

**A Critique of the Criminalization of Consensual Sexual
Interaction Between Adolescents in Comparative Jurisdictions**



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EXECUTIVE SUMMARY

Countries around the globe have established different minimum ages of sexual consent. This is aimed at protecting adolescents from sexual predators and adults who would prey upon their vulnerability. However, some countries are also using sexual consent laws to criminalize consensual sexual interaction between adolescents; hence adolescents are being exposed to the harshness of the punitive criminal justice system. As a result, adolescents' rights such as the right to privacy, freedom of expression, the right to health, the best interest of the child, and the right to autonomy are being trampled upon.

This research, therefore, aims to critique the criminalization of consensual sexual interaction between adolescents in South Africa, Kenya, and India within international and regional frameworks. It also seeks to address what measures countries can adopt to ensure that child rights compliant laws are adopted regarding consensual sexual interaction between adolescents.

Three recommendations arise from this research. One, the adoption of close-age-gap provisions as a compromise between ensuring protection from statutory rape and consensual sexual interaction between adolescents. Second, it recommends the use of comprehensive sexuality education. While early sexual debut should be discouraged, the research notes that its reality must be met with a comprehensive sexuality education instead of criminalizing adolescent sexuality. Lastly, it recommends that sexual and reproductive health information and services be made available and accessible to adolescents. This will stem the dangers associated with early sexual debut, such as early teenage pregnancies and sexually transmitted infections.

This research is divided into four chapters. Chapter one introduces the research questions and defines the scope of the research. It also gives a brief background on the age of consent laws and looks at the age of consent vis-a-vis the age of marriage as laid out in international and regional frameworks. Chapter two entails a critical analysis of the law on consensual sexual interaction between adolescents. It looks at the international and regional instruments, specifically the United Nations Convention on the Rights of the Child, Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse (hereafter Lanzarote Convention), and the African Charter on the Rights and Welfare of the Child. Additionally, it examines the rights associated with adolescent sexuality found in the CRC, such as the right to autonomy, the child's best interests, the right to health, freedom of expression, and the right to privacy.

Chapter three contains a comparative analysis of the legal regime of consensual sexual interaction between adolescents in South Africa, Kenya, and India. This aims to show how progressive South Africa has been with laws on adolescent sexuality and hopes to inspire countries like Kenya and India to decriminalize consensual sexual conduct between adolescents. Finally, chapter four provides an analytical synthesis of the major findings of the research and presents recommendations on how countries should tackle consensual sexual interaction between adolescents.

KEY FINDINGS

This research found that some jurisdictions still criminalize consensual sexual interaction between adolescents. Although the research appreciates that statutory rape laws aim to protect adolescents from adult sexual predators, the research found that strict application of age of sexual consent laws leads to the criminalization of consensual sexual interaction between adolescents. As a result, adolescents are met with severe penalties and are hindered from accessing comprehensive sexual reproductive and health services.

The research also found that whereas jurisdictions including South Africa have substantially moved away from criminalizing adolescent sexuality, Kenya and India are still criminalizing normative adolescent sexual conduct. Furthermore, the research found that South Africa is among the countries that used to criminalize consensual sexual interaction between adolescents. However, reform was brought through a Constitutional Court ruling in the *Teddy Bear Clinic* Case. The Constitutional Court found the law to be unconstitutional and directed Parliament to decriminalize consensual sexual conduct between adolescents. As a result, the law was amended and subsequently passed in 2015.

In Kenya, attempts to amend sections of the Sexual Offences Act that criminalize consensual sexual conduct between adolescents in the case of *CKW v. Attorney General & Others* was not successful. The petitioner in this case challenged the constitutionality of sections 8 (1) and 11 (1) of the Kenyan Sexual Offences Act in so far as it criminalized consensual sexual interaction between adolescents. The High Court of Kenya ruled that criminalization of consensual sexual conduct between adolescents was in the child's best interest as it protected children from harmful acts of sexual activity.

However, judgments after the *CKW* case show that some judges in determining defilement charges involving consensual sexual conduct between adolescents have expressed their discomfort with the criminalization of consensual sexual interaction between adolescents. They have recognized that adolescents may have the capacity to consent to sexual intercourse. Thus, the Kenyan parliament should fast-track amendments to the Sexual Offences Act to decriminalize consensual sexual conduct between adolescents.

In India, even though the POCSO Act is a comprehensive law that seeks to address issues of sexual abuse against children, the Act has simultaneously strengthened a protectionist and patriarchal control of adolescent sexuality. The Act assumes that adolescents in India are sexually inactive, and all adolescent sexual encounters amount to a violation of the sexual autonomy of the person and cause harm. Like Kenya, cases from the Indian Courts show that judges are recognizing the sexual autonomy of adolescents. However, there is still a conflict of law between the POCSO Act and the India Penal Code and this has promoted child marriages. Therefore, the POCSO Act needs to be amended in order to decriminalize consensual sexual interaction between adolescents. Thus, the research found there is a need for Kenya and India to change their laws to conform with international and regional instruments to which they are parties to.

LIST OF ABBREVIATIONS AND ACRONYMS

ACRWC	African Charter on the Rights and Welfare of the Child
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
CSE	Comprehensive Sexuality Education
POCSO Act	Protection of Children from Sexual Offences Act
UNCRC	United Nations Convention on the Rights of the Child

KEYWORDS

CRC- adolescent- consensual sexual interaction- age of consent- statutory rape- defilement

DEFINITION OF KEY TERMS

Adolescent: Persons aged between 12 and 18 years

Age of Consent: The age below which, in accordance with national law, it is prohibited to engage in sexual activities with a child

CHAPTER ONE: INTRODUCTION AND BACKGROUND TO THE STUDY

Adolescents worldwide tend to have sexual intercourse for the first time between the ages of 15 and 19. This can be inferred from the World Health Organization's adolescent pregnancy statistics, where it is indicated that an estimated 16 million girls aged between 15 to 19 years give birth every year, with 95% of births occurring in developing nations.¹ The statistics paint a picture of adolescents engaging in sexual activities before reaching the age of sexual consent as laid down in laws of different jurisdictions.

Most countries set an age at which adolescents are deemed legally capable of consenting to sex through "age of consent" provisions. In many countries, the age of sexual consent is set between 14 and 16, most commonly 16. However, it can range from 12 to 18 years.² Often found in criminal codes, these provisions define consent in the context of sexual offences, including statutory rape, which is based on the assumption that an individual is legally not capable of consenting to sexual intercourse until he/she reaches a certain age as laid out in the laws of different countries.³ Hence in some countries, if adolescents engage in consensual sexual conduct among themselves, either one or both of them are prosecuted under statutory rape laws.

Prosecution under statutory rape laws can have severe and long-term consequences for adolescents. Under some laws, consensual sexual conduct between adolescents may result in far more harsh penalties than those against an adult who rapes another adult.⁴ An adolescent who engages in consensual sexual conduct with another adolescent may be found guilty and placed on a sex offender register for the rest of his or her life. Inclusion on a sex offender register can have irreversible consequences affecting practically every aspect of a person's life, including school, work, housing, and even the ability to live with family members if there are children in the home.⁵ Additionally, the laws may deter and hinder access to comprehensive sexual reproductive health services as sexually active adolescents may not access contraceptive services to prevent pregnancy or sexually transmitted infections as they are fearful of getting in trouble with the law.⁶

¹ Adolescent Pregnancy: A Culturally Complex Issue, <https://www.who.int/bulletin/volumes/87/6/09-020609/en/>, last accessed (24/04/2021).

² Amnesty International, *Body Politics: A Primer on Criminalization of Sexuality and Reproduction*, (2018), at 136-137.

³ K. Dumond, *Cast Me Not Away: The Plight of Modern Day Romeo and Juliet*, *Quinnipiac Law Review (QLR)*, 36(3), (2018), at 458.

⁴ Amnesty International, *supra* note 2, at 136.

⁵ *Id.*, 136-137.

⁶ Center For Reproductive Rights, *Criminalizing Adolescence: A Call to Reform the Sexual Offences Act, 2019*, at 9, <https://reproductiverights.org/criminalizing-adolescence/>, last accessed (02/05/2021).

1.1 Background of Sexual Consent Laws

Sexual consent laws have existed for centuries, with some arguing that they can be traced back to the ancient code of Hammurabi.⁷ They were first codified into English law in 1275 and prohibited sexual relations between adults and girls under the age of twelve. In the late sixteenth century, the age of sexual consent was lowered to ten.⁸

Several factors show that the primary purpose behind these early laws was to protect the purity of vulnerable, virtuous young women, treating them as special 'property' in need of special protection.⁹ First, these early prohibitions were gender-specific, criminalizing adult sexual relations with females but not males. Furthermore, defendants could use a promiscuity defense to argue that no crime occurred if the victim was sexually experienced and thus lacked chastity to steal.¹⁰

The late nineteenth century saw a wave of sexual consent laws reform. Concerned about the spread of disease and the protection of young girls from abuse, a coalition of Victorian feminists, socialists, religious groups, and progressives mobilized to strengthen laws and raise the consent age. They were successful, and their accomplishments were a victory for the moral reform movement, which was primarily concerned with social purity and the upliftment of the lower classes.¹¹ Much of the feminist movement shifted its focus in the late twentieth century from a protectionist approach to the restrictive nature of statutory rape laws, which they saw as state-sponsored repression of young women's sexuality and sexual autonomy.¹²

Initially, proponents of statutory rape laws contended that such laws were required to protect young people from coerced sexual behavior. Legislators assumed that a young person in a relationship with a large age disparity could not make a sexual choice within that relationship. Others argued that young people were too immature to make decisions and were incapable of understanding the long-term effects of their actions. Furthermore, proponents of these legislations have linked sexuality to morality, arguing that any sexual engagement by adolescents is immoral.¹³

Additionally, cultural considerations were also at the forefront as in some cultures pre-marital sex was frowned upon. Cultural norms were taken very seriously and girls had to undergo puberty rites to ensure their virginity and dignity were intact. Unmarried people who were caught engaging in sexual activities were considered a disgrace to their families. Moreover, due to religious considerations,

⁷ VS. Beck and S. Boys, *Romeo & Juliet: Star-Crossed Lovers or Sex Offenders?*, *Criminal Justice Policy Review*, 24(6), (2013), at 656.

⁸ J. Daryl, *Statutory Rape in Wisconsin: History, Rationale, and the Need for Reform*, *Marquette Law Review* 89(3), (2006), at 694.

⁹ R. Oliveri, *Statutory Rape Law and Enforcement in the Wake of Welfare Reform*, *Stanford Law Review*, 52(2), (2000), at 466.

¹⁰ *Id.*

¹¹ *Id.*, at 466-467.

¹² D. Brand, *Sugar, Spice and Criminalized Consent: A Feminist Perspective of the Legal Framework Regulating Teenage Sexuality in South Africa*, *South African Journal on Human Rights* 29(2), (2013), at 196.

¹³ L. Pearlstein, *Walking the Tightrope of Statutory Rape Law: Using International Legal Standards to Serve the Best Interests of Juvenile Offenders and Victims*, *American Criminal Law Review*, 47(1), (2010), at 112.

young people were not permitted to have sex lest they incurred the wrath of their religion's supreme deity, so abstinence was strongly encouraged.¹⁴

Today, while chastity concerns are no longer prominent, countries provide various reasons to justify sexual consent laws. For instance, these laws are said to protect young people from coerced sexual activity, enforce morality, prevent teenage pregnancy, delay adolescents' sexual debut, and reduce welfare dependence.¹⁵

1.1.1 Defining the Age of Consent

The age of consent is the legal age at which an individual is deemed capable of consenting to sexual activity. It is based on the presumption that children lack the emotional and cognitive capabilities to make rational choices.¹⁶ International standards do not indicate the minimum age for sexual consent; hence there is no global uniformity as to what the benchmark age is. Various countries have established age minimums for adolescents, often at or around 14 and 15.¹⁷ Generally, the age of sexual consent is not set out in the law but is inferred from criminal laws that criminalize sexual activity with individuals below a specific age.

In its General Comment on adolescent health and development, the CRC Committee notes that state parties to the CRC need to ensure that specific legal provisions are adopted under domestic law that clearly set a minimum age of sexual consent. It also notes that the minimum age of sexual consent must be the same for boys and girls and should reflect the child's evolving capacity, age, and maturity.¹⁸

The CRC Committee has avoided being prescriptive of the age of sexual consent and instead recommends a balance between protection and evolving capacities in coming with an acceptable minimum age of consent. It warns state parties against criminalizing adolescents of similar ages for factually consensual and non-exploitative sexual activity.¹⁹ However, a review of the CRC Committee Concluding Observations provides some guidance on unacceptable lower limits. In its Concluding Observations to Costa Rica²⁰ and the Republic of Korea,²¹ the Committee has recommended that the states increase the minimum age of sexual consent from 13 years but did not specify a particular age to which it should be raised.

¹⁴ Ministry of Gender, Children and Social Protection, A Position Paper on Harmonizing the Age of Sexual Consent and the Age of Marriage in Ghana, (2018), at 13-14.

¹⁵ M. Cohen, No Child Left Behind Bars: The Need to Combat Cruel and Unusual Punishment of State Statutory Rape Laws, *Journal of Law and Policy*, 16(2), (2009), at 727-728.

¹⁶ L. Purdy, *In Their Best Interest? The Case Against Equal Rights for Children*, Cornell University Press, (1992), at 25.

¹⁷ Highest and Lowest Ages of Consent, <https://www.ageofconsent.net/highest-and-lowest>, last accessed (21/04/2021).

¹⁸ UN Committee on the Rights of the Child (CRC), General Comment No. 4 (2003) on Adolescent Health and Development in the Context of the Convention on the Rights of the Child, CRC/GC/2003/4, at Para 9.

¹⁹ 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, CRC/C/GC/20, at Para 40.

²⁰ CRC Committee Concluding observations on the combined fifth and sixth periodic reports of Costa Rica, 4th March 2020, CRC/C/CRI/CO/5-6, para 29 (e).

²¹ CRC Committee Concluding Observations on the Combined Fifth and Sixth Periodic Reports of the Republic of Korea, 24 October 2019, CRC/C/KOR/CO/5-6, para 29 (c).

1.1.2 Age of Sexual Consent vis-à-vis Age of Marriage

There have been intermittent demands to have an identical age of marriage and age of sexual consent. For example, in Ghana, the age of marriage is set at 18 years²² while the age of sexual consent is 16 years.²³ In 2018, the Ministry of Gender, Children and Social Protection proposed that the minimum age of sexual consent be raised to 18 to match the minimum age of marriage.²⁴ This is because the lower age of sexual consent in comparison to the age of marriage is interpreted as an endorsement of early sexual initiation. Furthermore, pre-marital sex is frowned upon in Ghanaian society, and adolescents are socialized to believe that they must wait until marriage or the legal age of marriage before engaging in sexual activities.²⁵ However, the age of consent to marriage and the age of sexual consent should not be aligned as the effects of the decisions to marry and have sexual intercourse are very different.²⁶

Child marriage can be harmful because it is associated with a number of negative consequences. Child brides, for example, have little exposure to meaningful educational activities that have a significant impact on personal growth and economic self-sufficiency. Child brides are also denied reproductive rights, which pose serious health risks such as birth complications and maternal deaths. In addition to vesicovaginal issues, girls under the age of 15 have a fivefold greater chance of dying during childbirth than women in their twenties.²⁷ Research further indicates that child brides are exposed to a more significant recurrence of neonatal mortality due to low birth weight and malnutrition, exacerbated by parental illiteracy and poverty. Moreover, child marriage also results in an increased experience of intimate partner violence.²⁸

Consensual sexual conduct between adolescents, on the other hand, is not as harmful as long as both adolescents give informed consent and have access to sexual and reproductive information and services. Adolescents who have access to the information and knowledge they need to protect themselves are better able to make full, free, and informed decisions about when and when not to have sex when they are ready, without fear of negative consequences.²⁹

In its Joint General Comment on harmful practices, the CRC Committee has stated that state parties should ensure that a minimum legal age of marriage for girls and boys, with or without parental

²² Section 13 (2), Act No. 560 of 1998, Children's Act (Ghana).

²³ Section 14 (a), Act No. 29 of 1960, Criminal Offences Act (Ghana).

²⁴ E. Ajarfor, Gender Ministry Pushes Age of Sexual Consent to 18, <https://www.modernghana.com/news/874827/gender-ministry-pushes-age-of-sexual-consent-to-18.html>, last accessed (2/7/2021).

²⁵ Ahinkorah et al. The Missing Link Between Legal Age of Sexual Consent and Age of Marriage in Sub-Saharan Africa: Implications for Sexual and Reproductive Health and Rights, *Reproductive Health*, 18(1), (2021) at 4, <https://reproductive-health-journal.biomedcentral.com/articles/10.1186/s12978-021-01177-w>, last accessed (2/7/2021).

²⁶ S. Petroni et al, "Protection Versus Rights: Age of Marriage Versus Age of Sexual Consent," *The Lancet Child & Adolescent Health*, 3(4) (2019), at 278.

²⁷ K. Elizabeth, 'Whose Foot Is in the Tight Shoe? Negotiating Inclusive Pathways for the Eradication of Child Marriage in West Africa,' *The International Journal of Children's Rights*, vol 24(4) (2016), at 721.

²⁸ *Id.*, 722.

²⁹ UNICEF Zimbabwe, Adolescent Consent to Marriage and Sexual Activity, and Access to Sexual Reproductive Health Services in Light of the Zimbabwe Marriages Bill, October 2019, pp. 8. <https://www.unicef.org/zimbabwe/reports/adolescent-consent-marriage-and-sexual-activity-and-access-sexual-reproductive-health>, last accessed (25/04/2021).

consent, is established at 18 years.³⁰ It has also reiterated the same sentiments in its General Comment on the rights of the child during adolescence positing that the minimum age limit for marriage should be at 18 years.³¹ Additionally, in its Concluding Observations to Malta, the CRC Committee recommended that Malta amend its Marriage Act and Civil Unions Act to remove all exceptions that allow for marriage and entering into civil unions under 18 years.³² Hence, unlike the age of sexual consent in which the CRC Committee does not recommend specific limits, it recommends that the age of marriage be 18.

In addition, the African Charter on the Rights and Welfare of the Child sets the age of marriage at 18 years for both boys and girls.³³ The African Committee of Experts on the Rights and Welfare of the Child has noted that state parties must adopt and enforce legislation that sets the minimum age of marriage at 18 for both boys and girls and posits that the best interest principle of the child should not be used as a justification to permit child marriage in any circumstance.³⁴ Additionally, the Committee, in its Concluding Observations to the People's Democratic Republic of Algeria, urged the state to set the minimum age of marriage for both boys and girls at the age of 18 years.³⁵

In recent years, commendable progress has been made in some countries, notably Zimbabwe, to bring the law on the minimum age of marriage into line with international standards. In 2016, Zimbabwe's Constitutional Court issued a groundbreaking ruling in the case of **Mudzuru & Another v Legal & Parliamentary Affairs NO & Others**³⁶ when it unanimously ruled that section 22 (1) of the Marriages Act³⁷ which set the minimum age of marriage at 16 years for girls and 18 years for boys was unconstitutional and therefore invalid, as no person of either sex should be married before 18 years. The applicants who were former child brides aged 19 and 18 relied on section 78 (1) of the Constitution of Zimbabwe³⁸ arguing that the Constitution had the effect of setting the minimum age of marriage at 18 years.

In its ruling, the Court held that by ratifying both the CRC and the African Charter, Zimbabwe had an obligation to take all appropriate measures, including legislative, to protect and enforce the rights of

³⁰ Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2019) on harmful practices, 8 May 2019, CEDAW/C/GC/31/Rev.1–CRC/C/GC/18/Rev.1, para 55 (f).

³¹ 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, CRC/C/GC/20, at Para 40.

³² CRC Committee Concluding observations on the combined third to sixth periodic reports of Malta, 29th June 2019, CRC/C/MLT/CO/3-6, para 18.

³³ Article 21 (2).

³⁴ Joint General Comment of The African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on Ending Child Marriage, at Paras 9 & 10.

³⁵ Concluding Observations and Recommendations by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the People's Democratic Republic of Algeria Report on the Status of Implementation of The African Charter on the Rights and Welfare of the Child, para 13.

³⁶ *Loveness Mudzuru v. Ruvimbo Tsopodzi v. Legal & Parliamentary Affairs N.O & Others*, Constitutional Application No. 79/14, 2016, Constitutional Court of Zimbabwe.

³⁷ Marriage Act, Chapter 5:11, Laws of Zimbabwe.

³⁸ Section 78(1) of Zimbabwe's Constitution of 2013.

the child as enshrined in the relevant conventions to ensure that they are enjoyed in practice.³⁹ The Court's use of international and regional child protection instruments, particularly the CRC and the African Charter, is impressive. It demonstrates how these instruments play an essential role in developing child rights jurisprudence in some countries within the African continent.⁴⁰ Moreover, the Court gave primacy to treaty obligations that Zimbabwe voluntarily undertook. It also establishes an important precedent for other state parties to the African Charter by outlining the expectations for domestic marriage and child protection legislation.⁴¹ The ruling, therefore, resonates with international and regional efforts to end child marriages.

However, even though the judgment can be termed to be a great and progressive one, specific paragraphs intimating that the age of sexual consent be aligned with the age of marriage still lurk. Justice Hlatshwayo argues that the age of sexual consent, which stands at 16 years, is seriously misaligned with the new minimum age of marriage of 18 years hence the scourge of early sexual activity and child pregnancies are likely to continue and even increase.⁴² However, even though international and regional instruments set the minimum age of consent to marriage at 18 years, countries should not use this age to advocate for a higher age of sexual consent as this may result in adolescents being treated as criminals for consensual sexual acts. It also hinders adolescents' access to sexual and reproductive health services. Moreover, the two minimum ages play different roles in legislation.⁴³

1.2 Statement of the Problem

Various countries have laws in place that prohibit sexual intercourse with persons below a certain age, based on the premise that they are incapable of consenting to sexual interaction regardless of whether the act in question can be qualified as consensual.⁴⁴ The legal age of sexual consent differs significantly across the world, ranging from 12 to 18. While the intent of these laws is imperative to protect children from sexual predators and adults who would prey upon their vulnerability, it is problematic for those same laws to criminalize consensual adolescent sexual interaction as adolescents themselves risk being exposed to the criminal justice system and the associated harmful consequences.⁴⁵ Hence, the laws that are meant to protect adolescents from sexual predation by adults harm the very people they were intended to safeguard. This exposes them to the harshness of the punitive criminal justice system and at the same time infringes other rights such as the right to privacy, freedom of expression, the best interest of the child, and the right to autonomy.

³⁹ Loveness Mudzuru, *supra* note 36, at 27.

⁴⁰ A. Skelton, The Development of a Fledging Child Rights Jurisprudence in Eastern and Southern Africa Based on International and Regional Instruments, 9 African Human Rights Law Journal, (2009), at 499.

⁴¹ J. Sloth-Nielsen & K Hove 'Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & 2 Others: A review' 15 African Human Rights Law Journal (2015), at 563.

⁴² Loveness Mudzuru, *supra* note 36, at 59.

⁴³ Tallarico et al, Age of consent: A Case for Harmonizing Laws and Policies to Advance, Promote and Protect Adolescents' Sexual and Reproductive Health Rights, African Journal of Reproductive Health, 25(2) (2021), at 99.

⁴⁴ Beck and Boys, *supra* note 7, at 655.

⁴⁵ Cohen, *supra* note 15, at 723.

1.3 Objectives of the Research

The overall objective is to critique the criminalization of consensual sexual interaction between adolescents in South Africa, Kenya, and India within international and regional frameworks.

Specific Objectives

- a.) To examine the legal and institutional frameworks of South Africa, India, and Kenya relating to consensual sexual interaction between adolescents.
- b.) To critique legal developments in comparative jurisdictions within the framework of relevant international and regional frameworks.
- c.) To make recommendations on child rights compliant measures that states may adopt when dealing with consensual sexual interaction between adolescents.

1.4 Research Questions

1. What are the international legal and institutional frameworks relating to non-coercive sexual interaction between adolescents?
2. How should laws balance autonomy and protection in consensual interaction between adolescents?
3. How do countries such as South Africa, India, and Kenya deal with consensual sexual interaction between adolescents?
4. What measures can states adopt to ensure that child rights compliant laws are adopted regarding consensual sexual interaction between adolescents?

1.5 Scope and Limitation of the Research

This research limits its research to consensual or non-coercive sexual interaction between adolescents. Although definitions of adolescents may vary, the research focuses on the age group of 12 to 18 years.

1.6 Theoretical Framework

There has been a push and pull between protection and autonomy regarding consensual sexual interaction between adolescents. Adolescents have rights as autonomous human beings on the one hand, and they deserve protection on the other. This research explores the tension between child protection and child autonomy as a guiding theoretical framework for consensual sexual interaction between adolescents.

Both the preamble of the CRC and the African Charter on the Rights and Welfare of the Child recognizes that children need special safeguards and care because of their physical and mental immaturity. Hence, they adopt the position that children are especially vulnerable to harm, and thus state parties must take measures to protect children from such harm. However, they also perceive children as having the agency to participate in matters concerning their lives. In particular, article 7 of the African Charter on the Rights and Welfare of the Child and Article 12 of the CRC recognize that children can form their own views and possess the right to express these views freely on issues affecting them.⁴⁶

From a paternalistic perspective, children are viewed as dependent future citizens who are generally unable to make rational decisions; thus, their rights are limited to the right to be protected, whether by parents, the state, or voluntary benefactors. Furthermore, control over children has been justified by

⁴⁶ Kangaude et al., Childhood Sexuality in Africa: A Child Rights Perspective, *African Human Rights Law Journal*, 20, (2020), at 699.

the need to protect children from themselves and others, and what is best for children is completely decided by caring and loving adults who offer their assistance and exercise their authority over children.⁴⁷

Freeman argues that a child's autonomy means treating the child as a person and a rights holder. He acknowledges that the exercise of autonomy by a child can have a detrimental impact. However, he argues that even adults make mistakes; hence having rights means being allowed to take risks and make choices. He draws from Dworkin's analogy that if rights are taken seriously, there must be an acceptance that rights-holders will sometimes do things that we do not think are good for them.⁴⁸ In addition, Freeman concludes that taking children's rights seriously requires us to take both the protection of children and recognition of their autonomy seriously. Further, it requires that laws, policies, institutional structures, and practices that both protect children and their rights are adopted.⁴⁹

Tobin⁵⁰ notes that while protectionist motivations may be well-intended, they create the risk of incoherence with the reality of children's evolving capacity, which is recognized under the CRC and refers to the processes of maturation and learning whereby children progressively acquire knowledge, competencies, and maturation. He concludes that even though protective measures are necessary to mitigate against the threats to children's well-being, a protective paradigm that emphasizes a child's vulnerability at the expense of their evolving capacity does little to increase children's resilience and capacity to protect themselves from harm.⁵¹

According to Hanson, protecting children and protecting their rights are not necessarily oppositional but can be complementary objectives; hence the right to freedom and self-determination should both be recognized. He argues that protection rights should be emphasized regarding young children, who first need protection and care. He adds that as children grow older, their rights to self-determination become more critical and that their right to protection may lead to a restriction of their rights to freedom.⁵² Skelton observes that the dilemma of autonomy versus protection is an ever-present tension in children's rights. She posits that a durable theory of children's rights must be flexible enough to incorporate protection for children against harsh treatment while at the same time give room for their evolving capacities to be recognized.⁵³

1.7 The Research Methodology

The thesis is based on desktop research. This involves the analysis of international and regional instruments on adolescent sexuality. In addition, it undertakes an analysis of the rights laid out in the CRC that form the basis of the decriminalization of consensual sexual interaction between adolescents. It also entails reviewing relevant case law, books, peer-reviewed articles, reports on

⁴⁷ K. Hanson, *Schools of Thought in Children's Rights*, (2008), at 12.

⁴⁸ M. Freeman, *Whither Children: Protection, Participation, Autonomy*, *Manitoba Law Journal*, 22(3), (1994), at 323.

⁴⁹ *Id.*, at 327.

⁵⁰ J. Tobin, *Understanding Children's Rights: A Vision Beyond Vulnerability*, *Nordic Journal of International Law*, 84(2), (2015), at 174.

⁵¹ *Id.*, at 182.

⁵² K. Hanson, *supra* note 47 at 9.

⁵³ A. Skelton, *Balancing Autonomy and Protection in Children's Rights: South African Account*, *Temple Law Review*, 88(4), (2016), at 904.

consensual sex between adolescents from international NGOs, National Human Rights Institutions, policy documents, general comments, concluding observations, and internet sources.

In addition, this research applies comparative analysis and specifically focuses on South Africa, Kenya, and India. South Africa is selected because it is one of the countries that introduced a new law that criminalized consensual sexual interaction between adolescents. However, the Constitutional Court ruling in the *Teddy Bear Clinic* case decriminalized consensual sexual interaction between adolescents. As a result, the law was amended in 2015. The new law decriminalizes consensual sexual interaction where the older adolescent is above 16 years but below 18 years, provided the age difference between the partners is not more than two years. Therefore, South Africa has been progressive in reforming the law on statutory rape, especially regarding adolescents.

On the other hand, the Kenyan and Indian laws still criminalize consensual sexual conduct between adolescents. Therefore, the findings of this research may create essential headway in identifying how best to balance the need to protect children from sexual abuse and develop appropriate measures of dealing with consensual sex between adolescents without resorting to the use of criminal law.

1.8 Chapter Breakdown

Chapter one introduces the research by giving a brief background into the issue of sexual consent laws and the concept of consensual sex between adolescents. It also contains a statement of the problem, the objectives, research questions, scope and limitation of the research, theoretical framework, and the research methodology.

Chapter two entails a critical analysis of the law on consensual sexual interaction between adolescents. It looks at the international instruments, more specifically the United Nations Convention on the Rights of the Child, Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse (hereafter Lanzarote Convention), and the African Charter on the Rights and Welfare of the Child. Additionally, it examines the rights associated with adolescent sexuality found in the CRC, such as the right to autonomy, the child's best interests, the right to health, freedom of expression, and privacy.

Chapter three contains a comparative analysis of the legal regime of consensual sexual interaction between adolescents in South Africa, Kenya, and India. Finally, chapter four provides an analytical synthesis of the major findings of the research and presents recommendations on how countries should tackle consensual sexual interaction between adolescents.

CHAPTER TWO: INTERNATIONAL LEGAL AND INSTITUTIONAL FRAMEWORK RELATING TO CONSENSUAL SEXUAL INTERACTION BETWEEN ADOLESCENTS

2.0 Introduction

Countries are obligated under international human rights law to protect adolescents from sexual coercion and sexual violence. They are also required to respect, protect and fulfill their human rights, including in the realm of their developing sexualities, and in accordance with their evolving capacities. To that end, countries ought to recognize adolescents as rights holders and not criminalize consensual sexual interaction between adolescents. This chapter looks at the international and regional legal framework governing consensual sexual interaction between adolescents and, in particular, the United Nations Convention on the Rights of the Child (hereafter UNCRC), the African Charter on the Rights and Welfare of the Child, and the Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse (hereafter Lanzarote Convention). This chapter further expounds on the CRC rights that are at particular risk in strict statutory rape laws.

2.1 The International Legal Framework

2.1.1 The United Nations Convention on the Rights of the Child

In 1989, the United Nations adopted the UNCRC, and the treaty entered into force on September 2nd, 1990. The Convention specifically recognizes that a child is a person aged below 18 years unless, under the law applicable to the child, majority is attained earlier.⁵⁴ Therefore, the CRC ultimately leaves the term open to varying cultural and religious interpretations.⁵⁵

The CRC contains broad measures to protect children from sexual violence. First, it requires state parties to take all appropriate legislative, administrative, social, and educational measures to protect the child from sexual abuse while in the care of parents, legal guardians, or any other person who has care of the child.⁵⁶ Even more importantly, article 34 obliges state parties to protect children from all forms of sexual exploitation and sexual abuse. This includes the inducement or coercion of a child to engage in any unlawful sexual activity. Also, article 39 requires states to provide recovery and reintegration in an environment that fosters the health, self-respect, and dignity of child victims of sexual exploitation.

In its General Comment on the right of the child to freedom from all forms of violence, the CRC Committee includes the inducement or coercion of a child to engage in any unlawful or psychologically harmful sexual activity to the list of what can be termed as sexual abuse. It further notes that sexual activities are also considered as abuse when committed against a child by another child if the child offender is significantly older than the child victim or uses power, threat, or other means of pressure. It adds that sexual activities between children are not considered sexual abuse if the children are older than the age limit defined by the state party for consensual sexual activities.⁵⁷

⁵⁴ Article 1 CRC.

⁵⁵ CRC Article 1: "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".

⁵⁶ Article 19 (1) CRC.

⁵⁷ UN Committee on the Rights of the Child, General Comment No. 13 (2011) on the Right of the Child to Freedom from All Forms of Violence, 18 April 2011, CRC/C/GC/13, at para 25 (a).

The CRC, through its General Comments, has recommended that state parties should not criminalize consensual sexual conduct between adolescents hence recognizing children as having sexual autonomy. In its General Comment 20, the CRC Committee recommends that state parties should avoid criminalizing consensual and non-exploitative sexual conduct between adolescents of similar ages.⁵⁸

In addition, in its General Comment on the rights of children in the justice system, the CRC Committee urges states to decriminalize status offences that are not considered crimes if committed by adults. It notes that adolescents who engage in consensual sexual acts are sometimes criminalized and urges state parties to remove status offences from their statutes.⁵⁹ Furthermore, the CRC Committee's guidelines on the Optional Protocol on the sale of children, child prostitution, and child pornography have explicitly called on states not to criminalize adolescents of similar ages for consensual sexual activities.⁶⁰

2.1.1.1 Right to Autonomy/Evolving Capacities

For the first time in an international human rights treaty, the CRC brings in the concept of evolving capacities of the child. Article 5 provides that guidance and direction provided by legal guardians or others who are legally responsible for the child must take into account the growing maturity of children in a manner that is consistent with their evolving capacities. This recognition of children's evolving capacities is further confirmed in articles 12 (1) and 14 (2) of the CRC.

Article 12 (1) of the CRC provides that state parties should accord children who are capable of forming their own opinions the right to express those views freely in all matters affecting the child; with the views of the child being given due weight in accordance with the age and maturity of the child.⁶¹ This provides a framework on which children can make certain decisions regarding their sexuality without the consent of their parents, and the state should not interfere with their decisions by using criminal law. Lansdown⁶² argues that the CRC also recognizes that children still require the protection of their parents and the state from participation in or exposure to activities likely to cause them harm. For example, the CRC includes rights to protection from violence and sexual abuse.

In General Comment Number 7, the CRC Committee explained that the concept of evolving capacities is an enabling principle in the sense that parents and others in authority are vested with the mandate to continually adjust the level of support and guidance they offer children.⁶³ Parents are to take into account the child's best interest, wishes, and capacity to make autonomous decisions. According to the Committee, the concept of evolving capacities should be viewed as a positive and enabling process rather than a justification for authoritarian practices that limit children's autonomy and self-

⁵⁸ 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, CRC/C/GC/20, para 40.

⁵⁹ UN Committee on the Rights of the Child (CRC), General Comment No. 24 (2019) on Children's Rights in the Child Justice System, 18 September 2019, CRC/C/GC/24, para 24.

⁶⁰ UN Committee on the Rights of the Child, Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 10 September 2019, UN Doc CRC/C/156, at para 73.

⁶¹ Article 12 CRC.

⁶² G. Lansdown, *Evolving Capacities Explained*, in *Measuring Maturity: Understanding Children's Evolving Capacities*, (23), (2009), at 7, accessed at https://archive.crin.org/en/docs/CRIN_review_23_final.pdf on (30/04/2021).

⁶³ Para 17.

expression, which have traditionally been justified by citing children's relative immaturity and need for socialization. Parents and others should be encouraged to offer direction and guidance in a child-centered way.⁶⁴

In its General Comment Number 20, the Committee on the Rights of the Child defines evolving capacities as an enabling principle that addresses the process of maturation and learning through which children gradually acquire competencies, understanding, and increasing levels of agency to take responsibility for themselves and exercise their rights.⁶⁵ As a result, the issue of evolving capacities emphasizes the need for a balance between, on the one hand, children's right to recognition of their increasing levels of responsibility in exercising their rights as they gain the capacity to do so, and, on the other hand, the need for protection in light of their relative youth and immaturity.⁶⁶

The CRC Committee also notes that in seeking to provide an appropriate balance between respect for the evolving capacities of adolescents and appropriate levels of protection, consideration should be given to a range of factors affecting decision making, including the level of risk involved, the potential for exploitation, understanding of adolescent development, recognition that competence and understanding do not necessarily develop equally across all fields at the same pace and recognition of individual experience and capacity.⁶⁷

Therefore, even though states are obligated to protect adolescents from sexual harm, this duty must be balanced with the obligations to protect, respect, and fulfill the right to realize their sexual development without any unjust interference and punishment. Hence, states should consider the age and power differentials between adolescents who engage in sexual interaction when enforcing age of consent laws in accordance with the principles of evolving capacities.⁶⁸

2.1.1.2 Best Interest of the Child

The CRC provides that, in all actions concerning children, the child's best interests shall be a primary consideration.⁶⁹ Other CRC provisions also mention the best interests of the child.⁷⁰ The CRC Committee has accorded the best interests of the child a threefold status: that of a substantive right, an interpretative legal principle, and a rule of procedure.⁷¹ As an interpretative legal principle, the child's best interest is relatively new in international law; it was introduced by the CRC.⁷² But it may be very forceful, in that if a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen'.⁷³ Hence, it is a potentially

⁶⁴ Para 17.

⁶⁵ General Comment No. 20, para 18.

⁶⁶ G. Lansdown, *supra* note 62, at 7.

⁶⁷ General Comment No. 20 para 20.

⁶⁸ Amnesty International, *Body Politics, A Primer on Criminalization of Sexuality and Reproduction*, (2018), at 137.

⁶⁹ Article 3(1) CRC.

⁷⁰ UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) On the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration, 29 May 2013, CRC /C/GC/14, para 3.

⁷¹ *Id.*, para 6.

⁷² M. Freeman, 'A Commentary on the United Nations Convention on the Rights of the Child, Article 3: The Best Interests of the Child, (2007), at 1.

⁷³ General Comment No. 14, *supra* note 70, at para 6(a).

powerful prioritization of the child's best interests. Sometimes, it goes even beyond prioritization, so that the child's best interests are the paramount or primary consideration.⁷⁴

However, Vandenhole⁷⁵ points out that the meaning of the best interest of the child has remained indeterminate and opaque so that it tends to be invoked from different sides to justify sometimes opposing decisions. In the context of consensual sexual interaction between adolescents, proponents for the criminalization of consensual sex between adolescents argue that it is in the best interest of the child to prevent them from engaging in sexual activities at an early age while opponents claim that criminalizing adolescent sexuality is not in the best interest of adolescents as it infringes on their rights.

In ***CKW v Attorney General & Others***,⁷⁶ the High Court of Kenya decided that criminalization of consensual conduct between adolescents was in the child's best interest to protect children from harmful acts of sexual activity. In making its determination, the Court considered the decision of the South African Constitutional Court in the ***Teddy Bear Clinic v Minister for Justice and Constitutional Development***.⁷⁷ In the South African case, the issue before the Constitutional Court was whether sections 15 and 16 of the Criminal Law (Sexual Offences Act and Related Matters) Amendment Act was unconstitutional for criminalizing sexual conduct between adolescents in the age group of 12 to 16 years. The Court found that imposing criminal culpability for otherwise appropriate adolescent sexual behavior has the consequence of harming the adolescents they are supposed to protect, in a way that violates the child's rights to dignity and privacy and goes against the best interest concept. In arriving at these diametrically opposed positions, both the South African and Kenyan courts claimed to be advancing the best interest of the child.⁷⁸

Sandberg⁷⁹ argues that in situations where different elements point in different directions as to what is in the child's best interest, a balance needs to be maintained and notes that the balancing exercise has to be performed with regard to the individual situation and needs of that child. She further argues that where protection factors stand up against factors related to the child's autonomy, the child's age and maturity should guide the balancing.

2.1.1.3 The Right to Health

The CRC guarantees children the right to the highest attainable standard of health and to the facilities for the treatment of illness and rehabilitation of health. State parties have the obligation of ensuring that no child is deprived of his or her right to access such health services.⁸⁰ The right to health includes the right to sexual and reproductive health. In its General Comment on adolescent health and

⁷⁴ Wouter Vandenhole, *Distinctive characteristics of children's human rights law in Children's Rights Law in the Global Human Rights Landscape*, 1st ed, Routledge, (2017), at 26.

⁷⁵ *Id*, at 26.

⁷⁶ *CKW. v. Attorney General & another* (2014) eKLR, Petition 6 of 2013.

⁷⁷ *Teddy Bear Clinic for Abused Children & Another vs Minister of Justice and Constitutional Development & Another*, [2013] ZACC 35.

⁷⁸ G. Kangaude & A. Skelton, (De) Criminalizing Adolescent Sex: A Rights-Based Assessment of Age of Consent Laws in Eastern and Southern Africa, (2018), at 2.

⁷⁹ K. Sandberg, 'Children's Right to Protection Under the CRC', in: A. Falch-Eriksen & E. Backen-Hansen (eds.), *Human Rights in Child Protection*, Cham: Palgrave Macmillan (2018), at 33

⁸⁰ Article 24 CRC.

development, the CRC Committee calls on state parties to ensure that health facilities, goods, and services, including counseling and health services for mental and sexual and reproductive health of appropriate quality and sensitive to adolescents' concerns, are available to adolescents.⁸¹

The CRC Committee also notes that laws that deny adolescents access to sexual health services, including contraceptive services, on the basis of age, are a violation of the adolescents' human rights, and may jeopardize their well-being.⁸² Moreover, the CRC Committee also calls for the creation of programs that provide adolescents with comprehensive sexual and reproductive health services.⁸³ It consistently asserts that adolescents must have access to comprehensive reproductive healthcare.

In its General Comment on the right of the child to the highest attainable standard of health, the CRC Committee recommends that short term, long term and permanent contraceptive methods such as condoms, hormonal methods, and emergency contraception should be made easily and readily available to sexually active adolescents.⁸⁴ In addition, in its Concluding Observations to India, the CRC Committee urged the country to take measures to ensure that adolescent girls and boys have effective access to confidential sexual and reproductive health information and services such as modern contraception.⁸⁵

Therefore, looking at the CRC's General Comments and Concluding Observations, it can be deduced that the right to health for adolescents includes the right to sexual and reproductive healthcare. This is in conformity with the principles of life, survival, and development of the child, the best interests of the child, and non-discrimination principles that underlie the very fabric of the CRC.

2.1.1.4 Freedom of Expression

The CRC provides that the child shall have the right to freedom of expression.⁸⁶ Children's freedom of expression is rarely discussed, although it is a key measure of how well they are treated as individuals with rights. Children learn to describe how their rights are respected or infringed upon by expressing their thoughts and opinions and to speak up for the rights of others, by expressing their feelings and opinions.⁸⁷

Article 13 makes no mention of a child's developing capacities, nor does it specify a minimum age or level of maturity for exercising the right to freedom of expression. In this sense, freedom of expression has been viewed as having a developmental aspect, as its goal is to enable children to develop their

⁸¹ UN Committee on the Rights of the Child (CRC), General Comment No. 4 on Adolescent Health and Development in the Context of the Convention on the Rights of the Child, CRC/GC/2003/4, at para 35 (c).

⁸² *Id.*, para 6.

⁸³ *Id.*, para 27, 31 (a).

⁸⁴ CRC Committee General Comment No. 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art 24), 17 April 2013, CRC/C/GC/15, at 8.

⁸⁵ CRC Committee Concluding Observations on the Combined Third and Fourth Periodic Reports of India, 7 July 2014, CRC/C/IND/CO/3-4, para 66 (b).

⁸⁶ Article 13.

⁸⁷ CRIN, Article 13, Freedom of Expression, <https://archive.crin.org/en/home/rights/convention/articles/article-13-freedom-expression.html>, last accessed (15/04/2021).

minds and themselves in society with others, allowing them to grow into citizens engaging in public life.⁸⁸

In a Peruvian case,⁸⁹ the Constitutional Tribunal gave judgment on December 12th, 2012, declaring article 1° of Law N° 28704 unconstitutional, due to the violation of sexual freedom of adolescents aged 15 to under 18. The Court ruled that all teenagers have the right to sexual freedom, understood as the capacity of self-determination regarding their sexuality, which means to decide with whom, how, and when they have sex.

2.1.1.5 The Right to Privacy

The issue of privacy arises whenever the law affects deeply personal areas such as sexual activity. While it is true that adolescents are subject to more restrictive state control than adults, they also have certain rights of privacy.⁹⁰ The CRC protects children against arbitrary and unlawful interference with their privacy, family, home, or correspondence and against unlawful attacks upon their honor or reputation.⁹¹ The CRC, in its General Comment on adolescent health and development, has stated that the right to privacy is fundamental in guaranteeing health and development rights to adolescents and should be respected strictly.⁹²

In addition, the CRC Committee interprets the right to privacy to encompass confidentiality with respect to advice and counseling on health matters and states that health care providers have an obligation to keep confidential medical information concerning adolescents.⁹³ In its latest General Comment on children's rights in the digital environment, the CRC Committee acknowledges that privacy is vital to children's agency, dignity and safety and for the exercise of their rights⁹⁴ and that state parties should promote awareness among parents and caregivers of the need to respect children's evolving autonomy, capacities, and privacy.⁹⁵

⁸⁸ PLAN International, The Right of the Child to Freedom of Expression, <https://www.girlsrightsplatform.org/node/1064>, last accessed (15/04/2021).

⁸⁹ File N°. 00008-2012-PI/TC.

⁹⁰ R. Oliveri, Statutory Rape Law and Enforcement in the Wake of Welfare Reform, *Stanford Law Review*, 52(2), (2000), at 486.

⁹¹ Article 16.

⁹² UN Committee on the Rights of the Child (CRC), General Comment No. 4 on Adolescent Health and Development in the Context of the Convention on the Rights of the Child, CRC/GC/2003/4, at para 7.

⁹³ *Id.*, at para 7.

⁹⁴ CRC Committee General Comment No. 25 (2021) on Children's Rights in Relation to the Digital Environment, 2 March 2021, CRC/C/GC/25, para 67.

⁹⁵ *Id.*, at para 21.

2.2 The Regional Legal Framework

2.2.1 The African Charter on the Rights and Welfare of the Child

The ACRWC is the first and only regional treaty protecting and promoting children's rights on the African continent. In addition, Africa is the only continent with a region-specific child rights instrument, making the ACRWC a unique tool for advancing children's rights in Africa. It was adopted in July 1990 and entered into force on November 29th, 1999. The Charter complements the CRC and addresses several issues missing from the CRC and those relevant to Africa. In that sense, the ACRWC goes further than the CRC in some areas for instance the protection against harmful practices more concretely dealt with in article 21 including the prohibition of child marriage setting the minimum age for marriage at 18 for boys and girls.⁹⁶

The definition of a child contained in the Charter is regarded as being superior to that of the CRC,⁹⁷ in so far as it does not permit exceptions for when majority is attained before the age of 18 years. The Charter adopts a 'straight 18' position and this is aimed at better protection of children under national law. The definition of a child as any person aged below 18 years is reinforced in article 21 dealing with child marriage. The article requires state parties to prohibit all marriages of persons aged below 18 years.⁹⁸

The implementation of the Charter is monitored by the African Committee on the Rights and Welfare of the Child, ACERWC, which consists of 11 members elected by state parties that acts as a supervisory body to monitor states' implementation of its provisions. The ACERWC performs its supervisory function by examining state reports and giving recommendations, by considering individual communications on alleged violations of children's rights, by undertaking investigations through conducting ad hoc missions and on-site visits, and by establishing principles for protecting children's rights and interpreting provisions of the ACRWC through general comments.⁹⁹

The Charter protects children from sexual abuse¹⁰⁰ and all forms of sexual exploitation, including inducement, coercion, or encouragement of children to engage in any sexual activity. The use of children in prostitution or other sexual activities and pornography is also prohibited.¹⁰¹ Therefore, the Charter has an adequate framework for protecting the child from statutory rape and other harmful sexual practices.

Kangaude et al.¹⁰² note that the only General Comment issued by the ACERWC that contains instances of language representing the African child as having sexual agency is the 2017 joint General Comment of the African Children's Committee and the African Commission on Human and Peoples'

⁹⁶ J. Doek, *The Human Rights of Children: An Introduction*, in U. Kil Kelly & T. Liefaard (eds), *International Human Rights of Children* (Springer Nature Singapore Pte Ltd), (2018), at 18.

⁹⁷ Article 1.

⁹⁸ J. Sloth-Nielsen, *The African Charter on the Rights and Welfare of the Child* (Book Chapter), *Child Law* 29 (2017), at 424-445.

⁹⁹ African Committee of Experts on the Rights and Welfare of the Child, *Agenda2040*, (2016), at 3, <https://www.acerwc.africa/publications/>, last accessed (31/05/2021).

¹⁰⁰ Article 16 (1).

¹⁰¹ Article 27.

¹⁰² Kangaude et al, *Childhood Sexuality in Africa: A Child Rights Perspective*, *African Human Rights Law Journal* 20 (2020), at 702.

Rights.¹⁰³ The General Comment encourages states to develop and implement comprehensive sexuality education and information programs. It further notes that age-appropriate information about sex, sexual and reproductive health rights, and sexually transmitted infections should form part of the school curriculum and recommends that sexuality education should have information about what constitutes consent to sex.¹⁰⁴

Some ACERWC's Concluding Observations are relevant to consensual sex between adolescents as they acknowledge that adolescents can engage in sexual activities. In its Concluding Observations to Algeria, the ACERWC recommended that the country ensure that adolescent children have access to reproductive health information, services and care.¹⁰⁵ The ACERWC also urged Benin to provide sexual reproductive education for adolescent girls in schools and at the community level to prevent teenage pregnancy.¹⁰⁶ Additionally, the ACERWC called on South Africa to expedite the redrafting of sections 15 and 16 of the Sexual Offences Act, which criminalized consensual conduct between adolescents as was ordered by the Constitutional Court in the Teddy Bear Clinic case.¹⁰⁷

The ACERWC has recently adopted an outcome statement on adolescent children's sexual and reproductive health and rights in which it acknowledges that adolescent children, mainly boys, are criminalized for engaging in consensual and non-coercive sexual conduct with their peers. As a result, this creates a barrier to their access to sexual and reproductive health and rights services and information.¹⁰⁸ It further notes that the criminalization of adolescents who engage in consensual sex fails to recognize their evolving capacities¹⁰⁹ and urges member states of the African Union to decriminalize consensual and non-coercive sexual interaction between adolescents who are closer in age.¹¹⁰

It also recommends that member states craft policies that allow adolescents to access sexual and reproductive health services and information without the requirement of third-party consent considering their evolving capacity and domesticate the Charter's provisions concerning the sexual and reproductive health and rights of adolescents.¹¹¹

¹⁰³ The African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child on Ending Child Marriage, 2017.

¹⁰⁴ *Ibid*, para 36.

¹⁰⁵ Concluding Observations and Recommendations by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on The People's Democratic Republic of Algeria Report on the Status of Implementation of The African Charter on the Rights and Welfare of the Child, at para 32.

¹⁰⁶ Concluding Observations and Recommendations of The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the Initial Report of the Republic of Benin on the Status of the Implementation of the African Charter on the Rights and Welfare of the Child, para 34.

¹⁰⁷ Teddy Bear Clinic for Abused Children & Another v. Minister of Justice and Constitutional Development and Another, CCT 12/13, [2013] ZACC 35 South Africa, Constitutional Court.

¹⁰⁸ African Committee of Experts on the Rights and Welfare of the Child, Outcome Statement of the Day of General Discussion on the Sexual and Reproductive Health and Rights of Adolescent Children, 17th March 2021, para 10, last accessed <https://www.acerwc.africa/Latest%20News/outcome-statement-of-the-day-of-general-discussion-on-the-sexual-and-reproductive-health-and-rights-of-adolescent-children/>, 17th May 2021.

¹⁰⁹ *Id*, para 11.

¹¹⁰ *Id*, para 16 (v).

¹¹¹ *Id.*, para iii.

2.2.2 Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse, 2007 (Lanzarote Convention)

The Lanzarote Convention¹¹² was adopted in 2007 in Lanzarote (Canary Islands, Spain). The Convention is considered the most comprehensive international human rights instrument dedicated to protecting children from sexual violence.¹¹³ The Convention is neither exclusively limited to the member states of the Council of Europe nor to the non-member states who participated in its elaboration¹¹⁴ but is also open for accession by other non-member states as long as they have been invited by the Committee of Ministers of the Council of Europe to accede.¹¹⁵ Tunisia was the first non-European state to accede to the Convention in 2019.

Article 18 (1) of the Convention requires state parties to take all the necessary legislative or other measures to criminalize sexual conduct with a child who has not attained the legal age for sexual activities according to provisions of national law. Also, state parties are required to criminalize sexual activities with a child where coercion, force, or threats is employed by a person in a position of trust or authority. It gives freedom to state parties to set the age of sexual consent and determine who a minor is.¹¹⁶

However, it categorically states that these provisions are not meant to govern consensual activities between minors even if they are below the age of sexual activities as provided in international law.¹¹⁷ This means that the Convention does not criminalize consensual sexual activities among young adolescents who are discovering their sexuality and engaging in sexual experiences with each other in the framework of sexual development.¹¹⁸

2.3 Conclusion

The analysis of the international and regional framework has demonstrated that there is a legal framework for the protection of adolescents who engage in consensual sexual interaction with other adolescents. However, despite the existence of these laws, adolescents are still being criminalized in some countries such as Kenya and India despite them having ratified the instruments.

¹¹² Council of Europe, Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse, 12 July 2007, CETS No: 201, available at <https://www.refworld.org/docod/4d19a904615b.html>, last accessed (20/052021).

¹¹³ Z. Rutai, 'The Lanzarote Committee: Protecting Children from Sexual Violence in Europe and Beyond,' *Pecs Journal of International and European Law*, 2020, pp. 24.

¹¹⁴ Canada, the Holy See, Japan, Mexico and the United States of America.

¹¹⁵ Article 46 (1).

¹¹⁶ Article 18 (2).

¹¹⁷ Article 18 (3).

¹¹⁸ Explanatory Report to the Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse, para 129.

CHAPTER THREE: COMPARATIVE ANALYSIS OF THE LEGAL REGIME OF CONSENSUAL SEX BETWEEN ADOLESCENTS IN SOUTH AFRICA, KENYA, AND INDIA

3.0 Introduction

This chapter presents a comparative analysis between three countries, South Africa, Kenya, and India. This is with the aim to examine what Kenya and India can borrow from South Africa's approach to the issue of consensual sexual interaction between adolescents. South Africa is selected as a model because it has vivid case law and legislation on the non-criminalization of consensual sexual interaction between adolescents. Therefore, this chapter aims to identify what aspects of the South African experience that Kenya and India can borrow to enhance their dealings with consensual sex between adolescents.

3.1 South Africa

3.1.1 Background to the Development of the Law

Before 2013, the Criminal Law (Sexual Offences and Related Matters) Amendment Act (hereinafter Sexual Offences Act)¹¹⁹ criminalized sexual conduct between two consenting adolescents under 16.¹²⁰ This meant that adolescents aged between 12 to 16 years could not only be prosecuted for having consensual sex but could also be prosecuted for kissing. The law was framed so that when adolescents who both belonged to this age group engaged in consensual sexual interaction, then a decision was reached for them to be prosecuted, then both had to be prosecuted.¹²¹ If convicted, those adolescents could be placed on the National Register for Sex Offenders and restricted from working with children or adopting children in the future.¹²²

This was brought into the spotlight in 2010 when three children aged 14 to 16 from Jules High School in Gauteng were charged with consensual sexual penetration. The sexual act was filmed on a cell phone camera and widely distributed on the internet. The girl claimed that she had been drugged and raped by the boys. A few days later, after further questioning of the three minors, it was revealed that the girl in question had not been raped: she admitted that the sex had been consensual. All three children were subsequently charged with statutory rape under section 15 of the Sexual Offences Act.¹²³ The charges were later on withdrawn against the children, and instead, they were given the option to complete a diversion program designed for children who are sex offenders.¹²⁴

In the opinion of Shaheda Omar, the Director of the Teddy Bear Clinic, the diversion program did more harm than good because the children felt humiliated and embarrassed as they were placed in the same bag as sex offenders. She further noted that this eroded their self-esteem and had a drastic

¹¹⁹ Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007, (South Africa).

¹²⁰ *Id*, sections 15 & 16.

¹²¹ A. Skelton, 'Child Justice in South Africa: Application of International Instruments in the Constitutional Court', *The International Journal of Children's Rights* 26(2018), pp. 405-406.

¹²² Kate Paterson, *Sexual Violence in Schools*, pp. 317, <https://section27.org.za/wp-content/uploads/2017/02/Chapter-18.pdf>, last accessed (15/04/2021).

¹²³ *Teddy Bear Clinic for Abused Children & Another vs Minister of Justice and Constitutional Development & Another*, [2013] ZACC 35, para 56.

¹²⁴ Kate Paterson, *Sexual Violence in Schools*, pp. 317, <https://section27.org.za/wp-content/uploads/2017/02/Chapter-18.pdf>, last accessed 15th April 2021.

influence on their school performance, and some of them wanted to change schools.¹²⁵ Skelton¹²⁶ correctly argues that even though the Sexual Offences Act had good intentions of protecting children against sexual abuse, it went too far by criminalizing consensual sexual interaction between adolescents aged between 12 and 16. She further asserts that this law exposed adolescents to the risk of prosecution, and if found guilty, their names would be placed on the sex offender's register. Hence, there was the need for the law to be amended to protect adolescents.

3.1.2 Teddy Bear Clinic Case

In April 2012, two non-profit organizations providing child protection services approached the North Gauteng High Court¹²⁷ seeking orders to decriminalize consensual sexual conduct between adolescents. The matter was heard on 23rd and 24th April by Rabie J, and in January 2013, he delivered his judgment. The Court held that sections 15 and 16 constituted an unjustified invasion of control into the intimate and private sphere of children's personal relationships in such a way as to cause them great harm, and as such constituted a violation of section 28(2) of the Constitution, and stigmatized and degraded children on the grounds of their consensual sexual conduct.¹²⁸ The Court referred the matter to the Constitutional Court for confirmation.

In the Constitutional Court,¹²⁹ the issues were the same as those before the High Court, whether sections 15 and 16 of the Sexual Offences Act were unconstitutional for criminalizing consensual sexual interaction between adolescents in the age group of 12 to 16 years. In its judgment, the Court noted that the case was neither about whether or not children should engage in sexual conduct nor whether parliament should set a minimum age for consensual sexual conduct. Instead, the question was whether it was constitutionally permissible to subject children to criminal sanctions to deter early sexual debut and combat the risks associated with it.¹³⁰

The applicants submitted that even though sections 15 and 16 of the Sexual Offences Act were enacted to protect the children, the breadth and formulation of the two sections was harming the very children they were intended to protect. In addition, the applicants noted that children would be exposed to the harshness of the criminal justice system¹³¹ and that the two sections infringed on the constitutional rights of children, namely their right to privacy, human dignity, bodily and psychological integrity, and the best interest of the child.¹³²

¹²⁵ M. Malan, Sexual Offences Act Taken to Task, 31st May 2013, <https://mg.co.za/article/2013-05-31-00-sexual-offences-act-taken-to-task/>, last accessed (08/05/2021).

¹²⁶ A. Skelton, Balancing Autonomy and Protection in Children's Rights: A South African Account, 88(4) Temp. L. Rev. (2016), at 898.

¹²⁷ Teddy Bear Clinic for Abused Children & Another v. Ministers of Justice and Constitutional Development & Another [2013] ZAGPPHC 1, Case No. 73300/10 South Africa, High Court.

¹²⁸ *Ibid*, paras 74, 77.

¹²⁹ Teddy Bear Clinic for Abused Children & Another v. Minister of Justice and Constitutional Development and Another, CCT 12/13, [2013] ZACC 35 South Africa, Constitutional Court.

¹³⁰ *Id*, para 3.

¹³¹ *Id*, para 28.

¹³² *Id*, para 29.

The applicants also presented expert evidence to the Court that proved that adolescents engage in sexual activity ranging from kissing to masturbation to intercourse during adolescence.¹³³ The expert evidence indicated that if conducted in ways that an adolescent is emotionally and physically ready and willing, then the exploration of some of the sexual activities is potentially healthy.¹³⁴ The expert evidence also indicated that most South African adolescents between the ages of 12 and 16 years were engaging in various sexual behaviors when they began to explore their sexuality.¹³⁵

In addition to the expert evidence, the applicants argued that adolescents would suffer various social and psychological effects when criminalized for engaging in consensual sexual conduct. One, adolescents would be filled with shame, embarrassment, anger, and regret, and these feelings could result in an adolescent having a negative attitude to sexual relations. Two, adolescents would avoid seeking help with or being open about issues with their sexuality. Third, instead of achieving the positive outcome of deterring the harmful effects of an early sexual debut, it would increase adolescents' risk for negative experiences and outcomes.¹³⁶

On the other hand, the respondents argued that sections 15 and 16 did not infringe on any rights. Instead, the statutory prohibitions were meant to advance and protect children by delaying the choice to engage in consensual sexual activities.¹³⁷ The respondents also contended that the statutory prohibitions protected children from the risks associated with sexual acts even where the acts were consensual.¹³⁸

3.1.2.1 Violated Rights

The Constitutional Court ruled that criminalizing consensual sexual behavior between adolescents breached several children's rights.¹³⁹

3.1.2.1.1 Best Interest of the Child

The Court agreed with the applicant's submission that sections 15 and 16 of the Sexual Offences Act exacerbated harm and risk to adolescents by preventing adolescents from seeking help and potentially driving their sexual behavior underground.¹⁴⁰ It also noted that even if an adolescent was to be diverted from the criminal justice system, he or she would still be arrested and forced to interact with arresting and investigating police officers. The adolescent would also have first to admit committing the offense to a magistrate during the trial. This is done in the presence of his or her guardian, the prosecutor, and a probation officer. Moreover, an adolescent would also have to disclose and have scrutinized details of his or her intimate affairs.¹⁴¹

¹³³ Compiled by the late Professor Alan Flisher, a child psychiatrist at the University of Cape Town, and Ms Anik Gevers, a clinical psychologist specialising in child mental health at University of Cape Town.

¹³⁴ Teddy Bear Clinic case, *supra note 129*, para 45.

¹³⁵ *Id*, para 46.

¹³⁶ *Id*, para 47.

¹³⁷ *Id*, para 31.

¹³⁸ *Id*, para 32.

¹³⁹ *Id*, para 123.

¹⁴⁰ *Id*, para 72.

¹⁴¹ *Id*, para 74.

In addition, the Court observed that prosecutorial discretion infringed on the best interest principle as the prosecution was at liberty to prosecute an adolescent who engaged in consensual sexual conduct with other adolescents.¹⁴² Therefore, the Court held that sections 15 and 16 were contrary to the best interest principle as they had the effect of harming the adolescents they were intended to protect.¹⁴³ Hence, this was a violation of section 28 (2) of the South African Constitution which provides that the child's best interest is of paramount importance in every matter.

3.1.2.1.2 Right to Privacy

The Court posited that sections 15 and 16 applied to the most intimate sphere of personal relationships hence inevitably implicated the constitutional right to privacy as enshrined in section 14 of the South African Constitution. It further noted the sections allowing prosecutors and judicial officers to scrutinize and assume control of the intimate relationships of adolescents was an intrusion into their personal lives.¹⁴⁴

3.1.2.1.3 Right to Dignity

The Court observed that sections 15 and 16 infringed on the human dignity of adolescents.¹⁴⁵ It noted that when an adolescent is publicly exposed to criminal investigation and prosecution, it would affect the good opinion that his or her peers may have of him or her.¹⁴⁶ The Court further observed that prohibiting adolescents from interacting with children in the future due to being placed in the sex offender's register for engaging in what may be developmentally sexual conduct infringed on the right to dignity of an adolescent.¹⁴⁷ Therefore, sections 15 and 16 were found to limit adolescents' right to dignity as enshrined in section 10 of the South African Constitution.

3.1.2.2 National Register of Sex Offenders

The Criminal Law (Sexual Offences and Related Matters) Amendment Act also established a National Register for Sex Offenders. If convicted of a sexual offense against a child, the Court was obliged to make an order that the person's particulars be included in the register.¹⁴⁸ The Court noted this had adverse consequences; namely, an individual would not be employed to work with a child, not hold any position that places him or her in authority, and may not have the opportunity to become a foster parent or an adoptive parent. It concluded that even though the provisions were aimed at protecting children from adult sexual predators, the goal would not be achieved by registering the details of adolescents who engaged in consensual sexual conduct.¹⁴⁹ The Constitutional Court declared the section unconstitutional and invalid, arguing that it violated the child's best interest.¹⁵⁰

¹⁴² *Id*, para 76.

¹⁴³ *Id*, para 79.

¹⁴⁴ *Id*, para 60.

¹⁴⁵ *Id*, para 55.

¹⁴⁶ *Id*, para 56.

¹⁴⁷ *Id*, para 57.

¹⁴⁸ Section 50 (1)(a)(i).

¹⁴⁹ *Teddy Bear Clinic case*, *supra* note 129, para 57.

¹⁵⁰ The automatic placement of child offenders on the National Sex Offenders Register was later found in the case of *J v. National Director of Public Prosecutions* to be unconstitutional.

3.1.3 The Law After the Teddy Bear Clinic Case

The Teddy Bear Clinic case resulted in a law reform process that culminated in July 2015 with the passage of the Criminal Law [Sexual Offences and Related Matters] Amendment Act 5 of 2015 (hereinafter the 2015 SOA Amendment Act). The 2015 SOA Amendment Act made two changes to Sections 15 and 16. Firstly, it decriminalized consensual sexual activity between adolescents who are 12 years or older but under 16 years. Secondly, it decriminalized consensual sexual activity where one teenager is 12 years or older but below 16 years of age and the other 16 or older but below 18 if the age difference between them is less than two years.¹⁵¹

However, the 2015 SOA Amendment Act did not change the age of consent to sexual activity, which remains 16 years old, a fact that is pointed out in the preamble to the Amendment Act. The preamble also underlines the importance of discouraging adolescents from prematurely engaging in consensual sexual conduct which may harm their development and engaging in sexual conduct in a manner that increases the likelihood of the risks associated with sexual conduct materializing.¹⁵²

With regard to children who were convicted under sections 15 and 16 of the Sexual Offences Act, the 2015 SOA Amendment Act provides for automatic expungement of the criminal records and removal of the name from the National Register of Sex Offenders. This applies where the convicted person was 12 years or older but under 17 at the time of the commission of the offense.¹⁵³

Thus, there are two main differences in approaches between the old and new laws. Firstly, peer-group sex and sexual activity between adolescents has been decriminalized; hence sexual activity between adolescents is no longer a criminal offense. Secondly, the 2-year close-in-age exception has been expanded to include sexual violation thus it is no longer an offense if a 16 or 17-year-old engages in a sexual act with an adolescent aged between 12 and 15 years, provided they are not more than two years older than the younger partner.¹⁵⁴ This inclusion of the close-in-age exception helps protect 16 and 17-year-olds from prosecution as long as they are not more than two years older than their younger sexual partner.

3.1.4 Concluding Remarks

As shown above, South Africa has taken steps to reform the law to curb some of the problems that were and are brought about to adolescents by the criminalization of consensual sexual interaction between adolescents. Statutory rape in terms of an adult having sexual relations with an adolescent still exists as a minor cannot legally consent to sex with an adult. This is all in an effort to ensure the protection of children and that their best interests are upheld. Therefore, South Africa offers many lessons that countries that still criminalize adolescent sexuality can learn from.

¹⁵¹ K. Moulton & A. Muller, Navigating Conflicting Laws in Sexual and Reproductive Health Service Provision for Teenagers, (2016), at 5, http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2223-62792016000100002, last accessed 26/06/2021.

¹⁵² *Id*, at 6.

¹⁵³ Department of Justice & Constitutional Development Republic of South Africa, 'The Implementation of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007,' Annual Report 2015/2016, at 52.

¹⁵⁴ S. Bhamjee et al, Amendments to the Sexual Offences Act Dealing with Consensual Underage Sex: Implications for Doctors and Researchers, *A Afr Med J*, (2016), at 257.

3.2 Kenya

3.2.1 Introduction

The law on sexual offences in Kenya is governed by the Sexual Offences Act (hereinafter SOA).¹⁵⁵ The SOA came into effect on July 21st, 2006, mainly due to the perception that too many sex offenders were either escaping justice by being acquitted when they ought to have been convicted or being left off the hook too leniently.¹⁵⁶

The passage of the SOA led to the repeal of the provisions in chapter XV of the Penal Code¹⁵⁷ on sexual offences against morality which defined sexual offences. More specifically, section 144 of the Penal Code defined defilement as the unlawful act of having sexual intercourse with a girl under the age of 14, and section 145 provided a defense if the offender had reasonable cause to believe and did in fact believe that the girl was over 14, or that she was his wife.

As of now, defilement is defined under section 8 of the SOA. It refers to having a sexual connection with a child, a person below the age of 18. The offense is committed when a person does an act that causes penetration with a child and is committed by both adults and children. Consent is not a factor in defilement, and it is not available as a defense to an accused who alleges that the minor consented to the sexual act.¹⁵⁸

The SOA imposes minimum penalties for defilement which vary according to the age of the child. Defilement of a child aged 11 years or less attracts a mandatory sentence of life imprisonment.¹⁵⁹ The minimum sentence for the defilement of a child aged between 12 and 15 years is 20 years,¹⁶⁰ while that for a child between 16 and 18 years of age is 15 years.¹⁶¹ Attempted defilement is provided for under section 9 of the Act, and it attracts a minimum sentence of 10 years.¹⁶²

3.2.2 Criminalization of Consensual Sexual Interaction Between Adolescents

The enforcement of the SOA has been marred with certain controversies since its enactment in 2006. For instance, the SOA criminalizes sexual acts with adolescents through crimes of defilement and indecent act with a child or adult. There were attempts to declare sections of the Sexual Offences Act unconstitutional in ***CKW v Attorney General & Another***.¹⁶³

In this case, the petitioner, a minor of 16 years old, had been charged, convicted, and sentenced under sections 8(1) and 8 (4) of the SOA for having sexual intercourse with a girl who was 16 years. He called on the Court to declare sections 8(1) and 11 (1) of the Sexual Offences Act invalid to the extent that they were inconsistent with children's rights as enshrined under the Kenyan Constitution. He argued that the sexual interaction between him and the complainant was consensual; thus, it was wrong to criminalize consensual acts between minors.

¹⁵⁵ Sexual Offences Act No. 3 of 2006, Laws of Kenya.

¹⁵⁶ P. Kiage, *Essentials of Criminal Procedure in Kenya*, Law Africa (2013) 215.

¹⁵⁷ Penal Code, Chapter 63, Laws of Kenya.

¹⁵⁸ Section 42.

¹⁵⁹ Section 8 (2).

¹⁶⁰ Section 8 (3).

¹⁶¹ Section 8 (4).

¹⁶² Section 9 (2).

¹⁶³ *C.K.W v Attorney General & Another* [2014] eKLR.

In his judgment, Justice Ochieng held that sections 8(1) and 11 (1) did not discriminate against adolescents by criminalizing consensual sexual conduct between adolescents, but it was only geared towards the protection of the child.¹⁶⁴ He further stated that the law aimed at achieving an important societal goal of protecting children from engaging in premature sexual conduct and that in matters of sexual conduct, the Kenyan child needed the protection of the law as they were vulnerable.¹⁶⁵ The petition was dismissed.

However, Justice Ochieng acknowledged that there was a need to consider other measures that were more appropriate and desirable for dealing with children without resorting to criminal proceedings.¹⁶⁶ He also noted that the criminalization of consensual adolescent sex was not a child-friendly response and challenged professionals to carry out the relevant studies in Kenya and come up with more innovative responses, mechanisms, and procedures.¹⁶⁷

Justice Ochieng disagreed with the reasoning of Khampepe J in the ***Teddy Bear Clinic*** case that criminalizing consensual sexual conduct between adolescents degrades and inflicts a state of disgrace on adolescents. Instead, he argued that adolescents require guidance and protection because they tend to engage in more risky behavior if left to their own devices.¹⁶⁸

The Court considered the ***Teddy Bear Clinic*** case, but it only did so by extracting lines that would support its ideology. Kangaude et al.¹⁶⁹ note that the Court used the best interest principle in a manner that focuses only on the non-agentic 'innocent child' even though the facts of the case clearly show the existence of a consensual relationship between peers. They further criticize the judgment because unlike the *Teddy Bear Clinic* judgment that found the impugned provisions breached several children's rights, the Court, in this case, put everything in the basket of children's best interest.

Kangaude¹⁷⁰ observes that it is counterproductive to adolescent sexual development and well-being to criminalize consensual sexual interaction between adolescents because it stigmatizes normal adolescent sexual conduct. He further notes that sexually active adolescents are regarded as criminals for engaging in behavior that is normal to their developmental age.

Thus, as rightly pointed out by Tsanga J in ***State v. B Masuku***,¹⁷¹ even though criminal law intends to protect adolescents from sexual predation by adults, discourage early sexual debut between adolescents, and protect them from the very real dangers of teenage pregnancies and sexually transmitted infections,¹⁷² sex among adolescents is a reality of adolescent life. Therefore, as noted by Khampepe J in the ***Teddy Bear Clinic*** case, it is contradictory and not in the child's best interest to

¹⁶⁴ *Id*, para 95.

¹⁶⁵ *Id*, para 98.

¹⁶⁶ *Id*, para 103.

¹⁶⁷ *Id*, para 104.

¹⁶⁸ *Id*, para 81.

¹⁶⁹ G. Kangaude et al, Childhood Sexuality in Africa: A Child Rights Perspective, *African Human Rights Law Journal* 20 (2020), at 710.

¹⁷⁰ G. Kangaude, *Challenging Criminalisation of Adolescent Sexuality in Africa*, (2019), at 3.

¹⁷¹ *State v. Masuku*, HH 106-15 (High Court of Zimbabwe).

¹⁷² *Id*, at 3.

assume that adolescents do not have the capacity to make choices about their sexual activity but have criminal capacity.¹⁷³ Moreover, criminalizing consensual sexual conduct between adolescents results in a punitive sentence, as evidenced in the above case; hence there is a need to decriminalize adolescent sexuality.

3.3.3 Lowering the Age of Sexual Consent From 18 to 16 years

However, after the **CKW** case, judgments show that some judges in determining defilement charges involving consensual sexual conduct between adolescents have expressed their discomfort with the criminalization of consensual sexual interaction between adolescents.¹⁷⁴ They have recognized that adolescents may have the capacity to consent to sexual intercourse, as was found in **Eliud Waweru Wambui v. Republic**.¹⁷⁵

In this case, the appellant was sentenced to 15 years imprisonment for defiling a 15-year-old female. In its judgment, the Court observed that while the law expressly provides that a person below the age of 18 years cannot consent, most teenagers are engaging in consensual acts; hence it is unfair to have 'young men' jailed in such circumstances. It further noted that although adolescents may not have attained the age of maturity, they may have well reached the age of discretion and can make intelligent and informed decisions about their lives and bodies.¹⁷⁶ Accordingly, the Court allowed the appeal and quashed the conviction.

The judges, in this case, called for the re-examination of the SOA. They posited that a candid national conversation on consensual sexual interaction between adolescents was long overdue as Kenyan prisons were teeming with 'young men' who were serving lengthy sentences for having consensual sex with their peers whose consent had been held to be immaterial because they were under 18 years. They proposed that the law be amended and discussed lowering the age of consent for sex from 18 years to 16 years in light of the realities and challenges of maturity, autonomy, and protection of children.¹⁷⁷

The advisory by the three-judge bench that the sexual consent age be lowered from 18 to 16 stirred up a national debate and discussion on the minimum age of sexual consent. It invited the country to consider the amendment to sections of the SOA on the broad consequences and criminal penalties for adolescents engaging in sexual intercourse.¹⁷⁸ In response, the Ministry of Education cautioned that it was not suitable for Kenya to compare itself with other countries that have a lower age of consent for sex as the issues Kenya is grappling with, for example, child pregnancies, high school dropout rates, and abortion cannot be solved by lowering the age of sexual consent, and it may just worsen the problems.¹⁷⁹

¹⁷³ Para 79.

¹⁷⁴ The Nairobi Law Monthly, It's Time We Decriminalized Consensual Sex Among Minors, 8th January 2020, <https://nairobiawmonthly.com/index.php/2020/01/08/its-time-we-decriminalised-consensual-sex-among-minors/>, last accessed (24/05/2021).

¹⁷⁵ Eliud Waweru Wambui v. Republic, [2019] eKLR, Criminal Appeal No. 102 of 2016.

¹⁷⁶ *Id*, at 7.

¹⁷⁷ *Id*, at 7.

¹⁷⁸ National Gender and Equality Commission, Minimum Age of Consent for Sex: Addressing the Dilemma, (2020), at 4.

¹⁷⁹ *Id*, at 5.

The former Chief Justice,¹⁸⁰ David Kenani Maraga, on May 16th, 2019, also joined in on the debate remarking that while the age of consent should not be reduced to 16 years, he was concerned that boys aged between 17 and 20 years were being jailed for voluntary relations stating that:

“There is an obvious injustice of filling up jails with teenage offenders who get intimate with fellow teenagers as they experiment their adolescence.”

He lauded the Court of Appeal¹⁸¹ for setting a precedent when it held that it was unconstitutional to criminalize sexual acts among teenagers.¹⁸²

The National Gender and Equality Commission organized a multi-sectoral forum to discuss various proposals to address the shortcomings of the SOA as it relates to consensual sex among and with persons below the age of 18. It was agreed that lowering the age of consent for sex would have wide and largely negative implications on children's educational, social, and health development; hence it was inappropriate to consider lowering the age of consent. Instead, it was decided that the country should consider developing and implementing behavioral and educational programs that address children's sexual and reproductive health.¹⁸³ Therefore, even though the issue is yet to be fully addressed, this is a step towards recognizing adolescent sexuality.

3.3.4 Discriminatory Laws Against Male Adolescents

The issue of the law discriminating against male adolescents came up in **CKW v. Attorney General & Another**. The petitioner argued that sections 8 and 11 of the SOA promoted disproportionate prosecution of the male adolescent in incidences of consensual sexual acts between adolescents, even when it was clear that the female child was a willing participant in the sexual acts.¹⁸⁴ He further argued that this was a violation of the rights of the male adolescent to equal protection and benefit of the law as it constituted indirect discrimination against the male adolescent contrary to article 27 (5) of the Kenyan Constitution.¹⁸⁵

In his submissions, the Attorney General posited that sections 8 and 11 of the SOA did not distinguish between males and females as either gender could be charged with the offences of defilement, unlike under the provisions of the Penal Code,¹⁸⁶ which had only criminalized the actions of males.¹⁸⁷

The Court posited that under Kenyan law, there was no express or implied requirement to charge both adolescents with the offense of defilement when both are involved in sexual penetration with one

¹⁸⁰ President of the Supreme Court and head of the judiciary.

¹⁸¹ Eliud Waweru Wambui v. Republic, [2019] eKLR, Criminal Appeal No. 102 of 2016.

¹⁸² Kamau Muthoni, CJ Maraga Calls for Change of Law Criminalizing Teen Sex, <https://www.standardmedia.co.ke/kenya/article/2001325822/cj-maraga-calls-for-change-of-law-criminalizing-teen-sex>, last accessed (24/05/2021).

¹⁸³ National Gender and Equality Commission, Minimum Age of Consent for Sex: Addressing the Dilemma, 2020, at v

¹⁸⁴ Para 42.

¹⁸⁵ Para 43.

¹⁸⁶ Penal Code, Chapter 63 Laws of Kenya.

¹⁸⁷ Para 14.

another.¹⁸⁸ However, it stated that if the prosecution had reasonable cause to charge both adolescents, they could do so.¹⁸⁹ The Court found that evidence of individual instances of gender discrimination in the application of the law, even if such evidence showed that the prosecution chose to discriminate in this particular instance, would not, in the absence of evidence showing broad discriminatory impact, render the sections discriminatory.¹⁹⁰

Penetration is defined in the SOA as the partial or complete insertion of the genital organs of a person into the genital organs of another person. Therefore, it is difficult to imagine that the sexual organs of a girl would penetrate those of a boy so that she could be charged with this offence. The Court ought to have explored this definitional dilemma and determined whether it was gender-neutral. Therefore, the Court did not really do justice to the issue of whether the defilement provision was gender-biased.¹⁹¹

In **GO v. Republic**,¹⁹² the appellant who was 16 years two months at the time of the commission of the offence, was sentenced to 15 years imprisonment for defiling a 17-year-year-old female. The Court faulted the trial court for imposing a sentence against the appellant to serve 15 years for an offence of defiling a girl who was older than the appellant.¹⁹³ Judge Makau acknowledged that apportioning blame only to the male adolescent amounted to discrimination, contrary to article 27 of the Constitution of Kenya. He observed that the appellant was discriminated against on the basis of sex in that he was arrested and charged instead of the prosecution charging both the complainant and the appellant for the offence of defilement.¹⁹⁴ He further noted that:

'I find that at the time of the commission of the offence, both the appellant and the complainant were minors; I find indeed the complainant was senior to the appellant, and the blame should not have been wholly shifted to the appellant but should have been apportioned against both the complainant and the appellant, and both being minors, they need protection against harmful sexual activities and none should have been sent to prison.'¹⁹⁵

The Court set aside the sentence meted against the appellant and placed him under probation for a period of six months under the supervision of the Probation Office in Siaya County.¹⁹⁶ The suggestion by the judge that the prosecution ought to have charged both the appellant and the complainant does not cure the deficiencies in the law. Instead, it perpetuates discrimination against adolescents engaging in consensual sexual conduct, which is a normal aspect of human development.¹⁹⁷

¹⁸⁸ Para 57.

¹⁸⁹ Para 58.

¹⁹⁰ Para 92.

¹⁹¹ Centre for Reproductive Rights, *Reproductive and Sexual Rights in Sub-Saharan African Courts*, Volume III, (2017), at 43-44.

¹⁹² *GO v. Republic* [2017] eKLR, Criminal Appeal No. 155 of 2016 (High Court of Kenya)

¹⁹³ *Id*, para 11.

¹⁹⁴ *Id*, para 11.

¹⁹⁵ *Id*, para 12.

¹⁹⁶ *Id*, para 13.

¹⁹⁷ Center For Reproductive Rights, *Criminalizing Adolescence: A Call to Reform the Sexual Offences Act*, (2019), at 18, <https://reproductiverights.org/criminalizing-adolescence/>, last accessed (02/05/2021).

Several children sector stakeholders in a forum organized by the National Council for Children Services in Nairobi concluded that the SOA criminalizes the male adolescent by perceiving them as perpetrators in situations where the act was consensual between both parties. They further state that the law has often failed to treat both children who need totally different interventions and not as the male adolescent as the perpetrator and the female adolescent as the victim.¹⁹⁸ Therefore, looking at the cases above, it can be concluded that the SOA is discriminatory against male adolescents and infringes on their rights as enshrined under the Children's Act and the Kenyan Constitution.

3.3.5 Significant Age Gap Between the Parties

Martin Charo v Republic¹⁹⁹ took a controversial stand. Martin Charo, a 23-year-old, was charged for defiling a 14-year-old girl and sentenced to 20 years in prison. Justice Chitembwe observed that even though under the SOA a child below 18 years was incapable of giving consent to sexual intercourse, the victim behaved like an adult and willingly sneaked into the appellant's house for purposes of having sex. Justice Chitembwe noted that:

'It can easily be concluded that it is immoral for one to have sex with a child under the age of 18 years. However, where the same child under 18 years who is protected by the law opts to go into men's houses for sex and then goes home, why should the Court conclude that such a person was defiled? In my view, that cannot be defilement.'²⁰⁰

Also, he stated that it would be unfair for the appellant to spend 20 years behind bars, yet it was clear the victim was after sex from him and that the circumstances of the case did not paint a picture of someone who had been defiled. Therefore, the appeal was allowed, and the appellant was set free.²⁰¹

The judgment attracted international attention from women's rights organizations and was awarded the Woman Link Worldwide Golden Bludgeon as the world's worst ruling for women's rights in 2016.²⁰² On April 12th 2021, when being interviewed for the position of Chief Justice of the Supreme Court of Kenya after the retirement of Chief Justice David Maraga, Justice Chitembwe defended his judgment, saying that he would still acquit Charo if given a chance to revisit the case. He went on to say:

'If you go to the prisons, there are fewer cases of robbery with violence than defilement. If we go to the law, then anyone who has sex with anyone under 18 years is guilty. But how do you take a 19-year-old to jail for 15 years for having a relationship with a 17-year-old girl? The number of magistrates who have called me to say thank you, you have freed us from the shackles of the Sexual Offences Act is high.'²⁰³

¹⁹⁸ National Gender and Equality Commission, Minimum Age of Consent for Sex: Addressing the Dilemma, (2020), at 15.

¹⁹⁹ Martin Charo Versus Republic [2016] eKLR, Criminal Appeal No. 32 of 2015 (Appeal originating from the conviction and sentence by Hon. L.N. Wasige-SRM in Kilifi CR No. 16 of 2016).

²⁰⁰ *Id*, at 4.

²⁰¹ *Id*, at 3.

²⁰² The East African, Kenyan Judge shoots to Global Infamy for Shameful Verdict, 9th June 2017, <https://www.theeastafrican.co.ke/tea/news/east-africa/kenyan-judge-shoots-to-global-infamy-for-shameful-verdict-1367184>, last accessed (28/05/2021).

²⁰³ Daily Nation, Justice Chitembwe defends 2017 Release of Defilement Convict, April 12th 2021, <https://nation.africa/kenya/news/justice-chitembwe-defends-2017-release-of-defilement-convict-3359768?view=htmlamp>, last accessed (28/05/2021).

Kangaude and Skelton argue that this judgment illustrates how adults discredit the sexual experience of adolescents. They further argue that the Court, in this instance, could not imagine adolescents as having both sexual agencies and at the same time needing protection from potentially sexually exploitative relationships.²⁰⁴ Kangaude also notes that for Justice Chitembwe, the sexual behavior of the victim was against social norms about how a girl is supposed to behave sexually. He further posits that the SOA's phrasing allowed the court to construe legal provisions in ways that reflected cultural gender stereotypes and expectations regarding a girl's sexual activity.²⁰⁵

Archard²⁰⁶ notes that the principal worry is the sexual use of a young person by an older adult. He posits that most people will find the idea of a 40-year-old having sex with a 14-year-old morally much more troubling than the idea of two 14-year-olds having sex, even if the sex in both cases is consensual. He concludes that due to the age difference and the corresponding disparity in experience, power, and influence, the adult can exploit and take advantage of the younger person.

Justice Luka Kimaru²⁰⁷ has also aired his sentiments regarding the age gap between offenders and victims. He states that,

“Where you have a 25-year-old man having sex with a 15-year-old, that is unlawful and such person should be punished. Where you are having even this 16-year-old having sex with an eight-year-old, that one should be punished. So, we are only talking about these people where the age difference is the girl may be 14 and the boy is 16. The age difference can go to a maximum of 4.”

However, in its General Comment on children in the justice system, the CRC Committee has recognized that the detention or imprisonment of children should only be used as a measure of last resort and for the shortest period of time.²⁰⁸ This is also encapsulated in Article 37 of the CRC. The sentiment by Justice Luka Kimaru that it would be okay for a 16-year-old to face a lengthy sentence is not in conformity with the law. In addition, it also brings up the issue of mandatory minimum sentences under the SOA, which is beyond the scope of this thesis.

3.3.6 Use of Diversion in Cases of Consensual Sexual Interaction Between Adolescents

The Office of the Director of Public Prosecutions often recommends diversion where two children admit they had mutually agreed to have sex. Such children are often recommended for counseling, and on further requests, the Court to refer the children to care and protection units.²⁰⁹

²⁰⁴ G. Kangaude & A. Skelton, (De) Criminalizing Adolescent Sex: A Rights-Based Assessment of Age of Consent Laws in Eastern and Southern Africa, (2018), at 8.

²⁰⁵ G. Kangaude, *Positive Approaches to Childhood Sexuality and Transforming Gender Norms in Malawi*, in E. Durojaye et al., *Advancing Sexual and Reproductive Health and Rights in Africa*, (2021), at 110.

²⁰⁶ D. Archard, *Children: Rights and Childhood*, London; Routledge, (2015), at 150.

²⁰⁷ Justice Luka Kimaru led a public hearing taskforce on the review of the Sexual Offences Act, https://www.youtube.com/watch?v=UIZxpNaV_CU, last accessed (20/05/2021).

²⁰⁸ UN Committee on the Rights of the Child General Comment No. 24 (2019) on Children's Rights in the Child Justice System, 18 September 2019, CRC/C/GC/24, para 85.

²⁰⁹ National Gender and Equality Commission, *Minimum Age of Consent for Sex: Addressing the Dilemma*, (2019), at 19.

However, as rightly pointed out by Khampepe J in the ***Teddy Bear Clinic*** case, even in circumstances where diversion is applied, adolescents would still be exposed to earlier processes in the criminal justice system, such as being arrested and questioned by police and other authorities about their intimate sexual behavior. Thus, a prosecutor choosing to act with circumspection does not do enough to alleviate the invasion of children's rights occasioned by those earlier processes.²¹⁰

3.3.7 Concluding Remarks

In conclusion, Kenya has ratified various international and regional instruments that require states not to criminalize consensual sexual interaction between adolescents. These include the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. Under the Kenyan Constitution, the general rules form part of the law of Kenya, and treaties become part of Kenyan law once they are ratified. In addition, these instruments form part of the law of Kenya; hence the Government of Kenya has a responsibility of ensuring its law governing consensual sexual interaction between adolescents conform to international standards.

²¹⁰ *Teddy Bear Clinic for Abused Children & Another v. Minister of Justice and Constitutional Development and Another*, CCT 12/13, [2013] ZACC 35 South Africa, Constitutional Court, para 83.

3.3 India

3.3.1 Background to the Enactment of the Protection of Children from Sexual Offences Act (POCSO Act)

From 1940 until 2012, the age of consent for sexual activity for women in criminal law was 16 years. Sexual intercourse with a woman under 16 years was considered rape, except if the intercourse was with her husband, where the age was set at 15 years. The law did not have a comprehensive framework to address non-penile penetrative acts and non-penetrative acts involving minors and did not have any age of consent for sexual activity for boys.²¹¹

To address gaps in criminal law, a framework for redressing child sexual abuse, the Protection of Children from Sexual Offences Act (hereinafter POCSO Act), was enacted in 2012.²¹² The POCSO Act is a comprehensive law that, besides expanding the scope and range of forms of child sexual abuse, makes its reporting mandatory and gives guidelines for various police and courts' actions. The Act includes a child-friendly mechanism for recording evidence, investigation, and speedy trial of offences through designated Special Courts. It deems a sexual assault to be 'aggravated' when abuse is committed by a person in a position of trust or authority vis-a-vis the child, such as a family member, police officer, teacher, or doctor. Different levels of punishment are included, which are more stringent in cases of aggravated assault.²¹³

3.3.2 Criminalization of Consensual Sexual Interaction Between Adolescents

The POCSO Act defines a child as a person under the age of 18 years.²¹⁴ Therefore, any sexual activity with a person under 18 years, including penetrative and non-penetrative acts, is considered a criminal offence if they involve a person under 18 years. This holds true regardless of the issue of consent as consent of the minor is immaterial.²¹⁵

As a result, consensual sexual interaction between adolescents is criminalized as the POCSO Act inexorably criminalizes sexual behavior for under-18-year-olds. The Act is based on a ludicrous assumption that adolescents in India are sexually inactive, and all adolescent sexual encounters amount to a violation of the sexual autonomy of the person and cause harm. In addition, the POCSO Act ignores the social realities prevalent in India as there has been a paradigm shift in adolescent sexual curiosities leading to increased experimentation with one's sexuality as a result of the rapidly changing contemporary attitudes in urban India.²¹⁶

²¹¹ Center For Reproductive Rights, *Reproductive and Sexual Rights in Sub-Saharan African Courts*, (2017), at 227.

²¹² The Protection of Children from Sexual Offences Act, 2012, Act No. 32 of 2012.

²¹³ R. Seth & RN. Srivastava, *Child Sexual Abuse: Management and Prevention, and Protection of Children from Sexual Offences (POCSO) Act*, (2017), <https://link-springer-com.ezproxy.leidenuniv.nl/content/pdf/10.1007/s13312-017-1189-9.pdf>, last accessed (07-05-2021).

²¹⁴ POCSO Act, at section 2 (d).

²¹⁵ A. Chandra et al, *Securing Reproductive Justice in India: A Casebook*, Center for Reproductive Rights, (2019), at 227.

²¹⁶ Singh et al, *The Protection of Children from Sexual Offences Act: A Critique of the Decision to Raise the Age of Consent for Sexual Relations*, *J Indian L & Soc'y*, (2012), at 292-293.

In **Sabari v. The Inspector of Police**,²¹⁷ the appellant was convicted by the lower Court for ten years for penetrative sexual assault and kidnapping from the lawful guardian. During the trial, the victim turned hostile and refused to support the prosecution's case. As a result, nothing that implicated the appellant with the offences he was charged with could be elicited from the victim.²¹⁸ The Court allowed the appeal and quashed the conviction and sentence imposed on the appellant by the trial court.

In his judgment, Justice Parthiban was concerned about the increase in cases of offences under the POCSO Act on one side and of the rigorous imprisonment envisaged under the POCSO Act. He noted that sometimes such offences are slapped against adolescents who fall victim to the application of the POCSO Act at a young age without understanding the implication of the severity of the enactment.²¹⁹ In addition, he observed that 'warning' of attraction of POCSO Act should be displayed before the screening of any film, which has adolescent characters suggesting a relationship between boy and girl.²²⁰

The judge also proposed for the lowering of the age of sexual consent from 18 to 16 years. He suggested that any consensual sex after the age of 16 be excluded from the rigorous provision of the POCSO Act. He further proposed that POCSO Act be amended to the effect that the age of the offender ought not to be more than five years than that of the victim so as to ensure that the victim is not taken advantage of by a person who is much older.²²¹

3.3.3 The Interplay Between Criminal Law and Culture

Additionally, the POCSO Act is also used to settle scores as the law is mostly invoked when adolescents disagree with their families and elope and marry from either from other castes or religious liaisons outside of accepted kinships groups belonging to lower socio-economic groups. The adolescents' families often resort to using criminal law by charging the other party who in most cases are boys.²²²

In **Vijayalakshmi v. State Rep. By**,²²³ the victim filed a petition to quash the criminal proceedings against the accused. The accused and the victim were involved in a romantic relationship. They later eloped from their respective homes, got married, and consummated the marriage, which led to the accused being charged under section 366 of the IPC, section 6 of the POCSO Act, and section 9 of the Prohibition of the Child Marriage Act.²²⁴

²¹⁷ Sabari v. The Inspector of Police, Criminal Appeal No.490 of 2018, Madras High Court, <https://indiankanoon.org/doc/197077895/>, last accessed (26-06-2021).

²¹⁸ *Id.*, para 12.

²¹⁹ *Id.*, para 21.

²²⁰ *Id.*, para 28.

²²¹ *Id.*, para 28.

²²² A. Pitre & L. Lingam, Age of Consent: Challenges and Contradictions of Sexual Violence Laws in India, (2021), at 11.

²²³ Vijayalakshmi v. State Rep. By, Crl.O.P.No.232 of 2021 and Crl.M.P.No.109 of 2021, Madras High Court, <https://indiankanoon.org/doc/35224205/>, last accessed (25/06/2021).

²²⁴ *Id.*, para 2.

The victim's father, a prosecution witness, did not support the prosecution's case and was treated as a hostile witness.²²⁵ Additionally, the victim's mother, who had initially reported the case, stated that she was no longer interested in pursuing the criminal proceedings as she wanted her daughter to get married and settle in life.²²⁶ When examined by the Court, the victim admitted that there was a love affair between her and the accused. She stated that she was unwilling to undergo the agony any further; hence she wanted the criminal proceedings against the accused to be quashed.²²⁷

Justice Venkatesh based his judgment on scientific and logical reasoning as to what adolescents experience and feel in their adolescent years and how it is relevant to consider in the present case.²²⁸ He noted that adolescent romance is an essential development marker for adolescents' self-identity, functioning, and capacity for intimacy.²²⁹

He also acknowledged that the vast exposure available to adolescents in the form of digital content plays a major role in influencing their growth and identity.²³⁰ Thus it does not help matters to avoid acknowledging that society is changing and affecting people's identity and cognition.²³¹

The Court noted that although the objective of the POCSO Act was to protect children from sexual assault, sexual harassment, and pornography, a large number of cases filed under the POCSO Act seemed to be those arising based on complaints registered by the families of adolescents who were romantically involved with each other. It further noted that the scheme of the POCSO Act clearly shows that the Act did not intend to bring within its scope cases of romantic relationships between adolescents.²³²

Justice Venkatesh posited that:

'Punishing an adolescent boy who enters into a relationship with a minor girl by treating him as an offender was never the objective of the POCSO Act. An adolescent boy and girl who are in the grips of their hormones and biological changes and whose decision-making ability is yet to fully develop should essentially receive the support and guidance of their parents and the society at large. These incidents should never be perceived from an adult's point of view, and such an understanding will, in fact, lead to a lack of empathy. An adolescent boy who is sent to prison in a case of this nature will be persecuted throughout his life.'²³³

The judge also urged the legislature to take into consideration cases of consensual sexual conduct between adolescents and swiftly bring in necessary amendments under the POCSO Act. He also posited that the legislature ought to keep pace with the changing societal needs and bring about

²²⁵ *Id.*, para 7.

²²⁶ *Id.*, para 8.

²²⁷ *Id.*, para 5.

²²⁸ *Id.*, para 13-15.

²²⁹ *Id.*, para 15.

²³⁰ *Id.*, para 15.

²³¹ *Id.*, para 16.

²³² *Id.*, para 12.

²³³ *Id.*, para 18.

necessary changes.²³⁴ Accordingly, the Court quashed the criminal proceedings against the accused.²³⁵

3.3.4 The Conflict Between the Provisions of the Indian Penal Code and POCSO Act

There exists a conflict between the provisions of the Indian Penal Code (hereinafter IPC)²³⁶ and the POCSO Act. The IPC in section 375 provides that sexual intercourse with a married woman who is above 15 years of age but below the age of 18 years cannot amount to rape irrespective of whether the intercourse had the consent of the wife. Thus, POCSO Act defines a child to be a person below the age of 18 while under the IPC, a married woman includes a child above the age of 15 but below the age of 18 years; hence, any form of sexual relations with a 'married woman'²³⁷ would amount to an offence under the Act while the same person may go scot-free under the IPC.

This conflict of law has promoted child marriages. Adolescents below the age of 18 who enter into consensual sexual relations use it to evade a minimum term of 10 years imprisonment under the POCSO Act by entering into marriage unions. Moreover, the marital rape exception under the IPC has been used to exonerate accused men who have married the woman or where marriage-like rituals had taken place.²³⁸

In its Concluding Observations, the CRC Committee called on the Indian government to resolve the inconsistency between the POCSO Act and the IPC to ensure that all forms of sexual abuse of girls under 18 years of age, including marriage, are fully criminalized.²³⁹ The CEDAW Committee has also expressed concern about the discrepancy between the POCSO Act and IPC concerning marital rape of girls between 15 to 18 years of age.²⁴⁰

In 2017, the Supreme Court of India, in *Independent Thought v. Union of India*,²⁴¹ negated the permission of husbands to conduct sexual intercourse with a child-wife between 15 and 18 years of age. The petitioner brought a petition under article 32 of the Indian Constitution in public interest litigation challenging the exception created under section 375 of the Indian Penal Code with regard to married girls above 15 but below 18 years of age. The issue was whether sexual intercourse between a man and his wife, the wife being between the age of 15 and 18 years, is rape and thus a punishable offence.

In its judgment, the Court affirmed that a child remains a child whether she is a married child or an unmarried child or a divorced child or a separated child or a widowed child.²⁴² It also pronounced that

²³⁴ *Id.*, para 18.

²³⁵ Special S.C.No.24 of 2018 on the file of the learned Sessions Judge, Mahila Court (Fast Track Mahila Court).

²³⁶ The Indian Penal Code, Act No. 45 of 1860.

²³⁷ Between 15 and 18 years of age.

²³⁸ A. Pitre & L. Lingam, *Age of Consent: Challenges and Contradictions of Sexual Violence Laws in India*, (2021), at 10.

²³⁹ CRC Committee Concluding Observation India, 2014, CRC/C/IND/CO/3-4, para 49.

²⁴⁰ Committee on the Elimination of all Forms of Discrimination Against Women, *Concluding Observations: India*, 2014, CEDAW/C/IND/CO/4-5, para 10.

²⁴¹ *Independent Thought v. Union of India & Anr* (2017) 10 SCC 800.

²⁴² *Id.*, para 77.

child marriage is an abhorrent practice that violates the human rights of the child.²⁴³ Furthermore, the Supreme Court upheld the superiority of POCSO Act over Indian Penal Code based on section 42A of POCSO Act which lays down the pre-eminence of POCSO Act over conflicting laws. This judgment made significant pronouncements on marital rape within child marriages and rendered void sections of the IPC, which encourages child marriage.

3.3.5 Compromised Access to Healthcare for Female Adolescents

Section 19 of the POCSO Act requires any private citizen especially those working with children in the education, social, religious, and health sectors who has knowledge of or suspects abuse to report it to law enforcement authorities. Failure to report amounts to an offence under the Act and is punishable with imprisonment of up to six months and or fines.²⁴⁴ While the objective of mandatory reporting may be laudable, it raises a lot of problems.

Since the Act criminalizes consensual sexual interaction for under 18-year-olds, health professionals and school counselors are reluctant to impart safe sex advice or treat the effects of reckless sexual practices because of fear of getting involved with reporting it to the authorities and the legal sanctions that come with non-reporting. This makes access to a range of healthcare services such as emergency contraception by adolescents who are sexually active inaccessible. Moreover, adolescents also do not seek healthcare services for fear of being reported to the authorities and facing the law for having consensual sexual intercourse. This, therefore, compromises the adolescents' autonomy and privacy in accessing healthcare.²⁴⁵

3.3.6 Concluding Remarks

In conclusion, even though POCSO Act seeks to address the important issues of sexual abuse against children, it has simultaneously strengthened a protectionist and patriarchal control on adolescent sexuality. This defeats the purpose of why the POCSO Act was enacted. Hence, there is a need for the amendment of the POCSO Act to cater to adolescents who engage in consensual sexual interaction with other adolescents. This will result in the protection of the adolescents while at the same time respecting their sexual autonomy. Moreover, as a party to the UNCRC, India is under obligation to decriminalize adolescent sexuality. It, therefore, needs to amend the POCSO Act to cater to adolescents who engage in consensual interaction with other adolescents.

²⁴³ *Id*, para 29.

²⁴⁴ Sec 21 (1) POCSO Act.

²⁴⁵ A. Pitre & L. Lingam, *Age of Consent: Challenges and Contradictions of Sexual Violence Laws in India*, (2021), at 9.

CHAPTER FOUR: FINDINGS, CONCLUSION, AND RECOMMENDATIONS

4.0 Introduction

This chapter presents the research findings, conclusions, and recommendations.

4.1 Findings

This research found that some jurisdictions still criminalize consensual sexual interaction between adolescents. Although the research appreciates that statutory rape laws aim to protect adolescents from adult sexual predators, the research found that strict application of age of sexual consent laws leads to the criminalization of consensual sexual interaction between adolescents. As a result, adolescents are met with severe penalties and are hindered from accessing comprehensive sexual reproductive and health services.

The research also found that whereas jurisdictions including South Africa have substantially moved away from criminalizing adolescent sexuality, Kenya and India are still criminalizing normative adolescent sexual conduct. Furthermore, the research found that South Africa is among the countries that used to criminalize consensual sexual interaction between adolescents. However, reform was brought through a Constitutional Court ruling in the *Teddy Bear Clinic* Case. The Constitutional Court found the law to be unconstitutional and directed Parliament to decriminalize consensual sexual conduct between adolescents. As a result, the law was amended and subsequently passed in 2015.

In Kenya, attempts to amend sections of the Sexual Offences Act that criminalize consensual sexual conduct between adolescents in the case of *CKW v. Attorney General & Others* was not successful. The petitioner in this case challenged the constitutionality of sections 8 (1) and 11 (1) of the Kenyan Sexual Offences Act in so far as it criminalized consensual sexual interaction between adolescents. The High Court of Kenya ruled that criminalization of consensual sexual conduct between adolescents was in the child's best interest as it protected children from harmful acts of sexual activity.

However, judgments after the *CKW* case show that some judges in determining defilement charges involving consensual sexual conduct between adolescents have expressed their discomfort with the criminalization of consensual sexual interaction between adolescents. They have recognized that adolescents may have the capacity to consent to sexual intercourse. Thus, the Kenyan parliament should fast-track amendments to the Sexual Offences Act to decriminalize consensual sexual conduct between adolescents.

In India, even though the POCSO Act is a comprehensive law that seeks to address issues of sexual abuse against children, the Act has simultaneously strengthened a protectionist and patriarchal control of adolescent sexuality. The Act assumes that adolescents in India are sexually inactive, and all adolescent sexual encounters amount to a violation of the sexual autonomy of the person and cause harm. Like Kenya, cases from the Indian Courts show that judges are recognizing the sexual autonomy of adolescents. However, there is still a conflict of law between the POCSO Act and the India Penal Code and this has promoted child marriages. In addition, the POCSO Act needs to be amended in order to decriminalize consensual sexual interaction between adolescents. Thus, the research found there is a need for Kenya and India to change their laws to conform with international and regional instruments to which they are parties to.

4.2 Conclusion

Statutory rape laws are intended to protect adolescents from coercion and exploitation by adults. The assumption behind these laws is that only adolescents who exceed the age of consent can make informed decisions about engaging in sexual behavior. However, the reality is that an increasing percentage of adolescents below the age of consent are engaging in consensual sexual activity with their peers. It is time for countries to accept the reality that adolescent relationships always have happened and will continue to happen and that sexuality is a reality that ought not to be brushed away.

As Skelton²⁴⁶ rightly observes, if countries want to play a role in delaying sexual debut, its tools should not be police and courts, but rather increased provision of education, counseling, and reproductive health services. Hence, instead of countries criminalizing consensual sexual interaction between adolescents, they should work towards making adolescents more aware of sex and its implications through comprehensive sexuality education.

Countries like Kenya and India that criminalize consensual sexual interaction between adolescents should reevaluate and revise their current statutory rape laws. And in doing so, they should be guided by international law, which recognizes adolescents' evolving capacities and the concept of normative sexual development.

In addition, there are lessons that Kenya, India, and countries that still criminalize adolescent sexuality can learn from the Teddy Bear Clinic case and the South African law in general. For example, even as the Court recognized the evolving sexual capacities of adolescents, it retained the criminal sanction against sexual relationships between adults and minors, regardless of the minor's consent.

4.3 Recommendations

Based on the above findings, this research proposes the following recommendations:

4.3.1 Close-in-Age Exemptions

To prevent the prosecution of adolescents who engage in consensual sexual conduct when both partners are significantly close in age to each other, and one or both partners are below the age of sexual consent, some countries have close-in-age exemption laws. This is in addition to the legally defined minimum age of sexual consent as laid down in law.²⁴⁷ These exemptions give room to normal adolescent sexuality and some degree of sexual autonomy and privacy while also protecting adolescents from age-based power imbalances that may impact them as they navigate their sexual development.²⁴⁸

For example, in Canada, the age of sexual consent is 16 years. Adolescents above the age of 16 years are legally able to consent to sexual intercourse, except for anal intercourse, for which both parties must be 18 years old and above.²⁴⁹ In cases of consensual interaction between adolescents, there are two close-in-age exemptions. Adolescents aged between 14 to 15 years old can consent to

²⁴⁶ A. Skelton, 'Balancing Autonomy and Protection in Children's Rights: A South African Account,' *Temple Law Review* 88 (2016), at 904.

²⁴⁷ K. Nuray, "Close-in-Age Exemption Laws: Focusing on the Best Interests of Children and Adolescents" *International Journal of Adolescent Medicine and Health*, 33(2), (2021), at 1.

²⁴⁸ A. High, Good, Bad and Wrongful Juvenile Sex: Rethinking the Use of Statutory Rape Laws Against the Protected Class, *Arkansas Law Review*, 69, (2016), at 795.

²⁴⁹ The Canadian Criminal Code (RSC, 1985, c. C-46), section 159.

consensual sexual conduct with persons who are less than five years older than they are²⁵⁰ while adolescents aged between 12 to 13 can consent to consensual sexual conduct if the partner is less than two years old.²⁵¹ However, the Canadian Criminal Code criminalizes the sexual touching of an adolescent over the age of 16 but under 18 by a person who is in a relationship of dependency, trust, or authority with the adolescent.²⁵²

Therefore, close-in-age exemptions allow states to avoid the unnecessary prosecution of adolescents engaging in mutually sought sexual activity. In addition, these laws keep children from fear of seeking medical care or advice which may arise from sexual activity. Still, they allow states to prosecute adults for abusive behavior with young adolescents. Thus, this approach best protects children's rights, as it both protects the predatory and abusive sexual behavior by adults but respects the rights of adolescents and leaves them free to seek necessary medical advice and guidance without fear of prosecution.²⁵³

4.3.2 Comprehensive Sexuality Education (CSE)

CSE is an essential tool to ensure that young people have the information they need to make healthy and informed choices. It has been defined as an age-appropriate, culturally relevant approach to teaching about sex and relationships by providing scientifically accurate, realistic, non-judgmental information.²⁵⁴

CSE empowers adolescents by educating them about their bodies and sexuality. From a personal health-protection perspective, research indicates that CSE reduces risky behavior, delay sexual debut, and decrease sexual activity better than abstinence-only-until-marriage programs. For example, countries with well-established sexuality education programs such as Norway, Sweden, and the Netherlands have lower teenage pregnancy rates than countries that do not.²⁵⁵

International human rights treaties and conventions such as the CRC have established that adolescents have the right to receive comprehensive, accurate, scientifically sound, and culturally sensitive sexuality education based on existing international standards. In its General Comment on the rights of the child during adolescence, the CRC Committee recommends that state parties should ensure that age-appropriate, comprehensive and inclusive sexual and reproductive health education is part of the mandatory school curriculum and reach out-of-school adolescents. It further notes that this should be based on scientific evidence and human rights standards and developed with adolescents. It also recommends that states give attention to sexual and reproductive health rights and preventing early pregnancy and sexually transmitted infections.²⁵⁶

²⁵⁰ *Id.*, section 150.1 (2.1).

²⁵¹ *Id.*, section 150.1 (2).

²⁵² *Id.*, section 153 (1).

²⁵³ National Gender and Equality Commission, *Minimum Age of Consent for Sex: Addressing the Dilemma*, (2020), at 13.

²⁵⁴ UNESCO, *International Technical Guidance on Sexuality Education 1(1)*, (2009), at 2.

²⁵⁵ D. Aoife, "Sexuality Education and International Standards: Insisting upon Children's Rights." *Human Rights Quarterly : A Comparative and International Journal of the Social Sciences, Philosophy, and Law*. 42 (2020), at 839.

²⁵⁶ 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*, CRC/C/GC/20, at para 61.

The CRC Committee also reiterates the same sentiments in its Concluding Observations to Japan²⁵⁷ and Mozambique.²⁵⁸ It recommends that sexual and reproductive health education be part of the mandatory school curriculum and targeted at adolescent girls and boys, with particular attention placed on preventing early pregnancy and sexually transmitted infections.

Unlike the traditional versions of sexuality education that promote abstinence, CSE recognizes children's rights to a positive and pleasurable sexuality.²⁵⁹ Khampepe J in the *Teddy Bear Clinic* case noted that comprehensive sex education is more effective than abstinence-only or no sex education in reducing risky sexual behavior of adolescents. He further noted that abstinence-only education programs had no significant impact on adolescents' values or attitudes towards sexual activity.²⁶⁰ Various countries have experienced challenges to their provision of CSE by conservative and or religious parents. For example, in South Africa, there has been a backlash against CSE by parents, teachers, and civil society as CSE is seen as a vehicle for promoting premature sexual conduct between adolescents. Moreover, CSE also conflicts with their beliefs, values, and religious principles.²⁶¹

In Zimbabwe, a review of the school curriculum in East and Southern Africa by UNESCO and UNFPA revealed that Zimbabwe's provision of CSE lacked content on sexuality and sexual behavior. The review also found that Zimbabwe only focused on the negative portrayal of relationships, did not mention condoms, and was too dependent on religious framing of acceptable or unacceptable behaviors.²⁶² In addition, in India, the Rashtriya Kishore Swasthya Karyakram, a government program for adolescent health, only focuses on menstrual hygiene to the exclusion of matters relating to sexuality. This is because of the belief that sex education could encourage sexual activity.²⁶³

However, evidence shows that CSE increases knowledge of HIV and teenage pregnancy prevention and improves condom use and the ability to refuse sex among females. In addition, evidence also shows that CSE delays initiation of first sex and significantly decreases the number of partners a young person has.²⁶⁴ Therefore, countries need to decriminalize consensual sexual interaction between adolescents and focus on CSE as it enables adolescents to make informed choices about their sexual and reproductive health and needs.

²⁵⁷ CRC Committee Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Japan, 5 March 2019, CRC/C/JPN/CO/4-5, at para 35 (a).

²⁵⁸ CRC Committee Concluding Observations on the Combined Third and Fourth Periodic Reports of Mozambique, 27 November 2019, CRC/C/MOZ/CO/3-4, at para 35 (c).

²⁵⁹ Kangaude et al., Childhood Sexuality in Africa: A Child Rights Perspective, *African Human Rights Law Journal*, 20, (2020), at 702-703.

²⁶⁰ Para 99.

²⁶¹ Kangaude et al, Childhood Sexuality in Africa: A Child Rights Perspective, *African Human Rights Law Journal* 20 (2020), at 703.

²⁶² Amnesty International, Lost Without Knowledge: Barriers to Sexual and Reproductive Health Information in Zimbabwe, (2018), at 31, <https://www.amnesty.org/en/documents/afr46/7700/2018/en/>, last accessed (01-07-2021).

²⁶³ Partners for Law in Development, Submissions to the ICJ: Impact on Health and Human Rights Through Criminalisation in Adolescent Sexuality, (2018), at 5, <https://pldindia.org/decriminalizing-sexuality/>, last accessed (02/07/2021).

²⁶⁴ UNFPA, Harmonizing the Legal Environment for Adolescent Sexual and Reproductive Health and Rights, (2017), at 19.

4.3.3 Accessible Sexual and Reproductive Health Information and Services to Adolescents

Statutory rape laws that criminalize consensual sexual interaction between adolescents can impede access to sexual and reproductive health information and services. Evidence shows that criminalizing adolescent sexual conduct has the united consequences of creating an atmosphere that discourages adolescents from seeking sexual health information and care. For example, research conducted in Senegal demonstrated how the age of consent law of Senegal constituted an indirect barrier to access sexual health information and services for adolescents. Article 320 of the Senegalese Penal Code prohibits any sexual activity, including kissing or touching someone below 16 years.²⁶⁵

In *State v. B Masuku*,²⁶⁶ Tsanga J rightly points out that in order to stem the dangers that arise for adolescent girls from teenage sex, part of the solution lies in the policymakers and society accepting the prevalence of adolescent sex and fashioning appropriate interventions. She notes that availing contraceptive protection is one such intervention. In addition, she asserts that a more rigorous and open approach to what information is given during sex education is imperative since the dominant message of abstinence has obviously not been successful in keeping adolescents from engaging in consensual sex between themselves.

Additionally, parental authorization prevents adolescents from making decisions about their bodies and the CRC Committee has strongly advocated that reproductive health services be made accessible to adolescents without parental consent. In its Concluding Observations to Hungary, the Committee urged Hungary to eliminate the need for parental permission for adolescents to access sexual and reproductive health services and psychological care, enabling adolescents to do so independently.²⁶⁷

Despite the CRC's recognition of the evolving capacities of adolescents to make decisions in matters affecting their lives, many states require parental or guardian consent for adolescents to access many reproductive health information and services. Such requirements deter adolescents from seeking necessary care because adolescents are afraid that their parents could discover that they are or are considering becoming sexually active.²⁶⁸

In addition, in its Concluding Observations to Cameroon, the CRC Committee urged the country to improve adolescents' access to reproductive health care and increase support for reproductive health and family planning services and access to affordable contraceptives.²⁶⁹ Therefore, countries should strive to make accessible sexual and reproductive health information and services to adolescents as this helps in preventing early teenage pregnancies and sexually transmitted infections.

²⁶⁵ G. Kangaude, *Challenging Criminalisation of Adolescent Sexuality in Africa*, (2019), at 4.

²⁶⁶ *Id.*, at 3.

²⁶⁷ CRC Committee Concluding Observations on the Sixth Periodic Report of Hungary, 3 March 2020, CRC/C/HUN/CO/6, para 33 (c).

²⁶⁸ A. Misasi, *The Sexual and Reproductive Rights of Adolescents: The Implementation and Expansion of the Reproduction Rights of Adolescents Through the Convention on the Rights of the Child*, 23(2), (2017), at 243.

²⁶⁹ CRC Committee Concluding Observations on the Combined Third to Fifth Periodic Reports of Cameroon, 6 July 2017, CRC/C/CMR/CO/3-5, para 35 (b).

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