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Freedom of Conscience of Healthcare Professionals and Conscientious Objection in the European Court of Human Rights

María José Valero

Department of Law, Universidad Villanueva, 28034 Madrid, Spain; mjvalero@villanueva.edu

Abstract: The recent social and legal debate in several European countries on abortion, euthanasia, and assisted suicide has caused a strong resurgence of the concerns of healthcare personnel as to the real possibility of protecting their consciences in their professional sphere. Individual refusal for religious, moral, deontological, or ethical reasons to participate in activities that directly or indirectly could result in the termination of a human life constitutes the most extreme manifestation of the legal phenomenon of conscientious objection. Although the European Convention on Human Rights does not recognize a general right to conscientious objection, since *Bayatyan v. Armenia*, the case law of the European Court of Human Rights has identified a connection between conscience-related claims to compulsory military service and Article 9 of the Convention. However, to this date, this doctrine has not been applied to cases that affect health-sensitive areas like abortion and contraception. This article analyzes the activity of the European Court of Human Rights in relation to the right to freedom of conscience and to conscientious objection, particularly in healthcare, and offers several final observations projected to possible future conflicts.



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1. Introduction

Freedom of conscience and conscientious objection, particularly in healthcare contexts, are back on the European human rights agenda. After a few years of apparent respite from the *big bang* of claims of conscience that characterized the second half of the 20th century (Navarro-Valls and Martínez-Torrón 2012), new laws on euthanasia and assisted suicide in Spain and Portugal, contested changes to the Polish legislation on abortion, and growing right-to-die activism in countries like Italy and the United Kingdom have rekindled the interest for the legal phenomenon of conscientious objection.¹ The European Court of Human Rights (hereinafter the Tribunal, the Court or ECtHR) has contributed to this new situation with its contested 2020 decisions of inadmissibility in two cases related to conscientious objection to abortion against Sweden, *Grimmark* and *Steen*.

Although the European Convention on Human Rights (hereinafter the Convention, the Covenant, or ECHR) protects freedom of religion, conscience, and belief in Article 9, it does not recognize a general right to conscientious objection. Even from the first years of activity of the judicial bodies of the Council of Europe, conscience claims have not been an infrequent source of work for the Commission (hereinafter, the Commission or ECsHR) and the European Court of Human Rights, particularly on the rejection by individuals to domestic laws imposing mandatory armed military service. For many decades, the magistrates sitting in Strasbourg refused to accord any relevance under the Convention to conscientious objection, which was considered to be outside the scope of the European human rights text and to pertain exclusively to the margin of appreciation of the member states. It was for the authorities of each country to decide if, and how, individual claims of conscience should or could be accommodated. The growing change in the worldwide

perception of compulsory military service brought about a change in the Court's doctrine in the early 2010s, in the seminal judgment of *Bayatyan v. Armenia*. For the first time, the ECtHR was ready to admit to an inherent connection between conscientious objection and the freedoms enshrined in Article 9 of the Convention, and to impose on member states the positive obligation to accommodate individual claims born from a serious and insurmountable conflict of conscience or based on convictions or beliefs that are of sufficient cogency, seriousness, cohesion, and importance.

This new take on conscientious objection has, however, not made its way to the case law of other situations that involve the refusal of individuals, for religious, moral, ethical, or deontological reasons, to submit to a conduct imposed by a legal norm. As has been recently proven in the two decisions against Sweden, the Court is still reluctant to extend its doctrine on conscientious objection to mandatory military service to other areas where individual conscience and the right to life are involved, thus creating a disconcerting disconnect between otherwise strongly related areas of the Court's jurisprudence. This lack of coherence creates a problematic grey area for physicians and other healthcare providers such as pharmacists, nurses, and midwives who refuse to take part in direct or indirect activities connected to therapeutic abortion or physician-assisted end of life, in what could be interpreted as a step backwards in the effective protection of human rights and the value of human dignity that justifies the Court's existence.

The purpose of this article is to provide some insight on how the European Court of Human Rights has dealt, so far, with conscience claims of healthcare providers related to human life, and how its current stance could affect future applications on related issues. In order to do so, the article begins with an analysis of the ECtHR's general jurisprudence on the right to freedom of conscience and to conscientious objection, before moving on to a more specific critical appraisal of its case law on the relationship between the right to life and abortion, and on conscientious objection to the voluntary termination of pregnancy. After a brief consideration on how some of the similarities of Strasbourg's end-of-life jurisprudence with its decisions on abortion could affect future conscience claims of physicians and other health care professionals regarding euthanasia and assisted suicide, the article concludes with some final reflections on how the European Court of Human Rights could contribute in the next decades to the pacification of controversial and divisive issues such as the ones discussed in this article.

2. Freedom of Conscience and Conscientious Objection in the European Court of Human Rights

2.1. Freedom of Conscience in the Case Law of the European Court of Human Rights

For a tribunal that has referred to itself as *the conscience of Europe*,² the European Court of Human Rights has paid relatively little attention in its case law to the right to freedom of conscience enshrined in Article 9 of the European Convention on Human Rights. As is known, Article 9 ECHR states that:

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

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

The recognition of the right to freedom of conscience is neither original nor exclusive to the Convention and appears in the main international human rights texts. Article 18 of the Universal Declaration of Human Rights states that “Everyone has the right to freedom of thought, *conscience* and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to

manifest his religion or belief in teaching, practice, worship and observance". Similarly, Article 12.1 of the American Convention on Human Rights establishes that "Everyone has the right to freedom of *conscience* and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private". Likewise, Article 10.1 of the Charter of Fundamental Rights of the European Union provides that "Everyone has the right to freedom of thought, *conscience* and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance".

Upon a first reading of Article 9 ECHR, an initial difference would seem to be derived between the freedoms of thought and conscience, and the freedom of religion or belief. While the first two would, in principle, not be susceptible to manifestation in the *forum externum* as they fall outside the literal wording of the second sentence of Article 9(1) ECHR, the latter would go beyond the mere *forum internum*, as their manifestations enjoy autonomous protection under the Convention, albeit subject to the limitations provided for in paragraph 2. This difference has been emphasized by certain authors, who maintain, moreover, that the terms *conscience* and *thought* are conceptually more difficult to delimit than those of *religion* and *belief* (Evans 2001; Petty 2016).

This assertion would appear to be corroborated by the doctrine of the Court itself. Although Article 9 ECHR remains silent as to what is to be understood by religion or belief, the Strasbourg case law has been moving towards an interpretation of this provision in the sense that any coherent and comprehensive worldview, whether or not it has a religious substratum, is protected by the Convention (Rainey et al. 2014). In the 1982 judgment of *Campbell and Cosans v. the United Kingdom*, the Court ruled that the term *convictions* does not refer to any kind of opinion or idea, but only to those that denote a certain degree of cogency, seriousness, coherence, and importance.³ The Court has added little more in this respect and has limited itself to pointing out, from this judgment onwards, that once these criteria are satisfied, and ideas can therefore qualify as beliefs or convictions, the mandate of neutrality and impartiality of States prevents public authorities from assessing their legitimacy or of the means in which they are expressed (Martínez-Torrón 2019; Valero 2022).⁴

It is more difficult to find in the judgments and decisions of both the no longer functioning European Commission on Human Rights (hereinafter, the Commission or ECsHR) and the Court itself, a specific conceptualization of freedom of conscience beyond the abstract, generic, and seemingly inevitable quote of *Kokkinakis v. Greece*, and its statement that "freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention" (Bratza 2012).⁵ In the language of Strasbourg, the reference to freedom of conscience is usually associated with one of the other two freedoms that accompany it in international human rights texts: freedom of thought and freedom of religion.

We find an example of the first thought-conscience duo in the 1978 judgment of *Arrowsmith v. the United Kingdom*, which recognized that pacifism is included in the scope of *freedom of thought and conscience*.⁶ Recently, the Grand Chamber has insisted on this idea by stating in *Vavrička v. the Czech Republic* that when an infringement of Article 9 ECHR is invoked without reference to religious grounds, what is being claimed is a potential interference with "freedom of thought and conscience" (Meseguer Velasco 2021).⁷

The second tandem of religion-conscience is a constant in the Court's jurisprudence, which, on many occasions, has pointed out how "religious freedom is primarily a matter of *individual conscience*".⁸ The ECtHR has also clarified that, although a legal person may be the victim of an infringement of the right to freedom of thought or religion, it cannot, as such, exercise freedom of conscience.⁹ Regarding its negative dimension, in the judgments against Greece of *Alexandridis* and *Dimitras*, the Court emphasized that forcing a citizen

to declare his or her religious beliefs or adherences constitutes an interference with the individual's right to freedom of conscience.¹⁰

This primary interconnection between freedom of conscience and freedoms of thought and religion is what justifies the protection of the former outside the strict scope of the internal forum; the beliefs that can be expressed through actions covered by Article 9(1) ECHR are an expression of freedom of conscience, just as they are, alternatively, of freedom of religion and freedom of thought. In *Savda v. Turkey*, the Court observed that Article 9 ECHR does not permit any restriction on the freedoms of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice since "[f]reedom of conscience is protected without reservation [. . .] and is part of the internal core of Article 9 of the Convention". However, the ECHR does differentiate freedom of thought, conscience and religion from the "freedom to *manifest* one's religion or beliefs".¹¹

The external and manifestable dimension of freedom of conscience has not only never been questioned by the Strasbourg doctrine, but has constituted the real, albeit scarce, focus of its case law (Martínez-Torrón 2020). In a partially dissenting opinion in *Eweida v. the United Kingdom*, judges Vučinić and de Gaetano referred to freedom of conscience in these terms: "[. . .] no one should be forced to *act* against one's conscience or be penalised for refusing to act against one's conscience. Although freedom of religion and freedom of conscience are dealt with under the same Article of the Convention, there is a fundamental difference between the two [. . .]. In essence [conscience] is a *judgment of reason* whereby a physical person recognises the *moral quality* of a concrete act that he is going to perform, is in the process of performing, or has already completed. This rational judgment on what is good and what is evil, although it may be nurtured by religious beliefs, is not necessarily so, and people with no particular religious beliefs or affiliations make such judgments constantly in their daily lives".¹² In short, it can be inferred that behind the Court's understanding of freedom of conscience lies the idea that it is a moral judgment of reason that would feed, and in turn be fed by, the freedoms of religion and thought (Gunn 1996).

The protection of the internal and external dimensions of freedom of conscience is directly linked to personal autonomy and to the right to the free development of personality (Power-Forde 2016), and far from being a private interest, constitutes a public interest of the first order (Navarro-Valls and Martínez-Torrón 2012). Conscience must be protected, not because it is objectively correct—which would be impossible, since it refers to an exclusively individual reality—or because it coincides with prevailing social values or with supposedly majority moral views, but because its relationship with human dignity and personal autonomy makes it an essential right for modern democracies (Laycock 2015–2016). In fact, the Court has repeatedly pointed out that Article 9 ECHR subjects public authorities to a principle of neutrality, which, as a general rule, prohibits them from assessing the legitimacy of beliefs or their forms of expression.¹³ Consequently, the effectiveness of Article 9(2) ECHR does not depend on the correctness of the beliefs that are expressed, but derives directly from the fact that the freedom to believe and to act according to one's convictions is an essential element of the right to freedom of thought and conscience and therefore "a fundamental aspect of an individual's autonomy in a democratic society" (Power-Forde 2016).

But the already emphasized connection of freedom of conscience with the freedoms of religion and thought not only justifies its protection in the forum externum but also makes it susceptible to being limited. Full freedom of the individual to act according to the dictates of conscience would be unfeasible in a democratic society (Laycock 2014). Like all manifestations of the freedoms recognized in Article 9 ECHR, the freedom to express one's conscience, whether by action or omission, is not absolute since the acts required by it may be unacceptable in a democratic society because of their impact on general interests or the rights of third parties (Petty 2016).

2.2. Conscientious Objection in the Case Law of the European Court of Human Rights

It is now almost commonplace to define conscientious objection as the refusal of an individual, for reasons of conscience, to submit to conduct that would in principle be legally enforceable (whether the obligation arises directly from a statute, a contract, a court order, or an administrative decision) (Navarro-Valls and Martínez-Torrón 2012).

As I have explained in the previous section, according to the settled doctrine of the European Court of Human Rights, freedoms of thought, conscience, and religion have a double internal and external dimension in such a way that although they are mainly matters that affect the personal sphere of each human being, they also include the right to manifest one's convictions in public and in private. A particularity of freedom of conscience is that, unlike the freedoms of thought and religion, it lacks a collective dimension.¹⁴ Manifestations of freedom of conscience can take the form of both actions and omissions. Consequently, although Article 9 ECHR does not expressly provide for a general right to conscientious objection, the decision of a person to not perform a certain act for reasons of conscience has been treated by the case law of the Strasbourg Court as a form of externalization of one's beliefs.¹⁵ As with all manifestations of the rights protected by Article 9 ECHR, freedom of conscience, also in its omissive declination of conscientious objection, can be limited, so long as that its restriction is provided by law and is necessary in a democratic society for the protection of morals, public health, and order, and the rights and freedoms of others.¹⁶

The Court recognizes that States have a certain margin of appreciation in determining whether a particular interference with freedom of conscience is proportional and necessary in a democratic society, since, in general, it understands that the authorities of each country are better positioned than an international court to make decisions based on national considerations and particularities, especially when moral or political issues are at stake.¹⁷ As I will have occasion to emphasize at various points in this paper, the Court's deference to the state's margin appreciation will be greater or lesser when there is or is not a broad degree of consensus on a given matter in the countries of the Council of Europe. Likewise, the margin of appreciation is subject to the conformity with the Convention of the domestic authorities' legislation and actions, both of which are susceptible to supervision by the Strasbourg jurisdiction. In the supervision carried out by the Court to determine the legitimacy and proportionality of a limitation of the freedoms of thought, conscience, and religion, the degree of observance by the respondent State of the general principles of neutrality and pluralism developed by the Court's jurisprudence will be of particular relevance.

Concerning neutrality, the Court has emphasized repeatedly that the State must be the impartial organizer of the religious and ideological diversity present in its territory in order to protect public order and promote the harmony and tolerance that must characterize any truly pluralistic democratic society. Therefore, in matters of beliefs, whether religious or not, the State is bound in its actions by a mandate of neutrality which, as has been said, is incompatible with any pretension to judge their legitimacy or that of the means by which they are manifested (Adenitire 2017).¹⁸

As for pluralism, since Kokkinakis, the Court has constantly repeated that the freedoms protected by Article 9 ECHR are a precious asset not only for those who have a religious worldview, but also for atheists, agnostics, sceptics, and indifferent people, because "the pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it".¹⁹ More recently, when referring to conscientious objection, the Court has insisted on the idea "that pluralism, tolerance and broadmindedness are hallmarks of a 'democratic society'", and that although sometimes the interests of an individual may have to be subordinated to those of the State, democracy does not imply that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position.²⁰

The Strasbourg Court began to receive complaints related to cases of conscientious objection, especially to compulsory armed military service, from the early days of its activity. In the mid-1960s, the Commission developed a doctrinal line according to which, since conscientious objection is not among the rights expressly recognized by the Convention, it could not be deduced that Article 9 ECHR imposes on States the obligation to accommodate particular requirements arising from imperatives of conscience.²¹ Whether or not to recognize conscientious objection, to regulate it, and to establish the conditions for its exercise, falls therefore within the exclusive margin of appreciation of each member State.

In 2011, the Grand Chamber revised its previous doctrine on conscientious objection in the famous case of *Bayatyan v. Armenia*. A new claim related to opposition to compulsory military service provided the Court the opportunity to reflect on the importance of ensuring that the rights protected by the Convention are real and effective, and not theoretical and illusory. To this end, it was necessary for the Court to adopt a dynamic and evolutionary attitude that allowed it to integrate into its jurisprudence the social and legal changes that occur around it. Therefore, starting from the affirmation that the Convention is a living instrument, and from the observation of the growing consensus among the member States of the Council of Europe on the need for contemporary societies to recognize the right to conscientious objection, the Grand Chamber affirmed that although the Convention does not explicitly recognize this right, when the opposition of an individual to submit to conduct imposed by a legal rule is motivated by a serious and insurmountable conflict of conscience or based on convictions or beliefs that are of sufficient cogency, seriousness, cohesion, and importance, it attracts the protection of Article 9 ECHR.²² In addition, the judgment adds, in those cases where there is an alternative that reasonably accommodates the interests of the objector and those of the State, the limitations imposed on freedom of conscience cannot “be considered a measure necessary in a democratic society”²³.

To this date, the change in the Court’s approach to conscientious objection in *Bayatyan* has so far not translated into a more favorable attitude towards claims by citizens seeking to be exempted from legal duties for reasons of conscience, except in cases strictly related to compulsory military service (Valero 2021). Based on the repeated argument that Article 9 ECHR does not always guarantee the right to act in the public sphere in the manner dictated by a religion or belief, both the Commission and the Court have systematically rejected claims relating, among others, to requests for exemption from the payment of certain taxes on grounds of conscience;²⁴ requests to be exempted from taking curricular content or performing school activities that violate one’s religious or philosophical beliefs;²⁵ with the desire not to provide certain services to same-sex couples both in the public sector and in private companies;²⁶ and, as we will see in detail in this paper, to claims by health professionals on issues directly or indirectly related to the right to life.

3. Right to Life and Abortion in the European Court of Human Rights

When the European Convention on Human Rights was adopted in the mid-twentieth century, abortion was illegal in most European countries which limited their legislation to a few exceptions in cases where the life or health of the mother was seriously threatened by the pregnancy (Puppink 2013). The debate that already existed at that time on questions related to this matter, especially as to whether the unborn child could be considered a person and therefore under the protection of Article 2 ECHR, led the drafters to be particularly cautious.²⁷

With the first two decades of the 21st century behind us, the European panorama is considerably different. Today, the voluntary termination of pregnancy is regulated or decriminalized in practically all the member States of the Council of Europe where both abortion on demand and termination of pregnancy for socioeconomic reasons are becoming increasingly widespread.²⁸ Only a small group of countries, including Andorra, Liechtenstein, Malta, Monaco, Poland, and San Marino, still maintain a more restrictive legislation²⁹.

The development by member States of legal systems that are increasingly permissive of abortion, together with the growing attention paid in recent decades by the Council of Europe to women's sexual and reproductive rights, led its Parliamentary Assembly to adopt Resolution 1607 (2008) on *Access to safe and legal abortion in Europe* (Quirós Fons 2021).³⁰ Based on the three-fold initial affirmation that abortion can never be considered a method of family planning, that it should be avoided as far as possible, and that mechanisms compatible with women's rights should be implemented in order to reduce both the number of unwanted pregnancies and abortions, the Resolution expresses its concern that, despite the fact that most countries of the Council of Europe allow abortion, there are still circumstances and contexts that make it difficult for women to have access to it in a real, acceptable, and safe manner.

After affirming that within the framework of the right of every human being to respect for their physical integrity and freedom to control of their own bodies, the ultimate choice of whether or not to have an abortion "should be a matter for the woman concerned, who should have the means of exercising this right in an effective way", the Assembly invited member States (i) to decriminalize abortion within reasonable gestational periods; (ii) to guarantee the effective exercise of the right of women to have access to safe and legal abortion; (iii) to respect women's autonomy of choice and implement the necessary conditions to enable them to make a free and informed choice without necessarily promoting recourse to abortion; (iv) to remove restrictions that hinder, *de iure* or *de facto*, access to safe abortion by creating the appropriate health, medical, and psychological conditions, and guaranteeing the necessary economic resources; (v) to adopt general strategies and policies on sexual and reproductive health and rights through the allocation of sufficient financial resources; (vi) to guarantee access for men and women to adequate contraceptive methods at reasonable cost; (vii) to introduce compulsory sex and relationships education programs for young people that are adapted to their age and gender in order to prevent unwanted pregnancies and abortions; and (viii) to promote family-friendly attitudes in public information campaigns, and to provide counselling and practical support to women who resort to abortion due to family or financial pressures.

Dating back to the 1960s and up to the present day, the jurisprudence of the Strasbourg Court in relation to abortion has been relatively extensive, and comprises decisions from both the Commission and the Court. In fact, at the time of writing, no fewer than twelve cases against Poland are pending before the Court, all involving the induced termination of pregnancy (Krajewska 2021).³¹ During its years of activity, the ECtHR's jurisdiction has been called upon in diverse matters such as petitions for in abstracto review of laws decriminalizing abortion,³² claims by male parents of fetuses aborted by their wives or partners,³³ claims concerning the provision of family-planning services,³⁴ doubts about the responsibility of the State in cases of forced termination of pregnancies as a result of medical negligence,³⁵ appeals related to the criminal consequences of the practice of illegal abortions,³⁶ and finally, claims related to effective access to abortion in countries traditionally reluctant to do so, such as Poland and Ireland.³⁷

The Strasbourg Court has built its corpus of decisions and judgments in this area through three articles of the Convention: Article 2 ECHR (right to life); Article 8 ECHR (right to respect for private and family life); and, more recently, Article 3 ECHR (prohibition of torture and inhuman or degrading treatment).

Article 2 ECHR states that

"Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to

effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully”.

In relation to this provision, the European Court of Human Rights has established that although the Convention does not recognize a right to abortion³⁸, nor does it per se exclude intrauterine life from its scope of application.³⁹ The determination of when human existence begins, as well as the decision to decriminalize or legislate on abortion, is left at the exclusive prerogative of each of the States that make up the Council of Europe, as is the regulation of the recognition and form of exercise of conscientious objection⁴⁰.

It has been in the context of cases related to abortion that the Strasbourg jurisdiction has expressed its view on the moment at which human life can be considered to have begun for the Convention. The Commission, and the Court itself, have reiterated on more than one occasion that in a matter as delicate as this in which scientific, philosophical, ethical, and religious opinions, as well as national laws themselves, differ considerably, the initial question arises as to whether the Convention can have anything to say at all⁴¹. The lowest common denominator on this matter identified by the Grand Chamber among the countries belonging to the Council of Europe is, first, that the embryo and the fetus belong to the human race, and second, that their potential capacity to become a person demands that they be protected in the name of human dignity.⁴² Any other consideration beyond these two initial assertions is left to the discretion of the States.

The Strasbourg doctrine on the applicability of Article 2 ECHR to the unborn fetus, developed by the Commission before it ceased its activity in 1998, was taken up by the Grand Chamber in the well-known judgment of *Vo v. France*, which resolved the application of a woman of Vietnamese origin who had been the victim of a medical negligence that had led to an unwanted therapeutic abortion. After the domestic courts rejected that involuntary manslaughter could be applied to a fetus, the claimant appealed to the Strasbourg Court, as she considered that the fact that French law did not attach any criminal consequences to causing the death of an intrauterine life, even involuntarily, amounted to a lack of protection of the right to life protected by Article 2 ECHR. The judges of the Grand Chamber rejected the applicant's claim on the grounds that since “Article 2 of the Convention is silent as to the temporal limitations of the right to life and, in particular, does not define ‘everyone’ (‘toute personne’) whose ‘life’ is protected by the Convention”, the Court “has yet to determine the issue of the ‘beginning’ of ‘everyone’s right to life’ within the meaning of this provision and whether the unborn child has such a right”.⁴³

In this regard, the judgment recalls that the Commission had already noted in previous rulings that the first paragraph of Article 2 ECHR contains two different, albeit interrelated, basic elements. While the first paragraph of the article establishes the general obligation for the law to protect the right to life, its second sentence contains a prohibition on the intentional termination of life. This prohibition is qualified by the exceptions provided for in Article 2(1) ECHR in fine, as well as in Article 2(2) ECHR, exceptions which, by their very nature, affect persons already born and cannot be applied to a fetus. In short, in the opinion first of the Commission and then of the Court, both the meaning generally attributed to the word “everyone” and the context in which the term is used by the Convention itself would support the idea that it does not include the unborn child. In any case, and without questioning as obvious the legitimate interest that States may have in protecting prenatal life, the Strasbourg Court considered that it is not for it to determine whether a fetus can be entitled to some kind of protection under the first paragraph of Article 2 ECHR. Reality proves that among the members of the Council of Europe there is no unanimity as to whether, or to what extent, Article 2 ECHR protects life before birth.⁴⁴ Finally, the Grand Chamber concluded that it is neither possible, nor desirable, to give an abstract answer to the question of whether the unborn child is a person for the purposes of Article 2 ECHR.⁴⁵

In relation to abortion itself, the Commission determined early on that although it is not expressly included among the exceptions to Article 2 ECHR that qualify the prohibition of intentionally terminating a life, the induced termination of pregnancy is always compatible

with this precept when it is justified by the need to protect the life and health of the pregnant mother.⁴⁶ As I pointed out in the previous paragraph, although the Strasbourg court has not expressed an opinion as to whether Article 2 ECHR should be interpreted as completely excluding the fetus as the holder of the right to life, what it has categorically rejected is that the unborn child has an absolute right to life: the life of the fetus is intimately connected with, and cannot be considered in isolation from, the life of the pregnant woman, and any interpretation in the sense of granting the fetus an unqualified right to life would lead to the conclusion that abortion would be prohibited even in the case of a pregnancy that involved a serious risk to the life of the mother, which in turn would mean “that the ‘unborn life’ of the foetus would be regarded as being of a higher value than the life of the pregnant woman”.⁴⁷

Article 8 of the Convention protects private and family life in the following terms:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

As regards to the implication of Article 8 ECHR in abortion-related issues, the connection between induced termination of pregnancy and the right to private and family life was established by the European Commission of Human Rights in 1976 in the case of *Brügemann and Scheuten v. Federal Republic of Germany* ([Martínez-Torrón 1986](#); [Zureick 2015](#)).⁴⁸ The complaint arose from the claim of two German citizens that the Constitutional Court’s decision to declare null and void a 1974 law decriminalizing several cases of abortion violated Article 8 ECHR by requiring them either to renounce sexual intercourse, to use contraceptive methods with which they did not agree, or to carry out an eventual pregnancy against their will⁴⁹. The Commission admitted that both pregnancy and its termination are part of the notion of private life and, sometimes, of family life. By resorting to a notion of private life that would include sexual life as part of the right to privacy and to “develop relationships with other human beings, especially in the emotional field, for the development and fulfilment of one’s own personality” the 1976 decision ruled that the legal regulation of abortion entails an intrusion into private life which may or may not be justified under Article 8(2) ECHR⁵⁰. In a subsequent report issued on the same case, the Commission itself introduced the nuance that pregnancy cannot be considered to belong exclusively to the sphere of a woman’s private life, since when she is pregnant, her own life is connected in a particularly intense and intimate way with that of the fetus. Therefore, not every regulation concerning the termination of unwanted pregnancies can be considered an interference with the mother’s right to respect for her private life, nor can Article 8(1) ECHR be interpreted to mean that the pregnancy, or its termination, is the exclusive responsibility of the pregnant woman.⁵¹

As a consequence of this doctrine, and without prejudice to the fact that the Court had considered that Article 8 ECHR includes a right to personal autonomy that extends not only to the respect for physical and psychological integrity but also to the individual decision to have or not to have children,⁵² for Strasbourg, any regulation on abortion implies for the State an initial weighing of public and private interests as well as a series of positive obligations aimed at guaranteeing the physical and psychological integrity of the mother.⁵³ Consequently, the woman’s right to respect for her private life must be weighed against other competing rights and interests, including those of the unborn child.⁵⁴ In this balancing exercise, the margin of appreciation that the Court grants to the States to establish the terms of their respective domestic legal systems plays an important role, as we will see in the judgments that are briefly described below.

In 2010, in the judgment *A., B., and C. v. Ireland*, the Grand Chamber ruled cumulatively on the claims of three women who had traveled to the United Kingdom to each have an abortion that they considered would not be authorized in their country of origin. Along with the violation of other provisions of the Convention, the applicants alleged that the legal limitations on voluntary termination of pregnancy then in force in Ireland constituted an interference with the right to privacy protected by Article 8 ECHR⁵⁵. The highest chamber of the Court found an interference with the invoked provision in the three cases, although it only considered such an interference unjustified in the case of the third applicant. In the cases of the first two claimants, the Court ruled based on the State's negative obligations; in the case of the last one, the judges sitting as a Grand Chamber chose to analyze the claim from the perspective of positive obligations. I will refer to this third case later on.

The first two applicants had decided to terminate their respective pregnancies for reasons of health and/or personal welfare, both of which were not covered by the, then current, Irish law.⁵⁶ Based on a broad interpretation of Article 8 ECHR, the Grand Chamber held that the prohibition on the applicants' being able to terminate their pregnancies in Ireland amounted to an interference with their right to privacy⁵⁷. However, in considering whether such an interference could be considered necessary in a democratic society, the Grand Chamber answered in the affirmative. Relying on the doctrine of the margin of appreciation, the majority judges considered that the limitations imposed in Ireland on abortion properly balanced the conflicting legal interests: on one hand, the women's right to respect for their private lives; on the other hand, the deep moral values of the Irish people concerning the nature of life and the consequent need to protect the unborn child. Without denying that there is indeed a growing consensus in Europe in favor of broadening the circumstances in which abortion would be permitted, the judgment did not consider this sufficient reason to limit Ireland's margin of appreciation and to question its decision to maintain a more restrictive legislation.

Without going so far as to admit that the margin of appreciation of each State in matters related to abortion is unlimited, since any State regulation must always be compatible with the Convention and subject to the supervision of the Court, the Grand Chamber did establish in *A., B., and C.* an interesting connection between Articles 8 and 2 ECHR which reinforces the discretion of the countries in this matter. Referring to the previously mentioned case of *Vo v. France, A., B., and C.* recalls that the question of when the right to life begins falls within the margin of appreciation of the States, precisely because there was no European legal or scientific consensus on the matter at the time the Convention was drafted, nor is there any today. From this initial lack of consensus, it was and is impossible to give a single answer to the question of whether the unborn child can be considered a person for the purposes of the protection afforded by Article 2 ECHR. Since it is the responsibility of the State to define which interests of the unborn child are worthy of protection and because the rights of the fetus and the mother are intrinsically interconnected, the margin of appreciation granted to the national authorities in relation to the protection of the unborn child inevitably conditions the weighing of the interests of the mother when they conflict with those of the child she is carrying. Thus, although most member States have chosen to resolve this conflict of interests by favoring a broad right of women to abortion, this consensus cannot, of itself, be decisive for the Court when assessing the situation in other countries, even in the light of the evolving interpretation of the Convention⁵⁸. Paradoxically, in comparison with other cases in which consensus is invoked as a limit to the margin of appreciation, this variable is less decisive in matters of abortion because it arises from a lack of agreement on a fundamental prior question, that being, whether or not the fetus is a person for the purposes of the protection afforded by Article 2 ECHR.

As mentioned above, the Court has also linked Article 8 ECHR and the positive obligations that derive from it for the State with the real possibility for women to access abortion when it is legally permitted in a national legal system.⁵⁹ Based on the traditional assertion that the Convention is intended to guarantee rights that are real and effective and

not theoretical or illusory, the Court has been particularly critical of some of the procedures established in domestic legal orders for women to access abortions. While recognizing that Article 8 ECHR does not contain any explicit procedural requirements, the Court has pointed out that it is important that fair processes be implemented that adequately respect the interests affected.⁶⁰ In particular, since the *Tysi c v. Poland* judgment, the Court has questioned national provisions that, while allowing access under certain conditions to voluntary termination of pregnancy, are formulated in terms that may have a chilling effect on the health professionals responsible for certifying the appropriateness or necessity of terminating the pregnancy. Once a State decides to permit abortion, it cannot design a legal framework that de facto limits the real possibilities of obtaining it.⁶¹

This was precisely the case of the third claimant in the above-mentioned A., B., and C. case. Her starting situation differed from that of the first two applicants. She had learned of her unplanned pregnancy at a time when she was in remission from a rare type of cancer and after having undergone a series of diagnostic tests that are contraindicated during pregnancy. Although her case could have qualified for the only exception to the general prohibition on abortion then allowed under Irish law—the real and substantial risk to the mother’s life—the alleged deterrent effect of the regulatory framework in force at the time meant that the health professionals who attended her were inconclusive not only about the risk that the pregnancy might cause her to relapse into her illness, but also about the effects that the diagnostic tests already carried out might have had on the fetus. Faced with this uncertainty, the third applicant chose to have an abortion in a clinic in the United Kingdom. In her application to the Strasbourg Court, she argued that the Irish authorities had breached their positive obligations under Article 8 ECHR by failing to establish a clear procedure by which she could have determined whether, because her life was at risk, she could have a legal abortion in her own country.⁶²

Following the precedent of *Tysi c*, the Grand Chamber recalled that, without prejudice to the wide margin of appreciation enjoyed by member States to establish their own regulations on abortion, once they have defined the applicable legal framework, it has to be designed in a coherent manner in order to ensure that the different legitimate interests involved are adequately taken into account. The judgment found that in Ireland, there was no clear procedure—neither medical nor before the courts of law—to verify the real risk to the life of the mother arising from a pregnancy. This lack of clarity and certainty necessarily resulted in an undesirable chilling effect, which led health professionals to be extremely cautious in their opinions and decisions for fear of the consequences, even criminal, of their actions⁶³.

Finally, in a relatively novel line of jurisprudence, the Strasbourg Court has analyzed the question of abortion in relation to Article 3 ECHR, which states that “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”. After having been rejected on previous occasions in 2011 and 2012, the judgments *R. R. v. Poland* and *P. and S. v. Poland* recognized the potential implication of this article of the Convention in those cases in which the procedures established by the States so that women can legally have an abortion are made difficult and delayed to the point of causing a vulnerable pregnant woman anguish or suffering that exceeds the limits allowed by Article 3 ECHR (Zureick 2015).⁶⁴

4. Healthcare Professionals and Conscientious Objection to Abortion in the European Court of Human Rights

Conscientious objection to abortion is defined as the refusal to perform an abortion or to cooperate directly or indirectly in its performance, and concerns not only medical or healthcare personnel, but has also been raised “by other citizens with respect to activities only indirectly related to the performance of abortions” (Navarro-Valls and Mart nez-Torr n 2012).

The Court’s meager body of decisions on the direct or indirect conscientious objection of healthcare professionals to abortion appears to be largely ignoring its own legal reasoning

and doctrine on freedom of conscience and the rights protected by Articles 2, 3, and 8 of the Convention in claims connected to human life that were discussed in previous sections.

In cases concerning abortion or prenatal life, the Court has carefully declined to express any opinion on the morally and scientifically contentious question of “when does human life begin?” and has delegated to member States what relevance each of them wants to accord to the public and private interests at stake when regulating the voluntary termination of pregnancy. In this weighing of competing interests, the magistrates sitting in Strasbourg have favored national specificities over European consensus by upholding the compatibility with the Convention of national regulations on abortion that are more restrictive than what is the accepted norm in the majority of countries that belong to the Council of Europe. Positive obligations become the threshold of the State’s margin of appreciation, and once its legislation permits the voluntary termination of pregnancy, provided certain conditions are met, public authorities cannot indirectly limit actual access to the procedure, particularly if as a result the woman is caused insufferable anguish or suffering.

Contrarily, in conscience claims by healthcare professionals who object to their direct or indirect involvement in the termination of prenatal life, despite the acknowledged divisive nature of the underlying conflict, the Court appears to be siding with a European social and political consensus that artificially confronts conscientious objection and women’s sexual and reproductive rights. Consequently, the State’s positive obligations to reasonably accommodate claims of conscience that fall under Article 9 of the Convention have, to date, been ignored, and the willingness of the Strasbourg Court to recognize a right to conscientious objection linked to Article 9 ECHR which could be briefly seen in *Bayatyan*, has not been continued in any of its decisions concerning the refusal of certain healthcare professionals to participate in abortion practices. This position of the Court is surprising for two reasons: first, because conscientious objection to abortion and to military service have a common axiological origin, and that is a deep respect for the sanctity of human life ([Harrison 2021](#));⁶⁵ second, because even before the decision in the case against Armenia, the concern within the Council of Europe for the protection of freedom of religion and conscience in the medical field had given rise to Resolution 1736 (2010) of its Parliamentary Assembly.⁶⁶

Under the title “The right to conscientious objection in legal medical practice”, Resolution 1736 (2010), begins by recognizing that conscientious objection by health professionals is satisfactorily regulated in most countries in the Council of Europe in such a way that its exercise does not prevent patients from accessing the services which objectors refuse to carry out. The Resolution expresses, however, two concerns: first, that no negative consequences can result from the decision of a person or institution not to perform, accommodate, or assist in the performance of an abortion, euthanasia, or any act that may cause the death of a human fetus or embryo; second, that it is important to reaffirm both the right to conscientious objection of the healthcare professional and the obligation of States to ensure that citizens have effective access to legally recognized medical services. Finally, the Resolution urges countries to weigh the interests of users of national health services against those of healthcare professionals and invites them to develop legislation that guarantees the rights of both parties, especially in cases of emergency.

As was the case for a long time with the Resolutions and Recommendations of the Parliamentary Assembly on conscientious objection to military service ([Valero 2021](#)), the Strasbourg Court has not yet taken the step of incorporating into its jurisprudence the concerns and aspirations contained in the 2010 Resolution. With the exception of *Eweida*, which resolved two cases of conscientious objection in the medical arena that had nothing to do with the right to life,⁶⁷ up to the time of writing this paper, the scarce number of applications that have reached the Court related to conscientious objection in the healthcare field in general, and to direct or indirect objection to abortion in particular, have been declared inadmissible. This was the case in 2001 in *Pichon and Sajous v. France*; and again in the 2020 cases against Sweden, *Grimmark and Steen* ([Martínez-Torrón 2020](#)).⁶⁸

In Pichon and Sajous, the claim was brought by two French pharmacists who ran a pharmacy in a small town near Bordeaux. Both objected to supplying contraceptive drugs in their establishment on religious grounds and were sanctioned for it. After exhausting all domestic remedies without being able to see their conscience-related choice validated before the French courts, they brought an application before the European Court of Human Rights. The Third chamber dismissed their claim, relying on the aforementioned argument that Article 9 ECHR does not guarantee that an individual can always behave in the public sphere in accordance with his personal convictions. The decision included a reflection to the effect that, in the context of a legal activity and a highly regulated profession, such as in France the sale of contraceptives and the management of a pharmacy, one cannot give priority to one's own religious beliefs, nor impose them on others.

In the most recent Grimmark and Steen cases, the applicants were two nurses who had received specific training to work as midwives. Both were denied employment in that specific professional category after they expressed to their potential employers an objection to abortion based on religious and ethical grounds. Their claims before the Court were dismissed as manifestly ill-founded by a three-judge Committee of the Third section of the ECtHR.⁶⁹ Both decisions found that the interference with the right to freedom of conscience protected by Article 9 ECHR of Ms. Grimmark and Ms. Steen was justified and necessary in a democratic society: Sweden provides access to medical abortion throughout its territory and consequently has a positive obligation to organize the national health system in such a way that the exercise of freedom of conscience by health care professionals does not impede the effective provision of abortion. Accordingly, the requirement that all midwives in Sweden be willing to carry out the duties inherent to their position, including performing abortions, is justified and not disproportionate. The applicants had voluntarily chosen their profession, and both should have been aware that accepting employment as midwives entailed performing each and every one of the functions attributed to their professional category (Martínez-Torrón 2020).

Although the Court's reluctance to decide on the merits of claims related to conscientious objections to direct or indirect intervention in abortions prevents us from knowing in detail its position in this regard, some of the arguments present in the three inadmissibility decisions, briefly outlined in the preceding paragraphs, and, above all, some of their notable omissions, seem to contradict in many respects both the Court's current doctrine on conscientious objection to compulsory military service and the Parliamentary Assembly's Resolution 1736 (2010).

Undoubtedly, the most striking thing about the Pichon and Sajous and Grimmark and Steen decisions is that they avoid any serious and reasoned consideration of the undeniable, and in theory, not denied, right of healthcare professionals to their freedom of conscience and the exercise of conscientious objection. This omission raises numerous doubts that the Court chooses not to address, much less resolve:

1. The first issue raised by the inadmissibility decisions discussed in this section, in particular those concerning the two Swedish midwives, is the fact that the deciding Committee placed so much emphasis on the positive obligations incumbent upon the respondent State "to organize its health system in a way as to ensure that the effective exercise of freedom of conscience of health professionals in the professional context".⁷⁰ This consideration is particularly surprising because Sweden does not recognize a right of conscientious objection for health professionals (Munthe 2016). Therefore, in this Nordic country, medical practitioners and related personnel are not permitted by law any effective exercise of freedom of conscience in the context of their professional activities. However, this singularity of the Swedish legal order, which directly contradicts the Committee's express statement, is not only not even mentioned in either of the two inadmissibility decisions, but also does not provoke the slightest reaction from the Court.

This omission could point, in the first place, to an implicit and disproportionate deference by the Committee to the doctrine of the margin of appreciation, which in itself would be questionable if we take into account the parameters set by Resolution 1736 (2010).

But equally, it could reveal a more worrying and somewhat myopic, or at least partial, interpretation of the positive obligations of the member States in relation to the organization of their national health systems when it is a matter of protecting the legal and fundamental rights of all the subjects involved. It cannot be denied that, indeed, European countries have a positive obligation to guarantee real and effective access for their citizens to the portfolio of health services established by law, including, where appropriate, abortion, but it is no less certain that they also have, as Grimmark and Steen are careful to point out, a positive obligation to guarantee that the fundamental right to freedom of conscience of healthcare professionals, protected by the Convention, is real and effective and not merely theoretical.

The lack of reflection on this second aspect of the State's positive obligations is all the more surprising if one considers the Court's recent case law on conscientious objection to compulsory military service. Since *Bayatyan*, Strasbourg case law has not hesitated to draw attention to the incompatibility with the Convention of the member States' legal systems that fail to comply with their positive obligations in relation to the effective exercise of conscientious objection to compulsory military service and do not accommodate conscience-related claims (Valero 2021).⁷¹ In view of this, one can only speculate as to why the Court has avoided attributing any consequences to the general prohibition in Sweden on the exercise of conscientious objection by health professionals.

2. A second issue that has not merited any consideration by the Court is related to the chilling effect mentioned in the previous pages and which refers to the dissuasive effect that very restrictive or unclear legislation can have on the exercise of certain rights. The concern expressed by the Court that the way in which the rules regulating access to abortion are drafted in less permissive legislations may have a dissuasive effect on health professionals that prevent women from effectively accessing a legally permitted medical service does not seem to have an adequate correlation when what is at stake is the exercise of a fundamental right—freedom of conscience—by health personnel. The *Grimmark* and *Steen* cases, and to some extent also *Pichon* and *Sajous*, raise the question of the extent to which legislation that denies or restricts the exercise of conscientious objection by health professionals does not produce the same chilling effect denounced by the Court, thus dissuading physicians, pharmacists, nurses, midwives, and other related personnel from exercising not only a right recognized in national legislation, but a freedom protected by the Convention, for fear of the disciplinary consequences or discrimination in employment that such exercise may entail (Martínez-Torrón 2020).

3. The fact that, to date, the Court has declined to fully consider the merits of the claims that have been brought before it in relation to direct or indirect conscientious objection to abortion by health professionals, has justified the fact that, for the time being, the Court has not carried out a reasoned balancing of the public and private rights and interests at stake in the conflicts that have come before it. The systematic deference to the decisions of the domestic courts in the three cases discussed seems to imply that, at least in the public sector and in highly regulated professions and those related to the organization of national healthcare systems, any allegedly neutral law prevails over a serious and insurmountable conflict of conscience, even if, as the Court has recognized, this conflict is protected by Article 9 ECHR.⁷² Once again, the Court avoids considering seriously and rigorously what is one of the fundamental points of Recommendation 1763 (2010) of the Parliamentary Assembly and of the Court's own jurisprudence: the need that exists, when a dilemma arises between individual conscience and the law, to weigh, and as far as possible, accommodate the rights and interests of all parties involved—health professionals, women who wish to access a legal abortion, and the State—for which it is essential to carry out a careful balancing exercise (Power-Forde 2016).

4. Linked to some of the reflections already made in the previous point, I do not want to conclude this section without highlighting one last particularly notable omission from the decisions discussed in the cases against France and Sweden: the absence of any mention of the doctrine of reasonable accommodation of religious beliefs in working environments,

the essentially fungible nature of the professional activities of the actors in the claims, and the lack of any analysis by which the Court sought to ascertain whether there were practicable options that, while guaranteeing the access of the women concerned to the medicines and services required, would leave the freedom of conscience of the appellants unscathed. On the contrary, in the Pichon and Sajous decision, the Third section affirmed that one's own beliefs cannot be imposed on third parties. And yet, at no point in the factual account of the case does it appear that the French pharmacists intended to impose their beliefs on anyone, any more than did the Swedish midwives. All they wanted was to be able to pursue their professions without violating their conscience. Comparative experience shows that allowing exceptions to compliance with neutral laws for serious religious, ethical, or moral reasons does not necessarily imply either the imposition of one's own beliefs on third parties or a reduction in the access of those same third parties to the exercise of their rights (Laycock 2015–2016).

There is nothing in the account of the cases to suggest that the refusal of two French pharmacists to dispense potentially abortifacient products, or of two Swedish midwives to intervene directly in pregnancy termination procedures, was of such a magnitude as to jeopardize the entire healthcare system of the two respondent States. But the Court does not even raise the possibility that France and Sweden would have any obligation to organize their public health services in a way that would reasonably accommodate the conscientious claims of a minority of professionals while maintaining the quality of care for women who wish to prevent or terminate a pregnancy. As has been observed in the doctrine, maximalist approaches, such as the one suggested, would lead to the undesirable conclusion that in order to fulfill a vocation to contribute to bringing children into the world, one would also have to be willing to terminate their intrauterine life (Laycock 2015–2016).

In view of these considerations, reasonable doubt arises as to whether there is not a certain reluctance among the Strasbourg judges to apply their own doctrine on the relationship between Article 9 ECHR and the exercise of conscientious objection to a subject as morally and socially sensitive as abortion; a perhaps unjustified fear that an application of its jurisprudence along the lines indicated in the preceding paragraphs, which would force member States to, at least, make the effort to accommodate individual conscientious choices in controversial areas and matters, would be interpreted as meaning that the Court endorses, or at least does not question, the beliefs that inform and underlie the consciences of objectors. As I have pointed out in the first pages of this paper, this would be a mistaken understanding of what freedom of conscience consists in, especially considering the notion of human dignity and the principles of neutrality and pluralism, and one which would be inappropriate in a human rights court.⁷³ It is true that there are beliefs, religious or not, which differ from the moral values prevalent in European societies today, but it is no less true that such beliefs, and the right to behave in accordance with them, are protected by Article 9 ECHR, and that their limitation is justified only when a real need can be proven. The protection of freedom of conscience does not depend on the objective correctness of each citizen's conceptions of what is good nor on their conformity with prevailing moral or social values but is based on its status as a human right essential to the dignity of the individual and to the democratic health of the State.

5. End of Life, Healthcare Professionals and Conscientious Objection in the European Court of Human Rights

Defined as the refusal of a health professional to participate directly or indirectly in the performance of actions conducive to ending a patient's life who requests it in accordance with the law, because he or she considers that such an act is against his or her deepest ethical, moral, philosophical, and religious convictions and to act in this way would significantly damage his or her conscience, deontology, and moral integrity, conscientious objection to euthanasia holds in the field of medicine "a qualified value that derives from the connection that the activity carried out in that professional field has with such transcendental values as life and the physical and psychological integrity of individuals".⁷⁴ In the same vein,

the World Medical Association has pointed out that “No physician should be forced to participate in euthanasia or assisted suicide, nor should any physician be obliged to make referral decisions to this end”;⁷⁵ while, in a very similar sense, the Code of Medical Ethics of the General Council of Official Medical Associations of Spain establishes in Article 32 that the recognition of conscientious objection is an indispensable prerequisite to guarantee the professional freedom and independence of physicians.⁷⁶

The Strasbourg Court has not yet had occasion to rule on questions relating to the practice of euthanasia, which has been decriminalized or legalized in the Netherlands, Belgium, Luxembourg, and Spain, nor on the exercise of conscientious objection by health professionals recognized by the laws that regulate it (Navarro-Valls and Martínez-Torrón 2012; Salinas Mengual 2021).

However, other questions relating to the end of life and its relationship with the Convention have been submitted to the jurisdiction of the Court, especially in the areas of assisted suicide and therapeutic obstinacy. The parallelism of the lines of argument developed by the Court in this small corpus of judgments with its jurisprudence on induced abortion suggests that there will be few differences in its position in future pronouncements affecting the conscientious objection of health professionals who carry out their professional activity in euthanasia (Valero 2021). The implication of Articles 2, 3, and 8 of the ECHR and the recourse to the doctrine of the margin of appreciation that the Convention and the Court grant to States in matters related to the beginning and end of human life would justify such an assumption.

The cases of *Pretty v. the United Kingdom* and *Lambert v. France* are the leading cases in this area today. In the former, the Court did not hesitate to recall the principle of the sanctity of life protected by the Convention.⁷⁷ In the second, the focus shifted to the wide margin of decision that the member states of the Council of Europe must legislate in matters related to the medical end of human life.

These cases decided by the Strasbourg Court only highlight the moral and deontological dilemma that doctors and other health personnel face in euthanasia and euthanasia contexts, such as assisted suicide (Smet 2019). It is therefore not to be ruled out that, in the future, the Court of Human Rights may be approached by health professionals who object to direct or indirect participation in these practices. The question remains as to the orientation that the Court will adopt in these cases, whether it will opt for a thoughtful application of the *Bayatyan* doctrine or whether, on the contrary, it will opt to adopt a position closer to the one it has maintained up to now about conscientious objection to abortion.

6. Conclusions

Freedom of conscience has become one of the principal areas in which the battle for religious freedom and freedom of thought is being fought in modern Western societies. In a social and political context, often marked by suspicion of the desire of citizens with beliefs—religious or not—to live in public and professional life according to their own moral codes, conscientious objection in matters related to the beginning and end of life has become the tip of the iceberg of a much deeper discussion about whether to admit exceptions to neutral laws for reasons of conscience (Adhar 2008).

In recent decades, language that approaches the legal dimension of deeply complex moral debates on issues, such as abortion and euthanasia, reflects a profound underlying confrontation of values, and terms and expressions, such as *intolerance*, *conscience wars*, and *culture wars*, are but the reflection of a worrying and divisive reality (Fredman 2020; Mancini and Rosenfeld 2018; NeJaime and Siegel 2015; Laycock 2014). In view of the analysis in this work, and although it may be argued that where conscientious objection in healthcare is concerned, the European Court of Human Rights has so far carefully avoided stepping out of the realm of social and political correctness by deferring systematically to the doctrine of the margin of appreciation (Brzozowski 2021), given the precedent of *Bayatyan*, I harbor a moderate hope that future pronouncements on conflicts of conscience

in contexts where the beginning and end of human life is compromised will contribute to appease this dialectic of conflict, to take it out of the media, social, and political spheres in which it normally unfolds, and to redirect it into the parameters of legal argumentation centered on human dignity, which is the proper home of this jurisdictional body.

The arguments developed by Strasbourg in relation to conscientious objection to military service in particular, the link established between Article 9 of the Convention with serious and unavoidable individual conflicts of conscience, the limitation of the margin of state appreciation, and the firm defense of the need to attend in a balanced way to the rights and interests of all parties involved, have the potential to turn future jurisprudence of the Court into an effective tool for the normalization of the exercise of conscientious objection. However, the Court must assume the challenge of extrapolating it to other fields and applying it outside the strict context of armed military service.

With these concluding reflections, I do not intend in any way to trivialize reality as multifaceted and complex as the exercise of conscientious objection (Martínez-Torrón 2019). If I had to draw only one conclusion from the analysis made in the pages of this work, it would be that the Strasbourg Court does not have a simple task ahead. If litigation in relation to conflicts of conscience and human life continues to increase in Europe as it has elsewhere in the West, it will not be easy for the judges of the Court to detach themselves from the cacophony surrounding these issues and focus on what their primary task is: to protect the reality and effectiveness of human rights, and the values of human rights and human dignity, “tolerance, equality, and respect for diversity among the 800 million individuals within its jurisdiction” (Power-Forde 2016).

But in this difficult task assumed by the Court, there is something that it can never forget, and that is that human rights in general, and religious freedom in particular, must never be trivialized, and their instrumentalization to the point of turning them into mere dialectical arguments at the service of alleged social wars or into ideological weapons to be wielded against those who seek to live in common social space in accordance with their conscience, can never be justified.

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Notes

- ¹ See the monographic issue on *Conscientious objection and human life* published by the Spanish Revista General de Derecho Canónico y Derecho Eclesiástico del Estado (57 Revista General de Derecho Canónico y Derecho Eclesiástico del Estado 2021), which includes reports on no less than 8 European countries, as well as on the European Court of Human Rights, with extensive analysis and references on the subject.
- ² *The Conscience of Europe* is the slogan chosen by the European Court of Human Rights (ECtHR) to celebrate its 50th anniversary. See https://www.echr.coe.int/Documents/Anni_Book_content_ENG.pdf (accessed on 12 May 2022). Unless otherwise stated, all online references in this article were accessed for the last time on 20 December 2021.
- ³ *Campbell and Cosans v. the United Kingdom* (app. 7511/76), 25 February 1982, par. 36. More recently, see for all *Bayatyan v. Armenia* (app. 23459/03), 7 July, 2011, par. 110; and *Jakóbski v. Poland* (app. 18429/06), 7 December 2010, par. 44.
- ⁴ See for all *Eweida v. the United Kingdom* (app. 48420/10), 15 January 2013, par. 81.
- ⁵ *Kokkinakis v. Greece* (app. 14307/88), 25 May 1993, par. 31.
- ⁶ *Arrowsmith v. the United Kingdom* (app. 7050/75), 12 October 1978, par. 69.
- ⁷ *Vavříčka v. the Czech Republic* (app. 47621/13), 8 April 2021, par. 330.
- ⁸ See for all *Stavropoulos v. Greece* (app. 52484/18), 25 June 2020, par. 44. Emphasis added.
- ⁹ *Kontakt-Information-Therapie and Hagen v. Austria* (dec. app. 11921/86), 12 October 1988, p. 6.
- ¹⁰ *Alexandridis v. Greece* (app. 19516/06), 21 February 2008, par. 38; and *Dimitras v. Greece* (app. 42837/06), 3 June 2010, par. 78.

- 11 *Savda v. Turkey* (app. 42730/05), 12 June 2012, par. 90. Emphasis added.
- 12 *Eweida* (cit. 4), Joint partly dissenting opinion of judges Vučinić and de Gaetano. Emphasis added.
- 13 *Hasan and Chaush v. Bulgaria* G. Ch. (app. 30985/96), 26 October 2000, par. 78.
- 14 *Kontakt-Information-Therapie and Hagen* p. 6; and *Rommelfanger v. the Federal Republic of Germany* (dec. app. 12242/86), 6 September 1989.
- 15 *Eweida* par. 82 *contrario sensu*; *Adyan v. Armenia* (app. 75604/11), 12 October 2017, par. 64; and *Grimmark v. Sweden* (dec. app. 43726/17), 11 February 2020, par. 25.
- 16 *Eweida* par. 80.
- 17 *Open Door and Dublin Well Woman Centre v. Ireland* (app. 14234/88), 29 October 1992.
- 18 *Bayatyan* par. 120.
- 19 *Kokkinakis* par. 31.
- 20 *Bayatyan* par. 126. Also in *Leyla Şahin v. Turkey* (app. 44774/98), 10 November 2005, par. 108.
- 21 *Grandrath v. the Federal Republic of Germany* (app. 2299/64), Report of the European Commission on Human Rights, 12 December 1966. See also the decision by the Committee of Ministers on the case (29 June 1967).
- 22 *Bayatyan* par. 110.
- 23 *Ibid.*, par. 124
- 24 *Ross v. the United Kingdom* (dec. app. 10295/83), 14 October 2010; *C. v. the United Kingdom* (dec. app. 10358/83), 15 December 1983; *B. H. and M. B. v. the United Kingdom* (dec. app. 11991/86), 10 July 1986; and *Bouessel du Borg v. France* (dec. app. 20747/92), 18 February 1993.
- 25 *Kjeldsen, Busk Madsen and Pedersen v. Denmark* (app. 5095/71), 7 December 1976; *Valsamis v. Greece* (app. 21787/93), 18 December 1996; and *Efstathiou v. Greece* (app. 24095/94), 18 December 1996.
- 26 *Eweida*, applicants 3 (Ladele) and 4 (McFarlane).
- 27 Report of the ECsHR, *Brüggemann and Scheuten v. the Federal Republic of Germany* (app. 6959/75), 12 July 1977 (*Brüggemann and Scheuten Report*).
- 28 For a list of countries, see <https://reproductiverights.org/wp-content/uploads/2020/12/European-abortion-law-a-comparative-review.pdf> (accessed on 12 May 2022).
- 29 *Ibid.*, pp. 4 ff.
- 30 Resolution 1607 (2008) 1 of the Parliamentary Assembly of the Council of Europe, Access to safe and legal abortion in Europe, 16 April 2008. Available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17638> (accessed on 12 May 2022).
- 31 *K. B. et al. v. Poland* (app. 1819/21); *K. C. et al. v. Poland* (app. 3639/21); and *A. L.- B. et al. v. Poland* (app. 3801/21). All applications refer to a recent decision by the Polish Constitutional Court which has declared incompatible with the Constitution Articles 4a (1) 2 and 4a (2) of the Family Planning Law. These articles refer to the possibility of accessing legal abortion in cases where the fetus has some genetical abnormality. According to the ECtHR's press service, as of July 2021 the Court had received over 1000 similar applications. See https://www.echr.coe.int/documents/fs_reproductive_eng.pdf, p. 2. (accessed on 12 May 2022).
- 32 *X. v. Norway* (dec. app. 867/60), 29 May 1961; *X. v. Austria* (dec. app. 7045/75), 10 December 1976; and *Knudsen v. Norway* (dec. app. 11045/84), 8 March 1985.
- 33 *X. v. the United Kingdom* (dec. app. 8416/79), 13 May 1980; *R. H. v. Norway* (dec. app. 17004/90), 19 May 1992; and *Boso v. Italy* (dec. app. 50490/99), 5 September 2002.
- 34 *Open Door and Dublin Well Woman Centre v. Ireland* (cit. 17).
- 35 *Vo v. France* (app. 53924/00), 8 July 2004.
- 36 *Silva Monteiro Martins Ribeiro v. Portugal* (dec. app. 16471/02), 26 October 2004. In a previous case, *Amy v. Belgium* (dec. app. 11684/85), 5 October 1988. Similar, in relation to a Polish gynecologist, *Tokarczyk v. Poland* (dec. app. 51792/99), 31 January 2002.
- 37 *A., B., and C. v. Ireland* (app. 25579/05), 16 December 2010.
- 38 *Ibid.*, par. 214
- 39 *Vo* par. 77.
- 40 *Ibid.*, par. 78.
- 41 *Ibid.*, par. 77 and 82.
- 42 *Ibid.*, par. 84. The judgment recalls how the Council of Europe's 4 April 1997 *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine*, known as the *Oviedo Convention*, does not define either who are "all human beings" to which the Convention applies according to Article 1.
- 43 *Vo* par. 74–75.

- 44 *Vo* par. 78; *R. H.* pp. 8–9; and *Boso* pp. 3–4.
- 45 *Vo* par. 85.
- 46 *X. v. the United Kingdom* par. 17 ff.; and *Vo* par. 77. In the same line, *Open Door and Dublin Well Woman Centre* par. 63, 72–80.
- 47 *Vo* par. 77.
- 48 *Brüggemann and Scheuten v. the Federal Republic of Germany* (dec. app. 6959/75), 19 May 1976.
- 49 *Ibid.*, p. 105.
- 50 *Ibid.*, p. 115.
- 51 *Brüggemann and Scheuten Report* (cit. 27) par. 59 and 61.
- 52 *Pretty v. the United Kingdom* (app. 2346/02), 29 April 2002, par. 61; *Evans v. the United Kingdom* (app. 6339/05), 10 April 2007, par. 71; and *Tysic v. Poland* (app. 5410/03), 20 March 2007, par. 107.
- 53 *Tysic* par. 107.
- 54 *A., B., and C.* par. 213.
- 55 *Ibid.*, par. 160.
- 56 The first applicant was already the mother of four children. Because of her continued problems with alcohol, the minors, one of them disabled, were under the guardianship of the State. She also had a history of depression during her first four pregnancies, and at the time of becoming pregnant again she was fighting a new outbreak. During the year prior to the pregnancy, she had managed to remain sober and be in permanent contact with social services to regain custody of her children. The fear that the arrival of a new baby would endanger both her mental health and the possibility of recovering her family, made her decide to travel to England to have an abortion. The second applicant had become pregnant after taking the morning after pill. Lacking the means to support a child at that time in her life, she also decided to travel to the United Kingdom to end her pregnancy (*A., B., and C.*, par. 14 ff.).
- 57 *Ibid.*, par. 216 ff.
- 58 *Ibid.*, p. 236.
- 59 *Tysic* (cit. 52). The Court ruled in favor of the applicant, a Polish woman who, at the time of becoming pregnant with her third child, was suffering from extremely severe myopia. Despite having obtained the opinion of different doctors that pregnancy constituted a severe risk for her eyesight she was unable to obtain the medical certificates required by Polish legislation to end a pregnancy. About six weeks after giving birth, her eyesight deteriorated to the point of being recognized as severely disabled. The claimant alleged a violation of Articles 3 and 8 ECHR. The ECtHR concluded that Polish law did not establish effective mechanisms to determine whether she could access a legal abortion, creating a situation of prolonged uncertainty and offering only compensatory remedies applicable after delivery. *D. v. Ireland* (dec. app. 26499/02), 27 June 2006.
- 60 *Tysic* par. 113.
- 61 *bid.*, par. 116. Years later, the Fourth section of the ECtHR reached a similar decision in a case about lack of access to the pre-natal tests which would have allowed the applicant to make an informed choice about terminating or not her pregnancy in the terms stated in Polish law. See *R. R. v. Poland* (app. 27617/04), 26 May 2011.
- 62 *A., B., and C.*, par. 22–25 and 243.
- 63 *Ibid.*, par. 249 ff.
- 64 *R. R. v. Poland* (app. 27617/04), May 26, 2011; and *P. and S. v. Poland* (app. 57375/08), 30 October 2012.
- 65 *Pretty* par. 65.
- 66 Resolution 1763 (2010) of the Parliamentary Assembly of the Council of Europe The right to conscientious objection in legal medical practice, 7 October 2010.
- 67 *Eweida* on applicants 3 (*Ladele*) and 4 (*McFarlane*). Also in the healthcare context, the ECtHR inadmitted the claim of a german physician who claimed a deontological conscientious objection to carry out a medical examination to one close female collaborators (*Blumberg v. Germany* (dec. app. 14618/03), 18 March 2008).
- 68 *Pichon and Sajous v. France* (dec. app. 49853/99), 2 October 2001; *Grimmark* (cit. 15); and *Steen v. Sweden* (dec. app. 62309/17), 11 February 2020.
- 69 Article 28 ECHR: Competence of Committees—“1. In respect of an application submitted under Article 34, a committee may, by a unanimous vote, (a) declare it inadmissible or strike it out of its list of cases, where such decision can be taken without further examination; or (b) declare it admissible and render at the same time a judgment on the merits, if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well-established case-law of the Court. 2. Decisions and judgments under paragraph 1 shall be final. 3. If the judge elected in respect of the High Contracting Party concerned is not a member of the committee, the committee may at any stage of the proceedings invite that judge to take the place of one of the members of the committee, having regard to all relevant factors, including whether that Party has contested the application of the procedure under paragraph 1.(b)”.
70 *Grimmark* par. 26; and *Steen* par. 21. Emphasis added.

- ⁷¹ Aydan par. 67.
- ⁷² In relation to conscientious objection in non healthcare-related professions which are also heavily regulated, see Mignot v. France (dec. app. 37489/97), 21 October 1998.
- ⁷³ See Skugar v. Russia (dec. app. 40010/04), 30 December 2009, pp. 7–8.
- ⁷⁴ See the Report of the Spanish Bioethics Committee on Conscientious objection to medically assisted death of 21 July 2021 Informe del Comité de Bioética de España sobre la objeción de conciencia en relación con la prestación de la ayuda para morir en la Ley Orgánica reguladora de la eutanasia, p. 7. Available at <http://assets.comitedebioetica.es/files/documentacion/Informe%20CBE%20sobre%20la%20Objecion%20de%20Conciencia.pdf> (accessed on 12 May 2022).
- ⁷⁵ World Medical Association. Declaration on Euthanasia and Physician-assisted Suicide, 13 November 2019. Available at <https://www.wma.net/policies-post/declaration-on-euthanasia-and-physician-assisted-suicide/> (accessed on 12 May 2022).
- ⁷⁶ Código de deontología médica del Consejo General de Colegios Oficiales de Médicos, July 2011. Available at https://www.cgcom.es/sites/default/files/codigo_deontologia_medica.pdf (accessed on 12 May 2022).
- ⁷⁷ Pretty (cit. 52).

References

- Adenitire, John Olusegun. 2017. Conscientious Exemptions: From Toleration to Neutrality; From Neutrality to Respect. *Oxford Journal of Law and Religion* 6: 268–92. [CrossRef]
- Adhar, Rex. 2008. Is Freedom of Conscience Superior to Freedom of Religion? *Oxford Journal of Law and Religion* 7: 124–42.
- Bratza, Nicolas. 2012. The ‘Precious Asset’: Freedom of Religion Under the European Court of Human Rights. *Ecclesiastical Law Journal* 14: 256–71. [CrossRef]
- Brzozowski, Wojciech. 2021. The Midwife’s Tale: Conscientious Objection to Abortion after *Grimmark* and *Steen*. *Oxford Journal of Law and Religion* 10: 298–316. [CrossRef]
- Evans, Carolyn. 2001. *Freedom of Religion Under the European Convention on Human Rights*. Oxford: Oxford University Press.
- Fredman, Sandra. 2020. Tolerating the Intolerant. Religious Freedom, Complicity, and the Right to Equality. *Oxford Journal of Law and Religion* 9: 305–28. [CrossRef]
- Gunn, Jeremy. 1996. *Adjudicating Rights of Conscience Under the European Convention on Human Rights*. Religious Human Rights in Global Perspective. Edited by John Witte Jr. and Johan D. van der Vyver. Leiden: Brill, vol. 2, pp. 305–30.
- Harrison, Joel. 2021. Christian Accounts of Religious Liberty: Two Views of Conscience. *BYU Review* 46: 1273–300.
- Krajewska, Atina. 2021. Connecting Reproductive Rights, Democracy, and the Rule of Law: Lessons from Poland in Times of COVID-19. *German Law Journal* 22: 1072–97. [CrossRef]
- Laycock, Douglas. 2014. Religious Liberty and Culture Wars. *University of Illinois Law Review* 3: 839–80.
- Laycock, Douglas. 2015–2016. Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel. *The Yale Journal Forum* 125: 369–86.
- Mancini, Susana, and Michel Rosenfeld, eds. 2018. *The Conscience Wars: Rethinking the Balance Between Religion, Identity and Equality*. Cambridge: Cambridge University Press.
- Martínez-Torrón, Javier. 1986. El derecho a la libertad religiosa en torno al Convenio Europeo de Derechos Humanos. *Anuario de Derecho Eclesiástico del Estado* 2: 403–96.
- Martínez-Torrón, Javier. 2019. Manifestations of Religion or Belief in the Case Law of the European Court of Human Rights. In *The European Court of Human Rights and the Freedom of Religion or Belief. The 25 Years since Kokkinakis*. Edited by Jeroen Temperman, T. Jeremy Gunn and Malcolm Evans. Leiden: Brill Nijhof.
- Martínez-Torrón, Javier. 2020. Objeción de conciencia al aborto: Un paso atrás en la jurisprudencia de Estrasburgo. *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 53: 1–11.
- Meseguer Velasco, Silvia. 2021. Libertad religiosa, salud pública y vacunación COVID-19. *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 56: 1–36.
- Munthe, Christian. 2016. Conscientious refusal in healthcare: The Swedish solution. *Journal of Medical Ethics* 43: 257–59. [CrossRef] [PubMed]
- Navarro-Valls, Rafael, and Javier Martínez-Torrón. 2012. *Conflictos Entre Conciencia y Ley. Las Objeciones de Conciencia*. Madrid: IUSTEL.
- NeJaime, Douglas, and Reva B. Siegel. 2015. Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics. *The Yale Law Journal* 124: 2516–91.
- Petty, Aaron R. 2016. Religion, Conscience, and Belief in the European Court of Human Rights. *The George Washington International Law Review* 48: 807–51. [CrossRef]
- Power-Forde, Anne. 2016. Freedom of Religion and ‘Reasonable Accommodation’ in the Case Law of the European Court of Human Rights. *Oxford Journal of Law and Religion* 5: 575–603. [CrossRef]
- Puppinc, Gregor. 2013. Abortion and the European Convention on Human Rights. *Irish Journal of Legal Studies* 3: 142–94.
- Quirós Fons, Antonio. 2021. Limitaciones al ejercicio de la objeción de conciencia en el ámbito sanitario europeo. *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 55: 1–15.
- Rainey, Bernadette, Elizabeth Wicks, and Clare Ovey. 2014. *The European Convention on Human Rights*. Oxford: Oxford University Press.

- Salinas Mengual, Jorge. 2021. Relationship Between COVID-19, Euthanasia and Old Age: A Study from a Legal-Ethical Perspective. *Journal of Religion and Health* 60: 2250–84. [[CrossRef](#)]
- Smet, Stijn. 2019. Conscientious objection through the Contrasting Lenses of Tolerance and Respect. *Oxford Journal of Law and Religion* 8: 93–120. [[CrossRef](#)]
- Valero, María José. 2021. Vida humana y libertad de conciencia. Una visión desde la jurisprudencia del Tribunal Europeo de Derechos Humanos. *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 57: 1–45.
- Valero, María José. 2022. *Neutralidad del Estado y Autonomía Religiosa en la Jurisprudencia de Estrasburgo*. Valencia: Tirant lo Blanch.
- Zureick, Alyson. 2015. (En)gendering suffering: Denial of abortion as a form of cruel, inhuman, or degrading treatment. *Fordham International Law Journal* 38: 99–140.