

‘Repeal the 8th’ in a Transnational Context: The Potential of SRHRs for Advancing Abortion Access in El Salvador

This article undertakes a discursive feminist reading of citizenship and human rights to understand, through the cases of the Ireland and El Salvador, domestic abortion rights movements as part of a transnational women’s rights movement. While abortion has been partially decriminalised in Ireland, approximately 42% of the world’s women¹ of reproductive age still live in a country where abortion is prohibited entirely or only permitted to save a woman’s life or health (Singh et al, 2018: 4). In El Salvador, abortion is illegal, and those suspected of having the procedure are prosecuted. As in Ireland, since 2012-2013 numerous controversies have brought the issue to wider public attention, and have further galvanised the feminist movement to campaign for reform. Feminist abortion rights campaigns in both countries have connected important sites of activism and contestation: civil society, national parliaments, regional human rights systems, and the UN.

Providing an overview of the evolution of sexual and reproductive health and rights (SRHRs), this article emphasises the importance of transnational feminist activism in their development. It discusses the situation in El Salvador regarding women’s rights and access to abortion, before considering the ways in which feminist activists at the domestic level there have used the language and mechanisms of human rights to seek redress and advance SRHRs. In placing the Salvadoran abortion rights movement in dialogue with its Irish counterpart, this article illustrates the consequences of and responses to restrictive abortion legislation.

I. Feminist Approaches to Citizenship and Human Rights

Before doing so, an explanation of ‘citizenship’ and ‘human rights’ as conceptual frameworks is needed. Feminist citizenship scholars understand citizenship as a dynamic, contested process, where new rights can be demanded and new meanings given to existing ones (Lister, 2003: 6). Citizenship and rights are ‘momentum concepts’: ideas that have anti-hierarchical potential which means they can serve as tools for marginalised groups in their struggles for social justice (Lister, 2007: 49).

Moreover, citizenship should be conceptualised as a ‘multi-layered construct’ in which citizenship takes place on national, transnational and supra-national levels. According to this understanding, human rights should ‘be viewed as a specific layer of supra-national citizenship’, one which is more responsive to women’s rights claims than the domestic level (Yuval-Davis, 1999: 122, 127, 128). Supra-national citizenship practices take the form of political mobilisation around human rights, and litigation in regional and international human rights fora (ibid: 127). Attempts to advance SRHRs can thus be understood as a multi-level feminist citizenship project: they seek to constitute active social subjects who define and claim what they consider to be their rights.

Feminist citizenship approaches have much in common with feminist legal theory; taking the two together facilitates an understanding of the transnational feminist movement to realise SRHRs. Feminist legal theory challenges the assumption that the law is neutral, demonstrating that it is a discourse that upholds oppressive societal structures (Fineman, 2005: 19). Indeed, the female legal subject has been constructed as disruptive to the social order if her sexuality and reproductive ability are unregulated (Smart, 1992: 7). These issues are present in international human rights law (IHRL), with the concept of human rights that has developed over the centuries taking a ‘white, Anglo-Western/European, Judeo-Christian, educated, propertied, heterosexual, able-bodied male’ as the normative standard (Hernández-Truyol, 1999: 31). As a result, women’s human rights are accorded a lower priority and subject to greater resistance than other areas of human rights (Charlesworth and Chinkin, 2000). Calling for the liberalisation of access to reproductive healthcare services should thus be understood as a direct challenge to a patriarchal social order that denies women’s right to have rights and be full citizens.

II. SRHRs: Origin and Evolution

Feminist approaches to law and citizenship provide a clear understanding of the origins and evolution of the concept of SRHRs. Feminists within and outside the formal structures of the international human rights regime were integral to this process.

In 1967, the UN General Assembly (UNGA) adopted the Declaration on the Elimination of Discrimination against Women (CEDAW Committee, 1995: para 10). In 1968, reproductive rights were included in a human rights document for the first time, the Proclamation of

Tehran (UNGA, 1968: para 5). The 1975 Declaration of Mexico expanded upon it to refer to the right of individuals, not just couples, 'to determine freely and responsibly whether or not to have children as well as to determine their number and spacing' (UNGA, 1975: para 12). The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was drafted from 1976 to 1979, adopted by the UNGA in 1979, and entered into force in 1981 (CEDAW Committee, 1995: paras 11-13). These were considerable achievements, since many states opposed women's human rights being given a special focus, and women UN staff had to cause 'considerable unrest' within the institutions to ensure attention to women's issues (Fraser, 1987: 18; de Hedervary, 1996: 692).

Around this time, feminist critiques of the population control approach to development began to be heard (Corrêa and Petchesky in Sen, Germain, Chen (eds.), 1994: 107, 108). Women in the Global South were being subjected to coercive state family planning programmes, characterised by forced sterilisation and the use of unsafe contraception, so as to lower birth rates and thus ensure the continued provision of foreign aid and development loans (Hartman, 1995). In response to these issues, and the growth of conservatism and neoliberalism in the 1980s, the concept of reproductive rights was developed: situating issues such as contraceptive access in the context of systemic inequalities, feminists advocated for a holistic approach to the structural barriers facing the realisation of women's human rights (Corrêa and Petchesky, 1994: 108).

Feminist activists from the Global South were integral to highlighting these issues and advancing this approach. In 1984, Development Alternatives with Women for a New Era (DAWN) was founded: their work was instrumental in ensuring that women's rights, including SRHRs, were central to 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 (Petchesky, 2003: 35). Since then, SRHRs have been further developed and legitimised, a process which continues to face challenges from conservative actors, and the UN system's power dynamics (ibid; Barot, 2013).

SRHRs combine four distinct but interrelated fields: sexual health, sexual rights, reproductive health and reproductive rights. They affirm the right of people of all sexual orientations and gender identities to enjoy safe, satisfying sexual relations free of coercion, discrimination and violence, and the freedom to make informed decisions about their sexual and reproductive

health, including if or when to have children (International Commission of Jurists, 2007; IPPF, 2003; WAS, 2014; ICPD, para 7.3). The following rights and principles are necessary to realise this:

- The principle of non-discrimination and equality
- The right to life
- Freedom from torture
- The right to marry and found a family
- The right to information
- The right to a fair trial
- The right to privacy
- Freedom of thought, conscience and religion
- The right to health
- The right to enjoy the benefits of scientific progress (WHO, 2012: 19; UNFPA et. al., 2014: 89-115).

The current UN position is that abortion should be permitted 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 lethal or fatal foetal abnormalities; otherwise the above rights could be violated ([see appendix 1](#), e.g. CAT, 2011; CEDAW, 2011; CESCR, 2016; HRC, 2005, 2011, 2016, 2017).

The above developments have also influenced regional human rights systems. The Organization of American States' (OAS) Inter-American Commission on Human Rights (IACHR) and Inter-American Court of Human Rights (IACtHR) have consistently demonstrated a commitment to SRHRs ([see appendix 2](#), IACHR, 2007; IACtHR, 2012). The Council of Europe's (CoE) European Court of Human Rights (ECtHR), European Committee of Social Rights (ECSR) and Parliamentary Assembly have affirmed the importance of SRHRs, including access to abortion ([CoE see appendix 3](#), Parliamentary Assembly, 2008; ECSR, 2013; ECtHR, 2011). Most notably, the African Union's Maputo Protocol to the African Charter on Human and Peoples' Rights has an article dedicated to SRHRs that requires States parties to authorise abortion in certain circumstances (African Union, 2003, art 14).

III. El Salvador

The growing legitimacy of SRHRs can and has been used by domestic feminist civil society actors across transnational contexts, including El Salvador. As in many Latin American states, the legacy of Spanish colonialism and Catholicism has been one of profound ethnic and socioeconomic inequalities and conservative, patriarchal norms (Htun, 2003: 35). In a similar manner to Ireland, the construction of a Salvadoran national identity drew heavily upon conservative Catholicism, particularly concerning women's proper role in society as maternal bearers of the nation. Feminist activism calling for the decriminalisation of abortion can be understood as a direct challenge to this, because it seeks to redefine the boundaries of citizenship and rights, both of which have historically excluded women.

Under the 1956 Penal Code, abortion was illegal except to save the woman's life (UNPD, 2002: 136-7). In response to widespread clandestine abortion and resultant high rates of maternal mortality, the 1973 Penal Code liberalised abortion access, permitting it when it was the only means of saving the life of the mother, in the case of rape, and in the case of 'serious foetal deformity' (ibid). Reduced penalties were imposed if a 'woman of good conduct' had an abortion in order to protect her reputation (ibid).

During the civil war (1979-1992), women were active in socialist and guerrilla movements, but were often relegated to the performance of traditionally female tasks such as care work; furthermore, feminism was often dismissed as secondary to the main objective of class struggle (Kampwirth, 2004: 75-111; Shayne, 2004: 46-66). Following the 1992 peace accords, legal and constitutional reform took place. In 1994, the Minister for Justice proposed maintaining the 1973 legislation with some minor changes (Agrupación Ciudadana, 2013: 46). However, reminiscent of the Irish Pro-Life Amendment Campaign's role in calling for the 8th Amendment of the Irish Constitution, the Catholic Church and anti-choice groups aligned with it campaigned for the complete criminalisation of abortion (ibid). Given government support for this and the reluctance of feminist organisations to adopt a clear stance on such a controversial issue (Kampwirth, 2004: 95), in 1997 abortion was criminalised without exception and now carries a sentence of between four and twelve years' imprisonment (Código Penal, arts 133-137). To ensure these new provisions' constitutionality, the Constitution was reformed and, as in Ireland, the 'unborn' obtained a

special constitutional status: the Salvadoran constitution defines life as beginning at conception (art 1).

Since 1997, those suspected of having had an abortion are prosecuted (Agrupación Ciudadana, 2013: 8, 10). Many healthcare providers in El Salvador mistakenly believe that they must report suspected abortions to the authorities, or do so because of their personal opposition to abortion (Luz McNaughton et al, 2006: 1927-8). Moreover, in many instances, women have had the charge of abortion increased to that of aggravated homicide which carries a penalty of up to 40 years' imprisonment (Agrupación Ciudadana, 2013: 8,10). UN treaty monitoring bodies have repeatedly criticised the complete criminalisation of abortion ([see appendix 4](#) CAT, 2009; CESCR, 2014; HRC, 2010), as well as the prevalence of discrimination and violence against women in general and poor, indigenous, and Afro-descendant women in particular; an under-resourced and inequitable healthcare system that fails to provide adequate sexual and reproductive health information, education and services; and the length and conditions of pre-trial detention and imprisonment ([see appendix 5](#) *ibid*).

In 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 her pregnancy for 26 weeks, despite medical consensus that this posed a risk to her health and life, and anencephaly being a fatal foetal abnormality (FFA) (Amnesty, 2014: 24-26). Her case was brought before the Supreme Court (310-2013), which ruled against her, in contravention of precautionary measures issued by the IACHR; this resulted in the IACtHR issuing provisional measures requiring the State to permit the abortion (IACHR, 2013; IACtHR, 2013). Beatriz’s daughter was delivered via Caesarean section in June 2013 and lived for five hours; Beatriz suffered permanent kidney damage (Agrupación Ciudadana, 2015). Making use of human rights mechanisms – in a similar fashion to *A, B and C v. Ireland*, *Amanda Mellet v. Ireland* and *Siobhán Whelan v. Ireland* – several civil society groups filed a case on Beatriz’s behalf with the IACHR in November 2013, which was accepted in April 2015 (IPAS, 2015) and has yet to be heard.

‘Las 17’ came to international prominence as a result of ‘el caso Beatriz’. They are seventeen women who have been sentenced to up to forty years in prison for having had abortions (Bougher, Romero, García, 2015: 3-5). There are many others – at least 49 – but ‘las 17’ serve as a symbol for all of them (Salinas, 2019). All these women are poor, were in

precarious or low-paying employment, and had received little or no schooling (Agrupación Ciudadana, 2013: 18, 21). Miscarrying and experiencing complications, they were brought to public hospitals where they were reported to the police (ibid.: 32). Many were interrogated while still undergoing medical treatment or semi-conscious and without a lawyer present (ibid.: 49, 59, 60). They received inadequate legal representation and were sentenced to an average of 30 years in prison on the basis of inconsistent, unreliable evidence (ibid.: 22). Furthermore, pre-trial detention and prison conditions fall well below international human rights standards: 17 were denied medical treatment while being held before trial, or were held in unsanitary conditions while recovering from an obstetric emergency (IACHR/CIDH, 2015). The prison where most of those convicted are held is severely overcrowded, and those who are jailed for abortions are subject to intimidation and assault by prison staff and other prisoners (ibid; Ochoa and García 2013: 9-13, 15-20). International human rights standards regarding basic prison conditions, and the importance of considering alternatives to imprisonment where the accused is a parent, have been contravened, with women being separated from their young children to serve prison sentences of 30 to 40 years' duration (UNGA, 1988; UNGA, 2016). In the case of 'Manuela', the state violated her right to life through failing to provide her with consistent chemotherapy treatment for advanced Hodgkin's lymphoma; she died two years into her sentence (Center for Reproductive Rights, 2014: 1-2; Ochoa and García, 2013: 35-7).

As in Ireland, civil society organisations are campaigning for reform. One of the most prominent of these groups, Agrupación Ciudadana formed in 2009: it promotes awareness about the current situation and the need for change, and provides legal aid to women accused of having had abortions (Agrupación Ciudadana, 2019). Their work is especially necessary in the face of attempts to further punish women suspected of having had abortions: in July 2016 the conservative party ARENA proposed increasing sentences for the crime of abortion to 50 years in prison (Soriano, 2016). In response, in October 2016, left-wing FMLN drew up a reform bill in conjunction with Agrupación Ciudadana and others that proposed the decriminalisation of abortion in the case of rape, incest, FFA and where the woman's life is at risk (Rivera, 2016). In August 2017, a cross-party group proposed a bill for the decriminalisation of abortion in the case of a risk to the woman's life or health, and in the case of rape or statutory rape (Labrador, 2017). These legislative attempts demonstrate that Salvadoran feminist activism could yet result in positive change through the use of domestic campaigns and parliament.

It is difficult to predict whether El Salvador will maintain current legislation or revise its implementation when women continue to be arrested and prosecuted for suspected abortions but others previously convicted and serving sentences have been released (BBC, 2018, 2019a, 2019b; Ford, 2018; The Guardian, 2019; Lakhani, 2016, 2017). While these women are now free, they have been pardoned for having committed a crime or are facing retrial, rather than having their innocence recognised (Martínez Coral, 2018). Furthermore, one of the women was granted asylum in Sweden in March 2017, due to the fear that prosecutor's appeals to reinstate the original verdict would be successful (Moloney, 2017).

The situation is also unpredictable following elections in February 2019. Representing a new party, GANA, comprised of former members of both ARENA and FMLN, the new president Nayib Bukele was elected on a populist, anti-corruption platform; he has yet to make public the composition of his cabinet, or his position on abortion. The composition of the Legislative Assembly, with ARENA occupying 37 seats, FMLN 23 and GANA 11, also adds to the uncertainty (García, 2019; Salinas, 2019; Webber, 2019). A slight majority of Salvadorans are in favour of the current legislation being relaxed, with 57% being in favour of decriminalising abortion in the case of a risk to life or for FFA (Kiernan, 2018).

As a result of Salvadoran legislation on abortion, women are victims of multiple human rights violations. Civil society activism within the country and in the inter-American system, and UN criticism, suggest that the development and growing legitimacy of the concept of SRHRs offer some hope of justice going forward.

Conclusion

As this article has demonstrated, transnational SRHR knowledge and activism is far from linear. The potential to redefine citizenship and human rights is apparent, but power dynamics within and outside the feminist movement mean that resistance, co-optation, and the disregarding of certain voices and experiences are constant challenges (Garita, 2015: 271-294). That the situation in El Salvador is so little known outside the Spanish-speaking world is indicative of some of these dynamics. Using human rights and the law is a fraught process, but in the absence of alternative discourses with the same symbolic and practical force, they are a useful means to articulate claims for women's emancipation. While progress may be

slow, uneven or even reversed, ~~using~~ the law ~~to~~ can nonetheless provide redress – and can ~~reforming the law so it addresses gendered harms – is a vital endeavour that~~ be further reformed ~~it could yet~~ to ensure that women worldwide have access to the full range of SRHRs to which they are entitled.

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Appendix 1: UN sources indicating the grounds for the decriminalization of abortion

¹ As has been highlighted by feminist and queer theorists, the very term 'woman' is problematic (Butler, 1990; Fineman, 2009: 1-8). 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 article 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 (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.