



**EUROPEAN COMMITTEE OF SOCIAL RIGHTS  
COMITÉ EUROPÉEN DES DROITS SOCIAUX**

5 December 2013

**Case Document No. 4**

**Federation of Catholic Family Associations in Europe (FAFCE) v. Sweden**  
Complaint No. 99/2013

**OBSERVATIONS FROM  
ALLIANCE DEFENDING FREEDOM (ADF)**

**Registered at the Secretariat on 14 November 2013**



**EUROPEAN COMMITTEE OF SOCIAL RIGHTS**

**COMPLAINT NO. 99/2013**

**Federation of Catholic Associations in Europe,  
Christian Physicians and Medical Students in Sweden and Pro vita**

**v.**

**Sweden**

**WRITTEN OBSERVATIONS  
OF THIRD PARTY INTERVENERS:**

**Alliance Defending Freedom**

**Filed on  
14 November 2013**



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## **Introduction**

1. Article 11 of the European Social Charter states:

### **Article 11 The right to protection of health**

With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organizations, to take appropriate measures designed *inter alia*:

1. to remove as far as possible the causes for ill-health;
  2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
  3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.
2. Based on Article E of the European Social Charter, the enjoyment of all rights set forth in the Charter shall be secured “without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.”
  3. Although the Charter does not contain a direct referral to the right of a conscientious objection for health care professionals in cases of induced abortion, the wording of Articles 11 and E, interpreted in the light of other international documents and the practice in an overwhelming majority of Contracting Parties to the Charter, should enable an inclusion of the said right in the general enumeration of rights connected with health care protection.
  4. This argument is strengthened by the fact that the Respondent State remains among only a very few of the Contracting Parties not providing for a right to conscientious objection in the context of induced abortion.<sup>1</sup> The legal and factual situation in Sweden prevents, from the outset, students of medicine having a conscientious

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<sup>1</sup> Even the main pro-abortion medical journal cites only three European countries not providing for a conscientious objection for induced abortions – Sweden, Finland and Bulgaria. See A. Heino, M. Gissler, D. Apter, C. Fiala “Conscientious objection and induced abortion in Europe” *Eur J Contracept Reprod Health Care*, 2013, Vol. 18, No. 4, 231-233.

objection to abortion to specialize in the field of gynecology and obstetrics. Other health care providers opposing induced abortion on moral or religious grounds are being repositioned or transferred to other departments. This is so despite the fact that it is not the core and essential role of health care professionals in the field of gynecology and obstetrics to perform induced abortion. The definitional role for health care providers in the field of gynecology and obstetrics is three-fold: (1) help save women's lives, (2) assist women during pregnancy and delivery of a new life, and (3) cure female reproductive system diseases. With the exception of saving a life of the mother due to an abortion procedure, an induced abortion serves neither of these three core missions of gynecology and obstetrics.

5. Rights of conscience are recognized both internationally and in domestic legal systems around the globe. These observations focus on recent international developments in the area of conscientious objection in the following order: (1) the jurisprudence of the European Court of Human Rights, (2) other international forums (the United Nations, the Parliamentary Assembly of the Council of Europe, the European Union), and (3) a comparative survey – the United States of America.

1. **The jurisprudence of the European Court of Human Rights**

- i. *Article 9 ECHR*

**Article 9  
Freedom of thought, conscience and religion**

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. 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.

6. The European Court of Human Rights (here and after “the Court”) has elevated the rights guaranteed by Article 9 to being one of the cornerstones of a democratic society.<sup>2</sup> The Court has held that religious freedom is one of the vital elements that go to make up the identity of believers and their conception of life.<sup>3</sup> Article 9 has taken the position of a substantive right under the European Convention on Human Rights (here and after “the Convention”).<sup>4</sup> Freedom of thought, conscience and religion is not *only* a cornerstone of a democratic or progressive society, but the choice between liberty and tyranny. Liberty cannot exist when individuals’ consciences are held captive—when belief and expression are stifled by invasive State action, or when authorities distinguish individuals based on their opinions and beliefs. Thus, freedom of thought, religion and conscience is emptied of its value without freedom to express deeply held convictions. One mode of expressing those beliefs is through conscientious objection.
7. Abortion in particular is an issue filled with tremendous moral controversy, with opponents of the termination of pregnancy viewing it as the unlawful killing of an unborn child. As explained by Fr. Daniel Fitzpatrick M.B., Ch.B., STL in the United Kingdom case of *Doogan & Anor, Re Judicial Review*,<sup>5</sup> it is the consistent teaching of the Catholic Church that abortion is a grave offence against human life. Thus, “abortion willed as an end or as a means, always constitutes a grave moral disorder, since it is the deliberate killing of an innocent human being. This doctrine is based

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<sup>2</sup> ECHR, 25 May 1993, *Kokkinakis v. Greece*, Series A No. 260-A, § 31; AFDI, 1994, p. 658.

<sup>3</sup> ECHR, 20 September 1994, *Otto-Preminger-Institut v. Austria*, Series A, No. 295-A; JDI, 1995, p. 772.

<sup>4</sup> *Kokkinakis op.cit.*, ECHR, 23 June 1993, *Hoffmann v. Austria*, Series A, No. 255-C; JDI, 1994, p. 788; *Otto-Preminger-Institut, op. cit.*; ECHR, 26 September 1996, *Manoussakis and Others v. Greece*, Reports 1996-IV; AFDI, 1996, p. 749.

<sup>5</sup> [2012] ScotCS CSOH 32 (29 February 2012).

upon the natural law and upon the written Word of God, is transmitted by the Church's Tradition and taught by the ordinary and universal Magisterium".<sup>6</sup>

8. However, not only is abortion highly controversial and completely rejected by the Catholic Church as well as all mainstream Christian denominations, it is also far from being accepted as a "right" which is to be accepted and even promoted. Indeed, an increasing number of countries around the world have recognized the right to life from conception,<sup>7</sup> highlighting the moral illegitimacy of abortion.
9. Moreover, requiring physicians or medical personnel to perform or participate in abortions against their conscience would have a severe and irreparable chilling effect on the medical community. In essence, the medical community would thereafter be closed to people solely on the basis of a well-founded moral conviction which is protected in Europe by Article 9 of the Convention. Such a position does violence to the principles of democracy which have been so dearly won over the centuries: tolerance, pluralism and broadmindedness.<sup>8</sup>

*ii. An unduly narrow view of Article 9*

10. Clearly, freedom of religion emptied of a right to act on one's deeply held convictions is no longer the fundamental right that is guaranteed protection by the Convention. Instead, it becomes the far more limiting freedom of "worship," which protects only private manifestations of faith. Precisely stated, religious faith is allowed so long as its manifestation does not touch any other boundaries of civil society. This is not what the Convention envisioned, nor what it protects. Indeed, Article 9 § 1 lists a number

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<sup>6</sup> Encyclical "Evangelium vitae" by Pope John Paul II issued in 1995 at § 68.

<sup>7</sup> For example, the Dominican Republic recently adopted a constitution which states that "the right to life is inviolable from conception until death" and at the beginning of 2012, Hungary passed its new constitution which states that: "Embryonic and foetal life shall be entitled to protection and respect from the moment of conception."

<sup>8</sup> ECHR, 30 September 1976, *Handyside v. the United Kingdom*, Series A, No. 24, at § 49 *et seq.*

of forms which manifestation of one's religion or belief may take: not only worship but teaching, practice and observance as well.<sup>9</sup>

11. In the recent cases of Federal Republic of Germany v Y (Case C-71/11) and Federal Republic of Germany v Z (Case C-99/11) before the Court of Justice of the European Union (here and after "the CJEU"), the Advocate General gave his opinion on the correct understanding of Article 9 of the Convention. The Advocate General stated that if the so-called "core area" of religious belief comprised only of "private conscience", it would render any protections for "the external manifestation of that freedom" effectively "meaningless".<sup>10</sup> He further held that "... there is nothing in the case-law of the Court or, specifically, of the European Court of Human Rights, to support the proposition that the 'core area' of freedom of religion must be limited to private conscience and the freedom to manifest one's religion in private or within the circle of those who share the faith, thus excluding the public manifestation of religion."<sup>11</sup> The Advocate General pointed to the judgment of *Metropolitan Church of Bessarabia and Others v Moldova*<sup>12</sup> to support this position, and stated that "bearing witness in words and deeds is bound up with the existence of religious convictions".<sup>13</sup> Moreover, the Advocate General stated that "[t]he manifestation of religion is inseparable from faith and is an essential component of freedom of religion, whether it be practiced in public or in private." He pointed to the jurisprudence of the European Commission of Human Rights,<sup>14</sup> where it was held that the term "in private or in public" in the legislation "means nothing other than allowing the faithful to

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<sup>9</sup> See *Hasan v. Bulgaria* (2002) 34 E.H.R.R. 55 at § 60 and *Metropolitan Church of Bessarabia v. Moldova* (2002) 35 E.H.R.R. 13 at § 114. Emphasis added.

<sup>10</sup> Advocate General opinion at § 46.

<sup>11</sup> *Id.*, at § 49.

<sup>12</sup> Judgment of 13 December 2001, ECHR Reports 2001-XII.

<sup>13</sup> *Id.*, at § 114

<sup>14</sup> ECHR *X v United Kingdom*, judgment of 12 March 1981, D.R. , 22, p. 39, § 5.



manifest their faith in one form or the other, and should not be interpreted as being mutually exclusive or as leaving a choice to the public authorities.”<sup>15</sup> Thus, according to the Advocate General of the CJEU, the notion that Article 9 only protects belief and not rarely, if ever, manifestation of that belief, is unfounded.

12. Moreover, the Court has recently upheld the right to act on one’s deeply held convictions in a number of settings. For example, the applicant in *Jakóbski v. Poland*<sup>16</sup> was a Buddhist and a detainee in a Polish prison, serving an eight year prison sentence for rape. He had asked the prison authorities to serve him meat-free meals in order to comply with Mahayana Buddhism but the prison authorities only provided him with a pork-free diet. Rather than simply stating that “Article 9 does not require that one should be allowed to manifest one’s religion at any time and place of one’s own choosing”, the Court held at § 54 that “the authorities failed to strike a fair balance between the interests of the prison authorities and those of the applicant, namely the right to manifest his religion through observance of the rules of the Buddhist religion.” It therefore concluded that there had been a breach of Article 9 of the Convention. The concept of “fair balance” was once again raised in the seminal “conscientious objection” case of *Bayatyan v. Armenia*, discussed below.

### *iii. Conscientious Objection*

13. Although the text of the Convention does not refer to conscientious objection *per se*, the right has been developed by the Court under Article 9.<sup>17</sup> In addition to holding that where Member States recognize conscientious objection, they must do so in a non-

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<sup>15</sup> Advocate General opinion at § 50.

<sup>16</sup> ECHR, judgment of 7 December 2010, application no. 18429/06.

<sup>17</sup> See I. Leigh, ‘New trends in religious liberty and the European Court of Human Rights’, *Ecc.L.J.*, 2010, 12(3), 266-279.

discriminatory manner,<sup>18</sup> the Court has more recently upheld the right to conscientious objection even when the State in question did not itself recognize the right.

14. In the landmark case of *Bayatyan v. Armenia*,<sup>19</sup> the Grand Chamber for the first time expressly upheld the right to conscientious objection. The Grand Chamber held in *Bayatyan* that: “opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person’s conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9.”<sup>20</sup>
15. While the Court held that one means of expressing the guaranteed right of conscience is through exemption from military service, the judgment is by no means limited the expression of conscientious objection only to military service. It is thus worth quoting the Grand Chamber at length, as the reasoning of the Court could quite easily apply to other situations, such as conscientiously objecting from being involved in an abortion procedure.

124. The Court cannot overlook the fact that, in the present case, the applicant, as a member of Jehovah’s Witnesses, sought to be exempted from military service not for reasons of personal benefit or convenience but on the ground of his genuinely held religious convictions. (...) Thus, the system existing at the material time imposed on citizens an obligation which had potentially serious implications for conscientious objectors while failing to allow any conscience-based exceptions and penalising those who, like the applicant, refused to perform military service. In the Court’s opinion, such a system failed to strike a fair balance between the interests of society as a whole and those of the applicant. It therefore considers that the imposition of a penalty on the applicant, in circumstances where no allowances were made for the exigencies of his conscience and beliefs, could not be considered a measure necessary in a democratic society. Still less can it be seen as necessary taking into account that

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<sup>18</sup> ECHR, *Thlimmenos v. Greece* (Application No. 34369/97) 6 April 2000.

<sup>19</sup> (2012) 54 E.H.R.R. 15.

<sup>20</sup> *Id.*, at § 110.

there existed viable and effective alternatives capable of accommodating the competing interests, as demonstrated by the experience of the overwhelming majority of the European states.

126. The Court further reiterates that pluralism, tolerance and broadmindedness are hallmarks of a “democratic society”. Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position (...) Thus, respect on the part of the State towards the beliefs of a minority religious group like the applicant’s by providing them with the opportunity to serve society as dictated by their conscience might, far from creating unjust inequalities or discrimination as claimed by the Government, rather ensure cohesive and stable pluralism and promote religious harmony and tolerance in society.<sup>21</sup>

16. The cited case is of critical value and importance, because it overruled previous decisions and a settled jurisprudence by the European Commission (“the Commission”). In the case of *X v. Austria*<sup>22</sup> the Commission stated that, in interpreting Article 9 of the Convention, it had also taken consideration the terms of Article 4 § 3 (b) of the Convention, which provide that forced or compulsory labour should not include “any service of a military character or, in cases of conscientious objectors, in countries where they are recognised, service exacted instead of compulsory military service”. The Commission made an important textual argument, that by including the words “in countries where they are recognised” in Article 4 § 3 (b), a choice was left to the High Contracting Parties whether or not to recognise conscientious objectors in the military arena and, if they were so recognised, to provide some substitute service.

17. Notwithstanding the textual basis of Article 4 § 3 (b), the Court came to the above cited conclusion that not providing for conscientious objection in the military field “imposed on citizens an obligation which had serious implications for conscientious objectors while failing to allow any conscience-based exceptions and penalising those

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<sup>21</sup> *Id.*, at § 126.

<sup>22</sup> Commission decision of 2 April 1973, no. 5591/72.

who, like to applicant, refused to perform military service. In the Court's opinion, such a system failed to strike a fair balance between the interests of society as a whole and those of the applicant."<sup>23</sup>

18. It should follow *a fortiori* that in the context of health care providers, without a clear textual reference to the contrary, a failure of the Government to recognize conscientious objection runs afoul of striking a fair balance between the interests of the society and those of health care providers.

19. The Court reached its decision also based on the narrow margin of appreciation the respondent State enjoyed due to the near consensus among Member States allowing for conscientious objection in the context of a compulsory military service. The Court noted that "almost all the member States of the Council of Europe ... have introduced alternatives to such service in order to reconcile the possible conflict between individual conscience and military obligations. Accordingly, a State which has not done so enjoys only a limited margin of appreciation and must advance convincing and compelling reasons to justify any interference."<sup>24</sup> Similarly, Sweden should enjoy only a very limited margin of appreciation due to the fact that it remains among the very few among Council of Europe Member States not providing for conscientious objection for medical personnel in procuring abortion.

20. The reasoning of the Grand Chamber was immediately then applied in the conscientious objection case of *Bukharatyan v. Armenia*,<sup>25</sup> thus cementing the the right under Convention law – which will surely be developed further in the future. In

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<sup>23</sup> *Bayatyan* at § 124.

<sup>24</sup> *Id.*, at § 123.

<sup>25</sup> (Application no. 37819/03) judgment of 10 January 2012

reaching this decision, the Court also noted at length the developments in international law on the right to conscientious objection.

21. The development and extension of a right to a conscientious objection takes place at the national level in many European countries as well. Just recently, in April 2013, the Court of Appeals in the United Kingdom extended a right to a conscientious objection to midwives that are not only performing duties directly connected with an abortion procedure, but also to any duties that would concern “delegation, supervision and support” of the staff involved in abortions. The ruling stated that: “In our view the right to a conscientious objection extends not only to the actual medical or surgical termination but to the whole process of treatment given for that purpose.”<sup>26</sup> The underlying premise of the ruling was a notion that a legislation providing for a right to a conscientious objection “should be interpreted in a way which allows [individuals] to be true to their beliefs while remaining respectful of the law.”<sup>27</sup> Furthermore, and most importantly, the right to a conscientious objection “is given because it is recognized that the process of abortion is felt by many people to be morally repugnant ... it is a matter on which many people have strong moral and religious convictions, and the right of conscientious objection is given out of respect for those convictions and not for any other reason.”<sup>28</sup>

## **2. Further international legal developments**

22. As the Court noted in *Bayatyan*, for a number of years there have been “important developments concerning recognition of the right to conscientious objection in

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<sup>26</sup> *Doogan & Anor v Greater Glasgow & Clyde Health Board*, [2013] ScotCS CSIH 36 (24 April 2013), § 37.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Id.* at § 38.

various international fora.”<sup>29</sup> These include developments at the United Nations, the Council of Europe and the European Union.

*i. The United Nations*

23. Perhaps the most notable development in international law is the recognition of conscientious objection by the Commission on Human Rights<sup>30</sup> and the interpretation by the UN Human Rights Committee (here and after “the Committee”) of the provisions of the International Covenant on Civil and Political Rights.<sup>31</sup>

24. Initially the Committee had adopted the same limited approach as the European Commission<sup>32</sup> on the issue of conscientious objection and had excluded it from the scope of Article 18 of the ICCPR (*c.f.* Article 9 of the Convention).<sup>33</sup> However, following developments in the Committee case law,<sup>34</sup> in 1993 it modified its initial approach, stating in General Comment 22, that: “...the Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one’s religion or belief.”<sup>35</sup>

25. Accordingly, the Committee held in *Frédéric Foin v. France*<sup>36</sup> that the applicant “was discriminated against on the basis of his conviction of conscience” and in 2006, in two cases against South Korea concerning conscientious objectors, found a violation

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<sup>29</sup> *Bayatyan* at § 105.

<sup>30</sup> For example, see Resolutions 1987/46, 1989/59, 1993/84, 1995/83, 1998/77 and 2004/35.

<sup>31</sup> See ICCPR Article 8 and 18 as compared with the Convention Articles 4 and 9.

<sup>32</sup> See the early Committee decisions of *Grandrath v. Germany* (2299/64) December 12, 1966 and *X v. Austria* (5591/72) April 2, 1973.

<sup>33</sup> See *LTK v Finland* Unreported July 9, 1985, Communication 185/1984, UN Doc.CCPR/C/25/D/185/1984, where a complaint brought by a Finnish conscientious objector was held to be inadmissible.

<sup>34</sup> See *JP v Canada* Communication 446/1991, UN Doc.CCPR/C/43/D/446/1991, November 7, 1991.

<sup>35</sup> General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18): 30/07/1993 at § 11. Emphasis added.

<sup>36</sup> Communication No. 666/1995, 9 November 1999, at § 10.3.

of Article 18 on account of the applicants' conviction for refusal to serve in the army for reasons of conscience.<sup>37</sup>

*ii. The Parliamentary Assembly of the Council of Europe*

26. Similarly, the Parliamentary Assembly of the Council of Europe supports the right to conscientious objection,<sup>38</sup> as does the Committee of Ministers.<sup>39</sup> Notably, the support of the Parliamentary Assembly for conscientious objection is not limited to military service, but also applies to abortion procedures. In 2010, the Parliamentary Assembly passed Resolution 1763 (2010) on “the right to conscientious objection in lawful medical care”, which states as follows:

1. No person, hospital or institution shall be coerced, held liable or discriminated against in any manner because of a refusal to perform, accommodate, assist or submit to an abortion, the performance of a human miscarriage, or euthanasia or any act which could cause the death of a human foetus or embryo, for any reason.
2. The Parliamentary Assembly emphasises the need to affirm the right of conscientious objection together with the responsibility of the state to ensure that patients are able to access lawful medical care in a timely manner. The Assembly is concerned that the unregulated use of conscientious objection may disproportionately affect women, notably those with low incomes or living in rural areas.
3. In the vast majority of Council of Europe member states, the practice of conscientious objection is adequately regulated. There is a comprehensive and clear legal and policy framework governing the practice of conscientious objection by health-care providers ensuring that the interests and rights of individuals seeking legal medical services are respected, protected and fulfilled.
4. In view of member states' obligation to ensure access to lawful medical care and to protect the right to health, as well as the obligation to ensure respect for the right of freedom of thought, conscience and religion of health-care providers, the Assembly invites Council of Europe member states to develop comprehensive and clear regulations that define and regulate conscientious objection with regard to health and medical services, and

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<sup>37</sup> *Yoon v Republic of Korea* and *Choi v Republic of Korea*, Communications 1321/2004 and 1322/2004, UN Doc.CCPR/C/88/D/1321-1322/2004, January 23, 2007.

<sup>38</sup> See Resolution 337(1967), Recommendation 478(1967), Recommendation 816(1977), Recommendation 1518(2001) and Recommendation 1742(2006).

<sup>39</sup> See Recommendation R(87)8 and Recommendation CM/Rec(2010)4

which:

- 4.1. guarantee the right to conscientious objection in relation to participation in the medical procedure in question;
- 4.2. ensure that patients are informed of any conscientious objection in a timely manner and referred to another health-care provider;
- 4.3. ensure that patients receive appropriate treatment, in particular in cases of emergency.

27. The Council of Europe has therefore explicitly recognized the right to refuse, for any reason, to perform, accommodate or assist in an abortion procedure. While such declarations are not binding, the Court certainly takes them into consideration when deciding cases – as the *Bayatyan* case made clear.<sup>40</sup>

### *iii. The European Union*

28. As well as consistent support from the European Parliament,<sup>41</sup> Article 10 § 2 of the Charter of Fundamental Rights, which was proclaimed on December 7, 2000 and entered into force on December 1, 2009, explicitly states that: “The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.” The right to conscientious objection is thus recognized explicitly in the Charter, and it does not limit the wording to military service.

### **3. Comparative jurisprudence: The United States of America**

29. A comparative analysis of rights of conscience with Europe’s largest legal counterpart, the United States, is helpful. In the cases of *Roe v. Wade*<sup>42</sup> and *Doe v. Bolton*,<sup>43</sup> (majority decision written by U.S. Supreme Court Justice H. Blackmun) abortion became a federally protected practice. However, similar to the protections afforded to conscience when the Abortion Act 1967 was passed, even Justice

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<sup>40</sup> See §§ 50-55, 107.

<sup>41</sup> For example, see the resolutions of the European Parliament of February 7, 1983, October 13, 1989, March 11, 1993 and January 19, 1994.

<sup>42</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>43</sup> *Doe v. Bolton*, 410 U.S. 179 (1973).



Blackmun wrote approvingly of protections for conscientious objection to abortion by medical staff as a right.<sup>44</sup> Congress, recognizing this right, codified it into Federal statutory law with the Church Amendment.<sup>45</sup> Thus, there are clear parallels between the U.S. lawmakers' recognition of conscience and those who provided the conscientious objection clause in section 4 of the Abortion Act 1967.

30. The Amendment states that courts or government agencies are prohibited from requiring hospitals to perform abortions or sterilizations merely because of their receipt of federal Health and Human Services funds. In addition to institutional conscientious objection, individuals would not be required to perform or assist in any health service or research activity, including abortion, which "would be contrary to his religious beliefs or moral convictions."<sup>46</sup> Furthermore, the Amendment prohibits discrimination or refusal of admission based on religious or moral opposition to any health service or research activity, including abortion.<sup>47</sup>

31. In 1996, further protections were codified by the Coats-Snowe Amendment to the Public Health Services Act.<sup>48</sup> The Amendment prohibits the federal government and any state or local government receiving federal funds from discriminating against physicians or health-training programs or their participants on the basis that they do not provide or undergo abortion training or perform or refer for abortions.<sup>49</sup>

32. Recently, three decades after the passing of the Church Amendment, Congress again intervened to protect conscientious objection to performing or assisting in abortion, both for individuals and institutions by passing the Weldon Amendment. The

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<sup>44</sup> *Doe v. Bolton* at § 198.

<sup>45</sup> 42 U.S.C. § 300a-7.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> 42 U.S.C. § 238n.

<sup>49</sup> *Id.*

Amendment is an appropriations rider that forbids any funds flowing through the Departments of Health, Labor, or Education from being provided to any federal agency or program or state or local government that discriminates against providers because of their refusal to “provide, pay for, provide coverage of, or refer for abortions.”<sup>50</sup> Despite two years of judicial challenges (all of which were ultimately rejected), the Amendment has been renewed in each successive budgets bill.<sup>51</sup>

33. The recent case of *Danquah v. University of Medicine and Dentistry of New Jersey*<sup>52</sup> provides useful insight into conscientious objection claims in the U.S. In the case of *Danquah*, twelve nurses sued their employer after the hospital they were working at introduced a policy which required all nurses to assist in abortion procedures. However, as previously noted, U.S. federal law prohibits hospitals that receive certain federal funds from forcing employees to participate in abortions.<sup>53</sup> Additionally, New Jersey law states that “No person shall be required to perform or assist in the performance of an abortion or sterilization.”<sup>54</sup> Thirdly, it was argued that the Fourteenth Amendment protects a liberty interest not to be involved in an abortion.<sup>55</sup> As a result of the federal court action, the New Jersey hospital agreed that it will not force nurses to assist with abortion cases and a settlement was reached.

34. Being that the United States provides the most analogous example to the cultural and legal climate of Europe, it is clear that the protection of conscientious objection of

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<sup>50</sup> Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, Div. F, § 508(d) (March 11, 2009).

<sup>51</sup> *Id.*

<sup>52</sup> Civil No. 11-6377(JLL), December 22, 2011.

<sup>53</sup> 42 U.S.C. § 300a-7(c).

<sup>54</sup> N.J. Stat. § 2A:65A-1.

<sup>55</sup> For example, the Supreme Court has insisted that abortion is “fraught with consequences . . . for the persons who perform and assist in the procedure,” including “devastating consequences” for nonconsensual involvement in abortion. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), at §§ 851, 882.

medical professionals should be guaranteed rather than arbitrarily denied in Europe as well.

### **Conclusion**

35. Rights of conscience are recognized both internationally and in domestic legal systems around the globe. Failure to recognize the right to conscientiously object from abortion procedures not only undermines the wide protections freedom of religion is afforded under numerous international covenants, but also does a disservice to the very principles of democracy: tolerance, pluralism and broadmindedness.
36. The jurisprudence of the European Court of Human Rights and other international bodies makes it crystal clear that religious freedom protects not only the sphere of personal beliefs, the *forum internum*, but it also protects the *forum externum*, on the basis that “bearing witness in words and deeds is bound up with the existence of religious convictions.”<sup>56</sup>
37. As Justice Albie Sachs of the South Africa’s Constitutional Court so poignantly observed in *Christian Education South Africa v Minister of Education*: “The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such a democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not ... Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the law of the land. At the same time, the state should, wherever

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<sup>56</sup> *Kokkinakis op.cit.*, ECHR, 23 June 1993, § 31.

reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.”<sup>57</sup>

38. The respondent State has not put forward any legitimate reasons for not providing a right to conscientious objection to health care providers. As the experience of practically all European countries confirms, a carefully drafted conscientious objection clause does not jeopardize any other rights guaranteed by domestic legislation.

39. Guaranteeing freedom of thought, conscience and religion assumes State neutrality. Therefore, where necessity and proportionality are lacking, a State must seek to **accommodate** religious beliefs no matter how irksome it finds them. This notion stems from the reluctance of European civilization – born of decency, forbearance, and tolerance – to compel our fellow citizens to humiliate themselves by betraying their own consciences.

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<sup>57</sup> 9 BHRC53 (2001), § 35.