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Women on the European Commission and Court of Human Rights: Would Equal Representation Provide More Effective Remedies?

I. Introduction

The atrocities that took place during the first part of the 20th century shocked the world into creating a body of international human rights law.¹ The human rights violations of World War II made it clear that international cooperation and unity was necessary to improve the conditions that existed around the world.² Europe's response to these indignities was to form the European Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter Convention].³ The Convention, drafted by the Council of Europe in 1949-1950,⁴ established not only the most successful system for protection of human rights, but also one of the most advanced forms of international legal process.⁵

The first important achievements of the international community were the conclusion of bilateral treaties designed to eliminate the slave trade and establish that human rights fall under the auspices of international law.⁶ With the advent of these treaties, international organizations have been able to outlaw distinctions between citizens based on qualities such as race, gender, religion, color, political

1. A.H. ROBERTSON, *HUMAN RIGHTS IN THE WORLD* 1 (2d ed. 1982). See also David Weissbrodt & Teresa O'Toole, *The Development of International Human Rights Law*, in *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948-1988 - HUMAN RIGHTS, THE UNITED NATIONS AND AMNESTY INTERNATIONAL* 17 (Amnesty International USA 1988). For example, the atrocities of World War I prompted the creation of the League of Nations. *Id.* Likewise, the horror of the Holocaust led to the formation of the United Nations. *Id.*

2. See Weissbrodt & O'Toole, *supra* note 1, at 22.

3. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221. [hereinafter Convention].

4. MARK W. JANIS & RICHARD S. KAY, *EUROPEAN HUMAN RIGHTS LAW* 1 (1990).

5. *Id.* See also A.H. ROBERTSON & J.G. MERRILLS, *HUMAN RIGHTS IN EUROPE* 1 (3d ed. 1993).

6. ROBERTSON, *supra* note 1, at 15-23. More than 50 bilateral treaties were enacted between 1815 and 1880 in an effort to abolish the slave trade. *Id.* at 15. These treaties led to additional international measures to ensure that the slave trade came to an end. *Id.* at 16. The evolution took 150 years, but resulted in a set of established rules of international law that recognize the right to freedom of the person, abolish slavery, and prohibit the slave trade. *Id.* at 16-17. The second major development of international law was the evolution of humanitarian law and the recognition of human rights. *Id.* at 17-19. The third major development relates to the protection of minorities. ROBERTSON, *supra* note 1, at 19-22.

philosophy, and national origin. Such discrimination has been declared against international policy and punishable by an international tribunal.⁷

Despite these measures, discrimination⁸ still occurs daily around the world. Distinctions by race and religion are vehemently attacked by human rights advocates. However, discrimination based on gender is often overlooked or considered less of an affront to humanity.⁹ Nevertheless, women's rights are human rights.¹⁰ Further, discrimination against women in the international arena has far-reaching implications. It not only affects women's political rights, but also attacks their rights to education, privacy, reproduction, marriage, family life, and physical well-being. Accordingly, these gender-specific rights must be equated with those concerns traditionally addressed by human rights advocates. For only in this manner, can the world transform the concept of human rights to better protect the interests of women.¹¹

This Comment discusses whether a greater female presence would have a positive impact on women's rights by bringing a wider range of experiences to the panel of judges on the European Commission and the Court of Human Rights. Part II of this Comment will explore the historical background of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Specifically, this part will discuss the advent of the European Commission of Human Rights [hereinafter Commission] and the European Court of Human Rights [hereinafter Court], and their impact on the rights of women. Part III will consider the feminist perspective in a predominantly patriarchal international political structure. In an effort to understand why women's issues have been traditionally overlooked, this part will analyze the contrast in the legal reasoning of men and women. Finally, Part IV will illustrate the manner in which the Commission and the Court address the petitions filed by women versus those filed by men. This part will also analyze the types of disputes that have a profound effect on women and argue that a Court and Commission comprised of both male and female members would better serve the European society.

7. See, e.g., Convention, *supra* note 3, art. 14; U.N. CHARTER, pmb1.

8. "Discriminate" is commonly used in the pejorative sense as an "unfair, unreasonable, unjustifiable or arbitrary distinction." WARWICK MCKEAN, EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW 9 (1983). However, modern international usage recognizes "discrimination" as conduct which "denies to individuals equality of treatment with other individuals because they belong to particular groups in society." *Id.* at 10-11.

9. See Charlotte Bunch, *Women's Rights as Human Rights: Toward a Re-Vision of Human Rights*, 12 HUM. RTS. Q. 486, 486 (1990).

10. *Id.*

11. *Id.* at 487.

II. History

In 1949, the Council of Europe sought to draft a resolution for the protection of human rights and the prevention of the atrocities witnessed during World War II.¹² Protection of human rights and respect for the rule of law were no longer just objectives of the Council, but rather were made a condition of membership.¹³ Consequently, the main purpose of the Convention was the principle of non-discrimination, which is embodied in Section I.¹⁴ It was thought that the new commitment to universal protection of human rights would eliminate the problems which plagued minorities.¹⁵ Eventually, the parties to the Convention agreed to use the provisions on non-discrimination and equality set forth in the Universal Declaration of Human Rights.¹⁶ However, the drafting process suffered great delay due to disagreements on the wording of what was to be article 14.¹⁷ The first draft provided that "equality before the law and freedom from discrimination on account of religion, race, national origin or political or other opinion."¹⁸ This February 1949 draft omitted any reference to sex or the protection of national minorities.¹⁹ After extensive debate, both clauses were included in the

12. ROBERTSON & MERRILLS, *supra* note 5, at 1. See Convention, *supra* note 3, at 222.

13. ROBERTSON & MERRILLS, *supra* note 5, at 1. Convention, *supra* note 3, at 222.

14. See MCKEAN, *supra* note 8, at 204. Section I of the Convention contains articles 2-18. Convention, *supra* note 3, at 224-34.

15. THE INTERNATIONAL BILL OF RIGHTS - THE COVENANT ON CIVIL AND POLITICAL RIGHTS 5 (Louis Henkin ed., 1981) [hereinafter THE INTERNATIONAL BILL OF HUMAN RIGHTS].

16. MCKEAN, *supra* note 8, at 204-07. The Universal Declaration was not conceived as law, but as "a common standard of achievement" for all to live up to and uphold. THE INTERNATIONAL BILL OF RIGHTS, *supra* note 15, at 9. As a result, the United Nations approved the Declaration without dissent. *Id.* In joining the United Nations, every national government agreed to protect human rights by promoting "universal respect for, and observance of, human rights and fundamental freedoms without distinctions as to race, sex, language, or religion." Weissbrodt & O'Toole, *supra* note 1, at 17. The U.N. General Assembly adopted the Universal Declaration of Human Rights in 1948. *Id.* See also MCKEAN, *supra* note 8, at 52-71. Article 2 of the Universal Declaration of Human Rights reads as follows: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." *Universal Declaration of Human Rights*, G.A.Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc A/811 (1948).

17. See *Digest of Case-Law Relating to the European Convention on Human Rights 1955-1967* (U.G.A. Heule, Belgium 1970). The final text of article 14 reads: "The enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status." Convention, *supra* note 3, art. 14.

18. MCKEAN, *supra* note 8, at 204.

19. *Id.* at 205. To further illustrate the prevailing attitude of the time, consider the reaction of Eleanor Roosevelt during the drafting of article I of the Universal Declaration. When it came time to debate the meaning of historical phrases such as "all men are created equal" and "in the

final draft of the Convention, however, it still did not guarantee equality before the law *and* equal protection of the laws.²⁰ This issue will be discussed more completely in later sections of the Comment.²¹

Further, until the middle of the 20th century, there had been no guarantee of human rights at the international level comparable to those available at the State level.²² The Convention permits each country to maintain their right to determine the *means* by which the guaranteed freedoms are exercised within their boundaries. However, national legislation may not undermine the purposes of the Convention or make distinctions based on the criteria set out in Section I.²³ The final draft of the Convention was signed on November 4, 1950 and came into effect on September 3, 1953, when it was ratified by eight countries.²⁴

In order to both ensure that its purposes would be carried out and grant legitimacy to its ideals, the Convention, through article 19,²⁵ created two bodies: (1) the European Commission of Human Rights²⁶

spirit of brotherhood," Mrs. Roosevelt added that "it had become customary to say 'manhood' and mean both men and women without differentiation" and that "the word 'men' used in this sense was generally accepted to include all human beings." Johannes Morsink, *Women's Rights in the Universal Declaration*, 13 HUM. RTS. Q. 229, 233-34 (1991).

20. MCKEAN, *supra* note 8, at 208.

21. *See infra* part IV.

22. JANIS & KAY, *supra* note 4, at 9.

23. MCKEAN, *supra* note 8, at 205; Convention, *supra* note 3, art. 17. Section I, article 17 of the Convention provides:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Id.

24. JANIS & KAY, *supra* note 4, at 1. The Convention was ratified on September 3, 1953 by Denmark, the Federal Republic of Germany, Iceland, Ireland, Luxembourg, Norway, Sweden, and the United Kingdom. *Id.* The following countries were bound by the Convention as of January 1, 1990: Austria, Belgium, Cyprus, Denmark, the Federal Republic of Germany, France, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. *Id.*

25. Article 19 of the Convention provides:

To ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention, there shall be set up:

(1) A European Commission of Human Rights hereinafter referred to as 'the Commission';

(2) A European Court of Human Rights hereinafter referred to as 'the Court'."

Convention, *supra* note 3, art. 19.

26. J.E.S. FAWCETT, *APPLICATION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS* 321, 338 (Clarendon Press, Oxford 1987). Section III, articles 20-38, established the European Commission of Human Rights and set out all matters pertinent to the purposes, requirements, procedures, decisions, and jurisdiction of the Commission. Convention, *supra* note 3, arts. 20-38.

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and (2) the European Court of Human Rights.²⁷ Together, these bodies make up the single most successful system and enforcement of international law for the protection of human rights in the world.²⁸ As required by article 20 of the Convention, the European Commission of Human Rights has the same number of Commissioners, or members, as the number of contracting parties, and no two members may be from the same State.²⁹ The members of the Commission are elected by the Committee of Ministers from a list of candidates compiled by the Bureau of the Consultative Assembly of the Council of Europe.³⁰ The members are elected for a term of six years and may be re-elected.³¹

The Commission's role was originally to protect the judicial function, specifically the work of the Court of Human Rights.³² The Commission would filter out frivolous claims and act as the intermediary between individuals, state governments, and the Court.³³ At present, the Commission's main functions include investigating alleged breaches of the Convention and arranging for friendly settlements.³⁴ Where settlement is not feasible, the Commission writes up a report expressing

27. FAWCETT, *supra* note 26, at 385. Section IV, articles 38-56 set up the European Court of Human Rights and all pertinent requirements for appointment, procedure, jurisdiction, decisions, and authority of the Court. Convention, *supra* note 3, art. 38-56.

28. JANIS & KAY, *supra* note 4, at 1.

29. Convention, *supra* note 3, art. 20. For amendments to article 20 of the Convention, see ROBERTSON & MERRILLS, *supra* note 5, at 389.

30. Convention, *supra* note 3, art. 21. Section III, article 21(1) and (2) state:

(1) The members of the Commission shall be elected by the Committee of Ministers by an absolute majority of votes, from a list of names drawn up by the Bureau of the Consultative Assembly; each group of the Representatives of the High Contracting Parties in the Consultative Assembly shall put forward three candidates, of whom two at least shall be its nationals.

(2) As far as applicable, the same procedure shall be followed to complete the Commission in the event of other States subsequently becoming Parties to this Convention, and in filling casual vacancies.

Id. For amendments to article 21 of the Convention, see ROBERTSON & MERRILLS, *supra* note 5, at 390.

31. Convention, *supra* note 3, art. 22. Section III, article 22 provides in part:

(1) The members of the Commission shall be elected for a period of six years. They may be re-elected. However, of the members elected at the first election, the terms of seven members shall expire at the end of three years.

(2) The members whose terms are to expire at the end of the initial period of three years shall be chosen by lot by the Secretary General of the Council of Europe immediately after the first election has been completed.

Id. For the amendments to article 22 of the Convention, see ROBERTSON & MERRILLS, *supra* note 5, at 390.

32. JANIS & KAY, *supra* note 4, at 39.

33. *Id.*

34. ROBERTSON & MERRILLS, *supra* note 5, at 250. See also, JANIS & KAY, *supra* note 4, at 41.

an opinion as to whether a violation of the Convention has occurred.³⁵ Any party to the Convention may bring an alleged violation by another party to the attention of the Commission through the Secretary General of the Council of Europe.³⁶ The Commission receives petitions from any person, group of persons, or non-governmental organization claiming to be the victim of a violation of the Convention.³⁷ However, article 26 states that the Commission may hear a complaint only after *all* domestic remedies have been exhausted.³⁸

Historically, there were no formal requirements or qualifications of the members of the Commission. However, in 1990, the Convention was amended, and now requires that candidates for the Commission must "be of high moral character and must either possess the qualifications required for appointment to high judicial office or be persons of recognised competence in national or international law."³⁹ Many of the Commissioners are law professors, while others are retired from national government, the judiciary, or university employment.⁴⁰

The European Court of Human Rights was also established by article 19 of the Convention. Whereas the Convention serves as the constitution of the Court, the Court acts to enforce the provisions of the Convention.⁴¹ The jurisdiction of the Court extends "to all cases concerning the interpretation and application of the present Convention which the High Contracting Parties or the Commission shall refer to it," in accordance with article 48.⁴² Therefore, no cases are brought

35. ROBERTSON & MERRILLS, *supra* note 5, at 250.

36. Convention, *supra* note 3, art. 24.

37. *Id.* art. 25(1). Section III, article 25(1) states in full:

The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, providing that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.

Id.

38. *Id.* art. 26. Section III, article 26 provides: "The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

Id.

39. Convention, *supra* note 3, art. 21(3). See ROBERTSON & MERRILLS, *supra* note 5, 390.

40. JANIS & KAY, *supra* note 4, at 40.

41. *Id.* at 87.

42. Convention, *supra* note 3, art. 45. Section IV, article 48 provides: "The following may bring a case before the Court . . . (a) the Commission; (b) a High Contracting Party whose national

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directly before the Court, nor are they brought by individuals. Rather, cases are referred to the Court by means of the Commission reports.⁴³ Moreover, the Court hears a case only after the Commission has decided that a friendly settlement is impossible.⁴⁴

Structurally, the Court consists of nine judges⁴⁵ who are elected by the Committee of Ministers and the Consultative Assembly of the Council of Europe.⁴⁶ Each member state nominates three candidates, two of whom must be its own nationals.⁴⁷ This list constitutes the ballot for judicial elections.⁴⁸

Article 39(3) sets out the requirements for nomination. Similar to the requirements of candidates for the Commission, judicial candidates must be of high moral character and "must either possess the qualifications required for appointment to high judicial office or be jurists of recognized competence."⁴⁹ Candidates for the Court are usually members of their national judiciary, professors of law, practicing attorneys, former government officials, or politicians.⁵⁰ There is no *formal* age requirement, however many judges become members after retiring from the bench in their own country. Thus, their

is alleged to be a victim; (c) a High Contracting Party which referred the case to the Commission; (d) a High Contracting Party against which the complaint has been lodged." *Id.* art. 48.

43. *Id.* art. 44. Section IV, article 44 provides: "Only the High Contracting Parties and the Commission shall have a right to bring a case before the Court." *Id.*

44. *Id.* art. 47. Section IV, article 47 provides that "[t]he Court may only deal with a case after the Commission has acknowledged the failure of efforts for a friendly settlement and within the period of three months provided for in Article 32." Convention, *supra* note 3, art. 47.

45. Section IV, article 38 states: "The European Court of Human Rights shall consist of a number of judges equal to that of the Members of the Council of Europe. No two judges may be nationals of the same state." *Id.* art. 38.

46. *Id.* art. 39. Section IV, article 39 provides:

(1) The members of the Court shall be elected by the Consultative Assembly by a majority of the votes cast from a list of persons nominated by the Members of the Council of Europe; each Member shall nominate three candidates, of whom two at least shall be nationals.

(2) As far as applicable, the same procedure shall be followed to complete the Court in the event of the admission of new Members of the Council of Europe, and in filling casual vacancies.

(3) The candidates shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurists of recognized competence.

Id.

47. *Id.*

48. Convention, *supra* note 3, art. 39.

49. *Id.*

50. ROBERTSON & MERRILLS, *supra* note 5, at 297.

age tends to be relatively high.⁵¹ In fact, some members have been in their late seventies or early eighties.⁵²

Based on this brief explanation of the formation and function of the Commission and the Court, it is possible to understand how these institutions may unintentionally disadvantage women. Both forums are made up almost entirely of experienced, well-respected, older members of the international legal community. By function of both tradition and qualification, most of these members are men.⁵³

III. Women's Rights Law as Human Rights Law

The protection of human rights on a global scale usually does not include the protection of *women's* human rights. Although great strides have been made in the furtherance of human rights and the dignity of the individual, respect for these rights has not been universal.⁵⁴ Perhaps this lack of universality is a result of the trend that offenses against women are rarely characterized as human rights violations.⁵⁵ Traditionally, human rights groups have been unwilling to address violations of women's rights.⁵⁶ In addition, women's groups have not fully realized the availability of international law as a remedy against such violations.⁵⁷ These misconceptions come with serious consequences because they shape the way the international community views and handles fundamental women's issues.⁵⁸ Many violations of women's human rights are directly related to being female.⁵⁹ The most obvious offense is gender-based discrimination.⁶⁰

Since the middle of the 20th century, the international community has continuously debated the future of human rights law and its impact on the people of the world.⁶¹ However, very little of this debate ever addressed issues of gender.⁶² Although unfortunate, it is not difficult

51. *Id.* at 297-98.

52. *Id.* at 298.

53. Doris Marie Provine, *Revising Law's Boundaries: Women's Petitions to the European Commission on Human Rights 6-7 (May 1992)* (unpublished manuscript, prepared for presentation at the 1992 annual meeting of the Law and Society Association, Philadelphia, Pennsylvania).

54. Rebecca J. Cook, *Women's International Human Rights Law: The Way Forward*, 15 HUM. RTS. Q. 230, 231 (1990).

55. *See id.*

56. *Id.*

57. *Id.*

58. Bunch, *supra* note 9, at 486.

59. *Id.*

60. *Id.*

61. Bunch, *supra* note 9, at 487.

62. *Id.*

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to understand how women could be left out of the movement to protect human rights. After all, the entire system of international human rights and the bodies that enforce the law of human rights were developed primarily by men in a "male-oriented world."⁶³ As a result, the law is not "gender sensitive."⁶⁴

Legal scholars offer some insight into the reasoning behind the exclusion of women's issues in human rights law. When it was suggested to governments and international organizations that women's concerns deserved attention, justification for not addressing the issue was their response.⁶⁵ These excuses suggest that the international community believes sex discrimination is not as important as other more traditional human rights concerns.⁶⁶ In addition, there is a prevailing attitude that abuse of women is a private, cultural issue which does not require or demand state action.⁶⁷ Moreover, when the abuse of women is actually recognized, "it is considered inevitable or so pervasive that any consideration of it is futile."⁶⁸ It is precisely these attitudes that prevent the full assimilation of women's rights into the collective human rights agenda.

As a result of this global misunderstanding, it has been suggested that a "recharacterization" of international human rights is necessary to solve the women's rights dilemma.⁶⁹ In particular, by encouraging a greater female presence on the Commission and the Court, specific experiences of women would be included in the more traditional approaches to human rights law in an attempt to "make women more visible and to transform the concept and practice of human rights in our culture so that it takes a better account of women's lives."⁷⁰ That is, by incorporating experiences unique to women, such as childbirth and child rearing, the international system of human rights may better protect women when their rights are compromised. The prerequisites for reform may include: (1) improving education of human rights law and processes; (2) providing legal services to specifically help women; (3) researching facts and publishing the findings; and (4) promoting the female presence on international human rights committees, courts, and

63. Cook, *supra* note 54, at 238.

64. *Id.*

65. Bunch, *supra* note 9, at 488.

66. *Id.*

67. *Id.*

68. *Id.*

69. Cook, *supra* note 54, at 238.

70. Bunch, *supra* note 9, at 487.

commissions.⁷¹ The remainder of this Comment will focus on the last of these prerequisites, namely the promotion of women to the European Commission and Court.

In order to evaluate how a greater female presence on the Commission and the Court would impact women's human rights decisions, it is necessary to address several issues. First, one must consider how the Law is a distinctively "male" phenomenon, with a structure that has been characterized as "patriarchal."⁷² In addition, one must explore how the Law is traditionally structured in the international context. Finally, one must recognize the various feminine legal theories and how these theories may change the remedies available to women before the Commission and the Court.

A. *Female v. Male Law*

The concept of Law is historically a "male" phenomenon. Men are characterized as being rational, active, thinking, reasoning, powerful, abstract, principled, and objective.⁷³ Similarly, Law has been described in the same manner.⁷⁴ Conversely, women have been portrayed as irrational, passive, feeling, emotional, sensitive, subjective, contextualized, and personalized.⁷⁵ It is not that these traits are explicitly negative, rather it is that they are viewed, perhaps, as "less strong."

Furthermore, there is a certain hierarchy between men and women.⁷⁶ Traditionally, women have been dominated and defined by men.⁷⁷ In the real world, women are often exploited and oppressed,

71. Cook, *supra* note 54, at 259.

72. Frances Olsen, *The Sex of Law*, in *THE POLITICS OF LAW - A PROGRESSIVE CRITIQUE* 453, 461 (David Kairys ed., 1990). "Patriarchy" is defined by Webster's Ninth New Collegiate Dictionary as "social organization marked by the supremacy of the father in the clan or family, the legal dependence of wives and children, and the reckoning of descent and inheritance in the male line." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 863 (9th ed. 1986).

73. Olsen, *supra* note 72, at 453.

74. *Id.*

75. *Id.*

76. *Id.* at 454. Birgit Brock-Utne states, "Though patriarchy is hierarchal and men of different classes, races, or ethnic groups have different places in the patriarchy, they are united in their shared relationship of dominance over their women." Birgit Brock-Utne, *Women and Third World Countries - What Do We Have in Common?*, 12 *WOMEN'S STUD. INT'L F.* 500 (1989); Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 *AM. J. INT. L.* 613, 621 (1991).

77. Olsen, *supra* note 72, at 453. Historically, ideas about women, the family, and women's relationship with the world outside the home have been used effectively to rationalize inequality. Diane Polan, *Toward a Theory of Law and Patriarchy*, in *THE POLITICS OF LAW - A PROGRESSIVE CRITIQUE*, 294, 297 (David Kairys ed., 1982). This patriarchal ideology has effectively convinced women that their social, economic, and political subordination and feelings of inferiority are the

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while in the realm of fantasy they are placed on a pedestal, worshipped, or treasured.⁷⁸ However, it remains true that no matter how often men extol the "virtues of women," society maintains that rational is better than irrational, objectivity is better than subjectivity, active is better than passive, and reason is better than feeling.⁷⁹ As a result, the dominant role in society has remained the man's role.

Although the image of Justice may be in the form of a woman, popular ideology states that Law is male, not female.⁸⁰ It is not difficult to understand this correlation, because for years the social, practical, and intellectual practices that comprise Law were dominated almost exclusively by men.⁸¹

In this sense, the international arena is the same as the national one. International law is also distinctly "male" in its approach.⁸² The main problem with international law is the difficulty in developing an international feminist perspective.⁸³ The key to gaining such a perspective requires looking behind the individual States and investigating the actual impact of international law, as a whole, on the individual.⁸⁴ By taking the women of the world more seriously and by understanding the "skewed nature" of international law, feminist legal theory can identify the possibilities for change.⁸⁵

result of natural forces, rather than socially-imposed by the actions and opinions of men. *Id.*

78. Olsen, *supra* note 72, at 454. Consider the Greek and Roman goddesses, created in the image of ideal beauty. Conversely, the women of ancient Greece and Rome toiled in the home and fields, serving the male aristocracy of the Empire. Another example of this fantasy-world treatment of women is our own traditional fairy tales. Snow White, Cinderella, and Sleeping Beauty were all oppressed, yet they were oppressed by other women. The men in these stories, on the other hand, adored the women and treasured their unparalleled beauty. Ironically, the men were characterized as "knights in shining armor" or "Prince Charming" and lived to protect and free the women from their misery. See Charles Perrault, *Centrillon*, in CINDERELLA — THREE HUNDRED AND FORTY-FIVE VARIANTS 342 (Marion Roalfe Cox ed., 1967); Jacob Grimm & Wilhelm Grimm, *Little Briar Rose (The Sleeping Beauty)*, in JACOB GRIMM AND WILHELM GRIMM AND OTHER GERMAN FAIRY TALES 118 (Helmut Brackert & Volkmar Sander eds., 1985); Jacob Grimm & Wilhelm Grimm, *Little Snow-White*, in JACOB GRIMM AND WILHELM GRIMM AND OTHER GERMAN FAIRY TALES 126 (Helmut Brackert & Volkmar Sander eds., 1985).

79. See Olsen, *supra* note 72, at 454.

80. *Id.* at 454.

81. *Id.* Olsen comments that the entire legal system has a "pervasive maleness" because law is considered to be rational, objective, abstract, and principled. *Id.* at 461. "The whole structure of law — its hierarchal organization; its combative, adversarial format; and its undeviating bias in favor of rationality over all other values — defines it as a fundamentally patriarchal institution." *Id.* (quoting Polan, *supra* note 77, at 300, 302).

82. Charlesworth et al., *supra* note 76, at 621.

83. *Id.* at 614.

84. *Id.*

85. *Id.* at 615.

Specifically, the content of international law and the law-making process both favor men.⁸⁶ Such a phenomenon can be explained by the way gender is characterized worldwide. Women are associated with an "ethic of care."⁸⁷ This means that women view things in terms of relationships, caring, responsibility, and communication.⁸⁸ In contrast, men are traditionally aligned with the "ethic of right or justice."⁸⁹ This ethic, comprised of fairness, logic, rationality, right versus wrong, and winning versus losing,⁹⁰ serves as the cornerstone of the law. Consequently, because gender is differentiated in this manner, the rules of international law are structured more in line with those traits attributed to men. Once again, Law is based on fairness, right versus wrong, logic, winning versus losing, and rationality.⁹¹ Similarly, the law-making process is structured to favor these masculine traits.⁹²

In addition, legal scholars emphasize that the organizational structure of international law also clearly reflects the male perspective and ensures its continued patriarchal nature.⁹³ Within the individual state governments of Europe, "power structures are overwhelmingly masculine."⁹⁴ They reflect the patriarchal nature of their individual State cultures.⁹⁵ Within these national decision-making bodies, women are almost always unrepresented or underrepresented.⁹⁶ The concentration of control, power, and the use of force to maintain control is harbored by a small, elite group.⁹⁷ It stands to reason, then, that international organizations are patriarchal because they are a "mere extension of the member states."⁹⁸ Similar to the member states, women are unrepresented or under-represented in the decision-making bodies of the international organizations.⁹⁹

86. *Id.* at 614-15.

87. Charlesworth et al., *supra* note 76, at 615.

88. *Id.*

89. *Id.* This goes back to the earlier discussion of the Olsen article which characterized men as "rational, active, thinking, reasoning, powerful, objective, abstract, and principled". Olsen, *supra* note 72, at 453.

90. Charlesworth et al., *supra* note 76, at 615.

91. *See* Olsen, *supra* note 72, at 461.

92. *Id.*

93. Charlesworth et al., *supra* note 76, at 622.

94. *Id.* at 621-22.

95. *Id.*

96. *Id.* at 622.

97. *Id.*

98. Charlesworth et al., *supra* note 76, at 622.

99. *Id.* Because their structures replicate national governments, international organizations restrict women to insignificant or subordinate roles. *Id.* "Women are excluded from all major decision making by international institutions on global politics and guidelines, despite the often

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Finally, the normative structure of international law has allowed women's issues to be left unattended.¹⁰⁰ Because men are not traditionally victims of gender discrimination, sexual degradation, or domestic violence, these matters have been ignored within the international community.¹⁰¹ The sphere of international law has been divided into two areas:¹⁰² the "public realm" and the "private realm."¹⁰³ The "public realm" is associated with men and includes law, economics, politics, and intellectual and cultural life.¹⁰⁴ The "private realm," conversely, contains the home, hearth, children, and family life.¹⁰⁵

Throughout history, a greater significance has been placed on the public realm.¹⁰⁶ Generally, it has been deemed appropriate for the State to intervene in the work place, the economy, and politics.¹⁰⁷ However, State intervention in the home and family has almost always been regarded as taboo.¹⁰⁸ Therefore, it is logical that issues relating to home life, and by association issues relating to women, are ignored by the policy making bodies of the State.¹⁰⁹ In order to bring women's

disparate impact of those decisions on women." *Id.* at 623. For example, only one woman has served as a judge on the International Court of Justice, and no woman has ever been a member of the International Law Commission. *Id.* The United Nations, at the present rate of change, will take 40 more years to reach equal legal representation. Charlesworth et al., *supra* note 76, at 623.

100. *Id.* at 625.

101. *Id.* at 626.

102. *Id.* at 625-26. See also Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 839 (1990). Bartlett quotes from Justice Bradley's concurring opinion in *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873), where he sets forth the "separate spheres" theory as follows:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization . . . indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.

Id. Although this opinion was composed in 1873, it is still this ideology that hinders the cause of women's rights worldwide.

103. Charlesworth et al., *supra* note 76, at 625-26.

104. *Id.* at 626.

105. *Id.*

106. *Id.*

107. *Id.* at 627.

108. Charlesworth et al., *supra* note 76, at 627.

109. *Id.* Although logical, it is not acceptable or appropriate that issues affecting women have been summarily excluded from the normative structure of international law. This explanation allows a better understanding of the difficulty of forming a "feminine perspective" of international rules and the bodies that enforce these rules. *Id.* at 614.

rights under the protection of general human rights, this distinction must be eradicated.

B. Feminist Legal Theory

It is not surprising that because of their differences, men and women have developed competing legal methodologies. Men have the tendency to view law as a concept of steadfast rules and regulations.¹¹⁰ Women approach the reasoning process differently.¹¹¹ Instead of generalizing and holding fast to universal principles of law, women are more attentive to individual situations.¹¹² Women recognize exceptions to the universal principles.¹¹³ This feminist legal theory is referred to as "feminist practical reasoning."¹¹⁴ This theory can be applied to a variety of areas of the law. However, it is most useful in situations where it reveals gender-based discrimination within existing legal principles and rules.¹¹⁵

A second feminist approach to law involves asking the "woman question."¹¹⁶ This theory concentrates on analyzing the gender implications of an established rule or practice.¹¹⁷ The woman question considers the following factors: (1) whether and how women have been excluded from consideration; (2) how a specific oppression might be corrected; and (3) what difference the correction would make.¹¹⁸ By asking and answering these questions, one can discover how the law fails to include the values and experiences which are more typical of women.¹¹⁹ Accordingly, it also becomes clear exactly how women are directly or indirectly disadvantaged by existing legal standards.¹²⁰ By exposing the *underlying* effects of the law on women, this method helps to demonstrate how social structures implicitly render women different and thereby, subordinate.¹²¹

110. Bartlett, *supra* note 102, at 849.

111. *Id.*

112. *Id.*

113. *Id.* Women do not believe that "the practicalities of every day life" should be neglected for the sake of abstract justice. *Id.* (citing M. BELENKY ET AL., *WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE, AND MIND* (1986)).

114. Bartlett, *supra* note 102, at 850.

115. *Id.* at 858.

116. *Id.* at 837.

117. *Id.*

118. *Id.*

119. Bartlett, *supra* note 102, at 837. Bartlett claims that the "woman question" assumes that some features of the law are not only non-neutral, but specifically "male". *Id.*

120. *Id.*

121. *Id.* at 843.

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The remainder of this Comment will apply the woman question and feminist practical reasoning to selected decisions of the Commission and the Court. The goal of the analysis is to explore the effect a stronger female presence could have on the decisions of the Commission and the Court and the availability of more effective remedies to the women of Europe in the future.

IV. Women on the Commission and Court of Human Rights — A Case Law Analysis

Male dominance in the area of international human rights is not limited to decisions in their favor.¹²² In fact, the majority of *all* issues that are decided begin with a man's, rather than a woman's, petition to the Commission.¹²³ Additionally, men have a higher degree of success getting their applications admitted for an on-the-merits decision by the Commission or the Court.¹²⁴ These statistics are further evidence that men and women are treated differently by the law.¹²⁵ Perhaps by electing women to the Commission and Court, European women would feel more comfortable petitioning the Commission with their grievances, hence more voices would be heard.

There are specific articles of the Convention that, when violated, illustrate gross gender discrimination. Unfair treatment between male and female petitioners occurs most frequently in cases involving privacy and non-discrimination provisions,¹²⁶ namely articles 8,¹²⁷ providing

122. Provine, *supra* note 53, at 22 (citing Erika S. Fairchild, *Criminal Procedure and the European Court of Human Rights* (1991) (paper prepared for the annual meeting of the Law and Society Association, June, 1991, on file with the author); Donald W. Jackson, *Judging Human Rights: The Formative Years of the European Court of Human Rights, 1959-1989* (1991) (paper presented at the 15th IPSA world congress, July, 1991, on file with the author). See *infra* part VI of this Comment.

123. Provine, *supra* note 53, at 22. For example, in 1989, 271 applications were filed with the Commission. *Id.* at 23. Of these 271 applications, 43 were filed jointly by a man and a woman, 23 were filed by women, and 203 were filed by men. *Id.*

124. *Id.* In 1989, only seven percent of those cases brought by women were admitted for on-the-merits review. *Id.* at 24.

125. See Provine, *supra* note 53, at 24.

126. *Id.* at 15.

127. Section I, article 8 provides:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by the public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.

Convention, *supra* note 3, art. 8.

a right to privacy, article 12,¹²⁸ providing for the right to marry and found a family, and article 14,¹²⁹ prohibiting discrimination based on sex, race, religion, language and the like. As the following cases illustrate, these privacy and non-discrimination provisions have often been used together to challenge rules related to reproductive freedom, family welfare, and personal independence.¹³⁰

A. Cases Relating to Family Welfare

Johanna Airey, an Irish national, was the victim of domestic abuse, for which her husband had been tried and fined.¹³¹ In June 1972, Mr. Airey left the family home permanently.¹³² Because divorce is prohibited in Ireland, Mrs. Airey's only available remedy was to obtain a legally binding deed of separation, which would relieve the couple of their obligation to co-habitate.¹³³ For eight years, Mrs. Airey tried to secure a separation but was unable to find a solicitor who would take her case.¹³⁴ Finally, on June 14, 1973, Mrs. Airey petitioned the Commission.¹³⁵ Her complaint alleged breaches of the Convention under articles 6, 8, 13, and 14.¹³⁶

In its report of March 9, 1978, the Commission held that Ireland violated article 6 of the Convention by not providing Mrs. Airey effective access to the courts.¹³⁷ Although the decision was in her

128. Section I, article 12 provides: "Men and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of this right." *Id.* art. 12.

129. Section I, article 14 states: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." *Id.* art. 14.

130. Provine, *supra* note 53, at 15.

131. *Airey v. Ireland*, App. No. 6289/73, 1977 Y.B. Eur. Conv. on H.R. 180, 182 (Eur. Comm'n on H.R.).

132. *Airey*, 1977 Y.B. Eur. Conv. on H.R. at 182.

133. VINCENT BERGER, CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS 120

134. *Id.*

135. *Airey*, Y.B. Eur. Conv. on H.R. at 186.

136. *Airey*, 1977 Y.B. Eur. Conv. H.R. at 184-86. BERGER, *supra* note 133, at 120.

137. *Id.* at 120 n.1. Section I, article 6 provides in part:

(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of a trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Convention, *supra* note 3, art. 6.

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favor, the Commission failed to examine her complaint under articles 8, 13, and 14.¹³⁸ Appropriate attention to article 8 required Ireland to provide Mrs. Airey with a judicial separation, yet, after eight years, she was still unable to obtain one.¹³⁹ The Commission recognized this as a breach of the Convention. However, it failed to formally view Mrs. Airey's complaint under that article.¹⁴⁰ As such, the Commission effectively denied legitimacy to Mrs. Airey's rights.

This case may have had full consideration if there were a greater female presence on the Commission. The application of feminist legal theory may have yielded a different point of view. Mrs. Airey's rights were clearly denied proper consideration. Moreover, the Commission summarily denied the petitioner consideration under articles 8, 13, and 14 because she was granted relief under article 6. This rationale suggests that Airey's claims under the other three articles are insignificant. Petitioner's rights under these articles are intrinsically "female." That is, her rights were violated because she was a woman. Perhaps this is the true reason they were not considered legitimate by the Commission.

The first inquiry in the "woman question" approach is whether women have been excluded from consideration under a certain law. In this case, the petitioner was oppressed because she could not obtain adequate relief under all articles of the Convention. The next step is to determine how this problem might be corrected. By providing women a forum that is representative of the population, their complaints may gain legitimacy and may be treated with a greater degree of fairness. That is, women on the Commission might view their complaints as justified under articles 8, 13, and 14, thereby providing female petitioners with a voice. However, this component of the woman question presents a more difficult problem. It is easy to suggest that

138. BERGER, *supra* note 133, at 120 n.1.

139. *Airey*, Y.B. Eur. Conv. on H.R. at 194, 200.

140. Incidentally, the Court heard Mrs. Airey's case and issued its decision on 9 October, 1979. BERGER, *supra* note 133, at 121. The Court held that Mrs. Airey was denied effect access to the High Court of Ireland and therefore, there had been a breach of article 6(1) (5 votes to 2). *Id.* at 122-23. In addition, the Court found that she had been a victim of an article 8 violation (4 votes to 3). *Id.* at 123. The Court held that "the existence of the remedy of judicial separation amounted to a recognition that the protection of family or private life might sometimes necessitate spouses' being relieved from the duty to live together." *Id.* Accordingly, effective respect for private life obligated Ireland to provide recourse to anyone who may need it. *Id.* However, like the Commission, the Court did not grant legitimacy to all of Mrs. Airey's complaints. BERGER, *supra* note 133, at 123. It held that, in light of the above recognition, Mrs. Airey's complaints under articles 13 and 14 did not warrant review (4 votes to 3). *Id.*

female members would balance the odds, yet it is difficult in practice to elect women to the Commission.¹⁴¹

The third inquiry of the woman question explores whether the suggested measures would exact a change. Electing women to the Commission and the Court would add the female perspective necessary to reform traditional human rights approaches.¹⁴² Likewise, this would make women more visible and would help "transform the concept and practice of human rights in our culture so that it takes better account of women's lives."¹⁴³ Perhaps a Commission comprised, at least in part, of women would have granted all of Mrs. Airey's complaints legitimacy, and thus, provided her with a more effective forum and remedy.

B. Cases Relating to Privacy in Sexuality and Reproductive Freedom

Cases involving a woman's right to privacy in her sexuality and reproductive freedom have posed interesting problems for the Court and the Commission. In *X and Y v. The Federal Republic of Germany*, two female petitioners filed a complaint against the Federal Republic of Germany, challenging the validity of its abortion statute.¹⁴⁴ On June 18, 1974, the government of West Germany had passed a statute providing for pregnancy counseling and containing new provisions of the German Criminal Code concerning abortion.¹⁴⁵ The petitioners filed their complaint alleging that the German court ruling upholding the statute violated articles 8, 9, 12, and 11 of the Convention.¹⁴⁶ The petitioners alleged a violation of article 8 in that they were left with no alternative but to abstain from intimate relations, use methods of contraception of which they disapprove, or carry out a pregnancy against their will.¹⁴⁷

141. See *Provine*, *supra* note 53, at 6. There are no *formal* requirements for membership. However, tradition dictates that nominees have had distinguished legal careers before pursuing election to the Commission and the Court of Human Rights. *Id.*

142. See *Bunch*, *supra* note 9, at 487.

143. *Id.*

144. *X and Y v. the Federal Republic of Germany*, App. No. 6959/74, 1976 Y.B. Eur. Conv. on H.R. 382 (Eur. Comm'n on H.R.).

145. *Id.* The *Bundestag* passed the Fifth Criminal Law Reform Act, which limits the period for legal abortion to 12 weeks after conception. *Id.* at 384 (citing Federal Law Gazette, § 218(a)). It also provides for legal abortion on specific grounds on the advice of a physician after the twelfth week. *Id.* (citing Federal Law Gazette, § 218(b)).

146. *Id.* at 388. For purposes of this Comment, only articles 8 and 12 will be addressed. For the text of article 8 and article 12, see *supra* notes 127 and 128, respectively.

147. *X and Y*, 1976 Y.B. Eur. Conv. on H.R. at 388. The second petitioner further alleged that the Convention was violated under article 12. *Id.* She reasoned that women with illegitimate children have a lesser chance of getting married, and therefore, her future and enjoyment of life may be limited by these laws of the State. *Id.*

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Regarding the alleged violation of article 8, the Commission affirmed the decision of the Federal Constitutional Court of Germany, holding that the statute does not interfere with the right to found a family, nor the right to engage in family planning.¹⁴⁸ The Commission stated that the termination of an unwanted pregnancy was not an acceptable form of “family planning,” and therefore no rights had been compromised.¹⁴⁹

Regarding article 12, the Commission held that the Convention guarantees the *right* to marry, and that this right had not been violated by Germany’s federal court decision.¹⁵⁰ The Commission explained that “[t]he *chances* of a person to marry, which depend on many objective and subjective factors, are not, and cannot, be protected as human rights.”¹⁵¹

The right of reproductive freedom would benefit most from the presence of the feminist perspective on the Commission and the Court. In this particular case, the petitioners would probably still be denied relief under article 12 because the application of the “marriage” principle is tenuous, at best. However, the Commission’s analysis of article 8 may have been different with the insight of more female members.

Laws restricting a person’s reproductive freedom may be construed as intrinsically gender-biased because women are the only members of society who may become pregnant.¹⁵² Although this Comment is not suggesting that men are wholly insensitive to the situation, it is reasonable to suggest that women have an easier time relating to the concepts of pregnancy and its impact on a woman’s life.

By applying feminist practical reasoning to the abortion debate, it is possible to see how this area of international law should not be one composed of bright line rules. The feminist practical reasoning approach, as discussed earlier, concentrates more on situation and context, rather than universal principles and generalization.¹⁵³ Because of the sensitive nature of reproduction issues, a case-by-case analysis

148. *Id.* at 392.

149. *Id.*

150. *Id.* at 394.

151. *X and Y*, 1976 Y.B. Eur. Conv. on H.R. at 394 (emphasis added).

152. See *Provine*, *supra* note 53, at 19. A later case reexamined whether abortion came under the protection of article 8’s privacy guarantee. *Id.* Once again, the Commission held that it did not. *Id.* See *Bruggemann and Scheuten v. the Federal Republic of Germany*, App. No. 6959/75, 10 Eur. Comm’n. H.R. Dec. & Rep. 100 (1978). Because of the State’s legitimate interest in the pregnancy, the Commission reasoned that privacy rights do not include a decision to choose abortion. *Provine*, *supra* note 53, at 20.

153. *Bartlett*, *supra* note 102, at 849.

may be a more appropriate approach. Compare the previous case to this next example.

For a decade after the case of *X and Y*, virtually no abortion cases came before the Commission or the Court.¹⁵⁴ However, in 1988, an Irish case, *Open Door Counselling Ltd. and Dublin Well Women Centre Ltd. and Others v. Ireland*, raised the issue of freedom of information regarding abortion.¹⁵⁵ The case was brought before the Commission by two pregnancy counseling services.¹⁵⁶ The services alleged an Irish Supreme Court decision, banning the distributing of abortion material, violated articles 8, 10, and 14 of the Convention.¹⁵⁷ The Commission held that the law did contravene article 10.¹⁵⁸ However, it failed to grant relief under the right to privacy or on the grounds of discrimination.¹⁵⁹

The incident that initiated *Open Door Counselling Ltd.* involved a 14-year-old girl who was raped, impregnated, and then compelled by the Irish authorities to have the baby.¹⁶⁰ The case was eventually brought before the Court on March 24, 1992 and was heard by a panel of twenty three judges.¹⁶¹ The panel was composed of one woman and twenty-two men.¹⁶² The Court, like the Commission held that the Irish Supreme Court injunction was violative of article 10, but the complaints did not merit review under articles 8 and 14.¹⁶³ Perhaps a Court comprised of a more representative panel would yield a more favorable outcome. Further, cases of this nature may be viewed more fairly and on a case-by-case basis.

Feminist practical reasoning may be employed here to analyze the impact of this particular case. Common sense dictates that a 14-year-old girl, impregnated against her will and forced to have the baby, is a grotesque violation of one's dignity and rights as a woman. This conclusion does not require a feminist perspective. *Open Door Counselling Ltd.*¹⁶⁴ is an ideal example of men's tendencies to rely on bright line rules and principles of law. That is, the fact that Ireland has

154. See Provine, *supra* note 53, at 20.

155. *Id.* *Open Door Counselling Ltd. and Dublin Well Woman Centre Ltd. and Others v. Ireland*, App. Nos. 14234/88 & 14235/88, 14 Eur. H.R. Rep. 131 (1991) (Commission report).

156. *Id.*

157. *Id.* at 135.

158. *Id.* at 136-38. See Convention, *supra* note 3, art. 10.

159. *Open Door Counselling Ltd.*, 14 Eur. H.R. Rep. at 139-40.

160. Provine, *supra* note 53, at 25.

161. *Id.* See *Open Door Counselling Ltd.*, 15 Eur. H.R. Rep. at 244.

162. Provine, *supra* note 53, at 25.

163. *Id.* *Open Door Counselling Ltd.*, 15 Eur. H.R. Rep. at 268, 270.

164. *Open Door Counselling Ltd.*, 15 Eur. H.R. Rep. at 244.

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such a law dictates the outcome of the case. No alternative relief is available, regardless of the circumstances. A more balanced Commission and Court may have given greater credence to the perspective of the victim and allowed for an "exception to the rule" line of reasoning.

In direct contrast to these two privacy cases is the case of *Norris v. Ireland*.¹⁶⁵ The *Norris* case brought the issue of homosexuality before the Court.¹⁶⁶ Mr. David Norris is an active homosexual who had been campaigning for gay rights in Ireland since 1971.¹⁶⁷ In November 1977, Norris sought a declaration in the Irish High Court that sections 61 and 62 of the Offences Against the Persons Act 1861, and section 11 of the Criminal Law Act 1885, were unconstitutional.¹⁶⁸ Both provisions criminalized homosexual activity and included penalties of imprisonment.¹⁶⁹

In October 1983, Mr. Norris filed a complaint with the Commission claiming that the Irish laws violated article 8 of the Convention.¹⁷⁰ The Commission referred the case to the Court.¹⁷¹ The Court held that the laws criminalizing and punishing homosexual behavior were violative of the Convention.¹⁷² However, under article 8, interference in one's private life is permitted if a legitimate State interest is involved.¹⁷³ The Irish Government advanced the argument that these laws were for the purpose of protecting the morals of the State.¹⁷⁴ The Court rejected this rationale and held that national officials did have the authority to

165. *Norris v. Ireland*, 1988 Y.B. Eur. Conv. on H.R. 163 (Eur. Ct. H.R.).

166. *Id.*

167. *Id.* at 164.

168. *Id.*

169. *Id.* at 164. Mr. Norris' complaint was dismissed by the Irish High Court on 10 October, 1980. *Norris*, 1988 Y.B. Eur. Conv. on H.R. at 164. On April 22, 1983 the Irish Supreme Court upheld the High Court's earlier decision. *Id.*

170. *Id.* Mr. Norris contended that by criminalizing homosexual activity, the laws interfered with his right to respect for private life. *Id.* The Commission held his petition to be admissible, and in its report of 12 March, 1987, the Commission held the Irish laws to be in breach of article 8. *Id.*

171. *Norris*, 1988 Y.B. Eur. Conv. on H.R. at 165.

172. *Id.*

173. *Id.* Section I, article 8 provides in pertinent part:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary . . . in the interest of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Convention, *supra* note 3, art. 8 (emphasis added).

174. *Norris*, 1988 Y.B. Eur. Conv. on H.R. at 165. The Government further argued that "the moral fibre of a democratic nation is a matter for its own internal institutions." *Id.* Accordingly, the Government should be allowed a degree of tolerance in its compliance with article 8. *Id.*

regulate matters of morals, yet this regulation was by no means unlimited.¹⁷⁵

In recent years, the Irish authorities had not enforced these laws as to private acts between consenting adult males.¹⁷⁶ The Court noted that there had been no injurious effect on the moral standards in Ireland, nor was there a need for a stricter enforcement of the rule.¹⁷⁷ Therefore, it could not be supported that there was, in fact, a "pressing social need" for the statute.¹⁷⁸ As a result of this finding, the Court held by eight votes to six, that the law was violative of article 8 of the European Convention.¹⁷⁹

It is unnecessary, for purposes of this Comment, to analyze the *Norris*¹⁸⁰ case under feminist legal theory because the Court reached an equitable conclusion. In all likelihood, a Court comprised of both men and women would have arrived at the same, or a similar, holding. The result of the case is fair and upholds the very ideals embodied in the European Convention. However, the reasoning of the Court in *Norris*¹⁸¹ is quite inconsistent with that of *Open Door Counselling Ltd.*¹⁸² Both cases were filed under the same theory, and the State advanced the exact same defense. In *Open Door Counselling Ltd.*, Ireland claimed that the federal statutes did not violate the Convention because there was a legitimate State interest — to protect the moral fibre of the nation.¹⁸³ In effect, this legitimate interest gave the Government authority to interfere with the private business of the petitioners. In *Norris*, the Court held that the State's interest was *not* legitimate and the statute was violative of the Convention.¹⁸⁴ Conversely, in *Open Door Counselling Ltd.*, the Commission held that the interests of the State were sufficient to justify intervention.¹⁸⁵ The Court also held that the abortion statute was not in violation of article 8.¹⁸⁶ It is worth noting

175. *Id.*

176. *Id.*

177. *Norris*, 1988 Y.B. Eur. Conv. on H.R. at 165.

178. *Id.*

179. *Id.* at 166.

180. *Id.*

181. *Id.*

182. *Open Door Counselling Ltd.*, 14 Eur. H.R. Rep. 131 (Commission report); 15 Eur. H.R. Rep. 244.

183. *Open Door Counselling Ltd.*, 14 Eur. H.R. Rep. at 141. (Commission report); 15 Eur. H.R. Rep. at 263.

184. *Norris*, 1988 Y.B. Eur. Conv. on H.R. at 165-66.

185. *Open Door Counselling Ltd.*, 14 Eur. H.R. Rep. at 100, 140 (Commission report). See also Provine, *supra* note 53, at 20.

186. *Open Door Counselling Ltd.*, 15 Eur. H.R. Rep. at 246, 268.

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that the petitioner in *Norris*¹⁸⁷ was a man, while the petitioner in *Open Door Counselling Ltd.*¹⁸⁸ represented a woman's interest. This is a blatant example of the disparity between the remedies available to men and those available to women before the tribunal. Once again, by providing a forum of equal representation, inconsistencies such as this may occur less frequently, or perhaps not at all. With respect to privacy and reproductive freedom, women need a louder voice on the Commission and the Court of Human Rights.

C. Cases Relating to Citizenship

The case law suggests that there has also been discriminatory treatment of citizenship cases. The most noted violations have occurred in the United Kingdom.¹⁸⁹ It was an established practice to allow male resident aliens to legally bring their spouses into the country, but female resident aliens were not provided the same opportunity.¹⁹⁰ The following case, *Mrs. Abdulaziz, Cabales, and Balkandali v. United Kingdom*, abolished this discriminatory practice.¹⁹¹

In *Mrs. Abdulaziz, Cabales, and Balkandali*, the petitioners filed a complaint against the United Kingdom claiming that the country's immigration laws violated articles 8 and 14 of the Convention.¹⁹² All three petitioners had lived in the United Kingdom since the 1960s or 1970s, and all had been given leave to remain there indefinitely by the British Government.¹⁹³ The legislation dictated that a foreign husband

187. *Norris*, 1988 Y.B. Eur. Conv. on H.R. at 165.

188. *Open Door Counselling Ltd.*, 14 Eur. H.R. Rep. 131 (Commission report); 15 Eur. H.R. Rep. 244.

189. See *Provine*, *supra* note 53, at 18.

190. *Id.* Over 100 cases were brought before the Commission challenging this rule. *Id.* The Commission chose to hear three of them. *Id.*

191. *Mrs. Abdulaziz, Cabales, and Balkandali v. United Kingdom*, 1985 Y.B. Eur. Conv. on H.R. 184 (Eur. Ct. H.R.).

192. *Id.* In addition, the complaint alleged violations of articles 3 and 13, however, these will not be discussed in this Comment.

193. *Id.* at 184-85. Mrs. Nargis Abdulaziz has lived in the United Kingdom, with leave, since 1977. *Id.* at 184. In May 1979, she was given leave to remain there indefinitely. *Id.* In December of the same year, Mrs. Abdulaziz married Mr. Abdulaziz, a Portuguese national. *Abdulaziz*, 1985 Y.B. Eur. Conv. on H.R. at 184. Mr. Abdulaziz had emigrated to the United Kingdom where he was granted leave to remain for a limited period. *Id.* In July 1980, after his marriage, he was denied leave to remain permanently. *Id.*

Mrs. Arcley Cabales has lived in the United Kingdom, with leave since 1967, she was given leave to remain indefinitely in June of 1971. *Id.* In 1980, she married Mr. Cabales, a Philippine citizen, in the Philippines. *Id.* In February 1981, the British authorities refused him a visa to join Mrs. Cabales for settlement in the United Kingdom. *Abdulaziz*, 1985 Y.B. Eur. Conv. on H.R. at 184. In 1984, Mrs. Cabales obtained naturalization as a British citizen. *Id.* at 185. Once again, her husband was denied leave to settle on the grounds that the Philippine marriage was invalid. *Id.*

would not be granted leave to enter or stay unless his wife was a citizen of the United Kingdom, *and* one of her parents had been born in the United Kingdom.¹⁹⁴ In 1983, this law was amended to require that the wife be a British citizen.¹⁹⁵ The birthplace of her parents was no longer relevant.¹⁹⁶ Conversely, a foreign wife could obtain leave to enter or stay whether or not her husband was a British citizen with the territorial birth link.¹⁹⁷ Since 1983, the parental birth link is not required.¹⁹⁸

In this case, the Court refused relief under article 8,¹⁹⁹ but did enter judgment in favor of the petitioners under article 14.²⁰⁰ The Court concluded that the enforcement of the immigration regulation resulted in differential treatment on the basis of gender.²⁰¹ Because there was no evidence of an "objective and reasonable" justification, the Court held the immigration policy to be discriminatory.²⁰² Although the law was struck down for violating the Convention, it was in effect until 1985.²⁰³ Certainly similar situations had occurred in the United

In January 1985, the couple was married in the United Kingdom and Mr. Cabales was given a twelve month leave. *Id.* At the end of that period, Cabales would have been eligible for leave to remain there indefinitely. *Id.*

Mrs. Sohair Balkandali has lived in the United Kingdom, with leave, since 1973. *Abdulaziz*, 1985 Y.B. Eur. Conv. on H.R. at 185. Mrs. Balkandali was granted leave to remain indefinitely and citizenship, after she married a British national in 1978. *Id.* That marriage has subsequently dissolved. *Id.* In 1981, she married Mr. Balkandali, a Turkish citizen, who was in the United Kingdom without leave. *Id.* In May of the same year, Mr. Balkandali applied for leave and was denied. *Id.* However, by subsequent legislation, his wife became a British citizen, and as the husband of a citizen he was granted limited leave in 1983, and permanent leave in 1984. *Abdulaziz*, 1985 Y.B. Eur. Conv. on H.R. at 185.

194. *Id.* (emphasis added).

195. *Id.*

196. *Id.*

197. *Id.*

198. *Abdulaziz*, 1985 Y.B. Eur. Conv. on H.R. at 185.

199. *Id.* at 185-86. The Court rejected the petitioners' argument regarding the violation of article 8. *Id.* at 185. While realizing that the article serves to protect the well-being of the family, the Court refused to extend it to include the obligation to respect a married couple's choice of residence. *Id.* at 186. At the time of their application for review, the petitioners failed to show that there were obstacles to establishing a home life in their husbands' countries, and therefore there had been no lack of respect by the British authorities and no violation of article 8. *Id.*

200. *Abdulaziz*, 1985 Y.B. Eur. Conv. on H.R. at 186-87.

201. *Id.*

202. *Id.* The Court pointed out that it was considerably easier for a man, settled in the United Kingdom, to obtain permission for his non-national spouse to enter into or remain in the country. *Id.* at 186. The State contended that the law was designed to protect the labor market at a time when there was very high unemployment. *Id.* Realizing the legitimacy of the State's interest, the Court maintained that the justification was not "weighty" enough to circumvent article 14. *Abdulaziz*, 1985 Y.B. Eur. Conv. on H.R. at 186.

203. Although the law was determined to be violative of the Convention, England chose to deny

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Kingdom prior to the early 1980s.²⁰⁴ This may serve as another example of how women's issues are treated with less immediacy and less vigor.

It is possible that the Commission and the Court would have dealt with this issue sooner had they been composed of men and women equally. Had the women of England believed that they had advocates on the Court, they may have been more apt to file a petition earlier. Under feminist legal theory, this immigration policy would have been identified as discriminatory by application of the woman question. Applying this theory, one would have asked whether women have been left out of consideration. In the instant case, the answer is clearly "yes." Second, one would inquire as to how this oppression might be corrected. The Court, comprised of men and women, would have corrected the problem by holding the British immigration regulations in violation of the Convention.²⁰⁵ Finally, this theory inquires whether it would make a difference to render the regulations discriminatory. The answer is simple. By concluding that the regulation is discriminatory, women would be afforded the same opportunity to choose where they would like to settle and raise a family. Women would have the same options that men have been entitled to for years.²⁰⁶

It is also arguable that with a representative Commission and Court, petitioners' complaint under article 8 would have received different consideration. By applying the feminist practical reasoning theory, the Court may have considered the family situations of the petitioners individually. The decision to stay in the United Kingdom may have a significant effect on one's family life. Should the authorities refuse petitioners' request for leave to remain, they may have no other alternative. Had the petitioners no option but to live in England without their spouses, their respect for and right to family life is, in effect, compromised.²⁰⁷

the benefit previously afforded to resident husbands rather than extend it to resident wives. *Provine, supra* note 53, at 18. In effect, the law is now in accordance with the Convention. However, no benefit may be derived by *anyone. Id.*

204. Mrs. Abdulaziz applied to the Commission on December 11, 1980. *BERGER, supra* note 133, at 293. Mrs. Cabales and Mrs. Balkandali applied on August 10, 1981. *Id.*

205. This Comment recognizes that the Court *did* hold the regulation in violation of the Convention. However, it suggests that with equal representation the issue would have been resolved prior to 1985.

206. This is true in theory, however, for purposes of this case, *see supra* notes 189-207 and accompanying text.

207. This argument is purely hypothetical because the petitioners did not offer evidence that suggested this as their only alternative. The feminist practical reasoning approach would handle such complaints on a case-by-case basis, rather than applying a broad-based rule. *See Bartlett, supra* note

V. Conclusion

The concept of human rights has come of age over the past fifty years. However, as to women's rights, it is still in its infancy. Equal representation on the European Commission and Court of Human Rights would provide a more effective forum for the discussion of women's human rights issues. A tribunal representing both men and women would provide insight into the daily experiences of women, and allow the impact of international rules to be viewed up close, rather than at a distance.

Although the Commission and Court are an effective means to a positive end, there is always room for change. The biggest obstacles are the patriarchy of Law, and the masculine tradition of the Commission and Court. However, increasingly, women are joining the professional ranks in Europe. They are achieving positions of distinction and the pool of distinguished candidates is growing. Soon, the advocates so badly needed by the women of Europe will be available to serve on the Court and the Commission. Will it be soon enough?

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