



Abortion and European Law

Introduction

In the past decade there has been increasing pressure by the European Parliament to create a so-called “right to abortion”. For example, in 2002 the European Parliament produced a report on “sexual and reproductive health and rights”. The report recommended, *inter alia*, that “abortion should be made legal, safe and accessible to all”.¹ The European Parliament passed similar resolutions in 2008² and 2010.³

Likewise, the Council of Europe passed a resolution in 2008 recommending, *inter alia*, that “women’s effective exercise of their right of access to a safe and legal abortion” should be guaranteed by all 47 Member States of the Council of Europe.⁴

However, apart from creating political pressure, the above resolutions are not binding on the Member States of the EU or the Council of Europe or any other European institutions. Despite what some pressure groups may suggest, there is no such thing as a “right to abortion” in international law or in European law.⁵

Competencies of the EU

Despite the European Parliament’s persistent resolutions, it is quite clear that the European Union has no competence over the area of abortion. This has been clarified on several occasions. For example, in 2006, the Council stated that:

“The European Union treaties have not bestowed on the Community or the Union the competence whereby the Union could regulate on abortions. The Member States thus have the

¹ Anne E.M. Van Lancker, A5-0223/2002, 6 June 2002, *Committee on Women’s Rights and Equal Opportunities*, p.9.

² European Parliament resolution of 3 September 2008 on equality between women and men — 2008 (2008/2047(INI)), Official Journal of the European Union, C 295 E/35, 4.12.2009

³ Marc Tarabella, A7-0004/2010, 1 February 2010, *Committee on Women’s Rights and Equal Opportunities*.

⁴ Resolution 1607 (2008), “Access to safe and legal abortion in Europe”, Parliamentary Assembly, 2008.

⁵ See Piero A. Tozzi, J.D., “International Law and the Right to Abortion”, *Catholic Family and Human Rights Institute*, Legal Studies Series, Number One, 2010. Available at: http://www.c-fam.org/docLib/20100420_Intern_Law_FINAL.pdf

competence to regulate on this and ensure compliance in their territory with the laws that they pass. The EU cannot interfere in unsatisfactory states of affairs due to differences in the legislation of Member States when it comes to areas that are not within its competence... it is incontrovertibly clear that big differences between the laws in Member States lead to very different practices around Europe.”⁶

Likewise, on a separate occasion, the Council clarified that: “the issue of abortion from a legal point of view falls under the competence of the individual Member States.”⁷

Furthermore, the Council has stated that the term "reproductive health" does not include any reference to a right to abortion and the Council does “not accept that abortion should form part of policies on reproductive and birth control education.”⁸

Likewise, the European Commission stated that: “The term ‘reproductive health’ was defined by the United Nations (UN) in 1994 at the Cairo International Conference on Population and Development. All Member States of the Union endorsed the Programme of Action adopted at Cairo. The Union has never adopted an alternative definition of ‘reproductive health’ to that given in the Programme of Action, which makes no reference to abortion.”⁹

In Ireland, a Protocol was attached to the Maastricht Treaty which states that:

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.¹⁰

⁶ Paula Lehtomäki, President-in-Office of the Council, 13 December 2006, replying to an Oral Question (H-0983/06) by Bastiaan Belder, MEP. Emphasis added. Available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20061213&secondRef=ITEM-021&language=EN#3-429>

⁷ Answer given by the Council to a Written Question (E-4955/06) by Emilio Menéndez del Valle, MEP, on 16 November 2006. Emphasis added. Available at: <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2006-4955&language=EN>

⁸ Answering questions from MEPs Bernd Posselt (H-0729/03) and Dana Scallon (H-0794/03), 4 December 2003. Available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20031216&secondRef=ITEM-005&language=EN#2-178>

⁹ Answering a written question by Dana Scallon MEP (H-0670/02), 24 October 2002. Available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20021024&secondRef=ANN-01&language=EN&detail=H-2002-0670&query=QUESTION>

¹⁰ Similar guarantees have also been granted under the Lisbon Treaty. On June 18 and 19, 2009, the European Council conclusions adopted a decision providing: “Nothing in the Treaty of Lisbon attributing legal status to the Charter of Fundamental Rights of the European Union, or in the provisions of that Treaty in the area of Freedom, Security and Justice affects in any way the scope and applicability of the protection of the right to life in Article 40.3.1, 40.3.2 and 40.3.3, the protection of the family in Article 41 and the protection of the rights in respect of education in Articles 42 and 44.2.4 and 44.2.5 provided by the Constitution of Ireland.”

Likewise, a Protocol is attached to Malta's Accession Treaty, which states that:

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 the territory of Malta of national legislation relating to abortion.¹¹

Hence, the European Union does not have competence over the area of abortion and consequently, Member States are free to enact laws on abortion as they see fit.

A connection with other competencies

It is clear that the EU has no competence over the area of abortion. However, there have been some cases taken to the European Court of Justice where the issue has been discussed. In *SPUC v. Grogan* the ECJ held that: "...medical termination of pregnancy, performed in accordance with the law of the State in which it is carried out, constitutes a service within the meaning of Article 60 of the [EEC] Treaty."¹²

Hence, it would appear that where abortion can be connected to another area that the EU has competence over, such as the free movement of persons or services, the ECJ is perhaps more willing to assert competency.¹³

However, it is notable that it was in the context of other competencies that the Council re-affirmed in 2006 that the EU has not "bestowed on the Community or the Union the competence whereby the Union could regulate on abortions". In response to this answer, Bastiaan Belder, MEP replied:

...this is a cross-border issue, and so I am surprised that it has not been discussed at all in the Council. If we talk about European values – something which has also been in the news a great deal – and we also consider the issue of the free movement of people, then we have a European problem, certainly if we take into account the fact that Dutch doctors were involved

¹¹ Protocol No 7, "on abortion in Malta". Available at: <http://eur-lex.europa.eu/en/treaties/dat/12003T/htm/L2003236EN.093100.htm>

¹² *Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan, et al* (C-159/90, 4 October 1991) at para 21. Emphasis added.

¹³ Nevertheless, the ECJ also held in the Grogan case that: "It is not 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..." *Id.*, at para 32.



in this affair. In short, I should like to ask you again how this relates to the freedom of movement of people, and whether we are not dealing with a European problem of a cross-border nature.¹⁴

However, the Council responded by stating that:

...the free mobility of people is one of the European Union's basic concerns. The movement of services has also been established for a very long time, and if there are illegal goings-on in Member States, it is their responsibility and duty to monitor them and intervene. In this case it is incontrovertibly clear that big differences between the laws in Member States lead to very different practices around Europe.¹⁵

Hence, the argument that the issue was not about abortion *per se* but about the movement of services was not accepted by the Council. Despite the issue in question involving both abortion *and* the free movement of services, the Council clarified that the EU did not have competency over the area.

Conclusion

Given that the EU has made it quite clear that it does not have competency to dictate to EU Member States how individual abortion laws operate, it is difficult to see how it could be claimed that EU law require Member States to do *anything* regarding abortion. There is no right to access an abortion under European law or, indeed, international law. Therefore, by restricting access to an abortion to certain people, a Member State should not be seen to be acting contrary to European law.

¹⁴ Available at:
<http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20061213&secondRef=ITEM-021&language=EN#3-429>

¹⁵ *Id.*