

E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS
*RESEAU U.E. D'EXPERTS INDEPENDANTS EN MATIERE DE DROITS
FONDAMENTAUX*

**OPINION N° 4-2005:
THE RIGHT TO CONSCIENTIOUS OBJECTION AND THE
CONCLUSION BY EU MEMBER STATES OF
CONCORDATS WITH THE HOLY SEE**

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The E.U. Network of Independent Experts on Fundamental Rights has been set up by the European Commission upon the request of the European Parliament. It monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. It issues reports on the situation of fundamental rights in the Member States and in the Union, as well as opinions on specific issues related to the protection of fundamental rights in the Union.

Le Réseau UE d'Experts indépendants en matière de droits fondamentaux a été mis sur pied par la Commission européenne (DG Justice, liberté et sécurité), à la demande du Parlement européen. Depuis 2002, il assure le suivi de la situation des droits fondamentaux dans les Etats membres et dans l'Union, sur la base de la Charte des droits fondamentaux de l'Union européenne. Chaque Etat membre fait l'objet d'un rapport établi par un expert sous sa propre responsabilité, selon un canevas commun qui facilite la comparaison des données recueillies sur les différents Etats membres. Les activités des institutions de l'Union européenne font l'objet d'un rapport distinct, établi par le coordinateur. Sur la base de l'ensemble de ces (26) rapports, les membres du Réseau identifient les principales conclusions et recommandations qui se dégagent de l'année écoulée. Ces conclusions et recommandation sont réunies dans un Rapport de synthèse, qui est remis aux institutions européennes. Le contenu du rapport n'engage en aucune manière l'institution qui en est le commanditaire.

Le Réseau UE d'Experts indépendants en matière de droits fondamentaux se compose de Florence Benoît-Rohmer (France), Martin Buzinger (Rép. slovaque), Achilleas Demetriades (Chypre), Olivier De Schutter (Belgique), Maja Eriksson (Suède), Teresa Freixes (Espagne), Gabor Halmai (Hongrie), Wolfgang Heyde (Allemagne), Morten Kjaerum (suppléant Birgitte Kofod-Olsen) (Danemark), Henri Labayle (France), Rick Lawson (Pays-Bas), Lauri Malksoo (Estonie), Arne Mavcic (Slovénie), Vital Moreira (Portugal), Jeremy McBride (Royaume-Uni), François Moyse (Luxembourg), Bruno Nascimbene (Italie), Manfred Nowak (Autriche), Marek Antoni Nowicki (Pologne), Donncha O'Connell (Irlande), Ilvija Puce (Lettonie), Ian Refalo (Malte), Martin Scheinin (suppléant Tuomas Ojanen) (Finlande), Linos Alexandre Sicilianos (Grèce), Pavel Sturma (Rép. Tchèque), Edita Ziobiene (Lituanie). Le Réseau est coordonné par O. De Schutter, assisté par V. Van Goethem.

Les documents du Réseau peuvent être consultés via :

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The EU Network of Independent Experts on Fundamental Rights is composed of Florence Benoît-Rohmer (France), Martin Buzinger (Slovak Republic), Achilleas Demetriades (Cyprus), Olivier De Schutter (Belgium), Maja Eriksson (Sweden), Teresa Freixes (Spain), Gabor Halmai (Hungary), Wolfgang Heyde (Germany), Morten Kjaerum (substitute Birgitte Kofod-Olsen) (Denmark), Henri Labayle (France), Rick Lawson (the Netherlands), Lauri Malksoo (Estonia), Arne Mavcic (Slovenia), Vital Moreira (Portugal), Jeremy McBride (United Kingdom), François Moyse (Luxembourg), Bruno Nascimbene (Italy), Manfred Nowak (Austria), Marek Antoni Nowicki (Poland), Donncha O'Connell (Ireland), Ilvija Puce (Latvia), Ian Refalo (Malta), Martin Scheinin (substitute Tuomas Ojanen) (Finland), Linos Alexandre Sicilianos (Greece), Pavel Sturma (Czech Republic), and Edita Ziobiene (Lithuania). The Network is coordinated by O. De Schutter, with the assistance of V. Van Goethem.

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I. Introduction

By a letter dated July 11th, 2005, the European Commission (DG Justice, Freedom and Security) requested from the EU Network of Independent Experts on Fundamental Rights an opinion on the question of religious conscientious objection as provided in existing or possible future concordats concluded between EU Member States and the Holy See. An example of such a concordat is the Draft Treaty between the Slovak Republic and the Holy See (hereafter referred to as the 'Draft Treaty') (DG JLS-C3/AG/(2005)D7705). This request for an opinion followed, in turn, from a request of the European Parliament on this question. In that letter, the European Commission suggested that the Opinion of the Network should be based on the examination of three questions. First, are such agreements between a State and the Holy See recognized a primacy above national law, including national constitutions? Second, do such agreements create an incompatibility with fundamental rights and the law of the European Union? Third, by which means do such agreements produce effects and how are such agreements terminated?

Mr. Martin Buzinger, a member of the EU Network of Independent Experts, contributed a report on the impact of the Draft Treaty on the legal order of the Slovak Republic. In the preparation of this opinion, the EU Network of Independent Experts on Fundamental Rights also consulted a number of sources, both official and non-governmental. At its request, it also received a contribution from Mr Castermans and Mr. De Blois, relating to the scope of the right to conscientious objection in international law. Mr Martin Scheinin, a member of the EU Network of Independent Experts, contributed information relating to the interpretation by the Human Rights Committee of Articles 18 and 26 of the International Covenant on Civil and Political Rights. The Network recalls in this respect that, while it bases its reports and opinions on the Charter of Fundamental Rights of the European Union, this instrument is read in accordance with international and European human rights law which it seeks its inspiration from.

A draft opinion was discussed at the meeting of the Network of 17 October 2005. This opinion takes into account the content of that discussion. It also benefited from the contributions of certain non-governmental organisations which were present at the hearing which took place on that day, in the presence of the experts of the Network. Still other non-governmental organisations submitted information to the Network for which the Network is particularly grateful.

The opinion addresses first the first and third questions recalled above, as contained in the letter of the European Commission of July 11th, 2005 (II). The second question is then addressed in more detail (III).

II. The legal framework of concordats concluded between States and the Holy See

Referring in particular to the Draft Treaty between the Slovak Republic and the Holy See on the Right to Objection of Conscience, the Commission asks, first, whether such agreements between a State and the Holy See are recognized a primacy above national law, including national constitutions. Before addressing that general question, which is not limited to the situation of the Slovak Republic, it is useful to present the question as it is raised in the context of the Draft Treaty.

1. The Draft Treaty between the Slovak Republic and the Holy See on the Right to Objection of Conscience

On November 24th, 2000, a Basic Concordat was signed between the Holy See and the Slovak Republic (N° 326/2001 Coll.). Under this agreement, the Holy See and the Slovak Republic 'consider themselves to be reciprocally independent and autonomous subjects of international law and will be inspired by these principles in their mutual relations'. The agreement contains a number of provisions

defining the modalities through which the Catholic Church will exercise its missions in the Slovak Republic. Article 7 of the agreement states :

The Slovak Republic recognizes the right of all to obey their conscience according to the doctrinal principles and morals of the Catholic Church. The extent and conditions of the application of this right will be defined by special Accord between the [Holy See and the Slovak Republic].

It is this provision of the Basic Concordat which the Draft Treaty between the Slovak Republic and the Holy See on the Right to Objection of Conscience seeks to implement. The negotiations on this treaty have begun in March 2003. A number of changes have been made to the initial text, with the most recent changes dating from May 2005.¹ If it is approved by the Slovak government, the text of this treaty will be submitted for approval to the Slovak National Council, before ratification by the President of the Slovak Republic pursuant to Article 86(d) of the Constitution of the Slovak Republic. Once ratified, the Treaty would enter into force thirty days after the exchange of the instruments of ratification.

After it will have been ratified, the Draft Treaty will have the status of a treaty under international law. It will therefore bind both Parties to the Treaty, and it can be terminated only agreement of the Parties or upon termination of the Basic Concordat which it implements.² That this is the understanding of the Parties negotiating the Draft Treaty is confirmed by Article 9.

The status of the Draft Treaty under international law is without prejudice of its relationship to the legal order of the Slovak Republic. Article 5 of the Draft Treaty states that

The right to exercise objection of conscience shall be implemented in conformity with the legal system of the Slovak Republic and within its limits. In setting out the scope and manner of exercising the right to objection of conscience, the Slovak Republic shall take care to preserve the essence and the meaning of this right.

However, because the Draft Treaty would be recognized the status of an international human rights treaty, it would take precedence over the laws of the Slovak Republic in accordance with Article 7 paragraphs 4 and 5 of the Slovak Constitution. Although, in the 'Precedence Clause' report appended to the Draft Treaty (Article 7(5) of the Constitution of the Slovak Republic), it is stated the Draft Treaty 'does not contain a direct regulation of rights and/or obligations of natural persons or legal persons', under Article 144(1) of the Slovak Constitution, the courts in Slovakia will be bound by its content, and they might, for instance, release certain health care practitioners from their legal obligations on the basis of the right to conscientious objection clause which the Draft Treaty contains. Under Article 7(5) of the Constitution of the Slovak Republic, the Draft Treaty would not take precedence over the Constitution. However, it cannot be excluded that Article 24 of the Constitution in particular, which guarantees freedom of thought, conscience, religion and belief, will be interpreted according to the terms of the Draft Treaty, if and when this instrument will be in force.

2. The status of international law treaties of concordats concluded between States and the Holy See

The status which, if ratified by the Slovak Republic, the Draft Treaty would be recognized in that Member State, is by no means unusual. There cannot be any doubt as to the fact that the Holy See has the status of a subject of international law, and that it can conclude agreements, which have the status

¹ The text of the Draft Treaty on which the present opinion is based is appended.

² However, the Basic Concordat itself does not contain any clause relating to its termination. It may of course, as all international treaties, be modified or discontinued by reciprocal consent of both parties (Art. 25 of the Basic Concordat).

of treaties, with States.³ Indeed, this is amply confirmed by the international practice of States, which have diplomatic relationships with the Holy See since 1870.⁴ Such concordats are binding on the States parties. They are assimilated to international treaties concluded with States.

The insertion within the internal legal order of concordats concluded by EU Member States with the Holy See operates through variable means. Although it is not the purpose of this opinion to review all Member States with regard to the solution they give to this difficulty, certain specific situations should be highlighted. In certain Member States, international treaties are recognized a primacy above all national laws, including the national Constitution. In the case of **Italy**, this is in practice the status which is recognized to the 1929 Lateran pacts between the Holy See and the State, as Article 7 of the Constitution envisages explicitly that the relationship between the government and the Catholic Church is regulated by those pacts signed in 1929. Amendments to these pacts which are accepted by both parties, however, do not require the procedure of constitutional amendments : such has been the case, in particular, of the Accord between the Republic of Italy and the Holy See of 18 February 1984, which substantially revised the Agreement of 1929.

In other Member States, they are recognized a primacy only above legislation, but not above the Constitution. **France** belongs to this second category of States.⁵ As a result, if concluded with France, a concordat similar to that which may be concluded between the Slovak Republic and the Holy See would only be applicable to the extent that it would be compatible with the principles of equality and of secularism ('laïcité'), as enshrined respectively in Art. 1 of the Déclaration des droits de l'homme et du citoyen (equality)⁶ and in both Art. 10 of this Declaration and in the Preamble of the Constitution of 27 October 1946 (secularism).⁷ It is doubtful that this would indeed be the case, to the extent at least that, as a result of the insertion in a concordat of a clause relating to the right to religious conscientious objection, believers of the Catholic faith would be recognized a broader freedom of religion than believers in other religious faiths. In **Portugal** also, international treaties are not recognized primacy above the Constitution. Similarly in **Spain**, international treaties may only be ratified after an amendment to the Constitution, where an incompatibility is identified by the Constitutional Court (Art. 95 of the Constitution), implying that the Constitution remains the supreme law of the land.

III. The compatibility of concordats containing a provision on the right to religious conscientious objection with the requirements of fundamental rights and Union law

1. General remarks

In its letter of July 11th, 2005, the European Commission asks whether the conclusion of an agreement such as that currently envisaged by the Slovak Republic would create an incompatibility with fundamental rights and the law of the European Union.

The importance of the question – apart from the specific instances which, in the Slovak Republic, have raised the question of religious conscientious objection⁸ – should not be underestimated. In certain

³ P. Dailler and A. Pellet, *Droit international public*, Paris, Librairie Générale de Droit et de Jurisprudence, 1999, p. 452 ; R. Jennings and A. Watts, *Oppenheim's International Law*, 9e éd., Vol. 1, Essex, Longman, 1992, p. 328.

⁴ I. Brownlie, *Principles of Public International Law*, 6e éd., Oxford, Oxford University Press, 2003, p. 64 ; J. Verhoeven, *Droit international public*, Bruxelles, Larcier, 2000, p. 267.

⁵ Art. 55 of the Constitution of 4 October 1958 ('les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par chaque partie').

⁶ See esp. Conseil constitutionnel, déc. n°99-412 DC of 15 June 1999 (on the European Charter on Regional and Minority Languages).

⁷ Art. 1 of the French Constitution states that 'la France est une République indivisible, laïque, démocratique et sociale'.

⁸ In March 2005 media have released the information that a doctor employed in a hospital in the city of Prešov had refused to provide a woman-patient with a medicine causing an abortion appealing to his right of objection of conscience despite the fact there was a serious danger of deformation of the woman's foetus. In July 2003 the President of the National Council of the Slovak Republic (the Slovak Parliament), who is also the chairman of the Christian Democratic Movement (conservative party in the Slovak Government), refused to sign an amendment to the Act no. 73/1986 Coll. on artificial termination of

Member States, a concordat is in force with the Holy See which includes a provision on religious conscientious objection. This is the case in **Italy**, in **Latvia** and in **Portugal**. In these States however, the clause on religious conscientious objection only concerns exemption from armed military service. The agreement applicable in **Italy** only exempted the members of the clergy, deacons and religious leaders from compulsory military service, before the abolishment of compulsory military service in 2005. In **Latvia**, an agreement was concluded on 8 November 2000 and entered into force as a statutory law after its ratification by the Saeima (the Parliament of the Republic of Latvia) on 25 September 2002 (likums «Par Latvijas Republikas un Sv_t_ Kr_sla l_gumu»), but the only provision relating to conscientious religious objection is Article 26 which provides – in line with the Alternative Service Law which is in force since 1 July 2002 – that students of the Major Seminary of Riga and novices of religious congregations shall be exempted from military service and may be assigned to a community service instead. In times of general mobilization, such students and novices will be assigned to operations which do not involve the use of weapons. In **Portugal**, while there was no reference to conscientious objection in the 1940 Concordat, the 2004 Concordat between the Holy See and Portugal refers in Art. 17(4) to the right to conscientious objection only in relation to military service; moreover, this clause has now lost its practical impact, as military service has ceased to be mandatory.

In other Member States, the existing concordats do not include a provision relating to religious conscientious objection. This is the case in **Austria**, where the existing bilateral agreement with the Vatican of 1933 and its later amendments do not refer to the issue of conscientious objection. It is the case also in **Lithuania**, where the agreement ‘Concerning Juridical Aspects of the Relations between the Catholic Church and the State’ passed between the Holy See and the Republic of Lithuania on 5 May 2000 – which seeks to establish the juridical framework of the relationship between the Catholic Church and Lithuania, where there is no State religion – does not explicitly refer to religious conscientious objection.⁹ Similarly in **Luxembourg**, the convention of 1997 between the Government and the Archbishop, replacing the previously existing concordat, contains no provision on the right to religious conscientious objection.¹⁰ In **Malta**, none of the numerous agreements currently in force between the Holy See and Malta or of the protocols to those agreements contain a clause relating to religious conscientious objection – which may be explained, in this case, by the status of the Roman Catholic Apostolic Religion as the religion of Malta,¹¹ and by the fact that the legislation is generally compliant with the prescriptions of that faith : in Malta, for instance, abortion remains a criminal offence ; divorce is unavailable (although the status of a divorced person when one of the spouses is a foreign national or a foreign resident); and marriage is reserved to two persons of a different biological sex. In **Slovenia**, the Agreement Between the Republic of Slovenia and The Holy See On Legal Questions, signed in Ljubljana on 14 December 2001 (Official Gazette RS – International Agreements, No. 4/2004) contains no provision on the right to religious conscientious objection.¹² In **Spain**, three agreements were concluded on 3 January 1979 with the Holy See (BOE, 15.12.1979), succeeding to the Concordat of 1953. These agreements concern respectively the economic relationships between Spain and the Catholic Church, teaching and cultural affairs, and legal affairs. They are silent, however, on the question of religious conscientious objection.

pregnancy as amended [zákon č. 73/1986 Zb. o umelom preru_ení tehotenstva v znení neskor_ích predpisov] approved by the Parliament on 3 July 2003, arguing that the signing of such amendment would be inconsistent with his confession and conscience. The Network is not asked an opinion about such specific instances.

⁹ However, Article 1 of the Agreement mentions (al. 2) that ‘The competent authorities of the Republic of Lithuania and the competent authorities of the Catholic Church shall cooperate in ways acceptable to both Parties on educational, cultural, family and social issues and, in particular, in the field of protecting public morals and human dignity’.

¹⁰ Loi du 10 juillet 1998 portant approbation de la Convention du 31 octobre 1997 entre le Gouvernement, d'une part, et l'Archevêché, d'autre part, portant refixation des cadres du culte catholique et réglant certaines matières connexes, Mém., 20.8.1998.

¹¹ Indeed, under Section 2 of the Constitution of Malta, ‘The authorities of the Roman Catholic Apostolic Church have the duty and the right to teach which principles are right and which are wrong’.

¹² The Slovenian Constitutional Court has reviewed the compatibility of the Agreement with the Constitution, in a preliminary review of a treaty during the proceedings of ratification. In its opinion of 19 November 2003 (Rm-1/02), the Constitutional Court concluded that no incompatibility arose between the Agreement and the Constitution.

In still other Member States (such as, for instance, in the **Czech Republic, Cyprus, Denmark, Estonia, Finland, France, and Greece**), there exists no concordat between the Holy See and the Member State. However, the right to conscientious objection may be recognized in these States in national legislation and benefit either any believer, or specifically members of the clergy. Indeed, as explained hereunder, insofar as it is an implication of the right to freedom of religion, all the EU Member States are to recognize to some extent at least the right to religious conscientious objection, understood as a right not to be obliged to perform certain otherwise compulsory legal duties where such performance would violate one's religious convictions, unless the refusal to perform these duties would lead to a violation of the rights of others.

2. The recognition of the right to religious conscientious objection in the EU Member States

Where it is recognized either under concordats or under constitutional or legislative provisions, conscientious objection – which under these instruments may be invoked either by the members of the clergy alone, or by all persons who thereby seek to manifest their religious beliefs – concerns especially four activities : military service¹³ ; the celebration of weddings, in particular in which one of the persons has divorced from a previous marriage, same-sex marriage or unions such as registered partnerships between two persons of the same sex ; the provision of health services, in particular abortion, euthanasia, artificial fertilisation and medically assisted contraception. This opinion shall not examine the situation of the right to religious conscientious objection with respect to military service in the Member States where military service still is compulsory. Neither will it examine the issue of

¹³ In **Austria**, the right to refuse to perform military service and to opt instead for civilian or community service is guaranteed as a constitutional right in Article 9a para. 3 of the Austrian Constitution and sect. 2 of the Civilian Service Act 1986 (Zivildienstgesetz, BGBl. No. 679/1986 as amended). In **Cyprus**, Article 10 of the Constitution refers to service exacted instead of compulsory military service by conscientious objectors (see also Decision of the Ministerial Council (Number 141) published on 9.11.2001). The right to conscientious objection towards military service on ethical, moral, humanitarian, philosophical, political or religious grounds was further recognized in the *National Guard Law* L. 20/1964 as amended by L. 2/1992. In **Denmark**, see the Consolidated Act on Compulsory Military Service (*Værnepligtsloven, Bekendtgørelse af værnepligtsloven* LBK nr 470, of 17.6.2002), and Consolidated Act on Conscientious Objection to Military Service (*Militærnægterloven, Bekendtgørelse af lov om værnepligtens opfyldelse ved civilt arbejde* LBK nr 1089, of 23.12.1998). In **Germany**, Article 4 para. 3 of the Grundgesetz guarantees that no person shall be compelled against his conscience to perform military service involving the use of arms. In **Hungary**, mandatory military service has been abolished since 1 January 2005 : the Parliament adopted a new act on national defence (Act No. CV of 2004 – 2004. évi CV. Törvény a honvédelemről); prior to this change the right to conscientious objection with respect to armed military service was recognized under Article 70 of the Constitution. In **Italy**, the right to religious conscientious objection has been recognized by the Constitutional Court as a limit of the duty to defend the homeland, which imposed by Article 52 of the Constitution. Moreover, Art. 4 of the 1984 Accord supplementing the Agreement of 1929 envisages a regulation (similar to another already included in the Agreement of 1929) which allows conscientious objection to military service by the clergy and religious Catholics. This Accord, referred to above, was approved and made executive with Law 121 of 25 March 1985, bearing the ratification and execution of the agreement with supplementary protocol signed in Rome on 18 February 1984 which modified the Lateran pact of 11 February 1929 between the Republic of Italy and the Holy See. A similar provision on conscientious objection exists in Art. 6 of the agreement between the Republic of Italy and the Italian Union of Christian Churches of Seventh-Day Adventists, approved and executed with Law 516 of 22 November 1988. Finally, since 1972, the law recognizes conscientious objection to the duty of performing military service and sets forth that conscientious objectors are still obligated to perform civil service according to the regulations under law 230 of 8 July 1998: this alternative civil service falls under a broader national civil service programme, regulated by law 64 of 6 March 2001. However, Military service is no longer obligatory in peace time as of 2005 pursuant to law 226 of 23 August 2004, after the armed forces for national defence were transformed by law 331 of 14 November 2000 into forces comprised in peace time of volunteer personnel. In **Spain**, the right to conscientious objection to military service is recognized in Article 30.2. of the Constitution; however, since compulsory military service has now been abolished, this provision has no reason to be invoked anymore. Similarly in the **Netherlands**, the right to conscientious objection to military service is recognized in Article 99 of the Constitution; however, since compulsory military service has now been abolished, this provision has no reason to be invoked anymore. See also, generally, the Recommendation No. R(87)8 of the Committee of Ministers to the Member States of the Council of Europe regarding conscientious objection to compulsory military service ; Recommendation 1518 (2001), 'Exercise of the right of conscientious objection to military service in Council of Europe Member States', adopted by the Standing Committee, acting on behalf of the Parliamentary Assembly of the Council of Europe, on 23 May 2001 (see Doc. 8809, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Marty); the Resolution on conscientious objection in the Member States of the Community adopted by the European Parliament. Reference can also be made to the Resolution adopted by the Commission on Human Rights on 8 March 1993 concerning conscientious objection to military service (doc. E/CN.4/1993/L.107 of 8 March 1993: 'The role of youth in the promotion and protection of human rights, including the question of conscientious objection to military service').

parents refusing life-saving medical treatment for their child, in particular where this would require blood transfusion, as this is a specific question which the Network considers to be situated beyond the scope of this Opinion. It will be useful however to recall the main provisions which exist in the Member States with regard to the other fields in which religious conscientious objection is recognized. The following are the most significant examples¹⁴ :

- In **Austria**, whereas under Article 97 para. 1 of the Criminal Code voluntary termination of pregnancy is allowed during the first three months of pregnancy without a need for a medical indication (and this is a medical service which, in principle, physicians should perform as part of their obligations as partners of the national health insurance program : see Art. 338 to 342 of the General Social Security Act (*Allgemeines Sozialversicherungsgesetz – ASVG*)), Article 97 para. 2 states that no physician, nurse or paramedic is obliged to perform or to assist in such a voluntary abortion, and Article 97 para. 3 adds that none may be discriminated against on the basis of him or her carrying out an abortion or refusing to do so. A similar exemption exists with respect to artificial and assisted fertilization, which is permitted under Austrian law in certain conditions. According to Article 6 of the Reproductive Medicine Act 1992 (*Fortpflanzungsmedizingesetz, BGBl. No. 275/1992, as amended*), no physician, nurse or paramedic is under a duty to perform or assist in a medically assisted fertilization and he or she must not be discriminated against for carrying out such fertilization or for refusing to take part in it. This presumably also applies to pre-implantation diagnosis (PID), which is a controversial method used in assisted fertilization in order to detect certain disabilities before implanting the fetus.
- In **Belgium**, the right to conscientious objection has been explicitly recognized in the context of abortion and euthanasia. Although the general regulations relating to the medical profession and to the rights of the patient do not allude the right to conscientious objection by medical practitioners, whether in the provision of certain medical services¹⁵ or in the information they must give to the patient,¹⁶ specific clauses were inserted in the legislations which have partly decriminalized abortion in 1990 and euthanasia in 2002. The Law of 3 April 1990 decriminalizing certain aspects of the voluntary interruption of pregnancy¹⁷ lists the conditions under which abortion will be decriminalized (while the general principle of the criminal prohibition is maintained in Article 348 of the Criminal Code). The Law provides explicitly that no medical doctor, nor any nurse or aid to the doctor, will be obliged to take part in the abortion. The Law however imposes on the medical doctor to inform the woman seeking abortion of his or her refusal to perform abortion for reasons of conscience, at the first visit of the patient.¹⁸ The Law of 28 May 2002 decriminalizing euthanasia¹⁹ entered into force on 22 September 2002. This law decriminalizes euthanasia under certain well-defined conditions, which are to be interpreted strictly, as the general prohibition remains in force. The law contains a provision similar to the conscientious objection clause of the Law on abortion, although – apart from his or her obligation to inform the patient immediately of his or her refusal to perform an euthanasia –, the medical doctor also is imposed an obligation to transfer the medical file of the patient to any other medical practitioner designated by either the patient him- or herself or the representative of the

¹⁴ Equally significant, especially considering the context in which the Network has been requested an opinion on the issue of the exercise of the right to religious conscientious objection, is the example of **Poland**. That example is referred to hereunder.

¹⁵ Arrêté royal n° 78 relatif à l'exercice des professions des soins de santé (*Moniteur belge*, 14 .11.1967, errata *Moniteur belge* of 12.06.1968). This regulation has been modified on many occasions since it was initially adopted.

¹⁶ The Law of 22 August 2002 on the rights of the patient does not explicitly state that the medical practitioner consulted may refuse to inform the patient about certain questions (such as, for instance, contraception, or abortion, or euthanasia) on religious or ethical grounds. See Loi du 22 août 2002 relative aux droits du patient (*Moniteur belge*, 26.9.2002), Art. 7 § 1er : 'Le patient a droit, de la part du praticien professionnel, à toutes les informations qui le concernent et peuvent lui être nécessaires pour comprendre son état de santé et son évolution probable'.

¹⁷ *Moniteur belge*, 5.4.1990.

¹⁸ Art. 348, al. 2, 6° of the Penal Code states : 'Aucun médecin, aucun infirmier ou infirmière, aucun auxiliaire médical n'est tenu de concourir à une interruption de grossesse. Le médecin sollicité est tenu d'informer l'intéressée, dès la première visite, de son refus d'intervention'.

¹⁹ *Moniteur belge*, 22.6.2002.

patient.²⁰ It may be added that, in the Law of 10 November 2005 completing the Law of 28 May 2002 with regard to the delivery of euthanizing drugs upon medical prescription,²¹ there is no right to conscientious objection explicitly recognized to the pharmacist. This does not necessarily imply that the individual pharmacist may not refuse to deliver such drugs on religious grounds, although no case-law has recognized this yet. It is notable however that the Law of 10 November 2005 provides that the government shall adopt the measures necessary to ensure the availability of euthanizing drugs.²² This may be seen to suggest that, if a pharmacist refuses to deliver the drugs medically prescribed in the context of a euthanasia, this must not result in the drug becoming unavailable to the patient. This argument remains however speculative, in the absence of further clarifications in the applicable legislation.

- In **Cyprus**, the Medical Profession is regulated by the *Regulations of Conduct of Doctors* that were issued under the *Doctors (Council, Discipline and Pension Fund) Law* of 1967 and 1970. According to Article 8 of the Regulations, a doctor may refuse medical treatment to a patient except in cases of emergency or humanitarian duty; this general provision may be relied upon, in principle, where the motivations for refusing to provide a medical service is religious or ideological.

- In **Denmark**, the Act of Registered Partnership, Section 3 (Lov om registreret partnerskab)²³, provides that registered partnerships may be passed, which have essentially the same legal consequences, with some few exceptions, as traditional different sex marriages.²⁴ However the registered partnership ceremony can only be performed as civil marriage : Church wedding is not an option, not even for religious communities willing to do so. In relation to civil marriage, no right to conscientious objection for the official exists, and therefore he or she cannot as such refuse to perform the wedding ceremony. However, if after the civil ceremony the registered partnership is to receive an ecclesiastical blessing, the priest is not obliged to perform the blessing and can refuse to do so.²⁵ Moreover, according to the Administrative order on weddings in the State Church²⁶, priests are not obliged to marry divorced persons. Furthermore, if it is of the opinion of the priest due to other religious reasons, that he or she is unable to marry a couple, the priest must present the case before the Bishop. The Bishop will decide whether the priest should be exempted or not.

With regard to the provision of health services, according to the Consolidated Act on induced abortion (*Lovbekendtgørelse 2004-06-16 nr. 541 om svangerskabsafbrydelse og fosterreduktion*), Section 10 subparagraph 2, doctors, nurses, midwives and social and health assistants, or students in these

²⁰ Article 14 of the Law of 28 May 2002 states : 'Aucun médecin n'est tenu de pratiquer une euthanasie. Aucune autre personne n'est tenue de participer à une euthanasie. Si le médecin consulté refuse de pratiquer une euthanasie, il est tenu d'en informer en temps utile le patient ou la personne de confiance éventuelle, en en précisant les raisons. Dans le cas où son refus est justifié par une raison médicale, celle-ci est consignée dans le dossier médical du patient. Le médecin qui refuse de donner suite à une requête d'euthanasie est tenu, à la demande du patient ou de la personne de confiance, de communiquer le dossier médical du patient au médecin désigné par ce dernier ou par la personne de confiance'.

²¹ Loi complétant la loi du 28 mai 2002 relative à l'euthanasie par des dispositions concernant le rôle du pharmacien et l'utilisation et la disponibilité des substances euthanasiantes, *Moniteur belge*, 13.12.2005. The euthanizing drug is delivered not directly to the individual patient, but to his or her doctor, who will perform the euthanasia.

²² According to Article 3bis of the Law of 28 May 2002, inserted by the Law of 10 November 2005 : 'Le Roi prend les mesures nécessaires pour assurer la disponibilité des substances euthanasiantes, y compris dans les officines qui sont accessibles au public'.

²³ Lov om registreret partnerskab LOV nr. 372 af 07/06/1989 [The Act of Registered Partnership nr. 372 of 07/06/1989].

²⁴ In addition to the normal rules for marriages the following conditions for registered partnership apply: one of the persons must have permanent address in Denmark and Danish citizenship or, both persons must have had permanent address in Denmark in the two previous years before the registration; citizenship and in the following countries is accepted as being equal to having Danish citizenship: Finland, Norway, Sweden, Iceland and The Netherlands. Moreover, according to Section 4 of the Act including, these exceptions concern in particular : adoption; special rules concerning one part of the marriage based on gender alone; provisions in international treaties regarding marriage require the other contracting parties' consent to also cover same-sex marriage.

²⁵ <http://www.workindk.dk/Parforhold/0/4/0>

²⁶ Bekendtgørelse 1969-12-15 nr. 547 om vielse inden for folkekirken. According to section 16(1) of the Danish Formation and Dissolution of Marriage Act, a church wedding may take place in 1) the Danish National Evangelical Lutheran Church, 2) the recognised religious communities, and 3) other religious communities with clergymen who have been authorised by the Minister for Ecclesiastical Affairs to perform weddings.

professions, for whom it is contrary to their ethic or religious beliefs to perform or assist in induced abortion, can apply for and be granted exemption.

- In **Finland**, although previous case law refused to accommodate the duties of a civil servant or someone else offering a public service on account of his or her religious or moral conviction,²⁷ a more tolerant attitude in respect of conscientious objection has developed since the late 1980s. In a leading textbook on the law on civil servants, published in 1988, support was given to the limited accommodation of a civil servant's duties on account of his or her religious or other convictions. As criteria for when a right of exemption could be granted the authors referred to situations where the task in question was not an essential and permanent part of the civil servant's duties and the rights of others did not require that the civil servant in question (instead of someone else through redistribution of tasks) performed the task.²⁸ Indeed, in the Government Bill for a new chapter II to the Constitution, submitted to Parliament in 1993, the proposed provision on a constitutional right of freedom of conscience and religion in respect of conflicting legal duties was explained as having 'interpretive effect in resolving conflicts between freedom of conscience and various obligations. The provision would generally support such distribution of labour or other administrative arrangements that help to avoid ordering a person to perform professional duties that are in conflict with his or her conscience. However, conflicts between, for instance, the duties of a civil servant and freedom of religion and conscience will need to be assessed case by case. Therefore one cannot derive from the provision a general right for a civil servant to refuse performing one's official duties on account of conscience.'²⁹ The Constitution came to include an explicit provision according to which no one is obliged to participate in the practice of a religion against his or her own conviction.³⁰ This clause is of direct relevance in situations where the old tradition of Lutheranism as state religion is still reflected in the form of religious ceremonies in public institutions, e.g. schools. For instance, a schoolteacher has a right to be exempted from attending such ceremonies.

- In **France**, Art. L.2212-8 of the Code of Public Health (*Code de la santé publique*) allows medical physicians to invoke a 'conscience clause' on the basis of which they may refuse to perform an abortion. However, they are obliged to inform the woman seeking abortion without delay of their intention to invoke the clause. Although this clause also may be invoked by health care practitioners employed in institutions, the heads of services in public health care institutions and those which take part in the provision of public health care services may not invoke the clause in order to oppose the performance of abortions within their service (*Loi n°2001-588 du 4 juillet 2001 relative à l'interruption volontaire de grossesse et à la contraception*).

- In **Germany**, the Constitution guarantees freedom of conscience unconditionally. Pursuant to Article 4 para. 1 Grundgesetz, 'freedom of faith and of conscience ... shall be inviolable'. Accordingly this means that no one can be obliged by State powers to act against his or her conscience. Freedom of conscience is a norm of fundamental value and of high constitutional status, which is to be respected in the framework of every activity of State authorities. This is a continuous jurisprudence of the Federal Constitutional Court and of the Federal Administrative Court³¹.

²⁷ See, e.g., *Supreme Administrative Court 17 January 1977 No. 107* (assistant doctor working at the department of obstetrics and gynaecology of a public city hospital having refused to perform abortions, with reference to religious and ethical convictions : the Supreme Administrative Court upheld the dismissal of the doctor by the city, as it considered that the city had not acted *ultra vires*) ; *Supreme Administrative Court 7 November 1977 No. 4466* (private pharmacist having refused to provide and sell contraceptive pills to customers : the Court confirmed that the pharmacist was obliged to sell contraceptives, although it annulled the decision of the Central Medical Board to cancel the licence of the pharmacist, due to the failure of the Board first to give a clear order to sell the pills in question).

²⁸ Niklas Bruun – Olli Mäenpää – Kaarlo Tuori, *Uusi virkamiesoikeus*, Helsinki 1988, p. 121. The authors referred to an unpublished licentiate thesis by Martin Scheinin (1987) where these and other criteria were discussed as a part of a general theory on resolving conflicts between a person's conscience and legal duties.

²⁹ Government Bill No. 309 of 1993, page 55.

³⁰ Section 11, subsection 2, of the Finnish Constitution (1999).

³¹ See e.g. Federal Administrative Court, judgment of 18 June 1997, BVerwGE 105, 73 <77, 78>.

- In **Hungary**, the Constitutional Court delivered a judgment in 1991 which concerns the duties of medical physicians in relation to legally permitted abortion (judgment 64/1991, (XII.17.) AB határozat). The Court recognized that medical practitioners have a right to religious conscientious objection, however it considered that certain restrictions to the freedom of religion which this right is derived from may be allowed unless they are unreasonable. Specifically, the Court considered that in any employment relationship, the employee may not object to the performance of duties which form a substantive part of the profession. It considered that only non therapeutic abortions – i.e., not medically prescribed – could be considered as not part of the normal activities of a gynaecologist.

- In **Italy**, conscientious objection by health workers in certain medical practices is regulated by Article 9 of Law 194 of 22 May 1978, as to the procedures correlated with voluntary abortion and Article 16 of Law 40 of 19 February 2004 as to medically assisted conception. In both cases, the law provides that the service requested (abortion or conception) can be performed only at certain publicly-run or legally certified clinics and that conscientious objection shall exempt health personnel and allied health personnel from carrying out procedures and activities specifically and necessarily designed to bring about the termination of pregnancy, but shall not exempt them from providing care prior to and following the termination. The above-mentioned law 194/1978 also provides that hospitals and health care clinics are required to ensure that the medical procedures are carried out and pregnancy terminations requested are performed in accordance with standardized procedures. The regions are to supervise and ensure implementation of this requirement, if necessary, by transferring personnel from one institution to another, according to the needs. In any event, the law lays down that conscientious objection may not be invoked by health personnel or allied health personnel if, under the particular circumstances, their personal intervention is essential in order to save the life of a woman in imminent danger.

- In the **Netherlands**, the Commissie Gelijke Behandeling (CGB) – the independent equality body which ensures compliance with the General Equal Treatment Act (Algemene Wet Gelijke Behandeling) – has been confronted with the case of a public servant who, for religious reasons, refused to celebrate a same-sex marriage and whose contract was not renewed on that ground (opinion 2002-25). The CGB arrived at the conclusion that the General Equal Treatment Act had been violated in this case, as other public servants were prepared to celebrate same-sex marriages, so that there were insufficient reasons to refuse to renew the contract of the applicant. The CGB observed in that respect that, in preparing the General Equal Treatment Act, the legislator had acknowledged that conscientious objections on religious grounds do occur and that, in principle, they ought to be respected. The CGB has confirmed this case-law in a case (Opinion 2002-26), and its approach is compatible with its previous opinions in this matter (Opinions 1997-46 and 2000-13).

- In **Portugal**, Article 41 (6) of the Constitution guarantees ‘the right to conscientious objection, as in accordance with the law’. Article 12 of Law n° 16/2001 (Law of Religious Freedom) further specifies this right. It provides :

1. Freedom of conscience includes the right to object to the compliance of laws that contradict the imperative commands of one’s own conscience, within the limits of the rights and duties imposed by the Constitution and under the terms of the law that may regulate the exercise of the conscientious objection.

2. The commands of conscience that are considered as imperative are those whose infringement involves a serious offence to one’s moral integrity and, consequently, make any other behaviour as not mandatory.

3. Conscientious objectors to military service, without excluding those who also invoke a conscientious objection to civil service, have the right to a civil service system, which respects the commands of their conscience, as long as it is compatible with the principle of equality.

Therefore, the right of a medical professional to refuse to perform an abortion if such an act goes against his or her religious or philosophical beliefs, would be based on the Constitution itself.

- In **Spain**, although the Constitution only refers to conscientious objection in the context of military service (Article 30 (2) of the Constitution), this right may be derived from the general protection of freedom of religion under Article 16 of the Constitution. The Organic Law 7/1980 on freedom of religion (*Ley Orgánica 7/1980, de 5 de julio, de libertad religiosa* (BOE del 24 de julio)) does not refer to conscientious objection, but this is without prejudice of the interpretation which could be given to Article 16 of the Constitution, which is to be interpreted in accordance with international and European human rights treaties. Indeed, this has been the conclusion the Constitutional Court arrived at when it examined an action for annulment of the reform of the Penal Code partially decriminalizing the voluntary interruption of pregnancy : although the Decree 2409/1986 of 21 November 1986 on health care centres was silent on this question, the Constitutional Court considered that health care practitioners may invoke Article 16 of the Constitution in order to justify refusing to perform certain operations which would violate their religious beliefs (STC 53/1985, judgment of 26 August 1988). This has been confirmed in later judgments by the same court, delivered on 16 and 23 January 1998. However, the High Courts of the Communities have emphasized that the exercise of this right to conscientious objection by health care practitioners may not endanger the right of the patient to have access to medical services. Thus, the High Court of Castilla-La Mancha (social chambers) insisted in a judgment of 11 June 1999 that the exercise of conscientious objection by a gynaecologist should lead to his replacement by another gynaecologist to perform the operation sought; the High Court of Valencia, in a judgment of 28 May 2003, awarded damages to a woman who gave birth to a child with serious malformations, whose gynaecologist, for reasons of conscience, had not revealed this information, thus not providing the woman concerned with the information which could have led to the decision to interrupt the pregnancy.

A number of decisions have been adopted by the Spanish courts which concern the right to religious conscientious objection in the context of employment relationships. In a judgment concerning a Seventh Day Adventist who refused to work on Saturdays, the Constitutional Court noted that religious conscientious objection may not be invoked in order to modify unilaterally the existing contractual relationships with the employer (STC 19/1985, of 13 February 1985). In another case, the Constitutional Court agreed that schoolteachers may have to comply with the educational doctrine of the institution in which they teach, and may not attack that doctrine in the context of their employment – although, at the same time, the Constitutional Court noted that any disagreement of the teacher with that doctrine would not as such justify his or her dismissal, unless this disagreement is expressed publicly, thus creating an obstacle for the school to the dissemination of its message (STC 47/1985, of 27 May 1985). The Constitutional Court also stated, in another case, that public servants may not always be authorized to invoke their conscientious objection to refuse to fulfil certain duties, as their position is not similar, for instance, to that of medical practitioners (ATC 135/2000, of 8 June 2000).

Moreover, specific legislations adopted by the Autonomous Communities recognize explicitly, in different contexts, the right to conscientious objection, in particular on religious grounds.³² Thus for instance, the Law 1/2003 of 28 January 2003 on the rights and information of the patient in the Community of Valencia (*Ley 1/2003, de 28 de enero, de la Generalitat, de Derechos e Información al Paciente de la Comunidad Valenciana* (DOGV de 31 de enero)), while it recognizes the right for each patient to adopt a ‘life will’ according to which he or she may express the will not to be artificially kept alive in certain circumstances where life-saving medical treatment would have to be delivered, also allows for a conscientious objection clause benefiting health care practitioners (Article 17 (2)), which they may invoke in order not to have to be instrumental in executing that will. However, this provision also provides an obligation for the public administration, where such conscientious objection

³² It may also be noted that the Organic Law 2/1997 on the conscience clause of professional in the information sector (*Ley Orgánica 2/1997, de 19 de junio, reguladora de la cláusula de conciencia de los profesionales de la información* (BOE del 20 de junio)) provides that in that sector, employees may rescind their relationship to the employer where the general orientation or the ideological line of the employer is changed. This legislation aims at protecting the editorial independency of employees in the media sector, while organizing the conciliation between the freedom of expression of the individual employee with that of the employer. However, this provision will typically not be invoked for religious reasons; rather, they concern the philosophical or ideological beliefs of the employee.

is raised, to adopt the necessary measures to ensure that the will of the patient is respected. This implies in practice that another health care practitioner must be available to execute the will of the patient having drafted a 'life will', and that it is the duty of the public administration to ensure this availability. Similarly, the Community of La Rioja adopted the Law 8/1998 on 16 June 1998 on pharmacologists (*Ley 8/1988, de 16 de junio, de ordenación farmacéutica de la Comunidad Autónoma de La Rioja* (BOLR de 20 de junio)), which recognizes the right to conscientious objection of the pharmacologists in the fulfilment of their professional duties, unless the exercise of this right would threaten the health of the patient (Article 5 (10)). The 2000 Statutes of the Professional Order of Pharmacologists in La Rioja, which state that each pharmacologist exercising his or her right to conscientious objection, must ensure that the patient will not thereby be deprived of the assistance he or she requests (Article 38 (10)), should be read in accordance with that law. A similar legislative framework regarding pharmacologists has been adopted by Cantabria, again limiting the right to conscientious objection of pharmacologists to situations where this does not threaten the right of the patients (*Ley de Cantabria 7/2001, de 19 de diciembre, de Ordenación Farmacéutica de Cantabria* (BOC de 27 de diciembre)). Finally, health care practitioners are recognized a right to religious conscientious objection under the Statutes of their Professional Orders, but this right may only be exercised in accordance with the Constitution and the Code of Deontology, implying in particular that its exercise may not threaten the right to health of the patient.

- In the **United Kingdom**, the right to religious conscientious objection is recognized in specific laws adopted in areas where it might be invoked (the same holds true of other Member States, such as e.g. the **Netherlands**). The British Abortion Act 1967 permits doctors and nurses to refuse to participate in terminations but obliges them to provide necessary treatment in an emergency where a woman's life is threatened. Furthermore this exemption has been interpreted as covering only the administration of the treatment so conscience could not be invoked in order to refuse to give advice or perform various participatory steps, including the signing of the certificate required from a medical practitioner before an abortion can occur (*Janaway v. Salford Health Authority*, 1988). Government guidance has indicated that the exemption should apply to ancillary staff involved in the handling of fetuses and fetal tissue and that medical students should be able to opt out of witnessing abortions. It should also be noted that the British Medical Association (the body representing doctors) expects doctors with a conscientious objection to the prescription of contraceptive devices to refer the patient to another doctor willing to do so. It also would expect doctors with a conscientious objection to the withdrawal of treatment on moral rather than clinical grounds to be moved to other duties without being marginalised but there is no specific legal protection for this.

Other examples of the right to conscientious objection being recognized are the Human Fertilisation and Embryology Act 1990, which provides a right of conscientious objection to participation in technological procedures to achieve contraception and pregnancy; the Gender Recognition Act 2004, which provides that an Anglican clergyman or a clerk in Holy Orders of the Church of Wales are not obliged to solemnise the marriage of a person if it is reasonably believed that the person's gender has become the acquired gender under the Act; or the Education Reform Act 1988, which allows the parents of a child at a maintained school (i.e., one receiving funding from the State) to withdraw him or her from its acts of collective worship and from any day exclusively set apart for religious observance by the religious body to which the parents belong.

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The Network has been asked to evaluate the compatibility of such concordats or equivalent provisions in the Member States' national constitutions or legislations, with the requirements of both the international law of human rights and Union law. Although not any violation of international or European human rights law may be seen as justifying a reaction of the Union – nor, indeed, as constituting as such a violation of Union law –, the Member States of the Union are bound by a set of common values, which the Charter of Fundamental Rights of the European Union sets out. The

principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, are common to the Member States (Article 6 (1) TEU), and the European Parliament, in particular, may express its concern at developments within the Member States which create the risk of endangering those principles on which the Union is founded. Nevertheless, this opinion will distinguish between potential difficulties raised under international and European human rights law, and potential incompatibilities of the Draft Treaty with Union law. In Section 3, the applicable principles under international and European human rights law are recalled. Section 4 describes the potential conflicts between Union law and the exercise, in certain circumstances, of the right to religious conscientious objection. Section 5 then illustrates these principles by applying them to the Draft Treaty between the Slovak Republic and the Holy See, the negotiation of which has led the European Parliament, through its Committee on Civil Liberties, Justice and Home Affairs, to request an opinion of the Network on the question of the right to religious conscientious objection in the EU Member States.

3. The applicable principles under international and European human rights law

All the EU Member States are bound by the European Convention on Human Rights, as well as by the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the Convention on the Elimination of All Forms of Discrimination against Women. All these international instruments for the protection of human rights are relevant for an evaluation of the issues raised by the exercise of the right to religious conscientious objection.

3.1. The right to religious conscientious objection as a dimension of freedom of thought, conscience and religion

It is important to recall, first, that the right to religious conscientious objection should be seen as one dimension of the right to freedom of thought, conscience and religion recognized both under Article 9 of the European Convention on Human Rights and under Article 18 of the International Covenant on Civil and Political Rights.³³

Relying on Article 14 of the European Convention on Human Rights (ECHR) in combination with Article 9 of that instrument, the European Court of Human Rights has recognized that where practices based on religious beliefs enter into conflict with certain legally imposed obligations, a State may have to provide the possibility of certain exemptions, the absence of which may lead to a form of indirect discrimination.³⁴ Indeed, although the guarantee in Article 9 ECHR of freedom of thought, conscience and religion primarily protects the inner faith of the individual (the *forum internum*), it also offers a protection to the external manifestations of this inner faith, as it translates into words or acts.³⁵

The Human Rights Committee has derived a similar requirement from Article 18 of the International Covenant on Civil and Political Rights. In its *General Comment No. 22 (1993)* on the right to freedom of thought, conscience and religion (Article 18 of the ICCPR), it noted :

11. Many individuals have claimed the right to refuse to perform military service (conscientious objection) on the basis that such right derives from their freedoms under Article 18. In response to such claims, a growing number of States have in their laws exempted from compulsory military service citizens who genuinely hold religious or other beliefs that forbid the

³³ It cannot be excluded, moreover, that the refusal to allow for religious conscientious objection will be seen as in violation with Article 1 para. 2 of the (revised) European Social Charter, insofar as it imposes a possibly disproportionate restriction on the right of every worker to make a living by freely choosing his employment (see, with respect to the conditions of the choice between an alternative civil service and military service, European Committee on Social Rights, decision on the merits of the collective complaint n°8/2000 *QCEA v. Greece*, 25 April 2001).

³⁴ Eur. Ct. HR, *Thlimmenos v. Greece* judgment of 6 April 2000 (Appl. N° n° 34369/97), § 44.

³⁵ Eur. Comm. HR, *Ahmad v. the United Kingdom*, Appl. N°8160/78, inadmissibility decision of 12 March 1981, DR 22, p. 27 (implicit); Eur. Ct. HR, *Otto-Preminger-Institut v. Austria* judgment of 20 September 1994, Series A n° 295-A, p.17, § 47; Eur. Ct. HR, *Kokkinakis v. Greece* judgment of 25 May 1993 (Series A n°260), § 31.

performance of military service and replaced it with alternative national service. 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. When this right is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service. The Committee invites States parties to report on the conditions under which persons can be exempted from military service on the basis of their rights under Article 18 and on the nature and length of alternative national service.

The Committee derives a right of conscientious objection from Article 18 of the ICCPR, however limiting its conclusion to conscientious objection to military service. The summary records of the drafting process of the General Comment indicate that a reference to a more general right of conscientious objection was discussed but the Committee chose not to express a position in respect of situations other than military service. However it is clear from the discussion within the Human Rights Committee that Article 18 ICCPR includes a more general right to religious conscientious objection.³⁶

3.2. The allowable restrictions to the right to religious conscientious objection

It is clear that the right to religious conscientious objection and the correlative obligation, as described above, to offer reasonable accommodation to the religious beliefs of an individual, are not unlimited.³⁷ Indeed, the right to religious conscientious objection may conflict with other rights, also recognized under international law. In such circumstances, an adequate balance must be struck between these conflicting requirements, which may not lead to one right being sacrificed to another. This is the case even where the right to religious conscientious objection is stipulated in a concordat, which has the status of an international law treaty between the Holy See and a State. Indeed, as a general rule, a State may not ignore its pre-existing international obligations as defined in particular by treaties concluded in the field of human rights by the conclusion, with other Parties, of later treaties affecting its ability to respect, protect and fulfil human rights under its jurisdiction (Article 30 (4) of the Vienna Convention on the Law of Treaties, 23 May 1969). According to the European Court of Human Rights,

³⁶ In the Committee's discussion that took place on 13 July 1993, Mr Wennergren proposed the inclusion of a more general reference to conscientious objection, covering also situations where doctors refuse to perform abortions. He emphasized that his proposal was meant as a request for states to provide the relevant information and did not entail that states would have a legal obligation to grant exemptions (CCPR/C/SR.1237, para. 25). Mr Dimitrijevic, who was the Committee's rapporteur in the project, argued that the more general aspects of matters of conscience were covered by another paragraph of the general comment, namely paragraph 8 which deals with legitimate restrictions. 'If for example a doctor had serious misgivings in following a particular procedure on grounds of conscience, his right to refuse could be restricted, if the Government saw fit, on one of the grounds listed in article 18 (3), i.e. public safety, order, health or morals' (Idem, para. 44). For a general analysis of the genesis of the general comment, see Bahiyih G. Tahzib, *Freedom of Religion or Belief. Ensuring Effective International Legal protection*, Kluwer 1995, esp. pp. 351 and 356-357.

³⁷ In *Kalaç v. Turkey*, where the applicant had been obliged to retire from a position of judge advocate within the armed forces because of his alleged membership of a fundamentalist muslim organisation which cast a doubt as to his ability to continue performing his tasks, the Court did not find Article 9 of the European Convention on Human Rights to be violated. Recalling that freedom to exercise one's religion under that provision 'does not protect every act motivated or inspired by a religion or belief', and that 'In choosing to pursue a military career Mr Kalaç was accepting of his own accord a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of members of the armed forces limitations incapable of being imposed on civilians (see the Engel and Others v. the Netherlands judgment of 8 June 1976, Series A no. 22, p. 24, para. 57)' (para. 28), the European Court of Human Rights held that 'the applicant, within the limits imposed by the requirements of military life, was able to fulfil the obligations which constitute the normal forms through which a Muslim practises his religion' (para. 29) and that the contested measure was 'not based on Group Captain Kalaç's religious opinions and beliefs or the way he had performed his religious duties but on his conduct and attitude' (judgment of 1 July 1997, *Rep.* 1997-IV, p. 1209, at para. 28-31). The precedential value of this judgment is debatable, however, due to the many particularities of the situation of Mr Kalaç. Moreover, the situation which the European Court of Human Rights was presented with in that case cannot be simply described as a case of conscientious objection: the applicant sought not to refuse to perform certain specific duties in order to comply with his religious obligations or in order not to act in violation of his religious beliefs; rather, he sought to remain judge advocate within the military while participating in the activities of what the Turkish authorities considered to be a fundamentalist sect.

a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations.³⁸

The jurisprudence of the Human Rights Committee suggests that the relevant criterion in determining whether exemptions or accommodation for reasons of conscience offered to one group are permissible depends on whether other persons can claim discrimination or other adverse effect in their enjoyment of human rights as a consequence. The case of *Kenneth Riley et al. v. Canada* (Communication No. 1048/2002) was about a complaint by certain retired officers of the Royal Canadian Mounted Police alleging that allowing Sikh officers to wear the turban as part of their RCMP uniform violated the author's rights under ICCPR Articles 3, 9, paragraph 1, 18, 23, paragraphs 3 and 4, 26, and 2, paragraph 1. The Committee took the view that the authors had failed to show how the enjoyment of their rights under the Covenant had been affected by allowing Khalsa Sikh officers to wear religious symbols (paragraph 4.2). Therefore, the authors could not be considered to be 'victims' within the meaning of Article 1 of the Optional Protocol and the complaint was declared inadmissible.

In order to identify how such a balance may be found between the right to religious conscientious objection and other rights protected under international human rights law, it would be necessary to examine separately the different rights which an abusive exercise of the right to religious conscientious objection may threaten. The right to have access to abortion in circumstances where it is lawful to perform an abortion is examined first. The opinion then discusses the other rights which may conflict with the exercise of the right to religious conscientious objection in different contexts. Finally, the content of the requirement of non-discrimination between different religious faiths is recalled.

a) The right to have access to lawful abortion services

In its Conclusions and Recommendations adopted on 15 April 2005, referring to the situation of Poland, the Network expressed its concern at the fact that 'a prohibition on non-therapeutic abortion or the practical unavailability of abortion may in fact have the effect of raising the number of clandestine abortions which are practised, as the women concerned may be tempted to resort to clandestine abortion in the absence of adequate counseling services who may inform them about the different alternatives opened to them' (*Synthesis Report : Conclusions and Recommendations on the situation of fundamental rights in the European Union and its Member States in 2004*, p. 51).

The issue of conscientious objection in the form of medical doctors refusing to perform such lawful abortions was discussed by the Human Rights Committee when examining the periodic report submitted by Poland in October 2004, under the International Covenant on Civil and Political Rights. Polish legislation allows for an abortion to be performed in situations specified in Article 4a of the Act of 7 January 1993 on family planning, human embryo protection and conditions of permissibility of abortion,³⁹ i.e., a) when pregnancy constitutes a threat to life or to the health of the pregnant woman; b) where pre-natal examination or other medical circumstances indicate a probability of heavy, irreversible damage of the embryo or incurable illness threatening the life; or c) where there is justified suspicion that the pregnancy is a result of an illegal act. Information on the refusal by medical doctors to perform abortions even under circumstances where it would be legal was provided to the Committee both by non-governmental organisations and by the state party itself,⁴⁰ which showed to the Committee that the effects of restrictive abortion laws were further aggravated by hospitals and medical doctors often refusing to perform lawful abortions by invoking a clause allowing for conscientious objection. Such an option is provided for under Article 4 of the Polish Code of Medical Ethics⁴¹ and art. 39 of the Act 5 of December 1996⁴² of the Medical Profession. According to Code of

³⁸ Eur. Ct. HR (GC), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim İrketi v. Ireland* (Appl. N° 45036/98), judgment of 30 June 2005, § 153.

³⁹ The Official Journal of 2001, No. 154, item 1792

⁴⁰ CCPR/C/SR.2240 (27 October 2004), para. 37.

⁴¹ Available at the website of the Polish Chamber of Physicians http://www.nil.org.pl/xml/nil/wladze/str_zl/zjazd7/kel

⁴² The Official Journal of 1997, No. 28, item 152

Medical Ethics a doctor, in performing his tasks, should retain the freedom to carry out professional activities in accordance with his conscience and modern medical knowledge. According to the Act of the Medical Profession the doctor may refrain from performing medical assistance because it is contrary to his conscience. The comments and questions by the members of the Committee were not directed towards the conscience clause itself, but addressed the practical consequences for women who were in effect denied a lawful right to abortion.⁴³ This was also the approach reflected in the Concluding Observations adopted after the consideration of the report:

8. The Committee reiterates its deep concern about restrictive abortion laws in Poland, which may incite women to seek unsafe, illegal abortions, with attendant risks to their life and health. It is also concerned at the unavailability of abortion in practice even when the law permits it, for example in cases of pregnancy resulting from rape, and by the lack of information on the use of the conscientious objection clause by medical practitioners who refuse to carry out legal abortions. The Committee further regrets the lack of information on the extent of illegal abortions and their consequences for the women concerned (art. 6).

The State party should liberalize its legislation and practice on abortion. It should provide further information on the use of the conscientious objection clause by doctors, and, so far as possible, on the number of illegal abortions that take place in Poland. These recommendations should be taken into account when the draft Law on Parental Awareness is discussed in Parliament.⁴⁴

According to the information obtained from the Ministry of Health by the Member of the Network for Poland, in 2004, 193 abortions were performed in Poland in accordance with the above-mentioned Act on family planning, human embryo protection and conditions of permissibility of abortion.⁴⁵ Before the Human Rights Committee, the Polish government's representative stated that 50 000 to 70 000 illegal abortions are performed in Poland each year.⁴⁶ Estimates on the extent of the 'abortion underground' presented by the Polish Federation for Woman and Family Planning range higher, between 80 000 to 200 000 illegal abortions performed in Poland each year.⁴⁷ The Polish government's delegation also confirmed to the Human Rights Committee that difficulties have been encountered in Poland in association with the enforcement of the possibility to have an abortion in cases provided for under the legally binding act. According to the Polish authorities, these difficulties are connected in particular with moral factors (first and foremost the Poles' religiousness); political factors (the strong influence of conservative parties linked with the anti-abortion policy propagated by the Catholic Church) and those factors that result from the code of medical ethics, especially the conscientious objection clause, which provides doctors with an opportunity to refuse the performance of an abortion on moral grounds⁴⁸. The Ministry of Justice assured that information concerning the 'abortion underground' and conscientious objection should be ready at the end of September 2005.

Despite the recognition by the Polish Supreme Court of a right to appeal the decision of a medical doctor to deny abortion in circumstances where it would be legal,⁴⁹ non-governmental organisations allege that Polish law still lacks an effective means of appeal against the decisions of doctors refusing to perform an abortion. Moreover, the women themselves are not familiar with the rights they are entitled to. Indeed, this is the background of the case of *Alicja Tysi_c*, currently pending before the

⁴³ Ibid., para. 53 (Ms Chanet).

⁴⁴ CCPR/CO/82/POL

⁴⁵ The figures were 174 and 159 in 2003 and 2002 respectively.

⁴⁶ Abridged minutes from the 2240th session of the Human Rights Committee, Geneva, 27 October 2004.

⁴⁷ The anti-abortion act in Poland, The Functioning, Social Consequences, Attitudes and Behaviors, The Report – September 2000, available at the website: <http://www.federa.org.pl/publikacje/raporty/aborcja2000/index.htm>

⁴⁸ A standpoint developed by the Ministry of Health and the Government Plenipotentiary for the Equal Status of Men and Women.

⁴⁹ In the judgment of 21 November 2003, concerning an appeal against the refusal to perform an abortion, the Supreme Court stated that in cases where the act clearly allows for the performance of an abortion, a woman has the right to have this operation. In the event of an unlawful refusal, she is entitled to financial compensation (Judgment of The Supreme Court of 21 November 2003, No. V CK 16/03)

European Court of Human Rights.⁵⁰ As a result of a refusal to perform an abortion justified by health considerations, the applicant became a category 1 disabled person due to loss of eyesight. She filed an application alleging the violation by Poland of the European Convention on Human Rights due to the lack of an effective means of appeal against the decision of a doctor, who refused to perform an abortion. The case presents the Court with the question of whether a State party to the Convention that allows abortion in certain circumstances in its laws, but fails to adopt effective regulations, procedures and policies to ensure the availability and accessibility of legal services, thereby rendering women's right to abortion ineffective in practice, violates its obligations under Articles 3, 8, 13, and 14 of the European Convention on Human Rights.

The European Court of Human Rights has not identified in the European Convention on Human Rights, as such – without further specification –, a right to seek abortion.⁵¹ In the current state of international human rights law however, the right to seek the interruption of pregnancy must be recognized to women where the continuation of pregnancy would seriously threaten their health.⁵² Indeed, all the EU Member States provide for therapeutic abortion as an exception to the prohibition of abortion. Moreover, there appears to be an emerging consensus that, where the regulation of abortion is too restrictive, and especially where abortion is made criminal in all circumstances or only with too narrow exceptions, the practice of illegal abortions performed in unsafe conditions may threaten the right to life, guaranteed in particular under Article 6 of the International Covenant on Civil and Political Rights.⁵³ Indeed, the UN Committee on Economic, Social and Cultural Rights has expressed its concern over the relationship between high rates of maternal mortality and illegal, unsafe, clandestine abortions, noting that restrictive abortion laws contribute significantly thereto.⁵⁴ This led the Committee to recommend the liberalization of abortion laws in certain States parties to the International Covenant on Economic, Social and Cultural Rights.⁵⁵

Denying to a woman the effective possibility to abort in circumstances where abortion is lawful under the regulations of the State concerned may moreover amount to the infliction of an inhuman and degrading treatment, in the meaning of Article 7 of the International Covenant on Civil and Political Rights. This, which the Human Rights Committee has already recognized on previous occasions,⁵⁶ has

⁵⁰ Appl. N° 5410/03.

⁵¹ Although the European Court of Human Rights has not identified in the European Convention on Human Rights a right to seek abortion, the Court has recognized the need to take into account, in the regulation of abortion, the rights of the pregnant woman, 'as she is the person primarily concerned by the pregnancy and its continuation or termination': see *Boso v. Italy*, App. No. 50490/99 (2002). In this case, the Court rejected the application by a prospective father challenging Italy's abortion law for precluding consideration of the putative father's interests, alleging that the law violated his rights to, *inter alia*, private and family life, and to found a family under the European Convention.

⁵² The Network is grateful to the Center for Reproductive Rights for the documentation it provided on this issue, which was also presented to the European Court of Human Rights in the case of *Tysi_c v. Poland*.

⁵³ See Human Rights Committee, *General Comment No. 28: Equality of rights between men and women (Art. 3)*, 68th Sess., para. 10, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000); see also *Concluding Observation of the Human Rights Committee: Chile*, 65th Sess., 1740th meeting, para. 15, U.N. Doc. CCPR/C/79/Add.104 (1999); *Costa Rica*, 65th Sess., 1751st meeting., para. 11, U.N. Doc. CCPR/C/79/Add.107 (1999); *Guatemala*, 72nd Sess., 1954th mtg., para. 19, U.N. Doc. CCPR/CO/72/GTM (2001); *Mongolia*, 68th Sess., 1835th mtg., para. 8(b), U.N. Doc. CCPR/C/79/Add.120 (2000); *Peru*, 70th Sess., 1892nd meeting., para. 20, U.N. Doc. CCPR/CO/70/PER (2000); *Poland*, 82nd Sess., 2251th meeting, para. 8, U.N. Doc. CCPR/CO/82/POL (2004).

⁵⁴ See e.g., *Concluding Observation of the Committee on Economic, Social and Cultural Rights: Cameroon*, 21st Sess., 54th meeting, para. 25, U.N. Doc. E/C.12/1/Add.40 (1999); *Mexico*, 21st Sess., 54th meeting, para. 29, U.N. Doc. E/C.12/1/Add.41 (1999); *Nepal*, 26th Sess., 55th meeting, para. 32, 55, U.N. Doc. E/C.12/1/Add.66 (2001); *Panama*, 26th Sess., 51st meeting, para. 20, U.N. Doc. E/C.12/1/Add.64 (2001); *Poland*, 18th Sess., 10–12th meeting, para. 12, 20, U.N. Doc. E/C.12/1/Add.26 (1998); *Senegal*, 26th Sess., 53rd meeting, para. 26–27 U.N. Doc. E/C.12/1/Add.62 (2001); *Bolivia*, 25th Sess., 28th meeting, para. 43, U.N. Doc. E/C.12/1/Add.60 (2001).

⁵⁵ See e.g., *Concluding Observation of the Committee on Economic, Social and Cultural Rights: Nepal*, 26th Sess., 55th meeting, para. 33, 55, U.N. Doc. E/C.12/1/Add.66 (2001); *Concluding Observations of the Committee Against Torture: Chile*, 14/06/2004, U.N. Doc. CAT/C/CR/32/5 para. 7(m). See also Committee on the Elimination of Discrimination Against Women, *General Recommendation 24: Women and health*, 20th Sess., para. 14, 22, 31(c), U.N. Doc. A/54/38 (1999).

⁵⁶ See *Concluding Observations of the Human Rights Committee: Ireland*, 69th Sess., 1858th meeting, para. 23–24, U.N. Doc. A/55/40 (2000); *Concluding Observations on Morocco*, 82nd Sess., 2249th meeting, para. 29, U.N. Doc. CCPR/CO/82/MAR (2004); *Concluding Observations on Sri Lanka*, 79th Sess., 2164th meeting, para. 12, U.N. Doc. CCPR/CO/79/LKA (2003).

been confirmed recently in the case of *Karen Llantoy v. Peru*.⁵⁷ The applicant, who was 17 years old at the material time, was denied access to abortion in circumstances where the interruption of pregnancy was lawful under Peruvian law.⁵⁸ The Human Rights Committee took the view that the lack of clear regulations ensuring that the right to have access to abortion will be effectively guaranteed leave women at the mercy of public officials. It concluded that Peru had violated a number of the rights of the Covenant : Article 2, in the absence of effective remedies against the refusal by the director of the public hospital to perform the abortion requested, Article 7, because of the inhuman and degrading nature of the treatment inflicted upon Ms Llantoy, who was in effect forced to carry a fatally impaired fetus to term, Article 17, because of the invasion of her privacy this amounted to, and Article 24, because she was denied the special protection of her rights due to a minor.

The Network also takes into account the *General Recommendation No. 24 (20th session, 1999) (art. 12 : Women and health)* (UN doc. A/54/38/Rev.1), adopted by the UN Committee on the Elimination of Discrimination against Women. This General Recommendation took the view that :

11. Measures to eliminate discrimination against women are considered to be inappropriate if a health care system lacks services to prevent, detect and treat illnesses specific to women. It is discriminatory for a State party to refuse to legally provide for the performance of certain reproductive health services for women. For instance, if health service providers refuse to perform such services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers.

In sum, whether the right to religious conscientious objection is recognized explicitly in a concordat, or whether it is derived from the guarantee of freedom of religion stipulated in international human rights instruments, in the national Constitution or in specific legislation, **this right should be regulated in order to ensure that, in circumstances where abortion is legal, no woman shall be deprived from having effective access to the medical service of abortion. In the view of the Network, this implies that the State concerned must ensure, first, that an effective remedy should be open to challenge any refusal to provide abortion ; second, that an obligation will be imposed on the health care practitioner exercising his or her right to religious conscientious objection to refer the woman seeking abortion to another qualified health care practitioner who will agree to perform the abortion ; third, that another qualified health care practitioner will be indeed available, including in rural areas or in areas which are geographically remote from the centre.** Such a regulation should thus accommodate the right to religious conscientious objection, which is derived from the freedom of religion, while ensuring that the exercise of this right will not lead to others either being deprived of access to certain services in principle available to all in the State concerned, or being treated in a discriminatory fashion.

In this regard, the Network draws the attention of the European Parliament and of the European Commission to the fact that, in a number of European States, a right to review has been recognized to women who are denied the possibility to seek abortion, in conditions which ensure the effectiveness of that right, where it is recognized under national legislation. The Center for Reproductive Rights has provided the European Court of Human Rights with the following comments in the case of *Alicja Tysi_c v. Poland* currently pending before that Court :

12. (...) The establishment of an appeals or review process in countries across Europe reflects a common understanding of the need to protect women's right to legal abortion in situations where a health-care provider denies such a request, including in cases where a woman's health is at risk. Lack of a timely appeals process undermines women's right to have access to reproductive health care, with potentially grave consequences for their life and

⁵⁷ Communication n° 1153/2003, *Karen Noelia Llantoy Huamán v. Peru*, final views of 17 November 2005 (CCPR/C/85/D/1153/2003).

⁵⁸ When Ms Llantoy was fourteen weeks pregnant, the fetus with anencephaly, a fatal anomaly in which the fetus lacks most or all of a forebrain.

health. It also denies women the right to an effective remedy as guaranteed by Article 13 of the European Convention.

13. Most laws and regulations on abortion appeals processes have strict time limits to which such appeals and reviews must be decided, recognizing the inherent time-sensitive nature of abortion procedures and the inability of regular administrative review or legal processes to act in a timely manner. While such time limitations implicitly obligate the medical professional denying the request for abortion to immediately forward documentation to the review or appeals body, some laws have explicit language requiring doctors to do so. Furthermore, in some countries the appeals or review body must inform the woman where the abortion will be performed should her appeal be granted. Where an appeal or review body finds that the conditions for pregnancy have not been met, some laws require written notice to the woman of the decision. In all countries, appeals procedures need not be followed when pregnancy poses a threat to health or life of the pregnant woman. These provisions ensure women access to an effective appeals process and ability to access timely reproductive health care services to which they are legally entitled.

14. The abortion laws of Bulgaria⁵⁹, Croatia⁶⁰, Serbia⁶¹, Slovenia⁶² and the Former Yugoslav Republic of Macedonia⁶³ permit a woman requesting abortion after the prescribed gestational limit for abortion without restriction to appeal a rejection of her request if a dispute is likely to occur over whether the conditions for abortion exist, such as when pregnancy poses a risk to a woman's health. All of these laws create an appeals commission to specifically deal with abortion-related appeals, and require the commission's decisions to be made in a timely fashion, namely within seven to eight days from the filing of the appeal⁶⁴. The Danish abortion law provides for a similar appeals board and process. The board is empowered to hear appeals, *inter alia*, in cases where the woman requesting abortion is beyond the gestational period for abortion without restriction and where pregnancy poses a risk to the woman's health⁶⁵. The board is established by the Ministry of Justice, and appointed members of the board must include a chairman who is a graduate in law⁶⁶.

15. The abortion law in the Czech Republic guarantees a woman's right to request a review of her gynecologist's decision to deny her an abortion during the 'on demand' period for abortion and after, including in cases where health reasons for the abortion are at issue. According to the law, the woman's request must be reviewed by the district specialist in gynecology and obstetrics within two days of its submission⁶⁷. If her request is approved, she must be informed of where the abortion will be performed. If her request is not approved, she

⁵⁹ Abortion is regulated by decree in Bulgaria. Decree No. 2 of 1 February 1990 on the conditions and procedures for the artificial termination of pregnancy (Bulg.).

⁶⁰ Law No. 1252-1978 of 21 April 1978, Act concerning the medical measures for materialization of the right to freely decide on the birth of children, Art. 24 (Croat.).

⁶¹ Law of 30 June 1977, the Act concerning the conditions of and procedures for the termination of pregnancy, Art. 25 (Serb.).

⁶² Law of 20 April 1977 on medical measures to implement the right to a free decision regarding the birth of children, Art. 25 (Slovn.).

⁶³ See UN Abortion Policies: A Global Review, Yugoslavia at 185, available at <http://www.un.org/esa/population/publications/abortion/profiles.htm>.

⁶⁴ Law No. 1252-1978 of 21 April 1978, Act concerning the medical measures for materialization of the right to freely decide on the birth of children, Art. 24 (Croat.); Law of 30 June 1977, the Act concerning the conditions of and procedures for the termination of pregnancy, Art. 25 (Serb.); Law of 20 April 1977 on medical measures to implement the right to a free decision regarding the birth of children, Art. 25 (Slovn.). While an immediate transfer of documentation to the appeals body is implied, Serbia's law explicitly requires this. See also Law of 7 October 1977 (Bosnia and Herzegovina).

⁶⁵ Law No. 350 of 13 June 1973 on the interruption of pregnancy, as amended through Law No. 389 of 14 June 1995, ch. 2, § 4 (Den.).

⁶⁶ Law No. 350 of 13 June 1973 on the interruption of pregnancy, as amended through Law No. 389 of 14 June 1995, ch. 2, §§ 2, 4 (Den.).

⁶⁷ The woman must submit her request to the district specialist in gynecology and obstetrics, who reviews her request in consultation with other gynecologists and, if necessary, medical specialists in other fields.

has the right to a second level of appeal. In the latter case, the woman's documentation must be 'immediately' forwarded to the regional specialist in gynecology and obstetrics and her request reviewed within three days of its submission. If her request is denied, the woman must receive written notification of the decision, but if it is granted, she must be informed of where the abortion will be performed, similar to the process at the first level of appeal⁶⁸. Slovakia's abortion law provides for a similar review process⁶⁹.

16. In some member states, such as Norway and Sweden, a rejected request for an abortion is *automatically* examined by a review body. In Sweden, the National Board of Health and Welfare reviews such decisions; in Norway, a committee is formed by the county medical officer, which also includes the pregnant woman⁷⁰. Finland's abortion law grants a woman the right to appeal directly to the National Board of Health where a physician rejects her request for an abortion, including in cases where pregnancy poses a risk to her health⁷¹.

In the same comments provided to the European Court of Human Rights, the Center for Reproductive Rights argues that the States have a duty to ensure effective access to reproductive health services which may be lawfully provided, including abortion, by ensuring the availability of an adequate number of trained providers to provide services in a timely manner. These comments are appended (Appendix 2) to this opinion.

b) Other fundamental rights

The reasoning presented with regard to access to abortion services in situations where abortion is lawful under the applicable legislation, may be transposed to other situations, where other rights are concerned, whether these rights are recognized under international or European human rights law or whether they are recognized under national law. For instance, although neither euthanasia nor assisted suicide are protected as such under the European Convention on Human Rights⁷² or any other international human rights instrument, in a State where euthanasia or assisted suicide are partially decriminalized, the right to religious conscientious objection, while it should be recognized to the medical doctors asked to perform euthanasia or to assist a person in committing suicide, should not be exercised in a way which leads to depriving any person from the possibility of exercising effectively his or her rights as guaranteed under the applicable legislation⁷³. Similarly, as illustrated in the Netherlands by the case-law of the Equal Treatment Commission, referred to above, although the right to religious conscientious objection may be invoked by an officer refusing to celebrate a marriage between two persons of the same sex or where one of the prospective spouses is a transsexual, it would be unacceptable to allow this to result in marriage being unavailable to the couple concerned : any form of discrimination on the basis of sexual orientation (as would result from the refusal to celebrate a marriage between two persons of the same sex where this institution is recognized), and

⁶⁸ Law No. 66 of 20 October 1986 of the Czech People's Council concerning the artificial termination of pregnancy, Art. 8 (Czech Rep.).

⁶⁹ A woman has the right to request review of the physician's decision to reject termination of pregnancy by the director of the health care institution where she is seeking to undergo an abortion. The director is required to review the request in consultation with other physicians within two days of its submission and is required to inform the woman where the abortion is to be performed should it be approved and if denied, is required to inform the woman in writing. Law on abortion, 23 October 1986, as amended through Law No. 419/1991, ¶ 8 (Slov.).

⁷⁰ Law No. 50 of 13 June 1975 concerning Termination of Pregnancy, as amended 16 June 1978 no.5, § 8 (Nor.); Act to amend the Abortion Act (1974:595), 18 May 1995, § 4 (Swed.). See also Swedish regulations regarding forms to complete for this procedure.

⁷¹ Law No. 239 of 24 March 1970 on the interruption of pregnancy, as amended through Law No. 572 of 24 July 1998, § 6 (Fin.).

⁷² Although the European Court of Human Rights has not excluded that prohibiting a person from being assisted in committing suicide exclude may constitutes an interference with the right of that person to respect for private life as guaranteed under Article 8 § 1 of the Convention, the Court has acknowledged that it is primarily for the States to assess the risk and the likely incidence of abuse if the general prohibition on assisted suicides were relaxed or if exceptions were to be created : see Eur. Ct. HR (4th sect.), *Pretty v. the United Kingdom*, Appl. N° . 2346/02.

⁷³ As illustrated for instance in Spain by Art. 17.3. of the Law 1/2003 of 28 January 2003 on the rights and information of the patient in the Community of Valencia.

any violation of the right to marry of transsexuals, should not be tolerated, and the public authorities should ensure in such circumstances that other officers will be available and willing to celebrate those unions.

As illustrated by the examples mentioned in part III.2. of this Opinion, the right to religious conscientious objection has been frequently referred to in relation to pharmacologists refusing, on religious grounds, to deliver certain pharmaceutical products to their patients, whether or not referred to them by medical doctors. The case-law of the European Court of Human Rights suggests that, where access to contraceptives is legal, women should not be deprived of such access because of the exercise, by health practitioners or pharmacologists, of their right to religious conscientious objection: under this case-law, a State may oblige pharmacologists to sell contraceptives, at least where women would otherwise not have access to contraceptives.⁷⁴ More broadly, a right to have access to counseling and to health care in area of reproductive health has been recognized in international human rights law, and this may be extended to the right to receive education on sexual health matters. Apart from General Recommendation No. 24 adopted in 1999 by the UN Committee on the Elimination of Discrimination against Women – which has been referred to above –, the Network would emphasize that the UN Committee on Economic, Social and Cultural Rights considers that, insofar as Article 12(2)(a) of the International Covenant on Economic, Social and Cultural Rights requires the States parties to take measures ‘for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child’. According to the Committee, this

may be understood as requiring measures to improve child and maternal health, sexual and reproductive health services, including access to family planning, pre- and post-natal care, emergency obstetric services and access to information, as well as to resources necessary to act on that information.⁷⁵

The UN Committee on Economic, Social and Cultural Rights defines ‘reproductive health’ as meaning that ‘women and men have the freedom to decide if and when to reproduce and the right to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice as well as the right of access to appropriate health-care services that will, for example, enable women to go safely through pregnancy and childbirth’. Indeed, the Committee has also stressed the importance of being provided with adequate information in the field of health. In its view, the accessibility of the right to health ‘includes the right to seek, receive and impart information and ideas concerning health issues’.⁷⁶ The Committee emphasized that

The realization of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health.⁷⁷

Under the International Covenant on Economic, Social and Cultural Rights, ‘States should refrain from limiting access to contraceptives and other means of maintaining sexual and reproductive health, from censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information’⁷⁸; indeed, they should ensure ‘that third parties do not limit people's access to health-related information and services’.⁷⁹

⁷⁴ Eur. Ct. HR (3^d section), *Pichon et Sajous v. France* (Appl. n° 49853/99), decision (inadmissibility) of 2 October 2001 (refusal of pharmacologists to deliver medically prescribed contraceptives, and invoking their religious convictions to justify this refusal : the Court considers manifestly ill-founded an allegation that the sanctioning of this attitude is in violation with freedom of religion protected under Article 9 ECHR).

⁷⁵ General Comment N° 14 (2000), The right to the highest attainable standard of health (UN doc. E/C.12/2000/4), para. 14.

⁷⁶ General Comment N° 14 (2000), The right to the highest attainable standard of health (UN doc. E/C.12/2000/4), para. 12.

⁷⁷ Committee on Economic, Social and Cultural Rights, *General Comment N° 14 (2000), The right to the highest attainable standard of health* (UN doc. E/C.12/2000/4), para. 21.

⁷⁸ General Comment N° 14 (2000), The right to the highest attainable standard of health (UN doc. E/C.12/2000/4), para. 34.

⁷⁹ General Comment N° 14 (2000), The right to the highest attainable standard of health (UN doc. E/C.12/2000/4), para. 35.

c) *The requirement of non-discrimination*

At its present stage of development, international and European human rights law does not prohibit a State from affording a particular form of recognition to a certain religious faith. When confronted, in the case of *Darby v. Sweden* (Appl. n° 11581/85), with an application alleging that the obligation to pay taxes with which a religious faith was supported by the State was in violation of Article 9 ECHR, the European Commission on Human Rights said in a report of 9 May 1989 (ex-Art. 31 ECHR) :

45. A State Church system cannot in itself be considered to violate Article 9 of the Convention. In fact, such a system exists in several Contracting States and existed there already when the Convention was drafted and when they became parties to it. However, a State Church system must, in order to satisfy the requirements of Article 9, include specific safeguards for the individual's freedom of religion. In particular, no one may be forced to enter, or be prohibited from leaving, a State Church. (...)

56. (...) The duty to pay general taxes which are not ear-marked for a specific religious purpose cannot, in the Commission's view, be considered to raise any problem in regard to the freedom of religion, even if the State uses money, collected by way of taxes, to support religious communities or religious activities. As regards general taxes there is no direct link between the individual taxpayer and the State's contribution to the religious activities.

A State Church system is therefore in principle compatible with the Convention.⁸⁰ Such a system however must not lead to a situation where the individual would be put under a pressure either to adhere to a particular religious faith, because of the advantages this would entail, or discouraged from changing religion, because of the risk of loss of such advantages. Neither should it result in a form of discrimination against certain religious faiths, either not recognized or recognized under less favourable conditions. According to the Human Rights Committee, 'When this right [to conscientious objection] is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs'.⁸¹ Indeed, in the case of *Aapo Järvinen v. Finland* (Communication No. 295/1988), which related to the allegedly discriminatory length of alternative civilian service compared to the duration of military service, the Human Rights Committee – although it did not find a violation of the non-discrimination clause of Article 26 ICCPR – took note of the fact that the author had not complained of discriminatory treatment between Jehovah's witnesses (who were exempted from both military and alternative service) and other conscientious objectors (paragraph 6.7). Similarly, in *Brinkhof v. The Netherlands* (Communication No. 402/1990) the Committee indicated that the granting of full exemption to Jehovah's witnesses might be problematic in respect of Article 26 if it was substantiated that a conscientious objector was similarly situated as Jehovah's witnesses in that his convictions prevented him from performing both military and alternative service. As this was not substantiated by the author, the Committee found no violation of Article 26.⁸²

⁸⁰ See also the inadmissibility decision adopted by the Eur. Commiss. HR on 22 December 1992, *Iglesia Bautista 'El Salvador' et José Aquilino Ortega Moratilla v. Spain*, Appl. n° 17522/90 (concerning the exemption from taxes of the Catholic Church in Spain, on the basis of a 1979 agreement between the State and the Holy See).

⁸¹ General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18)(1993) (CCPR/C/21/Rev.1/Add.4), para. 11.

⁸² Para. 9.3: "... However, in the instant case, the Committee considers that the author has not shown that his convictions as a pacifist are incompatible with the system of substitute service in the Netherlands or that the privileged treatment accorded to Jehovah's Witnesses adversely affected his rights as a conscientious objector against military service..."

4. The requirements of Union law

4.1. *The right to exercise objection of conscience in employment relationships*

Under Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation,⁸³ the Member States are to prohibit both direct and indirect discrimination based, in particular, on religion or belief, or on sexual orientation, in relation to '(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion; (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience; (c) employment and working conditions, including dismissals and pay; (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations' (Art. 3(1)). There are two exceptions to this general prohibition, however. First, Article 2(5) of the Directive states that it is 'without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others'. Second, Article 4 of the Directive provides for an exception, with regard to occupational requirements:

1. Notwithstanding Article 2(1) and (2) [which define discrimination as prohibited under the Directive], Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 [including religion or belief or sexual orientation] shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

Under Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, therefore, it is acceptable for churches or other religious organisations to require individuals working for them to be of their particular religious faith, but only to the extent that, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement. On the other hand, churches or religious organisations may not require from an

⁸³ OJ L 303 , 2.12.2000, p. 16.

individual working for them, but whose occupation presents no relationship to his or her religion or belief (for instance, a doctor in a catholic hospital), that he or she shares that religion or belief.

The Network would also emphasize that in no circumstance could it be justified for a church or a religious organisation to discriminate against a person on the basis of his or her sexual orientation, whatever the condemnation of homosexuality, on religious grounds, by those organisations. As stated by the last part of the second sentence of Article 4(2), al. 1, cited above, even where it may be justified to consider religion or belief as a genuine occupational requirement, this may not justify discrimination based on another ground. Neither could Article 2(5) of the Directive, also cited above, be relied upon by a church or a religious organisation to justify not employing, or otherwise discriminating in employment and occupation, a person on the basis of his or her sexual orientation, whether that sexual orientation is hidden or not. Although churches may exercise rights such as freedom of religion or freedom of expression – and in that sense, among the ‘rights and freedoms of others’, are the rights of those organisations –, any invocation of freedom of religion or of freedom of expression in order to seek to justify discrimination against homosexuals constitutes an abuse of rights, in the meaning of Article 17 of the European Convention on Human Rights.

The Network takes the view, therefore, that the right to exercise objection of conscience in employment relationships could only be interpreted as implying the right of the representatives of the Catholic church to choose employees in catholic organisations where this may be justified as a genuine and legitimate occupational requirement, taking into account in each individual case the nature of the activities concerned or of the context in which they are carried out. In no circumstance may that provision be interpreted to justify any other form of discrimination prohibited under Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

It may be appropriate to refer in this context to the ‘Diversity and Equality Guidelines’ adopted as a policy statement by the Catholic Bishops' Conference of England and Wales on 7 February 2005. The purpose of these guidelines is to clarify the implications for Catholic organisations of the European Equal Treatment Directives and the legislation implementing those Directives in the United Kingdom legislation. The guidelines read, in relevant part (footnotes omitted) :

4. There will be instances in most Catholic organisations where a particular job carries with it a ‘genuine occupational requirement’ that the post-holder be Catholic. (...) Other posts may require the post-holder to have knowledge of the Catholic Church. In many cases it will be appropriate to require that job applicants should be broadly in sympathy with the vision, mission and values of the organisation.

5. Every applicant and employee has a right to his or her private and family life and all Catholic employers must respect that right. At the same time, Catholic organisations and institutions will have expectations of their employees, and they should state explicitly what these are (eg ‘not to bring the organisation into disrepute’). Candidates for appointment should be fully informed about the expectations of the organisation, and they should be given the chance to discuss these before offers are made either orally or in writing. This is particularly important in relation to leadership and pastoral roles. Any such expectations should, of course, be applied in a consistent and non-discriminatory way, and reference should be made to them in the contract of employment.

6. As employers, subject to limited and narrow exceptions, Catholic organisations must ensure that no job applicant or employee receives less favourable treatment than another on the grounds of race, gender, disability, religion or belief, sexual orientation or age. This is ‘direct discrimination’. Only a person's qualifications and ability to do their job should determine decisions about recruitment, retention and promotion.

7. It is also important to avoid any requirements or conditions being applied to a job which would have the unintended effect of putting some individuals at a disadvantage because of their ethnic origin, gender, disability, religion or belief, sexual orientation or age, unless those conditions or requirements are clearly justifiable. This is 'indirect discrimination'.

The Network would however emphasize that, although the guidelines note in para. 4 that 'in many cases it will be appropriate to require that job applicants should be broadly in sympathy with the vision, mission and values of the organisation', this should not lead to treat less favorably a person because of that person not being a Catholic, except in those exceptional circumstances where this may be seen as a genuine occupational requirement in the meaning of Article 4(1) of Council Directive 2000/78/EC. Moreover, insofar as such a requirement could be seen as difference in treatment based on the opinions of the job applicant on issues such as, e.g., the legitimacy of abortion or the acceptability of homosexuality, it should be recalled that any discrimination on grounds of political opinion should be prohibited, as required by Article 26 of the International Covenant on Civil and Political Rights.⁸⁴ It is to be welcomed in this regard that, in the implementation of Directive 2000/78/EC, a number of Member States have chosen to include political opinion among the prohibited grounds of discrimination (this is the case in France, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Hungary, Italy, Latvia, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovenia, Spain, and the United Kingdom; in Belgium, this prohibition results from the judgment delivered on 6 October 2004 by the Constitutional Court (Court of Arbitration), which considered it discriminatory not to include political opinion and language among the range of grounds protected from discrimination in the Federal Law of 25 February 2003⁸⁵).

4.2. The impact of the right to exercise objection of conscience on access to healthcare services by women

Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ L 373, 21.12.2004, p. 37) lays down a framework for combating discrimination based on sex in access to and supply of goods and services, with a view to putting into effect in the Member States the principle of equal treatment between men and women (art. 1). It imposes on the Member States an obligation, in particular, to prohibit indirect discrimination based on sex (art. 4(1)(b)). This prohibition applies to 'all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context' (art. 3(1)).

⁸⁴ According to this provision, 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

⁸⁵ Judgment n° 157/2004 of the Court of Arbitration, delivered on 6 October 2004, on the actions of annulment lodged against the Law of 25 February 2003 combating discrimination and modifying the Law of 15 February 1993 creating a Centre for Equal Opportunities and Against Racism (*Moniteur belge*, 17.3.2003).

5. The Draft Treaty between the Holy See and the Slovak Republic

The Network has been requested by the Commission to examine the status of the right to religious conscientious objection as guaranteed in agreements concluded by the EU Member States and the Holy See. As recalled in the introduction to this Opinion, this request followed certain fears which were raised by the negotiation between the Holy See and the Slovak Republic of an Agreement on the Right to Exercise Objection of Conscience. It is therefore justified to examine the content of this Draft Treaty in the light to the general principles enunciated above (for the full text of the Draft Treaty, see Appendix I).

5.1. The background

The Draft Treaty contains in particular the following provisions :

Article 2

The Contracting Parties recognise the freedom of conscience regarding human life, human dignity, the meaning of human life, family and marriage, and the right of everyone to freely exercise objection of conscience in relation to these universal human values.

Article 3

- (1) For the purposes of this Treaty, “principles of the teaching of faith and morals” mean the principles proclaimed in the Magisterium of the Catholic Church.
- (2) For the purposes of this Treaty, “objection of conscience” means an objection raised in conformity with the principle of the freedom of conscience according to which anyone may refuse to act in a manner that he deems incompatible in his conscience with the teaching of faith and morals.
- (3) The term “to act” includes participating in an act or any other activity of unspecified duration connected with such act, including assistance.

Article 4

- (1) The right to exercise objection of conscience shall apply to:
 - a) the service in the armed forces or an armed corps, including conscription service;
 - b) performing certain acts in the area of healthcare, in particular acts related to artificial abortion, artificial or assisted fertilisation, experiments with and handling of human organs, human embryos and human sex cells, euthanasia, cloning, sterilisation or contraception;
 - c) activities in the field of education, in particular those relating to Articles 12 and 13 of the Basic Treaty;
 - d) provision of legal services, about law and other employment relationships falling under the scope of this Treaty.
- (2) The Slovak Republic undertakes not to impose an obligation on the hospitals and healthcare facilities founded by the Catholic Church or an organisation thereof to perform artificial abortions, artificial or assisted fertilisations, experiments with or handling of human organs, human embryos or human sex cells, euthanasia, cloning, sterilisations, acts connected with contraception, and not to make the establishment or operation of a hospital or a healthcare facility founded by the Catholic Church or an organisation thereof conditional on the performance of the aforementioned activities.

It should first be noted that a number of improvements have been made to the text of the agreement since the first versions were presented. In particular, the list of activities to which the right to exercise the objection of conscience has been shortened. A previous version of the text included ‘judicial decision-making’ in the list of these activities, with the implication in particular that it would have allowed judges to refuse to pronounce divorces. It also included a reference to ‘acting related to genocide, execution of captives without lawsuit, torture, soldierly cruelty and persecution of defenceless civilian population’. These acts are prohibited under both national and international law, and it was entirely unnecessary to include this in a provision which concerns, rather, acts which are normally prescribed by law but which, for reasons linked to the teaching of faith and morals of the Catholic Church, the obligee is recognized a right to refuse to perform. In previous versions of the Draft Treaty, the list of areas and activities in which the right to exercise the objection of conscience was purely exemplative. Under the current version of Article 4 of the Draft Treaty, the list of activities to which the right to conscientious objection applies is limitative, rather than exemplative.

Previous versions of the Draft Treaty included a provision according to which, where there would be a doubt concerning the content of the teaching of faith and morals of the Catholic Church, such an interpretation would be provided by the competent authority of the Holy See (Article 6(3), in the version of November 5th, 2004). In situations where, in the context for instance of civil liability suits filed against a health practitioner or a hospital by the person who complains of having been denied medical services as a result of the exercise of the right to conscientious objection, such a clause would have been relied upon, the compatibility of such a provision with the requirements of Article 6 § 1 of the European Convention on Human Rights should have been carefully examined : as recalled by the European Court of Human Rights, under Article 6 § 1 of the Convention, the “tribunal” envisaged by that provision ‘must have jurisdiction to examine all questions of fact and law relevant to the dispute before it’⁸⁶.

However, under the current version of the Draft Treaty, Article 7 provides that :

- (1) The Contracting Parties shall resolve contentious issues arising in connection with the interpretation or execution of this Treaty through mutual consultations. The Contracting Parties shall supply information to one another, in particular as regards individual activities falling under the scope of objection of conscience, and information concerning the drafts of generally binding legal acts that have a bearing on objection of conscience.
- (2) The Contracting Parties shall set up a joint commission with an advisory status for the purposes of executing this Treaty. The joint commission shall have a parity composition and include three representatives of each Contracting Party; it will be convened at least twice a year or at any time when so requested by a Contracting Party. The tasks of the joint commission shall include, in particular:
 - a) monitoring the areas and particular activities in respect of which objection of conscience may be invoked,
 - b) submitting comments concerning the drafts of generally binding legal acts and making legislative proposals concerning the right to objection of conscience and preventing its misuse,
 - c) evaluating the implementation of this Treaty, submitting proposals with a view to amending or supplementing this Treaty.

Although the commission envisaged under this provision is said to have a purely advisory status, it should be noted that it would be in violation of the right to equality of arms, as guaranteed in particular

⁸⁶ See on the significance of this requirement for the interpretation of international treaties Eur. Ct. HR, *Beaumartin v. France*, 24 November 1994, Series A no. 296-B; and Eur. Ct. HR (2nd sect.), *Chevrol v. France* (Appl. N° 49636/99) judgment of 13 February 2003 (final on 13 May 2003), §§ 77-79.

under Article 6 § 1 ECHR, either to request from this commission an interpretation of the Draft Treaty in the course of pending judicial proceedings, or to conduct consultations between the Parties (as provided for under Article 7(1) of the Draft Treaty) which could affect the outcome of pending judicial proceedings in which the objection of conscience is invoked.

Part III.3. of this Opinion has recalled the principles applicable to the status of the right of religious conscientious objection in international human rights law, especially in situations of conflict with other fundamental rights. Part III.4. recalled certain relevant provisions of Union law. The following paragraphs apply these requirements to the provisions of the Draft Treaty.⁸⁷

5.2. The scope of the right to religious conscientious objection as provided under the Draft Treaty between the Holy See and the Slovak Republic

Keeping those principles in mind, the most serious threat resulting from the text under discussion concerns its potential impact on the right to have access to certain medical services. The Draft Treaty provides that the right to exercise objection of conscience shall apply, in particular, to ‘performing certain acts in the area of healthcare, in particular acts related to artificial abortion, artificial or assisted fertilisation, experiments with and handling of human organs, human embryos and human sex cells, euthanasia, cloning, sterilisation or contraception’ (Art. 4(1) (b)). Furthermore, under Art. 4(2) of the Draft Treaty, the Slovak Republic would undertake

not to impose an obligation on the hospitals and healthcare facilities founded by the Catholic Church or an organisation thereof to perform artificial abortions, artificial or assisted fertilisations, experiments with or handling of human organs, human embryos or human sex cells, euthanasia, cloning, sterilisations, acts connected with contraception, and not to make the establishment or operation of a hospital or a healthcare facility founded by the Catholic Church or an organisation thereof conditional on the performance of the aforementioned activities.

It cannot be excluded in principle that certain religious organisations be recognized a right not to perform certain activities, where this would conflict with the ethos or belief on which they are founded. Although the reference in this context to ‘religious conscientious objection’ may be inappropriate, as this right is generally considered a right of the individual rather than of an organisation, the idea that Article 4(2) of the Draft Treaty seeks to express is not unknown to either the European Convention on Human Rights⁸⁸ or to European Community law,⁸⁹ both of which recognize that not only individuals, but also organisations, may invoke Article 9 of the European Convention on Human Rights in order to develop their activities in accordance with their specific objective.

However, it is important that the exercise of this right does not conflict with the rights of others, including the right of all women to receive certain medical services or counselling without any

⁸⁷ The opinion will not comment on the right to religious conscientious objection in the military service (art. 4(1)(a) of the Draft Treaty), which is not problematic and, indeed, apart from the status the Draft Treaty will be recognized in the Slovak internal legal order, is already recognized in the Constitution of the Slovak Republic and in Act No. 207/1995 Coll. on Civil Service.

⁸⁸ See Eur. Comm. HR, dec. of 6 September 1989, Appl. n° 12242/86, *M. Rommelfanger v. Federal Republic of Germany*, D.R., 62, p. 151 (catholic hospital adopting sanctions against its employee, a medical doctor who had publicly criticized the position of the Church on the issue of abortion). The precedential value of this inadmissibility decision is questionable, and it cannot be predicted whether the European Court of Human Rights would arrive at the same conclusion if it were presented with the same question today. However, it is clear that churches and religious organisations may invoke Articles 9 and 10 ECHR, which guarantee freedom of religion and freedom of expression, independently of the individual rights of their members. This is established case-law since the decision of the European Commission on Human Rights adopted on 5 May 1979, Appl. n° 7805/77, *Pastor X and Church of Scientology v. Sweden*, D.R., 16, p. 68. See, inter alia, Eur. Ct HR, judgment *Catholic Church of Canea v. Greece* of 16 December 1997, Rep. 1997-VIII, p. 2856, § 31 ; or Eur. Ct. HR, judgment *Cha'are Shalom Ve Tsedek v. France* of 27 June 2000, § 72.

⁸⁹ See, under 4.1. above, the discussion of Article 4(2) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

discrimination. Approximately 70% of the population in the Republic of Slovakia is catholic. There is a risk that the recognition of a right to exercise objection of conscience in the field of reproductive healthcare will make it in practice impossible or very difficult for women to receive advice or treatment in this field, especially in the rural areas. Article 6(2) of the Draft Treaty states that ‘The exercise of objection of conscience must not endanger human life or human health’. It is doubtful however that this will be interpreted to imply the legal liability of health care practitioners which would refuse to counsel women on how to interrupt their pregnancy or on contraceptive devices, where they seek to shield themselves from such liability by invoking Article 4(1)(b) of the Draft Treaty. Indeed, in comparison to this latter clause, the restriction contained in Article 6(2) of the Draft Treaty is vaguely circumscribed, and hardly may be read as imposing an obligation on healthcare providers to provide counselling to women in those circumstances, with the exception perhaps of the situation where the continuation of pregnancy would endanger the life or the health of the woman. The Network notes moreover that the right to exercise conscientious objection in these circumstances is not combined with an obligation to refer the person concerned to another practitioner ; neither is there an obligation imposed on the State to take all the necessary measures to ensure that a woman seeking abortion, in circumstances where it would be lawful, will effectively have access to this service. Such a broad recognition of the right to exercise objection of conscience in the field of reproductive healthcare, without providing for such compensatory measures, goes counter to the international undertakings of the Slovak Republic.

Another potential difficulty relates to the prohibition of discrimination between different religious faiths.⁹⁰ The Network is aware that, under Article 1 para. 1 of the Slovak Constitution, the Slovak Republic is a sovereign, democratic state governed by the rule of law, and that it is a secular state, in the sense that it is not bound to any particular ideology or religion. However, it is not the role of the Network – nor is it the object of the questions addressed to the Network – to examine whether the Draft Treaty would, or would not, be compatible with that provision of the Slovak Constitution. This opinion, rather, seeks to examine whether the particular Draft Treaty under examination would be incompatible with the existing international and European human rights law, which should be taken into account in identifying the principles upon which the European Union is founded (Article 6(1) EU), insofar as it recognizes a privileged position to the Catholic faith in the exercise of the right to exercise objection of conscience.

Although Article 24 of the Slovak Constitution recognizes to all a right to freedom of thought, conscience, religion and belief, the Draft Treaty, if and when it will be ratified, would place the Catholic faith in a specific position by affording a reinforced protection of the right to exercise objection of conscience to the followers of that faith. Indeed, Article 3(2) of the Draft Treaty defines ‘objection of conscience’ as ‘an objection raised in conformity with the principle of the freedom of conscience according to which anyone may refuse to act in a manner that he deems incompatible in his conscience with the teaching of faith and morals’, and the ‘principles of the teaching of faith and morals’ in turn is defined as ‘the principles proclaimed in the Magisterium of the Catholic Church’ (Art. 3(1) of the Draft Treaty). Therefore the exemption on religious grounds from the application of generally applicable laws benefits only those who invoke the Catholic faith.

The Network is aware that the Ministry of Justice of the Slovak Republic has also drafted an Agreement between the Slovak Republic and the Registered Churches and Religious Societies on the right to objection of conscience. The content of this draft Agreement is essentially identical to that of the Draft Treaty. The intent of the Slovak authorities, it would appear, is that the agreement be concluded with the eleven churches registered under the Act no. 308/1991 Coll. on freedom of religious belief and on the status of churches and religious societies as amended [*zákon . 308/1991 o slobode nábo_enskej viery a postavení cirkví a nábo_ensk_ch spolo_ností v znení neskor_ích predpisov*]. That agreement moreover provides that it will be open for accession by other churches and religious societies registered in conformity with the legal system of the Slovak Republic (art. 9(3)).

⁹⁰ On the applicable principles, see above, part III, 3.2., c), of the Opinion.

However, apart from the fact that the procedure which has been followed for the registration of those religious faiths remains open to question,⁹¹ the Network would note that there is still a large group of people whose conscience or moral principles are not governed by the official principles of teaching of faith and morals of either Catholic Church or of any other church or religious society registered in the Slovak Republic. These people, or their right to objection of conscience respectively is, of course, covered neither by the Draft Treaty, nor the Draft Agreement. Furthermore, the conclusion of an agreement, similar in content to the Draft Treaty which is the subject of this opinion, does not per se guarantee full equality between the different religious faiths. Indeed, in contradistinction to the Draft Treaty, the agreement will of course not gain the status of an international human rights treaty and therefore will not take precedence over laws of the Slovak Republic.

The Draft Treaty stipulates that the right to exercise objection of conscience shall apply to ‘labour law and other employment relationships falling under the scope of this Treaty’ (Art. 4(1)(e)). Although the meaning of this final expression (‘falling under the scope of this Treaty’) is not entirely clear, this clause should at the very least be carefully circumscribed according to the limits imposed by Union law, taking into account especially Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

It has been noted above that the Draft Treaty currently under consideration by the Slovak Republic may lead to the State violating its obligations under the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Elimination of All Forms of Discrimination against Women. Insofar as these violations would result from restrictions being imposed to access to counseling in the field of reproductive health and to access to certain medical services, including in particular abortion and contraception, which disproportionately affect women, this would also constitute a violation of the obligations of the Slovak Republic under Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

⁹¹ As mentioned in the *Report on the situation of fundamental rights in the Slovak Republic in 2004* prepared within the EU Network of Independent Experts on Fundamental Rights, the conditions under which churches and religious societies are registered may be considered discriminatory. According to the Act no. 192/1992 Coll. on registration of churches and religious societies [zákon . 192/1992 Zb. o registrácii cirkví a nábo_ensk_ch spo_lo_ností], the church or religious society may submit a request to be registered to the Ministry of Culture only if it proves that it has a support of at least twenty thousand adult persons who are permanently residing on the territory of the Slovak Republic. On the basis of the Act no. 308/1991 Coll on the freedom of religious belief and on the status of churches and religious societies as amended, 14 churches which had existed and been recognised at the time of adoption of this law, were registered *ex lege* and they did not have to meet the threshold of twenty thousand adherents. In fact, under the census of 2001, ten of fifteen churches and religious societies registered at that time were supported by less than 10,000 residents (including minors), and seven of them could not claim support of more than 5,000 residents. In July 2004 the Prosecutor General challenged the compatibility of several provisions of mentioned laws with the Slovak Constitution and the European Convention of Human Rights (Article 9) at the Constitutional Court, arguing essentially that the State by prescribing the census for registration of churches and religious societies discriminates citizens who are affiliated with churches and religious societies which have not been registered. The Constitutional Court has already admitted the motion for further proceeding and assigned the motion with Ref. no. PL. ÚS 7/05. The Constitutional Court has not made a decision on that motion as yet.

(DRAFT) TREATY

between the Slovak Republic and the Holy See on the Right to Objection of Conscience

The Slovak Republic and the Holy See,

Recognising the freedom of conscience in the protection and promotion of values intrinsic to the meaning of human life,

Emphasising this recognition in relation to the freedom of thought and freedom of religion,

Recognising human life, human dignity, meaning of human life, family and marriage as the highest universal values, which are at the source of common good and, as such, must be protected from loss or injury and from impediments to their development and generational handing down,

Declaring the will to protect the right to human life, human dignity, human physical integrity, human biological and psychological identity, family and marriage, invoking the commitments given in the Basic Treaty between the Slovak Republic and the Holy See, signed in the Vatican on 24 November 2000 (hereinafter the "Basic Treaty"),

and

the Slovak Republic, applying the Constitution of the Slovak Republic, and the Holy See, applying the teaching of faith and morals of the Catholic Church,

have agreed as follows:

Article 1

The Slovak Republic and the Holy See (hereafter "Contracting Parties") conclude this Treaty with the aim to set out the scope and terms of exercising the right to objection of conscience in conformity with Article 7 of the Basic Treaty.

Article 2

The Contracting Parties recognise the freedom of conscience regarding human life, human dignity, the meaning of human life, family and marriage, and the right of everyone to freely exercise objection of conscience in relation to these universal human values.

Article 3

- (4) For the purposes of this Treaty, "principles of the teaching of faith and morals" mean the principles proclaimed in the Magisterium of the Catholic Church.
- (5) For the purposes of this Treaty, "objection of conscience" means an objection raised in conformity with the principle of the freedom of conscience according to which anyone may refuse to act in a manner that he deems incompatible in his conscience with the teaching of faith and morals.

- (6) The term “to act” includes participating in an act or any other activity of unspecified duration connected with such act, including assistance.

Article 4

- (1) The right to exercise objection of conscience shall apply to:
- e) the service in the armed forces or an armed corps, including conscription service,
 - f) performing certain acts in the area of healthcare, in particular acts related to artificial abortion, artificial or assisted fertilisation, experiments with and handling of human organs, human embryos and human sex cells, euthanasia, cloning, sterilisation or contraception,
 - g) activities in the field of education, in particular those relating to Articles 12 and 13 of the Basic Treaty,
 - h) provision of legal services,
 - i) labour law and other employment relationships falling under the scope of this Treaty.
- (2) The Slovak Republic undertakes not to impose an obligation on the hospitals and healthcare facilities founded by the Catholic Church or an organisation thereof to perform artificial abortions, artificial or assisted fertilisations, experiments with or handling of human organs, human embryos or human sex cells, euthanasia, cloning, sterilisations, acts connected with contraception, and not to make the establishment or operation of a hospital or a healthcare facility founded by the Catholic Church or an organisation thereof conditional on the performance of the aforementioned activities.

Article 5

The right to exercise objection of conscience shall be implemented in conformity with the legal system of the Slovak Republic and within its limits. In setting out the scope and manner of exercising the right to objection of conscience, the Slovak Republic shall take care to preserve the essence and the meaning of this right.

Article 6

- (1) The exercise of objection of conscience shall not entail legal liability of the person who has exercised that right.
- (2) The right to invoke objection of conscience shall not be exercised in a manner leading to the misuse of that right. The misuse of the right to objection of conscience shall not entail protection from legal liability. The exercise of objection of conscience must not endanger human life or human health.

Article 7

- (1) The Contracting Parties shall resolve contentious issues arising in connection with the interpretation or execution of this Treaty through mutual consultations. The Contracting Parties shall supply information to one another, in particular as regards individual activities falling under the scope of objection of conscience, and information concerning the drafts of generally binding legal acts that have a bearing on objection of conscience.
- (2) The Contracting Parties shall set up a joint commission with an advisory status for the purposes of executing this Treaty. The joint commission shall have a parity composition and include three representatives of each Contracting Party; it will be convened at least twice a year or at any time when so requested by a Contracting Party. The tasks of the joint commission shall include, in particular:

- d) monitoring the areas and particular activities in respect of which objection of conscience may be invoked,
- e) submitting comments concerning the drafts of generally binding legal acts and making legislative proposals concerning the right to objection of conscience and preventing its misuse,
- f) evaluating the implementation of this Treaty,
- g) submitting proposals with a view to amending or supplementing this Treaty.

Article 8

The present Treaty can be changed and amended to include the facts that are not covered by the Treaty through written agreement of the Contracting Parties.

Article 9

This Treaty is concluded for an unlimited period and shall be terminated by agreement of the Contracting Parties or upon the termination of the Basic Treaty.

Article 10

This treaty shall be subject to ratification and shall enter into force as from the thirtieth day date from the date of exchange of the instruments of ratification.

Done in.....on..... in two original copies, each in the Slovak and the Italian languages, both texts being equally authentic.

For the Slovak Republic:

For the Holy See:

In the European Court of Human Rights

(Application No. 5410/03)

Between

Tysi_c Applicant

and

Poland Respondent

Written Comments

by

Center for Reproductive Rights

Pursuant to Rule 44, § 2 and § 4 of the Rules of the Court

21 September 2005

EXCERPT

(...)

2. States ensure access to legal abortion services by ensuring the adequate availability of providers willing and able to perform abortion services.

17. The duty of states to ensure access to services provided for by law necessarily entails ensuring the availability of an adequate number of trained providers to provide services in a timely manner.ⁱ In Finland, for example, physicians may not refuse to consider a request for termination of pregnancy.ⁱⁱ In circumstances where the government medical board observes that there are an insufficient number of physicians or facilities in some parts of the country “on account of long distances, a shortage of physicians or hospitals, or other reasons of this nature,” the law entitles women to submit their requests directly to the board itself.ⁱⁱⁱ In France, where women have had the right to abortion since 1975, subsequent abortion legislation has been adopted to improve women’s access to services. Decrees from 1980 and 1988 required regional and general hospital centers to have facilities to provide abortion, and then added public hospital establishments with surgical or obstetric units to the list.^{iv} To ensure the quality of women’s reproductive health services, both France and Denmark require that women have local access to at least one hospital with the capacity to perform abortions.^v

18. Clinical guidelines issued in 2004 by the Royal College of Obstetricians and Gynecologists (RCOG) in the United Kingdom for the care of women seeking abortion on physical or mental health grounds^{vi} view induced abortion as a health-care need and call upon health authorities to accept responsibility for the abortions needed by women residing in their districts.^{vii}

a. States regulate the practice of conscientious objection to ensure the adequate availability of legal abortion services and information.

19. The availability of providers for reproductive health services, especially abortion, is specifically impacted by the practice of conscientious objection. While many member states exempt health-care providers from performing procedures to which they conscientiously object, including abortion, some have regulated the practice to ensure that women nonetheless have access to services to

which they are legally entitled. Regulations on conscientious objection shield providers from liability for refusing to provide services, but they also impose certain obligations on providers in order to ensure that patients receive the medical care they need and are legally entitled to receive.

20. Poland's lack of a comprehensive and effective legal and policy framework governing the practice of conscientious objection^{viii} by health-care providers to ensure that women are able to access legal abortions is inconsistent with measures taken by other member states, as well as international standards. The absence of such regulation in Poland means that women today are generally unable to access abortion even when the conditions for termination of pregnancy have been satisfied,^{ix} undermining their rights to access reproductive health care services and to privacy among others, and constituting a breach of the duty of care and abandonment of patients.^x

(i) Legislation and jurisprudence of member states

21. Conscientious objection clauses are found either in a country's abortion law, the general public health law, regulations or deontology codes (ethics codes).^{xi} In most member states, health-care providers who refuse to perform services on grounds of conscience are legally obligated at a minimum to give notice to patients of their position and refer patients to health-care providers willing and able to perform the refused service(s). Through interpretation or explicit caveats in the law, such clauses apply only to *actual performance* of procedures; they do not justify the refusal of an appropriate referral. In all member states, health-care providers are prevented from refusing to provide services when patients require emergency care, such as when their lives or health are at risk. Some member states also have oversight mechanisms that facilitate women's access to legal health-care services by requiring conscientious objectors to report their position to their employer health-care institution, and health-care institutions to ensure the availability of competent and willing providers to perform services.

22. In addition, decisions by various national-level European courts have articulated and further defined the practice of conscientious objection in the context of abortion. All of these decisions are guided by the principle that states and public institutions have a positive obligation to ensure that women are able to access health-care services provided for by law.

- *Ensuring adequate availability of abortion providers*

23. Norway's abortion law guarantees that a woman can obtain an abortion at anytime by requiring that medical services are organized to take into account health personnel who conscientiously object to abortion.^{xii} Regulations on conscientious objection require health-care providers to give written notice to their employer hospital if they refuse to assist with an abortion and those hospitals, in turn, to report to government authorities.^{xiii} If requested, persons applying for hospital employment must give notice of their conscientious objection to performing or assisting in abortion procedures.^{xiv} Furthermore, in employment advertisements, hospitals may require as a condition for employment that hired health-care personnel be willing to perform or assist in abortion procedures.^{xv} As the abortion law states, these provisions are in place to ensure the availability of an adequate number of providers so that women are able to exercise their right to abortion.^{xvi}

24. Italy's abortion law requires health-care institutions to ensure that women have access to abortion. Specifically, regional health-care bodies are required to supervise and ensure such access, which may include transfer of health-care personnel to guarantee access to abortion.^{xvii} In accordance with this requirement, the law mandates health-care personnel to submit a written declaration of their conscientious objection to abortion to the medical director of their employer health-care institution and to the regional medical officer. Similarly, Portugal's Ministry of Health regulation on termination of pregnancy requires health-care institutions to adopt measures and cooperate with other health-care professionals and institutions to ensure women's access to abortion in cases where abortions are unobtainable because of conscientious objection.^{xviii}

25. A 1990 decision by the Bavarian High Administrative Court^{xix} in Germany, which was upheld by the Federal Administrative Court of Germany,^{xx} ruled that a municipality's job advertisement for a chief physician in a municipal women's hospital, which included a requirement that the physician be willing to perform abortions, was not in violation of a law providing that no one is obligated to perform abortions. The court referred to the need to provide abortions in public hospitals and took into consideration that private hospitals may not be willing to provide abortions due to religious or moral reasons. It emphasized that public hospitals must enable women to realize their entitlement to abortion under the law and, thus, the criteria for the job was deemed permissible.^{xxi}

26. Guidelines on the appointment of doctors to hospital posts issued by the United Kingdom National Health Services recommend that termination of pregnancy duties should be a feature of the job when adequate services for termination of pregnancy "would not otherwise be available," the job description should be explicit about termination of pregnancy duties, and applicants should be "prepared to carry out the full range of duties which they might be required to perform if appointed," including duties related to termination of pregnancy.^{xxii} The British Medical Association (BMA) has recommended that conscientious objectors' position be disclosed to supervisors, managers or partners at as early a stage in employment as possible to ensure the availability of an adequate number of providers to perform abortions.^{xxiii}

- *Conscientious objection applies only to actual performance of services and to objections by individuals, not institutions*

27. In most legal systems, only professionals who would otherwise have a legal duty to perform services directly on patients may invoke conscience clauses. Such individuals have the burden of proving the good faith of their objection. Hospital service staff, however, cannot refuse to provide routine general services on the basis of conscientious objection to the medical service the patient receives.^{xxiv} Likewise, conscientious objection clauses in Council of Europe member states either explicitly state that they apply only to health-care personnel involved in the *actual performance* of procedures and do not justify the refusal of an appropriate referral (see discussion on referral below), or have been interpreted as such. For example, Norway's regulations implementing the abortion law expressly provide that the right to refuse to assist in an abortion belongs only to personnel who perform or assist the actual procedure, not to staff providing services, care or treatment to the woman before or after the procedure.^{xxv} Italy's abortion law does not exempt health-care personnel from providing pre and post-abortion care.^{xxvi}

28. The scope of the conscientious objection clause in the United Kingdom's abortion law was clarified by House of Lords decision in 1988, which made clear that the clause applies only to participation in treatment.^{xxvii} The case involved a doctor's secretary who objected to signing an abortion referral letter on grounds of conscience. The House of Lords held that such an act did not constitute part of the treatment for abortion and, thus, was not covered by the conscientious objection clause of the abortion law. The decision supports the proposition that doctors cannot claim exemption from giving advice or performing the preparatory steps to arrange an abortion if the request for abortion meets legal requirements.^{xxviii}

29. The refusal of public institutions to provide select services on grounds of conscientious objection constitutes a governmental failure in ensuring the availability and accessibility of reproductive health services. Such institutions, as state entities, have a duty to provide legal health services to the public. In a 2001 decision of the French Constitutional Council, the Council recognized that conscientious objection is a right afforded to individuals, not institutions, and upheld the repeal of paragraphs in the Code of Public Health, removing the possibility that department heads of public health establishments could refuse to allow the provision of abortion services in their departments.^{xxix} The case was brought by senators who claimed in part that the repeal of these provisions violated the principle of freedom of conscience protected by the Constitution.^{xxx} While the Constitutional Council recognized the fundamental nature of the freedom of conscience, it also clarified that such freedom was that of *individual*, not institutional or departmental, conscience "...which cannot be exerted at the

expense of that of other doctors and medical staff working in his service.”^{xxxvi} The Council also provided that “... these provisions [of the Health Code] contribute in addition to respect for the constitutional principle of the equality of users before the law and before the public service.”^{xxxvii}

- *Timely notice to patients and duty to refer*

30. Dutch and French laws place a legal obligation on health-care professionals and physicians, respectively, to immediately communicate to a pregnant woman their refusal to perform an abortion.^{xxxviii} In France, doctors who conscientiously object also have a legal duty to the woman seeking abortion to “give her the name of experts to perform the procedure.”^{xxxix}

31. Guidelines issued by the BMA^{xxxv} and RCOG, which have informed the implementation and judicial interpretation^{xxxvi} of the conscientious objection provisions of the 1967 Abortion Act, obligate physicians who conscientiously object to providing abortion services to take preparatory steps to arrange for an abortion and provide referrals to another doctor without delay.^{xxxvii} The BMA guidelines explicitly provide that “[i]t is not sufficient simply to tell the patient to seek a view elsewhere since other doctors may not agree to see her without appropriate referral.”^{xxxviii} RCOG has issued recommended referral times to abortion services.^{xxxix} In addition, the UK National Health Service guidelines, which are issued to provide guidance to practitioners, note that all doctors who conscientiously object to “recommending termination should quickly refer a woman who seeks their advice about a termination to a different GP ... If doctors fail to do so, they could be alleged to be in breach of their terms of service.”^{xl}

- *Duty to maintain standards of care*

32. Under the established medical doctrine of informed consent, patients must be informed of all risks, benefits and alternatives to treatment in order to make informed and voluntary decisions in their best interest.^{xli} In 2003, the High Court of Justice Queens Bench Division found a doctor negligent for failing to properly counsel – in part because of his religious beliefs – his patient on her increased risk of giving birth to a baby with Down’s Syndrome and the availability of prenatal screenings for such abnormalities.^{xlii} The doctor, a devout Catholic, noted that he did not routinely and explicitly discuss screening for abnormalities with every pregnant woman. He testified that he thought pregnancy was a happy event and would want to “soothe, not alarm patients,” but that he expected he would have told someone of the plaintiff’s age that she was “at a slightly raised risk” for fetal abnormalities.^{xliii} The court noted that “[o]n his own account Dr. Kwun’s approach to the subject [of informing patients about screening for abnormalities] was coloured by his belief in Roman Catholic doctrine.”^{xliiv} The court ultimately found that if the doctor had used the phrase “slightly raised risk,” as the doctor testified, “it would have been seriously misleading,” considering that experts testified that the risk for fetal abnormalities increases significantly at the plaintiff’s age.^{xliv}

(...)

ⁱ See generally CEDAW Committee General Recommendation 24, *supra* note 13, ¶¶ 21, 23; CESCR General Comment 14, *supra* note 13, ¶¶ 35, 36.

ⁱⁱ Law No. 239 of Mar. 24, 1970 on the interruption of pregnancy, as amended through Law No. 572 of 24 July 1998, § 6 (Fin.).

ⁱⁱⁱ Ordinance No. 359 of May 29, 1970 on the interruption of pregnancy, § 5 (Fin.).

^{iv} Decree No. 80-285 of Apr. 17, 1980 and Decree No. 88-59 of Jan. 18, 1988 (Fr.), in UN Abortion Policies: A Global Review, France at 151, available at <http://www.un.org/esa/population/publications/abortion/profiles.htm>.

^v See Anika Rahman et al., *A Global Review of Laws on Induced Abortion, 1985-1997*, 24 Int’l Fam. Plan. Persp. 56, 62 (1998). See also 2409/ 1986, of 21 November, about authorized health centers and preceptive medical reports for the termination of pregnancy, (B.O.E., 1986, n. 281), Art. 5 (Spain) (providing that the health authority in each Autonomous Community is responsible for assuring the availability of necessary services, including access to emergency diagnostic techniques needed for abortion to be performed within the established time limits).

^{vi} Royal College of Obstetricians and Gynecologists, *The Care of Women Requesting Induced Abortion, Evidence-based Clinical Guideline Number 7*, § 1.1, at 1 (Sept. 2004) [hereinafter RCOG Guideline].

^{vii} *Id.* at 2.

- ^{viii} Conscientious objection: the refusal by individuals or entities to provide or cover certain health services based on religious or moral objections. Reproductive Freedom Project, Religious Refusals and Reproductive Rights 6 (2002).
- ^{ix} Federation for Women and Family Planning, The Anti-Abortion Law in Poland: The Report - September 2000, *available at* <http://www.federa.org.pl/english/reports/report00/index.htm>. *See also* Federation for Women and Family Planning, Independent Report Submitted to the UN Human Rights Committee, September 2004, *available at* http://www.federa.org.pl/english/report_indep.htm. Polish health care providers may or may not explicitly object based on conscientious objection but it is clear from their actions or their language that issues of religion or morality guide this decision. In addition in Poland, whole public health care institutions have refused to conduct such services, rendering women unable to effectively exercise this right. *Id.*
- ^x *See* Rebecca J. Cook & Bernard M. Dickens, *Considerations for Formulating Reproductive Health Laws*, at 34, Doc. WHO/RHR/00.1 (2000), *available at* http://www.who.int/reproductive-health/publications/rhr_00_1/considerations_for_formulating_reproductive_health_laws.pdf.
- ^{xi} Deontology or medical ethics codes, while not legally binding, are highly persuasive authority since the development of deontology codes are mandated by public health laws. Often times they are used by national courts as persuasive authority.
- ^{xii} Law No. 50 of 13 June 1975 concerning Termination of Pregnancy, as amended 16 June 1978 no. 5, § 14 (Nor.).
- ^{xiii} Regulations for the Implementation of the Act dated 13 June 1995 no. 50 concerning Termination of Pregnancy, with Amendments in the Act dated 16 June 1978 no. 66, cf. § 12 of the Act, laid down by Royal Decree, 1 December 1978, § 20 (Nor.). *See also* Slovenia Health Services Act, *available at* <http://www.consciencelaws.org/Conscience-Laws-Slovenia/Conscience-Laws-Slovenia-01.html>. The act allows for conscientious objection in accordance with international rules on the practice. It requires health-care workers to report their conscientious objection to their employer institution, and the institution to ensure that patients' rights to health care are accessible "without disruption." *Id.*, Art. 56.
- ^{xiv} Regulations for the Implementation of the Act dated 13 June 1995 no. 50 concerning Termination of Pregnancy, with Amendments in the Act dated 16 June 1978 no. 66, cf. § 12 of the Act, laid down by Royal Decree, 1 December 1978, § 20 (Nor.).
- ^{xv} *Id.* § 20.
- ^{xvi} Law No. 50 of 13 June 1975 concerning Termination of Pregnancy, as amended 16 June 1978 no. 5, § 14 (Nor.).
- ^{xvii} Law No. 194 of 22 May 1978 on the social protection of motherhood and the voluntary termination of pregnancy, *Gazzetta Ufficiale della Repubblica Italiana*, Part I, 22 May 1978, No. 140, pp. 3642-46, § 9 (Italy).
- ^{xviii} Ministry of Health Order No. 189/98 of 21 March 1998, *Diário da República*, Series I-B, No. 68, p. 1247 (Port.). "This Order establishes measures to be adopted in official health establishments with obstetric services for the termination of pregnancy under the circumstances provided for in Article 142 of the Penal Code," *summarized in Annual Review of Population Law*, *available at* <http://annualreview.law.harvard.edu/population/abortion/PORTUGAL.abo.htm>.
- ^{xix} Judgment of the Bavarian Higher Administrative Court of 03/07/1990, BayVGH DVB1. 1990, 880-82 (F.R.G.).
- ^{xx} Judgment of the Federal Administrative Court of 12/13/1991, BVerwGE 89, 260-70 (F.R.G.).
- ^{xxi} Judgment of the Bavarian Higher Administrative Court of 03/07/1990, BayVGH DVB1. 1990, 880-82 (F.R.G.).
- ^{xxii} NHS Guidelines Appointment of doctors to hospital posts: termination of pregnancy, NHS Executive HSG (94)39, 14 September 1994 (U.K.).
- ^{xxiii} British Medical Association, *Contraception, abortion, and birth, in Medical Ethics Today the BMA's Handbook of Ethics and Law* 248-50 (2d ed. 2004) [hereinafter *BMA's Handbook of Ethics and Law*].
- ^{xxiv} *See* Cook & Dickens, *supra* note 47, at 33.
- ^{xxv} Regulations for the Implementation of the Act dated 13 June 1995 no. 50 concerning Termination of Pregnancy, with Amendments in the Act dated 16 June 1978 no. 66, cf. § 12 of the Act, laid down by Royal Decree, 1 December 1978, § 20 (Nor.).
- ^{xxvi} Law No. 194 of 22 May 1978 on the social protection of motherhood and the voluntary termination of pregnancy, *Gazzetta Ufficiale della Repubblica Italiana*, Part I, 2 May 1978, No. 140, pp. 3642-46, § 9 (Italy).
- ^{xxvii} *Janaway v. Salford Health Authority*, 3 All E.R. 1079 (H.L. 1988).
- ^{xxviii} *BMA's Handbook of Ethics and Law*, *supra* note 60, at 248-50.
- ^{xxix} Decision 2001-446 DC of 27 June 2001, Voluntary Interruption of Pregnancy (Abortion) and Contraception Act, ¶¶ 11, 15, 17 (Fr.).
- ^{xxx} *Id.* ¶¶ 12-13.
- ^{xxxi} *Id.* ¶ 15.
- ^{xxxii} *Id.*
- ^{xxxiii} Code de la Sante Publique, arts. L2212-8 and R4127-18 (Fr.), <http://www.legifrance.gouv.fr/WAspad/RechercheSimpleCode?commun=CSANPU&code=>; Law of 1 May 1981 (Stb. 257) prescribing rules concerning the termination of pregnancy, § 20 (2) (Neth.). *See also* 2409/ 1986, of 21 November, about authorized health centers and preceptive medical reports for the termination of pregnancy, (B.O.E., 1986, n. 281) (Spain).
- ^{xxxiv} Code de la Sante Publique, arts. L2212-8 and R4127-18 (Fr.), <http://www.legifrance.gouv.fr/WAspad/RechercheSimpleCode?commun=CSANPU&code=>.
- ^{xxxv} *BMA's Handbook of Ethics and Law*, *supra* note 60, at 248-50.
- ^{xxxvi} *See e.g., Family Planning Ass'n of Northern Ireland v. Minister for Health, Soc. Serv. and Pub. Safety*, 2004 NICA 39 (Transcript) (Q.B.).
- ^{xxxvii} *BMA's Handbook of Ethics and Law*, *supra* note 60, at 248-50; RCOG Guideline, *supra* note 43, at 16-17.
- ^{xxxviii} *BMA's Handbook of Ethics and Law*, *supra* note 60, at 248-50.
- ^{xxxix} RCOG Guideline, *supra* note 43, at 23-24.
- ^{xl} NHS Guidelines HSG (95) 37, Guidance on Fundholder purchase of terminations of pregnancy, July 1995, ¶ 6 (U.K.).

^{xli} For example, many international documents and instruments set forth this standard. The European Convention on Human Rights and Biomedicine guarantees the right of individuals to “know any information collected about his or her health,” and to give “free and informed consent” to all health interventions, which includes the right to information about the nature, purpose, consequences and risks of the intervention. Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, April 4, 1997, at ch III, art. 10, § 2, ch. II, art 5.

^{xlii} *Enright and another v. Kwun and another*, [2003] E.W.H.C. 1000 (Q.B.).

^{xliii} *Id.* ¶¶ 29, 55.

^{xliv} *Id.* ¶ 30.

^{xlv} *Id.* ¶ 56. *See also Barr v. Matthews*, 52 BMLR 217 (Q.B. 1999). In 1999, the UK Queen’s Bench Division held that plaintiff’s medical negligence claim against defendant for failure to provide medical advice on termination of pregnancy because of defendant being “philosophically opposed to abortion, [and] unwilling to facilitate one,” thus *resulting in the birth of a child suffering from cerebral palsy*, was not successful. The court did emphasize that “once a termination of pregnancy is recognised as an option, the doctor invoking the conscientious objection clause should refer the patient to a colleague at once.”