Boston College International and Comparative Law Review

Volume 22 | Issue 1 Article 8

12-1-1999

Member State Sovereignty and Women's Reproductive Rights: The European Union Response

Peta-Gaye Miller

Member State Sovereignty and Women's Reproductive Rights: The European Union's Response

INTRODUCTION

By purporting to protect the rights of individuals in each Member State, European Union (EU) law confronts not only the economic and political interests of its Member States, but also sensitive moral issues.[1] In keeping in line with the goals of the Maastricht Treaty,[2] specifically to respect the fundamental rights of citizens in Member States, EU law faces a balancing of opposing moral interests of Member States, which is manifest in the balancing between fetal rights and women's rights.[3] Through the Maastricht Treaty, the EU intended to respond to the changing needs of Europe both politically and economically,[4] however, since its implementation the EU has also encountered the changing moral needs of its Member States.[5]

In seeking to achieve an even closer union among the peoples of Europe, the EU has undertaken a transfer of duties from the Member States, yet, has done so within limited fields.[6] Although these fields have been extended recently, there are limits on the extent to which the EU can substitute itself for the Member States.[7] These limited fields are delineated to protect against intrusive actions of EU law into the domestic issues of Member States, inclusive of issues dealing with morality.[8] The constitutional protection of the rights and principles con-

---

[1] *See* Siofra O'Leary, *Aspects of the Relationship Between Community Law and National Law, in* THE EUROPEAN UNION AND HUMAN RIGHTS 37 (Nanette A. Neuwahl & Allan Rosas eds., 1995) [hereinafter HUMAN RIGHTS].

[2] *See* Treaty on the European Union, Feb. 7, 1992, 31 I.L.M. 247, art. F [hereinafter Maastricht Treaty]. Article A of the Maastricht Treaty states that the European Union is founded upon the European Community, and thus for simplicity the European Community will be referred to as the European Union (EU) throughout this Note.

[3] *See* Dinah Shelton, *International Law on Protection of the Fetus, in* ABORTION AND THE PROTECTION OF THE HUMAN FETUS 7 (S.J. Frankowski & G.F. Cole eds., 1987) [hereinafter ABORTION].

[4] *See* HUMAN RIGHTS, *supra* note 1, at 37.

[5] *See id.*

[6] *See id.*

[7] *See id.*

[8] *See id.*

strued as fundamental by a given community is precisely one of these limited fields, since it is not possible to find in the legal and social orders of the Member States a uniform European conception of morality.[9] However, the growing concern of an undermining of women's fundamental rights[10] in certain Member States could break this construction of limited fields and force EU law to extend beyond its political and economic dimensions into the realm of moral decision-making.[11]

This note discusses whether a greater female presence in the EU will press the EU to recognize women's reproductive rights as fundamental human rights, thereby expanding the reach of EU law beyond economic and political decision making to moral decision making. Part I of this Note sets out the conflict facing the EU between women and the fetus. Part II of this Note undertakes a comparative analysis of the abortion regulations currently in effect in Ireland and England by exploring the historical (judicial and legislative) context in which these policy decisions were formulated. Part II further explores how the divergent abortion regulations of these two Member States define women's reproductive rights by either identifying or repudiating these rights as a fundamental human right. Part III examines the expanding voice of women in the EU with a resultant push towards recognizing certain women's issues as human rights issues. Finally, the Note examines the potential impact on the Member States if EU law becomes the moral decision maker, and thus recognizes women's reproductive rights as having human rights proportions. This Note concludes that if the EU intends to protect the rights of *all* individuals, it will eventually be forced to take on the role of moral decision maker, and identify women's reproductive rights as a fundamental human right.

I. BACKGROUND

Article 2 of the European Convention of Human Rights (Convention) guarantees that, "[E]veryone's right to life shall be protected by law."[12] The scope of Article 2's protection has caused much attenuated

---

[9] *See* HUMAN RIGHTS, *supra* note 1, at 37.

[10] *See* Kathleen M. McCauley, *Women on the European Commission and Court of Human Rights: Would Equal Representation Provide More Effective Remedies?*, 13 DICK. L. REV. 151, 151–52 (1994).

[11] *See infra* notes 124–25 and accompanying text.

[12] Convention for the Protection of Human Rights & Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S 221, art. 2 [hereinafter Convention].

debate in the EU, specifically within the past two decades.[13] Since the terms "everyone" and "life" are not explicitly defined in the Convention, there has been much controversy as to whether the scope of Article 2 grants protection to the unborn fetus.[14] If the European Court of Human Rights (ECHR) or the European Court of Justice (ECJ) were to interpret Article 2 as rendering protection to the unborn fetus, the abortion laws of many Member States would then be held to be in contravention to the Convention.[15]

The ECHR and the ECJ are thus faced with three options in interpreting Article 2's protection: whether to not recognize protection to the unborn fetus; whether to recognize a right to life for the fetus, with implied limitations; or whether to recognize an absolute right to life for the unborn fetus.[16] Thus far, neither the ECHR nor the ECJ have provided an absolute right to life for the fetus, reasoning that this would give the fetus a higher priority than that of the mother.[17]

Consequently, both the ECHR and the ECJ have chosen to defer to the domestic laws of the Member States, as long as those laws do not infringe upon the protection of fundamental rights.[18] Accordingly, there has not been an attempt to harmonize the laws of the Member States regulating abortion within their own domestic jurisdictions.[19] However, an undercutting of women's fundamental rights in certain Member States, particularly those with restrictive legal provisions, could provide pressure for such a harmonization to materialize in the near future.[20]

A. *Issue*

The abortion regulations and policies of Member States reflect diverging views of women, specifically when looking at the fundamental rights a woman is given in contrast to those of an unborn fetus.[21] Thus, any harmonization of the abortion laws of Member States would result

---

[13] *See* Shelton, *supra* note 3, at 6–10.

[14] *See id.* Both the European Court of Human Rights (ECHR) and the European Court of Justice (ECJ) have avoided defining whether "everyone's right to life" includes the unborn child. *See id.*

[15] *See* Katherine Freeman, *The Unborn Child and The European Convention of Human Rights: To Whom Does "Everyone's Right To Life" Belong?*, 8 EMORY L.J. 615, 616 (1994).

[16] *See* Shelton, *supra* note 3, at 9.

[17] *See id.* at 9–10.

[18] *See* Maastricht Treaty, *supra* note 2, art. F.

[19] *See* JAMES KINGSTON & ANTHONY WHELAN, ABORTION AND THE LAW 38 (1997).

[20] *See id.*

[21] *See infra* notes 30–31, 41, 93, 101 and accompanying text.

in the EU defining a European conception of morality.[22] This raises the relevant issue as to whether the EU, founded primarily for economic reasons,[23]is in a position to expound upon moral interests that have been mainly preserved to the discretion of individual Member States.[24] Under the goals of the Maastricht Treaty it becomes antithetical to allow conflicting regulations on abortion among Member States, particularly when trying to strengthen the EU by creating a closer union among the people of Europe.[25]

B. *Proposal*

In the midst of women demanding equal rights for such things as employment and training, as well as demanding a greater female presence on such ruling bodies as the European Commission and the Court of Human Rights,[26] the EU may be forced into eradicating its elusive stance on abortion by treating the reproductive rights of women as fundamental human rights.[27] With an increase in the number of women entering the public arena in Europe,[28] the discussion of women's reproductive rights will need to be advanced as a human rights issue.[29] As a result, the EU may not be able to balance the interests of opposing Member States but instead may be forced into choosing whether to recognize the right of the unborn fetus, as manifested in the Irish Constitution,[30] or to uphold a woman's guarded right to self-determination, as presented in England's Abortion Act of 1967.[31] Although EU law currently reflects the unwillingness of the EU to enter the "woman versus the fetus jurisprudential minefield,"[32] this Note proposes that as women achieve more positions of distinction, the EU may be compelled into being the moral decision maker.

---

[22] *See* HUMAN RIGHTS, *supra* note 1, at 37.

[23] *See* Maastricht Treaty, *supra* note 2, art. A.

[24] *See* HUMAN RIGHTS, *supra* note 1, at 37.

[25] *See id.*

[26] *See* McCauley, *supra* note 13, at 152.

[27] *See infra* notes 124–25 and accompanying text.

[28] *See* Sheila McLean, *Women, Rights and Reproduction, in* LEGAL ISSUES IN HUMAN REPRODUCTION 214 (Sheila A. M. McLean ed., 1989).

[29] *See infra* notes 41, 93, 101 and accompanying text.

[30] *See* IR. CONST. art. 40.3.3; *see also* ABORTION, *supra* note 3, at 80.

[31] *See* Abortion Act, 1967, ch. 87 (Eng.).

[32] Patrick M. Twomey, *Freedom of Expression for Commercial Actors, in* HUMAN RIGHTS, *supra* note 1, at 268 (quoting Spalin, *Abortion, Speech and the European Community*, 1 JOURNAL OF SOCIAL WELFARE AND FAMILY LAW 17–32, at 30 (1992).

II. DISCUSSION

A. *Ireland's Abortion Law*

In an attempt to preserve a history of moral conservatism and to secure the illegality of abortion, the Republic of Ireland [hereinafter Ireland] constructed the Eighth Amendment to the Irish Constitution in 1983, instituted as Article 40.3.3 of the Constitution.[33] The Eighth Amendment states: "[T]hat the State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and as far as practicable, by its laws to defend and vindicate that right."[34] Motivated by the desire to isolate the country from a trend among Western nations to liberalize abortion policies,[35] Ireland claimed an explicit constitutional protection of the fetus.[36]

As a result of the pro-life Amendment, a clash between the Convention and the Irish Constitution on the issue of women's fundamental rights emerged.[37] In opposition to the Convention, Ireland actualized a right to life for the fetus.[38] However, the legal consequences of the Amendment were not significant because before its implementation abortion was illegal in the State. Yet, the Amendment did signify a Member State implicitly defining the reproductive rights of women as not being a fundamental human right and furthermore, giving a right to life to the unborn fetus.[39]

The Eighth Amendment provided Ireland with a way to divorce women's reproductive rights and fundamental rights, ultimately displacing reproductive rights outside the scope of human rights protection as governed by the Convention.[40] For women, the most frightening prospect was that the "policing" effect of the law could now be brought into play to prevent them from going to other Member States, primarily England, for abortions, as well as to prosecute them when they

---

[33] *See* IR. CONST. art. 40.3.3. This is commonly referred to as the pro-life Amendment. *See* KINGSTON & WHELAN, *supra* note 19, at 119.

[34] IR. CONST. art. 40.3.3.

[35] *See* Angela Thompson, *International Protection of Women's Rights: An Analysis of Open Door Counselling Ltd. And Dublin Well Woman Centre v. Ireland*, 12 B.U. INT'L L.J. 371, 374 (1994).

[36] *See* IR. CONST. art. 40.3.3.

[37] *See* IR. CONST. art. 40.3.3; Convention, *supra* note 12, art. 2.

[38] *See* IR. CONST. art. 40.3.3.

[39] *See id.*

[40] *See* IR. CONST. art. 40.3.3; Convention, *supra* note 12, art. 2.

returned.[41] However, as a signatory to the Convention, Ireland recognized the right of individuals to petition the European Commission of Human Rights (Commission) to redress grievances and to be bound by the decisions.[42] Subsequently both the ECHR and the ECJ were faced with this issue.

1. Judicial Action: Cases Before the European Commission and Court of Human Rights and the European Court of Justice

In 1985, the case of *Attorney General, ex rel, Society for the Protection of Unborn Children (S.P.U.C.) (Ireland) Ltd. v. Open Door Counselling Ltd. and Dublin Well Woman Centre Ltd.* came before the Irish High Court.[43] The defendant clinics were accused of unlawful activity in violation of Article 40.3.3 of the Irish Constitution and conspiracy to corrupt public morals, by counseling and procuring pregnant women in Ireland to travel abroad for abortions.[44] Focusing specifically on the pro-life Amendment, both the Irish High Court and the Irish Supreme Court held that the clinics were in violation of the fetal rights section of the Constitution and granted and affirmed the injunctions against them.[45]

Subsequently, in *Open Door Counselling Ltd. and Dublin Well Woman Centre Ltd v. Ireland*, the clinic, and two women of child bearing age, petitioned the Commission challenging the injunction as being in violation of the guarantees of the Convention.[46] The Commission held that the Irish law was in violation of Article 10 (freedom of expression) of the Convention.[47] The Commission reasoned that the injunction prevented non-directive pregnancy counseling, which included pamphlets with information on how to contact abortion clinics outside the State, thus interfering with the freedom to impart information.[48] However, the Commission did not address the scope of women's reproduc-

---

[41] *See* Anna Eggert & Bill Rolston, *Ireland, in* ABORTION IN THE NEW EUROPE 163 (Bill Rolston & Anna Eggert eds., 1994) [hereinafter NEW EUROPE].

[42] *See* Convention, *supra* note 12, arts. 25, 26.

[43] *See* [1987] I.L.R.M. 477 (Ir.H.Ct.).

[44] *See id.*

[45] *See id.;* Attorney General, *ex rel,* Society for the Protection of Unborn Children (Ireland) Ltd. v. Open Door Counselling Ltd. and the Dublin Well Woman Centre Ltd., [1988] 2 C.M.L.R. 443, 449–52.

[46] *See* App. Nos. 14234/88. 14235/88, 14 Eur. H.R. Rep. 131 (1991) (Comm'n Report).

[47] *See id.* at 135–38.

[48] *See id.*

tive rights as fundamental human rights, nor did it discuss the reach of Article 2's protection to the unborn fetus.[49]

In October 1992, the Commission referred the case to the ECHR, which ratified the decision of the Commission, likewise not interpreting the scope of Article 2's protection.[50] The ECHR further stated that its function is limited to determining whether the restriction [injunction] is compatible with the Convention.[51] The ECHR reasoned that the national authorities enjoy a wide margin of appreciation[52] in moral matters, particularly in an area such as abortion which touches on matters of belief concerning the nature of human life.[53] It becomes especially difficult to discern the Court's position on women's rights issues when it invokes doctrines such as the "margin of appreciation."[54] Thus, although faced squarely with the issue, two governing bodies of EU law declined both to comment on reproductive rights as fundamental human rights, and to define the scope of Articles 2's protection.[55] However, the significant aspect of these rulings is the moral consequences, in that although the judgments by these bodies do not have to be obeyed by any Member State, Ireland is under moral pressure not to ignore the findings entirely.[56]

In a second major legal action, *Society for the Protection of the Unborn Child (S.P.U.C.) v. Grogan*, the Irish High Court did not enjoin the distribution of pamphlets on abortion and contact information for

---

[49] *See id.* at 131–41.

[50] *See* Open Door Counselling Ltd. & Dublin Well Woman Centre Ltd. v. Ireland, 246 Eur. Ct. H.R. (ser. A) at 32 (1992).

[51] *See id.*

[52] *See* Thompson, *supra* note 35, at 379 (stating that a doctrine of self restraint has emerged in which the Commission and the Court will defer to the domestic institutions in the regulation of certain fundamental rights). "The phrase margin of appreciation refers to the extent to which a court will allow the exercise of administrative discretion. The Court determines the margin of appreciation in a given case based upon the viability of an international ruling on the issue before it in light of the 'direct and continuous forces of [the] countries,' recognizing that in some situations, 'State authorities are in a better position than the international judge to give an opinion of the exact content of these requirements.'" *Id.* (quoting Clovis C. Morrison, Jr., THE DYNAMICS OF DEVELOPMENT IN THE EUROPEAN HUMAN RIGHTS CONVENTION SYSTEM 5–6 (1981)).

[53] *See* Open Door Counselling Ltd. and Dublin Well Woman Centre Ltd. v. Ireland, 246 Eur. Ct. H.R. (ser. A.) at 29 (1992).

[54] *See* Thompson, *supra* note 35, at 396.

[55] *See* Open Door Counseling Ltd. and Dublin Well Woman Centre Ltd. v. Ireland, 14 Eur. H.R. Rep. 131; Open Door Counselling Ltd. and Dublin Well Woman Centre Ltd. v. Ireland, 246 Eur. Ct. H.R. (ser. A) at 32 (1992); Thompson, *supra* note 35, at 397.

[56] *See* Eggert & Rolston, *supra* note 41, at 164.

foreign abortions.[57] The High Court reasoned that this did not constitute assistance of the procurement of abortion.[58] Furthermore, the High Court requested the ECJ to give a ruling on three questions.[59] However, pending a decision by the ECJ, the Supreme Court granted the interlocutory injunction preventing the distribution of the information.[60] The Supreme Court further disagreed with the High Court and advanced the belief that the abortion issue stood outside EU law.[61]

The questions referred to the ECJ by the High Court were as follows:

> (1) Does the organized activity or process of carrying out an abortion or the medical termination of a pregnancy come within the definition of "services" provided for in Article 60 of the Treaty Establishing the European Economic Community?
>
> (2)In the absence of any measures providing for the approximation of the laws of Member States concerning the organized activity or process of carrying out an abortion or the medical termination of pregnancy, can a Member State prohibit the distribution of specific information about the identity, location and means of communication with a specified clinic or clinics in another Member State where abortions are performed?
>
> (3)Is there a right at Community law in a person in Member State A to distribute specific information about the identity, location and means of communication with a specified clinic or clinics in Member State B where abortions are performed, where the provision of abortion is prohibited under both the Constitution and the criminal law of Member State A but is lawful under certain conditions in Member State B?[62]

In response to the first question, the ECJ determined that the termination of a pregnancy, as practiced in several Member States, is a medical activity which is normally provided for renumeration and may be carried out as part of a professional activity.[63] The ECJ reasoned that

[57] *See* Society for the Protection of Unborn Children (Ireland) Ltd. (S.P.U.C.) v. Grogan, *reprinted in* KINGSTON & WHELAN, *supra* note 19, at 111–12.

[58] *See id.*

[59] *See id.*

[60] *See* S.P.U.C. v. Grogan, [1989] I.R. 760 (Ir. S.C.).

[61] *See id.*

[62] *Id.*

[63] *See* Case C-159/90, Society for the Protection of Unborn Children Ireland Ltd., (S.P.U.C.) v. Grogan, [1991] 3 C.M.L.R. 849, 887–93.

the medical termination of pregnancy could constitute a "service" within the meaning of Article 60 of the EEC Treaty, when performed in accordance with the law of the Member State in which it is carried out.[64] The ECJ rephrased the second and third questions to ask essentially:

> [W]hether it is contrary to Community law for a Member State in which medical termination of pregnancy is forbidden to prohibit students' associations from distributing information about the identity and location of clinics in another Member State where voluntary termination of pregnancy is lawfully carried out and the means of communicating with those clinics, where the clinics in question have no involvement in the distribution of said information.[65]

The ECJ reasoned that because the national rule prohibiting the distribution of certain types of abortion information did not constitute a restriction on the freedom of clinics in other Member States, that is to provide abortion services to women traveling from Ireland to avail of those services, it was outside the ECJ's jurisdiction to advise on the applicability of the fundamental rights which form part of the general principles of EU law.[66] Therefore, the ECJ clearly established that the meaning of fundamental rights differs in the EU and Member State contexts.[67]

Since the ECJ's ruling, the Maastricht Treaty was signed along with the referendum, Protocol No. 17,[68] on the application of Article 40.3.3. of the Irish Constitution. Simultaneously, *Attorney General v. X* was before the Irish Courts.[69] The Attorney General sought an injunction against a fourteen year old girl, who was raped, to prevent her from traveling outside of the State to obtain an abortion.[70] The High Court granted the injunction which restrained the defendants, their servants and agents, and anyone having knowledge of the order, from interfer-

---

[64] *See id.*

[65] *Id.*

[66] *See* KINGSTON & WHELAN, *supra* note 19, at 145–46.

[67] *See* Diarmuid Rossa Phelan, *Right to Life of the Unborn v. Promotion of Trade in Services: The European Court of Justice and the Normative Shaping of the European Union*, 55 MOD. L. REV. 670, 677 (1992).

[68] *See* Protocol No. 17 annexed to the Maastricht Treaty and to the Treaties Establishing the European Communities. 31 I.L.M. 247, 362 [hereinafter Protocol].

[69] *See* [1992] 1 I.R. 1 (Ir. H. Ct.).

[70] *See id.*

ing with the right to life of the unborn as contained in Article 40.3.3.[71] The injunction restrained the first defendant (X) from leaving the jurisdiction and restrained the second and third defendants (her parents), their servants and agents, and anyone having knowledge of the order, from assisting X to leave the jurisdiction for nine months from the date of the court order.[72] In addition, the injunction restrained X, her servants and agents, and anyone having knowledge of the order, from procuring or arranging an abortion for X either within or outside the jurisdiction.[73] The High Court reasoned that the Attorney General had a constitutional duty to protect the life of the unborn once he knew there was a direct threat to the life of the unborn.[74]

On appeal, the Supreme Court overturned the injunction, accepting the argument posed by X's counsel that if her pregnancy was not terminated there would be a risk of her becoming a physical wreck.[75] The Supreme Court further suggested that the Eighth Amendment envisaged lawful abortion if there was a substantial risk to life of the pregnant woman.[76] In other words, a pregnancy may be terminated if its continuance, as a matter of probability, involves a real and substantial risk to the life of the mother.[77] Accordingly, the concept of the equal right to life of the mother and fetus enshrined in the Irish Constitution gave way to a superior right to the life for the pregnant woman in certain, albeit highly restricted, circumstances.[78]

2. Legislative Action: The Protocol and the Declaration

The insertion of the Protocol in the Maastricht Treaty can be seen primarily as a response to the decision of the ECJ in *Grogan*.[79] The Protocol states that the High Contracting Parties have agreed upon the following provision:

---

[71] *See id.*

[72] *See id.*

[73] *See id.*

[74] *See* Attorney General v. X and Others [1992] 1 I.R. 1 (Ir. H. Ct.).

[75] *See* Attorney General v. X and Others, *reprinted in* KINGSTON & WHELAN, *supra* note 19, at 9–19.

[76] *See id.*

[77] *See id.* The Supreme Court reasoned that the risk to the defendant's life—the risk that she would commit suicide—had to be taken into account when reconciling her right to life with that of the unborn. *See id.*

[78] *See* KINGSTON & WHELAN, *supra* note 19, at 18.

[79] *See* Case C-159/90, S.P.U.C. v. Grogan, [1991] 3 C.M.L.R. 849.

> Nothing in the Treaty on European Union, or in the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland.[80]

As a result of the differences between the Irish Courts' earlier rulings on abortion and the decisions of the ECHR and the ECJ, the Protocol seemed necessary in order to reconcile the Irish Courts' earlier rulings with EU law. The State of EU law after the *Grogan* case seemed as though the ECJ and the Irish Supreme Court were on a collision course and thus harmonization would come by way of a protocol.[81] Yet, the legal consequence of the Protocol was that it directed the ECJ to defer to Irish law in-so-far as there might be a conflict between Community law and the application in *Ireland* of Article 40.3.3 of the Constitution.[82] As a result, the Protocol insulates Ireland from any push by EU law towards awarding women's reproductive choices human rights protection.[83]

Furthermore, the Protocol constitutes a limitation by Ireland, in agreement with the other Member States, on its transfer of power to the EU.[84] In circumventing the sovereignty of EU law, Ireland reserved full rights with respect to matters governed by Article 40.3.3, so that such matters could not be said to be within the sphere of EU law.[85] However, if the Protocol is limited, in that it effects EU law only with regard to the extent Article 40.3.3 is applied in Ireland, then the derogation of EU law would be minimal, applying purely to internal matters affecting Ireland.[86]

However, skeptical of the "narrowing" of the Protocol's effect and recognizing the possible ramifications on other Member States, in May 1992 the High Contracting Parties adopted the Declaration on the Right to Access Information, which states in part:

> That it was and is their intention that the Protocol shall not limit freedom to travel between Member States or, in accordance with conditions which may be laid down, in conformity

---

[80] Protocol, *supra* note 68, at 362.

[81] *See* Case C-159/90, S.P.U.C. v. Grogan, [1991] 3 C.M.L.R. 849.

[82] *See* KINGSTON & WHELAN, *supra* note 19, at 164–65.

[83] *See* Protocol, *supra* note 68, at 362.

[84] *See* KINGSTON & WHELAN, *supra* note 19, at 166.

[85] *See id.*

[86] *See id.* at 170.

> with Community law, by Irish legislation, to obtain or make available in Ireland information relating to services lawfully available in Member States.[87]

The Declaration appears to modify the original meaning of the Protocol, but it allows the ECJ, in following its terms, to keep the corpus of EU law almost entirely intact in this difficult and controversial area.[88]

In response to the intentions of the Declaration, Ireland implemented the Thirteenth and Fourteenth Amendments, which read respectively:

> This subsection [Article 40.3.3] shall not limit freedom to travel between the State and another State. [1992; the Thirteenth Amendment]
> This subsection shall not limit the freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another State. [1992; the Fourteenth Amendment].[89]

Thus, the 1992 Amendments precluded Article 40.3.3 from limiting information and other assistance to services lawfully available in another State.[90] Hence, the Amendments were seen as merely granting to those wishing to exercise the existing rights an express immunity from restriction pursuant to Article 40.3.3 of the Constitution.[91]

B. *England's Abortion Law*

1. Legislative Action

The Abortion Act of 1967 developed with the decision of *R. v. Bourne*[92] as its prelude. In the *Bourne* case, the court stated, "the law permits the termination of pregnancy for the purpose of preserving the life of the mother . . . if the doctor is of the opinion . . . that the probable consequence of the pregnancy will be to make a woman a physical or mental wreck, the jury is quite entitled to take the view that

---

[87] Declaration of the Right of Access to Information, 31 I.L.M. 247, 367.

[88] *See* KINGSTON & WHELAN, *supra* note 19, at 175.

[89] IR. CONST. amends. 13 & 14.

[90] *See id.*

[91] *See* KINGSTON & WHELAN, *supra* note 19, at 189.

[92] *See* [1938] 3 All E.R. 615.

the doctor, is operating for the purpose of preserving the life of the mother."[93] Consequently, the road to therapeutic abortion was opened up in England.[94]

The Abortion Act came into effect in 1967, and states in pertinent part:

> (1) Subject to the provisions of this section, a person shall not be guilty of an offense under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in *good faith*—
>
> that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman, or any existing children of her family, greater than if the pregnancy were terminated; or that there is substantial risk that if the child were born it would suffer from such physical or mental abnormalities to be seriously handicapped.[95]

Thus, the 1967 Act transformed the *Bourne* judgment into statutory law.[96] In this Act, the legislature placed the reproductive decision to define a good faith abortion in the hands of the medical community.[97] Therefore, the implementation of the 1967 Act gave women a ground on which the legality of abortion could, arguably, easily be supported.[98] Thus, in contrast to Irish law, English law is lacking with regard to the legal protection of the fetus.[99]

2. Judicial Action: A challenge to the English Law Before the European Commission on Human Rights

In *Paton v. United Kingdom*,[100] the Commission addressed the issue of the protection afforded the fetus under Article 2 of the Convention. The British High Court had denied an injunction sought by a husband to prevent his wife, eight weeks pregnant at the time, from having an

---

[93] *Id.*

[94] *See* Madelein Simms, *Britain, in* NEW EUROPE, *supra* note 41, at 36.

[95] Abortion Act of 1967, ch. 87 (Eng) (emphasis added). An Act to amend and clarify the law relating to termination of pregnancy by registered medical practitioners. *See id.*

[96] *See* Simms, *supra* note 94, at 36.

[97] *See* KENNETH MCK. NORRIE, FAMILY PLANNING PRACTICE AND THE LAW 33 (1991).

[98] *See id.*

[99] *See* Nicolas Terry, *England, in* ABORTION, *supra* note 3, at 109.

[100] *See* 3 Eur. H.R. Rep. 408 (1980) (Commission Report).

abortion.[101] The British High Court reasoned that in English law the fetus has no legal rights until born and that the father of a fetus has no legal right to prevent the mother from obtaining an abortion or to be consulted or informed about a proposed abortion.[102]

Thereafter, the abortion was performed and the father petitioned the European Commission alleging that the English law violated Article 2 of the Convention.[103] The Commission, declaring the petition inadmissible, held that the provisions of Article 2 did not prohibit state parties from permitting abortion in a wide range of circumstances, such as those provided for in the British Abortion Act of 1967.[104] The Commission rejected the possibility that the Convention guaranteed an absolute right to life for the fetus, holding that if such a right were recognized, abortion may be denied to a pregnant woman whose life was at serious risk because of her pregnancy.[105]

C. *Comparative Analysis of Irish and English Law*

The abortion laws of Ireland and England, two Member States united under EU law, reflect divergent regulations and policies and promote incompatible views of the reproductive rights of women.[106] Under EU law it is contentious that one Member State, Ireland, discounts women's reproductive rights, while another Member State, England, affords them.[107]

The disparity in abortion laws between Ireland and England stems from the way women's rights are characterized in each respective state.[108] For example, at its foundation, Irish law questions whether reproductive rights exist for women—or are even founded—and concludes by abating those rights and protecting the rights of the unborn fetus.[109] Conversely, English law does not question the foundation or existence of women's reproductive rights, but assumes these rights exist and questions under what circumstances and with what safeguards these rights will be granted.[110] English law has never dealt with what

---

[101] *See* Paton v. British Pregnancy Advisory Service, [1978] 2 All E.R. 987.

[102] *See id.*

[103] *See* Paton v. United Kingdom, 3 Eur. H.R. Rep 408 (1980) (Commission Report).

[104] *See id.*

[105] *See id.*

[106] *See supra* notes 41 and 94 and accompanying text.

[107] *See id.*

[108] *See id.*

[109] *See* IR. CONST. art. 40.3.3.

[110] *See* Abortion Act, 1967, ch.87 (Eng.).

may be loosely described as the question of whether an abortion right exists.[111] Instead, the English position has been that certain people in certain situations will not be given criminal sanctions for procuring an abortion.[112]

Comparatively, Irish law reflects a view of women absent any reproductive rights.[113] Ireland's abortion policy treats women's reproductive rights as not deserving human rights protection.[114] If the right does not exist for women in Ireland, then there is nothing to be protected.[115]

English law, by positing that women have reproductive rights, reflects an advance towards recognizing women's issues as human rights law.[116] English law assumes the view that women have a legal interest in reproductive rights and thus, provides safeguards for those rights.[117] In England reproductive choices remain with the woman and the medical profession, not with the moral judgments of the courts.[118]

III. ANALYSIS

A. *Summary of Background*

The abortion regulations and policies of Member States remain within the spheres of domestic institutions.[119] However unsatisfactory this may be, it is apparent that the Member States do not share a common view on the question of abortion.[120] This divergence in opinion means that EU law does not lay down any clear rules on abortion but leaves to the Member States considerable freedom to determine their own abortion policies,[121] hence, capitulating to the application of the margin of appreciation doctrine.[122] It is this very doctrine that allows EU law to remain encapsulated from bringing women's repro-

---

[111] *See id.*

[112] *See* Terry, *supra* note 99, at 78–79.

[113] *See* IR. CONST. art. 40.3.3.

[114] *See id.*

[115] *See id.*

[116] *See* Abortion Act, 1967, ch. 87 (Eng.).

[117] *See id.*

[118] *See* Terry, *supra* note 99, at 79. The medicalization of abortion law has tended to keep abortion issues out of the English courts. *See id.*

[119] *See* KINGSTON & WHELAN, *supra* note 19, at 38.

[120] *See id.* at 98.

[121] *See id.*

[122] *See* Thompson, *supra* note 35, at 373 and accompanying text.

ductive choices into the forefront of EU law as fundamental human rights.[123]

B. *Potential for Legislative Harmonization and/or Judicial Harmonization*

The unification of the laws of Member States with regards to abortion is currently a fiction, however such a harmonization could inevitably materialize in the future.[124] The consequences of a move toward legislative harmonization could lead to a resistance from both liberal and conservative states.[125] With the goals of the EU being founded on the procurement of its economic interests,[126] it has long been the view that abortion is of no concern to the achievement of an internal market and that its regulation is outside EU competence.[127] However, EU competence becomes inept when the rights of women are marginalized, thus disempowering one half of its citizens.

An examination of the judgments of the ECHR, the Commission and the ECJ, with specific emphasis given to the ECJ's judgment in *Grogan*, signals a possible consolidation of EU law on abortion. It is the ECJ which has on many occasions served as the engine of integration in the EU.[128] Yet, the reluctance or avoidance of the ECJ to encroach upon national sensitivities in this area is evident.[129] However, given the continuing lacunae in the case law of the ECHR and the ECJ regarding the respective rights of women and the unborn, one of these two legal bodies in the future could adopt a position inconsistent with the degree of protection given an unborn life by the Irish Constitution, and in particular repudiate the extensive prohibition of abortion in Ireland.[130] If the premise of this argument is brought forth, the EU will be faced with accommodating and giving equal treatment to women's reproductive rights issues in EU law, thus, developing a supranational forum for women's rights to be protected.[131]

---

[123] *See id.* at 396.

[124] *See* KINGSTON & WHELAN, *supra* note 19, at 38.

[125] *See id.*

[126] *See* Maastricht Treaty, *supra* note 2, art. A.

[127] *See* KINGSTON & WHELAN, *supra* note 19, at 38.

[128] *See id.* at 42.

[129] *See* Case C-159/90, S.P.U.C. v. Grogan, [1991] 3 C.M.L.R. 849. This is most evident with the rephrasing of questions two and three posed by the Irish High Court in *Grogan*. *See id.*

[130] *See* KINGSTON & WHELAN, *supra* note 19, at 51.

[131] *See id.*

C. *Proposal*

In order for women's issues to be protected in a supranational forum, distinct from Member State policies, the requisite step will be for the EU to promote a unified conception of morality, something which the EU has declined to do. Yet, in the midst of women's movements into the public arena, the ECJ's role as the moral decision maker in securing reproductive rights for women across the Member States is inevitable. Women's groups are asking for a "recharacterization" of international human rights in order to solve the women's rights dilemma.[132] This recharacterization is forthcoming, specifically with a greater female presence on governing bodies in the EU, such as the Commission and the ECJ.[133]

However, as more women may be entering the arena of public life and joining the professional ranks of the EU, there is an attempt, particularly in Irish law, to exert control over the reproductive rights of women.[134] Yet, in protecting the fundamental rights of citizens of Member States,[135] the EU will be faced with advocating a relinquishment by Member States of the right to control such issues. The use of the "margin of appreciation doctrine," which threatens the coming forth of women's issues in EU law,[136] needs to be eradicated so as to grant equal treatment to both sexes. If EU law is to move forward, expounding unified interests, then a recognition of women's reproductive choices must follow, otherwise a view that "omits to take on board the needs and aspirations of half the human race cannot thereby lay claim to universality . . . ."[137]

Therefore, in order to prevent women from being subject to the individual abortion regulations of Member States, particularly those biased against women, the EU must become the moral decision maker and grant universal protection to all its citizens.

---

[132] *See* McCauley, *supra* note 10, at 159.

[133] *See id.* at 151–52.

[134] *See* McLean, *supra* note 28, at 214.

[135] *See* Maastricht Treaty, *supra* note 2, art. F.

[136] *See* Thompson, *supra* note 35, at 372 (stating that the use of the "margin of appreciation" doctrine in examining domestic policy, has disparately harmed women).

[137] *Id.* at 396 (quoting Noreen Burrows, *International Law and Human Rights: The Case of Women's Rights, in* HUMAN RIGHTS: FROM RHETORIC TO REALITY 82 (Tom Campbell et al. eds., 1986)).

CONCLUSION

In examining Ireland's and England's laws, it is apparent that differing views of women's fundamental human rights are expressed. To preserve the unification of the Member States on this issue, the EU will be forced to make the moral decision to protect the reproductive rights of women. An increasing female "voice" in the EU will not accommodate gender biased doctrines, such as the margin of appreciation, which seek to suppress the advancement of women's reproductive choices as having fundamental human rights dimensions. The unity of the EU, encompassing all its members, is highly dependent upon a progression of women's reproductive choices as fundamental human rights in order to provide universal protection to "all" its citizens and to preserve the unity. Failure to recognize women's reproductive rights will leave EU law, not as a representative of a unified body, but instead displacing one half of its citizens.

Peta-Gaye Miller