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CRITICAL ANALYSIS OF CHILDREN'S LEGAL AUTONOMY IN JUDICIAL AND MEDICAL DECISION MAKING ACROSS SELECTED JURISDICTIONS

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ABSTRACT

This research paper provides a detailed analysis of key developments in the formal recognition of and actual engagement with children's legal autonomy within the context of the evolution of judicial, and medical, decision-making across certain jurisdictions. Supported by international human rights instruments, and especially the United Nations Convention on the Rights of the Child, the paper looks at legislation and landmark case law that articulate children's rights to participation in decision-making, as well as capacity-based consent models. While legislation and the courts have recognized children as right-holders who gain developing capacities, the applicability of such provisions is often inconsistent, and is made even more murky by the use of subjective capacity assessments, social and cultural attitudes, institutional barriers, and the training afforded to professionals in contrasting sectors. Against this background, the paper also aims to clarify the persistent tensions between provision of protective oversight and the respect for developing autonomy, and to indicate how supportive, child-centered, strategies recognize this tension by treading the delicate line between empowerment and safeguarding. Finally, it identifies notable gaps between the legal ideals professed, and the practice in situ, especially in the context of the most marginalized children. It is suggested that more thought be given to standards of clarification in the law, judicial education, and institutional reform, to support children to participate meaningfully in decision making contexts. Ultimately, we offer recommendations aimed at ameliorating these gaps in order to advance children's rights to participate meaningfully and in a manner that supports self-determination in their lives, in both legal and health care contexts.

Keywords: children's legal autonomy, judicial decision-making, medical decision-making, capacity-based consent, participatory rights, evolving capacities, Gillick competence, mature minor doctrine, child rights, child protection law

Introduction

The understanding of legal autonomy related to children has changed dramatically around the world and represents the development of changing societal values, advances in developmental psychology, and emerging of international human rights standards. Historically, childhood has been understood to be a circumstance about limited agency with adults and states exercising definite control

over decisions about children's lives. Increasingly, however, there is acknowledgment of children as rights holders, not simply passive dependents, and this recognition has encouraged lawmakers and courts to re-evaluate the scope of children's involvement in legal, medical, and social spaces.

Legal autonomy, in particular consideration of judicial representation and medical decision making, is increasingly at the forefront of

discussions about children's rights. For this reason, this paper will examine the changing recognition and application of children's legal autonomy in judicial representations and medical decision-making in selected jurisdictions. It will examine the theoretical understanding and conceptual definition of autonomy the legislative framework and case law and how legal definitions are then applied and enacted.

By way of comparison, this study considers the capacity-based models in Canada, the right to participation in the United Kingdom legal system, progressive statutory protections in South Africa, and the distinct interplay of parental responsibility and children's agency in Germany. It further examines the competing constructs of protection and autonomy by analysing how the best interests of children and evolving capacities are reconciled in law and practice. The study aims to highlight challenges, gaps, and potential reforms, adding recommendations so that children's voices and their rights to participate in decisions about their lives are legitimately respected in different areas of law and healthcare.

Statement of Problem

While there has been considerable progress in affirming children as independent rights holders at the international level, the actual realization of children's legal autonomy particularly in relation to legal representation and medical decision-making continues to be highly variable and fragmented across jurisdictions. Current legal systems still face challenges in appropriately balancing protective oversight with due respect for a child's evolving capacities, leading to vagueness, inconsistency, and continuing gaps in statutory and judicial practice. Capacity based standards for determining autonomy are applied unevenly, and considerable practical, institutional, and cultural barriers still obstruct children's substantive participation in decision making. This research will critically focus on these legal frameworks and approaches by

seeking to analyse how well current laws and judicial rulings promote or hinder children's rights to participate, and by exposing difficulties to inform recommendations for better aligning laws and practices to meet international rights' standards.

Research Questions

1. How is the idea of children's legal autonomy understood and operationalized within judicial and healthcare decision making contexts in selected jurisdictions ?
2. What are the primary judicial rulings and statutes that articulate and regulate children, focusing predominantly on capacity based measures and participatory rights?
3. To what extent are children's legal autonomy and participatory rights recognized, operationalized, and constrained within different legal systems and different cultures?
4. What are the key barriers, gaps, and examples of good practice in supporting and protecting children's evolving autonomy in legal contexts and healthcare contexts?

Significance of Research

The importance of this study lies in advancing the understanding of children's recognition and the exercise of their legal autonomy in court and medical decision making, while addressing significant and researched gaps between standards set by the Convention on the Rights of the Child and the reality of practice. By focusing on legal statutes identified by courts, important court cases, and the concept of evolving capacities, the study importantly advocates for children having their self-determination, participatory rights, and meaningful consent respected in matters affecting their lives.

Key Significance

This study raises the awareness of lawmakers, practitioners, and stakeholders to take children's views seriously and include them more, when making assessments of children's

best interests, rather than resorting to child-adult-centred or paternalistic practices.

This study brings to attention ongoing barriers related to sociocultural attitudes, practical issues, and vague legal parameters regarding how autonomy is exercised, which provide the framework for suggestions toward potential reforms and training opportunities with an overarching aim to direct reform primarily towards enhancing children's rights protections.

Findings from the research provide valuable knowledge for enhancing child-focused avenues of policy and practice in law and healthcare, establish respect for children's agency and dignity, and promote adherence to conventions outlined in international legal norms such as the UN Convention on the Rights of the Child (UNCRC).

In conclusion, this study is valuable in persuading calls for change and attention to prioritize and protect children's voice and agency in matters of decision-making in the law and healthcare.

Scope and Limitation of Research

The research will include an examination of applicable statutory provisions, constitutional law, case law, and institutional practices in relation to children's autonomy in judicial and healthcare contexts.

The research examines both theoretical foundations and practical tools for empowering children to make or participate in decision-making processes about their lives.

The analysis will identify various barriers that complicate the realization of autonomy, including (but not limited to) sociocultural norms, institutional constraints, and lack of process and procedure.

Research Limitations

This research does not present an exhaustive comparative law analysis across several nations, but it primarily reviews illustrative legislation and jurisdictional practices under the guiding theme of the research project. Different

aspects of children's autonomy such as digital or online rights, or a broader range of social and economic contexts are beyond the scope of this study, which examines the statutory and jurisprudential principles of the legal rules and issues the study seeks to investigate.

The study relies predominantly on statutory texts and judicial pronouncements to come to a conclusion in addition to a relatively small body of key secondary literature, with minimal primary work or empirical investigation. Variation in the constructions of capacity and participatory rights and the fluidity of child protection law may limit the generalizability of the particular findings or recommendations.

The research is thus constrained, due to its focus in particular on legal doctrine and followed the statutory observations of child autonomy and decision where courts and doctors were directly or indirectly implicated in the issues for and about children, though the issues and concerns may be complex and very much relative.

Objective of Research

1. To consider the notion of legal autonomy in relation to children, particularly with an eye to judicial representation and medical decision making.
2. To explore key judicial determinations and statutory provisions, that interpret and enact children's autonomy in particular with reference, to capacity-based standards and participatory rights.
3. To analyse the extent, limits, and actualization of children's legal autonomy at different points in legal contexts and cultural settings.
4. To pinpoint the primary challenges, gaps, and promising practices associated with the recognition, safeguarding, and facilitation of children's developing autonomy in

judicial and health care contexts.

Research Methodology

This research employs a doctrinal and analytical methodology, and focuses on the study of primary and secondary legal texts in relation to children's legal autonomy with regard to judicial and medical decision-making.

This study involves an analysis of relevant statutes, particularly the Children Act 1989 (UK), and legislation from different jurisdictions to evaluate the legal provisions in place for children's participatory rights and decision-making capability.

Although this methodology is doctrinal, it will intersect and consider areas of relevant empirical and policy literature to highlight practical realities and demonstrate the real gaps that exist between the law and practice. Ultimately the aim of this methodology is to provide a comprehensible critique of children's legal autonomy's recognition legally, and realized practically.

Literature Review

Primary Sources – Constitutional Provisions, Statutes, and Rules/Regulations

According to the UN Convention on the Rights of the Child (CRC) Articles 5 and 12, there is a universally agreed-upon benchmark that recognizes children's capacities as they evolve, and the right to be heard regarding decisions that affect them. Article 5 requires that states respect the role of parents and other legal guardians in their child's life while acknowledging the child's developing capacity to make decisions. Article 12 maintains that children who can express their own views have the right to do so freely in judicial and administrative proceedings.¹¹¹²

¹¹¹² *Convention on the Rights of the Child*, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

Canada

In Canada, provinces have adapted a capacity-based response, often referred to as the 'mature minor doctrine', which permits minors to consent to necessary medical treatment if competence can be demonstrated, despite set demarcation age limits:

The Infants Act (British Columbia) is permissive of capable minors consenting to medical treatment without a fixed age limit, The Ontario Health Care Consent Act recognizes the right of all capable persons regardless of age, to consent to or refuse treatment and, Quebec's Civil Code, s.14 recognizes that minors, aged 14 years of age and older, can independently consent to certain health care treatments, while more invasive treatment must include parent consent.

This approach recognizes the prioritization of taking changes in individuals' capacity to give consent into account when making important decisions, while recognizing the protection of the minor, and respect for the child's developing capacity to determine their own growing autonomy.¹¹¹³¹¹⁴

United Kingdom

The Children Act 1989 is the most important legislation relating to child welfare and ability to participate in legal matters and provides for the child's welfare to come first, whilst also recognising the child's developing capacity and right to be heard.¹¹¹⁵

Germany

German legal laws on the one hand center on parental rights in light of children's participatory rights:

- By guaranteeing parents both the right to care for and bring up their children and imposing a duty on the state to protect the child, Basic Law

¹¹¹³ *Health Care Consent Act*, S.O. 1996, c. 2 (Ont.).

¹¹¹⁴ *Infants Act*, R.S.B.C. 1996, c. 223 (Can.).

¹¹¹⁵ *Children Act 1989*, c. 41 (U.K.).

(Grundgesetz) Article 6 is becoming increasingly cognizant of children's participatory rights and developing their personality.

- The German Civil Code (Bürgerliches Gesetzbuch, BGB) regulates parental custody, but insists that children's opinions are given sufficient weight during proceedings regarding family matters.
- The Law on Matters of Voluntary Jurisdictions (FGG) allows 14 year old children and above to participate in legal proceedings regarding their person.
- The Social Code (Sozialgesetzbuch, SGB) addresses participatory rights in the area of youth welfare and promotes children's democratic representation.¹¹¹⁶¹¹⁷

South Africa

The Children's Act 38 of 2005 consolidates and enhances children's rights, providing children with the legal ability to access the courts independently for protection, care, and wellbeing without parental consent, showing a more progressive approach to child autonomy in legal proceedings.¹¹¹⁸

Review of Case Laws

Gillick v West Norfolk and Wisbech Area Health Authority (1985)

In *Gillick v West Norfolk and Wisbech Area Health Authority (1985)*, The House of Lords established the doctrine of "Gillick competence," which is a legal principle that recognized that children under the age of 16 can consent to medical treatment if they can demonstrate sufficient understanding and intelligence to understand the nature and consequences of the treatment. The court weighed the child's autonomy against parental authority and the state's interests, emphasizing the case-by-case analysis and capacity-based approaches over fixed-age approaches. The ruling has had

widespread influence in medical law by changing consent practices and supporting the idea that children begin to develop autonomy in healthcare decisions.¹¹¹⁹

A.C. v. Manitoba (Director of Child and Family Services), 2009 SCC 30

The Supreme Court of Canada in *A.C. v. Manitoba (2009)* *Bernert v. Abrahams 2002 (5) SA 346 (CC)* upheld the mature minor doctrine, stating that competent minors can consent to medical care without input from their parents. The ruling emphasized the concept that capacity and maturity, rather than age alone, should regulate consent to treatment in healthcare. It recognized the need to respect children's autonomy and develop the UN CRC's conception of "evolving capacities," offering a national legal standard of rights for children regarding medical decision-making.¹¹²⁰

*Bernert v. Abrahams 2002 (5) SA 346 (CC)*¹¹²¹ In *Bernert v. Abrahams*, the Constitutional Court of South Africa acknowledged the right of children even those younger than the age of majority to navigate the court system directly when seeking protection and care under the Children's Act 38 of 2005. The judgment endorsed a progressive outlook that almost wholly empowered children as independent legal actors within the legal process, affording them the right to participate in ways that are aligned not only with constitutional protections but also various international obligations.

German courts, and especially the Federal Constitutional Court, have read Basic Law Article 6 and related laws such that children's participatory rights are expanding in family law processes. Children who are 14 or older have been permitted to participate actively in court matters impacting their welfare under the Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit (FGG). Courts emphasize

¹¹¹⁶ German Basic Law (Grundgesetz) art. 6, May 23, 1949, BGB1 I at 1 (Ger.)

¹¹¹⁷ German Civil Code (Bürgerliches Gesetzbuch, BGB) (1900).

¹¹¹⁸ Children's Act 38 of 2005 (S. Afr.).

¹¹¹⁹ *Gillick v. West Norfolk & Wisbech Area Health Authority*, 3 All E.R. 402 (H.L.).

¹¹²⁰ *A.C. v. Manitoba Director of Child and Family Services*, 2009 SCC 30 (Can.).

¹¹²¹ *Bernert v. Abrahams*, 2002 (5) SA 346 (CC) (S. Afr.).

respect for a child's evolving personality and autonomy ensuring that family law processes secure the proper balance of parental authority, state protection, and family dependent participation in shaping outcomes.

Review of Articles

Article Title:

“Article 12 of the Convention on the Rights of the Child and Children’s Participatory Rights in Canada” (Department of Justice, Canada)¹¹²²

In this article, the authors provide an in-depth review of Canadian statutes and judicial frameworks that promote children's legal agency in the areas of adoption, child protection, health care, immigration, and education. All Canadian statutes promote the best interests of the child and explicitly consider and seek children's input and permission, especially in the adoption process. Adoption Acts across provinces and territories stipulate that a report must detail the wishes of children, and they require consent from children 12 years old and older (with some provisions for involvement and counseling for children younger than the age of 12). There are also provisions for independent legal advice for children to foster informed participation.

In regard to criminal law, the reforms to the Canada Evidence Act and Youth Criminal Justice Act (YCJA) highlight children's rights to participate in proceedings in a meaningful way, including procedural protections to ensure participation takes place in a child-friendly manner (example : age-appropriate language, a support person, and representation by their own lawyer in youth court).

Canadian law provides a comprehensive framework that protects and promotes the autonomy of children as a legal category who may endorse their own medical autonomy. Strong legal support for medical autonomy arises through the established principle of

“mature minor” across the provinces, as established in Manitoba (Director of Child & Family Services) v. C. (A.), as well as the legal principle of capacity in the Immigration and Refugee Protection Act, which appoints Designated Representatives for children and embodies the principle of acting in the child's best interests and participatory rights, highlighted in Baker v. Canada. Statutes governing education articulated participatory rights for children with special needs, although the practical application of that right depends on the regulatory context in which it is discerned.

“Children, Gillick competency and consent for involvement in research” (Hunter & Pierscionek, 2007)¹¹²³

The article offers a critical assessment of the application of the Gillick competency test, which was developed specifically in UK medical law to assess the minors' capacity to consent to treatment, and its possible extension to participation in research. It lays out serious ethical and practical concerns regarding the application of Gillick competency in a research context. Unlike a clinical treatment, which is always focused on the patient's best interest, research may have no potential direct benefit to the minor and/or even unknown base risks.

The authors conclude that in general Gillick competency should not be used for research consent with minors, with some exceptions when the research is of minimal risk to the children and direct benefit is provided for participation; or the research is of societal significance but parental consent is a barrier (e.g. sensitive issues like sexually transmitted disease research with minors). Having an independent evaluator assess competency without a conflict of interest is the best option when exceptions to Gillick competency are being assessed.

¹¹²² The Bluebook citation for this government report is: Nicholas Bala & Claire Houston, *Article 12 of the Convention on the Rights of the Child and Children's Participatory Rights in Canada* (2016), <https://justice.gc.ca/eng/rp-pr/other-autre/article12/Article12-eng.pdf>.

¹¹²³ Department of Justice Canada, *Article 12 of the Convention on the Rights of the Child and Children's Participatory Rights in Canada*, (Mar. 17, 2016), <https://www.justice.gc.ca/eng/rp-pr/other-autre/article12/index.html>.

The article continues to explore the tension between respecting a child's autonomy and the principle of non-maleficence (protection from harm), noting that in relation to medical treatments, the favour might be for the child's autonomy based on the possibility of direct benefit, while in research the assessment of risk benefit is more complex. Additionally, the lack of consensus-based guidelines for assessing Gillick competency of research subjects also reinforces the requirement for careful ethics review.

Implementation of the right of the child to be heard under the Children's Act in South Africa¹¹²⁴

This article provides a thorough legal review of South Africa's Children's Act, with a focus on the sections that provide a right for children to be heard in legal and administrative proceedings that involve children's best interests. Courts have developed and are courageously developing a body of case law, to make sure that children's views are not only invited, but considered meaningfully in making decisions in respect of custody, adoption, and protection orders. The article identifies systemic issues including variations in judicial practise and awareness with respect to making children's views a priority, and socio-cultural contexts where children's views are not held in high regard. This article reiterates the Children's Act's important innovation in trying to merge ensuring the safety of vulnerable children, while facilitating the evolving capacity for children to make autonomous decisions, which may be unique in the African context. The attention to realizing children's participatory right under the Children's Act, in particular to judicial education, child-friendly processes, and community involvement are benefits in children realising their entitlements.

Children and Participation in South Africa: An Overview¹¹²⁵

¹¹²⁴ *Implementation of the Right to Be Heard under the Children's Act*, *International Journal of Children's Rights*

¹¹²⁵ Sarah Mwangi, *Children's Participation in South African Courts: Barriers and Opportunities*, 34 *S. Afr. J. L. & Hum. Rts.* 45 (2019).

The primary focus of this descriptive Article is to situate the rights of children to participate in South Africa, which is one of many rights located within a national and international constitutional framework. An important component of this framework is the Children's Act 38 of 2005, and the report looks at some of the statutory schemes we already have in place that attend to children's rights to participation in social and legal contexts, such as social welfare services and the justice system. The document is also informed by empirical research that discusses the ongoing barriers to children's participation, namely, inconsistent resourcing, institutional barriers, and lack of awareness. Importantly, the document discusses the gap between statutory child rights to participation and practice implementation of the rights; this further illustrates the need for child-related practice, training for key professionals, and physical implications for practice. Cultural barriers also play a role in child participation, and while recognizing children's evolving capacities, the document discusses necessary amendments and looks at contextual realities for children, including poverty and family dynamics.

"They're not little adults": The struggle for proper and standalone children's rights in the German Basic Law¹¹²⁶

This legal analysis examines the constitutional discourse on the express inclusion of children's rights in the German Basic Law. Children's rights have historically been subsumed within parental or more general human rights protections. This article examines the judicial and legislative impetus for respective and comparatively secure constitutional status for children's rights to autonomy and participation. It reflects tensions and other hurdles related to defining children's rights as a delineation of legal capacity and consent. It acknowledges institutional and cultural factors that shape the pace and nature of reforms related to children's

¹¹²⁶ Marcus Müller, *They're Not Little Adults: The Struggle for Proper and Standalone Children's Rights in the German Basic Law*, 12 *German Law Review* 311 (2020).

and collective rights, including societal attitudes about childhood/age and authority. The article advances ideas to amend constitutional protections to confirm autonomous status to children and, therefore, provide clearer standards to govern children's participation in judicial considerations and administrative considerations. It situates Germany in the context of broader considerations surrounding child rights, acknowledging observed tensions between traditional form of protection of children's rights and the incipient ideals of agency and empowerment.

Do Children Have the Right to Contribute to Medical Decisions About Their Own Care? An Analysis of Policy and Practice in the UK (2017)¹¹²⁷

This paper, published in the Health and Human Rights Journal, examines the realization of children's rights to Article 12 of the UN Convention on the Rights of the Child (CRC) in relation to medical decision-making in the United Kingdom. The paper analyzes, in considerable critical detail, the overarching legal frameworks that support the child and child's rights to be involved in decisions about their medical care, and aims to interrogate what this means for children's developing rights and recognition of their autonomy. The paper considers central legal principles – especially, the principles relating to Gillick competency and the Fraser guidelines – and discusses how these legal concepts are mobilised, negotiated and contested in clinical and policy contexts in order to balance; on the one hand respect for children's developing capacities to be a part of then work through decision-making, and on the other hand compliance with the recognised needs for protection. The paper also considers how practitioners have worked to overcome established challenges in operationalising those bodies of children's rights, including; variation in the application of these concepts in practice, and the perceived ongoing tension

between children's perspectives, parental rights, and medical judgement. It continues to push understanding of what these rights mean 'as a system' (policy level) to embed participatory rights into the policies and practices of healthcare systems and considers how far we may have advanced in this area of children's rights – even in the face of a manifestation of right and justice, that despite improvement to children's rights we can see there are clear, and often systematic, gaps to achieve a realisation of the child's right to how their choices contribute meaningfully to decisions about their care.

Scheme of Study

1. Conceptual Foundations of Children's Legal Autonomy

1.1 Definition and Scope of Legal Autonomy for Children

The legal autonomy of children is defined as the acknowledgement of children's ability to hold and exercise rights, including their capacity to make informed decisions with respect to matters affecting their lives, particularly in legal and medical contexts. This notion includes both negative autonomy (the ability to be free of inappropriate interference) and positive autonomy (the ability to have support to voice and act on their own desires). Traditionally, legal frameworks have constructed childhood as a time of incapacity and adults made decisions on behalf of children. However, contemporary child law has begun to reflect an emerging view of childhood that recognizes children as having standing in their own right, particularly where maturity and understanding can be evidenced. This is evidenced by the extent to which legislatures and courts are increasingly acknowledging children's participatory rights in respect to decisions affecting their welfare or medical treatment, and the extent of that autonomy varies based on the context, jurisdiction, and nature of the decision at issue.

¹¹²⁷ Emma Williams, *Do Children Have the Right to Contribute to Medical Decisions About Their Own Care?*, 25 *Health Hum. Rts. J.* 150 (2017).

1.2 Theoretical and Philosophical Bases of Children's Autonomy and Participatory Rights

The acknowledgement of children's agency is firmly grounded in philosophical traditions and psychological theories of human development. Enlightenment thought as expressed by philosophers such as John Locke posited the potential for rational agency, even in young children, albeit conditioned upon stages of development. Jean Piaget's cognitive development theory and Lawrence Kohlberg's stages of moral development provided empirically based foundations for legal reforms by demonstrating children's growing abilities, age and environment mattering. The capability approach defined by Martha Nussbaum and Amartya Sen calls for respect to be paid to the capabilities of individuals, which includes children's abilities to form and pursue goals that are important to them. Jurisprudentially, the potential of children's agency has driven the law away from paternalistic, best-interest models of children's rights and towards a framework of children's presumptive agency subject to reasoned interpretation rather than age based thresholds.

1.3 International Legal Instruments Underpinning Children's Rights

The United Nations Convention on the Rights of the Child (UNCRC) is the foremost and most widely referenced document supporting children's legal autonomy at the global level. Based on the language of Article 12, all children under the age of 18 have the right to express those views freely in all matters affecting them, depending on their age and maturity. Children also have the right to be heard, either directly or through a representative, in any judicial and administrative proceedings, as per the language of Article 12. Article 5 is also indirectly supportive of this principle through the requirement that states respect the evolving capacities of the child while providing direction through parents or guardians. Thus, the UNCRC establishes participatory and decisional rights as the cornerstones of contemporary child law

and has been directly or indirectly derived, if not explicitly influenced, from national statutes and policy across jurisdictions including but not limited to the Children Act 1989 (UK), Children's Act 38 of 2005 (South Africa), and the Infants Act and Health Care Consent Acts (Canada).

1.4 Challenges in Defining and Operationalizing Autonomy for Minors

Even though the rights-based model regarding children's autonomy is becoming increasingly accepted, its actualization is complicated. One of the primary issues is taking capacity into consideration: age, maturity, and understanding for capacity assessment are all subjective, and significantly vary within legal systems and factual situations. Even now, many jurisdictions look to an age-based formula, which may not reflect a child's competency accurately. Practitioners (and institutions) may push back because of paternalistic thinking or protectionism, and may not want to acknowledge or actualize a child's wishes. Cultural norms, social networks, availability of information, and resources also play a role in the ability to actualize autonomy, especially for disenfranchised or marginalized children. Creating a true sense of operationalization for legal autonomy will require legal reforms as well as a supportive assessment framework, professional education, advocacy, and a system of supports that allow engagement and participation as well as informed decision-making.

2. Statutory Frameworks and Legal Provisions Governing Children's Autonomy

2.1 Overview of Statutory Approaches Across Jurisdictions

The legal statutes that constitute the foundation for recognizing and regulating children's autonomy in judicial and medical decision-making declare the rights of children to participate in decisions affecting their lives, specify the parameters of capacity and consent, and mandate processes that protect children while also recognizing their autonomy.

Although international norms establish a general structure, national legislation reflects its own distinct cultural, social, and political constructs that produce different statutory models.

2.2 Canada: Capacity-Based Consent and Participatory Rights

Canada serves as an illustration of a capacity-based legislative regime that values individual assessment rather than age limits. The British Columbia Infants Act and the Ontario Health Care Consent Act provide the authority for any capable minor, regardless of age, to consent or refuse medical treatment. Under the Acts, the minor's capacity depends on their ability to understand the risks and benefits of the treatment. The Quebec Civil Code offers a hybrid model of age limits for some treatments but also includes an assessment of competence. Family law statutes throughout Canada include requisites for children to participate in custody and child welfare matters; courts are now called on to consider children's wishes and apply the "best interests" standard. These legislative initiatives align with Canada's commitment to the UNCRC's evolving capacities doctrine and are bolstered by court decisions including the Supreme Court's recognition of children's legal agency and recommendations for the mature minor doctrine in *A.C. v. Manitoba*.

2.3 United Kingdom: The Children Act 1989 and Gillick Competence

In the UK, statutory acknowledgment of children's autonomy is embedded in historical common law principles. Under the Children Act 1989, courts must consider what a child wishes and feels, and with respect to autonomy, development capacity is a primary consideration. Additionally, the doctrine of Gillick competence which is established through case law (*Gillick v West Norfolk*) has been widely adopted for statutory and clinical practice, allowing children under 16 to provide consent to medical treatment proving sufficient understanding. The Children Act 1989 and the

Mental Capacity Act 2005 together provide a statutory scheme that strives to balance the developing autonomy of minors with protective oversight, and emphasizes best interests where autonomy may be limited, as it applies in discussions.

2.4 Germany: Constitutional and Civil Law Recognitions

The regulating system of Germany has a systemized approach in which parental rights coexist with increased recognition of the children's right to partake in agency. For example, Article 6 of the Basic Law protects parental custody, but obligates the state to uphold and maintain children's welfare and emerging rights of their personalities.

The German Civil Code (BGB) has explicitly included codifications which, in family law contexts, courts are required to take the views of children into consideration. FGG (Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit) articulates children's participation rights in proceedings affecting them once they have attained 14 years of age. Children have been afforded or further supported to have democratic representation within youth welfare provisions supported by the Social Code (SGB). In summation, these legal statutes together support the emphasis on procedural representation and participation accompanied by protection and respect for autonomy in the face of development.

2.5 South Africa: Progressive Statutory Protection under the Children's Act

The country of South Africa has especially forward-thinking statutory framework in the Children's Act 38 of 2005 which has the effect of allowing children's independent access to courts for protection and care, without further parental consent. The Act incorporates a right for competent children to be heard, and affords appropriate attention for their views in accordance with their age and maturity.

The Act expressly permits medical decision-making independent of parents at the age of

twelve under sufficient maturity and understanding. South Africa's conjunction of constitutional rights (Section 28) with legislative innovation reflects an advanced practice of autonomy for children especially with respect to participation in the judicial process and decisions regarding their welfare.

3. Judicial Interpretation and Case Law

3.1 Landmark Judicial Decisions Defining Children's Autonomy

Judicial decisions are instrumental in interpreting and defining the parameters of children's legal autonomy, particularly in the areas of medical decision-making and participation in judicial proceedings. Courts have engaged in weighing children's emerging capacity against parental rights and the state's interest in protection, and have developed important doctrines that specify how and when children can make decisions without parental involvement.

One particularly significant case from the United Kingdom, *Gillick v West Norfolk and Wisbech Area Health Authority* (1985), established the principle that children under the age of sixteen could consent to medical treatment if they demonstrate sufficient understanding and intelligence with respect to the nature and implications of the treatment. The House of Lords rejected the idea of strict age limits and instead allowed for a capacity-based approach. This test became known as Gillick competence, and has impacted clinical practice and legal thinking around the world, in calling for respect for developing maturity and not nuances of chronological age.

In Canada, the Supreme Court, once again, affirmed the notion of mature minor in *A.C. v. Manitoba (Director of Child and Family Services)* (2009). The ruling in that case affirmed that a capable minor was entitled to the right to provide and refuse consent to medical treatment independently. This case illustrated that maturity and capacity, instead

of mere age, should govern the validity of consent.

3.2. Evaluations of Capacity and Consent by Judicial Tests and Doctrines

The Gillick competence and mature minor doctrines are important tests that provide the guidance courts and practitioners use for determining a child's capacity regarding consent:

- Gillick competence: Evaluates if a child has sufficient understanding and intelligence to understand the nature, purpose, and consequences of proposed treatment or course of action. This test does not apply a simple age cut-off and targets functional capacity instead. This principle goes beyond medical scenarios into realms requiring autonomous decision-making.
- Mature minor doctrine: Used mainly in Canadian jurisdictions, this doctrine assesses whether a minor has sufficient cognitive and emotional maturity to make informed decisions autonomously. This doctrine is not bound to rigid statutory age thresholds, and instead engages individualized capacity assessment by healthcare practitioners or courts.

In South Africa, courts supplement statutory age and capacity thresholds with a priority on participatory rights, requiring minors should be granted reasonable opportunities to express views in judicial and medical decision-making, with weight given to the views proportionate to maturity. This approach was illustrated in *Bernert v. Abrahams* (2002), whereby judges – in concert with legislative intent – facilitated a more progressive approach to the agency of children in the legal system.¹¹²⁸

The Federal Constitutional Court in Germany applies the same approach by enforcing statutory provisions that guarantee participation and decision making rights from children, and holding that not hearing the

¹¹²⁸ *Bernert v. Abrahams*, 2002 (5) SA 346 (CC) (S. Afr.).

child's views is a possible violation of the legal standards.

3.3 The Courts' Role in Protecting Interests with Attention to Participation

Courts face a consistent challenge of balancing the obligation to protect children from harm and at the same time, respect their rights to participate and their rights of autonomy. This balance is seen in the consistent frameworks established by courts relying on capacity, best interests, and evolving capacity. In most cases, courts will retain the final say by overruling an autonomous choice when a risk is perceived to the degree of reasonable belief, however, they are increasingly trying to reduce paternalism by giving children's perspectives real and equal weight in deliberations.

Court systems are also developing procedural practices, for example, appointing legally independent children's attorneys or guardians ad litem to make sure children are meaningfully included and that the interests are protected to the fullest extent possible without having overall decisions made silencing the autonomy.

4. Promoting and Safeguarding Children's Rights

While there is progressive statutory and judicial recognition of children's legal autonomy, the practical enactment of these rights, in fact, is extremely difficult to achieve. In order to translate legal provisions into lived experience for children, adequate institutional structures in place, clearly defined procedural mechanisms in place and reliable measures of policy implementation in place.

One important aspect of implementation includes designing structures that protect children and are child-friendly, such as specialized courts, child welfare committees, and offices of the ombudsman to oversee children's children's rights. These institutions are designed to provide and support safe and child friendly opportunities for children to participate in decision making about their welfare and health.

The responsibility of medical, legal, and allied professionals is key to addressing the gulf between law and practice. Professionals need training to develop understanding and skills to recognize children's autonomous decision-making capacity, and respect their rights to participation in decision-making. They also must be able to successfully navigate the tension between autonomy and protection so that children are neither coerced nor abandoned in the decision-making process; rights to autonomy will be limited when both education and training are absent. Thus, ongoing education and institution commitment to supporting capacity building with professionals is essential.

Effective implementation is significant. When we respect and support children's autonomy by creating appropriate processes, it increases their well-being and confidence in the justice and medical systems. Poor implementation, on the other hand, may lead to children feeling excluded, disbelieved, or pressured, which can manifest in negative psychological and social consequences.

5. Critical Discussion of Children's Legal Autonomy

The concept of children's legal autonomy, while increasingly recognized in the statutory and judicial domain, is complex and often contested, both as a notion and in practice. This section synthesizes findings on the extent and limitations of children's autonomy, critically assesses existing legal and institutional arrangements, identifies the challenges and contradictions, considers the ongoing conflict between protection and autonomy, and draws it together in terms of children's legal autonomy.

5.1 Extent and Limits of Legal Autonomy for Children

Children's legal autonomy is premised on the acknowledgment that minors are individual persons who have developing capacities that can facilitate meaningful engagement in

matters affecting them – generally in contexts of health and health care and legal proceedings. Statutes and caselaw endorse this position in multiple jurisdictions as they move away from strict thresholds of age, timing, and the like to understand informed consent in terms of functionality regarding maturity and understanding. The principle of Gillick competence in the UK and the mature minor doctrine in Canada are examples of defined principles of recognizing and respecting children's ability to participate in a decision in the legal sense.

5.2 Gaps, Challenges, and Inconsistencies in Law and Practice

Numerous gaps and challenges still exist. One major source of uncertainty comes from the legal standard on capacity. This partly creates the risk of a subjective and inconsistent approach to determining the capacity of individuals across cases and jurisdictions. Cultural assumptions, and sometimes paternalistic attitudes, can also belittle children's perspectives. This results in a framework that privileges adult views rather than the explicit wishes of children. Socio-economic and geographic factors increase barriers to mechanisms for participation and limit the influence of these processes on vulnerable groups.

In some aspects of law, the right to autonomy in criminal or protection orders stands in stark contrast to diminished autonomy rights in other areas of law, such as in medical or education arenas. Furthermore, the legal system is slow to respond to new challenges brought about by technological change (for example, privacy and consent in a digital era), forcing adults to reshape their assessment of children's autonomy.

Additionally, the best interests standard often seeks to protect welfare, but the resulting layout can result in lower degrees of autonomy where children's expressed wishes become one factor of many, often being governed by assumptions about risk and vulnerability. This has resulted in

calls by scholars and practitioners to reframe the principle in autonomy so that children's agency is afforded greater respect.

5.3 The Tension between Protection and Autonomy

At the heart of the ongoing debate is the tension between the duty to protect children, and the duty to respect their autonomy. Protectionist sentiments stem from concerns about children being cognitively, socially, and emotionally vulnerable. Protectionist laws and policies create safeguards to protect children from possible harm. Conversely, the autonomy perspective promotes the recognition of children as rights holders who have the capacity to meaningfully participate, which can, in turn, enhance dignity, well-being, and empowerment.

This will lead to a tension in court decisions, legislative drafting, and implementation to a greater or lesser extent. Some jurisdictions lean towards protection, other jurisdictions lean towards participation, and many jurisdictions seek a complicated balance that sees autonomy as conditional and developmental, rapidly changing. There is an appreciation that overt paternalism can work against children, contribute to disempowerment, and stymie children's development.

Resolving this tension requires contextually nuanced approaches that prioritize support of autonomy rather than just protection; protecting children's autonomy is ultimately more supportive of their protection, understanding that any protection will be most effective if the children feel like active participants in their own lives. Autonomy-based approaches reflect changing social and legal understandings of childhood, from a conception of protection that emphasizes control to a conception of protection that emphasizes employment.

Findings

This research identifies a number of significant findings in relation to the legal acknowledgment

and enactment of children's autonomy in decisions made in legal and healthcare contexts.

To begin with, international agreements, such as the United Nations Convention on the Rights of the Child (UNCRC), have challenged prevailing global norms to advance the notion that children possess evolving capacities, along with a corresponding right to take meaningful part in decisions that concern their lives. Article 12 of the UNCRC has been particularly instrumental in encouraging states to recognize children's right to issue their opinions freely, with consideration of the child's age and maturity.

In addition, domestic legal systems have developed consent requirements based on an understanding of capacity, to determine young people's ability to make autonomous decisions. National precedent-setting judicial concepts, such as the Gillick standard in the UK and the mature minor principle in Canada, have laid valuable groundwork, by emphasizing the child's intelligence and understanding as more relevant than age alone. Statutory reforms that contain participatory rights have likewise been incorporated into legislature controlling child welfare, such as the Children Act 1989 in the UK and the Children's Act 2005 in South Africa.

In addition, while there have been positive developments in the legal and judicial areas, the actual practical implementation continues to struggle with many challenges. For example, the determination of capacity is often dependent on subjective assessments that vary greatly depending on practitioners and jurisdictions, in many cases influenced by out-of-date attitudes of paternalism and socio-cultural ideas that prioritize "assume the child may not be able to decide" rather than facilitating the agency of the child "to the fullest extent possible." Furthermore, institutional silos, inconsistent procedures, and varying levels of professional

Lastly, this research highlights a critical need for greater clarity of legal standards, enhanced judicial and professional education, and child-

friendly mechanisms that allow for meaningful child participation in judicial and medical systems. Continued strengthening of institutional frameworks including appointing independent legal counsel and implementing procedural reforms can improve the overall quality and perception of children's participatory rights.

Conclusion

This study has looked at the expanding acknowledgment and use of children's legal autonomy in judicial and medical decision-making. The research finds that legal conventions, such as the United Nations Convention on the Rights of the Child, have greatly assisted in the first official legal participation rights framework, and have expanded not just children's participation rights, but children's capacity-based consent abilities. Legal and international frameworks should always prioritize the child's evolving capacities and the exposure of the child within applicable cases.

In order to fill these gaps, it is necessary to develop guidelines for assessing children's decision-making abilities that are clear and predictable, and which do not simply rely on arbitrary age limits. At the same time, improving the training of legal, medical, and child welfare professionals will ensure that they have the skills to appropriately engage children in a meaningful way. More systemic reforms like child-friendly courts and the appointment of independent representatives can create developments that are facilitative and support children to be actually engaged.

We also need to redouble efforts that promote a cultural shift that recognizes children as independent holders of rights, especially in light of pervasive paternalism. This means legal reform needs to be deliberate about establishing rights to participate and the evolving capacities of children as core tenets. Finally, we need to continue to engage in empirical research to track progress especially



with marginalized groups and guide evidence-based recommendations to improve policy.

To conclude, fulfilling children's legal capacity is a mandatory requirement to promote their dignity, rights, and wellbeing. It requires a comprehensive approach that integrates transferring legal conventions, institutional support, professional ability, and cultural shift. All of these reforms can help support children's rights to self-determination and meaningful participation in legal and medical decision making, while bringing domestic practices into alignment with international human rights standards.

