

Reproductive Autonomy versus Paternal Interests: Should Biological Fathers Have a Role in Abortion Decisions under South African Law?

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ABSTRACT

South African law vests the decision to terminate a pregnancy exclusively with the pregnant woman, a position grounded in the constitutional rights to bodily and psychological integrity, dignity, privacy and equality, and given legislative effect through Section 5 of the Choice on Termination of Pregnancy Act 92 of 1996. This article accepts that position as constitutionally sound but interrogates a separate question it leaves open: whether the woman's exclusive decision-making authority necessarily requires the complete legal exclusion of the biological father's interests. Drawing on comparative authority from the United States and England, and on South African law's recognition of paternal interests under Section 21 of the Children's Act, the article identifies an asymmetry whereby a father's relationship to his child is recognised once that child is born yet receives no acknowledgment whatsoever during pregnancy. It argues that this asymmetry can be addressed, without disturbing the woman's ultimate authority, through a narrowly confined duty to consult the biological father in cases of consensual conception where he is identifiable and consultation poses no risk of harm, violence or coercion. Such consultation would carry no power to delay, condition or prevent termination; it would instead offer the father an opportunity to communicate his position and, where relevant, to offer to assume parental responsibility. The article concludes that this distinction between consent and consultation allows the law to take the father's interest in prospective parenthood seriously while leaving the woman's constitutional right to decide fully intact.

KEYWORDS

Reproductive Autonomy; Termination of Pregnancy Act; Paternal interests in pregnancy termination; Women's Bodily and Psychological Integrity; South African Law

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I. INTRODUCTION

The South African Constitution² is the supreme law of the Republic,³ adopted against a history of colonialism, apartheid and entrenched inequality.⁴ It seeks to transform this past by protecting human dignity, equality and freedom, particularly for groups whose autonomy was historically curtailed. Women are foremost among these groups, colonial and apartheid-era law and custom frequently treated them as subordinate to men, restricting their capacity to make decisions about their own property, lives and bodies. The Constitution accordingly entrenches a range of rights aimed at advancing substantive equality and safeguarding women's autonomy.

This article focuses on the right to bodily and psychological integrity in Section 12 of the Constitution,⁵ which includes the right to make decisions concerning reproduction. This right underpins South Africa's legal framework governing the termination of pregnancy, under which a woman may terminate a pregnancy without the consent of the biological father. That position robustly protects women's reproductive autonomy, but it raises a further constitutional question: to what extent, if any, should the biological father have a say in the decision to terminate a pregnancy? The article considers whether the current approach gives appropriate weight to the interests of both prospective parents, or whether protecting the woman's reproductive autonomy necessarily requires excluding the father's interests altogether.

II. THE CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK

Section 12 of the Constitution guarantees everyone the right to freedom and security of the person.⁶ Section 12(2) protects the right to bodily and psychological integrity, including the right to make decisions concerning reproduction, to security in and control over one's body, and not to be subjected to medical or scientific experimentation without informed consent.⁷ Section 12(2)(a) in particular provides the constitutional foundation for reproductive autonomy and informs the legislation regulating termination of pregnancy.⁸

² S. Afr. Const., 1996.

³ *Id.*, §2.

⁴ Felix Dube, *The South African Constitution as an Instrument of Doing What Is Just, Right and Fair*, 54(1) IN DIE SKRIFLIG 1 (2020).

⁵ S. Afr. Const., 1996, § 12(2).

⁶ S. Afr. Const., 1996, § 12(1).

⁷ S. Afr. Const., 1996.

⁸ S. Afr. Const., 1996, §12(2)(a).

Reproductive autonomy is closely connected to the rights to dignity, privacy and equality. The ability to make decisions about reproduction allows women to exercise control over central aspects of their own lives, rather than having such decisions made for them by others; it protects their privacy in matters that are deeply personal, and it contributes to substantive equality by recognising women's capacity to make decisions about their bodies on an equal footing with men.

The Choice on Termination of Pregnancy Act, 92 of 1996⁹ gives legislative effect to this constitutional protection. Section 5 deals with consent and makes it clear that the consent of the pregnant woman alone is sufficient for a termination.¹⁰ The Act therefore places the decision in the hands of the woman, leaving the biological father without any legal right to consent to, or prevent the termination, a position that raises the central question addressed in this article.

The justification for this approach lies in the physical reality of pregnancy. It is the woman's body that undergoes the risks, changes and consequences of carrying a pregnancy to term, and requiring the consent of another person would interfere significantly with her bodily autonomy. Whether this justification requires excluding the father's interests altogether, however, is a separate question, considered below.

III. THE WOMAN'S CONSTITUTIONAL INTEREST IN TERMINATING A PREGNANCY

Several interconnected constitutional rights protect a woman's ability to decide whether to continue or terminate a pregnancy. The relevance of these rights to termination of pregnancy decisions has been discussed by Dr Camilla Pickles in her article.¹¹ In *AB and Another v. Minister of Social Development*,¹² Khampepe J interpreted 12(2)¹³ generously and contextually, noting its protection of bodily and psychological integrity in the surrogacy context.¹⁴

⁹ Choice on Termination of Pregnancy Act, No. 92 of 1996 (S. Afr.), (hereinafter 'Choice on Termination of Pregnancy Act').

¹⁰ *Id.* §5.

¹¹ Camilla 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) POTCHEFSTROOM ELEC. L.J. 403 (2012).

¹² *AB v Minister of Social Development* [2016] ZACC 43 (S. Afr.), hereinafter 'AB'.

¹³ S. Afr. Const., 1996, §12(2).

¹⁴ AB, *supra* note 12, ¶66.

Because pregnancy occurs within the woman's body, it exposes her to physical and psychological consequences that another person does not experience in the same way, and the decision whether to continue it may affect fundamental aspects of her life, her health, education, employment, family circumstances and future plans. Reproductive autonomy is accordingly not simply a right to make a medical decision; it is bound up with the woman's control over her own body and the course of her life.

This protection is reinforced by the right to dignity in section 10 of the Constitution which provides that everyone has inherent dignity and the right to have their dignity respected and protected.¹⁵ In *Christian Lawyers Association v. Minister of Health*,¹⁶ the High Court held that a woman's right to choose to terminate a pregnancy is grounded primarily in the right to bodily and psychological integrity under Section 12(2) of the Constitution, reinforced by the rights to dignity and privacy.¹⁷

The right to privacy in Section 14¹⁸ adds a further layer of protection. In *Bernstein v. Bester NO*,¹⁹ the Constitutional Court explained that the scope of the right to privacy is not fixed, it is broadest in the "truly personal realm" and narrows as a person moves into communal or business activities, with protection at common law extending to unlawful intrusion into that personal sphere and unlawful disclosure of private facts.²⁰ A decision as intimate as whether to continue a pregnancy attracts significant privacy interests, though privacy should not be read as creating an isolated or absolute right to termination; rather, read together with dignity and bodily integrity, it strengthens the overall protection surrounding reproductive decision-making.

Reproductive autonomy is also connected to the constitutional commitment to substantive equality under Section 9. Because pregnancy presents an obvious biological difference between women and men, the woman bears its physical consequences, the man does not, requiring identical decision-making authority for both would appear formally equal while ignoring this

¹⁵ S. Afr. Const., 1996, §10.

¹⁶ *Christian Lawyers' Association v Minister of Health (Reproductive Health Alliance as Amicus Curiae)* 2005 (1) SA 509 (T), 2004 (10) BCLR 1086 (T) (S. Afr.), (hereinafter 'Christian Lawyers' Ass'n').

¹⁷ *Id.*

¹⁸ S. Afr. Const., 1996, §14.

¹⁹ *Bernstein v Bester NO* [1996] ZACC 2, 1996 (2) SA 751 (CC) (S. Afr.).

²⁰ *Id.*, ¶67.

material difference. Protecting the woman's reproductive autonomy can therefore be understood as part of the Constitution's broader project of addressing gender inequality.

This constitutional foundation is reflected in the Choice on Termination of Pregnancy Act.²¹ Section 5(1) permits termination only with the informed consent of the pregnant woman, while Section 5(2) expressly provides that no other person's consent is required.²² The point was reinforced in *Christian Lawyers Association v. Minister of Health*,²³ which concerned a challenge to the provision allowing a pregnant minor to terminate a pregnancy without parental consent. Although that case concerned parental rather than paternal involvement, the court's emphasis on informed consent and self-determination as lying at the foundation of the constitutional right to terminate a pregnancy remains instructive: it demonstrates the constitutional importance of allowing the person undergoing the pregnancy to exercise meaningful control over the decision.²⁴

The historical context adds further weight to this position. South African women were subjected to legal and social structures that placed decisions about their lives and bodies under the control of others, and the constitutional protection of reproductive autonomy must be understood as part of the broader project of transforming that history of inequality.

These constitutional interests explain why South African law does not require another person's consent before a woman may terminate a pregnancy. That conclusion does not, however, determine whether other interests connected to the pregnancy deserve any legal recognition at all. It is therefore necessary to examine whether the biological father has an interest in the continuation of the pregnancy, and if so, what place, if any, that interest should occupy within the legal framework.

IV. THE INTEREST OF THE BIOLOGICAL FATHER

Comparative authority illustrates that the father's interest is not necessarily insignificant merely because he cannot be given a veto. In *Planned Parenthood of Central Missouri v. Danforth*,²⁵ the United States Supreme Court considered Missouri legislation requiring a

²¹ Choice on Termination of Pregnancy Act, *supra* note 9.

²² Choice on Termination of Pregnancy Act, *supra* note 9, §5(1),(2).

²³ Christian Lawyers' Association, *supra* note 16.

²⁴ *Id.*

²⁵ *Planned Parenthood of Central Missouri v Danforth*, 428 US 52, 57–58 (1976).

married woman to obtain her husband's written consent before an abortion in the first twelve weeks of pregnancy. The Court held the requirement unconstitutional, reasoning that the State could not give a husband a veto over a decision it was itself constitutionally barred from controlling.²⁶ It did not, however, treat the husband's interest as illegitimate: it acknowledged his genuine concern for his wife's pregnancy and the potential child, but concluded that because the woman physically bears the pregnancy and is more directly affected by it, the balance favoured her.²⁷

A similar issue arose in the English case of *Paton v. Trustees of the British Pregnancy Advisory Service*,²⁸ where a husband sought an injunction to prevent his wife undergoing a lawful abortion without his consent. The court refused the application, holding that he had no legal right enforceable against his wife to prevent the termination without necessarily denying the existence of his interest altogether. *Paton* therefore raises the broader question of whether the absence of legal recognition for the father's interest is necessarily justified, or whether that interest could be recognised without giving him control over the woman's body.

These foreign authorities do not determine the South African position, but they usefully frame the local inquiry. South African law itself recognises that biological fatherhood can give rise to significant legal interests in the form of Section 21 of the Children's Act²⁹ enables an unmarried biological father to acquire parental responsibilities and rights where he meets specified requirements, including a demonstrated commitment to the child's upbringing and support. This reflects a shift towards recognising fatherhood as a substantive legal relationship, not merely a biological fact.

*Christian Lawyers Association of South Africa v. Minister of Health*³⁰ complicates any attempt to extend this reasoning to the antenatal period, however, because the court held that a foetus is not a bearer of constitutional rights. The father cannot, therefore, rely on the rights of the foetus to find a right to participate in the termination decision; the relevant question is instead whether he has an independent interest in prospective parenthood.

²⁶ *Id.*, at 69.

²⁷ *Id.*, at 70–71.

²⁸ *Paton v Trustees of British Pregnancy Advisory Service* [1979] QB 276 (Eng.).

²⁹ Children's Act, No. 38 of 2005, § 21 (S. Afr.), (hereinafter 'Children's Act').

³⁰ *Christian Lawyers Ass'n of S. Afr. v. Minister of Health*, 1998 (4) SA 1113 (T) (S. Afr.).

This produces an apparent asymmetry. Once a child is born, an unmarried father may acquire parental responsibilities and rights under Section 21 of the Children's Act;³¹ yet during pregnancy, the Choice on Termination of Pregnancy Act gives him no legal right even to be informed, consulted or heard. The law recognises his relationship with the child once that child exists, while giving no recognition whatsoever to his interest in whether the relationship will arise at all. This asymmetry does not mean that the father should be given a veto over the woman's reproductive decision, her constitutional right to bodily and reproductive autonomy precludes that. It does, however, raise the narrower question addressed in the next section: whether his interest might be recognised in a limited way, through consultation, without allowing it to override the woman's decision.

V. WHEN SHOULD THE BIOLOGICAL FATHER BE CONSULTED?

Requiring the biological father's consent before a termination would unjustifiably interfere with the woman's rights to dignity, privacy, bodily and psychological integrity and reproductive autonomy, and this article does not propose one. It proposes instead a narrower form of recognition: that in appropriate circumstances, the biological father be afforded an opportunity to be consulted before the pregnancy is terminated. Such consultation would confer no right to prevent the termination; it would simply recognise that the decision may also touch his interest in prospective parenthood and family life.

This approach is consistent with the Constitution's broader commitment to balancing competing rights. Sections 10 and 14, dignity and privacy are not confined to the pregnant woman, though their application to her is especially significant because pregnancy directly affects her body and personal autonomy. The biological father may hold legitimate interests of his own in his private and family life, and in the possibility of assuming parental responsibilities, but these interests cannot be elevated into a right to determine what happens within the woman's body. The constitutional question is not whether one party's interests must entirely prevail, but whether both can be accommodated without unjustifiably limiting the woman's rights.

Historical and anthropological evidence bears this out. Abortion was practised in African communities prior to colonisation among the Akan of pre-colonial Ghana, for instance, in

³¹ Children's Act, *supra* note 29, §21.

circumstances involving adultery, rape and incest.³² Such evidence suggests that decisions about pregnancy have always been shaped by personal, familial and social circumstances, and that consultation cannot sensibly be imposed as a uniform rule irrespective of context.

Some circumstances should fall outside any proposed duty to consult altogether. Pregnancies resulting from rape, incest or other sexual violence are the clearest example: requiring a woman to consult the biological father in such cases, particularly where he is the perpetrator, would itself undermine her dignity, privacy and bodily integrity. The same applies wherever disclosure would expose her to violence, intimidation or coercion, or wherever continuing the pregnancy poses a serious threat to her life or health. In each of these situations, her decision alone must suffice, consultation would impose an unjustifiable burden on rights already directly implicated by the physical consequences of pregnancy.

The position is different where the pregnancy results from consensual intercourse and there is no apparent risk to the woman's safety or well-being. Consider two unmarried individuals who did not intend to become parents. The woman may seek a termination because she does not wish to assume the responsibilities of motherhood, for financial reasons, or because she does not consider herself ready for parenthood, considerations that remain entirely legitimate and are not diminished by a requirement of consultation. What consultation adds, in this context, is the opportunity for the biological father to indicate whether he is willing to assume primary responsibility for the child, provide financial support, or otherwise assist the woman should she prefer not to undertake parenthood herself.

This possibility takes on particular significance alongside Section 28 of the Constitution,³³ which places children's interests, including the right to family or parental care, at the centre of constitutional protection. Section 28 confers no right on the biological father to prevent a termination, but it underscores the constitutional significance of parental relationships and responsibilities. Consultation, on this view, offers a mechanism for establishing whether the father is willing and able to assume those responsibilities, without converting that possibility into a power over the pregnancy itself. The same reasoning extends to cases where the woman's decision is driven by anticipated economic or practical burdens: if the father is willing and able

³² Charles G. Ngwenya, *Access to Abortion: Legal Developments in Africa from a Reproductive and Sexual Health Perspective*, 19 S. AFR. PUB. L. 328, 335 (2004); John Ganle & Eunice Brookman-Amissah, *Abortion Law and Policy Reforms in Ghana*, in ABORTION LAW REFORM IN AFRICA: A REPRODUCTIVE HEALTH AND RIGHTS PERSPECTIVE 286–88 (Charles Ngwenya et al. eds., PULP 2025).

³³ S. Afr. Const., 1996, §§28(1)(b), 28(2).

to provide meaningful support, that information may be a relevant consideration for her, without in any way obliging her to accept it. She remains free to reject the offer and proceed with the termination.

The distinction between consultation and consent is therefore fundamental. Consent would give the father a substantive power to prevent the woman from exercising her reproductive choice, and would risk unjustifiably limiting her rights to dignity, privacy and bodily and psychological integrity. Consultation, by contrast, merely gives him an opportunity to communicate his position and, where relevant, to offer an alternative, the final decision remaining with the woman because she is the one who bears the physical consequences of the pregnancy. Recognising his interest in this limited way does not require treating it as equivalent to hers. It acknowledges only that prospective parenthood may carry significant personal and familial meaning for both parties, and that excluding him altogether in every consensual pregnancy may fail to accommodate an interest capable of constitutional recognition, particularly where consultation can occur without compromising the woman's autonomy or safety. The strongest objection to any consultation requirement, no matter how narrow, is that coercive control frequently precedes and exists independently of the disclosed violence that would trigger the proposed exemption. Global research on reproductive coercion documents that abusive partners already use pressure around continuing or terminating a pregnancy as a mechanism of control,³⁴ and South African data confirm that intimate partner violence is strongly associated with pregnancy termination nationally, with marked provincial variation.³⁵ A woman in a controlling relationship may be unable, or unwilling, to characterise her circumstances as falling within the excluded category, particularly where doing so requires naming the father as a source of risk. The self-declaration mechanism is designed to meet this directly. It requires no disclosure or justification beyond the woman's own assertion that consultation should not proceed, placing the burden of identifying an excluded case entirely on her.

The proposed approach is therefore one of accommodation rather than equal decision-making power. The woman's constitutional rights remain paramount, because the pregnancy is experienced through her body and its continuation imposes physical and psychological consequences upon her alone. Nevertheless, where the pregnancy arose from consensual

³⁴ Jay G. Silverman & Anita Raj, *Intimate Partner Violence and Reproductive Coercion: Global Barriers to Women's Reproductive Control*, 11(9) PLOS MED. e1001723 (2014).

³⁵ Rotimi Felix Afolabi & Martin Enock Palamuleni, *Sub-national Analysis of Intimate Partner Violence and Termination of Pregnancy Among Ever-in-Union Women in South Africa*, 15 SCI. REP. 45336 (2025).

intercourse, the father is identifiable, consultation poses no risk of harm or coercion, and the circumstances permit meaningful communication, a limited opportunity for consultation may properly recognise his prospective parental and family interests.

Paternal consultation should accordingly operate as a procedural opportunity, not a substantive condition for termination. It should neither delay access to lawful termination nor allow the father to veto the woman's decision. To remain compatible with the Act's own gestational time period, any consultation must be discharged within a short, fixed period³⁶, and a woman's own statement that her case falls within an excluded category of rape, incest, or risk of violence or coercion should be sufficient on its own to allow the termination of pregnancy, without requiring corroboration or external verification.³⁷ A woman who is not consulted or for whom consultation is waived on this basis, would have no cause of action against her capable of delaying or reversing a termination that has already taken place. Properly confined in this way, consultation would give practical effect to the Constitution's commitment to dignity, privacy, family relationships and the protection of children, while preserving the pregnant woman's ultimate autonomy over her body and her reproductive decision.

VI. CONCLUSION AND THE WAY FORWARD

South African law places the decision to terminate a pregnancy firmly in the hands of the woman, and this article has argued that this position is constitutionally correct. Sections 12(2), 10, 14 and 9³⁸ together establish that a woman's control over her own body cannot be made subject to another person's consent, and the Choice on Termination of Pregnancy Act³⁹ gives proper legislative effect to that principle. Nothing in this article disturbs that conclusion.

What the article has questioned is the further, and separate, assumption that the woman's right to decide must translate into the complete legal invisibility of the biological father. Section 21⁴⁰ shows that South African law is already willing to recognise a father's interest in his prospective child once that child is born, and Section 28's⁴¹ protection of the child's own right to family or parental care reinforces the general constitutional weight attached to the father-child relationship. There is no obvious reason why the same interest should count for nothing

³⁶ Choice on Termination of Pregnancy Act, *supra* note 9, §2.

³⁷ Choice on Termination of Pregnancy Act, *supra* note 9, §5(3); Christian Lawyers' Ass'n, *supra* note 17.

³⁸ S. Afr. Const., 1996, §§9, 10, 12(2) and 14.

³⁹ Choice on Termination of Pregnancy Act, *supra* note 9.

⁴⁰ Children's Act, *supra* note 29, §21.

⁴¹ S. Afr. Const., 1996, §28.

during the pregnancy itself, provided that recognising it does not translate into a power over the woman's body. A duty to consult, confined to consensual pregnancies where the father is identifiable and consultation carries no risk of harm, achieves exactly that, it acknowledges the father's stake in prospective parenthood without giving him any means of preventing, delaying or influencing the outcome of the termination.

The distinction between consent and consultation is therefore not a semantic one. It is the mechanism by which the law can take the father's interest seriously without compromising the woman's constitutional right to decide. Framed in this limited and carefully bounded way, paternal consultation would not weaken the protection the Constitution affords to women; it would simply complete the picture that Sections 21 and 28 already point towards, bringing the law's treatment of the father's interest during pregnancy into line with the recognition it already receives once the child is born.

