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Keywords

Abortion, European Union, Politics, Religion, Sex, Comparative Law, Democracy, Human Rights Law, Women

SEX, POLITICS, AND RELIGION: THE CLASH BETWEEN POLAND AND THE EUROPEAN UNION OVER ABORTION

Alicia Czerwinski*

I. INTRODUCTION

Poland's anti-abortion law is one of Europe's most stringent.¹ Given the European Union's (EU) pro-choice legislation, Poland's recent accession into the EU in spring 2004² will likely cast its abortion law into the spotlight. The following account foreshadows this clash.

In June 2003, Polish protestors greeted the Dutch ship, "Women on Waves" with eggs and paint bombs, as it entered a Polish port.³ Women on Waves is a mobile abortion clinic⁴ that enters ports in countries that prohibit abortion, boards women, and sails to international waters where physicians perform abortions.⁵ The ship typically travels into countries at the request of local women's organizations and gives women the option to receive safe, professional, and legal abortions.⁶ Because Women on Waves sails under a Dutch flag, Dutch law, which permits abortion, applies.⁷

Polish women were to be the first group to receive abortions aboard the ship.⁸ The ship previously entered an Irish harbor in 2001, but no abortions occurred aboard the ship because Women on Waves failed to obtain an abortion treatment

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1. Corinne Deloy, *Referendum on the European Union in Poland* ¶7, June 2003, available at <http://www.robert-schuman.org/anglais/occe/pologne/referendum/default.htm>.

2. *Id.*

3. *Poland: Abortion Boat' Stirres Up Controversy*, INDYMEDIA NL, June 22, 2003, at <http://indymedia.nl/en/2003/06/12512.shtml> (hereinafter *Abortion Boat*).

4. *Protests Greet Abortion Boat*, EXPATICA.COM-NEWS & COMMUNITY FOR EXPATRIATES IN THE NETHERLANDS ¶ 9, June 23, 2003, at http://www.expatica.com/main.asp?HRSite=&pad=2,18&item_id=32247.

5. *Id.*

6. *Abortion Boat*, *supra* note 3.

7. *Id.*

8. *Protests Greet Abortion Boat*, *supra* note 4.

permit.⁹ Although a spokeswoman for Women on Waves failed to confirm whether any Polish women actually terminated a pregnancy aboard the ship, the event cast Poland's anti-abortion law into controversy¹⁰

The arrival of Women on Waves in Polish port initiated a debate among Polish citizens that foreshadows the clash between Poland's strict anti-abortion law and the EU's pro-choice policy. Although Poland and the EU's abortion policies conflict, reconciliation is possible by including a Protocol to Poland's accession treaty that would guarantee Poland the right to assert its national abortion law over EU law. Reconciliation could also be achieved by asserting moral sovereignty, the use of the political process, including legislation, to make citizens "fundamentally better creatures."¹¹ However, after further analyzing the conflict and possible methods of reconciling Polish and EU law, this paper concludes that reconciliation would produce a devastating outcome by eroding democracy, women's fundamental rights, and gender equality; therefore, this paper prescribes that Poland adopt the EU's pro-choice policy. As a result of so doing, Polish women will have increased constitutional protections against gender discrimination, and increased protection of privacy. Furthermore, Poland will promote democracy within its borders, and those of the EU.

Section II of this paper examines Poland's tumultuous history. Specifically, this section explores: Poland's long ties to Christianity and the role the Catholic Church plays in Poland; the history of Poland's abortion law under communism and democracy; and Poland's accession into the EU. In Section III, this paper discusses the legal effect of the EU's pro-choice policy. This section demonstrates that although the EU's policy is non-binding, Poland would be bound to adopt the EU's policy as community law through the European Court of Justice's (ECJ) interpretation of case law. Section IV explores how Poland and the EU can reconcile their conflicting viewpoints regarding abortion. Poland can maintain its abortion law by following Ireland and Malta's example of adopting a protocol to its accession treaty. Poland can also exercise its abortion law under the principle of moral sovereignty. Alternatively, as already stated above, this paper suggests in Section V and concludes in Section VI by recommending that Poland adopt the EU's pro-choice policy given the devastating effects the current anti-abortion law has on democracy, women's fundamental rights, and gender equality.

II. BACKGROUND

In order to understand the conflict between Poland and the EU's abortion laws, it is necessary to first examine Poland's Catholic history and the history of Poland's abortion law.

9. *Id.*

10. *Abortion Boat*, *supra* note 3.

11. Paul Johnson, *Is Totalitarianism Dead? Beware of the "New Left"* ¶ 21, HUMAN LIFE REVIEW (Spring 1989).

A. Poland's Catholic History

Poland originated in the 10th century.¹² The intermingling of politics and religion in Poland was observable early on as parishes and castles were established side by side.¹³ Poland's predominant denomination is and always has been Catholicism.¹⁴ The image of the "Polish Catholic, however, did not actually emerge until the 17th Century¹⁵ Poles place an important role on religion, using it to define their national identity¹⁶ and consider being Catholic as "one of the most important features of belonging to the Polish nation."¹⁷ Currently over ninety-five percent of the Polish population is Catholic.¹⁸

Poland's tumultuous history has made its ties to the Catholic Church stronger as Poles often relied on the Catholic faith and Church to strengthen their national identity and to increase the country's stability. Poland's geographical location has been the source of much of its political instability¹⁹ As a vast plain bordered by Russia and Germany, Poland was a "natural arena" for surrounding armies.²⁰ Its access to the Baltic also made it a highly sought-after country²¹ In its infancy Poland formed ties to Christianity in 966 A.D. when Prince Mieszko and his court were baptized.²² The Prince converted to Roman Christianity to reap the political and cultural benefits of the religion and to avoid war with Germany and the Roman Emperor Otto.²³ During the fourteenth century, as Poland became infiltrated by powerful Germans and was threatened by the Teutonic Knights, Poland formed an alliance with the Lithuanian empire.²⁴ This alliance was formed when the Polish King Jadwiga, a female Christian,²⁵ married the pagan Grand Duke Jagiello of

12. ADAM ZAMOYSKI, *THE POLISH WAY: A THOUSAND YEAR HISTORY OF THE POLES AND THEIR CULTURE* 10 (1988).

13. *Id.* at 13.

14. Krystyna Daniel, *The Church-State Situation in Poland After the Collapse of Communism*, 1995 BYU. L. Rev. 401, 402 (1995).

15. Françoise Le Moal, *Tolerance in Poland: Political Choice and Tradition*, in *THE TRADITION OF POLISH IDEALS* 53 (1981). It was during this time that the Catholic Church became source of national pride for Poles. *Id.* Ironically, while Catholicism was becoming source of national pride in Poland, the power of religion was declining throughout the rest of Europe as tolerance increased during the Enlightenment. *Id.* at 54. Also, Poland's strong ties to Catholicism in the seventeenth century occurred at a time when internal disorder weakened the country and a century after Poland's "golden age, when Poland was once among the richest and most powerful states in Europe. Enlargement: Relations With Poland, at <http://europa.eu.int/comm/enlargement/poland/index.htm>.

16. ZAMOYSKI, *supra* note 12, at 75.

17. Daniel, *supra* note 14, at 402.

18. Statistics by Country by Catholic Population, (Oct. 3, 2003), available at <http://www.catholic-hierarchy.org/country/sc1.html>.

19. See THOMAS BOKENKOTTER, *CHURCH AND REVOLUTION: CATHOLICS IN THE STRUGGLE FOR DEMOCRACY AND SOCIAL INJUSTICE* 535 (1998).

20. *See id.*

21. *Id.* at 536.

22. ZAMOYSKI, *supra* note 12 at 10.

23. See BOKENKOTTER, *supra* note 19 at 535. See also ZAMOYSKI, *supra* note 12, at 10.

24. BOKENKOTTER, *supra* note 19 at 536.

25. JERZY LUKOWSKI & HUBERT ZAWADZKI, *A CONCISE HISTORY OF POLAND* 32 (2001).

Lithuania.²⁶ Although Poland's fate depended on this alliance, their marriage was conditioned on Jagiello's promise to convert to Catholicism.²⁷ After Jagiello's Lithuanian followers converted to Catholicism, the Jagiello Dynasty was able to conquer the Teutonic Order in 1410 at the battle of Grunwald and Tannenberg.²⁸ This alliance became the "greatest dynastic concatenation of territory Europe had ever seen."²⁹

In modern times, the Catholic Church has continued to play a major role in Poland. When Polish political institutions were weakened, the Church functioned as a religious institution as well as a "significant national icon."³⁰ The Church played significant roles to Poles during the 123 year period when Poland lost its independence and also during World War II.³¹ It was the period after World War II when Poland became "an overwhelmingly Catholic country."³²

Perhaps the Church's most unique and important role in modern times occurred during communism. Unlike other communistic countries in Europe, the Church in Poland retained a significant level of autonomy³³ and retained total freedom to practice.³⁴ Ironically, Polish citizens were permitted to practice their religion under communism³⁵ despite the fact that the Church gained strength during this period and contributed to the public's high dissatisfaction of Soviet controlled governmental institutions.³⁶ The collaboration between Catholic institutions and Polish society increased during the last decade of the communist regime.³⁷ In fact, the Church helped "unify and consolidate Polish society in the struggle against communism"³⁸ and could claim a "considerable share of credit" in ending the communist regime in 1989.³⁹

The Catholic Church strengthened Poles' resistance against communism by advocating human rights and social justice.⁴⁰ Pope John Paul II played a major role in increasing independence and solidarity in Poland, his homeland, in the years

26. BOKENKOTER, *supra* note 19, at 536.

27. LUKOWSKI & ZAWADZKI, *supra* note 25, at 32.

28. BOKENKOTER, *supra* note 19, at 536.

29. LUKOWSKI & ZAWADZKI, *supra* note 25, at 33. The Jagiellonian Dynasty stretched from "most of East-Central Europe from the Baltic to the Adriatic and from the Black Sea eastward to the gates of Moscow. BOKENKOTER, *supra* note 19, at 536.

30. Daniel, *supra* note 14, at 403 (1995).

31. *Id.* Poland lost its independence in 1772 and was partitioned among Austria, Prussia, and Russia for 123 years until 1918. The World Fact Book 2003, Aug. 1, 2003, *available at* <http://www.odci.gov/cia/publications/factbook/geos/pl.html>.

32. LUKOWSKI & ZAWADZKI, *supra* note 25, at 252.

33. *Poland's People: Determined and Discriminating*, at <http://www.globalvolunteers.org/Imain/poland/polandpeople.htm>.

34. LUKOWSKI & ZAWADZKI, *supra* note 25, at 252.

35. *See The Polish Catholic Church and the People*, at <http://reference.allrefer.com/country-guide-study/poland/poland99.html>.

36. *See* J. KLOCZOWSKI ET AL., *THE OUTLINE OF THE HISTORY OF THE CATHOLIC CHURCH IN POLAND* 362-70, 474-508 (Znak, Kraków 1986).

37. Daniel, *supra* note 14, at 404.

38. *Id.*

39. MARJORIE CASTLE & RAY TARAS, *DEMOCRACY IN POLAND* 94 (2d ed. 2002).

40. BOKENKOTTER *supra* note 19, at 552.

immediately preceding the collapse of communism⁴¹ and during visits to Poland urged Poles “to unite against oppression” and to “renew the face of Poland.”⁴² These pronouncements helped inspire the solidarity movement; solidarity was a movement led by Lech Walesa to promote independent trade unions, freedom of expression, and the right to strike.⁴³ Solidarity helped create the Soviet Bloc’s first legal independent workers’ union and evolved into a major social movement for democracy and capitalism, leading to the downfall of communism in Poland in 1989.⁴⁴ Walesa recognized the Catholic Church’s important role in promoting solidarity and believed “solidarity wouldn’t have survived without the Church.”⁴⁵ At the beginning of the Solidarity movement in 1980, leaflets promoting free trade unions were distributed at both factories and churches.⁴⁶ When the shipyard workers led the first strike against communism in Gdansk, Catholic symbols, from the Virgin Mary and Pope, to crosses, were visible everywhere.⁴⁷ Solidarity banners also found their way into Catholic Churches,⁴⁸ one of the only places Poles could publicly gather.⁴⁹ Solidarity’s growing influence in Polish society climaxed in 1989 when Solidarity received representation in the lower house of Polish parliament, the Sejm.⁵⁰ This event marked the beginning of the Polish Third Republic and resulted in the ultimate collapse of communist Poland.⁵¹

After communism, Poland established a parliamentary democracy and in 1997 passed a democratic constitution.⁵² Although Poland’s political regime changed, the Catholic Church continued to play a role in Polish society and politics.⁵³ The Church played a significant role in lobbying Poland’s new government for anti-abortion legislation.⁵⁴ The Church’s ability to influence the Polish political process demands attention, for despite Poland’s high Catholic population, the majority of Poles (sixty percent) oppose its anti-abortion law. The following section explores the history of Poland’s abortion law and discusses how the law reflects Catholic beliefs in spite of Poland’s new democratic government.

B. History of Poland’s Abortion Law

Although Poles retained their ability to practice Catholicism during

41. *Pope’s Visit to Former Victory Square Recalls Solidarity Launch*, CNN.COM, June 13, 1999, at <http://www.cnn.com/WORLD/europe/9906/13/pope.01/>.

42. *Id.*

43. LUKOWSKI & ZAWADZKI, *supra* note 25, at 273.

44. *Pope’s Visit to Former Victory Square Recalls Solidarity Launch*, *supra* note 42.

45. LECH WALESZA, *THE STRUGGLE AND THE TRIUMPH* 292 (Arcade Publishing, Inc. trans. 1992) (1991).

46. BOKNEKOTTER, *supra* note 19, at 553.

47. *Id.* at 555.

48. LUKOWSKI & ZAWADZKI, *supra* note 25, at 277.

49. BOKENKOTTER, *supra* note 19, at 562.

50. *Id.* at 567.

51. LUKOWSKI & ZAWADZKI, *supra* note 25, at 280.

52. POL. CONST. art. 2.

53. LUKOWSKI & ZAWADZKI, *supra* note 25, at 286.

54. *Id.*

communism, the communist regime guaranteed a woman's right to an abortion on demand.⁵⁵ By contrast, in 1993, only four years after becoming a democracy, the Polish government passed a restrictive abortion law that prohibited abortion on social grounds.⁵⁶ Although this anti-abortion law was overturned by a 1996 law that permitted abortion through the twelfth week of pregnancy,⁵⁷ the Polish Parliament reinstated the 1993 restrictive law only a year later in 1997.⁵⁸

The 1997 anti-abortion law, which is the current law,⁵⁹ reflects Catholic beliefs. The Parliament withdrew the liberal 1996 law based on the Constitutional Tribunal's decision that Article 38 of the Polish Constitution, which guarantees legal protection of life to every human-being, implies the protection of "life at every stage."⁶⁰ The present abortion law limits abortion to cases involving rape or incest, a threat to a woman's life, or a damaged fetus.⁶¹ In practice, however, obtaining an abortion even in these circumstances is seldom permitted.⁶²

After being adopted, the current abortion law's strict requirements significantly decreased the number of legal abortions per year. While abortion rates were as high as 199,400 per year under communism,⁶³ they dramatically fell during democracy from 82,137 in 1989 to only 140 in 2002.⁶⁴ With the exception of 1997 abortion rates have drastically decreased every year during democracy.⁶⁵ Alarmingly, the number of abortions actually occurring through illegal methods is as high as 200,000 a year.⁶⁶

55. GAZETA WYBORCZA, August 22, 1994, at 4. Many women used abortion during communism as a family planning method due to a lack of subsidized family planning programs in Poland.

56. See Shana Penn, *Poland Backs Away From Liberalizing Abortion Laws*, WOMEN ENEWS (Feb. 7, 2003), at <http://lists.partners-intl.net/pipermail/neww-rights/2003-February/000807.html> (hereinafter "*Poland Backs Away*"). The 1993 law permitted abortion only where there was rape or incest, a threat to the woman's life, or where the fetus was damaged. *Id.*

57. Federation for Women and Family Planning, *Independent Report Submitted to the United Nations Human Rights Committee on Gender Discrimination 2* (1999), available at <http://www.waw.pdi.net/~polfedwo/english/hrc.htm>.

58. Ian Traynor, *Abortion Issue Threatens Polish Admission to EU*, THE GUARDIAN, Jan. 30, 2003.

59. Federation for Women and Family Planning, *supra* note 57.

60. *Id.* See also POL. CONST. (1997) art. 38, which states: "The Republic of Poland shall ensure the legal protection of the life of every human being."

61. *Poland Backs Away*, *supra* note 56.

62. Federation for Women and Family Planning, *supra* note 57, ¶ 6. The medical community's personal beliefs and their ignorance of the anti-abortion act have forced women with serious medical problems to give birth. *Id.*

63. Wm. Robert Johnston, *Historical Abortion Statistics, Poland*, Sept. 25, 2003, at <http://www.johnstonarchive.net/policy/abortion/ab-poland.html>.

64. *Id.*

65. The rise in abortion rates in 1997 was probably the result of the liberalized abortion law of 1996. Although the 1996 law was overturned in 1997 by a law restricting abortions, the 1997 law was not enforced until 1998. Federation for Women and Family Planning, *supra* note 58.

66. Mindy Kay Bricker, *Anti-Abortion Group Inspired by Slovak Push*, PRAGUE POST, Apr. 10, 2003, available at http://www.praguepost.com/P03/2003/Art/0410/print_template.php.

C. Poland's Accession into the EU

On May 1, 2004 Poland is expected to join the EU.⁶⁷ The majority of Poles voted to join the EU⁶⁸ despite fears that the EU promoted a liberalism that could “destroy Polish deep religious roots and the Polish Catholic Church.”⁶⁹ Notwithstanding the EU's liberal position, Pope John Paul II, a Pole, urged his countrymen to vote for EU membership as a way to balance the EU's liberalism with Poland's conservative values.⁷⁰

In 2002, the EU urged all candidate countries to liberalize their reproductive rights legislation.⁷¹ Although the Polish government initially agreed to liberalize reproductive rights upon admission in the EU, Poland bowed to Church pressure and requested that the EU recognize its anti-abortion law.⁷² Poland changed its position to ensure that its large catholic population would vote for EU membership.⁷³ The EU has recognized that Poland is a “central player” in its enlargement plan.⁷⁴ Because several of the candidate countries expected to accede to the EU with Poland also have significant Catholic populations,⁷⁵ Poland's method of reconciling its abortion laws with the EU's policy will likely influence these and future member countries.

III. THE CONFLICT BETWEEN POLAND AND THE EU'S ABORTION LAWS

A direct conflict exists between Poland and the EU's position on abortion. Article 38 of the Polish Constitution prohibits abortion and states, “The Republic

67 The World Fact Book, *supra* note 31. In 1994, Poland submitted its application for EU accession to the European Commission. *Relations with Poland*, at <http://www.europa.eu.int/comm/enlargement/poland/index.htm>. Poland began negotiating full EU membership in 1998 after joining NATO. *Id.* Poland's accession was part of the Nice Council's Enlargement Strategy to enlarge the EU with Central and Eastern European countries. Embassy of the Republic of Poland, *The Eastern Policy of the European Union in the Run-Up to the EU's Enlargement to Include the Countries of Central and Eastern Europe-Poland's Viewpoint*, available at <http://www.polandembassy.org/Policy/p4-5.htm>.

68. *Poland Says Big Yes to EU*, BBC NEWS, June 9, 2003, available at <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/europe/2973738.stm>.

69. Jagoda Urban-Klachn, *European Union's Shortcomings in Eyes of Polish Euro-Skeptics, Final Remarks (XI)*, BELLA ONLINE, (Feb. 9, 2003), at <http://www.bellaonline.com/articles/art8206.asp>. Poles find the EU to be liberal because the EU's taxation system, which gives benefits to single parents and unmarried couples, promotes homosexual marriage and sexual freedom.

70. Traynor, *supra* note 58.

71. *Poland Backs Away*, *supra* note 56.

72. *Id.*

73. *Id.* About 77.5% of Poles voted in favor of the referendum to join the EU with the voter turnout reported around 59%. A 50% turnout was necessary to validate the referendum. *Id.*

74. Deloy, *supra* note 1. Poland is the largest and most populated of the ten countries, primarily from Eastern Europe, expected to join the EU in spring 2004. *Poland Says Big Yes to EU*, *supra* note 68.

75. Countries with a large catholic population and strict abortion laws include Poland, Slovakia, Lithuania, Malta, Slovenia, Hungary, and the Czech Republic. *Abortion not Considered in Enlargement Talks*, EUObserver.com, at http://www.euobserver.com/index.phtml?%20selected_topic=15&actio.

of Poland shall ensure the legal protection of the life of every human being.⁷⁶ The Polish Constitutional Tribunal interpreted this Article to imply the protection of "life at every stage."⁷⁷ In contrast, the EU is pro-choice. Although the EU lacks direct legislation legalizing abortion, the EU publicly endorses abortion as the "best practice" for women's reproductive health.⁷⁸ The EU also exerts political pressure to get member states to legalize abortion.⁷⁹ The following sections examine this conflict and explore how, despite the fact that the EU's law is non-binding, Poland would be bound by community law to promote abortion as set forth in *SPUC v. Grogan*.⁸⁰

A. The EU's Pro-Choice Policy

Poland's abortion law is the most restrictive abortion law in Eastern Europe.⁸¹ Along with Ireland's law, it is among the strictest abortion laws throughout Europe.⁸² The European Parliament's position, which was evident early on, distinctly differs from Poland's by endorsing freedom of choice.⁸³ In 1995 the EU issued the following statement, "it is critically important that individuals and couples can access reproductive health and family planning information and services"⁸⁴ As recent as July 2002 the European Parliament voted to adopt the Van Lancker report on sexual and reproductive rights.⁸⁵ As a result of the vote, the European Parliament passed a resolution suggesting that "in order to safeguard women's reproductive health and rights, abortion should be made legal, safe, and accessible to all."⁸⁶ The resolution also recommended accessibility to the morning-after pill.⁸⁷ While the European Parliament voted to adopt the Van Lancker resolution as being the "best practice" for women's reproductive rights and health, the resolution fails to be binding on member states.⁸⁸ Rather, the responsibility of passing reproductive health legislation lies with the individual member states.⁸⁹

76. POL. CONST. art. 38.

77. Federation for Women and Planning, *supra* note 57.

78. Anne Van Lancker, Report on Sexual and Reproductive Health and Rights, 2001.

79. Patrick Fitzmaurice, Note & Comment, *Attorney General v. X: A Lost Opportunity to Examine the Limits of European Integration*, 26 BROOK. J. INT'L L. 1723, 1732 (2001).

80. See generally Society for the Protection of the Unborn Child v. Grogan and Others, [1997] 317/92 (Transcript) (Ir. S.C.) (interpreting EU law) [hereinafter *Grogan*].

81. Traynor, *supra* note 58.

82. Deloy, *supra* note 1.

83. The Society for the Protection of Unborn Children, *European Parliament Votes to Promote Abortion*, at <http://www.spuc.org.uk/releases/20020703.htm> [hereinafter *European Parliament Votes*].

84. *Statement of European Union, H.E. Mr. Manfred Kanther*, U.N. Population Division, Dept. of Economic and Social Affairs, 94-09-05, §2, ¶5 (1994).

85. *European Parliament Votes*, *supra* note 83.

86. Van Lancker, *supra* note 78.

87. *European Parliament Votes*, *supra* note 83.

88. Van Lancker, *supra* note 78.

89. *Id.*

B. The Legal Effect of the EU's Abortion Policy

Despite the EU's pro-choice stance, abortion and health services fail to be within the EU's competency.⁹⁰ Even with Poland's impending accession to the EU, there is no "direct challenge from Brussels to Poland's abortion laws"⁹¹

Regardless, Poles still face a challenge from the EU. Even though the EU lacks competency regarding abortion and health services, the EU promotes freedom of choice. Presently except Ireland, the EU and all of its member states endorse abortion.⁹² Because most EU member states have already legalized abortion, new members fear that the EU may require them to legalize abortion in the future.⁹³ This fear is legitimate, for even though the European Parliament has repeatedly stated it does not favor abortion as a method of family planning, it has adopted five resolutions since 1994 calling for the legalization of abortion.⁹⁴ While these resolutions are non-binding they are a "means of exerting political pressure."⁹⁵

Moreover, although the EU's abortion policy is non-binding, it still poses a threat to Poland because EU law is supreme over national law.⁹⁶ If abortion becomes community law, Polish courts would be obligated to give full effect to this law under Article 5 of the Maastricht Treaty.⁹⁷ As a member state, Poland cannot interpret any EU directive or regulation under its national laws but would have to refer to the ECJ to interpret such matters.⁹⁸ EU laws that are binding and have precedence over national law but do not regulate abortion may still indirectly promote abortion. For instance, member states may be subject to taxes which are then used to fund abortions.⁹⁹ Promoting abortion even indirectly conflicts with Poland's abortion law and its conservative Catholic beliefs.

In order to be binding, the EU's abortion policy must be based on primary legislation, secondary legislation, or case law, the combination of which form the *acquis communautaire*.¹⁰⁰ Candidate states "must adopt, implement and enforce

90. *European Parliament Votes*, *supra* note 83.

91. Traynor, *supra* note 58.

92. Carmel Attard, *The Unborn Child*, (July 29, 2002), at http://www.mic.org.mt/EUINFO/sector/unborn_child.htm.

93. Dr. Simon Busuttill, *Protecting the Unborn Child*, ACCORNAT at http://www.mic.org.mt/AGGORNAT/special_edition/AGGSE21e_Abortion.pdf.

94. *Id.*

95. *Id.*

96. Fitzmaurice, *supra* note 79.

97. Article 5 "imposes constitutional obligation on national courts to give full effect to Community law and from ECJ decisions interpreting the Treaty so that EU law is directly effective and superior to national law. *Id.* at 1737-38. This provision conflicts with article 8 of the Polish Constitution which states that Polish law is the supreme law of the land.

98. *Id.*

99. John Rossiello, *European Union Funds Abortion Over Education*, NewsMax.com, (Nov. 19, 2002), at http://www.newsmax.com/cgi-bin/printer_friendly.pl?page=http://www.newsmax.com/archives/articles/2002/11/19/82832.shtml.

100. *Acquis Communautaire*, DEUTSCHE WELLE (July 12, 2002), at http://www.dw-world.de/english/0,3367,%201430_A_707549,00.html. The *Acquis communautaire* refers to the entire

all the *acquis* to be allowed to join the EU.”¹⁰¹ Case law that is binding on Poland includes judgments by the ECJ.¹⁰² Poland would therefore be bound by the Court’s decision in *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*.¹⁰³

Grogan was the first case in which a member state, Ireland, referred a case to the ECJ regarding a direct conflict between national and community abortion laws.¹⁰⁴ Although the ECJ failed to address this direct conflict, its decision laid the framework whereby ECJ case law would override a national constitution’s ban on abortion.¹⁰⁵

In *Grogan* the plaintiff sought a preliminary injunction in the Irish High Court against defendants alleging they violated Article 40.3.3 of the Irish Constitution.¹⁰⁶ The plaintiff accused defendants, three student unions in Ireland, of violating the Irish Constitution by publishing pamphlets containing information about abortion clinics in the United Kingdom.¹⁰⁷ The defendants argued that their right to disseminate such information was derived from their “legal economic right to receive information about services available in other member states”¹⁰⁸ The defendants claimed this right under Articles 59 and 60 of the Treaty of Rome,¹⁰⁹ which guarantees one the right to travel to avail oneself of services in other member states.¹¹⁰

While the Irish High Court agreed with defendants’ argument, it referred three issues to the ECJ for a preliminary ruling.¹¹¹ The first issue was whether abortion was a “service” as provided for in Article 60 of the European Economic

body of European laws and typically refers to the preparations by the 12 candidate countries in their accession process. *Acquis Communautaire*, BBC NEWS, (Apr. 30, 2001), available at http://news.bbc.co.uk/2/hi/in_depth/europe/euro-glossary/1216329.stm. Primary legislation refers to treaties and agreements similar in stature to treaties. Primary law is created by “direct negotiations between member state governments; such agreements may be ratified by national parliaments. Secondary legislation is made through regulations, directives, decisions, and recommendations and opinions. All but the latter are binding upon member states. Case law is also binding on member states and is based upon judgments from the European Court of First Instance and the European Court of Justice. LUR-Lex, at http://europa.eu.int/eur-lex/en/about/pap/process_and_players2.html.

101. *Acquis Communautaire*, BBC NEWS, (Apr. 30, 2001), available at http://news.bbc.co.uk/2/hi/in_depth/europe/euro-glossary/1216329.stm.

102. *Id.*

103. *Grogan*, *supra* note 80.

104. Donald A. MacLean, Note, *Can the EC Kill the Irish Unborn? An Investigation of the European Community’s Ability to Impinge on the Moral Sovereignty of Member States*, 28 HOFSTRA L. REV. 527, 554 (1999).

105. Allison M. Clifford, Comment, *Abortion in International Waters Off the Coast of Ireland: Avoiding Collision Between Irish Moral Sovereignty and the European Community*, 14 PACE INT’L L. REV. 385, 405 (2002).

106. Article 40.3.3 of the Irish Constitution guarantees the right of life of the unborn.

107. *Grogan*, *supra* note 80.

108. Clifford, *supra* note 105, at 402-403.

109. In 1991 the Maastricht Treaty replaced the Treaty of Rome. *Id.* at 405.

110. *Id.* at 402-403. Articles 59 and 60 referred to in this note are currently 49 and 50. *Id.*

111. *Grogan*, *supra* note 80.

Community Treaty¹¹² The ECJ ruled it was.¹¹³ The second issue was whether a member state could prohibit the distribution of information regarding the identity location, and means of abortion clinics in another member state.¹¹⁴ The final issue was whether a right existed in community law granting a person in a member state where abortion was constitutionally prohibited the right to distribute information about abortion in another member state where abortion is permitted.¹¹⁵ Regarding the latter two issues, the ECJ held:

It is not contrary to community law for a Member-State in which medical termination of pregnancy is forbidden to prohibit students [or] associations from distributing information about the identity and location of clinics in another Member-State where voluntary termination of pregnancy is lawfully carried out and the means of communicating with those clinics, where the clinics in question have no involvement in the distribution of the said information.¹¹⁶

Scholars have interpreted the ECJ's comment to mean that although abortion is a service and thus may be subject to community law, there must be "an economic nexus between [the information provider] and an abortion provider"¹¹⁷ Because the information provider in *Grogan* was not the clinic itself but student unions, no nexus existed. Ireland's prohibition therefore was not a restriction "within the meaning of Article 59 [currently Article 49] of the Treaty"¹¹⁸ Thus national law, not community law applied.¹¹⁹

In deciding the latter two issues, the ECJ failed to directly address the conflicting abortion laws between two member states.¹²⁰ Its decision regarding abortion as a service within Article 60 of the Rome Treaty does imply, however, that Poland would be subject to community law if the appropriate nexus exists. The ECJ's decision that community law may apply threatens Poland's anti-abortion law and its citizens' Catholic beliefs.

IV RECONCILING THE ABORTION LAWS

Considering the uniqueness of abortion and the diversity between member states, it may be difficult for the ECJ to dictate whether a member state should legalize abortion. Scholars have argued that abortion is "special" because it places the absolute right of the unborn as guaranteed by some member constitutions against the absolute right of a woman's guarantee to self-determination in another

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. Clifford, *supra* note 105, at 404; MacLean, *supra* note 104, at 557 (1994).

118. MacLean, *supra* note 104, at 557

119. *Grogan*, *supra* note 80. However, because the Irish High Court and the ECJ failed to issue an express order refusing or enjoining the injunction, the plaintiff appealed to the Irish Supreme Court and ultimately received the requested injunction.

120. MacLean, *supra* note 104, at 557.

member's constitution.¹²¹ Member states' legal and social orders are so diverse that it is impossible for a "uniform European conception of morality" to exist.¹²² Thus it may be impossible for the European Court of Justice to choose which of these rights is a community right.¹²³ The decision therefore, whether to legalize abortion should be left to member states that owe a democratic responsibility to its citizens.¹²⁴

The following sections demonstrate how national law, instead of community law, can ultimately determine whether abortion is permissible. Poland's abortion law can supersede community law if Poland adopts a protocol to its accession treaty similar to Ireland's and Malta's. Poland can also claim moral sovereignty as a basis for its national law to supersede community law.

A. *The Irish and Maltese Models*

Grogan demonstrated that Poland cannot restrict its citizens from receiving services including abortion.¹²⁵ In order to maintain its anti-abortion law member states should negotiate a special provision in its individual accession treaty.¹²⁶ Presently only one member state, Ireland, has done so.¹²⁷ Malta, a country expected to accede to the EU the same time as Poland, is also expected to negotiate special provisions in its accession treaty to preserve its national anti-abortion law.¹²⁸

Article 40.3.3 of the Irish Constitution guarantees the right of life to the unborn.¹²⁹ After the ECJ's decision in *Grogan*, the Irish government sought a way to prevent EU law from overriding its constitutional protection of the unborn.¹³⁰ *Grogan* involved the ECJ's interpretation of the laws under the Treaty of Rome.¹³¹ Shortly after *Grogan*, the Maastricht Treaty replaced the Treaty of Rome.¹³² Ireland annexed Protocol No. 17 to the Maastricht Treaty to state:

The High Contracting Parties have agreed upon the following provision, which shall be annexed to the Treaty on European Union and to the Treaties establishing the European Communities. Nothing in the Treaty on European Union, or in the

121. *Human Rights in the Union Legal Order: Review of Community Measures-The Conundrum of "High and "Low Standards*, at <http://www.jeanmonnetprogram.org/papers/96/9602-II.html>.

122. See also Peta Gaye-Miller, Note, *Member State Sovereignty and Women's Reproductive Rights: The European Union's Response*, 22 B.C. INT'L & COMP. L. REV. 195 (1999).

123. See *id.*

124. See Fitzmaurice, *supra* note 79, at 1752.

125. See *Grogan*, *supra* note 80; see also MacLean, *supra* note 104, at 527

126. *Abortion not Considered in Enlargement Talks*, *supra* note 75; see also Clifford, *supra* note 105, at 410 (stating that a Constitutional Amendment is required to ratify the Maastricht Treaty).

127. Treaty on European Union and Final Act, 31 I.L.M. 247, 362 (1992) (annexing Protocol No. 17 to the Maastricht Treaty and to the Treaties Establishing the European Communities).

128. Malta-EU, *supra* note 93.

129. IR. CONST. art. 40.3.3 (1937).

130. Clifford *supra* note 105, at 405.

131. *Id.*

132. *Id.*

Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3. of the Constitution of Ireland.¹³³

Protocol 17 “directs the European Court of Justice to defer to Irish law insofar as there may be a conflict between Community law and the application in Ireland of Article 40.3.3. of the Constitution.”¹³⁴

Like Ireland, Malta negotiated a protocol on abortion to its accession treaty.¹³⁵ This legally binding protocol is enforceable in the ECJ.¹³⁶ The protocol states: “Nothing in the Treaty on European Union, or in the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in the territory of Malta of national legislation relating to abortion.”¹³⁷ Unlike Ireland’s protocol which merely refers to its constitutional provision banning abortion, Malta’s protocol directly mentions abortion.¹³⁸ Malta enacted its protocol as a “faithful reflection of the values of the Maltese people.”¹³⁹

In order to maintain its abortion law, Poland should enact a protocol like Ireland’s and Malta’s. Similar to Ireland’s constitutional provision, Article 38 of Poland’s constitution prohibits abortion. To date, however, Poland lacks a protocol whereby its abortion law would override community law. As Malta’s protocol demonstrates, a protocol may be enacted to reflect the values of its citizens; Poland has failed to seek such a protocol even though a large number of its citizens view EU membership as a threat to its Catholic values.¹⁴⁰

B. Reconciling Abortion Laws through Moral Sovereignty

Poland can also assert moral sovereignty to reflect the values of its Catholic citizens. Moral sovereignty, as developed by Rousseau, is the belief that the “political process can be used to make men and women fundamentally better creatures.”¹⁴¹ “In the case of sexual politics, the object is to use the legislative process to rewrite the rules of sexual behavior.”¹⁴² The Polish Government used its political processes to support Catholic pro-life beliefs in promulgating and interpreting Article 38 of the Polish Constitution. Article 38 ensures “the legal protection of the life of every human being. The Polish Tribunal interpreted this

133. Treaty on European Union and Final Act, 31 I.L.M. 247, 362 (1992) (annexing Protocol No. 17 to the Maastricht Treaty and to the Treaties Establishing the European Communities).

134. Clifford, *supra* note 105, at 406.

135. *Id.*

136. Busuttil, *supra* note 93.

137. Clifford, *supra* note 105, at 406.

138. Busuttil, *supra* note 93.

139. *Id.*

140. Urban-Klaehn, *supra* note 69.

141. Johnson, *supra* note 11.

142. *Id.*

Article as implying the “protection of life at every stage.”¹⁴³ Although Poland used its legislative processes to promulgate and interpret Article 38, it failed to legislate special provisions in its individual accession treaty to prevent community law from overriding its anti-abortion law.

In the event of such a conflict, Poland should assert moral sovereignty, a principle reflected in the preamble of the draft of the EU’s constitution (Constitution).¹⁴⁴ The Constitution says within its first few lines that the Union recognizes its “spiritual and moral heritage.”¹⁴⁵ The EU should recognize its “spiritual and moral heritage” by supporting the diverse spiritual and moral beliefs held by its member states.. Article III-181 of the Constitution even states that the “Union shall contribute to the flowering of the cultures of the member states, while respecting their national and regional diversity.”¹⁴⁶ The Union shall also aim for the “conservation and safeguarding of cultural heritage of European significance.”¹⁴⁷ Additionally, the Charter of Fundamental Rights of the Union (the Charter), which is part of the Constitution, encompasses the principle of moral sovereignty and respect for the Union’s “spiritual and moral heritage.”¹⁴⁸ The Charter declares that the Union respects the “diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States.”¹⁴⁹

Because Poland’s national identity derives from Catholicism¹⁵⁰ the EU should permit Poland to maintain its abortion law. Catholicism has “defined the Polish nation for over a thousand years, including long periods in which no Polish state existed.”¹⁵¹ Poland has also maintained its values “through long periods of foreign and authoritarian rule.”¹⁵² By recognizing Poland’s Catholic influence the EU can also promote Europe’s Christian heritage. Christianity helped unify Europe and “inspired the democratic ideal and human rights of modern Europe.”¹⁵³ Finally, the EU should recognize Poland’s role as Europe’s moral compass.¹⁵⁴ Poland’s brutal history taught Poles the “essential wisdom and strength of European values.”¹⁵⁵

Moral sovereignty also promotes democratic principles as reflected in the

143. Federation for Women and Family Planning, *supra* note 57.

144. Draft Treaty Establishing Constitution for Europe, Preamble, July 18, 2003, CONV 850/03.

145. *Id.* Although the preamble refers to Europe’s moral and spiritual heritage it does not directly reference Europe’s Christian heritage. Pope John Paul II recently urged EU leaders to include a clear reference to Christianity. *Pope Renews Appeal to EU Leaders on Constitution*, AGENCE FRANCE PRESSE, Aug. 17, 2003.

146. Draft Treaty Establishing Constitution for Europe, art. III-181, July 18, 2003, CONV 850/03.

147. *Id.*

148. Draft Treaty Establishing a Constitution for Europe, July 18, 2003, CONV 850/03.

149. Charter of Fundamental Rights of the Union, preamble, *in* Draft Treaty Establishing Constitution for Europe, July 18, 2003, CONV 850/03. July 18, 2003, CONV 850/03.

150. Daniel, *supra* note 14, at 401-402.

151. CASTLE & TARAS, *supra* note 39, at 220.

152. GEORGE SANFORD, *DEMOCRATIC GOVERNMENT IN POLAND* 232 (2002).

153. *Pope Renews Appeal to EU Leaders on Constitution*, *supra* note 145.

154. ZAMOYSKI, *supra* note 12, at 395.

155. *Id.*

EU's Constitution.¹⁵⁶ Article 2 of the Constitution states that "the Union is founded on respect for. democracy."¹⁵⁷ Moral sovereignty is necessary to promote a democratic society.¹⁵⁸ Sovereignty is "the ability of a nation to determine the welfare of its own citizen."¹⁵⁹ Democratic society requires the "fidelity of the government to ideals of the moral sovereignty of the people as constitutive and the recognition that the obedience of citizens to the state's assertions of the law derives from the state's success in meeting these ideals."¹⁶⁰ The Polish Parliament interpreted Article 38 of its Constitution to reflect the moral ideals of its citizenry¹⁶¹ which is ninety-five percent Catholic.¹⁶² Because the EU's Constitution claims to recognize the "specific contribution" of member churches,¹⁶³ it should recognize Poland's abortion law.

The EU's goal for "greater political and cultural integration" has created concern among many European states that they would lose their national identity.¹⁶⁴ Poles share this concern and fear a loss of sovereignty, especially since they were only recently freed from a repressive communist regime.¹⁶⁵ The EU's Constitution states that the EU "shall take cultural aspects into account to respect and to promote the diversity of its cultures."¹⁶⁶ The EU's Constitution further says, "The Union shall respect the national identities of the Member States, inherent in their fundamental structures, political and constitutional."¹⁶⁷ Because the EU is predominantly liberal,¹⁶⁸ the EU can promote diversity and democracy within the Union by supporting Poland's law and thus fulfills its constitutional purpose to create a diverse and democratic union.

In sum, a constitutional protocol and moral sovereignty provide the basis whereby Poland's abortion law can withstand conflicting community law. Adopting a protocol and applying the principle of moral sovereignty would preserve Poland and Europe's unique cultural and Catholic heritage while promoting diversity and democracy within the EU.

156. Draft Treaty Establishing a Constitution for Europe, July 18, 2003, art. 2, CONV 850/03.

157. *Id.*

158. Michael H. Hoffheimer, *Hegel's First Philosophy of Law*, 62 TENN. L. REV. 823, 889 (1995).

159. Yamin Zakaria, *Defining Sovereignty! A New Political Concept?* KCOM J. (May 13, 2001), available at <http://www.khilafah.com/home/category.php?DocumentID=1533&TagID=1#>.

160. Hoffheimer, *supra* note 158, at 889.

161. See Federation for Women and Family Planning, *supra* note 57. The Polish Parliament interpreted Article 38 as meaning the "right of life at every stage.

162. Statistics by Country by Catholic Population, *supra* note 18.

163. Draft Treaty Establishing Constitution for Europe, July 18, 2003, art. 51(3), CONV 850/03.

164. CASTLE & TARAS, *supra* note 39, at 220.

165. Deloy, *supra* note 1.

166. Draft Treaty Establishing Constitution for Europe, July 18, 2003, art. III-181, CONV 850/03.

167. Draft Treaty Establishing a Constitution for Europe, July 18, 2003, art. 5(1), CONV 850/03.

168. Urban-Klaehn, *supra* note 69. This text refers to "modern liberal."

V WHY POLAND SHOULD ADOPT THE EU'S ABORTION POLICIES

This final section argues that although diversity and democracy within the EU is important, Poland should first increase diversity and democracy within its own borders by adopting the EU's pro-choice policy. The EU can only be a democratic union if its member states practice democracy. This section demonstrates the undemocratic effect of Poland's abortion law. The law fails to reflect the voice of the majority of Polish citizens, it threatens women's fundamental rights, and it creates damaging stereotypes that repress women and contribute to gender discrimination.

A. *The Voice of the Polish Majority*

As mentioned earlier, despite the fact that ninety-five percent of Poles are Catholic,¹⁶⁹ sixty percent of Poland's citizens oppose the Polish abortion law.¹⁷⁰ In addition, the majority of Poles want a secular state,¹⁷¹ with approximately seventy-five percent of Poland's population disapproving of the Church's political activity.¹⁷²

Poland's constitutional history also demonstrates that its citizens sought a secular state in spite of their country's strong ties to Catholicism.¹⁷³ Poland's constitution of 1952 guaranteed the separation of church and state.¹⁷⁴ Article 82 of the 1952 constitution required statutory law to establish a church-state relationship.¹⁷⁵ Articles 25(4) and 25(5) of Poland's current constitution declare that relations between Poland, the Catholic Church, and all other churches shall be determined by statute.¹⁷⁶ Thus Poland's current constitution, which was enacted in 1997 and after the fall of communism, promotes an ideologically-neutral state.

Poland can maintain its strong Catholic heritage while promoting a secular government. According to Tocqueville, a secular democracy can promote Roman Catholicism.¹⁷⁷ Tocqueville asserts that "America is the most democratic country in the world, and it is at the same time the country in which the Roman

169. Statistics by Country by Catholic Population, *supra* note 18.

170. *Poland Backs Away*, *supra* note 56.

171. CASTLE & TARAS, *supra* note 39, at 220.

172. Daniel, *supra* note 14, at 413.

173. *See generally id.* at 405.

174. POL. CONST. art. 82 (1952). The 1952 Constitution was Poland's first constitution asserting Poland as an ideologically neutral country. Daniel, *supra* note 14, at 405. Although the 1952 Constitution was passed under a communistic regime, Poland's current constitution of 1997 promotes an ideologically-neutral state. *See* R.P. art. 25(4) and art. 25(5). In contrast, Poland's previous constitutions of 1791 and 1921 used the principle of *primam inter pares* to establish a privileged role for the Catholic Church. Daniel, *supra* note 14, at 405.

175. POL. CONST. art. 82 (1952).

176. POL. CONST. art. 25(4), art. 25(5) (1997).

177. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, vol. II, 30 (1945).

Catholic religion makes the most progress. Tocqueville further states that Catholicism fosters equality amongst people and promotes democracy.¹⁷⁸ Italy, a country with catholic ties and a similar religious history to Poland nevertheless maintains a secular government.¹⁷⁹ Italy boasts a higher Catholic population than Poland,¹⁸⁰ yet maintains separation between church and state.

Scholars have also shown a correlation between Poland's stability as a nation and the role of the Church. The Church's significance increased when Poland faced a serious political crisis and democracy was unattainable.¹⁸¹ With increased democracy, however, the Church's prominence amongst Poles decreased.¹⁸² Because Poland is now democratic and free and the majority of its citizens seek secularization, the Polish government should promote separation between church and state.

B. Fundamental Rights

Poland should adopt the EU's abortion policy to ensure the fundamental rights of its citizens. Presently there is no fundamental right to an abortion.¹⁸³ There is, however, a fundamental right to religion.¹⁸⁴ Although Poles may assert their right to religion as a basis for prohibiting abortion, the international community has a duty to protect certain human rights and can limit religious freedom.¹⁸⁵ The International Covenant on Civil and Political Rights (hereinafter "ICCPR") limits religious freedom when necessary to protect fundamental rights and one's health.¹⁸⁶

178. ALEXIS DETOCQUEVILLE, *DEMOCRACY IN AMERICA*, vol. I, 311 (1945).

179. Bureau of Democracy, Human Rights, and Labor, *Int'l Religious Freedom Report 2002*, U.S. Dept. of State: Italy, available at <http://www.state.gov/g/drl/rls/irfr/2002/13941.htm>. Italy's 1947 Constitution established freedom of religion. Before this constitution, a 1929 Concordat recognized Catholicism as Italy's state religion. However, in 1984 revised Concordat declared Italy a secular state. *Id.*

180. Over 97% of Italy's population is Catholic whereas Poland's Catholic population is 95%. Statistics by Country by Catholic Population, *supra* note 18.

181. Daniel, *supra* note 14, at 417.

182. *Id.*

183. Rhoda E. Howard-Hassmann, *Dueling Fates: Should the International Legal Regime Accept a Collective or Individual Paradigm to Protect Women's Rights*, 24 MICH. J. INT'L L. 227, 233 (2002). There is a current movement among some groups who insist that the United Nations develop "international human rights, which would include the right to abortion. *Securing Our Sovereignty* (United Families International), 3rd Quarter Newsletter, available at <http://www.unitedfamilies.org/secsovereignty3q2002.html>.

184. Religious freedom is fundamental right. This right is recognized in: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Helsinki Accords, the Declaration on the Elimination of all Forms of Intolerance and Discrimination Based on Religion, the U.N. Charter, and The European Convention for the Protection of Human rights and Fundamental Freedoms.

185. Shannon Renton Wolf, *Making Waves: Circumventing Domestic Law on the High Seas*, 14 HASTINGS WOMEN'S L.J. 109 (2003).

186. Nichol Jeannette Starr, *Who Asked You? The Appropriateness of U.S. Leadership in Promoting Religious Freedom Worldwide*, 33 VAND. J. TRANSNAT'L L. 987, 994 (2000).

Poland's abortion law violates the ICCPR because it threatens women's fundamental right to liberty.¹⁸⁷ Some argue that "without the right to control their own body most other rights are difficult for women to attain."¹⁸⁸ Abortion is the only right that women alone need.¹⁸⁹

Poland's anti-abortion law further violates the ICCPR because it severely threatens women's health. Poland's law has not stopped abortions but forces it underground.¹⁹⁰ Underground abortions have jeopardized women's health and rights to such an extent that two U.N. committees have voiced concerns about human rights violations.¹⁹¹ The number of illegal abortions occurring each year in Poland is estimated to be as high as 200,000.¹⁹² Such clandestine abortions are not only very expensive, but are life threatening.¹⁹³ The law has caused tragedies in the health and life of hundreds of thousands of women.¹⁹⁴ Forcing women to give birth against their will also results in abandonment and infanticide.¹⁹⁵

Moreover, Poland's anti-abortion law violates the ICCPR because doctors arbitrarily decide when to perform abortions, even when they are permitted under the anti-abortion law's exception.¹⁹⁶ Article 17 of the ICCPR guarantees individuals the right to be free from arbitrary or unlawful interference with one's privacy [and] family.¹⁹⁷ While Poland's abortion law permits abortion when the mother's life or health is threatened, when a high probability of severe and irreversible damage to the fetus exists, and when the pregnancy is a result of a criminal act,¹⁹⁸ in reality, obtaining an abortion even in these situations is rare.¹⁹⁹ Many doctors are either unaware of the exception to Poland's abortion law or refuse to perform abortions when the exception is met.²⁰⁰

187. Federation for Women and Family Planning, *supra* note 57.

188. Howard-Hassmann, *supra* note 183, at 232 (2002).

189. *Id.* at 233.

190. Bricker, *supra* note 66.

191. *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee-Poland*, CCPR/C/SR.1779 (1999). *Report of the Commissioner for Human Rights, Mr. Alvaro Gil-Robles, on His Visit to Poland* 11, CommDH(2003)4, (Nov. 2002).

192. Bricker, *supra* note 66.

193. Wanda Nowicka, *Ethical Considerations on Anti-Abortion Law: Poland*, September 2000, available at <http://www.rodicovstvo.sk/nowicka.htm>.

194. Shana Penn, *Breaking the Silence: How Poland's Abortion Law Jeopardizes Women's Health and Rights*, Tribunal on Anti-Abortion Law in Poland, available at http://www.waw.pdi.net/polfedwo/english/news/tribunal/shana_penn.htm (hereinafter "*Breaking the Silence*").

195. See Wanda Nowicka & Agata Zielinska, *The Anti-Abortion Law in Poland: The Functioning, Social Effects, Attitudes and Behaviors*, Sept. 2000, available at http://www.waw.pdi.net/polfedwo/english/reports/report00/rep00_5.htm (hereinafter "*Nowicka & Zielinska*").

196. See International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 17, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16 at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

197. International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 17, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16 at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

198. *Report of the Commissioner for Human Rights, Mr. Alvaro Gil-Robles, on His Visit to Poland* 11-12, CommDH(2003)4, (Nov. 2002).

199. *Id.* at 12.

200. See Nowicka & Zielinska, *supra* note 195.

In one case, a woman with an artificial heart valve died after being forced to give birth against her and her husband's will.²⁰¹ In another instance, a woman with brain cancer needed an abortion so she could continue to receive her cancer treatment.²⁰² Her doctors refused to perform the abortion and discontinued her cancer treatment so she could give birth.²⁰³ The woman tragically died within two months after giving birth.²⁰⁴ Doctors also refuse to perform abortion in cases involving rape even though abortion is permitted in such circumstances.²⁰⁵ Rape is a crime against personal freedom and violates a woman's human rights.²⁰⁶ In still other cases, doctors refused to perform abortion on grounds of conscientious objection.²⁰⁷ Doctors' reluctance to perform abortions has significantly decreased the number of legal abortions performed to such an extent that only 140 legal abortions occurred in 2002.²⁰⁸

Finally, Poland's anti-abortion law violates Article 38 of the Polish constitution. Article 38 guarantees the protection of life of every human.²⁰⁹ Ironically, because the Polish Tribunal interpreted Article 38 as prohibiting abortion, this Article now fails to protect a woman's life when she is denied a necessary abortion. The Tribunal's interpretation also conflicts with Article 47 of the Polish Constitution which states, "[e]veryone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life."²¹⁰ This right is also reflected in the European Convention on Human Rights and Fundamental Freedoms (hereinafter "ECHR").²¹¹ Article 8 of the ECHR guarantees that "[e]veryone has the right to respect for his private and family life"²¹²

C. Gender Discrimination

The Polish legal system and Polish society promote gender discrimination.²¹³ Gender discrimination violates Article 32 of Poland's Constitution which

201. Federation for Women and Family Planning, *supra* note 57

202. See Nowicka & Zielinska, *supra* note 195.

203. See *id.*

204. See *id.*

205. See *id.*

206. Berta Esperanza Hernandez-Truyol, *Conceptualizing Violence: Present and Future Developments in International Law: Panel I: Human Rights & Civil Wrongs at Home and Abroad: Old Problems and New Paradigms: Sex, Culture, and Rights: A Re-Conceptualization of Violence for the Twenty-First Century*, 60 ALB. L. REV. 607, 609 (1997).

207. Report of the Commissioner for Human Rights, Mr. Alvaro Gil-Robles, on His Visit to Poland, CommDH(2003)4, (Nov. 2002).

208. Johnston, *supra* note 63.

209. POL. CONST. art. 38.

210. POL. CONST. art. 47.

211. See generally Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, 213 U.N.T.S. 221 (1950).

212. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, 213 U.N.T.S. 221 (1950).

213. See generally General Press Release: Gender Equality is Not De Facto Reality (Nov. 6, 2002), available at <http://www.eumap.org/whatsnew/pressinfo/1036510305>.

guarantees the equality of all persons.²¹⁴ Since the fall of communism, women have lost the benefits of equal pay for equal work, maternity, and childcare.²¹⁵ The loss of maternity and childcare benefits forces women to assume a primary role in the home because childcare services are insufficient and domestic services are expensive.²¹⁶ This perpetuates the traditional stereotype of a woman as mother and wife.²¹⁷

The widespread discrimination women face in the labor market also perpetuates this stereotype.²¹⁸ Discrimination in the work place violates Article 65 of the Polish Constitution which states, "everyone shall have the freedom to choose and to pursue his occupation and to choose his place of work."²¹⁹ In reality, women seeking jobs are frequently asked to undergo pregnancy tests as a means of eliminating pregnant women from employment.²²⁰ Women also face disproportionate pay, earning thirty percent less than men and receiving a pension forty percent less than men²²¹ despite being more educated than men.²²²

Gender discrimination and stereotypes can be decreased by adopting the EU's pro-choice policy. The EU has found women's participation in the Polish private sector to be unsatisfactory.²²³ The Polish government is predominantly male and fails to address gender issues.²²⁴ Although the Polish Parliament created a sub-committee on the equal status of women and men and recently sent legislation on gender equality to the Polish Senate, Polish leaders did so only to meet EU standards on gender equality.²²⁵ Gender equality requires more than merely amending laws.²²⁶ The EU recognizes that action is necessary and announced:

Paper legislation to promote equality for women is necessary but not enough. Governments, business, administrators, political parties, all must take more active steps to make equality a practical reality. Up to now member states have largely

214. Article 32 of the Polish Constitution states "All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities. No one shall be discriminated against in political, social or economic life for any reason whatsoever.

215. Susan Smolens, *Violence Against Women: Consciousness and Law in Four Central European Emerging Democracies-Poland, Hungary, Slovakia, and the Czech Republic*, 15 TUL. EUR. & CIV. L.F. 1, 15 (2000-2001).

216. General Press Release, *supra* note 213.

217. See Wanda Nowicka, *The Position of Women and Demographic Processes in the Countries in Transition*, Apr. 1997 [hereinafter Nowicka 1].

218. Federation for Women and Family Planning, *supra* note 57.

219. POL. CONST. art. 65.

220. See Federation for Women and Family Planning, *supra* note 57.

221. See *id.*

222. See Nowicka 1, *supra* note 217.

223. *Women and Equal Opportunities in Europe: Commission Adopts Annual Report, Diamantopoulou Says Equality Legislation Alone is Not Enough*, IP/03/323, Mar. 5, 2003, available at http://europa.eu.int/comm/employment_social/news/2003/mar/ip03323_en.pdf.

224. SANFORD, *supra* note 152, at 111.

225. Regional Network of Women NGO's in Central and Eastern Europe, *EU Enlargement Program*, available at <http://www.karat.org/links/pages/Detailed/171.html>.

226. Agnieszka Klich, *Constitutional Developments in Poland*, 1996 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 33, 46 (1996).

paid lip service to equality. This must change, both for women and also in the interest of political and economic Europe as a whole.²²⁷

Because the EU not merely advocates but requires gender equality Poland can increase gender equality by adopting the EU's pro-choice policy

VI. CONCLUSION

Since the fall of Communism, Poland has experienced several changes from passing a democratic constitution to preparing for EU membership. Throughout this transition Poland's abortion law has changed from being available on demand during communism to being prohibited except in rare circumstances. The one thing that did not change in Poland was the Catholic Church's strong presence.

The Catholic Church's long history in Poland has formed part of Poland's national identity. The EU, which is pro-choice, advocates the need to promote diversity and respect for member state's national identity. By joining the EU Poland must adopt community law. The ECJ ruled in *Grogan* that an individual of a member state has the right to receive services including an abortion. This conflicts with Poland's anti-abortion law. In order to preserve its anti-abortion law, Poland could adopt a protocol to its accession treaty similar to Ireland's and Malta's. Poland can also assert moral sovereignty, a principal recognized in the draft of the EU's constitution.

In practice however, Poland's anti-abortion law is undemocratic. The law fails to reflect the majority view of Poles who want to liberalize the law. The law threatens Polish women's fundamental rights to such an extent that two U.N. Committees voiced concerns regarding human rights violations.²²⁸ Most tragically, the anti-abortion law threatens women's lives. Hundreds of thousands of women have already died from being denied a necessary abortion or from seeking a dangerous underground abortion.²²⁹ The law also perpetuates gender discrimination and stereotypes.

In spring 2004 Poland will embark upon a new path by joining the EU. Although it is important for Poland to maintain its proud Catholic identity, it is also important for Poland to allow its citizens to live in a practicing democracy. Such a democracy means equality. Equality can be achieved through secularization. Poland, which is viewed as a central country in the EU's enlargement,²³⁰ can only truly contribute to the EU if its own citizens are equal. Granting abortion rights may be the only way to equalize Polish men and

227 Women and Equal Opportunities in Europe, *supra* note 223.

228. See generally Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee-Poland, U.N. Human Rights Comm., CCPR/C/SR.1779 (1999); Report of the Commissioner for Human Rights, Mr. Alvaro Gil-Robles, on His Visit to Poland, CommDH(2003) 4 (Nov. 2002).

229. *Breaking the Silence*, *supra* note 194.

230. Deloy, *supra* note 1. Poland is the largest and most populated of the ten countries, primarily from Eastern Europe, expected to join the EU in spring 2004.

women.²³¹ As a country that just recently freed itself from Communism, Poland should give Polish women the freedom of choice.

231. Howard-Hassmann, *supra* note 183, at 233.