EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

15 March 2013

Case No. 1

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

COMPLAINT

Registered at the Secretariat on 7 March 2013

EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

Secretariat of the European Social Charter
Directorate General of Human Rights and Legal Affairs
Directorate of Monitoring
F-67075 Strasbourg Cedex
France

7 March 2013

COLLECTIVE COMPLAINT against SWEDEN

Lodged in accordance with the Additional Protocol of 1995 providing for a system of collective complaints and with the Committee´s Rules of Procedure

Articles 11 (Right to protection of health) and Article E (Non-Discrimination) of the EUROPEAN SOCIAL CHARTER

Table of Contents of the Complaint

Identification of the Parties

1.1. The Respondent State

The present Complaint is being brought against Sweden.

Sweden ratified the European Social Charter on 17 December 1962 and the Additional Protocol providing for a system of collective complaints on 29 May 1985.

1.2. Standing of the FAFCE

FAFCE – with consultative status before the Council of Europe is, along with the Swedish organizations KLM and Pro Vita, presenting this case against Sweden for non-compliance or unsatisfactory compliance of Article 11 European Social Charter (Right to protection of health), read alone or in conjunction with Art. E (Non-discrimination).

FAFCE is a European NGO founded in 1997 with participative status at the Council of Europe since 2001 and is as such member of the Conference of INGO of the Council of Europe. The FAFCE is entitled to submit collective complaints and is currently registered for the period 1 July 2010-30 June 2014. The FAFCE focuses its attention on family policy and the rights of the family. With regard to the European Social Charter the FAFCE pays particular attention to the articles concerning the protection of and support to the family (art. 16 and 19), protection of the parents (art. 27) and in particular of the mother (art. 8 and 20), as well as children (art. 7 and 17).

KLM – Christian Physicians and Medical Students in Sweden
KLM is a national organization for Christian physicians and medical students. KLM often contributes to the public medical and ethical debate in Sweden. The organization holds symposiums and conferences, among others, in correlation with the Swedish Medical Society and is affiliated with the International Christian Medical and Dental Association, ICMDA. Moreover, KLM has a quarterly journal, Ars Medicina.

Pro Vita
Pro Vita is a non governmental organization dedicated to the protection of human life and dignity in the Scandinavian Countries.

2. Admissibility

The Complaint is lodged in accordance with the Additional Protocol of 1995 providing for a system of collective complaints and with the Committee's Rules of Procedure. Sweden (The State) has ratified the European social charter, and its 1995 Protocol. In ratifying the Charter, Sweden accepted to be bound by Article 11 and Article E. The Complainant is an NGO belonging to the list of organizations entitled to present collective complaints under the

1995 protocol *(annex n. 1)*. The Complainant has "particular competence" in the subject matter – the right to health, as required by the Protocol.

3. Introduction to the Subject Matter of the Complaint

The freedom of conscience and the right to conscientious objection is a well respected right under international and European human rights law. The practice of conscientious objection arises in the field of health care when healthcare providers object to provide certain health services based on religious, moral or philosophical objections. In the majority of the Council of Europe member states, the practice of conscientious objection is well regulated. In Sweden, however, there is an absolute lack of comprehensive and clear legal and policy framework governing the practice of conscientious objection by healthcare providers. The Complainant holds that the Respondent State is responsible for enacting such legislation and by failing this and by allowing conscientious objectors to be treated in a discriminatory way; the State has failed to comply with its obligations under Article 11.

The Complainant further holds that the State is responsible for the infringements of the rights of pregnant women under the new Patient Safety Act (2010:659) that was introduced on 1 January 2011 in Sweden, aimed at creating safer health care. Thus the State has failed to comply with its obligations under article 11 of the European Social Charter.

Healthcare providers in Sweden are legally obliged to report serious injuries and risks of injuries to the National Board of Health and Welfare, pursuant to Lex Maria. Health care staff shall report injuries caused by medical malpractice. The health care provider has a duty to investigate and report the cases to the National Board of Health and Welfare. The healthcare provider should also give the patient or a relative, the opportunity to provide information about the personal experience of the incident and injury. According to the Patient Safety Act, health damage/injury under this Act is suffering, physical or mental injury or illness and death that could have been avoided if adequate measures were taken by the health services and care givers. Serious health damage/injury is defined as health damage or injury that is permanent, has led to the patient receiving a significantly increased need for care or has led to the death of the patient. Patient safety is according to § 6, protection against health damage or injury.

The Complainant holds that the failing of Swedish Board of Health and Welfare to secure that women are not being incorrectly informed by physicians during ultrasound examinations, that the foetus is no longer alive, and on false grounds recommended to procure an abortion on a fully viable foetus, is an infringement of the right to the protection of pregnant women under to the Patient Safety Act. The Complainant further holds that the failing to protect the foetuses and infants born viable, and the failing to enact comprehensive and clear policy and guidelines by the National Board of Health and Welfare to ensure that similar deficiencies and incidents should not occur again, is an infringement of the right to the protection of health. Thus the State has failed to comply with its obligations under article 11 of the European Social Charter.

In the 30th National Report on the implementation of the European Social Charter submitted by the government of Sweden, the government points out some especially urgent public health problems. One of these problems is the severe high number of abortions performed by the youngest age group, without parental or informed consent or supportive consultation. No official guideline on how to reduce these numbers and promote the health of young women has been made by the Swedish government. The Complainant holds that the failure to draw up official guidelines on how to reduce the severe high number of abortions performed on the youngest age group, without parental or informed consent or supportive consultation is an infringement of the right to protection according to the Patient Safety Act.

United Nations policy provides guidelines as to how we should interpret the duties of states with regard to limiting or eliminating abortion. On the issue of abortion, the Cairo document states that: "Governments should take appropriate steps to help women avoid abortion, which in no case should be promoted as a method of family planning."[1] While the Programme of Action does state that "where abortion is not against the law, such abortion should be safe,"[2] importantly, it affirms that: "Any measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process."[3]

Therefore, rather than treating abortion as a "right" that should be cherished and protected, the Cairo outcome document states that governments should seek to "eliminate" and "reduce" the need for abortion and strive to help women "avoid repeat abortions."[4] Presumably, if abortion were a "right" like freedom of expression, the drafters of the Cairo document would not be stating that governments should seek to "reduce" and "eliminate" it.[5] The Beijing document repeats the same language from Cairo concerning abortion, including the statement that any changes in a country's abortion law "can only be determined at the national or local level according to the national legislative process."[6]

However it is important to recognize the obligation under international law and implicit in the European Social Charter with regard to the rights of women and mothers, that the goal of national legislation in countries where abortion is permitted is to reduce or eliminate the need for abortion and to help women avoid repeated abortions. The existing medical and educational framework in Sweden has done the absolute opposite in this regards. The mandate of Article 11 § 2 of the European Social Charter, to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health (particularly when read through the hermeneutic of the Cairo and Beijing outcome documents), is in clear violation of Sweden's obligations under the Charter.

[1] United Nations, *International Conference on Population and Development [ICPD] Programme of Action* (1994) at § 7.24.
[2] *ICPD Programme of Action* at § 8.25.
[3] *Id.* Emphasis added.
[4] *Id.*
[5] See Mary Ann Glendon, "What Happened at Beijing," *First Things* (Jan. 1996) ("One would hardly say of an important right like free speech, for example, that governments should reduce it, eliminate the need for it, and help avoid its repetition.").
[6] *Beijing Platform of Action* of 1995 at § 106(k).

4. Summary of the Merits of the Case

The Complainant claims that the State is responsible for non-compliance with the obligations set forth in Article 11 and article E for failing to enact legislation, enacting insufficient legislation or inefficiently supervising and controlling the execution of existing legislation.

Given the facts provided in this Complaint, the Complainant submits that the following facts constitute instances of non-compliance with article 11 of the Charter. According to the Charter, 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 organisations, to take appropriate measures designed inter alia:

1. to remove as far as possible the causes of ill-health;
2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in health matters;
3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

The Complainant submits that the following facts constitute instances of non-compliance with Article 11 of the Charter. The State is responsible for:

- Failing to enact a comprehensive and clear legal and policy framework governing the practice of conscientious objection by healthcare providers in Sweden.
- Failing to secure that health care workers, physicians and medical students that claim their right to conscientious objection, are not treated in a discriminatory way.
- Allowing the Swedish Board of Health and Welfare to unlawfully permit late term abortions in cases when the foetus is viable.
- Failing to prevent serious incidents when pregnant women are being *incorrectly* informed by physicians during ultrasound examinations, that the foetus is no longer alive.
- Failing to prevent serious deficiencies where abortion is recommended by physicians, though the foetus later, after a second ultrasound, is found viable.
- Failing to protect foetuses/infants born viable.
- Failing to enact comprehensive and clear policy and guidelines by the The National Board of Health and Welfare to ensure that similar deficiencies and incidents should not occur again.
- Failing to draw up official guidelines on how to reduce the severely high number of abortions performed on the youngest age group, without parental or informed consent or supportive consultation.
- Failing to actively prevent eugenic and sex-selected abortion.

The Complainant reserves the right to provide further evidence on both admissibility and merits in the following phases of the procedure, in conformity with whatever time-limits the Committee might choose to determine.

5. Petition

The Complainant invites the European Committee of Social Rights to:

1. Declare this Complaint admissible, and
2. having fully considered the merits of the Complaint, find that the Swedish State has failed to comply with its obligations under Article 11, paragraphs 1, 2 and 3, and failed to comply with its obligation under article E.

6. Subject Matter of the Complaint

With the present complaint the European Committee of Social Rights is requested to declare that the Swedish State has failed to comply with its obligations under Article 11, paragraphs 1, 2 and 3, read alone or in conjunction with Art. E (Non-discrimination).

6.1 The Articles of the European Social Charter Concerned

The articles of the European Social Charter which are purported to be violated are the following:

Art. 11 (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 organisations, to take appropriate measures designed inter alia:
1. to remove as far as possible the causes of ill-health;
2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in health matters;
3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

Art. E (Non-discrimination):
The enjoyment of the rights set forth in this 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.

6.2 The CoE Resolution 1763 (2010)

The Resolution 1763, adopted October 7, 2010, by the Council of Europe Parliamentary Assembly, implies the right to conscientious objection in lawful medical care 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 having 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 healthcare 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 healthcare 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, which:

4.1. guarantee the right to conscientious objection in relation to participation in the procedure in question;

4.2. ensure that patients are informed of any objection in a timely manner and referred to another healthcare provider;

4.3. ensure that patients receive appropriate treatment, in particular in cases of emergency.

6.3 Conscientious objection in international and European human rights law

European Convention on Human Rights
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.

Article 14
Prohibition of discrimination
The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Charter of Fundamental Rights of the European Union
Article 10
1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

The International Covenant on Civil and Political Rights (ICCPR)
Article 18
Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

The Universal Declaration on Human Rights
Article 18
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 teaching, practice, worship and observance.

6.4 The Swedish Abortion Act (1974:595)

Section 1
If a woman requests termination of her pregnancy, an abortion may be performed if the procedure is performed before the end of the eighteenth week of pregnancy and it may not be assumed that it will entail serious danger to the woman's life or health on account of her having an illness. Act (1995:660).

Section 2
If a woman has requested an abortion or if the question of termination of pregnancy has

arisen under the provisions of Section 6, she must be offered counselling before the procedure is performed. Act (1995:660).

Section 3
After the end of the eighteenth week of pregnancy an abortion may be performed only if the National Board of Health and Welfare has granted the woman permission for the procedure. Such permission may only be granted if exceptional grounds exist for the abortion.
Permission under the provisions of the first section of this paragraph may not be granted if there is reason to assume that the foetus is viable.

Section 4
If an abortion in a case referred to under Section 1 is refused, the matter shall be immediately referred to the National Board of Health and Welfare for review. Act (1995:660).

Section 5
Only a person authorised to practise medicine may perform an abortion or terminate a pregnancy under the provisions of Section 6.
The procedure must be performed at a general hospital or other medical institution approved by the National Board of Health and Welfare. Act (2007:998).

Section 6
If it may be assumed that the pregnancy entails grave danger to the life or health of the woman, on account of her having an illness or bodily defect, the National Board of Health and Welfare may give permission to terminate the pregnancy after the end of the eighteenth week of pregnancy, regardless of how far the pregnancy has progressed.
If, due to illness or bodily defect of the woman, the termination of a pregnancy can not be postponed the procedure may be performed notwithstanding the provisions of the first paragraph and Section 5, second paragraph. Act (2007:998).

Section 7
The decisions of the National Board of Health and Welfare regarding permission for abortion or termination of pregnancy under the provisions of Section 6 may not be appealed. Act (1995:660).

Section 8
After an abortion or termination of pregnancy under the provisions of Section 6 the woman must be offered counselling. The person in charge at the hospital or health care facility where the procedure has been performed must ensure that such an offer is made. Act (1995:660).

Section 9
Any person who, without being authorised to practise medicine, intentionally performs an abortion on another person shall be fined or imprisoned for a maximum of one year for illegal abortion.
If an offence referred to in the first paragraph is gross, a prison sentence of a minimum of six months and a maximum of four years shall be imposed. When assessing whether the offence

is gross special consideration shall be given to whether the act was habitual or for profit or involved particular danger to the woman's life or health.
An attempt to bring about an illegal abortion is punishable under Chapter 23 of the Penal Code.

Section 10
The intentional disregard by a medical practitioner of the provisions of Section 4 or, subject to Section 6, second paragraph, of Section 3 or Section 5, shall be punishable by a fine or imprisonment of a maximum of six months.

Section 11
The proceeds of an offence under this Act shall be declared forfeited, unless this is manifestly unreasonable. Act (2005:294).

6.4.1 The Swedish Abortion Act and the Swedish National Board of Health and Welfare

The current Swedish Abortion Act (SFS 1974:595) with later amendments in 1995 and 2007, entered into force on 1st of January 1975. According to the Abortion Act, if a woman requests termination of her pregnancy, an abortion may be performed if the procedure is performed before the end of the eighteenth week of pregnancy and it may not be assumed that it will entail serious danger to the woman's life or health on account of her having an illness. After the 18th week abortions can be performed after an evaluation by the National Board of Health and Welfare, the national supervisory authority for all healthcares in Sweden.

The Board's Legal Advisory Council gives the permission for abortion, sterilization, artificial insemination or sex change. In other types of cases the Legal Advisory Council makes statements at the request of a court or other authority. It concerns mainly general medical and medico-legal and forensic psychiatric and psychiatric issues.

In 1989 the National Board of Health and Welfare issued general advice on implementation of the law (SOSFS 1989:6). From September 2004, these advices were superseded by new advice and policy (SOSFS 2004:4). The Swedish government introduced a change in the Abortion Act (1974:595) 2008, allowing foreign women, including asylum applicants and non permanent residents, to have an abortion in Sweden. The law has been called the Abortion Tourism Act. After the statutory change, new abortion advices were introduced, (SOSFS 2009:15).

6.5 Infringements of the right to health of the mother and maternal and foetus/infant health protection

The right to protection of health guaranteed in Article 11 of the Charter complements Articles 2 and 3 of the European Convention on Human Rights, as interpreted by the case-

law of the European Court of Human Rights, by imposing a range of positive obligations designed to secure the effective exercise of the right to protection of health. Article 11 provides for a series of rights to enable persons to enjoy the highest possible standard of health attainable. These are reflected in measures to promote health and health care provision in case of sickness and removal of causes of ill-health. States are required to show, through concrete measures, that they have an appropriate policy in place to educate both the general population and groups affected by specific problems.[7]

Under Article 11 (right to protection of health), states are required to bring infant and maternal mortality under control. All measures should be taken to obtain a result as close as possible to "zero risk". The Committee monitors maternal and infant mortality rates. The Committee of Social Rights has found the situation to be in breach of the Charter as the rate of maternal and/or infant mortality was too high.[8] As the Information document prepared by the Secretariat of the ESC, regarding Article 11 states, the "women's right to health concern more directly the mother but they also affect the unborn child".

6.5.1. Infant mortality in Sweden

The Infant mortality, i.e. the number of children dying during their first year of life, is low in Sweden and has been steadily declining, though a certain year to year fluctuation is observable. According to the official governmental report, infant mortality in 2011 was 2.1 per 1,000 live births, which was a decrease as compared to 2010 (2.6). Most children dying in the first year of life die during the first week.

6.5.2. Deficient foetus/infant health protection

According to the Swedish Abortion Act, women in Sweden have the legal right to abortion during the first 18 weeks of pregnancy, without having to give a reason (abortion on demand). After the end of the eighteenth week of pregnancy an abortion may be performed only if the National Board of Health and Welfare has granted the woman permission for the procedure. Such permission may only be granted if "exceptional grounds" exist for the abortion. According to a statement made by a representative from the National Board of Health and Welfare, in practice, 90 % of every application of abortion after week 18 is granted approval and nearly every application is granted approval if there are indications of disability[9]. After the 22nd week, termination of pregnancy may be permitted, if the "special reasons" or "exceptional grounds" are strong enough. Permission under the provisions of this paragraph may not be granted if there is reason to assume that the foetus is viable.

In these cases, the National Board of Health and Welfare conducts an investigation and decides whether to allow the abortion. It is the Board's Legal Advisory Council on certain legal, social and medical issues that determines certain specific cases.

[7] Marangopoulos v. Greece, collective complaint no. 30/2005, decision on the merits of 6 December 2006, §§ 216 and 219.

[8] Case Law Fact Sheet prepared by the Secretariat of the ESC with reference to Conclusions XV-2 and Conclusions 2005

[9] http://www.varldenidag.se/nyhet/2011/05/27/Mer-regel-an-undantag-att-sena-aborter-beviljas/

In 2011, health care workers at Swedish hospitals alerted the Social Authorities about babies put aside to die by themselves in hospital rooms after late-term abortions[10]. This caused an ethical debate in Sweden and a Swedish professor in medical law made a statement in media that "if the foetus is born viable, the foetus is a child according to Swedish law, and the child is entitled to health care, just as any other child" [11]. Health care workers told the media that in some cases, after week 18 or week 22 abortions, the foetus could live up to one hour after the abortion.[12] Some health care workers felt that they had to resign from their work position due to the abortion practice on viable foetuses, who were left alone on a blanket or in the washer room to die by themselves. Because of the pressure and physiological distress related to the late term abortion practice, a nurse made complaints to the Social Authorities and to the National Board of Health and Welfare[13].

Still, no official report on how to secure that abortion is not permitted when the foetus is viable, has been made. The only solution that has been discussed is that the foetus receives a life extinguishing injection in the foetus heart or brain before the abortion is performed[14]. Health care professionals that have strong objections to abortion, especially late term abortions when the foetus aborted is viable, have been obliged to participate and act against their conscience. In one of the cases, reported by "The Medicine Today", the nurse says: "it feels terrible that we are allowing fully viable foetuses to die right before our eyes. But we can do nothing. Otherwise, we are breaking the law."[15]

According to the governmental statistics for the year 2010, over 400 abortions were performed after week 18 on medical or social grounds. [16] As mentioned, almost every abortion application between weeks 18-22 is granted approval. After the 22nd week, termination of pregnancy may be permitted, if the "special reasons" or "exceptional grounds" are strong enough. Although permission under the provisions of this paragraph may not be granted if there is reason to assume that the foetus is viable, it is assumed that the foetus was viable in several of these cases. Viability exists as a function of biomedical and technological capacities, which are different in different parts of the world. However, international reports mentioned by the Endowment for Human Development (EHD) show that by 21 to 22 weeks after fertilization, the lungs gain some ability to breathe air. This is considered the age of viability because survival outside the womb becomes possible for some foetuses. [17]

[10] http://www.dagensmedicin.se/nyheter/det-kanns-fruktansvart-att-lata-fullt-friska-foster-ligga-och-do-framfor-vara-ogon/
[11] http://www.dagen.se/nyheter/-fods-foster-levande-ar-det-som-ett-barn-/
[12] http://www.svd.se/nyheter/inrikes/levande-foster-dilemma-vid-aborter_6173807.svd
[13] http://www.dn.se/nyheter/sverige/levande-foster-dilemma-vid-aborter
[14] http://www.dagensmedicin.se/nyheter/experter-ska-se-over-om-rutiner-for-aborter-behover-andras/
[15] http://www.dagensmedicin.se/nyheter/det-kanns-fruktansvart-att-lata-fullt-friska-foster-ligga-och-do-framfor-vara-ogon/
[16] http://www.socialstyrelsen.se/Lists/Artikelkatalog/Attachments/18330/2011-6-1.pdf
[17] http://www.ehd.org/resources_bpd_documentation_english.php#_ftnref154 Footnote 154: O'Rahilly and Müller, 2001, 92, report the age of viability as 20 weeks postfertilization; Draper et al., 1999, 1094, report a survival rate of 2% at 20 weeks postfertilization, 6% at 21 weeks, and 16% at 22 weeks. Moore and Persaud, 2003, 103, report viability at 22 weeks; Wood et al., 2000, 379, report survival rates of 11% at 21 weeks, 26% at 22 weeks and 44% at 23 weeks (postfertilization weeks) based on premature birth data from the United Kingdom during 1995. Cooper et al. 1998, 976, (Figure 2) report infants with a birth weight over 500 grams experienced survival rates (all approximate) of 28% at 21 weeks postfertilization, 50% at 22 weeks, 67% at 23 weeks, and 77% at 24 weeks. Draper et al., 2003, updated their previously published survival

6.5.3 The 30th Swedish National Report on the implementation of the European Social Charter

In the 30th National Report on the implementation of the European Social Charter submitted by the government of Sweden 2012, the government points to some very urgent public health problems. Except from the increasing cases of HIV infections and Chlamydia infections, the report shows that suicide is increasing among young women and that the number of abortions performed in Sweden is increasing. Although there is a reduction in the number of abortions performed by the youngest age group, Sweden still tops the table as one of the countries with the highest teenage abortion rate compared to other countries in Europe.[18] One of the greatest urgent public health problems in Sweden is the extremely high number of abortions performed on the youngest age group, without parental or informed consent or supportive consultation. No official guideline on how to reduce these numbers and promote the health of young women has been made by the Swedish government.

6.5.4 Reports of serious incidents

In Sweden, complaints regarding deficiencies in the organisation and operations of health and medical care can be made to the Public Health and Medical Services Committee. The complaint can also be sent to the National Board of Health and Welfare[19].

In 2009, Radio Sweden, the Swedish Public Service Broadcasting Corporation, revealed that physicians in 24 cases during ultrasound examinations incorrectly informed the pregnant woman that the foetus was no longer alive[20]. In many of the cases, the physicians recommended the pregnant woman a medical abortion and the woman received a prescription for an abortion pill. Lex Maria Reports (reports of malpractice) [21] and Individual Complaints have showed that the women in many of the cases did not take the recommended abortion pill and that at a second ultrasound examination proved that the child was alive[22]. In one case the pregnant woman was told by the physician that the foetus had severe disabilities which probably would lead to the death of the foetus, thus the woman was strongly recommended abortion. The pregnant woman decided to wait for two weeks, and a second ultrasound examination showed that the foetus was fully viable, with no disabilities.[23]

The National Board of Health and Welfare promised investigation, supervision and guidance to ensure that similar deficiencies would not occur again. But on 24 February 2012 it was

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tables for premature infants and now report an overall survival rate of 7% at 20 weeks, 15% at 21 weeks, 29% at 22 weeks, 47% at 23 weeks and 65% at 24 weeks. [All ages corrected to reflect post fertilization age.] These survival tables are available online at http://bmj.bmjjournals.com/cgi/content/full/319/7217/1093/DC1.

[18] http://www.socialstyrelsen.se/Lists/Artikelkatalog/Attachments/18865/2012-10-22.pdf
[19] http://www.socialstyrelsen.se/reportingmalpractice
[20] http://sverigesradio.se/sida/gruppsida.aspx?programid=3182&grupp=8137 and http://sverigesradio.se/sida/artikel.aspx?programid=3182&artikel=3204744
[21] http://www.socialstyrelsen.se/reportingmalpractice
[22] http://sverigesradio.se/sida/artikel.aspx?programid=3182&artikel=3204744
[23] Ibid.

revealed that these serious incidents have been repeated, and that at least six additional cases have occurred. In one of the reported cases, the pregnant women received abortion pills by the physician after being wrongfully informed by an ultrasound examination that the foetus was "missing". The pregnant woman did take the recommended abortion pill but with little effect. A second ultrasound examination showed that the child was alive and that the heartbeats were strong. According to the report and decision by the National Board of Health and Welfare, the "physician made a wrongful act to prescribe abortion pills after the first ultrasound examination. But the doze and the effect of the abortion pill was apparently too weak in this case, which was positive for the patient, who apparently wanted a child. [24]. No disciplinary actions were made and no change of the routines were made in the case. In another similar case, reported by media, the severe circumstances of the case show that that the doctor once again recommended an abortion because the child, due to the abortion pill "could have been deformed."[25]

Lex Maria Reports and Individual complaints to the Social Authorities show that the malpractice continues. The requests for reports, complaints and Lex Maria reports at the National Board of Health and Welfare are, however, in many cases denied with reference to that the reports are not filed in a systematic order with reference to abortion, ultrasound or other relevant search criteria.

6.5.5. Failure to protect foetuses/infants born viable

According to the Information Document prepared by the Secretariat of the ESC, the Charter guarantees rights to children from birth and before, up to the age of 18 in respect of Article 11 issues. The maternal health protection affects the child before his or her birth.

The State should undertake, either directly or in cooperation with public or private health care providers appropriate measures designed to protect the foetuses and infants born viable. The Complainant holds that the State is responsible for the failure to enact such legislation, enacting insufficient legislation or inefficiently supervising and controlling the execution of existing legislation for this cause. Article 6 of the United Nation's Convention on the Rights of the Child, to which Sweden is also a party to, is also here applicable and states that: "[E]very child has the inherent right to life.... States Parties shall ensure…the survival and development of the child." Moreover, the Convention explicitly recognizes the child before birth as a rights-bearing person entitled to special need and protection. The Preamble recognizes that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before as well as after birth*."[26] Although this preamble is not binding, it certainly provides necessary interpretive context.[27]

[24] Case Dnr 9.3.1 – 5349/2011 (appendix)
[25] http://www.expressen.se/gt/lakarens-besked-till-kate-ditt-foster-ar-dott/
[26] Emphasis added.
[27] The Vienna Convention states the rule of interpretation that, "The context…shall comprise…the text, including its preamble and annexes." Vienna Convention art. 31(2).

6.6 Infringements of the right to the protection of pregnant women under the Patient Safety Act

A new Patient Safety Act (2010:659) was introduced on 1 January 2011 aimed at creating safer health care. A key aspect of the new legislation is that it should support patient empowerment. The new legislation emphasizes the role of the health care provider in working systematically to create an enabling environment to adequately prevent and manage adverse events. The Patient Safety Act also aims to facilitate and develop the reporting and management of adverse events. The National Board of Health and Welfare was given the main responsibility for the management of the reporting at national level.

In March 2011 the Swedish government appointed a committee of inquiry with the task of investigating how to strengthen the patients' position and influence over care and deliver a proposal for a new patients' act. The first results are to be delivered in January 2013 and a final proposal no later than June 2013.

Healthcare providers are legally obliged to report serious injuries and risks of injuries to the National Board of Health and Welfare, pursuant to Lex Maria[28]. Health care staff shall report injuries caused by medical malpractice. The health care provider has a duty to investigate and submit the cases to the National Board of Health and Welfare. The healthcare provider should also give the patient or a relative, the opportunity to provide information about his/her personal experience of the incident and injury.

Since the Patient Safety Act (2010:659) came into force, the National Board of Health and Welfare is responsible for dealing with individual patient complaints in order to make it easier for individuals to file complaints. Individual complaints regarding deficiencies and injuries caused by medical malpractice can be lodged to the National Board of Health and Welfare.

- According to § 5 of the Patient Safety Act, health damage/injury under this Act is suffering, physical or mental injury or illness and deaths that could have been avoided if adequate measures were taken by the health services and care giver. Serious health damage/injury is defined as health damage or injury that is permanent, has led to the patient received a significantly increased need for care for the patient or has led to the death of the patient.
- Patient safety is according to § 6, protection against health damage or injury.

The Complainant holds that the failing of Swedish Board of Health and Welfare to secure that women are not being *incorrectly* informed by physicians during ultrasound examinations, that the foetus is no longer alive, is an infringement of the right to the protection of pregnant women, according to the Patient Safety Act.

[28] http://www.socialstyrelsen.se/lexmaria

The Complainant holds that the failing to prevent serious deficiencies in cases where abortion is recommended by physicians, though the foetus later, after a second ultrasound is alive, is an infringement of the right to the protection according to the Patient Safety Act.

The Complainant holds that the failure to enact comprehensive and clear policy and guidelines by the National Board of Health and Welfare to ensure that similar deficiencies and incidents do not occur again, is an infringement of the right to the protection according to the Patient Safety Act.

The Complainant holds that the failure to draw up official guidelines on how to reduce the severe high number of abortions performed on the youngest age group, without parental or informed consent or supportive consultation is an infringement of the right to protection according to the Patient Safety Act.

6.7 Failure to implement International Medical Ethical Standards regarding conscientious objection

According to the Information document prepared by the Secretariat of the ESC, regarding Article 11, Public health policy must pursue the promotion of public health in keeping with the objectives laid down by the World Health Organization (WHO). National rules must provide for informing the public, education and participation.

International medical ethical standards, such as those established by the World Health Organization (WHO) and the International Federation of Gynaecology and Obstetrics (FIGO), provide guidance on regulating the right to conscientious objection. WHO and FIGO both direct that physicians, who conscientiously object to performing a procedure, have a duty to refer the patient to another health care provider who does not object to the procedure. By the lack of comprehensive legal framework for conscientious objectors in health care in Sweden, the State is failing to implement the International Medical Ethical Standards.

6.8 Failure to implement the CoE Resolution 1763

The resolution 1763 by the Council of Europe Parliamentary Assembly explicitly calls on member states to ensure the right to conscientious objection in lawful medical care and holds that 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.

The Report of Christine McCafferty, “Women’s access to lawful medical care: the problem of unregulated use of conscientious objection”, that preceded the Resolution 1763, caused a debate in Sweden about freedom of conscience for health care workers. The Swedish standing Committee has remained negative to the content of Resolution 1763 and the

Swedish delegation has been directed by the Swedish Government to take action to accomplish a "change" of this resolution.

On 11 May, 2011, the Swedish Parliament debated the report, Resolution 1763 and its recommendations after a report from the Foreign Affairs Committee. The prospect that medical professionals and health care workers might exercise freedom of conscience initiated a debate. The Foreign Affairs Committee Report recommended that the Parliament should advise the Government to be "critical of the content of Resolution 1763" and consider "that the delegation should work to bring about a change in the nature of this resolution." [29]The Left Party added a "reservation" suggesting that the Parliament ask for the abrogation of Resolution 1763. The Sweden Democrats, in contrast, expressed support for the Resolution in a separate reservation. The Swedish Parliament accepted the recommendation of the Foreign Affairs Committee. Sweden thus formally set itself against freedom of conscience for health care workers and against the goals of Article 11 of the European Social Charter.

6.8 Failure to implement legal framework regarding conscientious objection in prenatal sex selective cases

A Swedish case of sex selective abortion is mentioned in the report of Ms. Doris Stump from the Committee on Equal Opportunities for Women and Men that preceded the Prenatal sex selection Resolution 1829 (2011) of the Parliamentary Assembly of the Council of Europe. In the report it is stated that the Swedish National Board of Health and Welfare was asked to give its opinion on the case and clarify whether medical staff are obliged to disclose the sex of the foetus even if there are no medical reasons, and to perform an abortion even when the sex of the foetus is the only basis for the request. The reply was affirmative.

In the specific case, the woman already had two daughters and requested an amniocentesis and asked to know the sex of the foetus. The health care providers at a Swedish hospital objected to performing a repeated abortion when the female sex of the foetus was the sole reason for the abortions. The doctors at the hospital expressed their concern and asked the Swedish National Board of Health and Welfare to draw up guidelines on how to handle requests in the future in which they "feel pressured to examine the sex of the foetus" without having a medically compelling reason to do so. The National Board of Health and Welfare responded that "such requests cannot be refused" and that "it is not possible to deny a woman an abortion up to the 18th week of pregnancy even if the sex of the foetus is the only basis for the abortion request".[30]

[29] 2009/10:UU15 and 2011/12:KU14http://www.riksdagen.se/sv/Dokument-Lagar/Utskottens-dokument/Betankanden/Fri--och-rattigheter_GZ01KU14/

[30] "Sweden rules "gender based" abortion legal": http://www.thelocal.se/19392/20090512/

6.9 Discrimination against health care providers with a conscientious objection

Under Swedish law, no legal regulation of conscientious objection exists. In some exceptional Swedish cases, there is an understanding between hospital management and staff which makes it possible to avoid certain medical procedures. One example is the Chief Physician at Norrtälje Hospital, Stockholm, who received a written exemption from the task of being the responsible anaesthesiologist during an abortion, provided that there were other anaesthesiologists with the necessary expertise in service.[31]

Such cases are rare, and health care providers and medical students in general have no right to conscientious objection. In most cases, the health care workers that object to abortions are told that they have chosen the wrong job, the wrong profession or the wrong department. The Swedish Minister of Health and Social Affairs, Mr Göran Hägglund, has officially declared that he is not willing to recognize the rights of the health care workers and refers the conscientious objectors to "another job". Health care workers and health care students are reprimanded, repositioned or put at disadvantage for refusing to perform procedures such as abortions and the Swedish report about the need of a conscience clause for medical students, show that conscientious objection could lead to the denial of a medical diploma referred to the lack of a conscientious objection clause.[32] But the Swedish Government and the Swedish Parliament has repeatedly denied proposals about the need of a legal conscientious objection clause for health care students and health care workers. [33]

This severely anaemic view of freedom of thought, conscience and religion has been refused by the European Court of Human Rights: "Given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate."[34] Neither must that view be a central part of the dogma of the religious or moral views held by the individual seeking to manifest his right of conscience: "there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question" in order for the right to freedom of religion to have been interfered with."[35]

In balancing the conflicting rights of medical staff expressing their conscience against performing abortions and the requirements of one's supervisors to perform abortions, it must be noted that any interference with the rights of conscience of the conscientious objector must be necessary in a democratic society and proportionate to a legitimate aim. Interference with the enjoyment of Article 9 rights will not be considered prescribed by law

[31] Ars Medicina, nr 3 2012 page 17
[32] SOU 1994:84
[33] http://www.riksdagen.se/sv/Dokument-Lagar/Utskottens-dokument/Betankanden/201112Fri--och-rattigheter-_GZ01KU14/
[34] ECHR, *Eweida and Others v. the United Kingdom*, application nos. 48420/10, 59842/10, 51671/10 and 36516/10, judgment of 15 January 2013, § 83.
[35] *Id*., § 82.

if it is arbitrary and based on legal provisions which allowed an unfettered discretion to a supervising government actor.[36] Ethical questions involving abortion and the definition of when life begins are of the most sensitive and profound moral nature.[37] The Court of Justice of the European Union has gone even further by defining life, within the context of patent law, as beginning from conception.[38] No other supra-governmental body has ever ruled to the contrary leaving *Brüstle* as the most persuasive and definitive piece of jurisprudence on the issue. Finally, the European Court further indicated in dicta in the admissibility decision in *Pichon and Sajous v. France*[39], that while it would not admit an application for conscientious objection based on opposition to contraception, had the issue of abortifacients been at play they may very well have ruled differently.

Clearly, with the explosion of European supra-governmental case-law protecting religious manifestation, explicitly enumerating a right to conscience[40] and providing robust protections to the unborn child taken in conjunction with both the McCafferty resolution on conscience and the virtual unanimity among Member States in Europe to protect medical conscientious objection, there has emerged a strong consensus in Europe that medical staff must be allowed to exercise this most basic and profound manifestation of Article 9.

6.10 Regulation and practice of conscientious objection in Sweden compared to Norway

Sweden stands very far from other Scandinavian countries´ long-standing tradition of respect for freedom of conscience. Compared to other Scandinavian countries, Sweden has not fulfilled the 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 healthcare providers.

During 2012, an official report and investigation in Norway revealed that the Norwegian Board of Health and Welfare unlawfully permitted late term abortions in several cases when the foetus was viable.[41] The investigation caused massive protests from health care workers, who claimed the right to conscientious objection and challenged the National Social Authorities to suspend the National Board of Health and Welfare.

The Norwegian Abortion Act states that: “Health care workers have the right to conscientious objection when it comes to performance or assisting to an abortion”. These regulations have for 30 years included physicians and other health professionals who, for reasons of conscience, have objections to participate in abortion related procedures.

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[36] *Cf.* ECHR, 26 October 2000, *Hasan & Chaush v. Bulgaria* (Appl. No. 30985/96), § 86.
[37] *See*: ECHR: *A, B and C v. Ireland [GC],* Application No. 25579/05, judgment of 16 December 2010; ECHR: *Vo v. France*, Application No. 53924/00, Judgment of 08/07/2004.
[38] CJEU, Oliver Brüstle v Greenpeace e.V., Case C-34/10, 18 October 2011. *Available at*: http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-34/10.
[39] Application No. 49853/99, decision of 02 October 2001.
[40] *See*: Section 6.11 below.
[41] http://www.varldenidag.se/nyhet/2012/05/16/Abort-efter-vecka-22-tillats-i-strid-med-lagen/

6.11 Failure to implement and enact legal framework protecting conscientious objection

The right to conscientious objection is a right and tradition that is well-respected in many professions, and particularly in the medical profession. The conflicts of conscience and the question of conscientious objection can be found in many different areas in society. Besides the area of medical professionals and the military service, it can refer to college student's right to refuse participation in certain practical studies for reasons of conscience, a minister's right to conscientious objection to perform certain wedding ceremonies, or pharmacist's right to conscientious objection to dispense certain commodities. The common denominator is that it relates to more than an opinion or an idea; it is a matter of a strong conviction that emanates from the conscience.

The right to freedom of conscience is also a collective right and may be exercised institutionally.[42] The prohibition of institutional conscientious objection removes from the market safe-havens for pro-life medical practitioners. It further closes the market place to patients specifically seeking treatment by medical professionals who share the same value system.

In a January 2009 poll conducted by The Polling Company, Inc., WomenTrend, 88 percent of respondents said it is either very or somewhat important to them that they share a similar set of morals as their healthcare providers.[43] To maintain patient confidence and satisfaction among women, institutional conscientious objection must be maintained.

Furthermore, conscience rights do not threaten patient access, they protect patient access. Many patients want to be able to access doctors who practice with integrity by obeying their consciences, and who share the patients' values about the right to life. However, Sweden's restrictions on conscience rights would exclude all abortion opponents from the medical field by forcing them to assist or refer for abortion, and therefore would deny the right to medical access of patients who desire pro-life doctors. The Hippocratic Oath's directives against certain medical practices exist so as to give patients access to doctors who do not harm human life in their medical practice. Nevertheless, Swedish policy assumes that only patients who support abortion have a right to access medical care, while other patients have no similar right. This assumption is unwarranted and illogical. Even if patients' desires should trump conscience rights as Swedish policy would wrongly suggest, the desires of patients for medical staff who are allowed to practice consistent with their consciences would counsel in favour of conscience protection so that such doctors could exist, not against conscience protection as held by Swedish policy so that such medical staff are driven out of practice.
Freedom of conscience is a long-respected human right, established as one of the foundations of a "democratic society" within the meaning of the European Convention on Human Rights. The European Court of Human Rights (here and after "the Court") has held that the right enshrined in Article 9 of the Convention, in its religious dimension, is one of the most vital elements that protect the identity of believers and their conception of life. Most of the member states of the Council of Europe have enacted laws, ethical codes and

[42] *See e.g.*: ECHR, judgment of 25 May 1993, *Kokkinakis v. Greece* (Publications ECHR, Series A vol. 260-A), § 31.
[43] *See*: http://www.freedom2care.org/docLib/200905011_Pollingsummaryhandout.pdf.

occasionally regulations or guidelines, guaranteeing the right to conscientious objection in health-care settings, and the national courts of some countries have developed jurisprudence on this topic. The jurisprudence of the Court makes it crystal clear that Article 9 of the Convention 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."[44]

The Court has held that 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.[45] 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.

In order to secure the right of freedom of conscience, Sweden should ensure that freedom of conscience is protected at the workplace, by protecting the skill and dedication of employees, without, in difficult ethical issues, forcing conscientious objectors to participate in certain activities. As the European Court of Human Rights recently stated in *Bayatyan v. Armenia*[46], a system that has potentially serious implications for conscientious objectors while failing to allow any conscience-based exceptions and penalising those who object, fails to strike a fair balance between the interest of the society as a whole and the conscientious objector's The cited case overruled previous decisions and a settled jurisprudence by the European Commission ("the Commission") on conscientious objection in the field of the military. In the case of *X v. Austria*[47]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.

Notwithstanding the textual basis of Article 4 § 3 (b) of the Convention, the Court came to a 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 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."[48] It

ECHR, judgment of 25 May 1993, *Kokkinakis v. Greece* (Publications ECHR, Series A vol. 260-A), § 31. This affirmation has been mirrored by the Court of Justice of the European Union as well. *See*: CJEU*, Federal Republic of Germany v Y* (Case C-71/11) and *Federal Republic of Germany v Z* (Case C-99/11). Advocate General's Opinion of 19 April 2012.

[45] *Cf.* ECHR, 30 January 1998, *United Communist Party of Turkey and Others v. Turkey*, Reports 1998-I, p. 25, § 57. *See also*: ECHR, 13 December 2001, *Metropolitan Church of Bessarabia and Others v. Moldova*, Appl. no. 45701/99., § 116; ECHR, 14 December 1999, *Serif v. Greece*, Reports 1999-IX, § 53.

[46] ECHR, *Bayatyan v. Armenia*, application no. 23459/03, Judgment of 7 July 2011 [Grand Chamber].

[47] Commission decision of 2 April 1973, no. 5591/72.

[48] *Bayatyan* at §124.

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

The right to a conscientious objection in the workplace is of utmost importance and is a fundamental aspect of the right to freedom of thought, conscience and religion enshrined in many international treaties. The right of conscience is essential to the foundation of a democratic society. Protecting the right of conscience guarantees the right to be free from coercion by the government or other individuals. As a Council of Europe member state, Sweden should develop comprehensive and clear regulations that define and regulate conscientious objection at workplace, in particular for health care providers. The lack of legal framework to govern the practice of conscientious objection in Sweden is a threat to freedom of conscience for all health care providers and implies a threat to the freedom of conscience in general.

Because of the lack of a clear legal right for medical staff to refuse to participate in medical procedures that are conflicting their conscience, there is an uncertainty about how to secure the right of freedom of conscience. Medical workers, who are reprimanded, repositioned or put at disadvantage for refusing to perform procedures such as abortions, therefore claim that their rights under international treaties are infringed. This lack of legal framework and the consequent practice is in conflict not only with the principles expressed in the European Convention on Human Rights, in the PACE Resolution 1763, but also with the principles expressed by the European Social Charter.

Furthermore and by way of comparison, according to the Guttmacher Institute, a research organization affiliated with Planned Parenthood, the number of hospitals in the United States offering abortions dropped from 1,654 in 1977 to 603 in 2000.[49] This coincided with a roughly 50 percent drop in the number of surgical abortionists. As clearly established by these statistics, the abortion issue raises tremendous moral controversy among medical professionals. In light of such strong moral opposition to abortion among medical professionals, it would be wholly inappropriate to require medical staff to go against such strong held views.

It is intrinsic of the nature of the freedom of thought, conscience and religion that conscience is subjective and is defined by the individual through her/his religious faith, morality and ethics. If a person believes that an action is morally wrong, it would likewise be wrong for that person to encourage, condone or in any other way be complicit in that action. By failing to allow any conscience-based exceptions at a workplace and penalising those who objects on the basis of their conscience, an interference with the freedom of conscience has occurred.

To ensure that the freedom of conscience is in fact an effective right, one must secure that there is no sanction or reprisal penalizing a person that attempts to enforce his or her right, or that the sanctions are at least proportionate and justified. Before the practice of

[49] *See*: Finer LB and Henshaw SK, Abortion incidence and services in the United States in 2000, *Perspectives on Sexual and Reproductive Health*, 2003, 35(1):6–15.

conscientious objection is adequately regulated in domestic law, the employers have the option to pardon conscientious objectors allowing them instead to perform alternative duties. In view of member states' obligation to ensure respect for the right of freedom of thought, conscience and religion, the states should develop comprehensive and clear regulations that define and regulate conscientious objection at the workplace.

6.12 Summary of the Subject Matter of Complaint

The freedom of conscience and the right to conscientious objection is a well respected right under international and European human rights law. The practice of conscientious objection arises in the field of health care when healthcare providers object to provide certain health services based on religious, moral or philosophical grounds. In some nations the freedom of conscience is implemented in the constitution. In the majority of the Council of Europe member states, the practice of conscientious objection is well regulated. In Sweden, however, there is an absolute lack of comprehensive and clear legal and policy framework governing the practice of conscientious objection by healthcare professionals. Health care workers are coerced, held liable and discriminated against, because of a refusal to perform, accommodate, or assist in an abortion.

Swedish physicians and other health care workers have expressed their concern to Social Authorities and asked the Swedish National Board of Health and Welfare to draw up guidelines on how to handle requests in which they “feel pressured to examine the sex of a foetus” and then performing prenatal sex selective, female abortions without having a medically compelling reason to do so. The Swedish National Board of Health and Welfare has held that no such guidelines will be drawn. In other cases where health care workers claim their right to conscientious objection, they have been treated in a discriminatory way.

During 2012, physicians at Swedish hospitals had alerted the Social Authorities about babies put aside to die by themselves in hospital rooms after late-term abortions. Still, no official report of how to secure that abortion is not permitted when the foetus is viable, has been made. The only solution that has been discussed is whether the foetus should receive a life extinguishing injection before the abortion is performed. Health care professionals that have strong objections to abortion, especially late term abortions when the foetus aborted is viable, have been obliged to participate and act against their conscience. The Complainant holds that the Swedish Board of Health and Welfare has unlawfully permitted late term abortions in several cases when the foetus was viable.

After the Patient Safety Act (2010:659) came into force on 1 January 2011, the National Board of Health and Welfare is responsible for handling individual patient complaints. Individual patient complaints and official media reports reveal that pregnant women have been *incorrectly* informed by physicians in several cases during ultrasound examinations, that the foetus was no longer alive. Several women have on false grounds been recommended to undergo an abortion on a fully viable foetus. The recommendations of abortion, made by physicians, though the foetus was later found viable, have led to severe consequences for the pregnant women. The National Board of Health and Welfare promised

investigation, supervision and guidance to ensure that similar deficiencies should not occur in the future. However, subsequent reports have revealed that these serious incidents have been repeated.

In the 30th National Report on the implementation of the European Social Charter submitted by the government of Sweden, the government points out some urgent public health problems. One of these problems is the extremely high number of abortions performed on the youngest age group, without parental or informed consent or supportive consultation. No official guideline on how to reduce these numbers and promote the health of young women has been made by the Swedish government.

6.13 Conclusions

The Complainants claim that the State is responsible for non-compliance with the obligations set forth in Article 11 and Article E for failing to enact legislation, enacting insufficient legislation or inefficiently supervising and controlling the execution of existing legislation.
Given the facts provides in this Complaint, the Complainants submit that the following facts constitute instances of non-compliance with Article 11 of the Charter. According to the Charter, 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 organisations, to take appropriate measures designed inter alia:
1. to remove as far as possible the causes of ill-health;
2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in health matters;
3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

The Complainants submit that the following facts constitute instances of non-compliance with Article 11 of the Charter. The respondent State is responsible for:

- Failure to enact a comprehensive and clear legal and policy framework governing the practice of conscientious objection by healthcare providers in Sweden
- Failure to secure that health care workers, physicians and medical students that claim their right to conscientious objection, are not treated in a discriminatory way
- Allowing the Swedish Board of Health and Welfare to unlawfully permit late term abortions in cases when the foetus is viable
- Failure to prevent serious incidents when pregnant women are being *incorrectly* informed by physicians during ultrasound examinations, that the foetus is no longer alive.
- Failure to prevent serious deficiencies where abortion is recommended by physicians, though the foetus later, after a second ultrasound, is found viable
- Failure to protect foetuses/infants born viable
- Failure to enact comprehensive and clear policy and guidelines by the The National Board of Health and Welfare to ensure that similar deficiencies and incidents should not occur again.

- Failure to draw up official guidelines on how to reduce the extremely high number of abortions performed on the youngest age group, without parental or informed consent or supportive consultation.

The Complainant reserves the right to provide further evidence on both admissibility and merits in the following phases of the procedure, in conformity with whatever time-limits the Committee might choose to determine. The Complainant invites the European Committee of Social Rights to:

1. Declare this Complaint admissible, and
2. Having fully considered the merits of the Complaint, find that the Swedish State has failed to comply with its obligations under Article 11, paragraphs 1, 2 and 3, read alone or in conjunction with Article E of the European Social Charter.

Antoine Renard
President of the FAFCE