

**Evaluating the impact of child agency and autonomy on parental care and supervision in the context of socio-cultural practices with specific reference to African communitarianism**

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## **Abstract**

Since the enactment of the United Nations Convention on the Rights of the Child (UNCRC), child autonomy and agency has garnered more support and advocacy from the international law community. There has been support in favour of giving children a bigger voice and including them in the decision-making process when it comes to matters that concern the child. As a result, controversies ensue on whether the growing support of child autonomy and agency will negatively impact the roles that parents fulfil in the lives of their children. For example, parents are primarily responsible for the development and upbringing of the child. Consequently, if children were to have a louder voice than their parents, there is a possibility that the roles would be reversed, and the child would ultimately be responsible for their own development.

For this reason, parents are particularly concerned that the rights of care and supervision bestowed upon them by the law will be lost in favour of sole consideration for the interest of the child. This is contrary to the values of African communitarianism which encourages the interest of the community to prevail over any individual interest. As a result, when both rights are placed in situations that lead them to conflict with one another, neither the child's, the parent's or the community's interests are served. Two examples that showcase this predicament include children giving consent to their own medical treatment plan and the sexual rights of a child.

Therefore, the question remains whether the interest of the child should be achieved at the expense of the parent. This thesis demonstrates that, by highlighting the importance of both rights and appreciating their intertwined nature, there is no need for the rights of the child and the rights of the parent to compete with one another. Rather, a balance should be struck in order to accommodate the differing rights. By reconceptualising the notion of 'child autonomy and agency,' such balance can be struck.

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*“The steadfast love of the Lord never ceases; His mercies never come to an end; they are new every morning; great is your faithfulness”*

**Lamentations 3: 22-23**

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## Chapter One: Introduction

### 1.1 Background and problem statement

From the late nineteenth and early twentieth century, the children's rights movement pioneered the notion that children should have more autonomy and agency worthy of legal protection.<sup>1</sup> Before this time, children's views were held in what Paron describes as a 'virtual box.'<sup>2</sup> This meant that their opinions were listened to but kept in a separate process of representation.<sup>3</sup>

During the children's rights movement,<sup>4</sup> a distinction was drawn between protecting children and protecting children's rights.<sup>5</sup> Protecting children was recognised as the nurturance approach, which concerned the vulnerability and dependency of children.<sup>6</sup> Children were thus, simply given what was good for them by adults.<sup>7</sup> Protecting children's rights (the latter distinction) was the self-determination approach.<sup>8</sup> With this approach, children were given the right to determine what is good and befitting for themselves specifically, and the power to be able to vocalise those decisions.<sup>9</sup> This is important for children because as they grow older, they become less dependent on their parents and begin to take more responsibility for their actions.<sup>10</sup>

Despite the emergence of the self-determination approach, a number of scholars maintained that the nurturance approach was the better approach.<sup>11</sup> This is because, as the argument goes, the self-determination approach does not account for the physical and mental differences between children and adults.<sup>12</sup> As far as development, skills, knowledge, and

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<sup>1</sup> Hanneretha Kruger 'The Protection of Children's Right to Self-Determination in South African Law with Specific Reference to Medical Treatment and Operations' (2018) 21 *Potchefstroom Electronic Law Journal* at pg 4.

<sup>2</sup> Kristi Paron 'The Child's Autonomy in Decision-Making on Medical Treatment: Theoretical Considerations' (2020) 29 *Juridica International Law* at pg 124.

<sup>3</sup> *Ibid* at pg 125.

<sup>4</sup> According to Kruger, the beginning of the children's rights movement can be traced back to the middle of the nineteenth century, see Kruger op cit note 1 at pg 4.

<sup>5</sup> *Ibid*.

<sup>6</sup> *Ibid*.

<sup>7</sup> *Ibid*.

<sup>8</sup> *Ibid*.

<sup>9</sup> *Ibid*.

<sup>10</sup> *Ibid* at pg 5.

<sup>11</sup> *Ibid*.

<sup>12</sup> *Ibid*.

behaviour is concerned, the nurturance approach makes provision for this.<sup>13</sup> The nurturance approach acknowledges that the knowledge the child possesses does not and cannot equate to the knowledge of adults.<sup>14</sup>

Therefore, a unique interaction occurs between the nurturance approach and the self-determination approach when it comes to protecting children's rights.<sup>15</sup> It is unique because, during the children's rights movement, many of the rights given to children were nurturance rights,<sup>16</sup> and had no autonomous element.<sup>17</sup> This is because when the child is in the early stages of childhood, it is more important to receive nurturance rights than autonomy rights.<sup>18</sup> However, after the child grows up and becomes less dependent and more likely to take accountability for their own actions, autonomy rights become more meaningful.<sup>19</sup>

The problem, however, is that when children are given more autonomy and agency over their lives, there exists a possibility that this will do more harm than good. According to Kruger, the significance of limiting a child's capacity in respect of their rights is not to restrict the child, but to protect them from their immature judgments.<sup>20</sup> When the views and wishes of the child are contrary to the parent's responsibilities to safeguard the child's well-being, parental care and supervision will likely contravene the role of child autonomy and agency. This is because when there is an overlap between the rights of children and the broad responsibilities of parents, a potential conflict between children wanting to exercise their rights and parents seeking to exercise their responsibilities is inevitable.<sup>21</sup> This conflict may even occur in situations where the family role is threatened or challenged by modern-day views.<sup>22</sup>

If a careful balance is not struck, then there is a possibility that the exercise of parental rights and responsibilities will be severely impacted by the exercise of child rights. This issue is significant because of the respect of the rule of law which is the foundational basis of the

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<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> An example of a nurturance right is the right to protection.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid at pg 2.

<sup>21</sup> Mpumelelo Ennocent Ncube & Eleanor Ross 'Reproductive Health Issues emanating from the Children's Act No. 38 of 2005 as amended in 2008: A pilot study of the rights of parents versus rights of children' (2010) 3 *South African Journal of Bioethics and Law* at pg 68.

<sup>22</sup> Ibid.

Constitution.<sup>23</sup> The rule of law challenges legislation for any vagueness and uncertainty found in the law.<sup>24</sup> If the law has been unclear on the existence of a conflict between child autonomy and parental rights, and how to address this conflict, then a discussion of the above is necessary to avoid a lacuna in the law and bring clarity to the law.

## 1.2 Research question

Therefore, this thesis seeks to evaluate the existence of a conflict between an increase in rights and autonomy given to a child and the exercise of parental care and supervision.

In addressing this issue, this thesis will use the law to highlight the legal significance found in parental care and supervision, as well as child autonomy and agency. In considering, international, regional, and domestic law, this paper will be able to analyse why and how both parties' interests can conflict in certain situations. In situations where a conflict arises, this paper will consider whether the law makes provisions for the conflict and if not, what a possible solution would be. Further to this, this paper will also discuss the impact child autonomy rights will have in the African context. This is significant for a multicultural society such as South Africa where culture, tradition and religion are often celebrated.<sup>25</sup>

This thesis aims to highlight the reason why parental rights and responsibilities need to be accommodated when it comes to children's rights. This topic is important for several reasons. Firstly, child autonomy and agency have been getting more attention from the international community. Secondly, a lot of research attention has focused on child rights law without acknowledging the impact children's rights would have on parental rights. Lastly, I believe that it is important to also look at the impact that child autonomy and agency will have on African communitarianism. This will bring in a unique perspective that will analyse what some have argued to be a Western concept (child autonomy and agency), imposed on an African continent.

## 1.3 Proposed structure

Therefore, this paper will argue that parental care and supervision are rights and responsibilities owed by parents to their children and cannot simply be substituted for mere

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<sup>23</sup> Constitution of the Republic of South Africa, 1996 at s1(c).

<sup>24</sup> Pierre de Vos and Warren Freedman *South African Constitutional Law in Context* 2ed (2021) at pg 83.

<sup>25</sup> Mildred Bekink 'Child divorce: a break from parental responsibilities and rights due to the traditional socio-cultural practices and beliefs of the parents' (2012) 15 *Potchefstroom Electronic LJ* at pg 180.

advice as the child matures.<sup>26</sup> Instead, a balance must be struck between the rights of parents and children to give effect to the significance of both parties' interests.

To achieve this, Chapter One provides an introduction to the topic of the thesis and gives a brief overview and background of the autonomous rights of children and how they came about.<sup>27</sup> This chapter also discusses the importance of the research problem and what this research aims to achieve.

Chapter Two considers the demand placed upon children to be rights holders and autonomous beings.<sup>28</sup> This chapter will discuss the influence that international, regional, and domestic law has had on the children's rights discourse.

Subsequently, Chapter Three highlights the socio-legal development of parental roles and responsibilities toward children.<sup>29</sup> Particular attention will be paid to the role of a parent and the rights given to a parent to exercise care and supervision over their children. This will be drawn from a discussion of international, regional, and domestic law. Importantly, this chapter will also discuss the interaction between child autonomy and parental responsibilities in the context of African communitarianism.

Thereafter, Chapter Four provides a discussion of the interplay between child autonomy and parental rights and responsibilities.<sup>30</sup> This chapter will critically analyse two examples that highlight the conflict between these two rights, namely, child sexual rights and child consent to medical treatments for children.

Chapter Five considers how to balance these two competing rights.<sup>31</sup> To strike a balance, this chapter will consider the possibility of reconceptualising the notion of 'child autonomy and agency,' thereby, trying to understand 'child autonomy and agency' from the lens of being intertwined with parental rights and responsibility.

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<sup>26</sup> Ioana Padurariu 'Parental Authority between Law and Psychology' (2021) 28 *Scientia International Journal* at pg 13.

<sup>27</sup> Discussed on page 1.

<sup>28</sup> Discussed on page 6.

<sup>29</sup> Discussed on page 19.

<sup>30</sup> Discussed on page 33.

<sup>31</sup> Discussed on page 48.

Finally, Chapter Six provides concluding remarks, reflecting on all that was discussed in the thesis and what the proposed outcome of this thesis should be.<sup>32</sup>

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<sup>32</sup> Discussed on page 58.

## Chapter Two: Child autonomy and agency

From the beginning of the 16<sup>th</sup> to early 18<sup>th</sup> century, children were not viewed as persons or bearers of rights.<sup>33</sup> Children were considered to be property and valued for their contribution to family work and supporting their parents during their old age.<sup>34</sup> They were ignored and lacked individual identity, making them replaceable and substitutable.<sup>35</sup> However, over time, children came to be considered as a special class worthy of protection, education, and maintenance from their parents.<sup>36</sup>

During the 18<sup>th</sup> century, parents started viewing children differently.<sup>37</sup> Parents started changing their perception of their children as mere property to vulnerable and valuable property.<sup>38</sup> Children were then considered to be vulnerable to issues of immigration and urbanization, which were all issues that were currently threatening society.<sup>39</sup> This enacted ‘child-saving’ initiatives that prompted state, private and religious groups to intervene in family life.<sup>40</sup>

Thereafter, at the start of the 20<sup>th</sup> century, children were valued to be potential persons.<sup>41</sup> After the second half of the 20<sup>th</sup> century, momentum and support gathered to change a child’s status from being valued as property to persons bearing rights.<sup>42</sup> This momentum led to children being legally recognised as persons deserving of protection.<sup>43</sup> Therefore, children, after the second half of the 20<sup>th</sup> century, were not only acknowledged as persons but vulnerable persons.<sup>44</sup> This marked the beginning of children being acknowledged as ‘persons’ deserving of legal protection. Legal protection included, but was not limited to, granting children more autonomous rights.

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<sup>33</sup> Stuart N Hart ‘From property to person status: Historical perspective on children’s rights’ (1991) 46 *American Psychologist* at pg 53.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid* at pg 54.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

## 2.1 The legislative development of child autonomous rights

Granting children more autonomous rights, according to Hart, was necessary for the proper functioning of a democratic society.<sup>45</sup> According to Hart, a nation is a democratic society when all its citizens are involved in decisions that affect the nation.<sup>46</sup> As was discussed earlier, children are no longer considered property but full citizens. For this reason, Hart argues that in a nation aspiring to be democratic, children should be given increasing opportunities to participate.<sup>47</sup> This is so, particularly in those nations that are fully committed to being democratic.<sup>48</sup>

Hart defines participation as direct involvement in the decision-making that concerns oneself and the community the person lives in.<sup>49</sup> It is not simply being informed of the decisions that affect one's life but actively contributing to the decision-making process. Moyo adds further to Hart's definition and describes participation to mean that one has a voice (which he defines as having control of the process) and a choice on how to exercise the voice (which is having control over the outcome of the process).<sup>50</sup> Hart and Moyo's definition is the definition this thesis will adopt and use to analyse whether international, regional, and domestic law has given children more participatory, and accordingly, autonomous rights.

From participatory rights in legislation, children will be given a choice and freedom to exercise their choice the way they deem fit.<sup>51</sup> Thus, this paper argues that it is only when children are given this freedom that they can truly become autonomous. As Farson says,

Asking what is good for children is beside the point. We will grant children rights for the same reason we grant rights to adults, not because we are sure that children will then become better people, but for more ideological reasons because we believe that expanding freedom as a way of life is worthwhile in itself. And freedom, we have found, is a difficult burden for adults as well as for children.<sup>52</sup>

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<sup>45</sup> Roger Hart *Children's Participation: From Tokenism to Citizenship* (1992). Note: Autonomy can be defined as participatory rights given to children, see Ganya, Kling & Moodley op cit note 95 at pg 1.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid: Hart describes a democratic society as a society that is built on participation, a fundamental right of citizenship. The nation is democratic when its citizens are involved, especially at the community level.

<sup>49</sup> Ibid.

<sup>50</sup> Admark Moyo 'Child participation under South African law: beyond the convention on the rights of the child?' (2015) 31 *South African Journal on Human Rights* at pg173.

<sup>51</sup> Ibid at pg182.

<sup>52</sup> Farson *Birthrights* (1974) at pg307.

### 2.1.1 International law

#### *The Convention on the Rights of the Child (UNCRC) (1989):*

The United Nations Convention on the Rights of the Child (UNCRC),<sup>53</sup> is the leading international instrument of child rights.<sup>54</sup> Following South Africa's ratification of the UNCRC on the 16<sup>th</sup> of June 1995, South Africa became a legally bound signatory state of the convention.<sup>55</sup> One of the reasons for the adoption of the UNCRC was to create social and political changes in the way state parties perceive and treat children.<sup>56</sup> For this reason, since the adoption of the UNCRC, the intention of the Convention has been to treat children with a greater sense of agency by giving children a voice to speak and be heard.<sup>57</sup> Article 12 of the UNCRC authorises state parties to give children who are capable of forming their views, the right to express those views.<sup>58</sup> The purpose is to allow children to be fundamental players in decisions that affect them and to believe that their views are respected and taken into consideration in shaping the outcome of the decision-making process.<sup>59</sup> Accordingly, when children are given an opportunity to express their views, they are no longer acknowledged as passive actors but autonomous beings capable of agency.

Consequently, the UNCRC,<sup>60</sup> is the first Convention to declare a child to have agency over matters concerning the child.<sup>61</sup> The Convention takes an autonomous view of children's rights because it looks more to choice than the needs of the child.<sup>62</sup> What this means is that the Convention is leaning more towards rights that promote the interest and choices of children than rights that are only aimed at protecting children.<sup>63</sup> For this reason, the Convention takes a 'quantum leap' from the UN's 1959 Declaration's emphasis on the protection and personal

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<sup>53</sup> United Nations Convention on the Rights of the Child (UNCRC), 1990.

<sup>54</sup> Ursula Kilkelly & Ton Liefaard 'Legal implementation of the UNCRC: lessons to be learned from the constitutional experience of South Africa' 52 (2019) *De Jure LJ* at pg 521.

<sup>55</sup> *Ibid* at pg 526

<sup>56</sup> *Ibid* at pg 521.

<sup>57</sup> Kristi Paron 'The Child's Autonomy in Decision-Making on Medical Treatment: Theoretical Considerations' (2020) 29 *Juridica International Law* at pg 124.

<sup>58</sup> UNCRC *supra* note 53 at art12.

<sup>59</sup> Paron *supra* note 57.

<sup>60</sup> UNCRC *supra* note 53 at art12.

<sup>61</sup> Michael Freeman 'Whither Children: Protection, Participation, Autonomy' (1993) 22 *Manitoba LJ* at pg318.

<sup>62</sup> Bruce C Hafen & Jonathan O Hafen 'Abandoning Children to Their Autonomy' (1996) *Harvard International LJ* at pg451.

<sup>63</sup> *Ibid* at pg450.

development of children.<sup>64</sup> Instead, the Convention focuses more on children being given more autonomy and freedom from the control of adults.<sup>65</sup>

To give children more autonomy and freedom, the Convention advocates for children's voices to be heard in decisions concerning the child. For example, Article 12 places an obligation on state parties to afford children capable of forming their views, an opportunity to be heard and to have their views considered.<sup>66</sup> In addition to this, the views of the child must not only be considered but be given due weight.<sup>67</sup> Article 12 recognises children as full human beings capable of freely contributing and participating in society.<sup>68</sup> They participate by making their voices heard, especially in matters concerning themselves.

Moreover, Article 12 brings awareness to the fact that acknowledging children's agency in the form of participation rights is not simply a sign of good policymaking but a legally binding obligation.<sup>69</sup> This means that child autonomy and agency cannot be treated as a 'by the way' measure or beautiful jurisprudence. It is a law that state parties have ratified and must adhere to.

Child participation rights, like Article 12, confront images of children as vulnerable dependants in constant need of protection from adults.<sup>70</sup> Article 12 views children as individuals who are not only holders of rights but fully capable of exercising those rights.<sup>71</sup> Hence, it can be said that rights that give children a sense of agency in decision-making matters symbolise a separation between the child as a minor who still needs the guidance of their parents and the child as a participating individual whose voice should be taken seriously.<sup>72</sup>

Article 12 particularly avoids the use of age to limit the kinds of children that can express their views.<sup>73</sup> This is because no child is the same and some children form views at an early stage of their lives.<sup>74</sup> As such, children mature in different stages and through varying

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<sup>64</sup> Ibid at pg451.

<sup>65</sup> Ibid.

<sup>66</sup> UNCRC supra note 53 at art12.

<sup>67</sup> Ibid.

<sup>68</sup> Laura Lundy 'Voice' is not enough: conceptualising Article 12 of the United Nations Convention on the Rights of the Child' (2007) 33 *British Educational research journal* at pg928.

<sup>69</sup> Ibid at pg930.

<sup>70</sup> Moyo op cit note 50 at pg174.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid at pg175.

<sup>74</sup> Ibid.

degrees of autonomy before reaching the legal age of adulthood.<sup>75</sup> The absence of age allows all children, who are capable of expressing themselves, the opportunity and platform to share their views.<sup>76</sup>

Notably, however, in as much as the UNCRC is to be commended for its bold step in advocating for child autonomy by giving children more agency rights, there have been some critiques raised against the Convention and international law. Critics have argued that international law, like the Convention, only binds state parties and not families to promote child autonomous rights.<sup>77</sup> In addition, the UNCRC limits the circumstances whereby children can express their views on matters that affect them.<sup>78</sup> Article 12(2) of the UNCRC, limits the child to be heard only in ‘judicial and administrative proceedings.’<sup>79</sup> This raises the question of whether children would be granted agency in matters concerning them that are not heard in judicial or administrative proceedings. If we were to answer in the affirmative, then international law is lacking in its protection to promote autonomy and agency towards children in every sphere of the child’s life. This is because it is behind closed doors, for example within the family unit, that children need autonomy the most.

### 2.1.2 Regional law

#### *African Charter on the Rights and Welfare of the Child (ACRWC) (1990)*

Along with the UNCRC, the African Charter recognises children as autonomous beings deserving of protection.<sup>80</sup> The ACRWC considers children’s rights from a legal and cultural perspective.<sup>81</sup> The African Charter is no stranger to the controversy surrounding child autonomy and agency on the legal front. However, unlike the UNCRC, the African Charter’s legitimacy does not only come from ratification from member states but a genuine and collective belief in the child’s rights by the people and government.<sup>82</sup> Both the government and the people must believe in the advocacy of child autonomy and agency and believe that it is

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<sup>75</sup> Ibid at pg176.

<sup>76</sup> Ibid at pg175.

<sup>77</sup> Ibid at pg176.

<sup>78</sup> Ibid.

<sup>79</sup> UNCRC supra note 53 at art12(2).

<sup>80</sup> Danwood M Chirwa ‘The merits and demerits of the African Charter on the Rights and Welfare of the Child’ (2002) 10 *International Journal of Children’s Rights* at pg160.

<sup>81</sup> Amanda Lloyd ‘A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child’ (2002) 2 *African Human Rights LJ* at pg15.

<sup>82</sup> Ibid.

binding on them.<sup>83</sup> Government and the people need to come to a consensus in recognising that any neutrality of the law where children are concerned, is predominantly favourable law for adults to the detriment of children.<sup>84</sup> The law is neutral when at face value it appears that both children's and adults' interests are given equal weight, but in reality, the law only embraces the language and thought patterns of adults.<sup>85</sup> When the law is neutral, children are not necessarily protected but are left powerless under the law because they do not have a voice.<sup>86</sup>

The Charter rejects the neutrality of the law by giving children a voice in its drafting process.<sup>87</sup> Children were given a voice when they were invited to participate in the Charter's drafting process.<sup>88</sup> They sat in all the meetings with the ministers and offered numerous solutions.<sup>89</sup> Lloyd mentions that one of the solutions brought by children when drafting the Charter was for children to be represented in the Charter by their peers and not adults, allowing them to participate and be consulted with the government.<sup>90</sup> This allows for a child-centered Charter, designed and negotiated by adults but with child participation.

The perception of African children as autonomous beings in the Charter is important for several reasons. African children are not normally perceived as autonomous but as vulnerable and lacking in capacity when it comes to making decisions.<sup>91</sup> They deserve protection and guidance, usually from a group of male elders.<sup>92</sup> If they want to be heard, it would usually be through intermediaries like aunties, uncles, or grandparents.<sup>93</sup> This can be an issue because, if children are only heard through intermediaries, their needs may be lost in translation. There is also a perception that children are 'deficient' in their decision-making capabilities and as a result, their decisions should be made by an adult figure.<sup>94</sup>

Ganya, Kling and Moodley view the discourse on giving children individual autonomy as a Western liberal concept that does not consider the fact that African societies hold a

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<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

<sup>91</sup> Chirwa op cit note 80.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

communalistic notion of a person.<sup>95</sup> African societies are based on traditions of community and maintaining the continuity of relationships and interdependence shared by members of the community.<sup>96</sup> With this notion, children are not considered as a full person and hence, decisions concerning the child must be discussed and decided not by the child but by the community to which the child belongs.<sup>97</sup>

However, irrespective of the above, when it comes to the parent-child relationship and their community, there are circumstances where the community or group interests work as a hindrance to the child's needs.<sup>98</sup> For example, when the child's needs are subservient to the interest of the group, the child's needs would be side-lined to fulfil the family's or group's wishes.<sup>99</sup> The child's interest would be far less important than the group's interest.<sup>100</sup> Therefore, placing a child in the care of the community presents positive advantages and negative disadvantages, and giving children more autonomy may shed light on the disadvantages.<sup>101</sup>

The disadvantages, for example, are especially recognised in the life of the African girl child. Communitarianism has the potential to further side-line marginalised groups of the community, like the African girl child, who has historically been acknowledged as a disadvantaged and disempowered group in society.<sup>102</sup> Amongst other things, the African girl child usually does not have a say in the vocalisation of the group's interest, especially in cases like marriage.<sup>103</sup> In certain cases, the rights of the group may mask the inequalities experienced between the boy and girl child in customary law under the guise of communal good, in which women, including girl children, are often disadvantaged, and ignored because they do not participate in the discussion surrounding the interest of the group.<sup>104</sup>

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<sup>95</sup> Wandile Ganya, Sharon Kling & Keymanthri Moodley 'Autonomy of the child in the South African context: is a 12-year-old of sufficient maturity to consent to medical treatment?' (2016) 17 *Open Access* at pg 1.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

<sup>98</sup> Chuma Himonga 'African customary law and children's rights: intersections and domains in a new era' in *Children's rights in Africa* Routledge(2016) at pg 79.

<sup>99</sup> Ibid.

<sup>100</sup> Admark Moyo 'Reconceptualising the 'paramountcy principle': beyond the individualistic construction of the best interests of the child' (2012) 12 *African Human Rights Law Journal* at pg151.

<sup>101</sup> Himonga op cit note 98.

<sup>102</sup> Moyo op cit note 100 at pg155.

<sup>103</sup> Himonga op cit note 98 at pg 80.

<sup>104</sup> Ibid.

This makes child participation rights and privacy rights for children a much-welcomed law.<sup>105</sup> The recognition of child rights in most instances cannot be effectively achieved without giving children a platform to realise these rights. Article 4(2) of the Charter,<sup>106</sup> like Article 12 of the CRC,<sup>107</sup> provides for children to have the opportunity to have their views heard and be given due consideration.

Yet, like the UNCRC, the Charter also has shortcomings when it comes to recognising children as autonomous beings. According to Chirwa, Article 4(2) of the Charter is defined narrowly because it only allows children who are capable of communicating their views to be heard.<sup>108</sup> Children who can form an opinion but lack the ability to communicate their opinion may not be afforded the opportunity to be heard.<sup>109</sup> In this respect, the UNCRC is better in that it merely requires the child to be able to form an opinion.<sup>110</sup> This is a lower threshold than the Charter. Chirwa also notes that Article 4(2) only allows children to be heard as a ‘party to the proceedings.’<sup>111</sup> A child would officially have to be acknowledged as a party to the proceedings before his or her case may be heard.<sup>112</sup> Again, this points to the limitation of the CRC and the Charter to only restrict the opportunity to be heard to judicial and administrative proceedings.<sup>113</sup> Instances of informal gatherings,<sup>114</sup> would preclude a child from being given the opportunity to exercise their agency.<sup>115</sup>

Moreover, due weight must be given to the views of the child in circumstances where the child’s opinion is in ‘accordance with the provisions of appropriate law.’<sup>116</sup> However, in the UNCRC, the child only needs to be ‘of sufficient age and maturity’ before their opinion can be considered.<sup>117</sup> What constitutes ‘of sufficient age and maturity’ has yet to be determined by the Convention. Notably, also, Article 4(2) of the Charter is not the only provision that has limitations to a child’s autonomous rights. Other limitations in the Charter include Articles 7, 8 and 10. Article 7 of the Charter creates the right for children to express themselves as long

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<sup>105</sup> Chirwa op cit note 80.

<sup>106</sup> African Charter on the Rights and Welfare of the Child (ACRWC), 1990 at article 4(2).

<sup>107</sup> UNCRC supra note 53 at art12(2).

<sup>108</sup> Chirwa ‘op cit note 80 at pg161.

<sup>109</sup> Ibid.

<sup>110</sup> Ibid.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

<sup>114</sup> This is referring to instances where the child’s opinion may be helpful but not crucial.

<sup>115</sup> Chirwa op cit note 80 at pg161.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

as it is subject to restrictions that are prescribed by laws.<sup>118</sup> Article 8 allows freedom of association as long as it conforms with the law.<sup>119</sup> Article 10, provides for the privacy of children as long as parents or the child's legal guardian also has the right to supervision over the conduct of the children.<sup>120</sup>

Therefore, it can be acknowledged that both international and regional law affords children the chance to obtain all these autonomous rights as long as the rights are subject to the restrictions imposed by law.

### 2.1.3 Domestic law

#### *Children's Act 38 of 2005:*

In addition to international and regional law, support for child autonomy can also be found in South Africa's domestic legislation. The Children's Act has created a space for self-determination and agency.<sup>121</sup> This is particularly important because, as has been stated above, international children's rights instruments do not directly provide for autonomy but instead allow the exercise of autonomous rights subject to parental supervision and control.<sup>122</sup>

For this reason, the Children's Act,<sup>123</sup> is the preferred legislation to ensure the exercise of child autonomy and agency. Arguably, the Children's Act allows for a greater exercise of autonomy for children compared to those under international legal instruments. It confers on children more responsibilities and freedom for personal choices than international law allows.<sup>124</sup> Two examples support this. Firstly, virginity testing for a child older than the age of 16, may only be performed if the child gives consent to the process, and has received proper counselling to understand the nature and risk of the testing.<sup>125</sup> The result of the test may not be disclosed to the parent or legal guardian without the child's consent.<sup>126</sup> Secondly, circumcision for young boys over the age of 16 is not permitted unless the boy has given his consent.<sup>127</sup>

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<sup>118</sup> ACRWC supra note 106 at art 7.

<sup>119</sup> Ibid at art 8.

<sup>120</sup> ACRWC supra not 106 at art 10.

<sup>121</sup> Moyo op cit note 50 at pg180.

<sup>122</sup> Ibid.

<sup>123</sup> Children's Act 38 of 2005.

<sup>124</sup> Moyo 'op cit note 50 at pg181.

<sup>125</sup> Ibid at pg182.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid.

Furthermore, young boys have the right to refuse circumcision, with or without the support of their parents.<sup>128</sup>

In her article, ‘Children, Autonomy and Statements: The Need For A Bright-Line Rule,’ Lutchman provides further examples from South African law that demonstrate the intentionality of South Africa to provide children with a greater sense of autonomy in decisions that affect them.<sup>129</sup> Section 129(2) of the Children’s Act permits a child of 12 years or older, to consent to medical treatment without parental consent.<sup>130</sup> Section 129(3) of the Children’s Act requires parental consent, along with the child’s consent for any surgical operation performed on the child.<sup>131</sup> Moreover, with sections 1, 5(2) and 5(3) of the Choice on Termination of Pregnancy Act, a woman of any age can consent to an abortion without consent from her parents.<sup>132</sup> Children over 12 years old may also not be refused the sale of condoms according to section 134(1) of the Children’s Act.<sup>133</sup> Section 134(2) allows children, who have been given medical advice, to receive contraceptives without their parent’s permission.<sup>134</sup>

Moyo describes the Children’s Act approach to autonomy as a ‘presumption of competence for the young.’<sup>135</sup> This means that parental rights and responsibility usually fall away once the child reaches a certain age, which is generally 12 years old.<sup>136</sup> Once the child reaches a certain age, there is a presumption that the child has reached the age wherein he or she has the capacity to make their own choices.<sup>137</sup> Consequently, the Children’s Act enables children who have the capacity and maturity, to exercise a wide degree of decisional autonomy, in certain situations that affect them.<sup>138</sup> Therefore, one can conclude that the Children’s Act attaches a great degree of importance to the decisions of children when it comes to matters that affect them.<sup>139</sup>

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<sup>128</sup> Ibid.

<sup>129</sup> Salona Lutchman ‘Children, autonomy and statements: The need for a bright-line rule’ (2021) 138 *SALJ*.

<sup>130</sup> Children’s Act supra note 123 at s129(2).

<sup>131</sup> Ibid at s129(3).

<sup>132</sup> Choice on Termination of Pregnancy Act 92 of 1996.

<sup>133</sup> Children’s Act supra note 123 at s134(1).

<sup>134</sup> Ibid at s134(2).

<sup>135</sup> Moyo op cit note 50 at pg182.

<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

<sup>139</sup> Ibid at pg184.

Other than the Children's Act, the Wills Act,<sup>140</sup> and South African case law, has also been in favour of giving children more autonomy and agency. Section 1 of the Wills Act,<sup>141</sup> permits a child of 14 years to be a witness to the signing of a testament.<sup>142</sup> A child aged 16 years or older is permitted by law to draft their own will without the assistance of their parents.<sup>143</sup> The 1952 former Appellate Division case of *Edelstein*,<sup>144</sup> ruled that a child of any age can enter into a contract where they only acquire rights and not obligations, without any assistance from their parents or legal guardians.<sup>145</sup> In the 2021 Gauteng High Court case of *S v LM*,<sup>146</sup> child use and possession of cannabis have been decriminalised, pending confirmation from the Constitutional Court.<sup>147</sup>

Moreover, in the case of *MEC for Education, KwaZulu Natal v Pillay* (herein referred to as 'Pillay'),<sup>148</sup> the court recognised children's rights to autonomy, especially when it came to the case of adolescent children.<sup>149</sup> In the case of *Pillay*, the court held that by wearing a nose stud, the 16-year-old girl was expressing her right to religion.<sup>150</sup> It was subsequently held by the court that there is a need for adolescent voices to be heard because such children are at an age where they should be increasingly taking responsibility for their beliefs and actions.<sup>151</sup> In the case of *Milnerton*, the court granted a 16-year-old girl's request not to be sent to boarding school but to reside with her host family.<sup>152</sup> According to Bekink, the court's acceptance of this request suggested that they found the girl to be of sufficient intellectual, emotional, and psychological maturity.<sup>153</sup>

The examples provided above illustrate that the acquisition of rights that give children more autonomy and agency is not only encouraged but protected by South African law. As Sloth-Nielson points out, 'South African children's rights jurisprudence is arguably the most far-reaching currently in the world by having expanded the locus of its application beyond

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<sup>140</sup> Wills Act 7 of 1953.

<sup>141</sup> Ibid.

<sup>142</sup> Ibid at s1.

<sup>143</sup> Ibid at s4.

<sup>144</sup> *Edelstein v Edelstein* NO 1952 (3) SA 1 (A).

<sup>145</sup> Lutchman op cit note 129 at pg505.

<sup>146</sup> *S v LM & others* 2021 (1) SA 285 (GJ).

<sup>147</sup> Lutchman op cit note 129 at pg505.

<sup>148</sup> *MEC for Education, KwaZulu Natal v Pillay* 2008 1 SA 474 (CC).

<sup>149</sup> Bekink op cit note 25 at pg 185.

<sup>150</sup> Ibid.

<sup>151</sup> *MEC for Education, KwaZulu Natal* supra note 148 at para56.

<sup>152</sup> Bekink op cit note 25 at pg 186.

<sup>153</sup> Ibid.

the family law terrain.’<sup>154</sup> In advocating for greater recognition of children’s autonomy, many scholars are arguing that they are not asking for anything unusual but only for a rights-based claim already within the current legal framework.<sup>155</sup> This is ensuring that child participation is not simply ‘tokenistic’ as provided for by international law.<sup>156</sup> Rather a child’s participation and autonomy are acknowledged, not as an act of philanthropy on the part of adults, but as a real legal obligation that must be fulfilled.<sup>157</sup>

To this end, with the increase in international and domestic law advocating for children to present their opinions regarding matters affecting them, there has been a rise in providing children with real autonomy and agency.<sup>158</sup> Real autonomy and agency can be acknowledged as a self-determination approach to give children the power to decide what is good for them specifically and the power to be able to vocalise their decision.<sup>159</sup> This is important for children because as they grow older, they become less dependent on their parents and begin to take responsibility for their actions.<sup>160</sup> This is a trait that should be recognised and encouraged in children.<sup>161</sup>

Therefore, rights are important and should not be limited to individuals because of their age or apparent vulnerability.<sup>162</sup> The rights acquired by children must allow children to have a voice over decisions that concern them. Children with the requisite capacity and maturity deserve to be given the opportunity to express their views and have their views considered.<sup>163</sup> To act in the best interest of the child is to put the child at the forefront of all matters that affect the child. It should not be left to the parent and the government to determine what is best for the child. Children, along with parents and the government, should work together to meet the needs of the child.

Owing to this, chapter three shows that child autonomy and agency is a growing area of legal discourse that has been championed by international law. Even domestic law has

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<sup>154</sup> Julia Sloth-Nielsen, ‘Children’s Rights Jurisprudence in South Africa –a 20 Year Retrospective’ (2019) 52 *De Jure* at pg511.

<sup>155</sup> Lutchman op cit note 129 at pg505.

<sup>156</sup> Ibid at pg504.

<sup>157</sup> Ibid.

<sup>158</sup> Kruger op cit note 1 at pg 3.

<sup>159</sup> Ibid at pg 4.

<sup>160</sup> Ibid at pg 5.

<sup>161</sup> Ibid.

<sup>162</sup> Freeman op cit note 61 at pg307.

<sup>163</sup> UNCRC supra note 53 at art12.

supported this move and has offered greater autonomous protection to children than international or regional law. For example, the Constitution and the Children's Act have each played a contributory role in advancing child rights in South Africa. So much so that the advancement of autonomy and agency in child rights law might have a direct impact on the exercise of parental rights and responsibilities in the parent-child relationship. If this occurs then both the law on child rights and parental rights and responsibilities will have placed the interest of both parties on an equal level and created a situation in which conflict between these two rights is possible.

### Chapter Three: Parental rights and responsibilities

There are different terms that describe the parent-child relationship. It is a unique, simple yet complicated relationship that considers the interest of at least two parties, the parent, and the child.<sup>164</sup> The parent-child relationship begins from the birth of the child and is ongoing as the child matures.<sup>165</sup> Once the child matures and turns 18, there is a difference in the parent-child relationship because the responsibility and rights normally associated with the parent (Section 18 of the Children's Act,<sup>166</sup>) inevitably shift to the child, who is now, according to law, an adult.<sup>167</sup>

In light of the above, this chapter will consider the socio-legal development of parental rights and responsibilities. This is to foster an appreciation and understanding of the background and importance of recognising the rights and responsibilities parents have to exercise in the lives of their children. In doing so, this chapter will address how the fulfilment of parental rights and responsibilities in the lives of children would be directly impacted by the present social discourse, which is to give children more autonomy and agency.

#### 3.1 The historical development of parental rights and responsibilities

In South Africa, the development of parental rights and responsibilities occurred in two phases during two distinct eras in the country's history.<sup>168</sup> The first phase occurred before 1994 when the National Party was in power, and the second phase occurred after 1994 when South Africa became a democratic state.<sup>169</sup> During the first phase, parental rights and responsibilities were regulated under the common law as well as under statutes such as the Divorce Act of 1979,<sup>170</sup> the Child Care Act of 1983,<sup>171</sup> and the Guardianship Act of 1993.<sup>172</sup> Parents had the power to exercise authority over their children,<sup>173</sup> and this kind of authority created a hierarchical parent-child relationship.<sup>174</sup> With this kind of parent-child relationship, children

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<sup>164</sup> William S. Aquilino 'From Adolescent to Young Adult: A Prospective Study of Parent-Child Relations during the Transition to Adulthood' (1997) 59 *Journal of Marriage and Family* at pg 670.

<sup>165</sup> Ibid at pg 671.

<sup>166</sup> Children's Act supra note 123.

<sup>167</sup> The Child Act defines anyone that is 18 years and older, as an adult. See S1 of the Children's Act supra note 123.

<sup>168</sup> Bekink op cit note 25.

<sup>169</sup> Ibid.

<sup>170</sup> Divorce Act 70 of 1979.

<sup>171</sup> Child Care Act 75 of 1983.

<sup>172</sup> Guardianship Act 192 of 1993.

<sup>173</sup> This is known as parental power and authority.

<sup>174</sup> Bekink op cit note 25 at pg 181.

simply had to respect the authority of their parents.<sup>175</sup> This led to the interests, thoughts and opinions of children carrying little to no weight in the decision-making process.

One of the reasons for such a hierarchical and authoritarian approach<sup>176</sup> was to protect children from making decisions that bore consequences they were not equipped to handle.<sup>177</sup> This is because, unlike children, there was a common acceptance that parents knew what was best for their children and because of this, were capable of making decisions on behalf of their children.<sup>178</sup> Thus, the common law allowed parents to have complete control over their children to command obedience and discipline them as they saw fit.<sup>179</sup>

However, like most laws, parental power and authority were not unfettered but subject to limitations. The High Court acted as an upper guardian that would intervene in matters involving the parent-child relationship.<sup>180</sup> The High Court would exercise this power sparingly to not interfere with the family dynamic.<sup>181</sup> This is because the Court wanted to protect the family dynamic and the sanctity of parental power and authority.<sup>182</sup> To do this, the Court would only intervene when required to do so, by first determining whether good cause has been shown.<sup>183</sup> Hence, when a litigant would approach the court to intervene in a matter that pertained to the nature of the relationship between a parent and a child, they would have to show that the child's life, health, and morals were in danger as a result of the parent's actions.<sup>184</sup> This is because, unless the child's life was in danger, the Courts had to respect the importance of family life and afford parents the room they needed to train their children and make decisions on their behalf.<sup>185</sup>

This is evident in the Eastern Cape High Court judgment of *S v L*.<sup>186</sup> In this case, although the court acknowledged its right to intervene in matters concerning the authority parents exercised over their children, they nevertheless emphasised that the interference was

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<sup>175</sup> Ibid.

<sup>176</sup> Which is of particular interest in this paper.

<sup>177</sup> Bekink op cit note 25 at pg 181.

<sup>178</sup> Ibid.

<sup>179</sup> Ibid.

<sup>180</sup> Ibid at pg 182.

<sup>181</sup> Ibid.

<sup>182</sup> Ibid.

<sup>183</sup> Ibid.

<sup>184</sup> Ibid.

<sup>185</sup> Ibid.

<sup>186</sup> *S v L* 1992 (3) SA 713 (E) at para 721E-J.

not a free-for-all, but only needed when the exception permitted such intrusion.<sup>187</sup> The Court thus held that it would not intervene in a matter disrupting family life, and a parent's decision over their children, simply because the court disapproved or had opposing views on the decisions made.<sup>188</sup> Therefore, it can be argued that before 1994, the common law and statutes granted a wide mandate for parents to exercise authority and power over their children with little to no external intervention.

However, after the enactment of the Constitution,<sup>189</sup> the legal mandate given to parents enabling them to exercise authority and power over their children was soon revisited.<sup>190</sup> After the enactment of the Interim and then Final Constitution, South Africa introduced a comprehensive list of rights set out in Chapter Two of the Constitution.<sup>191</sup> The Bill of Rights placed an obligation on the state and parents to ensure the promotion, protection, and realisation of children's rights in South Africa.<sup>192</sup>

### 3.2 The legislative development of parental rights and responsibilities in South Africa

With the introduction of the Bill of Rights and further statutes, parental power and authority changed to parental rights and responsibilities. This is because the latter term denoted presumed power and a sense of ownership over children.<sup>193</sup> It was thus outdated and ill-suited to be used and understood in light of children's evolving capabilities to have agency and autonomy.<sup>194</sup> Parenthood was concerned more with rights and responsibilities than the possession of power.<sup>195</sup> For example, section 18(2) of the Children's Act listed four main rights and responsibilities for parents to exercise in the lives of their children.<sup>196</sup> From the four rights and responsibilities listed under section 18(2), this paper will only discuss two out of the four listed.<sup>197</sup>

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<sup>187</sup> Ibid.

<sup>188</sup> Ibid.

<sup>189</sup> Constitution supra note 23.

<sup>190</sup> Bekink op cit note 25 at pg 182.

<sup>191</sup> Ibid at pg 183.

<sup>192</sup> Ibid.

<sup>193</sup> Padurariu op cit note 26.

<sup>194</sup> Ibid.

<sup>195</sup> Brigitte Clark 'From rights to responsibilities? An overview of recent developments relating to the parent/child relationship in South African common law' (2002) 35 *Comparative and International Law Journal of Southern Africa* at pg 218.

<sup>196</sup> Children's Act supra note 123 at s18(2).

<sup>197</sup> This is because this paper is only concerned with the right to parental care and parental supervision.

### 3.2.1 Parental supervision

Firstly, section 18(2)(c) provides a parent with the responsibility to act as a guardian over their child.<sup>198</sup> Section 18(3) expands on section 18(2)(c) and lists the various obligations expected of a parent who would act as a guardian,<sup>199</sup> namely, to protect the child's property, assist or represent the child in administrative, contractual, or legal matters, and give or refuse consent in certain important matters concerning the child.<sup>200</sup> Accordingly, it can be acknowledged that section 18(3) allows the parent to assume a protective role over the child and confirms the legislature's confidence in the parent to do what is best for the child.

Although parental supervision is not a right and responsibility expressly defined in law, the characteristics of the right to act as a guardian of the child in section 18(3) of the Children's Act are arguably similar to the supervision of the child. This is because the parent would be responsible for safeguarding the property of the child, assisting the child in important matters the child may not have the requisite knowledge or maturity to understand, and consenting to important decisions affecting the child.<sup>201</sup> Hence, acting as a guardian is comparable to supervising the child and making important decisions on behalf of the child.

### 3.2.2 Parental care

Secondly, section 18(2)(a) empowers a parent to exercise their full parental rights and responsibilities by providing care for their children.<sup>202</sup> The Act does not stipulate the period or age limitation wherein care must be provided to the child. From the wording of the Act, one can assume that parents must provide care to their children for as long as they fall under the definition of being a 'child'. Section 1 of the Children's Act defines 'child' as any person who falls under the age of 18 years.<sup>203</sup> Moreover, section 1 of the Children's Act creates a broad definition of the parental responsibility of 'care.'<sup>204</sup> Hence, there is a change in terminology from parental power and autonomy, which in certain cases can be confused with control, to

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<sup>198</sup> Children's Act supra note 123 at s18(2)(c).

<sup>199</sup> Ibid at s18(3).

<sup>200</sup> Ibid.

<sup>201</sup> Constitution supra note 23 at s18(3).

<sup>202</sup> Children's Act supra note 123 at s18(2)(a).

<sup>203</sup> Ibid at s1.

<sup>204</sup> Ibid.

parental rights and responsibilities for children.<sup>205</sup> This shift in terminology recognises the parent's duty to provide care for the child and the child's right to receive care from their parents.<sup>206</sup>

Care is defined in section 1 of the Children's Act as safeguarding and promoting the well-being of the child.<sup>207</sup> The Act recognises that childhood is based on the notion that the upbringing of a child should ideally be in a family environment where care, love and understanding are prevalent.<sup>208</sup> The South African Law Commission expands on the definition of care and states that such responsibility includes parents providing an appropriate place of residence and living conditions suitable for the child's health, welfare, and development.<sup>209</sup> This is needed to ensure that the well-being is protected and promoted.<sup>210</sup> In addition to safeguarding and promoting the well-being of the child, parental responsibilities entail protecting the child's educational, religious, and cultural upbringing.<sup>211</sup>

Further to this, section 28 of the Constitution provides for the right to parental care.<sup>212</sup> The purpose of section 28(1)(b) of the Constitution is to protect the parent-child relationship in a home.<sup>213</sup> In the Constitutional Court case of *MS v M*, Justice Sachs expanded on the purposes of section 28(1)(b) and held that the responsibility of parents is not limited to caring for and providing for the daily needs of their children.<sup>214</sup> Justice Sachs held that parents have a responsibility to advise their children on how to overcome challenges and make difficult decisions for which they can and will be held accountable.<sup>215</sup> Thus, parental care in section 28(1) requires that a certain kind of care be provided to the child.<sup>216</sup>

In addition to the Constitution and the Children's Act, African Customary Law (ACL) also fulfilled a fundamental role in the development of parental rights and responsibilities.

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<sup>205</sup> CJ Davel & AM Skelton 'Commentary on the Children's Act/Chapter 1 interpretations, objects, application, and implementation of the Children's Act' (2018) *JUTA* at pg 34. Note: This 'change in terminology' will be dealt with extensively in Chap 3.

<sup>206</sup> *Ibid.*

<sup>207</sup> Children's Act supra note 123 at s1.

<sup>208</sup> Rushiella Songca 'Evaluation of children's rights in South African law: the dawn of an emerging approach to children's rights?' (2011) 44 *Comparative and International Law Journal of Southern Africa* at pg 344.

<sup>209</sup> Ennocent Ncube & Eleanor Ross op cit note 21.

<sup>210</sup> *Ibid.*

<sup>211</sup> *Ibid.*

<sup>212</sup> Constitution supra note 23 at s28.

<sup>213</sup> Bekink op cit note 25 at pg 186.

<sup>214</sup> *MS v M* 2008 (3) SA 232 (CC) at para 134.

<sup>215</sup> *Ibid.*

<sup>216</sup> Bekink op cit note 25 at pg 188.

African Customary Law (ACL) extended the right to parental care to include the support of the role the extended family would exercise in the child's life.<sup>217</sup> Oftentimes children tend to look to their relatives as opposed to their parents for the responsibility of parental care and support.<sup>218</sup> This is because oftentimes African communities' families are close-knit, as many members of the community still live near one another due to poverty.<sup>219</sup> The lack of a proper state social security systems and the negative impact of HIV and AIDS on the lives of young families has resulted in children being raised by their extended family members.<sup>220</sup> Moreover, the normative values and principles that members of the African community abide by, include collective solidarity and communal good.<sup>221</sup>

As a result of collective solidarity, members of the community commit to one another to partake in the pains and successes of the community and to look out for one another.<sup>222</sup> This is achieved by an acceptance amongst members of the community that there is a communal standard of behaviour each member has to subscribe to.<sup>223</sup> For example, if a child is being abused by their parents, members of the community will intervene on behalf of the child.<sup>224</sup> Intervention by community members may result in the local police officials getting involved or the removal of the child from the care of his or her parents by the community.<sup>225</sup> The child may then be placed in the care of a relative or a close family friend.<sup>226</sup> Consequently, under ACL and regarding the typical African practice, parental rights and responsibilities are undertaken not only by the parents but by any person in the community with whom the child has developed a significant relationship.<sup>227</sup>

Therefore, by emphasising the responsibility (and not authority) that parents and the community have towards children, it can be acknowledged that both parents and the community are now in a better position to act in the best interest of the child.<sup>228</sup> What would constitute the best interest of the child is a broad concept and there is no universal definition

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<sup>217</sup> Himonga op cit note 98 at pg 79.

<sup>218</sup> Ibid.

<sup>219</sup> Ibid.

<sup>220</sup> Ibid.

<sup>221</sup> Songca op cit note 208 pg352.

<sup>222</sup> Ibid.

<sup>223</sup> Ibid.

<sup>224</sup> Ibid.

<sup>225</sup> Ibid.

<sup>226</sup> Ibid.

<sup>227</sup> Ibid.

<sup>228</sup> Ibid at pg 346.

that best describes this principle.<sup>229</sup> The definition of the ‘best interest of the child’ varies and is culturally specific, meaning that there is a need to have an understanding of this principle in the local context.<sup>230</sup> The ‘best interest of the child’ principle is essentially a legal norm used to decide many issues that concern the welfare of the child.<sup>231</sup> The principle is at the centre of international child rights law,<sup>232</sup> and has been incorporated into South African domestic law.<sup>233</sup>

Indeed, a discussion of the legislative development of parental rights and responsibilities would not be complete without giving due consideration to the regional and international law standards.<sup>234</sup> As section 39(1) of the Constitution provides, when interpreting any rights set out in the Bill of Rights (for example, parental rights set out in section 28(1)(b)), international law must be considered.<sup>235</sup>

### 3.2.3 The influence of international and regional law

#### a. International law:

The importance of international law is therefore a mandatory consideration that has been entrenched in the new Constitutional era and one that gives context to the importance and development of parental rights and responsibilities.<sup>236</sup>

For example, the Universal Declaration of Human Rights (UDHR) has been recognised as a milestone treaty that addresses the history of human rights.<sup>237</sup> It was drafted by representatives from different cultures and backgrounds across the world. The Declaration was proclaimed by the UN General Assembly on the 10<sup>th</sup> of December 1948.<sup>238</sup> The treaty also sets

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<sup>229</sup> Obed Adonteng-Kissi ‘Exploring the Tension between the Rights of the Child and Parental Rights: Voices from Ghana’ in Trudy Corrigan (ed) *Human Rights in the Contemporary World* (2021) at pg1.

<sup>230</sup> Ibid at pg2.

<sup>231</sup> Ibid at pg2. Note, the ‘best interest of the child’ principle will be discussed in Chap 5.

<sup>232</sup> UNCRC supra note 53 at article 3(1): “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

<sup>233</sup> Children’s Act supra note 123 at s2(b)(iv): “The object of this Act are that the best interests of the child are of paramount importance in every matter concerning the child.”

<sup>234</sup> Bekink op cit note 25 at pg 198.

<sup>235</sup> Constitution supra note 23.

<sup>236</sup> Bekink op cit note 25 at pg 198.

<sup>237</sup> UN ‘Universal Declaration of Human Rights’ available at <https://www.un.org/en/about-us/universal-declaration-of-human-rights>, accessed on 03 February 2023.

<sup>238</sup> Ibid. Note also: Although South Africa did not ratify the treaty, this paper still considers this treaty as important law because South Africa is a member of the UN (the body that proclaimed the treaty), see ‘Claiming Human Rights’ op cit note 268.

out fundamental universal human rights deserving of protection.<sup>239</sup> Furthermore, the UDHR has been said to pave the way for the adoption of many other treaties that South Africa has ratified.<sup>240</sup> Hence, the UDHR is applicable to South African law in that it is persuasive. This means that it does not have any legal authoritative force behind it.<sup>241</sup> Rather, the purpose of this law is that as soft law (known as non-binding law), it creates an important framework for discourse that can alter the legal framework in the future.<sup>242</sup>

Although the UDHR does not explicitly deal with parental rights and responsibilities, it does touch on the importance of the family unit and the protection needed to preserve this social unit. This is acknowledged in Article 16 of the UDHR which recognises the family as an important unit of society deserving of protection from the state and society.<sup>243</sup> Article 12 prohibits arbitrary interference in the family and its home.<sup>244</sup> This is why parental rights and responsibilities cannot become second tier to child agency and autonomy, because the minute the child's view becomes contrary to that of the parents, there is already an interference of the family unit that some may argue, could be arbitrary; arbitrary in the sense that the interference may go against certain provisions (for example Article 29(3) in the UDHR).<sup>245</sup>

In addition to the UDHR, the International Covenant on Economic, Social and Cultural Rights (ICESCR) is an international human rights treaty that came into force on 3 January 1976.<sup>246</sup> The Covenant offers a wide range of protection for economic, social, and cultural rights.<sup>247</sup> It forms the basis of international human rights law and has been ratified by 169 signatory states.<sup>248</sup> Similar to the UDHR, the ICESCR emphasises the family unit as a fundamental aspect of society that is worthy of state protection and non-interference.<sup>249</sup> Article 10 states that the family should be accorded the 'widest possible protection and assistance.'<sup>250</sup>

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<sup>239</sup> UN 'Universal Declaration of Human Rights' op cit note 237.

<sup>240</sup> Ibid.

<sup>241</sup> Salona Lutchman 'A contradiction in terms? The promotion of adolescent sexual rights and the prevention of sexual violence' (2020) 63 *Acta Juridica* at pg74.

<sup>242</sup> Kal Raustiala & Anne-Marie Slaughter 'International Law, International Relations and Compliance' (2002) *International Relations and Compliance. Princeton Law & Public Affairs Paper* at pg552.

<sup>243</sup> Universal Declaration of Human Rights, 1948 at art 16.

<sup>244</sup> Ibid at art 12.

<sup>245</sup> Ibid at art 29(3).

<sup>246</sup> SPII 'Summary of recommendations for South Africa from the United Nations Committee on Economic, Social and Cultural Rights' available at <https://spii.org.za/summary-of-recommendations-for-south-africa-from-the-united-nations-committee-on-economic-social-and-cultural-rights>, accessed on 03 February 2023.

<sup>247</sup> Ibid.

<sup>248</sup> Note: South Africa has ratified and is therefore bound by the Covenant, since the 12<sup>th</sup> of January 2015, see *ibid*.

<sup>249</sup> International Covenant on Economic, Social and Cultural Rights, 1967 at article 10.

<sup>250</sup> *Ibid*.

This is because the family unit has the primary right and responsibility to provide for the care of dependent children.<sup>251</sup>

Furthermore, the UNCRC,<sup>252</sup> is considered and is arguably the best piece of international legislation available in child rights law.<sup>253</sup> The treaty covers a broad range of child rights issues such as health, family, education, etc.<sup>254</sup>

The UNCRC obliges state parties, to their best efforts, to ensure that parental rights and responsibilities for the upbringing and development of the child are recognised.<sup>255</sup> This is because the UNCRC recognises the role parents play in the care, supervision, and protection of children. In addition to this, section 5 of the UNCRC maintains that state parties must also respect the parental responsibilities and rights of parents to provide the child with the necessary guidance and direction as required.<sup>256</sup> Article 5,<sup>257</sup> realises that parents hold responsibilities and rights but at the same time, the phrase, ‘in a manner consistent with the evolving capacities of the child,’ subtly but importantly limits parental rights.<sup>258</sup> Hence, parental rights and responsibilities must be exercised in conformity with the rights of the child. This limitation to parental rights was a key factor in the United States’ choice to not ratify the UNCRC.<sup>259</sup> The United States believed that ratification of the Convention would be a justification for children to undermine the authority of their parents.<sup>260</sup>

However, this is not the case. The Convention does not compete with nor undermine parental rights, it simply advocates for children’s rights. The Convention recognises the duty specifically placed upon parents and/or legal guardians to bring up the child in a manner that ensures that the child’s best interests are met,<sup>261</sup> as ‘parents have an irreplaceable responsibility to safeguard the rights of the child.’<sup>262</sup> Thus, an argument can be made that if the Convention did not trust that parents are best equipped to handle their children as they deem fit, the

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<sup>251</sup> Ibid.

<sup>252</sup> UNCRC supra note 53.

<sup>253</sup> David Archard *Rights and Childhood* 3ed (2014) at pg55.

<sup>254</sup> Ibid. As already mentioned in my introductory chapter, the CRC became legally binding to South Africa when the country ratified the treaty on the 16<sup>th</sup> of June 1995, see Kilkelly & Liefwaard op cit note 54 at pg 526.

<sup>255</sup> UNCRC supra note 53 at ar18.

<sup>256</sup> Ibid at art 5.

<sup>257</sup> Ibid.

<sup>258</sup> Hafen & Hafen op cit note 62.

<sup>259</sup> Lundy op cit note 68.

<sup>260</sup> Ibid.

<sup>261</sup> UNCRC supra note 53 at art 3(1).

<sup>262</sup> Adonteng-Kissi op cit note 229 at pg2.

responsibility would not have fallen on the parents. Therefore, any focus that deprives parents of bearing the primary responsibility over their children can be argued to be contrary to some of the legislative objectives of the Convention.<sup>263</sup>

b. Regional law:

Lastly, the same position that is expressed in international law is reiterated in regional law.<sup>264</sup> The African Charter on Human and Peoples Rights recognises the family unit as the important unit and basis of society.<sup>265</sup> The Charter endows every individual with the responsibility to assist and protect the family unit.<sup>266</sup> Similarly, the ACRWC,<sup>267</sup> also known as the African Charter, places importance on the family unit as a fundamental part of society.

Unlike the UNCRC, the ACRWC is a comprehensive legal document that sets out the rights and principles for the status of children, and the responsibilities of parents, specifically on the African continent.<sup>268</sup> Article 19(1) of the ACRWC provides every child with the right to parental care and protection.<sup>269</sup> Article 20 confers upon parents the responsibility for the development and upbringing of the child.<sup>270</sup> Parents are given this right and responsibility because as the child's primary caregivers, it is assumed that every decision they make concerning the child would be in the best interest of the child.<sup>271</sup>

Furthermore, the ACRWC bestows upon children responsibility towards their family and society and the community.<sup>272</sup> The duty placed upon children towards their community is derived from the notion that children are part of the community and accordingly have to work

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<sup>263</sup> Some of the legislative objectives of the Convention include ensuring that the family is afforded the necessary protection and assistance to exercise their responsibilities, see the preamble of the UNCRC supra note 53.

<sup>264</sup> Bekink op cit note 25 at pg 200.

<sup>265</sup> African Charter on Human and Peoples' Rights, 1986.

<sup>266</sup> Bekink op cit note 25 at pg 200.

<sup>267</sup> South Africa is one of the 45 African states that have ratified the Charter, making it binding on the country. See 'Claiming Human Rights' op cit note 268.

<sup>268</sup> 'Claiming Human Rights' available at [http://www.claiminghumanrights.org/childrens\\_charter.html?&L=escyeybij%2F%2F%2F...%2F%3Foption%3Dcomjeformcr](http://www.claiminghumanrights.org/childrens_charter.html?&L=escyeybij%2F%2F%2F...%2F%3Foption%3Dcomjeformcr), accessed on 03 February 2023. Note also: The ACRWC came to be because member states of the African Union had critiques against the UNCRC as they believed that the UNCRC failed to adequately address important socio-cultural and economic realities in Africa. For this reason, the ACRWC was adopted specifically for Africa and its values and experiences in relation to the African child.

<sup>269</sup> ACRWC supra note 106 at art 19(1).

<sup>270</sup> Ibid at art 20.

<sup>271</sup> Ibid.

<sup>272</sup> Ibid at art 31.

towards the unity of the community and family.<sup>273</sup> Therefore, it can be argued that the agency and independence of the child cannot be considered in isolation but together with the responsibility the child owes to the community and family.<sup>274</sup> Therefore, Article 18(1) of the Charter, like international law, reaffirms the importance of the family unit and the responsibility placed on the state to protect and support the family.<sup>275</sup>

Thus, it can be accepted that the transition from parental power to parental rights and responsibilities in domestic law has been supported by both international and regional law. Parental rights and responsibilities, as discussed, are concerned with the well-being of the child and not necessarily with the power the parent has over their children. With parental rights and responsibilities, children should surely be in a better position to have their interests considered and their voices heard. Yet, this may not always be the case. This is because at the heart of parental rights and responsibilities provided by the law, lies the issue of implementation.

Given the current social discourse, it is possible that the existing legal framework does not adequately protect the rights and responsibilities of parents. This is due to the fact that the current social discourse on child autonomy and agency does not take into account the impact that this kind of autonomy will have on the exercise of parental rights and responsibilities.

### 3.3 The impact of child autonomy and agency on parental rights and responsibilities

With specific reference to ACL as the existing legislation, there is a concern that the current social discourse on child autonomy and agency may create difficulties with acknowledging and catering to the responsibilities and rights of the community towards the child.<sup>276</sup> As discussed above, the laws governing parental rights and responsibilities in ACL extend to community members as well. As a result, one can make an argument that individual autonomy should not triumph over the pursuit of communal responsibility.<sup>277</sup>

Examples of communal responsibility include but are not limited to mutual reciprocity, solidarity and loyalty.<sup>278</sup> This system of mutual reciprocity is known as ‘African

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<sup>273</sup> Bekink op cit note 25 at pg 201.

<sup>274</sup> This has also been reiterated in the discussion of parental rights and responsibilities under ACL.

<sup>275</sup> Bekink op cit note 25 at pg 201.

<sup>276</sup> Ganya et al op cit note 95 at pg 3.

<sup>277</sup> Ibid.

<sup>278</sup> Ibid at pg 6.

communitarianism.<sup>279</sup> The argument for African communitarianism, as opposed to individual child autonomy, is that it is in the best interest of the child to serve the community rather than itself.<sup>280</sup> In most cases, individuals within the group will realise that their interest is aligned with the group and in pursuit of the communal goal, rather than outside of the group.<sup>281</sup> This occurs because African communitarian societies deem the best interest of all persons, including the child, to be determined by being part of a community sharing the same values and ideology.<sup>282</sup> Consequently, decisions are established by reason of a group consensus made in the presence of the council of elders.<sup>283</sup> Therefore, from an African communitarians perspective, should the current social discourse push for children to have greater autonomy and agency, South Africa will see mounting tension between the current social discourse and the proper exercise of parental rights and responsibility in the communities.<sup>284</sup>

Moreover, proponents for African communitarianism contend that when the laws of the land primarily reflect one culture, for example, the Western culture, and are involuntarily imposed on another culture, there is a potential for injustice to occur.<sup>285</sup> In his article, 'The Cultural Differential in Parental Autonomy,' Chiu claims that parents from a minority culture constantly have their decisions and practices regulated to a far greater degree than the practices and decisions of parents from a dominant culture.<sup>286</sup> He argues that this occurs through the application of generally applicable laws that may be biased against a minority culture or laws that directly act against the practices of a minority culture.<sup>287</sup> This leads to parents from a minority culture having less autonomy and freedom to exercise their rights and responsibility over their children.<sup>288</sup> Stated differently, Chiu calls this a 'cultural differential in parental autonomy.'<sup>289</sup>

A cultural differentiation in parental autonomy, according to Chiu, means that when the culture of a parent does not coincide with the law, a culture clash arises.<sup>290</sup> Fortunately, Article

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<sup>279</sup> Ibid.

<sup>280</sup> Ibid.

<sup>281</sup> Ibid.

<sup>282</sup> Ibid.

<sup>283</sup> Ibid.

<sup>284</sup> Ibid at pg 8.

<sup>285</sup> Elaine M Chiu 'The culture differential in parental autonomy' (2007) 41 *UC Davis L. Rev.* at pg 1777.

<sup>286</sup> Ibid at pg 1780.

<sup>287</sup> Ibid.

<sup>288</sup> Ibid.

<sup>289</sup> Ibid.

<sup>290</sup> Ibid at pg 1793.

27 of the International Covenant on Civil and Political Rights (ICCPR),<sup>291</sup> provides for the protection of minority cultural rights by ensuring that members of other communities have the right to practice and enjoy their own culture.<sup>292</sup> Accordingly, when it comes to parenting and the role parents and extended families fulfil in a child's life, it would be disingenuous to assume that culture is not a big part of it.<sup>293</sup>

For this reason, like Chiu, there are arguments made that acts of parenting practised by cultures outside of the Western domain are re-evaluated according to the standards of the Western dominant culture. This begs the question of whether the growing discourse to enable children to have more autonomy seeks to actually serve the children or further perpetuate the culture, dominance, and control of the West upon African countries.<sup>294</sup> As a result, the culture and values of indigenous African persons are often engulfed by the imposition of a homogeneous version of child welfare.<sup>295</sup> An example of this is the definition of 'abuse' under the Children's Rights Act.<sup>296</sup> According to s1 of the Act, 'abuse' is defined as 'any form of harm or ill-treatment deliberately inflicted on a child.'<sup>297</sup> Yet for the African parent, this definition of abuse can also be mistaken for discipline to the child. Thus, in allowing children greater autonomy and more control of their lives, there is a possible argument that the current social discourse is not only interfering with but ignoring the implications it may have on the exercise of parental rights and responsibilities in African customary law.

In conclusion, this chapter has shown how the socio-legal development of parental rights and responsibilities, specifically within the context of parental care and supervision, came about. Parental rights and responsibility were changed from parental power and authority to offer children a better chance at their interests being met with paramount importance. This chapter has also shown how this transition to parental rights and responsibilities has been supported by both international and regional law. This is important because when it comes to the exercise of parental rights and responsibilities in the African communitarian context, the current social discourse makes it difficult for the law to take effect. Thus, from this chapter, it

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<sup>291</sup> International Covenant on Civil and Political Rights, 1966 at art 27.

<sup>292</sup> Himonga op cit note 98 at pg 74.

<sup>293</sup> Chiu op cit note 285.

<sup>294</sup> Moyo op cit note 100 at pg152.

<sup>295</sup> Ibid.

<sup>296</sup> Children's Rights Act supra note 123.

<sup>297</sup> Ibid at s1.

can be acknowledged that parental rights and responsibilities should not just be important in the law but in its implementation as well.

#### **Chapter Four:** The conflict between child autonomy and parental rights and responsibilities

From the previous chapters, one can ascertain the legal importance associated with parental rights as well as child rights. Both stated rights have equal significance in society and must be given due weight in the upbringing and development of the child. Given that there has been no express or implicit indication in the law as to when one right would triumph over the other,<sup>298</sup> it has become increasingly difficult to navigate between these two rights.

An example of this gap in the law can be found in international law. On the one hand, Article 3(1) of the UNCRC,<sup>299</sup> creates a presumption that children are passive and dependent on the guidance and decisions of state parties and authoritative figures, and for this reason, their best interests should always be a primary consideration in decisions affecting them. On the other hand, Article 12 of the UNCRC,<sup>300</sup> suggests that children are autonomous beings who can not only make decisions for themselves but can also actively contribute and express their views on the decisions that affect them. The contrast between these two articles is not consistent when it comes to the rights and interests of a child and how they should be exercised. Therefore, it has been challenging to understand how both rights would balance one another, especially in a ‘real life’ situation.

Given the difficulty alluded to above, this chapter will discuss the conflict between child autonomy and parental rights and responsibilities. It will critically analyse two examples that highlight the conflict between these two rights, namely, child sexual rights and consent to medical treatments for children.

By using these two examples, this chapter aims to illustrate the difficulty in balancing the rights and responsibilities of parents with the rights of the child in today’s society.

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<sup>298</sup> International and regional law does not address the conflict between these two rights but provides that the views of the child be given due consideration (art 12 UNCRC and art 4(2) African Charter) and that parents must exercise their rights in accordance with the evolving capacities of the child (art 5 UNCRC). South African law, although a wider ambit than international law, also does not seem to suggest when child rights would ‘trump’ parental rights.

<sup>299</sup> United Nations Convention on the Rights of the Child of 2 September 1990 at art3(1).

<sup>300</sup> United Nations Convention on the Rights of the Child of 2 September 1990 at art12.

## 4.1 Sexual rights

A child's sexual rights are one of the most controversial and thought-provoking discussions in today's society. This is particularly because of the conflict between a child's sexual agency and a parent's responsibility for the development and upbringing of their children.<sup>301</sup> There is a sense of concern when children are not brought up in an environment of innocence and protection. An environment of innocence and protection occurs when children are shielded from the potential evils of the world to protect the naivety of their childhood.<sup>302</sup> However, there is a budding discourse surrounding the fact that children should be sexually liberated and their voices regarding their sexuality should not be stifled.<sup>303</sup> For this reason, the question to be asked is whether there can be a balance between the two rights or whether one must triumph over the other.<sup>304</sup>

Sexuality, according to the World Health Organisation (WHO), is defined as an important aspect of a human being throughout their lifetime.<sup>305</sup> It is also a broad concept that comprises private sexual behaviour, sexual orientation, sexual identity, and feelings.<sup>306</sup> It furthermore includes an expression of one's sexual identity in gender roles, values, and relationships.<sup>307</sup> According to Johns and Adnams, an individual's sexual identity is shaped by the social, cultural, and historical environment they are exposed to.<sup>308</sup>

As a result, a child's sexual identity is often discovered during the transitional phase from childhood to early adolescence.<sup>309</sup> This transition is a critical point in the child's life because this is the time when social and cultural norms shape the sexual trajectories of adolescents.<sup>310</sup> Adolescents, according to WHO, range from ages 10 to 19 years old.<sup>311</sup> During

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<sup>301</sup> UNCRC supra note 53 at art 18(1).

<sup>302</sup> Karen Malone 'The bubble-wrap generation: children growing up in walled gardens' (2007) 13 *Environmental Education Research* at pg515.

<sup>303</sup> This 'budding discourse' will be discussed later on (see 4.1.1. and 4.1.3)

<sup>304</sup> This is particularly interesting given the significance attached to both parental (Chapter three) as well as children's rights (Chapter two).

<sup>305</sup> Rebecca Johns & Colleen Adnams 'My right to know: Developing sexuality education resources for learners with intellectual disabilities in the Western Cape, South Africa' (2016) 4 *African Disability Rights Yearbook* at pg102.

<sup>306</sup> Ibid.

<sup>307</sup> Ibid.

<sup>308</sup> Ibid.

<sup>309</sup> GD Kangaude, D Bhana & A Skelton 'Childhood sexuality in Africa: A child rights perspective' (2020) 20 *African Human Rights Law Journal* at pg689.

<sup>310</sup> Ibid.

<sup>311</sup> Ibid at pg691: For the purposes of this thesis, this chapter will only consider the ages of 10-18 years for adolescents because, after 18, the individual can no longer be considered a 'child.'

the adolescent age, children are more likely to enter into romantic relationships and recognise themselves as sexual beings.<sup>312</sup>

When children are recognised as sexual beings, there is an increased awareness of their sexual nature and identity.<sup>313</sup> The beliefs surrounding the sexual nature and agency of the child are informed by how people perceive and talk about the sexuality of children.<sup>314</sup> The sexual nature of a child and the capacity the child has to exercise their newfound sexuality is understood from the lens of ‘sexual agency.’<sup>315</sup>

Russell defines sexual agency as an individual’s belief in their ability to act upon their sexual needs.<sup>316</sup> This could be a positive act, such as doing something, or a negative act such as refraining from doing something.<sup>317</sup> When children are considered individuals with sexual identities and agency, they can be represented and protected through policy and legal instruments that create ‘sexual rights.’ Henceforth, sexual rights denote the rights given to children to be able to express their sexual agency, not only to themselves but to others as well.

South African law does not expressly offer protection for child sexuality as a right in itself.<sup>318</sup> Instead, a child’s sexual rights will form part of an expansion of other rights.<sup>319</sup> A few examples of these other rights include but are not limited to, non-discrimination, human dignity, bodily integrity, and reproductive decision-making.<sup>320</sup> As a result, one can conclude that South Africa does not have a self-standing sexual right that offers protection to individuals.<sup>321</sup> Yet, as stated above, South Africa does provide general rights that can be used to protect a child’s sexual ‘right.’

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<sup>312</sup> Ibid at pg690.

<sup>313</sup> Ibid.

<sup>314</sup> Ibid.

<sup>315</sup> Ibid.

<sup>316</sup> Ibid.

<sup>317</sup> Ibid: An example of a positive act is engaging in sexual intercourse and an example of a negative act is refusing unwanted sexual intercourse.

<sup>318</sup> Lutchman op cit note 241 at pg73.

<sup>319</sup> Ibid at pg74.

<sup>320</sup> Ibid.

<sup>321</sup> Ibid.

However, in respect of international law, a self-standing sexual right,<sup>322</sup> does exist but is considered persuasive rather than binding.<sup>323</sup> The problem with this is that sexual rights may only be best protected and liberated when they are recognised and binding by state parties. When international law is recognised and binding, state parties would be mandated to create domestic law to give effect to international law. When it is merely persuasive, there is no pressing need for state parties to create laws to this effect. Therefore, recognition needs to come not only from the legislators but society as a whole.

Further to this, the sexual rights of a child must be able to give effect to both parental and child rights. When the sexual agency is understood to only impact the rights of the child, there is a possibility of the right of the parent being undermined. When parental rights are undermined, international, domestic, and regional law are not being adhered to. Instead of a balance being maintained between the two conflicting rights, both parents and children are in what appears to be a ‘stalemate’ with only ‘one winner.’ This is contrary to the intention of the law, as both rights need not be mutually exclusive but must support one another.<sup>324</sup> This is because, as I argued in previous chapters, both rights have a significant and legal force that should not be disregarded but adhered to.

#### 4.1.1 The 2019 CSE incident

An example of this dilemma is acknowledged in a 2019 incident involving the Department of Education (DOE) and South African parents. In 2019, the DOE was criticised for its attempt to introduce a new curriculum to be taught in schools.<sup>325</sup> This new curriculum intended to address the known ‘comprehensive sexuality education (CSE)’ content taught in schools.<sup>326</sup> Comprehensive sexuality education (CSE) is sex education that focuses on the fulfilment of sexual and reproductive health and rights.<sup>327</sup> It has been fiercely criticised by parents as a ‘liberal’ value system pushed by the United Nations upon African countries.<sup>328</sup>

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<sup>322</sup> By “self-standing right,” I mean a right that is not attached to other rights in order to give it meaning and legal force.

<sup>323</sup> Lutchman op cit note 241. Note: the significance and legal effect of a non-binding (persuasive) source has been dealt with in Chap 3 (see footnote 242).

<sup>324</sup> See Chap 5, no. 5.1.

<sup>325</sup> Michael Swain ‘United Nations given control of sex education in African schools’ available at <https://www.forsa.org.za/articles/united-nations-given-control-of-sex-education-in-african-schools>, accessed on 27 March 2023.

<sup>326</sup> Ibid.

<sup>327</sup> Ibid.

<sup>328</sup> Ibid.

Moreover, it is argued that children are at an impressionable age and stage of development and what they learn about sex and sexuality should be taught by their parents.<sup>329</sup> This is because international and regional law mandates that parents have the primary responsibility for the upbringing and development of the child.<sup>330</sup> As a result, when children are taught about sexuality in school, there is an argument to be made that parents are no longer given the opportunity to have these kinds of conversations with their children first, and are essentially, stripped of their parental roles. Moreover, it may have a significant and permanent impact on the child's views on relationships, marriage, and family.<sup>331</sup>

This public outcry by parents led to the creation of a movement called, #LeaveOurKidsAlone.<sup>332</sup> From this movement, more than 100 000 individuals spoke out, strongly condemning the government and the work of the CSE.<sup>333</sup> Parents wanted their children to be removed from any CSE teachings whilst teachers refused to engage in the teaching of the content because it was deemed immoral, age-inappropriate and explicit.<sup>334</sup> The public concern was that this type of teaching would sexualise children and encourage them to become sexually active at a young age.<sup>335</sup>

Hence, the rights and responsibilities of parents and the duty of the state to educate children conflicted. Interestingly, however, in the debate over whether new content should be introduced in the school curriculum, children were not consulted. The introduction of the CSE not only had an impact on the rights and responsibilities of parents but also the sexual rights of the child. Thus, this chapter considers the difficulty in trying to achieve a balance between these two conflicting rights, specifically assessing the 2019 incident.<sup>336</sup>

#### 4.1.2 Child agency and autonomy on child sexual rights: argument for having CSE

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<sup>329</sup> Ibid.

<sup>330</sup> UNCRC op cit note 53 at art 18.

<sup>331</sup> Swain op cit note 325.

<sup>332</sup> Ronel Koch & Welma Wehmeyer 'A systematic review of comprehensive sexuality education for South African adolescents' (2021) *The Journal for Transdisciplinary Research in Southern Africa* at pg2.

<sup>333</sup> Ibid.

<sup>334</sup> Ibid.

<sup>335</sup> Ibid.

<sup>336</sup> It is noteworthy to state that this chapter is not trying to debate the moral or legal correctness of having CSE in the school's curriculum. This chapter is simply looking at the difficulty in trying to balance parental rights and child rights from the context of CSE.

The first difficulty in achieving this balance arises in the arguments made for children to have and express their sexual agency. When an argument is made that children's sexual rights should be acknowledged, part of that argument includes the support for children to be able to express their sexual agency and be part of the conversation. Koch and Wehmeyer, conducted a learner's report to understand the learner's perspective when it came to CSE.<sup>337</sup> Based on the report, there was a common need for more interaction and involvement with the learners over the CSE curriculum.<sup>338</sup> Learners were dissatisfied with being passive receivers when it came to discussions surrounding their sexual rights.<sup>339</sup> When adolescents are not part of the decision-making process, they are left uninformed and excluded. This may drive their curiosity to learn about sexuality from informal sources such as observing the conduct at home, the media or from their friends.<sup>340</sup>

Part of recognising children's sexual rights is the recognition of their agency to ask questions and explore their sexual curiosity.<sup>341</sup> This creates a sense of responsibility for children to be able to express their views about the topic without fear or condemnation.<sup>342</sup> In the case of *S v M*,<sup>343</sup> Sachs J held that all children have the right to express themselves as independent social beings.<sup>344</sup> This means that they also have the right to learn how to conduct themselves, ask questions, and make choices in adulthood. Children should be able to learn about their bodies and make choices as young adolescents.<sup>345</sup> In describing children's rights, Sachs J held that children are not an extension of their parents.<sup>346</sup> The child should be imagined as an individual with a distinct personality and capability to make their choice, not merely a 'miniature adult' that is waiting to reach adulthood.<sup>347</sup>

However, one possible criticism of Sach J's remark is that, while children are independent individuals, there is still a recognition by the court that they are still children. They are in an adult world and must navigate their way in this 'adult world.' If one accepts that children are learning and navigating their way in the adult world, then reasonably it should be

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<sup>337</sup> Koch & Wehmeyer op cit note 332 at pg6.

<sup>338</sup> Ibid.

<sup>339</sup> Ibid.

<sup>340</sup> Ibid.

<sup>341</sup> Ibid at pg7.

<sup>342</sup> Ibid.

<sup>343</sup> *S v M* 2008 (3) SA 232 (CC).

<sup>344</sup> Ibid at para 18-19.

<sup>345</sup> Ibid.

<sup>346</sup> Ibid.

<sup>347</sup> Ibid.

accepted that parental responsibility is of the essence to guide and ensure the proper development of children in this adult world. Perhaps in suppressing their child's sexual agency, parents are trying to ensure that 'the sins and traumas of fathers and mothers are not visited on the children.'<sup>348</sup> This means that parents might be trying to ensure that their children do not repeat the same mistakes they made when they were young and sexually aware of their bodies.

Nevertheless, as Lutchman correctly pointed out, there is a concern that those who exert power over children, such as the state, parents, and teachers, will not promote the autonomy and sexual rights of children.<sup>349</sup> This is because the focus would be on protecting children from sexual violence, instead of endorsing an environment where children are sexually liberated.<sup>350</sup> Should this happen, it is not only a moral or educational dilemma but an issue of rights. Article 7 of the African Children's Charter,<sup>351</sup> and Article 13(1) of the CRC,<sup>352</sup> make provision for the right to information for children. Article 7 of the African Charter offers protection to children to express their opinion without fear or condemnation.<sup>353</sup> Article 12(1) of the CRC provides children with the right to 'seek, receive and impart information.'<sup>354</sup> Therefore, from the articles mentioned above, it can be ascertained that a legal duty might arise to promote the autonomy and sexual rights of the child, irrespective of the societal pressure that is present.

Moreover, scholars have argued that sexuality in the African culture is mostly viewed from the lens of hypersexualised masculinity and suffering femininity.<sup>355</sup> This may raise a concern that African parents are not adequately exercising their right to parental care and supervision when it comes to the sexuality of their children. For example, Kangaude, Bhana and Skelton opine that African parents are particularly concerned with the differing roles of gender in society, and the vulnerability of the African girl child when it comes to sexual innocence, diseases, danger, and victimisation.<sup>356</sup> When it comes to childhood sexuality, the discourse is usually around rape, sexual coercion, early child marriage, pregnancy and unsafe sexual practices.<sup>357</sup> Therefore, it is argued that instead of parents focusing on the agency and

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<sup>348</sup> Ibid.

<sup>349</sup> Lutchman op cit note 241 at pg64.

<sup>350</sup> Ibid.

<sup>351</sup> ACRWC supra note 106 at art7.

<sup>352</sup> UNCRC supra note 53 at art 13(1).

<sup>353</sup> ACRWC supra note 106 at art7.

<sup>354</sup> UNCRC supra note 53 at art 12(1).

<sup>355</sup> Kangaude, Bhana & Skelton op cit note 309 at pg694.

<sup>356</sup> Ibid.

<sup>357</sup> Ibid.

girls' account of sexuality, the African girl is seen as a passive receiver of culture, gender, and sexuality.<sup>358</sup>

Consequently, it can be argued that on the one hand, children do not need parental consent to continue with CSE in the school's programme. The argument would be that children's sexual rights should be recognised and that the provisions in international law are wide enough to encompass the allowance of CSE in the school's curriculum to promote the sexual agency of the child. The provisions are broad enough to protect and advance the sexual rights of children in schools. Yet on the other hand, there is an argument to be made that a child's sexual right cannot be advanced without giving due weight to the responsibility of the parents.

#### 4.1.3 Parental rights and responsibilities on child sexual rights: arguments against having CSE

The responsibility of parents may include supporting and guiding the child in matters and topics of sexuality. Khampepe J in *Teddy Bear*,<sup>359</sup> highlighted the importance of parental support in the life of children to enable them to make healthy choices.<sup>360</sup> This, she contends, is particularly important given the 'high rates of negative experiences and consequences of sexual behaviour,' reported.<sup>361</sup>

Children are precious members of our society and any law that affects them must have due regard to their vulnerability and their need for guidance. We have a duty to ensure that they receive the support and assistance that is necessary for their positive growth and development.<sup>362</sup>

Parents commonly do not acknowledge children to be rational, mature, responsible beings in need of parental and state protection.<sup>363</sup> This is reflected in cultural practices in how adults think of children as dependent individuals constantly requiring adult assistance.<sup>364</sup> This is also reflected in international child rights treaties.<sup>365</sup> For example, the best interest of the child principle is in Article 3(1) of the CRC,<sup>366</sup> or other articles like Article 34 of the CRC,<sup>367</sup>

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<sup>358</sup> Ibid.

<sup>359</sup> *Teddy Bear Clinic* supra note 359.

<sup>360</sup> Ibid at para45.

<sup>361</sup> Ibid.

<sup>362</sup> Ibid at para1.

<sup>363</sup> Kangaude, Bhana & Skelton op cit note 309 at pg697.

<sup>364</sup> Ibid.

<sup>365</sup> Ibid at pg698.

<sup>366</sup> UNCRC supra note 53 at art 3(1).

<sup>367</sup> Ibid at art 34.

and 27 of the African Children's Charter.<sup>368</sup> The latter two articles protect children against sexual exploitation and unlawful sexual activity. This legal discourse thereby recognises childhood as 'blissful innocence' and places an obligation on parents and the state to preserve this state of innocence.<sup>369</sup>

Therefore, from the above, one is confronted with the dilemma of how to approach the discourse surrounding the promotion but also protection of children's sexual rights. The legal discourse underlines the difficulty between children trying to assert their sexual agency on the one hand, and parents trying to protect their children on the other hand. Thus, when parental rights and responsibility conflict with the right of a child, there is difficulty in trying to accommodate the two rights, especially with a controversial topic like sexual rights. This difficulty in balancing the two conflicting rights is further exacerbated in a situation in which children may (and can) consent to their medical treatment plan.

#### 4.2 Child consent to medical treatments for children

When a child is able to consent to their medical treatment plan, there is always a chance that parents and children will hold opposing views on the best course of action to take. Yet, when a child is unable to consent to certain medical treatments as a result of their age and capacity, or when the child is unable to give informed consent, it is up to the parent to decide on behalf of the child.<sup>370</sup> This is done in the belief that the parent will make decisions in the best interest of the child.<sup>371</sup> Owing to this, parents are often placed in a unique position when it comes to the medical treatment of their children.

However, what happens in a situation when the child can give informed consent, but the decision made by the child is a bad decision? This is especially the case when the responsibility of the parent to provide care and supervision to the child is in direct conflict with the right of the child to exercise autonomy and agency.

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<sup>368</sup> ACRWC supra note 106 at art27.

<sup>369</sup> Kangaude, Bhana & Skelton op cit note 309 at pg698.

<sup>370</sup> Elvis Fokala & Annika Rudman 'Age or maturity? African children's right to participate in medical decision-making processes ' (2020) 20 *African Human Rights Law Journal* at pg669.

<sup>371</sup> Ibid at pg668.

#### 4.2.1 Three-way partnership involved in medical decision-making

Scholars like Fokala and Rudman have argued that when it comes to medical treatments for children, three voices need to be heard; the voice of the parent, physician, and child.<sup>372</sup> The voice of the parent should not be subdued, but at the same time cannot be louder than the voice of the child. This is especially the case when the medical decision concerns the child.

The difficulty arises when mutual agreement, negotiation and compromise are being used in the decision-making process.<sup>373</sup> In most cases, parents and physicians have a clear mandate on the best approach to take and there are instances where the views of the child are listened to.<sup>374</sup> Yet, there are other instances when the child is at risk of a life-threatening disease and the voice or role of the child is non-existent.<sup>375</sup> For example, there is no clear indication of or uniform agreement on who should make the final decision in a life-threatening incident.<sup>376</sup> There are also disagreements when it comes to including or excluding the child from a medical decision-making process.<sup>377</sup> Although physicians usually lead when it comes to medical-related questions, there remains uncertainty as to whether the physician is better placed to permit child participation.<sup>378</sup>

This power imbalance comes about as a result of a certain level of power that physicians and parents both hold in the three-way partnership. Physicians hold information and a certain skill set that the child and the parent do not possess.<sup>379</sup> Parents hold control, authority, and an emotional and psychological connection to the child.<sup>380</sup> As a result, physicians could prefer to communicate with the parent because it is easier, or they may consider it their duty to inform and converse with the parent only.<sup>381</sup> Another reason may be that parents are the primary caregivers responsible for the care and supervision of the child.<sup>382</sup> Parents also hold important

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<sup>372</sup> Ibid at pg672.

<sup>373</sup> Ibid at pg670.

<sup>374</sup> Ibid.

<sup>375</sup> Ibid.

<sup>376</sup> Ibid at pg671.

<sup>377</sup> Ibid.

<sup>378</sup> Ibid.

<sup>379</sup> Ibid at pg672.

<sup>380</sup> Ibid at pg672.

<sup>381</sup> Hanneretha Kruger 'The realization of children's rights to participate in selected medical decisions in South Africa' (2018) *SALJ* at pg85.

<sup>382</sup> Fokala & Rudman 'op cit note 370 at pg672.

health-related information about the child that the physician may not know.<sup>383</sup> Children, unfortunately, do not hold much power.

#### 4.2.2 Child agency and autonomy on child consent for medical treatments

However, in *Castell*,<sup>384</sup> the Court held a different opinion and took what was known to be a ‘patient-centered approach.’<sup>385</sup> The patient-centered approach is when the focus on the patient-child’s right to autonomy and agency takes precedence in a medical decision.<sup>386</sup> Despite the age or maturity of the patient, it is and will always be the patient that comes first. This is because it is the patient’s life and health that is of concern. For this reason, only the patient is in a position to decide on their health. Hence, it may be argued, that by using this same patient-centered approach, in any matter involving the medical decisions of children, physicians must prioritise the rights and responsibilities of parents over the rights of the child.

Moreover, international law supports the voice of a child to be heard in medical decisions affecting the child. Children who are capable of forming their views must be allowed to express their views over their medical treatment and the way forward.<sup>387</sup> This includes the right to refuse medical treatment, even if it is considered unreasonable.<sup>388</sup> This is because the right to self-determination and autonomy also includes the right to bodily integrity.<sup>389</sup> This means that when it comes to medical decisions, children are not merely listened to but their opinions are valid and taken seriously.<sup>390</sup> As children are independent autonomous beings, they would have the right to make whatever decisions they deem appropriate for their situation.<sup>391</sup>

A prime example of the contrast between acknowledging children as autonomous beings whilst protecting parental rights and responsibility is recognised in the British case of *Gillick v West Norfolk and Wisbech Area Health Authority*.<sup>392</sup> The matter laid before the court concerned a proclamation issued by the British Department of Health and Social Security

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<sup>383</sup> Ibid.

<sup>384</sup> *Castell v De Greeff* 1994 (4) SA 408 (C).

<sup>385</sup> Ibid.

<sup>386</sup> Ibid at para425-426.

<sup>387</sup> UNCRC supra note 53 at art 12(1).

<sup>388</sup> Hanneretha Kruger ‘Allowing competent children in south africa to refuse medical treatment: lessons from england’ (2021) 32 *Stell LR* at pg411.

<sup>389</sup> Ibid.

<sup>390</sup> Ibid at pg420.

<sup>391</sup> Ibid at pg411.

<sup>392</sup> *Gillick v West Norfolk and Wisbech Area Health Authority and the DHSS* 1985 (3) All ER 402. Note: Although it is a British case, the facts of this case create similarities to the living realities of South African parents and children and are thus notable.

permitting doctors to provide young girls with contraceptive treatment and advice without the knowledge or consent of their parents.<sup>393</sup> Victoria Gillick, a Roman Catholic mother of five daughters, took the matter before the court, declaring the proclamation unlawful as it intruded on her parental authority and responsibility.<sup>394</sup>

The court held that parental authority is not absolute and may be limited.<sup>395</sup> One of the underlying principles elucidated in this judgment was a remark made by Lord Scarman in which he held that parental authority exists insofar as it is needed to protect the child.<sup>396</sup> When the child no longer needs the protection of their parents, then the parent's responsibility over the child lessens.<sup>397</sup> Therefore, as the child matures, they will no longer desire the protection of their parents as much as they did in their earlier stages of life.<sup>398</sup> Owing to this, when we acknowledge the child's right to be more autonomous, we must simultaneously recognise that adults must adjust their decisions and guidance accordingly to enable the child to make decisions and have control over their lives<sup>399</sup>

However, this is not always the case as recognition of child-patient autonomy always falls short in the three-way partnership. The child-patient often has to overcome various barriers in the decision-making process. For example, there is a lack of knowledge or proper direction given on how to establish the child-patient's maturity level or ability to give informed consent.<sup>400</sup> As a result, physicians are uncertain about how to assess the level of maturity needed from a child.<sup>401</sup> If there is no guideline on how to assess the child's 'evolving capabilities', the child may always be disadvantaged from partaking in the decision-making process. Owing to this, an argument can also be made that the determination of capacity and the 'evolving capabilities' of a child is a legal assessment that should not be left to physicians to make.<sup>402</sup> Moreover, these assessments require a lot of consultation time if the child is a first-time patient and has not yet established a relationship with their physician.<sup>403</sup>

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<sup>393</sup>Kruger op cit note 1 at pg 5.

<sup>394</sup> Ibid at pg 5-6.

<sup>395</sup> Ibid at pg 6.

<sup>396</sup> Ibid.

<sup>397</sup> Ibid.

<sup>398</sup> Ibid.

<sup>399</sup> Kruger op cit note 388 at pg421.

<sup>400</sup> Kruger op cit note 381 at pg86.

<sup>401</sup> Ibid.

<sup>402</sup> Ibid.

<sup>403</sup> Ibid.

However, the possibility of numerous consultations to assess a child's capabilities may prove to be difficult for physicians in the public healthcare sector with limited resources and time.<sup>404</sup> This is because physicians that are employed in the public health care sector are usually challenged with inadequate human and other resources available to make the assessment.<sup>405</sup> As a result, the length of time needed for the consultations would be shortened.<sup>406</sup> Further to this, when the child's illness worsens, the child is not seen as an autonomous patient anymore, but a vulnerable child in need of protection and security.<sup>407</sup> Although there might be a few parents that would be willing to include the child in the decision-making process, others may want to control that information and how it is delivered to the child.<sup>408</sup> In some cases, children may not even be told about the severity of their condition.<sup>409</sup> This will undoubtedly reduce the child's chances of meaningfully participating in the decision-making process.

When this occurs, not only is the child being disadvantaged, but the law is being interfered with. Section 12 of the Constitution gives individuals security and control over their bodies.<sup>410</sup> The use of the word 'everyone,' in section 12(2)(b) suggests that children are not excluded from this right.<sup>411</sup> Buchner-Eveleigh states that the right in section 12 of the Constitution is essentially a right 'to be left alone.'<sup>412</sup> This means that it is a right to make decisions about one's body without any undue interference by others.<sup>413</sup> Section 12(2)(b), Buchner-Eveleigh asserts, ensures that an individual does not have to succumb to unwarranted interference or invasion of bodily integrity.<sup>414</sup> The individual would be able to make autonomous decisions regarding their own body. The wording in section 12(2)(b) suggests that the individual is capable of making decisions in their own interest.<sup>415</sup> Therefore, whilst a family member of a physician may be genuinely concerned for the well-being of the patient, the decision made by the patient must be respected.<sup>416</sup>

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<sup>404</sup> Ibid.

<sup>405</sup> Ibid.

<sup>406</sup> Ibid.

<sup>407</sup> Ibid.

<sup>408</sup> Ibid.

<sup>409</sup> Ibid.

<sup>410</sup> Constitution supra note 23 at s12(2)(b).

<sup>411</sup> Ibid at s12(2)(b).

<sup>412</sup> Mariana Buchner-Eveleigh 'Is it a competent child's prerogative to refuse medical treatment?' (2019) *De Jure Law Journal* at pg245.

<sup>413</sup> Ibid.

<sup>414</sup> Ibid.

<sup>415</sup> Ibid.

<sup>416</sup> Ibid.

Consequently, as discussed above, children, as the law gives them the right to, must be permitted to make decisions regarding their medical treatment.<sup>417</sup> This includes the refusal to undergo a specific medical treatment.<sup>418</sup> The decision should be respected and understood, as it is made in terms of the right to bodily integrity.<sup>419</sup>

#### 4.2.3 Parental rights and responsibility on child consent for medical treatments

However, the difficulty with the argument provided above is the fact that the law also gives parents rights when it comes to the medical decisions of their children. According to section 6(5) of the Children's Act,<sup>420</sup> parents must be informed of any matter which significantly affects their child. In a surgical operation, for the child to give consent, the child must be 'duly assisted' by their parents.<sup>421</sup> The phrase 'duly assisted' is not defined in the Children's Act, but scholars have taken it to mean that the phrase refers to parental help.<sup>422</sup>

This is because, firstly, the Children's Act provides that parental rights and responsibilities must include parental care.<sup>423</sup> Parental 'care',<sup>424</sup> according to the Children's Act, is the responsibility to guide, advise and assist the child in decisions taken by the child.<sup>425</sup> This responsibility must take into consideration the child's age, maturity, and stage of development.<sup>426</sup> Secondly, the UNCRC obliges state parties to respect the rights and responsibilities of parents to provide their children with direction and guidance when exercising their rights.<sup>427</sup> Hence, if we are to interpret the phrase 'duly assisted' as 'duly directed and guided',<sup>428</sup> we are to acknowledge that a child's right must work 'hand in hand' with parental rights. Therefore, from the stated laws, an impression has been created that consent to medical treatments cannot be given without simultaneously acquiring consent or guidance from the parent.

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<sup>417</sup> Ibid at pg247.

<sup>418</sup> Ibid.

<sup>419</sup> Ibid.

<sup>420</sup> Children's Act supra note 123 at s6(5).

<sup>421</sup> Ibid at s129(3)(c).

<sup>422</sup> Kruger op cit note 1 at pg24.

<sup>423</sup> Ibid.

<sup>424</sup> The definition for 'parental care' has already been discussed in Chapter 2.

<sup>425</sup> Children's Act supra note 123 at s1.

<sup>426</sup> Ibid.

<sup>427</sup> UNCRC supra note 53 at art5.

<sup>428</sup> Kruger op cit note 1 at pg26.

In addition to the guidance from the parent, there is an argument made that consent from a child-patient in an African communitarianism community should not be obtained without consultation with the community.<sup>429</sup> In African communitarian societies, the interest of all persons is perceived to be best decided by the community through their value system.<sup>430</sup> A decision which is as important as the course of treatment a child should undergo is normally made in the presence of the elders of the community.<sup>431</sup> Their collective wisdom is valued in the community and as a result, will help in the decision-making process.<sup>432</sup>

Hence, parents along with the child's community, are important voices that should be heard in the decision-making process in a child's medical treatment plan. They have a responsibility to duly assist and guide the child in all important matters concerning the child. One's right must not trump another's obligation to help give effect to that right. However, when the parent's responsibility is intertwined with emotions and a sense of 'moral superiority', it is challenging for the child's right to have agency and autonomy in matters that concern themselves, to be given effect.

This chapter has illustrated the difficulty in trying to balance both child rights (in terms of child sexual rights and child consent to medical treatment) and parental rights and responsibilities. Controversial topics such as the two provided in this chapter, display the level of awareness one needs to engage with when trying to give effect to the laws of the land. It is not simply a means of advocating for child autonomy that allows a child to exercise their rights, but also a consideration of the necessity that parental assistance and care can bring to the full enjoyment of a child's right. Consequently, as has been discussed in the chapter above, one cannot uplift one right without simultaneously uplifting the other. Attempting to do so will lead to several difficulties, as assessed above. The question of how to balance two rights that are constantly competing with one another is therefore a discussion that will be dealt with in Chapter 5.

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<sup>429</sup> Ganya, Kling & Moodley op cit note 95 at pg6.

<sup>430</sup> Ibid.

<sup>431</sup> Ibid.

<sup>432</sup> Ibid.

## Chapter Five: Striking a balance between child rights and parental rights and responsibilities

Child autonomy and agency are important when understood in the context of their obligations under international,<sup>433</sup> regional,<sup>434</sup> and domestic law.<sup>435</sup> If a balance between child rights and parental rights is not carefully struck, child autonomy and agency may have a significant detrimental impact on parental care and supervision. This is because parental care and supervision are also meant to be understood under the same legislative framework as child rights law, and when this happens, conflict can ensue.<sup>436</sup>

Therefore, highlighting the above, this chapter aims to reconceptualise the notion of ‘child autonomy and agency’ to be understood beyond the lens of self-determination and independence from parental rights and responsibilities.<sup>437</sup> Through this, this chapter attempts to strike a balance between child rights and parental rights and responsibilities. To achieve this purpose, the first step is to draw attention to the realisation that children need their parent’s involvement in their lives. Likewise, parents have to exercise a limited role in their children’s lives as they get older. When parents exercise a limited role, it makes it easier to consider how to navigate and balance child rights law alongside parental rights and responsibilities. Once this is understood, the second step is to use the best interest of the child principle to try and achieve this balance.

### 5.1 Exercising a limited role in children’s lives

Therefore, if parents were to exercise a limited role in their children’s lives, parental roles and responsibilities would not be negated in light of the recognition of child autonomy. This is because parental rights and responsibilities need not be independent but can coincide with child autonomy to ensure that the interest and rights of the child are at the forefront. There is no need for the state and its laws to be mutually exclusive to that of the community and its interests.<sup>438</sup> Rather, the state should work towards finding a solution that supports child

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<sup>433</sup> UNCRC supra note 53.

<sup>434</sup> ACRWC supra note 106.

<sup>435</sup> Constitution supra note 23

<sup>436</sup> See the discussion on parental care and supervision under international, regional, and domestic law in Chap 3.

<sup>437</sup> Kruger op cit note 1.

<sup>438</sup> Himonga op cit note 98 at pg 80.

autonomy and parental rights in the family and community.<sup>439</sup> According to Chuma, there is a need to involve the family and community in child rights laws.<sup>440</sup>

This is because, as the argument goes, children cannot become autonomous outside of their family's assistance. Regarding decision-making, it is known that children are irrational and lack the capacity to understand reason.<sup>441</sup> The knowledge about who they are as individuals and the world they live in is still new and they lack the experience to provide wisdom.<sup>442</sup> Wisdom is to understand that decisions cannot be made for instant gratification but that certain actions bear long-term ramifications.<sup>443</sup> This, Bagattini and Macleod believe is because children do not perceive themselves as agents yet.<sup>444</sup> Children's outlooks are quite limited and because of that, they are driven by their most urgent wishes and not their values.<sup>445</sup> Consequently, children's decisions tend to change between various options and what they deem to be important at that particular moment.<sup>446</sup>

For this reason, children are not equipped to devoid themselves of parental rights and responsibilities to achieve agency and autonomy. In achieving autonomy, children need guidance and supervision from their parents to exercise and enhance their capacity to be independent agents.<sup>447</sup> Bagattini and Macleod contend that this is a normal occurrence, and thus does not require any further parental obligation beyond their standard rights and responsibilities as provided for in the aforementioned legislation.<sup>448</sup> When parents are given the responsibility to care for and supervise their children, they are expected to interfere with the decisions and actions of their children to protect them from the harmful implications of their decisions.<sup>449</sup> This is acknowledged when parents make certain decisions on behalf of their children without discussing them with their children first.<sup>450</sup> Accordingly, parents would deliberately circumvent the wishes of their children to protect them from the world.<sup>451</sup> They

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<sup>439</sup> Ibid.

<sup>440</sup> Ibid.

<sup>441</sup> Alexander & C Macleod Bagattini 'Children's Well-Being and the Family-Dilemma' in *The Nature of Children's Well-Being* Springer(2015) at pg66.

<sup>442</sup> Ibid.

<sup>443</sup> Ibid.

<sup>444</sup> Ibid.

<sup>445</sup> Ibid.

<sup>446</sup> Ibid.

<sup>447</sup> Ibid at pg68.

<sup>448</sup> Ibid at pg69.

<sup>449</sup> Ibid.

<sup>450</sup> Ibid.

<sup>451</sup> Ibid.

would also determine that the values and culture their children are brought up in would be in accordance with the parent's worldviews.<sup>452</sup>

While this kind of parental role and responsibility is necessary for the development of the autonomy of the child, it has the potential to stifle the child's agency. This is because parents in making decisions for their children, restrict the options available to children to grow up a certain way or hold values contrary to the values of the family.<sup>453</sup> Children's decisions are not a factor in the decision-making process but are set aside.<sup>454</sup> Children are not given any opportunities to be independent or control the consequences; for example, the less 'life-altering' consequences of the decisions they make.<sup>455</sup>

Moreover, parental rights and responsibility need to be limited to allow children the opportunity to become autonomous agents because parents can act as stumbling blocks to a child's deliberative capacity.<sup>456</sup> Children cannot become good decision-makers and rational beings when their attempts at reasoning are not listened to or even considered.<sup>457</sup> A parent who does not assist the child in determining the appropriate level of emotional response to a situation that affects them hinders the child's autonomy.<sup>458</sup> Even so, the parent does not provide any encouragement to be involved in the decision-making process and makes continuous attempts to be decisive in every area of the child's life.<sup>459</sup> Thus, when parental rights and responsibilities are extensive and controlling, parents are interfering and undoubtedly undermining a child's autonomy.<sup>460</sup> This is because parental interference hinders a child's capacity for autonomy that should develop as the child matures.<sup>461</sup> It is for this exact reason that this thesis argues for limited interference from the parents and a balance between these two rights.

## 5.2 Best interest of the child principle

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<sup>452</sup> Ibid.

<sup>453</sup> Ibid.

<sup>454</sup> Ibid at pg70.

<sup>455</sup> Ibid.

<sup>456</sup> Ibid at pg71.

<sup>457</sup> Ibid.

<sup>458</sup> Ibid.

<sup>459</sup> Ibid.

<sup>460</sup> Ibid.

<sup>461</sup> Ibid.

One of the ways in which legislators can attempt to strike a balance between child rights and parental rights is through the best interest of the child principle. The best interest of the child (BIOC) principle is embedded in international, regional, and domestic law. Article 3(1) of the UNCRC,<sup>462</sup> provides the child with the right to have their best interests assessed as a primary consideration. Similarly, the ACRWC states that in all actions that concern the child, the BIOC should be *the* primary consideration.<sup>463</sup> The Constitution differs slightly from the UNCRC and ACRWC in that section 28(2) makes provision for the BIOC to be of paramount importance.<sup>464</sup>

The BIOC is a unique principle as there is no singular explanation of what this principle entails or how to apply it.<sup>465</sup> This principle is devoid of particular rules or specific duties in its application.<sup>466</sup> As a result, ‘no one knows for certain what are the best interests of a child, or a group of children.’<sup>467</sup> This means that when applying this principle, one must do so on a case-by-case basis. To give effect to the application of this principle, there are a few points of consideration that should be undertaken.<sup>468</sup> Firstly, a child must be viewed as an individual with their own opinions and perspectives.<sup>469</sup> Secondly, consideration must be given to the short, medium, and long-term views of the child as a developing human being.<sup>470</sup> Lastly, this principle must not be read as denying the other rights in legislation like the UNCRC.<sup>471</sup>

After consideration of the above, the application of the BIOC principle may be used to balance the conflict between child autonomy and parental care and supervision. Instead of deciding whose rights (the child’s or the parents’) are more important in a given situation, the BIOC principle demands consideration of all the possible impacts (both positive and negative) that a decision may have on any matter affecting the child.<sup>472</sup> Each impact would be weighed accordingly and given due importance by taking into account all the different parties that may be involved.<sup>473</sup> The BIOC principle will also limit the potential abuse of power by parents over

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<sup>462</sup> UNCRC supra note 53 at art3(1).

<sup>463</sup> ACRWC supra note 106 at art 4(1).

<sup>464</sup> Constitution supra note 23 at s28(2).

<sup>465</sup> Jean Zermatten ‘The Best Interests of the Child Principle: Literal Analysis and Function’ (2010) 18 *International Journal of Children’s Rights* at pg485.

<sup>466</sup> Ibid.

<sup>467</sup> Ibid.

<sup>468</sup> Ibid.

<sup>469</sup> Ibid.

<sup>470</sup> Ibid.

<sup>471</sup> Ibid.

<sup>472</sup> Ibid.

<sup>473</sup> Ibid.

children.<sup>474</sup> It furthermore recognises that adults are only in a position to make decisions on behalf of their children in certain instances because of the child's vulnerability and inexperience.<sup>475</sup> Therefore, the BIOC considers different outcomes and which outcome would benefit the child the most. When it comes to decisions that concern the child, the voice of other parties, such as the parent or community members, may not matter if such decisions are not in the best interest of the child.

However, a possible counterargument that may arise is that the right of the child to have their best interest considered should be, according to the CRC, *a* primary consideration.<sup>476</sup> The use of the word 'a' indicates that the BIOC may not always be the single overriding factor that should be considered.<sup>477</sup> This thereby creates a degree of flexibility in its application and creates a possibility of being subject to limitation. Limitations may occur when other rights are weighed and may be deserving of greater protection.<sup>478</sup> Hence, an argument may be made that the BIOC is not the determining factor and places other interests on an equal level.

Yet, this is not the case. According to the UNCRC general comment 14, although the UNCRC provides for the BIOC to be '*a* primary consideration,' the BIOC must be read as a high-priority interest and not just one of several considerations.<sup>479</sup> When applying the BIOC principle, a larger weight must be attached to what serves the child best.<sup>480</sup> Further to this, the ACRWC attaches a larger weight and provides for the right of the child to have their best interest considered to be *the* primary consideration.<sup>481</sup> This means that the child's interest must not be one of several interests considered but must have high priority and be of paramount importance (as provided for in the Constitution).<sup>482</sup>

### 5.2.1 The problem with the best interest of the child principle

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<sup>474</sup> Ibid.

<sup>475</sup> Ibid.

<sup>476</sup> UNCRC supra note 53 at art3(1).

<sup>477</sup> Moyo op cit note 100 at pg146.

<sup>478</sup> *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para 104.

<sup>479</sup> United Nations Convention on the Right of the Child (UNCRC), *General Comment No. 14: on the right of the child to have his or her best interests taken as a primary consideration (Art. 3 of the Covenant)*, 29 May 2013 at pg10.

<sup>480</sup> Ibid.

<sup>481</sup> ACRWC supra note 106 at art 4(1).

<sup>482</sup> Constitution supra note 23 at s28(2).

However, therein lies the problem. The BIOC principle is not concerned with balancing the conflict between child rights and parental rights. Instead, the principle may only be interested in ensuring that the child's interest is attached the most weight out of everyone else's interest. With the BIOC principle, there is a concern that the rights of the child would be achieved at the expense of the rights of the other members of the family unit.<sup>483</sup> Moyo contends that although the BIOC is crucial when it pertains to matters affecting the child, sight must not be lost to the interests of the other members of the family.<sup>484</sup> Moyo makes the argument that the BIOC principle is 'unduly narrowly individualistic and fails to reconcile the rights of children and those of parents.'<sup>485</sup>

What Moyo means by this is that the BIOC principle is not effective in dealing with the conflict between child rights and parental rights. When following the trajectory of Moyo's argument, the author construes the BIOC as a 'zero-sum' game in which the wins of the child translate to the losses of the adult.<sup>486</sup> In other words, there is no balancing (or win-win situation) that may occur when it comes to these two conflicting rights. When one uses the BIOC principle, the decision-maker has to do what is best for the child, even if the benefit for others is marginal.<sup>487</sup> This is further exacerbated by the African Charter's use of the words '*the* primary consideration' when claiming what is in the best interest of the child.<sup>488</sup> Therefore, the BIOC principle does not effectively attempt to balance the right of the child with that of the parent.

Moreover, given the significance of communal interest in African societies, Moyo believes it to be regrettable that the African Charter expects the BIOC to be *the* primary standard, as opposed to *a* consideration as envisioned in the CRC.<sup>489</sup> Therefore, we need to shift our focus from an individualistic version of welfare to one that accommodates all the interests of the parties, which is not what the BIOC principle can offer.<sup>490</sup>

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<sup>483</sup> Emma C Lubaale 'Reconceptualising "discipline" to inform an approach to corporal punishment that strikes a balance between children's rights and parental rights' (2019) 20 *Child abuse research in South Africa* at pg46.

<sup>484</sup> Moyo op cit note 100 at pg142.

<sup>485</sup> Ibid at pg144.

<sup>486</sup> Ibid.

<sup>487</sup> Ibid at pg145.

<sup>488</sup> Ibid.

<sup>489</sup> Ibid at pg146-147.

<sup>490</sup> Ibid.

To shift our focus to one that accommodates the interests of all parties, one may begin to consider whether there is another way to view the notion of ‘child autonomy and agency.’ Is it possible to define this right in a way that may balance the competing interests? This thesis believes that this possibility exists and can be seen to emerge from the corporal punishment case.

### 5.3 Reconceptualising the notion of ‘child autonomy and agency’

#### 5.3.1 Lessons from the ‘corporal punishment case’

In the case of *YG v S* (herein referred to as the ‘corporal punishment case’),<sup>491</sup> the Court held that the common law defence of reasonable and moderate chastisement is unconstitutional and inapplicable to South African law.<sup>492</sup> The effect of this ruling resulted in the abolishment of corporal punishment or physical force on children, even in instances of discipline.<sup>493</sup> Parents could thus be barred from using physical force to discipline their children.<sup>494</sup> As a result, the judgment was met with much criticism and disapproval. This approach was criticised for being individualistic (similar to the critique of the BIOC principle) and inconsiderate of the values and nature of the family unit.<sup>495</sup> Lubaale opines that parents are responsible for the development and upbringing of the child, and part of this includes discipline.<sup>496</sup> Underlying this argument was a belief that without corporal punishment, children will be spoilt and undisciplined.<sup>497</sup> For this reason, to strike a balance between children’s rights and parental rights in the family unit, Lubaale reconceptualises the notion of ‘discipline.’<sup>498</sup>

By expanding the definition of discipline, Lubaale believes that the rights of parents may not be severely impacted.<sup>499</sup> This is because, according to Lubaale, parents may still be able to discipline their children through various other means.<sup>500</sup> Examples may include rewards or withholding rewards to dissuade a certain behaviour in a child.<sup>501</sup> Moreover, she contends

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<sup>491</sup> *YG v S* 2018 (1) SACR 64 (GJ).

<sup>492</sup> Lubaale op cit note 483 at pg36.

<sup>493</sup> Ibid.

<sup>494</sup> Ibid at pg42.

<sup>495</sup> Ibid at pg36.

<sup>496</sup> Ibid at pg43.

<sup>497</sup> Ibid.

<sup>498</sup> Ibid at pg36.

<sup>499</sup> Ibid.

<sup>500</sup> Ibid.

<sup>501</sup> Ibid at pg43.

that alternative measures will be just as effective, if not more, than physical punishment if children are taught about the consequences of their behaviour.<sup>502</sup>

Without alternative measures, the decision of the *YG* Court would be in complete conflict with the role of parents to discipline their children.<sup>503</sup> However, if one were to reconceptualise the notion of discipline to not simply include physical pain or punishment, it would follow that it is still possible to attribute this responsibility to parents.<sup>504</sup> Once we can reconceptualise ‘discipline’, the conflict between parental rights and child rights would dwindle.<sup>505</sup> If understood in this way, then due regard can be given to the best interest of the child as well as parental rights and responsibilities.<sup>506</sup>

### 5.3.2 Redefining ‘child autonomy and agency’

Against this backdrop, this thesis contends that it is possible to reconceptualise the notion of ‘child autonomy and agency’ to give effect to the BIOC and parental care and supervision. At the beginning of this thesis, autonomy and agency were defined as a measure of self-determination in which children were given the power to make decisions for themselves and vocalise those decisions.<sup>507</sup> The danger in this definition is that there is a possibility that it may present a narrow individualistic characteristic devoid of parental assistance. For example, it may create the impression that a child is entitled to be autonomous and independent, and parents simply have to accept this phenomenon.

However, if one is to rather conceptualise autonomy and agency as working in conjunction with parental rights and responsibilities, then a balance may arise. Child autonomy and agency would be understood as an extension of parental rights and responsibilities. Part of parental care is being responsible for the development and upbringing of a child.<sup>508</sup> This responsibility can also include developing the child’s autonomy by guiding their activities to align with the goals the children set for themselves.<sup>509</sup> Bagattini and Macleod contend that the duty of care and protecting a child’s well-being is connected to the enhancement of the child’s

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<sup>502</sup> Ibid at pg44.

<sup>503</sup> Ibid.

<sup>504</sup> Ibid at pg44.

<sup>505</sup> Ibid at pg46.

<sup>506</sup> Ibid at pg36.

<sup>507</sup> ‘Real autonomy and agency’ is defined by Hanneretha Kruger in Chap 2 of this paper. See footnote 159.

<sup>508</sup> This is also mentioned in Chap 3 of this paper. See footnote 270.

<sup>509</sup> Amy Mullin ‘Children, Paternalism and the Development of Autonomy’ (2014) 17 *Ethical Theory and Moral Practice* at pg414.

autonomy.<sup>510</sup> This is because parents are often in a unique position to develop the autonomy of their children.<sup>511</sup> Due to the proximity parents share with their children by living together and being part of one another's lives, they are particularly fortunate in playing a fundamental role in bearing the responsibility of ensuring that their children become autonomous.<sup>512</sup>

Further to this, parents would, if adopting this approach, involve themselves in the interest and feelings of their children and offer decisions and solutions that reflect those interests and feelings.<sup>513</sup> When children are making decisions that may not be in their best interest, rethinking 'autonomy and agency' permits parents to be able to override their children's decisions, but in a manner that still accords respect and self-determination to their children.<sup>514</sup>

Therefore, autonomy and agency can be understood from the lens of cooperation with both parents and children, as opposed to independence from parental rights and responsibilities. If it were to be reconceptualised, then children are still able to feel a sense of autonomy and to be heard. Likewise, parents can retain their responsibility to provide care and supervision to their children. This understanding can also be supported in African communitarian households. When autonomy is understood from this lens, parents from diverse cultural contexts can appreciate its importance and assist children to develop it.<sup>515</sup> Consequently, when one can conceptualise it using this approach, the autonomy of the child is not undermined, and the role of the parent is not overridden.

Yet, this new approach is not without criticism. This approach may be limited when it comes to implementation. This is because there is no way to ensure that parents adopt or implement this new approach in their homes. Parents may continue to make decisions on behalf of their children without including children in the decision-making process or making decisions that reflect the feelings and interests of their children. There is also a further assumption that all parents act in the BIOC at all times. However, this is not necessarily the case as some may cause harm to the child intentionally or unintentionally. This limitation is also recognised in the reconceptualisation of the notion of 'discipline'.<sup>516</sup> Even if 'discipline' were to be

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<sup>510</sup> Bagattini op cit note 441.

<sup>511</sup> Ibid.

<sup>512</sup> Ibid.

<sup>513</sup> Mullin op cit note 509 at pg415.

<sup>514</sup> Ibid at pg421.

<sup>515</sup> Ibid at pg415.

<sup>516</sup> Lubaale op cit note 483 at pg43.

approached differently, it may be quite difficult to assess whether discipline through the use of corporal punishment is still being practised inside the family home.<sup>517</sup>

To this effect, this thesis does acknowledge that implementation may be difficult, but not impossible. Creating guidelines and practical ways (as already illustrated above),<sup>518</sup> in which parents may support the autonomy of their children, may help increase the chances of parents adopting this new approach. Similar to the corporal punishment case, Lubaale notes that ‘without alternatives, it would seem like the overall effect of the *YG* decision is to take away from parents the right to discipline their children.’<sup>519</sup> Thus, without alternatives, it may be more difficult to persuade parents to implement this new approach. With alternatives and guidelines provided, it is a step in the right direction to balancing child rights with parental rights.

Therefore, notwithstanding the limitations that exist in this approach, it remains hopeful that an approach can exist to strike a balance between child autonomy and agency and parental care and supervision. The bottom line is that approaches such as these create a new way to think about how autonomy and agency can be fostered without placing a significant impact on parental rights and responsibilities. This approach would create a shift from an individualistic view of child autonomy that works to the exclusion of parental rights and responsibilities.<sup>520</sup> With this approach, children’s rights would work in conjunction with the interest of parents and others.<sup>521</sup> Taking this approach will allow the courts to consider the challenge of parental rights and child autonomy. The courts would consider the parent-child relationship, not as a conflict of rights but as an invitation to what an appropriate parent-child relationship should be on a case-by-case basis.<sup>522</sup> Essentially it will ensure a re-evaluation of the competing interest and that both parties’ interests are accounted for when making decisions considering the child’s life.<sup>523</sup>

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<sup>517</sup> Laetitia-Anne Greeff ‘Corporal Punishment: Law Reform Lessons for Australia from South Africa and New Zealand’ (2021) 54 *Comparative and International Law Journal of Southern Africa* at pg8.

<sup>518</sup> Mullin op cit note 509 at pg415.

<sup>519</sup> Lubaale op cit note 483 at pg43.

<sup>520</sup> Moyo op cit note 100 at pg147.

<sup>521</sup> Ibid.

<sup>522</sup> Ibid.

<sup>523</sup> Ibid.

## Chapter Six: Concluding remarks

This thesis set out to analyse the impact that child autonomy and agency would have on parental rights and responsibilities, specifically in the area of parental care and supervision. The research also considered the African communitarianism context to signify the impact African communities also face from the growing child autonomy discourse. Accordingly, the purpose of this thesis is that, in highlighting the need for children to have a voice in society, there simultaneously needs to be an acknowledgement of the importance of balancing children's autonomy and rights with parental responsibilities.

In the context of child autonomy and agency, this paper draws from the legislative framework of international, regional, and domestic law. This was to understand the growing narrative focused on the notion of autonomy and agency embedded in children's rights literature and legislation. In doing so, the following was acknowledged: (i) In matters concerning the child, children have a right to have their voices heard and be involved in the decision-making process;<sup>524</sup> (b) the views of the child must be given due consideration.<sup>525</sup>

Further to this, this paper uncovered the shortcomings of the UNCRC,<sup>526</sup> and the African Charter,<sup>527</sup> when it comes to the protection of child autonomy and agency. The rights in the treaties are limited in that they only offer protection to children in certain instances, e.g, 'in administrative or judicial proceedings' or to certain children, for example, children who are able to communicate their views and opinions. Unlike international and regional law, domestic law provides a wider ambit of protection by allowing children to have more autonomy and freedom for their personal choices. This is acknowledged by various examples discussed in Chapter Two, such as virginity testing, circumcision for young boys and surgical operations.

In terms of parental rights and responsibilities, the area of contention concerned the degree of importance that could be attributed to parental care and supervision. If the law does not recognise parental care and supervision, then the rights of a child may be far greater and more important than that of the parents.

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<sup>524</sup> UNCRC supra note 53 at art12(1).

<sup>525</sup> Ibid.

<sup>526</sup> Ibid.

<sup>527</sup> ACRWC supra note 106.

In order to evaluate the level of importance assigned to parental rights, this paper also drew from the legislative framework of international, regional, and domestic law. The family unit is acknowledged by international law as a significant part of society deserving of respect and state protection. Further to this, regional law and domestic law provides parents with the right to parental care and the responsibility for the development and upbringing of the child. Part of the responsibility to develop the child falls onto the child's extended family and community members, as provided for by African Customary Law.

Owing to this, child autonomy and parental care and supervision have conflicted with one another. The interplay between these two rights has been observed in situations such as analysing a child's sexual rights or consent to medical treatments for children. On the one hand, the voice of a child should not be subservient to the obligations of their parents. The discussion surrounding children's sexual rights has made it known that children are individual beings and not merely 'an extension of their parents.' Moreover, children should be given a voice when it comes to their medical treatments. Conversely, on the other hand, parents have a responsibility to make decisions on behalf of (and not always with) their children. This stems from the belief that parents know (or ought to know) better. They are thus held to be in a unique position to make decisions that are in the best interest of the child.

Yet, when the theory and arguments have been ascribed to 'real life situations,' the conclusion is that both parental and child rights have reached a point of contention and the law has not been clear on what to do when a conflict situation arises.

The clearest the law has been is in Article 3(1) of the UNCRC,<sup>528</sup> where the legislation provides for the best interest of the child to be met in all matters concerning the child. If one is able to go by this rule, then it should not matter whose rights are impacted, instead, whether the child's interests are being fulfilled by whatever decision is taken should be of paramount importance.

However, as has been discussed, this may not always be the case. The BIOC principle unduly impacts the rights and responsibilities of the parent. It does not attempt to balance the two intertwining rights but seeks to ensure that the interest of the child is the primary consideration, with every other interest being secondary. For this reason, this paper had to

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<sup>528</sup> UNCRC supra note 53 at art3(1).

consider an alternative solution that might benefit the different interests and resolve the conflict.

To do so, this paper reconceptualised the notion of ‘child autonomy and agency’ in an attempt to accommodate both interests. Child autonomy and agency should no longer be looked at as a concept promoting complete independence from parental rights and responsibility. It is not a concept that has been formulated to divide the family unit or the African communitarian values. Child autonomy and agency, reconceptualised, recognises the family as an important unit in society. It acknowledges the need to accommodate as well as include parental care and supervision in its attainment of autonomy and agency for the child. As a result, redefined, one can understand the definition of child autonomy and agency as incorporating the development and upbringing of the child provided for by the parent.

In conclusion, child autonomy and agency, although very important, have a great impact on parental care and supervision. Child autonomy and agency impose on the responsibility that is given to parents when the interest of a child is considered to weigh more than the obligation of the parent. Consequently, it was important for this paper to consider how to balance these two conflicting rights in a manner that accommodates the rights of both parents and children.

The laws made for children must accordingly translate to their harmonious fulfilment in society, especially in African societies. ‘They always come up with these laws, yet they don’t understand what we are dealing with down here. The problem is that the people who make these laws do not live in the real world.’<sup>529</sup> This is important because, in as much as the law is advocating for more rights to be provided for children, the law has a corresponding duty to acknowledge that it has also bestowed upon parents the right and responsibility to care for such children.

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<sup>529</sup> Lubaale op cit note 483 at pg36.

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