DOES CRIMINALISATION OF CONSENSUAL SEX BETWEEN MINORS IN KENYA VIOLATE THE CONSTITUTIONAL RIGHTS OF CHILDREN?

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List of abbreviations

CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
KDHS	Kenya Demographic and Health Survey
STIs	Sexually Transmitted Infections
WHO	World Health Organisation

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Summary of mini-dissertation

The provisions of Section 8(1) and 11(1) of the Kenyan Sexual Offences Act of 2006 are framed in a manner that essentially criminalises factually consensual sexual relations between adolescents. This is premised on social constructions around children's sexuality that influence how the law is framed. Most societies view children as innocent and non-sexual and thus in need of protection. However, this narrow perception fails to recognise children as right holders and denies them of their sexual rights. Sexual rights in themselves are not self-standing and do not bear an authoritative stand in international law but are linked to other rights that are already recognised in national laws and provided for under international human rights conventions. Notwithstanding all the instruments that protect and promote the rights of children on matters of sexuality, it is clear that the matter of children's sexuality is a delicate subject because of the nature of children. Matters relating to the assessment of whether a child has the capacity to consent are not straightforward and the state has an arduous task of balancing protectionism versus self-determination by fixing age limits that are not too high or too low. Kenya's population ratio of youth aged between 15 and 24 years stands at 20.3 per cent meaning that out of a population of 49.7 million, 10.1 million are youth. Therefore, for Kenya to achieve its development goals it must protect and harness the potential of its youth by recognising sexuality as an important component in the development stages of an adolescent.

Chapter 1: Introduction

1.1 Background

The 2014 Kenya Demographic and Health Survey (KDHS) reported that 15 percent of women and 22 percent of men aged between 20 - 49 years had their first sexual intercourse at the age of 15.[1] The survey also reported that ten percent of girls and 22 percent of boys had engaged in sexual intercourse before the age of 15.[2] In addition, 46.4 percent of girls and 50 percent of boys had engaged in sexual intercourse before the age of 18.[3] These statistics show that persons under the age of 18 who are considered as children by virtue of the provisions of Section 2 of the Children's Act of 2001 are engaging in sexual intercourse. In a bid to protect children and address issues on sexuality, the state has enacted various laws and policies.

The Sexual Offences Act of 2006 was enacted to introduce a comprehensive law that would address the rising cases of sexual assault, rape and protect all persons from unlawful sexual acts.[4] This purpose was expressly stated in the preamble of the Act.[5] In particular sections 8(1) and 11(1) which will form the basis of this study, were intended to address the issue of adults who preyed on minors. Section 8(1) provides that any person who causes penetration with a child is guilty of the offence of defilement and is liable upon conviction to imprisonment to a term of up to 20 years.[6] Similarly section 11 of the same act also provides that any person who engages in an 'indecent act with a child' is liable upon conviction to an imprisonment term of not less than ten years.[7] The Act defines an indecent act as 'any unlawful intentional act which causes any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration or exposure or display of any pornographic material to any person against his or her will'.[8] The Act however did not take into account circumstances where the act of

[1] Kenya National Bureau of Statistics *Kenya Demographic and Health Survey* (2014)248. https://dhsprogram.com/pubs/pdf/fr308/fr308.pdf (accessed 10 April 2018).
[2] n 1 above, 248.
[3] n 1 above, 248.
[4] Legal Action Worldwide *Best practices: African Sexual Offences Act* (2014) 16 http://legalactionworldwide.org/wp-content/uploads/2014/11/Best-Practices-African-Sexual-Offences-Act-2.pdf (accessed 10 April 2018).
[5] Sexual Offences Act 3 of 2006, preamble.
[6] n 5 above, sec 8.
[7] n 5 above, sec 11.
[8] n 5 above, sec 2.

penetration occurs between two consenting children which has led to the imprisonment of minors especially boys for the offence of defilement.

The framing of sections 8(5)(a) and (b) and 11(2)(b) which create the deception defence also introduce another angle that depicts minors as knowers and not as innocent as constructed by societal beliefs. The sections provide that if at the time of the alleged commission of the offences the child deceived the accused person into believing that they were over 18 years then that would be a ground for a defence.[9]

In the case of *CKW v Attorney General & Another* the petitioner through his lawyers instituted a suit seeking for a declaration that sections 8(1) and 11(1) of the Sexual Offences Act were invalid to the extent that they criminalised consensual sex between adolescents.[10] A minor who was 16 years at the time of the commission of the alleged crime had been charged with the offence of defilement in the Criminal Court for engaging in sexual relations with his girlfriend of the same age.[11] The court held that sections 8(1) and 11(1) did not violate his rights in any way as the law was meant to protect adolescents from harmful sexual conduct either from adults or other adolescents.[12] The court further stated that the law had the goal of protecting children from premature sexual conduct as children are vulnerable and they need protection.[13]

In the case of *POO (A Minor) v Director of Public Prosecutions & Another* a minor was also charged with the offence of defilement for engaging in consensual sexual relations with a girl his own age who later became pregnant.[14] However, unlike the judgment in *CKW*, the court held that the petitioner's right to equal treatment before the law was infringed as he was solely charged even though he engaged in consensual sexual activities with the girl.[15] In addition, the court held that the office of the Director for Public Prosecution did not take into account the fundamental principles of impartiality and gender equity as provided by the provisions of the Office of the Director of Prosecutions Act of 2013 when fulfilling its

[9] n 5 above, secs 8(5) (a) & (b) &11(2) (b).
[10] *CKW v Attorney General & another* (2014) eKLR (Constitutional Court of Kenya) para 2.
[11] n 10 above, paras 5 & 6.
[12] n 10 above, para 95.
[13] n 10 above, paras 98 & 99.
[14] *POO (A Minor) v Director of Public Prosecutions & Another* [2017] eKLR (Constitutional Court of Kenya) para 31.
[15] n 14 above, para 2.

mandate.[16] The court advocated the need for counselling and guidance rather than penal sanctions to minors who engaged in consensual sexual relations.[17]

These two cases show divergent discourses that prevail on matters of sexuality and children that either categorise minors as innocent and thus in need of protection or as knowers and thus in need of guidance and access to age appropriate information. Most Kenyan laws are modelled after those of Great Britain as result of the colonial influence. Consequently, the jurisdiction of the High Court, Court of Appeal and Subordinate Courts is exercised in conformity with *inter alia* Acts of Parliament of the United Kingdom which are provided within the Judicature Act 16 of 1967, common law, doctrines of equity, procedure and practice observed in the courts of justice of England which were in force on the 12th of August 1897.[18] Thus the precedents from decisions of superior courts' of the United Kingdom have persuasive force in Kenya courts.

Sexual offences in India are treated in a similar manner like Kenya because of its colonial history with Great Britain. Chapter will therefore examine how they have dealt with the issue of children's capacity to consent to consensual sexual relations. Section 375 of the Indian Penal Code (IPC) of 1860 creates the offence of statutory rape where a person indulges in any kind of sexual conduct with persons under the age of 18 years regardless of the victim's consent.[19] Similarly, sections 145 and 146 of the Penal Code of Kenya provided for the offence of defilement for engaging in sexual relations with a person below the age of 18 years.[20] These provisions were later repealed and provided for under the Sexual Offences Act. The Protection of Children from Sexual Offences Act 2012 of India just like the Sexual Offences Act of Kenya also criminalise any sort of sexual activity with a person below the age of 18 years. This is on the premise that a person below the age of 18 years is a child and therefore has no capacity to consent to sexual relations. In addition, India just like Kenya also faces a real problem in child marriage and this has been used as the main contention in India to justify the age of majority being the same as the age of consent. It would therefore be important to examine how the courts in India who are faced with quite similar circumstances as those in

[16] n 14 above, para 30.
[17] n 14 above, para 29.
[18] Judicature Act 16 of 1967, sec (1) (b) & (c).
[19] Indian Penal Code Act 45 of 1860, sec 375.
[20] Kenya Penal Code Act 81 of 1948, sec 145 & 146.

Kenya deal with the issue of establishing whether minors have capacity to consent to sexual relations.

The Constitution of Kenya of 2010 uses inclusive terms like 'every person' to mean that the rights it provides encompass all persons whether minors or adults. It thus, *inter alia,* protects every person from acts of discrimination and provides that each person has the right to privacy, to be treated equally before the law and with dignity.[21] It also provides that every child has the right not to be detained except as a measure of last resort and that the child's best interest is paramount in every matter concerning the child.[22]

Kenya has also ratified international and regional instruments such as the United Nations Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child[23] (African Children's Charter) all which guarantee a myriad of rights. The CRC introduces the principle of evolving capacities[24] of the child which recognises children as agents on their own and capable of making their own decisions but also as people who require protection because of their relative immaturity and youth. [25] Article 5 of the CRC acknowledges the rights, duties and responsibilities of parents or legal guardians for the child. This, however, has to be consistent with the evolving capacities of children.[26] In addition, article 5 also inserts the phrase 'appropriate direction and guidance' which would be interpreted to mean that parents or legal guardians do not have full and complete control in exercising their duties, giving direction and guidance to decisions affecting the life of a child.[27] Moreover, the direction and guidance given to children must be in the best interest of the child, which is also a principle guaranteed in the CRC[28] and the African Children's Charter.[29]

Both instruments also introduce the concept of participation which asserts that a child has the right to be involved in making decisions that affect their life.[30] The UN Committee on the Rights of the Child identifies this concept as one of the four general principles of the CRC

[21] Constitution of Kenya 2010, arts 27 & 28.
[22] n 21 above, art 53(1)(f) & (i) & (2).
[23]Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, art 4.
[24]UN General Assembly, Convention on the Rights of the Child, 20 November 1989, art 5.
[25] UNICEF Innocenti Research Centre 'The evolving capacities of the child' (2005) ix.
[26] n 24 above, art 5.
[27] n 24 above, ix.
[28] n 24 above, art 3.
[29] n 24 above, art 4.
[30] n 24 above, art 12; n 23 above, art 7.

and thus should be considered in the interpretation and implementation of all other rights.[31] The CRC particularly provides that the views of a child 'should be given due weight in accordance with their age and maturity'.[32] This article thus implies that children are capable of expressing their views and should be involved in the different levels of decision making which are; 'to be informed, to express an informed view, to have their views taken into account and to be the main or joint decision maker'.[33]

In addition to these principles, both the CRC and the African Children's Charter also guarantee certain human rights to children which are relevant when assessing the laws that relate to criminalisation of consensual sex between children. Some of the rights include right to privacy,[34] dignity,[35] non-discrimination which are all also provided under the Kenyan Constitution.[36] These are all very integral rights that are protected in virtually all human rights instruments.

Notwithstanding all the above instruments that protect and promote the rights of children on matters of sexuality, it is clear that the matter of children's sexuality is a delicate subject because of the nature of children. The study does not condone or encourage children to engage in consensual sexual relations but sets to explore whether criminalisation of these acts is the most effective way of protecting children from harm and violation. It also explores the challenges faced in a bid to ably balance the protection of children vis a vis acknowledging their autonomy.

1.2 Problem statement

The framing of sections 8 and 11 of the Sexual Offences Act creates a criminal offence for two children to engage in factually consensual sexual relations. This is usually because of social constructions around children's sexuality that influence how the law is framed. Most societies view children as innocent and non-sexual and thus in need of protection. However, this narrow perception fails to recognise children as right holders that the state has the

[31] UN Committee on the Rights of the Child General Comment 12 (2009): The right of the child to be heard (art 12) CRC/C/GC/12 (20 July 2009) para 2.
[32] n 24 above, art 12.
[33] n 24 above, 4.
[34] n 24 above, art 16; n 23 above, art 10.
[35] n 24 above, art 37(c); n 23 above, art 21(1).
[36] n 24 above, art 2; n 23 above, art 3.

obligation to respect. It gives the state the absolute and arbitrary veto to make decisions on behalf of the children denying them the right to sexual autonomy.

However, another challenge arises as to how to determine at what age a child possesses the reasoning skills and the capacity to make a competent decision on matters of sexuality.

Criminalising of consensual sex between children also works contrary to the government's policies to promote information and services on sexual and reproductive health rights.[37] Furthermore, it also raises the question as to whether criminalising consensual sex between children does indeed protect children.[38]

1.3 Research aims and objectives

The aims and objectives of this study are the following;

a) to illustrate that criminalisation of consensual sex between minors violates their sexual rights;

b) to explore the discourses of protectionism and self-determination in relation to children's sexuality rights;

c) to illustrate some of the dilemmas and challenges faced when regulating consensual sexual relations between minors;

d) to make recommendations on the amendment of provisions of the Sexual Offences Act of 2006 that relate to the criminalisation of consensual sex between minors; and

e) to illustrate that criminal law is not the most effective method of regulating consensual sexual activity between minors.

[37] Ministry of Health Kenya *National Adolescent Sexual and Reproductive Health Policy* (2015) http://aphrc.org/wp-content/uploads/2015/09/Ministry-of-Health-ASRH-Booklet-Final-1.pdf (accessed 12 January 2018).

[38] J Chalmers 'Regulating adolescent sexuality: English and Scottish approaches compared' (2011) 23 *Child and Family Law Quarterly* 450.

1.4 Research questions

The main research question is whether criminalisation of consensual sex between minors in Kenya violates the constitutional rights of children. This question will be explored through addressing the following sub-questions:

(a) What are the justifications of regulating sex between minors?

(b) What rights do the Kenyan law and international conventions bestow on children in regard to sexual rights?

(c) How have other jurisdictions recognised the children's capacity to make judgments or choices to engage in sexual conduct?

(d) If the Sexual Offences Act falls short of complying with the provisions of the Kenyan Constitution, what recommendations can be made to amend the Act to make it compliant?

1.5 Research method

This dissertation shall be conducted using a desk-based research method. This will entail reviewing relevant case law, statutes, government policies, international and regional conventions, published books and peer reviewed articles.

1.6 Significance of the research

A report by the National Adolescent Sexual and Reproductive Health Policy indicates that 37 percent of girls and 44 percent of boys aged between 15 and 19 years in Kenya have had sex. Adolescents make up 24 percent of Kenya's population. These statistics show that the State has an obligation to address the sexual and reproductive health of adolescents if it is determined to meet its development agenda.

This study will contribute to the debate on criminalisation of consensual sex between minors by illustrating that criminal law is not the most appropriate or effective method of dealing with underage consensual sexual activity. The study aims at making recommendations that will help create a balance between protecting children from sexual predators and securing the sexual rights of minors. It will also contribute towards showing the importance of aligning the Sexual Offences Act with the provisions of the Constitution of Kenya, 2010.

1.7 Literature review

The discourse of adolescent sexuality in Africa elicits different reactions and is usually viewed as a taboo subject. Paul Chappell in his article discusses the sexuality discourse in South Africa where it is viewed as dangerous, risky and socially unacceptable not only towards adolescents with disabilities but also towards non-disabled adolescents.[39] Kangaude contends that the harshness of sex laws is never because of their nature 'but because of hegemonic notions of sexuality'.[40] As a result of this perception any attempt by adolescents to communicate or access matters on sexuality is legislated under the terms of protectionism.[41] The protectionism of adolescents is further justified by the issues of gender violence, HIV/AIDS and sexual exploitation of children and in particular children with disabilities.[42] Adolescents are viewed as pure and innocent and as persons who are un-knowledgeable about issues of sexuality and thus in need of protection.[43] This has been the core reason for criminalising consensual sex between adolescents. The protectionist theory is also premised on the basis that there is a distinct difference between adults and children that justifies the denial of the rights of autonomy and personhood of children.[44]

Coppock discusses the discourse of protectionism within the context of feminism drawing comparisons between the social construction of childhood and that of gender.[45] She argues that the traditional protectionist discourses view children as vulnerable thus needing protection while under paternalism the woman is also viewed as vulnerable and incapable of making decisions concerning her life. The protectionist approach has also been criticised by feminists on account of regulating adolescent sexuality based on traditional and patriarchal norms of innocence and vulnerability in order to control a woman's sexual autonomy.[46] These

[39] P Chappell '(Re) Thinking sexual access for adolescents with disabilities in South Africa: Balancing rights and protection' (2016) 4 *African Disabilities Rights Yearbook* 137.
[40] G Kangaude 'Adolescent sex and 'defilement' in Malawi law and society' (2017) 17 *African Human Rights Law Journal* 546.
[41] Chappell (n 39 above) 139.
[42] Chappell (n 39 above) 139.
[43] Chappell (n 39 above) 137.
[44] M R Gardner 'Categorical distinction between adolescents and adults: Supreme Court's juvenile punishment cases- constitutional implications for regulating teenage sexual activity' (2013) 28 *Brigham Young University Journal of Public Law* 6.
[45] V Coppock 'Children as peer researchers: Reflections on a journey of mutual discovery' (2011) 25 *Children & Society* 435.
[46] D Brand 'Sugar, spice and criminalized consent: A feminist perspective of the legal framework regulating teenage sexuality in South Africa' (2013) 29 *South African Journal on Human Rights* 193 &194.

norms were inherited from English laws that sought to accord women special protection from exploitation thus statutory rape laws were strict liability and they only criminalised or penalised the man and not the woman.[47]

Batey[48] contends with the notion that children lack capacity for moral reasoning. The author uses Kolhberg's[49] development stages of moral reasoning to show that adolescents possess moral reasoning skills. The author suggests that the decisions of an adolescent should be treated the same as those of an adult except in circumstances where the adolescent portrays a lack of competence or failure to assess carefully before making a decision.[50] Later exercises carried to establish Kohlberg's theory, however, established that the environment of the adolescent affects the capacity for moral reasoning.[51] Adolescents in urban areas showed significantly better results in moral reasoning as compared to their counterparts in rural or less populous areas.[52] In addition, authors like Piaget believed that the social cultural environment of a person influenced ones moral judgment.[53]

However, we cannot deny the vulnerability of children that may affect their capacity to make competent decisions. Oberman suggests that due to the many physical developments that take place during this stage of development, adolescents tend to be unsure of themselves, they may not also strongly assert their decisions and are susceptible to coercion.[54] In addition to these factors and their sexual naivete the sexual encounters of many adolescents may be problematic.[55] Authors like Abma also submit that the level of wantedness to engage in consensual sexual conduct decreases for children who engage in voluntary intercourse at 13 years or younger.[56] Assumption of capacity in children would also

[47] Brand (n 46 above) 196.
[48] R Batey 'The rights of adolescents' (1982) 23 *William and Mary Law Review* 363.
[49] L Kohlberg, 'The development of children's orientation toward a moral order: I. sequence in the development of moral thought' (1963) 6 *Vita Humana* 11.
[50] Batey (n 48 above) 364.
[51] Batey (n 48 above) 368.
[52] Batey (n 48 above) 368.
[53] Batey (n 48 above) 368.
[54] M Oberman 'Regulating consensual sex with minors: Defining a role for statutory rape' (2000) 48 *Buffalo Law Review* 709.
[55]Oberman (n 54 above) 709.
[56]J Abma *et al* 'Young women's degree of control over first intercourse: An exploratory analysis' (1998) 30 *Family Planning Perspectives* 15.

lead to the abandoning of processes and structures that have been put in place for the development of their capacity.[57]

Chappell does not diminish the importance of protection of adolescents but suggests that a more holistic approach should be taken. This approach recognises the potential of adolescents to make decisions on matters of sexuality thus dispelling the notion of adolescents as 'agentic child' but view them as competent agents who are also participating in their own social situations.[58] The author further avers that taking only the protectionism approach that views issues of sexuality as dangerous, risky and children as devoid of agency has a twofold effect on adolescents with disabilities. [59] Firstly, it marginalises the voices of adolescents and thus fails to recognise the sexual rights of adolescents.[60] Secondly, it may impact their personal perceptions on sexual identity and desirability.[61]

The case of *Gillick v West Norfolk & Wisbeck Area Health Authority & Another* sets the parameters of determining whether a child possesses the capacity to give consent.[62] The case however raised concerns on how to determine or test understanding.[63] Another concern raised from Lord Fraser's conditions was that it changed the focus of decision making from the child to the doctor.[64]

In addition, the decision in the *Gillick case* also seemed to raise another issue on the fixed limits that the law places to determine at what age a minor could be taken to possess capacity. Herring suggests even with set ages of sexual consent capacity to consent is issue specific.[65] The author states the importance of having express fixed age limits as when the law is not clear a person cannot be held liable for their actions.[66] Ruth Dixon-Mueller, however, believes

[57]B C Hafen 'Children's liberation and the new egalitarianism: Some reservations about abandoning youth to their "rights''' (1976) 3 *Brigham Young University Law Review* 650.
[58] Chappell (n 39 above) 139.
[59] Chappell (n 39 above) 139.
[60] Chappell (n 39 above) 139.
[61] Chappell (n 39 above) 139.
[62] *Gillick v West Norfolk & Wisbeck Area Health Authority & Another* (1985) 402 All ER (House of Lords).
[63] A Perera 'Can I decide please? The state of children's consent in the UK' (2008) 15 *European Journal of Health Law* 414.
[64] J Devereux 'The capacity of a child in Australia to consent to medical treatment - Gillick revisited' (1991) 11 *Oxford Journal Legal Studies* 293.
[65] J Herring 'The age of criminal responsibility and the age of consent: Should they be any different?' (2016) 67 *Northern Ireland Quarterly* 349.
[66] Herring (n 65 above) 351.

that consent laws are symbolic as they can prove difficult to enforce.[67] In setting the age of consent, Herring suggests that the age limit should not be too low so it would result in adverse effects related to the social and economic costs of teenage pregnancy.[68] To the contrary when the age of consent is set too high it leads to criminalisation of attitudes rather than protection.[69] Kangaude suggests a multi-stage age of consent that strikes a balance between protection and self-protection.[70]

Contrary to the Gillick case, in the case of *Independent Thought v Union of India & Another* the court held that sex with a girl who was under the age of 18 years constituted the offence of rape regardless of whether the girl was married or not.[71] This was because a child below the age of 18 years did not cease being a child by virtue of being married.[72] In addition, such a child had not achieved full maturity therefore, they had no capacity to consent to sexual intercourse.[73] It is very clear from the case that one of the main intentions of the legislature in setting the age of consent with the age of marriage was to close every loop hole that may be used to promote child marriage.

Even as different states legislate on sexual consent laws they should take cognisance to the different obligations they have in international covenants. Misasi contends that sexual rights are constellation of rights already provided in international laws.[74] One of the principles of human rights is their interdependence, therefore the ability to enjoy one right is based on their right to enjoy other rights.[75] Durojaye states that sexual rights are not guaranteed in any human rights instruments but they are linked to other rights like right to privacy, security, liberty and liberty.[76] The 2002 World Health Report also buttresses this as it recognises sexual

[67] R Dixon – Mueller 'How young is 'too young'?' Comparative perspective on adolescent sexual, marital and reproductive transitions' (2008) 39 *Studies in Family Planning* 256.
[68] Herring (n 65 above) 355.
[69] A Misasi 'The sexual and reproductive rights of adolescents: The implementation and expansion of the reproduction rights of adolescents through the Convention on the Rights of the Child' (2016) 23 *University of California Davis Journal of International Law and Policy* 221, 245.
[70] Kangaude (n 40 above)545.
[71] *Independent Thought v Union of India & Another* (2013) (Supreme Court of India) para 1.
[72] *Independent Thought* (n 71 above) para 4.
[73] *Independent Thought* (n 71 above) para 16.
[74] Misasi (n 69 above)139.
[75] J Kossen 'Rights, respect, responsibility: Advancing the sexual and reproductive health and rights of young people through international human rights law' (2012) 15 *University of Pennsylvania Journal of law and Social Change* 150.
[76] E Durojaye 'Realising access to sexual health information and services for adolescents through the Protocol to the African Charter on the Rights of Women' (2009) 16 *Washington & Lee Journal of Civil Rights and Social Justice* 168.

rights as human rights already recognised in national, international and human right documents.[77]

1.8 Outline of the chapters

This chapter gives a background of the study and explains the significance of the research. It also examines sections 8 and 11 of the Sexual Offences Act which criminalise consensual sex between minors and the cases that have ensued out of the enforcement of the sections. The second chapter will explore the discourses of protectionism, self-determination, the construction of children as innocent or knowers that are used as justifications of criminalising sex between minors. Chapter three will examine the provisions of the Kenyan Constitution, regional and international conventions that have been ratified by Kenya that relate to children's sexual rights. The fourth chapter will examine how different jurisdictions have assessed whether a child has the capacity to engage in consensual sexual relations. It will also look at how courts have balanced between the autonomy of children while still ensuring that they are protected from harm and violation. Finally, Chapter five will summarise the main findings of the study and make recommendations on the amendment of the provisions of the Sexual Offences Act in relation to consensual sex between children to align them to the provisions of the Constitution of Kenya.

[77] World Health Organisation 'Defining sexual health: Report of a technical consultation on sexual health' (2002) 4.

2 CHAPTER 2: Discourses of protectionism and self-determination as justification on the criminalisation of consensual sexual relations between minors

2.1 Introduction

The wording of section 11 of the Sexual Offences Act criminalises unwanted, non-consensual sexual relations but it also categorises consensual sex between minors as an offence of defilement. The section fails to recognise that sex between minors can be mutually desired and consented. This is because legislative framework is shaped by societal norms or views on adolescent sexuality. This chapter will review the dichotomy between protectionism and enablement in the regulation of adolescent sexuality.

2.2 Protectionist concept

The core reason for criminalising consensual sex between adolescents has always been that children below the statutory age of majority are incapable of making rational decisions and are therefore in need of protection from the State and a legal guardian. This theory is premised on the basis that there is a distinct difference between adults and children that justifies the denial of the rights of autonomy and personhood of children.[78] Unlike the discourse on enablement, which advocates that children should be accorded the same rights as adults, this theory advocates that children cannot be seen to be miniature adults as their understanding and reaction to situations is very different.[79] These differences include immature mental capacity, unique vulnerability and dependence.[80] Moreover, due to the many physical developments that take place during this stage of development, adolescents tend to be unsure of themselves, they may not also strongly assert their decisions and are susceptible to coercion.[81] Studies also show that women's emotional development between the ages of 15 and 24 years is very difficult and are twice likely to commit suicide than their male counterparts.[82] Therefore the bargaining power of adolescent girls during sexual encounters may be very one sided.[83]

[78]Gardner (n 44 above) 6.
[79] Hafen (n 57 above) 651.
[80] Gardner (n 44 above) 6.
[81] Oberman (n 54 above) 709.
[82] Oberman (n 54 above) 714 & 715.
[83] Oberman (n 54 above) 714.

In addition to these factors and their sexual naiveté the sexual encounters of many adolescents may be problematic.[84] Some authors on adolescent sexuality have shown that although on the onset sex between minors may appear to be consensual many factors push them to 'consent' to unwanted sexual encounters like; fear, coercion, attention from men and peer pressure.[85] Social science research has also shown that teenage girls consent to sex due to emotional reasons like romance, to feel desired and respected, to keep their relationships and not on the ideal assumptions of sexual desire.[86] Abma in her article showed that the desire to engage in consensual sexual conduct decreased for children who engaged in voluntary intercourse at 13 years or younger.[87] Therefore, there would be cases where the sex may seem consensual but unwanted for various reasons. Intimidation is one of the reasons that would cause a younger adolescent girl who is less experienced socially and of a different social status to accept the advances of an older more affluent adolescent boy especially in social settings like parties.[88] Studies have also shown that decisional ambivalence was experienced more by younger adolescents which would most likely result to unprotected sexual intercourse.[89] It is on the basis of these distinctions that protectionist protagonists state that children are entitled to certain rights including the right to protection, care and discipline.[90] The evidence from such studies have also been used as the premise for criminalising all kinds of sexual contact between minors to protect them from themselves and from other persons who may prey on them due to their vulnerability.[91]

Assumption of capacity in children would also lead to the abandoning of processes and structures that have been put in place for the development of their capacity.[92] In addition, exposing children to too much freedom may work to their detriment as their decisions may have far more adverse effects than the temporary limitations to their freedom until the time they attain the age of majority.[93] Therefore, parental authority to developing

[84] Oberman (n 54 above) 709.
[85] Oberman (n 54 above) 709.
[86] Oberman (n 54 above) 713.
[87] Abma (n 56 above)15.
[88] Oberman (n 54 above) 718 & 719.
[89] Oberman (n 54 above) 719.
[90] Gardner (n 44 above) 6.
[91] Oberman (n 54 above) 710.
[92] Hafen (n 57 above) 650.
[93] Hafen (n 54 above) 650.

children is very essential as they are still very immature and naturally dependent.[94] Research also shows that parental authority is very integral to the psychological needs of a developing child.[95]

It is not in doubt that indeed adolescents need protection. However, where the law is framed to take a fully protectionist approach that views them as lacking sexual agency it acts as an impediment. Consequently, adolescents are marginalised, silenced and are restricted access to sexual education that protects them contracting HIV/AIDS, sexually transmitted infections (STI) and unsafe abortions.[96]

This means that where the law takes a fully paternalistic approach it punishes adolescents who engage in mutually desired sexual relations despite the presence of consent. This will be based on the ground that persons who lack competence cannot consent and thus age is an important factor to look at to determine whether the person has consent.

Sections 8 and 11 of the Sexual Offences Act reflect this protectionist approach by the criminalisation of all sexual contact between adolescents even where it is consensual and mutually desired in a bid to protect children. This is also reflected in the court's decision in the case of *CKW v Attorney General & another* where it held that sections 8(1) and 11(1) did not violate the rights of the accused adolescent boy in any way as the law was meant to protect adolescents from harmful sexual conduct either from adults or other adolescents.[97] The court further stated that the law had the goal of protecting children from premature sexual conduct as children are vulnerable and they need protection.[98]

The protectionist approach has, however, been criticized by feminists for regulating adolescent sexuality based on traditional and patriarchal norms of innocence and vulnerability in order to control a woman's sexual autonomy.[99] These norms were hinged on historical attitudes that viewed women and girls as 'special property' and thus they needed protection to protect their chastity from being corrupted by men.[100] This was to ensure a smooth transition of the girl or woman from her father to her husband and to ensure the

[94] Hafen (n 57 above) 651.
[95] Hafen (n 57 above) 652.
[96] Chappell (n 39 above) 139.
[97] n 10 above, para 95.
[98] n 10 above, 98 & 99.
[99] Brand (n 46 above) 193 &194.
[100] Brand (n 46 above) 195.

conformity with the societal status quo that maintain gender stereotypical roles of women only as wives and child bearers.[101] These norms were inherited from English laws that sought to accord women special protection from exploitation and thus statutory rape laws were strict liability and only criminalised or penalised the man and not the woman.[102] Like many other Commonwealth countries Kenya's criminal laws heavily borrowed from its former coloniser. The wording of section 8 of the Sexual Offences Act defines the offence defilement as the penetration of a child; meaning, that the accused person can only be a man as it is anatomically impossible for a woman to penetrate a man.[103] The wording of the law is therefore designed to show that women are vulnerable and may fall prey to the actions of man. It fails to take cognisance of an adolescent girl's capacity to consent to consensual mutually desired sexual relations.

The construction of innocence also perpetuates the notion that adolescents are unknowledgeable about sexuality or non-sexual as opposed to the reality that they are participating in consensual mutually desired sex.[104] The statistics in Kenya reveal that adolescents are engaging in sexual relations. A report by the National Adolescent Sexual and Reproductive Health Policy indicates that 37% of girls and 44% of boys aged 15 to 19 years in Kenya have had sex.[105] The Joint United Nations Programme on HIV/AIDS (UNAIDS) and World Health Organisation also report that most of new infection of HIV/AIDS are occurring in persons between the age of 18 and 24 years.[106] As a result of the 'politics of innocence' adolescents are unable to access information that will enhance their protection and the prevention of HIV and STIs.[107] These perceptions are usually perpetuated out of the false fear of awakening sexual desire in children.[108] They also act as a disguise of the lack of trust of adolescents when it comes to sexuality.[109] The construction of adolescents could also have other implications in that adolescents are categorised as safe and not at risk of venereal

[101] Brand (n 46 above) 195.
[102] Brand (n 46 above) 196.
[103]n 5 above, sec 8.
[104]C Mitchell *et al* 'Visualizing the politics of innocence in the age of AIDS' (2004) 4 *Sex Education* 36 & 37.
[105] Kenya National Bureau of Statistics *Kenya Demographic and Health Survey* (2014) 248. https://dhsprogram.com/pubs/pdf/fr308/fr308.pdf (accessed 10 April 2018).
[106] n 28 above, 248.
[107] Mitchell *et al* (n 104 above) 36
[108] Mitchell *et al* (n 104 above) 38.
[109] Chappell (n 39 above) 137.

diseases or HIV and thus the public should not bother with these group of persons.[110] The sad reality is that HIV does not discriminate between children and adults.

2.3 Knowers

Contrary to the presumptions of the protectionist theory, this concept believes that adolescents possess the same reasoning as adults and thus should be accorded the same treatment.[111] In addition, protagonists of this theory believe that children and adults have the same desires and their rights should not be curtailed based on their age which is used as a determinant of assessing their lack of competence to make decisions about their sexuality.[112] Their right to make decisions about their life should only be curtailed on the basis that the adolescent has demonstrated a lack of competence in their decision-making for example by contravening the law in which case the State is at liberty to intervene in the adolescent's life.[113] Therefore, in circumstances where a child has demonstrated competence in making decisions, regardless of the parents' wishes on the issue, the State and the parents should be barred from interference or intervention in the decision they have made.[114]

Human rights are essentially moral as they are based on how a society views certain dilemmas and issues they are facing and decide whether to accord rights to the individuals affected or not.[115] This is why issues like adolescent sexuality will be considered non-issues because of the societies' opinions that children are pure and innocent and therefore have no need for sexual rights. Thus, moral reasoning and judgment is an important issue and has formed the basis for which adolescents have been denied certain rights as the society constructs them as lacking the capacity for moral reasoning. Jean Piaget who was the pioneer in the field of the cognitive development of moral reasoning, whose work was later expounded by Lawrence Kohlberg believed that adolescents possess the moral skills comparable to those of an adult.[116] However, pre-adolescents (children below the age of 13) demonstrated no moral reasoning skills as compared to adolescents.[117] Kohlberg propounded

[110] Mitchell *et al* (n 104 above) 45.
[111] Batey (n 48 above) 373.
[112] Batey (n 48 above) 373.
[113] Batey (n 48 above) 374.
[114] Batey (n 48 above) 374.
[115] B J Peens & D A Louw 'Kohlberg's theory of moral development: Insights into rights reasoning' (2000) 19 *Medicine and Law* 351 & 352.
[116] Batey (n 48 above) 364, 365 & 369.
[117] Batey (n 48 above) 369.

that there are six stages of cognitive development and a person could not skip one stage of development but they had to be followed sequentially.[118] Kohlberg's theory further stated that adult reasoning commenced at the third stage, however, very few adults ever surpassed stage four of the development process.[119] Stage three of development process is a stage at which a person's decision making process is influenced by the people around them like friends and family while the fourth stage was influenced by the society.[120] Interestingly, one of Kohlberg's most astounding findings was that adolescents reasoning was in stage three of the development process meaning that they had the capacity for moral reasoning.[121] In one of the exercises carried out to establish Kohlberg's theory, children were grouped in age sets to test their moral reasoning.[122] The age 13 group demonstrated moral reasoning skills at stage four while the 16 year old group performed only slightly better.[123] This however, did not mean that traditional judgment of incapacity was inaccurate for some adolescents who demonstrated a lack of moral reasoning skills like pre-adolescents who were in stage two of the development process.[124] Later exercises carried to establish Kohlberg's theory established that the environment of the adolescent affected the capacity for moral reasoning.[125] Adolescents in urban areas showed significantly better results in moral reasoning as compared to their counterparts in rural or less populous areas.[126] In addition, authors like Piaget believed that the social cultural environment of a person influenced ones moral judgment.[127] In environments where there was mutual respect and equality one's moral judgment was autonomous.[128] Conversely, in environments where there was restraint and an emphasis on following rules and laws a person's moral judgment was inhibited.[129]

It is on the basis of these studies that demonstrate that indeed children possess moral capacity that the theory of self-determination advocates that adolescents must be allowed to

[118] Batey (n 48 above) 366.
[119] Batey (n 48 above) 366.
[120] Batey (n 48 above) 365.
[121] Batey (n 48 above) 365.
[122] Batey (n 48 above) 367.
[123] Batey (n 48 above) 367.
[124] Batey (n 48 above) 369.
[125] Batey (n 48 above) 368.
[126] Batey (n 48 above) 368.
[127] Batey (n 48 above) 368.
[128] Peens & Louw (n 115 above) 352.
[129] Peens & Louw (n 115 above) 352.

make their own moral choices.[130] In addition, the law should accord similar recognition to the considered decisions of competent adolescents as they do to adults.[131] The law should also give full recognition of the adolescents' right to make a decision and disobedience to persons in authority should not be used as a ground for state intervention unless they have demonstrated a lack of competence in their decision-making.[132] Adolescents should thus be constructed as knowers and as persons who are aware of themselves, their sexuality and their bodies.[133] The construction of adolescents as knowers acknowledges that they are persons who possess knowledge and can give and voice opinions on matters affecting their lives.[134]

Some feminists believe that the construction of children as vulnerable is the same paternalistic approach that was used to classify women as vulnerable in order to oppress and restrain their authority.[135] Thus when classifying children as vulnerable a distinction needs to be made between structural and inherent vulnerability. Inherent vulnerability emanates from biological features and thus an adolescent may demonstrate immaturity and structural vulnerability is as a result of interventions by adults through applications of best interest.[136] Additionally, some feminists believe that the principle of best interest of a child has been used by adults to stifle and silence the voices of adolescents and classify them as agents as opposed to persons who can make their own decisions.[137]

2.4 Conclusion

The two antagonistic views of self-determination and protectionism all agree that at one point of the process of development a child lacks capacity and their rational and judgmental capacities to make right decisions is negligible. The protectionist theory presumes that a child lacks capacity until the statutory age of majority and thus they cannot be accorded choice rights enjoyed by adults. On the contrary, under the self-determination theory there is a presumption that the capacities of children evolve and therefore they should be accorded the right to make decisions concerning their lives without the interference of the state except in

[130] Batey (n 48 above) 370.
[131] Batey (n 48 above) 373.
[132] Batey (n 48 above) 375.
[133] Mitchell *et al* (n 104 above) 36.
[134] Coppock (n 45 above) 432.
[135] Coppock (n 45 above) 435 & 436.
[136] Coppock (n 45 above) 436.
[137] Coppock (n 45 above) 438.

cases where it is proven that they lack capacity as a result of their actions. It is on the basis of these presumptions that legal systems determine what rights can be accorded to children. The question thus lies at what age would it be appropriate to state that a child has the capacity to make independent decisions that may have lifelong effects on their lives? For instance, should we measure competence using Kohlberg's Theory on moral development as this would suggest that a 13-year-old child has the competence to consent to consensual sexual relations with a child of the same age bracket without any interference from a higher authority on their decision. It would be a fallacy to believe that all children mature at the same age as different environments do affect the capacity of a child to make decisions even as demonstrated by Kohlberg's theory of moral development. Therefore, as competence evolves at a different pace with every child it would be reasonable for the law to put in place structures to support the competent decision of the child. Exposing the child to freedom gradually is also an essential aspect to the development of their judgmental capacity.[138] The law would be recognising the child as knower but also acknowledging that their competence evolves systematically thus the need for guidance and support.

[138] Hafen (n 57 above) 650.

3 CHAPTER 3: Constitutional and international framework on sexual rights

The intention of the legislature when enacting the Sexual Offences Act was to introduce a comprehensive law that would address the rising cases of sexual assault, rape and protect all persons from unlawful sexual acts.[139] However, the laws that were intended to protect children have been seen to stifle sexual health and development due to the stigma attached to criminalising consensual sex between adolescents.[140] The laws which punish adolescents for engaging in a non-problematic sexual experiences instigate stigmatisation and shame on issues of sexuality.[141] Sexuality has been seen as one of the necessary components of knowing one's personality.[142] These laws therefore impede minors from enjoying their sexual rights.

Sexual rights are not self-standing and do not bear an authoritative stand in international law but they embrace rights that are already recognised in national laws and provided for under international human rights conventions.[143] The World Health Organisation (WHO) defines sexual rights to include human rights already recognised in national laws and international human rights documents.[144] It further expounded the definition to include the following;

a) The right to obtain the highest attainable standard of sexual health, including access to sexual and reproductive health care services;

b) The right to seek, receive and impart information related to sexuality;

c) The right to access sexuality education;

d) Respect for bodily integrity;

e) The right for one to choose their partner;

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[139] Legal Action Worldwide *Best practices: African Sexual Offences Act* (2014) 16 http://legalactionworldwide.org/wp-content/uploads/2014/11/Best-Practices-African-Sexual-Offences-Act-2.pdf (accessed on 10 April 2018).

[140] G Kangaude & T Banda 'Sexual health and rights of adolescents: A dialogue with Sub-Saharan Africa' in C Ngwena & E Durojaye (eds) *Strengthening the protection of sexual and reproductive health and rights in the African region through human rights'* (2014) 269.

[141] Kangaude & Banda (n 140 above) 270.

[142] M J Roseman & A M Miller 'Normalising sex and its discontents: Establishing sexual rights in international law' (2011) 34 *Harvard Journal of Law & Gender* 315.

[143] S Lutchman ''Child savers' v 'kiddie libbers': The sexual rights of adolescents' (2014) 30 *South African Journal on Human Rights* 556 & 557.

[144] n 77 above, 4.

f) The right to decide whether or not to be sexually active;

g) Consensual marriage;

h) The right to engage in consensual sexual relations;

i) The right to decide whether or not and when to have children and

j) The right to pursue a satisfying, safe and pleasurable sexual life.'[145]

The Kenyan Constitution is the bedrock of all laws in Kenya and from it also flows the human rights that aim to preserve the dignity of every individual. Its preamble makes a commitment to nurture and protect the wellbeing of *inter alia* the individual. An individual encompasses every human being whether a child or an adult. Article 19(3) further provides that the rights and freedoms provided under the Bill of Rights of the Constitution of Kenya belong to each individual. This means that the Constitution recognises both adults and children as right-holders.

The Constitution of Kenya also obligates the state and all state organs to observe, respect, protect, promote and fulfil the rights and fundamental freedoms provided for under the Bill of Rights.[146] It is also obligated to come up with policies, measures and set standards for the implementation of the rights and freedoms provided under article 43 which include the right to the highest attainable standard of health including reproductive health care.[147] The Constitution also classifies children and youth as a vulnerable group whose needs are to be addressed by the state and its organs.[148] Apart from the provisions of the Bill of Rights that provide for rights and fundamental freedoms, Kenya has also ratified regional and international conventions that set certain human rights standards and impose legally-enforceable obligations on the state. Article 2(6) of the Constitution firms up these obligations further by providing that all treaties and conventions ratified by Kenya form part of Kenyan law. [149] The Constitution further obligates the state to enact legislation and policies in fulfilment of their obligations in respect to human rights and freedoms and the various ratified

[145]n 77 above, 4.
[146] n 21 above, art 21(1).
[147] n 21 above, art 21(2).
[148] n 21 above, art 21(3).
[149] n 21 above, art 2(6).

instruments.[150] It also provides that laws that are in contravention to the Constitution are void.[151]

One of the principles of human rights is their interdependence, therefore the ability to enjoy one right is based on the right to enjoy other rights. Sexual rights are linked to other rights already provided within the Constitution of Kenya. This chapter will therefore examine the following rights: right to health, survival and development of a child, equality and non-discrimination within the purview of rights provided for by the Constitution of Kenya of 2010.

3.1 Right to privacy

The Constitution accords the right to privacy to all persons which includes the right not to have their private affairs unnecessarily required or revealed.[152] A number of human rights instruments that have been ratified by Kenya including the African Children's Charter, the CRC, International Covenant on Civil and Political Rights (ICPPR) and the Universal Declaration of Human Rights provide against the arbitrary interference of a child's privacy or an attack on their reputation and honour.[153] The United Nation's Beijing Declaration and Platform of Action though not binding on state parties expounds on rights already provided in binding treaties. It recognises the right to privacy as one of the rights that are essential for adolescents to deal responsibly and positively on issues of sexuality.[154]

The Constitutional Court of South Africa in the case of *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* defined the term 'everyone' as used in the constitution to mean that both adults and children are to be accorded the right unless there was an express limitation by the law.[155] The court further stated that the justification of whether a right should be limited should not be at the point of determining whether the right was infringed but at the point where there is a determination of whether the justification is reasonable in a constitutional democracy.[156]

[150] n 21 above, art 21(4).
[151] n 21 above, art 2(4).
[152] n 21 above, art 31(c).
[153] n 21 above, art 16; n 21 above, art 1
[154] United Nations, *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women*, 27 October 1995, para 267 available at: http://www.refworld.org/docid/3dde04324.html (accessed 31 August 2018).
[155] *Teddy Bear Clinic for Abused Children & Another v Minister of Justice & Constitutional Development & Another* 2013 ZACC 35 (CC) para 38.
[156] *Teddy Bear* (n 155 above) para 39.

Though this decision may not be a binding authority in Kenyan courts, it provides persuasive guidance given that the Kenyan and South African constitutional provision are identical.

In addition, the court in the *Teddy Bear case* stated that the right to privacy is to protect the inner sanctum which was defined to include family life, sexual preference and home environment.[157] It is this privacy of the inner sanctum that allows people to form and nurture personal relationships.[158] The court further stated that when a police officer, prosecutors and judicial officers dealt with the case of adolescents who were engaging in consensual sexual relations, very private aspects about their personal lives were unnecessarily exposed.[159] Just like in South Africa then, consensual sex between minors is criminalised in Kenya and during court sessions details concerning the personal lives of these children are brought to light. Even though the court did not delve into the issue of the sexual rights of adolescents in its judgment, it 'acknowledged that adolescents engaging in consensual sexual relations was developmentally normative behaviour which is derived from constitutionally protected rights of dignity and privacy'.[160]

The UN Children's Rights Committee is a UN body which monitors the implementation of the CRC. The Committee's General Comment 4 on adolescent's health and development does not recognise the sexual rights of children but highlights the central components linked to sexual rights.[161] In the introduction of this General Comment the Committee defined the stage of adolescence as a period where there is rapid physical, cognitive, social, sexual and reproductive maturation.[162] The Committee also highlights that at this stage of growth and development that adolescents undergo a lot of challenges in finding their identity and dealing with their sexuality.[163] They note with concern that states have not appreciated children as right holders in the promotion of their health and development.[164] One of the rights linked to their development is privacy. Consequently, the Committee urges state parties to respect the privacy and confidentiality of children in order to promote their health and development.[165]

[157] *Teddy Bear* (n 155 above) para 59.
[158] *Teddy Bear* (n 155 above) para 59.
[159] *Teddy Bear* (n 155 above) para 60.
[160] S Lutchman (n 143 above) 559.
[161] S Lutchman (n 143 above) 559.
[162] UN Committee on the Rights of the Child (CRC), *General Comment 4 (2003): Adolescent health and development in the context of the Convention on the Rights of the Child*, 1 July 2003, CRC/GC/2003/4.
[163] n 162 above, introduction.
[164] n 162 above, introduction.
[165] n 162 above, para 7.

Adolescents are very sensitive when it comes to privacy and confidentiality and any perceived or actual threat acts as a barrier to seeking sexual and reproductive health care.[166] Consequently, where a state party criminalises consensual relations between adolescents or sets the age of consent too high it creates an attitude of criminalisation rather than protection that deters them from seeking information or health care that is critical to their wellbeing and development.[167] The Committee on Economic, Social and Cultural Rights in its General Comment on the right to sexual and reproductive health also highlights that sexual and reproductive health is linked to other rights including the right to privacy.[168]

3.2 Right to health

As earlier alluded to, sexual rights encompass human rights provided in national laws and international human right instruments. WHO recognises the rights to health as encompassing sexual rights.[169] The right to the highest attainable health is provided under the Constitution of Kenya and the CESCR.[170] The African Children's Charter and the CRC also provide that children have a right not only to physical health but also spiritual and mental health.[171] The Technical Consultation convened by WHO defined sexual health as a 'state of physical, emotional, mental and social well-being in relation to sexuality and it is not merely the absence of disease, dysfunction or infirmity.'[172] Therefore for sexual health to be attained the sexual rights of a person need to be protected, fulfilled and respected.[173] The African Union also acknowledges that in order for Africa to meet its millennium development goals states must address and ensure implementation of sexual and reproductive health especially of particular crucial target groups which include the youth.[174] The Children's Right Committee also recognised that the right to health not only encompasses preventative, rehabilitative

[166] Kangaude & Banda (n 140 above) 264.
[167] Misasi (n 69 above) 245.
[168] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment 22: Right to sexual and reproductive health (art. 12 of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/22, para 10.
[169] n 77 above, 4.
[170] n 21 above, art 43(1)(a).
[171] n 23 above, art 14; n 21 above, art 17.
[172]n 77 above, 5.
[173]n 77 above, 5.
[174] African Union *Maputo Plan of Action for the operationalisation of the continental policy framework for sexual and reproductive health and rights 2007 – 2010* (2006) paras 1 & 20.

services but also the right to grow and develop and live full lives.[175] The Committee also encourages that a more holistic approach to the right of health should be taken that also takes into account other rights provided in other human rights conventions.[176] The Committee urges states to recognise that the right to health contains certain freedoms and entitlements.[177] These include the freedom of children to make responsible sexual choices and the right to control their health and the bodies.[178] In addition to their freedoms, children are also entitled to access facilities, goods and services that promote their right to their right to the highest attainable health.[179] The Committee also emphasises that these freedoms and entitlements should increase in importance as a child's capacity and maturity evolves.[180] Other factors to be considered in realising a child's right to health include their age, sex and education.[181] It is also important to consider what stage of development a child is in and the challenges that they may face in relation to their health as each stage has an impact on the next phase of growth and development.[182] The Committee on Economic, Social and Cultural Rights urges state parties to thus ensure that distinct and tailored sexual health services are given to particular groups in accordance with their needs.[183] Therefore when the law sets the age of consent very high it fails to recognise the various development stages of children and properly address the issues they may be facing.

The criminalisation of consensual sexual relations between adolescents also creates an environment that hinders children from accessing information or services on issues affecting their sexuality. The Children's Right Committee acknowledges that health-seeking behaviour is shaped by the environment.[184] The Committee on Economic, Social and Cultural Rights encourages states to create a safe and supportive environment that allows adolescents to participate in decisions affecting their lives and get appropriate information to enable them

[175] UN Committee on the Rights of the Child (CRC), *General Comment 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)*, 17 April 2013, CRC/C/GC/15, para 2.
[176] n 175 above, para 2.
[177] n 175 above, para 24.
[178] n 175 above, para 24.
[179] n 175 above, para 24.
[180] n 175 above, para 24
[181] n 175 above, para 17.
[182] n 175 above, para 20.
[183] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, available at: http://www.refworld.org/docid/4538838d0.html (accessed 31 August 2018) para 24.
[184] n 183 above, para 30.

make suitable health-behaviour choices.[185] Criminalisation also creates an environment that impacts the attitude of health service providers who may act prejudicial to children who may come to seek information and services about their sexuality. The provisions of sections 8(1) and 11(1) of the Sexual Offences Act therefore work contrary to its original intended purpose of protecting children as it merely stifles them. The Constitution of Kenya expressly provides that on issues relating to children their best interest is of paramount importance.[186]

The Committee on Economic, Social and Cultural Rights also reiterated that social determinants of health based on age and gender among other factors deeply affect sexual and reproductive health.[187] They are usually expressed in laws and policies and they curtail the choices of adolescents when it comes to sexual and reproductive health.[188] Therefore state parties are urged to address the social determinants that are reflected in their national laws.[189] The criminalisation of consensual sexual relations between minors reflects the social inequality against minors based on their age that curtails them from exercising choice in respect to their sexual health. This is also reflected in the sexual and reproductive health patterns in Kenya where children are being infected with HIV/AIDS and STI's, procuring unsafe abortion and unplanned pregnancies.

3.3 Right to survival and development of the child

Both the CRC and the African Children's Charter provide for the right to survival and development of each child.[190] Although the Constitution of Kenya does not expressly provide for this right, by dint of ratifying these two conventions the provisions of these instruments form part of Kenyan law.[191] In addition, it also recognises that in all matters relating to a child, the best interest of the child should be considered.[192] The Committee on the Rights of Children recognises the threefold nature of the best of interest of the child concept. Firstly, it is a substantive right in itself and it should be guaranteed and implemented any time there is a decision involving the interest of the child.[193] Article 3(1) of the Convention of the Rights of

[185] n 183 above, para 23.
[186] n 18 above, art 53(2).
[187] n 183 above, para 8.
[188] n 183 above, para 8.
[189] n 183 above, para 8
[190] n 24 above, art 6; n 23 above, art 5.
[191] n 21 above, art 2(6).
[192] n 21 above, art 53(2).
[193] n 175 above, para 6(a).

the Child creates an intrinsic obligation for its direct application and can be invoked by a court of law.[194] Secondly, it is a fundamental interpretative legal principle that should be used in the interpretation and implementation of legislation, policies and budgetary decisions.[195] Thirdly, it is a rule of procedure, meaning, when a decision involving a child is being made whether individually or in a group, there must be procedural guidelines that ensure there is an examination on the positive and negative impact that the decision will have on the child or children.[196] Consequently, for the state to prove that it met its obligation under this right it must demonstrate

a) it respected the right to the best interests of the child in making its decision;

b) what it considered to be in the child's best interest;

c) what criteria were used to reach the decision; and

d) how the child's interest was evaluated against other considerations.[197]

The procedural guidelines or mechanisms put in place should not be rigid but should be applied on a case by case basis based on the facts of the case.[198] In addition, when interpreting these laws the state should also consider the physical, emotional, social, educational context and age in order to meet and fulfil its obligations under the right of the best interest of the child.[199] This principle should be at the centre of all decisions that affect the development of a child.[200] To give full effect to this right there must be an underlying consensus that it is a right that is interdependent on other rights, that children are right holders and the state has the obligation to protect, respect and fulfil all the rights under the Convention on the Rights of the Child.[201]

The development of a child is not limited to only the physical aspect but it also encompasses their mental, social, spiritual dimensions and that the state has a duty to ensure that these dimensions are developed adequately to help adolescents adequately prepare for

[194] n 175 above, para 6(a).
[195] UN Committee on the Rights of the Child (CRC), *General Comment 20 (2016) on the implementation of the rights of the child during adolescence*, 6 December 2016, para 22 CRC/C/GC/20, available at: http://www.refworld.org/docid/589dad3d4.html (accessed 31 August 2018).
[196] n 195 above, para 6(c).
[197] n 195 above, para 6(c).
[198] n 195 above, para 32.
[199] n 195 above, para 12.
[200] n 195 above, para 13.
[201] n 195 above, para 13.

adulthood.[202] Roseman and Miller et al believe that sexuality is an integral part in discovering one's personality.[203] The court in the *Teddy Bear case* also reiterated that adolescents engaging in consensual sexual intercourse was a developmentally normative behaviour which is protected by constitutional rights.[204] Therefore, in interpretation of the provisions of the Sexual Offences Act the right to the best interest of the child should come into play in realising what is the best way to deal with children who are engaging in consensual non-exploitative sexual intercourse. Prosecution and imprisonment of a child engaging in consensual sexual relations only creates an unfriendly environment for children to seek advice and guidance about their sexuality which is a vital component in their development. Preferring charges against minors also exposes children to stigmatisation, degradation, a sense of shame, anger and disillusionment. Many states may argue that the criminalisation of consensual sexual relations between children is in the best interest of the child to protect them from harm of engaging in sex prematurely. That aside, states are also reminded that the best interest of the child should not vitiate their obligation to respect the rights of the child.[205] The state therefore has an obligation to ensure that both public and private institutions have put in place mechanisms that ensure that the right to the best interest of the child is adhered to and consistently applied.[206]

The principle of best interest is a twin principle to the evolving capacities of a child, which go hand in hand.[207] The latter principle advocates for taking into account the views of the child in accordance with their understanding and maturity.[208] States are therefore obligated to put in measures that guarantee adolescents the opportunity to express their views and due consideration given in accordance with their level of maturity and understanding on issues affecting them, relating to, among other things, their sexuality and judicial and administrative proceedings.[209] In most instances in defilement cases, the courts do not take into account the views of the adolescents on the grounds that they have no

[202] n 195 above, para 16; n 175 above, introduction.
[203] Roseman & Miller (n 142 above) 315.
[204] Roseman & Miller (n 142 above) 559.
[205] UN Committee on the Rights of the Child General Comment 13: The right of the child to freedom from all forms of violence, CRC/C/GC/13, 18 April 2011, para. 61.
[206] n 244 above, para 8, 14(b) & (c).
[207] n 195 above, para 22.
[208] n 195 above, para 22.
[209] n 195 above, para 23.

capacity and that the law was enacted for their protection. It is this negative characterisation of adolescence that leads states to take a narrow intervention to issues that affect persons in this stage of development which affects other stages of their lives.[210] States are urged to create an environment that guarantees the adolescent the development of their physical, psychological, spiritual, social, emotional and cognitive facets.[211] This environment should be safe and open that allows children to thrive and explore in a balanced manner their identities, beliefs, sexuality, opportunities and to build their capacities to enable them make free, informed and positive decisions concerning matters touching on their lives.[212] States are further urged to protect the emerging autonomy of children and to enact legislation that takes into consideration the evolving capacities in order to promote the development of children.[213] This also includes the enactment of age limits that are consistent with the right to protection and the twin principles of best interest of a child and evolving capacity.[214] A multi-age of consent approach as compared to a single age approach balances between protection and self-protection and takes cognisance of the twin principles.[215] The Committee on the Rights of the Child urges states to strike a balance between protection and evolving capacity when determining the legal age for sexual consent.[216] The provisions of sections 8(1) and 11(1) take a single age approach to the issue of consent meaning that only persons over the age of 18 years can give sexual consent. Consequently, consensual sexual relations between children is criminalised. The Committee on the Rights of the Child urges states to avoid criminalising 'adolescents of similar ages for factually consensual and non-exploitative sexual activity.'[217]

The Constitution of Kenya provides for the rights of equal protection and non-discrimination.[218] It goes ahead to provide that the right to equality is the full and equal enjoyment of all rights and fundamental freedoms.[219] The law particularly prohibits discrimination against any person on the basis of their age among other grounds.[220] The same

[210] n 195 above, para 15.
[211] n 195 above, para 15.
[212] n 195 above, para 16.
[213] n 162 above, para 12.
[214] n 195 above, para 39.
[215] Kangaude (n 40 above) 545.
[216] n 195 above, para 40.
[217] n 195 above, para 40.
[218] n 21 above, art 27(1) & (2).
[219] n 21 above, art 27(1).
[220] n 21 above, art 27(2).

rights are also provided under the African Children's Charter and the CRC.[221] The Committee on Economic, Social and Cultural Rights (CESCR) defines indirect discrimination as discrimination as a result of laws and policies that may appear neutral on the face of it but have an impact on the exercise of certain rights provided by the Covenant on the basis of the prohibited grounds of discrimination.[222] The Committee also urges states that differential treatment on the grounds prohibited by the covenant is only justifiable if the differentiation is reasonable and objective.[223] An assessment of the justification will examine whether the aims of the differentiation are legitimate and compatible with the rights of the Covenant. In addition, it will also examine the aims of the measures put in place and whether they are proportional to the effects they will have.[224] These acts of discrimination may be perpetuated by the state or its institutions, agencies at national and local levels.[225]

On addressing discrimination on the ground of age, the CESCR states that unequal access of adolescents to information on sexual health amounts to discrimination.[226] It also states that all individuals, therefore including children, have a right to exercise their rights to sexual health without discrimination.[227] In order for all persons to enjoy this right states are urged to provide tailor made sexual and reproductive health services in accordance to the needs of different groups.[228] It thus, means the needs of adolescents have to be considered when providing them with sexual and reproductive health services. Confidentiality, privacy and an environment that fosters free and open communication are some of the aspects that have to be considered for adolescent sexual and reproductive health services. Adolescents have been mentioned as one of the groups of people who are at risk of facing intersectional discrimination in the context of sexual health and adolescents who are subject to discrimination are more vulnerable to abuse.[229] Therefore, section 8(1) and 11(1) of the Sexual Offences Act may be seen to perpetuate indirect discrimination on the ground of age.

[221] n 21 above, art 2 & n 21 above, art 3.
[222] UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, para 10 (b) E/C.12/GC/20, available at: http://www.refworld.org/docid/4a60961f2.html (accessed 31 August 2018).
[223] n 222 above, para 13.
[224] n 222 above, para 13.
[225] n 222 above, para 13.
[226] n 222 above, para 29.
[227] n 222 above, para 22.
[228] n 222 above, para 24.
[229]n 222 above, para 30.

This is because on the face of it the law seems to protect children from sexual predators but it also criminalises consensual sexual relations between minors. It therefore fails to recognise children as right holders whose views need to be taken into consideration in accordance to their maturity and understanding. The state therefore has an obligation to enact laws, policies and to put in place programmes and measures that prevent and eliminate discrimination, stigmatisation that hinder persons from accessing sexual and reproductive health services.[230]

3.4 Conclusion

Sexual rights although not recognised in international conventions as stand-alone rights comprise of human rights already recognised in national laws and international human rights law. The right to privacy, best interest of the child and the right to equality and non-discrimination are all rights provided under the Constitution of Kenya and have been expounded in general recommendations and comments by treaty monitoring bodies of conventions ratified by Kenya. The state therefore has a duty to ensure that these rights are observed, protected and respected in the implementation of the provisions of section 8(1) and 11(1) of the Sexual Offences Act by its agencies and institutions.

[230] n 222 above, para 31.

4 CHAPTER 4: Comparative study of how other jurisdictions have determined a child's capacity to engage in consensual sexual relations

4.1 Introduction

The wording of the Sexual Offences Act of Kenya sets the age of consent to engage in consensual sexual relations at 18 years. The Act therefore criminalises any consensual sexual contact or relations with or between children.[231] The definition of a child in this Act is the same as that provided under the Children's Act which provides that a child is any person under the age of 18 years. This therefore means that children lack the capacity to consent to sexual relations. In the case of *POO (A Minor) v Director of Public Prosecutions & Another* the court evaded to answer whether a child has the capacity to consent to consensual sexual relations but rather dealt with the issue of inequality in treatment between boys and girls in defilement cases.[232] However, in the case of *CKW v Attorney General & Another* the court expressly stated that when a person causes penetration with a child they have already committed the offence of defilement and it is irrelevant whether the child had consented to the act or not.[233] Moreover, the court further stated that even consensual sex between minors is still wrong.[234] The law therefore creates a scenario where the age of consent and criminal responsibility are different. This could be interpreted to mean that a minor has the capacity to understand legal proceedings and to receive the same punishment as an adult but lacks the capacity to consent to consensual sex with another minor. The defence of deception created by section 8(5) of the Sexual Offences Act also raises a curious scenario that seems to imply that children could consent to sex. This chapter will look at how other jurisdictions have assessed the age of capacity and balanced the right to self-determination while still protecting children.

4.2 United Kingdom (UK)

In the UK the most monumental case which has been used as a precedent for many other cases to assess whether the child has capacity to consent is *Gillick v West Norfolk & Wisbeck Area Health Authority & Another* which brought about the coining of the phrase a 'Gillick competent minor'.[235] In this case the Department of Health and Social Security issued a

[231] n 5 above, secs 8 & 11.
[232] *POO* (n 14 above) para 29.
[233] *CKW* (n 10 above) para 6.
[234] *CKW* (n 10 above) para 72.
[235] *Gillick* (n 62 above) 402.

circular to the area health authorities stating that a doctor who prescribed contraceptives to a girl under the age of 16 years would not be acting contrary to the law as long as he was acting in good faith to protect her against the harmful effects of sex.[236] The Plaintiff in this case was a mother of five girls who were all under the age of 16 years and she sought a declaration stating that the circular was unlawful as it encouraged the committal of sexual intercourse with girls under the age of 16 years which was an offence.[237] She also sought a declaration that the circular was unlawful as it was contrary to the girl's parental rights.[238] The plaintiff's main contention was that a girl under the age of 16 years could not give effective consent as they had no capacity to do so.[239] Lord Fraser held that a girl under the age of 16 years had the capacity to consent to contraceptive and the doctor would be justified to issue them with or without parental consent or even their knowledge provided that he was satisfied of the following;

a) that they would understand the advice given;

b) the doctor could not persuade her to inform her parents;

c) they were likely to engage in sexual intercourse with or without contraceptive;

d) that unless she received the contraceptives her physical or mental health would suffer; and

e) tat the girl's best interest would be to issue her with contraceptives.[240]

These conditions now referred to as the Gillick or Fraser Competence Guidelines were incorporated into the provisions of the Children's Act of 1989.[241]

Issue has, however, been raised on how to determine or test understanding.[242] In the case of *Re R (A Minor)* the court used the 'Gillick test' to determine whether the child had competence to give or withhold consent from taking anti-psychotic drug treatment.[243] The court held that the fluctuating condition of her sickness rendered her incompetent to issue

[236] *Gillick* (n 62 above) 402.
[237] *Gillick* (n 62 above) 402.
[238] *Gillick* (n 62 above) 402.
[239] *Gillick* (n 62 above) 408.
[240] *Gillick* (n 62 above) 409 & 413.
[241]Perera (n 63 above) 413.
[242]Perera (n 63 above) 414.
[243] *Re R (A Minor)* [1992] 3 Med LR 342.

consent as she had no sufficient understanding to make a right decision.[244] The court held that the ability to understand was not just to know the treatment given but to have a full appreciation of the consequences that would ensue from the failure to undergo the treatment.[245]

Another concern raised from Lord Fraser's conditions was that it changed the focus of decision-making from the child to the doctor.[246] Thus, in a situation where conflict arose between the decision of the child and the doctor the doctor's decision would prevail.[247] Jonathan Herring argued that there are certain situations that a person cannot be allowed to decide for themselves and a doctor would be best suited due to their expertise and detachment from the situation.[248] Though Lord Scarman agreed with Lord Fraser in totality, his decision focused on the understanding and intelligence of the minor to make a decision as compared to Lord Fraser's decision which focused on the 'satisfaction of the doctor' on the understanding of the minor.[249] He further stated that parental rights would be subject to the decisions of a minor who possessed understanding or maturity of what is involved in the decision they were about to make.[250]

The decision in the Gillick case also seemed to raise another issue on the fixed limits that the law places to determine at what age a minor could be taken to possess capacity. The case seemed to defy the issue of fixed limits as long as there was a satisfaction that the child passed the competence test. Lord Scarman in his decision stated that certainty the result of fixed limits was an advantage in other branches of law but was an impediment that could lead to a miscarriage of justice in other branches of law where what was needed was capacity for development.[251] He further stated that, 'If the law should impose on the process of 'growing up' fixed limits where nature knows only a continuous process the price would be artificiality, lack of realism in an area where the law must be sensitive to human development and social change.'[252] There, however, have been differing opinions where it is believed that where the

[244] *Re R* (n 243 above) 348.
[245] *Re R* (n 243 above) 348.
[246] Devereux (n 64 above) 293.
[247] Devereux (n 64 above) 293.
[248] Herring (n 66 above) 352.
[249] *Gillick* (n 62 above) 423.
[250] *Gillick* (n 62 above) 423.
[251] *Gillick* (n 62 above) 421.
[252] *Gillick* (n 62 above) 421.

law is not clear especially in relation to the age of consent it would be difficult to hold a person responsible for his actions.[253] In addition, in certain situations the person's judgment may not be trusted to judge the maturity of the child. An adolescent boy who is excited to engage in sexual intercourse with a young girl may not be best placed to judge the maturity of the girl.[254] Similarly, a defendant who decides that his partner has capacity to consent may claim the right to decide to for himself in a bid to vindicate himself and thus he would not be the best judge of maturity.[255] It is arguments like these that have been used to support fixed limits on consent or bright line ages.

In the case of *R v G* where the accused a 15-year-old boy pleaded guilty to the offence of rape of a child under the age of 13 years who consented to sexual intercourse, the House of Lords held that the strict liability offence was not a violation of his rights under article 6(2) of the European Convention of Human Rights. The court was seen to agree with the proposition of fixed limits. Section 5 of the Sexual Offences Act of 2003 clearly stated that it was an offence of rape to have sex with a child under the age of 13 even though they recognised the right of minors over the age of 16 years to consent. Lord Craighead stated that section 5 of the act was structured to accord protection to children under the age of 13 years from themselves and from persons who may want to prey on them.[256] Sharing the same sentiments Baroness Hale stated that children below the age of 13 years were incapable of giving any sort of consent to sexual activity and they were to be protected whether they agreed to it or not.[257] In this case the House of Lords was very clear that the bright line for children to be involved in sexual intercourse was the age of 13 years. In addition, Lord Carswell stated that sexual intercourse could not be consensual with a child below 13 years irrespective of the child's willingness.[258]

Even with the Gillick case seeming to give autonomy to the child upon meeting certain conditions courts have been hesitant to grant the child full autonomy where a competent child's decision differed with that of the court on the issue of their welfare.[259] No child could

[253] Herring (n 65 above) 351.
[254] A Duff 'Crime prohibition and punishment' (2002) 19 *Journal of Applied Philosophy* 97 & 103.
[255] Duff (n 254 above) 103.
[256] *R v G* [2008] UKHL 37 (House of Lords) para 24.
[257] *R* (n 256 above) para 54.
[258] *R* (n 256 above) para 58.
[259] R Taylor 'Reversing the retreat from Gillick ?R (Axon) v Secretary of State for Health' (2007) 19 *Child & Family Law Quarterly* 82.

be taken to be wholly autonomous and even the decisions of a competent minor could be overruled by the court.[260] This is because the state has the custodial jurisdiction to protect children if the decision made is for the best interests of the child.[261]

The Sexual Offences Act of 2003 which governs England, Wales and Scotland sets the age of consent at 16 years for any form of sexual activity.[262] However, the Act is not intent in prosecuting consensual sexual relations between minors of a similar age.[263] On the other hand, any sexual activity with a child under 13 years that causes penetration is classified as rape and carries the penalty of life imprisonment on conviction while any form of sexual touching bears a penalty of 14 years imprisonment.[264] The veracity of the punishment shows the state intent to protect children on the basis that children below the age of 13 years cannot give consent. Even though the act classifies children over the age of 16 years as having capacity to consent, the act still makes it an offence for a family member to have any kind of sexual activity with a child below 18 years.[265] These provisions depict the custodial jurisdiction of the state to protect all minors even those considered to be competent to give consent.

4.3 India

Just like in Kenya the age of consent in India is 18 years of age having been recently increased from 16 years on the enactment of the Protection of Children from Sexual Offences Act 2012 (POCSO). In the case of *Independent Thought v Union of India & another* the court looked at whether the age of consent still applied to a girl who was married at 15 years.[266] Protection of Children from Sexual Offences Act 2012 criminalised any kind of sexual activity with persons under the age of 18 years.[267] Section 375 of the Indian Penal Code (IPC) of 1860 also created the offence of statutory rape where a person indulged in any kind of sexual conduct with persons under the age of 18 years regardless of the victim's consent.[268] However, the section provided an exception to this law where the sexual acts were between

[260] Taylor (n 259 above) 83.
[261] G Douglas 'The retreat from Gillick' (1992) 55 *Modern Law Review* 573.
[262] n 5 above, sec 9.
[263]Home Office 'Children and Families: Safer from sexual crime – The Sexual Offences Act 2003, London: Home Office Communications Directorate' (2004) 3.
[264] n 5 above, secs 5, 6 & 7.
[265] n 5 above, sec 25(1).
[266] *Independent Thought* (n 71 above).
[267] Protection of Children from Sexual Offences Act 2012.
[268] n 19 above, sec 375.

a man and his wife as long as the girl was not below the age of 15 years.[269] This provision thus created a classification between married girls below the statutory age of consent and unmarried minors. This distinction between married and unmarried girls was not in the best interest of the girl child as it went contrary to the philosophy of acts like the POSCO which was aimed at protecting the bodily integrity of the child.[270] Justice Madan in his decision held that sex with a girl who was under the age of 18 years constituted the offence of rape regardless of whether the girl was married or not.[271] This was because a child below the age of 18 years did not cease being a child by virtue of being married.[272] In addition, such a child had not achieved full maturity therefore, they had no capacity to consent to sexual intercourse.[273] The Respondent's justification for relying on the exception under section 375 of the IPC was that by virtue of a marriage the child consented to sexual intercourse with her husband either expressly or by implication.[274] They also contended that classifying sex between a man and his underage wife as rape would destroy the institution of marriage.[275] The Supreme Court refused this justification on the ground that a child who was otherwise incapable of giving consent could not be deemed to have given consent by implication by virtue of marriage.[276] Justice Deepak Gupta also reiterated the sentiments of Justice Madan, stating that a person who was under the age of 18 year was not fully developed and thus they could not understand the consequences of their actions and consequently could not give consent.[277] The court also refused the defence of the government on the grounds of the destruction of marriage and tradition as it was contrary to the constitutional morality and it endangered the life of minors.[278]

It is very clear from the case that one of the main intentions of the legislature in setting the age of consent with the age of marriage was to close every loop hole that may be used to promote child marriage. In India, there are many cases of child marriages and reducing the age of marriage would defeat the cause of protecting children from the dangers of early

[269] n 173 above, sec 375 (exception).
[270] *Independent Thought* (n 71 above) para 1.
[271] *Independent Thought* (n 71 above) para 1.
[272] *Independent Thought* (n 71 above) para 4.
[273] *Independent Thought* (n 71 above) para 16.
[274] *Independent Thought* (n 71 above) para 81.
[275] *Independent Thought* (n 71 above) para 91.
[276] *Independent Thought* (n 71 above) para 81.
[277] *Independent Thought* (n 71 above) para 67 & 69.
[278] *Independent Thought* (n 71 above) para 78.

marriage. A study showed that most sexual activity of adolescent girls in India takes place within the context of marriage.[279] 25% of adolescent girls between the age of 15 and 19 years are married.[280] The study also revealed that most of these young women frequently experienced unwanted or coerced sex from their husbands for fear of punishment or violence.[281] Antony Duff believes there would be less harm in assessing a child has no capacity when in fact they do as compared to assessing they have capacity when they do not.[282] Moreover, there are physical, socio-economic risks that come by putting the age of consent too low.[283]

Nevertheless, the age of consent in India has also been criticised for being too high and not sensitive to the needs of adolescents. The Protection of Children from Sexual Offences (POCSO) Act, 2012 is silent on the issue of consensual sex between minors.[284] However, the India Juvenile Justice (Care and Protection of Children) Act of 2015 was enacted to deal with children who are found to be in conflict with the law.[285] Though the act does not necessarily classify consensual sex between minors as an offence it does define a heinous offence as one with a minimum punishment of imprisonment of not less than seven years as provided by the Indian Penal Code or any other law.[286] The POSCO Act provides for the imprisonment term of seven years for engaging in sexual intercourse with a person under the age of 18 years.[287] This act could be used as a conduit for convicting minors who have engaged in consensual sex especially young boys.[288]

However, even after the promulgation of the POSCO Act which increased the age of consent to 18 years, the Special Courts have been reluctant to rule that only children above the age of 18 years can consent. In the case of *State v Suman Dass* in the Additional Sessions by Judge Dharmesh Sharma gave a verdict contrary to the provisions of the POSCO Act by

[279] K G Santhya *et al* 'Consent and coercion: Examining unwanted sex among married young women in India' (2007) 33(3) *International Family Planning Perspectives* 125.
[280]Santhya *et al* (n 279 above) 125.
[281]Santhya *et al* (n 279 above) 128.
[282] Duff (n 254 above) 354.
[283] Duff (n 254 above) 355.
[284] Protection of Children from Sexual Offences Act 32 of 2012.
[285] Juvenile Justice (Care and Protection of Children) Act 2 of 2016.
[286] n 285 above, sec 2(33).
[287] n 284 above, sec 4.
[288] https://qz.com/579566/five-reasons-why-india-shouldnt-reduce-the-juvenile-delinquency-age-from-18-to-16/ (accessed 17 July 2018).

holding that 22-year-old man was not guilty of the offence of penetrative sexual assault of a minor of 15 years on the ground that their sexual relationship was consensual.[289] He further held that it would be impractical to prohibit 'adolescents from having any kind of sexual relationship as that would mean that the body of any person below the age of 18 years is the property of the state and they have no prerogative to enjoyment of the pleasures connected to their body'.[290] He further urged the state to sensitise adolescents on the dangers of engaging in sexual relations and getting married at an early age.[291]

4.4 Conclusion

It is clear that matters relating to the assessment of whether a child has the capacity to consent are not straightforward. Age limits that are too high make an assumption that adolescents are not engaging in sexual relations and thus they do not adequately provide guidance and information on sexual health which could prove to be detrimental. On the contrary, where the age of consent is too low it exposes children to dangers like unwanted pregnancies and Sexually Transmitted Infections. However, fixed limits do not always act as deterrents and they are also difficult to enforce but they act as symbolic markers to the community.

[289] *State v Suman Dass* (2013) SC 66 para 24 & 25.
[290] *Dass* (n 289 above) para 23.
[291] *Dass* (n 289 above) para 23.

5 CHAPTER 5: Conclusion and recommendations

5.1 Conclusion

The intention of Section 8(1) and 11(1) of the Sexual Offences Act was to protect children from sexual predators. The wording of the provisions also introduced another angle that criminalised consensual sexual relations between minors. The Kenyan Constitutional Court has found no fault on the criminalisation of consensual sexual relations between minors on two grounds. Firstly, on the ground that children lack the capacity to make decisions on matters concerning their lives. Secondly, the intent of the law was to protect children from the harm that emanates from premature sexual encounters even if the encounter was between two children.

The idea of children engaging in sexual relations is not an area that can be articulated in black and white. This is because adolescent sexuality is moulded by societal norms and views that eventually shape the framing of legislation. The protagonists of the protectionist discourse believe that there is a distinct difference in the reasoning of adults and children that justifies denying children the rights of autonomy and personhood. Therefore, even in a situation where sexual relations is between two children it may still prove to be problematic as seemingly consensual sex may sometimes be unwanted. This is because, due to the nature of the different stages of development of children their reasoning capabilities may not be fully matured and are thus susceptible to coercion and peer pressure. The protagonists of this discourse believe that it is due to this reason that children require protection from their legal guardian and state. On the contrary, the protagonist of the concept of self-determination believe that children are knowers and should be accorded the rights and freedoms accorded to adults.

The two antagonistic views of self-determination and protectionism all agree that at one point of the process of development a child lacks capacity and their rational and judgmental capacities to make right decisions is negligible. The protectionist theory presumes that a child lacks capacity until the statutory age of majority and thus they cannot be accorded choice rights enjoyed by adults. On the contrary, under the self-determination theory there is a presumption that the capacities of children evolve and therefore they should be accorded the right to make decisions concerning their lives without the interference of the state except

in cases where it is proven that they lack capacity as a result of their actions. It is on the basis of these presumptions that legal systems determine what rights can be accorded to children. The question thus lies at what age would it be appropriate to state that a child has the capacity to make independent decisions that may have lifelong effects on their lives.

Different jurisdictions have also wrestled with the idea of children's capacity to give sexual consent and what age is appropriate to recognise that children possess this ability. In the UK it was a monumental case that set out certain parameters to determine whether a child possessed the capacity to consent. The courts have also been reluctant to hold that a child could be taken to be wholly autonomous and even the decisions of a competent minor could be overruled by the court.[292] Even with those parameters set in the *Gillick case* the House of Lords put a threshold of 13 years as the age at which a child was deemed incapable of giving any sort of consent to sexual activity even in the event they passed the Gillick competence test.[293] In jurisdictions like India where the government was criticised of setting the age of sexual consent too high, the Special Courts were also reluctant to hold that only persons of the age of 18 years and over possess the capacity to consent. Looking at the statistics in Kenya of children who are engaging in sexual relations the issue of age limits is pertinent. Age limits that are too high make an assumption that adolescents are not engaging in sexual relations and thus does not adequately provide guidance and information on sexual health which could prove to be detrimental. On the contrary, where the age of consent is too low it exposes children to dangers like unwanted pregnancies and sexually transmitted infections (STIs). Even when the age of consent has been fixed the state also has to examine the age difference between the two minors who are engaging in consensual sexual relations because that also has on impact on the capacity of the minors.

Even in the bid of protecting the minor by enacting legislation, the state also must put in mind that minors are right holders and the state has a duty to protect, respect and fulfil their rights under the Kenyan Constitution and the ratified treaties. Sexual rights although not recognised in international conventions as stand-alone rights comprise of human rights already recognised in national laws and international human rights law. The right to privacy, best interest of the child and the right to equality and non-discrimination are all rights

[292] Taylor (n 259 above) 83.
[293] *R* (n 256 above) para 54.

provided under the Constitution of Kenya and have been expounded in general recommendations and comments by treaty monitoring bodies of conventions ratified by Kenya. The state therefore has a duty to ensure that these rights are observed, protected and respected in the implementation of the provisions of section 8(1) and 11(1) of the Sexual Offences Act by its agencies and institutions.

5.2 Recommendations

Kenya's population ratio of youth aged between 15 and 24 years stands at 20.3 per cent meaning that out of a population of 49.7 million, 10.1 million are youth.[294] Therefore, for Kenya to achieve its development goals it must protect and harness the potential of its youth. The criminalisation of consensual sexual relations between minors is not the best solution to deal with adolescent sexuality. It just creates an environment that stigmatises the youth to speak out and have the issues related to their sexuality addressed. Sexuality is an important component in the development stages of an adolescent. It is therefore essential for the state to create a safe and supportive environment that allows adolescents to participate in decisions affecting their lives and get appropriate information to enable them make suitable health-behaviour choices.

In line with Kenya's Vision 2030 and the National Adolescent Sexual and Reproductive Health Policy of 2015 this study proposes the following recommendations.

5.2.1 Amendment of sections 8(1) and 11(1) of the Sexual Offences Act

It is recommended that sections 8 and 11 be amended to create a multi-age consent approach rather than the single-age approach that currently pertains under the two sections. This will be in line with the obligations of Kenya under the CRC that take cognisance of the twin principles of the best interests and evolving capacity of the child. A multi-age consent approach also strikes a balance between protectionism and self-determination that allows for the normative development of the child as they prepare to enter adulthood.

A multi-stage approach will create a minimum threshold age at which a child is deemed incapable of giving any sort of consent to sexual activity and the defence of deception created by section 8(5) would be vitiated. In instances where consensual sexual relations

[294] https://www.businessdailyafrica.com/economy/Kenya-youth-percentage-among-the-highest-globally/3946234-4072946-jvv2x2/index.html (last accessed 31 August 2018).

between minors is allowed, a child below the minimum threshold age will still be deemed incapable of giving consent. The UK's Sexual Offences Act sets this minimum age at 13 years.[295] The Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007 of South Africa sets the minimum threshold as 12 years.[296] I recommend a minimum threshold age 16 years be included in the Sexual Offences Act under which a child is deemed incapable to give sexual consent.

In addition, to the multi-age consent approach, the two sections should be amended to ensure that factually consensual and non-exploitative sexual activity between adolescents of similar ages is not be criminalised.

The language of the two provisions should also be amended to ensure that the provisions are gender neutral. This ensures that both sexes are accorded equal treatment before the courts.

5.2.2 Sentencing guidelines

I also recommend the enactment of sentencing guidelines that govern the sentencing of minors who have been convicted of sexual offences. This ensures that the sentence is proportionate to the seriousness of the offence which will be determined by balancing the culpability of the offender and the harm caused by the offender.[297]

5.2.3 Comprehensive Sexuality education (CSE)

It will be equally important to adopt age sensitive and comprehensive sexuality education (CSE) in the Kenyan school curriculum. CSE would be a holistic subject that would not only focus on HIV prevention. It would give accurate information on issues including; anatomy, pregnancy, childbirth and gender-based violence.[298] In addition, it would nurture positive values like self-esteem, gender equality, self-control and tolerance.[299] It would also help the students develop life skills such as critical thinking and communication to help them

[295] Sexual Offences Act 2003 sec 5.
[296] The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 Sec 57(1).
[297] National Society for the Prevention of Cruelty to Children 'Sentencing for sexual or violent offences against children and offences under section 1 of the Children and Young Persons Act 1933' (2011).
[298] United Nations Population Fund *Operational guidelines for comprehensive sexuality education: Focus on human rights and gender* (2014); https://www.unfpa.org/sites/default/files/pub-pdf/UNFPA%20Operational%20Guidance%20for%20CSE%20-Final%20WEB%20Version.pdf (accessed 30 June 2018).
[299] n 298 above, 6.

deal better with their relationships and situations around them.[300] Therefore the five key areas that the CSE would focus on is HIV/sexually transmitted infections, contraception and unintended pregnancies, values and interpersonal skills, gender and sexual and reproductive rights and sexual reproductive physiology. This is to ensure that the child is armed with information that would empower them to make well balanced and informed decisions on issues pertaining to their sexuality.

[300] n 298 above, 6 & 7.

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