

Webinar

Wednesday 10 December 2025 at Noon

Human Rights and Health Related Issues

The question of dignity and human health services has given rise to a number of ethical and legal issues.

Today it has been established that the moment a patient is received in a State hospital a sort of contract is certified whereby in view of the payments of taxes by the individual, the State has a duty to take care of the patient. This has solved the issue of the *culpa in eligendo* in tort cases against the State. The State is responsible for the actions of its servants in negligence in State institutions. This principle was extended to cover injuries suffered by pupils and students in State schools.

One issue which ended before the Constitutional Court was the question of whether a drug not prescribed in the list of free medicines provided by the National Health Scheme, amounted to a breach of the right to life. In *Caterina Cachia*, the apex Court in Malta ruled that apart from the fact that the drug in question if at all, merely prolonged one's life and was not any form of cure, the State had a right to apportion the health budget according to priorities. The case was dismissed,

An interesting case was one relating to the application in Malta of the Cross Border Health Directive

Under this Directive a person in the EU who needs a medical intervention, which though provided in his country, is being delayed owing to bureaucratic or other reasons, has the right to seek such medical intervention abroad within the EU and the expense of the State of his home country.

In *Daniel Cassar (CA 24 June 20112)* the Court of Appeal ruled that the Directive applied to the case of a person who had sought medical treatment abroad relating to a complicated pancreas transplant in Pisa, Now the Directive did not apply if the treatment was not available in Malta. However, according to the court, the Maltese health authorities had a legal obligation to publicly list the medical intervention and assistance which were free of charge under the National Health Scheme . Since it had not, the court ruled that the treatment was not excluded and consequently ordered Government to refund the expense of the medical treatment sought abroad. This judgment seems to be based more on compassion than law, for judges are human beings, and this is a factor to bear in mind in health litigation.

Another issue which relates more to the dignity of medical personnel than the patient is the issue of freedom of conscience. To what extent can medical doctors nurses etc object to their participation in any medical intervention to which they have serious grounds of objection on the basis of conscience. This right is guaranteed as a fundamental one in article 40 of the Maltese Constitution and article 9 of the European Convention on Human Rights. In some health related legislation such as the Embryo Protection Act 2012, (Cap 524) the right is expressly guaranteed also ordinary law. For instance article 20 of that Act provides that :

20. (1) A health care professional is under no obligation to participate in any procedure for the application of any technique of medically assisted procreation regulated by this Act when such professional considers such participation objectionable as a matter of conscience and declares his objection beforehand. Such declaration shall be communicated within three months from the coming into force of this Act, to the Authority and to the director of the hospital or medical establishment with whom the health care professional is employed.

(2) The objection declared as provided in sub-article (1) maybe revoked or the said objection may be declared even after the lapse of the period referred to in sub-article (1) but in such a

case the declaration raising the objection shall only come into effect after the lapse of a month from the date of its communication as provided in sub-article (1).

(3) The objection declared as provided in sub-articles (1) or (2) shall have the effect of exempting the health care professional who makes the declaration from any participation in any procedure or activity specifically and necessarily directed towards the implementation of the technique or procedure leading to a medically assisted procreation but does not exempt him from providing assistance before or after the said procedure or activity.

However, in the case of abortion, without proclaiming abortion as a fundamental human right, the European Court in times has found ways and means to submit such freedom, restrict and circumscribe it, to the extent that it conflicts with one's religious or moral beliefs.

The classical judgment on this point was that of *Grimmark v Sweden* (43726/17) decided on 11 February 2020. As shall be stated, what is grave and serious in this case, was not only that it was decided against applicant nurses, but that it amounted to a blocking at a preliminary stage of admissibility, from the case to be decided as is normally done by a seven-member court. Instead three judges buried the case declaring it to be inadmissible. That such decision be taken on such an important moral and legal matter and belief relating to abortion was unusual, when one compares this case to less serious ones such a wearing certain attire, or refusing certain food.

Applicant was nurse at a Swedish hospital . She was employed permanently as a nurse in a geriatric hospital. She then trained as a midwife, her studies being subsidized by the County. During her traineeship course she informed her employer that her conscience did not permit her to participate in any abortion procedure Her traineeship salary was withdrawn and she was not allowed to participate at the hospital as part of her studies.

She then applied in another clinic. She immediately informed her employer that she would not participate in abortions; she was told that this was permissible for her summer job ; then all of a sudden such permission was withdrawn even though there was a shortage of midwives . She was then accepted at another hospital for 6 months in spite of her objections to abortion through she was ready to take care of women seeking an abortion but not participate in the process itself . However even this employment was terminated when she publicly expressed in an interview her pro-life position on abortion, and her employer offered counselling so that she would change her position and views on abortion.

All attempts at seeking redress before the Swedish courts and tribunals failed.)

She then filed a complaint before the ECRTHR alleging a breach of freedom of conscience and belief and freedom of expression in view of her dismissal following the publication of the interview . The Court however ruled that the interference by the State with her freedom was necessary in a democratic society and proportionate. Sweden provides nationwide abortion services and therefore had a positive obligation to organize its health system in a way as to ensure that the effective exercise of freedom of health professionals in the professional context does not prevent the provision of such services , The requirement that all midwives should be able to perform all duties inherent to the vacant spots was not disproportionate or unjustified . Employers had under Swedish law great flexibility in deciding how work was to be organized and the right to request that employees perform all duties inherent to the post. When concluding an employment contract , the Court added, employees inherently accept these duties,. Applicant had voluntarily chosen to become a midwife and apply for vacant posts while knowing that this would mean assisting also in abortion cases . Moreover, as a result of the refusal the applicant was not left unemployed but was sent to work as a nurse at another hospital.

What is serious in this case is that the decision was taken unanimously by three judges declaring the case as inadmissible and therefore preventing it from being decided by the normal composition of seven judges. Declaring such a delicate case as inadmissible reveals a prejudice against pro-life employees. Besides, such decision is at odds with the Court's position in previous cases including those dealing with military service .

Another health related issue which has recently appeared on the horizon is surrogacy and the moral ethical and legal issues related to such topic,. A woman carries the pregnancy with a pledge to surrender the child once it is born to the party who commissioned or made the agreement for the pregnancy.

In most countries including countries with governments of different political hues, such as Spain, Portugal, Italy, Germany and France this is not allowed by law; indeed recently surrogacy has been prohibited in the Slovakian Constitution. and the reasons are various; the one which I firmly hold is that surrogacy amounts to exploitation of vulnerable women. Who would be prepared to carry for free the child of another for nine months; even more so if the person who "hires" the womb of another is wealthy? The probability therefore, is that compensation will be paid and a market of womb hiring will arise; and who would be prepared even against compensation to be pregnant in a sort of rent-a-womb exercise? Probably persons who are , for some reason or another in dire straits and owing to some vice such as gambling or drug abuse, or sickness, need money urgently ; and they would then offer their womb at a price.

Italy has already prohibited the commission of such crime by Italian nationals even outside Italy; The Charter of Human Rights of the EU also prohibits surrogacy in article 3 in that *"In the fields of medicine and biology, the following must be respected in particular...(c) the prohibition on making the human body and its parts as such a source of financial gain;"*

A further complication is the fact that most commercial surrogacy contracts contain specific provisions directing the surrogate to undergo risky and invasive medical procedures, or even purporting the power to compel her to undergo an abortion. In some cases therefore an abortion is performed as part of a commercial contract and on the orders of the intended parents

A movement is growing to declare surrogacy as an international crime since it debases the female sex, and makes pregnancy a commercial matter . Surrogacy is contrary to the dignity of the procreation of the human person. Surrogate motherhood represents an objective failure to meet the obligations of maternal love, and of responsible motherhood; it offends the dignity and the right of the child to be conceived, carried in the womb, brought into the world and brought up by his own parents; it sets up, to the detriment of families, a division between the physical, psychological and moral elements which constitute those families.