Gender and Justice in International Human Rights Law: The Need for an Intersectional Feminist Approach to Advance Sexual and Reproductive Health and Rights

Abstract

While the concept of sexual and reproductive health and rights (SRHRs) has grown in legitimacy at the regional and international levels of the human rights system in recent decades, it continues to face significant challenges. Not least among these is that liberal, masculinist understandings of human rights continue to inform and limit the legal reasoning of the UN, inter-American and European human rights systems, often inadvertently perpetuating the very stereotypes of the female legal subject that they need to challenge in order to prevent violations of women's human rights. As a result of these problematic conceptual underpinnings, these institutions often take an inconsistent, flawed approach to cases that do not fit comfortably into androcentric understandings of rights violations. This chapter will provide an overview of the origins and evolution of SRHRs, emphasising the centrality of intersectional, transnational feminist activism to its development. It will then undertake a close reading of sample cases from the UN treaty monitoring bodies, inter-American system and European system to highlight the limits of the current approach, and in doing so will propose an alternative, explicitly intersectional feminist approach to legal reasoning that can contribute to jurisprudence that better represents and responds to the lived experiences, needs and realities of women[i] and gender-diverse people, and that better aligns with the original understanding of SRHRs articulated by feminist activists.

Introduction

Sexual and reproductive health and rights (SRHRs) are a prime site in which to observe the dynamics of emerging and contested rights discourses. They concern sensitive subjects related to reproduction and sexuality, such as access to contraception, abortion, and assisted reproductive technology. They also pose a direct challenge to the current gendered political and social order by advocating a transformative approach to human rights and development that requires women's and gender diverse people's full equality, personhood and bodily integrity to be recognised. It is unsurprising, then, that they are often highly controversial and subject to considerable resistance and opposition. These obstacles are further compounded by the problematic theoretical foundations upon which human rights and the law rest and from which they derive their legitimacy. Therefore, feminist theorists and activists must make use of the language and mechanisms of human rights as they currently exist to advance their agenda, and also reshape the boundaries and meanings of these systems.

This chapter will first provide an overview of the origins, evolution, and scope of SRHRs, emphasising the role of feminists – particularly those from the Global South – in developing and legitimising the concept within international human rights law (IHRL). It will then turn to the ways in which the UN treaty monitoring bodies, the Inter-American Commission and Court of Human Rights, and the European Court of Human Rights and the European Committee of Social Rights have applied the concept in their jurisprudence. Focusing on one of the most contested aspect of SRHRs, the need for safe, straightforward and legal access to abortion, this chapter will highlight the limits and contradictions that have arisen in the interpretation of SRHRs at the regional and international levels, arguing that in many respects these limits and contradictions are due to the persistence of understandings of

the law and legal subjects that do not fully represent or respond to women's and gender-diverse people's lived needs and realities. In carrying out its critique of this jurisprudence, this chapter will suggest ways forward for the reconceptualisation of human rights law and its underlying, liberal principles so that they can better ensure human rights are respected, protected and fulfilled for groups which have been and continue to be marginalised and oppressed. Before doing so, an articulation of the theoretical approach taken in this chapter is required.

Taking a discursive approach, the law and human rights – and the liberal concepts that inform them – are understood to be sites of struggle. Although they have been a source of and justification for oppression and exclusion, they are also potential sources of protection, advancement, and liberation. In all likelihood, they will never fully be one or the other, but attempting to reconcile these two contradictory aspects can lead to more nuanced understandings of concepts such as rights, subjectivity, and autonomy, and so can bring about positive social change.

As noted by Flax, 'The liberal political theories we have inherited and depend upon in the contemporary west have produced impoverished and unsatisfactory concepts of reason, subjectivity and justice' (1992, 189). These concepts, along with Aristotelian dichotomies such as public/private and reason/emotion, are fundamental to traditional interpretations of law which have resulted in a legal construction of life, the body and society that are reductive and ideological. Informed by these concepts, the understanding of human rights that has developed since the Enlightenment has taken a 'white, Anglo-Western/European, Judeo-Christian, educated, propertied, heterosexual, able-bodied male' to be the normative standard (Hernández-Truyol 1999, 31). As a result, those who do not conform to this narrow idea of a legitimate subject are at best unable to have their experiences properly recognised before the law, and are at worst considered illegitimate, deviant and other, in need of surveillance and

control. Since the 1970s, feminist and queer legal theory, and other critical approaches to legal studies, have drawn attention to the ways in which it the law is a discourse that upholds and perpetuates sexist, racist, class-based, ableist, heteronormative, cisnormative assumptions about society and legal subjects (Fineman 2005, 19). One of the key developments in feminist legal theory has been the work of Crenshaw and other Black feminist scholars in articulating the concept of intersectionality, **'**a method and a disposition, a heuristic and analytic tool' which names and makes visible the ways in which personal identities and power structures such as gender, race, and class overlap and interact to create differing forms of privilege and disadvantage (Carbado, et al. 2013, 303). Another concept necessary for a comprehensive understanding of the evolution of SRHRs and the resistance they face is Smart's 'legal gaze', the construction of a female subject considered disruptive to the social order if her sexuality and reproductive ability are left unregulated (Smart 1992, 7, 13). The restriction of access to contraception, abortion and other reproductive healthcare services, and the persecution of sexualities and gender identities deemed 'deviant', should be understood through this lens.

In recent decades, feminist legal scholars have analysed these dynamics in IHRL (Bunch 1990; Charlesworth, Chinkin and Wright 1991; Otto 2009). For example, Charlesworth and Chinkin argue that 'feminists should tackle international law on a number of levels at the same time' by using existing laws where possible, reforming them where necessary, and harnessing the 'symbolic force' of IHRL 'to reshape the way women's lives are understood in an international context' (Charlesworth and Chinkin 2000).

To summarise, an intersectional feminist approach to IHRL is required in order to understand the power dynamics that inform it, and to approach it as a site of contestation where alternative, more emancipatory understandings of rights and legal subjects can emerge.

SRHRs are an especially interesting and worthwhile area of IHRL where this process can be observed, as will be discussed in the next section.

Part One: SRHRs – Their Content, Origins and Evolution

In the space of just over fifty years, the concept of SRHRs has evolved and grown in legitimacy in IHRL thanks to the efforts of feminist and LGBTQ* activists. This section will first discuss the current scope of SRHRs in the international and regional human rights systems. The second section will provide a chronological overview of the origins and evolution of SRHRs. In doing so, it will emphasise the integral role of transnational feminist activism, led by Global South feminists, in articulating the holistic, intersectional and structural interpretation of IHRL which needs to inform its interpretation and application for SRHRs to be fully realised.

Section One: SRHRs Today

SRHRs combine four distinct but 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, and to have the freedom to make informed decisions about their sexual and reproductive health, including if or when to have children (IPPF, 2008; WAS, 2014; Yogyakarta Principles, 2017; UNGA 1994, para 7.3). The following human rights are necessary to realise this:

- The principle of non-discrimination and equality

- The right to life
- The right to be free from torture and other forms of cruel, inhuman or degrading treatment or punishment (CIDT)
- 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 (WHO 2012, 19; UNFPA et al. 2014, 89-115).

In relation to abortion, the UN human rights system's current position 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; otherwise some or all of these rights could be violated (Méndez 2016, paras 5-11, 43-4, 72; CAT, 2009; CESCR, 2016; CEDAW, 2011; HRC, 2005, 2011, 2016, 2017). This position has been more consistently asserted in recent years. For example, the UN Committee on Economic, Social and Cultural Rights (CESCR) – the treaty monitoring body which oversees the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR) – released General Comment No. 22 in 2016, which 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 (CESCR 2016, para 1).

The situation varies at the regional level. The African human rights system has adopted the Protocol to the African Charter on Human and People' Rights on the Rights of

Women in Africa (The Maputo Protocol), which has an article dedicated to reproductive rights, including the need to authorise abortion 'in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus' (African Union 2005, article 14). It is the first international human rights treaty to recognise abortion as a human right under certain circumstances (Ngwena 2014,190; African Commission on Human and Peoples' Rights 2014). However, the Maputo Protocol has yet to be signed and ratified by many AU member states, and is subject to numerous reservations; moreover, abortion remains widely restricted across the continent (Ngwena 2010, 2014, 2016). Furthermore, the African Commission and Court on Human and Peoples' Rights have yet to engage with specific cases to the extent that the inter-American and European systems have, and for this reason will not be discussed further in this chapter. Future cases from this regional human rights system should be considered with interest, however.

The two main components of the inter-American human rights system are the Organization of American States' Inter-American Commission on Human Rights (IACHR) and Inter-American Court of Human Rights (IACtHR). The IACHR conducts country visits and work on thematic areas such as women's rights, and hears individual petitions concerning alleged violations of the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights (OAS 1978; OAS 1979, arts 34-51; OAS 1993). The IACtHR is responsible for the application and interpretation of the American Convention on Human Rights (ACHR), and it has jurisdiction over the 25 OAS member states which have acceded to the Convention. It hears cases which have been referred to it from the IACHR's individual petitions system, and also issues advisory opinions on the interpretation inter-American human rights treaties, and on whether domestic legislation is compatible with the Convention (OAS 1978; OAS 1979). As will be discussed in greater

detail in part two of this chapter, the inter-American human rights system – particularly the IACHR – has often taken an intersectional approach to women's and LGBTQ* people's rights, and it has also demonstrated a commitment to SRHRs since the early 2000s. At present, based on a survey of the IACHR's individual petitions system, thematic reports, and country reports, the IACHR's current stance on abortion is that it should be decriminalised at a minimum in the case of risk to the pregnant person's life or health, in the case of rape or incest, and in the case of fatal foetal abnormality (IACHR 2010, 2011, 2015, 2017, 2018). The Court has yet to hear a case on abortion access.

In contrast to the inter-American and African systems, the European human rights system – consisting primarily of the European Court of Human Rights (ECtHR) – has been more cautious and conservative in advocating for SRHRs. The European Committee of Social Rights (ECSR), The Parliamentary Assembly of the Council of Europe (PACE), and the Council of Europe's Commissioner for Human Rights have also engaged on occasion with SRHRs, but a coherent stance on the issue and the extent to which they influence the Court's jurisprudence is difficult to discern (Parliamentary Assembly of the Council of Europe 2008) (Commissioner for Human Rights 2019) (IPPF-EN v. Italy 2013). Four potential reasons for the Council of Europe's cautious approach to SRHRs are the European Convention of Human Rights' focus on civil and political rights, the centrality of the doctrine of the margin of appreciation to the Court's interpretation of the Convention when engaging with controversial issues, the less extensive engagement of the Court (when compared to the UN and inter-American human rights systems) with civil society activism, and the lack of a specialised body dedicated to women's human rights. The Court's current stance on abortion is that States have a wide margin of appreciation to determine under which circumstances it should be legal. If States have decriminalised abortion in certain circumstances, people should be able to access it under those conditions. If they are refused an abortion, they should

have access to a procedure to challenge the decision (A, B and C v Ireland 2010; P and S v Poland 2012; RR v Poland 2011; Tysiąc v. Poland 2007).

In summary, SRHRs have been formally recognised as an emerging 'family' of rights within IHRL at the international and regional levels of the human rights system, but significant interpretative obstacles hinder their full realisation. The next section will consider the root causes of these challenges by providing an overview of the origins and evolution of SRHRs.

Section Two: SRHRs – Origins and Evolution

An awareness of human rights issues relating to reproduction and sexuality first emerged in IHRL at the UN in the 1960s. This section will discuss the development of the concept within the UN to the present day, before summarising its incorporation and interpretation in the inter-American and European human rights systems.

The first reference to reproductive rights occurs in the 1968 Proclamation of Tehran, formulated at the UN's International Conference on Human Rights. The Proclamation's section on 'human rights aspects of family planning' states that 'couples have a basic human right to decide freely and responsibly on the number and spacing of their children and a right to adequate education and information in this respect' (UN General Assembly (UNGA) 12 May 1968, sec XVIII, para 5). During this period, 'second-wave' feminist thinking and activism influenced both domestic and international politics: in 1972, following considerable efforts by feminists within and outside the UN, the UNGA approved a world women's conference to be held in 1975, designated as International Women's Year (Fraser 1999, 894). The 1975 Declaration of Mexico, which was adopted at this conference, 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.’ (UNGA 1975, para 12) This evolution in language and expansion in scope would continue in the following decades.

With the growing focus on human rights work across all aspects of the UN’s work, feminist critiques of the population control approach to development began to be heard (Corrêa and Petchesky 1994, 107, 108). According to this approach, women were ‘targets’ and ‘users’ of coercive family planning programmes, characterised by the use of forced sterilisation and unsafe contraceptive devices, focused on driving down birth rates to ensure continued provision of foreign aid and development loans (Hartman 1995; Jaquette and Staudt 1998). In response to these issues, the growth of conservatism and neoliberalism in the 1980s, and increased attention to the AIDs pandemic, 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 (Antrobus 2004, 31, 67; Corrêa and Petchesky 1994, 108). Feminist activists from the Global South, such as the DAWN coalition, played a vital role in drawing attention to these issues and in advancing this approach, informed by ‘a shared ethical core’ that ‘all human rights have both personal and social dimensions that are intimately connected.’ (Petchesky 2000, 4-5) (DAWN n.d.).

The work of transnational feminist coalitions like DAWN before and during the UN conferences of 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 (Petchesky 2003, 35).

In regard to reproductive rights, the Vienna Declaration and Programme of Action expanded on the 1968 Proclamation of Tehran and the 1975 Declaration of Mexico yet

further, by framing access to 'the widest range of family planning services' as a woman's human rights issue in of itself, rather a means to the end of population control (UNGA 1993, sec IIB, para 41). The ability of feminist transnational activists to place women's issues on the human rights agenda, and reshape human rights to respond to these issues, would also inform the ICPD held in Cairo the following year. It was at this Conference that the contemporary definition of reproductive rights was first articulated.

The ICPD's final document, the Programme of Action, represents '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' (Petchesky 1995, 152). In many respects it also adopted an intersectional understanding of structural inequality, and the ways in which only transformative approaches to law, politics and economics could address it (UNGA 1994, paras 1.5, 1.6, Principles 4, 8, 10, 14, paras 4.1, 4.12, 4.24, 4.25, Chapter VI, paras 7.7, 7.8, 7.9, 7.12, 7.13, Chapters XIII, XIC, XV, paras 15.1-15.4). The ICPD PFA set out the definition of the concepts of reproductive health, reproductive healthcare, and reproductive rights (ibid. paras 1.8, 7.2, 7.3). These were significant advances, as was the inclusion of references to the negative health and human rights impact of unsafe abortion, albeit in heavily qualified terms due to pressure from the conservative coalition led by the Vatican (UNGA 1994, paras 7.23, 8.25) (Buss 1998, 343). The cautious, conservative language of the ICPD PFA concerning abortion, as well as the absence of any discussion of LGBTQ* rights, would be critiqued and developed in subsequent years, including at the Fourth World Conference on Women held in Beijing in 1995.

Due to the conservative and religious right's efforts to 'stem the tide of what they termed 'gender' feminism' (Buss 1998, 340), the terms 'sexuality', 'sexual orientation' and 'sexual health' were excluded from the final Beijing Declaration and Programme of Action.

However, the heated debates surrounding sexuality represented the first time that non-heterosexual sexualities were widely and visibly discussed in the context of an international human rights forum, marking the beginning of the inclusion of the 'sexual' in 'sexual and reproductive health and rights' (Girard 2014). In regard to reproductive rights, the definitions of reproductive rights, reproductive health and reproductive healthcare presented in the ICPD Declaration and PFA were restated, representing their safeguarding against conservative attempts to have them removed and modified; concerning abortion specifically, paragraph 8.25 of the ICPD PFA was restated, but slightly expanded in that states agreed to 'consider reviewing laws containing punitive measures against women who have undergone illegal abortions.' (ibid., paras 94, 95, 106(k)) The subtle but by no means insignificant consolidations and developments achieved by feminist human rights activists at the Vienna, Cairo and Beijing Conferences would serve as an important starting point for further evolution in the concept and legitimacy of SRHRs from the late 1990s to the present. However, they would also face concerted resistance and opposition during this period, especially in the 2000s or 'decade of stagnation' (Garita 2015, 272).

At the 'plus five' review sessions of these three Conferences, 'feminist movements continued to gain ground' on securing commitments to the importance of ending gender-based violence, and the reproductive health and rights of women and adolescents within the framework of the UN's human rights and development work. However, 'the gains of the 1990s were being significantly eroded' due to a less active transnational feminist SRHR movement, sustained fundamentalist religious opposition, and wide-ranging impact of the US administration's neoconservative stance (ibid 273-277). In many respects, this represented the cautionary notes that feminist activists and scholars had sounded about the obstacles SRHRs would face if economic, political and legal structures were not meaningfully reformed: they argued that without such structural change, SRHRs would simply be

incorporated in a reductive form across disparate issue areas, and would also be actively undermined by their opponents (Corrêa 2005; Sen 2005).

Nevertheless, 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 agenda. Since the 2000s, there has been growing attention to LGBTQ* rights as human rights within the UN. 2011 marked the real watershed in LGBTQ* rights at the UN, with a UNHRC resolution affirming the rights of LGBT people and requesting that the OHCHR draft a report 'documenting discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity' (UN Human Rights Council 2011). In 2014, the UNHRC adopted a second resolution on sexual orientation and gender identity which called for a report from the OHCHR on best practices for combating discrimination on these grounds (UN Human Rights Council 2014). An independent expert on sexual orientation and gender identity was mandated through UNHRC Council resolution 32/2, and began their work at the 35th session of the UNHRC in June 2017 (UN Human Rights Council 2016). Sexual health and rights have thus been recognised by the UN system as integral to IHRL.

In regard to abortion access, since 2005 the UN treaty monitoring bodies have issued Views, Concluding Observations and General Recommendations and General Comments 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. For example, the UN Human Rights Committee – responsible for overseeing states' compliance with and implementation of the International Covenant on Civil and Political Rights (ICCPR) – has found states to be responsible for violations of the right to be free from torture and CIDT, the right to equality and non-discrimination, and the right to privacy for failing to provide women and girls with access to

abortion services (KL v Peru 2005, LMR v Argentina 2011, Amanda Mellet v Ireland 2016, Siobhán Whelan v Ireland 2017). The CEDAW Committee, which is responsible for overseeing states' compliance with and implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), has also issued 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 (Alyne da Silva v Brazil 2011; LC v Peru 2011). Although these Views represent a powerful assertion of the UN's stance that abortion must be decriminalised 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, and although they also offer some indication of an awareness of the need for intersectional approaches to challenging structural inequalities that inform and exacerbate restrictive abortion legislation, the inconsistencies and limitations that persist as a result of the liberal legal framework in which they are situated must be acknowledged. These will be discussed in greater detail in Part Two, in relation to the *Mellet* and *Whelan* Views.

While the structural transformation that SRHRs require has yet to come to pass, the growing coherence and legitimacy of SRHRs at the UN is testament to the effectiveness of persistent transnational feminist activism. It also illustrates the importance and utility of intersectional approaches to the law: activists and legal practitioners will not be able to properly address and eradicate one expression of discrimination (for example restrictions to abortion access) without also addressing other expressions of discrimination (for example the criminalisation of homosexuality), and acknowledging that these expressions of discrimination have common origins in narrow, ideological ideas about sexuality and reproduction which serve to justify and perpetuate an unequal social order. Activists and legal practitioners will similarly be unable to address and eradicate such inequalities unless the recognise and actively challenge the ways in which such discrimination can manifest and

differentially impact upon people because of their race, ethnicity, geographical location, age, dis/ability and/or socioeconomic background. Such approaches to IHRL are becoming more apparent within the inter-American system, as will be demonstrated in the next section.

SRHRs in the Inter-American System

The IACHR and IACtHR have consistently demonstrated a commitment to SRHRs in recent years. This is evident in the IACHR's work since the 1990s, and in that of the Court since 2012. This would appear to be for four main reasons: the Commission's dynamic approach to the interpretation of human rights provisions in the American Declaration and Convention and their commitment to the principle of the universality, indivisibility, and interdependence of human rights; the existence of a specialised body dedicated to women's human rights; their engagement with regional feminist civil society activists; and their openness to citing UN interpretations of human rights.

A survey of the origins and evolution of the inter-American human rights system (IAHRS) reveals that issues relating to what are now known as SRHRs are largely absent until the 1990s, but that women's human rights issues have often been given particular attention since its inception. This has been in large part through the work of the Inter-American Commission of Women, also known as the Comisión interamericana de las mujeres (CIM). Interestingly, CIM predates the OAS by twenty years, having been founded in 1928; now a specialised organisation of the OAS, it has its origins in transnational feminist activism of the early 20th century that advocated for women's right to be included in intergovernmental organisations and conferences.

Partly because of the increased attention to women's human rights issues at the UN conferences and partly as the culmination of decades of work by regional feminist activists

and CIM, from 1993 on there is a more pronounced focus on women's human rights issues in the work of the IACHR (CIM n.d.; IACHR 1993; IACHR 1994). In 1994, the Special Rapporteur on the Rights of Women was established within the Commission, and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (the Belém do Pará Convention) was also adopted. In 1998, the Report of the Inter-American Commission on Human Rights on the Status of Women in the Americas was published (IACHR 1998). This Report included a section on the right to health and reproductive health, which it interpreted as being enshrined in article 11 of the American Declaration, articles 5 and 26 of the ACHR, and articles 4 and 5 of the Belém do Pará Convention (ibid). Country reports also increasingly drew attention to SRHR-related issues. For example, the 1999 report on the human rights situation in Colombia framed the criminalisation of abortion as 'a very serious problem for Colombian women, not only from a health perspective, but also considering their rights as women, which include the rights to personal integrity and to privacy' (IACHR 1999).

During the 2000s, the IACHR's annual and country reports included increasing concrete references to sexual and reproductive rights and to LGBTI rights (e.g. IACHR 2001; IACHR 2008), and two friendly settlements contributed to the jurisprudence on the negative human rights impact of forced sterilization and restricting access to abortion, respectively (María Mamérita Mestanza Chavez v Peru 2000; Paulina Del Carmen Ramirez Jacinto (Mexico).

From 2010 to the present, both the IACHR and the IACtHR have increasingly focused on SRHRs, making explicit reference to them in reports, individual petitions, and cases. They have increasingly emphasised the negative human rights impact of the criminalisation of abortion, forced sterilization, and limiting access to IVF, and have also increasingly called on states to respect diverse sexual orientations and gender identities.

In the IACHR's thematic reports during this period, there is a growing focus on the rights of LGBTI people, human rights defenders (HRDs), indigenous peoples – particularly indigenous women – and women's human rights as standalone topics and in relation to SRHRs (e.g. (IACHR 2014) (IACHR 2015) (IACHR 2017)). Of particular relevance here are the 2010 and 2011 thematic reports on access to maternal health services and access to information on reproductive health from a human rights perspective ((IACHR 2010) (IACHR 2011)). 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 also issued precautionary measures concerning the complete criminalisation of abortion in El Salvador (IACHR 2015, Chapter II, paras 42-3). The IACHR's annual reports from 2010 to the present demonstrate a growing awareness of and commitment to an intersectional approach to human rights in general, and in relation to SRHRs in particular (e.g. (IACHR 2011) (IACHR 2013) (IACHR 2018)). In its country reports during this period, the IACHR continued to dedicate specific sections to women's human rights; it also began to focus more on LGBTI rights, and made use of the concept 'intersectional' to describe forms of discrimination experienced by women and the ways in which states should address it (e.g. (IACHR 2013, Chapter 6) (IACHR 2015, para 395) (IACHR 2012, Chapters V, VII)). Its 2015 reports on Guatemala and Honduras and 2017 report on Venezuela make explicit references to sexual and reproductive rights and the measures states should take to ensure their full realisation ((IACHR 2015) (IACHR 2015, paras 398-401) (IACHR 2017, para 436)). Following country visits in 2018 to El Salvador and Honduras, both reports both specifically mention the negative human rights impact of the complete criminalisation of abortion, and stated 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 of fatal foetal abnormality (IACHR 2018) (IACHR

2018). It can therefore be asserted that this is the IACHR's current position on access to abortion.

Numerous scholars have highlighted the growing attention to women's human rights in the IACtHR's jurisprudence since the 2000s, and the limits and potential of their current approach (Acosta López 2012) (Celorio 2011). In relation to SRHRs, the Court has yet to hear a case on the negative human rights impact of the criminalisation of abortion, although it did issue provisional measures in relation to the 2013 abortion controversy in El Salvador (IACtHR 2013). The 2012 *Artavia Murillo v Costa Rica* case has some significant implications for any future cases on reproductive health and rights for reasons which will be discussed in Part Two of this chapter. In this case, the IACtHR found that the State's complete prohibition on IVF violated the right to personal integrity, personal freedom, privacy, and family life in relation to the equality and non-discrimination provision of the ACHR (Artavia Murillo et al ('In Vitro Fertilization') v Costa Rica 2012). Subsequent cases on the rights of people living with HIV and on forced sterilization also contributed to the Court's jurisprudence on SRHRs; they drew upon UN jurisprudence on SRHRs and took something of an intersectional approach in considering the interaction between factors such as HIV status, age, socioeconomic status, and gender (Gonzalez Lluy et al v Ecuador 2015) (IV v Bolivia 2016). In 2017, the Court issued an advisory opinion on state obligations in relation to gender identity, equality and non-discrimination of same-sex couples. In this opinion, the Court declared that the right to have one's name, public records, and identity records changed to conform to a person's gender identity is protected under the ACHR, and that states must extend all existing legal mechanisms, including marriage, to same-sex couples (IACtHR 2017). A significant advance for sexual rights, it is in marked contrast to the ECtHR's jurisprudence on marriage equality, which holds that it is within states' margin of appreciation as to whether or not to allow LGBTQ* couples to marry and that article 12 of

the European Convention should not be interpreted to extend the right to marriage to non-heterosexual couples (e.g. (Schalk and Kopf v Austria 2010). In relation SRHRs in general – from access to abortion to marriage equality – the European system has been considerably more conservative than its largely progressive, intersectional inter-American counterpart.

SRHRs in the European System

Within the Council of Europe (CoE), the Parliamentary Assembly, the Commissioner for Human Rights, the European Committee of Social Rights (ECSR), and the European Court of Human Rights (ECtHR) has in some respects affirmed the importance of SRHRs, albeit in a less coherent and more cautious manner than the IAHRS or UN. Moreover, a survey of the ECtHR's history suggests less dialogue with and influence of both feminist civil society activism and the UN system. The absence of a body such as the UN's CSW and the OAS' CIM may be one contributing factor to this.

Until reforms of the system in 1998, the Court was complemented in its functions by a European Commission of Human Rights. Now defunct, some of its rulings still exert an influence on the Court's jurisprudence, such as the 1978 Commission decision in *Brüggemann and Scheuten v. Germany*, to the detriment of SRHRs. The applicants argued that German abortion legislation of the time – which criminalised abortion except for 'in specific situations of distress of the woman concerned' – interfered with their article 8 right to privacy (Brüggemann and Scheuten v. Federal Republic of Germany 1977, paras 4-5). 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' (ibid para 61). This is indicative of the problematic nature of traditional understandings of the right to privacy that fail to capture the complexity of non-

masculine embodied experiences. The problematic nature of this decision was highlighted in one dissenting and one separate opinion, both of which argued that restrictive abortion legislation should be considered a violation of article 8(2) (Dissenting Opinion, para 7). The separate opinion asserted that 'the self-determination of women' is the issue on which cases concerning restrictive abortion legislation need to focus, 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' (Separate Opinion, paras 1-2). The separate opinion also highlighted that traditional understandings of the right to privacy 'depended on the outlook which has been formed mainly by men' (ibid para 3). The ideas expressed in these two opinions have yet to find full articulation in contemporary ECtHR jurisprudence.

During the 1980s and 1990s, the Court heard a number of cases relating to women's rights and LGBTQ* rights, in many instances finding the applicants' article 8 rights to have been violated due to the disproportionate or unjustified nature of the interference that legislation imposed (Dudgeon v The United Kingdom 1981) (B v France 1992) (Open Door and Dublin Well Woman v Ireland 1992) (Burghartz v Switzerland 1994). Perhaps because of the Court's cautious, deferential approach, there is little discussion of systemic discrimination, or of how legislation criminalising homosexuality or with a discriminatory impact on women has its origins in and serves to perpetuate an unequal social order. This failure to address such concerns is in contrast to the approach of the IACHR and IACtHR.

In the 2000s and 2010s, the Court began to hear more cases concerning SRHR-related issues such as forced sterilisation and gender identity, but did not use the term 'SRHR' to describe them (KH and Others v Slovakia 2009) (Christine Goodwin v The United Kingdom 2002). In contrast to the IAHRS and UN stance 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 (A, B and C v Ireland 2010) (P and S v Poland 2012) (RR v Poland 2011) (Tysiąc v. Poland 2007). This position 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. It is hoped that the case pending before the Court concerning access to abortion in Northern Ireland will finally redress this and bring the European system more in line with its UN and inter-American counterparts (A and B v the United Kingdom (pending) 2019).

The work of the Commissioner for Human Rights, established in 1999, might also contribute to an evolution in the Council of Europe's approach to SRHRs. Since 2007, the Commissioners have used the term 'sexual and reproductive rights' in their reports and issue papers (Commissioner for Human Rights 2008, paras 78-80) (Commissioner for Human Rights 2011, section I.7) (Commissioner for Human Rights 2011, 4-5). Most notably, the 2017 report on women's sexual and reproductive rights in Europe makes use of an explicitly intersectional framework to conceptualise both SRHRs and the steps states must take to implement them fully (Commissioner for Human Rights 2017). The Commissioners have also issued statements on the need to decriminalise access to abortion (Commissioner for Human Rights 2019) (Commissioner for Human Rights 2018).

Along with the Commissioner for Human Rights, the ECSR, which is responsible for overseeing the implementation of the European Social Charter, has also taken a more assertive stance than the Court on the importance of abortion rights. Two ECSR decisions found there to be a violation of article 11(1) on the right to health, and in conjunction with it, a violation of article E on non-discrimination, due to the overly-broad nature of domestic conscientious objection provisions relating to abortion impacting on women being able to access the procedure (IPPF-EN v. Italy 2013) (CGIL v Italy 2015). In its survey of relevant

law, the Committee referred to UN human rights treaties and their treaty monitoring bodies' interpretative standards, as well as WHO guidelines on abortion and conscientious objection (ibid).

Finally, in recent years the Court has made use of the concepts of 'vulnerability' and 'vulnerable groups' in ways that partially parallel intersectional approaches to inequality, and that this approach has some potential in framing and addressing multiple forms of inequality experienced by marginalised groups; this is a development worth monitoring in the coming years (Timmer 2013) (Peroni and Timmer 2013).

In light of these developments, there is some hope that the European human rights system, and the ECtHR in particular, may yet adopt a more reflexive, progressive approach to SRHRs, recognising their legitimacy as a family of rights in IHRL, and engaging more fully with standards and jurisprudence developed by the UN and IAHRS.

These issues, and the ways in which all three human rights systems under consideration in this chapter could bring their approach to SRHRs more in line with their intersectional feminist core, are the focus of the next part.

Part Two: Current Jurisprudence and a Proposals for an Alternative Approach

As highlighted in Part One of this chapter, SRHRs continue to face significant challenges in the form of concerted opposition from conservative forces. Their full realisation is also hampered by the need for a more intersectional feminist approach to legal reasoning. The first cases considered will be the UNHRC *Amanda Mellet v Ireland* and *Siobhán Whelan v Ireland* , followed by the IACtHR *Artavia Murillo et al v Costa.* The final section will consider the ECtHR's *A, B and C v. Ireland*.

Before turning to these analyses, the key ideas underpinning this intersectional feminist approach to IHRL need to be briefly set out. In essence, it turns upon reconceptualising the liberal legal subject so that the rights that flow from having the status of a legitimate legal subject take on new meanings. This requires disrupting the rigid dichotomy between 'a liberal quasi-disembodied subject' and 'a human, embodied, vulnerable subject' that the development of the law and human rights has created (Timmer 2013, 152). In doing so, the law's historical 'others' – such as women, LGBTQ* people, and people of colour – can have their agency and concerns recognised as legitimate, and so can reshape the law and human rights to represent and respond to their experiences. In the context of advancing SRHRs, and particularly access to abortion, this has implications for the ways in which the right to equality, the right to privacy, and the right to be free from torture and CIDT should be interpreted and applied.

Formal equality, in which the same law is applied equally to everyone, has been criticised by feminists as doing little to address power imbalances and as perpetuating the imposition of a male norm against which others must be measured (Fineman 2005) (Hunter 2008). Substantive equality has been proposed as a more promising alternative, given that it focuses on the outcomes of the law's application and seeks to address discrimination and oppression (Fineman 2005, 4). Substantive equality offers a potential starting point for acknowledging the ways in which the law has historically conceptualised women's embodiment as problematic, in need of regulation, and grounds for their exclusion from full legal subjecthood and agency. As the close reading of cases in this section will illustrate, there are some indications that the UN human rights system is gradually moving towards adopting a more consistently substantive approach to equality but there is still resistance. At the regional level, the inter-American system regularly invokes the non-discrimination principle in conjunction with rights violations, and has interpreted protected statuses in a

dynamic and evolving way. In contrast, the ECtHR inconsistently invokes the principle of non-discrimination, and it remains under-theorised.

In challenging the public-private dichotomy and offering a more nuanced understanding of autonomy by emphasising its relational nature, this theoretical framework offers a more comprehensive understanding of the right to privacy than it being simply 'a right to be left alone' (Neff 1991, 329) It also recognises that the state often applies the public-private divide in a selective fashion that enables it 'to interfere with' a woman's decision whether or not to continue with a pregnancy 'in furtherance of its own policies' (ibid). Applying this framework requires a shift from a competing-rights model to a relationship-based approach, in which the relationship between the woman and her pregnancy, between her and other people in her life, and between her and wider power structures are all taken into account. Moreover, in arguing that women are full legal subjects who can and should have the ability to participate in shaping the scope and meaning of rights, it opens up the possibility of a more reflexive understanding of the right to privacy that takes into account and responds to women's realities and needs. Ideally, this right to privacy would be one that simultaneously respects the deeply personal nature of deciding whether or not to continue with a pregnancy, while also ensuring that necessary state supports are provided to allow for the woman's decision to be respected and realised. The extent to which the UN, IACtHR and ECtHR have aligned with such an interpretation will be discussed below.

In regard to freedom from torture, by reconciling the quasi-disembodied, invulnerable liberal subject and the human, embodied vulnerable subject, vulnerability can be understood as simultaneously universal and taking particular forms, and as a condition which can be exacerbated by existing power structures such as patriarchy (Turner 2008, 13-14, 259) (Fineman 2008). The right to be free from torture can then be reinterpreted to better recognise the particular ways in which women's embodiment – especially in relation to reproduction

and sexuality – can be a site of abuse, mistreatment and violence. As will be discussed below, the UN and inter-American human rights systems have demonstrated some willingness to do so. One reason for these is advances in the inter-American system could be that under the American Convention on Human Rights, freedom from torture falls under a broader category of the right to humane treatment which includes not just the standard IHRL prohibition on torture and CIDT in article 5(2) but also articulates a right to physical, mental, and moral integrity in article 5(1). In contrast, article 3 of the European Convention on Human Rights only refers to 'torture or to inhuman or degrading treatment or punishment' and has been narrowly interpreted by the ECtHR because of the subjectivity of the *de minimis* rule and its roots in a male-centred understanding of torture. These advances and limitations will now be explored in relation to the UN Human Rights Committee, the IACtHR, and the ECtHR.

The UN

The UN Human Rights Committee (HRC), which is responsible for overseeing the implementation of the International Covenant on Civil and Political Rights (ICCPR) issued two Views that reveal some of the key theoretical issues concerning the interpretation of human rights in relation to abortion. In both *Amanda Mellet v. Ireland* and *Siobhán Whelan v. Ireland*, the HRC found Ireland to be 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. Both Views concerned women who had to travel to the UK to obtain an abortion following the diagnosis of fatal foetal abnormalities.

In recognising these women's experiences as traumatic and a violation of the right to be free from torture, the HRC effectively reconceptualised this right to include and respond to women's lived experiences. Both women were subjected to conditions of intense physical

and mental suffering amounting to cruel, inhuman or degrading treatment due to the lack of continuity in care; the distress of having to choose between continuing their non-viable pregnancies to term or travelling abroad at personal expense to receive medical treatment; the shame and stigma arising from the criminalisation of abortion; and the suffering caused by having to leave their children's remains in the UK, to be delivered later (and in Ms Mellet's case, unexpectedly) by courier (Amanda Mellet v Ireland 2016, para 7.4) (Siobhán Whelan v Ireland 2017, paras 2.5, 7.5). Rather than a narrow understanding of torture which prioritises state action over state inaction and physical cruelty over mental suffering, this is an empathic and nuanced understanding of ill-treatment as personal, cumulative, and both physical and psychological. 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 interrelatedness of human rights. The acknowledgement of shame and stigma's profound effect in this context is also an important development, and seems to have been informed by the work of CAT Special Rapporteur Juan Méndez, among others (Méndez 2013, 2016; Cook 2014).

The HRC also effectively articulated connections between the right to be free from torture and the right to privacy. In finding the State's interference with the applicants' ability to decide as to how best cope with their non-viable pregnancies to be unreasonable and arbitrary, the Committee made reference to the 'intense suffering' and 'mental anguish' Ireland's restrictive abortion legislation had inflicted on the applicants (Mellet v Ireland, para 7.8; Whelan v Ireland, para 7.9).

However, the Committee's Views, concurring opinions, and dissenting opinions also epitomised some of the continued conceptual uncertainty surrounding SRHRs. For example, the Committee did not consider the applicants' allegations under articles 2(1) and 3 of the

Covenant, which pertain to the principle of non-discrimination. While it did find that the right to equality before the law had been violated, it did so using both a formal and a substantive understanding of equality without effectively linking the two. 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 (Mellet v Ireland, para 7.10; Whelan v Ireland, para 7.12). It then acknowledged that Ireland's criminalization of abortion was informed by gender-based stereotypes of women's reproductive role, made a passing reference to 'similarly situated women' without explaining who these women were, before citing the applicant's medical needs and socioeconomic circumstances as further reasons for a violation of article 26 (Mellet v Ireland, para 7.11).

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 should have taken the opportunity to articulate the ways in which denying women 'the right to choose' is a form of gender-based discrimination (Mellet v Ireland, Appendix I, paras 3,4; Appendix II, paras 3-16). 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 (Mellet v Ireland, Appendix V). 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' (Mellet v Ireland, Appendix V, para 4). 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 (ibid, Appendix II, para 8). 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.

The Committee also 'sidestepped' a discussion of whether or not article 19 had been violated by deciding not to separately examine allegations in relation to the restrictions in Irish law on the freedom to seek, receive and impart information about abortion (Mellet v Ireland, Appendix IV, para 1). Three Committee members asserted in their concurring opinion that 'the existing legal framework encourages the withholding of clear and timely information' that is necessary for individuals to make fully informed decisions about their reproductive health (ibid para 6). 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 reproductive rights, and would have been further proof of the interrelated and indivisible nature of human rights.

To summarise, the HRC's approach to interpreting the right to be free from torture marks a welcome evolution, and its recognition of its connection with the right to privacy is also commendable. This reasoning is broadly in keeping with a feminist approach to legal reasoning. The ongoing debate about how best to interpret equality suggests there is a need for a more coherent theoretical approach; adopting a substantive approach to equality, one which explicitly recognises the intersection of unequal power relations such as gender, race and class in the violation of human rights, would be a positive development from an intersectional feminist perspective. There are some indications that the IACtHR is beginning to take such an approach, as the next section will illustrate.

The IACtHR

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 (Artavia Murillo et al ('In Vitro Fertilization') v Costa Rica 2012). 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 system; 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, enshrined in article 4(1); and made some attempt at an intersectional approach to recognising human rights violations. The limits of its intersectional approach, and the persistence of ideas about the integrity of motherhood to women's identity require critique, however.

In articulating its understanding of the right to privacy as it pertained to the case at hand, the Court emphasised its interrelationship with the right to life, the right to found a family, the right to physical and mental integrity, the right to health, and the right to enjoy the benefits of scientific progress. 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' (ibid, paras 144, 146, 147). It also directly quoted the definitions of SRHRs articulated by the 1994 ICPD Programme of Action, 1995 Beijing Declaration and Platform for Action of the Fourth World Conference on Women, and Committee on Economic, Social and Cultural Rights. This holistic approach to the interrelated nature of human rights of relevance to SRHRs, and reliance on the ICPD and Beijing PFAs indicates the IACtHR's commitment to feminist understandings of human rights law. So too does the use of the terms 'reproductive autonomy' and 'reproductive freedom', which are often used by feminist activists and scholars to indicate that human

rights are a useful discursive framework to realise structural change and social justice (Hernández-Truyol 1999) (Sifris 2014) (Corrêa, Petchesky and Parker 2008).

The Court's dynamic approach to interpreting the Convention and specifically the right to life is one of the major developments this case made to its jurisprudence that will have important implications for future SRHR-related cases, especially relating to IVF and abortion. Its analysis of article 4(1) ACHR 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 (Artavia Murillo v Costa Rica, paras 73-77). In order to counter this assertion, the Inter-American Court interpreted the word 'conception' in terms of its ordinary meaning (paras 174-190), according to a systematic and historical interpretation (paras 191-244), an evolutive interpretation (245-256), and according to the principle of most favourable interpretation (paras 257-263). On the basis of this analysis, it concluded that 'the embryo cannot be understood to be a person for the purposes of Article 4(1)' and that the embryo's right to life following conception (understood as occurring at the moment of implantation) is 'gradual and incremental according to its development' (para 264). 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 undertook a systematic and historical analysis of these conventions and declarations to demonstrate that such a conclusion was mistaken and would jeopardise the human rights of pregnant people (paras 191-244). 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 (paras 226-8). 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 (paras 243, 235). It is surprising that the Court did not allude to the work of the IACHR on SRHRs in its discussion of the inter-American system, however (paras 220-23).

This oversight, along with an assertion that 'motherhood is an essential part of the free development of a woman's personality' (para 143) were nuanced by an attempted intersectional approach to the ways in which the ban on IVF differentially impacted on the complainants according to disability, gender, and socioeconomic situation (para 276, 284). It emphasised the importance of the principle of non-discrimination, and drew attention to the importance of challenging both direct and indirect discrimination (para 286). However, the way in which it approached disability, gender and class was not entirely in keeping with intersectional feminist understandings. Firstly, its presentation of its analysis – discussing each of the three categories under separate sub-headings – makes it seem as though these categories are separate and additive, rather than interrelated and interacting in complex ways (paras 288-293, 294-302, 303-304). 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 additional barriers and prejudices in accessing IVF (paras 85, 288-293). Its discussion of gender featured some promising and reasonably nuanced points: it recognised the 'differentiated disproportionate impacts owing to the existence of stereotypes and prejudices in society' and emphasised that it was not 'validating' them but only recognising and defining them 'in order to describe the disproportionate impact of the

interference caused by the Constitutional Chamber's judgment' (paras 294, 302). It also asserted that because of the existence of these stereotypes and the resulting internalised, highly gendered expectations and pressures about becoming a parent, the complete ban on IVF had the effect of indirectly discriminating against those who wished to become parents and could not because of involuntary fertility (paras 294, 296, 299, 301).

In sum, *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. Further engagement with the IACHR's work on SRHRs and a more comprehensive understanding of intersectionality will improve even further on these promising beginnings. This is in marked contrast to the ECtHR, which has taken a far more deferential and conservative approach to the state restrictions on SRHRs.

ECtHR: A, B, C v Ireland

The ECtHR has taken a very different approach to abortion compared to the UN and the IAHRS. Rather than acknowledging the negative human rights impact of restrictive abortion legislation, it has employed the following line of reasoning: firstly, it has ruled that it is neither 'desirable or possible' to decide whether the right to life (article 2 ECHR) applies to the foetus, given the absence of European and scientific consensus on when life begins (Vo v France 2004). Secondly, it has acknowledged that any potential right to life the unborn is 'implicitly limited by the mother's rights and interests' (ibid, para 80). In light of these considerations, and the fact that there is a broad European consensus to permit abortion in at least some circumstances, the Court has generally found that where abortion is legal, it should be accessible (Tysiąc v. Poland 2007, paras 121-130) (A, B and C v Ireland 2010, para 235). 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 have access to an appeals mechanism should they be refused access to this procedure (A, B and C v Ireland, para 154; RR v Poland para 200; Tysiąc v Poland, paras 121-130). The lack of a gender-sensitive approach and engagement with SRHRs that this approach represents has resulted in a body of jurisprudence that does little to advance women's human rights.

A, B and C v Ireland concerned three applicants who had to travel to the UK to have abortions.[ii] All three experienced complications following the procedure once back in Ireland, with A having to be taken to hospital by ambulance for emergency care and C experiencing 'prolonged bleeding and infection' (para 16, 21, 26). 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) (ibid para 113). 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 these rights as well as her right to life (article 2) (ibid).

Despite considering the ICPD and Beijing PFAs (paras 104-5), and 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 (paras 109-11), the Court found that there had been no violation of the applicants' rights, with the exception of C's right to privacy. In contrast to the UN HRC, the ECtHR ruled that the psychological, physical and financial burden of having to travel abroad for an abortion 'did not disclose a level of severity falling within the scope of Article 3' (para 164). It 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 (para 162). This too is in marked contrast to the approach taken by the UN HRC in *Mellet* and *Whelan*.

The Court also dismissed A and B's allegations that their right to privacy had been violated. This was because 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' (paras 241-2). Since the applicants had had access to information and medical care in Ireland, and were legally permitted to travel abroad for an abortion, the Court ruled that the Stated 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 (ibid). The Court was extensively criticised for this reasoning in both case commentaries and the Joint Partly Dissenting Opinion (Ronchi 2011) (Ryan 2014) (Westeson 2013). The latter questioned the Court's finding that 'these profound moral views are still well embedded in the conscience of the majority of Irish people' and stated that considering 'profound moral views' as capable of overriding the European consensus marked 'a real and dangerous new departure in the Court's case-law' (Joint Partly Dissenting Opinion, para 9). In contrast to the UN HRC Views and the applicants' own allegations, the Court failed to recognise that the criminalisation of abortion in Ireland prevented women from making free and informed decisions about their sexual and reproductive health, thus violating their rights to privacy and to non-discrimination.

In relation to C, the Court decided that her allegation of a violation of article 2, i.e. 'her complaint that she was required to travel abroad for an abortion given her fear for her life', fell to be examined under Article 8 (para 158). In this respect, at least, the Court found that her right to privacy had been violated. This was because the state had 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 (paras 267-

8). 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 (paras 270, 274). The lack of gender-sensitive reasoning, let alone intersectional feminist reasoning, in this case is in marked contrast to the approach advocated for by feminist activists and that is increasingly adopted by the UN and inter-American human rights systems. It is hoped that future cases before the ECtHR will align with the growing IHRL consensus that SRHRs, including straightforward access to safe and legal abortion, are vital to ensure the respect, protection and fulfilment of women's human rights.

Conclusion

There is a contested, difficult process underway at the regional and international levels of the human rights system to ensure that women's rights are recognised as human rights. This is especially apparent in relation to SRHRs and access to abortion specifically, as claims for reproductive agency and autonomy threaten the patriarchal social order that requires the subordination of women's reproductive function integral to its continuation. At the international and regional levels of the human rights systems, there is evidence of varying degrees of responsiveness to this approach, as well as the tensions inherent in such structures attempting to adopt a more intersectional feminist approach. The UN has been a prime site for the articulation and advancement of SRHRs, as evidenced by the origins and evolution of the concept, and the jurisprudence and policy of special procedures and treaty monitoring bodies. The IAHRS has also contributed to the promotion and protection of SRHRs through regional transnational feminist activists' influence on the OAS and the UN, and through the work of the IACHR, CIM and – to a lesser extent – the IACtHR in drawing attention to and challenging the ways in which they are restricted in the region. There are certain indications

of SRHRs gaining in visibility and legitimacy at the CoE, largely through the work of the ECSR and the Commissioner for Human Rights. However, the ECtHR – arguably the cornerstone of the CoE's human rights protection system – and other institutions such as Parliamentary Assembly and the Committee of Ministers need to move away from the deferential approach to human rights protection characterised by its doctrine of the margin of appreciation, and instead embrace its more progressive doctrine of the Convention as a living instrument. A revised understanding of article 14, and the relationship between the ECHR and the ESR, would also be welcome. Across all three systems, more representation of women, more dialogue with civil society and across the systems, and a clearer understanding of the ways in which violations of women's human rights are a symptom of wider structural inequalities, is required to fully advance SRHRs and achieve true gender justice.

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[i] As has been highlighted by feminist and queer theorists, the very term 'woman' is problematic (Butler 1990) (Fineman 2009). 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. '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.

[ii] Until January 2019, abortion was prohibited in Ireland except where there was a risk to the woman's life. Until 2013, Article 40.3.3˚ and Sections 58 and 59 of the 1861 Offences Against the Person Act (hereafter, 1861 Act) formed the basis of Irish abortion legislation. The punishment for women who induced a miscarriage, or those who assisted them in doing so, was life imprisonment, while the supply of abortifacients was punishable by three years in prison. In 1983, Article 40.3.3º, also known as the 8th Amendment, was added to the Constitution. This amendment guaranteed 'the right to life of the unborn.' From 2013 to 2019, the Protection of Life During Pregnancy Act legislated abortion in the case of a risk to the woman's life, including from suicide, and punished the intentional 'destruction of unborn human life' with 14 years in prison, an unlimited fine, or both. Women were legally entitled to travel abroad for an abortion and to obtain information on abortion under the Thirteenth and Fourteenth Amendments to the Constitution and The Regulation of Information (Services outside the State for Termination of Pregnancies) Act 1995.