MINI-DISSERTATION

THE MISSING 'DISCOURSE OF DESIRE' IN LIFE ORIENTATION: A CLAIM FOR COMPREHENSIVE SEXUALITY EDUCATION

by

Sibusisiwe Ndlela

(Student Number: u12076733)

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Magnus Killander

& Godfrey Kangaude

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PLAGIARISM DECLARATION

I, SIBUSISIWE NDLELA, declare that the work presented in this dissertation is original. It has not been presented to any other university or institution. Where the work of other people has been used, it has been duly acknowledged.

Signature: SP Ndlela

Date: 1 October 2019

Supervisor:

Co-supervisor:

Date:

DEDICATION

This dissertation is dedicated to my mother, Makhosi Matilda Ndlela (nee Moloi), whose perfect love for me knows no bounds. It is not confined by time, distance and space. It simply exists.

The dissertation is also dedicated to my father, Christopher Juba Ndlela whose support, presence and love are to me, a recurrent blessing, which I treasure beyond measure.

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LIST OF ACRONYMS AND ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACRWC	African Children's Convention on the Rights and Welfare of the Child
AU	African Union
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	International Covenant on Economic, Social and Cultural Rights
CESRH	Comprehensive education on sexual and reproductive health
CRC	Convention on the Rights of the Child
CSE	Comprehensive sexuality education
DBE	Department of Basic Education
HIV/AIDS	Human Immunodeficiency Virus/ Acquired Immunodeficiency Syndrome
ICCPR	International Covenant on Civil and Political Rights
ICPD	International Conference on Population and Development
Maputo Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
OHCHR	Office of the High Commissioner for Human Rights
SRH	Sexual and reproductive health
SRHR	Sexual and reproductive health and rights
STI	Sexually transmitted infection
STD	Sexually transmitted disease

UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNFPA	United Nations Population Fund
UNHRC	United Nations Human Rights Council
WHO	World Health Organisation

TABLE OF CONTENTS

1. CHAPTER 1: INTRODUCTION

1.1. Background

In South Africa, sexuality education is offered to school-going adolescents[1] in the compulsory subject of Life Orientation. The subject is designed to guide learners to develop their capacity to make informed personal decisions, to acquire knowledge and to apply skills in a manner that is meaningful to their lives.[2] It is the state's primary means for the provision of sexuality education to adolescents.

Life Orientation, however, has been subject to widespread criticism that includes the inadequacy of its curriculum and deficiencies in its teaching and learning environment.[3] This dissertation homes in on Life Orientation's ineffectiveness at fostering the potential for sexual development in female adolescents. This is premised on its failure to provide a positive approach to female adolescent sexuality in an engaging environment that is effective at dismantling gender norms and normative constructions of childhood.

Sexuality is an inherent part of all human beings and it is an essential aspect of human personality.[4] The process through which persons form an understanding of their sexuality is one that is driven by discourses.[5] Loosely defined, a discourse is a way of deriving meaning and knowledge from a social context by considering the positions occupied by subjects in relation to power.[6] Michelle Fine has described the 'discourse of desire' as a positive and dialogic teaching and learning environment that expressly engages with sexual desire and sexual pleasure in a manner that is conducive to

[1] The term 'adolescent' is used to describe persons between the ages of 10-19 as per the World Health Organisation definition in WHO 'Adolescent health' https://www.afro.who.int/health-topics/adolescent-health (accessed 23 September 2019).
[2] Department of Basic Education 'Life Orientation Curriculum and Assessment Policy Statement: Grades 10-12' (2011) 3 & 7.
[3] J Glover & C Macleod 'Policy Brief: Rolling out comprehensive sexuality education in South Africa: an overview of research conducted on Life Orientation sexuality education' (2016) https://www.ru.ac.za/media/rhodesuniversity/content/criticalstudiesinsexualitiesandreproduction/documents/Life%20Orientation%20Policy%20Brief_Final.pdf (accessed 30 November 2018) 2. E Mayeza & L Vincent 'Learners' perspectives on Life Orientation sexuality education in South Africa' (2019) 19(4) *Sex Education* 472 473.
[4] MJ Roseman & AM Miller 'Normalizing sex and its discontents: establishing sexual rights in international law' (2011) 34 *Harvard Journal of Law & Gender* 313 315.
[5] As above 313.
[6] LS Young *et al* 'Feminine sexual desire and shame in the classroom: an educator's construction of an investments in sexuality education' (2019) 19(4) *Sex Education* 486 489.

female adolescents' potential for sexual development.[7] This discourse, however, is often absent from sexuality education, owed to normative ideas of female and childhood sexuality.[8] This absence has been linked to differential sexual development outcomes for male and female adolescents, to the disadvantage of the latter. Fine has argued that this constitutes discrimination on the basis of sex.[9] Premised on the strength of Fine's argument, in this dissertation, a claim is made for a positive and dialogic teaching and learning environment in sexuality education for the greater realisation of female adolescents' sexual development and human rights.

1.2. Problem statement

Prevailing discourses in the teaching and learning environment of sexuality education have a material bearing on how female adolescents understand their sexuality. In South African sexuality education that is offered under Life Orientation, there are material deficiencies in the teaching and learning environment. For this reason, it is important to identify these deficiencies and consider how they affect female adolescents' potential for sexual development and their enjoyment of human rights.

1.3. Research question

Whether the absence of a positive and dialogic teaching and learning environment in South African sexuality education, which engages with sexual desire and sexual pleasure, affects female adolescents' potential for sexual development and their enjoyment of human rights?

[7] M Fine 'Sexuality, schooling, and adolescent females: The missing discourse of desire' (1988) 55(1) *Harvard Educational Review* 29 35.
[8] C Macleod 'Danger and disease in sex education: the saturation of 'adolescence' with colonialist assumptions' (2009) 11(2) *Journal of Health Management* 375 380.
[9] Fine (n 7 above) 50.

1.4. Research Objectives

The research objectives are as follows:

1. to elaborate on the discourse of desire and its connection to human rights;
2. to provide an exposition of the missing discourse of desire in the sexuality education delivered in Life Orientation in South Africa;
3. to consider female adolescents' right to comprehensive sexuality education (CSE) in international, regional and domestic law;
4. to consider from which rights the right to CSE is derived; and
5. to consider whether the absence of the discourse of desire is capable of constituting discrimination on the basis of sex/gender and age.

1.5. Limitations

The dissertation has two limitations. The first relates to how it draws from existing research that has been conducted on the prevailing discourses in sexuality education classrooms in South Africa. To this extent, it does not advance new qualitative research.

The second limitation concerns the National Curriculum and Assessment Policy Statements on Life Orientation, which set out broad topics covered in sexuality education without expanding on their precise content. This leads to a degree of uncertainty on the nature and scope of the curriculum, which uncertainty is left to prescribed textbooks and teaching manuals to overcome. The present research, however, does not venture into how textbooks and teaching manuals overcome this uncertainty. This is premised on the degree of variance in content that occurs in these sources, which would unnecessarily lead to an evaluation of which sources are most effective at supplementing the curriculum. For this reason, the present research is restricted to the compulsory and common parts of Life Orientation.

1.6. Literature review

The seminal work of Fine forms the founding premise of the dissertation. Fine formulated the notion of the discourse of desire to describe a positive and dialogic teaching and learning environment that expressly engages with sexual desire and sexual pleasure.[10] Fine's discourse of desire is analogous to Allen's discourse of erotics, the latter which is premised on creating a space in sexuality education for the recognition and legitimation of each person's right to sexual desire and sexual pleasure.[11] The discourse of desire is of particular interest because of its effect on female adolescents' sexual development. The notion and its effects have subsequently been expounded upon by other scholars.

Tolman's work expounds on sexual development, specifically the social factors that inhibit its development in female adolescents. The factors are largely premised on gender stereotypes that posit that women and girls are sexually passive.[12] Her work engages on the meaning of concepts that include: sexual subjectivity, sexual agency and sexual empowerment. Similarly, Peterson and Lamb contribute to the notions of sexual subjectivity and sexual empowerment.[13]

The theoretical underpinnings of the dissertation are premised on social constructivism. Tamale describes sexuality as being socially constructed.[14] The work of Bhana elucidates the normative constructions of childhood and female sexualities that underlie the absence of the discourse of desire.[15] Cook and Cusack link normative constructions, and their effects, to stereotypes.[16] As does Timmer, by elaborating on the notion of transformative equality.[17] Together, Tolman and Bhana's works elaborate

[10] Fine (n 7 above) 30.
[11] L Allen 'Beyond the birds and the bees: constituting a discourse of erotics in sexuality education' (2004) 16(2) *Gender and Education* 151 152. L Allen ''Say everything': exploring young people's suggestions for improving sexuality education' (2005) 5(4) *Sex Education* 389 401-402.
[12] DL Tolman *Dilemmas of desire: teenage girls talking about sexuality* (2002) 21. DL Tolman 'Doing Desire: Adolescent Girls' Struggles for/with Sexuality' (1994) 8(3) *Gender and Society* 324 340.
[13] S Lamb 'Feminist ideals for a healthy female adolescent sexuality: a critique' (2010) 62 *Sex Roles* 294 294. S Lamb & ZD Peterson 'Adolescent girls' sexual empowerment: two feminists explore the concept' (2012) 66 *Sex Roles* 703 705.
[14] S Tamale 'Exploring the contours of African sexualities: Religion, law and power' (2014) 14 *African Human Rights Law Journal* 150 152.
[15] D Bhana 'Love, sex and gender: Missing in African child and youth studies' (2017) 42(2) *Africa Development* 243 245.
[16] R Cook & S Cusack *Gender stereotyping: transnational legal perspectives* (2010) 59-65.
[17] A Timmer 'Towards an anti-stereotyping approach for the European Court of Human Rights' (2011) 11(4) *Human Rights Law Review* 707 712-713.

on how female adolescent sexuality is conceived as being passive and how this has served to exclude, in sexuality education, material that is conducive to female adolescents' potential for sexual development.

Female adolescent sexuality is then situated within the claim to the existence of sexual rights that include the right to CSE. Roseman and Miller argue that there is no consensus on the notion and existence of sexual rights in international law.[18] This is apparent in the opposition to the report of Vernor Muñoz Villalobos, the United Nations Special Rapporteur on education (Special Rapporteur), which alleged the existence of a right to CSE.[19]

To affirm Villalobos' assertion, this dissertation relies on the work of Campbell who argues that there is a positive right to CSE in international law, which is inferred from human rights that are codified in binding international legal instruments.[20] This is juxtaposed with the strong contestation of such a right by Curvino and Fischer.[21] Villalobos' assertion is affirmed through the analysis of primary sources together with reference to Miller, Lutchman and Kismödi *et al*.[22] The work of Ngwena situates South Africa's historic educational policies which, through their provision for sexuality education, recognise the state duty to provide CSE.[23]

The crux of this dissertation rests in the evaluation of whether South African sexuality education complies with the norms and standards on CSE and whether it discharges the state's human rights obligations. There is an extensive amount of qualitative research into the sexuality education in Life Orientation. In totality, the research

[18] Roseman & Miller (n 4 above) 317. AM Miller *et al* 'Sexual rights as human rights: a guide to authoritative sources and principles for applying human rights to sexuality and sexual health' (2015) 23(46) *Reproductive Health Matters* 16 16. E Kismödi *et al* 'Advancing sexual health through human rights: the role of the law' (2015) 10(2) *Global Public Health* 252 253.
[19] Roseman & Miller (n 4 above) 363-365.
[20] M Campbell 'The challenges of girls' right to education: let's talk about human rights-based sex education' (2016) 20(8) *The International Journal of Human Rights* 1219.
[21] M Curvino & MG Fischer 'Claiming comprehensive sex education is a right does not make it so: a close reading of international law' (2014) 20(1) *The New Bioethics* 72.
[22] Miller *et al* (n 18 above). AM Miller 'Sexual but not reproductive: exploring the junction and disjunction of sexual and reproductive rights' (2000) 4(2) *Health and human rights* 69. Kismödi *et al* (n 18 above). RN Oronje *et al* 'Operationalising sexual and reproductive health and rights in sub-Saharan Africa: constraints, dilemmas and strategies' (2011) 11(3) *BMC International Health and Human Rights* 1. S Lutchman ''Child savers' v 'kiddie libbers': the sexual rights of adolescents' (2014) 30(3) *South African Journal on Human Rights* 555.
[23] C Ngwena 'AIDS in schools: a human rights perspective on parameters for sexuality education' (2003) 35(2) *Acta Academica* 184.

reveals deficiencies in the teaching and learning environment, which include a negative approach to sexuality, the existence of harmful gender stereotypes and learners' sense of disconnection to the subject.[24] These deficiencies militate against: (1) the existence of a positive and dialogic teaching and learning environment in sexuality education; (2) state compliance with the CSE norms and standards; and (3) the fulfilment of female adolescents' human rights. In the circumstances, a case is made for the inclusion of a discourse of desire based on the analogous recommendations of researchers.[25]

1.7. Significance of the research

The dissertation contributes to scholarship by linking psychology and law to conclude that a positive and dialogic teaching and learning environment, which engages with sexual desire and sexual pleasure, is conducive towards the fulfilment of female adolescents' human rights. It also reinforces that silencing female adolescents' sexualities, is rooted in their broader social repression, which deprives them of the opportunity to develop their sexualities.

Further, the dissertation is aimed at contributing to scholarship on the association between sexuality and human rights, specifically, that sexual rights are human rights and that the right to CSE exists. This is based on how an individual's constructions of their sexuality are embedded in social and cultural discourses that influence one's capacity to exercise and enjoy one's human rights. By couching the research as socio-legal, the inadequacies of sexuality education are transferred into a legal context that

[24] Young *et al* (n 6 above). N Jearey-Graham & CI Macleod 'Gender, dialogue and discursive psychology: a pilot sexuality intervention with South African high-school learners' (2017) 17(5) *Sex Education* 555. N Jearey-Graham & C Macleod 'A discourse of disconnect: young people from the Eastern Cape talk about the failure of adult communications to provide habitable sexual subject positions' (2015) 33(2) *Perspectives in Education* 11. T Shefer & C Macleod 'Life Orientation sexuality education in South Africa: Gendered norms, justice and transformation' (2015) 33(2) *Perspectives in Education* 1. Macleod (n 8 above). Glover & Macleod (n 3 above) 2.

[25] T Shefer & S Ngabaza ''And I have been told that there is nothing fun about having sex while you are still in high school': Dominant discourses on women's sexual practices and desires in Life Orientation programmes at school' (2015) 33(2) *Perspectives in Education* 63. Glover & Macleod (n 3 above). L Kruger *et al* ''I could have done everything and why not?': Young women's complex constructions of sexual agency in the context of sexualities education in Life Orientation in South African schools' (2015) 33(2) *Perspectives in Education* 30.

render them justiciable, which could lead to structural change through the state accountability mechanisms of the human rights framework.

1.8. Methodology

The research is conducted by desktop review. First, there is an analysis of discursive psychology literature to provide an exposition of the discourse of desire and its effects on female adolescents. Second, a legal doctrinal methodology is applied to review the international, regional and domestic human rights instruments that form norms and standards on CSE. This is complemented by literature on the normalisation and development of the right to CSE and sexual rights more broadly. Third, there is an analysis of qualitative research on the discourses in sexuality education classrooms in South Africa with the intent of assessing whether there is compliance with the norms and standards on CSE, and the state's human rights obligations.

1.9. Chapter outline

The dissertation is divided into five chapters. Chapter 1, the introductory chapter, comprises of the background, the problem statement, the research question, the research objectives, the limitations, the literature review, the significance of the research, the methodology and the present chapter outline. Chapter 2 provides an exposition of the notion, underpinnings and effect of the discourse of desire as well as its connection to the realisation of female adolescents' human rights. Chapter 3 documents the international, regional and domestic norms and standards on CSE and South Africa's attempts at their fulfilment. Chapter 4 analyses the prevailing discourses in Life Orientation and it proceeds to provide an assessment of the teaching and learning deficiencies in Life Orientation before advancing a claim for the inclusion of the discourse of desire. Chapter 5, the concluding chapter, comprises of a summary, the conclusion and the recommendations.

2. CHAPTER 2: THE DISCOURSE OF DESIRE IN SEXUALITY EDUCATION AND ITS EFFECT ON FEMALE ADOLESCENTS' HUMAN RIGHTS

2.1. Introduction

Fine formulated the concept of the discourse of desire in her research into the prevailing discourses in sexuality education. In essence, she defines it as a positive and dialogic teaching and learning environment that involves the express engagement with sexual desire and sexual pleasure.[26] The discourse of desire is linked to female adolescents' potential development of an empowered sexual self.[27] Accordingly, a link is drawn between the discourse of desire and its capacity to bring about the greater realisation of female adolescents' human rights.

This chapter comprises of four sections, with the introduction being the first and the conclusion being the last. The second section describes the discourse of desire and its effects. It is argued that the absence of a discourse of desire in sexuality education is premised on the silencing of female adolescent sexuality through the imposition of normative constructions of adolescent and childhood sexualities. Further, the discourse of desire is critical to the potential sexual development of female adolescents as it disrupts the silence and facilitates the construction of relatable sexual subject positions for them to embody.

In the third section, the discourse of desire is linked to the realisation of female adolescents' human rights. It is argued that the discourse of desire materially influences the achievement of the following human rights: the right to dignity, equality, the best interests of the child, bodily integrity, freedom of expression, the right to education, health, and the child's right to development.

[26] Fine (n 7 above) 33.
[27] Fine (n 7 above) 33, 42 & 49-50. Tolman (n 12 above) 332.

2.2. The discourse of desire

2.2.1. The discourses of sexuality education

In 1988, Fine conducted research into the prevailing discourses of sexuality education in an inner New York City public school. This research is lauded as having 'inspired and marked a critical turning point in the study of female adolescent sexuality'.[28] Fine places reliance on Foucault's notion of a discourse, which notion Weedon has interpreted as being the manner in which knowledge and meaning are constructed through social practices that articulate subject positions and power relations.[29] Similarly, Young *et al* interpret a discourse as 'the shared, taken for granted coherent sets of meanings that work to position subjects in particular ways, sometimes leading to resistance through talk, thereby challenging existing power relations, and at other times, maintaining and reinforcing the status quo'.[30]

In a discourse, knowledge and meaning is often based on inherent and commonly accepted premises or normative constructions such as stereotypes that are 'often hidden from view and are connected to our unconscious mental processes.'[31] Stereotypes are defined as 'a generalised view or preconception about attributes or characteristics that are or ought to be possessed by, or the roles that are or should be performed by, members of a particular social group'.[32] For this reason, stereotypes form the underlying premises of discourses, which are associated with the imposition of a normative idea of certain categories of persons and their expected sexual behaviour.[33]

[28] Fine (n 7 above) 29. DL Tolman 'Female adolescents, sexual empowerment and desire: a missing discourse of gender inequity' (2012) 66(11-12) *Sex Roles* 746 748.
[29] C Weedon *Feminist Practice and Poststructural theory* (1987) 108.
[30] Young *et al* (n 6 above) 489.
[31] Timmer (n 17 above) 708.
[32] OHCHR-Commissioned Report 'Gender stereotyping as a human rights violation' (2013) 8.
[33] Tolman (n 12 above) 12.

2.2.2. The discourses that were documented by Fine

Fine identified four prevailing discourses in sexuality education, namely: sexuality as violence; sexuality as victimisation; sexuality as individual morality; and the discourse of desire.[34] She homes in on the discourse of desire, which she found to be missing in the context she studied.[35] She concluded that the absence of a discourse of desire would likely inhibit the development of sexual subjectivity and sexual responsibility in female adolescents.[36]

Tolman defines sexual subjectivity as a person's experiences and understanding of him/herself as a sexual being.[37] Similarly, Lamb argues that sexual subjectivity relates to girls' ownership of their desires.[38] Fine proceeds to argue that the absence of sexual subjectivity would likely have an adverse effect on female adolescents' sexual responsibility by impairing their ability to access contraceptives and healthcare services.[39] Based on this, she concludes that the absence of a discourse of desire would constitute discrimination on the basis of sex.[40] In Chapter 4 below, with reference to the norms and standards on CSE, this conclusion is affirmed and expanded in the context of South African sexuality education. For present purposes, each of Fine's discourses is, below, expanded upon.

Sexuality as violence

Fine describes the first discourse, sexuality as violence, as being premised on equating adolescent heterosexual sexual activity with violence.[41] This discourse is underpinned by heterosexuality, which, in the absence of gender equality, is inherently coercive and violent.[42] This discourse is also underpinned by the notion that adolescents, particularly female adolescents, are asexual, innocent and easily

[34] Fine (n 7 above) 31-33.
[35] As above 35.
[36] As above 50.
[37] Tolman (n 12 above) 5-6.
[38] Lamb (n 13 above) 294.
[39] Fine (n 7 above) 47.
[40] As above 50.
[41] As above 31.
[42] As above.

corruptible.[43] Consequently, sexuality education would provide harmful information that they are not ready to receive, which would lead them to prematurely engage in sexual activity.[44]

Sexuality as violence is premised on a protectionist approach to childhood and female sexuality.[45] This discourse assumes that sexuality education prematurely sexualises children when in fact there is evidence to suggest that they become aware of sex and sexuality at quite a young age.[46] This discourse is present in sexuality education in South Africa, which excludes content on sexual pleasure and sexual desire in its curriculum.[47] It is also evident in the recent uproar concerning the state's proposed revision of the Life Orientation curriculum to commence offering sexuality education to learners in grade 4 as opposed to in grade 7 as is currently the case.[48]

Sexuality as victimisation

Fine proceeds to describe the second discourse, sexuality as victimisation, which is premised on females being posited as victims of male sexual desire.[49] This discourse provides that women suffer adverse consequences from sexual activity with men, which include: unintended pregnancy and the contraction of sexually transmitted infections and diseases (STIs and STDs).[50] In this discourse, sexuality education is aimed at equipping female adolescents with skills to defend themselves from the unsolicited sexual advances of males.[51] Lamb found this discourse to be particularly suppressive of female sexual desire and sexual pleasure in a manner that originates from and maintains the societal control of female sexuality.[52] This discourse is

[43] As above.
[44] As above.
[45] Lutchman (n 22 above) 556.
[46] Bhana (n 15 above) 245.
[47] UNFPA 'Incorporating comprehensive sexuality education within basic and higher institutions of learning in KwaZulu-Natal' (2016) 40.
[48] Eyewitness News 'Basic education dept defends teaching of sex ed to grade 4 pupils' 14 May 2019 https://ewn.co.za/2019/05/14/basic-education-dept-defends-teaching-of-sex-ed-to-grade-4-pupils (accessed 22 September 2019). As will be seen below, this forms part of the state's attempt to align the sexuality education offered in life Orientation to the CSE norms and standards.
[49] Fine (n 7 above) 32.
[50] As above.
[51] As above.
[52] S Lamb *et al* 'The use and misuse of pleasure in sex education curricula' (2012) 13(3) *Sex Education* 305 305. Lamb (n 13 above) 295.

prominent in sexuality education in South Africa, which has been found to disproportionately emphasise the negative consequences of heterosexual sexual activity, particularly for female adolescents.[53] It is also notable that, in the South African context, this type of discourse is rooted in the country's 'real political, social, health and economic challenges' particularly the prevalence of gender-based violence.[54]

Sexuality as victimisation fails to recognise female adolescents as sexual subjects who experience sexual desire. This occurs through the overemphasis of danger that foreshadows female adolescents' ability to exercise sexual agency, which is 'the ability of a person to act in the world, and to feel like she/he can will things and make them happen'.[55] This discourse fails to recognise that sexuality is complex enough for danger and pleasure to co-exist.[56] Tolman argues that 'female sexuality is always constituted by both pleasure and danger'.[57] She proceeds to remark as follows concerning learning about the co-existence of danger and desire:

> Girls need to be educated about the duality of their sexuality, to have safe contexts in which they can explore both danger and desire (Fine 1988) and to consider why their desire is so dangerous and how they can become active participants in their own redemption.[58]

Tolman argues that female adolescents' sexuality education needs to be linked with sexual empowerment because their age and gender puts them in a position of disadvantage when it comes to acting as sexual subjects.[59] In essence, sexual empowerment refers to the ability to 'feel entitled to act on one's own sexual desire' and it is essential to assisting female adolescents to engage with negative messages on their sexuality, to validate their sexual desires and to promote the achievement of long-term sexual satisfaction.[60] This is premised on how sexual empowerment

[53] Glover & Macleod (n 3 above) 2-3.
[54] D Bhana *et al* 'Sex, sexuality and education in South Africa' (2019) 19(4) *Sex Education* 361 362.
[55] Tolman (n 12 above) 6.
[56] D Bhana & B Anderson 'Desire and constraint in the construction of South African teenage women's sexualities' (2013) 16(5/6) *Sexualities* 548 553-554. Campbell (n 20 above) 1222. Miller (n 22 above) 75.
[57] Tolman (n 28 above) 746 & 749.
[58] Tolman (n 12 above) 340.
[59] As above.
[60] Tolman (n 12 above) 183. Lamb & Peterson (n 22 above) 710.

involves developing the ability to 'critically reflect upon and negotiate safer relationships'.[61]

Tolman reinforces that it is possible for girls to be 'empowered to know and act on their own desire'.[62] She argues that when desire is not addressed within and amongst women and girls, they miss an opportunity to tap into a source of empowerment.[63] Carboni and Bhana reinforce this by claiming that 'sexuality is thus a resource for girls to claim power and status'.[64] Tolman proceeds to comment as follows on how to foster sexual empowerment:

> to be empowered to desire one needs a critical perspective, and that critical perspective will be extended and sustained through knowing and experiencing the possibilities of desire and healthy embodied living.[65]

In the circumstances, the discourse of victimisation is one that is countered by sexual empowerment through the creation of environments for the critique of power and its influence on gender, age and other factors affecting disadvantage. Cumulatively and implicitly, the authors embrace transformative equality that is aimed at recognising female adolescents' structural disadvantage whilst empowering them by disrupting the silences and normative conceptions that underpin their inequality.

Sexuality as individual morality

Fine proceeds to describe the third discourse, being sexuality as individual morality, which recognises the sexual subjectivity of women but only to the extent that it conforms to morality, specifically the choice for premarital abstinence.[66] This discourse places morality at its centre, with little or no reference to sexual desire and sexual pleasure. The discourse is, therefore, heavily influenced by moral principles such as chastity and purity.[67] Tamale identifies religion, culture and law as sources that

[61] D Bhana 'Love grows with sex: teenagers negotiating sex in the context of HIV and the implications for sex education' (2017) 16(1) *African Journal of AIDS Research* 71 77.
[62] Tolman (n 58 above) 340.
[63] As above.
[64] N Carboni & D Bhana 'Teenage girls negotiating femininity in the context of sexually explicit materials' (2019) 19(4) *Sex education* 371 373.
[65] Tolman (n 58 above) 340.
[66] Fine (n 7 above) 32.
[67] As above.

dominate sexual morality in a manner that perpetuates gender hierarchies and deprives certain categories of persons of their full citizenship.[68]

The discourse of sexuality as morality is present in South African sexuality education as is evident in the emphasis on abstinence.[69] Shefer and Ngabaza document this discourse, which they term 'the discourse of moral degeneration', which is particularly evident in teachers' responses to teenage pregnancy that condemn and silence female adolescents' sexuality.[70] Similarly, Bhana argues that teenage pregnancy is framed as a moral problem that signifies the deviation from the normative conception of children as asexual.[71]

The discourse of desire

The final discourse is the discourse of desire, which Fine argues is premised on the express naming of sexual desire and sexual pleasure in a positive and candid environment that is amenable to 'sexual dialogue and critique'.[72] Fine argues that sexuality education that incorporates a discourse of desire would centre on the learner who would play a critical role in developing their own understanding of their sexuality.[73] The presence of the discourse of desire encourages the development of sexual subjectivity and sexual responsibility in a manner that implies sexual agency and sexual empowerment.[74] This is evident in how the discourse of desire is capable of constructing a sexual subject whose empowerment allows him/her to act as a sexual agent in a manner that is conducive to sexual responsibility.[75] Fine's notion of sexual responsibility is linked to sexual health.[76]

Allen, affirming Fine's notion of a discourse of desire, describes the analogous discourse of erotics, which she argues 'is about creating spaces in which young

[68] Tamale (n 14 above) 176.
[69] Shefer & Ngabaza (n 25 above) 65. Young *et al* (n 6 above) 494.
[70] Shefer & Ngabaza (n 25 above) 65.
[71] D Bhana *et al* 'South African teachers' responses to teenage pregnancy and teenage mothers in schools' (2010) 12(8) *Culture, Health and Sexuality* 871 874.
[72] Fine (n 7 above) 30.
[73] As above 34.
[74] As above 42-43 & 49.
[75] As above 47.
[76] As above 31.

people's sexual pleasure and desire can be legitimated, positively integrated and deemed commonplace.'[77] Allen's discourse of erotics does not simply engage with sexual desire and sexual pleasure, as Fine's discourse of desire, but it further encourages the recognition that all persons, irrespective of age, sex/gender, sexual orientation and gender identity, have a right to sexual pleasure and sexual desire.[78]

Reverting to Fine's discourse of desire, sexuality education that includes the discourse of desire would reinforce two points. First, female adolescents are sexual subjects capable of being initiators and negotiators of sexual activity.[79] Further, 'it would invite adolescents to explore what feels good and bad, desirable and undesirable, grounded in experiences, needs and limits.'[80] Francis argues that adolescents are conceived as being experimental and innocent, which is an oversimplification that forms the basis for providing them with sheltered protection by virtue of their age, without recognising that they are also bearers of rights.[81] If this were recognised, sexuality education would focus on developing adolescents' capacity to enjoy and exercise their human rights.

Second, the discourse of desire would identify the specific needs, experiences and limitations of adolescents.[82] Francis argues that in the rapidly changing context in which adolescents construct and perform their sexuality, their needs shift and so too should the content and approach of sexuality education.[83] Therefore, there is a need to affirm and recognise the experiences of adolescents by seeing them 'as "knowers" who bring with them knowledge about sexuality'.[84] Francis identifies sex positivity as a means of providing a more balanced view of the dangers and pleasures involved in sex in a manner that is capable of meeting the needs of adolescents.[85]

[77] Allen (n 11 above) 152.
[78] As above.
[79] Fine (n 7 above) 33.
[80] As above.
[81] D Francis 'Sexuality education in South Africa: three essential questions' (2010) 30 *International Journal of Educational Development* 314 315.
[82] Fine (n 7 above) 33.
[83] Francis (n 81 above) 315.
[84] As above.
[85] As above.

2.2.3. Fine's findings

The absence of a discourse of desire in sexuality education

Fine found three discourses to be present in the context that she studied.[86] The discourse of violence was present through the conservative content of sexuality education to prevent the corruption of children.[87] The discourse of victimisation was present in teachers' tendency to posit female adolescents as passive, asexual and lacking sexual subjectivity.[88] The discourse of sexuality as morality was present in the promotion of abstinence-only-until-marriage.[89]

Fine acknowledges that, in 1988, a discourse of desire was neither present in the context that she studied nor in public school sexuality education in the United States.[90] In 2006, in a similar study, Fine and McClelland argue that the discourse of desire was still missing.[91] However, Lamb *et al* have argued that the discourse of desire is no longer missing but is suffused into discourses on safer sexual practices.[92] It is notable that the discourse of desire is missing in sexuality education in South Africa, the nature and extent of its absence is documented below in Chapter 4.[93]

An explanation for the absence of the discourse of desire

The absence of the discourse of desire in sexuality education is reflective of the silence on childhood sexualities, particularly those of girls.[94] This is attributable to the normative construction of childhood and female sexuality. Tamale argues that sexuality is not exclusively determined by biology, but rather, a large part of it is socially

[86] Fine (n 7 above) 31.
[87] As above.
[88] As above 32.
[89] As above.
[90] As above 33.
[91] As above. M Fine & S McClelland 'Sexuality education and desire: Still missing after all these years' (2006) 76(3) *Harvard Educational Review* 297.
[92] Lamb *et al* (n 52 above) 315.
[93] Macleod (n 8 above) 380. Young *et al* (n 6 above) 496. Kruger *et al* (n 25 above) 33. See also the research into how Life Orientation textbooks offer different sexual subjects than popular music in C Macleod *et al* 'Sexual socialisation in Life Orientation manuals versus popular music: Responsibilisation versus pleasure, tension and complexity' (2015) 33(2) *Perspectives in Education* 90 98. T Shefer *et al* ''… a huge monster that should be feared and not done': lessons learned in sexuality education classes in South Africa' (2015) 13(1) *African Safety Promotion Journal* 71 77.
[94] Bhana (n 46 above) 245.

constructed through ‘legal, cultural and religious forces’ that constitute systems of power that are given meaning through discourses.[95]

Bhana argues that African childhood is framed as being in crisis and in collapse.[96] In this construction, the child is not recognised as enjoying the same measure of rights and freedoms as an adult. Rather, the child is conceived as being passive and innocent with an ‘inability to think, know and feel sexuality’.[97] This normative construction renders invisible the full account of childhood sexualities that include ‘desires, concerns, pleasures and anxieties’.[98] Bhana argues in favour of dismantling the normative conception whilst ‘developing new methodological and theoretical tools’ to understand African childhood sexualities and to improve the quality and effectiveness of sexuality interventions.[99] This is premised on how the failure to recognise the sexual subjectivity and sexual agency of African children would affect the design of interventions, which would likely take ‘an abstract and technical direction’.[100]

Shefer *et al* highlight the relational aspect of the normative constructions of gender that cast a male/female binary of sexuality.[101] Similarly, Tolman argues males and females’ understanding of their sexuality is associated with the complementary notions of normative sexuality.[102] Bhana describes the normative conception of African female sexuality, as follows with reference to the normative conception of African male sexuality:

> The social constitution of sexuality as dangerous is embedded within gender relations and power where young African men are regarded as vicious and violent with voracious sexual appetites putting young women and girls at risk, and creating painful African female sexualities… In such a representation, young women and girls are deemed to be docile victims, unprotesting and casualties of culturally embedded practices of patriarchy where African men hold monolithic power.[103]

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[95] Tamale (n 68 above) 155-156.
[96] Bhana (n 46 above) 244 & 249. Carboni & Bhana (n 64 above) 371.
[97] E Durojaye ‘The potential of the Expert Committee of the African Children's Charter in advancing adolescent sexual health and rights in Africa’ (2013) 46(3) *The Comparative and International Law Journal of Southern Africa* 385 387. Bhana (n 46 above) 246-248.
[98] Bhana (n 46 above) 244.
[99] As above 245-246.
[100] As above 248.
[101] Shefer *et al* (n 93 above) 78.
[102] Tolman (n 12 above) 14-15.
[103] Bhana (n 46 above) 249.

Bhana's above statement is reflective of the silencing of female sexualities, by positing African female sexuality as marred by danger and victimhood as a result of African male sexuality. This results in females' sexual subjectivity being 'enmeshed in and oftentimes subsumed by masculine norms'.[104] Further, to the extent that African female adolescents' sexuality is acknowledged, there is the good-girl/bad-girl binary that masks the complexity of African female sexualities that are not homogenous and are in fact 'more expansive, fluid, contradictory and bound up with, rather than separate from, sexual pleasures'.[105] Through the recognition of the plurality of sexualities, there too is a recognition of the diverse ways for their constitution, which form the basis for an understanding of the existence of different sexual subject positions that can be occupied.[106]

The recognition of the plurality of female sexualities is thwarted by gender stereotypes. Cook and Cusack argue that a gender stereotype is premised on the social or cultural construction of men and women.[107] Further, they argue that gender stereotyping may diminish women's dignity by failing to take cognisance of each women's individual choices. This occurs when gender stereotyping 'interferes with [women's] ability to shape, or carve out their own identities… meaning that it prevents women from defining and presenting themselves as they would like'.[108] In this regard, a gender stereotype categorises women as a class without taking into consideration their individual desires, experiences and circumstances.[109]

Aside from gender stereotypes, there are other normative constructions that contribute to the expectations that are imposed on adolescent girls. Bhana opines that cumulatively, the intersection of age, gender and culture have contributed to a construction of masculinity that is premised on sexual entitlement, which she links to the corresponding subordination of women and their diminished capacity to negotiate safer sex.[110] She further notes that gendered cultural norms provide that women

[104] Carboni & Bhana (n 64 above) 373.
[105] As above. Bhana & Anderson (n 56 above) 549 & 558. C Ngwena *What is Africanness: Contesting nativism in race, culture and sexualities* (2018) 194.
[106] D Bhana ''Sex isn't better than love' exploring South African Indian teenage male and female desire beyond danger' (2016) 23(3) *Sexualities* 362 375.
[107] Cook & Cusack (n 16 above) 20.
[108] As above 64-65.
[109] As above 65.
[110] Bhana (n 61 above) 71. D Bhana '"Girls are not free" – in and out of the South African school' (2012) 32 *International Journal of Educational Development* 352 356.

acquire social power by their conformity to gender norms, which form inducements for women to conform.[111] Bhana notes that in spite of this, women have been shown to have the capacity to resist the normative constructions of African female adolescent sexuality.[112]

In the circumstances, the conceptions of childhood and female sexuality intersect to construct the normative female adolescent sexuality, which underpins sexuality education that excludes the recognition of their sexual subjectivity and any meaningful attempt at its development. The normative constructions constrain female adolescents' capacity to break away from the mould by identifying themselves as anything other than the normative constructions.

The effect of the absence of the discourse of desire

In the absence of a discourse of desire, sexuality education renders differential outcomes for male and female learners.[113] For female adolescents, their sexuality is subverted, which adversely affects their potential sexual development; whilst for adolescent males, their sexuality is affirmed in a manner that is conducive to their potential sexual development.[114] This, Fine argues, constitutes discrimination on the basis of sex.[115]

Tolman elaborates on the causes for the differential outcomes. She argues that during adolescence, girls 'lose the ability to speak about what they know, see, feel, and experience [as] evident in childhood'.[116] She notes that their trajectory towards the development of an empowered sexual self is interrupted when they adapt to conventional ideas of 'good women' and 'nice girls'.[117] Unlike Fine, whose argument implies sexual agency, Tolman expressly argues that the absence of a discourse of desire inhibits female adolescents' development of sexual agency.[118] Further, she

[111] Bhana (n 61 above) 72 &75.
[112] D Bhana 'Virginity and virtue: African masculinities and femininities in the making of teenage sexual cultures' (2016) 19(4) *Sexualities* 465 476. Bhana (n 106 above) 367.
[113] Fine (n 7 above) 49.
[114] As above 50.
[115] As above.
[116] Tolman (n 58 above) 324.
[117] As above.
[118] Tolman (n 28 above) 752. Lamb (n 38 above) 295.

argues that female adolescents' sexuality, as compared to male adolescents, is disproportionately restricted by the societal norms that offer them a range of poor options on the available sexual subject positions to be embodied.[119] For this reason, they conform to the normative sexual subject position.

Fine notes that the negative outcomes of the absence of a discourse of desire are most felt by at-risk adolescents that include females and non-heterosexual males.[120] McClelland and Fine extend this category to include adolescents with disabilities and lesbian, gay, bisexual, transgender and intersex (LGBTI) adolescents.[121] The disproportionate effect to this category of persons is attributable to their inherent disadvantage, which, when an intervention fails to take measures to empower them and remove barriers to their equal treatment, reinforces the systemic power imbalances that already exist.[122] This is exacerbated by how they are less likely to have access to effective alternative sources of education and information.[123]

In the circumstances, the discourse of desire, is a positive and dialogic teaching and learning environment that expressly engages with sexual desire and sexual pleasure in a manner that is conducive to female adolescents' potential sexual development. The absence of the discourse of desire in sexuality education is largely attributable to the normative conceptions that determine how childhood and female sexualities are constructed. The resultant effect of the absence inhibits the potential sexual development of female adolescents. In light of its effect, in what follows, a link is drawn between the discourse of desire and female adolescents' human rights.

[119] As above 18-19.
[120] Fine (n 7 above) 49.
[121] McClelland & Fine (n 91 above) 297.
[122] Special Rapporteur on the right to education (2004) (E/CN. 4/2004/45) para 37. CEDAW General Comment No 36 para 45.
[123] Fine & McClelland (n 91 above) 322. S Lamb 'Towards a sexual ethics curriculum: bringing philosophy and society to bear on individual development' (2010) 80(1) *Harvard Educational Review* 81 86.

2.3. The connection between the discourse of desire and human rights

As has been demonstrated above, the discourse of desire has a material impact on the potential sexual development of female adolescents. Accordingly, it is important to consider whether the discourse of desire can give rise to the greater realisation of female adolescents' human rights. Below, the discourse of desire is linked to a number of human rights.

The right to dignity (and autonomy) is implicated in the discourse of desire. This is premised on how it creates an enabling environment that recognises female adolescents' sexual citizenship. Further, the skills, attitudes and information that are disseminated through the discourse of desire develop female adolescents' capacity to operate as independent sexual agents that are capable of making 'meaningful decisions about their lives and health'.[124]

The right to equality is implicated in the discourse of desire. This is based on how the discourse of desire implies transformative equality, which envisages the removal of structural impediments that underlie disadvantage.[125] To work against this disadvantage, the discourse of desire deconstructs the norms that constrain female adolescents' capacity to embody non-normative sexual subject positions.

The best interests of the child and the child's right to development are implicated in the discourse of desire. This is premised on how the discourse of desire provides an accurate and holistic approach to sexuality that engages the adolescent in a positive and interactive manner.[126] The discourse of desire exalts the interests, the development and the well-being of the adolescent by providing information, skills and attitudes that are conducive to developing their full potential.

The rights to education and information are implicated in the discourse of desire. This is premised on how the discourse of desire provides the necessary information in an interactive teaching and learning environment that involves interactive pedagogical

[124] CESCR Committee General Comment No 22 (2016) on the rights to sexual and reproductive health (article 12 of the CESCR) (E/C.12/GC/22) para 25.
[125] Timmer (n 17 above) 712. CESCR Committee General Comment No 22 para 27.
[126] Fine (n 7 above) 42-43.

methods and positive approaches to sexuality. The type of content and the manner of its delivery, therefore, has a material impact on the fulfilment of this right.[127]

The right to health is implicated in the discourse of desire based on its effect on female adolescents' mental and psychological health by affecting the manner in which they understand and perform their sexuality.[128] This largely affects sexual health, particularly sexual decision-making.

The right to bodily and psychological integrity is implicated in the discourse of desire, which is premised on how it recognises adolescents' entitlement to find ease within and have control over their bodies.[129] The freedom of expression is implicated in the discourse of desire's ability to provide an enabling environment that is conducive to female adolescents freely expressing curiosity and interest in their sexuality.[130]

2.4. Conclusion

The discourse of desire is a positive and dialogic teaching and learning environment that engages with sexual desire and sexual pleasure. The inclusion of the discourse of desire in sexuality education has been linked to the greater potential for sexual development, which is particularly important to equip female adolescents to work against normative constructions by allowing them to envisage habitable sexual subject positions to embody. By fostering female adolescents' sexual development, the discourse of desire is capable of bringing about the greater realisation of female adolescents' human rights.

[127] CESCR Committee General Comment No 22 para 9.
[128] Fine (n 7 above) 48.
[129] Tolman (n 12 above) 152.
[130] Fine (n 7 above) 41.

3. CHAPTER 3: THE RIGHT TO COMPREHENSIVE SEXUALITY EDUCATION

3.1. Introduction

Human rights systems are hegemonic discourses that determine the rights of legal subjects, who are to a large extent sexual.[131] In these fora, divergent approaches are taken to the interpretation of human rights.[132] This is evident in how there is no consensus on the notion or existence of sexual rights.[133] It is also evident in how the right to CSE, a sexual right, is derived from different combinations of human rights. Accordingly, states' recognition and domestication of their human rights obligations differ markedly.

This chapter comprises of four sections, with the introduction being the first and the conclusion being the last. The second section situates the right to CSE in the human rights obligations that South Africa is bound to respect, protect, promote and fulfil. It is argued that, although there is no consensus on the recognition of the right to CSE, it is a sexual right that exists as inferred from regional and international human rights that include the right to education, equality, health and development. Further, it is argued that South Africa has affirmed the existence of a right to CSE and it has committed itself to the attainment of the international best practice standards.

In the third section, there is an exposition of international best practice standards on CSE as articulated by the agencies of the African Union (AU) and the United Nations (UN). It is argued that the norms and standards on CSE are consonant to the discourse of desire, which is evident in the positive and human rights-based approach to sexuality education that includes content on the whole spectrum of sexuality that is delivered in an interactive and age-appropriate manner.

[131] Roseman & Miller (n 4 above) 315-316 & 343.
[132] As above 341.
[133] Campbell (n 20 above) 1224.

3.2. The claim to the existence of a right to CSE

3.2.1. The contestation concerning the existence of a right to CSE

There is no express right to CSE in regional and international law treaties. However, there is a claim to its existence as a sexual right.[134] In 2010, the UN Special Rapporteur on the right to education, Vernor Muñoz Villalobos, tabled a report in the UN Human Rights Council (UNHRC), which asserted the existence of a right to CSE, being inferred from human rights that include the right to health, equality and education.[135] This assertion is affirmed below with reference to Campbell who argues that the nature of the rights from which the right to CSE is inferred, is indicative of the existence of the right and a corresponding positive state obligation.[136]

There is strong resistance to the claim to the existence of a right to CSE.[137] This is evident in the vociferous objections to the UNHRC debate on the above report of the Special Rapporteur.[138] The Africa Group, the Caribbean Community and the Islamic Conference accused the Special Rapporteur of inventing a non-existent right and exceeding his mandate in disregard of the UN Special Procedures.[139] Although the report found some state support, it was not submitted to the UN General Assembly as is customary.[140] It is worth noting that in this debate, South Africa, with an existing sexuality education programme, argued that the mandate of the Special Rapporteur did not extend to matters relating to health, implicitly rejecting the report.[141]

The resistance in the UNHRC and international fora arises from at least three points of contention. First, the absence of an express right to CSE in international treaties and customary international law, and the objection to the derivation of such a right from the human rights contained in already binding treaties.[142] In light of the aforesaid,

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[134] As above.
[135] Special Rapporteur on the right to education (2010) (A/65/162) para 2. Roseman & Miller (n 4 above) 363-365.
[136] Campbell (n 20 above) 1224.
[137] Curvino & Fischer (n 21 above) 74.
[138] Roseman & Miller (n 4 above) 365.
[139] As above.
[140] As above 365-366.
[141] UN Press Release 'General Assembly, Human Rights Council texts declaring water, sanitation human right 'breakthrough'; challenge now to turn right 'into reality', third committee told' (2010) (GA/SHC/3987) https://www.un.org/press/en/2010/gashc3987.doc.htm (accessed 23 September 2019).
[142] Curvino & Fischer (n 21 above) 74 & 92.

so the argument proceeds, it is difficult to delineate the content of CSE that is necessary to discharge the state obligation to provide CSE.[143] More poignantly, it is difficult to ascertain whether the right is for the narrow notion of sex education as opposed to the broader notion of CSE. This point of contention is explained below with reference to existing state human rights obligations that cannot be fulfilled in the absence of the recognition of a right to CSE.

Second, it is argued that international law should not intrude into the social regulation of the individual, which falls beyond the human rights framework and into the state's exclusive domain.[144] This argument is mounted by proponents of conservative religious, traditional and cultural beliefs, who are the greatest objectors to the recognition of sexual rights and the right to CSE.[145] These proponents employ the right to culture and religious freedom to either completely remove sexuality education programmes, to limit their scope and content or to allow religious or moral exemptions thereto.[146] In light of these claims, the Special Rapporteur has recognised that 'sexuality education has been obstructed in the name of religious ideas and reiterates that systematic education acts as a guarantor of a democratic and pluralistic environment'.[147] Accordingly, the benefit that accrues from providing sexuality education outweighs the limitation to culture and religious freedom.[148]

Third, there is a conflation of the notion of reproductive health, which has received some degree of acceptance, and the notion of sexual health.[149] This is partially attributable to the International Conference on Population and Development (1994) (ICPD) Programme of Action (POA), which political declaration required state signatories to develop laws and policies aimed at recognising the reproductive rights of persons, specifically women, as an aspect of development.[150] The ICPD POA

[143] As above 92.
[144] Roseman & Miller (n 4 above) 365.
[145] As above 361. Campbell (n 20 above) 1222 & 1233-1234.
[146] Roseman & Miller (n 4 above) 370. Campbell (n 20 above) 1233. UN Press Release (n 140 above).
[147] Special Rapporteur on the right to education (2010) para 79.
[148] Campbell (n 20 above) 1234.
[149] AM Miller *et al* 'Sound and fury – engaging with the politics and the law of sexual rights' (2015) 23(46) *Reproductive Health Matters* 7 8.
[150] V Balogun & E Durojaye 'The African Commission on Human and Peoples' Rights and the promotion and protection of sexual and reproductive rights' (2011) 11(2) *AHRLJ* 368 374. Oronje *et al* (n 22 above) 1.

definition subsumed sexual health into reproductive health.[151] Nonetheless, this argument is flawed as reproductive health, which is claimed through reproductive rights, and sexual health, which is claimed through sexual rights, are related but distinct notions.[152] This confusion has posed a challenge to the acceptance and operationalisation of sexual rights.[153] Given the conceptual conflation, it is important to define the notions of sexual health and sexual rights.

The ICPD POA defines sexual health with regard to its purpose, being 'the enhancement of life and personal relations, and not merely counselling and care related to reproduction and sexually transmitted disease.'[154] However, in the ICPD POA, there is no recognition nor definition of the corresponding notion of sexual rights. Nonetheless, the commitments made in the ICPD POA have shaped subsequent developments.[155] For instance, in 2006, the World Health Organisation (WHO) facilitated a meeting of experts that culminated in the following expansive working definition for sexual health:

> Sexual health is a state of physical, emotional, mental and social well-being in relation to sexuality; it is not merely the absence of disease, dysfunction or infirmity. Sexual health requires a positive and respectful approach to sexuality and sexual relationships, as well as the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination and violence. For sexual health to be attained and maintained, the sexual rights of all persons must be respected, protected and fulfilled.[156]

Further, the same experts developed the following working definition for sexual rights:

> Sexual rights embrace human rights that are already recognized in national laws, international human rights documents and other consensus statement. They include the right of all persons, free of coercion, discrimination and violence, to: the highest attainable standard of sexual health, including access to sexual and reproductive health care services; seek, receive and impart information related to sexuality; sexuality education; respect for bodily integrity; choose their partner; decide to be sexually active or not; consensual sexual relations… and pursue a satisfying, safe and pleasurable sexual life.[157]

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[151] International Conference on Population and Development Programme of Action (1994) para 7.2-7.3 & 3.29-3.30.
[152] CESCR Committee General Comment No 22 para 6.
[153] Oronje (n 18 above) 2.
[154] ICPD POA para 7.2.
[155] Miller (n 22 above) 83.
[156] WHO 'Defining sexual health: Report of a technical consultation on sexual health' (2006) 5.
[157] As above.

In the circumstances, sexual rights are distinct from reproductive rights. They envisage content that extends beyond reproduction and for this reason, they are separately constituted from reproductive rights. Given that sexual rights exist in international, regional and domestic laws, in what follows, there is an exposition of the primary human rights from which the right to CSE is derived, namely: the rights to education, equality, health and development. It is argued that the interpretation of these rights affirms the assertion of the Special Rapporteur on the existence of a right to CSE.

3.2.2. The rights from which the right to CSE is derived

The right to education

The right to CSE is inferred from the right to education. In his report, the Special Rapporteur stated that the right to CSE is indivisible from the right to education.[158] The right to education is, in and of itself, a right as well as a means towards the realisation of other human rights.[159] In the first instance, the right to education is a self-standing right that is contained in the generalist conventions of the African Charter on Human and Peoples' Rights (1981) (ACHPR)[160] and the International Covenant on Economic, Social and Cultural Rights (1966) (CESCR);[161] and the specialist conventions on children, being the African Charter on the Rights and Welfare of the Child (1990) (ACRWC)[162] and the Convention on the Rights of the Child (1990) (CRC).[163]

[158] Special Rapporteur on education on the right to education (2010) para 75. Campbell (n 20 above) 1227 & 1231.
[159] Special Rapporteur on education (2010) paras 19 & 81. CEDAW Committee General Recommendation No 36 (2017) on the rights of girls and women to education (CEDAW/C/GC/36) para 8. Campbell (n 20 above) 1219 & 1226.
[160] ACHPR article 17(1). South Africa ratified the ACHPR on 9 July 1996 see 'OAU/AU treaties, conventions, protocols & charters' https://au.int/sites/default/files/treaties/36390-sl-african_charter_on_human_and_peoples_rights_2.pdf (accessed 20 September 2019).
[161] CESCR article 13(1). South Africa ratified the CESCR on 12 January 2015 see UN 'Status of treaties' https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en (accessed 22 September 2019).
[162] ACRWC article 11(1). South Africa ratified the ACRWC on 21 January 2000 see 'OAU/AU treaties, conventions, protocols & charters' https://au.int/sites/default/files/treaties/36804-sl-AFRICAN%20CHARTER%20ON%20THE%20RIGHTS%20AND%20WELFARE%20OF%20THE%20CHILD.pdf (accessed 20 September 2019).
[163] CRC article 28(1). South Africa ratified the CRC on 16 June 1995 see UN 'Status of treaties' https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en (accessed 20 September 2019).

In the second instance, the right to education is a means to realise the state's duty to respect, protect, promote and fulfil other human rights.[164] Accordingly, it is important to draw attention to the content and aims of education, which are contained in the ACRWC and the CRC. The ACRWC provides that children's education shall be directed to: (1) 'the promotion and development of the child's personality, talents and mental and physical abilities to their fullest potential'; (2) promoting the child's respect for human rights; (3) preparing the child for responsible life in a free society; and (4) promoting the child's understanding of primary healthcare.[165]

The CRC contains similar provisions to which the CRC Committee has provided the following normative content:

> [t]he education to which every child has a right is one designed to provide the child with life skills, to strengthen the child's capacity to enjoy the full range of human rights… The goal is to empower the child by developing his or her skills, learning and other capacities, human dignity, self-esteem and self-confidence. "Education" in this context goes far beyond formal schooling to embrace the broad range of life experiences and learning processes which enable children, individually and collectively, to develop their personalities, talents and abilities and to live a full and satisfying life within society.[166]

From the above comment of the CRC Committee, it is apparent that education should be directed to the holistic development of all aspects of the child's personality.[167] This goes beyond providing information to include the development of skills and the capacity to enjoy a full and satisfying life. Of further significance is 'not only the content of the curriculum but also the educational processes, the pedagogical methods and the environment within which education takes place'.[168]

In the circumstances, the expansive interpretation of the right to education points to the existence of a right to CSE that is aimed at the holistic development of the personality of the child, including their sexuality. Accordingly, it is difficult to conceive of how the right to education and its aims are capable of being achieved in the absence of the recognition of a right to CSE and the state obligation to provide same.

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[164] CEDAW Committee General Recommendation No 36 para 14.
[165] ACRWC article 11(2)(a), (b), (d) and (h).
[166] CRC article 29(1)(a) and (d). CRC Committee General Comment No 1 (2001) on article 29(1): the aims of education (CRC/GC/2001/1) para 2.
[167] CRC Committee General Comment No 1 paras 9 & 12.
[168] As above para 8.

The right to equality

The right to CSE is inferred from the right to equality. This is premised on how the provision of CSE, to girls and boys, is a means to eliminate discrimination and to modify social patterns of conduct based on gender stereotypes.[169] This contributes to the creation of a more equitable society where women and girls develop the potential to enjoy human rights on an equitable basis to men and boys. The right to equality is entrenched in the generalist conventions of the ACHPR,[170] the International Covenant on Civil and Political Rights (1966) (ICCPR)[171] and the CESCR.[172] It is also entrenched in the specialist conventions on children and in the specialist conventions on women.

The specialist conventions on women (that includes girls) require the state to take all appropriate measures to eliminate discrimination against women in all spheres of society.[173] The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003) (Maputo Protocol) defines 'discrimination against women' as 'any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life'.[174] The Convention on the Elimination of All Forms of Discrimination against Women (1979) (CEDAW) contains a similar definition.[175]

To eliminate discrimination against women, the Maputo Protocol requires state parties to commit themselves to modify social and cultural patterns of conduct that are based

[169] Campbell (n 20 above) 1228.
[170] ACHPR article 3.
[171] ICCPR article 3. South Africa ratified the ICCPR on 10 December 1998 see UN 'Status of treaties' https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&clang=_en (accessed 20 September 2019).
[172] CESCR article 3. South Africa ratified the CESCR on 12 January 2015 https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en (accessed 20 September 2019).
[173] Maputo Protocol articles 1(k) & 2(1). CEDAW article 2.
[174] Maputo Protocol article 1(f). South Africa ratified the Maputo Protocol on 14 January 2000 see African Union 'OAU/AU treaties, conventions, protocols and charters' https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf (accessed 20 September 2019).
[175] CEDAW article 1. South Africa ratified the CEDAW on 15 December 1995 see UN 'Status of treaties' https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&clang=_en (accessed 20 September 2019).

on gender roles.[176] The Maputo Protocol provides that the state can achieve this through 'information, education and communication strategies'.[177] In the elimination of discrimination against women in education, the Maputo Protocol obliges states to take all appropriate measures including to eliminate all stereotypes in syllabuses that perpetuate discrimination against women;[178] and to 'integrate gender sensitisation and human rights education at all levels of education curricula including teacher training'.[179] Similar provisions in the CEDAW require the revision of school programmes and the adaptation of teaching methods.[180]

The Maputo Protocol and the CEDAW take a transformative approach to equality by requiring the state to remove gender stereotypes that form impediments to women's equal recognition.[181] In General Comment No 36 (2017) on the right of girls and women to education, the CEDAW Committee noted that the lack of access to high-quality education is likely to result in disadvantage to women by depriving them of developing their capacity to have control over their health and developing their capacity to make sexual and reproductive decisions.[182]

In recognition of this disadvantage, the CEDAW Committee pursues transformative equality that is rooted in: '[1] breaking the cycle of disadvantage; [2] promoting respect for dignity and worth; [3] accommodating difference by achieving structural change and promotion political and social inclusion; [4] and [ensuring women and girls'] participation.'[183] In this regard, CSE is capable of giving effect to transformative equality by recognising the unique disadvantages of female adolescents and then deconstructing the gender stereotypes and normative childhood constructions that undermine their dignity in a manner that fosters their equal claim to human rights.[184]

The CESCR Committee pursues substantive equality, which it broadly defines to be 'concerned with the effects of law, policies and practices and with ensuring that they

[176] Maputo Protocol article 2(2).
[177] As above article 2(2). See also the CEDAW articles 2(f) and 5(a).
[178] Maputo Protocol article 12(1)(a).
[179] As above article 12(1)(e).
[180] CEDAW article 10(c).
[181] Campbell (n 20 above) 1224. See also the Convention on the Rights of Persons with Disabilities (2006) that takes a transformative approach to equality, which contains provisions that pertain to women and children with disabilities in articles 6 & 7.
[182] CEDAW Committee General Recommendation No 36 para 28.
[183] Campbell (n 20 above) 1229.
[184] As above 1229-1230.

do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience.'[185] It has highlighted that CSE is important for boys and girls. However, because of their reproductive capacities, it is imperative that women and girls have access to information on sexuality and reproduction to have the capacity to make meaningful decisions about their lives.[186] It accordingly interprets the right to education to include the right to access CSE for adolescents.[187]

In his report, the Special Rapporteur emphasised that education is responsible for 'combating patriarchalism and generating the cultural shift so necessary for equality among individuals. When it is not properly organized, the education system has the opposite result, perpetuating injustice and discrimination.'[188] Further, he linked the existence of prejudices and stereotypes in sexuality education to their potential to infringe not just the right to equality but also on the child's right to development.[189] In this regard, he stated that:

> Both the hidden curriculum and the omitted curriculum currently play a central role in perpetuating among children the inequalities associated with patriarchal models and drastically reduces children's potential for full development.[190]

In the circumstances, the right to CSE is inferred from the right to equality. This is premised on how CSE includes a gender perspective that is capable of dismantling stereotypes and changing social and cultural patterns of behaviour that are associated with inequality. Accordingly, it is difficult to discharge the human rights obligations associated with the right to equality, particularly discrimination against women (and girls), in the absence of recognising a right to CSE and the corresponding state obligation to provide same.

[185] CESCR Committee General Comment No 16 (2005) on the equal right of men and women to the enjoyment of economic, social and cultural rights (E/C.12/2005/4) para 7.
[186] CESCR Committee General Comment No 22 para 25.
[187] As above paras 28, 47 & 49(f).
[188] Special Rapporteur on the right to education (2010) para 8.
[189] As above para 63.
[190] As above.

The right to health

The right to CSE is inferred from the right to the highest attainable standard of health. This is premised on the effects of CSE on health, particularly sexual and reproductive health (SRH). The right to health is entrenched in the generalist conventions of the ACHPR and CESCR,[191] the specialist conventions on the child, being the ACRWC and the CRC,[192] and the Maputo Protocol.[193]

The CEDAW and the Maputo Protocol require the state to eliminate discrimination against women in health.[194] However, the Maputo Protocol is more robust on SRH for women as it is couched in express and comprehensive terms that entrench negative and positive state obligations that distinguish it from the CEDAW.[195] For instance, the Maputo Protocol provides that states must ensure that women's right to health, explicitly SRH, is fulfilled by the provision of SRH education and information.[196]

The right to health is the most dominant right from which the right to CSE is derived. This is owed to its ability to essentialise and depoliticise sexuality in a manner that is more acceptable and fit for public discussion.[197] This is evident in the number of cases where treaty bodies, in their concluding observations, have recommended that to comply with state obligations concerning the right to health, states ought to introduce sexuality education programmes.[198] However, the interpretation of the right to health has historically been circumscribed to reproductive health to the exclusion of non-reproductive sexual health.[199] This is largely attributable to the idea held by cultural, religious and conservative proponents that sexual health is the precursor of sexual rights, which have often been interpreted as a proxy for 'abortion, sex work, and same-sex sexual practices'.[200] The resultant effect of the dominance of reproductive health has given rise to the narrow notion of sex education, being education that is necessary

[191] ACHPR article 16(1). CESCR article 12(1).
[192] ACRWC article 14(1). CRC article 24(1).
[193] Maputo Protocol article 14(1).
[194] CEDAW article 12(1).
[195] L Gerntholtz *et al* 'The African Women's Protocol: bringing attention to reproductive rights and the MDGs' (2011) 8(4) *PLoS Med* 1 3.
[196] Maputo Protocol article 14(1)(a) & (f) & 14(2)(a).
[197] Roseman & Miller (n 4 above) 349.
[198] CRC Committee Concluding Observations: Egypt (2001) (CRC/C/15/Add.145) para 44. CESCR Committee Concluding Observations: Bolivia (2001) (E/C.12/1/Add.60) para 43. CEDAW Committee Concluding Observations: Slovakia (2008) (CEDAW/C/SVN/CO/4) para 10.
[199] Roseman & Miller (n 4 above) 321.
[200] As above 333, 351 & 360-361.

to attain positive health outcomes. This notion results in the contestation of the aims, nature and scope of sexuality education.

In General Comment No 1 on the Maputo Protocol (2012), the African Commission on Human and Peoples' Rights (African Commission) recognises that the right to health includes the recognition of women's sexual and reproductive health and rights (SRHR).[201] It provides that the right to self-protection and protection from HIV and STIs under article 14(1)(d), includes women's right to access SRHR information and education.[202] This, the African Commission argues, is premised on how the rights to self-protection and protection are intrinsically linked to other human rights that include 'the right to equality and non-discrimination, life, dignity, health, self-determination, [and] privacy'.[203] Accordingly, it prescribes that the following content is necessary to discharge the obligation:

> The content must be evidence-based, facts-based, rights-based, non-judgemental and understandable in content and language. This information and education should address all taboos and misconceptions relating to sexual and reproductive health issues, deconstruct men and women's roles in society, and challenge conventional notions of masculinity and femininity which perpetuate stereotypes harmful to women's health and well-being…[204]

Although the African Commission takes an expansive approach, it only specifically prescribes content on sexual health in General Comment No 2 on the Maputo Protocol, where it interprets the scope of the state's obligation to provide access to information and education on family planning under article 14(1)(f). The African Commission states that the information and education necessary to discharge this obligation must include 'comprehensive information on human sexuality, reproduction, and sexual and reproductive rights'.[205] This is juxtaposed with the personal development emphasis of the CRC Committee in General Comment No 15 (2013),

[201] General Comment No 1 on Article 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2012) para 5.
[202] As above para 11.
[203] As above.
[204] General Comment No 1 on the Maputo Protocol para 26.
[205] General Comment No 2 on Article 14(1)(a), (b), (c) and (f) and Article 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2014) preamble & para 51.

which provides that CSE requires the inclusion of 'self-awareness and knowledge about the body... [and] content related to sexual health and well-being'.[206]

It is also notable that in General Comment No 22 (2016) the CESCR Committee interprets SRH as including its underlying determinants such as SRH-related education and information and protection from discrimination.[207] Accordingly, the right to health requires states to address social determinants that arise from social inequalities and the unequal distribution of power based on factors that include gender and age, which limit individuals' SRH choices.[208]

Being a health service, the CESCR Committee's statement on the state's duty to provide sexuality education includes guarantees on its availability, accessibility, adaptability and quality.[209] Concerning access to information, the CESCR Committee specifically held that this standard applies to adolescents.[210] This standard has also been reinforced by the African Commission in the context of women and girls' right to sexuality education and information; and the CRC Committee in the context of children's right to health and development.[211] Accordingly, its repeated recognition in different fora is indicative of the concretisation of this standard.

In the circumstances, CSE is one of the key determinants of the right to SRH. The right to SRH, specifically reproductive health, dominates the drive for CSE in a manner that subsumes sexual health. This is attributable to the inherent difficulty in advancing the claim to sexual health in international fora. Nonetheless, it is difficult to conceive of the discharge of a state's human rights obligations under the right to health in the absence of the recognition of the right to CSE and the state's corresponding obligation to provide same.

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[206] CRC Committee General Comment No 15 (2013) on the rights of the child to the enjoyment of the highest attainable standard of health (CRC/C/GC/15) paras 7-8.
[207] CESCR Committee General Comment No 22 para 7.
[208] As above para 8.
[209] CESCR Committee General Comment No 14 (2000) on the right to the right to the highest attainable standard of health (E/C. 12/2000/4) para 12. CESCR Committee General Comment No 22 para 7.
[210] CESCR Committee General Comment No 22 para 18.
[211] General Comment No 2 on the Maputo Protocol preamble & para 55. CRC Committee General Comment No 4 (2003) adolescent health and development in the context of the Convention on the Rights of the Child (CRC/GC/2004/4) para 41. CG Ngwena *et al* 'Human rights in women's reproductive health in Africa' (2015) 129 *International Journal of Gynecology and Obstetrics* 184 186.

The child's right to development

The right to CSE is inferred from the child's right to development. As demonstrated above, CSE can be used as a basis for the advancement of children's development of a sexual self. The child's right to development is set out in the ACRWC and the CRC. The ACRWC provides that state parties must 'ensure, to the maximum extent possible, the survival, protection and development of the child'.[212] The CRC has similar provisions.[213]

The CRC Committee has interpreted the normative content of the right in General Comment No 20 (2016), where it cautions against the negative characterisation of adolescence, which is likely to lead to 'problem-focused interventions and services, rather than a commitment to building optimum environments to guarantee the rights of adolescents and support the development of the physical, psychological, spiritual, social, emotional, cognitive, cultural and economic capacities.'[214]

Further, in General Comment No 4 (2003), the CRC Committee highlighted that '[t]he health and development of adolescents [is] strongly determined by the environments in which they live.'[215] It identifies that it is important to address attitudes in their immediate environment that would include creating an 'environment based on trust, information-sharing, the capacity to listen and sound guidance that is conducive for adolescents' participating equally'.[216] In this regard, the CRC Committee provides that:

> States, together with non-State actors, through dialogue and engagement with adolescents themselves, should promote environments that acknowledge the intrinsic value of adolescence and introduce measures to help them to thrive, explore their emerging identities, beliefs, sexualities and opportunities, balance risk and safety, build capacity for making free, informed and positive decisions and life choices, and successfully navigate the transition into adulthood.[217]

The CRC Committee recognises that the family environment is not safe for all children.[218] It, therefore, interprets the state obligation under the right to health and development to include the duty '[t]o create a safe and supportive environment for

[212] ACRWC article 5(2).
[213] CRC article 6(2).
[214] CRC Committee General Comment No 20 (2016) on the implementation of the rights of the child during adolescence (CRC/C/GC/20) para 15.
[215] CRC Committee General Comment No 4 para 14.
[216] As above paras 8 & 14.
[217] As above para 16.
[218] As above para 15.

adolescents… in school'; and 'to ensure that adolescents have access to the information that is essential for health and development'.[219] Similar sentiments were expressed by the CEDAW Committee, which requires state parties to train teachers to provide a 'supportive environment and culture' to allow female adolescents 'to participate confidently in learning, without fear, shame or risk' and employ constructivist teaching strategies to foster critical thinking and positive self-worth.[220]

In its General Comment on article 31 (2017), which elaborates on the normative content of the children's duties as entrenched in the ACRWC, the African Committee of Experts on the Rights and Welfare of the Child recognises that education is an important tool in empowering children to take up their responsibilities.[221] Sloth-Nielsen and Mezmur take this argument further by arguing that the imposition of duties on children does not make for the 'gratuitous invasion of rights' it rather reinforces rights.[222] This finds application to CSE, which equips children with the necessary (sexual and) life skills to promote their development to take up their role as sexual citizens.

In the circumstances, the right to CSE can be inferred from the child's right to development. This is premised on how sexuality is an inherent part of every human being, which is an aspect of human personality that must be developed through specialised sexuality education.[223] In the circumstances, it is critical that education, particularly CSE, is directed towards the recognition and the development of sexuality. Accordingly, it is difficult to conceive of how states would discharge the child's right to development in the absence of the recognition of the right to CSE and the state's corresponding obligation to provide same.

[219] As above para 39(a) & (b).
[220] CEDAW General Comment No 36 paras 32(f) & 81(a).
[221] General Comment on article 31 of the ACWRC on the responsibilities of the child (2017) para 33.
[222] J Sloth-Nielsen & BD Mezmur 'A dutiful child: the implications of article 31 of the African Children's Charter' (2008) 52(2) *Journal of African Law* 159 161.
[223] Special Rapporteur on education (2010) para 5. Miller (n 22 above) 72.

3.2.3. South Africa's recognition of the right to CSE

Externally, the above human rights obligations are binding on South Africa as a signatory to the various human rights instruments from which the right to CSE is inferred. Like the international position, domestically, South Africa has no express legislation on sexuality education. However, the Bill of Rights, as contained in the supreme Constitution of the Republic of South Africa, 1996, entrenches the following rights from which the right to CSE is inferred: the right to equality (including non-discrimination on the basis of sex/age and gender), human dignity, bodily and psychological integrity (including reproductive decision-making and security in and control over one's body), freedom of expression, health care (specifically sexual and reproductive healthcare), the best interests of the child, basic education and the right to access information.[224]

It is necessary to elaborate upon the best interests of the child and the right to access information as contained in national legislation. The Children's Act 38 of 2005, which is binding on the state and all persons, was introduced to give effect to the constitutional rights of the child.[225] It entrenches the best interests of the child, as a right and a principle that can be assessed through a non-exhaustive list of factors that include the child's age, gender and level of development. [226] The Children's Act provides that every child has the right to 'have access to information on health promotion and the prevention of ill-health and disease, sexuality and reproduction', which must be provided in a manner that is accessible to children.[227] This is the strongest legislative provision from which the right to CSE is derived.

The state has also developed educational policies for the inclusion of sexuality education in Life Orientation. The current Life Orientation curriculum policies are expanded upon below in Chapter 4. For present purposes, it is important to contextualise the educational policies within the state's recognition of a right to CSE. The National Policy on HIV/AIDS, for Learners and Educators in Public Schools, and Students and Educators in Further Education and Training Institutions (1999),

[224] Constitution of the Republic of South Africa sections 9, 10, 11, 12(2)(a) & (b), 16, 27(1)(a), 28(2), 29(1)(a) & 32(1).
[225] Children's Act 38 of 2005 preamble & section 8(2) & (3).
[226] As above sections 6(2)(a) & (e), 9 & 7(g)-(h).
[227] As above section 13(1)(a) & (2).

primarily in response to the HIV/AIDS pandemic, introduced sexuality education into the life skills component of Life Orientation for the survival and the development of the child.[228] Subsequent curricular revisions have incorporated an outcomes-based approach to education, which Ngwena argues have constituted a clear attempt at facilitating the acquisition of skills, values and knowledge for the empowerment of learners.[229]

Aside from educational policy, there is also policy on SRHR. In its National Adolescent Sexual and Reproductive Health and Rights Framework Strategy 2014-2019 (2015) (ASRH&R Strategy), South Africa has explicitly recognised the right to SRH, which it defines as 'the rights of all people, regardless of their nationality, age, sex, gender, health or HIV status, to make informed and free choices with regard to their own sexuality and reproductive well-being…'.[230] The state also recognises that the right to SRH constitutes a basic human right for all persons irrespective of age or gender.[231] The ASRH&R Strategy further acknowledges that the right to SRH is derived from human rights instruments and it highlights that SRH is vital to the wellbeing of individuals.[232]

The ASRH&R Strategy recognises a definition of SRH that includes reproductive health elements as well as elements on sexual health, specifically, 'the right to seek pleasure'.[233] It is notable that sexual health is defined with reference to the WHO definition.[234] There is no definition of sexual rights, this is in spite of the widespread reference to the term in the policy, specifically: (1) how the policy recognises that the development of this notion has become muted in international fora; and (2) how the policy expressly states that it aims to take measures to increase the promotion of sexual rights and reporting cases of their violation.[235] Accordingly, this failure to define sexual rights, and its meaning in the context, is regrettable.

[228] National Policy on HIV/AIDS, for Learners and Educators in Public Schools, and Students and Educators in Further Education and Training Institutions (1999). Ngwena (n 23 above) 188.
[229] Ngwena (n 23 above) 195.
[230] National Adolescent Sexual and Reproductive Health and Rights Framework Strategy 2014-2019 (2015) 6.
[231] As above.
[232] As above.
[233] As above.
[234] As above 18.
[235] As above 6, 27 & 33.

Further, the ASRH&R Strategy affirms that the right to SRHR includes the right to CSE.[236] It recognises that CSE has the capacity to 'transform unequal power relations' and empower persons to deal with sexuality.[237] It includes as a priority, 'developing innovative approaches to comprehensive SRHR information [and] education'.[238] With this in mind, it aims to develop a CSE curriculum that draws from international best practices.[239] It also has the aim of increasing the positive SRHR messaging that is directed to adolescents; and educating adolescents on their SRHR as contained in national legislation, policies and guides.[240] This constitutes an affirmation of the state's intention to comply with CSE in accordance with its human right obligations.

In the circumstances, it is clear that South Africa recognises that it is bound by human rights obligations that require it to provide CSE. The state has included sexuality education in educational policies prior and subsequent to the controversy associated with the Special Rapporteur's statements on the existence of the right to CSE. Further, through its policies, the state has committed itself to the revision of its curriculum and the implementation of CSE that draws from international best practice standards. This is a process that is currently underway and, in this process, documented below are the international best practice standards to which the state should have regard.[241]

[236] As above 6.
[237] As above 7.
[238] As above.
[239] As above 29.
[240] As above 33.
[241] Eyewitness News (n 48 above).

3.3. The international norms and standards on CSE

Human rights obligations form the basis for the existence of a right to CSE, accordingly, these obligations have vested treaty bodies with the jurisdiction to interpret the nature and scope of these human rights, and in turn determine the content of CSE. However, additional norms and standards on CSE have been established by the agencies of intergovernmental organisations, which constitute international best practice standards on CSE. In what follows, it is demonstrated how the CSE norms and standards are consonant to the discourse of desire.

The UNESCO *International technical guidance on sexuality education: an evidence-informed approach* (2018) (UNESCO technical guidance) defines CSE as:

> a rights-based and gender-focused approach to sexuality education, whether in school or out of school. CSE is curriculum-based education that aims to equip children and young people with the knowledge, skills, attitudes and values that will enable them to develop a positive view of their sexuality, in the context of their emotional and social development… by embracing a holistic vision of sexuality and sexual behaviour, which goes beyond a focus on prevention of pregnancy and sexually transmitted infections (STIs).[242]

Accordingly, CSE envisages the inclusion of the full range of topics on all aspects of sexuality, which is more effective at facilitating development as it prevents the omission and silencing of contested aspects of sexuality that contribute to their 'stigma, shame and ignorance'.[243] Sexual desire and sexual pleasure fall within the scope of CSE, which is evidenced by their inclusion in the UNESCO technical guidance's modules on 'Understanding Gender', 'The Human Body and Development' and 'Sexuality and Sexual Behaviour'.[244] In this regard, CSE includes content that is envisaged by the discourse of desire.

The Specialised Technical Committee on Health, Population and Drug Control, an AU agency, developed the circumscribed notion of comprehensive education on sexual and reproductive health (CESRH), which is defined as an 'age-appropriate and culturally sensitive comprehensive education on sexual and reproductive health for

[242] UNESCO International technical guidance on sexuality education: an evidence-informed approach (2018) 16. See also UNFPA Operational Guidance for Comprehensive Sexuality Education: a focus on human rights and gender (2014) 6.
[243] As above 6 & 16.
[244] As above 50, 52, 66 & 70.

young people that involves parents and communities'.[245] This definition is cited with approval in the Maputo Plan of Action for the Operationalisation of the Continental Policy Framework for Sexual and Reproductive Health and Rights (2015), a political declaration to guide African states on the implementation of the ICPD PoA.[246]

There are two notable points on CESRH that constitute a departure from the well-established standard of CSE.[247] First, CESRH takes a health-based approach to sexuality education without reference to or implication of human rights. This approach could lead to the notion of sexual health being construed restrictively or expansively, as envisaged by the ICPD POA or the WHO working definition. Second, the reference to cultural sensitivity serves as the litmus test for the determination of the appropriate content of CESRH.

It is notable that the Ministerial Commitment on comprehensive sexuality education and sexual and reproductive health services for adolescents and young people in Eastern and Southern Africa (2013) (ESA Commitment), a regional political declaration to which South Africa is a signatory, affirmed the UNESCO definition of CSE.[248] Further, in the ESA Commitment, South Africa committed to comply with the agreed international standards on CSE, largely being the UNESCO and UNFPA guides.[249] In light of this, it is clear that South Africa considers itself bound by the notion of CSE as opposed to that of CESRH.

Returning to the notion of CSE, the UNFPA published the *Operational Guidance for Comprehensive Sexuality Education: a focus on human rights and gender* (2014) (UNFPA operational guidance) that prescribes the following aims and content of CSE:

> [1] Acquire accurate information about human sexuality, sexual and reproductive health, and human rights, including about: sexual anatomy and physiology; reproduction, contraception, pregnancy and childbirth; sexually transmitted infections and HIV/AIDS; family life and interpersonal relationships; culture and sexuality; human rights

[245] Maputo Plan of Action for the Operationalisation of the Continental Policy Framework for Sexual and Reproductive Health and Rights 2016-2030 (2015) 6.
[246] As above.
[247] BM Munyati 'African women's sexual and reproductive health and rights: The revised Maputo Plan of Action pushes for upscaled delivery' (2018) 32(1) *Agenda* 36 41.
[248] Ministerial Commitment on comprehensive sexuality education and sexual and reproductive health services for adolescents and young people in Eastern and Southern Africa (2013) para 1.5.
[249] As above para 3.5.

empowerment, non-discrimination, equality and gender roles; sexual behaviour and sexual diversity; and sexual abuse, gender-based violence and harmful practices.

[2] Explore and nurture positive values and attitudes towards their sexual and reproductive health, and develop self-esteem, respect for human rights and gender equality. CSE empowers young people to take control of their own behaviour and, in turn, treat others with respect, acceptance, tolerance and empathy, regardless of their gender, ethnicity, race or sexual orientation.

[3] Develop life skills that encourage critical thinking, communication and negotiation, decision-making and assertiveness. These skills can contribute to better and more productive relationships with family members, peers, friends, and romantic or sexual partners.[250]

The UNFPA operational guidance includes the following essential components of CSE: (1) universal values of human rights; (2) an integrated focus on gender; (3) scientifically accurate information; (4) participatory teaching methods; (5) 'a safe and healthy learning environment'; (6) strong youth advocacy and civic engagement; and (7) social and cultural relevance.[251] Given their relevance to the present research, the components on gender, teaching methods and the learning environment require further elucidation.

The UNFPA operational guidance provides that CSE must include an integrated focus on gender with content that includes a critique of the socialisation of males and females into gender roles, how gender norms change and their impact on the lives of persons.[252] Inherent in this content is the relationship between gender and power, which is capable of influencing males and females' realisation of their human rights.[253]

Further, the UNFPA operational guidance provides that education is most effective where learners 'are allowed to construct their own understanding of information and material by critically engaging with personal experiences and information.'[254] The quality and impact of sexuality education is dependent on teachers' capacities, approaches and learning material, in this regard, CSE must include 'participatory teaching methods for personalization of information'.[255] Given that the necessary skills

[250] UNFPA operational guidance (n 242 above) 6; See also UNESCO (n 242 above) 16.
[251] UNFPA operational guidance (n 242 above) 10-14.
[252] As above 11.
[253] As above.
[254] UNESCO technical guidance (n 242 above) 19.
[255] UNFPA operational guidance (n 242 above) 12-13.

involved in CSE are materially affected by gender norms, it should facilitate their disruption through personal reflection and analysis through critical thinking.[256]

The UNFPA operational guidance requires a 'safe and healthy learning environment' that is free from discrimination, which is indispensable to effective learning in CSE.[257] To create and sustain such an environment, teacher training is critical.[258] Young *et al* argue that it is also important to elicit teachers' emotional investments in sexuality education that may operate to reinforce silences on female sexuality.[259]

In the circumstances, the CSE standard is consistent with the discourse of desire. This is evident in the focus on gender, which is consonant to the discourse of desire's transformative equality that aims to address gender roles through empowerment. The participatory teaching method is consistent with the discourse of desire's emphasis on the dialogic engagement of learners through critique. The CSE standard on a safe learning environment is also consistent with the discourse of desire's cultivation of a positive and open learning environment. In the circumstances, the CSE standards envisage a teaching and learning environment that is akin to the discourse of desire.

3.4. Conclusion

This chapter has advanced an argument, affirming the assertion of the Special Rapporteur, that there is a right to CSE in international law, as inferred from the rights to education, equality, health and development. In this regard, the right to CSE is inferred from the human rights obligations that are binding on South Africa.

Further, there has been an exposition of the consolidated norms and standards on CSE that highlight the importance of a positive and dialogic teaching and learning environment that engages on sexual desire and sexual pleasure. In this regard, these standards on CSE are in consonance with the discourse of desire.

[256] UNESCO technical guidance (n 242 above) 13.
[257] UNFPA operational guidance (n 242 above) 12.
[258] As above.
[259] Young *et al* (n 6 above) 497.

4. CHAPTER 4: AN ASSESSMENT OF LIFE ORIENTATION AGAINST THE INTERNATIONAL NORMS AND STANDARDS ON THE RIGHT TO COMPREHENSIVE SEXUALITY EDUCATION

4.1. Introduction

South Africa offers school-based sexuality education through the compulsory subject of Life Orientation.[260] Although Life Orientation shows some compliance with the international standards on CSE, it fails to articulate a positive approach to sexuality and it imposes normative sexual subject positions in an environment to which learners fail to relate. Accordingly, there are deficiencies that affect the teaching and learning environment.

This chapter comprises of four sections, with the introduction being the first and the conclusion being the last. The second section evaluates the current state of Life Orientation sexuality education against the norms and standards on CSE. It is argued that although Life Orientation provides access to sexuality education, for the most part, it fails to engage a teaching and learning environment that is effective at developing the child as a potential sexual subject.[261] This is premised on how Life Orientation takes a negative approach to sexuality, it entrenches rigid gender roles and it fosters disconnection in learners.

The third section assesses South Africa's compliance with its human rights obligations and makes a case for the incorporation of the discourse of desire as an educational intervention that is capable of remedying the identified deficiencies and contributing towards the achievement of the norms and standards on CSE. It is argued that the aforesaid deficiencies constitute discrimination against women (and girls) and a breach of the state's duty to modify social and cultural patterns of conduct. The discourse of desire is then proposed as an intervention to remedy the deficiencies and promote the greater realisation of female adolescents' human rights.

[260] Francis (n 81 above) 315.
[261] UNFPA (n 47 above) 14.

4.2. The current state of sexuality education in South Africa

4.2.1. The Life Orientation curriculum

In South Africa, school-based sexuality education is taught to learners between grades 7-12 in the compulsory subject of Life Orientation, which constitutes the most widely implemented sexuality education programme in the country.[262] Life Orientation takes a holistic approach that is designed to guide learners to develop their capacity to make informed and responsible decisions about their health and well-being and that of others.[263] The Department of Basic Education (DBE) published the Life Orientation curriculum in two National Curriculum and Assessment Policy Statements (2011), one for grades 7-9 and another for grades 10-12.[264] Teachers, with the aid of prescribed learner textbooks, deliver the curriculum in at least two hours of lessons per week.[265]

There is significant variation in the implementation of the curriculum across schools in South Africa, this is due to reasons that include: the absence of a 'detailed, scripted curriculum'; 'the economic divide in the school system'; and the wide-ranging responsibility and autonomy that is conferred on school management to deliver the curriculum.[266] For this reason, although a broad curriculum statement is determined by the DBE, the implementation of the curriculum is highly adaptable and varied depending on the individual classroom context. This would mean that trends in the implementation of Life Orientation must be determined through empirical research.

Despite the adaptability and the broad reach of the subject, its effectiveness is not always apparent.[267] Research has shown that Life Orientation is successful at disseminating information but there is no evidence of its success at prompting behavioural change.[268] The absence of such evidence is attributed to the difficulty in teasing out the extent to which behavioural change arises from sexuality education as opposed to external factors.[269] Nonetheless, there is evidence that suggests that Life

[262] Francis (n 81 above) 315. Jearey-Graham & Macleod (n 24 above) 555. Department of Basic Education 'Life Orientation Curriculum and Assessment Policy Statement: Grades 7-9' (2011) 12. Department of Basic Education (n 2 above) 9. Jearey-Graham & Macleod (n 24 above) 12.
[263] DBE Grades 10-12 (n 2 above) 7. Jearey-Graham & Macleod (n 24 above) 12.
[264] DBE Grades 10-12 (n 2 above). DBE Grades 7-9 (n 262 above).
[265] DBE Grades 10-12 (n 2 above) 5-6. DBE Grades 7-9 (n 262 above) 12-24.
[266] Francis (n 81 above) 315. UNFPA (n 47 above) 9-11 & 17-19. Campbell (n 20 above) 1221.
[267] Jearey-Graham & Macleod (n 24 above) 13.
[268] As above. Macleod (n 93 above) 376.
[269] Jearey-Graham & Macleod (n 24 above) 13.

Orientation is, for the most part, failing to advance gender consciousness and develop female sexual agency.[270]

The design and content of Life Orientation must be seen in the context of the state's pursuits to address gender inequality and negative health outcomes.[271] However, this approach should not neglect the underlying development of the child, accordingly, Life Orientation must be seen as a 'resource for facilitating young people's development of life skills to challenge normative gender roles' particularly concerning female adolescents' constructions of their sexuality.[272] This would, in turn, contribute to the realisation of the state's aims.

As has been argued above in Chapter 3, the state has acknowledged that it must provide CSE and it has introduced policy that is aimed at its provision. The content of the Life Orientation curriculum, as set out in the current education policy, covers the following sexuality education material in the topics 'Development of the self in society' and 'Health, social and environmental responsibility':

(1) Information on: sexuality and its socio-cultural influences,[273] personal feelings and identity formation,[274] gender-based and sexual violence,[275] sexual behaviour and the consequences of unhealthy sexual behaviour (teenage pregnancy and STIs including HIV/AIDS),[276] strategies aimed at changing unhealthy sexual behaviour,[277] human rights and international human rights instruments,[278] gender inequality and gender roles,[279] personal and intimate relationships,[280] sexual abuse, harassment and violence,[281] puberty;[282] and

[270] Kruger (n 93 above) 43.
[271] Shefer & Ngabaza (n 25 above) 65. Macleod (n 8 above) 376. Jearey-Graham & Macleod (n 24 above) 555.
[272] Shefer & Ngabaza (n 25 above) 74. Kruger *et al* (n 270 above) 32.
[273] DBE Grades 7-9 (n 262 above) 16.
[274] As above. DBE 10-12 (n 2 above) 12.
[275] DBE Grades 7-9 (n 262 above) 19.
[276] DBE Grades 7-9 (n 262 above) 20. DBE 10-12 (n 2 above) 12, 16 and 20.
[277] DBE Grades 7-9 (n 262 above) 20.
[278] DBE Grades 10-12 (n 2262 above) 10.
[279] DBE Grades 7-9 (n 262 above) 17. DBE Grades 10-12 (n 2 above) 10.
[280] DBE Grades 10-12 (n 2 above) 14.
[281] DBE Grades 7-9 (n 262 above) 19. DBE Grades 10-12 (n 2 above) 10, 12 & 17.
[282] DBE Grades 7-9 (n 262 above) 10 & 12.

(2) Skills on: 'self-awareness, critical thinking, decision-making, problem solving, assertiveness, negotiations, communication, refusal, goals setting and information gathering relating to sexuality and lifestyle choices'.[283]

The content of the Life Orientation curriculum shows some degree of compliance with that prescribed in the CSE norms and standards.[284] What is, however, missing is the value-based component, specifically a positive approach to sexuality; and the inclusion of particular sexual content that includes sexual pleasure and sexual desire.[285] Though permissive towards the adoption of a positive attitude to sexuality, the absence of its express naming constitutes a failure to enunciate an important component that often underlies the general tenor of the teaching and learning environment. In what follows, there is an identification of the deficiencies in the teaching and learning environment in Life Orientation and an exposition of how they undermine its noble pursuits.

4.2.2. The deficiencies in the teaching and learning environment in Life Orientation

The lack of a positive approach to sexuality

The norms and standards on CSE require a positive approach to sexuality. As is demonstrated below, in the research that has been conducted into Life Orientation, in breach of the standard, there is an overwhelming amount of evidence that suggests that sexuality has been associated with negative consequences, particularly for female adolescents. It is important to analyse the approach to sexuality education because it reflects underlying premises of sexuality and it also elicits whose interests the education is geared towards serving.[286]

[283] DBE Grades 10-12 (n 2 above) 12.
[284] UNFPA (n 47 above) 9-11 & 17-19.
[285] Bhana (n 61 above) 76.
[286] TM Jones 'Saving rhetorical children: sexuality education discourses from conservative to post-modern' (2011) 11(4) *Sex Education* 369 371.

The ‘danger, disease and damage’ approach is a common trend in sexuality education in South Africa, having been found in a number of studies on Life Orientation.[287] Macleod describes this approach as one that disproportionately highlights the negative consequences of sexual activity.[288] It is strongly associated with the use of sexuality education as a deterrent against sexual activity, particularly for the attainment of health-based outcomes.[289] In essence, this discourse is aimed at instilling sexual responsibility without necessarily engaging the underlying sexual development of the individual.

In their research into the dominant discourses in women’s sexual practices, Shefer and Ngabaza found that the ‘danger, disease and damage’ approach was prominent in sexuality education.[290] They argue that it reinforces the idea that the inevitable negative consequences of sexual activity are designed to punish deviation, particularly for female adolescents, by evoking shame and disgust in response to their actual or perceived participation in sexual activity.[291] The rationale behind the punitive effect is premised on how the most apparent consequence of sexual activity, teenage pregnancy, is borne by female adolescents.[292] On this basis, female adolescents are held to a higher standard of sexual responsibility to rein in their own sexual desire (and that of men) as it has the most damaging consequences on their lives.[293]

To remedy the negative approach to sexuality, Glover and Macleod recommend that the Life Orientation classroom ought to constitute a positive environment where adolescents engage on and come to understand their sexuality.[294] This, Shefer and Ngabaza argue, can occur where Life Orientation constitutes a constructive space for young men and women to interrogate their subjectivities, relationships and practices

[287] Shefer & Ngabaza (n 25 above) 65. See research into the express and implicit messages in Life Orientation in Kruger *et al* (n 25 above) 33. See also the research into how adolescents’ communication with adults fail to provide habitable sexual subject positions for adolescents to embody in Jearey-Graham & Macleod (n 24 above) 11-12.
[288] Macleod (n 8 above) 375. Shefer & Macleod (n 287 above) 1.
[289] Francis (n above) 315. See also how it has necessitated the change in educational policies and curriculum in D Bhana ‘Childhood sexuality and rights in the context of HIV/AIDS’ (2007) 9(3) *Culture, Health & Sexuality* 309 311. Ngabaza *et al* ‘“Girls need to behave like girls you know”: the complexities of applying a gender justice goal within sexuality education in South African school’ (2016) 24 *Reproductive Health Matters* 71 71. Francis (n 81 above) 315.
[290] Shefer & Ngabaza (n 25 above) 67.
[291] As above. Young *et al* (n 6 above) 494. Bhana (n 71 above) 874.
[292] Young *et al* (n 6 above) 494.
[293] Tolman (n 28 above) 751.
[294] Glover & Macleod (n 3 above) 2.

of gender and sexuality'.[295] This would accordingly require an accurate and complete articulation of the positive and negative elements of sexuality.

The entrenchment of rigid gender roles

The CEDAW and the Maputo Protocol require the elimination of discrimination against women by the removal of gender stereotypes and the modification of social and cultural patterns of conduct.[296] Life Orientation has been criticised for its entrenchment of rigid gender roles.[297] This is apparent in how men's sexuality is assumed to be 'dominant, predatory and sexualised' whilst women's sexuality is assumed to be 'submissive, lacking sexual desire and [a] potential victim'.[298]

Kruger *et al* conducted research into female adolescents' construction of their sexual agency in Life Orientation.[299] They found that express messages provide that female adolescents have sexual agency as they are capable of sexual decision-making.[300] However, implicit messages, through the silence on female sexual desire and sexual pleasure, communicate that female adolescents' thoughts and feelings about sex are unimportant.[301]

The implicit messages are particularly dominant in advancing gender stereotypes as they place the responsibility of adhering to positive health outcomes and social moralities on the shoulders of female adolescents in a manner that reduces the individual development of the female adolescent to the state's attempt to secure collective health aims.[302] The implicit messages filter into Life Orientation through sources that include teachers, whom Young *et al* argue, are not immune to the broader context and are capable of reinforcing gender roles that are not conducive to the construction of diverse sexualities.[303]

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[295] Shefer & Ngabaza (n 25 above) 65.
[296] CEDAW article 5(a) & 10(c). Maputo Protocol article 12(1)(b).
[297] Glover & Macleod (n 3 above) 2. Jearey-Graham & Macleod (n 24 above) 556.
[298] Jearey-Graham & Macleod (n 24 above) 556.
[299] Kruger *et al* (n 25 above) 30.
[300] As above.
[301] As above.
[302] As above 72. Macleod (n 93 above) 381. Tolman (n 12 above) 15. Tolman (n 28 above) 751. Young *et al* (n 6 above) 494 & 497. Macleod (n 8 above) 382-383.
[303] Young *et al* (n 6 above) 496-497. Shefer & Ngabaza (n 25 above) 74.

Shefer and Ngabaza argue that the rigid entrenchment of gender roles is not conducive to the positive development of female adolescents' sexual self.[304] This is premised on how they only portray women in sexual subject positions that are consistent with the gender stereotype. This restricts the sexual subject positions to which female adolescents are exposed and, therefore, the sexual subject positions which female adolescents can embody.[305] Further, gender roles inhibit female adolescent's capacity to develop their sexuality that in turn impairs their ability to exercise their sexual rights on an equitable basis to men.[306]

Shefer and Ngabaza argue in favour of an intervention into the teaching and learning environment of sexuality education that is akin to the discourse of desire. This is evident in how they encourage the use of Life Orientation to dismantle harmful social constructions that restrict the sexual development of female adolescents and privilege male power and desire.[307] To do so, there needs to be a safe space in Life Orientation classrooms for the express engagement with conflicting messages on sexual subject positions.[308] In this regard, Glover and Macleod recommend that sexuality education should highlight the fluidity of sexuality whilst empowering learners, particularly female adolescents.[309]

The use of teaching methods that foster learners' sense of disconnection

The CEDAW and the Maputo Protocol require the adaptation of teaching methods to eliminate gender stereotypes and to modify social and cultural patterns of conduct.[310] Research into sexuality education has revealed the disconnection between, on the one hand, learners' needs and experiences and, on the other hand, the content that is delivered in Life Orientation.[311] The disconnection results from at least two attributes of Life Orientation, which are considered below with reference to research conducted

[304] Shefer & Ngabaza (n 25 above) 74.
[305] Tolman (n 12 above) 50.
[306] Shefer & Ngabaza (n 25 above) 74.
[307] As above. Glover & Macleod (n 3 above) 3.
[308] Kruger *et al* (n 25 above) 42.
[309] Glover & Macleod (n 3 above) 3.
[310] CEDAW article 5(a) & 10(c). Maputo Protocol article 12(1)(b).
[311] Jearey-Graham & Macleod (n 24 above) 556.

by Jearey-Graham and Macleod into adolescents' ability to find relatable sexual subject positions in their communication with adults in sexuality education.[312]

First, learners experience disconnection because the 'danger, disease and damage' approach does not engage the realities of youth sexualities, consequently, learners fail to relate to the 'responsible risk-averse sexual subject' portrayed in Life Orientation.[313] Accordingly, instead of dismantling the prevailing normative constructions on sexuality, to which learners can relate, the teaching and learning environment becomes a site for regulation and discipline as opposed to a site for 'constructive engagement, and skills- and knowledge-development to make informed choices.'[314] Inherently, there is also a failure to recognise that, as sexual subjects, learners are motivated by sexual desire and sexual pleasure.[315] In the absence of this recognition, learners develop an apathetic attitude to Life Orientation; and the risk-averse sexual subject position constructed in Life Orientation is likely to be confined to the bounds of the classroom.[316]

Second, learners experience disconnection because Life Orientation classes are conducted in a manner that is 'primarily non-relational and teacher-centred'.[317] This is largely premised on the privileging of the adult construction of knowledge with a didactic pedagogy where the all-knowing teacher passes on knowledge to the unknowing leaners.[318] Jearey-Graham and Macleod found that the use of 'chalk and talk' methods in Life Orientation, which are less effective at dismantling gender roles, fail to adequately engage the interest of learners.[319] Rather, they found that learners were interested in engaging in open and in-depth discussions on sexuality.[320] Accordingly, the manner in which teaching is conducted is not conducive to the learning and development of the child.

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[312] Jearey-Graham & Macleod (n 24 above) 11.
[313] As above 12. Jearey-Graham & Macleod (n 24 above) 556.
[314] S Ngabaza & T Shefer 'Sexuality education in South African schools: deconstructing the dominant response to young people's sexualities in contemporary school contexts' (2019) 19(4) *Sex Education* 422 423.
[315] Bhana (n 61 above) 76.
[316] Miller (n 22 above) 85. Jearey-Graham & Macleod (n 24 above) 19-20. Jearey-Graham & Macleod (n 24 above) 556.
[317] Jearey-Graham & Macleod (n 24 above) 14.
[318] D Francis 'What does the teaching and learning of sexuality education in South African schools reveal about counter-normative sexualities?' (2019) 19(4) *Sex Education* 406 408.
[319] Jearey-Graham & Macleod (n 24 above) 18.
[320] As above. Kruger *et al* (n 25 above) 37.

To remedy the sense of disconnection, Glover and Macleod recommend a teaching and learning environment that is akin to the discourse of desire. This is evident in their recommendation that Life Orientation should take a 'learner-focused approach' to engage learner's experiences and desires.[321] Further, there should be 'in-depth interactions and discussions' that would involve learners being active participants through dialogic teaching methods.[322] This envisages creating a space for learners to reflect and engage.[323] Inherent in this approach is the challenge to adult authority in sexuality education, instead, learners' own narratives and experiences should drive the content and approach of their sexuality education.[324]

4.3. A case for the use of the discourse of desire in Life Orientation

4.3.1. The breach of international norms and standards on CSE

Above it has been demonstrated that Life Orientation suffers from deficiencies in the teaching and learning environment that include the reinforcement of negative aspects of sexuality, the failure to dismantle gender stereotypes and the failure to adapt teaching methods to engage learners' interests. In what follows it is argued that the prevailing teaching and learning environment in Life Orientation constitutes a breach of the state's obligations to eliminate discrimination against women (and girls), and to modify certain social and cultural patterns of conduct.

Discrimination against women (and girls)

The provisions of CEDAW and the Maputo Protocol provide that discrimination against women is constituted by any distinction based on sex that undermines women's equal recognition and equal enjoyment of their human rights on an equitable basis to men.[325] The state is required to eliminate discrimination generally in all spheres of society and

[321] Glover & Macleod (n 3 above) 4.
[322] As above.
[323] As above.
[324] Ngabaza & Shefer (n 314 above) 429.
[325] Maputo Protocol article 1(f). CEDAW article 1.

specifically in the field of education.[326] The state is also required to eliminate stereotyped roles for men and women by the adaptation of teaching methods and the inclusion of gender sensitisation.[327]

The inadequacies in Life Orientation constitute discrimination against women specifically in the field of education. This is premised on the state's failure to take appropriate measures to dismantle gender stereotypes by the adaptation of teaching methods. This is evident in how the teaching methods take a negative approach to sexuality, particularly female sexuality, and they reinforce gender stereotypes that would cumulatively give rise to differential outcomes that limit female adolescents' enjoyment and exercise of their rights. The teaching methods also foster a sense of disconnection in learners that allows the gender norms to prevail. In the circumstances, the continued perpetuation of gender stereotypes constitute discrimination against women in terms of CEDAW and the Maputo Protocol.

The inadequacies in the teaching and learning environment in Life Orientation also constitute discrimination on the basis of age. The ACRWC and the CRC provide that children are entitled to equal enjoyment of human rights irrespective of their age.[328] In this regard, children have a right to education, which should be directed to the achievement of their full personality and potential.[329] Discrimination on the basis of age arises from the teaching and learning environment that is not effectively geared towards the development of children. This is evident in the continued application of normative constructions of childhood that deprive children of a positive approach to their sexuality and an opportunity for engagement on sexual desire and sexual pleasure. It is notable that this type of discrimination, though also applicable to boys, has a disproportionate effect on girls because of their reproductive capacity. In the circumstances, this constitutes discrimination against children, specifically girls, in terms of CEDAW and the Maputo Protocol.

To establish that there is discrimination, there must be an actual or intended impairment of equal enjoyment. Accordingly, in breach of the best interests of the child,

[326] Maputo Protocol article 2(1). CEDAW article 2(d) & (e).
[327] CEDAW article 10(c). Maputo Protocol article 12(1)(b) & (e).
[328] ACRWC article 3. CRC article 2(1).
[329] As above article 11(1) & (2)(a). CRC articles 28(1) & 29(1)(a).

the discrimination on the basis of sex/gender and age has an adverse effect on female adolescents' exercise and enjoyment of the following human rights:

1) the right to dignity is impaired by the failure to recognise and develop their sexual subjectivity, which is an aspect of their personalities;
2) the right to equality is affected by the failure to acknowledge female adolescents' sexual subjectivity and their entitlement to equal treatment and recognition irrespective of their sex/gender and age;
3) the right to bodily and psychological integrity is materially impacted by the internal dilemma that female adolescents face: the uncertainty concerning their sexual desires but their simultaneous positioning as asexual, which affects their capacity to find comfort in and control over their bodies;
4) the freedom of expression is undermined by the social imposition of shame on female adolescents who step beyond the gender norms and the normative construction of childhood;
5) the child's right to development is infringed by the failure to recognise sexual subjectivity as it inhibits the sexual development of the female adolescent;
6) the right to education and information is undermined by the failure to modify teaching methods to ensure the reception of information and the development of the child; and
7) the right to health, specifically sexual health, is undermined by the repression of sexual subjectivity that influences female adolescents' mental health and decreases the propensity to the uptake of SRH services.

A failure to take positive steps to modify social and cultural patterns of conduct

The CEDAW and the Maputo Protocol oblige the state to take steps to modify social and cultural patterns of conduct based on stereotyped roles for men and women.[330] Through the reinforcement of gender stereotypes in society more broadly and in schools specifically, the state has failed to take appropriate measures to modify social and cultural patterns of conduct that are based on gender roles. This is evident in the

[330] CEDAW article 5(a). Maputo Protocol article 2(2).

teaching and learning deficiencies that have filtered into the Life Orientation classroom as a result of the inaction of the state.

In the circumstances, South Africa is in breach of the following provisions:

(1) The elimination of discrimination against women (and girls):
Articles 2(d), (e), and 10(c) of CEDAW;
Articles 2(1), 12(1)(b) and (e) of the Maputo Protocol;
Articles 2(1), 28(1) and 29(1)(a) of the CRC; and
Articles 3, 11(1) and (2)(a) of the ACRWC;

(2) The violation of the following human rights as set out in international treaties: the best interests of the child, human dignity, equality, bodily and psychological integrity, freedom of expression, the child's right to development, information, education and health;

(3) The failure to modify social and cultural patterns of conduct based on the equality of the sexes:
Article 5(a) of the CEDAW; and
Article 2(2) of the Maputo Protocol.

4.3.2. The discourse of desire as an educational intervention

The deficiencies in the teaching and learning environment in Life Orientation are rooted in the normative constructions of child and female sexuality. Given that the identified deficiencies constitute a breach of state's human rights obligations, it is important to consider how the discourse of desire, being consonant to the CSE standard, can be employed as an educational intervention that is capable of better aligning Life Orientation with the CSE standards.

First, the discourse of desire takes a positive approach to sexuality that would balance the dangers with the positive aspects of sexuality, which include 'pleasure, relationships, connection and warmth'.[331] In the circumstances, such an approach

[331] Jearey-Graham & Macleod (n 24 above) 556.

would be central to the comprehensiveness of sexuality education in line with the holistic approach taken by the CSE standard.

Second, the discourse of desire has been found to be effective at dismantling gender norms and providing habitable sexual subject positions for female adolescents to embody. This occurs through a gender critique that allows learners to internalise knowledge. Accordingly, the discourse of desire is capable of aligning Life Orientation with the CSE standard that emphasises a gender focus.

Third, the discourse of desire creates an interactive and dialogical learning environment. This is premised on how it incorporates participatory teaching methods that directly engage with learners on their interests and concerns in a manner that is conducive to learning. In the circumstances, the discourse of desire aligns the teaching methods and the safe learning environment with the CSE standard.

4.4. Conclusion

This chapter has shown that sexuality education in South Africa comprises of a curriculum that is not fully compliant with the norms and standards on CSE. This is exacerbated by the fact that there are deficiencies in the teaching and learning environment that reinforce normative constructions of child and female sexuality. This is evident in how the teaching and learning environment takes a negative approach to sexuality, it reinforces gender stereotypes and it fosters a sense of disconnection in learners.

The resultant effect of the deficiencies is that the teaching and learning environment not only fails to comply with the norms and standards on CSE, but also constitutes a breach of the state's obligations to eliminate discrimination against women (and girls); and a failure to modify social and cultural patterns of conduct. In light of the prevailing condition, the discourse of desire is presented as an educational intervention that is capable of remedying the deficiencies and promoting the greater realisation of the human rights of female adolescents.

5. CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1. Summary

The discourse of desire is a positive teaching and learning environment that involves the express engagement of sexual desire and sexual pleasure. It is conducive to female adolescents' development of a sense of sexual self that is linked to the realisation of human rights that include the right to equality, education, health and development.

Although there is no express right to CSE in international, regional and domestic law, the human rights instruments that are externally and internally binding on South Africa entrench rights from which the right to CSE is inferred. South Africa has prescribed sexuality education in the compulsory subject of Life Orientation. Although the curriculum content shows some degree of compliance with the CSE norms and standards, it has the following deficiencies in the teaching and learning environment that undermine its implementation: a negative approach to sexuality, the reinforcement of gender stereotypes and an element of learner disconnection.

In light of these deficiencies, there is a breach of the state's duty to eliminate discrimination against women (and girls); and a breach of the state's duty to modify social and cultural patterns of conduct. In the circumstances, the discourse of desire is as an educational intervention that is capable of better aligning the state's sexuality education programme with the CSE standard to achieve the greater realisation of the human rights of female adolescents.

5.2. Conclusion

The use of sexuality education to achieve primarily health-related outcomes is a symptom of societal conditions that are aimed at the silencing of female adolescent sexuality. This occurs through the denial of the sexual nature of female adolescents and through the entrenchment of gender roles and normative constructions of childhood. In the hegemonic discourse that is human rights, there is a similar denial of the existence of sexual rights and the right to CSE.

The omission of the discourse of desire in sexuality education in South Africa mirrors the muting of female adolescent sexuality in social and international discourses. This omission exists even in spite of the state's recognition of SRHRs and the right to CSE. This is regrettable given that the absence of a discourse of desire has an inhibitory effect on the potential for sexual development in female adolescents whose position in society is already compromised. In the absence of a forum to engage on sexuality in a candid and positive manner, female adolescents lose out on the potential to be empowered and to occupy relatable sexual subject positions that portray them as being more than sexual victims. Further, in the absence of this safe space, female adolescents' capacity to enjoy their sexuality is severely undermined.

In the circumstances, South Africa must recall its commitment to respect, protect, promote and fulfil the human rights of all persons irrespective of gender and age. This it must do by ensuring that the right to CSE is not only recognised as being in existence, but is also given effect through the provision of CSE that complies with the international norms and standards. These are the commitments South Africa must bear in mind in the revision of Life Orientation.

5.3. Recommendations

In light of the aforesaid, South Africa should comply with its international human rights obligations by taking positive steps to eliminate discrimination against women (and girls) in Life Orientation.

First, in its revision of the Life Orientation curriculum, South Africa must expressly include a positive approach to sexuality; and a more detailed curriculum that would include positive content on sexuality such as sexual desire and sexual pleasure.

Second, South Africa should provide training and ongoing support to teachers to assist them to understand and dismantle gender roles and normative constructions on female and child sexuality in Life Orientation classes. Associated with this, is the development of teaching methods to ensure that teachers are capable of creating a teaching and learning environment that is learner-centred and dialogic.

(Word count: 20 173)

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