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Law over mind, and body?

A study of the debate and aftermath of the abortion travels to Poland in 1965 and the case of a midwife invoking her conscience in 2017

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To my mother, whose wisdom is my compass.

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Summary

This thesis orbits around the changes in the Swedish abortion laws during the last century, and the relation to religion. The aim is to make visible the values enshrined in the first abortion law, and those in the current abortion law, as the legislation made a volte-face in the 1970's. Today, abortion is a right and the state is the duty-bearer. This construction collides with the conscience of religious health care personnel. By the examination of two events and the debates in relation to them, the changes and the collisions are highlighted. In addition, the material is examined by the help of the theory critical positivism. Critical positivism divides the law into three levels. This division makes visible how the law serves to produce and reproduce itself – and the values therein. Then, exactly what has changed? What values can we see in the laws and what has been put forward in each respective debate? As the issues pertain to human rights, what does the ECHR framework set forth?

In 1965, Swedish women travelled to Poland to obtain abortion. At the time, the Swedish penal law had ceased to be applied, but remained in force. Nevertheless, the Prosecutor General wanted to prosecute the persons involved, for the purpose of preserving Swedish morals; a purpose that cause indignation in the debate. Subsequently, abolition was employed. In the affair's immediate aftermath, the investigation that lead to the new abortion law was commissioned. At the time of writing, a midwife has lost her case before the Labour Court, where she claimed her right to conscientious objection to abortion. To uphold a criterion for employment that requires every employee to participate in all parts of work, even though a part of the work is not compatible with the conscience of the one seeking the position, does not amount to discrimination.

By also studying the preparatory works to both the abortion legislation and the provision on freedom of religion, the breaking of ties between abortion and religion, and the state and religious morals, is made even more visible. It is also revealed that the constitutional protection of religious exercise is not as strong as it seems – freedom of religion cannot impede social reforms or interfere with the principle of majority. As a result of the comparison and the analysis, the thesis highlights the development and finds that the value promoted today, access to abortion, is upheld by the Labour Court's judgment in relation to conscientious objection, and in a Swedish context, also by the ECtHR.

Sammanfattning

Studien i fråga ämnar lyfta fram de förändringar som svensk abortlagstiftning har genomgått, från den första abortlagstiftningen till den nuvarande regleringen – samt de värderingar som finns däri. Eftersom lagstiftningen har stått i nära förbund med religiös moral, ingår skyddet för religionsfrihet i studien. Abort är i dag en rättighet och det åligger staten att förverkliga rättigheten – konstruktionen har lett till problem för hälso- och sjukvårdspersonal med religiösa värderingar. Genom att dels studera den relevanta lagstiftningen, dels undersöka två stycken för abortdebatten betydande händelser – en på 1960-talet och en som sker i skrivande stund, och de därtill förekommande diskussionerna – förs de förändringar som har skett på området fram än tydligare. Kaarlo Tuoris teori critical positivism, som genom sin tredelade struktur visar på hur lagstiftning står i ständig färd med att bekräfta sig själv, har anammats i analysen. Vilka förändringar har skett? Vilka värderingar har givits företräde i lagstiftningen? Hur har debatten kring abort och samvetsfrihet – som Ellinor Grimmark, barnmorskan vars fall studeras, åberopar – sett ut? Hur förhåller sig rätten och värderingarna till EKMR?

År 1965 stod det svenska åklagarväsendet i färd med att åtala ett antal svenska kvinnor och deras medhjälpare för att kvinnorna i fråga hade erhållit abort i Polen. Vid denna tidpunkt hade strafflagstiftningen för avbrytande av havandeskap upphört att tillämpas. Emellertid rekommenderade riksåklagaren åtal i syfte att upprätthålla svensk moral, en tolkning som kritiserades och sedermera mynnade ut i att abolition tillämpades. Några dagar efter beslutet om abolition tillsattes den utredning som kom att utgöra grunden för den nya abortlagstiftningen, som än i dag är i kraft. I skrivande stund har Ellinor Grimmark förlorat sin talan rörande samvetsfrihet i Arbetsdomstolen; sjukhusen som nekade henne anställning har inte diskriminerat henne när de krävde att hon skulle utföra samtliga uppgifter som åligger en barnmorska. Trots att hennes oförmåga att utföra bland annat abort grundar sig i en religiös övertygelse får ett kriterium av detta slag upprätthållas om verksamheten så kräver. Undersökningen av händelserna och den relevanta lagstiftningen tydliggör separationen mellan abort – religion och stat – religiös moral. Det visas i sammanhanget att det konstitutionella skyddet för religionsfrihet inte är så starkt som en första läsning av bestämmelserna antyder. Religionsfriheten får inte utgöra hinder för demokratisk utveckling. Avslutningsvis lyfter analysen fram utvecklingen, ur vilken framgår att rätten till abort bekräftas av Arbetsdomstolens avgörande och i förlängningen, av EKMR.

Preface

These last five-six years have been quite a journey – not one to Poland, I only got to Italy. As I sit here, late May 2017, I would like to thank my supervisor *Elsa Trolle Önnerfors*, whose encouragement has been vital for my spring – you are a true inspiration at the Faculty of Law. There are a number of reasons I asked you to supervise both my master thesis and my bachelor thesis, all anchored in your talent and wit. I would also like to thank – as I proceed to the end of my time as a law student – *Karol Nowak* and *Eva Ryrstedt*, whose presence at the Faculty of Law in Lund inspired me to become the law student I wanted to be. I would like to express gratitude to the kind personnel at the National Archives in Marieberg and Arninge. My sincerest gratitude to all my *friends*, worldwide, for support and love during my years as a student. Especially *Isabelle* (23 years of friendship – and we got our diplomas the very same spring!) and *Jeanette* (we did it!). To my *mother* – my indebtedness to you will never cease to grow – you are the reason I realised my dreams of cobblestone, law, and the Raoul Wallenberg Institute. To my *Peter*, for numerous reasons: for lectures in medicine and genuine interest in my thesis. However, most of all, for your tireless patience, encouragement, and love – *spasibo*.

At last I would like to send a letter to the younger version of me – a letter to her who arrived in Lund with a green suitcase full of necessities, youth dreams, and the blue statute book – in the form of an excerpt from a poem I love so dearly, T. S. Eliot’s “*Little Gidding*”:

We shall not cease from exploration
And the end of all our exploring
Will be to arrive where we started
And know the place for the first time

Lund, 23rd May 2017

(*And oh, the quite Cartesian title is nothing but a coincidence.*)

Abbreviations and Glossarium

<i>1938 Abortion Act</i>	Lag (1938:318) om avbrytande av havandeskap
<i>1975 Abortion Act</i>	Abortlag (1974:595)
<i>ADF</i>	Alliance Defending Freedom
<i>Church of Sweden</i>	Svenska kyrkan
<i>DO</i>	The Equality Ombudsman
<i>ECHR</i>	Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950
<i>ECtHR</i>	The European Court of Human Rights
<i>EU</i>	The European Union
<i>Instrument of Government</i>	Kungörelse (1974:152) om beslutad ny regeringsform, <i>part of the Swedish Constitution</i>
<i>JO</i>	Parliamentary Ombudsmen (<i>Justitiesombudsmännen</i> in Swedish)
<i>Penal Code</i>	Brottsbalk (1962:700)
<i>PACE</i>	The Parliamentary Assembly of Council of Europe
<i>Swedish Constitution</i>	Sveriges grundlag
<i>UDHR</i>	The Universal Declaration of Human Rights, as proclaimed by the General Assembly on the 10 th of December 1948, <i>United Nations General Assembly Resolution 217 A</i>

UN

The United Nations

UN Charter

The Charter of the United Nations, signed 26th June 1945, date of entry into force 24th October 1945¹

Abortion is employed in order to describe all methods of termination of pregnancy, no matter how far the pregnancy has proceeded. Noteworthy, throughout history, and still today, legislation contains different definitions of termination of pregnancy as to mark *when* during pregnancy an interruption was made, in order to stipulate different legal consequences.²

Kungl. Maj:t is, in Swedish, an older form for His Majesty the King. The form was used before the strictly formal and representative – when the functional relationship remained - role of the King in the Swedish Government was dissolved. *Ergo*, *Kungl. Maj:t* equals the Swedish Government. The notion disappeared when the new Instrument of Government entered into force in 1975.

SOU is short for *statens offentliga utredningar*, meaning ‘Swedish Government Official Reports’. Such a report contains consultation comments – opinions from different institutions of society as well as, *exempli gratia* historical accounts on the subject of the report.

The Prosecutor General is in Sweden the prosecutor who holds the highest position within the Swedish public prosecution service. The Prosecutor General is responsible for the main international issues.³

The Riksdag is employed when referring to riksdagen, the Swedish Parliament.

¹ See United Nations, *Charter of the United Nations*. Available at: <http://www.un.org/en/charter-united-nations/>, (accessed 25th March 2017).

² See the 1975 Abortion Act, Article 5 where the distinction between abortion and termination of pregnancy is stipulated – Article 6 of the same act provides that *termination of pregnancy* are procedures performed post the 18th week of pregnancy; abortions are those before.

³ Åklagarmyndigheten, *Om oss: Riksåklagaren*. Available at: <https://www.aklagare.se/om-oss/riksaklagaren/> (accessed 25th March 2017).

The Medical Board in Swedish: Medicinalstyrelsen, the former board allotted responsibility for healthcare and related social functions, replaced by *the National Board of Health and Welfare*.

The National Board for Health and Welfare named Socialstyrelsen in Swedish, the authority responsible for health care issues, welfare and access to good care.

1 Introduction

1.1 Background and Introductory Words

During the 20th century, the structure of Sweden underwent crucial reforms which yielded a democratic welfare-system. As archaic conceptions were put under the microscope, universal suffrage was introduced, the welfare-system was constructed and sexual norms were challenged. The last century was a century of important changes in the fundamentals of society. There among, abortion and the diminishing morals were subject to vivid debate. Not all agreed on the criminalisation of abortion, not all agreed on the new moral order they claimed to observe. The dissenters as to the prohibition on abortion had been active for a while. For example, the Swedish midwife Carolina Redlund was sentenced for practising abortions in the late 19th century.⁴ Little did a midwife know of the changes to come. The thorough liberalisation of the abortion legislation in Sweden took place in the 1970's. However, judging from the headlines of today, we are not done with the question. Few matters repeated cause controversy like the subject of abortion. Everyone, as a democracy solemnly swears, has a say in the matter. In late March 2017, SVT⁵ reported that, when the search term abortion is used, Google Croatia presents, as a second hit, a link to the homepage of an 'Abortion Clinic' offering consulting. Once at the appointment, it is revealed that the 'clinic' is an organisation with the intention of convincing women not to have an abortion.⁶ In early 2017, there were headlines with a photo picturing the 45th President of the United States, sitting in the Oval Office, in the process of signing an order on a strict abortion policy, surrounded by a group of men.⁷ The scenario resembles the history of Sweden's abortion legislation; this is why the thesis gazes back to 1965 in Sweden and the debates that followed the revealed abortion trips to Poland by Swedish women. The Prosecutor General recommended that the people involved could be prosecuted in Sweden, which caused nothing less than an earthquake in the debate; all ended as the rare and seldom employed institute *abolition* – a form of waiver of prosecution – was used. In the wake of the debacle, a commission was

⁴ Sveriges Radio P1, *Släktband: De bröt medvetet mot lagen för att hjälpa*. Aired and published 12th December 2016. Available at: <http://sverigesradio.se/sida/avsnitt/821291?programid=2068>, (accessed 30th March 2017).

⁵ SVT is short for Sveriges Television, a Swedish national TV-channel.

⁶ SVT, *Pappor ångrar sig när de ser bebisen*. Published 28th March 2017. Available at: <https://www.svt.se/nyheter/pappor-angrar-sig-nar-de-ser-bebisen>, (accessed 24th April 2017).

⁷ See, amongst many sources, BBC, "*Trump's order on abortion policy: What does it mean?*" Published 24th January 2017. Available at: <http://www.bbc.com/news/world-us-canada-38729364>, (accessed 30th January 2017).

formed, with a mandate to investigate the abortion legislation.⁸ Then there is the contemporary example of the Swedish midwife, Ellinor Grimmark, who argues for her freedom of conscience, to have the right *to not* perform abortion and related medical treatment. *In tandem*, an anti-abortion movement spreads over Europe and existing ‘liberal’ abortion laws are challenged – laws made in the recent past. The medial earthquake Ellinor Grimmark’s case resulted in resembles the one the Poland abortions caused. Importantly, both events and debates concern individual opposition against the ethical principle enshrined in law. Therefore, the two debates highlight issues as to an individual in opposition to the idea reflected by the law in force. As we find ourselves in an international legal context where the ECHR holds a parent position in the norm hierarchy, the questions’ relation to and the influence of ECHR must be examined. Learning from the 1960’s, we find that the countries of the Council of Europe can drastically change their legislation. Poland’s abortion law is a textbook example of a law subject to a turnabout. Noteworthy, Poland ratified the ECHR in 1993 whilst Sweden did so in 1952. Swedish citizens travelled to Poland in the 1960’s to access abortions, when Poland was not a member of the Council of Europe, but had more liberal abortion laws in force than today.⁹ Nowadays, both countries are members of the Council of Europe, yet have abortion laws which express the will to protect fundamentally different values. *In tandem*, the Polish Abortion Act is subject to heated debate, where attempts have been made to further restrict the already restrictive access to abortion. What does this tell us about the structure of law, society, and the structure of changes? How is people’s sense of justice reflected in the changes of the law?

The first event is referred to as the *Poland case* or the *Poland affair*, the second by the name of the objecting midwife: the *case of Ellinor Grimmark*. The first event occurred in the 1960’s, the second is taking place whilst this thesis is written. Both events belong to a contentious sphere and are characterised by intense debates: the first preceded what can be described as the liberal cleanse of the Swedish abortion legislation, the second happens in a time where the set values of the abortion law are suddenly questioned, yet again. In the wake of the Poland case, the long traditional view lost its dominance. Completely abandoned, a more liberal view was favoured with a focus of the individual wherein social conditions and free choice became salient. Today, Ellinor Grimmark argues her freedom of conscience – her

⁸ SOU 1971:58, p. 3.

⁹ See Council of Europe, *Treaty Office: Chart of signatures and ratifications of Treaty 005*. Available at: <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures>, (accessed 17th April 2017).

belief in the sacrosanctity of life from the moment of conception – in objecting to perform *inter alia* abortion. Her perception is in line with the state position questioned and abandoned circa 50 years ago. The two events meet and blend as they touch upon the same issue and call into question the intricate notion of the state as neutral in morally sensitive – eternal – issues. Adjacent to religion and individual freedom, the events raise questions on how the individual's conscience and privacy is to be positioned in a democratic society and what the focus and interests of a state are in relation to abortion laws. As Peter Stockmann in Henrik Ibsen's *An Enemy of the People* says:

Dr. Stockmann: But what about public opinion, then? Surely you would not dare to do it on account of public feeling...

Peter Stockmann: Public opinion is an extremely mutable thing.¹⁰

1.2 Objective

The purpose of this thesis is to examine, understand, and analyse values and changes in the interest that Sweden gives precedence to in the abortion legislation, by examining two distinguished events related to abortion and conscientious objection to abortion. Subsequently, to unfold and trace the arguments of the debates. A subsidiary aim is to ponder possible similarities of the two debates and reflect on the issues in relation to the ECHR, as the ECtHR holds a strong position in relation to the signatory states. The topic is of current interest and furthermore, it brings into light important aspects of how different starting points in the interpretation of rights and freedoms affect the perception of what human rights are and how a collision of interest is to be solved.

1.3 Research Questions

The central theme of this thesis is how the relationship between the individual and the state has been shaped and developed in the specific context of abortion, covering a span from the beginning of the cardinal change of the Swedish abortion legislation in 1975 to the present times where the abortion legislation seems to be put under the microscope yet again, in

¹⁰ Ibsen, *An Enemy of the People*, EBook.

connection to the debate of conscientious objection. The question is explored by examining two cases: *The Poland case*, from 1965 and the current case of *Ellinor Grimmark*. Both concern individuals in opposition to the current legislation. First, in order to grasp the debates, it is necessary to lay down the relevant legal framework. This process will answer the question: *What values are enshrined within the relevant laws?* The answer constitutes the basis for the thesis as a whole.

Second, having addressed the question of what values lead to and are protected by the relevant legal framework, the next step is to look at what arguments dominated the respective debates in order to find out *if any similarities can be discerned?*

The third and overarching research question draws on the findings from the other questions. By employing Kaarlo Tuori's theory on law, the question to be answered is: *What changes can be observed, how are the changes reflected in the patterns of law and societal values – what the interest of society is framed as – as to abortion in the relevant period of time?*

In all this, the international context is inevitable. The period of time explored is intimately linked with the development of human rights. Ellinor Grimmark intends to bring her matter before the ECtHR, she now works in Norway and importantly, the Poland case evolves around an event where Swedish citizens travelled to Poland, a country with a liberal abortion law. Today, Sweden has proclaimed itself as a leading country in the area of reproductive health.¹¹ Hence, this descends intimately from the core issue and touches upon the human rights perspective: as Sweden is a signatory state to the system emanating from the Council of Europe, relevant regulations in the ECHR are examined and Sweden's relationship to the ECtHR in the context. Thus, the question as to *how the Swedish regulation is affected by the ECHR* is subject to interest *from a perspective of state-specific morals*.

1.4 Method

The research questions chosen border on a variety of aspects of law, moral, and society. Therefore, the method is chosen to function for all angles of the thesis and adequately answer the questions posed. The legal dogmatic method is employed and supplemented by the

¹¹ SOU 2005:90, p. 25.

method of sociology of law. First, to examine and answer the research questions, the legal dogmatic method is used as to bring about a proper understanding of the legal framework that governs abortion and freedom of religion and conscience, in Sweden and under the ECHR. Further, the Swedish legislation is in focus, and therefore the traditional Swedish legal dogmatic method is used. The doctrine of the hierarchy of legal sources constitutes the basis of the Swedish legal system. The doctrine confers to each source of law a certain value, a given place in the hierarchy of norms, as follows: 1) the Constitution, 2) legislation,¹² 3) legislative preparatory works, 4) case law, 5) general principles of law, 6) custom and usage, and 7) legal scholarship. The accession to ECHR and other international instruments influences the hierarchical order. For the purposes of the thesis, it is worth to know that the legislative preparatory works have a high dignity in the interpretation of what the law is.¹³

In order to define *de lege lata* and understand the law, the traditional legal dogmatic method is employed. Hereto, understanding the history of the given law is crucial as the composition behind and history of the norm may still affect the legislation of today. Obsolete ideas sometimes linger within the law.¹⁴ The basis in the traditional legal dogmatic method is to work on the norm hierarchy and analyse its components as an end to find what the law is and how to interpret and implement the said law in a given situation.¹⁵ In sum, the method used is helpful in the search of a possible legal solution by the application of an identified law.¹⁶ In addition, the method proves itself useful as the method's inherent approach illuminates and maps the considerations and issues at stake that served to form the law. Human rights law is a branch of international law. International law differs from domestic law when it comes to sources. Thereby, the classic legal dogmatic method is employed *mutatis mutandis*. However, as the ECHR is the instrument in focus, the method functions in relation to the ECHR and the interpretation of the rights as carried out by the Strasbourg organs. Hence, the ECtHR's flora of jurisprudence constitutes the main source of law, in addition to the ECHR itself.

The sociology of law method complements the legal dogmatic method. Closely connected to the theory explained *infra*, the method constitutes the basis for analysing the relationship between law and society; the approach enlightens how society affects law making and its

¹² Under this sorts a) Parliamentary acts, b) governmental regulations and c) agency regulations.

¹³ Carlson, 2012, p. 41–47.

¹⁴ Kleineman, 2013, p. 23.

¹⁵ Kleineman, 2013, p. 21, 26.

¹⁶ Kleineman, 2013, p. 29.

interpretation. The method helps in the search to highlight how the opinion influenced and influence law – to know and understand the context in which the law exists and how it shapes the law. The thought which powers the method is that the function of a norm in society, and thereto related questions, must be examined in order to truly understand a given legal norm from a societal perspective. Hence, it focuses on the role of law in society. In the Nordic countries, the methodology grew popular *in tandem* with the welfare state.¹⁷ As the early abortion act intimately links to the women’s rights movement and indeed, goes hand in hand with the said emerging welfare state, the method is of particular relevance.

1.5 Theory

The theory is chosen to adequately grasp and present the object of the thesis. The theory critical positivism coined by Kaarlo Tuori – professor emeritus at University of Helsinki – is used to highlight the most pertinent elements of the two debates and as a tool to understand the changes the examined period is tinged with. Appearing mainly in the analysis, the theory is useful as a means to grasp, structure, and understand the results of the debates as well as the role of *de lege lata*. Further, the theory is found to be helpful in order to illuminate differences and similarities between the debates and the legal aspects encompassed.

In brief, critical positivism is defined as the idea that law can be considered and analysed from the understanding that it consists of multiple layers.¹⁸ Tuori sketches his scheme against a background of understanding natural law and human law, where the former is derived from something abstract – human, subjective nature, the objective will of God or the eternal objective order of the universe – whilst the latter roots in human actions. Human law is divided in two main subdivisions: positive law and traditional law; the former origins in decisions from authorities *et similar*; the latter appears in patterns of human social life. Traditionally, natural law governed the limits of law. In context, the close relationship between human rights and natural law must be pointed to. As Tuori stresses, the subjective human nature or an objective order is no longer viable as an instrument to justify and set the limits of law. Thus, as the contemporary law builds on positive law and has rejected the abstract order earlier accepted, what doctrine sets demarcations of law in modern times –

¹⁷ Hydén, 2013, p. 207–209.

¹⁸ Tuori, 1997, p. 429.

limits needed as the regulations of the welfare states are vast and increasing?¹⁹

In sum, legal positivism – the theory on modern law – is characterised by three main principles: the separation of the two spheres Is and Ought, the isolation of law from other social norms, therein morals, and the view of law as a product of practical human action.²⁰ It is worth noting that the theory of Tuori evolves around the question of law’s validity and processes through which law is made, production and reproduction. Validity as such is of little, yet some, interest for the purposes of this thesis, and his theory is mainly employed as a tool to shed light upon the changes and discern patterns of arguments. Tuori’s scheme consists of three layers:

The surface level of law (*top-level*)

The legal culture (*middle-level*)

The deep structure of law (*deep-level*)



In a view from above – the surface level – the two lower levels are sedimentations of the changes, changes which are reflected in the legislation enacted and applied. The levels can differ as society changes. Within the surface level of law falls all forms of legal regulations, such as laws enacted and court decisions – it consists of the outcome of a constant discussion between the legislator, the judges, and the legal scholars. In the layer thereunder, the legal culture layer, the expert culture of legal professionals’ crowd is sorted, as well as the general legal culture of ordinary citizens. Hereunder sorts doctrine and general principles that serve to systematise the legal system – legal science. The most stable and difficult notions to change and challenge are identified in the deep structure of the law. Here rest the matters which bear

¹⁹ Tuori, 1997, p. 427–428. Further, Tuori posed his theory on critical positivism as an alternative to theories posed by two of the most influential legal positivists, Hans Kelsen and H.L.A. Hart; an alternative to Kelsen’s idea of the Grundnorm, which in brief can be described as the basic and necessary, non-positivist, norm that explains the unity of all legal systems; as Kelsen postulates a system where each norm finds validity in other norms, the Grundnorm serves the ultimate validity basis. Hart however found validity in the rule of recognition – a social fact – which in brief consists of the application of the law by judges and others, thereby conferring validity to the norms. As the question of validity of the laws and limits thereto is not the object of this thesis, this part has been left to the footnote as it caters a deeper understanding of Tuori’s theory, Tuori, 1997, p. 429. See also, Raz, Joseph, *Kelsen’s Theory of the Basic Norm*, p. 94–111, In: *The American Journal of Jurisprudence*, Vol. 19, Iss. 1, Article 6, June 1974, p. 94–95.

²⁰ Tuori, 1997, p. 429–430.

and govern what types of laws that mark an era: Tuori holds that what we find at the deepest level, divides law into and marks *époques*. The base level comprises categories of general legal subjectivity and subjective right – it forms what rationality is, and tends to limit and shape what is acceptable during a given era. Thus, insight at the deep level enables understanding of what type of law dominated a certain era and differences manifested at the surface level. The notions work both constitutively and restrictively. The categories at the sediment influence what is accepted; it sets the dominating argumentation, forms the normative prerequisites and thereby the changes on the surface level.²¹ Tuori argues that every act of legislation takes part “in the production, reproduction, and modification of legal culture and the deep structure of law”²² – the structures are interrelated. For example, human rights in the positivist era have reached the deeper levels through constitutional amendments, international influence, and the works of scholars. Moreover, an interpretation by a judicial organ can be done in the light of a principle rooted in certain morals. This relation between the levels of law comprises the immanent critical part of the system – the different levels exercise critique over one another. Justification of norms and principles are intertwined herein where a certain principle, be it morally tinged or not, finds justification at the deep level.²³

Görel Granström’s dissertation, mentioned *infra*, has been important in the framing of a theory. Some points made by Granström on the male conscientious objector to military service serve as a complement to, or an elucidation of, the theory on critical positivism. Granström postulated that, as the sphere of the individual’s possibility is governed and narrowed by the relationship between the interests of the individual and the interests of the state, the relationship is also one of rights and duties. As the state is responsible for and governs Swedish health care, which is the area of abortion and midwives, the relationship is similarly circumscribed. Granström aimed to understand the notion of an individual’s latitude.²⁴ Hence, Granström’s approach helps to discern the details in the changes in relation to the events and legislation discussed in the thesis; the approach serves as a guide in the endeavour to point out patterns in the arguments and the interests given precedence. Inevitably in context, reflections on the women’s rights movement will be brought up in the analysis as the women’s rights movement has played and still plays an important part in the realisation of equity.

²¹ Tuori, 1997, p. 432–439.

²² Tuori, 1997, p. 437.

²³ Tuori, 1997, p. 435–437, 440–442.

²⁴ Granström, 2002, p. 13–15.

1.6 Material and Status of Research

First, in order to fulfil the purposes, a thorough background study on the law is taken on, enabling a robust contextual understanding of the subject. This forms part of the research question *per se*; mapping the legislation and principles governing the field of focus is cardinal in an examination of changes and development. Second, to trace and understand the debates, official documents such as judgments and decisions, newspaper clippings, writings, and other statements akin are vital. Debates in newspapers are therefore paired with abstracts of the debate and the event provided for in the SOUs and other public prints. The official material offers a stable reflection of the public opinion and highlights tendencies. Both subjects form excellent content for sensation journalism. The more vociferous entries have only sometimes been included to represent properly the debate. In addition, the inclusion of an argument from a newspaper clipping in the thesis does not afford a precise scientific value to the argument. The opinions are included for the purpose of understanding the happenings and the debates that surround the two events. As for the Poland affairs and its retinues, the materials are available at the National Archives; this is true for both newspaper clippings, materials included in the preliminary investigation and other public documents and sources. The documents which preceded the governmental decision – *inter alia* the missives from the Prosecutor General – and the decision itself constitute the prime material. The newspaper clippings serve as a complement to understand the debate.

Turning to Ellinor Grimmark and the freedom of conscience, the judgment of the Labour Court delivered 12th April 2017 is the principal document used. Victoria Enkvist at the Faculty of Law of Uppsala University has written a dissertation on freedom of religion, “*A Framework for Religious Freedom under the Swedish Law*”. Enkvist examines the issues emanating from the lack of coherency between the absolute prohibition on limits of the freedom of religion – the black letter of the law provides for an absolute protection – of the Swedish constitution and the jurisprudence which reflects the freedom as relative in nature. Enkvist’s colleague, Kavot Zillén, has undertaken research in a related field, namely the freedom of conscience of healthcare professionals. Zillén’s dissertation gravitates around the rights of the patient and the employee. Zillén was interviewed on the subject of freedom of

conscience in relation to the pleas of Ellinor Grimmark;²⁵ Enkvist and Zillén, in collaboration, wrote an article on how the freedom of religion functions.²⁶ The works of Enkvist and Zillén have been useful in understanding and mapping the legal framework of the question.

For the sections on ECHR and the interpretation of its rights and freedoms, William A. Schabas commentary *The European Convention on Human Rights. A Commentary* is a solid and authentic opus on the rights and freedoms and their respective interpretation.²⁷ William A. Schabas holds tenure at a number of universities, *inter alia* Middlesex University in London and University of Leiden. Schabas has written numerous books on international law and human rights.²⁸ Nevertheless, the ECtHR's case-law is the most prominent material in understanding what the rights and freedoms are under the ECHR, as the black letter of the law is open for a dynamic interpretation.

In addition, Görel Granström's academic dissertation has served as a solid source of inspiration; it has been helpful in the progress of grasping, theorizing, and contextualising the abstract ideas that form the basis for the thesis. Görel Granström is a senior lecturer at the Department of Law, Umeå University.

Further, Lenita Freidenvall is an associate professor and senior lecturer at the Department of Political Science, Stockholm University. Freidenvall conducts research on topics as gender, political representation and intersectionality.²⁹ In the chapter "*In Pursuit of Bodily Integrity in Sweden*" in *European Women's Movement and Body Politics*, she analysed prostitution, abortion, and women's organisations in Sweden in a similar range of time as this thesis; she

²⁵ Sveriges Radio, *Barnmorskorna och antiabortlobbyen: Abortvägrande barnmorskor får stöd av amerikansk lobby*. Aired and published 24th January 2017. Available at:

<http://sverigesradio.se/sida/artikel.aspx?programid=83&artikel=6614458>, (accessed 10th February 2017).

²⁶ Zillén, Kavot and Enkvist, Victoria, *Abortvägran, religiös klädsel och obligatorisk skolundervisning – så fungerar religionsfriheten*. Published 21st February 2017. Available at:

<http://www.dagensjuridik.se/2017/02/abortvagran-religios-kladsel-och-obligatorisk-skolundervisning-sa-fungerar-religionsfriheten>, (accessed 22nd February 2017).

²⁷ The work is listed at the website of the European Court of Human Rights, *Library: Collections: Latest Commentaries and Manuals on the Convention*. Available at:

http://www.echr.coe.int/Pages/home.aspx?p=library/collections&c=#n14846619462154096107699_pointer (accessed 16th April 2017).

²⁸ Middlesex University London, *Prof. William Schabas*. Available at:

<https://www.mdx.ac.uk/about-us/our-people/staff-directory/profile/schabas-william> (accessed 16th April 2017).

²⁹ Stockholms universitet, Statsvetenskapliga institutionen, *Lenita Freidenvall*. Available at:

<http://www.statsvet.su.se/forskning/vara-forskare/lenita-freidenvall/lenita-freidenvall-1.119508> (accessed 27th April 2017).

found that bodily integrity has been strengthened as the issue was framed as one of bodily citizenship. Women were given the right to their own bodies.³⁰

Reinhold Fahlbeck is professor emeritus in labour law and senior professor at the Faculty of Law, Lund University. His voice has been heard in the debate of freedom of conscience. He has *inter alia* written an article on the subject of freedom of conscience and abortion in relation to the ECHR, where he claimed that the ECtHR will find that Sweden has breached the ECHR in the case of Ellinor Grimmark.³¹ However, this thesis does not deal with the outcome of a balancing task under the ECtHR *per se*. Yet the arguments employed by Reinhold Fahlbeck are of interest in the debate related to freedom of conscience.

1.7 Delimitations

Rare are the contentious debates characterised by only objective and pertinent arguments; ‘the women’s issue’ and ‘the religious matter’ both attract arguments of all types as well as arguments associated with innumerable disciplines. The material aspect of such arguments – their potential durability and scientific basis – falls outside the scope of this thesis, yet the existence and the use of such thoughts in the debate are included, as debate structures and arguing *per se* form part of the thesis. *Exempli gratia*, the inherent validity of philosophical, religious, and medical arguments on when and how life begins will not be explored. Their existence and the simple fact that different strands exist and therefore – to a greater or lesser extent – polarize the debate overall is relevant. The precise content of a patient’s right and access to medical care is not considered, nor is a labour law perspective examined. The thesis takes on the values expressed at the time of the two events chosen, whereby the lawfulness of an employee’s objection to abortion is not discussed *per se*. In her dissertation, Kavot Zillén³² examines health care personnel’s conscientious objection from a health care and labour perspective, whereby her writings are recommended for those interested. The scope of the thesis is akin to other territories occupied with the question of the individual’s role or a citizen’s part in society, in relation to others and importantly, in relation to the state.

³⁰ Freidenvall, Lenita, *In Pursuit of Bodily Integrity in Sweden*, p. 118–152, In: *European Women’s Movement and Body Politics: The Struggle for Autonomy*, Joyce Outshoorn (eds.), Palgrave Macmillan UK: United Kingdom, 2015.

³¹ Fahlbeck, Reinhold, *Religionsfrihet och mänskliga rättigheter*, In: *Juridisk Tidsskrift*, No. 12014/15, p. 3–27.

³² See under the presentation of Kavot Zillén.

Inter alia euthanasia and conscientious objection to (compulsory) military service are questions moving in the same sphere. These areas will be brought up frugally, but remain in general outside the scope. The aspect of discrimination – an important Article of the ECHR, set forth in Article 14, not operating alone standing but always in conjunction with one of the material rights such as Article 9 – will not be dealt with in detail. As mentioned *supra*, the purpose of the thesis is to shed light on values embedded in the laws governing the subject, but reflections on whether the measures subject to examination amount to discrimination or not is left outside the scope.

Furthermore, the ECHR constitutes the main international legal framework for this thesis. The ECtHR takes into account national legislation and international law – it does not operate in a legal vacuum.³³ Therefore, the ECHR can be considered indicative of the international development relevant for Sweden. For example, Sweden is a member of the EU. EU has its own bill of rights – the Charter of Fundamental Rights of the European Union.³⁴ Article 52.3 of said Charter states that when the rights of the Charter correspond to those in the ECHR, the meaning and scope of the rights in the Charter shall be the same as in ECHR. However, this unity in interpretation does not prevent the rights protection by the EU to be more extensive. Nevertheless, the ECHR sets the standard, whereby this document is in focus. The topic of this thesis is oftentimes described as one of a conflict of rights – the woman’s will and body and the health care employee’s will and conscience. As the matter is one of balancing rights, the discussion on an extended protection is not paid attention to. Lastly, these matters touch upon a wide range of other human rights than the two in focus. Freedom of expression and the right to life are sometimes mentioned. The absence of discussion on other human rights implications does not render such implications irrelevant. However, those are considered to fall outside the scope as the chosen focus illumines the values and opinions subject to analysis.

³³ Letsas, *Strasbourg’s Interpretive Ethics: Lessons for the International Lawyer*, p. 521–523. See also Articles 31–33 of the Vienna Convention on the Law of Treaties, in which means and methods for interpretation governing the area of international law are enshrined.

³⁴ The Charter of Fundamental Rights of the European Union, (2000/C 364/01).

1.8 Disposition and Structure

The disposition is ordered according to a chronological structure and a division of sections, where the first chapter includes introduction, method, theory and related formalities, followed by chapter two that describes some useful basic concepts. In the third chapter on abortion there is an account of the abortion legislation – both the national law and the ECHR protection – the Poland case and the debates on the matter. Consequently, the impact of the event is examined by mapping the end of the road to the 1975 Abortion Act. In the fourth chapter the thesis takes a turn to freedom of religion and conscience. This is done by unfolding the status of freedom of religion and conscience in Sweden and under the ECHR. The case of Ellinor Grimmark and the debates on conscientious objection are examined thereto. In the fifth chapter comes an analysis of the two debates and the values expressed therein, where the theory presented by Kaarlo Tuori is employed in order to highlight the structures. In chapter six, a brief conclusion is given.

2 Basic Concepts

In order to facilitate a better understanding of the thesis, this chapter contains brief presentations on basic concepts drawn on in the text.

2.1 A Brief Note on Democracy in Sweden

Parliamentary rule was realised in 1917 and was followed by the introduction of universal suffrage in 1921.³⁵ Chapter 1 Articles 1 and 4 of the Instrument of Government states that all public power proceeds from the people, where the Riksdag, the foremost representative of the people, enacts the laws.³⁶ The seats of the Riksdag are assigned in proportion to the election result.³⁷ In brief, the Riksdag appoints the Government. The Swedish Government has mandate to submit governmental bills to laws. In addition, any Member of the Riksdag can submit motions. The Riksdag votes on the proposals in accordance with the principle of majority.³⁸ Hence, the principle of majority is crucial in the Swedish law-making process. Thus, a law can be said to reflect the will of the majority, as expressed by the voting in the Riksdag, and in extension, the voting during the elections. Inevitably, there is a principal concern to respect the minority without departing from the fundamental principle of majority rule and deviating from democratic rule.³⁹

2.2 On Sovereignty and the Nationality Principle

The concept of sovereignty in international law covers a range of aspects. For the purpose of this thesis, the fundamentals of sovereignty as to jurisdiction is relevant. Independent states

³⁵ Larsson and Bäck, 2008, p. 69.

³⁶ The Constitution of Sweden is available in translation (English) at <http://www.riksdagen.se/en/SysSiteAssets/07.-dokument--lagar/the-constitution-of-sweden-160628.pdf/> (accessed April 17th 2017).

³⁷ See, for a brief summary of elections: Sveriges Riksdag, *Så funkar riksdagen: Riksdagens uppgifter: Beslutar om lagar*. Available at: <http://www.riksdagen.se/sv/sa-funkar-riksdagen/riksdagens-uppgifter/beslutar-om-lagar/> (accessed 27th April 2017).

³⁸ See, for a brief summary on how laws are enacted in Sweden: Sveriges Riksdag, *Så funkar riksdagen: Demokrati: Val till riksdagen*. Available at: <http://www.riksdagen.se/sv/sa-funkar-riksdagen/demokrati/val-till-riksdagen/>, (accessed 27th April 2017).

³⁹ Larsson and Bäck, 2008, p. 32–33.

possess sovereignty.⁴⁰ Sovereignty is a form of power, *inter alia* “the power to exercise authority over all the individuals living in the state’s territory”.⁴¹ Intimately linked with territory, states have a duty not to intervene in the area of another state’s exclusive jurisdiction; this springs from the principle of sovereign equality.⁴² The system on equal states is said to emanate from 1648 and the Peace of Westphalia, where the basis for a secular European order was created. The international legal arena restrains sovereignty.⁴³ Thus, a state’s accession to the ECHR entails limitations on sovereignty. From the concept of sovereignty emanates a discretion to decide matters⁴⁴ – as described in the UN Charter Article 2 (7) – “essentially within the domestic jurisdiction”. This legal competence is therefore a part of sovereignty. In this thesis, the will to exercise jurisdiction beyond the territorial borders of Sweden, a legitimate practice under international law under certain circumstances, is relevant. States have jurisdiction to prescribe and jurisdiction to enforce. In the context, it is enough to know that the latter jurisdiction confers upon states the right to enforce its laws when, *exempli gratia*, a Swedish citizen has committed a crime abroad. The basis for whom a state can enforce its criminal jurisdiction upon varies. Within a state’s territory, the territory will be the rationale. Outside the territory, the nationality principle justifies the enforcement of Swedish laws over Swedish citizens; Sweden can define the conduct of its citizens.⁴⁵

The Dutch organisation Women on Waves serves a good example on the rules of jurisdiction: the organisation provides abortifacients on a ship flying the Dutch flag and does so out on the high seas where – as a principal rule – the law of the flag state applies. Women on Waves thereby enables abortion for women living in states with restrictive abortion laws.⁴⁶ However, *the nationality principle* may apply as the citizen who takes the abortifacients could still be liable to the enforcement of the laws of the citizen’s home country.⁴⁷

⁴⁰ Mansell and Openshaw, 2013, p. 28–29.

⁴¹ Mansell and Openshaw, 2013, p. 29.

⁴² Article 2 (1) of the UN Charter explicitly provides that the principle of sovereign equality is the edifice of the entire UN structure and organisation.

⁴³ Mansell and Openshaw, 2013, p. 30.

⁴⁴ Mansell and Openshaw, 2013, p. 31.

⁴⁵ Renton Wolf, Shannon, *Making Waves: Circumventing Domestic Laws on the High Seas*, Article No. 7, In: Hastings Women’s Law Journal, Volume 14, Issue 1, Symposium Issue: Together: Bridging the Gaps in Legal Response to Domestic Violence, 2003, p. 114–115.

⁴⁶ Women on Waves, *Who are we? Legal Position of Women on Waves*. Available at: <https://www.womenonwaves.org/en/page/611/legal-position-of-women-on-waves> (accessed April 7th 2017).

⁴⁷ Renton Wolf, Shannon, *Making Waves: Circumventing Domestic Laws on the High Seas*, Article No. 7, In: Hastings Women’s Law Journal, Volume 14, Issue 1, Symposium Issue: Together: Bridging the Gaps in Legal Response to Domestic Violence, 2003, p. 114–115.

2.3 A Brief Note on the History of Human Rights

A state bound by an international treaty must operate within what is permissible according to the treaty in question. International human rights law significantly qualifies the ambit of permissible actions and omissions of a state.⁴⁸ Following the atrocities of the World War II, the UN was founded and shortly thereafter, in 1948, the UN General Assembly adopted the UDHR.⁴⁹ A number of conventions on the subject of human rights was issued in the years that followed. During the postwar period, the international community realised the urgent need for other mechanisms to protect and develop the democratic order; universal suffrage and the democratic decision-making process had not prevented the atrocities the world had just witnessed. A system that could prevent the dismantling of democracy and at the same time protect the individual from abuses in the name of different doctrines, was necessary. International human rights treaties were created, natural law had a renaissance, and international institutions such as the Council of Europe, the UN⁵⁰ and the precursor to EU saw the light of the day.⁵¹ As for the ECHR, the real development took place in the 1970's, after states had began to accept the right to individual petition. The ECtHR began to interpret the ECHR broadly – as a true human rights constitution. Before this, the ECHR had a status of a document discussed among a smaller, initiated group.⁵²

2.4 Sweden and the ECHR

2.4.1 The Nature of Sweden's Obligations under the ECHR

The full enjoyment of human rights requires of the duty-bearer, the state, adherence to the tripartite principle which includes a duty to *respect*, *protect*, and *fulfil* human rights. The tripartite construction entails both negative and positive obligations where the negative obligations tend to be branded as more traditional, being the duty to refrain from any interference. Positive duties require a more proactive role of the state.⁵³ A stipulated right to abortion in national legislation can create a positive obligation to provide abortion – there

⁴⁸ Mansell and Openshaw, 2013, p. 31.

⁴⁹ Bates, 2010, p. 2.

⁵⁰ The UN had a less successful precursor in the League of Nations.

⁵¹ Prop. 1993/94:117, p. 10–11.

⁵² Bates, 2010, p. 10–16.

⁵³ Zillén, 2016, p. 113.

included, *inter alia* to set up a proper framework and hire personnel. An example of a negative obligation would be the duty for a state to refrain from dictating the minds of its citizens. However, the obligations blur; it is not always called for to define in exact terms the nature of an obligation when dealing with an impugned human rights violation. Indeed, this follows from another fundamental aspect of human rights: human rights are universal, indivisible, interrelated, and interdependent – there is no need to draw a sharp line.⁵⁴ Nevertheless, the varying nature of obligations implies a complex role of the state in the process to ensure every person her human rights.

2.4.2 Sweden and the ECHR: Accession and Relationship

The ECHR was signed on the 4th November 1950.⁵⁵ The judgments delivered by the ECtHR are legally binding upon the states concerned, see Article 46 of the ECHR. Nevertheless, the ECtHR's case law will often have implications for the general European development. The principle of *stare decisis* does not apply to the ECtHR as the living instrument doctrine guides the ECtHR in dealing with precedents. The doctrine entails that any given situation shall be interpreted in the light of present-day conditions and changes in society (such as science and altered morals) shall be taken into account in the assessment. However, legal certainty and foreseeability are also important values. Thus, the uniformity in the adjudication process its application of law is seldom altered – save for when compelling reasons are at hand. As the ECHR belongs to a system of human rights protection, the dynamic and evolutive application is crucial not to render the rights a bar to improvement.⁵⁶ Notably, in the authority *Ireland v. the United Kingdom*⁵⁷, the ECtHR recognised its judgments go beyond the ambit of the factual cases; the judgments function “more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties”.⁵⁸ Hence, the reasoning and findings of one case will affect other signatory states. The above presented information also displays

⁵⁴ *P. and S. v Poland*, App. No. 57375/08, Judgment delivered by the ECtHR 10th October 2012, paras. 94–96.

⁵⁵ Today, the Convention has been amended through the sixteen Additional Protocols, see Council of Europe, *Treaty Office: Search on Treaties: Human Rights (Conventions and Protocols Only)*. Available at: <http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/results/subject/3> (accessed 3rd April 2017). Protocols No. 15–16 are not yet into force.

⁵⁶ *Christine Goodwin v. The United Kingdom*, App. No. 28957/95, Judgment delivered by the ECtHR, 11th July 2002, paras. 74–75.

⁵⁷ *Ireland v. the United Kingdom*, App. No. 5310/71, Judgment delivered by the ECtHR 18th January 1978.

⁵⁸ *Ireland v. the United Kingdom*, App. No. 5310/71, para. 154. See also “*Partly concurring and partly dissenting opinion of Judge Pinto de Albuquerque*” in *Herrmann v. Germany*, App. No. 9300/07, Judgment delivered by the ECtHR 26th June 2012, for a well-written and concise note on *stare decisis* and the living instrument doctrine.

that changes in the jurisprudence are rare, yet not alien to the nature of the ECtHR jurisprudence.

Sweden ratified both the ECHR and the optional individual right to petition on the 4th February 1952. In doing so, the function of the European Commission of Human Rights (now repealed and replaced by the ECtHR and its new function)⁵⁹ in relation to Sweden was activated. The Commission's main task was to reach conciliation. If conciliation failed, a non-binding report was written on whether the given situation amounted to a rights violation.⁶⁰ Sweden did only initially acknowledge the competence of the Commission and did not admit the ECtHR full and binding jurisdiction until 1966.⁶¹ Noteworthy, Sweden submitted a reservation to Article 2 of the First Additional Protocol. The section of law guarantees the right to education and confers upon the states a duty to respect the right of parents to ensure education in conformity with their own religious and philosophical conviction. Sweden made a reservation: (today no longer in force⁶²) parents were not allowed to invoke their philosophical conviction in order to have their children exempted from certain teaching, nor could Sweden as a principal rule guarantee children exemption from the then mandatory teachings in Christianity.⁶³

Not until 1995, the ECHR was incorporated into Swedish law.⁶⁴ One aim with the incorporation was the will to guarantee citizens a greater enjoyment of the ECHR rights.⁶⁵ Chapter 2 Article 19 of the Instrument of Government explicitly stipulates that no act of law or other provision may be adopted that contravenes Sweden's undertakings under the ECHR. Sweden must interpret national law in accordance with the ECHR.⁶⁶ This principle of interpretation requires of the national institutions a vigilance to the development in Strasbourg; the precedents of the ECtHR – the ECtHR's position on law – is law in Sweden.⁶⁷ Besides holding the status of Swedish law, ECHR and the ECtHR constitute what may rightfully be described as the most powerful mechanism of human rights protection in

⁵⁹ The European Commission of Human Rights was abolished when Additional Protocol No. 11 came into force (*Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby*).

⁶⁰ Prop. 1993/94: 117, p. 10–11. See also Sundberg and Sundberg, 1992, p. 14–15.

⁶¹ Sterzel, 1993, p. 13.

⁶² Reservation by Sweden to ETS No. 009, period covered: 18/05/1954 - 01/01/1995.

⁶³ Prop. 1993/94:117, p. 10–11. See also Sterzel, 1993, p. 13–14.

⁶⁴ As adopted in *lag (1994:1219) om europeiska konventionen om de mänskliga rättigheterna och de grundläggande friheterna*, see also prop. 1993/94:117, p. 1.

⁶⁵ Prop. 1993/94:117, p. 12.

⁶⁶ *Decision by DO on E.G.*, 2014, p. 7.

⁶⁷ SOU 1997:41, p. 91.

Europe.⁶⁸ However, the primary responsibility for adherence to the ECHR rights is bestowed upon the states, as the ECtHR surveillance is subsidiary to the national monitoring.⁶⁹

2.5 The Margin of Appreciation Doctrine

In the exercise of its European surveillance and in the review of the states' compliance with the ECHR, the doctrine of margin of appreciation is applied. The doctrine comes in to question when a potential interference with a right is examined: it falls within the assessment as to whether an impugned measure was necessary in a democratic society. For the requirements of the necessity test to be met, the national authorities must evince that the disputed measure was proportionate to the legitimate aim pursued. The ECtHR will determine whether the national authorities in the particular circumstances have struck a fair balance between the interests at stake. Here, the states are afforded a margin of appreciation; its limits dictate the room for a state in a given situation to decide on the proportionality as to an impugned decision.⁷⁰ The broader the margin, the smaller the scope for Strasbourg surveillance, the greater the national independency and the room to let prevail the national authorities' interpretation. Depending on the level of consensus within the Council of Europe states on a given issue, the doctrine will vary significantly. When applied, the margin of appreciation can either be wide or narrow – overall narrow when there is a consensus among a majority of the states, wide when there is no consensus, allowing for greater national differences.⁷¹ Notably, the doctrine often is decisive to the outcome in contentious moral issues such as abortion and euthanasia.⁷² In matters regarding the protection of health and safety on hospital wards, states are left a significant margin of appreciation, for the hospital managers are considered better equipped to make decisions on clinical safety than the

⁶⁸ This is so as the ECtHR, established as a permanent court, Article 19, has been equipped with a powerful mandate to interpret and apply the rights and freedoms in the Convention, Article 32. Noteworthy, if a dispute on the jurisdiction of the ECtHR appears, the ECtHR shall decide the matter, Article 32. The judgments are binding, Article 46 of the ECHR. See also SOU 1974:88, p. 3. Moreover, the Strasbourg system is oftentimes, within the human rights sphere, referred to as exactly this, the most powerful mechanism, see among others United Nations Human Rights Office of the High Commissioner, United Nations Guide for Minorities, Pamphlet No. 7, *Minority Rights under the European Convention on Human Rights*, p. 7.

⁶⁹ See for example *Linda Steen v. Södermanlands läns landsting*, p. 33.

⁷⁰ See for example *Bayatyan v. Armenia*, App. No. 234509/03, Judgment delivered by ECtHR 7th July 2011, paras. 112–128. This test is employed under a number of Articles in the ECHR, *exempli gratia* Articles 8–10.

⁷¹ *Lambert and others v. France*, App. No. 46043/14, 5th June 2015, para. 145.

⁷² See *inter alia* *Bayatyan v. Armenia*, App. No. 234509/03, *Lambert and others v. France*, App. No. 46043/14, *A, B and C v. Ireland*, App. No. 25579/05, Judgment delivered by the ECtHR 16th December 2010.

ECtHR.⁷³ With respect to questions on the beginning of life, and inextricably, abortion, first, the ECtHR has not decided whether life within the meaning of Article 2 encompasses the unborn child. Second, it has not been decided if the unborn equals the legitimate aim “the protection of others” under Article 8 § 2, whereby an interference in the private life of the mother-to-be could possibly be justified.⁷⁴ Further, the ECtHR has found no evidence that the signatory states intended to bind themselves to any interpretation on when life begins: therefore, the question is open.⁷⁵ It is worth to note that a substantial majority amongst the Council of Europe states are in favour of access to abortion, even so on more numerous indications than just a risk to the life of the expectant mother. Nevertheless, the existing consensus has not been considered to render the margin of appreciation narrow with respect to abortion: it remains for the national authorities to balance the conflicting rights.⁷⁶ All this is not without the ECtHR reservation to a potential use of an evolutive interpretation. This method of interpretation – the living instrument doctrine – allows the ECtHR to fully take into account the European development and deviate from earlier case law.⁷⁷

From the given information, we can establish that there exists a consensus on allowing abortion to a certain extent. Nevertheless, the non-existing consensus on when life begins – being *the other interest* that the interest of the expectant mother is weighed against – affects the margin and leaves it wide. The Council of Europe states do not ascribe the interests concerned the same weight, and have not reached unification as to the rights of the unborn. However, this is not set in stone, as future trends can potentially alter the current interpretation, as enabled through the living instrument doctrine. Lastly, if the margin of appreciation is found to be narrow and a state deviates from the European standard, convincing and compelling reasons must be advanced to justify the interference in question. In this, the state must establish that the impugned measure was prompted by a pressing social need.⁷⁸

⁷³ *Eweida and Others v. the United Kingdom*, App. No. 48420/10; 59842/10; 51671/10; 36516/10, Judgment delivered by the ECtHR 15th January 2013, para. 99.

⁷⁴ *Vo v. France*, App. No. 523924/00, Judgment delivered by the ECtHR, 8th July 2004, para. 76.

⁷⁵ *Vo v. France*, App. No. 523924/00, para. 76.

⁷⁶ *A, B and C v. Ireland*, App. No. 25579/05, paras. 234–238.

⁷⁷ *A, B and C v. Ireland*, App. No. 25579/05, para. 237.

⁷⁸ *Bayatyan v. Armenia*, App. No. 234509/03, para. 123.

2.6 A Note on Health Care and the Patient

For the purposes of this thesis, it is enough to conclude that the state is the duty-bearer as to guarantee care, or more precisely, good care for the entire population. The notion good care covers a range of quality standards; the health care personnel bear a major medical onus in the realisation of good care for the population; health care personnel must be professional. There exists no exact definition on what constitutes good care, whereby the notion can be subject to and influenced by – in any given situation where care is provided – the health care personnel’s religious or moral conviction. The health care in Sweden puts the patient in focus; the product of a development during the last decades.⁷⁹ Moreover, the right to health is guaranteed in *inter alia* the European Social Charter⁸⁰. Noteworthy, the line between civil and political rights – as protected by the ECHR – and the economical and social sphere does not allow for an exact division. For certain, the latter sphere can fall within positive obligations of an ECHR right.⁸¹

⁷⁹ Zillén, 2016, p. 43–47.

⁸⁰ Council of Europe, *European Social Charter*, European Treaty Series - No. 35. Turin 18.X.1961. Sweden ratified the European Social Charter in 1962. The date for its entry into force was, interestingly, 26th February 1965, http://www.coe.int/en/web/conventions/full-list//conventions/treaty/035/signatures?p_auth=ZdlttdKTH, (accessed 4th April 2017).

⁸¹ Bates, 2010, p. 16.

3 The Section on Abortion

3.1 History of Abortion in Sweden

As mentioned, Sweden ratified the ECHR in 1952.⁸² The 1938 Abortion Act in an amended version was the current legislation in force. In this section a brief compilation on the history of abortion is given to facilitate a better understanding of the paragraphs following. Noteworthy, when Sweden adopted the ECHR, the notion of abortion being criminal governed the Swedish regulations. Today, the same wording of the ECHR applies, however the principle of free abortion governs the legislation in force.

For centuries, abortion has been considered a prohibited act. It appears for the first time as an independent crime according to canon law in the 15th century. Death penalty was fully introduced as a penalty for the crime of abortion – no matter when carried out during the pregnancy – in the 18th century. Even attempt to abortion was criminalised. Parallel to this, laws from the 17th century stipulated that midwives were not allowed to perform abortions – midwives had to vow not to take any part in actions promoting abortion. Pharmacists and medical practitioners were prohibited from ordination of abortifacients. In the latter part of the 19th century, sentences were reduced. Nevertheless, at the end of the century, the abortionist were punished more severely whilst sanctions for the woman were further relaxed.⁸³ In 1921, the range of punishments were reduced for both the women and the abortionists – the assisting ones. The legislation was in force, save with a few amendments, until the 1938 Abortion Act was adopted. Criminal responsibility could be asserted for abortion from the moment of conception and covered the entire period until the spontaneous birth started. However, if the woman's life was at risk, abortion was not a criminal act. The collision of interests between the need to prevent the death of the woman and the interest of the unborn repealed the reprehensibility of the act, according to a general principle of law.⁸⁴ The very same year the sentences were significantly lowered, 1921, was the year when the recently introduced legislation on universal suffrage, including all women, was applied for the first

⁸² Prop. 1971:13, p. 2.

⁸³ SOU 1944:51 p. 13–14; SOU 2005:90, p. 37–38. The midwives' vow is for certain nothing groundbreaking when reflecting upon the vow in the light of the Hippocratic oath.

⁸⁴ SOU 1944:51 p. 14–15; SOU 1935:15, p. 40.

time. As a curiosity, Kerstin Hesselgren became the first woman in the Riksdag in 1922.⁸⁵ Kerstin Hesselgren's name is to be found amongst the signatures of the many motions that finally led the investigation which preceded the first law on abortion in Sweden, the 1938 Abortion Act.⁸⁶ For a moment, the section shall dwell on the considerations that formed the 1938 Abortion Act. Examining these considerations will enable an understanding of what the law originated in.

3.2 The 1938 Abortion Act

The investigation commissioned (hereafter, in this chapter, denominated the committee) underlined the increase of abortions and found that whilst criminal abortions increased, so had contraceptive methods.⁸⁷ In an attempt to understand why there had been an increase, different factors were considered. Possible reasons – amongst other thinkable such – was the alteration in the dominating conception of life, as a result of the (first) world war, the diminishing proliferation of Christian faith, the Christian view of life and the shift of sexual morals.⁸⁸ When studying the preparatory works, the reasons for the high number of abortions become apparent. Economical struggles, the remainders of social stigma of pregnancy outside marriage, the difficulties on the labour market – a difficulty severely elevated by pregnancy and motherhood – the light view on men's responsibility and a man's "needs" – earlier remedied by the prostitute, but now also "cured" by the Madonna woman.⁸⁹ Even though the number of prosecuted for criminal abortion was negligible, the dire reality spoke for itself.⁹⁰ Reality required a change. The legislator dealt with a dynamic period. One reason for the increase of desire to carry out abortions was the heightened approach for the individual to herself master her life, which according to the committee entailed a lowered capacity to meet the difficulties of life. One interesting conclusion was that the most difficult group of women to persuade into refrain from carrying out abortion was women from what today would be considered middle-class. For those with recently elevated standards, childbirth could risk a

⁸⁵ Hamrin-Thorell, Ruth, *Kerstin Hesselgren* In: *Svenskt biografiskt lexiko*. Digital version available at <https://sok.riksarkivet.se/Sbl/Presentation.aspx?id=12947>, (accessed April 16th 2017).

⁸⁶ SOU 2005:90, p. 38–39.

⁸⁷ SOU 1935:15, p. 17–18.

⁸⁸ SOU 1935:15, p. 21–22.

⁸⁹ SOU 1935:15, p. 21–26.

⁹⁰ SOU 1935:15, p. 19.

severe decrease of the standards just won.⁹¹ The new sexual morals were considered a peril to nativity and society. The increasing opinion that parents have a right to decide when and whether at all they want to have children, that came with the rising use of birth control, was explicitly condemned – the regrettable unwillingness of women to adapt to and accept pregnancy was likely to further increase.⁹² However, as abortion was as a severe evil to society, the practice had to be curbed.⁹³ By social-welfare reforms, underlying poor conditions were to be eliminated. The reforms were to be paired with an introduction of the first abortion legislation and a relaxed penal law.⁹⁴

As a response to opinions that had questioned the role of society as protector of the unborn, the committee reported those arguments as simplified and devastating; for the protection of the unborn was certainly incumbent upon society. The committee linked the protection of the unborn to the roots of the independent criminalisation of abortion and canon law. According to Christian tradition, the unborn life⁹⁵ possesses a soul. The mentioned perception of life later transcended the territory of canon law and entered the ambit of civil – bourgeois – law in Christian countries; it transformed into a general duty for society to protect the sanctity of life. The duty came to serve as a fundamental principle in especially criminal law – no matter the factual and moral worth of the individual whom the foetus later would become.⁹⁶

The word patronising might encapsulate the investigation properly. The aim with the proposal was to impede abortions and alleviate the severe social conditions for women. Illegal abortions had to be stopped, yet it was more important to impede abortions in general. Therefore, decriminalising the act of abortion in principle was not in question – this would change the general morals as to abortions, whereby the abortions would increase. As this was not acceptable, the law had to be firm and condemn the immanent reprehensibility of the act. Only if a true collision of interests was at hand, the mother's could prevail.⁹⁷ Eventually, the

⁹¹ SOU 1935:15, p. 21–22.

⁹² SOU 1935:15, p. 22–23, 27.

⁹³ SOU 1935:15, p. 86.

⁹⁴ SOU 1937:6, p. 19–20.

⁹⁵ Initially, the perception of when life came in possession of a soul differed between the genders. Latter, the criminalisation of abortion in canon law was extended in order to encompass protection of unborn life not in possession of a soul, consequently, all abortions were criminalised, see SOU 1935:15 p. 87.

⁹⁶ SOU 1935:15, p. 86–87.

⁹⁷ SOU 1935:15, p. 88–90.

finished proposal comprised four abortion indications: medical, social, humanitarian (conception as a result of *inter alia* rape and other exploitation of the woman), and eugenic.⁹⁸

The 1938 Abortion Act entered into force without the social indication, due to protests and firm belief in the introduction of social reforms that were to eliminate causes for abortions with social motifs.⁹⁹ Noteworthy, the eugenic and the social indication were subject to scrutiny by another investigation (hereafter, in this chapter, the commission).¹⁰⁰ Their opinions illustrate the view given precedence at the time. The commission found the social, medical, and humanitarian indications mainly called for by the interests of the woman, whereby abortion on eugenic and some humanitarian grounds – based on mental deficiency – was in the interest of society. The commission agreed on the need for a eugenic indication and held that there existed a pressing and direct social need to prevent the genesis of a “deficient offspring”.¹⁰¹ The report by the commission in 1937 contained explicitly patronising writings.¹⁰² An aspect constantly underlined was the need to restore the morals in accordance with the principles enshrined in the penal law. The commission was convinced that danger was ahead if the penal law and its canon were subject to further relaxation: the general sense of justice would change to accept abortion the grounds of a woman’s free will, if nothing was done. A point of view that promoted individualism could not be tolerated; indeed, to let women decide over their bodies in a manner juxtaposed to her female instincts would hurt both society and the woman herself. The commission agreed with the committee in that freedom for women to decide on abortion was not the solution to the difficulties women faced and nor the answer to the combat against charlatan doctors and illegal abortions. A potential increase in abortions and the acceptance of the practice was a risk not to be taken, but a possible scenario to assiduously prevent by enforcing strong morals.¹⁰³ Therefore, the commission was not in favour of the pure social indication, but could accept the medical indication with social elements.¹⁰⁴

⁹⁸ SOU 1935:15, p. 9.

⁹⁹ SOU 1944:51 p. 36.

¹⁰⁰ SOU 1937:6, p. 3–4.

¹⁰¹ SOU 1937:6, p. 4.

¹⁰² One inapprehensible and astounding example: The sterilisation of ‘poor’, ‘deficient’, ‘imbecile’ individuals was subject to discussion, where the commission first established that abortion is a lesser of encroachment than sterilisation for the woman, only to find that permitting abortion shall be done with more care than when permitting sterilisation – the interests of society to prevent from being the deficient offspring weighs heavy, as to impede the woman from ever again giving birth, but the interests of the unborn (no matter when during pregnancy) weighs heavier, before permitting abortion, see SOU 1937:6, p. 5–6.

¹⁰³ SOU 1937:6, p. 17–18, 32–34.

¹⁰⁴ SOU 1937:6, p. 34.

The investigation was Janus faced; the sanctity of life did not extend to “deficient individuals”.¹⁰⁵ Thus, we observe a position where a morally educative and indeed, by religion marked, interpretation of what the interests of society were, prevailed. The penal law on the prohibition on abortion for both the woman and the ones assisting her remained in force. Thus, the 1938 Abortion Act constituted an exception to the general prohibition. Nevertheless, the 1938 Abortion Act was not paired with the social reforms that had been predicted during its preparation. In 1946, a sociomedical indication was introduced and the penal law was relaxed – despite a powerful resistance. The opposition found that abortion was even more unjustifiable on social indications. Thus, society had to maintain the general sense of justice shaped in accordance with the rights of the unborn. Society had to condemn the assertion that a woman should be allowed to decide for herself whether she wanted a child. Mainly the women’s lobby was in favour of the sociomedical indication.¹⁰⁶ Noteworthy, Karl Schlyter, a prominent Swedish jurist, was an activist in favour of the introduction of a social indication already in the 1938 Abortion Act.¹⁰⁷

The investigation commissioned in 1941 began by concluding that the 1938 Abortion Act had not rendered a change in the devastating statistics on illegal abortions.¹⁰⁸ As the commission was one from a population policy, this permeated the report. It was noted that the focus used to be on the penal law, however the focal point tended more to the social issues.¹⁰⁹ Illustrative of this is the reference to Gunnar Myrdal¹¹⁰ and his point on the need to describe the reality of the abortion-seeking woman, for the purpose of truly concurring the problem. Understanding the subjective motifs for abortion was a part to this, even though the report did not find the subjective motifs as truly revealing the causes of the problem. The inquest laid a mosaic of so-called subjective reasons for abortion that were known: fear of war, fear of lower standards paired with unwillingness to change standards, pure laziness, economical reasons, age and so forth. The deficient individuals, however, had a proper rationale for their will to abort.¹¹¹ The great importance to end all abortions was stressed.¹¹² It was found that the view of abortions

¹⁰⁵ SOU 1937:6, p. 5–6, 21–22.

¹⁰⁶ SOU 2005:90, p. 40–42.

¹⁰⁷ SOU 1944:51, p. 36.

¹⁰⁸ SOU 1944:51, p. 8.

¹⁰⁹ SOU 1944:51, p. 38.

¹¹⁰ Gunnar Myrdal, a former Swedish politician and minister (Social Democrat). Myrdal is particularly known for his stark influence on Swedish population politics.

¹¹¹ SOU 1944:51, p. 69–82.

¹¹² SOU 1944:51, p. 118.

as criminal in nature had to be preserved: the general sense of justice required that abortionists were sentenced.¹¹³

Abortion remained subject to constant reports and motions. In 1950, yet another state investigation was commissioned, however not with a mandate to submit proposals as to changes in the abortion legislation.¹¹⁴ The investigation revealed a polemic debate; the voices heard in the public discussion attacked one another without finding a solution. Arguments from perspectives of population policy, medicine, and religion had been prominent, whereas the woman's will and autonomy had been less so. More generally, two strands existed where one stressed the sanctity of life and principally rejected all abortion indications, alleging such laws to countenance infanticide, save from, as supported by the Church and the Christian love, when the mother's life was at risk. This side oftentimes argued potentials risks abortion entailed, such as sterility and a deep post-abortion anxiety when the woman felt she had deviated from her motherly instincts; all this could paralyse her life and leave her invalid. Such horrible effects and the weakening morals were to be prevented by severe punishment, however especially severe for the person assisting. Indeed, the unborn could grow to become an extraordinary useful individual. The other side forwarded the social situation for women, liberty and the right to one's own body. This strand meant that a woman's interests triumphed those of the unborn; the unborn had no right to be born. The commission noted that the debate had strong tendencies to wander from the actual matter to the question of individual freedom *contra* society's interests.¹¹⁵ In addition, risks with counselling were emphasised. Many women avoided counselling in fear of meeting personnel pressuring them to change their minds. *Exempli gratia*, women who suffered personal stress and difficulties in life could be dismissed as hysteric and infantile. One example provided displays a woman who was denied abortion on the basis that she sought abortion on grounds of convenience. Many women – as the statistics displayed clearly – turned to illegal abortionists.¹¹⁶ It is worth to note that the Church of Sweden expressed the need to care for the conscience and anxiety of the health care personnel forced to carry out abortions.¹¹⁷ A fifth abortion indication was introduced in 1963, allowing abortion when a suspected foetal damage was at hand.¹¹⁸

¹¹³ SOU 1944:51, p. 122–124.

¹¹⁴ SOU 1953:29, p. 7–10.

¹¹⁵ SOU 1953:29, p. 17–25.

¹¹⁶ SOU 1953:29, p. 77, 90–93.

¹¹⁷ SOU 1953:29, p. 24.

¹¹⁸ SOU 1971:58, p. 117.

The legal framework during the Poland case prescribed penalties for abortion, save for abortion permitted in accordance with any of the five indications.¹¹⁹ A change from 1946 had equipped the courts with a possibility to exempt from penalty a woman who had killed her foetus when extenuating circumstances were at hand.¹²⁰ Moreover, Chapter 3 Article 11 in the recently introduced Penal Code prescribed that the woman could only be prosecuted if special reasons existed.¹²¹ Chapter 3 Article 4 taken with Chapter 23 Article 4 of the Penal Code prescribed both the acts of the ones assisting the woman and the acts of the woman as criminal offences. The black letter of the law provided no ground for abortion on the basis of a woman's right to privacy. Thus, a woman had to resign herself to pregnancy or obtain an illegal abortion, either in the obscure within the nation or by crossing the borders in accessing an abortion abroad.

3.3 A Journey to Poland, 1965

3.3.1 What Happened?

Early winter 1965. In the wake of a recent conference on "Sex and society"¹²² in Stockholm, Sweden, a debate flared up on the subject of a particular presentation held at the conference. A young woman held a highly personal presentation of her trip to Poland for the sole purpose of carrying out an abortion. The woman revealed the motifs: neither she, nor her partner, was ready for having a child. Subsequently, her story came to the attention of the public and ended up on the Prosecutor General's desk. On 13th February 1965 the Prosecutor General Emanuel Walberg answered a missive sent to him by the Chief Prosecutor in Jönköping municipality: Could a Swedish woman who had obtained an abortion outside the country be prosecuted according to Swedish law? The Prosecutor General adduced that the Swedish Penal Code provided for prosecution in Swedish courts in the current case. The principal rule stated, the Penal Code Chapter 2 Article 2, that a Swedish citizen should be prosecuted in accordance with Swedish law if he or she had committed a crime outside the country. Generally, for such matters, a special decree was required for prosecution. An exception existed if the criminal act

¹¹⁹ SOU 1971:58, p. 23.

¹²⁰ SOU 2005:90, p. 41.

¹²¹ SOU 1971:58, p. 94. The Penal Code was introduced in January 1965. See prop. 1974:70, p. 58 and 74. For information on the enactment of the Penal Code, see <http://rkrattsbaser.gov.se/sfsr?bet=1962:700>, (accessed 6th May 2017).

¹²² The conference was arranged by the Liberal student association in 1964.

had been directed at a Swedish interest; then no decree was required. The Prosecutor General found that a woman who had obtained an abortion outside the country was punishable according to Swedish law. To pursue a measure with the purpose of driving out a foetus of a Swedish woman's body – an action considered directed against the foetus – was to be considered an action directed against Swedish interests. Therefore, according to the Prosecutor General, the question on prosecution in the particular case did not need to be submitted to the Swedish Government. By citing the legal scholar Agge, it was emphasized that a citizen was not to let go of the morals of the home country when abroad; the nationality principle was applicable. In addition, those who assisted the women were also punishable in Sweden. The Prosecutor General added that the lack of possibility to trace the perpetrators in Poland amounted to an additional special reason for prosecution of the women involved.¹²³ As will be seen, this rule had long been an impediment for the Swedish courts to prosecute women for the crime of abortion. However, the Prosecutor General now had found a special reason to deviate from that standard. Moreover, the provision – Chapter 3 Article 11 of the Penal Code – only made possible to refrain from prosecution of the women, not the ones who had assisted them – Hans Nestius, in this case. Hans Nestius was the one who had helped the women with contacts in Poland. He was punishable in accordance with the Penal Code, Chapter 23 Article 4, for complicity.¹²⁴

The matter was thereafter delegated to the Chief Prosecutor in Stockholm, who decided to open up a preliminary investigation.¹²⁵ A search of the premises in Hans Nestius' home was decided on and executed. In the days that followed, a number of letters, from renowned personalities and influential fellowships, arrived to the Swedish Government and the Riksdag. In a letter signed Ingvar Carlsson¹²⁶, the Social Democratic Youth pleaded the Government to declare the woman and the involved free from prosecution.¹²⁷ Sala municipality protested in a letter to the hunt of young women and claimed the public opinion was clear on the matter;

¹²³ Letter from the Prosecutor General to the Chief Prosecutor in Jönköping, ÅAD 132/65, 13th February 1965, In: Justitiedepartementets arkiv, Konselj 26 februari 1965, Dnr 373, 379, 346, 371, 332.

¹²⁴ Letter from the Prosecutor General to the Chief Prosecutor in Jönköping, ÅAD 132/65, 13th February 1965, In: Justitiedepartementets arkiv, Konselj 26 februari 1965, Dnr 373, 379, 346, 371, 332.

¹²⁵ SOU 2005:90, p. 46; letter from Chefsåklagare Mats Lundqvist to Kriminalpolisen, Stockholm, 15th February 1965, In: Riksåklagarens arkiv SE/RA135.01, serie F1A "Handlingar i särskilda smärre mål", volym 11.

¹²⁶ Ingvar Carlsson was, at the time, head of the Social Democratic Youth. He later held position as the Prime Minister of Sweden, during two separate periods.

¹²⁷ Letter from the Social Democratic Youth to his Majesty the King, RDnr 11/65, Stockholm, 24th February 1965, In: Justitiedepartementets arkiv, Konselj 26 februari 1965, Dnr 373, 379, 346, 371, 332.

author associations protested to the measures, measures that only suited a police state.¹²⁸ One voice was highly likely crucial in the case: the voice of the criminal law professor Alvar Nelson, as embodied in his article in *Stockholms-Tidningen* on 21st February, 1965. Alvar Nelson suggested Kungl. Maj:t to use the rare and seldom applied legal institute abolition. Abolition, suggested Alvar Nelson, should be used as it made possible to refrain from prosecuting the involved persons.¹²⁹ Hans Nestius lawyer argued for abolition, held that the public opinion demanded a liberal abortion law and criticised the judgment of the Prosecutor General: it was not for him but for the Swedish courts to decide on what a Swedish interest was.¹³⁰ Other letters and the main traces observed in the debate are presented in the section *infra*, 3.3.2 *The Poland Affair Debate*.

26th February 1965. Only a few days after the first letter on the matter had arrived at the Prosecutor General's desk, Kungl. Maj:t decided to order abolition.¹³¹ Thereby, the ones involved were freed from further judicial attention. The Prosecutor General agreed with the decision; he held the circulation in media of the law had had effect on the general prevention. After the widespread debate, the Swedish people knew the general prohibition on abortion extended to Swedish citizens worldwide, whereby prosecution was unnecessary.¹³² Noteworthy, to decide on abolition appertains to a political mandate. The decision by Kungl. Maj:t was a constitutionally anchored decision by a political organ – an intervention in the judicial field.

¹²⁸ Letter from Sala socialdemokratiska arbetarekommun to the Prime Minister and the Minister of Justice, Sala, 20th February 1965; Letter from members of Författarföreningen, Trönödal, 18th February 1965; Telegram from members of Författarföreningen to the Prime Minister, Stockholm, 17th February 1965, In: Justitiedepartementets arkiv, Konselj 26 februari 1965, Dnr 373, 379, 346, 371, 332.

¹²⁹ *Stockholms-Tidningen*, "En bredsida för justitieministern. Alvar Nelson: Regeringen bör ingripa", 21st February 1965, In: Riksåklagarens arkiv SE/RA135.01, serie F1A "Handlingar i särskilda smärre mål", volym 11.

¹³⁰ Letter from H. G. Franck to His Majesty the King, Stockholm, 24th February 1965, RDnr 12/65, In: Justitiedepartementets arkiv, Konselj 26 februari 1965, Dnr 373, 379, 346, 371, 332.

¹³¹ Abolition is a constitutional legal principle that allows the Kungl. Maj:t to grant a pardon, a remission of prosecution. At the material time, the institute had been employed 46 times since 1631 – a seldom used institute, indeed. See Konstitutionsutskottets memorial nr 27 år 1965, nr 11 *Beslut om abolition*, Bilaga 6, p. 86 – 89. Today, it is regulated in the Instrument of Government, Chapter 12 Article 9.

¹³² Decision on Abolition by Kungl. Maj:t, as communicated by Herman Kling, 26th February 1965; letter from the Prosecutor General to Kungl. Maj:t, RD 11/65, Stockholm, 25th February 1965, In: Justitiedepartementets arkiv, Konselj 26 februari 1965, Dnr 373, 379, 346, 371, 332.

3.3.2 The Poland Affair Debate

Before diving into the materials, three things must be brought to the attention of the reader. First, many arguments circulated around the potential use of abolition, the search of premises in Hans Nestius' home, and general discussions on how correct the Prosecutor General's interpretation was. These arguments gravitated around the individuals in the Poland case. Some of these arguments will be tended to in detail, however, the main focus in this section is to trace the patterns in the debate in relation to abortion; to identify the dimensions wherein the general sense of justice was reflected. As will be seen, the two – the Poland case and the abortion issue – were not separated in the debate; the voices transitioned to debate principles that governed and should govern the Swedish abortion legislation. Second, the newspaper press and media coverage seem to have played a great part in the course of events. Inevitably, sensation journalism was all over the tabloids, paired with a sincere debate. From the archives it appears as all Sweden had an interest in the matter. Some of these less wise arguments will appear in the amplification that follows, as they contribute to the map of the debate. Third, the presentation is not chronological. However, all the arguments presented appeared between February and early March, 1965.

The decision to carry out a search of the premises in Hans Nestius home was met with sharp critique. Notably, preparatory works to the abortion laws were invoked and interpreted as guaranteeing the best for women involved.¹³³ Hans Nestius and his attorney Franck argued an interpretation of the 1938 Abortion where the law was directed at the charlatan doctors for the purpose of protecting women; Nestius repeatedly held he had helped the women. Thus, as he had helped women to undergo safe abortions by qualified doctors in Poland, a potential prosecution was unimaginable.¹³⁴ As seen, this interpretation is not strict in line with what has been shown *supra* as to the content of the preparatory works.

Especially upsetting among the public was the lack of coherence in morals as to the prosecution of illegal abortions in Sweden and the Poland affairs. The nebulous interpretation

¹³³ Dagens Nyheter "Polisen jagar abortflickorna. Husrannsakan", 18th February 1965; Dagens Nyheter "Abortstriden", 21st February 1965, In: Riksåklagarens arkiv SE/RA135.01, serie F1A "Handlingar i särskilda smärre mål", volym 11.

¹³⁴ Dagens Nyheter, "RÅ får avgöra åtal mot student för abortadress" as continued under headline "Polsk abort ej straffbar. Förmedlingen juridisk nöj", 13th February 1965; Aftonbladet, "Mannen som ordnade abortresorna: Ska jag ha fängelse för att jag hjälpt andra?" 14th February 1965, Aftonbladet, "Fängelse om han skyddar dem som fick abort", 14th February 1965, In: Riksåklagarens arkiv SE/RA135.01, serie F1A "Handlingar i särskilda smärre mål", volym 11.

of criminality abroad was also a cause of excitement and many questioned the preservation of morals when abroad – a linked question that had repercussions in the Riksdag.¹³⁵ Arguments on whether or not the interpretation of the law had been correct flourished, where some held the general sense of justice in Sweden to favour an approach where the suspected should be freed from all suspicion. Among the names Ingemar Hedenius stands out. He accused the Prosecutor General for having interpreted the law without the conscience of an enlightened mind.¹³⁶ Others were horrified over evanescent Christian morals and praised the Christian principles that governed the coexistence – and restrictive abortion policies.¹³⁷ In an interview with Emanuel Walberg, he underlined what had got lost in the debate: the difference between on the one hand law and the obligation to prosecute and on the other moral values presented by a temporary opinion.¹³⁸

The main legal argument for the use of abolition as shown *supra* was that the women and the other ones involved were in good faith as to the legality of abortion abroad. In the light of this, the Prosecutor General's declaration that the impossibility to prosecute the Polish doctors amounted to such a special reason as required according to Swedish law in order to allow prosecution of the women, caused indignation.¹³⁹ Another root to indignation was the argument on general prevention as a reason for prosecution. Many could not accept that a Swedish woman's pregnancy came within the Swedish state interests – that the foetus and a

¹³⁵ Örebro Kuriren "Att testa dockskåp med kulspruta", 19th February 1965; Ny Tid "En riksåklagare", 17th February 1965; Dagens Nyheter, "RÅ-reträten räcker ej", 26th February 1965; Svenska Dagbladet, "Kling om Polenresorna: Bestämda regler för åtal bör ersätta gällande praxis", 6th March 1965; Dagens Nyheter "Utomlandsbrott", 6th March 1965; Dala Demokraten "Likheten inför lagen", 27th February 1965; Västgöta Demokraten, "Justitieministern bör skapa klarhet", 1st March 1965; Östra Småland, "Moralisk inkonsekvens", 16th February 1965; Stockholms-Tidningen, "Aborter och straff", 17th February 1965; Stockholms-Tidningen, "Svensk rätt", 16th February 1965, In: Riksåklagarens arkiv SE/RA135.01, serie F1A "Handlingar i särskilda smärre mål", volym 11.

¹³⁶ Eskilstuna-Kuriren, "Husrannsakan", 18th February 1965; Arbetet, "SvD och RÅ", 18th February 1965; Ny Tid, "Kmt kan avbryta utredningen", 22nd February 1965; Östgöta Corren, "En hysterisk debatt", 25th February 1965; Folkbladet Västerås, "Sikta rätt", 22nd February 1965; Expressen, "Jakten slut, men...", 26th February 1965; Stockholms-Tidningen, "Polisen tog breven", 18th February 1965; Dagens Nyheter, "RÅ-reträten räcker ej", 26th February 1965; Stockholms-Tidningen, "Rättens långsamma anpassning – by Stig Jutterström", 3rd March 1965; Stockholms-Tidningen, "Abortfrågan ännu olöst", February 26th 1965, In: Riksåklagarens arkiv SE/RA135.01, serie F1A "Handlingar i särskilda smärre mål", volym 11. Ingemar Hedenius was a Swedish professor in philosophy, particularly famous for his active opposition to the church and organised Christianity. His book *Tro och vetande* caused a heated debate in Sweden when it was first released in 1949.

¹³⁷ Smålands Allehanda, "'Människojakt' eller lag", 9th March 1965; Stockholms-Tidningen, "Svensk abortlag diskriminerande", 10th March 1965, In: Riksåklagarens arkiv SE/RA135.01, serie F1A "Handlingar i särskilda smärre mål", volym 11.

¹³⁸ Sydsvenska Dagbladet, "En storm i ett vattenglas", 18th February 1965, In: Riksåklagarens arkiv SE/RA135.01, serie F1A "Handlingar i särskilda smärre mål", volym 11.

¹³⁹ Expressen, "Riksåklagarens abortbeslut kom som en fullständig chock" 14th February 1965, Aftonbladet, "Hr Palme", 24th February 1965, In: Riksåklagarens arkiv SE/RA135.01, serie F1A "Handlingar i särskilda smärre mål", volym 11.

woman's body 'belonged' to the state. This would amount to, as one writer concluded, a human rights violation. The issue was about a woman's right to own her own body, thus her opinion should prevail.¹⁴⁰ Indeed, a common argument was that which emphasised a woman's capacity to make decisions as to her own life and body – that a woman only as a last resort would turn to abortion. These arguments expressed a clear understanding of women's social situation. In relation to such arguments, ridicules of Sweden as a nanny state, a police state that exercised undue control over its citizens, had a tendency to occur.¹⁴¹ Many political youth associations commented on the matter: Liberal youth associations sent letters the office of the Prosecutor General and urged the authorities to respect the integrity and protection of the individual; one liberal youth association criticised the expressed wish to gain a general preventive effect by prosecuting the involved and invoked a fundamental principle of a democracy: to afford priority to individual rights.¹⁴² The student's association Verdandi in Uppsala demanded an investigation for a new abortion act.¹⁴³ The Social Democratic Youth wing wrote a thunderous satire: the Prosecutor General was an envoy of God; the Swedish abortion law and its century-old morals were the celestial words of God and no one should infringe God's law in the democratic state of Sweden. The Prosecutor General was righteous and a good Christian, serving the reactionary forces in Sweden.¹⁴⁴ Noteworthy, a Polish doctor held that the personal liberty was lacking in Sweden.¹⁴⁵ Given the Polish abortion

¹⁴⁰ Aftonbladet, "Det upprörande abortbeslutet", 15th February 1965; Stockholms-Tidningen "Inför RÅ är alla små", 16th February 1965; Folkbladet Västerås, "Kvinnans rätt", 15th February 1965; Expressen, "Vem äger vår kropp?", 24th February 1965; Dagens Nyheter, "Aborterna – en kvinnofråga – by Greta Sörlin-Margulies", 19th February 1965; Stockholms-Tidningen, "Han uppger aldrig kvinnornas namn, RÅ vill åtala, fängelsehot", 14th February 1965; Aftonbladet, "Åklagarnas dolda vapen", 21st February 1965, In: Riksåklagarens arkiv SE/RA135.01, serie F1A "Handlingar i särskilda smärre mål", volym 11.

¹⁴¹ Expressen, "Riksåklagarens abortbeslut kom som en fullständig chock" 14th February 1965; Stockholms-Tidningen, "SSU-distrikt attackerar RÅ: Glöm paragrafen – bli human!", 15th February 1965; Upsala Nya Tidning, "Liberalare abortlag", 22nd February 1965; Expressen, "Stoppa riksåklagarens människojakt", 15th February 1965; Stockholms-Tidningen, "Våra abortlagar måste mildras kräver läsare" (compilation of letters to the editor of Stockholms-Tidningen), 17th February 1965; Stockholms-Tidningen, "Fria aborter", 18th February 1965; Aftonbladet, "Protest till Erlander mot jakt på abortkvinnor" (the protest came from Sala Municipality), 23rd February 1965; Aftonbladet "Fängelse om han skyddar dem som fick abort", 14th February 1965, Stockholms-Tidningen, "Svensk abortlag diskriminerande", 10th March 1965, In: Riksåklagarens arkiv SE/RA135.01, serie F1A "Handlingar i särskilda smärre mål", volym 11.

¹⁴² Letter to the Prosecutor General from Uppsala Centerstudenter, 18th February 1965 (Dnr 132:65); letter to the Prosecutor General from Liberala Studentklubben, 17th February 1965 (Dnr 132:65), In: Justitiedepartementets arkiv, Konselj 26 februari 1965, Dnr 373, 379, 346, 371, 332.

¹⁴³ Dagens Nyheter, "Verdandi kräver utredning om abort", 16th February 1965. In: Riksåklagarens arkiv SE/RA135.01, serie F1A "Handlingar i särskilda smärre mål", volym 11. Noteworthy, Verdandi has been a critical voice in the debate on freedom of religion for decades.

¹⁴⁴ Stockholms-Tidningen, "SSU-distrikt attackerar RÅ: Glöm paragrafen – bli human!", 15th February 1965, In: Riksåklagarens arkiv SE/RA135.01, serie F1A "Handlingar i särskilda smärre mål", volym 11.

¹⁴⁵ Stockholms-Tidningen, "Polsk läkare till ST: Dåligt ställt med personliga friheten i Sverige", 16th February 1965, In: Riksåklagarens arkiv SE/RA135.01, serie F1A "Handlingar i särskilda smärre mål", volym 11.

legislation of today and the 1975 Abortion Act, this quote certainly emphasises how vigorous the changes have been.

The debate was one between progressive and conservative forces – the youth demanded the dissolving of archaic sexual morals whilst others swore the need for further fortification of time-honoured morals.¹⁴⁶ A Swedish doctor sent to the Prosecutor General an article from the periodical *Himmat* on abortion and claimed that the debate on free illegal abortion was a symptom of the disease in the Swedish cultural debate. Arguments on statistics were turned to: relaxed abortion laws entailed an increased number of abortion operations; surveys had disclosed that some women suffered from feelings of guilt post abortion. The article stated in clear print the sexual morals many probably held on to: sex was not to be used for pleasure without responsibilities. A nation's attitude to sexual morals affected the national progress, and liberal abortion laws had proved dangerous to the birth rates in many nations.¹⁴⁷

As observed, many found that the event brought attention to the abysmal difference in opinion between authorities and people. An illustrative example comes from the socialistic press, where people as the ones setting the moral agenda was argued for strongly.¹⁴⁸ Arbitrariness in that the 1938 Abortion Act sanctioned certain selected types of murders were criticised; the arbitrariness was also highlighted by reference to the possibility for women with the right contacts – women from bourgeois families – to obtain the necessary attestation from two doctors, whilst women from other social groups struggled with this – the law was a class law.¹⁴⁹ An abortion law fitting the social reality was called for.¹⁵⁰ As evident, the happenings bordered to the ongoing debate on a potential liberalisation of the 1938 Abortion Act; those who participated constantly added and touched upon arguments that rather belonged to the bigger debate. Eventually – after the decision on abolition – the debate comprised of many

¹⁴⁶ Borås Tidning "*Vi som skriker mest*", 22nd February 1965 ; Smålands Allehanda, "*Politik och etik*", 15th February 1965, In: Riksåklagarens arkiv SE/RA135.01, serie F1A "Handlingar i särskilda smärre mål", volym 11.

¹⁴⁷ Letter to the Prosecutor General from doctor Fred Richert, Stockholm, dated 16th February 1965, Claxton, Ernest and Watson, David (doctors), "*The Debate on Legal Abortion*", *Himmat*, 12th February 1965, p. 13 and 16, In: Riksåklagarens arkiv SE/RA135.01, serie F1A "Handlingar i särskilda smärre mål", volym 11.

¹⁴⁸ Stockholms-Tidningen, "*Om överheten*", 24th February 1965, In: Riksåklagarens arkiv SE/RA135.01, serie F1A "Handlingar i särskilda smärre mål", volym 11.

¹⁴⁹ Stockholms-Tidningen, "*Svensk abortlag diskriminerande*", 10th March 1965; Dagens Nyheter, "*Inga argument mot fria aborten. Debatten fortsätter*", 10th March 1965; Dagens Nyheter, "*Argument för fri abort – by Jacob Palme*", 12th March 1965; Dagbladet Sundsvall, "*Abortresorna*", 22nd February 1965; Svenska Dagbladet, "*Uppsaladebatt: Abortlagen en klasslag som gynnar de besuttna*", 24th February 1965, In: Riksåklagarens arkiv SE/RA135.01, serie F1A "Handlingar i särskilda smärre mål", volym 11.

¹⁵⁰ Svenska Dagbladet, "*Justitieministern får kvinnoprotest*", 18th February 1965, In: Riksåklagarens arkiv SE/RA135.01, serie F1A "Handlingar i särskilda smärre mål", volym 11.

conclusions as to the people's demand for a liberal abortion law. A striking observation was that the public opinion showed the 1938 Abortion Act not to be in line with the general sense of justice: the abortion law had to be revised in order to truly move within the democratic order; only a totalitarian state forced female citizens to give birth: the law had to undergo liberalisation.¹⁵¹

The preliminary investigation was closed on the 26th of February 1965.¹⁵² Some held that Hans Nestius had had his 'plan' realised – post Poland, the Swedish debate was occupied by the liberalisation of the abortion laws. Conditions for abortion-seeking women with attestation from the Medical Board had been disclosed: the medical personnel moralised over abortion and ill-treated women – the representatives of the state let show their private morals at work, a practice condemned in some media; a practice denied by other voices.¹⁵³ Hans Nestius praised the good that had come with the enlightenment through the Poland case: people had now heard women's stories on the arbitrary practices. Lars Engström – chairman of the Medical Board – had appeared in media where he had presented an open interpretation of the 1938 Abortion Act, which opened up for a liberalisation. Lars Engström had also informed on the actual and arbitrary application of the 1938 Abortion Act, and Nestius claimed that all this had made Sweden ready to finally declare Swedish women to be of age.¹⁵⁴

After the decision to commission an investigation on a new abortion law had been announced, the coverage in media continued to link the two questions.¹⁵⁵ Christian opinion claimed the psychotic propaganda in the Poland affairs had reached the Government; the legislative remit was a compilation of Herman Kling's liberal posture – in juxtaposition to the proper and true

¹⁵¹ Folkbladet Västerås, "Sikta rätt", 22nd February 1965, Dagbladet Sundsvall, "Abortresorna", 22nd February 1965; Expressen, "Diktatur tvingar kvinnor att föda barn mot sin vilja", 15th February 1965; Aftonbladet, "Det upprörande abortbeslutet", 15th February 1965; Arbetet, "RÅ:s moraliska attityd märklig", 16th February 1965; Stockholms-Tidningen, "RÅ:s beslut strider mot rättsmedvetandet", 16th February 1965; Folket, "Den enskildes rätt", 23rd February 1965; Falu Kuriren, "En klasslag", 20th February 1965, In: Riksåklagarens arkiv SE/RA135.01, serie F1A "Handlingar i särskilda smärre mål", volym 11.

¹⁵² Official letter from prosecutor C.A. Robèrt to Stockholms rådhusrätt (today, Stockholms tingsrätt, in translation the District Court of Stockholm), department 8, ÅK 4AI, 15/65, 26th February 1965, In: Riksåklagarens arkiv SE/RA135.01, serie F1A "Handlingar i särskilda smärre mål", volym 11.

¹⁵³ Arbetet, "Abolition – och sedan...", 27th February 1965; Svenska Dagbladet, "Vi skrämmer inga abortsökande med ruskigheter", 26th February 1965; Expressen, "Hellre Polen! Fick laglig abort, hotad med stryk av sköterska", 21st February 1965; Nyheterna, "Abolition med fortsättning", 1st March 1965, In: Riksåklagarens arkiv SE/RA135.01, serie F1A "Handlingar i särskilda smärre mål", volym 11.

¹⁵⁴ Arbetet, "Den omänskliga abortlagen – by Hans Nestius", 25th February 1965, In: Riksåklagarens arkiv SE/RA135.01, serie F1A "Handlingar i särskilda smärre mål", volym 11.

¹⁵⁵ Sydsvenska Dagbladet, "Ny abortutredning", 6th March 1965, In: Riksåklagarens arkiv SE/RA135.01, serie F1A "Handlingar i särskilda smärre mål", volym 11.

public opinion, which remained that of life's sanctity.¹⁵⁶ One notice in Svenska Dagbladet held the public opinion had not shifted and stressed a necessity to separate the Poland affair from the abortion question. Rather, it was argued, the decreasing number of abortions upheld the 1938 Abortion Act and its rationale: protection of the foetus.¹⁵⁷ Not all opinions equalled the public opinion as to the Poland affair with a public opinion in favour of a liberal abortion law.¹⁵⁸ For example, some called for further social securities and options for women in order to strengthen women to not abort and protect the unborn in accordance with public morality. A liberal abortion law would have devastating consequences for the population number; it would relax the sexual morals in a dangerous way.¹⁵⁹

3.3.3 The Riksdag Discussions

The Poland affair echoed in the Riksdag. Examined by the Committee on the Constitution¹⁶⁰ opinions were put forward on the abolition decision in relation to Hans Nestius and another, more peripheral person, who had been suspected for having mediated contacts with Polish clinics. Especially objectionable was that people had been doing business of abortion trips, as the public could interpret this as an acceptance from the state to make business of connecting women to abortion clinics abroad. Thus the extent of the decision was offensive to the sense of justice.¹⁶¹ During the audit in the Riksdag, the legality of the abolition decision and the remarkably short period between the proposal to use abolition and the abolition decision was the main topic discussed. The Minister of Justice held that a simple waiver of prosecution for the women would not have been enough.¹⁶² The prosecutors and police officers involved had only acted in accordance with their duties set forth by Swedish laws. By using abolition, the needs of the women involved had been put forward, as they thereby were freed from any further interrogations and publicity. Kling quoted a newspaper item in which the standpoint of some Members of the Riksdag was expressed: The Minister of Justice was asked to correct

¹⁵⁶ Dagen, "Abortutredningens direktiv", 6th March; Dagen, "Den kristna opinionen i abortfrågan", 5th March 1965, In: Riksåklagarens arkiv SE/RA135.01, serie F1A "Handlingar i särskilda smärre mål", volym 11.

¹⁵⁷ Svenska Dagbladet, "På väg mot fri abort?", 6th March, In: Riksåklagarens arkiv SE/RA135.01, serie F1A "Handlingar i särskilda smärre mål", volym 11.

¹⁵⁸ Svenska Dagbladet, "Å och aborterna", 16th February 1965, In: Riksåklagarens arkiv SE/RA135.01, serie F1A "Handlingar i särskilda smärre mål", volym 11.

¹⁵⁹ Svenska Dagbladet, "Ett alternativ i abortfrågan – by Ingrid Ydén-Sandgren", 3rd March 1965; Västmanlands Läns Tidning, "Fri abort – en orimlighet", 16th February 1965, In: Riksåklagarens arkiv SE/RA135.01, serie F1A "Handlingar i särskilda smärre mål", volym 11.

¹⁶⁰ The Committee on the Constitution is a committee of the Riksdag which *inter alia* examines the ministers' performance of their official duties, see Article 1 of Chapter 13, the Instrument of Government.

¹⁶¹ Konstitutionsutskottets memorial nr 27 år 1965, nr 11 Beslut om abolition, p. 19 – 21.

¹⁶² The Prosecution Office was only equipped with the possibility to decide on waiver of prosecution in relation to the women; Swedish law did not entitle the Prosecution Office to include the other ones involved in a waiver of prosecution.

the situation, as the world had been turned upside down by Swedish authorities. Moreover, the Minister of Justice explained that he had, before the Poland affair, prepared a proposal to commission an investigation of the 1938 Abortion Act.¹⁶³ However, consensus had existed with regard to that the women involved had acted in error of law; they had believed it was lawful to obtain abortion in Poland; Kling was met with support in his statement that abolition was the only way to fully protect the women involved.¹⁶⁴ In studying these official documents, it is perfectly clear that the newspaper headlines reached the public chambers of Sweden. For example, during the Riksdag debate, the Minister of Justice referred to newspapers and pamphlets that had demanded liberal abortion laws.¹⁶⁵ One representative of the Social Democrats established that the Poland affair had attracted the attention of the public, media, doctors, jurists, politicians, and many others; the debate had been characterised by confusion, even among the professionals.¹⁶⁶ Moreover, emphasised the delegate, the decision on abolition was taken in order to protect the women involved from the stress in participating as witnesses in the preliminary investigation or, following thereafter, a trial.¹⁶⁷ A liberal delegate accused the decision on abolition to be a result of propaganda and the force of public opinion – a people’s court had decided the matter.¹⁶⁸

3.3.4 Post the Poland Case: the Road to the 1975 Abortion Act

Only a week after the decision on abolition, 5th March 1965, the Minister of Justice Herman Kling (by office Head of the Ministry of Justice), received a delegation to appoint an investigation for the purposes of reviewing the current abortion laws.¹⁶⁹ As the investigation was commissioned (hereafter, the 1965 Abortion Committee), Kling emphasised that the interests and feelings of the woman were to be given due consideration in the investigation; the time was right to look into the possibilities of a liberalisation. A major part of the remit was to examine if the woman’s will – not the will ascribed to her by the authorities – should be the governing element; if so, whether the criminalisation in regard to the woman should be lifted.¹⁷⁰ The features submitted in the 1965 Abortion Committee came to underpin the 1975 Abortion Act, which, save a few edits, remain in force as of today.¹⁷¹

¹⁶³ Riksdagens protokoll, 1965 nr. 23, p. 113–115.

¹⁶⁴ Riksdagens protokoll, 1965 nr. 23, p. 118, 131.

¹⁶⁵ Riksdagens protokoll, 1965 nr. 23, p. 120, 130–131.

¹⁶⁶ Riksdagens protokoll, 1965 nr. 23, p. 105–106.

¹⁶⁷ Riksdagens protokoll, 1965 nr. 23, p. 107.

¹⁶⁸ Riksdagens protokoll, 1965 nr. 23, p. 119–120.

¹⁶⁹ SOU 1971:58, p. 3.

¹⁷⁰ SOU 1971:58 p. 24–25.

The penal laws long had upheld a woman's duty to accept pregnancy. However, the 1965 Abortion Committee found that this duty had been questioned repeatedly with regard to the sake of the woman. Nevertheless, morality and general prevention had prevailed under the 1938 Abortion Act.¹⁷² In a compilation of the most common arguments, the commission observed that those pro liberal abortion laws had stressed that the penal legislation was an impediment for society to get to the charlatans. Counter to this, the low number of prosecuted women and the relaxed penal legislation was pointed to. Further, the potential deterrent effect – the need to keep in force the criminalisation due to reasons of general prevention – had been argued to fail: Women continued to carry out abortions no matter the status of the law; the penal law made the abortion regulation arbitrary due to the haphazard application; it put women in perilous situations.¹⁷³

The working group of the Department of Justice, in shaping the law, emphasised a need to curb abortions even though the introduction of a liberal abortion law lay ahead. The Minister of Justice at the time – the Social Democrat Lennart Geijer – concluded the abortion debate had intensified in connection to the Poland trips.¹⁷⁴ The number of abortions on sociomedical grounds amounted to more than 75 percent of all abortions, in comparison to the 10 percent these comprised in 1965. Geijer stressed this was because such abortions were decided by two doctors; hence, doctors' personal and subjective view on abortion governed the abortion field.¹⁷⁵ Geijer further noted that the criminal provision as regards the woman and abortion had ceased to be applied. Gender roles had changed, the sexual morals had altered, and many rationales that had upheld the 1938 Abortion Act was outdated. The main method for birth control was the use of contraceptives. The old way of thinking that had justified before the population a criminalisation of abortion, were no longer viable.¹⁷⁶ The woman should through the new legislation be freed from the obligation to tolerate the pregnancy, as earlier imposed by the state: the *right* to abortion should be introduced, in order to protect women from charlatans.¹⁷⁷ Therefore, the new act should embody contemporary values. Geijer expressed worries as the willingness of doctors to issue abortion attestations varied throughout the

¹⁷¹ SOU 2005:90, p. 37; see <http://rkrattsbaser.gov.se/sfsr?bet=1974:595> (accessed 6th May 2017) for the full list of amendments in the 1975 Abortion Act.

¹⁷² SOU 1971:58, p. 94–96.

¹⁷³ SOU 1971:58, p. 96–97.

¹⁷⁴ Prop. 1974:70, p. 54.

¹⁷⁵ Prop. 1974:70, p. 55. The National Board of Health and Welfare was to decide on the eugenic indication and suspected foetal damage, see p. 71.

¹⁷⁶ Prop. 1974:70, p. 29–30.

¹⁷⁷ Prop. 1974:70, p. 32.

country; these varying practices could generate that women, despite a new law, could be affected still and suffer impediments to obtain abortion. Therefore, Geijer criticised the proposal by the 1965 Abortion Committee to let committees, or sometimes doctors, decide on abortion even in the new, more liberal law.¹⁷⁸

Many consultation bodies meant that the proposal had not investigated the collision of interests between the foetus and a woman's right to decide over her own body. Geijer did not agree on this; the ethical aspect had been subject to discussion since time immemorial.¹⁷⁹ Social aspects had become crucial; it was for society to assist the woman in accordance with her decision. Geijer found support to the liberalisation in both the gradual enlargements of the 1938 Abortion Act and the development since the middle of the 1960's. A woman's role had changed; society should entrust women the right to make their own decisions.¹⁸⁰ As the new act that had been proposed by the 1965 Abortion Committee contained indications and a committee procedure, yet again, it was deemed not in line with the principle of women's autonomy. The final proposal presented in the government bill came without indications and contained the right to abortion.¹⁸¹ As the criminal provision on abortion for the woman did not find support in public opinion, was a peril and served no improvement as to general prevention, it was left in history. Moreover, this was reflected in the total abstention of prosecution.¹⁸²

The 1975 Abortion Act changed the nature of the laws on abortion. Still echoed the eternal necessity to decrease the number of abortions in the preparatory works. Abortion as a harmful practice was confirmed.¹⁸³ From having been an exception to a criminal provision, the law became civil and public in nature. The new law stipulated a freedom for the individual to decide for herself whether to have an abortion as well as the right to obtain one.¹⁸⁴ Today, every woman, no matter citizenship, can access abortion in Sweden.¹⁸⁵ However, the 1975 Abortion Act does contain a certain stance for the unborn; after week 18, an abortion must be

¹⁷⁸ Prop. 1974:70, p. 56–57, 71–72.

¹⁷⁹ Prop. 1974:70, p. 57–60.

¹⁸⁰ Prop. 1974:70, p. 60–62.

¹⁸¹ Prop. 1974:70, p. 68.

¹⁸² Prop. 1974:70, p. 75.

¹⁸³ Prop. 1974:70, p. 2.

¹⁸⁴ Save for the time limits set by the law. The SOU 1971:58 given by the abortion committee commissioned in 1965 bore the name Rätten till abort. In translation: The right to abortion.

¹⁸⁵ See SOU 2005:90, p. 95, as adopted through rskr. 2007/08:29, prop. 2006/07:124.

prompted by compelling reasons; the National Board of Health and Welfare must endorse abortion.¹⁸⁶

With regards to the official posture in the issue of abortion, Christian tradition has historically been characterised by two interpretations. The first tradition reasoned that sexuality *per se* is a peril and an evil. In order to truly be a good Christian, observance of continence was a must. Inevitably, abortion was an evil phenomenon. A second tradition perceived sexuality as God's gift, but the enjoyment of sex as a pure pleasure could not reign as sexuality was strictly designated for the matrimonial orb. In principal, abortion was an evil, but there were situations when abortion could result in the lesser of two evils – when the pregnancy was a result of rape or posed a risk of death for the woman.¹⁸⁷ In the 1960's, the position within the Church of Sweden moved between these two poles. A common denominator was however the aversion towards the free choice – an aversion that would become subject to revision. However, not even the Church of Sweden was spared from the upheavals in the sexuality debate and the rather germinal legal events during the 1960's. During the 1960's, the opinion within the Church of Sweden was shattered; some movements showed tendencies towards an understanding and acceptance of the difficulties that came with an unwanted pregnancy. The posture of the Church of Sweden in the consultation response to the 1975 Abortion Act preparatory works did however not reflect the new tendencies; the church favoured the sanctity of life.¹⁸⁸ Today, the Church of Sweden emphasises social support and other measures to strengthen the woman as the church has found it impossible to change public opinion: there exists no alternative to a woman's right to decide for herself.¹⁸⁹

3.4 Abortion under the ECHR

Knowing that Sweden has a liberal abortion law, the rules governing abortion under the ECHR will now be turned to. As earlier mentioned, Sweden had ratified the ECHR at the time of the Poland affair. The values brought out during and after the Poland case as enshrined in the 1975 Abortion Act remain the underlying values in the field. It will appear from this section that these values also govern how ECHR is interpreted in a Swedish context.

¹⁸⁶ SOU 2005:90, p. 56.

¹⁸⁷ Kumlien, 2012, p. 33.

¹⁸⁸ Kumlien, 2012, p. 34–41.

¹⁸⁹ SOU 2005:90, p. 59.

It is curious to begin this section with an observation made in an item published in *Svensk Juristtidning*, in 1979, where one ‘unimaginable’ example on how the Council of Europe system could show itself perilous to the democratic exercise of power in each state. If the ECtHR was to rule on a national abortion law’s compatibility with the right to life, Article 2 ECHR, as the rights are broadly formulated, the judges would rule based on their own conscience and value-conviction. This method is more akin to the act of legislating than interpretation and adjudication; legislating is an act reserved for the national legislator.¹⁹⁰ Indeed, the ECtHR is equipped with a mandate to interpret the ECHR as a means to secure for individuals under the jurisdiction of the signatory states their human rights; this follows from Articles 1 and 19 of the ECHR. Through this interpretation, the ECHR is under constant development; the broad formulation of the rights and freedoms renders a versatile protection.¹⁹¹ Noteworthy, abortion on other grounds than to save the woman’s life was at the time of ECHR’s creation in principle criminalised all over Europe.¹⁹² From a strict literal reading, the ECHR comprises no independent right to abortion. Nevertheless, issues related to abortion have appeared before the ECtHR a number of times.¹⁹³ Already in 1976, the former European Commission of Human Rights found abortion laws to interfere with a woman’s private life – as is protected by Article 8.¹⁹⁴ However, jurisprudence leaves that termination of pregnancy does not exclusively pertain to the woman’s private life as the pregnancy constitutes a close connection between the woman and the foetus.¹⁹⁵ Thus, her rights must be weighed with potential competing rights; the ECtHR is oftentimes to strike a balance between invoked rights of the foetus, in accordance with public opinion,¹⁹⁶ and those of the woman.¹⁹⁷ As explained *supra* under *section 2.5 The Margin of Appreciation Doctrine*, the competence to decide on matters related to when life begins and ends falls within the margin of appreciation of states, given that due weight is afforded to all interests.¹⁹⁸ What the states

¹⁹⁰ Kellberg, Love, *Europarådet och de mänskliga rättigheterna*, p. 22–39, In: SvJT, Häfte 1, 1979, p. 37. Available at: <http://svjt.se/svjt/1979/37>, (accessed 20th February 1965).

¹⁹¹ Sterzel, 1993, p. 19.

¹⁹² Puppinc, Gregor, *Abortion and the European Convention on Human Rights*, p. 142 – 193, In: *Irish Journal of Legal Studies*, Vol. 3 (2), 2013, p. 144. From this point of perspective, the 1938 Abortion Act was already more liberal than the average abortion law.

¹⁹³ *Inter alia R.R. v Poland*, App. No. 27617/04, Judgment delivered by the ECtHR, 26th May 2011; *P. and S. v Poland*, App. No. 57375/08; *Tysiack v. Poland*, App. No. 5410/03, Judgment delivered by the ECtHR 20th March 2007.

A, B and C v. Ireland, App. No. 25579/05.

¹⁹⁴ *Brüggemann and Scheuten v. Germany*, App. No. 6959/75, Decision by the European Commission of Human Rights on the admissibility, 19th May 1976, p. 103.

¹⁹⁵ *A, B and C v. Ireland*, App. No. 25579/05, para. 213.

¹⁹⁶ As invoked by the state in question, having a (*exempli gratia*) restricted access to abortion, or none.

¹⁹⁷ *A, B and C v. Ireland*, App. No. 25579/05, para. 213.

¹⁹⁸ *A, B and C v. Ireland*, App. No. 25579/05, paras. 229, 233.

consider as the weightier interest varies. Thus, the outcome will vary depending on the interest promoted by each national law. Inevitably, cases on abortion before the ECtHR generally originate in countries where abortion is severely restricted, as Poland and Ireland.¹⁹⁹ *Exempli gratia*, the ECtHR has found that, as Ireland's restrictive abortion laws are rooted in "the profound moral views of the Irish people as to the nature of life"²⁰⁰ the balance struck between the protection of the unborn *vis-à-vis* a woman's private life by Ireland in forming the abortion law is fair.²⁰¹

As the margin of appreciation is drawn on when the ECtHR carries out the test under Article 8, a short passage on the test is in place. First, the notion respect for private life covers negative and positive obligations.²⁰² Second, Article 8 is a relative right; Article 8 § 2 governs limitations. An interference must be prescribed by law and be necessary in a democratic society on one of the given grounds in order to be justified; the impugned measure must pursue one or more of the aims set forth by the Article.²⁰³ During all other circumstances – save for times of war²⁰⁴ – the measure will amount to an infringement.

When ECtHR tests if the impugned measure was necessary in a democratic society, it looks as to whether the measure was proportionate in order to achieve the aim invoked by the state. Here, the accorded margin of appreciation appears, it is a part of the balancing between competing interests. The interests of the individual compete with those of the community, and the states are left a broad margin of appreciation in this proportionality test.²⁰⁵ Here, the public opinion on abortion qualifies under the concept of the interest of the community as a whole and can originate in *exempli gratia* a population policy or the dominating religious order.²⁰⁶ The ECtHR has found that Article 8 does not give rise to a general right to

¹⁹⁹ Schabas, 2015, p. 373.

²⁰⁰ *A, B and C v. Ireland*, App. No. 25579/05, para. 241.

²⁰¹ *A, B and C v. Ireland*, App. No. 25579/05, para. 241.

²⁰² Schabas, 2015, p. 367.

²⁰³ Article 8 § 2: "as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

²⁰⁴ Article 15 of the Convention governs derogation from the Convention rights in time of war or other public emergency threatening the life of the nation, whereunder Article 8 is one of the Articles possible to derogate from.

²⁰⁵ Schabas, 2015, p. 367–368.

²⁰⁶ See in *A, B and C v. Ireland*, App. No. 25579/05, in paras. 222–228, 230 where the legitimate aim of the strict Irish abortion laws (including criminalisation thereof) were considered to be the protection of morals as reflected in the Irish majority opinion that the sacrosanctity of the unborn life requires prohibition on abortion. This had been expressed in a national referendum.

abortion.²⁰⁷ However, once the national legislator has adopted laws that permit abortion, the doctrine on effective enjoyment of the rights is activated. The doctrine entails the access must not be illusory. The state must structure the procedures so that women can enjoy the right as adopted.²⁰⁸ Accordingly, the ECtHR has declared that criminal provisions on abortion may cause a chilling effect on doctors when they are to decide if the requirements of legal abortion are met in a given case. Thus, a state allowing induced abortion – even if only when the expectant mother’s life is at risk – must take the potential chilling effect into account and set up a framework that does not limit the possibilities for women to obtain lawful abortion.²⁰⁹

In the context of abortions across borders, the authority *Open Door and Dublin Well Woman v. Ireland*²¹⁰ is relevant. Irish consulting bureaus for women had been banned from providing counselling that could include information on abortion clinics abroad.²¹¹ The injunction from the Irish Supreme Court perpetually restrained the consulting bureaus from providing such information. The ECtHR found the injunction to violate freedom of expression, protected by Article 10. For certain, the injunction had pursued the legitimate aim of the protection of morals.²¹² The consulting bureaus had only provided women with an explanation on the available options. This, taken together with the absolute nature of the injunction, the availability of such information elsewhere, and the potential adverse risks for women not sufficiently resourceful to find such alternative sources of information, rendered the injunction disproportionate.²¹³ Another interesting matter was touched upon in relation to Ireland in this case. According to subsequent development after the injunction in Ireland, the Irish Supreme Court had clarified that the Irish Constitution empowered courts, when necessary, to restrain a pregnant woman from leaving the jurisdiction, in the name of the unborn.²¹⁴

Noteworthy, the PACE²¹⁵ Resolution 1607 (2008) Access to safe and legal abortion in Europe, originates in a motion presented with a Swedish representative in front.²¹⁶ PACE has

²⁰⁷ *A, B and C v. Ireland*, App. No. 25579/05, para. 214.

²⁰⁸ *P. and S. v. Poland*, App. No. 57375/08, para. 99.

²⁰⁹ *Tysiack v. Poland*, App. No. 5410/03, para. 116–118.

²¹⁰ *Open Door and Dublin Well Woman v. Ireland*, App. No. 14234/88; 14235/88, Judgment delivered by the ECtHR 29th October 1992.

²¹¹ *Open Door and Dublin Well Woman v. Ireland*, App. No. 14234/88; 14235/88, paras. 7–9, 20.

²¹² *Open Door and Dublin Well Woman v. Ireland*, App. No. 14234/88; 14235/88, para. 63.

²¹³ *Open Door and Dublin Well Woman v. Ireland*, App. No. 14234/88; 14235/88, paras. 74–77.

²¹⁴ *Open Door and Dublin Well Woman v. Ireland*, App. No. 14234/88; 14235/88, paras. 22–25.

²¹⁵ PACE is a Council of Europe organ, composed of representatives from the parliaments of the Council of Europe member states. The aim of Council of Europe is pursued through its organs. PACE’s mission is to

no mandate to pass binding laws.²¹⁷ Nevertheless, the PACE resolutions reflect the current debates and topics within the states of Council of Europe.²¹⁸ By majority – 109 votes in favour, 69 against, and 14 in abstention – Resolution 1607 (2008) was passed.²¹⁹ The resolution invited states to decriminalise abortion within reasonable gestational limits if so had not been done and to guarantee the effective enjoyment of the right to safe and legal abortion. Moreover, the well-known conclusion that criminalisation of abortion does not decrease the practice, but leads to clandestine abortions, was underlined in the resolution.²²⁰ Doctors unwilling to carry out abortion were listed as an impediment to access to legal abortion.²²¹ In addition, the report that preceded the resolution established that the ultimate aim was to avoid as many abortions as possible.²²²

Conclusively, at the material time of the Poland affair, the ECtHR was not the renowned protector of human rights as it is today.²²³ It remains the ECtHR's argument that the existence of a right to abortion depends on the national laws. As for Sweden, the 1975 Abortion Act gives every woman seeking an abortion at a clinic in Sweden the right to one, save for women who wants abortion after pregnancy week no. 18, where the request is subject to a specific examination. The Swedish law confers a right that gives rise to a positive obligation for Sweden to provide an effective enjoyment of the right under the ECHR. Noteworthy, national abortion laws tend to reflect the role of religion in a society. The 1975 Abortion Act is, in comparison to other national laws, particularly liberal – originating in the, during the last decades, increased promotion of integrity in relation to society.²²⁴

perpetuate the values as common to the member states: the rule of law, democracy, and to ensure the compliance to human rights standards, see Articles 1 a–b, 3, 10 and 25 in Statute of the Council of Europe, ETS no. 001, London, 5.V.1949, Council of Europe, Parliamentary Assembly, *The democratic conscience of Greater Europe*. Available at: http://website-pace.net/en_GB/web/apce/in-brief (accessed 25th April 2017).

²¹⁶ Hägg, Carina, and others, *Abortion and its impact on women and girls in Europe*. Motion for a resolution, document 10802, 24th January 2006.

²¹⁷ Council of Europe, Parliamentary Assembly, *The powers of the Assembly*. Available at: http://website-pace.net/en_GB/web/apce/powers (accessed 26th April 2017).

²¹⁸ Council of Europe, Parliamentary Assembly, *Origins and History*. Available at: <http://website-pace.net/web/apce/history> (accessed 26th April 2017).

²¹⁹ Council of Europe, Parliamentary Assembly, *Access to safe and legal abortion in Europe, Voting results*. Available at: <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=17638&lang=EN>, (accessed 26th April 2017).

²²⁰ Resolution 1607 (2008) Access to safe and legal abortion in Europe, para. 4.

²²¹ Resolution 1607 (2008) Access to safe and legal abortion in Europe, para. 3.

²²² PACE Committee on Equal Opportunities for Men and Women, *Access to safe and legal abortion in Europe*, Report, Document 11537, 2008, 8th April 2008, paras 6.31 and 5.23.

²²³ See for example NJA 1973 s. 423, where Swedish courts doubted the applicability of the ECHR if the provisions in the ECHR did not correspond to the view as expressed in Swedish laws, or, if it could not serve as filling gaps in the domestic laws.

²²⁴ SOU 2005:90, p. 56–58.

4 The Section on Freedom of Conscience

4.1 Freedom of Religion and Conscience in Sweden

4.1.1 History of the Protection

In an attempt to recite and understand religion in a Swedish context, one must know that Sweden has a long tradition of Christianity. In the 11th century, the first Christian king ruled. With the introduction of Christianity, the canon law followed.²²⁵ Along with the 16th century came the reformation and at the end of the century, the Lutheran faith had won definitive approval as the religion of the Swedish nation.²²⁶ In the first Instrument of Government, 1634, the doctrine of unity between the state and the Church of Sweden was fortified; total unity in religion was pursued.²²⁷ The first development to border on the notion of freedom of religion began in the 18th century, where immigrants were guaranteed a narrow version of the freedom. In the Instrument of the Government of 1809, Article 16 enshrined the freedom. The rule stated that the King were not to force the conscience of anyone, but to protect free religious exercise, save for under circumstances when the religious exercise disturbed the peace of society or provoked annoyance amongst the public. However, this did not change the duty to profess the Evangelic-Lutheran faith, but conferred a freedom to exercise the religion as one pleased.²²⁸ To fall off from the pure evangelism was criminal until 1860.²²⁹ Religious matters were decided upon in the Riksdag until 1866. The Riksdag was at the time divided into representative sections, thereamong a priest section, until it was abolished with the reform in 1866.²³⁰ Both freedom of religion and the separation between the Church of Sweden and the state was subject to considerable debate in the 19th and 20th centuries. In 1952, religionsfrihetslagen (1951:680) – the Freedom of Religion Act – entered into force and fortified both the positive and the negative aspects of the freedom. A similar writing as the one in 1809's Instrument of Government qualified the positive aspects of the freedom: limitations were allowed when the religious exercise disturbed the peace of society or provoked annoyance amongst the public.²³¹ Worthy of repetition, 1952 was also the year in

²²⁵ SOU 1997:41, p. 53.

²²⁶ SOU 1997:41, p. 57–58.

²²⁷ SOU 1997:41, p. 60.

²²⁸ SOU 1997:41, p. 62–63.

²²⁹ SOU 1997:41, p. 64. It is curious to take note of some of the sentences to banishment from Sweden.

²³⁰ SOU 1997:41, p. 67.

²³¹ SOU 1997:41, p. 70–72.

which Sweden ratified the ECHR.²³² Nevertheless, the Church of Sweden remained in close unity with the state.²³³ After close consideration and a number of investigations, the Riksdag historically decided, December 1995, on the separation between the Church of Sweden and the state.²³⁴ In 2000, the separation was executed.²³⁵ As seen, Sweden has a long tradition of Christian values. Due to the close relationship and the dominance of Christianity, the religious doctrine has had a notable impact on many areas of law, even though unity in religion is no longer an aim of the Swedish state.

4.1.2 The Constitutional Protection

In the judgment *E.G v. Region Jönköpings län*, the Swedish Labour Court found that the midwife's conscience could not be separated from her religious conviction.²³⁶ Thus, freedom of religion governs the question. In addition, Kavot Zillén has come to similar conclusions. Freedom of conscience is not explicitly protected – as it has been historically in the Swedish constitution – whereby the protection falls under freedom of religion. Zillén has also concluded that there exists no absolute right to conscientious objection.²³⁷ Noteworthy, these findings find a linguistic support in two dictionaries, presented by Mats Aldén in his dissertation from 2002.²³⁸ A dictionary from 1996 described freedom of conscience as especially the right to hold religious opinions; the other – from 1965 – described it as the right for citizens to follow the religious conviction in religious matters, and profess any religion.²³⁹

The protection is laid down in the Instrument of Government²⁴⁰ where in Chapter 2 Article 1 paragraph 1 no. 6 the positive aspects are protected; the right to religion. Freedom of religion is listed among other freedoms of opinion in the Instrument of Government. The negative aspect – the right to stand outside and not take part in religion – is set forth in Chapter 2 Article 2 of the Instrument of Government. The black letter of the law provides no possibility

²³² Prop. 1993/94:117, p. 11.

²³³ SOU 1997:41, p. 73.

²³⁴ SOU 1997:41, p. 51, 74–87, 90. See also Enkvist, p. 76.

²³⁵ See http://rkrattsbaser.gov.se/sfsr?fritext=Prop.+1997%2F98%3A116&upph=false&sort=desc&post_id=3 (accessed 26th April 2017).

²³⁶ *E.G v. Region Jönköpings län*, p. 11.

²³⁷ Zillén, 2016, p. 138–140.

²³⁸ Aldén, 2002.

²³⁹ Aldén, 2002, p. 18–19.

²⁴⁰ The Instrument of Government was revised in 2010. However, freedom of religion remains at large the same as in the 1974 proposition, and the Instrument of Government that came into force in 1975. See Lag om ändring i regeringsformen (2010:1408) and prop. 1973:90, p. 7.

to limit the freedom of religion, as exists for the other freedoms of opinion.²⁴¹ However, this in theory absolute protection does not reflect reality, according to findings by Victoria Enkvist.²⁴² Enkvist has problematised the confused standpoint on freedom of religion in Swedish law and has found that limitations are allowed in relation to freedom of religion – save for matters belonging to the core of the right. Enkvist has pointed to a statement in the preparatory works that emphasised the following: Any exercise of freedom of religion that flows from another right or freedom is to be governed by the rules of that right, not freedom of religion. The interpretation of what exercise of religion is crucial when trying to understand the ambit of protection of freedom religion. A broad interpretation entails a broad scope of protection.²⁴³

The conclusion that limitations are allowed corresponds to jurisprudence as well as the ECHR – even though the ECHR does set a minimum level and allows for higher protection in national law – as the rights of others may be affected. Back to what exercise of religion is, this will, according to Enkvist’s interpretation, be decisive on the matter of limitations. According to a scheme by Enkvist first, the phenomenon must be examined as to whether the practice is religious or originates in culture or tradition. If the practice comes within the latter, it does not enjoy protection under freedom of religion. Moving on, if the phenomenon does not amount to religious exercise, the phenomenon will be excluded; if it constitutes religious exercise yet emanates from another freedom of opinion, limitations can be justified. When the exercise is not an extension of another opinion freedom, limitations are prohibited and the protection afforded is absolute.²⁴⁴ For example, in the case of pastor Åke Green, where the pastor had made statements on homosexuals during preachment, the Swedish Supreme Court held that it was apparent the pastor could not be freed from charges by invoking freedom of religion.²⁴⁵ A limitation must pursue a legitimate aim, an aim that pertain a democratic society; the limitation must be necessary to the aim pursued.²⁴⁶ The relevant rules on restriction are set forth in the Instrument of Government, Chapter 2 Articles 20, 21 and 23.

²⁴¹ Enkvist, p. 84–89.

²⁴² Enkvist, p. 121–122.

²⁴³ Enkvist, p. 121.

²⁴⁴ Enkvist, 2013, p. 95–97.

²⁴⁵ NJA 2005 s. 805, see also Enkvist, p. 97–98. However, Åke Green was found not guilty on other grounds.

²⁴⁶ Further, a limitation may not compose a threat to freedom of opinion – being a fundament in the forming of opinion which constitutes the Swedish democratic system – and may not be founded on a sole basis of conviction or political opinion. Notably, this resembles the limitation rules in the ECHR.

With the intent to facilitate understanding of this irregularity, and what values build the freedom, follows a passage on the more immediate history of the law and commentaries during its preparation. Explained *supra*, freedom of religion was earlier subject to relative protection. Before the new Instrument of Government saw daylight, a number of investigations were commissioned to prepare a new constitution, and its bill of rights.²⁴⁷ Early in the process, in the 1960's, the importance of fortification of time-honoured traditions was underlined; strong protection of religious freedom was such a tradition.²⁴⁸ As the question on rights and freedoms was prepared further, the importance of democracy and universal suffrage in order to realise the rights was emphasised.²⁴⁹ The investigation submitted in 1973, that served basis for the new Instrument of Government, did not pay much attention to the bill of rights. Nevertheless, it was concluded that protection of the rights and freedoms had to be clear and precise – and limitations had to be possible. Freedom of religion was not allowed to disturb peace in society or offend the public; this self-written prohibition was not to be considered a limitation of the freedom.²⁵⁰ The first proposal was shaped as follows: “Unless otherwise prescribed by law, a Swedish citizens shall have [...] the freedom to join with other individuals in religious communities and exercise his or her religion”²⁵¹.²⁵²

The new Instrument of Government entered into force with a slightly different wording than proposed as for freedom of religion.²⁵³ Due to the limped background to the rights catalogue, a new investigation was commissioned.²⁵⁴ In brief, this investigation resulted in the finding that rights and freedoms bring with them an austerity on the public authorities. Therefore, rights and freedoms had to be chiselled out with great prudence as they could otherwise endanger crucial interests of the vital democracy in Sweden.²⁵⁵ Limitations were to be allowed as to make possible social reforms and the strengthening of vital social interests.²⁵⁶ The existence of a rights catalogue was not allowed to impede ordinary legislation, legislation that formed the basis for democratic development and the strife for social and economical reforms.²⁵⁷ Furthermore, the principle of majority – vital to the Swedish democratic order –

²⁴⁷ Enkvist, 2013, p. 69–76.

²⁴⁸ Enkvist, 2013, p. 72.

²⁴⁹ Enkvist, 2013, p. 73.

²⁵⁰ SOU 1972:15, 106–108, 158; as reiterated in prop. 1973:90, p. 240.

²⁵¹ SOU 1972:15, p. 23.

²⁵² Enkvist, 2013, p. 73–75, SOU 1972:15, 106–108, 158; as reiterated in prop. 1973:90, p. 240.

²⁵³ See prop. 1973:90.

²⁵⁴ Enkvist, 2013, p. 75.

²⁵⁵ SOU 1975:75 p. 91.

²⁵⁶ SOU 1975:75, p. 14–16.

²⁵⁷ SOU 1975:75 p. 91.

could not be compromised. Deviation from the principle of majority could only be permissible when necessary to the proliferation of the democratic system itself and values intrinsically linked with the spirit of democracy.²⁵⁸ The purpose of the rights catalogue was principally, in times of crisis, to protect the fundamental democratic values from outer force and anti-democratic views.²⁵⁹ In addition, it was clarified that religious expressions fell under freedom of expression; the same was true for freedom of assembly and association in relation to religion.²⁶⁰ The parts of freedom of religion which were not flowing from the other freedoms of opinion could not be subject to limitation. As all the other freedoms of opinion could be limited, the intention of the legislator can be interpreted as conferring absolute protection to the inner core of the freedom. Nevertheless, what comprised the inner core was not clarified.²⁶¹ Conclusively, the preparatory works contribute to a quite shattered picture of the intentions and values. The importance of democracy and respect for social reforms was fundamental and freedom of religion could not be limited – yet, it was not allowed to impede ordinary legislation. In addition, restriction on some religious acts were not even considered to constitute a restriction.

There exist different opinions among legal scholars in Sweden on the matter. A possible conclusion regarding the inner core and the relationship to other opinion rights would be that it is only what is termed *forum internum* that enjoys protection under the Instrument of Government – however, this is an interpretation that contradicts the explicit text of the freedom that refers to the exercise of religion. Some prominent Swedish jurists have argued that the Instrument of Government confers a protection against the banning or disfavouring of a religion. A similar interpretation stressed that the protection encompasses persecution without legitimate purposes, whilst another has held the protection to cover the *forum internum* and religious exercise that complies with laws and values of importance to society – such as equality between the sexes. Other interpretations hold that the most important parts – the religious assemblies and worship in community with others – can be limited.²⁶² In addition to this, all these interpretations by distinguished jurists are narrow as to the width of the freedom. This might imply a common trend in the legal culture. However, the legislator intended to bestow a particular – yet undefined – part absolute protection.

²⁵⁸ SOU 1975:75, p. 91–92.

²⁵⁹ SOU 1975:75 p. 92.

²⁶⁰ SOU 1975:75, p. 132.

²⁶¹ Enkvist, 2013, p. 89.

²⁶² Enkvist, 2013, p. 97–99.

Turning to the question on state neutrality, first, as the bill of rights was created, the Church of Sweden still held a privileged position in relation to the state. This special relationship did however not constitute a limitation to freedom of religion.²⁶³ Consequently, freedom of religion was created during a time when Sweden in fact was not neutral in the sphere of religion.²⁶⁴ Second, the neutral position Sweden aims to take in relation to religion, confirms in itself that religion is a question of the individual conscience – a question that belongs to the private sphere. Third, it is incumbent upon the state to express democratic values; this shall be compared to that the state historically were to express Christian values.²⁶⁵ Indeed, many ethical values, on which the state has built its laws, can be incompatible with ethics of religious groups. Veritably, absolute neutrality has been deemed not possible: the Swedish system is built on a set of fundamental ethical values. These values are said to originate in a humanism influenced principally by Christian ethics, but also other ideals such as non-religious values.²⁶⁶ The description does not paint a picture of a fully neutral state. Rather, as a quote incorporated in an investigation on democracy in Sweden expressed: society will never be able to realise the idea of laws free from values; this is visible in its most extreme form during times when laws are cleared of morals, as even during those times, some values are given priority.²⁶⁷

4.2 The Freedom of Conscience under the ECHR

The freedom of thought, conscience, and religion is afforded protection under Article 9 of the ECHR. In general, freedom of religion is considered to be primarily a matter of individual conscience.²⁶⁸ A phrase constantly reiterated in connection to freedom of religion is that pluralism and tolerance is of paramount importance in a democracy.²⁶⁹ The repeating of the maxim is understandable in light of the history behind the ECHR. The ECHR was created as

²⁶³ SOU 1975:75, Bilaga 9, p. 325.

²⁶⁴ Enkvist, 2013, p. 77.

²⁶⁵ Enkvist, 2013, p. 77–79, 82. As for an interesting perspective on religion being reduced to a private matter, see SOU 1999:9 p. 72.

²⁶⁶ Enkvist, 2013, p. 78–79.

²⁶⁷ See SOU 1999:13, p. 3. The quote is a conclusion drawn by a scholar after having looked at how the Swedish Government and the Riksdag had dealt with questions on morals from the 1950's to 1990's.

²⁶⁸ *Kalac v. Turkey*, App. No. 20704/92, Judgment delivered 1st July 1997, para. 27.

²⁶⁹ See for example, *Otto-Preminger-Institut v. Austria*, App. No. 13470/87, Judgment delivered by the ECtHR 20th September 1994, para. 49; *Eweida and Others v. the United Kingdom*, App. No. 48420/10; 59842/10; 51671/10; 36516/10, para. 79; *Kokkinakis v. Greece*, App. No. 14307/88, Judgment delivered by the ECtHR 25th May 1993, para. 31; *Leyla Sahin v. Turkey*, App. No. 44774/98, Judgment delivered by the ECtHR 10th November 2005, para. 108.

an alarm bell, to protect against the rise of totalitarian regimes and to impede any gradual dismantling of individual freedom.²⁷⁰ In addition, ECHR is alleged to be a secular instrument, particularly so as secularism is considered to pair well with its the core values.²⁷¹ Turning back to the freedom of religion, it consists of inner aspects: the freedom of thought, conscience, and religion, and the right to change beliefs; it also comprises of an external aspect: the freedom to manifest beliefs.²⁷² These aspects are oftentimes sorted into two categories where the inner aspects qualify as the *forum internum* whereas the freedom to manifest religion or belief qualifies as the *forum externum*.²⁷³ Only the *forum externum* – the manifestation – can be subject to limitations, as set forth and governed by Article 9 § 2. Hence, the protection of the *forum internum* is absolute whereas the forum externum enjoys a relative protection. Only four forms of manifestation – worship, teaching, practice, and observance – come within the scope of the ECHR. Not every act motivated or inspired by the religion is afforded protection by Article 9. Thus, in order for a specific act to qualify as a manifestation, a sufficiently close and direct nexus between the belief and the act is required.²⁷⁴ In this, the state shall be the neutral organiser of the exercise of various religions. To execute this role properly, the state must ensure the fair and proper treatment of minorities. However, Article 9 does not guarantee in every situation the right to behave as required by one’s faith; there exists no right for an individual who acts in accordance with his or her beliefs the right to disregard justified rules.²⁷⁵ Moreover, the relationship between a state and religion will depend on the specific domestic context; no uniformity as to what a state’s neutral position must be shaped as can be discerned.²⁷⁶ Noteworthy, the ECtHR has agreed on that some religious symbols are difficult to reconcile with *inter alia* the message of equality, that constitutes a fundamental aspect of a democratic society.²⁷⁷ In addition, the freedom has a negative aspect. For example, proselytising that amounts to an exertion of “improper pressure on people in distress or in need”²⁷⁸ is not compatible with the constant presence of the need to respect the inner freedom of others.²⁷⁹

²⁷⁰ Bates, 2010, p. 6–7.

²⁷¹ Schabas, 2015, p 412–413.

²⁷² Schabas, 2015, p. 420.

²⁷³ Zillén, 2016, p. 125–126.

²⁷⁴ Schabas, 2015, p. 427, see especially therein footnote no. 98 with an enumeration of jurisprudence.

²⁷⁵ *Leyla Sahin v. Turkey*, App. No. 44774/98, paras. 107–108, 121.

²⁷⁶ *Leyla Sahin v. Turkey*, App. No. 44774/98, para. 109.

²⁷⁷ *Leyla Sahin v. Turkey*, App. No. 44774/98, para. 111.

²⁷⁸ *Kokkinakis v. Greece*, App. No. 14307/88, para. 48. The Court juxtaposed the improper proselytism and the bearing of true Christian witness, whereas improper exercise does not correspond to true evangelism.

²⁷⁹ Schabas, 2015, p. 426–427.

As the case of *Ellinor Grimmark* concerns a potential breach, and the interest that is afforded primacy by a state is best reflected when there is a conflict, the test carried out under Article 9 is here explained in brief. It is worth to mention that being an employee does not deprive the individual the enjoyment of the ECHR rights – Article 1 declares the protection to stretch for everyone within the jurisdiction of a state.²⁸⁰ The most relevant part of the test is carried out as it has been found that Article 9 is affected, that there exists a sufficient nexus and that the measure is prescribed by law. The criterion prescribed by law implies requirements as to the restriction’s descent and form – established in accordance with the national legal order – as well as its quality. The criterion embodies the notion of the rule of law.²⁸¹ Further, the limitation must serve a legitimate aim.²⁸² In assessing the circumstances *in casu*, the paramount importance is oftentimes granted the test of necessity in a democratic society.²⁸³ Thereafter follows the necessary in a democratic society test: whether the measure was proportionate to the legitimate aim pursued. In this, a fair balance shall be struck between the individual and the community as a whole; here, the margin of appreciation can be decisive.²⁸⁴

William Schabas summarises the ECHR’s relation to religion and employment by stressing that the contractual obligations often serve to justify measures taken against an employee in this context. Schabas observes that the basis is not the religious belief but the contract and being an employee.²⁸⁵ For example, the ECtHR has found a requirement for a registrar to register all couples, including homosexual couples, as refused by a Christian applicant, to be justified; also, a limitation that required individuals to remove any ornament – including such religious symbols – that could risks the clinical safety at a health institution, has been evaluated and accepted under the ECHR.²⁸⁶ In a decision by the former European Commission of Human Rights, it was concluded that a civil servant’s possibility to relinquish a post is the ultimate guarantee of the freedom.²⁸⁷ However, in *Kalac v. Turkey*, in the context

²⁸⁰ *Kosiek v. Germany*, App. No. 9704/82, Judgment delivered by the ECtHR 28th August 1986, paras. 35–36; in context of religion, *Eweida and Others v. the United Kingdom*, App. No. 48420/10; 59842/10; 51671/10; 36516/10, para. 83.

²⁸¹ Schabas, 2015, p. 435–436.

²⁸² Article 9.2 reads: “Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

²⁸³ Schabas, 2015, p. 436–437.

²⁸⁴ *Eweida and Others v. the United Kingdom*, App. No. 48420/10; 59842/10; 51671/10; 36516/10, para. 84.

²⁸⁵ Schabas, 2015, p. 432.

²⁸⁶ *Eweida and Others v. the United Kingdom*, App. No. 48420/10; 59842/10; 51671/10; 36516/10, paras. 89–110.

²⁸⁷ *Konttinen v. Finland*, App. No. 24949/94, Decision on the admissibility by the European Commission of Human Rights 12th March 1996, under section “The Law”.

of an employee who had expressed fundamentalist opinions not compatible with his work as a military judge, the ECtHR stated that “an individual may need to take his specific situation into account”²⁸⁸ in the manifestation. In later development concerning employees and religion, the ECtHR has held the argument on the possibility of changing job to be less appropriate; freedom of religion is vital to a democratic society whereby assessing the proportionality of the interference is more appropriate for a democratic state.²⁸⁹ Thus, this argument, frequent in the Ellinor Grimmark debate, will probably not persuade the ECtHR.

As to cases related to conscience, conscientious objection to military service – both with ethical and religious basis – falls within the ambit of Article 9; criminalisation of conscientious objection to military service amounts to a violation of Article 9 § 2. At the time when this was established, in 2011, a striking European consensus on the right to such objection had developed; this was also reflected in international instruments. To deviate from such a standard, a state must show that the deviating measure corresponds to a pressing social need.²⁹⁰ Here, the ECtHR followed the modern opinion, as reflected in national laws, in a morally sensitive issue. Needless to say, it is difficult to compare conscientious objection to military service with that of conscientious objection to abortion; applying for a job as a midwife is voluntary – military service is oftentimes compulsory and often imposed on an individual based on the simple fact that the individual is born male.

In *Pichon and Sajous v. France*²⁹¹, the owners of a pharmacy could not enjoy the protection under Article 9 for the purpose of refusing to sell contraceptive pills. Noteworthy, the French Court of Cassation had held that as pharmacists have the exclusive right to sell medicines, personal conviction could not be invoked. It was added that “as long as the sale of contraceptives is legal and occurs nowhere other than in a pharmacy”²⁹², precedence could not be given the religious beliefs of the applicants.²⁹³ Additionally, it is established from the ECtHR’s jurisprudence that the health service system must be organised so that – when it exists – conscientious objection does not obstruct the patient’s effective enjoyment of his or her right as guaranteed by the applicable legislation.²⁹⁴ The ECtHR has not dealt with

²⁸⁸ *Kalac v. Turkey*, App. No. 20704/92, para. 27.

²⁸⁹ *Eweida and Others v. the United Kingdom*, App. No. 48420/10; 59842/10; 51671/10; 36516/10, para. 83.

²⁹⁰ *Bayatyan v. Armenia*, App. No. 234509/03, paras. 103–111, 118–128; Zillén, 2016, p. 259–261.

²⁹¹ *Pichon and Sajous v France*, App. No. 49853/99, Decision on admissibility by the ECtHR, 2nd October 2002.

²⁹² *Pichon and Sajous v France*, App. No. 49853/99, p. 4.

²⁹³ *Pichon and Sajous v. France*, App. No. 49853/99, p. 2–5.

²⁹⁴ *R. R. v. Poland*, para. 206; *P. and. S. v. Poland*, para. 106.

conscientious objection separately, but has interpreted conscientious objection as a manifestation of religion. May it be that this is based on the intimate relationship between the objection and a religion in the cases that have appeared before the ECtHR; nevertheless, freedom of conscience *per se* only affords an absolute protection to the inner aspects, the mind of the individual.²⁹⁵

In the context, the European Social Charter shall be mentioned in brief, which *inter alia* guarantees the right to health. Being a Council of Europe treaty, the ECtHR can take the European Social Charter into account. Moreover, the European Social Charter has its own compliance mechanism, the European Committee of Social Rights, before which cases on abortion and conscientious objection have been heard: The Catholic organisation FAFCE claimed the right to health had been breached as Sweden had failed to minimise the number of abortions – a conscientious objection clause had to be introduced. The Committee held that the right to health does not give rise to a positive obligation for states to introduce such a clause. In a case regarding Italy, the Committee has clarified that the impediment which conscientious objection constitutes to real access to abortion for women in Italy must be eliminated.²⁹⁶ In 2010, PACE passed Resolution 1763 (2010) on the right to conscientious objection in lawful medical care. It invited the states to develop regulations affirming the right to conscientious objection with regard to health and medical care, specifically targeting abortion. However, it originated in a motion for a resolution that stressed the issues stemming from unregulated use of conscientious objection as a practice that could have severe consequences for women's access to health care. The motion expressed concerns as to the arise of conscientious objection.²⁹⁷ However, religious groups from, among others, Poland and Italy, protested and managed to change the purpose of the resolution. Instead, the *right* to conscientiously object to perform abortion was emphasised.²⁹⁸ In order to meet the obligation to ensure access to lawful medical care, the duty to refer the patient to another health care provider was emphasised. A right for hospitals and institutions to refuse the practice of abortion was included.²⁹⁹ The resolution was adopted with small majority – 56 in favour, 51 against. However, the resolution can be said to mirror a form of consensus in the Council of

²⁹⁵ Zillén, 2016, p. 136–139.

²⁹⁶ Zillén, 2016, p. 100–103. Statistics presented showed that, in some Italian regions, 85 % of the health care personnel refused to perform abortion.

²⁹⁷ Hägg, Carina, and others, *Women's access to lawful medical care: the problem of unregulated use of conscientious objection*. Motion for a resolution, document 11757, 14th October 2008.

²⁹⁸ Zillén, 2016, p. 241.

²⁹⁹ Resolution 1763 (2010). The right to conscientious objection in lawful medical care.

Europe. Later, Resolution 1928 (2013) was adopted, that reaffirmed the need to respect conscientious objection by health care personnel.³⁰⁰ Moreover, PACE Resolution 2036 (2015) Tackling intolerance and discrimination in Europe with a special focus on Christians contains a clause, 6.2.2, where the states were urged to uphold freedom of conscience in the workplace while maintaining access to services provided by law.³⁰¹

4.3 The Debate on Ellinor Grimmark's Conscience

4.3.1 Contextualisation

In the debate of freedom of conscience, a particular statement in the preparatory works made by the Minister of Justice tends to be invoked. First, the 1975 Abortion Act only confers to doctors the right to ordinate abortion. In the preparatory works, it was stated that doctors are under a duty to make proper and right decisions – *id est*, to respect the woman's wish.³⁰² The health care personnel's duty to take part in abortion was sorted under the category questions of medical and administrative nature.³⁰³ Second, a number of consultation bodies had emphasised the importance to respect the wish of personnel refusing to participate in abortion procedures. The Minister of Justice agreed that in organising the work, one should avoid the tying of such personnel to abortion work; such wishes were to be respected to the greatest extent possible. This was to be solved in the same way such questions were solved in the labour market in general. However, the principal interest that governed this statement was the interest of the abortion-seeking woman. It was found unnecessary to regulate conscientious objection to abortion.³⁰⁴ Noteworthy, in an investigation on the subject of students' possible right to conscientious objection, it has been emphasised that exercise of religion cannot be admitted if it has impact on patient safety. Therefore, no clause on conscientious objection was introduced in that field.³⁰⁵ Moreover, a motion from 1976 proposed that the new law had to be overruled by reference to the Christian values upon which the Swedish society is built. Abortion constituted a breach of Christian principles of right; the new law was that of a

³⁰⁰ Zillén, p. 244–246. Resolution 1928 (2013) Safeguarding human rights in relation to religion and belief, and protecting religious communities from violence.

³⁰¹ Resolution 2036 (2015) Tackling intolerance and discrimination in Europe with a special focus on Christians.

³⁰² Prop. 1974:70, p. 72.

³⁰³ Prop. 1974:70, p. 49.

³⁰⁴ Prop. 1974:70, p. 76–77.

³⁰⁵ Zillén, 2016, p. 285–288. The investigation was carried out in 1993.

dictatorship – save for cases when the mother’s life was at risk.³⁰⁶ The motion was inspired by a statement of JO in 1975, wherein the statement of the Minister of Justice and conscientious objection was brought up. JO had dealt with an errand of two doctors’ conscientious objection to perform abortion. The doctors had not been granted the right to object. The Medical Association argued for the introduction of a clause on the right to conscientious objection. However, JO found the statement by the Minister of Justice to constitute an opening for local administration: If possible, conscientious objection could be allowed. Yet, JO held that the statement by the Minister of Justice was not categorical with regard to the allowance of conscientious objection to abortion.³⁰⁷

4.3.2 Procedure and Judgment of the Swedish Labour Court

Ellinor Grimmark reported the County of Jönköping Region (hereafter the Region) to DO, the Equality Ombudsman, and contended she had been discriminated by the Region. DO closed the matter by concluding that there had been no discrimination. DO found the criteria laid down by the Region – that a midwife must be able to participate in work at all departments of the clinic – necessary and proportional to secure the rights of abortion-seeking women. Thus, the interference with Grimmark’s freedom of religion was justified.³⁰⁸

Ellinor Grimmark thereafter filed a claim before the District Court of Jönköping. The District Court found the measures by the Region had not amounted to discrimination, and she appealed to the Labour Court. On 12th April 2017 the Labour Court delivered the judgment. The same conclusions were found as those in the appealed verdict. The primary object of the dispute concerns damages as to aspects of labour law, Article 9 and 10 of the ECHR and discrimination thereto. The prohibition of discrimination is to be found in Article 14 of the ECHR. The Labour Court interpreted Swedish law in conformity with the ECHR.³⁰⁹

Grimmark invoked her rights enshrined in the ECHR³¹⁰ and held that the repeated treatment the Swedish hospitals – where she, at each respective women’s clinic, had applied for a position as a midwife – had subjected her to amounted to a breach of her ECHR rights.

³⁰⁶ Motion 1975:76/1282.

³⁰⁷ Riksdagen 1976/77 2:a samlingen, Nr. 1, Redogörelse 1976/77:1, *Justitieombudsmännens ämbetsberättelse*, p. 165–183.

³⁰⁸ *Decision by DO on E.G.*, 2014, p. 9–10.

³⁰⁹ *E.G. v. Region Jönköpings län*, p. 11.

³¹⁰ As established in 2.4.2 *Sweden and the ECHR: Accession and Relationship*, the ECHR holds the status of Swedish law since 1995. See also p. 6 in *E.G. v. Region Jönköpings län*. In addition, EU law was to be interpreted in accordance with the ECHR.

Grimmark had, as she applied for the positions, informed each potential employer of her incapacity to perform abortion, assist thereto (save for *exempli gratia* giving the woman a glass of water post operation), insert IUDs and prescribe morning after pills.³¹¹ All positions were as a civil servant, *id est* public employment. Grimmark alleged refusal to offer her an employment³¹² amounted to discrimination, especially when taking into account the acute shortage in health care professionals and her professional competence. The refusals had been discriminatory in nature since they were based on her conscience and beliefs. Grimmark asserted there was a difference between conscientious objection and the manifestation of religious beliefs – conscientious objection enjoyed absolute protection. Moreover, the 1975 Abortion Act Article 5 only conferred upon doctors the right and obligation to perform abortion. She further emphasised the existence of a near total European consensus in accepting the conscientious objection to abortion, where Sweden remains one of the few states refusing to introduce a conscientious objection clause. This consensus leaves Sweden a narrow margin of appreciation. Moreover, she held the measures and the criteria by the Region not necessary as her objection would not affect the practical and principal access to abortion. Hence, the Region should organise the work in order to fit her conscientious objection, especially so as some other midwives at Swedish public hospitals enjoyed this right.³¹³

The Region challenged Grimmark's arguments. The Region held the decisions were based on organisational needs, as every employee had to serve at all departments. The said need originated in the duty of the Region to provide abortions. Through this, the Region put the abortion-seeking woman first. The Region agreed that only doctors were entitled to prescribe abortion. However, midwives could be delegated the task to prepare and give abortifacients; the right to delegate and structure work appertain to the managerial prerogative. The Region highlighted the progress and emphasised custom developed in the recent years, whereby

³¹¹ The measures which E.G. explained herself incapable to carry out varied with the different applications, where the refusal to participate in the abortion procedure and to give abortifacients was the common denominator.

³¹² Grimmark held a position as a nurse at one of the hospitals when she was granted payment for further studies to become a midwife. Moreover, she was a trainee at a women's clinic in the Region and a possible summer job for her at the clinic was in question when her incapability of performing certain acts was displayed. As this came to the knowledge of the hospital, the summer position was reported to be no longer in question and her study salary was cancelled. This part did not become subject to judicial review due to a statutory limitation, see p. 3–4, 8 of *E.G. v. Region Jönköpings län*. Moreover, the Labour Court did not try the matter of alleged offensive statements as Grimmark had not sufficiently proven the matter, see p. 10 in *E.G. v. Region Jönköpings län*. Not discussed in the thesis is the matter of costs.

³¹³ *E.G. v. Region Jönköpings län*, p. 11, 13–15.

medical abortion – by the intake of abortifacients – dominates nowadays, in contrast to the practice in 1975, when surgical abortion dominated.³¹⁴

The Labour Court found the conscientious objection by Grimmark to fall within the ambit of Article 9 ECHR; her posture to refuse to take part in the performing of abortion, manifested as refusal of work, amounted to an exercise of religion in the sense of Article 9 ECHR.³¹⁵ The Labour Court did not specify closer whether the objection fell under freedom of conscience or freedom of religion – Grimmark’s objection was based in both, the two of them being inseparable.³¹⁶ The Labour Court found that the decisions not to offer her employment had not been based on her religious belief, but rather her expressed unwillingness to perform certain work – however emanating from her belief – as required by each position. Thus, the measures did not amount to a breach of Article 9 § 1 or constitute direct discrimination.³¹⁷

Furthermore, the decisions did not constitute prohibited indirect discrimination; the criterion set forth by the Region was proportionate to the legitimate aim pursued.³¹⁸ In brief, the criterion was found to be prescribed by law. The Labour Court agreed with the Region and found support in instructions set by the National Board of Health and Welfare. The instructions entitle midwives to prepare and administer medicine – thereby, to provide abortion-seeking women with abortifacients, even if the entitlement to prescribe the medicine comes within the doctor’s specific mandate. Moreover, the measure found support in the managerial prerogative and the Health and Medical Services Act with its provisions on good care. As the contested criteria appeared neutral but could put persons who professed a specific faith in disfavour, the Labour Court examined whether the decisions had pursued a legitimate aim and if so, a fair balance had been struck between the competing interests.³¹⁹ The Labour Court found that the measure served a legitimate aim, namely, the rights and interests of women (to obtain abortion). Noteworthy, the Region had alleged that the protection of interests of other employees and the public was an additional aim.³²⁰ Conclusively, the Region’s approach enforced the regulations on abortion, regulations issued in accordance with the democratic procedure set forth in the Swedish Constitution. The Region – in the capacity of a care giver – is obligated to provide abortion, which entails that Sweden may violate its

³¹⁴ *E.G. v. Region Jönköpings län*, p. 13–14.

³¹⁵ *E.G. v. Region Jönköpings län*, p. 10–11.

³¹⁶ *E.G. v. Region Jönköpings län*, p. 11.

³¹⁷ *E.G. v. Region Jönköpings län*, p. 12.

³¹⁸ *E.G. v. Region Jönköpings län*, p. 17.

³¹⁹ *E.G. v. Region Jönköpings län*, p. 14.

³²⁰ *E.G. v. Region Jönköpings län*, p. 12–17.

obligations under the ECHR if the right to abortion is not effectively enjoyed. In addition, the frequency of medical abortion has increased among the abortion methods.³²¹ Due to its nature, a non-performed abortion does not render itself feasible for repair in retroactivity. A wait too long can entail unrepairable aftermaths. According to Swedish law, the patient is in focus. With this established, the criterion laid down by the Region was both necessary and proportional to the legitimate aim pursued.

Another part of Grimmark's claim was that the Region had violated her freedom of expression, protected by Article 10 of the ECHR. Grimmark contended that one of the decisions not to employ her had been based in a statement made by her in a local newspaper, on the subject of abortion. Thus, her opinion *per se* comprised a part of the Region's decision material. Moreover, patients would not be affected by her posture; her opinion on abortion would not be expressed at the hospital. Therefore, her freedom of expression had been violated by the Region. The Labour Court did not agree with Ellinor Grimmark and found no violation. Her incapacity to perform parts of the job had constituted the fundament of the Region's decisions. That her incapacity to perform abortion and other tasks also had come to the Region's knowledge through Ellinor Grimmark's statement in the local newspaper did not render any change in the earlier finding.³²² In addition, presentation of evidence took place under the hearing in the District Court, where interrogations were held. A number of interrogations were held with managers at the clinics involved. During one questioning, a manager explained that after having read the local newspaper she had realised Grimmark was an active opponent to abortion; Grimmark's posture and reputation as an opponent could hurt the clinic's reputation and risk the clincial safety.³²³ One manager denied whilst interrogated the assertion made by Grimmark that she had ever questioned whether one even could become a midwife with an abortion approach like Ellinor Grimmark's; another had allegedly stated people like Ellinor Grimmark did not belong at a women's clinic.³²⁴ While interrogated, yet another manager confirmed it was her firm belief that one could not work at a women's clinic if one did not hold a positive attitude to abortion.³²⁵

Ellinor Grimmark is not alone in claiming a right to conscientious objection. In late 2016, another midwife-to-be lost in a similar case. The same construction as was applied in relation

³²¹ *E.G. v. Region Jönköpings län*, p. 15–16.

³²² *E.G. v. Region Jönköpings län*, p. 18.

³²³ Judgment of the District Court of Nyköping, annex to *E.G. v. Region Jönköpings län*, p. 52.

³²⁴ Judgment of the District Court of Nyköping, annex to *E.G. v. Region Jönköpings län*, p. 24, 46, 49.

³²⁵ Judgment of the District Court of Nyköping, annex to *E.G. v. Region Jönköpings län*, p. 47.

to Ellinor Grimmark, was applied to this midwife, Linda Steen – the criterion that all midwives had to participate in tasks at all parts of the clinic, did not violate freedom of religion. Noteworthy, the fact that Linda Steen had not applied to the position under any form of coercion, also justified the interference.³²⁶ Linda Steen’s counterpart argued that a woman who wanted an abortion should be sure to only meet personnel showing empathy for her situation.³²⁷ Alike Ellinor Grimmark, Linda Steen now works in Norway, where conscientious objection is permitted.³²⁸

4.3.3 The General Debate

Media has covered the case of Ellinor Grimmark. Among the debaters, two strands are visible – the ones who claim the individual right of Ellinor Grimmark must prevail, and, in addition, that this would not affect the right to abortion, as conscientious objection and the right to abortion are two separate entities. By not recognising conscientious objection, Sweden comes across as a closed and intolerant society.³²⁹ This strand finds support in statements by professor emeritus Reinhold Fahlbeck, whose argument is that the preparatory works to the 1975 Abortion Act comprises a conscience clause, whereby the right to conscientious objection already exists in Sweden.³³⁰ In addition, Grimmark has held that other midwives have asked her to proceed with her claim, as conscientious objection is necessary in Sweden.³³¹ Three doctors, fellows at Claphaminstitutet – an ecumenical think tank – argued that Resolution 1763 must be respected and incorporated in Sweden. Noteworthy, the doctors

³²⁶ *Linda Steen v. Södermanlands läns landsting*, p. 10 and 28.

³²⁷ *Linda Steen v. Södermanlands läns landsting*, p. 15–16.

³²⁸ Scandinavian Human Rights Lawyers, *Fallet Linda Steen*, Available at: <http://manniskorattsjuristerna.se/fallet-linda-2/>, (accessed 27th April 2017).

³²⁹ Svenska Dagbladet, *”Barnmorska i aborttvist inte diskriminerad: ’Besviken’*”. Published 12th April 2017. Available at: <https://www.svd.se/idag-avgors-tvist-om-abortvagan>, (accessed 6th May 2017); Svenska Dagbladet, *”Barnmorskan har lagen på sin sida – by Olof Edsinger”*. Published 30th January 2017. Available at: <https://www.svd.se/barnmorskan-har-lagen-pa-sin-sida>, (accessed 3rd May 2017); Värnamo Nyheter, *”Jag har tappat tron på Sverige”*. Published 12th April 2017. Available at: <https://www.vn.se/article/jag-har-tappat-tron-pa-sverige/>, (accessed 15th April 2017); Dagen *”Grimmark: ’Andra barnmorskor ber mig driva fallet vidare’*”. Published 13th April 2017. Available at: <http://www.dagen.se/grimmark-andra-barnmorskor-ber-mig-driva-fallet-vidare-1.953326>, (accessed 14th May 2017); SVT, *”Barnmorskemålet handlar inte om aborträtt – by Ruth Nordström and Rebecca Ahlstrand”*, Published 31st January 2017. Available at: <https://www.svt.se/opinion/ruth-nordstrom-om-samvetsfrihet>, (accessed 27th February 2017).

³³⁰ Svenska Dagbladet, *”Samvetsfrihet finns redan i abortlagen – by Reinhold Fahlbeck”*, Svenska Dagbladet. Published 2nd May 2015. Available at: <https://www.svd.se/samvetsfrihet-finns-redan-i-abortlagen>, (accessed 4th May 2017). Noteworthy, Reinhold Fahlbeck is a part of *Scandinavian Human Rights Lawyers*, the organisation representing Ellinor Grimmark and Linda Steen. *Scandinavian Human Rights Lawyers* is accused for linkage to the anti-abortion movement through its founder Ruth Nordström. Scandinavian Human Rights Lawyers, *About Scandinavian Human Rights Lawyers*, <http://manniskorattsjuristerna.se/about-scandinavian-human-rights-lawyers/>, (accessed May 17th 2017); Dagen, *”Hon driver värdefrågor med hjälp av juridiken”*. Published 14th November 2010. Available at: <http://www.dagen.se/livsstil/hon-driver-vardefragor-med-hjalp-av-juridiken-1.299067>, (accessed May 10th 2017).

³³¹ Dagen *”Grimmark: ’Andra barnmorskor ber mig driva fallet vidare’*”.

also made reference to an earlier discussed register on persons invoking conscientious objection in a comparison to practices of totalitarian dictatorship.³³² One argument related to the conscientious objection debate holds that diversity as to belief and conviction among health care personnel may have a positive impact as this reflects the diversity among patients.³³³

The other school invokes potential effects on access to abortion and difficulties for employers in organising the work; it tends to interpret Ellinor Grimmark's claim as an attack on the 1975 Abortion Act.³³⁴ This strand holds abortion to be a self-written part of midwifery – like any other employee, a midwife must perform all relevant tasks and put aside personal opinions.³³⁵ Representatives from Sex and Politics in Norway and the Swedish Association for Sexuality Education claim that Norway struggles with the right to conscientious objection.³³⁶ Representatives and presidents of prominent associations in the care giver field, as the Swedish Medical Association, Swedish Association of Midwives, the Swedish Association of Local Authorities and Regions *et alia* have expressed in an united opinion that the right to abortion would be threatened by the mere existence of a right to conscientious objection – Swedish health care is about putting the patient first. Moreover, the representatives argued – as many other – that to be a midwife is no human right.³³⁷ The vice-chairman of the Swedish Association of Health Professionals has expressed worry as to a potential dispute before the ECtHR, as there is a risk that ECtHR would interpret the case contrary to Swedish

³³² Svenska Dagbladet, “*Vårdpersonal har rätt till samvetsfrihet – by Christina Doctare, Bengt Malmgren och Tomas Seidal*”. Published 21st October 2010. Available at: <https://www.svd.se/varpersonalar-ratt-till-samvetsfrihet/om/debatten-om-samvetsfrihet>, (accessed 8th May 2010).

³³³ Zillén, 2016, p. 45, 49.

³³⁴ Jönköpingsposten, “*Ellinor Grimmark är barnmorskan som inte får finnas*”. Published 27th January 2017. Available at: <https://www.jp.se/article/ellinor-grimmark-ar-abortmotstandaren-som-inte-far-finnas/>, (accessed 30th March 2017); Svenska Dagbladet, “*Norge visar varför samvete inte ska styra – by Kristina Ljungros and Johannes Rindahl*”. Published 14th November 2014. Available at: <https://www.svd.se/norge-visar-varfor-samvete-inte-ska-styra/om/debatten-om-samvetsfrihet>, (accessed 10th May 2017).

³³⁵ Karlskoga Tidning and Karlskoga Kuriren, “*Naturligtvis är hon inte diskriminerad – by Catarina Forsberg*”. Published 15th April 2017. Available at: <http://nwt.se/karlskoga-degerfors/2017/04/15/naturligtvis-ar-hon-inte>, (accessed 17th April 2017); Svenska Dagbladet, “*Hyllade inlägget: 'Trött på abortmotståndare'*”. Published 15th March 2017. Available at: <https://www.svd.se/barnmorska-ar-trott-pa-abortmotstandare/om/ellinor-grimmark>, (accessed 5th April 2017).

³³⁶ Svenska Dagbladet, “*Norge visar varför samvete inte ska styra – by Kristina Ljungros and Johannes Rindahl*”.

³³⁷ Aftonbladet, “*Aborträtten hotas av samvetsfrihet*”. Published 12th November 2015. Available at: <http://www.aftonbladet.se/debatt/article21742277.ab>, (accessed 4th May 2017). Also published on Swedish Association of Midwives' webpage, <http://www.barnmorskeforbundet.se/aktuellt/forbundet/abortratten-hotas-av-samvetsfrihet/>; Borås Tidning, “*Ingen rättighet att bli barnmorska – by Anela Murguz*”. Published 27th January 2017. Available at: <http://www.bt.se/ledare/murguz-ingen-rattighet-att-bli-barnmorska/>, (accessed 10th May 2017); Svenska Dagbladet, “*För offentligt anställda ska lag gå före religion – by Staffan I. Lindberg*”. Published 24th January 2017. Available at: <https://www.svd.se/for-offentligt-anstallda-ska-lag-ga-fore-religion/om/ellinor-grimmark>, (accessed 8th May 2017).

standards.³³⁸ A professor in political science presented an interpretation in which he stressed that civil servants must obey by the law and put aside individual convictions. Moreover, the freedom of religion is a protection afforded the individual *vis-à-vis* the public, not when one *is* the public – a midwife working at a public health care facility *is* the public in exercising the power of a public employment. As the state is secular, it befits civil servants to show secularity in relation to patients.³³⁹ One observant debater noted that Sweden stands out as extremely secular in surveys on religion.³⁴⁰

After she had lost in the Labour Court, Grimmark stated that she will proceed and file an application before the ECtHR.³⁴¹ In addition, the American organisation ADF, with a clear anti-abortion agenda, has been said to fund Ellinor Grimmark's trial costs.³⁴² An opinion by the ADF was submitted to DO.³⁴³ However, that Ellinor Grimmark's case is part of a purpose to undermine the 1975 Abortion Act has been denied by both ADF and Ellinor Grimmark.³⁴⁴

In the wake of Resolution 1763, presented *supra*, a debate was held on conscientious objection in the Riksdag. On 11th May 2011, a decision was taken not to introduce a clause on a right to conscientious objection to abortion, *inter alia* as the legitimacy of the resolution was questioned. Both the special position Sweden holds in relation to reproductive health as well as the potential consequences on access to abortion were emphasised.³⁴⁵ Noteworthy, the argument commonly seen in the debate on Ellinor Grimmark appeared: arguments against stressed that there is no right to work as a midwife, whilst there exists a fundamental human right for every person to decide over his or her own body. As for the voices in favour of a clause on conscientious objection, the need to separate the issue of abortion from the right to

³³⁸ Svenska Dagbladet, "Barnmorska i aborttvist inte diskriminerad: 'Besviken'".

³³⁹ Svenska Dagbladet, "För offentligt anställda ska lag gå före religion – by Staffan I. Lindberg".

³⁴⁰ Svenska Dagbladet, "Religion på arbetsplatsen skapar friktion". Published 12th April 2017. Available at: <https://www.svd.se/religion-pa-arbetsplatsen-skapar-friktion/om/debatten-om-samvetsfrihet>, (accessed 8th May 2017).

³⁴¹ Värnamo Nyheter, "Jag har tappat tron på Sverige".

³⁴² Dagens Nyheter, "Kristen amerikansk lobbygrupp driver svenskt rättsfall – vill påverka aborträtten". Published 24th January 2017. Available at <http://www.dn.se/ekonomi/kristen-amerikansk-lobbygrupp-driver-svenskt-rattsfall-vill-paverka-abortratten/>, (accessed May 10th 2017). Vårdfokus, "Barnmorskorna som vägrar abort stöds av amerikansk lobby". Published 24th January 2017, Available at: <https://www.vardfokus.se/webbnyheter/2017/januari/barnmorskorna-som-vagrar-abort-stods-av-amerikansk-lobby/>, (accessed May 10th 2017). In addition, the midwife Linda Steen is also said to accept funding from ADF.

³⁴³ *Decision by DO on E.G.*, 2014, p. 3.

³⁴⁴ Dagen, "Barnmorskan Ellinor: Därför vägrar jag göra aborter". Published 11th February 2014. Available at: <http://www.dagen.se/barnmorskan-ellinor-grimmark-darfor-vagrar-jag-gora-aborter-1.94551>, (accessed 10th May 2017).

³⁴⁵ Riksdagens protokoll 2010/11:100, under: 22 § UU12 Europarådet, section 6, p. 99. See also Zillén, p. 246–247.

conscientious objection was stressed, particularly so as the right to conscientious objection is a fundamental human right – derived from Resolution 1763 (2010).³⁴⁶ In 2012, Resolution 1763 (2010) was referred to yet again. Similar arguments appeared: Health care personnel's ethical dilemmas must be respected. This argument was paired with graphic stories from late abortions. On the contrary, no one is forced to work within the health care sector; no abortion-seeking woman should be met by someone refusing to provide the relevant care. The health care cannot include such exceptions as the patient is and shall be in focus.³⁴⁷ In addition, motions arguing the introduction of a clause on the right to conscientious objection for health care personnel have been submitted frequently in the last years, by the right-winged nationalist party and the Christian party, represented in the Riksdag.³⁴⁸

³⁴⁶ Riksdagens protokoll 2010/11:100, under no. 37–45, p. 38–45.

³⁴⁷ Riksdagens protokoll 2011/12:95, under no. 14 and 17–18, p. 16–30, 21–28.

³⁴⁸ See *inter alia* motions 2016/17:1751; 2015/16:2709; 2015/16:2902; 2014/15:1601; 2014/15:2516; 2013/14:K344, and a number of similar motions, all proposed by either representatives of Kristdemokraterna or Sverigedemokraterna.

5 Analysis

5.1 A Short Summary: What Has Been Presented?

Before beginning with the proper analysis, a short reminder on what materials have been put forth and examined is required. We have seen that abortion pertained to the area of penal law for decades in Sweden. However, the existence of a collision of interest was first recognised by the general principle of law that repealed the reprehensibility of abortion when the woman's life was at risk. Thus, to obtain an abortion during the said circumstances was not a criminal act. After decades of debate, the 1938 Abortion Act was finally introduced and comprised of three abortion indications: medical; eugenic; humanitarian. The preparation procedure of the new law was characterised by tensions between those who promoted the old morals and those who urged for social reforms. The 1938 Abortion Act claimed to protect the sanctity of life, sexual morals, and women from taking decisions against their nature. General prevention was important. The indications constituted exceptions to the principal rule on accountability for the criminal act of abortion.

The 1938 Abortion Act remained in force with a few amendments in 1965; the sociomedical indication had finally been introduced; women were seldom prosecuted for the act of abortion due to Chapter 3 Article 11 of the Penal Code. With this legal framework in Sweden, Swedish women travelled to Poland to obtain abortions. The Prosecutor General recommended prosecution and held that Swedish morals had to be protected; the foetus came within the notion of Swedish interests, whereby it was possible to take legal proceedings against all the persons involved. Prosecution was called for in the name of general prevention. The Prosecutor General's statement had an immediate aftermath in the debate. Organisations as well as individuals from all over the country engaged in the discussion. Many strongly disagreed with the official interpretation. Indignation was expressed as to the deviation from the standard to not prosecute a woman who had obtained an illegal abortion. Within a few days, the issue was linked to the question on the character of the 1938 Abortion Act. Two strands were visible. The more conservative opinion put forward arguments on the necessity to maintain the law, not give in to propaganda, and to preserve the sexual morals. The more progressive opinion heckled the conservative morals by presenting Sweden as a nanny state, and held that the Poland case made visible social injustice; therefore, the need for a

liberalisation and dechristianisation of the 1938 Abortion Act was displayed. A couple of days after the statement from the Prosecutor General had come, Kungl. Maj:t decided to use abolition for the purpose of waiving further legal proceedings. At the stroke of a pen, the women and Hans Nestius were freed from all allegations and could not be prosecuted. An investigation was commissioned, and in 1975, the new law entered into force, where the old morals had yielded before the new principal value: A woman's right to decide over her own body. The 1975 Abortion Act also constitutes a *right* to abortion under the ECHR, within the ambit of Article 8. Nevertheless, this does not give rise to a general right to abortion under the ECHR, but only affects Sweden. Therefore, the current Polish, more restrictive legislation, is also viable under the ECHR.

In the preparatory works to the 1975 Abortion Act, the Minister of Justice dealt with a question that had appeared during the preparation of the new law. The question concerned health care personnel whose conscience made it impossible for them to perform abortion. Requests from such personnel was to be respected to the greatest extent possible, like how the managerial prerogative was exercised in other areas of the labour market. In the now, Ellinor Grimmark is a midwife with such a conscience. In April 2017, she lost her case before the Swedish Labour Court; the Region in which she had sought and been denied employment had not discriminated against her. To require of a midwife to perform all tasks at a clinic, including abortion, was a justified practice that found basis in the protection of patients, and in particular, in the interests of abortion-seeking women. The basis for Ellinor Grimmark's claim is that her conscientious objection comes within the sphere of protection of freedom of conscience, a freedom that does not exist independently in the Instrument of Government, but must be considered to fall under freedom of religion. Sweden, being a state party to the ECHR, shall interpret Swedish law in conformity with the ECHR. Therefore, both the provision on freedom of religion in the Instrument of Government and Article 9 in the ECHR are relevant in the case of Ellinor Grimmark. We have also seen that the Swedish Constitutional framework earlier had a strong relationship to the Church of Sweden and that, even though the general religious freedom has a stronger protection today, there seems to be a narrow room for religious exercise in the workplace. One possible answer to this is the legislator's wish to not let religious exercise impede democratic development and social reforms. Or, the more secular approach by the state. Furthermore, the debate on Ellinor Grimmark's conscience is dominated by two strands. One strand claims that the individual

right of Ellinor Grimmark must prevail, the other holds that access to abortion is at risk and that abortion is a natural part of midwifery.

5.2 Studying the Two Debates: What Do They Unveil?

To facilitate reading, each research question will be answered separately. Every paragraph begins with a reiteration of the research question to be answered.

What values are enshrined within the relevant laws?

It falls naturally to begin with the values protected by the 1938 Abortion Act, as this law was in force during the Poland case. The 1938 Abortion Act was a child of a quite tense debate between conservative and more liberal forces. The members of the investigations that preceded the legislative act watched the development in the field of sexuality and sexual morals with abhorrence. However, the factual social conditions required some sort of regulation. Indeed, people did not act in accordance with the morals the criminal provision aimed to preserve. A strong discrepancy existed between the deep structure of the law and the surface level of the law, as the morals to a large extent failed to gain a foothold in people's actual conduct. Before the 1938 Abortion Act was enacted, the existing general principle of law recognised the root: It was all about a collision of interests. However, the law operated under the principal rule of abortion as a criminal and reprehensible act; society had the task to protect the unborn. Therefore, the legislator wished to preserve the values as expressed in the penal law provision. We here see that the surface level of the law asserted a right to decide on the matter, whilst women's actions posed an immediate threat to that assertion. As the legislator could not accept that a woman should have the right to decide over her own body, social reforms had to be introduced to change such tendencies among women. In a way, the legislator tried to change the sediment so that it would match the values that the legislator wished to protect – so that the movements at the bottom level would not influence the higher levels of law any further. Nevertheless, the process had already been started. Indeed, the controversial sociomedical indication was not introduced at first, still, the question had been brought to the table. It is worth to note that the existence of the eugenic indication strongly contradicted the principle of the sanctity of life. The underpinning value then gradually lost its validity, and pointed to that the legislation also promoted other moral dictates: chastity, and a wish to govern both the woman and the nativity. Given the strong Christian tradition and the explicit referral to canon law as the source of the state duty to protect the unborn, the values

can be considered as religious. The law aimed at an ideal, an ideal imposed upon women through a penal provision.

Now, the courts had practically ceased to prosecute women at the material time of the Poland case, and Chapter 3 Article 11 of the Penal Code stipulated special reasons were required in order to hold the woman accountable for the act of illegal abortion. A slow liberalisation – to a small extent – had come with the gradual relaxation through the amendments of the 1938 Abortion Act. However, the nature of the legislation was the same as in 1938, when the 1938 Abortion Act first was introduced. One may argue that the surface level of the law at the time was Janus-faced. There existed no coherence between the morals in the legislation and the application of the law. The courts for certain acted in accordance with Chapter 3 Article 11 of the Penal Code, yet, the 1938 Abortion Act enshrined completely different values. The law moved between two extremes, there existed a sort of inherent antagonism. Rightfully observed throughout the law-making process, the law was applied differently in different areas of Sweden. Conclusively, the law at the material time of the Poland case held on to the old morals, yet existed in a society that had begun to take another direction.

The 1975 Abortion Act promotes the free will of women, stipulates a right to abortion, and obliges the state to guarantee access to abortion. Little regard is had to the old values – only after week 18, the unborn's interests are given protection. The 1975 Abortion Act exists in a context that promotes equality and equity, a context that wishes to separate conservative morals from the public policy. Moreover, it is the values of the 1975 Abortion Act and the principle that the patient's interests are to be put first that constitute the actual justification of the criterion that locks Ellinor Grimmark out of the relevant labour market. By looking at the materials gathered, it is clear that the woman's right to abortion and her autonomy prevail. The law is secular and wishes not to impose a moral ideal, in contrast to its predecessor. Hospitals are obligated to secure the right to abortion, and from this duty spring a need to hire personnel willing to comply with instructions from the hospital management. This line of argumentation is reasonable as midwifery in Sweden presupposes participation in abortion procedures. This brings us to the next legislation to examine, namely the Instrument of Government.

The Instrument of Government, despite its wording, does not protect freedom of religion in absolute terms. It appears as if only the *forum internum* is guaranteed absolute protection –

an interpretation in line with the ECHR approach. From the preparatory works, we learn that the exercise of religion cannot impede social reforms or undermine the majority principle. One may argue that this despatches religion to the private sphere. Moreover, the state shall mediate democratic values to its citizens – and many religious and other ethics are not compatible with such values. In the context, Sweden has deliberately contravened the invitation to introduce a clause on conscientious objection to abortion. Moreover, religious exercise that emanates from another right or freedom, or originates in culture or tradition, is not protected by freedom of religion. This yet again confirms that the legislation holds religious practices to be a private thing. Therefore, the Labour Court judgment is not exactly surprising – at work, especially when working as a civil servant, an individual shall comply with the management orders and laws, and express democratic values. Indeed, it would be difficult to suggest that the abortion issue does not pertain to women’s rights issues. Inevitably, the right to abortion is intimately linked to the questions on equality and equity. The Instrument of Government values religious freedom yet seems to give a certain priority to the majority opinion, as, *exempli gratia*, expressed in laws enacted by the Riksdag. Cautiously it can be suggested that the Swedish Constitution does not accord religion at a public workplace any particular value if opposed to an interest related to women’s rights, as promoted by Swedish law. The Swedish state encompasses secular values. This conclusion finds support in the fact that Sweden today claims to be a neutral state expressing democratic values, as compared to the earlier mission to express Christian values, and the long relationship with the Church of Sweden. Even though religion has had great impact on the Swedish system, those are not the values of the state anymore. Clearly, the secular and neutral posture of the state is reflected at all levels of the law. The narrow margin for religious exercise at the workplace can be argued to constitute a product of this approach, where the sediment level is reflected in the application of the law as well as the preparatory works. Moreover, the refusal to introduce a clause on conscientious objection to abortion is a product of the principles that permeates the entire abortion area today. Religion does not belong to this area, according to the current dominating opinion.

The ECHR sets out to protect the rights of individuals as well as democracy. However, as to both abortion and exercise of religion at the workplace, it appears as if the ECHR values sovereignty and the national context. These questions are left to the margin of appreciation. Therefore, the ECHR gives room for diverse interpretations and in this, confirms that

religion's status in a country is allowed to, and will, influence – however various they might be – the abortion related frameworks.

What arguments dominated the two debates? Is it possible to discern any similarities?

The materials of this thesis comprise, as is quite obvious, arguments from the two classical strands *pro et contra* abortion. Indeed, the basis for Ellinor Grimmark's conscientious objection to abortion is the very same that once governed the entire area of abortion laws. Ingemar Hedenius' critique in the Poland case pinpointed the issue; his critique makes the frictions appear clear: The Prosecutor General's interpretation of the law – and the law itself – appertained to another kind of society. As for the Poland debate, the Church of Sweden's historically strong position and the Christian doctrines' vigorous impact on Swedish legislation was also challenged, although not explicitly.

The Poland case debate was characterised by tension. First, the statements by the Prosecutor General – to preserve morals, to prosecute for the purposes of general prevention, and that the foetus was a Swedish interest – caused indignation. Debaters did not accept the persecution of already vulnerable persons and the use of the nationality principle to preserve a moral standard that the Penal Code and the Swedish courts no longer insisted on. Here, we see that the debaters, and thereafter Kungl. Maj:t and the legislator, took a stance for an expurgation where old morals and other remains of eras dominated by religion and population policy, were left behind. This grip is also one of the main features of legal positivism, the separation of law and morals. The same separation is reflected in the difficulty for debaters to accept the principle of nationality in context. For example, we have seen that Hans Nestius was convinced he had helped the women involved, in particular as the law aimed to protect women from charlatans. This is an interesting interpretation that of course must be seen in the light of his role and agenda. Still, the purpose of the 1938 Abortion Act *inter alia* was to protect women from taking decisions against a woman's nature and to overcome issues with charlatans. One can therefore question the nature of Hans Nestius' interpretation as the will to get at charlatan doctors rather seems to have been based on a will to uphold the morals and disable access to abortion based on women's right to decide for themselves. The more conservative body held that the propaganda had influenced the authorities' decision-making and later, the law. At some point, this speculation is reasonable. The rule of law must of course be conserved. However, this indicates democracy, as some debaters inferred. The old

law that inclined toward a patronising posture apparently seemed to have had less support within the public opinion. This leads to the finding that it was more legalistic to apply abolition – a constitutional, legal institute – to bring about a situation where a moral law, (however being positive law) that did not have support in the public opinion, was in principle annulled. In addition, this respects the principle of majority. With this in mind, we can see how a legal principle was used to bring about justification. The movements in the sediment level of law could reach the highest level of the law, and therefrom, the actions at the top level further justified what moved in the depths.

We can see that both claims by the individual – Ellinor Grimmark, the Poland travellers – spring from a perception of the individual as central, a line of thought sanctioned and favoured by the ECHR and the human rights movement. Interestingly, in both events, we can identify the human rights argumentation: the focus on the individual in relation to the state. Similar to the debaters who mocked the interpretation that the foetus belonged to Sweden, and that its protection was a Swedish state interest, the core of this absurdity permeates the entire argumentation of Grimmark: as she deviates from a set norm, is her way of thinking a property of the state? When this argument is put in contrast to the Poland case, it becomes clear that so is not. The 1938 Abortion Act was built on clear canons, canons that the state had earlier imposed upon its citizens – the jurisprudence, as seen, deviated from this standard. Nevertheless, the purpose to impose the morals therein was not obscured in the Prosecutor General's statement. Indeed, this caused indignation and many voices in the opinion could not accept – or understand – the application of the nationality principle. In addition, through the application of the nationality principle, the notion of owning probably became more visible for people in the debate; that the law reached for a woman's body outside the Swedish territory shed light on the freedom aspects of the question.

The two events separate when it comes to the relationship to the state. As a midwife in Sweden, one works on a mandate that springs from the state duty to provide health care. A pregnant woman in Sweden holds no duty to – as earlier manifested in law – give birth. An employment, is, of course, a contractual obligation. However, a contract can be varied in accordance with the conditions set up at the time when the agreement was entered. Therefore, this argument is in itself not compelling, as the employment contract *can* be adapted to the particular circumstances. The argument that the midwife should just change her job, seems insufficient and simplistic. A rejection so categorical seems to limp; it appears to shut out all

other perspective. Nevertheless, the resolute nature of this argument opens for another question to be posed: What constitutes the authority, the presupposed assertion behind it all? This will be further explicated under the next research question, yet, debaters touched upon this in that they assume abortion is considered a natural part of midwifery in Sweden today. Even so, those in favour of allowing conscientious objection to abortion – in line with the international recommendations – stressed that the right to abortion would remain respected; Ellinor Grimmark was not trying to alter the societal norms and did not participate in ADF's lobby programme. Here, we see how their argumentation was circumscribed by the current judicial perception of abortion; they did not attempt to argue about the Ought, or to let morals re-enter the legal framework. This legalistic grip can also be identified in the Poland case. Good faith of the people involved was constantly argued and indeed, took part in the vindication of abolition.

Both the Poland case and the case of Ellinor Grimmark seemed not to concern access to abortion *de jure*. The Poland case came to be about abortion, but the decisions concerned abolition and jurisdiction outside Swedish territory. Grimmark argued for her freedom of religion. However, as seen, debaters in both discussions subsequently drifted to what can be described as a *de facto* argumentation on access to abortion.

The Ellinor Grimmark debate is divided between those who stress the need to maintain access to abortion and in this, claim that we must preserve the values enshrined in the 1975 Abortion Act, and those who hold that respect for freedom of religion must prevail, as the access to abortion will not be affected. To work as a midwife is no human right, insisted some debaters. The quality of this argument is of course questionable; it does not point to the key issue. Rather, it points us to another observation: The human rights talk is, however tentative, present in the Poland case debate, whilst it blossoms proudly in the Ellinor Grimmark debate. Now this brings us to the recognition of another similarity, namely, the question on defining the content of a democracy. The frequency of the notion general sense of justice in the Poland affair discloses that indeed, it was a question of democracy, for the law was not to moralise without support in the public opinion. One may express that the opinion mobilised in relation to the event; religious morals were not to be preached for a woman already in a vulnerable position. It was not considered democratic to disregard social conditions. The rather sharp contrast between the authorities' first conclusion and the more popular opinion seem to have amplified the gap experienced between the powers and the people. As for conscientious

objection to abortion, debaters held it less democratic – rather totalitarian – to not accept a dissident like Ellinor Grimmark. At least, this strand opines that the refusals to hire Ellinor Grimmark were equal to the non-acceptance of dissidents. The totalitarian argument, a less reasonable one, appeared in both debates, and can probably be said to be indicative of the individualist approach.

There is no connection between abortion and conscientious objection to abortion, some debaters argued. Indeed, abortion as a right created under the right to a private life and freedom of expression are two different rights; they are separate. Ellinor Grimmark's objection at work will not affect access to abortion. Consequently, this argument is quite persuasive. Against this finding speaks history and our experiences of abortion and doctors' morals under the 1938 Abortion Act. The statistics in Italy is another argument in this armoury. However, it is probably an axiom that Sweden and Italy differ severely when it comes to the status religion holds. Application of critical positivism here points us in another direction. If we accept that law comprises the three levels and that the system operates to justify itself, within itself, one may argue that the values of the current abortion law has trickled down to the sediments and is considered the right solution of the problem. Regardless if a midwife's conscientious objection to abortion could potentially affect access to abortion, the Labour Court's finding can be considered as indicative of the Swedish context. Throughout the procedure, authorities have unanimously come to the same conclusion in the balancing task: in the context, the rights and interests of others – women – are heavier on the scales. This affirms the individualist approach, where the state shall be neutral. Religion and moral is something for the private sphere, and the state shall not moralise in providing the individual with different services that help facilitate private life.

Notwithstanding the outcome in the case of Ellinor Grimmark, she argued that her position in the abortion question *per se* affected the contested decisions, and that this was a violation of her freedom of expression. Indeed, some managers did not express that they sympathised with Ellinor Grimmark's conscience. However, to conclude that this, taken together with the refusals to employ her, is the act of a totalitarian state, is hasty. To not employ her as she refused to perform some of her duties are of course not dictatorship; it is not an attempt to dictate her mind. Nevertheless, in the Poland case, penal law existed to maintain morals. If anything, that was a situation where the state tried to dictate the minds and bodies of its

citizens – to be born a woman and become pregnant in a difficult situation is certainly not comparable to the act of applying for a job.

Noteworthy, the managerial prerogative appeared in the debate. In regard to this argument, it is clear that the outcome was affected by the values in the 1975 Abortion Act. As clinics are under a duty to provide abortions, this duty – safeguarding women's right to abortion – was indeed considered more important in the collision of interests.

How are the changes reflected in the patterns of law and societal values – what the interest of society is framed as – as to abortion in the relevant period of time?

As we know by now, general prevention and general sense of justice were frequently referred to in the Poland case. The Prosecutor General wanted to preserve the morals by pronouncedly maintaining the values in the 1938 Abortion Act. A strict separation between law and morals had not been realised, as the law built on explicit moral grounds. Noteworthy, the Prosecutor General did not let go of the general prevention; he agreed with abolition, noting that through the media coverage, people had learnt that such abortions abroad were punishable. Therefore, prosecution was no longer called for as to secure this knowledge among the population. However paternalistic, the Prosecutor General's statement is typical for a jurist. An explicit aim, despite the existing indications, in the entire abortion regulation was to maintain the morality. *Dura lex, sed lex* summarises the Prosecutor General's interpretation. Nevertheless, political powers meddled with the judicial powers. As Tuori argues, validity is equally important in a modern society of legal positivism as it was in one of natural law. May it be that the rather confused relationship between the old maxim and the judiciary practice was brought up through the Poland case. These practices displayed the ambiguity: abortions were not overcome and social reforms had not proven sufficient. But – the morals, and the decency! Indeed, the media coverage seem to have raised awareness. Many people felt that the law was a class law and protested against the moralising doctors; people felt sympathy for young women. Knowing that the social reforms had not been sufficient and that the morals of others could strengthen a vulnerable position, people were ready for a change.

When grasping the Poland case and its aftermath with the help of critical positivism, the process where the deep structure was brought up to the surface level happened within a number of days. Certainly, the conflict was not a new one, yet, the Prosecutor General's

statement provoked something. As the story was covered for days in media all over the country, the information reached numerous of citizens. The Poland affair brought the conflicting matters to a head and contributed to a sharp turn in the legislation. The abolition decision and the amendment of the law had support in the public opinion, but the resistance was strong. As seen, the resistance invoked that ‘the true general sense of justice’ advocated high sexual morals and the sanctity of life. Indeed, the conservative approach had support in the 1938 Abortion Act. Apparently, the law had gradually lost validity.

With this in mind, we move to what interest was promoted by society. The earlier abortion laws exercised control in the name of the sanctity of life and morality. As we have seen, this interest was questioned already in the early 1900’s. Nevertheless, the questioning stood in the spotlight during the Poland case. Through the Prosecutor General statement, the governing principles were brought into light. One potential answer here is that the amended abortion law had made it possible for many to obtain abortion, oftentimes by paying medical personnel, whereby many could actually get abortion. As this was paired with absence of prosecution and the provision on special reasons in Chapter 3 Article 11 of the Penal Code, the enthusiasm of reform had been asleep– until the Poland case was discussed and pulled the old moral into daylight. Why should the nationality principle awaken morals that had, more or less, ceased to apply domestically? In the 1975 Abortion Act, the principle that recently had been unimaginable to respect, came to form the new principal interest. Now, the preparatory works to the 1975 Abortion Act confirmed that doctors had a duty to secure a woman’s right to obtain abortion; a woman’s right to decide for herself was strongly underlined. Symptomatic, religion and the sanctity of life was scarcely dealt with in the preparatory works. Despite the critique from many instances, the issue was considered to have been dealt with enough at the time – it belonged to history. Today, Sweden has proclaimed to be an ambassador for reproductive health. This is reflected in the Region’s argument, that abortion-seeking women had to be protected and put first.

Another explanation of the Swedish approach to conscientious objection to abortion can be found in the state’s mission to present democratic values to its citizens. As the ECtHR concluded, parts of many religions are not compatible with the strife for equality. It remains true that a woman’s body is affected by pregnancy. No matter the situation a woman finds herself in, the possibility of abortion can adjust some of the biological differences we cannot

change, and thereby heal possible struggles of an unwanted pregnancy – an expression of equity.

The Swedish state no longer considers itself a responsible entity in the protection of the unborn. The personal morale is no longer a state interest in the context. The urge to protect the patient can be seen as an expression of the positivist division between law and morals. Indeed, the existence of *'free'* abortion confirms the distinction between Is and Ought – history have taught us that a vast number of women *will* obtain abortions, no matter what the law prescribes – one may put it as an expression of traditional human law. Is is this, however sad, insight. Ought is the strife to diminish the number of abortions, a strife that society still claims to pursue. Is comprises the law, a regulation of the practical outcome to protect – and not moralise over – the woman from turning to charlatans, or even death. This is not to say, that, for example, harmful practices that have existed throughout the entire history of humanity can be justified. One must separate different questions, and indeed, a general *ultima ratio* discussion is not for this thesis. In addition, those with another perception as to when life begins can never agree with the current abortion legislation. But it remains that a woman gives birth, with all its practical aftermath – no matter the conclusion an objective weighing of the colliding interests may arrive at. Hence, the 1975 Abortion Act does only give little – if any – room for Ought; Ought used to govern the field. Nevertheless, some may argue that the law remains moral, as laws tend to express values either way. However, a law that lets the individual choose for herself – to do or not to – must be considered less moralising than a law comprised of a favoured behaviour upheld by a penal provision. This is not to say that such laws are always uncalled for.

As for changes in relation to freedom of religion, we saw how the Christian values lost importance with the introduction of the 1975 Abortion Act. The separation between the state and the Church of Sweden in 2000 serves to illustrate what happened clearly. The dominating church, with its traditions, was phased out. The public was not to express any religion, and religion was not something to exercise whilst representing the state. Religion has grown into a private matter. The Labour Court judgment confirms this conclusion. Furthermore, we can categorise the 1975 Abortion Act as such a social reform law that religious exercise is not to impede, according to the preparatory works. *Ergo*, religious convictions are not allowed to affect access to abortion. JO's interpretation of conscientious objectors in the 1970's strengthens this finding; the statement by the Minister of Justice was by JO considered

restrained. The religious respect within the abortion legislation was not left much room – that had already been dealt with during time and again. Furthermore, the statement by the Minister of Justice in the preparatory works underlined that respecting conscientious objection to abortion should mainly be done to respect the abortion-seeking women. In addition, a clause on conscientious objection was deliberately avoided at the time when the new law was created. One may argue that this course of action further confirms the diminishing role of religion. The morals of doctors had earlier caused trouble. Evidently, the Minister of Justice did not want those impediments to continue. It is here interesting to take note of the education provision in the ECHR, in 1952. At the time, Sweden made a reservation as exemption from teachings in the dominating religion, Christianity, could not be guaranteed. Toward this background, the radical changes are even more interesting. Earlier, schools – a public institution – were dominated by Christianity. Further back in time, midwives had to swear not to perform abortion; medical practitioners were prohibited to ordinate abortifacients. Today, hospitals, a public institution, are reluctant to accept that this religious doctrine appears within the medical practice. The fact that this is an exercise of authority strengthens the interpretation. As we have learned, Swedish authorities are to express democratic values. Morals in relation to a decision on abortion is hard to combine with the respect for the individual subject to the state's authority – a woman is left to the state as the state holds the mandate in the area. Indeed, the interrogated managers in the case of Ellinor Grimmark are ambassadors for the right to abortion, and they too contribute to the reproduction of the existing norms.

Like Tuori argues, every court decision has implications for the other layers. The Labour Court judgment, one may argue, consolidates the general mistrust against conscientious objection. This mistrust is visible in that Sweden remains one of the few, even in difference from the other Nordic countries that we usually are similar to, to refuse the introduction of a clause on conscientious objection to abortion. Moreover, it cements the interpretation stressed by legal scholars on that religion is, in principal, a matter of individual conscience, belonging to the private sphere. As a midwife is a part of the state when at work, and the state has decided on abortion in accordance with the 1975 Abortion Act, she is simply not to deviate from the set standard. We have observed that the construction of discrimination is built on a *presumption* as to the midwife profession, a presumption that comprises the notion that within the profession lie the duties to perform and support women in abortion procedures. One may argue that the experience of the varying access to abortion in the country in the application of

the 1938 Abortion Act, that depended on the doctors' subjective feelings and opinions on abortion controlled the application of the law, can be seen as a rationale behind this. For certain, the Labour Court did not invoke the history of access to abortion, but, the court operates within a secular legal system and, most importantly, dealt with a case whose occurrence is based in the values of the 1975 Abortion Act – a law that builds on *inter alia* this experience. To invoke the managerial prerogative in relation to Ellinor Grimmark must be considered reasonable against this background. That the Swedish relationship to religion is manifested in a way that requires civil servants to comply with the current legal framework is nothing strange in a positivist legal order – it is reasonable to respect the majority principle in the context of abortion. But, this is not only an expression of legality, for it is *the assertion behind the 1975 Abortion Act* every midwife has to comply with, in stark contrast to *the assertion behind the 1938 Abortion Act* and its precedents. A century ago, midwives like Carolina Redlund, mentioned in the introduction, opposed to the presumptions embedded in the earlier laws. Today, midwives find themselves in a framework of an exact opposite to that Carolina Redlund found herself in. As for now, all three levels of law seem to constantly produce and reproduce the values in favour of the Poland travellers – in disfavour of Ellinor Grimmark. Here, we clearly see what Tuori has claimed. The surface level of the law has run down to strongly root and set in at the two lower levels. The Labour Court's findings in the case of Ellinor Grimmark make a good example of how the levels are intertwined, reproduce, and produce one another. Even though the PACE resolutions promotes conscientious objection, their construction – that access to legal abortion must be secured when conscientious objection to abortion is introduced – builds on the existence of a right to abortion, and in a way, at least in their wording, further affirms the primacy of abortion.

The grips by the Prosecutor General and the Minister of Justice summarise the changes. From the tirade on preservation of Swedish morals, general prevention and the illation that a foetus in a Swedish woman's body is a Swedish interest to the finding that abolition had to be employed in order to protect the women involved; two downright contradictory findings, all over the course of two weeks. People were met with headlines that revealed arbitrariness and an ambiguous application of the law during the first months of 1965. Even if Kling asserted that he already was about to propose a change in the abortion legislation, it is evident that this took off properly during the time of the Poland affair. Thus, abortion went from the form of an exception to a penal provision to the shape of a full-scale right. The changes of course reflect the advances within the women's rights movement and the emerging line of thought

that advocated the individual in relation to the state. Religious morals were as good as thrown away. Under these circumstances and conditions Ellinor Grimmark appears. The existing framework justifies itself, and therefore, the idea underpinning the abortion law – no morals are to affect a woman’s decision – continues to limit what arguments are acceptable in our time. The Labour Court’s finding is an elongation of a history lesson. An individual’s latitude of action in the area related to morals and abortion is nowadays narrow; Ellinor Grimmark’s case makes this visible. That she even questions the values within the 1975 Abortion Act revives the abortion debate in Sweden. Then, what appears before us from this study seems clear as the sun in the summer sky. The reason cases like Ellinor Grimmark’s even exist is the rise of new interests somewhere in the 1960’s and latter, the incorporation of those values into the 1975 Abortion Act. One thing has not changed, namely the goal society has set: to diminish the number of abortions is still the ultimate objective. However, the rationale behind may have changed – from protecting the foetus to protecting women.

How is the Swedish regulation affected by the ECHR from a perspective of state-specific morals?

To guess whether Ellinor Grimmark’s case will be admissible and heard before the ECtHR is not for this thesis. However, *that* she will proceed and file a claim before the ECtHR is interesting to discuss. Nor is it for this thesis to augur the ECtHR’s potential application of the margin of appreciation doctrine, but, we can conclude that as Sweden already deviates from the European standard, a judgment from the ECtHR could potentially have large implications for Sweden. However, conscientious objection is examined under the Article 9 § 2, as a manifestation. Therefore, we know that under the ECHR there exists no absolute right to conscientious objection. Here, the margin of appreciation plays a decisive role. And indeed, the answer to the question posed can be found in the doctrine of margin of appreciation. As we have seen, ECHR does not contain a general right to abortion, but the 1975 Abortion Act creates a right to abortion for women (within Sweden’s jurisdiction). In this sense, the ECHR strengthens the right to abortion in Sweden, as it has the status of a right under the ECHR; it also contributes by further justifying the existing values in the 1975 Abortion Act. Case law implies that it is up for each state to decide on the matter, given that a fair balance is struck by the national authorities. Apparently, Sweden’s liberal abortion law and Ireland’s restrictive regulation constitute the outcome of a fair balancing. Even though the ECtHR does not cease to apply at the workplace, the contractual obligations are often given precedence. Moreover,

as we learned from the Labour Court judgment, the construction of discrimination – both direct and indirect – draws on presumptions derived from the context. Belike will the margin of appreciation allow the narrative of the Swedish context – that abortion is a part of midwifery – to prevail. Therefore, the illation that the ECHR serves to strengthen the state-specific morals in the context is close at hand. What human rights are can be said to vary across borders and times, as the state-specific context and values are allowed to shape human rights. The knowledge that Sweden had an abortion law of quite a different nature in force when signing and ratifying the ECHR, supports this illation; it illustrates the changing nature of what interest a state promotes. Indeed, the endeavour of Ireland to preserve morals and the general sense of justice as depicted in *Open Door and Dublin Well Woman v. Ireland* is not too far from our own, Swedish reality. The same endeavour can be identified in the early days of the Poland case. Certainly, Europe is under constant development and the times have changed since then. Still, it remains true that ECHR had the same content in relation to abortion back then, over five decades ago. If nothing else, this teaches us to be humble as we gaze across Europe and criticise others. The ECtHR constantly reserves itself against a potential development, whereby a once wide margin of appreciation can convert into a narrow. This could of course in a near future affect Sweden in any direction. The resolutions – that Sweden has chosen not to comply with – inviting states to introduce a clause on the right to conscientious objection to abortion are indicative of a European trend, especially so as Resolution 1763 began as an initiative to strengthen abortion rights, but ended in being one of the right to conscientious objection. As for now, abortion regulations and clauses on conscientious objection to abortion in other European countries do not, through the ECHR, affect Sweden.

One may argue that the margin of appreciation is a way of avoiding encroachments. However, a total unity does not always constitute a guarantee for greater enjoyment of human rights – in these matters, we see that the outcome varies depending on the national context. What context and doctrine that affects the ECtHR in defining a right can vary as well. From this point of view, to allow state-specific morals can be positive, where cases before the ECtHR displays the temperature of a question and the diversity allows for development towards standards that take into account all human rights even better – the common forum allows for audit. Even though the ECHR for now does allow the national context to be decisive in this type of questions, it remains that the ECtHR *per se* affects Sweden significantly through the fundamental right for every individual to have his or her claim heard and tried before an

international court like the ECtHR. The recognition that conscientious objection falls under freedom of religion and abortion can come within the scope of the right to private life, opens the human rights door. This is a valuable and influential possibility, as it enables for individuals to question and make visible practice and prominent values within a nation. Nevertheless, one can always travel abroad to find a legal order that is pleasing and then, instigate a change.

6 Conclusion and Final Remarks

This thesis has shown the changes in the values enshrined within the Swedish abortion laws during the last decades, all by using two rather particular cases. If the Poland case symbolises a powerful turn where the morals were wrested before a youthful people's court, then the case of Ellinor Grimmark represents the aftermath of the reform. Indeed, the case of Ellinor Grimmark is a result of the changes post the Poland case. The time-honoured principle of abortion as a criminal act was lifted with the 1975 Abortion Act. Ellinor Grimmark's pursuit is one of the inevitable consequences of the volte-face. The otherwise quite eviscerated expression 'paradigm shift' is to the point and made justice in this judicial milieu, for the principal rule suffered defeat and was replaced by its true antagonist. Conscientious objectors constitute what can be described as an extremity, the utter result of the values in the 1975 Abortion Act; Ellinor Grimmark's claim accentuates and elucidates how decidedly Sweden relegated the old norms to history. One possible explanation for the quite harsh treatment of Ellinor Grimmark in media – at large, jeers have not been included, for rather obvious reasons – can be sought in the history of abortion in Sweden. It could be that the winding road to the liberalisation has had retinues – from a small lacuna, via the first indications and the two indications added, to an event spread out over all newspapers and at last, awareness. From this we can see that what begins as a small adjustment contrary to the values of a law, can end in a framework that instead promotes what once was the tiny adjustment. As Tuori explains – now the value justifies itself, and gains validity from within its own legal framework. We have seen how such a small thing grew to root itself in the majority. We have also seen how a legal institute – abolition – was employed to mediate between the levels of the law, and how Kungl. Maj:t – the government, a high political organ – interfered. An interference that reveals the alterable and political nature of the abortion laws. Holding the status of legislation and not a constitutional right, a change could come if the public opinion changes. For now, the question remains one of the religious and nationalist parties. Knowing that Sweden has a history when health care personnel exerted power over access to abortion, this allows us to see the stance among hospital managers in another light. The fewer the morals the stronger the focus on the individual patient. It would be tempting to argue that the Labour Court's judgment was a *requiem* for old morals. However, the existing trend in Europe signifies the opposite. The status of abortion in Poland today, knowing that Swedish women used to travel there, might contextualise the opposition to conscientious objection to abortion, within both the legal

application and the general debate. Indeed, the statistics from Italy, the events in the U.S.A., the fact that Women on Waves exists, and the connections between Ellinor Grimmark and ADF³⁴⁹ speak for themselves in the search for an understanding of the strong repulsion in Sweden against conscientious objection to abortion. Thus we see, the state can be neutral with regard to the application of the law, but the law is filled with values and builds upon them. In this field, the ECHR holds no categorical directives and provides no answer, it only serves to vindicate the Swedish solution and therefore constitutes yet another phenomenon of law within the system that confirms the system.

To round off, a reflection by Peter Englund – a Swedish author and historian – is suitable. The quote comes from a foreword to the collection of essays “*Förflutenhetens landskap*”. Studying a painting by Phillips de Koninck at the National Gallery in London, he reflects:

I fjärran en stad, krönt av kyrkspiornas fint mejlade siluetter. Därefter börjar havet som en strimma av silver och bortom det, kan vi tänka oss, en ny värld.³⁵⁰

Standing in the moment of a now, Peter Englund beautifully pondered the past shown to him in a landscape painting. His reflection helps illuminate the very core of the changes that have been examined in this thesis. Perhaps the refusal to grant conscientious objection to abortion becomes clearer with history in mind. It might be that Ellinor Grimmark, her peers, and the European tendencies of today mark the end of an era in the sphere of abortion. The values enshrined in the amended 1975 Abortion Act are put under the microscope – like the values of the Penal Code and the 1938 Abortion Act once were. Ellinor Grimmark questions the pre-conditions of the contemporary law. The presumptions in the deep structure level are made visible, namely, a woman’s right to decide over her own body, work-related ethics and the perception of religion as something private; these presumptions limit what rationales and arguments that are accepted at the surface level. The values constantly reproduce themselves, just recently in the Labour Court judgment. As for now, their protection is heightened under the ECHR. The ECHR also serves to justify and strengthen the status of abortion in Swedish

³⁴⁹ See ADF International, *Grimmark v. Jönköping County Council*. Available at: <https://adfinternational.org/detailspages/case-details/grimmark-v.-jönköping-county-council>, where ADF confirms partnership with Scandinavian Human Rights lawyers, (accessed 19th May 2017).

³⁵⁰ In translation: *In the far distance a town, by the skyline of delicate church spires crowned. Thereafter like a ray of silver the sea begins, and beyond this we can imagine a new world.* Englund, Peter, *Förflutenhetens landskap. Historiska essäer*, Stockholm: Atlantis, 1991, p. 8. Title in translation: *The Landscape of the Past. Historical essays.*

opinion: abortion is an individual choice. It seems as if the ECHR confirms, in a Swedish context, that religion belongs to the private sphere. To stand at this contrasting point facilitates the observance of the changes around the time of the Poland case; the contrasts are amplified by the comparison. Swedish interests have varied considerably during the last decades – from promoting true evangelism to mediating democratic values. From protecting a Swedish foetus to guaranteeing women's autonomy. Knowing the background of the abortion law, Ellinor Grimmark's claim seems almost atavistic, whilst the women who travelled to Poland almost were guilty of an anachronism. Wherever one may stand in the question on abortion and conscientious objection, all the individuals in the events discussed unite in that their actions and claims were in opposition to the values within the laws. Their actions illuminate the traditional base in the human rights strife: to protect the individual from a state that imposes unjustified laws over her mind and body.

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