

**Robert Schuman Centre
for Advanced Studies**

**Between Domestication and Europeanisation
A Gendered Perspective on
Reproductive (Human) Rights Law**

SUSAN MILLNS

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**Millns: *Between Domestication and Europeanisation*
A Gendered Perspective on Reproductive
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**ROBERT SCHUMAN CENTRE
FOR ADVANCED STUDIES**



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European Forum

The European Forum was set up by the High Council of the EUI in 1992 with the mission of bringing together at the Institute for a given academic year a group of experts, under the supervision of annual scientific director(s), for researching a specific topic primarily of a comparative and interdisciplinary nature.

This Working Paper has been written in the context of the 2000-2001 European Forum programme on "Between Europe and the Nation State: the Reshaping of Interests, Identities and Political Representation" directed by Professors Stefano Bartolini (EUI, SPS Department), Thomas Risse (EUI, RSC/SPS Joint Chair) and Bo Stråth (EUI, RSC/HEC Joint Chair).

The Forum reflects on the domestic impact of European integration, studying the extent to which *Europeanisation* shapes the adaptation patterns, power redistribution, and shifting loyalties at the national level. The categories of 'interest' and 'identity' are at the core of the programme and a particular emphasis is given to the formation of new social identities, the redefinition of corporate interests, and the domestic changes in the forms of political representation.

INTRODUCTION*

Human reproduction has long been a site of contestation in moral, religious and political debate. In particular, finding ways to promote or to prevent conception and pregnancy has occupied many sectors of society including the church, the medical profession, women's groups and, of course, the institutions of the state. The development of the oral contraceptive pill and more liberal access to abortion in the 1960s heralded a 'sexual revolution' and increased individual control over reproductive matters, especially for women who sought to avoid pregnancy and motherhood. Having thus established ways to avoid reproduction, the 1980s saw a different kind of 'reproductive revolution', one that promoted procreation by furthering the possibilities of assisted conception for those seeking non-traditional ways to reproduce using developments in medical technologies such as donor insemination and in vitro fertilisation (IVF). This is seen particularly in the context of same-sex relationships with the phenomenon of the 'gay family' being highly contested. The 1990s brought wider dissemination and availability of new reproductive technologies, together with their further development (such as, for example, the advent of cloning techniques) and have seen an extension of these procedures into more people's lives lifting the debate on human reproduction to a new level both in terms of the generality and the breadth of the application of the new technologies. The reproductive revolution has evidently not been short-lived and, furthermore, is not yet complete, for it seems that scarcely a week passes but that one reads of a new development and a new stage being reached in our reproductive histories.

Increased choice in reproductive matters, however, comes at a price. As the outer limits of reproductive possibilities are ever extended, choice may swiftly evolve into pressure to reproduce, a sense of failure on the part of those who do not succeed, and social exclusion of those who wish to remain child-free. Choice may also become coercive if it leads to the commercialisation of body parts that take on increased value in the reproductive market. For example, women may face financial pressures that induce them to engage in egg donation or surrogacy arrangements. Increased choice also makes more likely disagreements between those seeking to maximise or minimise use of the new reproductive opportunities on offer. Inevitably conflicts will arise between the varied interests of the protagonists of the sexual and reproductive revolutions: between women seeking terminations and putative fathers, or between these same women and their fetuses. One can also imagine disputes materialising between would-be parents and doctors, health authorities and gametes donors,

* For their valuable comments and suggestions on earlier drafts of this paper my thanks go to Gráinne de Búrca, Bruno de Witte, Elizabeth Kingdom, Sally Sheldon, Neil Walker, Noel Whitty and the participants in the European Forum seminar programme 2000-01.

and more generally between the interests of human beings and embryos created via the new technologies.

It is with the resolution of these conflicts in mind that this paper focuses on one particular aspect of the reproductive revolution – the question of the rights of the protagonists. More specifically still it is their legal – as opposed to moral – rights that are under the spotlight. Of course, to talk of legal rights does not exclude from the parameters of debate questions about the moral and political choices involved in the enforcement of those rights. The complex interrelationship between law and morality has long exercised the minds of scholars as exemplified in the infamous debate which took place in the 1960s between H.L.A. Hart and Lord Devlin upon the question of whether or not some issues should be quite simply not the law's business.¹ Despite the desirability that areas of life (particularly one's private life), should be beyond law's reach, the idea that law can exist in isolation from questions of morality is simply untenable as it is evident that law does not operate in a vacuum and that consideration of the political and social contexts in which legal rights are exercised cannot be excluded when determining their enforceability. That said, the focus of this article upon *legal* rights is justified not only because of their normative function in prescribing certain modes of behaviour, but also because of their political importance in a democratic society premised upon the rule of law.²

Questions about the legal rights of those involved in issues of human reproduction are, of course, vast and wide-ranging – including issues of entitlement to services and treatments, the legal status of mothers and fathers, access to information, authorisation to pursue research and experimentation upon embryos and so on. In order to narrow the subject matter somewhat, the particular focus of this article is upon the *human* rights, or *fundamental* rights, of those involved. Thus the paper situates its discussion of reproductive rights within the context of contemporary human rights discourses. In particular, it looks at the new mechanisms for human rights protection in the UK since the adoption of the Human Rights Act 1998 (HRA), whose unprecedented legal and political significance has led to talk of a 'rights revolution'.³ Discussion is situated, therefore, at the point of confrontation between the reproductive

¹ P. Devlin, *The Enforcement of Morals* (OUP, 1968); H.L.A. Hart, *Law, Liberty and Morality* (OUP, 1968).

² Discussion of the broader questions surrounding the political morality of rights discourse and the inter-relationship between rights and democracy is beyond the scope of this paper which is predominantly strategic in nature. A useful contextualisation of reproductive matters within these wider themes can be found in R. Dworkin, *Life's Dominion - An Argument about Abortion and Euthanasia* (Harper Collins, 1993).

³ C. Harvey, 'Governing after the Rights Revolution' (2000) 27 *Journal of Law and Society* 61.

revolution and the more recent rights revolution. Moreover, the subject is approached from a gendered perspective - that is one which conceives of gender as a central organising principle of social life.⁴ Such a perspective aims to reveal the power relationships which are inherent within social relations and is premised upon a commitment to progressive social change. From this standpoint, with its present emphasis upon the gendered nature of legal relationships,⁵ particular consideration will be given to the implications and effects of the HRA upon the UK's legal culture (that is the legal environment, techniques of legal argumentation and litigation practices and strategies) given that, for the first time in our constitutional history, this Act incorporates the European Convention on Human Rights (hereafter the Convention) into domestic law, permitting litigants to rely on the human rights guarantees provided under the Convention before national (as opposed to a European) court(s).

It is to be recognised that this scenario presents a distinct problem peculiar to the United Kingdom. There has been no need for a similar 'rights revolution' elsewhere in Western Europe given that, with the exception of Ireland, other states signatory to the Convention have incorporated it into their legal systems.⁶ So, for example, in France and the Netherlands the monist approach to international law means that national courts have for many years been used to applying international legal texts which protect fundamental rights (such as the Convention and the International Covenant on Civil and Political

⁴ See generally, M. Humm, *Feminisms: A Reader* (Harvester Wheatsheaf, 1992); A.M. Jagger, *Feminist Politics and Human Nature* (Harvester, 1983); S. Kemp and J. Squires, *Feminisms* (OUP, 1997); R. Tong, *Feminist Thought: A Comprehensive Introduction* (Unwin Hyam, 1989).

⁵ On the relationship between law and gender see, for example, A. Bottomley (ed.), *Feminist Perspectives on the Foundational Subjects of Law* (Cavendish Publishing, 1996); A. Bottomley and J. Conaghan (eds.), *Feminist Theory and Legal Strategy* (Blackwell, 1993); J. Bridgeman and S. Millns, *Feminist Perspectives on Law: Law's Engagement with the Female Body* (Sweet and Maxwell, 1998); R. Greyer and J. Morgan, *The Hidden Gender of Law* (The Federation Press, 1990); N. Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart Publishing, 1998); C.A. MacKinnon, *Feminism Unmodified* (Harvard University Press, 1987); N. Naffine, *Law and the Sexes* (Allen & Unwin, 1990); K. O'Donovan, *Sexual Divisions in Law* (Weidenfeld & Nicolson, 1985); A. Sachs and J.H. Wilson, *Sexism and the Law: A Study of Male Beliefs and Legal Bias in Britain and the United States* (Martin Robertson, 1978); C. Smart, *Feminism and the Power of Law* (Routledge, 1989).

⁶ This does not, however, render the Irish situation analogous to that in the UK because there exists, nevertheless, in Ireland a strong tradition of rights protection based upon the judicial development of the rights guaranteed in the Irish Constitution. For discussion of national approaches to the Convention see the country specific studies in C.A. Gearty (ed.), *European Civil Liberties and the European Convention on Human Rights: A Comparative Study* (Martinus Nijhoff, 1997).

Rights) in order to disapply national legislative provisions in cases of conflict.⁷ Furthermore, the Constitutional Courts of other countries, such as Germany and Italy, have developed an active national system of rights protection through interpretations of the extensive rights provisions contained in their own Constitutions. This has meant that international texts such as the Convention have had relatively little impact given that the protection of rights under national law is already considered more extensive than that under international law.

Questions of the interpretation of reproductive rights in other Western European countries have, hence, been dealt with according to these various mechanisms for rights protection. Thus, in France, for example, the *Conseil d'Etat* has ruled that the 1975 law on abortion is indeed compatible with the European Convention on Human Rights,⁸ while in Germany, the Constitutional Court has examined the compatibility of domestic legislation on abortion with fundamental rights protected under the German Constitution.⁹ While, therefore, the reproductive revolution may be a common phenomenon throughout Western Europe, its occurrence in conjunction with a 'rights revolution' is very particular to the UK context.

Bearing this particularity in mind, the first section of the paper introduces the new regime for the protection of fundamental rights under the HRA and sets this within contemporary human rights discourses. Two themes are then advanced concerning the role of two sets of actors in the rights debate. The first theme centres upon litigants themselves and addresses the question of the utility of pursuing rights-based strategies (as opposed to other legal and non-legal options) within the new system of rights protection. This question is important especially with regard to the situation of minority groups and those who conventionally lack power in society. For example, scepticism has been expressed by feminists such as Elizabeth Kingdom and Carol Smart over the desirability of using rights-based arguments to advance women's position in society given that such arguments may promise more in theory than they can deliver in practice.¹⁰ How likely, therefore, is it that the rights revolution will make such scepticism now obsolete? The second theme is concerned with another set of empowered, rising stars of the rights revolution - the national judiciary. Under scrutiny will be their enhanced role after incorporation of the Convention which will require of them a shift in traditional ways of articulating questions of human rights protection and will demand unprecedented

⁷ French Constitution, Article 55; Dutch Constitution, Article 94.

⁸ *Conseil d'Etat* 21 December 1990, D. 1991, 283.

⁹ Abortion I Case (1975) 39 BVerfGE 1; Abortion II Case (1993) 88 BVerfGE 203.

¹⁰ E. Kingdom, *What's Wrong with Rights: Problems for Feminist Politics of Law* (Edinburgh University Press, 1991); C. Smart, *ibid.*

involvement at national level in balancing the disparate interests of those asserting their rights under the Convention.

This initial introduction to the new human rights culture in the UK is followed by a second section which considers the ways in which reproductive rights may be litigated currently under the Convention and under domestic law and how this might change under the new human rights regime. In particular the provisions of national legislation, such as the Abortion Act 1967 and the Human Fertilisation and Embryology Act 1990, are investigated in order to uncover the measure of their (in)compatibility with the rights guaranteed under the Convention. The example of reproductive rights used here to highlight tensions between Europe and the nation state is particularly illuminating in that reproduction is at once both a *universal* concern and one which in its operationalisation, that is its facilitation or prevention, raises questions that are intimately connected to *national* visions of concepts such as the family, motherhood and marriage, not to mention country specific moral values and concerns. The section will highlight the problematic interaction between domestic law and Convention rights and pinpoint areas which might spark litigation.

I BRINGING RIGHTS HOME – THE HUMAN RIGHTS ACT 1998 AND THE NEW RIGHTS CULTURE

In order to place the question of reproductive rights in context, it is first necessary to take a brief look at the prevailing climate of rights protection in the UK. This has undergone important changes associated with the constitutional reform programme of the new Labour government following its election victory in 1997.¹¹ One key aspect of the programme has been 'Bringing Rights Home' - the government's response to the long-standing debate over whether or not a Bill of Rights should be introduced in the UK and if so what form it should take.¹² As outlined above, this project, introducing one of the most radical reforms to human rights law that the UK has known, involves the 'domestication' of human rights via the incorporation into national law of the European Convention on

¹¹ In its first parliamentary session the government introduced eleven new constitutional Bills (six on devolution, one on the EU, two on electoral reform, one on elected mayors and one on human rights). These reforms are neatly reviewed in R. Hazell, 'Reinventing the Constitution: Can the State Survive?' [1999] *Public Law* 84.

¹² *Rights Brought Home: The Human Rights Bill*, Cm 3782, 1997. Literature on the desirability or otherwise of a Bill of Rights in the UK is abundant. See, for example, Institute of Public Policy Research, *The Constitution of the United Kingdom* (IPPR, 1991); A. Lester, 'Fundamental Rights: The United Kingdom Isolated' [1984] *Public Law* 46; Liberty, *A People's Charter: Liberty's Bill of Rights* (Liberty, 1991); J. Wadham, 'Bringing Rights Home: Labour's Plans to Incorporate the European Convention on Human Rights into UK Law' [1997] *Public Law* 75; M. Zander, *A Bill of Rights* 4th ed. (Sweet & Maxwell, 1997).

Human Rights.¹³ In order to protect national sovereignty no such implementing measure had been taken before, despite the fact that the UK had been a significant contributor to the drafting process of the Convention and in 1951 was one of the first states to ratify it. Given the supremacy of the UK parliament, and hence of domestic law, the Convention was only ever applicable as part of international law. Consequently victims alleging violations of their Convention rights had to take their claims to the European Commission and Court of Human Rights in Strasbourg in order for them to be heard – a lengthy and costly process (although it might be noted in passing that, while in the past claims of alleged violations of rights under the Convention had to be made first of all to the Commission which would then screen them for admissibility and take an initial decision upon their merits, with the coming into force of Protocol 11 to the Convention on 1 November 1998, applications may now be made directly to the Court with the expectation that this will speed up the time taken to render decisions).¹⁴ In the domestic context, however, while the UK judiciary has always been under a duty to do its best to interpret national law in the light of Convention rights, in cases of clear conflict between UK law and the Convention, national law would prevail.¹⁵

1. THE MECHANICS OF THE NEW REGIME

The ‘rights revolution’ has introduced a number of important changes to the old regime. As of October 2000, when the HRA came into force in England, Wales and Northern Ireland (having already been made partially effective in Scotland since May 1999), the substantive rights under the Convention may be invoked by individuals before the UK courts (although a number of procedural rights and the right to an effective remedy under Article 13 remain, controversially, unincorporated). For litigants this process has the advantage of speed and cost efficiency in the resolution of rights claims, but it is also a form of empowerment for the national judiciary in that it devolves upon them a new responsibility to give effect to Convention rights and represents an opportunity for them to reassert a domestic interpretation of rights (another important aspect of the project to ‘bring rights home’). But, unlike many constitutional courts in

¹³ For further detail on the operation of the HRA see K.D. Ewing, ‘The Human Rights Act and Parliamentary Democracy’ (1998) 62 *Modern Law Review* 79; D. Feldman, ‘The Human Rights Act 1998 and Constitutional Principles’ (1999) 19 *Legal Studies* 165; F. Klug, ‘The Human Rights Act 1998, *Pepper v. Hart* and All That’ [1999] *Public Law* 246; J. Wadham and H. Mountfield, *Blackstone’s Guide to the Human Rights Act 1998* (Blackstone Press, 1999).

¹⁴ A.R. Mowbray, ‘The Composition and Operation of the New European Court of Human Rights’ [1999] *Public Law* 219.

¹⁵ On the enforcement of rights in the domestic context see M. Hunt, *Using Human Rights Law in English Courts* (Hart Publishing, 1998) and comment thereon in N. Walker, ‘Setting English Judges to Rights’ (1999) 19 *Oxford Journal of Legal Studies* 133.

other jurisdictions, the new power of the judiciary does not extend to striking down primary legislation judged to be incompatible with Convention rights. In this respect parliamentary sovereignty is maintained. Instead, some courts (the High Court and above) may issue a 'declaration of incompatibility' signifying a finding of a legislative breach of the Convention which may then be rectified by a 'fast-track' procedure whereby the appropriate government minister can issue an Order to amend the offending legislation subject to the approval of both houses of parliament. A finding, therefore, that the Abortion Act 1967 or the Human Fertilisation and Embryology Act 1990, for example, contain provisions contrary to the rights guaranteed under the Convention might result in a swift amendment to these statutes short-cutting the normally extensive parliamentary debate in these controversial matters.

A further limitation of the HRA is with respect to the types of executive actions which can be reviewed for their compatibility with rights under the Convention. The Act has only 'vertical' effect which means that it is only acts of *public* authorities that are subject to review by the courts for their Convention compliance. The provisions of the Act are not 'horizontally' effective meaning that the courts have no power to review the actions of *private* individuals, even if they appear to infringe rights guaranteed by the Convention, the only exception being where a private body can be said to be performing a 'public' function. So, for example, while the decision of a public health authority not to allow a woman access to new reproductive technologies might be scrutinised for its compatibility with that woman's fundamental rights, a similar decision of a private clinic would not be unless it could be established that the clinic (being regulated under the Human Fertilisation and Embryology Act 1990 in its provision of IVF services) was performing a public function and thus fell within the terms of the HRA. This situation might well introduce inequalities between individuals in the enforcement of their rights claims depending upon the interpretation of the nature and status of the authority against whom they seek to enforce these rights.¹⁶

That said, there is an important way in which this limitation may not be as restrictive as it initially appears. This is because the HRA imposes a further, and more general, duty of interpretation upon the judiciary who are obliged to interpret *all* legislation as far as possible to be in conformity with Convention

¹⁶ It is evident that the very definition of what constitutes a 'public authority' and 'functions of a public nature' under s.6 of the HRA is contested terrain and capable of either a broad or a narrow construction. The consequences of giving broad or narrow meanings to these phrases are discussed in D. Oliver, 'The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act' [2000] *Public Law* 476.

rights.¹⁷ Hence, the actions of private individuals will be subjected to interpretation through the lens of Convention rights when questions over the meaning of any legislation are raised.¹⁸ This may be of particular relevance in the sphere of reproductive rights given their often private nature arising within the context of intimate human relationships and ostensibly, therefore, beyond the reach of the state. Furthermore, in carrying out this interpretative exercise, the judges are required to have regard to the existing body of decisions and case law of the Strasbourg institutions. It is, therefore, of importance to investigate the way in which reproductive rights have been interpreted by these institutions as this is bound to be influential upon any disputes brought before the UK courts.¹⁹ We will return to this question below.

2. THE CHANGING CULTURE OF RIGHTS

The HRA has, therefore, brought about substantial shifts in the legal mechanisms in place for human rights protection in the UK. Beyond the procedures themselves, however, broader questions may be identified concerning the shift in legal culture which the operation of the HRA will require.²⁰ Primarily, it is clear that the behaviour of individual litigants and the legal strategies adopted by lawyers and the judiciary demand adaptation to the new culture of rights protection. This is particularly so given that the HRA marks a shift away from the traditional approach to rights protection in the UK, which has been largely negative in its formulation (one is permitted to do anything which the law does not prohibit) towards an emphasis on the protection of rights framed in a positive fashion (for example, the entitlement to a right to

¹⁷ F. Bennion, 'What Interpretation is "Possible" under Section 3(1) of the Human Rights Act 1998?' [2000] *Public Law* 77.

¹⁸ See further M. Hunt, 'The "Horizontal Effect" of the Human Rights Act' [1998] *Public Law* 423.

¹⁹ Convention jurisprudence on reproductive rights represents only one facet of the European Commission and Court's discussion of issues that feature a gender dimension. As such it can be viewed more broadly within the context of discussion by the Strasbourg organs of other matters such as the family and marital status (*Marckx v Belgium* (1979) 2 EHRR 330, *Keegan v Ireland* (1994) 18 EHRR 342); homosexuality (*Dudgeon v United Kingdom* (1982) 4 EHRR 149, *Norris v Ireland* (1991) 13 EHRR 186, *Modinos v Cyprus* (1993) 16 EHRR 485, *Laskey, Jaggard and Brown v United Kingdom* (1997) 24 EHRR 39, *Smith and Grady v United Kingdom* (2000) 29 EHRR 493); transsexuality (*Rees v United Kingdom* (1987) 9 EHRR 56, *Cossey v United Kingdom* (1991) 13 EHRR 622, *B v France* (1993) 16 EHRR 1, *Sheffield and Horsham v United Kingdom* (1999) 27 EHRR 163); sexual violence (*X and Y v The Netherlands* (1986) 8 EHRR 235, *SW v United Kingdom* and *CR v United Kingdom* (1995) 21 EHRR 363); and immigration (*Abdulaziz, Cebales and Balkandali v United Kingdom* (1985) 7 EHRR 471).

²⁰ See further L. Clements and J. Young 'Human Rights: Changing the Culture' (1999) 26 *Journal of Law and Society* 1; M. Hunt, 'The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession' (1999) 26 *Journal of Law and Society* 86.

life, a right to respect for private life, to freedom of expression and so on). It is hardly surprising that experience in Scotland, where the HRA was binding upon the Scottish Executive for 18 months prior to its full implementation in the rest of the UK, suggests a rather mixed and messy beginning in adapting to the demands of the new rights culture.²¹

Nevertheless, as far as individual litigants are concerned the new regime might appear attractive in that it offers increased possibilities for the enforcement of their individual rights and freedoms and a new legal strategy to pursue before the courts. However, this new possibility needs to be viewed with a degree of caution. In the past a number of problems have been identified when individuals have sought to base claims upon an assertion of their legal rights and the question, therefore, needs to be asked as to whether the HRA might not just simply exacerbate these difficulties.

A preliminary difficulty may be identified in the way that human rights tend to be understood in terms of *individual* rights. While on the one hand such a construction is helpful in ensuring that rights are seen to pertain to each and every human being, it can, nevertheless, be a hindrance to the progressive construction of group and collective rights, particularly those of minorities. The violation of individual rights demands an individual initiative in enforcing that right and results in an individual remedy should an interference be found. Individual rights are, therefore, not necessarily the best way to tackle pervasive and systemic discrimination against particular sectors of society.

Furthermore, a distinction can be drawn between the formal acquisition of a right and its capacity to realise change in practice. For example, historically, while individuals who have suffered discrimination have initially sought to combat this through claims for a right to legal equality, it has subsequently become apparent that such claims, even though they may result in anti-discrimination measures being enacted and hence the acquisition of formal legal rights, may not ultimately produce a more substantive form of equality. Hence, in the area of sex equality, despite the enactment of the Sex Discrimination Act 1975, discrimination against women in many spheres of life still persists both in those areas covered by this legislation (employment, education and the receipt of services) and also beyond its sphere of operation.²² It is apparent, therefore, that

²¹ It is, primarily, aspects of the Scottish criminal justice system which have been declared contrary to fundamental rights. See A. Loux and W. Finnie (eds.), *Human Rights and Scots Law – Comparative Perspectives on the Incorporation of the ECHR* (Hart Publishing, 2000).

²² For discussion in the area of employment law, see A. Morris and S. Nott, *Working Women and the Law: Equality and Discrimination in Theory and Practice* (Routledge, 1991). For more general discussion on the difference between formal and substantive equality see J. Bridgeman and S. Millns, *supra*, n.4, ch.2.

calls for the enforcement of greater legal rights which, even when successful, result in the failure to confer concrete gains may simply act as a decoy, detracting from the substance of a particular problem and providing an excuse for no further action on the part of public authorities. In the area of abortion and fertility treatment services, particularly, it may be of little worth to those seeking access to these provisions whether or not they have a formally protected legal right to do so if ultimately the state refuses to fund the services, making access impossible for those lacking the financial resources to fund the treatments themselves. This situation is well illustrated in the United States of America where the decriminalisation of abortion founded upon the constitutional right to privacy, has not prevented the Supreme Court from finding that this right does not mean that abortions need be funded by federal Medicaid programmes (*Harris v. McRae* (1980) 448 US 297). The constitutionally protected right to privacy and a woman's ability to 'choose' a termination, therefore, are only guaranteed in so far as she is able to pay for the service herself.

Another danger for some litigants when entering into the new rights discourse is the fact that rights provisions inevitably cut both ways. That is to say claims for legal rights made by one litigant may produce counter-claims on behalf of another – claims which will probably run in direct opposition to one another. Hence, the rights of the various protagonists of the reproductive revolution may clash and, as will be seen below, this can lead to tussles in court over the meaning and interpretation of the various rights and interests involved. Thus, as rights claims proliferate, it may be that certain individuals are required to become more *defensive* as opposed to offensive in their litigation strategies simply in order to maintain the status quo and any already acquired legal rights. In the area of reproductive rights, for example, Stephanie Palmer has highlighted the difficulties for pro-choice activists who, in the face of an assertion of rights claims by the anti-choice movement, may have to retrench simply in order to defend in court the democratically acquired rights which women currently have to seek abortion services in the UK.²³ The effect of adopting this defensive position would be to limit the resources available to push for increased access and would ultimately impede the pursuit of the more far-reaching goal of securing a right for women to choose freely whether or not to terminate a pregnancy.

²³ S. Palmer, 'Critical Perspectives on Women's Rights: The European Convention on Human Rights and Fundamental Freedoms' in A. Bottomley (ed.), *Feminist Perspectives on the Foundational Subjects of Law* (Cavendish Publishing, 1996) p.223, at p.239. Similar concerns have been raised about the way in which Convention rights might be used by defendants in cases of sexual assault to undermine the position of their alleged victims: T. Murphy and N. Whitty, 'What is a Fair Trial? Rape Prosecutions, Disclosure and the Human Rights Act' (2000) 8 *Feminist Legal Studies* 143.

A further difficulty is created for litigants by the very nature of the Convention itself. It protects in the main only civil and political rights and is short on social and economic rights which have, furthermore, been largely excluded from the whole debate on reform.²⁴ In the area of reproduction, however, the application of social rights in particular might well be a more pertinent way to approach the subject matter. For example, a right to adequate health care does not feature among the rights under the Convention. Rights claims made under the new regime might, therefore, lead to a skewing of the real issue in order to 'fit' the prescribed rights agenda on offer.

Yet, despite these evident difficulties with the new human rights regime, it must not be forgotten that the call to rights can be empowering for individuals. It allows claimants to access the new legal rights culture by putting them at centre stage and gives litigants a new string to their bow of legal strategies. To this extent the new rights culture provides an important space in which new ways of thinking about human rights law can be advanced and will certainly give voice to individual rights claims which may not have surfaced under the old regime. Furthermore, given the overwhelming climate change in favour of rights discourse in the UK political context, it is apparent that engagement with this discourse is ineluctable and, as such, its opportunities need to be explored as fully as possible by would-be litigants.²⁵ Proceeding with a degree of caution, therefore, litigants may have much to gain from the new climate of human rights protection.

The need to proceed with caution might also be sound advice with regard to a second set of protagonists in the rights revolution – the judiciary – with whom much of the operation of the HRA now rests. Remembering, however, that the judges have been schooled, and are used to working, within a tradition of common law which has focussed upon providing *remedies* as opposed to granting rights, they too, like the litigants before them, will be required to make changes in their ways of thinking about rights claims within the new human rights culture.

²⁴ See K.D. Ewing, 'Social Rights and Constitutional Law' [1999] *Public Law* 104.

²⁵ The 'ineluctability' of rights discourse is advanced by Elizabeth Kingdom as one strategic reason for feminists to engage in this discourse; the other two grounds being the 're-assertion' of rights discourse where its limitations are judged less important than its political effectiveness, and the 'conversion strategy' according to which conventional 'women's rights' can be converted into rights which more effectively improve women's position: E. Kingdom, 'Body Politics and Rights' in J. Bridgeman and S. Millns (eds.), *Law and Body Politics: Regulating the Female Body* (Dartmouth, 1995) p.1, at pp.10-18.

First, and perhaps most obviously, it must not be forgotten that the enforcement of rights before the courts does not operate in isolation of the context in which those rights are sought. While much scholarship recognises that human rights reform is a key aspect of the constitutional reform programme, debate both in practice and in the academy has, nevertheless, tended to take place at a rather abstract level concentrating on internal analyses of competing rights provisions and paying little attention to the contexts in which human rights law operates and the external impact of judicial decision-making. The new regime requires much more insight to the extent that it is imperative that it reveal the power relations at the centre of all competing rights claims and that it does not ignore the ways in which the interpretation of fundamental rights will inevitably affect the lives of individual rights claimants and work towards the construction of the identities of particular groups within society, such as women, and sexual and ethnic minorities.²⁶

The requirement of contextualisation does, of course, mean that the judiciary will not be able to eschew the need to make difficult choices which have no easily identifiable legal solution and which in fact go to the very heart of moral and political decision-making. This is nowhere more evident than in the context of human reproduction with the ethical dilemmas it provokes. Yet, it may prove a challenge given the habitual way in which questions of reproduction have been steered by the UK judiciary away from the difficult terrain of reproductive politics and onto more 'scientific' or medical terrain. For example, in cases concerning abortion, Sally Sheldon has demonstrated that the judiciary, rather than pronouncing upon the individual rights claims of litigants, has preferred to conceptualise abortion disputes within a medical framework and thus to defer to medical authority with regard to the question of foetal viability in order to determine the legality or otherwise of a termination.²⁷ So, in a case where an 18 week old foetus was found not to be viable from a medical point of view a termination was deemed legitimate (*C v S* [1987] 1 All ER 1230) and where a 27 week old foetus was deemed medically to be viable, a termination was judged to be unlawful (*Rance v Mid-Downs Health Authority* [1991] 1 All ER 801). This deference to medical opinion has meant that judicial authorities are able to skirt around the thorny question of prioritising in a specific way the competing rights and interests of the pregnant woman, the foetus and the putative father. While, on the one hand it is debateable to what extent the escape route based upon medical expertise will remain open once the judiciary is forced to articulate its decisions within the context of competing claims based upon

²⁶ As demonstrated, for example, in the work of D. Herman, *Rights of Passage: Struggles for Lesbian and Gay Equality* (Toronto UP, 1994); and C. Stychin, *A Nation by Rights: National Cultures, Sexual Identity Politics and the Discourse of Rights* (Temple UP, 1998).

²⁷ S. Sheldon, 'Subject Only to the Attitude of the Surgeon Concerned: The Judicial Protection of Medical Discretion' (1996) 5 *Social and Legal Studies* 95.

positive legal rights, there may yet be other escape routes open. As will be seen below, courts at the European level have also been fairly successful in developing alternative ways to characterise rights disputes in the sphere of reproduction, managing to slot them into frameworks which serve to obscure the politics behind those rights. It might be supposed that these alternative characterisations or formulations of rights disputes will influence national judicial decision-making too.

The question of the context of human rights law, however, does raise an extremely important question about the legitimacy of an increased judicial role in making decisions which are replete with moral and political overtones (notwithstanding the attempts – conscious or unconscious – of judges to disguise them). Aileen McColgan in her study of the impact of the HRA upon women's rights expresses scepticism as to the democratic legitimacy of increased judicial intervention and fails to derive much comfort from the fact that parliamentary sovereignty is (at least theoretically) still preserved.²⁸ On the other hand Joanne Conaghan sees litigation strategies pursued before the courts (in the area of the development of the law of torts to encompass sexual harassment) as an important mechanism for judicial enterprise which can enhance the rights of minority groups who have otherwise found themselves marginalized, or unsuccessful, before the parliamentary process.²⁹ Whatever the rights or wrongs of increased judicial activity in assessing human rights claims it is worth bearing in mind that the judges themselves are a highly selective group of individuals who tend to share similar traits and life experiences. One might, therefore, naturally be sceptical as to their ability to bring a plurality of perspectives to bear upon the matters brought before them. This point is particularly important for questions of reproductive rights which are often asserted by women and yet will continue to be determined by a still predominantly male judiciary.³⁰

Having set out the stall of provisions under the HRA it is clear that the new human rights culture presents both troublesome and promising aspects. On balance a degree of cautious optimism as regards the Act's potentially wide-ranging application, together with vigilant scrutiny of the way in which it is applied in practice, would seem to be in order. Armed with an awareness of the risks entailed in any recourse to rights, a certain boldness on the part of litigants

²⁸ A. McColgan, *Women Under the Law: The False Promise of Human Rights* (Pearson, 2000).

²⁹ J. Conaghan, 'Gendered Harms and the Law of Tort: Remedying (Sexual) Harassment' (1996) 16 *Oxford Journal of Legal Studies* 407.

³⁰ For an assertion that women judges do make a difference to the legal process, see C. McGlynn, *The Woman Lawyer: Making the Difference* (Butterworths, 1998). On the influence of the composition and background of the judiciary upon decision-making, see J.A.G. Griffith, *The Politics of the Judiciary* (Fontana Press, 1997).

and imagination on the part of legal advocates carries with it the definite possibility of the creation of a new and dynamic human rights policy across the breadth of the UK's legal order. In the light of this assessment of more general concerns about the HRA, we will now turn to a detailed consideration of reproductive rights in particular. These will be investigated as they stand both under the Convention and under domestic law in order to identify points of tension between Convention rights and UK law. This is in an attempt to anticipate what might happen where there is confrontation between the two legal regimes and the new role played by the national judiciary begins to take effect.

II REPRODUCTIVE RIGHTS, CONVENTION RIGHTS AND UK LAW

The first important point to note within the sphere of reproductive rights is that neither UK law nor the Convention (nor indeed any international law), recognise a specific 'right to reproduce' nor conversely, do they recognise a 'right *not* to reproduce'. Any rights which are, therefore, associated with the processes of reproduction, have to be pinned upon other legal provisions. Under the Convention this means hanging reproductive rights upon a number of the civil and political rights set out therein, the remit of which is necessarily rather broad and general. Within domestic UK law, conversely, the trend is more towards specificity with the articulation of reproductive rights and interests through the enactment of fairly detailed legislative provisions.

Taking domestic law first, both the prevention of reproduction and the assistance of conception have been subjected to legal regulation at the national level – the former more substantially and for a longer period of time than the latter. So, for example, legal aspects of the prevention of reproduction have led to measures regulating the provision in Great Britain of abortion (Abortion Act 1967) and contraception (National Health Service Act 1977). More contemporaneously, controversy over surrogacy in the 1980s led to the swift passage of the Surrogacy Arrangements Act 1985, while the new wave of reproductive technologies, such as IVF and donor insemination, have been subjected to regulatory measures by the Human Fertilisation and Embryology Act 1990.

Under the Convention several different ways are identifiable in which reproductive matters may interrelate with the rights guaranteed, notably through an application of Article 2 (the right to life), Article 8 (the right to respect for private and family life), Article 9 (freedom of thought, conscience and religion) Article 10 (freedom of expression), and Article 12 (the right to marry and found a family). Here, however, it is necessary to highlight an important feature of the rights under the Convention – and a factor which is not uniform amongst them – which is the way in which their enjoyment may be curtailed by the state in

certain situations. So, for example, while the right to life guaranteed under Article 2 is subject to few limitations (such as the use of lethal force in self defence), Articles 8, 9 and 10 permit the state to curtail the right to respect for private and family life, freedom of thought, conscience and religion and freedom of expression where this is necessary in a democratic society for a number of key reasons such as the protection of health or morals and the protection of the rights and freedoms of others. Article 12 may also be limited in its application by the national law of the signatory state. These limits, which are interpreted by the Strasbourg authorities to allow the state a broad 'margin of appreciation' (see *Lawless v Ireland* (1961) 1 EHRR 15 and *Handyside v United Kingdom* (1976) 1 EHRR 737), are not insignificant when viewed with respect to the diverse moral and ethical concerns, together with specific national interests, which may figure in reproductive choices and which must be managed and balanced. Also of potential relevance is Article 14 which prohibits discrimination upon a number of grounds including sex and any 'other status'. However, this Article is not free-standing in that the guarantee which it contains cannot be pleaded on its own, but can only be raised in conjunction with the alleged violation of one of the substantive rights or freedoms set out in the Convention. This necessarily limits its utility in combating discrimination.³¹

1. CASE LAW UNDER THE CONVENTION

It is necessary to consider the ways in which the above mentioned Articles have been interpreted by the European Commission and Court of Human Rights in reproductive matters as this case law will be called upon by the UK judiciary in actions brought before the national courts. Despite the absence of a specific right to reproduce, but given the diverse ways of advancing arguments about reproductive rights under the Convention, it is surprising that the case law in this area is relatively limited. The issue of abortion has provoked most discussion, but even this has often been raised in issues which can at first glance seem tangential to the construction of abortion as a matter of reproductive politics. Given, however, the significant margin of appreciation doctrine applied when balancing competing individual rights and state interests under the Convention, together with a distinct absence of consensus in the provision of abortion among parties to the Convention, the reluctance of the Commission and Court to intervene in such a sensitive area becomes easier to understand.

³¹ Developments regarding the Committee of Ministers of the Council of Europe's commitment to revise Article 14 by adopting Protocol no. 12 to the Convention (open for signature by member states on 4 November 2000) are summarised in G. Moon, 'The Draft Discrimination Protocol to the European Convention on Human Rights: A Progress Report' [2000] *European Human Rights Law Review* 49. See further below, section II(2)(A)(iii).

Of particular interest is the fact that neither the Commission (in its initial assessment of the admissibility and merits of a case) nor the Court (in its capacity as final arbiter) has found it necessary to pronounce upon the extent to which the right to life guaranteed under Article 2 is applicable to the foetus. This gap will undoubtedly prove challenging should UK judges be faced with mooted the same point. The closest the Commission has come to discussing the issue is in two cases, *Bruggemann and Scheuten v Federal Republic of Germany* (1981) 3 EHRR 244 and *Paton v United Kingdom* (1981) 3 EHRR 408 where debate centred upon the right to respect for private and family life under Article 8 as opposed to the right to life. In the former case a restriction on the law on abortion in Germany was found not to violate the right to respect for private life because it was decided that not every aspect of abortion related to privacy and therefore any regulation would not necessarily constitute an interference in a woman's private life. In the *Paton* case a husband's claim that he should be consulted about his wife's decision to have a termination was unsuccessful under Article 8. His attempt to prevent the termination did not succeed as the Commission found that the right to life and health of the mother limited any right that the foetus might have. The Commission did not, however, articulate specifically what those rights might be or the moment at which they begin to take effect.

The European Court of Human Rights has rendered two decisions in cases pertaining to abortion – *Open Door Counselling, Dublin Well Woman Centre Ltd and Others v Ireland* (1993) 15 EHRR 244 and *Bowman v United Kingdom* (1998) 26 EHRR 1. It has been equally circumspect in its pronouncements again offering relatively little guidance for the national judges and leaving a degree of freedom for creative interpretation. Both cases in fact turned upon Article 10 of the Convention with its guarantee of a right to freedom of expression. The *Open Door* case, which concerned access to information about abortion services, was brought by two counselling organisations in Ireland which sought to challenge an injunction granted in the Irish courts restraining them from helping pregnant women to travel from Ireland in order to obtain abortions elsewhere. The Court found that there was indeed a violation of Article 10 because of the breadth of the injunction. The Irish government's attempt to argue that Article 10 was not breached because the aim of Irish law was to protect the right to life of the unborn (as per Article 2 of the Convention) was unsuccessful as the Court held that, while there was no common standard of European morality and Ireland did have a degree of discretion, this discretion was subject nevertheless to the review of the Court. Because it was not an offence to seek an abortion outside of Ireland, the prohibition upon information was an improper restriction.

In the *Bowman* case the issue was somewhat differently constituted but still brought within the umbrella of freedom of expression and as such largely decontextualised from questions of abortion politics. Mrs Bowman, a leading UK anti-choice activist, was prosecuted for distributing a large quantity of leaflets in election constituencies throughout Britain which set out the various candidates' views on abortion and embryology – the prosecution being brought under s.75(1) of the Representation of the People Act 1983 which prohibits any expenditure in excess of five pounds being incurred by any person other than candidates, their election agents and persons authorised in writing by the latter, with a view to promoting or procuring the election of a candidate. Although Mrs Bowman was eventually acquitted, this was on a technicality, due to her having been summonsed after the one year time limit for prosecution had passed. The European Court found that the prosecution amounted to a violation of the right to freedom of expression guaranteed under Article 10.

The *Bowman* decision raises a number of important issues which go to the heart of what it means to live within a democratic society which seeks to balance the various rights and interests of its citizens and is telling about the way in which the Court constructs human rights provisions sometimes without consideration of the full context of their operation.³² For example, the issue is framed by the Court in terms of the promotion of democracy and electoral choice in which the leaflet produced by Mrs Bowman is represented as a means of providing the electorate with 'factually accurate' information as opposed to revealing the purpose of the leafleting strategy as an attempt to reposition abortion at the heart of electoral politics. The Court's usage, without citation marks, of the phrase 'factually accurate' to describe the information disseminated (in the context of the reported account of Bowman's contention that there was no pressing social need to prevent the distribution of such information) implies that the accuracy of the information in the election leaflets should remain uncontested with the result that its capacity to actually enhance electoral choice (were it to have been revealed as misleading) was not discussed. Thus, it is apparently irrelevant that the leaflets contained language which could be described at best as highly emotive, if not simply inaccurate. Consider the following characterisation of the Labour candidate, Alison Mahon, described in the leaflet as:

'a leading pro-abortionist. As an MP she voted to allow abortion up to birth for handicapped babies... She also voted to allow human embryos to be used as guinea-pigs in programmes including the testing of drugs and other experiments.'

³² See further S. Millns and S. Sheldon, 'Delivering Democracy to Abortion Politics: *Bowman v The United Kingdom*' (1999) 7 *Feminist Legal Studies* 63.

The above representation of Ms Mahon's position could, however, be paraphrased rather differently to provide a less misleading account. Consider, for example, the following hypothetical alternative:

Ms Mahon is a leading pro-choice MP who voted to extend the provision of abortion services until term where two doctors believe that termination is necessary because of serious risk of grave foetal disability and who voted to allow human embryos to be used in approved and regulated scientific programmes including investigation into infertility and other diseases.

The lack of contestation of the wording of Bowman's leaflets is mirrored by a similar failure to analyse the accuracy of the imagery contained therein, notably the depiction of a free-floating foetus at ten weeks gestation. Yet it has been argued persuasively by Petchesky that this type of imagery has the power to abstract and then to represent as fact an image which is inaccurate in that it obscures from view the body of the pregnant woman surrounding the foetus and negates her role in the gestation process.³³ Hence, the representation is one of the foetus as an autonomous individual, devoid of context and wholly disconnected from the woman supporting its development.

The election leaflets are, therefore, loaded in a way which is not productive of accurate and informed debate on abortion politics and as such their ability to facilitate democratic choice seems to require some questioning in order to properly contextualise the dispute. The Court preferred a classic (and decontextualised) formulation of the right to freedom of expression as being essentially negative in that the state was prevented from interfering in Bowman's right in these circumstances. This exposes the troublesome consequence of an absence of positive obligation to ensure that information delivered into the public domain is accurate and that it is understood correctly by its audience in order to be conducive to the operation of a democratic society.

Thus, within this line of case law it is evident that the reproductive issues in question are largely decontextualised as they are sieved through a legal analysis and reduced to the bare legal bones of the right to freedom of expression. This lack of contextualisation at the European level is troubling because, as shown in the *Bowman* decision, it demonstrates an unwillingness to consider the reality in which rights provisions may bite and is a practice which it is feared the national judiciary may adopt, paying lip service to judicial precedent while avoiding the difficulties of interpretation demanded by a heightened sensitivity to context.

³³ R. Petchesky, 'Foetal Images: The Power of Visual Culture in the Politics of Reproduction' in M. Stanworth (ed.), *Reproductive Technologies: Gender, Motherhood and Medicine* (Polity, 1987) p.57.

That said, there is, at least, in the area of abortion a history, albeit limited, of case law to which the national judges should refer. But as pointed out above, preventing procreation is only one facet of the reproductive coin. In the area of facilitation of parenthood there has been little activity beyond questions of national adoption provisions within the context of Article 12's right to found a family (*X v Belgium and the Netherlands* Decisions & Reports 7 (1977)), this deficit being due probably to the length of time taken for disputes raised by the use of new reproductive technologies to reach the European Court.

One instructive exception, however, is the decision of the European Commission in *X, Y and Z v United Kingdom* (Application no. 21830/93, 27 June 1995) in which X, a female to male transsexual, whose long-term female partner, Y, became impregnated by artificial insemination using donor sperm and went on to give birth to Z, successfully established a violation of the right to respect for family life guaranteed by Article 8. The violation resulted, in the view of the Commission, from the failure of English law to give legal recognition to the de facto father-child relationship between X and Z. The Commission accepted a relatively expansive notion of 'family life' (as established through the use of new reproductive technologies) and refused to accept the assertion of the UK government that no family relationship existed between X and the other applicants and that Article 8 did not extend beyond the recognition of relationships of blood, marriage and adoption. Instead, the Commission maintained that in the UK, in the context of children born by artificial insemination by donor, it was accepted for the purposes of s.28(3) of the Human Fertilisation and Embryology Act 1990 that a 'father' need not be linked to a child either by blood or by marriage to its mother. Rather, according to the legislation, where a man who is not married to the mother is party to the treatment which results in the sperm of another being placed in the woman, he shall be deemed the 'father' of the child. The impossibility of a female to male transsexual (who remains of the female sex under English law) being considered the father of a child conceived through the lawful insemination by donor of his de facto partner, in the Commission's view constituted an interference in the family life of the applicants.

On its referral to the European Court of Human Rights ((1997) 24 EHRR 143) the case was reconsidered whereupon it was agreed that the notion of family life did indeed encompass de facto relationships and that de facto family ties were identifiable between X, Y and Z. However, a shift in perspective was then operated by the Court to the extent that the novelty of reproductive technologies and the transsexuality of the applicant both became of central concern and a disagreement with the position of the Commission ensued. First, the Court noted that in its previous case law regarding de facto relationships these had only been found to exist with regard to biological parents and their

children and not to children conceived through new reproductive technologies. Secondly, it pointed out that there was no common European standard with regard to either the legal relationship between a child conceived through use of reproductive technologies and the person who performs the role of that child's father, nor moreover, with respect to the granting of parental rights to transsexuals. The combination of the newness of the technologies together with the transsexuality of the applicant produced an exotic cocktail which, in the view of the Court, gave rise to no common response among signatory states, meaning that each state should enjoy a wide margin of appreciation in dealing with such matters. The UK had not surpassed this margin. Hence there was no failure to respect family life and no obligation on the part of the UK to recognise legally the relationships existing between X and Z.

The case of *X, Y and Z*, thus, provides an illustration of the Commission's fairly liberal, and Court's more restrictive, approach to the construction of 'family life' for the purposes of Article 8, especially with regard to its application beyond biological and blood ties and to transgendered persons. Such interpretations will be important - but undoubtedly confusing - to the national judiciary in these relatively uncharted waters as and when disputes concerning would-be parents arise before the domestic courts.

On balance, it is apparent that the interpretation of the Commission and Court in reproductive matters has not been extensive. It offers some guidance to the national judiciary (not least in terms of strategies to be adopted in order to side-step the ethical, moral and political overtones of such issues), but not a great deal besides, particularly as regard the fundamental question of what amounts to 'life' in the context of the foetus and embryo. How, then, will the fundamental rights under the Convention translate into the national context with its new rights culture? How compatible is UK law with the provisions of the Convention as interpreted in the cases outlined above? Furthermore, what might one expect the national judges to do when required to relieve moments of tension through the process of domestication of Convention rights?

2. CONFLICTS BETWEEN EUROPEAN AND UK LAW

A. Abortion

One of the key pieces of British legislation which might require judicial interpretation for its human rights compliance is the Abortion Act 1967. The Abortion Act, while not creating a right for a woman to have a termination, sets out in s.1(1) the time-limit and conditions under which abortion is lawful. This is 24 weeks in cases where continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, or where continuance would

involve injury to the physical or mental health of the pregnant woman or any existing children of her family (s.1(1)(a)). The time-limit can be extended (up to birth) where termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman (s.1(1)(b)), where continuance of the pregnancy would involve risk to the life of the pregnant woman greater than if the pregnancy were terminated (s.1(1)(c)), or where there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped (s.1(1)(d)). Section 1(1) of the Abortion Act also makes access to abortion subject to the agreement of two registered medical practitioners.

i) *Approval by two medical practitioners*

Taking the latter provision first, the requirement that a woman's decision to terminate a pregnancy should be approved by two registered medical practitioners may constitute a violation of that woman's Convention rights, notably the right under Article 8 to respect for her private life. This is because the orientation of the requirement is quite clearly to underscore the fact that the decision to abort does not belong to the woman alone and that external confirmation is necessary of the impact of continuance of the pregnancy on her physical or mental health and upon that of any children she may already have. It has been argued by Emily Jackson in the context of domestic British health care law that the requirement of medical approval sits uncomfortably with existing legal principles, notably that of patient self-determination and the commitment to autonomy.³⁴ Furthermore Jackson expresses the concern that a woman's motives for seeking a termination might be increasingly scrutinised for their moral legitimacy in an age where prenatal tests allow for the diagnosis of foetal disability with abortion being potentially made more restrictive in response to what might be seen as women's cavalier use of abortion for trivial reasons.³⁵ It is evident, that while neither social rights with respect to health care, nor general principles such as patient autonomy and self-determination feature in the Convention, any claim made with regard to the fundamental rights violations at stake here could be positioned quite squarely within the right to respect for private life along the lines of the United States Supreme Court decision in *Roe v Wade* (1973) 410 US. The right to private life is, of course, not absolute and not every interference therein amounts to a violation of privacy especially, for example, when the state must look also to the protection of the rights and freedoms of others as indicated by the European Commission in the *Bruggemann* case. It might nonetheless be sustained that the interference in the right to private life, implied by a blanket requirement that at even the earliest stages of pregnancy a woman must submit her wish to terminate to the

³⁴ E. Jackson, 'Abortion, Autonomy and Prenatal Diagnosis' (2000) 9 *Social and Legal Studies* 467.

³⁵ *Ibid.*, at 479-487.

authorisation of medical personnel, is on balance disproportionate and therefore unlawful.

ii) *Time limits*

Converse to the above pro-choice interpretation of the incompatibility of s.1(1) with the Convention, it is not unimaginable that the time limit for abortion, particularly in cases where abortion beyond the 24 week period is permitted (and thus the foetus is potentially viable) might be challenged as too high by anti-choice groups basing their claim under Article 2's right to life provision. This would suggest a need for judicial clarification of the ambit of the concept of a 'life' capable of being protected under the Convention. While under domestic law a foetus has never been recognised as a legal person, and hence does not have any legal rights until birth (*Re F (in utero)* [1988] 2 All ER 193), there has been an indication by the judiciary that a foetus is not completely without legal interests (see, for example, the case of *Re S* [1992] 3 WLR 806, in which the High Court gave a declaration that it was lawful to perform a caesarean section upon a pregnant woman despite her refusal to consent to the operation). It is not necessarily the case that what amounts to a 'life' for the purposes of the Convention and what amounts to a 'legal person' for the purposes of domestic law are one and the same, with the former going potentially to the question of viability. Should this interpretation be preferred to one based upon the fact of birth, then it is worth remembering that under Article 2 of the Convention there is little possibility for the state to justify an interference in the right to life. The right is virtually absolute with no question of balancing it against the rights or interests of another individual such as the pregnant woman.

iii) *Disability discrimination*

Probably the most vulnerable aspect of s.1(1) of the Abortion Act as regards its human rights compatibility is subsection (d) which permits terminations to term in the case of serious foetal handicap. This vulnerability lies in the fact that the provision might be argued to be in violation not only of the right to life provision contained within Article 2 of the Convention, but also might be considered a form of discrimination against disabled people and thus in violation of Article 14. Although disability is not a specified category under Article 14 discrimination under this heading could be invoked under the auspices of disability being another 'status' demanding equal protection in accordance with the widely drafted, final phrase of this Article.

Because, as mentioned above, the foetus lacks legal personality in UK law, it would be difficult to argue that it is disabled fetuses themselves which are the 'victims' of this form of discrimination either vis-à-vis the non-disabled or vis-à-vis those who become disabled through accident or illness after birth. It might, however, be more persuasively sustained that the termination of

abnormal fetuses constitutes discrimination against existing disabled persons.³⁶ This is because it perpetuates a negative view of disability (which is seen as something to be eradicated) and because it operates to reduce the number of disabled people in society thus diminishing the number of positive role models available to the disabled leaving them isolated and with an impoverished community.

While the European Court of Human Rights has traditionally been rather cautious in its usage of Article 14, in that, having once found a violation of a substantive right under the Convention, further pronouncement upon that right taken in conjunction with Article 14 has been deemed unnecessary (*Airey v Ireland* (1979) 2 EHRR 305, at p.318, para.30; see also *Dudgeon v United Kingdom* (1982) 4 EHRR 149), it is not clear to what extent UK judges will be able to resist a deeper consideration of the relevance and meaning of Article 14. This is because, first, the terrain of discrimination law is extremely familiar to the UK courts which have for the past 25 years been used to dealing with discrimination claims based notably upon grounds of sex (under the Sex Discrimination Act 1975), race (Race Relations Act 1976) and disability (Disability Discrimination Act 1995). For the sake of legal coherency and stability, it is likely that a semblance of similarity in interpretation will be sought between notions of discrimination under national provisions and that contained within Article 14 (albeit that the sectors to which the national provisions apply – primarily employment, education and services – are more limited than the potential spheres of influence of Convention rights). Secondly, the Council of Europe's proposed new Protocol No. 12 to the Convention, introducing a free-standing anti-discrimination provision with regard to any legal right currently recognised in domestic or international law, suggests a general acknowledgment that the present ambit of Article 14 is inadequate. Thus, any move by the UK judiciary to give a broader interpretation to Article 14 would be in line with recognition of this deficiency and would demonstrate a deeper commitment towards equality and non-discrimination.

iv) *Putative fathers*

A fourth type of claim to assert reproductive rights challenging the compatibility of the Abortion Act with the Convention may also be envisaged given previous history of disputes in this area in which putative fathers have brought actions in order to prevent their female partners from having a termination (as in *Paton v Trustees of British Pregnancy Advisory Service* [1978] 2 All ER 987 and *C v S* [1987] 1 All ER 1230). Litigants bringing similar action in future may seek to rely on Article 8's guarantee of a right to respect for family life. They might also invoke the right under Article 12 to marry and to found a family – it having

³⁶ This argument is run, but eventually rejected, by L. Gillan, 'Prenatal Diagnosis and Discrimination Against the Disabled' (1999) 25 *Journal of Medical Ethics* 163.

already been left open by the European Commission that these two components are separable (*X v Belgium and the Netherlands* Decisions & Reports 7 (1977) p.75).³⁷ It would not matter, therefore, if the couple were unmarried (as was the case in *C v S*) thus extending the number of potential litigants considerably.

Here, however, one might envisage a lesser degree of success for the litigant. This is because the claims of putative fathers might be stemmed by invoking the second paragraph of Article 8 and the necessity in a democratic society to protect the rights of others which in this case would be those of the pregnant woman (as already determined by the Commission in the *Paton* case). Furthermore, the fate of any claim made under Article 12 would be linked to that made under Article 8 since Article 12 explicitly permits restrictions on the right to marry and found family in accordance with national law. Given that in *Paton v Trustees of British Pregnancy Advisory Service* and *C v S* it was decided that putative fathers have no rights under the Abortion Act to intervene in the decision to terminate a pregnancy, acting either in their own right or on behalf of the foetus, it would only be in the event that this determination is reviewed and overruled, meaning that an unjustified interference in the putative father's right to family life is judged to have taken place and therefore national law is invalidated because contrary to Article 8, that a claim under Article 12 might also stand a chance of success.

v) *Conscientious or religious objection*

A further aspect of the Abortion Act which might prove vulnerable to claims of a human rights violation is s.4. This section states that '...no person shall be under any duty whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by this Act to which he has a conscientious objection ...', with a limitation upon the right to object being imposed in an emergency situation. The conscientious objection clause has been interpreted in the domestic courts to encompass those people who actually physically participate in an abortion, such as doctors and nurses (*Royal College of Nursing v Department of Health* [1981] 1 All ER 545) but not those ancillary personnel who are indirectly associated with the procedure, such as a secretary who refuses to type a letter recommending an abortion (*Janaway v Salford Health Authority* [1988] 3 All ER 1079).

The compatibility of this interpretation of s.4 with the Convention can be viewed in two distinct ways, both of which turn upon its compliance with Article 9 which guarantees that '[e]veryone has the right to freedom of thought, conscience and religion...'. On the one hand, it has been argued that the right to abortion objection in s.4 is too restrictive and, thus, contrary to Article 9 in that

³⁷ See discussion on this interpretation in P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* 2nd ed., (Kluwer, 1990), p.448.

it excludes ancillary personnel whose beliefs might lead them to object to participating in an abortion, such as those workers required to clean medical instruments used in an abortion or to dispose of foetal tissue.³⁸ This view is based upon the premise that for the objector there is no real difference between physical participation in the termination and assistance given at other stages either prior to, or post, the abortion. Both amount to acting in a way which is contrary to a belief that abortion is wrong.

On the other hand, it might be asserted that s.4 is not incompatible with Article 9 because of the possibility of restricting the right contained therein in accordance with the Article's second paragraph in order to protect public health and to safeguard the rights and freedoms of others, namely those of women seeking a termination who would otherwise run up against a refusal by doctors or nurses to either refer them for a termination or to perform one. The provision for disallowing the right to object in an emergency does not necessarily adequately secure protection because, while many women may not present themselves as emergency cases whose lives are threatened should a termination be refused, there may be instances in which particularly a failure to refer causes delay and the possibility that the legal time-limit for the termination is surpassed. Evidently the current position represents a finely-tuned balance between the individual right of the objector and the social costs (and costs to individual women) of the objection. As in the case of claims made by putative fathers discussed above, it is certainly not beyond doubt that the balance between competing rights and interests as currently configured should be revised in future to take account of shifts in judicial and social attitudes towards termination provision.

vi) *Northern Ireland*

While, with the exception of (i) above, the examples discussed so far contemplate the possibility that the Abortion Act may be judged non-compliant with human rights provisions because of its undue liberality in permitting women to exercise reproductive choices, the reverse scenario presents itself in the context of Northern Ireland where, unlike the rest of the UK, the Abortion Act does not apply. Instead, the guide-lines given in the common law authority of *R v Bourne* [1939] 1 KB 687 are still in operation and these broadly restrict the availability of abortion to situations in which it is necessary to save the woman's life. Using Convention rights one might imagine an intervention by representatives of the pro-choice lobby in Northern Ireland arguing that this position represents a violation of Article 8 and a woman's right to respect for private life. Of course one would expect the counter argument to be posed that

³⁸ L. Hammer, 'Abortion Objection in the United Kingdom Within the Framework of the European Convention on Human Rights and Fundamental Freedoms' [1999] *European Human Rights Law Review* 564.

this legal situation is necessary in order to give due respect to the prevailing moral climate in Northern Ireland (as was advanced in the *Open Door* case by the Irish government). However, the European Court of Human Rights is only willing to push the margin of appreciation allowed to each state in defence of its particular moral concerns so far. It might, therefore, be decided by the UK judiciary that the current situation in Northern Ireland, given the relative liberal access to abortion throughout the rest of Europe, is overly restrictive and that on balance it does, indeed, interfere with the respect due to private life. Such a view would not be untenable, moreover, given that the European Court has already determined that the maintenance in Northern Ireland of criminal sanctions for male homosexual activity when similar acts had been decriminalised in the rest of the United Kingdom (in line with a European wide movement towards decriminalisation) could not be sustained on the basis that the moral and religious particularities of Northern Ireland demanded a more restrictive stance towards male homosexuality (*Dudgeon v United Kingdom* (1982) 4 EHRR 149).

It is, finally, worth remembering that the determination of the many and varied human rights questions raised by the Abortion Act is rendered especially difficult under UK law for two principal reasons. One is the historic, and controversial, absence in national law of any 'right to privacy'. The want of a positive right in this regard has led to some of the components of privacy being judicially interpreted to fall within various other aspects of the law on civil liberties such as autonomy, secrecy and dignity.³⁹ Articulating a specific and new right to respect for private life in the light of the long-standing judicial development of existing legal concepts will require careful thought and skilful handling, not only to achieve a reconciliation with the past but also because, prospectively, the notion of 'private life' is an empty vessel which may be filled with a huge variety of different subject matters. Hence, a judicial decision taken with respect to its interpretation in any one particular sphere (abortion, for example) may be used as a precedent in many other cases beyond the field of reproductive rights.

A second difficulty is raised by the requirement that the judges carry out a 'proportionality' test in order to assess whether the interference in the enjoyment of the right to private life (or to the assertion of one's beliefs as in the case of conscientious objection, or to freedom of expression) is proportionate to the aim pursued by the state in creating the interference (such as, for example, the protection of health, morals or the rights and freedoms of others) and is, therefore, justifiable. This type of balancing exercise is something which UK judges are unused to undertaking as the formulation of similar tests in judicial review applications under national law would be to frame the question in terms

³⁹ D. Feldman, 'Secrecy, Dignity, or Autonomy? Views of Privacy as a Civil Liberty' (1994) 47 *Current Legal Problems* 41.

of the 'reasonableness' of the measure. The outcome would then involve ascertaining whether or not the measure was so unreasonable that no reasonable authority could possibly have taken it (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223). Evidently the two tests require very different evaluative exercises to be carried out – with the test under national law being much more generous to the position adopted by public authorities vis-à-vis individuals than that under European law.

B. New Reproductive Technologies

It is not only in the area of abortion, but also that of assisted reproduction that one might imagine a number of challenges being made to domestic legislation.

i) Access criteria

One prime target for a challenge as to its Convention compliance is s.13(5) of the Human Fertilisation and Embryology Act 1990 in which it is stipulated that in determining who should have access to new reproductive technologies decision-makers should give due regard to the welfare of any resultant child and in particular the needs of that child for a father. Research carried out with respect to the provision of reproductive technology treatment services under the National Health Service has demonstrated that certain women are more likely to be refused access to these services because of a particular aspect of their status or life-style and also that there is a marked lack of coherency between health authorities as to criteria for access.⁴⁰ Already under national law a decision to refuse IVF treatment services to a woman aged 37 on the grounds that she was over the age limit fixed at 35 has been challenged in judicial review proceedings in the UK courts (*R v Sheffield Health Authority, ex parte Seale*, 17 October 1994). Although the litigant was unsuccessful – the judge finding that the policy on age was neither irrational nor unreasonable because clinical findings indicated that treatment over the age of 35 was less effective – the case provides an important template for litigation once the provisions of the HRA take effect. This is because, prospectively, it might be argued by women refused access to treatment services because of their status or life-style (not just older women but also, for example, disabled women, single women or those in a lesbian relationship), that the stipulation in s.13(5) amounts to discrimination. This argument could be made by focusing upon the guarantee under Article 8 of a right to respect for private and family life, and could be used in conjunction with Article 14's prohibition on discrimination which includes specifically discrimination based upon sex and might be interpreted also to include discrimination on the grounds of age, sexuality and disability as any one of these

⁴⁰ A. Plomer, I. Smith and N. Martin-Clement, 'Rationing Policies on Access to *In Vitro* Fertilisation in the National Health Service, UK', *Reproductive Health Matters* (1999).

may potentially constitute an 'other status' demanding protection against discrimination.

ii) *Information*

Beyond the question of access to new reproductive technologies, further questions under the Human Fertilisation and Embryology Act 1990 might arise regarding access to information by children born of donor insemination. Currently donors remain anonymous and are not legally entitled to, or obliged by, parental responsibility over any resulting child, nor can disclosure of the identity of the biological parent be required (s.31(5)). But might not it be envisaged that the children of the reproductive revolution who begin to seek answers to questions about their biological origin and identity should make a claim that current provisions about access to information are unlawful because contrary to the right to freedom of expression contained within Article 10? Such a claim might be given added weight when considered alongside the not wholly dissimilar situation of adopted children who have the right to trace their biological parents. Indeed, it has already been reported in the press that the Department of Health is considering the creation of a register containing information on donors in order to allow children born from anonymous donations to trace their genetic origins.⁴¹

It was noted above that in the *Open Door* case Article 10 was held to cover the dissemination of information within the context of abortion services. However, the question is rather differently framed in the context of donor information because in this case individuals are claiming a right to *receive* information from a *public body*, as opposed to, in the Irish case, the censoring of the *provision* of information by *non-state* actors. Clearly the former situation would seem to be more delicate than the latter – not least because of the need to respect the rights of donors themselves. It would remain to be seen, therefore, whether in this extremely sensitive area, the second paragraph of Article 10 with its requirement to pay heed to the rights of others (that is donors) would take precedence. In practical terms, too, any threat to release information about donors, or indeed to attribute them with a degree of parental responsibility for a child born as a result of the use of their sperm or egg, would lead to a marked reduction in the number of donors. Thus the legal question of the legitimacy of limitations upon access to information cannot be divorced from wider considerations of public policy which must surely be at the back (if not the front) of the minds of the judiciary in balancing the interests of donors and children seeking access to information about their origins.

⁴¹ A. Gillam, 'Register Plan for Donor Births' (25 April, 2000) *The Guardian*.

3. THE INFLUENCE OF EUROPEAN UNION LAW

At the risk of overcomplicating matters, but in order to avoid a partial view, there is a further legal factor at play which must be considered in any discourse on human rights protection at national and European levels – the law of the European Union (EU).⁴² There is a complex relationship between national law, Convention rights and EU law – one which has evolved gradually over time, but which has become increasingly important since reference to the Convention was made by the European Court of Justice (ECJ) in the case of *Rutili v Minister for the Interior* C-36/75 [1975] ECR II-1219, and since the inclusion in the Treaty on European Union (the ‘Maastricht’ Treaty 1992) of a reference to the Convention as a source of human rights principles to be respected by the EU. The relationship has been strengthened further by the Treaty of Amsterdam (1997) which shores up the human rights framework of the EU making adherence to the human rights principles contained within the Convention and EU law a condition of membership of the Union and providing sanctions for use against any offending member state. Moreover, the human rights dynamic is set to flourish with the introduction of a Charter of Fundamental Rights into the EU legal order.⁴³ Importantly, however, EU law, unlike the European Convention on Human Rights, has always been incorporated into domestic law as a result of the European Communities Act 1972 with the UK courts having now accepted its supremacy over national law (*R v Secretary of State for Transport ex parte Factortame (no.2)* [1991] 1 All ER 70). What to make, therefore, of a potential clash between EU law, Convention rights and national provisions should all three be found to apply in a particular factual circumstance?

Relevant for present purposes is the fact that EU law has been evoked already in several cases in the areas of both assisted reproduction and abortion. That said, however, the construction of these issues in terms of fundamental rights has been strongly resisted by both the ECJ and national courts. Instead reproductive matters have been located amongst the provisions on the four freedoms of movement of goods, persons, services and capital. More specifically access to abortion facilities and to fertility treatments in another member state have been dealt with under the remit of ‘services’ with regard to which the ECJ has held that the free movement principles include not only their provision but also their receipt, and which substantively have been interpreted to include medical services (*Luisi and Carbone v Ministero del Tesoro* C-286/82, C-26/83 [1984] ECR I-377; *Kohll v Union des Caisses de Maladie* C-158/96 [1998] ECR I-1931). With respect to abortion, its construction as a service was

⁴² See P. Alston and J.H.H. Weiler, ‘An “Ever Closer Union” in Need of a Human Rights Policy: The European Union and Human Rights’ in P. Alston (ed.), *The EU and Human Rights* (OUP, 1999) p.3.

⁴³ EC OJ 2000, C 364/8.

determined by the ECJ in *SPUC (Ireland) v Grogan* C-159/90 [1991] ECR I-4685, a further case dealing with the provision of information about termination facilities. As for fertility treatments it was the English Court of Appeal which decided, in the case of Diane Blood (who, having been refused permission for treatment in the UK, sought to export her dead husband's sperm to Belgium where insemination was lawful under Belgian law), that fertility treatment services came within the purview of EU law (*R v Human Fertilisation and Embryology Authority, ex p Blood* [1997] 2 All ER 687). Consequently a member state may not prevent the movement of individuals to another member state to receive access to such services.

It is clear that the construction of these issues in EU law is different from that under the European Convention on Human Rights. This is because the former is fundamentally grounded upon the *economic* nature of the service provision.⁴⁴ Thus, having found that abortion was indeed a service covered by EU law, the ECJ in the *Grogan* decision went on to find that there was no interference in the freedom to provide this service because there was no economic link between the provision of the service by the abortion clinics in Britain and the distribution of the information by the Students Union in Dublin. This conceptual framework is not unproblematic for a number of reasons.

First, with respect to EU law itself, the reduction of human rights issues to purely economic, internal market arguments can be disconcerting. This is because such a formulation appears to trivialise the fundamental nature of the rights at stake paying little heed to the way in which these particular rights may go to the heart of member states' constitutions and conceptions of the nation (as is clearly the case with abortion in Ireland).⁴⁵ In this respect the potential significance of the new EU Charter of Fundamental Rights is deceptively limited.

On the one hand, the Charter appears as a dynamic and innovative text which, with a distinct basis apart from the treaties, operates a conceptual decoupling of fundamental rights from the largely economic rights contained in the pre-existing legislation. Furthermore, in terms of the material substance of the rights contained within the Charter, this extends far wider than the existing scope of rights within EU law. Taking, for example, the first three rights set out

⁴⁴ See L. Flynn, 'The Body Politic(s) of EC Law' in T. Hervey and D. O'Keeffe (eds.), *Sex Equality in the European Union* (John Wiley, 1996) p.301; T. Hervey, 'Buy Baby: The European Union and Regulation of Human Reproduction' (1998) 18 *Oxford Journal of Legal Studies* 207.

⁴⁵ D.R. 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' (1992) 55 *Modern Law Review* 670.

in the Charter, it is apparent that all of them might contribute to legal developments in the domain of human reproduction. Hence, the first article of the Charter, which asserts that human dignity is inviolable and as such must be respected and protected, provides a key underlying value with regard to which all claims to reproductive rights and freedoms should be judged. The second and third articles offer an interesting combination of classic and innovative rights, the former guaranteeing the right to life while the third expressly addresses the advent of new technologies by proclaiming a right to physical and mental integrity and requiring that in the fields of medicine and biology free and informed consent must be respected and eugenic practices (such as the selection of persons), using the human body and its parts in order to obtain financial gain and reproductive cloning of humans should be prohibited. In this respect it seems that the conceptualisation of fundamental rights contained within the Charter goes well beyond the strict service based approach set out in *Grogan* and *Blood*.

On the other hand, however, the Charter is not legally binding, having been merely 'solemnly proclaimed' by the European Council in Nice in December 2000. Furthermore, even should it one day become binding in law (which in itself is far from evident) its scope is restricted to the actions of institutions and bodies of the EU and to member states when implementing EU law.⁴⁶ It is regrettable, therefore, that the Charter and any EU human rights policy developed with respect to it, will be inseparable from the overall market dynamic of the Union.

Secondly, and not unconnected to the distinct legal approaches adopted under EU law and the Convention, there is a degree of apparent tension between the *Grogan* decision of the ECJ and the *Open Door* decision of the European Court of Human Rights. In the latter the restriction on the provision of information by counselling groups was unlawful amounting to a violation of the Convention, while in the former a similar restriction was deemed outside the scope of EU law because of an insufficient economic link with the service provision. Tension arises because the construction of the provision of abortion services as an economic matter is vastly different from the construction of access to information about such services as a matter of fundamental human rights. So, faced with not only conflicts between national and European provisions but also conflicting conceptualisations of Convention rights and EU law, the national judges will have no easy time trying to realise a solution which respects not only the claims to supremacy of European laws over national law

⁴⁶ Article 51(1) Charter of Fundamental Rights of the EU.

but also the varied representations of reproductive rights which make up the European picture itself.⁴⁷

The challenge for the future, therefore, is set and it is indeed complex. The one certainty is that there can be no return to the old regime of rights protection in the UK. Even those who are sceptical of the benefits of using rights based arguments as a strategy in seeking redress for discrimination, inequalities and social and political wrongful acts cannot but accept the ineluctability of rights discourse in a legal world now so heavily saturated by talk of fundamental rights, as exemplified by the enactment of the HRA. Like it or not, rights claims will henceforth form a staple part of litigation and it is, therefore, to their interpretation in a progressive and inclusive manner that attention should be addressed.

Interpretation remains the prerogative of the judiciary. Having previously been required to act in a climate which saw precious little formulation of any positive rights claims at all, the national judges are now required to determine complex questions about the interrelationship between the newly domesticated Convention, the formerly uniquely supreme law of the EU, and long-standing democratically enacted national legislation. All this in areas such as human reproduction which require infinitely sensitive handling and which are also continuously in a state of technological evolution to which law (at whatever level and in whatever form) must adapt. It remains to be seen whether the UK judiciary are inclined to see the construction of reproductive matters as pertaining to first generation fundamental civil and political rights or second generation socio-economic rights when these matters are debated in the post rights revolution era. What is evident, however, is that the focus will be on their formulation in terms of 'legal' rights meaning that their content cannot be automatically equated with any moral and political claims made in relation to reproductive issues. That said, law, morality and politics are bound inextricably together in their ability to regulate society and all are required to adjust as times and attitudes change. To this end a revolutionary shift in judicial thinking about human rights is in order – one which tends towards the production of a discourse on human rights which is international in outlook while remaining acutely aware of the domestic contexts in which important moral and political choices about reproduction are made.

⁴⁷ It is suspected that a degree of tension will persist between interpretations of the Convention by the ECJ and the European Court of Human Rights because of the specific remit of EU law. This is despite the worthy declaration in Article 52(3) of the EU Charter that '[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention...'

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