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Children and medical decision making

by

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Summary

The Constitutional Court judgments of *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (1) SACR 327 (CC) *and Centre for Child Law and Others v Media 24 Ltd and Others* 2020 (1) SACR 469 (CC) have set important precedents for a child's right to autonomy and privacy. International law, such as the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, endeavour to provide a legal basis for the creation and enforcement of autonomy rights of children by allowing children to participate in matters that will have an effect on them. It does however fall short by not providing for the full autonomy of children. Two requirements are put forth in the Children's Act 38 of 2005 for when a child may consent to his or her own medical treatment. The first requirement is the age of consent. A child aged 12 and older was allowed to consent to his or her own medical treatment and his or her surgery at 18 years without parental consent under the now repealed Child Care Act 74 of 1983. The Children's Act however reduced this age of consent for both medical treatment and surgery and section 129 of the Children's Act states that a child can consent to his or her own medical treatment without parental assistance at the age of 12. The second requirement is the maturity of the child which entails his or her ability to understand the nature of the medical procedure and the risk and consequence of giving consent to it. If one of the two requirements are not met, then consent may be obtained from the parent or guardian or caregiver of the child, the Superintendent or the person in charge of the hospital, the Minister of Social Development or a High Court or Children's Court. The concept of refusal of consent by a child is a further elaboration on the autonomy of children. Should a child's refusal be overruled just because of the fact that he or she is a child? What is the obligation on stakeholders to accept such a refusal if it is in fact in the best interests of the child? South Africa's health system is already in turmoil and adding an individualised approach to enforcing the autonomy of children by assessing their age and maturity will provide more pressure on an already strained system. However, this can be easily remedied by providing health practitioners with the necessary skills and expertise to assess children. Children's rights cannot be encroached upon merely because they lack maturity in society's opinion. Children should always receive the necessary

guidance and protection but should be free to explore their autonomy and the consequences thereof.

Annexure G

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Declaration of originality

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1. Chapter 1: Introduction

Children's rights are ever-developing, especially in the South African context. This has the result of certain rights being given content and an important aspect thereof is the recognition of children's autonomy over certain aspects of their lives. One such an aspect is medical decision making. Children enjoy all the rights stipulated in section 28 of the Constitution of the Republic of South Africa, 1996 (hereafter 'the Constitution') as well as all other rights set out in the Constitution.

In this regard, all persons are guaranteed the right to freedom and security of their person in terms of the Constitution.[1] This right also extends to bodily and psychological integrity, which includes the right to security in and over their bodies.[2] Consent to a medical procedure or treatment is of utmost importance. In order for medical intervention to take place, there is a legal duty on the medical practitioner to obtain informed consent from the patient involved.[3] Informed consent is a common law principle and comprises of three aspects briefly summarised as follows: the patient granting consent must have knowledge of the nature and extent of the harm inflicted, he or she must appreciate the nature and the harm and grant subjective consent considering these factors.[4] The Children's Act[5] provides children with the right to access to information in section 13 and states that:

> *(1) Every child has the right to –*
>
> *(a) have access to information on health promotion and the prevention and treatment of ill-health and disease, sexuality and reproduction;*
>
> *(b) have access to information regarding his or her health status;*
>
> *(c) have access to information regarding the causes and treatment of his or her health status; and*
>
> *(d) confidentiality regarding his or her health status and the health status of a parent, care-giver or family member, except when maintaining such confidentiality is not in the best interests of the child.*

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1 Section 12(1) of the Constitution.
2 Section 12(2)(b) of the Constitution.
3 *Castell v De Greef* 1994 4 SA 408 (C).
4 1994 4 SA 408 (C).
5 38 of 2005.

(2) Information provided to children in terms of this subsection must be relevant and health status; and must be in a format accessible to children, giving due consideration to the needs of disabled children.

The case of *Castell v De Greeff*[6] elaborated on the concept of a 'patient-focused approach that recognised the fundamental rights of autonomy and self-determination'.[7] As this matter was decided shortly before South Africa's democracy, this case is a note-worthy recognition of rights that were at the heart of the people's struggle. In a medical context, the right to freedom and security over one's body allows adults, who are of a sound mind and who have attained majority, to exercise the control afforded to them over their bodies. This means that they have the capacity to make decisions independently. Children[8] cannot perform juristic acts independently as the lack capacity.[9] Children therefore need the assistance of a parent, guardian or care-giver unless that juristic act will only be beneficial to the child.[10] In terms of medical decision making, the common law position was that a child's parent had to consent to medical treatment or surgery.[11] As will be discussed in this essay, there has however been a gradual relaxation of these limitation on the capacity of children to consent to medical decisions. A number of factors have resulted in the easing of these limitations, namely:

(a) to the ever-changing relationship between a parent and a child, parents consider their children to be independent at a much earlier age. This allows for children to be granted autonomy regarding certain matters. However, this still requires the weighing up of the child's age and maturity and the matter at hand[12];

(b) the children's right movement where a clear distinction was drawn between 'protecting children and protecting children's rights'[13];

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6 1994 (4) SA 408 (C).

7 1994 (4) SA 408 (C) 425-426.

8 Who are below the age of 18 years old and have therefore not yet attained majority if they are not married or emancipated.

9 Kruger (2018) *PER / PELJ* 2.

10 Kruger (2018) *PER / PELJ* 2.

11 Kruger (2018) *PER / PELJ* 2.

12 Kruger H 'The Protection of Children's Right to Self-Determination in South African Law with Specific Reference to Medical Treatment and Operations' 2018 *PER / PELJ* (21) 3.

13 Kruger 2018 *PER / PELJ* (21) 4.

(c) that research has shown that children are able to make informed decisions at a much earlier age than what the legal age of majority requires. Children are considered to reach maturity at a much earlier age than what was initially suspected[14]; and

(d) the democratic disposition in South Africa, granting children certain specific rights in the Bill of Rights in the Constitution as well as international treaties specifically dealing with the rights of children that has been ratified by South Africa[15].

As will be analysed and explored in this essay, it is clear that international and domestic law strive to create and enforce autonomy rights for children. One such an aspect is to allow children the autonomy to make their own decisions, independently, which includes consent in medical spheres. The main question is, though, whether this gradual relaxation to consent to medical treatment or surgery allows for the adequate recognition of the autonomy of children and if so, to what extent?

14 Kruger 2018 *PER / PELJ* (21) 3.
15 Kruger 2018 *PER / PELJ* (21) 3.

2. Chapter 2: Does the Constitution of the Republic of South Africa provide for a legal basis for the protection of a child's right to independently make decisions regarding his or her body without assistance?

2.1 Introduction

The Constitution provides a legal basis for the protection of a child's right to make medical decisions independently without assistance in the equality clause[16] and especially in section 9(3) where discrimination based on age.[17] The Bill of Rights protects the rights that South Africans are entitled to. At the heart of our democracy is the right to equality, dignity[18] and freedom.[19] Apart from the rights mentioned in section 28 of the Constitution, children are also entitled to most rights mentioned in the Bill of Rights. Section 28 of the Constitution provides for specific children's rights in the Bill of Rights. This however does not exclude children from benefitting from all rights contained in the Constitution, including the rights to equality, dignity, bodily integrity[20] and individual autonomy. These rights will be explored in further detail.

2.2 The right to bodily integrity

The right to bodily integrity is found under the so-called 'umbrella right' of freedom and security of the person.[21] Section 12(2) of the Constitution clearly states that everyone, including children, has the right to bodily and psychological integrity which includes, *inter alia*, 'security in and control over their body'. This right in the simplest of terms means that a person has a right to make autonomous decisions concerning his or her body without undue interference.[22] In a health care context, this right necessitates a right to give or withhold informed consent before any procedure is undertaken.[23] It is important to note that section 12(2) also speaks of the principle of informed consent

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16 Section 9 of the Constitution.

17 Kruger H 'The Protection of Children's Right to Self-Determination in South African Law with Specific Reference to Medical Treatment and Operations' *PER / PELJ* (2018) 26.

18 Section 10 of the Constitution.

19 Section 7 of the Constitution.

20 Section 12(2) of the Constitution.

21 Section 12 of the Constitution.

22 Buchner-Eveleigh M 'Is it a competent child's prerogative to refuse medical treatment?' (2019) *De Jure* 245.

23 Buchner-Eveleigh (2019) *De Jure* 242.

as discussed above. This right therefore entails the right that a person has to make autonomous decisions independently where it concerns his or her body. This should be read to include children because, as stated above, children also benefit from this constitutional right. Of particular importance is the right to make medical decisions without assistance which includes the right to give or refuse informed consent regarding medical procedures, prior to undertaking them. This essentially gives effect to exercise the right to bodily integrity.

2.3 The right to autonomy

At the core of the right to bodily integrity, lies the right to autonomy.[24] From a Child Law perspective this should make provision for, *inter alia*, the right that a child has to make his or her own decisions regarding his or her own health and body independently. Freedom, human dignity and privacy forms part of the constitutional value of autonomy.[25] It can be interpreted to mean the 'ability to regulate one's own affairs'.[26] This ability to regulate one's own affairs implies that autonomy is an 'evolving capacity'[27] and could mean that a child with autonomy is capable of making decisions regarding matters that affect his or her life. The term 'evolving capacity' also implies that autonomy is developed as a person matures.[28]

The children's right movement in the late nineteenth and twentieth century marked the need to recognise and protect children's right to autonomy.[29] The notion was characterised by protecting children rather than protecting the rights that children have.[30] There are two distinct approaches to the protection of children's rights: the nurturance approach and the self-determination approach.[31] The nurturance approach entails giving children what is considered 'good for them' but the self-determination approach provides children with the right to rather 'decide what [is] good for them'.[32]

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24 Buchner-Eveleigh (2019) *De Jure* 246.
25 *NM V Smith* 2007 5 SA 250 (CC) par 145-146.
26 Buchner-Eveleigh 2019 De Jure 247.
27 Buchner-Eveleigh 2019 De Jure 247.
28 Buchner-Eveleigh 2019 De Jure 247.
29 Kruger H 'The Protection of Children's Right to Self-Determination in South African Law with Specific Reference to Medical Treatment and Operations' *PER / PELJ* (2018) 4.
30 Kruger (2018) *PER / PELJ* p4.
31 Kruger (2018) *PER / PELJ* p4 with reference to Farson R 'Birthrights' (1974) 165.
32 Kruger (2018) *PER / PELJ* 4.

The last-mentioned approach thus makes provision for children to exercise their right to autonomy by granting them the opportunity to make decisions for themselves that they consider are in their best interests. The self-determination approach is part and parcel to the notion of "children's liberation".[33] Farson argues that effect can only truly be given to children's rights once children can exercise self-determination.[34] Holt strengthens this argument by stating that children should be able to enjoy freedoms awarded to adults, such as taking part in the work force and choosing their education.[35] Essentially, this then allows for children to be treated on an equal footing to adults. The importance of nurturance rights should not be minimised – should a child's nurturance rights not be fostered, he or she may find themselves in a position unable to exercise their autonomy rights.[36] Sometimes giving children what is best for them, instead of making them decide for themselves, nurtures a healthy right to autonomy. I agree with this. It allows children to be exposed to an independent lifestyle and to exercise their autonomy rights when they deem fit. By allowing children to start making their own decisions, with or without assistance, puts them in a better position as they grow up. In my opinion, this will in fact strengthen their maturity by exposing them to different views and the ability to make decisions without having to rely on the consent of an adult. By granting them the authority to make an independent decision, does not mean that they will not have access to resources, such as the guidance of a parent or guardian. It merely means that the child will have the opportunity to listen to that view of the adult but still have the freedom and right to make an independent decision to undergo medical treatment or surgery or refuse it all together.

In Freeman's work[37], four categories of children's rights are identified. The first category is welfare rights and the second category is protection rights. The third category, namely social justice rights and the fourth category, the right to autonomy, are of importance to children's autonomy rights. The third category proposed by Freeman is the right to be treated as an adult which supports the notion that children should enjoy the same rights and freedoms afforded to adults. Freeman argues that

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33 As coined by John Holt, a teacher, and Richard Farson, a psychologist. With reference to Wald (1979) *UCDLR* 257.

34 Kruger (2018) *PER / PELJ* 5.

35 Kruger (2018) *PER / PELJ* 5.

36 Kruger (2018) *PER / PELJ* 5.

37 Freeman M 'The Rights and Wrongs of Children' (1983) 22-23.

age restrictions placed on children should be reviewed on a regular basis.[38] This implies that the age restriction placed on children in terms of medical decision making should constantly be revised in order to make provision for the ever-changing development of children.[39] Linking to this, Freeman suggests that 'the legal capacity of children to make decisions should be determined on a case-by-case basis' as maturity levels differ from child to child.[40] A child's age may therefore not necessarily be a determining factor of maturity. The fourth category suggests that the right to autonomy that a child has goes against the rights of parents. This category 'allows for claims of independence from parental control before the age of majority'.[41] This category would then also allow for children's rights to independent medical decision making. Studies on the intellectual, social and moral development of children, conducted by developmental psychologists, showed that a child's capacity to make decisions equivalent to adults' capacity peaks at mid-adolescence.[42]

The right to autonomy safeguards the right that children have to make decisions independently, and even more so when it comes to medical decision making regarding their own bodies. As this right to autonomy is constitutionally protected, there is a legal obligation on medical practitioners to respect a patient's right to autonomy.[43] Since the right to autonomy is encompassed in the right to bodily integrity, children who can exercise their right to have their bodily integrity respected, should also be able to exercise their right to autonomy and make decisions involving their health. Considering the right to autonomy and the right to bodily integrity, children should be able to make medical decisions and also refuse medical treatment.[44] If a child is competent and can make competent decisions, effect must be given to his or her right to bodily integrity.[45] Thus, his or her decision to refuse medical treatment must also be respected regardless of the consequences of such a refusal.

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38 Freeman (1983) 46.

39 This could include the circumstances and environment of children that rapidly change globally on a yearly basis.

40 Freeman (1983) 46.

41 Freeman (1983) 48.

42 Buchner-Eveleigh 2019 De Jure 246.

43 Buchner-Eveleigh 2019 De Jure 247.

44 Buchner-Eveleigh 2019 De Jure 247.

45 Buchner-Eveleigh 2019 De Jure 247.

2.4 The limitation on children's right to autonomy

Section 28(2) of the Constitution allows for the best interests of a child to be of paramount importance in all matters concerning the child. Other rights' meanings and scope of operation, as contained in the Bill of Rights, have subsequently been developed or limited by the operation of section 28(2).[46] In *S v M (Centre for Child Law as Amicus Curiae)*[47], the Court held that:

> *'[T]he fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights in the Bill of Rights their operation has to take account of their relationship to other rights, which might require that their ambit be limited.'*[48]

Based on this, it is clear that section 28(2) of the Constitution is not supreme to a limitation of rights. Section 28(2) is a right in itself and can subsequently be limited similarly to other rights.[49] A child's age is of particular importance when considering the right to autonomy. Article 5 of the United Nations Convention on the Rights of the Child (hereafter 'the UNCRC) first introduced the concept of evolving capacities by stating that holders of parental responsibilities and rights provide guidance to a child, that holder must consider the capacity, or lack thereof, that a child has to exercise his or her rights on his or her own behalf. Children have always been treated differently based on their age and sometimes they are prohibited from enjoying certain freedoms because of an age restriction. Section 9 of the Constitution provides that discrimination based on age is unfair discrimination. Therefore, any distinction made in terms of children based on their age, will be subject to the limitation clause[50] in the constitution to determine whether such distinction amounts to unfair discrimination. Section 36 of the Constitution states that:

> *(1) 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-*

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46 Kruger (2018) *PER / PELJ* 18. These terms include but are not limited to family or parental care.
47 2008 (3) SA 232 (CC).
48 2008 (3) SA 232 (CC) par 26.
49 *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) par 17.
50 Section 36 of the Constitution.

(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.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Currie and De Waal hold that age is not a rigid characteristic as it changes constantly throughout a person's life.[51] Thus, age differentiation is not unique to children as all persons have been subjected to this differentiation based on certain age restrictions imposed by legislation. Examples of these are the right to vote, the right to obtain a driver's license and the right to consume alcohol.[52] Furthermore, specific parental responsibilities, such as care and support towards a child, may justifiably limit a child's right to autonomy.[53] However, as the child's age increases, the justifiability of the limitation may start to decrease and the possibility then exists of infringing on a child's right to autonomy.[54] Based on this, Heaton supports the idea of determining on a case-by-case basis what is in the best interests of the child by considering all the relevant factors to that specific child's situation.[55] The Constitutional Court followed this notion by saying that 'a truly principled child-centred approach require[s] a close and individual examination of the precise real-life situation of the particular child involved'.[56] Kruger holds that 'an approach that recognises the evolving capacities of children and allows children who have the required level of maturity to make independent decisions' correlates with the child-centred approach as set out by the Constitutional Court.[57] She is of the opinion that protecting a child from his or her immaturity is in the best interests of the child.[58] However, she also holds that it is in the best interests of a child to allow him or her to make independent decisions when

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51 Currie and De Waal 'Bill of Rights Handbook' (1999) 233.
52 Currie and De Waal (1999) 233-234.
53 Kruger (2018) *PER / PELJ* 18.
54 Kruger (2018) *PER / PELJ* 18.
55 Kruger (2018) *PER / PELJ* 19.
56 2008 (3) SA 232 (CC) par 24.
57 Kruger (2018) *PER / PELJ* 19.
58 Kruger (2018) *PER / PELJ* 19.

reaching the required level of maturity.[59] Based on this, allowing a child the independence to make decisions, would grant a child the opportunity to make independent medical decisions even if such decision is to his or her detriment.[60]

2.5 Case law on the rights to bodily integrity, autonomy, dignity and privacy

2.5.1 The *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another*[61] case

The case of *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* (the '*Teddy Bear Clinic* case') dealt with a declaration of the unconstitutionality of sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act[62] (the 'Criminal Law Amendment Act') and specifically touches on the right to autonomy that children possess. The applicants in this matter argued that sections 15 and 16 of the Criminal Law Amendment Act unjustifiably infringed on children's constitutional rights to dignity, privacy and bodily and psychological integrity by criminalising consensual sexual activities between minors.[63] The applicants also argued that the best interests of the child are not advanced or protected by the above-mentioned sections.[64] The respondents on the other hand argued that sections 15 and 16 do not infringe on the rights of children as set out by the applicants and that the sections are actually protecting those rights by delaying the choice that children have 'to engage in consensual sexual activities'.[65] The respondents further argued that the children's best interests were not affected as the sections were carefully considered and implemented after due consideration was given to children's best interests. The first *amicus curiae* in this matter, Justice Alliance of South Africa (JASA), argued that children cannot give informed consent and based on this reason held that it will not be in the best interests of children if they are allowed to engage in sexual penetration, albeit consensual.[66]

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59 Kruger (2018) *PER / PELJ* 19. This concept of maturity will be discussed in more detail in Chapter 4 of the essay.

60 Kruger (2018) *PER / PELJ* 19.

61 2014 (1) SACR 327 (CC).

62 32 of 2007.

63 2014 (1) SACR 327 (CC) par 25.

64 2014 (1) SACR 327 (CC) par 25.

65 2014 (1) SACR 327 (CC) par 31.

66 2014 (1) SACR 327 (CC) par 35.

JASA further submitted that because children lacked the capacity to give informed consent, the law should not allow them to have the freedom to engage in sexual penetration as it is a potentially harmful act.[67] The second and third *amici*, the Women's Legal Centre Trust and the Tshwaranang Legal Advocacy Centre respectively, advanced the argument regarding section 9 of the Constitution by saying that sections 15 and 16 'disproportionately' affected girls more than it did boys and that the girls' right to access to healthcare[68] are infringed by these sections.[69]

In its judgment, the Court mentioned the importance of adults assisting children in order 'to enable them to make healthy choices'.[70] The court also stressed that children should feel comfortable to discuss certain matters with adults without the fear of being ridiculed or finding themselves in an unsafe environment.[71] This type of negative treatment would then hamper any future discussions between a child and an adult. The court held that the rights to dignity and privacy are not subject to limitations[72] or the fulfilment of any requirements. These are rights that are automatically conferred on South African citizens. On the right to dignity, the court held that an 'individual's human dignity comprises not only on how he or she values himself or herself, but also includes how others value him or her'.[73] The court quoted Sachs J, who held that:

> *'Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. The unusually comprehensive and emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children.'*[74]

The court held that dignity is the 'deeply personal understanding we have of ourselves, our worth as individuals and our worth in our material and social context'.[75] The court

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67 2014 (1) SACR 327 (CC) par 35. JASA supported the applicants' argument to a certain extent but held that section 15 is constitutional with the exception of section 15(2)(a).

68 Section 27 of the Constitution.

69 2014 (1) SACR 327 (CC) par 36.

70 2014 (1) SACR 327 (CC) par 45.

71 2014 (1) SACR 327 (CC) par 45.

72 2014 (1) SACR 327 (CC) par 38.

73 2014 (1) SACR 327 (CC) par 45.

74 2008 (3) SA 232 (CC).

75 2014 (1) SACR 327 (CC) par 52.

found that 'children's dignity rights are of special importance' and 'not dependent on the rights of their parents'. To emphasise this position, the court held that the 'exercise by children of their dignity rights [cannot be] held in abeyance until they reach a certain age'.[76]

The court held that the right to privacy entails the recognition that 'we all have a right to a sphere of private intimacy and autonomy...'.[77] The court further held that '[p]rivacy fosters human dignity insofar as it is premised on, and protects, an individual's entitlement to "a sphere of private intimacy and autonomy"'.[78] In this case, the court found that by limiting a child's right to consent to consensual intercourse is an intrusion on their right to privacy.[79]

On the best interests of the child, the court held that determining what is in the best interests of a child is a matter that should be decided on a case-by-case basis with due consideration of the specific factors of each case.[80] The court went on to say that section 28(2) of the Constitution has at least two distinct roles. Firstly, section 28(2) is a 'guiding principle' that needs to be considered in every matter where a child is concerned.[81] Secondly. Section 28(2) is used as a measuring tool to test certain provisions or conduct which will have an effect on children in general.[82]

Due to the above, the court ordered that imposing criminal liability on children under the age of 16 years is unconstitutional and invalid[83] as it does not promote a child's right to dignity and privacy and it is not in a child's best interests to be criminally prosecuted for exercising autonomous decisions regarding one's own body. This case therefore affords children under the age of 16 similar rights to adults by allowing consensual sexual; relations. This is an important step towards granting children full autonomy my allowing them to make intimate decisions such as having sexual relations. Medical treatment or surgery is also an intimate decision as the person receiving the treatment or surgery is the one who has to live with the outcome thereof.

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76 2014 (1) SACR 327 (CC) par 52.

77 2014 (1) SACR 327 (CC) par 59 with reference to *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (2) SACR (CC).

78 2014 (1) SACR 327 (CC) par 64.

79 2014 (1) SACR 327 (CC) par 63.

80 2014 (1) SACR 327 (CC) par 65.

81 2014 (1) SACR 327 (CC) par 69.

82 2014 (1) SACR 327 (CC) par 69.

83 2014 (1) SACR 327 (CC) par 117.

Ultimately, if no consensus can be reached regarding decisions concerning a child's body, one would have to weigh up the benefits of trusting a child to make an informed decision versus involving third parties with no background or knowledge of one's intimate environment to make that decision for the child.

2.5.2 The *Centre for Child Law and Others v Media 24 Ltd and Others*[84] case

The rights that children have in terms of dignity and privacy were further explored in the case of *Centre for Child Law and Others v Media 24 Ltd and Others* (the '*CCL v Media 24* case'). The Court in this case had to consider the privacy and dignity of person's identity who was a victim of a crime as a child as victims were not included in the ambit of the protection afforded by section 154(3) of the Criminal Procedure Act 51 of 1977 (the 'Criminal Procedure Act). Section 154(3) already allowed for the protection of the identities of witnesses and offenders but not for the protection of victims of crime. In doing so, the Court declared section 154(3) of the Criminal Procedure Act unconstitutional as it did not protect the anonymity of children who were victims of crime at criminal proceedings and that the protection was not extended beyond them turning 18 years old as the current legislation allowed for the identities of child victims and offenders to be made public when they reached the age of majority. The Court held that the matters at hand in this case required the Court to strike a balance between the best interests of children and the rights that children have in terms of dignity, equality and privacy on the one hand and the rights to expression and open justice on the other.[85] The principle of the best interests of the child is a 'benchmark for the treatment and protection of children'.[86] The respondents in this matter argued that children's best interests should be considered based on their individual circumstances.[87] Similarly to the situation in the *Teddy Bear Clinic* case above, the respondents argued that protection afforded to children in order to advance their best interests should be determined on a case-by-case basis.[88]

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84 2020 (1) SACR 469 (CC).

85 2020 (1) SACR 469 (CC) par 4.

86 2020 (1) SACR 469 (CC) par 37 with ref to *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* 2009 (2) SACR 130 (CC).

87 2020 (1) SACR 469 (CC) par 38.

88 2020 (1) SACR 469 (CC) par 38.

The right to privacy has been described as 'the inner sanctum of a person'.[89] This relates to the fact that a person's autonomous identity is often shaped by the right to privacy.[90] A person should be allowed to reveal his or her identity on his or her own terms. Children's self-identities are still forming and is often subjected to the opinions and approvals of others[91] and by protecting the right to children's privacy, 'respect for dignity, personal integrity and autonomy' are nurtured[92]. The rights to dignity and privacy overlap as each child's identity, social needs and interests are unique to their circumstances[93] and are elements that are evolving constantly. The Court held that 'not [having] control over how some of the most traumatic and intimate moments of a child's life are shared with the public strikes at the very core of the child's identity'.[94] In the dissenting judgment, the Court who dissented held that the right to privacy is found in the personal and communal aspects of a person's life, even if this right has a different application in each of these environments.[95]

This case thus extended the protection of the identity of persons at criminal proceedings by including in section 154(3) that a victim of a crime's identity also be protected. The case further held that such protection of the identity of a victim, offender or witness at criminal proceedings is extended beyond that victim, offender or witness turning 18 years old. This afford a victim, offender or witness privacy and allows him or her to reveal his or her identity when he or she chooses. This case is an important step in advancing the autonomy of children as a child victim, offender or witness will be able to make the decision, to reveal his or her identity, independently. If he or she chooses not to reveal his or her identity, he or she cannot be influenced by an adult to do so.

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89 2020 (1) SACR 469 (CC) par 45 with reference to *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC).

90 2020 (1) SACR 469 (CC) par 48.

91 2020 (1) SACR 469 (CC) par 49.

92 2020 (1) SACR 469 (CC) par 49 with ref to *Toronto Star Newspaper Ltd v Ontario* (2012) ONCJ 27 paras 40 and 44.

93 2020 (1) SACR 469 (CC) par 50.

94 2020 (1) SACR 469 (CC) par 50.

95 2020 (1) SACR 469 (CC) par 176.

2.6 Conclusion

The above-mentioned cases are of extreme importance when developing and enforcing the right to autonomy. These two cases are benchmark cases as it expands the protection of a child's dignity and privacy and even develops legislation to allow for the adequate implementation of these rights. Both cases considered that children should not necessarily be treated differently because of their age and found that a child's opportunity to exercise his or her rights cannot be limited or postponed until he or she reaches majority. There should thus be a way of providing protection to children but also to provide them the freedom to make their own decisions. The right to make medical decisions regarding your own body is also a very private matter and most times take place in an intimate setting. Children should be able to exercise their right to privacy by being able to give or refuse consent for medical treatment without having to subject themselves or their decision regarding the medical treatment to public scrutiny. This publication of their most inner private decisions violates their human dignity and robs them of the right to privacy awarded to adults in the same position. By allowing children to independently make medical decisions, their autonomy in terms of their bodily integrity is advanced and protected.

3. Chapter 3: How does international law instruments recognise a child's right to independent medical decision making?

3.1 Introduction

It is important to note that international law instruments also recognise the autonomy of children. Both the UNCRC and the African Charter on the Rights and Welfare of the Child, 1990 (hereinafter 'the ACRWC') recognise the autonomy rights of children. The Constitution also aligns itself with these international law instruments by promoting children to be 'independent legal actors'.[96]

3.2 The UNCRC

The UNCRC defines a child as 'every human being below the age of 18 years' unless majority is then attained earlier. In a General Comment[97], adolescence is described as a period that involves 'rapid' developments in a child's life physically, cognitively and developmentally.[98] During these rapid developments, children are faced with various aspects of autonomy and confronted with decisions throughout their entire childhood. These decisions are, *inter alia*, impacted by the environment in which they find themselves at that specific period of their development. According to the preamble of the UNCRC, this ever-changing position makes children vulnerable and they are therefore in need of 'special care and assistance'. The General Comment then further notes that State Parties did not consider these changes when implementing the obligation under the UNCRC that adolescents have certain rights pertaining to their health and development.[99] This obligation makes provision for children to adequately express their views and opinions freely and indicates that this should also be considered when developing children's health.[100] It also states that a minimum age should be set for consent to be given by a child to undergo medical treatment without

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96 Mahery P 'The United Nations Convention on the Rights of the Child' In: Maintaining its Value in International and South African Child Law. In: Boezaart, T, editor. *Child Law in South Africa*. Claremont: Juta; 2009 p309-330.

97 Committee on the Rights of the Child General Comment No. 4: Adolescent Health and Development in the Context of the Convention of the Rights of the Child (CRC/GC/2003/41 July 2003).

98 General Comment No. 4 Introduction.

99 General Comment No. 4 Introduction.

100 General Comment No. 4 par 4.

the need for parental consent.[101] Consent also plays a crucial role regarding disclosure of medical information of the child.[102] Provision must be made for children to enjoy the right to privacy and only disclose medical information on their own terms. The doctrine of informed consent is also of particular importance. Children should be consulted and given an opportunity to express their views before parents are then faced with the final decision.[103] In accordance with article 12 of the UNCRC, due weight should be given to a child's views but what is of great importance is that, if a child does in fact satisfy the requirement of having sufficient maturity to make his or her own decisions, that child should then be allowed to give his or her own informed consent which is in accordance with his or her best interests.[104] To execute this provision in line with article 3 of the UNCRC, certain duties are placed on State Parties regarding privacy, confidentiality and informed consent to treatment. In this regard, the General Comment provides for the following:[105]

(a) State Parties should enact law or regulations that provide that medical advice given to adolescents should be confidential in order to give adolescents the opportunity to give informed consent. A minimum age should be set and the child's 'evolving capacity'[106] should also be kept in mind; and

(b) Health personnel working with adolescents should be trained regarding the rights that adolescents have in terms of privacy and confidentiality in order and to be aware of the rights that adolescents have to be informed of the treatment and that adolescents can then give informed consent to such treatment.

The Committee on the Rights of the Child identified certain articles in the UNCRC which represent the 'value system on which the Convention is based' and these articles play a crucial role in the interpretation of the UNCRC.[107] However, certain articles in the UNCRC also provide for the necessity of a child to be an active

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101 General Comment No. 4 par 5.

102 General Comment No. 4 par 7.

103 General Comment No. 4 par 28.

104 General Comment No. 4 par 28.

105 General Comment No. 4 par 29.

106 This refers to the fact that children are still developing during the course of their childhoods and that their capacity to make certain decisions or perform certain actions are also subject to their development.

107 Kruger H 'The Protection of Children's Right to Self-Determination in South African Law with Specific Reference to Medical Treatment and Operations' *PER / PELJ* (2018) 13.

participant when it comes to decision making.[108] These articles are discussed separately below.

3.2.1 Article 3

This article is similar to section 28 of the Constitution and requires that the best interests of the child should be a primary consideration in all matters concerning the child. As this article does not provide that the best interests of children should be 'the primary consideration', it allows for the interests of other parties to also be considered.[109] Such other parties may include the child's parents and the state. However, even though these parties' interests are also considered, it is the child's best interests that should be duly considered.[110]

3.2.2 Article 5

This article in the UNCRC requires State Parties to respect the responsibilities, rights and duties that parents have to provide the necessary guidance and direction to children in order for children to exercise the rights afforded to them in the UNCRC.[111] However, it is important for parents to exercise these obligations and rights bearing in mind at all times that a child is subject to change and in the process of continuous development.[112] Parents should take into consideration that what is in the best interests of a child today, might not be in the best interests of that same child tomorrow due to the fact that children are constantly changing and adjusting according to their circumstances. Parental decisions and opinions carry more weight in this regard than that of the child and the autonomy of the child is thus not as clear as one would have hoped. Even though the parent has a duty to duly consider the views of the child, it is still the parent's prerogative to follow these views or not.

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108 Ford A 'Do Children Have the Right to Contribute to Medical Decisions about their own Care? An Analysis of Policy and Practice in the United Kingdom and the United States' *Health and Human Rights Journal* (2017) 2.

109 Kruger (2018) *PER / PELJ* 13.

110 Kruger (2018) *PER / PELJ* 13.

111 Kruger (2018) *PER / PELJ* 14-15.

112 Kruger (2018) *PER / PELJ* 15.

3.2.3 Article 6

Article 6 of the UNCRC provides that 'every child has the inherent right to life'[113] and places the obligation on the state to ensure 'the survival and development of the child'[114]. When read with article 24 of the UNCRC, which recognises the right of a child to enjoy 'the highest attainable standard of health' and for a child to have access to 'facilities for the treatment of illness and rehabilitation of health', article 6 ensures that children will have access to medical treatments suitable to their needs.[115] However, when articles 6 and 24 are read separately, these rights only allow for a child to be a inactive participant in decisions pertaining to their health and they are subsequently not granted the opportunity to independently make decisions that directly affect their own health and well-being.

3.2.4 Article 12

Articles 12 and 13 of the UNCRC specify that minors have the right to express themselves freely, be heard on all matters affecting them, and have their views taken seriously. This is similar to section 10 of the Children's Act[116] in South Africa (hereinafter 'the Act'). Similarly, this is also reflected in Article 6 of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (hereinafter 'the Convention on Human Rights and Biomedicine') which provides protection for persons who are unable to give consent. With regards to minors, article 6(2) of the Convention on Human Rights and Biomedicine states that only when a minor is unable to give consent may his or her representative act on his or her behalf. Section 6(2) further states that 'the opinion of the minor shall be taken into consideration as an increasingly determining factor in proportion to his or her age and degree of maturity'. Although South Africa has not ratified this Convention, it may serve as an important international guideline in effecting full autonomy of children by allowing them to voice their opinions and having those opinions be a determining factor and not just a consideration. Article 12 of the UNCRC thus emphasises the UNCRC's child-

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113 Article 6(1) of the UNCRC.

114 Article 6(2) of the UNCRC.

115 Ford (2017) *Health and Human Rights Journal* 2.

116 38 of 2005.

centred approach.[117] This provision provides for the fact that children have a right to also have a voice when decisions are made that directly affect them. If a child is capable of forming and expressing his or her own views or opinions, article 12(1) of the UNCRC provides that State Parties must ensure that the child may express such views freely. The necessary weight attached to the child's opinion will be subject to his or her age and maturity. Children also have an opportunity to express their views in judicial and administrative proceedings that affect them, albeit directly or through a representative.[118] The Committee on the Rights of the Child stated that age alone 'cannot determine the importance of a child's views' as there are various factors that play a role when a child forms an opinion.[119] These factors include 'information, experience, environment, social and cultural expectations' and the level of support that children have.[120] Thus, the Committee on the Rights of the Child's recommendation is that children's views should be considered on a case-by-case basis.[121] Some authors have expressed their views that article 12 does not give effect to the full autonomy of children as article 12 merely 'promotes children's capacity for self-determination and autonomy [and] it does not follow that children have the right to have their decisions implemented'.[122] In essence, there is thus provision made for children to express their views in matters concerning them but there is no guarantee that these views will be acted upon.[123]

In conclusion, the UNCRC 'does not expressly afford children that possess a certain level of maturity the right to independent decision making.[124] Kruger is of the opinion that this right can however be found in article 12 read with article 5 of the UNCRC.[125] She is of the view that mere consultation with the child about his or her views or opinions is not sufficient when due weight is given to the views of the child based on the child's age and maturity.[126] Kruger holds that her view is 'strengthened by the

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117 Kruger (2018) *PER / PELJ* 14.
118 Article 12(2) of the UNCRC.
119 Kruger (2018) *PER / PELJ* 14.
120 Kruger (2018) *PER / PELJ* 14.
121 Committee on the Rights of the Child General Comment No. 12: The Right of the Child to be Heard (CRC/C/GC/12 20 July 2009) par 29.
122 Kruger (2018) *PER / PELJ* 14 with reference to Sloth-Nielsen 1995 *SAJHR* 403; Barratt 2002 *THRHR* 557-558; Fortin *Children's Rights* 21-22.
123 Kruger (2018) *PER / PELJ* 14.
124 Kruger (2018) *PER / PELJ* 15.
125 Kruger (2018) *PER / PELJ* 15.
126 Kruger (2018) *PER / PELJ* 15.

obligation placed upon the state in article 5 to recognise the fact that children have evolving capacities, and that the direction and guidance given to them should reflect this fact'.[127] If a child is of a certain age and maturity, the child should be allowed to independently make decisions that affect his or her life, including medical decisions. Kruger holds that if a child possesses the necessary age and maturity, that child should also be able to 'veto' any decisions made for him or her by his or her parents.[128] It defeats the purpose to allow for a child to express his or her views if their voice will not be heard in the final decision.[129] Theoretically, provision is made by the UNCRC for children to exercise their autonomy, especially pertaining to matters that directly affect them, but the execution thereof is sometimes lacking.

3.3 The ACRWC

The Organisation of African Unity Assembly adopted the ACRWC on 11 July 1990 as a 'pendant' to the UNCRC.[130] The ACRWC provides that the best interests of a child shall be *the* primary consideration in all matter affecting him or her.[131] This is in contrast to the UNCRC which provides that the best interests of a child shall be only *a* primary consideration in all matters affecting him or her.[132] Article 4(2) of the ACRWC, similarly to article 12(2) of the UNCRC, provides that:

> *'[i]n all judicial or administrative proceedings affecting a child who is capable of communicating his [or] her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law'.*

Article 12(1) of the UNCRC should be read together with article 7 of the ACRWC which makes provision for a child's right to freedom of expression.[133] Paragraph 4 of the African Youth Charter states that every young person shall have the right of expression

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127 Kruger (2018) *PER / PELJ* 15.
128 Kruger (2018) *PER / PELJ* 15.
129 Kruger (2018) *PER / PELJ* 15. Emphasis added.
130 General Comment No. 12 par 84. Emphasis added.
131 Article 4(1) of the ACRWC .
132 Article 3 of the UNCRC.
133 Kruger (2018) *PER / PELJ* 16.

in all matters and to 'seek, receive and disseminate information and ideas of all kinds'. This should be read to allow for children to also be able to express their opinions and views regarding medical treatment and procedures. They should be able to express their willingness to undertake such treatments or procedures and be given an opportunity to consent to it. Furthermore, paragraph 16 of the African Youth Charter provides that every young person shall have the right to a healthy state of physical, mental and spiritual health and further places the onus on the State Parties, including South Africa, to take the necessary steps to ensure that this is attained. This includes providing for a health care system that fulfils the needs of children and has the infrastructure to assist children with medical treatments and procedures. It also allows for children to be involved in making decision regarding their health needs.

Therefore, as the best interests of the child carry more weight in the ACRWC, it seems that the protection provided by the ACRWC is far stronger that of the UNCRC.[134] Furthermore, the ACRWC allows for all children who are capable of expressing their views and opinions to participate in matters concerning them.[135] In the ACRWC, contrary to the UNCRC, the child's age and maturity is not indicative of his or her capability to express or form an opinion.[136] The ACRWC also provides that children are participants to proceedings that affect them and not merely just represented.[137] However, the ACRWC only allows for the participation of children in judicial and administrative proceedings that affect the child whereas the UNCRC also provides protection in all matters that affect the child as well as participation in judicial and administrative proceedings. Thus, this aspect could point to the UNCRC providing more protection to children in this regard.[138]

It is clear that both the UNCRC and the ACRWC strive to protect children and to ensure that, as children develop and evolve, their rights are also fluid and will develop with them. If this is applied in practice, it will ensure that children are capable of making independent decisions regarding various aspects in their lives. As South Africa has ratified both the UNCRC and the ACRWC, South African children will benefit from the protection afforded by these international law instruments. As the UNCRC also

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134 Kruger (2018) *PER / PELJ* 16.
135 Kruger (2018) *PER / PELJ* 16.
136 Kruger (2018) *PER / PELJ* 16.
137 Kruger (2018) *PER / PELJ* 17.
138 Kruger (2018) *PER / PELJ* 16.

provides for informed consent, children have the opportunity to be consulted as an active participant in decisions that could have an adverse effect on them. In the next chapter, domestic law will be evaluated to see to what extent children's right are afforded to the fullest extent of the protection contained in the above-mentioned international law instruments and whether South Africa is considering and implementing international law when giving effect to the rights of children to independently make decisions.

4. Does section 129 of the Children's Act provide adequate respect for a child's right to bodily integrity and autonomy?

4.1 Introduction

The Children's Act aims to supplement and give effect to the rights afforded to children in terms of the Constitution and to provide care, protection and safeguards to children to ensure they can exercise their constitutional rights while simultaneously protecting their overall well-being.[139] Section 129 of the Children's Act deals with medical decision making and fully explains which children can exercise their autonomy rights when making decisions regarding medical treatment or surgery.

4.2 The element of consent

Consent is an important part of the health provisions in the Children's Act. As stated above, the UNCRC encourages the possibility of children consenting to medical treatment without parental assistance. The UNCRC has urged State Parties to also take this view and consider allowing children to consent to medical treatments without needing permission from a parent, guardian or care-giver.[140] This then allows for a child 'to have access to a particular health care service independently'.[141]

A child aged 14 and older was allowed to consent to his or her own medical treatment and his or her surgery at 18 years without parental consent under the repealed Child Care Act[142]. The Children's Act however reduced this age of consent for both medical treatment and surgery and section 129 of the Children's Act states that a child can consent to his or her own medical treatment without parental assistance at the age of 12. For surgery, the child can consent at age 12 but must be duly assisted by his or her parent or guardian and that parent or guardian must assent[143] to the surgery in

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139 Buchner-Eveleigh (2019) *De Jure* 248.

140 Committee on the Rights of the Child General Comment No. 15: On the right of the child to the enjoyment of the highest attainable standard of health (CRC/C/GC/15 17 April 2013).

141 Mahery P 'Special child protective measures in the Children's Act and beyond' in Boezaart T (ed) *Child Law in South Africa* (2017) 262.

142 74 of 1983.

143 The expression of approval or agreement.

writing.[144] The definition of 'assistance' is not clear and the role of the parent is thus up for debate. This parental assistance does make it clear, though, that a child aged twelve years and older will never be in a position where he or she can independently grant consent for surgery to take place. It seems rather this subsection relates to section 10[145] of the Children's Act and a child is merely consulted generally regarding the surgery as it is a matter that affects him or her. In the Regulation to the Children's Act in Form 34 it seems however that a child signs the form to grant consent for the surgery but that the person who then assists the child, as required, must assent to this in writing.[146] Section 129 of the Children's Act does not define what medical treatment or surgery entails.

Requirements are put forth in section 129(2) of the Children's Act for when a child may consent to his or her own medical treatment or may consent to his or her own child receiving medical treatment. The two requirements are: the child must be twelve years of age or older[147] and the consenting child must be 'of sufficient maturity and [must have] the mental capacity to understand the benefits, risk, social and other implications of the treatment'[148]. Considering the above, as well as the elements of informed consent, maturity of a child means his or her ability to understand the nature of the medical procedure and the risk and consequence of giving consent to it. In order to comply with these requirements, the child will be assessed by being subjected to answering questions and being part of discussions to demonstrate that he or she is capable of understanding the nature of the procedure as well as the risks associated with the treatment or surgery.[149] If one of these two requirements are not met, then consent may be obtained from the parent or guardian or care-giver of the child, the Superintendent of a hospital or the person in charge of the hospital, the Minister of Social Development or the High Court or Children's Court.

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144 Section 129(3)(c) and the Regulations to section 129 of the Children's Act.

145 This section requires that a child of a specific age, maturity and stage of development may be a participant in matters concerning him or her and also to have their views duly considered.

146 Kruger (2018) *PER / PELJ* 22.

147 Section 129(2)(a) of the Children's Act.

148 Section 129(2)(b) of the Children's Act.

149 Buchner-Eveleigh (2019) *De Jure* 248 – 249.

4.2.1 Consent of a parent, guardian or care-giver

If a child lacks capacity to consent, consent for that child's medical treatment can be obtained from a parent, guardian or care-giver.[150] The Children's Act expanded the realm of persons who may grant consent as the Child Care Act did not provide for the possibility of a care-giver giving consent to a child's medical treatment.[151] However, care-givers cannot consent to a child's surgery in terms of the Children's Act but parents and guardians can.[152] In this regard, section 31 of the Children's Act is of importance as it deals with major decisions that involve the child.[153] Section 30(2) of the Children's Act provides for the situation that where more than one person holds the same parental responsibilities and rights regarding a child, each co-holder can exercise such responsibilities and rights independently of the other(s). But where major decisions are concerned, the views of the child concerned and the views of the other holder(s) of parental responsibilities and rights must be considered by the holder making the decision.[154] Once again, this links to section 10 of the Children's Act as it allows all children, considering their age and maturity, to participate in matters that concern them. However, the parent or guardian does not have to follow the child or other co-holder's wishes.[155] This at least allows for a child's voice to be heard in a situation where a major decision is involved although they are not actively participating in the decision making. When parents or guardians consent to medical treatment or surgery when the child is below the age of consent or when the child lacks the maturity to consent, it allows for parents or guardians to 'fulfil [their] responsibility towards their children and gives effect to the child's constitutional right to parental care' as set out in section 28 of the Constitution.[156]

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150 Mahery *Child Law in South Africa* (2017) 264.

151 Mahery *Child Law in South Africa* (2017) 265.

152 Mahery *Child Law in South Africa* (2017) 265.

153 According to the section 31(1)(iv), a major decision may be a decision 'which is likely to significantly change, or to have an adverse effect on, the child's living conditions, education, health, personal relations with a parent or family member, or generally, the child's well-being'.

154 Section 31(2)(a).

155 *J v J* 2008 (6) SA 30 (C) par 35.

156 Mahery *Child Law in South Africa* (2017) 265.

4.2.2 Superintendent of a hospital or the person in charge of a hospital

The Children's Act also makes provision for the Superintendent of the hospital or the person in charge of the hospital, where the child is receiving care, to consent to the surgery or medical treatment of a child[157] if the medical treatment or surgery is needed to save the child's life or prevent possible life-long disabilities should the surgery or treatment not be performed[158] and the surgery or treatment constitutes an emergency that warrants not following the necessary steps to obtain consent as one would normally[159]. The National Health Act[160] however states that a health service may only be given to a person once it is an emergency and that person 'has not expressly, impliedly or by conduct refused that [health] service'[161]. An emergency in this context is defined as 'any delay in the provision of a health service to a user [that] might result in his or her death or irreversible damage to his or her health'.[162] This is quite similar to what constitutes urgent intervention by the Superintendent or person in charge of the hospital in terms of the Children's Act. The difference however lies in the fact that once a person has refused consent, they will not be able to receive emergency medical treatment under the National Health Act. If a competent child refuses medical treatment or surgery in an emergency situation and obtaining ministerial or court-ordered consent to veto that refusal would result in a delay, the Superintendent of the hospital or person in charge of the hospital can also grant consent for a child's medical treatment or surgery in terms of the Children's Act.[163]

4.2.3 Consent from the Minister of Social Development

Consent from the Minister of Social Development can also be obtained in specific circumstances, namely:

(a) Consent or assistance is unreasonably refused by the child's parent, guardian or care-giver[164];

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157 Section 129(6) of the Children's Act.
158 Section 129(6)(a) of the Children's Act.
159 Section 129(6)(b) of the Children's Act.
160 61 of 2003.
161 Section 7(1)(e) of the National Health Act.
162 Section 7(1)(e) of the National Health Act.
163 Mahery *Child Law in South Africa* (2017) 266.
164 S 129(7)(a).

(b) The child's parent, guardian or care-giver is incapable of granting consent or assisting the child[165];

(c) The child's parent, guardian or care-giver cannot be located[166];

(d) The child's parent, guardian or care-giver is deceased[167]; or

(e) The child unreasonably withholds consent[168].

The process of obtaining ministerial consent in terms of the Child Care Act was criticised by scholars as they found it to have a detrimental impact on patients due to the fact that the granting or refusing of consent was often delayed and resulted in surgeries or treatment being cancelled.[169] This situation is somewhat remedied in Children's Act as the minister needs to respond within 14 days after receiving an application for consent.[170] Considering the fact that some surgeries or treatment will often be a matter of urgency, this time period may be too long. In my opinion, ministerial consent might be a measure of last resort as one would rather approach the courts with an urgent application for consent, as discussed below. Waiting for 14 days for consent might require the child to stay in hospital, which would be costly, or using already limited resources unnecessarily.

4.2.4 Court-ordered consent

A High Court or Children's Court may also be approached to grant consent should any authorised person be unable to give consent or that authorised person withholds consent. This route is mostly followed by practitioners as opposed to approaching the Minister of Social Development for consent as it is more efficient.[171] An example of this is reflected in the newspaper article published by the *Pretoria News*[172] about a 12-year-old girl, suffering from leukaemia, who refused consent for a life-saving blood transfusion as she was a Jehovah's witness. Her doctors then approached the Johannesburg High Court to override her refusal. The court granted the doctors'

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165 S 129(7)(b).

166 S 129(7)(c).

167 S 129(7)(d).

168 S 129(8) of the Children's Act.

169 Karpelowsky and Rode 2006 *South African Medical Journal* 505.

170 Regulation 47 of the Regulations on section 129 of the Children's Act with reference to Form 33.

171 Mahery *Child Law in South Africa* (2017) 267.

172 See https://www.iol.co.za/travel/south-africa/court-saves-jehovahs-witness-girls-life-435180#:~:text=A%2012%2Dyear%2Dold%20Jehovah's,gave%20doctors%20the%20go-ahead.

application that same day. Similarly, the *Hay v B* case[173] deals with a situation where a blood transfusion for a child was rejected by the child's parents based on their religious beliefs. The paediatrician of the child approached the High Court with an urgent application to overrule the refusal of an urgent blood transfusion by the child's parents as this was the child's best chance of survival.[174] Furthermore, such transfusion had to happen within the next three to four hours otherwise the child would not survive.[175] However, the Respondents, the parents of the child, did not oppose the application as they knew the Applicant was acting in the best interests of the child by bringing the urgent application.[176] The Applicant also stated that she would be able to do the blood transfusion using the Respondents' blood and not the blood of a third party donor.[177] The urgent application was granted and the child received the blood transfusion. The case of *Hay v B* therefore illustrates the parental refusal of treatment due to religious beliefs which is not based on the child's best interest as the court held that the child's right to life outweighs the right to religion that a parent might base their consent on.[178] Court-ordered consent thus allows a court to intervene should the medical care be in the best interests of the child.

The Children's Act also provides that a parent or guardian cannot refuse to assist a child or withhold consent by reason of 'other beliefs'.[179] These other beliefs should also be read to include cultural beliefs and not exclusively religious beliefs.[180] South Africa is known for its diversity of cultures and traditional medicine is often the preferred route to treat medical conditions in these different cultural practices. Although traditional health practices are in the process of gaining recognition[181], the Children's Act still requires parents, guardians and care-givers to provide proof as to why the traditional medicine practice should be followed instead of the 'conventional'

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173 2003 (3) SA 492 (W).
174 2003 (3) SA 492 (W) 494.
175 2003 (3) SA 492 (W) 494.
176 2003 (3) SA 492 (W) 494.
177 2003 (3) SA 492 (W) 494.
178 2003 (3) SA 492 (W) 496.
179 Section 129(10) of the Children's Act.
180 Section 129(10) of the Children's Act.
181 The Traditional Health Practitioners Act 22 of 2007 has not yet been allocated a date of commencement.

medicine route.[182] Most often, this dispute ends up in court and the conventional medicine route is almost always upheld.[183]

4.3 The refusal of consent by the child or a parent, guardian or care-giver

As mentioned previously, children are also entitled to the right to bodily and psychological integrity.[184] The right for a person to have freedom and security over their body means that a person may make decisions that involve his or her body.[185] Just as this right to make decisions includes consenting to treatment or surgery in a medical context, it also includes the right to refuse treatment or surgery. However, the same standard of competency to refuse treatment is not applied equally to adults and children.[186] Similarly to having informed consent, a child must be capable of making an informed decision about refusing treatment or surgery. The implications, risks and obligations of refusing treatment or surgery must be communicated to the child before such a refusal is made.[187] The Children's Act tacitly provides for a child's express refusal as section 129(1) states that no child may be subjected to treatment or surgery without consent from an authorised person.[188] As discussed above, the minister or a competent court may override a decision of refusal of consent if the child exercises his or her right to withhold consent and this refusal is unreasonable and/or not in his or her best interests.[189]

In terms of a parent, guardian or care-giver refusing to consent to treatment or surgery, Mahery aptly states that:

> *'Although it is easy to classify a refusal of treatment as a parental right stemming from an obligation to care for a child and to secure a child's well-being, it is not that easy to classify a refusal of treatment as a parental responsibility because it is hard to imagine how a refusal of treatment could*

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182 Section 129(10) of the Children's Act.
183 Mahery *Child Law in South Africa* (2017) 273.
184 Section 12 of the Constitution.
185 Mahery *Child Law in South Africa* (2017) 271.
186 Mahery *Child Law in South Africa* (2017) 271 with reference to footnote 274.
187 Mahery *Child Law in South Africa* (2017) 272.
188 Mahery *Child Law in South Africa* (2017) 272.
189 Mahery *Child Law in South Africa* (2017) 272 with reference to section 129(2), (3) and (8) of the Children's Act.

benefit a child's well-being. However, it is a fact that refusing treatment is also a parental responsibility stemming from the duty of care."[190]

An example of this could be when a parent, guardian or care-giver refuses treatment when that treatment is not in the best interests of the child and a less invasive or harmful treatment is available.[191] On the other hand, a parental responsibilities and rights holder may consent to treatment or surgery when it is in the best interests of the child and that child does not have the capacity to grant consent.[192]

4.4 Analysis of section 129 of the Children's Act

4.4.1 The 'maturity test'

Maturity is defined by the Committee on the Rights of the Child as 'the ability to understand and assess the implications of a particular matter'.[193] The repealed Child Care Act did not expressly provide for a maturity test and by including it in the Children's Act advances the age-based approach.[194] However, maturity cannot be determined by means of a standardised test[195] as maturity differs from child to child based on their unique development and circumstances. This links with a child's evolving capacities mentioned above. Determining maturity is therefore a subjective test and health practitioners are not always in the best position to determine whether a child has sufficient maturity before that child consents or refuses to consent.[196] This is partly because health practitioners are not able to spend sufficient time with a child in order to establish whether he or she possesses the necessary maturity to make an informed decision and most often, health practitioners also do not have the necessary expertise in child development to know whether a certain child is capable of consenting.[197] Himonga and Cooke hold that some health practitioners are of the

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190 Mahery *Child Law in South Africa* (2017) 272.
191 Mahery *Child Law in South Africa* (2017) 272.
192 With reference to article 18(1) of the UNCRC.
193 General Comment No. 12 par 30.
194 Mahery *Child Law in South Africa* (2017) 267. An age-based approach is an approach where age alone determines the capacity of a child to consent. It is also known as the status approach.
195 Mahery *Child Law in South Africa* (2017) 267.
196 Himonga and Cooke 2007 *International Journal of Children's Rights* 323.
197 Himonga and Cooke 2007 *International Journal of Children's Rights* 354.

opinion that 'capacity is a legal construct and it is inappropriate for medical professionals to make legal determinations'.[198]

4.4.2 The lowered age of consent

As a requirement, a child must be at least 12 years of age before he or she may consent to treatment or surgery. This therefore allows for a wider application of autonomy of children than what was previously provided by the Child Care Act. Under the Child Care Act, when consent needed to be given for non-emergency treatment or surgery parents could, for example, not be located or they were far away from the hospital and could not be contacted telephonically, this presented obstancles and resulted in some delays as a child could not then consent in the absence of a parent, guardian or care-giver. [199] However, Mahery is of the view that the lowered age of consent now also presents its own challenges as more children will be able to consent and more health practitioners will be needed to act on this consent which results in additional stress on an already strained health care system in South Africa.[200]

4.4.3 A combined approach of maturity and age in order to determine capacity to consent in terms of the Children's Act

There should be a caution to grant children the same autonomy rights than adults purely for the fact that children are still in the process of constant development. A 17-year-old is considered a minor the day before he or she turns 18 and cannot necessarily exercise his or her autonomy as he or she would have had they been 18 years old. However, the day the child turns 18 does not automatically meant that the child is now equipped with the necessary maturity he or she lacked just the day before. It is for this reason that the Children's Act prefers to use of a hybrid approach when determining a child's capacity to consent to treatment or surgery by incorporating both the element of maturity and that of age. However, this can be seen as an 'overly protective' approach and could hamper the child's autonomy.[201] Being below the age

198 Himonga and Cooke 2007 *International Journal of Children's Rights* 355.
199 South African Law Commission 2002 *Discussion Paper* 466.
200 Mahery *Child Law in South Africa* (2017) 268.
201 Mahery *Child Law in South Africa* (2017) 269.

of consent automatically labels a child as being immature and therefore excludes that child from making medical decisions without further investigation into his or her maturity.[202] This can prove to be more harmful than good as 'restricting children's autonomy unduly stunts their ability to judge and to make decisions for themselves, and, therefore, hampers their development as autonomous persons'.[203]

202 Mahery *Child Law in South Africa* (2017) 269.

203 Reynolds 'Consent and competence in paediatrics' 2007 *International Journal of Children's Rights* 503 at 504.

5. Chapter 5: Conclusion

As mentioned above, children should be given the right to actively participate in matters that direct affect them and have their voices heard if they possess the necessary maturity, age and understanding.[204] As children develop at different rates, each case should be assessed on a case-by-case basis[205] in order to assess and determine whether a child does indeed meet these criteria. It is clear, though, that a child's voice should be heard when decisions are made by a parent, guardian or care-giver that will directly affect the child. Even though the decision maker need not follow the child's view, it at least opens the door to a discussion with the child and affords the child the opportunity to express his or her view. The new developments in the law, as discussed above, now allows for children, who can give informed consent and who comply with the minimum age standard, to have their 'decisions carry authoritative value'. There is still a safeguard in that the refusal of consent may still be overruled by a person with authority, should such a refusal by the child, parent or guardian not be in the best interests of the child. It should be kept in mind that even if a child lacks capacity to consent or make decisions regarding his or her health, that child should still be allowed to participate in decisions that are made regarding his or her healthcare.[206]

The international law attempts to supports the movement to allow for children to be more involved in the process of decision making when it comes to matters that will have a direct impact on their lives. However, article 12 of the UNCRC does not allow for a 'strong legal basis for the protection of children's right to self-determination' and therefore does not give effect to the full autonomy of children.[207] As discussed, if article 12 is read with article 5 of the UNCRC, the position of children's autonomy is strengthened.[208] The Constitution, on the other hand, provides a much better standing for children's autonomy. Various sections in the Constitution allow for children to have their voices heard and for their dignity[209], equality[210]and privacy[211] to be protected.

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204 Mahery *Child Law in South Africa* (2017) 270 with reference to section 10 of the Children's Act.
205 Mahery *Child Law in South Africa* (2017) 270.
206 Section 8 of the National Health Act.
207 Kruger (2018) *PER / PELJ* 25.
208 Kruger (2018) *PER / PELJ* 25.
209 Section 10 of the Constitution.
210 Section 9(3) of the Constitution.
211 Section 11 of the Constitution.

The strongest protection, in my opinion, is found in the Children's Act. I agree with Kruger that this autonomy of children can only be strengthened by the necessary training of health practitioners[212] in order for them to be able to determine whether a child fulfils the requirement of having sufficient maturity to make an informed decision about his or her health care even if that child is below the age of 12. Health practitioners should also comply with the duty to protect the best interests of the child and arming them with the necessary skills to do so, will only benefit children. To enable parents, guardians and care-givers to also comply with the duty of protecting children against their own immaturity, the Children's Act provides for a legal basis to overrule a child's refusal to consent if that refusal is not in his or her best interests. However, too much emphasis is placed on the role of the child's parents, guardians or care-givers when it comes to making medical decisions. To alleviate this position, Kruger suggests that where the Children's Act provides for the child to be 'duly assisted' by a parent, guardian or care-giver, it rather read that the child should be 'duly directed or guided'.[213] To this extent, children will be able to exercise their right to autonomy fully and their views will not just be duly considered and maybe not even followed at the end of the day. The world that children are exposed to has vastly changed and will continue to change drastically. It is important to remember that children might be more mature than one would initially think and sometimes a child is capable of making decisions that he or she feels is in their best interests even if those best interests differ from the views of an adult. When a child is competent and capable of making an informed decision to consent or refuse to a specific medical treatment or surgery performed in him or her, such a decision should not be overruled by an adult just because that adults complies with the age and maturity standard.

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212 Kruger (2018) *PER / PELJ* 26.

213 Kruger (2018) *PER / PELJ* 26.

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