

MINORS, SEX AND THE LAW: RETHINKING THE
REGULATION OF CONSENSUAL SEX BETWEEN
MINORS IN KENYA

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Table of Contents

Acknowledgements	iv
Declaration	v
Abstract	vi
List of Abbreviations.....	vii
List of Cases	viii
List of Legal Instruments	ix
CHAPTER ONE: INTRODUCTION	1
1.1. Background to the study.....	1
1.2. Statement of the Problem	4
1.3. Justification of study	5
1.4. Statement of Objectives	5
1.5. Research Questions	6
1.6. Hypothesis.....	6
1.7. Limitations	6
1.8. Chapter Breakdown.....	6
CHAPTER TWO: THEORETICAL FRAMEWORK.....	8
2.1. Defilement as a crime of strict liability.....	8
2.2. Defilement as a crime of strict liability and theories of punishment	10
2.2.1. Deterrence.....	10
2.2.1.1. Deterrence, strict liability and defilement laws	11
2.2.2. Retribution	12
2.2.2.1. Retribution, strict liability and defilement laws.....	12
2.3. The best interest of the child principle.....	13
CHAPTER THREE: AN ANALYSIS ON THE APPLICATION OF THE DEFILEMENT LAW ON MINORS BY THE COURTS IN KENYA	15
3.1. The law and adolescent sexual realities in Kenya.....	15
3.2. Application of defilement laws on minors	16
3.2.1. A nuanced approach to sex involving a minor	17
3.3. The complexity of adolescent sexualities.....	18
3.3.1. Adolescence: A time of change	18

3.3.2.	Societal view of adolescence and sex (An African view)	19
3.3.2.1.	Virginity as virtue	21
3.3.2.2.	The taboo of premarital pregnancy	23
3.3.2.3.	The complexity	23
3.4.	Severe and absurd punishments: A result of the application of law on defilement to minors	24
3.4.1.	Both minors are defiler and victim	24
3.4.2.	Discriminatory prosecutions	24
3.4.3.	Social shame, fear and stigma	25
CHAPTER FOUR: A COMPARATIVE STUDY BETWEEN KENYA’S DEFILEMENT LAW AND SOUTH AFRICA’S STATUTORY RAPE LAW.		27
4.1.	The purpose of the comparative study	27
4.2.	South Africa focused law reforms on minors’ consensual sex activities	27
4.3.	Comparison of South Africa and Kenya	28
4.3.1.	The South African law	28
4.3.2.	South African Law after the Teddy Bear Clinic Case	29
4.3.3.	Lessons Kenya can learn from South Africa	30
CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS		32
5.1.	Conclusion	32
5.2.	Recommendations	32
BIBLIOGRAPHY		35

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Declaration

I, **KIGEN TRACY JEROP**, 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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This Research Proposal has been submitted for examination with my approval as University Supervisor.

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Abstract

According to the Sexual Offences Act of Kenya (2006), minors cannot consent to sex. Any act of sex with a minor is deemed defilement, a strict liability offence, punishable by law. This provision in law was aimed at protecting minors against sexual abuse, especially by adults. Today, minors are having sexual relations with each other claiming consent and voluntariness. However, the courts have maintained a similar position to the law, that a minor cannot consent to sex. Thus, consensual sex between minors is unlawful. This has left minors who are caught participating in consensual sex with each other charged of the offence of defilement and subjected to judicial proceedings.

The general objective of this study is to examine the appropriateness of the law as a mechanism to regulate early adolescent sexual activities. This study also seeks to establish a deeper understanding of adolescent sexual behaviour and the need to regulate it. It suggests that criminal law can be a powerful tool in protecting children against sexual abuse by adults. However, by examining the deterrence and retributive theories of punishment, criminal law fails to be effective in preventing minors from engaging in sexual activities with each other.

List of Abbreviations

ACRWC- African Charter on the Rights and Welfare of the Child

AIDS- Acquired Immune Deficiency Syndrome

BIC – Best Interest of the Child

CRC- Convention of the Rights of the Child

HIV- Human Immunodeficiency Virus

RAPCAN- Resources Aimed at the Prevention of Child Abuse and Neglect

SOA- Sexual Offences Act of Kenya (2006)

The Bill- Sexual Offences Bill of Kenya (2005)

UN- United Nations

UNICEF- United Nations Children’s Fund

List of Cases

Bonu v R (2010) eKLR.

CKW v Attorney General & another (2014) eKLR.

Ezekiel Cheruiyot Koros v R (2010) eKLR.

J. v. National Director of Public Prosecutions (2014) ZACC 13.

John Otieno Obwar v Republic (2011) eKLR.

Martin Charo v Republic (2016) eKLR.

P O O (A Minor) v Director of Public Prosecutions & another (2017) eKLR.

Teddy Bear Clinic for Abused Children, and Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN) v Minister of Justice and Constitutional Development (The Teddy Bear Clinic case) (2013) ZACC 35.

List of Legal Instruments

African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49.

Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3.

Age of Majority Act, Kenya (Cap 33 of 1977).

Borstal Institutions Act, Kenya (Cap 92).

Children Act, Kenya (Act No. 8 of 2001).

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

Constitution of Kenya (2010)

Penal Code, Kenya (Cap 63).

Sexual Offences Act, Kenya (Act No.12 of 2012).

CHAPTER ONE: INTRODUCTION

1.1. Background to the study

In Kenya, it is a crime for any person to have sex with a child.¹ The Sexual Offences Act (SOA) constitutes the offence of defilement, which is defined as an act of sexual penetration caused to a child² by any person.³ Any person means either an adult or a child. Children are legally incapable of giving consent to an act of sex.⁴ Therefore, the legal age of consent to sex in Kenya is 18 years.⁵

Currently, the law governing sexual and related offences in Kenya is contained in the SOA. Prior to the SOA, the Penal Code governed sexual offences.⁶ The SOA was introduced as a Sexual Offences Bill in parliament in the year 2005.⁷ There had been a significant increase in sexual offences between the years 2002 and 2005, particularly against children.⁸ Sexual violence was on the rise and the legislation in place then was unable to deal with this problem.⁹ The Bill was then proposed as a cure for the ills of the earlier legal framework for which at the time, could not adequately address the prosecution and management of sexual offences.¹⁰ These sexual offences included those against children. Hon. Njoki Ndung'u, architect and mover of the Bill, recognized the rise of a new category of offenders known as pedophiles who sexually prey on children and the need to address this.¹¹ Other legislators seconded her move

¹ Section 8(1), *Sexual Offences Act*, Kenya (Act No.12 of 2012).

² The Sexual Offences Act Kenya Cap 62A, assigns the definition of a child to mean that under the Children Act Cap 141 which is "any human being under the age of eighteen years".

³ Section 8(1), *Sexual Offences Act*, Kenya (Act No.12 of 2012).

⁴ Section 43(1)(c) and Section 43(4)(f), *Sexual Offences Act*, Kenya (Act No.12 of 2012).

⁵ Section 2, *Age of Majority Act*, Kenya (Cap 33 of 1977). This is the age at which one legally becomes an adult.

⁶ Chapter XV, *Penal Code*, Kenya (Act No.14 of 1991).

⁷ Parliament Hansard Report, Kenya, 26 April 2006, 743.

⁸ Ndung'u N, 'Legislating against sexual violence in Kenya: An interview with the Hon. Njoki Ndung'u' 15(29) *Reproductive Health Matters*, 2007, 154. The statistics on reported figures of sexual violations by the Gender Violence and Recovery Centre shows an increase between 2002 and 2005. The reported cases rose from 6 in 2002 to 1485 in 2005 and the majority of victims were between the ages of 1 and 15.

⁹ Ndung'u N, 'Legislating against sexual violence in Kenya: An interview with the Hon. Njoki Ndung'u', 149.

¹⁰ Hon. Njoki Ndung'u mentions this while answering an interview question on the impact of the Sexual Offences Act in Kamau M, 'Why judges want Kenya sexual offences law amended' *The Standard*, 3 October 2016.

¹¹ Parliament Hansard Report, Kenya, 27 April 2006, 794.

to protect children against rape and other sexual offences.¹² This led to the creation of the offence of defilement, designed specifically to address sexual offences against children.¹³

At the time of the Bill's introduction, consent was very controversial in cases of sexual assault and rape.¹⁴ The Bill therefore aimed to re-define the meaning of consent and its boundaries in such cases.¹⁵ Children are particularly vulnerable due to their physical and mental immaturity hence they require a higher legal standard of protection.¹⁶ In this spirit of protecting children, the Bill then limited the ability to consent to adults by declaring that a child cannot legally consent to sex.¹⁷ This limitation is a special safeguard, especially against adults, who by virtue of their greater levels of maturity and experiences can easily coerce children.¹⁸ Contrary to this ideal situation on paper where children cannot consent, the reality on the ground is different. Children are expressing consent by willingly participating in sexual activities with each other.¹⁹ This then challenges the presumption that children are incapable of being sexual agents who make conscious sexual decisions free from coercion.²⁰ The question then is, in such a case, how should the law then treat minors who have consented to engage in sex with each other?

The Kenyan courts have advanced a solution to this question. The general position of courts as regards consensual sex between two minors, is reflected in *CKW v Attorney General & another*.²¹ This case involved a 16-year-old boy (CKW) who had been charged with the defilement of a 16-year-old girl. The boy claimed that the sex was consensual and the girl was even his girlfriend. The court however stated that a minor cannot consent to sex and the boy remained guilty of the offence of defilement. Hence, consensual sex between minors is

¹² Parliament Hansard Report, Kenya, 26 April 2006, 743. Parliament applauds as Hon. M Kilonzo seconds the Sexual Offences Bill as he asks a rhetorical question, “*If this Parliament and this country cannot defend and protect those children, who else will?*”

¹³ Section 145, *Penal Code*, Kenya (Act No.14 of 1991) provided for the offence of defilement of girls under fourteen years. This is different from the offence of defilement under the Sexual Offences Act which means sex with any child, regardless of age or gender.

¹⁴ Parliament Hansard Report, Kenya, 27 April 2005, 988.

¹⁵ Parliament Hansard Report, Kenya, 27 April 2005, 988.

¹⁶ The Preamble, *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3.

¹⁷ Parliament Hansard Report, Kenya, 27 April 2005, 988.

¹⁸ Smith BL, Kercher GA, *Crime victims' report: Adolescent sexual behaviour and the law*, 2011, 7.

¹⁹ National AIDS Control Council, *Kenya AIDS indicator survey: Final report*, 2012, 137. The most common reason given in the survey by minors for having sex was because they wanted to have sex.

²⁰ Walsh K, ‘The sexual rights of children and age of consent’ *Interdisciplinary.Net*, 2010, 9.

²¹ (2014) eKLR.

unlawful in Kenya. This position is similar to the one taken by the courts when it comes to cases of consensual sex between an adult and minor. In *Bonu v R*,²² Bonu was accused of having defiled a 10-year-old girl. He claimed that the girl was his lover and had willingly consented to the sex act. The court emphasized that a minor cannot consent despite the minor's willingness to participate in the act.

This approach has led to several legal and non-legal consequences for minors caught participating in consensual sex with other minors. First, in such instances, the practice by state prosecutors has been to pursue the male child as the offender.²³ This is especially so where the girl is younger than the boy.²⁴ The move to prosecute the male child as opposed to both children is considered a discriminatory application of the law.²⁵ This is because the law is framed in gender-neutral terms and since both cannot legally consent, both participants can be liable for offending the other. The prosecution of the male child only as result of the application of the law is supported by prosecutors enforcing defilement laws in ways that reflect bias and stereotypes.²⁶ Second, a finding of guilty to a child accused of defilement ideally results in the placement of such a child in a juvenile facility.²⁷ The placement of a child in juvenile detention should always be a measure of last resort²⁸ and such an action must be in conformity to the best interests of the child.²⁹ However, the SOA as written and applied, leaves no alternatives for a child convicted of the crime of defilement other than juvenile detention.³⁰ Also, once a child is convicted, he or she inevitably bears the tag of a criminal which can often lead to them experiencing stigma from their fellow peers and society at large.³¹

The framing of the Act and subsequent interpretation of the law by courts has rendered consensual sex between minors unlawful. While the Act was in its formative stages as a Bill,

²² (2010) eKLR.

²³ Ochieng A, 'Lawyers see bias in application of sexual offences law' Daily Nation, 1 February 2016.

²⁴ Gachuki N, 'The issue of consensual sexual relationships among minors and the law' Academia.edu, 4.

²⁵ Gachuki N, 'The issue of consensual sexual relationships among minors and the law' Academia.edu, 4.

²⁶ Ochieng A, 'Lawyers see bias in application of sexual offences law' Daily Nation, 1 February 2016.

²⁷ The Preamble, *Borstal Institutions Act*, Kenya (Cap 92), borstal institutions function as detention areas for youthful offenders.

²⁸ Article 3, *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3.

²⁹ Article 37(b), *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3.

³⁰ Section 8(2) -(4), *Sexual Offences Act*, Kenya (Act No.12 of 2012).

³¹ Goodwin M, 'Law's limits: Regulating statutory rape law' *Wisconsin Law Review*, 2013, 492.

Hon. Kembi Getura questioned the legal implication of a minor's inability to consent.³² This was in the context of the possible occurrence of consensual sex between minors. His argument was that since a child is incapable of consent,³³ how is it possible to convict a child for a sexual offence that in the first place, he (she) cannot consent to? Minors are the objects of the laws on the offence of defilement. These laws have been created to serve and protect them.³⁴ Should these very laws then be used against the minors who engage in consensual sex with each other? The Bill was however passed with no further contemplations on amendments or guidance on how to deal with the issue of a minor's consent in cases where he or she is an agent of sex.

The Sexual Offences Act's vision when precluding a minor's ability to consent was to protect minors, especially against adults.³⁵ Therefore, it was well-meaning. However, it failed to comprehensively give guidelines on how to deal with minors who consent to sex with each other. Consequently, it is imperative to re-evaluate the current legal framework on consensual sex between minors. It is also important to reconsider the practicability of attaching criminal liability on minors who legally cannot approve the commission of the act but actually express consent.³⁶ This is in light of the harsh penalties minors can face as a result of the approach by Kenyan courts highlighted above. Also, judges such as Justice F.A. Ojwang' have expressed the need to consider alternative measures appropriate and desirable for dealing with minors without resorting to the criminal justice system.³⁷

This study shall discuss and aim to put forward a coherent legal framework to respond to the realities of adolescents engaging in early sexual activities.

1.2. Statement of the Problem

The SOA makes minors incapable to consent to an act of sex. By impeding their ability to consent, this law is their shield from sexual abuse and makes them a protected class under it.³⁸

³² Parliament Hansard Report, 27 April 2006, 794.

³³ A child's inability to consent was captured in Clause 47 of the Sexual Offences Bill which is the present Section 43(4) of the Sexual Offences Act.

³⁴ Goodwin M, 'Law's limits: Regulating statutory rape law', 484.

³⁵ Parliament Hansard Report, Kenya, 27 April 2006, 794.

³⁶ Goodwin M, 'Law's limits: Regulating statutory rape law', 483.

³⁷ *C K W v Attorney General* (2014) eKLR.

³⁸ High A, 'Good, bad and wrongful juvenile sex: Rethinking the use of statutory rape laws against the protected class' 69 *Arkansas Law Review*, 2016, 787.

However, minors are engaging in sexual activities with each other in the belief that they can consent despite the law prohibiting them from consenting. Is it then possible for the law, a shield to this class, to be turned to a sword and used against the very same protected class?³⁹

1.3. Justification of study

Consensual sex between minors has been put within the scope of defilement laws. These laws were created to protect children from sexual abuse, that is, sex that is exploitative. However, the laws that were designed to protect children from sex that is out rightly exploitative is being used against the members of the class it was meant to protect.⁴⁰ This has led to minors facing both legal and non-legal consequences. Kenya as a state has a duty to take all appropriate legislative, administrative, social and educational measures to protect a child against all forms of abuse including sexual abuse.⁴¹ There is no approach to mitigate against the harsh consequences on the application of the defilement laws strictly on children who engage in consensual sex. Therefore, the findings of this study may be an important headway in identifying how best to balance the need to protect children from sexual abuse and to develop appropriate measures of dealing with consensual sex among minors.

1.4. Statement of Objectives

This paper seeks to meet the following objectives:

- i) Analyse the application of the defilement laws in consensual sex among minors in Kenya.
- ii) Highlight the problems caused by such an application of the law on minors who engage in consensual sex with each other.
- iii) Discuss the legal response to the issue of consensual sex among minors: A comparative study between Kenya and South Africa.
- iv) Give recommendations on a framework Kenya can adopt to deal with consensual sex among minors.

³⁹ High A, 'Good, bad and wrongful juvenile sex: Rethinking the use of statutory rape laws against the protected class', 799.

⁴⁰ High A, 'Good, bad and wrongful juvenile sex: Rethinking the use of statutory rape laws against the protected class', 787.

⁴¹ Article 19(1), *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3.

1.5. Research Questions

- i) How have Kenyan courts dealt with the issue of consensual sex among minors as regards defilement laws?
- ii) What are the ramifications of the application of the defilement in cases of consensual sex among minors?
- iii) How has South Africa as compared to Kenya addressed the issue of consent in consensual sex between minors?
- iv) What legal framework can Kenya adopt to respond to the current adolescent realities?

1.6. Hypothesis

The criminalization of consensual sex between minors does not deter them from having sex with each other, instead, it leads to unreasonably harsh legal and non-legal burdens on minors.

1.7. Limitations

This study limits the age of an individual who can participate in consensual sex to 12 years old. This is because the Penal Code states that a person under 12 years cannot be held criminally liable unless proved her or she had capacity of knowledge.⁴² Again, male persons under 12 years cannot be capable of carnal knowledge.⁴³

This study shall be limited to only desktop research and it shall not include quantitative research such as the use of questionnaires and oral interviews due to time constraints.

1.8. Chapter Breakdown

The objectives of this study shall be met within five chapters.

Chapter One will be an introduction of the study, the background to the problem, the research problem, the hypothesis, the research objectives, questions and the chapter breakdown.

Chapter Two will be a discussion on the deterrence and retributive theories on punishment which underpin, justify and criticise the existence of defilement laws as those of a strict liability

⁴² Section 14(2), *Penal Code*, Kenya (Cap 63).

⁴³ Section 14(3), *Penal Code*, Kenya (Cap 63).

nature. It shall also look into the principle of ‘best interest of the child’ in relation to the laws on defilement.

Chapter Three will focus on how the laws on defilement have been applied by the courts in criminal cases of consensual sex among minors in Kenya and the effects of such application.

Chapter Four will be a comparative study between South Africa and Kenya. South Africa has recently had to deal with the issue of consensual sex between minors and this has seen a shift in how consent is treated in cases of consensual sex between minors.

Chapter Five will conclude the study and confirm the hypothesis. It will also give suggestions and recommendations on possible policy and legislative changes as regards consensual sex between minors and the law.

CHAPTER TWO: THEORETICAL FRAMEWORK

This chapter delves into the deterrence and retributive theories of punishment to justify and criticise the existence of defilement laws as those of a strict liability nature. It shall also discuss the principle of ‘best interest of the child’ in a bid to evaluate how child laws and policies should best be structured based on this principle.

2.1. Defilement as a crime of strict liability

Mens rea is generally an essential element in criminal offences.¹ *Mens rea* refers to the state of mind defined in a criminal offence required to convict a particular defendant of a particular crime.² However, there are some offences in which *mens rea* is not a required element of the offence.³ Such offences which negate requirements of proof of mental state are known as strict liability offences.⁴ For one to be prosecuted and convicted for a strict liability offence, the prosecution only needs to show that the accused participated in an act voluntarily or omitted to do an act in which the accused was able to perform.⁵

The solidification of the concept of strict liability in criminal law is attributed to various reasons. First, he who alleges must prove both the guilty act and guilty mind of the actor.⁶ Proving mental culpability is often difficult,⁷ therefore, it would be obvious for prosecutors to heartily welcome the use of strict liability crimes.⁸ This is because the use of strict liability relieves them of the burden of having to prove the culpability of one’s mental state.⁹ Secondly, the concept of strict liability may be inviting for legislators as a means for them to make a

¹ Musyoka W, *Criminal law*, Law Africa, Nairobi, 2013, 58.

² Musyoka W, *Criminal law*, 47. Mental states differ from offence to offence but include: intention, recklessness or negligence.

³ Musyoka W, *Criminal law*, 58.

⁴ Hamdani A, ‘Mens rea and the cost of ignorance’ Bar-Ilan University Public Law Working Paper No. 06-4, 2006, 1, --- <https://ssrn.com/abstract=892700> or <http://dx.doi.org/10.2139/ssrn.892700> on 12 August 2017.

⁵ Thomas WR, ‘On strict liability crimes: Preserving a moral framework for criminal intent in an intent-free moral world’ 110(4) *Michigan Law Review*, 2012, 650.

⁶ The maxim in criminal law ‘*actus non facit reum, nisi mens sit rea*’ literally translates to an act does not make a person guilty unless the mind is also guilty.

⁷ Hamdani A, ‘Mens rea and the cost of ignorance’, 7. Hamdani notes that is especially so because the prosecution can often rely only on circumstantial evidence to support its case.

⁸ Levenson LL, ‘Good faith defenses: Reshaping strict liability crimes’ 78 *Cornell Law Review*, 1992, 403.

⁹ Levenson LL, ‘Good faith defenses: Reshaping strict liability crimes’, 403.

public statement of their disapproval of certain conduct.¹⁰ For legislators, the worry is that innocent individuals will suffer a detriment resulting from the harmful actions of others if they are not held strictly liable for their actions which create harm.¹¹ Therefore, to ensure the larger public the greatest protection from these harms, legislators make strict liability offences. This act of denying leniency to individuals who commit public harm to others is an expression of their commitment to protecting society.¹² In this regard, strict liability screams the message that behavior frowned upon shall not be condoned despite the offender's intent.¹³ In essence, strict liability offences persuade individuals to take an enormous amount of care and acts as a possible deterrent.¹⁴

Statutory rape is probably the most controversial example of a strict-liability crime.¹⁵ In many jurisdictions as regards statutory rape, strict liability applies with respect to victim's age.¹⁶ This means that an offence of defilement is considered to have occurred once one of the parties to a consensual act of sex is a minor.¹⁷ Strict liability also prevents a defendant from using the defense of mistake or ignorance of age.¹⁸ Statutory rape which is referred to as the offence of defilement in Kenya, is a typical example of the offenses for which no *mens rea* is required as to a particular element of the crime.¹⁹ One can be convicted just by proof of commission of act. Consequently, making defilement a strict liability offence, can be taken as a sign of the Kenya legislative's arm disapproval of the offence.

Despite the various justifications for the doctrine of strict liability, it has been considered as one that does not sit well with criminal law.²⁰ This is because of a cardinal principle in criminal

¹⁰ Thomas WR, 'On strict liability crimes: Preserving a moral framework for criminal intent in an intent-free moral world', 651.

¹¹ Thomas WR, 'On strict liability crimes: Preserving a moral framework for criminal intent in an intent-free moral world', 651.

¹² Levenson LL, 'Good faith defenses: Reshaping strict liability crimes', 422.

¹³ Levenson LL, 'Good faith defenses: Reshaping strict liability crimes', 422.

¹⁴ Hamdani A, 'Mens rea and the cost of ignorance', 10.

¹⁵ Hamdani A, 'Mens rea and the cost of ignorance', 23.

¹⁶ Hamdani A, 'Mens rea and the cost of ignorance', 6.

¹⁷ In *John Otieno Obwar v Republic* (2011) eKLR, Makhandia J states that "defilement is a strict offence, whose sentence upon conviction is staggered depending on the age of the victim."

¹⁸ Levenson LL, 'Good faith defenses: Reshaping strict liability crimes', 422.

¹⁹ Thomas WR, 'On strict liability crimes: Preserving a moral framework for criminal intent in an intent-free moral world', 651.

²⁰ Musyoka W, *Criminal law*, 60.

law found in the maxim *actus non facit reum, nisi mens sit rea*.²¹ This means that for a crime to have occurred one has to prove the two elements of criminal law which are *actus reus* and *mens rea*.²² Yet the doctrine of strict liability dictates that a crime can be committed without the *mens rea* element.²³ However, the notion that it can be said that a crime has been committed without the *mens rea* element has gained a lot of traction over the years.²⁴ This notion seems unbending in cases of statutory rape.²⁵ Strict liability permits the conviction of a criminal defendant in the absence of *mens rea* in a case of the offence of defilement.

2.2. Defilement as a crime of strict liability and theories of punishment

For every crime, there is a penal sanction.²⁶ Penal sanctions or punishments are one of the main characteristics of criminal law.²⁷ For a penal sanction to be justified as effective, one must understand the purposes of criminal law.²⁸ Punishments have goals discussed under the different general theories of punishments. Under the theories of punishment of retribution and deterrence, the guilty mind serves as the justification to punish those individuals who participate in activities that forbidden by law.²⁹ These two theories will be contrasted as against strict liability statutory rape laws to find out whether these goals are accomplished by such laws in order to justify their establishment.

2.2.1. Deterrence

The theory of deterrence draws from the works of classical theorists such as Thomas Hobbes, Jeremy Bentham and Cesare Beccaria.³⁰ These deterrence theorists paint the picture of man being a rational creature who seeks pleasure and avoids pain.³¹ Deterrence as a theory of

²¹ Musyoka W, *Criminal law*, 60.

²² Musyoka W, *Criminal law*, 60.

²³ Musyoka W, *Criminal law*, 58.

²⁴ Carpenter CL, 'On statutory rape, strict liability and the public welfare offense model' 53(2) *American University Law Review*, 2003, 316.

²⁵ Carpenter CL, 'On statutory rape, strict liability and the public welfare offense', 316-317.

²⁶ Musyoka W, *Criminal law*, 5.

²⁷ Musyoka W, *Criminal law*, 5.

²⁸ Punishment-- <https://plato.stanford.edu/entries/punishment/> on 22 September 2017.

²⁹ Carpenter CL, 'On statutory rape, strict liability and the public welfare offense model', 325.

³⁰ Hobbes T, 'Early classical philosophers of deterrence theory', 41 *Criminology*, 1968, 99-130.

³¹ Vito GF and Maahs JR, *Criminology: Theory, research and policy*, 4ed, Jones & Bartlett Publishers, Burlington, 2017, 45.

punishment was developed in the nineteenth century.³² The theory posits that life is regulated by calculating the pleasures and pains involved in deliberate actions.³³ Therefore in order to deter a deliberate act, there must be an increase of the pain over pleasure.³⁴ Therefore, punishment is meant to lead towards desired conduct.³⁵ Thus, individuals will only carry out crimes where there is chance to gain a lot of pleasure but very little risk to experience pain.³⁶

Deterrence then, is premised on the belief that punishment keeps the offenders off from committing the same act of crime again while setting an example for the others on the consequences of such an act.³⁷ Therefore, the purpose can be either to specifically deter an individual or generally deter everyone at large.³⁸

2.2.1.1. Deterrence, strict liability and defilement laws

One of the principal arguments of strict liability is its deterrent value.³⁹ However, this value may have been overestimated.⁴⁰ First, the key deterrent in strict liability cases may not be chances of being convicted, but the chances of being caught and charged.⁴¹ Therefore, in situations where the chances of being caught and prosecuted are not high, the fact that strict liability will be imposed if they do is not much of a deterrent.⁴² This would mean where children believe that they would not be caught engaging in sex with each other then there is no actual deterrence. Secondly, the system cannot deter someone from committing an act that they themselves do not even know they are committing.⁴³ This is in the instance of minors having sex with each other not knowing it is a crime. In Kenya, it is clear that many minors believe

³² Hobbes T, 'Early classical philosophers of deterrence theory', 41 *Criminology*, 1968, 99-130.

³³ Vito GF and Maahs JR, *Criminology: Theory, research and policy*, 45.

³⁴ Vito GF and Maahs JR, *Criminology: Theory, research and policy*, 45.

³⁵ Meyer J, 'Reflections on some theories of punishment' 59(4) *The Journal of Criminal Law, Criminology, and Police Science*, 1968, 596.

³⁶ Vito GF and Maahs JR, *Criminology: Theory, research and policy*, 45.

³⁷ Reid ST, *Crime and criminology*, 2ed, Harcourt Brace College Publishers, 1979, 98.

³⁸ Vito GF and Maahs JR, *Criminology: Theory, research and policy*, 45.

³⁹ Allen M, *Criminal law*, 14ed, Oxford University Press, New York, 2013, 142.

⁴⁰ Elliot C and Quinn F, *Criminal law*, 9ed, Pearson Education, Harlow, 2012, 43.

⁴¹ Elliot C and Quinn F, *Criminal law*, 44.

⁴² Elliot C and Quinn F, *Criminal law*, 44.

⁴³ Palumbo C, 'Logical incongruities in the law of strict liability statutory rape' *Appalachian School of Law*, 2010, 15.

they can consent and they do not think this is an offence.⁴⁴ For these reasons, statutory rape laws of a strict liability nature may not be entirely effective in accomplishing the aims of the deterrence theory.

2.2.2. Retribution

Retribution is not punishment that is intended to eliminate the evil from an individual neither to deter, but is directed at returning equilibrium.⁴⁵ In order to restore this equilibrium, the punishment has to be fast and equal to the evil.⁴⁶ Retributive justice is therefore taking action to get even with the offender in the same way he or she harmed the victims.⁴⁷ It is thought to be the modern 'an eye for an eye and a tooth for a tooth' approach referred to as 'just deserts' which means to give the offender what he or she deserves in light of the offence committed.⁴⁸ The modern approach is thought to be more human than traditional retribution, although some argue nothing has changed but the name.⁴⁹

This theory purports to punish the wrongdoer simply for the sake of punishment. The typical criticism is that this theory is a form of retaliation and as such cannot be morally justified.⁵⁰ It is claimed that retributive justice is needed to maintain respect for the law and forestall acts of private vengeance.⁵¹

2.2.2.1. Retribution, strict liability and defilement laws

A retributivist theory of criminal law dictates that an individual's criminal liability should be based only on their blameworthiness.⁵² One can only be considered to be blameworthy where he or she knowingly and consciously violated the law and not the result of an accident or mistake of fact.⁵³ A defendant must have acted consciously below the designated level or

⁴⁴ National AIDS Control Council, *Kenya AIDS indicator survey: Final report*, 2012, 137.

⁴⁵ Meyer J, 'Reflections on some theories of punishment', 595.

⁴⁶ Meyer J, 'Reflections on some theories of punishment', 595.

⁴⁷ Meyer J, 'Reflections on some theories of punishment', 595.

⁴⁸ Vito GF and Maahs JR, *Criminology: Theory, research and policy*, 45.

⁴⁹ Reid ST, *Crime and criminology*, 98.

⁵⁰ Palumbo C, 'Logical incongruities in the law of strict liability statutory rape', 16.

⁵¹ Palumbo C, 'Logical incongruities in the law of strict liability statutory rape', 16.

⁵² Levenson LL, 'Good faith defenses: Reshaping strict liability crimes', 426.

⁵³ Levenson LL, 'Good faith defenses: Reshaping strict liability crimes', 426.

standard of care that a reasonable man would have, given similar circumstances.⁵⁴ Strict liability offences at times may punish defendants who have not chosen to violate prescribed laws.⁵⁵ In this case, based on a retributive theory, such defendants do not ‘deserve’ to be punished.⁵⁶ Also, sometimes an innocent individual may be sacrificed by being punished for the sake of the majority.⁵⁷ Therefore, retribution justifies an application of strict liability laws where individuals are aware of the law and go ahead to violate them knowingly. However, this theory is undermined where defendants commit strict liability statutory rape unknowingly or with good faith.⁵⁸ This would be a case of minors have consensual sex with each other with knowledge that their actions constitutes an offence.

2.3. The best interest of the child principle

The best interest of the child (BIC) principle generally refers to the well-being of a child.⁵⁹ The BIC principle is enshrined in Article 53 of the Kenyan Constitution.⁶⁰ Article 3 of the United Nations Conventions on the Rights of a child stipulates that; the BIC must be a top priority in all actions concerning children.⁶¹ This principle is also articulated and reiterated in Article 4 of the African Charter on the Rights and Welfare of the Child (ACRWC).⁶² The expression of this principle in all these legal instruments is in mandatory terms, such that states may not exercise discretion when acting in matter that affect children.⁶³ Therefore, it is imperative to any one in a position of authority to consider this principle. This would include legislators and judicial officers.

⁵⁴ Levenson LL, ‘Good faith defenses: Reshaping strict liability crimes’, 426.

⁵⁵ Stinneford, JF, ‘Punishment without culpability’ 102(3) *Journal of Criminal Law & Criminology*, 2013, 684.

⁵⁶ Stinneford, JF, ‘Punishment without culpability’, 689.

⁵⁷ Stinneford, JF, ‘Punishment without culpability’, 685.

⁵⁸ Levenson LL, ‘Good faith defenses: Reshaping strict liability crimes’, 426.

⁵⁹ UN High Commissioner for Refugees (UNHCR), *UNHCR Guidelines on determining the best interests of the child*, May 2008.

⁶⁰ Article 53(2), Constitution of Kenya (2010). “A child’s best interests are of paramount importance in every matter concerning the child.”

⁶¹ Article 3(1), *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3. “...the best interests of the child shall be a primary consideration.”

⁶² Article 4(1), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49, “In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.”

⁶³ *CRC General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, 8.

The evolving capacities of the child⁶⁴ must be taken into consideration when the child's best interests and right to be heard are at stake.⁶⁵ The concept of evolving capacities is central to the balance embodied in the Convention between recognising children as active agents in their own lives, entitled to be listened to, respected and granted increasing autonomy in the exercise of rights, while also being entitled to protection in accordance with their relative immaturity and youth.⁶⁶ This concept provides the basis for an appropriate respect for children's agency without exposing them prematurely to the full responsibilities normally associated with adulthood.⁶⁷ All relevant legislation should be scrutinised with respect to appropriate protection for children and with respect to their evolving capacities.⁶⁸

The Convention on the Rights of the Child (CRC) requires states to set up legal minimum ages so as to protect children from harm.⁶⁹ Therefore, Kenya's legal age of sexual consent at 18 years can be inferred to be Kenya's adherence to this international obligation. However, the setting up of minimum ages is not a straightforward matter, including sexual age.⁷⁰ States and legislators have to take care to balance the protection of children against sexual abuse and a state of over-criminalization that hampers children's access to reproductive healthcare and information.⁷¹ Therefore, as regards legislation and policies on matters to do with consensual sex between minors, the best interests of the child and evolving capacities of the child must be taken into account. If there exists alternative to judicial proceedings against children then based on the BIC principle, these are to be preferred. The setting of legal age limits should also be tempered with the realization that adolescent is a time of change and risky behaviour.

⁶⁴ Article 5, *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3.

⁶⁵ *CRC General Comment No. 14*, 10.

⁶⁶ Lansdown G, *The Evolving Capacities of the Child*, UNICEF Innocenti Research Centre, Florence, 2005, ix.

⁶⁷ Lansdown G, *The Evolving Capacities of the Child*, ix.

⁶⁸ Lansdown G, *The Evolving Capacities of the Child*, 52.

⁶⁹ Article 4, *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3

⁷⁰ Sedletzki V, *Legal minimum ages and the realization of adolescent's rights: A review of the situation in Latin America and the Caribbean*, UNICEF, 2016, 22.

⁷¹ Sedletzki V, *Legal minimum ages and the realization of adolescent's rights: A review of the situation in Latin America and the Caribbean*, 23.

CHAPTER THREE: AN ANALYSIS ON THE APPLICATION OF THE DEFILEMENT LAW ON MINORS BY THE COURTS IN KENYA

This chapter will discuss the complexity of adolescent sexual realities, the law of defilement as regards its application on minors who have sex with other minors and the problems such an application creates.

3.1. The law and adolescent sexual realities in Kenya

The law creates two different classes of persons on the basis of age. One class is that of minors while the other is of adults.¹ Minors are presumed dependent, vulnerable and incompetent to make decisions while adults are independent, autonomous, responsible and entitled to exercise legal rights and privileges.² Minors in Kenya are individuals under 18 years,³ who do not have a legal privilege or right to an act of sex.⁴

However, based on the Kenya AIDS Indicator Survey, children believe that they can consent by acknowledging that they want to have sex.⁵ A study carried out on the Kenyan population in 2012 showed that by age 15, almost 12 percent of women and 20 percent of men have had sex at least once in their lifetime.⁶ By age 17, 40.9 percent of women and 42.3 percent of men have had sex.⁷ Among children aged between 12 and 14 who had sex, the most common reasons they gave were that they wanted to and did it for love.⁸ These reasons imply a sense of volition by the teenagers that is they have had sex which is consensual. Only 5 percent reported that they had sex because they were coerced.⁹ Their partners were relatively the same age.¹⁰ In 2015, a study was carried out in the county of Nyeri, Kenya. In Nyeri, it is reported that between individuals aged 10 and 24, 55 percent of them have had sex before the age of 15.¹¹

¹ Bonnie JR, and Scott SS, 'The teenage brain: Adolescent brain research and the law' 22(2) *Current Directions in Psychological Science*, 2013, 158.

² Bonnie JR, and Scott SS, 'The teenage brain: Adolescent brain research and the law', 158.

³ Section 2, *Age of Majority Act*, Kenya (Cap 33 of 1977).

⁴ Section 43(1)(c) and Section 43(4)(f), *Sexual Offences Act*, Kenya (Act No.12 of 2012).

⁵ National AIDS Control Council, *Kenya AIDS indicator survey: Final report*, 2012, 137.

⁶ National AIDS Control Council, *Kenya AIDS indicator survey: Final report*, 2012, 81.

⁷ National AIDS Control Council, *Kenya AIDS indicator survey: Final report*, 2012, 81.

⁸ National AIDS Control Council, *Kenya AIDS indicator survey: Final report*, 2012, 137.

⁹ National AIDS Control Council, *Kenya AIDS indicator survey: Final report*, 2012, 138.

¹⁰ National AIDS Control Council, *Kenya AIDS indicator survey: Final report*, 2012, 138.

¹¹ Mbae D, 'Report: Youths having sex before age 15' *Daily Standard*, 26 August 2015.

Evidently, the Kenyan adolescent is having sex at a very early age. These children may not realize it, but their actions of having sex with each other opens them to being subjects of prosecution under the current law.

3.2. Application of defilement laws on minors

Defilement is a strict liability offence in Kenya.¹² Strict liability offences are those that do not require the presence of *mens rea* for one to be held culpable. All that is needed is proof of commission of an unlawful act, once proven the law assumed a level of culpable intent hence justifying the punishment.¹³

In *CKW v AG & another*,¹⁴ the petitioner was CKW, a 16-year-old minor who had been charged with the offence of defilement. He sought the relief of a declaration that Sections 8(1) and 11(1) of the SOA were invalid, to the extent that they criminalised consensual sexual relationships between adolescents. It had been stated that he defiled a girl of the same age of 16 years. The petitioner contended that the complainant (the 16-year-old girl) was his girlfriend and the sex they had had was consensual in nature. He went further to demonstrate the consensual nature of the act by stating it was the petitioner who willingly went to his house. In addressing itself on the issue of consent, the court stated that once a person committed an act which caused or causes penetration with a child, the person has already committed the offence of defilement. The fact that a child has consented or not is not a factor. On this basis, the petitioner's petition lacked merit and was dismissed.

This strict liability approach has been applied to cases of minors having sex with other minors. From this case, it is clear that with this approach, the key question is whether the sex occurred. It does not examine other aspects and circumstances before the act. For example, did the minor consent? Did the participants know each other? Such questions place the act in context.

¹² In *John Otieno Obwar v Republic* (2011) eKLR, Makhandia J states that "defilement is a strict offence, whose sentence upon conviction is staggered depending on the age of the victim."

¹³ Levenson LL, 'Good faith defenses: Reshaping strict liability crimes' 78 *Cornell Law Review*, 1992, 404.

¹⁴ (2014) eKLR.

3.2.1. A nuanced approach to sex involving a minor

A Lolita affair:¹⁵*Martin Charo v Republic*¹⁶

This case was an appeal in which the appellant, Martin Charo, had been charged with the offence of defilement contrary to Section 8(1)(3) of the Sexual Offences Act in the trial court. He had been convicted and sentenced to 20 years imprisonment as a result. The complainant in the case was then a 14-year-old girl. She testified that she had willingly gone to the appellant's place to have sex and then returned home after three days. She also made it known to the court that she had known the appellant for about three years. The trial court had convicted the appellant on the basis that the complainant was a minor and the appellant had had sex with her.

On appeal, Justice Chitembwe considered other elements other than the *actus reus*. He first considered the behaviour of the child. It was evident that the child went willingly to the appellant's house, she did not complain about the act and that it was only when her brothers interfered did she return home. He also stated that she had behaved like a full-grown woman and enjoyed the sex. The evidence had also been shown that the child had not been taken advantage of by the then 23-year-old appellant. On the point of age, the judge stated that the relationship between the two had subsisted long enough for her age to no longer be an issue. On this basis, he released the appellant.

This case was a step in a different direction to that of *CKW*.¹⁷ As opposed to asking the technical question of whether the sex occurred¹⁸ after establishing the age of the child, he went ahead to consider the circumstances of the act. It may seem that the learned Justice was trying to uphold the spirit of the law.¹⁹ In that, the law was passed to protect children from sexual violence. This case it was different, the minor voluntarily participated, hence not a violation as

¹⁵ The term Lolita in urban slang is defined as a young girl who has a very sexual appearance or behaves in a very sexual way. It is derived from the novel *Lolita* by Vladimir Nabokov, in which a middle-aged man, Humbert, has a tragic love affair with his 12-year-old stepdaughter, Lolita.

¹⁶ (2016) eKLR.

¹⁷ *CKW v AG & another* (2014) eKLR.

¹⁸ Goodwin M, 'Law's limits: Regulating statutory rape law' *Wisconsin Law Review*, 2013, 483.

¹⁹ Muyesu S, 'Bad in law' sums up Chitembwe decision in defilement appeal' *The Nairobi Law Monthly*, 17 June 2016.

it was not coercive. However, this case received a lot of backlash, some even calling it the worst ruling.²⁰

The main criticism is that the complainant in the case was a 14-year-old minor and the appellant was a 20-year-old adult.²¹ The law clearly states that a child cannot consent and this should have been the case. The case however had a more critical evaluation of the circumstances. The judge took into account other factors other than the commission of the act. The only qualm is that the offender was an adult. Adults are a different class in law. They should be treated that way as they have greater levels of experience and hence more mature than children. This point on the difference of maturity between adults and minors was emphasized in the case in *Ezekiel Cheruiyot Koros v R*.²² The court stated that the defilement provisions were put in place because society had realized that girls below the age of 18 are not mature enough to make informed decisions on sexual relations and hence can be vulnerable.

3.3. The complexity of adolescent sexualities

This section discusses the physical, emotional and cognitive changes experience by a typical minor during adolescence and how this has an impact on his or her sexual conduct.

3.3.1. Adolescence: A time of change

Adolescence is the period during which individuals transition from childhood to adulthood.²³ It is a time when there is an increase in the mental and physical capabilities, a stage of growth.²⁴ Individuals during this period are generally stronger, have better capacities to reason and decision-making skills than children.²⁵ The improvements in reasoning and decision making are enhanced by increases in knowledge, both specific and general. This is knowledge gained

²⁰ Bocha G, 'Kenyan judge 'wins prize' for worst ruling in the world' Nairobi News, 9 June 2017.

²¹ Muyesu S, "'Bad in law' sums up Chitembwe decision in defilement appeal' The Nairobi Law Monthly, 17 June 2016.

²² (2010) eKLR.

²³ Casey BJ and Caudle K, 'The teenage brain: Self-control' 22(2) *Current Directions in Psychological Science*, 2013, 82.

²⁴ Dahl RE, 'Adolescent brain development: A period of vulnerabilities and opportunities. Keynote address' 1021(1) *Annals of the New York Academy of Sciences*, 2004, 3.

²⁵ Steinberg L and Scott ES, 'Less guilty by reason of adolescence: Developmental immaturity, diminished responsibility and the juvenile death penalty' 58(12) *American Psychologist*, 2003, 1011.

both through experience and education.²⁶ However, it is also during this period when teenagers and adolescents are seen to be the most reckless and take a lot of risks.²⁷ Some forms of recklessness can be examples of driving while drunk and illegal drug use.²⁸ This then exhibits a paradox because their increases in knowledge should make adolescents more conscious of the potential dangers of their acts.²⁹ This period of adolescence is also a time of experimentation, a time when individuals want to try out new experiences. This includes sexual experiences.³⁰ Sexual activity normally begins at the adolescence.³¹

3.3.2. Societal view of adolescence and sex (An African view)

That which is considered appropriate for children is dependent on the beliefs and norms of a particular society.³² Hence, what one society believes to be appropriate may not be necessarily the same for another.³³ One must note that the sexual behaviour of an adolescent is a result of cultural orientation.³⁴ There exists a stark contradiction in Africa, in terms of attitudes of African societies as regards sex and sexuality.³⁵ Sexuality here is used to mean sexual knowledge, beliefs, values, attitudes and behaviours.³⁶ The literature available on African culture and its attitudes towards sex both in general and specifically towards adolescent sex presents two kinds.

²⁶ Steinberg L and Scott ES, 'Less guilty by reason of adolescence: Developmental immaturity, diminished responsibility and the juvenile death penalty', 1012.

²⁷ Casey BJ and Caudle K, 'The teenage brain: Self-control', 83.

²⁸ Arnett J, 'Reckless behavior in adolescence: A developmental perspective' 12(4) *Developmental review*, 1992, 341-344.

²⁹ Dahl RE, 'Adolescent brain development: A period of vulnerabilities and opportunities. Keynote address', 3.

³⁰ Hiršl-Hečej V and Štulhofer A, 'Urban adolescents and sexual risk taking' 25(1) *Collegium Antropologicum*, 2001, 195.

³¹ Hiršl-Hečej V and Štulhofer A, 'Urban adolescents and sexual risk taking', 195.

³² Kioli, FN, Were AR and Onkware K, 'Traditional perspectives and control mechanisms of adolescent sexual behavior in Kenya' 4(1) *International Journal of Sociology and Anthropology*, 2012, 1.

³³ Kioli, FN, Were AR, and Onkware K, 'Traditional perspectives and control mechanisms of adolescent sexual behavior in Kenya', 1.

³⁴ Kioli, FN, Were AR, and Onkware K, 'Traditional perspectives and control mechanisms of adolescent sexual behavior in Kenya', 1.

³⁵ Ugwu C, 'Sexuality and culture in post-colonial Africa' Humanities and Social Sciences Network, 8 September 2015-- <https://networks.h-net.org/node/GROUP_NID/discussions/82326/sexuality-and-culture-postcolonial-africa> on 1 July 2017.

³⁶ Tamale S, 'Researching and theorising sexualities in Africa' in Tamale S (ed) *African sexualities: A reader*, Pambazuka Press, 2011, 11-36.

The first kind is evidenced in pre-colonial times, around the nineteenth century where there was actually some openness as regards children and sexuality.³⁷ This is shown by scarce examples and oral history.³⁸ There existed African societies in which it was the norm for adolescents were to be educated about sexuality. This was through initiation ceremonies and institutions. The initiation institutions were complemented by senior family members who also contributed to the education of the adolescents in matters sexuality.³⁹

However, this is totally different for other societies in Africa. This presents the other kind of attitude towards sex by a given society; sex is a hush hush affair. Under this kind of African culture, open discussions on issues pertaining to sex and sexuality are forbidden.⁴⁰ Sexuality is construed as the domain exclusive to adults with the preconditions of physical and social maturity.⁴¹ Talks and teachings to children about sex are considered taboo and one is to find about such matters only through experience.⁴² This was mostly because of the construction of childhood as a time of innocence and ignorance and therefore they needed to be protected from sexual knowledge.⁴³ For example, Talavera notes that in some cultures in Namibia, young girls did not learn about menstruation until it happened and if the youth were told about sex, it was often put in a negative context – ‘penises bite and premarital sex is lethal.’⁴⁴

It is often suggested that this attitude was formed with the coming of religion during the period of colonization by the various powers in the African region.⁴⁵ Therefore, the conservative nature of given African societies is as a result of Christian and Islamic ideologies on what is

³⁷ Mudhovozi P, Mpho R and Tholene S, ‘Adolescent sexuality and culture: South African mothers’ perspective’ 16(2) *African Sociological Review/Revue Africaine de Sociologie*, 2015, 122.

³⁸ Mudhovozi P, Mpho R and Tholene S, ‘Adolescent sexuality and culture: South African mothers’ perspective’, 122.

³⁹ Mudhovozi P, Mpho R and Tholene S, ‘Adolescent sexuality and culture: South African mothers’ perspective’, 124.

⁴⁰ Bamgbose O, ‘Legal and cultural approaches to sexual matters in Africa: The cry of the adolescent girl. 10(2) *University of Miami International & Comparative Law Review*, 2001, 130.

⁴¹ Kioli, FN, Were AR, and Onkware K, ‘Traditional perspectives and control mechanisms of adolescent sexual behavior in Kenya’, 2.

⁴² Kioli, FN, Were AR, and Onkware K, ‘Traditional perspectives and control mechanisms of adolescent sexual behavior in Kenya’, 2.

⁴³ Talavera P, ‘Past and present practices: Sexual development in Namibia’ in LaFont S and Hubbard D (eds), *Unravelling taboos: Gender and sexuality in Namibia Windhoek*, Legal Assistance Centre, Windhoek, 2007, 2.

⁴⁴ Talavera P, ‘Past and present practices: Sexual development in Namibia’, 2-3.

⁴⁵ Ojo MA, Adelakun AJ, ‘Christianity and sexuality in Africa’ in Bongmba EK (ed) *Routledge Companion to Christianity in Africa*, Routledge, New York, 2016, 473.

moral and immoral.⁴⁶ Therefore, one can see that while there was silence in some societies on the issues of sex, some were very open and did not dismiss it.

Despite the varied openness in discussing sex and sexuality matters with children, there was some form of control of adolescent sexual behaviour in these African societies.⁴⁷ For a long time now, there has been a worldwide concern about the sexual behaviours of adolescents and this is the same in African communities.⁴⁸ For example, traditional societies in Kenya had already understood this and realized that if the sexual behaviour of adolescents was not checked, then it could lead to disruption in the social order and altogether the functioning of such a society.⁴⁹ Sanctions on the sexual behaviours of individuals in a community, specifically that of adolescent was premised on various reasons.

This study will highlight two reasons for adolescent sexual control found in African traditional societies.

3.3.2.1. Virginitv as virtue

Traditionally, African societies made sure to mold and socialize young females in ways to ensure they remain virgins until marriage.⁵⁰ Consequently, they were not to engage in sexual activities particularly penetrative sex.⁵¹ The main reason for this state of affairs was because of the value virginitv had and what it symbolized. A woman's virginitv was a source of pride and honor not only to a young woman of the tribe, but by extension to her family and community at large.⁵² Clearly, virginitv was very significant in African societies. The only socially acceptable time for one to lose her virginitv was once one was married. There existed

⁴⁶ Ojo MA, Adalakun AJ, 'Christianity and sexuality in Africa', 475.

⁴⁷ Kioli, FN, Were AR, and Onkware K, 'Traditional perspectives and control mechanisms of adolescent sexual behavior in Kenya', 2.

⁴⁸ Kioli, FN, Were AR, and Onkware K, 'Traditional perspectives and control mechanisms of adolescent sexual behavior in Kenya', 2.

⁴⁹ Kioli, FN, Were AR, and Onkware K, 'Traditional perspectives and control mechanisms of adolescent sexual behavior in Kenya', 3. The examples of the communities given include the Kalenjii, Abagusii and the Luo.

⁵⁰ Nnazor AI, 'Virginitv rituals and national development: Harnessing a traditional virtue to address modern challenges in Africa' 7(1) *Mediterranean Journal of Social Sciences*, 2016, 156.

⁵¹ Nnazor AI, 'Virginitv rituals and national development: Harnessing a traditional virtue to address modern challenges in Africa', 156.

⁵² Falola T, *Teen life in Africa*, Greenwood Publishing Group, Connecticut, 2004, 141.

very serious consequences for the loss of virginity of a young woman.⁵³ Some of these consequences were such as dishonor to the family, for the woman she would be unable to get a husband, less dowry or just outright rejection by society and ostracization.⁵⁴

In order to maintain sexual order then, societies held virginity rituals. More specifically, these rituals were to serve as a means to protect young girls from early unplanned pregnancies and diseases.⁵⁵ Different societies had different mechanisms in controlling the sexual behaviours of adolescents. For instance, there was the traditional testing of virginity. One such people who participated in virginity testing in Kenya were the Swahili.⁵⁶ The process of testing began right after the wedding ceremony of a girl. The newly married girl was given a white sheet which was to be used when the new couple sexually consummated their marriage. The evidence of virginity for the girl would be blood stains on the white sheet the next day after the act. In the case where there were no blood stains, it was taken that the bride was not a virgin and the consequences of that was annulment of the marriage.⁵⁷ For the Yoruba people, they tested virginity through literally listening for excruciating sounds of pain from the girl.⁵⁸ This was done by the bride and bridegroom's family both standing outside the room of the newlyweds as they consummated their marriage. Where there was no sound hence found to not be a virgin, she would be flogged until she revealed the person who took her virginity. Once revealed, this man would be sued for damages.⁵⁹

Evidently, virginity is regarded as a virtue in Africa. This then called for strict measures to be enforced against adolescent premarital sex as it could have dire consequences.

⁵³ Falola T, *Teen life in Africa*, Greenwood Publishing Group, Connecticut, 2004, 141.

⁵⁴ Nnazor AI, 'Virginity rituals and national development: Harnessing a traditional virtue to address modern challenges in Africa', 158.

⁵⁵ Kioli, FN, Were AR, and Onkware K, 'Traditional perspectives and control mechanisms of adolescent sexual behavior in Kenya', 3.

⁵⁶ Kioli, FN, Were AR, and Onkware K, 'Traditional perspectives and control mechanisms of adolescent sexual behavior in Kenya', 3.

⁵⁷ Kioli, FN, Were AR, and Onkware K, 'Traditional perspectives and control mechanisms of adolescent sexual behavior in Kenya', 2.

⁵⁸ Familusi OO, 'African culture and the status of women: The Yoruba example' 5(1) *The Journal of Pan African Studies*, 2012, 303-304.

⁵⁹ Familusi OO, 'African culture and the status of women: The Yoruba example', 304.

3.3.2.2. The taboo of premarital pregnancy

Traditional African communities perceived the importance of sexuality in human life. They recognised and were aware of the sexual passions that engulfed persons in a community.⁶⁰ In all communities however, there existed very strong prohibitions against premarital pregnancy.⁶¹ These societies made it clear that sexual relations were only proper for married couples.⁶² Sex serves a reproductive purpose; therefore, childbearing would be a function of a marriage and accepted within it. As a result, children born out of wedlock were carried with them strong disapproval causing premarital relations to be not only condemned but punished.⁶³

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

3.3.2.3. The complexity

Society has the view that a child is innocent and virginal at best and that their engagement in sexual activities is wrong or as a result of some corrupting influence.⁶⁴ However, during adolescence, children participate in risky behaviour such as sexual experimentation as part of their normal developmental process.⁶⁵ Age appropriate sexual activity and sexual abuse is a grey area but there is consensus that children should be protected from sexual abuse.⁶⁶

The law is therefore employed to protect children from sexual abuse, that is age of consent laws and statutory rape provisions (defilement laws). These provisions in law set an age of consent at which it is presumed minors can safely and maturely make conscious sex

⁶⁰ Bhana, D, 'Love, sex and gender: Missing in African child and youth studies' 42(2) *Africa Development*, 251-264.

⁶¹ Bhana, D, 'Love, sex and gender: Missing in African child and youth', 251-264.

⁶² Bhana, D, 'Love, sex and gender: Missing in African child and youth studies', 251-264.

⁶³ Meekers D and Ghyasuddin A, 'Adolescent Sexuality in Southern Africa: Cultural Norms and Contemporary Behavior' XXIIIrd IUSSP General Conference, session on "Religion, culture, and sexuality," in Beijing, 11-17 October 1997, 6.

⁶⁴ Walsh K, 'The sexual rights of children and age of consent' *Interdisciplinary.Net*, 2010, 1.

⁶⁵ Hiršl-Hećej V and Štulhofer A, 'Urban adolescents and sexual risk taking', 195.

⁶⁶ High A, 'Good, bad and wrongful juvenile sex: Rethinking the use of statutory rape laws against the protected class', 793.

decisions.⁶⁷ The problem then comes in when all sexual activities minors participate in is normalized as sexual abuse.⁶⁸ However, not all sex is coercive, adolescents willingly participate in sexual activities with each other as part of their normal developmental process. The law finds it difficult to strike an appropriate balance between protecting children from sexual exploitation and allowing adolescents to sexually express themselves with each other.⁶⁹ That is why sex between two 13-year old children is placed on the same pedestal as sex between a child of 13 years and an adult of 30 years.

3.4. Severe and absurd punishments: A result of the application of law on defilement to minors

3.4.1. Both minors are defiler and victim

Legally, minors cannot give consent to an act of sex. However, in the event that they factually give, who should be the offender and who victim? The provisions on defilement are gender neutral therefore it does not distinguish between male and female in who can be a perpetrator of the offence hence 'defiler'.⁷⁰ Given that the law is framed in this manner, then both should be seen to have defiled each other making them both defiler and victim.⁷¹ This would however present a difficulty for the prosecution in such cases where both parties file complaints. In such an instance, the gathering of evidence where the act takes place is private and the two are the only witnesses.

3.4.2. Discriminatory prosecutions

Despite the gender neutrality in the law, it has been argued where both parties are minors, it is the boy who is charged with the offence while the girl is viewed as the victim.⁷² In *C K W v Attorney General*, the petitioner pointed out that the law should not have discriminated against

⁶⁷ High A, 'Good, bad and wrongful juvenile sex: Rethinking the use of statutory rape laws against the protected class', 788.

⁶⁸ Goodwin M, 'Law's limits: Regulating statutory rape law', 492.

⁶⁹ Walsh K, 'The sexual rights of children and age of consent' Interdisciplinary.Net, 2010, 10.

⁷⁰ Section 8(1) of *the Sexual Offences Act* uses the term 'any person' while defining an individual who is capable of committing the offence of defilement. This therefore implies that it can be either male or female.

⁷¹ Gachuki N, 'The issue of consensual sexual relationships among minors and the law' Academia.edu, 4

⁷² Kamau W, 'Legal treatment of consent in sexual offences in Kenya', 10(1) *The Law Society of Kenya Journal*, 2014, 29.

him as it is the complainant who initiated the act when she willingly went to his house and had consensual sex. The opinion of the Law Society of Kenya was that it would be appropriate if the two minors in the case were to be punished for engaging in sexual intercourse.⁷³ However, because it was only the male child who was being punished, it was deemed discriminatory. Lawyers have also been very vocal in calling out the discrimination in the laws application in consensual sex between minors.⁷⁴

In *P O O (A Minor) v Director of Public Prosecutions & another*,⁷⁵ the petitioner P.O.O. was a minor and had been charged of the offence of defilement as a result of having consensual sexual relations with his then girlfriend. It was established that the minor was 16 years at the time of the alleged offence. Instead of being remanded in a juvenile facility, the boy was remanded with adults. This was an infringement of his rights as a child not to be placed together with adults if held on the basis of a criminal charge.⁷⁶ In ordering the state to compensate P.O.O, the magistrate pointed out that the prosecution had discriminated on the boy solely on the basis of sex.⁷⁷ This was because both the boy and girl participated in the sex without either coercing the other.

The broadness of the current statutory rape laws leaves it to the prosecution to decide who is a victim/ victimhood. In the court cases above regarding consensual sex between two minors, gender is used as a basis to assign offender or victim status. This could probably be because of the historical background of the offence of defilement before enactment of the SOA to be an offence against young girls.⁷⁸ Hence suggesting that males were mostly the offenders and continue to be the offenders till date.

3.4.3. Social shame, fear and stigma

Criminal law punishments have aims such as deterrence and incapacitation, however with them they carry non-legal externalities.⁷⁹ One of these externalities is social shame and stigma. Once

⁷³ *CKW v AG & another* (2014) eKLR, para 10.

⁷⁴ Ochieng A, 'Lawyers see bias in application of sexual offences law' Daily Nation, 1 February 2016.

⁷⁵ (2017) eKLR.

⁷⁶ Section 143 (1), Children Act (Act No. 8 of 2001), Kenya.

⁷⁷ *P O O (A Minor) v Director of Public Prosecutions & another* (2017) eKLR, para 23.

⁷⁸ Section 145, *Penal Code*, Kenya (Act No.14 of 1991) provided for the offence of defilement of girls under fourteen years. This already depicts a picture of the offence of defilement to one perpetrated only by males.

⁷⁹ Goodwin M, 'Law's limits: Regulating statutory rape law', 2013, 532.

convicted on a defilement charge, a minor is labelled a criminal. The tag of a criminal carries with it castigation, shame and stigma, which are the intended by products of criminal law.⁸⁰ The criminalization of sex between minors has caused those minors participating in sexual activities with each other more often than not, fail to seek proper reproductive health information and service.⁸¹ Such information can benefit adolescents in ways such as by reducing sexually transmitted infections and early unwanted pregnancies. Adolescents do not seek such information due to the fear of the risk of conviction.⁸²

⁸⁰ Goodwin M, 'Law's limits: Regulating statutory rape law', 2013, 532.

⁸¹ Sedletzki V, *Legal minimum ages and the realization of adolescent's rights: A review of the situation in Latin America and the Caribbean*, 23.

⁸² Sedletzki V, *Legal minimum ages and the realization of adolescent's rights: A review of the situation in Latin America and the Caribbean*, 22.

CHAPTER FOUR: A COMPARATIVE STUDY BETWEEN KENYA'S DEFILEMENT LAW AND SOUTH AFRICA'S STATUTORY RAPE LAW.

This Chapter shall be a comparative study between Kenya's law on defilement and South Africa's law on statutory rape. This is with a view to examine whether Kenya can borrow from South Africa's approach to the issue of minors participating in consensual sex between minors. This is given by the fact that the previous chapter discusses the problems of the current application by courts of the defilement provisions on minors in Kenya.

4.1. The purpose of the comparative study

This comparative study has been incorporated into this study so as to discuss the steps South Africa has taken to ensure that minors are adequately protected by statutory rape laws. South Africa recently made legislative changes to the treatment of consensual sex between minors in its jurisdiction. Therefore, the aim of this comparative study is to identify what aspects of the South African experience Kenya can borrow from and improve on in its dealing with consensual sex between minors.

4.2. South Africa focused law reforms on minors' consensual sex activities

The choice to select South Africa as the best comparative for this study is based on the following reasons. First and foremost, it is an African country just like Kenya and therefore it is likely to find similar cultural practices and traits as those in Kenya. Secondly, South Africa's Constitutional Court of South Africa has decriminalized consensual sexual activities between minors.¹ Again, Kenya's legal system is based on the common law approach while South Africa is based on a hybrid system of Roman Dutch law with a blend of English common law approach.² While coming up with the current Kenyan constitutional framework, Kenya largely

¹ *Teddy Bear Clinic for Abused Children, and Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN) v Minister of Justice and Constitutional Development (The Teddy Bear Clinic case)* (2013) ZACC 35 para 123.

² Kaguongo W, 'Introductory note on Kenya', 6--
<http://www.icla.up.ac.za/images/country_reports/kenya_country_report.pdf> on 13th January 2018.

borrowed from the South African one.³ This is particularly the bill of rights and devolution.⁴ This shows that the South African experience can again be useful in identifying possible solutions to the issue of consenting minors in Kenya.

4.3. Comparison of South Africa and Kenya

4.3.1. The South African law

In Kenya, the offence of defilement is codified in the SOA⁵ while in South Africa, it is codified in the Criminal Law (Sexual Offences and Related Matters) Amendment Act.⁶ What Kenya terms the offence of defilement, South Africa labels it statutory rape. The provision on statutory rape is codified in Section 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.⁷ The Criminal Law (Sexual Offences and Related Matters) Amendment Act is the statute in South Africa currently governing sexual offences. Section 15 of this Act provides that '*any person who commits an act of sexual penetration with a child is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child.*' Section 16 provides for the offence of statutory sexual assault.⁸

Prior to the *Teddy Bear Clinic* case,⁹ Section 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act were constitutional and therefore being the authority on the offence of defilement. However, this position was changed by the decision of the Constitutional Court of South Africa in 2013.

³ Kaguongo W, 'Introductory note on Kenya', 6--

<http://www.icla.up.ac.za/images/country_reports/kenya_country_report.pdf> on 13th January 2018.

⁴ Musiga TJ, 'Review of Nico Steytler and Yash Pal Ghai's Kenya-South Africa dialogue on devolution' 2(1) *Strathmore Law Journal*, 2016, 228.

⁵ Section 8(1), *Sexual Offences Act, Kenya* (No. 3 of 2006)

⁶ Section 15 & 16, *Criminal Law (Sexual Offences and Related Matters) Amendment Act, South Africa* (No. 32 of 2007).

⁷ (2013) ZACC 35.

⁸ Section 16, *Criminal Law (Sexual Offences and Related Matters) Amendment Act, South Africa* (No. 32 of 2007); 'A person who commits an act of sexual violation with a child is, despite the consent of the child to the commission of such an act, guilty of the offence of having committed an act of consensual sexual violation with a child.'

⁹ *The Teddy Bear Clinic case* (2013) ZACC 35.

4.3.2. South African Law after the Teddy Bear Clinic Case

The brief facts of this case are that it involved two not-for-profit organisations. One of them was known as the Teddy Bear Clinic for Abused Children and the other RAPCAN. These organizations sued to invalidate statutory rape and statutory sexual assault laws (Sections 15 and 16 of the Sexual Offences and Related Matters Act) which criminalise consensual sexual activity between adolescents.

At the heart of the matter was whether it was constitutionally permissible for children to be subjected to criminal punishments as a means to deter early sexual intimacy and combat the risks associated with it. This is given that adolescents have the rights to dignity and privacy. The court ruled that criminalising consensual sexual behaviour between adolescents violates their rights to dignity and privacy and the BIC principle under the Constitution and is therefore invalid.¹⁰

The court based its judgment on the following reasons. It first stated the provision on the criminalisation of consensual sexual conduct between minors is a kind of stigmatization. This is a violation of a minor's right to human dignity as the provision is demeaning and invasive. Secondly, minors have a right to privacy in that the sexual relationship they have with other minors is extremely personal. The subjecting of these sexual relationships which are deemed to be personal to examination by these statutory rape laws, is out rightly an invasion of privacy. In addition, the state failed to justify using objective data that the limitation of these rights (privacy and dignity) accruing to minors were warranted. It was also unable to give any empirical evidence to support their claim that early adolescent sexual relations produce really harmful effects that the legislature could only curb through legislation and no other less restrictive means. On the other hand, the two applicants made available an expert, who countered the position of the state by showing that the statutory rape laws do not actually decrease but increase those targeted risks. On this basis, the court held the contested provisions to be invalid and ordered a moratorium on prosecutions of children.¹¹

¹⁰ *The Teddy Bear Clinic case* (2013) ZACC 35, para 123.1.

¹¹ *The Teddy Bear Clinic case* (2013) ZACC 35, para 123.1.

The Teddy Bear case has had a subsequent impact on South African law. The court in invalidating the provisions that criminalise sex among minors suspended the invalidation for 18 months to allow the South African parliament to amend the law in light of the case.¹² In 2015, the parliament's Portfolio Committee for Justice began the process of consulting the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill 18 of 2014.¹³ This was in a bid to implement the order from the Constitutional court to decriminalise consensual sex between minors. It was also to amend the automatic registration of minors convicted of sexual offences to the South African national register of sex offenders.¹⁴ Parliament's revision of the law was to be based on the decriminalisation of sexual relations of adolescents between 12 and 15 years old. In addition to this, minors who were aged 16 and 17, who happen to have sex with minors who are two years younger than them would have protection and cannot be charged of statutory rape.¹⁵

South Africa realized that the criminalization of consensual sexual activities brought more harm than good. It leads to the feeling of shame and stigma on the child.¹⁶ Also, children do not seek information on sexuality and healthy practices as they are in fear of criminal sanction¹⁷ Again, criminalization is degrading and a violation of the right to dignity.¹⁸ Therefore, the criminalization of consensual sex between minors, it is not in the best interest of the child.

4.3.3. Lessons Kenya can learn from South Africa

As depicted from the above, South Africa has tried to take steps to reform the law to curb some of the problems that were and are brought about to minors by the criminalization of consensual sex between minors.

This has been through a reduction of the age of consent of minors but only specifically adolescents aged between 12 to 15. Despite this, statutory rape, in terms of an adult having sex with a minor, still exists since a minor cannot legally consent to sex with an adult. This is all

¹² *The Teddy Bear Clinic case* (2013) ZACC 35, para 118.

¹³ --<<https://pmg.org.za/bill/545/>> on 15 November 2017.

¹⁴ In *J. v. National Director of Public Prosecutions* (2014) ZACC 13, the court made it unconstitutional for minors convicted for sexual offences to be automatically registered in the national registry of sex offenders.

¹⁵ *The Teddy Bear Clinic case* (2013) ZACC 35 para. 23.1.

¹⁶ *The Teddy Bear Clinic case* (2013) ZACC 35, para 76.

¹⁷ *The Teddy Bear Clinic case* (2013) ZACC 35, para 76.

¹⁸ *The Teddy Bear Clinic case* (2013) ZACC 35, para 28.

in an effort to ensure the protection of children and that their best interests of children are upheld. In developing a legal framework to address the sexual activities of adolescents, Kenya could use the model South Africa has adopted to mitigate the legal and non-legal burdens of the defilement provisions on minors.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1. Conclusion

Adolescence is a time of sexual development and experimentation and this is normal. In Kenya, criminal law has been used to regulate adolescent sexual behaviour and activities. This approach has led to minors having to bear the burden of being subjected to the criminal justice system while young. The effect of this has been minors having to bear legal and non-legal punishments. As this study has shown, despite the law rendering consensual sex between each other unlawful, minors are still participating in sexual activities with each other. Thus, the hypothesis of this study, that the criminalization of minors having sex between each other does not deter them but imposes legal and non-legal burdens on minors, has been proved. It has also brought to light the need to re-examine the suitability of using the law as a means to address the issue of minors having consensual sex with each other.

5.2. Recommendations

First, where there is sex between a minor and an adult, the status of victimhood is assigned to the minor.¹ However, in the case of consensual sex between a minor and another minor, as per the framing of provisions on defilement, both are victim and defiler. In this case, as High puts it, it is not clear who the 'true' offender and who is the 'true' victim.² In cases of consensual sex between minors, there should be a clarification to the legal fraternity and society at large on who punitive target is. As a legal measure, this ought to be done through legislation to achieve certainty when prosecutors charge minors for defilement in a case of consensual sex between minors. The spirit of parliament while legislating the law on defilement as proposed by Hon. Njoki Ndung'u, was to protect minors against sexual abuse and advances from adults. The law as being applied creates the notion that all sex minors participate in is as a result of coercion and a form of abuse and exploitation. This is clearly not the case as minors at the adolescence stage make decisions to participate in sexual experimentation without necessarily

¹ Section 8(1), *Sexual Offences Act*, Kenya (Act No.12 of 2012).

² High A, 'Good, bad and wrongful juvenile sex: Rethinking the use of statutory rape laws against the protected class' 69 *Arkansas Law Review*, 2016, 813.

being coerced. This study suggests that the punitive target in cases of consensual sex between minors should be where the sex was non-voluntary by one party to the sex act.

Secondly, minors are considered vulnerable individuals and of a lower physical as well as emotional maturity as compared to that of adults. Hence, there is the need to put more measures to protect them. However, minors are still individuals who hold different thoughts, opinions and may want to assert their independence by making their own decisions. To guide and assist in making sexual decisions, Kenya should enforce and implement the current policy framework on adolescent sexual education. This is a non-legal measure Kenya can take to deal with the problem of consensual sex between minors. The provision of sexuality education in Kenya is supported by the Policy Framework for Education and Training of 2004 and also both the 2004 and 2013 Education Sector Policy on HIV and AIDS.³ The problem with such policies is that they focus on HIV education and life skills.⁴ Other problems faced by sexual education policies in Kenya is that there is generally a difficulty of translating policy into practice, also differing opinions stakeholders such as religious groups and parents who oppose such education.⁵

The government can improve the implementation of such policy by taking up a tougher supervisory and regulatory role of schools empowered to educate children on sexuality. This is in fulfillment of Kenya's duty take social and educational measures to protect a child against all forms of abuse including sexual abuse.⁶ Therefore, before minors make such critical decisions, they should be guided and advised appropriately on the risks and dangers of early sexual activities. This will enable minors make more informed decisions and reduce the number of minors engaging in harmful sex practices.

Thirdly, the prosecution of males in cases of consensual sex between minors implies that the status of victimhood is left to prosecutorial discretion.⁷ Currently, the law treats all sex between

³ Sidze EM, Mulupi S, Egesa C et al., *From Paper to Practice: Sexuality Education Policies and Their Implementation in Kenya*, Guttmacher Institute, 2017, 17.

⁴ Sidze EM, Mulupi S, Egesa C et al., *From Paper to Practice: Sexuality Education Policies and Their Implementation in Kenya*, Guttmacher Institute, 2017, 17.

⁵ Sidze EM, Mulupi S, Egesa C et al., *From Paper to Practice: Sexuality Education Policies and Their Implementation in Kenya*, Guttmacher Institute, 2017, 22.

⁶ Article 19(1), *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3.

⁷ High A, 'Good, bad and wrongful juvenile sex: Rethinking the use of statutory rape laws against the protected class' 69 *Arkansas Law Review*, 2016, 813.

minors is treated as exploitative and wrongful. However, it is clear this is not the case as minors are increasingly claiming consent in participation of sex with other minors. Kenya can take a legal measure and go the South African way and limit the application of defilement provisions to adults and in cases of minors only when the sex is out rightly coercive. Therefore, legislative reforms can be implemented to protect minors from the harsh legal and non-legal penalties of the strict law on defilement. This law would be effectively warrant criminal charges of the offence of defilement only when it is clear that the sex between minors was not consensual but coercive hence wrongful.

Lastly, while setting legal age minimums, particularly when it comes to the age of consent, legislators need to be guided by the evolving capacities of the child and the best interest of the child. Minimum ages aim to protect the children from harm and do not set out to limit the autonomy and rights of children.⁸ This as a legal measure will enable legislators to contextualize sexual activities minors are involved in and be able to differentiate those which can be considered as part of normal adolescent development from that which is clearly exploitative and abusive. Also, the evolving capacities of the child concept ensure that the setting up of a minimum age of consent is not arbitrary. It does this by taking into account cultural and economics backgrounds of children which can have an impact on their maturity and decision-making abilities.

⁸ Sedletzki V, *Legal minimum ages and the realization of adolescent's rights: A review of the situation in Latin America and the Caribbean*, UNICEF, 2016, 22.

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