Realising the right to reproduce with assistance in South Africa: a constitutional perspective

Jacobs, C.

CHAPTER 4
THE RIGHT TO REPRODUCE: REPRODUCTIVE AUTONOMY AND REPRODUCTIVE HEALTH IN SOUTH AFRICA

4.1 Introduction

In the previous chapter, the meaning of the right to reproduce was examined from a global perspective. It was concluded that this right is distinct from the right to have a child. However, neither of these rights are expressly recognised in South Africa. At best, the right to reproduce can be inferred from several other rights. These include the rights to reproductive autonomy, reproductive health, privacy, dignity and equality. This chapter considers the first two of these rights. Particular attention will be paid to the meaning of reproductive autonomy as well as answering the question of how free one's choice actually is. In order to answer these questions, this chapter will first define reproductive autonomy. It will further examine the manner in which autonomy, in general, has been protected by the Constitution as well as how reproductive autonomy has been protected to date. The chapter will further examine how the right to reproductive autonomy has been given expression in the context of sexual reproduction. This discussion will consider whether these expressions are useful for the purposes of extending this right to AR. Thereafter this chapter will explore how reproductive autonomy has been applied to AR thus far and what this means for future uses of AR. This will be considered at paragraphs 2 to 5 below. Lastly, this chapter will explore the extent to which prospective parents will be able to access ART as an exercise of their right to reproductive autonomy.

However, it is possible that reproductive autonomy may not afford prospective parents the freedom to engage in reproductive technologies to the extent that they desire. As mentioned, the reason for this is that increasingly this right conflicts with the rights of the prospective child.[1] This is an interesting development in light of the fact that in many instances where the rights of prospective parents are considered, there is no child as yet, merely a desire for one. This chapter will therefore consider the impact of children's rights on the rights of the prospective parents to engage in ART. This will be considered in paragraph 6 below.

---

1 See para 1.3 above.

In the event, that reproductive autonomy can assist prospective parents in realising their desire for offspring using ART, the next question to consider is to what extent the right to reproductive health care allows them to do so. The reason for this is that reproductive autonomy means very little unless individuals can access health care facilities that will help facilitate reproduction. This will be considered in paragraph 7 below.

4.2 The boundaries of reproductive autonomy

Almost since its adoption, the right to reproductive autonomy or freedom[2] as recognised in the Constitution, as will be discussed in detail below,[3] has referred to the right to refrain from reproduction. This could either occur by means of terminations of pregnancy, sterilisation or the use of contraceptives. The right to reproduce was thus primarily defined with reference to the negative exercise of the right. This interpretation, however, provides a limited perspective of the right. What is thus often omitted or overlooked is the fact that reproductive autonomy also includes a second positive component, namely the right to engage in activities that result in reproduction.[4] Reproductive freedom can thus be exercised either positively or negatively.[5]

It has furthermore been suggested that reproductive autonomy includes the right to decide on the quantity **and** quality of one's offspring.[6] As indicated in chapter 3, deciding on the quantity of offspring involves the decision regarding how many children one will have and how far apart they should be spaced.[7] Deciding on the quality of offspring, in comparison, involves a decision about whether an offspring should be born at all.[8] This right has long been recognised both in international and national laws. There are also several human rights treaties that specifically

---

2 For purposes of this chapter the terms "autonomy" and "freedom" will be used interchangeably.

3 See para 3 below.

4 J.A. Robertson, *Noncoital reproduction and procreative liberty* 59 Southern California Law Review (1986) 249-50 observed that

> [t]he right to procreate – to do those things that will lead to biological descendants – is equally or even more significant to persons" than the right not to reproduce. This is, however, a matter of opinion and depends entirely on the preference of the person concerned. He is however correct in his observation that this right has received less "explicit legal recognition than the avoidance of procreation.

5 It is however worth noting that at the time that M. O'Sullivan, Reproductive Rights in S. Woolman & M. Bishop M (eds) Constitutional Law in South Africa 2nd ed (Service 2) 16-1 (1998), for example, wrote her chapter on reproductive rights from a South African constitutional perspective, she focused entirely on the negative aspect of this right. Her reason for doing so was not a mere oversight, rather a statement regarding the state of affairs in the country at the time. She noted that "[t]his chapter concentrates exclusively on abortion because it is at present the sole focus of the constitutional debate over reproductive rights."
This position has not changed substantially during the intervening two decades.

6 R. H. Blank *Assisted reproduction and reproductive rights: the case of in vitro fertilization* 16 (2) P&LC (1997) 280.

7 See para 3.3.3 above.

8 In some instances, the potential offspring may carry a genetic defect which will influence the parents' decision to continue with the pregnancy.

endorse such a choice. Article 16(1) of CEDAW is one such example of this.[9] In addition, national legislatures in various countries have increasingly passed legislation or implemented policies that reduce the quantity of offspring produced.[10] South Africa is one example of this; although in this case, this was the result of legislation rather than a particular government policy to control the population.[11] Legislation giving recognition to the right to decide on the quantity of offspring produced include the Choice Act[12], the Sterilisation Act[13] and the Children's Act.[14] This issue has thus received significant attention in South Africa's legal framework.[15]

It is this right to decide on the quality of offspring that will increasingly receive attention as advancements in medical science continue to occur.[16] The current range of reproductive technology not only makes reproduction possible in circumstances where this was previously not possible, but it also makes it possible to alter the reproductive outcome or quality of potential offspring.[17] South Africa already allows individuals to decide on the quality of their future offspring to avoid offspring with disability.[18] This is evident in a number of instances. For example, the same legislation referred to above, that permits individuals to decide on the quantity of their offspring also allows individuals to control the quality of their offspring. The Choice Act, for example, in

---

9 Article 16(1) of the Convention on the Elimination of all forms of Discrimination against Women (1979) is one such example. This article states that:

> States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
>
> (e) The same rights to decide freely and responsibly on the number and spacing of their children ….

10 China in the late 1970's implemented a one-child policy. Furthermore, since the 1970s Vietnam has discouraged couples from having more than two children. A similar policy was adopted in Iran in 1988 where the government discouraged individuals from having more than two children. See G. Seetharaman, *Child policies across the world: From restrictions to incentives* 16 April 2017 The Economic Times (https://economictimes.indiatimes.com/news/politics-and-nation/child-policies-across-the-world-from-those-imposing-restrictions-to-others-offering-incentives-to-have-more-kids/articleshow/58199912.cms), last visited (02-02-2021).

11 In South Africa legislation has been passed to create safe conditions in which individuals may limit the number of offspring that they produce.

12 Act 92 of 1996. This act permits women to terminate their pregnancies under certain circumstances.

13 Act 44 of 1998. This act allows for the sterilisation of persons over the age of 18 years to prevent procreation from occurring entirely.

14 Act 38 of 2005. Certain provisions of this Act permit children to access contraceptives as an exercise of their rights to reproductive autonomy.

15 All three Acts identified collectively allow individuals to prevent the birth of children that are not desired.

16 A.B. Coan, *Is there a constitutional right to select the genes of one's offspring?* 63 HLJ (2011) 236, who considers the American position, similarly grapples with this question. He observes that

> The Supreme Court has long recognized a due process right to make deeply personal decisions such as whether to bear or beget a child. Might this right extend to selecting genes of one's offspring?

17 One such advancement includes mitochondrial donation which allows for the creation of healthy offspring by means of donated mitochondria in circumstances where an ill child would otherwise have been guaranteed.

18 The question of reproductive quality control is however not limited to this one instance. It is merely the only instance in which this is currently allowed in South Africa. Other instances include, gender selection, other nonmedical traits, nontherapeutic enhancement and intentional diminishment, which will be discussed below.

limited circumstances allows individuals to terminate their pregnancies where the foetus suffers from a severe physical or mental abnormality or malformation[19] or where the continued pregnancy would pose a risk to the health of the foetus[20] and would presumably result in deformity or death. Accordingly, deciding on the quality of future offspring can be said to be an exercise of reproductive autonomy. This argument is bolstered by the preambles of both the Choice Act[21] and the Sterilisation Act[22] which indicate that these acts have been promulgated to give effect to the right contained in section 12(2)(a) of the South African Constitution.[23]

Also, sterilisations are sometimes carried out where individuals want to avoid the risk of creating offspring with inherited deformities.[24] This amounts to another exercise in what has increasingly become known as reproductive quality control.[25] There is as such a direct link between reproductive decisions and the quality of future offspring,[26] which indicates that the right to decide on the quality of future offspring possibly exists. As mentioned above, this possibility has inadvertently been created by existing legislation which has a direct link to section 12(2)(a).[27]

Moreover, in an era where increased use is being made of technological advancements to detect genetic disorders during pregnancy[28] and to decide whether to continue with the pregnancy, it is arguable that parents have the right to decide on the quality of their offspring as an exercise of

---

19 S 2(1)(b)(ii) and s 2(1)(c) (ii) of the Choice Act.

20 S 2(1)(c) (iii) of the Choice Act.

21 The preamble of the Choice Act states:

> Recognising that the Constitution protects the right of persons to make decisions concerning reproduction and to security in and control over their bodies …
> This Act therefore … promotes reproductive rights and extends freedom of choice by affording every woman the right to choose whether to have an early, safe and legal termination of pregnancy according to her individual beliefs.

22 The preamble of the Sterilisation Act states:

> Recognising that the Constitution protects the rights to bodily and psychological integrity of persons which includes the right to make decisions concerning reproduction and the right to security in and control over their bodies ….

23 S 12(2)(a) of the Constitution states that

> Everyone has the right to bodily and psychological integrity, which includes the right –
> (a) to make decisions concerning reproduction.

This provision will be discussed in greater detail below.

24 See for example the discussions by T. Jenkins, *Medical genetics in South Africa* 27 JMG (1990) 762 and A.M. Stern, *Sterilized in the Name of Public Health: Race, Immigration, and Reproductive Control in Modern California* 95 (7) AJPH (2005) 1129.

25 Robertson, supra note 4, at 147 referred to this term as far back as 1994 in his book *Children of Choice* in the context of assisted reproduction, although for many it may be viewed as offensive.

26 See once again the comment by J.A. Robertson, *Genetic Selection of Offspring Characteristics* 76 BULR (1996) 425.

27 Specific reference is made to the acts identified at supra notes 12 & 13.

28 Such as amniocentesis and chorion villus sampling which is used to detect Down's syndrome.

their reproductive autonomy.[29] Women are on a daily basis confronted with the question of whether to continue with a pregnancy where the potential offspring suffers from a genetic defect or abnormality. In these instances, some women do choose to terminate the pregnancy. While the decision to do so may be prompted by concerns for the child's quality of life and the difficulties associated with raising a severely ill child, the decision simultaneously speaks of reproductive quality control.[30]

Likewise, the existence of pre-implantation genetic diagnosis (PGD) or embryo screening makes it possible for prospective parents to screen for negative traits.[31] This effectively allows them "to ensure that only [the desired, healthy] embryos are transferred to the [female's] uterus,"[32] which again amounts to a decision regarding the quality of future offspring.[33] This was confirmed in the UK decision of *R (on the application of Quintavalle) v Secretary of State for Health*[34] where the Court of Appeal in England and Wales permitted tissue-typing in order to determine which embryo should be selected for implantation to save the life of the applicants' existing son. In this instance, all embryos which carried the genetic defect were excluded. Tissue-typing was thus deemed necessary for exercising one's reproductive autonomy.[35] This decision aptly illustrates the scope of the right to control the quality of future offspring in certain countries. Where ART is used to avoid

---

29 Robertson, supra note 26, at 433 describes this position in the following terms: "the main support for a right to engage in prebirth selection rests on the close connection between the expected characteristics of offspring and the decision whether or not to reproduce."

30 Robertson, supra note 26, at 433 observes that "[s]election of offspring on [this] basis would clearly fall within the couple's procreative liberty."

31 This includes "severe, irreversible genetic conditions (such as sickle-cell anaemia, Tay-Sachs disease, Duchenne's muscular dystrophy and beta-thalassaemia)". See A. Strode & S. Soni, *Pre-implantation diagnosis to create 'saviour siblings': A critical discussion of the current and future legal framework in South Africa* 102 (1) SAMJ (2012) 21.

32 Strode & Soni, id 21.

33 It could similarly be argued that events in China involving gene editing in order to produce twins that are more resistant to HIV amounts to a decision regarding quality control. However, unlike other technologies that are utilised for this purpose, the birth of gene-edited babies has been met with outrage. The reasons for this could possibly be attributed to the fact that this type of genetic modification is outlawed in most countries, including China, and were not in exercise of the prospective parents' rights. T.H. Saey, *News of the first gene-edited babies ignited a firestorm* 18 December 2018 Science News (https://www.sciencenews.org/article/gene-edited-babies-top-science-stories-2018-yir), last visited (02-02-2021).

34 [2003] EWCA Civ 667 para 142.

35 The decision reached in this case has led the UK to amend its existing legislation governing the use of ART. The *Human Fertilisation and Embryology Act* 1990, as amended in the 2008 Act, now contains the following provisions regarding "tissue typing for the purposes of saving a sibling":

> Schedule 2: Activities that may be licenced under the 1990 Act.
> Paragraph 1ZA(1): A licence...cannot authorise the testing of an embryo, except for one or more of the following purposes:
>
> > (d) in a case where a person ('the sibling') who is the child of the persons whose gametes are used to bring about the creation of the embryo (or of either of those persons) suffers from a serious medical condition which could be treated by umbilical cord blood stem cells, bone marrow or other tissue of any resulting child, establishing whether the tissue of any resulting child would be compatible with that of the sibling.

See L. Cherkassky, *The Wrong Harvest: The Law on Saviour Siblings* IJLP&F (2015) 6.

producing offspring with disabilities, this is a permissible exercise of reproductive autonomy. Support for this is found with Robertson, who opines as follows: where a "characteristic in question is one that is central or material to a reproductive decision, [in other words, if it] determines whether reproduction will occur," then "the law must give this choice the same respect and weight it gives to other decisions about whether or not to reproduce."[36] Conversely, where a

> characteristic is only a preference as to offspring characteristics, but not one that determines whether reproduction should occur, then it may not be part of procreative liberty and may not deserve the respect accorded to procreative choices generally.[37]

In other words, where prospective parents are confronted with a characteristic in their future offspring that will impact the quality or condition of the child, then the decision not to have that child amounts to a decision concerning reproduction, which falls within the ambit of section 12(2)(a).[38]

In contrast, instances where commissioning parents make use of donor eggs and/or sperm and have the option of choosing between different donor profiles and selecting gametes with traits which they perceive as superior to others[39] will likely fall into this last category and would by Robertson's logic not fall within the ambit of section 12(2)(a). Here the reproductive decision relates to preference, which is distinguishable from the first scenario which is material.

However, the use of mitochondrial transfer (MT), which allows the defective mitochondria of a female to be replaced with healthy mitochondria from a female donor and produce offspring that is still predominantly the genetic offspring of the first female, would fall into the first category. In this instance, the availability of this technology would undoubtedly impact whether reproduction would occur at all. But, while this could qualify as an exercise of reproductive autonomy, often the justification offered for the use of MT is the preservation of the offspring's health.[40] In other

---

36 Robertson, supra note 26, at 429.

37 Robertson, id observes that: "The distinction between freedom in the course of reproduction and freedom in deciding to reproduce is relevant here to remind us that not everything touching on procreation implicates procreative liberty."

38 It is uncertain whether gene editing by means of CRISPR/cas9 will similarly fall within the ambit of this right. The reason for this while MT allows for the exclusion of a particular genetic defect, CRISPR "allows the editing of hundreds of genes at once." N. Stephens and R. Dimond, *Debating CRISPR/cas9 and Mitochondrial Donation: Continuity and Transition Performances at Scientific Conferences* 2 EST&S (2016) 314.

39 Wijnland Fertility Clinic, *What are the Legal Aspects of IVF and Donor Eggs and Sperm in South Africa?* 3 October 2016 *Health24* (https://www.health24.com/Parenting/Fertility/News/What-are-the-legal-aspects-of-IVF-and-donor-eggs-and-sperm-in-South-Africa-20150512), last visited (02-02-2021).

40 This view is confirmed by M.D. Garasic & D. Sperling, *Mitochondrial replacement therapy and parenthood* 26 (3-4) *Global Bioethics* (2015) 202 who observes that "[t]he reason one tends to justify the use of MRT is that it seeks "only" to

words, this option is pursued in the interests of the potential offspring. This raises the question of whether the best interests' principle should apply in the case of potential offspring, who have yet to be conceived. This question as well as the conflict between the rights of prospective parents and the potential offspring will be considered below.

From the aforementioned discussion, the following observations can be made: reproductive autonomy in South Africa today bears a different meaning to the one than it once did. This right incorporates not only the right to have children or to refrain from having them. It additionally includes the right to decide on the quality of one's offspring, provided that the characteristic in question is material to whether reproduction will occur or not.[41] In light of the numerous technological advancements occurring in the field of reproductive medicine, some reproductive decisions may fall within this definition, while others will not. This leads one to reach a preliminary conclusion that the current interpretation of the right to reproductive autonomy extends only to a limited range of reproductive options. This will be considered in greater detail below. In the interim, what follows is a discussion of the various sources that give effect to the wide concept of reproductive autonomy in the South African Constitution.

4.3 Constitutional protection of reproductive autonomy

4.3.1 Autonomy in general

Under the South African Constitution, reproductive autonomy is primarily protected by means of the value of freedom entrenched in section 1 as well as the right contained in section 12(2)(a). Section 1, while not specifically making reference to reproduction, enshrines the values of human dignity, equality and freedom.[42] While acknowledging that this provision protects individual autonomy, there is no specific right to freedom or autonomy[43] resulting in a lack of clarity regarding the exact meaning of this concept.[44] The lack of clarity regarding the precise meaning of this

preserve the health dimension of the fetus (i.e. from hereditary disease)." The authors however question whether this is the only reason or whether the interests of the prospective parents are also promoted by the use of this technology. Another question to consider is whether the use of CRISPR/cas9 technology, which allows for extensive gene editing, can be justified in cases where such extensive editing is needed in the first place.

41 An additional consideration that arises is the extent to which genes would need to be modified in order to realise the desire for healthy offspring.

42 This provision states that:

> The Republic of South Africa is one sovereign democratic state founded on the following values:
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

43 C. Pickles, Pregnancy Law in South Africa - Between Reproductive Autonomy and Foetal Interests (2017) 92 confirms that "the Constitution does not specifically grant anyone the right to autonomy".

44 This may be attributed to the fact that autonomy is quite a complex term which has various meanings. This sentiment is shared by Khampepe J in *AB* para 51 who observes that

concept is further complicated by the fact that case law emanating from the Constitutional Court does not provide a single answer.[45] Instead, one needs to examine a number of different, individual decisions in order to arrive at a feasible and practicable concept.[46] These decisions will be considered next.[47]

For example, in *AB v Minister of Social Development* Khampepe J observed that "autonomy is a necessary … part of the value of freedom."[48] This interpretation confirms the dictum in *Bernstein v Bester*[49] where O'Regan J observed that the right to freedom should not deny the value of individual autonomy.

In *Barkhuizen v Napier* Ncgobo J further held that "[s]elf-autonomy, is the very essence of freedom and a vital part of dignity".[50]

In the same decision, Sachs J observed that the value of autonomy should be constitutionally prized.[51] Furthermore in *Mayelane v Ngwenyama,*[52] Froneman J, Khampepe J and Skweyiya J found

---

> [A]utonomy is a concept that bears many conceptions, encompassing a tangled net of intuitions, conceptual and empirical issues, and normative claims.

Authors such as D.W. Jordaan, *Autonomy as an Element of Human Dignity in South African Case Law* 8 JPS&L (2009) 4 further opine that there is an "overlap between autonomy and freedom". It is for this reason that these terms will be used interchangeably.

45 Pickles, supra note 43, at 92. The position in South Africa is no different than the position abroad. E. Nelson, Law, Policy and Reproductive Autonomy (2013) 5 observes that certain cases have considered aspects of this term and while there is some agreement that this notion has a broader meaning than it does in the context of decisions not to reproduce, sufficient attention has not been paid to provide an extensive meaning of this term within the context of AR.

46 Pickles, id 92. Jordaan, supra note 44, at 4-5 similarly notes that

> In the first five years since the inception of the Constitutional Court (1995-1999) the term 'autonomy' was used in association with several enumerated constitutional rights and values, including human dignity, freedom, privacy and equality. However, the nature of the relationship between autonomy and these rights and values was still inexact and vague at this stage. (Footnotes omitted.)

47 Here it should be noted that Pickles, supra note 43, relies on the same cases to support her understanding of autonomy, although this is in the context of terminations of pregnancy, rather than in the context of decisions to reproduce with assistance which forms the focus of this study. Of necessity, this discussion also requires a consideration of the meaning of autonomy.

48 2017 (3) BCLR 267 (CC) para 51. The court added at para 52 "[w]hat animates the value of freedom is the recognition of each person's distinctive aptitude to understand and act on their own desires and beliefs."

49 1996 (2) SA 751 (CC) para 150 which dealt with the constitutionality of ss 417 and 418 of the Companies Act 61 of 1973, which has since been repealed. These provisions permit the summoning and examination of any person regarding the affairs of a company being wound up. These sections further permit the imprisonment of anyone who fails to comply with the summons or who fails to submit to examination.

50 2007 (5) SA 323 (CC) para 57. The same court in *S v Jordan* 2002 (6) SA 642 (CC) paras 52-53 confirmed that while autonomy is not a right in and of itself, it informs the rights to human dignity, privacy and freedom and security of the person. At an international level Nelson, supra note 45, at 2 similarly observes that

> There does not seem to be much, if any, disagreement around the idea that freedom of choice in reproductive matters is a significant aspect of the freedom to map the course of one's own life.

51 See *Barkhuizen v Napier* para 150.

52 2013 (4) SA 415 (CC) para 73. This case concerned the validity of a husband's subsequent polygynous customary marriage in circumstances where the existing/first wife's consent had been lacking.

that "[a]utonomy and control over one's personal circumstances is a fundamental aspect of human dignity."[53] However, Ackermann J confirmed in *Ferreira v Levin NO* that "[a]lthough freedom is indispensable for the protection of dignity, it has an intrinsic constitutional value of its own."[54] As valuable as the dicta of the Constitutional Court are on the value of autonomy, there was still a lack of clarity regarding the precise meaning of this concept.

Jordaan observes that at its most basic form, autonomy refers to self-determination.[55] This he interprets as individual freedom to "choose and pursue one's own ends in life".[56] The meaning proposed by Jordaan is consistent with the one adopted in *Barkhuizen v Napier* where Ncgobo J observed that autonomy is "the ability to regulate one's own affairs, even to one's own detriment".[57] This speaks to the idea of self-determination.

In *NM v Smith*[58] O'Regan J further attempted to shed more light on the content of this value. She noted that autonomy encourages "the constitutional celebration of the possibility of morally autonomous human beings independently able to form opinions and act on them". This dictum once again confirms that autonomy is integral to one's freedom.

In *National Coalition for Gay and Lesbian Equality v Minister of Justice*,[59] which concerned the decriminalisation of consensual homosexual acts, Sachs J provided greater clarity on the meaning of this value when he stated that "[w]hat is crucial [for autonomy] is the nature of the activity, not its site". In the context of reproduction, this is quite instructive and suggests that all procreative acts should be valued regardless of whether they take place in one's home or a clinic. Here the emphasis should be on what is perceived to be a private act rather than on where it is carried out. De Vos and Freedman attempt to further define autonomy. They opine that it is

---

53 This sentiment was shared in *Ferreira v Levin NO* 1996 (1) SA 984 (CC) para 49 where Ackermann J observed that
> Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible…. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity.

54 *Ferreira v Levin NO* para 49.

55 Jordaan, supra note 44, at 4.

56 Jordaan, id 4.

57 2007 (5) SA 323 (CC) para 57.

58 2007 (5) SA 250 (CC) para 145. This case concerned the publication of the three applicants' names and HIV status in a book without their consent. The court found that their rights to dignity and privacy had been violated by the respondents which had bearing on their autonomy.

59 1999 (1) SA 6 (CC) para 117.

> [t]he ability to make decisions freely about your life as an individual without being forced to do so by your family, your community or other cultural or religious institutions.[60]

Here it should be noted that at times there is a very fine line between being forced to do something and exercising individual choice - but being influenced by one's family, community and other institutions and cultural and religious values. The distinction drawn by de Vos and Freedman alludes to the ongoing debate about the precise nature of autonomy. On the one hand, it seems clear that the right to decide is central to the value of autonomy and that the above decisions extend to what is best for oneself in the circumstances regardless of how others feel. This speaks of "unfettered individual choice".[61]

However, Khampepe J in *AB* referred to "recent academic trends … [that] point to the inherently relational character of [autonomy]".[62] This begs the question: has the Constitutional Court departed from the traditional Kantian notion of autonomy that it once embraced?[63] This appears to be the case. For example, in *MEC for Education: Kwazulu-Natal v Pillay* Langa CJ observed that "an individual human person cannot develop and achieve the fullness of his/her potential without the concrete act of relating to other individual persons".[64] Khampepe J in *AB* further suggested that "to be autonomous is to be socially and politically connected". Both Langa J and Khampepe J suggest that one cannot make an informed choice without regard for the social and political climate in which one finds oneself. In other words, we do not truly exercise unfettered individual

---

60 P. De Vos & W. Freedman, South African Constitutional Law in Context 781 (2014). This definition was particularly relevant in the context of terminations of pregnancy where women were denied access to abortions and effectively coerced to reproduce. See further Nelson, supra note 45, at 2 who notes that

> [t]he development of the legal conception of reproductive autonomy relates to women's claims to access to contraception and abortion services; it stems from assertions that women should be free from coercion in reproduction (footnotes omitted).

61 *AB* para 51.

62 These trends are in stark comparison to past trends which promoted "unfettered individual choice".

63 L. Ackermann, Human Dignity: Lodestar for Equality in South Africa (2013) 100 makes the observation that the Constitutional Court's jurisprudence traditionally adopted a distinctly Kantian approach to autonomy. According to Immanuel Kant, as cited in *Ferreira v Levin NO* para 52,

> Freedom (independence from the constraint of another's will), insofar as it is compatible with the freedom of everyone else in accordance with a universal law, is the one sole and original right that belongs to every human being by virtue of his humanity.

Jordaan, supra note 44, at 7 confirms that the approach adopted by the Constitutional Court was "once again the classic liberal position that autonomy is a *conditio sine qua non* for the individual's pursuit of his or her "unique set of ends". The pursuit of one's unique set of ends is an ideology attributed to Kant.

64 2008 (1) SA 474 para 53.

choice. Every informed decision is – or should be – the result of external influences.[65] In this respect, autonomy is thus a relational concept.[66]

On the other hand, adopting a purely relational approach to autonomy has the potential of overlooking the individual and instead focusing on the "relations" that inform that decision.[67] Granted, we are all influenced by our surroundings, but in making any choice, we need to weigh up to what extent we allow a particular source to impact that decision. Autonomy, in my opinion, should thus be less relational in nature than Langa J and Khampepe J suggest, at least as far as decisions to reproduce with assistance are concerned. In this context, autonomy should be the product of unfettered individual choice. Although, the use of AR has historically been met with cultural and religious opposition.[68] But being autonomous means being able to overcome opposition (whether in the form of interference or social pressure) and being able to make a decision without fear of repercussions. This interpretation of autonomy thus advocates for the widest possible meaning of the term, provided that it is not against public interest, of course. In this respect, the role of the state also becomes relevant.

Autonomy should only be limited in the public interest where state interference would constitute a permissible limitation on autonomy as opposed to the limitations inherent in relational autonomy. Given the potential for abuse and exploitation, AR is more heavily regulated than SR.[69] As such AR is subjected to greater state interference and carries with it the potential for legal repercussions.

In this context, an important question to consider is how much state interference or regulation is desirable? At present South Africa finds itself midway between the United States where there is no federal regulation of AR[70] and the United Kingdom which heavily regulates all practices related to

---

65 This notion of autonomy seems to coincide with the notion of *ubuntu* which according to the court in *S v Makwanyane* 1995 (3) SA 391 (CC) para 224 "is a culture which places some emphasis on communality and on the interdependence of members of the community." Although Ackermann, supra note 63, at 111 links *ubuntu* more closely to human dignity which is related to autonomy.

66 Pickles, supra note 43, at 94 makes the observation that Sachs J in his minority decision in *AB* (para 51) subscribes to the relational nature of autonomy. This notion has further increasingly found support in reproductive decision making, particularly in the field of bioethics. See, for example, Nelson, supra note 45, at 43-46.

67 In this respect Nelson, supra note 45, at 48.

68 See, for example, F.M. Mahlobogwane *Surrogate Motherhood Arrangements in South Africa: Changing Societal Norms?* 2 SJ (2013) 45.

69 Although the extent of regulation differs across countries. This is largely due to beliefs about the purpose of regulation. See E.L. Nelson, *Comparative Perspectives on the Regulation of Assisted Reproductive Technologies in the United Kingdom and Canada* 43 ALR (2006) 1024.

70 D. Adamson, *Regulation of Assisted Reproductive Technologies in the United States* 39 (3) FLQ (2005) 728 notes that while there is no federal regulation of ART, the idea that the practice is unregulated is inaccurate.

AR.[71] South Africa has piecemeal legislation and lacks a suitable regulatory body that has oversight over matters relating to ART.[72] To answer the above-posed question, a further question arises: what is the purpose of regulation in this instance?[73] Clearly, the state has a public interest in reproduction, arguably more so in the case of AR than in sexual reproduction.[74] These interests include the obligations of raising motherless children where the prospective mother is of an advanced maternal age[75] and protecting vulnerable members of society who are involved in the reproductive process. Academic literature on this issue seems to suggest that the purpose of regulation is to protect vulnerable parties who may be involved in the reproductive process or who may be impacted thereby.[76] The former group includes surrogates, who may lack education and who may be providing their services for the promise of financial reward; while the latter includes potential offspring, who may potentially suffer harm as a result of the decision-making of others. I will discuss this aspect in greater detail below.

In light of public interest in AR, a further question to consider as far as autonomy is concerned is how far it extends. It has been suggested by O'Regan[77] that freedom does not merely extend to the choice alone, but also incorporates the exercise of that choice.[78] This is a logical conclusion but not one that is supported by all. There are some who opine that only making the choice is

---

71 The UK has both the *Human Fertilisation and Embryology Act* as well as the Human Fertilisation and Embryology Authority which is responsible for the regulation of ART in this country. See also Nelson, supra note 69, at 1025-1026. However, the current legislation regulating surrogacy has been found to be problematic. This has led to the Law Commissions of England, Wales and Scotland embarking on a joint three-year project to investigate surrogacy laws to ensure that the laws are reformed to afford greater protection to all the parties concerned. See Law Commission, *Surrogacy laws set for reform as Law Commissions get Government backing* 4 May 2018 (https://www.lawcom.gov.uk/surrogacy-laws-set-for-reform-as-law-commissions-get-government-backing/), last visited (02-02-2021).

72 C. van Niekerk, *Strange (and incompatible) bedfellows: The relationship between the National Health Act and the regulations relating to artificial fertilisation of persons, and its impact on individuals engaged in assisted reproduction* 10 (1) SAJBL (2017) 35. In terms of the existing legislation, the Minister of Health is the final authority on matters relating to ART, however he may not have the necessary expertise to deal with the issues that arise.

73 This question will be discussed later in the chapter.

74 At present the potential harm to offspring born by means of AR is uncertain. Should such harm however manifest later on, this could potentially place a burden on the state to provide care for and assistance to these children. The state therefore has an interest in ensuring that AR is undertaken in a manner that does not cause harm. Very often this is done by means of regulation.

75 The example of Maria Carmen del Bousada, a Spanish native, comes to mind, who at the age of 67 gave birth to twin boys, but died less than three years later from cancer. This occurred after she proclaimed that longevity ran in her family in response to concerns about offering fertility treatment to women of advanced maternal age. See B Hale, *World's oldest mother dies of cancer just three years after giving birth to twin boys, sparking new ethical debate* 1 September 2009 Mail Online (http://www.dailymail.co.uk/femail/article-1199866/Worlds-oldest-mother-dies-cancer-just-years-giving-birth-twin-boys.html), last visited (02-02-2021).

76 Adamson, supra note 70, at 737 identifies both the advantages and disadvantages that regulation holds. These include the protection of patients and the prevention of illegal behaviour. While there is a tendency to protect the interests of surrogates and the potential offspring, the interests of prospective parents are often overlooked.

77 *NM v Smith*, supra note 58 para 145.

78 This distinction needs to be highlighted as there is some disagreement in academic circles about whether the value of freedom protects only the decision or the implementation thereof as well.

protected.[79] This, however, seems illogical. Being able to decide without the concomitant freedom to carry out that decision belies the very notion of freedom in the first instance. Although, autonomy may justifiably be limited where it is in the public interest to do so. Autonomy thus only extends as far as competing interests allow and is not absolute. Autonomy, either as a value or a right, does not grant prospective parents the freedom to engage in all reproductive technologies.

Furthermore, it is clear that autonomy as such is not an independent constitutional right and cannot directly serve as the basis for a constitutional challenge.[80] Instead, an applicant would need to rely on a right that gives effect to the value of autonomy.[81] Rights such as freedom, privacy and dignity, are thus necessary for autonomy to operate.[82] These rights will be discussed both later in this chapter and subsequent chapters.

To summarise: autonomy is central to the notion of freedom; it is less of a relational concept as some academic and judicial opinion suggest and more an expression of unfettered individual choice as initially proposed by the jurisprudence emanating from the Constitutional Court and supported by academic opinion. It is further both the decision that is protected as well as the ability to carry out that decision. What is additionally important is the nature of the activity, rather than the place where it is carried out; and depending on the nature of the reproduction concerned, autonomy may be subject to certain limitations. Lastly, autonomy cannot serve as the basis for litigation as it is not an independent right.[83]

---

79 See, for example, J.A. Robinson*, Provisional Thoughts on Limitations to the Right to Procreate* 18 (2) PER/PELJ (2015) 347.

80 This was confirmed in *S v Jordan*, supra note 50, at para 53 where O'Regan made the following statement:

> While we accept that there is manifest overlap between the rights to dignity, freedom and privacy, and each reinforces the other, we do not believe that it is useful for the purposes of constitutional analysis to posit an independent right to autonomy. There can be no doubt that the ambit of each of the protected rights is to be determined in part by the underlying purport and values of the Bill of Rights as a whole and that the rights intersect and overlap one another. It does not follow from this however that it is appropriate to base our constitutional analysis on a right not expressly included within the Constitution.

In this case the appellants, a brothel-owner, a brothel employee and a prostitute or sex worker, were convicted in the Magistrates' Court of contravening the Sexual Offences Act, 1957. They appealed to the High Court, arguing that the relevant provisions of the act were unconstitutional. The High Court found in their favour. On appeal, the Constitutional Court confirmed the finding of the High Court in respect of the unconstitutionality of the criminalisation of sexual intercourse for reward. It however found that certain provisions relating to the keeping of a brothel and prostitution were valid.

81 See, for example, *Ferreira v Levin NO* para 49 and *Christian Lawyers II* at 527A which illustrate this point.

82 Supra, note 58.

83 Supra, note 80.

4.3.2 Reproductive autonomy

In South Africa, there also appears to be a conundrum regarding the particular meaning of reproductive autonomy as such.[84]

While not specifically mentioned in section 12(2) of the Constitution, one would assume that reproductive autonomy as an extension of the broad value of freedom and autonomy is not much different in principle. However, it is conceivable that in this specific context it could well have a meaning less focused on the relational context but more focused on the individual in his/her private environment, especially where self-determination is required to make the right to reproductive autonomy more effective.[85] In this respect, self-determination is of paramount importance in the exercise of this right. This view is supported by a number of academics.

For example, Hall and Van Niekerk define reproductive autonomy as

> the strong interest or right to make choices regarding reproduction even when others might regard such choices as unwise or against public interest.[86]

Dworkin further defines reproductive autonomy as

> A right to control [one's] own role in procreation unless the state has a compelling reason for denying them that control.[87]

Once again self-determination is tempered only by a legitimate state (i.e. public) interest.

---

[84] This was confirmed by Pickles, supra note 43, at 97 who asserts that
> [T]he term 'reproductive autonomy' seems problematic because this term does not appear in any South African legislation. It recently made its debut in *AB* 1, but the High Court did not explicitly engage the concept and it did not clarify its meaning in a constitutional setting. The court merely used the phrase as a heading to its discussion of how s 12(2)(a) of the Constitution includes the right to procreate via the use of a surrogate. The majority in *AB* 2 did not go on to clarify the conceptual scope of reproductive autonomy and the Constitutional Court set the High Court decision aside. This makes it difficult to determine the position of … reproductive autonomy generally … (Footnotes omitted).

As previously indicated, extensive reference is made to Pickles as she is the only South African academic to fully consider the meaning of this right, albeit in the context of terminations of pregnancy.

[85] Khampepe J (*AB* para 53) explains the relationship between freedom and reproductive autonomy in the following terms: "the value of freedom vivifies the rights protected by section 12 of the Constitution", which is "narrower and more specific." This makes sense as reproductive autonomy relates only to reproduction, while freedom or autonomy is more general and non-specific. Pickles, supra note 43, at 97 suggests that "[i]f human autonomy is broadly understood as the process of self-regulation, then reproductive autonomy will be the process of self-regulation in the context of reproduction."

[86] D.R. Hall & A. van Niekerk, *A Reproductive autonomy: A case study* 9 (2) SAJBL (2016) 61.

[87] R. Dworkin, Life's Dominion (1993) 148.

Hall and van Niekerk further observe that "[a]utonomy and self-determination are enhanced by the freedom to decide whether or when to have children."[88] Autonomy is thus necessary for freedom. This is consistent with the views adopted both in South Africa[89] and abroad. The statement by Hall and Van Niekerk further explain the connection between reproductive freedom and autonomy.[90]

As previously indicated, the right to reproductive freedom is protected under section 12(2)(a) of the Constitution. This provision states that "[e]veryone has the right to bodily and physical integrity, which includes the right to make decisions concerning reproduction". The meaning of this provision came under judicial scrutiny in *AB*.[91] The High Court found that the provision indeed violated the applicant's rights and was unconstitutional.[92] This decision was then referred to the Constitutional Court for confirmation. In that court, the following observations were made regarding the meaning of section 12(2)(a).

On the meaning of bodily and psychological integrity within the ambit of section 12(2), the minority (per Khampepe J) observed that the protection afforded extends to either act which infringe bodily integrity or psychological integrity. Unlike the interpretation adopted by the majority, the minority was willing to acknowledge that the right may apply to individuals who are unable to physically contribute to the reproductive process, but who are psychologically impacted by legislation that prohibits them from making use of surrogacy as a means of reproducing. The majority in turn found that section 12(2)(a) only applies where someone is physically involved in the reproductive process.[93] Here the court acknowledged that decisions to make use of AR are an exercise of the right to reproduce. It, however, limited its interpretation of this right to those who

---

88 Hall & van Niekerk, supra note 86, at 62.

89 Pickles, supra note 43, at 110 observes that "[s]ection 12(2) plays a vital role in the context of voluntary parenthood avoidance." She further adds that "Albertyn, Artz, Combrink et al view section 12(2) as essential to bodily autonomy and the source of reproductive freedom;" and that "Bishop and Woolman also understand section 12(2)(a) as protecting reproductive freedom".

90 Pickles, supra note 43, at 98 observes that there is a tendency to conflate rights with autonomy. Rights refer to freedoms, while autonomy is derived from freedoms. It should be noted that there are a number of reproductive rights that give expression to autonomy. In this chapter, only section 12(2)(a) will be considered, while in the later chapters some of the other reproductive rights that have bearing on reproduction will be considered.

91 As previously indicated, in this case the applicant, a divorcee, was both conception and pregnancy infertile. This meant that she was neither able to contribute gametes nor carry a child that had been created using donor gametes, as required by certain provisions of the Children's Act. AB thus sought to challenge the constitutionality of section 294 of the Act, which prevented her from making use of a surrogate in order to realise her desire for offspring. She alleged that the legislation in question violated her rights to human dignity, "reproductive autonomy", privacy, equality and reproductive health care.

92 *AB* para 15.

93 The majority (per Nkabinde J) at para 313 confirmed that "the focus [of section 12(2)(a)] is on the individual woman's own body."

physically contributed to the outcome,[94] and found that the applicant's rights have not been violated by section 294. The relief sought by the applicant was thus denied to her.

The interpretation of section 12(2)(a) adopted by the majority decision of the Constitutional Court clearly limited the ambit of this right. In doing so, the decision raises questions regarding the applicability of section 12(2)(a) as a means of promoting/protecting reproductive freedom and autonomy as far as all forms of AR is concerned. It is further likely that the narrow interpretation adopted by the Constitutional Court will not conceive of the possibility that this right could extend to decisions regarding the quality of future offspring.

A South African court has yet to be confronted with the possible extension of the meaning of reproductive freedom to accommodate this development. As yet there is no judicial authority for extending the meaning of this right to include reproductive quality control. However, by virtue of the provisions in certain legislation and developments in medical science, such an extension is already taking place. This is merely not reflected in existing jurisprudence.[95] This lack of development may be directly attributed to our legislative and judicial past. To this end, the next section considers the past reliance on reproductive autonomy as an exercise of reproductive rights in South Africa.

4.3.3 Past manifestations of reproductive autonomy in South Africa in the context of sexual reproduction

As previously indicated, reproductive autonomy has since the adoption of the Constitution predominantly been interpreted as referring to the right not to reproduce. This is supported by the promulgation of legislation which in their various preambles acknowledge the link between the statutes and the right contained in section 12(2)(a).

At the time when the Sterilisation and Choice Acts were drafted, the focus of reproductive rights within South Africa was aimed at the legal recognition of attempts to prevent reproduction.[96] Reproductive autonomy was thus seldom considered within the context of acts aimed at

---

[94] The majority was clearly unwilling to consider the possibility that individuals have a psychological interest in reproducing which does not include a bodily interest to do so. This decision is in conflict with case law which recognises that individuals may suffer harm to their psyche without concomitant harm to their physical bodies. Seen, for example, the discussion by Van Niekerk, supra note 72, at 15-16 on the absurdity hereof.

[95] This is evident in the case of PGD and mitochondrial transfer, for example.

[96] See, for example, C. Ngwena, *An Appraisal of Abortion Laws in Southern Africa from a Reproductive Health Rights Perspective* 32 JLM&E (2004) 715.

procreation, let alone those that involved AR. This section, therefore, considers how reproductive autonomy was interpreted within South Africa since 1996 in the context of sexual reproduction, with specific reference to terminations of pregnancy, sterilisations and contraceptive use; and whether these interpretations can be useful for purposes of exercising one's freedom within the context of AR.

4.3.3.1 Terminations of pregnancy

In 1998 O'Sullivan, in her chapter on reproductive rights,[97] made the following observation:

> This chapter concentrates exclusively on abortion because it is at present **the sole focus** of the constitutional debate over reproductive rights. (Emphasis added)

This quotation aptly describes the situation in South Africa at the time and for possibly the next decade.[98] With the promulgation of the Choice Act the entire focus on reproductive rights centred on terminations of pregnancy. This Act for the first time provided a regulatory framework for the termination of pregnancies under certain circumstances. In terms of this Act a pregnancy can be terminated upon the request of the pregnant woman during the first twelve weeks of gestation,[99] under specified grounds during the 13th to 20th weeks,[100] and under limited circumstances from the 20th week onwards.[101] From these provisions, it is evident that the right to terminate a pregnancy is not absolute and may be limited in the interest of the foetus from the 20th week onwards.

---

97 O'Sullivan, supra note 5, at 16-1. While there are later editions of this source, the quote by O'Sullivan has been removed from these, hence the reference to the earlier edition.

98 Pickles, supra note 43, at 91 confirms this when she states that "the current reproductive rights discourse tends to focus on the rights of women to terminate pregnancies."

99 This is confirmed in s 2(1) which states that
A pregnancy may be terminated-
(a) upon request of a woman during the first 12 weeks of the gestation period of her pregnancy ….

100 S 2(1)(b) further confirms that:
from the 13th up to and including the 20th week of the gestation period if a medical practitioner, after consultation with the pregnant woman, is of the opinion that-
(i) the continued pregnancy would pose a risk of injury to the woman's physical or mental health; or
(ii) there exists a substantial risk that the fetus would suffer from a severe physical or mental abnormality; or
(iii) the pregnancy resulted from rape or incest; or
(iv) the continued pregnancy would significantly affect the social or economic circumstances of the woman ….

101 S 2(1)(c) furthermore states that:
after the 20th week of the gestation period if a medical practitioner, after consultation with another medical practitioner or a registered midwife, is of the opinion that the continued pregnancy-
(i) would endanger the woman's life;
(ii) would result in a severe malformation of the fetus; or
(iii) would pose a risk of injury to the fetus.

While the promulgation of the Choice Act signalled a victory for women in South Africa,[102] it was not easily won. The provisions of the Act were challenged on at least two occasions. In *Christian Lawyers Association of South Africa v Minister of Health* (hereafter *Christian Lawyers I*)[103] the courts were confronted with a challenge regarding the constitutionality of the Choice Act. The applicants alleged that the act violated the foetus' right to life. McCreath J, however, found that the unborn foetus did not have a right to life and that the act fulfilled a constitutional mandate by recognising the rights of individuals not to reproduce, which is protected by section 12(2)(a).[104] Regrettably, this decision while vindicating the reproductive freedom of women, did not take the issue further. It did little to provide insight into the meaning of this right.[105] In the context of AR, this decision does not help much. Fortunately, the decision in *Christian Lawyers II*[106] remedied this defect. In this case, the plaintiff alleged that certain provisions of the Choice Act which permits girls below the age of 18 to terminate their pregnancies without parental consent, were unconstitutional. The court disagreed.[107] In its decision, it however considered the concept of reproductive self-determination/autonomy, a term which had never previously been evaluated under the Constitution. The court found that

> The recognition of the right of every individual to self-determination has now become an imperative under the Constitution and particularly the following provisions of the Bill of Rights:
> (a)In terms of section 12(2), "everyone" has the right to bodily and psychological integrity which includes the right "to make decisions concerning reproduction" and "the security and control over their body".
> (b)In terms of section 27(1)(a) "everyone" has the right to have access to "reproductive health care".
> (c)In terms of section 10, "everyone" has "inherent dignity and the right to have their dignity respected and protected."
> (d)In terms of section 14, "everyone" has "the right to privacy".[108]

From the aforementioned decision, reproductive autonomy thus rests on a number of rights, of which section 12(2)(a) is but one. According to the interpretation adopted by the court, the right

---

[102] M.C. Engelbrecht, *Termination of Pregnancy Policy and Services: An appraisal of the implementation and operation of the Choice on Termination of Pregnancy Act (92 of 1996)* (unpublished PhD thesis University of the Free State 2005) 220.

[103] 1998 (4) SA 1113 (T). This decision is to be distinguished from the 2005 decision with the same name.

[104] *Christian Lawyers I* at 1123.

[105] Pickles, supra note 43, at 111.

[106] 2005 (1) SA 509 (T).

[107] Instead it concluded at 528D-E that

> The approach is however consistent with the Constitution *inter alia* for the following reasons:
> 1. The right of every woman to choose whether to terminate her pregnancy or not, is enshrined in ss 12(2)*(a)* and *(b)*, 27(1)*(a)*, 10 and 14 of the Constitution. All of those rights are afforded to 'everyone' including girls under the age of 18. They are accordingly also entitled to respect for and protection of their right to self-determination.

[108] *Christian Lawyers II* at 518A-D. Pickles, supra note 43, at 111 describes this in the following terms:

> The court found that the 'fundamental right to self-determination' is founded on a number of rights such as the rights to dignity, privacy, access to reproductive health care and bodily and psychological integrity, including the right to make decisions concerning reproduction and the security of one's own body. These rights were found to provide the foundation for the right to terminate a pregnancy in South Africa. (footnotes omitted)

to make decisions regarding reproduction does thus not provide the sole basis on which the right to refrain from reproduction can stand.[109] However, according to the court in *Christian Lawyers II* reproductive autonomy proves sufficient ground to vindicate the rights of women to terminate their pregnancies.[110]

The question, however, arises whether a similar conclusion can be drawn in respect of the right to reproduce, in particular the right to do so with assistance. From the decision in *AB* it would appear that as far as AR is concerned, section 12(2)(a) provides a basis on which individuals' reproductive autonomy can be protected, provided that one's body was engaged in the reproductive process. In such instances, it is however questionable – in the absence of any case law on this issue – whether individuals would be able to rely solely on this provision to vindicate their right to reproduce with assistance to the same extent that this provision can be utilised in the context of terminations of pregnancy. To this extent, it would appear that the right to reproduce with assistance is different from the right to terminate a pregnancy. At best, the evidence will show that section 12(2)(a) is not the most successful basis for such a right. In reality, this right may be too weak to protect the rights of individuals to utilise certain forms of AR, particularly on the narrow interpretation adopted by the majority in *AB* who found that this right is only implicated if a person's bodily material was used in reproduction. Some forms of AR do not require this and may thus fall outside the individuals' reproductive rights. This will be explored in greater detail below.

4.3.3.2 Sterilisations

Sterilisation provides yet another way, other than by means of termination of pregnancy, for individuals to exercise their right not to reproduce. These procedures are regulated by the *Sterilisation Act*, which defines sterilisation as "a surgical procedure performed for the purpose of making the person on whom it is performed incapable of procreation".[111] From this definition, there is a clear link between sterilisations and the decision to refrain from reproduction, provided of course that the procedure was undertaken voluntarily.[112] This is confirmed by Pickles who suggests that the legislative framework provided by this act

---

109 *Christian Lawyers II* at 527B.

110 This was confirmed in *Christian Lawyers II* at 526I where the court held that section 12(2)(a) "is quite clearly the right to choose whether to have her pregnancy terminated or not, for short, the right to termination of pregnancy."

111 S 1 of the Sterilisation Act.

112 In South Africa, there are recorded instances of involuntary contraceptive sterilization of HIV positive women which have taken place. This will be discussed below.

> protects and promotes patient autonomy and the rights to bodily and psychological integrity, including the right to make reproductive decisions, and to security and control over one's body.[113]

The focus on this act has arisen in circumstances where South African women living with human immunodeficiency virus (HIV) were sterilised against their wishes or without their consent.[114] The focal point in each of these cases was on a denial of their rights rather than on the use of sterilisation based on reproductive rights. During the period 1986-2014 reports surfaced of 48 women in Gauteng and Kwa-Zulu Natal who were subjected to involuntary sterilisations. In most of these cases, the matters were resolved through "public activism and/or civil litigation".[115] In the former instance advocacy groups championed the rights of the victims. This was at the time supplemented by civil litigation, which was predominantly delictual[116] and subject to certain limitations.[117] What is further worth noting regarding cases of this nature is the tendency to focus on the violation of rights from an equality perspective,[118] as opposed to the implications for reproductive autonomy.[119] This is hardly surprising as the reason for the human rights violation was the women's HIV status. They were treated as being unequal to women who were not HIV+. Sterilisation was thus a tool to restrict these women's reproductive decision-making. This particular example speaks to the fact, that while section 12(2)(a) can be used to promote reproductive autonomy, it is not sufficient on its own and may be secondary to some other right – if considered at all – which in this case was the equality right. In this respect, sterilisations differ from terminations of pregnancy.

4.3.3.3 Contraceptive use

Contraceptive use as a means of exercising reproductive autonomy has until now never come under judicial scrutiny in South Africa. The reason for this may be the legislature's somewhat liberal

---

113 C. Pickles, *Involuntary contraceptive sterilisation of women in South Africa and the criminal law* 2 SACJ (2016) 92.

114 See J. Koka, *"Forced" Sterilisation of HIV women violates rights"* 19 March 2015 Bhekisisa (http://bhekisisa.org/article/2015-03-19-forced-sterilisation-of-hiv-women-violates-rights), last visited (11-07-2021); and Anon, *SA's forced sterilisation shame* 8 June 2014 City Press (https://www.news24.com/Archives/City-Press/SAs-forced-sterilisation-shame-20150429), last visited (02-02-2021).

115 Pickles, supra note 113, at 94.

116 See for example *Isaacs v Pandie* [2012] ZAWCHC 47; and *Pandie v Isaacs* (A135/2013, 1221/2007) [2013] ZAWCHC 123 (4 September 2013). In these cases, the plaintiff sought delictual damages from the defendant for being sterilised without her consent. On appeal, the ruling in her favour was however overturned as evidence failed to show negligence on the part of the defendant.

117 Pickles, supra note 113, at 95 observes that such redress while placating a victim does little to send a public message about the "violation of broader public interests".

118 For purposes of this discussion, an equality perspective is one that considers whether a particular person or group has been treated fairly compared to another person or group, or whether there has been differentiation and possible discrimination.

119 This argument was similarly raised in *Government of the Republic of Namibia v LM (*SA 49/2012), [2014] NASC 19. It was however rejected by the court at para 83.

approach to provisions regarding access to contraceptives. The Children's Act, for example, makes provision for access to contraceptives to persons over the age of 12 years.[120] Interestingly, this particular provision has not been challenged. The reason for this may be attributed to the legacy left by *Christian Lawyers I* where the court found that girls under the age of 18 years could terminate their pregnancies without first consulting their parents. The existence of this ruling has potentially put paid to any challenge that may be brought against providing children access to contraceptives when terminations of pregnancy – a far more invasive choice – is permitted.

Regrettably, the lack of case law on this particular means of preventing reproduction provides limited insight into the extent to which section 12(2)(a) may be of use. So, while it is accepted that individuals may decide not to reproduce by means of contraceptives, the ambit of this right is unclear. Contraceptive use as an expression of section 12(2)(a) is thus unhelpful as far as AR is concerned.[121]

In conclusion, the application of section 12(2)(a) as far as decisions not to reproduce are concerned provides the following insights: First, while this right may stand alone in protecting the right to terminate a pregnancy, it is unclear whether it would equally suffice in other decisions not to reproduce. Second, while the right to terminate a pregnancy can be vindicated by solely relying on section 12(2)(a), this is apparently not the case with decisions to reproduce with assistance, if the example set by *AB* is to be followed. In such an instance an individual may need to simultaneously allege a violation of their rights to equality, dignity, privacy and access to reproductive health care. This potentially suggests two things: First, decisions to prevent reproduction are treated differently to those intended to result in reproduction. Second, acts where one's body are implicated are to be distinguished from those where this is not the case.

---

[120] S 134 states that:

(1) No person may refuse-
  (a) to sell condoms to a child over the age of 12 years; or
  (b) to provide a child over the age of 12 years with condoms on request where such condoms are provided or distributed free of charge.
(2) Contraceptives other than condoms may be provided to a child on request by the child and without the consent of the parent or care-giver of the child if-
  (a) the child is at least 12 years of age;
  (b) proper medical advice is given to the child; and
  (c) a medical examination is carried out on the child to determine whether there are any medical reasons why a specific contraceptive should not be provided to the child.
(3) A child who obtains condoms, contraceptives or contraceptive advice in terms of this Act is entitled to confidentiality in this respect, subject to section 110.

[121] At best, we can learn that "lack of access to contraception diminishes decision making about sexual activities." See F.H. Berhane, *Women, sexual rights and poverty* in C. Ngwenya & E. Durojaye Strengthening the protection of sexual and reproductive health and rights in the African region through human rights (ed) (2014) 343.

Furthermore, a distinction appears to exist between those instances where the interested party requiring the procedure requests it and those instances where it is done in other circumstances. In the first instance, reproductive autonomy alone is sufficient to assert the applicant's rights. However, in cases where the applicant's rights have been violated, for example in the case of involuntary sterilisation, the applicant would need to rely on reproductive autonomy as well as other rights to support their claim. Based on the case law discussed above, there thus appears to be a discrepancy between instances where rights are asserted and those where they have allegedly been violated. This is potentially because the onus of proof in the case of a violation of rights is higher than in the case where a party seeks to assert their rights.[122] In this respect, there appears to be no distinction between decisions intended to prevent reproduction and those intended to result in reproduction. These insights potentially prove both helpful and detrimental to the use of AR by prospective parents and will be considered more fully below.

4.4 Reproductive autonomy in South Africa in the context of AR

Since the promulgation of the Children's Act South African courts have on very few occasions been confronted with the right to reproductive freedom and autonomy beyond surrogacy. This section considers how this right has been interpreted to date and whether the current approach would prove useful as far as other forms of AR are concerned. For ease of reference, a distinction is made between those instances where the commissioning parent(s) desire a child, where they desire a specific child and those instances where they desire a healthy child.

4.4.1 Desiring a child

4.4.1.1 Surrogacy

While *AB v Minister of Social Development*[123] was not the first case involving surrogacy in South Africa,[124] it was the first one to consider the meaning of section 12(2)(a) in the context of surrogacy. In fact, the majority recognised that this case "provide[d] the first opportunity for th[e] Court to vindicate this right".[125] It however failed to so do, particularly in the context of AR, despite considering at length the meaning attached to the right to reproductive autonomy.[126] To recap, this

122 Where one alleges a violation of rights, this is often accompanied by an allegation that another person failed in a legal duty owed to the victim. Courts generally are reluctant to find that such a duty exists.

123 2017 (3) BCLR 267 (CC).

124 See, for example, *In re Confirmation of Three Surrogate Motherhood Agreements* 2011 (6) SA 22 (GSJ); *Ex parte WH* 2011 (6) SA 514 (GNP); *Ex Parte MS* 2014 (3) SA 415 (GP); and *Ex Parte CJD and Others* 2018 (3) SA 197 (GP).

125 *AB* para 309.

126 *AB* paras 306ff.

case involved an application by a divorcee, who wished to make use of surrogacy as a means of acquiring a child. She was however prohibited from doing so by certain provisions of the *Children's Act* which required her to provide the gamete needed to establish a genetic link with the child.[127]

In its decision, the court linked this right to dignity.[128] It acknowledged that section 12(2)(a) affords protection to "physical integrity" and thus effectively limited the extent of this right only to the physical body, which is consistent with international trends.[129] The court further limited the ambit of this right to the application of a person's own body and not that of another person.[130]

The primary reason why the Constitutional Court failed to conceptualise the meaning of this right within the context of AR, is that it attempted to apply an abortion paradigm to a decision that is markedly different to a decision not to reproduce.[131] This was tantamount to treating different decisions the same way by virtue of the fact that they both concern reproduction. Adopting such an approach has firstly failed to consider the different natures of these decisions and has secondly limited the scope of reproductive autonomy in respect of different forms of AR.

The tendency to adopt such an approach is by no means unique to South Africa.[132] Mutcherson confirms that such a limiting approach is not suitable. Her reasons are as follows:

> abortion has become the lens through which all understanding of procreative choice is viewed, but debates about termination do not tell us what conclusions can be drawn when a person actively seeks to create a pregnancy, nurture a foetus through that pregnancy, and, perhaps parent the child that hopefully ensues.[133]

This quote clearly illustrates the differences between decisions to reproduce and decisions not to do so. While drawing comparisons between these different decisions help determine the way

---

127 What is worth noting about this particular decision is the fact that the applicant was of an advanced maternal age. Interestingly this factor was not considered by the court in reaching its decision. Although, based on the decision in *Ex parte CJD* it is likely that her age would have constituted a legitimate reason for limiting her right to reproductive autonomy as it is arguable that it would not have been in the child's best interests or that of the public for women of advanced age to reproduce by this means as there is a burden on society should the mother die before the child reaches majority. This then raises the question about who should shoulder this responsibility. This question is particularly relevant in light of the case of Maria Carmen del Bousada, supra note 75.

128 *AB* para 308.

129 *AB* para 309.

130 *AB* para 313.

131 *AB* paras 312-313.

132 In the United States a similar approach has been adopted in the past.

133 K. Mutcherson, *Feel Like Making Babies? Mapping the Borders of the Right to Procreate in a Post-Coital World* (draft paper) 21 (https://philosophy.columbian.gwu.edu/sites/g/files/zaxdzs1676/f/image/BrownBag-Mutcherson.pdf) last visited (02-02-2021).

forward, they are unhelpful if one's perception of reproductive autonomy within the context of decisions to reproduce is limited by it.

Furthermore, another challenge posed by this judgment is the fact that the majority, in reaching its decision that the applicant's reproductive autonomy had not been infringed by section 294 of the Children's Act, found that the future offspring's best interests militated against allowing the applicant to exercise her reproductive autonomy in this instance.[134] What this effectively meant was that the applicant's rights to reproductive autonomy were placed second to those of a potential child, who arguably does not have the protection afforded by section 28(2).[135] Our courts have on numerous occasions confirmed that the rights contained in the Bill of Rights do not apply to the foetus.[136] Presumably, they would also not apply in instances where conception has yet to take place. Yet the court nonetheless elevated the interests of potential offspring to those of children, who are rights bearers under the Constitution. The challenge posed by this decision is that the rights of legal subjects have succumbed to the interests of non-entities. This sends a rather poor message, in the first place regarding the reproductive autonomy of individuals and the second regarding the general rights of prospective parents. This, despite the assertion made by the court that "children's rights do not trump other rights".[137] The value of reproductive autonomy in cases of AR thus seems bleak.

It would further appear that concerns about harm to prospective offspring will feature heavily and may well serve as grounds for denying access to various forms of AR.[138]

As far as surrogacy is concerned, this is increasingly becoming the norm. For example, in *Ex Parte CJD and Others,*[139] where the applicants sought to have their surrogacy agreement confirmed, the Gauteng division of the High Court (per Tolmay J) declined to do so. In this case, the court expressed some concern about the second applicant's desire to exercise secrecy regarding his sexual orientation, which in the court's opinion would impact the best interests of the child.[140] In this

---

134 The court at para 281 observed that the purpose of the Children's Act is to "give effect to the constitutional rights of children." And while the court acknowledged at para 281 that "children's rights do not trump other rights", this is effectively the decision that was reached in this case.

135 This section states that: "A child's best interests are of paramount importance in every matter concerning the child." For a more detailed discussion, see para 4.5 below.

136 See for example, *Christian Lawyers I and II* as well as *S v Mshumpa* 2008 (1) SACR 126 (E) para 55.

137 *AB* para 281.

138 Concerns of this nature have been raised by academics for a number of years. See, for example, J.A. *Robertson, Procreative Liberty and Harm to Offspring in Assisted Reproduction* 30 American Journal of Law & Medicine (2004) 7-40.

139 Supra note 124.

140 *Ex Parte CJD and Others,* id para 9.

respect, the court confirmed that it "must always place the rights of children and their interests first, even in circumstances where the rights of the prospective parents may be compromised."[141] This effectively confirms that the second applicant's reproductive autonomy could be limited. This in itself is not a problem as reproductive autonomy is not absolute. The question however remains whether this was a justifiable limitation. Here it would seem that the second applicant's right to equality was trumped by the best interests of the prospective offspring. While the author agrees that some consideration must be given to the interests of prospective offspring and that the court was perhaps justified in refusing to confirm the surrogacy agreement in this instance,[142] it is incorrect that these interests are elevated to the status of rights, when foetuses do not qualify for the same. At best, legal recognition should be afforded to the interests of prospective children, and nothing more.[143] In this case, it is suggested that a pre-conception best interests standard[144] be applied which considers the interests of prospective offspring but which is distinct from the standard reserved for children in section 28 of the Constitution and which does not elevate prospective offspring to the status of rights' bearers. Adopting such an approach will be more consistent with existing jurisprudence on the start of legal personality[145] and will at the same time prevent the claims of prospective parents succumbing to the insurmountable challenge posed by the best interests' principle that is repeatedly applied to the prospective child.[146]

---

141 *Ex Parte CJD and Others,* id para 10.

142 There are conflicting views on this decision. On the one hand, it appears that the court applied a heteronormative approach to family which can be faulted. Families do not all look the same, nor do they need to. Our courts have on numerous occasions confirmed this. On the other hand, a parent who wants to be discreet about his sexual orientation and his relationship with the potential offspring may suggest a lack of commitment to bringing a child into the world.

143 C. Pickles, *Termination-Of-Pregnancy Rights and Foetal Interests in Continued Existence in South Africa: The Choice on Termination of Pregnancy Act 92 Of 1996* 15 (5) PER/PELJ (2012) 415-420, for example, argues that recognition should be afforded to foetal interests, as opposed to rights, because elevating these interests to the status of rights is inherently problematic. In this respect, the author agrees. However, the prospective child in the context of AR is not yet a foetus in many instances. It would thus be presumptuous to afford it rights which have been withheld from foetuses.

144 The feasibility of such a standard is considered by S.R. Waxman, *The Pre-Conception Welfare Principle: A Case Against Regulation* (unpublished LLD Thesis, University of Manchester 2017) in the context of the United Kingdom. It is suggested that a similar alternative be explored for South Africa and the legal implications of this.

145 In South Africa, as in many other countries, legal subjectivity begins at birth. Foetuses therefore are not rights bearers. Our courts have confirmed this in the *Christian Lawyers* decisions and more recently in *S v Mshumpa*, supra note 136.

146 In the UK and Australia, the welfare principle is applied to children rather than the best interests' principle. However, in the context of ART, reference is also made to a pre-conception welfare principle. See, for example, Waxman, supra note 144, at 169-175 who discusses this principle and argues that it is vague and lacks a philosophical basis. She adds that "the core of the failings in the current regulatory framework stem from the insertion of the PCWP." In my opinion, this need not be the case. Instead such a principle could very well provide the solution to balancing the interests of all the parties involved in AR.

4.4.1.2 Posthumous reproduction (PHR)

Posthumous reproduction is another form of AR that has recently received judicial consideration in South Africa. To recap, the current legal position is as follows: post-mortem gamete retrieval is not permitted in terms of any legislation. Gametes may only be removed from a living person.[147] While the current regulatory framework is silent on the issue of whether PHR may be undertaken where gametes have been removed from a living person who has since died,[148] it is likely that this is not possible.[149] A recent court decision however suggests that PHR is being carried out in practice.

For example, in the matter of *NC v Aevitas Fertility Clinic,*[150] the Western Cape Division of the High Court was confronted with an application by NC, a widow, who sought a declaratory order permitting her to reproduce using her deceased husband's sperm. Prior to his death, the deceased, known only as TC, concluded an agreement with a storage facility for his semen to be cryopreserved and in the event of his death to be transferred to his wife. In the affidavit filed by the applicant, she alleged that, as PHR was unregulated in our law, general medico-legal principles should apply.[151] Thus, in terms of the contract concluded between the storage facility and the deceased, the terms of the agreement should be complied with. In this instance, the court granted the request. In doing so, no consideration was given to the place of reproductive autonomy in general in cases of this nature.[152] Instead, the only autonomy considered was that of the deceased,[153] and this was based on freedom of contract, which may be limited by legality or public interest. In reaching its decision, the court clearly found that neither legality nor public interest, in this case, served as a bar to granting the application. Yet does public interest not dictate, as it has done in

---

147 This is confirmed by s 56 of the National Health Act, which states that

> (A) A person may use tissue or gametes removed or blood or a blood product withdrawn from a living person only for such medical or dental purposes as may be prescribed.

The Regulations contain a provision that mirrors the Act, which states that 'These regulations only apply to the withdrawal of gametes from and for use in living persons.'

148 D.W. Thaldar, *Posthumous conception: Recent legal developments in South Africa* 108 (6) SAMJ (2018) 472 describes the current situation in the following terms:

> The ambiguity in these provisions is evident: should the sperm donor be living only at the stage of donating the sperm (so-called 'withdrawal'), or at the stage of using the sperm for in vitro fertilisation, or at the stage of embryo transfer? While posthumous retrieval of sperm is clearly banned, is posthumous use of sperm also banned?

149 Van Niekerk, supra note 72, at 32-33 for a detailed discussion of the current regulatory framework governing posthumous reproduction.

150 (23236/2017) [2018] ZAWCHC (23 January 2018).

151 According to Thaldar, supra note 148, at 472, these medico-legal principles require that that deceased must have consented to posthumous use of his gametes.

152 In other words, regard must be had to the reproductive autonomy of the deceased as well as the applicant. Yet, the only consideration seemingly applied was whether the deceased consented. This raises an important question: what if the deceased clearly indicates that his gametes may not be used posthumously. What role will reproductive autonomy play in this case?

153 *NC v Aevitas Fertility Clinic* (Applicant's Affidavit para 3.4).

previous jurisprudence involving AR, that the best interests of the potential offspring be considered in this instance?

In this matter, the director of the respondent in his affidavit confirmed that this was not the first case of PHR.[154] In fact, he asserted that his clinic had assisted a woman to posthumously conceive her deceased spouse's child in 2015. What is evident from this assertion is that while there is no case law on this issue in South Africa, PHR is taking place and these matters are being decided on contract principles rather than with reference to reproductive autonomy. This effectively allows a court to circumvent the best interests' argument which features so prominently in surrogacy cases[155] but which are surprisingly lacking with this form of AR. This case further serves to illustrate that reproductive autonomy may be limited by the application of contract principles. This does not bode well for other forms of AR and ultimately suggests that different legal rules may be applied to different forms of ART. This is quite problematic and suggests that there is a need for regulation that expressly covers all the various specific forms of ART.[156]

4.4.1.3 Other forms of AR

While there are other circumstances in which individuals may desire to have a child by means of AR, these have not received judicial consideration in South Africa. As a result, it is unclear, whether reproductive autonomy, contract principles or some other consideration will apply. For example, in *Parrillo v Italy*[157] the ECtHR considered whether gamete and embryo donation for purposes of research constituted a violation of the right to privacy. The court found that it did not. This decision, however, suggests that while reproductive autonomy may not provide a legal basis for engaging in AR, privacy may well do so. This proposition will be considered in greater detail in chapter 5.

4.4.2 Desiring a specific child

Given recent advancements in ART and specifically the ability to now incorporate pre-implantation genetic diagnosis (PGD) along with in vitro fertilisation (IVF), it is not only possible

---

154 *NC v Aevitas Fertility Clinic* (Respondent's Affidavit para 10).

155 Thaldar, supra note 148, at 472 observes that while it may be possible to do so in cases where consent has been obtained, the law would need to be developed to address instances where this is not the case. Such legal development would likely entail a consideration of the various interests of the parties concerned.

156 Thaldar, supra note 148, at 472 disagrees. He is of the opinion that clarity is only needed in those situations where consent has not been obtained and it is unclear whether the deceased would have agreed to PHR. In his opinion the law on the use of PHR in cases such as NC, is settled. PHR is permitted where the deceased consented to the procedure prior to his death.

157 See para 3.5.1 above.

to have a child but to create a specific child. Surprisingly, while this advancement has been possible since 2001,[158] South Africa has yet to be confronted with a judicial dispute involving this phenomenon. What has however come under scrutiny amongst academics is whether it is possible to balance the interests between saviour siblings and benefactor children and deciding whose interests weigh more.[159] The issue in these cases is the autonomy of the two children concerned rather than the reproductive autonomy of the commissioning parents. This potentially suggests that the reproductive autonomy of the commissioning parents may be limited by the potential harm to the offspring.[160] The use of PGD thus poses a particular challenge for commissioning parents in instances where their desire is to save an existing child.

Nevertheless, this is not the only instance where prospective parents may resort to ART in order to create a specific child. Other instances include gender selection, nontherapeutic enhancement and intentional diminishment. These will be considered next. It should however be noted that it was previously suggested that AR should be permitted as an exercise of reproductive autonomy only where the decision to use a particular technological advancement is material or pivotal to the decision to reproduce.[161] It was concluded that the use of technology to avoid offspring with a disability would likely qualify as a permissible extension of the meaning of reproductive autonomy as contained in section 12(2)(a). It is questionable whether the other instances identified above would equally qualify.

4.4.2.1 Gender selection

One of the benefits that PGD holds is that it allows prospective parents to determine the sex of prospective offspring before implantation occurs and to select the gender of their choice. The challenge that this poses is that this particular use of PGD is not for medical reasons, such as

[158] The first reported saviour sibling was born in Chicago in 2001. Adam Nash was conceived for the primary purpose of saving the life of his older sister, Molly, who suffered from Fanconi Anaemia. See Cherkassky, supra note 35, at 2.

[159] See, for example, E. Du Plessis, A. Govindjee & G. van der Walt, *A legal analysis of 'Saviour Siblings' and 'Benefactor Children' in South Africa* 35 Obiter (2014) 224-253.

[160] Du Plessis *et al,* id.

[161] Du Plessis *et al,* id para 2.

preventing a sex-linked disease.[162] Instead, the desire for a specific child is based on non-medical or social reasons.[163]

As no judicial consideration, has been given to the question of whether the creation of a specific child qualifies as an exercise of reproductive autonomy, it is thus difficult to gauge the extent to which section 12(2)(a) would be of assistance to commissioning parents. In this respect, the previously mentioned UK decision of *R (on the application of Quintavalle) v Secretary of State for Health*[164] may be of some assistance. As indicated, the Court of Appeal, in this case, permitted tissue-typing on the basis that it was essential for the "purpose of assisting women to carry children".[165] It is thus arguable that provided a particular medical advancement is essential for the "purpose of assisting women to carry children", it would be permissible under section 12(2)(a). Applying the same reasoning advanced above, namely that a particular technological advancement should be permitted as an exercise of reproductive autonomy where it is material or pivotal to the decision to reproduce, it is arguable that gender selection for non-medical reasons does not fall within the ambit of section 12(2)(a). Robertson, however, presents a compelling counter-argument. He argues that "[s]ome families may not reproduce unless they can be sure that their firstborn will be a child of a particular gender". Gender selection is therefore material to the decision to reproduce. As such it should enjoy "presumptive protection as an exercise of procreative freedom".[166] This reasoning suggests that gender selection could qualify either as an exercise of reproductive autonomy or be excluded. In the absence of a court decision to resolve the issue, it thus remains unanswered.

Although, the use of PGD for social reasons such as family balancing could be permissible under the right to privacy, for example. The reasons why individuals desire a specific child are deeply personal and private. It is thus possible that while the desire for a specific child may not be

---

162 K. Wevers, *Prenatal torts and pre-implantation genetic diagnosis* 24 *Harvard JL & Tech* (2010) 260 defines these diseases as disorders caused by a mutation on the X chromosome and are more likely to affect boys because they have only one X chromosome, whereas girls, who have two X chromosomes, are more likely to receive at least one chromosome without the mutation. Sex selection can be used to select against male embryos and thus avoid having a child who will suffer from the disorder. Examples of sex-linked disorders include Lesch Nyhan syndrome and hemophilia.

163 This includes family balancing where, for example, a family already has a number of daughters and desire a son. Robertson, supra note 26, at 434 opines that in these circumstances: choice of gender is still arguably within the scope of procreative liberty. For example, in countries with severe overpopulation problems or restrictive population policies, the ability to control the gender of offspring may well determine whether or how often a couple reproduces.

164 *Quintavalle*, supra note 34.

165 *Quintavalle* , id para 142. The court held that tissue-typing was thus deemed necessary for exercising one's reproductive autonomy.

166 Robertson, supra note 26, at 434.

protected by reproductive autonomy, it may fall within the ambit of another right. If this is indeed the case, then it is arguable that reproductive autonomy is not the most efficient means of guaranteeing individuals' rights to reproduce with assistance. Instead, other rights may be better suited to this task. Chapters 5 and 6 will explore these alternatives.

4.4.2.2 Other nonmedical traits (i.e. designer babies)

Current advancements in ART make it possible to determine hair and eye colour, and intelligence and in the near future, it will even be possible to determine sexual preference or orientation. Arguably these traits are a matter of preference and would be chosen for social or non-medical reasons. On the one hand, this could qualify as a falling outside the ambit of section 12(2)(a). However, based on the reasoning adopted by Robertson as discussed under gender selection, prospective parents could argue that

> choices over nonmedical traits might also qualify for presumptive protection, because the person seeking such information would base a reproductive decision on it.[167]

But if one accepts Robertson's interpretation then all decisions relating to prospective offspring should be protected. This raises important questions about which is material or pivotal to reproduction and what is not.

4.4.2.3 Nontherapeutic enhancement

> A major fear [surrounding ART] is that positive prebirth selection of offspring traits will move beyond assuring parents that offspring are born healthy to enhancing the capacities and well-being of healthy and otherwise normal children. The fear is that, through prebirth genetic alteration and manipulation, parents will strive to give their offspring genes for intelligence, beauty, height, and other positive traits, not because they will suffer with their given genome, but because this will enhance or increase their chances in life.[168]

This quote aptly describes the concerns surrounding nontherapeutic enhancement. According to Robertson, this reproductive decision-making would only fall within the ambit of section 12(2)(a) if a couple would allege that they will not reproduce without the enhancement. It would thus qualify as a decision material to reproduction and would as such fall within the ambit of reproductive choice or autonomy.[169] On the other hand, it could be argued that these enhancements "fall outside of accepted and understood reproductive experience [and] would not receive the same …

---

167 Robertson, id 435.
168 Robertson, id 436.
169 Robertson, id 436

protection of procreative liberty."[170] As suggested above, there would as such be a need to clarify what is pivotal to reproduction and what is not.

Needless to say, decisions of this nature are more controversial than simply preferring a particular gender or traits. Reproductive autonomy may as such prove insufficient as a means of guaranteeing these enhancements. The alternative approach would be to argue that access to such enhancements is central to child-rearing and a denial of this right would constitute a violation of privacy and/or dignity.[171] This argument will be explored in greater detail in chapters 5 and 6.

4.4.2.4 Intentional diminishment

Not only is it possible to enhance a prospective child's genes, but it is also equally possible to alter a child's genes to deprive him/her of some trait that would otherwise have been normal. For example, a deaf couple could desire a child with the same characteristic as them, which would require intentional diminishment.[172] This decision could arguably fall into the same category as nontherapeutic enhancement. Prospective parents could as such decide not to reproduce without the diminishment. This constitutes a decision material to reproduction which should as such enjoy protection under section 12(2)(a). It is however unlikely that such an interpretation would be easily accepted in light of South Africa's current position regarding the use of PGD for nonmedical purposes.[173]

4.4.3 Desiring a healthy child

It has on more than one occasion been confirmed by our courts that there is no right to a healthy child. This view has repeatedly been expressed in respect of wrongful life claims.[174] Where claims were thus instituted against medical practitioners for negligently omitting to inform their pregnant patients that their offspring suffers from a genetic abnormality, the courts have rejected the claims *by the children* on the basis that they are, amongst other, *contra bonos mores*.[175] In doing so courts have been unwilling to find that no life is better than a life of disability.[176] It would thus be interesting

---

170 Robertson, id 436.
171 Robertson, id 436.
172 Robertson, id 438.
173 Regulation 13 of the 2016 Regulations titled "Pre-implantation and prenatal testing for sex selection" states that "[p]re-implantation and prenatal testing for selecting the sex of a child is prohibited except in the case of a serious sex linked or sex limited genetic conditions."
174 See for example, *Stewart v Botha* 2008 (6) SA 310 (SCA); and *H v Foetal Assessment Centre* 2015 (2) SA 193 (CC).
175 Additional reasons why these claims have not been permitted is due to the inability of the child's representative to prove wrongfulness on the part of the doctor, causation and harm.
176 See, for example, *Stewart v Botha*, supra note 174, at paras 16-17.

to see whether a court will make a similar finding in respect of access to ART in order to realise such a right. On the other hand, our courts do recognise claims for wrongful birth. These are claims by parents who have suffered a loss as a result of the doctor's negligence. These individuals can thus recover the costs of raising a disabled child.[177] The claim however does not entitle the parents to a healthy child.

In light hereof, the question arises whether the same principle applies in respect of the right to a healthy child in the context of ART given the fact that the two instances are distinguishable. For example, in the case of AR medical science makes it possible to not only screen for defective genes and implant only embryos with healthy ones, but it is also possible to modify or manipulate embryos or foetuses in order to ensure a healthy child.[178] This occurs early in the reproductive process. In contrast, wrongful claims arise when it is already too late to prevent the birth of the disabled child. This distinction alone could result in a different outcome for prospective parents, especially when coupled with the argument that a denial of such a right impact on their reproductive autonomy, as the decision to procreate, is greatly influenced by whether or not the prospective offspring will be healthy or not.[179]

This issue has yet to receive judicial consideration in South Africa. The main question to be considered will thus be whether this is a permissible expression of reproductive autonomy. The obvious answer to this question is that it is. Reproductive autonomy as articulated in section 12(2)(a) entails making a decision concerning reproduction. It is submitted that a decision regarding the quality of future offspring falls squarely within the ambit of section 12(2)(a) as the decision to create offspring is undeniably influenced by whether that offspring will be healthy or will suffer from a defect.[180] Deciding on the quality of one's future offspring could thus arguably

---

[177] While our courts are willing to recognise wrongful birth claims, doing so apparently does not send a message that no life is better than a disabled life. In this case the courts are willing to award delictual damages for the loss suffered.

[178] Germline modification is defined as the act of deliberately changing "the genes in eggs, sperm, or early embryos. …these alterations would appear in every cell of the person who developed from that gamete or embryo, and also in all subsequent generations." Mitochondrial transfer (MT) is one such example of this. Germline modification is used in circumstances where PGD alone is insufficient. That is, while PGD is able to screen for genetic defects in different embryos, it does not assist in instances where the genetic defect manifests in every embryo. In these instances, screening for the defect simply will not solve the problem. See Center for Genetics and Society, *Human Genetic Modification* (https://www.geneticsandsociety.org/topics/human-genetic-modification#:~:text=Germline%20genetic%20modification%20would%20change,also%20in%20all%20subsequent%20generations), last visited (02-02-2021).

[179] However, the right to reproductive autonomy is not absolute. The extent of the genetic defect and the extent of genetic modification required could impact on this right.

[180] Support for this argument is found with Coan, supra note 16, at 239 who uses the following example to illustrate the link between the decision to reproduce and genetic selection. He makes use of what he terms the following "extreme example":

be an expression of reproductive autonomy. Furthermore, applying the test adopted in *Quintavalle,*[181] it is arguable that making use of MT qualifies as a decision essential for the "purpose of assisting women to carry children". Additionally, on the narrow interpretation adopted by the Constitutional Court in *AB* it is arguable that making use of genetic modification qualifies as an exercise of reproductive autonomy within the ambit of section 12(2)(a), as both commissioning parents contribute to the reproductive process in this instance. The question of satisfying the desire for a healthy child thus gives expression to one's reproductive autonomy. Support for this approach is provided by Nelson who submits that "limits on the permissible uses of PGD [and presumably genetic modification] are inappropriately restrictive of reproductive autonomy."[182] This suggests that the use of PGD and genetic modification fall within the ambit of reproductive autonomy. On the other hand, it could be argued that allowing parents to make use of this technology gives them "unprecedented power and authority over the lives of their future offspring."[183] This concern is particularly real in light of the birth of genome-edited twins in China.[184] This negatively impacts the prospective children and would as such likely constitute a justifiable limitation of reproductive autonomy.[185]

Regardless of the view adopted, at its very minimum, limited use of genetic modification to satisfy the desire for a healthy child involves reproductive autonomy.[186] The question just remains how far this right will take one and whether reproductive autonomy is the most effective means of allowing prospective parents to access this form of AR.[187]

> Imagine a couple deciding whether or not to have a third child where both prospective parents are known carriers of a devastating autosomal recessive disorder like Tay-Sachs disease. The resulting child would have a one-in-four chance of suffering from the disease. How many such couples would have another child without the option of some type of genetic screening? Surely a sizeable number would be unwilling to take the risk.

[181] Supra note 34.

[182] Nelson, supra note 45, at 323-324.

[183] S.S. Park, *A question of ethics and law: Should prospective parents have the right to design their ideal child?* 20 CLRJ (2000) 41.

[184] Saey, supra note 33.

[185] Nelson, supra note 45, at 325 observes that "unrestricted use of such technology may have significant consequences on society."

[186] This view is confirmed by Robertson, supra note 26, at 435-6, who opines that

> Because procreative liberty involves the choice to have healthy children, as well as the right not to have unhealthy children, actions to assure a healthy birth through germline therapy, like actions to achieve the same through other selection methods, would appear to fall squarely within procreative choice. Without the germline or in utero therapy, the couple would not have this embryo implanted or would not bring this fetus to term.

He adds:

> Whether germline therapy affects the gene pool, increases the risks of abusive nontherapeutic uses, or has other harmful effects are separate questions. Courts will have to assess these effects when determining, under the more rigorous scrutiny given to interferences with procreative choice, whether the harms of germline gene therapy justify restricting the practice. (Footnotes omitted.)

[187] In the context of CRISPR/cas9 technology, it is unlikely that reproductive autonomy will take one very far.

4.5 Conflicting children's rights

As previously mentioned, questions about the limits of reproductive autonomy are increasingly being raised amidst concerns regarding the rights of prospective offspring.[188] The right to reproductive autonomy is thus often in conflict with section 28 of the South African Constitution which affords protection to children. Section 28 includes the following provisions:

> (1) Every child has the right –
> (a) to a name and a nationality from birth;
> (b) to family care or prenatal care, or to appropriate alternative care when removed from the family environment;
> (c) to basic nutrition, shelter, basic health care services and social services;
> (d) to be protected from maltreatment, neglect, abuse or degradation;
> …
> (2) a child's best interests are of paramount importance in every matter concerning the child.
> (3) In this section "child" means a person under the age of 18 years.

From a children's rights' perspective, AR raises a number of concerns. These include the right to health, the right to be protected from discrimination, the right to know one's genetic origins, the right to a nationality, the right to know and be cared for by one's parents. Since these are important rights, the wording of section 28 raises important questions within the context of AR. First, do potential offspring qualify as "a child" for purposes of section 28(3); and depending on the answer to the first question, are prospective offspring entitled to the protection afforded by section 28 in general and section 28(2) specifically? If the answers to both questions are negative, a further question arises: should some protection be afforded to prospective offspring and if so, what form should this take. These questions will be considered next.

4.5.1 Do potential offspring qualify as children for purposes of section 28(3)?

From the discussion earlier on in this chapter,[189] it is evident that our courts do not view foetuses as children. They, therefore, do not qualify for the protection afforded by the rights contained in the Bill of Rights including section 28. Foetuses are thus not rights bearers as legal subjectivity begins at birth. This position has been confirmed in both *Christian Lawyers* decisions as well as in *S v Mshumpa*.[190] The position regarding foetuses remains unchanged despite academic debate on the subject in recent years calling for a review of the start of legal personality.[191]

---

188 Recent court decisions involving confirmation of surrogacy agreements are evidence of this. See for example *Ex Parte CJD and Others*, supra note 124.
189 Specifically, at para 4.4.1(a).
190 Supra note 146.
191 R. Pillay, *The beginning of human personhood: Is South African law outdated?* 21 Stell LR (2010) 230-238.

The advent of AR in South Africa appears to have avoided this debate entirely in that courts when confronted with applications for AR by prospective parents automatically consider the best interests of prospective offspring, even though conception/fertilisation has yet to take place.[192] This may be attributed to the obligation imposed by section 295(d) of the Children's Act which prescribes that all applications involving surrogacy must consider the interests of the child. This is interesting as there is at this point no embryo or foetus to which the best interests' principle should be applied as section 28 does not extend to pre-birth and neither does it extend to prospective offspring who have yet to be conceived.[193] It may be argued that legislation that thus mandates courts to apply this principle is thus ostensibly in conflict with the Constitution. However, a closer look at the system of female reproductive rights in South Africa illustrates that it progressively shelters foetal interests to some extent.[194] For instance, while the Choice of Termination of Pregnancy Act recognises various constitutional rights that are categorically female reproductive rights,[195] the act simultaneously protects the interests of the foetus by limiting the right to terminate a pregnancy at certain stages in the gestation period.[196] It is possible that the Children's Act attempts to achieve a similar objective. Alternatively, it may be argued that the Constitution does not now reflect the *boni mores* which requires legal subjectivity to commence prior to birth.[197]

If this is true, the question arises at what point prior to birth should regard be had for the interests of the potential offspring. Should this even precede conception, which is currently the standard applied in surrogacy cases? The challenge that is posed by adopting such an approach – and which is evident from existing case law on this issue – is that reproductive autonomy is often yielding to the pressure of the prospective child's best interests.[198] This in effect elevates the interests of the prospective offspring to that of children, when in effect, they are not rights-bearers.

---

192 S 296 of the Children's Act.

193 The Child Rights International Network (CRIN) in its report titled *A Children's Rights Approach to Assisted Reproduction* 6 observes that the CRC definition of child in section 1 was never meant to extend prior to birth.

194 Pickles, supra note 143, at 403.

195 These rights include the rights to life, privacy, bodily and psychological integrity, dignity, equality, access to information and health care, and pregnant children's rights, and affect the right to terminate a pregnancy in South Africa.

196 See s 2 and 5 of the Choice Act.

197 The *boni mores* is not static and reflects the legal convictions of society at a particular point in time. It is therefore subject to change. This view seems more consistent with the preamble of the CRC which mandates that the child's best interests should be considered "before as well as after birth". However, it is also in conflict with the views expressed in note 192 above.

198 See for example *AB v Minister of Social Development* and *Ex parte CJD*, supra note 124.

4.5.2 Should the best interests' principle apply to prospective offspring?

In light of existing jurisprudence on the subject, it is clear that the best interests' principle should not apply to prospective offspring. Yet, in jurisprudence dealing with surrogacy as a form of ART, this principle is applied. Arguably some protection should be afforded to the interests of prospective offspring born by means of AR in light of the apparent harm that these children may face both during the gestation period and following their birth. Despite the fact that there appears to be an apparent conflict with the Constitution which is perhaps justified in the circumstances, the question arises whether the Constitution should be amended to reflect a change to the beginning of legal subjectivity or whether an alternate standard should be applied to consider the interests of prospective offspring. Regarding the second question, it is not clear whether applying an alternate standard would make a difference or whether this would merely amount to repackaging the best interests' principle.

4.5.3 An alternative to best interests?

Previously in the thesis it was proposed that an alternative standard be applied to consider the interests of prospective offspring created in the context of AR.[199] Waxman specifically refers to the pre-conception welfare principle,[200] although she has concerns about its efficacy in light of the current experiences in using this principle in the United Kingdom. It was proposed that a similar standard be applied in South Africa, although it would be necessary to clarify the essential components of this standard in the context of AR and even modify this standard to accommodate various forms of AR. It would also be necessary to clarify, while such a standard is aimed at protecting the interests of potential offspring, that it does not equate those interests with rights. The rights of prospective parents should as such be given primacy. Adopting such an approach would support the reproductive autonomy of prospective parents who are rights-bearers. This is not to say that reproductive autonomy should be given priority in every circumstance. It should however be limited only in cases where there is evidence of potential harm to the prospective offspring.[201]

---

[199] See para 4.4.1(a) above.

[200] Waxman, supra note 144, at 169-175 who discusses this principle and argues that it is vague and lacks a philosophical basis. She adds that "the core of the failings in the current regulatory framework stem from the insertion of the PCWP." However, this need not be the case. Instead such a principle could very well provide the solution to balancing the interests of all the parties involved in AR.

[201] At present, there is insufficient evidence of harm to potential offspring, yet this has resulted in applications for surrogate motherhood agreements being rejected. See generally D. Thaldar, *Surrogate Motherhood and scaremongering: Is South Africa entering an age of post-truth jurisprudence?* 2018 De Rebus 28-29.

4.6 Conclusions regarding reproductive autonomy

From the above discussion, it is evident that reproductive autonomy has acquired the following meaning in South Africa: it includes decisions not to reproduce as well as decisions to reproduce. As far as decisions to reproduce are concerned, these are not limited only to decisions regarding the number and spacing of children. It includes decisions regarding the quality of prospective offspring, provided that the quality or characteristic is material or pivotal to the decision to reproduce and not merely an exercise of preference on the part of the prospective parent.

Nevertheless, it is evident that reproductive choice is not as free as it may appear. Individuals desiring to use AR as a means of procreation are subjected to a number of factors that serve as a restriction on their reproductive autonomy. These include public interest which may limit access to certain forms of AR, the interests of prospective offspring as well as current interpretations of reproductive rights. The tendency to view decisions to reproduce through an abortion lens also limits the scope of this right. Perhaps if a wider lens were used, a greater variety of decisions to reproduce with assistance would fall within the ambit of this right. However, as things currently stand, the right to reproductive autonomy as provided for under section 12(2)(a) falls short. It is therefore not the most efficient way to realise the right of individuals to reproduce with assistance in most cases.

In light of this reality, the question arises, in light of limitations on the right to reproductive autonomy, to what extent will prospective parents be able to exercise their right to reproductive health care to access ART? This will be considered next.

4.7 Reproductive health care

The right to health care is protected under section 27 of the Constitution. This provision *inter alia* protects the right of everyone to have access to health care services, including reproductive health care.[202] Reproductive health care in the context of AR means access to fertility or infertility treatments, preimplantation genetic testing, prenatal and postnatal care especially in cases of multiple pregnancies, and access to cryopreservation to preserve fertility.[203]

---

202 S 27(1)(a).

203 These are the minimum requirements that individuals would need.

This right does not entitle anyone to immediate access to health services.[204] Reproductive health services are no exception. In fact, reproductive health services may be in a worse position than other health services, in light of the condition in section 27(2) which obliges the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. In a country, such as South Africa, where there is a lack of available resources to provide everyone with quality basic health care, reproductive health care may not feature as a priority.[205] State resources will as such be focused on meeting the needs of the general public rather than a portion thereof who are in need of reproductive health care services. This interpretation is supported by the landmark judgment in *Soobramoney v Minister of Health*[206] where the Constitutional Court held that the implementation of this right in section 27(1)(a) is dependent on available resources. Given the current state of affairs, it may not be reasonable to dedicate extensive resources to assisted reproductive health care.

Additionally, the high costs involved in reproductive technologies means that it may not be as readily available as reproductive health care services directed at preventing procreation and ultimately curbing population growth. The state may therefore have a greater interest in targeting these kinds of reproductive health care services than those aimed at facilitating reproduction. The high costs coupled with limited state interest in prioritising access to reproductive health care services means that a large portion of society who require access to ART will have to forego these services. [207]The track record for the right contained in section 27(1)(a) does not seem to support access to AR to the degree that many South Africans may require.[208] Instead many will have to rely on their own resources to realise their desire for offspring.[209] This leads one to conclude that while section 12(2)(a) does not take one very far in realising the right to make use of ART, the right in section 27(1)(a) achieves even less than this.

---

[204] Pickles, supra note 43, at 120.

[205] This position is by no means unique to South Africa. In fact, it is a challenge faced by many nations. See A. Otu, G. Danhoundo, & S. Yaya, *Prioritizing sexual and reproductive health in the face of competing health needs: where are we going?* 18 (8) *Reprod Health* (2021) 3.

[206] 1998 (1) SA 765 (CC).

[207] V. Mhkize, *SA's fertility treatment services need boosting* 9 February 2017 IOL (https://www.iol.co.za/lifestyle/family/sas-fertility-treatment-services-need-boosting-7591521), last visited (02-02-2021).

[208] W. Stassen, *Cutting the cost to conceive* 15 January 2015 Health-E News (https://www.health-e.org.za/2015/01/15/cutting-cost-conceive/), last visited (02-02-2021).

[209] C. Huyser & L. Boyd, *Assisted reproduction laboratory cost-drivers in South Africa: value, virtue and validity* 22 O & GF (2012) 91-99.

4.8 Conclusion

From the above discussion, it is evident that neither the right to reproductive autonomy nor the right to reproductive health care will allow prospective parents to access the widest array of reproductive options. Limitations imposed by legislation, narrow interpretations of the meaning of the right to reproductive autonomy coupled with the high costs of reproductive medicine means that governments may allege that these measures fall outside its available resources. These factors severely curtail the effectiveness of these rights. It thus needs to be determined whether another right would provide individuals with the protection that they require to engage in order to access the maximum amount of ART. The right to privacy provides the first alternative to these rights and will be considered in the next chapter as well the conflict of this right with children's rights.