



**AMENDMENT OF SECTION 8(4) OF THE SEXUAL OFFENCES
ACT TO REMOVE THE MINIMUM MANDATORY SENTENCE
OF 15 YEARS**

**Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,
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By

SUBIRA CHERUTTO CHEMENGICH

127817

Prepared under the supervision of

EVA NYAMBURA MAINA

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DECLARATION

I, SUBIRA CHERUTTO CHEMENGICH, 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 its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

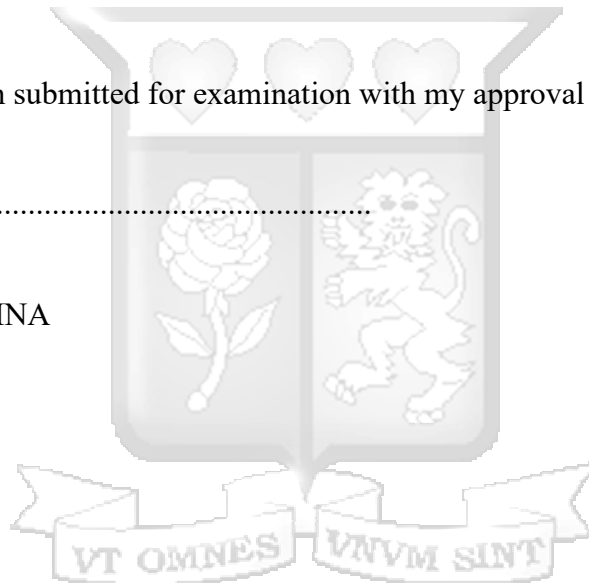
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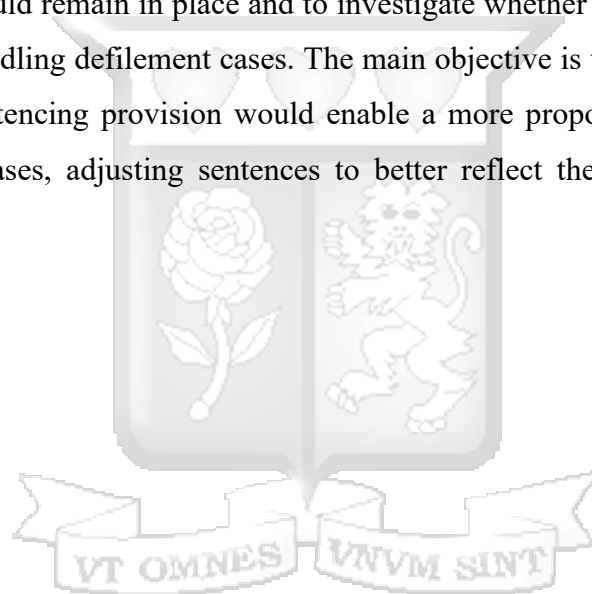
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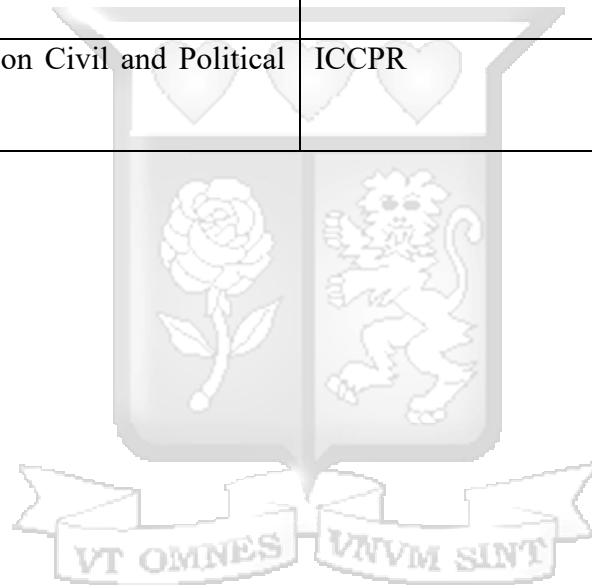
ABSTRACT

Sentence procedures in Kenya have been influenced by particular conditions, resulting in a specific trajectory in the terrain of defilement cases. Discretion was crucial in resolving the complexities present in every case, and these conditions were traditionally carefully considered during court proceedings. However, this discretionary liberty has been severely limited by the imposition of a mandatory penalty, as stated in Section 8(4) of the Sexual Offences Act No 3 of 2006. As a result, uniform procedures are routinely used to decide cases, ignoring the subtle differences between each case that may exist. This paper aims to critically examine whether the minimum mandatory sentence of 15 years should remain in place and to investigate whether doing so would provide a more equal means of handling defilement cases. The main objective is to ascertain if doing away with this mandatory sentencing provision would enable a more proportionate decision-making process in defilement cases, adjusting sentences to better reflect the gravity of each distinct offence.



LIST OF ABBREVIATIONS

The Sexual Offences Act No 3 of 2006	SOA
Minimum Mandatory Sentence(s)	MMS(s)
The Constitution of Kenya 2010	COK
Kenya Demographic and Health Survey	KDHS
The United Nations Standard Minimum Rules for the Administration of Juvenile Justice	The Beijing Rules
United Nations Convention on the Rights of the Child 1990	UNCRC
International Covenant on Civil and Political Rights 1966	ICCPR



LIST OF CASES

Bachan Singh v. State of Punjabi (1980) (India)
Lejony v The State (2000) (Botswana)
SOO v Republic (2018)
Hoare v The Queen (1989) (The United Kingdom)
Caroline Auma Majabu v Republic (2014)
Francis Karioko Muruatetu v Republic (2016)
Christopher Ochieng v Republic (2018)
Lukas Mberia v Republic (2020)
State v Toms (1990) (South Africa)
State v Mahomotsa(2002) (South Africa)
State v Jansen (1999) (South Africa)
Simon Kipkurui Kimori v Republic (2018)
Bernard Kimani Gacheru v Republic (2002)
Kelvin Muthoni Makembo v Republic (2021)
Mercy Chelagat v Republic (2022)
Wanyema v Republic (1971)
Rophas Furaha Ngombo v Republic (2019)
Jared Koita Injiri v Republic (2019)
Margrate Lima Tuje v Republic (2016)
Alister Antony Pariera v State of Maharashtra (2012) (India)
WOR v Republic (2022)
Taifa v Republic (2022)
Dismas Wafula Kilwake v Republic (2019)
Yawa Nyale v Republic (2018)
Maingi and 5 others v Director of Public Prosecutions & another (2022).
Gillick v. West Norfolk and Wisbech Area Health Authority (1985) (The United Kingdom)

LIST OF LEGAL INSTRUMENTS

Sexual Offences Act (No 3 of 2006)

The Constitution of Kenya (2010)

Penal Code (No 81 of 1948)

Penal Code (1964) (Botswana)

Defence Act (No 42 of 2002) (South Africa)

United Nations Convention on the Rights of the Child 1990

Alcoholic Drinks Control Act (No 4 of 2010)

International Covenant on Civil and Political Rights 1966



CHAPTER ONE

1.1 BACKGROUND

Kenya started tackling the prosecution of sexual offences in 2006, and as a result, the Sexual Offences Act (SOA) of 2006 was passed by the government.¹ This was regarded as a significant step toward combating some serious sexual assault cases. A person under the age of eighteen (18) is not allowed to consent to sex under this Act. Any sexual conduct with a minor is considered defilement, which is illegal and subject to strict liability.² The purpose of this legal measure was to shield children from sexual abuse, particularly at the hands of adults. In this instance, voluntary agreement to sexual activity with a partner by an able person—typically understood to mean someone in a healthy mental state—is considered consent. It should be obvious to both parties that the other desires to engage in sexual activity.³

Young people today are engaging in sexual activity while seeming to be consenting and voluntary. This is supported by a 2014 KDHS study that discovered that, while the two events may not always happen at the same time, first marriage is frequently used as a stand-in for first sexual encounters. Men and women were asked how old they were when they had their first sexual experience in the 2014 KDHS.⁴ By the age of fifteen, 15% of women and 22% of men in the 20–50 age range had experienced their first sexual encounter. In Kenya, over 25% of women gave birth before turning 18 years old.⁵ This study establishes what is known as the "age of discretion," or the legal age at which an individual is deemed knowledgeable enough to be held accountable for specific actions or capable of using specific powers.⁶ This is the age in which as much as the person is below 18

¹ Sexual Offences Act (No. 3 2006).

² Section 8, Sexual Offences Act (No.3 2006).

³ Bedsworth J, What Is Sexual Consent? <https://www.goodrx.com/health-topic/sexual-health/what-is-sexual-consent> 25 February 2022.

⁴ Kenya Demographic and Health Survey 2014.

⁵ Muiruri P, Kenya debates lowering age of consent from 18 to 16. The Guardian, 20 April 2021, <https://www.theguardian.com/global-development/2021/apr/28/kenya-debates-lowering-age-of-consent-from-18-to-16> on 12 October 2022.

⁶ Merriam Webster, 10 ed.

years of age (the age of consent), they possess carnal knowledge and this is a factor that cannot be ignored.

Nonetheless, the courts have continued to uphold the legal stance that a child cannot give permission for sexual activity. Due to this, minors who are observed having ‘consensual sex’ with one another may face legal action and be charged with defilement.⁷ In addition, Justice Chitembwe stated in his interview for the chief justice position that although the law considered anyone who "defiled" a person under the age of eighteen guilty, the legislation's applicability needed to be examined. According to the law, a person who engages in sexual activity with a minor must serve at least 15 years in prison. “How do you take a 19-year-old man to 15 years in jail for having a relationship with a 17-year-old girl?” he asked the panel.⁸

This brought about the problem of proportionality of sentences to the crime. The idea of proportionality is one of the cornerstones of sentencing in many nations. It is founded on the idea that, to be reasonable, a sentence must be of a length and nature that matches the offence and the circumstances of the offender.⁹ In Kenya, a lot of cases have faced this challenge especially cases charged under the SOA. The law gives judges an excessive amount of discretion while also allowing for exceptionally lengthy and harsh sentences.¹⁰

Justice system management has had issues with sentencing. It is one of those problems that has consistently and rightfully damaged the reputation of the judiciary. Criminal proceedings have occasionally resulted in outright ludicrous, excessive, and inconsistent punishments being given.¹¹ This has contributed to the public's opinion that judges' use of their discretion in sentencing is haphazard. The difficulties with sentencing in the administration of justice led to the development of Sentencing Guidelines.¹² It states under the message from the then Chief Justice, Hon. Willy

⁷ Kigen TJ, Minors, sex and the law: Rethinking the regulation of consensual sex between minors in Kenya, Published LLB Thesis, Strathmore University, Nairobi, 2018.

⁸ Muiruri P, Kenya debates lowering age of consent from 18 to 16. *The Guardian*, 20 April 2021 <https://www.theguardian.com/global-development/2021/apr/28/kenya-debates-lowering-age-of-consent-from-18-to-16>, 12 October 2022.

⁹ Rogan M, Out of balance: disproportionality in sentencing, 25 August 2014.

¹⁰ Mutsotso B, The reality of sexual offending in Kenya: Are sex offenders finally cornered? *Journal of Sociology and Social Work*, American Research Institute for Policy Development, <http://dx.doi.org/10.15640/jssw.v2n2a4>, 2014.

¹¹ Albonetti CA, An Integration of Theories to Explain Judicial Discretion, Volume 38, *Social Problems*, 1991. p 247–266.

¹² Sentencing Policy Guidelines, 2020

Mutunga, that the constitutional requirements stated in Article 159 COK¹³ serve as the foundation for these Policy Guidelines. The guidelines aim to address a number of issues, such as an excessive predilection for jail sentences despite the availability of numerous alternatives that may be more appropriate in certain situations, and disproportionate and unjustifiable differences in the sentences meted out to criminals who committed the same crimes under roughly similar circumstances.¹⁴ Although MMSs lessen sentencing inequalities, they restrict the courts' discretion and can occasionally lead to serious injustice, especially for young offenders.

1.2 PROBLEM STATEMENT

The age of discretion has been proven to exist in teenagers, even when they are under the legal consent age of 18. Sections 8(4) of the SOA states that “A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”¹⁵

There are defences set in section 8 (5) and (6) of the SOA but they do not give leeway to evade the MMS of 15 years. This scenario creates a situation of giving disproportionate penalties. According to the Sentencing Policy guidelines under clause 7.17, the court is bound by the rules of any MMSs¹⁶ and may not impose a sentence that is less than what is required.¹⁷ Where an MMS is specified, a fine cannot replace that term.¹⁸

The existing policy in this realm lacks comprehensive consideration of various crucial factors that should inform sentencing decisions. Questions arise pertaining to the validity of consent provided by adolescent minors, the relevance of the age gap between individuals involved, and whether the parties involved perceive themselves to be in a consensual sexual relationship. These critical inquiries bring into focus the issue of whether the punishment meted out to offenders aligns with the principles of proportionality in criminal justice.

¹³ Article 159, Constitution of Kenya (2010).

¹⁴ Sentencing Policy Guidelines, 2020.

¹⁵ Section (4), Sexual Offences Act (Act no 3 of 2006).

¹⁶ Sexual Offences Act.

¹⁷ Kennedy Munga v. Republic (2011) eKLR.

¹⁸ Section 26 (3) (i), Penal code, (Act No 81 of 1948).

This brings up the issue of whether S 8 (4) of the SOA of 2006 should be amended to remove the MMS of 15 years for the offence of defilement.

1.3 RESEARCH OBJECTIVES

1. To establish the concept of age of discretion and its applicability in Kenya.
2. To examine whether the criteria for deciding MMS is sufficient to warrant its strict following.
3. To establish whether the amending S 8(4) to remove MMS will solve the problem of disproportionate sentencing cases.

1.4 RESEARCH QUESTIONS

1. Should the age of discretion be applied in Kenya?
2. a) What criteria was used in determining the MMS of 15 years for defilement cases?

b) Is the criterion for deciding MMS sufficient to warrant its strict following?
3. Will amending S 8(4) to remove MMS of 15 years solve the problem of disproportionate sentencing of such defilement cases?

1.5 JUSTIFICATION OF THE STUDY

Judges and other judicial officers will benefit directly from this study's findings in deciding what constitutes defilement. It will aid them in making appropriate assessments when giving judgements and penalties in accordance, assisting in reducing the problem of handing out excessive punishments. The ability to have a point of reference and some recommendations will be helpful to lawmakers when it comes to modifying laws and preparing national reports on the subject. Still considering the same group of people, the power they carry regarding this matter will also benefit the national and county governments to do some crowd control in imprisonment facilities. There have been issues on overcrowding prisons and in addition to all the ways they are using to solve the problem, this can be one of them.

In addition to that, it is my hope that this study will help scholars and researchers in general as they write and carry out studies around this field and that my research will assist them in getting information useful to their own study.

1.6 HYPOTHESIS

As aforementioned, legally, minors do engage in consensual sex. Removing the MMS in the provisions in the SOA in Kenya is the best way to help determine defilement cases. This is because it has been proven from patterns that adolescents, even if under the age of legal consent, are at the age of discretion, which exists and this allows minors, mostly between the age of 16 and 18, to give sane consent even if not legally valid, to engage in consensual sex. The lack of consideration of this concept poses a problem when it comes to sentencing in courts hence more judicial discretion is required.

1.7 THEORETICAL FRAMEWORK:

RETRIBUTIVE THEORY OF PUNISHMENTS

Throughout the beginning of time, cultures have vigorously discussed the problem of criminal punishment. According to Antony Flew,¹⁹ Stanley Benn²⁰ and HLA Hart,²¹ punishment is often characterised as something unpleasant that is administered by society and enforced by a legal authority for a violation of the law. Punishment is a typical way for the punishing authority or those "in whose name" the punishment is inflicted to express attitudes of resentment and indignation, as well as judgments of disapproval and reprobation.²² Retributive theory supports a system in which offenders face punishment commensurate with the moral gravity of the harms they knowingly cause.²³ The retributive justice doctrine holds that people who break the law should

¹⁹ Flew A, *The Justification of Punishment*, Volume 29, Cambridge University Press, Issue 111, 1954, p 293-294.

²⁰ Benn SI, *An Approach to the Problems of Punishment*, Volume 33, Cambridge University Press, Issue 127, 1958, p 325.

²¹ HLA Hart, *Punishment and Responsibility*, University of Toronto Press, Toronto, 1968.

²² Feinberg J, *Doing & Deserving; Essays in the Theory of Responsibility*, Princeton University Press, Princeton and London, 1970, p 9

²³ Carlsmith KM, Darley JM, *Psychological Aspects of Retributive Justice: Advances in Experimental Social Psychology*, Volume 40, Academic Press, 2008, p 193-236.

be held accountable for their deeds.²⁴ In other words, when someone hurts another person or the community, they ought to pay a price for it. Retributivism has drawn criticism for what has been described as a "morally desirable" appeal.²⁵ In a system of retribution, the degree of punishment is inversely correlated with the seriousness of the offence.

In the case of *Bachan Singh v State of Punjab*,²⁶ In relation to particularly serious offences, it was said that the retributive view of punishment—which treats society's outcasts as its subjects—is not out of date. Adopting Lord Justice Denning's stance, it was further declared that punishment, as a manifestation of society, ought to suitably represent what society thinks; hence, acts of a ridiculous character carry penalties that the perpetrator is entitled to since society has decided they are so.²⁷ In addition to this, in the *Dhananjay Chatterjee* case, the Supreme Court of Bengal ruled that imposing punishment that is adequate for the offence in order to reflect widespread disapproval is how the legal system responds to society's call for justice.²⁸

There are two elements of the theory of retributive punishments. Desert and proportionality are its main tenets. The two ideas are slightly connected. The punishment needs to be appropriate for the offence done, according to retributivists. The term "desert" alludes to some flaw that the accuser's committed a crime as a result of. Punishment in retaliation must be proportionate to the level of desert. There must be a balance between the severity of punishment and the degree of desert. Therefore, the more the desert, the more the punishment should be.²⁹ Retributivists contend that it is harmful to impose a harsher punishment than is necessary. The punishment must be appropriate for the severity of the offence and the desert.³⁰

There are two types of retributivism that have been categorised by theorists, positive and negative retributivism. Positive retributivism is often defined as the belief that an offender's crime serves as a justification for their punishment; in other words, the state should punish individuals who are

²⁴Walen, A, "Retributive Justice", The Stanford Encyclopedia of Philosophy, Summer 2021 Edition.

²⁵Scanlon T M, *What We Owe to Each Other*, Belknap Press of Harvard University Press, England, 1998, p. 266.

²⁶ *Bachan Singh v. State of Punjab* (1980) Supreme Court of India.

²⁷Walen, A, "Retributive Justice", The Stanford Encyclopedia of Philosophy, Summer 2021 Edition.

²⁸ *Dhananjay Chatterjee v State of West Bengal* (1994), Supreme Court of India.

²⁹ M Abhishek, *Retributive Theory of Punishment: A Critical Analysis*, January 15, 2015.

³⁰ The Retributive Theory of Punishment: A Brief, *Law Times Journal*, <https://lawtimesjournal.in/the-retributive-theory-of-punishment-a-brief/>, 25 November 2019.

found guilty of criminal misconduct because they deserve it.³¹ Contrarily, negative retributivism retributive constraint has been extensively featured in attempts at mixed accounts of punishment since it simply serves as a constraint on punishment and not a motive to punish.³²

Theoretically, the seriousness of the offences should have determined the severity of the sanctions. It is challenging to match punishments and crimes in practice because there is no reliable way to determine the moral gravity of a particular crime or the misery of a particular punishment. This theory is retrospective; to decide what to do in the present, it turns to the past.³³ This brings up one of the criticisms in this theory. Many academics believe that the principle of proportionality should only be applied to the most severe penalties that are practical. A mild theory of "limited retributivism" emphasises the need that penalties lie between two extremes: acceptable and severe.³⁴ Retributive penalties, in Norval Morris' opinion, are not always accurate in their evaluation.³⁵

This theory is important in this study because the major reason to ban the MMS laws is to help in determining defilement cases. As established, there are debates on how proportional punishment given to people accused of defilement are. This is because of the existence of the age of discretion, bringing in the question of validity of a minor's consent in practice. This theory helps the study in that it reinforces the notion that the gravity of the mistake should be checked when sentencing them.

1.8 LITERATURE REVIEW

1.8.1 The concept of age of discretion

Any person who is younger than 18 cannot give their consent to any kind of sexual conduct. Most recently, Barabara Hewson made a significant effort to argue in favor of reducing the consent age

³¹Duus-Otterström G, *Retributivism and Public Opinion: On the Context Sensitivity of Desert*, Criminal Law and Philosophy, <https://doi.org/10.1007/s11572-017-9415-z> , 2018.,p 125–142 .

³²Zachary H, *The Moral Permissibility of Punishment*, Published LLM Thesis, Washington University, St Louis, 2011.

³³ Criminal Justice: Theory of punishments, Cliff Notes, <https://www.cliffsnotes.com/study-guides/criminal-justice/sentencing/theories-of-punishment>.

³⁴ Abhishek M, *Retributive Theory of Punishment: A Critical Analysis*, 15 January 2015.

³⁵Norval M, *The Future of Imprisonment*, Volume 72, Michigan Law Review, Issue 6, University of Chicago Law School,1974. p 83-119.

in Spiked magazine.³⁶Felicity Gerry also made a compelling case against this approach in Criminal Law and Justice Weekly, highlighting the crucial distinction between allowing adults to prey on minors and allowing teenagers to engage in consensual sex, as many of them currently do.³⁷

Despite this view, a recent survey by the National Gender and Equality Commission demonstrated that many children begin to consent to sexual intercourse when still children. During the survey, a purposeful sampling technique was used, focusing on boys and girls from various primary schools in chosen counties who were between the ages of 10 and 17. The children were divided into age and gender-based groups; those in the 10–13 age range formed one group, while those in the 14–17 age range participated in focus group talks in separate groups. Among the results from the 10–13 age group was that, once puberty occurs, girls believe they are mature enough to have boyfriends and, thus, have sex. The kids showed that they were quite aware of sexual issues, and that the first places they learned about sex were in science classes at school, in the media, and in public awareness campaigns for HIV and AIDS. The researcher also noted that, among the age range that was the subject of a study, those between the ages of 14 and 17 had a high level of awareness on matters of sex.³⁸

1.8.2 Disproportionality of punishments

In his essay on the proportionality principle, Joel Goh emphasised its significance as a cornerstone of every legal system. The idea that the criminal justice system should only impose punishments in proportion to the offences to which it aims to respond is inherent in the concept of justice.³⁹ Because it "agrees with notions of fundamental justice and with the objective of sentencing — to maintain respect for the law and a safe society by applying reasonable sanctions," proportionality is seen as being crucial in the context of criminal sentencing.⁴⁰The most shrewd legislator will be able to identify the main divisions without upsetting the order, leaving first-degree crimes to be

³⁶ Hewson B, 'Yewtree is destroying the rule of law', Spiked Magazine, 8 May 2013, <https://www.spiked-online.com/2013/05/08/yewtree-is-destroying-the-rule-of-law/>

³⁷ Sjölin C, "Underage sex" and sexting: There is no such thing as "the age of consent", Nottingham Law School, 2014.

³⁸ National Gender and Equality Commission (NGEC), Minimum Age of Consent for Sex: Addressing the Dilemma, 2019, p 6.

³⁹ Bonesana C and Beccaria C, On Crimes and Punishments, Hackett Publishing Co Inc, Indianapolis, 1986.

⁴⁰ R v Arcand (2010), Supreme Court of Canada.

punished with the harshest penalties. If the mysterious and endless combinations of human actions could be calculated mathematically, a scale of punishments descending from the most severe to the least severe might exist. We should have a common indicator for the degree of freedom and enslavement, kindness and cruelty, among other things, among numerous nations if there were an exact and universal scale of crimes and punishments.⁴¹

In addition, when "good reasons" warrant it or there are significant mitigating circumstances that must be considered, the legislator will occasionally be willing to accept exceptions to the automatic execution of a mandatory punishment. Occasionally, the precise "mitigating factors" that the courts may take into account are stated in detail.⁴² This is the opinion of Yvon Dandurand, Ruben Timmerman and Tracee Mathison-Midgley from the School of Criminology and Criminal Justice University of the Fraser Valley and International Centre for Criminal Law Reform and Criminal Justice Policy.

In his theory of punishment, Christopher Bennett explores the use of apologies, specifically the responses of regret and making amends. He contends that offenders have a "right to be punished" and that subjecting the offender to retaliatory attitudes when they disobey the expectations of a normatively demanding relationship is an essential component of treating the offender seriously as a member of that relationship. So even though he argues that punishment and retributive attitudes are the essential manifestation of moral judgement, his explanation of these responses resembles restorative justice more than orthodox retributivism. According to him, demanding that the perpetrator make commensurate restitution is the best response to crime.⁴³

Dr. Beneah Mutsotso from the University of Nairobi, Department of Sociology and Social Work, says that more and more men are being arrested for sexual offences after Kenya's sexual offences statute went into effect. Given the ease with which offenders are imprisoned, the numbers are so high that there are currently calls for its adjustment. The large number of sexual offenders convicted, begs the question of whether Kenya has too many sexual offenders or the law is too

⁴¹ Bonesana and Beccaria *Of Crimes and Punishments*, 1986.

⁴² Dandurand Y, Timmerman R and Mathison T, *Exemptions from Mandatory Minimum Penalties Recent Developments in Selected Countries*, Justice Department of Canada, March 2016.

⁴³ Bennett, Christopher, *The Apology Ritual: A Philosophical Theory of Punishment*, Cambridge University Press, 2008.

strict. He states that future studies should focus on identifying the factors that make convicting sexual offenders considerably simpler. He defends himself by concluding that his entire piece praises this law without seeming to imply that Kenya's sexual offenders need a reprieve.

1.9 METHODOLOGY

The sources of information used in this study's qualitative research will be secondary sources such as journal articles, books, book chapters, reports, and other online resources. Moreover, primary materials like case law, statutes and the constitution will be used in the study. In general, I anticipate using a structured process to reach my conclusions and attempting to support my hypothesis with the results of the given research objectives.

In my efforts to study whether the age of discretion be applied in Kenya I will closely look at case law as my main source of information. I will also use psychological and social kinds of materials to get to conclusions. This is because the objective expects a laying down of a pattern to be able to answer it. My main sources will be secondary sources and I intend to do deductive and qualitative research as a desk study.

For my second research objective, which will be divided into looking at the criteria was used in determining the MMS of 15 years for defilement cases and whether it is sufficient to warrant its strict following, the method of study will be quite similar to the one above. It will be done through a critical analysis of public opinion and precedent in court. Similarly, my third research objective will take the same format. It will however follow a deductive analysis of qualitative nature.

In general, this study does not involve any form of field study, interviews or any other way of sourcing information apart from case law, books, articles, scholarly work, newspapers, reports, the internet and any other form of secondary sources.

1.10 CHAPTER BREAKDOWN

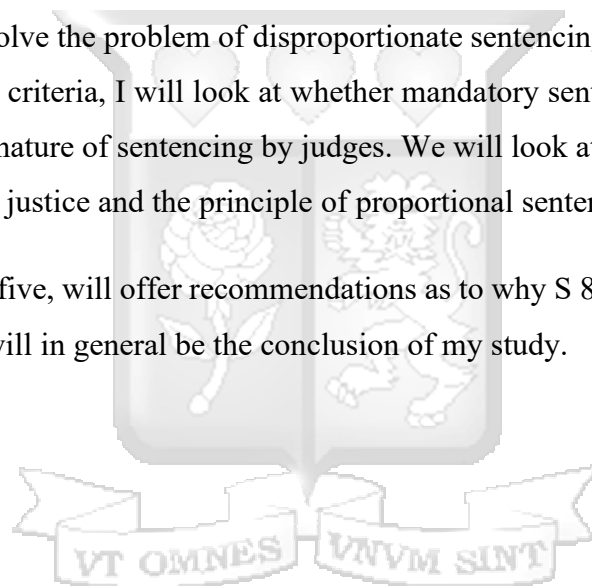
The introduction to the study will consist of this research proposal. It provides key study details. In particular, the study's justification, research objectives, and theoretical framework provide context and a sense of perspective that serve as the cornerstone for the remaining chapters. The second chapter will focus on answering whether the concept of age of discretion is actually

applicable in Kenya. Here, I will look at what are some situations or circumstances that might lead to either the answer of affirmation or a more negative one. Here ,case law and existing scenarios in Kenya will be used to try to get to an answer that will be suitable.

The third chapter will be done by answering two different but linked research questions. I will look at the criteria that was used in getting to 15 years as the most suitable number of years for the MMS of defilement of children between 16 and 18. Was there a criterion? Was it a guess? If there was one, this will lead me to studying why 15 years was considered the best and if these criteria should be considered solid enough to avert discretion in court over it.

The fourth chapter will be covered by the third research objective which is on whether amending S 8(4) to remove MMS solve the problem of disproportionate sentencing of such defilement case. Here, after looking at the criteria, I will look at whether mandatory sentencing has had a positive or negative effect on the nature of sentencing by judges. We will look at whether it acknowledges the concept of retributive justice and the principle of proportional sentencing.

The last chapter, chapter five, will offer recommendations as to why S 8 (4) of the SOA should be amended . This chapter will in general be the conclusion of my study.



CHAPTER TWO

SHOULD THE AGE OF DISCRETION BE APPLIED TO KENYA?

The term "age of discretion" has been defined in a number of ways. It is important to remember that the age of discretion and permission are not the same. The legal age of consent is the age at which a person is able to grant consent, particularly for marriage or sexual activity.⁴⁴ However, as was previously stated, the age of discretion is the legal minimum age at which an individual is deemed knowledgeable enough to be held accountable for specific actions or capable of using specific powers.⁴⁵ According to the Collins Dictionary this is the age at which a person is considered to be able to manage his or her own affairs.⁴⁶ St. Pius X's understanding with regard to the age for receiving the sacraments of penance and Holy Communion, "refers to the age at which a person reaches adulthood and can make lifetime decisions, especially regarding one's state of life. But more commonly it is the age when a child is capable of making free acts of the will and therefore becomes morally responsible for his actions."⁴⁷ From the definitions above, this raises the question of whether this same concept applies to children who have attained this age when looking at perception of carnal knowledge.

It is important to recognise that not all sexual activity is a consequence of coercion or outside forces. Many young people who engage in sexual activity are aware of their own desires and limits. Through fostering a sense of self-awareness and emotional development, these experiences can aid in their sexual education and personal development.⁴⁸

The idea that abstinence is the only effective strategy for preventing teenage sexual engagement has increasingly lost support. In the past, it was widely believed that adolescents should not engage in sexual behaviour until they reached adulthood or got married. This traditional method has, however, been severely contested and altered over time.⁴⁹ The socioeconomic changes, sexual

⁴⁴ Merriam Webster, 10 ed.

⁴⁵ Merriam Webster, 10 ed.

⁴⁶ Collins Dictionary, 14 ed.

⁴⁷ Fr. John Hardon's Modern Catholic Dictionary.

⁴⁸ Cohen M, No Child Left Behind Bars: The Need to Combat Cruel and Unusual Punishment of State Statutory Rape Laws, *Journal of Law and Policy*, <https://brooklynworks.brooklaw.edu/jlp/vol16/iss2/>, 2008.

⁴⁹ Githinji , Why Sex Education in Kenya is Necessary for Children, AfroCave, <https://afrocave.com/why-sex-education-in-kenya-is-important/>, 1 January 2021.

experimentation, and shifting cultural standards have all had a significant impact on how adolescents view sex and sexuality as they develop.

Numerous studies carried out globally, including research undertaken in Kenya support a change in adolescent sexual behaviour that has caused a re-evaluation of the general consensus regarding juvenile abstinence because of the substantial changes in adolescent sexual behaviour. Teenage pregnancy and motherhood are prevalent in Kenya, where the prevalence is 18%. Approximately one in five teenage girls between the ages of 15 and 19 either have a child under their belt or are expecting their first child. When it comes to age, the prevalence rises sharply, from 3% for females aged 15 to 40% for girls aged 19.⁵⁰ There were 110,821 documented teen pregnancies in the first five months of 2023, ranging in age from 10 to 19. 6110 of these instances involved children between the ages of 10 and 14, and 104,711 included adults between the ages of 15 and 19, according to statistics from the Kenya Health Information Systems. This is almost exactly half of the 260,734 figures from 2022. In 2021 there were 316,187 pregnancies, while in 2020 there were 331,549.⁵¹

A survey was done on children from the Informal Settlement of Kibra (through Local Agency) on 4th April 2019.⁵² This survey found several noteworthy characteristics of adolescent relationships and attitudes toward sexual activity. It had a comprehensive study with a sizable sample size of 1407 students selected from 19 different schools. Gender distribution among these participants was remarkable, with 56% of participants being female (790 girls) and 44% being male (617 boys).

19% of participants in the study, which involved 1407 students from 19 schools in Kibra, were in romantic relationships at the time of the assessment. These findings shed light on how young people are introduced to romantic involvement. A closer look revealed that 63% of the participants, 14 and older said that their friends and neighbours in the neighbourhood were already in a relationship, pointing to a widespread and perhaps socially acceptable norm for adolescent

⁵⁰ Teenage pregnancy and motherhood situation in Kenya: the county burden and driving factors; policy brief, UNESCO, Health and Education Resource centre.

⁵¹ Saya M, Teen pregnancies: 110,821 cases recorded in five months: Cases were recorded from January to May 2023, The Star, 11 August 2023.

<https://www.the-star.co.ke/news/realtime/2023-08-11-teen-pregnancies-110821-cases-recorded-in-five-months/> on 3 October 2023.

⁵² National Gender and Equality Commission (NGEC), Minimum Age of Consent for Sex: Addressing the Dilemma, 2019, p 6.

romantic involvement. Notable results also surfaced about attitudes about sexual behaviour: 85% of respondents thought it was acceptable at age 18, which is the legal consent age. It's interesting to note that 8% had differing views, with some believing it to be appropriate when desired and others only agreeing when their partner persisted, illustrating the complex beliefs surrounding teenage sexuality.

The age of discretion has involved the idea of knowledge of action; the consciousness of one's behaviour. However, this does not mean that it applies the same way in every aspect of life. For example, in divorce cases the judge may take a teen's choices into consideration when deciding what arrangements are in the best interests of the child if the teen has the necessary maturity to express preferences on custody and visitation and the requests of the child are reasonable.⁵³ On matters like allocating time across households, for instance, the court might take those preferences into consideration.⁵⁴ This acknowledges that a child under the age of 18 can make some certain serious decisions that affect their lives.

Another example is the age of Criminal Responsibility in children. According to Section 14 (2) of the Penal Code,⁵⁵ a child over the age of eight but under the age of twelve can only be found criminally accountable if they had the mental capacity to know that they shouldn't have done the act or omitted to make the decision at the time of the alleged offence.⁵⁶ The theory goes that because of their undeveloped moral and mental development, children between the ages of 8 and 12 are assumed to be incapable of committing crimes. This "age of criminal responsibility" is a reflection of the societal view that minors shouldn't be held criminally accountable at this age since they don't have the essential comprehension of the consequences of their acts. Legal systems take this stance, acknowledging that young children are emotionally and intellectually immature and that they might not possess the guilty mind (*mens rea*) required for adult culpability. This assumption, nonetheless, may be contested if particular case facts demonstrate the kid had the necessary understanding of their actions. Examples include a high degree of maturity, prior criminal conduct, or a manifest intent to commit a crime.

⁵³ Section 103 (1)(c), Children's Act (Act No 22 of 2022).

⁵⁴ Gersten J, Doctrine of Teenage Discretion in a Nevada Custody Case, 7 October 2022.

⁵⁵ Section 14(2), Penal code (Act No 81 of 1948).

⁵⁶ Section 14 (2), *Penal Code*, (Act No 81 of 1948).

In the end, the presumption reflects a delicate balancing act between acknowledging their developmental vulnerabilities and the requirement to establish justice and accountability where necessary. It emphasises how crucial it is to carefully consider each individual's circumstances and available facts when deciding whether to hold a youngster legally accountable for their deeds. Doli incapax is the legal term for an English common law provision that applies to minors.⁵⁷ This doctrine literally means 'incapable of wrong'.⁵⁸

The question to be raised in all this is now that the age of discretion has been proven to exist, at what age should a child be considered to have attained the age of discretion? It is crucial to emphasise that figuring out a child's capacity to make legal choices at age is a complicated and subtle process. As a result, courts place a high priority on carefully examining the particular child in question and evaluate the child's comprehension of the current situation. Determining a child's maturity and ability to use caution is essentially a case-by-case process. It entails a thorough assessment of the child's emotional and psychological growth, as well as their comprehension of the issue and ability to express their needs.⁵⁹ This adaptable approach reflects the understanding that children age and gain the capacity to make informed decisions at varied rates, including those related to sexual behaviours, as a result of their unique personalities and life experiences.

It is reasonable to state that the most appropriate age threshold, as supported by statistical data, is often set at 16 years old when it comes to comprehending sexual behaviours, based on both practical factors and the information presented earlier. The SOA to an extent shows support of this. It has divided ages into three separate groups, which is a crucial first point to make. Particularly, section 8 of the SOA focuses on minors, and within this provision, section 8 (4) deals with the oldest category of minors. In addition to providing a legal framework that identifies 16 as a key turning point on the road to adulthood, this statutory division also acknowledges the developmental disparities between distinct age groups which will be further discussed in the next chapter. When the SOA was being created, the criteria used to define these age ranges were carefully examined and found to be sufficient in addressing the particular issues that each group

⁵⁷ Garcia P, What does "Doli Incapax" Mean? 18 September 2023.

⁵⁸ Baja N, All you need to know about doli incapax, 3 January 2022.

⁵⁹ A Child's "Age of Discretion" and Visitation, New Direction Family Law, A Child's "Age of Discretion" and Visitation - New Direction Family Law, <https://newdirectionfamilylaw.com/blog/child-custody/a-childs-age-of-discretion-and-visitation>

had. This shows that lawmakers understood that people who are 16 and older are typically better able to handle the complexities of sexual behaviour and relationships.

Establishing a 16-year-old age restriction for sexual activity is sensible, as it reflects the legal system's recognition of adolescents' developmental stages and the difficulties in establishing carnal knowledge. Assuming that informed consent is universally unavailable based on an age-specific threshold oversimplifies the nature of human development. It is retrogressive to treat minors identically when it comes to consent, as the law treats them differently, such as in concepts like criminal responsibility.

In more support of this, it is clear that this norm is a custom in many nations worldwide. 16 is the legal age of consent in numerous countries, including Canada, Russia, South Africa, Australia, New Zealand, Spain, Ukraine, Belgium, Netherlands, Switzerland, Finland, Norway, and many more. The broad acceptance of a uniform age restriction indicates a recognition on a global scale of the psychological development reached in adolescence. As a result, it seems sense to draw the conclusion that 16 is a sensible and widely recognised cutoff age for admitting the ability to have voluntary sexual awareness.

Adults and educators must recognise that adolescents have a tremendous level of awareness rather than maintaining a dogmatic posture that clearly states, "sex is for adults only." Adolescents understand that sexual activity can be a healthy way to show affection and desire in their interpersonal relationships. A disconnect between adults and teens may result from an effort to undermine this understanding, making it more challenging for young people to ask for advice and help when they need it.

CHAPTER THREE

a) WHAT CRITERIA WAS USED IN DETERMINING THE MINIMUM MANDATORY SENTENCING OF 15 YEARS FOR DEFILEMENT CASES?

Thorough analysis of the factors considered while determining MMSs in defilement cases is necessary, especially when imposing a 15-year sentence. The choice to apply an MMS of 15 years is the result of rigorous analysis of several variables, including the seriousness of the offence, society norms, and the pursuit of justice. By exploring the factors that determine this sentencing norm, this introduction hopes to clarify the legal, moral, and societal aspects that influence the way judges handle defilement cases.

There is no clear indication from research that any of the countries following "English" legal systems have established or implemented comprehensive sentencing guidelines for sexual offences beyond the ranges stipulated by statute.⁶⁰ To illustrate, in Kenya, the determination of an MMS is predominantly influenced by the age of the victim. Courts have always recognised that the victim's youth or fragility greatly increases the seriousness of the offence. An important factor in deciding the harshness of a sentence is how the victim's physical, mental, and psychological health will be affected by such early years of vulnerability. *Republic v. DKJ (2018)*⁶¹ is a significant case that aptly illustrates the courts' position on this issue. In this court precedent, the defendant was charged with defiling a girl who was 9 years old. When announcing the sentencing decision in this instance, the trial judge carefully emphasised the victim's age and inherent fragility as key aggravating elements that called for a severe punishment. By giving the accused a life sentence, the court in this case showed its unwavering dedication to safeguarding society's most vulnerable citizens. This case reaffirmed the rule that defilement cases with juvenile or especially very young victims require a strong response from the court, and that the severity of the sentence should be commensurate with the serious harm.

Meanwhile, in jurisdictions like Botswana, the MMS is elevated by five years in cases where HIV infection is a factor. An example of a case where this was considered is in the case of *Lejony v*

⁶⁰ Thompson J, Simmonds FN, Rape Sentencing Study: Statutory Sentencing Provisions for Rape, Defilement and Sexual Assault in East, Central and Southern Africa, Legislative Review, Population Council.

⁶¹ *DK v Republic (2017)* eKLR.

The State.⁶² Following a trial, Ontshabetse Lejony was found guilty of defiling a female under the age of sixteen. A person found guilty of defilement must get an HIV test before being sentenced, as per section 147(2) of the Penal Code of Botswana,⁶³ as amended by the Penal Code (Amendment) Act 5 of 1998. Despite the fact that the appellant's HIV test result was positive, there was insufficient proof to support his status at the time the offence was committed. The accused must be proven to have been HIV positive at the time of the offence, not just at the time of the test following conviction, according to the Botswana Court of Appeal, which dismissed the appeal.

Another criterion used in determining sentencing is the relationship between the victim and the perpetrator. Courts have repeatedly recognised that the loss of trust that is inherent in certain relationships makes the act of greater severity and calls for a more severe sentencing strategy. In the appellate case of *SOO v Republic* (2018),⁶⁴ the complainant had been defiled by her uncle, severally in their home. Judge Aburili upheld the sentencing given in the lower court and stated that “the complainant was aged 10 years and a niece of the appellant who should have protected the child from would be sex pests. Instead, he took advantage of her innocence and defiled her. He breached the trust that the child had of a father figure. The sentence meted out was appropriate.”⁶⁵ Adding on to the aforementioned factors that are considered, the Sentencing Guidelines provide for a comprehensive list of aggravating circumstances which is to increase the term of the custodial sentence.⁶⁶

B) IS THE CRITERION FOR DECIDING MINIMUM MANDATORY SENTENCING SUFFICIENT TO WARRANT ITS STRICT FOLLOWING?

The court is not constrained by stringent regulations where statute law is silent on a particular offence's punishment. Rather, it has the authority to utilise what is known as "judicial discretion." This provides the court with the chance to determine an appropriate sentence, considering the specifics of each case and guaranteeing that it conforms with the ideas of justice and

⁶² *Lejony v The State* (2000), Court of Appeal of Botswana.

⁶³ Section 147(2), Penal Code, Botswana, (1964).

⁶⁴ *SOO v Republic* (2018) eKLR.

⁶⁵ *SOO v Republic* (2018) eKLR.

⁶⁶ Sentencing Policy Guidelines, 2020

proportionality. Judges in Namibia⁶⁷ and South Africa⁶⁸ are obligated to depart from the statute and give a reduced sentence in cases where they determine that there are "substantial and compelling circumstances" or that the MMS would be "unjust." Given that the statute doesn't define these terms it is giving the court a hard time when practicing discretion. In light of this point, if the accepted norm includes the idea of discretion, why is there such a need to follow the MMS set in place?

The Sentencing Guidelines discuss the setting of MMSs and the courts' obligation to follow them, especially in clause 7.1.⁶⁹ It states categorically that the court must follow MMSs set forth by statutory law and indicates that a fine cannot be used in lieu of incarceration. This provision makes MMSs legally binding and eliminates the possibility for judges to utilise their discretion to depart from these legislative requirements. Article 50 (1) COK⁷⁰ guarantees a fair trial. It must be interpreted to include a hearing from both sides. These clauses clash, leading to the ultimate conclusion that MMSs violate people's constitutional rights because they interfere with their ability to seek justice. This is because it is impossible to say that a murderer who has been found guilty of the crime and whose circumstances could have mitigated their mandatory sentence has been given a fair trial.⁷¹

In addition to this, it is important to look at statistics on teenage pregnancies. In Kenya, the rate of teenage pregnancy and motherhood is 18%. This suggests that almost 1 in 5 adolescent ladies between the ages of 15 and 19 have given birth to a living child or are expecting their first kid. From 3% among 15-year-old females to 40% among 19-year-old girls, the rate rises sharply with age. ⁷²In the first five months of 2023, a total of 110,821 teen pregnancies between the ages of 10 and 19 were documented. According to data from the Kenya Health Information Systems, 6,110 of these cases were children between the ages of 10 and 14 while 104,711 involved people between the ages of 15 and 19. This is almost exactly half of the 260,734 figures from 2022. In 2021 there

⁶⁷ State v. Lopez (2003) High Court of Namibia.

⁶⁸ State v Malgas (2001) The Supreme Court of Appeal of South Africa.

⁶⁹ Clause 7.1, Sentencing Policy Guidelines, 2020.

⁷⁰ Article 50(1), Constitution of Kenya, 2010.

⁷¹ Petition No 15 of 2015 (As consolidated with petition No 16 of 2015).

⁷² Teenage pregnancy and motherhood situation in Kenya: the county burden and driving factors; policy brief, UNESCO, Health and Education Resource centre.

were 316,187 pregnancies, while in 2020 there were 331,549. The reported statistics between 2003 and 2014 indicate a reduction in the adolescent pregnancy rate from 23% to 18% within the specified timeframe.⁷³ This reduction, though apparent, does not demonstrate a substantive decline in the prevalence of teenage pregnancies. The decrease is being attributed to an increase in use of birth control and contraceptives from 23.0% in 2003 to 36.4% in 2014. Moreover, the consistent 18% rate from 2008/2009 to 2014 raises concerns about the effectiveness of the SOA in curbing teenage pregnancies. Notably, the data's potential underestimation due to the exclusion of terminated pregnancies and the ability to confirm the lack of other sexual activities that do not lead to pregnancy, amplifies the uncertainty regarding the actual figures.⁷⁴

The SOA was introduced in 2006 with the specific goal of protecting minors and vulnerable groups from sexual abuse and exploitation through the establishment of legal safeguards. In order to prevent such acts and guarantee justice for victims, it established severe punishments for a variety of sexual offences, including those committed against minors. The fact that teenage pregnancies are still common, even though they have decreased slightly, and even that is not attributed to it, indicates that the legislation may not have had a substantial impact on the underlying causes of teenage pregnancies.

On the same note, as earlier mentioned, one important thing to consider is that the SOA clearly divides age ranges into three categories. Particular attention is paid to minors in Section 8 (4)⁷⁵ of the SOA, which particularly addresses the eldest subset of minors. The aforementioned statutory segmentation acknowledges the developmental differences that exist between these distinct age groups in addition to establishing the age of 16 as a milestone toward adulthood within the legal framework. The legal penalties for defilement are significantly harsher for children under the age of eleven,⁷⁶ indicating a stricter response to safeguard the most vulnerable and youthful members of society and an awareness of their increased susceptibility. For those between the ages of 16 and

⁷³ (i) CBS M ORC-Macro. (2004). Kenya demographic and health survey, 2003.

(ii) Macro D. Kenya National Bureau of Statistics, and ICF. Kenya demographic and health survey. 2008.

⁷⁴ Mutea L, Were V, Ontiri S *et al.* Trends and determinants of adolescent pregnancy: Results from Kenya demographic health surveys 2003–2014. *BMC Women's Health*, <https://doi.org/10.1186/s12905-022-01986-6> on 23 November 2023.

⁷⁵ Section 8(4), Sexual Offences Act (No 3 of 2006).

⁷⁶ Section 8 (2), Sexual Offences Act (No 3 of 2006).

18, however, a separate dynamic arises within the framework of the SOA. Here, the seriousness of the legal penalties for defilement violations is noticeably lessened.⁷⁷ This approach suggests that people in this older age group receive distinct treatment from the judicial system. The reduction in intensity may be explained by the existence of the age of discretion.

Beyond these conventional disciplinary concepts of reprisal and deterrence, the Kenyan legal system places special emphasis on two more crucial goals: reformation and rehabilitation. Rehabilitation aims to make it easier for the offender to reintegrate into society. In order to successfully do this, the main objective is to address the underlying causes of criminal behaviour. To prevent recidivism, reformation aims change a person's viewpoint, attitudes, and behaviour in order to promote a positive shift toward legal behaviour and make a beneficial contribution to society.⁷⁸

The key idea supported by the Kenyan legal system is the understanding that punishment should not be applied only as a form of reprisal or discouragement. Rather, it ought to incorporate a holistic strategy that incorporates both reformation and rehabilitation.⁷⁹ This strategy seeks to address the offence and promote positive behavioural changes while also giving people the chance to lead law-abiding, productive lives after their involvement with the criminal justice system. The ultimate goal is to encourage criminals' rehabilitation and reformation in order to make society a safer place.

The inference made after using these disciplinary principles is a significant observation. The frequency of defilement cases in the nation has not decreased, despite the emphasis on deterrence and retribution through harsh sanctions. This realisation emphasises the necessity of reevaluating the punitive strategy now in use and looking for new approaches to deal with and lessen similar offences.

Re-examining the idea of MMS to allow more judicial discretion, is one suggested remedy. There has been a noticeable shift in the past few years toward judges using their discretion more often

⁷⁷ Section 8 (4), Sexual Offences Act (No 3 of 2006).

⁷⁸ Jain S, Reformatory theory of punishment,23 Oct 2022.

⁷⁹ Clause 4.1, Sentencing Policy Guidelines,2020.

rather than strictly following MMS guidelines. Entrusting the courts with discretionary powers and eliminating the inflexibility of MMSs are critical elements in prioritising rehabilitation.



CHAPTER FOUR

WILL AMENDING S 8(4) TO REMOVE MINIMUM MANDATORY SENTENCES SOLVE THE PROBLEM OF DISPROPORTIONATE SENTENCING OF SUCH DEFILEMENT CASES?

Within the Kenyan legal framework, judges are accountable for making sure that the penalties imposed correspond with the magnitude of the offence that was committed. In Clause 3.1 of the Sentencing Guidelines, proportionality is given as a principle underpinning the sentencing process. The punishment must not be more or less than is merited in view of the gravity of the offence. The actual, anticipated, and intended impact of the offence as well as the offender's accountability are taken into consideration when determining how proportionate the punishment is to the offending behaviour.⁸⁰

In *Hoare v The Queen* (1989)⁸¹, it was stated that “a basic principle in sentencing law is that a sentence of imprisonment imposed by the court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in light of its objective circumstances.” The focus on appropriate punishments emphasises the idea that justice involves more than merely punishment; it also involves reestablishing equilibrium and respecting the rights of both the criminal and the victim.

Another reason for doing away with the MMSs is that it often limits the flexibility and discretion of courts while seeking to reduce sentence inequalities. Judges may be unable to take important considerations into account when they are constrained by required minimums. This rigidity can therefore lead to incidents of extreme unfairness and disproportionate punishments, particularly when it comes to situations involving weaker or less guilty parties.

MMSs that restrict the use of judicial discretion have never been embraced by the courts. This has been illustrated by several cases in Kenya and even around the world. The pivotal case of *Francis Karioko Muruatetu v Republic* (2016)⁸² challenged the constitutionality of the mandatory death

⁸⁰ Sentencing Policy guidelines, 2020.

⁸¹ *Hoare v The Queen* (1989), The United Kingdom House of Lords.

⁸² *Francis Karioki Muruatetu and another v Republic and 5 others* (2016) eKLR.

sentence for murder under Section 204 of the Penal Code⁸³. The court, in its wisdom, deemed such mandatory provisions as unconstitutional, as they encroach upon the court's legitimate jurisdiction to exercise discretion in appropriate cases which limits the right to a fair trial. This resonates with the fair trial principles enshrined in Article 25 (c) COK⁸⁴, acknowledging the need for individualised sentencing based on case-specific considerations. For example, in the case of *Christopher Ochieng v Republic (2018)*⁸⁵, appellant was accused of defiling MO, an 8-year-old child. The appellant faced charges of an additional offence under section 11 (1)⁸⁶ of the SOA, namely indecent act with a child. The specifics of this complaint stated that the appellant had touched the complainant, MO, an 8-year-old child, in an unlawful and intentional manner. The appellant simply claimed that he was not accountable and denied having committed the offence. While the appellant initially faced life imprisonment under Section 8(1)⁸⁷ of the SOA, the judges in the Court of Appeal deliberated on the applicability of the principles established in the *Muruatetu* case. In a move consistent with constitutional considerations, the court overturned the life imprisonment sentence, substituting it with a 30-year term.

In light of the recent decision in the appeal case of *Lukas Mberia v Republic (2020)*⁸⁸, by Hon. Judge David Majanja to reduce the sentence from life imprisonment to 20 years in jail, several questions have emerged, casting a spotlight on the complexities of section 8(1) of the SOA⁸⁹. In this case, Lukas Mberia had been accused of defiling a 9-year-old and had received a life sentence which he contested. The Court of Appeal cited *Christopher Ochieng v Republic* in declaring the MMS of life imprisonment unconstitutional and overturned it and replaced it with a 20-year jail sentence. The decision in this case eliminating the required minimum term has ignited public concern, prompting a re-evaluation of the existing legal framework and its implications. The appellate court's decision underscores the significance of the appeal process, emphasising the continued guilt of the appellant in the underlying crime⁹⁰. This legal trajectory brings to the forefront the considerations within the SOA, specifically drawing parallels to the legal principles

⁸³ Section 204, *Penal Code*, (Act No 81 of 1948).

⁸⁴ Article 25(c), Constitution of Kenya, 2010.

⁸⁵ *Christopher Ochieng v Republic (2018)* eKLR.

⁸⁶ Sections 11(1), Sexual Offences Act, (Act No.3 of 2006).

⁸⁷ sections 8(1), Sexual Offences Act, (Act No.3 of 2006).

⁸⁸ *Lukas M'Rami Mberia v Republic (2020)* eKLR.

⁸⁹ sections 8(1)

⁹⁰ Oswago S, *Mandatory Minimum Sentencing Vis A Vis Defilement Offences; Is It Necessary?* The East African Centre for Human Rights, 2019.

articulated in the Muruatetu case. A discussion concerning the adaptability and flexibility of statutory sentencing criteria has been sparked by Judge Majanja's decision, especially in situations when horrific crimes against vulnerable victims are involved. Concerns about the wider implications for Kenya's judicial system managing sexual offences are raised in light of these cases.

This concern has also been addressed around the world. In the South African case of *S v. Toms* (1990)⁹¹, the accused was charged under section 126 A(1)(a) of the Defence Act⁹². Toms was convicted for contravening the provisions of the above section. He was working full-time in community health at the time of his trial. He had attained the rank of first lieutenant after completing his basic military training a few years earlier. His unwavering unwillingness to serve for any longer periods of time due to conscience led to his conviction. A substantial amount of evidence was presented to lessen the penalty. Nonetheless, the presiding magistrate ruled that he lacked discretion over the sentencing. Using what he believed to be the required provisions of art. 126 A(1)(a), he gave Toms a 630-day prison term. This decision was appealed. A core concept is revealed in the decision made by the South African Court of Appeal, as expressed by Justice Corbett: the trial Court has the authority to decide whether to impose punishment. The Court emphasised that the Court's customary sentencing duty is greatly diminished by MMSs, underscoring the crucial role that judicial discretion plays in determining suitable punishments. The South African Court of Appeal, expressed a firm position opposing the legislature's MMSs legislation, viewing it as an unwanted encroachment on the courts' sentencing discretion. It claimed that laws imposing mandatory sentences contradict the fundamental principles of judicial discretion in addition to undermining the court's independence.

In *S v Mahomotsa*⁹³, where the accused was charged with rape, Stegmann, J stated that the judiciary's independence may be jeopardised by the legislature's intrusion into its area through the imposition of rigid MMSs. The courts run the risk of being used only as tools to carry out the legislative agenda, especially when it comes to issues of penal policy. The separation of powers doctrine's intended balance is threatened by this meddling, which could turn the court into a mindless executor rather than an independent decision-making body. Consequently, the conflict

⁹¹ *S v Toms* (1990) The Supreme Court of Appeal of South Africa.

⁹² Section 126 A(1)(a), The Defence Act, (No. 44 of 1957) South Africa.

⁹³ *S v Mahomotsa* (2002), The Supreme Court of Appeal of South Africa.

between judicial discretion and legislative imposition poses a practical threat to the constitutionally guaranteed division of powers and the goal of fair and just legal resolution.

Similarly, in *S vs. Jansen* (1999)⁹⁴, where the accused was charged with the offence of defilement, Davis J held that MMS function under a rigid framework that frequently ignores the complex patchwork of unique traits that uniquely define each case. This approach ignores the subtleties and complexity of an offence or the circumstances of the offender, leaving a factual void in which neither the viability of rehabilitation nor the appropriateness of the selected confinement strategy are taken into account. As so, it eliminates the opportunity to craft sentences that are appropriate for the crimes while also addressing any underlying issues that may have led to it. In the event that this individualised assessment is not provided, a system that applies uniform sanctions regardless of a person's potential for development or progress may result.

In addition, this mechanical implementation of MMSs might lead to a blatant disrespect for the accused person's fundamental right to dignity. Reducing people to mere statistics inside the legal system is a concern associated with handling each case as an isolated, context-free entity. This reductionist method may lead to overly severe actions that disregard a person's capacity for reform or rehabilitation, violating their right to legal respectability.

The judge in *Simon Kipkurui Kimori v Republic* (2018), declared that the obligatory sentences rulings of the Supreme Court apply equally to MMSs and non-optional penalties. The accused had been charged with defilement of a 17-year-old in 2017. The judge's view was in fact supported by the Sentencing Policy Guidelines where it is shown that "whereas MMSs reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for juvenile offenders." In this case, the appeal was dismissed and the retaining of the sentence of 15 years imprisonment was based on the fact that he deemed it fair according to the circumstances implying that it is not just because it was the MMS set. Judge Odungo, the judge presiding over this case, citing *Bernard Kimani Gacheru v Republic* (2002)⁹⁵ stated that "sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the

⁹⁴ *S v Jansen* (1999), The Supreme Court of Appeal of South Africa.

⁹⁵ *Bernard Kimani Gacheru v Republic* (2002) eKLR

trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle.” He emphasised that the complainant was stalked by the appellant for a while before she was confronted. The entire incident must have been extremely traumatic for the complainant, as he threatened to kill them with a knife if they raised an alert. Despite being aware that he had committed the crime, the appellant gave the court an unwarranted trial before coming clean and putting up his defence. He claimed that extraordinary forces forced him to commit the crime. According to the judge's assessment, the appellant was not deserving of any leniency from the court.

Another point to look at is the purpose of punishment according to law and philosophy. The ideas of retribution and deterrence have been the primary rationales for Kenyan law's imposing of an MMS in certain circumstances. Even though they are crucial elements of the criminal justice system, they frequently supersede the Sentencing Policy Guidelines' equally vital objectives of rehabilitation and reformation.⁹⁶When an MMS is imposed in cases involving children or young people, for example, the opportunity for rehabilitation and reformation may be subordinated to the goal of deterrence and retaliation⁹⁷. As a result, the contradiction between MMSs and the more general goals of rehabilitation and reformation under Kenyan law emphasises the need to do away with MMS. Their rigid application may unintentionally jeopardise the possibility of true rehabilitation and social reformation of offenders—two equally important aspects of a fair and just legal system—even though deterrence and retribution are essential components of the justice system.

Moreover, other factors should be considered when sentencing. This idea acknowledges that attentively listening to a child's viewpoints is necessary to determine what is in their best interest. The law has set out a threshold that determines which kind of child is able to do this. The principle is formulated in Article 12(1) of the UNCRC⁹⁸that provides for state parties to assure to the child who is capable of forming his or her own views the rights to express them freely in all matters

⁹⁶ Clause 4.1, *Sentencing Policy Guidelines*, 2020.

⁹⁷The Purposes of Punishment, M Libraries <<https://open.lib.umn.edu/criminallaw/chapter/1-5-the-purposes-of-punishment/>> on 9th December 2023.

⁹⁸ Article 12(1), *United Nations Convention on the Rights of the Child*, 1990.

affecting the child, the view being given due weight in accordance with the age and maturity of the child. As a result, taking into account a child's perspective becomes morally required in legal disputes, particularly those that are as delicate as those pertaining to a minor's welfare and rights⁹⁹.

Recognising the view of a 16 to 18-year-old may offer significant perspectives on issues related to their affairs. Their opinions could provide important background information or points of view that drastically change the direction of a court decision. When dealing with defilement instances or other critical circumstances, it becomes essential to hear the child's point of view. A single expression of love or understanding, for example, could completely change the case's context. The verdict's severity may be considerably affected by this change. It is important to understand that an excessive punishment could be imposed if an MMS is strictly followed without taking into account the specifics of each case. It may therefore be helpful to listen to a child's point of view.

To add on to this The Beijing Rules¹⁰⁰ recognise the principle of proportionality but emphasise that in respect to juveniles, the response should not only take into account the gravity of the offence but also the personal circumstance of the juvenile. This approach recognises that minors are in a unique stage of development, and that conditions outside of their control or a lack of maturity may have an impact on their behaviour in addition to malignancy. Consequently, a more comprehensive understanding of justice is provided by including these unique factors into the formula.

Even though statutes prescribe certain sentences, there is a noticeable pattern among judges to refrain from giving sentences longer than the MMS of 15 years, frequently claiming constitutional objections as grounds for deviation. The willingness to impose sentences that are different from what the law specifies is a result of the complex interaction between constitutional demands and statutory directives. This calls for a reassessment of the constitutional soundness and normative effectiveness of these statutory mandates in the context of modern law.

There are so many examples of such cases. For instance, in the appeal case of Kelvin Muthoni Makembo v Republic (2021)¹⁰¹, Kelvin Makembo was accused of defiling C.K a 16 year old girl. Due to the fact that the case's circumstances demonstrated that the 15-year sentence was not

⁹⁹ Four principles of the Convention on the Rights of the Child <<https://www.unicef.org/armenia/en/stories/four-principles-convention-rights-child>>

¹⁰⁰Rule 5, The Beijing Rules.

¹⁰¹ Kelvin Muthoni Makembo v Republic (2021) eKLR.

appropriate, Judge L.W. Gitaru overturned it and replaced it with a 7-year jail sentence. Similarly, in the case of *Mercy Chelagat v Republic (2022)*¹⁰², the appellant, was charged and convicted of the offence of defilement. The particulars of the offence were that the appellant defiled KK, a boy aged 16 years. In the submissions by the respondent, it was submitted that the accused was well known to the victim and had gotten into an intimate relationship. This was one of the situations bringing up the idea of a ‘declaration of love’. The respondent argued that the trial court had discretion over penalties and that a superior court may only get involved in cases where the trial court had given an excessively harsh sentence or had neglected to take into account relevant circumstances. The respondent in the appeal case believed that the sentence of 10 years was reasonable and lawful even though the offence included an MMS of 15 years. In support of this, they cited *Wanyema v Republic (1971)*¹⁰³ and *Rophas Furaha Ngombo v Republic (2019)*¹⁰⁴ in respect of MMSs, where the circumstances in the case warranted a way lesser sentence than the mandatory one. The judgement in *Jared Koita Injiri v Republic (2019)*¹⁰⁵ was also in support of the fact that the mandatory sentences limits the discretionary power of the court.

In the case of *Margrate Lima Tuje v Republic (2016)*¹⁰⁶, the applicant was charged with the offence of being in possession of alcoholic drink that does not conform with the requirements of Section 27 (1) (b)¹⁰⁷ as read with Section 27 (4)¹⁰⁸ of the Alcoholic Drinks Control act No 4 of 2010. The court, citing *Alister Antony Pariera v State of Maharashtra*¹⁰⁹, that held that, in criminal cases, sentence is a crucial examination. The severity and intent of the crime, the nature of the offence, and all other relevant circumstances must be taken into consideration by the court when determining the appropriate sentence in each case. The MMSs deprived the court of its discretionary power in sentence, according to the Supreme Court and the Court of Appeal's reasoning. It is further observed that mandatory sentences fail to conform to the tenets of fair trial

¹⁰² *Mercy Chelagat v Republic (2022)* eKLR.

¹⁰³ *Wanyema v Republic (1971)* eKLR.

¹⁰⁴ *Rophas Furaha Ngombo vs. Republic (2019)* eKLR.

¹⁰⁵ *Jared Koita Injiri v Republic (2019)* eKLR.

which are an in-alienable right guaranteed under Articles 50¹¹⁰ and 25 COK¹¹¹ which was also stated in the case of Christopher Ochieng v Republic (2018) that was mentioned above.

In his decision in the appeal case of WOR v Republic (2022)¹¹², FA Ochieng J (as he then was) stated inter alia that, “if the mandatory nature of the death penalty was declared unconstitutional, a similar reasoning can extend to MMSs such as those in Section 8 of the SOA and that he was unable to see any distinction between the mandatory nature of the sentence for the offence of murder, and the MMS for the offence of defilement. In his view that renders the sentence unconstitutional as the fact that the prescribed sentence completely precluded the Court from exercising any discretion, regardless of whether or not the circumstances so require.”

To add on to this, Aburili J, in his decision in the appeal case of Taifa v Republic (2022)¹¹³, where the appellant had been accused of defiling a 14 year old girl, LAO, the appellant stated that ‘whereas MMSs may be lawful, they indeed deprive the trial court of the discretion in sentencing having regard to mitigations and circumstances of each case. This is not to say that there would be any justifiable cause for one to defile a child but that each case must be considered on its own facts and circumstances.’ In support of this, the appeal case of Dismas Wafula Kilwake v Republic (2019)¹¹⁴ and Yawa Nyale v Republic (2018)¹¹⁵ both argued that the legislature's imposition of statutory MMSs amounted to usurping the judiciary's sentencing authority.

In a petition brought forward in 2022 against the Director of Public Prosecutions and the Attorney General, six petitioners questioned the interpretation of MMSs under the SOA.¹¹⁶ The petitioners were prisoners serving sentences for offences related to the SOA. Their complaint was based on the fact that it imposed MMSs that restricted judges' ability to impose different orders or penalties. According to their arguments, the SOA's MMSs infringed their right to human dignity and resulted in an overwhelming number of convicts serving these sentences. They argued that it was necessary to change the SOA through legislation

¹¹⁰ Article 50, Constitution of Kenya (2010).

¹¹¹ Article 25, Constitution of Kenya (2010).

¹¹² WOR v Republic (2022) eKLR.

¹¹³ Taifa v Republic (2022) eKLR.

¹¹⁴ Dismas Wafula Kilwake v Republic (2019) eKLR.

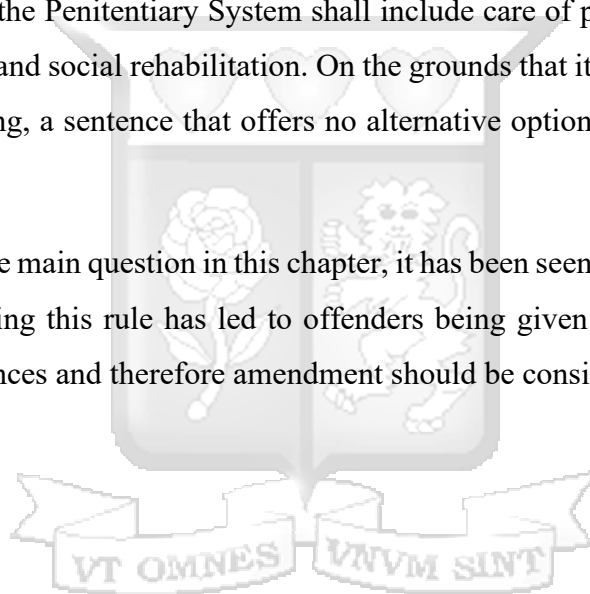
¹¹⁵ Yawa Nyale v Republic (2018) eKLR.

¹¹⁶ Maingi and 5 others v Director of Public Prosecutions & another (Petition E017 of 2021) (2022).

In his decision, Judge Odunga held that the SOA violates Article 28 COK¹¹⁷ to the degree that it sets MMSs without giving the trial court any discretion in determining the proper penalty to impose. However, as long as the sentences aren't thought to be the MMS the court is free to impose the punishments specified therein. The court further decided that prisoners who believe their sentences are unfair because of MMSs may file an appeal to have their sentences reviewed based on the specific facts of their case.

There is also disagreement over whether MMSs that only specify incarceration as a form of punishment are consistent with the 1966 ICCPR, which Kenya ratified in 1972 and which, as a result, is incorporated into Kenyan law by virtue of Article 2(6) COK¹¹⁸. According to Article 10(3)¹¹⁹ of the covenant, the Penitentiary System shall include care of prisoners with the primary goal of their reformation and social rehabilitation. On the grounds that it might not accomplish the primary goal of sentencing, a sentence that offers no alternative options than imprisonment may be disapproved of.

In a nutshell, to answer the main question in this chapter, it has been seen from the recently decided cases that strictly following this rule has led to offenders being given punishments that are not proportional to their offences and therefore amendment should be considered.



¹¹⁷ Article 28, Constitution of Kenya, 2010.

¹¹⁸ Article 2(6), Constitution of Kenya, 2010.

¹¹⁹ Article 10(3), *International Covenant on Civil and Political Right*, 1972.

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSION

In conclusion, courts must ensure that sentences they impose uphold the individual's dignity as guaranteed by Article 28 COK¹²⁰, even though it's possible that the mandated sentences are still lawful and can be applied. Put another way, the presumptive mandatory penalties for MMSs must now be construed with the aforementioned modifications, exclusions, and qualifications because the SOA went into effect prior to the constitution. This is especially true when the sentences fail to consider the individuals' dignity as required by Article 28 COK¹²¹, as recognised in the Muruatetu Case. The interpretation that holds these provisions to be unlawful is the one that ties the hands of the trial courts. To be clear, and to avoid repetition, my conclusion here does not imply that the court should not impose an MMS that seems to be prima facie required. Simply said, it means that the circumstances surrounding the offence must be taken into account, and nothing should prevent the court from imposing punishments that are suitable for the offence committed, including an MMS.

When sentencing an offender under appropriate conditions, the court should have the discretion to implement any of the recommended punishments if the facts of the case demand it. On the other hand, when the circumstances do not support the imposition of these specified penalties, the court should not be limited by Section 8 (4)¹²² to imposing them. It becomes clear that the SOA requires a thorough re-evaluation that is methodical and considerate. Many states only make sexual relationships with minors under the age of sixteen illegal. It appears unrealistic to assume that adolescents and developing adults do not deliberately seek or engage in sexual behaviour with informed awareness, as established by a case in the English House of Lords¹²³. Even though they may not have reached legal adulthood, they may have developed insight and become capable of making wise choices for their lives and bodies. This maturation process is a continuum, as Lord

¹²⁰ Article 28, Constitution of Kenya, (2010).

¹²¹ Article 28, Constitution of Kenya, (2010).

¹²² Section 8, Sexual Offences Act (No.3 2006).

¹²³ Gillick v. West Norfolk and Wisbech Area Health Authority (1985), The United Kingdom House of Lords.

Scarman pointed out in the same case¹²⁴. If the law is fixed in imposing strict limits in the middle of an ongoing natural process, it runs the risk of being artificial and unrealistic in an area that requires sensitivity to changes in society and human growth¹²⁵.

In England, only sexual relations with those under 16 are illegal, and even then, the maximum sentence for those aged 14 to 16 is two years. Many jurisdictions follow similar practices, necessitating a national conversation on the complexities of development, moral behavior, individuality, and the need to protect children. Currently, young males face lengthy sentences for engaging in intercourse with underage girls, raising questions about the wisdom and fairness of such practices. Examining the concept of the age of discretion offers an alternative perspective for assessing defilement cases, ensuring proportional sentences in accordance with Kenyan law. MMSs limit judges' discretion, resulting in punishments that may lack proportionality and fairness. Re-evaluating the use of MMSs in the court system is necessary in order to maintain everyone's fundamental right to justice and to be in line with constitutional norms.

My recommendation then is to amend S 8 (4) of the SOA to remove the 15 years sentence as a minimum as it hinders the giving of proportional penalties. Though legally permissible, they do take away the trial court's ability to determine the appropriate sentence while taking into account the unique facts and mitigations in each case. This is not to suggest that defiling a child would ever have a legitimate reason, but rather that each situation needs to be evaluated in light of its unique set of circumstances. Similarly, it is essential that legislature amend this in light of the existence and validity of the age of discretion.

¹²⁴ Gillick v. West Norfolk and Wisbech Area Health Authority (1985), The United Kingdom House of Lords, p421.

¹²⁵ Gillick v. West Norfolk and Wisbech Area Health Authority (1985), The United Kingdom House of Lords, p 422.

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