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### Article

**Citation** (please note it is advisable to refer to the publisher's version if you intend to cite from this work)

**Fleming, V, Ramsayer, B and Zaksek, TS (2017) Freedom of conscience in Europe? An analysis of three cases of midwives with conscientious objection to abortion. Journal of Medical Ethics, 44 (2). pp. 104-108. ISSN 0306-6800**

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## ABSTRACT

While abortion has been legal in most developed countries for many years, the topic remains controversial. A major area of controversy concerns women's rights vis a vis the rights of health professionals to opt out of providing the service on conscience grounds. Although scholars from various disciplines have addressed this issue in the literature there is a lack of empirical research on the topic. This paper provides a documentary analysis of three examples of conscientious objection on religious grounds to performing abortion-related care by midwives in different Member States of the European Union, two of which have resulted in legal action. These examples show, that as well as the laws of the respective countries and the European Union, professional and church law each played a part in the decisions made. However, support from both professional and religious sources was inconsistent both within and between the examples. The authors conclude that there is a need for clear guidelines at both local and pan-European level for health professionals and recommends a European wide forum to develop and test them.

Keywords: abortion; conscientious objection; midwives; human rights.

## INTRODUCTION AND BACKGROUND

In the 1950s debates arose in political circles in Europe and elsewhere concerning the high numbers of women dying or being seriously mutilated from illegal abortions. Subsequently, laws ensuring the safe provision of abortion were gradually enacted with abortion on demand now available in 69% of the world's developed countries. Due to a shortage of medical practitioners, it is often midwives or nurses who provide abortion services. This is strongly supported by the World Health Organisation (WHO) which recommends that midwives or nurses should be the key providers in the provision of abortion care. [1] Abortion remains a morally contentious issue with some midwives and other health professionals refusing to participate in them on the grounds of conscience. The decision to lodge conscientious objection to the provision of abortion services however means that other health professionals must assume an additional workload that they may resent.

Freedom of conscience is at the heart of human rights and in Europe it is protected in treaties such as the Council of Europe's Resolution 1763. [2, 3] The right to conscientious objection is enshrined in most European countries' abortion laws, though Sweden is a notable exception, which will be referred to later in this paper. In the WHO's recent guidelines on abortion, [4] however, conscientious objection is not mentioned. Conversely, the International Confederation of Midwives' Code of Ethics [5] states that 'midwives may decide not to participate in activities for which they hold deep moral opposition'.

There is still polarisation in views on how much weight to give to the rights and responsibilities of healthcare providers to offer a service and their rights to make conscientious objections to certain practices. Authors on both sides of the debate state that European countries should critically assess the laws governing conscientious objection and their effects on women's legal rights to a service. [6, 7] None, however, go so far as to make suggestions as to how this could be achieved.

The seminal work of Wicclair [8] provides a balanced overview between conscience and duty to provide care, concluding that *carte blanche* rights of conscientious objection should not be given but rather respect for the moral integrity of the physician, even in practices endorsed by the medical profession, is the best way forward. Wicclair's work has gained considerable support from a diverse group of authors in law, philosophy and medicine because it argues that the most promising ethical justification for conscientious objection is respect for moral integrity. This, however, is challenged by others who argue that the core ethical values on

which decisions are based need to correspond with one or more core values in medicine. [9 - 11]

Some writers challenge the rights of health care professionals to allow their private values to interfere with their work. [12, 13] Others have delineated criteria for conscientious objection adding responsibilities which should accompany this stance. [14, 15] The International Federation of Obstetricians and Gynecologists' criteria for conscientious objection, for example, involve providing notice of professional services that practitioners decline to undertake on conscience grounds, referring patients to colleagues timeously and providing emergency care where required. [16]

McHale [17] acknowledges the change from surgical to medical abortions and concludes that the time has come to revise public policy and not to permit nurses to opt out of procedures such as abortion. A White Paper drawing on the international literature from a number of disciplines attempts to sum up the issue and develop a road map for the future. [18] Its authors give clear acknowledgement of the lack of well carried out relevant empirical research but conclude, from the available evidence, that there is a growing trend towards refusal to provide certain reproductive health services especially abortion. Acknowledging the difficulty of the situation, they recommend that a standard definition of conscientious objection be developed together with accompanying guidelines that set out healthcare professionals' obligations and duties. However, this White Paper falls short of providing them.

## AIM

In the light of the polarised debate highlighted above, the aim of this paper is to address some of the gaps in the empirical evidence on this issue, by providing a documentary analysis of examples of conscientious objection to participating in abortion by midwives in three European countries: Scotland, Croatia and Sweden. Each author of this paper each has a differing stance on abortion but all support the right of conscientious objection.

## METHODS

Data were collected from material in publicly available sources. Thereafter, the legal teams involved, following discussion with their clients, provided the authors with additional data including letters written as part of evidence used in the legal cases. A documentary analysis of each example was carried out. Each example is presented and then in the discussion the commonalities and differences are considered.

## RESULTS

Example 1: Mary Doogan and Constanza Wood (Scotland, (UK))

This case involved two senior midwives, Mary Doogan and Constanza Wood, each with over 20 years' professional midwifery experience. Both are Roman Catholics with declared conscientious objection throughout their careers in accord with the UK law on abortion. [19] The case ran from 2005 to 2014 and involved a major Glasgow hospital. The situation giving rise to the conflict was that following service restructuring, the midwives believed that they were required to engage with the process of procuring abortion.

The midwives made numerous attempts to resolve the issue informally, but eventually lodged a formal grievance which escalated to Health Board level where it was rejected. Following the exhaustion of the grievance process, the midwives petitioned the courts for a judicial review based on section 4(1) of the Abortion Act and Article 9 of the European Convention on Human Rights. [2, 3] The question under consideration was, 'Are the respondents [Greater Glasgow and Clyde Health Board (GGCHB)] entitled to require them to delegate, supervise and support staff in the treatment of patients undergoing termination of pregnancy?' [20] The single judge judged that the midwives, due to their seniority, were not being required to play any direct part in bringing about the termination of pregnancy and therefore ruled against them.

In the midwives' appeal [21] it was acknowledged that in the previous hearing GGCHB accepted that some of their arguments would have to be decided on a day to day basis as any of them could involve direct contact with the woman involved. The new argument put forward by the midwives was that care for women undergoing abortions was not something that took place at a defined time but involved the bringing together of many factors in addition to drug administration, many of which were ultimately dependent on each woman's physiological and psychological reactions. In their ruling in favour of the midwives, the three appeal judges concurred that the conscience clause applied to all provisions in which abortion could be legally carried out.

GGCHB's counter appeal took place at the UK Supreme Court, London. [22] In addition to the solicitors for the midwives and GGCHB, two interveners, the Royal College of Midwives (RCM) and the British Pregnancy Advisory Service (BPAS), made oral submissions. In the hearing the five judges established that the case was about the precise scope of the right of conscientious objection to participating in abortion.

The Supreme Court judges, after agreeing on a definition of abortion, focused on the meaning of the word 'participate' and expressed the view that it is only applicable to the provision of hands on care. They then proceeded to test this against the arguments submitted initially by the midwives. In their findings, the judges ruled that being present to assist and support if

medical intervention were required was the only situation that should be fully covered by the conscience clause. Some others, such as monitoring the progress of patients to ensure that any deviations from normality are referred to an obstetrician, could be covered in particular circumstances; such as when a junior midwife required a more expert opinion. GGCHB's appeal was thus supported.

Concern was immediately expressed by both lawyers and ethicists that rather than being a landmark case the narrow interpretation of the conscience clause has not provided clear guidance for the future as there seemed to be no underpinning rationale given for its adoption, Neal pointing out that the Supreme Court's reliance on a simplistic formula "collapses under scrutiny" [23](p. 682).

#### Example 2: Jaga Stojak (Croatia)

The second example is that of Jaga Stojak, a Croatian Roman Catholic midwife with 27 years' professional experience. The matter was based in Hrvatski Ponos hospital, Knin, from 2013-2015. The situation that gave rise to the example was that Stojak was asked to provide direct abortion care after the appointment of a new head of obstetrics and gynaecology stated that she saw no grounds for conscientious objection by midwives (Mikulandra N Jaga Stojak: explanatory email to V Fleming 15 November, 2015). This was against Stojak's declared conscientious objection to participating in abortion, legal under the Croatian Constitution, which had been respected for many years in her workplace.

After Stojak was asked to assist at a surgical abortion she advised her manager that on conscience grounds she could not do this, as it was not a procedure necessary for saving the life of the woman concerned. Disciplinary action was initiated against Stojak, and appeals to the hospital management were unsuccessful. Stojak was first suspended, then ultimately dismissed from her position.

Stojak sought advice from a Croatian Non Governmental Organisation, the Vigilares, who claimed that the hospital management failed to hear and respect her rights both as a taxpayer and employee whose position had been respected for many years and was apparently changed without reason. A lawyer was appointed to take Stojak's case.

A series of letters between the lawyer and hospital management then followed with the initial letter laying out Stojak's claim of illegal dismissal (Letter from N Mikulandra to Antonela Kračić, November 2013 case number 012505/13.) and the hospital's reply citing a patient complaint which was dismissed by Stojak's lawyer as irrelevant to Stojak's legal position (Letter from Antonela Kračić to N Mikulandra 17 December 2013 case number 4004/13). The

complaint was not mentioned in subsequent internal procedures by either party. Concurrently, the Vigilares wrote to the Minister of Health concerning Stojak's position and asking for his intervention (Letter from Udruga Vigilare Dr. sc. Vice John Batarelo to Prof. dr. sc. Rajko Ostojić Croatian Minister of Health 8 August 2013).

A carefully planned and executed series of press releases from the Vigilares then saw the case making national and international headlines. All of these actions resulted in Stojak returning to her employment but in a different position in early 2014 and her right to conscientious objection respected. The interventions by Stojak's lawyer and the Vigilares prevented court proceedings from being initiated.

### Example 3: Ellinor Grimmark (Sweden)

Ellinor Grimmark, a newly qualified midwife, is a Pentecostal Christian. She sought employment in three hospitals but each time after she explained that because of her faith she could not perform abortions, offers of employment were rescinded.

First, she was offered a position in Höglands women's clinic in Eksjö, during the course of an internship, but after she explained that because of her faith she could not perform abortions, she received a telephone message from the manager of the labour and maternity ward saying that the offer was withdrawn. She was later advised that the clinic could not create exemptions from certain tasks to be performed and that all midwives must be prepared to care for women undergoing abortions.

Grimmark next sought work as a midwife in Ryhov's women's clinic, having advised the potential employers of her stance against abortion but was again denied employment on the same grounds. She later applied for a position as a midwife in Varnamo hospital women's clinic. During the interview, the discussion centred on how she could be facilitated to work in the clinic, respecting her views and the needs of the clinic, and this resulted in an offer of work for six months. However, ten days later the employer withdrew the job offer.

Finally Grimmark sought recourse in law, notifying the County Council of discrimination against her because of her religious beliefs. Sweden, unlike the countries in the above mentioned examples, does not have a law protecting workers' conscientious objection and the reason given for rejecting Grimmark's claim was that she was unable to fulfil the role of a midwife.[24] The Council and later the Discrimination Ombudsman found against Grimmark. Grimmark, represented by legal counsel and with the backing of the international organisation 'Alliance Defending Freedom', then submitted her case against Jönköping County Council, as the provider of health services in each of the three hospitals, to the District Court of Jönköping. Her lawyers contended that this is part of an emerging human rights' problem in

Sweden (Letter from Ruth Nordström to Ombudsman for discrimination, Jönköping re Ellinor Grimmark. 21 May, 2014).

On 14 September 2015 an ‘amicus curiae’ letter was submitted from the European Centre for Law and Justice as part of evidence to be considered. [25] Focusing throughout on freedom of conscience as a basic human right, the letter’s conclusion points out that Sweden is isolated in Europe with its lack of provision for conscientious objection to abortion. However, the letter states that it should be considered as:

a right not to take part in the voluntary termination of a human life when such termination is permitted by law, whether you have a religious belief or not. Thus, the purpose of the ‘conscience clause’ is less to permit anyone to object than to make sure that no one is forced to participate against their will.

The initial case was heard in September 2015 with Grimmark seeking non-pecuniary damages only rather than compensation for lost earnings. Another claim concerns discrimination in that her status as a conscientious objector is not recognised and yet another concerns violation of the European Convention article 9. The three judges of the District Court ruled against Grimmark on the grounds that the region has an obligation to provide guaranteed access to abortion and that carrying out abortions was a necessary part of Swedish midwives’ duties. Thus the hospitals’ grounds for refusing employment were legitimate and Grimmark could not have suffered discrimination. [26] She was, however, given leave to appeal.

## DISCUSSION

Each of the above examples concerns midwives in European Union countries with its inherent principle of free movement within the labour market. As indicated in the introduction it is often midwives or nurses who carry the bulk of responsibility for women undergoing abortions. However, from the summaries of the examples provided, it is clear that there are many complex factors impacting on the right to conscientious objection to abortion that may differ from country to country and it is these which are discussed next.

### Legal systems

In two out of the three countries concerned, conscientious objection to provision of abortion is enshrined in law. However, the major issues which gave rise to each example have been dependent on interpretations of the law in each country. Two of the examples, Scotland and Sweden, resulted in court cases, and that in Croatia also threatened it.

The UK Abortion Act, [19] states that ‘no person shall be under any duty ...to participate in any treatment authorised by this Act to which he has a conscientious objection.’ A major issue



in the Scottish case was that of ‘what actually constitutes carrying out the abortion?’ In a previous UK case [27] petitioners requested clarity on the legality of nurses taking part in mid-trimester abortions carried out by medical means. The five judges ruled that nurses and midwives caring for the women were part of the process and thus covered by the conscience clause:

‘Termination of pregnancy’ is an expression commonly used, perhaps rather more by medical people than by laymen, to describe in neutral and unemotive terms the bringing about of an abortion. So used, it is capable of covering the whole process designed to lead to that result, and in my view it does so in the present context.

Other provisions of the Act make it clear that termination of pregnancy is envisaged as being a process of treatment.

Thus it was clearly established that abortion was considered to be a process rather than a single act or combination of acts. This ruling has relevance across all the examples as the procedure for abortion changes from a surgical to a medical one, thereby potentially involving more midwives.

In Croatia there is no one single law. Instead the legislation on conscientious objection is linked to individual professions with doctors being regulated by the Law on Medical Practice, which states that a doctor ‘has the right to conscientious objection..... if this does not cause permanent damage to the health or the patient’s life’. [28] Equally, the Nursing Act allows conscientious objection for nurses. [29] As there was no midwifery education outside of nursing training at the time of Stojak’s training, she was educated as a nurse and came under nursing legislation. [30] Although midwifery became recognised as a separate profession from nursing in 2009, there are still no specific laws for midwives thus leaving the legal position of midwives wishing to exercise conscientious objection to abortion in some doubt. Church law

In the Scottish and Croatian examples the midwives concerned were Roman Catholic, whose universal Code of Canon Law:1398 states that anyone who procures a completed abortion is liable to automatic excommunication. [31] As with the ambiguity in the Scottish case surrounding the nature of the word ‘participate’, canon 1398 introduces two words which may also assume differing meanings, those of ‘completed abortion’. The question of relevance remains ‘what completes the abortion?’

In a commentary, [32] the potential extent of those involved in procuring abortion is discussed as technically, once labour starts, an abortion could proceed with the woman unaccompanied by any health professionals. This is the situation, however, that legalisation of

abortion sought to overcome as it leads to unnecessary maternal deaths. Other commentaries, however, make the stronger point that the word ‘procure’ means to perform or cooperate in the act of abortion, which must be carried out ‘with malicious intent’. [33, 34] In them the important issue is the notion of ‘levels’ at which accomplices are involved, as there appears to be no fixed definition of those who participate in the abortion. The notion of ‘co-delinquency’ is first discussed suggesting that this term applies to persons who cooperate in a ‘single delinquent action’ claiming the most important issue is that of unity of purpose; in this case the procuring of a completed abortion. The Roman Catholic Church’s law applicability to the midwives in two of the examples is clear but the other two churches do not have comparable legal codes, leaving fewer religious grounds upon which their members can base their actions.

#### Professional legislation

As noted above, Scotland has a conscience clauses allowing all health professionals to opt out of participating in caring for women undergoing abortions and Croatia has this for the nursing and medical professions but there remains no specific law concerning midwives’ and conscientious objection [35]. Sweden, with no conscience clause, has no professional guidelines associated with the provision of abortion and indeed the Swedish Midwives’ Association has spoken out against them. [36] It is also noteworthy that following release of the judgement on the Scottish case, the UK’s Nursing and Midwifery Council’s Code of Conduct, binding on all registered midwives, has been updated to include only a limited right to conscientious objection and the necessity for onward referral in such cases. [37] In this, the need for careful thought before taking such a step was emphasised and accountability for any decisions related to conscientious objection placed in the hands of individual practitioners.

#### Support

##### Support from churches

Each of the midwives conscientiously objected on religious grounds; all being practising Christians of various denominations. Yet support from the various churches concerned has been mixed. In the Swedish case, Grimmark’s church has provided active support but as it is a minority religion in Sweden with less than 1% of the population being members, it appears to hold little sway. Support from the Roman Catholic Church was forthcoming for the Scottish midwives from their individual and other parishes. However, it is noteworthy that, despite their public statement condemning abortion on the 40<sup>th</sup> anniversary of the Act, the Catholic Bishops’ Conference of Scotland neither commented on the case nor publicly offered its support. [38] The failure to produce a strong statement stands in total contrast to the situation in Croatia where there was a great deal of publically voiced support from the Catholic

Church's hierarchy. The Justice and Peace arm of the Croatian Bishops' Conference released a statement of support, [39] other bishops gave statements to the press and the provincial of one of the major religious orders [40] called for support and prayers while referring to Canon 1398 and the Second Vatican Council Resolution *Gaudium et Spes*. [41]

#### Support from professional organisations

It appears that none of the midwives received any support from their respective professional midwifery organisations. This is despite all Associations being members of the International Confederation of Midwives whose Code of Ethics, [5] as shown in the introduction, permits conscientious objection. While the law in Sweden contains no conscience clause, conscientious objection is supported by the European Convention of Human Rights and might have been considered relevant.

Not only did the midwives in the Scottish and Croatian cases receive no active support but conversely their professional organisations spoke out against them. The Croatian Midwives' Association in response to a number of requests issued a press release advising of that while the case is *sub judice* they were unable to take a stand. [35] This still remains in effect despite the completion of the case. However, a request to the Ministry of Health for an amendment to the Midwives' Act had not been actioned. In the same press release the Association's president commented that she is unable to speak about a particular case and she has not done so in public since.

The Royal College of Midwives of the UK has issued guidance stating that a midwife may have to weigh up her own position in relation to each woman's interests and hand over her care to another midwife if she sees conflicts arising due to her conscience. Moreover, it added that 'all midwives should be prepared to care for women before, during and after a termination in a maternity unit under obstetric care'. [42] In the legal proceedings it consistently took the side of the Health Board rather than the midwives. The evidence given in the Supreme Court by the RCM clearly stated that its policy makers believed conscientious objection should be restricted to administration of the drugs rather than including care of the woman during the subsequent labour or birth. [22] This could be argued to be contrary to its position on continuity of care which states that continuity of care is the most defining element of midwifery practice and is what distinguishes it from other professions. [43]

The aim of this paper was to address some of the gaps in the empirical evidence on the issue of conscientious objection to the provision of abortion through a documentary analysis. The findings of this documentary analysis not only outlined that support of different churches in different European countries was equivocal but also that support from the professional

organisations was lacking. This permitted the formulation of the following conclusions with their foundations in real situations.

## CONCLUSIONS

The examples examined appear similar in that midwives in three European countries chose, on grounds of conscience, not to participate in the provision of care to women undergoing abortions. Each of the midwives faced hostile reactions from colleagues, professional associations and managers, which were escalated in various ways; two of them reaching the court system. It is clear, however, that there is a discrepancy between the legislation on conscientious objection of three of the countries and the way that the midwives in the three examples presented have been treated. Additionally, there is no unanimous agreement on the right of conscientious objection within each country and there are no pan European guidelines. However, as the European Court of Human Rights regularly reminds petitioners, 'freedom of thought, conscience and religion is one of the foundations of a democratic society'. [3] It may be timely for positive action to be made towards developing such guidelines for midwives, nurses and other health professionals who have the right of free movement within EU Member States in order for consistency in practice.

The expectation that midwifery practice may include the provision of abortion services often fails to take account of the freedom of conscience as the heart of human rights [2] whereby midwives or other health professionals choose not to provide such services and which has been legislated by the Council of Europe's parliamentary assembly. [3] By reflecting on the three examples presented in this article, it became apparent that the professional practice of midwives was challenged when they refused to provide abortion-related care.

The general support from churches and the lack of it from professional organisations suggest that there is a need for reflection throughout Europe on current practice. Such reflections should be multidisciplinary in nature and not only consider how the provision of safe abortion services can be facilitated but also how health professionals' decisions to object on conscience grounds to the participation in abortion related care can be managed. The provision of 'Freedom of conscience' as the heart of human rights requires in its practical implementation that such decisions are respected and do not lead to discrimination in professional practice. This article identified an urgent need for a European wide forum to develop guidelines and test these in the light of the European Council's legislation and mobility within the European Union.

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