Aspects of rape, statutory rape and the Choice on the Termination of Pregnancy Act 92 of 1996: Do we protect our minor women?

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OPSOMMING

Aspekte van verkragting, statutêre verkragting en die Wet op die Keuse oor die Beëindiging van Swangerskap 92 van 1996: Beskerm ons ons minderjarige vroue?

Dit is alom bekend dat die nuwe Grondwet met sy Handves van Regte in die algemeen, en artikel 28 in die besonder, spesiale beskerming aan die regte van kinders verleen. Die Handves van Regte bevestig ook die weerloosheid van kinders en die besondere beskerming wat hulle regte moet geniet. Die beskerming van kinderregte en bevordering van hulle beste belang is juis die fokuspunt van hierdie bydrae. Volgens gerapporteerde statistiek beskik Suid-Afrika oor een van die hoogste ratio's van geweld teen vroue, waarvan die hoogste persentasie van spesifiek verkragtings blyk te wees dié van meisies tussen 12 en 17 jaar. 'n Kommerwekkende aantal jong meisies onder die ouderdom van 16 jaar raak ook elke jaar swanger en laat hul swangerskappe beëindig. Wat talle mense blykbaar vergeet, is dat volgens die gemenereg en die Wet op Seksuele Misdrywe 23 van 1957 gemeenskap met 'n meisie onder die ouderdom van 16 jaar neerkom op verkragting of statutêre verkragting en strafregtelik vervolg moet word. Dit is juis in dié verband dat sekere bepalings van die Wet op die Keuse oor die Beëindiging van Swangerskap 92 van 1996 kommer wek, onder andere oor die vervolging van die oortreders en die beskerming van die beste belang van minderjarige meisies. Uit 'n studie van die tersaaklike bronne is skrywers hiervan van mening dat 'n heroorweging van die bepalings van die Wet op die Keuse oor die Beëindiging van Swangerskap nodig is ten einde die toename in geweldsmisdade teen en seksuele misbruik van minderjarige meisies te voorkom, misdadigers behoorlik te vervolg en die beste belang van veral minderjarige meisies te bevorder.

1 INTRODUCTION

Not only are we celebrating 12 years of democracy, but in 2004 we also celebrated the year of the family. This is indicative of the importance of especially women and children and the role healthy family partnerships play in a growing society. The new constitutional dispensation in South Africa and the ratification of international documents such as the Convention on the Rights of the Child

have given new meaning to the protection and the rights of the child.[1] The Constitution with its Bill of Rights in general, and section 28 in particular, gives special protection to the rights of children.[2] The Bill of Rights recognises children as a vulnerable group in society in that their specific and unique interests deserve special protection.[3] It is precisely this protection that is the main focus of this contribution.

It has been reported that South Africa has one of the highest rates in the world of violence against women. A 1996 comparison of South African crime ratios to those in over one hundred other countries in the world showed South Africa to be the leader in the incidence of murder, rape, robbery and violent theft. In 1998, three out of ten women surveyed in the Southern Metropolitan region of Johannesburg reported that they had been victims of sexual violence in the previous year. One in four young men questioned reported having had sex with a woman without her consent by the time he had reached eighteen.

According to the South African Police Service statistics, there were 51 249 cases of rape reported to the police nationally in 1999 and yet, according to the same source, rape continues to be one of the most under-reported, and therefore unpunished, crimes. A further upsetting statistic is that rape ranks lowest on the list of South African crimes in terms of conviction rates. According to a 1997 South African government report, the rape of children and their sexual abuse are increasing rapidly and are matters of grave concern. From 1996 to 1998, girls aged 17 and below constituted approximately 40 percent of reported rape and attempted-rape victims nationally. Another recent study investigating sexual violence suggests that there has been a steady increase in the proportion of women reporting having been raped before the age of 15.

According to 1998 figures from the South African Police Service (SAPS) Child Protection Unit and the Victims of Crime Survey from 1999, rape is the most prevalent reported crime against children, accounting for one-third of all serious offences against children reported between 1996 and 1998. According to a SAPS statistical analysis of reported rape cases, the age group reflecting the highest rape ratio per 100 000 of the female population is the category of 12- to 17-year-old girls, this comprising 471,7 cases. The age category of 0 to 11 years of age reflected a ratio of 130,1 rapes per 100 000 of the female population.[4] Far too many girls have no safe haven from sexual violence. Many girls are coerced into have sex or are subjected to sexual harassment and violence by male relatives, boyfriends, schoolteachers or male classmates.

In the context of South Africa's explosive HIV/AIDS epidemic, sexual violence can be a death sentence for many women and girls. A recent study found

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1 See Davel (ed) *Introduction to child law in South Africa* (2000) 7.

2 See s 28 of the South African Constitution Act 108 of 1996.

3 See Davel 177.

4 Impact of the Political, Social and Economic Environment on Education Human Rights Watch, available at http://www.hrw.org/reports/2001/safrica/za-final-03.htm, visited on 2004-09-03. Some researchers attribute the increase in sexual violence against girls to a belief gaining credence in some communities that sexual intercourse with a young virgin can "cleanse" HIV-positive men or men with AIDS of the disease. Some research suggests that child rape is also committed as a preventive measure to avoid contracting the virus from older women.

that more than 1 in 20 children aged between 2 and 14 in South Africa are HIV-positive and that most of the infections cannot be attributed to mother-to-child transmission. Studies suggest that sexual abuse is one of the factors that may contribute to this finding. In light of these circumstances, the commitment to improving the response to rape and other sexual offences is a matter of urgent necessity[5] and general public concern.

An alarming number of teenage girls in South Africa also become pregnant. Figures from Statistics South Africa show that in one year more than 17 000 babies were born to mothers 16 years old or younger. Of that number, 4 000 babies were born to mothers younger than 14 years of age. These absolutely shocking teenage pregnancy figures do not take into account the number of abortions performed each year. Since the passing of the Choice of Termination of Pregnancy Act,[6] thousands of legal abortions have been carried out. However, what many are failing to realise is that under the common law and the Sexual Offences Act[7], sexual intercourse with a girl under the age of 16 amounts to either rape or statutory rape and must be criminally prosecuted.

During 2000, a Disa Health Care clinical sexologist, Elna McIntosh, allegedly said to a Sunday newspaper that young girls are often coerced into sex, whilst Love Life spokesperson Judi Fortuin-Nwokedi allegedly said that it was common for girls to have babies without even understanding menstruation. According to the same newspaper, the education authorities in turn say that, due to restrictive budgets, they focus more on the dangers of unprotected sex than on sex education itself. According to the same source, the Dean of Student Development of the University of Natal, Dr Devi Râjab, allegedly said that the law of statutory rape was archaic in the light of what was happening in society today. She allegedly said that "[t]eenagers are unaware of the law, and it [the law] is not in keeping with reality on the ground".[8] Although this viewpoint, if quoted correctly, is unacceptable and very alarming, it shows some of the prevalent ideas that exist in the public domain on such issues.

The purpose of this contribution is therefore to focus on the main sexual (criminal) offences in our society, rape and statutory rape, and some of the principles of the Choice of Termination of Pregnancy Act that contribute to or violate the principles of these offences. Regard will constantly be shown to the rights and interests of minor women.

2 THE LAW PERTAINING TO UNLAWFUL SEXUAL INTERCOURSE WITH YOUNG FEMALES

2 1 Rape

Rape is defined as unlawful, intentional sexual intercourse with a female without her consent. "Sexual intercourse" consists of the penetration of a female's sexual

5 Submission to the Parliamentary Portfolio Committee on Justice and Constitutional Development, Parliament of South Africa, on the draft Criminal Law (Sexual Offences) Amendment Bill, 2003, from Amnesty International and Human Rights Watch, available at http://www.hrw.org/press/2003/09-sa-drafcrimelaw.htm, accessed on 2004-09-03.

6 Act 92 of 1996.

7 Act 23 of 1957.

8 "One in three girls pregnant before 20" *Sunday Star* 2000-10-03.

organ by a male organ.[9] The slightest penetration without the female's consent is sufficient to comprise rape, and it is immaterial whether the female becomes pregnant or not. For consent to be valid, it must be given consciously and voluntarily, either tacitly or expressly, by a woman who has the mental ability to understand what she is consenting to. Consent must further be based on a true knowledge of the material facts relating to the intercourse.[10]

Heterosexual intercourse with a girl younger than 12 years of age is always presumed to be rape and is punishable accordingly. The reason for this is that a child younger than 12 years of age is neither physically nor psychologically prepared for the act of intercourse and is likely to suffer not only significant physical harm, but also emotional and psychological trauma.[11] There is thus an irrebuttable presumption that girls under the age of 12 are incapable of consenting to sexual intercourse. Such sexual intercourse amounts to rape, irrespective of whether *quasi* consent was given or not.[12]

The effects of rape are considerable. The victim fears physical harm during a rape, and then faces the reality that she may contract HIV. The victim may also become pregnant as a result of the rape and have to endure the trauma of deciding whether to terminate the pregnancy or bear the child. Rape victims often suffer from a "rape trauma syndrome" with negative emotional, social and psychological effects.[13] For children, the impact of rape is even more profound and may be devastating. The seriousness with which the rape of a child is regarded is illustrated by the sentence that must be imposed where the rape is that of a woman under the age of 16. In terms of section 51(1) of the Criminal Law Amendment Act,[14] the high court must sentence a person convicted of such a rape to life imprisonment, unless there are substantial and compelling circumstances that justify the imposition of a lesser sentence.[15]

2 2 Statutory rape

Apart from rape in general and the rape of girls under the age of 12, the lawmakers also enacted a further category known as statutory rape. The aim of this statutory offence is to protect the sexual integrity of girls of a tender age, and more specifically between the ages of 12 and 16. In the case of a girl who is over 12 years of age who, by definition, may be physically prepared for the act of intercourse, concern regarding the emotional, social and psychological effects of the act of intercourse gives rise to a supplementary statutory offence.

Section 14 of the Sexual Offences Act prohibits carnal intercourse or the commission of immoral or indecent acts with young women below the age of 16. Section 14 provides that any male person who (a) has or attempts to have unlawful carnal intercourse with a girl under the age of 16; or (b) commits or attempts

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9 See *R v D* 1956 4 SA 277 (N).
10 See Snyman *Criminal law* (2002) 446.
11 See Milton and Cowling *South African criminal law and procedure Vol III Statutory offences* (1988) ch E3 4.
12 *Quasi* consent refers to a situation where consent is perceived to have been given, but which could not have been given in terms of the law.
13 See Milton *South African criminal law and procedure Vol II Common law crimes* (1996) 466.
14 Act 105 of 1997.
15 See Snyman 452.

to commit an immoral or indecent act with such a girl; or (c) solicits or entices such a girl to the commission of an immoral or indecent act, commits an offence. Consent by the girl is no defence.

Only a male can contravene section 14(1)(a). The crime created in this section is of particular importance to this investigation. The effect of the section is *inter alia* the following: If X is charged with raping Y, and the evidence discloses that Y was a willing party, though not yet 16 years of age, X will be guilty of the offence created in section 14(1)(a). In fact, the offence created in section 14(1)(a) is often informally referred to as "statutory rape". If X has intercourse with a girl under the age of 12, he not merely contravenes section 14(1)(a) but also commits rape, since any possible "consent" by the young girl is immaterial. In practice he would always be charged with the latter crime, which is the more serious and carries a harsher punishment. The crime created in section 14(1)(b) can be committed only if the immoral or indecent act is committed with a young person.[16]

The Sexual Offences Act thus sets the age of consent for women at 16 years. If a woman does not consent, the sexual act constitutes rape, regardless of her age. However, if a woman aged below 16 years consents to intercourse, such intercourse cannot constitute rape, but will be an offence in terms of section 14(1)(a) of the Sexual Offences Act.

The underlying principle of the offence created in section 14(1)(a) of the Sexual Offences Act is that women below the age of 16 are vulnerable and may be coerced into the act of sexual intercourse, an act for which they may not have the emotional, social and psychological maturity. The Act thus serves to protect our young girls and to ensure that women under the age of 16 are not coerced or forced into sexual intercourse.

As mentioned in the introduction of this contribution, the picture is a very bleak one in which studies show that an average of 54 000 rapes are reported in South Africa every year, of which 40% concern children under the age of 12. Rape is one of the most under-reported crimes in our society, with an estimate of only 35% of rape victims reporting the rape. This is due mainly to a lack of support for rape victims and a reporting process fraught with problems.[17]

Child rape cases are regrettably the most difficult to prove. This is understandable to a degree, when one considers the trauma these girls have experienced and the difficulty they have in expressing themselves in court regarding what happened. This is especially the case where the child is a single witness. Even though the courts are no longer obliged to apply the cautionary rule of practice before a conviction can be handed down, in that the state only has to prove the guilt of an accused only beyond reasonable doubt,[18] the evidence of a particular case may call for a cautionary approach which will still lead to the child witness's being regarded with suspicion.

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16 See *idem* 363.

17 A 1999 South African study indicated the actual rapes to be around 1,7 million. Facts about rape available at http://www.grip.org/za/facts/facts.htm, visited on 2004-09-01. See also fn 5.

18 In terms of the cautionary rule of practice, trial courts had to warn themselves of the dangers inherent in the evidence of the testimony of complaints in sexual cases and young children and require some safeguard to reduce the risk of wrong convictions. See Davel 352–353. See also *Director of Public Prosecutions v Swartz* 2000 2 SA 711 (T).

In this regard, the Choice on Termination of Pregnancy Act raises serious concerns regarding both the enforcement of the offence of rape and statutory rape, as well as the protection of our minor women, in that the Act allows for the termination of a pregnancy that in some instances might be the result of rape or statutory rape. These issues are in need of separate discussion and are set out below.

3 CONSEQUENCES OF THE CHOICE ON TERMINATION OF PREGNANCY ACT

On 1 February 1997 the Choice on Termination of Pregnancy Act came into effect. This Act replaced the Abortion and Sterilisation Act.[19] The word "abortion" was replaced by the term "termination of pregnancy", being the separation and expulsion, by medical or surgical means, of the contents of the uterus of a pregnant woman. A woman is defined in the Act as any female person of any age. The main aim of the Act is to regulate the termination of pregnancy of women, depending on the stage of the pregnancy, which is calculated from the first day of the last menstrual period. In terms of section 2 of the Act, a pregnancy may be terminated as follows:

"(1) A pregnancy may be terminated–

(a) upon request of a woman during the first 12 weeks of the gestation period of her pregnancy;

(b) from the 13th up to and including the 20th week of the gestation period if a medical practitioner, after consultation with the pregnant woman, is of the opinion that–

(i) the continued pregnancy would pose a risk of injury to the woman's physical or mental health; or

(ii) there exists a substantial risk that the fetus would suffer from a severe physical or mental abnormality; or

(iii) the pregnancy resulted from rape or incest; or

(iv) the continued pregnancy would significantly affect the social or economic circumstances of the woman; or

(c) after the 20th week of the gestation period if a medical practitioner, after consultation with another medical practitioner or a registered midwife, is of the opinion that the continued pregnancy–

(i) would endanger the woman's life;

(ii) would result in a severe malformation of the fetus; or

(iii) would pose a risk of injury to the fetus.

(2) The termination of a pregnancy may only be carried out by a medical practitioner, except for a pregnancy referred to in subsection (1)(a), which may also be carried out by a registered midwife who has completed the prescribed training course."[20]

The termination of a pregnancy is also subject to the following further regulatory provisions:

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19 Act 2 of 1975.

20 The definition of rape in the abovementioned referral includes consensual sexual intercourse with a girl under the age of 16. A charge of proof of rape or incest is not required by the Termination Act. For the purpose of this contribution and due to the limited extent thereof, regard will not be had to the situation where the woman is severely mentally disabled or continuously in a state of unconsciousness.

- The termination may be performed only at a facility designated by the Minister.[21]
- The state is obliged to promote the provisions of non-mandatory and non-directive counselling before and after the termination of the pregnancy.[22]
- The termination may be done only with the informed consent of the pregnant woman. No consent other than that of the pregnant woman is required. During the first 12 weeks of pregnancy, no more is required than the woman's informed consent.[23] In the case of a pregnant minor[24], a medical practitioner or a registered midwife shall advise the woman to consult her parents, guardians, family members or friends before terminating the pregnancy. However, the final decision lies with the minor. Should the minor choose not to consult others, the termination shall not be denied. Such consultation is thus not mandatory before a termination is performed.[25]
- The termination may be performed only by a medical practitioner or, if performed during the first 12 weeks, by a registered midwife. The medical practitioner or midwife who performs a termination must inform the woman of her rights under the Act.[26]
- The Act also requires the notification and keeping of records of terminations by the medical practitioner or registered midwife. Notification is to be given to the person in charge of the facility, who is again responsible for forwarding it confidentially to the Director-General of Health.[27]

The fundamental aspect of the law regulating the termination of a pregnancy of any woman is that of informed consent. The Act does not set an age limit above which consent is regarded as informed. The Act also does not define "informed consent". It can therefore be argued that the common-law doctrine of *volenti non fit injuria* can be applied. In terms of this doctrine invasive medical treatment which would otherwise have constituted a violation of the patient's rights to privacy and personal integrity is lawful because of the patient's informed consent.[28] For consent to be valid, the following six requirements must be met:

(a) The consent must be given freely or voluntarily.

(b) The person giving the consent must be capable of volition. The person must thus be intellectually mature enough to appreciate the implication(s) of her acts.[29]

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21 S 3.
22 *Ibid.*
23 Act 92 of 1996, ss 5(1) and 5(2).
24 A child under the age of 18. See s 28(3) of the Constitution. The notion of 18 years indicating the end of childhood is also found in a 1 of the UN Convention on the Rights of the Child.
25 S 5(3).
26 S 6.
27 S 7.
28 Neethling, Potgieter and Visser *Law of delict* (2001) 104. See also *Castell v De Greef* 1994 4 SA 408 (C).
29 See also Van der Walt and Midgley *Delict: Principles and cases* (1977) 117: "A child of 14 years may, for example, have the necessary legal capacity to consent to the destruction of her doll, but she would normally not have the legal capacity to consent to medical treatment. Where the child does not have the necessary legal capacity, the guardian must act on behalf of the child" (quoted by Neethling, Potgieter and Visser 101).

(c) The consenting person must have full knowledge of the extent of the possible harm, including the nature and extent of such harm, that a decision could have.

(d) The consenting party must realise or appreciate fully what the nature and extent of the harm will be. The consenting party must thus also understand and comprehend the nature and extent of the harm or risk.

(e) The consenting party must in fact consent subjectively to the termination of pregnancy.

(f) The consent must be permitted by the legal order and may not be *contra bonos mores*. The consent of a girl in certain circumstances may therefore be invalid, simply because it is contrary to the *boni mores*.[30]

With regard to the termination of a pregnancy, the woman who consents must therefore have full knowledge of the nature and extent of the harm or risk, must comprehend and understand the nature and extent of the harm or risk and must subjectively consent to the entire procedure, inclusive of its consequences.[31] In this context, valid consent can be given only by a woman with the intellectual and emotional capacity for the required knowledge, appreciation and consent. The question that thus arises is whether or not a woman under the age of 18 is capable of giving informed consent for the termination of a pregnancy, especially if it is taken into account that, in terms of the Child Care Act,[32] minors under the age of 18 need parental consent to undergo *any operation*[33] and parental consent under the age of 14 for medical treatment.[34] It should further be taken into account that in terms of the common law offence of rape, women under the age of 12 are irrebuttably presumed incapable of giving consent to sexual intercourse and that, in terms of the Sexual Offences Act, the consent of women under the age of 16 is presumed invalid. The abovementioned women are thus unable to consent to the act of sexual intercourse. The question can rightly be asked whether they are then capable of giving informed consent for the termination of pregnancy resulting from the abovementioned sexual offences.

The matter of informed consent by minors with regard to the Choice on Termination of Pregnancy Act was for the first time under consideration in *Christian Lawyers Association v The National Minister of Health*.[35] The plaintiff instituted an action in which it sought an order declaring sections 5(2) and 5(3) read with the definition of "woman" in sections 1 and 5(1) of the Choice on Termination of Pregnancy Act unconstitutional and also an order striking down sections 5(2) and 5(3) and the definition of "woman" in section 1. The plaintiff directed its claim against the provisions of the Act that allow women under the age of 18 the choice of having their pregnancies terminated without: (a) the consent of their parents or guardians; (b) consulting their parents or guardians; (c) first undergoing counselling; and (d) reflecting on their decisions for a prescribed period. The measures in (a) to (d) are for the sake of convenience

30 Neethling, Potgieter and Visser 101–104. See also Neethling *Persoonlikheidsreg* (1998) 121–122.

31 Neethling, Potgieter and Visser 101–104. See also *Castell v De Greef* 1994 4 SA 408 (C).

32 Act 74 of 1983.

33 Own emphasis added.

34 S 39(4) of the Child Care Act.

35 Case 7728/2000 (T) unreported.

collectively referred to as "parental consent". In essence, it was the plaintiff's case that young women or girls below the age of 18 are not capable on their own, without parental consent or control, to take an informed decision whether or not to have a termination of pregnancy which serves their best interests. It was therefore submitted by the plaintiff that the provisions under attack are unconstitutional because they permit a woman under the age of 18 to choose to have her pregnancy terminated without parental consent or control. The plaintiff based its case on sections 28(1)(b), 28(1)(d), 28(2) and 9(1) read with section 7(1) of the Constitution. These sections broadly provide that a child has the right to family care or parental care; to be protected from maltreatment, neglect, abuse or degradation; to have his or her best interest protected and to equality before the law, the Bill of Rights being the cornerstone of democracy in South Africa.

The plaintiff was therefore of the opinion that:

> "[A] pregnant girl requires special protection by the state, *inter alia* by ensuring that when enacting legislation which affects her, she is not deprived in any way of the support, guidance and care of her parents/guardian and/or counsellor."[36]

In his judgment, Mojapelo J submitted *inter alia* the following:

- That the Act only requires informed consent, and does not set an age limit for such consent. This is the cornerstone of the regulations of access to termination of pregnancy.
- That within the context of the Act, capacity to give informed consent is determined in each case by the medical practitioner or registered midwife.
- That a medical practitioner or registered midwife who is not satisfied that the minor has the capacity to give informed consent should therefore not perform the termination of the pregnancy of such minor.
- If it is true that a girl younger than 18 cannot give informed consent for the purpose of considering the exception, then that girl cannot access the right to termination. On this ground the judge dismissed the action on the grounds that the particulars of the claim did not disclose a cause of action.

The judge also stated that the approach followed in the Act is indeed consistent with the Constitution for, *inter alia*, the following reasons:

- ➢ The right of every woman to choose whether to terminate her pregnancy or not is enshrined in sections 12(2)(a) and (b), 27(1)(a), 10 and 14 of the Constitution. All of these rights are afforded to "everyone", including girls under the age of 18.
- ➢ Section 9(1) provides, moreover, that "everyone" is equal before the law and has the right to equal protection and benefit of the law. Section 9(3) goes further to prevent unfair discrimination against "anyone" on the ground of, *inter alia*, "age". Any distinction between women on the ground of their age would invade these rights.
- ➢ It follows that any limitation upon the freedom of any woman, including any girl under the age of 18, to have her pregnancy terminated constitutes a limitation of their fundamental rights, such a limitation being valid only if justified in terms of section 36(1).

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36 2.

- That the legislative choice opted for in the Act serves the best interests of the pregnant girl (section 28(2)) because it is flexible enough to recognise and accommodate the individual position of a girl child based on her intellectual, psychological and emotional make-up and actual majority.

The judge then also referred to other leading democracies such as the United States of America, Canada, Germany and the European Union. In our opinion it is regrettable that the judge, in referring to the other democracies, focused on the right of choice and self-determination for women in general and not specifically on whether minors should be allowed to make such a choice. It is also regrettable that, in referring to case law such as *Planned Parenthood of Southeastern Pennsylvania v Casey*[37] of the US Supreme Court, he referred only to the fact that the court affirmed the essential findings of *Roe v Wade*,[38] including the principle that women have a constitutional right to determine the fate of their own pregnancies. The court failed to mention that in the said case the court confirmed that the provision of the Pennsylvania Abortion Control Act of 1982, which mandates the informed consent of one parent for a minor to obtain an abortion with a judicial bypass procedure, was indeed constitutional. The court stated the following: "It is reasonably designed to further the state's important and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience and lack of judgment may sometimes impair their ability to exercise their rights wisely."[39]

In terms of the abovementioned Act, a physician shall not perform an abortion unless, in the case of a woman below the age of 18, he first obtains the informed consent of the pregnant woman and one of her parents or guardians or, if none is available, an adult person *in loco parentis*. If the parent refuses or the woman elects not to seek the consent of either of her parents or guardians, a court may be approached to substitute such consent. The court will then determine whether or not the woman is mature enough to give informed consent. In the event that the court determines that the woman is not mature enough, it may still decide to grant an abortion if it would be in her best interests. The pregnant woman may also participate in the proceedings and is entitled to legal representation.[40]

The above approach seems to be more balanced, safeguarding the right to self-determination as well as the principle of the best interest of minors. Such an approach does not deny minors the right to a termination of a pregnancy, but ensures that the exercise of such right is executed in the child's best interest, either by requiring the consent of one adult or guardian, or by way of a judicial bypass procedure where the court exercises its role as upper guardian of all children.

After having regard to the South African Choice of Termination of Pregnancy Act, its application and the issues considered in *Christian Lawyers Association*, one cannot but be left with serious concerns pertaining to the rights and interest of our minor women. Some of these concerns are in need of serious consideration.

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37 505 US 833 (1992).
38 410 US 113 (1973).
39 505 US 833 (1992).
40 *Ibid*.

4 SOME CONCERNS PERTAINING TO THE TERMINATION OF PREGNANCY ACT

One of the aspects of the Choice on Termination of Pregnancy Act that raises concern is the fact that the adjudication of informed consent is left to the medical practitioner or, in some instances, the registered midwife who is going to perform the termination. Such individual may, in certain instances, not have the full knowledge and appreciation of the legal requirements of informed consent as laid down in our common law and judicial precedents. This places a very heavy responsibility or even burden upon him or her. In this regard the application of a joint decision by a medical practitioner and parent or guardian or a judicial bypass procedure[41] seems to be more appropriate and more in line with serving the best interests of minor women and other parties involved.

A second aspect that is of grave concern and that has unfortunately not been addressed in *Christian Lawyers Association* is that, in allowing and in fact performing an abortion on a woman below the age of 16, the medical practitioner or registered midwife is in fact destroying critical evidence in a possible case of rape or statutory rape. Although the Act allows the termination of a pregnancy until the 20th week of the gestation period where the pregnancy resulted from rape or incest,[42] it gives no indication of how to deal with the criminal background that led to the particular pregnancy. The Act also gives no indication as to whether physical evidence must be kept for future proof in a criminal case. Such physical evidence may be a crucial element in convicting a perpetrator, especially if it is taken into account, as previously stated, that in certain instances the outcome of a case may depend on the evidence of a single witness, namely that of the woman making the claim of sexual violation.

A third concern that goes hand in hand with the second concern raised above is the fact that the Act also makes reference only to the referral of *inter alia* the following information to the Director-General of Health:[43]

- the age of women requesting termination;
- the gestation period of the pregnancy; and
- the reason for the proposed termination of the pregnancy.

The above information is given to the Director-General of Health in confidence. However, the Act itself does not require the Director-General to forward the information to the office of the National Director of Public Prosecutions or any other law enforcement agency.[44] Under the new constitutional dispensation the state is constitutionally tasked not only to protect the rights of its citizens, but also to institute criminal proceedings where the law has been breached. This could be interpreted in certain circumstances to require of the state to act in a positive manner.

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41 Such as the Pennsylvania Abortion Control Act of 1982 previously referred to.

42 It is regarded as a fact that a pregnancy of a woman under the age of 16 is the result of rape or statutory rape. In some exceptional circumstances the pregnancy may not be the result of sexual intercourse. See also *R v Theron* 1924 EDL 204.

43 See Annexure A to the Choice of Termination of Pregnancy Act.

44 In terms of s 179(1) of the Constitution, the national prosecuting authority consists of a National Director of Public Prosecutions, Directors of Public Prosecution and prosecutors. The prosecuting authority has the power to institute criminal proceedings on behalf of the state.

The non-disclosure of information to the National Director of Public Prosecution is of grave concern in light of the high number of rapes that are committed and also because of the significant under-reporting and low conviction rate of such offences. A lot more rapes may thus be committed than those shown by the statistics, and a lot of perpetrators may still be at large. It is of general importance in our new democratic dispensation that the public should be entitled to statistics that show as correct a picture as possible of the crimes committed and of perpetrators having been prosecuted for such crimes. We all have a stake in the effective functioning of our criminal justice system.

A fourth concern flowing from the case is the apparent contradiction between the mandatory obligation in terms of section 42(1) of the Child Care Act on *inter alia*, medical practitioners, nurses and social workers to report child abuse and the requirement of confidentiality in terms of the Choice on Termination of Pregnancy Act. This position places medical practitioners and registered midwives in a serious predicament, in that they are legally obliged in terms of the Child Care Act to report any ill treatment or abuse of children, yet under the Choice of Termination of Pregnancy Act the information about women that are requesting pregnancy terminations must be kept confidential.[45]

Taking into account that under the new constitutional dispensation the protection of children's rights is a constitutional imperative and that their best interests are of paramount importance in all matters that concern them,[46] the application of the Child Care Act seems to be the better approach.[47] In light of the principle of constitutional supremacy, the constitutional obligation is obviously stronger than the statutory protection against the breach of confidentiality.[48] In this regard the statutory scheme applied in the state of Wisconsin might be well worth considering. The statutory scheme and its implementation in Wisconsin presents an attempt to balance increased enforcement of statutory rape laws and broad reporting requirements with protection of adolescents' access to confidential health care. Wisconsin has enacted a child-abuse-reporting law like many other states, which requires health care professionals to report child abuse. This includes both consensual and non-consensual sexual intercourse with a minor under the age of 16. This would require a health care professional to make reports in almost any instance in which a minor younger than 16 sought reproductive or sexually-related health care. To mitigate such an effect, the state included an exception in its reporting law allowing children to obtain confidential health care with regard to family planning services, pregnancy testing, obstetrical care or diagnoses and treatment of sexually transmitted diseases. However, a report is required if the health care provider has reason to suspect that the intercourse occurred with a caregiver; the minor suffers from mental illness or deficiency; the minor is due to immaturity incapable of understanding the nature or consequences of the sexual intercourse; the minor was unconscious at the time of the act; the minor has been exploited or the health

45 The disclosure of information may also affect the client-doctor privilege.
46 S 28(2) of the Constitution.
47 English and Teare "Statutory rape enforcement and child abuse reporting: Effects on health access for adolescents" 2001 *De Paul LR* 827.
48 The scope of this article unfortunately does not allow a further discussion of this aspect.

care provider has any reasonable doubt to the voluntariness of the minor's participation.[49]

A final concern is that in not obtaining the consent of parents, custodians or guardians in the termination of the pregnancy by minors, and in non-mandatory and non-directive counselling, the law is leaving our minors to their own fate. Both the termination of the pregnancy and the possible rape that preceded the pregnancy have tremendous physical, emotional and psychological effects on the victim. Many rape victims suffer from post-traumatic stress disorder, and adolescents also frequently experience depression and other mental illness. Rates of suicide and suicide attempts are high in this age group.[50] By giving minors mandatory counselling and by disclosing the information to their parents, the law will not only enable parents to fulfil their parental responsibilities and care giving roles towards their children but will also protect children from facing severe psychological and emotional trauma on their own. It is even possible that in certain circumstances a case can be made out for a civil claim against the state should the minor suffer from severe psychological or emotional trauma or even commit suicide due to non-support of the parents or state.

It is thus submitted that it is not only self evident that some principles of both the Sexual Offences Act and the Child Care Act are in conflict with some of the principles of the Choice on Termination of Pregnancy Act, but that the application of some of the principles of the Act itself raises serious concerns for the best interests of our minor women. A serious re-evaluation and maybe amendment of the Choice on Termination of Pregnancy Act therefore seem urgently needed in order to ensure that our children receive the childhood care they so rightly deserve.

5 CONCLUSION

In view of the abovementioned legal principles, the following concluding remarks may be made. There should be no doubt that children, and especially female children, must be afforded proper protection under any criminal justice system. This is even more true in a society where violent crime and sexual abuses are committed on a regular basis. Modern South African society, under a new constitutional dispensation, requires that all measures be implemented to prevent the escalation of such crimes and to assist the victims appropriately.

Under the Constitution children specifically are afforded various rights and entitlements. Some of these rights are specific rights,[51] whilst others are of a

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49 Similar viewpoints are held in the article of Jones and Lupton "Liability in delict for failure to report family violence" 1999 *SALJ* 371, in which it was stated, *inter alia*, that "it is legally permissible to relate otherwise confidential information to the authorities when some compelling public purpose, such as protecting battered women from further abuse, is served by so doing." See also "Pregnant again at 15" *News Telegraph* 2004-11-18, in which concern was again raised for, *inter alia*, the rights of teachers and health workers to advise children without the children's parents' knowledge. The article refers to the case of such a schoolgirl who had an abortion on the advice of a school health worker without her mother's knowledge. The daughter was later desperate to replace her lost baby.

50 Strickland "Rape exceptions in post-Webster anti-abortion legislation: A practical analysis" 1992 *Colum J L and Soc Probs* 163.

51 See s 28 of the Constitution.

more general nature.[52] All of these constitutional imperatives together with other statutory requirements and the well-established principles of our common law should be approached holistically. In light of the fact that the Constitution is the supreme law, all other laws must comply with its founding values and principles. Any law or conduct inconsistent with the Constitution is invalid.[53] Even when the common law is interpreted it must be done within the spirit and purport of the constitutional values. All in all it is of paramount importance that any legal decision involving children should have their best interests at heart.[54] The judge in *Christian Lawyers* was indeed correct to test the provisions of the Choice on Termination of Pregnancy Act against the requirements of our supreme law. It is, however, our submission that the judge made certain wrong conclusions. In the first instance it seems that the judge concluded that the rights of the child protected under the Constitution, such as the rights to equality, human dignity, physical integrity and privacy, will be encroached upon should the Act require not only the informed consent of the child alone but also the co-consent of her parents, guardians or custodians. This is not necessarily the case. Such rights must first be interpreted in order to determine their extent. Even judicial precedents seem to indicate that certain statutory requirements set stricter limitations that are not necessarily in breach of constitutional provisions.[55] It seems therefore permissible that the statutory provision to require co-consent in the case of a minor who is considering a termination of a pregnancy should not be in breach of the abovementioned fundamental rights of that child as set out in the Bill of Rights. Even if it were found that such a provision does indeed limit certain rights of a minor, it is still possible that such a limitation or limitations could be regarded as reasonable and justifiable under section 36 of the Constitution. A further problem of the judgment in *Christian Lawyers Association* is the fact that the court seems to have ignored important principles regarding co-consent relevant to minors under the common law and that the court has not opted to interpret the common law in line with the spirit, purport and values underlying our constitutional dispensation.[56]

It is unclear on what basis it can be argued that to obtain the parental/guardian/custodian consent of a minor pregnant child who is contemplating a termination of such pregnancy would be to the detriment of such a child. It is indeed submitted that the benefits of obtaining such co-consent are of much more value than any negative consequences for the child. It is very easy, through the process of statutory regulation, to provide for appropriate safeguards in cases where co-consent is unattainable because of the unreasonable refusal of such consent. The possible application to a court of law to substitute such consent, as

52 See eg ss 9, 10, 11, 12, 14 and 15 of the Constitution.

53 See s 2 of the Constitution.

54 Refer to s 28(2) of the Constitution which states that a child's best interest is of paramount importance in every matter that concerns the child.

55 See eg *NNP of SA v Government of RSA* 1999 3 SA 191 (CC) and also *DP v Minister of Home Affairs* 1999 3 SA 254 (CC) where the Constitutional Court held that the requirement of a bar-coded identity document as was set out in the Electoral Act 73 of 1998 did not breach the right to vote set out in s 19 of the Constitution.

56 See in this regard s 39(2) of the Constitution, read with *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC). In *Carmichele* the Constitutional Court held, *inter alia*, that the common law must be developed to conform to the new constitutional order.

is provided for in other instances, seems to be a good example of such a safeguard.[57]

It is thus submitted that a requirement of co-consent would indeed be a more appropriate requirement, as it would not only be in the child's best interests, which is a constitutional imperative, but would also ensure that a child as a victim of sexual abuse and maltreatment is afforded the necessary support and assistance in order to overcome the trauma of the criminal offence committed against her and, finally, it would also ensure that the criminal justice system is not legally side-stepped through misinformation and the non-prosecution of possible sexual offenders.[58]

57 For more on this refer to Bekink "Parental religious freedom and the rights and best interest of children" 2003 *THRHR* 246 ff.

58 For more on the doctrine of a child's best interest see Bekink and Bekink "Defining the standard of the best interest of the child: Modern South African perspectives" 2004 *De Jure* 21 ff.