador of Universalism' [2011] Quebec Journal of International Law, 60; IACHR '2012 Annual Report' (OEA/Ser.L/V/II.147 Doc. 1 5 March 2013) paras 6-7; K Sikkink, 'Human Rights, Principled Issue-Networks, and Sovereignty in Latin America' (1993) 47 International Organization, 427-8. N Thède, H Brisson, 'International Relations and the Inter-American System for Human Rights Promotion and Protection: Strategic Exploitation of Windows of Opportunity' [2011] Quebec Journal of International Law, 13, 15-6; D Weissbrodt, ML Bartolomei, 'The Effectiveness of International Human Rights Pressures: The Case of Argentina, 1976-1983' (1991) 75 Minnesota Law Review, 1019-1025, 1032-3

of human rights that would respond to the systemic and widespread nature of violations occurring in the region, an understanding which required a structural approach to intersecting forms of oppression and discrimination.[161]

Beginning in the 1990s, the IACHR devoted considerable attention to SRHRs, and has since then articulated a progressive, often expressly intersectional, approach to their protection and promotion that is in line with the scope of SRHRs envisioned by feminists. From 1993, women's human rights issues were given increasing attention in IACHR annual and country reports, in large part as a result of the UN World Conference on Human Rights held in Vienna.[162] The IACHR's 1998 Report on the Status of Women in the Americas, which was written in conjunction with CIM, includes a section on the right to health and reproductive health, which it interpreted as being enshrined in article XI (right to health) of the American Declaration, articles 5 (right to physical, mental, and moral integrity) and 26 (progressive development) of the ACHR, and articles 4 and 5 (women's right to full enjoyment of all human rights) of the Belém do Pará Convention.[163] This demonstrates the receptiveness of the IACHR to human rights standards developed by feminists at the UN human conferences of the 1990s and cooperation between CIM and the IACHR to advance women's human rights and full citizenship. During the 2000s and 2010s, SRHRs received particular attention in the IACHR's thematic, annual, and country reports, as well as in several individual petitions.[164] Since 2009, the IACHR has dedicated panels at its periodic sessions to women's

[161] ibid
[162] IACHR, '1992-1993 Annual Report' (OEA/Ser./L/V/II.83 Doc. 14 corr. 1, 12 March 1993) Ch V; IACHR, '1996 Annual Report' (OEA/Ser.L/V/II.95 Doc. 7 rev., 14 March 1997) Ch VII; IACHR, '1997 Annual Report' (OEA/Ser.L/V/II.98 Doc. 6 rev., 13 April 1998) Ch VII; IACHR, '1998 Annual Report' (OEA/Ser.L/V/II.102 Doc. 6 rev., 16 April 1999) Ch VII; IACHR, 'Report on the Situation of Human Rights in Haiti' (OEA/Ser.L/V/II.88 Doc. 10 rev., 9 February 1995) Ch IV, paras 119-136
[163] IACHR, 'Report of the Inter-American Commission on Human Rights on the Status of Women in the Americas' (OEA/Ser.L/V/II.100 Doc. 17 sec 3., 13 October 1998)
[164] IACHR, '2005 Annual Report' (OEA/Ser.L/V/II.124 Doc. 5, 27 February 2006) para 20; IACHR, '2006 Annual Report' (OEA/Ser.L/V/II.127 Doc. 4 rev. 1, 3 March 2007) para 28; IACHR, '2008 Annual Report' (OEA/Ser.L/V/II.134 Doc. 5 rev. 1, 25 February 2009) para 74; IACHR, '2009 Annual Report' (OEA/Ser.L/V/II Doc. 51 corr 1, 30 December 2009) para 55; IACHR, 'Access to Maternal Health Services from a Human Rights Perspective' (OEA/Ser.L/V/II. Doc. 69, 7 June 2010); IACHR, 'Access to Information on Reproductive Health from a Human Rights Perspective' (OEA/Ser.L/V/II. Doc. 61, 22 November 2011); IACHR, 'Access to Justice and Social Inclusion: The Road Towards Strengthening Democracy in Bolivia' (OEA/Ser.L/V/II. Doc. 34, 28 June 2007) Ch V, paras 363-6; IACHR, 'Fifth Report on the Situation of Human Rights in Guatemala' (OEA/Ser.L/ V/II.111 Doc. 21 rev., 6 April 2001) Ch XIII, paras 34-40; IACHR, *María Mamérita Mestanza Chávez (Peru). Friendly Settlement* (Report No. 66/00, Case 12.191, 22 October 2003); IACHR, 'Second Report on the Situation of Human Rights in Peru' (OEA/Ser.L/V/II.106 Doc. 59 rev., 2 June 2009) Ch VII, paras 22-26; IACHR, *TGGL v Ecuador* (Report No. 89/09, Petition 663-06, 7 August 2009); IACHR, 'Third Report on the Situation of Human Rights in Colombia' (OEA/Ser.L/V/II.102 Doc. 9 rev. 1, 26 February 1999) Ch XII, paras 47-52; IACHR, 'Third Report on the Situation of Human Rights in Paraguay' (OEA/Ser.L/V/II.110 Doc. 52, 9 March 2001) Ch VIII, paras 42-4, 48; IACHR, 'Truth, Justice and Reparation:

and girls' human rights, women human rights defenders, maternal mortality, reproductive rights, emergency contraception, and access to abortion.[165]

The first IACHR jurisprudence on abortion is the 2007 friendly settlement *Paulina Del Carmen Ramírez Jacinto (Mexico)*.[166] The parties agreed to a friendly settlement, an IACHR mechanism which focuses on reparation measures to benefit the direct alleged victims and wider society through structural change such as legislative reforms, public policy implementation, and community programmes.[167] Chapter 3 will argue that the non-adversarial nature of the friendly settlement mechanism, and its focus on the structural changes required to achieve restorative and transformative justice, is particularly effective for respecting, protecting and fulfilling women's human rights, and for challenging the underlying causes of their exclusion from citizenship and rights.

CIM's 2012 and 2013 studies on women and citizenship, which frame SRHRs as fundamental to the realisation of women's full citizenship, appear to have influenced the IACHR's approach to SRHRs from 2013 to the present. In 2013, the IACHR mentioned the negative impact of the criminalisation of abortion on women's human rights in its annual report for the first time, and it also issued precautionary measures concerning the complete criminalisation of abortion in El Salvador, discussed further in Chapter 4.[168] The IACHR's 2015 report on Honduras, 2017 report on Venezuela, 2018 reports on El Salvador and Honduras, and 2019 report on El Salvador make explicit references to SRHRs and the measures that states must take to ensure their full realisation.[169] The 2018 and 2019 El Salvador reports and the 2018 Honduras report discuss the negative human rights impact of the complete criminalisation of abortion, and state that abortion should be legal at a minimum where there is a risk to the pregnant person's life or health, in the case of rape, and in the case

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Fourth Report on Human Rights Situation in Colombia' (OEA/Ser.L/V/II. Doc. 49/13, 31 December 2013) paras 908-913, 919, 923

[165] IACHR, 'IACHR Sessions' (IACHR, 2020) <http://www.oas.org/en/iachr/activities/sessions.asp> accessed 3 December 2020

[166] IACHR, *Paulina Del Carmen Ramírez Jacinto (Mexico) (Friendly Settlement)* (Report No. 21/07, Petition 161-02, 9 March 2007) paras 11-13

[167] IACHR, 'Friendly Settlements' (IACHR, 2020) <http://www.oas.org/en/iachr/friendly_settlements/default.asp> accessed 4 September 2020

[168] IACHR, Legal Standards related to Gender Equality and Women's Rights in the Inter-American Human Rights System: Development and Application. Updates from 2011 to 2014' (Washington DC, IACHR 2015) paras 42-3; IACHR, *PM 114/13-B, El Salvador*

[169] IACHR 2018 El Salvador Country Visit, 7-8; IACHR 2018 Honduras Country Visit, 10-12; IACHR 2019 El Salvador Country Visit, 12-13, 18-19; IACHR, 'Situation of Human Rights in Honduras' (OEA/Ser.L/V/II. Doc. 42/15, 31 December 2015) paras 398-401; IACHR, 'Situation of Human Rights in Venezuela' (OEA/Ser.L/V/II. Doc. 209, 31 December 2017), para 436

of fatal foetal abnormality.[170] The IACHR has therefore broadly adopted the understanding of abortion and SRHRs that has been articulated by feminists: that it is only through straightforward, safe, and legal access to abortion that women's human rights can be respected, protected, and fulfilled. The Court has also demonstrated a growing commitment to SRHRs and to feminist approaches to legal reasoning.

Despite initially being more conservative than the IACHR and despite an unwillingness or inability to adopt an intersectional feminist approach to legal reasoning,[171] in recent years the IACtHR has indicated a more coherent commitment to women's human rights and SRHRs.[172] *Artavia Murillo et al v Costa Rica*, which concerned Costa Rica's de facto IVF ban,[173] is the most significant IACtHR case with implications for abortion access thus far. In this case, the Court concluded that there is no absolute right to life before birth, in part because of the negative human rights consequences of this for women.[174] The Court also highlighted this case as one which contributed to the development of its case-law in relation to reproductive rights, stating that 'the rights to private life and to personal integrity' are 'directly and immediately linked to health care services.'[175] This approach is welcome because it recognises the interrelated nature of various rights relevant to SRHRs and, by extension, to straightforward and legal access to safe abortion. It also directly references the UN definition of reproductive rights, demonstrating the influence of the idea of SRHRs articulated by feminists at the UN conferences that led to the adoption of this definition.[176] Moreover, the

[170] IACHR 2018 El Salvador Country Visit, 7-8; IACHR 2018 Honduras Country Visit, 10-12; IACHR 2019 El Salvador Country Visit, 12-13, 18-19
[171] See for example JI Acosta López, 'The *Cotton Field* Case: Gender Perspective and Feminist Theories in the Inter-American Court of Human Rights Jurisprudence' (2012) 21 Revista Colombiana de Derecho Internacional 17; RM Celorio, 'The Rights of Women in the Inter-American System of Human Rights: Current Opporunities and Challenges in Standard-Setting' (2011) 65 University of Miami Law Review 819; IACtHR, *Loayza Tamayo v Peru*, Merits. Judgment of 17 September 1997. Series C No. 33; IACHR, 'Report of the Inter-American Commission on Human Rights on the Status of Women in the Americas', sec B.3; P Palacios Zuloaga, 'The Path to Gender Justice in the Inter-American Court of Human Rights' (2008) Texas Journal of Women and the Law 227
[172] See for example IACtHR, *Atala Riffo and Daughters v Chile*, Merits, reparations and costs. Judgment of 24 February 2012. Series C No. 239; IACtHR, *Gonzáles Lluy et al v Ecuador*, Preliminary objections, merits, reparations and costs. Judgment of 1 September 2015. Series C No. 298; IACtHR, *IV vs Bolivia*, Preliminary objections, merits, reparations and costs. Judgment of 30 November 2016. Series C No. 329; IACtHR, *Opinión Consultiva OC-24/17: Identidad de género, e igualdad y no discriminacion a parejas del mismo sexo*, 24 November 2017 Series A No. 24
[173] IACtHR, *Artavia Murillo et al ('In Vitro Fertilization') v Costa Rica*, Preliminary objections, merits, reparations and costs. Judgment of 28 November 2012, Series C No. 257, para 181
[174] ibid, paras 171-264
[175] IACtHR '2012 Annual Report' (San José, IACtHR 2013) 65
[176] ibid

new IACtHR President Elizabeth Odio Benito has expressed her commitment to 'a new stage' in IACtHR jurisprudence dedicated to advancing gender justice and SRHRs. [177]

The IACtHR's awareness of the need to advance SRHRs is evident in a survey of its recent annual reports. In its 2012 annual report, the Court stated that *Artavia Murillo et al v Costa Rica* represented it developing its jurisprudence on reproductive rights.[178] The Court emphasised the importance of 'reproductive autonomy', 'reproductive liberty', the ICPD definition of reproductive rights, and 'the right to the highest level of sexual and reproductive health.'[179] In its 2016 annual report, in relation to *IV v Bolivia*, the IACtHR claimed that this case represented the Court's recognition of how 'historically, a woman's liberty and autonomy as regards her sexual and reproductive health had been limited, restricted or annulled based on negative and prejudicial gender stereotypes…women have been seen, above all, as a reproductive entity.'[180] Similar commitment to SRHRs is evident in its 2019 annual report.[181] Therefore, there is a clear commitment on the part of the IACtHR to advancing SRHRs, and a growing understanding of how restrictions on access to reproductive healthcare such as abortion represent and perpetuate gender inequality.

The IACtHR also demonstrated a commitment to SRHRs when it issued provisional measures in relation to the case of 'Beatriz', discussed in Chapter 4.[182] When read in conjunction with the IACHR's current work on SRHRs and abortion, it can therefore be argued that the IAHRS's current stance on abortion is that it should be decriminalised at a minimum in the case of a risk to life or health, in the case of rape or incest, and in the case of fatal foetal abnormality.

Summary

The IAHRS approach to SRHRs represents the influence of feminist rearticulations of the nature and scope of rights at the international and regional levels of the human rights system, i.e., a multilevel feminist citizenship project. However, as the next chapter will illustrate,

[177] IACtHR, 'A message from the President' (IACtHR, 2020) <https://www.corteidh.or.cr/mensaje_presidencia.cfm?lang=en> accessed 4 December 2020
[178] IACtHR, '2012 Annual Report', 65
[179] ibid
[180] IACtHR, '2016 Annual Report' (San José, IACtHR 2017) 148-55
[181] IACtHR, '2019 Annual Report' (San José, IACtHR 2020) 40, 43, 44, 77-8
[182] IACtHR, *Provisional Measures with regard to El Salvador: Matter of B*, 29 May 2013

certain limitations arising from the Western liberal legal tradition persist and limit the full realisation of the transformative potential of SRHRs in inter-American jurisprudence. These issues are also evident in the European human rights system's jurisprudence on SRHRs, as are issues arising from its structure and approach to human rights that impede the full realisation of this family of rights.

2.3.3. SRHRs at the CoE

In comparison to the UN and inter-American human rights systems, the CoE has taken a more conservative approach to SRHRs. This is as a result of the absence of a body such as the UN's CSW and the OAS's CIM, and the absence of economic, social and cultural rights from the ECHR. It is also the result of the ECtHR's deferential approach to human rights protection, which is the product of the particularly historical and political context in which the CoE evolved: founded by Western European states at the start of the Cold War, the CoE was intended to set a minimum standard of human rights protection and prevent a backslide into authoritarianism by any Member States; provided that states met minimum requirements, they had significant discretion in determining domestic legislation and policy.[183] In contrast to the UN and inter-American position that abortion should be decriminalised at a minimum in some circumstances in order to ensure women's human rights are respected protected, and fulfilled, the ECtHR and ECSR stance is that where legal, abortion should be accessible, and human rights violations will only arise when this is not the case. However, the CoE Commissioner for Human Rights has indicated support for the UN/inter-American position, especially since Dunja Mijatović's appointment to the position in 2018. This section considers the ECtHR, the ECSR, and the CoE Commissioner for Human Rights' respective approaches to SRHRs, arguing that the ECtHR and ECSR need to adopt the more progressive, assertive stance articulated by the UN and inter-American human rights systems, as well as the CoE Commissioner, in order to ensure that women's human rights and full citizenship are recognised.

[183] E Bates, 'The Birth of the European Convention on Human Rights—and the European Court of Human Rights' in J Christoffersen, M Rask Madsen (eds), *The European Court of Human Rights: Between Law and Politics* (OUP 2011), 18; S Besson, 'Evolutions in Non-Discrimination Law within the ECHR and the ESC Systems: "It Takes Two to Tango in the Council of Europe"' (2012) 60 American Journal of Comparative Law, 149; E DuBois, L Derby 'The Strange Case of Minerva Bernardino', 46; I Tinker 'The Camel's Nose', 144

The ECHR and the ECtHR

The absence of economic, social and cultural rights from the ECHR is because the general consensus among the CoE Member States in 1948 was that Western Europe required a Convention that would provide a minimum standard of protection for civil and political rights to prevent the emergence of authoritarian and Communist regimes while allowing states considerable discretion in determining their legislation and policy.[184] The absence of economic, social and cultural rights from the Convention meant that these rights were not addressed by the CoE for the first twelve years of its existence – the European Social Charter (ESC) did not enter into force until 1965.[185] Even then, the current CoE approach to the ESC continues to create a divide between civil and political rights on the one hand and economic and social rights on the other, with the former being accorded higher priority than the latter: the ESC is an optional charter that is overseen by an independent body, as opposed to being an obligatory treaty for CoE Member States which the Court can invoke. A more integrated approach – at a minimum enabling the Court to invoke, interpret, and apply the Charter when hearing cases – is required to ensure the genuine interdependence and indivisibility of these rights.

The European human rights systems' androcentric approach to human rights is evident in its first abortion case. Heard by the now-obsolete European Commission on Human Rights in 1978, the applicants in *Brüggemann and Scheuten v West Germany* argued that the criminalisation of abortion except for 'in specific situations of distress of the woman concerned' interfered with their article 8 right to privacy.[186] The Commission found that 'pregnancy cannot be said to pertain uniquely to the sphere of private life' and that 'not every regulation of abortion amounts to interference with the right to respect for private life.'[187] The assertion that pregnancy 'cannot be said to pertain uniquely to the sphere of private life' continues to form the basis of the Court's approach to abortion. This assertion is indicative of the problematic nature of traditional understandings of the right to privacy which fail to capture or respect the complexity of non-masculine embodied experiences. The problematic nature of this decision was highlighted in one dissenting and one separate opinion, both of

[184] E Bates, 'The Birth of the European Convention on Human Rights', 18
[185] A revised European Social Charter was adopted in 1996 and entered into force in 1999. CoE, 'Revised European Social Charter' (ETS No. 163, 3 May 1996)
[186] European Commission of Human Rights, *Brüggemann and Scheuten v Federal Republic of Germany* (Application No. 6959/75) 12 July 1977, paras 4-5
[187] ibid, para 61

which argued that restrictive abortion legislation should be considered a violation of article 8(2).[188] The dissenting opinion highlighted that 'over-restrictive legislation not only fails to prevent 'back-street abortions'…but may even encourage recourse to them.'[189] The separate opinion asserted that 'the self-determination of women' was the crux of the matter, arguing that 'the laws regulating abortion ought to leave the decision to have it performed in the early stage of pregnancy to the woman concerned.'[190] The separate opinion also highlighted that traditional understandings of the right to privacy 'depended on the outlook which has been formed mainly by men.'[191] The ideas expressed in these two opinions – that the real-world consequences of restrictive abortion legislation and the underlying rationale of restrictive abortion legislation are harmful to women – have yet to find full expression in contemporary ECtHR jurisprudence.

In the 2000s and 2010s, the Court began to hear more cases concerning SRHR issues, such as forced sterilization and IVF, although it did not refer to them as such.[192] In regard to abortion, the Court determined that states have a margin of appreciation in determining abortion legislation. It is only where abortion is legal and not accessible that Convention violations may arise.[193] This position fails to acknowledge the origins and consequences of restrictive abortion legislation vis-à-vis the status of women. It also represents the ongoing dichotomy of issues deemed worthy of international legal attention and those deemed of lesser, domestic, importance that the ECtHR's deferential approach to human rights protection perpetuates. Such issues are less evident in the work of the ECSR, although they are still apparent.

ECSR

The ECSR monitors state compliance with the ESC by examining national reports submitted by States Parties and through a collective complaints mechanism open to approved

[188] *Brüggemann and Scheuten*, Dissenting Opinion of Mr JES Fawcett, para 7
[189] ibid, para 4
[190] ibid, Separate Opinion of Mr T Opsahl (Mr C Norgaard and Mr L Kellberg concurring), paras 1, 2
[191] ibid, para 3
[192] See for example ECtHR, *Christine Goodwin v UK* (Application No. 28957/95) 11 July 2002; *KH and Others v Slovakia* (Application No. 32881/04) 6 November 2009; *Women on Waves v Portugal* (Application No. 31276/05) 3 February 2009
[193], ECtHR, *A, B and C v Ireland* (Application No. 25579/05) 16 December 2010; *P and S v Poland* (Application No. 57375/08) 20 October 2012; *RR v Poland* (Application No. 27617/04) 28 November 2011; *Tysiąc v Poland* (Application No. 5410/03) 20 March 2007

organisations that has been operative since 1998.[194] As will be discussed in Chapter 3, ESC article 11 guarantees the right to health, and the ECSR has found States responsible for violations of it in the context of SRHRs including abortion.[195] However, as will also be discussed in Chapter 3, it has replicated some of the more problematic aspects of the ECtHR's approach from a feminist perspective, such as the use of the margin of appreciation and a narrow understanding of non-discrimination. Moreover, the fact that it is a secondary body for the promotion of human rights compared to the ECtHR perpetuates the dichotomy of civil and political versus economic, social and cultural rights, with the former afforded higher priority than the latter. Despite this, its overall approach to SRHRs – recognising their legitimacy as a family of human rights, referring to and to an extent complying with UN and inter-American SRHR standards[196] – is more in keeping with that envisaged by intersectional feminists than that of the ECtHR. In contrast to both the ECtHR and the ECSR, the CoE Commissioner for Human Rights has adopted an assertive, progressive stance on SRHRs including abortion.

The CoE Commissioner for Human Rights

Successive Commissioners have demonstrated commitment to SRHRs, particularly since 2007. That year and again in 2011, the Commissioner criticised Ireland's abortion legislation in his country visit reports, highlighting the negative, discriminatory impact of the lack of legislation on abortion in line with the limited constitutional guarantee of access to abortion in the case of a risk to the woman's life.[197] In 2017, The Commissioner published a thematic report on women's sexual and reproductive rights which demonstrated an awareness of and commitment to challenging the structural inequalities impeding the full realisation of SRHRs

[194] CoE, 'Revised European Social Charter', arts C and D
[195] ECSR, *Confederazione Generale Italiana del Lavoro (CGIL) v Italy* (Complaint No. 91/2013) 12 October 2015; ECSR, *Federation of Catholic Families in Europe (FAFCE) v Sweden* (Complaint NO. 99/2013) 17 March 2015; ECSR, *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v Croatia*, Decision on the Merits (Complaint No. 45/2007) 30 March 2009, paras 64-6; ECSR, *International Planned Parenthood Federation – European Network (IPPF-EN) v Italy*, Decision on the Merits (Complaint No. 87/2012) 10 September 2013, paras 69, 160, 163-4, 174-77, 194; *Transgender Europe and ILGA-Europe v the Czech Republic* (Complaint No. 117/2015) 15 May 2018, para 76
[196] ECSR, *CGIL v Italy*, paras 36, 42-3 69-72, 74, 190-3; ECSR, *IPPF-EN v Italy*, paras 37-41
[197] CoE Commissioner for Human Rights 'Report by the Commissioner for Human Rights on his visit to Ireland, 26-30 November 2007' (CommDH(2008)9, 30 April 2008) paras 78-80 (CoE Commissioner 2008 Ireland report); 'Report by the Commissioner following his visit to Ireland from 1 to 2 June 2011' (CommDH(2011)27, 15 September 2011) paras 15, 48 (CoE Commissioner 2011 Ireland report); CoE Commissioner for Human Rights 'Report by the Commissioner for Human Rights on his visit to Ireland, 22-25 November 2016' (CommDH(2017)8, 29 March 2017) paras (CoE Commissioner 2017 Ireland report) paras 75-95

in Member States.[198] Drawing upon UN and inter-American human rights standards, it went beyond the ECtHR and ECSR stance that where legal, abortion should be accessible by recommending that CoE Member States decriminalise abortion; ensure access to safe, quality, and legal abortion services; and remove legal, policy, financial, and other barriers that impede women's access to abortion such as mandatory waiting periods, obligatory counselling, and restrictive third-party authorisation.[199] This indicates a level of commitment to the intersectional multilevel feminist citizenship project of SRHRs that is lacking among other CoE bodies.

The current Commissioner, Dunja Mijatović, was appointed in January 2018 and is the first women to assume the role.[200] She has made SRHRs one of the main priorities of her mandate, as evidenced by statements, reports on country visits, letters to governments, submissions to the Committee of Ministers, and discussions with PACE.[201] She conceptualises SRHRs as necessary to upholding 'women's right to self-determination'[202] and as 'an essential component of Council of Europe Member States' obligations to guarantee women's rights and advance gender equality.'[203] In regard to abortion, she has reiterated the 2017 thematic paper's stance that CoE Member States must decriminalise abortion and remove all barriers impeding access to safe abortion care, with a particular emphasis on addressing intersecting, structural forms of inequality.[204]

A relatively new institution, the extent to which the Commissioner can effectively pressure Member States to comply with the CoE's minimal SRHRs standards – let alone the approach called for by the UN, IAHRS and intersectional feminists – remains to be seen. The Office of

[198] CoE Commissioner for Human Rights, *Women's Sexual and Reproductive Health and Rights in Europe* (Strasbourg, Council of Europe 2017) 21, 45, 47-56
[199] ibid, 11, 36-8, 59
[200] CoE Commissioner for Human Rights, 'The Commissioner' (CoE, 2020) <https://www.coe.int/en/web/commissioner/the-commissioner> accessed 30 November 2020
[201] CoE Commissioner for Human Rights, 'Annual Activity Report 2019' (CommDH(2020)7, 21 April 2020) 3, 7, 17, 20; CoE Commissioner for Human Rights, '1st Quarterly Activity Report 2020' (CommDH(2020)12, 13 May 2020) 13, 15-6; CoE Commissioner for Human Rights, '2nd Quarterly Activity Report 2020' (CommDH(2020)19, 8 September 2020) 6-7
[202] CoE Commissioner for Human Rights, 'We need to stand up for women's sexual and reproductive health and rights' (CoE, 7 March 2019) <https://www.coe.int/en/web/commissioner/-/we-need-to-stand-up-for-women-s-sexual-and-reproductive-health-and-rights> accessed 30 November 2020
[203] CoE Commissioner for Human Rights, 'COVID-19: Ensure women's access to sexual and reproductive health and rights' (CoE, 7 May 2020) <https://www.coe.int/en/web/commissioner/-/covid-19-ensure-women-s-access-to-sexual-and-reproductive-health-and-rights> accessed 30 November 2020
[204] CoE Commissioner for Human Rights, 'COVID-19'; CoE Commissioner for Human Rights, 'Women's sexual and reproductive rights in Europe' (CoE, 2020) <https://www.coe.int/en/web/commissioner/women-s-sexual-and-reproductive-rights-in-europe> accessed 30 November 2020

the Commissioner nevertheless represents the creation of a responsive actor and a platform for intersectional feminist approaches to human rights such as SRHRs that could yet prove an important ally to national and transnational feminist activists in their multilevel feminist citizenship project to advance straightforward, safe, and legal access to abortion.

Summary

Part 3 of this chapter set out the current stance of the UN, inter-American and European human rights systems vis-à-vis SRHRs, and abortion specifically. The UN and inter-American human rights systems recognise that abortion should be decriminalised in at least circumstances in order to ensure that women's human rights are respected, protected and fulfilled, while the European human rights system has adopted the more conservative position that states can determine whether or not to legalise abortion, and that violations of women's rights will only arise if, where legal, abortion is not accessible. The more progressive UN and inter-American position represents their willingness to adopt a feminist approach to IHRL to some extent, a willingness which is the direct result of concerted transnational feminist activism to guarantee women's right to have rights, and to determine the scope of those rights. This feminist activism has been successful in part because of (1) a dedicated women's rights agency within both the UN and the OAS (2) the influence of feminist activism at the UN conferences of the 1990s and (3) the receptiveness of the inter-American human rights system to incorporate UN human rights developments into its own jurisprudence. In contrast, the CoE has no specialised women's rights agency, and the ECtHR has been less open to interpreting the Convention in light of UN jurisprudence. The progressiveness and responsiveness of the CoE Commissioner for Human Rights vis-à-vis SRHRs may yet redress this.

Even though the UN and inter-American human rights systems are making progress in recognising and promoting the legitimacy of SRHRs, conceptual inconsistencies arising from the persistence of the androcentric liberal legal framework are still apparent in their jurisprudence. These issues, issues with the ECtHR and ECSR approach to SRHRs, and the need for all levels of the human rights system to adopt the transformative feminist vision of SRHRs, will be critiqued in the next chapter. It will be argued that a transformative intersectional feminist approach to the law, particularly regarding SRHRs, is necessary to

realise women's full citizenship through an approach to human rights that represents and responds to their lived realities.

Conclusion

This chapter articulated the conceptualisation of citizenship that serves as the theoretical framework for this research project. Citizenship is defined as the right to have rights, and the right to determine the scope of those rights. It is understood to be a contested process with a long history of excluding and oppressing women, an exclusion predicated upon their reproduction and sexuality. When mediated through the processes of colonisation and nation-building in El Salvador and Ireland, the discourse of citizenship constructed women as non-citizens, bearers of future citizens, and bearers of the nation's honour. As a consequence of these combined processes, women's sexuality and reproduction were heavily regulated by the law, for example through the criminalisation of abortion. Any claims by women for reproductive autonomy, such as through calls for the decriminalisation of abortion, are understood as potentially disruptive to the entire patriarchal social order because (1) these claims challenge women's role in the citizenship project as non-citizens/bearers of future citizens and (2) these claims represent women attempting to assert their right to have rights and determine the scope of rights, a privilege afforded only to citizens, who can only be men. Applying this multilevel feminist citizenship framework contextualises and makes visible the fact that feminist campaigns for SRHRs at the international and domestic level are interrelated power struggles over the meaning of citizenship and rights. The nature of this struggle at the national level will be explored in Chapters 4 and 5 of this thesis in relation to El Salvador and Ireland.

In regard to the international and regional levels of this contested feminist citizenship project, the creation of the modern international human rights system replicated the exclusion of women from citizenship at the national level, but also opened up a new space for women to contest this exclusion. As part 2 of this chapter demonstrated, SRHRs are best understood as a multilevel feminist citizenship project because their origins, evolution and increasing legitimacy are the direct result of feminist activism around the right to have rights and to determine the scope of those rights in IHRL.

This process is ongoing and has enjoyed considerable success within the UN and inter-American human rights systems, as evidenced by part 3 of this chapter. In contrast, the European human rights system has maintained a more conservative approach to SRHRs, with their full realisation being circumscribed by institutional factors such as the absence of a dedicated women's rights agency and the lack of economic, social and cultural rights in the ECHR. Regardless of progress or lack thereof, in all three systems the transformative feminist approach to IHRL that SRHRs require is circumscribed by the persistence of androcentric Western liberal legal reasoning. This will be demonstrated in the next chapter, which consists of a critical reading of UN, inter-American and European jurisprudence on abortion. It argues that the multilevel feminist citizenship project of SRHRs can only be fully realised if the human rights system embraces an intersectional feminist approach to legal reasoning.

Chapter 3

An Intersectional Feminist Critique of SRHRs in UN, Inter-American, and European Jurisprudence on Abortion

This chapter engages in a critical feminist reading of key UN Human Rights Committee (HRC), IACHR/IACtHR, and ECtHR/ECSR jurisprudence on abortion. In doing so, it argues that while the international and regional human rights systems have made important contributions to advancing SRHRs in IHRL – contributions outlined in the previous chapter – their continued reliance on Western androcentric liberal legal reasoning is circumscribing the feminist aim of realising women's full citizenship in the form of SRHRs. This chapter argues that the full realisation of SRHRs, including the decriminalisation of abortion, can only be realised if these human rights bodies employ legal reasoning that is informed by a transformative intersectional feminist approach to SRHRs and concepts such as rights, autonomy, equality, and justice. Taking such an approach to legal reasoning requires these human rights bodies to recognise the historical, systemic exclusion of women and other oppressed groups from citizenship; it also requires them to frame the harms arising from this exclusion and oppression as human rights violations.

Part 1 discusses the two UN Human Rights Committee (HRC) Final Views pertaining to Ireland's abortion legislation, *Mellet v Ireland* and *Whelan v Ireland*. As discussed in the previous chapter, these two Views represent the culmination of UN human rights treaty monitoring body 'jurisprudence' on SRHRs and abortion since they are the most recent, assertive, and coherent stance on the part of these bodies that abortion should be decriminalised at a minimum in the case of a risk to life or health, in the case of rape or incest, and in the case of fatal foetal abnormalities. Despite the importance, both symbolic and real, of these HRC Views for the multilevel feminist citizenship project – as will be demonstrated in Chapter 5, they had a bearing on Ireland's subsequent abortion law reform – they are still somewhat flawed and inconsistent from an intersectional feminist perspective. These flaws and inconsistencies relate to the right to be free from torture and other forms of cruel, inhuman or degrading treatment or punishment (CIDT), the principle of non-discrimination, and a failure to emphasise the indivisible, interdependent, and interrelated

nature of human rights by not engaging with the allegations of violations of the freedom to seek, receive and impart information.

Part 2 of this chapter considers IACHR and IACtHR jurisprudence on abortion. Through friendly settlements, country and thematic reports, precautionary measures, provisional measures, and cases on other SRHR issues such as IVF, the inter-American human rights system (IAHRS) has articulated the most intersectional feminist understanding of human rights, SRHRs, and abortion access of the three human rights institutions under discussion here. This part highlights the friendly settlements procedure and its commitment to restorative and transformative justice, the holistic understanding of a right to bodily integrity, and an intersectional, substantive approach to non-discrimination are the greatest strengths of the IAHRS in advancing the multilevel feminist citizenship project of SRHRs including abortion access. The IACHR 2014 friendly settlement *Alba Lucía Rodríguez Cardona (Colombia)* illustrates the strengths of the inter-American human rights system's approach, while the 2012 IACtHR case *Artavia Murillo v Costa Rica* highlights some of the ongoing limitations and contradictions arising from the androcentric liberal legal framework still evident in inter-American jurisprudence. As with the UN and the ECtHR, the IAHRS has provided feminist activists campaigning for abortion access, including those in El Salvador, with a useful channel for articulating rights claims and contesting their exclusion from citizenship at the national level. This will be explored in greater detail in Chapter 4.

The third and final part of this chapter concerns ECtHR and ECSR abortion jurisprudence. The European human rights system has taken a far more conservative approach to abortion than the UN and inter-American systems. This is as a direct result of the androcentric liberal legal framework being more deeply embedded in the CoE than the UN or OAS. As the previous chapter argued, this is in large part due to the absence of a dedicated women's rights agency and the historical and political context informing the evolution of the European human rights system. The manifestation of this in narrow understandings of the right to be free from torture and CIDT, the right to privacy, and the principle of non-discrimination in their jurisprudence are discussed in relation to the ECtHR's *A, B and C v Ireland* and the ECSR's *IPPF-EN v Italy*. This part argues that the full realisation of women's citizenship through the recognition of their SRHRs will be impeded rather than advanced by the European human rights system unless the ECtHR and ECSR adopt an approach to legal reasoning that is informed by a transformative intersectional feminist approach underpinning

SRHRs. This approach recognises the historical, systemic exclusion of women and other oppressed groups from citizenship, and names the harms done to them as a result of this as human rights violations. The ECtHR/ECSR's abortion jurisprudence serves as an important reminder that human rights and the law are only one means among many to achieve a more just political, economic and social order; as mentioned in Chapter 1, feminists must simultaneously make use of and decentre the discourses and mechanisms of law and human rights to achieve their goals of emancipation and social justice.

3.1. Abortion in UN human rights treaty monitoring body jurisprudence

Introduction

UN human rights treaty monitoring bodies and Special Rapporteurs have stated that abortion should be permitted at a minimum in the case of a risk to the pregnant person's life or health, in the case of rape or incest, and in the case of lethal or fatal foetal abnormalities to ensure that these rights are respected, protected, and fulfilled.[1] The most recent Final Views which evidence this position are the HRC's 2016 *Mellet v Ireland* and 2017 *Whelan v Ireland* Final Views. These two Views have been chosen for close analysis since they are the most recent Final Views concerning abortion and since they directly address the negative human rights impact of Ireland's restrictive abortion legislation. In both *Mellet* and *Whelan*, the HRC determined that the state was responsible for violations of article 7 (the right to be free from cruel, inhuman or degrading treatment); article 17 (the right to privacy); and article 26 (the right to equality before the law) of the ICCPR because it failed to provide access to abortion in the case of a non-viable pregnancy.[2] In doing so, it recognised that restrictions on abortion access impede women's full enjoyment of their right to have rights and determine the scope of those rights.

These decisions represent a powerful assertion of the UN human rights system's stance that abortion must be decriminalised at a minimum in the case of a risk to the life or health of a pregnant person, in the case of rape or incest, and in the case of fatal foetal abnormalities. They also demonstrate some awareness of the need for intersectional approaches to challenging the structural inequalities that inform and exacerbate restrictive abortion legislation, i.e., awareness of the ways in which individual identities and forms of oppression

[1] See Annex 3
[2] *Mellet v Ireland*, para 8; *Whelan v Ireland*, para 8

such as race, class, disability, gender, and socioeconomic status can interact to produce particular experiences of marginalisation and discrimination. However, there are still some limitations to its reasoning. While the HRC's framing of the harms arising from restrictive abortion legislation as human rights violations is significant, it needs to advance its analysis further by recognising restrictive abortion legislation as a manifestation of the historical, systemic exclusion of women and other oppressed groups from citizenship on the basis of their reproductive capacity and sexuality. It is only by recognising this longstanding structural inequality that women's subordination can be meaningfully challenged and their full citizenship and human rights can be realised.

This section first presents the facts of *Mellet* and *Whelan*, before highlighting some of the strengths and weaknesses from an intersectional feminist perspective of the Committee's reasoning in regard to freedom from torture and CIDT, the freedom to seek, receive and impart information, and the principle of non-discrimination.

Mellet v Ireland and Whelan v Ireland

Mellet and *Whelan* both concerned women who had to travel to the UK to obtain an abortion following the diagnosis of fatal foetal abnormalities, given that abortion was not legal on these grounds in Ireland at the time.

In November 2011, Mellet received the diagnosis of the fatal foetal abnormality trisomy 18 when in the 21st week of her pregnancy. Medical professionals told her that she could not obtain an abortion in Ireland but alluded to the fact that she could 'travel.'[3] The medical professionals did not provide any further information on what travelling would entail or on suitable abortion providers, with a midwife recommending that she contact a local family planning organisation for information and counselling. She did so, and they provided her with information on the procedure as well as contact information for the Liverpool Women's Hospital.[4] Without the support, continuity of care or referral procedure that would have been in place had abortion in the case of fatal foetal abnormality been legal, Mellet had to spend €3,000 to pay for travel to and accommodation in Liverpool, as well as the procedure itself.[5]

[3] *Mellet v Ireland*, para 2.2
[4] ibid, paras 2.1, 2.2
[5] ibid, para 2.4

She underwent a 36-hour labour to deliver a stillborn baby and had to travel back to Dublin only 12 hours after without her baby's remains and while still bleeding.[6] She did not receive aftercare or bereavement counselling at the maternity hospital, services which would have been made available to her had she carried the pregnancy to term; instead, she had to independently organise post-abortion counselling with the family planning organisation.[7]

In January 2010, Whelan received the diagnosis of two fatal foetal abnormalities when in the 20th week of her pregnancy.[8] As with Mellet, allusions were made to the possibility of travelling should she decide to have an abortion, but no further information or referrals to support services were made by medical professionals.[9] Instead, she obtained contact information for the Liverpool Women's Hospital through a friend and, like Mellet, had to spend almost €3,000 on the procedure, travel, accommodation, and leave from work.[10] In her application to the HRC, Whelan emphasised the disruptions and complications to her grieving process engendered by having to travel abroad, having to rely on friends, having to disclose personal information to acquaintances so that they could help her make the appointment in Liverpool, and the lack of follow-up care upon her return to Ireland.[11]

Mellet and Whelan alleged that the criminalisation of abortion in Ireland subjected them to cruel, inhuman and degrading treatment by denying them the reproductive healthcare and bereavement support they required, forcing them to continue with a non-viable pregnancy, forcing them to seek abortion care abroad, and stigmatising the already difficult decision to end a wanted but unviable pregnancy.[12] They also alleged that Ireland's abortion legislation represented a disproportionate interference with their right to privacy by limiting their ability to make choices pertaining to their reproductive autonomy, and by disrupting the continuity of care and support from family and friends they required during an especially distressing time.[13] In regard to their freedom to seek, receive and impart information as enshrined in article 19(2) ICCPR, Mellet and Whelan both argued that the 1995 Regulation of Information (Services Outside the State for Termination of Pregnancies) Act 'effectively censored' health

[6] ibid
[7] ibid, para 2.5
[8] *Whelan v Ireland*, paras 2.1, 2.2
[9] ibid, para 2.2
[10] ibid, 2.3, 2.4
[11] ibid, 2.4, 2.5, 2.6
[12] *Mellet*, para 3.1; *Whelan*, para 3.1
[13] *Mellet*, para 3.5; *Whelan*, paras 3.4, 3.5

care providers from providing even legal information, thus violating their right to access information and compounding their mental distress.[14] Finally, the applicants asserted that the criminalisation of abortion in Ireland violated the principles of equality, non-discrimination, and the right to equality before the law enshrined in articles 2(1), 3 and 26 of the ICCPR by placing restrictions on health services that only women need, reducing women to their reproductive capacity, and failing to account for women's 'different reproductive health needs, thus reinforcing women's vulnerability and inferior social status.'[15] These references to the criminalisation of abortion 'reinforcing women's vulnerability and inferior social status' and 'reducing women to their reproductive capacity' echo feminist critiques of the ways in which the traditional citizenship discourse excludes and oppresses women by forcing them to fulfil the roles of non-citizens and bearers of future citizens.[16]

The HRC found in favour of the applicants regarding their claims under articles 7 (torture and CIDT), 17 (privacy) and 26 (equality before the law) of the ICCPR. In recognising these women's experiences as traumatic and a violation of the right to be free from CIDT, the HRC effectively reconceptualised this right to include and respond to women's lived experiences – the aim of feminist approaches to international human rights law in general, and SRHRs in particular. The HRC did so by agreeing with the women that they had been subjected to conditions of intense physical and mental suffering due to the lack of continuity in care; to the distress of having to choose between continuing their non-viable pregnancies to term or travelling abroad at personal expense to receive medical treatment; to the shame and stigma arising from the criminalisation of abortion; and to the suffering caused by having to leave their children's remains in the UK, to be delivered later (and in Mellet's case, unexpectedly) by courier.[17] The HRC's reasoning was informed by an empathic and nuanced understanding of ill-treatment as personal, cumulative, and both physical and psychological.[18] The emphasis on the economic, social and cultural aspects of a civil and political right – the cost of travel and healthcare, the lack of emotional support, the delays to and disruptions of the grieving process –is a striking example of commitment to the indivisibility, interdependence, and

[14] *Mellet*, paras 3.8, 3.10; *Whelan*, paras 3.6-3.8
[15] *Mellet*, paras 3.15, 3.19, 3.20; *Whelan*, paras 3.9-3.11
[16] AM Jaggar 'Arenas of Citizenship', 91-110; E Jelin, 'Engendering Human Rights', 67; R Lister, *Citizenship*, 1, 71-2; C Pateman, 'Equality, Difference, Subordination', 15; C Pateman, *The Sexual Contract*, 61; N Yuval-Davis, 'The 'Multi-Layered Citizen'', 120-1; N Yuval-Davis, P Werbner, 'Women and the New Discourse of Citizenship', 5
[17] *Mellet*, para 7.4; Whelan, *paras* 2.5, 7.5
[18] *Mellet*, 7.2-7.6; *Whelan*, 7.2-7.7

interrelatedness of human rights.[19] The acknowledgement of shame and stigma's profound effect in this context, as well as the especially vulnerable situation in which people find themselves when in medical settings, is also an important development, and seems to have been informed by the work of Special Rapporteur on Torture (SR Torture) Juan Méndez. For example, his 2013 and 2016 reports discuss how the stigma, vulnerability, and discrimination arising from restrictive abortion legislation amount to torture or ill-treatment, and that the 'abuse and mistreatment of women seeking reproductive health services can cause tremendous and lasting physical and emotional suffering, inflicted on the basis of gender.'[20]

The HRC also effectively articulated connections between the right to be free from torture and CIDT, and the right to privacy. The Committee did so by affirming the applicants' assertion that their 'physical and psychological integrity and reproductive autonomy' were the aspects of their private life that were disproportionately and arbitrarily interfered with by Irish abortion legislation.[21] This represents some commitment to the indivisibility, interdependence, and interrelatedness of human rights – a necessary approach from a feminist perspective since it challenges the hierarchisation, compartmentalisation, and dichotomisation inherent in Western liberal thinking. The reference to 'reproductive autonomy' is welcome from an intersectional feminist perspective for two reasons. Firstly, this wording alludes to the understanding of reproductive autonomy/reproductive freedom underpinning the intersectional feminist vision of SRHRs articulated by Global South and BIPOC feminists discussed in Chapter 1. According to their conceptualisation, reproductive freedom/autonomy is 'the right to have, or not to have, children with dignity and with all the necessary material conditions to make raising children a sustainable life choice'[22] and requires 'the full achievement and protection of women's human rights.'[23] In making use of the term 'reproductive autonomy', the HRC signalled awareness of, and potentially support for, this approach to SRHRs, which requires structural transformation of the current political, social, economic, and legal order to ensure women's right to have rights and determine the

[19] ibid
[20] SR torture, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: applying the torture and ill-treatment protection framework in health-care settings' (A/HRC/22/53, 1 February 2013) paras 46-50, para 90 (SR 2013 torture report); SR torture, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: gender perspectives on torture and other cruel, inhuman and degrading treatment or punishment' (A/HRC/31/57, 5 January 2016) paras 14, 42, 43-4, 51, 72 (SR torture 2016 report)
[21] *Mellet* 7.7, *Whelan* 7.8
[22] RP Petchesky, 'Owning and Disowning the Body', 255
[23] L Ross cited in K Ackerman et al 'Every Body Has Its Own Feminism', 6

scope of those rights in regard to her reproduction and sexuality. Secondly, by interpreting the right to privacy as including a right to reproductive autonomy, the HRC challenged traditional Western liberal legal understandings of the right to privacy as 'the right to be left alone.'[24] Instead, in keeping with feminist articulations of the right to privacy as 'the positive liberty of self-determination and equal personhood'[25], and in keeping with the idea of autonomy informed by vulnerability, relational autonomy, and dignity articulated in Chapter 1, the HRC implicitly recognised the importance of political, economic, social and legal structures (in this instance, Ireland's restrictive abortion legislation) to the realisation or frustration of the right to privacy, understood here as the ability to make decisions about one's reproductive life (in this instance, whether or not to carry a non-viable pregnancy to term). Explicitly stating that the right to privacy entails ensuring the necessary conditions for the realisation of human dignity so that individuals 'can determine their own destiny in areas of central concern.'[26], and that realising these conditions requires consideration of both the interpersonal relationships and wider societal structures that can make us more or less vulnerable, would have advanced the multilevel feminist citizenship project of reconceptualising human rights to better represent and respond to women's lived needs and realities even further.

These HRC Views could also have advanced an intersectional feminist approach to legal reasoning even further in their consideration of the claims under article 7 (freedom from torture and CIDT) and by engaging with the claims made under article 19 (freedom to seek, receive and impart information), and by taking a more coherent approach to equality and non-discrimination. The Committee's Views, concurring opinions, and dissenting opinions in regard to article 19 and equality and non-discrimination epitomise some of the continued conceptual uncertainty surrounding SRHRs within IHRL.

In regard to torture and CIDT, the UN human rights system has emphasised that these should not be understood in hierarchical terms with torture as a more severe version of CIDT, but rather that the distinction between torture and CIDT rests on whether or not the pain or suffering was inflicted with purpose or intention where a person is under the de facto control of another (torture), or whether the pain or suffering was inflicted without purpose or

[24] R Copelon, 'Losing the Negative Right of Privacy: Building Sexual and Reproductive Freedom' (1990) 18 NYU Review of Law and Social Change, 41
[25] ibid
[26] ibid, 65

intention outside a situation where a person is under the de facto control of another.[27] Reports by the SR Torture have also emphasised that gender-based discrimination fulfils the purpose element of the definition of torture, and that the intention element can be inferred if it can be shown that an act had a specific purpose or that serious harm was reasonably foreseeable as a result of the act.[28] Furthermore, as mentioned above, Special Rapporteur Juan Méndez's 2013 and 2016 reports discuss how the stigma, vulnerability, and discrimination arising from restrictive abortion legislation amount to torture or ill-treatment.[29] These developments represent engagement with and responsiveness to feminist critiques of traditional approaches to torture and CIDT, which drew attention to the problematic nature of hierarchies and dichotomies (torture/CIDT), the failure to address violations of this right in private/non-state contexts (e.g. domestic violence), and the need to recognise gender-based discrimination as both a violation of women's rights in of itself and as leading to violations of women's human rights.[30] The HRC's *Mellet* and *Whelan* Views indicate some awareness of, engagement with, and responsiveness to these developments of a gender-sensitive approach to interpreting torture and CIDT articulated by the SR torture: the Views recognised the profound effects of stigma, shame, and the especially vulnerable situation in which people find themselves when in medical settings as key elements in determining that there had been a violation of the right to be free from CIDT. However, the HRC could have advanced an intersectional feminist approach to legal reasoning even further in these Views had it engaged with the idea of gender-based discrimination as fulfilling the purpose and/or intent elements of the definition of torture. This reasoning is as follows. If the purpose element of torture includes gender-based discrimination, and if – as recognised not only by feminists but also the SR torture in his 2013 report – restrictive abortion legislation is underpinned by the desire to enforce 'socialized gender roles and expectations'[31], then restrictive abortion legislation fulfils the purpose criterion of torture. Furthermore, it is arguable that restrictive abortion legislation also fulfils the intention criterion of torture: as discussed in Chapters 1 and 2, there is

[27] SR torture, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (A/HRC/13/39, 9 February 2010) para 60 (SR Torture 2010 report)
[28] SR torture, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (A/HRC/7/3, 15 January 2008) para 30 (SR Torture January 2008 report); SR torture 2013 report, paras 45-6
[29] SR torture January 2008 report, 'Part II: Strengthening the Protection of Women from Torture'; SR torture 2013 report, paras 46-50, para 90; SR torture 2016 report, paras 14, 42, 43-4, 51, 72
[30] SR torture 2013 report, para 37; SR torture 2016 report, para 8; See for example C Chinkin, S Wright, H Charlesworth 'Feminist Approaches to International Law: Reflections from Another Century' in D Buss, A Manji (eds) *International Law*, 25-6; A Edwards 'The 'Feminizing' of Torture under International Human Rights Law' 19 Leiden Journal of International law (2006) 349
CA MacKinnon, *Are Women Human?* 17-18, 23
[31] SR torture 2013 report, para 43

extensive evidence, including from the UN human rights treaty monitoring bodies themselves, that restrictive abortion legislation results in higher rates of unsafe abortion, higher rates of maternal mortality, and negative health outcomes for women. Moreover, being forced to continue with a pregnancy means that an individual's ability to pursue education, employment, and other forms of personal and professional fulfilment is potentially circumscribed.[32] Therefore, rather than focusing solely on the individual experiences of *Mellet* and *Whelan* and the ways in which they amounted to CIDT, the HRC could also have undertaken a structural analysis of Ireland's restrictive legislation to find that it was discriminatory, had the foreseeable consequence of causing harm, and was therefore also torture. While a novel and potentially controversial approach to legal reasoning, and while the ICCPR and the UNCAT and their respective treaty monitoring bodies may differ in their approach to interpreting torture and CIDT, such an approach is the logical consequence of drawing upon recent work by the SR torture, as well as being the logical consequence of applying intersectional feminist principles to legal reasoning. While the HRC advanced women's citizenship by recognising the individual harms arising from Ireland's restrictive abortion legislation, it could have advanced this project even further by recognising the structural causes of these harms, namely the fact that Ireland's restrictive abortion legislation was grounded in misogynistic attitudes to women, their reproductive capacity, and their sexuality. The HRC's approach in these Views to the right to seek, receive and impart information, and to the principle of non-discrimination, also require critique.

In an individual concurring opinion to both Views, three Committee members argued that the Committee 'should have also established that the State violated the author's right to seek and receive information in accordance with article 19(2) of the Covenant' rather than 'sidestepping' a discussion of article 19.[33] Their reasoning was that the Abortion Information Act placed a disproportionate and unjustifiable limit on the communication of reliable, transparent information.[34] In what would have been a welcome finding in the *Mellet* and *Whelan* Views, the Committee members presenting this concurring opinion stated that:

[32] R Dixon, MC Nussbaum, 'Abortion, Dignity, and a Capabilities Approach' 70
[33] *Mellet v Ireland*, Appendix IV: Individual opinion of Committee members Víctor Rodríguez Rescia, Olivier de Frouville and Fabián Salvioli (concurring); *Whelan v Ireland*, Annex III: Individual opinion of Committee member Olivier de Frouville (concurring), paras 1, 6
[34] ibid, paras 5, 6

> We believe that, when it comes to issues of health, including matters relating to sexual and reproductive rights, in which, moreover, people's lives and well-being may be at risk, information must be publicly available. Access to such information must figure as part of a public policy of the State that sets uniform guidelines for assisting users in taking personal decisions with regard to such a complex issue as abortion.[35]

Had the Committee supported this decision, it would have been of symbolic and substantive importance in demonstrating that the right to seek, receive and impart information is an integral component of SRHRs, and it would have been further proof of the indivisible, interdependent, and interrelated nature of human rights. As is also often the case with the ECtHR, there appears to be a belief that finding a violation of one human right provides sufficient redress and absolves the human rights body from adjudicating on other impugned rights. This represents a missed opportunity to emphasise the indivisible, interdependent, and interrelated nature of human rights, and it instead creates a hierarchy between rights. This suggests the persistence of hierarchical, dichotomous approaches to reasoning inherent in the androcentric Western liberal legal tradition and criticised by feminists as an impediment to the full realisation of women's human rights and citizenship.[36]

The potential to articulate a clear, unified understanding of equality and non-discrimination was another missed opportunity on the part of the Committee. The HRC did not consider the applicants' allegations under articles 2(1) and 3 of the Covenant, reasoning that finding a violation of the right to equality before the law was sufficient.[37] It did so by conflating a formal and a substantive understanding of equality. Firstly, the Committee found this right to have been violated because similarly-situated women (i.e. those pregnant with a non-viable foetus) who continued with their pregnancy were given support by the State that those who decided to terminate the pregnancy were not.[38] It then acknowledged that Ireland's criminalisation of abortion was informed by gender-based stereotypes of women's reproductive role, made a passing reference to 'similarly situated women' without explaining

[35] ibid, para 3
[36] See for example H Charlesworth, C Chinkin, S Wright 'Feminist Approaches to International Law' 621, 625, 634, 635
[37] *Mellet*, para 7.12; *Whelan*, para 7.13
[38] *Mellet*, para 7.10; *Whelan*, para 7.12

who these women were, before citing the applicant's medical needs and socioeconomic circumstances as further reasons for a violation of article 26.[39]

This muddle of promising elements reflects dissent within the Committee: two concurring opinions stated that the HRC should have considered the claims under articles 2(1) and 3, and that it should have taken the opportunity to articulate the ways in which denying women access to abortion is a form of gender-based discrimination with its origins in sexist stereotypes about women's appropriate role in society; this represents a more substantive/structural approach to equality and non-discrimination that is in keeping with the understanding of equality set out in Chapter 1 and which would advance women's full citizenship.[40] Another Committee member issued a partly dissenting opinion stating the opposite: that the HRC should exercise caution and not extend the concept of discrimination to the point of it becoming meaningless.[41] Such disagreement reflects the tension between formal and substantive understandings of equality: for Seibert-Fohr, formal equality should inform the Committee's reasoning, asserting that '[d]ifference in treatment requires comparable situations in order to give rise to discrimination.'[42] In contrast, Ben Achour and Cleveland favour a substantive approach, whereby any 'distinction, exclusion, restriction or preference' that 'has the purpose or effect' of inhibiting the full enjoyment of human rights constitutes discrimination.[43] This more expansive and reflexive understanding of discrimination is better adapted to recognising and challenging legislation that is informed by and perpetuates gendered stereotypes of women's social and biological role. It is also more in keeping with the transformative vision underpinning SRHRs, namely that only through profound systemic change in the attitudes and laws that make up our social, economic, and political system can the citizenship and rights of historically oppressed groups be respected, protected, and fulfilled.

[39] *Mellet*, para 7.11; *Whelan*, para 7.12
[40] S Fredman, *Women and the Law*, 179, 184-5, 192; *Mellet*, Appendix I: Individual opinion of Committee member Yadh Ben Achour (concurring), paras 3-4; *Mellet*, Appendix II: Individual opinion of Committee member Sarah Cleveland (concurring), paras 3-16; *Whelan*, Annex I: Individual opinion of Committee member Yadh Ben Achour (concurring); *Whelan*, Annex II: Individual opinion of Committee member Sarah H. Cleveland (concurring)
[41] *Mellet*, Appendix V: Individual opinion of Committee member Anja Seibert-Fohr (partly dissenting); *Whelan*, Annex IV: Individual opinion of Committee member Anja Seibert-Fohr (partly dissenting)
[42] *Mellet*, Appendix V, para 4
[43] *Mellet*, Appendix II, para 8

Summary

The UN human rights system was the first forum in which feminists were able to articulate and advance the alternative understanding of citizenship and rights that SRHRs represent. As a result of their efforts, the UN human rights treaty monitoring bodies have recognised the legitimacy of this family of rights, and there are also some indications of intersectional feminist awareness in their reasoning. However, the tensions between traditional androcentric liberal legal reasoning and the transformative intersectional feminist approach required for the full realisation of SRHRs are evident in the dissent among Committee members as to how best to interpret and apply human rights. In *Mellet* and *Whelan*, this was evident in the Committee's approach to torture and CIDT, its failure to engage with the claims relating to the freedom to seek, receive and impart information, and its somewhat incoherent approach to equality and non-discrimination. It was argued that these issues arose from the persistence of the liberal legal framework, although there are indications that legal reasoning that is informed by intersectional feminist thinking is beginning to influence the Committee.

Nevertheless, the *Mellet* and *Whelan* Views represent the importance and utility of feminist engagement with the language and mechanisms of human rights to advance women's full citizenship. As will be discussed in Chapter 5, national and transnational feminist activists filed this petition with the HRC – representing feminist engagement with the international level of the human rights system – and the HRC's finding of violations in these two Views created greater pressure on the Irish government to respond to demands by the international human rights system and feminist civil society activists to repeal the 8th Amendment and implement less restrictive abortion legislation.

As such, these Views represent both the positive real-world change that can be made within and through IHRL, and the ongoing limitations in the legal reasoning employed by human rights bodies. This speaks to the ongoing and contested nature of the multilevel feminist citizenship project that is SRHRs: engaging with the language and mechanisms of human rights is vital for the advancement of SRHRs and therefore women's full citizenship, but the process of engaging with the international level of the human rights system is not without its limits. Similar challenges are apparent in inter-American jurisprudence on abortion, but so too are means to overcome them.

3.2. Abortion in the inter-American human rights system's jurisprudence

Introduction

As demonstrated in the previous chapter, both the IACHR and the IACtHR have made use of a progressive and reflexive approach to the interpretation of human rights, one which is often informed by an intersectional feminist understanding of the structural barriers impeding the realisation of women's citizenship. The current stance of the inter-American human rights system on abortion is that it should be legal at a minimum where there is a risk to the pregnant person's life or health, in the case of rape, and in the case of fatal foetal abnormality. The first section undertakes a critical reading of the IACHR's 2014 friendly settlement *Alba Lucía Rodríguez Cardona (Colombia)*. It argues that the nature of the friendly settlements procedure and the Commission's intersectional, substantive approach to non-discrimination contribute to this human rights body being the most committed of all those under consideration to the transformative feminist rationale underpinning the advancement of SRHRs and, by extension, women's full citizenship. The second section will discuss the IACtHR's *Artavia v Murillo* case, reflecting on the positive contributions it has made to advancing SRHRs in the inter-American human rights system. It will also reflect on its shortcomings, particularly in relation to its inaccurate understanding of intersectionality, and its approach to the principle of non-discrimination, and how these need to be addressed to ensure that women's full human rights and citizenship are realised.

The IACHR

As discussed in the previous chapter, the IACHR has demonstrated a commitment to the respect, protection and fulfilment of SRHRs including abortion access in its reports and jurisprudence. Its approach, which focuses on restorative and transformative justice through the friendly settlements procedure, and which demonstrates an understanding of intersectionality and substantive equality that converges with that called for by the transnational feminist movement, is especially effective for guaranteeing women's right to have rights and to determine the scope of those rights. In fact, it is not the Commission's reasoning but rather the challenges of ensuring state compliance and managing its caseload that represent the greatest impediment to the IACHR's protection and promotion of SRHRs

in the region.[44] The aspects of the Commission's approach to legal reasoning conducive to advancing an intersectional feminist approach to human rights will now be considered in relation to the friendly settlement *Alba Lucía Rodríguez Cardona (Colombia)*. This friendly settlement has been chosen for close analysis because the facts of the case bear remarkable similarities to those of the women in El Salvador who were prosecuted and incarcerated for having had an abortion, as Chapter 4 will demonstrate.

First filed in 2000 by the Center for Justice and International Law (CEJIL) and *la Red Colombiana de Mujeres por los Derechos Sexuales y Reproductivos* (the Colombian Network of Women for Sexual and Reproductive Rights), the Cardona petition alleged violations of article 5 (right to humane treatment), article 8 (fair trial), article 11 (privacy), article 24 (equal protection), and article 25 (judicial protection) of the ACHR.[45] These violations arose from the 1997 sentencing of Alba Lucía to 42 years and 5 months in prison for the alleged murder of her newborn baby; she had become pregnant as the result of rape and given birth to a stillborn baby girl in the toilet of her home.[46] Accused by her attending physician of having murdered the baby, Cardona served almost five years of the sentence before it was overturned by the Supreme Court in 2002 on the grounds that offensive and discriminatory attitudes toward Alba Lucía informed the collection of evidence, the conduct of the trial, and her sentencing.[47] Nine years later, in 2011, the two parties agreed to a friendly settlement.[48] This settlement supported the petitioners' assertion that 'the victim's status as an economically disadvantaged peasant woman and unmarried pregnant woman led to the violation of her fundamental rights'[49] by including the following statement in the Friendly Settlement Agreement:

> Alba Lucía Rodríguez Cardona…was subjected to discriminatory prosecution based on gender and social status. The court proceedings in her case were plagued by irregularities as a consequence of the stigmas attached to her situation and the prejudices of public servants of the State and other key actors in the development of

[44] D Shelton 'The Rules and the Reality of Petition Procedures in the Inter-American Human Rights System' (2015) 5 Notre Dame Journal of International and Comparative Law, 26-8
[45] IACHR, *Alba Lucía Rodríguez Cardona (Colombia). Friendly Settlement* (Report No. 59/14, Case 12.376, 24 July 2014), para 2
[46] ibid para 2
[47] ibid, paras 18-25
[48] ibid, para 4
[49] ibid, para 3

> the case. Therefore, through its state agents, the Colombian State violated the rights of Alba Lucia Rodriguez Cardona enshrined in Articles 1, 5, 8 11, 24, and 25 of the American Convention on Human Rights, and Article 7(a), (b), (f), and (g) of the Convention of Belém do Pará.[50]

By adopting the language and argumentation of the petitioners – two feminist organisations – and by including violations of the Belém do Pará Convention in addition to the alleged violations of the ACHR, the IACHR demonstrated its commitment to an intersectional feminist approach to IHRL. In keeping with the intersectional approach to legal reasoning articulated in Chapter 1, the IACHR framed of Cardona's experiences as violations of human rights with their origins in deep-rooted patriarchal, misogynistic assumptions about women's reproduction and sexuality. Its reasoning also represents an awareness of the ways in which these misogynistic assumptions interact with the discourses of race and class to result in disproportionate surveillance and punishment of poor, indigenous/*mestiza*/*campesina* women. In naming and challenging these issues, the IACHR is challenging the colonial and patriarchal discourses that hold that women are non-citizens and in need of regulation and control, instead asserting women's right to have rights and determine the scope of those rights as full citizens.

The awareness of a need for structural change to provide redress and prevent repeat violations is also evident in the measures of reparation that the IACHR obliged the Colombian government to undertake: not only was Colombia to provide medical, psychological, sexual and reproductive healthcare to Cardona and her partner, and to finance her education or employment training to help her 'rebuild her life plan',[51] the state was also required to design and implement national training courses for civil service, as well as medical, psychological and psychiatric personnel, on gender perspective and professional privilege, with a special emphasis on gender and human rights, and overcoming stereotypes on the social role of women.[52] This friendly settlement therefore illustrates the IACHR's commitment to an intersectional feminist approach to legal reasoning which challenges structural inequalities that undermine human dignity and exacerbate vulnerability, and provides guidance on how to dismantle these structures of oppression.

[50] ibid, para 29
[51] ibid, Measures of Reparation, paras 4-6
[52] ibid, para 3

However, there are some ways in which it could develop its non-repetition methods further and so improve the likelihood of state compliance. According to O'Connell, these include even more effective remedy design and requiring states to cooperate with civil society in implementing the non-repetition measures.[53] For example, the Commission should provide details of and guidance on the 'the quality, duration, and content' of the required national training courses, and it should also require the state to report on the provision and outcomes of these courses.[54] In regard to civil society cooperation and participation in the implementation of non-repetition measures, the Commission should explicitly require this in its friendly settlements on SRHRs, and it should require states to submit reports that outline its collaboration with civil society.[55] Given the ongoing development of IACHR jurisprudence on SRHRs, and given its longstanding responsiveness to civil society engagement, it is likely that these recommendations will feature in future friendly settlements.

The *Cardona* friendly settlement illustrates the IACHR's awareness of structural, intersecting inequalities and the systemic change required to address them, and its responsiveness to feminist activists and their interpretation of human rights. The dynamic, progressive approach of the IACHR to human rights protection, an approach which is informed by an awareness of the historical, structural causes of human rights issues in the region, is the product of the historical and political context in which the IAHRS evolved, the commitment of the numerous Commissioners to intersectional feminism, and the responsiveness of the IACHR to feminist actors both within the IAHRS, such as CIM, and outside of it, such as national and transnational feminist organisations. The importance and utility of this for advancing the multilevel feminist citizenship project of SRHRs at the regional level is thus evident. The importance and utility of the inter-American human rights system for advancing women's full citizenship at the national level is discussed in detail in the next chapter in regard to El Salvador. The next section considers the growing awareness within the IACtHR of intersectionality and the gendered nature of human rights violations, albeit at a slightly slower and more conservative pace than that of the IACHR.

[53] C O'Connell, 'Litigating Reproductive Health Rights In The Inter-American System: What Does A Winning Case Look Like?' (2014) 16 Health and Human Rights Journal, 125
[54] ibid, 123-4
[55] ibid, 125

The IACtHR

As mentioned in the previous chapter, the IACtHR has yet to hear a case on abortion specifically. However, the Court has clarified its current understanding of the right to life (guaranteed from the moment of conception by article 4 of the ACHR and article I of the American Declaration on the Rights and Duties of Man) in a way that has important implications for abortion access. In *Artavia Murillo v Costa Rica*, the IACtHR found that the State's complete prohibition on IVF violated the 18 complainants' rights to personal integrity, personal freedom, privacy, and rights of the family in relation to the equality and non-discrimination provision of the ACHR.[56] This judgment is significant for several reasons: it articulated the inter-American human rights system's commitment to SRHRs as defined and developed by the UN human rights system and therefore by extension by intersectional transnational feminists; it undertook a dynamic approach to treaty interpretation to clarify the meaning of 'from the moment of conception' in relation to the right to life; and it made some attempt at an intersectional approach to recognising human rights violations. However, its failure to engage with IACHR jurisprudence on SRHRs, a problematic understanding of motherhood as integral to women's identity, and an incomplete understanding of intersectionality all require critique.

In articulating its understanding of the right to privacy as it pertained to the case, the Court emphasised the interrelatedness of this right with the right to life, the right to family, the right to physical and mental integrity, the right to health, and the right to enjoy the benefits of scientific progress. In a similar fashion to the HRC's *Mellet* and *Whelan* Views, The Court emphasised the centrality of 'the reproductive rights of the individual', as well as of 'reproductive autonomy', 'access to reproductive health services', and 'reproductive freedom'[57], thus indicating awareness of and potentially support for the understanding of SRHRs articulated by intersectional feminists. The IACtHR also directly quoted the definitions of SRHRs articulated by the 1994 ICPD Programme of Action, 1995 Beijing Declaration and Platform for Action, and the Committee on Economic, Social and Cultural Rights in its judgment. This commitment to the interrelated nature of human rights of relevance to SRHRs, to reproductive autonomy and reproductive freedom, and its references

[56] IACtHR, *Artavia Murillo et al v Costa Rica*
[57] ibid, paras 144, 146, 147

to the ICPD and Beijing PFAs indicate the IACtHR's commitment to feminist understandings of IHRL that centre women's right to have rights and to determine the scope of those rights.

The Court's dynamic interpretation of the Convention in light of other international and regional human rights bodies' jurisprudence, specifically the right to life as enshrined in article 4(1) ACHR, is one of the major developments this case made to its jurisprudence. Its analysis of this article was in response to the fact that the de facto ban on IVF in Costa Rica arose from the 2000 ruling by the Costa Rican Supreme Court's Constitutional Chamber that article 4(1) ACHR accorded 'full recognition of the legal and real personality of the unborn child and its rights' and that the voluntary or involuntary 'elimination or destruction of embryos' during IVF treatment violated this.[58] To counter this assertion, the IACtHR interpreted 'conception' as occurring at the moment of implantation, and interpreted any right to life of embryos as 'gradual and incremental according to its development.'[59] Moreover, since the Costa Rican Court claimed that the UDHR, ICCPR, Convention on the Rights of the Child, and 1959 Declaration on the Rights of the Child also guaranteed an absolute right to life from the moment of conception, the Inter-American Court analysed them to demonstrate that such a conclusion was mistaken and would jeopardise the human rights of pregnant people.[60] In doing so, it drew attention to General Comments, Concluding Observations and Views issued by the UN Human Rights Committee and the CEDAW Committee that a 'total ban on abortion, as well as its criminalization under certain circumstances' violates the CEDAW Convention and could also violate women's right to life as enshrined in the ICCPR.[61] It also referred to regional human rights standards, specifically the 'non-absolute scope of the protection of prenatal life in the context of cases of abortion and medical treatments related to in vitro fertilization' in the European system, and the provisions on sexual and reproductive rights in the African system's Maputo Protocol.[62] As such, it is clear that feminist interpretations of international human rights standards on SRHRs are exerting an influence on the Court's reasoning. This represents the Court's openness to developments in other human rights systems, as well as an understanding of human rights that is influenced by feminist approaches. Despite these significant gains, there are limits to the Court's approach, however: these are its failure to engage with IACHR jurisprudence on SRHRs, a

[58] *Artavia Murillo v Costa Rica*, paras 73-77
[59] ibid, para 264
[60] ibid, paras 191-244
[61] ibid, paras 226-8
[62] ibid, paras 243, 235

problematic understanding of motherhood as integral to women's identity, and an incomplete understanding of intersectionality.

Firstly, the Court did not allude to the work of the IACHR on SRHRs in its discussion of the inter-American system.[63] This oversight is surprising, given the extensive work on the topic that the IACHR has undertaken, and given that the IACHR refers cases to the IACtHR. Indeed, the rules of procedure for both bodies set out a close working relationship between the two.[64] In future jurisprudence, it is hoped that the Court will make direct references to the IACHR's work on SRHRs in the interests of demonstrating a unified inter-American human rights system position on SRHRs, and in the interests of advancing the intersectional feminist approach that the IACHR has embraced vis-à-vis SRHRs.

Secondly, the Court reiterated its problematic stance from *Gelman v Uruguay* that 'motherhood is an essential part of the free development of a woman's personality.'[65] This phrasing is reminiscent of the discourses of women-as-mothers and women-as-non-citizens that actively work against women's right to have rights and to determine the scope of those rights. By stating that motherhood is 'essential' to 'a woman's personality', the Court fails to recognise that not all women want to become mothers and also fails to recognise that women who are mothers are not reduced to or defined by that one aspect of their identity. By using the 'essential' nature of motherhood as the basis for including the decision of whether or not to become a parent within the scope of the right to privacy, the Court perpetuated the public/private dichotomy of reproduction/politics and also perpetuated the discourses of women-as-mothers and women-as-non-citizens as explained in Chapters 1 and 2. Had the Court phrased this assertion in a more nuanced fashion – for example by recognising that for those wish to become parents (not just mothers), the ability to do so is of vital importance to their wellbeing and autonomy – it could have challenged these discourses which work to impede women's full citizenship.

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[63] ibid, paras 220-23

64 IACHR, 'Rules of Procedure of the Inter-American Commission on Human Rights' (approved by the Commission at its 109th special session and amended at its 116th regular period of sessions) 25 October 2000, Title III: Relations with the Inter-American Court of Human Rights; IACtHR, 'Rules of Procedure of the Inter-American Court of Human Rights' (approved by the Court at its 49th regular session) 25 November 2000, arts 25, 33, 59

[65] *Artavia Murillo v Costa Rica*, para 143

Thirdly, the Court's attempt at an intersectional approach, while a welcome step in the right direction, did not always represent an accurate understanding of the concept. The Court discussed intersectionality in relation to the ways in which the ban on IVF differentially impacted the complainants according to disability, gender, and socioeconomic situation, emphasising the importance of the principle of non-discrimination and the importance of challenging both direct and indirect discrimination.[66] While this is a welcome development for the multilevel feminist citizenship project, the Court's presentation of its analysis and its failure to fully develop certain aspects of it indicate that the Court still needs to refine its understanding the concept and practice of intersectionality. Firstly, its presentation of its analysis – discussing each of the three categories of gender, class and disability under separate sub-headings – makes it seem as though these categories are separate and additive, rather than interrelated and interacting in complex ways; emphasising the interrelated nature of these identities and power structures in its analysis would have gone some way to address this.[67] Secondly, although its attention to the social model of disability and its understanding of involuntary fertility as a disability are progressive and reasonably nuanced, it failed to reflect on the fact that one of the petitioners was paraplegic and so might have experienced specific barriers and prejudices in accessing IVF.[68] Discussing this particular issue in greater depth would have made for a more complete engagement with an intersectional feminist approach to legal reasoning.

Despite these shortcomings, *Artavia Murillo* sets an important precedent for SRHR cases in relation to the right to life, and it also suggests that the Court is slowly adapting a more intersectional approach to judicial reasoning. Ongoing engagement with UN SRHR standards, further engagement with the IACHR's work on SRHRs, and a more comprehensive understanding of intersectionality will improve further on these promising beginnings to adopting legal reasoning which will advance women's full citizenship.

Summary

The inter-American human rights system, particularly the IACHR, has demonstrated a firm commitment to the respect, protection, and fulfilment of SRHRs including abortion access.

[66] ibid, para 276, 284, 286
[67] ibid, paras 288-293, 294-302, 303-304
[68] ibid, paras 85, 288-293

This is the result of its openness to developments in other human rights systems, the particular approach to human rights protection it has developed as a result of the specific political and historical context in the region, and (as discussed in Chapter 2) the existence of an organisation dedicated to women's human rights in the form of CIM. The *Cardona* petition illustrated the IACHR's commitment to SRHRs and intersectional feminist legal reasoning through adopting the language and argumentation of the two feminist organisation petitioners, through a focus on restorative and transformative justice, and through an approach to legal reasoning that is clearly informed by intersectional feminist understandings of the structural causes of inequality and the need for structural change to address them. While the IACtHR's approach to SRHRs and intersectional feminist legal reasoning in *Artavia Murillo* was somewhat less effective due to a failure to engage with IACHR jurisprudence on SRHRs, a problematic understanding of motherhood as integral to women's identity, and an incomplete understanding of intersectionality, it nevertheless indicated awareness of and commitment to SRHRs. The IACtHR did so by articulating the inter-American human rights system's commitment to SRHRs as defined and developed by the UN human rights system and therefore by extension by intersectional transnational feminists; undertaking a dynamic approach to treaty interpretation to clarify the meaning of 'from the moment of conception' in relation to the right to life; and making some attempt at an intersectional approach to recognising human rights violations. Overall, then, the inter-American human rights system is proving to be a responsive actor and important site for the realisation of the multilevel feminist citizenship project that is SRHRs. This is in marked contrast to the ECtHR, which has taken a deferential and conservative approach to SRHRs.

3.3. Abortion in the jurisprudence of the ECtHR and ECSR

Introduction

Of the three human rights systems under consideration here, the European system has heard the most cases concerning abortion.[69] It has also taken the most conservative approach to the human rights implications of restrictive abortion legislation: rather than acknowledging the

[69] ECtHR, *A, B and C v Ireland* (Application No. 25579/05) 16 December 2010; ECtHR, *Boso v Italy* (application no. 50490/99) (admissibility decision) 5 September 2002; *Open Door and Dublin Well Woman v Ireland* (application no. *14234/88; 14235/88)* 29 October 1992; ECtHR, *P and S v Poland* (Application No. 57375/08) 20 October 2012; ECtHR, *RR v Poland* (Application No. 27617/04) 28 November 2011; ECtHR, *Tysiąc v Poland* (Application No. 5410/03) 20 March 2007; ECtHR, *Women on Waves v Portugal* (Application No.31276/05) 3 February 2009

discriminatory intent underlying restrictive abortion legislation or the negative human rights impact of restrictive abortion legislation and ruling accordingly, the European human rights system maintains that states are entitled to determine the scope of abortion legislation, and that violations of the Convention will only arise if abortion is not accessible in the circumstances where it has been legalised.[70] As will be demonstrated, this has resulted in the European human rights system perpetuating the androcentric biases in legal reasoning that were highlighted in the previous chapters: taking male experience as the normative standard, perpetuating the public/private dichotomy of international/domestic law, and perpetuating the public/private dichotomy of civil and political/economic, social and cultural rights.[71]

Three ways in which this androcentric approach to legal reasoning is evident in the structure and jurisprudence of the ECtHR and ECSR are discussed in this section. Firstly, the fact that the Court is responsible for civil and political rights and the Committee is responsible for economic, social and cultural rights – and the fact that the Court is the main body for the protection and promotion of human rights in CoE Member States – represents the perpetuation of the civil and political/economic, social and cultural rights dichotomy highlighted by feminists as detrimental to the full realisation of women's human rights.[72] Human rights issues of particular concern to women, such as access to reproductive healthcare, have to be juxtaposed onto a rights framework that neither represents nor responds to their needs and realities, a framework that is based on narrow understandings of civil and political rights that take men to be the normative standard.[73] Secondly, the ECtHR's androcentric approach to legal reasoning is evident in its narrow and inaccurate approach to interpreting both the right to privacy and the right to be free from torture/CIDT. Thirdly, an androcentric approach to legal reasoning is evident in the jurisprudence of both the ECtHR and the ECSR in their formal rather than substantive approach to equality. It is also evident in their stance that the legality of abortion can be determined by states: the European human rights systems' deferential approach to human rights protection as expressed through the doctrines of the margin of appreciation and European consensus – and the ways in which the Court interpreted these doctrines in relation to *A, B and C v Ireland* – resulted in the Court according unjust state practice greater precedence than women's human rights. As the below

[70] ECtHR, A*, B and C v Ireland*, para 235; ECtHR *Tysiąc v Poland*, paras 121-130
[71] See discussion in Chapter 1 and also for example H Charlesworth, 'Alienating Oscar: Feminist Analysis of International Law' (1993) 25 Studies in Transnational Legal Policy (1993), 5
[72] See discussion in Chapter 1
[73] ibid

case analyses demonstrate, as a result of the interaction of these three issues, the European human rights system has failed to represent or respond to the real human rights issues that result from restrictive abortion legislation, namely the ongoing subordination of women and their exclusion from full citizenship. While the previous chapter highlighted that the European human rights system has articulated a commitment to SRHRs in recent years, this commitment exists in name only since the real meaning and transformative goal of SRHRs have yet to be accurately incorporated into the jurisprudence of the ECtHR/ECSR.

The ECtHR

As discussed in the previous chapter, the ECtHR (and until 1998 its associated Commission) has heard cases on abortion since the late 1970s.[74] Its most recent jurisprudence on the subject dates from the 2000s and 2010s.[75] While the Court has on occasion found in favour of the applicants, ruling that there had been a violation of Convention rights as a result of their experiences when attempting to obtain an abortion to which they were legally required, the legal reasoning employed to come to this conclusion is fundamentally flawed. The Court's stance is that states have a margin of appreciation in determining the scope of domestic abortion legislation, and simply have to ensure that where legal, abortion should be accessible.[76] This means that states are under a positive obligation to implement a clear legal and procedural framework under which women can establish whether they are legally entitled to an abortion, and they should also have access to an appeals mechanism if they are refused access to an abortion.[77]

Such an approach fails to address the real-world human rights issues arising from restrictive abortion legislation: that restrictive abortion legislation negates women's and girls' ability to make decisions about their own bodies and lives, and that such legislation has its origins in the desire to control women's reproductive ability in the service of a patriarchal social order which requires the negation of women's status as rights-bearers/citizens. In essence, the Court is asking the wrong questions when cases concerning alleged human rights violations

[74] European Commission of Human Rights, *Brüggeman v Scheuten*; ECtHR, *Boso v Italy*; ECtHR, *Open Door and Dublin Well Woman v Ireland*
[75] ECtHR, *A, B and C v Ireland*; ECtHR, *P and S v Poland*; ECtHR, *RR v Poland*; ECtHR*, Tysiąc v Poland*; ECtHR Fourth Section, *D v Ireland*
[76] ECtHR, *A, B and C v Ireland*, para 235; ECtHR *Tysiąc v Poland*, paras 121-130
[77] ECtHR, *A, B and C v Ireland*, para 154; ECtHR*, RR v Poland*, para 200; ECtHR, *Tysiąc v Poland*, paras 121-130

arising from restrictive abortion legislation come before it:[78] rather than considering the rationale and impact of restrictive abortion legislation – legislation most likely passed by predominately male legislatures – vis-à-vis women's human rights, the Court limits itself to determining whether or not such legislation passes a proportionality test that also fails to represent or respond to the women's lived realities. The Grand Chamber ruling in *A, B and C v Ireland* represents these issues, as well as the problematic approach of the Court to defining the nature and scope of the right to privacy, the right to be free from torture and CIDT, and the right to equality and non-discrimination.

A, B and C v Ireland concerned three applicants who had to travel to the UK for abortions: A for personal, socioeconomic and mental health reasons; B because she did not want to become a single parent; and C because continuing with the pregnancy would likely cause her cancer to return.[79] A and B's experiences highlighted the financial difficulties engendered by having to organise travel and treatment abroad, as well as the sense of shame and need for secrecy, and the fear of seeking medical care on return to Ireland.[80] C's experience highlighted the lack of guidance and information available to women in Ireland considering an abortion.[81] All three women's experiences demonstrated the ways in which having to travel to England resulted in delays, complications, and disruptions to care, such as by having to have a surgical rather than medical abortion, feeling unable to tell their regular GP that they had had an abortion, and the lack of follow-up physical or mental healthcare on return to Ireland.[82] All three experienced complications following the procedure once back in Ireland, with A having to be taken to hospital by ambulance for emergency care, B 'passing blood clots', and C experiencing 'prolonged bleeding and infection.'[83] A and B alleged that the prohibition of abortion in Ireland violated their right to be free from torture and CIDT (article 3), their right to privacy (article 8), and the right to an effective remedy (article 13) in conjunction with the prohibition of discrimination (article 14).[84] C alleged that her inability to establish her right to a lawful abortion in Ireland on the grounds of a risk to her life violated

78 F de Londras, 'When the European Court of Human Rights Decides Not to Decide: The Cautionary Tale of *A, B & C v Ireland* and Referendum Emergent Constitutional Provisions' in P Kapotas, VP Tzevelekos (eds), *Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond* (CUP 2019) 314
79 *A, B and C v Ireland*, paras 14
80 ibid, paras 15, 16, 19, 20, 21
81 ibid, para 24
82 ibid,, paras 16, 21, 26
83 ibid, paras 16, 21, 26
84 ibid, para 113

these rights as well as her right to life (article 2).[85] Despite considering the ICPD and Beijing PFAs – and despite acknowledging concerns about Ireland's restrictive abortion legislation raised by the CoE's Commissioner for Human Rights, the CEDAW Committee and the UN Human Rights Committee – the Court found that there had been no violation of the applicants' rights, with the exception of C's right to privacy.[86] The Court's reasoning in relation to torture/CIDT, privacy, and non-discrimination will be now discussed in turn.

In regard to torture/CIDT, the Court continued to foreground an understanding of experiences amounting to torture grounded in the male embodied experience. In contrast to the UN HRC's findings in *Mellet* and *Whelan* and in contrast to developments in the understanding of torture and CIDT articulated by the UN human rights system, the ECtHR ruled that the psychological and financial burden of having to travel abroad for an abortion, the disruption in continuity of care, and the negative psychological and physical health impacts of this 'did not disclose a level of severity falling within the scope of Article 3.'[87] This marked a divergence in the Court's jurisprudence on abortion: in both *RR v Poland* and *P and S v Poland*, the ECtHR found there to have been a violation of this right as a result of the applicants' vulnerability and their experiences.[88] While the facts of the Polish abortion cases differ from those in *A, B and C v Ireland*, the applicants' physical, psychological and socioeconomic vulnerability, the medical complications they experienced following their abortions, and the profound sense of shame and humiliation they felt as a result of Ireland's ban on abortion could and should have been interpreted as meeting the minimum threshold of severity.[89] The Court's ruling could and should have recognised these women's experiences as amounting to torture/CIDT by recognising the discriminatory and stigmatising rationale and impact of Ireland's abortion legislation, and by recognising the physical, psychological, and emotional toll of these women's experiences as meeting the minimal threshold of severity.

The Court's androcentric liberal legal reasoning was also apparent in its finding that the interference with A and B's right to privacy was justified.[90] In contrast to the UN and inter-American human rights systems' approaches, the Court did not recognise reproductive

[85] ibid, para 3
[86] ibid, paras 104-5, 109-11
[87] ibid, paras 164-5
[88] *P and S v Poland*, paras 148, 162; *RR v Poland*, paras 140, 151
[89] *A, B and C v Ireland*, paras 13-16, 21, 22-26
[90] *A, B and C v Ireland*, paras 216, 241-2

autonomy as falling within the scope of this right. Instead, it reiterated the problematic *Brüggemann v Scheuten* precedent that 'pregnancy cannot be said to pertain uniquely to the sphere of private life' and that 'not every regulation of abortion amounts to interference with the right to respect for private life.'[91] In light of this, the Court found that Ireland had not exceeded the margin of appreciation afforded to it in enacting restrictive abortion legislation supposedly based on the 'profound moral views of the Irish people as to the nature of life.'[92] That these supposedly 'profound moral views' could override European consensus (the majority of CoE Member States permit access to abortion in at least some circumstances) and widen the margin of appreciation afforded to Ireland was in marked contrast to the rest of the Court's jurisprudence, and it was rightly criticised as 'a real and dangerous new departure in the Court's case-law' by the joint partly dissenting opinion of six of the Court's judges and numerous case commentaries.[93]

The Court's reasoning was that since the applicants had had access to information and medical care in Ireland, and since they were legally permitted to travel abroad for an abortion, the state had struck the appropriate balance between their right to privacy and the 'legitimate' aim of protecting these profound moral views on the right to life of the unborn.[94] In coming to its conclusion that the Irish people still held the 'profound moral views' that had informed the introduction of Article 40.3.3º to the Constitution through a referendum characterised by low turnout almost thirty years previously, the Court dismissed evidence indicating popular support for liberalisation of Irish abortion legislation.[95] Moreover, the Court failed to acknowledge the financial, psychological and – for migrant and asylum-seeking women – legal difficulties in being forced to travel abroad for a time-sensitive medical procedure that often requires physical and psychological aftercare. It also failed to acknowledge that the many high-profile cases and controversies arising from Ireland's restrictive abortion legislation – discussed in Chapter 5 – that had demonstrated the negative human rights implications of Ireland's abortion legislation. Instead of taking these important

[91] ibid, para 216
[92] ibid, paras 241-2
[93] F de Londras, When the European Court of Human Rights Decides Not to Decide', 329; ECtHR, *A, B and C v Ireland*, 'Joint Partly Dissenting Opinion of Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi' para 9; P Ronchi, 'A, B and C v. Ireland: Europe's *Roe v. Wade* still has to wait' [2011] 127 Law Quarterly Review 365; C Ryan, '*A, B and C v Ireland*: A Disproportionate Response to the Violation of Women's Reproductive Freedom' (2014) 3 UCL Journal of Law and Jurisprudence 237; J Westeson, 'Reproductive Health Information and Abortion Services: Standards Developed by the European Court of Human Rights' [2013] 122 International Journal of Gynecology and Obstetrics 175
[94] ECtHR, *A, B and C v Ireland*, paras 221, 222, 227, 241-2
[95] ibid, paras 225-6

considerations into account, the Court validated the specious arguments of successive Irish governments that Article 40.3.3º of the Irish Constitution reflected 'the deeply held and profound moral position of the Irish people when it comes to abortion' to such an extent that even entertaining the idea of a referendum and legislative reform would be too sensitive and complex.[96] Despite IHRL's established stance at this point that restrictions on reproductive healthcare services including abortion could result in human rights violations, despite clear evidence that Ireland's abortion legislation had resulted in harms to multiple women (not least among them A, B and C), and despite the majority of other CoE Member States having far less restrictive abortion legislation, the Court evaded its responsibility to adjudicate by finding that abortion was 'quite simply, for the national polity to decide.'[97] Deciding that abortion was a matter for domestic rather than international law perpetuated the public/private dichotomy of international/domestic law and concerns that feminists have criticised as a major impediment to the realisation of women's rights and citizenship.[98] As well as perpetuating this false dichotomy, the Court's approach to privacy does not situate individual agency within the context of wider power relations, as a feminist approach to the right to privacy informed by reproductive autonomy or relational autonomy would have.[99] In other words, the Court's liberal legal understanding of the individual failed to recognise that just because these women could exercise a degree of free will and agency by travelling to the UK for an abortion did not mean that they were not harmed by the structural inequalities of gender and socioeconomic disadvantage informing their experiences of Ireland's restrictive legislation. The ECtHR's approach to the right to privacy in this case represents the Court's unwillingness and inability to recognise the inherently discriminatory nature of restrictive abortion legislation and the human rights violations which it causes. Its unquestioning acceptance of the Irish government's arguments regarding "profound moral values" and its excessive deference to them represents at best an unwillingness to challenge female subordination before the law, and, at worst, tacit support for it.

While the Court decided that C's right to privacy had been violated, the basis for this finding was fundamentally flawed. Rather than highlighting the ways in which such a restrictive

[96] F de Londras, 'When the European Court of Human Rights Decides Not to Decide', 330-1
[97] ibid, 331-2
[98] See discussion in Chapter 1
[99] M Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition', 1, 10, 16; M Friedman, 'Autonomy, Social Disruption and Women' in C Mackenzie, N Stoljar (eds), *Relational Autonomy*, 40; J Herring, *Caring and the Law*, 2; C Mackenzie, N Stoljar, 'Introduction: Autonomy Reconfigured' in C Mackenzie, N Stoljar (eds), *Relational Autonomy*, 21

legislative context was counter to the full realisation of women's human rights and citizenship, the Court found that a violation of the right to privacy had occurred because the State failed to implement a legislative or regulatory regime providing an accessible and effective procedure by which she could have established whether she qualified for a lawful abortion in Ireland.[100] Again, as a result of its liberal legal reasoning and its focus on proportionality, the Court failed to recognise the lived experiences of women when considering human rights issues arising from restrictive abortion legislation.

As for violations of the prohibition on discrimination and the right to an effective remedy, the Court decided that there was no need to examine complaints separately under article 14, and that no separate issues arose under article 13.[101] This is because of the subsidiary nature of article 14, whereby a violation of article 14 will not be examined by the Court when it has already found a violation of other Convention rights.[102] Rather than a commitment to equality and non-discrimination being the cornerstone of human rights interpretation, the Court considers this principle an add-on. This means that the opportunity for adjudication to name, make visible, and address human rights violations arising from structural inequalities such as sexism is foreclosed. As with the failure to discuss the right to information in the *Mellet* and *Whelan* Views, the structure of the Convention and the Court's interpretation of it represents a missed opportunity to emphasise the supposedly interrelated and indivisible nature of human rights and instead creates a hierarchy between rights. Again, the hierarchical, dichotomous nature of androcentric Western liberal legal reasoning is evident.

The persistence of formal equality approaches to legal reasoning and their reliance on the male as normative standard is evident in the Court's approach to non-discrimination in this case. As has been noted by scholars and even Court judges themselves, the Court has yet to fully develop a substantive conception of equality.[103] While there has been some development in the ECtHR's anti-discrimination jurisprudence in recent years through an increase in cases in which article 14 has been invoked, the development of the concept of vulnerable groups, and the adoption of Protocol 12 on non-discrimination, there is still 'a

[100] *A, B and C v Ireland*, para 267-8
[101] ibid, paras 270, 274
[102] S Besson, 'Evolutions in Non-Discrimination Law within the ECHR and the ESC Systems: "It Takes Two to Tango in the Council of Europe"' (2012) 60 American Journal of Comparative Law, 156-7
[103] S Besson, 'Evolutions in Non-Discrimination Law', 179-80; MB Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (CUP 2006); R O'Connell, 'Cinderella Comes to the Ball: Article 14 and the right to non-discrimination in the ECHR' (2009) 29 Legal Studies 4

regrettable lack of overall coherence', a dilution of the 'special protection' supposed to be afforded to recognised minority groups through the margin of appreciation, and considerable 'evidentiary hurdles' to proving discriminatory intent in its article 14 and Protocol 12 jurisprudence.[104] Furthermore, even though scholars have noted a shift towards substantive equality approaches in the Court's recent jurisprudence through the introduction of the concept of vulnerable groups,[105] the Court's conceptualisation of vulnerable groups has not sufficiently acknowledged that this vulnerability is the result of historic and ongoing unequal power relations that require structural change to remedy, i.e., the understanding of vulnerability that was articulated in Chapter 1 of this thesis. The Court also persists in using a comparator in its supposed substantive equality reasoning, even though substantive equality reasoning should not require a comparator since it considers whether provisions are inherently discriminatory in that they deny the full enjoyment of an individual or group's human rights.[106] As such, while the Court's jurisprudence indicates movement in a more progressive direction, it still falls short of the intersectional feminist approach that SRHRs and by extension women's full citizenship require. These issues were apparent in the *A, B and C* case.

In *A, B and C*, the Court did not engage with the applicants' allegations that 'the criminalisation of abortion was discriminatory' and that 'the stigma and taboo effect of the criminalisation of abortion' amounted to degrading treatment.[107] Since the Court favours a formal equality approach, and there was no available comparator (i.e. no cisgender man can experience being forced to travel abroad for an abortion), the Court was unwilling or unable to recognise the structural nature of discrimination that restrictive abortion legislation caused. As noted by O'Connell, the Court's adherence to formal equality approaches at this time, with their focus on comparator requirements and grounds for distinction mean the Court did not meaningfully consider 'central questions in substantive equality inquiries.'[108]

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[104] S Besson, 'Evolutions in Non-Discrimination Law', 160, 168-9, 172. See also D Kagiaros 'Vulnerability as a Path to a 'Social Minimum'? An Analysis of ECtHR Jurisprudence' in T Kotkas, I Leijten, F Pennings (eds) *Specifying and Securing A Social Minimum in the Battle Against* Poverty (Oxford, Hart 2019); L Peroni, A Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) ICON 1056; A Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights' in MA Fineman, A Grear (eds), Vulnerability : Reflections on a new ethical foundation for law and politics (Abingdon, Routledge 2013) 147

[105] R O'Connell, 'Cinderella Comes to the Ball'; L Peroni, A Timmer, 'Vulnerable Groups'; A Timmer, 'A Quiet Revolution'

[106] S Besson, 'Evolutions in Non-Discrimination Law', 163

[107] *A, B and C v Ireland*, para 162

[108] R O'Connell, 'Cinderella Comes to the Ball', 20

The Court's commitment to non-discrimination and equality is further weakened by its prioritisation of civil and political over economic, social and cultural rights.[109] Since the Convention does not protect social, economic and cultural rights of potential relevance to SRHRs, and since the Court has taken such a narrow approach to interpreting freedom from torture/CIDT and privacy, the ability of women to articulate rights claims relating to SRHRs such as abortion is circumscribed. While there are some indications that the Court is increasingly considering socioeconomic factors in its analysis of potential human rights violations, and while Protocol 12 opens up the possibility of the ECtHR having to interpret the ESC,[110] in regard to abortion it is only in certain, exceptional circumstances that women's inability to access a medical procedure in a straightforward, safe, and timely manner will be framed as a violation of human rights in light of the Court's current jurisprudence. Therefore, the ways in which women are excluded from exercising their human rights through restrictive abortion legislation cannot be recognised by the European human rights system as it currently stands because of its indebtedness to the androcentric liberal legal tradition. As a result, experiences that cannot be accounted for by the male as normative standard or by a dichotomous, hierarchical understanding of rights will not be named as subjects of human rights protection, even though they should be.

Summary

Whereas the IAHRS and the UN have asserted that abortion should be decriminalised at least in some circumstances in order to prevent violations of women's human rights, the ECtHR still maintains that states have a margin of appreciation in determining the legislation on abortion. It is only where abortion is legal and not accessible that violations of the Convention may arise. This stance fails to acknowledge the origins and consequences of restrictive abortion legislation vis-à-vis the status of women – something the dissenting and separate opinions in *Brüggemann and Scheuten* recognised over forty years ago when they highlighted the fact that 'over-restrictive legislation not only fails to prevent 'back-street abortions'…but may even encourage recourse to them'[111] and asserted that 'the self-determination of women' was the crux of the matter in adjudicating on restrictive abortion

[109] ibid, 6
[110] D Kagiaros, 'Vulnerability as a Path to a 'Social Minimum'?'; Besson, 'Evolutions in Non-Discrimination Law', 180
[111] *Brüggemann and Scheuten*, Dissenting Opinion of Mr JES Fawcett, para 7

legislation.[112] The Court's current approach to cases concerning access to abortion is based in an adherence to androcentric liberal legal reasoning that fails to represent or respond to the lived realities of women. This is impeding the full realisation of women's citizenship, understood as their right to have rights and to determine the scope of those rights. As will be discussed in Chapter 5, its conservative, deferential approach to human rights protection may have resulted in partial advances for women's human rights in Ireland, but it consistently failed to consider the underlying discriminatory rationale and real-world impact of Ireland's abortion legislation. Similar dynamics are apparent in the ECSR.

ECSR

As mentioned in the previous chapter, the ECSR is responsible for examining State compliance with the European Social Charter (ESC) through examining national reports submitted by States Parties, and through a collective complaints procedure open to approved organisations. While it has recognised the legitimacy of SRHRs as a family of human rights, and while it has been drawn upon UN SRHR standards in making some of its decisions, it has also replicated some of the more problematic aspects of the ECtHR's approach from a feminist perspective, such as the deferential approach to states' abortion legislation, the failure to recognise the real human rights issues at play in abortion cases, and a narrow understanding of non-discrimination.

The ECSR has considered three cases concerning abortion, all of which have found that abortion access falls within the scope of article 11 (the rights to health) and article E (non-discrimination) of the ECSR, and two of which found that disproportionate restrictions on abortion access result in violations of these rights.[113] In *IPPF-EN v Italy*, the ECSR found there to be a violation of article 11(1) and article E due to the overly-broad nature of domestic conscientious objection provisions relating to abortion.[114] In its survey of relevant law, the Committee referred to ICESCR, ICCPR, CEDAW, the CESCR's General Comment No. 14 and its discussion of non-discrimination in the provision of healthcare to women, CEDAW's General Recommendation No. 24 on Women and Health, and WHO's technical and policy

[112] ibid, Separate Opinion of Mr T Opsahl (Mr C Norgaard and Mr L Kellberg concurring), paras 1, 2
[113] ECSR, *CGIL v Italy*; ECSR, *FAFCE v Sweden*; ECSR, *IPPF-EN v Italy*
[114] ECSR, *IPPF-EN v Italy*, paras 69, 160, 163-4, 174-77, 194

guidance of health systems on access to abortion and conscientious objection.[115] This indicates some engagement with UN SRHR standards on the part of this body, which is to be commended because it represents a responsiveness to the intersectional feminist ideal of SRHRs that influenced this UN SRHR jurisprudence.

The Committee's assertion that 'the right to protection of health guaranteed in Article 11 of the Charter' complements 'the protection afforded to the principle of human dignity by Articles 2 and 3 of the European Convention on Human Rights' is also welcome, given that it recognises the interdependent, interrelated, and indivisible nature of these rights and thus goes some way to overcome the divide between civil and political rights on the one hand and economic, social and cultural rights on the other.[116] Moreover, the Committee goes on to state that there is a positive obligation upon States to 'provide appropriate and timely health care on a non-discriminatory basis, including services relating to sexual and reproductive health' to ensure that the principles of human dignity and non-discrimination, and the right to health are respected, protected and fulfilled.[117] This too represents the Committee's commitment to the legitimacy of SRHRs, as well as awareness of the fact that SRHRs encompass a number of core human rights and their underlying principles.

Despite these indications that the ECSR is aware of and committed to the holistic nature of SRHRs, the ECSR also replicates some of the more problematic elements of androcentric liberal legal reasoning apparent in the ECtHR's jurisprudence. Firstly, the Committee claimed that the issue which it had been asked to rule on was how Italy's organisation of sexual and reproductive healthcare impacted upon the enjoyment of the right to protection of health, and not 'whether individuals enjoy a right to obtain an abortion.'[118] In reality, these two issues are not separate, as the Committee claimed, but in fact one and the same: as has been recognised by the UN and inter-American human rights systems, ensuring that individuals can access abortion care in at least some circumstances is integral to the right to health and to the full realisation of SRHRs, and ensuring access to abortion care is directly impacted upon by how a state organises and regulates sexual and reproductive healthcare. To make such a distinction is specious, and it contradicts the ECSR's own assertion that 'States must provide appropriate and timely health care on a non-discriminatory basis, including

[115] ibid, paras 37-41
[116] ibid, para 66
[117] ibid
[118] ibid, para 68

services relating to sexual and reproductive health' and that 'a health care system which does not provide for the specific health needs of women will not be in conformity with Article 11, or with Article E of the Charter taken together with Article 11.'[119]

Along with this inaccurate distinction between SRHRs on the one hand and abortion access on the other, the Committee reiterates the ECtHR's stance that the legality of abortion can be determined by states and that therefore the only issue is that where legal, abortion should be accessible.[120] As already discussed, this approach to abortion falls short of the intersectional feminist, UN, and inter-American stance that abortion should be decriminalised in some, if not all, circumstances to prevent violations of women's human rights. Therefore, even though the Committee did find a violation of Article 11 and Article E,[121] the basis of its legal reasoning was far narrower than that which is required to guarantee the full and meaningful realisation of women's human rights. Italy was found responsible for violations of this right because it was not ensuring the effective implementation of existing legislation, and not because restrictions on abortion access violate, among others, the right to health and the principle of non-discrimination.[122]

Finally, the ECSR also replicates the ECtHR's problematic equality reasoning. Rather than taking the substantive equality approach of considering whether the legislation in question had the purpose or effect or inhibiting women's full human rights, the Committee made use of the formal equality approach of comparators to determine whether there had been a breach of the principle of non-discrimination. Therefore, rather than the inability to access legal abortion care being framed as inherently discriminatory and as having a direct bearing on women's ability to enjoy the full range of their human rights, the Committee framed inequality as something which only occurs when 'similarly situated individuals' are not afforded identical treatment.[123] This perpetuates the idea that there is some kind of neutral, normative standard against which behaviour and experience must be measured; given that this neutral, normative standard is in fact value-laden and based on the heterosexual, middle-class, non-disabled, white male experience, such an approach is unable to represent or

[119] ibid, para 66
[120] ibid, para 69
[121] ibid, para 194
[122] E Bribosia et al, 'Objection, Ladies! Taking *IPPF-EN v Italy* (ECSR) One Step Further' in E Brems, E Desmet (eds), *Integrated Human Rights in Practice: Rewriting Human Rights Decisions* (Cheltenham, Edward Elgar Publishing 2017) 269-70, 275-7
[123] ECSR, *IPPF-EN v Italy*, para 190

respond to the complexities of lived experiences that fall outside their scope. As a result, the Committee created the constructs of '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' and 'discrimination on the grounds of gender and/or health status between women seeking access to lawful termination procedures and men and women seeking access to other lawful forms of medical procedures',[124] both of which only partly capture the human rights issues at stake in this case, namely the ways in which restrictive abortion legislation has the purpose and effect of restricting women's human rights.

However, as with the concurring opinions in the HRC's *Mellet* and *Whelan*, there is evidence that the ECSR may yet adopt a different approach, one which employs a more expansive understanding of discrimination that better serves the systemic change that the realisation of SRHRs requires. In his concurring opinion to the *IPPF v Italy* decision, Committee member Stangos took a more structural and discursive approach, arguing that 'the fundamental structure' of Italy's abortion legislation resulted in violations of Article 11 of the Charter.[125] He argued that 'women's freedom and independence and their control over their bodies and personalities are at risk of being seriously undermined' by the Italian abortion legislation, which, in his words, put in place 'a whole set of institutional and operational machinery' that operates to dissuade women from having an abortion and instead forces them to 'ultimately "choos[e]" to give birth.'[126] In effect, Stangos recognised that the origins and rationale of Italy's abortion legislation was to deny women's right to have rights and determine the scope of those rights and to ensure that they fulfil their role of women-as-mothers and women-as-non-citizens. Moreover, he also highlighted the problematic nature of the Committee's reasoning, stating that it was 'not fully in tune with the real issues raised by this complaint', which as intersectional feminist approaches to SRHRs attest, centre on 'women's right to abortion as a right stemming from, and forming part of every human being's right to self-determination.'[127] In articulating such a position, Stangos recognised that the Committee should have engaged in a more in-depth critique of Italy's abortion legislation. Such a critique of the legislation could and should have recognised that the legislation's intention is the regulation of women's reproduction in the service of a patriarchal social order predicated

[124] ibid, para 190
[125] ibid, Concurring opinion of Petros Stangos
[126] ibid
[127] ibid

upon women's exclusion from citizenship and rights. As with the other jurisprudence analysed in this chapter, then, IPPF v Italy provides insight into the tensions between the transformative approach SRHRs require and the traditional androcentric liberal legal reasoning that persists in IHRL.

Summary

In 1975, one of the key players in the drawing up of the ECHR stated that 'the Convention is not designed to promote social reform.'[128] The above review of *A, B and C v Ireland* suggests that such an understanding persists in key ECtHR jurisprudence on SRHRs. In contrast to intersectional feminist understandings of IHRL as a means to advance social change and contest women's exclusion from and oppression by the traditional citizenship discourse, the ECtHR still understands the ECHR as offering a minimal standard of human rights protection under which CoE Member States should not fall. Given that the Court's mandate is 'to effectively protect fundamental rights', in reality 'the scope of application of fundamental rights should be interpreted broadly, and limitations restrictively.'[129] Therefore, the Court should adopt the more progressive, dynamic approach to human rights interpretation of the UN and Inter-American human rights system. The doctrine of the Convention as a living instrument, first articulated in 1978,[130] may provide the Court with a basis for doing so, and so this is an area deserving further consideration from a feminist standpoint. For the present, the Court's deferential approach to human rights protection as epitomised by the margin of appreciation and European consensus doctrines, the persistence of formal equality approaches in its reasoning, and the lack of attention to economic, social and cultural rights, makes it an actor that has impeded, rather than advanced, the intersectional feminist understanding of SRHRs necessary for their full realisation and, by extension, women's full citizenship.

The Court's increasing attention to substantive equality issues through its conceptualisation of vulnerable groups and its potential new obligation to interpret the ESC as a result of Protocol 12, may yet go some way to addressing these issues. The more progressive approach of the ECSR, and the strong commitment to SRHRs including the decriminalisation of

[128] E Bates,'Consensus in the Legitimacy-Building Era of the European Court of Human Rights' in P Kapotas, VP Tzevelekos (eds) *Building Consensus on European Consensus*, 51
[129] K Henrard, 'How the ECtHR's Use of European Consensus Considerations Allows Legitimacy Concerns to Delimit its Mandate' in P Kapotas, VP Tzevelekos (eds) *Building Consensus on European Consensus*,163
[130] ECtHR, *Tyrer v United Kingdom* (Application No. 5856/72) 25 April 1978, para 31

abortion on the part of the CoE Commissioner for Human Rights, might also exert an influence on the Court in the coming years. Until then, the jurisprudence of the European human rights system will be unable to represent and respond to women's lived realities, therefore circumscribing their right to have rights and determine the scope of those rights and instead perpetuating the legal constructs of women as divergent from the male norm and of women as non-citizens.

Conclusion

This chapter undertook a critical feminist reading of sample UN human rights treaty monitoring body, IACHR/IACtHR, and ECtHR/ECSR jurisprudence on abortion. In doing so, it demonstrated that the feminist aim of realising women's full citizenship in the form of advancing SRHRs is an ongoing and contested process because of the persistence of liberal legal reasoning in these bodies' jurisprudence. As indicated by certain aspects of the judgements, as well as concurring and dissenting opinions, there is some evidence that these bodies are moving toward legal reasoning that is more in keeping an intersectional feminist approach that recognises systemic inequality and the specific steps required to represent and respond to women's lived realities. Of the three systems, the inter-American seems to have advanced the legitimacy of SRHRs and their transformative intersectional feminist core to greatest effect, closely followed by the UN system and with the European system lagging behind.

Part one analysed the HRC Views *Mellet v Ireland* and *Whelan v Ireland*, finding that this UN human rights treaty monitoring body has to a considerable extent adopted an intersectional feminist approach to legal reasoning. While it articulated an understanding of freedom from CIDT and the right to privacy that represented and responded to the lived realities of these women, and while it named the harms they experienced as human rights violations, it could have advanced an intersectional feminist approach even further by considering the intent and purpose elements of torture; engaging with the freedom to seek, receive and impart information; and a more coherent approach to equality and non-discrimination.

Part two discussed sample jurisprudence of the IACHR and the IACtHR, arguing that the IACHR's approach – particularly its emphasis on restorative/transformative justice and a commitment to an intersectional and substantive understanding of equality – is most in keeping with that envisaged by intersectional feminists in relation to the full realisation of SRHRs and, by extension, women's citizenship. While the IACtHR has also demonstrated a commitment to SRHRs in its jurisprudence, its legal reasoning continues to be inhibited by essentialist notions of women and their reproduction, as well as a partial understanding of intersectionality and substantive equality.

Part three considered the ECtHR and ECSR's abortion jurisprudence, and it came to the conclusion that these bodies still employ androcentric liberal legal reasoning that cannot adequately represent or respond to women's lived realities. These limitations are especially apparent in regard to the conceptualisation of non-discrimination, the right to privacy, the right to be free from torture/CIDT, and the system's deferential approach to human rights protection as epitomised by its margin of appreciation and European consensus doctrines. A clear understanding of and commitment to substantive understandings of inequality, a more nuanced understanding of the right to privacy than current dichotomous approaches, and a more holistic understanding of freedom from torture/CIDT in light of developments within the UN human rights system would go some way to address these issues. So too would a revised approach to the margin of appreciation and European consensus doctrines, one which recognises that applying such doctrines in the case of the systemic exclusion and oppression of the Court's 'vulnerable groups' is inappropriate and counter to the respect, protection, and fulfilment of their human rights.

While the development of IHRL by international and regional human rights bodies is a vital space for ongoing feminist engagement, human rights are only meaningful if they are respected, protected and fulfilled at the national level. These spaces – international, regional and domestic – are interrelated. As such, the next two chapters consider the ways in which feminist activists in El Salvador and Ireland have made use of the language and mechanisms of human rights at the domestic, regional and international level of the human rights system to contest their exclusion from citizenship through the criminalisation of abortion.

Chapter 4

El Salvador

This chapter argues that feminist activism for abortion access in El Salvador can be understood as a multilevel feminist citizenship project. Feminists are working at the interconnected domestic, regional, international, and transnational levels of the human rights system to contest their exclusion from and oppression by the traditional discourse of citizenship as represented by the complete criminalisation of abortion. They are doing so through a 'multidimensional' strategy which involves gathering research and evidence, campaigning and raising awareness, alliance-building with actors who share their aims, and strategic litigation.[1]

Part 1 provides a general overview of the situation in El Salvador. This overview is necessary since, as mentioned in Chapter 1 of this thesis, El Salvador is 'Latin America's least researched nation-state.'[2] In order to understand the rationale and impact of the state's current abortion legislation, and in order to understand the actors and power dynamics involved in the multilevel citizenship project under discussion, some historical, political, economic, and social context is required.

Following on from this, parts 2, 3, and 4 explore the ways in which feminists are engaging with the language and mechanisms of human rights nationally, regionally, internationally, and transnationally in order to advance their claims for straightforward, safe, and legal access to abortion in El Salvador. Part 2 provides context for these processes by providing an overview the Salvadoran feminist movement. It then analyses some of the key cases arising from the complete criminalisation of abortion, and the ways in which Salvadoran and transnational feminist organisations – along with national human rights institutions and certain legislators – are campaigning for legislative reform and the release of women who

[1] X Casas, 'They are Girls not Mothers: The Violence of Forcing Motherhood on Young Girls in Latin America' (2019) 21 Health and Human Rights Journal, 163
[2] A Lauria-Santiago, L Binford, 'Local History, Politics, and the State in El Salvador' in A Lauria-Santiago, L Binford (eds), *Landscapes of Struggle*, 2

have been incarcerated. Part 3 considers Salvadoran and transnational feminist engagement with the inter-American human rights system (IAHRS). It contends that the IACHR, IACtHR, and CIM are being responsive to and supportive of feminist calls for change in El Salvador by advocating for the decriminalisation of abortion in El Salvador, justice for the women imprisoned, and the advancement of SRHRs in IHRL. Part 4 discusses the responsiveness of the UN human rights system to Salvadoran and transnational feminist campaigns for the decriminalisation of abortion in El Salvador. It does so by highlighting the ways in which national and transnational feminist and human rights organisations have influenced the UN human rights treaty monitoring bodies' Concluding Observations, as well as Special Rapporteurs' country visit reports and the UN High Commissioner for Human Rights. This chapter argues that these interrelated processes of national, regional, international and transnational contestation of El Salvador's complete criminalisation of abortion represent a multilevel feminist citizenship project.

At the time of writing, abortion remains completely illegal in El Salvador, and women continue to be prosecuted and imprisoned for suspected abortions. Nevertheless, there is hope that the situation may yet change since national, regional, international and transnational actors are increasingly vocal and unified in their calls for the Government to reform Salvadoran abortion legislation to ensure compliance with IHRL. The current situation in El Salvador demonstrates that feminists' contestation of women's exclusion from and oppression by the traditional citizenship discourse as it manifests in the criminalisation of abortion is an ongoing and contested process whose outcome is yet to be determined.

4.1. El Salvador: General Overview

Chapter 2 illustrated the ways in which colonialism created a context of profound ethnic and socioeconomic inequalities, violence, and conservative, patriarchal norms in El Salvador, interrelated issues which directly influenced the drawing up and implementation of the state's abortion legislation. Since 1998, abortion is completely illegal: a person who performs an abortion with the woman's consent, or a woman who self-induces or consents to someone else inducing her abortion, can be imprisoned for two to eight years.[3] A person who performs an abortion to which the woman has not consented can be sentenced to between four and ten years' imprisonment; if the person is a healthcare worker, they can be sentenced to between

[3] Código Penal, arts 133-137

six and twelve years in prison.[4] To ensure that these provisions' constitutionality, the Constitution defines life as beginning at the moment of conception.[5]

Not only is abortion completely criminalised in El Salvador, those suspected of having had the procedure are actively prosecuted.[6] Moreover, many women have had the charge of abortion increased to that of aggravated homicide – the murder of a close family member – which carries a sentence of up to 40 years in prison.[7] The women who have been charged, prosecuted, and imprisoned are mostly poor, rural, and indigenous/*mestiza*, representing a continuation of the disproportionate surveillance of these women's sexuality since colonial times.[8] The concept of aggravated homicide also represents the continuity of colonial-era attitudes and legislation since colonial Spanish legislation classed abortion and infanticide as parricide, the murder of any persons related by consanguinity.[9] The complete criminalisation of abortion in El Salvador therefore represents the denial of women's citizenship and the control of their sexuality and reproduction in the service of a patriarchal social order. It has been repeatedly criticised by feminist and human rights organisations, the inter-American human rights system, and the UN human rights system for causing multiple violations of women's and girls' human rights.[10] They have called for a moratorium on prosecutions, and they have urged the state to decriminalise abortion in at least some circumstances.[11]

These bodies and organisations have highlighted that the complete criminalisation in El Salvador and the prosecution of women suspected of having had the procedure is situated in a wider context of 'the highly unequal distribution of wealth';[12] a general climate of violence and insecurity, largely as the result of gang activity;[13] deep-rooted patriarchal stereotypes and

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[4] ibid
[5] Constitución de la República de El Salvador, art 1
[6] Agrupación Ciudadana, *Del hospital a la cárcel,* 8, 10; Amnesty, *On the Brink of Death*, 36, 38
[7] ibid
[8] Agrupación Ciudadana*, Del hospital a la cárcel*, 16-26; Center for Reproductive Law and Policy, *Persecuted*, 46-51; MT Ochoa, S García, *¿Por qué me pasó esto a mí?*, 7-8, 41
[9] NE Jaffery, 'Reconceiving Motherhood', 5
[10] See Annex 1 and Agrupación Ciudadana*, Del hospital a la cárcel*; Amnesty International, *On the Brink of Death*; Freedom House, 'Freedom in the World 2020: El Salvador' (Freedom House, 2020) <https://freedomhouse.org/country/el-salvador/freedom-world/2020> accessed 22 November 2020; Human Rights Watch, 'El Salvador: Events of 2019' (Human Rights Watch, 2020) <https://www.hrw.org/world-report/2020/country-chapters/el-salvador> accessed 22 November 2020; IACHR 2018 El Salvador Country Visit, 7-8; IACHR 2019 El Salvador Country Visit, 19, 12-3
[11] ibid
[12] CESCR, 'Concluding Observations on the combined third, fourth and fifth periodic reports of El Salvador' (E/C.12/SLV/CO/3-5, 19 June 2014) para 19 (CESCR 2014 Concluding Observations)
[13] CEDAW Committee 'Concluding Observations on the combined eighth and ninth periodic reports of El Salvador' (CEDAW/C/SLV/CO/8-9, 9 March 2017) paras 24-6 (CEDAW 2017 Concluding Observations);

gender-based discrimination leading to widespread gender-based, homophobic, transphobic violence, exploitation, and abuse;[14] high rates of child and adolescent pregnancy as the result of rape, incest, and the social acceptability of girls entering sexual relationships at a young age, often with much older men;[15] barriers to women and girls' access to education, including comprehensive sexuality education;[16] gender inequality in the labour force;[17] low levels of women's political participation and representation;[18] inadequate healthcare provision, particularly in the area of sexual and reproductive healthcare;[19] weaknesses in the independence and competence of the judiciary, and poor pre-trial and prison conditions.[20] They have highlighted the specific, disproportionate impacts of these issues on rural women and girls,[21] LGBTQ* people,[22] indigenous and Afro-descendant women and girls,[23] women

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CRC Committee, 'Concluding Observations on the combined fifth and sixth periodic reports of El Salvador' (CRC/C/SLV/CO/5-6, 29 November 2018) paras 22-4 (CRC 2018 Concluding Observations); HRC, 'Concluding Observations on the seventh periodic report of El Salvador' (CCPR/C/SLV/CO/7, 9 May 2018) paras 22-3 (HRC 2018 Concluding Observations); Special Rapporteur on contemporary forms of slavery, including its causes and consequences (SR slavery), 'Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, on her mission to El Salvador' (A/HRC/33/46/Add.1, 3 August 2016) paras 24, 26, 33, 34 (SR slavery 2016 Report); IACHR 2018 El Salvador Country Visit, 1-3; IACHR 2019 El Salvador Country Visit, 2-4, 9

[14] CEDAW 2017 Concluding Observations, paras 22-29; CESCR 2014 Concluding Observations, para 17; CRC Committee 2018 Concluding Observations, paras 13, 25-28; HRC 2018 Concluding Observations, paras 13-4; IACHR 2019 El Salvador Country Visit, 9; Special Rapporteur on violence against women, its causes and consequences (SR VAW), 'Mission to El Salvador' (E/CN.4/2005/72/Add.2, 20 December 2004) paras 28-32, 40-2 (SR VAW 2004 Report); SR VAW, 'Report of the Special Rapporteur on violence against women, its causes and consequences, on her follow-up mission to El Salvador (17-19 March 2010)' (A/HRC/17/26/Add.2, 14 February 2011) paras 17-21, 76 (SR VAW Report 2011); SR Slavery Report 2016, paras 24, 26, 33, 34, 47, 48, 57, 62

[15] CEDAW Committee 2017 Concluding Observations, paras 32(a), 36, 50-1; CRC Committee 2018 Concluding Observations, paras 29, 35; HRC 2018 Concluding Observations, paras 15-6; IACHR 2018 El Salvador Country Visit, 3-6; IACHR 2019 El Salvador Country Visit, 12; SR VAW 2004 Report paras 31-2; SR VAW 2011 Report, paras 66-7

[16] CEDAW 2017 Concluding Observations, paras 32-3; CERD Committee, 'Concluding observations on the combined eighteenth and nineteenth periodic reports of El Salvador' (CERD/C/SLV/CO/18-19, 13 September 2019) paras 26-7, 34-5 (CERD 2019 Concluding Observations); CESCR 2014 Concluding Observations, paras 24-6; CRC Committee 2018 Concluding Observations, paras 42-5; HRC 2018 Concluding Observations, paras 9-10; IACHR 2019 El Salvador Country Visit, 12-3,15, 19

[17] CEDAW 2017 Concluding Observations, paras 34-5, 40-1; CESCR 2014 Concluding Observations, paras 10-12; HRC 2018 Concluding Observations, paras 11-12; IACHR 2019 El Salvador Country Visit, 10

[18] CEDAW 2017 Concluding Observations, paras 20-1, 23(b), 30-1; CESCR 2014 Concluding Observations, paras 10-1; HRC 2018 Concluding Observations, paras 11-12

[19] CEDAW 2017 Concluding Observations, paras 36-8; CESCR 2014 Concluding Observations, paras 21-3; CRC 2018 Concluding Observations, para 34; HRC 2018 Concluding Observations, paras 9-10, 15-6; IACHR 2018 El Salvador Country Visit, 3-6, IACHR 2019 El Salvador Country Visit, 9, 12

[20] CEDAW 2017 Concluding Observations, paras 48-9; HRC 2018 Concluding Observations, paras 27-30 35; Special Rapporteur on the independence of judges and lawyers (SR judiciary), 'Mission to El Salvador' (A/HRC/23/43/Add.1, 24 May 2013); Working Group on arbitrary detention (WG arbitrary detention), 'Mission to El Salvador' (A/HRC/22/44/Add.2, 11 January 2013); IACHR 2019 El Salvador Country Visit, 4-6, 11-13

[21] CEDAW 2017 Concluding Observations, paras 42-3 CERD 2019 Concluding Observations, paras 20-1, 26-7; CESCR 2014 Concluding Observations, paras 16, 18-20, 23-6; CRC 2018 Concluding Observations, paras 40-1, 48; HRC 2018 Concluding Observations, paras 13-4; IACHR 2018 El Salvador Country Visit, 3-6, IACHR 2019 El Salvador Country Visit, 10

human rights defenders (HRDs) and journalists,[24] disabled women and girls,[25] and internally displaced, migrant and refugee women and girls.[26]

In response to these issues, and despite the opposition, intimidation, harassment, and violence they face for doing so, feminists in El Salvador campaign for abortion law reform, an end to gender-based violence and sexual abuse, and the systemic political, economic, and social change required for the realisation of all women's full citizenship and human rights. The next part of this chapter argues that Salvadoran feminist contestation of the complete criminalisation of abortion is part of a multilevel feminist citizenship project.

4.2. Domestic Struggle

This part explores the ways in which feminists in El Salvador are contesting women's exclusion from and oppression by the traditional citizenship discourse as it manifests in the complete criminalisation of abortion and the prosecution of women suspected of having had abortions. It first provides a brief overview of the Salvadoran feminist movement, illustrating that there is a long history of feminists contesting women's exclusion from and oppression by the traditional citizenship discourse. It then discusses the key abortion cases and how they

[22] CEDAW 2017 Concluding Observations, paras 44-5; HRC 2018 Concluding Observations, paras 9-10; IACHR 2018 El Salvador Country Visit, 3-6, IACHR 2019 El Salvador Country Visit, 9-12, 19; IACHR, 'Recognition of the Rights of LGBTI Persons' (OEA/Ser.L/V/II.170/Doc. 184, 7 December 2018) paras 178, 247; IACHR, 'Violence against LGBTI Persons' (OAS/Ser.L/II.rev.1/Doc. 36, 12 November 2015) paras 102, 184, 279, 281, 286, 295, 346-7

[23] CEDAW 2017 Concluding Observations, paras 46-7; CERD 2019 Concluding Observations, paras 26-7; CRC 2018 Concluding Observations, para 13, 41, 47, 48; HRC 2018 Concluding Observations, paras 9-10, 41-2; IACHR 2019 El Salvador Country Visit, 10, 11, 17; Special Rapporteur on the rights of indigenous peoples (SR indigenous rights), 'The situation of indigenous peoples in El Salvador' (A/HRC/24/41/Add.2, 25 June 2013)

[24] CEDAW 2017 Concluding Observations, paras 16-7; HRC 2018 Concluding Observations, paras 37-8; IACHR 2018 El Salvador Country Visit, 3-6, IACHR 2019 El Salvador Country Visit, 9, 17; IACHR, 'Criminalization of the Work of Human Rights Defenders' (OEA/Ser.L/V/II. Doc. 49/15, 31 December 2015) paras 52-3; IACHR, 'Second Report on the Situation of Human Rights Defenders in the Americas' (OEA/Ser,L/V/II. Doc. 66, 31 December 2011) paras 30, 33, 38, 271, 287

[25] CRC 2018 Concluding Observations para 33; HRC 2018 Concluding Observations paras 9-10; CRPD 'Concluding observations on the combined second and third periodic reports of El Salvador' (CRPD/C/SLV/CO/2-3, 1 October 2019) paras 8-19, 12, 20-1, 32-3, 34-5, 48-9, 50-1, 52-3 (CRPD 2019 Concluding Observations); IACHR 2018 El Salvador Country Visit, 3-6; IACHR 2019 El Salvador Country Visit, 11, 20

[26] CEDAW 2017 Concluding Observations, paras 24(f), 25(f); CERD 2019 Concluding Observations, paras 14, 28-9; CRC Committee 2018 Concluding Observations, para 42(g); CRPD 2019 Concluding Observations, para 53(b); HRC 2018 Concluding Observations, paras 31-4; Special Rapporteur on the human rights of internally displaced persons (SR IDPs), ' Report of the Special Rapporteur on the human rights of internally displaced persons on her visit to El Salvador' (A/HRC/38/39/Add.1, 23 April 2018) paras 22, 24, 27, 28-9, 40; IACHR 2018 El Salvador Country Visit, 3-6; IACHR 2019 El Salvador Country Visit, 13-15

represent (1) the persistence of the oppressive, exclusionary citizenship discourse and (2) feminist contestation of this oppression and exclusion through the language and mechanisms of human rights.

4.1.1. Feminism in El Salvador

In order to understand the contemporary Salvadoran feminist movement, it is necessary to chart its origins in the late-19th and early-20th century, and the emergence in the 1970s and 1980s of some of the main feminist organisations working today. This is because the particular intellectual and political dynamics of these periods shaped feminist thinking and activism in El Salvador, informing the inherently intersectional approach of the contemporary feminist movement to its campaigns for abortion law reform.

Since its emergence at the turn of the 19th century, the modern Latin American and Salvadoran feminist movement has had a close relationship with democratic opposition, labour rights, indigenous, and campesino[27] movements.[28] These relationships informed the proto-intersectional feminist awareness of the need to address the interconnected challenges of sexism, socioeconomic inequality, racial and ethnic discrimination, and the urban/rural divide.[29] Women in the opposition, campesino, labour rights, and feminist movements began to develop closer connections and an awareness of the interrelated nature of their struggles from the late 1950s to the 1970s.

During this period, the emergence of liberal and left-wing democratic opposition movements created links between the various rural and urban political organisations, as well as links with

[27] *Campesino* is usually translated as 'a poor Latin American farmer or farm labourer.' It emerged as a political identity and movement in the mid-19th century. The Salvadoran *campesino* movement of the 19th and 20th century consisted of indigenous, *ladino*, and *mestizo* labourers who campaigned for decent pay and conditions, land rights, and indigenous rights to collective land ownership. This heterogenous movement was influenced by left-wing and Marxist thinking, as well as indigenous and pan-Mayan philosophy and political practices. See JL Gould, AA Lauria-Santiago, *To Rise in Darkness*, 99-101; RT Alexander 'Landscape change in the Maya Region 1450-1910 AD' in DL Nichols (ed), *The Oxford Handbook of Mesoamerican Archaeology* (OUP, 2012), 941-2

[28] S Migden Socolow, *The Women of Colonial Latin America*, 180; B Potthast, *Madres, obreras, amantes*, 229

[29] SR Berruz, 'Latin American Feminism'; CD Deere, M León, *Empowering Women*, 41-3; JL Gould, AA Lauria-Santiago, *To Rise in Darkness*, 128-9; F Martínez Castro, 'Historia del feminismo en El Salvador'; R Morgan, 'El Salvador' in R Morgan (ed), *Sisterhood is Global: The International Women's Movement Anthology* (New York, The Feminist Press at the City University of New York 1996), 209; L Stephen, K Ready, S Cosgrove 'Women's Organizations in El Salvador', 185; UN ECLAC, 'Women's Contribution to Equality in Latin America and the Caribbean' (LC/L.2738(CRM.10/3) August 2007) 21

similar movements in other Latin American countries.[30] Transnational, left-wing, and anti-imperial theory and praxis influenced contemporary Salvadoran feminism in terms of a structural understanding of the socioeconomic and racial inequality of Salvadoran society.[31] During the increasingly violent and politically divided 1970s, known as *el tiempo de locura* (the time of madness), women's and feminist groups grew in number and visibility.[32] One of the most famous, CoMadres, sought justice for relatives who had been disappeared by the state security and paramilitary forces.[33] Members saw themselves as 'citizens and mothers too', representing an alternative understanding of citizenship which sets up citizenship and motherhood as mutually exclusive.[34] While their activism initially revolved around justice for their relatives, their organising, campaigning, and discussing of their individual and shared experiences 'led CoMadres to question the social and sexual role assigned to Salvadoran women.'[35] Women in the left-wing political and guerrilla movements during and after the civil war had a similar experience of becoming aware of the fact that their partners, fellow trade union members, and fellow guerrilleros were often less than supportive of their efforts to challenge gender-based inequality.[36]

During the civil war, women made up around 30% of FMLN combatants and 36% of political personnel.[37] Despite the 'strikingly gendered system of stratification in the guerrilla camps', these women gained an education, training, and a sense of confidence and independence as a result of their time in the FMLN.[38] Their experiences also led to a growing awareness among girls and women within the left's guerrilla forces that gender equality was a secondary concern for, or even opposed by, many of their male comrades; as a result, they began to form feminist committees and organisations within their political parties, trade unions, and local areas.[39] There was a further proliferation of feminist organisations between

[30] R Crandall, *The Salvador Option*, 23; P Hipsher, 'Right and Left-Wing Women in Post-Revolutionary El Salvador: Feminist Autonomy and Cross-Political Alliance Building for Gender Equality' in V González, K Kampwirth (eds), *Radical Women in Latin America*, 137; J Viterna, *Women in War*, 23-4, 28
[31] JL Gould, AA Lauria-Santiago, *To Rise in Darkness*, 50, 52; UN ECLAC, 'Women's Contribution to Equality', 21
[32] P Hipsher, 'Right and Left-Wing Women', 137-8; L Stephen, 'Maria's compañeras: women's grassroots organizing in El Salvador, 1970-1991' in MT Tula, *Hear My Testimony*, 206-7
[33] CL Bejarano 'Las Super Madres de Latino America: Transforming Motherhood by Challenging Violence in Mexico, Argentina, and El Salvador' (2002) 23 Frontiers: A Journal of Women Studies, 133
[34] MT Tula, *Hear My Testimony*, 58-9
[35] ibid, 3-4, 69
[36] ibid; V González, K Kampwirth 'Introduction' in V González, K Kampwirth (eds), *Radical Women in Latin America*, 13
[37] P Hipsher, 'Right and Left-Wing Women', 138; IC Silber, J Viterna, 'Women in El Salvador', 331
[38] J Viterna, *Women in War*, 118, 168
[39] P Hipsher, 'Right and Left-Wing Women', 138; M Thomson, *Women of El Salvador*, 94-9

1986 and the end of the civil war in 1992, such as ORMUSA (*Organización de Mujeres Salvadoreñas por la Paz*, Organisation of Salvadoran Women for Peace), CEMUJER (*Instituto de Estudios de la Mujer "Norma Virginia Guirola de Herrera"*, Norma Virginia Guirola de Herrera Institute for Women's Studies), *Las Dignas*, and *Las Mélidas*, all of which are still active today and involved in campaigns for the decriminalisation of abortion.[40]

Following the end of the civil war, many feminist and women's group members felt disillusioned due to 'ongoing poverty, organising fatigue, and memories of violence and loss'; the failure of foreign donor-driven projects to recognise their extensive experience in community organising and activism; and the exclusion of women and their specific needs from the peace process.[41] Human rights institutes including *la Procuraduría para la Defensa de los Derechos Humanos* (Office of the Ombudsman for Human Rights, hereafter *la Procuraduría*) and *el Instituto Salvadoreño para el Desarrollo de la Mujer* (Salvadoran Institute for Women's Development, hereafter ISDEMU) were established in the early and mid-1990s, but a lack of funding and independence impeded their work.[42] Despite these issues, many feminists continued with or became involved in feminist activism through community-level politics and local NGOs.[43] For example, the feminist organisation *Las Dignas* was formed in 1990 during the peace negotiations in response to their failure to include women or address their issues.[44] One of its founders, Morena Herrera, founded *Agrupación ciudadana por la despenalización del aborto en El Salvador* (Citizens' Group/Collective for the decriminalisation of abortion in El Salvador, hereafter *Agrupación Ciudadana*) in 2009, one of the main organisations campaigning for the decriminalisation of abortion. *Las Mélidas* was founded in 1992 and is also one of the key civil society

[40] Alianza por la Salud Sexual y Reproductiva en El Salvador, which campaigns for the decriminalisation of abortion, includes CEMUJER, ORMUSA and Las Mélidas among its members. See Alianza por la Salud Sexual y Reproductiva en El Salvador, *Compromisos internacionales suscritos por El Salvador y su vinculación con los derechos sexuales y derechos reproductivos* (San Salvador, Alianza por la Salud Sexual y Reproductiva en El Salvador 2011); P Hipsher, 'Right and Left-Wing Women', 140; L Stephen, 'Maria's compañeras', 206-208

[41] IC Silber, J Viterna, 'Women in El Salvador', 333

[42] CEDAW Committee 'Concluding Observations on the combined third, fourth, fifth and sixth periodic reports of El Salvador' in 'Report of the Committee on the Elimination of Discrimination against Women' (A/58/38, 2003) paras 246, 253-5; HRC, 'Concluding observations on the second periodic report of El Salvador' (CCPR/C/79/Add.34, 18 April 1994) para 13; K Kampwirth, *Feminism and the Legacy of Revolution*, 92-5; Ley de la Procuraduría para la Defensa de los Derechos Humanos, Decreto Legislativo No. 183, 20 febrero 1992, Diario Oficial No. 45, Tomo No. 314, 6 marzo 1992; Ley del Instituto Salvadoreño para el Desarrollo de la Mujer, Decreto Legislativo No. 644, 29 febrero 1996, Diario Oficial No. 43, Tomo No. 330, 1 marzo 1996

[43] IC Silber, J Viterna, 'Women in El Salvador', 333

[44] Las Dignas, 'Quienes somos' (Las Dignas, 2020) <http://www.lasdignas.org.sv/quienes-somos/> accessed 19 November 2020; S Pinto, 'Desafiando la prohibicion total del aborto en El Salvador' (Amnesty, London, 21 January 2015) <https://www.amnesty.org/es/latest/campaigns/2015/01/defying-el-salvador-s-total-ban-on-abortion/> accessed 19 November 2020

organisations campaigning for the decriminalisation of abortion.[45] Therefore, feminist activists from the left-wing opposition and revolutionary movement, and the structural, intersectional approach to inequality that they have developed as a result of their experiences, is central to the contemporary Salvadoran feminist movement and its campaigns for the decriminalisation of abortion.

Transnationalism is another important characteristic of the contemporary Salvadoran feminist movement. From the 1970s onwards, women's involvement in the opposition, human rights, and/or left-wing revolutionary movements provided them with the opportunity to travel abroad and build connections with the wider Latin American feminist movement.[46] Following the end of the civil war in 1993, over 1,500 women from across Latin America and the Caribbean participated in the sixth feminist *encuentro* in El Salvador in 1993.[47] Held every two years since 1981, the feminist *encuentros* provide a forum for feminists from across the region to meet, share experiences, and develop strategies for realising liberation.[48] Participants in the *encuentros* often also attend UN human rights conferences. In the 1980s and 1990s, Latin American and Caribbean feminists – including Salvadoran feminists – used the *encuentros*, the UN World Conferences on Women in Copenhagen and Nairobi, and regional forums held in preparation for the UN human rights conferences of the 1990s to advance women's human rights issues, including SRHRs.[49] Therefore, the connections between the Salvadoran feminist movement, the Latin American feminist movement, and the international human rights movement, are clear. Salvadoran feminists' activism domestically, transnationally, and internationally represents their involvement in the multilevel citizenship project of contesting women's exclusion from and oppression by the traditional citizenship discourse through their engagement with the language and mechanisms of human rights to campaign for the decriminalisation of abortion in El Salvador.

Although the 1990s and early 2000s was largely characterised by new and ongoing challenges to women's human rights and full citizenship in the form of violence, inequality, and the complete criminalisation of abortion, the feminist movement continued its

[45] Las Mélidas, 'Historia' (Las Mélidas, 2020) <https://www.lasmelidas.org.sv/index.php/historia> accessed 19 November 2020
[46] P Hipsher, 'Right and Left-Wing Women', 140
[47] ibid, 90-1; IC Silber, J Viterna, 'Women in El Salvador', 342; L Stephen, 'Maria's compañeras', 219
[48] N Saporta Sternbach et al, 'Feminisms in Latin America: From Bogotá to San Bernardo' (1992) 17 Signs, 395
[49] L Stephen, 'Maria's compañeras', 217-8; N Saporta Sternbach et al, 'Feminisms in Latin America', 405; M Thomson, *Women of El Salvador*, 102-3

contestation of women's exclusion from and oppression by the traditional citizenship discourse. They did so through campaigns against domestic violence, campaigns for increasing women's political participation, and improving the child support system.[50] As mentioned above, *Agrupación Ciudadana* was formed in 2009. It promotes awareness among the general public about the current legal situation concerning abortion, campaigns for legislative change, and provides legal aid to women accused of having had abortions or having committed aggravated homicide following an obstetric emergency.[51] As will be highlighted in parts 3 and 4, it has extensively engaged with both the inter-American and the UN human rights system as part of its strategy for change. *Agrupación Ciudadana's* activism within El Salvador and the human rights system is an example of feminists contesting unfair laws and practices that deny women full enjoyment of their rights, and as such is a feminist citizenship project. Their work gained increasing attention and momentum following the case of Beatriz in 2013 which, along with several other key cases, is the subject of the next section.

4.1.2. Abortion in El Salvador: key cases

This section provides a chronological overview of the main cases concerning El Salvador's complete criminalisation of abortion and active prosecution of women suspected of having one. It argues that these cases represent a manifestation of the oppressive, exclusionary citizenship discourse which denies women's right to have rights and to determine the scope of their rights on the basis of their reproduction and sexuality. It also argues that feminists contest this exclusion and oppression through the language and mechanisms of human rights. At the domestic level, national and transnational feminist organisations, *la Procuraduría* and ISDEMU, and certain legislators and medical professionals are engaged in awareness raising, campaigns for legal reform, and support for women on trial or incarcerated as a result of the abortion legislation. At the regional level, they engage with the IAHRS's emergency procedures, individual complaints procedure, ordinary sessions, and research for thematic, annual, and country reports. At the international level, they submit information for the UN human rights treaty monitoring bodies' periodic review sessions and meet with Special Rapporteurs during their country visits. Parts 3 and 4 focus on their regional and international

[50] P Hipsher, 'Right and Left-Wing Women', 133, 146-7, 150; K Ready, 'Feminist Reconstruction of Parenthood Within Neoliberal Constraints: La Asociación de Madres Demandantes in El Salvador' in V González, K Kampwirth (eds), *Radical Women in Latin America, Left and Right*, 169-72
[51] ibid

engagement in depth, while this part will allude to the importance of this engagement and the responsiveness of these human rights bodies in its discussion of the domestic situation.

This part's first section considers the period between 2001 and 2013, when evidence was emerging that women's human rights were being violated by El Salvador's abortion legislation, but the situation was not yet receiving considerable attention at the national, regional or international level. The second section, concerning 2013 to the present, discusses the case of Beatriz and how it brought increased national, regional, and international attention to the situation in El Salvador. It asserts that this increased attention provided momentum for national and transnational feminist organisations campaigning for reform, and that it prompted the inter-American and UN human rights systems to voice increasingly coherent and assertive calls for the decriminalisation of abortion and the release of women incarcerated for abortion and aggravated homicide. This process of feminist engagement with increasingly responsive human rights systems is best understood as a multilevel feminist citizenship project.

2001-2013

The first major criticism of El Salvador's abortion legislation was a 2001 report by the Center for Reproductive Law and Policy (now the Center for Reproductive Rights, CRR). The evidence that CRR collected in conjunction with the Salvadoran feminist organisation CEMUJER indicated that El Salvador's complete criminalisation of abortion was being actively implemented and disproportionately impacting the most marginalised. 46 women and girls were prosecuted for having abortions between April 1998 and October 1999.[52] The majority were young, unmarried, with little education, and living in poverty.[53] The report alleged violations of human rights enshrined in the Salvadoran Constitution, as well as 'the right to life, to liberty and to physical integrity; the right to reproductive freedom and autonomy; the right to health, to reproductive health and family planning; and the right to privacy' enshrined in international and regional human rights treaties to which El Salvador is a State Party.[54] It recommended far-reaching legislative and policy changes in education, public health, and social assistance to ensure the recognition and promotion of women's

[52] The Center for Reproductive Law and Policy, *Persecuted*, 5, 7-8, 46-8
[53] ibid
[54] ibid, 57-8, 61-69

SRHRs.[55] The 2005 case of eighteen-year-old Isabel Cristina Quintanilla and the 2008 case of 'Manuela' typified the issues raised in this report, namely the multiple human rights violations arising from El Salvador's complete criminalisation of abortion, and its disproportionate impact on poor, young, unmarried women and girls who have had little access to education.

In August 2005, Quintanilla was sentenced to 30 years in prison for aggravated homicide following a stillbirth in the seventh month of her pregnancy.[56] Her initial interrogation took place without a lawyer present, while she was handcuffed to her hospital bed, and while she was still under the effects of anaesthesia.[57] As soon as she was released from hospital, she was kept in an overcrowded pre-trial detention cell for three days; she was not provided with medical care even though she was still bleeding.[58] She was tried for the crime of aggravated homicide. [59] Quintanilla's due process rights were violated in three ways. Firstly, her public defence lawyer was inadequately prepared, failing to revise documents pertaining to the case.[60] Secondly, her sentencing was based on insufficient evidence: the main evidence relied upon by the judge to convict Quintanilla was the autopsy report, despite the fact that the autopsy concluded that the baby's cause of death could not be determined, and that the baby most likely died during or very shortly after birth as a result of complications during labour.[61] The judge's reasoning was that since this was Quintanilla's second pregnancy, she should have realised that the pains she was experiencing throughout the day were labour pains and not stomach or lower back pains as Quintanilla claimed, and therefore she should have told her mother and stepfather that she was in labour and sought medical attention to ensure safe delivery of her baby.[62] The judge considered suspicious Quintanilla's failure to tell her mother and stepfather about her physical discomfort, and heavily implied that she attempted to hide the fact that she was in labour from them so that she could murder the baby.[63] Even if she did not intend to murder her baby, the judge reasoned that Quintanilla's failure to seek

[55] ibid, 79-85
[56] Tribunal Segundo de Sentencia, *Proceso Penal 102-2005-3, Isabel Cristina Quintanilla*, 23 August 2005
[57] CRR, Agrupación Ciudadana, *Excluidas, perseguidas, encarceladas*, 12
[58] ibid
[59] ibid
[60] ibid, 32; IACHR, 'Situación de derechos humanos de mujeres privadas de libertad por emergencias obstétricas durante sus embarazos en El Salvador' in Informe sobre el 156º Período de Sesiones de la CIDH, 24 December 2015, 7
[61] *Proceso Penal 102-2005-3*
[62] ibid
[63] ibid

medical attention amounted to aggravated homicide by omission.[64] This reasoning is flawed on several grounds: firstly, it failed to recognise that each pregnancy and labour experience can vary widely, including for those who have previously experienced pregnancy and labour. Secondly, it disregarded the fact that Quintanilla had been prone to back and stomach pain since the birth of her first child and an appendectomy shortly after; it is not implausible that she would misattribute early signs of labour to these chronic issues, or that she would not tell her family about every time she experienced discomfort. Thirdly, it sets the alarming precedent that failing to seek medical attention when in labour amounts to a crime for which a woman can be prosecuted if her baby is injured or dies during labour. Finally, there are strong indications that her sentencing was informed by prejudiced, stereotypical attitudes to what the judge called her 'economic, social, and cultural' background.[65] There are numerous allusions throughout the judgment to the fact that Quintanilla was unmarried, working-class, and an early-school leaver who had had her first child at a young age, and who was again pregnant at a young age,[66] as though these factors immediately rendered her behaviour suspect and in need of greater scrutiny. Despite equally or more plausible explanations being available as to what happened – that she had genuinely misidentified the pain she was experiencing, that she was unable to seek medical attention once the situation became critical because by then she had lost consciousness – the judge decided that her failure to seek medical attention amounted to aggravated homicide by omission. This ruling and the reasoning behind it represent the ways in which the legal gaze operates in postcolonial El Salvador to surveil, discipline, and punish young, working-class women. Any indication, however unsubstantiated, that they are resisting or contravening their prescribed role of mothering non-citizen in the patriarchal social order is met with serious reprisals. Feminist responses to the ruling represent resistance to this traditional patriarchal discourse.

Between 2007 and 2009, Salvadoran feminist organisations campaigned for Quintanilla's release by requesting a repeal, a pardon, and finally a commutation of her sentence on the grounds that her trial had been characterised by multiple due process violations.[67] In July 2009, the Supreme Court commuted her sentence, finding that her sentencing had been excessive and based on violations of due process.[68] Quintanilla was released from prison that

[64] ibid
[65] ibid
[66] ibid
[67] CRR, Agrupación Ciudadana, *Excluidas, perseguidas, encarceladas*, 33; SR VAW 2011 Report, page 18
[68] CRR, Agrupación Ciudadana, *Excluidas, Perseguidas, encarceladas*, 33-4

August; since then, she has campaigned for the decriminalisation of abortion and the release of women incarcerated for having had an abortion by sharing her testimony nationally, before the IACHR, and before the CEDAW Committee.[69] As such, she is participating in the multilevel citizenship project of contesting women's exclusion from and oppression by the traditional citizenship discourse as it manifests in the criminalisation of abortion.

Quintanilla's case represents how El Salvador's abortion legislation – which as Chapter 2 argued is informed by the belief that women's bodies, reproduction, and sexuality must be controlled to ensure the stability of the patriarchal social order – results in violations of women's rights to due process, health, physical and mental integrity, freedom from CIDT, non-discrimination, privacy, the right to decent treatment when deprived of liberty, and the right to a life free from violence.[70] Prejudiced attitudes among the police, medical staff, and judiciary against women informed her treatment in hospital, pre-trial detention, and her sentencing: the assumption throughout was that as a young, unmarried, working-class woman she must be guilty.[71] Similar discriminatory attitudes to women and girls informed the treatment of 'Manuela.'

On 26 February 2008, 32-year-old single mother of two Manuela experienced severe pelvic bleeding and fainted following a fall.[72] She was taken to hospital and, since she was experiencing heavy vaginal bleeding, hospital staff called the police because they suspected that she had self-induced an abortion.[73] The following day, much like Quintanilla, the police interrogated her while she was still in poor health and without a lawyer present.[74] On 28 February, police officers questioned her parents in an aggressive and intimidating manner.[75] They accused them of covering up the alleged crime, and they threatened to investigate them

[69] CRR, 'Supplementary information on El Salvador, submitted for consideration by the Pre-Sessional Working Group of the Committee for the Elimination of Discrimination against Women for the 66th Session' 25 April 2016 <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/TBSearch.aspx> accessed 22 November 2020; IACHR, 'Situación de derechos humanos de mujeres', 7; C Provost, 'El Salvador: Meet the women who dare to challenge the anti-abortion state' *The Guardian* (London, 17 April 2014) <https://www.theguardian.com/global-development/2014/apr/17/beatriz-case-resistance-el-salvador-abortion-law> accessed 22 November 2020

[70] CRR, Agrupación Ciudadana, *Excluidas, perseguidas, encarceladas*, 11, 13, 61, 64

[71] ibid 13, 61

[72] CRR, 'Manuela Toolkit' (Center for Reproductive Rights, 21 October 2014) 1 <https://reproductiverights.org/document/manuela-toolkit-english> accessed 2 December 2020

[73] MT Ochoa, S García, *¿Por qué me pasó esto a mí?*, 35

[74] ibid

[75] MT Ochoa, S García, *¿Por qué me pasó esto a mí?*, 35-6

as accomplices.[76] They forced her father to sign a document he could not read due to being illiterate, and which they did not explain to him; this document, a formal accusation against Manuela, was later used as a key piece of evidence against her.[77] Like Quintanilla, Manuela was represented by a poorly-prepared defence lawyer, and insufficient evidence, including the document her father was forced to sign, was used against her.[78] On the basis of this evidence, and on the basis of discriminatory attitudes against poor, rural, illiterate single mothers, Manuela was sentenced to 30 years for aggravated homicide.[79]

Manuela spent two years in prison, during which time she was diagnosed with Hodgkin's lymphoma.[80] Despite being in seriously poor health, and despite this diagnosis, she was not provided with consistent chemotherapy treatment and so she died in April 2010.[81] In 2012, CRR and *Agrupación Ciudadana* filed an individual petition on her behalf with the IACHR.[82] It alleges violations of Manuela's rights to health, life, physical and mental integrity, freedom from torture and CIDT, and due process.[83] The IACHR has yet to consider the petition, but in light of its previous friendly settlements, periodic sessions, country visits, and thematic reports, it is likely that it will find El Salvador responsible for multiple human rights violations due to its abortion legislation. Therefore, Salvadoran and transnational feminists are making use of the language and mechanisms of IHRL to contest women's exclusion from and oppression by the traditional citizenship discourse as it manifests in the criminalisation of abortion.

Quintanilla and Manuela's cases, among others,[84] highlight the multiple negative human rights impacts of El Salvador's legislation. The cases also demonstrate the ways in which this legislation requires medical professionals to deny women and girls healthcare, and which encourages medical and legal professionals to treat women – particularly young, poor, rural,

[76] CRR, 'Manuela Toolkit', 1
[77] CRR, Agrupación Ciudadana, *Excluidas, perseguidas, encarceladas*, 38
[78] CRR, 'Manuela Toolkit', 1-2; CRR, Agrupación Ciudadana, *Excluidas, perseguidas, encarceladas*, 38
[79] CRR, 'Manuela Toolkit', 2
[80] ibid
[81] ibid; MT Ochoa, S García, *¿Por qué me pasó esto a mí?*, 36
[82] ibid
[83] CRR, 'Manuela Toolkit', 10-11
[84] Agrupación Ciudadana et al, 'Report on violations of women's human rights due to the complete criminalisation of abortion in response to the periodic report of El Salvador' (October 2020) Annex A <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/TBSearch.aspx> accessed 22 November 2020; CRR, Agrupación Ciudadana, *Excluidas, perseguidas, encarceladas*, 26-39; MT Ochoa, S García, *¿Por qué me pasó esto a mí?*

indigenous/mestiza women – with suspicion if they are experiencing pregnancy loss.[85] Research conducted by *Agrupación Ciudadana* found that, in addition to the 46 women and girls prosecuted for having abortions between April 1998 and October 1999, a further 129 women and girls were tried for abortion or aggravate homicide between 2000 and 2011.[86] 49 of them were found guilty, 23 for abortion and 26 for various grades of homicide.[87] As with the cases highlighted by CRR's 2001 report and as illustrated by the cases of Quintanilla and Manuela, the majority were young, single, had received little to no education, and lived in poverty.[88] The complete criminalisation of abortion in El Salvador, the active prosecution of women and girls suspected of having had one, and the disproportionate impact of this legislation on women and girls experiencing other, intersecting forms of oppression, represents the exclusionary, oppressive nature of the traditional citizenship discourse that requires the strict regulation of women's reproduction, bodies, and sexuality. National and transnational feminist organisations' contestation of this exclusion and oppression was intensifying at the national, regional and international levels of the human rights system when the case of 'Beatriz' in April 2013 brought worldwide attention to the multiple human rights violations occurring in El Salvador as a result of its total abortion ban.

2013-present

In March 2013 – a few months after the death of Savita Halappanavar galvanised the Irish abortion rights campaign – Beatriz, a 22-year-old woman with lupus who was pregnant with an anencephalic foetus, was forced to continue with her pregnancy, despite medical consensus that this posed a grave risk to her health and life, and despite anencephaly being incompatible with life outside the womb.[89] While her health team recognised that she needed an abortion to save her life and protect her health, both they and Beatriz would face legal action if they carried out the procedure and so they had to file an *amparo* (an appeal alleging that the abortion legislation was unconstitutional since it violated Beatriz's rights) with the

[85] CRR, Agrupación Ciudadana, *Excluidas, perseguidas, encarceladas*, 14
[86] Agrupación Ciudadana, *Del Hospital a la cárcel*, 10-12, 13-23; CRR, Agrupación Ciudadana, *Excluidas, perseguidas, encarceladas*, 13-4
[87] ibid
[88] ibid
[89] Agrupación Ciudadana, 'Beatriz, 9 semanas de lucha y espera' (San Salvador, Agrupación Ciudadana 2014) available at <http://agrupacionciudadana.org/biblioteca/publicaciones/otras-publicaciones.html> (accessed 4 May 2019), 1; Amnesty International, *On the Brink of Death*, 24-26; E Freedman, 'The Case of Beatriz: Who Gets to Decide?' *Revista envío* (San Salvador, Agrupación Ciudadana 2014) 2

Constitutional Bench of the Supreme Court.[90] The amparo was filed on 11 April and the Court took six days to agree to hear the case despite Beatriz's rapidly deteriorating health.[91]

National, regional, and transnational feminist and human rights organisations, as well as the inter-American and UN human rights systems, intervened in the controversy. On 26 April, four UN human rights experts issued a statement calling on the government to permit the abortion and so protect Beatriz's rights to life, health, and freedom from cruel, inhuman and degrading treatment.[92] Throughout April and May, her case received attention from national and international media outlets, and individuals contacted the Salvadoran government and organised demonstrations outside Salvadoran embassies to voice their support for Beatriz.[93] Even still, the Court did not make progress in its deliberations. In response to the Supreme Court's procrastination, three organisations including *Agrupación Ciudadana* and *la Colectiva Feminista para el Desarrollo Local* (Feminist Collective for Local Development, hereafter *la Colectiva Feminista*) requested that the IACHR intervene in the case.[94] The IACHR did so, issuing precautionary measures on 29 April 2013 calling on El Salvador 'to protect the life, personal integrity and health' of Beatriz by permitting the abortion.[95] Since these were ignored, the IACHR requested that the IACtHR issue provisional measures.[96] The IACtHR issued provisional measures on 29 May 2013 that required El Salvador to urgently 'adopt and guarantee' measures permitting Beatriz's doctors to provide the medical treatment that they 'considered opportune and appropriate to ensure due protection' of her rights to life, health, and physical, mental, and moral integrity.[97] Despite clear evidence that Beatriz urgently required an abortion, and despite these interventions by the international and regional human rights systems, the Constitutional Bench of the Supreme Court ruled by a 4-1 majority on 29 May that 'the rights of the mother cannot take precedence over those of the "nasciturus" or vice versa' and that permitting the abortion would contravene the

[90] Amnesty, *On the Brink of Death*, 24-6; E Freedman, 'The Case of Beatriz', 2-3
[91] Amnesty, *On the Brink of Death*, 25
[92] OHCHR, 'El Salvador: UN rights experts appeal to government to provide life-saving treatment to woman at risk' (OHCHR, 26 April 2013) <https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13269&LangID=E> accessed 2 December 2020
[93] Amnesty, *On the Brink of Death*, 25
[94] E Freedman, 'The Case of Beatriz', 4
[95] IACHR, *PM-114/13 – B, El Salvador* in IACHR 'Annual Report 2013: Precautionary Measures granted in 2013', para 19, available at <https://www.oas.org/en/iachr/docs/annual/2013/TOC.asp> (accessed 24 November 2020)
[96] IACHR, '2013 Annual Report' (OEA/Ser.L/V/II. Doc. 50 Corr. 1, 31 December 2013) para 72
[97] IACtHR, *Provisional Measures with regard to El Salvador: Matter of B*, 29 May 2013, para 17

constitutional right to life understood as beginning at the moment of conception.[98] To further ensure no new legal precedent was set with regard to the complete ban on abortion, the Supreme Court's protracted deliberations meant that Beatriz's pregnancy passed the 20th week of pregnancy, at which point its termination was considered to be 'induced labour' rather than abortion.[99] Beatriz's daughter was delivered via Caesarean section on 3 June and lived for only five hours.[100] Beatriz spent a period of time in intensive care and one of her kidneys was permanently damaged.[101] *Agrupación Ciudadana*, *la Colectiva Feminista*, CEJIL, and Ipas filed a petition on her behalf with the IACHR in November 2013, which was accepted in April 2015.[102] The IACHR declared the petition admissible in 2017 in relation to ACHR article 4 (right to life), article 5 (humane treatment), article 8 (fair trial), article 9 (freedom from ex post facto laws), article 11 (privacy), article 24 (equal protection), article 25 (judicial protection), and article 26 (progressive development) in conjunction with article 1(1) (non-discrimination) and article 2 (domestic legal effects).[103] It also declared the petition admissible in relation to Belém do Pará Convention article 7 (state obligation to prevent, punish and eradicate violence against women), and in relation to article 1 (obligation to prevent and punish torture), article 6 (effective measures to prevent and punish torture and CIDT), and article 8 (right to an impartial examination of allegations of torture) of the Inter-American Convention to Prevent and Punish Torture.[104] The IACHR has yet to publish its Decision on the Merits, but it is likely that it will find El Salvador responsible for violations of these rights given the inter-American human rights system's current position on abortion indicated in Chapters 2 and 3. The case of Beatriz represents the profound harms arising from the complete criminalisation of abortion, the obstacles facing the full realisation of SRHRs at the national level, and the efforts of national, regional and transnational feminist and human rights actors to address this situation. This multilevel feminist process of contestation has continued and intensified in recent years.

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[98] Sala de lo Constitucional de la Corte Suprema de Justicia, *Proceso de Amparo 'B.C'*, 28 May 2013, 310-2013, sec VII, 5C ('Este Tribunal sostiene que los derechos de la madre no pueden privilegiarse sobre los del *nasciturus* ni viceversa'); Amnesty, *On the Brink of Death* 26; E Freedman, 'The Case of Beatriz', 5

[99] ibid

[100] ibid

[101] Agrupación Ciudadana, 'Beatriz, 9 semanas de lucha y espera', 9; S Nolen, 'El Salvador: Home of the World's Strictest Anti-Abortion Law' *The Globe and Mail* (Toronto, 18 September 2015) <https://www.theglobeandmail.com/news/world/el-salvador-home-of-the-worlds-strictest-anti-abortion-law/article26442683/> accessed 24 November 2020; C Provost, 'El Salvador'

[102] Ipas 'Inter-American Commission on Human Rights to hear Beatriz case against El Salvador' (Ipas, 14 April 2015) <https://www.ipas.org/news/inter-american-commission-on-human-rights-to-hear-beatriz-case-against-el-salvador/> (accessed 2 December 2020)

[103] IACHR, '*Beatriz v El Salvador: Report on Admissibility* (Report No. 120/17, Petition 2003-13, 7 September 2017) VIII

[104] ibid

Capitalising upon the increased attention to and debate about El Salvador's abortion legislation and its impact, *Agrupación Ciudadana* and *la Colectiva Feminista* launched its campaign for *las 17* in April 2014.[105] The two groups filed a request for pardons for 17 women convicted of abortion-related crimes and sentenced to up to 40 years in prison.[106] Since then, they have been engaged in a range of campaigning and awareness-raising activities within El Salvador and at the inter-American and UN human rights systems in order to seek justice for *las 17 y otras* – not just these 17 women, but also the many others who have since been prosecuted, convicted and sentenced.[107] Like Quintanilla, Beatriz, and Manuela, *las 17 y otras* were poor, in precarious or low-paying employment, and had received little or no schooling.[108] After miscarrying and subsequent complications such as heavy bleeding, they were brought to public hospitals where they were reported to the police.[109] Many were interrogated while still undergoing medical treatment or semi-conscious and without a lawyer present.[110] According to observers, the women received inadequate court representation by poorly-prepared public defence lawyers, and were sentenced to an average of 30 years in prison on the basis of inconsistent, unreliable evidence and in judgments characterised by discriminatory pronouncements by the presiding judges.[111] Furthermore, pre-trial detention and prison conditions have resulted in violations of the right to be free from torture and CIDT. Similar to Quintanilla and 'Manuela', *las 17 y otras* were denied the medical treatment they required while being held before trial, or were held in unsanitary conditions while recovering from an obstetric emergency.[112] The Ilopango Women's Prison, where most of those convicted are held, is severely overcrowded.[113] Those who are jailed for having had abortions are subject to intimidation and assault by prison staff

[105] C Provost, 'El Salvador'; See also 'Las 17' (2020) <https://las17.org/> accessed 2 December 2020
[106] IACHR, 'Criminalization of Human Rights Defenders', para 52
[107] K Bougher et al, 'Sigue la lucha por las 17' (San Salvador, Agrupación Ciudadana 2015), 3-5; S Nolen, 'El Salvador: Home of the World's Strictest Anti-Abortion Law'; C Provost, 'El Salvador'; C Salinas, ''Creo que Bukele puede garantizar derechos a las mujeres pero hay que estar vigilantes'', *El País* (Madrid, 10 March 2019), available at <https://elpais.com/internacional/2019/03/09/america/1552099211_027441.html> accessed 1 May 2019
[108] Agrupación Ciudadana, *Del hospital a la cárcel*, 18, 21
[109] ibid, 32
[110] ibid, 49, 59, 60
[111] ibid, 22; J Viterna, JS Guardado Bautista, 'Análisis independiente de la discriminación de género en el proceso judicial de El Salvador contra las 17 mujeres acusadas del homicidio agravado de sus recién nacidos' (17 November 2014) <https://scholar.harvard.edu/files/viterna/files/viterna_guardado_2014_white_paper_spanish.pdf> accessed 24 November 2020
[112] IACHR, 'Situación de derechos humanos de mujeres', 7; MT Ochoa, S García*, ¿Por qué me pasó esto a mí?*, 39-40
[113] ibid, 7; ibid, 15-20, 29-33

and other prisoners.[114] This contravenes international human rights standards regarding basic prison conditions and prisoner safety; it also goes against the importance of considering alternatives to imprisonment if the accused is a parent, with women routinely being separated from their young children to serve prison sentences of 30 to 40 years' duration.[115] A strong argument can therefore be made on the basis of international human rights standards articulated by the inter-American and UN human rights system that there have been violations of the right to health, the right to privacy, the right to be free from torture and CIDT, and the right to a fair trial, and the principle of non-discrimination on the basis of ethnicity, class, and gender. These cases also demonstrate how restrictive abortion legislation impacts upon the most vulnerable by intersecting with and exacerbating existing inequalities: middle-class or wealthy women, and women living in urban areas, are subject to less scrutiny and are more likely to be able to afford black market "abortion pills", access to private clinics in El Salvador, or travel abroad for an abortion and so circumvent the criminalisation of abortion in ways that poor and working-class women and girls living in small towns or remote areas cannot.[116]

The negative health and human rights consequences of El Salvador's abortion ban, inadequate healthcare system, and near-total lack of supports for disabled people and their families were thrown into even starker relief by the outbreak of the Zika virus in the country in 2015.[117] A mosquito-borne virus, Zika can cause pregnancy complications including preterm birth, miscarriage, and congenital Zika syndrome, which is characterised by physical and intellectual disabilities that can range from mild to severe.[118] In response to the rapid spread of the virus, in January 2016 the Ministry of Health advised women to avoid pregnancy for two years, without implementing effective measures to improve access to contraception or abortion, or to address other drivers of high pregnancy rates such as

[114] ibid,7; ibid, 9-13, 15-20
[115] Amnesty International, *Separated Families, Broken Ties*; UNGA, 'Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment' 9 December 1988, A/RES/43/173, Principles 1, 5.2, 6, 10, 13, 19, 24, 31, 33; UNGA, 'United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)' 8 January 2016, A/RES/70/175, Rules 1, 12-17, 24-35, 51-2, 106, 109, 111, 119
[116] ML Nóchez, L Aguirre, 'El privilegio de abortar' *El Faro* (San Salvador, 1 February 2018) <https://elfaro.net/es/201801/el_salvador/21427> accessed 24 November 2020
[117] PAHO, WHO, 'Zika – Epidemiological Report: El Salvador', 25 September 2017 <https://www.paho.org/hq/dmdocuments/2017/2017-phe-zika-situation-report-els.pdf> accessed 2 December 2020
[118] WHO, 'Zika virus' (WHO, 20 July 2018) <https://www.who.int/news-room/fact-sheets/detail/zika-virus> accessed 2 December 2020

widespread rape, incest, and sexual violence.[119] Moreover, while the Zika outbreak prompted some awareness and discussion within government on the need to improve disability services and access to them, concrete measures were not taken to do so.[120] This lack of a disability rights and women's rights perspective in the government's response to Zika represented its continued inability or unwillingness to address the multiple issues impeding the full realisation of women's SRHRs and citizenship.[121]

Despite increasing international attention from the media, human rights systems, and human rights and feminist organisations, and despite the Zika virus outbreak providing further evidence that El Salvador needed to address a range of issues impeding the full realisation of SRHRs in the country, the government instead took steps to further punish women and girls suspected of having had abortions. In July 2016, ARENA proposed increasing sentences for those convicted of performing or having had abortions to 50 years in prison.[122] The IACHR criticised the proposal, and urged 'the countries of the region that criminalise abortion regardless of the circumstances to amend their laws' to ensure that women's human rights would be protected.[123] In response to the ARENA proposal, in October 2016 the FMLN drew up a reform bill in conjunction with *Agrupación Ciudadana* and other feminist organisations that proposed the decriminalisation of abortion in the case of rape, incest, non-viability of the foetus, and where the woman's life is at risk.[124] Following the bill's limited progress, in August 2017 a cross-party group of 41 Legislative Assembly deputies worked to gain support for a legislative bill that proposes decriminalising abortion in the case of a risk to the woman's life or health, and in the case of rape or statutory rape of a minor.[125] These developments were welcomed by both the CEDAW Committee and the IACHR, particularly in the context of the Zika epidemic.[126] However, the bills have not progressed through the

[119] Agrupación Ciudadana, 'Enfrentar el zika con un enfoque de derechos' (Agrupación Ciudadana, 11 February 2016) <https://agrupacionciudadana.org/enfrentar-el-zika-con-un-enfoque-de-derechos/> accessed 2 December 2020; CRR, *Unheard Voices: Women's Experiences with Zika. El Salvador* (Washington DC, CRR 2018), 20;
[120] CRR, *Unheard Voices*, 14, 38-9
[121] ibid, 16
[122] A Soriano, 'ARENA pide elevar pena para aborto consentido' *El Mundo* (San Salvador, 12 July 2016) <https://diario.elmundo.sv/arena-pide-elevar-pena-para-aborto-consentido/> accessed 9 May 2019
[123] IACHR, '2016 Annual Report', paras 31, 35, 37 <http://www.oas.org/en/iachr/docs/annual/2016/TOC.asp> accessed 2 December 2020
[124] E Rivera, 'FMLN pide despenalizar el aborto por violación' *El Mundo* (San Salvador, 12 October 2016) <https://diario.elmundo.sv/fmln-pide-despenalizar-el-aborto-por-violacion> accessed 9 May 2019
[125] G Labrador, 'Alianza entre diputados de derecha y el FMLN apunta hacia la despenalización del aborto' *El Faro* (San Salvador, 17 August 2017) <https://elfaro.net/es/201708/el_salvador/20764/Alianza-entre-diputados-de-derecha-y-el-FMLN-apunta-hacia-la-despenalizaci%C3%B3n-del-aborto.htm> accessed 2 December 2020
[126] IACHR, '2017 Annual Report', paras 82, 86, <http://www.oas.org/en/iachr/docs/annual/2017/TOC.asp> accessed 12 June 2019

Assembly since,[127] and the extent of President Nayib Bukele's commitment to abortion law reform is unclear: he has said that he is anti-abortion, but during his presidential campaign he pledged to legalise abortion where the pregnant person's life is at risk and has since stated that no woman should be jailed for an obstetric emergency.[128] These legislative proposals relating to El Salvador's abortion ban represent the contested, ongoing nature of the multilevel citizenship project that is the advancement of SRHRs including abortion access. Conservative and progressive legislators – in collaboration with domestic, transnational, regional, and international actors – are setting out competing notions of how women and girls should be conceptualised: as subordinate non-citizens whose only role is motherhood regardless of the consequences, or as full citizens with the ability to determine their right to have rights and the scope of those rights. The tensions between these two competing understandings of women's place in the citizenship project are also apparent in the release of some women, and the ongoing prosecution of others, by the judiciary.

Since 2016, several women imprisoned for having had an abortion have been released, potentially indicating some change in the political climate and some responsiveness to the *Agrupación Ciudadana*-led campaign for *las 17 y otras*.[129] However, these women often continue to face ostracisation and the threat of renewed prosecution. For example, in May 2016, one of *las 17 y otras*, Maria Teresa Rivera, had her conviction annulled; however, a few months later prosecutors appealed for the original verdict of aggravated homicide to be reinstated.[130] Fearful that they would be successful, and unable to find work or otherwise

[127] CV Escobar, ''Simple y sencillamente no están los votos para despenalizar el aborto'' *El Faro* (San Salvador, 24 April 2018) <https://elfaro.net/es/201804/el_salvador/21770/%E2%80%9CSimple-y-sencillamente-no-est%C3%A1n-los-votos-para-despenalizar-el-aborto%E2%80%9D.htm> accessed 2 December 2020

[128] N Lakhani, 'El Salvador woman acquitted of stillbirth murder charge' *The Guardian* (London, 19 August 2019) <https://www.theguardian.com/world/2019/aug/20/el-salvador-victim-acquitted-over-stillbirth-charge> accessed 2 December 2020; Reuters, 'El Salvador will seek third trial of woman accused of 'murdering' stillborn' *The Guardian* (London, 6 September 2019) <https://www.theguardian.com/world/2019/sep/06/el-salvador-stillbirth-retrial-evelyn-hernandez> accessed 2 December 2020

[129] BBC News, 'El Salvador baby death: Teodora Vásquez freed after 9 years' *BBC News* (London, 15 February 2018) <https://www.bbc.co.uk/news/world-latin-america-43073424> accessed 2 December 2020; BBC News, 'El Salvador libera a 3 mujeres presas por abortar que enfrentaban penas de más de 30 años de cárcel' *BBC News* (London, 8 March 2019) <https://www.bbc.com/mundo/noticias-america-latina-47494226> accessed 2 December 2020; BBC News, 'Aborto en El Salvador: el caso de Cindy Erazo y qué supone su liberación para otras 18 mujeres condenadas por la estricta ley contra la interrupción del embarazo' *BBC News* (London, 23 September 2020) <https://www.bbc.com/mundo/noticias-america-latina-54272238> accessed 2 December 2020; CM Coral, 'Pivotal moment for El Salvador's abortion law reform' *Thomson Reuters Foundations News* (Bogotá, 13 March 2018) <https://news.trust.org/item/20180313175830-5gz10/> accessed 2 December 2020

[130] N Lakhani, 'El Salvador: Maria Teresa Rivera jailed and freed', *Al Jazeera* (Doha, 26 October 2016) <https://www.aljazeera.com/features/2016/10/28/el-salvador-maria-teresa-rivera-jailed-and-freed> accessed 2 December 2020

continue on with her life due to intense public opprobrium, Rivera moved to Sweden with her son in October 2016.[131] She was granted asylum there in March 2017, with Sweden finding that she had been subject to gender-based persecution by the Salvadoran state.[132]

Along with the ongoing ostracisation and harassment that women released from prison face, women and girls continue to be prosecuted for crimes related to suspected abortions. Their experiences highlight other, interrelated human rights issues in El Salvador such as high rates of rape and incest, the gendered nature of gang violence, and, as ever, the deep-seated discriminatory attitudes against women and girls from poor, working-class, and/or indigenous/mestiza backgrounds. In December 2018, 20-year-old Imelda Cortez was found not guilty of attempted murder following the birth of her baby in April 2017; she had not known she was pregnant as a result of sexual abuse by her stepfather, and although her baby survived she was still convicted and forced to spend eighteen months in pre-trial detention because prosecutors claimed that her failure to tell anyone about the pregnancy and seek medical assistance during birth amounted to attempted murder.[133] In July 2017 Evelyn Beatriz Hernández Cruz was sentenced to 30 years in jail for aggravated homicide after giving birth to a stillborn baby in a toilet in April 2016.[134] She also did not realise that she was pregnant as the result of being 'raped by a gang member over several months as part of a forced sexual relationship.'[135] She lost consciousness, and so her mother took her to hospital where she was detained on suspicion of having had an abortion.[136] Medical experts were unable to determine whether the baby was born dead or died shortly after, but the judge decided that Cruz did in fact know she was pregnant, failed to seek antenatal care because she did not want a baby, and intentionally threw the baby in the toilet to kill him.[137] In February 2019, having served nearly three years of her sentence and in response to multiple appeals,

[131] A Moloney, 'Sweden welcomes Salvadoran woman wrongly jailed for abortion in asylum first' *Thomson Reuters Foundation* (Bogotá, 5 April 2017) <https://uk.reuters.com/article/us-el-salvador-abortion/sweden-welcomes-salvadoran-woman-wrongly-jailed-for-abortion-in-asylum-first-idUSKBN1771QP> accessed 2 December 2020
[132] ibid
[133] BBC News, 'El Salvador court frees woman jailed under anti-abortion laws' *BBC News* (London, 18 December 2018) <https://www.bbc.com/news/world-latin-america-46600886> accessed 2 December 2020
[134] N Lakhani, 'El Salvador teen rape victims sentenced to 30 years in prison after stillbirth' *The Guardian* (London, 6 July 2017) <https://www.theguardian.com/global-development/2017/jul/06/el-salvador-teen-rape-victim-sentenced-30-years-prison-stillbirth> accessed 2 December 2020
[135] ibid
[136] BBC News, 'Teenager jailed in El Salvador after toilet stillbirth' BBC News (London, 7 July 2017) <https://www.bbc.com/news/world-latin-america-40530711> accessed 2 December 2020
[137] ibid

the Supreme Court annulled her sentence and ordered a retrial.[138] In July 2019, a new trial for manslaughter commenced.[139] Hernández was acquitted on the basis of insufficient evidence in August 2019,[140] but the following month prosecutors announced their intention to appeal the ruling and have Cruz face a third trial.[141] Whether El Salvador will decriminalise abortion in the near feature, and whether it will cease prosecutions against women and girls suspected of having had one, therefore remains unclear. What is clear, however, is that feminist and human rights activists at all levels of the human rights systems are contesting this situation and advocating for the full realisation of women's and girls' human rights and citizenship. The ways in which they do are the subject of the next two parts of this chapter.

Part 2: Summary

While the situation remains uncertain in terms of the potential for legislative reform, release of women currently imprisoned, and the outcome of ongoing cases against those suspected of having had abortions, the strength of the Salvadoran and Latin American feminist movements, and their influence on the regional and international human rights system's evolving position on SRHRs, is more certain. Along with their contribution to the 2016 legislative proposals, Salvadoran feminists have continued to participate in the feminist *encuentros*, which focus on SRHRs including abortion access.[142] In 2019, *Agrupación Ciudadana* member Sara Garcia Gross was awarded the Simone de Beauvoir human rights prize, which recognises individuals who 'mobilise international solidarity, reaffirm women's rights', support HRDs and 'defend the ideals of equality and peace.'[143] Campaigning and awareness-raising by feminist human rights defenders like Gross is also influencing public opinion: a slight majority of Salvadorans are in favour of the current legislation being

[138] BBC News, 'Salvadorean woman jailed over baby's death is freed' *BBC News* (London, 16 February 2019) <https://www.bbc.com/news/world-latin-america-47263743> accessed 24 November 2020; BBC News, 'El Salvador: Woman faces retrial after baby died in toilet birth' *BBC News* (London, 16 July 2019) <https://www.bbc.com/news/world-latin-america-48995803> accessed 24 November 2020
[139] BBC News, 'Woman faces retrial'
[140] N Lakhani, 'El Salvador woman acquitted'
[141] Reuters, 'El Salvador will seek third trial'
[142] La Delegación salvadoreña, 'Pronunciamiento de la delegación salvadoreñas feministas en el 34º encuentro plurinacional de mujeres y disidencias sexuales' (EFLAC, 13 October 2019) <https://www.15eflac.org/pages/informacion> accessed 2 December 2020
[143] A Montoya, 'Le prix Simone-de-Beauvoir remis à une Salvadorienne pour son combat pour le droit à l'avortement' *Le Monde* (Paris, 7 January 2019) <https://www.lemonde.fr/international/article/2019/01/07/le-prix-simone-de-beauvoir-remis-a-une-salvadorienne-pour-son-combat-pour-le-droit-a-l-avortement_5406003_3210.html> accessed 2 December 2020

relaxed, with 57% being in favour of decriminalising abortion in the case of a risk to life or fatal foetal abnormalities.[144]

The ongoing, contested process of campaigns for reform of El Salvador's abortion legislation and justice for those affected by it form part of a multilevel feminist citizenship project. National and transnational feminist and human rights organisations such as *Agrupación Ciudadana*, Amnesty, and CRR are consciously engaging in a multidimensional strategy of researching, awareness-raising, campaigning, alliance-building, and strategic litigation in relation to the complete criminalisation of abortion in El Salvador and its negative human rights impact.[145] They are engaging with the legislature, judiciary, general public, and media to raise awareness about the situation in El Salvador and so pressure the state to reform its legislation and provide redress to women and girls who have been subjected to unfair trials and imprisonment. As a result of their work, between 30 and 41 women have been freed,[146] proposals for the liberalisation of the current abortion legislation have been tabled in the Legislative Assembly, and the human rights system has been increasingly assertive in its calls for the full realisation of SRHRs in El Salvador. The next two parts will demonstrate that national and transnational feminist engagement with the inter-American and the UN human rights systems is proving to be an especially effective part of their multidimensional strategy to realise women's full citizenship in the form of SRHRs such as straightforward, safe, and legal access to abortion.

4.2. Regional Struggle (OAS)

Introduction

As Chapters 2 and 3 illustrated, the inter-American human rights system (IAHRS) has expressed a strong commitment to SRHRs and an increasing understanding of the intersectional feminist approach necessary for their full realisation. The IAHRS's commitment to SRHRs, and its attention to the negative human rights impact of El Salvador's abortion legislation, has intensified in the past decade and especially since the case of Beatriz in 2013. As previously stated, the IAHRS's current position on abortion is that it should be

[144] M Cidón Kiernan, 'Encuesta Iudop: los salvadoreños solo están encontra del aborto cuando una niña es violada' *Revista Factum* (Antiguo Cuscatlán, 23 May 2018) <https://www.revistafactum.com/iudop-aborto/> accessed 2 December 2020
[145] N Lakhani, 'El Salvador woman acquitted'
[146] ibid

decriminalised at a minimum in the case of a risk to the pregnant person's life or health, in the case of rape or incest, and in the case of fatal foetal abnormalities. Developments in the IAHRS regarding SRHRs and abortion represent the importance and effectiveness of feminist engagement with the language and mechanisms of human rights in order to contest women's exclusion from and oppression by the traditional discourse of citizenship and rights.

This part first highlights the IAHRS's growing commitment to SRHRs and abortion law reform in El Salvador through a survey of the IACHR's annual, country, and thematic reports. It argues that the IAHRS has been responsive to and supportive of Salvadoran and transnational feminists' contestation of El Salvador's abortion legislation. This is evidenced by the fact that feminist engagement with the IACHR's sessions resulted in the IACHR conducting a country visit to El Salvador which focused on El Salvador's abortion legislation and its negative human rights impact. This part focuses on the work of the IACHR, rather than the IACtHR or CIM, because it is the IAHRS body which has engaged the most with the situation in El Salvador specifically, rather than SRHRs and abortion access in general.

The IACHR's annual, country, and thematic reports

Chapter 2 highlighted that the IACHR has dedicated increasing attention to women's human rights and SRHRs since the 1990s in its annual, country, and thematic reports. The IACHR first discussed El Salvador's abortion legislation in 2011 in its thematic reports on sexual violence in Mesoamerica and on women's human rights defenders. In these reports, the IACHR expressed concern regarding the complete criminalisation of abortion in Nicaragua and El Salvador, as well as the intimidation that activists campaigning for reform were subjected to in these countries.[147] Following the case of 'Beatriz' in 2013, the IACHR dedicated increasing attention to the criminalisation of abortion in El Salvador and the active prosecution of women accused of having had one. For example, the IACHR mentioned the negative impact of the criminalisation of abortion on women's human rights in its annual report for the first time in 2013, the same year that it issued precautionary measures concerning the case of Beatriz.[148] This demonstrates that actors within the IAHRS are

[147] IACHR, 'Access to Justice for Women Victims of Sexual Violence in Mesoamerica' (OEA/Ser.L/V/II Doc. 63, 9 December 2011) para 242; IACHR, 'Second Report on the Situation of Human Rights Defenders in the Americas' (OEA/Ser.L/V/II. Doc. 66, 31 December 2011) paras 283, 287
[148] IACHR, 'Legal Standards related to Gender Equality and Women's Rights' paras 42-3; IACHR, *PM 114/13-B, El Salvador*

committed to addressing issues related to SRHRs in OAS Member States. This commitment to the multilevel feminist citizenship project of advancing SRHRs is also evident in the IACHR's engagement with civil society actors through its periodic sessions.

The IACHR's periodic sessions

From 2014 to the present, the IACHR dedicated increasing attention to SRHRs in its periodic sessions.[149] As a result, it provided a platform for feminist organisations campaigning for SRHRs, including feminist organisations campaigning for the decriminalisation of abortion in El Salvador. The IACHR also proved responsive to these feminist organisations' requests that the IACHR discuss issues relating to SRHRs such as abortion with national governments. At the 156th period of sessions in October 2015, the IACHR held a session on women deprived of liberty for experiencing obstetric emergencies in El Salvador, during which Quintanilla presented her personal testimony.[150] The rights to health, to a life free from violence, and to privacy were highlighted as main issues by participating organisations, namely CRR, *Agrupación Ciudadana*, and *la Colectiva Feminista*. They requested that the IACHR conduct a country visit, and the IACHR expressed its grave concern regarding the facts presented.[151] The requested country visit took place in 2018, but prior to that the IACHR demonstrated its responsiveness to this feminist engagement with the IAHRS in two thematic reports published in 2015. The thematic report on legal standards related to gender equality used 'the alarming impact of the criminalisation of abortion in all circumstances on women in El Salvador'[152] and the prosecution for the crimes of abortion or aggravated homicide as an example of laws, policies, and practices impeding the full realisation of SRHRs in the region.[153] Taking an intersectional approach, it emphasised the disproportionate and specific impact of such legislation on girls and women 'affected by poverty' with 'low levels of education' and living in rural areas.[154] It called on states to review and eliminate legislation and policy restricting access to sexual and reproductive healthcare including abortion in order to ensure their compliance with IHRL standards.[155] The IACHR's 2015 thematic report on

[149] IACHR, 'Sessions' (IACHR, 2020) <http://www.oas.org/en/iachr/activities/sessions.asp> accessed 4 February 2020
[150] IACHR, 'Situación de derechos humanos de mujeres', 7
[151] ibid; IACHR, 'IACHR Hearings and other Public Events' <http://www.oas.org/es/cidh/audiencias/advanced.aspx?lang=en> accessed 4 February 2020
[152] IACHR, 'Legal Standards', para 54
[153] ibid, paras 52-55
[154] ibid, para 55
[155] ibid

human rights defenders highlighted the 'stigmatization, accusations, and harassment' facing *Agrupación Ciudadana* following the launch of its campaign for *las 17*.[156] Therefore, the IACHR's responsiveness to the concerns raised by these Salvadoran and transnational feminist activists, and by extension its commitment to the multilevel feminist citizenship project of SRHRs, is apparent. This responsiveness and commitment were also apparent in the 2018 country visit requested by the Salvadoran and transnational feminist activists.

The country visit took place in January 2018. In its subsequent report, the IACHR urged a moratorium on prosecutions for the crime of abortion, and the reform of abortion legislation so as to avoid 'violations of the fundamental rights of women, girls, and adolescents.'[157] It criticised the ban as a violation of 'the State's international obligations to respect, protect and guarantee women's rights to life, to health, and to integrity', as well as the failure to respect due process rights, the right to medical privacy, and non-discrimination due to 'negative stereotypes' about women in judgments.[158] It stated that 27 women were currently in prison on charges of aggravated homicide.[159] It reiterated its concerns with the total criminalisation of abortion's impact on 'fundamental rights' in its 2018 annual report, and the need for access to abortion at a minimum in the case of a risk to life or health, in the case of rape, and in the case of foetal non-viability.[160] Following its 2019 country visit to El Salvador, the IACHR again emphasised the government's obligation 'to comply with inter-American standards on the sexual and reproductive rights of women and girls' (i.e. decriminalising abortion at a minimum in certain circumstances), and urged it to implement a moratorium on the application of Criminal Code article 133, review sentences in cases involving obstetric emergencies, and prioritise requests to commute sentences.[161] As a result of the IAHRS' commitment to SRHRs and its responsiveness to civil society actors, the IACHR, Salvadoran feminists, and transnational feminists are cooperating across the national, regional, and transnational levels of the human rights system to advance SRHRs through their efforts to realise straightforward, safe, and legal access to abortion in El Salvador. This process represents the multilevel feminist citizenship project articulated in Chapter 2: these actors are contesting women's historical exclusion from and oppression by the traditional citizenship

[156] IACHR, 'Criminalization of Human Rights Defenders', para 52
[157] IACHR, 2018 El Salvador Country Visit, 5-8
[158] ibid
[159] ibid
[160] IACHR, '2018 Annual Report', paras 192, 200 <http://www.oas.org/en/iachr/docs/annual/2018/TOC.asp> accessed 12 June 2019
[161] IACHR 2019 El Salvador Country Visit, 12-13, 19

discourse which, through restrictive abortion legislation, seeks to maintain women's subordinate position as non-citizens and bearers of future citizens.

Part 3: Summary

As a result of the commitment to intersectional feminism among individuals within the IAHRS and their responsiveness to domestic and transnational feminist actors outside of it, the IAHRS has been and continues to be a vital site and actor in the multilevel feminist citizenship project of decriminalising abortion in El Salvador and so advancing SRHRs. This is evident in its attention to SRHRs including abortion in annual, thematic, and country reports, and it is also evident in its engagement with and support for feminist activists in El Salvador who are campaigning for the decriminalisation of abortion and justice for those prosecuted and incarcerated for having had or alleged to have had one. This commitment to SRHRs and responsiveness to feminist actors from the national and transnational levels is also apparent at the international level of the human rights system. Numerous UN human rights bodies have criticised the negative human rights impact of El Salvador's abortion legislation, and these criticisms are often the direct result of Salvadoran and transnational feminist and human rights organisations bringing these issues to their attention. The fourth and final part of this chapter considers this aspect of the multilevel feminist citizenship project.

4.3. International Struggle (UN)

Introduction

As Chapters 2 and 3 indicated, the UN human rights system has been the prime site for the advancement of SRHRs in IHRL, and it has demonstrated a firm commitment to the respect, protection, and fulfilment of SRHRs. In regard to El Salvador, six of the nine core human rights treaty monitoring bodies, the Special Rapporteur on violence against women, its causes and consequences (SR VAW), and the UN High Commissioner for Human Rights have criticised the negative human rights impact of El Salvador's complete criminalisation of abortion and the active prosecution of women and girls suspected of having had one. The UN human rights system's awareness of the situation is the result of Salvadoran and transnational feminist and human rights organisations engaging with the UN human rights system as part

of their campaign for the decriminalisation of abortion in El Salvador. Their engagement with the UN human rights system consists of submitting information to the human rights treaty monitoring bodies during their periodic report review sessions, and meeting with UN Special Rapporteurs and the UN High Commissioner for Human Rights during country visits. Not only has this feminist engagement contributed to the UN human rights system's awareness of the situation in El Salvador, the UN human rights system is proving responsive to this feminist activism. This section argues that there is clear evidence that the information provided by these domestic and transnational feminist organisations is influencing the treaty monitoring bodies' Concluding Observations, the recommendations adopted by Special Rapporteurs following country visits, and statements by the UN High Commissioner. Therefore, the multilevel feminist citizenship project of advancing SRHRs is proving successful at the international level of the human rights system.

This section first discusses the HRC, CESCR, CEDAW, CAT, CRC, and CERD Concluding Observations from 2008 to the present. It demonstrates that their criticisms of El Salvador's abortion legislation are the direct result of Salvadoran and transnational feminist organisations submitting information highlighting its negative human rights impact. This section then discusses the 2004 and 2011 SR VAW country reports, and the UN High Commissioner for Human Rights' statement following his 2017 country visit, highlighting the ways in which information provided by Salvadoran feminist and human rights organisations informed their condemnation of El Salvador's abortion legislation. This feminist engagement with the UN human rights system, and the UN human rights system's responsiveness to it, represents the utility of feminists engaging with the international layer of the multilevel citizenship project.

Treaty monitoring bodies

The first criticism of El Salvador's abortion legislation by the UN human rights system came from the HRC in its 2003 Concluding Observations, which expressed 'concern at the severity of the current law against abortion.'[162] The 2007 CESCR Concluding Observations went further, urging the state 'to reform its abortion legislation and to consider exceptions…in the

[162] HRC, 'Concluding Observations on the consolidated third, fourth and fifth periodic reports of El Salvador' (CCPR/CO/78/SLV, 22 Aug 2003) para 14

cases of therapeutic abortion and pregnancy resulting from rape or incest.'[163] The first available example of feminist organisations submitting information concerning the complete criminalisation of abortion in El Salvador is a joint submission by feminist NGOs to the CEDAW Committee in the lead-up to its 2008 Concluding Observations. Co-written by ORMUSA, CEMUJER, and *Las Mélidas* among others, the report highlighted the high rate of teenage pregnancy, the negative health impact of unsafe, illegal abortion, and the consequences of this for the full enjoyment of the right to health as set out in article 12 of CEDAW. [164] They requested that the CEDAW Committee reiterate CESCR's 2007 recommendation that El Salvador reform its abortion legislation to permit therapeutic abortions.[165] In response to this shadow report, CEDAW's 2008 Concluding Observations expressed alarm at 'the high incidence of births among adolescents, as well as the high number of illegal abortions, including very young women, which have a negative impact on women's physical and mental health.'[166] Its recommendations included holding 'a national dialogue on women's right to reproductive health, including on the consequences of restrictive abortion laws.'[167] Therefore, transnational and national feminist organisations successfully drew attention to the negative human rights impact of the criminalisation abortion in El Salvador through its engagement with the UN human rights system, and their report directly resulted in the CEDAW Committee calling on El Salvador to address the human rights issues arising from its abortion legislation.

A similar responsiveness is evident in CAT's 2009 Concluding Observations. The Committee expressed concern with the complete criminalisation of abortion and how it had 'resulted in serious harm to women, including death' in contravention of the State Party's obligations to prevent torture and CIDT.[168] This was in response to a submission by *la Procuraduría* which framed the complete criminalisation of abortion in this manner.[169]

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[163] CESCR, 'Concluding Observations on the second periodic report of El Salvador' (E/C.12/SLV/CO/2, 27 June 2007) para 44
[164] CLADEM, 'Women's Human Rights in El Salvador, Alternative Report' (September 2008) 22 <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/TBSearch.aspx> accessed 2 December 2020
[165] ibid, 23
[166] CEDAW Committee, 'Concluding Observations on the seventh periodic report of El Salvador' (CEDAW/C/SLV/CO/7, 7 November 2008) para 35
[167] ibid, para 36
[168] CAT, 'Concluding Observations on the second periodic report of El Salvador' (CAT/C/SLV/CO/2, 9 December 2009) para 23
[169] Procuraduría para la defensa de los derechos humanos de El Salvador, 'Informe Especial sobre la aplicación de la Convención contra la Tortura y otros Tratos o Penas Cureles, Inhumanos o Degradantes' (2009) paras 99-101,106, 108-9 <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/TBSearch.aspx> accessed 2 December 2020

This process of feminist engagement with the treaty monitoring bodies – and the treaty monitoring bodies being responsive to this engagement – has continued since then. National and transnational feminist and human rights organisations including *Agrupación Ciudadana*, CRR, and *la Procuraduría* submitted information for the HRC's 2010 and 2018 Concluding Observations, CESCR's 2014 Concluding Observations, and CEDAW's 2017 Concluding Observations. In each instance, their submissions influenced the Concluding Observations.

In 2010, *Agrupación Ciudadana* and three other organisations submitted a joint shadow report to the HRC in the lead up to El Salvador's sixth periodic review. The report asserted that the complete criminalisation of abortion and the active prosecution of women suspected of having had abortions violated women's and girls' rights to equality, life, liberty, health, privacy, and freedom from torture.[170] In light of this, the HRC's Concluding Observations expressed concern over the complete criminalisation of abortion and the prosecution and imprisonment of women suspected of having had the procedure.[171] The Committee reiterated its 2003 recommendation that El Salvador amend its legislation 'to bring it into line with the Covenant'; it also called for the suspension of prosecutions and 'a national dialogue on the rights of women to sexual and reproductive health.'[172] Between 2015 and 2018, numerous civil society organisations including *Agrupación Ciudadana* and *la Colectiva Feminista* submitted information to the HRC in relation to its periodic review of El Salvador's seventh periodic report.[173] The HRC drew on these contributions, its previous Concluding Observations, and the work of UN human rights procedures to urge El Salvador 'to suspend immediately the criminalization of women for the offence of abortion', to 'review all cases of women who have been imprisoned for abortion-related offences, with the aim of ensuring their release', and to 'ensure unimpeded access to high-quality sexual and reproductive health

[170] Agrupación Ciudadana et al 'Report on Violations of Women's Human Rights due to the Complete Criminalisation of Abortion' (October 2010) <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/TBSearch.aspx> accessed 2 December 2020
[171] HRC, 'Concluding Observations on the sixth periodic report of El Salvador' (CCPR/C/SLV/CO/6, 18 November 2010) para 10
[172] ibid
[173] The Advocates for Human Rights, 'Submission to the Human Rights Committee for the 114th Session, 29 June-24 July 2015' (2015) para 5; Espacio de Mujeres Lesbianas Salvadoreñas por la Diversidad (ESMULES), 'Human Rights Situation for Lesbian, Bisexual and Trans Women in El Salvador' (9 February 2018); Fundación Red Nacional de Derechos Humanos (RENADDHH), Consejo Nacional para la Defensa del Derecho Humano de la Salud, 'Aportes para el VII informe periódico del Estado del Salvador 122º Sesión del Comité de Derechos Humanos' (January 2018); Women's Link Worldwide, 'El Salvador's Compliance with the International Covenant on Civil and Political Rights' (2018) all available at <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/TBSearch.aspx> accessed 2 December 2020

services nationwide'.[174] It also called on El Salvador to 'guarantee safe, legal and effective access' to abortion in the case of a risk to life or health, in the case of rape or incest, and in the case of the pregnancy's non-viability.[175]

CESCR's 2014 Concluding Observations reiterated the Committee's previous calls for legislative reform permitting abortion for therapeutic reasons and in the case of rape or incest, stating that such reform was required to ensure respect for women's rights to health, life, and dignity.[176] This recommendation was informed not only by its previous Concluding Observations, but also by *Agrupación Ciudadana* and CRR submissions which highlighted the ongoing negative human rights impact of the complete criminalisation of abortion and the prosecution and incarceration of women for abortion and homicide.[177]

In its 2017 Concluding Observations, CEDAW expressed concern with the complete criminalisation of abortion and the prosecution, lengthy pretrial detention, and disproportionate criminal penalties facing women for having an abortion or miscarriage.[178] Reiterating its previous Concluding Observations, it called on El Salvador to introduce a moratorium on the enforcement of the current law, review the detention of women for abortion-related offences, and decriminalise abortion at a minimum in the cases of rape, incest, threats to the life and/or health of the pregnant person or severe foetal impairment.[179] In doing so, it reflected the concerns raised in submissions by *la Procuraduría*, CRR, and *Agrupación Ciudadana*, among others.[180]

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[174] HRC 2018 Concluding Observations, para 16
[175] ibid
[176] CESCR 2014 Concluding Observations, para 22
[177] Agrupación Ciudadana, CRR, 'Supplementary information on El Salvador, submitted for consideration by the on Economic, Social and Cultural Rights during its 52nd Session' (2014); Fundación de Estudios para la Aplicación del Derecho (FESPAD), 'Informe sombra presentado por organizaciones de la sociedad civil salvadoreña en el marco de los Informes periódicos tercero, cuarto y quinto presentados por el Estado de El Salvador, de conformidad con los artículos 16 y 17 del PIDESC' (March 2014) para 114; International Commission of Jurists, 'Submission of the International Commission of Jurists to the Committee on Economic, Social and Cultural Rights in View of the Committee's Examination of the Combined Third, Fourth and Fifth Periodic Reports of the Republic of El Salvador under the Covenant on Economic, Social and Cultural Rights' (March 2014) paras 30, 40; Procuraduría para la defensa de los derechos humanos, 'Informe Alternativo de la Procuraduría para la Defensa de los Derechos Humanos sobre la aplicación del Pacto Internacional de Derechos Económicos, Sociales y Culturales en El Salvador (2006 - 2013)' (2013) 49, all available at <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/TBSearch.aspx> accessed 2 December 2020
[178] CEDAW Committee 2017 Concluding Observations, para 38
[179] ibid, para 39
[180] Agrupación Ciudadana et al, 'Informacion complementaria sobre El Salvador programada para revision por parte del Comite de la CEDAW durante la session 66' (23 January 2017); CRR, ' El Salvador's total abortion ban and its harmful impact on women' (2017); Human Rights Watch, 'Human Rights Watch submission to the Committee on the Elimination of Discrimination against Women concerning the combined eighth and ninth

The two most recent Concluding Observations issued by treaty monitoring bodies in relation to El Salvador also speak to this ongoing process of feminist engagement and treaty monitoring body responsiveness. In 2018, the CRC called on El Salvador 'decriminalize abortion and ensure access to safe abortion and post-abortion care services for adolescent girls.'[181] In doing so, it echoed feminist and human rights organisations' submissions on the human rights impact of El Salvador's abortion legislation.[182] CERD's 2019 Concluding Observations called on El Salvador to 'guarantee access to sexual and reproductive health for indigenous women and women of African descent', and to 'review legislation on abortion in order to ensure that it is consistent with other human rights such as women's right to life and right to physical and mental health.'[183] While documents were unavailable to determine whether or not civil society organisations submitted information on this topic to CERD during the review process, CERD's most recent Concluding Observations represent convergence within the UN human rights system that El Salvador's abortion legislation needs to be reformed in order to guarantee the respect, protection, and fulfilment of women's human rights. This convergence is the result of feminist engagement with the UN human rights system, beginning with their articulation of the concept of SRHRs during UN human rights conferences, and continuing with their participation in the periodic review process. Effective feminist engagement with the UN human rights system by Salvadoran and transnational organisations is also evident in their influence on SR VAW country reports and a recent statement by the UN High Commissioner for Human Rights.

SR VAW and the UN High Commissioner

The SR VAW's engagement with and responsiveness to national actors campaigning for abortion law reform in El Salvador can be seen in the SR VAW's 2004 and 2011 country visit reports. During both of these country visits, the SR VAW met with feminist

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periodic report of El Salvador' (2017); Procuraduría, 'List of Issues and Difficulties for the Implementation of the Convention on the Elimination of All Forms of Discrimination against Women, from the perspective of the Office of the Human Rights Procurator of El Salvador' (2017) paras 8, 32, all available at <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/TBSearch.aspx> accessed 2 December 2020

[181] CRC Committee 2018 Concluding Observations, para 36(d)

[182] Human Rights Watch, 'Submission by Human Rights Watch to the Committee on the Rights of the Child on El Salvador, 79th session, 2018' (2018); Women's Link Worldwide, 'El Salvador's Compliance with the Convention on the Rights of the Child: Women's and Girls' Rights. 79th session of the Committee on the Rights of the Child' (2018) 3-5, 14-5, both available at <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/TBSearch.aspx> (accessed 2 December 2020)

[183] CERD Committee 2019 Concluding Observations, para 26(c)

organisations campaigning for abortion law reform and her conclusions and recommendations were informed by the evidence with which they provided her. For example, during the SR VAW's 2004 country visit to El Salvador, she met with feminist organisations campaigning for abortion law reform including CEMUJER and *Las Dignas*.[184] Her report reflects their concerns: she criticised El Salvador's abortion legislation for prioritising 'the rights of the foetus…over a woman's right to life, health and well-being' and for denying all women and girls 'the right to control their bodies and their lives.'[185] She highlighted its disproportionate impact on women and girls who were pregnant as the result of rape or incest, on poor women and girls, and on teenagers.[186] She called on El Salvador to consider permitting abortion in at least certain circumstances.[187] The 2011 country report reiterated these concerns and recommendations, and it refers to meetings with *la Procuraduría*, feminist groups, and women detained in Ilopango Prison to discuss the negative human rights impact of El Salvador's abortion legislation.[188] It also commends the 'laudable efforts' of women's rights organisations to contest the complete criminalisation of abortion and active prosecution of women suspected of having had one.[189] Therefore, the SR VAW's engagement with and support for national actors campaigning for abortion law reform in order to realise women's full citizenship in El Salvador is evident. This engagement and support are also apparent in The UN High Commissioner for Human Rights' recent work.

In 2017, the UN High Commissioner for Human Rights conducted a country visit to El Salvador. He stated that he was 'appalled' by the consequences of the country's total criminalisation of abortion, and he urged the government 'to lift the absolute prohibition on abortion', 'to launch a moratorium on the application of article 133 of the Penal Code', and 'to review all cases where women have been detained for abortion-related offences' to ensure State compliance with its obligations under IHRL.[190] This statement indicates the Commissioner's support for the position of national and transnational feminist and human rights organisations, as well as other UN human rights bodies, that El Salvador's abortion

[184] SR VAW 2004 Report, para 29
[185] ibid, paras 73, 75
[186] ibid, paras 73-6
[187] ibid, para 77(b)(v)
[188] SR VAW 2011 Report, para 69, case studies pp 18-19, paras 1-2
[189] ibid, para 68
[190] UN High Commissioner for Human Rights, 'Statement by UN High Commissioner for Human Rights at the end of his mission to El Salvador' (Office of the High Commissioner for Human Rights, 17 November 2017) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22412&LangID=E> accessed 21 November 2020

legislation needs to be reformed to ensure that women's human rights and full citizenship are realised.

Therefore, in light of this review of Concluding Observations, country visit reports, and statements it is clear that multiple important actors within the UN human rights system are committed to the multilevel citizenship project of SRHRs as it manifests in calls for straightforward, safe, and legal access to abortion in El Salvador. They are responsive to Salvadoran and transnational feminist and human rights organisations campaigning for the decriminalisation of abortion and an end to the prosecution of women suspected of having had one, as indicated by their incorporation of these organisations' evidence into their own work. Therefore, feminist and human rights organisations should continue to meet with and submit information to these UN actors to ensure ongoing pressure on the Salvadoran government to address the multiple human rights violations arising from the current legislative context. They should also consider engaging with the individual complaints procedures of the UN human rights treaty bodies as part of this multilevel feminist citizenship process.

The individual complaints procedure

Salvadoran and transnational feminist engagement with the UN human rights system represents several aspects of the 'multidimensional strategy' employed by feminists to advance SRHRs.[191] In writing and submitting reports to the UN human rights system, Salvadoran and transnational feminist organisations are engaging in 'research and evidence generation', the 'dissemination of information' and the 'forging' of alliances with actors who share their aims.[192] However, the fourth aspect of this multidimensional strategy, strategic litigation, has not yet been pursued by national or transnational feminist organisations within the UN human rights system. This is curious, since El Salvador has accepted the individual complaints procedure of five UN human rights treaty monitoring bodies – HRC, CESCR, CERD, CRC, and CRPD – and therefore filing a complaint with one of these bodies is an option.[193] Perhaps Salvadoran and transnational feminist organisations are focusing on the

[191] X Casas, 'They are girls not mothers',163
[192] ibid
[193] UN Treaty Body Database, 'Ratification Status for El Salvador' (UN Treaty Body Database, 2020) available at <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=55&Lang=EN> (accessed 2 December 2020)

IACHR's individual complaints procedure instead, having filed petitions with the IACHR concerning the cases of Manuela and Beatriz. Given the UN human rights system's responsiveness to campaigns for the decriminalisation of abortion in El Salvador, and given the HRC's multiple Final Views finding states responsible for violations of the ICCPR due to restrictive abortion legislation, filing an individual complaint relating to the complete criminalisation of abortion in El Salvador may yet be a strategy worth pursuing in order to advance the full realisation of women's and girls' SRHRs and citizenship in El Salvador.[194]

Part 4: Summary

There is clear evidence that Salvadoran and transnational feminist organisations are engaging with the UN human rights system to advance SRHRs, including abortion access, within El Salvador. There is also clear evidence that the UN human rights system is responsive to their engagement through its incorporation of their submissions into Concluding Observations, final reports on country visits, and statements. This represents convergence between the national, international, and transnational levels of the multilevel feminist citizenship project of SRHRs: feminist actors, and actors who are responsive to feminist approaches, are working within and across these levels to contest women's exclusion from and oppression by the traditional discourse of citizenship and rights as it manifests in the criminalisation of abortion in El Salvador. Translating this success into change at the national level through the decriminalisation of abortion and the release of women imprisoned for obstetric emergencies represents the final, unrealised, and most crucial step of this process.

Conclusion

This chapter considered the ways in which feminists are making use of the language and mechanisms of human rights at the domestic, regional, international, and transnational levels of the human rights system to campaign for the decriminalisation of abortion in El Salvador and so realise women's full citizenship. It first provided a general overview of the human rights situation in El Salvador, and the ways in which systemic inequality exacerbates the impact of the criminalisation of abortion and informs the active prosecution of those

[194] CEDAW Committee, *LC v Peru*; HRC, *KL v Peru*; HRC, *LMR v Argentina*; HRC, *Mellet v Ireland*; HRC, *Whelan v Ireland*

suspected of having had one. It then detailed the origins and evolution of the Salvadoran feminist movement, emphasising its intersectional and transnational nature. Following on from this discussion, it demonstrated that the criminalisation of abortion and the prosecution of women and girls suspected of having had one is a manifestation of the patriarchal, oppressive, exclusionary citizenship discourse that requires the strict regulation of women's reproduction and sexuality in the service of the continuity and stability of a patriarchal social order. Part 2 also demonstrated that feminists are contesting this exclusion and oppression through awareness-raising, campaigns for legislative reform and justice, and engagement with the regional and international human rights system, and that this contestation should be understood as a multilevel citizenship project.

The importance of feminist engagement with the inter-American and UN human rights systems, and the responsiveness of these systems to this engagement, was the subject of parts 3 and 4. They highlighted the growing assertiveness of the inter-American and UN human rights' statements vis-à-vis the need for the decriminalisation of abortion in El Salvador, and it argued that this is the direct result of Salvadoran and transnational feminist and human rights organisations bringing the issue to their attention. It noted that these organisations have yet to file an individual complaint with a UN human rights treaty monitoring body, and it suggested that this might be a useful avenue to pursue in their attempts to provide redress for, and advance the human rights of, women and girls in El Salvador who are affected by the complete criminalisation of abortion.

Although abortion remains illegal in El Salvador, and although women and girls continue to be prosecuted for it, there is increasing pressure upon the government from national, regional, international and transnational actors to enact reforms and so ensure that women's and girls' human rights are respected, protected, and fulfilled. This represents the contested, ongoing nature of the multilevel feminist citizenship project that is SRHRs. The success of the Irish feminist movement in realising abortion law reform, the subject of the next chapter, may provide some inspiration to the Salvadoran feminist movement to continue its struggle. This success, as well as ongoing challenges and the lessons that the Irish feminist movement could learn from the Salvadoran feminist movement in terms of intersectionality and transnationalism, will also be considered.

Chapter 5

Ireland

This chapter argues that feminist activism for abortion access and SRHRs in Ireland represents a multilevel feminist citizenship project. It demonstrates that feminists' engagement with the interconnected domestic, regional, international, and transnational levels of the human rights system resulted in the repeal of the 8th Amendment and the introduction of partial access to abortion in 2018-9. While this was a major success for the multilevel feminist citizenship project of SRHRs and abortion access, the contestation of women's historical exclusion from and oppression by the traditional citizenship discourse is ongoing, given ongoing restrictions on straightforward access to abortion in Ireland. As with their Salvadoran-based counterparts, Irish feminists are continuing their multilevel feminist citizenship activism through a 'multidimensional' strategy which involves gathering research and evidence, campaigning and raising awareness, alliance-building with actors who share their aims, and strategic litigation.[1]

Part 1 provides a brief overview of the main human rights issues in Ireland and their interrelationship with its abortion legislation past and present. Part 2 discusses the origins and evolution of the Irish feminist movement, and their engagement with the key cases arising from Ireland's restrictive abortion legislation from the 1980s to the 2010s. Part 3 analyses feminist engagement with the European human rights system. It reflects on the ways in which the absence of bodies like the IACHR and CIM, as well as the conservative, deferential approach of the ECtHR to human rights protection, has in some ways limited the advancement of the multilevel feminist citizenship project of realising abortion access and SRHRs. In contrast, part 4 highlights the responsiveness of the UN human rights system to Irish and transnational feminist and human rights organisations' engagement, as evidenced by their influence on Concluding Observations and Final Views. Throughout, the ways in which feminists successfully engaged with the language and mechanisms of human rights

[1] X Casas, 'They are Girls not Mothers', 163

nationally, regionally, internationally, and transnationally in order to realise access to abortion in Ireland through the repeal of the 8th Amendment and the introduction of The Health (Regulation of Termination of Pregnancy) Act in 2018 (hereafter the 2018 Act), are highlighted. The ongoing challenges facing the full realisation of abortion access and SRHRs in Ireland, including issues with the 2018 Act itself and the Irish feminist movement, are also considered.

5.1. General Context

From 1922 until 2019, abortion was illegal in the Republic of Ireland except when there was a risk to the life, as distinct from the health, of the mother. As Chapter 2 argued, abortion's continued criminalisation following independence through the maintenance of Sections 58 and 59 of the 1861 Offences Against the Person Act (hereafter, the 1861 Act) was part of wider societal and legal measures to deny women's citizenship in the name of upholding a conservative, patriarchal, Catholic social and moral order. In 1983, the 8th Amendment to the Constitution resulted in additional restrictions on women's access to abortion. This Amendment added Article 40.3.3º to the Constitution, which enshrined 'the right to life of the unborn' on an equal footing with the 'right to life of the mother.'[2] Chapter 2 demonstrated that the anti-choice campaign for the 8th Amendment was a direct response to the liberalisation of social mores and modest advancements of women's rights, which conservative actors understood as a threat to the continuity and stability of the conservative, Catholic, patriarchal Irish nation.

In the 1992 'X case' (discussed in greater detail below), the Supreme Court ruled that abortion could be permitted where there was a risk to a woman's life, as distinct from her health, including when the risk to her life was through suicide. However, successive governments failed to implement legislation allowing for this exception to Ireland's criminalisation of abortion, creating ongoing uncertainty for women and medical professionals as to whether they could legally access or provide abortion care in a life-threatening situation. These restrictions and this sense of uncertainty were further compounded by the 1995 Regulation of Information Act, which placed extensive restrictions on the nature of information on abortion services abroad that could be published or advertised, as well as the information and advice that healthcare professionals could provide,

[2] Bunreacht na hÉireann, Art 40.3.3º

even if patients explicitly requested it.[3] Despite numerous domestic cases and controversies, widespread awareness of the fact that thousands of women were travelling abroad every year to access abortion care, extensive civil society activism, and international condemnation, the 1861 Act and the 8th Amendment remained the basis of Ireland's abortion legislation until 2013. That year, in response to the controversy caused by the death of Savita Halappanavar in October 2012, the Protection of Life During Pregnancy Act (PLDPA) was signed into law. A highly restrictive law which punished the intentional 'destruction of unborn human life' with 14 years in prison, an unlimited fine, or both, it merely legislated for the 'X Case' ruling, permitting abortion where there was a risk to the woman's life (including from suicide), as distinct from her health, due to the pregnancy.[4] The feminist campaign for straightforward access to safe, legal abortion had by then gathered momentum and, in response to this activism, the recommendations of the Citizens' Assembly, and pressure from the UN human rights system, the government agreed to a referendum on the 8th Amendment. On the 25th of May 2018, the proposal to repeal the 8th Amendment was approved by a two-to-one margin, and the Oireachtas (parliament) was able to legislate on abortion. The Health (Regulation of Termination of Pregnancy) Act 2018 came into force on the 1st of January 2019. It permits abortion up to twelve weeks without restriction as to reasons, and, after twelve weeks it permits abortion in the case of a risk to the woman's life or health, or in the case of fatal foetal abnormality.[5] This represented a major success for the feminist movement: through their multilevel engagement with the language and mechanisms of human rights, Ireland's abortion legislation was brought in line with IHRL standards.

Although Ireland's abortion legislation is now broadly in line with the minimum IHRL standards established by the UN human rights system, there are numerous issues limiting the full respect, protection, and fulfilment of pregnant peoples' SRHRs that are inherent in the Act and that arise from the wider Irish socioeconomic and political context. As such, the multilevel feminist citizenship project of realising women's right to have rights and determine those rights through facilitating their access to straightforward, safe, and legal abortion is ongoing. Some of the issues feminists face in realising this will be discussed in part 2 of this chapter. First, a brief overview of some of the main human rights issues in Ireland will be provided.

[3] Regulation of Information (Services Outside the state for Termination of Pregnancies) Act Number 5 of 1995, secs 3, 4, 5, 6, 10
[4] Protection of Life During Pregnancy Act 2013, Number 35 of 2013, secs 7, 8, 9, 22(1), 22(2)
[5] Health (Regulation of Termination of Pregnancy) Act 2018, secs 9, 10, 11, 12 (2018 Act)

While Ireland is far wealthier and far less violent than El Salvador – it is ranked 3rd in the world according to the Human Development Index Ranking[6] – it nonetheless has human rights issues. These human rights issues represent a particular, country-specific manifestation of the same systemic inequalities impeding the full realisation of women's and girls' citizenship in El Salvador, namely sexism, racism, ableism, class inequality, homophobia, and transphobia.

Prior to the liberalisation of Ireland's abortion legislation, national and transnational feminist and human rights organisations, as well UN human rights bodies, repeatedly criticised Ireland's restrictive abortion legislation.[7] UN human rights bodies also drew – and continue to draw – attention to other, interrelated issues such as the persistence of gender-based discrimination in attitudes, legislation, and policy;[8] gender inequality in the labour force;[9] lack of women's representation in politics and decision-making;[10] barriers to young people obtaining access to quality, impartial reproductive and sexual health information and services;[11] failure to conduct prompt, independent, thorough and effective investigations into the historical abuse of women and children in Magdalene laundries and similar Church/state institutions;[12] and the prevalence of domestic and gender-based violence in the state.[13] These

[6] UNDP, '2019 Human Development Index Ranking' (UNDP, 2020) <http://hdr.undp.org/en/content/2019-human-development-index-ranking> accessed 4 December 2020

[7] See Annex 2 and Abortion Rights Campaign (ARC), < https://www.abortionrightscampaign.ie/> (ARC, 2020) accessed 4 December 2020; Amnesty International, *She is Not a Criminal*; Human Rights Watch, *A State of Isolation: Access to Abortion for Women in Ireland* (New York, Human Rights Watch 2010)

[8] CEDAW Committee, Concluding Observations on the combined second and third reports of Ireland' in General Assembly Official Records (A/54/38 Rev. 1 Supp. 38, 20 August 1999) paras 180, 185, 186, 193-4 (CEDAW 1999 Concluding Observations); CEDAW Committee, 'Concluding Observations on the combined fourth and fifth periodic reports of Ireland' (CEDAW/C/IRL/CO/4-5, 22 July 2005) para 24 (CEDAW 2005 Concluding Observations); CEDAW Committee, 'Concluding Observations on the combined sixth and seventh periodic reports of Ireland' (CEDAW/C/IRL/CO/6-7, 9 March 2017) paras 10-3 (CEDAW 2017 Concluding Observations)

[9] CEDAW 1999 Concluding Observations, paras 181-4; CEDAW 2005 Concluding Observations, paras 35-6; CEDAW Committee 2017 Concluding Observations, paras 40-1

[10] CEDAW 1999 Concluding Observations, paras 189-90; CEDAW 2005 Concluding Observations, paras 24, 32-3; CEDAW 2017 Concluding Observations, paras 22-3, 34-5

[11] CEDAW 1999 Concluding Observations, para 186; CRC Committee, 'Concluding Observations on the second periodic report of Ireland' (CRC/C/IRL/CO/2, 29 September 2006) para 52 (CRC 2006 Concluding Observations); CRC Committee, 'Concluding Observations on the combined third and fourth periodic reports of Ireland' (CRC/C/IRL/CO/3-4, 1 March 2016) paras 57, 58 (CRC 2016 Concluding Observations)

[12] CAT, 'Concluding Observations on the initial report of Ireland' (CAT/C/IRL/CO/1, 17 June 2011) paras 20-1 (CAT 2011 Concluding Observations); CAT, 'Concluding Observations on the second periodic report of Ireland', (CAT/C/IRL/CO/2, 31 August 2017) paras 23-30 (CAT 2017 Concluding Observations); CEDAW 2017 Concluding Observations, paras 14-5; CESCR, 'Concluding Observations on the third periodic report of Ireland' (E/C.12/IRL/CO/3, 8 July 2015) para 18 (CESCR 2015 Concluding Observations); HRC, 'Concluding Observations on the fourth periodic report of Ireland' (CCPR/C/IRL/CO/4, 19 August 2014) para 10 (HRC 2014 Concluding Observations); Special Rapporteur on the sale and sexual exploitation of children, including

organisations and bodies have also been critical of other, interrelated issues, such as systemic discrimination against Travellers and other ethnic and racial minorities;[14] the multiple human rights violations arising from the direct provision system for asylum seekers;[15] high rates of income inequality and relative poverty, particularly since the implementation of austerity measures following the 2008 recession;[16] a longstanding housing crisis characterised by inadequate provision of social housing and resulting in increasing rates of homelessness and substandard housing conditions;[17] and the erosion of social security, the healthcare system, and public service provision.[18] This particular social, political, economic and cultural context informed the implementation of Ireland's restrictive abortion legislation, and it also influenced the emergence and development of the Irish feminist movement. The next part of this chapter explores the ways in which the Irish feminist movement contested women's exclusion from and oppression by the traditional patriarchal citizenship discourse as it manifested in restrictions on women's political, economic, and reproductive autonomy.

5.2. Domestic Struggle

Introduction

This part discusses the national level of the multilevel feminist citizenship project, exploring how the particularities of the Irish context shaped women's exclusion from and oppression by citizenship, as well as feminist responses to this exclusion and oppression. It first provides a

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child prostitution, child pornography and other child sexual abuse material (SR sale of children), 'Visit to Ireland' (A/HRC/40/51/Add.2, 15 November 2019) paras 11-19 (SR sale of children 2019 report)

[13] CAT 2011 Concluding Observations, para 27; CAT 2017 Concluding Observations, paras 31-2; CEDAW 1999 Concluding Observations, paras 187-8; CEDAW 2005 Concluding Observations paras 22, 23, 28, 29; CEDAW 2017 Concluding Observations, paras 26-7; CRC 2016 Concluding Observations, paras 37, 38; HRC, 'Concluding Observations on the third periodic report of Ireland' (CCPR/C/IRL/CO/3, 30 July 2008) para 9 (HRC 2008 Concluding Observations); HRC 2014 Concluding Observations, para 8

[14] CEDAW 2017 Concluding Observations, paras 48-51; CERD Committee, 'Concluding Observations on the combined fifth to ninth reports of Ireland' (CERD/C/IRL/CO/5-9, 23 January 2020) paras 15-6, 19-36 (CERD 2020 Concluding Observations); Independent Expert on the question of human rights and extreme poverty (IE poverty), 'Mission to Ireland' (A/HRC/17/31/Add.2, 17 May 2011) paras 75-82 (IE poverty 2011 report); Special Rapporteur on the situation of human rights defenders (SR HRDs), 'Mission to Ireland' (A/HRC/22/47/Add. 3, 26 February 2013) paras 88-91 (SR HRDs 2013 report); Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (SR freedom of expression), 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. Addendum: Report on the mission to Ireland' (E/CN.4/2000/63/Add.2, 10 January 2000) paras 64-69 (SR freedom of expression 2000 report)

[15] CERD 2020 Concluding Observations, paras 37-8; IE poverty 2011 report, paras 89-94; SR sale of children 2019 report, para 36

[16] CEDAW 2005 Concluding Observations, paras 34-5; CEDAW 2017 Concluding Observations, paras 46-7; IE poverty 2011 report, paras 16-26, 43-47

[17] SR extreme poverty, paras 83-88

[18] ibid, 43-47, 48-51

brief overview of the Irish feminist movement, before discussing the key cases and controversies relating to Ireland's abortion legislation. In doing so, it argues that the disparate and largely liberal nature of the Irish feminist movement, the strength of conservative actors, and government unwillingness to meaningfully address the issue of abortion all circumscribed the advancement of women's citizenship in the form of SRHRs well into the 2010s. In contrast to El Salvador, it was only in 2013 that explicitly intersectional feminist organisations emerged in Ireland. As will be demonstrated, their structural understanding of inequality, and of the need for transformation rather than reform to ensure the full realisation of SRHRs in Ireland, has to some extent permeated feminist discourse in Ireland. Intersectional feminist activism at the national and international levels of the human rights system certainly contributed to the repeal of the 8th Amendment and the introduction of access to abortion in certain circumstances, representing success for the multilevel feminist citizenship project of SRHRs. However, this process of feminist contestation is as yet ongoing: abortion is still technically a criminal offence, and it is not fully accessible even in the circumstances permitted under the 2018 Act. Furthermore, systemic legislative, policy, and societal changes are still necessary to ensure that all historically oppressed and marginalised groups in Ireland have the right to have rights and determine the scope of those rights.

5.2.1. The Irish feminist movement

This section considers the first and second waves of the Irish feminist movement, arguing that they achieved some advances in women's rights, but that the generally liberal and diffuse nature of the movement, and the introduction of the 8th Amendment, impeded the realisation of women's full citizenship.

At the turn of the 20th century, feminists campaigned for Irish independence, for the right to vote and stand for election, and for married women's legal capacity and property rights. They were also active in the labour rights movement, which was less robust in Ireland than in other countries.[19] Whereas the feminist movement in El Salvador was enriched by connections with other political and intellectual movements, the weakness of the Left, the lack of strong connections between the Irish feminist movement and left-wing movements, and the

[19] E Crawford, *The Women's Suffrage Movement*, 252-276; M Luddy, 'Feminism' in R Bourke, I McBride (eds) *The Princeton History of Modern Ireland* 474-477, 480

indifference or opposition to women's rights issues within the Irish independence movement all impeded the development of a strong Irish feminist movement with an awareness of intersecting forms of oppression.[20]

Despite these limitations, Irish feminists mounted concerted protest against legislation and constitutional provisions excluding women from full citizenship.[21] These feminists articulated the idea of a female citizen, one who had earned her right to participate in the new state given her active role in the independence movements.[22] However, these organisations and individuals largely remained silent on the issues of contraception and abortion, as they were seen as too controversial and divisive.[23] This reluctance diminished only slightly in subsequent decades, as will be demonstrated below.

The conditions necessary for women to contest their exclusion from and oppression by the Irish citizenship discourse came about towards the end of the 1940s, and intensified during the 1960s.[24] The emergence of the modern international human rights system and the advent of second-wave feminism were also integral to this process. In 1949 Ireland became one of the founding members of the CoE, and in 1955 it was admitted to the UN.[25] Irish women delegates and trade unionists attended UN and CoE meetings and conferences, sharing knowledge and experience with other women's and feminist organisations, and participating

[20] I McBride 'Religion' in R Bourke, I McBride (eds) *The Princeton History of Modern Ireland*, 311; MG Valiulis 'The Politics of Gender in the Irish Free State, 1922-1937', 573-4

[21] I Bacik 'From Virgins and Mothers to Popstars and Presidents: Changing Roles of Women in Ireland' 35 Irish Review (2007), 101; Bunreacht na hÉireann, Article 41.2.1º, 41.2.2º; Civil Service Regulation Act 1924, s 4; Civil Service Regulation (Amendment) Act 1926, s 2(3)(3); Conditions of Employment Act 1936, s 12; R Cullen Owens, *A Social History of Women in Ireland, 1870-1970* (Dublin, Gill and Macmillan 2004) (ebook), Chapter 10; Juries Act 1927, s5 and First Schedule, Part II; J Redmond, J Harford, '"One Man One Job": The Marriage Ban and the Employment of Women Teachers in Irish Primary Schools' (2010) 46 Pedagogica Historica, 639, 649; MG Valiulis 'Power, Gender, and Identity in the Irish Free State', 119, 121; MG Valiulis 'The Politics of Gender in the Irish Free State, 1922-1937', 572

[22] MG Valiulis, 'Power, Gender, and Identity in the Irish Free State' 119; MG Valiulis 'The Politics of Gender in the Irish Free State, 1922-1937', 572

[23] L Earner-Byrne 'Moral Prescription: The Irish Medical Profession, the Roman Catholic Church and the Prohibition of Birth Control in Twentieth-Century Ireland' in C Cox, M Luddy (eds), *Cultures of Care in Irish Medical History, 1750-1970* (London, Palgrave Macmillan 2010) 218-9

[24] 1967 School Attendance (Amendment) Act; A Bielenberg, 'Economy in Independent Ireland' in R Bourke, I McBride (eds) *The Princeton History of Modern Ireland*, 429-431, 434; F McGarry, 'Independent Ireland' in R Bourke, I McBride (eds), *The Princeton History of Modern Ireland*, 127-8; G Meaney et al (eds), *Reading the Irish Woman: Studies in Cultural Encounter and Exchange, 1714-1960* (Liverpool University Press 2013) 132-158, 169, 174; M Walsh, 'Media and Culture in Ireland, 1960-2008' in R Bourke, I McBride (eds) *The Princeton History of Modern Ireland*, 255, 258

[25] CoE, Statute of the Council of Europe; R Cullen Owens, *A Social History of Women in Ireland*, Chapter 11; UNGA Resolution 995 (X) 'Admission of new Members to the United Nations' (A/RES/995 (X), 14 December 1955)

in the growing post-war discussion of 'equality between the sexes.'[26] In 1967, the UN Commission on the Status of Women issued a directive to collect data on gender-based discrimination; this ultimately resulted in the establishment of the Council for the Status of Women (CSW) in 1973.[27] The CSW is now known as the National Women's Council (NWC), and it is the national representative organisation for women's and feminist groups in Ireland.[28] It was one of the main members of the Together for Yes campaign to repeal the 8th Amendment in 2018.[29] The NWC has only recently begun to incorporate an intersectional approach to its work[30] and it was and still is largely 'liberal/reformist in both its ideology and its tactics.'[31] Therefore, as will be argued below in regard to the 2018 repeal campaign, much of their language and strategy focuses on building consensus around modest reforms to existing power structures so as to accommodate women. This forecloses more radical, intersectional feminist approaches which demand structural transformation, such as those articulated by the Abortion Rights Campaign (ARC) and Migrants and Ethnic-Minorities for Reproductive Justice (MERJ). Nevertheless, the NWC has been an important player in the Irish feminist movement, one which originated in Irish feminist groups making use of human rights system to challenge women's exclusion from citizenship.

Along with feminist activism within and around the human rights system, international and transnational activism around birth control, voluntary motherhood, and reproductive rights was also influential on feminists in Ireland. For example, in 1969 the Fertility Guidance Company, now known as the Irish Family Planning Association (IFPA), was established to circumvent the criminalisation of contraceptives by providing them to its members.[32] The IFPA joined the International Planned Parenthood Federation in 1975, and it has long campaigned for abortion access in Ireland.[33] As the origins and evolution of both the NWC and IFPA demonstrate, Irish feminists engaged in multilevel citizenship practices through their involvement with the UN human rights system and transnational feminist organisations.

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[26] R Cullen Owens, *A Social History of Women in Ireland*, Chapter 11
[27] ibid; M Luddy, 'Feminism', 484-5
[28] NWC, 'About Us' (NWC, 2020) <https://www.nwci.ie/discover/about_us> accessed 4 December 2020
[29] Together for Yes, the National Campaign to Remove the Eighth Amendment, 'Who We Are' (Together for Yes, 2018) <https://www.togetherforyes.ie/about-us/who-we-are/> accessed 4 December 2020
[30] NWC, 'About Us'
[31] A Smyth, 'The Contemporary Women's Movement in the Republic of Ireland' (1988) 11 Women's Studies International Forum, 332
[32] D Ferriter, *Occasions of Sin*, 366-7; IFPA, 'Irish Family Planning Association: 50 Years' (IFPA, 2019) <https://www.ifpa.ie/app/uploads/2019/11/IFPA_50Years_Accordian_WEB.pdf> accessed 4 December 2020
[33] IPFA, 'Irish Family Planning Association: 50 Years'

In the coming decades, the language and mechanisms of human rights became increasingly important in their attempts to advance women's full citizenship.

Although the 'sexual revolution' of the 1960s did not occur in Ireland with the same intensity as in other Western countries, an evolution in attitudes and the influence of the American and European women's liberation movement was discernible in 1970s Ireland.[34] From 1971 to 1977, grassroots feminist organisations such as the Irish Women's Liberation Movement (IWLN) and Irishwomen United (IU) broke the taboos around gender inequality in Ireland through media appearances and public actions.[35] While many of their demands were in reality modest and informed by liberal rather than radical feminism, their activism represented a powerful challenge to the status quo given the conservative cultural context in which they operated.[36] During this period, single-issue feminist organisations that are still active today such as Women's Aid and the Dublin Rape Crisis Centre were also founded.[37] The Council for the Status of Women (today's NWC) was also established during this period.

The CSW/NWC's structure and ideology, and the short-lived or single-issue nature of the main grassroots Irish feminist organisations, circumscribed the development of a coherent, intersectional feminist movement, with ongoing repercussions for feminist activism in Ireland into the present.[38] Nonetheless, these feminist organisations contributed to important legislative and policy changes, often through engagement with the CoE and EEC: these changes included the abolition of the public-sector marriage bar in 1973; the criminalisation of gender discrimination in employment in 1977; the provision of paid maternity leave; improvements in access to legal aid; social welfare benefits for widows, "deserted wives" and single mothers; and the lifting of the ban on women serving on juries.[39]

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[34] U Barry 'Women in Ireland' (1988) 11 Women's Studies International Forum, 320; A Smyth 'The Contemporary Women's Movement', 331, 332
[35] A Smyth, 'The Contemporary Women's Movement', 334-6
[36] ibid, 334-5, 337
[37] ibid, 336, 337, 340; L Connolly, *The Irish Women's Movement: From Revolution to Devolution* (Dublin, The Lilliput Press 2003) 131
[38] A Smyth, 'The Contemporary Women's Movement', 335, 337, 339
[39] C Bradley, 'The Construction of Teenage Parenting in the Republic of Ireland' in A Kamp, M McSharry (eds) *Re/Assembling the Pregnant and Parenting Teenager: Narratives from the Field(s)* (Oxford, Peter Lang 2018) 156; ECtHR, *Airey v Ireland* (Application No. 6289/73) 9 October 1979; R Cullen Owens, *A Social History of Women in Ireland*, Ch 11; *Máirín De Burca and Mary Anderson v AG* [1976] IR 38 at 57; F McGarry, 'Independent Ireland', 133

These feminist organisations also contested women's exclusion and oppression by the traditional citizenship discourse through activism in opposition to Ireland's criminalisation of contraception. In contrast to feminist activism elsewhere in Europe and the US, abortion was not a main focus of Irish feminist organisations for fear that it would alienate people and for want of a unified commitment to decriminalising abortion within the Irish feminist movement.[40] Therefore, contraception was the central reproductive rights issue during the 1970s.[41] Feminists staged public actions such as the May 1971 contraceptive train and made use of the legal system to advance contraceptive access in Ireland. [42] FPS Ltd. and the lawyers Seán McBride, Dudley Potter, and Donal Barrington brought the case of Mary McGee to the High Court and from there to the Supreme Court.[43] They argued that the ban on the sale or import of contraceptives was incompatible with the Constitution and that it violated a number of McGee's constitutional rights.[44] The Court found in McGee's favour, and in response to their ruling a bill permitting married couples access to contraception was introduced in 1974, only to be rejected – even this modest reform was considered too disruptive to the conservative, Catholic, patriarchal social order which required women to "do their duty by their husbands", "submit to God's will" and bear and rear future citizens, regardless of the risks to their health, wellbeing, and lives.[45] In 1979 the Health (Family Planning) Act successfully passed through the Oireachtas, coming into force in 1980: it allowed for the publication and distribution of information about contraception in Ireland, but it was still highly restrictive in terms of access to contraception.[46] It only permitted the provision of contraceptives on prescription for 'bona fide' family planning or for 'adequate medical reasons.'[47] Moreover, it heavily restricted the importation, manufacture, and advertising of contraceptives, and included a section emphasising that nothing in the Act could be interpreted to allow for abortion.[48]

Even this slight relaxation of restrictions was seen by conservative actors as threat to the conservative, Catholic, patriarchal social order which required women to fulfil the role of

[40] A Smyth, 'The Contemporary Women's Movement', 338
[41] ibid, D Ferriter, *Occasions of Sin*, 407
[42] M Luddy 'Feminisms' 484-5; F McGarry, 'Independent Ireland' 133; A Smyth, 'The Contemporary Women's Movement', 336, 339
[43] E Cloatre, M Enright, 'Commentary on McGee v Attorney General' in M Enright et al (eds) *Northern/Irish Feminist Judgments*, 95-115
[44] Fitzgerald J, Budd J in *McGee v AG* [1973] IR 284
[45] F McGarry, 'Independent Ireland', 133
[46] 1979 Health (Family Planning) Act, secs 12, 13
[47] ibid, sec 4; D Ferriter *Occasions of Sin*, 423
[48] ibid, secs 5-7, 10

mothering non-citizens.[49] As a result, anti-choice organisations successfully campaigned for the insertion of Article 40.3.3º into the Constitution.[50] The mobilisation and success of these conservative actors 'put the Women's Movement on the defensive' at a time when it was already fragmented.[51] The force of the 'fundamentalist backlash' and the anti-amendment campaign's decision to focus on 'mainly medical and legal/constitutional grounds' rather than feminist arguments for the right to choose left the Irish feminist movement demoralised.[52] This demoralisation was further compounded by several high-profile tragedies and cases in the early and mid-1980s.[53] For the next three decades, the 8th Amendment in conjunction with the 1861 Act further exemplified women's oppression and exclusion by creating a legal context which forced them into the role of the mothering non-citizen. This legislative context resulted in numerous cases and controversies which demonstrated the negative consequences for women's and girls' lives, health, and wellbeing of this discourse. As discussed in the next section, feminists contested this exclusion and oppression through domestic, regional, and international human rights activism from the 1980s to the present.

5.2.2. Key cases and feminist contestation

This section discusses some of the key cases and controversies relating to Ireland's abortion legislation, divided into the periods 1983-2007, 2007-2012, and 2013-present. It demonstrates that Ireland's restrictive abortion legislation resulted in multiple human rights violations, disproportionately impacting on women and girls experiencing other, intersecting forms of oppression. It also demonstrates successive governments' unwillingness to address these harms, resulting in feminist engagement with the regional and international human rights systems in an ultimately successful attempt to bring Ireland's abortion legislation in line with (minimal) international human rights standards. The need for ongoing feminist

[49] U Barry, 'Abortion in the Republic of Ireland' (1988) 29 Feminist Review 57; E Mahon, 'Abortion Debates in Ireland: An Ongoing Issue' in D McBride Stetson (ed), *Abortion Politics, Women's Movements and the Democratic State* (OUP 2001) 160
[50] ibid
[51] U Barry, 'Women in Ireland', 320
[52] A Smyth 'The Contemporary Women's Movement', 339, 340
[53] ibid; I Bacik, 'From Virgins and Mothers', 103; YM Daly, V Conway 'Commentary on the Report of the Tribunal of Inquiry into the 'Kerry Babies' Case' in M Enright et al (eds) *Northern/Irish Feminist Judgments*, 212; R Fletcher, 'Pro-Life Absolutes, Feminist Challenges: The Fundamentalist Narrative of Irish Abortion Law' (1998) 36 Osgoode Hall Law Journal, footnote 35; *Flynn v Power* [1985] IEHC 1; [1985] IR 648 (8th March, 1985); Houses of the Oireachtas, 'Report of the Tribunal of Inquiry into "the Kerry Babies Case"' (Dublin, The Stationery Office 1985); MJ Maguire, 'The Changing Face of Catholic Ireland: Conservatism and Liberalism in the Ann Lovett and Kerry Babies Scandals' (2001) 27 Feminist Studies, 344-9; P Yeates, 'Sheila Hodgers – a case in question' *Irish Times* (Dublin, 2 September 1983)

contestation of women's exclusion from and oppression by the traditional citizenship discourse as it manifests in restrictions on access to abortion, and the need for a more unified and intersectional feminist movement to realise women's full citizenship, is also highlighted.

1983-2007

During the late 1980s and early 1990s, anti-choice groups ensured that the abortion ban they had campaigned for – and the conservative, Catholic, patriarchal moral order that it sought to perpetuate – was further consolidated. In 1985, SPUC initiated High Court proceedings against two women's health centres, Open Door Counselling and Dublin Well Woman, arguing that they were violating Article 40.3.3º by providing information on abortion and assisting women in obtaining abortions abroad.[54] The case went to the Supreme Court, which upheld the High Court's decision to place an injunction on the centres. The fact that the Courts agreed with SPUC's position represented their failure to consider the harms of this legislative and constitutional context to women's human rights, and their commitment to upholding the conservative, patriarchal social order that it represented. The case eventually came before the ECtHR, and is analysed in greater detail in part 3.

Galvanised by their success, SPUC then brought a case against student union officers for distributing UK abortion clinic contact details.[55] The High Court again granted the requested injunction against the student unions and referred questions to the EC's Court of Justice for a preliminary ruling.[56] In 1991, The Court of Justice found that the distribution of this information by the student unions was not protected by EC law.[57] As a result, British phone books were removed from libraries and UK magazines had to publish separate Irish editions with information on abortion care removed.[58] In granting the injunction, the Irish courts again failed to consider the real-world impact of this legislative and constitutional context on women in Ireland, and so demonstrated their unwillingness to challenge the conservative, patriarchal social order. As for the European Court of Justice, it too failed to address women's human rights issues at stake and instead engaged in a legal analysis of what

[54] ECtHR, *Open Door and Dublin Well Woman v Ireland* (Application No. 14234/88) 29 October 1992, paras 11, 12, 15, 16
[55] K Holland, *Savita: The Tragedy That Shook A Nation* (London, Transworld Ireland 2013) 45; *SPUC v Grogan* [1989] IR 734, paras 3, 6
[56] *SPUC v Grogan*, para 8
[57] ibid, para 26
[58] K Holland, *Savita*, 44

constitutes a service under EC law. This represented the inability of traditional liberal legal reasoning to meaningfully address women's needs and realities. It was in this context that the 'X case' demonstrated the consequences of Ireland's restrictive abortion legislation.

In February 1992, the Attorney General (AG) brought a High Court injunction against a pregnant, suicidal 14-year-old rape victim ('X') in order to prevent her from travelling to England for an abortion that the AG argued would violate the constitutional right to life of the unborn.[59] The girl and her parents filed an appeal, and so the case came before the Supreme Court.[60] The defendants' argued that since X was suicidal as a result of the pregnancy, 'the continuation of the life of the unborn child constituted a real and substantial risk to' her life, a conflict that 'should be resolved by preferring the life of the mother.'[61] The Supreme Court agreed with this reasoning and overturned the injunction in March 1992, holding that a woman had a right to an abortion if she was suicidal because this constituted 'a real and substantial risk to her life.'[62] The Supreme Court also emphasised the need for legislation on abortion to clarify the circumstances in which abortions could be legally carried out in Ireland.[63] The Oireachtas, which has the 'sole and exclusive power of making laws for the State'[64] and so was not bound by this Supreme Court recommendation, failed to legislate on abortion in line with this ruling for the next 21 years, resulting in ongoing legal uncertainty and multiple cases and controversies.

Moreover, while the Court's decision meant that X could travel to the UK for an abortion, the judgment's reasoning failed to address the lived needs and realities of women and girls impacted by Ireland's abortion legislation. The judges focused solely on how to interpret the wording of 40.3.3º, rather than on the wider context and real-world implications of this provision. They could have done so by considering the impact of this provision on X's constitutional rights or her human rights as enshrined in the UN human rights treaties to which Ireland was a State party at the time, the ICCPR and CEDAW. Therefore, the X case simply became a symbol of the real-world impact of Ireland's abortion regime, and the judiciary and legislature's unwillingness to change it.

[59] *AG v X*, paras 5, 6
[60] ibid, paras 8, 9, 13
[61] ibid, paras 21, 38-40, 172
[62] AG v X, paras 41-45, 134, 155, 166-169, 187
[63] ibid
[64] Bunreahct na hÉireann, art 15.2.1º

Rather than legislating for the X case ruling, the government held a referendum in November 1992 on three constitutional amendments. The referendum resulted in the 13th and 14th Amendments, which guarantee the freedom to travel outside the state for an abortion and the freedom to obtain or make available information on abortion services outside the country.[65] The 12th Amendment, which would have partially reversed the ruling by removing the clause on suicide as grounds for abortion, was rejected.[66] By guaranteeing access to and information about abortion abroad, the government hoped to quell any demand for domestic legislation on abortion.[67] As evidenced throughout this chapter, this unwillingness to directly address the issue of abortion characterised state responses to subsequent cases and controversies until 2018.

While the X case represented the force of the patriarchal legal gaze and the state's complicity in it, it also represented a moment for feminists to contest women's subordination by and exclusion from the Irish citizenship discourse. Public protests, news coverage of the case, and opinion pieces in newspapers all highlighted the ways in which X's rights had been violated, first by the man who raped her, and secondly by the state's attempts to force her to continue with the pregnancy.[68] Many of these interventions also used the X case as the starting point for a deeper analysis of women and girls' subordinate place in Irish society, analyses which were often framed in terms of citizenship. They argued that Ireland's abortion legislation was representative of a patriarchal social order that required women to occupy the subordinate position of non-citizen, bearer of future citizens, and bearer of national morality.[69] The potential for feminists to challenge this social order through the language and mechanisms of human rights first became apparent in October 1992. As a result of the ECtHR's *Open Door and Well Woman* ruling that Ireland was responsible for violations of article 10 ECHR, the 1995 Regulation of Information Act was introduced to allow for the provision of information on abortion services abroad should a woman request it, subject to numerous conditions.[70] As with the X case and subsequent referendums, the 1995 Act maintained excessive restrictions and failed to address the real issue – that Ireland's restrictive abortion legislation was resulting in real and substantial harms to women and girls in Ireland.

[65] Bunreacht na hÉireann, 'Amending Acts'
[66] ibid
[67] E Mahon, 'Abortion Debates in Ireland', 157-179
[68] L Smyth, 'Narratives of Irishness and the Problem of Abortion: The X Case 1992' (1998) 60 Feminist Review, 75
[69] ibid, 77-8
[70] Regulation of Information Act, paras 5, 6

In 1997, as a result of the 'intense' and 'divisive' debate engendered by the 1983 referendum, the 1992 X case, and the 1997 C case,[71] the Government began work on a Green Paper to consider the main issues concerning Ireland's abortion legislation.[72] Published in 2000, the Green Paper considered Ireland's obligations under international and European law;[73] a discussion of grounds for abortion recognised in other jurisdictions;[74] and a discussion of the wider social context, including repeated calls for the need to improve sex education and education about and access to contraception; the need to challenge the social stigma and economic hardship facing single mothers; and the inadequacy of counselling services for women facing crisis pregnancies.[75] The report also noted submissions that framed the criminalisation of abortion 'as a rights issue for women' which failed to recognise 'their capacity to make good, rational and moral decisions about their lives.'[76] The Green Paper also highlighted submissions that discussed the socioeconomic impact of Ireland's abortion legislation through the cost of travelling abroad and the disproportionate impact of the legislation on women 'from the lower socioeconomic groups.'[77]

Despite clear evidence of concern expressed by UN treaty monitoring bodies, despite clear evidence of more effective and liberal legal regimes in other countries, and despite submissions by individuals and organisations that highlighted the negative human rights impact of Ireland's restrictive abortion legislation, the government nevertheless decided that the most appropriate option was to hold another referendum which would permit the introduction of legislation completely criminalising abortion but permitting travel outside the state to obtain one.[78] The 25th Amendment of the Constitution Bill was narrowly rejected.[79] The impact of Ireland's abortion legislation continued and took new forms from 2007 on.

[71] *A and B v Eastern Health Board* [1997] IEHC 176; [1998] 1 IR 464; [1998] 1 ILRM 460 (28th November 1997) (The 'C case')
[72] Department of the Taoiseach, 'Green Paper on Abortion' (Dublin, Department of the Taoiseach 2000) 3 < https://www.lenus.ie/handle/10147/45549> accessed 4 December 2020
[73] ibid, paras 3.08-.11, paras 3.12, 3.13-16, 3.17, 3.18
[74] ibid, paras 4.04-9, 4.10-4.19, 4.20-4.28, 4.29-4.31, 4.32
[75] ibid, paras 5.53-5.65
[76] ibid, paras 5.84
[77] ibid, paras 5.86
[78] Twenty-Fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill, 2001
[79] Bunreacht na hÉireann, 'Amending Acts'

2007-2012

The ongoing interrelationship between law, Catholicism, and national identity to the detriment of women's human rights was evident in abortion jurisprudence and controversies from this period. The racialised, as well as gendered, discourse surrounding Irish identity and citizenship was exemplified by the 'Baby O case.' This case concerned a pregnant Nigerian asylum seeker who was facing deportation following the rejection of her application for refugee status. She argued that deporting her would contravene her unborn baby's right to life as enshrined in Article 40.3.3º of the Constitution because healthcare and living standards were far lower, and infant mortality rates were far higher, in Nigeria than in Ireland.[80] The Supreme Court upheld the High Court's rejection of this assertion, which claimed that the case had 'nothing to do with abortion or the right to life of the unborn.'[81] Irish feminist legal scholar Mullally highlighted the contradictions, inconsistencies and implicit racism of this reasoning: the Court's prioritising of the 'right to deport failed asylum seekers' over the right to life of the unborn indicates that this supposedly fundamental constitutional right has limits, and that those limits are whiteness and Irish citizenship.[82] She also highlighted the silence of the anti-choice movement during the case, during which it 'had little to say in support of Baby O or her mother' despite the case offering them the opportunity to advocate for an expansion of the right to life of the unborn.[83] This case laid bare that it was white, Irish unborn life that was to be prioritised and protected in order to ensure the continuity of an exclusionary, patriarchal, white Irish nation.[84]

As the decade continued, so too did Ireland's alphabet of abortion cases. In 2006, the ECtHR rejected the *D v Ireland* application (discussed in part 3) on the grounds that D had not exhausted available domestic remedies.[85] In 2007, 17-year old 'Miss D' (Amy Dunne) decided to have an abortion since her pregnancy was unviable; however, since she was in

[80] *Baby Oladapo and Others v Minister for Justice, Equality and Law Reform, and the Attorney General*, 17 February 2002, Judgment by Keane C.J., Unreported Supreme Court Judgment, [2002] I.R. 169.
[81] ibid
[82] S Mullally, 'Debating Reproductive Rights in Ireland' (2005) 27 HRQ, 101
[83] ibid
[84] E Luibhéid, 'Sexual Regimes and Migration Controls: Reproducing the Irish Nation-State in Transnational Contexts' (2006) 83 Feminist Review, 74
[85] ECtHR Fourth Section, *D v Ireland* (admissibility decision) (Application No. 26499/02) 27 June 2006

state care, she had to seek permission from the Health Services Executive (HSE) to travel. [86] They refused, and so she took the state to the High Court.[87] In a 2019 documentary about the case, Dunne discusses the physical and psychological impact of being pregnant with a non-viable foetus while being the subject of a high-profile court case.[88] The Court found in her favour, and within a few days she travelled to Liverpool for the procedure.[89] She spent 16 hours in labour and had to travel back to Ireland six hour after giving birth.[90] Reflecting on her experience, she expresses her anger that she 'never got to turn around and have my word' – a succinct summary of the ways in which the voice, agency, and rights of women in Ireland have been denied by restrictive abortion legislation. [91]

Three years later, in 2010, the ECtHR ruled in A*, B, C v Ireland* (discussed further in part 3) that Ireland's failure to adopt legislation and establish an effective and accessible procedure for women to access lawful abortions amounted to a violation of Ireland's positive obligations under Article 8 in regard to applicant C. Therefore, the ECtHR ordered Ireland to establish a legislative framework to implement its abortion law.[92] The Irish government submitted an action plan to the CoE Committee of Ministers in September 2011 which detailed its intentions to establish an expert group, but the government did not establish a legislative framework to implement abortion access.[93] Two years later, the government's failure to legislate for the X case, the lack of clarity surrounding when an abortion may be carried out legally, the extent to which doctors can discuss it with their patients, and the severe restrictions and penalties imposed by this legislation resulted in the death of Savita Halappanavar.

[86] K Holland, *Savita*, 59; L Smyth , *Abortion and Nation*, 48; L Smyth 'From Rights to Compassion: The D Case and Contemporary Abortion Politics' in J Schweppe (ed), *The Unborn Child, Article 40.3.3º and Abortion in Ireland,* 47-64
[87] ibid
[88] *Amy Dunne ('Miss D')* (TG4, 2019) <https://www.tg4.ie/en/information/press/press-releases/2019-2/finne/> accessed 17 October 2019
[89] *Amy Dunne ('Miss D');* RTÉ News, 'Miss D can travel for abortion: court' *RTÉ News* (Dublin, 9 May 2007) <https://www.rte.ie/news/2007/0509/88757-abortion/> accessed 4 December 2020
[90] *Amy Dunne ('Miss D')*
[91] ibid
[92] *A, B, C v Ireland*, para 260
[93] CoE Committee of Ministers, 'Supervision of Execution of Judgments Case No. 4: Case against Ireland 25579/05 *A, B and C*, judgment of 16/12/2010 - Grand Chamber' 1120th Meeting, 14 September 2011

2012-present

Experiencing an inevitable second-trimester miscarriage, Savita Halappanavar was refused a termination because medical professionals failed to recognise that her health was rapidly deteriorating as a result of infections arising from the miscarriage, and therefore they did not recognise that there was a risk to her life, as distinct from her health, as required by Article 40.3.3°.[94] They also believed they could not intervene because a foetal heartbeat could still be detected (even though foetal death was inevitable) and inducing labour would violate its right to life.[95] She died a week after her admission to hospital from complications caused by the medical professionals' failure to treat septicaemia in the case of miscarriage.[96] When news of her death became public in November 2012, there was a public outcry, and a new phase in Irish pro-choice activism began. No longer satisfied with campaigning to simply 'legislate for X', feminist activists ranging from those active since the 1970s to those still in secondary school mobilised to campaign for a repeal of the 8th Amendment.[97] Between 2012 and 2017 new grassroots, volunteer-led organisations were established, such as the Abortion Rights Campaign (ARC), ROSA (For Reproductive Rights, against Oppression, Sexism and Austerity), and Migrants and Ethnic-minorities for Reproductive Justice (MERJ).[98] These organisations, particularly MERJ, were and are committed to an intersectional feminism that aims to dismantle the systemic inequalities impeding the full realisation of SRHRs for historically oppressed and marginalised groups.[99] In September 2013, the Coalition to Repeal the Eighth was established; between 2013 and 2018, it brought together feminist, LGBTQ*, student, trade union, and professional organisations that were committed to not just abortion law reform but also 'the full range of social justice issues' facing historically marginalised and oppressed groups.[100] This new wave of activism coincided with, influenced, and was influenced by an international human rights system that was increasingly willing to assert that

[94] S Arulkumaran, 'Investigation of Incident 50278 from time of patient's self-referral to hospital on the 21st of October 2012 to the patient's death of the 28th of October, 2012' (Dublin, Health Services Executive 2013) 4-6, 22-53
[95] ibid, 4-6
[96] ibid, 4, 13
[97] S Kennedy 'Ireland's Handmaid's Tale' in A Quilty, C Conlon (eds), *The Abortion Papers Ireland: Volume 2* (Cork University Press 2016) 279
[98] ARC, < https://www.abortionrightscampaign.ie/> (ARC, 2020) accessed 4 December 2020; MERJ, 'About Us' <http://merjireland.org/index.php/about-us/> (MERJ, 2020) accessed 5 December 2020; ROSA, <http://rosa.ie/> accessed 5 December 2020
[99] ibid
[100] R Fletcher, 'Contesting the Cruel Treatment of Abortion-Seeking Women' (2014) Reproductive Health Matters, 17

the criminalisation of abortion resulted in multiple human rights violations and was in of itself inherently discriminatory against women.

In 2013, in response to the controversy caused by the death of Savita Halappanavar, and a 'strong reprimand by the Council of Europe' for its failure to legislate in line with the *A, B, C v Ireland* ruling, the Protection of Life During Pregnancy Act (PLDPA) was signed into law.[101] It legislated for the X Case ruling made 21 years previously and punished the intentional 'destruction of unborn human life' with 14 years in prison, an unlimited fine, or both.[102] Abortions could only be carried out in nineteen approved hospitals, and individual practitioners could refuse to perform an abortion for reasons of conscience. A woman or girl who was said to be suicidal had to be assessed by three doctors, two psychiatrists and an obstetrician, who had to agree unanimously that this was the case.[103] The 'Ms Y' case and *PP v HSE* drew further attention to the deeply problematic consequences such a legislative context can have.

In August 2014, it was reported that a young woman known only as 'Ms Y', pregnant as the result of rape and an asylum seeker in state care, was denied an abortion even though there was clear evidence that she was suicidal and so qualified for a legal abortion under the PLDPA.[104] She had attempted to travel to the UK but was turned back by UK authorities due to her lack of migration papers; upon her return to Ireland, she was referred to a HSE panel tasked with determining whether she was legally entitled to an abortion.[105] The HSE panel of two psychiatrists and one obstetrician made their decision 12 weeks after Ms Y first presented to health services, by which time she was in the 20th week of her pregnancy.[106] Following a similar logic to that of the Salvadoran Supreme Court in the case of Beatriz, the panel determined that performing a Caesarean section on Ms Y in the 25th week of her

[101] CoE Committee of Ministers, 'Decision of the Committee of Ministers of the Council of Europe in relation to *A, B and C v Ireland* (pending case under Enhanced Supervision)' 1136th meeting, 6-8 March 2012; CoE Committee of Ministers, 'Decision of the Committee of Ministers of the Council of Europe in relation to *A, B and C v Ireland* (pending case under Enhanced Supervision)' 1157th meeting, 6 December 2012; R Lentin 'After Savita' in A Quilty, C Conlon (eds) *The Abortion Papers*, 182-3
[102] Protection of Life During Pregnancy Act 2013, secs 22(1), 22(2),18
[103] ibid, secs 3, 9
[104] D McDonald, F Sheahan, 'Baby delivered as woman refused abortion under law' *Irish Independent* (Dublin, 16 August 2014) <http://www.independent.ie/irish-news/health/baby-delivered-as-woman-refused-abortion-under-law-30512513.html> accessed 6 November 2020. It was necessary to rely on newspapers here and in subsequent footnotes because official legal records are not yet publicly available in regard to Ms Y's case.
[105] R Fletcher, 'Contesting the Cruel Treatment', 12
[106] ibid

pregnancy to deliver a live baby constituted 'termination of pregnancy' in a way that upheld the constitutional right to life of the unborn.[107] In response, to this decision, Ms Y went on a hunger and fluid strike. Threatened with force-feeding and force-hydration through the initiation of a High Court injunction to this effect, she eventually acceded to a Caesarean section being performed; she alleges that medical professionals told her that 'the only route that remained was a Caesarean', that 'wherever you go in the world…at this point it has to be a Caesarean.'[108] Ms Y's treatment once again demonstrated 'just how unethical and rights-violating the substance of Irish abortion law' was, highlighting the ways in which it imposed 'cruel, inhuman and degrading treatment', violated 'integrity and autonomy', and discriminated against women in general, and against asylum-seeking women, women experiencing psychiatric distress, and women with limited economic resources in particular.[109] 'Ms Y' is now undertaking personal injury proceedings against 11 named respondents, and a civil action for damages against the state.[110] Her case represented the ways in which Ireland's restrictive abortion legislation denied women's citizenship – their right to have rights and determine the scope of those rights – by obliging them to continue with a pregnancy regardless of circumstances. Women's subjection to this obligation, even after death, was highlighted by *PP v HSE*.

PP brought the case on behalf of his daughter NP, who had died at the age of 26 on 3 December 2014 after 'a catastrophic internal injury as a result of a blood clot.'[111] She was 15 weeks pregnant at the time of her death and, since a foetal heartbeat could still be detected and medical professionals feared prosecution if they failed to protect the right to life of the unborn, they began ''somatic care' – i.e. measures to support the maternal organs after death in an attempt to maintain foetal viability.'[112] These measures included mechanical ventilation, feeding via nasogastric tube, 'very heavy doses of medication for a number of conditions

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[107] ibid
[108] K Holland, 'Timeline of Ms Y case' *Irish Times* (Dublin, 4 October 2014) <http://www.irishtimes.com/news/social-affairs/timeline-of-ms-y-case-1.1951699> accessed 6 November 2020; K Holland, R Mac Cormaic, 'They said they could not do an abortion. I said, 'You can leave me now to die. I don't want to live in this world anymore'' *Irish Times* (Dublin, 19 August 2014) <https://www.irishtimes.com/news/health/they-said-they-could-not-do-an-abortion-i-said-you-can-leave-me-now-to-die-i-don-t-want-to-live-in-this-world-anymore-1.1901258> accessed 6 November 2020
[109] R Fletcher, 'Contesting the Cruel Treatment', 14
[110] Irish Times, ''Ms Y' to sue 11 respondents over abortion refusal' *Irish Times* (Dublin, 19 September 2015) <http://www.irishtimes.com/news/social-affairs/ms-y-to-sue-11-respondents-over-abortion-refusal-1.2357456> accessed 6 November 2020
[111] *PP v HSE*; S Phelan, 'Clinically dead pregnant woman being kept alive by hospital' *Irish Independent* (Dublin, 17 December 2014) <http://www.independent.ie/irish-news/health/clinically-dead-pregnant-woman-being-kept-alive-by-hospital-30845660.html> accessed 6 November 2020
[112] M Taylor, 'Women's right to health', 95

including pneumonia, fungal infections, high blood pressure, fluid build-up', and twice-daily physiotherapy 'for secretions from her chest and her joints.'[113] PP went to the High Court seeking an order for the withdrawal of these somatic support measures, given that he and NP's partner as well as close family members were all in agreement that NP deserved 'to have a dignified death and be put to rest' and that 'the chances of the unborn child surviving were minimal.'[114] On 26 December the Court ruled that the doctors could withdraw somatic support, partly because maintaining 'the present somatic support for the mother would deprive her of dignity and subject her father, her partner and her young children to unimaginable distress', but primarily because it was 'in the best interest of the unborn child' to do so.[115] While the Court's judgment expressed sympathy for NP and her family throughout, and while it described medical evidence detailing the gradual decomposition of her body as 'devastating',[116] its focus throughout was on the right to life of the unborn and the measures that could reasonably be taken to vindicate this right. As a result of Article 40.3.3º and the PLDPA, the Court was required – or felt that it was required – to prioritise the right to life of the unborn over the human rights, wishes, and well-being of NP's family. Its judgment refers to the 'unfortunate unborn' and its 'dreadful fate of being present in the womb of a mother who has died', and it reduced NP to a 'uterine environment' that was 'neither safe nor stable' and which held 'nothing but distress and death in prospect' for the unborn.[117] As noted by Taylor, 'notions of the woman's dignity, autonomy, and bodily integrity were entirely trumped by what the Court described as "the best interest" of the foetus.'[118] The Court's reasoning represented the near-complete disregard for the lived needs and realities of women and their families that Ireland's abortion legislation required. *PP v HSE* represents the deeply disturbing outcomes of restrictive abortion legislation that requires women to fulfil the role of the mothering non-citizen, even after death. This case provided further legitimacy to national, regional, and international calls for legislative reform in Ireland.

Between 2013 and 2017, Ireland's abortion legislation came under increasing scrutiny from UN treaty monitoring bodies and special procedures, as well as the CoE's Commissioner for

[113] *PP v HSE*, 2
[114] ibid
[115] *PP v HSE*, 29
[116] ibid 1, 11, 17
[117] ibid 28
[118] M Taylor, 'Women's Right to Health', 95

Human Rights. [119] As parts 3 and 4 will illustrate, this was partly in response to submissions by Irish and transnational organisations campaigning for abortion law reform in Ireland. The HRC was the first of four UN human rights treaty monitoring bodies to heavily criticise Ireland's abortion legislation. During the meetings on Ireland's fourth periodic report in 2014, HRC Chairman Nigel Rodley's comment that Irish abortion legislation treated women as a 'vessel and nothing more' was widely reported in Irish media, and resonated deeply with feminist activists in the country.[120] The HRC's Concluding Observations called on Ireland to revise its legislation on abortion to permit it in the case of rape, incest, risk to health, and fatal foetal abnormality.[121] The following year, CESCR reiterated these calls for legislative reform.[122] In March 2016 the CRC went even further, calling on Ireland to decriminalise abortion in all circumstances.[123] That June, the HRC View *Mellet v Ireland* found Ireland responsible for violations of freedom from CIDT, privacy, and equality before the law as a result of the criminalisation of abortion.[124] In the same year, the CoE's Commissioner for Human Rights country visit report paid particular attention to the issue of abortion, urging the Irish government to implement a 'legislative regime that is more respectful of the human rights of women, including their right to be free from ill-treatment, the right to the highest attainable standard of physical and mental health, and the right to private life.'[125] He recommended the decriminalisation of abortion or, at 'the very minimum', to permit abortion 'to preserve the physical and mental health of women, or in cases of fatal foetal abnormality, rape or incest.'[126]

In 2017, the CEDAW Committee and CAT both called on Ireland to amend Article 40.3.3º and decriminalise abortion at a minimum in the cases of rape, incest, risk to the pregnant woman's health or life, and in the case of fatal foetal abnormalities, stating that a failure to do so was discriminatory against women and infringed upon their rights to health, and to

[119] SR HRDs 2012 report, paras 86-7
[120] A Cahill, 'UN: Irish abortion law treats women as 'vessels'' Irish Examiner (Cork, 16 July 2014) < https://www.irishexaminer.com/news/arid-20275578.html> accessed 5 December 2020; RTÉ News, 'UN Human Rights Committee Chairman says Irish law treats raped women as a 'vessel' ' *RTÉ News* (Dublin 15 July 2014) <https://www.rte.ie/news/2014/0715/630888-un-human-rights/> accessed 5 December 2020
[121] HRC 2014 Concluding Observations, para 9
[122] CESCR 2015 Concluding Observations, paras 30-1
[123] CRC 2016 Concluding Observations, para 58
[124] *Mellet v Ireland*, paras 7.6, 7.8, 7.11
[125] CoE Commissioner for Human Rights 2017 report, paras 80, 81, 85, 86, 91, 94
[126] ibid, para 94

freedom from torture and CIDT.[127] That same year, the HRC reiterated its findings that Ireland's criminalisation of abortion was responsible for violations of the right to freedom from CIDT, the right to privacy, and the right to equality before the law in the *Whelan v Ireland* View.[128] As a result of this pressure from the international and regional human rights systems, as well as from domestic civil society activism, the government finally agreed to consider reforming Ireland's abortion law. To this end, it convened a Citizens' Assembly.

An exercise in deliberative democracy held over five weekends in 2016 and 2017, the Citizens' Assembly consisted of a Chairperson appointed by the government and 99 randomly-selected citizens entitled to vote at a referendum.[129] The Assembly was tasked with considering, making recommendations on, and reporting to the Oireachtas vis-à-vis Article 40.3.3°.[130] Following sessions featuring legal and medical experts as well as interest groups representing a variety of positions on abortion, the Assembly recommended by a majority vote of 87% that the 8th Amendment should not be retained, that it should be replaced or amended, and that the Oireachtas should legislate on abortion.[131] A majority of members recommended twelve cases in which abortion should be lawful in Ireland, including in the case of a risk to a woman's life or to her physical or mental health; in the case of rape; in the case of fatal and non-fatal foetal abnormalities; for socioeconomic reasons; and with no restriction as to reasons. The Assembly proposed the inclusion of these last two categories on the ballot.[132] Members also made five ancillary recommendations to the government on the need for comprehensive sexuality education, improvements in reproductive healthcare services and equal access to these services, and improvements in counselling and support facilities for women during pregnancy or following an abortion.[133] Consciously or otherwise, the Citizens' Assembly adopted a feminist, rights-based approach to discussing the topic of abortion. For example, following the first session, Members called for better gender balance and more representation of young women in the composition of expert panels.[134] They also requested that women's personal testimony on their experience of having an abortion be

[127] CAT 2017 Concluding Observations, paras 31-2CEDAW 2017 Concluding Observations, paras 10(c), 42-43
[128] *Whelan v Ireland*, paras 7.7, 7.9, 7.12
[129] The Citizens' Assembly, *First Report*, *Papers and Presentations from Citizens' Assembly Speakers* (29 June 2017) paras 12, 91
[130] ibid, para 90
[131] See Appendix E Volumes 1 and 2 of the Citizens' Assembly *First Report;* Citizens' Assembly, *First Report*, 3-4
[132] ibid
[133] Citizens' Assembly, *First Report*, page 5
[134] ibid, page E247

provided.[135] In discussions of how best to frame their recommendations to the Oireachtas, many members stated that they wanted abortion on health grounds to be conceptualised as broadly as possible and they also rejected the inclusion of the language 'abortion on demand', deeming it 'flippant' and a misrepresentation of what straightforward abortion access entails.[136] Their five ancillary recommendations demonstrates an intuitive understanding of the interrelatedness the conditions necessary to the full realisation of SRHRs. Ultimately, their reasoning was informed by a desire to ensure that women can make decisions about their own lives, and that these decisions be respected – that is, that women should have the right to have rights and determine the scope of those rights. In many respects the Citizens' Assembly epitomised Lister's understanding of citizenship as a process during which rights are reinterpreted to represent and respond to women's lived realities.[137]

In response to the Citizens' Assembly's findings and growing pressure from civil society, the Thirty-sixth Amendment of the Constitution Bill 2018 was introduced to the Oireachtas on 9 March 2018, and successfully passed through both houses on the 27 March 2018. The Bill proposed that Article 40.3.3º would be repealed and replaced with the following:

> 3° Provision may be made by law for the regulation of termination of pregnancy.

In the run-up to the campaign, Together for Yes was established to serve as the national civil society campaign in favour of a 'yes' vote in the referendum. It was co-led by the National Women's Council, the Coalition To Repeal The 8th Amendment, and the Abortion Rights Campaign.[138] While one of its co-directors, Ailbhe Smyth, has demonstrated a lifelong commitment to intersectional feminist thinking and activism, and while organisations representing disabled, ethnic minority, trans, non-binary, and Traveller voices were members of Together for Yes, this civil society campaign was largely white, settled, Irish, middle-class, heterosexual, and non-disabled.[139] There were no Black, Traveller or minority ethnic women on its Executive, nor were there any disabled, trans* or non-binary Executive members or core staff. The Together For Yes campaign's tone was one of conciliation and moderation: it appealed to people's sense of 'compassion' for 'women in their time of

[135] ibid, paras 225, 231-244
[136] ibid, para 76
[137] R Lister, *Citizenship*, 6
[138] Together for Yes, the National Campaign to Remove the Eighth Amendment, 'Who We Are'
[139] Together for Yes, 'Our Campaign Platform' <https://www.togetherforyes.ie/about-us/campaign-platform-members/> accessed 5 December 2020

greatest need' and acknowledged that 'this is a complex and sensitive issue for many.'[140] Rather than clearly and confidently asserting that Ireland's abortion legislation was responsible for multiple human rights violations and that it disproportionately impacted upon women and pregnant people experiencing other, intersecting forms of discrimination and oppression, fear of alienating voters once again prevented the Irish feminist movement from voicing an assertive intersectional feminist commitment to the need for straightforward, safe and legal access to abortion in a range of circumstances to realise women's human rights and full citizenship. This cautious, conciliatory approach that failed to represent and respond to intersecting forms of oppression, and the willingness to accept modest legal reform rather than push for the best possible legislation, was criticised by organisations such as MERJ before, during, and after the referendum.[141] These tensions between different feminist approaches to theory and praxis represent some of the challenges facing the full realisation of the feminist multilevel citizenship project at the national level.

Nevertheless, the success and historical importance of organisations including Together for Yes in repealing the Eighth Amendment by 66.4% on the 25 May 2018 cannot be denied.[142] Exit polls indicated that a 'woman's right to choose' was the main reason motivating individuals to vote; this suggests that feminist discourse on the need to realise women's human rights and citizenship through liberalising access to abortion was influential on voting decisions.[143] Between September and December 2018, the Health (Regulation of Termination of Pregnancy) Bill was debated and amended by the two houses of parliament, the Dáil and the Seanad. Anti-choice politicians attempted to introduce amendments limiting the scope of the Bill, such as requiring parental notification/consent for minors.[144] Pro-choice politicians attempted to introduce amendments to address the continued criminalisation of abortion, the continued stigmatisation of abortion through 'the avoidance of the word abortion' in the Bill,

[140] Together for Yes, 'Who We Are'
[141] MERJ, 'What does reproductive justice look like after the referendum? A migrant perspective' (MERJ, 2020) <http://merjireland.org/index.php/2019/02/05/what-does-reproductive-justice-look-like-after-the-referendum-a-migrant-perspective/> accessed 5 December 2020
[142] RTÉ News, 'As it happened: Ireland votes to repeal Eighth Amendment' RTÉ News (Dublin 26 May 2018) <https://www.rte.ie/news/2018/0526/966122-eighth-amendment-referendum/> accessed 5 December 2020
[143] RTÉ Behaviour and Attitudes Exit Poll, 'Thirty-sixth Amendment to the Constitution Exit Poll 25th May, 2018', 127, 131 <https://static.rasset.ie/documents/news/2018/05/rte-exit-poll-final-11pm.pdf> accessed 5 December 2020
[144] Dáil Eireann, 'Debate – Tuesday 4 December 2018 Vol 976 No 1' <https://www.oireachtas.ie/en/debates/debate/dail/2018-12-04/57/> accessed 5 December 2020

as well as the need for trans* inclusive language.[145] Much like the debates in El Salvador's Legislative Assembly regarding legislative proposals to further restrict or liberalise abortion access, these debates represented the competing understandings of citizenship informing pro- and anti-choice attitudes, as well as the ongoing and contested nature of the citizenship process that drawing up and implementing new abortion legislation represented. The Health (Regulation of Termination of Pregnancy) Bill remained largely unchanged throughout; it was signed into law on 20 December 2018 and came into effect on 1 January 2019.

The 2018 Act repealed the provisions in the Censorship of Publications Act 1929, Censorship of Publications Act 1946, and Health (Family Planning) Act 1979 that limited access to information on abortion, as well as the entirety of the 1995 Regulation of Information Act and the 2013 PLDPA.[146] It allows for abortion in the case of a risk to life or health, which requires certification by two medical practitioners, except in an emergency;[147] in the case of conditions likely to lead to the death of the foetus before or within 28 days of birth, requiring certification by two medical practitioners;[148] and without restriction as to reasons up to twelve weeks of pregnancy, as certified by a medical practitioner and following a three-day waiting period.[149] The Act also sets out the framework for a reviews procedure through which individuals can appeal a medical practitioner's decision,[150] and the circumstances in which conscientious objection is permitted.[151] Although the legislation is a major improvement compared to the 1861 OAPA and 2013 PLDPA, it is still flawed from an intersectional feminist perspective. Its limitations include (1) the ongoing stigmatisation of abortion as a result of its continued overall criminalisation, the need for two specialists to approve an abortion in certain circumstances, the mandatory three-day waiting period, and terminology used in the Act; (2) issues of geographical and financial accessibility; (3) the conscientious objection clause; (4) the failure to provide for buffer zones or regulation of 'rogue' counselling services, and (5) the failure to adopt trans* inclusive language.[152] These issues

[145] Dáil Eireann, 'Debate – Tuesday 27 November 208 Vol 975 No 5' <https://www.oireachtas.ie/en/debates/debate/dail/2018-11-27/32/> accessed 5 December 2020
[146] 2018 Act, sec 5
[147] ibid, secs 9, 10
[148] ibid, sec 11
[149] ibid, sec 12
[150] ibid, sec 13-18
[151] ibid, sec 22
[152] ibid, secs 2, 23, 24, 25; ARC, 'Abortion law in Ireland' (ARC, 2020) <https://www.abortionrightscampaign.ie/abortion-law-in-ireland/> accessed 5 December 2020; RJ Cook 'Stigmatized Meanings of Criminal Abortion Law' in RJ Cook et al (eds), *Abortion Law in Transnational Perspective: Cases and Controversies* (University of Pennsylvania Press, 2014) 347, 358, 359; P Cullen, J Bray

were highlighted by intersectional feminist academics and activists throughout the Repeal campaign and during the drafting process.[153] As such, the repeal of the 8th Amendment and Ireland's current abortion legislation 'do not yet reflect the new, emancipatory discourse of reproductive agency' that intersectional feminists recognise as necessary to the full realisation of SRHRs and women's citizenship.[154] The imperfect nature of the 2018 Act represents the inherent ambivalence and limitations of using the law and human rights to realise the full transformative intersectional feminist project of SRHRs. This ambivalence and these limitations also characterise feminist engagement with the European human rights system, as will be discussed in the next part of this chapter.

Part 2: Summary

This part considered the specific forms of women's exclusion and oppression from citizenship, and feminist contestation of this exclusion, in Ireland from 1922 to the present. Beginning with an overview of the modern Irish feminist movement, it argued that the particularities of this movement and the context in which it operated impeded the full realisation of women's citizenship. This manifested in modest demands for access to contraception rather than emphatic demands for abortion access during the 1970s, a conservative backlash to strengthen the conservative Catholic patriarchal citizenship discourse resulting in the introduction of further restrictions on abortion access in the 1980s, and subsequent decades of government unwillingness to address the multiple human rights violations arising from Ireland's restrictive abortion legislation. A range of cases and tragedies from the late 1980s to 2017 threw into stark relief the ways in which Ireland's abortion legislation denied women's right to have rights and determine the scope of those rights by reducing them to their reproductive function. Following the death of Savita Halappanavar in 2012, a new wave of often intersectional feminist activism for abortion

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'Less than 15% of GPs sign up to provide abortion services' *Irish Times* (Dublin, 31 December 2019) <https://www.irishtimes.com/news/ireland/irish-news/less-than-15-of-gps-sign-up-to-provide-abortion-services-1.4127530> accessed 5 December 2020; F de Londras, M Enright *Repealing the 8th: Reforming Irish Abortion Law* (Bristol, Policy Press 2018) 70, 79; C Hogan, 'Why Ireland's battle over abortion is far from over' *The Guardian* (London, 3 October 2019) <https://www.theguardian.com/lifeandstyle/2019/oct/03/why-irelands-battle-over-abortion-is-far-from-over-anti-abortionists> accessed 5 December 2020; A McMahon, 'Harris appoints board to deal with 'rogue' therapists, counsellors' *Irish Times* (Dublin, 28 February 2019) <https://www.irishtimes.com/news/health/harris-appoints-board-to-deal-with-rogue-therapists-counsellors-1.3810447> accessed 5 December 2020

[153] ibid

[154] F de Londras, M Enright ' "The only lawyer on the panel": anti-choice lawfare in the battle for abortion law reform' in K Browne, S Calkin (eds), *After Repeal*, 53

access represented the emergence of a feminist movement that was capable of contesting women's exclusion from and oppression by the traditional Irish citizenship discourse. Engaging in national, regional, international, and transnational activism around the language and mechanisms of human rights, the Irish feminist movement contributed to the repeal of the 8th Amendment and the introduction of the 2018 Act. A considerable success for the multilevel feminist citizenship project of SRHRs, the ongoing limitations of the Act and its implementation indicate the need for continued feminist activism for women's right to have rights and determine the scope of those rights. This process will continue to take place in the interconnected national, regional, international, and transnational levels of the human rights system.

5.3. Regional Struggle (CoE)

Introduction

While the inter-American human rights system has proven to be an effective, responsive site and actor in the multilevel citizenship project of feminist contestation of El Salvador's restrictive abortion legislation, the same cannot be said of the European human rights system vis-à-vis campaigns for abortion law reform in Ireland. As argued here and in Chapter 3, this is due to the conservative, deferential approach to human rights protection that informs the ECtHR's jurisprudence. It is also due to the absence of bodies like the IACHR and CIM which would provide a platform for feminist activists and their transformative approach to human rights and SRHRs through a close working relationship with civil society actors. The establishment of the CoE Commissioner for Human Rights, and the commitment of the last three Commissioners to SRHRs, may yet address this shortcoming.

The first section analyses the Court's jurisprudence on Ireland's abortion legislation, arguing that its conservative, deferential approach to human rights protection resulted in partial advances for women's human rights in Ireland but failed to consider the underlying discriminatory rationale and real-world impact of Ireland's abortion legislation. The second section analyses the Commissioner's 2008, 2011, and 2017 reports on Ireland. These reports indicate the Commissioner's more responsive, progressive approach to women's human rights compared to the Court. In light of this responsiveness and the current Commissioner's strong commitment to SRHRs, it will be argued that Irish and transnational feminist

organisations campaigning for straightforward, safe, and legal access to abortion should foster links with this actor within the European human rights system.

5.3.1. The ECtHR

Open Door and Well Woman v Ireland

As mentioned in part 2, the *Open Door and Well Woman* case originated in legal proceedings brought against these two women's health centres by the anti-choice organisation SPUC. These legal proceedings resulted in injunctions being placed on both centres, which caused Open Door Counselling to close down and Dublin Well Woman to suspend its counselling service.[155] The centres took their case to the ECtHR, which ruled that the injunctions against them failed the proportionality test and so violated article 10 (freedom of expression and information) of the ECHR.[156]

While the finding of a violation of Article 10 was of symbolic importance and resulted in the introduction of the 1995 Regulation of Information Act, and while the Court acknowledged that the injunctions created a risk to women's health, issues with liberal legal reasoning nevertheless inform this judgment. Rather than critiquing the wider context – the negative, real-world impact of restricting access to abortion information and services for women's and girls' health, wellbeing and lives – the ECtHR instead applied the proportionality test.[157] According to this test, the Irish legislation was in fact unproblematic insofar as it fell within the state's margin of appreciation and pursued the legitimate aim of protecting public morals; the only issue was that the way in which it pursued this legitimate aim was disproportionate.[158] The Court failed to undertake a deeper interrogation of these public morals, their origins, and their rationale. As Chapter 2 and part 1 of this chapter argued, the origins and rationale of the 1861 Act and the 8th Amendment lay in a desire to maintain women's subordinate position of non-citizen and bearer of future citizens in the service of a patriarchal social order. In failing to name and make visible the discriminatory rationale underlying these provisions, and in failing to centre the negative impact on women's human

[155] U Barry Abortion in the Republic of Ireland, 60
[156] *Open Door and Dublin Well Woman v. Ireland* [1992] 15 EHRR 244 (Application No. 14234/88; 14235/88), 29 October 1992, paras 80, 77
[157] S Mullally, 'Debating Reproductive Rights in Ireland' (2005) 27 HRQ, 93-95
[158] ibid

rights, health, and equality of restrictive abortion legislation in its judgment, the Court did little to challenge impediments to women's rights and full citizenship. The ways in which the Court's proportionality test have impeded the advancement of women's human rights as they pertain to abortion were also apparent in the Chapter 3 analysis of *A, B and C v Ireland*. The Court's admissibility procedures, and the way in which it interprets them, have also impeded the advancement of women's human rights in relation to abortion access in Ireland. This is demonstrated by the 2006 *D v Ireland* admissibility decision.

D v Ireland admissibility

D's application concerned her inability to obtain an abortion in Ireland on the grounds of fatal foetal abnormality: in late 2001 she became pregnant with twins and, following an amniocentesis in the 14th week of her pregnancy, was informed that one foetus had a fatal foetal abnormality that would result in both twins dying shortly after birth.[159] She travelled to the UK for a medical abortion in January 2002, and in February 2002 experienced complications which required further treatment at a hospital in Ireland.[160] The facts of her case speak to the lack of support, the sense of secrecy and shame, and the ways in which these compound an already distressing situation[161] As a result of Ireland's abortion legislation, D experienced major gaps in the continuity of physical and mental healthcare she required. She claimed that the inability to obtain an abortion in the case of fatal foetal abnormality under Ireland's abortion legislation resulted in violations of ECHR article 3 (freedom from torture and CIDT), article 8 (privacy), article 10 (right to seek, receive and impart information) in conjunction with article 14 (non-discrimination).[162] She emphasised the lack of continuity in care and access to information in the run-up to the procedure, the sense of taboo surrounding abortion, and the absence of follow-up support such as genetic counselling, bereavement counselling, and medical follow-up care as reasons for these violations.[163]

Nine years later, the HRC would agree with her arguments, finding that Mellet and Whelan's similar experiences resulted in violations of the right to be free from torture and CIDT, the

[159] *D v Ireland*, para 3
[160] ibid, paras 4-8
[161] ibid, para 7
[162] ibid, paras 58-60
[163] ibid

right to privacy, and the right to equality before the law.[164] The ECtHR, however, decided that *D v Ireland* was inadmissible because D had failed to exhaust domestic remedies.[165] The suggested domestic remedy, proposed by the Irish Government, entailed D initiating High Court proceedings, 'pursued if unsuccessful to the Supreme Court', to obtain a declaration that 'Article 40.3.3º of the Constitution allowed an abortion in Ireland in the case of a fatal foetal abnormality.'[166] Apparently taking the 'novel' but 'arguable' case that Article 40.3.3º excluded an abortion in the case of a fatal foetal abnormality to the High Court and Supreme Court was a sufficient domestic remedy, despite uncertainty, time constraints, and potential loss of confidentiality for the applicant.[167] That the ECtHR did not consider such a procedure too burdensome, time-consuming, and costly an undertaking for someone already experiencing acute emotional distress and dealing with a time-sensitive health issue represents a near total disregard for D's lived reality and for women's human rights.

A similar inability or unwillingness to address the real-world issues arising from restrictive abortion legislation was also evident in *A, B and C v Ireland*, as discussed in Chapter 3. The Court's failure to find violations of articles 3, 8 and 14 in relation to all the applicants, and its expanding of the margin of appreciation on the basis of the supposedly profound moral views of the Irish people on the right to life of the unborn, represented the inability of the Court's current approach to legal reasoning to recognise the inherently discriminatory nature of restrictive abortion legislation, and its inability to represent and respond to the lived realities of women affected by restrictive abortion legislation. In contrast, the CoE Commissioner for Human Rights has demonstrated an awareness of the need to address the systemic inequalities informing and arising from restrictive abortion legislation.

5.3.2. CoE Commissioner for Human Rights

In 2008, the Commissioner Thomas Hammarberg published a country report on Ireland which considered Ireland's restrictive abortion legislation in relation to sexual and reproductive rights.[168] He drew attention to civil society activism for access to abortion for 'all women in the country, particularly when a woman's health is at risk, she is pregnant as a

[164] HRC, *Mellet v Ireland*; HRC, *Whelan v Ireland*
[165] *D v Ireland*, para 103
[166] ibid, para 64
[167] ibid, 88, 92, 102
[168] CoE Commissioner 2007 country report, para 75

result of rape or incest or there is evidence of severe foetal anomaly' – representing awareness of and engagement with organisations such as Amnesty and the IFPA – and he also mentioned that the case of Miss D illustrated the 'particular difficulties' that 'vulnerable women, especially young and migrant women' face in accessing abortion services abroad.[169] He expressed concern with the absence of legislation formalising the existing case-law permitting abortion under limited circumstances, and he urged the Irish government to enact such legislation.[170] However, Hammarberg stopped short of suggesting further liberalisation of Ireland's abortion legislation in both this and his 2011 report.[171] His successor Nils Muižnieks, who served as Commissioner from 2012 to 2018, expressed a more assertive stance on the need to decriminalise abortion to realise SRHRs through the publication of a 2017 issue paper on SRHRs and his 2017 report on Ireland.

As mentioned in part 2, the Commissioner's 2017 report on Ireland paid particular attention to the human rights violations arising from Ireland's restrictive abortion legislation. His analysis of Ireland's restrictive abortion legislation was informed by the work of Amnesty and the Coalition to Repeal the Eighth Amendment, as well as UN human rights experts' stance that human rights violations that arise from criminalising abortion.[172] In engaging with their work, the Commissioner demonstrated an awareness of and responsiveness to national and transnational civil society activism, as well as a commitment to the UN's more progressive understanding of SRHRs.

The Commissioner criticised the restrictive and 'burdensome' nature of the PLDPA, the uncertainty among medical professionals as to what information they could provide about abortion, the strong sense of stigma surrounding abortion in Ireland, and smear campaigns targeting pro-choice activists.[173] He also criticised the 'burden' that having to travel abroad for abortion care represented, the ways in which it disrupted continuity of care, and the fact that it restricted healthcare access for 'poor women, asylum-seekers and undocumented migrants among others', forcing them to either continue with unwanted pregnancies or resort to illegal and potentially unsafe clandestine abortion.[174] The Commissioner emphasised that 'the lawfulness of abortion does not have an effect on a woman's need for an abortion, but

[169] ibid, para 79
[170] ibid, para 80
[171] ibid, paras 75-80; CoE Commissioner 2011 country report, paras 15, 48
[172] CoE Commissioner 2017 country report, paras 77, 86, 87
[173] ibid, paras 77, 79, 80, 81
[174] ibid, para 84

only on her access to a safe abortion', indicating an awareness of the real-world implications of restrictive abortion legislation.[175] In contrast to the ECtHR, the CoE Commissioner highlighted the real-world impact of restrictive abortion legislation, and he urged the Irish government to decriminalise abortion entirely, or at a minimum to permit it 'to preserve the physical and mental health of women, or in cases of fatal foetal abnormality, rape or incest.'[176] He argued that complete decriminalisation of abortion, or decriminalisation at a minimum in these circumstances, was necessary for the respect of 'the human rights of women, including their right to be free from ill-treatment, the right to the highest attainable standard of physical and mental health, and the right to private life.'[177]

As indicated in Chapter 2, the current Commissioner has reiterated her commitment to this position, stating that SRHRs are integral to 'women's right to self-determination'[178] and 'an essential component of Council of Europe Member States' obligations to guarantee women's rights and advance gender equality.'[179] She has reiterated the 2017 thematic paper's stance that CoE Member States must decriminalise abortion and remove barriers to safe abortion care.[180] Therefore, the CoE Commissioner for Human Rights is emerging as an actor within the European human rights system that supports the full realisation of SRHRs and that is responsive to feminist engagement with the language and mechanisms of human rights.

Part 3: Summary

While the ECtHR's *Open Door* and *A,B, C* judgments provided partial symbolic and real-world redress for those affected by Ireland's restrictive abortion legislation, the European human rights system has overall proven to be of limited utility in advancing the multilevel feminist citizenship project of SRHRs including abortion. As discussed here and in previous chapters, this is because of its deferential approach to human rights protection, the persistence of liberal legal reasoning, and the absence of a body specifically dedicated to women's rights within the CoE. The Commissioner for Human Rights, and their increasing commitment to

[175] ibid, para 90
[176] ibid, para 94
[177] ibid
[178] CoE Commissioner for Human Rights, 'We need to stand up for women's sexual and reproductive health and rights'
[179] CoE Commissioner for Human Rights, 'COVID-19: Ensure women's access to sexual and reproductive health and rights'
[180] CoE Commissioner for Human Rights, 'COVID-19'; CoE Commissioner for Human Rights, 'Women's sexual and reproductive rights in Europe'

SRHRs in recent years, may yet provide an important ally in and forum for the advancement of SRHRs in the European human rights system. However, given that Ireland's current abortion legislation now meets minimum international human rights standards, and given that other CoE Member States have more restrictive legislation or are implementing new restrictions on abortion access, Ireland's abortion legislation will probably not be a priority focus of the Commissioner unless feminists in Ireland actively bring the issue to her attention. Therefore, feminists in Ireland should foster links with the current Commissioner as part of the ongoing process of contesting women's exclusion from and oppression by the traditional discourses of citizenship and rights through campaigns for the full realisation of SRHRs.

Although engagement with the European human rights system has only afforded partial success, the importance and utility of feminists in Ireland engaging with the UN human rights system is apparent, since the UN human rights treaty monitoring bodies contributed to the pressure on the Irish government to implement reforms to Ireland's abortion legislation. The fourth and final part of this chapter highlights the ways in which Irish and transnational feminist organisations effectively engaged with the UN treaty monitoring bodies through the periodic review 'system' and the submission of individual complaints, arguing that their engagement with the UN human rights system, and the UN human rights system's responsiveness to this engagement, represents the effectiveness of employing a multilevel feminist citizenship project to advancing SRHRs including abortion access.

5.4. International Struggle (UN)

Introduction

As early as 1990, UN human rights treaty monitoring bodies expressed concern with Ireland's restrictive abortion legislation.[181] As evidenced throughout this thesis, since then, the UN human rights system has been an important and responsive actor in the multilevel feminist citizenship project of advancing abortion access as part of SRHRs. This part considers Irish and transnational feminist and human rights organisations' engagement with the UN human rights system in the form of their participation in the periodic sessions review process, and their submission of individual petitions to the complaints procedures. It argues

[181] CEDAW Committee, 'Concluding Observations on the initial report of Ireland' in General Assembly Official Records (A/44/38 Supp. 38, 13 February 1990) paras 89, 123

that this engagement, and the UN human rights system's responsiveness to it, is a key component of a multilevel feminist citizenship project. This multilevel feminist citizenship project of contesting women's exclusion from and oppression by the traditional citizenship discourse as it manifests in restrictive abortion legislation contributed to the introduction of Ireland's abortion law reform. However, this process is as yet unfinished, given the ongoing restrictions on straightforward, safe, and legal access to abortion in Ireland. Therefore, this part closes by reiterating the need for Irish and transnational feminist and human rights organisation to continue engaging with all levels of the human rights system to realise women's full citizenship through the decriminalisation of abortion.

UN human rights treaty monitoring bodies: periodic review

The first available submission by a civil society group to a UN human rights treaty monitoring body on the subject of Ireland's restrictive abortion legislation the IFPA's 2008 submission to the HRC. In this submission, the IFPA asserted that Ireland's abortion ban and the lack of legislative clarity constituted a violation of ICCPR articles 2 (non-discrimination), 3 (effective remedy), 6 (right to life), 7 (freedom from torture and CIDT), 17 (privacy) and 24 (children's rights).[182] In its Concluding Observations, the HRC highlighted some of the IFPA's criticisms of Ireland's abortion legislation such as its highly restrictive nature and the fact that it forced women to travel abroad.[183] It called on Ireland to 'bring its abortion laws into line with the Covenant' and ensure respect for the rights enshrined in ICCPR articles 2, 3, 6 and 26 (equality before the law).[184] The HRC's 2014 Concluding Observations also reflected submissions by the Abortion Rights Campaign (ARC), Amnesty, Doctors for Choice, the Center for Reproductive Rights (CRR), the IFPA, and the Irish Human Rights Commission through its criticisms of the highly restrictive nature of the PLDPA and its severe criminal penalties; the lack of legal and procedural clarity regarding the meaning of 'a real and substantive risk' to life; the 'excessive degree of scrutiny' required for women seeking access to abortion when suicidal which compounded their distress; the discriminatory impact of the Act on women who could not travel abroad; restrictions on access to information about abortion; and 'the severe mental suffering caused by the denial of abortion

[182] IFPA, 'Comments of the Irish Family Planning Association in respect of the Third Periodic Report of Ireland under the International Covenant on Civil and Political Rights (ICCPR)' (June 2008) <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/TBSearch.aspx> accessed 5 December 2020
[183] HRC 2008 Concluding Observations, para 13
[184] ibid

services to women seeking abortions due to rape incest, fatal foetal abnormality or serious risks to health.'[185] These submissions and the HRC's Concluding Observations related these issues to ICCPR articles 2 (non-discrimination), 3 (effective remedy), 6 (right to life), 7 (freedom from torture and CIDT), 17 (privacy), 19 (freedom to seek, receive and impart information) and 26 (equality before the law), and it called on Ireland to permit abortion in the case of rape, incest, risk to health, and fatal foetal abnormality to ensure that these rights were respected, protected, and fulfilled.[186]

Feminist engagement with and influence on the UN human rights treaty monitoring body system is also evident in CAT's 2013 and 2017 Concluding Observations. They criticised the restrictiveness and uncertainty of Ireland's abortion legislation, arguing that it disproportionately affected minors, migrant women, and women living in poverty, and that it resulted in 'severe physical and mental anguish and distress' that was in potential breach of UNCAT articles 2 (obligation to prevent torture) and 16 (obligation to prevent CIDT).[187] This reflected submissions by ARC, Amnesty, the Irish Council for Civil Liberties, and the IFPA.[188]

Submissions by national and transnational feminist and human rights organisations also seem to have influenced CESCR's 2015 Concluding Observations. Dedicating a section to sexual and reproductive health, CESCR reiterated these organisations' criticisms of Ireland's criminalisation of abortion which included the lack of legal and procedural clarity on "real and substantive risk to life"; the discriminatory impact on women who could not travel abroad to have an abortion; and the limited access to information on sexual and reproductive

[185] ARC, '4th Periodic Report of Ireland – list of issues' (12 June 2014); Amnesty, 'Ireland: Submission to the United Nations Human Rights Committee, 111th Session (7-25 July 2014)' (London, Amnesty 2014) 6-17; CRR, 'Supplementary Information on Ireland Submitted to the Pre-Sessional Working Group of the Human Rights Committee during its 109 Session' (9 August 2013); Doctors for Choice, 'Submission to the United Nations Human Rights Committee for Ireland's Review under the International Covenant of Civil and Political Rights' (12 June 2014); HRC 2014 Concluding Observations, para 9; IFPA, 'Supplementary information on Ireland in respect of restrictive laws on abortion' (9 August 2013); all available at <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/TBSearch.aspx> accessed 5 December 2020

[186] ibid

[187] CAT 2011 Concluding Observations, para 26; CAT 2017 Concluding Observations para 31

[188] ARC, 'Submission to the United Nations Committee Against Torture (UNCAT) 24 July-7 August' (June 2017); Amnesty, 'Submission to the United Nations Committee Against Torture, 24 July-11 August 2017' (London, Amnesty 2017); ICCL, 'List of Issues Prior to Reporting – Ireland' (16 August 2013) sec 9; IFPA, 'Supplementary information on Ireland in respect of restrictive laws on abortion for the consideration of the Committee Against Torture at its 51st session (28 October to 22 November 2013)' (9 August 2013) all available at <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/TBSearch.aspx> accessed 2 December 2020

health.[189] It called on the state to guarantee the enjoyment of ICESCR article 12 (health) by revising legislation on abortion to bring it in line with international human rights standards; adopting guidelines clarifying what constitutes a real and substantive risk; providing information on crisis pregnancy options; and ensuring accessibility and availability of sexual and reproductive health information.[190] Curiously, CESCR did not allude to article 3 (equal rights of men and women) in its consideration of Ireland's abortion legislation, even though most of these civil society organisations did. This represents some of the ongoing, subtle, but by no means unimportant divergences between intersectional feminist and IHRL understandings of SRHRs.

In March 2016 the CRC Committee called on Ireland to decriminalise abortion in all circumstances and to provide comprehensive sexual and reproductive health education as part of the mandatory school curriculum, reflecting a submission by ARC which highlighted the negative human rights impact of Ireland's abortion legislation, as well as wider restrictions on access to sexual and reproductive care, information, and services.[191] Responsiveness to national, international, and transnational feminist perspectives on abortion and SRHRs was also evident in the CEDAW Committee's 2017 Concluding Observations. The Committee called on Ireland to decriminalise abortion, ensure 'free access to information on sexual and reproductive health information and education', improve access to and information on contraceptives, and ensure the provision of post-abortion care for women irrespective of the legality of their abortion.[192] As with the HRC and CESCR, the adoption of these

[189] ARC, 'Shadow Report to the Third Periodic Report of Ireland under the International Covenant on Economic, Social and Cultural Rights' (29 September 2014); Amnesty, 'Ireland: Submission to the UN Committee on Economic, Social and Cultural Rights, 1-5 December 2014' (London, Amnesty 2014); CESCR 2015 Concluding Observations para 30; IFPA, 'Submission in relation to the review by the Committee on Economic, Social and Cultural Rights of Ireland's compliance with the International Covenant on Economic, Social and Cultural Rights (ICESCR)' (21 April 2015); Irish Human Rights and Equality Commission (IHREC) 'Submission to the UN Committee on Economic, Social and Cultural Rights on Ireland's Third Periodic Report on the International Covenant on Economic, Social and Cultural Rights – List of Issues Stage' (October 2014) para 25; International Commission of Jurists, 'The International Commission of Jurists' Submission for the Preparation by the Committee on Economic, Social and Cultural Rights of a List of Issues for the Examination of the Combined Third Periodic Report of Ireland' (October 2014) all available at <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/TBSearch.aspx> accessed 5 December 2020

[190] ibid

[191] ARC, 'Issues raised by the Irish state's response to the list of issues published by the Committee (CRC/C/IRL/Q/3-4) on 15 July 2015' (2015) <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/TBSearch.aspx> accessed 2 December 2020; CRC 2016 Concluding Observations, para 58

[192] CEDAW 2017 Concluding Observations, paras 42-3

recommendations was influenced by Irish and transnational feminist and human rights organisations' submissions.[193]

In light of this review of Concluding Observations since 2008, it is clear that feminists have effectively made use of the language and mechanisms of IHRL to advance their campaigns for straightforward, safe, and legal access to abortion in Ireland. As part 1 of this chapter illustrated, increasing pressure from the UN human rights system on the Irish government was one of the key reasons for the government convening the Citizens' Assembly and agreeing to hold the referendum on the 8th amendment. As this part has demonstrated, one of the reasons for this increasing pressure from the UN human rights system was because of submissions by Irish and transnational feminist and human rights organisations detailing the negative consequences for human rights arising from Ireland's restrictive abortion legislation. Therefore, it can be argued that as result of their engagement with the UN human rights system, and the responsiveness of the UN human rights system to this engagement, this multilevel feminist activism prompted the government to hold the referendum to repeal the 8th Amendment and to introduce the 2018 Act. These Concluding Observations, in conjunction with the HRC's *Mellet* and *Whelan* Views, represent the utility and necessity of feminist engagement with the human rights system to advance women's citizenship in the form of SRHRs and abortion access. The next section discusses how Mellet and Whelan's decision to file individual complaints with the HRC represented the strategic litigation aspect of the multilevel feminist citizenship project.

UN human rights treaty monitoring bodies: individual complaints

Mellet and Whelan's engagement in civil society activism began with the establishment of Termination for Medical Reasons (TFMR Ireland) in 2012. Mellet was one of the founding members of this group, which served the dual aim of a support group and a campaign for change vis-à-vis the inability to access abortion care in Ireland in the case of fatal foetal

[193] ARC, 'Submission to the Pre-Sessional Working Group of the Committee on the Elimination of Discrimination Against Women (23-27 November 2015)' (16 October 2015); Amnesty, 'Ireland – List of Issues Prior to Reporting' (2 October 2015); CRR, 'Submission to the Committee on the Elimination of All Forms of Discrimination against Women (the Committee)' (23 January 2017); Coalition to Repeal the Eighth Amendment, 'Submission to the Committee on the Elimination of Discrimination Against Women (CEDAW)' (2015); NWCI, 'Shadow Report in advance of the examination of Ireland's combined sixth and seventh periodic reports under the UN Convention on the Elimination of All Forms of Discrimination against Women' (20 January 2017) 19-20 all available at <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/TBSearch.aspx> accessed 5 December 2020

abnormality.[194] In April 2012 they began holding interviews with Irish media and meeting with Irish politicians to discuss their experiences and so highlight the ways in which Ireland's abortion legislation compounded the grief they were already experiencing by subjecting them to stigma, uncertainty, financial difficulties, and disruptions in continuity of care.[195] Initially reluctant to identify as pro-choice for fear of losing support, TFMR campaigned for termination of pregnancy in the specific case of non-viability.[196] Following the failure of the PLDPA to include such an exception to the criminalisation of abortion, in November 2013 Mellet submitted her petition to the HRC with the support of the CRR and Doctors for Choice.[197] In March 2014 Whelan submitted her petition, again with the support of these two organisations.[198] Their direct engagement with the UN human rights system represents their articulation of a right to have rights and to determine the scope of those rights. The support from transnational and national NGOs, CRR and Doctors for Choice, represents the interconnected nature of the national, transnational, and international levels of the multilevel feminist citizenship project around SRHRs. As such, the dynamics of the multilevel feminist citizenship project are apparent: individuals and organisations in Ireland and abroad made use of the language and mechanisms of IHRL to contest and seek reparation for the harms arising from restrictive abortion legislation.

As already noted, the HRC found both women to have been subjected to human rights violations in Final Views issued in 2016 and 2017 respectively. These Views prompted the Irish government to offer Mellet financial compensation and access to counselling, and the then-Minister for Health provided a personal apology.[199] By 2016, TFMR had overcome its initial reluctance to be associated too closely with the pro-choice movement and become a member of the Coalition to Repeal the Eighth Amendment. Mellet, Whelan, and other TFMR members continued to speak about their experience in the hopes of influencing public opinion

[194] K Sheridan, ''I believe in a loving God and that I won't be damned for what I did'' Irish Times (Dublin, 17 April 2012) <https://www.irishtimes.com/life-and-style/people/i-believe-in-a-loving-god-and-that-i-won-t-be-damned-for-what-i-did-1.502988> accessed 5 December 2020
[195] ibid
[196] ibid
[197] K Holland, 'Irish women forced to travel for abortions to take cases to UN' *Irish Times* (Dublin, 9 November 2013) <https://www.irishtimes.com/news/social-affairs/irish-women-forced-to-travel-for-abortions-to-take-cases-to-un-1.1590008> accessed 5 December 2020
[198] CRR, 'Center for Reproductive Rights Brings Second Case Against Ireland Abortion Laws to United Nations' (CRR, 13 March 2014) <https://reproductiverights.org/press-room/CRR-brings-second-Ireland-case> accessed 5 December 2020
[199] CRR 'Irish Government to Provide Monetary Reparations Following Landmark United Nations Abortion Case' (CRR, 30 November 2016) <https://reproductiverights.org/press-room/irish-government-to-provide-monetary-reparations-following-landmark-un-abortion-case> accessed 5 December 2020

and politicians to support abortion law reform.[200] The fact that 'the question of fatal foetal abnormalities' was one of the main factors influencing voters' participation in the 2018 referendum, and that 53% of voters surveyed stated that they 'strongly agreed' with abortion being made available in the case of fatal foetal abnormality, suggests that their personal testimony and their engagement with the language and mechanisms of human rights contributed to repeal of the 8th Amendment and the introduction of the 2018 Act.[201] TFMR has continued its campaign for full access to abortion in the case of fatal foetal abnormalities, given that women are still being forced to travel given the restrictive nature of the 2018 Act and its cautious interpretation by medical professionals.[202] As such, the multilevel feminist citizenship project of realising straightforward, safe, and legal access to abortion in Ireland remains an ongoing process.

Part 4: Summary

This part demonstrated the utility and importance of Irish and transnational feminist engagement with the UN human rights system for advancing the national discourse on abortion and for realising constitutional and legislative change. Through the UN human rights bodies' periodic review and individual petition systems, Irish and transnational feminist and human rights organisations have used IHRL to advocate for straightforward, safe, and legal access to abortion in Ireland. In doing so, they have participated in the ongoing process of contesting women's exclusion from and oppression by traditional understandings of citizenship that denied them the right to have rights and determine the scope of those rights on the basis of their reproduction and sexuality. Their achievements have been considerable, but, as in El Salvador, much remains to be done.

Conclusion

This chapter argued that Irish and transnational feminist activism for straightforward, safe and legal access to abortion in Ireland is best understood as part of the wider multilevel feminist citizenship project of SRHRs. It did so by considering the origins and evolution of

[200] TFMR Ireland <http://tfmrireland.com/> accessed 5 December 2020
[201] RTÉ Behaviour and Attitudes Exit Poll, 127, 131
[202] E Coyne, ''Restrictive law' forcing women to travel for abortion, doctors warn' Irish Independent (28 November 2019) <https://www.independent.ie/irish-news/health/restrictive-law-forcing-women-to-travel-for-abortion-doctors-warn-39760344.html> accessed 5 November 2020

the feminist movement, key cases and controversies arising from Ireland's restrictive abortion legislation from the 1980s to 2017, and feminist engagement with the regional and international human rights systems.

Despite the considerable obstacles of powerful conservative national actors, government reticence, and a conservative regional human rights system, feminist activism and widespread societal change resulted in repeal of the 8th Amendment and introduction of the 2018 Act. This process is best understood as a multilevel feminist citizenship project: feminists made use of the language and mechanisms of human rights to contest women's exclusion from and oppression by traditional citizenship discourse as it manifested in Ireland's criminalisation of abortion.

Understanding the repeal of the 8th Amendment and the introduction of the 2018 Act in this manner sheds light on the interconnected nature of national, regional, international and transnational struggles around SRHRs and abortion access. It also highlights the ways in which the multilevel feminist citizenship project remains unfinished: abortion must be decriminalised in Ireland, and the Irish feminist movement must become more unified and intersectional in its approach. Modest reform is not enough: there is urgent need for systemic transformation of Ireland's political, social, and economic structures to ensure that the rights of all historically marginalised and oppressed groups are respected, protected, and fulfilled.

Chapter 6

Conclusion

This thesis considered the following two research questions:

1. In what ways have intersectional feminists harnessed the language and mechanisms of international human rights law to advance women's citizenship in the form of sexual and reproductive health and rights?

2. In what ways can they further advance the multilevel feminist citizenship project of SRHRs, as represented by the decriminalisation of abortion, through their engagement with all levels of the human rights system?

In regard to the first research question, this thesis demonstrated that feminists' efforts to realise women's full citizenship through engaging with the language and mechanisms of human rights has resulted in IHRL now recognising the legitimacy and importance of SRHRs including abortion access. This represents the contested, ongoing process of challenging women's exclusion from and oppression by the traditional citizenship discourse as it manifests in restrictions on reproductive freedom. Feminists have worked and continue to work in interconnected national, regional, international, and transnational fora as UN, CoE, and OAS staff; academics; civil society activists; and petitioners. They do so at the national level by protesting restrictive abortion legislation, campaigning for constitutional and legislative change, and tabling legislation. At the regional, international and transnational levels they advocate for a specific focus on women's human rights issues; participate in conferences, seminars, workshops and *encuentros*; submit information to and participating in events and sessions held by the human rights bodies; and engage with the individual complaints procedures.

Despite the challenges the multilevel feminist citizenship project faces in terms of the practical constraints on the human rights systems; resistance and opposition to SRHRs from

conservative actors; and tensions within the feminist movement, it has realised some not inconsiderable achievements. These include IHRL's recognition of the legitimacy of SRHRs, and a gradual move towards a more intersectional feminist approach to legal reasoning in order to ensure their realisation; increased awareness of and discussion about restrictions on abortion and their negative human rights consequences at the national level in El Salvador; and, on occasion, legal reform that has at least somewhat improved individuals' ability to access safe and legal abortion in Ireland. In order to continue this process and so realise women's full citizenship, this research project identified areas for further development, which will be summarised in the next section of this chapter.

In regard to the second research question – how feminists can further advance the multilevel feminist citizenship project of SRHRs as represented by the decriminalisation of abortion through their engagement with all levels of the human rights system – this research project demonstrated that human rights bodies need to use intersectional feminism to reconceptualise concepts underpinning our understanding of human rights such as citizenship, autonomy, equality, and justice – this will lead to an interpretation of human rights law by judicial bodies that better represents and responds to women's lived realities. This research project also demonstrated the need to use intersectional feminism to imagine new international human rights legal mechanisms that are dedicated to realising restorative and transformative justice, such as the friendly settlements procedure of the IACHR. It is only by reconfiguring the language and mechanisms of IHRL in these ways that IHRL will be able to represent and respond to women's needs and experiences.

However, exclusive reliance on IHRL to address the many harms arising from the current white supremacist capitalist patriarchal political and social order. As noted in the introduction to this thesis, 'human rights alone can never fulfil justice.'[1] Instead, intersectional feminist engagement with the language and mechanisms of IHRL must form just one part of a wider process to challenge structural oppression that also includes education/consciousness-raising, grassroots activism, and community organising across a range of issues.[2] While making use of the language and mechanisms of IHRL to advance social justice, feminists must not lose sight of the fact that these discourses are inherently limited in how much they can achieve,

[1] S Corrêa et al, *Sexuality, Health and Human Rights*, 152
[2] S Bradshaw, 'Is the Rights Focus the Right Focus?' Third World Quarterly, 1338. See also N Menon, *Recovering Subversion*, 5-6, 44-5

and that other, non-legal strategies and activism are also necessary to dismantle the current white supremacist capitalist patriarchal social order.[3]

In light of this analysis, this chapter discusses the aims, findings and original contributions of this thesis. It then considers limitations on this research project, before discussing some potential areas for future research.

6.1. Thesis aims, findings, and original contributions

Chapter 1 of this thesis articulated an intersectional feminist methodology informed by Third World and feminist approaches to IHRL. It also developed the theoretical framework of a multilevel feminist citizenship project, defined as feminist engagement nationally, regionally, internationally, and transnationally with the language and mechanisms of human rights to contest women's historical exclusion from and oppression by traditional citizenship discourses as they manifests in restrictive abortion legislation. The articulation of a new theoretical framework that synthesised existing feminist literature on and critiques of liberalism and IHRL; the application of this theoretical framework to an issue of real-world importance, namely the need for straightforward, safe, and legal access to abortion; and the challenging of dominant forms of understanding and knowledge production that applying this framework entailed represents the main original contributions of this thesis. The ways in which each chapter advanced these aims, their findings, and their contributions to research, will now be considered.

Chapter 2 developed the theoretical framework of the multilevel feminist citizenship project in detail. It argued that traditional citizenship discourses has long been used to exclude and oppress women on the basis of their reproduction and sexuality as evidenced by the rationale underpinning restrictive abortion legislation, which is to exclude women from citizenship and force them to fulfil the role of bearers of future citizens, and bearers of individual, familial, and the nation's honour. It also highlighted that feminists have contested this exclusion from and oppression by the traditional citizenship discourse by articulating alternative understandings of citizenship as the right to have rights and determine the scope of those rights. Chapter 2 demonstrated that understanding citizenship in this manner – as a contested, dynamic process where new rights can be articulated and new meanings given to existing

[3] C Smart, *Feminism and the Power of Law*, chapter 8

rights – brings a new level of insight to the origins, evolution, and growing legitimacy of women's human rights and SRHRs including abortion in international human rights law (IHRL). It then provided an overview of the extent to which the UN, inter-American and European human rights systems have incorporated SRHRs, providing general context for the close reading of their jurisprudence in Chapter 3.

Chapter 3's aim was to engage in a critical analysis of the UN, inter-American, and European human rights bodies' jurisprudence on abortion and SRHRs to demonstrate that the multilevel feminist citizenship project of realising SRHRs and therefore women's citizenship is underway but by no means finished in IHRL. In undertaking this analysis, it made the original contribution of demonstrating that these bodies have been influenced by intersectional feminist thinking to a certain extent – representing a significant achievement for the multilevel feminist citizenship project – but that they need to move away from the problematic liberal assumptions underpinning legal reasoning and fully embrace an intersectional feminist approach in order to ensure the full realisation of SRHRs and, by extension, women's citizenship. It highlighted some of the key strengths and weaknesses in terms of these systems' structures and approaches to legal reasoning in this regard, and it demonstrated that the multilevel feminist citizenship project of SRHRs is unfinished and ongoing within IHRL. This chapter suggested some new ideas for advancing the multilevel feminist citizenship project, such as non-adversarial methods of adjudication that are committed to restorative and transformative justice; consistently including the idea of reproductive autonomy within the right to privacy; an interpretation of freedom from torture and CIDT that recognises restrictive abortion legislation fulfilling the purpose and intent criteria; and a more coherent, substantive approach to non-discrimination and equality in order to better represent and respond to women's lived needs and realities. It argued that in order to realise women's full citizenship, quasi-judicial human rights bodies and human rights courts need to not only recognise the harms arising from restrictive abortion legislation as human rights violations, but that they also need to recognise the structural harms that restrictive abortion legislation represent and perpetuate.

The contested and ongoing nature of the multilevel feminist citizenship project of SRHRs and abortion access in El Salvador and Ireland, and the connections between national, regional, international, and transnational citizenship processes, were considered in Chapters 4 and 5. Chapter 4 demonstrated the utility of applying the theoretical framework of a multilevel

feminist citizenship project to the situation in El Salvador. By applying this framework, this thesis elucidated ways in which national and transnational feminist and human rights organisations such as *Agrupación Ciudadana*, Amnesty, and CRR are working nationally, regionally, internationally, and transnationally to realise women's full citizenship and rights by contesting El Salvador's complete criminalisation of abortion and prosecution of women suspected of having had one. Despite the considerable challenges feminist and human rights activists face in pursuing these aims, they are nevertheless making progress: at the national level their campaigns have resulted in increasing public awareness and support for legislative reform, in between 30 and 41 women being freed, and in proposals for the liberalisation of the current abortion legislation being tabled in the Legislative Assembly. Through their engagement with the regional and international levels of the human rights system in the form of submitting shadow reports, presenting evidence at periodic sessions, meetings during country visits, and filing individual petitions, these activists have prompted both the inter-American and the UN human rights system to be increasingly assertive in their calls for the decriminalisation of abortion in El Salvador. This may yet serve as a catalyst for the state to reform its legislation. Applying the theoretical framework of a multilevel feminist citizenship project makes visible these dynamics. It also highlights potential ways for Salvadoran and transnational feminists to advance this process further, for example by engaging with the UN individual complaints procedure and by participating in CIM's campaign for an Inter-American Convention on Sexual and Reproductive Rights.

Applying the theoretical framework of the multilevel feminist citizenship project also highlights some of the parallels between El Salvador and Ireland, and the ways in which these countries' feminist movements could learn from each other. In the case of the Salvadoran feminist movement, the Irish feminist movement's success in repealing the 8th Amendment and realising the liberalisation of Ireland's abortion law could serve as a point of reference and a source of hope for the Salvadoran feminist movement. In the case of the Irish feminist movement, it could learn much from the unified, intersectional Salvadoran feminist movement.

Chapter 5 demonstrated the ways in which the multilevel feminist citizenship project explains the success of Irish and transnational feminist activism in realising the repeal of the 8th Amendment and the introduction of the 2018 Health (Regulation of Termination of Pregnancy) Act, which provides access to abortion in line with minimum IHRL standards.

These developments came about through feminists engaging with the language and mechanisms of human rights nationally, regionally, internationally, and transnationally. It found that despite the Irish feminist movement's own limitations, successive governments' evasion of the abortion issue, and a largely unresponsive and conservative regional human right system, feminists in Ireland and in transnational organisations such as Amnesty and CRR made use of the language and mechanisms of human rights to exert pressure on the government to convene a Citizens' Assembly, to hold a referendum on the 8th Amendment, and to introduce more liberal abortion legislation. Their engagement with the UN human rights system in the form of submitting information as part of the periodic review process and in the form of filing individual complaints was an especially effective strategy in contesting women's historical exclusion from and oppression by the traditional citizenship discourse as it manifested in Ireland's restrictive abortion legislation. It resulted in the UN human rights system exerting increasing pressure on the Irish Government to address the situation. This chapter also demonstrated that the multilevel feminist citizenship project of realising SRHRs is contested and ongoing in Ireland, and that this struggle for full decriminalisation of abortion and political, social, and economic transformation must continue. It argued that a key aspect of this will be the development of a more unified and intersectional feminist movement that confidently asserts the need for full decriminalisation of abortion. It also highlighted the potential of fostering links with the CoE Commissioner for Human Rights as part of the ongoing process of contesting women's exclusion from and oppression by the traditional discourses of citizenship and rights through campaigns for the full realisation of SRHRs.

Therefore, this thesis demonstrated throughout that feminist campaigns for SRHRs and abortion access are best understood as a multilevel feminist citizenship project around women's right to have rights and determine the scope of those rights, a process from which women have historically been excluded from and oppressed by on the basis of their reproduction and sexuality. It demonstrated that this multilevel feminist citizenship project is taking place in the interconnected national, regional, international, and transnational spaces created by feminist activism and IHRL, and that this process is ongoing in both practical and theoretical terms. Until women in El Salvador, Ireland, and worldwide have access to the full range of sexual and reproductive healthcare they require to live free of discrimination and oppression, and until each of the human rights systems consistently and explicitly recognises this through legal reasoning informed by intersectional feminism, the multilevel feminist

citizenship project of contesting women's exclusion and oppression must continue. This thesis can only offer an insight into this process up to December 2020. Some of its other limitations will now be considered.

6.2. Limitations of the study

As with any thesis, there are limitations on the research conducted and its outcomes. The three main ones identified in regard to this research project are difficulty accessing literature and primary sources, and the lack of direct engagement with feminist activists and women affected by restrictive abortion legislation in Ireland and El Salvador.

Difficulties accessing literature and cases

As noted in Chapter 1, while Ireland and its restrictive abortion legislation has been the focus of a considerable amount of academic research and international public attention, and while the researcher herself is Irish and thus has a certain "intuitive" knowledge of the particularities of Ireland's cultural, political and historical dynamics, the situation in El Salvador has received comparatively little attention and has only briefly been visited by the researcher. This meant that creating a detailed and accurate picture of the situation in El Salvador was a particular challenge for this thesis. It endeavoured to capture at least some sense of the considerable challenges facing the full realisation of women's human rights and citizenship in the country, and to demonstrate the dynamic, intersectional, transnational nature of the Salvadoran feminist movement. As a white, Irish, middle-class researcher based in Scotland, fear of inadvertently perpetuating any stereotypes about Central America or of simplifying and romanticising the complexity of the situation in El Salvador was never far from the researcher's mind. Throughout the researching and writing process, an attempt was made to maintain an intersectional feminism awareness of the contingent, partial nature of knowledge production and the power dynamics that inform it.

In regard to both countries, it was on occasion difficult or impossible to access courts cases or reports, and so this thesis had to rely on secondary sources such as newspaper articles, documentaries, and accounts by academics or activists when discussing certain cases. This was especially true of El Salvador, but details of the Miss D and Ms Y cases in Ireland were also unavailable. The ability to conduct a first-hand, in-depth critical reading of more Salvadoran cases, as well as these two Irish cases, would have enriched this thesis further. It

is hoped that future research can address this. Another lacuna that future research could correct is the absence of direct engagement with feminist activists and women affected by Ireland and El Salvador's restrictive abortion legislation.

First-person interviews and research

When first starting this research project, it was agreed that the author's academic background and training was best suited to conducting primary and secondary research. It was also agreed that conducting fieldwork or interviews would require training and ethical approval, and would be better suited to a future project. As such, the desire to ensure that this research project gave voice to those directly engaged in the contestation of restrictive abortion legislation in Ireland and El Salvador took the form of citing first-hand accounts by women affected by the legislation, or citing feminist activists who had interviewed these women and their families. Letting women speak for themselves and tell their own stories is a central tenet of intersectional feminism, and one which this research project was only able to partly fulfil. Future projects that build on this research will endeavour to engage directly with activists, women, and their families. This and other areas and forms of future research will now be considered.

6.3. Areas for future research

There are three main areas for future research in relation to this thesis. These are (1) applying the multilevel feminist citizenship project framework to the advancement of SRHRs in Africa, Asia, the Middle East, and Oceania; (2) conducting interviews with those who have been directly affected by or who have directly engaged in the process of contesting restrictive abortion legislation, with a view to determining whether they agree with the application of such a framework; and (3) the potential of applying the framework of a multilevel feminist citizenship project to other social justice struggles, such as campaigns for LGBTQ* rights, anti-racism movements, or responses to the climate crisis.

SRHRs in other regions

As mentioned in Chapter 1, there are currently around 125 countries worldwide where abortion is prohibited entirely or permitted only to save a woman's life or health.[4] Of these, the majority are in Latin America, Africa, the Middle East, and Southeast Asia.[5] Therefore, there are numerous states within these regions that could be chosen for an analysis of multilevel feminist contestation of this restrictive abortion legislation. During research for this thesis, Concluding Observations criticising restrictive abortion legislation in a number of states from these regions were identified.[6] Organisations including the Center for Reproductive Rights, the Guttmacher Institute, and the IPPF also have resources on abortion legislation and issues arising from it in countries including Kenya, Nepal, the Philippines, Sri Lanka, and Tanzania, among others.[7] As such, there is a clear starting point for conducting research into feminist engagement with the language and mechanisms of human rights to advance SRHRs in these regions. Collaboration with native speakers of local languages other than English, French or Spanish would be required to ensure full access to national feminist and human rights work were this author to undertake this project, however.

The importance of the African human rights system for the continued development of SRHRs in IHRL is another area of research which deserves further attention. As noted in passing in this thesis, the African Union (AU) adopted the Maputo Protocol in 2005, article 14 of which requires States Parties to authorise medical abortion in certain circumstances.[8] The African human rights system consists of the AU's African Commission on Human and Peoples' Rights (ACHPR) – which was established in 1986 and began operating in 1987 - and the African Court on Human and Peoples' Rights (ACtHPR), which was established in 2004 and

[4] S Singh et al, *Abortion Worldwide 2017*, 224
[5] CRR, 'The World's Abortion Laws' (CRR, 2020) <https://reproductiverights.org/worldabortionlaws> accessed 7 December 2020
[6] These are available in UNFPA et al, *Reproductive Rights are Human Rights*
[7] CRR, *Realizing a Healthy, Equal, and Thriving Philippines: The Role of Abortion Law Reform in Achieving the Nation's Development Goals* (New York, CRR 2018); CRR, 'Challenging Institutional Stigma Against Abortion Care in Kenya' (CRR, 2018); CRR 'Open Secret: The Toll of Unsafe Abortion in Tanzania' (CRR, June 2020); Guttmacher Institute, CREHPA, 'Abortion and Unintended Pregnancy in Nepal' (New York, Guttmacher Institute 2017); IPPF, 'Fighting for Safe Abortion Access in Sri Lanka' (IPPF, 27 February 2019) <https://www.ippf.org/blogs/fighting-safe-abortion-access-sri-lanka#:~:text=Sonali%3A%20Sri%20Lanka%20has%20one,the%20abortion%20is%20not%20permitted.> accessed 7 December 2020
[8] African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (The Maputo Protocol) (adopted 11 July 2003, entered into force 25 November 2005) art 14

began holding sessions in 2006.[9] According to a brief survey of available information, the ACHR has demonstrated a commitment to SRHRs including straightforward, safe, and legal access to abortion. In 2014, it issued General Comment No. 2 on article 14 of the Maputo Protocol, which takes an intersectional feminist approach to recognising and challenging the root causes of women's oppression as it manifests in restrictions on SRHRs, and which emphasises the importance of decriminalising abortion as part of these efforts to realise women's 'reproductive freedom.'[10] In 2015, the ACHPR's Special Rapporteurs on the Rights of Women and Human Rights Defenders issued a joint statement with UN human rights experts which called on states to commit to ensuring the full respect, protection and fulfilment of SRHRs in the context of the Sustainable Development Goals.[11] In 2016 the ACHR launched its Campaign for the Decriminalization of Abortion in Africa, and in both 2016 and 2018 the Special Rapporteur on the Rights of Women issued statements calling for the decriminalisation of abortion on the Global Day of Action for Access to Safe and Legal Abortion.[12] While the Court has yet to hear a contentious case or issue advisory opinions regarding SRHRs and whether it will share the Commission's intersectional feminist approach to SRHRs thus remains to be seen,[13] the important contributions that the ACHPR has already made to promoting the legitimacy of an intersectional feminist approach to SRHRs demonstrates the importance of making visible and engaging with Global South knowledge production. An in-depth analysis of the national, regional, and transnational dynamics informing the advancement of SRHRs in Africa was beyond the scope of this

[9] African (Banjul) Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) Chapter I; Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004) OAU Doc. OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997)

[10] ACHPR, 'General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' 28 November 2004, para 21

[11] OHCHR 'Joint Statement by UN human rights experts, the Rapporteur on the Rights of Women of the Inter-American Commission on Human Rights and the Special Rapporteurs on the Rights of Women and Human Rights Defenders of the African Commission on Human and Peoples' Rights' (OHCHR, 24 September 2015) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16490> accessed 7 December 2020

[12] ACHPR, 'Statement by Commissioner Lucy Asuagbor during launch of ACHPR Campaign for the Decriminalization of Abortion in Africa' (ACHPR, 18 January 2016) <https://www.achpr.org/news/viewdetail?id=83> accessed 7 December 2020; ACHPR, 'Statement by the Special Rapporteur on the Rights of Women in Africa commemorating the Global Day of Action for Access to Safe and Legal Abortion' (ACHPR, 28 September 2016) <https://www.achpr.org/news/viewdetail?id=53> accessed 7 December 2020; ACHPR, 'Statement by the Special Rapporteur on the Rights of Women in Africa on the Occasion of the "Global Day of Action for Access to Safe and Legal Abortion" 28 September, 2018' (ACHPR, 28 September 2018) < https://www.achpr.org/pressrelease/detail?id=22> accessed 7 December 2020

[13] ACtHPR, 'Cases' (ACtHPR, 2020) <https://www.african-court.org/en/index.php/cases> accessed 7 December 2020

thesis, but it is one which has been identified as a high priority for future projects. It is hoped that such a project would not face the same barriers in accessing information that on occasion characterised this thesis.

First-person accounts of contesting women's exclusion from and oppression by citizenship

Carrying out research based on interviews with feminist activists and women directly affected by restrictive abortion legislation would be an important area for future research in relation to this topic. It could serve multiple purposes, including realising the feminist aim of providing space for women to tell their own stories and have their voices heard. This is especially important in relation to abortion and other SRHRs because they are often taboo and stigmatised, and also because those most impacted by restrictive abortion legislation are often those who are least likely to be centred in research or policy. It could also serve the purpose of providing an oral history of, for example, the abortion rights campaign in Ireland from 2012 to the present, or feminist campaigns for abortion law reform in El Salvador in 2015-6. Conducting interviews could also provide insight into how feminists and women affected by restrictive abortion legislation understand their experiences, and whether the idea of citizenship resonates with them. The extent to which the concept of citizenship resonates with or has explanatory power in regard to other social justice movements is another potential avenue for research provided by this thesis.

Social justice struggles as multilevel (feminist) citizenship projects

The intersectional, transnational nature of social justice struggles around issues such as climate justice, prison abolition, and anti-racism lend themselves to a multilevel feminist citizenship project analysis. This is because many of the actors involved in these struggles are ones who have historically been excluded from and oppressed by the traditional discourse of citizenship and rights such as children and young people, Global South and indigenous peoples, and LGBTQ* people.[14] Their engagement with the language and mechanisms of

[14] See for example Black Lives Matter < https://blacklivesmatter.com/>; Fridays for Future <https://fridaysforfuture.org/>; Indigenous Climate Action, <https://www.indigenousclimateaction.com> ; Seed, <https://www.seedmob.org.au/about_seed> ; all accessed 7 December 2020. See also AY Davies, D Rodriguez, 'The Challenge of Prison Abolition: A Conversation' (2000) 27 Social Justice 212; SJ Hartnett (ed), *Challenging the Prison-Industrial Complex : Activism, Arts, and Educational Alternatives* (Chicago IL, University of Illinois Press 2010)

human rights to contest this exclusion and oppression, and to articulate new understandings of human rights obligations such as non-discrimination or the right to a safe environment, represents engagement in a citizenship project that takes place nationally, internationally, regionally, and transnationally. Moreover, applying the framework of the multilevel citizenship project makes visible the interconnected nature of these struggles with each other and with campaigns for women's human rights – at their core, they are all concerned with dismantling white supremacist capitalist patriarchy and building a more just and equitable social, political, and economic order. As such, this research project has articulated a theoretical framework of relevance not only to SRHRs and IHRL, but also to the most crucial and high-profile contemporary social justice struggles.

Conclusion

This thesis began with the exploration of the parallels between two high-profile tragedies in seemingly very different countries, and it evolved into an intersectional feminist critique of IHRL and its potential and limits for realising women's liberation. It demonstrated that feminist activism at the interconnected national, regional, international and transnational levels of the human rights system has resulted in the growing legitimacy of SRHRs including access to abortion in IHRL, and that this feminist activism is part of and speaks to a deeper, longstanding contestation of women's exclusion from and oppression by the white supremacist capitalist patriarchal liberal discourse of citizenship and rights. In applying the framework of a multilevel feminist citizenship project, this thesis highlighted the root causes of women's oppression that inform and are exacerbated by restrictive abortion legislation. It also highlighted the ways in which feminists have contested this oppression, and the ways in which this contestation can and must continue both conceptually and practically.

The law is 'a transformative and emancipatory instrument, flawed and recalcitrant though it may be.'[15] While progress may be slow, uneven and on occasion reversed, intersectional feminist engagement with the language and mechanisms of IHRL to contest women's historical exclusion from and oppression by the discourses of citizenship and human rights is a vital endeavour.

[15] N Menon, *Recovering Subversion*, 6

Annexes

Annex 1 – UN criticism of El Salvador's abortion legislation

1. CAT, 'Concluding Observations on the second periodic report of El Salvador' (CAT/C/SLV/CO/2, 9 December 2009) para 23
2. CEDAW Committee, 'Concluding Observations on the seventh periodic report of El Salvador' (CEDAW/C/SLV/CO/7, 7 November 2008) paras 35-6
3. — —, 'Concluding Observations on the combined eighth and ninth periodic reports of El Salvador' (CEDAW/C/SLV/CO/8-9, 9 March 2017) paras 38-9
4. CERD Committee, 'Concluding Observations on the combined eighteenth and nineteenth periodic reports of El Salvador' (CERD/C/SLV/CO/18-19, 13 September 2019) paras 26-7
5. CESCR, 'Concluding Observations on the second periodic report of El Salvador' (E/C.12/SLV/CO/2, 27 June 2007) paras 25, 44
6. — —, 'Concluding Observations on the combined third, fourth and fifth periodic reports of El Salvador' (E/C.12/SLV/CO/3-5, 19 June 2014) para 22
7. CRC Committee, 'Concluding Observations on the combined third and fourth periodic reports of El Salvador' (CRC/C/SLV/CO/3-4, 17 February 2010) paras 60-61
8. — —, 'Concluding Observations on the combined fifth and sixth periodic reports of El Salvador' (CRC/C/SLV/CO/5-6, 29 November 2018) paras 35-6
9. HRC, 'Concluding Observations on the combined third, fourth and fifth periodic reports of El Salvador' (CCPR/CO/78/SLV, 22 August 2003) para 14
10. — —, 'Concluding Observations on the sixth periodic report of El Salvador' (CCPR/C/SLV/CO/6, 18 November 2010) para 10
11. — —, 'Concluding Observations on the seventh periodic report of El Salvador' (CCPR/C/SLV/CO/7, 9 May 2018) paras 15-6
12. Special Rapporteur on extrajudicial, summary or arbitrary executions (SR summary executions), 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on her mission to El Salvador' (A/HRC/38/44/Add.2, 7 December 2018) paras 87-92, 108
13. Special Rapporteur on violence against women, its causes and consequences (SR VAW), 'Mission to El Salvador' (E/CN.4/2005/72/Add.2, 20 December 2004) paras 73-76, 79
14. — —, 'Report of the Special Rapporteur on violence against women, its causes and consequences, on her follow-up mission to El Salvador (17-19 March 2010)' (A/HRC/17/26/Add.2, 14 February 2011) paras 65-68

Annex 2 – UN criticism of Ireland's abortion legislation

1. CAT, 'Concluding Observations on the initial report of Ireland' (CAT/C/IRL/CO/1, 17 June 2011) para 26
2. — —, 'Concluding Observations on the second periodic report of Ireland', (CAT/C/IRL/CO/2, 31 August 2017) paras 31-2
3. CEDAW Committee, 'Concluding Observations on the initial report of Ireland' in General Assembly Official Records (A/44/38 Supp. 38, 13 February 1990) paras 89, 123
4. — —, 'Concluding Observations on the combined second and third reports of Ireland' in General Assembly Official Records (A/54/38 Rev. 1 Supp. 38, 20 August 1999) para 180
5. — —, 'Concluding Observations on the combined fourth and fifth periodic reports of Ireland' (CEDAW/C/IRL/CO/4-5, 22 July 2005) paras 38, 39
6. — —, 'Concluding Observations on the combined sixth and seventh periodic reports of Ireland' (CEDAW/C/IRL/CO/6-7, 9 March 2017) paras 10-1, 42-3
7. CESCR, 'Concluding Observations on the third periodic report of Ireland' (E/C.12/IRL/CO/3, 8 July 2015) para 30
8. CRC Committee, 'Concluding Observations on the combined third and fourth periodic reports of Ireland' (1 March 2016, CRC/C/IRL/CO/3-4) paras 57-8.
9. HRC, 'Concluding Observations on the initial report of Ireland' (CCPR/C/79/Add.21, 3 August 1993) para 15
10. — —, 'Concluding Observations on the third periodic report of Ireland' (CCPR/C/IRL/CO/3, 30 July 2008) para 13
11. — —, 'Concluding Observations on the fourth periodic report of Ireland' (CCPR/C/IRL/CO/4, 19 August 2014) para 9
12. Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (SR freedom of expression), 'Report on the mission to Ireland' (E/CN.4/2000/63/Add.2, 10 January 2000) paras 57-61
13. Special Rapporteur on the situation of human rights defenders (SR HRDs), 'Report of the Special Rapporteur on the situation of human rights defenders. Addendum: Mission to Ireland (19 – 23 November 2012)' (A/HRC/22/47/Add.3, 26 February 2013) paras 79-87, 111(l)

Annex 3 – UN support for decriminalisation of abortion in the case of a risk to the pregnant person's life or health, in the case of rape or incest, and in the case of fatal foetal abnormality

See Annexes 1 and 2, and also:

1. CAT, 'General Comment No. 2: Implementation of article 2 by States parties' (CAT/C/GC/2, 24 January 2008) para 22
2. CEDAW Committee, 'General Recommendation No. 19: Violence Against Women' (A/47/38, 30 January 1992) paras 19, 24(m)
3. — —, 'General Recommendation No. 21: Equality in Marriage and Family Relations' (A/49/38, 4 February 1994) paras 21, 23
4. — —, 'General Recommendation No. 24: Article 12 of the Convention (Women and Health)' (A/54/38/Rev.1, chap. I, 6 February 1999) paras 2, 11, 12(d), 14, 23, 31(b), (c), (e)
5. — —, 'General Recommendation No. 28: Core Obligations of the States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women' (CEDAW/C/GC/28, 16 December 2010) paras 9, 27, 31
6. — —, 'General Recommendation No. 33: Women's Access to Justice' (CEDAW/C/GC/33, 3 August 2015) paras 47(b), 48, 49
7. — —, 'General Recommendation No. 34: the rights of rural women' (CEDAW/C/GC/34, 7 March 2016) paras 38, 39(a) and (c)
8. — —, 'General Recommendation No. 35: gender-based violence against women, updating general recommendation No. 19' (CEDAW/C/GC/35, 26 July 2017) para 18, 29(c)(i)
9. — —, 'General Recommendation No. 36: the right of girls and women to education' (CEDAW/C/GR/36, 27 November 2017) paras 28, 68, 69
10. — —, LC v Peru (CEDAW/C/50/D/22/2009, 25 November 2011) paras 8.6-9
11. CESCR, 'General Comment No. 14: the right to the highest attainable standard of health' (E/C.12/2000/4, 11 August 2000) paras 8, 11, 14, 21, 23, 34, 35, 36, 44(a)
12. — —, 'General Comment No. 16: the equal right of men and women to the enjoyment of all economic, social and cultural rights' (E/C.12/2005/4, 11 August 2005) paras 12, 29
13. — —, 'General Comment No. 20: non-discrimination in economic, social and cultural rights' (2 July 2009, E/C.12/GC/20) para 29
14. — —, 'General Comment No. 22: The Right to Sexual and Reproductive Health' (E/C.12/GC/22, 2 May 2016) paras 5, 8, 9, 10, 11, 12, 14, 15, 16, 17, 21, 18, 19, 24, 25, 28, 34, 40, 41, 49(a), 56, 59, 62-3
15. — —, 'General Comment No 25: science and economic, social and cultural rights' (E/C.12/GC/25, 30 April 2020) para 33

16. CRC Committee, ‘General Comment No. 4: adolescent health and development in the context of the Convention on the Rights of the Child’ (CRC/GC/2003/4, 1 July 2003) para 31
17. — —, ‘General Comment No. 15: the right of the child to the enjoyment of the highest attainable standard of health’ (CRC/C/GC/15, 17 April 2013) paras 131, 157, 159, 163, 164, 174.
18. — —, ‘General Comment No 20: the implementation of the rights of the child during adolescence’ (CRC/C/GC/20, 6 December 2016) para 60
19. CRPD, ‘Joint statement by the Committee on the Rights of Persons with Disabilities and the Committee on the Elimination of All Forms of Discrimination against Women: Guaranteeing sexual and reproductive health and rights for all women, in particular women with disabilities’ (29 August 2018)
20. — —, Amanda Mellet v Ireland (CCPR/C/116/D/2324/2013, 9 June 2016) paras 7.2-7.11
21. HRC, ‘General Comment No. 19: protection of the family, the right to marriage and equality of the spouses’ (HRI/GEN/1/Rev.9 (Vol. I), 27 July 1990) para 5
22. — —, ‘General Comment No. 28: Article 3 (the equality of rights between men and women)’ (HRI/GEN/1/Rev.9 (Vol. I), 29 March 2000) para 20
23. — —, KL v Peru (CCPR/C/85/D/1153/2003, 22 November 2005) paras 6.1-8
24. — —, LMR v Argentina (CCPR/C/101/D/1608/2007, 28 April 2011) paras 9.1-11
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26. Special Rapporteur on freedom of religion or belief (SR religion), ‘Report of the Special Rapporteur on freedom of religion or belief: freedom of religion or belief and equality between men and women’ (A/68/290, 7 August 2013) paras 52-4
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28. — —, ‘Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health: health-related Millennium Development Goals’ (A/59/422, 8 October 2004) para 13
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31. — —, ‘Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health: criminal laws and other legal restrictions relating to sexual and reproductive health’ (A/66/254, 3 August 2011) paras 15, 16, 21-36, 65 (e), (h)-(m)

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33. Special Rapporteur on the right to education (SR education), ‘Report of the Special Rapporteur on the right to education: girls’ right to education’ (E/CN.4/2006/45, 8 February 2006) paras 107-113, 144
34. — —, ‘Report of the Special Rapporteur on the right to education: the right to comprehensive sexual education in international human rights law’ (A/65/162, 23 July 2010) paras 16-19
35. Special Rapporteur on the rights of persons with disabilities (SR disabilities), ‘Challenges experienced by girls and young women with disabilities in relation to their sexual and reproductive health and rights’ (A/72/133, 14 July 2017) para 11
36. Special Rapporteur on the situation of human rights defenders (SR HRDs), ‘Report of the Special Rapporteur on the situation of human rights defenders: women human rights defenders’ (A/HRC/16/44, 20 December 2010) paras 32, 37, 45
37. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (SR torture), ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: applying the torture and ill-treatment protection framework in health-care settings’ (A/HRC/22/53, 1 February 2013) paras 45-50, 90
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