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Abortion rights in EU law: recent developments

Tamara Hervey, Tiyash Banerjee*

ABORTION RIGHTS IN EU LAW: RECENT DEVELOPMENTS

ABSTRACT: The European Parliament's 2022 Resolution on *Global Threats to Abortion Rights* promotes a wide-ranging and women-focused approach to sexual and reproductive health and rights, which continue to be in jeopardy globally, and have worsened following the US Supreme Court's *Dobbs* ruling. The Resolution's most striking aspect is a call for the right to abortion to be included in the European Union's Charter of Fundamental Rights. The legal effects of such an inclusion would be limited, although potentially improving cross-border access to abortion. Union law remains a legally constrained space for pursuing abortion rights.

KEYWORDS: Abortion; women's rights; European Union

SUMMARY: 1. Introduction – 2. Brief history of Union involvement in abortion law – 3. Recent developments in Union abortion law – 4. The Motion – 5. The Resolution – 6. Process for incorporating a right to abortion in the EU Charter of Fundamental Rights – 7. Legal effects of incorporating a right to abortion in the EU Charter of Fundamental Rights – 8. Conclusions.

1. Introduction

The USA Supreme Court's *Dobbs* ruling¹ has reverberated across the globe. In this chapter, we discuss recent developments in abortion law at the level of the European Union. Our focus is not the national law of the Union's Member States. These are covered elsewhere.² In principle, abortion law is not a European Union ('Union') competence. The European regional organisation that has been concerned with abortion is the Council of Europe, especially through application of its Convention on Human Rights (ECHR).³ Nevertheless, the Union's judicial and legislative institutions have engaged with abortion law for decades.

* Tamara Hervey, *The City Law School, City, University of London*. Mail: Tamara.Hervey@city.ac.uk. Tiyash Banerjee, *The City Law School, City, University of London*. Mail: Tiyash.Banerjee@city.ac.uk. The article was subject to a blind peer review process.

¹ *Dobbs v. Jackson Women's Health Organization*, 19, 1392, 2022.

² For a recent summary, see L. BERRO PIZZAROSSA, T. HERVEY, A. DE RUIJTER, *Abortion Law in Europe: the promise and pitfalls of human rights and transnational trade law in the face of criminalization with exceptions*, in M. ZIEGLER, ed, *Research Handbook on International Abortion Law*, 2023 and the references therein.

³ See *Open Door and Dublin Well Woman v. Ireland* ECHR (Grand Chamber), 29 October 1992, Applications 14235/88 and 14234/88; *Vo v. France* ECHR (Grand Chamber), 8 July 2004, Application 53924/00; *Tysiack v. Poland*, ECHR (Fourth Section), 20 March 2007, Application 5410/03; *A., B. & C v. Ireland*, ECHR (Grand Chamber), 16 December 2010, Application 25579/05; *P and S v. Poland*, ECHR (Fourth Section), 30 October 2012, Application 57375/08. See also, eg Council of Europe, *Women's Sexual and Reproductive Rights in Europe*, 2017, <https://rm.coe.int/women-s-sexual-and-reproductive-health-and-rights-in-europe-issue-pape/168076dead>,

The article proceeds as follows. First, we briefly outline some key elements of the history of Union institutions engaging with questions of abortion. We conclude this section by mentioning some possible future bases on which Union law might be used by women to secure or provide safe abortions. Here, we refer to earlier work by Hervey and Sally Sheldon.⁴ We then turn to the recent involvement of the European Parliament on abortion rights. This development is directly in response to the *Dobbs* ruling. We consider the detail of Parliamentary activity, and explore its possible effects. We note that the European Parliament is only a co-legislature in the Union's 'constitutional' system, and that the European Parliament has little formal role in Treaty reform. Even if the most striking aspects of the Resolution were to come to fruition, ensuing legal changes would be limited. We conclude by pointing out that current Union abortion law is inherently legally constrained in its nature and scope.

2. Brief history of Union involvement in abortion law

The earliest well-known involvement of the Union's institutions in abortion involves the Union's Court of Justice in the early 1990s.⁵ At a time prior to the widespread availability of information about abortion clinics through the internet, students unions in Irish universities published a guide to clinics in England where abortions could be performed legally. An anti-abortion organisation, the Society for the Protection of Unborn Children, brought a legal claim seeking an injunction against the publication of the guide. The Irish Supreme Court referred the matter to the European Court of Justice, asking whether Union Member States were prohibited, as a matter of Union law, from banning advertising a service that is illegal in one Member State, but lawful in another, where the service would be provided. The Court of Justice focused on the advertising services, not on the service of abortion *per se*. The Court was reluctant to consider the question from the point of view of sexual health and reproductive rights.

Union law does not directly cover abortion. The EU's Charter of Fundamental Rights, which is a primary source of Union law, does not mention abortion. The Court of Justice of the European Union has not ruled directly on the matter. The EU Charter does refer to the European Convention on Human Rights in its explanations, which provide a source for interpretation of its provisions. The European Convention on Human Rights is also a source of 'general principles' of Union law, which again

(last visited 09/03/2022). For discussion see L. BERRO PIZZAROSSA, T. HERVEY, A. DE RUIJTER, *Abortion Law in Europe: the promise and pitfalls of human rights and transnational trade law in the face of criminalization with exceptions*, in M. ZIEGLER (ed.), *Research Handbook on International Abortion Law*, 2023; F. FABBRINI, *The European Court of Human Rights, the EU Charter of Fundamental Rights and the Right to Abortion: Roe v. Wade on the Other Side of the Atlantic?*, in *Columbia Journal of European Law*, 18, 2011, 1–54; D. FENWICK, 'Abortion Jurisprudence' at Strasbourg: Deferential, Avoidant and Normatively Neutral? in *Legal Studies*, 34, 2014, 214–45; D. FENWICK, *The Modern Abortion Jurisprudence under Article 8 of the European Convention on Human Rights*, in *Medical Law International*, 12, 2012, 249–76.

⁴ T. HERVEY, S. SHELDON, *Abortion by telemedicine in Northern Ireland: patient and professional rights across borders* in *Northern Ireland Law Quarterly*, 68, 1, 2017, 1-33.

⁵ Case C-159/90, *SPUC v Grogan*, EU:C:1991:378. See G. DE BÚRCA, *Fundamental Human Rights and the Reach of EC Law* in *Oxford Journal of Legal Studies*, 13, 3, 1993, 283; D. ROSSA PHELAN, *Right to Life of the Unborn v Promotion of Trade in Services: the ECJ and the normative shaping of the EU* in *Modern Law Review*, 55, 1992, 670; E. SPALIN, *Abortion, speech and the European Community: I. Abortion and state border conflicts* in *Journal of Social Welfare and Family Law*, 14, 1, 1992, 17-32.

provides an interpretative guide, as Union law is assumed to be consistent with the European Convention on Human Rights. As far as we are aware, however, there have been no attempts to rely on European Convention rights in litigation involving Union law. Hervey and Sheldon suggested a possible route for such litigation in 2017.⁶ This suggestion would involve a doctor providing cross-border abortion services in the Union relying on her freedom to provide services in Union law. The focus of such potential litigation is not on women as human rights holders. Instead, the idea is to frame women as economic actors, giving and receiving medical services, exercising autonomy not against the state *per se*, but operating in a trade or professional context. The possibility of such litigation has not (as yet) been realised.

3. Recent developments in Union abortion law

Instead of litigation, recent developments in Union law involve the European Parliament. The European Parliament is the directly elected institution of the Union.⁷ Unlike the Council, whose members are drawn from the governments of the Union's Member States,⁸ Members of the European Parliament are directly elected by the Union electorate. The powers and duties of the European Parliament include acting as a co-legislature⁹ with the European Commission (which has powers to propose Union legislation) and the Council (which, under the ordinary legislative procedure, decides, along with the European Parliament, whether to adopt a Commission proposal for new Union legislation). The power of the Union legislature to adopt legislation is constrained by Union law on competence.¹⁰

The European Parliament's Rules of Procedure¹¹ determine how Parliament undertakes its business. Under Rule 132, members of the European Commission or the Council may seek permission from the President of Parliament to make a statement in Parliament. The President decides whether each statement is to be followed by a full debate, or by a brief 30 minute period of questions and answers. If the President decides that a full debate is to take place, Parliament then has to decide whether to wind up that debate with a formal Resolution. If Parliament decides that this will be the case, a committee of Parliament, a political group within Parliament, or simply a group of one twentieth of all Members of the European Parliament (36/705 MEPs), may table a formal Motion for a Resolution. On 8 June 2022, Isabelle Rome, on behalf of the Council, and Valdia Dombrovskis, on behalf of the Commission made statements in the European Parliament on "Global threats to abortion rights: the possible overturn of abortion rights in the US by the Supreme Court". Rome's statement pointed to the complexities and sensitivities of discussions of abortion, health and human rights. She reminded MEPs that abortion law is a matter for national constitutions within the Union, and that Union law does not interfere with such matters. However, she went on to note that "there is no doubt" that women's rights are fundamental human rights, and that breach of such rights is discriminatory. She

⁶ HERVEY, SHELDON, *Abortion by telemedicine*, see 4.

⁷ Article 223 TFEU.

⁸ Article 237 TFEU.

⁹ Articles 289 and 294 TFEU.

¹⁰ Article 5 TEU; Articles 2-6 TFEU.

¹¹ Adopted under Article 232 TFEU, European Parliament, Rules of Procedure — 9th parliamentary term — July 2019 OJ L 302, 22.11.2019, 1-128.

noted that the Parliament has often discussed such matters in the context of its external affairs – the way the Union interacts with the rest of the world – and that the Union is committed to the rights of women and girls across the globe, following developments in this regard attentively, and seeking progressive changes in human rights protection, both within its borders and elsewhere.¹² Dombrovskis focused more explicitly on the *Roe v Wade* ruling, describing a (then) potential overruling of the right to access abortion guaranteed in the US constitution as “a profound retrogression”. He expressed a shared concern with US President Biden’s view that to overturn *Roe v Wade* would be to put in question other rights, such as women’s access to reproductive healthcare, and women’s control over their own lives and bodies. The consequences of that decision would have a radical effect not just in the USA, but globally, leading to an increase in unsafe abortions, preventable maternal deaths and morbidities. The Union’s commitment to sexual and reproductive health and rights is expressed through the Union’s external development policies,¹³ where the Union works in partnership with its Member States, the United Nations, and partner countries across the world. Dombrovskis described the Union as a “leader” in sexual and reproductive health and rights, and “staunch supporter” of their realisation.

On 3 June 2022, the European Conservatives and Reformist Group, a centre-right political group in the European Parliament, tabled a formal Motion¹⁴ for a Resolution following the Council and Commission statements and the ensuing Parliamentary debate on 8 June 2022. Founded in 2009, the European Conservatives and Reformist Group in the European Parliament focuses on the Union “doing less, but better”. Their tagline on their website¹⁵ is “cooperation, yes; superstate, no”, and they claim to embody a “commonsense” approach to European integration. Their “family and life” policies include “respecting motherhood”.¹⁶ Prominent members of the Group support anti-abortion campaigns.¹⁷

4. The Motion

The Motion situates the debate within the context of the Treaty on the Functioning of the European Union, the Universal Declaration of Human Rights (UDHR), the Declaration of the United Nations Convention on the Rights of the Child (UNCRC), the Charter of Fundamental Rights of the European Union, the Council of Europe Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, the European Parliament Resolution on 10 December 2013 on Sexual and Reproductive Health and Rights,¹⁸ and Parliament’s Rules of Procedure.

¹² See, for example, European Parliament resolution of 24 June 2021 on the situation of sexual and reproductive health and rights in the EU, in the frame of women’s health (2020/2215(INI)); European Parliament resolution of 26 November 2020 on the de facto ban on the right to abortion in Poland (2020/2876(RSP)).

¹³ Articles 208-212 TFEU.

¹⁴ https://www.europarl.europa.eu/doceo/document/B-9-2022-0292_EN.html (last visited 25/11/2022).

¹⁵ <https://ecrgroup.eu/> (last visited 25/11/2022).

¹⁶ https://ecrgroup.eu/campaign/family_and_life (last visited 25/11/2022).

¹⁷ See, for example, <https://bit.ly/4096HTI> (last visited 25/11/2022).

¹⁸ https://www.europarl.europa.eu/doceo/document/TA-7-2013-0548_EN.html (last visited 25/11/2022).

The Motion refers specifically to several provisions within these frameworks. The European Parliament is invited to have regard to Article 168(7) TFEU, which states that Union action “shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care”. Article 3 UDHR concerns the right to life, liberty and security of person, and Article 18 UDHR the right to freedom of thought, conscience and religion. Article 10 of the EU’s Charter of Fundamental Rights similarly concerns the right to freedom of thought, conscience and recognises the right to conscientious objection, in accordance with the national laws governing the exercise of this right. The preamble of the UNCRC notes that “the child [...] needs special safeguards and care, including appropriate legal protection, before as well as after birth.” In focusing on these provisions, the Motion seeks to situate the debate within particular aspects of abortion debates and policies, particularly those focused on the idea of embryos or fetuses being similar enough to children to have rights; those focused on women’s motherhood as an essentialist aspect of womanhood; and those focused on the Union’s limited competences in healthcare. For example, on 10 December 2013, the European Parliament had adopted a Resolution which noted that “even though it is a competence of the Member States, to formulate and implement policies on health and on education, the EU can contribute to the promotion of best practices among Member States”. This Resolution was adopted within the context of sexual education in schools and sexual and reproductive health and rights more generally. By referring to this, the Motion of June 2022 recognises the status of any Resolution as a mere promotion of best practices, rather than specifically formulating or affecting the policies of Member States. The constrained nature of Union competence in the field of abortion is stressed.

The Motion reflects concerns about abortion and the divisive nature of the debate. By contrast to the Resolution (discussed below), which focuses on increasing sexual and reproductive health and rights, the Motion emphasises the more controversial elements of abortion. The Motion centres children (arguably not at issue in the context of abortion, which by definition concerns women and embryos or fetuses). It defines abortion as “the termination of a life in progress in a mother’s womb”. One of the most striking aspects of the Motion is its explicit statement to the effect that “abortion can never be considered a human right because it violates the very basis of human rights and contravenes human nature itself”. This is in stark contradiction to the reasoning, for example, in *Roe v Wade*.¹⁹ Women, their rights, autonomy, health or dignity, are absent from the Motion, except where women are constructed as mothers. The Motion considers negative practices around abortion, such as the selective abortion of girls, and the negative consequences of encouraging mothers whose babies may have some kind of malformation or physical or biological limitation to have abortions, alongside the violation of forced abortion.

Overall, the emphasis of this Motion, reflecting the views of the European Conservatives and Reformist Group, differs significantly from the Resolution that was ultimately adopted by the European Parliament as a whole. The Motion shows more explicitly the controversial nature of abortion debates, whereas the Resolution downplays these, by adjusting its focus towards women (and girls); drawing on global data about abortion practice, and its effects on women; and reframing the relevant concepts.

¹⁹ *Roe v. Wade*, 410 U.S. 113 (1973).

5. The Resolution

The European Parliament's Resolution on *Global Threats to Abortion Rights: the possible overturn of abortion rights in the US by the Supreme Court*²⁰ was adopted on 9 June 2022. As the title suggests, the Resolution was passed within the political context of the initial draft majority of the Supreme Court of the United States in the *Dobbs* case.²¹ Following a plenary debate, the Parliamentary Resolution was passed by 364 votes in favour, 154 against, and 37 abstentions.

The Resolution is situated within a number of relevant International Covenants, including the Convention on the Elimination of All Forms of Discrimination against Women of 1979 and the European Convention on Human Rights of 1950. Beyond international covenants and the relevant American sources, the European Parliament makes reference to six of its own resolutions: 1) its resolution on 7 October 2021 on the state law relating to abortion in Texas, USA; 2) its resolution on 24 June 2021 on the situation of sexual and reproductive health and rights in the EU in the frame of women's health; 3) its resolution on 11 November 2021 on the first anniversary of the de facto abortion ban in Poland; 4) its resolution on 13 February 2019 on experiencing a backlash in women's rights and gender equality in the EU; 5) its resolution on 11 February 2021 on challenges ahead for women's rights in Europe, more than 25 years after the Beijing Declaration and Platform for Action; and 6) its resolution on 5 May 2022 on the impact of the war against Ukraine on women. The existence of these six resolutions reflects the European Parliament's active consideration of women's rights and sexual and reproductive health and rights in recent years.

Paragraphs A-T of the Resolution provide a factual outline of the status of abortion globally. This analysis forms the basis for the European Parliament's view on the unique status and importance of *Roe v Wade* and the consequences of overturning it. The Resolution highlights that, according to the WHO, around 45% of all abortions are unsafe²² and that the United Nations Population Fund²³ estimates 121 million unintended pregnancies each year, over 60% of which end in abortion. The European Parliament's Resolution calls for contraception to be "integrated within the provision of age-appropriate and comprehensive sexual and reproductive health and rights information, education and services, and that they are accessible to all".²⁴ The Resolution considers the findings of the UN Committee on the Elimination of Discrimination Against Women that highlight that where abortion is criminalised, abortion becomes "a privilege of socio-economically advantaged women"²⁵ and that "the proportion of unsafe abortions are significantly higher in countries with highly restrictive abor-

²⁰ https://www.europarl.europa.eu/doceo/document/TA-9-2022-0243_EN.html (last visited 25/11/2022).

²¹ *Thomas E. Dobbs, State Health Officer of the Mississippi Department of Health, et al. v Jackson Women's Health Organization, et al.*, dated February 2022 and leaked to the press in May 2022 (<https://www.politico.com/news/2022/05/02/read-justice-alito-initial-abortion-opinion-overturn-roe-v-wade-pdf-00029504> (last visited 25/11/2022)).

²² <https://www.who.int/news-room/fact-sheets/detail/abortion> (last visited 25/11/2022).

²³ UNFPA state of world population report, *Seeing the Unseen: The case for action in the neglected crisis of unintended pregnancy*, March 2022.

²⁴ https://www.europarl.europa.eu/doceo/document/TA-9-2022-0243_EN.html#def_1_10, para 8, (last visited 25/11/2022).

²⁵ https://www.europarl.europa.eu/doceo/document/TA-9-2022-0243_EN.html#def_1_10, para B, (last visited 25/11/2022).

tion laws than in countries with less restrictive laws".²⁶ In essence, drawing on global data, the Resolution highlights that, in practice, abortion itself cannot be banned. The effect of criminalising abortion is simply to ban *safe* abortion, and to foster wide-reaching negative consequences for the sexual and reproductive health of women and girls, particularly those who are vulnerable because of their race, social class, age, or other disadvantage. The Resolution thus pays attention to intersectional²⁷ aspects of abortion rights.

After outlining the international political framework, the Resolution goes on to criticise the backsliding in women's rights and sexual and reproductive health and rights in the USA and globally. Paragraphs 2-15 urge the United States, by way of the Supreme Court, Texan State Government, the Senate, Joe Biden and the US Government, to uphold *Roe v Wade* and support a wide range of reproductive rights. The Resolution highlights that the Women's Health and Protection Act, aimed at protecting the right to abortion care throughout the USA, passed in the House of Representatives, but expresses regret that it failed to pass in the Senate.

The Resolution strongly condemns the roll-back of human rights and constitutional rights. The Resolution notes its concern for the disproportionate impact of these proposed measures on women in poverty, racialized women, women from rural areas, LGBTIQ people, women with disabilities, adolescents, migrant women, including irregular migrants, and single-parent households headed by women. In this, the Parliament highlights that forcing women to carry pregnancies to term against their will is a violation of human rights, and a form of gender-based violence, informed by the 2020 *Information Series on Sexual and Reproductive Health and Rights* produced by the UN Office of the High Commissioner of Human Rights.²⁸

Three apparently unconnected paragraphs follow. Paragraph 17 welcomes positive developments on abortion rights globally. Paragraph 18 highlights the need for female involvement in policies that affect them. Paragraph 19 addresses that the lack of access to contraception and existing unmet needs is connected to the disproportionate responsibility which women bear in relation to these.

Paragraphs 20-32 invite the Union and its Member States to both encourage the US Government to establish the right to abortion, and affirm stronger protections of sexual and reproductive health and rights in the Union. Of these proposals, the most radical can be found at paragraph 24 which: "Calls for the EU and its Member States to include the right to abortion in the Charter". This is not the first time such a proposal has been made. On 20 January 2022, Spanish MEP, Iratxe García Pérez, also proposed that the right to abortion be included in the Union's Charter of Fundamental Rights. Speaking to the European Parliament at the time Macron, the French President, noted: "Twenty years after the proclamation of our Charter of Fundamental Rights, which enshrined the abolition of the death penalty throughout the Union, I hope that we can update this charter, notably to be more explicit on environmental protection or the recognition of the right to abortion."²⁹

²⁶ <https://www.who.int/news-room/fact-sheets/detail/abortion> (last visited 25/11/2022).

²⁷ K. CRENSHAW, *On Intersectionality: Essential Writings*, 2017.

²⁸ <https://bit.ly/3RhRxHH> (last visited 25/11/2022).

²⁹ <https://www.elysee.fr/front/pdf/elysee-module-19159-fr.pdf> (last visited 25/11/2022).

Paragraph 29 offers a softer option, urging “Member States to decriminalise abortion and remove and combat obstacles to safe and legal abortion and access to sexual and reproductive services”.³⁰ Paragraph 29 goes beyond abortion to include pre-natal care, voluntary family planning support, and HIV prevention, treatment, care and support, all without discrimination. Paragraph 31 “Urges the Commission to make full use of its competence in health policy, and to provide support to Member States in guaranteeing universal access to sexual and reproductive health and rights (SRHR) in the framework of the EU4Health Programme for 2021-2027; in promoting health information and education; in strengthening national health systems and the upward convergence of healthcare standards in order to reduce health inequalities within and between Member States; and in facilitating the exchange of best practices among Member States with regard to SRHR [sexual and reproductive health and rights]; calls on the Member States to progress towards universal health coverage, for which SRHR is essential”.

6. Process for incorporating a right to abortion in the EU Charter of Fundamental Rights

If the Resolution’s proposal were to be implemented, in order to amend the EU’s Charter of Fundamental Rights, the procedure for amending the Union’s primary treaties would need to be followed. This procedure is found in Article 48 TEU, and involves agreement of all Member States, and ratification according to their constitutional requirements. The European Parliament plays only a very limited role in Treaty reform.³¹ Given the constitutional position on abortion in several Member States,³² especially Poland and Malta, such an amendment seems inherently improbable as things currently stand.

7. Legal effects of incorporating a right to abortion in the EU Charter of Fundamental Rights

If the right to abortion were included in the Union’s Charter of Fundamental Rights, what would be its principal legal effects? First and foremost, the Charter binds the Union institutions. Union legal acts must be interpreted consistently with Charter provisions, and if consistent interpretation is not feasible, Union acts are judicially reviewable for non-conformity with Charter rights.³³ However, the Charter does not extend the field of application of Union law. Nor does it establish any new Union power or competence.³⁴ As there is currently no clear Union competence to act within the field of

³⁰ https://www.europarl.europa.eu/doceo/document/TA-9-2022-0243_EN.html#def_1_10, para 29, (last visited 25/11/2022).

³¹ Article 48 TEU.

³² Full *formal* prohibition of abortion exists only in a minority of small European countries, only one of which (Malta) is a Union Member State: Andorra, Malta, San Marino and the Vatican, see World Health Organization. Global Abortion Policies Database, <https://abortion-policies.srhr.org> (last visited 25/11/2022). However, in practice, Poland’s position is close, following a decision of its Constitutional Court in 2021, see Polish Constitutional Court, Dz.U.2021.175, reviewing Dz.U.1993.17.78, Article 4a, para 1(2).

³³ Under Article 263 or 267 TFEU. See A. WARD, *Article 51 in The EU Charter of Fundamental Rights: A Commentary*, S. PEERS, et al, 2021.

³⁴ Article 51(2) EUCFR.

abortion (except the untested context, as noted above, of cross-border abortion services within the Union), merely adding a provision on abortion rights in the Charter would not, in itself, change the scope of Union competences.

The Union is competent in some aspects of public health.³⁵ As noted above, paragraph 31 of the Resolution urges the European Commission to use its full competences in public health, especially the Commission's competence to use Union funding to promote sexual and reproductive health rights. The Union's use of its resources to promote women's health could be strengthened if abortion rights were included in the EU's Charter of Fundamental Rights, as access to safe abortion is a key part of sexual and reproductive health and rights. This aspect of the Union's competence is *only* to support and complement actions of its Member States. Union financial support for health-related projects normally takes place on the basis of collaboration and co-financing with the Member States. So the use of Union competences and resources would only have a practical effect in those Member States willing to engage with the Union on this basis. There would be no change to the Union's lack of competence to adopt binding Union law that would provide a harmonised Union-level right to abortion. But a change in the EU Charter could bring about a change in the use of Union resources, and the Union's 'soft competence' - a limited but potentially valuable contribution to abortion rights in the Union.

The Charter also binds the Member States, but only when they are acting within the scope of,³⁶ or implementing,³⁷ Union law. Because Union law does not, in general, cover abortion rights, it is difficult to imagine a situation (other than the cross-border provision of services) in which Member States would be acting within the scope of, or implementing, Union law, in the field of abortion. Thus, even if the amendment called for in the Resolution were to be adopted, its legal effects would be inherently limited.

The most promising potential legal difference flowing from incorporation of a right to abortion in the EU's Charter of Fundamental Rights lies in a potential difference in the *interpretation* of other provisions of Union law. The obvious situation is cross-border provision of abortion services within the Union. Union law on cross-border service provision protects the autonomy and choice of patients and the rights of doctors to access patients outside of their 'home state'.³⁸ To begin with, it was assumed that Union market law did not apply to health services, because of the basis of European healthcare systems, which are organised on 'solidarity' rather than 'market' principles. However, in a series of cases from the late 1990s onwards,³⁹ it was established that this was not the case, and that, so long as 'remuneration' (which could be paid by a third party⁴⁰) was present, health services fall within the scope of Union law on freedom to provide services within the Union's internal market, even when

³⁵ Article 168 TFEU.

³⁶ Case 5/88 *Wachauf* EU:C:1989:321; Case C-260/89 *ERT* EU:C:1991:254; Case C-309/96 *Annibaldi* EU:C:1997:631. See A. WARD, "Article 51", above at 33.

³⁷ Article 51(1) EUCFR. See Case C-617/10 *Fransson* EU:C:2013:280.

³⁸ See, in general, for discussion of Union law as applicable in health contexts, T. HERVEY and J. MCHALE, *European Union Health Law: Themes and Implications*, Cambridge, 2015, pp. 77-83.

³⁹ Beginning with Case C-158/96 *Kohll* EU:C:1998:171. For discussion, see T. HERVEY, J. MCHALE, *European Union Health Law: Themes and Implications*, above at 38.

⁴⁰ Case 352/85 *Bond van Adverteerders* EU:C:1988:196.

provided on a 'not-for-profit' basis.⁴¹ It had already been established that abortion constitutes such a service,⁴² and the Union's 'e-Commerce Directive' confirms that medical consultations undertaken through a website constitute electronic services in Union law.⁴³

Unlike ordinary transnational trade law, Union law gives enforceable rights to individuals⁴⁴ - including both providers of cross-border services and people who receive those services.⁴⁵ Any 'restriction' on cross-border services is in principle unlawful, and can be challenged by an individual seeking to provide (or receive) such services. What counts as a 'restriction' in this sense is very broadly defined: "any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within a Member State".⁴⁶ A Member State seeking to justify such a restriction must do so on the basis of objective public interests such as "public policy, in particular the prevention, investigation, detection and prosecution of criminal offences ... public health ... the protection of consumers," or where the service presents a "serious and grave risk of prejudice to those objectives".⁴⁷ The burden lies on the Member State to justify restrictions, and the proportionality test which applies here is a narrow one,⁴⁸ not a wide margin of appreciation as often the case in the context of international or regional human rights norms.⁴⁹

If the Union's Charter of Fundamental Rights were to establish a right to abortion, it would become more difficult for a Member State to claim that any restriction on providing or receiving abortions in another Member State would be a proportionate protection of public policy, or any other national objective. While under the current situation, a Member State might refer to its constitutional or other protections of foetal rights, or other constitutional values, as justification, it would become more difficult to maintain such an argument in the context of a Union right to abortion. The way in which

⁴¹ Case C-281/06 *Jund* EU:C:2007:816.

⁴² Case C-159/90 *SPUC v Grogan* EU:C:1991:378.

⁴³ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-Commerce Directive) OJ 2000 L 178/1, Article 1 (2), 2(a), referring to Directive 98/43/EC, Article 1 (2).

⁴⁴ Case 33/74 *Van Binsbergen* EU:C:1974:131.

⁴⁵ Joined Cases 286/82 & 26/83 *Luisi and Carbone* EU:C:1984:35.

⁴⁶ See Case C-444/05 *Stamatelaki* EU:C:2007:231, paragraph 25. See T. HERVEY, J. MCHALE, *European Union Health Law: Themes and Implications*, above at 38; W. GEKIERE, R. BAETEN, W. PALM, *Free Movement of Services in the EU and Health Care in Health Systems Governance in Europe: The Role of European Union Law and Policy*, in E. MOSSIALOS, G. PERMANAND, R. BAETEN and T. HERVEY ed. (Cambridge: Cambridge University Press, 2010); L. HANCHER and W. SAUTER, *EU Competition and Internal Market Law in the Healthcare Sector* (Oxford: Oxford University Press, 2012).

⁴⁷ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-Commerce Directive), Article 3 (4).

⁴⁸ In Case C-137/09 *Josemans* EU:C:2010:774, paragraph 70, "a restrictive measure can be considered to be suitable for securing the attainment of the objective pursued only if it genuinely reflects a concern to attain that objective in a consistent and systematic manner." The CJEU adopts a strict scrutiny of public morality as an objective public interest justifying restrictions on free movement of services or goods, with particular care to decline to accept any double standards, see, eg, Case 121/85 *Conegate* EU:C:1986:114 concerning import of sex toys, and Cases 115&116/81 *Adoui and Cornuaille* EU:C:1982:183 and Case C-268/99 *Jany and Others* EU:C:2001:616 concerning prostitution.

⁴⁹ Contrast the approach of the European Court of Human Rights in the cases discussed above at 3.

national courts, or the Union's Court of Justice, interpreted such free movement provisions, would be likely to change. The hesitation seen in the *Grogan* case,⁵⁰ in focusing on questions of women's sexual and reproductive health and rights, would become more difficult to sustain.

8. Conclusions

Legally speaking, including a right to abortion in the European Union's Charter of Fundamental Rights would likely have only relatively modest effects. The Union's competences to act within public health fields would remain unchanged. It is the law of the Member States, not Union law, that determines women's and girls' sexual and reproductive health and rights, including the right to abortion. Union competence is limited to providing support and complementing national laws and policies. However, a Charter provision would make a difference to interpretation of Union internal market law, where Member States seek to justify restrictions on cross-border abortion provision.

The more significant aspects of including a right to abortion in the Union Charter would not be legal: they would be political and social. The European Convention on Human Rights - unlike the US Constitution following *Roe v Wade* and prior to the *Dobbs* case - does not include a right to abortion.⁵¹ If the European Parliament's Resolution were implemented, the European Union's Charter would be the first European level instrument to do so. That would have a tremendous symbolic power, strengthening the position of women not only within the Union, but also globally.

⁵⁰ Case C-159/90, *SPUC v Grogan*, EU:C:1991:378.

⁵¹ See cases cited above at 3.