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**The child's right to self-determination in relation to his/her right to bodily and  
psychological integrity**

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## **List of Abbreviations**

|         |   |
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| ACRWC   | African Charter on the Rights and Welfare of the Child 1999 |
| CTP Act | Choice on Termination of Pregnancy Act 92 of 1996           |
| CRC     | United Nations Convention on the Rights of the Child 1989   |

## 1 Introduction

Children have not always been regarded as legal subjects and one could say that the recognition of children's rights is in many ways revolutionary.<sup>1</sup> The changes in common law and legislation and the recognition of children's rights in the *Constitution of the Republic of South Africa, 1996*<sup>2</sup> have done much in legally recognising the child as an autonomous person<sup>3</sup> and having the right to self-determination.<sup>4</sup> The recognition of children as legal subjects rather than as objects amounts to the recognition of every child's right to the same protections in the Bill of Rights as their adult counterparts.<sup>5</sup>

Section 12(2) of the Constitution, for example, provides that everyone has the right to bodily and psychological integrity. This right includes the right to make decisions about reproduction, to have security in and control over one's own body and not to be subjected to medical or scientific experiments without one's informed consent.<sup>6</sup> The right to make decisions about one's bodily and psychological integrity is in most instances referred to as the right to self-determination.<sup>7</sup> A literal interpretation of section 12(2) would entail that everyone, including children of all ages, would have the right to self-determination in relation to bodily and psychological integrity. The question that comes to mind is whether children of all ages are capable of making reasoned and informed decisions that will directly influence their wellbeing.<sup>8</sup>

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<sup>1</sup> Ngwena "Health care decision-making and the competent minor: the limits of self-determination" 133; Wald "Children's Rights: A Framework for Analysis" 114.

<sup>2</sup> Specifically s 28 of the *Constitution of the Republic of South Africa, 1996*. Hereafter the Constitution.

<sup>3</sup> Ngwena "Health care decision-making and the competent minor: the limits of self-determination" 133.

<sup>4</sup> Rogers and Wrightsman "Attitudes towards children's rights: Nurturance or Self-determination?" 21. Rogers and Wrightsman define the child's right to self-determination as the right to make decisions about what the child wants or the right to have autonomous control over various aspects of his/her life.

<sup>5</sup> Currie and De Waal *The Bill of Rights Handbook* 600.

<sup>6</sup> S 12(2)(a)-(c) of the Constitution.

<sup>7</sup> Currie and De Waal *The Bill of Rights Handbook* 309-311. Bekink and Brand "The Constitutional Protection of Children's rights" 181 points out that it is crucial to note that the specific protection of children's rights in section 28 of the Constitution does not create an individual right to self-determination<sup>7</sup> and any claim that children may have to self-determination must be based on the fundamental rights to which everyone is entitled. In *Christian Lawyers Association v National Minister of Health* 2004 10 BCLR 1086 (T) 1095 the Court held that the right to self-determination has become an imperative under the Constitution and specifically in terms of the right to bodily and psychological integrity, the right to have access to reproductive health, the right to dignity and the right to privacy.

<sup>8</sup> Bekink and Brand "The Constitutional Protection of Children's rights" 180-181.

The determination of the extent of the child's right to self-determination is not without difficulty as it depends on the nature of the decisions to be taken and the age or maturity of the child.<sup>9</sup> The recognition of the child's right to self-determination also creates practical problems because of the potential conflict with legitimate parental responsibilities and rights.<sup>10</sup> Legislation, for example sections 129 to 134 of the *Children's Act* 38 of 2005<sup>11</sup> gives some clarity as to the extent of children's rights in relation to bodily and psychological integrity. The understanding of this legislation is problematic as the interpretation of this legislation by the courts is very limited.

Case law that has thus far dealt with the child's right to self-determination in relation to his/her bodily and psychological integrity also pose problems. For example in *Christian Lawyers Association v National Minister of Health*<sup>12</sup> the court dealt with the right to reproductive freedom as an element of the right to bodily and psychological integrity. Mojabelo J held in this case that where the child was not sufficiently mature to make an informed decision without parental assistance, a child's decision to terminate her pregnancy would not meet the requirement for valid consent in terms of section 5 of the *Choice on Termination of Pregnancy Act* 92 of 1996.<sup>13</sup> This results therein that a child who is not mature enough to make an informed decision will not be allowed to make any decisions about the termination of her pregnancy.<sup>14</sup> The *CTP Act* uses the child's ability to give informed consent as the criteria to establish which children are entitled to the full enjoyment of self-determination and it can therefore be argued that not all children are fully entitled to the right to self-determination in relation to bodily and psychological integrity as protected by section 12(2) of the Constitution.

The *Children's Act* sets 12 years as the minimum age at which a child can consent to medical treatment or surgery, subject thereto that the child has the maturity and

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<sup>9</sup> Ngwena "Health care decision-making and the competent minor: the limits of self-determination" 133.

<sup>10</sup> Ngwena "Health care decision-making and the competent minor: the limits of self-determination" 133; Currie and De Waal *The Bill of Rights Handbook* 601; Skelton "Parental Responsibilities and Rights" 63. It is argued that parental authority has its roots in the responsibility that parents have towards their children and that this power diminishes as the child gets older. It is also important to note that parental authority is not a constitutionally protected right. The *Children's Act* also shifted the traditional focus from parental authority to parental rights and responsibilities. This has the result that the traditional idea of parental authority no longer exists in South African law.

<sup>11</sup> Hereafter the *Children's Act*.

<sup>12</sup> *Christian Lawyers Association v National Minister of Health* 2004 10 BCLR 1086 (T).

<sup>13</sup> Hereafter the *CTP Act*.

<sup>14</sup> *Christian Lawyers Association v National Minister of Health* 2004 10 BCLR 1086 (T) 1093.

intellectual ability to understand the risks and effects of such treatment or surgery.<sup>15</sup> The *National Health Act* 61 of 2003, on the other hand, sets different minimum ages for consent to medical procedures, but does not provide for a consideration of the individual child's intellectual capacity or maturity.<sup>16</sup> The limited extent of case law, together with the different requirements provided for by the relevant legislation, does not make the understanding of section 12(2) in relation to the child's right to self-determination any easier.

Furthermore one should bear in mind that every child has the right to have his/her best interests regarded as of paramount importance in every matter concerning the child.<sup>17</sup> The best interests principle is considered as the 'golden thread' that has run through South African case law concerning children since 1948.<sup>18</sup> The best interests-principle is applicable to all law.<sup>19</sup> The interpretation and understanding of the child's right to self-determination will thus always be influenced by the best interests-principle.

The aim of this study is thus to answer the question as to what extent children should enjoy the right to self-determination in relation to their bodily and psychological integrity without jeopardising the requirement that the best interests of the child should always prevail.

## 2 The theory of children's rights

In studying children's rights it is of great importance to consider the status of children as individuals and as members of a family.<sup>20</sup> This in itself poses challenges as there exists a lack of legal principles that apply to the family as a unit as well as to children as individuals.<sup>21</sup> Furthermore, even if older children are capable of making reasoned decisions, autonomy may still not be recognised because of its disruptive effect on the

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<sup>15</sup> S 129 of the *Children's Act*.

<sup>16</sup> Ss 56(2) and 62 of the *National Health Act* 61 of 2003 (hereafter the *National Health Act*).

<sup>17</sup> S 28(2) of the Constitution; S 7-9 of the *Children's Act*; A 3(1) of the *United Nations Convention on the Rights of the Child* 1989 (hereafter the CRC); A 4(1) of the *African Charter on the Rights and Welfare of the Child* 1999 (hereafter the ACRWC).

<sup>18</sup> Skelton "Parental Responsibilities and Rights" 62.

<sup>19</sup> S 28(2) of the Constitution is a part of the Bill of Rights and s 8(1) of the Constitution provides that the Bill of Rights is applicable to all law.

<sup>20</sup> Human "The Theory of Children's Rights" 243; 260.

<sup>21</sup> Human "The Theory of Children's Rights" 243.

family system.<sup>22</sup> The theory behind children's rights reflects the reality of human lives. It seeks to find a balance between the rights and interests of children, adults and the state and recognises that children are the bearers of rights which are often challenged by the notion of parental responsibilities and rights.<sup>23</sup> The fact that children have the same protection under the Bill of Rights as their adult counterparts, means that:<sup>24</sup>

[C]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.

The recognition of children's rights together with the adoption of legislation to give effect to these rights is not enough to be persuasive in the fulfilment of children's rights.<sup>25</sup> Theory construction is an essential tool to identify and address difficulties in the implementation and realisation of children's rights. The question of whether children are entitled to choose their own lifestyle or to what extent children should enjoy the right to self-determination are examples of the difficult issues that need to be addressed.<sup>26</sup> The right to self-determination is central to the classical debate surrounding the importance of protection on the one hand and liberation on the other. Rogers and Wrightsman<sup>27</sup> refer to this as the nurturance orientation and the self-determination orientation. The former is labelled as the protection of children and the latter as the protection of the child's right to choice.<sup>28</sup> Bekink and Brand<sup>29</sup> contend that the extent to which children can lay claim on the right to self-determination is limited by those responsibilities and rights parents have in order to meet their responsibilities of care and support towards their children. Thus the child's right to self-determination

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<sup>22</sup> Wald "Children's Rights: A Framework for Analysis" 133; Amos *Human Rights Law* 351. Amos contends that autonomy and self-determination can be used as synonyms in relation with human rights analysis.

<sup>23</sup> Human "The Theory of Children's Rights" 244; Currie and De Waal *The Bill of Rights Handbook* 600 – 601. At this point it is important to note, as mentioned above, that parental authority is not constitutionally protected, but that the state is obliged to respect, protect, promote and fulfil all the rights in the Bill of Rights, including children's right to have their best interests regarded as paramount in all matters concerning them. One can thus argue that the state has a constitutional mandate (according to section 7 of the Constitution) to ensure that children's rights are protected and respected. (Also see *Carmichele v Minister of Safety and Security and Another* 2001 10 BCLR 995 (CC) 1006.

<sup>24</sup> Currie and De Waal *The Bill of Rights Handbook* 600.

<sup>25</sup> Human "The Theory of Children's Rights" 244.

<sup>26</sup> Currie and De Waal *The Bill of Rights Handbook* 600.

<sup>27</sup> Rogers and Wrightsman "Attitudes towards children's rights: Nurturance or Self-determination?" 21.

<sup>28</sup> Hafen "Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their Rights" 644 – 647.

<sup>29</sup> Bekink and Brand "The Constitutional Protection of Children's rights" 181.

must be seen in the "context of the relationship of dependence that of necessity exists between child and parent."<sup>30</sup> As with the contention of Bekink and Brand, the theory of children's rights also deals with the reality that the study of children's rights is more than just an analysis of legal aspects. It also involves moral, social and philosophical considerations.<sup>31</sup> It is thus necessary to construct a theory of children's rights that can be used as a framework to understand and analyse the contents of specific children's rights, in this instance the right to bodily and psychological integrity.

Various scholars address the concept of a theory or framework for children's rights. Human<sup>32</sup> contends that a well-balanced theory of children's rights should consist of elements of both protection and liberation. Freeman<sup>33</sup> suggests that protection and liberation should not be seen as competing concepts, but rather as phases in the ever changing development of a child's life. Freeman<sup>34</sup> classifies children's rights into certain categories in order to demonstrate the diversity in the rights that children may claim. Such classification also indicates the complexity of the child's right to bodily and psychological integrity. It is submitted that a study of the different categories of children's rights, as identified by various scholars can be divided into four categories, namely protection, prevention, provision and participation. These categories are seen as the so-called four P's of the *United Nations Convention on the Rights of the Child* 1989.<sup>35</sup> It is argued that these categories encompass all rights that children should enjoy and are also complementary as all of these categories are equally necessary for the realisation of children's rights.<sup>36</sup> One can thus come to the conclusion that the four P's can be used as a framework within which children's right to self-determination in relation to their bodily and psychological integrity should be understood as it

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<sup>30</sup> Bekink and Brand "The Constitutional Protection of Children's rights" 181.

<sup>31</sup> Human "The Theory of Children's Rights" 243.

<sup>32</sup> Human "The Theory of Children's Rights" 244.

<sup>33</sup> As referred to in Human "The Theory of Children's Rights" 248. (The author was unable to locate the original source anywhere in the country.)

<sup>34</sup> As referred to in Human "The Theory of Children's Rights" 252.

<sup>35</sup> Hereafter the CRC. Mahery "The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Child Law" 314; Van Bueren "A History of the International Law on the Rights of the Child" 15. United Nations 2012 *United Nations Treaty Collection* [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=4&lang=en). The CRC was ratified by the South African government on the 16<sup>th</sup> of June 1995. The CRC is thus binding on South Africa in terms of s 231(2) of the Constitution which states that "An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces."

<sup>36</sup> Van Bueren "A History of the International Law on the Rights of the Child" 15.

recognises the overlap and equal importance of different categories of rights, which is in line with the necessity of a well-balanced theory for children's rights.

## **2.1 The right to provision**

The right to provision can be defined as the right to provision of assistance in the realisation of children's basic needs.<sup>37</sup> In other words the right to provision creates the obligation to ensure that children receive the basic necessities for their general well-being. These rights are thus based on the most fundamental rights to which children are entitled and can also be seen as rights to welfare or socio-economic rights.<sup>38</sup> Section 28(1)(c) of the Constitution specifically protects children's socio-economic rights and provides that every child has the right to have access to basic nutrition, basic health care, shelter and social services. The CRC also enshrines a wide range of socio-economic rights, including the right to adequate nutrition, medical services and housing.<sup>39</sup> At a bare minimum the child's right to provision should contribute to their general welfare, ensuring that they have access to and receive, for example, medical treatment necessary for their well-being. The realisation of children's basic socio-economic rights is essential in order for children to enjoy the right to self-determination. No child will be able to exercise the right to self-determination, for example, to make a decision about medical treatment if children don't have access to medical treatment.

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<sup>37</sup> Van Bueren "A History of the International Law on the Rights of the Child" 15; Eekelaar *Oxford Journal of Legal Studies* 166. Eekelaar argues that children have basic interests that include the provision of physical, emotional and intellectual care and that the primary duty to provide this rests on the parents of the child. If parents fail to fulfil their responsibilities the state may intervene. It has been argued in South African jurisprudence that the responsibility to provide the basic necessities to children rests primarily on the child's parents. This responsibility is derived from sections 28(1)(b) and (c) of the Constitution. In *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC) 77 the court held that the primary duty to provide for the basic needs of the child rests on the parents and that the State only bears this responsibility if a child is for example removed from his/her parents and is placed in the State's care. In *Minister of Health and Others v Treatment Action Campaign and Others* 2002 5 SA 703 (CC) 79 the court relied on the *Grootboom*-decision but held that when children are not physically separated from their parents and parental care is lacking (for example where parents lack financial resources to pay for health care services) the duty rests on the State to provide basic care entitlements to children.

<sup>38</sup> Wald "Children's Rights: A Framework for Analysis" 119; Proudlock "Children's Socio-economic Rights" 291; Human "The Theory of Children's Rights" 253; 257. Wald emphasises that these rights are not limited to children, but is intended to benefit the welfare of all people. The provision of assistance to children to receive these entitlements emphasises the fact that children cannot provide for themselves.

<sup>39</sup> Aa 24; 27 of the CRC.

## 2.2 *The right to protection*

The child's right to protection is very well recognised in South African law.<sup>40</sup> Protection rights include the right to protection against discrimination and all forms of exploitation and neglect.<sup>41</sup> Socio-economic rights are based on the idea that children are entitled to the best society has to offer; protective rights on the other hand provide a minimum acceptable standard of treatment.<sup>42</sup> The right to be protected from all forms of exploitation and neglect is based on the notion that children need protection, care and guidance from adults because they cannot provide it for themselves, placing a duty on parents or other adult decision-makers to fulfil these responsibilities.<sup>43</sup> One can thus argue that the child's right to bodily and psychological integrity should afford the necessary protection to the child, allowing parents and other adults to guide a child in matters relating to his/her bodily and psychological integrity, placing the emphasis on parental responsibilities and rights in the decision making process.

The right to protection against discrimination on the other hand is based on social justice in the sense that children, as fellow human beings, should enjoy the same rights and liberties as adults, except in circumstances where there is a good reason for differentiation between children and adults.<sup>44</sup> This leads to the assumption that children should enjoy full autonomy or self-determination in the exercise of their right to bodily and psychological integrity. Only where there is a good reason to limit a child's right to autonomy, should such limitation be allowed. Children of a very young age will for obvious reasons not be able to make decisions about their bodily and psychological well-being, resulting in differentiation based on age being a good reason to limit children's autonomy.

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<sup>40</sup> S 28(1)(d) of the Constitution provides that every child has the right to be protected from maltreatment, neglect, abuse or degradation; Chapter 7 of the Children's Act is titled "Protection of Children."

<sup>41</sup> Van Bueren "A History of the International Law on the Rights of the Child" 15.

<sup>42</sup> Human "The Theory of Children's Rights" 253.

<sup>43</sup> Wald "Children's Rights: A Framework for Analysis" 120; Human "The Theory of Children's Rights" 253.

<sup>44</sup> Human "The Theory of Children's Rights" 253; s 9 of the Constitution; Bekink and Brand "The Constitutional Protection of Children's rights" 178. Bekink and Brand emphasise the importance of the right to equality in the realisation of children's rights. They indicate that if discrimination is based on age, such discrimination will be scrutinised to determine whether it is fair. It is argued that age related discrimination may be justified by parents' responsibility of care and support towards their children. It is important to note that this type of discrimination will become progressively more difficult to justify as the child grows older.

Freeman<sup>45</sup> is sceptical about the idea that children should be treated as adults. He contends that respect for children does not constitute adulthood for every child, but "a childhood for every child."<sup>46</sup> He argues that age-related limitations should be determined on a case-by-case basis by objectively assessing the actual capacity of the individual child for specific activities.<sup>47</sup>

Freeman's concept is rather idealistic, which is highly unlikely to work effectively in the field of children's rights. To determine each individual child's maturity and capacity to act independently in different situations will never be done by state organs such as social workers or the judiciary as it will be practically impossible to do so. The practical impossibility for state organs to play an active role in the day-to-day decision making of every individual child, leads to the situation where parents or other adult decision makers are responsible for the determination of a child's capacity and maturity in different situations, placing the responsibility on parents and other adults to decide when it will be in the best interests of their child to make decisions independently.<sup>48</sup> This is also not a desirable situation as parents are more often than not in favour of decisions that reflect their own beliefs, ignoring the individual and different opinions of a child, resulting in the ignorance of the child's right to self-determination. For this reason Freeman<sup>49</sup> also suggests a group of rights that protect children against their parents, which can also be referred to as the child's right to participation.<sup>50</sup>

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<sup>45</sup> As referred to in Human "The Theory of Children's Rights" 253.

<sup>46</sup> As referred to in Human "The Theory of Children's Rights" 253; Mahery "The United Nations Convention on the Rights of the Child: Maintaining its Value in international and South African Child Law" 312. The idea that every child should be afforded a childhood seems to be acknowledged in international law as well as in South African jurisprudence. A 31 of the CRC recognises that every child has the right to rest, leisure and to engage in play. In *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC) 19, the Constitutional Court held that all children, individually and collectively "have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, to imagine and explore in their own way...."

<sup>47</sup> As referred to in Human "The Theory of Children's Rights" 254. See paragraphs 3.2.1 and 3.3.2. The requirements of the CTP with regards to informed consent and the *Children's Act* with regards to sufficient maturity and mental capacity can be seen as measures to determine the limitation of the right to self-determination on a case-by-case basis.

<sup>48</sup> See paragraph 3.2.1. S 5 of the CTP Act makes it clear that an abortion can only be performed without parental assistance after the child has given informed consent. The doctor, nurse or midwife responsible for the termination of the pregnancy has the responsibility to determine whether the child has the capacity to give informed consent. It is questionable whether these medical personnel have the knowledge to determine whether the capacity to give informed consent within the juridical meaning thereof as required by the CPT Act, exists.

<sup>49</sup> As referred to in Human "The Theory of Children's Rights" 260.

<sup>50</sup> See paragraph 2.4.

### 2.3 *The right to prevention*

Section 13 of the *Children's Act* refers to prevention and provides that every child has the right to have access to information in relation to health care and the prevention and treatment of disease and ill-health, sexuality and reproduction.<sup>51</sup> The right to prevention aims to ensure the prevention of harm to children.<sup>52</sup> As stated above there is an overlap between the different categories.<sup>53</sup> This overlap is particularly clear in relation to prevention and protection.<sup>54</sup> It can be argued that protection includes prevention, which argument explains the reason why human rights implementation and academic writing have not focused on the right to prevention.<sup>55</sup> Prevention in the form of technical advice and assistance has been overshadowed, but remains important to ensure that children's rights are fully implemented.<sup>56</sup> A typical example of how the right to prevention of harm would operate would be to ensure that a young girl who chooses to terminate a pregnancy without parental assistance should receive advice on how the procedure works, the implications thereof, the emotional effects it will have on her and the provision of adequate assistance to prevent any possible harm, emotionally and physically, that the procedure may have on her.

### 2.4 *The right to participation*

The child's right to participation is clearly protected in the South African as well as international law.<sup>57</sup> The child's right to participation can plainly be described as the right to make decisions on matters affecting his/her life.<sup>58</sup> This category of rights entails that a child has autonomy in making decisions about, for example, the use of

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<sup>51</sup> S 13(1)(a) of the *Children's Act*.

<sup>52</sup> Van Bueren "A History of the International Law on the Rights of the Child" 15.

<sup>53</sup> See chapter 2.2.

<sup>54</sup> Van Bueren "A History of the International Law on the Rights of the Child" 15.

<sup>55</sup> Van Bueren "A History of the International Law on the Rights of the Child" 15.

<sup>56</sup> Van Bueren "A History of the International Law on the Rights of the Child" 15.

<sup>57</sup> S 10 of the *Children's Act* provides that 'every child that is of such an age, maturity and stage of development to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration' and a 12 of the CRC provides that state parties are obliged to ensure that every child has the right to express his/her opinion and to have that opinion taken into account. Fortin *Children's Rights and the Developing Law* 372 points out that it is crucial to understand that a 12 of the CRC does not create the right to autonomy, it only creates the right to be involved in decisions relating to the child.

<sup>58</sup> Van Bueren "A History of the International Law on the Rights of the Child" 15.

contraceptives or consent to abortion.<sup>59</sup> These rights can be said to be based on the notion of independence from parental responsibility and rights before the age of majority is obtained.<sup>60</sup> The right to participation or rights against parents can be divided in two groups. The first group involves the child's claim for complete independence from his/her parents, typically adolescents who want to make independent decisions on medical care, abortion or the use of alcohol.<sup>61</sup> Freeman<sup>62</sup> suggests that the right to make independent decisions must only be legally recognised if an adolescent has the capacity and understanding to make these decisions. Once again the practical implications are problematic, leaving the question as to who should decide when an adolescent has the capacity and maturity to act independently open.<sup>63</sup> The second group involves the child's claim to act independently from his/her parents, subject to the assistance of a third or outside party such as a court.<sup>64</sup> This is based on the assumption that parents have a representative role in protecting a child's best interests.<sup>65</sup>

The concept of parental-representation can be useful in both instances where the parent and the child's views correlate and where they are in conflict with one another. In the first case there will be no conflict and the parents will represent their child's views and ensure that the child's interests are protected.<sup>66</sup> The latter scenario will lead to conflict and where the parents' views do not reflect the best interests of the child, they should no longer represent their child and a third party or outside agency may be asked to assist or represent the child in order to protect the interests of the child.<sup>67</sup>

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<sup>59</sup> Human "The Theory of Children's Rights" 260.

<sup>60</sup> Human "The Theory of Children's Rights" 260.

<sup>61</sup> Human "The Theory of Children's Rights" 260.

<sup>62</sup> As referred to in Human "The Theory of Children's Rights" 260. Hafen contends that rights of choice rest on the assumption that children have the capacity to make rational and moral decisions and indicates the dangers that exist if moral and rational capacity are assumed when in fact they do not exist.

<sup>63</sup> See paragraph 2.3.

<sup>64</sup> Human "The Theory of Children's Rights" 260.

<sup>65</sup> Eekelaar *Oxford Journal of Legal Studies* 169; Human "The Theory of Children's Rights" 254.

<sup>66</sup> Human "The Theory of Children's Rights" 260.

<sup>67</sup> See paragraph 3.3.2. Human "The Theory of Children's Rights" 260. This correlates with s 129 of the *Children's Act* which provides that consent may be given for the medical treatment or surgery of child by the Minister or a High Court if the parents or guardians of the child refuse to give consent. S.28(1)(h) of the Constitution provides that every child has the right to have a legal practitioner assigned to the child in all civil proceedings affecting the child by the state at state expense if substantial injustice will otherwise result.

Wald<sup>68</sup> suggests that certain factors should be considered when deciding whether parents' decision making responsibilities should be removed, which include the question as to whether the child can make decisions adequately; whether there are other decision-makers or decision-making processes that are likely to reach better decisions than the parents if the child lacks the capacity to make independent decisions; whether the state has the capacity to remove decision-making responsibilities from parents; what the effect of the removal of the decision-making responsibilities of the parents will have on the family and family autonomy and what the consequences of the decision making responsibilities not being granted to the child will be.

The child's right to participation is a very difficult and complex right and is directly linked to the developmental interests of a child, as well as to the right to protection. Parents should take cognisance of the evolving capacities of their children and guide the development of their children, recognising the child's growing need for autonomy towards maturity.<sup>69</sup> The child's right to participation will thus become more central in decisions affecting the child as the child develops towards becoming an independent adult. It is also important to protect children from making decisions that they are not mature enough to make or that will not be in their best interests.<sup>70</sup> This once again indicates the overlap between the different categories of children's rights, coming back to the right to be protected against discrimination and to be treated as autonomous human beings, unless there is a good reason to limit children's autonomy.<sup>71</sup> The assumption is that young children lack the capacity and maturity to act independently, which in age related issues, is relevant with regards to the limitation of children's

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<sup>68</sup> Wald "Children's Rights: A Framework for Analysis" 129. Wald does not refer to the representative role of parents but one can argue that power to make decisions on behalf of your child comes down to a representative role in the sense that the decisions the parent makes should reflect the best interests of the child and if the parents' decision making power does not reflect the best interests of their child, they should no longer represent their child. See also Human "The Theory of Children's Rights" 259.

<sup>69</sup> Human "The Theory of Children's Rights" 260.

<sup>70</sup> Wald "Children's Rights: A Framework for Analysis" 140. The right to participation should not have the effect of "abandoning children to their rights."

<sup>71</sup> See paragraph 2.2. This argument is in line with s 9 of the Constitution that provides that everyone is equal before the law and has the right to equal protection and benefit of the law. According to s 9(2) the right to equality includes the full and equal enjoyment of all rights and freedoms. S 9(3) provides that neither the state nor any person may unfairly discriminate directly or indirectly against anyone, including on the ground of age. See footnote 44 for the effects of discrimination based on the ground of age.

autonomy rights.<sup>72</sup> Wald<sup>73</sup> suggests that such age related limitations should be examined from both a constitutional and legislative perspective.

From a constitutional perspective the question would be whether the limitation is necessary to achieve a legitimate state interest and whether such limitation is reasonable in the light of the capacities of children of a particular age.<sup>74</sup> From a legislative perspective the question to be asked is whether the existing limitations make sense in view of changes in the development of children's rights, the social structure and whether the existing assumptions about the capacities of children are accurate.<sup>75</sup> Children as autonomous human beings should thus be entitled to self-determination in relation to their bodily and psychological integrity in so far as the right to participation is afforded to those children who have the capacity and maturity to act independently. The right to participation should in no case trump the right to prevention, provision and protection. All categories of children's rights should be balanced in a manner that protects the best interests of the child and recognise that children are bearers of constitutional rights. The right to self-determination in relation to bodily and psychological integrity should thus be analysed and interpreted against the theoretical background as discussed. Legislation that gives effect to the child's right to bodily and psychological integrity should also reflect the four categories of rights that comprise the theory of children's rights.

### **3 The right to bodily and psychological integrity**

#### ***3.1 The Constitutional protection of the child's right to bodily and psychological integrity***

Section 12(2) of the Constitution provides that everyone has the right to bodily and physiological integrity, including the right to make decisions concerning reproduction;

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<sup>72</sup> Human "The Theory of Children's Rights" 258.

<sup>73</sup> Wald "Children's Rights: A Framework for Analysis" 125. See also Human "The Theory of Children's Rights" 258.

<sup>74</sup> Human "The Theory of Children's Rights" 258. This argument correlates with the provisions of s 36 of the Constitution which provides that the rights in the Bill of Rights may be limited only in terms of law of general application, only if such limitation is reasonable and justifiable.

<sup>75</sup> Human "The Theory of Children's Rights" 258.

to have security in and control over one's body and not to be subjected to medical or scientific experiments without one's informed consent.<sup>76</sup> It is important to recognise that the right to bodily and psychological integrity are also indirectly protected by other fundamental rights, such as the right to privacy,<sup>77</sup> human dignity,<sup>78</sup> the proscription of slavery<sup>79</sup> and due process rights.<sup>80</sup> Broadly speaking this right encompasses the right to personal autonomy or self-determination.<sup>81</sup> Section 12(2) thus ensures that everyone, irrespective of age or maturity, has the right to personal autonomy based on his/her bodily and psychological integrity. In most societies an adult's right to integrity is well protected by law.<sup>82</sup> Without doubt the same cannot be said about the child's right to integrity.<sup>83</sup>

The child's right to self-determination advocates the idea of children enjoying autonomy and making decisions as independent individuals.<sup>84</sup> The explicit recognition of a child's right to bodily and psychological integrity will imply a right to self-determination, but it seems as if authorities and parents are unwilling to recognise that children should enjoy this right to an unlimited extent. It is interesting to note that the CRC, which was the first international convention to formally recognise the child's right to participation, does not provide for a child's right to bodily and psychological integrity. The ACRWC, the only regional children's rights charter, is also silent on this matter. According to international and regional law, the child's right to self-determination will have to be based on other human rights that encompass the right to personal autonomy, such as the right to privacy<sup>85</sup> and freedom of religion.<sup>86</sup>

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<sup>76</sup> Devenish *A Commentary on the South African Constitution* 53. Devenish explains that the use of the word "includes" is an indication that the "constitutional list" of what is meant with the right to bodily and psychological integrity is merely explanatory and that the "list" was not meant to be exhaustive.

<sup>77</sup> S 14 of the Constitution.

<sup>78</sup> S 10 of the Constitution.

<sup>79</sup> S 35 of the Constitution.

<sup>80</sup> Devenish *A Commentary on the South African Constitution* 53 – 54.

<sup>81</sup> Currie and De Waal *The Bill of Rights Handbook* 308.

<sup>82</sup> Newell *Respecting children's right to physical integrity* 215.

<sup>83</sup> Newell *Respecting children's right to physical integrity* 215.

<sup>84</sup> Rogers and Wrightsman "Attitudes towards children's rights: Nurturance or Self-determination?" 21.

<sup>85</sup> A 16 of the CRC, a 10 of the ACRWC.

<sup>86</sup> A 14 of the CRC, a 9 of the ACRWC. See Currie and De Waal *Bill of Rights Handbook* 601.

The discussion of section 12(2) of the Constitution focuses on the right to “bodily integrity.” Integrity advocates the idea of self-determination<sup>87</sup> and section 12(2) specifically refers to both bodily and psychological integrity. One could thus come to the conclusion that section 12(2) includes the right to have control over one’s mind.<sup>88</sup> This can have serious implications for children’s rights, for example the right to psychological integrity could be used as the basis for an objection to compulsory flag saluting by school children<sup>89</sup> and to exercise the choice not to attend school.<sup>90</sup> It is questionable whether this right will be interpreted as to include all matters that may have a psychological influence on children. Probably the most important aspects that should be considered in this regard are compulsory school attendance,<sup>91</sup> the prescribed academic curriculum of school children as well as discipline structures in public schools.

### **3.2 The child’s right to make decisions concerning reproduction**

Section 12(2)(a) of the Constitution provides that everyone has the right to make decisions about reproduction. Thus it is clear that the right to make decisions about reproduction is a crucial aspect of control over one’s body.<sup>92</sup> The most important aspects that should be considered in this regard are the right to make decisions about abortion, the use of contraceptives and sterilisation.<sup>93</sup>

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<sup>87</sup> Currie and De Waal *Bill of Rights Handbook* 310.

<sup>88</sup> Currie and De Waal *Bill of Rights Handbook* 310. This aspect of the right to self-determination is also surrounded by difficult questions. For example, children are obliged to attend school until grade 9 or the age of 15 years. One could ask whether this stipulation suggests that children under this age do not have the psychological maturity to make independent decisions relating to their education.

<sup>89</sup> Currie and De Waal *Bill of Rights Handbook* 310.

<sup>90</sup> Rogers and Wrightsman “Attitudes towards children’s rights: Nurturance or Self-determination?” 23.

<sup>91</sup> S 3 of the *South African Schools Act* 84 of 1996 (hereafter the *Schools Act*) provides that every child is obliged to attend school until such child reached the age of 15 years or the ninth grade, whichever occurs first. One can ask the question whether this provision suggests that children below this age do not have the psychological maturity to make decisions regarding academic education.

<sup>92</sup> Currie and De Waal *Bill of Rights Handbook* 308.

<sup>93</sup> Skelton *Children and the Law* 67.

### 3.2.1 Abortion

The right to make decisions about abortion is regulated by the *CTP Act*. According to the *CTP Act* there is no minimum age requirement for girls to make decisions about abortion.<sup>94</sup>

Section 1 of the *CTP Act* defines "woman" as any female person irrespective of age.

Section 5 of the *CTP Act* provides as follows:

- (1) Subject to the provisions of subsections (4) and (5), the termination of a pregnancy may only take place with the informed consent of the pregnant woman.
- (2) Notwithstanding any other law or the common law, but subject to the provisions of subsections (4) and (5), no consent other than that of the pregnant woman shall be required for the termination of a pregnancy.
- (3) In the case of a pregnant minor, a medical practitioner or a registered midwife, as the case may be, shall advise such minor to consult with her parents, guardian, family members or friends before the pregnancy is terminated: Provided that the termination of the pregnancy shall not be denied because such minor chooses not to consult them.

This legislation is the most liberal in the recognition of the child's right to self-determination in the sense that the *CTP Act* does not provide for a minimum age at which the right to self-determination may be exercised.<sup>95</sup> Female children thus have the same rights as female women to decide about abortion. By not setting a specific minimum age for informed consent the possibility to determine maturity and intellectual capacity on a case-by-case basis is created.

In *Christian Lawyers Association v National Minister of Health and Others*<sup>96</sup> the High Court dealt with the constitutionality of sections 5(2) and 5(3) read with the definition of "woman" in sections 1 and 5(1) of the *CTP Act*.<sup>97</sup> The plaintiff argued that the relevant provisions were unconstitutional because they permit a girl under the age of 18 years to choose to have her pregnancy terminated without the assistance or consent of her parents.<sup>98</sup> The plaintiff also contended that a minor girl is not able to make an informed decision that will be in her best interests without the guidance or assistance of her

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<sup>94</sup> Boezaart "Child Law, the Child and South African Private Law" 14.

<sup>95</sup> See paragraph 2.2.

<sup>96</sup> *Christian Lawyers Association v National Minister of Health* 2004 10 BCLR 1086 (T).

<sup>97</sup> *Christian Lawyers Association v National Minister of Health* 2004 10 BCLR 1086 (T) 1089.

<sup>98</sup> *Christian Lawyers Association v National Minister of Health* 2004 10 BCLR 1086 (T) 1089.

parents/guardians and that a minor girl is not able to appreciate the value of and need for parental care and support.<sup>99</sup> In essence the plaintiff contended that minor girls cannot give "informed consent" as required by section 5(1) of the *CTP Act*.

The defendants, based on the ground that the plaintiff did not disclose a cause of action, excepted to the particulars of claim.<sup>100</sup> In order to address the question of whether the plaintiff disclosed a cause of action, the Court considered the structure and scheme of the *CTP Act*.

The Court found that "informed consent" was the cornerstone of the *CTP Act* and that this should be seen as a measure to regulate the termination of pregnancies or as a limitation on the right to self-determination.<sup>101</sup> The *CTP Act* provides that no woman can have her pregnancy terminated if she is not capable of giving her informed consent.<sup>102</sup> It is clear that the concept of "informed consent" is central to the question as to whether it is constitutional to allow girls of any age to decide independently about the termination of pregnancies. The Court analysed the juridical meaning and effect of the requirement of informed consent and pointed out that although the *CTP Act* does not define what is meant by the requirement of "informed consent," the concept is not alien to our common law.<sup>103</sup> The Court held that the requirement of informed consent

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<sup>99</sup> *Christian Lawyers Association v National Minister of Health* 2004 10 BCLR 1086 (T) 1090.

<sup>100</sup> *Christian Lawyers Association v National Minister of Health* 2004 10 BCLR 1086 (T) 1088.

<sup>101</sup> Thomas 2007 *South African Law Journal* 205. Thomas contends that self-determination is not an absolute right because of the fact that we live in a society of imposed laws and social conditioning. According to Thomas the theoretical idea of self-determination is useful as it guards the individual's right to have the freedom and ability to make conscious and rational decisions even though these decisions might be influenced by what is morally and legally permissible. One could thus agree with the Court's argument in the sense that the right to self-determination might be limited by what is seen as legally permissible. In this instance it will be legally permissible to exercise the right to self-determination if the child has the ability to give informed consent.

<sup>102</sup> *Christian Lawyers Association v National Minister of Health* 2004 10 BCLR 1086 (T) 1097 – 1098. The Court held that if the plaintiff's contentions are assumed as the truth, that girls under the age of 18 cannot give informed consent to terminate a pregnancy, girls younger than 18 will never be allowed, in terms of section 5(1) of the *CTP Act*, to choose to undergo an abortion without assistance. The plaintiff erred in its attempt to attack the *CTP Act* on this basis and should rather have attempted to stop the medical practitioners and midwives who terminate the pregnancies of girls younger than 18. On the basis of the plaintiff's argument, it is the medical personnel that violates section 5(1) of the *CTP Act* when they administer the termination of pregnancy on a girl under the age of 18.

<sup>103</sup> *Christian Lawyers Association v National Minister of Health* 2004 10 BCLR 1086 (T) 1093. It forms the basis of the doctrine of *volenti non fit injuria* that justifies conduct that would have constituted a delict or crime if it were not for the informed consent. Day to day medical treatment that constitutes a violation of a patient's right to personal integrity and privacy is also justified by the given informed consent of the patient.

rests on the three independent legs of knowledge, appreciation and consent.<sup>104</sup> "Knowledge" in relation to the termination of a pregnancy should be understood as full knowledge of the extent and nature of the harm or risks.<sup>105</sup> "Appreciation" means more than knowledge in the sense that the woman/girl that gives consent must comprehend and understand the extent and nature of the harm or risk.<sup>106</sup> The requirement of "consent" entails that the woman/girl must in fact subjectively consent to the harm or risk and the consent must be comprehensive, meaning that the consent extends to the entire procedure, inclusive of all its consequences.<sup>107</sup>

The court referred to the common law meaning of the concept of "informed consent" and used case law to illustrate how this concept should be understood. The absence of any reference to legislation in this regard can be criticised, as the *National Health Act* 61 of 2003<sup>108</sup> explicitly refers to "informed consent." Section 6(1) of the *National Health Act* obliges all health care providers to inform a user<sup>109</sup> of the user's health status, except where such information will not be in the best interests of the user; to inform the user about all available diagnostic procedures and treatment options; to inform the user about all benefits, risks, costs and consequences associated with the proposed treatment option(s); to inform the user about his/her right to refuse health services and to explain the risks, implications and obligations of such refusal. Section 6(2) ensures that the user who receives information as contemplated by section 6(1)

<sup>104</sup> *Christian Lawyers Association v National Minister of Health* 2004 10 BCLR 1086 (T) 1093. In *Waring & Gillow Ltd v Sherbone* 1904 Th 340 at 344 the Court held that "it must be clearly shown that the risk was known, that it was realised, that it was voluntarily undertaken. Knowledge, appreciation, consent – these are the essential elements; but knowledge does not invariably imply appreciation, and both together are not necessarily equivalent to consent." Other cases that deal with the meaning of informed consent include: *Van Wyk v Lewis* 1924 AD 438 451; *Castell v Greef* 1994 4 SA 408 (C) 425 and *C v Minister of Correctional Services* 1996 4 SA 292 (T) 300.

<sup>105</sup> *Castell v Greef* 1994 4 SA 408 (C) 425; *Christian Lawyers Association v National Minister of Health* 2004 10 BCLR 1086 (T) 1093. This requirement may be neglected by the fact that counselling before the termination of a pregnancy is not mandatory. According to section 4 of the *CTP Act*, the State only has the obligation to promote the provision of counselling. Section 6 of the *CTP Act* obliges the medical personnel to inform the woman of her rights under the *CTP Act*, but is also silent on the provision of information regarding the extent and nature of the procedure as well as the possible harm or risk that the procedure entail. This begs the question as to whether all women who choose to terminate a pregnancy have full knowledge relating to such termination.

<sup>106</sup> *Castell v Greef* 1994 4 SA 408 (C) 425; *Christian Lawyers Association v National Minister of Health* 2004 (10) BCLR 1086 (T) 1093.

<sup>107</sup> *Castell v Greef* 1994 4 SA 408 (C) 425; *Christian Lawyers Association v National Minister of Health* 2004 10 BCLR 1086 (T) 1093.

<sup>108</sup> Hereafter the *National Health Act*.

<sup>109</sup> S 1 of the *National Health Act* defines a user as any person who receives treatment in a health establishment, including receiving blood or blood products or using a health service. A user also includes those persons responsible for taking decisions on behalf of a 'user' if the 'user' is under the minimum age as provided for by specific legislation to take decisions independently or is incapable of taking decisions.

can understand such information, by providing that health care providers should inform the user in a language that the user understands and in a manner which takes the user's level of literacy into account. Section 6(2) should be read with section 8(2)(b) which can be seen as the second component of "informed consent" namely "appreciation." Section 8(2)(b) of the *National Health Act* provides that a user who is capable of understanding must be informed even if such a user lacks the capacity to give the informed consent as required by section 7. Section 7(1) provides that a health service may not be provided to a user without his/her informed consent. Section 7(3) provides that "informed consent" should be understood as consent given by a person with legal capacity to do so and who has been informed as contemplated by section 6. It is clear that section 7 deals with the third component of "informed consent" namely capacity. If one reads sections 6, 7 and 8 together one can come to the conclusion that informed consent can only be given by a person who was duly informed to have sufficient knowledge, who understands the information provided, thus appreciating the knowledge obtained and who indeed has the legal capacity to consent. It is submitted that the *National Health Act* should thus be used as a legislative framework to interpret the concept of "informed consent" with regards to the child's right to self-determination in relation to medical decision making.

In *Christian Lawyers Association v National Minister of Health*, the Court dealt specifically with sections 12(2)(a) and 12(2)(b) of the Constitution. These fundamental rights form the basis of the right of every woman, including a minor girl, to terminate her pregnancy if she chooses to do so.<sup>110</sup> In other words, it protects the woman's right to freedom of choice and thus the right to self-determination.<sup>111</sup> As with all other fundamental rights, these rights are not absolute and may be limited. Any such limitation must be valid to the extent that it is reasonable and justifiable in terms of section 36 of the Constitution.<sup>112</sup> Although the state has a legitimate interest in the protection of pre-natal life, the state cannot unduly interfere with the right to choose to terminate a pregnancy.

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<sup>110</sup> *Christian Lawyers Association v National Minister of Health* 2004 10 BCLR 1086 (T) 1095.

<sup>111</sup> Thomas 2007 *South African Law Journal* 23.

<sup>112</sup> Currie and De Waal *Bill of Rights Handbook* 308.

The Court pointed out that the legislature anticipated that there will be situations where women below and above the age of 18 would not be capable of giving informed consent.<sup>113</sup> These women, who are not capable to give informed consent, must be assisted in some way in order to give informed consent.<sup>114</sup> Thus the *CTP Act* does not differentiate on the basis of age, but on the intellectual and emotional capacity to give informed consent.<sup>115</sup> The Court held that this is a rational and justifiable distinction and that the *CTP Act* is therefore constitutional.<sup>116</sup> As a result, each case should be dealt with individually in order to determine intellectual and emotional capacity to give informed consent.<sup>117</sup> This is a factual enquiry that must be determined by the medical professional or registered midwife.<sup>118</sup>

The right of every woman, including girls under the age of 18, to choose whether or not to terminate her pregnancy boils down to respect and protection of the right to self-determination.<sup>119</sup> The fact that the *CTP Act* does not differentiate on the bases of age is in line with section 9 of the Constitution.<sup>120</sup> The *CTP Act* also does not violate section 28(2) of the Constitution.<sup>121</sup> The Court held that the *CTP Act* serves the best interests of the pregnant child (girl) based on the fact that the *CTP Act* is flexible in order to recognise and accommodate the individual position of the child.<sup>122</sup> The Court pointed out that it cannot be in the best interests of the pregnant child to adopt a rigid

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<sup>113</sup> *Christian Lawyers Association v National Minister of Health* 2004 10 BCLR 1086 (T) 1105.

<sup>114</sup> The *CTP Act* does not stipulate who must assist such women or what the extent of this assistance should be. The Court held at 1093 that in such cases the normal common-law rules that require the consent to be given by or with the assistance of the guardian/parent should apply. *Christian Lawyers Association v National Minister of Health* 2004 10 BCLR 1086 (T) 1093.

<sup>115</sup> *Christian Lawyers Association v National Minister of Health* 2004 10 BCLR 1086 (T) 1104.

<sup>116</sup> *Christian Lawyers Association v National Minister of Health* 2004 10 BCLR 1086 (T) 1105.

<sup>117</sup> *Christian Lawyers Association v National Minister of Health* 2004 10 BCLR 1086 (T) 1105.

<sup>118</sup> *Christian Lawyers Association v National Minister of Health* 2004 10 BCLR 1086 (T) 1105. See paragraph 2.4. This correlates with the right to participation or the right against parents and specifically the first group, namely to act completely independently from parents. Moodley "How to obtain informed consent" 376 – 377 indicates how medical professionals should go about the process of obtaining informed consent. Moodley contends that obtaining informed consent entails a process that includes the following: Making sure that the patient is competent to understand and make a decision; establishing that the patient gives consent voluntarily; giving the patient all the information relevant to the procedure and establishing whether the patient understands the information; the patient should decide against or in favour of the proposed procedure or treatment and the patient must authorise such procedure or treatment.

<sup>119</sup> *Christian Lawyers Association v National Minister of Health* 2004 10 BCLR 1086 (T) 1104.

<sup>120</sup> *Christian Lawyers Association v National Minister of Health* 2004 10 BCLR 1086 (T) 1104. See paragraphs 2.2 and 2.4. It can be argued that the *CTP Act* protects children against unfair discrimination and respects the right to self-determination. The *CTP Act* limits the child's autonomy rights in light of the capacity of each individual child making such limitation reasonable.

<sup>121</sup> See paragraph 4.

<sup>122</sup> *Christian Lawyers Association v National Minister of Health* 2004 10 BCLR 1086 (T) 1104.

age-based approach that takes no account of the individual circumstances of each child.<sup>123</sup> The Court found that the relevant provisions of the *CTP Act* were not unconstitutional and that the Plaintiff's particulars of claim indeed failed to disclose a cause of action.

### 3.2.2 Contraception

The *Children's Act* provides for the child's right to obtain contraceptives. Section 134(1) provides that no person may refuse to sell or provide condoms to a child who is older than 12 years. Section 134(2) provides that contraceptives other than condoms may be provided to children older than 12 with the additional requirement that proper medical advice must be given to the child and that a medical examination should be performed on the child. The *Children's Act* is silent on how the person that is approached should establish whether the child is actually 12 years or older. These provisions also pose practical issues. The fact that children from the age of 12 years theoretically have the right to obtain contraceptives does not in fact mean that children will be able to enjoy this right. Contraceptives should either be bought or obtained at a clinic. If a child older than 12 wishes to buy contraceptives one must wonder where the child will get the necessary money to do so. Not all children receive money from their parents or guardians to spend as they see fit. The reality is that approximately 68% of children in South Africa are living in poverty<sup>124</sup> and will not have the means to pay for contraceptives or the necessary medical examination that is required to obtain contraceptives other than condoms, which is also expensive. It is thus clear that most children will have to make use of medical clinics that are subsidized by the state. This poses a further problem as approximately 6.9 million children are more than 30 minutes away from their nearest health clinic.<sup>125</sup> These children will either have to walk to the nearest clinic or ask to be assisted by a parent or other adult person, in which case assistance can be easily denied based on the parent or other adult's personal beliefs. The *Children's Act* only creates an obligation to sell or provide children with

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<sup>123</sup> *Christian Lawyers Association v National Minister of Health* 2004 10 BCLR 1086 (T) 1104.

<sup>124</sup> Boezaart *Child Law* 304 -306.

<sup>125</sup> Boezaart *Child Law* 304 -306.

condoms or contraceptives, but creates no structure to provide assistance to children in order to gain access to contraceptives.<sup>126</sup>

To date there is no South African case law that has dealt specifically with the child's right to make independent decisions about the use of contraceptives. In order to gain some clarity on children and the use of contraceptives it could therefore be helpful to consider foreign case law.<sup>127</sup> In the English landmark case of *Gillick v West Norfolk and Wisbech Area Health Authority and Another*<sup>128</sup> Lord Scarman held that:

The underlying principle of the law..... is that parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision.<sup>129</sup>

It can be said that a *Gillick*-maturity test should be performed in order to establish the degree of maturity at which it is appropriate to take account of the child's views<sup>130</sup> and then also at which it is appropriate to allow children to use contraceptives. This test involves an assessment of each child's individual level of maturity and intellectual capacities.<sup>131</sup> This view correlates with the provisions of the *CTP Act* and also the finding of the court in *Christian Lawyers Association v National Minister of Health*.<sup>132</sup> The *Children's Act* does not provide for a maturity test to establish whether children should be provided with contraceptives and bluntly provides a minimum age of 12 years. One can argue that this is not a reflection of a well-balanced statutory provision that takes into account all of the elements that need to be present in dealing with children's rights. The focus is on participation and autonomy with very little focus on

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<sup>126</sup> See paragraph 2.1. As sated earlier, no child will be able to exercise the right to self-determination, for example, to use contraceptives, if children don't have access to contraceptives.

<sup>127</sup> S 39(1) of the Constitution provides that foreign law may be considered when a provision in the Bill of Rights is interpreted.

<sup>128</sup> *Gillick v West Norfolk and Wisbech Area Health Authority and Another* 1986 1 AC 112. This case dealt with the changed position in England regarding the prescription of contraceptives for children under the age of 16 years. Mrs. Gillick argued that this unjustifiably interfered with her parental authority and that doctors should not be allowed to prescribe contraceptives to children younger than 16 years. The court held that parental rights exist for the protection and benefit of the child, not for the parent and that parental rights are terminated as soon as a child has the capacity to make decisions independently.

<sup>129</sup> *Gillick v West Norfolk and Wisbech Area Health Authority and Another* 1986 1 AC 112 186.

<sup>130</sup> *Buck International Child Law* 143.

<sup>131</sup> Davel and Skelton (eds) *Commentary on the Children's Act* 30. See paragraphs 2.2 and 3.2.1. The *Gillick*-test correlates with Freeman's argument, as referred to in Human "The Theory of Children's Rights" 254, that age-related limitations should be objectively assessed on a case-by-case basis as well as the requirement of "informed consent" in terms of the *CTP Act*.

<sup>132</sup> *Christian Lawyers Association v National Minister of Health* 2004 10 BCLR 1086 (T).

protection, prevention and provision. It can thus be submitted that this is a classic example of abandoning children to their rights.<sup>133</sup>

### 3.2.3 Sterilisation

The *Sterilisation Act*<sup>134</sup> regulates the requirements for consent to sterilisation. From the age of 18 anyone can consent to sterilisation subject thereto that the person is capable of giving consent.<sup>135</sup> Section 1 of the *Sterilisation Act* defines sterilisation as a procedure whereby a person could permanently become incapable of reproduction or fertilisation. Sterilisation of children under the age of 18 years is not permitted unless the child's life would be jeopardised or his/her health seriously impaired if the sterilisation is not performed.<sup>136</sup> In such cases the parents or guardians together with a medical practitioner who has consulted with the child and who is convinced that the sterilisation is in the best interests of the child must consent.<sup>137</sup> If the sterilisation amounts to a surgical operation, section 129 of *the Children's Act* will also be applicable and if the child is 12 years or older and of sufficient maturity to consent, such child's consent must also be given for the sterilisation.<sup>138</sup> Thus children's right to self-determination in relation to decision making about sterilisation is limited to situations only where they can refuse to consent to sterilisation which is necessary for their own health and/or life.<sup>139</sup> This legislation strongly focuses on the protective element of children's rights and very poorly on the right to participation and provision.

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<sup>133</sup> Wald "Children's Rights: A Framework for Analysis" 140. The right to participation should not have the effect of "abandoning children to their rights." See footnote 70.

<sup>134</sup> *Sterilisation Act* 44 of 1998 (hereafter the *Sterilisation Act*).

<sup>135</sup> S 2 of the *Sterilisation Act*.

<sup>136</sup> S 3 of the *Sterilisation Act*.

<sup>137</sup> S (2)(3)(c) of the *Sterilisation Act*.

<sup>138</sup> Centre for Child Law 2011 <http://www.centreforchildlaw.co.za/index.php/children/at-what-age-can-iChild> centre website – age threshold; s 129 of the *Children's Act*.

<sup>139</sup> Although children have the right to refuse to consent to sterilisation, it can be argued that the child's refusal will not be respected in all circumstances. The right to refuse to consent will only come into operation if the sterilisation is necessary for his/her own health and/or life, leading thereto that the refusal will probably not be in the best interests of the child. The child's refusal may also be trumped by the consent of the Minister in terms of s 129(8) of the *Children's Act* which provides that the Minister may consent to the medical treatment of or surgical operation on a child if the child unreasonably refuses to give consent to treatment or surgery.

The *Sterilisation Act* thus creates an irrebuttable presumption that all minors are incompetent to make decisions about their own sterilisation.<sup>140</sup>

### 3.3 *The child's right to have security in and control over his/her body*

Section 12(2)(b) of the Constitution provides that everyone has the right to security in and control over their own body. In this context "security in" and "control over" are not synonymous.<sup>141</sup> "Security in" should be understood as the right to be left alone in the sense of being protected from any intrusion, violence or harm by others.<sup>142</sup> "Control over" is also a component of the right to be left alone, but in the sense of having the right to choose the life one wants.<sup>143</sup> The former can thus be categorised under "protection rights" and the latter under "participation rights." As discussed earlier these different categories of rights are interrelated. It is submitted that the right to self-determination in relation to bodily and psychological integrity cannot exist without the proper protection of the right to bodily and psychological integrity. This can also be seen as the rationale behind the construction of section 12(2)(b). Thus the right to have control over one's body strongly depends on the right to have security in one's body.<sup>144</sup> This line of argumentation was followed by the *amicus curiae* in *Carmichele v Minister of Safety and Security and Another* 2001 10 BCLR 995 (CC) where it was stated that:<sup>145</sup>

Sexual violence and the threat of sexual violence ..... is the single greatest threat to the self-determination of South African women.

It is thus necessary to establish whether the child's right to have security in his/her body is properly protected before one deals with the question of the extent to which a child's right to have control over his or her body is recognised.

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<sup>140</sup> The *Sterilisation Act* thus fails to recognise that there might be children younger than 18 years who are indeed capable of making decisions about sterilisation.

<sup>141</sup> Currie and De Waal *Bill of Rights Handbook* 308.

<sup>142</sup> Currie and De Waal *Bill of Rights Handbook* 309.

<sup>143</sup> Currie and De Waal *Bill of Rights Handbook* 309.

<sup>144</sup> In other words a specific right needs to be recognised and protected before one can claim to participate based on this right.

<sup>145</sup> *Carmichele v Minister of Safety and Security and Another* 2001 10 BCLR 995 (CC) 1016. "Security in" is considered as the right to be protected against intrusion, violence and harm. "Control over" is seen as the right to live the life one chooses or self-determination. Thus the argument is that the greatest threat to the right to self-determination is the improper protection of the right to bodily integrity.

### 3.3.1 *The right to security in one's body*

In essence the right to bodily integrity means the right to be protected from any intrusion, violence or harm.<sup>146</sup> Section 12(1)(c) of the Constitution which guarantees the right to be free from violence as well as section 28(1)(d) of the Constitution which provides that every child has the right to be protected from neglect, abuse, degradation or maltreatment should be read in this context. Physical punishment by parents is one of the most common forms of violence against children.<sup>147</sup> Although corporal punishment has been abolished in schools,<sup>148</sup> there is uncertainty about parents' rights in this regard. In *Christian Education South Africa v Minister of Education*<sup>149</sup> the court made a very clear distinction between corporal punishment administered by schools and that administered by parents. This distinction implies that parental rights and responsibilities in terms of the common law and punishment in terms of religious beliefs would not necessarily be unconstitutional.<sup>150</sup> In this instance one can thus submit that the right to freedom of religion could enjoy preference over the child's right to bodily integrity. It can be argued that the child's right to bodily security and integrity should enjoy special protection because of the fact that they are physically more vulnerable than adults. The fact that children are not protected against physical punishment results in the child's right to self-determination in relation to his/her bodily and psychological integrity being completely ignored. This leaves no room for participation whatsoever of the child in his or her own upbringing or the discipline structure within his/her family.

As already mentioned, the *Schools Act* prohibits corporal punishment in schools. This ensures that children are protected against physical abuse and maltreatment and it further protects the child's right to bodily and psychological integrity. The *Schools Act* goes further than mere protection and also recognises the child's right to participation. Section 8 obliges the governing body of a public school to adopt a code of conduct after consultation with the learners, parents and educators of the school. This ensures

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<sup>146</sup> Currie and De Waal *Bill of Rights Handbook* 309.

<sup>147</sup> Newell *Respecting children's right to physical integrity* 217.

<sup>148</sup> S 10 of the *Schools Act*.

<sup>149</sup> *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) 27.

<sup>150</sup> Currie and De Waal *Bill of Rights Handbook* 615.

that children are a part of the decision making process with regards to the discipline structure to which they will have adhere during school hours.

Sexual violence against children is a further threat to the child's right to bodily and psychological integrity.<sup>151</sup> In this regard the *Criminal Law (Sexual Offences and Related Matters) Amendment Act*<sup>152</sup> is the most important piece of legislation to protect children against sexual abuse by criminalising various acts.<sup>153</sup> Proper protection of children against sexual violence and abuse respects the child's right to have security in his/her own body and forms the basis of the claim to have control over his/her own sexual activities from the age at which informed consent can be given.

### 3.3.2 *The right to have control over one's body*

The right to have control over one's body can also be seen as an element of personal autonomy; a component of the right to be left alone in the sense of being allowed to live the life one chooses.<sup>154</sup> This is a very difficult aspect with regards to children. The right to have control over one's body is a right to which everyone, including children, is entitled. The Constitution provides no minimum age for this right and it is left to the legislature to give content to this right with regards to children. The greatest attempt thus far by the legislature to give effect to the child's right to self-determination in relation to his/her bodily and psychological integrity is sections 129, 130, 132 and 134 of the *Children's Act*. These sections are incorporated under chapter 7, entitled "Protection of children." The contents of these sections deal specifically with the child's right to self-determination.

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<sup>151</sup> *Carmichele v Minister of Safety and Security and Another* 2001 10 BCLR 995 (CC) 1016.

<sup>152</sup> *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007.

<sup>153</sup> The following sexual crimes committed against children are included in the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007: s 3 rape; s 4 compelled rape; s 5 sexual assault; s 6 compelled sexual assault; s 7 compelled self-sexual assault; s 15(1) acts of consensual sexual penetration with certain children; s 16(1) Acts of consensual sexual violation with certain children; s 17 sexual exploitation of children; s 18 sexual grooming of children; s 19 exposure or display of, or causing exposure or display of, child pornography or pornography to children; s 20 using children for, or benefiting from, child pornography, s21 compelling or causing children to witness sexual offences, sexual acts or self-masturbation; s 22 exposure or display of, or causing exposure or, display of genital organs, anus or female breasts to children; s 55 attempt, conspiracy, incitement or inducing another person to commit a sexual offence; s 71 trafficking in persons for sexual purposes.

<sup>154</sup> Currie and De Waal *Bill of Rights Handbook* 308 – 309.

One can thus argue that the legislature has recognised the reality of children's right to self-determination as dependent on the protection of children's rights.<sup>155</sup> It is also recognised that the right to self-determination or participation needs to be limited in certain instances to protect the well-being of children.<sup>156</sup> Section 129(1) of the *Children's Act* determines that children may only be subjected to medical treatment or surgical operations if consent has been given as provided for by subsections (2) – (7).<sup>157</sup> Section 129(2) of the *Children's Act* provides that children from the age of 12 years may consent to their own medical treatment, subject thereto that the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and all other implications of such treatment. Section 129(3) provides that a child from the age of 12 may consent to surgical operations on themselves if such child is mature enough and has the mental capacity to understand the necessity, consequences, risks and social implications of the surgery. The parents of a child must assist the child in order to give consent to the surgery.<sup>158</sup> Section 129(4) and (5) provides that where the child is under the age of 12 years or not sufficiently mature to give consent, the parent or care-giver of the child may give permission to medical treatment or surgery. Section 129(7) and 129(9) provides that consent may be given for the medical treatment or surgery of child by the Minister<sup>159</sup> or a High Court if the parents or guardian of the child refuse to give consent.<sup>160</sup> Section 129(10) provides that parents may not refuse to give permission for a child's medical treatment or surgery solely based on religious grounds, unless they can indicate that there is acceptable alternative medical treatment available.<sup>161</sup> There are thus two requirements that have to be met before a child can consent. Firstly the child must reach a certain age and then it must be established whether the child is mature enough and has the mental capacity to understand the risks, benefits and implications of the medical treatment or surgery.

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<sup>155</sup> See paragraphs 2.2 and 2.4.

<sup>156</sup> See paragraphs 2.2 and 2.4.

<sup>157</sup> Subsections (2) – (7) determine that 12 years is the minimum age to consent together with other specific requirements. Centre for Child Law 2011 <http://www.centreforchildlaw.co.za/index.php/children/at-what-age-can-i> Child centre website – age threshold.

<sup>158</sup> Kassan and Mahery "Special Child Protective Measures in the Children's Act" 208. According to s 129(3)(c) and regulations of the *Children's Act* the parents of the child who is capable of consenting to a surgical operation must assent to the operation in writing.

<sup>159</sup> "minister" should be understood in this context as the Cabinet member whom is responsible for social development as provided in s 1 of the *Children's Act*.

<sup>160</sup> See paragraph 2.4; Kassan and Mahery "Special Child Protective Measures in the Children's Act" 211 – 212.

<sup>161</sup> *Hay v B and Others* 2003 3 SA 492 (W) illustrates how s 129(10) is used in practice. See paragraph 4.1.

The *Children's Act* thus creates an irrebuttable presumption that all children under the age of 12 are not capable of giving independent consent and a rebuttable presumption that all children between the ages of 12 and 18 are not capable of giving independent consent, which presumption can be rebutted in the instance where the individual child is of sufficient maturity and intellectual capacity to give consent. It is submitted that the minimum age of 12 years may be interpreted as to create a rebuttable presumption that all persons older than 12 are capable of giving consent, which interpretation does not provide the necessary protection to children.

The *Children's Act* does not specify how medical personnel should establish whether the child is indeed mature enough and has the mental capacity to give consent.<sup>162</sup> It is submitted that the second requirement correlates with the meaning of "informed consent" as required by the *CTP Act*.<sup>163</sup> If the court's reasoning in *Christian Lawyers Association v National Minister of Health* is followed, the age threshold of 12 years makes little sense.<sup>164</sup> It seems that the fixed age guideline does not necessarily reflect a minimum age at which children are considered to be mature enough to make independent decisions with regard to medical treatment or surgery, but rather to provide a measure of legal certainty for medical and health professionals.<sup>165</sup> Although the *Children's Act* does not explicitly provide that children have the right to refuse medical treatment or surgery, this right is implied in section 129(1)<sup>166</sup> as well as

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<sup>162</sup> See paragraphs 2.2 and 2.4.

<sup>163</sup> See paragraph 3.2.1.

<sup>164</sup> *Christian Lawyers Association v National Minister of Health* 2004 10 BCLR 1086 (T) 1088. The Court held that a woman, regardless of age, will only be able to terminate her pregnancy if she is capable of giving her informed consent. Thus it is assumed that children under the age of 12 are not capable of consenting to medical treatment or surgical operations, that no child under the age of 12 will be allowed to give consent in terms of the second requirement of the *Children's Act* namely that the child must be of sufficient maturity and intellectual capacity to understand the benefits and risks that accompany such treatment or surgery. Sloth-Nielsen "Protection of Children" 35. Sloth-Nielsen contends that the fixed age guideline of 12 years can also be criticised because it does not take into account the possibility that children younger than 12 can have the sufficient maturity to give independent consent.

<sup>165</sup> Sloth-Nielsen "Protection of Children" 34 - 35.

<sup>166</sup> According to s 129(1) of the *Children's Act*, the child's consent must be obtained before a child is subjected to medical treatment or surgery, if the child meets the requirements set out in ss 129(2) and 129(3). This implies that if a child, who meets the requirements to give consent, refuses to give consent, treatment or surgery cannot be performed. Thus section 129(1) protects the competent child's right to consent and the right to refuse. Skelton *Children and the Law* 66. Skelton also states that "every person has a right to refuse medical treatment." Mason 2010 *South African Medical Journal* 646 states that any person who has the legal capacity to consent, can also refuse medical treatment or surgical operations.

section 129(8)<sup>167</sup> of the Act. The right to refuse medical treatment or surgery is also protected by section 6(1) of the *National Health Act* which provides that users must be informed of their right to refuse health services.<sup>168</sup>

Sections 130 and 132 of the *Children's Act* deal with children and HIV-testing. The rationale behind the differentiation between all other medical treatment and procedures and HIV-testing is most probably because of the fact that HIV/AIDS contributes significantly to the burden of diseases from which South Africans suffer, especially poor and vulnerable groups, including children.<sup>169</sup> The Department of Health<sup>170</sup> contends that this is the reason why the government has put such a huge effort into combating HIV/AIDS and that testing and counselling is regarded as the most important strategy to combat this disease. Section 130(1) determines that a child may undergo an HIV-test if such test is conducted in accordance with the requirements set out in section 132 and if the test is in the best interests of the child or if such test is necessary to establish whether a health worker or any other person may have contracted HIV due to contact with the child. Section 130(2) determines that a child may give consent without the assistance of a parent or care-giver if the child is 12 years of age or older.<sup>171</sup> A child under the age of 12 years can also consent independently if the child is of sufficient maturity to understand the benefits, risks and social implications of such a test.<sup>172</sup> In the circumstances where the child is under the

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<sup>167</sup> Section 129(8) provides that the Minister may consent if the child unreasonably refuses to give consent to medical treatment or surgical operations.

<sup>168</sup> See footnote 103 for the definition of 'user.'

<sup>169</sup> Sloth-Nielsen "Protection of Children" 37; Department of Health 2012 <http://www.doh.gov.za/list.php?type=HIV%20and%20AIDS> - HIV and AIDS.

<sup>170</sup> Department of Health 2012 <http://www.doh.gov.za/list.php?type=HIV%20and%20AIDS> HIV and AIDS.

<sup>171</sup> See Sloth-Nielsen "Protection of Children" 38; Kassan and Mahery "Special Child Protective Measures in the *Children's Act*" 218. It is contended that the fixed age of 12 years does not imply that all children older than 12 will be allowed to consent to HIV-testing. Children older than 12 years must also be able to give informed consent in accordance with common-law principles. This means that the use of "consent" in the preamble of s 130(2) implies that the child who is older than 12 years should be able to understand the nature or significance of an HIV-test. See paragraph 3.2.1 for a discussion of the concept "informed consent."

<sup>172</sup> The requirement of sufficient maturity is the same as provided for in section 129 as discussed above. Kassan and Mahery "Special Child Protective Measures in the *Children's Act*" 218 point out that there may arise difficult situations due to the fact that a child younger than 12 can decide independently to undergo an HIV-test and know his/her status. This will typically be in a case where an 11-year old is sufficiently mature to consent to a test, is found to be HIV-positive and needs medical treatment. This child has the right to privacy and to keep his/her status confidential in terms of s 133 of the *Children's Act*, but cannot receive medical treatment without parental consent because he/she is not 12 years of age as required by s 129 of the *Children's Act*. In order to receive treatment the child will have to inform his/her parents. If the child refuses to inform them,

age of 12 years and not mature enough to give consent, the parent or care-giver of such a child; the provincial head of social development; a designated child protection organisation; the superintendent or person in charge of a hospital or a children's court can give consent for a child to undergo an HIV-test.<sup>173</sup> Section 130(2) thus creates the irrebuttable presumption that a child is capable to consent independently to an HIV-test from the age of 12 years. It further creates a rebuttable presumption that children younger than 12 years are not capable to consent independently to HIV-testing, which presumption can be rebutted if the child is of sufficient maturity to understand the benefits, risks and social implications of an HIV-test. Section 132 of the *Children's Act* deals with the counselling of children before and after HIV-testing. Section 132(1) provides that a child may only be tested after an appropriately trained person has provided proper counselling to the child, if the child is of sufficient maturity to understand the benefits, risks and social implications of the HIV-test and the child's parents or care-giver, if they have knowledge of the test. Section 132(1) is of great significance as it:<sup>174</sup>

(c)oncretises in legislative form the requirement established in common law that consent must be preceded by adequate information in order to constitute 'informed consent', which is necessary to avoid an undue invasion of the fundamental right to bodily integrity and individual autonomy...

Moodley<sup>175</sup> also recognises the importance of section 132(1) and states that the mandatory counselling before a HIV-test is an excellent example of how the informed consent process should work and contends that this process should also be used in order to obtain consent for other medical tests and procedures. One can argue that the provisions regarding HIV-testing afford more protection to the child than those of the *CTP Act* with regards to obtaining informed consent. Both the *CTP Act* and the *Children's Act* do not set a minimum age at which a child can consent to the termination of a pregnancy or an HIV-test. The *CTP Act* does not provide for mandatory counselling<sup>176</sup> whereas the *Children's Act* does. One can thus argue that

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the question is whether such refusal can be overruled based on s 13(1)(d) of the *Children's Act*, which provides that a child's right to confidentiality should be maintained unless it is in the best interests of the child or whether a court should be approached to overrule the child's unreasonable refusal as provided for in s 133(e)(iii) of the *Children's Act*. See paragraph 4.

<sup>173</sup> Ss 130(2)(b) – (f) of the *Children's Act*.

<sup>174</sup> Sloth-Nielsen "Protection of Children" 39.

<sup>175</sup> Moodley "How to obtain informed consent" 376–377.

<sup>176</sup> See footnote 99.

the *CTP Act* does not provide for the best possible protection of the child, especially in light of the fact that there is no minimum age set by the *CTP Act*.

Section 132(2) provides that an appropriately trained person must provide post-test counselling to the child, if such a child is of sufficient maturity to understand the implications of the result and the child's parents or care-giver if they have knowledge of the test.

Further legislation that deals with the child's right to have security in his/her body is the *National Health Act*. Section 56(2) provides that tissue which is not naturally replaceable (for example kidneys) cannot be removed for medical or dental purposes from a person younger than 18 years.<sup>177</sup> Section 62 deals with the donation of human bodies and tissue of deceased persons and determines that a person who is competent to make a will may donate his or her body or any specified tissue thereof to be used after his or her death or give consent to the post mortem examination of his or her body. In terms of section 4 of the *Wills Act* 7 of 1953 any person from the age of 16 is competent to make a will. Thus a child from the age of 16 is competent to consent to the donation of his/her body or the use of specified tissue thereof after the death of the child. The *Human Tissue Act* 65 of 1983<sup>178</sup> is also applicable. Section 2 deals with the donation of human bodies and tissue and provides that any person who is competent to make a will may in his/her will donate his/her body or any specific tissue thereof to be used after his/her death. The *Human Tissue Act* also deals with the removal or withdrawal of tissue, blood or gametes from the body of a living person. Section 18(aa) provides that:

[i]n the case of the removal of tissue which is replaceable by natural processes, or the withdrawal of blood, from the body of a person who is a competent witness, the consent of that person to the removal of that tissue or blood shall be sufficient, whether it be granted in writing or orally.

Section 1 of the *Human Tissue Act* defines a competent witness as a person of 14 years or older. Thus a child is competent to consent to the removal of naturally replaceable tissue and the withdrawal of blood from the age of 14.

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<sup>177</sup> Centre for Child Law 2011 <http://www.centreforchildlaw.co.za/index.php/children/at-what-age-can>  
-iChild centre website – age threshold.

<sup>178</sup> Hereafter the *Human Tissue Act*.

The *National Health Act* and the *Human Tissue Act* use fixed age guidelines and are, together with the *Sterilisation Act*, the most conservative legislation with regards to the child's right to self-determination in relation to bodily integrity. The *National Health Act* creates an irrebuttable presumption that all minors are incapable of consenting to the donation of tissue that is not replaceable by natural process. It also, together with the *Human Tissue Act*, creates the irrebuttable presumption that all children younger than 16 are not capable to consent to the donation of their own body or tissue after death. The *Human Tissue Act* creates the irrebuttable presumption that no child younger than 14 is competent to consent to the removal of naturally replaceable tissue or the withdrawal of blood.<sup>179</sup> These acts do not provide for any individual circumstances or a case-by-case assessment of the individual child's abilities to give consent to the donation of tissue or their own bodies.

### **3.4 The child's right not to be subjected to medical or scientific experiments without his/her informed consent**

There are two questions that need to be addressed in relation to the right of the child not to be subjected to medical or scientific experiments without his/her consent. Firstly it must be established what is meant by medical or scientific experimentation and the second question that needs to be answered is what is meant by informed consent.<sup>180</sup>

Generally medical and scientific experimentation or research can be described as those methods which are used to understand the cause of a disease or dysfunction and to find preventative measures or treatment.<sup>181</sup> It is important to recognise that medical and scientific experimentation entail more than the general understanding thereof.<sup>182</sup> Day-to-day medical care and treatment can also amount to experimentation.<sup>183</sup> Medical knowledge can never be absolute and concrete, resulting

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<sup>179</sup> This provision does not correlate with the Provisions of the *Children's Act* with regards to HIV Testing.

<sup>180</sup> Currie and De Waal *Bill of Rights Handbook* 310.

<sup>181</sup> British Medical Association *The Medical Profession & Human Rights Handbook* 205.

<sup>182</sup> Currie and De Waal *Bill of Rights Handbook* 310. Generally it is seen as measuring the effects of nuclear radiation; monitoring the reactions of patients injected with cancer cells or calculating the death-rates of people exposed to serious air pollution.

<sup>183</sup> Currie and De Waal *Bill of Rights Handbook* 310.

in the fact that even prescribed approved drugs can still amount to experimentation as patients react differently to the same drugs.<sup>184</sup> One can argue that patients will not easily consent to medical treatment if they are aware of the experimental element thereof.

Incidental to this is the issue surrounding the concept of informed consent. According to *Christian Lawyers Association v National Minister of Health*,<sup>185</sup> informed consent, as discussed earlier, requires knowledge of the risk or potential harm; appreciation of the risk or potential harm and actual consent.<sup>186</sup> In the limited time available for consultation between doctors and their patients it is questionable whether doctors inform their patients of the potential risk or harm of the proposed treatment.<sup>187</sup> If patients are not aware of this, one of the elements of informed consent is absent. It is also important to bear in mind that a doctor has an ethical obligation to do what is in the best interests of his/her patient and that patients rarely have any medical knowledge on which to base their objection to treatment. This poses the question as to whether a doctor's choice of treatment based on his/her knowledge of the benefits and risks of all available treatments versus the patient's choice of non-treatment, can outweigh the autonomy of the patient.<sup>188</sup> Currie and De Waal<sup>189</sup> put it that the question should be

[w]hen and to what extent can the benefits which accrue to society for medical and scientific experimentation outweigh considerations of individual dignity and autonomy?

The *National Health Act* provides some clarity in this regard. Section 71(1) provides that notwithstanding anything to the contrary in any other law, research or experimentation on a living human being, may only be done in the prescribed manner and with the written consent of the person after he or she has been informed of the objects of the research or experimentation as well as any possible consequences, whether positive or negative, that the research or experimentation may have on the

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<sup>184</sup> Currie and De Waal *Bill of Rights Handbook* 310. In many cases the side-effects and untoward reactions of treatments come to light years after. Currently medicine must be approved by the Medicines Control Council, as provided for in s 13 of the *Medicines and Related Substances Act* 101 of 1965.

<sup>185</sup> *Christian Lawyers Association v National Minister of Health* 2004 10 BCLR 1086 (T).

<sup>186</sup> See paragraph 3.2.1.

<sup>187</sup> Currie and De Waal *Bill of Rights Handbook* 310.

<sup>188</sup> Currie and De Waal *Bill of Rights Handbook* 310.

<sup>189</sup> Currie and De Waal *Bill of Rights Handbook* 311.

person's health. Section 71(2) and (3) deals with research or experimentation conducted on minors and distinguish between research and experimentation conducted for therapeutic purposes and non-therapeutic purposes.<sup>190</sup> When research or experimentation is to be conducted for a therapeutic purpose, such research and experimentation may only be conducted if it is in the best interests of the minor.<sup>191</sup> If the research and experimentation is considered to be in the best interests of the child, the research and experimentation should be conducted in such a manner and upon such conditions as may be prescribed; with the consent of the parent or guardian of the minor and if the minor is capable of understanding, the consent of the minor.<sup>192</sup> When research or experimentation is to be conducted for a non-therapeutic purpose, such research and experimentation may only be conducted in a manner and on such conditions as may be prescribed; with the consent of the Minister;<sup>193</sup> with the consent of the parent or guardian of the child and the consent of the minor, if the minor is capable of understanding.

The requirement that the research or experimentation should be in the best interests of the child, as provided for in section 71(2), is not mentioned in section 71(3). Although it seems that section 71(3) does not require the best interests of the child to be considered when non-therapeutic research or experimentation is to be conducted, one should take into account that the consent of the Minister needs to be obtained.<sup>194</sup> Section 71(3)(b) deals specifically with the consent of the Minister in order to provide adequate protection of a minor on whom non-therapeutic research or experimentation is to be conducted. The Minister is prohibited from granting consent when the objects of the research or experimentation can be achieved if it is conducted on an adult; when it is unlikely that the research or experimentation will significantly improve scientific understanding of the minor's condition, disorder or disease to such an extent

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<sup>190</sup> Strode et al 2005 *South African Medical Journal* 267. *The National Health Act* retains the distinction between therapeutic and non-therapeutic experimentation, but does not provide for any definition of the terms. This distinction is problematic in the medical sphere as many ethical guidelines abandoned the distinction between therapeutic and non-therapeutic experimentation and research.

<sup>191</sup> S 71(2)(a) of the *National Health Act*. See paragraph 4 with regards to the understanding of the concept of the best interests of the child.

<sup>192</sup> S 71(2)(b)–71(2)(c) of the *National Health Act*.

<sup>193</sup> S 1 of the *National Health Act* provides that "Minister" for purposes of this Act means the Cabinet member whom is responsible for health.

<sup>194</sup> The Minister will be bound by section 28(2) of the Constitution which protects the best interests of the child. See chapter 4.

that it will result in a significant benefit to the minor or other minors; when the consent given by the parent, guardian or minor is against public policy; when the research or experimentation significantly puts the minor's health at risk or when the risk to the wellbeing or health of the minor and the potential benefit of the research or experimentation does not significantly outweigh the risk.<sup>195</sup>

#### 4 The best interests of the child principle

Section 28(2) of the Constitution provides that every child has the right to have his/her best interests considered as paramount in every matter concerning him/her. The concept of the best interests of the child is not new to the constitutional era.<sup>196</sup> In *Fletcher v Fletcher*<sup>197</sup> the court held that the most important factor to consider is not the rights of parents, but the best interests of children.<sup>198</sup> It seems that the most important factor to consider in all situations where children are involved is their best interests as recognised by the Constitution,<sup>199</sup> legislation,<sup>200</sup> common law<sup>201</sup> and international law.<sup>202</sup>

In *Minister of Welfare and Population Development v Fitzpatrick*<sup>203</sup> the court held that section 28(2) of the Constitution extends beyond the rights listed in section 28(1) and creates an independent right.<sup>204</sup> Although the concept of the best interests of the child is crucial in the implementation of children's rights in general, it has become

<sup>195</sup> Ss 71(3)(b)(i)–71(3)(b)(v) of the *National Health Act*.

<sup>196</sup> Ngidi "Upholding the Best Interests of the Child in South African Customary Law 227; *van Deijl v van Deijl* 1966 4 SA 260 (R).

<sup>197</sup> *Fletcher v Fletcher* 1948 1 SA 130 (A) 134, 144-145.

<sup>198</sup> Currie and De Waal *Bill of Rights Handbook* 617; Devenish *A Commentary on the South African Constitution* 75; Skelton "Parental Responsibilities and Rights" 63. Although this case was decided long before the enactment of the Constitution, the idea that children's interests should be regarded as more important than those of parents is seen as part of the reasons for the construction of section 28(2). Devenish submits that the consequence of making the child's interests paramount has been to purge the repressive elements familiar to parental power. It is important to note that the *Children's Act* correlates with this argument as the best interests principle was included as a part of the *Children's Act* while Skelton contends that the act also shifted the traditional focus from parental power or parental authority to parental rights and responsibilities.

<sup>199</sup> S 28(2) of the Constitution.

<sup>200</sup> Ss 7 and 9 of the *Children's Act*, S 71(2) of the *National Health Act*. See Davel and Skelton (eds) *Commentary on the Children's Act* 6

<sup>201</sup> *Fletcher v Fletcher* 1948 1 SA 130 (A) 134, 144-145, *V v V* 1998 4 SA 169 (C), *Mcall v Mcall* 1994 3 SA 201 (C) 205.

<sup>202</sup> A 3(1) of the CRC; A 4(1) of the ACRWC.

<sup>203</sup> *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC).

<sup>204</sup> *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) 428 C-D 18.

controversial because of the fact that it failed to provide a reliable or clear standard in the past.<sup>205</sup> A further problem with the best interest-principle is that it is often used to justify the interests of parents rather than the best interests of children.<sup>206</sup> The contrary is also true as the court held in *Jooste v Botha*<sup>207</sup> that the application of the best interest standard can mean that the rights of parents and others are always subject to those of children.<sup>208</sup> In *V v V*<sup>209</sup> the court also held that:<sup>210</sup>

[t]he child's rights are paramount and need to be protected, and situations may well arise where the best interests of the child require that action is taken for the benefit of the child which effectively cuts across the parent's rights.

In *Jooste v Botha*<sup>211</sup> the court addressed the problems surrounding the best interests of the child principle. The court stated that the formulation of section 28(2) of the Constitution can lead to the assumption that the interests of the child will override all other legitimate interests of parents, siblings and other parties.<sup>212</sup> The court was of opinion that this was not the intention and that section 28(2) should rather be used as a general guideline and not as a rule of law with a horizontal application.<sup>213</sup>

Currie and De Waal<sup>214</sup> contend that the uncertainty surrounding the best interests-principle can to some extent be solved by providing courts with a detailed list of factors which must be considered whenever the best interests of the child is in question.<sup>215</sup> The *Children's Act* gave more clarity on the use of the best interests of the child

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<sup>205</sup> Burman (ed) *The Fate of the Child* 145; *Bill of Rights Handbook* 618; Davel and Skelton (eds) *Commentary on the Children's Act* 7. Davel and Skelton indicate that the interpretation of the best-interests concept is influenced by various factors such as historical background, political, economic, cultural and social conditions.

<sup>206</sup> Currie and De Waal *Bill of Rights Handbook* 619. It is argued that South African cases that dealt with the best interests of children after the inclusion thereof in the Constitution simply equate the principle with the existing rules of family law.

<sup>207</sup> *Jooste v Botha* 2000 2 SA 199 (T).

<sup>208</sup> *Jooste v Botha* 2000 2 SA 199 (T) 210 C – E.

<sup>209</sup> *V v V* 1998 4 SA 169 (C).

<sup>210</sup> *V v V* 1998 4 SA 169 (C) 189 B.

<sup>211</sup> *Jooste v Botha* 2000 2 SA 199 (T).

<sup>212</sup> *Jooste v Botha* 2000 2 SA 199 (T) 210 C – E.

<sup>213</sup> *Jooste v Botha* 2000 2 SA 199 (T) 210 C – E.

<sup>214</sup> *Bill of Rights Handbook* 619.

<sup>215</sup> In the case of *Mcall v Mcall* 1994 3 SA 201 (C) 205 B-G the court set out a checklist of potentially relevant factors that can be considered when the best interests of children are in question. Davel and Skelton (eds) *Commentary on the Children's Act* 7-8 points out that this list was designed to resolve custody disputes specifically and that subjective opinions may still have an influence on objective judgement.

principle.<sup>216</sup> Section 7 of the *Children's Act* lists various factors that should be considered when the best interests of the child is considered and section 9 provides that in every matter concerning the care, protection and well-being of the child the principle that the best interests of the child is of paramount importance should be applied.

A crucial aspect that needs to be addressed in relation with the best interests-principle is whether it is a right or a standard or both, as this will have an effect on how the concept of the child's best interests will be used in practice.<sup>217</sup>

It is important to bear in mind that although the best interests-principle is a complex matter, it is applicable to all law. Section 8(1) of the Constitution provides that the Bill of Rights is applicable to all law and binds the legislature, the executive, the judiciary and all organs of state.

It follows that there is a duty imposed on the State and all of its organs not to perform any act that infringes these rights. In some circumstances there would be a positive component which obliges the State and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection.<sup>218</sup>

Thus the best interests-principle as part of the Bill of Rights, whether it is seen as a right or a standard, is applicable to all law.

#### **4.1 Best interests as a right**

Section 28(2) of the Constitution provides that every child has the right to have his/her best interests considered as paramount in every matter concerning him/her. This is

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<sup>216</sup> Davel and Skelton (eds) *Commentary on the Children's Act* 6-8. Despite the fact that s 7 provides some legal certainty with regards to the application of the best interest-principle, the court held in *S v M* 2008 3 SA 232 (CC), after the enactment of the *Children's Act*, that there are still problems with the application of the best interests-principle. These problems include that it is indeterminate, that various professionals dealing with matters concerning children have different opinions and perspectives on the concept and that interpretation and application of this standard will always be influenced by cultural, political, social and economic conditions.

<sup>217</sup> Davel and Skelton (eds) *Commentary on the Children's Act* 10. It was used as both a right and a standard before the enactment of the *Children's Act*. In *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) 428 C-D the court made it clear that section 28(2) creates an independent right, but in *Jooste v Botha* 2000 2 SA 199 (T) 210 C-E the court interpreted section 28(2) as to be used as a standard.

<sup>218</sup> *Carmichele v Minister of Safety and Security and Another* 2001 10 BCLR 995 (CC) 1009.

reflected in section 9 of the *Children's Act* and clearly indicates that children have a specific right that guarantees the paramountcy of their best interests.<sup>219</sup> The fact that the best interests-principle is a right in itself has certain effects as result. The State is obliged to respect, protect, promote and fulfil this right as with any other fundamental right.<sup>220</sup> It is also not absolute, like all other fundamental rights it may be limited by section 36 of the Constitution.<sup>221</sup> This right will further, like all other rights, have to be balanced and demarcated with the rights of others.<sup>222</sup> The case of *Hay v B and Others*<sup>223</sup> provides an example of the balancing of the child's right to have his/her best interests protected and the fundamental rights of parents. In this case the parents of an infant refused to give permission to a blood transfusion that was necessary for the child to survive, on the grounds of their religious beliefs. The court held that a child's best interests were of paramount importance and was the single most important factor to be considered when balancing or weighing competing rights and interests concerning children.<sup>224</sup> It was in the best interests of the child to afford protection to his right to life and thus to receive medical treatment.<sup>225</sup>

In *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division*<sup>226</sup> it was held that section 28(2) does not trump other rights enshrined in the Bill of Rights and emphasised that constitutional rights are mutually interrelated and interdependent.<sup>227</sup> Davel<sup>228</sup> contends that this means that it cannot be assumed that the best interests of children will in all circumstances outweigh the constitutional rights of parents or others. Following this line of argumentation one could say that the child's right to have his/her best interests regarded as paramount cannot be assumed to outweigh the child's right

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<sup>219</sup> Davel and Skelton (eds) *Commentary on the Children's Act* 10.

<sup>220</sup> S 7 of the Constitution; Skelton "Constitutional Protection of Children's Rights" 280.

<sup>221</sup> Davel and Skelton (eds) *Commentary on the Children's Act* 10. *Sonderup v Tondelli* 2001 1 SA 1171 (CC) is a good example of how section 36 was used to limit the child's right to have his/her best interests regarded as paramount.

<sup>222</sup> Davel and Skelton (eds) *Commentary on the Children's Act* 10.

<sup>223</sup> *Hay v B and Others* 2003 3 SA 492 (W).

<sup>224</sup> *Hay v B and Others* 2003 3 SA 492 (W) 495 D-E.

<sup>225</sup> *Hay v B and Others* 2003 3 SA 492 (W) 495.

<sup>226</sup> *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 1 SA 406 (CC).

<sup>227</sup> *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 1 SA 406 (CC) 432A –G 54 -55.

<sup>228</sup> Davel and Skelton (eds) *Commentary on the Children's Act* 12.

to self-determination in all circumstances.<sup>229</sup> This is in vast contrast with the finding in *YM v LB*<sup>230</sup> where Lewis J held that:<sup>231</sup>

[i]t is clear, in my view, that the rights to privacy and bodily integrity may be infringed .....if it is in the best interests of a child to do so. These rights, like others enshrined in the Constitution, may be limited where it is reasonable and justifiable, applying the criteria in section 36(1) of the Constitution.

One gets the impression that the court not only recognised the best interests-principle as a right, but also as a standard to establish whether the limitation of the child's fundamental rights can be said to be reasonable and justifiable in terms of section 36 of the Constitution.

#### **4.2 Best interests as a standard**

The *Children's Act* clarifies any uncertainty about the use of the best interests-principle as a standard and this correlates with the best interests-principle as enshrined in article 3 of the CRC.<sup>232</sup> Section 7 of the *Children's Act* determines that it is a standard that must be adhered to.<sup>233</sup> This section lists 14 factors that must be taken into account in all matters concerning children in order to ensure that the best interests of the child is applied as a uniform standard.<sup>234</sup>

As indicated above, the use of the best interests - principle as a right results in the effect that the best interests of a child is a right like any other which has to be balanced with other fundamental rights, such as the right to self-determination. The use of the best interests-principle as a standard has the effect that the protection of the child's best interests is used as a measuring tool to determine whether a specific

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<sup>229</sup> This correlates with what the court held in *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC) 50 where it was stated that the best interests of the child cannot be seen as absolute based on the fact that it should be considered as paramount.

<sup>230</sup> *YM v LB* (465/09) [2010] ZASCA 106.

<sup>231</sup> *YM v LB* (465/09) [2010] ZASCA 106 15.

<sup>232</sup> Wolf "The Concept of the 'Best Interest' in Terms of the UN Convention on the Rights of the Child" 125 -131. Wolf contends that the application of the provisions or rights in the CRC should be done with the best interests-standard constantly in mind. He thus argues that the best interest of the child is not an independent right, but that it is applicable as a standard alongside the other rights to which children are entitled.

<sup>233</sup> Davel and Skelton (eds) *Commentary on the Children's Act* 12.

<sup>234</sup> Davel and Skelton (eds) *Commentary on the Children's Act* 12.

decision is regarded as reasonable, fair and just. This results in the best interests of a child always being regarded as paramount in every matter concerning the child.

The question must be asked how the best interests-principle should be applied in order to give proper recognition to the child's right to self-determination. In the instance where a 14 year old child, who is mature enough and has the intellectual capacity to understand the risks and benefits of medical treatment, refuses to consent to medical treatment as contemplated by section 129(1) and (2) of the *Children's Act* the situation can be summarised as follows. The child has the right to security and control over his body, which gives the child the right to self-determination. Based on this the child indeed has the right to refuse to consent to medical treatment. Whether this decision will be respected depends on the parents' rights as well as the child's right to have his best interests protected. Section 129(3) creates a rebuttable presumption that the child in question is not capable of consenting independently. This presumption is rebutted in this instance because of the fact that the child is indeed mature enough and has the intellectual capacity to make such a decision independently, extinguishing the parent's right to object to the decision of the child. The question that follows is whether this decision will be in the best interests of the child. If, for argument sake, the treatment is absolutely necessary for the health of the child, it can be assumed that the child's exercise of his right to self-determination will not be in his best interests. The child has the "*right to have the best interest's standard* considered and applied as being paramount."<sup>235</sup> Thus, although his right to self-determination has the same value as his right to have his best-interests protected, as competing fundamental rights, his best interests is also used as a standard to determine whether his refusal to consent should be respected. One can come to the conclusion that children enjoy the right to self-determination only to the extent to which the exercise of the right to self-determination will be in their best-interests.<sup>236</sup>

The fact that there exist some problems with the interpretation and application with the best interests - principle cannot be denied. These problems are mainly caused by the wide formulation of section 28(2) as well as the uncertainty surrounding the principle. It

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<sup>235</sup> Davel and Skelton (eds) *Commentary on the Children's Act* 12.

<sup>236</sup> This correlates with the notion of s 13(1)(d) of the *Children's Act* which determines that a child has the right to confidentiality regarding his/her health status except where such confidentiality will not be in the child's best interests. Thus the child enjoys the right to confidentiality only as far as such confidentiality will be in his/her best interests.

has been argued that the strength of section 28(2) lies in the contextual nature and inherent flexibility of section 28.<sup>237</sup> One can thus come to the conclusion that the best interests of the child principle must be flexible and applied to the individual circumstances of every child.<sup>238</sup> It will be contrary to the child's best interests to have a predetermined formula only for the sake of certainty.<sup>239</sup>

## 5 Conclusion and recommendations

Section 12(2) of the Constitution ensures that everyone, including children of all ages, have the right to self-determination in relation to bodily and psychological integrity.<sup>240</sup> It is clear that not all children are capable of making reasoned and informed decisions relating to their wellbeing.<sup>241</sup> The legislation relevant to the child's right to bodily and psychological integrity does not provide for any legal certainty with regards to the extent of the child's enjoyment of the right to self-determination in relation to his/her right to bodily and psychological integrity.<sup>242</sup>

For this reason it is suggested that the child's right to self-determination in relation to his/her bodily and psychological integrity should be analysed within a general theoretical framework in order to provide a certain legal standard.<sup>243</sup> The right to provision, protection, prevention and participation can be seen as categories of the rights that children enjoy.<sup>244</sup> A well-balanced theory of children's rights require that all the categories of children's rights should be balanced in a manner that protects the best interests of the child and recognise that children are bearers of constitutional rights.<sup>245</sup> Legislation that gives effect to children's right to bodily and psychological integrity should thus reflect the four categories of rights that comprise the theory of children's rights in order to ensure that children can enjoy the right to self-determination without jeopardising their best interests.

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<sup>237</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC) 24.

<sup>238</sup> *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) 18; *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC) 24.

<sup>239</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC) 24.

<sup>240</sup> See paragraph 1.

<sup>241</sup> See paragraph 1 and paragraph 2.

<sup>242</sup> See paragraph 1, paragraph 2 and paragraph 3.

<sup>243</sup> See paragraph 2.

<sup>244</sup> See paragraph 2.1, paragraph 2.2, paragraph 2.3 and paragraph 2.4.

<sup>245</sup> See paragraph 2.

The *CTP Act* provides for no minimum age at which a child can give consent to terminate her pregnancy.<sup>246</sup> The cornerstone of the *CTP Act* is the concept of 'informed consent' which is regarded as a limitation on the right to self-determination. The *CTP Act* makes no differentiation on the basis of age, is regarded as flexible and accommodates the individual position of a child.<sup>247</sup> The *Children's Act* determines that all children have the right to obtain condoms from the age of 12 years.<sup>248</sup> Children can also obtain contraceptives, other than condoms, from the age of 12 years after a medical examination has been performed on the child and proper medical advice given to the child.<sup>249</sup> The *Sterilisation Act* creates an irrebuttable presumption that every child under the age of 18 years is incompetent to make decisions about his/her sterilisation.<sup>250</sup> This Act ignores the possibility that there might be children younger than 18 years who are capable of giving informed consent.<sup>251</sup> Section 129 of the *Children's Act* creates an irrebuttable presumption that all children under the age of 12 are not capable of giving independent consent to medical treatment or surgery and a rebuttable presumption that all children between the ages of 12 and 18 are not capable of giving independent consent, which presumption can be rebutted in the instance where the individual child is of sufficient maturity and intellectual capacity to give consent.<sup>252</sup> Section 130(2) of the *Children's Act* creates the irrebuttable presumption that a child is capable of consenting independently to a HIV-test from the age of 12 years. It further creates a rebuttable presumption that children younger than 12 years are not capable of consenting independently to a HIV-test, which presumption can be rebutted if the child is of sufficient maturity to understand the benefits, risks and social implications of a HIV-test.<sup>253</sup> The *National Health Act* creates an irrebuttable presumption that all minors are incapable of consenting to the donation of tissue that is not replaceable by natural process.<sup>254</sup> It also creates, together with the *Human Tissue Act*, the irrebuttable presumption that all children younger than 16 are not capable of consenting to the donation of their own body or tissue after death. The

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<sup>246</sup> See paragraph 3.2.1.

<sup>247</sup> See paragraph 3.2.1.

<sup>248</sup> See paragraph 3.2.2.

<sup>249</sup> See paragraph 3.2.2.

<sup>250</sup> See paragraph 3.2.3.

<sup>251</sup> See paragraph 3.2.3.

<sup>252</sup> See paragraph 3.3.2.

<sup>253</sup> See paragraph 3.3.2.

<sup>254</sup> See paragraph 3.3.2.

*Human Tissue Act* creates the irrebuttable presumption that no child younger than 14 is competent to consent to the removal of naturally replaceable tissue or the withdrawal of blood.<sup>255</sup> These Acts do not provide for any individual circumstances or a case-by-case assessment of the individual child's abilities to give consent to the donation of tissue or their own bodies.

It is evident that there is no clear indication of how one should go about in order to determine the extent of a child's self-determination in relation to bodily and psychological integrity. The minimum age prescribed at which children can consent or participate in decisions relating to their wellbeing differs from one piece of legislation to the next. There is also legislation that does not provide for any minimum age, namely the *CTP Act*<sup>256</sup> and the *Children's Act* with regards to HIV-testing.<sup>257</sup> These Acts make use of the concept of 'informed consent' and 'sufficient maturity' in order to determine if an individual child should enjoy the right to exercise the right to self-determination.<sup>258</sup> In vast contrast with this, is the *Sterilisation Act*, which absolutely limits the child's right to exercise the right to self-determination in relation to decisions concerning reproduction.<sup>259</sup> It seems as if some legislation focuses on the child's right to participation and other legislation on the child's right to protection.<sup>260</sup> There is also throughout the legislation little reference to the right to provision and prevention.<sup>261</sup>

It is recommended that the legislation, relevant to the child's right to self-determination in relation to his/her bodily and psychological integrity, should be flexible and brought in line with one another in order to provide legal certainty. It cannot be denied that the nature of a decision to be made by a child will have an influence on the average minimum age at which a child will be considered to have the capacity to make decisions relating to his/her bodily and psychological integrity. It can further not be denied that every child should be regarded as an individual, whom will reach sufficient

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<sup>255</sup> See paragraph 3.3.2. This provision does not correlate with the Provisions of the *Children's Act* with regards to HIV- testing.

<sup>256</sup> See paragraph 3.2.1.

<sup>257</sup> See paragraph 3.3.2

<sup>258</sup> See paragraph 3.2.1 and paragraph 3.3.2.

<sup>259</sup> See paragraph 3.2.3.

<sup>260</sup> See paragraph 2 and paragraph 3.

<sup>261</sup> See paragraph 2 and paragraph 3.

maturity on his/her own time, in order to fulfil the requirement to give informed consent for a specific decision.

Furthermore the child's best interests should be regarded as paramount in all decisions affecting the child.<sup>262</sup> Thus the extent to which a child can exercise the right to self-determination in relation to bodily and psychological integrity should not jeopardise the child's right to have his/her best interests protected.<sup>263</sup> The concept of the best interests of the child is also not without difficulty and does not contribute to legal certainty.<sup>264</sup> The best interests-principle is applied as both a standard and an independent right.<sup>265</sup> One can thus say that every child has the right to have his/her best interests considered as a paramount standard, which standard should be flexible and applied on a case-by-case basis, whether it is in official proceedings or the day-to-day life of a child.<sup>266</sup>

Children as autonomous human beings should thus be entitled to enjoy the right to self-determination in relation to their bodily and psychological integrity in so far as the rights to provision, protection, prevention and participation are balanced in such a manner to ensure that the exercise of the right to self-determination does not jeopardise the best interests of the child.

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<sup>262</sup> See paragraph 1 and paragraph 4.

<sup>263</sup> See paragraph 1 and paragraph 4.

<sup>264</sup> See paragraph 4.

<sup>265</sup> See paragraph 4.1 and paragraph 4.2.

<sup>266</sup> See paragraph 4.2.

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