FACULTY OF LAW
Lund University

Myrra Hellgren Franzén

Conscientious Objection and Access to Lawful Abortion in the Council of Europe System

- Does Conscientious Objection Undermine Legal Abortion Rights?

JURM02 Graduate Thesis

Graduate Thesis, Master of Laws programme
30 higher education credits

Supervisor: Christina Johnsson

Semester: VT2014

Contents

Summary

Historically, objections based on the freedom of thought, conscience and religion have been invoked in relation to compulsory military service. These *conscientious objections* are protected by national, regional and international human rights instruments. In the European Convention on Human Rights this right is grounded in Article 9 on the freedom of thought, conscience and religion. In Europe, the practice of conscientious objection is increasing in the healthcare context, specifically in relation to abortion procedures. This practice does not gain the same protection from regional and international human rights instruments as the refusal to partake in compulsory military service. Having said this, the practice still gains protection at national level in a number of Member States of the Council of Europe. While allowing objectors to refuse to provide lawful abortion services, these states fail to control the practice effectively, creating a conflict with women's access to lawful abortions. Despite the legal right to abortion, these women are denied effective access to it.

The present study investigates the lack of regulation of conscientious objection to abortion in the Council of Europe setting, with the aim of clarifying whether additional regulation of the practice is required to secure women's access to abortion on a national level as well as on a regional level. The study arrives at the conclusion that there is no clear answer as to what extent conscientious objection to abortion is protected under the regulation of the Council of Europe, because the regulation of conscientious objection to abortion is principally decided on the state level, within the discretion of each state. There are, however, a number of critical parameters in relation to women's access to lawful abortion that states are obliged to safeguard. These parameters set the limits of the state's discretion in relation to the practice of conscientious objection on a national level. A number of cases demonstrate that these parameters are not secured in all countries of Europe. This fact calls for increased regulation of conscientious objection to abortion in countries that allow this practice.

Sammanfattning

Historiskt sett har människor gjort invändningar grundade på tankefrihet, samvetsfrihet och religionsfrihet i förhållande till obligatorisk värnpliktstjänstgöring. Denna *samvetsvägran* inom militären är en erkänd rätt i nationella, regionala och internationella människorättsinstrument. I den Europeiska konventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna är denna rätt förankrad i artikel 9 om tankefrihet, samvetsfrihet och religionsfrihet. Runt om i Europa ökar bruket av samvetsvägran även i sjukvårdssammanhang, särskilt i relation till abort. Samvetsvägran i dessa sammanhang är dock inte berättigad till samma skydd från regionala och internationella människorättsinstrument som vägran att utföra obligatorisk värnplikt. I ett antal av Europarådets medlemsstater finns dock regler som gör det möjligt för sjukvårdspersonal att vägra utföra aborter. Dessa stater har dock till stor del misslyckats med att införa regler som gör det möjligt att begränsa och kontrollera utbredningen av samvetsvägran. När det inte finns en effektiv kontroll över hur många samvetsvägrare som finns på ett visst sjukhus eller inom en särskild region, riskerar kvinnor att inte få tillgång till abort, trots att hon har en laglig rätt till densamma.

Föreliggande uppsats utreder Europarådets brist på reglering av samvetsvägran till laglig abort, i syfte att klargöra om ytterligare reglering krävs för att säkra kvinnors tillgång till abort på nationell och på regional nivå. Slutsatsen är att det är oklart i vilken utsträckning samvetsvägran till abort är skyddad av Europarådets reglering, eftersom detta bedöms från fall till fall. Eftersom Europarådets reglering är oklar, innebär det att regler kring samvetsvägran huvudsakligen beslutas på statlig nivå, inom det bedömningsutrymme dessa tilldelas av Europadomstolen. Det finns dock ett antal kriterier som begränsar staternas bedömningsutrymme och som syftar till att skydda kvinnors tillgång till laglig abort. Dessa kriterier är medlemsstaterna i Europarådet skyldiga att se till att de uppfylls och de sätter därmed gränserna för utövandet av samvetsvägran på nationell nivå. Ett antal rättsfall visar dock att tillgången till laglig abort inte är säkrad i alla länder i Europa. På grund av detta krävs en ökad reglering av samvetsvägran i de länder som tillåter sjukvårdspersonal att vägra utföra aborter.

Preface

This thesis marks the end of my 4.5 years of law studies at Lund University. I have had the opportunity to study at the ELTE Faculty of Law in Budapest and to do an internship at the Department for International Law, Human Rights and Treaty Law at the Swedish Ministry for Foreign Affairs. These experiences have in many ways altered my views of law and life.

First of all, I would like to thank my supervisor, Christina Johnsson, for our initial talks and for her constructive advice.

Furthermore, I would like to thank the Swedish Ministry for Foreign Affairs for providing an interesting and challenging internship. I would especially like to thank Gerd Johnsson-Latham for being an excellent and inspiring mentor during the internship and for providing input to this thesis.

Moreover, I would like to express my deep gratitude to my friends who have proofread and provided new perspectives on this thesis: Emeafa Doe, Cecilia Englund, Paula Langöe Eliasson, Frida Thelvén and Steffica Warwick.

Finally, I have been fortunate to have had the support of my beloved family and my significant other, Johan Ingerman, throughout my law studies. Thank you.

Lund in August 2014,
Myrra H. Franzén

Abbreviations

CO	Conscientious Objection
CoE	Council of Europe
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
ESC	European Social Charter
ICCPR	International Covenant on Civil and Political Rights
PACE	Parliamentary Assembly of the Council of Europe
UN	United Nations

1 Introduction

Today, people with different beliefs and morals are often found living side by side. Despite creating opportunities for cultural, religious and philosophical exchange, the existence of fundamentally opposing viewpoints in the same environment suggests increasing conflict between people and the framework in which they exist. In instances in which an individual's moral and religious beliefs are in direct opposition to the system in operation, he or she might refuse to adhere to mandated procedures required by said system. This act or omission is known as *conscientious objection*.

Theoretically, it is possible to conscientiously object to anything. However, it could undermine the very essence of the legal system if a state allowed its citizens to do so. As a result, it is inevitable that states need maintain tight regulations on avenues for conscientious objection. Interestingly, despite the specific provisions permitting conscientious objections being regulated, there are cases showing that the actual use of conscientious objection might not be effectively monitored or controlled by the authorities.[1] In the healthcare field, this can create situations where it is impossible for a patient or prospective patient to know if he or she can expect to receive the healthcare provided by law or not.

In the healthcare context, conscientious objection is most commonly invoked in relation to abortion.[2] Problems arise when the will of the woman seeking a lawful abortion and the will of the assisting medical doctor are divergent. Since the medical doctor (hereinafter referred to as the healthcare provider) is in a position of trust and authority in relation to women seeking abortion services, it is not unreasonable to assume that there is an imbalance between the two in this situation. One question to examine, therefore, is if Council of Europe Member States are adhering to both their negative and their positive obligations in relation to protecting women's access to lawful abortion. Following this enquiry is the question of rule of law and law enforcement. Can a state, which has legalised abortion but is not securing an actual access to abortion services, be said to be in accordance with the rule of law?

Conscientious objection and women's right to lawful abortion can be regulated on national, regional as well as international levels. The regulation on international and regional levels control the national level to the extent a state has ratified international and regional treaties.[3] On a national level, there are many different solutions within European states on how to regulate abortion services

[1] *Cf.* chapters 4.3.2, 4.3.3 and 5.1.
[2] ACOG 2007, Obstetrics & Gynecology, p. 1203.
[3] Linderfalk 2012, p. 77.

as well as conscientious objection.[4] In some countries, there is no legal right to conscientiously object to performing abortions. In Sweden, for example, there is no right to conscientiously object to performing abortions.[5] Gynaecologists and obstetricians, as well as nurses and administrative personnel, are expected to perform all their work duties in order to provide women with abortion before the 18th week of gestation, notwithstanding moral or religious objections.[6] Some individuals and organisations are questioning the aims of the Swedish regulation, and in early 2014, conscientious objection became a topic of interest in Sweden as a newly graduated midwife refused to perform abortions.[7]

In other European countries, conscientious objection to performing abortions is a legal right. In these countries, healthcare providers may object to assisting or performing abortions, providing that they comply with the national legal provisions relating to conscientious objection. An example of a country where effective access to abortion has been disregarded in favour of the right of healthcare providers to conscientiously object is Italy.[8] In some regions of the country, more than 85 percent of the gynaecologists object to performing abortions, according to national statistics. This practice creates significant difficulties for women to obtain a lawful abortion.[9]

The contrasting environments in Italy and Sweden serve as an illustration of a phenomenon present all over Europe.[10] This phenomenon consists of competing interests; the interest of a woman to receive lawful healthcare and the interest of the healthcare provider to follow his or her beliefs. These interests are, to different extents, protected under the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR, the Convention or the European Convention on Human Rights[11]). What protection these interests are awarded and how they are balanced against one another in the Council of Europe (hereinafter CoE or the Council) legal system is, therefore, an important question.

1.1 Purpose and Research Questions

As illustrated above, the practice of conscientious objection is not unproblematic. An unregulated use of conscientious objection to abortion may lead to a

[4] See different variations in regulation in chapters 3.3.1, 4.3.1 – 4.3.3.
[5] The Swedish Abortion Act (1974:595) Sections 4 and 10.
[6] The Swedish Abortion Act (1974:595) Sections 1 and 4.
[7] Decision by the Swedish Equality Ombudsman (Complaints No. 2014/12 2014/226 2014/227) 10 April 2014.
[8] A more detailed account for conscientious objection and abortion in Italy is provided in chapter 5.
[9] *IPPF v. Italy* (Complaint No. 87/2012) ECSR, 3 September 2012, paras. 82 and 169.
[10] Zampas and Andión-Ibañez 2012, European Journal Of Health Law, p. 236.
[11] The European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, ETS 5.

situation where women's legal right to effective access to reproductive healthcare no longer can be guaranteed. To assure effective protection of women's access to lawful abortions, an examination of the scope and the limitation of the right to have *access to lawful abortion* within the Council of Europe context is necessary. It is, however, also important to establish the scope and limitation of *conscientious objection to performing an abortion* since some aspects of this practice are protected by the Convention. These aspects are important because states also have to protect these rights, especially if they have an absolute character.

There is no clear answer to what extent the European Convention on Human Rights allows healthcare providers to conscientiously object to performing abortions. Nor is it clear to what extent the Convention provides protection for women's access to a lawful abortion. As it seems, there is a small 'gap' in the Convention and the case law of the European Court of Human Rights (hereinafter ECtHR or the Court), which leaves the *balancing* of these two practices largely unregulated. However, there is still some guidance to be found in the Convention, in the case law of the Court and other instruments of the Council of Europe. The intention here is to narrow down the scope of this 'gap' with the help of named instruments.

To examine the above, the focus of the thesis is the following questions:

1. How are conscientious objection and access to abortion defined within the legal system of the Council of Europe?
2. How does the Council of Europe balance the interests of objecting healthcare providers and women with legal abortion rights, when these interests collide?
3. Does conscientious objection undermine legal abortion rights? If so, how is this demonstrated?

1.2 Method and Material

In order to answer the research questions I mainly use a rule-oriented approach, but also an interest- or problem-oriented approach. The interest- or problem-oriented approach indicates a focus, not on one specific legal rule, but rather on the social phenomenon as a whole.[12] The phenomenon of conscientious objection and its effect on access to lawful abortion spans across legal orders, both national and international, but also across several rules within the same legal order. Because of this, the interest- or problem-oriented approach is apt in the present framework. However, to be able to use this approach, it is necessary to identify and establish *de lege lata* in relation to the relevant interests. To establish and analyse if conscientious objection, as well as access to abortion, com-

[12] Westberg 1992, p. 436.

ply with de lege lata within the Council of Europe, the rule-oriented, legal dogmatic method, is applied to the relevant provisions of the CoE legal instruments.[13] This means that the main sources of law, such as the provisions of the Convention and the judgements of the ECtHR, together with the secondary sources of law, such as law reference books and articles on the subject, are used to provide an understanding of de lege lata.

In order to shed light on the legal 'gap' between conscientious objection and access to abortion within the Council of Europe system, a large number of European Court of Human Rights cases have been used throughout the thesis. In most of these cases, the information relevant to the present question have been extracted, but in six more relevant cases the merits are presented, and the cases are examined more thoroughly. I have chosen the cases because they are the most pertinent cases within the field; hence, they have not been chosen based on their geographic origin.

To facilitate a better understanding of the case law of the European Court of Human Rights, I have utilised articles and literature on the matter. Since there is little material addressing both conscientious objection to abortion and women's access to abortion, I have to a large part utilised articles and literature which discuss either of the two. As there is a limited supply of Swedish material regarding conscientious objection and access to abortion, the material is collected mainly from European and North American sources. Because the reason for examining the regulation on conscientious objection is to investigate whether it can be allowed to limit women's access to abortion, the material on conscientious objection has been extracted from Council of Europe publications, but also from critics of the practice.

To further clarify the standpoint of the Council of Europe in the matter I have utilised resolutions from the Parliamentary Assembly (hereinafter PACE or the Assembly) and decisions of the European Committee of Social Rights (hereinafter ECSR or the Committee).[14] Two recent cases from the ECSR have been examined in order to show national regulation on conscientious objection and abortion. One of these cases, a complaint against Italy, is used to show that conscientious objection can result in a lack of adequate reproductive health care in relation to women. Another case from the ECSR that has not yet been decided, was initiated as a complaint against Sweden due to the country's stance on the illegality of conscientious objection to abortion. Together these cases are used in order to show different aspects of the same issue and to highlight the issue by putting it into a specific context. The countries' legislation on abortion and conscientious objection in the countries is examined in order to illustrate

[13] Westberg 1992, pp. 421, 427-436.
[14] See more on these Council of Europe organs under section 1.3.

different legal techniques in the matter. As I speak both Italian and Swedish, I am able to take part of national legislation and literature from both countries.

The field of research integrates to some extent the different areas of law, medicine and ethics. The main scope is the legal regulation, but the other two fields are not without relevance for the thesis. This is reflected in the material, as a number of relevant articles are found in medical publications.

1.3 Denomination and Delimitation

The legal instruments and case law relevant for the study derive from the Council of Europe. The Council has its seat in Strasbourg and consists of six institutions and bodies with varying tasks.[15] Three of these, namely the European Court of Human Rights, the Parliamentary Assembly and the European Committee of Social Rights, play different roles in this thesis. As the only judicial human rights organ empowered to make legally binding judgments, the European Court of Human Rights provides interpretation of the European Convention on Human Rights.[16] The European Committee of Social Rights has recently provided a decision on conscientious objection and access to abortion in Italy and is to provide yet another decision in a case against Sweden. Through two resolutions, the Parliamentary Assembly has provided CoE Member States with recommendations regarding access to abortion and conscientious objection. The three organs work in different ways, and as such, address the relevant issue differently. As a result, they complement each other and make it possible to achieve a more comprehensive understanding of the subject. Legislation and case law of the *European Union* are excluded from the scope. Legislation from other international sources, such as the UN, is mentioned to put the rights mandated by the Council of Europe into context.

Because one of the focal concerns of this thesis is the lack of *access* to legal abortion, it falls outside the scope of this thesis to examine the situation regarding conscientious objection in countries where abortion is illegal. Having said this, the decisions and judgments of the ECtHR in which it evaluates the importance of access to abortion are remain relevant despite emanating from environments in which abortion is illegal, because the decisions and judgments are still applicable to all the Member States of the Council of Europe. A comparison between countries where conscientious objection is legal versus countries where it is not legal provides an interesting comparison and shows variations on women's access to abortion. Therefore, no CoE Member State is excluded from the scope of this thesis because of its stance on the legality or non-legality of conscientious objection.

[15] Evans and Silk 2013, p. 41.
[16] San Giorgi 2012, p. 92.

At least two different concepts are used for the individual decision by healthcare providers not to provide contraceptives or to perform an abortion. These concepts are 'conscientious objection' and 'conscientious refusal'. As 'conscientious objection' is the most recurring concept and the two concepts to a large extent are synonymous, I have chosen to utilise 'conscientious objection' for a more cohesive reading. 'Conscientious objection' also replaces the concept 'conscience clause', which is often used to describe national legislation recognising conscientious objection. When the word 'law' is used, it denotes national legislation in one or more of the Council of Europe Member States. As the perspective of this thesis is not limited to one specific country, I have chosen to utilise the expression 'healthcare provider' to describe those involved in the process of performing an abortion. This is because the distribution of responsibilities in relation to the task of performing an abortion changes between different countries as well as within different medical facilities. The professions included in the concept 'healthcare provider' are, *inter alia*, obstetricians, midwifes, gynaecologists, nurses, auxiliary nurses, administrative personnel and pharmacists. All of the above are in a position to hinder a woman from obtaining an abortion through their conscientious objection and are therefore of relevance for the thesis. Article 9 ECHR protects the right to freedom of thought, conscience and religion. As all the three freedoms are of importance to the contexts, they are at times joined in the expression *freedom of belief.*

Within the European Convention on Human Rights and the European Social Charter, there are several articles designed to protect different aspects of access to lawful abortion, primarily:

- The right to life in Article 2 ECHR
- The prohibition of torture in Article 3 ECHR
- The right to a fair trial in Article 6 ECHR
- The right to respect for private and family life in Article 8 ECHR
- The right to freedom of thought, conscience and religion in Article 9 ECHR
- The right to freedom of expression in Article 10 ECHR
- The right to marry in Article 12 ECHR
- The prohibition of discrimination in Article 14 ECHR
- The right to protection of health in Article 11 ESC and as interpreted in Articles 3, 6, 8 and 14 of the ECHR[17]

I have chosen to focus on three of these articles to be able to explore them adequately: the right to respect for private life in Article 8, the right to freedom of expression in Article 10 ECHR and the right to protection of health in Article 11 ESC. I have selected these articles based on the case law of the Court and

[17] *Cf.* chapter 4.1.

the decisions of the Committee, which show that these three articles have a particularly close connection to women's access to lawful abortions.

This thesis does not seek to discuss the moral permissibility or non-permissibility of abortion, since the focus is on countries where abortion is legal. For the same reason, it only addresses the question of the potential rights of the foetus in contexts where it is needed for the better understanding of the context. Within the present scope, only public medical institutions are addressed as the employer of objecting healthcare providers.

1.4 Outline

The focus throughout this thesis is human rights within the Council of Europe system, interconnected with access to a lawful abortion or conscientious objection. Neither conscientious objection within the healthcare context, nor the right to abortion, is explicitly recognised in the European Convention on Human Rights or the European Social Charter (hereinafter ESC or the Charter). However, as the case law and decisions of the European Court of Human Rights and the European Committee of Social Rights reveal, there is protection for some aspects of conscientious objection, as well as some aspects of access to abortion within the CoE. What these aspects are and to what extent the Council of Europe system protects them is gradually revealed.

Prior to entering the main part of the thesis, it is essential to have an understanding of which the relevant stakeholders are and their relation to one another. There are in total three relevant interests affected by CoE legal regulation concerning accessibility to abortion and conscientious objection. Firstly, the interests of women with existing or prospective needs for abortion to receive the medical treatment to which they are legally entitled. Secondly, there is the objecting healthcare provider's interest in a system that protects their preference not to perform certain professional obligations. Thirdly, there is the state's interest of acting in accordance with the European Convention on Human Rights and balancing the interests of its citizens. In addition to this, the state has an interest, as the employer of healthcare provider, in hiring medical staff that are capable of providing all medical care necessary, without discrimination, within their area of professional responsibility. Foreseeability is also a common interest of citizens when seeking medical care. Below in figure 1 is a schematic explanation of the relationships between the three relevant actors, the female citizen, the healthcare provider and the state.

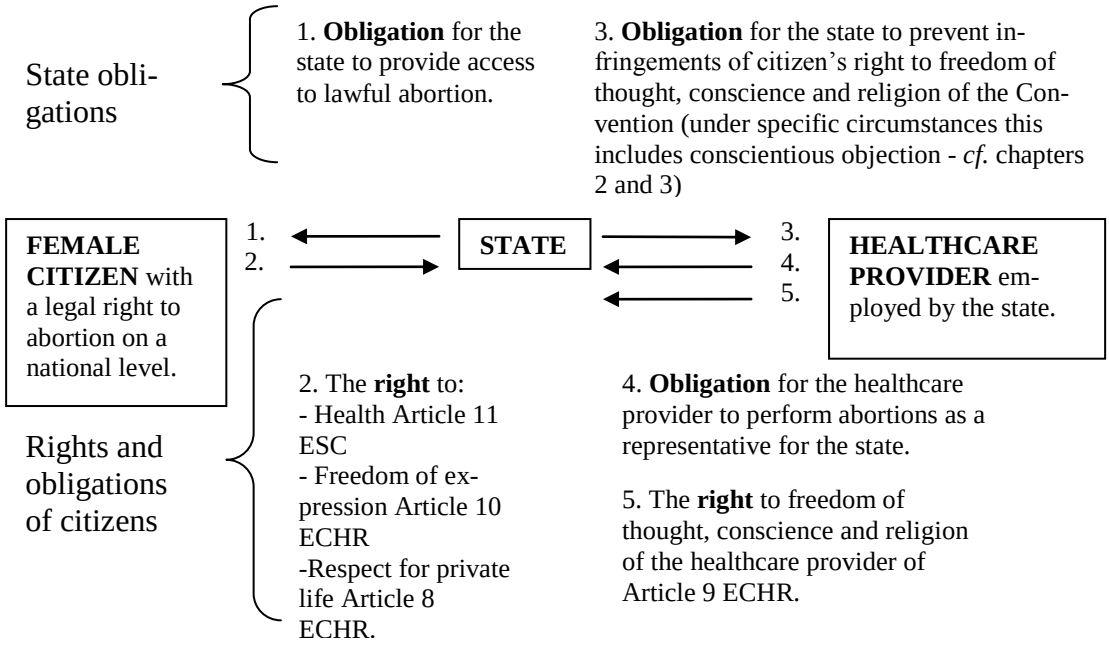

Figure 1. *Schematic view of relevant interests in relation to conscientious objection to abortion.* The right to abortion is established on a national level[18], but is also protected under the human rights instruments of the Council of Europe. The practice of conscientious objection to abortion, on the other hand, is not explicitly recognised under the human rights instruments of the Council, but under certain circumstances it might gain protection from Article 9 ECHR.[19] *Note:* Adapted from the European Convention on Human Rights and case law and doctrine referred in this thesis.

The numbered arrows in Figure 1 show the different rights and obligations that need to be taken into account by the state. The citizen holds no obligations towards the state in this matter, only the right to receive the medical care that the state should provide her with, according to national legislation.[20] The healthcare provider, on the other hand, as a representative of the state, has an obligation towards both the state and the women seeking abortion services. In terms of the woman, the healthcare provider has an obligation to represent the state and provide legal abortion, unless there is a valid ground for conscientious objection in national legislation. In relation to the state, the healthcare provider has an obligation to realise the services guaranteed by the state. As demonstrated by arrows 3 and 5 in Figure 1, the healthcare provider also has a right (corresponding to an obligation of the state) to enjoy the freedom of thought, conscience and religion, which at times include conscientious objection.[21]

[18] *Cf.* chapter 3.1.
[19] Zampas and Andión-Ibañez 2012, European Journal Of Health Law, p. 234.
[20] See below in chapter 4 on *Access to Lawful Abortion Services.*
[21] *Cf.* chapters 2 and 3.

If the interests of the healthcare provider interfere with the interests of the citizen, the state has an obligation to balance their respective interests in order to fulfil its undertakings in relation to the European Convention on Human Rights.[22] The practice of conscientious objection seems to be impeding women's access to lawful abortions. Because of this, it is important to study the scope, but primarily the limits of conscientious objection. Hence, a large part of the thesis focus on what conscientious objection is, and under what circumstances healthcare providers are allowed to object to performing an abortion. Chapter 2 introduces the reader to conscientious objection and its relation to the right to freedom of thought, conscience and religion of the Convention. The chapter also discusses the possibility of creating an analogy between conscientious objection to compulsory military service and conscientious objection in a healthcare context. The next chapter is somewhat an extension of chapter 2, since its focus is also on conscientious objection. It also addresses situations where the practice of conscientious objection impedes the rights and freedoms of others. Chapter 3 also evinces the manner in which CoE Member States and the Court share the responsibility of balancing the named interests.

When the limitations and the scope of conscientious objection have been defined as far as possible, and the balancing between the different interests has been addressed, the following chapter, Chapter 4, is concerned with access to lawful abortion in a CoE context. It examines to what extent the legal instruments of the CoE protect women's right to access legal abortion services. It studies the right to protection of health, the right to respect for private life and the right to freedom of expression, mainly with the assistance of relevant case law of the European Court of Human Rights. Chapter 5 introduces Italy and Sweden as examples of the conflict between conscientious objection and access to abortion, while chapter 6 provides an analysis and conclusions on the issue at hand.

[22] *A, B and C v. Ireland*, application no. 25579/05, ECtHR Grand Chamber Judgment of 16 December 2010, para. 249.

2 Conscientious Objection

Conscientious objectors frequently invoke Article 9 ECHR on the right to freedom of thought, conscience and religion to motivate their objection. Chapter 2 mainly discusses whether the practice of conscientious objection falls within the ambit of Article 9 ECHR or not. As it is not clearly regulated in the Convention or stated by the Court whether conscientious objectors in the healthcare field are entitled to protection as a human right, this chapter examines Article 9 of the Convention and its provisions. One of its provisions is the *freedom to manifest one's religion or beliefs*. This provision is examined in order to establish to what extent it corresponds with the traits of conscientious objection.

Legal standards regulating conscientious objection in the healthcare setting are, as expressed by Christina Zampas and Ximena Andión-Ibañez in the European Journal of Health Law, inadequate in relation to the complexity of the practice.[23] Because of the lack of regulation, this chapter also discusses whether it is possible to make an analogy between conscientious objection to compulsory military service and conscientious objection in a healthcare setting or not. The reason for this is that the Court has recognised a right to conscientiously object to *compulsory military service* in the case Bayatyan v. Armenia from 2011.

2.1 Freedom of Thought, Conscience and Religion

Few people would probably disagree that the freedom from state interference with the thought, conscience and religion of state citizens is a rudimentary component in a democratic society.[24] Article 9 of the European Convention on Human Rights (ECHR or the Convention) safeguards these freedoms. In interpreting Article 9 ECHR, the European Court of Human Rights accentuates the fact that the main objective of the first paragraph of the article is to protect the right to *hold* any belief and the right to change that belief at any time. In relation to the freedom of religion, the European Court of Human Rights holds that "[r]eligious freedom is primarily a matter of individual thought and conscience".[25] This is the notion known as the *forum internum* of Article 9 ECHR.[26] In order for a personal belief to qualify for the forum internum protection of the Convention, the belief has to attain a certain level of cogency, seri-

[23] Zampas and Andión-Ibañez 2012, European Journal Of Health Law, p. 232.
[24] *Cf.* ECtHR statements regarding the necessity of creating pluralism in a democratic society; *Eweida and Others v. The United Kingdom* (Application nos. 48420/10, 59842/10, 51671/10 and 36516/10) ECtHR Judgment of 25 May 2013, para. 79, *Kokkinakis v. Greece* (Application no. 14307/88) ECtHR Judgment of 25 May 1993, para. 31.
[25] *Kokkinakis v. Greece* (Application no. 14307/88) ECtHR Judgment of 25 May 1993, para. 31.
[26] Maher 2014, International and Comparative Law Quarterly, p. 215.

ousness, cohesion, importance and an identifiable formal content.[27] It is not enough to hold a mere thought or statement of belief. To that extent, personal belief qualifies for the forum internum aspect of Article 9 ECHR, and the Convention protects this internal right as an absolute right.[28]

2.2 A Relative Freedom to Manifest Beliefs

Compared to the forum internum, the *forum externum*[29], the right to *manifest* religion or belief, may affect other people as well as the state and this right is not absolute. The interests of others may, in accordance with Article 9 § 2 ECHR, limit the exercise of acts or omissions with religious justification under certain conditions.[30] This was the case in Pichon and Sajous v. France[31], where the European Court of Human Rights did not allow two pharmacists to impose their religious belief on others, since they could manifest their belief in many ways outside the professional sphere.

A central question is how an act or omission qualifies to become a manifestation of belief in the meaning of Article 9 ECHR. The previous definition was that if the act or omission was 'intimately linked' to a belief or faith, it qualified as a manifestation of said faith, and as such it could gain protection from the Convention. This definition typically comprised acts, which were "[…] aspects of the practice of a religion or belief in a generally recognised form"[32], such as worship, teaching, practice and observance.[33] This definition is still in use, however, in one of its cases (the Eweida case described below[34]) the ECtHR established that manifestation of religion is not limited to these acts. As long as it is possible to establish a "sufficiently close and direct connection between an act or omission and the underlying belief"[35], after careful consideration of the circumstances in each case, the act or omission may be defined as a manifestation of religion or belief within the definition of Article 9 ECHR.[36]

---

[27] *Campbell and Cosans v. the United Kingdom* (Series A, No. 48)ECtHR Judgment of 25 February 1982, para 36 and Renucci 2005, Human Rights Files, p. 12.
[28] *Eweida and Others v. The United Kingdom* (Application nos. 48420/10, 59842/10, 51671/10 and 36516/10) Judgment of 25 May 2013, para. 80.
[29] Maher 2014, International and Comparative Law Quarterly, p. 215.
[30] *Eweida and Others v. The United Kingdom* (application nos. 48420/10, 59842/10, 51671/10 and 36516/10) Judgment of 25 May 2013, para. 80.
[31] See chapter 3.3.1.
[32] *Kuznetsov and Others v. Russia* (Application no. 184/02) ECtHR Judgment of 11 January 2007, para. 57, *Kalaç v. Turkey* (Application no. 20704/92) ECtHR Judgment of 1 July 1997, para. 27.
[33] *Skugar and Others v. Russia* (Application no. 40010/04) ECtHR Admissibility Decision of 3 December 2009, p. 6 and Article 9 ECHR.
[34] The Eweida case is discussed in more detail in section 3.3.2.
[35] *Eweida and Others v. The United Kingdom*, application nos. 48420/10, 59842/10, 51671/10 and 36516/10, Judgment of 25 May 2013, para. 82.
[36] *Eweida and Others v. The United Kingdom*, application nos. 48420/10, 59842/10, 51671/10 and 36516/10, Judgment of 25 May 2013, para. 82.

The breadth of the provision pertaining to the qualification of behaviour motivated or influenced by religion or belief as a manifestation of said convictions, depends on how closely connected the behaviour and the belief are.[37] In the above case, the Court has stated that:

> "[...]acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of Article 9 § 1"[38].

When applying these prerequisites to conscientious objection, there is no definite answer as to when conscientious objection might be defined as a manifestation of belief. This is dependent on the situation and is evaluated first hand by the state and second by the Court, if there is a case before it. Below is a schedule showing a way to evaluate if an act or omission based on an underlying belief might constitute a manifestation of belief within the meaning of Article 9 ECHR.

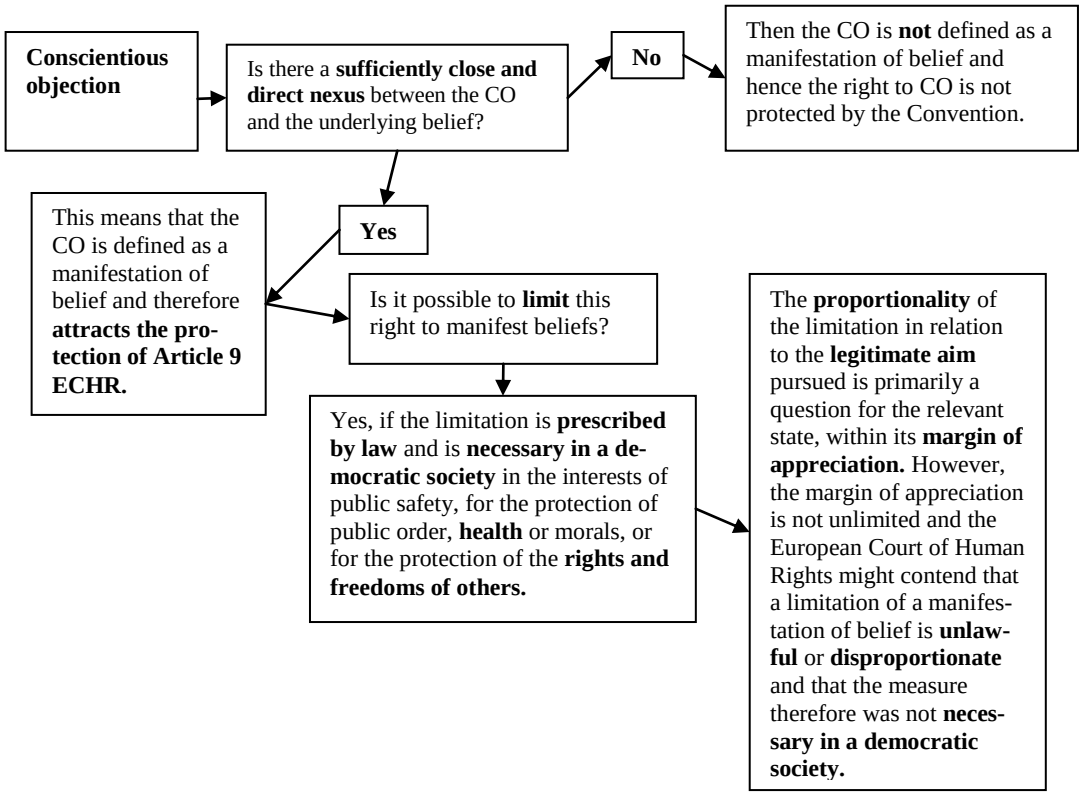

Figure 2. *Manifestation of belief.* This schedule shows the way the ECtHR decides if a conscientious objection qualifies as a manifestation of belief in the meaning of Article 9 ECHR, and what limitations the ECtHR allows the state to impose on a manifestation of belief. *Note:* Adapted from the case Eweida and Others v. the United Kingdom, Article 9 ECHR and Arai-Takahashi 2002, pages 2, 8, 9, 12, 219, 220 and 231.

[37] *Skugar and Others v. Russia* (Application no. 40010/04) ECtHR Decision, 3 December 2009, p. 6.
[38] *Eweida and Others v. The United Kingdom* (Application nos. 48420/10, 59842/10, 51671/10 and 36516/10) Judgment of 25 May 2013, para. 82.

The conscientious objection of a healthcare provider that meet the requirements to be defined as a manifestation of belief might receive protection from Article 9 ECHR on freedom of thought, conscience and religion, but as shown in Figure 2 above, it may also be subject to limitations.[39] According to Article 9 § 2 ECHR manifestation of belief can be derogated against *inter alia* in regard to protection of health or the protection of the rights and freedoms of others, as long as the limitation is "prescribed by law" and is "necessary in a democratic society".[40] The corollary being that it might be possible to limit the right to conscientiously object in states where there is a legal right to abortion, as long as the right to abortion is "prescribed by law" and is "necessary in a democratic society". These concepts are described further in the chapter on *the State Margin of Appreciation*.[41]

2.3 A Comparison of Conscientious Objection in Two Different Fields

This section provides an idea of what protection the Convention offers conscientious objectors in two different fields, the military and the healthcare context. The reason for a comparison to the military is that this is the only context in which conscientious objection has been explicitly recognised by the Court and in which it has gained protection by the Convention.

Nothing within the European Convention on Human Rights expressly grants an individual the right to conscientiously object.[42] However, even if there is no explicit right, the Court may interpret a protection in the Convention, because it is a living instrument that is adaptable to a changing consensus within the CoE. This is known as an "evolutive interpretation" of the Convention.[43]

In Bayatyan v. Armenia from 2011[44], the European Court of Human Rights examined the issue of the applicability of Article 9 ECHR to conscientious objectors within the military. The reason to include this case is purely because this is the only case where the European Court of Human Rights has explicitly recognised a right to conscientiously object. It is however important to keep in mind that this case concerns conscientious objection within the military which is very different from conscientious objection in a healthcare setting.

In this case, the European Court of Human Rights recognised the right to conscientiously object to performing *compulsory military service*. Prior to this

[39] Article 9 § 2 ECHR.
[40] Article 9 § 2 ECHR.
[41] *Cf.* chapter 3.1.
[42] The European Convention on Human Rights in full.
[43] *R.R. v. Poland* (Application no. 27617/04) ECtHR Judgment of 26 May 2011, para. 186.
[44] *Bayatyan v. Armenia* (Application no. 23459/03) European Court of Human Rights GC Judgment of 7 July 2011.

case, it was only clear that Article 9 ECHR offered protection to the *forum internum*, but not whether this also applied to the forum externum or not.[45] In Bayatyan v. Armenia, the European Court of Human Rights articulated that certain cases of manifestations against compulsory military service might attract the guarantees of Article 9 ECHR on freedom of thought, conscience and religion.

2.3.1 Bayatyan v. Armenia

In the Bayatyan v. Armenia case, the applicant, who was a member of Jehovah's Witnesses, conscientiously objected against partaking in the mandatory military service of Armenia with reference to his religious beliefs.[46] The applicant made known to the authorities that he would prefer to serve within an alternative civil service instead. However, contrary to most Council of Europe Member States, Armenia did not offer an alternative civilian service as a substitute to the compulsory military service at the time.[47]

Upon the accession to the Council of Europe, the Armenian state committed to adopting a law making alternative service available for conscientious objectors.[48] Until the enactment of that law, the state also undertook to pardon all objectors from their prison or service sentences and allow them to perform an alternative civilian service instead.[49] The law had not been enacted yet and discordant with the latter commitment, Bayatyan was prosecuted and convicted for his refusal to partake in the military service.[50] He alleged that "his conviction for refusal to serve in the army had violated his right to freedom of thought, conscience and religion."[51]

The European Commission of Human Rights (the Commission) was until 1998 a part of the system ensuring state observance of the ECHR.[52] The Commission had several opportunities to examine the issue of conscientious objection in relation to military service. It repeatedly reaffirmed in its case law that there was no right to conscientious objection among the rights and freedoms guaran-

[45] van Dijk and van Hoof 1998, p. 543.
[46] *Bayatyan v. Armenia* (Application no. 23459/03) European Court of Human Rights GC Judgment of 7 July 2011, para 111.
[47] Muzny 2012, Human Rights Law Review, p. 136.
[48] PACE, Armenia's application for membership of the Council of Europe, 28 June 2000, Opinion No 221, para. 13.
[49] *Bayatyan v. Armenia* (Application no. 23459/03) European Court of Human Rights GC Judgment of 7 July 2011, para. 127.
[50] Armenia still had two more years to comply with the demands of the Council of Europe - See Muzny 2012, Human Rights Law Review, p. 136.
[51] *Bayatyan v. Armenia* (Application no. 23459/03) European Court of Human Rights GC Judgment of 7 July 2011, para. 3.
[52] Bates 2010, p. 16.

teed by the Convention.[53] The Commission based this reasoning on the existence of Article 4 § 3 (b) of the Convention and the fact that there is no explicit right to conscientious objection in the European Convention on Human Rights.

Article 4 § 3 (b) ECHR *excludes from the notion of forced labour*[54] "any service of a military character or, in case of *conscientious objectors* in countries where they are recognised, service exacted instead of compulsory military service".[55] The Commission argued that by adding the words "in countries where they are recognised"[56], the Convention left a choice to the High Contracting Parties whether or not to recognise conscientious objectors. It follows from this argumentation that Article 9 ECHR, as qualified by Article 4 § 3 (b), does not impose an obligation on the states to acknowledge conscientious objectors or to "make special arrangements for the exercise of their right to freedom of conscience and religion as far as it [affects] their compulsory military service"[57]. As a result, a state that does not acknowledge the right to conscientiously object would have the right to punish citizens for refusing to do military service.[58] If applied to the case of Bayatyan v. Armenia, this would mean that imprisoning the applicant would be lawful and would not result in damages for the state.

The later reasoning of the European Court of Human Rights, however, differs from the reasoning of the Commission.[59] The European Court of Human Rights contends that Article 4 § 3 (b) neither recognises nor excludes a right to conscientious objection. Because of this, it argues that the article should not have a limiting effect on the exercise of the rights under Article 9 ECHR.[60] The Court contended that the reasoning by the Commission, excluding the possibility to conscientiously object to compulsory military service from the scope of Article 9 ECHR, was obsolete. It was obsolete because the development of the international and domestic perspectives on refusing mandatory military service shifted substantially after the Commission's last decision on the matter in 1995.[61]

Despite the fact that the Convention holds no explicit right to conscientious objection, the European Court of Human Rights argued in Bayatyan v. Armenia

[53] *Bayatyan v. Armenia* (Application no. 23459/03) European Court of Human Rights GC Judgment of 7 July 2011, paras. 93 - 96.
[54] On forced labour see Article 4 § 2 ECHR.
[55] Article 4 § 3 (b) ECHR.
[56] Article 4 § 3 (b) ECHR.
[57] *Bayatyan v. Armenia* (Application no. 23459/03) European Court of Human Rights GC Judgment of 7 July 2011, para. 94.
[58] *Bayatyan v. Armenia* (Application no. 23459/03) European Court of Human Rights GC Judgment of 7 July 2011, para. 94.
[59] *Bayatyan v. Armenia* (Application no. 23459/03) European Court of Human Rights GC Judgment of 7 July 2011, paras. 100 - 101.
[60] *Bayatyan v. Armenia* (Application no. 23459/03) European Court of Human Rights GC Judgment of 7 July 2011, paras. 100.
[61] *Bayatyan v. Armenia* (Application no. 23459/03) European Court of Human Rights GC Judgment of 7 July 2011, para. 101.

that conscientious objection could attract the protection of Article 9 ECHR. A prerequisite for this was that the belief behind the objection constituted a belief of sufficient *cogency, seriousness, cohesion and importance* to motivate an objection to compulsory military service.[62] The objection also had to be motivated by:

> [...] a *serious and insurmountable conflict* between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs [emphasis added]"[63]

Notwithstanding this view, the Court clarified that the assessment regarding the qualification under these provisions needs to be done in consideration of the special circumstances of the particular case.[64] In this case the Court argued that the Armenian state failed to strike a fair balance between the interests of society as a whole and the interests of the individual by not providing an alternative civil service as a substitute to the compulsory military service and by prosecuting and convicting the applicant.[65] It considered that the applicant, instead of sharing the societal burden and fulfilling an alternative civil service had to serve a prison sentence.[66] This penalty could not be considered a measure necessary in a democratic society.[67]

2.3.2 An Analogy to the Healthcare Context

The above gives an account of the prerequisites to gain the right to conscientiously object to *compulsory military service*. This is the only area in which conscientious objection has been internationally recognised and the only area in which it to some extent has earned protection as a human right. Apart from the European Convention on Human Rights, the United Nations International Covenant on Civil and Political Rights (ICCPR) also recognises conscientious objection against performing obligatory military service.[68] There is, however, no similar right established within the healthcare field.[69]

---

[62] *Bayatyan v. Armenia* (Application no. 23459/03) European Court of Human Rights GC Judgment of 7 July 2011, para. 110.
[63] *Bayatyan v. Armenia* (Application no. 23459/03) European Court of Human Rights GC Judgment of 7 July 2011, para. 110.
[64] *Bayatyan v. Armenia* (Application no. 23459/03) European Court of Human Rights GC Judgment of 7 July 2011, para. 110.
[65] *Bayatyan v. Armenia* (Application no. 23459/03) European Court of Human Rights GC Judgment of 7 July 2011, para. 124.
[66] *Bayatyan v. Armenia* (Application no. 23459/03) European Court of Human Rights GC Judgment of 7 July 2011, para. 125.
[67] *Bayatyan v. Armenia* (Application no. 23459/03) European Court of Human Rights GC Judgment of 7 July 2011, para. 124.
[68] *Bayatyan v. Armenia* (Application no. 23459/03) European Court of Human Rights GC Judgment of 7 July 2011, para. 110 and Article 18 ICCPR.
[69] There is no such right in the ECHR or in the ECSR, compare however how the ECtHR weighs the national legislation on the alleged rights of the foetus in *A,B and C v. Ireland* (Application no. 25579/05) Judgment of 16 December 2010, para. 227.

One could argue that it is possible to make an analogy between conscientious objection in the military and conscientious objection in a healthcare context.[70] However, conscientious objection towards *compulsory* obligations that a state forces upon its citizens is substantially different from conscientious objection against performing work tasks within an employment into which the employee has entered on a *voluntary* basis. Even though it might have significant consequences to resign from a job in order to fully be able to manifest one's beliefs[71], it is not equal to being forced into a job, which might also entail coercion to exert deadly violence, and where it is impossible to resign. Due to the said nature of the work as well as the degree of state interference, the result in Bayatan v. Armenia can be distinguished from conscientious objection in a healthcare setting in a number of ways. Primarily because a healthcare provider is not coerced to train to become a doctor or midwife or forced to work in a setting where he or she has to perform abortions.

Another difference is that if an individual refuses to perform mandatory military service, the refusal does not directly infringe the human rights or access to human rights of others. If everyone refused to partake in mandatory military service, those refusals would, quite oppositely, result in less harm to others. Within the healthcare field, the ramifications could be different. If a medical doctor decides to refuse to provide a woman with an abortion or information regarding abortion due to conscientious conviction and if there at the same time are no other healthcare providers to perform the procedure, it infringes her access to lawful medical care. In these cases, a woman is directly affected if a healthcare provider chooses not to assist her, since there is no other way for her to obtain a lawful abortion.

The *ratio decidendi* of Bayatyan v. Armenia was that the High Contracting Parties to the Convention may no longer prosecute a conscientious objector on the grounds of the objection, in case the refusal is genuine[72] and if he or she wishes to perform an alternative civilian service as a substitute for regular military service.[73] The Court argued that in not providing a substitute civilian service, the Armenian state failed to strike a fair balance between the interests of society as a whole and those of the applicant within its margin of appreciation. There is no indication that the European Court of Human Rights would have allowed someone to conscientiously object towards performing the substitute civilian service. In fact, Article 4 § 3 (b) ECHR[74] states the exact opposite. A conscientious objector that refuses to perform alternative civilian service in a

[70] See for instance: *FAFCE v. Sweden* (Complaint No. 99/2013) ECSR, March 2013, p. 24.
[71] Compare the 'free-contract' doctrine below in Section 3.3.2 *Eweida and Others v. UK*
[72] See the previous page: a refusal is genuine if it constitutes a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his/her *deeply* and *genuinely held* religious or other beliefs and if it constitutes a conviction or belief of *sufficient cogency*, *seriousness*, *cohesion* and *importance.*
[73] Muzny 2012, Human Rights Law Review, p. 135.
[74] See section 2.3.1 above.

country where that possibility is offered cannot rely on the protection of the Convention.[75] This shows that even if conscientious objection might be recognised by the Council of Europe in matters concerning objection to perform compulsory military service, there are limitations to the scope of this right, just as it would be with a recognised right to conscientious objection within any other field. That limitation serves to protect the interest of the state and the rights and freedoms of others.

[75] Article 4 § 3 (b) ECHR e contrario.

3 Conscientious Objection and Opposing Interests

The previous chapter gave rise to a number of questions in relation to when a conscientious objection can be classified as a manifestation of belief. The case of Bayatyan v. Armenia showed that there is a right to conscientiously object to compulsory military service and that this right gains protection from the Convention under specific circumstances. This, however, does not answer the question of the status of conscientious objection in the healthcare context, seeing that this context automatically provides an opposed interest to that of the objector. This question has not been answered directly by the Convention and only partly by the Court. Hence, in order to answer this question, other principles of the Court and recommendations from other institutions of the Council of Europe are examined in this chapter. The principle of 'margin of appreciation' gives good guidance in showing how conflicts between competing interests are usually resolved within the Council. Policy decisions from another organ of the CoE, the Parliamentary Assembly, show recommendations given to the Member States of the CoE in the matter.

3.1 The State Margin of Appreciation

When comparing rights to one another, as in the context of conscientious objection and access to lawful abortion, there must be a method of prioritising the two. This ranking is made primarily by the CoE Member States, within their *margin of appreciation*, but also by the European Court of Human Rights, if the alleged victim of human rights violations by said states brings a case to the Court. The margin of appreciation is the scope of freedom CoE Member States enjoy when they are fulfilling their obligations under the Convention.[76]

This freedom includes the possibility for a state to restrict and balance the rights of its citizens. However, states do not have a margin of appreciation in relation to every single right in the Convention. There are absolute rights that cannot be derogated from, and in relation to those rights, the Strasbourg organs have refused to recognise a margin of appreciation.[77] An example of such a right is the right to freedom from torture in Article 3 ECHR.
In cases concerning the morals of state citizens and in cases where there is no clear consensus between the CoE Member States, the European Court of Human Rights has expressed that the Member States enjoy a wide discretion in

[76] Arai-Takahashi 2002, p.2.
[77] Arai-Takahashi 2002, p. 219 - 220.

balancing the Convention rights involved.[78] For example, the Court stated in the case Vo. V. France that there was no European consensus on the scientific and legal definition of when life begins.[79] Hence, the question of when life begins, and therefore the question whether the right to life under Article 2 ECHR applies to the foetus or not, falls within the states' margin of appreciation.[80]

Yutaka Arai-Takahashi, who has analysed the margin of appreciation in the case law of the Court in detail[81], alleges that the Court has specifically recognised a margin of appreciation in three contexts. These circumstances are 'cases involving certain specified rights and freedoms', in relation to 'non-discrimination' under Article 14 ECHR and with regards to 'derogation under a state of emergency' under Article 15 ECHR.[82] The rights relevant in this context are included in the group 'certain specified rights and freedoms' and comprise of the right to respect for private and family life in Article 8 ECHR, the right to freedom of thought, conscience and religion in Article 9 ECHR and the right to freedom of expression in Article 10 ECHR.[83]

In these three articles, there are limitation clauses within their second paragraphs. When the ECtHR has found an interference with the right expressed in the Article, the interference has to be examined in relation to three standards in these limitation clauses. The three standards are as follows: that the state interference has to be 'prescribed by law', it has to pursue a 'legitimate aim'[84] and it has to be 'necessary in a democratic society'. It is the third standard that is most relevant when it comes to the margin of appreciation. Arai-Takahashi holds that in order to be necessary in a democratic society, the reasons for the interference must be both 'relevant and sufficient' as well as representing a 'pressing social need'.[85] The fact that the state interference to an individual right has to be motivated by a pressing social need means that it must be *proportionate* in relation to the legitimate aim pursued. It is in relation to the proportionality and in deciding if there is a pressing social need that the states are provided with a margin of appreciation. [86]

In relation to rights where states have a margin of appreciation, the state must consider the fact that the breadth of the margin may differ from time to time,

[78] *Open Door and Dublin Well Woman v. Ireland* (Application No. 14234/88; 14235/88) European Court of Human Rights Judgment of 29 October 1992, para. 68.
[79] *Vo. v. France* (Application no. 53924/00) ECtHR Judgment of 8 July 2004, para. 84.
[80] *Vo. v. France* (Application no. 53924/00) ECtHR Judgment of 8 July 2004, para. 82.
[81] In "*The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR",* Arai-Takahashi 2002.
[82] Arai-Takahashi 2002, p.8.
[83] Arai-Takahashi 2002, p.9. Apart from these rights, the right to freedom from discrimination in Article 14 might also be of some relevance in the context of this thesis.
[84] The legitimate aims are exhaustively laid down in the second paragraphs of Articles 8-11 ECHR.
[85] Arai-Takahashi 2002, p.12.
[86] Arai-Takahashi 2002, p.12.

depending on the nature of the right that has been restricted by the state and the aim of the restriction.[87] For instance, in regards to the right to respect for private and family life in Article 8 ECHR, the European Court of Human Rights has stated that where state limitations affect "[the] most intimate part of an individual's private life"[88] states need a *particularly serious reason* in order to strike a balance that interferes with the said right.[89]

States generally enjoy a broad margin of appreciation with regards to abortion, which means that it is for the state to decide if it should be legal or not, and to define in which circumstances it should be allowed.[90] However, once a state has decided to legalise abortion, the state is obliged to ensure that the national legal framework is in accordance with the obligations emanating from the Convention.[91] In relation to Article 9 the states generally enjoy a wide margin of appreciation as well.[92] Because of this, Mark Campbell argues in an article in *Medical Law International* that the ECtHR should award states a wide margin of appreciation in applying Article 9 in cases where conscientious objection has been invoked.[93]

Even if a certain matter is generally within the state's discretion and a state has evaluated the proportionality of an infringement in relation to a pressing social need, the European Court of Human Rights may still scrutinise the state's deliberation when striking a balance between Convention rights. For example, the Court stated in Open Door and Dublin Well Woman v. Ireland that a state's balancing of rights with regards to the protection of morals within its margin of appreciation is not unreviewable. Thus, restrictions or penalties imposed on citizens may be subject to the European Court of Human Rights' supervision even if the question per se is within a state's margin of appreciation.[94]

---

[87] Steiner et al., 2008, p. 975 and *Lustig-Prean And Beckett v. The United Kingdom* (Applications Nos. 31417/96;32377/96) European Court of Human Rights Judgment of 27 September 1999, paras. 81-82.
[88] Steiner et al., 2008, p. 975 and *Lustig-Prean And Beckett v. The United Kingdom* (Applications Nos. 31417/96;32377/96) European Court of Human Rights Judgment of 27 September 1999, paras. 81-82.
[89] Steiner et al., 2008, p. 975 and *Lustig-Prean And Beckett v. The United Kingdom* (Applications Nos. 31417/96;32377/96) European Court of Human Rights Judgment of 27 September 1999, paras. 81-82.
[90] *A, B and C v. Ireland* (Application no. 25579/05) Judgment of 16 December 2010, paras. 231-238.
[91] *A, B and C v. Ireland* (Application no. 25579/05) Judgment of 16 December 2010, para. 249.
[92] Campbell 2011, Medical Law International, p. 302.
[93] Campbell 2011, Medical Law International, p. 302.
[94] *Open Door and Dublin Well Woman v. Ireland* (Application No. 14234/88; 14235/88) Judgment of 29 October 1992, para. 68 and *Norris v. Ireland* (Series A no. 142) Judgment of 26 October 1988, para. 45.

However, Arai-Takahashi stresses, that the doctrine of the margin of appreciation has been criticised.[95] One such criticism is that there is no substantive basis for the margin of appreciation in the Convention. Another more alarming critique is whether or not the application of the doctrine is compatible with the notion of human rights. As the essence of human rights is that individual rights should be protected against the main subjects of public international law, the states, it is considered contradictory that there is a doctrine limiting this right.[96]

Another aspect of the margin of appreciation that has been criticised is the fact that there are no express rules on its application and because of this, the application has been considered inconsistent and unforeseeable.[97] This creates a problem in relation to the rights discussed in the context of this thesis since it makes it hard, if not impossible, to foresee to what extent those rights are under the supervision of the Court, and to what extent they are under the supervision of the states within their margin of appreciation.

3.2 Policy Decisions

As established in the previous section, CoE Member States usually enjoy a wide margin of appreciation in striking a fair balance between competing Convention rights, such as conscientious objection if it qualifies as a manifestation under Article 9 ECHR and women's right to lawful abortions under Articles 8 and 10 ECHR and 11 ESC. In this balancing of interests, the states may take advice from other CoE institutions. The Parliamentary Assembly of the Council of Europe provides advice or policy decisions that can serve as guidelines for the Member States.[98] The Statute of the PACE refers to these policy decisions or advice as recommendations. The Assembly can also communicate these recommendations in the form of resolutions.[99] These recommendations or resolutions are proposals aimed to be implemented by national governments at will[100] and are not legally binding to states.[101]

Two Resolutions of the PACE that are regularly referred to in relation to conscientious objection and access to lawful abortion are Resolution 1607 (2008) *Access to safe and legal abortion in Europe* and Resolution 1763 (2010) *The right to conscientious objection in lawful medical care.* Their perspective on

[95] Arai-Takahashi 2002, p.231.
[96] Arai-Takahashi 2002, p.231.
[97] Arai-Takahashi 2002, p.231.
[98] Statute of the Council of Europe, ETS no. 001, London, 5.V.1949. The Committee of Ministers comprises Foreign Affairs Ministers of all the Member States of the Council of Europe, and it monitors Member States' compliance with their undertakings, *cf.* Evans and Silk pp. 45 - 53.
[99] Evans and Silk 2013, p. 230.
[100] Evans and Silk 2013, p. 230.
[101] Articles 22-23 in the Statute of the Council of Europe establish the competencies of the Parliamentary Assembly of the Council of Europe. An e contrario reading of these articles indicates that its recommendations are not legally binding on states.

the issue differs, but they both establish that a conscientious objection should not hinder *real access* to lawful abortion. Since resolutions from the PACE are not legally binding to CoE states, the two Resolutions do not oblige Council of Europe Member States to act. Because of the advisory function of the Assembly, its recommendations may however have a persuasive impact on the reasoning of the CoE Member States.

Resolution 1607 (2008) *Access to safe and legal abortion in Europe* calls on Council of Europe Member States to *inter alia* guarantee women's effective exercise of their right to safe and legal abortion and to remove restrictions that hinder *de jure* and *de facto* access to abortion. The Resolution also recommends the CoE Member States to provide access to affordable contraception for men and women and to provide comprehensive sexuality education for young people.[102]

In addition to this, the Resolution points out that the lack of healthcare providers that are willing to carry out lawful abortions might affect women's effective access to safe, affordable, acceptable and appropriate abortion services in the Member States.[103]

A concern of the Assembly is that many of the Member States impose conditions upon the access to lawful abortion services, with the effect of restricting the access to legal abortions. According to the Assembly, the provisions imposed by the Member States could have a discriminatory effect amongst women, making it easier for women with access to information and sufficient financial means to obtain legal and safe abortions.[104] In the Resolution, the Assembly: "[...] affirms the right of all human beings, in particular women, to respect for their physical integrity and to freedom to control their own bodies. In this context, the ultimate decision on whether or not to have an abortion should be a matter for the woman concerned, who should have the means of exercising this right in an effective way."[105] However, the Assembly also points out that there is a need to reduce the number of induced abortions and that that the procedure is not to be used as a method of family planning.[106]

Resolution 1763 *The right to conscientious objection in lawful medical care* consists of four paragraphs and aim to encourage states to ensure women's access to lawful medical care and the right to health in parallel with the right to freedom of thought, conscience and religion of a healthcare provider. The Parliamentary Assembly invite Council of Europe Member States to secure the right to conscientious objection in relation to abortion. However, the language

[102] Resolution 1607 (2008) the Parliamentary Assembly of the Council of Europe.
[103] Resolution 1607 (2008) the Parliamentary Assembly of the Council of Europe, para. 3.
[104] Resolution 1607 (2008) the Parliamentary Assembly of the Council of Europe, para. 2.
[105] Resolution 1607 (2008) the Parliamentary Assembly of the Council of Europe, para. 6.
[106] Resolution 1607 (2008) the Parliamentary Assembly of the Council of Europe, para. 1.

in the resolution suggests that, apart from individuals, hospitals and institutions should also hold the right to conscientiously object. The European Commission on Human Rights has clarified that hospitals and institutions are not entitled to enjoy the right to freedom of conscience under Article 9 ECHR as this is an individual right. Established human rights, therefore, run contrary to this proposition.[107]

The main objective of the Resolution is to strike a balance between an option for healthcare providers to conscientiously object and the right to access lawful medical care. In Paragraph 2 of the resolution, the Parliamentary Assembly expresses its concern that "...the unregulated use of conscientious objection may disproportionately affect women, notably those with low incomes or living in rural areas"[108]. This indicates that it is mainly in regards to women's interest to *access* their legally granted rights that the resolution seeks to establish a clearly regulated use of conscientious objection.

Furthermore, the Parliamentary Assembly recommends Member States to ensure that patients receive information in a *timely manner* when a health-care provider has conscientiously refused to treat a patient. It also invites the states to ensure that patients receive appropriate treatment in all situations, but particularly in situations of emergency.[109]

3.3 Opposing Interests and the European Court of Human Rights

This subchapter examines two cases from the European Court of Human Rights where conscientious objection is one component, and the opposing interest of others who are affected by the refusal is the other. The cases also have in common that the conscientious objector was in his or her professional role when objecting. The first case, Pichon and Sajous v. France concerned two pharmacists who conscientiously objected to selling legal contraceptives to three women. The second case, Eweida and Others v. the United Kingdom, concerned four applications, two of which are of relevance for this context. The issue in these two cases was that the applicants refused to provide same-sex couples with partnership ceremonies and psychosexual therapy.[110]

[107] *Kontakt-information-Therapie and Hagen v. Austria* (Application No. 11921/86) European Commission of Human Rights, Admissibility decision of 12 October 1988, para. 1 and *Federation of Catholic Family Associations in Europe (FAFCE) v. Sweden Complaint No. 99/2013*, Case document No. 5, third-party intervention, 9 January 2014, para.21.
[108] Resolution 1763 (2010) the Parliamentary Assembly of the Council of Europe, para. 2.
[109] Resolution 1763 (2010) the Parliamentary Assembly of the Council of Europe, para. 4.
[110] *Eweida and Others v. The United Kingdom* (Application nos. 48420/10, 59842/10, 51671/10 and 36516/10) ECtHR Judgment of 25 May 2013, paras. 7 - 40.

3.3.1 Pichon and Sajous v. France

The case Pichon and Sajous v. France[111] is of interest because it provided the ECtHR with an opportunity to evaluate the applicability of Article 9 ECHR on conscientious objection within the sphere of healthcare. Hence, the Court had to evaluate the balance struck by the Government between the competing interests.

The application concerned conscientious objection by two pharmacists refusing to sell contraceptives to three women with reference to religious conviction. The pharmacists claimed under Article 9 ECHR to the European Court of Human Rights that their refusal amounted to a manifestation of religion and that their right to freedom of religion was not given fair consideration during the national trial.[112]

The European Court of Human Rights found that the conviction of the pharmacists did not interfere with their exercise of the rights under Article 9 ECHR, and the application was, therefore, ill-founded in the meaning of Article 35 § 3 ECHR and the Court declared it inadmissible.[113] This means that even though the applicants refused to sell the prescribed contraceptives on the grounds of their religious belief, the European Court of Human Rights did not recognise their omission to sell contraceptives as a manifestation of religion within the meaning of Article 9 ECHR.[114]

In the rationale behind this decision, the Court reiterated that the protection of Article 9 mainly serves to protect the forum internum. It also stated that, apart from the different ways of manifesting one's religion or belief listed in Article 9, the Convention might safeguard other ways of showing one's belief. However, not every act of conscience draws protection from the Convention, because "[t]he word 'practice' used in Article 9 § 1 does not denote each and every act or form of behaviour motivated or inspired by a religion or a belief".[115]

The European Court of Human Rights was not very clear on why the refusal did not qualify as a manifestation of religion under Article 9, but the reasoning of the decision might still give us some guidance. The Court argued *inter alia* that

[111] *Pichon and Sajous v. France* (Application no. 49853/99) ECtHR Admissibility Decision of 2 October 2001.
[112] *Pichon and Sajous v. France* (Application no. 49853/99) ECtHR Admissibility Decision of 2 October 2001, p. 3.
[113] *Pichon and Sajous v. France* (Application no. 49853/99) ECtHR Admissibility Decision of 2 October 2001, p. 4.
[114] Lamačková 2008, European Journal Of Health Law, p. 8 and *Pichon and Sajous v. France* (Application no. 49853/99) ECtHR Admissibility Decision of 2 October 2001, p. 4.
[115] *Pichon and Sajous v. France* (Application no. 49853/99) ECtHR Admissibility Decision of 2 October 2001, p. 4.

pharmacists, as sole providers of contraceptives on medical prescription, "...cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products, since they can manifest those beliefs in many ways outside the professional sphere."[116] In this case the ECtHR let professional duties prevail in order to protect the legal right to access contraceptives.

In Pichon and Sajous the conscientious objection did not meet the requirements to qualify as a manifestation of religion under Article 9 ECHR and as a result of this, the objection did not qualify as a human right within the meaning of the ECHR. The question is if the Convention in a different situation, like when a healthcare provider refuses to perform an abortion, would provide a right to conscientiously object within the healthcare context, or if competing rights and freedoms of others would prevail because it is a legitimate aim in that situation as well. It is not possible to draw any lengthy conclusions from one admissibility decision, but the decision may indicate some unwillingness of the ECtHR to address conscientious objections in relation to healthcare.

3.3.2 Eweida and Others v. The United Kingdom

The ECtHR saw the opportunity to clarify a number of previously hidden principles in the case Eweida and Others v. The United Kingdom.[117] The judgment not only addressed the situation of the four applicants, but also provided a new way of interpreting Article 9 ECHR.[118] The Eweida case meant a clear departure from the jurisprudence of the previous European Commission of Human Rights[119]. In *Eweida and Others* the European Court of Human Rights evaluated the national courts' proportionality assessment regarding the right of four British citizens to express their belief in the workplace. Two of the applicants complained that they were not allowed to show religious symbols in the workplace, and the other two applicants had conscientiously objected to providing partnership ceremonies for same-sex couples and providing psychosexual therapy to same-sex couples.[120]

Concerning the two applicants conscientiously objecting to providing services to same-sex couples, the ECtHR had to evaluate whether their behaviours constituted manifestations of religion. In this context, the Court has implemented a

[116] *Pichon and Sajous v. France* (Application no. 49853/99) ECtHR Admissibility Decision of 2 October 2001, p. 4. This reasoning requires that the sale of medically prescribed contraceptives is legal in the Member State and that it is the sole right of pharmacists to dispense them.
[117] *Eweida and Others v. The United Kingdom* (Application nos. 48420/10, 59842/10, 51671/10 and 36516/10) ECtHR Judgment of 25 May 2013.
[118] Maher 2014, International and Comparative Law Quarterly, p. 213.
[119] Maher 2014, International and Comparative Law Quarterly, p. 213.
[120] *Eweida and Others v. The United Kingdom* (Application nos. 48420/10, 59842/10, 51671/10 and 36516/10) ECtHR Judgment of 25 May 2013, paras. 7 - 40.

new set of rules in order to define a manifestation of belief. Previously an act or omission had to be *intimately linked* to a belief or faith to qualify as a manifestation of belief. This created a narrow scope for qualification as a manifestation of belief and entailed "aspects of the practice of a religion or belief in a generally recognised form"[121], such as worship, teaching, practice and observance.[122] In *Eweida and Others*, the Court applied a broader interpretation of manifestation of religion, calling for a *sufficiently close and direct connection between an act or omission and the underlying belief*.[123]

This altered the interference test previously applied in the ECtHR and it means that the applicant does not need to be in conformity with religious doctrines in order to qualify for protection.[124] This change might entail a better protection for minorities within religious groups.

The broader scope applied by the Court in the present case made it possible for it to conclude that the two applicants' conscientious objection towards providing services to same-sex couples constituted behaviours that qualified as a manifestation of belief. Hence, they also qualified for protection under Article 9 ECHR.[125]

Another break with the previous jurisprudence was the so-called 'free-contract doctrine'[126], reiterated by the Commission in several of its decisions. The free-contract doctrine meant that when an employee voluntarily had accepted to follow the provisions of a workplace, they could not complain that those rules limited their freedom to manifest their religion, because they were *free to resign* from the job and change employment. The free-contract doctrine worked as a filter, preventing employee's from contending that there had been an interference with their religious freedom in the workplace.[127] In Eweida and others, the ECtHR changed approach. The possibility to resign and find another employment no longer works as a barrier to Article 9 ECHR. However, it is still a factor that should be weighed into the proportionality assessment.[128] A significant change expressed by the Court in the Eweida and Others case, was the fact

[121] *Kuznetsov and Others v. Russia* (Application no. 184/02) ECtHR Judgment of 11 January 2007, para. 57, *Kalaç v. Turkey* (Application no. 20704/92) ECtHR Judgment of 1 July 1997, para. 27.
[122] *Skugar and Others v. Russia* (Application no. 40010/04) ECtHR Admissibility Decision of 3 December 2009, p. 6 and Article 9 ECHR.
[123] *Eweida and Others v. The United Kingdom* (Application nos. 48420/10, 59842/10, 51671/10 and 36516/10) ECtHR Judgment of 25 May 2013, para. 82.
[124] Maher 2014, International and Comparative Law Quarterly, p. 222.
[125] *Eweida and Others v. The United Kingdom* (Application nos. 48420/10, 59842/10, 51671/10 and 36516/10) ECtHR Judgment of 25 May 2013, paras. 103 and 108.
[126] *Konttinen v. Finland* (Application No. 24949/94) European Commission of Human Rights, Admissibility decision of 3 December 1996.
[127] *Eweida and Others v. The United Kingdom* (Application nos. 48420/10, 59842/10, 51671/10 and 36516/10) ECtHR Judgment of 25 May 2013, para. 83.
[128] *Eweida and Others v. The United Kingdom* (Application nos. 48420/10, 59842/10, 51671/10 and 36516/10) ECtHR Judgment of 25 May 2013, para. 83.

that the possibility to resign from a job, or change workplace should be weighed into the Court's assessment of proportionality rather than its assessment of interference.[129]

In the proportionality assessment regarding the two applicants, weighing in their favour was the fact that they had both lost their jobs due to their religious convictions. In addition to this, one of the applicants was not hired to provide same-sex partnership ceremonies but had this task introduced on a later date. Against the two applicants, stood the aim of the authorities to secure the rights and freedoms of others under the Convention.[130] Another fact that detracted from their chance of receiving protection from Article 9 ECHR, was the fact that one of the applicants specifically had sought out the role as a psychosexual counsellor, knowing that there was a policy on equal treatment in relation to services with which he had to comply.[131] Another significant diminishment was the fact that the state had not decided in their favour with regards to their conscientious objection. Given that the Court generally allows the national authorities a wide margin of appreciation when it comes to striking a balance between competing Convention rights, it fell within the state margin of appreciation to weight the opposing interests against one another. In the *Eweida and Others case,* the Court did not consider that there had been a violation of the right to freedom of religion in relation to the two objecting applicants. The main reason for this was the fact that the action by the national authorities was intended to secure the implementation of its policy of providing services without discrimination and in doing so, protecting the rights and freedoms of others.[132]

[129] *Eweida and Others v. The United Kingdom* (Application nos. 48420/10, 59842/10, 51671/10 and 36516/10) ECtHR Judgment of 25 May 2013, para. 83.
[130] *Eweida and Others v. The United Kingdom* (Application nos. 48420/10, 59842/10, 51671/10 and 36516/10) ECtHR Judgment of 25 May 2013, paras. 106 and 109.
[131] *Eweida and Others v. The United Kingdom* (Application nos. 48420/10, 59842/10, 51671/10 and 36516/10) ECtHR Judgment of 25 May 2013, para. 109.
[132] *Eweida and Others v. The United Kingdom* (Application nos. 48420/10, 59842/10, 51671/10 and 36516/10) ECtHR Judgment of 25 May 2013, para. 109.

4 Access to Lawful Abortion Services

Compared to the focus on conscientious objection in the previous chapters, this chapter addresses the right to access lawful abortion in the Council of Europe Member States. The previous chapters showed that the practice of conscientious objection in the healthcare context is far from an established right under the legal instruments of the Council of Europe. They showed that there are distinct criteria that need to be satisfied in order for an action or omission to qualify as a manifestation of religion in relation to Article 9 ECHR. Even then, it is hard for a conscientious objector to abortion to gain protection from the Convention since there are opposing interests that justify interferences with the right to manifest freedom of thought, conscience and religion.

This chapter shows that the right to abortion, at the present time, cannot be derived from the Convention, despite a broad consensus among majority of the Contracting States to allow abortion at least in relation to grounds of health and well-being.[133] By contrast, it also shows that the European Court of Human Rights repeatedly emphasises the importance of *access to abortion* in Member States where this is a legal right. This means that the Court interprets a right to *access* lawful abortion under the Convention and that the Member States of the Council of Europe that have a legal right to abortion are obliged to provide these services in an effective and accessible manner.

Three human rights of the Convention and the Charter with significant relevance to the context are studied to provide an understanding of access to lawful abortion in the Council of Europe Context. First, the chapter provides an overview of the regulation on the *right to access health and healthcare* in the Convention and Article 11 of the Charter, which is the overarching right in relation to access to abortion. Second, it provides insight into the right to impart and receive information regarding abortion under Article 10 ECHR on the *right to freedom of expression*, since this is a fundamental right which is necessary for individuals to be able exchange information on abortion. Third, it discusses access to abortion in relation to the *right to respect for private life* under Article 8 ECHR, which is currently the most central provision of the Convention in relation to access to abortion. Each of these rights is closely connected to the other and together they form the main framework regarding access to abortion within the Council of Europe context. In connection to these rights, the chapter points out a number of critical variables, such as the limited time available in

[133] The Court has pointed out that it is possible to obtain an abortion on health and well-being grounds in approximately 40 out of 47 Contracting States. *A, B and C v. Ireland (*Application no. 25579/05) ECtHR Judgment of 16 December, para. 235.

relation to abortion procedures and the need of access to effective procedures to establish whether a woman has a right to abortion in a specific setting. First, a basic model showing the overlap between access to a lawful abortion and conscientious objection is provided.

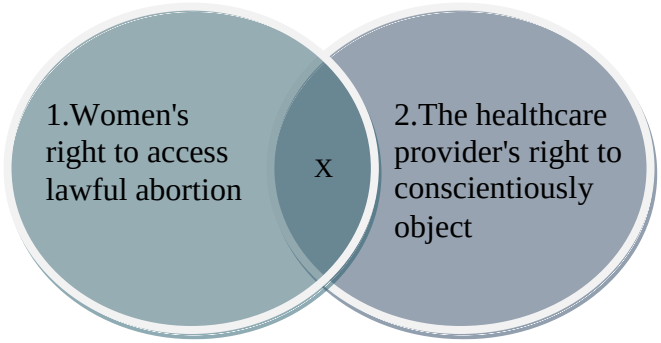

Figure 3. *The effect of conscientious objection on women's access to lawful abortion. Note:* Adapted from referred case law of the ECtHR that show the conflicting area between conscientious objection and access to lawful abortion.

Figure 3 demonstrates the effect of conscientious objection on women's access to lawful abortion, in a country where both abortion and conscientious objection towards abortion is legal. Women's right to access abortion is in most cases (main part of circle 1) not affected by the conscientious objection of healthcare providers. However, as demonstrated by the symbol X in the figure, there are cases when, due to conscientious objection, women are not able to obtain the medical care that they are legally entitled to. Situation X occurs when healthcare providers conscientiously objects, lawfully or unlawfully, to provide women with lawful abortions, if, at the same time, there is no one else to perform the abortion.[134] Thus, situation X symbolises situations where women have no *actual access* to abortion services, despite a legal right to these services. Rebecca J. Cook et al. hold that in cases where law conflict with individuals' perception of morals and ethics, citizens' perception of ethics commonly prevails as the law is undermined if not obeyed and respected. As expressed by the authors: "Law frames the setting within which ethical choices may be practically exercised, but ethics frames the limits within which law is voluntarily obeyed and respected as an expression of the values and aspirations of the society in which it applies."[135] However, it is questionable if healthcare providers' perception of moral and ethics in relation to abortion motivates refraining from applying democratically made laws.

[134] Compare to the Court's argumentation in relation to the pharmacists in *Pichon and Sajous v. France* in chapter 3.3.1 above.
[135] Cook et al. 2003, p.89.

4.1 The Right to Health

The right to health addresses the conflict illustrated above in relation to women's access to lawful abortion services. It recognises the right to access health and healthcare. The human rights to health and healthcare are firmly incorporated in international human rights law.[136] States have to realise the scopes of these two rights to the maximum level possible, in relation to state resources. However, the rights to health and healthcare have a core content that is not subject to derogations and limitations. The core content of a right comprises of the minimum entitlement under its scope.[137] States are under a direct obligation to realise the core contents of these rights. The core contents of the rights to health and healthcare encompass the *equal and non-discriminatory access to healthcare*.[138] The question is the significance in relation to access to abortion and how the above rights are protected within the Council of Europe system.

In the Council of Europe system, an explicit right to health is found in Article 11 of the European Social Charter[139] on the right to protection of health. The Committee emphasised in 2012 that Article 11 ESC puts a positive obligation on CoE Member States to provide appropriate and timely reproductive healthcare on a non-discriminatory basis.[140] The Committee also emphasised that healthcare systems that do not provide for the specific health needs of women necessarily violates Article 11 ESC or Article 11 in conjunction with Article E of the Charter.[141]

Furthermore, an information document prepared by the secretariat of the European Social Charter stresses that the national systems of healthcare need to be accessible to the entire population, as a basic human right, without discrimination.[142] The Secretariat also holds that the right to access to healthcare means, *inter alia*, that the costs for the healthcare should not be born exclusively by the individual and that the number of healthcare providers and the access to healthcare equipment should be adequate. It also highlights that preparatory work to arrange access to healthcare should not delay the implementation of this right. In relation to state citizens, all treatment should be based on *transparent criteria* and agreed at a *national level.*[143] Applied to abortion, this means that the criteria used by healthcare providers or national courts in order to decide

[136] San Giorgi 2012, p. 197.
[137] San Giorgi 2012, pp. 197 - 198.
[138] San Giorgi 2012, p. 198.
[139] The concept the"European Social Charter" includes both the European Social Charter from 1961 and the Revised European Social Charter from 1996.
[140] *IPPF v. Italy* (Complaint No. 87/2012) ECSR, 3 September 2012, para. 66.
[141] *IPPF v. Italy* (Complaint No. 87/2012) ECSR, 3 September 2012, para. 66.
[142] Information document prepared by the secretariat of the ESC, 2009, p.9.
[143] Information document prepared by the secretariat of the ESC, 2009, p. 10.

whether a woman qualifies for an abortion should be predictable and clear to the national population.

There is no equivalent, explicit right to health under the Convention. However, because the European Court of Human Rights is the *only* judicial human rights body that can make legally binding decisions and judgments[144], it would make a difference if the Court could interpret a right to health within the Convention.

The Court indicated in 1979 that there is no sharp line between the civil and political rights on one hand and economic, social and cultural rights on the other hand. The Court has substantiated its jurisprudence on economic, social and cultural rights (ESC-rights) *from* the rights laid down in the Charter.[145] The Court has now addressed fundamental questions concerning economic, social and cultural rights and clarified the responsibilities of CoE Member States in relation to these rights.[146]

The Court used several articles of the Convention to confer protection to the ESC-rights. The articles most frequently used are: Article 3 on the prohibition of torture and degrading treatment; Article 8 on the right to respect for private and family life; Article 6 on the right to a fair trial and these rights in conjunction with Article 14 on the prohibition on discrimination.[147]

For example, in the case Boso v. Italy[148], a man contended that his partner's abortion constituted a breach of the right to life[149] of the foetus and his right to family life under Article 8 ECHR.[150] The Court held that the Italian law aimed to protect the health of the woman in relation to an abortion and that this law struck a fair balance between the woman's interests and the state's interest of protecting the foetus. Therefore, the state had not gone beyond its margin of appreciation when dismissing Boso's complaints. This case, among others, illustrates the Court's tendency to evaluate cases related to abortion under Article 8 of the Convention from a view of health.[151]

[144] San Giorgi 2012, p. 92.
[145] San Giorgi 2012, p. 93.
[146] San Giorgi 2012, p. 93.
[147] San Giorgi 2012, p. 93.
[148] *Boso v. Italy* (Application no. 50490/99) ECtHR Admissibility Decision of 5 September 2002.
[149] Article 2 ECHR.
[150] *Boso v. Italy* (Application no. 50490/99) ECtHR Admissibility Decision of 5 September 2002.
[151] Zampas and Gher 2008, Human Rights Law Review, p.265.

4.2 The Freedom to Receive and Impart Information on Abortion

Access to abortion in relation to the right to health was addressed in the previous section, which among other things showed that the Contracting States to the ESC need to provide healthcare addressed to women's specific needs in order to comply with the Charter. This subchapter introduces the right to freedom of expression in relation to abortion. In order to comprehend the Court's stance in this matter, the case Open Door and Dublin Well Woman v. Ireland[152] is examined.

Without general access to information on abortion, there is a risk that especially citizens with less informational or financial resources might not be able to obtain an abortion even if they have the legal right to it.[153] The question is what obligation Council of Europe Member States have to protect freedom of expression with regards to reproductive health. In the ECtHR case Open Door and Dublin Well Woman v. Ireland, exactly this question was addressed. To be more precise, the right to receive and impart information concerning abortion was addressed.[154]

The applicants of the case were two non-profit companies, Open Door Counselling Ltd (hereinafter Open Door[155]) and Dublin Well Woman Centre Ltd (hereinafter Dublin Well), as well as two counsellors working at Dublin Well, Ms Maher and Ms Downes. The two companies provided women in Ireland with non-directive counselling regarding the legal option of obtaining an abortion abroad. Two private persons, Mrs X and Ms Geraghty joined the application of Dublin Well to the European Court of Human Rights as women of child-bearing age.[156] The above complained to the European Court of Human Rights of an injunction imposed by the Irish Supreme Court on the non-profit organisations Open Door and Dublin Well. The aim of the injunction was to prohibit Open Door and Dublin Well from providing certain information regarding abortion to pregnant women.

The applicants alleged that the Supreme Court injunction, especially the provision regarding information to pregnant women, infringed the rights of the corporate applicants and the two counsellors to *impart information* as well as the

[152] *Open Door and Dublin Well Woman v. Ireland* (Application No. 14234/88; 14235/88) ECtHR Judgment of 29 October 1992.
[153] Resolution 1607 (2008) the Parliamentary Assembly of the Council of Europe, para. 2.
[154] *Open Door and Dublin Well Woman v. Ireland* (Application No. 14234/88; 14235/88) ECtHR Judgment of 29 October 1992.
[155] Open Door ceased to operate in 1988 due to insufficient financial means.
[156] Anyone can claim to be a victim of a violation by one of the High Contracting Parties to the Convention according to Article 34 of the Convention, however, it is a matter of the Court to decide whether the applicant is entitled victim status.

rights of Mrs X and Ms Geraghty to *receive information*.[157] They invoked their right to freedom of expression under Article 10 § 1 ECHR, which provides that everyone has the right to freedom of expression and that this right shall include the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. On the other hand, the Government argued in favour of the protection of the life of the foetus and pointed to a referendum showing the Irish consensus on the equal right to life of the pregnant woman and the foetus.[158]

The private persons Mrs X and Ms Geraghty were not affiliated with the companies, nor were they pregnant. However, since they were women of childbearing age and as such were running the risk of being directly affected by the injunction, the European Court of Human Rights settled that the Convention entitled them to contend that the injunction violated their rights under Article 10 § 1 ECHR.[159]

The Irish Government had accepted that the injunction interfered with the freedom of the corporate applicants to impart information, but not with the freedom to impart and receive information of the other applicants.[160] The European Court of Human Rights established, contrary to the Government, that there had been an interference with the right of the applicant counsellors to *impart information* since the scope of the injunction included restrictions on servants or agents of the corporate applicants from assisting pregnant women. The European Court of Human Rights also established an interference with the right of Mrs X and Ms Geraghty to *receive information*.[161] Even though the Court considered the special protection awarded by national legislation to the foetus, it did not find the injunction against the applicants a measure motivated by a pressing social need and it did not find it proportionate to the legitimate aim pursued.[162]

To conclude, the Court established that in spite of the very strong protection awarded to the foetus in Irish legislation, the hindrance of the two non-profit companies and the two women from receiving and imparting information regarding reproductive health was not motivated by a pressing social need or proportionate to the aim pursued. The fact that the ECHR established this right

[157] *Open Door and Dublin Well Woman v. Ireland* (Application No. 14234/88; 14235/88) ECtHR Judgment of 29 October 1992, para. 53.
[158] *Open Door and Dublin Well Woman v. Ireland* (Application No. 14234/88; 14235/88) ECtHR Judgment of 29 October 1992, paras. 28 and 63.
[159] *Open Door and Dublin Well Woman v. Ireland* (Application No. 14234/88; 14235/88) ECtHR Judgment of 29 October 1992, para. 44.
[160] *Open Door and Dublin Well Woman v. Ireland* (Application No. 14234/88; 14235/88) ECtHR Judgment of 29 October 1992, paras. 41 and 55.
[161] *Open Door and Dublin Well Woman v. Ireland* (Application No. 14234/88; 14235/88) ECtHR Judgment of 29 October 1992, para. 55.
[162] *Open Door and Dublin Well Woman v. Ireland* (Application No. 14234/88; 14235/88) ECtHR Judgment of 29 October 1992, paras. 68 - 80.

to receive and impart information regarding abortion resulted in an amendment to the Irish Constitution. This provided that other regulations "[...] shall not limit freedom to obtain or make available, in the State, [...] information relating to services lawfully available in another State".[163]

4.3 The Right to Respect for Private Life and Access to Abortion

The previous section showed that even if a restriction is prescribed by law and the state is pursuing a legitimate aim, it cannot limit individuals' and corporation's freedom of expression on lawful abortion unless the limitation is proportionate to the aim pursued. Article 8 of the Convention on the right to respect for private and family life, shows a different aspect of access to lawful abortion. The article encompasses, *inter alia*, the protection of private life and is one of the most central provisions of the Convention with regards to abortion.[164] Another provision, deriving not from the Council of Europe, but from the UN-system is Article 16 (1) (e) in the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). It enacts that women have a right to freely, and responsibly, decide the number and spacing of children.[165] This right can be said to correspond with a similar right under Article 8 ECHR on the right to respect for private and family life as it corresponds with private and family life, but also with the right to health of women.[166]

With the assistance of the case A, B and C v. Ireland from 2010 this section initially provides an understanding of abortion in relation to the right to private life in Article 8 ECHR.[167] Second, it discusses the protection of women's access to lawful abortion under Article 8 ECHR and put it in contrast with the practice of conscientious objection in a healthcare setting. Two recent cases address this issue, R.R. v. Poland from 2011 and P. and S. v. Poland from 2012. These cases are examined and analysed in the present chapter to clarify CoE Member States' obligations when balancing the right to respect for private life and the practice of conscientious objection. Poland is a state with strict regulation on abortion, but it still provides a legal right to abortion under specific circumstances. Poland also provides a right to conscientiously object, which makes these cases highly relevant to the present context.

[163] Mowbray 2012, p. 720.
[164] See e.g. Mowbray 2012, pp. 501 - 502.
[165] Packer 1996, p. 36.
[166] Packer 1996, pp. 17 – 18, 38 and 61.
[167] *A, B and C v. Ireland (*Application no. 25579/05) ECtHR GC Judgment of 16 December 2010.

4.3.1 A, B and C v. Ireland

The case of A, B and C v. Ireland mainly relates to the question of a Convention-based right to abortion, but it also addresses the question of access to abortion in relation to Article 8 ECHR.

Prior to 2010, the European Court of Human Rights found that national legislation, regulating the termination of pregnancies was *within the ambit* of the right to private life under Article 8 ECHR.[168] However, it was insecure *what protection* Article 8 provided in relation to abortion. In the Grand Chamber case A, B and C v. Ireland from 2010[169], the Court pointed out that even though abortion was an aspect of Article 8 ECHR, pregnancy and abortion was not to be interpreted exclusively as aspects of a woman's private life since the private life of the pregnant woman becomes closely intertwined with the developing foetus.[170] This reasoning led the Court to establish that it cannot interpret Article 8 as conferring a Convention based right to abortion.[171] However, since complaints relating to abortion still fall within the ambit of Article 8, it makes it possible to petition the ECtHR for other reasons than asking the ECtHR to establish a legal right to abortion in a country where it was previously illegal.

Hence, in the case A, B and C v. Ireland, the Court could not establish a right to abortion in Ireland that did not already exist in the Irish legal framework. However, since the Irish Constitution provided a right to abortion in a few specific situations, including when a pregnancy poses a risk to the life of the pregnant woman[172], the Court could assess whether Ireland provided real access to this right in the present case.

The third applicant to the Court, applicant C, was pregnant and had contracted a rare form of cancer three years earlier. Because of the cancer, she feared that she would not survive the pregnancy.[173] The applicant consulted her general practitioner and several other medical consultants, but she believed that, due to the 'chilling effect' caused by the general ban on abortion in Ireland, she had received insufficient information regarding the possible risks the pregnancy

[168] *A, B and C v. Ireland (*Application no. 25579/05) ECtHR GC Judgment of 16 December 2010, para. 213.
[169] *A, B and C v. Ireland (*Application no. 25579/05) ECtHR GC Judgment of 16 December 2010.
[170] *A, B and C v. Ireland (*Application no. 25579/05) ECtHR GC Judgment of 16 December 2010, para. 213.
[171] *A, B and C v. Ireland (*Application no. 25579/05) ECtHR GC Judgment of 16 December 2010, para.214.
[172] *A, B and C v. Ireland (*Application no. 25579/05) ECtHR GC Judgment of 16 December 2010, para. 154.
[173] *A, B and C v. Ireland (*Application no. 25579/05) ECtHR GC Judgment of 16 December 2010, e.g. para. 250.

posed to her life.[174] Therefore, she travelled to England, where she had an abortion. The abortion performed in England was however incomplete, causing the applicant prolonged bleeding and infection.

Due to the lack of an effective and accessible procedure to establish her right to a lawful abortion, the third applicant lodged a complaint principally under Article 8 of the Convention. She alleged that Ireland had failed to implement a procedure by which she could have established if she qualified for a lawful abortion in Ireland on grounds of the risk to her life.[175]

Before the Court, the Government held that the applicant had to prove the alleged medical risk in order for an abortion to be lawful. However, the Court stressed that due to the lack of any effective domestic procedure to establish her right to have an abortion, the applicant did not have to demonstrate the alleged medical risk in relation to the Court.[176]

The Government refused to acknowledge that there was a lack of effective and accessible procedures. Contrary to the Government, the Court held that the only non-judicial means constituting a procedure, was the ordinary medical consultation process between a woman and her doctor.[177] This was not considered an effective and accessible procedure to establish whether the third applicant was entitled to a lawful abortion in Ireland, because of several reasons. One of the main reasons being that there was no legal framework in place to allow for a difference of opinion between the woman and the doctor to be examined and resolved through a decision that could establish the legality of the woman's request.[178]

The Government alleged that the applicant also had the option to initiate a constitutional action in order for her right to a lawful abortion to be established.[179] However, the ECtHR did not find this an effective way to ensure the third applicant's right to respect for her private life, since a constitutional court could not be considered the appropriate forum to decide, on a case-by-case basis, whether a woman had the right to a lawful abortion.[180] Another concern of the

[174] *A, B and C v. Ireland (*Application no. 25579/05) ECtHR GC Judgment of 16 December 2010, para. 24.
[175] *A, B and C v. Ireland (*Application no. 25579/05) ECtHR GC Judgment of 16 December 2010, para. 3.
[176] *A, B and C v. Ireland (*Application no. 25579/05) ECtHR GC Judgment of 16 December 2010, para. 250.
[177] *A, B and C v. Ireland (*Application no. 25579/05) ECtHR GC Judgment of 16 December 2010, para. 252.
[178] *A, B and C v. Ireland (*Application no. 25579/05) ECtHR GC Judgment of 16 December 2010, para. 253.
[179] *A, B and C v. Ireland (*Application no. 25579/05) ECtHR GC Judgment of 16 December 2010, para. 256.
[180] *A, B and C v. Ireland (*Application no. 25579/05) ECtHR GC Judgment of 16 December 2010, paras. 257- 258.

Court was that Ireland had not amended its Offences Against the Person Act 1861[181] to comply with the Irish Constitution concerning the legality of abortion where the life of the pregnant woman is at risk. The criminal provisions of the 1861 Act provided that anyone to perform or to undergo an abortion would risk serious criminal conviction and imprisonment.[182] The Court emphasised that the lack of amendment constituted an obstacle to the third applicant's access to her lawful right to have an abortion.[183]

The Court found that there had been a violation of Article 8 ECHR since the Irish authorities had failed to comply with their positive obligation to secure an accessible and effective procedure by which the applicant could establish whether or not she qualified for a lawful abortion in accordance with the Irish Constitution.[184] According to the Court "[...] the lack of effective and accessible procedures to establish a right to an abortion under that provision, [resulted] in a striking discordance between the theoretical right to a lawful abortion in Ireland on the ground of a relevant risk to a woman's life and the reality of its practical implementation".[185]

This case clearly shows some of the issues arising when there is a discrepancy between the legal and the actual access to abortion. It also shows that it is within the state's discretion to decide whether or not to provide a legal right to abortion. *If*, however, a national legal system provides a right to abortion, this case demonstrates that the state cannot refrain from providing accessibility to this right. According to the present case, access to abortion means that a woman seeking legal abortion should be provided an accessible and effective procedure where her rights can be established. Within this concept lies an obligation of the state to provide a legal framework which is not contradictory in relation to the legality of abortion. In addition, CoE Member States are obliged to provide a mechanism to establish when the provisions of obtaining a lawful abortion are satisfied. This prerequisite is not satisfied through one doctor's evaluation of the situation. Lastly, judicial proceedings are not a suitable means to establish a legal right to abortion. In particular, constitutional proceedings are dismissed as inept by the ECtHR since a constitutional court is not the correct forum and because it is inappropriate that pregnant women should take on such complex procedures in relation to a right that is clearly established in the constitution.[186]

---

[181] *A, B and C v. Ireland (*Application no. 25579/05) ECtHR GC Judgment of 16 December 2010, para. 30.
[182] *A, B and C v. Ireland (*Application no. 25579/05) ECtHR GC Judgment of 16 December 2010, para. 254.
[183] *A, B and C v. Ireland (*Application no. 25579/05) ECtHR GC Judgment of 16 December 2010, para. 254.
[184] *A, B and C v. Ireland (*Application no. 25579/05) ECtHR GC Judgment of 16 December 2010, paras. 267 - 268.
[185] *A, B and C v. Ireland (*Application no. 25579/05) ECtHR GC Judgment of 16 December 2010, para. 264.
[186] *A, B and C v. Ireland (*Application no. 25579/05) ECtHR GC Judgment of 16 December 2010, para. 259.

4.3.2 R.R. v. Poland

The case R.R. v. Poland[187] differs from the case A, B and C v. Ireland in a number of ways. A, B and C v. Ireland mainly concerns the right to an effective and accessible procedure to establish a right to abortion and R.R. v. Poland concerns access to lawful abortion and prenatal testing as contrasted by conscientious objection. When R.R. was in the 18th week of gestation, the medical doctors informed her that the foetus was probably affected with malformation. R.R. responded that if this proved to be true, she wished to have an abortion.[188] Abortion is considered lawful in a handful situations in Polish law. Section 4 (a) of the Polish Law on Family Planning (*Protection of the Human Foetus and Conditions Permitting Pregnancy Termination*) from 1993 (hereinafter the 1993 Act), establishes a right to obtain an abortion lawfully when prenatal tests indicate a high risk that the foetus suffers from a deformation which is severe and irreversible or which is incurable and life-threatening. It is also necessary that the foetus is not capable of surviving outside the mother's body.[189] In addition, section 2 (a) of the 1993 Act provides that the state and local authorities are obliged to ensure unimpeded access to prenatal information and testing, in particular in cases of increased risk or suspicion of a genetic disorder or development problem or of an incurable life-threatening disease.[190]

At a number of ultrasound scans, at different medical clinics, R.R. was recommended a genetic test to make sure, beyond doubt, that the foetus indeed had a malformation.[191] When R.R. asked the family doctor, Dr S.B, for the referral needed, he refused to provide her with this because "in his view the foetus' condition did not qualify the applicant for an abortion under the provisions of the 1993 Act"[192]. As the ultrasound scans were not a sufficient ground for termination of pregnancy, it was necessary for R.R. to gain access to genetic examination. After the refusal of the family doctor, she, therefore, went to different hospitals, each reaffirming the probable malformation of the foetus, but each refusing to provide her with the genetic examination. Furthermore, in spite of the probable deformation of the foetus, her decision to terminate the pregnancy was repeatedly questioned.[193] Finally, during the twenty-third week of pregnancy she was accepted as an emergency patient and had the tests performed. Awaiting the test results, R.R. requested a termination twice. Two weeks later she received the results of the test, which confirmed the presence of Turner syndrome in the foetus and requested termination of the pregnancy

[187] *R.R. v. Poland* (Application no. 27617/04) ECtHR Judgment of 26 May 2011.
[188] *R.R. v. Poland* (Application no. 27617/04) ECtHR Judgment of 26 May 2011, para. 9.
[189] *R.R. v. Poland* (Application no. 27617/04) ECtHR Judgment of 26 May 2011, para. 67.
[190] *R.R. v. Poland* (Application no. 27617/04) ECtHR Judgment of 26 May 2011, para. 66.
[191] *R.R. v. Poland* (Application no. 27617/04) ECtHR Judgment of 26 May 2011, paras. 9 - 14.
[192] *R.R. v. Poland* (Application no. 27617/04) ECtHR Judgment of 26 May 2011, para. 14.
[193] *R.R. v. Poland* (Application no. 27617/04) ECtHR Judgment of 26 May 2011, eg. para. 20.

again, the very same day.[194] At this point, the doctors refused to carry out the abortion, as they alleged the foetus was now viable and could survive outside the womb.[195]

The applicant invoked Article 3 ECHR on the prohibition of torture, Article 8 ECHR on the right to respect for private and family life, and complained under Article 13 ECHR that she did not have access to an effective remedy.[196] For the relevance of this chapter, her complaint under Article 8 ECHR is examined below.

In its assessment, the Court held that the applicant's process of obtaining access to genetic examination of the foetus was "[...] marred by procrastination, confusion and lack of proper counselling and information given to the applicant".[197] Regarding the applicants right to obtain information on her condition, the Court clarified that Article 8 of the Convention contains a right to obtain information on one's medical condition. The Court stressed that the effective exercise of this right was vital for her possibility to exercise her right to personal autonomy under article 8 ECHR.[198] In situations where medical conditions may develop rapidly, *timely access* to information on one's health is crucial. Applied to the context of pregnancy, this means that timely access to information on the health conditions of the woman and the foetus is directly relevant for pregnant women's exercise of their personal autonomy.[199]

CoE Member States have both negative and positive obligations in relation in ensuring the 'respect' for private life in Article 8 ECHR. The boundaries between these obligations are not easily defined, but the principle is the same. A fair balance must be struck between the competing interests of the society as a whole and the individual in both cases.[200] The positive obligation to secure respect for women's private life may include measures and mechanisms active in the sphere of relations *between individuals.*[201] Nota bene that in the present case this primarily means the relation between women and objecting healthcare providers. Furthermore, the notion of 'respect' is not unambiguous. It must adjust to varying, and complex situations in the Contracting States and because of this, its requirements vary between different situations.[202] Even though it is constantly changing, the states have to abide by the rule of law. The Court emphasised that the principle of rule of law is one of the fundamental principles in a democratic society and that it is inherent in all the articles of the Convention.

[194] *R.R. v. Poland* (Application no. 27617/04) ECtHR Judgment of 26 May 2011, para. 153.
[195] *R.R. v. Poland* (Application no. 27617/04) ECtHR Judgment of 26 May 2011, para. 33.
[196] *R.R. v. Poland* (Application no. 27617/04) ECtHR Judgment of 26 May 2011, para. 3.
[197] *R.R. v. Poland* (Application no. 27617/04) ECtHR Judgment of 26 May 2011, para. 153.
[198] *R.R. v. Poland* (Application no. 27617/04) ECtHR Judgment of 26 May 2011, para. 197.
[199] *R.R. v. Poland* (Application no. 27617/04) ECtHR Judgment of 26 May 2011, para. 197.
[200] *R.R. v. Poland* (Application no. 27617/04) ECtHR Judgment of 26 May 2011, para. 189.
[201] *R.R. v. Poland* (Application no. 27617/04) ECtHR Judgment of 26 May 2011, para. 184.
[202] *R.R. v. Poland* (Application no. 27617/04) ECtHR Judgment of 26 May 2011, para. 190.

Thus, the Contracting States need to make sure that rules of domestic law "[...] provide a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention".[203]

In the present case, the Court clearly stated that CoE Member States must ensure that conscientious objectors in the healthcare context are not infringing women's lawful right to abortion. In exact words, it declared:

> States are obliged to organise the health services system in such a way as to ensure that an effective exercise of the freedom of conscience of health professionals in the professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation.[204]

To conclude, the applicant had been denied adequate and timely access to prenatal genetic testing, which would have made it possible to establish whether she was entitled to a lawful termination of the pregnancy or not.[205] The Court considered that the respondent state's failure to effectively implement its abortion laws constituted a violation of its positive obligations under Article 8 ECHR. This violation occurred as the state had failed to implement a procedure which constituted an effective and accessible procedure to regulate disagreements between a pregnant woman and doctors as to the need of prenatal genetic testing.[206] Outside of the scope of this section, but still of interest, is the fact that the Court in this case, for the first time in a reproductive rights case, found a violation of Article 3 ECHR on the prohibition of torture.[207]

4.3.3 P. and S. v. Poland

In the judgment P. & S. v. Poland[208] from 2012, a fourteen-year-old girl (the first applicant) was raped and, as a result, she became pregnant.[209] She alleged that she had been raped on 8 April 2008. The first applicant decided together with her mother (the second applicant) to have an abortion.[210] Poland's strict abortion statute permits a female assault victim an abortion. The Polish 1993 Act guarantees the right to obtain an abortion lawfully until the end of the twelfth week of pregnancy when "there are strong grounds for believing that the pregnancy is the result of a criminal act". In another provision of the 1993

[203] *R.R. v. Poland* (Application no. 27617/04) ECtHR Judgment of 26 May 2011, para. 190.
[204] *R.R. v. Poland* (Application no. 27617/04) ECtHR Judgment of 26 May 2011, para. 206.
[205] *R.R. v. Poland* (Application no. 27617/04) ECtHR Judgment of 26 May 2011, para. 176.
[206] *R.R. v. Poland* (Application no. 27617/04) ECtHR Judgment of 26 May 2011, paras. 176, 210 and 214.
[207] Zampas and Andión-Ibañez 2012, European Journal Of Health Law, p. 240.
[208] *P. and S. v. Poland* (Application no. 57375/08) ECtHR Judgment of 30 October 2012.
[209] *P. and S. v. Poland* (Application no. 57375/08) ECtHR Judgment of 30 October 2012, paras. 6 - 8.
[210] *P. and S. v. Poland* (Application no. 57375/08) ECtHR Judgment of 30 October 2012, para. 8.

Act, the circumstances surrounding the alleged criminal act need to be certified by a prosecutor in order for the abortion to be lawful.[211] On 20 May 2008 the District Prosecutor issued the necessary certificate declaring that the pregnancy of the first applicant resulted from unlawful sexual intercourse with a minor.

In order to actually obtain the abortion, the applicants were told that they needed to get a referral for abortion from the regional consultant of gynecology and obstetrics. The consultant refused to provide her with this referral. When the two applicants subsequently applied for having the legal abortion performed in other medical institutions in both Lublin and in Warsaw, they were obstructed by dissenting healthcare providers, as well as catholic priests and abortion objectors.[212] On several occasions the first applicant was interrogated by authorities questioning her decision to have an abortion, without her parents or any other adults or legal assistance present to represent her as a minor.[213] The process of receiving the abortion that had been certified by the District Prosecutor as lawful was repeatedly procrastinated, and it was not until 17 June 2008, more than two months after the rape, that the first applicant was driven approximately 500 kilometers by the Ministry of Health to have an abortion in Gdánsk. The applicants alleged that when the abortion in Gdánsk was finally provided, it was in a clandestine manner.[214] When the abortion was performed, a total of 9 weeks had passed since the applicants had decided that the first applicant was to have an abortion. The legal limit of having an abortion due to the pregnancy being a result of a criminal act was 12 weeks into the pregnancy.[215] If the applicants had realised that she was pregnant a little later, the obstructions and the delays of the healthcare providers might have resulted in the loss of her legal right to abortion.

To the European Court of Human Rights the applicants alleged that the circumstances of their case had given rise to violations of Articles 8, 3 and 5 of the Convention. In this context, the Court's assessment of the alleged violations of Article 8 ECHR is of central importance.

In its assessment, the Court noted that conscientious objection is a recognised right in the Polish legal system.[216] It also noted that there was a mechanism in place by which an objection could be voiced. The mechanism also provided

[211] *P. and S. v. Poland* (Application no. 57375/08) ECtHR Judgment of 30 October 2012, paras. 53 - 54.
[212] *P. and S. v. Poland* (Application no. 57375/08) ECtHR Judgment of 30 October 2012, paras. 15 - 28.
[213] *P. and S. v. Poland* (Application no. 57375/08) ECtHR Judgment of 30 October 2012, e.g. para. 36.
[214] *P. and S. v. Poland* (Application no. 57375/08) ECtHR Judgment of 30 October 2012, paras. 40 - 41.
[215] *P. and S. v. Poland* (Application no. 57375/08) ECtHR Judgment of 30 October 2012, paras. 53 - 54.
[216] *P. and S. v. Poland* (Application no. 57375/08) ECtHR Judgment of 30 October 2012, para. 107.

some balance between the interests of a healthcare provider and the interests of patients by making it mandatory for a healthcare provider's conscientious objection to be included in the patient's medical record and for a healthcare provider to refer the patient to a different physician capable of carrying out the same service.[217] However, the Court concluded that these procedural requirements were not complied with in the present case. It stated that the applicants were provided with misleading and contradictory information and that the medical counselling they received was neither objective nor appropriate. There was also a lack of a set procedure where the interests of the healthcare providers and the interests of the applicants could be weighed and the views of the applicants be heard.[218] The Polish Government alleged that the applicants could bring a civil lawsuit and that this would satisfy the need for a set procedure. The Court rejected the civil-law remedy since it was of a retroactive and compensatory character and did not present women seeking an abortion with an opportunity to *fully* vindicate their right to respect for private life. The only way to fully ensure that women's right to private life is not violated, is to introduce a mechanism to establish their lawful right to abortion, *prior to* giving birth.[219]

Regarding the misleading and contradictory information provided by the objecting healthcare providers, the Court emphasised that *effective access to information* when abortion is lawful and what procedures to follow to be able to enjoy this lawful right is "directly relevant for the exercise of personal autonomy".[220]

The Court pointed out that the notion of private life applies both to decisions to become and not to become a parent.[221] The Court also highlighted that the nature of a woman's decision to terminate a pregnancy was such that the time factor was of high importance. Because of this, the Court states that the procedures establishing a right to lawful abortion should make it possible for a pregnant woman to make such decisions in good time.[222] The Court highlighted that:

> [O]nce the State, acting within its limits of appreciation, adopts statutory regulations allowing abortion in some situations, it must not structure its legal framework in a way which would limit real possi-

[217] *P. and S. v. Poland* (Application no. 57375/08) ECtHR Judgment of 30 October 2012, para. 107.
[218] *P. and S. v. Poland* (Application no. 57375/08) ECtHR Judgment of 30 October 2012, para. 108.
[219] *P. and S. v. Poland* (Application no. 57375/08) ECtHR Judgment of 30 October 2012, para. 110.
[220] *P. and S. v. Poland* (Application no. 57375/08) ECtHR Judgment of 30 October 2012, para. 111.
[221] *P. and S. v. Poland* (Application no. 57375/08) ECtHR Judgment of 30 October 2012, para. 111.
[222] *P. and S. v. Poland* (Application no. 57375/08) ECtHR Judgment of 30 October 2012, para. 111.

> bilities to obtain an abortion. In particular, the State is under *a positive obligation to create a procedural framework enabling a pregnant woman to effectively exercise her right of access to lawful abortion*[emphasis added].[223]

In the same paragraph of the Judgment, the Court held that the Convention "is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective".[224] As in A, B and C v. Ireland, the Court in this case concluded that there was a striking discordance between the theoretical right to lawful abortion and its real implementation.[225] The Court found that there had been a breach of Article 8 since the authorities had failed to comply with their positive obligation to secure the applicants effective respect for their private life.[226]

4.3.4 Limitations of the Right to Private Life

In the previous sections it was shown that, at the present time, the Convention cannot be used to confer a right to abortion in the CoE Member States. However, queries in relation to abortion fall within the scope of Article 8 ECHR and are, therefore, under the scrutiny of the Court, and in relation to *access* to abortion the Court recognizes a right to effectively enjoy this right if abortion is legal on a national level. Meaning that when there already is a lawful right to abortion at the national level, the Convention puts an obligation on CoE Member States to set up a procedure to establish whether a citizen is entitled to have an abortion or not.

With regard to conscientious objection in the healthcare context, the question is what possibilities there are to interfere with the rights under Article 8 ECHR. An interference with the right to private life in Article 8 may be justifiable if the two prerequisites in 8 § 2 ECHR have been met. The first prerequisite requires the interference to be 'prescribed by law'. In the case Rekvényi v. Hungary, the European Court of Human Rights explained that there are qualitative requirements on national legislation regarding *foreseeability* and, generally, the *absence of arbitrariness* in order for it to be 'prescribed by law'.[227] Foreseeability means in this context that the law has to be formulated with adequate preci-

[223] *P. and S. v. Poland* (Application no. 57375/08) ECtHR Judgment of 30 October 2012, para. 99.
[224] *P. and S. v. Poland* (Application no. 57375/08) ECtHR Judgment of 30 October 2012, para. 99.
[225] *P. and S. v. Poland* (Application no. 57375/08) ECtHR Judgment of 30 October 2012, para. 111.
[226] *P. and S. v. Poland* (Application no. 57375/08) ECtHR Judgment of 30 October 2012, para. 112.
[227] *Rekvényi v. Hungary* (Application no. 25390/94) ECtHR GC Judgment of 20 May 1999, para. 59.

sion to enable citizens to foresee what consequences a given action may induce at a given time.[228]

When applied to conscientious objection, it signifies that if conscientious objection is considered by the Court to interfere with the rights under Article 8 ECHR, the state has to make sure that the foundation for the right to conscientious objection is prescribed by law, meaning that it has to be foreseeable to state citizens and non-arbitrary in its construction.

If a legal right to conscientiously object is established on a national level, and if that practice interferes with Article 8 ECHR, any interference need to be 'necessary in a democratic society'. This means that the societal interest of having a legal possibility to conscientiously object need to outweigh the infringement of the individual's right to access a lawful abortion. How to strike a balance between the interests is generally for each state to decide within its margin of appreciation, but the deliberation of the state is still subject to the review of the ECtHR.[229]

Summarising the European Court of Human Rights' case law on the right to private life in relation to access to lawful abortion, it is clear that *if* a Council of Europe Member State has passed laws permitting abortion, with or without certain provisions, the Member State must also guarantee accessibility to the procedure.[230] The Court especially emphasises that there should be procedures in force in these Member States, that effectively clarify the legal situation and which can provide a decision on whether a woman is entitled to a lawful abortion. In the two cases, R.R. v. Poland and P. and S. v. Poland, that addressed conscientious objection in relation to abortion, the Court decided in favour of women's access to lawful abortions, notwithstanding a legal right to conscientiously object in Poland.

4.4 Access to Abortion in the Council of Europe

Chapter 4 on *Access to Lawful Abortion Services* showed that, in relation to the right to health, states are obliged to provide equal and non-discriminatory access to healthcare and that they have to provide reproductive healthcare on a timely and non-discriminatory basis. In relation to conscientious objection this means that a state which allows that practice, must also provide a very strict set of rules and control mechanisms in order to guarantee the right to health.

[228] *Rekvényi v. Hungary* (Application no. 25390/94) ECtHR GC Judgment of 20 May 1999, para. 34.
[229] *Cf.* Chapter 3.1 *The State Margin of Appreciation.*
[230] *Tysiąc v. Poland* (Application no. 5410/03) ECtHR Judgment of 20 March 2007, para.117 and *P. and S. v. Poland* (Application no. 57375/08) ECtHR Judgment of 30 October 2012, para. 99.

Healthcare systems that *do not* provide for the specific health needs of women, necessarily violates Article 11 ESC or Article 11 ESC in conjunction with Article E of the Charter. In addition, there is a requirement that all treatment shall be based on *transparent criteria* and agreed at a *national level*. Furthermore, the Court has created the possibility to interpret a right to health in the Convention, which provides for a stronger protection in relation to access to healthcare and thus for access to lawful abortion. In addition, the Court emphasised that a limitation of women's right to receive and impart information on abortion can be disproportionate in relation to public interests, even if these public interests have been established by public referendum.

In relation to women's right to respect for private life in Article 8 ECHR, the Court expresses that it cannot establish an obligation for CoE Member States to legalise abortion emanating from the Convention. In spite of that, it makes clear that it is possible to petition the ECtHR regarding questions of *access to lawful abortion*. The Court also clarified that if a Council of Europe Member State has passed laws that permit abortion the Member State has an obligation to guarantee the accessibility to the lawful abortion procedure in practice.[231] This entails an obligation for CoE Member States with a legal right to abortion to have effective and accessible procedures in force, which can clarify the legal situation and provide a decision on whether a woman is entitled to a lawful abortion or not. If there is no such procedure in place, an applicant to the Court does not bear the burden of proof to establish if the provisions of national legislation have been met in order for her to qualify for an abortion. Within the concept of establishing an accessible and effective procedure also lies the obligation of the state to provide a legal framework which is not contradictory in relation to the legality of abortion. Two measures that are not effective and accessible in themselves, are judicial proceedings and assessments by healthcare providers without a control mechanism.

The Court emphasised in both R.R. v. Poland and P. and S. v. Poland that Member States with a legal right to abortion are obliged to organise their health services system in a way that ensures that healthcare providers' conscientious objections do not prevent patients from obtaining access to services to which they are entitled under the applicable legislation.[232]

In the two cases where the Court has addressed conscientious objection in relation to abortion, R.R. v. Poland and P. and S. v. Poland, the Court decided in favour of women's access to lawful abortions despite a legal right to conscientiously object in the respondent state. These cases show the weight of women's personal autonomy in questions of reproductive health. In addition, they clarify

[231] *Tysiąc v. Poland* (Application no. 5410/03) ECtHR Judgment of 20 March 2007, para.117, and *P. and S. v. Poland* (application no. 57375/08) ECtHR Judgment of 30 October 2012, para. 99.
[232] *R.R. v. Poland* (Application no. 27617/04) ECtHR Judgment of 26 May 2011, para. 206.

that the rights of the patient should be the main focal point in the national healthcare systems of the Contracting States.

5 Two States - Two Regulations

This chapter examines the regulation and implementation of conscientious objection and women's access to lawful abortions on a national level, more specifically in Italy and Sweden. These states have been chosen to show that a lack of effective access to abortion services on a national level is partly a result of healthcare provider's objections. Sweden and Italy are well fitted as examples as they both provide a right to lawful abortion to their citizens. When their abortion regulations were evaluated by the United Nations (hereinafter UN) in its global study on abortion, Italy's abortion system complied with six parameters out of seven and Sweden's abortion system adhered to seven parameters out of seven.[233] The parameters used by the UN are; to save the life of the woman, to preserve physical health, to preserve mental health, due to rape or incest, due to foetal impairment, due to economic or social reasons and if it is available on request (without having to give reasons). Of these, it is only the last parameter that differs between the two countries. This means that they both have a liberal view on abortion. However, they differ in the implementation of the abortion right. Another important difference is the fact that Italy recognises a right for healthcare providers to conscientiously object, whereas the same practice is illegal in Sweden.

Another reason for choosing these states is the fact that two collective complaints have been lodged against Italy as well as Sweden with the European Committee of Social Rights, for reasons of conscientious objection to abortion. The ECSR oversees compliance with the European Social Charter. The main reason behind the complaint against Italy was the lack of access to lawful abortion care due to the unrestricted use of conscientious objection. On the other hand, the main reason behind the complaint against Sweden was the lack of a legal option to conscientiously object to performing abortions.

It is important to notice that the collective complaint against Italy has resulted in a decision by the Committee. This decision is, therefore, discussed in relation to Italy's legislation on abortion. The complaint against Sweden, on the other hand, has not yet resulted in a decision, hence the outcome is at the present time unknown. Instead of discussing the decision of the Committee, the section on Sweden, therefore, shows the Swedish regulation in a retrospective and contemporary perspective. It also lifts the main arguments of the complainant organisation and three intervening organisations.

[233] The United Nations 2001, Abortion Policies: A Global Review.

5.1 Italy

In Italy, a large number of gynaecologists, medical doctors and other healthcare personnel are refusing to perform lawful abortions. The effect of their joint refusals is that it is not possible for the state to guarantee access to the medical care that it has agreed to provide in legal documents. This chapter seeks to answer if the Italian Government has taken enough steps to secure effective access to abortion services.

The Italian Act N° 94 of 22 May 1978 *Norme per la tutela sociale della maternità e sull'interruzione volontaria della gravidanza - Gazzetta ufficiale 22/05/1978 n. 140*[234] or Norms on the social protection of motherhood and the voluntary termination of pregnancy (hereinafter the 194/1978 Act) legalises abortion and provides women with the right to receive an abortion during the first 90 days of pregnancy.[235] Abortion is always allowed if pregnancy, childbirth or motherhood seriously endangers the physical or mental health of the pregnant woman. If there is no such danger, a decision must be motivated in view of her state of health, her social, economic or family situation or, due to the circumstances in which the conception occurred or, if there is a risk of deformities or abnormalities of the foetus.[236] These reasons represent six out of seven parameters used by the United Nations in its assessment of abortion policies.[237] Italy does not accept abortion on request without providing reasons, but in all other situations, the 194/1978 Act provides a right to abortion.[238]

More than 90 days into the pregnancy a voluntary abortion might still be performed, but only if continued pregnancy entails a serious threat to a woman's life or where pathological processes have been diagnosed that are constituting a serious threat to her physical or psychological health.[239]

In Section 9 of the same law, healthcare providers are ensured the right to conscientiously object to performing abortions if they have declared to the provincial medical officer and the medical director of a hospital or nursing home within a month from the date of commencement of employment at an establishment required to provide services for the termination of pregnancy, from the date of qualification or the drawing up of an insurance agreement containing the provision of such services. However, the second paragraph of Section 9

[234] The law is found in the Official Journal of the Italian Government, *Gazzetta Ufficiale del 22 maggio 1978, n. 140* on *http://www.salute.gov.it/imgs/c_17_normativa_845_allegato.pdf*, viewed 24 July 2014.
[235] Act 194/1978, Section 6.
[236] Act 194/1978, Section 4.
[237] The United Nations 2001, Abortion Policies : A Global Review.
[238] The United Nations 2001, Abortion Policies : A Global Review, pp. 74 - 76.
[239] Act 194/1978, Section 6.

makes it possible to declare a conscientious refusal at any time, with one month for the objection to enter into effect.[240]

There are a number of exceptions to the right to conscientiously object in Act 194/1978. Paragraph 3 contains a specific provision limiting conscientious objection in relation to care prior to abortion and aftercare. Paragraph 4 concerns women's right to access lawful abortion services. It requests all hospitals and authorised nursing homes to ensure that pregnancy termination requested in accordance with the 194/1978 Act are carried out. The region has the obligation to supervise and ensure the implementation of these provisions, including moving personnel if necessary.[241]

The third exception is found in paragraph 5 and it prohibits healthcare providers from invoking conscientious objection if there is an imminent danger to a woman's life, and his or her personal intervention is necessary in order to save the life of the woman. The conscientious objection may however be withdrawn voluntarily at any time, and it is deemed withdrawn with immediate effect if the objector participates in terminating a pregnancy in other cases than where the life of the pregnant woman is in impending danger.[242]

The question is how these provisions are enforced and if the right to conscientious objection for healthcare providers in Italy results in an infringement of the right to access abortion services. In 2012, the European Network of the International Planned Parenthood Federation (IPPF EN) brought a complaint against Italy to the European Committee of Social Rights of the Council of Europe (ECSR), alleging that the practice of conscientious objection is impeding women's right to health. [243]

In the case IPPF EN v. Italy, the IPPF EN complained that the wording of paragraph 4, Section 9 of the 194/1978 Act, which governs the conscientious objection of medical practitioners, violate the right to protection of health in Article 11 of the Revised European Social Charter (the Charter), read alone or in conjunction with the non-discrimination clause in Article E of the Charter, since it does not offer protection to women's lawful access to abortion.[244]

According to the IPPF EN the above-mentioned paragraph is rendered ineffective, and the full implementation of Act 194/1978 is prevented due to the large number of conscientiously objecting healthcare providers in Italy. The lack of

[240] Act 194/1978, Section 9 para. 2.
[241] Act 194/1978, Section 9 para. 4.
[242] Act 194/1978, Section 9 paras. 2 and 6.
[243] *IPPF v. Italy* (Complaint No. 87/2012) ECSR Decision, 3 September 2012.
[244] *IPPF v. Italy* (Complaint No. 87/2012) ECSR Decision, 3 September 2012, para. 2.

specific provisions to ensure women's *effective* access to abortion procedures obstructs the enactment of Act 194/1978.[245]

The respondent Government answered to IPPF EN's complaint and invited the Committee to declare the complaint of IPPF EN unfounded. The Government claimed that IPPF EN's interpretation distorted Article 11 and Article E of the Charter. It also claimed that there was no possibility for the Government to limit the number of objecting healthcare providers, because it would then violate Article 9 of the ECHR on the right to freedom of thought, conscience and religion.[246] The Government finally stated that Act 194/1978 provided for a good balance of the interests of the woman and the interests of the objecting healthcare provider and that the reduction in the number of abortions was solely the result of abortion prevention services.[247] It also held that the constant increase of objection healthcare providers started to stabilise after year 2010 and emphasised that the national committee investigating the issue is positive to promote a revision of its internal organisation to make a more differentiated selection of human resources.[248]

The intervening organisation *Associazione Italiana per l'educazione demografica* (AIED) is a non-governmental organisation with the aim *inter alia* to ensure that laws are properly enforced in terms of contraception, abortion and social-health prevention. The AIED stresses that based on available data, seven gynaecologists out of ten were refusing to perform abortions in Italy 2012.[249] AIED is also concerned that the number of clandestine and illegal abortions is increasing in Italy as a result of the decreasing number of non-objecting gynaecologists.[250] It also considers that the territorial allocation of objectors is not evenly distributed in Italy, resulting in some regions being more exposed to the effect of objecting healthcare providers.[251]

Another intervening organisation, *Associazione Luca Coscioni per la libertà per la ricerca scientifica* (ALC), a non-governmental organisation which promotes freedom of care and scientific research, points out that the increasing level of conscientious objection in Italy exposes contradictions in the national legal framework. The legislation is self-contradictory since the increasing level of conscientious objectors undermines the provision of adequate service se-

[245] *IPPF v. Italy* (Complaint No. 87/2012) ECSR Decision, 3 September 2012, para. 160.
[246] *IPPF v. Italy* (Complaint No. 87/2012) ECSR Decision, 3 September 2012, paras. 92 a) and b).
[247] *IPPF v. Italy* (Complaint No. 87/2012) ECSR Decision, 3 September 2012, paras. 93, 98 and 100 - 101.
[248] International Planned Parenthood Federation - European Network v. Italy (Complaint No. 87/2012) Case Document no. 9, Response from the Government to the Committee's questionnaire, 13 May 2013.
[249] *IPPF v. Italy* (Complaint No. 87/2012) ECSR Decision, 3 September 2012, para. 33.
[250] *IPPF v. Italy* (Complaint No. 87/2012) ECSR Decision, 3 September 2012, para. 34.
[251] *IPPF v. Italy* (Complaint No. 87/2012) ECSR Decision, 3 September 2012, para. 33.

cured in the same legal documents as the legal right to conscientious objection.[252] ALC is also supporting the statement of the AIED that some citizens, for reasons of regional differences et cetera, might be more exposed to the risk of encountering a conscientious objector while seeking an abortion than others. The ALC considers this increased exposure an issue of discrimination. The fact that women in some parts of the country need to travel to search for a clinic offering the legal treatment of abortion constitutes territorial and economic discrimination towards them.

An opposing intervening organisation, *The European Centre for Law and Justice* (ECLJ), which is a non-governmental organisation that promotes liberty of conscience and religion, point out that conscientious objection is a personal, fundamental and inalienable right and that abortion, on the other hand is not a fundamental right. The ECLJ is of the view that the right to conscientious objection exist *outside* of any legislative permission, meaning that anyone should be able to conscientiously object at any time without state interference. The ECLJ also contends that the implementation of the 194/1978 Act concerning abortions where the life of the mother is at risk, is too broad and that a healthcare provider is "[...]fully entitled to exercise his freedom of conscientious objection as secured under Article 9 of the 1978 Law"[253] in these cases.[254]

The Committee held in its assessment of the case that, in Italy, there had been a decrease in the total number of hospitals and nursing homes that carry out abortions, and that there is a discrepancy between the number of available non-objecting healthcare providers and the number of requests to terminate pregnancies.[255] The hospitals that in effect provide the legal abortion on demand within 90 days of the pregnancy are not spread evenly throughout the country and there is a risk of geographical zones where abortion services are non-available, despite the legal requirement of access to such services. There were, as a matter of fact, a considerable number of healthcare facilities in Italy with either one or no non-objecting gynaecologists.[256] The waiting times to receive a lawful abortion at an Italian healthcare facility were unreasonable. At several hospitals, there were no replacements of non-objecting healthcare providers when they went away for vacation, when they were ill or when they retire. Abortion procedures were repeatedly deferred due to the lack of non-objecting healthcare providers.[257] Contrary to Section 9 paragraph 3 of Act 194/1978,

[252] *IPPF v. Italy* (Complaint No. 87/2012) ECSR Decision, 3 September 2012, para. 26.
[253] *IPPF v. Italy* (Complaint No. 87/2012) ECSR Decision, 3 September 2012, para. 17.
[254] *IPPF v. Italy* (Complaint No. 87/2012) ECSR Decision, 3 September 2012, para. 17.
[255] *IPPF v. Italy* (Complaint No. 87/2012) ECSR Decision, 3 September 2012, para. 69 c).
[256] *IPPF v. Italy* (Complaint No. 87/2012) ECSR Decision, 3 September 2012, para. 169.
[257] *IPPF v. Italy* (Complaint No. 87/2012) ECSR Decision, 3 September 2012, paras. 169 d), e) and f).

healthcare personnel have also illegally refused to provide the needed medical care prior to and following abortion.[258]

The Committee considered that it had not been demonstrated that the steps taken by the Government, which comprise of the mobilisation of staff and the introduction of pharmacological abortions, guaranteed effective access to abortion facilities in practice.

The Committee was concerned that the increasing number of clandestine abortions were a symptom of the high level of objecting personnel, the lack of mechanisms ensuring an effective right to access to abortion and the failure to observe the provision of ante- and post-operative care related to abortion procedures.[259] The Committee emphasised that clandestine abortions have the potential of leading to detrimental effects on women's health.[260]

In the assessment of the facts of the case in relation to the invoked Article 11 and Article E, the Committee noted that the differential treatment of individuals does not constitute discrimination if it is based on "objective and reasonable justification"[261], according to the appendix of the Charter.[262] However, it stated, if a differential treatment does not fulfil these prerequisites, it constitutes discrimination according to Article E of the Charter.

The complaining organisation alleged that Italy was guilty of two types of discrimination, the first being discrimination on the grounds of territorial and/or socio-economic status between women who have less restricted access to abortion and those who do not. The second form of alleged discrimination was on the grounds of gender, health status, or a combination of the two, between women seeking legal abortion services and in relation to men and women seeking access to other legal health services.[263] The conclusion by the Committee was in accordance with the allegations of IPPF EN. It contended that women are discriminated against since they are denied effective access to abortion services as *a consequence* of the "failure of the competent authorities to adopt the necessary measures, which are required to compensate for the deficiencies in service provision caused by health personnel choosing to exercise their right of conscientious objection[...]"[264].

Based on the information provided by the parties, the Committee summarised that the lack of non-objecting healthcare providers in a number of hospitals and

[258] *IPPF v. Italy* (Complaint No. 87/2012) ECSR Decision on the Merits, 3 September 2012, para. 169 g).
[259] *IPPF v. Italy* (Complaint No. 87/2012) ECSR Decision, 3 September 2012, para. 172.
[260] *IPPF v. Italy* (Complaint No. 87/2012) ECSR Decision, 3 September 2012, para. 172.
[261] *IPPF v. Italy* (Complaint No. 87/2012) ECSR Decision, 3 September 2012, para. 189.
[262] *IPPF v. Italy* (Complaint No. 87/2012) ECSR Decision, 3 September 2012, para. 189.
[263] *IPPF v. Italy* (Complaint No. 87/2012) ECSR, 3 September 2012, para. 190.
[264] *IPPF v. Italy* (Complaint No. 87/2012) ECSR, 3 September 2012, para. 190.

nursing homes in Italy resulted in women having to travel nationally or internationally, in order to receive the healthcare to which they were legally entitled. The Committee emphasised that if women are forced to travel to another region or abroad to seek an abortion, the time-factor may deprive them of "any effective opportunity to avail of their legal entitlement to such services".[265] This is harmful to the health of the women concerned, and the Committee concluded that "[...]the women concerned are treated differently than other persons in the same situation with respect to access to healthcare, without justification."[266] The conclusion of the Committee was that the situation in Italy constituted a violation of Article 11 of the Charter read in conjunction with Article E.[267]

In addition to the case to the ECSR, the voices of several organisations and groups in Italy, for example, *The Free Italian Association of Gynaecologists for the Law Enforcement of the 194/78 Act* have been heard regarding the lack of law enforcement in relation to women's access to lawfully granted abortion rights.[268]

5.2 Sweden

The illegality of conscientious objection in Sweden became a topic of interest in early 2014, when a newly graduated midwife refused to perform abortions. Conscientious objection within the healthcare profession is a rare phenomenon in Sweden, which is why the case attracted a lot of attention. The midwife, E.G., claimed that while applying for a job, the Jönköping County Council had by not hiring her, discriminated against her because of her objection to performing abortions.[269] She brought the case to the Swedish Equality Ombudsman, who found that the County had not discriminated against her because of her belief, since she had been treated the same way everyone refusing to perform a core work task would have been.[270] In addition to this case, three motions concerning conscientious objection have been proposed to the Swedish Parliament in the past 10 years.[271] A complaints procedure has also been initiated in March 2013 by the *Federation of Catholic Family Associations in Europe* (hereinafter FAFCE) in the European Committee for Social Rights

[265] *IPPF v. Italy* (Complaint No. 87/2012) ECSR, 3 September 2012, para. 193.
[266] *IPPF v. Italy* (Complaint No. 87/2012) ECSR, 3 September 2012, para. 191.
[267] *IPPF v. Italy* (Complaint No. 87/2012) ECSR, 3 September 2012, para. 194.
[268] The web page of LAIGA, http://www.laiga.it/index.php?option=com_content&view=article&id=152:la-laiga-si-rinnova-e-si-rinforza&catid=42:notizie&Itemid=93 [retrieved 01-08-2014]
[269] Decision by the Swedish Equality Ombudsman 10 April 2014, Complaints No. 2014/12 2014/226 2014/227.
[270] Decision by the Swedish Equality Ombudsman 10 April 2014, Complaints No. 2014/12 2014/226 2014/227.
[271] Parliamentary Motions: 2007/08:K378 Conscience Clause, 2011/12:K281 Freedom of Conscience, 2012/13:K220 Freedom of Conscience.

(ECSR) against Sweden for not providing a legal right for healthcare providers to conscientiously object to performing abortions.[272]

The FAFCE complained in March 2013 to the European Committee for Social Rights that Sweden does not comply with its obligations under the Social Charter. At the present time, the ECSR has not yet reached a decision in the FAFCE v. Sweden case.[273] For this reason, an aspiration to establish what the Committee decides would only be speculative. Instead, the main arguments by the parties are presented against a backdrop of historical and contemporary Swedish legislation on abortion and conscientious objection.

Before 1939, it was illegal to terminate pregnancies in Sweden. It was estimated that approximately 20 000 clandestine abortions were performed each year in Sweden at the beginning of the 1930s. The people performing illegal abortions often lacked medical education and used various types of instruments to perform the abortions, leaving many young women permanently disabled or dead in the aftermaths of the illegal procedures.[274]

After a process spanning from 1927 to 1938, with repeated parliamentary motions in favour of lawful abortions, the Termination of Pregnancy Act (1938:318)[275] entered into force on 1 January 1939. The law allowed abortion to be performed if certain provisions were satisfied. A woman could ask to have an abortion performed if a continued pregnancy would endanger her life or health, if she had become pregnant because of rape or if there were a risk that the child would suffer from insanity, mental deficiency, or severe physical illness.[276] Despite the enactment of the Termination of Pregnancy Act in 1939, it was difficult to get a request on abortion granted, and the number of clandestine abortions was still very high. It was not until the more liberal Swedish Abortion Act (1974:595) entered into force on 1 January 1975 that the number of clandestine abortions declined.[277] Today there are no known clandestine abortions in Sweden and the methods used in hospitals are safe and result in few medical complications.[278]

The Swedish 1975 Abortion Act is still in force. Access to abortion is not restricted in terms of age or marital status in Sweden and services are free of charge. There is a right to confidentiality in relation to any counselling pro-

[272] *FAFCE v. Sweden* (Complaint No. 99/2013) Case document No. 1, Complaint, ECSR, 15 March 2013.
[273] *FAFCE v. Sweden* (Complaint No. 99/2013) Case document No. 1, Complaint, ECSR, 15 March 2013.
[274] Official Investigations of the Swedish Government 2005:90, p. 37.
[275] Author's translation.
[276] Official Investigations of the Swedish Government 2005:90, p. 39.
[277] Official Investigations of the Swedish Government 2005:90, p. 37.
[278] Official Investigations of the Swedish Government 2005:90, p. 39.

vided to the woman.[279] The Abortion Act provides abortion on request until the end of the 18th week of gestation, if it cannot be presumed to entail any serious danger to the life or health of the woman.[280] This means that there is no need to furnish the hospital or healthcare provider with a reason for the abortion. However, if a woman has requested an abortion, she shall be provided supportive counselling before the measure is taken.[281] Similar counselling shall also be provided after the abortion has been performed, although neither of the counselling sessions is mandatory for the woman.[282] After the 18th week of gestation, a woman must receive permission by the *National Board of Health and Welfare* in order to have an abortion performed. In order for permission to be granted, there have to be special reasons for the abortion. Permission may not be granted if there are reasons to assume that the foetus is viable.[283]

The Swedish Abortion Act is very clear in relation to clandestine abortions. Only authorised physicians are allowed to perform abortions, and anyone performing an abortion without being an authorised medical doctor is fined or sentenced to a maximum of one year's imprisonment.[284] The Act is also very clear in relation to conscientious objection. If a healthcare provider intentionally refuses to perform or assist an abortion, the *National Board of Health and Welfare* looks into the situation immediately, and he or she is fined or sentenced to a maximum of six months' imprisonment.[285]

A Government Bill in the legislative history of the Abortion Act stated that healthcare providers that did not want to perform abortions for reasons of conscience or religion should not be assigned these tasks, due to respect for women seeking abortion services.[286] The same source emphasises that specific hospital managers are in charge of the distribution of the work tasks for the personnel and that it is their responsibility to accommodate individual wishes as far as possible. Therefore, the Government Bill argues, personnel that for reasons of conscience or religion find it difficult to accept such work, should not be tied to abortion care facilities.[287]

On March the 7th 2013, the Federation of Catholic Family Association in Europe (FAFCE) brought a complaint against Sweden to the European Com-

[279] Jonsson et. al. 2001, p. 6.
[280] The Swedish Abortion Act (1974:595) Section 1.
[281] The Swedish Abortion Act (1974:595) Section 2.
[282] Commentary on the Swedish Abortion Act (1974:595) Sections 2 and 8.
[283] The Swedish Abortion Act (1974:595) Section 3.
[284] The Swedish Abortion Act (1974:595) Section 9. If the same offence is deemed to be aggravated, the offender needs to serve a minimum of six months' and a maximum of four years imprisonment.
[285] The Swedish Abortion Act (1974:595) Sections 4 and 10.
[286] Government Bill (1974:70) p. 76.
[287] Government Bill (1974:70) pp. 76 - 77.

mittee of Social Rights.[288] At the time of this writing, the ECSR has not yet provided a decision on basis of the complaint. Nevertheless, several organisations have provided their observations and the Swedish Government has provided its submissions on the merits.[289]

This complaint was brought against Sweden in order to show that the state has failed to comply with its obligations under Article 11 §§ 1, 2 or 3 ESC on the right to protection of health, read alone or in conjunction with Article E ESC on the prohibition of discrimination.[290] The FAFCE alleges that Sweden's failure to, *inter alia*, enact a comprehensive and clear legal and policy framework governing the practice of conscientious objection constitutes a violation of in Article 11 ESC. The intervening organisations *The Swedish Association for Sexuality Education* (RFSU) and the *Center for Reproductive Rights* (CRR) hold that the FAFCE fails to specify on the ground of whose health it invokes Article 11 ESC and contends that the right to freedom of conscience cannot be invoked under this article.[291]

The FAFCE also alleges that Sweden has failed to ensure that conscientiously objecting healthcare providers are not discriminated against. The RFSU and the CRR point out that in the recent ECtHR case Eweida and Others v. the United Kingdom the Court emphasised that the protection of health and safety in the hospital was considered far more important than the wearing of a cross to manifest one's belief. The Court further held that the aim of providing equal opportunities and non-discrimination of same-sex couples prevails over conscientious objection to providing services to the same.[292] The intervening organisations also emphasised that there had been no appeals before the Swedish Labour Court or any negotiations between employers and labour unions regarding discrimination related to employees' objection to abortion. Neither have there been any appeals to the Higher Education's Appeals Board regarding employees or students claiming that they were not allowed to be exempted from lectures on abortion care.[293]

[288] *FAFCE v. Sweden* (Complaint No. 99/2013) Case document No. 1, Complaint, ECSR, 15 March 2013.
[289] List of complaints and state of procedure under the European Social Charter, Council of Europe.
[290] *FAFCE v. Sweden* (Complaint No. 99/2013) Case document No. 1, Complaint, ECSR, 15 March 2013, p. 28.
[291] *FAFCE v. Sweden* (Complaint No. 99/2013) Case document No. 5, third-party intervention, ECSR, 9 January 2014, para. 26.
[292] *FAFCE v. Sweden* (Complaint No. 99/2013) Case document No. 5, third-party intervention, ECSR, 9 January 2014, para. 18.
[293] *FAFCE v. Sweden* (Complaint No. 99/2013) Case document No. 5, third-party intervention, ECSR, 9 January 2014, para. 45.

The FAFCE holds that the Swedish Government has failed to implement resolution 1763 of the Parliamentary Assembly[294] and concludes that Sweden consequently "formally sets itself against freedom of conscience for healthcare workers and against the goals of Article 11 of the European Social Charter".[295] As has been demonstrated above, in section 3.2, this resolution is not binding on states. The RFSU and the CRR also maintain that the aim of calling for increased regulation of conscientious objection in Resolution 1763 is to protect women's right to health.[296] The Parliamentary Assembly resolutions do not exist in a vacuum, and RFSU and CRR cited the UN Special Rapporteur on the right to health[297], who has held that the practice of conscientious objection constitutes a barrier for women's reproductive health. The Rapporteur has also recommended that regulation on conscientious objection should be specific in its provisions, controlled in use and that the objecting healthcare provider is required to refer the patient to a non-objecting provider.[298] These statements combined with other similar statements cited by the organisations show that the main concern at an international level is the unavailability of abortion services, rather than the protection of the practice to object to providing these services.[299]

The FAFCE also alleged that, in Europe, a strong consensus has emerged to protect medical conscientious objection and that regarding abortion there is an "absolute lack of comprehensive and clear legal and policy framework governing the practice of conscientious objection by healthcare professionals".[300] Furthermore, the FAFCE argues that conscience rights[301] do not threaten women's access , but rather protects it, since "[m]any patients want to be able to access doctors who practice with integrity by obeying their consciences, and who share the patients' values about the right to life".[302] A third intervening organisation, the Ordo Iuris Institute, maintains that a healthcare provider needs to make moral assessments of the acts that he or she is performing within the professional sphere. It argues that conscientious objection is not properly regulated

[294] *Cf.* chapter 3.2. where the resolutions of the Parliamentary Assembly are presented in detail.
[295] *FAFCE v. Sweden* (Complaint No. 99/2013) Case document No. 1, Complaint, 15 March 2013, pp. 19 - 20.
[296] *FAFCE v. Sweden* (Complaint No. 99/2013) Case document No. 5, third-party intervention, ECSR, 9 January 2014, paras. 11 - 16.
[297] In full: the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
[298] *FAFCE v. Sweden* (Complaint No. 99/2013) Case document No. 5, third-party intervention, ECSR, 9 January 2014, paras.12 and 14.
[299] *FAFCE v. Sweden* (Complaint No. 99/2013) Case document No. 5, third-party intervention, ECSR, 9 January 2014, para. 14.
[300] *FAFCE v. Sweden* (Complaint No. 99/2013) Case document No. 1, Complaint, ECSR, 15 March 2013, p. 26.
[301] It is not clear if the FAFCE aims at freedom of conscience or conscientious objection.
[302] *FAFCE v. Sweden* (Complaint No. 99/2013) Case document No. 1, Complaint, ECSR, 15 March 2013, p. 23.

if there are no facilities enabling healthcare providers to "take individual responsibility in matters of health care services".[303]

In response to this, the RFSU and the CRR show that there is no such consensus.[304] They further argue that there is no need to regulate conscientious objection in Sweden in order to secure women's access to lawful abortion since women's access to abortion is already ensured by law and properly implemented.[305] Furthermore, because it has not been proved that healthcare providers are discriminated against on grounds of their objection to abortion and because no data has been presented that show that healthcare providers have been forced to perform abortions against their will, there is no real need for increased regulation on conscientious objection in Sweden.[306]

As mentioned above, the European Committee of Social Rights has not yet provided a decision regarding this complaint. Hence, the outcome of the case is not clear. It can however be discussed whether there is a need for regulation conscientious objection in Sweden, as there are already mechanisms in place to make sure that objecting healthcare providers are given work tasks to which they do not object. Situations where a citizen has chosen to study a degree, which leads to employment with central tasks that he or she objects to, as in the case with the Swedish midwife, E.G., do not show a real need of regulation.

[303] *FAFCE v. Sweden* (Complaint No. 99/2013) Case document No. 7, Observations from Ordo Iuris Institute, ECSR, 15 March 2013, paras. 6 - 7.
[304] The organisations demonstrate from paragraph 7 to paragraph 23 that there is not an international or European consensus to protect the practice of conscientious objection. *FAFCE v. Sweden* (Complaint No. 99/2013) Case document No. 5, third-party intervention, ECSR, 9 January 2014, paras. 7 - 23.
[305] *FAFCE v. Sweden* (Complaint No. 99/2013) Case document No. 5, third-party intervention, ECSR, 9 January 2014, para. 24.
[306] *FAFCE v. Sweden* (Complaint No. 99/2013) Case document No. 5, third-party intervention, ECSR, 9 January 2014, para. 24.

6 Analysis and Conclusion

Through an interest- or problem-oriented approach in combination with a more traditional rule-oriented approach, this thesis sought to investigate the existing 'gap' of the CoE regulation of conscientious objection in relation to abortion. Finding this gap was crucial to see what protection is actually granted to conscientious objectors.

The research questions inquired what balance the Council of Europe has struck between the practice of conscientious objection and the national legal right to access abortion. They also asked whether it could be argued that healthcare providers' conscientious objections undermine women's effective access to lawful abortion and if there are reasons for additional regulation of the practice on a national level or regional level to secure women's effective access to lawful abortion. This chapter aims at answering these questions, based on the material provided in previous chapters.

Conscientious objection can be regulated on a national, regional and international level. This writing has examined the regulation primarily on a regional level, mainly because of the fact that the European Court of Human Rights binds all states, which have ratified the Convention, by its decisions and judgments. There is no express right in the European Convention on Human Rights for healthcare providers to object to abortion procedures, nor is such a right recognised in the European Social Charter. Since conscientious objection is performed on grounds of conscience or religion, it can nevertheless be considered founded in Article 9 of the Convention, if certain conditions are at hand. The objection is required to be grounded in a belief of sufficient cogency, seriousness and cohesion, which is also important for the individual, society or both, and to some extent have a formal content. These prerequisites need to be fulfilled for the belief of the objector to qualify for the forum internum aspect of Article 9 ECHR. These prerequisites are important since they prevent individuals from maintaining that they are Christian one day and Muslim the other. If the objector would also like to act on his or her belief, this act (or omission) is required to have a sufficiently close and direct connection to the underlying belief. Previously the act or omission instead had to be intimately linked to the underlying belief, but this was changed in 2013 by the Court's judgment in the case Eweida and Others v. The United Kingdom. This change altered the Court's way of assessing conscientious objections in the workplace. There is no longer a 'filter' causing the Court to render these cases inadmissible due to their weak link to the underlying belief. It now evaluates the claims of applicants within the proportionality assessment instead. As shown in Eweida and Others, the Court did not change its substantive assessments regarding the two applicants objecting to ensuring the rights and freedoms of others, compared to pre-

vious cases such as Pichon and Sajous v. France. This change merely allows for conscientious objectors to have their case accurately assessed by the Court and does not provide for an enhanced substantive protection of their rights.

Another effect of the change is that applicants no longer need to be in conformity with religious doctrine in order to gain protection from the Convention, something that reasonably facilitates for minorities within religious groups to argue that they are entitled to protection from Article 9 ECHR. This seems to be an improvement of human rights in an individualistic society, allowing everyone to think and believe anything they prefer. A problem may however arise if this reasoning is transferred to manifestation of belief. The forum internum is not problematic in relation to the rights and freedoms of others. The exercise of forum externum rights, on the other hand, may create a number of problems for others. If all healthcare providers gain equal protection for all their specific beliefs and also for the manifestation of these beliefs, it would create a number of complications since the manifestation of these beliefs most likely would result in clashes in between themselves. It would also result in less foreseeability for women seeking abortion care. Still, the provisions of seriousness and cogency of the belief prevents healthcare providers from maintaining that they believe in different things each day, therefore limiting abuse. This partly enhances foreseeability, but the fact that healthcare providers may hold and manifest any belief might still have an intimidating effect of women contemplating seeking abortion care.

It is possible to make a number of derogations from the right to manifest beliefs according to Article 9 ECHR and the case law of the Court. These are commonly decided by the CoE Member States within their margin of appreciation. In case the state fails to properly regulate or balance the relevant interests, namely the interest to manifest a belief and the interest of derogating from this right, the state has exceeded its discretion. Eventually, this is decided by the Court together with the decision on whether the state has violated the Convention or not. Irrespective of at what level the decision is made, the balancing of these interests affects women of childbearing age. The main problem in relation to abortion is that those decisions often are made retrospectively, i.e. in a situation where women have already given birth to the child she was expecting, a child that she has to take care of for the majority of her life. An economic remedy seems as insufficient reparation in relation to the unwanted parenthood. Particularly, as it might be the effect of rape, as in P. and S. v. Poland or might risk the life of the pregnant woman as in A, B and C v. Ireland.

In these cases, the Court highlighted a number of provisions limiting the margin of appreciation of the Contracting States in relation to providing real and effective access to lawful abortion. One such provision was the fact that CoE Member States are obliged to *organise their health services system* so as to ensure that healthcare providers' objections do not prevent women from accessing

lawful abortion services. This entails implementing an *accessible and effective procedure* by which women can establish whether they qualify for a lawful abortion or not. A procedure was not considered accessible or effective in cases where there were no *set procedure or mechanism* in which the interests of the healthcare providers and the interests of the abortion-seeking women could be weighed, and the views of the applicants heard. Since the consultation between healthcare provider and patient is commonly performed behind closed doors, this is one of the most important results from these cases. As a healthcare provider is in a position of trust and authority in relation to the woman seeking abortion care, a set and timely procedure establishing her legal right to abortion in cases when their opinions differ, is an important advancement in states with a high number of objecting healthcare providers.

The Court noted that there was a mechanism in place in Poland, by which an objection could be voiced and which created some balance between the woman applying for an abortion and the healthcare provider. Those measures included an obligation for the healthcare provider to refer the patient to another healthcare provider with the same competence as the first and an obligation for the conscientious objection to be included in the patient's medical record. The state had thus established a procedure *de jure*, but not *de facto*. The Court held that this constituted a breach of the state's positive obligations in relation to Article 8 ECHR. The fact that the Court takes this stance is important since it clearly shows that a state does not fulfil its obligations under named article, merely by pretending it is ensuring women's right to lawful abortion, but only by actually ensuring this right. The Court also clarified that even if a woman is treated by an objecting healthcare provider she has the right to *adequate, clear and objective information.* In Poland there was, however, no procedure to question the differences in opinion between the woman and the healthcare provider. There was, therefore, no way of controlling that the information the applicants had received in the named cases met the above requirements. Another provision, which can be implemented in national legislation, as in Poland, is the obligation for a refusing healthcare provider to refer women seeking abortion care to another healthcare provider who is competent and able to perform the abortion. As seen in the two cases R.R. v. Poland and P. and S. v. Poland, the objecting healthcare providers did not abide by this rule. If there had been a mechanism controlling healthcare providers' referral of patients, neither of these cases would probably have resulted in complaints to the European Court of Human Rights.

The Court rejected arguments on civil-law remedies for violations of Article 8 ECHR, as they were retrospective in their nature and did not provide satisfactory compensation to women who had been denied an abortion due to objecting healthcare providers. In between the lines, it argued that women seeking lawful abortion care should be provided with an assessment on their right in good time

before any national time limits run out so that she can exercise her right to personal autonomy effectively.

Several of the Court's statements under Article 8 ECHR are related to the notion of access to health and healthcare. This is emphasised by the fact that the obligations under Article 11 ESC in many aspects correspond with the obligations voiced by the Court in the cases analysed in relation to the right to private life. According to the Committee, the article on the right to protection of health puts an obligation on states to provide equal and non-discriminatory access to healthcare. In the specific context of reproductive healthcare, states also have to make sure that care is provided on a timely and non-discriminatory basis. The fact that it needs to be provided on a non-discriminatory basis makes healthcare providers' conscientious objections problematic. Unless the practice is very well controlled, its effects are by nature arbitrarily distributed amongst abortion seeking women. Hence, it is likely that two women within the same jurisdiction are treated differently by representatives of the state, as in Italy, even if they are entitled to a lawful abortion on the same grounds. The discriminatory effects of conscientious objection to abortion have to be evaluated on a case-by-case basis, but there is also a structural effect, which has to be taken into consideration. An increased regulation of the practice is called for in order to ensure that it does not have discriminatory effects.

Regarding women's access to lawful abortion, there are states which have implemented procedures which effectively secure these rights *prior* to giving birth. Sweden is one such example. From 1939, the country has gone from an estimated 20 000 clandestine abortions each year, resulting in many injured and killed women, to no known clandestine abortions today. This must be an indication that the present regulation and its implementation is satisfying Swedish women's need for abortions. The procedures do, however, work in a different way than in the other countries reviewed. In Sweden it is the objecting healthcare provider that undergoes a procedure and is questioned, instead of the pregnant woman. The healthcare provider's decision is subject to review by the Swedish National Board of Health and Welfare, which decides whether his or her behaviour was lawful. In the meantime, the woman is provided with a different healthcare provider to assist her. The Swedish Abortion Act nonetheless limits women's access to abortion after the 18th week of gestation and permissions for abortions after this week are not given when the foetus is assumed to be viable.

Sweden does not recognise a right for healthcare providers to object to performing abortions, and it can be argued that Sweden, therefore, is not complying with its obligations under the Convention or the Charter. However, the question whether to recognise conscientious objection to abortion or not is precisely the type of question that falls within the state's discretion. The Swedish regulation puts the rights of the patient at the centre of attention. This shows, *inter alia*, in

the Government Bill preceding the Swedish Abortion Act. It states that healthcare providers who object to performing abortion procedures should be given other tasks, instead of those to which they object. The Government Bill also clarifies that specific hospital managers are responsible for the distribution of these tasks. This is a simple solution, which takes the interests of both the care seeking women and the objecting healthcare providers into account. Such a solution would only be problematic if a very high percentage of the national healthcare providers objected to performing abortions. This is not the case in Sweden at the present time. According to the recent decision IPPF EN v. Italy from the European Committee of Social Rights, this is however the situation in Italy. Despite legal regulation on the responsibilities of the authorities regarding access to lawful abortion, women in Italy cannot effectively exercise this right. The 194/1978 Act requires that hospitals and authorised nursing homes provide abortions if they have been requested in line with the provisions of that act. It also states that the supervision and implementation of the provisions of the 194/1978 Act should be ensured at regional level, and that, if necessary, personnel should be transferred to other parts of the country to even out the number of objecting and non-objecting healthcare providers. As has been shown in the previous chapter, these provisions have not been implemented properly. The gap between the legal provisions and the implementation, the law enforcement, is questionable in relation to the rule of law principle. If the provisions of the 194/1978 Act are not enforced, they merely constitute a façade that the present state wishes to show other states of the international community. It is questionable that Italy had not taken action in the matter prior to the ECSR decision, especially given the importance of the rule of law in relation to democratic values and human rights.

Specific protection for the practice of conscientious objection to abortion has not been voiced in the CoE, except for in resolution 1763 of the Parliamentary Assembly, where calls for an increased regulation of the practice were made. It has been shown that these calls for increased regulation of conscientious objection to abortion were primarily made to safeguard women's effective access to lawful abortion, not to reinforce the practice of conscientious objection in the CoE Member States. Having said this, it cannot be ruled out that the Assembly to some extent recommend states to adopt legislation on conscientious objection also for the sake of objectors. If resolution 1763 is read in the light of resolution 1607, there is however an even stronger reason to interpret resolution 1763 as a measure to prevent conscientious objection from obstructing women from accessing the healthcare to which they are entitled. These recommendations are, in any case, merely of a consultative character and not binding on states.

A question is then if it could be possible to make an analogy between conscientious objection within the military and conscientious objection in a healthcare setting. The one reason for this comparison was the fact that the Court has rec-

ognised conscientious objection in relation to compulsory military service, in the Bayatyan v. Armenia case, but in no other context. One of the main disparities between the fields is their different natures. In the healthcare setting the highest objective is to save lives, whereas the highest objectives within the military can be both to save and to take lives. The natures of the employments are also different. Citizens are forced to partake in compulsory military service, whereas it is voluntary to seek employment as a healthcare provider. Another difference is that a citizen's objection to mandatory military service might be harmful to societal interests, but it is in most situations not directly infringing the rights and freedoms of other citizens. Within the healthcare field, the ramifications could be different. If a healthcare provider refuses to provide abortion care to a woman, the woman's right to access lawful abortion might be at risk. This is especially the case when a large number of healthcare providers object at the same time and place, as in Italy. Because of these discrepancies, this analogy is not clear-cut, but it could serve as a contrasting agent between the practice in these two fields. It might also provide some guidance in regards to the practice of conscientious objection in states where it is legal. The Court voiced a few, general prerequisites for practicing conscientious objection to mandatory military service in its judgment. For example, the internal conflict between a person's beliefs and his or her task to provide abortion care would have to be serious and insurmountable. In case she or he invokes *religious* beliefs as a reason for objecting, those beliefs need to be deeply and genuinely held. In countries where conscientious objection is a lawful practice, these requirements could serve as measures to accept a citizen's objection.

Another question is then if the Court's judgment in the Bayatyan case could be used to interpret a Convention based right to conscientiously object to providing *abortion* as well. The Bayatyan v. Armenia judgment came after the R.R. v. Poland judgment, but before the P. and S. v. Poland judgment. This clearly shows that the fact that the Court recognised conscientious objection in the Bayatyan case is not an 'evolutive' interpretation of the Convention that also applies to abortion services, particularly since the Court in these cases ruled that the practice of conscientious objection infringed women's right to access lawful abortion care and that the respondent state needed to control the practice. Since both cases concerned conscientious objection to abortion and women's lack of access to lawful abortions, the Court, if it considered that conscientious objectors were entitled to protection from the Convention, had every chance to clarify the situation, but did not.

Several of the reviewed cases show that the use of conscientious objection in relation to abortion was not adequately regulated or controlled in the respondent states. In the cases, R.R. v. Poland and P. and S. v. Poland, general confusion permeated the treatment of the applicants and they were almost treated as criminals despite not having violated state law. The Court made it clear that CoE Member States were obliged to secure access to lawful abortions even if

they simultaneously recognise a right for healthcare providers to conscientiously object. Essentially, this means that there is no prohibition for the Contracting States to legalise conscientious objection in a healthcare setting on a national level, but it does not mean that states are under an obligation to legalise the practice either. Ultimately, it is for each state to decide within its margin of appreciation whether it wants to recognise a right to conscientiously object or not and whether it would like to recognise a right to abortion or not. If it has recognised both these rights, it has to make sure that there are mechanisms in place to control the use of conscientious objection and to provide women with timely procedures to establish whether they have a right to abortion or not.

Having enough available healthcare providers is essential to well-functioning healthcare. Therefore, whether it is in the interest of society to employ healthcare providers who object to performing certain tasks can be questioned, especially if there are other non-objecting healthcare providers available for employment. From the state point of view, securing human rights in the healthcare setting, in particular the rights of the patients, would certainly be easier without objecting healthcare providers. Nevertheless, the point of view of the employee must also be considered, bringing about the interest of non-discrimination. Being employed as a healthcare provider is not, however, a human right.

It can be argued that healthcare providers actively should consult their conscience and, where applicable, religion, before providing services within the professional sphere, and that orders from someone with superior authority should not be followed without reflection. However, if all healthcare providers, as representatives of the state, were to always act in line with their conscience, the rule of law would risk being disenabled. Democratically enacted laws would be rendered ineffective if healthcare providers could refuse to provide care within their respective area of expertise, if there is no strict control by the authorities. In such scenario, healthcare would no longer be provided under the laws, and there would be no proper foreseeability regarding healthcare procedures. The rule of man would prevail over the rule of law. Because of this, there is a clear need for increased regulation, especially on a national level. The control by Council of Europe institutions and bodies also fills an important role, particularly in countries which recognise both the right to lawful abortion and the right to conscientiously object in a healthcare setting.

7 Concluding Remarks

This thesis has largely focused on the legal 'gap' in the Council of Europe regulation in relation to conscientious objection to abortion. In order to unravel whether women's access to lawful abortions can motivate limitations of healthcare providers' conscientious objections, case law of the European Court of Human Rights has primarily been utilised. Decisions by the European Social Committee and resolutions and reports of the Parliamentary Assembly have also been means of analysing and interpreting to what extent conscientious objection to abortion and women's access to lawful abortion are rights under the legal documents of the Council of Europe.

It has been shown that the right to manifest beliefs is not unlimited and that the rights and freedoms of others constitute a legitimate aim for the states to infringe this right. Therefore, if conscientious objection to abortion qualifies as manifestation of belief under Article 9 ECHR, it is possible to limit this right through the rights and freedoms of others, namely women's right to access lawful abortion services.

The Court has recognised that Member States of the Council of Europe have a wide margin of appreciation with regards to both access to lawful abortion and conscientious objection to abortion and in relation to the balancing of these interests. However, as soon as states within the Council of Europe provide a legal right to obtain an abortion, the Court has emphasised that they are obliged to secure this right also in practice. The states have both positive and negative obligations in relation to access to lawful abortion. However, it has been showed that continuous violations have been made in several Council of Europe Member States in this regard. The lack of clear regulation and implementation of rules limiting conscientious objection in a number of European states, which recognise a right for healthcare providers to object to providing abortion services, cause women numerous problems in relation to their health, their freedom of expression and their private lives.

As women's access to abortion is infringed in several European countries, increased regulation of conscientious objection to abortion seems motivated in states which have an established right to abortion and also recognises a right for healthcare providers to conscientiously object to abortion, in order to secure women's de facto access to lawful abortion.

Bibliography

Cited Sources

Literature

Arai-Takahashi, Yutaka (2002) *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR,* Intersentia, Antwerpen.

Bates, Ed (2010) *The Evolution Of The European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights,* Oxford University Press, Oxford.

Cook, Rebecca J., Bernard M. Dickens, and Mahmoud F. Fathalla (2003) *Reproductive Health And Human Rights: Integrating Medicine, Ethics, And Law,* Oxford University Press, Oxford.

Dijk, Pieter van, Hoof, Godefridus Josephus Henricus van, and Heringa, Aalt Willem (1998) *Theory And Practice Of The European Convention On Human Rights,* Kluwer, cop., the Hague.

Evans, Paul and Silk, Paul (2013) *The Parliamentary Assembly : Practice And Procedure,* 11th Edition, Council of Europe Publishing, Strasbourg.

Linderfalk, Ulf (2012) *Folkrätten i ett nötskal*, 2nd Edition, Studentlitteratur, Lund.

Mowbray, Alastair (2012) *Cases, Materials, and Commentary On The European Convention On Human Rights*, 3rd Edition, Oxford University Press, Oxford.

Packer, Corinne A. A (1996) *The Right To Reproductive Choice : A Study In International Law,* Institute for Human Rights, Åbo Akademi University, Åbo.

San Giorgi, Maite (2012) *The Human Right To Equal Access To Healthcare,* Intersentia, Cambridge.

Steiner, Henry J., Philip Alston, and Ryan Goodman (2008) *International Human Rights In Context : Law, Politics, Morals,* 3rd Edition, Oxford University Press, Oxford.

Westberg, Peter (1992). "Avhandlingsskrivande och val av forskningsansats – en idé om rättsvetenskaplig öppenhet" *Festskrift till Per Olof Bolding*, pp. 421, 427-436, Juristförlaget, Stockholm.

Articles

Campbell, Mark (2011) "Conscientious Objection, Healthcare And Article 9 Of The European Convention On Human Rights" *Medical Law International* Vol. 11 Issue 4, pp. 284-304. [cited as: Campbell 2011, Medical Law International]

Lamačková, Adriana (2008) "Conscientious Objection in Reproductive Healthcare: Analysis of *Pichon and Sajous v. France*" *European Journal Of Health Law* Vol. 15 Issue 1, pp. 7-43. [cited as: Lamačková 2008, European Journal Of Health Law]

Maher, Julie (2014) "Eweida And Others: A New Era for Article 9?" *International and Comparative Law Quarterly* Vol. 63 Issue 1, pp. 213-233. [cited as: Maher 2014, International and Comparative Law Quarterly]

Muzny, Petr, (2012) "Bayatyan V Armenia: The Grand Chamber Renders A Grand Judgment." *Human Rights Law Review* Vol. 12 Issue 1, pp. 135-147. [cited as: Muzny 2012, Human Rights Law Review]

Renucci, Jean-François (2005) "Article 9 of The European Convention on Human Rights, Freedom Of Thought, Conscience and Religion" *Council of Europe Publishing, Human Rights Files, No. 20.* [cited as Renucci 2005, Human Rights Files]

The American College of Obstetricians and Gynecologists (ACOG) (2007) "The Limits of Conscientious Refusal in Reproductive Medicine", Committee on Ethics Opinion, No. 385, *Obstetrics & Gynecology* Vol. 110 Issue 5, pp. 1203-1208. [cited as: ACOG 2007, Obstetrics & Gynecology]

Zampas, Christina, and Jaime M. Gher (2008) "Abortion as a Human Right - International and Regional Standards", *Human Rights Law Review Oxford University Press* 8:2, pp. 249 – 294. [cited as: Zampas and Gher 2008, Human Rights Law Review]

Zampas, Christina, and Andión-Ibañez, Ximena (2012) "Conscientious Objection to Sexual and Reproductive Health Services: International Human Rights Standards and European Law and Practice" *European Journal Of Health Law*, Vol. 19 Issue 3, pp. 231-256. [cited as: Zampas and Andión-Ibañez 2012, European Journal Of Health Law]

Online Resources

The Free Italian Association of Gynaecologists for the Law Enforcement of the 194/78 Act, from: *http://www.laiga.it/index.php?option=com_content &view=article&id=152:la-laiga-si-rinnova-e-si-rinforza&catid=42:notizie &Itemid=93* [retrieved 2014-07-30]

The Italian Act N^{o} 94 of 22 May 1978 Norme per la tutela sociale della maternità e sull'interruzione volontaria della gravidanza - Gazzetta ufficiale 22/05/1978 n. 140, from:
http://www.salute.gov.it/imgs/c_17_normativa_845_allegato.pdf [retrieved 2014-07-24]

List of complaints and state of procedure, the European Social Charter, Council of Europe, from:
http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp [retrieved 2014-07-02]

International Instruments

Official Documents of the Council of Europe

Conventions and Statutes

European Social Charter (Revised), 3 May 1996, ETS no. 163.

European Social Charter, 18 October 1961, ETS no. 035.

Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS no 005.

Statute of the Council of Europe, 5 May 1949. ETS no. 001.

The Parliamentary Assembly of the Council of Europe

Resolution 1763 (2010) *The right to conscientious objection in lawful medical care*

Resolution 1607 (2008) *Access to safe and legal abortion in Europe*

European Committee of Social Rights

The Right to Health and the European Social Charter - Information document prepared by the secretariat of the European Social Charter, 1 March 2009.

United Nations Conventions

Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

International Covenant on Civil and Political Rights, New York, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 and vol. 1057, p. 407.

National Legislation and Public Documents

Legislation

Italy

N^{o} 94 of 22 May 1978 *Norme per la tutela sociale della maternità e sull'interruzione volontaria della gravidanza - Gazzetta ufficiale 22/05/1978 n. 140* [Norms on the social protection of motherhood and the voluntary termination of pregnancy Act 194/1978].

Sweden

Abortlag (1974:595) [The Swedish Abortion Act 1974:595].

Public Documents

Motion 2007/08:K378 Samvetsklausul [Conscience Clause].
Motion 2011/12:K281 Samvetsfrihet [Freedom of Conscience].
Motion 2012/13:K220 Samvetsfrihet Freedom of Conscience].

Other

DO-beslut, nr. 2014/12 2014/226 2014/227, 10 April 2014. [Decision by the Swedish Equality Ombudsman 10 April 2014, Complaints No. 2014/12 2014/226 2014/227]

Abort i Sverige: Betänkande av Utredningen om utländska Aborter, Statens Offentliga Utredningar (SOU 2005:90), Stockholm 2005. [Author's translation: *Abortion in Sweden, Investigative Report on Abortion for Aliens in Sweden*, Official Investigations of the Government 2005:90, Stockholm 2005]

Table of Cases

European Court of Human Rights

Eweida and Others v. The United Kingdom (Application nos. 48420/10, 59842/10, 51671/10 and 36516/10) Fourth Section Judgment of 25 May 2013.

P. and S. v. Poland (Application no. 57375/08) Fourth Section Judgment of 30 October 2012.

Bayatyan v. Armenia (Application no. 23459/03) Grand Chamber Judgment of 7 July 2011.

R.R. v. Poland (Application no. 27617/04) Fourth Section Judgment of 26 May 2011.

A, B and C v. Ireland (Application no. 25579/05) Grand Chamber Judgment of 16 December 2010.

Skugar and Others v. Russia (Application no. 40010/04) First Section Admissibility Decision of 3 December 2009.

Tysiąc v. Poland (Application no. 5410/03) Fourth Section Judgment of 20 March 2007.

Kuznetsov and Others v. Russia (Application no. 184/02) First Section Judgment of 11 January 2007.

Vo v. France (Application no. 53924/00) Grand Chamber Judgment of 8 July 2004.

Boso v. Italy (Application no. 50490/99) First Section Admissibility Decision of 5 September 2002.

Pichon and Sajous v. France (Application no. 49853/99) Third Section Admissibility Decision of 2 October 2001.

Lustig-Prean And Beckett v. The United Kingdom (Applications Nos. 31417/96; 32377/96) Third Section Judgment of 27 September 1999.

Rekvényi v. Hungary (Application no. 25390/94) Grand Chamber Judgment of 20 May 1999.

Kalaç v. Turkey (Application no. 20704/92) Chamber of the Court Judgment of 1 July 1997.

Kokkinakis v. Greece (Application no. 14307/88) Chamber of the Court Judgement of 25 May 1993.

Open Door and Dublin Well Woman v. Ireland (Application No. 14234/88; 14235/88) Plenary Court Judgment of 29 October 1992.

Norris v. Ireland (Series A no. 142) Plenary Court Judgment of 26 October 1988.

Campbell and Cosans v. the United Kingdom (Series A, No. 48) Chamber of the Court Judgment of 25 February 1982.

European Commission of Human Rights

Konttinen v. Finland (Application No. 24949/94) Admissibility Decision of 3 December 1996.

Kontakt-information-Therapie and Hagen v. Austria (Application No. 11921/86) Admissibility Decision of 12 October 1988.

European Committee on Social Rights

IPPF EN v. Italy

International Planned Parenthood Federation - European Network v. Italy (Complaint No. 87/2012) Decision on the Merits, 10 September 2013.

International Planned Parenthood Federation - European Network v. Italy (Complaint No. 87/2012) Case Document No. 9, Response from the Government to the Committee's questionnaire, 13 May 2013

FAFCE v. Sweden

Federation of Catholic Family Associations in Europe v. Sweden (Complaint No. 99/2013) Case document No. 5, third-party intervention, 9 January 2014.

Federation of Catholic Family Associations in Europe v. Sweden (Complaint No. 99/2013) Case document No. 2, Observations of the Government on the admissibility, 15 March 2013.

Federation of Catholic Family Associations in Europe v. Sweden (Complaint No. 99/2013) Case Document No. 1, Complaint, 7 March 2013.

List of Figures

Figure *Page*

All figures are my own, adapted from content of the case law of the European Court of Human Rights and the wordings of the European Convention on Human Rights.