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ABORTION INSIDE SWEDISH DEMOCRACY: THE CASE OF ELLINOR GRIMMARK

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Sweden is among the most celebrated of European democracies, a country that has consistently stayed out of the fray of war, has invested for years in a self-proclaimed welfare democracy, and prides itself on being one of the most "modern" nations, able to function more effectively than others and skilled in taking care of all of its citizens. The concept of freedom features prominently in Swedish political and social self-conceptions. Further, Sweden has often publicly declared its ambition to provide moral leadership to other countries in light of its advanced capabilities:

"Our country must be a leading and inspirational force in the world. A country in which we close gaps and fulfill the promises of freedom we have made to our children. A country in which we invest together in people and the environment, in knowledge and competitiveness, in security in the present and hope for the future."

It has been, therefore, rather startling to find the case of Ellinor Grimmark, a Swedish midwife who has unsuccessfully attempted to assert her right of conscientious objection to performing abortions. In 2013 after completing an internship, Grimmark informed the management at

Höglandssjukhuset women's clinic in Eksjö, southern Sweden, that she did not wish to perform abortions due to her personal religious convictions. She was subsequently denied an extension of her contract and informed by the head of the maternity ward that she, "was no longer welcome to work with them" and questioning "whether a person with views actually can become a midwife." Grimmark's student funding, which was originally intended to extend for another year, was also cancelled. Grimmark then sought employment at the Ryhovs women's clinic. Once again she was informed that a refusal to perform abortions was not permissible for anyone working as a midwife in Sweden. Finally, she was offered employment at Värnamo Hospital's women's clinic, but this offer was also revoked when management discovered that Grimmark had filed a civil rights complaint against the Höglandssjukhuset clinic with the local Equality Ombudsman.

The Ombudsman ruled that Grimmark was not being discriminated against for her pro-life views and that her conscientious objection could threaten the "availability of abortion care" and the "protection of health" of patients requiring abortion in Sweden. Grimmark, represented by Ruth Nordstrom, president of the organization Scandinavian Human Rights Lawyers, escalated the complaint, filing suit in the Jönköping district court. She is seeking 80,000 Swedish kronas (USD $11,655) in compensation for damages and 60,000 Swedish kronas (USD $8,740) in compensation for discrimination. Jönköping County District Court will hear the case in September 2105.

The controversy the case has generated extends all the way up to Swedish royalty. In October 2013, Uppsala University, Sweden's oldest, planned to host an international conference on human rights and human trafficking, organized by Scandinavian Human Rights Lawyers in cooperation with the University and the United Nations. The head speaker was to be the Council of Europe's Rapporteur on prostitution, human trafficking and modern slavery. Also slated to participate were a host of international researchers, members of the Civil Society Platform Coalition Against Trafficking in Sweden, police officials and delegates from the Parliament of Norway. HM Queen Silvia of Sweden was to receive the Scandinavian

Human Dignity Award for her dedication to the cause of protecting children against abuse and exploitation.

Three days before the start of the conference, the influential daily newspaper “Aftonbladet” published an article calling attention to the involvement in the conference of Ruth Nordstrom, president of Scandinavian Human Rights Lawyers and counsel for midwife Ellinor Grimmark. Accusations were made that Ms. Nordstrom planned to use the conference, and the presence of the Queen, as an opportunity to lobby against abortion in Sweden. The Swedish Association for Sexuality Education (RFSU), part of the International Planned Parenthood Federation conducted what has been termed “a media firestorm featuring personal attacks on Mrs Nordström.” Following the media controversy, the conference was cancelled. Queen Silvia announced that, “due to the cancellation and political implications of the scandal,” she would not be accepting the award she had been offered.

As far as Grimmark’s legal case is concerned, Swedish legal expert Reinhold Fahlbeck has written that Sweden’s legal treatment of conscientious objection is bound by the European Convention of 1950 on the protection of Human Rights and Fundamental Freedoms (ECHR), signed by Sweden in 1993. As well known, Article 9 states:

1.Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or 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 in a democratic society, are necessary with regard to the general public safety or the protection of public order, health or morals or for the protection for other rights and freedoms.

After assessing the relationship between Swedish legal provisions and the requirements of international law, Fahlbeck concludes that, “the ECHR is thus the governing legal source regarding religious freedom in Sweden. The Convention applies in Sweden in three guises, (1) the international

law binding Convention, (2) as part of EU law, and (3) domestic Swedish law. This means that it is possible 'to directly apply the Convention in Swedish court.'"

Directly relevant to a legal assessment of the case is resolution 1763 adopted in 2010 by the Parliamentary Assembly of the Council of Europe concerning conscientious objection in medical care. Paragraph 1 states:

"*No person, hospital or institution shall be coerced, held liable or discriminated against in any manner because of a refusal to perform, accommodate, assist or submit to an abortion, the performance of a human miscarriage, or euthanasia or any act which could cause the death of a human fetus or embryo, for any reason.*"

The statement is quite clear. However, there has been great resistance in Sweden on the grounds that as a resolution it should be considered to be "soft law," and that it interferes with Swedish laws guaranteeing abortion (with restrictions). The Swedish government has further argued that a midwife's participation in abortion is required per the ECHR provision that a State must guarantee, "that the interests and rights of Individuals seeking legal medical services are respected, protected, and fulfilled." While the argument has been made repeatedly in the media that if conscientious objection to abortion is allowed it will threaten the material availability of abortions, this does not appear to have any factual or legal grounding in Sweden, a country with the highest rate of abortion in northern Europe. Furthermore, as Fahlbeck argues, "Factors of a practical nature in the workplace fall considerably further down the hierarchical values scale with respect to the Article 9 protected right to freedom of conscience." Whereas the Convention has a clearly defined right to freedom of religion, there is no parallel "right to abortion."

An additional complication in the matter is the issue of the rights which may or may not be accorded the unborn fetus. While this issue pulls the matter into a political/moral realm, European law has not been immune to making declarations on the issue, for example in the Oviedo Convention of 1997, which sets out the fundamental principles applicable in day-to-day medicine as well as those applicable to new technologies in

human biology and medicine, and indeed prohibits the commoditization of the human embryo and forbids the creation of embryos for research purposes.

Though outside the field of healthcare, the ECHR case Bayatyan v. Armenia has been used as an example of European legal support for conscientious objection, and the role of majority consensus among European states in determining new rulings. In this case the Court held that: "The Court has already pointed out above that almost all the Member States of the Council of Europe which ever had or still have compulsory military service have introduced alternatives to such service in order to reconcile the possible conflict between individual conscience and military obligations. Accordingly, a State which has not done so enjoys only a limited margin of appreciation and must advance convincing and compelling reasons to justify any interference. In particular, it must demonstrate that the interference corresponds to a 'pressing social need.'" The argument is that when there is an almost total consensus by the Council of Europe member states to accept conscientious objection regarding a certain area, a State which has not done so has minimal opportunity to justify a violation of an interference with the right to freedom of conscience.

While the legal issues affecting Grimmark's case are not entirely black and white, there is a fairly strong body of evidence substantiating the validity of the claim that her right to conscientious objection under the ECHR has indeed been violated. Interestingly, there was another case in Sweden in 2004, the case of Pastor Åke Green, in which the Swedish Supreme Court voted to support the religious freedom of the defendant based on the ultimate superiority of the ECHR. Pastor Green was initially tried by the Swedish court under a law against hate crimes for having given a sermon highly critical of homosexuals. The Supreme Court overturned the decision, stating that the rights to freedom of expression and freedom of religion provided by the ECHR, recognized to be superior to Swedish law, protected him since jurisprudence shows that a judgment would probably not be upheld by the European Court. In its judgement, the Swedish Supreme Court stated:

"The determining factor appears to be whether the restriction of A□ke Green's freedom to preach is necessary in a democratic society. This means that it must be assessed whether the restriction is proportionate to the protected interest. Considering the central role that religious conviction plays for an individual, it can be assumed a certain restraint in applying the European Convention to accept restrictions as legitimate pursuant to Article 9."

The Supreme Court's final decision was principally focused on Pastor Green's right to free speech. The conclusion reached was that criminalizing Pastor Green's speech was not proportionate to his infringement of a minority group's rights to protection from "hate speech." However in the Court's statement, references are made to the broader protection of freedom of religion by the ECHR and the need to determine whether a given restriction is "necessary in a democratic society." Specifically:

"When the European Court determines whether an alleged restriction is necessary in a democratic society, the court considers whether the restriction meets a pressing social need, whether it is proportionate to the legitimate purpose to be achieved, and whether the reasons asserted by the national authorities to justify it are relevant and sufficient."

Grimmark's case has not yet reached the Supreme Court, so an official consideration of its position with regard to the ECHR has not yet been adjudicated. The argument against Grimmark thus far would seem to center on the notion that the availability of abortion in Sweden is a "pressing social need," and that her refusal to participate makes her unemployment in Sweden as a midwife proportionate. However in order to legitimate this argument, the case would have to be made that her specific participation in abortions is more important than her right to manifest her religion or beliefs (as per Article 9) and that limiting this right is necessary "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." While European states are afforded a "margin of appreciation" in their consideration of European law, as Swedish legal scholar Fahlbeck notes, this margin is closely connected with whether there is consensus

among member countries regarding the issue in question; the greater the consensus, the smaller the margin of appreciation for divergence. He cites ECHR case *Bayatyan v. Armenia*, in which a man eligible for military service refused on the grounds of religious belief. The ECHR ruled in Bayatyan's favor, stating:

"…pluralism, tolerance and broadmindedness are hallmarks of a 'democratic society.' Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position (see Leyla Şahin, cited above, § 108). Thus, respect on the part of the State towards the beliefs of a minority religious group like the applicant's by providing them with the opportunity to serve society as dictated by their conscience might, far from creating unjust inequalities or discrimination as claimed by the Government, rather ensure cohesive and stable pluralism and promote religious harmony and tolerance in society."

There seems little doubt that refusing employment to a midwife for exercising her freedom of conscience is quite the opposite of providing her with "the opportunity to serve society." The obvious question, then, is why? Why is freedom-loving Sweden categorically denying Ms. Grimmark the right to freedom of thought, conscience, and religion?

Excerpted from The Statement of Government Policy presented by Swedish Prime Minister, Mr Stefan Löfven, at the Swedish Riksdag 3 October 2014.

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Resolution 1763 (2010) of the Parliamentary Assembly of the Council of Europe.

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Convention on Human Rights and Biomedicine, Oviedo, 4.IV.1997 (ETS 164). Available at: http://conventions.coe.int/Treaty/en/Treaties/Html/164.htm. Article 18 states: (1) Where the law allows research on embryos in vitro, it shall ensure adequate protection of the embryo. (2) The creation of human embryos for research purposes is prohibited."

Judgment of the Supreme court of Sweden, issued in Stockholm on 29 November 2005, available at: https://web.archive.org/web/20120218220008/http://www.domstol.se/Domstolar/hogstadomstolen/Avgoranden/2005/Dom_pa_engelska_B_1050-05.pdf

Ibid.

"Religious Freedom and Human Rights," Reinhold Fahlbeck, legal article published by Scandinavian Human Rights Lawyers, available at: http://www.shrl.eu%2Fwp-content%2Fuploads%2F2014%2F11%2FReinhold-Fahlbeck-JT.pdf&sandbox=1