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## Conscientious objection and legal abortion in South Africa: delineating the parameters

### Summary

The purpose of this article is to delineate the scope and limitations of the exercise of the right to conscientious objection in respect of participation in abortion procedures under the *Choice on Termination of Pregnancy Act*. The Act is silent about the right to conscientious objection. However, section 15 of the South African Constitution in particular, implicitly accommodates conscientious objection to abortion. It is submitted that whilst the *Choice on Termination of Pregnancy Act* fails to provide the principles for determining the limits of the right to conscientious objection, guidance can be derived from section 36 of the Constitution. It is submitted that section 36 supports the limitation of the right to conscientious objection where maternal life or health is in serious danger or there is a medical emergency. Furthermore, it is argued that in the particular circumstances of South Africa, section 36 is also capable of supporting the imposition of a duty to at least provide the pregnant woman with information about where she might be able to obtain an abortion. It is noted that determining the parties that are entitled to conscientious objection beyond health care professionals that are immediately involved with abortion procedures can raise difficult issues. However, section 36 of the Constitution is, once again, a useful tool for resolving any difficulties in this regard.

### Gewetensbeswaar en wettige vrugafdrywing in Suid-Afrika: bepaling van die grense

Die oogmerk van die artikel is om die grense van die reg op gewetensbeswaar van gesondheidsdienswerkers in verband met deelname aan vrugafdrywingsprosedures ingevolge die *Wet op die Keuse van Beëindiging van Swangerskap* te ondersoek. Die Wet swyg oor die reg op gewetensbeswaar. 'n Reg op gewetensbeswaar teen deelname aan vrugafdrywingsprosedures is egter implisiet in artikel 15 van die Grondwet van die Republiek van Suid-Afrika vervat. Dit word aan die hand gedoen dat terwyl die *Wet op die Keuse van Beëindiging van Swangerskap* in gebreke bly om die reg op gewetensbeswaar te reguleer, artikel 36 van die Grondwet riglyne hiervoor verskaf. Artikel 36 ondersteun die beperking van die reg op gewetensbeswaar in die geval waar die moeder se lewe of gesondheid ernstig in gevaar is of indien daar 'n mediese noodgeval voorkom. Verder, in die besondere omstandighede van Suid-Afrika, kan geargumenteer word dat artikel 36 die ople van 'n verpligting om ten minste aan die verwagte vrou inligting te verskaf oor waar vrugafdrywing gedoen kan word, ondersteun. Dit word aangetoon dat dit moeilik is om vas te stel watter partye, anders as die gesondheidswerkers wat direk by die vrugafdrywing betrokke is, op 'n reg op gewetensbeswaar aanspraak sou kon maak. Artikel 36 is egter weereens 'n handige rigsgnoer in hierdie verband.

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## 1. Introduction

South Africa ranks among the jurisdictions with the most liberal laws on abortions.<sup>1</sup> The *Choice on Termination of Pregnancy Act* of 1996 is manifestly a radical measure.<sup>2</sup> It was passed in November 1996 and implemented in February 1997. It replaced the previous law on abortion as contained in the *Abortion and Sterilization Act* of 1975.<sup>3</sup> The dichotomies between the old and the new law cannot be overstated.<sup>4</sup> The 1975 Act was conservative and restrictive in orientation.<sup>5</sup> Access to abortion was not so much a legal right, but a privilege that was conferred in exceptional circumstances only. The grounds for abortion were limited to narrowly circumscribed medical reasons and pregnancy resulting from unlawful sexual intercourse.<sup>6</sup> In addition, the 1975 Act was interpreted by medical practitioners very restrictively. In terms of third party certification, the administrative requirements under the Act about whether a woman met the ground(s) for abortion, were cumbersome to the point of being a deterrent.<sup>7</sup> All these factors cumulatively assured that only a limited number of women would be able to access legal abortion. On average, 1 000 women per year “qualified” for abortion under the 1975 Act.<sup>8</sup> A consequent and parallel development throughout the operation of the Act, was the very high incidence of illegal ‘backstreet’ abortion. Conservative estimates place the number of women accessing illegal abortion each year to 44 000.<sup>9</sup>

The *Choice on Termination of Pregnancy Act*, on the other hand, has opened the doors to abortion in a number of respects. Access to abortion under the new law is conceived as a constitutional right.<sup>10</sup> The Act makes provision for abortion on request in the first twelve weeks of pregnancy.<sup>11</sup> There is no requirement, at all, to furnish supporting reasons. From the 13th to the 20th week of pregnancy, the Act recognises, *inter alia*, socio-economic

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1 Cook *et al* 1999.

2 Act No 92; Haroz 1997; Ngwena 1998.

3 Act No 2.

4 Haroz 1997:863-903; Ngwena 1998:32-68.

5 Haroz 1997:879-883; Ngwena 1998:37-40.

6 Section 3 of the 1975 Act provided for abortion on the following grounds: (a) where the continued pregnancy endangered the life of the pregnant woman, or constituted a serious risk to her physical health; or (b) where the continued pregnancy constituted a serious threat to the pregnant woman's mental health and created a danger of permanent damage to her mental health; or (c) where there is a serious risk that the child to be born would suffer a physical or mental defect of such nature as to be irreparably handicapped; or (d) where the pregnancy was a result of unlawful sexual intercourse, including rape, incest or intercourse with a mentally defective female unable to appreciate the consequences of intercourse or bear parental responsibility.

7 Hanson and Russell 1993:500-524.

8 South African Race Relations 1997:492.

9 South African Race Relations 1996:227-8.

10 The Preamble to the Act.

11 Section 2(1)(a).

circumstances as a ground for abortion.<sup>12</sup> The consent of a parent or guardian is not an invariable requirement where a minor requests abortion.<sup>13</sup> In the first twelve weeks of pregnancy, abortion can be performed not only by a registered medical practitioner, but also by registered midwife who has completed the prescribed training.<sup>14</sup> There is no requirement for mandatory counselling prior to abortion, as is the case in some jurisdictions.<sup>15</sup> Instead, the state seeks to promote non-mandatory and non-directive counselling.<sup>16</sup>

Third party certification procedures about whether the pregnant woman satisfies the ground(s) for abortion have also been made least burdensome. In the first twelve weeks of pregnancy, there is no third party certification required. Moreover, from the 13th to the 20th week of pregnancy, there is no third party certification required once the medical practitioner performing the abortion after consulting the pregnant woman, is of the opinion that the woman meets the ground(s) for abortion.<sup>17</sup> It is only in respect of a pregnancy after the 20th week that there is a requirement for the medical practitioner to consult with another medical practitioner or midwife about whether the woman meets the ground(s) for abortion.<sup>18</sup> Given the rarity of third trimester abortions, it effectively means that in practice, third party certification is no longer an impeding factor as it used to be under the 1975 Act.

Government has committed significant resources to ensure that cost does not become an impediment to access to legal abortion. In the health public sector, abortion is free at the point of access. Whilst a number of factors still constitute impediments to abortions, access has, nonetheless, vastly increased.<sup>19</sup> In 1997 — the first year of operation of the Act — 26 401 women accessed abortion. By 1999 the figure had gone up to 39 328. Clearly, these figures represent a phenomenal increase in legal abortions far beyond the 1 000 that were, on average, performed annually under the 1975 Act.

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12 Section 2(b)(iv). The other grounds for abortion during this period of pregnancy are: if the continued pregnancy would pose a risk of injury to the woman's physical or mental health, or where there is a substantial risk that the foetus would suffer from severe physical or mental abnormality; or where the pregnancy resulted from rape or incest. After the 20th week, however, the *Choice on Termination of Pregnancy Act* is not substantially different from its predecessor. According to section 2(1)(c) abortion can be obtained only if the pregnancy would endanger the woman's life, or would result in severe malformation of the foetus, or would pose a risk of injury to the foetus.

13 Section 5(3). Note that this must be intended to apply only where the minor has otherwise the intelligence and maturity to understand the nature, purpose and inherent risks of a proposed abortion procedure so as to give informed consent. The Act is, however not explicit on this point and might be erroneously understood as implying that the consent of a parent is not required in all cases, regardless of the age and maturity of the minor.

14 Section 2(2).

15 Cook *et al* 1999:584; McDonagh 1996:107-154.

16 Section 4.

17 Section 2(1)(b).

18 Section 2(1)(c).

19 Engelbrecht *et al* 2000; Ngwena 2000:19-44.

While the *Choice on Termination of Pregnancy Act* is making a huge impact in realising reproductive rights of women, as well as meeting their health needs, it cannot be overlooked that the Act does not enjoy unanimous support. Abortion is underpinned by moral dichotomy.<sup>20</sup> A law that provides relatively easy access to abortion and results in a huge increase in the number of legal abortions, such as the *Choice on Termination of Pregnancy Act*, is apt to engender controversy not only among the public, but also among health care professionals who are involved in the dispensation of health care services.

The purpose of this article is to examine the scope and limitations of the right of health care professionals such as doctors, nurses and midwives to exercise conscientious objection to abortion. This is important for two reasons. Firstly, there is evidence of possible abuse of the right to conscientious objection by health care workers opposed to the Act. The nature and form of opposition to the Act among health care professionals has been varied. Some have merely disassociated themselves with participation in abortion procedures.<sup>21</sup> Others have in addition to disassociation, declined to provide women seeking abortion with information about which facilities they can approach to have an abortion. Some health care workers have been openly hostile not only to women seeking abortion, but also to fellow health care professionals who are supportive of abortion or are involved in the provision of abortion services under the new law. In the Western Cape, 14% of doctors who are opposed to abortion said that they would not attend to women seeking abortion even in medical emergencies.<sup>22</sup> Opposition to the Act by nurses and doctors is partly the reason why a significant proportion of designated facilities are not providing abortion services.<sup>23</sup>

The second reason is that there are also reports about victimisation of health care workers who refuse to participate in abortion procedures on grounds of conscience. It has been reported that many health care workers have been coerced into assisting in abortion procedures against their will, and have faced harassment for refusing to comply.<sup>24</sup> Some have felt under pressure to participate in abortion procedures to avoid jeopardising their careers. Health workers who have participated against their will have faced problems of post-traumatic stress.<sup>25</sup> It is thus important to articulate the parameters of the right to conscientious objection to abortion.

A shortcoming with the *Choice on Termination of Pregnancy Act* is that it is silent about the right to conscientious objection. Consequently, it falls on the Constitution to fill this omission. It is submitted that a number of provisions of the Constitution, and most significantly section 15 which, *inter alia*, guarantees the right to freedom of conscience, implicitly accommodate

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20 Tribe 1990.

21 *Natal Witness* 10 February 1998.

22 *Cape Argus* 3 April 1998.

23 Ngwenya 2000:36-39.

24 Reproductive Health Alliance 2000:11.

25 Doctors for Life 2000:11.

the right to conscientious objection to abortion.<sup>26</sup> However, like other constitutional rights, the right to conscientious objection is not absolute. It is submitted that the principles for determining the limits of this right can be derived from section 36 of the Constitution. At the very least, section 36 supports the limitation of the right to conscientious objection where maternal life or health is in serious danger, or where there is a medical emergency. Furthermore, it is submitted that in the particular circumstances of South Africa, section 36 might also be capable of supporting the imposition of a duty to at least provide the pregnant woman with information about where she might be able to obtain an abortion. It is noted that determining the parties that are entitled to conscientious objection beyond health care professionals that are immediately involved with abortion procedures can raise difficult issues. However, section 36 is, once again, a useful tool for resolving any difficulties in this regard.

## 2. The significance of the right to conscientious objection to abortion as a human right

The right to conscientious objection to abortion must be understood in the light of the right to freedom of conscience which has universal appeal. Freedom of conscience is recognised as a fundamental right, and is well enshrined in international human rights instruments. For example, the *Universal Declaration of Human Rights*<sup>27</sup> contains a guarantee on freedom of conscience and so does the *International Covenant on Civil and Political Rights*.<sup>28</sup> Regional instruments such as the *European Conventions on Human Rights*<sup>29</sup> and the *African Charter on Human and Peoples' Rights*<sup>30</sup> similarly contain conscience clauses. The right to freedom of conscience is an affirmation of moral and ethical diversity. It is an acknowledgement that people do not always share the same outlook to life. They may differ in thought, belief and opinion for religious, political, philosophical and other reasons. Individual autonomy must, thus, be respected. The right to freedom of conscience is also about protecting the practice associated with such thought, belief and opinion. It would serve little to respect thought, belief and opinion, but then fail to protect the practice that is a manifestation thereof.<sup>31</sup> Hence, for example, as part of the guarantee of the right to freedom of thought, conscience and religion, article 18(1) of the *International Covenant on Civil and Political Rights*, also provides that this right shall include the freedom "to manifest his religion or belief in worship, observance, practice and teaching". Without adherence to the practice, the cherished belief is otherwise undermined or even nullified.<sup>32</sup>

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26 Constitution of the Republic of South Africa Act No 108 of 1996. This Constitution replaced the Constitution of the Republic of South Africa Act No 200 of 1993.

27 Article 18.

28 Article 18.

29 Article 9.

30 Article 8.

31 Hammer 1999:572.

32 Hammer 1999:572.

The right to freedom of conscience is not confined to religious beliefs only. It is all-embracing in the sense that it also protects the political, ethical or moral beliefs and practices that are genuinely held regardless of whether they are outside conventional religious doctrines or practices.<sup>33</sup> In its General Comment on article 18 of the *International Covenant on Civil and Political Rights*, the United Nations Human Rights Committee underscored the catholic nature of the right to conscientious objection when it said:

Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion of belief. The terms 'belief' and 'religion' are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional beliefs.<sup>34</sup>

A legal instrument such as the *Choice on Termination of Pregnancy Act* is guaranteed to meet with support, as well as antipathy. Tribe appositely described views on the merits and demerits of abortion as "a clash of absolutes".<sup>35</sup> Political ideology, religion, science, and the law cannot disguise the rift that exists between societal attitudes towards abortion. Each argument about abortion has logic internal only to itself.<sup>36</sup> A cherished conviction that all human life is sanct and that life begins at conception, cannot be reconciled with pro-choice views that accord premium to the woman's right to self-determination and subordinate the life of the unborn to that of the mother. It matters less whether the conviction is informed by religious or mere humanitarian concerns. The right of freedom of conscience serves to ensure that a sincerely held belief about the wrongfulness of abortion is protected.

South Africa is a heterogeneous society. Its polity is clearly anchored in democratic pluralism. The Preamble to the Constitution recognises the diversity of the country's peoples. Once we recognise political or moral diversity, it becomes imperative to respect individual autonomy. That way, we are able to accommodate and tolerate different views. South African society has always exhibited a diversity of views about abortion. In traditional African society, customary beliefs and practices governed abortion. There was no moral consensus on abortion. For the Southern Sotho, for example, abortion was condoned but only as a private rather than a public matter. Its proper forum was a family council rather than the chief's court.<sup>37</sup> In contradistinction, among the Tswana people, abortion was proscribed and was indeed punishable.<sup>38</sup> In modern times, the people of South Africa, in common with peoples from other jurisdictions, have exhibited irreconcilable attitudes to abortion.

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33 Devenish 1999:183.

34 Human Rights Committee, General Comment 22, UN Doc. HRI/GEN/1/Rev.2; Detrick 1999:244.

35 Tribe 1990:1.

36 McLean 1990:17.

37 Ashton 1967:28.

38 Nathan 1980:85-6; Shapera 1938:263.

In common with other countries, religious or spiritual beliefs, in particular, are the basis of much of the antipathy towards abortion in South Africa. Outside Parliament, public debates on the Bill<sup>39</sup> preceding the *Choice on Termination of Pregnancy Act* were marked by a pro-choice and pro-life divide.<sup>40</sup> In Parliament, uncompromising opposition to the Bill by two political parties — the African Christian Democratic Front and the Freedom Front — was based on religious grounds. These two parties saw the Bill as irreligious and irreverent towards human life.<sup>41</sup> Even within the majority party — the African National Congress — there were Christian and Muslim Members of Parliament who were opposed to the Bill, but were however denied a free vote by their own party's parliamentary caucus.<sup>42</sup> The Act has, indeed, been challenged in court (albeit unsuccessfully) by a religious organisation, on the ground that its liberal provisions are tantamount to a violation of the right to life of a foetus under the Constitution.<sup>43</sup> Clearly, the unbridgeable dichotomy underpinning abortion is a good reason for recognising conscientious objection to abortion by health care professionals.

For many health workers, the rendition of health care is not a mere technical or indifferent exercise. It is also, as Wicclair has put it, a moral enterprise.<sup>44</sup> It is accepted that procedures such as withdrawal of life-sustaining treatment, euthanasia, corporal and capital punishment, contraception and abortion are morally controversial.<sup>45</sup> They impact on the personal conscience of those health care workers who might be asked to participate. To oblige a doctor or nurse who is religiously opposed to abortion to participate in a procedure for abortion is comparable to requiring self-betrayal or even complicity in an act that might be regarded as taking away innocent life.<sup>46</sup> Such an obligation even in a secular state, would be excessively utilitarian and tantamount to using the doctor or nurse as a mere means to an end rather than a person with equal moral worth.

Thus, ethically, the exercise of freedom of conscience by health care professionals serves to protect moral integrity and perforce, human dignity. Wicclair is right when he says that few people would argue that it is appropriate to allow conscientious objection to abortion as it is a subject laden with moral controversy.<sup>47</sup> Respect for human dignity enjoins that we recognise moral diversity, individual autonomy and individual moral integrity as values that inform and govern the manner in which health care professionals interpret and discharge their duties.<sup>48</sup>

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39 Choice on Termination of Pregnancy Bill [W 80B-96].

40 Ngwena 1998:44-46.

41 Ngwena 1998:44.

42 Ngwena 1998:46.

43 *Christian Lawyers Association of SA v Minister of Health* 1998 (4) SA 1113 (T); Ngwena 1998:51-62; Cf Naude 1999:541-562.

44 Wicclair 2000:215.

45 Dickens 2000:226.

46 Hammer 1999:572-574; Dickens 2000:227.

47 Wicclair 2000:207.

48 Wicclair 2000:210-217; Beauchamp and Childress 1994:473-483.

### 3. The Choice on Termination of Pregnancy Act and conscientious objection

Jurisdictions that liberalise abortion law tend to simultaneously make explicit legislative provision for conscientious objection. As part of the liberalisation of abortion law in 1967, the United Kingdom included in the *Abortion Act* of 1967, a conscientious objection clause.<sup>49</sup> In the United States, following the decisions of the Supreme Court in *Roe v Wade* and other cases which defined, in generous terms, a constitutional privacy right to abortion, a majority of states enacted conscience clauses for abortion.<sup>50</sup> The *Roe v Wade* line of decisions were highly controversial and gave rise to bitter and opposing camps.<sup>51</sup> Conscience clauses became a vehicle for accommodating divergence of views about abortion among health care professionals. They were introduced to protect the constitutional right to equality and provide reasonable accommodation for those health care workers who opposed abortion. Health care professionals, who for religious, moral or other reasons objected to participating in the rendition of abortion services were protected from unfair discrimination. In the United States, a typical conscience clause provides as follows:

No person shall be required to perform or participate in medical procedures which result in the termination of pregnancy; and the refusal of any person to perform or participate in these medical procedures shall not be a basis for civil liability to any person, nor a basis for any disciplinary or other retributory action against him.<sup>52</sup>

As alluded to earlier, South Africa did not provide for a conscience clause in the *Choice on Termination of Pregnancy Act*. However, an earlier draft of the Bill preceding the Act had contained a conscience clause that provided as follows:

- (1) Subject to subsection (2), no person shall be under a legal duty, whether by contract or any statutory or any other legal requirement, to participate in the termination of a pregnancy if he or she has a conscientious objection to termination of pregnancy.
- (2) The provisions of subsection (1) shall not affect any duty to participate in treatment which is necessary to save the life or to prevent serious injury to the health of the woman, or to alleviate pain.
- (3) Any person having an objection referred to in subsection (1) shall be obliged to refer a woman who wants her pregnancy to be terminated to a medical practitioner or a registered midwife, as the case may be, who shall terminate the pregnancy.<sup>53</sup>

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49 Section 4 of the 1967 Act.

50 *Roe v Wade* 410 U.S. 113 (1973). See also *Planned Parenthood v Danforth* 428 U.S. 52 (1976); *H.L. v Matheson* 540 U.S. 398 (1981). Wardle 1993:180-181.

51 Milbauer 1983; Tribe 1990; McDonagh 1996.

52 Del. Code Ann. Tit. 24, § 1791 (1987).

53 Heyns 1996.



The omission of a conscience clause in the Act was not so much an oversight but a conscious decision of the part of the government. Opponents of the Bill both inside and outside Parliament had strongly criticised the draft conscience clause as too restrictive of the right to conscientious objection. The clause went beyond providing an exception where it is necessary to save life or prevent serious injury to the health of the woman. It made an exception in respect of relief of pain. It also imposed upon the conscientious objector, a duty to refer the pregnant woman to another facility. For these reasons, the Bill was perceived by its opponents as unreasonably and unjustifiably attenuating the right to conscientious objection. To avoid controversy and smooth the passage of the Bill, government decided to omit the conscience clause and leave the matter to be implicitly governed by the Constitution.<sup>54</sup> At the same time, government saw it fit to introduce section 6 of the Act. Section 6 provides as follows:

A woman who in terms of section 2(1) requests termination of pregnancy from a medical practitioner or a registered midwife, as the case may be, shall be informed of her rights under this Act by the person concerned.

Of course, section 6 is not about conscientious objection. Rather, it assumes it. The section was drafted in the hope that it would have the effect of ensuring that conscientious objection is not exercised in such a way as to turn away women seeking abortion without providing them with information about the facilities that they may approach to access to legal abortion. However, as will be discussed later, it is far from clear whether section 6 has this effect.

A right to conscientious objection to abortion under the *Choice on Termination of Pregnancy Act* obtains by reason of the Constitution. The most direct provision is section 15 which provides, *inter alia*, that “everyone has the right to freedom of conscience, religion, thought, belief and opinion.”<sup>55</sup> Section 15 takes its cue from comparable provisions in the *Universal Declaration on Human Rights* and the *International Covenant on Civil and Political Rights*. Like its international counterparts, section 15 is a generous provision in that it recognises not only religious pluralism, but also ethical and political pluralism. What is important is that the doctor, nurse or midwife, must sincerely hold an opinion against personally participating in the provision of an abortion service.

It is important to note that section 15 is not the only provision that is applicable to conscientious objection. Other provisions of the Constitution as well as other statutes are also pertinent. Section 9 — the equality clause — is particularly germane. The right to equality in section 9 provides for protection against unfair discrimination, *inter alia*, on religious and other analogous grounds.<sup>56</sup> Where abortion is one of the range of health services

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<sup>54</sup> Debates of the National Assembly (Hansard) November 1996, col 4780.

<sup>55</sup> Section 15(1); McQuoid-Mason 1997:15-17.

<sup>56</sup> Sections 9(3) and (4).

that the health facility offers, performance thereof constitutes an integral part of the inherent requirement of the job.<sup>57</sup> Failure by the employer to provide reasonable accommodation to health care professionals opposed to participating in abortion procedures also constitutes unfair discrimination.<sup>58</sup> This is a consequence of the proportionality principle inherent in the test for determining whether a discriminatory requirement is justifiable under section 36 of the Constitution that, where it is reasonably practicable, an employer must resort to a non-discriminatory or less-discriminatory alternative.<sup>59</sup> Likewise, the *Labour Relations Act*,<sup>60</sup> the *Employment Equity Act*<sup>61</sup> and the *Promotion of Equality and Prevention of Unfair Discrimination Act*<sup>62</sup> would equally require the employer to discharge the duty of reasonable accommodation in respect of conscientious objectors by, for example, ensuring that there are alternative health care professionals to dispense abortion services. Reasonable accommodation is, of course, not an unlimited duty. Where undue hardship would otherwise be incurred by the employer, such as when the employer's facility is the only provider of abortion services for a given catchment area, and there is a compelling need for a service that would not otherwise be rendered, then it would be legitimate to discriminate say, against a job applicant whose conscience does not permit him or her to participate in an abortion procedure.

Section 10 of the Constitution which provides that everyone has inherent dignity and the right to have their dignity respected and protected also has bearing on conscientious objection. As alluded to in the preceding section, the recognition of conscientious objection to abortion is perhaps ultimately about respecting human dignity. Indeed, human dignity, with its all-embracing potential, is arguably the source and origin of all constitutional values including, the right to conscientious objection.<sup>63</sup> As a philosophical concept, human dignity finds a resonance not only in Western moral thought, as enunciated in Kant's deontological categorical imperative,<sup>64</sup> but also in African moral thought. It is encapsulated in the African value of *ubuntu*. *Ubuntu* signifies the recognition of the human worth and respect for the dignity of every person.<sup>65</sup> In *S v Makwanyane*, Mokgoro J said that ultimately, *ubuntu* is about humanity and morality. Its spirit emphasises respect for human dignity. Requiring a conscientious objector to participate in an abortion procedure would be a manifest violation of human dignity. Freedom and dignity are inseparably linked.

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57 Pretorius *et al* 2001:5-15 - 5-18.

58 Pretorius *et al* 2001:5-33 - 5-35.

59 Pretorius *et al* 2001:5-33 - 5-35.

60 Act No 66 of 1995.

61 Act No 55 of 1998.

62 Act No 4 of 2000.

63 Chaskalson 2000:197-198.

64 Kant 1970; Kupperman 1983:7-9.

65 *Hoffmann v South African Airways* 2000 (11) BCLR 1211 (CC) at para 38.

Thus, the issue is not so much whether conscientious objection obtains under the *Choice on Termination of Pregnancy Act*. Rather, it is about determining the limits of this right.

#### 4. Conscientious objection and the limitation clause

The right to conscientious objection, like any other fundamental right under the Constitution, is not absolute. It is subject to the limitation clause — section 36.<sup>66</sup> Section 36(1) provides that:

The rights in the Bill of Rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

The import of section 36 is clear. The health care worker cannot, as a matter of course, assert a superior claim over the woman seeking abortion or vice-versa. A balance must be struck between the interests of the health care worker and the woman taking into account other legitimate societal interests. The rationale behind the limitation clause is that a fundamental right cannot be enjoyed in such a way as to be indifferent to the rights of others or the wider societal interests. The right to conscientious objection cannot be exercised in such a manner as to permit the health worker to impose anti-abortion views on the pregnant woman or society and vice-versa. The health worker has the freedom to choose to refuse to participate in abortion procedures. At the same time, however, the rights of the pregnant woman and the interests of society must be taken into account. Where the rights conflict, the court must engage in a balancing exercise and arrive at an overall assessment based on proportionality.<sup>67</sup> There are a number of situations that might justify limitation of the right to conscientious objection.

- Saving life and preventing serious damage to health

The right to conscientious objection is an important right of a plural multi-religious society. However, it must at least yield to the rights of the pregnant woman in emergency cases where non-attendance of the woman would otherwise endanger her life or seriously damage her health. It can scarcely be argued that protecting life and preventing serious injury to health is not important in a constitutional democracy. Indeed, jurisdictions that have made explicit provision for the right to conscientious objection in their law,

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<sup>66</sup> De Waal *et al* 2001:144-165.

<sup>67</sup> *S v Makwanyane* 1995(6) BCLR 665 (CC) paragraph 104.

also tend to provide for an exception based on considerations of saving life or preventing a serious damage to health. Section 4(2) of the United Kingdom's *Abortion Act* is a case in point. It says:

Nothing in subsection (1) shall affect any duty to participate in treatment which is necessary to save the life or to prevent grave permanent injury to her physical or mental health of a pregnant woman.

There is little doubt that an exception similar to the English statute implicitly obtains under the Constitution, not least because the Constitution guarantees everyone the right not to be refused medical treatment in emergencies.<sup>68</sup> The limitation of the right to conscientious objection for this purpose cannot be said to be overbroad in that the right is circumscribed only to the extent that it is necessary to save life or prevent a serious damage to health. To abandon, within a health care setting, a pregnant woman who is in need of emergency care, would also be tantamount to violating her rights to human dignity and life. The practitioner must at least render that treatment which is necessary to avert an emergency. Refusal to participate in abortion procedures in these circumstances may not only lead to the denial of constitutional rights but may also lead to disciplinary action. Furthermore, it might lead to civil liability in the form of negligence.<sup>69</sup> Where the pregnant woman dies as a result of lack of medical attention, culpable homicide would be an appropriate charge if the doctor knew or ought to have been aware of the consequences of non-attendance.<sup>70</sup>

- Imposing a duty to provide information

A more difficult question to determine is whether in non-emergency cases, it is justifiable to impose a duty upon the health care professional to refer a woman seeking abortion to another facility that is willing to carry out abortion. The Act does not address this question. However, in section 6, it provides that a woman who requests termination of pregnancy from a medical practitioner or a registered practitioner "shall be informed of her rights under this Act by the person concerned".<sup>71</sup> It was suggested earlier that in its present form, the section cannot reasonably be interpreted to mean that the doctor or midwife has a duty to refer the woman to another practitioner who is prepared to carry out the abortion. To comply with section 6, it would seem sufficient to provide the woman with information to the effect whether she has or does not have right to termination of pregnancy under the Act, but without necessarily being obliged to provide information about which practitioner or facility she can approach.<sup>72</sup> Where the statutory intention is to impose an obligation to refer the woman to another practitioner or facility, then clearer words must be used, not least because referral is regarded by some conscientious objectors to mean complicity.

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68 Section 27(3).

69 Burchell 1993:85-106.

70 Burchell and Milton 1997:473-475.

71 Emphasis provided.

72 Strauss 1999.

The imposition of a statutory duty to refer the women seeking abortion to another practitioner or facility is tenable, not least because under section 7(2) of the Constitution, the state has a duty to “respect, protect, promote and fulfil” the rights in the Bill of Rights. The state must ensure that the reproductive rights that are expressly recognised by the Constitution are given a tangible expression. In the specific circumstances of South Africa, large numbers of women are ignorant about the right to abortion or are not aware about the location of facilities that conduct abortion.<sup>73</sup> Simply turning women away without at least providing information about an alternative facility may be tantamount to thwarting their constitutional rights to make decisions about reproduction<sup>74</sup> and to access health services, including reproductive health care.<sup>75</sup> Moreover, the exercise of conscientious objection must take particular cognisance of the fact that there is an imbalance in the provision of abortion facilities in the country.<sup>76</sup> Rural women in particular are disadvantaged in that they often travel long distances to urban centres to have abortions.<sup>77</sup> For such women, an unwanted child or backstreet abortion may easily become the option in the event of simply being turned away. It is important to recognise that the provision of abortion services is simply not about vindicating the constitutional rights of women. It is also about taking into account the wider public interest in removing the incentives for backstreet abortion. In the past, as indicated earlier, thousands of women were hostage to backstreet abortions, with all their attendant morbidity and mortality. To require medical practitioners and midwives to at least provide information about alternative facilities is not only rationally connected to the legitimate purpose of facilitating the exercise of rights and preventing backstreet abortion. It is also not a disproportionate erosion of the right to conscientious objection. Such an obligation does not require the practitioner to counsel in favour of abortion, or much less, participate in an abortion procedure.

The duty to refer the woman to alternative facilities also has support in international human rights jurisprudence. In General Recommendation 24, the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) has given normative content to the right to health of women in article 12 of CEDAW.<sup>78</sup> The Committee has called on States to be alive to the general vulnerability of women and their historically disadvantaged position in respect of access to health care services. It is incumbent upon States to plan, promote and implement their health care services in a gender-sensitive manner. Obstacles against timely and affordable access to legally available reproductive services must be removed. In the particular context of reproductive health services and conscientious objection, the Committee has recommended that measures

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73 Engelbrecht *et al* 2000:9-10; Ngwena 2000:33.

74 Section 12(2)(a).

75 Section 27(1).

76 Varkey and Fonn 2000:7; Ngwena 2000:33-35.

77 Varkey and Fonn 2000:6; Ngwena 2000:35.

78 CEDAW, General Recommendation 24, UN GAOR, 1999, Doc. No. A/54/38/Rev.1.

should be introduced to ensure that women are referred to alternative health providers in the event of the exercise of conscientious objection by health care professionals.<sup>79</sup> Implicit in the reasoning of the Committee is the realisation that failure to refer women to alternative facilities perpetuates a pattern of systemic discrimination and historical disadvantage, and thus renders the attainment of substantive equality unachievable for women. Denial of information opens the doors for unsafe abortions with attendant morbidity and mortality, especially among the poorest and youngest of women who are at highest risk from unsafe abortion.<sup>80</sup>

- Limiting the right procedures and personnel directly connected with abortion

Another parameter for determination has been the kind of procedures to which conscientious objection applies. Courts elsewhere have been reluctant to extend the ambit of conscientious objection beyond procedures and personnel that are proximate to the abortion itself.<sup>81</sup> The decision of the United Kingdom's House of Lords in *Janaway v Salford Area Health Authority* is a case in point.<sup>82</sup> The issue in this case was whether typing a letter of referral of a pregnant patient with a view to arranging an appointment with a doctor in order to form an opinion whether the pregnancy should be terminated under the United Kingdom's *Abortion Act* fell within the phrase "participate in any treatment authorised by this Act" so as to entitle the person asked to type the letter to refuse on ground of conscientious objection. The appellant, Mrs Janaway, was a Roman Catholic. She had refused to type a letter of referral on the ground of conscientious objection. She had been dismissed for misconduct on the grounds that she had unjustifiably refused to carry out a lawful and reasonable instruction. She argued before the court that "participate in any treatment authorised by this Act" should be given a wide interpretation so as to include arrangements that are preliminary to abortion. The hospital argued that the meaning of the phrase was limited to taking part in the actual procedures undertaken to terminate the pregnancy. Mrs Janaway did not succeed. It was held that typing a letter was marginal and preliminary to the procedure of abortion. Lord Keith who delivered the leading speech said that if Parliament had intended the results contended for by the appellant, it could have clearly and easily procured it by referring to participation "in anything authorised by this Act" instead of "in any treatment" so authorised.

In the United States, there is ample support for the approach adopted in *Janaway*. In *Spellacy v Tri-County Hospital*, a Pennsylvania court held that the conscience clause did not apply to a clerk who was dismissed for refusing to participate in admission procedures of abortion patients.<sup>83</sup> Such

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79 CEDAW, General Recommendation 24, paragraph 11.

80 Cook and Dickens 2002:76.

81 Dickens 2000:230.

82 [1988] 3 All ER 1079 (HL).

83 395 A.2d. 998 (Pa.1978).

a clerk was merely playing an “ancillary” or “clerical” role. In *Erzinger v Regents of the University of California*, the California appellate court said:

The crucial words [in the federal conscience clause] are ‘performance of abortions or sterilizations’. The proscription only applies when the applicant must participate in acts related to the actual performance of abortions and sterilizations. Indirect or remote connection with abortions or sterilizations are not within the terms of the statute.<sup>84</sup>

The courts’ approach in so limiting the exercise of the right to conscientious objection to immediate involvement with abortion procedures, has been the subject of criticism, however. Hammer says that such a narrow approach fails to take into account that a belief can be violated when a person assists indirectly an action that is contrary to his or her conscientious or religious belief.<sup>85</sup> Wardle sees the narrow approach as evidence of implicit indifference or even hostility towards conscientious objection.<sup>86</sup> She argues that courts should adopt a subjective approach in that a conscience clause must seek to protect the right not to participate in services that a health worker believes to be immoral. One may feel morally culpable even he or she is not the immediate or direct provider of an immoral act. The protection of conscience ought to be defined by what the employee rather than an administrative agency believes to be an unacceptable conflict situation. Wardle says that no public policy will be seriously impeded by interpreting conscience clauses broadly to include persons indirectly involved.<sup>87</sup>

The problem with widening the scope of conscientious objection beyond procedures that are immediate and integral to the performance of the abortion is that it ignores the exigencies of the workplace where the condition and terms of employment are based, *inter alia*, on the ascertainability of contractual duties. To treat a procedure that is merely preliminary to a medical procedure as analogous to the procedure itself, runs the risk of introducing undesirable uncertainty into the determination of the inherent requirements of the job. The inherent requirements of the job relate to the “essential features” or the “defining characteristics” of the position in question.<sup>88</sup> Once, as a matter of law, the scope of conscientious objection is widened to include preliminary procedures, then the right becomes virtually open to an unidentifiable and potentially limitless chain of third parties. It will also be open, say, to the factory workers who design the medical equipment that is used in abortion, or the driver who transports the equipment to the facility to claim the exercise conscientious objection. The purpose of the right to conscientious objection to abortion is to facilitate refusal to participate in a procedure that one finds morally objectionable. Thus, excluding from the scope of the right, procedures that are distal rather than proximal to abortion does not defeat the essential purpose of the right under the Constitution.

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84 137 Cal. App. 3d 389 at 394.

85 Hammer 1999:574.

86 Wardle 1993:199-200.

87 Wardle 1993:188.

88 Pretorius *et al* 2001:5-15.

## 5. Conclusion

It was a mistake for the *Choice on Termination of Pregnancy Act* to omit to provide for conscientious objection and set out the principles for determining its limits. Clear guidance would have served to reassure the proponents of conscientious objection to abortion, as well as the women wishing to access abortion services that their rights are acknowledged and protected. As the Act stands, it does not provide guidance on the exercise of conscientious objection. The Constitution is the only available yardstick. Clearly, the Constitution recognises the right to conscientious objection to participating in abortion procedures. At the same time, it imposes limits on the right to conscientious objection where it is necessary to save life or prevent a serious injury to health. Whilst it is a moot point whether, the Constitution will support the imposition of a statutory duty to provide the pregnant women with information about alternative facilities, it was argued that ignorance on the part of women about the location of facilities, the general paucity of abortion services in rural areas, the wider societal interest in stemming access to backstreet abortion, international human rights jurisprudence, and the duty of the state under section 7(2) of the Constitution to respect, protect promote and fulfil, *inter alia*, reproductive rights are sufficiently good reasons for supporting such a duty.



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