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*The Society for the Protection of Unborn Children*  
v. *Grogan*: Rereading the Case and Retelling the Story  
of Reproductive Rights in Europe

STÉPHANIE HENNETTE VAUCHEZ

INTRODUCTION: REFRAMING GROGAN AS A TEMPLATE FOR  
JUDICIAL REASONING AT THE EUROPEAN COURT OF JUSTICE

The 1991 European Court of Justice (“ECJ” or “the Court”) 1991 ruling in *The Society for the Protection of Unborn Children v. Grogan*<sup>1</sup> is often overlooked by reproductive and human rights advocates, as they do not view the ruling as a canon. Commentators have criticized the Court for failing to find that Ireland’s ban on the distribution of information pertaining to abortion clinics in Great Britain was a violation of the law of the European Union (“EU”). Although striking down Ireland’s ban would have been a more powerful message than upholding it, the judges’ reasoning nevertheless laid out important rules of interpretation in favor of women’s reproductive rights. Consequently, this chapter suggests that the ECJ’s ruling in *Grogan* should be studied under a new light, as the Court, in fact, made a significant contribution to women’s reproductive rights.

The context of the case is as follows. Under common law, abortion was a misdemeanor. In 1861, Great Britain’s Offenses Against the Person Act criminalized abortion. The Offenses Against the Persons Act was confirmed in 1979 by the Irish Health Act, which added to the prohibition on abortion in Ireland a prohibition on the sale, importation, manufacture, advertisement and display of abortifacients. In 1983, an amendment to the Irish Constitution was adopted by referendum, according to which, “[t]he State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and as far as practicable, by its laws to defend and vindicate that right.”<sup>2</sup> This set of rules made Ireland the

<sup>1</sup> Case C-159/90, *Society for the Protection of Unborn Children Ireland Ltd. v. Grogan*, [1991] E.C.R.4685.

<sup>2</sup> Irish Constitution of 1937, art. 40 (text of the 8th amendment of the Constitution Act, 1983).

country with the strictest abortion regime in Europe, which in turn encouraged some student-run organizations to disseminate information on the ways through which abortions could be legally obtained in Great Britain.<sup>3</sup> The Society for the Protection of Unborn Children (“SPUC”), a pro-life organization, sought an injunction against the student-run organizations to prevent them from disseminating that information. The Irish High Court agreed with the students’ claim that the compatibility of such an injunction with EU law was unclear. Consequently, the High Court refused to deliver the injunction and referred the following three questions to the ECJ.<sup>4</sup> First, whether an abortion was to be considered a “service” under EU law<sup>5</sup>; second, whether the injunction was an invalid restriction of the freedom of circulation of services<sup>6</sup>; and third, whether the restriction was a violation of fundamental rights. This chapter focuses on the ECJ’s answer to the first question as laid out in paragraphs 17–21 of the ruling:

17 According to the first paragraph of [Art. 60], services are to be considered to be “services” within the meaning of the Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital or persons . . .

18 It must be held that termination of pregnancy, as lawfully practiced in several Member States, is a medical activity which is normally provided for remuneration and may be carried out as part of a professional activity. In any event, the Court has already held in the judgment in *Luisi and Carbone* . . . that medical activities fall within the scope of Article 60 of the Treaty.

<sup>3</sup> As abortion became legal in Britain in 1967, a so-called “abortion trail” soon emerged, which is estimated to have led 72,000 Irish women to seek abortion there between 1970 and 1999. See del Moral, Paulina Garcia, and Anne C. Korteweg, “The Sexual Politics of Citizenship and Reproductive Rights in Ireland: From National, International, Supranational and Transnational to Postnational Claims to Membership?” *European Journal of Women’s Studies* 19 (2012): 413–27, 413, 416.

<sup>4</sup> On appeal, however, the Supreme Court maintained the referral but delivered the injunction.

<sup>5</sup> At the time of the referral, “services” were defined by art. 60 of the Treaty; see, now, Consolidated Version of the Treaty of the Functioning of the European Union art. 57 2008 O.J. C 115/47 [hereinafter TFEU]: “Services shall be considered to be ‘services’ within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. ‘Services’ shall in particular include: (a) activities of an industrial character; (b) activities of a commercial character; (c) activities of craftsmen; (d) activities of the professions.”

<sup>6</sup> The relevant provision at the time of the referral was art. 59; see now TFEU art. 56: “Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.”

19 SPUC, however, maintains that the provision of abortion cannot be regarded as being a service, on the grounds that it is grossly immoral and involves the destruction of the life of a human being, namely the unborn child.

20 Whatever the merits of those arguments on the moral plane, they cannot influence the answer to the national court's first question. It is not for the Court to substitute its assessment for that of the legislature in those Member States where the activities in question are practised legally.

21 Consequently, the answer to the national court's first question must be that medical termination of pregnancy, performed in accordance with the law of the State in which it is carried out, constitutes a service within the meaning of Article 60 of the Treaty.<sup>7</sup>

In its answer, the Court proceeded to mechanically apply the technical definition of "services" under EU law to abortions. The Court reasoned that because "services" are to be identified whenever normally provided for remuneration and medical activities fall within the scope of then-article 60 of the EC Treaty<sup>8</sup> as a matter of principle,<sup>9</sup> the termination of pregnancy was a service, insofar as it was lawfully provided in several Member States for remuneration and as part of a professional activity. The Court rejected the moral arguments brought by the SPUC and explicitly stated that such arguments are irrelevant to the "purely" legal answer to the first question.<sup>10</sup>

The ECJ's answer to the second and third questions flows logically from the reasoning described earlier. In answering the second question, the Court found the fundamental right of British abortion clinics to provide services was not violated or unduly restricted by the injunction issued by the Irish

<sup>7</sup> *Society for the Protection of Unborn Children Ireland v. Grogan*, Case C-159/90, [1991] E.C.R. I-04685

<sup>8</sup> Now article 57 of the Treaty on the Functioning of the EU.

<sup>9</sup> This had been determined earlier by the Court, see *Luisi and Carbone v. Ministero dello Tesoro*, Joined Cases 286/82 and 26/83, [1984] E.C.R. 00377, ¶ 16: "It follows that the freedom to provide services includes the freedom, for the recipients of services, to go to another member state in order to receive a service there, without being obstructed by restrictions, even in relation to payments and that tourists, persons receiving medical treatment and persons travelling for the purpose of education or business are to be regarded as recipients of services."

<sup>10</sup> It is worth noting that this position of the Court on morals in legal reasoning is all the more striking given that the AG had been offering a rather different solution. While AG Van Gerven had no doubt that abortion was to fall under the category of services under EC law, he also believed that the freedom of information about services regularly offered under EC law had been infringed upon by the Irish ban. The question for him then, was not whether there had been an infringement, but whether it was a proportional one. He thought it was; and the reason he did was that he insisted that the reasons for the ban were profoundly moral and corresponded to deep concerns that received constitutional protection in Ireland.

authorities. The ECJ reasoned that the definition of services under EU law is intertwined with the freedom of information pertaining thereto. The injunction, however, only targeted the Irish students' associations, not the British clinics – and absent any kind of link between the two, the Court could only find that the injunction against the associations did not amount to a violation of the freedom of services to which only the clinics were entitled.<sup>11</sup>

Encapsulated here are two main features of the Court's reasoning that I propose to call the "Grogan template" (or "the template"), for, as I later argue, it resonates in subsequent case law. The template's first feature leads the Court to discard "morals" as an appropriate reference for legal reasoning. Through the template's second feature, the Court affirms the full relevance of EU legal categories to the matter at stake (in particular, that of "services") – which leads to the Court fully applying EU law to the particulars of the case. These features have precisely led the Grogan ruling to receive widespread and sometimes fierce criticism. Some authors have focused on its arguably unjustified discarding of moral reasoning<sup>12</sup>; others have insisted that its judgment on the inapplicability of article 59 was regrettable.<sup>13</sup> This chapter does not aim at engaging in these doctrinal discussions of the Grogan case; rather, it purports to underline the unnecessary marginal role the ruling plays in the European laws on abortion. In particular, the Luxemburg court's refusal to accept moral lines of reasoning even on such a vexed theme as abortion, as well as its choice to consider European law legitimate and relevant to the particular matter rather than defer to the State's autonomy, could have had a brighter destiny. Indeed, albeit unexpectedly, they affirm women's reproductive rights. Widening the scope of the inquiry from abortion to other sexual and reproductive justice issues reveals that the Grogan template, whereby the ECJ claims that "morals" are an inappropriate reference for legal reasoning and

<sup>11</sup> The court applied a similar reasoning to answer the third question: the Court could not find that fundamental rights that are protected within the EU legal order were violated by the injunction, in so far as it had previously determined, in its answer to the second question, that the measure at stake (the Irish injunction to students' associations) lied outside the scope of EU law. Here is not the place to recall the history of the EU's legal engagement with fundamental rights (their initial absence from the European legal order, the anxieties voiced by several constitutional courts, their progressive incorporation, first throughout the Court's case law and ultimately in the treaties). Suffice it to say that European institutions and Member States are bound by the respect of the fundamental rights only if and when then either apply or derogate from European law.

<sup>12</sup> See, e.g. Phelam, Diarmuid Rossa, "Right to Life of the Unborn v. Promotion of Trade in Services: The ECJ and the Normative Shaping of the EU." *Modern Law Review* 55, no. 1 (1992): 670.

<sup>13</sup> Hélène Caudemet-Tallon, *Revue Trimestrielle de Droit Européen* (1992): 163; Louis Dubouis, *Revue de droit sanitaire et social* (1992): 48.

affirms the full relevance and applicability of EU law categories, seems to be consistently applied in several lines of cases on prostitution, assisted reproduction and maybe even in cases regarding the legal status of the embryo.

The impetus for this chapter is the growing discomfort with the traditional narrative about this case – and beyond *Grogan stricto sensu*, about abortion in European law. The dominant version of this narrative is as follows: in its 1991 ruling in *Grogan*, the ECJ ruled against Irish students' organization's right to distribute information about abortion services legally provided in Great Britain. In 1992, however, in *Open Door and Dublin Well Women v. Ireland*,<sup>14</sup> the European Court of Human Rights ("ECtHR") found that Ireland had violated article 10 of the European Convention on Human Rights' freedom of expression clause by imposing a total ban on the distribution of that kind of information. In other words, this narrative conveys the unsurprising view that the ECtHR protected fundamental human rights, whereas the ECJ failed to do so. This classic interpretation of what long remained the two leading abortion cases in Europe<sup>15</sup> focuses narrowly on the judicial *outcomes*, insisting that the ECHR found Ireland had breached its European human rights obligations, whereas the ECJ ruled Ireland had acted legally.<sup>16</sup> This narrative, however, overlooks the *modes of reasoning* of both courts, and, as this chapter argues, the two modes of reasoning are of great relevance. This chapter thus focuses on the arguments put forth by each court and unearths the following two major elements: first, the ECtHR said nothing about abortion in its 1992 *Open Door* ruling; the court reframed the case as strictly and merely a freedom-of-expression case. By contrast, the ECJ said something very important about abortion: it specifically settled the fact that abortion is a service under EU law, and there is no reason to shield abortion away from the correlative constitutional regime of free circulation of information pertaining to services. In addition, it appears that the ECtHR actually deferred to the Irish state and awarded Ireland a wide "margin of appreciation"<sup>17</sup> in its 1992 ruling,

<sup>14</sup> Case 14234/88, *Open Door and Dublin Well Woman v. Ireland*, [1992] ECHR 68.

<sup>15</sup> Not to mention that they are truly the comparativist's dream, as these two rulings were delivered by the two European courts only a year apart (October 1991 and October 1992) and stem from the exact same facts (the Irish injunction on students' associations to stop distributing information about legal abortion in Britain).

<sup>16</sup> For the sake of clarity and at the expense of exactitude in the chronology of legal denominations, I shall refer to "EU law" throughout this chapter regardless of the fact that, of course, it was technically EC law that was at stake in the 1991 *Grogan* decision that is this essay's starting point.

<sup>17</sup> The margin of appreciation is a classic doctrine of ECHR law that was first articulated by the ECtHR in 1976: "The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights . . . .

whereas in the Grogan decision the ECJ affirmed the full-fledged applicability of EU law to the facts of the case.

This chapter's introduction thus outlined the main reasons why the traditional narrative of EU Law on abortion may well be told anew. Part 2 of the chapter argues that the ECJ in 1991 did more for the affirmation of women's reproductive rights than the ECtHR did in 1992 or ever since for that matter. Part 2 thus contrasts subsequent uses of the Grogan template in Luxembourg with the ways in which it operates in reverse mode in Strasbourg. The fundamental structure of the ECJ and ECtHR case law on issues of sexual and reproductive rights (prostitution, reproductive rights and the legal status of the embryo) is presented here as symmetrical: the ECJ continuously affirms the mechanical applicability of EU law categories to these matters, whereas the ECtHR consistently defers back to the states, therefore limiting the relevance of the ECHR law. Part 3 of this chapter invites the reader to think about the potential meaning and questions raised by this renewed way of telling the story of abortion in the context of EU law. Can it be said that the paradigm of "the market" that dominates the EU legal order does, or has done, a better job at protecting women's rights than that of "human rights" that dominates the Council of Europe's? The question thus reframed certainly leads to an "uncomfortable conversation"<sup>18</sup> that goes beyond the scope of the present chapter. This chapter does, however, wish to bring in several elements in order to tentatively provide an answer, by insisting on the importance of not shying away from the legal tools and reasoning that the paradigm of the market brings into the conversation on reproductive rights. The feminist critique of the market, including on issues of reproductive justice, has surely put forward compelling reasons for caution. Critical stances, however, on the legal

The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted (Article 26) (art. 26) . . . . These observations apply, notably, to Article 10 para. 2. In particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them . . . . Consequently, Article 10 para. 2 (art. 10-2) leaves to the Contracting States a margin of appreciation" (ECHR, 7 Dec. 1976, *Handyside v. UK*, n° 5493/72, ¶ 48).

<sup>18</sup> Fineman, Martha, Jack Jackson, and Adam Romero, eds. *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations*. Farnham: Ashgate, 2009.

instruments and modes of reasoning also accommodates forms of pragmatism. If one views “the law” as an essentially ambivalent instrument that is neither good nor bad, but as an instrument that is used and moved in various directions depending on the context, one need not “believe” in the moral superiority of particular legal grammars, but only realistically assess the best ways of achieving particular goals<sup>19</sup> (whatever works).<sup>20</sup> From that perspective, it may be argued that advocates of reproductive rights at the European level should pay closer attention to the market’s potential instead of relying essentially on the human rights paradigm through the ECtHR litigation, for indeed a form of “market taboo” may be viewed as having led to arguably disappointing outcomes that are worth unraveling as new directions ought to be taken for better ascertaining reproductive rights in Europe.

The goals of this chapter are not normative; its point is not to claim that either model is necessarily superior to the other, either in terms of principle or of outcome. Rather, the goals of this chapter are pragmatic and theoretical. On the pragmatic side, this chapter stresses that the contribution of EU law to reproductive rights is underestimated in academic and activist conversations that mostly focus on other “human rights” identified legal actors (such as the ECtHR). On the theoretical side, this chapter purports to encourage the development of a conversation about market and reproductive rights that remains timid in Europe, with the objective of not being taken by surprise when it inevitably will impose itself on judicial, legislative and political agendas.

REFRAMING THE GROGAN TEMPLATE: RETELLING AND WIDENING  
THE STORY OF REPRODUCTIVE RIGHTS IN EUROPEAN LAW

*Using the Grogan Template in Luxembourg*

There are convincing arguments to be made in support of the view that European integration and some diversity among national approaches to sensitive topics are compatible.<sup>21</sup> The claim that there should be limits to

<sup>19</sup> Only very recently have some authors started to tackle the issue of reproductive justice through the lens of freedoms of circulation; among several papers, see notably: Britta van Beers, “Is Europe ‘Giving in to Baby Markets’? Reproductive Tourism in Europe and the Gradual Erosion of Existing Legal Limits to Reproductive Markets.” *Medical Law Review*, 23, no. 1, 2015: 103.

<sup>20</sup> See, e.g., Dembour, Marie-Benedicte, *Who Believes in Human Rights?: Reflections on the European Convention*. 1st ed. Cambridge: Cambridge University Press, 2006.

<sup>21</sup> See, e.g., Bruno de Witte, “The Value of Cultural Diversity in European Union Law,” in *Protection of Cultural Diversity from a European and International Perspective*, edited by H. Schneider and P. Van den Bossche, 219–47. Antwerp: Intersentia, 2008.



moral integration is a powerful one, and the ways in which it can be related to the wider claim about self-determination that is central to much contemporary political and moral theories makes it all the more compelling.<sup>22</sup> However, there is something troubling in the notion that as this claim gains or regains momentum, issues of sexual and reproductive freedoms seem to be at the forefront of the discussion.<sup>23</sup> Indeed, contemporary political theory has convincingly argued that concepts of State sovereignty and biopolitics are tightly entangled; the conditions of the production of life are one of the main loci for the constitution and affirmation of political power.<sup>24</sup> Additionally, sovereignty has been analyzed as a deeply gendered notion, in both its political and legal dimensions.<sup>25</sup> Therefore, any form of “nationalist” return in the process of European integration could hardly be presumed to be a liberating one, but rather a sign of the continued reluctance to truly recognize individual autonomy in the determination of sexual identities and practices and gender roles.

In fact, it is striking that the much discussed and alleged comprehensive movement towards globalization of law and the internationalization of legal orders has hardly altered individual legal regimes in the field of human reproduction. Neither the European integration process nor subjection to the ECtHR has allowed Europe (be it the EU or the EC) to affirm itself as the default or main regulatory entity of reproductive issues; it has not ruled out or even dominated other traditional regulations at the national levels. The Irish abortion regime’s steadiness since its initial formulation in 1983 is quite telling in that respect. Twenty-five years after the *Grogan* and *Open Door* cases, the status of abortion in Ireland remains essentially unchanged. Admittedly, in July 2013, an Irish Protection of Life During Pregnancy Act was voted into law, which allows abortion when the life of the mother is at risk. Although an important disruption of abortion politics in Ireland, this is merely the legalization of the judicial-borne resolution of 1992

<sup>22</sup> Floris de Witte, “Sex, Drugs and EU Law: the Recognition of Ethical and Moral Diversity in Europe.” *Common Market Law Review* 50, no. 6 (2013): 1545.

<sup>23</sup> The particularly stimulating paper by Floris de Witte does not, however, circumscribe the plea for judicial restraint in the fields where “morals” are at stake to sexual and reproductive freedoms, since it also examines issues such as drugs policy or the consumption of seal meat.

<sup>24</sup> Drawing on the work of Michel Foucault (in particular, *Histoire de la sexualité, La volonté de savoir*, Gallimard, 1976), see Giorgio Agamben, *Homo sacer. Le pouvoir souverain et la vie nue*, Seuil, 1998; or Nikolas Rose, *The Politics of Life Itself: Biomedicine, Power and Subjectivity in the 21st Century*. Princeton: Princeton University Press, 2007.

<sup>25</sup> See Hilary Charlesworth and C. M. Chinkin, *The Boundaries of International Law: A Feminist Analysis*. Executive Park, NY: Juris Publishing, 2000.

(*State v. X* case<sup>26</sup>). Also, there is reason to believe that that the death of 31-year-old Savita Halappanavar in October 2012 (caused by septicemia after she was denied abortion although the fetus she was carrying was unviable) was more instrumental to the reform than either the ECJ or the ECtHR case law. As such, the facts support the idea that first, there has been little evolution of the Irish abortion regime over the past 35 years; and second, such evolution is not clearly linked to the role of transnational and European law.

At any rate, regardless of how powerful the calls to limit moral integration may be, they do not seem to have been the natural or dominant trend in the ECJ case law. Rather, quite strikingly, the Court has consistently applied the Grogan template on a whole range of issues related to sexual and reproductive justice. Therefore, the ECJ positively affirmed the reach of EU law rather than receding to national policy choices even on “morally sensitive” issues such as prostitution, assisted reproduction and the legal status of the embryo. On all these issues, the Court affirmed the relevance of EU law categories and crafted European solutions and answers to questions that receive widely discrepant answers at the national levels. In doing so, the Court has systematically repeated the Grogan template, inspired by the idea that “morals” are an inappropriate tool of legal reasoning.<sup>27</sup>

In the case of prostitution, the ECJ has dealt several times with instances where a Member State tried to either deport or refuse residence and work permits to female prostitutes on the grounds that their “profession” was immoral or to be combated. The ECJ generally adopted the view that a Member State cannot ground its decision on the immorality of prostitution when it does not make prostitution illegal for its own nationals.<sup>28</sup> This line of reasoning is firmly grounded in the principle of non-discrimination on the basis of nationality,<sup>29</sup> but it also expresses the view that questions of mortality

<sup>26</sup> Supreme Court (Ireland), 5 March 1992, *Attorney General v. X*, [1992 No846P]. For a recent account, see Andrea Mulligan, *The Right to Travel for Abortion Services: A Case Study in Irish ‘Cross Border Reproductive Care’*, *European Journal of Health Law* 22, no. 3, 2015: 239.

<sup>27</sup> Of course, one should probably not take the Court at its word on this; its discarding of “morals” can well be reframed as a discarding of some morals rather than a value-free mode of reasoning.

<sup>28</sup> *Adoui & Cornuaille v. Belgium*, Joined Cases C-115 and 116/81, [1982] E.C.R. 01665: “A Member State may not, by virtue of the reservation relating to public policy contained in Articles 48 and 56 of the Treaty, expel a national of another Member State from its territory or refuse him access to its territory by reason of conduct which, when attributable to the former State’s own nationals, does not give rise to repressive measures or other genuine and effective measures intended to combat such conduct.”

<sup>29</sup> On two grounds: free circulation on workers regardless of nationality since the inception of the EU, as well as the prohibition of discrimination *per se* (see now TFEU art. 18).

fall outside of the Court's jurisdiction. This is particularly explicit in the 2001 *Aldona Malgorzata Jany* ruling, where the Court stated that “[so] far as concerns the question of the immorality of that activity, raised by the referring court, it must also be borne in mind that, as the Court has already held, it is not for the Court to substitute its own assessment for that of the legislatures of the Member States where an allegedly immoral activity is practiced legally.”<sup>30</sup> Again, this containment of “morals” at the national level leads the Court to affirm the full applicability of EU legal categories to the matter at stake. In the subsequent paragraphs of the ruling, the Court thus accepts that prostitutes are self-employed persons pursuant to then article 52 of the EC treaty and that prostitution is a service under EU law.<sup>31</sup>

In the context of assisted reproduction, in the 2008 *Sabine Mayr* case, the Court highlighted the need to disregard national morals in deciding the extent of the protection offered by EU labour and anti-discrimination laws to a female worker enrolled in an in vitro fertilization (“IVF”) cycle. Sabine Mayr, an employee of a bakery, was dismissed a couple of days after she started her IVF treatment and a few days before the embryos were implanted. She sued her employer, arguing that pregnant workers were protected against dismissal. The national court referred to the ECJ for guidance as to whether Mayr was to be considered pregnant. The ECJ seemed to apply the Grogan template as it affirmed, first, that it was not for the Court to engage in any kind of moral assessment of the practices at stake, and second, that it was to make full use of the relevant EU legal tools and categories.<sup>32</sup> The “mechanical” application of EU law that the ECJ proceeded to apply led to astounding results. Although the Court admitted that it was impossible to award to Mayr the protection that EU law offers to pregnant workers (as she was, by no means, pregnant), it nonetheless went out of its way to secure some form of EU protection for the plaintiff.<sup>33</sup> The Court invoked *proprio motu* Directive 76/207 on equal treatment of workers regardless of their sex, and ruled that “dismissal of a female

<sup>30</sup> *Aldona Malgorzata Jany & Others v. Staatssecretaris van Justitie*, Case C-268/99, [2001] E.C.R. I-08615 ¶ 56.

<sup>31</sup> *Id.* at ¶¶ 48-49: “[I]t is sufficient to hold that prostitution is an activity by which the provider satisfies a request by the beneficiary in return for consideration without producing or transferring material goods. Consequently, prostitution is a provision of services for remuneration which, as indicated in paragraph 33 above, falls within the concept of economic activities.”

<sup>32</sup> *Sabine Mayr v. Bäckerei und Konditorei Gerhard Flöckner OHG*, Case C-506/06 [2008] E.C.R. I-01017.

<sup>33</sup> *Id.* at ¶ 43: “[E]ven if Directive 92/85 is not applicable ... the fact remains that, in accordance with the case-law of the Court, the Court may deem it necessary to consider provisions of Community law to which the national court has not referred in its question.”

worker on account of pregnancy, or for a reason essentially based on that state, affects only women and therefore constitutes direct discrimination on the grounds of sex.”<sup>34</sup> Because IVF is a treatment that “directly affects only women,” the Court held that “the dismissal of a female worker essentially because she is undergoing that important stage of IVF treatment constitutes direct discrimination on grounds of sex.”<sup>35</sup>

As to matters related to embryos, in its 2011 *Brüstle*<sup>36</sup> ruling, the ECJ answered a preliminary reference in the field of patent law by providing nothing less than a legal definition of the embryo. Ironically, what constitutional courts, international courts and legislators around the world have been trying to avoid for the past three or four decades has become a field for normative regulation. The Court of Justice of the European Union (“CJEU”) determined that the “human embryo” mentioned under article 6(2)(c) of the 1998 Patents Directive should be interpreted as referring to “any human ovum after fertilization, any non-fertilized human ovum into which the cell nucleus from a mature human cell has been transplanted, and any non-fertilized human ovum whose division and further development have been stimulated by parthenogenesis”.<sup>37</sup> It is worth noting that this decision is one in which the Court purports to elaborate on a European autonomous notion of the embryo, a move by which the Court situates itself on the side of activism rather than deferral.<sup>38</sup> The Grogan template informs parts of the Court’s reasoning through, in particular, Advocate General Bot’s Opinion. Bot argued that the reasoning he offered was “purely legal in nature”.<sup>39</sup> Also, this underlying reliance on the Grogan template surfaces in the ruling itself, where the Court insists that

[as] regards the meaning to be given to the concept of ‘human embryo’ set out in Article 6(2)(c) of the Directive, it should be pointed out that, although, the definition of human embryo is a very sensitive social issue in many

<sup>34</sup> Id. at ¶ 46. <sup>35</sup> Id. at ¶ 50. <sup>36</sup> Case C-34/10, *Oliver Brüstle v Greenpeace eV*, [2011]

<sup>37</sup> *Brüstle v. Greenpeace*, Case C-34/10 [2011] E.C.R. I-09821, ¶ 53.

<sup>38</sup> The Court has recently qualified its *Brüstle* ruling: *International Stem Cell Corporation v. Comptroller General of Patents, Designs and Trade Marks*, Case C-364/13 [2014]. For commentaries on *Brüstle*, see Stéphanie Henneze Vauchez, “L’embryon de l’Union,” *Revue trimestrielle de droit européen*, no. 2, 2012: 355; Aurora Plomer, “After *Brüstle*: EU Accession to the ECHR and the Future of European Patent Law”, *Queen Mary Journal* 2, 2012: 110–35; Ciara Staunton, “Embryonic Stem Cell Research and the ECJ’s New Found Morality”, *Medical Law Review* 21, 2013: 310.

<sup>39</sup> See Opinion of Advocate General Bot, *Brüstle*, supra n. 32 at ¶ 45: “The question which the Court is asked is certainly a difficult one. However, it is exclusively legal in nature”; and ¶ 47: “In my view, against this background only legal analyses based on objective scientific information can provide a solution which is likely to be accepted by all the Member States.”

Member States, marked by their multiple traditions and value systems, the Court is not called upon, by the present order for reference, to broach questions of a medical or ethical nature, but must restrict itself to a legal interpretation of the relevant provisions of the Directive.

The Court even cited its prior *Sabine Mayr* ruling in support of this line of reasoning.<sup>40</sup>

In all these cases, the ECJ has thus affirmed the full application of EU legal categories regardless of the sensitivity of the issues at stake: prostitutes are self-employed workers providing services, IVF treatment gives rise to a protection against workers' dismissal, and there exists a European autonomous notion of the embryo. In all these instances, instead of yielding to national authorities and qualifications, the Court chose to move forward and affirm the applicability of European law and has allegedly done so by virtue of "pure" legal reasoning and by discarding references to "morals". Interestingly, this reframing of the ECJ's case law helps to unearth the fundamental contrast it entertains with ECtHR law. On similar issues in comparable cases, the ECtHR used an approach contrary to this Grogan template. Such approach is more lenient towards morals and gives much more deference to States through the famous margin of appreciation doctrine.

### *Reversing the Grogan Template in Strasbourg*

Abortion is probably the topical example that helps to illustrate the opposing approaches of the two European courts. In a 2010 grand chamber ruling, the ECtHR confirmed that the rights to private life under the ECHR's article 8 "did not encompass" a woman's right to terminate her pregnancy.<sup>41</sup> This position is consistent with the ECtHR's 1992 ruling<sup>42</sup> in the exact ECtHR law counterpart to the ECJ's Grogan case, where it states that "the protection

<sup>40</sup> Brüstle, *supra* n. 36 at ¶ 30.

<sup>41</sup> ECHR, GC, 10 Dec. 2010, A, B and C v. Ireland, 25579/05 ¶ 214: "While Article 8 cannot, accordingly, be interpreted as conferring a right to abortion." The Court actually even referred to the women's and the fetus's interests as "competing interests", thus acknowledging the fact that they had similar legal weight; see ¶ 213: "The Court has also previously found, citing with approval the case-law of the former Commission, that legislation regulating the interruption of pregnancy touches upon the sphere of the private life of the woman, the Court emphasizing that Article 8 cannot be interpreted as meaning that pregnancy and its termination pertain uniquely to the woman's private life as, whenever a woman is pregnant, her private life becomes closely connected with the developing fetus. The woman's right to respect for her private life must be weighed against other competing rights and freedoms invoked including those of the unborn child."

<sup>42</sup> ECHR, 29 Oct. 1992, Open Door and Dublin Well Woman, 14235/88.

afforded under Irish law to the right to life of the unborn is based on profound moral values”,<sup>43</sup> and that Ireland’s abortion regime thus “pursued the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn is one aspect”.<sup>44</sup> Thus, the Strasbourg court chose to insist on the necessity of granting States a “wide margin of appreciation”.<sup>45</sup> For the ECtHR, diversity – hence deference to domestic law – is the preferred template of reasoning over uniformity or the affirmation of European law’s reach and applicability.<sup>46</sup>

Interestingly, the ECtHR’s reliance in this case on the margin-of-appreciation doctrine can be challenged even from a perspective internal to the mainstream justifications of the doctrine itself.<sup>47</sup> Indeed, the very applicability of the doctrine to the *Grogan* case is debatable. According to the ECtHR, States’ margin of appreciation exists when there is no consensus among High Contracting Parties on a given issue. However, even in 1992, it could have been said that there was a consensus in Europe on abortion as access to safe and legal abortions, at least in the early stages of pregnancy, was and still is the dominant norm throughout Europe.<sup>48</sup> In fact, in the 2010 *ABC v. Ireland* case, the ECtHR explicitly acknowledged that fact. It stated that “in the present case . . . the Court considers that there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law.”<sup>49</sup> The ECtHR decided however that in the particular case, the existence of this consensus was to have no effect and, notably, was not to prevent recourse to the margin-of-appreciation doctrine.<sup>50</sup> Moreover, the

<sup>43</sup> *Id.* at ¶ 63.    <sup>44</sup> *Id.*    <sup>45</sup> *Id.* at ¶ 68.

<sup>46</sup> See further *id.* at ¶ 68: “As the Court has observed before, it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals, and the State authorities are, in principle, in a better position than the international judge to give an opinion on the exact content of the requirements of morals as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them.”

<sup>47</sup> See, e.g., Luzius Wildhaber, Arnaldur Hjartarson & Stephen Donnelly, “No Consensus on Consensus”, *Human Rights Law Journal* 33 (2013): 248; Yukata Arai Takahashi, “The Margin of Appreciation Doctrine: a Theoretical Analysis of Strasbourg’s Variable Geometry”, in *Constituting Europe, The European Court of Human Rights in a National, European and Global Context* 62, edited by Andreas Follesdal, Brigit Peters & Geir Ulfstein, Cambridge University Press, 2013.

<sup>48</sup> Angela Thompson, “International Protection of Women’s Rights: An Analysis of Open Door Counseling Ltd”, *Boston University International Law Journal* 12, 1994: 371, especially the section titled “The Margin of Appreciation: Cultural Sensitivity or Gender Bias?”

<sup>49</sup> *A, B and C v. Ireland*, *supra* n. 36 at ¶ 235.

<sup>50</sup> After acknowledging the existence of a consensus (*id.* at ¶ 235), the Court ruled: “However, the Court does not consider that this consensus decisively narrows the broad margin of appreciation of the State.” *Id.* at ¶ 236.

ECtHR hardly substantiated its choice to deprive the existing consensus from its usual effects. Paragraph 236 of the 1992 ruling only affirms, without providing a justification, that “the Court does not consider that this consensus decisively narrows the broad margin of appreciation of the State.”<sup>51</sup>

Equally interestingly, this approach opposite to the Grogan template seems to underpin the ECtHR’s case law on other topics related to sexual and reproductive justice, as it provides similar outcomes to the application of the template itself and to the ECJ’s position on comparable issues.

For instance, the ECtHR refused to draw consequences from emerging consensus among High Contracting Parties on assisted reproductive technologies (“ARTs”), thus maintaining a wide margin of appreciation for States who retain a defiant stance on ARTs.<sup>52</sup> The *SH v. Austria* grand chamber ruling of 2011 is a case in point. In paragraph 96 of that ruling, the ECtHR states that

the Court would conclude that there is now a clear trend in the legislation of the Contracting States towards allowing gamete donation for the purpose of IVF, which reflects an emerging European consensus. That emerging consensus is not, however, based on settled and long-standing principles established in the law of the Member States but rather reflects a stage of development within a particularly dynamic field of law and does not decisively narrow the margin of appreciation of the State.<sup>53</sup>

There are further illustrations of the contrast between the ECJ’s refusal to engage with arguments based on “morals” and the ECtHR’s readiness to embrace them. Both courts’ encounter with the issue of prostitution is telling in that respect. As recalled above, in the 2001 *Adona Malgorzata Jany* case, the ECJ insisted that the morality and acceptability of prostitution are questions that should remain alien to the European judges, whose task was only to ascertain whether EU law categories (self-employed workers, services) apply to prostitution. The ECJ reaffirmed that the legal status of

<sup>51</sup> It is also worth noting that furthermore, the doctrine largely justifies preserved national sovereignty on reproductive issues and thus restricts international/transnational law’s reach, replicates the gendered dimension of the public/private divide that has been so central to classical political theory, and thus is strongly criticized by feminist theory. Indeed, this application of the margin of appreciation doctrine does transpose the “sanctity” of the “private” home to which women have traditionally been confined in the national context onto that of “domestic law” in the international and supranational context.

<sup>52</sup> This is all the more striking that the Court had previously established that “where a particular facet of an individual’s existence or identity is at stake (such as the choice to become a genetic parent) the margin of appreciation accorded to a State will in general be restricted.” See ECHR, GC, 4 Dec. 2007, *Dickson v. UK*, 44362/04.

<sup>53</sup> ECHR, GC, 3 Nov. 2011, *S H v. Austria*, 57813/00; see Sheelagh McGuinness, “Commentary”, *Medical Law Review* 21, 2013: 146.

prostitution is for individual Member States to determine. In contrast, in the 2007 *Tremblay* case, the ECtHR expressly underlined how complex the issue of prostitution was.<sup>54</sup> That court insisted on the lack of consensus among the Council of Europe's High Contracting Parties<sup>55</sup> and paid close attention to the different national regimes. The ECtHR recalled that some countries were abolitionists,<sup>56</sup> while others pursued a regulatory approach. The court made a distinction between the countries that ratified the 1949 UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others<sup>57</sup> and the countries that had not (including the United Kingdom, Austria, Germany, Russia or Andorra). The ECtHR then held that in its view, prostitution is incompatible with human rights and dignity when it operates under constraint.<sup>58</sup> Additionally, it observed that "some consider that prostitution never is freely chosen, but always at least constrained by socioeconomic conditions."<sup>59</sup> All in all, the ECtHR not only made sure to echo the notion that prostitution was a morally dubious activity, but also gave leads as to its own view on the topic, which is that freely chosen prostitution is a myth and all prostitution is traffic in human persons. It is worth noting that this particular question was well beyond the scope of the case in point. The case had been brought by a former prostitute who was alleging that the amount of taxes the French State was requiring her to pay in regards to her (past) prostitutional activity was in fact making it impossible for her to quit. Thus, as the ECtHR acknowledges, the question was not to decide whether prostitution was a violation of article 3 of the ECHR or of the Convention on inhuman or degrading treatment, but whether the particular circumstances of tax collection could be upheld.

<sup>54</sup> ECHR, 11 Sept. 2007, *Tremblay c. France*, 37194/02

<sup>55</sup> Id. at ¶ 24 ("Il est manifeste qu'il n'y a pas de consensus européen quant à la qualification de la prostitution en elle-même au regard de l'article 3").

<sup>56</sup> For instance, in France, criminal or other provisions making prostitution illegal have been abolished, and prostitution therefore is not illegal, nor is it controlled or regulated (however, satellite practices such as pimping are criminally sanctioned).

<sup>57</sup> G.A. Res. 317 (IV) (2 Dec. 1949). "Whereas prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community." Id. at Preamble.

<sup>58</sup> *Tremblay*, supra n. 49 at ¶ 25: "C'est en revanche avec la plus grande fermeté que la Cour souligne qu'elle juge la prostitution incompatible avec les droits et la dignité de la personne humaine dès lors qu'elle est contrainte."

<sup>59</sup> Id. at ¶ 26: "Il reste que cette question est elle aussi controversée, certains estimant que la prostitution n'est jamais librement consentie mais toujours, au moins, contrainte par les conditions socioéconomiques."



#### NEW DIRECTIONS FOR REPRODUCTIVE RIGHTS IN EUROPE?

Regardless of the fact that this tentative reframing of EU law stories on abortion and reproductive rights reveals a limited traction of the human rights paradigm compared to the rather uninhibited application of the market, advocates and activists of reproductive rights in Europe seem to neglect the market and continue to rely essentially on human rights.

Feminist scholars in particular have long called for caution as far as the private ordering of justice goes, and much of their contribution remains accurate, including in the field of reproductive services. The following section argues, however, that advocates of reproductive justice need not shy away from the market theory, for facts indicate that it has become a potent operator of contemporary modes of reproduction. Realistic or pragmatic legal reasoning calls for internal observation and analysis of legal instruments and categories upon which the market relies.

#### *Feminist Caution vis-à-vis the Market*

Feminist theory on the subject at hand has questioned liberalism and viewed it as a potentially deceiving framework for women's rights.<sup>60</sup> The myth of the autonomous rational moral agent of classical political philosophy has been shown to be a profoundly gendered subject. As Carole Pateman writes, it secured a sexual contract that led to women's exclusion prior to the social contract.<sup>61</sup> Formal equality and the "sameness model" may have infused much of the moves towards equality between the sexes in the field of human rights law, but they have also proved deceiving for failing to grasp how differently situated men and women are to start with, thus leading to more radical critiques of human rights<sup>62</sup> and ultimately, the law itself as individualistic and competitive.<sup>63</sup> As discussed in the following paragraphs, many of the questions raised by the feminist theory on the stakes associated with the commodification of body parts and services need to be kept in mind

<sup>60</sup> See, e.g., Jytte Klausen and Charles Maier (eds), *Has Liberalism Failed Women? Assuring Equal Representation in Europe and the United States*. New York: Palgrave, 2001.

<sup>61</sup> Carole Pateman, *The Sexual Contract*. 1st ed. Stanford: Stanford University Press, 1988.

<sup>62</sup> For a panorama of feminist critiques of human rights, see Stephanie Palmer, "Feminism and the Promise of Human Rights: Possibilities and Paradoxes." In *Visible Women: Essays on Feminist Legal Theory and Political Philosophy*, edited by S. Palmer and S. James. London: Hart, 2002, p. 92.

<sup>63</sup> See, e.g., Carol Smart, *Feminism and the Power of the Law*, London: Routledge, 1989.

as they constitute a critical theoretical background against which the CJEU's alleged ethical neutrality needs to be tested.

Concerns related to the commodification of the body are a main way through which feminist scholars have criticized the market theory as applied to the field of reproductive justice. Much of the feminist-inspired agenda of distrust vis-à-vis romanticized accounts of the ways in which “the market” could free us from patriarchy remains accurate. In the mid-1990s, legal theorist Margaret Jane Radin authored important pieces on contested commodities<sup>64</sup> and identified human reproduction such as the circulation of sex, children and body parts as central to her investigation. Radin argued that commodification threatens humanist values that are best defended by understanding some forms of property as constitutive to personhood. More recently, Anne Phillips authored a book that similarly contests the attraction of bodily goods and services into the realm of the market. Phillips conceives the human body as a universal equalizer and as the permanent and universal given of the human condition. Thus she argues that commodification of the human body necessarily leads to inequality and subordination.<sup>65</sup> Before Phillips's theory, Dorothy Roberts argued that the market in human reproduction was deeply racialized. In her later work, Roberts insisted that the apparently contradictory directions in human reproduction laws and policies – from population control programs that target predominantly black women to reproduction enhancement options from which mostly whites benefit – actually converge in the neoliberal biopolitics that lead to the privatization of genetic responsibility.<sup>66</sup>

<sup>64</sup> Margaret Jane Radin, *Contested Commodities*, Cambridge, MA: Harvard University Press, 1996; Margaret Jane Radin, *Reinterpreting Property*, Chicago: University of Chicago Press, 1993; Margaret Jane Radin, “Market Inalienability,” *Harvard Law Review* 100, no. 8 1987: 1849.

<sup>65</sup> Anne Phillips, *Our Bodies, Whose Property?* Princeton: Princeton University Press, 2013.

<sup>66</sup> Dorothy Roberts, “Race, Gender and Genetic Technologies: A New Reproductive Dystopia?” *Signs* 34, no. 4 2009: 783. In a wider perspective, one could also mention works such as that of political theorist Michael Sandel, who has recently critiqued the seemingly never-ending expansion of markets (into the fields of the environment [pollution permits], arts, sports, but also, life and death and, thus, human reproduction). Sandel argues that oftentimes, not only are such markets bound to be unfair (i.e., lead people to engage into selling under tremendous pressure and thus maybe not so freely or voluntarily as liberal theory likes to think) but also that they lead to corruption, as they degrade “the moral importance of the goods at stake”; see, e.g., Michael Sandel, *What Money Can't Buy: the Moral Limits of Markets*. Farrar, Straus and Giroux, 2012, p. 113 (“the corruption argument focuses on the character of the good themselves and the norms that should govern them. So it cannot be met simply by establishing fair bargaining conditions. Even in a society without unjust differences of power and wealth, there would still be things that money should not buy. This is because markets are not mere mechanisms; they embody certain values”). Compare Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality*. New York: Basic Books, 1983 (discussing his notion of “desperate exchanges” that justifiably warrant a restraint from the market).

Concerns from commodification, however, need not only stem from a reluctance regarding commodification per se. In fact, social anthropology supports the notion that commodification need not be assessed in an ontological fashion. Social anthropology theory holds that because there is a “social life of things,”<sup>67</sup> their commodification is not intrinsically good or evil.<sup>68</sup> What matters is not so much what is commodified but how and when, and what needs to be paid attention to are the conditions under which commodification, be it the case, operates. Various questions arise from that perspective. The central question probably has to do with solutions that commodify services that only women can provide.<sup>69</sup> There are many instances in which it has been verified that women are expected not to commodify “much of what [they] have power over, such as their sexual or reproductive services,” and “even when monetary compensation is allowed, it is often kept low and female providers are expected to be interested in rewards rather than money.”<sup>70</sup>

As mentioned earlier, the ECJ has often claimed to set morals aside and to undertake “pure” legal reasoning. In cases like *Grogan*<sup>71</sup> or the 2008 *Sabine Mayr* case,<sup>72</sup> the Court explicitly stated that it is not to decide upon the moral admissibility of abortion or ARTs. In the 2011 *Brüstle* case, Advocate General Yves Bot repeatedly and similarly claimed that it was necessary to approach the

<sup>67</sup> Arjun Appadurai, *The Social Life of Things: Commodities in Cultural Perspective*. Cambridge: Cambridge University Press, 1988: Appadurai insists in his chapter that the concept of “value” awarded to things is complex and contingent, and that they are conveyors of a multitude of social meanings.

<sup>68</sup> Sociologist Zelizer also insists that markets and social life are inextricably intertwined rather than made of clear lines of demarcation between things and values that are commodified and others that never are: Viviana Zelizer, *The Purchase of Intimacy*. Princeton: Princeton University Press, 2005.

<sup>69</sup> Richard Wilk, “Taking Gender to the Market.” *Feminist Economics* 2, no. 1 (1996): 90–93: One of the hallmarks of feminist scholarship has been to show that concepts like the free market are socially constructed and embedded. There are always limits on markets; there is no society where people buy and sell everything. All market behavior is shaped by cultural perceptions, moral precepts and social roles, so we always bring a gendered social identity to the market. The “free market” is a powerful cultural icon, a metaphor, a personified and fetishized abstraction constructed through rhetoric. Economic anthropology demonstrates that the only universal thing about markets is that everywhere they have limits, and in every society people engage in active debate about where the boundaries and limits around market exchange should be. They argue about what should be traded in the market, how markets should be regulated, and they always declare particular parts of a culture “off bounds” to market exchange (e.g., Parker Shipton’s *BitterMoney*, 1989). Just as we do.

<sup>70</sup> Mary Anne Case, “Pets or Meat?” *Chicago Kent Law Review* 80 (2005): 1129, 1149.

<sup>71</sup> *Grogan*, supra n. 6 at ¶¶ 17–20.

<sup>72</sup> *Mayr*, supra n. 28 at ¶ 38. See also *Brüstle*, supra n. 32 at ¶ 30.

issue of the Patents Directive's applicability to embryonic material from a "strictly legal" perspective.<sup>73</sup> However, should these affirmations by the Court be taken at face value? The question ought to be answered in the negative. When the Court holds that it discards "morals" from legal reasoning, what it really does is discard one or several particular moral discourses. It is highly unlikely that the interpretative and normative choices the Court ultimately retains are value-free. As Diarmuid Phelan wrote in her critique of the Grogan ruling,

the Court adopted an approach with enormous moral implications by a recharacterization of the rights in issue, based on economic principle which denies the validity of the Irish constitutional position in the EC. By defining abortion as an economic activity in EC law, the Court placed abortion under the article 2 [of the European Economic Community] task to promote throughout the Community a harmonious and balanced development of economic activities.<sup>74</sup>

Following this line of argumentation, it could be said that when the Court qualifies prostitution as a service and prostitutes as (potentially) self-employed workers, it makes positive normative choices as opposed to remaining axiologically neutral. Christophe Hillion stated that

not only does [the Court] defines [prostitution] as a service, but it also gives it a Community objective meaning: "it is sufficient to hold that prostitution is an activity by which the provider satisfies a request by the beneficiary in return for consideration without producing or transferring goods." Seen from this perspective, the Court's approach cannot be perceived as entirely neutral, particularly for the Member States which have made the activity illegal.<sup>75</sup>

Similar interrogations are raised by the ECJ's more recent standing in the *Brüstle* case, where the Court claimed to propose a legal definition of the embryo under the 1998 Patents Directive in the form of an "autonomous

<sup>73</sup> Opinion of Advocate General Bot, *Brüstle*, supra n. 32 at ¶ 45: "La question qui est posée à la Cour est une question certes difficile. Elle est cependant exclusivement juridique."

<sup>74</sup> Diarmuid Rossa Phelan, "Right to Life of the Unborn v. Promotion of Trade in Services: the ECJ and the normative shaping of the EU", *Modern Law Review* (1992): 670, 689: "Under this rationale, fundamental rights are shaped according to a market actor's economic role in the transnational society under construction; fundamental rights are not implied by a person's human and moral nature. The fundamentals of EC law depend on weighing the consequences of possible decisions according to liberal economic axioms; justification is not seen in terms of the fundamental nature of the principle, the right or the person as such."

<sup>75</sup> Christophe Hillion, "Case Law", *Common Market Law Review* 40 (2003): 435.

notion” of EU law. Both the Advocate General’s references to concepts<sup>76</sup> or lines of reasoning<sup>77</sup> that are situated in the wider law and politics of bioethics framework, and the Court’s endorsement of a wide definition of “the embryo,” support the view that the discarding of morals and correlative claim to pure legal reasoning are merely rhetorical devices. In other words, the Court’s allegation of ethical abstention is questionable.

Furthermore, the ECJ’s claim to moral neutrality and the mere mechanical application of EU law categories, notably the freedom of circulations, oriented towards a particular EU law teleology of market completion need to be tested against the contentious notion that “the market” is neutral to start with. Some scholars have argued that market mechanisms are prone to emancipation from paternalistic/moralistic norms, especially in the field of human reproduction. Martha Ertman, for instance, argued that “market mechanisms provide unique opportunities for law and culture to recognize that people form families in different ways. If state or federal law (in the US case) rather than the laws of supply and demand determine who can have children using reproductive technologies, then many single and gay people will be excluded from this important life experience.”<sup>78</sup> It is undeniable that in legal orders in which biomedicine in general, and human reproduction in particular, has been the object of heavy regulation,<sup>79</sup> the legal regimes that ensued are organized along

<sup>76</sup> Such as the concept of human dignity; see in particular ¶ 34 of the Advocate General’s opinion, whereby he claims that because of the human dignity principle, the concept of “the embryo” should be widely defined. More generally, on the politics of human dignity, especially in the field of bioethics, see Roger Brownsword & Derek Beyleveld, *Human Dignity in Bioethics and Biolaw*, Oxford: Oxford University Press (2001); Stéphanie Hennette Vauchez, “A Human Dignitas? Remnants of the Ancient Legal Concept in Contemporary Dignity Jurisprudence”, *I-CON* 9, no. 1 (2011): 32.

<sup>77</sup> See in particular the Advocate General’s insistence on the inadmissibility of any taking into account of human intent in the determination of the legal status of the embryo: Yves Bot conveys the view that the human embryo ought to have a ontology-based status (i.e. one that does not vary depending on contexts of obtention, conservation, use, etc.) and therefore discards intent as irrelevant (see Bot’s opinion, esp. ¶ 89). This however, can be challenged both legally (for an analysis of French law that shows that the embryo does not have one fixed legal status but that it varies according to whether the embryo is invested with a parental project or not, see *L’être Humain Sans Qualités*. In *Bioéthique, Biodroit, Biopolitique: réflexions à l’occasion du vote de la loi du 6 août 2004*, edited by Stéphanie Hennette Vauchez, Florence Bellivier & Pierre Egéa. Paris: L.G.D.J., 2006, p. 211. Further, for a theoretical reflection on the role of intent in parenthood, see Marjorie Schulty, “Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality”, *Wisconsin Law Review* (1990): 297.

<sup>78</sup> “The Upside in Baby Markets.” In *Baby Markets: Money and the New Politics of Creating Families*, edited by Michele Goodwin & Martha Ertman. 1st ed. Cambridge: Cambridge University Press, 2010, p. 23.

<sup>79</sup> Whereas in Europe, generally speaking, issues of human reproduction tend to be heavily regulated, Debora Spar has famously coined the expression that designates the United States as

lines of deeply gendered hierarchies. In many European countries, access to ARTs have long been, or remains, limited to heterosexual couples, and the ECtHR case law on these issues remains fundamentally heteronormative.<sup>80</sup> However, recent work on the operation of markets in gametes in the United States, where the field remains essentially unregulated,<sup>81</sup> tends to establish that such hierarchies, along with race and class inequalities, are similarly produced and reproduced by market arrangements. Both at the level of gametes procurement (donors)<sup>82</sup> and of access to reproductive services (customers),<sup>83</sup> markets in human reproduction operate on the basis of a number of stereotypes and gender norms,<sup>84</sup> not to mention their racial dimension.<sup>85</sup> At the end of the 1990s, Dorothy Roberts reported, “most IVF clinics accept only heterosexual married couples as clients, and most physicians have been unwilling to assist in the insemination of women who depart from that norm. They routinely deny their services to single women, lesbians, welfare recipients and other women who are not considered good mothers.”<sup>86</sup> Naomi Cahn’s updated account published in 2009 indicates that little has changed in that respect. Cahn cited a report according to which “50% (of fertility clinics) are likely to turn away a man who does not have a wife or a partner, 20% would not offer their services to a single woman, 17% would not provide services to a lesbian couple and 5% would not give services to a biracial couple.”<sup>87</sup>

the “Wild West” of reproductive justice: Debora Spar, *The Baby Business: How Money, Science and Politics Drive the Commerce of Conception*, Cambridge, MA: Harvard Business School Press, 2006.

<sup>80</sup> “Bioéthique Et Genre: Cadrage Théorique, Enjeux Européens.” In *Bioéthique Et Genre*, edited by Anne-Françoise Zattara-Gros & Stéphanie Hennette Vauchez, Paris: LGDJ, Lextenso Editions, 2013.

<sup>81</sup> At least at the federal level; in some States, human reproduction is the object of legal regulation, but overall, sperm banks, fertility clinics and ARTs in general are private operators on a market. For a critique, see Naomi Cahn, *Test Tube Families. Why the Fertility Market Needs Legal Regulation*, New York: NYU Press, 2009.

<sup>82</sup> Rene Almeling, *Sex Cells, The Medical Market for Eggs and Sperm*, Berkeley: University of California Press, 2011.

<sup>83</sup> Cahn, *supra* n. 76.

<sup>84</sup> See, e.g., Dorothy Roberts, “Killing the Black Body”, *op. cit.*: “most often they complete a traditional nuclear family by providing a married couple with a child. Instead of disrupting the stereotypical family, they enable infertile couples to create one.”

<sup>85</sup> In that regard, the ambivalences of ARTs as a primarily genetics-oriented project need to be further explored, for they are prone to revivifying concerns if not policies related to racial purity.

<sup>86</sup> *Id.* at 248.

<sup>87</sup> Andrea Gurmankin, Arthur Caplan & Andrea Braverman, “Screening Practices and Beliefs of Assisted Reproductive Technologies Programs”, *Fertility and Sterility* 83 (2005): 61 (cited by Naomi Cahn, *Test Tube Families, op. cit.*, p. 133).

*Freedoms of Circulation as Factual Pillars of Human Reproduction in Europe*

In their work on blood, cell lines and organs in late capitalism, Catherine Waldby and Robert Mitchell make the compelling point that legal scholarship's continued tendency to frame the regulation of biomedicine in terms of "human rights" may conceal or even reinforce the marketization or commodification processes that are taking place.<sup>88</sup> Their work on the political economy of the circulation of tissues focuses on the persistent, and at times deceiving, insistence of many legal narratives according to which substances of human origin may not lead to remuneration. The authors argue it is precisely the ambiguity of many central legal concepts on which biomedical law was built, including non-marketability of substances of human origin and informed consent, that allowed the transformation (as opposed to the impediment) of gifts (donation) into property (acquisition). Thus that ambiguity resulted in a situation in which "while persons have no property rights in their own body parts, it is possible for a second party to establish property rights in tissues once they have left the donor's body."<sup>89</sup> If "traditional" human-rights concepts such as non-marketability and anonymity contribute to severing the legal grammars discussed in scholarly conversations on the one hand and the circulation of bodies and body parts on the other hand, there is a risk for scholars to wake up to a transformed world, one largely out of reach of the traditional tools we have lingering on without taking into account what was also happening in parallel. Because bodies, body parts and services circulate across the globe, and because the market and its correlated freedoms of circulation are legal tools that favour and encourage such circulation,<sup>90</sup> the precise way these legal categories operate and questions they raise must be addressed.

This line of questioning is opportune, as there are indications that the pervasiveness of the "market" or "fundamental freedoms" approach has started to weaken the human rights approach, especially, or perhaps coincidentally, regarding issues of sexual and reproductive freedoms. Two recent ECtHR

<sup>88</sup> Catherine Waldby & Robert Mitchell, *Tissue Economies: Blood, Organs and Cell Lines in Late Capitalism*. Durham: Duke University Press, 2006.

<sup>89</sup> *Id.* at 71.

<sup>90</sup> The contemporary dramatic increase in cross-border medical care is a great testimony to the extent to which the market favours such circulation; see Eris Blyth & Abigail Farrand, "Reproductive Tourism – A Price Worth Paying for Reproductive Autonomy", *Critical Social Policy* 25 (2005): 96. See also I. Glenn Cohen, *The Globalization of Health Care: Ethical and Legal Issues*, Oxford: Oxford University Press, 2013. As far as legislation goes, see, emblematically, Directive 2011/24/EU of the European Parliament and of the Council on the Application of Patients' Rights in Cross-Border Healthcare, 2011 O.J. L 88/45.

rulings are worth singling out, as they illustrate the ways in which the ECtHR's incorporation and reliance on freedoms of circulation within the logic of human rights raise concerns. These are cases in which the ECtHR seems to alleviate the burden of ECHR standards that weighs on States when that court is convinced that applicants could have travelled abroad to obtain services whose unavailability was challenged as a violation of the ECHR. In that respect, these cases touch upon questions pertaining to the weakening of human rights standards by freedoms of circulation that are all the more worrisome given that the latter are largely inaccessible to the less privileged groups of society. In its 2010 *A, B and C v. Ireland* ruling,<sup>91</sup> the ECtHR took into account the possibility for women in Ireland to travel abroad to obtain abortion services while assessing the conformity of Ireland's abortion regime to the ECHR. Paragraph 241 of the ruling reads:

[H]aving regard to the right to lawfully travel abroad for an abortion with access to appropriate information and medical care in Ireland, the Court does not consider that the prohibition in Ireland of abortion for health and well-being reasons, based as it is on the profound moral views of the Irish people as to the nature of life . . . and as to the consequent protection to be accorded to the right to life of the unborn, exceeds the margin of appreciation accorded in that respect to the Irish State.

Similarly, in its 2011 *S and H v. Austria* ruling, the ECtHR insisted that ARTs were more accessible in countries other than Austria. The ECtHR stated: "The Court also observes that there is no prohibition under Austrian law on going abroad to seek treatment of infertility that uses artificial procreation techniques not allowed in Austria and that in the event of a successful treatment the Civil Code contains clear rules on paternity and maternity that respect the wishes of the parents."<sup>92</sup>

Such modes of reasoning create a number of interrogations. As a matter of principle, one wonders what is left of the project of international human rights law in Europe if any given country can deny the right to access given services on the basis that they are available in neighbour States. The notion that States cannot get away from their international human rights obligations based on the sole notion that their counterparts do not respect these obligations has played an instrumental role in the emergence and consolidation of human rights law. Technically, this mode of reasoning from the ECtHR is disturbing because it allows for instances of discrimination. Generally speaking,

<sup>91</sup> Case 25579/05, *A, B and C v Ireland*, [2010] ECHR 2032.

<sup>92</sup> ECHR, GC, 3 Nov. 2011, *S.H. and Others v. Austria*, 57813/00 ¶ 114.



freedoms of circulation are enjoyable under circumstances of wealth and legal status. As such, the ECtHR's reliance on the technical and legal possibility for women based in Ireland or individuals and couples based in Austria to travel abroad to obtain abortion and reproductive services is problematic because it narrows the scope of those susceptible of enjoying those rights. Furthermore, would the ECtHR have ruled the same way in cases against a non-EU country? If not, the whole ECHR system is at risk of becoming a two-tier mechanism, with loosened human rights standards for EU countries that are linked by freedom-of-circulation agreements. A positive answer would hardly be more satisfactory. Such an answer would amount to even greater damages to the very project of international human rights in Europe, as it would ignore the heightened difficulties that nationals of non-EU Member States encounter as far as their mobility goes, making the option of traveling for services and goods all the more illusory.

#### 4. CONCLUSION

This chapter could be summarized in two main claims. First, both human rights and the market theory are problematic as regulatory paradigms in the field of human reproduction. While the former tends to perpetuate the paternalistic limitation of individual freedoms by undue deference to States sovereignty, the latter has been rightfully criticized as hardly neutral, including in its application of reproductive issues. Additionally, the market perpetuates hierarchies and does not enable egalitarian or universal access to reproductive justice. Second, shying away from the difficulties of identifying proper principles according to which reproductive justice should be promoted cannot be a viable option. In that regard the present chapter's goal was to restore the underestimated contribution of the ECJ to the affirmation of rights in the field of sexuality and reproduction. By doing so, it does not suggest that market-oriented modes of reasoning and solutions are necessarily better than others. They are, however, increasingly present – including in Europe. The CJEU recently had to deal with a surrogacy case.<sup>93</sup> Although the legality of the principle of surrogacy does not fall under the scope of EU law, the Court had to answer a referral by a British and an Irish court as to whether it was a violation of EU law to deny a commissioning mother who was also a worker a maternity leave. Similarly, as cross-border reproductive care blossoms in Europe and within the EU, Member States are increasingly going to be

<sup>93</sup> Cases C-167/12 *C. D. v S. T.* and C-363/12 *Z. v A. Government Department and the Board of Management of a Community School* (2014).

confronted with what I. Glenn Cohen called “circumvention tourism”.<sup>94</sup> In other words, reproductive rights seem to be a domain in which the interaction between “fundamental rights” and “economic freedoms” is most visible. In that context, it is necessary to prepare for the new ways in which the issues will continue to arise. Reframing Grogan, and thus reframing the story of reproductive rights in Europe, seems like one way to start doing just that.

<sup>94</sup> Cohen, I. Glenn, “Circumvention Tourism”, 97 *Cornell Law Review* (2012): 1309.

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