ROMEO AND JULIET LAWS: PROTECTING KENYA'S CONSENTING ADOLESCENTS

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BY

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Contents

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Declaration

I Macharia Mukono, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in part or in whole, been submitted to any other university for a degree or diploma. Works referred to are accordingly acknowledged.

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Date: 31ST JULY 2021

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: MELISSA MUINDI

Date: 23rd July

List of Abbreviations

AIDS	Acquired Immune Deficiency Syndrome
BIC	Best Interest of the Child
CRC	Convention on the Rights of the Child
CSE	Comprehensive Sexuality Education
HIV	Human Immunodeficiency Virus
ODPP	Office of the Director of Public Prosecution
SOA	Sexual Offences Act

List of Cases

CKW v Attorney General & Another (2014) eKLR.

Constitutional Development and National Director for Public Prosecutions (2013), Constitutional Court of South Africa.

Eliud Waweru Wambui v Republic (2019) eKLR

Francis Karioko Muruatetu & Another v Republic (2017) eKLR.

G.O v Republic (2017) eKLR.

John Otieno Obwar v Republic (2011) eKLR.

Martin Charo v Republic (2016) eKLR.

Michael M v Superior Court of Sonoma City (1981), The Supreme Court of the United States.

National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others

(1998), Constitutional Court of South Africa.

Omus Kiringi Chivatsi (2017) eKLR.

POO (A minor) v Director of Public Prosecutions & Another (2017) eKLR.

The Teddy Bear Clinic for Abused Children and RAPCAN v Minister of Justice and

Constitutional Development and National Director for Public Prosecutions (2013), Constitutional Court of South Africa.

List of Legal Instruments

Borstal Institutions Act (Act No. 23 of 1983).

Children Act (Act No. 12 of 2012).

Constitution of Kenya (2010).

Criminal Law (Sexual Offences and Related Matters) Amendment Act (Act No. 32 of 2007).

Sexual Offences Act (Act No. 3 of 2006).

United Nations Convention on the Rights of the Child.

CHAPTER ONE: INTRODUCTION

1.1. Background to the study

The period leading up to the enactment of the *Sexual Offences Act*[1] (hereafter SOA) were troubled times – particularly for women. As Hon. Njoki Ndung'u put it, the country was at war with sexual violence.[2] Statistics at the time showed that between the period of 2003 and 2005, over 2,000 sexual violence offences had been reported at the Gender Violence Recovery Centre.[3] Of these, 944 involved victims who were 15 years or younger. The objectification of women, improper deterrence mechanisms, insensitivity of law enforcement officers and judicial laxity in the punishment of sexual offenders were among the reasons given as necessitating reform to the legal framework governing sexual offences in Kenya.[4] The system at the time; for example, classified rape and sexual assaults as crimes against morality meaning that they carried lighter sentences in comparison to offences on the person of another.[5] The law also inadequately catered for conventional issues of the time such as the spread of HIV/AIDS and the onset of child sex tourism among other forms of sexual offences.[6]

To address these issues, the SOA was passed in 2006 after years of lobbying and grass-root sensitization aimed at pressurizing parliamentarians to pass the Bill into law.[7] The Act was aimed at preventing and providing protection from the harm caused by unlawful sexual acts.[8] Some of the key amendments introduced by the Act included the creation of new sexual offences including deliberate infection with HIV/AIDS,[9] and the introduction of minimum sentences for various offences under the Act.[10]

The enactment of the Bill; however, did not arrest the rising incidences of sexual violence in the country as was hoped. In 2014, the Kenya Demographic and Health Survey indicated that 14% of women aged between 15 and 49 years had experienced some form of sexual violence

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[1] *Sexual Offences Act* (Act No. 3 of 2006).
[2] Parliament Hansard Report, 26 April 2006, 735.
[3] Ndung'u N, 'Legislating against Sexual Violence in Kenya: An Interview with the Hon. Njoki Ndung'u' *Reproductive Health Matters*, 2007, 150.
[4] Parliament Hansard Report, 26 April 2006, 738.
[5] Kwani Trust, *The Making of the Kenya Sexual Offences Act, 2006: Behind the Scenes*, 2009, 7.
[6] Ndung'u N, 'Legislating against Sexual Violence in Kenya: An Interview with the Hon. Njoki Ndung'u' *Reproductive Health Matters*, 2007, 149.
[7] Ndung'u N, 'Legislating against Sexual Violence in Kenya: An Interview with the Hon. Njoki Ndung'u' *Reproductive Health Matters*, 2007, 151.
[8] Preamble, *Sexual Offences Act* (Act No. 3 of 2006).
[9] Section 26, *Sexual Offences Act* (Act No. 3 of 2006).
[10] Section 8, *Sexual Offences Act* (Act No. 3 of 2006). This section, dealing with defilement, provides for different minimum sentences to be meted out based on the age of the victim – the younger the victim, the more severe the sentence.

while 6% of men suffered the same fate.[11] Kenya also experiences electoral related sexual violence whereby sexual violence is weaponized with ethnicity being used as the targeting mechanism and with involvement of law enforcement officers as perpetrators.[12] Previous governments have often showed little political will to investigate and prosecute sexual offences with survivors often being left on their own.[13] In the lead-up to the 2017 General Elections for instance, the electoral commissions' operations plan failed to integrate an assessment of the risk of electoral-related sexual violence despite having reports of over 900 such cases during the 2007-2008 post-election violence.[14] Approximately 201 cases of sexual violence were documented across 11 counties; 100 of which reported during the first round of elections between July and August.[15]

Children too have increasingly been victimised. Reports indicate that 70% of sexual violence survivors handled at the Moi Teaching and Referral Hospital between 2007 and 2010 were below 18 years of age.[16] Furthermore, between the period of May to December of 2010, the Gender Recovery Centre at Kitale District Hospital handled over 350 cases of defilement.[17] Thousands more incidences are suspected to go unreported given the fear, stigma and historical impunity attached to sexual violence.[18] A 2019 report on violence against children revealed that among 18 – 24 year olds, 15.6% of females and 6.4% of males had experienced one or more forms of sexual violence before they were 18 years of age.[19] These numbers indicate that sexual violence against children continues to be an issue of concern for Kenyans.

Recent times have seen a new problem arise with regards to sexual offences involving adolescent teenagers who allegedly consent to sexual activity. The Court of Appeal recently decried the large number of young men convicted of having defiled adolescent girls whose

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[11] Kenya National Bureau of Statistics, *Kenya Demographic and Health Survey 2014*, December 2015, 297.
[12] Kenya National Commission on Human Rights, *Silhouettes of Brutality: An Account of Sexual Violence During and After the 2017 General Election*, 2018, 6.
[13] Truth Justice and Reconciliation Commission (Kenya), *Report of the Truth, Justice and Reconciliation Commission*, Volume IV, 3 May 2013, 32.
[14] United Nations Office of the High Commissioner, *Breaking Cycles of Violence: Gaps in Prevention of and Response to Electoral Related Sexual Violence*, 2019, 6.
[15] United Nations Office of the High Commissioner, *Breaking Cycles of Violence: Gaps in Prevention of and Response to Electoral Related Sexual Violence*, 2019, 1.
[16] 'Sexual and Gender Based Violence in Kenya: A Call for Action', National Council for Population and Development, Policy Brief No. 26, 2012, 2 -< https://ncpd.go.ke/wp-content/uploads/2016/11/Policy-Brief-26_-Sexual-and-Gender-Based-Violence-in-Kenya-A-Call-for-Action-June-2012.pdf > on 17 March 2020.
[17] 'Sexual and Gender Based Violence in Kenya: A Call for Action', National Council for Population and Development, Policy Brief No. 26, 2012, 2 -< https://ncpd.go.ke/wp-content/uploads/2016/11/Policy-Brief-26_-Sexual-and-Gender-Based-Violence-in-Kenya-A-Call-for-Action-June-2012.pdf > on 17 March 2020.
[18] Truth Justice and Reconciliation Commission (Kenya), *Report of the Truth, Justice and Reconciliation Commission*, Volume IV, 3 May 2013, 32.
[19] Ministry of Labour and Social Protection, *Violence Against Children Survey Report*, 2019, 31.

consent had been invalidated by virtue of being below eighteen years.[20] The High Court at Malindi had earlier overturned a defilement conviction noting that no defilement charge should stand where the alleged complainant enjoyed the sexual conduct and, in fact, went soliciting for it.[21] These decisions raise queries regarding the absolute application of the SOA, particularly regarding defilement.

1.2. STATEMENT OF THE PROBLEM

Sexual violence is an issue that each society struggles to prevent and contain. Governments globally have put in place laws and mechanisms aimed at curbing these crimes and for the care and protection of victims. The SOA was meant to rectify the previously deficient legal framework in offering protection and deterring sexual violence. The Act particularly provides for the protection of children from sexual predation by strictly criminalising defilement,[22] indecent acts with children,[23] the promotion of sexual offences with children,[24] among several other provisions specifically targeted at the protection of children.

While the Act does rightly cater for sexual predators who violate children and adolescents, it did not envision a scenario where teenagers consented to sexual activity with their fellow teenagers. The upshot of this is that teenagers who otherwise consented to sexual activity are tried and convicted as criminals. They must carry the tag of sex offenders long after they have served their sentences – a situation which often hinders their re-integration into the society. Incarceration also exposes teenagers who would otherwise have avoided criminal lifestyles to the crime life. It is no small coincidence that a large proportion of convictions are suffered by persons of the male gender.

This research seeks; therefore, to review the absolutist application of the SOA where both the perpetrator and the victim are adolescent teenagers. Ultimately, the research seeks to evaluate the possibility of introducing close-in-age exemptions to cushion consenting adolescent teenagers from the harsh outcomes and penalties meted out to sexual offenders.

[20] *Eliud Waweru Wambui v Republic* (2019) eKLR.
[21] *Martin Charo v Republic* (2016) eKLR.
[22] Section 8, *Sexual Offences Act* (Act No. 3 of 2006).
[23] Section 11, *Sexual Offences Act* (Act No. 3 of 2006).
[24] Section 12, *Sexual Offences Act* (Act No. 3 of 2006).

1.3. JUSTIFICATION OF THE STUDY

This study's policy relevance stems from its analysis of the downfalls arising from an absolutist application of Kenya's SOA's provisions on defilement particularly in cases involving adolescent teenagers. It seeks to analyse close-in-age exemptions applied in foreign jurisdictions to protect adolescent youths from the harsh penalties that befall convicted sex offenders and evaluate the possibility of introducing such a policy and the potential outcomes that they may have in Kenya. Ultimately, the study hopes to inspire reforms to the Act that will protect against sexual violence and predation while ensuring that adolescent sexuality is not criminalised.

1.4. STATEMENT OF OBJECTIVES

The general objective of this study is to analyse the possibility of introducing close-in-age exemptions to mitigate the absolutist application of Kenya's defilement laws in cases involving adolescent teenagers as both the victim and the perpetrator.

The specific objectives of this study are:

1. To evaluate Kenya's defilement laws and the impact of absolutist application in cases involving adolescents.
2. To assess the possibility of introducing close-in-age exemptions to mitigate the harshness of defilement laws in the cases.
3. To assess the potential harms and risks that may accompany the introduction of close-in-age exemptions to Kenya's statutory rape laws.

1.5. RESEARCH QUESTIONS

1. What impact has the absolutist application of Kenya's statutory rape laws had on adolescent convicts in Kenya?

2. How effective would close-in-age exemptions be in addressing the harshness of absolutist application of statutory rape laws to Kenya's adolescents?

3. What risks does the Kenyan society face in introducing close-in-age exemptions to defilement law?

1.6. Theoretical Framework

1.6.1. Re-integrative punishment

The rush to find justification for criminal sanctions was sparked by utilitarian efforts to emphasise social ends such as rehabilitation in opposition to the more traditional moral justification of punishment as a means of retribution.[25] The main justifications for punishment often cited include deterrence, retribution, rehabilitation, re-integration, and incapacitation.[26] Despite the possible complementarity of these aims, it is often difficult to achieve each one equally satisfactorily.[27]

Of the five aims advanced to justify punishment, retribution and deterrence seem to be the most prevalent in most legal systems today.[28] The former doctrine represents the idea that punishment is a merited harm for the criminal's violation of order rather than a socially beneficial tool and is regarded as the foundation of other criminal justice principles such as criminal culpability and proportionality of sanctions.[29] Efforts to dilute the retributivist approach to punishment have often failed given its strong moral appeal.[30]

The deterrent theory of punishment views punishment as a tool to dissuade would be offenders from criminal tendencies by increasing the cost of crime.[31] This theory relies on the presumption that no rational actor would seek to commit a crime where the cost of sanctions would greatly outweigh the potential benefits of the offence.[32] Furthermore, it presupposes that by experiencing the suffering of others, people would be scared to remain along the straight and narrow path.[33]

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[25] Cotton M, 'Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment' 37(4) *American Criminal Law Review,* 2000, 1313.

[26] Cotton M, 'Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment', 1313. Cragg W, 'H.L.A. Hart and the Justification of Punishment' 5 *Canadian Journal of Law and Jurisprudence*, 1992, 43. H.L.A Hart describes the utility of punishment as giving an incentive to follow laws without which he posits that laws would be disregarded.

[27] Cotton M, 'Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment', 1317.

[28] Falvey J, 'Crime and Punishment: A Catholic Perspective' 43 *Catholic Lawyer*, 2004, 150.

[29] Cotton M, 'Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment', 1359. See also, Falvey J, 'Crime and Punishment: A Catholic Perspective', 156.

[30] Cotton M, 'Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment', 1360. Cotton describes criminal law as a primarily retributive tool from which utilitarians have drawn auxiliary purposes.

[31] Carr K, 'An Argument Against Using General Deterrence as a Factor in Criminal Sentencing' 44(2) *Cumberland Law Review*, 2013, 249.

[32] Carr K, 'An Argument Against Using General Deterrence as a Factor in Criminal Sentencing', 254.

[33] Carr K, 'An Argument Against Using General Deterrence as a Factor in Criminal Sentencing', 254.

The notion of re-integration in punishment is premised on the understanding that the effect of criminal action is to alienate the offender from the greater society because they undermined a shared value.[34] Punishment; therefore, gives the offender an opportunity to reaffirm their commitment to those values.[35] The interpretation of what constitutes a crime consequently becomes crucial if society wishes to attach proportionate sanctions.[36]

The conception of crimes as public wrongs; however, runs the risk of subordinating atypical members of society who fail to share in the community's interpretation of certain actions.[37] With regard to adolescent sexual behaviour, while society does reasonably frown upon adolescent sexual behaviour, it would be undesirable to punish adolescents who consensually engage in sexual activities as one would a sexual predator who takes advantage of an under-age individual.[38]Sanctions imposed; therefore, should be reflective of the differing contexts of these actions.[39]

Furthermore; punishment should always recognize its role in the maintenance of community.[40] Often, persons who have previously been incarcerated face difficulties re-entering society because of discrimination, stigma and communal hostility often directed at them.[41] Ironically, regardless of low re-offending rates of sexual offenders relative to other crimes, the global trend has been towards designing laws that prevent re-offence which often entails long prison terms coupled with stiff post-incarceration requirements.[42] Such an approach, despite being reflective of society's abhorrent view of such crimes, is counter-productive to successful re-integration and crime reduction. Some people still view offender reintegration as being soft on criminals.[43] Muntingh challenges the general public expectation that prisoners learn their lesson from the pain of incarceration by highlighting the fact that imprisonment is a deeply

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[34] Ciochetti C, 'Punishment, reintegration and atypical victims' 23(2) *Criminal Justice Ethics,* 2004, 26.
[35] Ciochetti C, 'Punishment, reintegration and atypical victims', 26.
[36] Ciochetti C, 'Punishment, reintegration and atypical victims', 27.
[37] Ciochetti C, 'Punishment, reintegration and atypical victims', 30. The term "atypical" is used to describe individuals who may not share with their community's interpretation of particular values or of how those values are interpreted in meting out sanctions.
[38] Okwatch H, 'The Problematic Jurisprudence on the Law of Defilement on Adolescents in Kenya' 4(1) *Strathmore Law Review,* 2019, 49.
[39] Okwatch H, 'The Problematic Jurisprudence on the Law of Defilement on Adolescents in Kenya', 63.
[40] Ciochetti C, 'Punishment, reintegration and atypical victims', 25.
[41] Graham J, Shinkfield A, Lavelle B and McPherson W, 'Variables Affecting Successful Reintegration as Perceived by Offenders and Professionals' 40(1/2) *Journal of Offender Rehabilitation,* 2004, 149.
[42] Fox K, 'Contextualizing the Policy and Pragmatics of Reintegrating Sex Offenders' 29(1) *Sexual Abuse: A Journal of Research and Treatment,* 2007, 29. As examples, Fox notes the use of community notification and sex offender registries in the United States and the use of indefinite sentences in New Zealand.
[43] Muntingh L, 'Tackling Recidivism: What is Needed for successful offender Reintegration' 11(2) *Track Two: Constructive Approaches to Community and Political Conflict,* 2002, 20.

disempowering process that is antithetical to the concepts of freedom and responsibility that encompass a functional society.[44] A re-integrative system; therefore, requires that punishment should not just be seen as being just and proportional, but also respect the humanity of the offender and be inviting to them to re-enter society.[45]

In this regard, Romeo and Juliet provisions serve as a much better tool for reintegration of adolescents than the current punitive justice system. These exemptions recognise that consenting adolescents are not the intended subject of punitive statutory rape laws and thus should not be punished and shunned in the same manner as adults who seek out children for sexual exploitation. With the current situation of increasing numbers of adolescents engaging in sexual activities, the law cannot continue to punish such parties as adults taking advantage of children.

1.6.2. The Best Interest of the Child Principle

The Best Interest of the Child Principle (BIC) is at once the most heralded, relied upon yet derided doctrine in family law.[46] The overall theme behind the concept is that due priority should be afforded to the political and socio-economic interests of a child whenever a policy, law or administrative action directly or indirectly impacts a child.[47] The law has always reserved a special place for children largely borne out of the existence of a strong social interest in the nurture and welfare of children.[48] Andrup also traces this special interest to the nature of man as social beings whose survival is dependent on the way in which members bring up their children. The quality of up-bringing; therefore, becomes a deciding factor in the community's well-being.[49]

The development of this protectionist attitude towards children; however, has not come about without controversy; largely influenced by the society's view and approach towards children. Eekalaar notes that historical records are riddled with instances where assertions that an action was in line with the BIC relied on the identification of those interest with those of others – men

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[44] Muntingh L, 'Tackling Recidivism: What is Needed for successful offender Reintegration', 22.
[45] Muntingh L, 'Tackling Recidivism: What is Needed for successful offender Reintegration', 24. + include Graham point on the economical rationality of such a system. Also link it to Dewey's idea.
[46] Rohm L, 'Tracing the Foundations of the Best Interest of the Child Standard in American Jurisprudence', 10(2) *Journal of Law and Family Studies,* 2008, 337.
[47] Degol A and Dinku S, 'Notes on the "Best Interest of the Child": Meaning, History and its Place under Ethiopian Law' 5(2) *Mizan Law Review,* 2011, 319.
[48] Eekalaar J, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism' 8(1) *International Journal of Law and the Family,* 1994, 44.
[49] Andrup H, 'The Best Interest of the Child' 26(2) *Conciliation Courts Review,* 1988, 15.

predominantly.[50] Rohm also notes that the BIC became a pressing legal concern only once a growing class of parents when child labour needs became less urgent.[51] This attitude is also reflected in Africa where children were intricately part of the larger society's economic framework especially given the lack of advanced technology.[52]

The principle is now anchored on Article 3 of the United Nations Convention on the Rights of the Child (CRC) which provides that the best interests of the child shall be a primary consideration in all actions concerning children regardless of the institution or body undertaking it.[53] This principle had previously been expressed in the1924 Geneva Declaration on the Rights of the Child and the 1959 UN Declaration on the Rights of the Child – both of which expressed the understanding that man owed to children the best they could offer.[54] As part of the first five articles, the principle serves to provide an overall framework under whose shadow the other provisions are interpreted.[55] The principle is visible in later provisions of the Convention.[56] It is embodied in various other international and regional instruments including the African Charter on the Rights and Welfare of the Child.[57]

The CRC is reflective of the desire to universalise human rights and is considered one of the most comprehensive instruments protecting rights of a specified group.[58] Despite its importance in the family law regime, the BIC principle is also heavily criticised for being indeterminate and speculative and; therefore, leaving too much room for discretion on the party called upon to apply it.[59] Most scholars identify that the principle lacks any binding content to

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[50] Eekalaar J, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism', 44.
[51] Rohm L, 'Tracing the Foundations of the Best Interest of the Child Standard in American Jurisprudence',346.
[52] Rwezaura B, 'The Concept of the Child's Best Interest in the Changing Economic and Social Context of Sub-Saharan Africa' 8(1) *International Journal of Law and the Family,* 1994, 92. Apart from having a labour intensive economy, the African social structure dictated a subsuming of individual interests into those of the community and this conflict is also reflected in how the BIC has been applied.
[53] Article 3, *Convention on the Rights of the Child,* 20 November 1989, 1577 UNTS 3.
[54] Degol A and Dinku S, 'Notes on the "Best Interest of the Child": Meaning, History and its Place under Ethiopian Law', 323.
[55] Alston P, 'The Best Interest Principle: Towards a Reconciliation of Culture and Human Rights' 8(1) *International Journal of Law and the Family,* 1994, 4.
[56] Article 18, *Convention on the Rights of the Child.* This section recognises that while parents and guardians have the primary responsibility for the up-bringing of the child, the best interests of the child shall be the primary concern. Article 20, *Convention on the Rights of the Child.* This section provides for the BIC principle where the child is to be removed from their family setting. Article 21, *Convention on the Rights of the Child.* Incorporates the BIC principle into the adoption system and process.
[57] Article 4, *African Charter on the Rights and Welfare of the Child,* 11 July 1990, CAB/LEG/24.9/49. See also Articles 25 and 26 of the Universal Declaration of Human Rights; Articles 23 and 24 of the International Covenant on Civil and Political Rights; Articles 10 and 13 of the International Covenant on Economic, Social and Cultural Rights and Article (b) of the Convention on the Elimination of All Forms of Discrimination Against Women.
[58] Alston P, 'The Best Interest Principle: Towards a Reconciliation of Culture and Human Rights', 1.
[59] Skivenes M, 'Judging the Child's Best Interest: Rational Reasoning or Subjective Presumptions?' 53(4) *Acta Sociologica,* 2010, 339.

it and thus has to be applied on the subjective realities of individual states.[60] This position was highlighted by a High Court in Australia that noted that absent a defined hierarchy of values or rules the BIC approach would depend on the subjective value system of the decision maker.[61] For legal scholars and practitioners, the principle allows for an amount of discretion difficult to reconcile with the concept of rule of law.[62]

Despite these criticisms, the BIC principle is still widely relied upon as there is yet to arise a more comprehensive foundational principle of similar stature.[63] Proponents of the principle suggest that the more specific catalogued rights in the CRC can provide a starting point in determining what would be in line with the BIC principle.[64] Included in those provisions are specific provisions that seek to protect children from sexual exploitation.[65] With regard to incarceration, the CRC requires that it be used only as permitted by local laws but only as a measure of last resort; and, that the incarceration conditions have to consider the needs of the child.[66] As Mugo notes; however, cases involving both adolescent victims and perpetrators are often tried in the ordinary open court where some of the accused persons sometimes lack legal representation.[67] This scenario coupled with the lengthy sentences attached to sexual offences directly conflict with the provisions of the CRC which are also reflected in the Kenyan Constitution; which, under Article 53 (2) specifically incorporates the BIC principle.[68]

Later chapters of this research will reveal that Romeo and Juliet provisions succeed in advancing the BIC principles by shielding the subjects from the punitive penalties meant for persons who defile children. Penalties such as compulsory entry into the sexual offenders register last a lifetime and adversely affect the chance of these adolescents to lead normal lives long after their incarceration for an action that many do not regard as a crime. It is, therefore, in the best interest of these adolescents that they be offered some protection such penalties.

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[60] Degol A and Dinku S, 'Notes on the "Best Interest of the Child": Meaning, History and its Place under Ethiopian Law', 324.
[61] Parker S, 'The Best Interest of the Child – Principles and Problems' 8(1) *International Journal of Law and the Family*, 1994, 26.
[62] Rohm L, 'Tracing the Foundations of the Best Interest of the Child Standard in American Jurisprudence', 373.
[63] Rohm L, 'Tracing the Foundations of the Best Interest of the Child Standard in American Jurisprudence', 337.
[64] Alston P, 'The Best Interest Principle: Towards a Reconciliation of Culture and Human Rights', 12.
[65] Article 19, *Convention on the Rights of the Child.* See also Article 34 of the Convention.
[66] Article 37, *Convention on the Rights of the Child.*
[67] Mugo R, 'Application of the Best Interest Principle to the Criminal Justice Juvenile System: A Review of Emerging Case Law' 1(1) *Interdisciplinary Journal of the African Child*, 2019, 12.
[68] Article 53, *Constitution of Kenya* (2010). The Constitution stipulates that children have a right to not be detained except as a matter of last resort and, when detained, to be held for the shortest period of time, separate from adults and in conditions that take into account their age and sex.

1. 6.3. Evolving Capacities of the Child

Debates on the value of children rights begin and end with a society's construction of childhood and what it means to be a child.[69] Historically, the concept of child rights was unheard of, with children being considered as vulnerable and in need of special protection because of their relative physical and mental immaturity.[70] Parents often had unfettered authority on issues regarding the up-bringing of their children and the State was to interfere only where the parents' decision clearly went against the child's best interest.[71] In African societies, the decision making capacities of children and adolescents was hardly emphasised with heavy focus directed to ensuring strict adherence to authority and dictates.[72]

The concept of evolving capacities initially began out of concern for the fact that children were not afforded enough considerations particularly in choosing their preferred religion.[73] Evolving capacities recognizes that while children are rightly entitled to protection as a result of their vulnerabilities, they also enjoy emancipatory and participatory rights that gradually transfer to them as they develop the capacity to take responsibility for their actions.[74] The concept therefore recognises the gradual mental and psychological development that children undergo as they near adulthood.[75]

The concept is provided for under Article 5 of the CRC which states that appropriate guidance and direction offered by legal guardians shall be consistent with the evolving capacities of the child.[76] Article 12 of the same convention provides for a child's right to express their opinions in matters that affect them and that such opinion should be given due weight having regard to the age and maturity of the child.[77] Hart stresses that the mere voicing of opinions is no guarantee that they will be accommodated; only their integrity and applicability should determine the weight to be accorded to the opinions.[78]

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[69] Arthur R, 'Exploring Childhood, Criminal Responsibility and the Evolving Capacities of the Child: The Age of Criminal Responsibility in England and Wales' 67(3) *Northern Ireland Legal Quarterly,* 2016, 270.
[70] Varadan S, 'The Principle of Evolving Capacities under the UN Convention on the Rights of the Child' 27 *International Journal of Children Rights,* 2019, 307.
[71] Skivenes M, 'Judging the Child's Best Interest: Rational Reasoning or Subjective Presumptions?', 340.
[72] Oluwemi A, Oyenkule S, and Nienaber A, 'Female adolescents' evolving capacities in relation to their right to access contraceptive information and services: A comparative study of South Africa and Nigeria' 48(1) *The Comparative and International law Journal of Southern Africa,* 2015, 112.
[73] Varadan S, 'The Principle of Evolving Capacities under the UN Convention on the Rights of the Child', 310.
[74] Clyde J, Bain J, Castagnero K, Rueda M, Tatum C, and Watson K, 'Evolving capacities and decision making in practice: Adolescent access to legal abortion services in Mexico City' *Reproductive Health Matters,* 2013, 167.
[75] Oluwemi A, Oyenkule S, and Nienaber A, 'Female adolescents' evolving capacities in relation to their right to access contraceptive information and services: A comparative study of South Africa and Nigeria', 104.
[76] Article 5, *Convention on the Rights of the Child.*
[77] Article 12, *Convention on the Rights of the Child.*
[78] Hart S, 'Making Sure the Child's Voice is Heard' 48(3) *International Review of Education,* 2002, 253.

The period of adolescence while being a key developmental stage is often riddled with challenges associated with acquiring the necessary social interaction and sexual skills to be carried into adulthood.[79] It is; therefore, a period during which sexual and reproductive health problems with immediate and future consequences occur.[80] In his critic to conventional criminal justice system, Arthur notes that aside from simply focusing on the action or choice taken such systems should consider the possibility of alternatives available to the adolescents and be cognizant of the fact that adolescents often act impulsively without due regard for consequences.[81] As earlier noted, adolescent sexual activity occurs in a completely different context to either rape or defilement. A criminal justice system that recognizes that context would rightly be adhering to the evolving capacities of adolescents. Hollingsworth notes that a criminal justice system that permanently restricts a child's ability to develop capacities needed for future autonomy would be an illegitimate system.[82]

Given the current status quo where adolescents worldwide are experiencing sexual debuts at progressively younger ages, the risk of criminalisation becomes more pronounced.[83] The situation in Kenya is twofold with case-law regarding such conduct revealing a misguided notion of boys being the offending party despite having a gender neutral law.[84] Furthermore, these laws continue to restrict the sexuality of adolescent women therefore ultimately reinforcing double standard morality.[85] What is needed; therefore, is a system that serves the best interest of the adolescents by respecting their evolving capacities in decision making.[86]

1.7. Research Methodology

This research will be undertaken using a doctrinal methodology involving the review and analysis of various primary and secondary sources. This methodology suits the objectives of this paper as there exists an array of available information on the impact that absolutist application of contemporary statutory rape laws adversely affects adolescents who are punished

[79] Oluwemi A, Oyenkule S, and Nienaber A, 'Female adolescents' evolving capacities in relation to their right to access contraceptive information and services: A comparative study of South Africa and Nigeria', 99.
[80] Oluwemi A, Oyenkule S, and Nienaber A, 'Female adolescents' evolving capacities in relation to their right to access contraceptive information and services: A comparative study of South Africa and Nigeria', 99.
[81] Arthur R, 'Exploring Childhood, Criminal Responsibility and the Evolving Capacities of the Child: The Age of Criminal Responsibility in England and Wales', 275.
[82] Arthur R, 'Exploring Childhood, Criminal Responsibility and the Evolving Capacities of the Child: The Age of Criminal Responsibility in England and Wales', 276.
[83] Oluwemi A, Oyenkule S, and Nienaber A, 'Female adolescents' evolving capacities in relation to their right to access contraceptive information and services: A comparative study of South Africa and Nigeria',99.
[84] Okwatch H, 'The Problematic Jurisprudence on the Law of Defilement on Adolescents in Kenya', 48.
[85] Okwatch H, 'The Problematic Jurisprudence on the Law of Defilement on Adolescents in Kenya', 50.
[86] Oluwemi A, Oyenkule S, and Nienaber A, 'Female adolescents' evolving capacities in relation to their right to access contraceptive information and services: A comparative study of South Africa and Nigeria', 115.

for having engaged in consensual sex with their peers. There also exists various available sources that discuss the history and application of Romeo and Juliet provisions to mitigate this issue.

For comparison, a comparative analysis will be undertaken with South Africa as the country of focus. This is because South Africa has recently adopted a 2-year age-gap provision into its statutory rape laws in a graduated system which also decriminalizes sexual encounters for persons between 12 and 15 years with persons within the same age bracket. As an African country, it is also anticipated that the culture and factors that may drive adolescents to early sexual debut are similar in both countries. The comparison will also highlight some of the queries that have arisen since the adoption of the model in South Africa.

Despite this, it must be noted that a lot of the literature available on Romeo and Juliet provisions primarily focuses on the American regime where the provisions have been numerously revised and discussed. Given their recent introduction in South Africa, there is still much to be discussed about their effectiveness in Africa given the cultural difference that exists between Africa and America. This research, therefore, is only an evaluation of the Romeo and Juliet laws as they exist in other regimes and how they have helped to protect adolescents from being prosecuted for consensual sex with their peers.

1.8. Literature Review

The academic world is not scarce of literature that attempts to discuss questions involving consent and sexual activities among adolescents to find the solution that best protects them without doubly exposing them as victims of the same law including discussing considerations that ought to guide legislators in setting minimum ages of consent for sexual conduct.

In her article titled ‘Good, Bad and Wrongful Juvenile Sex: Rethinking the Use of Statutory Rape Laws Against the Protected Class’, Dr Anna High discusses the generalisation problem of most defilement laws and the tension between protection and self-protection. She highlights the fact that while society may frown upon adolescent sexual activity, society also recognises that the same may be part of a normal healthy transition to adulthood. She proposes a move towards age gap provisions which would allow for ordinary adolescent sexuality while focusing on the prevention of potentially exploitative sexual relations. She however concedes that even age-gap provisions rely on age to determine age-classes within which sexual conduct would not be criminalised.

Steve James in his article ' Romeo and Juliet were Sex Offenders: An analysis of the Age of Consent and a Call for Reform' while noting that statutory rape laws are found on sound public policy notes that the same may end up being used retrogressively against otherwise ordinary sexual conduct. He highlights that in certain jurisdictions, the law is no longer being used to punish adults who exploit children but to punish young adults whose consent is deemed irrelevant due to their age. In certain cases, he notes that even would be victims are similarly punished for failing to aid in the prosecution of their "abuser". James also laments that such laws embody an element of gender bias with males often being the ones being prosecuted as well as a sexual orientation bias were same-sex offenders are more likely to draw harsher penalties. He proposes the use of close in age provisions which either make sexual conduct between adolescent peers non-criminal or substantially reduce the penalties. Furthermore, he also suggests complimenting close-in-age provisions with victim cooperation requirements which would only warrant prosecution where the victim consensually participates and agrees to the proceedings.

Godfrey Kangaude in 'Adolescent Sex and "Defilement" in Malawi Law and Society' in discussing the statutory rape law provisions on the African continent notes that most of them were carried over as part of colonial heritage. He notes that childhood sexuality is a political and contested topic often dominated by a moral panic about adults abusing children but notes that this fear does not warrant the treatment of such children as asexual. In his discussion on the importance of adolescent sexuality as an integral part of human development he references the *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development*[87] where the court was opposed to criminalising adolescent sexual activity noting that this leads to stigmatization and a lack of support for such children. Kangaude notes that the State duty is not just to protect children but to nurture and support them as they progressively attain the capacity to avoid and manage risks related to sexual health in negotiating sexual development.

In the paper '(De)Criminalising Adolescent Sex: A Rights Based Assessment of Age of Consent Laws in Eastern and Southern Africa' Kangaude and Skelton discuss the contrast between African and colonial perspectives of age of consent laws. They highlight that most African cultures had no absolute age based restrain on sexuality and that puberty was often the signal for the onset of adulthood. They also highlight that these cultures had their own sexual

[87] *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* (2013), Constitutional Court of South Africa.

regulation norms which allowed for non-penetrative sex between unmarried adolescents. They however frowned upon pre-marital pregnancies and girls who got pregnant were chastised while boys would often be required to pay damages or sometimes marry the girl. Ultimately, they note that criminal law is a blunt tool in promoting sexual behaviour among adolescents and that punitive approaches in the name of protection undermine the development of harmonious, gender equitable and respectful relationships.

Kigera's[88] tackles the law's inadequacy in respecting children's autonomy regarding sexual conduct. She opines that criminal law should not be the primary tool of regulation for adolescent sexual conduct. The study criticises the overly protectionist approach of statutory rape laws that ignores the reality of the increasing cases of minors engaging in sexual activities. Her recommendations include a multi-age consent approach that provides for a minimum age threshold for consent and age-gap provisions for adolescents. Additionally, she proposes the enactment of specific sentencing guidelines to deal with cases involving minors.

Locally, much of these discussions have undoubtedly arisen out of controversial court decisions on defilement cases. The case of *Martin Charo v Republic* is perhaps the most infamous having received the title of "worst court decision for women's' rights".[89] Okwatch[90]opines that the context and nature of defilement greatly differs from that of consenting adolescent sexual relations and that the law should not treat them as equal. The paper also noted that mandatory sentences attached to statutory rape laws contradict the constitution's attempt to ensure that the detention of minors is as a last resort. He opines that rehabilitation rather than retribution should be the focus in cases involving minors. Ultimately, he recommends the inclusion of age-gap provisions as well as discretionary sentencing policies in defilement cases.

1.9. Hypothesis

This research will be guided by the following hypothesis:

- The current statutory rape laws in Kenya have failed to cater for the increasing number of adolescents engaging in sexual activity and are doing more harm than good to that population.

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[88] Kigera S, 'Does Criminalisation of Consensual Sex Between Minors in Kenya Violate the Constitutional Rights of Children' Published LLM Thesis, University of Pretoria, Pretoria, 2018.

[89] Bocha G, 'Rape ruling by Kenyan judge voted world's worst ruling' Daily Nation, 8 June 2017 - <https://www.nation.co.ke/news/Rape-ruling-Kenyan-judge-voted-world-worst-verdict/1056-3962138-8amynh/index.html> on 25 March 2020.

[90] Okwatch J, 'The Problematic Jurisprudence on the Law of Defilement of Adolescents in Kenya' 4 *Strathmore Law Review*, 2019.

1.10. Chapter Breakdown

The research will be divided as follows:

Chapter One: The author will attempt to give a general background involving the SOA and statutory rape laws in Kenya. This chapter will also highlight theories such as the Best Interest of the Child Principle and Evolving Capacities theory that underpin the advocacy for inclusion of Romeo and Juliet laws into the Kenyan defilement regime.

Chapter Two: This chapter will look at the implications that arise when the current statutory rape laws are applied absolutely in cases involving consenting adolescents. The chapter will evaluate the historical rationales for the current framing and application of statutory rape laws have necessitated the reform that this paper advocates for through Romeo and Juliet laws.

Chapter Three: This chapter will evaluate proceed in two parts. The first will evaluate the issue of adolescent sexual experimentation and lead into the second part where Romeo and Juliet provisions will be analysed. The chapter will evaluate both the age-ap provision and affirmative defence model and reveal the comparative advantage that these models carry.

Chapter Four: This chapter will cover a comparative study with South Africa which recently introduced a 2-year age-gap provision in its statutory rape laws. The objective of this comparative will be to analyse the rationales advanced in support of the reform and, the challenges they may have faced post-reform.

Chapter Five: This chapter will conclude the research and make requisite recommendations drawn from the research.

Chapter Two: Consequences of an Absolutist Approach to Statutory Rape Laws

This chapter analyses the consequences that arise from an absolutist application of statutory rape laws in cases involving consenting adolescents. To do so, this chapter will provide a brief historical analysis of statutory rape laws and the resultant issues that have necessitated their reform including the aims of these laws, their gendered and strict-liability nature. The chapter will conclude with an evaluation of judicial decisions from Kenyan courts involving consenting teenagers.

2.1. Statutory Rape Laws: A Historical Perspective

The history of statutory rape laws can be traced back to English codification of sex crimes where the Statute of Westminster prohibited the "ravishing" of a female within age.[91] The placing of the age line at puberty – 12 years - served to highlight the age at which girls were presumed capable of procreation.[92] High describes this use of a single consent age as a 'legal fiction' given that the transition from childhood to adulthood is a continuum rather than a switch.[93] At the time; however, statutory rape laws served two intertwined purposes: the more blatant being the protection of children from sexual exploitation and the more subtle role of securing male control over female sexuality.[94]

The law's special attitude towards children has carried on since the concept of the "rule of sevens" which recognized gradual acquisition of competence by children and protected any child below seven years of age from liability for their actions.[95] This protective attitude is evident in the framing of statutory rape laws and the assumption that minors lack the capacity to consent.[96] Sexual activity with a minor is presumed to be the result of coercion, manipulation or deception regardless of circumstance.[97]

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[91] Leslie Y and Tenzer G, '#MeeToo, Statutory Rape Laws and the Persistence of Gender Stereotypes' 2019(1) *Utah Law Review,* 2019, 125.
[92] Leslie Y and Tenzer G, '#MeeToo, Statutory Rape Laws and the Persistence of Gender Stereotypes', 125.
[93] High A, 'Good, Bad and Wrongful Juvenile Sex: Rethinking the Use of Statutory Rape Laws Against the Protected Class' 69 *Arkansas Law Review,* 2016, 8.
[94] Oberman M, 'Girls in the Master's House: Of Protection, Patriarchy and the Potential for Using the Masters' Tools to Reconfigure Statutory Rape Laws' 50(3) *DePaul Law Review,* 2001, 800.
[95] Oberman M, 'Girls in the Master's House: Of Protection, Patriarchy and the Potential for Using the Masters' Tools to Reconfigure Statutory Rape Laws' 802.
[96] Goodwin M, 'Law's Limit: Regulating Statutory Rape Law' 2013(2) *Wisconsin Law Review,* 2013, 502.
[97] Goodwin M, 'Law's Limit: Regulating Statutory Rape Law', 489.

Aside from the inherent supposition of incapacity, the gendered nature of early statutory rape laws has also contributed to the current predicament where males find themselves disproportionately being prosecuted for cases involving consenting minors.[98] Until the 1970s, only females could be victims of statutory rape.[99] The protection of young females also served to protect male dominance over female sexuality; chastity was an object of socio-economic and personal value and it was considered theft to have intercourse with an unwed girl without her father's permission.[100] This was reflected as well in the traditional common law defence of promiscuity which allowed a defendant to escape liability by showing that a victim was already sexually active prior to their encounter.[101] Those who supported such gendered legislative protection noted that the consequences of adolescent sexual activity applied unevenly between males and females and to the detriment of females; especially during adolescence when they are more susceptible to coercion.[102]

The gendered nature of the laws also had an economic perspective of combating out of wedlock babies.[103] Adolescent females who bore children were considered less likely to finish schooling, less likely to get married, less likely to adequately sustain their families and would most likely rely on welfare throughout their lives.[104] In *Michael M v Superior Court of Sonoma City*[105] the Supreme Court upheld existing gendered statutory rape laws against an equal protection challenge noting that the law served to curb teenage pregnancy. Justifying the gendered law, Blackmun J noted that girls had a natural disincentive against having sex – the risk of pregnancy – whereas boys risked nothing; consequently, the law sought to provide such a disincentive using legal sanctions.[106]

Second wave feminists spearheaded the call to reform statutory rape laws towards gender-neutral laws in the hope that this would allow for equal recognition of male and female sexual

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[98] Okwatch J, 'The Problematic Jurisprudence on the Law of Defilement of Adolescents in Kenya', 48.
[99] Leslie Y and Tenzer G, '#MeeToo, Statutory Rape Laws and the Persistence of Gender Stereotypes', 117.
[100] Oberman M, 'Girls in the Master's House: Of Protection, Patriarchy and the Potential for Using the Masters' Tools to Reconfigure Statutory Rape Laws', 802. See also, Goodwin M, 'Law's Limit: Regulating Statutory Rape Law', 494.
[101] Oberman M, 'Girls in the Master's House: Of Protection, Patriarchy and the Potential for Using the Masters' Tools to Reconfigure Statutory Rape Laws', 805.
[102] Goodwin M, 'Law's Limit: Regulating Statutory Rape Law', 514.
[103] Oberman M, 'Girls in the Master's House: Of Protection, Patriarchy and the Potential for Using the Masters' Tools to Reconfigure Statutory Rape Laws', 807.
[104] Oberman M, 'Girls in the Master's House: Of Protection, Patriarchy and the Potential for Using the Masters' Tools to Reconfigure Statutory Rape Laws', 809.
[105] *Michael M v Superior Court of Sonoma City* (1981), The Supreme Court of the United States.
[106] Oberman M, 'Girls in the Master's House: Of Protection, Patriarchy and the Potential for Using the Masters' Tools to Reconfigure Statutory Rape Laws', 805.

agency and, reduce the stigma of women as predisposed victims.[107] The objective was to formulate a law that allowed for female sexuality but still offered ample protection for minor females against adult sexual exploitation.[108] For the factors that disproportionately impacted on girls, the call was for more nuanced discourse that did not turn boys into scapegoats.[109] Key critiques of gendered statutory rape laws were that they violated the sexual freedom and privacy rights of young females as well as violating their right to equality by offering special yet unwarranted protection not similarly provided for young males.[110] At the time of calling for reform, teen involvement in sexual promiscuity was on the rise and the disincentive apparently offered by the retributive statutory rape laws was not visible as teens did not view themselves as criminals.[111] The economic cost of subsequent life-long surveillance of convicted teenagers was also a subject of concern. [112] Consequently, criminal law seemed not to produce superior outcomes either economically or socially because of the attendant prosecution and incarceration costs and the impact it has on the family unit.[113]

Ultimately, gendered statutory rape laws were struck down in favour of gender-neutral laws partly out of the recognition that older women could also exploit young males as well as the rise of same-sex relations.[114] This move, however, has been little more than semantics largely because gender-neutral laws had the unintended consequence of vesting in the prosecutor the burden of allocating victim and perpetrator.[115] Unsurprisingly, much of the brunt has been borne by the male partner also due to the social attitudes towards male aggressiveness and female passivity in the context of sexuality.[116] Sometimes the labelled "victims" are coerced to aid in the prosecution of their partner.[117] Prosecutorial discretion is not adequate because of the potential risk for gender bias against males that creates a level of uncertainty, equal protection concerns.[118]

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[107] Leslie Y and Tenzer G, '#MeeToo, Statutory Rape Laws and the Persistence of Gender Stereotypes', 117.
[108] Oberman M, 'Girls in the Master's House: Of Protection, Patriarchy and the Potential for Using the Masters' Tools to Reconfigure Statutory Rape Laws', 807.
[109] Goodwin M, 'Law's Limit: Regulating Statutory Rape Law', 515.
[110] Olsen F, 'Statutory Rape: A Feminist Critique of Rights Analysis' 63(3) *Texas Law Review*, 1984, 404.
[111] Goodwin M, 'Law's Limit: Regulating Statutory Rape Law', 529.
[112] Goodwin M, 'Law's Limit: Regulating Statutory Rape Law', 531.
[113] Goodwin M, 'Law's Limit: Regulating Statutory Rape Law', 492.
[114] Leslie Y and Tenzer G, '#MeeToo, Statutory Rape Laws and the Persistence of Gender Stereotypes', 127.
[115] Leslie Y and Tenzer G, '#MeeToo, Statutory Rape Laws and the Persistence of Gender Stereotypes', 121.
[116] Allen M, 'Gender-Neutral Statutory Rape Laws: Legal Fictions Disguised as Remedies to Male Child Exploitation' 80(1) *University of Detroit Mercy Law Review*, 2002, 116.
[117] James S, 'Rome and Juliet were Sex Offenders: An Analysis of the Age of Consent and a Call for Reform' 78(1) *UKMC Law Review*, 2009, 248.
[118] High A, 'Good, Bad and Wrongful Juvenile Sex: Rethinking the Use of Statutory Rape Laws Against the Protected Class', 20.

Furthermore, the strict liability nature of this crime further aggravates the gender bias against males. This strict liability nature has aided courts and prosecutors in their legal administration of the law as they are not required to delve into the particularities of each case; they only need to determine the age of the female and whether the defendant engaged in sexual activity with her.[119] This sort of framing leaves room only for technical assessment rather than for critical evaluation of circumstances.[120] It also makes the prosecution work easier in comparison to typical rape cases where a lack of consent has to be proved.[121] Courts have sometimes sought to mitigate this strict liability aspect by considering evidence of a victim's provocativeness thereby nullifying the protection offered on the basis that the law was meant to protect those who might not be aware of the repercussions of sexual activity and not sexually experienced adolescents.[122] Such an approach not only reduces the deterrent effect of these laws but also leads to an understanding that a victim's actions are an appropriate basis for leniency.[123]

Age-differential laws have been proposed as a possible solution to this predicament seeing as they provide a limitation against prosecutorial discretion by removing the potential for charging either of the consenting partners.[124] This could also be coupled with a similar graduated statutory scheme premised on the nature of sexual conduct.[125] Such provisions, despite maintaining the strict liability nature would provide much needed protection against discretionary prosecution of adolescents involved in consensual sexual activity.

2.2. The Kenyan Regime

Kenyan courts have increasingly been faced with statutory rape cases where both the accused and the victim are below the age of consent. Kenyan law defines statutory rape as any act that causes penetration with a child.[126] A child is subsequently defined in the Children Act as a human being under the age of eighteen years.[127] The SOA employs a graduated scale of punishment whose severity is dependent on how young the victim is. The Act stipulates a life sentence where the victim is below eleven years;[128] a term of not less than twenty years where

[119] Guerinna B, 'Mitigating Punishment for Statutory Rape' 65(4) *University of Chicago Law Review*, 1998, 1253.
[120] Goodwin M, 'Law's Limit: Regulating Statutory Rape Law', 483.
[121] Goodwin M, 'Law's Limit: Regulating Statutory Rape Law', 510.
[122] Guerinna B, 'Mitigating Punishment for Statutory Rape', 1258.
[123] Guerinna B, 'Mitigating Punishment for Statutory Rape', 1271.
[124] Leslie Y and Tenzer G, '#MeeToo, Statutory Rape Laws and the Persistence of Gender Stereotypes', 122.
[125] Guerinna B, 'Mitigating Punishment for Statutory Rape', 1255.
[126] Section 8, *Sexual Offences Act* (Act No. 3 of 2006).
[127] Section 2, *Children Act* (Act No. 12 of 2012).
[128] Section 8(2), *Sexual Offences Act* (Act No. 3 of 2006).

the victim is between twelve and fifteen years[129] and not less than fifteen years where the victim is between sixteen and eighteen years old.[130] The sections are couched in mandatory terms which for a long time was binding on the courts. This position has changed, however, following the Supreme Court decision that found legislative provisions that provided for mandatory sentences to be unconstitutional as the right to fair trial included the sentencing phase.[131] The court noted that denying accused persons the opportunity to mitigate their sentences deprived them of their dignity by failing to acknowledge individual circumstances of the crime.[132]

Section 8(5) of the SOA provides for two defences to a charge of defilement. The first defence is where the accused claims that the child deceived them into believing that they were of age.[133] The other possible defence is if that an accused person reasonably believed that the alleged victim was over the age of majority.[134] The latter defence requires judicial determination having regard to all the circumstances and steps that the accused took to ascertain the age of the child.[135] The defences afforded under the Act do not apply where the accused is related to the child within the prohibited degree of blood affinity.[136]

Under the Act, where the accused person is below eighteen years of age, courts are to sentence in accordance with the provisions of the Children Act and the Borstal Institutions Act.[137] The Children Act expressly recognises that the best interests of the child shall be of primary consideration for any private or public body that undertakes an action concerning children.[138] These interests are to be taken as the first and paramount consideration and are to be construed in a manner that safeguards and promotes child welfare and secures such guidance and correction for the child as is necessary for their welfare and public interest.[139] Section 184 of the Act grants the Children's Court jurisdiction to try child offenders for any offence except murder or an offence where the child is charged together with an adult.[140] Section 185 gives

[129] Section 8(3), *Sexual Offences Act* (Act No. 3 of 2006).
[130] Section 8(4), *Sexual Offences Act* (Act No. 3 of 2006).
[131] *Francis Karioko Muruatetu & Another v Republic* (2017) eKLR.
[132] *Francis Karioko Muruatetu & Another v Republic* (2017) eKLR, para 53.
[133] Section 8(5)(a), *Sexual Offences Act* (Act No. 3 of 2006).
[134] Section 8(5)(b), *Sexual Offences Act* (Act No. 3 of 2006).
[135] Section 8(6), *Sexual Offences Act* (Act No. 3 of 2006).
[136] Section 8(8), *Sexual Offences Act* (Act No. 3 of 2006).
[137] Section 8(7), *Sexual Offences Act* (Act No. 3 of 2006).
[138] Section 4(2), *Children Act* (Act No. 12 of 2012).
[139] Section 4(3), *Children Act* (Act No. 12 of 2012).
[140] Section 184, *Children Act* (Act No. 12 of 2012).

other courts the discretion to remit suitable cases to the Children's Court for adjudication.[141] As shall be seen later, this discretion is often not utilised in cases of consenting minors.

The Act further offers for restriction on punishment and provides that no child shall be ordered to imprisonment or to a detention facility.[142] It further expressly shields children from the death penalty and prohibits the sentencing of a child below ten years of age to rehabilitation schools.[143] This section, therefore, should shield consenting minors and adolescents from any of the sanctions provided for under Section 8 of the SOA.

Furthermore, the Borstal Institutions Act provides that before sentencing a youthful offender to a borstal institution, the court should take into consideration the character and previous conduct of the accused as well as the circumstances of the offence and whether such committal would be expedient for their reformation.[144] This is in line with the provisions of Article 53(1)(f) of the Constitution which stipulates that children have a right not to be detained except as a matter of last resort, and, if so, to be held for the shortest appropriate period, separate from adults and in conditions that take into account their age and sex.[145]

As the subsequent cases show, however, adolescents have continued to bear the brunt of the harsh sanctions imposed under the SOA with little indication of whether their best interests were considered. The cases also illustrate how courts and prosecutors have continued to propagate the misguided gender bias of male partners being the offenders.[146]

In *G.O v Republic*[147] the High Court in Siaya had to contend with an appeal against a decision where the accused had been convicted to fifteen years imprisonment n a charge of defilement. At the time of his trial, the accused was 16 years of age and was accused of having defiled a girl aged 17. Furthermore, the accused was not availed with any form of legal representation at trial. In his decision to quash the conviction, Justice Makau making reference to the Children Act provisions on punishment termed the imposition of a 15 year sentence as illegal for violating Article 53 of the Constitution and the Children Act.[148] Furthermore, he noted that the decision to charge only the male partner as opposed to charging both minors was indicative of

[141] Section 185, *Children Act* (Act No. 12 of 2012).
[142] Section 190, *Children Act* (Act No. 12 of 2012).
[143] Sections 190(2) and (3), *Children Act* (Act No. 12 of 2012).
[144] Section 5, *Borstal Institutions Act* (Act No. 23 of 1983).
[145] Article 53(1)(f), *Constitution of Kenya* (2010).
[146] Okwatch J, 'The Problematic Jurisprudence on the Law of Defilement of Adolescents in Kenya', 48.
[147] *G.O v Republic* (2017) eKLR.
[148] *G.O v Republic* (2017) eKLR.

discrimination based on sex which violated the Appellant's right to equal protection of the law enshrined in Article 27 of the Constitution.[149]

A similar decision was reached in the case of *POO (A minor) v Director of Public Prosecutions & Another*[150] where the petitioner sought to have on-going proceedings in which he was charged with defilement quashed because of several blatant violations of his rights. The court was made aware that it was only after the complainant and the clinical officer had testified that the accused was afforded legal representation. It also emerged that the accused was being held in an adult prison and that despite having notified the court that he was a minor and being issued with an age-assessment order, the same was violated and he continued being held in the same facility for almost a year. The court found that the decision to only charge the boy was discriminatory and proceeded to terminate the proceedings and award damages worth Ksh. 200,000 for the violation of rights.

In *CKW v Attorney General & Another*[151] the court was faced with a petition seeking a declaration that Sections 8(1) and 11(1) of the SOA were invalid to the extent that they criminalized consensual sexual relations among adolescents. In response to the issue of why only the male partner was being prosecuted the Attorney General noted that it was within the purview of the prosecution to bring charges against either or both minors. The Prosecution claimed that they did not charge the girl because the accused had not lodged a complaint against her. The court disagreed with this noting that the lodging of a complaint was not an element of the crime and did not negate the fact that the boy had also been defiled. Despite this pronouncement, they did not explicitly find the decision to be discriminatory as they required the accused to adduce evidence of the same. Ultimately, however, the court found that Section 8(1) and 11(1) did not discriminate against adolescents as its main purpose was to offer special protection to minors against sexual exploitation.

Some courts have opted to turn to mitigation tactics to mitigate the harshness of following an absolutist approach to the provisions on defilement. It should be noted, however, that these cases unlike the previous ones involved adults accused of having had sexual relations with adolescents. In *Martin Charo v Republic*[152] the court opined that defilement should not be limited to age and penetration but should also consider the complainant's conduct in

[149] Article 27(1) and (4), *Constitution of Kenya* (2010).
[150] *POO (A minor) v Director of Public Prosecutions & Another* (2017) eKLR.
[151] *CKW v Attorney General & Another* (2014) eKLR.
[152] *Martin Charo v Republic* (2016) eKLR.

determining whether defilement occurred. In this decision, the court quashed a defilement conviction on the reasoning that because the complainant had sought out the accused for sex and had enjoyed the intercourse then that could not amount to defilement.[153]

In *Omus Kiringi Chivatsi v Republic*[154] the court also dug into the conduct of the complainant as a mitigating factor to quash a defilement conviction. There the court opined that where it arose that the complainant enjoyed the sexual relations then an accused person ought to be given the benefit of doubt before being convicted of defilement. The court noted that since the complainant enjoyed the sexual relations and went seeking for it numerous times then she was behaving like an adult and should be treated so.

In 2019, the Court of Appeal in *Eliud Waweru Wambui v Republic*[155] overturned a fifteen year conviction sentence – ten years of which had already been served. The accused had been convicted for having defiled a girl who was then 7 months shy of being an adult. In their decision, the court took cognizance of the reality of adolescents increasingly engaging in sexual relations noting that while they may legally not have reached the age of majority they had reached the age of discretion and were increasingly capable of making decisions about their lives and their bodies. They also noted that maturity is a process and not a series of disjointed leaps. The court called for candid discussion on the challenges regarding the application of the statute as regards consenting minors.

The above cases illustrate the potential harms that arise from an absolutist application of the defilement provisions in cases involving consenting minors. Aside from long prison stints, consenting minors run the risk of being branded as dangerous sex offenders under Section 39(1)(c) and being enlisted into sex offender register – an entry which may have serious repercussions even after having served their sentences including restricting employment opportunities in particular fields and restricting the visitation of specified places.[156]

The framing of the offence of defilement as an offence where a person commits an act which causes penetration with a child is innovative.[157] Despite the gender neutral framing of the law,

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[153] *Martin Charo v Republic* (2016) eKLR.
[154] *Omus Kiringi Chivatsi* (2017) eKLR.
[155] *Eliud Waweru Wambui v Republic* (2019) eKLR.
[156] Section 39, *Sexual Offences Act* (Act No. 3 of 2006). See also High A, 'Good, Bad and Wrongful Juvenile Sex: Rethinking the Use of Statutory Rape Laws Against the Protected Class', 17.
[157] Kamau W, 'Legal Treatment of Consent in Sexual Offences in Kenya' Equality Effect, 2013, 12 - https://www.theequalityeffect.org/pdfs/ConsentPaperKenya.pdf on 20 July 2021. Dr Kamau notes a similar phrasing of the offence of rape which recognises it may be committed also by females against males and even against persons of the same sex.

the cases discussed above show that adolescent boys bear the most brunt of prosecution in such cases. Kenya has no statutory requirement that instructs prosecutors to prosecute both adolescents; a situation which would produce an absurd result regardless.[158] In 2019, the ODPP released a Diversion Policy through which it envisions the possibility of resolving criminal cases without resorting to full judicial proceedings.[159]

The Policy notes that all child all child offenders regardless of the offence committed must be considered for diversion.[160] For children charged with felony offences the ODPP Diversion Guidelines note that they may be subjected to the exceptional circumstances test to determine whether their case will be subject to diversion.[161] The decision to divert a criminal case is taken by the Public Prosecutor having regard to the offender's circumstances, the proportionality of conviction to the offence, the victim's views on diversion and the investigating officer's views on diverting the case.[162] The Diversion Policy and Guidelines are likely to lessen the number of adolescents being prosecuted for consensual adolescent sexual activity and the very least could help reduce the apparent gender bias of prosecution. The requirement to consider the victim's view on diversion and the circumstances of the offence are particularly useful in this regard seeing as the circumstances differ greatly from situations that involve exploitative relations involving coercion, manipulation or exploitation of vulnerable individuals.[163] This new model allows for more emphasis on rehabilitation of the consenting adolescents rather than subjecting them to the more adverse retributive system which ultimately leaves a permanent record of offence on individuals viewed as the future of society.[164]

[158] Okwatch J, 'The Problematic Jurisprudence on the Law of Defilement of Adolescents in Kenya', 58.
[159] The Office of the Director of Public Prosecution, *Diversion Policy,* 2019, 1. The policy envisions a range of alternatives from a simple caution to enrolment in a structured diversion programme.
[160] The Office of the Director of Public Prosecution, *Diversion Policy,* 2019, 5.
[161] The Office of the Director of Public Prosecution, *Diversion Guidelines and Explanatory Notes,* 2019, 4.
[162] The Office of the Director of Public Prosecution, *Diversion Policy,* 2019, 5.
[163] High A, 'Good, Bad and Wrongful Juvenile Sex: Rethinking the Use of Statutory Rape Laws Against the Protected Class', 9.
[164] Okwatch J, 'The Problematic Jurisprudence on the Law of Defilement of Adolescents in Kenya', 63.

Chapter Three: Romeo and Juliet Exceptions and the Protection of Consenting Adolescents

This chapter seeks to analyse Romeo and Juliet exceptions to statutory rape laws and the subsequent protection that such provisions avail to minors particularly those engaging in consensual sexual activity. Focus will be directed towards the age-gap provision scheme although schemes that avail affirmative defences to consenting adolescents will also be discussed. Furthermore, the chapter will highlight some of the criticisms proffered against such reforms.

3.1. Adolescents and Sexual Experimentation

Adolescence is a difficult time; not just for the adolescent but for society as well as it seeks to promote the individual into a productive and socially acceptable member of society. It is a period that imposes new demands on the individual as they progress towards relative independence.[165] Unfortunately, this period often involves the initiation of behaviours that could lead to illness and possibly premature death.[166] Some scholars speculate that an adolescent's risk of dying from chosen risky behaviour during this phase increases by about 200%.[167]

Sexual experimentation is one of many risk behaviours that adolescents often engage in. A recent study found that 15% of women aged 20-49 had their first sexual debut by the age of 15 while 50% had initiated intercourse by the time they were legally coming of age.[168] Contrastingly, 22% of men reported having their sexual debut by age 15 while 56% of them had had their first sexual encounter by the time they were 18.[169] The rising number of adolescents engaging in sexual activities is not a novel realisation. A 1980 study in Kenya revealed that induced abortions were the leading cause of admission at Kenyatta National Hospital's gynaecology wards with over 60% of patients being below 20 years of age.[170] These figures reflect a change in social attitudes and norms towards teen sexuality with more and

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[165] Casey BJ and Caudle K, 'The Teenage Brain: Self Control' 22(2) *Current Direction in Psychological Science,* 2013, 83.
[166] Okigbo C, Kabiru C, Munah J, and Mojola S, 'Influence of parental factors on adolescent transition to first sexual intercourse in Nairobi Kenya: A longitudinal study' *Reproductive Health,* 2015, 2.
[167] Casey BJ and Caudle K, 'The Teenage Brain: Self Control', 82.
[168] Kenya National Bureau of Statistics, *Kenya Demographic and Health Survey,* 2014, 55.
[169] Kenya National Bureau of Statistics, *Kenya Demographic and Health Survey,* 2014, 55.
[170] Ajayi A, Marangu L, and Miller J, 'Adolescent Sexuality and Fertility in Kenya: A Survey of Knowledge, Perceptions and Practice' 22(4) *Studies in Family Planning,* 1991, 205.

more teenagers becoming sexually active at younger years than before. Today's society is more open to policies like availing school going adolescents with comprehensive sexual education while grappling with a media that has romanticized teenage sexuality.[171] This situation calls into question the utility of statutory rape laws that continue to criminalize consensual sexual activity between adolescents.[172]

Various factors contribute to the sexual risk behaviour patterns often associated with adolescents. The most common explanation is their psychosocial immaturity which ultimately affects their decision making.[173] Adolescent susceptibility to factors such as peer pressure demonstrate how they are more likely to respond adversely to external pressures which an adult would be expected to resist.[174] Even where adolescents' reasoning capacity can be demonstrated to be almost fully developed, their capacity to respond to emotional and stressful real-life situations is often questionable.[175] Often, an adolescent's cost-benefit analysis of their actions differs from what is expected of adults.[176] Additionally, adolescents tend to be more short sighted when weighing the possible outcomes of an action; often placing more weight on positive possibilities than potential negative outcomes. As Casey and Caudle note, adolescents often do not subscribe to the concept of delayed gratification which is the hallmark of self-regulation.[177]

The level or scope of socialization to which adolescents may also affect the development of risky behaviours.[178] Adolescents brought up within a narrow social context have a clear set of beliefs of right and wrong taught to them and are often more aware of social expectations and responsibilities.[179] In this context, parents and society at large play a big role in monitoring and regulating the lives and conduct of younger members of society. Consequently, they are less likely to develop deviant behaviour and, in the event of such development, less variance of

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[171] Flynn D, 'All the Kids are Doing It: The Unconstitutionality of Enforcing Statutory Rape Laws against Children and Teenagers' 47(3) *New England Law Review,* 2013, 696.
[172] Tover J, 'For Never was a Story of More Woe than this of Juliet and Her Romeo – An Analysis of the Unexpected Consequences of Florida's Statutory Rape Laws and its Flawed Romeo and Juliet Exception' 38(1) *Nova Law Review,* 2013, 167.
[173] Steinberg L, and Scott E, 'Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility and the Juvenile Death Penalty' 58(12) *American Psychological Association,* 2003, 1012.
[174] Steinberg L, and Scott E, 'Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility and the Juvenile Death Penalty', 1014.
[175] Scott E, and Steinberg L, 'Adolescent Development and the Regulation of Youth Crime' 79 *Temple Law Review,* 2006, 20.
[176] Scott E, and Steinberg L, 'Adolescent Development and the Regulation of Youth Crime', 20.
[177] Casey BJ and Caudle K, 'The Teenage Brain: Self Control', 85.
[178] Arnett J, 'Reckless Behaviour in Adolescents: A Developmental Perspective' 12 *Developmental Review,* 1992, 357.
[179] Arnett J, 'Reckless Behaviour in Adolescents: A Developmental Perspective', 357.

deviant behaviour.[180] Studies indicate that adolescent boys have earlier sexual debuts in comparison to their female counterparts. This early onset could be because of society's acceptance of male sexual adventure as opposed to its often-punitive response to similar female adventurism.[181] Parental supervision may also influence the onset of sexual activity among adolescents.[182] Teens with parents who monitor their whereabouts and friendships are less likely to initiate sexual activity at younger ages. This relationship – between parental supervision and onset of sexual debut – is not always linear.[183] Some studies report a curvilinear effect with the lowest rate of sexual activity being among adolescents with moderately strict parents with those with extremely strict and lenient parents displaying higher rates.[184] Adolescents socio-economic context also influences the onset of sexual activities among teens. Youths in high poverty settings demonstrate higher propensity for sexual promiscuity and earlier sexual debuts.[185] In these areas, period poverty sometimes forces adolescent girls to exchange sex for money to cater for basic needs like sanitary pads.[186] This last scenario, however, is beyond the consensual peer to peer relationships that are the focus of this paper.

3.2. Africa and Adolescent Sexuality

Adolescent sexuality has always been an issue of concern in Africa where most communities sought to reserve sexual behaviour for couples.[187] Communities often relied on initiation schools to induct adolescents on matters of sexuality, fertility, and parenthood.[188] Among the Zulu people, youths were engaged in pretend marriages where they learned about relationships and were allowed to practice limited forms of intercourse without full sexual penetration.[189]

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[180] Arnett J, 'Reckless Behaviour in Adolescents: A Developmental Perspective', 357.
[181] Zabin L and Karungari K, 'The Correlates of Premarital Sexual Activities Among School Aged Adolescents in Kenya' 19(3) *International Family Planning Perspective,* 1993, 96.
[182] Zabin L and Karungari K, 'The Correlates of Premarital Sexual Activities Among School Aged Adolescents in Kenya', 92.
[183] Zabin L and Karungari K, 'The Correlates of Premarital Sexual Activities Among School Aged Adolescents in Kenya', 93.
[184] Zabin L and Karungari K, 'The Correlates of Premarital Sexual Activities Among School Aged Adolescents in Kenya', 93.
[185] Okigbo C, Kabiru C, Munah J, and Mojola S, 'Influence of parental factors on adolescent transition to first sexual intercourse in Nairobi Kenya: A longitudinal study', 2.
[186] Oppenheim M, 'Kenyan girls forced into sex in exchange for sanitary products' Independent, 5 July 2019 - < https://www.independent.co.uk/news/world/africa/kenya-girls-sex-sanitary-products-pads-period-poverty-a8533081.html> on 9 December 2020.
[187] Kioli F, Were A and Onkware K, 'Traditional perspectives and control mechanisms of adolescent sexual behaviour in Kenya' 4(1) *International Journal of Sociology and Anthropology,* 2012, 2.
[188] Mudhovozi P, Ramarumo M, and Sodi T, 'Adolescent Sexuality and Culture: South African Mothers' Perspective' 16(2) *African Sociological Review,* 2012, 120.
[189] Mudhovozi P, Ramarumo M, and Sodi T, 'Adolescent Sexuality and Culture: South African Mothers' Perspective', 121.

Such practices were geared towards the development of sexual discipline and self-regulation as preparation for adulthood. Cases of pre-marital pregnancies were rarely witnessed within communities as sexual discipline was the subject of elaborate parental and societal control.[190]

Majority of the practices in the traditional African setting were focused on the regulation of female sexuality as opposed to both genders.[191] This was largely due to the patriarchal settings into which females were born where the male gender was dominant.[192] Practices such as clitoridectomies were premised on the belief that they reduced sexual desire among girls and therefore reduced the possibility of sexual promiscuity.[193] Child marriages were also a demonstration of male dominance over female sexuality as it sought to underscore the place of women as chattels.[194] Today, many of these practices are regarded as violent and are legally proscribed in most African countries.

Today, sexuality has become a veiled topic of discourse. Parents today find it difficult to talk about sex with their children which has pushed them to seek information elsewhere.[195] Most parents who speak with their children often do so by use of threats or as a subject of fear or shame.[196] Conversely, some parents often have the discussion after their child's first sexual encounter.[197] The discrepancy noted in contemporary adolescent behaviour could be explained by collapse of traditional moral codes and control mechanisms in the context of an over-sexualised media.[198] The fear to talk about sexuality could be due to a lack of information given that many of them probably did not have the same discourses with their own parents and, therefore, they consider themselves ill-equipped to have the discussion with their own children.[199] Some believe that keeping silent on the subject would reduce the chance of

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[190] Kioli F, Were A and Onkware K, 'Traditional perspectives and control mechanisms of adolescent sexual behaviour in Kenya', 2.
[191] Kioli F, Were A and Onkware K, 'Traditional perspectives and control mechanisms of adolescent sexual behaviour in Kenya', 6.
[192] Bamgbose O, 'Legal and Cultural Approaches to Sexual Matters in Africa: The Cry of the Adolescent Girl' 10(2) *University of Miami International and Comparative Law Review,* 2001, 129.
[193] Kioli F, Were A and Onkware K, 'Traditional perspectives and control mechanisms of adolescent sexual behaviour in Kenya', 4.
[194] Bamgbose O, 'Legal and Cultural Approaches to Sexual Matters in Africa: The Cry of the Adolescent Girl', 129.
[195] Mudhovozi P, Ramarumo M, and Sodi T, 'Adolescent Sexuality and Culture: South African Mothers' Perspective', 119.
[196] Mudhovozi P, Ramarumo M, and Sodi T, 'Adolescent Sexuality and Culture: South African Mothers' Perspective', 121.
[197] Okigbo C, Kabiru C, Munah J, and Mojola S, 'Influence of parental factors on adolescent transition to first sexual intercourse in Nairobi Kenya: A longitudinal study', 3.
[198] Kioli F, Were A and Onkware K, 'Traditional perspectives and control mechanisms of adolescent sexual behaviour in Kenya', 6.
[199] Mudhovozi P, Ramarumo M, and Sodi T, 'Adolescent Sexuality and Culture: South African Mothers' Perspective', 135.

experimentation.[200] The opposite appears to be true. Research indicates that adolescents whose parents openly discuss sexuality with their children often delay their sexual debut.[201] Adolescent sexual behaviours, therefore, often is the product of cultural orientation with parents' sexual values exerting significant influence on their own attitudes towards the issue.[202]

3.3. Legislating for Modern-Day Romeo and Juliet

Romeo and Juliet exceptions are provisions built into statutory rape laws with the purpose of affording protection to minors who willingly and voluntarily engage in sexual conduct by either decriminalizing the conduct or reducing its severity.[203] The term 'Romeo and Juliet' is used to encompass provisions that introduce age-gap provisions as well as provisions that provide a defendant with affirmative defences or mitigating factors without necessarily decriminalizing the conduct.[204] Ultimately, the effect of such provisions is to make statutory rape less of a strict liability offence and one of sexual violence requiring proof of coercion or exploitation.[205]

3.3.1. Age-gap Provision Model

An age-gap provision model is one where the law creates brackets for which consensual sexual activity between parties within the same age-bracket is decriminalized. The age-gap adopted are left to the discretion of the legislator and can be suitably crafted to suit individual social contexts. The adoption of age-gap reforms eliminates strict liability for certain sexual activity between minors within defined age differentials while leaving room for normal adolescent sexuality and autonomy.[206] The scheme shifts legal focus from restricting all adolescent sex to the prevention of potentially exploitative sexual relationships whilst still using age as the imperfect proxy of measure for inequality or coercion.[207] This scheme operates on the understanding that the power differential – responsible for the presumed coercion - that exists

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[200] Mudhovozi P, Ramarumo M, and Sodi T, 'Adolescent Sexuality and Culture: South African Mothers' Perspective', 121.
[201] Okigbo C, Kabiru C, Munah J, and Mojola S, 'Influence of parental factors on adolescent transition to first sexual intercourse in Nairobi Kenya: A longitudinal study', 9.
[202] Mudhovozi P, Ramarumo M, and Sodi T, 'Adolescent Sexuality and Culture: South African Mothers' Perspective', 136.
[203] Dumond K, 'Cast Me Not Away: The Plight of Modern Day Romeo and Juliet' 36(3) *Quinnipiac Law Review,* 2018, 463.
[204] Kern J, 'Trends in Teen Sex are Changing but Are Minnesota's Romeo and Juliet Laws' 39(5) *William Mitchell Law Review,* 2013, 1613.
[205] High A, 'Good, Bad and Wrongful Juvenile Sex: Rethinking the Use of Statutory Rape Laws Against the Protected Class', 832.
[206] High A, 'Good, Bad and Wrongful Juvenile Sex: Rethinking the Use of Statutory Rape Laws Against the Protected Class', 794.
[207] High A, 'Good, Bad and Wrongful Juvenile Sex: Rethinking the Use of Statutory Rape Laws Against the Protected Class', 795.

in the case of an adult-minor relationship is less prevalent where the relationship involves adolescents close in age.[208] The lack of power-play positioning in these relationships therefore reduces the risk of potential coercion or exploitation.[209] Using this approach, therefore, sexual relations cutting across defined age brackets would be criminalised just as the adult-minor relationship is currently criminalised.[210] For sexual relations within the age-brackets, however, strict liability would not apply consequently requiring exploitation or non-consent to be proved as in the case of common sexual assault crimes like rape.[211]

Similar to current statutory rape laws, age-gap provisions encompass a minimum age of victim provision that incapacitates children below the set age from being able to consent sexual activity even with agemates.[212] The minimum age recognises the existence of adolescent sexuality whilst acknowledging the risk of significant exacerbation of psychological and physical harm likely to be borne by children below a certain age from sexual encounters.[213] The minimum age should be one that protects the most vulnerable group while still reflecting society's judgement of evolving morality.[214] A similar approach is taken in the application of the 'rule of sevens' in the determination of incompetency to make decisions in commercial relations.[215] The minimum age of victim is often set to coincide with the onset of puberty and sexual activity of subsequent years is then regulated by the age-brackets adopted. The age-brackets could take into consideration currently existing interactions created by social institutions such as high schools and universities.[216] Most of these institutions engage adolescents within a four-year age-difference and considers them competent enough to interact on a regular basis; albeit with close monitoring and often gender segregation at the high school

[208] Allen T, 'Gender Neutral Statutory Rape Laws: Legal Fictions Designed as Remedies to Male Child Exploitation', 122.
[209] Flynn D, 'All the Kids are Doing It: The Unconstitutionality of Enforcing Statutory Rape Laws against Children and Teenagers', 688.
[210] High A, 'Good, Bad and Wrongful Juvenile Sex: Rethinking the Use of Statutory Rape Laws Against the Protected Class', 826.
[211] High A, 'Good, Bad and Wrongful Juvenile Sex: Rethinking the Use of Statutory Rape Laws Against the Protected Class', 826.
[212] Kern J, 'Trends in Teen Sex are Changing but Are Minnesota's Romeo and Juliet Laws', 1610.
[213] Kitrosser H, 'Meaningful Consent: Towards a New Generation of Statutory Rape Laws', 322.
[214] Franklin J, 'Where Art Thou Privacy: Expanding Privacy Rights of Minors in Regard to Consensual Sex: Statutory Rape Laws and the Need for a Romeo and Juliet Exception in Illinois' 46(1) *John Marshall Law Review,* 2012, 324.
[215] Franklin J, 'Where Art Thou Privacy: Expanding Privacy Rights of Minors in Regard to Consensual Sex: Statutory Rape Laws and the Need for a Romeo and Juliet Exception in Illinois', 324.
[216] Flynn D, 'All the Kids are Doing It: The Unconstitutionality of Enforcing Statutory Rape Laws against Children and Teenagers', 712.

level. The four-year age gap, however, could serve as the basis for the institution of age-gap provisions into statutory rape laws.

In addition to the adoption of an appropriate minimum age and age-disparity, age-gap models can further be calibrated to allow only for specific types of conduct based on the age of the parties. Younger adolescents could be allowed to engage in modest acts of sexual conduct but barred from penetrative sexual intercourse. As they advance in age, less and less restrictions are applied with older adolescents being allowed greater autonomy to engage in penetrative sex. This allows for a more graduated lessening of restrictions and increased autonomy would allow for a smoother transition, development of self-discipline and more active participation of the adolescent in their development.[217] It also gives society ample time to educate the adolescents on matters sexuality in preparation for the time when they eventually become sexually autonomous. Where the objective of adolescence is to grow into an independent member of society, this model provides for the possibility to demonstrate such acquired freedom and responsibility which is essential part of development.[218]

3.3.2. Affirmative Defences Model

Aside from the age-gap provision model, the affirmative defence model also acts to protect against the harsh outcomes of being convicted of statutory rape. Unlike the age-gap provisions which effectively decriminalize sexual relations within the prescribed age-brackets, this model operates by providing defendants with affirmative defences or mitigating factors against the offence.[219] Currently the SOA avails two affirmative defences. The first involves a case where the alleged victim deceived the accused person into believing that they were legally capable of consenting to sexual activity.[220] The second affirmative defence is broader and requires the accused person to have reasonably believed the alleged victim to have been above the age of consent taking into consideration the circumstances of the offence.[221] It was this latter defence that was the basis of the previously highlighted and controversial decision in the *Martin Charo* case. Newly introduced Romeo and Juliet laws could entail the adoption of more specific affirmative defences such as affirmative victim consent to sexual relations.[222]

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[217] Franklin J, 'Where Art Thou Privacy: Expanding Privacy Rights of Minors in Regard to Consensual Sex: Statutory Rape Laws and the Need for a Romeo and Juliet Exception in Illinois', 325.
[218] Casey BJ and Caudle K, 'The Teenage Brain: Self Control', 86.
[219] Kern J, 'Trends in Teen Sex are Changing but Are Minnesota's Romeo and Juliet Laws', 1613.
[220] Section 8(5)(a), *Sexual Offences Act* (Act No. 3 of 2006).
[221] Section 8(5)(b), *Sexual Offences Act* (Act No. 3 of 2006).
[222] High A, 'Good, Bad and Wrongful Juvenile Sex: Rethinking the Use of Statutory Rape Laws Against the Protected Class', 834.

This model could also include the inclusion of victim cooperation requirements which would require the alleged victim to participate in the prosecution of their alleged abuser for the matter to proceed.[223] This requirement, however, is best suited for cases where one party is below the age of consent and the other above it. Where both parties fall below the age of consent this may lead to an instance of reciprocal prosecution as each party seeks to avoid being prosecuted by the other.[224] Ultimately, an affirmative defence model would turn the justice system's attention from adolescent sexuality as a whole and towards prevention of abusive and forceful sexual encounters which it should rightly be concerned about.[225] This model may, however, be considered less effective than the age-gap provision model as it still allows for prosecution and, may suffer from the same prosecutorial discretion dilemma evident with the current system.[226] By not completely decriminalizing consensual adolescent sex, however, this system ensures that the law does not abdicate its moral authority completely to the realm of developmental science but plays an active role in shaping the development of socially appropriate behaviour among teenagers.[227]

3.4. Comparative advantage

The protection of adolescents from the physical and psychological effects of sexual relations remains a strong policy concern.[228] These consequences range from high risk of infection with sexually transmitted illnesses, the procurement of illicit abortions which contribute to high mortality rates to the socio-economic handicaps associated with unwanted pregnancies.[229] Many of these disproportionately apply to adolescent girls. Many of them discontinue their education upon getting pregnant and this attrition greatly undermines efforts to involve women

[223] James S, 'Romeo and Juliet were Sex Offenders: An Analysis of the Age of Consent and a Call for Reform', 257.
[224] James S, 'Romeo and Juliet were Sex Offenders: An Analysis of the Age of Consent and a Call for Reform', 257.
[225] High A, 'Good, Bad and Wrongful Juvenile Sex: Rethinking the Use of Statutory Rape Laws Against the Protected Class', 803.
[226] Hessick C, and Stinson J, 'Juveniles, Sex Offences and the Scope of Substantive Law', 46(1) *Texas Tech Law Review,* 2013, 21.
[227] Buss E, 'Rethinking the Connection Between Developmental Science and Juvenile Justice' 76 *University of Chicago Law Review,* 2009, 510.
[228] High A, 'Good, Bad and Wrongful Juvenile Sex: Rethinking the Use of Statutory Rape Laws Against the Protected Class', 791.
[229] Zabin L and Karungari K, 'The Correlates of Premarital Sexual Activities Among School Aged Adolescents in Kenya', 92.

in development processes.[230] This protective goal could, however, be achieved in a manner that is more just towards members of the same class for whom the protection is sought.[231]

A core concept of any justice system is that of proportionality – that penalties imposed should be based on a culprit's culpability and the harm caused by their actions.[232] The current punishments meted out to sexually consenting adolescents are considerably disproportionate considering their motives and circumstances.[233] Punishments such as the requirement to register as sexual offenders serve no penological goals.[234] The impact of such harsh penalties – some of which continue are life-long – manifest beyond the justice system's reach and often hinder proper re-integration and greatly reduces their chance of ever leading a normal and meaningful life.[235] These penalties fall short of protecting children's right to be treated in a manner that promotes their sense of worth or dignity and promotes their reintegration into society.[236]

The Romeo and Juliet exceptions proposed in this chapter seek to rectify this situation by at least mitigating the penalties imposed on consenting adolescents. They would allow society to mete out more proportionate punishments considering that they are responsible for their actions but do not outrightly intend to cause any disharmony within society.[237] Rather than relying on a single age-line demarcation of good and wrongful sexual encounters, this system takes into account other factors of sexual competency such as the age-disparity of partners and the power-imbalances that may arise from such disparity.[238] Ultimately, this system takes better cognizance of the fact that age-determinative offences carry less culpability when committed

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[230] Ajayi A, Marangu L, and Miller J, 'Adolescent Sexuality and Fertility in Kenya: A Survey of Knowledge, Perceptions and Practice', 206.
[231] James S, 'Romeo and Juliet were Sex Offenders: An Analysis of the Age of Consent and a Call for Reform' 78(1) *University of Missouri-Kansas Law Review,* 2009, 249.
[232] Scott E, and Steinberg L, 'Adolescent Development and the Regulation of Youth Crime', 19.
[233] Stine E, 'When Yes Means No Legally: An Eighth Amendment Challenge to Classifying Consenting Teenagers as Sex Offenders' 60(4) *DePaul Law Review,* 2011, 1202.
[234] Stine E, 'When Yes Means No Legally: An Eighth Amendment Challenge to Classifying Consenting Teenagers as Sex Offenders', 1211.
[235] Wood C, 'Romeo and Juliet: The 21st Century Sex Offenders' 39(2) *Southern University Law Review,* 2012, 392.
[236] Article 40(1) *Convention on the Rights of the Child,* 20 November 1989, 1577 UNTS 3. See also the General Comment by the UN Committee on the Rights of the Child on Article 40 which reminded States that no information capable of identifying a child offender should be published publicly due to its stigmatizing effect as well as their right to privacy.
[237] Scott E, and Steinberg L, 'Adolescent Development and the Regulation of Youth Crime', 19.
[238] High A, 'Good, Bad and Wrongful Juvenile Sex: Rethinking the Use of Statutory Rape Laws Against the Protected Class', 794.

by persons of the same peer group as opposed to the quintessential adult-minor scenario that was more likely the context envisioned for regulation.[239]

The current regime fails to properly respond to the current reality where adolescents are increasingly becoming sexually active amongst themselves.[240] The over-reliance on a simple age-determinative system of punishment restricts meaningful conversation on the concept of consent and the circumstances that may negate the possibility of any meaningful consent.[241] Adolescent sexuality has the potential for harmful consequences but may also serve as an important growth tool and part of a healthy transition into adulthood.[242]

Dispensing with the requirement to register as sexual offenders also has a positive effect on the overall offender monitoring system. The current system where all statutory rape convicts must register may greatly hamper the resourcefulness of monitoring agencies making them less effective in ensuring public safety.[243] Less subjects of monitoring would allow them to focus on those who pose legitimate threat to society. Finally, cases of consenting adolescent could be left to the exclusive jurisdiction of juvenile courts which would be better suited to handle the cases.[244] The system should be tailored towards improving adolescent participation in the process and enhancing their understanding of societal expectations and their role in it.[245] Ultimately, these models not only offer ample protection of minors from exploitative sex but also ensure more positive discourse on adolescent sexuality.

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[239] Hessick C, and Stinson J, 'Juveniles, Sex Offences and the Scope of Substantive Law', 46(1) *Texas Tech Law Review,* 2013, 7.
[240] Stine E, 'When Yes Means No Legally: An Eighth Amendment Challenge to Classifying Consenting Teenagers as Sex Offenders', 1226.
[241] Kitrosser H, 'Meaningful Consent: Towards a New Generation of Statutory Rape Laws' 4(2) *Virginia Journal of Social Policy and the Law,* 1997, 289.
[242] Kitrosser H, 'Meaningful Consent: Towards a New Generation of Statutory Rape Laws', 323. See Also, High A, 'Good, Bad and Wrongful Juvenile Sex: Rethinking the Use of Statutory Rape Laws Against the Protected Class', 792.
[243] Stine E, 'When Yes Means No Legally: An Eighth Amendment Challenge to Classifying Consenting Teenagers as Sex Offenders', 1171.
[244] Hessick C, and Stinson J, 'Juveniles, Sex Offences and the Scope of Substantive Law', 23.
[245] Buss E, 'Rethinking the Connection Between Developmental Science and Juvenile Justice' 76 *University of Chicago Law Review,* 2009, 613.

Chapter Four: A Comparative Analysis of the Romeo and Juliet Regime in South Africa

This Chapter provides for a comparative study of a country which has included Romeo and Juliet laws – particularly age-gap provisions – into its criminal justice system. The objective is to identify the rationales behind their inclusion as well as the possible benefits or challenges that this system may have faced because of these laws. For this comparison, the author has chosen to focus on South Africa.

The choice to evaluate the South African legislation is made because of its close ties to the Kenya not only in geographic location but also in socio-cultural aspects. As such, one would be understood for estimating that the rationale and contexts within which South Africa has chosen to introduce Romeo and Juliet laws are similarly present in Kenya. It would, therefore, be prudent of us to turn to them for lessons that may enable us to structure our system in a manner that best protects our adolescents while still respecting their autonomy on sexual decisions.

Like Kenya, South Africa is also at war with sexual violence. Human Rights Watch has accused the country of being the rape capital of the world based on the number of reported cases alone.[246] Clarke notes that the country may have very sound legislation on sexual violence but such legislation is useless absent effective implementation.[247] In 2019, the country recorded a total of 53,293 sexual offences including 42,289 rape cases and 7,749 sexual assaults.[248] The high rate of sexual violence has been traced to various factors including the diverse traditional and established patriarchal systems which subordinate women to their male counterparts.[249] Clarke also notes that part of the sexual violence culture is carried from the legacy of apartheid which not only normalised violence within society but also created a great level of mistrust of the police by women who felt that no action was being taken to address their concerns.[250]

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[246] Clarke J, 'Why is sexual violence so endemic in South Africa and why has it been so hard to combat?' *South Africa History Online*, 2015.

[247] Clarke J, 'Why is sexual violence so endemic in South Africa and why has it been so hard to combat?'. South Africa's 1994 Constitution was backed by the most progressive Sexual Offences Act in the world recognising marital rape and incorporating pornography making restrictions at a time when such legislations were unheard of in most jurisdictions.

[248] -https://www.africacheck.org/fact-checks/factsheets/factsheet-south-africas-crime-statistics-201920 on 22 July 2021.

[249] Clarke J, 'Why is sexual violence so endemic in South Africa and why has it been so hard to combat?'.

[250] Clarke J, 'Why is sexual violence so endemic in South Africa and why has it been so hard to combat?'.

As a result of this apartheid legacy, women from different racial groups have had different experiences regarding abuse with patriarchy being the common feature.[251] Even women who have not experienced sexual violence have had to evolve their behavioural tendencies as a precaution.[252] Children also face various forms of violence including sexual homicides and murders. Research from 2009 put the rate of sexual homicides against children at 8.7%.[253] In 2019, 943 children were killed.[254] For many of these cases, a lack of coordination among health, police and social service providers often compromise the management and investigative outcomes leading to a low rate of conviction.[255]

4.1. South-African Age-gap Provision

Like Kenya, the South African law governing sexual offences has undergone changes to ensure that it not only protects children from sexual predators but also recognises the reality of adolescent sexual experimentation.[256] In 2013 the Constitutional Court in South Africa made a landmark ruling in the *Teddy Bear Clinic* case[257] in which the court grappled with the question of whether it was constitutionally permissible for children to be subjected to criminal sanctions aimed at deterrence of early sexual intimacy and its attendant risks.[258] This case was decided within the context of Sections 15 and 16 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act*[259] which at the time was the governing law on sexual offences in South Africa.

At the time of the decision, South African law criminalised consensual sexual acts with certain children. Section 15 of the Act criminalised sexual penetration with a child regardless of whether the child consented to the conduct.[260] It is important to note that whereas the South

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[251] Spengler C, 'Rape in South Africa: The experience of women who have been raped by a known person: A case study of women at a shelter in Johannesburg' published LLM Thesis, University of Witwatersrand, 2013, 11.
[252] Spengler C, 'Rape in South Africa: The experience of women who have been raped by a known person: A case study of women at a shelter in Johannesburg', 12.
[253] Abrahams N, Mathews S, Lombard C and Jewkes R, 'Sexual Homicides in South Africa: A National Cross-sectional Epidemiological Study of adult women and children' *PLoS One* 2017, 4.
[254] -https://www.africacheck.org/fact-checks/factsheets/factsheet-south-africas-crime-statistics-201920 on 22 July 2021.
[255] Abrahams N, Mathews S, Lombard C and Jewkes R, 'Sexual Homicides in South Africa: A National Cross-sectional Epidemiological Study of adult women and children', 10.
[256] Essack Z and Toohey J 'Unpacking the 2-year age-gap provision in relation to the decriminalisation of underage consensual sex in South Africa' 11(2) *South African Journal of Bioethics and Law*, 2013, 85.
[257] *The Teddy Bear Clinic for Abused Children and RAPCAN v Minister of Justice and Constitutional Development and National Director for Public Prosecutions* (2013), Constitutional Court of South Africa.
[258] *The Teddy Bear Clinic for Abused Children and RAPCAN v Minister of Justice and Constitutional Development and National Director for Public Prosecutions* (2013), Constitutional Court of South Africa, 4.
[259] *Criminal Law (Sexual Offences and Related Matters) Amendment Act* (Act No. 32 of 2007).
[260] Section 15, *Criminal Law (Sexual Offences and Related Matters) Amendment Act* (Act No. 32 of 2007).

African Constitution defined a child as a person below 18 years of age,[261] sections 15 and 16 of the SOA regarded a child as a person below the age of 16 but above the age of 12.[262] Sexual 15 granted the National Director of Public Prosecution the discretion to decide on whether to prosecute where both parties were children. It did, however, require that if they did proceed to institute proceedings that they prosecute both children for having contravened the section.[263] This provision was set to guard against gender bias in the decision to prosecute. The result, however, was that both children served as both victim and perpetrator and, the conviction of one guaranteed the conviction of the other, thereby subjecting two children to the criminal justice system's penalties.

Section 16 criminalised statutory sexual assault of a child – again referring to individuals between 12 and 15 years of age.[264] This section also had a similar provision guarding against gender biased prosecutions for the offence.[265] Section 50 of the Act mandates that persons convicted for a sexual offence against a child must have their particulars entered into the national register for sex offenders.[266] Consequences of such entry into the register include a restriction on employment in places where one would come into contact with children as well as a restriction on the possibility of ever becoming a foster parent or adoptive parent of a child.[267] Section 54 obliged persons who became aware that a sexual offence had been committed against a child to report the same to a police official; failure to which they risked a fine and a five year prison sentence.[268]

The Act makes it a defence to statutory rape and statutory sexual assault that the accused was deceived into believing that the child was above the age of 16 or reasonably believed it so.[269] A second defence is also availed for the offence of statutory sexual assault – that both the accused persons were children and that the age difference between them was not more than two years when the alleged offence was committed.[270]

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[261] Section 28(3), *The Constitution of the Republic of South Africa* (1993).
[262] *The Teddy Bear Clinic for Abused Children and RAPCAN v Minister of Justice and Constitutional Development and National Director for Public Prosecutions* (2013), Constitutional Court of South Africa, 15.
[263] Section 15(2)(a), *Criminal Law (Sexual Offences and Related Matters) Amendment Act* (Act No. 32 of 2007).
[264] Section 16, *Criminal Law (Sexual Offences and Related Matters) Amendment Act* (Act No. 32 of 2007).
[265] Section 16(2)(a), *Criminal Law (Sexual Offences and Related Matters) Amendment Act* (Act No. 32 of 2007).
[266] Section 50(1)(a)(i), *Criminal Law (Sexual Offences and Related Matters) Amendment Act* (Act No. 32 of 2007).
[267] Section 41, *Criminal Law (Sexual Offences and Related Matters) Amendment Act* (Act No. 32 of 2007).
[268] Section 54, *Criminal Law (Sexual Offences and Related Matters) Amendment Act* (Act No. 32 of 2007).
[269] Section 56(2)(a), *Criminal Law (Sexual Offences and Related Matters) Amendment Act* (Act No. 32 of 2007).
[270] Section 56(2)(b), *Criminal Law (Sexual Offences and Related Matters) Amendment Act* (Act No. 32 of 2007).

In its determination, the court evaluated Sections 15and 16 of the SOA considering the constitutionally established rights to dignity and privacy. The Constitution of Kenya also guarantees these rights in its Bill of Rights.[271] The Constitutional Court in South Africa noted that criminalisation of consensual sexual conduct leads to stigmatization of children that is degrading as it ignores their consensual sexual choices of adolescents.[272] By ignoring these choices, the laws stripped adolescents of individual autonomy and thus violated their dignity. It also found the resultant consequence of preventing adolescents from meaningful interactions with children because of engaging in developmentally normative behaviour constituted a violation of adolescent's dignity.

Regarding the right to privacy, the court relied on the *National Coalition for Gay and Lesbian Equality* case[273] which noted that the expression of sexuality – where consensual and absent harm – constituted part of individual's inner sanctum whose invasion would amount to a breach of privacy. It therefore followed that as far as sections 15 and 16 failed to respect the consensual sexual choices of adolescents it would amount to a violation of their right to privacy.[274] The Court further noted that sections 15 and 16 run the risk of driving adolescent sexuality underground therefore undermining established support structures, particularly those meant to safeguard their sexual and reproductive health. Furthermore, the court noted the irrationality of stating that an adolescent had no capacity to decide on their sexual conduct yet have the capacity to be held liable for their choices and thus subject to criminal sanctions. The Court ultimately suspended both sections of the Act and ordered the expungement of records of children convicted under the sections as well as a moratorium on any investigations and prosecutions premised on the sections.

Following this decision, the South African parliament made an amendment to the law whose consequence was to decriminalise sex among adolescent peers – persons between 12 and 15 years – as well as sex between younger adolescents and older adolescents provided that the parties are within a 2-year age gap.[275] The amendment put an end to the dilemma faced by doctors and researchers. It harmonised the sexual offences law with the South Africa Children

[271] Article 28, *Constitution of Kenya* (2010). See also, Article 31, *Constitution of Kenya* (2010).
[272] *The Teddy Bear Clinic for Abused Children and RAPCAN v Minister of Justice and Constitutional Development and National Director for Public Prosecutions* (2013), Constitutional Court of South Africa, 55.
[273] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (1998), Constitutional Court of South Africa.
[274] *The Teddy Bear Clinic for Abused Children and RAPCAN v Minister of Justice and Constitutional Development and National Director for Public Prosecutions* (2013), Constitutional Court of South Africa, 59.
[275] Essack Z and Toohey J 'Unpacking the 2-year age-gap provision in relation to the decriminalisation of underage consensual sex in South Africa', 85.

Act which allows for children above 12 years of age to access a range of sexual and reproductive health rights - including contraceptives – without parental consent.[276] Prior to this, service providers had to choose between providing the services in line with the right to sexual and reproductive health and breaching the doctor-patient confidentiality and subsequently risk undermining adolescent right to sexual and reproductive health.[277]

South Africa has taken a conservative approach by introducing the 2-year age gap in their statutory rape law. This is considering evidence showing that the risk of sexual activity increases the larger the age-gap is between the partners.[278] It also soothes public opinion as larger age-gaps are likely to attract more criticism and scrutiny on their capacity to protect children from the harms that may arise from sexual interactions. The narrowness of the age-gap, however, may simultaneously undermine adolescent sexual health. This age-gap runs the risk of interfering with on-going relationships particularly in the case of a 15-year-old and 12-year-old when the former turns 16 and therefore moves into an older age-group.[279] This scenario is prevalent given that most relationships begin in high school where the age difference may be up to 4 years.[280] A possible solution would be to reform the mandatory reporting requirements therefore giving service providers more discretion on when to bring cases to the attention of the authorities.[281] Nonetheless, the move to introduce the 2-year age-gap provision was a positive step in accommodating normative and prevalent adolescent sexuality.

[276] Strode A, Toohey J, Slack C and Bhamjee S, 'Reporting underage consensual sex after the Teddy Bear Case: A different perspective' 6(2) *South African Journal of Bioethics and Law, 2013,* 45.
[277] Strode A, Toohey J, Slack C and Bhamjee S, 'Reporting underage consensual sex after the Teddy Bear Case: A different perspective', 45.
[278] Essack Z and Toohey J 'Unpacking the 2-year age-gap provision in relation to the decriminalisation of underage consensual sex in South Africa', 86.
[279] Essack Z and Toohey J 'Unpacking the 2-year age-gap provision in relation to the decriminalisation of underage consensual sex in South Africa', 87.
[280] Essack Z and Toohey J 'Unpacking the 2-year age-gap provision in relation to the decriminalisation of underage consensual sex in South Africa', 87.
[281] Strode A, Toohey J, Slack C and Bhamjee S, 'Reporting underage consensual sex after the Teddy Bear Case: A different perspective', 47.

Chapter Five: Conclusion and Recommendations

5.1. Conclusion

The objective of this research was to evaluate whether and how well Romeo and Juliet provisions could mitigate the harms caused by the application of current statutory rape laws in cases involving two consenting adolescents. To this end, the paper evaluated the history and rationale for the laws as currently framed as well as the problems that arise when these laws are applied to cases of consenting adolescents. As the study illustrates, statutory rape laws in force now were enacted to protect adolescents from sexual exploitation with primarily adult perpetrators. It is because of this that legislators sought to harshly punish such adults; first, by crafting defilement as a strict liability offence, and secondly, by attaching severe penalties to the offence as a way of deterrence.

The application of these laws to cases involving consenting adolescents; however, does more harm than good to the very adolescents that it seeks to protect as there is no exploitation to be punished. As shown by the study, the deterrent effect that the law was expected to have is targeted at adults and is consequently less effective when targeted at adolescents as most of them do not consider their actions to be wrong. Rather than deter adolescent sexual encounters, the law pushes adolescents to be more secretive of their encounters, thereby making the laws even less effective; particularly in tackling instances where there might have been some form of coercion or exploitation.

5.2. Recommendations

Central to the recommendations to be made is a mutual consensus on the need to protect adolescents from sexual exploitation by adults. The overarching aim of the SOA – the protection of individuals from harm caused by unlawful sexual acts – therefore remain paramount.[282] To this end, provisions protecting adolescents and children from sexual exploitation such as child pornography, child sex tourism, child prostitution and trafficking for sexual exploitation are to remain unchanged.[283]

Legislative reform to introduce age-span provisions would only touch on Section 8 of the Act in respect of cases involving two consenting adolescents. Were the provision to be rightly applied, the law would treat both parties as both victim and aggressor and thus punish both for

[282] Preamble, *Sexual Offences Act* (Act No. 3 of 2006).
[283] *Sexual Offences Act* (Act No. 3 of 2006).

conduct that may be regarded as a normal and healthy aspect of transition to adulthood.[284] Instead, Kenya could borrow from the South African experience and reform its statutory rape laws to include age-span provisions that protect consenting teenagers from the harsh penalties that result from being convicted of defilement and being subsequently labelled as a sex offender. As noted in preceding chapters, legislators could consider currently existing institutions engaging adolescents, most of which often make it possible for adolescents within four years of each other to interact on a regular basis.[285] Age-span provisions also ensure that children below a set age are unable to consent to sexual encounters with anyone. The adoption of a four-year age bracket model – as opposed to South Africa's two year age gap – possibly escapes the possible adversities that may arise from having too narrow an age-span as identified by Essack and Toohey.[286]

Aside from protecting adolescents from punitive justice systems, age-span provisions and affirmative defence models nudge the society towards the proper subject of regulation – abusive sex. As High notes, the current application of defilement laws to curtail what is little more than cases of fornication – which is both victimless and, today, morally contentious – statutory rape laws ought to focus on abusive sex.[287] Moving away from this ultimately dilutes the stigma and moral authority that these laws ought to command.[288]

To supplement the age-span provisions and to boost their effectiveness, Kenya should focus on implementing its National Adolescent Sexual and Reproductive Health Policy.[289] This would be in line with Kenya's various commitments to address various adolescent specific issues including sexual and reproductive health under the Ministerial Commitment on Comprehensive Sexuality Education (CSE) and Sexual and Reproductive Health Services for Adolescents and Young People in Eastern and Southern Africa.[290] CSE also compliments Kenya's robust legislative framework on sexual and reproductive health matters including the National Reproductive Health Policy, the HIV and AIDS Prevention and Control Act, the Prohibition of

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[284] High A, 'Good, Bad and Wrongful Juvenile Sex: Rethinking the Use of Statutory Rape Laws Against the Protected Class', 23.
[285] Flynn D, 'All the Kids are Doing It: The Unconstitutionality of Enforcing Statutory Rape Laws against Children and Teenagers', 712.
[286] Essack Z and Toohey J 'Unpacking the 2-year age-gap provision in relation to the decriminalisation of underage consensual sex in South Africa' 11(2), 87.
[287] High A, 'Good, Bad and Wrongful Juvenile Sex: Rethinking the Use of Statutory Rape Laws Against the Protected Class', 804.
[288] High A, 'Good, Bad and Wrongful Juvenile Sex: Rethinking the Use of Statutory Rape Laws Against the Protected Class', 804.
[289] *National Adolescent Sexual and Reproductive Health Policy, (*2015).
[290] *National Adolescent Sexual and Reproductive Health Policy* (2015), 4.

Female Genital Mutilation Act, and the SOA. The National Policy, *inter alia*, places provision of holistic and integrated information and services on reproductive health as a key component in advancing adolescent sexual and reproductive health.[291] To this end, it calls for the strengthening of school and out-of-school CSE programs and the leveraging of digital platforms and community health structures to increase awareness of sexuality education as well as sexual and reproductive rights and services available.[292]

CSE programs are essential in addressing adolescent sexuality issues by equipping them with more nuanced understanding of their sexual health as well as information that may inform their decisions on sexuality.[293] Currently, majority of the CSE programs in place across Sub-Sharan Africa are school-based with CSE being integrated as part of core carrier subjects in most countries.[294] Few countries offer CSE as a stand-alone subject. Mass media and digital platforms can also be leveraged through the creation of programs and sites that aid in dissemination of information regarding sexual and reproductive health issues.[295] The *World Starts With Me* and *CyberSenga* programs developed in Uganda are two such illustrations of how digital media can help in CSE awareness.[296] Despite having robust frameworks, Kenya still has to deal with barriers posed by socio-cultural norms which affect the delivery of core CSE curricula material.[297] Given that the country already has a policy framework in place, focus should be on capacity building through inclusion of CSE in teachers' training programs which will ultimately allow for robust challenge of socio-cultural norms among those entrusted with implementing the program.[298] Focus also needs to be made to make CSE a transparent and candid issue of discussion so as to bring on board all relevant stakeholders including parents and adolescents themselves.

Lastly, as noted in the National Policy, there is need to address other aspects such as income and social status which have an impact on sexual and reproductive health issues.[299] As

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[291] *National Adolescent Sexual and Reproductive Health Policy* (2015), 8.
[292] *National Adolescent Sexual and Reproductive Health Policy* (2015), 17.
[293] African Population and Health Research Centre, *Comprehensive Sexuality Education in Sub-Sharan Africa,* 2019, 2.
[294] African Population and Health Research Centre, *Comprehensive Sexuality Education in Sub-Sharan Africa,* 2019, 4.
[295] African Population and Health Research Centre, *Comprehensive Sexuality Education in Sub-Sharan Africa,* 2019, 5.
[296] African Population and Health Research Centre, *Comprehensive Sexuality Education in Sub-Sharan Africa,* 2019, 5.
[297] African Population and Health Research Centre, *Comprehensive Sexuality Education in Sub-Sharan Africa,* 2019, 7.
[298]
[299] *National Adolescent Sexual and Reproductive Health Policy* (2015), 5.

discussed earlier, the socio-economic status within which an adolescent finds themselves may affect their decisions regarding sexuality. Without proper information and services on sexual and reproductive health, many of these adolescents are likely to engage in sexually risky behaviour which may further increase their chances of hindering the achievement of their full potential in national development.[300]

[300] *National Adolescent Sexual and Reproductive Health Policy* (2015), 7.

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