

**EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX**



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Confederazione Generale Italiana del Lavoro (CGIL) v. Italy
Complaint No.91/2013

**COMPLAINT
(Translation)**

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Confederazione Generale Italiana del Lavoro

Corso d'Italia 25

Rome

Italy

Secretariat of the European Social Charter

Directorate General of Human Rights and Legal Affairs

Directorate of Monitoring

F-67075 Strasbourg Cedex

France

COLLECTIVE COMPLAINT

*Lodged in accordance with the Additional Protocol of 1995 providing for a system of collective complaints
and with Rules Nos. 23 and 24 of the Rules of the European Committee of Social Rights*

Confederazione Generale Italiana del Lavoro

v.

Italy

Contents

1. Preliminary observations on the subject matter of the collective complaint

2. Admissibility and parties to the complaint

2.1. The respondent State

2.2. The complainant organisation

2.2.1. The Confederazione Generale Italiana del Lavoro (CGIL)

2.2.2. The CGIL's standing to lodge collective complaints before the European Committee of Social Rights

3. Subject matter of the collective complaint

3.1. Subject matter of the collective complaint

3.2. Relevant provisions of the European Social Charter and provisions of Law No. 194 of 1978

3.3. The legal situation in Italy regarding conscientious objection in respect of voluntary terminations of pregnancy

3.4. Women's right to health

3.5. The rights of medical staff and of staff performing auxiliary activities

3.6. The failure to implement Article 9 of Law No. 194 of 1978

3.7. Data on the number of objecting doctors in Italy

3.8. Articles of the European Social Charter alleged to have been violated with regard to the legal situation of women

3.8.1. Article 11 (*The right to protection of health*)

3.8.2. Article E (*Non-discrimination*)

3.9. Articles of the European Social Charter alleged to have been violated with regard to the legal situation of non-objecting medical and auxiliary staff

3.9.1. Article 1 (*The right to work*)

3.9.2. Article 2 (*The right to just conditions of work*)

3.9.3. Article 3 (*The right to safe and healthy working conditions*)

3.9.4. Article 26 (*The right to dignity at work*)

3.9.5. Article E (*Non-discrimination*)

3.10. Articles of the European Social Charter assumed to be relevant to the subject matter of this collective complaint

3.10.1. Article 21 (*The right to information and consultation*)

3.10.2. Article 22 (*The right to take part in the determination and improvement of working conditions and the working environment*)

4. Conclusions

Appendices

1. Preliminary observations on the subject matter of the collective complaint

The purpose of this complaint against Italy is to request the European Committee of Social Rights to rule that the implementation of Article 9 of Law No. 194 of 1978 (Appendix 1)¹ governing voluntary terminations of pregnancy is in violation of:

- Article 11 (*The right to protection of health*) of the European Social Charter, read alone or in conjunction with Article E (*Non-discrimination*), in respect of women's legal situation;
- Article 1 (*The right to work*) of the European Social Charter in respect of the legal situation of medical staff and auxiliary staff who are not conscientious objectors;
- Articles 2 (*The right to just conditions of work*), 3 (*The right to safe and healthy working conditions*) and 26 (*The right to dignity at work*) of the European Social Charter, read alone or in conjunction with Article 3, in respect of the legal situation of medical staff and auxiliary staff who are not conscientious objectors.

In addition, the European Committee of Social Rights is asked to determine whether Articles 21 (*The right to information and consultation*) and 22 (*The right to take part in the determination and improvement of working conditions and the working environment*) of the European Social Charter are relevant to the subject matter of this complaint on account of the principles which can be inferred from them, despite the fact that their scope is confined to for-profit undertakings (Appendix to the European Social Charter, Articles 21 and 22).

Indeed, Article 9, governing conscientious objection by medical staff in respect of voluntary terminations of pregnancy, says nothing about the specific implementation measures whereby the hospitals and the regions² must guarantee the presence of a sufficient number of non-objecting medical staff in all public hospital establishments, so as to ensure that the right of access to a voluntary termination of pregnancy is always secured.

¹ Law No. 194 of 22 May 1978 governing the social protection of motherhood and voluntary terminations of pregnancy

² The regions have their basis in Article 5 of the Constitution, which provides: "The Republic shall be one and indivisible. It shall recognise and promote local self-government, shall ensure the greatest possible administrative decentralisation of services which are the responsibility of the State and shall adapt the principles and methods of its legislation to the requirements of autonomy and decentralisation" and in Article 114, which provides "The Republic shall be composed of the municipalities, the provinces, the metropolitan cities, the regions and the State. The municipalities, provinces, metropolitan cities and regions shall be self-governing entities with their own statutes, powers and functions in accordance with the principles laid down in the Constitution. ...".

These legislative deficiencies lead to inadequate implementation of Law No. 194 of 1978, as can be seen from the data on its application in practice, and accordingly to violations of the rights to health and to self-determination of women wishing to terminate a pregnancy.

This legislation also results in a breach of the rights of medical staff who do not wish to raise a conscientious objection in respect of voluntary terminations of pregnancy, since it engenders working conditions which prevent them from exercising their recognised employment rights. They in fact have to bear the full workload relating to such terminations in view of the ever-growing number of doctors in this sector who are conscientious objectors.

Hence, in addition to the doubts concerning the compatibility of these provisions with the Italian Constitution (Articles 1, 2, 3, 4, 13, 32, 35 and 36), while it remains valid in principle the implementation of Article 9 of Law No. 194 of 1978, which gives no specific indications as to the manner in which it is to be applied, can be seen to be contrary to the European Social Charter (Article 11, read alone or in conjunction with Article E; Article 1 and Articles 2, 3 and 26, the latter articles being read alone or in conjunction with Article E).

Furthermore, as already indicated, the question arises of the relevance to the subject matter of this complaint of the provisions of Articles 21 and 22 of the European Social Charter.

2. Admissibility and parties to the complaint

2.1. The respondent State

This complaint is lodged against Italy.

Italy ratified and brought into effect the European Social Charter through Law No. 30 of 9 February 1999, entitled "Ratification and implementation of the revised European Social Charter and the appendix thereto, signed in Strasbourg on 3 May 1996" (Appendix 2).

It ratified the additional protocol to the Charter relating to the system of collective complaints through Law No. 298 of 28 August 1997, entitled "Ratification and implementation of the Additional Protocol to the European Social Charter providing for a system of collective complaints, signed in Strasbourg on 9 November 1995" (Appendix 3).

2.2. The complainant organisation

2.2.1. The Confederazione Generale italiana del Lavoro (CGIL).

The Confederazione Generale Italiana del Lavoro is an association for the defence of workers' and employment rights, founded in 1906, which has its national headquarters in Rome. It is the oldest Italian trade union and the most representative one (the CGIL has about 6 million members, including workers, pensioners and young people entering the labour market).

The CGIL is an organisation which pursues a programme founded on the principles of unity, secularity, democracy and multi-ethnicity and promotes freedom of association and the collective, solidarity-based self-protection of employees and other non-independent workers, workers employed in co-operative and self-managed entities, para-subordinated workers, unemployed workers, non-workers and those seeking their first job, pensioners and elderly people (Article 1 of the Statutes of the CGIL, Appendix 4).

The activities of the CGIL have their basis in the principles of the Italian Constitution, as its aim is to further their full implementation (Article 2 of the Statutes of the CGIL).

In particular "the CGIL asserts the value of solidarity in a society devoid of privileges or discrimination, within which the rights to work, to health and to social protection are recognised and wealth is equally distributed, ... seeking to erase the political, social and economic barriers which prevent women and men, whether of indigenous or immigrant

origin, from taking their own decisions concerning their lives and work based on equality of rights and opportunities and in a manner which acknowledges diversity. ...

The CGIL safeguards in the most appropriate ways the right of all workers to just and impartial employment relations ...".

Through its own category-based organisations, the CGIL determines the substance of employment contracts and at the same time pursues activities aimed at safeguarding, defending, asserting and conquering individual and collective rights, ranging from social welfare systems to workplace rights.

It plays a fundamental role in the protection of employment against the free and unrestricted operation of market forces. Its action principally consists in establishing solidarity in the workplace and between workers through its day-to-day concrete activities of representation and negotiation.

The association has a vertical structure, formed of category-based federations, and a horizontal one, comprising "chambers of labour". There are presently 13 categories at national level, and 134 chambers of labour.

The CGIL is affiliated to the European Trade Union Confederation (ETUC) and the International Trade Union Confederation (ITUC).

Further information concerning the CGIL can be found on its website www.cgil.it.

2.2.2. The CGIL's standing to lodge collective complaints before the European Committee of Social Rights

The CGIL is legitimately entitled to lodge collective complaints before the European Committee of Social Rights.

This entitlement is governed by Article 1 of the Additional Protocol to the European Social Charter providing for a system of collective complaints, which provides that the right to submit complaints shall belong inter alia to "representative national organisations of employers and trade unions within the jurisdiction of the Contracting Party against which they have lodged a complaint" (Appendix 5).

Vested with this authority, the CGIL hereby submits this collective complaint against Italy to the European Committee of Social rights through its Secretary General.

Article 17 of the Statutes of the CGIL provides "... the legal representatives of the CGIL with regard to third parties and in legal matters shall be:

- a) the Secretary General for all matters apart from those mentioned below, which may be delegated;
- b) other persons appointed by a formal decision of the confederal secretariat to deal with all legal matters of an administrative, fiscal, budgetary or financial nature and work safety matters. The secretariat may by a similar decision withdraw such an appointment without prior notice at any time and proceed in parallel with the appointment of another person. The Governing Board shall be formally informed of such decisions. ..."

The current Secretary General of the CGIL is Susanna Camusso, who was elected on 3 November 2010.

3. Subject matter of the collective complaint

3.1. Subject matter of the collective complaint

By lodging this complaint, the CGIL, assisted by lawyers Marilisa d'Amico and Benededetta Liberali del Foro of the Milan Bar, requests the European Committee of Social Rights to declare that Italy is failing to apply in a satisfactory manner Article 11 of the European Social Charter, read alone or in conjunction with Article E, since Article 9 of Law No. 194 of 1978 governing conscientious objection in respect of voluntary terminations of pregnancy does not suffice to guarantee the effective exercise of women's right of access to voluntary terminations of pregnancy.

The CGIL also asks the European Committee of Social Rights to declare that Italy is failing to apply in a satisfactory manner Article 1 and Articles 2, 3 and 26 of the European Social Charter, the latter articles being read alone or in conjunction with Article E, since Article 9 of Law No. 194 of 1978 does not suffice to guarantee the effective exercise of the rights belonging to medical and auxiliary staff in respect of such termination procedures.

The data gathered both at national level and at the level of the individual regions show that the public hospitals have insufficient non-objecting medical staff to carry out terminations of pregnancy, access to which is guaranteed by Law No. 194 itself.

Law No. 194 indeed guarantees women access to a pregnancy termination procedure when certain conditions are met.³

This legislation, which was put in place by Parliament following the Italian Constitutional Court's ruling on the unconstitutionality of the provisions criminalising voluntary terminations of pregnancy (judgment No. 27 of 1975),⁴ permits medical and auxiliary staff

³ In particular it states that "In order to undergo a termination of pregnancy during the first 90 days, women whose situation is such that continuation of the pregnancy, childbirth or motherhood would seriously endanger their physical or mental health, in view of their state of health, their economic, social or family circumstances, the circumstances in which conception occurred or the probability that the child would be born with abnormalities or malformations, shall apply to a public counselling centre [...] or to a fully authorised medico-social agency in the region or to a physician of their choice." (Art. 4, Law No. 194 of 1978), and that "a voluntary termination of pregnancy may be performed after the first 90 days: a) where the pregnancy or childbirth entails a serious threat to the woman's life; b) where pathological processes constituting a serious threat to the woman's physical or mental health, such as those associated with serious abnormalities or malformations of the foetus, have been diagnosed." (Art. 6, Law No. 194 of 1978).

⁴ With this decision the Italian Constitutional Court further declared: "Now there is no equivalence between the rights not only to life but also to health itself of someone who is already a person, such as the mother, and the protection of the embryo which has yet to become a person."

to raise a conscientious objection in relation to pregnancy termination procedures (Article 9 of Law No. 194 of 1978).

In this respect, Article 9 of Law No. 194 provides that medical and auxiliary staff may opt out of taking part in procedures resulting in a termination of pregnancy if they decide to raise a conscientious objection.

Notwithstanding this provision, it is recognised that women's right of access to such procedures cannot be sacrificed in any way.

First and foremost, the legislation denies all relevance to a conscientious objection if there is an imminent danger to the woman's health. It also provides that the hospitals and the authorised nursing homes must "in any event" guarantee the performance of such procedures in accordance with the provisions of Law No. 194. Each region must take steps to supervise and guarantee the activities carried out by the hospitals and the authorised nursing homes, including – and therefore not solely – through recourse to staff mobility measures.

Given this normative framework, it can be seen from the data relating to the number of non-objecting medical staff that, as expected, the implementation of Article 9 of Law No. 194 is inadequate to guarantee that, firstly, the hospitals and the authorised nursing homes and, secondly, the regions in all cases secure women's right of access to a pregnancy termination procedure.

This impairment of women's right of access renders Article 9 of Law 194, while still valid in principle, incompatible with the Italian Constitution (in particular Articles 2, 3, 13 and 32)⁵

⁵ Art. 2: "The Republic shall recognise and guarantee the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic shall require that the fundamental duties of political, economic and social solidarity be fulfilled." Art. 3: "All citizens enjoy equal social dignity and are equal before the law, without distinction as to sex, race, language, religion, political opinion, and personal or social conditions. It shall be the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country." Art. 13: "Personal freedom shall be inviolable. No one may be detained, inspected or searched or otherwise subjected to any restriction on personal liberty except by a reasoned judicial order and only in such cases and in such a manner as provided by law. In exceptional circumstances and for reasons of necessity and urgency, as peremptorily defined by law, the police may take provisional measures, which shall be referred for judicial validation within 48 hours and which, in the absence of such validation within 48 hours, shall be revoked and considered null and void. Any act of physical or moral violence against a person whose freedom is restricted shall be punished. The law shall establish the maximum duration of preventive custody." Art. 32: "The Republic shall safeguard health as a fundamental right of the individual and as a collective interest, and shall guarantee free medical care to persons who are indigent. No one may be obliged to undergo any health treatment, except as provided by law. The law may not under any circumstances violate limits imposed out of respect for the human person".

and with Article 11 (*the right to protection of health*) of the European Social Charter, read alone or in conjunction with Article E (*non-discrimination*).

As a result of this situation the workload in respect of such termination procedures necessarily falls on those who have conversely decided not to raise a conscientious objection. The data on the law's application in practice show that the number of non-objecting practitioners is insufficient, regard being had to women's guaranteed right of access to a voluntary termination of pregnancy, resulting in an impairment of the employment rights of those who decide not to become conscientious objectors.

In view of the growing number of objecting practitioners and the above-mentioned insufficiency of the number of non-objecting practitioners in relation to the guaranteed right of access, the rights of the latter practitioners are in fact violated, since they have to bear the entire workload in this field.

The impairment of these rights renders Article 9 of Law No. 194 incompatible with both the Italian Constitution (in particular Articles 1, 2, 3, 4, 35 and 36)⁶ and Article 1 and Articles 2, 3 and 26 of the European Social Charter, the latter articles being read alone or in conjunction with Article E (*non-discrimination*), showing the need to specify in greater detail the tangible measures whereby the hospitals and the regions are to guarantee the exercise of such rights through the presence of a sufficient, suitable number of non-objecting medical staff in each hospital.

The CGIL would also bring to the attention of the European Committee of Social Rights the possibility that it might assess the relevance to the subject matter of this complaint of Articles 21 and 22 of the Charter, in as much as they lay down certain principles regarding

⁶ Art. 1 of the Constitution: "Italy is a democratic republic founded on labour. Sovereignty is vested in the people, who shall exercise it under the forms and within the limits laid down in the Constitution." Art. 2: "The Republic shall recognise and guarantee the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic shall require that the fundamental duties of political, economic and social solidarity be fulfilled." Art. 3: "All citizens enjoy equal social dignity and are equal before the law, without distinction as to sex, race, language, religion, political opinion, and personal or social conditions. It shall be the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country." Art. 4: "The Republic shall recognise all citizens' right to work and shall promote the conditions making this right effective. All citizens shall have the duty, according to their own possibilities and personal choice, to carry on an activity or an occupation which contributes to the material and spiritual progress of society." Art. 35: "The Republic shall safeguard work in all its forms and applications. It shall take care of the training and professional advancement of workers. It shall promote and foster international agreements and organisations aimed at asserting and regulating workers' rights. It shall recognise freedom to emigrate, subject to requirements laid down by law in the public interest, and protect Italian employment abroad." Art. 36: "Workers shall be entitled to a remuneration proportionate to the quantity and quality of their work and, in any case, sufficient to ensure them and their families a free and dignified existence. The maximum duration of the workday shall be laid down by law. Workers shall be entitled to weekly rest and to paid annual leave, and may not renounce this entitlement."

information and consultation as well as participation in the determination and improvement of working conditions and the working environment.

3.2. Relevant provisions of the European Social Charter and provisions of Law No. 194 of 1978.

The following articles are alleged to have been violated with regard to the legal situation of women.

Article 11 (The right to protection of health):

“With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia:

1. to remove as far as possible the causes of ill-health;
2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in health matters;
3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.”

Article E (Non-discrimination):

“The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health association with a national minority, birth or other status.”

The following articles of the European Social Charter are alleged to have been violated with regard to the legal situation of medical and auxiliary staff who are not conscientious objectors, in addition to Article E.

Article 1 (The right to work):

"With a view to ensuring the effective exercise of the right to work, the Parties undertake:

...

2. to protect effectively the right of the worker to earn his living in an occupation freely entered upon;
... ."

Article 2 (The right to just conditions of work):

"With a view to ensuring the effective exercise of the right to just conditions of work, the Parties undertake:

- 1) to provide for reasonable daily and weekly working hours, the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit;
- 2) to provide for public holidays with pay;
- 3) to provide for a minimum of four weeks' annual holiday with pay;
- 4) to eliminate risks in inherently dangerous or unhealthy occupations, and where it has not yet been possible to eliminate or reduce sufficiently these risks, to provide for either a reduction of working hours or additional paid holidays for workers engaged in such occupations;
- 5) to ensure a weekly rest period which shall, as far as possible, coincide with the day recognised by tradition or custom in the country or region concerned as a day of rest;
- 6) to ensure that workers are informed in written form, as soon as possible, and in any event not later than two months after the date of commencing their employment, of the essential aspects of the contract or employment relationship;
- 7) to ensure that workers performing night work benefit from measures which take account of the special nature of the work."

Article 3 (The right to safe and healthy working conditions):

"With a view to ensuring the effective exercise of the right to safe and healthy working conditions, the Parties undertake, in consultation with employers' and workers' organisations:

- 1) to formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment. The primary aim of this policy shall be to improve occupational safety and health and to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, particularly by minimising the causes of hazards inherent in the working environment;
- 2) to issue safety and health regulations;
- 3) to provide for the enforcement of such regulations by measures of supervision;

4) to promote the progressive development of occupational health services for all workers with essentially preventive and advisory functions."

Article 26 (The right to dignity at work):

"With a view to ensuring the effective exercise of the right of all workers to protection of their dignity at work, the Parties undertake, in consultation with employers' and workers' organisations:

... 2) to promote awareness, information and prevention of recurrent reprehensible or distinctly negative and offensive actions directed against individual workers in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct."

The following articles of the European Social Charter are considered relevant to the subject matter of this complaint, even if it cannot be argued that they have been violated.

Article 21 (The right to information and consultation):

"With a view to ensuring the effective exercise of the right of workers to be informed and consulted within the undertaking, the Parties undertake to adopt or encourage measures enabling workers or their representatives, in accordance with national legislation and practice:

... b) to be consulted in good time on proposed decisions which could substantially affect the interests of workers, particularly on those decisions which could have an important impact on the employment situation in the undertaking."

Article 22 (The right to take part in the determination and improvement of working conditions and the working environment):

"With a view to ensuring the effective exercise of the right of workers to take part in the determination and improvement of the working conditions and working environment in the undertaking, the Parties undertake to adopt or encourage measures enabling workers or their representatives, in accordance with national legislation and practice, to contribute:

a) to the determination and the improvement of the working conditions, work organisation

and working environment;

b) to the protection of health and safety within the undertaking;

c) to the organisation of social and socio-cultural services and facilities within the undertaking;

d) to the supervision of the observance of regulations on these matters."

The provision considered to be in breach of the European Social Charter, while remaining valid in principle, is Article 9 of Law No. 194 of 1978, by reason of the difficulties encountered with its implementation:

"Medical and auxiliary staff shall not be required to participate in the procedures referred to in Articles 5 and 7⁷ or in operations aimed at terminating a pregnancy if they raise a

⁷ Art. 5: "In all cases, in addition to guaranteeing the necessary medical examinations, counselling centres and socio-medical agencies shall be required, especially when the request for termination of pregnancy is motivated by the impact of economic, social or family circumstances upon the pregnant woman's health, to examine possible solutions to the problems in consultation with the woman and, where the woman consents, with the father of the conceptus, with due respect for the dignity and personal feelings of the woman and the person named as the father of the conceptus, to help her to overcome the factors which would lead her to have her pregnancy terminated, to enable her to take advantage of her rights as a working woman and a mother, and to encourage any suitable measures designed to support the woman by providing her with all necessary assistance both during her pregnancy and after the delivery. Where the woman has applied to a physician of her choice, he/she shall: carry out the necessary medical examinations, with due respect for the woman's dignity and freedom; assess, in conjunction with the woman and, where the woman consents, with the father of the conceptus, with due respect for the dignity and personal feelings of the woman and of the person named as the father of the conceptus, if so desired taking account of the result of the examinations referred to above, the circumstances leading her to request that her pregnancy be terminated; and inform her of her rights and of the social welfare services available to her, as well as regarding the counselling centres and the socio-medical agencies. Where the physician at the counselling centre or socio-medical agency, or the physician of the woman's choice, finds that in view of the circumstances termination is urgently required, he/she shall immediately issue the woman a certificate attesting to the urgency of the case. Once she has been issued this certificate, the woman may report to one of the establishments authorised to perform pregnancy terminations. If a termination is not found to be urgently required, the physician at the counselling centre or the socio-medical agency, or the physician of the woman's choice, shall at the end of the consultation, if the woman requests that her pregnancy be terminated on account of circumstances referred to in Article 4, issue her a copy of a document signed by him/herself and the woman attesting that the woman is pregnant and that the request has been made, and shall request her to reflect for seven days. After seven days have elapsed, the woman may take the document issued to her under the terms of this paragraph and report to one of the authorised establishments in order for her pregnancy to be terminated."

Art. 7: "The pathological processes referred to in the preceding article shall be diagnosed and certified by a physician on the staff of the department of obstetrics and gynaecology of the hospital establishment in which the termination is to be performed. The physician may call upon the assistance of specialists. The physician shall be required to forward the documentation on the case as well as his/her certificate to the medical director of the hospital in order for the termination to be performed immediately. Where the termination of pregnancy is necessary in view of an imminent threat to the woman's life, it may be performed without observing the procedures referred to in the preceding paragraph and in a place other than those referred to in Article 8. In such cases, the physician shall be required to notify the provincial medical officer. When there is a possibility that the foetus may be viable, a termination of pregnancy may be carried out only in the case provided for in Article 6a) and the doctor performing the operation must take all appropriate measures to safeguard the life of the foetus."

conscientious objection, which is declared in advance. Such a declaration shall be transmitted to the provincial medical officer and, in the case of staff employed by a hospital or nursing home, to the medical director, within one month of the entry into force of this law or the date of their qualification or commencement of employment within an establishment required to provide services aimed at the termination of pregnancies, or the date of conclusion of an agreement with insurance agencies entailing the provision of such services.

The objection may be withdrawn at any time, or may be notified outside the time-limits specified in the preceding paragraph, in which case the declaration shall take effect one month after it has been submitted to the provincial medical officer.

The hospitals and authorised nursing homes shall be required to guarantee in any event the completion of the procedures provided for in Article 7 and the implementation of terminations of pregnancy requested in accordance with Articles 5, 7 and 8.⁸ The regions shall supervise and guarantee the implementation of this requirement, including through staff mobility measures.

Conscientious objection may not be invoked by medical and auxiliary staff when, given the specific circumstances, their personal intervention is indispensable to save the life of a woman in imminent danger.

A conscientious objection shall be deemed withdrawn, with immediate effect, if the person having raised it participates in the procedures or pregnancy termination operations provided for under this law apart from in the cases referred to in the previous paragraph."

⁸ Art. 8: "Pregnancy terminations shall be performed by a physician on the staff of the obstetrics and gynaecology department of a general hospital as referred to in Article 20 of Law No. 132 of 12 February 1968; this physician shall also verify that there are no medical contra-indications. Pregnancy terminations may likewise be carried out in the specialised public hospitals, institutes and establishments referred to in the penultimate paragraph of Article 1 of Law No. 132 of 12 February 1968, and the institutions referred to in Law No. 817 of 26 November 1973 and Presidential Decree No. 754 of 18 June 1958, whenever the competent administrative agencies so request. During the first 90 days, pregnancy terminations may also be performed in nursing homes authorised by the regions which have the requisite medical equipment and adequate obstetric and gynaecological services. The Minister of Health shall issue a decree restricting the capacity of authorised nursing homes to carry out terminations of pregnancy, by establishing: 1) the percentage of pregnancy terminations that may be performed relative to the total number of surgical operations carried out the preceding year at the particular nursing home; 2) the percentage of patient-days allowed for pregnancy-termination cases in relation to the total number of patient-days in the previous year under the conventions concluded with the regions. The percentages referred to in items 1 and 2 shall not be less than 20% and shall be the same for all nursing homes. Nursing homes may select the criterion which they will observe from the two set out above. During the first 90 days, pregnancy terminations may likewise be performed, following the establishment of local socio-medical units, at suitably equipped public outpatient clinics operating under the hospitals and licensed by the regions. The certificate issued in accordance with the third paragraph of Article 5 and, after seven days have elapsed, the document delivered to the woman under the fourth paragraph of the same article shall permit the woman to obtain a termination, on an emergency basis, and, where necessary, her admission to hospital."

3.3. The legal situation in Italy regarding conscientious objection in respect of voluntary terminations of pregnancy

Conscientious objection constitutes a way of exercising one's freedom of conscience, which can be defined as the freedom to act according to one's most inner convictions.

In particular, conscientious objection can be defined as the solution adopted by parliament for certain fields of law on account of the inner conflicts which may be experienced by certain persons in given situations. Indeed, on one hand there are the individual's own inner convictions and, on the other hand, there is the obligation to comply with the law, which may require that person to behave in a manner that departs from those personal convictions.

In this connection, before examining in detail the problems encountered with the application of Article 9 of Law No. 194, arising from the exercise of the right of conscientious objection by staff wishing to opt out of participating in pregnancy terminations, it is necessary to focus specifically on the concept of conscientious objection itself so as to understand how it is construed in Italian law.

It can be noted that the concept of conscientious objection is recognised, albeit indirectly, in Articles 2, 3, 19 and 21 of the Italian Constitution, which safeguard inalienable human rights, human dignity, freedom of religion and freedom of thought.⁹

This recognition is based on the interpretations given by the Italian Constitutional Court, which has considered that the above constitutional provisions provide a justification for certain types of conduct, such as conscientious objection, whereby an individual seeks to evade obligations imposed by law.¹⁰ Concerning this last point, with particular reference to the risk that the possibility of raising a conscientious objection may extend to all fields of law, it can be noted that the legislation in Italy comprises a number of specific provisions

⁹ Art. 19: "Everyone is entitled to freely profess their religious beliefs in any form, individually or with others, and to promote them and celebrate rites in public or in private, provided they are not offensive to public morality", Art. 21: "Everyone has the right to freely express their thoughts in speech, writing or any other means of communication. The press may not be subjected to any form of authorisation or censorship. Seizure may be permitted only by a judicial order stating reasons and only for offences expressly determined by legislation on the press or in case of a breach of the obligation to identify a person responsible for such offences. In such cases, where there is an absolute urgency and timely intervention by the judiciary is not possible, a periodical may be confiscated by the criminal police, which shall immediately and within not more than 24 hours refer the matter to the judiciary for validation. Failing such validation within the next 24 hours, the measure shall be revoked and considered null and void. The law may introduce general provisions for the disclosure of periodicals' sources of funds. Publications, performances, and all other exhibits which offend against public morality shall be prohibited. Measures to prevent and punish such violations shall be established by law".

¹⁰ See the Constitutional Court's decisions Nos. 196 of 1987, 467 of 1991 and 43 of 1997, as published on the website www.cortecostituzionale.it.

establishing such an entitlement, which seek to strike a fine balance between the various rights which may be at stake.

Conscientious objection therefore takes the form of a subjective right in the specific legal fields where it is expressly provided for, such as military service, medically assisted reproduction and, as already mentioned, voluntary terminations of pregnancy.

In this connection, and with specific reference to the need to standardise such provisions, reference can be made to the Italian Constitutional Court's observations that the protection accorded to freedom of conscience "cannot be considered unlimited and unconditional. It is above all for parliament to strike a balance between the individual's conscience and the possibility to be accorded to that individual, on one hand, and the fundamental duties of political, economic and social solidarity, as imposed by the Constitution (Article 2), on the other hand, so as to safeguard public order and ensure that the resulting burdens are shared equally by all, without privileges" (judgment No. 43 of 1997).

As already mentioned, freedom of conscience can be guaranteed in so far as parliament succeeds in finding the right balance regarding the other rights and duties that may be at issue in this sensitive matter of terminations of pregnancy.

Article 9 of Law No. 194 of 1978 is of particular importance (even though, as we shall see below, its precept is being flouted), since it establishes a balance between the protection of medical practitioners' freedom of conscience and the protection of other constitutional rights conferred on women.

These rights are known to include the personal, inalienable rights to life, to health and to self-determination in the case of a pregnant woman who decides to undergo a termination.

Article 9 of Law No. 194 provides "Medical and auxiliary staff shall not be required to participate in the procedures referred to in Articles 5 and 7 or in operations aimed at terminating a pregnancy if they raise a conscientious objection, which is declared in advance."

This provision is intended to guarantee that doctors and health care staff can enjoy freedom of conscience. To this end, they are afforded the possibility, if they raise a conscientious objection, of abstaining from participating in the procedures and related activities aimed at terminating a pregnancy under the measures provided for by Law 194 of 1978.

However, despite this apparently unlimited recognition, the same provision stipulates "Conscientious objection may not be invoked by medical and auxiliary staff when, given the specific circumstances, their personal intervention is indispensable to save the life of a woman in imminent danger."

Accordingly, the legislation ensures that the possibility of raising a conscientious objection can never jeopardise a woman's right to life.

Article 9 also provides that, even where there is no imminent danger to life, "The hospitals and the authorised nursing homes shall be required to guarantee in any event the completion of the procedures provided for in Article 7 and the implementation of terminations of pregnancy requested in accordance with Articles 5, 7 and 8. The regions shall supervise and guarantee the implementation of this requirement, including through staff mobility measures."

It is clear from Article 9 that the legislators wished to strike a balance between the rights to life and to health of women wishing to obtain a termination of pregnancy and medical staff's freedom of conscience.

They sought to ensure that women were always guaranteed a possibility of access to a termination without having to suffer the negative consequences inherent in medical staff's freedom to raise a conscientious objection.

In this respect, Article 9 provides that a doctor whose personal intervention proves necessary to save a woman's life, in the event of imminent danger thereto, cannot raise a conscientious objection. In all other cases the presence of non-objecting medical staff is to be guaranteed, above all by the hospitals and the authorised nursing homes, and the regions are to superintend the activities carried out in this field, including through staff mobility measures.

This spectrum of means employed (namely, the organisational measures taken by the hospitals, the supervision of their activities exercised by the regions, and the regions' recourse to staff mobility) does not, however, in practice appear sufficient and therefore appropriate to achieve the objective which Law No. 194 seeks to fulfil, as will be shown below.

Lastly, mention must be made here of a point which will be expanded upon below. Women's right of access to pregnancy termination procedures can be exercised solely in hospitals where non-objecting doctors are present in sufficient number to deal with the demand for such terminations.

From this standpoint, it can be seen that there is a close link between the guarantees and the protection of women's legal situation and the guarantees and protection to be accorded to the legal situation of non-objecting medical staff.

Notwithstanding this legal framework, the complainant organisation therefore intends to raise a number of criticisms concerning the manner in which Article 9 of Law No. 194 is applied, making it necessary to specify in greater detail the tangible measures whereby it is possible to secure women's right of access to terminations of pregnancy (in respect of which a violation of Article 11 of the European Social Charter, read alone or in conjunction with Article E, is alleged) and the rights of those who, in the exercise of their medical and health-related activities, do not raise a conscientious objection (in respect of which a violation of Article 1 and Articles 2, 3 and 26 of the European Social Charter, the latter articles being read alone or in conjunction with Article E, is alleged).

3.4. Women's right to health

As already mentioned, Law No. 194 of 1978 establishes a balance between the requirements relating to women (primarily respect for their right to life and to health and the right to self-determination as regards their reproductive choices in matters of termination of pregnancy) and those relating to medical staff (their right to raise a conscientious objection in the manner and according to the time-limits laid down in Article 9 of Law No. 194), ensuring that neither set of rights is ever sacrificed, except in cases where there is an imminent danger to a woman's life (since in such cases, as indicated above, Article 9 precludes the possibility of exercising the right of conscientious objection).

Nonetheless, in practice, the high number of doctors who are objectors prevents the full implementation of the legislation, on account of the same legislation's deficiencies when it comes to determining tangible means of ensuring that there is a sufficient number of non-objecting doctors within each hospital.

As a result of the unsatisfactory implementation of the legislation, women's rights to life and to health and their right to self-determination, as expressly recognised in the Italian Constitution (Articles 2, 13 and 32), are irremediably sacrificed.

The conditions laid down in Law No. 194, governing access to a termination of pregnancy, also clarify the relationship that exists between the exercise of these constitutionally guaranteed rights and the voluntary termination of pregnancy.

As mentioned above, Law No. 194 permits women to have access to termination procedures during the first ninety days when the situation is such that "continuation of the pregnancy, childbirth or motherhood would seriously endanger their physical or mental health, in view of their state of health, their economic, social or family circumstances, the circumstances in which conception occurred or the probability that the child would be born with abnormalities or malformations" (Art. 4), whereas after three months a voluntary termination of pregnancy may be carried out "where the pregnancy or childbirth entails a serious threat to the woman's life" or "where pathological processes constituting a serious threat to a woman's physical or mental health, such as those associated with serious abnormalities or malformations of the foetus, have been diagnosed" (Art. 6).

It can be seen from these provisions that access to a termination of pregnancy may be necessary for a number of reasons closely related to the protection of a woman's health - physical and mental - and life.

Therefore, a situation where it is impossible to obtain a termination requested in accordance with these legal conditions constitutes a direct, absolute breach of women's fundamental rights.

Reference can be made here to the rulings already handed down by the Italian Constitutional Court with regard to voluntary terminations of pregnancy and assisted reproductive technology, so as to clarify the specific scope of women's right to life and health in these matters closely linked to questions of reproduction.

With its judgment No. 27 of 1975,¹¹ the Court dealt in particular with the question of the constitutionality of the provision of the Criminal Code which criminalised procurement of an abortion, including in cases where it had been established that the pregnancy would endanger the woman's physical and mental health.

In this judgment, while recognising the constitutional basis for protection of the unborn child (Article 31, second paragraph, and Article 2 of the Italian Constitution), the Court held that there can be no equivalence between the rights to life and to health of someone who is already a person, namely the mother, and the rights of someone yet to become a person, namely the embryo.

In matters of assisted reproductive technology, with judgment No. 151 of 2009¹² the Constitutional Court extended the protection of women's health beyond the limit of harm not foreseeable at the time of fertilisation, as established by Article 14 of Law No. 40 of

¹¹ See the website www.cortecostituzionale.it.

¹² See the website www.cortecostituzionale.it.

2004.¹³ In weighing the legal situations of the woman and the embryo, where there is a risk of harm to the woman's health, it is the protection of the latter that is given precedence. The Court indeed makes it clear that the protection afforded to the embryo is not absolute.

In the light of these considerations, sacrificing a woman's right to health would seem even more unreasonable, regard being had to the acknowledged exceptional nature, as we have already seen, of one of the elements in balance, namely conscientious objection.

As underlined, however, Article 9 of Law No. 194 provides that conscientious objection must never endanger the life or health of the woman, thereby establishing a precise equilibrium between the legal situations of the parties concerned.

3.5. The rights of medical staff and of staff performing auxiliary activities

As already mentioned, with regard to voluntary terminations of pregnancy freedom of conscience can be guaranteed for the protection of individuals in so far as the legislators succeed in striking a fair balance in respect of other rights and obligations that may be at issue.

Article 9 of Law No. 194 of 1978 is of particular importance, since its aim is to grant medical staff and staff performing auxiliary activities the possibility of raising a conscientious objection concerning terminations of pregnancy. An instrument for the protection of practitioners' freedom of conscience has thus been established (Articles 2, 3, 19 and 21 of the Italian Constitution).

However, in the light of this article, consideration must be given to the position of those who, while belonging to the same professional category, decide not to raise a conscientious objection and accordingly agree to carry out termination procedures, thereby putting into effect Law No. 194 of 1978 and guaranteeing women access to terminations in accordance with the conditions laid down therein.

¹³ The third paragraph of Article 14 of Law No. 40 provides "When the transfer of embryos to the uterus proves impossible on serious, documented grounds of force majeure, linked to the woman's state of health, which were not foreseeable at the time of fertilisation, the cryopreservation of the embryos shall be permitted up to the date of the transfer, which is to be implemented as soon as possible."

With judgment No. 151 of 2009 the Constitutional Court deemed the third paragraph of Article 14 to be unconstitutional "in so far as it does not provide that the transfer of embryos, which, as this provision states, must take place as soon as possible, shall be carried out without jeopardising the woman's health."

In particular, in view of the data gathered on the law's practical application, it is possible to identify the conditions under which these practitioners – referred to as "non-objectors" - are required to work and, hence, to raise the question of the protection of their rights, namely the right to work and the right to conditions permitting them to avail themselves of this right in practice, in addition to respect for the dignity of the workers themselves (Articles 1, 2, 3, 4, 35 and 36 of the Italian Constitution).

Article 9 of Law No. 194 provides "Medical and auxiliary staff shall not be required to participate in the procedures referred to in Articles 5 and 7 or in operations aimed at terminating a pregnancy if they raise a conscientious objection, which is declared in advance."

The aim of this provision is to afford medical and other health care staff a guarantee of freedom of conscience. To this end, they are indeed granted the possibility of raising a conscientious objection and thereby abstaining from participating in the procedures and related activities aimed at terminating a pregnancy under the conditions laid down in Law 194 of 1978.

The data on the legislation's application in practice, to which we shall return below, show that the number of those who choose to raise a conscientious objection is constantly growing.

This situation accordingly results in a heavier workload for those who decide not to do so.

The rights of the non-objectors are therefore impaired for the very reason that the number of objecting doctors is high compared with the unchanging workload involved in carrying out terminations.

From this standpoint, therefore, it is necessary to determine specific, tangible implementation measures intended to ensure that each hospital has a sufficient number of non-objecting doctors to prevent the impairment and the sacrifice of their legal rights.

Only in cases where there is an imminent danger to a woman's life does the law provide that a conscientious objection, even if notified in a timely manner, cannot be invoked against a woman seeking a termination, when the personal intervention of the objecting doctor proves necessary to save her very life.

Conversely, in all other cases, as already mentioned, the law stipulates in general terms that "The hospitals and the authorised nursing homes shall be required to guarantee in any event the completion of the procedures provided for in Article 7 and the implementation of terminations of pregnancy requested in accordance with Articles 5, 7 and 8. The regions

shall supervise and guarantee the implementation of this requirement, including through staff mobility measures."

As can be inferred from the wording of the law, three levels of control are established in order to secure women's access to terminations and, hence, the presence of non-objecting personnel: the activity of the hospitals, the supervision of their activity exercised by the regions, and the possibility for the regions also to resort to staff mobility measures.

As can be seen from the data on the law's application in practice, this spectrum of controls does not suffice to guarantee that there is a sufficient number of non-objecting doctors in each hospital.

It must also be noted that the objective of guaranteeing a sufficient presence of non-objecting medical and auxiliary staff, so as to avoid any risk of undermining their rights, is clearly and unavoidably linked to the objective – laid down in Law No. 194 itself – of guaranteeing women access to a termination of pregnancy.

In view of the high number of objecting doctors, the tangible implementation measures taken to guarantee the presence of a sufficient number of non-objecting doctors in each hospital, and the achievement of this objective, constitute not only an effective guarantee of access to the required treatment for women, but also a safeguard of the non-objectors' subjective legal rights.

Notwithstanding this legal framework, the complainant organisation therefore intends to raise a number of criticisms concerning the application of Article 9 of Law No. 194, which show the non-conformity of this article with the requirements of the European Social Charter (Article 1 and Articles 2, 3 and 26, the latter articles being read alone or in conjunction with Article E) and the need for greater precision regarding the tangible measures to be taken to guarantee the rights of staff belonging to the category of those who decide not to raise a conscientious objection regarding health care activities linked to terminations of pregnancy.

3.6. The failure to implement Article 9 of Law No. 194 of 1978.

Notwithstanding the provisions of Article 9 of Law No. 194, there is a problem linked to the ever-growing number of objecting doctors and the resulting violation of women's rights when a hospital is not in a position to guarantee them access to a termination of pregnancy on account of a shortage of non-objecting medical personnel.

The exponential growth in the number of doctors exercising the right to raise a conscientious objection impairs the exercise of women's right of access to a termination.

In parallel, the same normative situation negatively affects the rights of the medical and other health care staff who do not raise a conscientious objection.

This is because the law provides, as we have seen, for a spectrum of measures aimed at guaranteeing access to pregnancy termination procedures, but does not specify the tangible means whereby such measures are to be put in place.

Article 9 of Law No. 194 indeed confines itself to providing that the hospitals must in any event guarantee the requested service and that the regions shall superintend the organisational activity of the hospitals, including through staff mobility measures.

As a result of the exponential growth in the number of objecting doctors and of the deficiencies regarding the determination of tangible measures for the implementation of Article 9 of Law No. 194, this normative provision and its application in practice (as reflected in the data set out below) are incompatible with the European Social Charter, and doubts can also be raised as to their conformity with the principles of the Italian Constitution.

Mention must also be made of the fact that the unsatisfactory application of Article 9 (as a result of the same failure to determine tangible measures to guarantee the presence of non-objecting staff and of the growing number of doctors who are objectors) concerns a piece of legislation, Law No. 194 of 1978, to which the Italian Constitutional Court has attributed a specific status.

The Constitutional Court has in fact deemed this law to be of "constitutionally required substance" (judgments Nos. 26 of 1981 and 35 of 1997) and has therefore recognised that it is a law "whose core provisions cannot be amended or rendered ineffective without breaching the corresponding specific provisions of the Constitution itself (or other constitutional laws)" (judgment No. 16 of 1978).

Given these implementation difficulties, the solutions identified in practice have also proved insufficient and unsuitable to guarantee the implementation of Law No. 194 and hence to ensure the effective protection of the rights of women wishing to seek a termination of pregnancy.

In many cases the hospitals have called on external non-objecting staff. This solution, which indeed appears to guarantee the required service, namely a termination of

pregnancy, can be seen to have obvious limits linked to the failure to guarantee the continuity of care provision.

In other cases the hospitals have had recourse to agreements with authorised nursing homes. However, in such cases the conclusion of agreements with private establishments undermines the public sector foundations of Law No. 194. Here, rather than solving the problem of the shortage of staff, it is being circumvented

Another solution consists in including a clause in the notices of competitions to fill vacant posts of doctor in public hospitals which excludes objecting doctors from taking part. In this connection, attention must be drawn to the Italian administrative courts' case-law regarding such clauses, which are not unequivocally recognised as lawful.¹⁴

It can be seen from this legislative framework and from its application in practice that there is a need for greater precision regarding the practical measures whereby hospitals are to guarantee the presence of non-objecting personnel and the practical measures to be taken by the regions to supervise these activities and have recourse to staff mobility. For these reasons the complainant organisation alleges:

- with regard to the legal rights of women, that the situation is not in conformity with both the principles laid down in the Italian Constitution (in particular Articles 2 and 13, since there is a violation of women's right to life and to self-determination; 3, since there is a violation of the principle of equality and of the reasonableness of the legislation itself; and 32, safeguarding women's right to health) and the principles of Article 11 of the European Social Charter, read alone or in conjunction with Article E;
- with regard to the legal rights of non-objecting medical and auxiliary staff, that the situation is not in conformity with both the principles laid down in the Italian Constitution (in particular Articles 1, 2, 3, 4, 35 and 36), and with the principles of Article 1 and Articles 2, 3 and 26 of the European Social Charter, the latter articles being read alone or in conjunction with Article E.

¹⁴ See for example, concerning the illegality of such clauses, the decision handed down by the Regional Administrative Court (TAR) of Liguria on 3 July 1980, No. 396, whereby every special requirement for admission to public employment which has the effect of limiting access must have its basis in a law, which may lay down restrictions or exclusions in respect of certain categories of persons, on condition that they are linked to the competencies required or to other objective requirements and, in any case, do not institute entirely arbitrary, unjustified differences in treatment.

Conversely, the Regional Administrative Court of Emilia Romagna ruled on 13 December 1982, in judgment No. 289, that a person recruited on a provisional basis by a hospital through a vacancy notice containing a clause whereby the post could be awarded solely to persons who had not raised a conscientious objection could be lawfully dismissed in the event that he or she subsequently decided to become a conscientious objector.

Furthermore, the principles laid down in Articles 21 and 22 of the European Social Charter, which recognise and guarantee the right to information and consultation and to take part in the determination and improvement of working conditions and the working environment, are deemed relevant to the subject matter of this complaint.

3.7. Data on the number of objecting doctors in Italy

In view of the above considerations, it is necessary to supply statistical data to substantiate the alleged inadequacy of the number of non-objecting medical staff in public hospitals, and hence the problems with the application of Article 9 of Law No. 194 of 1978.

Each year the ministry of health submits a report on the state of implementation of Law No. 194 to Parliament.¹⁵

The latest report, submitted in August 2011, contains the following data on the different professional categories (Appendix 6).

In 2009 the number of conscientious objectors among the gynaecologists and the anaesthetists stabilised, after having increased significantly in recent years.

At national level, for gynaecologists the percentage of objectors increased from 58.7% in 2005, to 69.2% in 2006, 70.5% in 2007, 71.5% in 2008 and 70.7% in 2009;

For anaesthetists the percentage rose from 45.7% to 51.7% over the same period;

For non-medical staff there was also an increase, from 38.6% in 2005 to 44.4% in 2009.

In southern Italy the percentages exceed 80% among the gynaecologists: 85.2% in Basilicata, 83.9% in Campania, 82.8% in Molise, 81.7% in Sicily and 81.3% in Bolzano;

For anaesthetists the highest percentages can be noted in Molise and Campania, with more than 77%, and in Sicily with 75.6%, and the lowest in Tuscany with 27.7% and Trento with 31.8%;

For non-medical staff the percentages are lower, but with a peak of 87% in Sicily and 82% in Molise.

¹⁵ The health minister's reports can be found on the website www.salute.gov.it.

If these statistics are compared with the data supplied in the Ministry of Health's reports for previous years (Appendix 7), it can be noted that there has been a significant increase in the percentage of objectors in all three professional categories:

	GYNAECOLOGISTS	ANAESTHETISTS	NON-MEDICAL STAFF
Ministerial report of 2011 (2009 data)	70.7%	51.7%	44.4%
Ministerial report of 2010 (2008 data)	71.5%	52.6%	43.3%
Ministerial report of 2009 (2007 data)	70.5%	52.3%	40.9%
Ministerial report of 2008 (2006 data)	69.2%	50.4%	42.6%
Ministerial report of 2007 (2005 data)	58.7%	45.7%	38.6%
Ministerial report of 2006 (2004 data)	59.5%	46.3%	39.1%
Ministerial report of 2005 (2003 data)	57.8%	45.7%	38.1%

The reports also indicate the percentages for the three categories (gynaecologists, anaesthetists and non-medical staff) in northern, central and southern Italy and the islands (see: <http://espresso.repubblica.it/dettaglio/Camici-obiettori/2131653> for the data of the 2010 ministerial report) (Appendix 8):

	Northern Italy	Central Italy	Southern Italy	Islands
GYNAECOLOGISTS	67%	71.1%	80.5%	74.3%
ANAESTHETISTS	44.3%	54.2%	68.3%	68.3%
NON-MEDICAL STAFF	32.2%	40%	55%	67%

The tables showing the data for these three categories – gynaecologists, anaesthetists and non-medical staff – by region are also appended hereto (Appendices 9 and 10).

We also enclose a question raised by certain members of the Lombardy regional council on this issue of conscientious objections and the state of implementation of Law No. 194 of 1978. This document shows in particular that there are growing obstacles to the full implementation of the legislation in this region on account of a significant increase in the number of objecting medical and non-medical staff, which in some areas exceeds 85% (Appendix 11, with the data relating to conscientious objectors in Appendix 12).

We also provide other data, supplied by the CGIL itself.

Mention can be made above all of the situation in the hospitals at Jesi and Fano in the Marche region, where all the gynaecologists are conscientious objectors. Apart from leading to inadequate implementation of Law No. 194, as regards the guarantee of the service requested, this situation "penalises the non-objecting doctors, anaesthetists and nurses who have to bear the full workload of terminations of pregnancy" (Appendix 13).

In the province of Palermo, the data are as follows by hospital (Appendix 14):

HOSPITAL	OBJECTING GYNAECOLOGISTS
Villa Sofia Cervello	All are objectors , apart from two
Ingrassia	All are objectors , apart from one coming from Partinico
Buccheri La Ferla	All are objectors
Civico	All are objectors , apart from two
Policlinico	All are objectors , apart from one
Termini Imerese	All are objectors , apart from one coming from Petralia
Petralia	All are objectors , apart from one
Partinico	All are objectors , apart from one

These data show the insufficient number of non-objecting doctors even where staff mobility has been utilised, as in the case of the Ingrassia and Termini Imerese hospitals.

The CGIL has supplied further significant data relating to the Abruzzo region (Appendix 15):

ASL ¹⁶ Pescara	Out of three hospitals, terminations of pregnancy are carried out only in the Pescara hospital and by a single gynaecologist
ASL Chieti	Out of five hospitals, terminations of pregnancy are carried out solely in the Ortona, Vasto and Lanciano hospitals. In Vasto the gynaecologist comes from another establishment
ASL Teramo	Out of four hospitals, terminations of pregnancy are carried out solely in the S. Omero and Teramo hospitals
ASL L'AQUILA	All three hospitals carry out terminations of pregnancy, but with just one gynaecologist per establishment

¹⁶ ASL = Azienda Sanitaria Locale – local health authority

With reference to the city of Messina, the data show that there are no non-objecting staff at all in many hospitals (Appendix 16):

	Number of doctors carrying out voluntary terminations of pregnancy
Messina	4
Papardo Piemonte	2
Milazzo	2
Barcellona	None
Patti	None
S. Agata	2
Taormina	2
Lipari	None
Mistretta	None

The CGIL has gathered statistics for the Puglia region (Appendix 17, showing all the data relating to doctors, anaesthetists, nurses and obstetricians for each hospital), from which the overall data below have been drawn:

Anaesthetists Total	Anaesthetists Objectors	Doctors Total	Doctors Objectors	Nurses Total	Nurses Objectors	Obstetricians Total	Obstetricians Objectors
460	303	444	371	848	664	498	421

Here too, the data show the disproportion existing between the total number of doctors and auxiliary staff and the number of those who have raised a conscientious objection.

3.8. Articles of the European Social Charter alleged to have been violated with regard to the legal situation of women

In view of the above, we can proceed to highlight the principal guarantees of the European Social Charter that are alleged to have been violated in the light of the considerations already set out in respect of Article 9 of Law No. 194 and of the practical application of the provisions of that article.

We shall therefore analyse Articles 11 and E of the European Social Charter, and above all their interpretation by the European Committee of Social Rights, with a view to bringing to the fore the inconsistencies between the Charter provisions and the provisions of Italian law with regard to voluntary terminations of pregnancy, in particular Article 9.

It is in fact this article, which is not sufficiently precise with regard to the means whereby the hospitals and the regions are to guarantee the presence of a sufficient number of non-objecting medical staff in each establishment, while respecting the right to freedom of conscience, that can be seen to violate the European Social Charter.

3.8.1. Article 11 of the European Social Charter (the right to protection of health)

With reference to this article, it must be noted that the European Social Charter aims to guarantee the effective exercise of the right to health, requiring the member States to adopt all the necessary and appropriate measures.

This requirement is justified on the ground that the right to health is perceived as a prerequisite for upholding respect for human dignity.

The recognition given to the fundamental right to health is further reinforced by the reference made to the European Convention on Human Rights (Articles 2 and 3, on the right to life and the prohibition of torture) (page 81, *Digest of the Case Law of the European Committee of Social Rights*, 1 September 2008). In particular, it can be noted that the two international treaties are inextricably linked, since both impose a positive obligation on the member States to guarantee the exercise of the right to health.¹⁷

¹⁷ With reference to the European Convention on Human Rights, reference can be made to the decision handed down by the European Court of Human Rights in the case of *R. R. v. Poland* (application number 27617/04). The Court held that “States are obliged to organise the health services system in such a way as to ensure that an

In the light of the above, the States undertake to eliminate obstacles to the full enjoyment of the right to health. In this respect, the European Social Charter requires that, as far as possible, the highest possible standard of health care services must be secured, thereby guaranteeing the right to health, construed in the physical and the mental sense.

The extent of the undertaking required of States to this end is determined based on scientific knowledge and therefore also on the basis of the health risks which can effectively be contained through such knowledge.

With reference to the Italian legislation in matters of voluntary termination of pregnancy, particular importance should be attached to the requirement that access to medical care must be universally guaranteed. In this connection, as has been mentioned, even with a specific law on the subject (law No. 194 of 1978) guaranteeing women access to pregnancy termination procedures, because of the high number of objecting doctors there is no effective guarantee of actual access to such health care procedures, which are necessary for the protection of life and health, and of women's right to self-determination.

Another important consideration is that the right of access to medical care entails that the corresponding waiting times must not be such as to jeopardise the person's health itself and that there must be sufficient numbers of medical and other health care staff (page 83, *Digest of the Case Law of the European Committee of Social Rights*, 1 September 2008).

This consideration is of particular importance in the sphere of voluntary terminations of pregnancy, since Law No. 194 of 1978 establishes specific time-limits during which such procedures can be carried out and beyond which they are consequently no longer authorised. From this standpoint, it is all the more necessary that there should be a sufficient number of non-objecting doctors to perform the requested termination procedures.

effective exercise of the freedom of conscience of health professionals in the professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation".

In the same decision the Court also ruled "While a broad margin of appreciation is accorded to the State as regards the circumstances in which an abortion will be permitted in a State, once that decision is taken the legal framework devised for this purpose should be 'shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention' (*A, B and C v. Ireland ...*)."

This decision can be consulted on the website www.echr.coe.int.

With reference to pregnancy termination procedures, it can be recalled that, in the States which authorise access thereto, women's right to respect for their decision to end a pregnancy is to be recognised under the conditions laid down by the law itself, without any unreasonable restriction being imposed (in this matter see *S. BARTOLE – P. DE SENA – V. ZAGREBELSKY, Commentario breve alla Convenzione Europea dei Diritti dell'Uomo*, Cedam, Padua, 2012, page 325).

Article 11 of the European Social Charter also requires the States to provide for counselling and services aimed at raising awareness of health issues and of the related individual responsibilities. In this connection, special importance must be attached to the attention to be paid to the state of health of pregnant women, for whom free and regular check-ups must be made available.

3.8.2. Article E of the European Social Charter (non-discrimination)

Article E of the European Social Charter is of importance here, since it accompanies the implementation of all the other provisions of the Charter, with a particular focus on the enjoyment of the rights it recognises and guarantees.

It can first be observed that the principle of non-discrimination is universally recognised, including under Article 3 of the Italian Constitution,¹⁸ and requires that legal provisions should be examined according to the principles of equal treatment and reasonableness.

With reference to Article E, mention must also be made of the corresponding provision of the European Convention on Human Rights (Article 14, *Prohibition of discrimination*). Precisely because it is the expression of an internationally recognised principle, the related assessment taking place before the European Court of Human Rights does not differ "significantly from the procedures followed by national courts, in particular the Italian Constitutional Court" (S. BARTOLE – B. CONFORTI – G. RAIMONDI, *Commentario alla Convenzione Europea per la tutela dei diritti dell'uomo e delle libertà fondamentali*, Cedam, Padua, 2001, page 416).

Article E of the European Social Charter requires that people in the same situation must be treated in the same way and those in different situations must be treated differently (see page 176 of the *Digest of the Case Law of the European Committee of Social Rights*, 1 September 2008).

In this respect, the European Committee of Social Rights has ruled that States violate Article E in cases where, "without an objective and reasonable justification" (*ibidem*), they fail to treat differently people whose situations are not the same.

¹⁸ Article 3 of the Italian Constitution reads "All citizens enjoy equal social dignity and are equal before the law, without distinction as to sex, race, language, religion, political opinion, and personal or social conditions. It shall be the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country."

In particular, it has underlined that human differences should not only be viewed positively in a democratic society, but should also be responded to in such a way as to ensure genuine and effective equality.

It therefore follows that Article E is violated not only in cases of direct discrimination, but also by any form of indirect discrimination.

From this viewpoint, indirect discrimination can arise when no account is taken of all relevant differences or when there is a failure to take adequate steps to ensure everyone's effective enjoyment of their rights.

With reference to Article 9 of Law No. 194 and to the implementation difficulties described above, the following observations can be made regarding the violation of the principle of non-discrimination, as guaranteed by Article E of the European Social Charter.

First, attention must be drawn to the geographical and economic discrimination, devoid of any objective or reasonable justification, that exists between women wishing to seek a termination of pregnancy.

This discrimination has its origin in the fact that, since the presence of non-objecting medical staff is not guaranteed in all public hospitals, women are obliged to travel from one hospital to another so as to find an establishment that can guarantee access to the termination procedure.

This need to travel accordingly results in differentiated treatment (a form of geographical discrimination) of individuals in the same situation, namely those seeking to exercise the right of access to a termination of pregnancy in accordance with the conditions and arrangements laid down by law No. 194 of 1978. As already mentioned, this situation also undermines the very possibility of exercising this right in cases where the time spent searching for a hospital capable of providing the required service extends beyond the time-limits established by Law No. 194, within which the procedure itself is authorised.

The shortage of non-objecting medical staff, which obliges women to seek alternative solutions, and hence to look around for a hospital which carries out the required procedure, also results in a form of economic discrimination between women.

Wealthier women are led to resort to private clinics in Italy or to public hospitals or private clinics abroad, since they are able to bear the costs associated with such a decision. Conversely, it can easily be imagined that women who are not in a position to incur such an expense – above all the "categories" of women who are less well off – are forced to

turn to establishments and individuals, or even to other countries, that do not guarantee the full protection required by the termination procedure in terms of health and hygiene.

Secondly, it can be noted that Article E specifically provides that health cannot be assumed to constitute a ground of discrimination, alongside race, skin colour, gender, language, religion, political or other opinion, national extraction or social origin, membership of a national minority, birth or other status.

A person's state of health accordingly cannot qualify as a ground justifying discriminatory treatment, or for differentiating the requirements which apply to some people but not to others.

In matters of voluntary termination of pregnancy, given the problems encountered in applying Article 9 of Law No. 194, there is a kind of discrimination between women wishing to obtain a termination and women who do not intend to do so, whether they are pregnant or not.

The state of health, both physical and mental, of women seeking an abortion becomes a ground (to be included on the list of grounds which cannot constitute a ground of discrimination, as established by Article E) for discriminating against them and thus exposing them to a risk of being treated less favourably regarding the protection and the guarantee of their right of access to a termination procedure, and hence the protection and the guarantee of their rights to life, health and self-determination. The principle of non-discrimination safeguarded by Article E must indeed always be linked to one or more provisions of the European Social Charter: in the instant case Article 11, protecting the right to health.

Accordingly, in the case of the legislation on terminations of pregnancy, it is chiefly a direct violation of the right to health that is recognised, as guaranteed by Article 11 of the European Social Charter.

This legislation is also considered to violate the principle of equal treatment and non-discrimination (Article 11 being read here in conjunction with Article E), since women are unreasonably discriminated against with regard to their decision to terminate a pregnancy, both from the standpoint of their choice of hospital establishment and from an economic standpoint.

The Italian legislation would also seem to infringe these Charter provisions in so far as its own provisions can be seen to be lacking in consistency. On one hand, Law No. 194 provides for and guarantees women's access to hospitals with a view to obtaining a

termination of pregnancy (and thereby guarantees their right to life, to health and to self-determination), while on the other hand it fails to establish the instruments and means necessary to attain this objective, as can clearly be seen from its application in practice.

3.9. Articles of the European Social Charter alleged to have been violated with regard to the legal situation of non-objecting medical and auxiliary staff

With specific reference to the legal situation of non-objecting medical and auxiliary staff, we will continue by highlighting the principles guaranteed by the European Social Charter which are alleged to have been violated by the provisions of Article 9 of Law No. 194, as already mentioned, and by the manner in which this legislation is applied in practice.

We therefore intend to analyse Articles 1, 2, 3 and 26 of the Charter, and above all their interpretation by the European Committee of Social Rights, so as to bring to the fore the inconsistencies between the requirements of the European Social Charter and the provisions of Italian law relating to voluntary terminations of pregnancy, in particular Article 9, which can be seen to breach the European Social Charter in that it fails to lay down with sufficient precision the means whereby the hospitals and the regions are to guarantee, while respecting the right to freedom of conscience, the presence of a sufficient number of non-objecting medical staff in each establishment.

3.9.1. Article 1 of the European Social Charter (the right to work)

With regard to the situation of non-objecting medical and auxiliary staff, particular relevance must be attached to Article 1 of the European Social Charter, which, with a view to guaranteeing the effective exercise of the right to work, requires States to guarantee workers a real possibility of choosing their own employment and hence of pursuing freely undertaken work activities.

Italy's violation of this article is evident not only from its very wording, but also from the manner in which it has been interpreted by the European Committee of Social Rights.

In particular, it has been clarified (page 20 of the *Digest of the Case Law of the European Committee of Social Rights*, 1 September 2008) that the substance of Article 1 covers:

- the prohibition of any kind of discrimination in the workplace;
- the prohibition of forced or compulsory labour;

- the prohibition of any practice that might interfere with or undermine workers' rights freely to choose their occupation.

With regard to the first prohibition established by the European Committee of Social Rights, attention must be drawn to the discrimination that exists between the two categories of doctors – the conscientious objectors and the non-objectors – in terms of their workload and the protection of their physical and mental health.

Although the Committee itself has ruled that any discrimination based on grounds of gender, race, ethnic origin, religion, disability, age, sexual orientation or political opinion is prohibited (hence creating a link with Articles 15 and 20 of the Charter, concerning the right to work of persons with disabilities and equality of opportunity and non-discrimination in the workplace on grounds of gender), it can be noted that this list is not rigidly established and can therefore extend to discrimination ensuing from and having its very basis in workers' choice to avail themselves of the possibility of raising a conscientious objection.

In this connection, reference can also be made to the European Committee of Social Rights' rulings on Article E (*non-discrimination*). While in a way being openly worded ("*other status*"), so that the list of grounds on which discrimination is not permitted can be considered as non-exhaustive, the provision always goes hand in hand with the application of other articles of the European Social Charter, thereby supplementing the protection afforded to the rights recognised and safeguarded therein (page 175 of the *Digest of the Case Law of the European Committee of Social Rights*, 1 September 2008).

With specific reference to the type of discrimination, and in keeping with its rulings concerning the scope of Article E, the European Committee of Social Rights has clarified that the prohibition extends to both direct and indirect discrimination.

As can be seen from the data on the practical application of law No. 194 of 1978, the difficulties in implementing Article 9 thereof result in a difference in treatment between two categories of persons in comparable situations, for which there is no objective, reasonable justification and which is moreover not proportionate to the aim which the law in question seeks to achieve.

The Committee has also given a precise definition of discrimination, which it regards as a difference in treatment between persons in comparable situations where it does not pursue a legitimate aim, is not based on objective and reasonable grounds and where there is no proportion between the predetermined objectives and the means put in place

to achieve them (page 21, *Digest of the Case Law of the European Committee of Social Rights*, 1 September 2008).

With specific reference to the subject matter of this complaint, and constantly bearing in mind the Committee's interpretation of Article 1, it can be noted that the discrimination against non-objecting medical staff is of an indirect nature, since the provision states explicitly that all doctors have a right to raise a conscientious objection. The discrimination in fact occurs once the decision whether to exercise this right has been made.

Furthermore, discrimination may also exist in the event of a failure to take measures such as to guarantee the effective exercise of rights guaranteed to all (“Discrimination may also result [...] by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all”, page 21, *Digest of the Case Law of the European Committee of Social Rights*, 1 September 2008).

With regard to the second prohibition, that of forced or compulsory labour, attention should be drawn to the fact that the hospitals are required to distribute the overall workload relating to voluntary terminations of pregnancy among an insufficient number of non-objecting doctors. In view of the very high number of doctors who are objectors, those who choose not to raise a conscientious objection are obliged endlessly to carry out a single type of operation, that of terminating pregnancies.

It should be noted that the European Committee of Social Rights has interpreted the scope of the anti-discrimination provision with specific reference to the production of goods or services, prison work and conditions for the payment of unemployment benefits (page 23, *Digest of the Case Law of the European Committee of Social Rights*, 1 September 2008).

However, although that is the scope to be given to the provision, another interpretation can also be proposed which, in keeping with the interpretative line taken by the Committee, also encompasses the issues at stake with regard to the subject matter of this complaint.

It can thus be noted that the overall workload which the non-objecting medical staff are required to assume, on account of the high and growing number of doctors who are conscientious objectors, leads to conditions which force them to carry out a specific type of procedure – terminations of pregnancy – without discontinuing, as can be seen from the data on the law's practical implementation.

From this standpoint, disregarding the fact that those who do not raise a conscientious objection have made this choice, it can be seen that the non-objecting medical staff are

nonetheless forced to carry out a single procedure for the bulk of their working time and even their entire working time.

What is more, a termination of pregnancy can in no way be compared to other health care procedures, on account of its particularly delicate nature, and not just from a technical standpoint.

Non-objecting medical staff who find themselves obliged exclusively or principally to carry out such procedures moreover cannot perform other kinds of procedure, which prevents them from utilising the skills they have acquired – either during their studies or during their practical work experience – with a view to carrying on the occupation they have chosen.

Further considerations can be advanced on this aspect with regard to the third prohibition contained in the above-mentioned provision, namely the ban on interfering with or undermining workers' rights freely to choose their occupation.

Here too, the European Committee of Social Rights has interpreted the article in question, making reference, as concerns its scope, to the alternative form of service proposed to those who raise a conscientious objection with regard to military service, to part-time work and to private life at work.

With particular regard to the latter aspect, the European Committee of Social Rights has indicated that individuals must be protected from interference in their private or personal lives associated with or arising from their employment situation (page 24, *Digest of the Case Law of the European Committee of Social Rights*, 1 September 2008).

As regards the subject matter of this complaint, it can be noted that the article affords workers protection concerning their choice of occupation and, hence, also their subsequent exercise thereof.

As can be seen from the data, the difficulties in implementing Article 9 of Law No. 194 make it impossible for medical and auxiliary staff who are not objectors to carry out procedures other than terminations of pregnancy, on account of the workload they have to bear due to the high number of doctors who are conscientious objectors.

It must be said that, as regards the performance of other medical and health care procedures, the non-objecting doctors have undergone exactly the same preparation during their studies and their work experience, and this makes the discrimination between the two categories – objectors and non-objectors – even more unreasonable.

3.9.2. Article 2 of the European Social Charter (the right to just conditions of work)

With this article the European Social Charter aims to guarantee just conditions of work through the setting of a number of objectives, corresponding to obligations incumbent on States.

The provision requiring the determination of reasonable daily and weekly working hours, so as to ensure just conditions of work is of particular relevance to the subject matter of this complaint.

Although the European Social Charter gives no precise indication of what is meant by "reasonable hours", the European Committee of Social Rights has interpreted this expression, adapting its interpretation to the different tangible situations submitted to its assessment (page 27, *Digest of the Case Law of the European Committee of Social Rights*, 1 September 2008).

In the instant case, account must be taken of the observations made with regard to the workload in respect of terminations of pregnancy, which has to be borne entirely by those who decide not to raise a conscientious objection, and the fact that the number of non-objectors is proving completely insufficient to cope with it. Apart from having an impact on women's right of access to termination procedures, this situation also affects the hospitals' organisational arrangements and hence the work organisation and the distribution of the workload among the medical and auxiliary staff.

Given the insufficient number of doctors who do not raise a conscientious objection, the distribution of the workload is likely to lead to the determination of daily and weekly working hours which are entirely unreasonable, regard being had to the requirement that access to the required health care service must be guaranteed "in any event", as laid down by Article 9 of Law No. 194.¹⁹

¹⁹ In this connection it can be noted that, on 26 April 2012, the European Commission served formal notice on Italy concerning its exclusion of doctors working in public health services from the scope of Directive 2003/88/EC – the Working Time Directive (Appendix 18). In particular, legislative decree No. 112 of 2008 (Appendix 19) provides that managerial staff working within undertakings and organisations belonging to the national health service shall be excluded from the scope of Articles 4 and 6 of legislative decree No. 66 of 2003 on working time and daily rest periods (Appendix 20) (the CGIL's observations are also enclosed in Appendix 21).

3.9.3. Article 3 of the Social Charter (the right to safe and healthy working conditions)

This article aims to guarantee workers effective safe and healthy conditions in the workplace and, to that end, sets a number of objectives to be achieved by States.

In particular, States are required to undertake to adopt a coherent national policy on health and safety of workers and the working environment. The aim of this policy shall be to reduce the risks to workers' health that may arise in connection with their own work activities. Provision is also made for the adoption of health and safety regulations, measures to supervise compliance therewith and prevention and consultation mechanisms.

On account of the clear wording of this article and the manner in which it has been interpreted by the European Committee of Social Rights it cannot be inferred that the Charter intends to safeguard workers from work accidents - and the resulting harm to their health – purely and solely as regards the physical dimension of health.

The right to safe and healthy working conditions (Article 3 of the Charter), and accordingly the right of workers not to have their health jeopardised, also encompasses the psychological dimension of health, which, if impaired, can also undermine the worker's physical integrity.

It is also useful to refer to the observations made by the European Committee of Social Rights, which, with regard to paragraph 3 of Article 3, has indicated that the frequency of the injuries sustained by workers can be determined by calculating the ratio between the number of accidents and the number of workers. The situation is deemed incompatible with the Charter where "for several years, this frequency is clearly too high for it to be maintained that the right to health and safety at work is being effectively secured" (page 39, *Digest of the Case Law of the European Committee of Social Rights*, 1 September 2008).

With reference to the subject matter of this complaint, it is therefore necessary to consider whether the "injuries" and "accidents" can be attributed to the difficulties and the poor working conditions with which those who decide not to raise a conscientious objection have to contend, since they alone have to bear the entire workload relating to terminations of pregnancy.

These poor working conditions, due to the insufficient number of non-objectors and the related need endlessly to carry out the same procedure, namely terminations of pregnancy, are likely to have a negative impact on the health, both physical and mental, of the medical and auxiliary staff concerned.

The data on the number of objecting doctors make it possible to establish the frequency with which such situations arise and, consequently, to gauge the extent of the impairment of the right to health, both physical and mental, of the workers who decide not to raise a conscientious objection.

Again, as regards the need to ensure the application of the European Social Charter, reference can be made to the observations of the European Committee of Social Rights, which has deemed that the mere operation of legislation, seeking to resolve certain situations, is not enough. It is in fact necessary to provide for effective mechanisms to apply the regulations and for means of monitoring compliance therewith (page 39, *Digest of the Case Law of the European Committee of Social Rights*, 1 September 2008).

With specific reference to Article 9 of Law No. 194 of 1978, it can be noted that there is a need for greater precision regarding the tangible measures to be taken to guarantee non-objecting doctors' right to health and safety at work, a right which is in fact impaired due to the high number of doctors who are objectors.

In this context, the small group of non-objecting doctors is required to cope with the entire workload (relating to terminations of pregnancy), thereby jeopardising their own health, whether mental – above all because they are aware that they belong to a group of medical staff who deal on their own and exclusively with certain procedures which, given their nature, unquestionably cannot be assimilated to other health care procedures – and physical – on account of the fact that the workload can have negative consequences for the physical integrity of these workers, who are called upon to take charge of the overall number of termination requests.

3.9.4. Article 26 of the European Social Charter (the right to dignity at work)

Article 26 of the European Social Charter enshrines the right to respect for one's dignity in the workplace. To this end States are required to adopt information, protection and prevention measures in respect of forms of conduct which impair workers' dignity in the workplace or for work related reasons.

This provision is of particular importance with regard to the issue raised by this complaint.

The growing number of doctors who decide to raise a conscientious objection and the resulting workload, which falls entirely on the insufficient number of doctors who, conversely, choose not to raise a conscientious objection, engender poor working conditions, as we have seen, which impair the rights of the latter category of doctors.

In particular the high and constantly increasing number of objecting doctors and the workload with which doctors who do not raise an objection have to contend result in a situation where the latter doctors are called upon to carry out interruptions of pregnancy on a continuous basis.

Indeed, the hospitals' organisational arrangements have to take account of the choice made by medical and auxiliary staff whether or not to raise a conscientious objection in respect of pregnancy termination procedures.

Since the number of objecting doctors is high and constantly growing, as shown by the data on the law's application in practice, the entire workload ensuing from the demand for pregnancy terminations falls on those who have not raised a conscientious objection (except in cases where, as already mentioned, there is an imminent danger for the woman's life, making the personal intervention of an objecting doctor indispensable).

Non-objecting doctors will therefore be called upon to deal with all the requests for voluntary terminations of pregnancy and, hence, to carry out on a continuous basis this specific type of procedure, which, setting aside the decision whether or not to object, remains a particularly delicate procedure, and not just from a technical standpoint.

This results in the isolation of what has become a genuine "category" of doctors, the non-objectors, whose dignity as health care professionals is undermined or completely sacrificed, since they are required mainly or exclusively to perform certain health care procedures, and not even those for which they have the skills and training.

3.9.5. Article E of the European Social Charter (non-discrimination)

Article E of the European Social Charter is of importance since it accompanies the implementation of all the other provisions of the Charter, with a particular focus on the enjoyment of the rights it recognises and guarantees.

With regard to the subject matter of this collective complaint, and in particular the legal situation of the medical and auxiliary staff, Article E applies in conjunction with Articles 2, 3 and 26 of the European Social Charter. As already mentioned in paragraph 3.9.1. of this complaint, Article 1 of the Charter, as interpreted by the European Committee of Social Rights, already establishes a prohibition on all forms of discrimination, with specific reference to discrimination in employment (page 20, *Digest of the Case Law of the European Committee of Social Rights*, 1 September 2008).

It can first be observed that the principle of non-discrimination is universally recognised, including under Article 3 of the Italian Constitution, and requires that legal provisions should be examined in the light of the principles of equal treatment and reasonableness.

With reference to Article E, mention must also be made of the corresponding provision of the European Convention on Human Rights (Article 14, *Prohibition of discrimination*). Precisely because it is the expression of an internationally recognised principle, the related assessment taking place before the European Court of Human Rights does not differ "significantly from the procedures followed by national courts, in particular the Italian Constitutional Court" (S. BARTOLE – B. CONFORTI – G. RAIMONDI, *Commentario alla Convenzione Europea per la tutela dei diritti dell'uomo e delle libertà fondamentali*, Cedam, Padua, 2001, page 416).

Article E of the European Social Charter requires that people in the same situation must be treated in the same way and those in different situations must be treated differently (see page 176 of the *Digest of the Case Law of the European Committee of Social Rights*, 1 September 2008).

In this respect, the European Committee of Social Rights has ruled that States violate Article E in cases where, "without an objective and reasonable justification" (*ibidem*), they fail to treat differently people whose situations are not the same.

In particular, it has underlined that human differences should not only be viewed positively in a democratic society, but should also be responded to in such a way as to ensure genuine and effective equality.

It therefore follows that Article E is violated not only in cases of direct discrimination, but also by any form of indirect discrimination. From this viewpoint, indirect discrimination can arise when no account is taken of all relevant differences or when there is a failure to take adequate steps to ensure everyone's effective enjoyment of their rights.

With reference to Article 9 of Law No. 194 and to the implementation difficulties described in respect of the legal situation of doctors who choose not to raise a conscientious objection, the following observations can be made regarding the violation of the principle of non-discrimination, as guaranteed by Article E of the European Social Charter.

Attention must be drawn, in particular, to the discrimination between categories of medical and auxiliary staff, since two categories of staff who have decided to engage in the same career are without reason treated differently according to whether they have decided to raise a conscientious objection or not.

The decision not to raise a conscientious objection in fact leads to poor and unfavourable working conditions for those who make it, without it being possible to identify any objective and reasonable basis for such discrimination.

The unreasonableness of this discrimination is even more evident if one takes into account the fact that those who decide not to raise a conscientious objection are merely putting into effect (in an insufficient, incomplete way on account of their numerical insufficiency) an Italian legal instrument (law No. 194 of 1978).

The failure to identify an "*objective and reasonable justification*" makes this differentiated treatment of persons who, on account of their occupational activity, belong to the same category, discriminatory in nature. As a consequence, the deficiencies in the provisions given by Article 9 of law No. 194, as described above, which result in this difference in treatment, can be seen to be incompatible with the European Social Charter.

3.10. Articles of the European Social Charter assumed to be relevant to the subject matter of this collective complaint

As already mentioned, in relation to the subject matter of this complaint, the European Committee of Social Rights is requested to assess, in the light of the observations set out below, the relevance of Articles 21 and 22 of the European Social Charter and of the

principles that can be derived therefrom, although the scope of these provisions does not include the public hospital establishments required to apply Law No. 194 of 1978.

3.10.1. Article 21 of the European Social Charter (the right to information and consultation)

Article 21 of the European Social Charter enshrines workers' right to information and consultation within the workplace.

To give effect to this right, the States undertake to implement measures permitting workers (or their representatives) to be kept up to date about the economic and financial situation of the undertaking (sub-paragraph a)

For the purpose of this complaint, attention can be drawn to the provisions of sub-paragraph b), requiring States to ensure that workers are consulted in good time on the undertaking's decisions which could affect their interests.

The article refers to the "undertaking" and specifies that, for the purpose of applying both Article 21 and Article 22, this term shall be construed as referring to the set of "tangible and intangible components, with or without legal personality, formed to produce goods or provide services for financial gain and with power to determine its own market policy" (*Appendix to the Revised European Social Charter, Articles 21 and 22*).

Although the European Social Charter uses the term "undertaking" to refer to an entity which produces goods or provides services for a profit, and although the European Committee of Social Rights has clarified that this provision is "however, ... not applicable to public servants" (page 144, *Digest of the Case Law of the European Committee of Social Rights*, 1 September 2008), it can nonetheless be noted that principles can be inferred from Article 21 which may also be applied to the subject matter of this complaint.

As we have seen, Article 9 of Law No. 194 brings to the fore the need to specify the tangible measures whereby the rights of the non-objecting doctors can be guaranteed, in accordance with the principle, laid down in the same article, that each hospital must guarantee access to pregnancy termination procedures.

The non-objecting doctors' rights which are being impaired include the right to information on decisions which could be substantially prejudicial to the working conditions of those carrying out pregnancy termination procedures.

In particular, there is a violation of the principle that workers must be "consulted in good time on proposed decisions" which could affect their interests, in so far as such

information and consultation processes are in any case not capable of preventing the damage which Article 21 aims to avert.

The non-objecting doctors, while being aware of the organisational decisions of their own hospitals, cannot in any way avoid the workload relating to terminations of pregnancy (which is due to the high number of doctors who raise a conscientious objection), with the consequence that their own working conditions are undermined, particularly as regards their rights to information and effective consultation.

3.10.2. Article 22 of the European Social Charter (the right to take part in the determination and improvement of working conditions and the working environment)

For the purpose of this complaint, it can be seen that there is a close link between Article 21 of the Social Charter and Article 22, whereby, so as to guarantee the effective exercise of the right of workers to take part in the determination and improvement of working conditions and the working environment, the States undertake to adopt or encourage measures enabling workers to contribute to the attainment of this objective (including, apart from the determination and improvement of working conditions, work organisation and working environment, mentioned in sub-paragraph a), the protection of health and safety within the undertaking, mentioned in sub-paragraph b).

4. Conclusions

As has been demonstrated, the lack of specific legal provisions concerning the effective means of guaranteeing a fair balance between objecting and non-objecting medical staff unreasonably sacrifices women's rights to self-determination regarding reproductive choices, to physical and mental health and to life, as well as unreasonably sacrificing the rights of medical and auxiliary staff.

Notwithstanding the recognition given to medical staff's right to raise a conscientious objection, women's right of access to termination procedures must not be impaired, or even denied, since this right too is provided for and safeguarded by the same law, No. 194 of 1978.

The same applies to the rights of those who, in exercising the medical profession, decide not to raise a conscientious objection, and hence to seek to put into effect Law No. 194.

As can be seen from the data on the law's implementation in practice, there is a need for greater precision regarding the tangible arrangements for applying Article 9, guaranteeing a proper balance between the rights at stake in matters of voluntary termination of pregnancy (on one hand the rights of women and of non-objectors, and on the other hand the right to raise a conscientious objection).

This article provides for such a balance only in an abstract and general manner, since it recognises both the women's right of access to a termination of pregnancy and the doctors' right to raise a conscientious objection, without laying down tangible means whereby both these rights can be guaranteed while preventing the high number of objecting doctors from impinging on the women's rights.

Furthermore, as a result of the legal requirement to guarantee the requested service in any event, the entire workload falls on those who do not raise a conscientious objection, thereby jeopardising their position on account of the completely inadequate number of non-objecting doctors. The legislation indeed fails to indicate the tangible implementation arrangements whereby the presence of doctors ensuring access to the service (pregnancy termination procedures) can be guaranteed, and thus impairs the rights of those who decide not to raise a conscientious objection. At the same time, the latter play an even more essential role in the efforts to guarantee the required service and hence the application of Law No. 194 (which the Constitutional Court has defined as being of

constitutionally required substance) given the growing number of doctors who are conscientious objectors.

The reason for the impairment of the rights of women and of non-objecting medical staff must be perceived to lie in the lack, within the law itself, of specific provisions on the implementation measures whereby the hospitals and the regions can give full application to the law by guaranteeing the availability of pregnancy termination procedures.

The general wording of Article 9 regarding the requirement that hospitals and authorised nursing homes should in any event guarantee the performance of the requested pregnancy termination procedures and the regions should supervise and guarantee their implementation through staff mobility can be seen to be particularly inadequate.

On the contrary it is necessary to determine with greater precision the tangible arrangements whereby a sufficient presence of non-objecting doctors can be secured, for example by providing that, as the Constitutional Court has already ruled in matters of assisted reproduction (judgment No. 151 of 2009), each hospital shall be endowed with the "number strictly necessary" to cope with the demand for voluntary terminations of pregnancy, requiring the regions to exercise specific scrutiny over the manner in which this number is determined.

For these reasons the CGIL requests the European Committee of Social Rights to hold that Italy is violating:

- with regard to women's rights, Article 11 of the European Social Charter read alone or in conjunction with Article E, on account of the difficulties in applying Law No.194 of 1978, which impair the right of access to pregnancy termination procedures;
- with regard to the rights of medical and auxiliary staff who are not conscientious objectors, Article 1 of the European Social Charter, on account of the difficulties in applying Law No. 194 of 1978, which impair the legal position of non-objecting medical practitioners, who have to bear the entire workload relating to terminations of pregnancy;
- with regard to the rights of medical and auxiliary staff who are not conscientious objectors, Articles 2, 3 and 26 of the European Social Charter, read alone or in conjunction with Article E, on account of the difficulties in applying Law No. 194 of 1978, which impair the legal position of non-objecting medical practitioners, who have to bear the entire workload relating to terminations of pregnancy.

The CGIL further requests the European Committee of Social Rights to recognise the relevance to this complaint of the principles set out in Articles 21 and 22 of the European Social Charter, although their scope is confined to for-profit undertakings.

Susanna Camusso

Secretary General of the CGIL

Appendices

- Appendix 1. Law of 22 May 1978, No. 194, governing social protection of motherhood and voluntary terminations of pregnancy
- Appendix 2. Law No. 30 of 9 February 1999, entitled "Ratification and implementation of the revised European Social Charter and the appendix thereto, signed in Strasbourg on 3 May 1996"
- Appendix 3. Law No. 298 of 28 August 1997, entitled "Ratification and implementation of the Additional Protocol to the European Social Charter providing for a system of collective complaints, signed in Strasbourg on 9 November 1995"
- Appendix 4. Statutes of the CGIL
- Appendix 5. International Non-Governmental Organisations (INGOs) entitled to submit collective complaints
- Appendix 6. Extract relating to conscientious objection – Report by the Ministry of Health, August 2011
- Appendix 7. Extracts relating to conscientious objection – Reports by the Ministry of Health, 2005 – 2010
- Appendix 8. Data on conscientious objection – Report by the Ministry of Health, 2010 – tables relating to the areas of Italy
- Appendix 9. Data on conscientious objection – Report by the Ministry of Health, 2010 – tables relating to individual regions
- Appendix 10. Data on conscientious objection published on the website *www.laiga.it*
- Appendix 11. Question for a written reply – Conscientious objection and full application of Law 194/1978, from members of the Lombardy regional council – 26 April 2012
- Appendix 12. Conscientious objection – data relating to the question for a written reply – Lombardy region
- Appendix 13. Statement "Conscientious objection in the hospitals of Jesi and Fano and voluntary terminations of pregnancy", CGIL regional secretariat for the Marche region
- Appendix 14. Statement by the provincial secretariat of the CGIL in Palermo
- Appendix 15. Statement by the CGIL concerning the Abruzzo region
- Appendix 16. Statement by the CGIL concerning the towns of Messina and Trapani
- Appendix 17. Statement by the CGIL concerning the Puglia region
- Appendix 18. The EU and doctors' working time in the national health system
- Appendix 19. Legislative Decree No. 112 of 2008, "Emergency measures for economic development, simplification, competitiveness, stabilisation of public finances and tax equalisation"
- Appendix 20. Legislative Decree No. 66 of 8 April 2003, "Implementation of directives 93/104/EC and 2000/34/EC concerning certain aspects of the organisation of working time"
- Appendix 21. The CGIL's observations on Legislative Decree No. 112 of 2008