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EXAMINING THE MINIMUM AGE FOR SEXUAL CONSENT UNDER THE KENYAN CRIMINAL JUSTICE SYSTEM

EUNICE AKELLO

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DECLARATION

I, **EUNICE AKELLO** do hereby declare that this thesis titled Examining the Minimum Age for Sexual Consent under Kenyan Criminal Justice System, is my original work and has not been submitted, and is not currently being submitted by any other University. Where other people's works have been used, references have been provided.

04/11/2021

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EUNICE AKELLO **DATE**

G62/37389/2020

APPROVAL

This research paper titled has been done and submitted for examination with my approval as University Supervisor

30.11.2021

______________________________ ____________________

Dr. Agnes K. Meroka-Mutua, **DATE**

Senior Lecturer, Dept. of Private Law,

School of Law, University of Nairobi.

ACKNOWLEDGEMENT

There are pillars to life which are numerous in number, but some will be mentioned with respect to this paper. To my supervisor, Dr. Agnes Meroka, thank you. The patience and ever abiding love of my family has been a melting experience. The uninterrupted time to concentrate on the research given by my employer, Shapley Barret & Co. Advocates. Above all, I recognize the Pillar of pillars, God.

DEDICATION

I dedicate this research project paper to all those who would wish for an efficient and effective criminal justice system in order to achieve a free, fair and just Kenya.

ABSTRACT

The age of consent in Kenya is set at 18 years. Any sexual intercourse with a person under this age is illegal and attracts dire consequences to the extent of serving a life imprisonment even though the law accords a defense such as the minor deceived the accused to be above the age of maturity and the accused reasonably believed that he/she was of age. However, this defense is rarely applicable owing to the stringent application and invocation of the age of consent. There is an arbitrary application of this concept and any attempt by different actors in the justice system among them judges to call for a reform of the law have been met with anger, fury and backlash.

Based on this sorry state that has seen many minors teeming in our prisons, this study sets out to call for a reconsideration of the law on the age of consent. The study calls for an honest national discourse on this subject so as to reform the character and behavior of minors. This study propagates the take ascribed to the celebrated author, Chimamanda Ngozi Adichie, that, *'... tell her that her body belongs to her and her alone, that she should never feel the need to say yes to something she does not want, or something she feels pressured to do. Teach her that saying no when no feels right is something to be proud of.'* In order to make the informed decision Chimamanda talks of, [with necessary modifications to include both sexes], the minors need to be engaged in this discourse of maturing of children, morality, autonomy, protection of children and the need for proportionality in punishing sexual offenders.

This study culminates in proposing a number of recommendations that will create a fair and just criminal justice system and therefore create a harmonious society where dreams of consenting minors to sexual escapades' potential is not thwarted because of rigid and obsolete legal regime that seeks to set abstract limits on natural processes like maturity.

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AIDS	Acquired Immuno-Deficiency Syndrome
ASC	Age for Sexual Consent
ASRH	Adolescent Sexual and Reproductive Health
AYFS	Adolescent and Youth Friendly Services
BIC	Best Interest of the Child
CJS	Criminal Justice System
CLS	Critical Legal Studies
CRC	United Nations Convention on the Rights of the Child
CSA	Child Sexual Abuse
ESA	Eastern and Southern Africa
HIV	Human Immuno-Deficiency Virus
SOA	Sexual Offences Act
SRH	Sexual and Reproductive Health
STI	Sexually Transmitted Infections
UDHR	Universal Declaration of Human Rights
WHO	World Health Organization

TABLE OF CONSTITUTIONS, STATUTES AND CASE LAW

The Constitution of Kenya, 2010

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Children Act No. 8 of 2001

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International Instruments

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Republic v AJK, 2020, EKLR

Teddy Bear Clinic v Minister of Justice and Constitutional Development, 2004(2) SA 168(CC)

CHAPTER ONE

1.0 Introduction

The offence of defilement, as enshrined in section 8(1) of the Sexual Offences Act (SOA),[1] has been germane to the discourse on the revision of the age of sexual consent (ASC) in Kenya. The application of this provision limits the ASC in Kenya to eighteen (18) years. The Act construes a child within the conception of the Children Act, [2] which defines a child as an individual who has not attained the age of 18 years. [3] This debate, which has been evidenced in cases such as *C K W*[4] and *Eliud Waweru Wambui*[5] in recent times, is underpinned by multiple considerations which include: the provision's detrimental impact on the best interests of the child (BIC) and its gender discriminatory application.

The above-mentioned judicial decisions are but a few, amongst a host of so many other cases which have brought to the fore this shortcoming of the SOA within the realm of the Criminal Justice System (CJS) in Kenya. The gendered nature of the application of this section has been criticized for favoring the girls to the detriment of boys. [6]

This harsh reality is brought to the limelight in cases where both parties involved are teenagers. In the majority of such scenarios, it is the males who have faced the brunt of the sentences. For instance, in *P O O (A Minor) v Director of Public Prosecutions & another [2017] eKLR*, [7] the

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[1] Act No 3 of 2006.
[2] Act No 8 of 2001.
[3] Section 2 ibid (n.2).
[4] 'Petition 6 of 2013 - Kenya Law' <http://kenyalaw.org/caselaw/cases/view/100510/> accessed 5 April 2021.
[5] 'Criminal Appeal 102 of 2016 - Kenya Law' <http://kenyalaw.org/caselaw/cases/view/170043/> accessed 1 April 2021.
[6] Godfrey Dalitso Kangaude and Ann Skelton, '(De)Criminalizing Adolescent Sex: A Rights-Based Assessment of Age of Consent Laws in Eastern and Southern Africa' (2018) 8 SAGE Open 215824401880603.
[7] 'Constitutional Petition 1 of 2017 - Kenya Law' <http://kenyalaw.org/caselaw/cases/view/140634/> accessed 5 April 2021.

appellant, a boy aged 16 years was charged with the offence of defilement in contravention of Section 8(1) of the SOA. His partner, a fellow teenage girl of the same age, with whom they had discretional sex, was however not charged. While quashing the charges, the judge decried the gender-discriminatory nature of this provision. She stated in part: [8]

> "Does a boy under 18 years have the legal capacity to consent to sex? Haven't both children defiled themselves? I really think this kind of situation should be re-examined in the criminal justice system."

The criminalization of discretional teenage sex and the selective penalization of the male counterpart, has been an underpinning in the calls for reform in the age of sexual consent in Kenya. In *Eliud Waweru Wambui,*[9] in which the facts were alike in terms of age and offence to the above case,[10] a similar clarion call was made by the Court of Appeal. It was stated that the SOA indeed does cry out for a serious re-examination in a sober and pragmatic manner. While making reference to the minimum age of 16 years in majority of other jurisdictions, it was emphatically averred that the CJS governing the age of sexual consent is in urgent need of reform. The judges expressed themselves as follows: [11]

> "Where to draw the line for what is elsewhere referred to as *statutory rape* is a matter that calls for serious and open discussion…. A candid national conversation on this sensitive yet important issue implicating the challenges of maturing, morality, autonomy, protection of children and the need for proportionality is long overdue (*emphasis added)"*

[8] P O O (A Minor) v Director of Public Prosecutions & another [2017] eKLR, Per Justice H.A. OMONDI (paragraph 29).
[9] Ibid (n. 4).
[10] Ibid (n.7)
[11] Eliud Waweru Wambui v Republic [2019] eKLR, Per Justice Kiage (page 7).

This manifest injustice towards boys has resulted in the brimming up of prisons with young men and boys serving lengthy sentences for having discretional sex with teenage girls, whose consent is invalidated for their being below eighteen years. [12] This unfolding tragedy within the CJS therefore calls for a serious re-evaluation of the minimum ASC.

Further, the debate on the revision of the ASC has been informed by the current regime's perceived limitation on the rights and BIC. In its General Comment No. 16,[13] the United Nations Committee on the Rights of the Child entreats state parties to the crucial need of balancing between protection of the child and evolving practices when determining the requisite ASC. The said document urges state parties (Kenya being one of the signatories) to refrain from criminalizing teenagers of similar ages for factually discretional and non-exploitative sexual activity.[14] This appeal from the document has since been germane to the discussions on whether Kenya needs to revise this minimum of age for consent.

By and large, there is no gainsaying that that there is a flaw within the CJS as pertains the age of sexual consent. The teeming number of teenage boys serving long sentences for discretional sex with their fellow teenage girls is a testament of the imbalance of the law in this area. A closer interrogation of this gender-biasness of the law forms the backbone of this study. Over and above that, the impact of this provision of the law on the BIC in Kenya is of great concern to this research.

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[12] 'CJ Maraga Calls for Change of Law Criminalizing Teen Sex - The Standard' <https://www.standardmedia.co.ke/kenya/article/2001325822/cj-maraga-calls-for-change-of-law-criminalizing-teen-sex> accessed 5 April 2021.

[13] UN Committee on the Rights of the Child (CRC), *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, 6 December 2016, CRC/C/GC/20.

[14] Ibid (n.12), paragraph 40.

1.1 Problem Statement

Whereas criminalization of sexual intercourse with minors may be justified on the premise of protecting them from exploitation by adults, the same statutory prohibition of discretional teenage sex is fallacious.[15] This study seeks to critically examine the Kenyan legal framework on the minimum ASC within the CJS. In particular, an analysis of the jurisprudence on defilement, as enshrined within the SOA will be undertaken. The study seeks to expose the injustices which have been occasioned to the boy child, by the application of this provision of the SOA to cases of discretional teenage sex. Over and above that, the study seeks to investigate the effect of this legal framework on the BIC.

1.2 Research Objectives

The overreaching goal is to assess the Kenya's legal infrastructure on the minimum ASC within the corpus of the Criminal Justice System (CJS). Its specific objectives are:

1. To critically examine the philosophical justifications for regulating the minimum ASC in the Kenyan CJS
2. To evaluate the legal framework underpinning on the minimum ASC consent in Kenya CJS
3. To outline the shortcomings in the Kenyan legal infrastructure on the current age of eighteen (18) years in the CJS
4. To make recommendations of reforms necessary to move beyond these shortcomings to the CJS

[15] Sarah Beresford, 'The Age of Consent and the Ending of Queer Theory' (2014) 3 Laws 759.

1.3 Research Questions

The study seeks to answer the following questions:

1. What is the philosophical justification for the current legal infrastructure governing the minimum ASC in Kenya in the CJS?
2. What is the legal infrastructure underpinning the minimum ASC in Kenya in the CJS?
3. What are the drawbacks and shortcomings occasioned in the current age of eighteen (18) years in the Kenyan CJS?
4. What are the recommendations for reform which are needed to move beyond these shortcomings?

1.4 Hypothesis

The current legal infrastructure on the minimum ASC within the corpus of the CJS is gendered and detrimentally biased against the boy child.

1.5 Justifications of the Study

The findings of this study would go a long way in developing three main areas in law.

Firstly, the research will enable law development displayed through the necessary amendments to the Sexual Offences Act and inform further enactments of children related laws and regulations under the Victim Protection Act and Children Act.

Secondly, the findings of the research will help in designing of policies geared at enabling both substantive and procedural access to justice and fair treatment with regards to no fears as to legal biases or prejudices of the boy child.

Lastly, the findings of this research shall aid in attracting the needed legal research in the field of sexual consent age in Kenya and the wider East African region. This is because such research is currently scarce as compared to the weight of the subject matter.

1.6 Theoretical Framework

This research examines the biasness of the law through the lenses of Critical Legal Studies (CLS) with a sharper focus on the theory of equality.

1.6.1 Critical Legal Studies (CLS)

The CLS is a movement of legal scholarship which arose as a reaction to the entrenched and established classical schools of legal thought. The movement's definite aim is to debunk the law's pretensions to neutrality, determinacy and objectivity.[16] In its very nature, it is a critique of the current legal order's assertion to the formalism and liberalism of law. All CLS scholars are guided by the mantra that "things could be otherwise."[17] CLS therefore functions by assessing and critiquing the deficiencies within the legal order through various heads of critiques in which they "diagnose" the deficiency within the legal object by highlighting the flaws within it.

This study's main mission is to examine the flaw within the CJS as pertaining the minimum age of consent. In this regard, it will rely heavily on the inspiration of the CLS to debunk the pretensions of neutrality, formalism and objectivity of the CJS regarding the minimum age of consent. In particular, the study anchors its assertions on the following CLS critiques: indeterminacy, entrenchment and ideals principle.

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[16] J Paul Oetken, 'Form and Substance in Critical Legal Studies' (1991) 100 The Yale Law Journal 2209.

[17] Linz Audain, 'Critical Legal Studies, Feminism, Law and Economics, and the Veil of Intellectual Tolerance: A Tentative Case for Cross-Jurisprudential Dialogue' (1992) 20 Law and Economics 89.

The critique of indeterminacy is indispensable to the mission of this research. Under, the indeterminacy critique, CLS proponents seek to demonstrate the manner in which a legal object (usually a legal rule or a legal order) is indeterminate. The indeterminacy assessment is conducted by identifying the incoherence or inconsistency which results from the application of the legal object.[18] This critique fuels this study. The study will hold that the CJS framework on the age of sexual consent is indeterminate by identifying the inconsistencies which have resulted from its application.

Another critique, the critique of entrenchment is the instrument through which CLS proponents fault the legal order by an analysis of how the law perpetuates the interests of those groups which are already entrenched.[19] In the same breadth, the disenfranchised critique further analyses how the legal order in turn disenfranchises other minority groups.

These two critiques are a further drive for this study as the research is interested in investigating how the current CJS provision on the age of sexual consent entrenches particular classes within the Kenyan societies and further, the manner in which the same legal order disenfranchises a particular class. It is to this study the contention that the CJS framework is detrimentally biased towards the female gender and this assertion bases its theoretical anchorage on the disenfranchised critique within the CLS.

Finally, the ideals critique is used by the CLS scholar to fault the legal object by demonstrating failure of an object living into its announced and intended ideals.[20] This research is buttressed on the ideals principle as it asserts that the CJS framework on the age of sexual consent has failed to

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[18] James Boyle, *Critical Legal Studies* (NYU Press 1993).
[19] Ibid (n. 16) 21.
[20] 'Critical Legal Theory | Wex | US Law | LII / Legal Information Institute' <https://www.law.cornell.edu/wex/critical_legal_theory> accessed on 6th March 2021.

live up to one of its ideals; the securing of the best interests children. The research holds that the legal framework constitutes a scathing attack on the rights to dignity to be enjoyed by children.

1.6.2 Theory of Equality

Ronald Myles Dworkin's equality of resources calls for the fact of human beings being in a position of being responsible for the life choices they make. Like the rest of Dworkin's work, his theory of equality is underpinned by the core principle that every person is entitled to equal concern and respect in the design of the structure of society.[21]

This theory advocates for equal treatment of the two genders. This theory also seeks for equality between men and women on the premise that women, just like men, are autonomous and right-bearing beings.[22] This study asserts that there should be equal treatment of both sexes when it comes to the age of sexual consent and its enforcement. The study holds (from the cases cited above) that the boy child, in cases of discretional teenage sex, has been unduly punished with the girl child being left Scot Free in many cases. It relies on this theory of equality to make its case that there should be no differential treatment of the both the girl child and boy child in cases of discretional teenage sex.

1.7 Literature Review

Various scholars have attempted to bring to light the challenges posed by Section 8 of SOA in dealing with the sexual activities among the minors. These scholars associate themselves with the strand that holds that the offence as defined under Section 8 of SOA is particularly discriminatory. This is due to the fact that one minor is branded the harsh label of a villain and

[21] https://link.springer.com/content/pdf/bfm%3A978-0-230-24446-7%2F1.pdf accessed on 3rd November 2021
[22] Raymond Wacks, *Understanding Jurisprudence, An Introduction to Legal Theory* (3rd edn 2012).

offender, while the other gender is glorified into the status of victimhood. This is so despite the fact that all parties are minors and of same age bracket.

While their discussions are valid and timely, there is witnessed a lacuna on the appropriate legal, social, cultural and political remedy to this dilemma. Thus, this research paper's literature discusses two repetitive themes which will inform the objectives of this study which are:

a) The conundrum on the requirement of the age of consent for sexual activities among the minors; and
b) The paradox of gendering the classification of an offender and victim in sexual activities between minors

Age of Consent for Sexual Activity between Minors

Okwatch[23] gives a notable contribution to the discourse on the age of sexual consent in his paper on the jurisprudence of defilement in Kenya. He considers the offshoots which have arisen from the rigid criminal regulation of the age of sexual consent. His work is based on a critique of Section 8 of SOA[24] which provides for the offence of defilement. In sum, the problems he associates with the criminalization of sexual relations for individuals below the statutory age of consent include: the complexities which arise from discretional sexual relations between teenagers *inter se*, the potential hindrance to access to reproductive health and the unjust outcome associated with the CJS stipulations of the mandatory minimum sentences for those found culpable.

Another dimension which has not been addressed into this discussion is whether the law is sociologically informed on the consequence of it partially criminalizing and partially victimizing

[23] Henry Okwatch, 'The Problematic Jurisprudence on the Law of Defilement of Adolescents in Kenya' [2019] Strathmore Law Review.
[24] Ibid (n.1).

two minors who ought to be guided and in whom the best interests of the child apply. The ironically presented situation is whether the law is encouraging double standards in dealing with children, or whether it is placing an ill-informed presumption that a minor boy engaging in sexual activity with a female minor is in all manners an adult; ultimately facing the thunderous sentences under the law.

Okwatch further posits that the statutory age of consent in Kenya poses a hurdle to the enjoyment of the right to reproductive health care by teenagers.[25] In illustrating this, he cites the famous South African *Teddy Bear Clinic* case[26] in which it was averred that if sexual relations of minors are unduly supervised and regulated by criminal law, the outcome is that the minors' sexual behaviors are shelved underground hence posing greater risks from unhealthy sexual practices.[27] In this regard, he concurs with Arshaougni P, who writes that the major limitation to access to reproductive health care is legal and policy constraints.[28]

This research will labor to examine in a deeper pedestal the manner in which legal reforms in the age of sexual consent in Kenya can be fashioned in order to break down this barrier which it possesses. While Okwatch postulates for these changes from the perspective of the teenagers (both male and female), this assessment will be particularly advocating for a revision from the angle on teenagers who are particularly female.

[25] Ibid (n.14) 18.
[26] Teddy Bear Clinic v. Minister of Justice and Constitutional Development, 2014 (2) SA 168 (CC).
[27] Ibid (n.25) 7.
[28] Arshaougni P, "But I am an adult now…sort of"; adolescent consent in health care decision making and the adolescent brain' 9(2) *Journal of Health Care Law and Policy*, 2006. First letters of Journal title should be in CAPS

The Gender Paradox in Sexual Activities between Minors

Another writer, Olesen[29] explores on the paradox which is posed by rigid statutory rape laws. This paradox manifests itself in that the statutory law appears to protect the female on one hand while restricting their sexual activity on the other. The result of this double standards according to her, breeds uncertainty as to whether state's intervention should be securing girls from defilement through prohibitive laws, or to relax those laws in order to accommodate the positive views of teenage sexuality.

This research weighs in on this tension by asserting that the state should interfere minimally in this arena by relaxing this punitive legal framework. The research will base this assertion on Olsen's views that a relaxation of the law will accommodate and foster the positive views on teenage sexuality of which the Kenyan CJS have long been blinded to.

Another author, Gruber,[30] in making her case against the punitive penal laws, buttresses her argument on the discourse of formal equality between men and women. She laments that the legal actors have confused biological differences with socially-engineered differences which they have in turn utilized to justify such discriminatory legal frameworks.[31] She goes deeper to debunk the social construct which has held sway in most societies; that it is men who are the primary seekers of sexual favors and that women should thus be protected against sexual access by sexually aggressive men. In this regard, she is in total concurrence with McClain who makes her case that rigid sexual laws deprive young women of their autonomy to determine their sexual relations.[32] She suggests that young women, like their male counterparts are also right-bearing individuals who should be allowed to self-govern in their domain of sexual relations.

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[29] Refer to Christopher R. and Christopher K, 'The paradox of statutory rape' 87 *Indiana Law Journal*, (2012).

[30] Aya Gruber, 'Rape, Feminism, and the War on Crime' (2009) 84 Washington Law Review 581.

[31] Ibid (n.32) 47.

[32] Mcclain L, 'Some ABCs of feminist sex education (in light of the sexuality critique of legal feminism)' 15(1) *Columbia Journal of Gender and Law,* 2006, 67.

Thus, in her advocacy for the decriminalization of teenage sex, she supports her stand by the justification that girls should be sexually accessible to males. Putting this into sharper context, this research will assert that maintaining punitive CJS standards will do more harm than good by continually relegating females to the realm of victimhood.

Kagaunde and Skelton in their work[33] make an assessment of several of the CJS regimes on age of consent of various countries in Eastern and Southern Africa. Their report reveals that although most countries have their stipulated minimum age of consent, there is an ambiguity on the part of the law regarding discretional sex between minors. Be that as it may, they postulate that majority of the countries in the web of study focus more on retributive justice rather than on addressing harms which are associated with sexual intercourse.

This research seeks to further contextualize this in the Kenyan experience by elucidating the manner in which the rigid, retributive minimum sentences of defilement, is blindsided to the antecedents of harms associated with sexual intercourse.

Similarly, these authors drum support for decriminalization of teenage sex by citing the gendered ideal which criminalization constructs.[34] This ideal, they postulate, victimizes the woman as a passive and defenseless creature. My assessment aims to bring this further home by moving from generalization to the contextualization of this justification to the Kenyan experience.

1.8 Research Methodology

To effectively test its hypotheses, meet the objectives, answer research questions, this study will use library-based research. The method of extraction of data shall be qualitative in nature. Legal words, phrases and opinions shall be extracted in order to understand their meaning in relation to

[33] Ibid (n. 6).
[34] Ibid (n. 7).

the sexual consent age in Kenya. Generally, the doctrinal research methodology would thus be applied in focusing on law and commentaries to answer questions about law.

This library-based research shall evaluate primary and secondary data through the above-mentioned doctrinal research methodology in analysing primary sources of law: constitutions, statutory laws, case laws. The research will also rely on secondary sources of data extracted from books, journal papers, electronic journals, newspaper articles, publications and websites in discussing the legal framework on the minimum sexual consent age.

1.8.1 Limitations

In its reliance of desk research as a method of data collection, the study expects to be confronted with the following challenges:

1. Inadequacy and insufficiency of local research on the subject.

To mitigate this challenge, the study will exhaustively analyse the present and available data and make a lesson from the best practices in other jurisdictions.

1.9 Scope of the Study

This research is limited to the legal and scholarly jurisprudence on the minimum age of consent.

1.10 Chapter Breakdown

Chapter One

This chapter begins with the background of the study. It then discusses the problem statement, examines the research questions and relates them to the objectives, discusses the justification for

the study and the delimitation of the study. It then concludes on the theoretical framework of this study and the literature review.

Chapter Two

This chapter discusses the rationales for the current legal framework on the minimum sexual consent age for children. It brings out the historical and legal developments while appreciating the conceptions of the current legal framework.

Chapter Three

This chapter discusses the legal, policy and institutional framework which informs the minimum consent age in Kenya as reflected through international conventions, statutory laws, and legal jurisprudence from Court of law. This will illustrate the spirit of a conflict between statute law and case laws. This chapter deeply analyses the discrimination of the CJS laws on which are dominantly based on sexual discrimination.

Chapter Four

This chapter discusses the drawbacks and biases and how they have resulted into avalanches of injustices. This chapter will heavily undertake a review and analysis of the best practices as witnessed in other jurisdictions in an attempt to make a case of equal treatment of both the girl child and boy child. This chapter then examines the best practices from other jurisdictions which have attempted to cure these drawbacks.

Chapter Five

Chapter five will outline the conclusions of the study backed with the recommendations.

CHAPTER TWO

THEORITICAL AND PHILOSOPHICAL JUSTIFICATIONS FOR REGULATING THE AGE OF SEXUAL CONSENT IN KENYA

2.0 Introduction

This chapter explores the philosophical and conceptual rationales for the regulation of the age of sexual consent in Kenya. It sheds light on the justifications which necessitate the need for this legal restriction. Largely, the chapter will delve into the doctrinal concepts, social, economic and political underpinnings for regulation of the age of sexual consent in Kenya.

2.1 Doctrinal Concepts

Some inherent doctrinal concepts are crucial in informing on the standards and measures the law must address either through amendments or enactment. These doctrinal concepts form the rationales which inform any legal infrastructure. These rationales interrogate the justifications which the law seeks to protect by criminalizing sexual intercourse with minors.[35] Consequently, this will help in addressing any imbalanced treatment in the law between different sexes between the children.[36] This discourse will be anchored majorly on the principle of the BIC. The considerations of safeguarding the child’s right to education, health and social development will

[35] Richard G Wilkins and Trent Christensen and Eric Selden, 'Adult Sexual Desire and the Best Interest of the Child' (2005) 18 St Thomas L Rev 543.
[36] Graham Hughes, 'Consent in Sexual Offences' (1962) 25 Mod L Rev 672.

be viewed and discussed as emanating of this principle.[37] Further, the role of public order and culture as underpinnings will also be dealt with.[38]

2.2.1 Best Interest of Children (BIC)

The concept of the BIC is a tenet which holds that in matters pertaining to the children, their best interest should be of paramount consideration both nationally and globally.[39] There's no general definition of what constitutes BIC; however, it can be accorded an acceptable understanding that administrative and courts of law will undertake to bear in mind actions, measures, services and order which are promoting and sustaining children's welfare and absolute safety.[40] This concept is beyond a mere principle: it constitutes substantive rights and rules of procedure.[41]

As a procedural rule, the concept demands that in any decision involving the child must take into account the primary repercussions of the decision on the child or group of children concerned.[42] As a substantive right, it holds that the child has a right to be treated in a way that upholds their best aspirations and promotes their well-being.[43] Its essence is to facilitate the harmonious development children, and the complete realization and enjoyment of their rights.[44] Indeed, the well-being of the child is the underpinning of this concept.[45] Tracing its development to the 1959

[37] Rachel Sloth-Nielsen, 'Gender Normalisation Surgery and the Best Interest of the Child in South Africa' (2018) 29 Stellenbosch L Rev 48.
[38] Belinda Carpenter and Erin O'Brien and Sharon Hayes and Jodi Death, 'Harm, Responsibility, Age, and Consent' (2014) 17 New Crim L Rev 23.
[39] Constitution of the Republic of Kenya, 2010 Article 53 (2).
[40] Bringing International Human Rights Law Home: Judicial Colloquium on the Domestic Application of the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child. New York, United Nations.
[41] Christian Reichel Van Deusen, 'The Best Interest of the Child and the Law' (1991) 18 Pepp L Rev 417.
[42] Implementation Handbook for the Convention on the Rights of the Child, 3d revised edition, UNICEF 2007.
[43] Ibid (n. 45).
[44] Michael Freeman, 'The Best Interests of the Child - Is the Best Interests of the Child in the Best Interests of Children' (1997) 11 Int'l JL Pol'y & Fam 360.
[45] Steve James, 'Romeo and Juliet Were Sex Offenders: An Analysis of the Age of Consent and a Call for Reform' (2009) 78 UMKC L Rev 241.

Declaration of the Rights of the Child,[46] the concept has been engraved in various instruments concerning the rights of the child; key among them being the Convention on the Rights of the Child (CRC).[47]

This doctrinal concept on best interests of children has informed the enactment of various constitutions and laws world over geared at promoting the interests of the children.[48] The doctrine poses that the shackles which have been supported by law in the past over ill treatment of children must be abandoned.[49] Thus the law not only becomes as a tool for social change but also a key component for social protection and engineering.[50] Generally, this doctrinal has been applied in protecting the children from sexual exploitation by adults.[51]

The conundrum for this study is to make a case that the law, in it being informed by the best interest of children, has tilted an imbalance when dealing with children engaging in sexual activity.[52] This imbalance might suggest an indirect discrimination of the boy child where he is being labeled the villain while the girl child a victim.[53]

Pertinent to any consideration of this concept is the protection of the child without any discrimination as to the sex of the child. States have duty to ensure the incorporation of the BIC in all institutions and processes which affects the child either directly or indirectly in a manner

[46]KhatiaShekiladze, 'The Substance of the Best Interests of the Child' (2016) 2016 J Law 205.
[47] Article 3 paragraph 1.
[48] Sanford N Katz, 'Protecting Children through State and Federal Laws' (2007) 2007 Int'l Surv Fam L 309.
[49] Ana L Partida, 'The Case for Safe Haven Laws: Choosing the Lesser of Two Evils in a Disposable Society' (2002). 28 New Eng J on Crim & Civ Confinement 61.
[50] N Linnyk, 'European Social Charter for Protection of Children Rights' (2016) 2016 Law Rev Kyiv UL 38.
[51] David P Shouvlin, 'Preventing the Sexual Exploitation of Children: A Model Act' (1981) 17 Wake Forest L Rev 535.
[52] Charles A Phipps, 'Misdirected Reform: On Regulating Consensual Sexual Activity between Teenagers' (2003) 12 Cornell J L & Pub Pol'y 373.
[53] Nicole A Rapp, 'Teenage Sex in California: Thirteen Years after Michael M.' (1994) 15 J Juv L 197.
See Also: Douglas McNamara, 'Sexual Discrimination and Sexual Misconduct: Applying New York's Gender-Specific Sexual Misconduct Law to Consenting Minors' (1998) 14 Touro L Rev 479.

which diminishes any appearance of bias or discrimination.[54] As observed above, the rationality is that legal regulation of the ASC is a bid to secure the BIC by protecting them from the harms of exposure to sexual activity. This child can either be male, female, or of any sexual orientation.[55] The justification which therefore informs any legal development must assert a deeper consideration of the consequences resulting from the sexual exposure of minors for casting a requisite age in which they are deemed capable of consenting.[56] In particular, the adverse consequences on the child's entitlement to good health, high standard education and social development are viewed as integral concepts for which this legal limitation seeks to protect.[57] Worthy of observing is how the law can be applied equally when dealing with all sexes of children so as to avoid any tilting of imbalanced handling of the girl at the expense of the 'villain' boy.[58]

2.2.1.1 Securing Children's Rights to Health

Every child is entitled to the highest attainable standards of health.[59] This includes physical, mental and psychological health.[60] Child sexual abuse (CSA) which has been defined by the World Health Organization (WHO) as "an involvement of a child in sexual activity that he or she does not fully understand, <u>is unable to consent to</u>, or is not developmentally prepared

[54] Jean Zermatten, 'The Best Interests of the Child Principle: Literal Analysis and Function' (2010) 18 Int'l J Child Rts 483.
[55] Erika Skougard, 'The Best Interests of Transgender Children' (2011) 2011 Utah L Rev 1161.
[56] Emily J Stine, 'When Yes Means No, Legally: An Eighth Amendment Challenge to Classifying Consenting Teenagers as Sex Offenders' (2011) 60 DePaul L Rev 1169.
[57] Shah, Saleem A.; Sales, Bruce D., Editors. Law & Mental Health: Major Developments and Research Needs. Washington, U.S. Dept. of Health and Human Services.
[58] Joseph J Fischel, 'Per Se or Power - Age and Sexual Consent' (2010) 22 Yale JL & Feminism 279.
[59] Convention On the Rights of the Child, Article 24.
[60] Oluremi A Savage-Oyekunle and Annelize Nienaber, 'Adolescents' Access to Emergency Contraception in Africa: An Empty Promise' (2017) 17 Afr Hum Rts LJ 475.

for”[61](*added emphasis*), is a major threat to the health of the child.[62] The health effects of sexual abuse of minors are devastating and long-lasting.

Exposure of Children to sexual activity bears far-reaching implications on their physical health. Physical harms such as Sexually Transmitted Infections (STIs) and Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome (HIV/AIDS) are the often upshots of an early exposure of minors to sexual undertakings. What the law should catalyze on is the environment of free and frank disclosure whenever teenagers engage in sexual activities among themselves, and consequently, contract these diseases.[63] The law must be socially informed that sexual activities among children or rather teenagers are rampant. This should awaken the need to both review the criminalization of such acts among children and thereafter provide a plausible solution of sexual education in primary and secondary schools.[64] The challenges arising from this is further compounded by the reality that such minors are usually unsuspecting or lacking in adequate knowledge of the ensuing repercussions.[65]

Further, the toll on the psychological health of the child is a further impetus for the legal regulation on the age of sexual consent. This is particularly striking in cases of sexual abuse of the child. A study has established a link between premature sexual exposure of minors and

[61] Consultation on Child Abuse Prevention (1999: Geneva, World Health Organization Violence and Injury Prevention Team and Global Forum for Health Research, ‘Report of the Consultation on Child Abuse Prevention, 29-31 March 1999, WHO, Geneva’ [1999] <https://apps.who.int/iris/handle/10665/65900> accessed 11 April 2021.
[62]Kim McGregor and Shirley Julich and Marewa Glover and JenyGautam, 'Health Professionals' Responses to Disclosure of Child Sexual Abuse History: Female Child Sexual Abuse Survivors' Experiences' (2010) 19 J Child Sexual Abuse 239.
[63] Malinda L Seymore, 'Sixteen and Pregnant: Minors' Consent in Abortion and Adoption' (2013) 25 Yale JL & Feminism 99.
[64] Hazel Glenn Beh, 'Recognizing the Sexual Rights of Minors in the Abstinence-Only Sex Education Debate' (2006) 26 Child Legal Rts J 1.
[65]Kristen W Springer and others, ‘The Long-Term Health Outcomes of Childhood Abuse’ (2003) 18 Journal of General Internal Medicine 864.

deteriorated psychological health.[66] Psychological disorders such as depression are more prevalent in children who have been exposed to sexual activities than those who have not.[67] The psychological health must thus be critically examined among the sexes of children, and a balanced treatment met with thorough exactness in promoting the equality of and in the law.[68]

Children of both sexes are thus victims of undesired physical health consequences due to engagement in sexual activities and openness and fairness to information and treatment must be adhered to.[69] The need to appreciate on these risks to children's health makes it imperative for a legal restriction on the freedom to consent which is not discriminatory.[70] It borrows, in part, a leaf from John Stuart Mill's assertion on the limitation of liberty and freedom. He avers that people who are under the care of others like children ought to be protected not only from their own actions and dangers but also from any external injury.[71] The area which needs reflection is the protection of minors' interests whenever they engage in sexual activities among themselves. The law should be careful not to forget that boy child is also protected from sexual consent requirements, and critically balance in situation where a girl child and boy child engages in sexual activities, and its effect on consent requirements.[72] This premise of the regulation of the age of consent serves as a guardian to protect the children from the adverse health repercussions which results from an exposure to premature sexual intercourse.[73]

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[66]Golding JM. Sexual assault history and limitations in physical functioning in two general population samples. *Res Nursing Health.* 1996;19:33–44.
[67] Ibid (n. 68).
[68] Michelle Oberman, 'Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape' (2000) 48 Buff L Rev 703.
[69] Hazel Glenn Beh and Milton Diamond, 'The Failure of Abstinence-Only Education: Minors Have a Right to Honest Talk about Sex' (2006) 15 Colum J Gender & L 12.
[70] John McInnes and Christine Boyle, 'Judging Sexual Assault Law against a Standard of Equality' (1995) 29 U Brit Colum L Rev 341.
[71]John Stuart Mill, *On Liberty* (IndoEuropeanPublishing.com 2014).
[72] Stephen Knight, 'Libertarian Critiques of Consent in Sexual Offences' (2012) 1 UCLJLJ 137.
[73] Mark Kelman, 'THINKING ABOUT SEXUAL CONSENT' (2005) 58 Stan L Rev 935.

2.2.1.2 The Children's Rights to Education

The legal developments in conventions, statutes, case jurisprudence and legal writing have exhaustively affirmed the lack of consent for sexual intercourse with children; there is however, a lacuna on whether there is a *sui generis* consent whenever children engage in sex.[74] The practicality of this lacuna is displayed when a boy child is convicted of defilement in a sexual activity with a fellow teenager.[75] The ultimate reality is that the boy child is convicted and sentenced to many years of imprisonment hence curtailing his right to education as a child. This scenario has been captured well in a petition before the High Court in Kenya.

In Petition 6 of 2013,[76] the case involved two minors who had been dating and the accused had been charged when he was 16. The Appellant sought a declaration that sections 8(1) and 11(1) of the SOA were invalid as they criminalized discretional sexual relationships between children. He further contended that the law was biased as it only charged the boy contrary to section 5 of the Children's Act (2001) which had prohibited any form of discrimination against children. The appeal was however dismissed. One of the pertinent issues being investigated was that the minor's education had been discontinued during the period of the trial begging the question whether children who were in remand homes continued with their education or had to wait until trial concluded. In essence, these children remandees are robbed off their right to education which is against their constitutional right of freedom from discrimination. The law still remains silent and has not been used to protect the societal discrimination and stigma with which these children face. The ideals of prevention of direct or indirect discrimination should inform the

[74] J M Thomson, 'A Serious Lacuna Filled by Legislative Confusion' (1989) 1 J Child L 49.
[75] Pallavi Arora, 'Proposals to Reform the Law Pertaining to Sexual Offences in India' (2012) 3 J Indian L & Soc'y 233.
[76] CKW v AG & another (2014) eKLR.

salient features on how the law can be designed to help this specific group by virtue of Article 53(2) of the Constitution of Kenya, 2010.[77]

With the ticking of time, it is now crucial that the law be informed of the reality and practicality of protecting all children equally,[78] and consequently removing any outright bias on the boy child in favour of protecting the girl child. All these are children, and there should be no justification why the law discriminates one gender over the other.[79]

2.2.1.3 Protecting the Social Development of Children

Children cannot develop socially once their liberty is taken away. The reason is that they do not get to experience life together with their peers since they have been locked away in prisons because of engaging in an 'apparent' discretional sex with fellow peer; actions interpreted as discriminatory.[80] This may be as a means of deterrence but the use of criminal law as a tool to address the perennial problem of teenagers engaging in sexual activities can be misleading. Such would be an escapist method of stopping the teenage pregnancies by locking away young boys as villain which the girl child is glorified to the status of vulnerable victim. Such actions leads to demonizing of one child sex against the other, and this shows evidently that the state lacks appropriate structural measures by law to protect all sexes of children equally.[81]

When the law sets a closed interpretation of consent on sex between teenagers, there might occasion avalanche of injustices against one gender, mostly the boy child. The law, in its opaque application, fails to recognize the different stages of growth and development of children and

[77] Ruthann Robson, 'Sexual Democracy' (2007) 23 S Afr J on Hum Rts 409.
[78] Jean Strout and Divya Vasudevan and Riya Saha Shah, 'Protecting Youth from Themselves: The Overcriminalization of Consensual Sexual Behavior between Adolescents' (2020) 40 Child Legal Rts J 1.
[79] Megan Annitto, 'Consent Searches of Minors' (2014) 38 NYU Rev L & Soc Change 1.
[80] Douglas McNamara, 'Sexual Discrimination and Sexual Misconduct: Applying New York's Gender-Specific Sexual Misconduct Law to Consenting Minors' (1998) 14 Touro L Rev 479.
[81] Cynthia Godsoe, '#MeToo and the Myth of the Juvenile Sex Offender' (2020) 17 Ohio St J Crim L 335.

becomes a vain tool to properly address the issues they may be facing.[82] Another perspective to view this conundrum is through the lenses of human rights. These rights are essentially moral and often individualist. However, they also encompass certain perceptions ion how the society views some issues which might be coupled with irreconcilable communication convergence. These topics include teenage sexuality which will therefore be considered non-issues because of the societies' opinion that children are innocent and therefore have no need for sexual rights. Such topics are pushed to blurriness.

The fact would be that the tendency then to punish teenagers, more so boys, for engaging in discretional sexual conduct fails to respect their individualist enjoyment of human rights at the expense of blurriness caused by societal conceptions. Instead of punish the boy child, the law and society must accept that the notions of teenage sexuality are likely to raise the existence of a victimless crime scene.[83] Consent laws should then balance, support and protection the capacity of capacity for sexual desire by teenagers.

In the controversial case of Martin Charo case discussed above, the judge had a struggle in reconciling the evolving capacities of a child below the age of 14 and her capacity for sexual desires. The high court developed a concept of construing an d according a child the capacity of adulthood status for the purposes of sexual desire. Although the decision was legally wrong, it presents technical issues of consideration when dealing with the evolving capacities of a class of children who desire sexual desire yet the law considers then as being incapable. Further, South Africa has seen development in reconciling some technical segments evolving on this subject in

[82] Paul Roberts, 'The Philosophical Foundations of Consent in the Criminal Law' (1997) 17 Oxford J Legal Stud 389.
[83] Joanna R Lampe, 'A Victimless Sex Crime: The Case for Decriminalizing Consensual Teen Sexting' (2013) 46 U Mich JL Reform 703.

the outcome of the Teddy Bear Clinic case.[84] South Africa decriminalized sexual activity between teenagers between the age of 12 and 16 years.

2.2.1 The Cultural Aspect

Practices and criticism on some cultural aspects have influenced the need for modern regulation of consent age geared at protection some sacred steps children must undergo.[85] As it will be observed below, this protection was reflected on the girl child than boy child. It had a mono-dimensional reflection in which a family could avoid shame brought by the girl child.[86] Boy child was considered as a grown-up man capable of responsibilities at circumcision,[87] at roughly 13 years. This meant that he can start a family. Ultimately this became an error in the current law with respect on how a boy child should be treated. The protection of children in sexual activities was then tilted in favour of the girl child while the boy child wore the shackles of a deterrent being. This deterrence of sexual activities among minors conclusively painted the boy an offender and the girl child forever a victim. This happens with a blind eye that the parties involved are both minors.

Traditional African communities perceived the importance of sexuality in human life. They recognized and were aware of the sexual passions that engulfed persons in a community.[88] In all communities however, there existed very strong prohibitions against premarital pregnancy.[89]

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[84] Ibid (n. 28).
[85] T W Bennett, 'The Cultural Defence and the Custom of Thwala in South African Law' (2010) 10 U Botswana LJ 3.
[86] Cynthia Grant Bowman and Elizabeth Brundige, 'Child Sex Abuse within the Family in Sub-Saharan Africa: Challenges and Change in Current Legal and Mental Health Responses' (2014) 47 Cornell Int'l LJ 233.
[87] Alice Armstrong and Matrine Chuulu and Chuma Himonga and Puleng Letuka, 'Towards a Cultural Understanding of the Interplay between Children's and Women's Rights: An Eastern and Southern African Perspective' (1995) 3 Int'l J Child Rts 333.
[88] Bhana, D, 'Love, sex and gender: Missing in African child and youth studies' 42(2) *Africa Development,* 251-264.
[89] C M N White, 'Matrimonial Cases in the Local Courts of Zambia ' (1971) 15 J Afr L 251.

These societies made it clear that sexual relations were only proper for married couples.[90] Sex serves a reproductive purpose; therefore, childbearing would be a function of a marriage and accepted within it. As a result, children born out of wedlock were carried with very strong disapproval causing premarital relations to be not only condemned but punished.[91]

It is quite clear that the African perspective of teenage sex was that it needed to be controlled and regulated. This could then be a basis upon which age of consent laws governing sexual activities were legislated upon; to maintain social order and functioning of the society as a whole.

2.2.2 'Discretional' Actions among Minors

Legally, minors cannot give consent to an act of sex. However, in the event that they factually give, the law should be fair to both parties. Just as observed by Kangaude:[92]

> Constructing children as legally incapable of consenting to sexual activity when in fact they have an evolving capacity to make certain decisions about their sexuality is not merely unfortunate. It conjures limitations on the child's enjoyment of sexual health and sexual rights…The consequence of failure to support children is unwanted or unprotected sex, and the sequelae are common knowledge; unwanted pregnancies, unsafe abortions and sexually-transmitted infections, including HIV.

The provisions on the law on defilement in Kenya are gender neutral therefore it does not distinguish between male and female in who can be a perpetrator of the offence hence ' defiler'.[93] Thus, in cases of children, it could summarily be considered that both parties should be seen to

[90] Bhana, D, 'Love, sex and gender: Missing in African child and youth studies', 251-264.
[91] Meekers D and Ghyasuddin A, ' Adolescent Sexuality in Southern Africa: Cultural Norms and Contemporary Behavior' XXIIIrd IUSSP General Conference, session on "Religion, culture, and sexuality," in Beijing, 11-17 October 1997, 6.
[92] Godfrey D Kangaude, 'Adolescent Sex and Defilement in Malawi Law and Society' (2017) 17 Afr Hum Rts LJ 527.
[93] Walsh K, 'The sexual rights of children and age of consent' Interdisciplinary Net, 2010, I.

have defiled each other making them both defiler and victim.[94] This is a paradoxical view point of trying to push for the calls for equality of the law in treating both the boy and girl child. This same position is reiterated in the *lolita affair, Martin Charo v. Republic* by Hon. Justice Chitembewe.[95]

2.2 Conclusion

In order to bridge the above lacuna, equal provisions should be implemented to encapsulate all minors, to wit, both genders. This is because the prosecution of males in cases of discretional sex between minors implies that the status of victimhood is left to prosecutorial discretion.[96] While setting legal age minimum, particularly when it comes to the age of consent, legislators need to be guided by the evolving capacities of the child and the best interest of the child.

[94] Gachuki N, 'The issue of consensual sexual relationships among minors and the law' Academia.edu, 4.
[95] Ibid (n. 81).
[96] High A, 'Good, bad and wrongful juvenile sex: Rethinking the use of statutory rape laws against the protected class' 69 *Arkansas Law Review,* 2016, 813.

CHAPTER THREE

THE LEGAL, POLICY AND INSTITUTIONAL FRAMEWORK ON THE AGE OF SEXUAL CONSENT

3.0 Introduction

The essence of this chapter is to conduct an exposition of the legal and institutional framework on the ASC. The chapter will proceed under a tripartite arrangement in which it will delve into an analysis of the international, regional and national framework.

In its analysis, this section will analyze the inextricable link between the law on the age of consent and other pressing global concerns such as Sexual and Reproductive Health (SRH). Thus, the chapter will delve into an analysis of the various international instruments and institutions in this area. Further, the advancements in the international arena especially in the progressive advocacy of child autonomy will be particularly used to audit the Kenyan regime in this area. The chapter will focus on the international say on discretional teenage sexual relations and weigh them against the Kenyan regime. Here, the emerging concept of "close-in-age" doctrine and the "teenager's evolving capacity" will be explored.

Regionally, the chapter will review the various strides made within the African continent *viz-a-viz* the international standards. Nationally, the chapter will painstakingly analyze the SOA and its viability in light of the international and regional standards. Furthermore, the policies on the SRH in Kenya will be compared with the SOA in order to make the case for a re-examination of the latter. Over and above that a review of teenage sexual relations under the Act will be conducted. The chapter will make its case that the Act is in need for reform in its regulation of

discretional teenage relations. Ultimately, it will conclude that the Kenyan regime is discordant with the international framework and hence needs fundamental realignments.

3.1 International Legal framework

3.1.1 The Universal Declaration of Human Rights (UDHR)

The UDHR which is fondly esteemed as constituting the "international bill of rights"[97] became one of the initial endeavors of the international community towards the recognition of human rights.[98] Though initially a mere declaration, the UDHR has stood the test of time and gained a befitting status of an international instrument. At its very core and in relation to this discourse is its stipulation on human dignity.[99] It decrees that all persons are born free with an inherent dignity. Human dignity is the foundation of personhood, connoting a person's intrinsic worth.[100] Sexual consent is an offshoot of the concept of human dignity. The whole idea of consent is premised on the respect of a person's autonomy over his being.[101] Therefore at the very substratum, respect for human dignity commands that a person's decision on whether or not to engage in a sexual endeavor be heeded to. Respect for human dignity is largely the basis of the other instruments which make provisions for the age of consent. The Kenyan constitutional regime has explicitly incorporated this provision under its bill of rights.[102]

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[97] Hurst Hannum, 'The UDHR in National and International Law Fiftieth Anniversary of the Universal Declaration of Human Rights: Thematic Analyses' (1998) 3 Health and Human Rights 144.
[98] Avitus A Agbor, '70 Years after the UDHR: A Provocative Reflection Shaped by African Experiences Special Edition: The Universal Declaration of Human Rights at 70' (2020) 23 Potchefstroom Electronic Law Journal 1.
[99] Article 1 of the Universal Declaration of Human Rights
[100] Jonathan Mann, 'Dignity and Health: The UDHR's Revolutionary First Article Fiftieth Anniversary of the Universal Declaration of Human Rights: The Articles of the UDHR: Article 1' (1998) 3 Health and Human Rights 30.
[101] Joseph J Fischel and Hilary R O'Connell, 'Disabling Consent, or Reconstructing Sexual Autonomy' (2015) 30 Columbia Journal of Gender and Law 428
[102] Ibid (n.39), Article 28

3.1.2 UN Convention on the Rights of the Child (CRC)

This convention[103] is chiefly and specially concerned with the rights of the child in the international arena. It has four broad pillars of provisions for the ultimate realization of the rights of the child:[104] non-discrimination,[105] best interests,[106] the right to be heard[107] and parental guidance assistance.[108] The BIC is an important parameter which must be observed by states in any action touching on the child. As a substantive and procedural rule, its application demands that any law concerning the child must fully consider his/her best interests,[109]including laws on the requisite age for sexual consent.[110]

States parties are therefore required, as a bare minimum to consider the BIC when enacting laws affecting the child. Seeing as the laws on the minimum age of consent directly affect children, it is imperative for states to thoroughly interrogate whether they promote these best interests or stifle them.

Another critical parameter provided by the CRC is the "evolving capacities" of the child as enumerated under Article 5. This concept, which is akin to the "best interest" principle, has been at the fore front in a multiple of recent debates regarding the position of the child under international law. A deeper insight of it will be undertaken in the subsequent sections of the chapter.

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[103] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

[104] Sheila Varadan, 'The Principle of Evolving Capacities under the UN Convention on the Rights of the Child' (2019) 27 The International Journal of Children's Rights 306.

[105]Article 2.

[106] Articlle3(1).

[107] Article 12.

[108] Article 5.

[109] Oana Ghita and Sevastian Cercel, 'Child's Best Interest' (2018) 2018 Romanian Review of Private Law 130.

[110] Michael Freeman, 'The Best Interests of the Child - Is the Best Interests of the Child in the Best Interests of Children' (1997) 11 International Journal of Law, Policy and the Family 360.

3.1.3 CRC General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child

This General[111] Comment is majorly concerned with the specific measures which can be undertaken to ensure that teenagers have the highest attainable standards of health under the convention.[112]

In the context of adolescent's health and development, the comment declares that in accordance with Article 4 of the Convention, states should ensure that specific legal provisions are secured under their domestic laws. Among such legal provision is the setting of the minimum ASC.[113]

In deciding the requisite age, states are further urged to ensure that the age should be the same for both boys and girls, in accordance with the foundational principle of non-discrimination under Article 2 of the Convention.

3.1.4 UN Committee on the Rights of the Child (CRC), General comment No. 20 (2016) on the implementation of the rights of the child during teenage age

This comment[114] provides states with further guidance towards the realization of children rights during teenage age. It takes a human rights-based approach, while appreciating the peculiar needs and interests of the children in this phase of development.[115]

The evolving capacities of the child

Concerning the crafting of age of sexual consent laws, the comment calls on state parties to perform a balancing act between the protection of the child and the evolving capacities of the child. Paragraph 40 calls for states to take into consideration and balance between protecting

[111] UN Committee on the Rights of the Child (CRC), *General comment No. 4 (2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, 1 July 2003, CRC/GC/2003/4.
[112] Preamble, paragraph 4.
[113] Paragraph 5.
[114] Ibid (n. 12).
[115] Introduction, Paragraph 4.

children and recognizing their evolving capacities in design and framing the legal ASC. This entails state parties avoiding the urge to shift the down lane into penalization of teenagers engaging in discretional sexual activity.[116]

This concept of "evolving capacities" of the child therefore stipulates that the autonomy or capacity of the child should be heeded to. It seeks to challenge the traditional conception of a child as a mere object of protection and advocates for the child to be viewed as a bearer of rights capable making sound decisions. In describing this concept, Durojave writes that this concept may lead into a manifestation of adult like behaviors which are not based on age but also other factors:[117]

The Committee therefore calls upon states to consider this phenomenon when drafting the age of consent laws. Particular focus is given to relations between teenagers *inter se*. In this regard, the Committee urges states to allow teenagers freely interact amongst themselves without any legislative impediments.[118] The Committee on this basis therefore invites states to restrain from penalizing discretional teenage sex and this should be reflected in the various national legislations governing sexual consent. Further, the Committee recommends the inclusion of close-in-age provisions to cater for teenagers within the Criminal Justice System. This has informed the inclusion of "Romeo and Juliet laws" in some jurisdictions, predominantly in the US, which permit sexual intercourse between minors under the age consent provided the age difference is within the prescribed limit.[119]

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[116] Ibid (n. 123).

[117] Ebenezer Durojaye, 'The Potential of the Expert Committee of the African Children's Charter in Advancing Adolescent Sexual Health and Rights in Africa' (2013) 46 The Comparative and International Law Journal of Southern Africa 385.

[118] Ursula Kilkelly, '"Evolving Capacities" and "Parental Guidance" in The Context of Youth Justice: Testing the Application of Article 5 of the Convention on the Rights of the Child' (2020) 28 International Journal of Children's Rights 500.

[119] Steve James, 'Romeo and Juliet Were Sex Offenders: An Analysis of the Age of Consent and a Call for Reform' (2009) 78 UMKC Law Review 0.

The evolving "capacities of the child" is therefore taking a global momentum in the reshaping of various states' legal regimes on sexual consent. States are taking cognizance of the autonomy of the child to self-govern within their sexual spheres. However, the Kenyan regime, as will be later revealed has not incorporated this concept within its laws on sexual consent. The SOA snatches the child the capacity of consenting to sexual intercourse. This tragedy is more eminent in teenage sexual relations since the Act makes no distinction between teenage relations *inter se* and teenage-adult relations. The Act uniformly applies to both categories without considering the unique "evolving capacities" of the former.[120]

3.2 Regional Framework

3.2.1 African Charter on the Rights and Welfare of the Child

This is the substantive Convention[121] governing the rights of the African child. It is more contextually appreciative of the stead of the African child.[122] Like the CRC, it defines a child as being below the age of 18 years.[123]

Furthermore, the Charter also recognizes the concept of the evolving capacities of the child.[124] This provision has been cited in other comments and opinions on the ASC for the African child.

[120] Ibid (n. 25).
[121] Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990).
[122] Osifunke Ekundayo, 'Does the African Charter on the Rights and Welfare of the Child (ACRWC) Only Underlines and Repeats the Convention on the Rights of the Child (CRC)'s Provisions?: Examining the Similarities and the Differences between the ACRWC and the CRC' (2015) Vol. 5 International Journal of Humanities and Social Science.
[123] Article 2 of the African Charter on the Rights and Welfare of the Child.
[124] Ibid (n.131) Article 9.

3.2.2 Ministerial Commitment on comprehensive sexuality education and sexual and reproductive health services for teenagers and young people in Eastern and Southern Africa (ESA)

This Commitment[125] by ministers of health and education from within the ESA seeks to guarantee a comprehensive sexuality education and a youth-friendly SRH within the region. It recognizes the pertinent link between the age of consent legal regime and access to SRH services.

On the age of sexual consent, the Ministerial Commitment provides for the need of an urgent review, and if need be, an amendment of laws and policies on the age of consent in order to better the access of SRH for teenagers.[126]

The Commitment recognizes the barrier to access of SRH services caused by restrictive age of consent laws[127]. The Policy Commitment gives this further guidance on the laws governing the age of consent:

> Laws, policies must recognize the need for a balance between protection and autonomy and the evolving capacity of teenagers as they begin to make their own choices about their education and health needs.

Here again, the need to pay regard to the concepts of evolving capacity of the child and child autonomy appears. States are thus called to ensure their national laws conform to these international standards.

Notably, these principles have been at the core of various landmark decisions in the African region. In the *Teddy Bear Clinic case,*[128] the Constitutional Court of South Africa heavily

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[125] http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/HIV-AIDS/pdf/ESACommitmentFINALAffirmedon7thDecember.pdf .

[126] Paragraph 3.2 of the Ministerial Commitment on comprehensive sexuality education and sexual and reproductive health services for adolescents and young people in Eastern and Southern Africa (ESA).

[127] Erin Nelson, 'Autonomy, Equality, and Access to Sexual and Reproductive Health Care' (2016) 54 Alberta Law Review 707.

relied on the concept of the evolving capacities of the child to declare the criminalization of discretional teenage sex as unconstitutional.

3.3 National framework

3.3.1 The Sexual Offences Act

The SOA was passed against a historical backdrop of rampant sexual violence in Kenya. Its major aim was thus to secure and protect those who are vulnerable, especially women, through its stringent and deterrent provisions.[129] However, this paper holds that the Act, in this bid is unappreciative of other pressing concerns which are informing the contemporary global debate in this area.

The Offence of defilement

Section 8 of the SOA makes provision for the offence of defilement- the provision of controversy in this discourse. It provides as follows:

> *A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.* (Emphasis added)

The Act defines a child within the conception of the Children Act; any human being under the age of 18 years.[130] Further, the Act explicitly places the child under categories of persons who lack the capacity of "appreciating the nature of the act".[131] The age of consent in Kenya as per the SOA is therefore capped at 18 years. These provisions thus make the offence of defilement that of strict liability since a child is presumed to lack the capacity to give consent.[132].

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[128] Ibid (n. 28).
[129] Kithure Kindiki, 'Towards a Sexual Offences Law: Reappraising the Legal Framework on Sexual Violence in Kenya' (2005) 2005 East African Law Journal 64.
[130] Section 2 of the Children Act.
[131] Section 43(4)(f).
[132] Ibid (n. 25).

However, a thorough scrutiny of this provision, especially in light of the international standards reveals various fundamental flaws[133] which have also been the subject of various judicial debates around the topic. Firstly, the Act does not appreciate nor make any provision for discretional teenage sex.

Section 43(4)(f) arbitrarily decrees that a child falls within the lot of persons incapable of appreciating the nature of the Act. However, this position is not reflective of the true psychological position of the child, nor does it conform to the international stipulations in this area. The Act ignores the concept of "evolving capacities" of the child as captured within the various international instruments discussed above. Furthermore, it is completely ignorant of the general assertion made in General Comment No.20[134] that:[135]

> Teenage is a period characterized by rapid physical, cognitive and social changes, including sexual and reproductive maturation; the gradual building up of the capacity to assume adult behaviors and roles involving new responsibilities requiring new knowledge and skills.

In *P O O,*[136] Ochieng J weighed in on this by refuting the stand taken by the Act, saying that teenagers in most scenarios are well appreciative of the nature of sexual relations.

Additionally, the penalization of discretional teenage sexual relations is further counterintuitive to the spirit of General Comment No. 20 which entreats states to avoid "criminalizing teenagers of similar ages for factually discretional and non-exploitative sexual activity."[137]

A further fault within the Act lies in the uniform application of the punitive sentences even to teenagers who are interacting discretionally. The "close-in-age provisions," which are currently

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[133] Mercy Deche, Sarah Kinyanjui and Kiarie Mwaura, 'The Double Standards of Childhood in the Kenyan Legal Framework: The Minimum Age of Criminal Responsibility versus Age of Consent' (2019) 2019 East African Law Journal 1.
[134] Ibid (n. 12).
[135] Paragraph 2.
[136] Ibid (n.7)
[137] Paragraph 40.

shaping the age of consent regimes in the international arena, is not captured by the Act. Thus, teenagers face the sentences just like adults.

Therefore, the Act's stand on discretional teenage sex is retarded, in light of the international provisions. It is unconscious of the true state of teenage - a period of active physical and psychological growth and development.

3.3.2 National Adolescent Sexual and Reproductive Health (ASRH) Policy and the National Guidelines for provision and Adolescent and Youth Friendly Services (AYFS) in Kenya

This framework seeks to enhance teenagers' access to SRH services and the general provision of services to the youths. The ASRH advocates for among other things: the revision of age and sex-related barriers that restrict teenagers' access to HIV and SRH services; the provision of services to curb or reduce early pregnancy through contraceptive methods.[138] In this regard, the ASRH policy recognizes that teenagers in non-exploitative sexual conduct, hence the need for robust provisions of SRH services.

Furthermore, the AYFS policy seeks for among other concerns, "the promotion of autonomy so that teenagers can consent to their own treatment and care"[139] the framework thus recognizes the need to promote teenage autonomy in freely consenting to sexual relations.

It is therefore beyond doubt that the SOA is discordant with the SRH policy. Whereas the SOA prohibits any sexual intercourse between minors, the policy acknowledges the existence of these happenings among minors.

[138] Centre for Reproductive Rights, CRIMINALIZING ADOLESCENCE: A Call to Reform the Sexual Offences Act (2019).
[139] Ibid (n. 146).

3.4 Institutional and Policy Interventions on the Age of Consent in Kenya

Kenya is a democratic country that is founded on the principles of respect for all arms of government.[140] There is the Executive, the Judiciary and the Parliament. The Parliament passes legislations, the Executive implements the laws and policies enacted by Parliament and the Judiciary interprets the laws. In exercise of its interpretive role, the Judiciary has through case laws influenced a change in laws and the agencies of government among them the Parliament advisory opinions and obiter dicta or ratio decidendi opinions in cases.

The Judiciary has taken a lead in this debate about the ASC and capacity to consent let alone discretional sex between teenagers as well as teenagers and adults.[141] In its decision in *Criminal Appeal No. 7 of 2019*, the High Court through Justice *Said Chitembwe*, [who is no visitor to delving into this controversial subject, having established another jurisprudence on consent in the Martin Charo case], decreed that a 17 year old girl cannot deny that she did not know the exercise she was engaging in during her sexual escapades and thereafter hide under the law as one who is below the age of consent.

It is the proposition of this study that the Court made the right determination on this controversial subject matter. Time has come for Parliament and other institutions of law making to rise up to the occasion and make amendments to the Sexual Offences Act, No. 3 of 2006. Time has come for the society to stop dissuading themselves from the sheer hypocrisy that teenagers, more so, those that have indicated the evolving aspect of the child, do not engage in sex. Perceived from this perspective, the legal regime should be amended to establish mechanisms that will allow children guided by their parents have a lengthy discussion on the aspects of maturing children, morality, autonomy and the need for proportionality in punishing sexual offenders. It is

[140] Article 4, Constitution of Kenya, 2010.
[141] Republic v AJK [2020] eKLR.

necessary to accord an innocent child born from a relationship involving two 'consenting' minors to miss the guidance and parental love of one of the partners who in most instances is the boy under the pretext of legal age of consent.

In the upshot, there is needed a candid national conversation on this very critical subject that has all to do with maturity, morality, autonomy and integrity. This is not a subject in a vacuum. Many jurisdictions among them the United Kingdom have already lowered the ASC to 16 years and even then, whenever the statutory rape happens between minors aged 14 to 16 years the penalties handed down are much lessened to a maximum of 2 years.[142] Indeed, there is a need to ensure that the law should not impose itself from an abstract perspective on the process of growing up by fixing limits where nature only knows a continuous process.[143]

To guide the conversation the Executive and Judiciary together with the Parliament, should team up and come up with a concrete policy statement on the aspect of the age of discretional sex. This policy framework should encompass the ideas of ordinary Kenyans, the youth, the academy, jurists from the bench and the bar and adopt the best practices from other jurisdictions. There should be enshrined as a matter of law in the policy a requirement for social awareness creation in order to avoid an abuse of an amendment to lower the age of consent for instance to 16 years. The awareness should be to the effect that all sexual interactions need to be voluntarily acceded to and no amount of blackmail should be used which impeaches the element of consent. Borrowing from the outcome of the deliberations, the National Assembly should in strict conformity with the recommendations amend the relevant laws among them the Sexual Offences Act, No. 3 of 2006.

[142] Arch Bold, Criminal pleading, Evidence and Practice, [2002], page 1720.
[143] Gillick v. West Norfolk and Wisbech Area Health Authority [1985] 3 ALL ER 402, page 422.

3.5 Conclusion

This chapter has examined the legal framework on the age of sexual consent. It has analyzed contemporary concepts within the international framework which have influenced the debates in this area. The principle of child autonomy and evolving capacities of the child has been exposed to be the primary underpinnings towards the recognition of the unique position of the teenager.

The chapter has thus revealed that teenagers, just like adults, are right bearers, capable of exercising some adult-like decisions, including those regarding their sexual relations. Thus, the greater international community is moving towards recognition of discretional and non-exploitative teenage intercourse, and this is being mainstreamed in the domestic legal regimes.

This has translated into the incorporation of age of consent laws which reflect this reality.

The SOA, in view of this legal review is thus deficient in many respects. The Act as is currently constituted gives no recognition to discretional teenage sexual relations. In its bid to protect children, the SOA has overly ignored the need to promote their "evolving capacities." Furthermore, the Act is at odds with the SRH framework by outlawing the very intent which the policy seeks to promote. Therefore, the SOA highly needs revisions in order to conform to the international and regional standards.

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CHAPTER FOUR

BEST PRACTICES ON MINIMUM CONSENT AGE

4.0 Introduction

The Purpose of this chapter is to conduct a comparative assessment of the age of sexual consent in Kenya with that of South Africa. The chapter seeks to explore the frameworks in this jurisdiction and pick the best practices which Kenya can incorporate into its framework. Largely, the chapter will explore how South Africa has handled the phenomenon of discretional teenage sexual interactions within their age of consent legislations. Additionally, the chapter also seeks to analyse how it has captured the concept of the evolving capacities of the child within its legal framework.

4.1 South Africa

4.1.1 Introduction

The main legislation governing the age of sexual consent under the South African CJS is the Sexual Offences Act.[144] The Act generally caps the age of sexual consent at 16 years. However, teenagers who are aged 12-15 years can also consent provided that their age difference is not more than two (2) years. This latter provision however only came into being after the landmark ruling in the famous *Teddy Bear Clinic case,*[145] which questioned the validity of the then

[144] Act No 32 of 2007.
[145] Ibid (n. 28).

Sections 15 and 16 of the Act, which forbade any sexual relations between individuals aged below 16 years.[146]

The following sections of this chapter seek to analyse the South African legal framework prior to the *Teddy Bear Clinic case* in order to appreciate the shortcomings which necessitated the clamour for a change. The chapter will hold that these are the same shortcomings that the Kenyan framework is currently grappling with. Thereafter, an analysis of the *Teddy Bear Clinic case* will be undertaken with a view of singling out the overriding issues which also is the concern of the Kenyan CJS. The chapter will then analyse the current amendments to the legal framework which were effected subsequent to the case.

The above analysis will then set the stage for a comparative assessment with the Kenyan CJS, especially the SOA in order to pick out the best practices which Kenya can borrow into its framework.

4.1.2 Sections 15 and 16: the Impugned provisions of the South African SOA

Prior to their invalidation by the *Teddy Bear Clinic case*, sexual offences against children, which also largely dictated the position of the law on the age of consent, were largely governed by Sections 15 and 16 of the SOA. Section 15, which was a near-replica of Section 8 of the Kenyan SOA provided for the offence of "statutory rape" while Section 16 (the almost-equivalent of Section 11 of the Kenyan SOA) covered the offence of sexual violation.

Section 15 stipulated that statutory rape is committed where there is sexual penetration between an adult or a child aged above 16 years and a teenager.[147] Further and notably, this Section also provided that such statutory rape would still obtain where there is discretional sexual penetration

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[146] Godfrey Dalitso Kangaude, Deevia Bhana and Ann Skelton, 'Childhood Sexuality in Africa: A Child Rights Perspective' (2020) 20 African Human Rights Law Journal 688.
[147] Section 15(a).

between teenagers *inter se,* and that in the event of a prosecution, both children were to be charged. Therefore, if two (2) teenagers engaged in sexual penetration with each other, Section 15 would have deemed them both guilty of having statutorily raped one another.[148] The effect therefore was to deny teenagers below the age of 16 years the ability to consent since the Act, for its purposes, construed a child as an individual below the age of 16 years.[149]

Section 16 on the other hand provided that the offence of statutory sexual assault is committed where an adult or a teenager below the age 16 years engages in "sexual violation" with a child. Similarly, this offence still obtained where the "sexual violation" was committed by teenagers *inter se*.[150] The Act however provided for "close-in-age" defense only for the offence of statutory sexual assault for minors below the age of 18 provided that their age difference did not exceed two (2) years.[151]

The effect therefore of Sections 15 and 16 was to deprive teenagers below the age of 16 years from consenting to discretional and non-exploitative sexual intercourse since the application of the two offences rendered such teenagers incapacitated.[152]

Admittedly, this had so many far-reaching ramifications on the rights of the child in various fronts. The Act made it mandatory for a person who has had knowledge of a sexual offence committed against a child to report to the commission established under the Act.[153] Failure to report amounted to a crime punishable by a fine or imprisonment for a term of up to 5 years. The

[148] Warren Binford, 'The Constitutionalization of Children's Rights in South Africa' (2015) 60 New York Law School Law Review 333.
[149] Section 1(I)(b).
[150] Section 16(b).
[151] Section 56(2)b.
[152] Salona Lutchman, 'A Contradiction in Terms? The Promotion of Adolescent Sexual Rights and the Prevention of Sexual Violence' (2020) 2020 Acta Juridica 63.
[153] Section 54.

offences of which individuals were obliged to report included those which were envisaged by Section 15 and 16.

Minors below 16 years were therefore highly restricted by law from discretional and non-exploitative sexual interaction. This further disadvantaged such minors in their access to SRH services since health care providers were duty-bound to report minors who sought such services, failure of which amounted to a crime.[154] Just as it was then in South Africa, this impediment holds true for Kenya. A notable barrier to the access of SRH health services in Kenya is the restrictions posed by punitive age of sexual consent laws.[155] Minors are thus deprived of essential services and information which ultimately exposes them to risks of STIs and early pregnancies.[156]

Perhaps the most unfortunate consequence of the criminalization of discretional teenage sexual intercourse was of the Act's requirement[157] that the violators of Sections 15 and 16 be entered into the national register. Thus, children who were discretionally and non-exploitatively in sexual relations were entered in to the national register of sexual offenders. The entry of children into this register had far-reaching negative repercussions on them.[158] Such children were precluded from: employment which involves working with other children, holding any position of authority over a child etc. Apparently, this provision was tailored to protect children from adult sexual predators. However, the application of Sections 15 and 16 placed teenagers in the position of

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[154] Oluremi A Savage-Oyekunle and Annelize Nienaber, 'Adolescents' Access to Emergency Contraception in Africa: An Empty Promise' (2017) 17 African Human Rights Law Journal 475.
[155] Kenya National Commission on Human Rights, *Realising Sexual and Reproductive Health Rights in Kenya: A myth or reality?: A Report of the Public Inquiry into Violations of Sexual and Reproductive Health Rights in Kenya* (April 2012).
[156] Oluremi A Savage-Oyekunle and Annelize Nienaber, 'Adolescent Girls' Access to Contraceptive Information and Services: An Analysis of Legislation and Policies, and Their Realisation, in Nigeria and South Africa' (2015) 15 African Human Rights Law Journal 433.
[157] Section 41.
[158] Rushiella Songca, 'Children Seeking Justice: Safeguarding the Rights of Child Offenders in South African Criminal Courts' (2019) 52 De Jure 316.

such offenders, thereby construing them as both the victim and the predator.[159] Therefore, the very law which was designed to protect such children was deployed against them.[160]

This irony is similarly evident for the Kenyan framework. One of the crucial and overriding objectives for the enactment of the SOA was for the protection of children against sexual abuse.[161] The preamble of the Act spells out its objective to include to protect all people from unlawful sexual acts. However, the application of the Act has resulted in contrary ends to its announced ideal of protection.

The cases of mutual teenage defilement in Kenya often results in the minor being penalized instead of being accorded protection. While the punitive sentences may be justifiable for adults who prey on unsuspecting minors, it is unarguable for the same punishment to be meted against minors of whom the Act is intended to protect. These inconsistencies within the South African CJS formed the backdrop of the *Teddy Bear Clinic case*. The following Section intends to analyze the emergent issues from the case and the resultant jurisprudence which ultimately prompted legislative intervention.

This presentation has thus illustrated that the South African framework before this landmark ruling highly mirrored the current state of affairs in the Kenyan CJS i.e., the legislative penalization of discretional and non-exploitative teenage sexual relations. Therefore, the best practices which emerged from the case are of significant relevance to the Kenyan framework.

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[159] Ibid (n. 6).
[160] Ibid (n. 163).
[161] Mercy Deche, Sarah Kinyanjui and Kiarie Mwaura, 'The Double Standards of Childhood in the Kenyan Legal Framework: The Minimum Age of Criminal Responsibility versus Age of Consent' (2019) 2019 East African Law Journal 1.

4.1.3 Teddy Bear Clinic case and the defining best practices from the South African regime: lessons for Kenya

This landmark ruling emerging from this case majorly concerned the constitutionality of Sections 15 and 16 of the SOA. The appellant, a non-profit organization petitioned the High Court to declare the impugned provisions as unconstitutional to the extent of their penalization of discretional teenage sexual intercourse.

The appellant cited that the impugned provisions were inconsistent with the child's constitutional right to dignity,[162]privacy,[163]bodily and psychological integrity[164] and the BIC.[165] The High Court declared the impugned provisions unconstitutional. However, the decision still left some issues unresolved. For instance, the Act's mandatory obligation of reporting teenagers in sexual relations was not addressed by the Court. The matter was thus referred to the constitutional Court for confirmation and further clarity.

The constitutional Court gave a sharper focus on the effect of this criminalization on the rights of the child. Furthermore, the concept of child autonomy and the evolving capacities of the child were critically analyzed against the impugned provisions. The Court averred that the provisions were inconsistent with the best-interest of the child as they exposed children to the harsh CJS for participating in "discretional sexual conduct" which is developmentally normal for teenagers.[166] Additionally, the Court stated that criminalizing discretional teenage relations was an effrontery

[162] Section 10 of the Constitution of South Africa.
[163] Ibid (n. 166) Section 14.
[164] Ibid (n. 166) Section 12(2).
[165] Ibid (n. 166) Section 28(2).
[166] Ibid (n. 15).

to their evolving capacity[167] as this ignored the developmental changes concomitant with teenagers.

Further, the Court appreciated the need of protecting the child. However, it stated that in pursuance of that protection the law should be very careful not to put restrictions which are detrimental to their development and well-being. Khampeppe J graphically expressed this in part as follows:[168]

> *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 must be careful, however, to ensure that, in attempting to guide and protect children, our interventions do not expose them to harsh circumstances which can only have adverse effects on their development*

The Court further rendered itself on whether such limitations on the autonomy of the child were consistent with the constitutional stipulation[169] on the limitation of the freedoms in the bill of rights. The court firstly endorsed the position that children, just like adults are right bearers and that their rights ought not to be unjustifiably limited. Seeing as the right to dignity and privacy goes to the very root of the impugned provisions, the Court stated that a legislative limitation of them must merit the conditions set out in Section 36 of the Constitution. Having considered everything, the Court held that the limitation posed by Sections 15 and 16 of the Act did not merit the constitutional parameters.

Ultimately, the Court declared the impugned provisions unconstitutional. Furthermore, the obligations of mandatory reporting of teenage discretional activity were also suspended. Additionally, the Court gave parliament 18 months to revise the Act in light of its findings.

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[167] Ibid (n. 28) Paragraph 64.
[168] Ibid (n. 28) Paragraph 1.
[169] Ibid (n.166) Section 36.

4.2 Criminal Law (Sexual Offences and Related Matters) Amendment Act

This legislation[170] was passed by parliament in order to realign the SOA to be in conformity with the Constitution and the *Teddy Bear Clinic case*. The foremost amendment is the revision of the definition of a child for the purposes of the Act. The Act defines a child as an individual below the age 18 years or a person below 12 years for the purposes of Sections 15 and 16 of the Act.[171]

Secondly, the Act amends Sections 15 and 16 of the SOA. As per the amendments, discretional teenage sex among teenagers *inter se* is no longer a crime.[172] Furthermore, the amendment has incorporated the close-in-age provisions for the offence statutory rape. Teenagers aged 12-15 year can engage in sexual intercourse with other teenagers aged 16-17 years provided that the age difference is no more than two years. Additionally, it is noteworthy that the amendment has maintained its stand on discretional sex between adults and minors.[173] Therefore, this new regime has struck a perfect balance between enhancing child autonomy and protecting the child since adult sex predators are prohibited from sexual activity with minors, regardless of any proximity in age that there might be.[174]

These outcomes of the *Teddy Bear Clinic case* were appreciated in *Raduvha v Minister of Safety and Security and Another*[175] where it was averred that any constitutional dispensation constitutes a watershed and a new era from its former. The Court further went on to state that the South African Constitution has embraced the developing concept of the BIC and that no other case law brought out and appreciated this phenomenon than that of *Teddy Bear Clinic case.*

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[170] Act No. 5 of 2015.
[171] Ibid (n. 174) Section 1.
[172] Ibid (n. 174) Section 2. See also Phillip Steven, 'Recent Developments in Sexual Offences against Children - A Constitutional Perspective' (2016) 19 Potchefstroom Electronic Law Journal 1.
[173] N Mollema, 'The Viability and Constitutionality of the South African National Register for Sex Offenders: A Comparative Study' (2015) 18 Potchefstroom Electronic Law Journal 2706.
[174] Ibid (n. 29).
[175] (CCT151/15) [2016] ZACC 24; 2016 (10) BCLR 1326 (CC); 2016 (2) SACR 540 (CC) (11 August 2016).

In sum, South Africa now possesses an innovative and progressive legal regime which recognizes discretional teenage sexual activity. The injustices which were occasioned by the criminalization of such activities have now been ameliorated by an amendment to Sections 15 and 16. Further, even though discretional teenage sexual activity has been decriminalized, parliament has ensured that adult predators are kept off from engaging in sexual activity with teenagers.

4.3 Best Practices from South Africa: Areas for change in Kenya

The South African regime presents great lessons for the Kenyan CJS. Kenya, unlike South Africa has maintained criminalization of discretional teenage sexual activity. Section 8 of the SOA makes no distinction for teenagers. This is counter to the ideal of the evolving capacity of the child. The framework presupposes that those teenagers are incapable of consenting, an assumption which is fallacious in light of their psychological reality. It is necessary for Kenya to follow the South African model and recognize this reality by making provisions for discretional teenage sexual relations. Furthermore, Kenya needs to amend the SOA in order to provide for close-in-age exceptions or defense, just like South Africa.

These changes are indeed necessary since the prevailing status quo has caused many minors to face the cruel hand of the law for engaging in an activity which is developmentally normal. From *the Teddy Bear Clinic case,* the statutory limitation of constitutionally guaranteed rights must be merited. The limitation on the rights of the Kenyan child posed by the SOA is unjustifiable in a just, open and democratic society. The constitutional proximity between the South African Constitution and the Kenyan one is a telling testament that Kenya is in high need to ensure an immediate alignment of the SOA with the Constitution.

The Courts have similarly expressed the need for a parliamentary intervention for a change to the SOA. In *Evans Wanjala Siibi v Republic [2019] eKLR*[176], the Court of Appeal made an express reference to the *Teddy Bear Clinic case* while lamenting over the shortcomings of the SOA in handling teenage sexual activities. The Court went on to say that the Constitution of Kenya is the water-shed which ushered in a new era in many respects. The constitutional provision on the BIC, the Court further noted, should be appreciated and be the foremost justification in the amendment of the SOA.

4.4 Conclusion

This chapter has undertaken a comparative assessment of the Kenyan legal framework with that of South Africa, with the objective of singling out best practices. It has undertaken a historical background of the age of sexual consent laws in South Africa and appreciated the challenges which plagued the former framework. The chapter has also examined deeply the *Teddy Bear Clinic case* and its implications to the South African CJS. Additionally, the presentation has also analyzed the various reforms which were occasioned by the case. The chapter has identified these reforms as the best practices which the Kenyan CJS need in order to better capture the reality of discretional teenage sexual intercourse.

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[176] Criminal Appeal No. 314 of 2018.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

This chapter discusses the study's conclusions and recommendations through three thematic areas: findings; conclusion and recommendations

5.1 Study Findings

The study in analyzing the minimum consent age for sexual consent in cases involving minors makes the following findings:

i. The Kenyan law, SOA, though being informed by the best interest of children, has tilted an imbalance when dealing with children engaging in sexual activity. This imbalance suggests an indirect discrimination of the boy child where he is being labeled the villain while the girl child a victim.

ii. The law has not entirely factored in the status of a boy child who is also protected from sexual consent requirements, and critically balance in situation where a girl child and boy child engage in sexual activities, and its effect on consent requirements.

iii. The Kenyan law has not evolved to the developing jurisprudence in reshaping of various legal regimes on sexual consent.

iv. That a thorough scrutiny of national and international standards reveals various fundamental flaws which have also been the subject of various judicial debates around the topic, and evidently the Act does not appreciate nor make any provision for discretional teenage intercourse.

v. The penalization of discretional teenage sexual relations is further counterintuitive to the spirit of General Comment No. 20 which entreats states to avoid “criminalizing teenagers of similar ages for factually discretional and non-exploitative sexual activity

vi. The punitive sentences to teenagers who are interacting discretionally is against the overall principles and ideals of the CJS in Kenya.

vii. The provisions of SOA with respect to this subject are discordant with the SRH policy. Whereas the SOA prohibits any sexual intercourse between minors, the policy acknowledges the existence of these happenings among minors.

5.2 Conclusion

The study concludes that the contemporary concepts within the international framework and jurisprudence which have influenced the debates consent in sexual activities among the minors have not been captured under the statutory law in Kenya. The principle of child autonomy and evolving capacities of the child has been exposed to be the primary underpinnings towards the recognition of the unique position of the teenager.

It would be important to note that teenagers, just like adults, are right bearers, capable of exercising some adult-like decisions, including those regarding their sexual relations. Thus, the greater international community is moving towards recognition of discretional and non-exploitative teenage intercourse, and this is being mainstreamed in the domestic legal regimes. This has translated into the incorporation of age of consent laws which reflect this reality in various jurisdictions like South Africa. Kenya ought to learn from the historical and legal development in South Africa as the two nations have similar legal systems and practices.

The overstretching conclusion is that the SOA, in view of this legal review is deficient in many respects. The Act as is currently constituted gives no recognition to discretional teenage sexual

relations. In its bid to protect children, the SOA has overly ignored the need to promote their "evolving capacities." Furthermore, the Act is at odds with the SRH framework by outlawing the very intent which the policy seeks to promote. Therefore, the SOA highly needs revisions in order to conform to the international and regional standards. Conclusively, the SOA can be said to be promoting discrimination with respect to the doctrine of best interest of children.

Thus, in order to bridge the above lacuna, equal provisions should be implemented to encapsulate all minors, to wit, both genders. This is because the prosecution of males in cases of discretional sex between minors implies that the status of victimhood is left to prosecutorial discretion. While setting legal age minimum, particularly when it comes to the age of consent, legislators need to be guided by the evolving capacities of the child and the BIC.

This study has identified reforms which the Kenyan CJS need in order to better capture the reality of discretional teenage sexual intercourse.

5.4 Recommendations

To ensure that the Act is fully implemented, the study makes legislative due to the fact that we have witnessed numerous court decisions which fault the current statutory position.

5.4.1 Legislative Reforms

The National Assembly should effect enactment or amendments as follows:

a) Section 8 of the SOA gives an overall application without due regard to teenagers. This has resulted into categorization of one child as a 'victim' and another 'a devouring villain'. The National Assembly should amend section 8 to counter the presupposition that teenagers are incapable of consenting, and/or that teenagers are adults, an assumption which is fallacious in light of their psychological reality. It is necessary for Kenya to follow the South African model and recognize this reality by making provisions for

discretional teenage sexual relations. In following the South Africa's application, Kenya needs to include in the amendments the provision for close-in-age exceptions.

b) In the alternative, there should be an amendment to section 8 of SOA to decriminalize sexual activity between teenagers who are both between 12 to 16 years; and 16 to 18 years them being of close range. Other factors like absence of force or undue influence should also be considered.

c) The SOA should be amended to give room for the concept of "evolving capacities" of the child therefore stipulates that the autonomy or capacity of the child should be heeded to. The reasonability would be those children from the age of 12 have the capacity to independently make decisions when among the peers of the same range of ages identified above.

d) There should be an amendment to the minimum sentences to empower magistrates and judges with discretion in dealing with offence elucidated under section 8 of SOA. This would be a plausible step in realizing the SRH ministerial commitment which provides for the need of an urgent review, and if need be, an amendment of laws and policies on the age of consent in order to better the access by teenagers.

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