CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 155/15

In the matter between:

AB	First Applicant
SURROGACY ADVISORY GROUP	Second Applicant
and	
MINISTER OF SOCIAL DEVELOPMENT	Respondent
and	
CENTRE FOR CHILD LAW	Amicus Curiae

Neutral citation:	*AB and Another v Minister of Social Development* [2016] ZACC 43
Coram:	Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Mhlantla J, Madlanga J, Nkabinde J and Zondo J
Judgments:	Khampepe J (minority): [1] to [236] Nkabinde J (majority): [237] to [330]
Heard on:	1 March 2016
Decided on:	29 November 2016
Summary:	surrogate motherhood agreement — statutory genetic origin requirement — whether irrational — whether limits commissioning parent's rights to equality, dignity, reproductive

autonomy, reproductive health care, and privacy — best interests of the child

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ORDER

In respect of the application for confirmation of the order of the High Court of South Africa, Gauteng Division, Pretoria, the following order is made:

1. The order of constitutional invalidity in respect of section 294 of the Children's Act 38 of 2005 made by the High Court of South Africa, Gauteng Division, Pretoria is not confirmed.
2. The appeal by the respondent is upheld.
3. The High Court costs order, in paragraphs 2 and 3, in favour of the applicants, is confirmed.
4. The respondent is ordered to pay the applicants' costs in this Court including the costs of two counsel.

JUDGMENT

KHAMPEPE J (Cameron J, Froneman J and Madlanga J concurring):

Introduction

[1] The decision to have a child of one's own has for thousands of years formed a central part of the lives of human beings. It is a blessing that is for the most part taken for granted. The effects of an inability to carry out that decision have, for so many of

us, been nothing short of devastating. Laura Bush puts it eloquently when she writes that—

> "[t]he English language lacks the words to mourn an absence. For the loss of a parent, grandparent, spouse, child or friend, we have all manner of words and phrases, some helpful some not. Still we are conditioned to say something, even if it is only 'I'm sorry for your loss'. But for an absence, for someone who was never there at all, we are wordless to capture that particular emptiness. For those who deeply want children and are denied them, those missing babies hover like silent ephemeral shadows over their lives. Who can describe the feel of a tiny hand that is never held?"[1]

[2] We are not in any way short of words when it comes to describing the effects of experiencing infertility: grief; sadness; despair; panic; helplessness; and isolation are but a few of the feelings that often ensue. For a large number of people, infertility has been "the most upsetting experience of their lives".[2] For others, infertility is rated as comparably stressful to the loss of a partner or a child.[3] The likelihood of depression has been shown to double for women who are infertile.[4] Disturbingly, infertility levels are on the rise globally, with one in every ten people facing infertility problems.[5]

[3] We are fortunate, however, to live in an era where the effects of infertility can be ameliorated to a large extent through assistive reproductive technologies. The technological advances seen over the last half century have greatly expanded the reproductive avenues available to the infertile. These reproductive avenues should be celebrated as they allow our society to flourish in ways previously impossible.

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[1] Bush *Spoken from the Heart* (Simon & Schuster, New York 2010) at 104.

[2] Orentlicher "Discrimination out of Dismissiveness: the Example of Infertility" (2010) 85 *Indiana Law Journal* 143 at 155.

[3] Id.

[4] Id.

[5] World Health Organisation "Infertility is a global public health issue", available at http://www.who.int/reproductivehealth/topics/infertility/perspective/en/.

[4] At the heart of this matter lies the question of the extent to which the state may regulate the reproductive opportunities available to those who are unable to have children of their own because they are conception and pregnancy infertile.[6]

Parties

[5] The first applicant is cited as "AB" pursuant to a court order intended to protect her identity.[7] She is an adult who wishes to enter into a surrogacy agreement in order to have a child of her own. The second applicant is the Surrogacy Advisory Group (Surrogacy Group), a voluntary association of medico-legal practitioners and other professionals experienced in the field of infertility that offer education, advice and support, free of charge, to persons considering entering into surrogacy agreements in order to become parents. The Surrogacy Group seeks to promote and protect the interests of surrogate mothers and commissioning parents.

[6] The respondent is the Minister of Social Development (Minister), cited in her capacity as the Minister responsible for the administration of the Children's Act.[8]

[7] The Centre for Child Law (Centre) was admitted as amicus curiae. It is a law clinic registered with the Law Society of the Northern Provinces. Its primary objectives are establishing and promoting child law as well as upholding the rights of children in South Africa within an international and regional context. I am grateful to the Centre for its contributions to these proceedings. They have been of valuable assistance.

[6] For the definition of these terms, see n 9 below.

[7] This order was granted by the High Court of South Africa, Gauteng Division, Pretoria per Ledwaba DJP on 28 June 2013 under case number 38354/13.

[8] 38 of 2005.

Factual background

[8] AB has admirably persevered in distressing circumstances. Between 2001 and 2011, she underwent 18 *in vitro* fertilisation (IVF) cycles which were all unsuccessful in helping her fall pregnant. These attempts went through several phases:

(a) In 2001, AB attempted to fall pregnant by undergoing two cycles of IVF treatment using her own ova and her then-husband's sperm. She was in her early 40s at the time. The couple's endeavours proved unsuccessful on both occasions. After the second cycle failed, AB's gynaecologist advised her that it would no longer be feasible to continue harvesting her own ova; she could no longer supply her own gametes for the purpose of conceiving a child.

(b) For this reason, AB undertook a third IVF cycle using anonymous donor ova and the sperm of her then-husband. After this attempt failed, the process was repeated for a fourth time. This attempt was likewise unsuccessful.

(c) In 2002, after 20 years of marriage, AB's relationship with her husband ended in divorce. This did not weaken her resolve to have a child. She began using anonymous donor ova as well as donor sperm, repeating the process nine times, on each occasion unsuccessfully.

(d) In 2009, AB switched fertility clinics. At the new clinic, a further five IVF cycles resulted in AB falling pregnant on two occasions, each time ending in miscarriage. Following her second miscarriage, AB was informed that the chances of successful conception by way of IVF treatment had become, in the words of Dr Cassim, her gynaecologist at the new clinic, "highly improbable if not impossible". AB is thus permanently and irreversibly infertile in two different senses: first, she is unable to contribute her own gametes for conception; and second, she is unable to carry a pregnancy to term.[9]

[9] Referred to as conception infertility and pregnancy infertility respectively.

[9] Later in 2009, Dr Cassim recommended that AB look into surrogacy as a means to have a child. Through the surrogacy programme of *Baby2Mom* – a surrogacy facilitation agency – she was put in touch with a potential surrogate mother, who agreed to act for her. As a single woman unable to donate her own ova, the only way for AB to proceed was to use both donor ova and donor sperm, as she had done over the course of the last 14 of the total of 18 IVF cycles she had undergone.

[10] However, on consulting an attorney, AB was informed that she could not enter into a surrogacy agreement without contributing a gamete to the surrogacy process. Specifically, AB was made aware that she, as a single woman incapable of donating a gamete, could not legally enter into a surrogacy agreement because of section 294 of the Children's Act.[10] To use her own words, AB experienced a "mixture of shock, sadness and bafflement".

[11] Against this backdrop, AB approached the High Court of South Africa, Gauteng Division, Pretoria (High Court), seeking an order declaring section 294 of the Children's Act inconsistent with the Constitution and invalid. The Surrogacy Group and the Centre were subsequently joined as second applicant and amicus curiae respectively.

A person is "conception infertile" if they are unable to contribute a gamete for the purposes of conception through artificial fertilisation.

A person is "pregnancy infertile" if they are permanently and irreversibly unable to carry a pregnancy to term. In other words, they meet the requirements laid out in section 295(a) of the Children's Act.

Section 1 of the Children's Act 38 of 2005 defines a gamete as "either of the two generative cells essential for human reproduction."

[10] Section 294 reads:

> "No surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both commissioning parents or, if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents or, where the commissioning parent is a single person, the gamete of that person."

In the High Court

[12] The applicants' constitutional challenge in the High Court was grounded in their assertion that section 294 violates the rule of law, as well as the rights to equality, human dignity, "reproductive autonomy", privacy and access to healthcare.

[13] The Minister opposed the application on several grounds, namely that:

(a) It was not only AB's rights that were at issue, but also those of the child to be created by the surrogate mother and donor(s). The prospective child had the right to know its genetic origins.
(b) The adoption process in South Africa catered for AB's need to have a child.
(c) To allow a single infertile person to create a child with no genetic link to her would result in the creation of a "designer" child. This would not be in the public interest.
(d) Section 294 prevents commercial surrogacy.

[14] In its reply, the Surrogacy Group asserted that none of these grounds offered sufficient justification for the retention of the offending provision. Seeing as the Minister had not offered a proper justification for the purported violation of the rights listed above,[11] the Surrogacy Group sought an order declaring section 294 of the Children's Act inconsistent with the Constitution and invalid.

[15] The High Court's judgment was penned by Basson J.[12] I do not propose to retrace the judgment in detail. In sum, the High Court came to the conclusion that section 294 of the Children's Act unjustifiably violates AB's rights to equality, human dignity, "reproductive autonomy", privacy and access to health care. It accordingly

[11] [12].

[12] The judgment is reported as *AB v Minister of Social Development* [2015] ZAGPPHC 580; 2016 (2) SA 27 (GP) (High Court judgment).

declared the section constitutionally invalid. The Court also granted a special costs order against the Minister.

[16] The High Court's declaration of constitutional invalidity triggered this Court's confirmation jurisdiction.[13]

In this Court

The applicants' submissions

[17] The Surrogacy Group asserts that the High Court judgment is correct, both in fact and in law, and that the declaration of invalidity should therefore be confirmed.[14] In its view, "families without a parent-child genetic link are just as valuable as families with such a link" in our constitutional dispensation.

[18] The applicants accept that one of the purposes of section 294 of the Children's Act is to guarantee that a child to be born as a consequence of a surrogate motherhood agreement is genetically related to at least one of her commissioning parents.[15] The Surrogacy Group argues, however, that this purpose does not immunise the provision from constitutional scrutiny. It frequently refers to what it calls the "threshold requirement". This is defined as "the requirement found in section 295(a) of the Children's Act, namely that the commissioning parent or parents must not be able to give birth to a child and that such condition must be permanent and irreversible".

[13] In terms of section 167(5) of the Constitution, which provides:

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force."

[14] The confirmation is sought jointly by AB and the Surrogacy Group. The Surrogacy Group filed written submissions on behalf of both applicants.

[15] Section 1 of the Children's Act defines "commissioning parent" as "a person who enters into a surrogate motherhood agreement with a surrogate mother".

[19] The Surrogacy Group also draws a distinction in its written submissions between what it terms the "Class" and the "Subclass". This same terminology is adopted by the High Court. Members of the Class are "persons who fulfil the threshold requirement and who intend to use surrogacy as a method to become parents". Members of the Subclass are "members of the Class who are biologically unable to contribute their own gametes to conception or are not involved in a sexual relationship with a person who is able to make such contribution". The Subclass, they maintain, is a subset of the Class. Accordingly, persons like AB, by virtue of being both conception and pregnancy infertile, are members of both the Class and the Subclass.

[20] The Surrogacy Group argues that section 294 of the Children's Act separately infringes the rights of members of the Class to equal protection before the law, human dignity, "reproductive autonomy" and privacy. Additionally, as members of the Subclass, persons like AB are unfairly discriminated against and are denied access to reproductive healthcare.

[21] Relying on *Makwanyane*,[16] the Surrogacy Group reasons that our Constitution is value-based. One of these values is autonomy. In its view, because autonomy is a value underlying the Constitution, it is "axiomatic". It is not an entitlement granted by the state. Nor does an exercise of autonomy need to be justified by the person exercising it. It further emphasises that the choice to reproduce and the manner in which one exercises that choice is an important act of autonomy; it is central to an individual's life plan. The Surrogacy Group does not suggest that autonomy amounts to a self-standing right. Instead, it contends that autonomy is a lens through which the individual rights allegedly violated must be viewed when delineating their scope.

[22] Once rights contained in the Bill of Rights have been limited, the Surrogacy Group points out that the party defending the rights violation – the Minister

[16] *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) (*Makwanyane*).

in this case – bears the burden to justify that violation. It further asserts that none of the justifications offered by the Minister have merit. This because, in the first place, it has successfully shown that none of the justifications for the differentiation posited suggest a rational nexus between section 294 and its purported purpose. Section 294 is accordingly out of step with the rule of law. Secondly, the limitation of constitutional rights brought about by section 294 is not reasonable and justifiable in terms of section 36 of the Constitution.

[23] Moreover, the Surrogacy Group claims that the purpose of section 294 contended for by the state cannot qualify as a "legitimate government purpose" in our constitutional dispensation. Accordingly, the only appropriate remedy is the striking down of section 294. In sum, it supports the confirmation of the High Court order without alteration.

The Minister's submissions

[24] The Minister submits that none of the rights enumerated by the applicants are violated by section 294. The Minister also asserts that, even if this Court were to come to the conclusion that some or all of the rights have been infringed, such an infringement comes as a result of the Children's Act's promotion of legitimate government purposes. The limitations are therefore reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

[25] The Minister asserts that section 294 exists for the protection of the best interests of children. According to the Minister, section 294 is there to ensure the protection of children that may be born as a result of surrogacy agreements. It prevents commercial surrogacy and the commodification of children, neither of which are in the best interests of prospective children. Additionally, section 294 exists to ensure that the adoption process is not "circumvented".

[26] She further argues that the High Court erred in not considering the interests of the infertile person vis-à-vis the interests of "all the parties concerned", including the

unborn child. By focusing exclusively on the needs of the infertile person the needs of the child become secondary. This is unacceptable given that "[t]he unborn child's best interests are paramount in every matter concerning him or her". The Minister also submits that the child "has a right to dignity and the right to development in uterus". Accordingly, this Court should decline to confirm the High Court's order.

[27] In the event that this Court comes to the conclusion that section 294 is constitutionally impermissible, the Minister suggests that it would be appropriate, and in accordance with the doctrine of separation of powers, to suspend the declaration of invalidity for a period of 18 months. Alternatively, the Minister suggests that the following words be read into section 294: "In exceptional circumstances and on application to court, an exemption [of compliance] may be allowed".

[28] Finally, the Minister asserts that it was inappropriate for the High Court to grant a special costs order in the applicants' favour. She accordingly asks this Court to set that order aside.

The Centre's submissions

[29] The Centre posits that the purpose of Chapter 19 of the Children's Act in general, and of section 294 in particular, is to regulate surrogacy agreements in order to protect the rights of the child to be born. This purpose, they contend, is achieved by ensuring that the child knows her genetic origin. It argues that the heading of section 294, "Genetic origin of child", is indicative of this. In its view, genetic origin is something that belongs to the prospective child. The Centre insists that the risk to children's self-identity and self-respect – their dignity and best interests – is all-important. Section 294 is accordingly rationally connected to the purpose of ensuring that children know their genetic origin.

[30] The Centre further points out that section 41(2) of the Children's Act provides that the information revealed to anyone born of a surrogacy agreement may never disclose the identity of the person or persons whose gamete or gametes were used.

The Centre sees the withholding of this information as harmful to the best interests of children. It essentially gives three reasons for this assertion, namely that:

(a) Knowing one's genetic origins is essential to human wellbeing.
(b) People have a right to the truth about their origins.
(c) Children who are aware that they are donor-conceived suffer psychologically when they are denied information about their origins and identity.

[31] The Centre argues that international law supports the approach that donor-conceived children have a right to know their genetic parents. Moreover, there is a developing global trend towards what it terms "openness": the disclosure of identifying information to donor-conceived children, where assistive reproductive technologies like surrogacy are used.

[32] It also opines that the state has a duty to use legislative power to ensure that donor-conceived children are aware of their status and the nature of their conception, and that the state should allow them access to identifying information regarding their donor. Section 294 provides some protection in this respect; it ensures that children born of surrogacy agreements will at least be able to ascertain the identity of one of their genetic parents. As a result, the Centre concludes that section 294 is a reasonable and justifiable limitation on commissioning parents' rights to dignity and privacy.

Issues

[33] The following issues arise:

(a) The historical and legislative framework of surrogacy and the effect and purpose of section 294 situated within that framework.

(b) Whether section 294, properly construed, limits AB's rights to psychological integrity,[17] human dignity, equality, privacy and access to reproductive health care.

(c) If so, whether it has been shown that section 294 constitutes a reasonable and justifiable limitation of AB's rights.

(d) If not, what the appropriate remedy is.

(e) Costs, both in the High Court and in this Court.

The historical and legislative framework of surrogacy

[34] Before the enactment of Chapter 19 of the Children's Act, surrogacy was not expressly regulated in South Africa by any legislation. Nor does our jurisprudence manifest any pre-constitutional judgments where parties approached our courts in an attempt to enforce a surrogacy contract.[18] Surrogacy as a concept, however, is not new.

[35] The Bible, for instance, is replete with examples of arrangements akin to surrogacy. Perhaps most well-known is the story of Abram, Sarai and Hagar:

> "Sarai, Abram's wife, had not been able to bear children for him. But she had an Egyptian servant named Hagar. So Sarai said to Abram, 'The Lord has prevented me from having children. Go and sleep with my servant. *Perhaps I can have children through her*."[19]

[17] In terms of section 12(2)(a) of the Constitution, which the High Court and the Surrogacy Group have referred to as the right to "reproductive autonomy" throughout these proceedings.

[18] Some academic commentators have suggested, however, that an attempt at enforcing a surrogacy contract in the pre-constitutional era was likely to be refused on the basis that it contradicted the *boni mores* (moral convictions) of apartheid South Africa. See for example Louw "Surrogate Motherhood" in Davel and Skelton *Commentary on the Children's Act* (Juta & Co, Cape Town 2007) 19–3 to 19–6.

[19] Genesis 16:1-2. My emphasis. Another example is Jacob and his wives Rachel and Leah. After Leah had given birth to four of Jacob's children, Rachel grew jealous. She subsequently said to Jacob (Genesis 30:3):

> "Take my maid, Bilhah, and sleep with her. She will bear children for me, *and through her I can have a family, too*." My emphasis.

[36] Surrogacy arrangements have also existed for some time in African customary law.[20] In other less enlightened times, African-American slaves often acted as surrogate mothers for their owners.[21] In addition, the ancient Babylonian legal code of Hammurabi acknowledged surrogacy arrangements as part of Babylonian law, with regulations specifying when it would be permitted, as well as the respective rights of both wife and surrogate mother.[22]

[37] The type of surrogacy at issue in the present matter is, however, narrower. The Children's Act defines a "surrogate motherhood agreement" as—

> "an agreement between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilised for the purpose of bearing a child for the commissioning parent and in which the surrogate mother undertakes to hand over such a child to the commissioning parent upon its birth, or within a reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent."[23]

This definition makes clear that the type of surrogacy we are dealing with necessarily involves artificial fertilisation. It stems from the development of modern reproductive technologies, particularly IVF. The development of IVF technology paved the way for modern surrogacy arrangements; it forms part of the "artificial fertilisation" process referred to in the Children's Act.[24] By 1992, the South African Law

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[20] Bekker *Seymour's Customary Law in Southern Africa* 5 ed (Juta & Co Limited, Cape Town 1989) at 279.

[21] Allen "Surrogacy, Slavery, and the Ownership of Life" (1990) 139 *Harvard Journal of Law and Public Policy* 144.

[22] Claire Fenton-Glynn "Human Rights and Private International Law: Regulating International Surrogacy" (2014) 10 *Journal of Private International Law* 157.

[23] Section 1 of the Children's Act.

[24] Section 1 of the Children's Act defines "artificial fertilisation" as—

> "the introduction, by means other than natural means, of a male gamete into the internal reproductive organs of a female person for the purpose of human reproduction, including—
>
> (a) the bringing together of a male and female gamete outside the human body with a view to placing the product of a union of such gametes in the womb of a female person; or

Commission (SALC) had concluded that the "practical application of existing legislation [regulating surrogacy] leaves much to be desired" as it "does not provide adequate protection for the parties involved".[25]

[38] In the same year, the SALC sought to fill this lacuna. It drafted the Surrogacy Bill and proposed that Parliament adopt it as an Act. The Bill was never passed. In 2002, the SALC suggested that an amended version of the Surrogacy Bill be made a chapter of the new Children's Act.[26] The Legislature then set up an *Ad hoc* Select Committee (*Ad hoc* Committee) to make recommendations regarding the SALC's proposal. The *Ad hoc* Committee subsequently compiled its own report (*Ad hoc* Committee report). Based on this, the Legislature enacted Chapter 19 of the Children's Act, which presently regulates surrogacy in our law. The central provisions of this chapter are outlined below.

[39] Chapter 19, spanning sections 292 to 303 of the Children's Act, delineates the procedural and substantive boundaries of surrogate motherhood agreements. Section 292 sets out several prerequisites for a valid surrogate motherhood agreement, including that it must be in writing and confirmed by a High Court in order for it to be valid. Section 293 tells us when the consent of the husband, wife or partner of a commissioning parent is necessary, and when it can be dispensed with.

[40] Section 295 articulates further requirements which, if not met, require a High Court to decline confirmation of a surrogate motherhood agreement. Section 295(a) provides that a court "may not confirm a surrogate motherhood agreement unless . . . the commissioning parent or parents are not able to give birth to

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(b) the placing of the product of a union of male and female gametes which have been brought together outside the human body, in the womb of a female person."

[25] South African Law Commission *Report on Surrogate Motherhood* (Project 65, November 1992) at para 4.6.3.

[26] Notably, the Surrogacy Bill was drafted well before its proposed inclusion in the Children's Act.

a child and that the condition is permanent and irreversible". Also important is section 295(e), which provides that a High Court—

> "may not confirm a surrogate motherhood agreement unless . . . *in general*, having regard to the personal circumstances and family situations of *all the parties concerned*, *but above all the interests of the child that is to be born*, the agreement should be confirmed."[27]

[41] Section 296(1) states that the artificial fertilisation of a surrogate mother may not take place before a surrogate motherhood agreement has been confirmed by a relevant High Court. It further states that this agreement lapses after a period of 18 months from the date of its confirmation by a relevant High Court. Section 296(2) dictates that any artificial fertilisation contemplated in the Children's Act must comply with the provisions governing artificial fertilisation contained in the National Health Act.[28]

[42] Section 297 speaks to the effect of surrogate motherhood agreements on the status of children. A child born out of surrogacy is for all purposes the child of the commissioning parents from the moment of her birth and the surrogate mother is obliged to hand over the child to them as soon as is reasonably possible thereafter.[29] A surrogate motherhood agreement that does not comply with the Children's Act is invalid, and a child born of this agreement is deemed to be the child of the woman who gave birth to her.[30]

[43] Section 298 regulates the termination of surrogate motherhood agreements, and the effects of termination are contained in section 299. Section 300 incorporates the rights of surrogate mothers to terminate a pregnancy in terms of the Choice on

[27] My emphasis.

[28] 61 of 2003.

[29] Section 297(1)(a) and (b) of the Children's Act.

[30] Section 297(2) of the Children's Act.

Termination of Pregnancy Act.[31] It also vitiates any existing surrogate motherhood agreement in the event of a termination of pregnancy.[32]

[44] Section 301 prohibits the receipt of payment in respect of surrogate motherhood agreements,[33] and provides for limited exceptions such as the payment of medical expenses. Section 303(2) reinforces that commercial surrogacy is unlawful by preventing anyone from facilitating surrogate motherhood agreements in return for compensation. Chapter 19 only permits surrogacy which is altruistic in nature. Commercial surrogacy is prohibited, and is a punishable criminal offence which carries with it the potential of 20 years' imprisonment.[34]

[45] Section 294 is headed "Genetic origin of child". I repeat it here for ease of reference:

> "No surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both commissioning parents or, if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents or, where the commissioning parent is a single person, the gamete of that person."

[46] The Surrogacy Group calls this the "Genetic Link Requirement". From a technical perspective, this is a slight misnomer. The provision does not merely require a genetic link, it requires a gamete from at least one commissioning *parent*. If a genetic link were to suffice, certain family members of would-be commissioning parents could donate gametes for the purposes of artificial fertilisation. Accordingly, where the Surrogacy Group has used the term "Genetic Link Requirement", I will simply refer to "section 294".

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[31] 92 of 1996.

[32] Section 300(1) of the Children's Act.

[33] Section 301(1) of the Children's Act.

[34] In terms of section 305(1)(b) of the Children's Act read together with section 305(7).

[47] The intended and actual effect of section 294 is unambiguous: all children born of a surrogate motherhood agreement must be conceived by using the gamete of at least one commissioning parent.

Does section 294 limit constitutional rights?

[48] I will answer this question by considering first the constitutional value of freedom, and subsequently the rights alleged to have been violated.

Value of freedom

[49] Our Constitution, "unlike its dictatorial predecessor, is value-based".[35] The rights in the Bill of Rights are sourced in constitutional values; these rights give effect to the founding values and must be construed consistently with them.[36] In interpreting the meaning of rights for the purpose of establishing whether they have been violated, we are consequently obliged to take constitutional values into consideration. These values function as interpretative aids through which we establish the meaning of constitutional rights.

[50] One of the constitutional values in section 1 of the Constitution includes the "advancement of human rights and freedoms".[37] O'Regan J explains in *NM* that this provision encourages, "the constitutional celebration of the possibility of morally autonomous human beings independently able to form opinions and act on them".[38]

[35] *Makwanyane* above n 16 at para 313.

[36] *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) (*NICRO*) at paras 21 and 23.

[37] Section 1(a) of the Constitution.

[38] *NM v Smith* [2007] ZACC 6; 2007 (5) SA 250 (CC); 2007 (7) BCLR 751 (CC) (*NM*) at para 145 per her minority judgment.

The importance of autonomy has likewise been highlighted in *Barkhuizen*[39] and *Jordan.*[40]

[51] As Gerald Dworkin explains, autonomy is a concept that bears many conceptions, encompassing "a tangled net of intuitions, conceptual and empirical issues, and normative claims".[41] Recent academic trends – which echo the lessons of our own past – point to the inherently relational character of the term: to be autonomous is to be socially and politically connected, rather than an agent of unfettered individual choice.[42] This Court's repeated endorsement of ubuntu underscores this point.[43] In *Pillay*, Langa CJ explained 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".[44] Autonomy is a necessary, but socially embedded, part of the value of freedom.[45]

[52] What animates the value of freedom is the recognition of each person's distinctive aptitude to understand and act on their own desires and beliefs. The value recognises the inherent worth of our capacity to assess our own socially-rooted situations, and make decisions on this basis. By exercising this capacity, we define

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[39] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 57.

[40] *S v Jordan* [2002] ZACC 22; 2002 (6) SA 642 (CC); 2002 (11) BCLR 1117 (CC) (*Jordan*) at para 53.

[41] Dworkin *The Theory and Practice of Autonomy* (Cambridge University Press, Cambridge 1988) at 7. At 6, Dworkin describes autonomy as "a term of art [that] will not repay an Austinian investigation of its ordinary uses".

[42] See, for example, Oshana *Personal Autonomy in Society* (Ashgate, Hampshire 2006); Meyers (ed) *Being Yourself: Essays on Identity, Action, and Social Life* (Rowman and Littlefield, Lanham 2004); Mackenzie and Stoljar (eds) *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (Oxford University Press, New York 2000); Sherwin "A Relational Approach to Autonomy in Health Care" in Sherwin (ed) *The Politics of Women's Health: Exploring Agency and Autonomy* (Temple University Press, Philadelphia 1998).

[43] See, for instance, *Makwanyane* above n 16 at paras 225-7; *Dikoko v Mokhatla* [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) at paras 68-9.

[44] *MEC for Education: Kwazulu-Natal v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (*Pillay*) at para 53 quoting Gyekye *Person and Community: Ghanaian Philosophical Studies* (1992) reprinted as "Person and Community in African Thought" in Coetzee and Roux (eds) *Philosophy from Africa: A Text with Readings* (Oxford University Press, Cape Town 1998) at 321.

[45] See further, *Meyers* "Intersectional Identity and the Authentic Self?: Opposites Attract!" in Mackenzie and Stoljar above n 42.

our natures, give meaning and coherence to our lives, and take responsibility for the kind of people that we are.[46] This, in turn, enriches our community and contributes to healing the divisions of the past. Our Constitution actively seeks to free the potential of each person; a goal which can only be achieved through a deep respect for the choices each of us makes.

Freedom and security of the person

[53] The value of freedom vivifies the rights protected by section 12 of the Constitution.[47] This is especially true of section 12(2)(a); a right that centres on the ability to make "decisions".[48] The freedom protected by the right is not, however, coextensive with autonomy. The ambit of section 12(2)(a) is narrower and more specific. In the absence of previous judicial analysis by this or other courts, the sections which follow outline my interpretation of section 12(2)(a) in the context of the present case.

[54] This Court has adopted a purposive[49] and contextual[50] approach to interpreting the Constitution. In doing so, we are enjoined to provide a broad and generous

[46] *Dworkin* above n 41 at 20.

[47] Section 12 of the Constitution states:

> "(1) Everyone has the right to freedom and security of the person, which includes the right—
>
> (a) not to be deprived of freedom arbitrarily or without just cause;
>
> (b) not to be detained without trial;
>
> (c) to be free from all forms of violence from either public or private sources;
>
> (d) not to be tortured in any way; and
>
> (e) not to be treated or punished in a cruel, inhuman or degrading way.
>
> (2) Everyone has the right to bodily and psychological integrity, which includes the right—
>
> (a) to make decisions concerning reproduction;
>
> (b) to security in and control over their body; and
>
> (c) not to be subjected to medical or scientific experiments without their informed consent."

[48] In *Barkhuizen* above n 39 at para 57, Ngcobo J described autonomy as "the very essence of freedom".

[49] *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 15.

reading in determining the ambit of constitutionally enshrined rights.[51] Because of the inclusion of the limitation clause in section 36, rights should not be interpreted in a miserly fashion. In the section that follows, I consider the meaning of section 12(2)(a) within the context of our jurisprudence on "freedom" as a whole; subsequently situating section 12, and then section 12(2)(a), within this framework.

Freedom

[55] This Court has repeatedly expressed a reluctance to examine the "philosophical foundation or the precise content" of freedom.[52] This is an understandable approach in light of the numerous specified rights that deal with different aspects of the broader idea. The Bill of Rights safeguards, for instance, freedom of religion; belief and opinion; expression; association; movement and residence; and trade, occupation and profession.[53] These explicitly designated rights should be interpreted on their own terms in order to give credence to their particular inclusion. The majority in *Ferreira* found further that to ascribe a general right to freedom on the basis of section 11(1) of the interim Constitution[54] would undermine the role of other arms of state in regulating conduct.[55] The same Court nevertheless concluded that the Constitution

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[50] *Makwanyane* above n 16 at para 9.

[51] *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) at para 53; *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) (*National Coalition 1998*) at para 21.

[52] *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer Port Elizabeth Prison* [1995] ZACC 7; 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC) at para 10.

[53] Sections 12, 15, 16, 18, 21 and 22 of the Constitution respectively.

[54] Section 11 of the interim Constitution provided:

> "(1) Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.
>
> (2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment."

[55] *Ferreira v Levin NO; Vryenhoek v Powell NO* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (*Ferreira*) at para 183. See also the discussion of *Lochner v New York* 198 US 45 (1905) in Bishop and Woolman "Freedom and Security of the Person" in Woolman et al (eds) 2 ed (Juta & Co Limited, Cape Town 2012) at 40–15.

does protect certain "residual freedom[s]" that fall outside of specifically identified rights.[56]

[56] Chaskalson P summarises the Court's position as encompassing a two-stage inquiry: [57]

(a) Is the right not otherwise protected adequately by another provision in Chapter 3 of the interim Constitution?
(b) If not, is the "residual right" claimed of a character appropriate for protection under section 11(1) of the interim Constitution?

[57] The Court defined "character appropriate for protection" restrictively. It explained that "[t]he primary, though not necessarily the only, purpose of section 11(1) of the [interim] Constitution is to ensure that the physical integrity of every person is protected".[58] This characterisation suggests that it will only be in exceptional circumstances that freedoms not related to physical integrity will be protected. Because additional forms of freedom are safeguarded by other sections of the Bill of Rights, these exceptional circumstances must involve the curtailment of "fundamental" freedoms, and are "likely to be rare".[59]

[58] The reasons behind this general approach to "freedom" remain persuasive. However, in light of the enactment of the Constitution the dicta from *Ferreira* have been, to some degree, modified. To begin with, the analogous provision in the Constitution to section 11(1) of the interim Constitution, section 12(1), outlines in more detail what rights fall under the auspices of "freedom and security of the person". Notably, section 12(1) also includes those rights previously protected by section 11(2) of the interim Constitution. The whole of section 11 of the interim

[56] *Ferreira* id at para 174.

[57] Id at para 185.

[58] Id at para 170.

[59] Id at para 184.

Constitution is therefore to a large extent represented by section 12(1) of the Constitution.[60]

[59] This is significant because the Court in *Ferreira* grounded the "residual" right to freedom only in section 11(1) of the interim Constitution. By combining section 11(1) and section 11(2) into a composite right, the Constitution alters this position. Now, all of the rights previously enumerated in section 11 of the interim Constitution are linked with the residual right to freedom in section 12(1) of the Constitution. Section 12(1), like section 11(1) in the interim Constitution, provides a *general* right to freedom, grounded in bodily security. Section 12(2), however, falls into a different category. As is the case with section 11(2) of the interim Constitution, section 12(2) – and, therefore, section 12(2)(a) – provides for a new, freestanding and definitionally-proscribed freedom right.

[60] This distinction makes good sense. The analysis of freedom in *Ferreira* as ordinarily a protection against physical impediment does not accord with section 12(2)'s explicit focus on *integrity*, and, in particular, on *psychological integrity*. As I read it, section 12(2) does not alter the general schematic approach to freedom adopted by the Court in *Ferreira*. Instead, it introduces a new freedom right, akin to those enumerated elsewhere in the Bill of Rights.

[61] One possible impediment to this approach is the notable fact that section 12(2) is included under the broad heading "Freedom and security of the person".[61] The *right* to freedom and security of the person is then protected specifically by section 12(1). I do not think that this suggests section 12(2) is different in kind to the other freestanding freedom rights. As I see it, section 12(2)'s unique position is attributable to section 12(1) and 12(2) sharing the purpose of protecting particular freedoms per se, rather than of protecting freedoms in order to ensure secondary

[60] Section 12 of the Constitution is quoted at n 47 above, and section 11 of the interim Constitution is quoted at n 54 above.

[61] Section 12 of the Constitution is headed "Freedom and security of the person".

entitlements. As the title of the section suggests, section 12 is an amalgam of freedom and security rights, brought together because both sets protect a person's ability to lead their lives without being subject to certain constitutionally prohibited impediments. It is because section 12(1) and section 12(2) share this underlying rationale that they are placed under the same heading.

[62] A further difference between the position under the interim Constitution and that under the Constitution is that the Bill of Rights' limitation clause is no longer disjunctively defined. Under the interim Constitution, in order to limit particular "higher order" rights, the limitation had to be "necessary" in addition to being "reasonable" and "justifiable".[62] In *Ferreira*, the majority of the Court relied on section 11(1) having to meet this higher threshold to argue that the right should not be given too wide a meaning.[63] In terms of the Constitution, all rights can be limited if doing so is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[64] The limitation clause thus no longer preserves the hierarchy at the limitation stage present in the interim Constitution. There is, therefore, no reason to think that any of the rights in the Bill of Rights should be restrictively defined. For this reason, section 12(2)(a), despite forming part of the general entitlement to freedom and security of the person, should be given as broad a reading as any other right.

Section 12

[63] I have held that section 12(1) continues to protect specific physical freedoms, along with a residual right to freedom more generally on exceptional occasions as detailed in *Ferreira*. By contrast, section 12(2) is a freestanding freedom right that should be interpreted broadly on its own terms.

[62] Section 33(1) of the interim Constitution.

[63] This wide approach was taken by Ackermann J in his minority judgment. See *Ferreira* above n 55 at para 49.

[64] Section 36(1) of the Constitution.

[64] As noted, section 12(1) speaks specifically of "the right to freedom and security of the person". This right principally provides procedural and substantive protection for any deprivation of physical liberty.[65] All five listed dimensions of the right deal with unwarranted incursions into the physical domain of individuals. The need for protection against these harms is grounded in our history; violence and physical deprivation of liberty was a regular feature of everyday life for many people.

[65] But the lessons of our past have taught us that freedom means more than just physical liberty. Section 12(2) thus protects "the right to bodily and psychological integrity". There is a close connection between the freedoms protected by our Constitution and "integrity". The Constitution enjoins us to actively turn away from indifference and move towards respect, empathy and compassion. The protection section 12(2) provides is grounded in these ideals. When interpreting the provisions of the Constitution, it is therefore incumbent on us to enhance the integrity of those who seek to rely on it.

[66] The importance of protecting bodily and psychological integrity has long formed part of our law,[66] and is now buttressed by the Constitution.[67] This right is especially important for women who may, for instance, decide to terminate a pregnancy in appropriate circumstances.[68] Section 12(2) is not, however, limited to preserving abortion rights: section 12(2)(c) further protects against medical or

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[65] See *Thebus v S* [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) at para 39; *De Lange v Smuts NO* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 22; *Nel v Le Roux NO* [1996] ZACC 6; 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC) at para 12; *Bernstein v Bester NO* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 145.

[66] See, for example, *Minister of Justice v Hofmeyr* [1993] 2 All SA 232 (A) at 145H-I:

> "One of an individual's absolute rights of personality is his right to bodily integrity. The interest concerned is sometimes described as being one in corpus, but it has several facets. It embraces not merely the right of protection against direct or indirect physical aggression or the right against false imprisonment. It comprehends also a mental element."

[67] See *Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School* [2013] ZACC 25; 2014 (2) SA 228 (CC); 2013 (9) BCLR 989 (CC) (*Welkom*) at para 115.

[68] *H v Fetal Assessment Centre* [2014] ZACC 34; 2015 (2) SA 193 (CC); 2015 (2) BCLR 127 (CC) at para 1; *Christian Lawyers' Association v Minister of Health* 2005 (1) SA 509 (T) 518C-F.

scientific experiments without informed consent. This suggests that section 12(2) should be interpreted generously to cover all instances where the bodily or psychological integrity of a person is harmed. These infringements can take a number of guises, but should be interpreted within the general rubric of "freedom and security of the person". The emphasis in section 12(2) is thus on whether a law or conduct deprives a person of freedom or security, broadly understood. This general guiding principle is necessarily wider than the "freedom and security of the person" protected by section 12(1); incorporating, as it must, considerations of bodily and psychological integrity.

[67] The drafting history of section 12(2) supports this view. Until a very late version, the section protected "security of the person" rather than "bodily and psychological integrity".[69] The change in language illustrates a shift in emphasis away from a sanctuary approach that protects a person's corpus, towards one which acknowledges the multifaceted lives people may choose to live by providing for a more expansive range of bodily and psychological protections. This adjustment in focus coheres with the lessons of our past. The defilements of integrity that characterised our pre-constitutional era extended beyond violations of personal security. The legal structure that marked and marred the apartheid era was one of disregard and disrespect. The Constitution thus enjoins us to develop a new understanding of "freedom and security of the person" that demonstrates respect and attentiveness to the decisions of others. The inclusion of section 12(2) is one facet of this new approach.

[68] That historically-grounded shift builds on the recognition in our common law – chiefly in the law of delict – that a person's psychological integrity, independent of their body, can be harmed in numerous ways by the actions of others.[70] In *NM*,

[69] See Woolman above n 55 at 40–4.

[70] See, for example, *Els E v Bruce; Els J v Bruce* 1922 EDL 295; *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* [1972] ZASCA 1; 1973 (1) SA 769 (A); *Barnard v Santam Bpk* [1998] ZASCA 84; 1999 (1) SA 202 (SCA).

Madala J explained why the non-consensual disclosure of confidential medical information, including the HIV status of the applicants, can be the basis of a claim for damages:

> "Private and confidential medical information contains highly sensitive and personal information about individuals. The personal and intimate nature of an individual's health information, unlike other forms of documentation, reflects delicate decisions and choices relating to issues pertaining to bodily and psychological integrity and personal autonomy."[71]

[69] This description appositely highlights the harm that emerges from the psychological stress caused by the removal of the applicants' *choice* to disclose medical information, with subsequent damaging effects. Disclosure of HIV status may be liberating or cathartic if done with the permission of the person affected. To do so without the backing of this decision is, however, an "assault" on the person's psychological integrity.[72] The autonomy of the person involved is severely compromised, irrespective of the outcome. This is so even if the disclosure is ostensibly for the public good. A stifling of the ability to make a decision can therefore be a violation of psychological integrity, provided the consequences are of an invidious nature.

Section 12(2)(a)

[70] Section 12(2)(a) protects the right "to make decisions concerning reproduction". Conspicuously, it is the decision that is protected, rather than any particular choice. Consequently, a person relying on this right need only show that their inability to make the decision – resultant upon some law or conduct – has caused (at least) psychological harm. Section 12(2)(b) then also protects "security in and control over [a person's] body". These two rights are often mutually reinforcing. They remain, however, independently enforceable. In light of our history, the

[71] *NM* above n 38 at para 40.

[72] *NM v Smith* [2005] 3 All SA 457 (W) at para 46.

Constitution's account of freedom, and the purpose of section 12, it is fitting that these rights are separately protected. Both decisions concerning reproduction and the possible physical implications of these choices are crucial to an individual's wellbeing.

[71] AB is a single person who intends to have a child by way of surrogacy but is unable to donate a gamete of her own. Clearly, this process has no physical implications for her. The same can be said of any single person or couple who wishes to rely on surrogacy without donating a gamete of their own. Therefore, a constitutional challenge of section 294 cannot be grounded in section 12(2)(b).

[72] Instead, it falls to be determined whether section 294 objectively prevents persons from making a decision concerning reproduction in a manner which is detrimental to their psychological integrity in terms of section 12(2)(a). This inquiry comprises three parts:

(a) Does the impugned law or conduct prevent or inhibit a person or group of persons from making a decision?
(b) If the answer to (a) is yes, does the decision concern reproduction?
(c) If the answer to (b) is yes, does preventing or inhibiting the decision detrimentally affect the psychological integrity of the person or persons concerned?

Each of these questions is considered in turn below with reference to section 294.

Decision

[73] Section 294 forbids a court from sanctioning a surrogate agreement unless the gamete of at least one commissioning parent is used in the conception of the child. An implication of this is that a prospective parent who is both conception and pregnancy infertile, and who does not have a relationship partner who is able to

donate a gamete of their own or carry a pregnancy to term, is precluded from considering surrogacy as an option in order to have a child.

[74] Importantly, choosing to have a child by way of surrogacy is otherwise available to a person in this position. The wonders of modern medical technology mean that it is now physically viable to have a child using surrogacy. Before the enactment of section 294, it was possible for a person in the position described to choose to have a child in this way. Alternatively, this person could have chosen to adopt, or to not have a child at all. The capacity to decide is an implication of what is physically possible in the world – it has nothing to do with any positive act by the state. The state foreclosing a reproductive option necessarily impacts upon a person's ability to make reproductive decisions, which is protected by section 12(2)(a). This, however, is distinguishable from the state guaranteeing the realisation of this choice. As stated earlier, section 12(2)(a) does not protect or guarantee any particular choice. The effect of section 294 is to remove one option that would otherwise have been available. This axiomatically limits the affected person's ability to make decisions. For this reason, the answer to the first leg of the section 12(2)(a) test must be "yes".

Concerning reproduction

[75] Is the decision made by the affected persons, including AB, one "concerning reproduction"? It is alluring in this regard to restrict matters concerning reproduction to a person's own physical reproductive capacities. To do so would not be in line with the generous approach to rights adopted by this Court. A plain reading of the word "reproduction" suggests that it incorporates all matters to do with the "process of producing new individuals of the same species by some form of generation".[73] One manner in which this process could occur is by a surrogate mother bearing a child for a single commissioning parent who cannot donate a gamete. While the decision itself does not result in physical implications for the affected person, it does have a reproductive outcome in the form of the conception and birth of a child. This is

[73] *Oxford English Dictionary* (Clarendon Press, Oxford 1996).

patently a reproductive act. For this reason, the decision is one concerning reproduction, and the answer to the second question must also be "yes".

[76] The second judgment comes to a different interpretation. It finds that section 12(2)(a) protects only reproductive decisions that have a physical effect on the body of the person seeking to rely on the right. It accordingly concludes that the choice made by a commissioning parent, who cannot donate a gamete, to enter into a surrogate motherhood agreement would not be protected by section 12(2)(a), no matter the psychological impact of the deprivation.[74]

[77] In reaching this conclusion, the second judgment notes that section 11 of the interim Constitution has been found to principally protect each person's physical integrity. It correctly observes that "[i]n *Ferreira* this Court held that this is how the guarantee of 'freedom (liberty) and security of the person' is ordinarily understood".[75] But the focus in *Ferreira* was on *freedom and security of the person*; a right now protected explicitly by section 12(1). *Ferreira* should therefore not be used as an ill-fitting interpretative crow-bar to pry open other freedom rights. As I have shown, section 12(2) must be given its own meaning.[76] I am also unconvinced that section 12(2) "deviates" from section 11 primarily by extending the ambit of the entitlements given by section 11 to "private relationships".[77] Not only does section 12(1) already explicitly protect certain acts in the private sphere,[78] but section 12(2) may also apply between citizen and state.[79]

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[74] The second judgment does not find that section 12(2) *as a whole* is limited to instances where there has been harm to a person's bodily integrity. A person may still, for instance, have the right – in terms of section 12(2)(c) – not to be subjected, without consent, to a scientific experiment composed only of psychological harm. Instead, the judgment concludes that section 12(2)(a) in particular is limited to cases where the person's body is affected.

[75] Second judgment at [309].

[76] [60]-[62].

[77] Second judgment at [310].

[78] Section 12(1)(a) states that "everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either *public or private* sources". My emphasis.

[79] For instance, nothing precludes section 12(2)(c) from protecting against non-consensual medical or scientific experiments conducted in the public domain.

[78] The second judgment next turns to the application of section 12(2) in the abortion context in order to show that the right's application is limited to cases where a person is physically affected. It points out that the harm of preventing a woman from choosing to terminate a pregnancy has previously been linked to her bodily integrity.[80] But this case law does not say that the harm caused by precluding the choice to have an abortion is protected *only* because it affects the body of the person making the decision. To the contrary, this Court's decision in *H* makes clear that—

> "[t]oday, having regard to the fundamental right of everyone to make decisions concerning reproduction . . . the harm may simply be seen as an infringement of the right of the parents to exercise a free and informed choice in relation to these interests."[81]

This is supported by academic writing, which stresses that the impairment caused by preventing women from having an abortion is grounded in depriving them of choice, and the social and personal impacts that doing so may have.[82]

[79] The second judgment reasons that, "[t]he right relating to reproductive autonomy in section 12(2)(a), confronts directly the fact that many women do not enjoy security in and control over their own bodies. To that end, the focus is on the individual woman's own body and not a body of another woman".[83] But the right "to security in and control over [one's] body" is expressly protected by section 12(2)(b), rather than section 12(2)(a). Moreover, the final draft of the Constitution specifically extended the ambit of section 12(1)(a) from decisions concerning the "body" to decisions concerning "reproduction". This suggests that section 12(2)(a) was specifically geared to protecting all aspects of reproduction, including the decision of

[80] Second judgment at [312] – [313].

[81] *H* above n 68 at para 59.

[82] See, for instance, Sumner *Abortion and Moral Theory* (Princeton University Press, Princeton 2014) at 9.

[83] Second judgment [313].

whether or not to have an abortion in permissible circumstances. Even in the context of termination of pregnancy, section 12(2)(a) has therefore not been limited to protecting only against physical harm.

[80] The comparative law that the second judgment relies on does not contradict this broader reading of section 12(2)(a). The Canadian, Indian and United States authorities referred to all identify the psychological harm of preventing the decision in question.[84] None of these cases say that these decisions are protected *only* because it is the person's physical corpus that is affected. Moreover, as the second judgment notes, none of these jurisdictions have a specific, constitutionally protected right to "make decisions concerning reproduction".[85] The Canadian and Indian Constitutions – those closest to our own – instead protect personal liberty and security of the person in a manner akin to our section 12(1). The comparative law thus does not support the interpretation that only physical harm to a person's body can give rise to a violation of section 12(2)(a).

[81] Fundamentally, the second judgment fails to take heed of the fact that "bodily" and "psychological" in the right to "bodily and psychological integrity" are two different concepts. Yes, one form of infringement of the section 12(2) right may have elements that relate to both bodily and psychological aspects. An example would be a medical or scientific experiment that is not only physically invasive, but also causes psychological trauma to the person on whom it is being performed. But another act may impugn only the psychological integrity of the affected person. The denial of a person who is conception and pregnancy infertile the opportunity to have a child by means of surrogacy is one example. I see no reason why section 12(2)(a) should be read so restrictively as not covering this instance as well. I next deal more fully with psychological integrity.

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[84] See *R v Morgentaler* [1988] 1 S.C.R. 30 at 37; *New Brunswick (Minister of Health and Community Services) v G (J)* [1999] 3 S.C.R. 46 at p. 49; *Carter v Canada (Attorney General)* [2015] 1 S.C.R 331 at para 64; *Suchita Srivastava v Chandigarh Administration AIR* 2010 SC 235 at para 11; *Roe v Wade* 410 U.S. 113 (1973) at VIII; *Eisenstaedt v Baird* 405 U.S (1972) at para 154.

[85] Second judgment at [314].

Psychological integrity

[82] Whether the psychological integrity of a person has been harmed is a subjective question. The Constitution acknowledges that we live in a diverse society, and that people's mental and emotional responses may vary markedly. Whether law or conduct violates section 12(2)(a), on the other hand, is an objective determination. In deciding whether section 294 violates the right to psychological integrity, I therefore focus on the propensity of the impugned law to bring about psychological harm, even if not in all cases.

Infertility

[83] The effect of section 294 on an affected person's psychological integrity must be seen within the context of their infertility. As previously suggested, the effect of Chapter 19 of the Children's Act is to regulate the use of surrogacy. Part of this regulatory regime is section 295(a), which restricts the use of surrogacy arrangements to those who are pregnancy infertile.[86] This shows statutory recognition for the unique difficulties infertile people face. Before turning to section 294 specifically, it is worth noting why this legislative sanction exists.

[84] As Judith Daar explains, "[t]he emotional and psychological devastation wrought by the recognition or diagnosis of infertility cannot be overstated. Numerous studies have reported that the inability to reproduce takes a severe toll on both men and women."[87] Many people describe infertility as "the most upsetting experience of their lives".[88] The psychological harm is especially damaging for women. An

[86] [40].

[87] Infertility problems are as likely to occur in men as in women. See Daar "Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms" (2013) 23 *Berkeley Journal of Gender, Law & Justice* 30 at 14. See also Sternke and Abrahamson "Perceptions of Women with Infertility on Stigma and Disability" (2015) 33 *Sexuality and Disability* 3.

[88] See, for example, Freeman et al "Psychological Evaluation and Support in a Program of In Vitro Fertilization and Embryo Transfer" (1985) 43 *Fertility & Sterility* 48 who note that 50 per cent of women and 15 per cent of men being treated for infertility described it in this way.

influential study, for instance, found that many infertile women suffer severe depression equivalent to terminal cancer.[89] The psychological trauma experienced by all infertile people is further heightened by an abiding sense of social shame, leading them to conceal their infertility. The stigma that attaches to infertility is damaging and pervasive, especially in developing countries like our own.[90]

[85] These conclusions are supported in our own society by the expert opinion of Ms Rodrigues, a clinical psychologist, who points to the "societal marginalisation of infertile people in South Africa". For many South Africans who identify as male, not having a child of one's own is considered a mark of failed masculinity.[91] This leads to these men's social status being detrimentally harmed: "the community did not view them as adults, let alone as a 'man'."[92] The same is true of South African women. One study group explained that women "are not allowed to wear a 'doek' . . . unless they have a child. Socially, this lack of apparel victimises infertile women and subjects them to verbal, emotional and physical abuse."[93] In the Zulu culture, there is even a disparaging term for women who cannot bear children: "inyumba".[94]

[86] It can be inferred from this body of work that infertility is an unenviable and psychologically harmful condition. It is harmful both because it prevents people from having children of their own, and because it results in serious social exclusion and stigma. Where possible, our state should therefore look to alleviate these harmful effects. As explained in *S v Williams*:

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[89] Domar et al "The Prevalence and Predictability of Depression in Infertile Women" (1992) 58 *Fertility and Sterility* 1158.

[90] Rouchou "Consequences of Infertility in Developing Countries" (2013) 133 *Perspectives in Public Health* 174.

[91] Dyer et al "'You are a man because you have children': Experiences, reproductive health knowledge and treatment-seeking behaviour among men suffering from couple infertility in South Africa" (2004) 19 *Human Reproduction* 960.

[92] Id.

[93] Dyer et al "'Men leave me as I cannot have children': Women's experiences with involuntary childlessness" (2002) 17 *Human Reproduction* 1663.

[94] The term is a degrading title given to women who cannot bear children.

> "The Constitution has allocated to the State and its organs a role as the protectors and guarantors of those rights to ensure that they are available to all. In the process, it sets the state up as a model for society as it endeavours to move away from a violent past. It is therefore reasonable to expect that the State must be foremost in upholding those values which are the guiding light of civilised societies."[95]

This responsibility includes the negative obligation to avoid placing additional hurdles in the way of an infertile person's attempts to temper the consequences of infertility. Infertility is as much a social as a physical condition. The state should avoid standing in the way of decisions that people take to mitigate the socio-psychological harm of this condition, including reproductive decisions on how to have a child using modern reproductive technologies.

[87] Because infertility is experienced differently by women and men, and because social stigma plays a role in determining the psychological effects it has, infertility may be a phenomenon independent of bearing children. The psychological harm of infertility is to some extent *derived from the infertility itself*, rather than the inability to bear a child. As Katherine Pratt explains, "[i]t is not the child that is the loss . . . the infertility is the loss".[96] Understood in this manner, infertility affects the psychological integrity of a person by placing them in a socially precarious situation. Being able to choose to have a child is almost universally accepted as central to "identity and meaning in life".[97] Stripping a person of this choice has far-reaching personal and social ramifications. Infertility is thus harmful partly because it removes the ability to elect to have a child; a decision almost universally considered important.

[88] This conclusion is supported by a substantial body of academic work that shows the psychological harms associated with infertility. It shows that "the nature of

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[95] *S v Williams* [1995] ZACC 6; 1995 (3) SA 632 (CC); 1995 (7) BCLR 861 (CC) at para 77.

[96] Pratt "Inconceivable? Deducting the Costs of Fertility Treatment" (2004) 89 *Cornell Law Review* 1121.

[97] Robertson *Children of Choice: Freedom and the New Reproductive Technologies* (Princeton University Press, Princeton 1994) at 24.

the suffering [brought about by infertility] is often wrapped up in (relational) notions of personal identity (regarding personal expectations and social roles), forming special relationships, pursuing valued life projects and so on".[98] The ensuing feeling of disempowerment permeates the person's everyday affairs, negatively affecting their psychological wellbeing.

[89] Infertility therefore has the capacity to detrimentally affect the psychological integrity and wellbeing of a person at least partly because it restricts their ability to make reproductive decisions, within the context of strong social expectations. In my view, much of the harm infertility brings has to do with the forced deprivation of choice in an area of life that humans consider particularly significant. Infertility cruelly dispossesses a person of the capacity to decide whether or not to have a child; where making this decision has extensive social implications.

Section 294

[90] It is against this backdrop that the effect of section 294 should be understood. Surrogacy meaningfully contributes to ameliorating the harms of infertility because it provides a pathway through which infertile people can exercise their right to make reproductive decisions. Those who use surrogacy are able to elect to join the ranks of parenthood. The great benefit of surrogacy is that it opens reproductive avenues for those who would otherwise be unable to have children of their own. Surrogacy *itself* allows the infertile to ameliorate the psychological harms of infertility.

[91] Regrettably, section 294 has the opposite effect for those who are both pregnancy infertile and cannot contribute a gamete to conception. Chapter 19 unambiguously recognises that because infertility puts people in a position that is harmful to their psychological integrity, they should be allowed to pursue surrogacy as a means of having a child of their own. But section 294 prevents a segment of this

[98] Brown et al "Reframing the Debate around State Responses to Infertility: Considering the Harms of Subfertility and Involuntary Childlessness" (2016) *Public Health Ethics* 1.

same Class of people from accessing surrogacy to their psychological detriment. Moreover, these psychological hurts are visited on a group who are especially affected by their infertility because they are not only pregnancy infertile, but are also conception infertile.[99] As the facts in this case cogently illustrate, this group's ability to make reproductive decisions are already significantly restricted. Section 294 imposes and compounds psychological harm for a vulnerable constituency. It does so by limiting their ability to make reproductive decisions. This limitation is a violation of section 12(2)(a).

[92] It must be stressed that it is not the *inherent* harm of infertility that triggers section 12(2)(a). Instead, it is the *impact* section 294 has on the psychological integrity of conception and pregnancy infertile people that limits the right. Section 294 prevents a conception and pregnancy infertile person from moderating the harmful consequences of their infertility by using surrogacy to have a child of their own.

[93] Accordingly, I disagree with the second judgment's conclusion that "[w]hat disqualifies AB, and others similarly placed, is nothing but the biological, medical or other reasons as contemplated in section 294".[100] Section 294 creates a *legal* barrier between a conception and pregnancy infertile person and the use of surrogacy. While psychological harm is caused by the person's infertility, it is the legal barrier blocking access to surrogacy for conception and pregnancy infertile persons that brings about the harm that triggers section 12(2)(a). Section 294 takes the option of surrogacy away, and thus becomes the cause of continuing psychological trauma: if the provision did not exist, then a conception and pregnancy infertile person could choose to use surrogacy in order to have a child.

[99] On these definitions, see n 9 above.

[100] Second judgment at [299].

[94] On the one hand, being conception and pregnancy infertile is in itself psychologically harmful. But a person's rights are not violated by virtue of their infertility. On the other hand, where a law results in detrimental consequences for a person's psychological integrity by preventing them from making a decision concerning reproduction, it constitutes a violation of section 12(2)(a). It is because section 294 has the latter effect – it precludes the making of a reproductive decision – that it constitutes a rights infringement.

[95] The second judgment takes a different view. It holds that it is the "personal choice" of a single, conception and pregnancy infertile person like AB that precludes them from using surrogacy.[101] It explains:

> "In the case where the commissioning parent is single, the impugned provision provides for that parent, where a gamete of that parent can be used in the creation of the child. But if that parent cannot contribute a gamete, the parent still has available options as afforded by the law: A single parent has the choice to enter into a permanent relationship with a fertile parent, thereby qualifying the parent for surrogacy. If the infertile commissioning parents, or parent, decide not to use the available legal options, they have to live with the choices they made."[102]

[96] In sum, the second judgment argues that if a single, conception and pregnancy infertile person wishes to have a child, they are obliged to enter into a permanent relationship with a fertile person who is willing to contribute a gamete to the conception of a child by way of surrogacy. I cannot endorse this argument. In *Fourie*, this Court noted that "South Africa has a multitude of family formations that are evolving rapidly as our society develops, so that it is inappropriate to entrench any particular form as the only socially and legally acceptable one".[103] A prejudicial law cannot be defended on the basis that other forms of family life are open to an affected

[101] Second judgment at [301].

[102] Second judgment at [302].

[103] *Minister of Home Affairs v Fourie* [2005] ZACC 19; 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC) (*Fourie*) at para 59.

person. The decision to be single, or to follow any other relationship path, is deeply personal. It is not appropriate for courts to interfere in this decision making process. Consequently, it cannot be argued that section 294 does not lead to psychological harm because an infertile person can hypothetically find a life partner.

[97] For all of these reasons, I conclude that section 294 objectively limits the right to psychological integrity by preventing AB and others from making decisions concerning reproduction in terms of section 12(2)(a) of the Constitution. A generous, contextual and purposive reading of the right necessitates this conclusion. In my view, this is the pivotal and fundamental right that section 294 violates. In the sections that follow, I assess to what extent the effect section 294 has on the right to equality augments the reasoning underlying this conclusion.

Equality

[98] The equality challenge is two-pronged. First, the applicants argue that section 294 differentiates between persons who are capable of contributing a gamete to the conception of a child, and those who are not.[104] This is differentiation on the basis of conception infertility. Second, the applicants argue that section 294 differentiates between persons who are unable to contribute a gamete to the conception of a child and intend to use IVF, and those who are unable to contribute a gamete to the conception of a child and intend to use a surrogacy arrangement.[105] This, they claim, is differentiation on the basis of pregnancy infertility.

[99] The Minister rightly concedes that both of these scenarios amount to differential treatment. The differentiation in the first case stems from section 294 requiring the use of a gamete from at least one commissioning parent in the conception of a child by way of surrogacy. Therefore, those who are able to

[104] I refer to this as the "first differentiation".

[105] I refer to this as the "second differentiation".

contribute a gamete are permitted to conceive a child using a surrogacy agreement, while those who cannot, may not. This, in fact, is the intended effect of the provision.

[100] In the second case, the differentiation stems from contrasting approaches in two sets of laws. Where a person or persons wishes to use IVF treatment in order to have a child, section 68(1)(k) of the National Health Act allows the Minister of Health to make regulations "regarding the bringing together outside the human body of male and female gametes". The Regulations Relating to Artificial Fertilisation of Persons, published in March 2012 (and updated in September 2016), now regulate the use of IVF in the conception of a child (IVF regulations).[106] In terms of these regulations, the recipient of IVF treatment is not prevented from using both male and female donor gametes of their choice.

[101] Section 294 of the Children's Act, on the other hand, requires that at least one of the gametes used in the conception of a child by way of surrogacy belong to a commissioning parent. Section 294 therefore prohibits the use of both male and female donor gametes of the commissioning parent or parents' choice in the conception process. The IVF regime does not require that the parent or parents of a child to be conceived through IVF donate a gamete, while the surrogacy regime does. This amounts to differential treatment.

[102] In *Harksen*, this Court adopted a multistage process for determining if law or conduct violates the right to equality.[107] Establishing whether the impugned law or

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[106] See Regulations Relating to Artificial Fertilisation of Persons, GN R1165 *GG* 40312, 30 September 2016. These regulations repealed the previous Regulations Relating to Artificial Fertilisation of Persons, GN R175 *GG* 35099, 2 March 2012.

[107] *Harksen v Lane NO* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) (*Harksen*) at paras 50-3. The approach was summarised by Goldstone J, at para 54, as follows:

> "(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1) [of the interim Constitution]. Even if it does bear a rational connection, it might nevertheless amount to discrimination.
>
> (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:

conduct differentiates between people or categories of people is the first stage of that process. If differentiation is established, it must next be determined whether the differentiation bears a rational connection to a legitimate government purpose.[108]

Rational connection

[103] If law or conduct does not bear a rational connection to a legitimate government purpose, then it violates section 9(1) of the Constitution. The High Court found that the second differentiation does not reach this threshold, and that section 294 therefore violates the right to equality.[109]

[104] I am unpersuaded by this reasoning. As explained in *Weare*, "[t]he question is not whether the government could have achieved its purpose in a manner the court feels is better or more effective or more closely connected to that purpose. The

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(i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution)."

This methodology was endorsed under the Constitution in *National Coalition 1998* above n 51 at paras 15 and 17.

[108] See also *Prinsloo v Van der Linde* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at paras 24-6. In *National Coalition 1998* above n 51 at para 18, the Court found that "the rational connection inquiry would be clearly unnecessary in a case in which a court holds that the discrimination is unfair and unjustifiable". I nevertheless deal briefly with section 9(1), as it was the basis of the finding that section 294 violates the right to equality in the High Court.

[109] See the High Court judgment above n 12 at para 87.

question is whether the means the government chose are rationally connected to the purpose, as opposed to being arbitrary or capricious".[110] As more fully discussed below, the purpose of section 294 is principally to ensure that the best interests of the child to be born are safeguarded. In the case of surrogacy arrangements, the commissioning parent does not carry the child. This is significantly different to cases where conception is realised through IVF treatment of one of the commissioning parents. That is reason enough to conclude that the differentiation is not arbitrary or capricious. Section 294 is therefore not constitutionally invalid on the basis of section 9(1).

Discrimination

[105] If section 9(1) has not been violated, the next stage of the *Harksen* test is to determine if the differentiation amounts to discrimination. If the differentiation is on a ground listed in section 9(3), it is necessarily discriminatory. In oral argument, counsel for the Surrogacy Group conceded that there was no differentiation on a listed ground. I proceed on the assumption that this is correct. It must therefore be determined whether there is discrimination on an unlisted ground. The Court in *Harksen* found that, "[t]here will be discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner".[111] In the same decision, Goldstone J "caution[ed] against any narrow definition" of discrimination.[112] Determining whether there has been discrimination is an objective question, independent of the intentions of the Legislature.[113]

[110] *Weare v Ndebele NO* [2008] ZACC 20; 2009 (1) SA 600 (CC); 2009 (4) BCLR 370 (CC) at para 46.

[111] *Harksen* above n 107 at para 47.

[112] Id at para 50.

[113] *City Council of Pretoria v Walker* [1998] ZACC 1; 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) at para 43.

[106] The unlisted ground that underpins the alleged discrimination in the case of the first differentiation is conception infertility. It must therefore be determined if differentiation on the basis of conception infertility has the capacity to impair the fundamental dignity of those who are both conception and pregnancy infertile, or adversely affect them in a comparably serious manner. In my view, the essential components necessary to come to the conclusion that it does are to be found in the violation of section 12(2)(a) already established. Those who are pregnancy infertile, but not conception infertile, can use surrogacy to ameliorate the psychological harms of infertility. By contrast, those who are both conception and pregnancy infertile cannot. This raises the differentiation to the level of discrimination.

[107] The harm to psychological integrity that infertility brings, and which results in discriminatory treatment, is buttressed by our dignity jurisprudence. The section which follows illustrates in more detail the effect section 294 has on the dignity of those negatively affected by it.

Dignity

[108] The Constitution's understanding of dignity is rooted in our past. Specifically, it is rooted in a recognition that indifference to the concerns of other members of society leads to "a culture of retaliation and vengeance".[114] Thus, our Constitution acknowledges that protecting and promoting diversity of thought and action is a requirement for human flourishing, and for community building. It is only by accepting that the opinions and decisions of each individual should be respected and encouraged that dignity is ensured. The right to dignity "requires us to acknowledge the value and worth of all individuals in a society".[115]

[109] This is particularly true in the context of decisions concerning reproduction. As Michelle O'Sullivan explains, "[t]he history of reproductive rights in South Africa

[114] *Makwanyane* above n 16 at para 218.

[115] *National Coalition 1998* above n 51 at para 28.

is a history of pervasive, highly invasive regulation".[116] Marriage law subjected women to the will of their husbands, relegated them to the status of perpetual minors, and limited their capacity to make reproductive decisions. Only in 1993 were women considered capable of being legal guardians of their own children, including for the purposes of planning parenthood. Abortion was criminalised, and those who attempted to use it were hounded and victimised. In addition, racist population control policies sought to control the fertility of black people, including through the use of injectable contraceptives.[117]

[110] Section 294 strips Classes of persons, including those who are both conception and pregnancy infertile, of the power to choose to have a child using available reproductive technology. The removal of this choice both limits the ability of those persons to construct their reproductive lives in a manner that adheres to their own "conscience and convictions", and prevents society from enjoying what may be a beneficial new form of family life.[118] While section 294 remains in force, we cannot explore the benefits of this kind of kinship. Instead, section 294 pushes those in AB's position to the margins of society.

Biology

[111] Section 294 is targeted at prospective parents who are unable to contribute a gamete to a surrogacy arrangement. It is because of a biological condition, and the suspected consequences thereof, that section 294 exists. If AB were able to contribute

[116] O'Sullivan "Reproductive Rights" *Constitutional Law of South Africa* 2 ed (2012) vol 2 at 37-17.

[117] Id.

[118] This Court has, on several occasions, connected the ability to make autonomous decisions with the meaning of dignity. In *Mayelane v Ngwenyama* [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC) at para 73, the right to dignity is described as including, "the right-bearer's entitlement to make choices and to take decisions that affect his or her life – the more significant the decision, the greater the entitlement. Autonomy and control over one's personal circumstances is a fundamental aspect of human dignity". Similarly, in *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* [2013] ZACC 35; 2014 (2) SA 168 (CC); 2013 (12) BCLR 1429 (CC) (*Teddy Bear Clinic*) at para 52: "[D]ignity recognises the inherent worth of all individuals . . . as members of our society, as well as the value of the choices that they make". See also *Barkhuizen* above n 39 at para 57 and *Pillay* above n 44 at para 64.

a gamete, she could have a child by way of surrogacy. Because she is biologically unable to do so, she is prevented from entering into a surrogacy agreement.

[112] The provision pays scant regard to whether the prospective parent or parents can perform their parental role effectively. Instead, it assumes that the biological fact of lacking a "genetic link" necessarily means that a person should no longer be entitled to decide when it is appropriate for them to have a child.[119] Notably in this respect, the Minister provides no empirical justification for this drastic conclusion. The effect of section 294 is to assume, without the support of evidence, that the state is in a better position to make reproductive decisions than the parent who will raise her.[120] This is a flagrant violation of dignity, especially where the consequences are an increase in stigma, and an endorsement of homogeneity over difference.[121]

Technology

[113] Section 294 also has the effect of ignoring the impact of new technologies on the ambit of rights. In the context of HIV, this Court's decision in *TAC* shows that where innovations in technology, like the advent of nevirapine, mean that harm can be mitigated, the state has an obligation to avoid rigidly disregarding these advances.[122] There is an even stronger argument here. In this case, no positive act is asked of the state, and so questions of "reasonableness" in the context of socio-economic rights do not arise. Instead, the state has the lesser, negative duty to avoid standing in the way

[119] Compare *Hoffmann v South African Airways* [2000] ZACC 17; 2001 (1) SA 1 (CC); 2000 (11) BCLR 1235 (CC) at paras 28 and 30: exclusion on the basis of a biological condition in the form of HIV.

[120] See the concurring judgment of Sachs J in *Matatiele Municipality v President of the Republic of South Africa* [2006] ZACC 12; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC) at para 109: "The notion that 'government knows best, end of enquiry', might have satisfied Justice Stratford CJ in the pre-democratic era. It is no longer compatible with democratic government based on the rule of law as envisaged by our Constitution."

[121] See also *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) (*National Coalition 1999*) at para 54: "The message is that gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected. It serves in addition to perpetuate and reinforce existing prejudices and stereotypes. The impact constitutes a crass, blunt, cruel and serious invasion of their dignity."

[122] *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1075 (CC) (*TAC*) at paras 80 and 95.

of advances in technology that can radically alter peoples' lives for the better. The invention of IVF and IVF-based surrogacy over the last 50 years is a marvel of modern medicine. The effects have been drastically beneficial for a range of people including gay men, single persons, and the infertile, who could not previously have children of their own. For the law, advances in technology have meant that the protection of rights associated with reproduction has been extended beyond its previous range.

[114] The same rights should, therefore, be accorded to those who are both conception and pregnancy infertile. Modern technology has made it possible for them to be involved in the conception process by opting to use surrogacy, and choosing donor gametes. This is not a capacity that is granted by the state. Instead, it is a fact. Where previously those who are both conception and pregnancy infertile could not have children except by adoption, technological advancements now make surrogacy a viable option. The effect of section 294 is to take away the right to make this reproductive decision. This it cannot do on the basis of luddite reasoning. The ambit of rights protected by the Constitution must take into consideration developments in technology, even more so where the state has endorsed the technological development.

Family

[115] Just as changes in technology alter the ambit of rights, so too do changes in our social structure. As the Surrogacy Group rightly points out, how we conceptualise the family is one of these social phenomena. In *Du Toit*, the Court concluded that "family life as contemplated by the Constitution can be provided in different ways and the legal conception of the family and what constitutes a family should change as social practices and traditions change".[123] Consequently, the kinds of family life that are constitutionally protected can alter over time.

[123] *Du Toit v Minister of Welfare and Population Development* [2002] ZACC 20; 2003 (2) SA 198 (CC); 2002 (10) BCLR 1006 (CC) at para 19.

[116] The second judgment takes the view that "this case is about the validity of section 294 of the Children's Act and not about whether the genetic link requirement in that section has relevance to the legal conception of the family".[124] I do not see how these two questions can be separated. Determining whether section 294 passes constitutional muster requires that we ask whether the section violates constitutional rights, including the prohibition of unfair discrimination. As *Fourie* makes perspicuous, preventing the legal entrenchment of one form of family life over another is an "unambiguous feature" of "the prohibition against unfair discrimination".[125] Therefore, establishing to what extent one kind of family life is privileged over another contributes to determining whether section 294 is constitutionally valid.

[117] The Constitution values alternative forms of family life for good reason. Because of the diversity that characterises our society, there is no one correct version of the family against which others can be assessed. Therefore, it would be presumptuous and arbitrary to define what an acceptable family entails. In a legal culture based on justification, capricious restrictions on something as important to human beings as the family cannot be countenanced. This will harm the dignity of those directly affected, as well as our society in general.

[118] Moreover, by requiring the existence of a "genetic link" between parent and child, section 294 is problematically disparaging of forms of family life that have already been constitutionally sanctioned, including adoption. Children who are adopted necessarily have no genetic or gestational link with their parents. To suggest that adopted children are inevitably worse off for this fact is to contradict this Court's clear indication that families with adopted children should not be thought of or treated differently to other families.

[124] Second judgment at [273].

[125] *Fourie* above n 103 at para 59.

[119] That adopted children have already been born does not change this fact. It is constitutionally impermissible to say that families with children who are not genetically connected to their parents are significantly worse off. The Constitution instead celebrates this difference, and recognises that the diversity of our society is what makes it robust. Section 294 therefore not only affects the dignity of prospective parents, but also of families with adopted children, and our society as a whole.

IVF

[120] The second differentiation further demeans the dignity of the conception and pregnancy infertile by compelling them to accept that the law does not deem it necessary to police the implications of the choices of people who elect to use IVF, but does where surrogacy is employed. Users of IVF can decide to utilise two anonymous donor gametes. By contrast, those who choose to use surrogacy because they are pregnancy infertile, and therefore necessarily cannot use IVF to fall pregnant, are prevented from doing the same.

[121] The only variance between users of IVF and users of surrogacy is that in the former case, one of the parents carries the child. The second judgment puts much store in this difference.[126] It endorses the view that "[t]he gestational link is considered emotionally significant as it allows the woman to feel that the child is 'hers' and that she is a 'normal' mother who conceived 'naturally'."[127] Again, this language problematically entrenches certain "normal" kinds of family life and in particular has a negative connotation for families with adopted children. The implication is that the mother of an adopted child should not feel that she is a "normal" mother.

[122] In addition, there is a complete absence of evidence in front of us to show that a *gestational* link between parent and child is in any way valuable in and of itself. In

[126] Second judgment at [290].

[127] Second judgment footnote 272.

fact, neither the Minister nor the Centre make this argument. At most, both parties instead contend that section 294 is valuable because it ensures that at least one commissioning parent is *genetically* linked to a child born of surrogacy. This is the purpose endorsed by the second judgment.[128] But if the purpose of section 294 is to ensure a genetic link between parent and child, then whether there is a gestational link or not is immaterial. If all children *must* have a genetic link to at least one of their parents in order to have a worthwhile life, then this logic must apply in both the IVF and surrogacy contexts: it is discriminatory to require a genetic link in only one of these cases.[129]

[123] Because of this, it can only be concluded that the differentiation is harmful to the affected person's dignity. Potential users of surrogacy must live with the indignity of knowing that the law gives extra entitlements to those who are not pregnancy infertile, and therefore can use IVF, for no discernible reason supported by argument or evidence. As pointed out in *Larbi-Odam*, differentiation with negative effects is likely to be discrimination where the basis is a "personal attribute that is difficult to change".[130] In the context of our past where discrimination based on physical characteristics has been wide-spread, we must be especially careful to avoid condoning the use of physical differences as the basis for differentiation, particularly where the differentiation results in harmful consequences.

[124] For all of these reasons, section 294 harms the dignity of those who are both conception and pregnancy infertile. It fails to consider all people as worthy of our mutual concern and respect. By doing so, it impoverishes our polity, and diminishes the gains we have taken from our past. There are important emotional, social and

[128] Second judgment at [279] and [293].

[129] The second judgment at [290] further contends that the mere fact that children born using IVF are not entitled to a genetic link to at least one of their commissioning parents does not mean that we should not uphold this entitlement where surrogacy is used. As I will argue later, this argument disregards the fact that it is section 41(2) of the Children's Act that prevents a child from knowing her genetic origin, rather than section 294.

[130] *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* [1997] ZACC 16; 1998 (1) SA 745 (CC); 1997 (12) BCLR 1655 (CC) at para 19.

historical reasons, rightly recognised by law, for allowing both conception and pregnancy infertile persons the option to use surrogacy.[131] These reasons are tightly wound up with the psychological wellbeing of those who rely on surrogacy to have a child of their own.

Unfairness

[125] In order to violate section 9(3), the challenged law or conduct must also discriminate unfairly.[132] Unfairness is determined by focussing on the impact of the discrimination on the complainant and others in his or her situation.[133]

[126] In *Van Heerden*, Moseneke J found that "[i]n the assessment of fairness or otherwise a flexible but 'situation sensitive' approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society".[134] As previously shown, while the use of surrogacy to have children is an ancient phenomenon, modern reproductive technologies have only recently enabled it to occur in the manner now governed by Chapter 19. We should thus be careful to adopt a "situation sensitive" approach that prevents the creeping influence of small-minded prejudice. AB could not have imagined having a child through surrogacy 50 years ago. As the social implications of this changing landscape are made manifest over time, our duty under a transformative Constitution is to make sure that the wellbeing of as many people as possible is enhanced through the Bill of Rights.

[127] The impact of both the first and second differentiations on those who are both conception and pregnancy infertile is manifest: they cannot choose to have a child using surrogacy. This is exactly the effect that section 294 seeks to achieve. By doing

[131] [84]-[89].

[132] *Harksen* above n 107 at paras 51-2.

[133] Id at para 51.

[134] *Minister of Finance v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) (*Van Heerden*) at para 27.

so, it compels those who are both conception and pregnancy infertile, and who wish to become a parent, to adopt. Assuming for present purposes that adoption and surrogacy are not comparable processes,[135] the effect of this law is unfair; it prevents a vulnerable group of people from utilising modern technology to have a child of their own, in the manner that they have chosen, for reasons that they appreciate. Against the backdrop of the fundamental breach of the right to psychological integrity, section 294 therefore discriminates unfairly against those who are both conception and pregnancy infertile, and consequently violates the right to equality.

Further rights

[128] The Surrogacy Group argues that the rights to privacy and access to reproductive healthcare are also infringed by section 294. As I have found that section 294 infringes other rights, judicial economy renders it unnecessary for me to deal with these arguments.

Limitations analysis

[129] Having concluded that section 294 of the Children's Act limits the rights to psychological integrity, as well as equality, it falls to be determined whether the limitation is justifiable in terms of section 36(1) of the Constitution.[136]

[135] That the two processes are not comparable is shown in [180]-[185] below.

[136] Section 36(1) states:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose."

[130] The question is therefore whether, in an open and democratic society based on human dignity, equality and freedom, section 294 reasonably and justifiably limits the rights violated. The onus is on the Minister to show that the limitation is justified. This involves determining whether the justification offered by the Minister for the rights violation is proportionate to the extent of the violation. In answering this question, the Constitution enjoins us to take into account the factors set out in section 36(1). Each of these factors is considered below.

The nature of the rights

[131] The substantive nature of the individual rights violated has been canvassed in the section above. Each violation is a serious infraction that impacts negatively on the lives of those affected. In addition, the harmful effect of the individual violations is made acute by their interdependence.[137] When considering whether the limitation of these rights is justifiable, it is the nature of the rights as a totality that is considered, with emphasis on the impairment caused by individual rights violations where appropriate.

[132] For the purposes of conducting a limitation analysis, the nature of the rights infringed also gives substance to the terms "human dignity", "equality" and "freedom". In establishing the meaning of these terms, section 36(1) requires that we determine what is reasonable and justifiable "in an open and democratic society". This leaves scope to examine the way in which foreign jurisdictions regulate surrogacy. What other open and democratic societies consider appropriate can be of assistance in determining what is reasonable and justifiable in our own.

[137] See *Teddy Bear Clinic* above n 118 at para 64:

> "[A]s we have emphasised time and again, the rights in the Bill of Rights are not discrete silos, each protecting a set of interests that is neatly categorised and absolutely divided along sharp, bright lines. Rather, there are levels of interconnectedness that must be acknowledged in any constitutional analysis."

[133] How surrogacy should be regulated is a disputed issue globally. Responses range from, on the one hand, a complete ban on all forms of surrogacy, whether altruistic or commercial – as is done in Switzerland[138] and most European Union Member States,[139] – to a highly permissive regulatory environment allowing for surrogacy in most forms, including for commercial gain – as is done in parts of the United States[140] and Russia,[141] as well as in Georgia – on the other.[142]

[134] Chapter 19 of the Children's Act falls between these two extreme ends of the spectrum. While commercial surrogacy is prohibited in South Africa, altruistic surrogacy is conditionally permitted. Democracies that have similar positions in this regard include the United Kingdom,[143] as well as most states in Australia[144] and most provinces in Canada,[145] all of which permit some form of altruistic surrogacy.

[135] These three countries take disparate approaches to the question whether double-donor surrogacy[146] should be permitted. In the United Kingdom, single persons are prevented entirely from becoming a parent of a child born of a surrogacy agreement.[147] Moreover, at least one of the two commissioning parents must

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[138] See Article 4 of the Swiss Bundesgesetz über die medizinisch unterstützte Fortpflanzung (Federal Act on Medically Assisted Reproduction).

[139] See, for example, Articles 16-7 of the French Civil Code; Article 10 of the Spanish Ley sobre técnicas de reproducción humana asistida (Law about the techniques of assisted reproduction).

[140] This is the position, for example, in states like California.

[141] See Article 51 of the Russian Semeinyi Kodeks Rossuskoi Federatsii (Family Code).

[142] See Article 143 of the Law of Georgia: "On Health Care". I refer here to the Eurasian Country and not to the State of Georgia in the United States. In the latter, there are no official state laws or court rulings on surrogacy and the legal status afforded to surrogacy agreements accordingly remains unclear.

[143] See section 2 of the Surrogacy Arrangements Act 1985 Chapter 49.

[144] See, for example, Part 4 of the Parentage Act 2004 (Australian Capital Territory); Division 2 of the Surrogacy Act 2010 (New South Wales); section 44 of the Assisted Reproductive Treatment Act 2008 (Victoria).

[145] See, for example, section 29 of the Family Law Act Chapter 25 (British Columbia); section 8.2 of the Family Law Act Chapter F-4.5 (Alberta).

[146] "Double-donor surrogacy" refers to the use of sperm and ova donated by persons other than a commissioning parent in terms of the National Health Act for the purposes of artificial fertilisation.

[147] See section 54(2) of the Human Fertilisation and Embryology Act 2008 (HFEA).

contribute a gamete for the purposes of conception.[148] On the other hand, most states in Australia, and most provinces in Canada,[149] do not require that an intended parent or parents contribute a gamete or gametes in order to enter into a surrogacy arrangement.

[136] Unlike the United Kingdom and Australia, Canada's Charter of Rights and Freedoms includes a comparable right against unfair discrimination to our own section 9(3). The position in Canada accordingly seems of greater comparative assistance than the position in Australia, which has no Bill of Rights, or the United Kingdom, which has no formal constitution. Unlike in South Africa, Canadian federal law does not require a person to contribute his or her own gamete for the purposes of surrogacy. This despite the Canadian Charter not having a comparable provision to our own section 12(2)(a).

[137] While there are thus a variety of regulatory responses to the question of whether double-donor surrogacy is permissible, there is no helpfully comparable open and democratic society with a provision similar to section 294. In addition, South Africa has adopted a unique constitutional approach to non-discrimination and the protection of psychological integrity. In determining whether section 294 is reasonable and justifiable, we must accordingly give weight to this singular approach.

The importance of the purpose of the limitation

[138] In order to establish the importance of the purpose of the limitation, it must first be established what the purpose itself is. In this case, doing so equates to understanding the purpose of section 294.

[148] Section 54(1)(b) of the HFEA.

[149] See, for example, section 29 of the Family Law Act 2011 (British Columbia).

The purpose of section 294

[139] It is by now trite that "statutory provisions should always be interpreted purposively" and that "the relevant statutory provision must be properly contextualised".[150] Accordingly, I interpret the meaning of section 294 against the background of Chapter 19, the Children's Act as a whole, and other relevant legislative and contextual considerations.

[140] This Court has often used the long title and preamble to contextualise particular provisions of an Act.[151] In this case, the Children's Act's long title indicates that it was enacted, amongst other reasons, to "*provide for* surrogate motherhood".[152]

[141] This indicates that the Children's Act endorses the use of surrogacy as a means of reproduction. However, it does so within the broader context of an Act whose primary purpose is the promotion and protection of children's rights. Therefore surrogacy is permitted in South Africa, but regulated with the best interests of children in mind.

[142] Notably, surrogacy itself is not "provide[d] for" in order to promote the best interests of children. As the *Ad hoc* Committee explained in its report, surrogacy provides "a legitimate alternative for irreversibly infertile persons who wish to have children". Chapter 19, on the other hand, was passed to ensure that surrogacy is practiced in a manner that considers primarily the wellbeing of children who may be born of surrogate motherhood agreements.

[143] This said, although Chapter 19 broadly accepts surrogacy as a legitimate reproductive avenue, it does not make surrogate motherhood agreements available to

[150] See *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) (*Cool Ideas*) at para 28.

[151] See, for example, *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31; 2016 (1) SA 132 (CC); 2015 (12) BCLR 1407 (CC).

[152] My emphasis.

everyone. Instead, surrogacy is only available to persons who are pregnancy infertile; that is, to those who are permanently and irreversibly unable to give birth to a child. This is an indication that Chapter 19 recognises that surrogacy enables pregnancy infertile people to choose to have a child of their own outside of the adoption process.

[144] What is the purpose of section 294 within this context? The Minister contended before the High Court and this Court that section 294 has several separate but overlapping goals, which can be reduced to the following four purposes:

(a) The prevention and deterrence of the practice of commercial surrogacy;
(b) The prevention of the creation of "designer children", which would not be in the public interest;
(c) The promotion of the best interests of the child to be born insofar as she has the right to know her genetic origins; and
(d) The prevention of the circumvention of existing adoption processes, through the creation of commissioned children for "adoption".

In order to determine the purpose of section 294, I consider each of these ostensible purposes below.

Commercial surrogacy

[145] As explained in the *Ad hoc* Committee report, commercial surrogacy—

> "means a surrogate arrangement where the surrogate mother is motivated by the prospect of financial gain as the surrogacy is undertaken in exchange for payment. The commissioning parent or parents undertake to pay the surrogate mother a fee which is greater than the costs incurred and income lost in conceiving and bearing the child."

[146] It is difficult to understand how the absence of section 294 would encourage commercial surrogacy. Commercial surrogacy, as already mentioned, is specifically prohibited and its practice attracts heavy criminal sanction.[153] Counsel for the Minister correctly conceded at the hearing that section 294 does not in any way ensure the non-proliferation of commercial surrogacy in a manner that the provisions already in place for that purpose do not.

[147] With or without the inclusion of section 294, the Children's Act has stringent provisions in place to ensure that surrogate motherhood agreements are concluded strictly on an altruistic basis. Simply put, the removal of section 294 from the Children's Act makes no difference to the proliferation of commercial surrogacy as a practice. No evidence has been placed before us that suggests otherwise. The purpose of preventing commercial surrogacy is achieved through other sections in Chapter 19, not through section 294. The Minister's argument that one of the purposes of section 294 is to prevent the propagation of commercial surrogacy must accordingly be rejected.

[148] This does not mean that measures aimed at the prevention and non-proliferation of commercial surrogacy constitute an illegitimate use of Legislative power. It simply means that nothing has been placed before this Court to show that section 294, specifically, is aimed at curbing commercial surrogacy.

"Designer children"

[149] Without a fairly precise explanation of what is intended by it, the term "designer children" is, at best, confounding. The Minister's only real attempt to define the term is through the expert evidence tendered by Professor Donna Knapp van Bogaert, who defines the term "designer baby" as—

[153] [44].

> "a baby whose physical [characteristics] are chosen in advance of their implantation by commissioning parents. The motivation for [this] choice is unrelated to health matters; it is a cosmetic choice as opposed to a choice arising from a medical need."

Aside from claiming that "designer babies" are those chosen for cosmetic reasons, this definition is unhelpful. Is the term limited only to children who are conceived using two donor gametes? Or does it include scenarios where one gamete is used from a commissioning parent and another from a donor? Is a child born of the latter type of arrangement also a "designer child"?

[150] This Court is not well placed to define the term in the absence of clear expert evidence. In any event, on Professor van Bogaert's own account, it is unclear whether the term is predicated on sound scientific principles. She makes reference to the work of Professor Alan Handyside, who she describes as "one of the pioneers in [the field of] IVF".

[151] Professor Handyside insists that the term has no scientific merit whatsoever. He opines that it would be very difficult, if not impossible, to "cherry-pick a desired combination of traits" because of, amongst other reasons, the approximately eight million possible genetic combinations available in one embryo. As the Surrogacy Group correctly points out, Professor van Bogaert makes no attempt to refute Professor Handyside's assertions.

[152] It bears repetition that the double donation of gametes in the case of IVF not involving surrogacy is legally permissible. Here, too, the parent or parents are at liberty to make whatever selection of gametes they like. In this sense, the ability to pick and choose is similar to what the Minister says section 294 seeks to prevent in the case of conception and pregnancy infertile parents. It makes no sense that the ability to choose as one pleases should be acceptable in the one instance, but not in the other. If some fundamental problem inheres purely in being able to choose gametes, that should be the case across the board. Relatedly, even where one gamete is from one of

the parents and the other donated, there is still an exercise of choice with regard to the donated gamete and, therefore, an element of "designing", whatever that may mean. Does that make the "designing" in this instance acceptable? If so, why? I cannot think of any cogent reasons that justify these distinctions. And none have been given. Alleging that the purpose of section 294 is aimed at preventing the creation of "designer children" is, it seems to me, contrived.

The "right" to know one's origin

[153] The heading of section 294, as the Centre correctly points out, is a clear indication that the provision is aimed at regulating the genetic origin of children born pursuant to surrogate motherhood agreements in order to ensure that their best interests are promoted. The Centre concludes that the reason for this is that children are entitled to *know* their genetic origin. The second judgment endorses this interpretation of the section's purpose. It holds that there is a "need for a genetic link between a child and at least one parent", as "clarity regarding the origin of a child is important to the self-identity and self-respect of the child".[154] The judgment concludes that the possible harm to self-identity and self-respect brought about by a child not knowing the identity of either of their genetic parents "is, unquestionably, all important".[155]

[154] Section 294, so the argument goes, ensures that any child born of a surrogacy arrangement knows their genetic origin. The provision is necessary in light of section 41 of the Children's Act:

> "(1) A child born as a result of artificial fertilisation or surrogacy or the guardian of such child is entitled to have access to—
>
> (a) any medical information concerning that child's genetic parents; and

[154] Second judgment at [294].

[155] Id at [290]

(b) any other information concerning that child's genetic parents but not before the child reaches the age of 18.

(2) Information disclosed in terms of subsection (1) may not reveal the identity of the person whose gamete was or gametes were used for such artificial fertilisation or the identity of the surrogate mother."

[155] The effect of section 41 on children born as a result of surrogate motherhood agreements is that they are, as of birth, barred by law from finding out the identity of any gamete donor who contributed to their conception. A child is entitled to medical and other information about the donor in terms of section 41(1), but that person's identity may not be revealed in terms of section 41(2). The Centre contends that it is for this reason that section 294 was enacted. The purpose of section 294, the Centre insists, is to ensure that children born of surrogate motherhood agreements will be able to *know* the identity of one of their genetic parents, or, ideally, both.

[156] At first blush, the Centre's argument, endorsed by the second judgment, appears to be consistent with the hierarchy created by section 294. In the event that there are two commissioning parents, the provision envisions the use of the gametes of *both* commissioning parents. If this scenario ensues, the prospective child's genetic parents will be the commissioning parents themselves, and there will be no bar to that child knowing her full genetic origins, provided that her parents disclose the requisite information to her.

[157] Only "if that is not possible due to biological, medical or other valid reasons" may one of the two commissioning parents' gametes be used. Similarly, in the event that there is only one commissioning parent, the gamete of that person must be used. In sum, the purpose of section 294, on the Centre's argument, is to ensure that children born of surrogacy must be able to know their genetic origin either in respect of: (1) both their genetic parents; (2) one of their genetic parents in the event that the other commissioning parent cannot donate a gamete for valid reasons; or (3) at least one of their genetic parents in the event of their having a single commissioning parent.

[158] If we accept that a child has the right to know her genetic origins, and that, as the Centre contends, it would always be in the best interests of a child to know her genetic origins – including the identity of her genetic parents – then it must follow that the constitutionality of section 41(2) is brought into question. This is because section 41(2) explicitly prevents a category of children from discovering the identity of gamete donors who are their genetic parents. If we accept the Centre's line of reasoning, a logical corollary of this argument would be, had the Legislature not enacted section 41(2), all children born of surrogacy arrangements would be able to know their genetic origin.

[159] It is trite that, where possible, different provisions in a single Act should be read as consistent with one another.[156] Claiming that section 41(2) deliberately *prevents* a category of children from knowing their genetic origin, while simultaneously claiming that the purpose of section 294 is to ensure that a portion of this category *do* know their genetic origin, is contradictory.

[160] If the Legislature thought that the right to know one's genetic origins was in the best interest of children in every case, then it is unlikely that section 41(2) would have been enacted in its present form. This is because the best interest of the child standard applies to all matters involving a child. It would be paradoxical for the Legislature to promote other interests, like donor anonymity, above knowing one's genetic origins in section 41, but then include a provision in the same Act whose purpose is to ensure knowledge of one's genetic origins in order to protect the best interests of the child.

[161] This is particularly so if one has regard to the wording of section 41(2). It contemplates a situation where a child is born of two donated gametes. If this were not the case, section 41(2) would not keep secret the "identity of the person whose

[156] See *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) (*Ermelo*) at para 70.

gamete was *or gametes were* used".[157] The provision quite perspicuously envisages a scenario where a child is born of two donated gametes. An implication of this is that the Children's Act – whether validly or not – allows for the possibility that children may be born without any knowledge of who their genetic parents are.

[162] The IVF regulations are consistent with this understanding. It is quite clear from my reading of section 41(2) that the Minister of Health's enactment of those regulations was permissible in terms of the Children's Act, and consistent with it. The only manner in which a challenge to the validity of the IVF regulations could succeed, in my view, is if a constitutional challenge is levelled directly at section 41(2). In the absence of this challenge, however, the IVF regulations are perfectly valid in terms of the Children's Act.

[163] In light of section 41(2), then, I struggle to see how the purpose of section 294 is to ensure that children born of surrogacy may know their genetic origin. If this were the purpose of section 294, it would amount to a situation where the Children's Act allows a particular purpose to be pursued in a manner which is not even-handed. In other words, it would allow for *some* children – those born of surrogacy – to know, partially or fully, their genetic origins. But it would simultaneously result in a situation where other children – those born of double-donor IVF – are completely barred from knowing theirs. It follows that section 41(2) and section 294 are contradictory, rather than complimentary.

[164] This is a problem for two reasons:

(a) It suggests that there are two different best interests of the child standards, one for children born of surrogacy, and another for children born of double-donor IVF. This is impermissible and inconsistent with a plain understanding of the phrase "best interests".

[157] My emphasis.

(b) Second, it suggests that genetic origins matter less if one is born of double-donor IVF, presumably because there is a *gestational* link between mother and child even if there is no genetic tie. While a gestational link may be of importance in some instances, it has no bearing on *genetic* identity.

[165] A more convincing and consistent explanation of why section 294 requires a gamete link between a commissioning parent and child is that provided by the *Ad hoc* Committee report:

> "In instances where both the male and the female gametes used in the creation of the embryo are donor gametes, it would result in a situation similar to adoption, as the child or children would not be genetically linked to the commissioning parent or parents. This would obviate the need for surrogacy as the couple could adopt a child. This type of surrogacy was not preferred by most commentators. It was felt that in both partial and full surrogacy it should be a pre-condition that the child or children should always be genetically linked to the commissioning parent or parents."

Notably, the report does not advance any further reasons for the inclusion of a provision requiring that there be a genetic link between the prospective child and the commissioning parent or parents. The only reason it propounds is that adoption is already an option for prospective parents looking to have a child that bears no genetic connection to them. Preparatory documents can be misleading and are not, without more, indicative of legislation having a particular purpose. Nevertheless, the reasoning contained in the report is illuminating.[158] Tellingly, this is also the version endorsed by the Minister in her written and oral submissions.

[166] This is not to say that section 294 does not have the effect of ensuring that children born of surrogate motherhood agreements may know their genetic origins, albeit partially in the event that a donor gamete is used. However, this, in my view, is

[158] This is especially true as most of the wording of Chapter 19, and of section 294 in particular, has been taken directly from the *Ad hoc* Committee report.

merely a coincidental additional effect. To hold otherwise is to accept that different provisions of the Act – sections 41 and 294 – were enacted for purposes that were inconsistent with one another, contrary to the Minister's own view.

Surrogacy and adoption

[167] The Minister argues that another purpose of section 294 is to promote adoption. This argument strikes me as opportunistic. There is nothing in Chapter 15 – the chapter that regulates adoption – or anywhere else in the Children's Act, which suggests that adoption *as a means to becoming a parent* should be promoted over other means. The long title of the Children's Act merely says that Chapter 15 is there "to make new provision for the adoption of children". I find it highly improbable that the Children's Act would neglect to state that the promotion of adoption is one of its aims, make no mention of the promotion of adoption in the chapter that deals with adoption, only to make the promotion of adoption a central purpose of a section in another chapter that has little to do with adoption in general.

[168] In addition, the Minister argues that section 294 prevents would-be commissioning parents from circumventing the adoption process. This argument is different from the argument that the purpose of section 294 is to *promote* adoption. As already stated, the *Ad hoc* Committee argued in its report that the adoption process obviates the need for double-donor surrogacy because the two processes are sufficiently similar. Taking this argument to its logical conclusion, the purpose of section 294 is thus simply to ensure that surrogacy is only used in order to have a child that is genetically related to a commissioning parent. This is the main purpose proposed by the Minister in her written submissions.

[169] On the Minister's view, the circumvention of the adoption process is not in the best interests of children. So called "commissioned adoptions" result in the creation of children not genetically related to their commissioning parents. She suggests that it is morally preferable for there to be a direct genetic link between child and parent. Where there is no such link, the child may be psychologically harmed. It is by now

trite that the Children's Act, in accordance with section 28(2) of the Constitution, seeks to promote the best interests of the child, which includes preventing them from being psychologically harmed. Therefore, double-donor surrogacy should be prevented.

[170] In this regard, the Minister relied on the expert evidence of Professor van Bogaert, an ethicist. In her expert opinion filed before the High Court, Professor van Bogaert framed the ethical issue of harm in, as she describes it, an "either or" fashion. She stated that—

> "If we can reasonably assume that [section 294] causes harm to relationships, that is, we consider denying a child his or her genetic link as a harm, then it should be considered unethical [to remove section 294 from the Children's Act]. Conversely, if we can reasonably assume that the removal of [section 294] will not cause a child harm, then it should be considered ethical [to remove section 294 from the Children's Act]."

Later, Professor van Bogaert advocates, "[b]ased upon our current knowledge", for the retention of section 294 as a matter of ethics. Until there is sufficient evidence to show that it is not harmful to a child not to have a genetic link to her parents, section 294 should remain.

[171] In my view, preventing the circumvention of the adoption process is the purpose of section 294. This purpose is in line with a plain reading of the section, as well as its legislative context. It also fits with the *traveaux preparitoire* (preparatory documents) of Chapter 19. Moreover, it accords with the Minister's argument that section 294 furthers the best interests of children.

The importance of the purpose of section 294

[172] Section 294 is a regulative provision that seeks to limit the ambit of surrogacy arrangements that can be lawfully pursued. I have found that in creating this legal

barrier, the section infringes protected rights. As such, the purpose of the limitation is conterminous with the purpose of the provision.

[173] The chief goal of section 294 is to prevent a child from being born as a consequence of a surrogate motherhood agreement without being genetically related to at least one commissioning parent. I concluded previously that a contextual and purposive reading of the provision shows that the reason for seeking to achieve this goal is to ensure that a party who wishes to have a child with no genetic link to themselves or their partner does so by adopting.[159] The purpose of section 294, and thus of the rights limitation, is to discourage the use of surrogacy where other sufficiently "similar" avenues are available.[160]

[174] Other than bald assertion, the Minister provided no justification for why this purpose should be considered important. Moreover, making this argument requires reliance on two contradictory suppositions. On the one hand, it supposes that if adoption and surrogacy are two different mechanisms for coming to the same end point – that is, to becoming the parent of a child genetically unrelated to the commissioning parent or parents – then adoption is the preferable option. If this were not the case, then there would be no reason to enact section 294, as both processes would be equally acceptable means of becoming a parent of a child genetically unrelated to the commissioning parent or parents. On the other hand, it supposes that becoming the parent of a child genetically unrelated to oneself by means of adoption is *functionally equivalent* to becoming the parent of a child genetically unrelated to oneself by means of surrogacy. In essence, as the Minister suggests, because adoption and surrogacy both result in a person becoming the parent of a genetically unrelated child, they "may as well adopt".

[159] [167]-[171].

[160] A person who is conception infertile but not pregnancy infertile is prevented by section 295(a) from using surrogacy because they can utilise IVF. Whether this is a violation of rights, however, is not before us in the present matter.

[175] These two suppositions pull in opposite directions. The first implies that there is some reason to treat becoming a parent by way of surrogacy and becoming a parent by way of adoption differently; that one should be promoted over the other. The second claims that the two processes are, in all significant respects, identical. The inconsistency points to an important difficulty with the Minister's justification of section 294. While adoption and surrogacy may both result in a person becoming the parent of a child unrelated to them, what this *entails* may be radically different. The importance of the purpose of section 294 depends on whether adopting a child is sufficiently similar to having a genetically unrelated child by way of surrogacy to render the limitation of AB's rights reasonable and justifiable.

[176] At the hearing, all of the parties agreed that there are substantial differences between double-donor surrogacy on the one hand, and adoption on the other. While this concession by the Minister carries weight, we must still be satisfied that the concession was correctly made.

[177] At the outset, there is a broad, albeit superficial, similarity between double-donor surrogacy and adoption inasmuch as both processes result in an individual, or individuals, becoming the parent of a child who is not biologically related to them. However, the evidence before us shows substantial differences between the *processes* that result in the different outcomes.

[178] When a person chooses to become a parent using double-donor surrogacy, they are involved at various stages in the creation of a child. To begin with, commissioning parents are involved in gamete selection. This is significantly different from adopting a child. Ms Rodrigues, a clinical psychologist who has worked with hundreds of infertile couples in South Africa, states in her expert opinion:

> "I must also add the observation that the gamete donor selection process causes prospective parents – particularly non-biological parents – to feel that they are contributing to the process of procreation. Although there may not be a biological

> link, gamete donor selection by the prospective parents establishes a positive *psychological* link between the prospective parents and their prospective child, even though the prospective child is at this stage only a concept – a psychologically powerful concept – in the minds of the prospective parents."

[179] Another key decision made by the commissioning parent in the case of double-donor surrogacy, that is not made when adopting a child, is the selection of a surrogate mother. This process occurs before conception, and can radically alter how the commissioning parent and prospective child relate once the child is born.

[180] There are important psychological differences between becoming a parent through adoption, and having a child through surrogacy. While the end result of both processes is that a person becomes the parent of a child genetically unrelated to them, the nature of the relationship between parent and child is substantially different. In the case of double-donor surrogacy, an emotional link develops between commissioning parent and child through the choices that the commissioning parent makes before conception, at conception, and during pregnancy. While a emotional link no doubt develops between parent and adoptive child, it is of an entirely different nature. We must show equal respect to these different mechanisms of forming a family.

[181] The difference between adoption and surrogacy is especially important against the backdrop of infertility. As the expert evidence shows, the choices made during the surrogacy process "often [have] a strong psychological healing function that ameliorates the negative psychological effects of infertility". The decision to use surrogacy over adoption thus not only plays a role in developing a unique bond between commissioning parent and child, but also in the mental wellbeing of the commissioning parent as an infertile person.

[182] A second difference is that commissioning parents are often intimately involved in the pregnancy process where surrogacy is used. As Ms Rodrigues notes, "[i]n my practice I have found that the overwhelming majority of commissioning

parents desire to be involved with the pregnancy." This is confirmed by the research and expert evidence of Dr Jadva, a senior research associate at the Centre for Family Research at Cambridge University, and several of her colleagues, who confirm that a study undertaken by them showed that the vast majority (that is, 83 per cent) of commissioning mothers are "very involved" with the pregnancy, with a relatively small minority (the remaining 17 per cent) being "moderately involved".

[183] Involvement in the pregnancy includes attending prenatal medical appointments together with the surrogate mother, keeping a pregnancy photo album for the purpose of creating a narrative in order to facilitate communication of the surrogate pregnancy to the child in future and playing voice and music recordings to the unborn baby during the pregnancy. This leads Ms Rodrigues to the conclusion that—

> "[a]part from commissioning parents' own desire for involvement with the pregnancy, it should also be noted that such involvement facilitates the parent-child bonding process and is therefore encouraged by the clinical psychology community."

[184] The parties before us were in agreement on this point at the hearing. All accepted that an emotionally significant parent-child bond developed between commissioning parent and child during the pregnancy. This difference in process then has implications for how the commissioning parent and child relate once the child is born.

[185] Having a child using double-donor surrogacy is thus not merely a difference in mechanics. Instead, the commissioning parent's involvement in the surrogacy process shapes the relationship between the child and parent. This difference goes beyond the superficial similarity that both processes result in a commissioning parent or parents having a child that is not genetically related to them. The decisions made by the commissioning parent or parents animate the relationship between parent and child. Premising the limitation of rights on this purpose is therefore misguided: since

adoption and surrogacy are fundamentally different, it cannot be correct to limit surrogacy purely because the outcome is the same as adoption.

Psychological harm and genetic origin

[186] The Minister asserted in the High Court that "the child to be created has a right to know about its genetic origin and has a right to information about the process involved in its conception". Section 294 does nothing to guarantee the latter of these two purported rights. However, the former, as explained above, is to some degree ensured by section 294.[161] This by assuring that the child born is genetically related to one of her commissioning parents.

[187] In this Court, the Minister appears to have abandoned this argument. She presented no written or oral submissions in support of it. When questioned on the expert evidence she tendered in the High Court to support it, she expressly disavowed any reliance on it. Nevertheless, the Centre persisted with the argument in this Court.

[188] As I understand their argument, it entails that it is better to not be born at all, than to be born without being able to determine the identity of one's genetic parents. This is premised on two assertions:

(a) It is better not to be born into a psychologically harmful situation. That is, given the choice between being born into a psychologically harmful situation and not being born at all, the latter option is preferable (first argument).

(b) To be born without being able to determine who one's genetic parents are is to be born into a psychologically harmful situation. That is, on available evidence, it is true that to be born without being able to determine who one's genetic parents are is psychologically harmful (second argument).

[161] [153]-[166].

[189] Neither the Minister – nor the Centre – has convincingly shown that these arguments are true. I expound on each below.

[190] According to the expert opinion of Professor Metz, placed before the High Court, the only logical conclusion that can be drawn from the first argument is that if a child is unable to determine who her genetic parents are she would experience a degree of harm so severe as to warrant the conclusion that she should never have been born in the first place. This necessarily entails a value judgement.

[191] In *H*, Froneman J, writing for a unanimous Court, concluded that evaluating the existence of children against their non-existence is "not a decision that lies outside the law".[162] This was so to "ensure that the values of the Constitution underlie all law, [and] not that some part of the law can exist beyond the reach of constitutional values".[163] I agree. In the present case, therefore, it is necessary for us to deal head on with the value judgement of whether being unable to determine one's genetic parents results in so extensive a harm as to justify the view that it is better never to have been born.

[192] Importantly, section 295(e) of the Children's Act mandates the High Court to make this very decision when determining whether to confirm a surrogate motherhood agreement. The court must not confirm the agreement unless, putting the best interests of the prospective child at the centre of the inquiry, it is of the view that, "generally", the agreement should be confirmed. In other words, the court must, on every occasion it decides whether to confirm an agreement, engage with the value judgement of whether it would be in the best interests of the prospective child to be born.

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[162] *H* above n 68 at para 24. Compare *Stewart v Botha* [2008] ZASCA 84; 2008 (6) SA 310 (SCA), where the Supreme Court of Appeal had to compare the existence of a child with her potential non-existence. The Court held that this sort of question "goes so deeply to the heart of what it is to be human that it should not even be asked of the law". It accordingly declined to engage in any analysis on the point.

[163] *H* id at para 23.

[193] What is in a child's best interests is a flexible inquiry which must be determined on the facts of each particular case. As this Court held in *M*, "[t]o apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned".[164]

[194] However, section 294 supersedes section 295(e) inasmuch as it prevents the court from determining what is in the best interests of the child. What can be inferred from this legislative scheme is that it will never be in *any* child's best interests to be born of a surrogate motherhood agreement if she will not be genetically related to a commissioning parent. In sum, section 294 puts a child being able to know her genetic origin above any of her other interests, including life itself.[165]

[195] Section 294 therefore contradicts section 7(1) of the Children's Act, which requires a number of factors to be taken into account "whenever" a provision of the Children's Act requires that the best interests of the child standard be applied. These include the nature of the personal relationship between child and parent,[166] the attitude of the parent towards the child,[167] the attitude of the parent towards the exercise of parental responsibilities and rights in respect of the child,[168] the capacity of the parent to provide for the needs of the child,[169] the need for the child to maintain a connection with her family, extended family, culture or tradition,[170] the child's physical and

[164] *S v M* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at para 24.

[165] There are ethicists who posit that it will always be in the best interests of all persons never to have been. One eloquent proponent of this theory is Professor David Benatar who opines that "coming into existence is always a serious harm". While this is an intriguing proposition, if it were true, it would mean that there should be a complete prohibition on bringing children into the world. This is a substantially broader question than those that arise in the present constitutional challenge. Benatar *Better Never to Have Been: The Harm of Coming into Existence* (Oxford University Press, New York 2006) at 2.

[166] Section 7(1)(a)(i) of the Children's Act.

[167] Section 7(1)(b)(i) of the Children's Act.

[168] Section 7(1)(b)(ii) of the Children's Act.

[169] Section 7(1)(c) of the Children's Act.

[170] Section 7(1)(f)(ii) of the Children's Act.

emotional security and her intellectual, emotional, social and cultural development,[171] and the need for the child to be brought up within a stable family environment.[172] All of the section 7 factors must be considered in totality in each particular child's unique circumstances so as to determine what is in the best interests of that particular child.

[196] Section 294 privileges one factor to the exclusion of all others. For example, a child that could be brought into a loving and stable family environment that would enable her physical, intellectual, emotional, social and cultural development would be prevented from being born purely because she could never know the identity of her genetic parents. As this Court held in *AD*, "[c]hild law is an area that abhors maximalist legal propositions that preclude or diminish the possibilities of looking at and evaluating the specific circumstances of the case".[173] Section 294 has exactly this kind of maximalist legal effect.

[197] This is especially true as those who, for cultural or other reasons, do not believe that using double-donor surrogacy is appropriate are not compelled to pursue this avenue. For example, a couple or individual who follow the African custom that requires that a boy must know the genetic origin of his father to form a part of the community need not utilise surrogacy without a gamete link.[174] Section 293 moreover protects the partner or spouse of a person wanting to use surrogacy by requiring their written consent. As explained in *Fourie*, people have the right "to self-expression without being forced to subordinate themselves to the cultural and religious norms of others . . . individuals and communities [should be] able to enjoy what has been called the 'right to be different'".[175] Removing this restriction does not create an obligation on any other person to decide to utilise double-donor gametes for reproduction.

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[171] Section 7(1)(h) of the Children's Act.

[172] Section 7(1)(k) of the Children's Act.

[173] *AD v DW* [2007] ZACC 27; 2008 (3) SA 183 (CC); 2008 (4) BCLR 359 (CC) at para 55.

[174] However, if the custom should change, members of such a community should be entitled to access surrogacy without a genetic link. See *Shilubana v Nwamitwa* [2008] ZACC 9; 2009 (2) SA 66 (CC); 2008 (9) BCLR 914 (CC).

[175] *Fourie* n 103 above para 61.

[198] It therefore cannot be concluded that it is better not to be born into a given psychologically harmful situation in all cases. A much broader investigation is necessary.

[199] Even if the first argument were true; the second remains contentious. It relies on there being sufficient evidence to conclude that not being able to know one's genetic origin is harmful to enough children on enough occasions to justify forbidding entirely the ability to use double-donor surrogacy in the case of conception and pregnancy infertility.

[200] In order to support this claim, the Minister, in the High Court, relied solely on the evidence of Professor van Bogaert to assert that, as a matter of ethics, it is immoral to "intentionally create children who will not know both of their genetic parents". Notably, this "ethical" claim is premised on psychological observations. To this, the Surrogacy Group replies:

> "Prof van Bogaert opines that knowledge of one's 'genetic origins' – in the case of donor-conceived children knowledge of the identity of the gamete donors – is an important part of one's 'self-identity'. Prof van Bogaert's opinion is denied – first, because Prof van Bogaert has no expertise in psychology; secondly, because her opinion suffers from a lack of intellectual rigor, objectivity and integrity."

[201] To support these claims, the Surrogacy Group tendered the expert opinion of Professor Hester Pretorius, an expert in the field of psychology.[176] She concludes that Professor van Bogaert is not qualified to express expert opinions in the field of psychology, intimating further that she would initiate an investigation and disciplinary action against Professor van Bogaert on the basis that her testimony is an "an attempt to mislead the Court, and is unethical".

[176] Professor Pretorius is a Professor at the University of Johannesburg and is the vice Chairperson of the Professional Board of Psychology of the Health Professions Council of South Africa.

[202] These arguments, together with the High Court's finding that the various criticisms against her evidence are well-founded,[177] led counsel for the Minister to concede that the evidence of Professor van Bogaert is flawed, and that the Minister no longer intends to place any reliance on it. Even if this Court were to accept Professor van Bogaert's views as purely ethical claims, it would be inappropriate in a pluralistic society, such as our own, to adopt a single moral view as representative of that of the South African community in order to justify the violation of rights.[178]

[203] This leaves the Centre's argument that "children who are aware that they are donor conceived suffer psychologically when they are denied information about their origins and identity". For this proposition, the Centre relies on two academic sources. The first is an article by Ms Lucy Frith.[179] The article by Ms Frith simply does not stand for the proposition that the Centre contends it does. Following a review of numerous works, Frith concludes that "[a]t present, perhaps all that we can say is that it is not possible to reach any definite conclusions about the effects of secrecy and anonymity on the [psychological] welfare of donor offspring".

[204] The second source is an article by Ms Mhairi Cowden.[180] While Ms Cowden makes a compelling argument in favour of disclosing identifying information to donor-conceived children, she does so based on the assumption that the child has already been born. The article does not stand for the proposition that a child should never be born without the capacity to determine her genetic origins.

[205] It is, however, indicative of the Centre's actual concern. As they explain:

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[177] High Court judgment above n 12 at para 85.

[178] *National Coalition 1998* above n 51 at para 37.

[179] Frith "Gamete donation and anonymity: The ethical legal debate" (2001) 16 *Human Reproduction* 821.

[180] Cowden "'No Harm, No Foul': A Child's Right to Know their Genetic Parents" (2012) 26(1) *International Journal of Law, Policy and the Family* 102.

> "The [Centre] submits that the fact that South African laws have not yet formalised the realisation of the right to know [the identity of] one's genetic parents, is one of the reasons why section 294 is constitutionally defensible. The requirement that a child should be able to know the identity of at least one parent provides a measure of protection of the child's right to know his or her identity."

[206] The Centre, in short, contends that all children have the right to know "identifying information regarding their donor". As previously shown, it is section 41(2) of the Children's Act that stands in the way of children having access to this information.[181] To argue that the purpose of section 294 – and therefore the purpose of the limitation of the rights in question – is to ensure that a child is never born without being able to determine her genetic origins, is, therefore, as explained above, an example of bootstraps logic. It bears repeating that there are good reasons for concluding that the purpose of section 294 is to prevent the circumvention of the adoption process and not to ensure that children are never born without being able to determine their genetic origins.

[207] Properly construed, the Centre's arguments are directed at the constitutionality of section 41(2). Section 294 does not result in the full realisation of the purported right to be able to know one's genetic origins. Only the removal of section 41(2) can achieve this goal, and that issue is not before us.

The nature and extent of the limitation

[208] As stated previously, the limitation in question is equivalent to the effect of section 294. The provision results in an absolute barrier to the use of surrogacy as a means of reproduction where a gamete is not provided by at least one commissioning parent. The severe implications this has for those who are both conception and pregnancy infertile has been discussed above.[182]

[181] [153]-[166].

[182] [82]-[89].

[209] Further, as there is no comparable alternative to double-donor surrogacy for those who cannot provide a gamete in order to have a child, the limitation of rights in the present case is far-reaching. As already shown, double-donor surrogacy and adoption are not sufficiently similar processes.

The relation between the limitation and its purpose, and less restrictive means

[210] The particular facts of this case show that section 294 and its purpose are closely related. The provision does precisely what it aims to do: it ensures that all children born of surrogate motherhood agreements are genetically related to at least one commissioning parent. It means that a person can only become a parent to a child not genetically related to themselves through adoption.

[211] The relationship between the limitation and its purpose cannot be afforded much weight in the present case. This is because the limitation achieves its purpose, which is deliberately prohibitive in nature. It follows that the less restrictive means analysis is also of little assistance; any measure that is less restrictive would lead to the non-attainment of the purpose of section 294.

[212] The question that lies at the heart of this matter is not how effectively section 294 *achieves* its purpose: all the parties accept that double-donor surrogacy is rendered impermissible by section 294. Nor is it whether the Legislature could have employed less restrictive means to achieve this purpose because the prohibition contained in section 294 is the only way in which the purpose could have been achieved.

[213] Ultimately, the quintessential question that lies at the heart of this matter is whether section 294, as it stands, serves a purpose which is so fundamental as to outweigh and justify the corresponding limitations of the rights in question. As this Court explained in *Bhulwana*, "the court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad

into fundamental rights, the more persuasive the grounds of justification must be."[183] Considering the analysis above, I am of the view that section 294 is an extensive and unjustifiable intrusion into a central part of the lives of those persons who are both conception and pregnancy infertile. This violates the rights to psychological integrity and equality in an unjustifiable manner. The applicants are therefore entitled to relief.

Remedy

[214] I have found that section 294 of the Children's Act unreasonably and unjustifiably infringes the rights to psychological integrity and equality. Section 172(1)(a) of the Constitution accordingly obliges this Court to declare that section 294 is inconsistent with the Constitution and invalid.[184]

[215] The question that remains is whether this Court should suspend the declaration of invalidity in terms of section 172(1)(b) of the Constitution, as suggested by the Minister, in order for the Legislature to be given an opportunity to correct the defect.[185] This Court is not obliged to suspend any declaration of invalidity. It has the discretion to do so in the event that it is just and equitable to follow this course.

[216] AB has requested that her matter be dealt with on a "semi-urgent" basis. In the High Court, she supported this request with the following statement:

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[183] *S v Bhulwana, S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 18.

[184] Section 172(1)(a) provides:

> "When deciding a constitutional matter within its power, a court—
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency."

[185] Section 172(1), in relevant part, provides that—

> "When deciding a constitutional matter within its power, a court—
>
> (b) may make any order that is just and equitable, including—
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

> "I am currently 55 years old. I am in excellent health and hope to look forward to many more years of enjoying good health. If I were still 35 or even 45 years old, having to wait several months or even a few years for the outcome of this matter would not have impacted greatly on my personal life plans to have and raise a child. However, as I am getting older, time gets more precious. At this stage in my life, saving three months has significant value to me."

[217] The Surrogacy Group argues that AB is entitled to the proper vindication of her constitutional rights violated by section 294, as well as to immediate and effective relief which "eliminates the source of the constitutional complaint in a way that provides a meaningful remedy". For this proposition, the Surrogacy Group relies on this Court's decision in *Van der Merwe*.[186] In that matter, Moseneke DCJ held for a unanimous Court that litigants—

> "are entitled to a proper vindication of their constitutional rights violated by the legislation. Another compelling consideration is that the order we make must constitute immediate and effective relief. It must eliminate the source of the constitutional complaint in a way that provides a meaningful remedy."[187]

Against this background, the Surrogacy Group insists that the only appropriate remedy is the striking down of section 294 without a suspension of invalidity.

[218] The Minister argues that the High Court misdirected itself in failing to give recognition to the constitutional principle of separation of powers. In the present matter, the Minister contends a suspension of the declaration of invalidity is warranted because a striking down of section 294 "would require the Court to engage in the details of law-making". The removal of section 294 from the Children's Act requires that a policy decision be made; the High Court should have refrained from making choices that are reserved for the Legislature.

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[186] *Van der Merwe v Road Accident Fund* [2006] ZACC 4; 2006 (4) SA 230 (CC); 2006 (6) BCLR 682 (CC).

[187] Id at para 71.

[219] As the Minister sees it, the policy decisions relate to whether the IVF regulations should be amended to bring them in line with section 294, or whether section 294 should be removed to bring surrogacy law in line with the IVF regulations. The Minister makes this argument on the basis that the Legislature should be allowed to reconsider the inclusion of section 294 in light of the enactment of the IVF regulations.

[220] The Minister is correct to say that section 294 would no longer unfairly discriminate vis-à-vis the IVF regulations if they were to be amended so as to prevent the use of double-donor gametes. This, however, is only correct when this aspect of the discrimination is viewed in a vacuum. Whether "levelling-down" is acceptable in any given case depends on the *effect* that doing so would have. As this Court pointed out in *Fourie*, levelling down in order to achieve equality is inappropriate where doing so leads to equal marginalisation:

> "Levelling down so as to deny access to civil marriage to all would not promote the achievement of the enjoyment of equality. Such parity of exclusion rather than of inclusion would distribute resentment evenly, instead of dissipating it equally for all. The law concerned with family formation and marriage requires equal celebration, not equal marginalisation; it calls for equality of the vineyard and not equality of the graveyard."[188]

Denying entitlements that are currently available to those using IVF in order to prevent discrimination is an example of parity of exclusion, which does not promote the achievement of equality. To hold otherwise is to undermine the constitutional values of human dignity, equality, and the advancement of human rights and freedoms.

[221] Notably, as I have held above, even if double-donor IVF was not legally permissible, section 294 would still unfairly discriminate against persons who are both

[188] *Fourie* above n 103 at para 149.

pregnancy infertile and conception infertile.[189] Moreover, I have found that section 294 not only violates AB's right to equality, but also her right to psychological integrity. In the event that the Legislature were to "level down" – for example by overriding the IVF regulations – in order to ensure that section 294 does not operate in a discriminatory fashion, section 12(2)(a) would still be violated independently of the right to equality. The Minister's assertion that the Legislature should be given the opportunity to make a policy decision in relation to whether the IVF regulations should be amended to bring them in line with section 294 is accordingly misplaced.

[222] This is not to say, however, that the striking down of section 294 is void of policy implications. The regulation of surrogacy is complex, and involves balancing the rights of multiple parties. In deciding whether to confirm a surrogate motherhood agreement, a court must in particular consider the best interests of the child. It must also consider the rights of the surrogate mother.

[223] Importantly, the central reason for finding that section 294 violates the Constitution is the effect that it has on those who are both conception infertile and pregnancy infertile. However, the effect of striking down section 294 is to upset the scheme of Chapter 19. As explained above, section 295(a) requires first that would-be commissioning parents are pregnancy infertile. Section 294 then creates a further hierarchy which, as explained above, obliges the use of the gametes of both commissioning parents where possible. If, for biological, medical or other valid reasons, this is not possible, section 294 permits the use of the gamete of one of the two commissioning parents. If the commissioning person is a single person, the gamete of that person should be used.

[224] The removal of section 294 means that this hierarchy is disrupted. Seeing as this matter pertains only to the constitutionality of a part of the overall hierarchy, it

[189] [127].

would be inappropriate to deprive the Legislature of the opportunity to reformulate section 294 in a manner that it considers appropriate in light of this judgment.

[225] For this reason, a suspension of the declaration of invalidity is warranted despite the applicants' contention to the contrary. I am cognisant that this will delay AB's ability to have a child. Considering the difficult journey she has been on this is an unfortunate result. However, in the context of the implications the removal of section 294 has on the legislative scheme of Chapter 19, a suspension remains appropriate.

Costs

Special costs order in the High Court

[226] In the High Court, the Minister filed her notice to oppose timeously. Every other document she filed was, however, late.[190] For example, the Minister's answering affidavit was late by five months. It was, moreover, incomplete. Not only did the Minister not attach any of the many documents referred to by Professor van Bogaert in her expert opinion, but the most important part of Professor van Bogaert's opinion was missing entirely. A month later, the remainder of Professor van Bogaert's expert opinion was filed. Various attachments, however, remained absent.

[227] Up until that point, approximately six months had been wasted. The Minister had filed her pleadings and the expert opinion she sought to rely on only after regular prompting from the applicants. The applicants had further resorted to filing three applications requiring the Minister to discover certain documents referred to in her pleadings.[191]

[190] Every document filed by the applicants was on time. I mention this only to indicate that none of the Minister's filings were late due to the applicants' conduct.

[191] In terms of rule 35(12) of the Uniform Rules of Court.

[228] The Minister, however, continued to drag her feet. A report referred to in the Minister's pleadings in the High Court – labelled "the Adoption Report" by the parties – had still not been furnished to the applicants. They subsequently approached the High Court for an order compelling its discovery, which was granted.[192] To this day, the Minister has still not delivered the Adoption Report to the applicants, and various other documents remain undiscovered as well.

[229] It is in this context that the High Court came to the conclusion that the Minister had "flagrantly disregarded her constitutional duty in respect of ensuring that all relevant evidence was timeously . . . placed before the Court" and ordered that the Minister pay costs on an attorney-client scale in respect of the main application and the interlocutory application necessitated by the Minister's failure to discover the Adoption Report.

[230] The Minister asks that the High Court's costs orders be reversed by this Court. Three reasons have been given as to why this would be appropriate:

(a) AB did not make out a case for urgency: she merely requested that her case be treated as one of semi-urgency and that judgment in the matter be given as soon as possible.
(b) The Minister was entirely at the mercy of outside experts over whom she had no control.
(c) The Adoption Report was in the public domain and the High Court should accordingly have found that it was always open to the applicants to obtain it through various other means provided for in legislation.

[231] In my view, the urgency of the matter is neither here nor there. The Minister's responsibility to comply with court rules and orders is not contingent on the matter being urgent or otherwise. An unnecessary delay of more than eight months,

[192] By Ledwaba DJP on 6 March 2014.

incomplete discovery of documents and non-compliance with a court order cannot be shrugged off merely because the Minister is of the view that AB's matter lacks urgency.

[232] The Minister's further arguments are thin at best. Notably, the opinion of Professor van Bogaert was the only expert evidence tendered by the Minister, and no extension was sought for her to complete the report. Second, even if the Minister was reliant on Professor van Bogaert in order to file her pleadings on time, it does not excuse her from failing to comply with the High Court's order in respect of the Adoption Report.

[233] No evidence was tendered to prove that the Adoption Report was in the public domain. Even if the Adoption Report was in the public domain this is no excuse for non-compliance with an order of court.

[234] The Surrogacy Group contends that a court of appeal should not interfere with the decision of a lower court unless that court has not exercised its discretion judicially.[193] The Minister, they submit, has failed to show how the High Court failed to exercise its discretion judicially. I agree. I can see no reason advanced by the Minister which shows that the costs order granted by the High Court was an inappropriate exercise of its discretion. The costs order in the High Court must accordingly stand.

[193] The Surrogacy Group point to the following dicta from *National Coalition 1999* above n 121 :

> "A [c]ourt of appeal is not entitled to set aside the decision of a lower court granting or refusing a postponement in the exercise of its discretion merely because the [c]ourt of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles."

National Coalition 1999 at para 11 as quoted by the Supreme Court of Appeal in *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* [2014] ZASCA 21; [2014] 2 All SA 493 (SCA) at para 28.

Costs in this Court

[235] The applicants, having been successful in this Court, are entitled to their costs.

Order

[236] In the result, I would have granted an order confirming that of the High Court, and suspended the declaration of invalidity for 18 months; the Minister to bear the applicants' costs.

NKABINDE J (Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Jafta J, Mhlantla J and Zondo J concurring):

Introduction

[237] This matter raises complex and important issues concerning the validity of a legislative provision that regulates surrogate motherhood agreements (surrogacy agreements). It touches on sensitive issues that cut across cultures and for both genders: issues of infertility and the inability to conceive a child or to produce a gamete,[194] in order to meet the legal requirement to enter into a surrogate motherhood agreement. At its core is the power of the state to regulate the assistive reproductive opportunities available to those who are conception and pregnancy infertile, to have children of their own. The issues involved thus raise complicated legal and ethical questions that have an impact on many people who are unable to give birth to children of their own. Naturally, because of the poignancy of the nature of the issues involved, sensitivity is necessary. Indeed, the issues trigger sympathy for those who are conception and pregnancy infertile.

[238] The first applicant (AB) challenged the constitutional validity of section 294 of the Children's Act in the High Court of South Africa, Gauteng Division, Pretoria

[194] See above n 9 for definition of gamete.

(High Court). The challenge was based on the grounds that the "genetic link requirement" in the impugned provision violates the rule of law and AB's rights to equality, human dignity, privacy, reproductive autonomy and access to health care services. AB sought costs including costs of two counsel. The second applicant was joined to the proceedings.[195] In the amended rule 16A notice, the second applicant sought the same declaratory relief and costs, including costs of two counsel and the qualifying costs of all the experts who provided their opinions on affidavit for the second applicant.[196] The respondent opposed the application.

[239] The impugned provision prohibits the conclusion of a surrogate motherhood agreement where the gametes of both commissioning parents are not used or, in the case of a single commissioning parent, where the gamete of that parent is not used. The High Court declared the provision inconsistent with the Constitution and invalid.[197] It further ordered the respondent to pay the costs on a punitive scale as between attorney and client. The declaration of invalidity was referred to this Court for confirmation as required by section 172(2) of the Constitution.[198] The applicants further seek condonation for their delayed written submissions. The respondent appeals against the order of the High Court.

[240] I have read the well-expressed judgment of my sister, Khampepe J (first judgment). I am in agreement with the remarks regarding the effects of a woman's inability to have a child of her own. I agree also with the first judgment's exposition of the background facts as well as its conclusion regarding costs.

[195] The second applicant was joined on 8 November 2013.

[196] The second applicant generally supported the analysis of the issues as stated by AB however, given the different nature and frame of reference by each of them, it filed a separate affidavit. Seemingly, after its joinder, the second applicant drove the case on behalf of AB. In this regard see High Court judgment above n 12 at para 13.

[197] Id at para 115.

[198] Confirmation proceedings are also regulated by section 15 of the Superior Courts Act 10 of 2013, read with rule 16 of the Rules of this Court.

However, I do not agree that the declaration of constitutional invalidity of section 294 should be confirmed. None of the implicated rights are violated.

Parties

[241] The parties, AB, Surrogacy Group, and the Minister, are described in the first judgment and so is the Centre, the amicus curiae.[199] I am thankful to the Centre for the helpful submissions.

Factual background

[242] The facts are comprehensively set out in the first judgment. I mention briefly those relevant for the purpose of this judgment. During the period of 2001 to 2011 AB, who was 55 years old at the time of the High Court judgment,[200] underwent a number of IVF cycles to conceive a child.[201] Seemingly, 16 of the IVF cycles were done with embryos that had no genetic link to her. Of the 16, 14 used both male and female anonymous donor gametes. The IVF treatments twice resulted in pregnancy but ended in miscarriages. AB was advised to consider surrogacy as a means to have a child. She was however informed that the law does not allow persons who are infertile and cannot contribute their own gamete for conception, to use surrogacy. This resulted in the constitutional challenge in the High Court.

[243] Reports of divergent opinions by experts were lodged in the High Court and relied upon by the parties in support of their respective perspectives.[202] Also, the

[199] First judgment at [5]-[7].

[200] AB was single from 2002 when she got divorced.

[201] An IVF cycle involves the process of spontaneous fertilisation of an ovum with a male sperm outside of the body. This process is only conducted by an institution authorised to do so. See Artificial Fertilisation of Persons Regulations, GN R175, GG 35099, 2 March 2012.

[202] For example, Ms Rodrigues, a clinical psychologist as identified in the first judgment at [85], reports:

> "Infertility is often a painful and complicated emotional experience for both sexes and across cultures; it has a profoundly negative effect on some of the core element of a person's being, such as self-worth, sense of identity and autonomy . . . infertile persons often feel socially isolated and marginalised, as they often experience their family and friends as – although well-intentioned – lacking in understanding of the full reality and impact of infertility."

report of the *Ad hoc* Committee on Surrogate Motherhood was filed and relied upon by the parties. This report recommended the retention of the requirement that the gametes of the commissioning parents should be used towards conception or in the case of a single person the gametes of that single parent.

[244] The rationale behind the *Ad hoc* Committee's recommendation was this:

> "In the instance where both the male and female gametes used in the creation of the embryo are donor gametes, it would result in a similar situation to adoption, as the child or children would not be genetically linked to the commissioning parent or parents. This would obviate the need for surrogacy as the couple could adopt a child. This type of surrogacy was not preferred by commentators. It was felt in both partial and full surrogacy it should be a pre-condition that the child or children should always be genetically linked to the commissioning parent or parents."[203]

Of further note and in the context of homosexual relationships, the SALC recognised that individuals have the right to make certain decisions concerning reproduction and that the limitation of the right may constitute a violation of their rights to dignity and privacy.

Legislative scheme

[245] Before I deal with the issues, it is important to have an understanding of the relevant legislative provisions of the Children's Act, because it is against those provisions that the impugned provision should be considered. Context is also important.

[246] Chapter 19 of the Children's Act regulates surrogate motherhood agreements. Before the commencement of the Act in April 2010,[204] "altruistic surrogacy" was allowed while "commercial surrogacy", considered to be *contra bonos mores* (against

[203] Quoted in the High Court judgment above n 12 at para 37.

[204] Proc R12 GG 33076 of 26 March 2010 brought into operation sections of the Children's Act which were not yet in operation at the time. This included Chapter 19.

good morals), was prohibited.[205] Surrogacy agreements were informally entered into seemingly because of the perceived advantage over the legally prescribed adoption procedure. Artificial fertilisation was regulated by the Human Tissue Act[206] and its Regulations. The mother, who gave birth to the child, and her partner, if they were married, were regarded as the parents of the child because of the maxim *pater est quem nuptiae demonstrant* (a father is he whom the marriage points out).[207]

[247] That meant that the commissioning parents in a surrogate relationship could only become legal parents of the child if they followed the adoption procedure in terms of the Child Care Act.[208] The consent of the married couple to artificial fertilisation was presumed and the child born of the fertilisation was thus held to be their legitimate child.[209] Section 5(2) of the Children's Status Act provided that no

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[205] The *Ad hoc* Committee report defines these two types of arrangements:

> "a) Altruistic surrogacy means a surrogacy arrangement where the surrogate mother is motivated, not by the prospect of financial gain, but by the altruistic desire to assist another person or persons to have a genetically linked child of his or her or their own.
>
> b) Commercial surrogacy means a surrogacy arrangement where the surrogate mother is motivated by the prospect of financial gain as the surrogacy is undertaken in exchange for payment. The commissioning parent or parents undertake to pay the surrogate mother a fee which is greater than the costs incurred and income lost in conceiving and bearing the child."

According to the report, most of the commentators expressed the view that surrogacy should not be a means of conducting business and that commercial surrogacy should be prohibited, because it is degrading to the surrogate mother as she is dehumanised to being a mere "incubator".

[206] 65 of 1983.

[207] This maxim received statutory recognition in section 5(1) of the Children's Status Act 82 of 1987 (which has been repealed in full by the Children's Act). That section read as follows:

> "(a) Whenever the gamete or gametes of any person other than a married woman or her husband have been used with the consent of both that woman and her husband for the artificial insemination of that woman, any child born of that woman as a result of such artificial insemination shall for all purposes be deemed to be the legitimate child of that woman and her husband as if the gamete or gametes of that woman or her husband were used for such artificial insemination.
>
> (b) For the purposes of paragraph (a) it shall be presumed, until the contrary is proved, that both the married woman and her husband have granted the relevant consent."

See also *J v Director General, Department of Home Affairs* [2003] ZACC 3; 2003 (5) SA 621 (CC); 2003 (5) BCLR 463 (CC), where this Court declared section 5 of the Children's Status Act invalid and ordered the words "or permanent same-sex life partner" to be read in after the word "husband" wherever it appears in that section.

[208] 73 of 1983 (Chapter 4). This statute has also been repealed in full by the Children's Act.

[209] This was in terms of section 5(1)(b) of the Children's Status Act. See above n 207.

right, duty and obligations arose between a child and a genetic donor or donors.[210] If the consent was given by the surrogate mother for the adoption of the child, the procedure in terms of the Child Care Act would apply.[211]

[248] The informal surrogacy agreement with its resultant uncertainties[212] – for example, its effect on the status of the child – gave rise to an investigation into surrogate motherhood by SALC. SALC produced a report with certain recommendations to Parliament. The latter referred the report to the *Ad hoc* Committee and a Bill was drafted and published for comment in 1995.[213] This Bill culminated in the amendment of the Children's Act, to include Chapter 19 that generally regulates the content, conclusion and confirmation of surrogacy agreements. The legislative intervention, although not a panacea for many problems,[214] was welcome as surrogacy had been a troubled issue veiled in uncertainties.[215] A discussion of the legislative scheme in this chapter follows shortly.

[249] As the long title of the Children's Act explicates, the statute was enacted "to give effect to certain rights of children as contained in the Constitution; to set out

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[210] This meant that in a situation where a surrogate mother changed her mind and no longer wished to consent to the adoption of the child by the commissioning parents, she would be entitled to withhold her consent and the agreement would thus be considered against good morals.

[211] Section 18(4) of the Child Care Act provided, in relevant part, as follows:

> "(4) A children's court to which an application for an order of adoption is made in terms of subsection (2), shall not grant the application unless it is satisfied—
>
> . . .
>
> (d) that consent to the adoption has been given by both parents of the child, or, if the child is illegitimate, by the mother of the child."

[212] The uncertainty arose also as a result of the case of the conception and birth of surrogate triplets, whose pregnancy was carried by their 40 year old grandmother, for the conception on behalf of her own daughter and son-in-law who contributed their gametes.

[213] Draft Bill on Surrogate Motherhood, proposed by South African Law Commission, GN 512 *GG* 16479, 14 June 1995.

[214] See, for example, *In re Confirmation of Three Surrogate Motherhood Agreements* 2011 (6) SA 22 (GSJ), concerning the requirements for confirmation – by a court as upper guardian of all children – of surrogate motherhood agreements in terms of section 295 of the Children's Act.

[215] See Nicholson "Surrogate motherhood agreements and their confirmation: A new challenge for practitioners" (2013) *De Jure* 510 at 515-6.

principles relating to the care and protection of children; to define parental responsibilities and rights . . . to provide for partial care of children . . . to provide for children in alternative care . . . to make new provision for the adoption of children . . . to provide for surrogate motherhood". The preamble reads:

> "WHEREAS the Constitution establishes a society based on democratic values, social justice and fundamental human rights and seeks to improve the quality of life of all citizens and to free the potential of each person;
> AND WHEREAS every child has the rights set out in section 28 of the Constitution;
> AND WHEREAS the State must respect, protect, promote and fulfil those rights;
> . . .
> AND WHEREAS it is necessary to effect changes to existing laws relating to children in order to afford them the necessary protection and assistance so that they fully assume their responsibility within the community as well as that the child, for the full and harmonious development of his or her personality, should grow up in a family environment in an atmosphere of happiness, love and understanding".

[250] The objects of the Children's Act, as set out in section 2, include the following:

> "(a) to promote the preservation and strengthening of families;
> (b) to give effect to the following constitutional rights of children, namely—
> (i) family care or parental care or appropriate alternative care when removed from the family environment;
> . . .
> (iv) that the best interests of a child are of paramount importance in every matter concerning the child;
> . . .
> (d) to make provision for structures, services and means for promoting and monitoring the sound physical, psychological, intellectual and social development of children;
> . . .
> (f) to protect children from . . . exploitation and any other physical, emotional or moral harm or hazards;
> (g) to provide care and protection to children who are in need of care and protection;
> . . .

(i) generally, to promote the protection, development and well-being of children."

[251] Section 4(2) empowers organs of state, in their implementation of the Children's Act, "to take reasonable measures to the maximum extent of their available resources to achieve the realisation of the objects of the Act". Section 6(1)(a) sets out general principles that guide the implementation of all legislation applicable to children, including the Children's Act. Section 6(1)(b) provides that these principles will guide "all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general". In terms of section 6(2)(a) to (c) all proceedings, actions or decisions in a matter concerning a child must—

"(a) respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation;
(b) respect the child's inherent dignity;
(c) treat the child fairly and equitably".

[252] Section 7 deals with the best interests of the child. Section 7(1) states that, when the best interests of the child standard is required by a provision of the Children's Act, that standard must be applied and several factors must be taken into consideration, where relevant. Moreover, section 7(1) should be read with section 28(2) of the Constitution. The factors to be considered, as set out in section 7(1), include:

"(a) the nature of the personal relationship between—
the child and the parents, or any specific parent;
. . .
(f) the need for the child—
(i) to remain in the care of his or her parent, family and extended family; and
(ii) to maintain a connection with his or her family, extended family, culture or tradition.
(g) the child's—

(i) age, maturity and stage of development;
(ii) gender;
(iii) background; and
(iv) any other relevant characteristics of the child;

(h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development".

[253] Section 9 goes further to underscore the best interests of the child standard, in harmony with section 28(2) of the Constitution. It provides that "[i]n all matters concerning the care, protection and well-being of a child the standard that the child's best interests is of paramount importance, must be applied." Most of the children's rights protected under the Children's Act are set out in section 28 of the Constitution. It is not insignificant that the preamble makes specific reference to those constitutionally guaranteed rights. The rights in section 28 are the rights—

"(a) to a name and a nationality from birth;
(b) to family care or parental 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;
(e) to be protected from exploitative labour practices;
(f) not to be required or permitted to perform work or provide services that:
(i) are inappropriate for a person of that child's age; or
(ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be:
(i) kept separately from detained persons over the age of 18 years; and
(ii) treated in a manner, and kept in conditions, that take account of the child's age;
(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

(i) not to be used directly in armed conflict, and to be protected in times of armed conflict."

[254] Section 41 makes provision for a child born as a result of surrogacy, or the guardian of that child, to have access to any medical information or other information concerning the child's genetic parent(s) after the child reaches the age of 18 years. This is consistent with the object of section 294,[216] to ensure that the child becomes aware of its genetic origin. This is so even if the provision does not allow access to information regarding the identity of the surrogate mother in terms of section 41(2). Section 41(3) makes it possible for the child and guardian to receive counselling, if the Director-General of the Department of Health deems fit. Chapter 19, spanning sections 292 to 295 outlines procedural and substantive confines of the surrogate motherhood agreement. Sections 292 and 293 set out formalities regarding a surrogate motherhood agreement.[217]

[255] Section 294 deals with the "[g]enetic origin of [the] child". It reads:

"No surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both commissioning parents or, if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents or, where the commissioning parent is a single person, the gamete of that person."

[256] Section 295 deals with the confirmation of a surrogate motherhood agreement by a court. In relevant part it reads:

"A court may not confirm a surrogate motherhood agreement unless—

[216] Requiring the gametes of the commissioning parents or parent, in the case of a single parent, to be used for the purpose of the surrogacy motherhood agreement.

[217] In particular, section 293 requires the consent of the husband, wife or partner of the commissioning parent before the surrogate motherhood agreement is confirmed by a court, when a commissioning parent is married or involved in a permanent relationship. A court has the discretion to confirm the agreement where the consent is unreasonably withheld by a husband or partner who is not a genetic parent of the child to be. This provision protects the interests of the commissioning parent.

(a) the commissioning parent or parents are not able to give birth to a child and that the condition is permanent and irreversible;

. . .

(e) in general having regard to the personal circumstances and family situations of all the parties concerned, but *above all the interests of the child that is to be born*, the agreement should be confirmed."

[257] Section 296 sets out the requirements for the artificial fertilisation of a surrogate mother and section 297 deals with the effect of the surrogate motherhood agreement on the status of the child. Section 297 may be read in conjunction with section 41(2) regarding the non-disclosure of the identity of the surrogate mother to the child. Section 301 disallows payments in respect of surrogacy agreements. Section 303 prohibits artificial fertilisation of a woman in the execution of a surrogate motherhood agreement or the rendering of assistance in the artificial fertilisation, unless that artificial fertilisation is authorised by a court in terms of the Children's Act. It is against the above history, constitutional provisions and legislative scheme that the issues before us must be considered.

High Court proceedings

[258] The applicants argued that the genetic link requirement allocates special value to genetic lineage in the context of establishing a family through surrogacy. This, they argued, is in conflict with the legal conception of family. The applicants' "central" challenge in that Court was based on the infringement of the right to equality.[218] It was contended that the genetic link criterion in section 294 impacted firstly, on the rights of all members of the Class of persons[219] by prohibiting them from electing to

[218] High Court judgment above n 12 at para 70.

[219] This is a Class of persons who fulfil the threshold requirement in terms of which pregnancy infertility constitutes the basis for qualifying for surrogacy and who intend to use surrogacy to become parents. This type of infertility is described as "pregnancy infertility", referring to the inability of a woman to procure implantation or to carry a pregnancy to full term. Pregnancy infertility is said to constitute a basis for qualification for surrogacy. AB is pregnancy infertile. (High Court judgment id at paras 28-9).

use the donor gametes for the conception of their child-to-be and, secondly, on the right of the Subclass[220] by effectively prohibiting them from using surrogacy.

[259] In relation to each of the Classes, the applicants submitted that the genetic link requirement violated AB's right to equality because it causes a certain category of persons – described as members of the Subclass[221] – to be treated differently and not to enjoy equal protection and benefit of the law in terms of section 9(1) of the Constitution. It was contended that societal marginalisation of infertile people is perpetuated and the negative effect of infertility is reinforced.[222]

[260] Also in relation to members of the Subclass, the applicants relied on sections 9(3) and 27(1) of the Constitution. In relation to the former, they said that the genetic link requirement imposed on the Subclass is particularly "noxious" and constitutes unfair discrimination. As to the latter, they contended that surrogacy is a form of "reproductive health care". The genetic link requirement, they asserted, violates AB's right to reproductive health care. The applicants contended that the purported reasons for the genetic link requirement cannot justify the limitation of the rights of the members of the Subclass.

[261] Additionally, the applicants submitted that the prospective parents' right to human dignity and "reproductive autonomy as guaranteed by section 12(2)(a) of the Constitution" was violated. This section guarantees everyone the right "to bodily and psychological integrity, which includes the right to make decisions concerning reproduction." The prospective parent's right to choose whether to use her own

[220] Id at para 70.

[221] The members of the Subclass are said to be distinguishable from those of a Class by virtue of the fact that they are biologically unable to contribute their own gamete for conception or are not involved in a sexual relationship with a person who is able to make such a contribution. AB is also conception infertile. (Id at paras 27 and 29).

[222] For these contentions, as it is apparent from paras 74 and 75 of the High Court judgment, the applicants relied on the report of Ms Rodrigues.

gametes or through IVF make use of donor gametes was allegedly infringed. The applicants said that autonomy is a core element of human dignity.

[262] The respondent raised several bases to support the contention that the statutory genetic link requirement between the commissioning parent and the child is not inconsistent with the Constitution and invalid. More fundamentally was her submission that the constitutional right of a child guaranteed in section 28(2) of the Constitution will be compromised if the genetic link requirement is removed. The respondent specifically raised issues regarding the promotion of the child's right to know its genetic origin and to information about the processes involved in the conception and the prevention, among other things, of: (a) the creation of designer children and of shopping around for gametes with the intention of creating children with particular characteristics; (b) commercial surrogacy; (c) the potential of exploitation of surrogate mothers; and (d) circumvention of adoption law. She argued that, should the Court find that the impugned provisions limit the rights invoked by AB, the limitation is justifiable in terms of section 36 of the Constitution.

[263] In declaring section 294 of the Children's Act to be inconsistent with the Constitution and invalid, the High Court approached the matter by analysing the legal conception of what constitutes family. It remarked that the Legislature should take cognisance of the advances in fertility and reproductive technology and the obligation to redefine the traditional view of the family.[223] The Court held that the genetic link requirement—

(a) is irrational in terms of section 9(1) of the Constitution. It referred to the differentiation in the procedures between IVF in terms of the Regulations Relating to Artificial Fertilisation of Persons (IVF

[223] High Court judgment above n 12 at para 46.

regulations)[224] and surrogacy. The Court concluded that there is no rational connection between the differentiation and the legitimate government purpose that differentiation is designed to achieve;[225]

(b) infringes AB's or the Subclass's right—

(i) not to be unfairly discriminated on the basis of infertility whereas under the IVF regulations parents are free to use double-donor gametes in terms of section 9(3) of the Constitution;

(ii) to human dignity in terms of section 10 of the Constitution;

(iii) to reproductive autonomy in terms of section 12(2)(a) of the Constitution. The Court remarked that in making decisions to use donor gametes towards conception of the prospective child commissioning parents exercise their autonomy – a vital part of human dignity. The genetic link requirement, it held, thus infringes human dignity[226] and the right to bodily and psychological integrity, which includes the right "to make decisions concerning reproduction";[227] and

(iv) to access to health care services in terms of section 27 of the Constitution."[228]

[264] While the High Court accepted that "mere differentiation" does not necessarily violate the right to equality, it said that the factual differentiation does not justify a legal differentiation.[229] The Court said that this is so "[i]f regard is had to the IVF regime where parents are free to use double-donor gametes".[230] It held that differentiation based on the genetic link requirement constitutes discrimination

[224] Id at para 78. Section 10(2)(a)(ii) of the Regulations above n 106 seems to allow for the use of double-donor gametes but sets out conditions under which the artificial fertilisation should be done.

[225] High Court judgment above n 12 at paras 85-7.

[226] Id at para 89.

[227] Id. See also para 92.

[228] Id at para 99.

[229] Id at paras 73 and 77.

[230] Id.

because it has the effect of excluding members of the Subclass "from accessing surrogate motherhood as a reproductive avenue".[231] That exclusion, it said, reinforces the profound negative psychological effects that infertility has on a person.[232]

[265] For that proposition the High Court relied on the IVF regulations.[233] The Court said that they "stand in stark contrast with the genetic link requirement in terms of which members of the Class, to which [AB] belong[s], may not choose to use and select both male and female donor gametes *purely based on personal choice*."[234] As the historical context of Chapter 19 shows, the recognition of surrogacy was an appropriately considered policy decision that ended in that legislative scheme. It was not as a result of an individual's choices.[235]

[266] The High Court rejected the respondent's arguments. It accepted, however, that the procedures – IVF and surrogacy – are fundamentally different. It held that that does not however "offer a justification for the fact that in law a differentiation is drawn between [the procedures], allowing infertile people to become parents."[236] The Court held that whether one donor gamete or two donor gametes are used would make

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[231] Id at para 76.

[232] Id.

[233] Id at para 78.

[234] Id at para 79.

[235] Section 85(2)(b) and (d) and section 73(2) of the Constitution affirm the fact that legislation comes about as a result of a process that involves policy decisions being taken by relevant governmental duty bearers.

Section 85(2)(b) and (d) provides:

> "(2) The President exercises the executive authority, together with the other members of the Cabinet, by—
>
> . . .
>
> (b) developing and implementing national policy;
>
> . . .
>
> (d) preparing and initiating legislation."

Section 73(2) of the Constitution, in relevant part, provides:

> "Only a Cabinet member or a Deputy Minister, or a member or committee of the National Assembly, may introduce a Bill in the Assembly".

[236] High Court judgment above 12 at para 82.

no difference to the consequence of the surrogate motherhood agreement.[237] It considered that that would merely be a factor to be taken into account together with all other relevant factors.[238]

[267] In relation to the submissions regarding the child's rights in terms of section 28 of the Constitution, the High Court held that "there is no persuasive evidence before the Court that information relating to the child's genetic origin is necessarily in the best interests of the child". If that is so, the Court held, that begs the question "how is the child's alleged interest in knowing its genetic origin promoted by targeting only surrogacy commissioning parents who elect to use double-donor gametes, but not prospective parents who use IVF and elect to use double-donor gametes?" Relying on *Poverty Alleviation*[239] the Court concluded that there is no rational connection in the differentiation.

[268] The High Court said that in making decisions to use donor gametes towards conception of the prospective child, for whatever personal reasons, commissioning parents exercise their autonomy – a vital part of human dignity. The genetic link requirement thus infringes human dignity[240] and the right to bodily and psychological integrity, which includes the right "to make decisions concerning reproduction." The Court's remarks were based on the fact that "gamete donor selection, and in fact double-donor selection, is recognised as a legal right in the context of IVF".[241] On whether the genetic link requirement constitutes an infringement to AB's right of access to health care in terms of section 27(1) and (2) of the Constitution, the

[237] Id at para 84.

[238] Id.

[239] *Poverty Alleviation Network v President of the Republic of South Africa* [2010] ZACC 5; 2010 (6) BCLR 520 (CC).

[240] High Court judgment above n 12 at para 89.

[241] Id at para 92.

High Court did not analyse the content of this right. It held that the genetic link requirement limits the right.[242]

In this Court

[269] The applicants seek confirmation of the declaration of invalidity of section 294. Their case is largely the same as in the High Court. It is thus not necessary to restate their argument in detail. The applicants submit that the legal conception of family is of "critical importance to the determination of this matter" and that it does not allocate special value to genetic lineage.[243] The nub of the applicants' argument is that surrogacy provides an opportunity for a person who is conception and pregnancy infertile[244] to have a child – irrespective of whether the child will be genetically related to the parents or not.[245]

[270] The applicants argue that there is no rational basis for the differentiation caused by the genetic link requirement. They argue that the exclusion on the basis of infertility is discriminatory and unfair. The applicants also argue that the commissioning parents' rights to reproductive autonomy and human dignity are infringed by the genetic link requirement, because it prohibits the double-donor gametes decision by commissioning parents. Further, the applicants maintain that AB's right to access to health care services and reproductive health care in terms of section 27 of the Constitution is violated.

[242] Id at para 99.

[243] For this proposition they rely on *Fourie* above n 103 at paras 59 and 86, and *Du Toit* above n 123 at para 19.

[244] Because, regarding the first, she cannot contribute her gamete(s) for conception and regarding the second, is unable to carry pregnancy to term.

[245] As in the High Court, the parties relied on the opinion by experts in support of their perspectives. I will not place reliance on the divergent opinions of the experts in deciding the issues because this Court, as the ultimate authority on the questions regarding the validity of legislation and violation of rights, should arrive at its own independent evaluation. See *Pillay* above n 44 at paras 81-3.

[271] The respondent seeks an order upholding the appeal and replacing the High Court order by dismissing prayers 1 and 2 of the notice of motion.[246] Alternatively, she opposes the application for confirmation. Further alternatively, if section 294 does not pass muster, the respondent seeks an order suspending the declaration of invalidity for Parliament to remedy the inconsistency between the impugned provision and the IVF regulations enacted in terms of the Health Act, or for a reading in of the words: "occur in exceptional circumstances and on application to Court, an exemption of compliance may be allowed".

[272] The amicus curiae emphasises the importance of a purposive interpretive approach that would give meaning to the object of the Children's Act and to the trend towards openness in relation to the rights of a child to know their genetic origin.

Issues

[273] It is important to highlight at the outset that this case is about the validity of section 294 of the Children's Act and not about whether the genetic link requirement in that section has relevance to the legal conception of family. The primary issue is whether the order of the High Court should be confirmed. In deciding this question regard must be had to the text of the impugned provision, to determine its legislative objectives.[247] This entails an interpretive process limited to what the text of the

[246] These prayers are:

> "1 Confirming the declaration of invalidity of section 294 of the Children's Act, Act 38 of 2005, made by Basson J in the North Gauteng High Court (Pretoria) on 12 August 2015;
>
> 2 Directing that the costs of this application, including the costs incumbent upon the employment of two counsel, be paid by the respondent".

[247] In the High Court, much reliance is placed on the views of the experts to demonstrate this point. In *Cool Ideas,* above n 150 above, this Court had this to say at para28 about tenets of statutory interpretation:

> "A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:
>
> (a) that statutory provisions should always be interpreted purposively;
>
> (b) the relevant statutory provision must be properly contextualised; and

impugned provision is reasonably capable of meaning.[248] We need to consider whether—

(1) the impugned legislation is irrational in terms of section 9(1) of the Constitution;
(2) AB's implicated rights to equality; dignity; bodily integrity including the right to make decisions concerning reproduction; access to reproductive health care; and privacy are limited by the genetic link requirement in terms of section 294 and if so;
(3) the limitation of the rights is justifiable in terms of section 36(1) of the Constitution.

[274] In determining whether the declaration of invalidity should be confirmed the starting point is to delineate the correct approach to statutory interpretation. Words in the legislation must be given their ordinary meaning unless doing so would result in absurdity.[249] And more importantly, statutes must be interpreted purposively,[250] with regard to the context of the statute as a whole.[251]

Meaning of section 294

[275] Section 294 of the Children's Act bears repeating:

"**Genetic origin of child**

No surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both

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(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)

[248] See *National Coalition 1999* above n 121 at para 24.

[249] *SATAWU v Garvas* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) at para 37.

[250] *Cool Ideas* above n 150 at para 28.

[251] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (*Bato Star Fishing*) at paras 89-90.

> commissioning parents or, if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents or, where the commissioning parent is a single person, the gamete of that person."

[276] Section 294 regulates the conclusion of a valid surrogate motherhood agreement by stipulating certain requirements. The prerequisite for a valid agreement is that the conception of the child contemplated in that agreement must be achieved by the use of the gametes of both commissioning parents or the gamete of one of the two parents if both parents cannot donate gametes due to either biological, medical or other reasons. Where there is one commissioning parent, as is the case with AB, the section requires the use of the gamete of that parent.

[277] In the main, the legislative scheme under Chapter 19 protects the commissioning parents or parent or persons who are permanently and irreversibly infertile by allowing them to conclude a surrogate motherhood agreement. The scheme, in particular section 294, favours infertile commissioning parents as it disqualifies the fertile commissioning parent(s) who are able to conceive without the assistance of surrogacy.[252]

[278] The prohibition in this impugned provision relates only to the conclusion of the surrogate motherhood agreement where the gametes of the commissioning parents or parent are not used. The objective of the provision is evident from the plain language used in the heading of and the provision itself, the heading reads: "Genetic origin of child". Textually, if both commissioning parents are unable to contribute gametes for procreation, they are disqualified. Single commissioning parents are likewise disqualified if they cannot, in person, contribute gametes for that purpose.[253]

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[252] This view is bolstered by the High Court's observation that the inclusion of homosexual parents and single parents in the context of surrogacy demonstrates an acceptance of the constant change and evolution in the social practices requiring the Legislature to take cognisance of the changes. See High Court judgment above n 12 at para 38.

[253] Section 294 is broadly permissive because it does not disqualify fertile commissioning parents. This group of parents is disqualified by section 295(a), if they can give birth to a child without the assistance of surrogacy or IVF. This section gives a court the discretion not to confirm a surrogacy agreement "unless the

[279] The regulatory scheme in Chapter 19 must be considered in the context of the Children's Act, as a whole.[254] While the Children's Act seeks to protect other rights in the Constitution its main objective, as set out in section 2, is to give effect to the constitutional rights of children: this is plain from the name of the statute itself. Its long title and preamble also bear that out. The legislative scheme under Chapter 19, especially the impugned provision, also protects the child by ensuring that a genetic link exists when that child is conceived.

[280] Section 295(e), read with section 9, of the Children's Act also affirms the paramountcy of the best interests of the child contemplated in the surrogate motherhood agreement. This does not mean that the child's rights assume dominance over other constitutional rights. In terms of section 295(e), the personal circumstances and family situations of "all the parties concerned" have to be considered when confirming the agreement.

[281] Section 28(2) of the Constitution avows the paramountcy of the best interests of the child in every matter concerning the child. The fact that this provision gives paramountcy to the best interests of the child in matters concerning the child does not mean that other rights should not be taken into account.[255] Moreover, as this Court remarked in *De Reuck*, "constitutional rights are mutually interrelated and interdependent and form a single constitutional value system."[256] The Court said that section 28(2), like the other rights in the Bill of Rights, is subject to limitations that

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commissioning parent or parents are not able to give birth to a child and that the condition is permanent and irreversible".

[254] *Cool Ideas* above n 150 at para 28.

[255] In this regard see *Centre for Child Law v Minister for Justice and Constitutional Development* [2009] ZACC 18; 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC) at para 29 which provides "The constitutional injunction that '[a] child's best interests are of paramount importance in every matter concerning the child' . . . means that the child's interests are 'more important than anything else', but not that everything else is unimportant". See also *S v M* above n 164 at paras 25-6.

[256] *De Reuck v Director of Public Prosecutions* (*Witwatersrand Local Division*) [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at para 55.

are reasonable and justifiable in compliance with section 36 of the Constitution. It follows that children's rights do not trump other rights.[257]

[282] With this prelude, the alleged limitation of AB's rights needs to be examined with a view to determining whether the challenged provision passes muster. These rights include, broadly, the rights to equality, human dignity, freedom and security of the person, privacy and health care.

Is section 294 irrational?

[283] It is contended by the applicants that the genetic link requirement in section 294 of the Children's Act constitutes an irrational legal differentiation that violates section 9(1) of the Constitution because the IVF regulations permit double-donor gametes.[258] Section 9(1) provides that "[e]veryone is equal before the law and has the right to equal protection and benefit of the law." Rationality is an incident of the rule of law. When enacting laws, the Legislature is constrained to act rationally and not capriciously or arbitrarily.[259] The questions that need to be answered are as follows: when is the differentiation permissible; and under what circumstances is the differentiation a limitation of the equality right in section 9(1) and thus unconstitutional?

[284] At the outset, an observation needs to be made that the applicants' pleading of irrationality is incorrect. The objective of the inquiry here is to determine whether there is a rational link between the impugned provision itself and the genetic link

[257] Id. See *S v M* above n 164 at paras 25-6. The Court stressed that section 28(2) "cannot be said to assume dominance over other constitutional rights".

[258] High Court judgment above n 12 at para 87.

[259] See *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) (*Pharmaceutical Manufacturers*) at paras 17 and 89; *New National Party v Government of the Republic of South Africa* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) at para 19.

requirement.[260] Legislation, or provisions within legislation, becomes invalid for being inconsistent on its own terms with the Constitution.[261]

[285] The correct approach to be adopted when legislative measures are challenged is to determine whether there is a rational connection between the means chosen and the objective sought to be achieved.[262] A mere differentiation does not render a legislative measure irrational. The differentiation must be arbitrary or must manifest "naked preferences" that serve no legitimate governmental purpose for it to render the measure irrational.[263] Moseneke DCJ aptly puts it thus in *Law Society*:[264]

> "It is by now well settled that, where a legislative measure is challenged on the ground that it is not rational, the Court must examine the means chosen in order to decide whether they are rationally related to the public good sought to be achieved.
>
> It remains to be said that the requirement of rationality is not directed at testing whether legislation is fair or reasonable or appropriate. Nor is it aimed at deciding whether there are other or even better means that could have been used. Its use, is restricted to the threshold question whether the measure the lawgiver has chosen is properly related to the public good it seeks to realise. If the measure fails on this

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[260] The following was said in *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 51:

> "The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved."

[261] See *Bato Star Fishing* above n 251 at para 90 and *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC) at para 61 that provide that legislation must be interpreted in its context. See also *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit NO* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai*) at paras 21-2 which provides that legislation must be interpreted through the prism of the Bill of Rights and in ways which give effect to the values in the Constitution.

[262] *Prinsloo* above n 108 at para 25-6. See also *Harksen* above n 107 at paras 42, 44 and 53.

[263] *Prinsloo* id at para 25.

[264] *Law Society of South Africa v Minister of Transport* [2010] ZACC 25; 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC) (*Law Society*) at paras 32-3. See also *Albutt* above n 260 at para 51.

> account, that is indeed the end of the enquiry. The measure falls to be struck down as constitutionally bad."

[286] The respondent accepted that there is a differentiation between the surrogacy legislation and the IVF regulations. This is correct because IVF is regulated by the Regulations Relating to Artificial Fertilisation of Persons. The Regulations are enacted in terms of the National Health Act.[265] Surrogacy is regulated in terms of the Children's Act even though the artificial fertilisation procedures have to be carried out in terms of the Regulations. Needless to say, the objectives of the Children's Act and the National Health Act are different,[266] hence the obvious differences between IVF and surrogacy. It then follows that a statutory provision cannot be measured against regulations under different legislation to decide whether it is rational or consistent with the Constitution.[267] It is only when the regulatory measure does not serve a legitimate government purpose that it can fall foul of section 9(1) of the Constitution. Otherwise, many statutes that are replete with measures that merely differentiate[268] would run afoul of the Constitution.

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[265] At section 68(1)(k). In paragraph 8.21 of its answering affidavit, the respondent denies that—

> "allowing the commissioning [parent] of a child with no genetic link is analogous to a commissioned child in an IVF environment. In an IVF environment, the commissioning mother carries the pregnancy herself. The commissioning mother becomes the gestational mother and thus a gestational bond is at least created between the child and the commissioning mother. The procedure is highly regulated under the National Health Act and the regulations thereto."

[266] As its long title shows, the National Health Act was enacted to provide a framework for a structured uniform health system while taking into account the obligations imposed by other laws on the national, provincial and local governments with regard to health services. The preamble to the National Health Act recognises, among other things, the socio-economic injustices, imbalances and inequalities of health services of the past. It therefore aims to ensure compliance with, inter alia, section 27(2) of the Constitution that enjoins the state to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right to have access to health care services, including the right to reproductive health care. It is in this context that the Minister is authorised to make regulations regarding artificial fertilisation of persons in terms of section 68 of the National Health Act.

[267] The following judgments provide that we cannot use regulations or other subordinate legislation and similar instruments to interpret primary legislation: *Welkom* above n 67 at para 65; *Sebola v Standard Bank of South Africa Ltd* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) at para 62; *Rossouw v First Rand Bank Ltd t/a FNB Homeloans (Formerly First Rand Bank of South Africa Ltd)* [2010] ZASCA 130; 2010 (6) SA 439 (SCA) at para 24 and *National Lotteries Board v Bruss* [2008] ZASCA 167; 2009 (4) SA 362 (SCA) at para 37.

[268] Take for example, the Electoral Act 73 of 1998. Although section 19 of the Constitution confers the right to vote on every adult citizen to vote one can only do so if duly registered and their details inserted on the voters

[287] Is there a rational connection between the differentiation in question and the legitimate governmental purpose that differentiation is designed to achieve? YES: The requirement of donor gamete(s) within the context of surrogacy indeed serves a rational purpose – the public good chosen by the lawgiver – of creating a bond between the child and the commissioning parents or parent. The creation of a bond is designed to protect the best interests of the child-to-be born so that the child has a genetic link with its parent(s). Therefore, a rational connection exists.

[288] In any event, the disqualification of AB or of other people similarly placed is rational in that it safeguards the genetic origin of the child as contemplated in the surrogacy agreement, for the child's best interests. The disqualification is no different, for example, from the disqualification from obtaining or holding a learner's or driving licence in terms of section 15(1) the National Road Traffic Act.[269] Those disqualified include people with biological disabilities or medical conditions: defective vision (blindness) or uncontrolled epilepsy and uncontrolled diabetes mellitus, respectively.[270] Unquestionably, these disqualifying conditions, as those contained in the impugned provision, result in differentiation that serves legitimate government purposes. In this case, although AB is disqualified from concluding the surrogate motherhood agreement by reason of biological, medical or other reasons she is not left without any legal option. She could in theory bring herself within the ambit

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roll. Section 6 of the Electoral Act prohibits the placing on the voter's roll of the name of a person below the age of 18 years and consequently denies them the opportunity to exercise a right afforded to them by the Constitution. So, if the qualification age of 18 years for the exercise of the right to vote is not attained, the person below the age of 18 years is disqualified and the disqualification cannot, by itself, render section 6 irrational in terms of section 9(1) of the Constitution.

[269] 93 of 1996.

[270] In relevant parts, section 15(1) of the National Road Traffic Act reads:

> "(1) A person shall be disqualified from obtaining or holding a learner's or driving licence—
>
> (f) if he or she is suffering from one of the following diseases or disabilities:
>
> (v) uncontrolled diabetes mellitus;
>
> (vi) defective vision ascertained in accordance with a prescribed standard."

of section 294 by entering into a partnership relationship with someone whose gamete may be used for the conception of the child as contemplated in the agreement.

[289] Besides, an IVF arrangement cannot be compared with the use of donor gamete within the surrogacy context. This is so because the procedures in respect of IVF and surrogacy differ substantially. In relation to the former, although the "host mother" may not necessarily be the genetic mother of the child she retains a gestational link to the child as a result of carrying the child. In regard to surrogacy a genetic link is created between the child-to-be and the commissioning parents or parent.

[290] It is correct that the IVF regulations allow for double-donor IVF. This is in the context of the National Health Act. Thus, a specific recipient can, in terms of regulation 10(2)(a)(ii),[271] receive gametes from a male and female donor. But that cannot be a justification to strike down the challenged provision. The applicants did not dispute that the clarity of origin may be important to a self-identity and self-respect of the child. The High Court nonetheless considered that, because the same is not required in the context of IVF where double-donation of gametes is permitted, it should not be required in the context of surrogacy.[272] Indeed, as the amicus correctly argued, the logic in the reasoning is difficult to follow. The risk to children's self-identity and self-respect (their dignity and best interests) is, unquestionably, all important. The fact that these rights are placed at similar risk in another context is hardly a reason to find their protection irrelevant.[273]

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[271] Regulation 10(2) reads:

> "(a) A competent person shall not effect in vitro fertilisation except for embryo transfer, to a specific recipient and then only by the union of gametes removed or withdrawn from the bodies of—
>
> (i) such recipient and an individual male gamete donor; or
>
> (ii) an individual male and an individual female gamete donor."

It is noteworthy that the rest of the regulations deal with different medical processes and procedures that apply to different forms of artificial fertilisation.

[272] High Court judgment above n 12 at para 85.

[273] In the case of IVF, there is a gestational link between the mother and the child. The gestational link is considered emotionally significant as it allows the woman to feel that the child is "hers" and that she is a "normal" mother who conceived "naturally".

[291] The High Court's approach,[274] suggesting the need for credible data to demonstrate that the presence or absence of a genetic link in the context of surrogacy will have adverse effects on the child, is wrong. That approach elevates the importance of empirical research above the purposive construction of the challenged provision, to establish a legitimate governmental purpose. In any case, courts do not rely on the opinions or "credible data" by experts when determining the constitutionality of legislation.[275]

[292] Additionally, seemingly because of the applicants' submission that the legal conception of family is of "critical importance to the determination of this matter", the Court examined the legal conception of what constitutes family. It then remarked that the "legislature should . . . take due cognisance of the advances made in fertility and reproductive technology, and that with that comes the obligation to redefine the traditional view of the family".[276] Similarly, that approach is wrong. Where polycentric legislative measures are challenged on the basis that they are irrational a court must, as this Court pronounced in *Law Society*,[277] examine the means chosen in order to decide whether they are rationally related to the public good sought to be achieved. It needs to be stressed that the legislative measure chosen by the Legislature in section 294 is rationally related to the public good sought to be achieved by government. Therefore, we cannot interfere with the lawfully chosen measure on the ground that the Legislature should have taken other considerations into account or that it should have considered a different decision that is preferable.[278] As this Court stressed in *Albutt*,[279] the purpose of the enquiry is to determine not whether

[274] High Court judgment above n 12 at paras 85-6.

[275] See *Pillay* above n 44 at paras 81-3.

[276] High Court judgment above n 12 at para 46.

[277] *Law Society* above n 264 at para 34.

[278] Id at para 35. See also *Bel Porto School Governing Body v Premier, Western Cape* [2002] ZACC 2; 2002 (3) SA 265 (CC); 2002 (9) BCLR 891 (CC) at paras 41-5.

[279] *Albutt* above n 260 at para 51. See also *Law Society* above n 264 at paras 32-3.

there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved.

[293] At the risk of repetition, it cannot be disputed that the conditions in section 294 are the means to establishing a genetic link between the commissioning parents and the child to be born as contemplated in the surrogacy agreement. Nor can it be questioned that establishing a genetic link is a legitimate government purpose. The High Court disregarded the object of the Children's Act. It overemphasised the interests of the commissioning parent(s) and overlooked the purpose of the impugned provision and the best interests of children despite it being established that cases involving children are pre-eminently of the kind where one "must scratch the surface to get to the real substance below".[280]

[294] Here, the substance below the surface is the need for a genetic link between a child and at least one parent. The importance of this genetic link is affirmed in the adage "*ngwana ga se wa ga ka otla ke wa ga katsala*" (loosely translated the adage means "a child belongs not to the one who provides but to the one who gives birth to the child").[281] Hence clarity regarding the origin of a child is important to the self-identity and self-respect of the child. Unsurprisingly, this was correctly endorsed by the High Court.[282] There is a rational nexus between the purpose of the legislative scheme, including section 294, that provides a framework within which individuals are able to have children and become parents in circumstances where they would otherwise not have been. For all these reasons, I do not support the conclusion by the High Court that section 294 constitutes an irrational legal differentiation that violates section 9(1) of the Constitution. The rationality challenge must fail.

[280] See *Welkom* above n 67 at para 130.

[281] The other somewhat related principle under the common law is expressed in the latin maxim that *mater semper certa est* (the mother is always certain).

[282] High Court judgment above n 12 at para 85.

Does section 294 limit AB's right to equality?

[295] Having concluded that the impugned provision is rationally connected to a legitimate government purpose, the next inquiry is whether the provision limits AB's right to equality. Here, it is necessary to determine whether the impugned provision discriminates against AB and members of the Subclass in terms of section 9(2) of the Constitution and, if so, whether the discrimination is unfair in terms of section 9(3) of the Constitution. Section 9(2) and (3) of the Constitution reads:

> "(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

[296] Coupled with other constitutional values, including human dignity and human rights and freedoms, equality – both as a value[283] and a right – gives meaning to specific substantive constitutional rights. The right to equality provides a mechanism to achieve substantive equality which, unlike formal equality that presumes that all people are equal, tolerates difference.[284]

[297] In determining whether this right is limited, a two-stage inquiry regarding the categories of discrimination is important. The inquiry is described by this Court in *Harksen* where Goldstone J remarked:

> "The first is differentiation on one (or more) of the fourteen grounds specified . . . (a 'specified ground'). The second is differentiation on a ground not specified in

[283] In terms of section 1(a) of the Constitution.

[284] *Van Heerden* above n 134 at paras 26-7.

[section 9(3)] but analogous to such grounds . . . ('unspecified' ground) . . . formulated as follows in *Prinsloo*:

> 'The second form is constituted by unfair discrimination on grounds which are not specified in the subsection. In regard to this second form there is no presumption in favour of unfairness.
>
> Given the history of this Country, we are of the view that "discrimination" has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. . . . [U]nfair discrimination, when used in this second form in section 8(2) [the equivalent of section 9(3)], in the context of section 8 as a whole, principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.
>
> Where discrimination results in treating persons differently in a way which impairs their fundamental dignity as human beings, it will clearly be a breach of section 8(2). Other forms of differentiation, which in some other way affect persons adversely in a comparably serious manner, may well constitute a breach of section 8(2) as well.'

There will be discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or affect them adversely in a comparably serious manner.

The question whether there has been differentiation on a specified or an unspecified ground must be answered objectively. In the former case the enquiry is directed at determining whether the statutory provision amounts to differentiation on one of the grounds specified in section 8(2). Similarly, in the latter case the enquiry is whether the differentiation in the provision is on an unspecified ground. . . . If in either case the enquiry leads to a negative conclusion then section 8(2) has not been breached and the question falls away. If the answer is in the affirmative, however, then it is necessary to proceed to the second stage of the analysis and determine whether the discrimination is unfair."[285]

[285] *Harksen* above n 107 at paras 47-8.

[298] In this case, it is argued that the discrimination is based on infertility and the genetic link requirement. These grounds are not specified in section 9(3) of the Constitution. The differentiation will amount to discrimination if the impugned provision authorises unequal treatment of people based on certain attributes and characteristics attaching to them.[286] As mentioned above, section 294 regulates the conclusion of valid surrogacy agreements. The section does not confer a right to conclude the agreement. The High Court correctly recognised that mere differentiation does not necessarily violate the right to equality. However, it held that the differentiation based on the genetic link requirement constitutes discrimination because it has the effect of excluding members of the Subclass "from accessing surrogate motherhood as a reproductive avenue". [287]

[299] It cannot be gainsaid that inherent human dignity is at the heart of individual rights, including the right to equality. It is true also that equality will mean nothing if it does not recognise a person's equal worth as a human being.[288] Undeniably, infertile people often feel socially isolated and marginalised. But, it cannot be safely said that all these negative effects of infertility are attributable to the legislative measures contemplated in section 294, specifically the genetic link requirement in that provision. It needs to be stressed that section 294 merely regulates the conclusion of a valid surrogate motherhood agreement. What disqualifies AB, and others similarly placed, is nothing but the biological, medical or other reasons as contemplated in section 294.[289]

[300] Notably, as evidenced by the history behind the legislative scheme, Chapter 19 favours the commissioning parents or parent. It has brought certainty regarding the

[286] Id at para 47, where this Court here refers to *Prinsloo* above n 108 at paras 28, 31 and 33.

[287] High Court judgment above n 12 at para 76.

[288] *President of the Republic of South Africa v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 41.

[289] See example in n 291 below.

status of the relationship between the commissioning parents or parent and the child-to-be as well as the surrogate mother. Moreover, given the object of the Children's Act, it gives effect to the best interests of the child-to-be. Section 7 lists the needs for the child to maintain connection with his or her culture and tradition and the need to protect the child from psychological harm. In our diverse society keeping the connection with extended family, culture and tradition is indeed part of the factors showing where the best interests of the child lie.

[301] In my view, the alleged ground of discrimination is not based on the attributes and characteristics of AB or of the Subclass. As a result, unless the applicants can show that the object of the legislative scheme is arbitrary, capricious or manifests naked preferences, the "personal choice" of AB or the Subclass is of no relevance to the inquiry.[290] Section 294 neither creates nor compounds infertility, as submitted by AB.

[302] The impugned provision does not disqualify commissioning parents because they are infertile. It affords infertile commissioning parents the opportunity to have children of their own by contributing gametes for the conception of the child contemplated in the surrogate motherhood agreement. In the case where the commissioning parent is single, the impugned provision provides for that parent, where a gamete of that parent can be used in the creation of the child. But if that parent cannot contribute a gamete, the parent still has available options afforded by the law: a single parent has the choice to enter into a permanent relationship with a fertile parent, thereby qualifying the parent for surrogacy. If the infertile commissioning parents, or parent, decide not to use the available legal options, they have to live with the choices they make.

[303] As a matter of fact, AB made several attempts to fall pregnant by undergoing the IVF treatment, using her own ova and the sperm of her husband at the time. When

[290] *Pharmaceutical Manufacturers* above n 259 at para 84 quoting *Prinsloo* above n 108 at para 25.

this failed she repeatedly used anonymous donor ova and the sperm of her husband at the time by using the IVF option because of her infertility. At some stage, after switching fertility clinics and getting divorced, she underwent further unsuccessful IVF treatment cycles – using anonymous donor ova as well as donor sperm but miscarried. As a single person, who is conception and pregnancy infertile, AB sought to resort to surrogacy but the donor gamete requirement disqualified her. But, as mentioned above, the Legislature affords her an option. It is her personal choice and not her attributes of being infertile or the challenged provision that place her outside of the ambit of section 294. This being the case, it cannot be said that the impugned provision discriminates against her or members of the Subclass.

[304] To that end, it is not necessary to proceed to the final leg of the inquiry – to determine whether the discrimination is unfair. In any event, assuming that the differentiation in section 294 amounts to discrimination, which I do not find, it does not necessarily follow that it is unfair. It can only be so if the differentiation results in AB or the Subclass being treated differently in a way which impairs their fundamental dignity as human beings, or which affect them adversely in a comparably serious manner.[291]

[305] For these reasons, I do not agree with the first judgment that section 294 of the Children's Act discriminates against AB and the members of the Subclass and that the discrimination is unfair. Therefore, the challenge based on section 9(2) and (3) of the Constitution must also fail.

Does section 294 limit AB's right to reproductive autonomy?

[306] It is submitted that AB's right to dignity and "reproductive autonomy as guaranteed by section 12(2)(a) of the Constitution" is limited by the genetic link requirement in section 294. I do not agree. I emphasise that section 294 of the

[291] For example, blindness does not impair blind people's human dignity. Likewise, a legislative provision that prevents blind people from being pilots or drivers on public roads cannot be said to discriminate unfairly against the blind people. It is the blindness that disqualifies them from the occupation of being pilot or driver.

Children's Act regulates the conclusion of a valid surrogate motherhood agreement. A commissioning parent is required to donate a gamete for the conception of a child-to-be as contemplated in that provision.

[307] Section 12 of the Constitution deals with "freedom and security of the person." Section 12(2) in particular reads:

> "(2) Everyone has the right to bodily and psychological integrity, which includes the right—
>
> (a) to make decisions concerning reproduction;
>
> (b) to security in and control over their body; and
>
> (c) not to be subjected to medical or scientific experiments without their informed consent."

[308] The Constitution's concern for the dignity of women takes a specific form in this section. The section recognises that each "physical body"[292] is of equal worth and gives protection to the construction regarding their bodies. The conception of "bodily integrity" goes further than the largely negative protection afforded in section 12(2)(b).[293]

[309] This is the first opportunity for this Court to vindicate this right in relation to surrogacy. It is thus necessary to trace the scope of the right in section 12(2)(a). Its scope may be traced from section 11 of the interim Constitution. The primary purpose of the right was to "ensure that the *physical integrity* of every person was protected".[294] In *Ferreira* this Court held that this is how the guarantee of "freedom (liberty) and security of the person" is ordinarily understood.[295] The Court remarked

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[292] Woolman "Dignity" in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2006) vol 2.

[293] Id at 40-77.

[294] See *Ferreira* above n 55 at para 170. Under the interim Constitution the structure of the right was divided into three major components: freedom of the person; security of the person; and freedom from torture, cruel and degrading treatment.

[295] Id.

that it is also the primary sense in which the phrase – "freedom, and security of the person" – is used in public international law.[296]

[310] The scope of section 12 deviates in some aspects from the ambit of section 11, especially in relation to section 12(2) that extends the ambit of the right largely to private relationships. The latter's new grouping regarding the reproductive autonomy right in subsection (2)(a) is combined with the right to security in and control over a person's body in subsection (2)(b) and to be free from medical experimentation without informed consent in subsection (2)(c).

[311] In *Certification of the Constitution,*[297] this Court considered the "right to bodily integrity" in terms of section 12(2) of the Constitution. Objection was taken to this provision on the ground that it opened the way to abortion. This Court emphasised that its task was not to determine whether the new text permitted abortion but to decide whether the text complied with Constitutional Principle II[298] which required the Constitutional Assembly to include "all universally accepted fundamental rights"

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[296] For example, the International Covenant on Civil and Political Rights (ICCPR), the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the African Charter on Human and Peoples' Rights all use the phrase in a context which shows that it relates to detention or other bodily or physical constraints.

Article 9(1) of the ICCPR provides: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides in part: "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law."

Article 6 of the African Charter on Human and Peoples' Rights provides: "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."

[297] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (*Certification of the Constitution*) at paras 59-62.

[298] Constitutional Principle II reads:

> "Everyone shall enjoy all universally accepted fundamental rights, freedom and civil liberties, which shall be provided and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution."

in the Constitution. The right to "bodily integrity" in section 12(2) was thus held to be a universally accepted fundamental right.

[312] Section 12(2)(a) has to this point, been interpreted to relate to people's ability to make decisions about their bodies.[299] Although this Court has not yet grappled with this issue, neither on abortion nor on surrogacy, two High Courts[300] have rejected statutory challenges to the Choice on Termination of Pregnancy Act.[301] In *Christian Lawyers II* the High Court, although the case concerned the right of every woman to determine the fate of her pregnancy, endorsed the views postulated above. Mojapelo J said:

> "The specific provisions of section 12(2)(a) and (b) of our Constitution guarantee the right of every woman to determine the fate of *her* pregnancy. The Constitution of this Country in explicit language affords 'everyone' the right to *bodily integrity* including the right 'to *make decisions concerning reproduction*' and to security *in and control over their body.*' This is quite clearly the right to choose whether to have *her* pregnancy terminated or not, for short, the right to termination of pregnancy. *Her* freedom of choice protected under the explicit provisions of section 12(2)(a) and (b) is moreover reinforced by . . . the right to equality and protection against discrimination on the ground of gender, sex and pregnancy."[302]

[313] The right relating to reproductive autonomy in section 12(2)(a) confronts directly the fact that many women do not enjoy security in and control over their own bodies.[303] To that end, the focus is on the individual woman's own body and not a

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[299] *Christian Lawyers Association v Minister of Health* 2005 (1) SA 509 (TPD) (*Christian Lawyers II)* and *Certification of the Constitution* above n 297 at paras 59-62.

[300] In the first case, *Christian Lawyers Association of SA v Minister of Health* 1998 (4) SA 1113 (T) (*Christian Lawyers I*), the Court was confronted with a legal issue concerning the interpretation of section 11 of the interim Constitution – whether the word "everyone" in that section included the unborn child. In the second one, *Christian Lawyers II* id, the Court dealt with section 12(2) of the Constitution.

[301] 92 of 1996.

[302] *Christian Lawyers II* above n 299 at 526H-7A.

[303] For the proposition that women do not enjoy security in and control over their own bodies see: Neff "Woman, Womb, and Bodily Integrity" (1990) 3 *Yale Journal of Law & Feminism* 327; Banda "Building on a global movement: Violence against women in the African context" (2008) 8 *African Human Rights Law Journal* 1; and Office of the United Nations High Commissioner for Human Rights (OHCHR) *Report of the Special*

body of another woman. This view finds support in the context of scholarly writings that have analysed section 12(2) to date, generally within the confines of the issue of abortion and the subject's own body.[304]

[314] Jurisprudence in comparable jurisdictions also shows that security of the person encompasses personal autonomy involving control over a person's bodily integrity.[305] The applicants' argument that the "donor gametes decision" entails a decision regarding AB's reproduction is thus misconceived. Surrogacy, in its most basic sense,

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Rapporteur on violence against women, its causes and consequences on her mission to South Africa, (A/HRC/32/42/Add.2, June 2016).

[304] See Currie and de Waal *The Bill of Rights Handbook* 6 ed (Juta, Cape Town 2013) at 287 and Woolman "Reproductive Rights" in Woolman *et al* above n 292.

[305] In Canada, individual autonomy and dignity are not freestanding rights. Rather, those rights are encompassed in the right protected in section 7 of the Canadian Charter of Rights and Freedoms (Constitution Act 1982) which states that "[e]veryone has the right to life, *liberty and security of the person* and the right not to be deprived thereof except in accordance with principles of fundamental justice". The Supreme Court of Canada in *R v Morgentaler* above n 84, held that the sections of the Criminal Code which restrained access to abortion interfered with the liberty and security of the person. It held that "security of the person" encompasses a notion of *personal autonomy involving . . . control over one's bodily integrity* free from state interference". In *New Brunswick (Minister of Health and Community Services) v G (J)* above n 84 at para 58, the notion was said to extend to an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering. Recently in *Carter v Canada (Attorney General)* above n 84 at para 64, the Supreme Court of Canada confirmed that "underlying [the rights to liberty and security of the person] is a concern for the protection of individual autonomy and dignity".

In India article 21 of the Constitution provides that "[n]o person shall be deprived of his life or personal liberty except according to procedure established by law". In *Suchita Srivastava v Chandigarh Administration AIR* above n 84 at para 11, the Supreme Court of India applied article 21 in the following manner: "There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth-control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However in the case of pregnant women there is also a 'compelling state' interest; in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled."

In the United States of America (US), there is no specific constitutional right to bodily or psychological integrity. Previous cases which have addressed issues related to these aspects have generally been grounded in the 5th/14th Amendments to the US Constitution, providing that no person shall be deprived of life, liberty or property without due process of law. The Supreme Court has developed the rights to liberty and privacy in cases involving substantive due process. In *Roe v Wade* above n 84 at VIII, it was held that the right to privacy allowed a woman to procure an abortion. However, the competing interests of the foetus (sought to be protected by the state) and the woman were seen as limiting the woman's rights. The right to privacy was expanded in *Eisenstaedt v Baird* above n 84 at 154, protecting the right to use contraceptives for unmarried individuals, where it was recognised that, if anything, the right of the individual is to be free from unwarranted government intrusions into matters so fundamentally affecting a person as the decision to bear or beget a child.

is the situation where one woman bears a child for another. As a result, an interpretation that the text of section 12(2)(a) affords reproductive autonomy protection to the commissioning parent in the context of the surrogate motherhood agreement is unduly strained.[306]

[315] I acknowledge the need to respect the autonomy of commissioning parents in relation to the choices they make, for purposes of concluding surrogacy agreements. However, section 12(2)(a) does not give anyone the right to bodily integrity in respect of someone else's body. If this were so, that begs the question, how then does section 294 of the Children's Act impair the right to bodily integrity of someone who is unable to produce gamete? In my view, while the donor gamete decision is an important exercise of a prospective parent's autonomy, it does not entail a decision regarding the commissioning parent's bodily integrity. It entails the body of a surrogate "host" mother.

[316] Furthermore it can hardly be argued that section 294 is invalid because it is not in line with the constitutional value of self-autonomy which is encapsulated in the maxim *pacta sunt servanda*.[307] The recognition of a surrogacy motherhood agreement flows from a policy decision to reform the law as contained in the Children's Act.[308] It is this Act which regulates the right to conclude a surrogacy motherhood agreement. With section 294 there is no right to conclude a lawful surrogacy agreement. Section 294 does not prevent AB from regulating her own affairs. On the contrary it regulates the choices that are open to her. Regulation of the exercise of contractual

[306] *Hyundai* above n 261 at para 24.

[307] This phrase essentially means that "agreements are binding and must be enforced" and has long been a principle of South African law. See *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC) at para 126. This principle applies to this matter due to the fact that a surrogacy motherhood agreement can be viewed as a contractual agreement.

[308] *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 36. There this Court remarked that the "major engine for law reform should be the [L]egislature not the [J]udiciary".

rights is not by its nature constitutionally objectionable and is a common feature in most democratic jurisdictions.[309]

[317] Section 293 requires the non-commissioning parent, spouse or partner, to give his or her consent for the conclusion of the surrogate motherhood agreement. Where the husband or partner who is not the genetic parent of the child unreasonably withholds his or her consent, the court may confirm the agreement. This reinforces the view that the legislative scheme favours infertile commissioning parents contrary to the view held by the applicants. It means that the decision allowing the creation of a child, without a genetic link between the commissioning parent(s) and the child-to-be born, will not accord with the object of the legislation that also favours the commissioning parent.

[318] For these reasons, I do not agree with the first judgment that section 294 of the Children's Act limits the commissioning parent's right to reproductive autonomy or to make decisions concerning reproduction in terms of section 12(2)(a) of the Constitution. Likewise, the attack on section 294 based on section 12(2)(a) must fail.

Does section 294 limit AB's right to reproductive health care?

[319] The High Court held that surrogacy is a form of "reproductive health care" guaranteed in terms of section 27(1)(a) of the Constitution.[310] This section entitles everyone to have access to health care services including reproductive health care.[311] Section 27(2) obliges the state to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation" of these rights.

[309] *Barkhuizen* above n 39 at para 30; *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at paras 18-9.

[310] High Court judgment above n 12 at para 98. The applicants support these findings.

[311] The other rights mentioned in section 27(1) of the Constitution are the right to have access to sufficient food and water and social security, including, if people are unable to support themselves and their dependants, appropriate social assistance in terms of section 27(1)(b) and (c), respectively.

[320] It is difficult to understand the applicants' constitutional challenge based on the right to have access to reproductive health care in terms of section 27(1). This is so because the applicants have not elaborated on the content of the right to health care under section 27. The first two subsections of section 27 are to be read together. In other words, the one cannot be read without the other because section 27(1) does not give rise to a self-standing and independent positive right that is immediately enforceable. This Court made this clear in *Treatment Action Campaign*:[312]

> "[S]ection 27(1) of the Constitution does not give rise to a self-standing and independent positive right enforceable irrespective of the consideration mentioned in section 27(2). Sections 27(1) and 27(2) must be read together as defining the scope of the positive rights that everyone has and the corresponding obligations on the State to 'respect, protect, promote and fulfil' such rights. The rights conferred by sections 26(1) and 27(1) are to have access to the services that the State is obliged to provide in terms of sections 26(2) and 27(2)."[313]

[321] In *Soobramoney*[314] this Court said the following with regard to the rights referred to in section 27(1)(a), (b) and (c):

> "What is apparent from these provisions is that the obligation imposed on the State by . . . section 27 in regard to . . . health care . . . [is] dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources."[315]

[322] The High Court reached its conclusion regarding section 27(1) without analysing the nature of this right. On the facts of this case, and based on what I have said regarding the impugned provision in relation to the position of the infertile commissioning parent(s), I am unable to conclude that the genetic link requirement

[312] *TAC* above n 122.

[313] Id at para 39.

[314] *Soobramoney v Minister of Health, KwaZulu-Natal* [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC).

[315] Id at para 11.

prevents AB and members of the Subclass from enjoying the right to have access to health care services, including reproductive health care. It cannot therefore be said that the guaranteed rights in section 27(1) of the Constitution are limited by the genetic link requirement in terms of section 294 of the Children's Act.

Does section 294 limit AB's right to privacy?

[323] The applicants' challenge based on AB's privacy right in terms of section 14 of the Constitution must also fail because this right is not limited by the genetic link requirement in section 294 of the Children's Act. Section 14 of the Constitution provides that "[e]veryone has the right to privacy, which includes the right not to have: (a) their person or home searched; (b) their property searched; (c) their possessions seized; (d) or the privacy of their communications infringed". In *Jordan*[316] this Court remarked that the right to make autonomous decisions in respect of "intensely significant aspects of one's personal life" falls into the right to privacy but it declined to posit an independent right to autonomy.[317] As with the position in relation to the other rights dealt with earlier, the impugned provision does not limit AB's right to privacy.

[324] In the view I take of the matter, the issue regarding limitation of rights does not arise.

Costs

[325] There are two issues relating to costs. The first concerns the special costs made by the High Court against the Minister and the second relates to the appropriate costs in this Court. In relation to the former, the High Court ordered the Minister to pay special costs[318] because of the dilatory manner in which she conducted the

[316] *Jordan* above n 40.

[317] Id at para 53.

[318] These costs are also referred to as punitive costs.

proceedings in almost every step she was required to take.[319] It detailed instances which clearly show the Minister's flagrant disregard of her duty to ensure that all relevant evidence was timeously placed before the Court.[320] The Minister asks this Court to set aside the special costs order and to order each party to pay its own costs.

[326] It is commonplace that when awarding costs a court has a discretion which it exercises judicially upon consideration of the facts of each case.[321] The Minister submits that the High Court erred in awarding the punitive costs because the issues involved required a thorough investigation before responses could be provided. In respect of the punitive costs concerning the refusal to provide the Adoption Report (which refusal prompted the order compelling the Minister to discover the same) the Minister argued that the Court ought to have found that the Report was in the public domain and that the applicants could have obtained it through various other means. There is no merit to these arguments. The High Court's exercise of discretion on costs cannot, in these circumstances, be interfered with. Its special costs order[322] should, in my view, be confirmed.

[327] In opposing the application for confirmation in terms of section 172(2) of the Constitution, read with section 15 of the Superior Courts Act, the Minister does not

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[319] For example: The notice of intention to oppose was filed late; the answering affidavit was five months late – but was incomplete; the expert opinions she relied upon were filed after regular prompting by the applicants and certain other documents relied upon by her were filed after application to the High Court to compel her to discover them; and a certain report (Adoption Report), which should have been discovered after being compelled to do so by the High Court, has to date not been discovered.

[320] High Court judgment above n 12 at paras 109-12.

[321] *Ferreira* above n 55 at para 3; see also *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC), where the Court considered the exercise of the discretion to make a substitution order. See also *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 138.

[322] The costs order reads as follows:

> "2. The respondent is directed to pay the costs of the application, including the costs incumbent upon the employment of two counsel, and including the qualified costs of all the experts who provided their expert opinion on affidavit for the second applicant, on a scale as between attorney and client.
>
> 3. The respondent is directed to pay the costs of interlocutory application that was filed on 25 February 2014, including the costs incumbent upon the employment of two counsel, on a scale as between attorney and client."

seek costs. She submits merely that the High Court should have dismissed the application to declare the impugned provisions unconstitutional and invalid. The applicants seek costs including costs of two counsel. They submit that AB is entitled to proper vindication of her constitutional rights which, they contend, are limited by the genetic link requirement. The applicants submit further that they are entitled to immediate and effective relief that would eliminate the source of the constitutional complaint in a way that provides a meaningful remedy.

[328] The applicants have succeeded in part and lost in part: they succeeded in opposing the appeal against the special costs order but are unsuccessful in the confirmation application.

[329] As this Court has said in *Weare*, the "ordinary rule in this Court is that where litigants unsuccessfully raise important constitutional issues against the State, costs will not be awarded against them." [323] The rationale for this is to ensure that the parties are not dissuaded from challenging the constitutionality of laws that limit their rights in fear of being mulcted with costs.[324] If an application is not frivolous or vexatious or in any other way manifestly inappropriate, as is the case here, the applicants should not be ordered to pay costs.[325] The applicants have raised important constitutional issues involving, among other things, an alleged limitation of rights including the right to bodily and psychological integrity which includes the right to make decisions concerning reproduction. As I have mentioned earlier, this Court has not grappled with this novel issue.[326] A costs order against the applicants in respect of the confirmation application may have a chilling effect on constitutional litigation. In my view, the respondent must also pay the costs in this Court.

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[323] *Weare* above n 110.

[324] Id at paras 78-9.

[325] See *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) 232 (CC); 2009 (10) BCLR 1014 (CC) at paras 23-4.

[326] In this regard see [120].

Order

[330] The following order is made:

1. The order of constitutional invalidity in respect of section 294 of the Children's Act 38 of 2005 made by the High Court of South Africa, Gauteng Division, Pretoria is not confirmed.
2. The appeal by the respondent is upheld.
3. The High Court costs order, in paragraphs 2 and 3, in favour of the applicants, is confirmed.
4. The respondent is ordered to pay the applicants' costs in this Court including the costs of two counsel.

For the Second Applicant:	D Jordaan and C Woodrow instructed by Christo Botha Attorneys Inc
For the Respondent:	N Cassim SC and H Mpshe instructed by the State Attorney
For the Amicus Curiae:	K Ozah of the Centre for Child Law