

## State doctors, freedom of conscience and termination of pregnancy revisited

David McQuoid-Mason, BComm, LLB (Natal), LLM (London), PhD (Natal)

Advocate of the High Court of South Africa, Fellow of the University of KwaZulu-Natal, Acting Director, Centre for Socio-Legal Studies, University of KwaZulu-Natal, Durban

There is a conflict in the South African Bill of Rights between the rights of women to reproductive health care and to make decisions about their reproductive capacity, and freedom of conscience on the part of the medical profession. State-employed doctors, unlike private practitioners, cannot pick and choose their patients. In emergency cases where there is a risk to the patient's life or danger of grave illness, all doctors have a legal duty to render assistance to eliminate such risk or illness, and the same applies where the risk or danger arises from pregnancy. In non-emergency cases, doctors wishing to exercise freedom of conscience must refer patients to another doctor who is prepared to terminate the pregnancy – failure to do so may be construed as preventing or obstructing access to termination of pregnancy under the Choice on Termination of Pregnancy Act 92 of 1996.

The Constitution<sup>1</sup> refers to reproductive rights in two sections: section 27(1)(a) provides that everyone has the right of 'access to health care services, including reproductive health care', while section 12(2)(a) states that everyone has the right to 'bodily and psychological integrity, which includes the right to make decisions concerning reproduction'. At the same time, the Constitution provides that everyone has the right to 'freedom of conscience, religion, thought, belief and opinion'.<sup>2</sup> What happens when these rights conflict?

Given that the health care services required by section 27(1)(a) are generally provided by state hospitals employing state doctors, and that the right referred to in section 12(2)(a) is now accommodated by the Choice on Termination of Pregnancy Act<sup>3</sup> (the Choice Act), what is the position of state-employed doctors who refuse to participate in terminations of pregnancy on the grounds of conscience? What are their legal and ethical duties? Is there freedom of conscience for state doctors under the Choice Act? Does freedom of conscience extend to preventing or obstructing terminations of pregnancy under the Act? Does freedom of conscience extend to refusing to give information about the Act?

### Ethical and legal duties of state doctors

As a general rule, medical practitioners are not required to treat every patient who consults them unless there is an emergency,<sup>4</sup> they are bound by contract,<sup>5</sup> or there is a statutory duty to treat such persons.<sup>6</sup> However, state hospitals are bound by statute to render medical care to patients who qualify for such care,<sup>7</sup> and state-employed health practitioners are contractually bound to render services to such patients on behalf of hospitals employing them.<sup>5</sup> In this respect, state doctors and health care practitioners

can be likened to persons exercising a public calling, where liability is imposed in delict for failing to carry out such calling.<sup>8</sup> Unlike private practitioners, state-employed practitioners cannot pick and choose their patients.

Section 27(1)(a) of the Constitution now strengthens the right of public patients who cannot afford private medical services to demand 'reproductive health care' at the expense of the state, provided that it is 'within its available resources'.<sup>9</sup> It is submitted, however, that while the latter includes both financial and human resources, it would be untenable if at an otherwise adequately staffed state hospital, terminations of pregnancy were not done because the medical personnel were not prepared to participate in lawful abortions on the grounds of conscience.<sup>9</sup> In such circumstances, there may well be a legal duty on the state to ensure that it employs health care practitioners who are prepared to participate in terminations of pregnancy at all state hospitals.

It is submitted that in emergency cases, where there is a severe risk to the patient's life or the danger of grave illness, any doctor, whether state-employed or not, is morally, ethically and legally bound to render medical assistance to eliminate the cause of such risk or illness. This emergency principle extends to persons who are not patients of the doctor at the time the need arises. Although it is said that there is generally no liability for a mere omission in South African law, where the legal convictions of the community would regard the failure to act as unlawful, liability will be imposed.<sup>10</sup> It is submitted that the legal convictions of the community would be outraged if doctors were to fail to render assistance during medical emergencies because of their conscience.

In the light of the above, it could be argued that where a medical emergency is caused by pregnancy, there is a moral, ethical and legal duty on the doctor concerned to terminate the pregnancy, provided of course that it can be done safely and in accordance with good medical practice. In England, such a duty is imposed by statute.<sup>11</sup> The Choice Act in South Africa allows for terminations of pregnancy in emergency cases to be done even after the 20th week of pregnancy, e.g. where the continued pregnancy would endanger the woman's life.<sup>12</sup> Furthermore, the Constitution provides that no one may be refused emergency medical treatment.<sup>4</sup>

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## Freedom of conscience and the Choice on Termination of Pregnancy Act

The Choice Act makes no mention of a conscience clause, unlike the Abortion and Sterilization Act,<sup>13</sup> which provided that persons, other than the authorising medical superintendent, who had conscientious objections against abortion need not participate in the operation.<sup>14</sup> This is because, before enactment of the Constitution, a failure to mention a conscience clause in the Abortion and Sterilization Act would have meant that health care personnel would not have had such a right. As freedom of conscience is mentioned in the Constitution<sup>1</sup> it was not necessary to mention it in the Choice Act because all laws and enactments of the legislature are bound by the Bill of Rights.<sup>15</sup> Therefore the Choice Act must be read together with the Bill of Rights as allowing doctors some measure of freedom of conscience. The question in the case of state-employed doctors is: how much?

Our courts can seek some guidance from the English medical profession concerning how the issue of conscientious objection is handled. England now has a Human Rights Act<sup>16</sup> based on the European Convention on Human Rights,<sup>17</sup> but also has a conscientious objection clause in its Abortion Act.<sup>18</sup> Despite the conscience clause, there is a duty to participate in an abortion operation that is necessary to save life or prevent grave permanent injury to the physical or mental health of pregnant women.<sup>11</sup> It has been suggested that in non-emergency cases the medical practitioner is under a duty to refer the patient to another practitioner who is willing to carry out the procedure.<sup>19</sup> Failure to refer a patient who subsequently suffers damage as a result of not having her pregnancy terminated is likely to result in legal liability, and it will be no defence for a doctor to argue that he or she was acting out of conscience.<sup>20</sup> Likewise, the British Medical Association takes the view that failure to refer a patient to another doctor who is prepared to terminate a pregnancy could give rise to legal liability if a delay or refusal results in an inability to obtain a termination.<sup>21</sup> These principles apply to all doctors and nursing staff.<sup>22</sup>

It is submitted that, in South African law, similar principles apply to both state and private doctors. In the case of a pregnancy being life-threatening or likely to cause severe injury to the health of the woman, there will be a duty on any available doctor to terminate the pregnancy. In such circumstances, any doctor who does not wish to participate in an abortion on grounds of conscience may only refuse to treat if there is another doctor who is able to do the procedure. If not, the only available doctor will have to carry out the emergency pregnancy termination against his or her conscience or face the legal consequences of failure to do so. Conscientious objection will not be a good defence in emergency situations.

In non-emergency cases, doctors who wish to exercise their right of conscientious objection must refer the patient to a doctor who is prepared to terminate the pregnancy. This is consistent with the Declaration of Oslo,<sup>23</sup> which states: 'If a physician considers that his convictions do not allow him to advise or perform an abortion, he may withdraw while ensuring the continuity of medical care by a qualified colleague'.<sup>24</sup> It could also be argued that in some instances failure to refer a patient on conscientious grounds can be construed as trying to force a particular religious belief on the patient, which is contrary to the Declaration of Geneva<sup>25</sup> and

which updated the original Hippocratic Oath that outlawed abortion.<sup>26</sup> For instance, it has been said that the right to freedom of religion, thought, belief and opinion protects the moral autonomy of persons and groups, and that 'when a state prohibits abortion it dictates the morality which should govern women's decisions concerning pregnancy and childbearing'.<sup>27</sup>

## Freedom of conscience and preventing or obstructing of access to termination of pregnancy under the Choice Act

The requirement of referral to a medical practitioner prepared to do an abortion in non-emergency cases is further strengthened by the provision in the Choice Act that makes it an offence if any person 'prevents the lawful termination of a pregnancy or obstructs access to a facility for the termination of a pregnancy'.<sup>28</sup> It could be argued that a doctor who refuses or omits to refer a patient to another doctor who is prepared to terminate the pregnancy lawfully, or to a facility where such termination may be done, is preventing the lawful termination of pregnancy or obstructing access to a facility for the termination of pregnancy. This interpretation of the need to refer could be considered as an infringement of a pro-life doctor's freedom of conscience because he or she may regard the act of referral as tantamount to being an accessory to murder.<sup>29</sup> Can such infringements be justified in terms of the Constitution?<sup>30</sup>

The limitation clause of the Constitution provides that a right may be limited in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society. When considering whether the limitation is reasonable and justifiable the following factors must be taken into account: (i) the nature of the right; (ii) how important it is to limit the right; (iii) the nature of the limitation and its extent; (iv) the relationship between the limitation and its purpose; and (v) whether there are less restrictive means to achieve the purpose.<sup>30</sup>

The provisions in the Choice Act regarding the obstruction of prevention of access to a termination of pregnancy are of general application because they apply to any person who prevents or obstructs an abortion.<sup>28</sup> The question arises whether these provisions may be regarded as reasonable and justifiable in terms of the limitation clause. It is submitted that they may, for the following reasons: (i) the nature of the right to freedom of conscience is such that it cannot be regarded as absolute in relation to the medical profession, particularly in cases of emergency and where doctors are state-employed; (ii) the limitation has a sufficiently important purpose because it ensures that women who wish to exercise their constitutional<sup>31</sup> and legal rights<sup>32</sup> concerning their reproductive capacity are not prevented or obstructed from doing so; (iii) the nature and extent of the limitation is such that it is not over-broad because it only refers to preventing lawful terminations of pregnancy or obstructing access to facilities for terminating pregnancies,<sup>33</sup> and does not compel doctors in non-emergency cases to participate actively in abortion operations; (iv) the limitation is rationally connected to the purpose of enabling women who qualify to exercise their constitutional and legal rights to procure a legal abortion without being prevented or obstructed from doing so; and (v) the limitation restricts freedom of conscience as little as possible in that it can be interpreted to mean that doctors are only obliged to procure abortions in cases of emergency or where no other doc-

tor is available – in all other cases, they merely have to refer the patient to a practitioner who is prepared to do the procedure.

## Freedom of conscience and the duty to give information on termination of pregnancy in terms of the Choice Act

The Choice Act provides that a woman who requests an abortion from a medical practitioner or registered midwife 'shall be informed of her rights under [the] Act by the person concerned'.<sup>33</sup> This provision creates a new statutory duty, and the question arises whether this is an infringement of a doctor's (or midwife's) right to freedom of conscience. It is submitted that although technically it may be such an infringement for similar reasons to those set out above, such a limitation is justifiable. The fact that a doctor, opposed to abortion on grounds of conscience, is obliged to give a woman information about a statute that enables her to exercise her constitutional and statutory rights, should generally be regarded as reasonable and justifiable in open and democratic societies based on human dignity, equality and freedom – particularly if the doctor is state-employed. The limitation on the right to freedom of conscience is reasonable and justified because: (i) as previously mentioned, the right to freedom of conscience cannot be regarded as absolute in respect of doctors (and midwives); (ii) the limitation has a sufficiently important purpose because if women do not know what their rights are under the Act they will not be able to exercise their constitutional and legal rights; (iii) the nature and extent of the limitation is such that it is not over-broad because it only refers to the provision of information about women's rights under the Act; (iv) the limitation is rationally connected to the purpose of ensuring that women who qualify for a termination of pregnancy under the Act are informed of their rights; and (v) the limitation restricts freedom of conscience as little as possible because doctors (and midwives) are not required to participate in the abortion operation itself but merely to explain to the patient what her rights are under the Act.

In England, the Abortion Act<sup>34</sup> states that, as a general rule, doctors may refuse to 'participate in any treatment' to which they have a conscientious objection,<sup>35</sup> and this has been held to mean participation in the medical or surgical process itself, and not the mere typing of a letter of referral to another doctor willing to do an abortion.<sup>36</sup> It has therefore been suggested that, while doctors may refuse to treat in non-emergency cases, they remain under a duty to advise, for example by referring the patient to another doctor prepared to terminate the pregnancy.<sup>22</sup>

The South African Choice Act goes further than the English Act by requiring the doctor (or midwife) consulted to inform the woman about her rights under the Choice Act. If the English approach were followed in South Africa, it could be argued that the provision is not an infringement of the freedom of conscience provision because it does not require doctors to become involved in the medical or surgical procedures regarding the abortion. In such a case, it would not be necessary to conduct an enquiry in terms of the limitation clause.

## Conclusion

The following conclusions may be drawn from the above:

- There is a conflict in the South African Bill of Rights between the rights of women to reproductive health care and to make

decisions about their reproductive capacity, and freedom of conscience on the part of the medical profession.

- State-employed doctors, unlike private practitioners, cannot pick and choose their patients.
- In emergency cases where there is a risk to the patient's life or danger of grave illness, all doctors have a legal duty to render assistance to eliminate such risk or illness, and the same applies where the risk or danger arises from pregnancy.
- During an emergency, a doctor may only refuse to participate in a termination of pregnancy on grounds of conscience if there is another doctor available to do the procedure.
- In non-emergency cases, doctors wishing to exercise freedom of conscience must refer patients to another doctor who is prepared to terminate the pregnancy – failure to do so may be construed as preventing or obstructing access to termination of pregnancy under the Choice Act.
- The provisions of the Choice Act dealing with preventing or obstructing terminations of pregnancy, or requiring doctors to give pregnant women information about their rights under the Act, may be construed as infringing their right to freedom of conscience, but are likely to be justified under the limitation provisions of the Constitution.
- If the English law approach is followed, doctors may not use freedom of conscience to refuse to give advice or refer a patient to another doctor because such conduct cannot be construed as participating in an abortion operation.

## References

1. Constitution of the Republic of South Africa, 1996.
2. Section 15(1) of the Constitution of the Republic of South Africa, 1996.
3. Choice on Termination of Pregnancy Act No. 92 of 1996.
4. Section 27(3) of the Constitution of the Republic of South Africa, 1996.
5. Cf. *Magware v Minister of Health* 1981 (4) SA 472 (Z).
6. Section 5 of the National Health Act No. 61 of 2005.
7. Cf. Section 25(2) of the National Health Act No. 61 of 2005.
8. Cf. Newman E, McQuoid-Mason DJ. Lee and Honore. *The South African Law of Obligations*. 2nd ed. Durban: Butterworths, 1978: 198 para 539(i)(e).
9. Section 27(2) of the Constitution of the Republic of South Africa, 1996.
10. Cf. *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) 597.
11. Section 4(2) of the Abortion Act of 1967.
12. Section 2(1)(c)(i) of the Choice on Termination of Pregnancy Act No. 92 of 1996.
13. Abortion and Sterilization Act No. 2 of 1975.
14. Section 9 of the Abortion and Sterilization Act No. 2 of 1975.
15. Section 18(1) of the Constitution of the Republic of South Africa, 1996.
16. Human Rights Act of 2001.
17. Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and its Protocols.
18. Section 4 of the Abortion Act of 1967.
19. Davies M. *Textbook on Medical Law*. London: Blackstone Press, 1996: 251.
20. Mason K. Abortion and the law. In: McLean SAM, ed. *Legal Issues in Human Reproduction*. Aldershot: Gower, 1989: 49.
21. British Medical Association. *Medical Ethics Today: Its Practice and Philosophy*. London: British Medical Association, 1996: 108.

# Article

22. Mason JK, McCall Smith RA. *Law and Medical Ethics*. 4th ed. London: Butterworths, 1994: 116.
  23. World Medical Association Declaration of Oslo adopted by the 24th World Medical Assembly, Oslo, Norway, August 1970; and amended by the 35th World Medical Assembly, Venice, Italy, 1983. South Africa is a member of the World Medical Association and the Declaration is binding on South African medical practitioners.
  24. Clause 6 of the Declaration of Oslo.
  25. World Medical Association Declaration of Geneva, adopted by the 2nd General Assembly, Geneva, Switzerland, September 1948; amended by the 22nd World Medical Assembly, Sydney, Australia, August 1968, and the 35th World Medical Assembly, Venice, Italy, 1983.
  26. The Hippocratic Oath states, inter alia: 'I will give no deadly drug to any, though it be asked of me, nor will I counsel such, and especially I will not aid a woman to procure abortion' (Medical Association of South Africa. *Guide to the Maintenance of Ethical Standards*. 3rd ed. Pretoria: Medical Association of South Africa, 1985: 26).
  27. O'Sullivan M, Bailey C. Reproductive Rights. In Chaskalson M, Kentridge J, Klaaren J, Gilbert M, Spitz D, Woolman S, eds. *Constitutional Law of South Africa*. Kenwyn: Juta & Co, 1996: 16-6.
  28. Section 10(1)(c) of the Choice on Termination of Pregnancy Act No. 92 of 1996.
  29. Cf. Brazier M. *Medicine, Patients and the Law*. London: Penguin Books, 1992: 308.
  30. Section 36(1) of the Constitution of the Republic of South Africa.
  31. In terms of section 12(2) of the Constitution of the Republic of South Africa.
  32. In terms of section 2(1) of the Choice on Termination of Pregnancy Act No. 92 of 1996.
  33. Section 6 of the Choice on Termination of Pregnancy Act No. 92 of 1996.
  34. Abortion Act of 1967.
  35. Section 4(1) of the Abortion Act of 1967.
  36. *Janaway v Salford Health Authority* [1988] All ER 1079 (HL).
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