



**THE CONSTITUTION, PARENTS AND COMPREHENSIVE SEX AND SEXUALITY
EDUCATION IN SOUTH AFRICA**

By

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Dedication

This dissertation is dedicated to my friend and confidant Katelyn-Mae Carter, and our desire to make the world a better place.

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Chapter 1: The Constitution, Parents and Comprehensive sex and sexuality education in South Africa

1. Introduction

The Basic Education Laws Amendment Bill (BELA Bill) announced in the government gazette on 6 December 2021 has caused a great degree of controversy in the basic education sector and controversy around the proposed amendments to the minister's powers in making regulations. The latest in a series of amendments to the South African Schools Act 84 of 1996 (the Schools Act), enacted to: "redress past injustices in the education system... to effect the transformation of society to combat racism and sexism and all other forms of discrimination..."¹ In terms of section 61 of the Schools Act, the minister may make regulations concerning a national curriculum applicable to public and independent schools.² In terms of section 41 of the BELA Bill the minister of education has additional powers in terms of the Minister's authority to create regulations on the management of learner pregnancy as well as the creation of a national education information system and provides for the imprisonment of anyone who contravenes provisions of regulations created under section 61.³

The controversy concerning the BELA bill is that South Africans have received the Bill as promoting comprehensive sex education in schools which they find inappropriate.⁴ From the above, the Bill does not speak directly to sexual education, there is room for the interpretation of the Bill to be interpreted to include sexual education in the authority of the Minister to promulgate regulations. The addition, of being liable to imprisonment opens the door for teachers who wish not to teach a comprehensive sexual education curriculum raises some validity to the concerns raised. In addition, it places a competing interest on what is it that parents wish for their kids to know and understand about sex and sexuality, juxtaposed against what is it that a responsive education curriculum would require their children to understand about sexuality and sex.

¹ South African Schools Act 84 of 1996 preamble.

² Acts 84 of 1996 section 61(c).

³ Basic Education Law Amendment Act

⁴ <https://www.iol.co.za/capetimes/news/lack-of-understanding-causes-bela-bill-misinformation-07402256-cff6-483e-8a68-8923e7ba1a53> (accessed: 27 February 2024)

2. Problem Statement

Comprehensive sex and sexuality education is defined by the World Health Organisation, hereafter WHO, as: education that gives young people accurate and appropriate information on sexuality and sexual reproductive health as it relates to them.⁵ The South African Department of Education, hereafter Department of Education, currently provides comprehensive sex education which is described as: an informative part of the Life Orientation/Skills curriculum that does not offer misleading messages on sex, sexuality and sexual behaviours.⁶ The department of education's stance on sex and sexuality education is conservative in its construction, the department states that its curriculum does not teach learners how to have sex, it does not sexualise children, it does not seek to propagate values that encourage sexual behaviour.⁷ In light of these indications, what are children to know of sex insofar as it relates to notions of consent before engaging in sexual activities; sexual minorities and their expressions; notions of safe sex, family planning services and all the antecedental issues that arise with sex and sexuality?

However, adolescent pregnancy remains a serious social crisis in South Africa, as learners from ages 10 – 19 have shown indicators of having unprotected sex and increased vulnerability to sexually transmitted infections.⁸ Factors that put adolescents at risk for pre-mature pregnancies include: notions of womanhood and maturity and the means of going about proving that one is a mature woman; a limited understanding of the way in which pregnancy occurs and perceptions of the inequality between men and women; cultural obedience; ineffective utilisation of contraceptives.⁹ In addition, the prevalence of sexually transmitted infections in a representative population sample of adolescents aged 10 – 19 randomly, reveals that among youths in Kwa-Zulu Natal there is a high prevalence of curable sexually transmitted diseases. Adolescents living

⁵ <https://www.who.int/news-room/questions-and-answers/item/comprehensive-sexuality-education#:~:text=What%20is%20comprehensive%20sexuality%20education,for%20their%20health%20and%20survival> (accessed: 11 May 2024).

⁶ <https://www.education.gov.za/Home/ComprehensiveSexualityEducation.aspx> (accessed 11 May 2024).

⁷ <https://www.education.gov.za/Home/ComprehensiveSexualityEducation.aspx> (accessed 18 May 2024).

⁸ G Mchunu et al 'Adolescent Pregnancy and Associated Risk Factors in South African Youth' (2012) 12(4) *African Health Sciences* pp 426 – 427.

⁹ Mchunu (n8 above) p 433.

in urban and peri-urban areas had a higher prevalence of these infections than those living in rural areas in Kwa-Zulu Natal.¹⁰

The abovementioned is supported by national data on the subject. Statistics South Africa, hereafter StatsSA, profiled the health challenges faced by adolescents in South Africa listing the health five leading causes of adolescent mortality, one of them is HIV.¹¹ Furthermore, in 2019 South Africa recorded 106 000 live births among adolescents and that adolescents amounted for 12% of terminations in South Africa in the same year.¹² In addition crime statistics show that victims of sexual violence tend to be children and adolescent women, and young men.¹³ The abovementioned is worsened by the fact that 70% of adolescents self-medicate and actively avoid seeking medical care administered by professionals or advice.¹⁴

From the above, it is patently clear that sex and matters of sexuality emerge at various points in children's lives, be it though sexual infections, being the victims of crime and mortality outcomes. It is worsened by the growing prevalence in the use of social media activism to protest comprehensive sexuality education other movements, like the anti-vaxx, flat earther and other movements in 2020. Recently a growing movement of parents have organised online to protest sexual and sexuality education in schools known as #LeaveOurKidsAlone, which sees adult voices resisting the further expansion of comprehensive sexuality education, suggesting that this is pushing for the moral decay of society; it conflicts with the values of Christianity and is a corrupting force on children.¹⁵ Digital activism, has the potential to shape public discourse and even mislead the public on the nature and purpose of Comprehensive Sexuality Education.¹⁶ The Facebook group is currently where the most activism occurs online amassing an audience well over two thousand likes.¹⁷

The problem illustrated above, sees a social reality that the parents of #LeaveOurKidsAlone is disconnected from the reality of sex and sexuality as it

¹⁰ J Jarlimova 'Prevalence of Curable Sexually Transmitted infections in a Population Representative of young adults in a High HIV incidence Area' (2023) 50(12) *Sexually Transmitted Diseases* 798 – 800.

¹¹ StatsSA 'Profiling health challenges faced by adolescents' (2023) pp 66 – 68.

¹² StatsSA 'Profiling health challenges faced by adolescents' (2023) pp 36 – 38.

¹³ StatsSA 'Crimes against children report' (2024) 18 – 19.

¹⁴ StatsSA 'Profiling health challenges faced by adolescents' (2023) pp 34.

¹⁵ <https://www.leaveourkidzalone.org/> (accessed 28 April 2024).

¹⁶ S Ngabaza 'Parents resist sexuality education through digital activism' (2022) *Journal of Education* p 85.

¹⁷ <https://www.facebook.com/LeaveOurKidsAlone/> (accessed: 23 April 2024).

emerges in the lives of children and adolescents, this has serious implications for sexual and reproductive rights of children. Furthermore, the current comprehensive sexuality education curriculum is not responding to these crises appropriately as the data has indicated. To offer clarity, the crux of this thesis is not a critique or commentary of the BELA Bill, rather it is an examination of sex and sexuality education in South Africa in light of the relevant legal instruments that should inform it.

To those ends the problem can be summarised as the following: what the interests of children to have access to comprehensive sexual education juxtaposed against the parents' interests to have their children exposed to an education that aligns with their values and the values of their community.

3. Research Questions

To those ends the research objectives of this research are to:

1. To what extent is the best interest of children applicable insofar as a comprehensive sexual education is concerned, considering South Africa's international and Constitutional obligations?
2. To what extent can the rights and interests of parents in ensuring their children get an education that aligns with their religious and cultural rights can be conceded?
3. Does the BELA Bill promote sexual activity among young learners?
4. What is the appropriate framework for sex and sexuality education, considering the needs of young learners in South Africa?

4. Research Objectives

To those ends the research objectives of this publication are:

1. Demystify the BELA Bill as a promoter of sexual activity among young children.
2. Understand the rationale of sex and sexuality education in South Africa.
3. Amplify the necessity for sex and sexuality education in South Africa.
4. Posit an appropriate framework for sex and sexuality education in South Africa.

5. Research Methodology

This paper will adopt a qualitative approach to answering these questions through an analysis of legislation against foreign case law, international conventions, general recommendations, and other scholarly works. The analysis will incorporate an intersectional analysis to posit recommendations for a comprehensive sex and sexuality education curriculum that responds to the social pressures that young South Africans face. In addition, comparative analysis of the sex and sexuality education of foreign jurisdictions.

6. Significance of the Research

The significance of this research comes in the fact that it opens the door to interact with sexual and reproductive rights in the classroom, and thinking in the interests of children and the sexual realities of the contexts that they live in. Thus, understanding the limits and extent to which South African education can be reformed from the ground up through review mechanisms or through the law-making powers that the minister of education and to understand the limits of paternalism in determining the nature and substance of a school curriculum.

7. Theoretical Approach

This paper will adopt a theoretical approach that uses a historical and, ethnographic approaches to sex and sexuality in South Africa to analyse the current legal positions regarding the extent to which the state has control over sex education and ensuring that all South African children receive sex education that promotes sexual and reproductive rights.

8. Literature Review

In their article, Ally and Murcott, 'Beyond Labels Executive Action and the Duty to Consult,'¹⁸ the authors suggest that executives have duty to consult when making executive decisions, and they distinguish between procedural fairness and procedural rationality as separate requirements under the current administrative law regime in South Africa against the constitutional values. In this discussion, it is useful to this discussion as it offers additional insight to how review mechanisms operate under the

two different standards of review in South Africa given the parallel system of laws. In addition, it will assist in answering the question whether review mechanisms can assist in reforming South African sex education, regardless of whether the regulations are administrative or executive in nature.

Wojicki in, 'She drank his money: survival sex and the problem of violence in taverns in South Africa',¹⁹ explores the intersection of sex and economic necessity surrounding South African tavern culture and sexual violence endured with the aim of meeting economic need. In addition, the article describes a culture of sexual entitlement in taverns in South Africa. This article will be useful to this paper in the discussions regarding what a sex education curriculum can respond to in South Africa.

Duff in, 'Facts about ourselves: Negotiating sexual knowledge in the early twentieth century South Africa',²⁰ this article is a historical exposition on sexual education in early twentieth century South Africa between white middle-class children and the African majority. This will assist in laying the social context of sex education in South Africa.

In *Minister of Basic Education v Basic Education for All* (20793/2014) [2015] ZASCA 198 (2 December 2015) the court discussed the content of the right to education in South African law.²¹ This case is good in that it establishes the vagueness in how the right is described in the Constitution its very useful precedent in elaborating on the right and will contribute as a model to measure the current sex education against these findings.

In *Minister of Health and Another v Alliance of Natural Health Products (South Africa) (Case no 256/2021)* [2022] ZASCA 49 (11 April 2022), the making of ministerial regulations as administrative in nature, this serves as the latest precedent in explaining the difference between executive action and administrative actions since the *New Clicks* case.²² This is useful to the discussion as it offers an opportunity to understand

¹⁹ JM Wojicki 'Survival Sex and the Problem of violence in taverns in South Africa's Gauteng Province' (2002)16(3) *Medical Anthropology Quarterly* pp 276 – 293.

²⁰ SE Duff 'Facts about ourselves: negotiating sexual knowledge in early twentieth century South Africa' (2015)41(1) *The Politics of Knowledge Production in Southern Africa* pp 215 -235.

²¹ *Minister of Basic Education v Basic Education for All* (20793/2014) [2015] ZASCA 198 (2 December 2015).

²² *Minister of Health and Another v Alliance of Natural Health Products (South Africa) (Case no 256/2021)* [2022] ZASCA 49 (11 April 2022)

which review path would be applicable or appropriate in curriculum setting with regard to sex education in South Africa.

Hallman and Grant in, 'Pregnancy related school dropouts and prior school performance in Kwa-Zulu Natal, South Africa',²³ explain through analysis the dropout of pregnant adolescents in schools and the continuation of the education post-pregnancy. This article is useful in setting another context to which a progressive sex education curriculum in South Africa can respond to.

Cooky in 'Policing the boundaries of sex: A Critical Examination of Gender Verification and the Caster Semenya Controversy', explores how rules are enforced to reinforce gender verification directly affects intersex individuals and offers a perspective that applies to the scope of this research. This article will be useful to the research in that it also offers an additional perspective for which curriculums can respond to and inform children of.

9. Main arguments

The main arguments laid out in this paper should be understood as follows: the Constitution, parents' comprehensive sex and sexuality education in South Africa; are in a space where the need to be redefined and reinterpreted.

Historically, South African sex and sexuality education policy, has always been informed by the goals of the political order of the day interacting with the social relations of ordinary people through the mechanisms of governance, and this is no different for the present day.

Further, due to the social relations of South Africa's past as they were enforced by the governments of South Africa's pre-colonial; settler-colonial and Apartheid history; post-apartheid sex and sexuality education is no longer informed by the politics of the government, rather the objectives of the Constitution.

As the Constitution now should inform sex and sexuality education; this legal reality must contend with the parent's say over sex and sexuality education as they would

²³ J Monica & K Hallman 'Pregnancy related school dropouts and prior school performance in Kwa-Zulu Natal, South Africa' (2008)39(4) *Studies in Family Planning* pp369 – 382.

desire; be scrutinised against the best interests of the child as formulated in the Constitution of the republic of South Africa.

Finally, in light of the manner in which South Africa's best interest standard has now limited the influence over the sex and sexuality education of children by their parents, the perfect framework for sex and sexuality education against the present day Post Apartheid convictions of the state as informed by the Constitution can be found in liberal sexual ethics.

10. Chapter outline

Chapter 2 will introduce a brief social and legislative history to sex and sexuality and sex and sexuality education in South Africa from the early twentieth century to the present will outline the legal framework in South Africa and South Africa's international obligations insofar as they relate to sex education.

Chapter 3 will assess the rights of parents about their say over what their children learn and critically evaluate those rights that parents have in the curriculum that their children receive against the best interest standards in South Africa.

Chapter 4 will demystify the BELA Bill; posit recommendations and propose a framework that South Africa can rely on to promote a progressive sex education curriculum/framework in South Africa that strikes a balance between the two competing interests.

Chapter 5 will conclude the paper's findings and recommendations.

Chapter 2: Sex, Sexuality and South Africans

1. Introduction

In this chapter the relationship between sex, sexuality and the state are discussed. Reason being, relationship between, sex, sexuality, and governance in South Africa, is an intimate one that often goes understated in discussions surrounding comprehensive sex and sexuality education. Highly informed by the social order of the day and enforced by the state, sex and sexuality have played a massive role in defining

social relations, changing social relations, and establishing or enforcing the political with the social. South Africa's history of the state's say in sex and sexuality stretches as far back as the 19th century and pulls through to the present day, never veering from the common motif that the overarching goals of the governing regime of the day informs how those relations manifest themselves.²⁴ Evidenced in how native populations incentivised certain behaviours through policing sexual activity or early settler regimes racist approaches to governing sexuality; the Apartheid regime's racist policies aimed at maintaining segregation and even the human rights oriented Constitutional dispensation of present-day South Africa, sex and sexuality have always been a priority of the state, which is further elaborated upon below in the discussion of sex and sexuality policy formulation in the 20th century.

As this chapter demonstrates, the state's priority as envisaged by the socio-political order of the day. The state's priorities trickle into the sex and sexuality education offered to children and subsequent dispensations have inherited their approaches from one another. These traditions are those that society does not let go of easily and this social context informs the moral panic of the BELA Bill.

Finally, this chapter will discuss the present-day context that informs sex education. It is submitted that South Africa's legal frameworks and international obligations per the treaties that it is a party to prompt a new evolution of South Africa's sex and sexuality education scheme.

2. The Evolution of Sex Education in South Africa

2.1 The 19th Century

The interaction of sex and sexuality and the State in South Africa is an old one. The earliest iterations of the state's investment into sex and sexuality, although presumably much older, can be traced from the 19th century in the form the Zulu army's policy of abstinence during the reign of Shaka Zulu.²⁵ In terms of this policy, under the mandatory conscription policy of the time, men serving (and those who had never served) in the military were forbidden from engaging in sexual intercourse as it was

²⁴ C Lennox & M Waites (eds) *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth* (2013) p 316.

²⁵ D Wylie 'Shaka & Myths of Paradise' (1995) 22(1) *English in Africa* p 27.

seen as a source of distraction that deprived the military man of his strength.²⁶ Those who broke this rule, were faced with capital punishment in the form of the death sentence.²⁷ Serving in the army was highly incentivised and defined masculine and feminine roles as men who had served, could be marry, establish a homestead and have children. The policy of abstinence in the military defined social relations between men and women in profound ways that went to interesting sexual and social practices, most notably non-penetrative pre-marital sex in the form of *ukusoma*; the rubbing of the thighs with the penis till ejaculation.²⁸ Another practice that persists in Northern Kwa-Zulu Natal in the present day is virginity testing which is a part of the practice known as *ukuhlolwa kwezintombi* a practice aimed at promoting abstinence in young women.

The interaction of the state and sex and sexuality in the 19th century is not limited to the Zulu people of South Africa, but extends to the early Boer colonies in the Transvaal and Orange Free State.²⁹ At the end of the 19th Century, the settler colonies in South Africa were grappling with the, “native question” which was the political terminology used to frame the policy of the colonies interactions with native populations in South Africa. The Boer colonies instilled a strict policy of segregation that was aimed at offering stability, a part of this meant mitigating against potential and manifest threats. The threat that the early settlers constructed, was the presumed “insatiable sexuality” of black natives in South Africa.³⁰ The concern for the safety of women in the colonies would create a culture with a strong proclivity toward anti-miscegenation, banning any intimacy between non-whites and white settlers in the Boer colonies.³¹ However, even an outward ban on miscegenation did not completely prevent new settlers to the region from having children with natives which saw a civil response of pity viewing them as a by-product caught in a conflict between ‘barbarism and civility’.³²

²⁶ Wylie (n25 above) p 27.

²⁷ <https://www.sahistory.org.za/people/shaka-zulu> (accessed: 17 May 2024).

²⁸ T Buthelezi ‘The One who has Eaten it, has only Eaten a Part: exploring traditional Zulu Pre-Marital Sexual Practices’ (2006) 3(2) *Sexuality in Africa* p 4.

²⁹ V Kruitensbrouwer *War of Words: Dutch Pro-Boer Propaganda and the South African War (1899 – 1902)* (2012) p 94.

³⁰ Kruitensbrouwer (n29 above) p 95.

³¹ Kruitensbrouwer (n29 above) p 95.

³² Kruitensbrouwer (n29 above) p 95.

2.2 The 20th Century

Stepping into the 20th century, the newly established, Union of South Africa policed sexuality officially through the enactment of the Immorality Act 5 of 1927, hereafter 'Immorality Act'. The Immorality Act outlawed interracial relationships across South Africa. In terms of sections 1 and 2 of the Immorality Act, any European male or European female who has illicit carnal intercourse with a native male or native female in circumstances that do not amount to rape, commits an offence.³³ The aim of the Immorality Act was to crystalise borders among racially defined lines.³⁴ Further amendments to the Immorality Act would criminalise same-sex sexual relationships, and this was premised on Calvinist assumptions that underpinned separate development which is best summed up in this quote: 'it is necessary to keep the white nation [of South Africa] morally and sexually pure.'³⁵ In the days of the Apartheid regime the rigorous policing of same-sex unions was further premised under the National Party's association with the collapse of society with homosexuality which led to expanding the application of anti-sodomy laws and more rigorous policing.³⁶

Considering the above, the earliest introduction of Sex education to South Africans was in 1934 which was aimed at regulating the sexuality of young black Africans in urban areas and white-middle class South Africans.³⁷ In 1934 the Red Cross, published a pamphlet aimed at white-middle class South African children titled, 'Facts about Ourselves for Growing Girls & Boys.'³⁸ Written by a school teacher, with a foreword from a medical health officer of the government, explained that growing sexual conservatism with the collective ignorance of parents was creating a society that was unfamiliar with matters of sexual reproduction.³⁹

The pamphlet stated that sexual education was of paramount importance to a society's future, and that it is important to marry and produce heterosexual nuclear families to guarantee the future of South Africa.⁴⁰ One of the circumstances that the book saw as

³³ Immorality Act 5 of 1927.

³⁴ Lennox & Waites (n24 above) p 316.

³⁵ Lennox & Waites (n24 above) p 317.

³⁶ Lennox & Waites (n24 above) p 317.

³⁷ SE Duff 'Facts about Ourselves: Negotiating Sexual Knowledge in Early 20th Century South Africa' (2015) 41 *SPECIAL ISSUE: The Micro-Politics of Knowledge Production in Southern Africa* p 215.

³⁸ SE Duff (n37 above) p 215.

³⁹ SE Duff (n37 above) p 215.

⁴⁰ SE Duff (n37 above) p 216.

a threat to the future of South Africans was the risk that miscegenation posed to South Africa. The book focused a great amount of its attention to the risk that the black African, specifically the black African male, posed to the well-being of white women.⁴¹ However, even a text discussing sex of the time was conservative in its approach and fixated on only discussing sex in a scientific manner.⁴² The primary reason for this was to curb the spread of sexually transmitted diseases, among which syphilis was a primary problem for the government of the day.⁴³ This would be an instance of a formal introduction of sex education into South African schooling. The sex education of the day, in addition to the above, taught a curriculum that was: sexually conservative and promoted abstinence, encouraging wilful ignorance of sex as it was considered a topic that was too complicated for children to know of.⁴⁴ Further, the syllabus was anti-masturbation as it saw masturbation as a path to sexual deviancy and degeneracy and limited any explicit mention of sex to clinical reproductions that were as brief as they were restricted in their exposition of the act of sex.⁴⁵ The text even limiting the definitions of penetrative sex as, “the penetration of the penis of a married man into the vagina of his wife.⁴⁶ In light of the above, sex education was the by-product of a modernising South African state, that saw a moral appeal to patriotism, conservatism at its centre.⁴⁷

Thus, this era of sex education was informed by the history that came before it, from Shaka Zulu’s policy of abstinence to, the Boer settler’s policies on miscegenation and the Apartheid government’s anti-homosexual policy. Therefore, this iteration of sex education can be described as: promoting heterosexuality, sexual conservatism, and strict anti-miscegenation.

The impact of this perspectives on sex and sexuality in South Africa cannot go understated. For starters, the main victims of prosecutions and convictions under the immorality act were disproportionately, white and non-white men and non-white

⁴¹ SE Duff (n37 above) p 216.

⁴² SE Duff (n37 above) p 217.

⁴³ SE Duff (n37 above) p 220.

⁴⁴ SE Duff (n37 above) p 224.

⁴⁵ SE Duff (n37 above) p 221 – 223.

⁴⁶ SE Duff (n37 above) p 234.

⁴⁷ SE Duff (n37 above) p 235.

women.⁴⁸ While many of these convictions resulted in suspended sentences, social ostracization was an expected consequence with many white men killing themselves.⁴⁹ Another profound impact of this perspective of sex and sexuality is that white women have had it instilled in their communities to have a general abhorrence for non-whites, with a specific distaste for the black African male, which led to fewer convictions of white women but also a negative perspectives of non-white men by white women.⁵⁰ From the above, it would be difficult to construct the societal response of the purported sexual deviancy as disconnected from the education received on the subject and the general goals of the state. The heteronormative and racist objectives of the Apartheid state, together with the general sexual conservatism of the society normalised the poor treatment of sexual minorities and alternative constructions of heterosexual relationships as well.

2.3 The 21st Century

A shift in the established societal approach to sex and sexuality would be on the horizon for 21st century South Africa, and nowhere is this clearer than in 1987 which was the year of the last 'whites only' election in South Africa.⁵¹ The significance of this election lies in the fact that it is an example of the shift in the politics of sex and sexuality in South Africa be used as a political power play to maintain power. In 1987 the National party sought to win the votes of the constituency of Hillbrow Johannesburg by fielding a candidate that was Pro-Gay rights.⁵² Hillbrow was a known gay community in the Transvaal at the time, with the Gay Association of South Africa's first national office being established in the area.⁵³ In addition Hillbrow was known for the community's flagrant disregard for the Group Areas Act, legislation focused on segregating South Africans along racial lines.⁵⁴ In the wake of a state of emergency, growing disillusion of faith in the Apartheid system among white South Africans, the

⁴⁸ A La Guna 'The Immorality Act: South Africa's Sex Law' (1970) *United Nations Department of Political and Security Council Affairs: Unit on Apartheid* p 3.

⁴⁹ La Guna (n48 above) p 3.

⁵⁰ La Guna (n48 above) p 4.

⁵¹ D Conway 'Queering Apartheid: The National Party's 1987 Gay Rights Election Campaign in Hillbrow' (2009) 34(4) *Journal of African Studies* p 849.

⁵² Conway (n51 above) p 849.

⁵³ Conway (n51 above) p 850.

⁵⁴ Conway (n51 above) 850.

Apartheid government sought the white queer vote to gain white unity again and reassert itself as the main hegemonic force in South Africa.⁵⁵

This position is strange given the National Party's known exclusion of queerness from the cultural identity, even associating same-sex relationships as a reason behind the fall of Rome.⁵⁶ This shift in the positioning of queer voices in the politics of power, was not limited to the National Party, and even saw inclusion in the African National Congress' democratisation project, with Thabo Mbeki stating the African National Congress' commitment to LGBTQI+ advocacy within the anti-Apartheid movement.⁵⁷ This commitment would materialise in the CODESA⁵⁸ negotiations with queer individuals lobbying for the inclusion of sexual orientation as part of the grounds of discrimination in the formulation of the equality clause.⁵⁹ These developments would open the door to a barrage of developments in the legal recognition of same-sex relationships in South Africa. However, same-sex relationships remain heavily stigmatised in South Africa, and receive little attention in studies concerning their vulnerability to HIV/AIDs and similar sexually transmitted infections.⁶⁰ This invisibility in their vulnerability extends to the way South African sex education has evolved alongside these developments.

In the post-Apartheid manifestation of sexual education, the approach has changed as while keeping some of the already established features of its 20th century counterparts. The approach to sex and sexuality education is still primarily one that promotes abstinence, neglects any meaningful discussion of sexual minorities and has a scientific approach to exposing sex, with the added dimension of HIV/AIDs as a core part of the curriculum. In the 2000s, the South African government saw prioritising schools, as a place where the dissemination of information on HIV/AIDs as an

⁵⁵ Conway (n51 above) 850.

⁵⁶ Lennox & Waites (n24 above) p 316.

⁵⁷ Lennox & Waites (n24 above) p 319.

⁵⁸ CODESA is the acronym for the Convention for a Democratic South Africa, which was a bilateral multi-party convention geared toward negotiating the present day South African constitution and the end of Apartheid.

⁵⁹ Lennox & Waites (n24 above) p 321.

⁶⁰ GB Evans et al 'HIV Risk Among Men Who Have Sex with Men, Women Who Have Sex with Women, Lesbian, Gay, Bisexual and Transgender Populations in South Africa: A Mini-Review' (2016) *The Open Aids Journal* p 49.

intervention in curbing the spread of HIV/AIDs in South Africa, which saw the inclusion of HIV/AIDs into the Life Orientation syllabus.⁶¹

From the above, the main thesis of this section has been thoroughly explained and substantiated, the overarching goals of the state inform the direction of sex and sexuality education. This brings the discussion to what informs the South African sex education of the 21st century as opposed to what informed the sex education of the 20th century. This can be understood by understanding that the governance of the 20th century was informed by a system of parliamentary sovereignty, where the whims of the ruling party would be prioritised as the driving force and guiding hand of and policy consideration.⁶² In contrast the South African governance of the 21st Century is premised on the notion of constitutional supremacy which sees the Constitution of the Republic of South Africa as the supreme law of the country and is premised on establishing a society on Human Rights.⁶³ Considering these progressive reforms into the South African socio-cultural consciousness, and these insertions finding their incorporation into the syllabus are a positive incorporation worthy of praise. The new foundations of South African governance infer a legal obligation on what comprehensive sexual education is required to be.

3. Understanding Comprehensive Sexual Education Considering in the Present Socio-legal context

The requirements that inform the overarching goals for governance in South Africa can broadly be summed as human rights obligations that the State has toward its citizens. The sources of law for these obligations can be regarded as emerge through treaties concluded regionally and treaties the 1996 Constitution of the Republic of South Africa⁶⁴, hereafter referred to as the Constitution. These sources interact with the discussion on comprehensive sexuality education, wherein the government objectives are often reflected in the way in which the government polices sex and sexuality, this informs what the sex and sexuality education curriculum fixates itself with.

⁶¹ N Ahmed et al 'HIV education in South African schools: The dilemma and conflicts of educators' (2009) 37 *Scandinavian Journal of Public Health* p 48.

⁶² B Bekink *Principles of Constitutional Law 2nd Edition* p 71.

⁶³ Bekink (n62 above) p 77.

⁶⁴ The Constitution of the Republic of South Africa, 1996.

South Africa's goals for governance can be regarded as operating on three levels. The first layer can be said to operate domestically from the Constitutional obligations imposed by the Constitution of the Republic of South Africa and national legislation enacted to give effect to the rights in the Bill of Rights. The second layer can be regarded as the regional obligations that South Africa has agreed to abide by in terms of regional treaties of the African Union hereafter AU. The final layer that South Africa's overarching governance goals can be said to operate on is the international level through treaties South Africa has entered at the United Nations, hereafter UN, level.

As discussed below the obligations on what education needs to be balanced against what parents desire for their children and this creates a balancing act that will be discussed in the proceeding chapter. The need to highlight this conflict stems in that the same framework that establishes the overarching considerations that governance strives toward, also places within it, the desires of parents as well. As the previous chapter has discussed through movements like #LeaveOurKidsAlone, what parents want and what kids need are in dissonance, and this dissonance creates a conflict in the operation of the framework that currently informs sex and sexuality education in South Africa today.

3.1 International Obligations

The first of the international law treaties to discuss will be the Convention on the Rights of the Child, hereafter CRC. Created to delineate the political, economic, social and health rights of children in the world.⁶⁵ South Africa, is a signatory of the aforementioned international treaty and thus has obligations imposed on the State.⁶⁶ However, as South Africa is a monist-dualist state the obligations of this treaty only apply at the state level and have not been concretised as law applying to natural and juristic persons equally in the country.⁶⁷ This is important as this means that the duty to realise the obligations imposed by the treaty only extend to the State and not individual citizens or organisations and thus is only enforceable at this level and not the latter level. In terms of article 3(1) of the CRC, in all actions concerning the child

⁶⁵ Convention on the Rights of the Child Preamble.

⁶⁶ South Africa Ratified this treaty on 16 June 1995.

⁶⁷ J Dugard et al *Dugard's International law: A South African Perspective 5th Edition* p 64.

whether taken by public or private social welfare, courts of law, administrative or legislative bodies the best interests of the child are of primary consideration.⁶⁸

The United Nation's Committee on the Rights of Children in, General Comment No.14 on the right of the child to have his or her best interests taken as a primary consideration to be interpreted as: ensuring that a child's best interests are appropriately integrated and consistently applied in actions taken by public institutions which directly or indirectly impact children. Further, the best interests of children should also require a body that decides on behalf of children to demonstrate that the interests of children have been taken into consideration by adequately illustrating how the interests of the child have been assessed and examined and what weight has been assessed.⁶⁹ In terms of article 13(1) of the CRC the child shall have the right to freedom of expression which includes the right to receive and impart information,⁷⁰ in addition article 14(1) requires State parties to respect the rights of freedom of thought, conscience and religion of children and article 14(2) further requires State parties to respect the rights and duties of parents to provide direction in exercising this right in a manner consistent with the evolving capabilities of a child.⁷¹ In addition in terms of article 19(1) state parties are obligated to, among other measures, take educational measures to ensure children are protected from mental violence, sexual abuse, poor treatment while in the care of a parent or guardian.⁷² Further, article 24(1) of the CRC requires state parties to attain the highest standards of health which requires states to implement education on family planning.⁷³ Finally article 34 of the CRC, states that states have an obligation to protect children from all forms of sexual exploitation and must take measures to prevent children from being exploited sexually.⁷⁴ Therefore, under international law the child has a right to have their interests be a primary consideration that must adequately be demonstrated to be considered consistently and appropriately integrated, and their right to freedom of expression is administered under the direction of the parent or guardian. In addition, children are to be protected

⁶⁸ Convention on the Rights of the Child Article 3(1).

⁶⁹ General Comment No.14 on the right of the child to have his/her best interests taken as a primary consideration paragraph 14(b).

⁷⁰ Convention on the Rights of the Child Article 13(1).

⁷¹ Convention on the Rights of the Child Article 14(1), Article 14(2).

⁷² Convention on the Rights of the Child Article 19(1).

⁷³ Convention on the Rights of the Child Article 24(4).

⁷⁴ Convention on the Rights of the Childs Article 34.

by parents and guardians from sexual abuse, and the state should take steps to educate children on sexual abuse and protect children from sexual exploitation.

The above relates to the right to sex and sexuality education on the basis that: denying a child to receive information (in this instance about sex and sexuality) would be an infringement of the rights under the CRC, and the parent has the authority to give direction in the child's exercise of this right, bearing in mind these obligations. Therefore, at the international level the State must provide comprehensive sex and sexuality education that has appropriately integrated the interests of children and demonstrated to adequately have considered their best interests. However, in considering the best interests of children the State is obligated to respect the direction that a parent offers as far as the application of the child's right to receive information is concerned.

The next international law treaty is the International Covenant on Civil and Political Rights, hereafter ICCPR. Created to see that States commit to respecting the civil liberties of its citizens across the legislative, administrative, and judicial levels which includes the right to life, freedom of conscience and religion as well as the right to a fair trial.⁷⁵ In terms of article 18(1) of the ICCPR, everyone has the right to freedom of thought, conscience and religion, this includes the right to adopt a religion or belief of choice and the ability to manifest those private or public beliefs without fear of sanction.⁷⁶ In terms of article 18(4) State parties have an obligation to show respect for parents and legal guardians to ensure religious and moral education of their children conform with their own convictions.⁷⁷

The implications that these obligations have for sex and sexuality education in South Africa are two-fold: whereas it was established in the previous chapter that the social circumstances of that young South Africans find themselves facing sees the requirement for a sex and sexuality education curriculum that is responsive to their social context would require an intervention on the part of the State. Thus, the State is required to respect that the education offered conforms with the religious and moral convictions of the parent and child, whose right to receive information is directed by the parent. Secondly, it means that where a parent's considerations are contrary to a

⁷⁵ International Covenant on Civil and Political Rights Preamble.

⁷⁶ International Covenant on Civil and Political Rights Article 18(1).

⁷⁷ International Covenant on Civil and Political Rights Article 18(4).

State's obligation to decide in the best interests of children insofar as the right to receive information is under the direction of the parent, is required to take into account the convictions the child may be exposed to under that direction offered by the parent. In terms of article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) everyone has the right to education directed at the full development of the human personality enabling them to participate fully and freely in society.⁷⁸ Furthermore, the Convention to Eliminate All forms of Discrimination Against Women (CEDAW) finds applicability, to this discussion. In terms of article 10 of CEDAW, state parties are obligated to ensure the elimination of all forms of discrimination against women through education that eliminates stereotypes of women's gender roles and eliminate the factors that lead to pregnant learners dropping out of school.⁷⁹

3.2 Regional and Sub-Regional Obligations

The first regional instrument that is applicable in the South African case is the African Charter on the Rights and Welfare of the Child, hereafter African Children's Charter. Created to speak directly to the challenges faced by children on the African Continent by delineating the rights of children and the obligations of the State to children on the African continent.⁸⁰ In terms of article 11(1) of the African Children's Charter, every child has the right to education and that education is to be aimed at promoting the development of the child's personality and physical ability and is premised around fostering respect for human rights and fundamental freedoms and values and preparing a child to participate in society freely and responsibly.⁸¹ In terms of article 11(4) of the African Children's Charter State parties are required to respect the rights and duties of parents to ensure the religious and moral education of the child in a manner consistent with the evolving capacities of the child.⁸² Furthermore, article 27 of the African Children's Charter state parties are to take steps to protect children from all forms of sexual exploitation, and to ensure that children are not coerced into sexual activity; prostitution and child pornography.⁸³ In terms of General Comment no.3 of the African Children's Committee; requires states to incorporate education to raise

⁷⁸ International Covenant on Economic Social and Cultural Rights article 13(1).

⁷⁹ Convention to Eliminate all forms of Discrimination Against Women article 10(1)(a) – (c).

⁸⁰ African Charter on the Rights and Welfare of the Child Preamble.

⁸¹ African Charter on the Rights and Welfare of the Child Article 11(1), Article 11(2)(a).

⁸² African Charter on the Rights and Welfare of the Child Article 11(4).

⁸³ African Children's Charter article 27(1)

awareness on the inducement of children into sexual activity as a part of education.⁸⁴ Even though the African Committee on the Rights and Welfare of the Child, (African Children's Committee) is yet to make any strong pronouncement of sexuality education, the African Commission on Human and People's Rights (African Commission), has. In terms of the African Commission resolution on protection against violence and other human rights violations against persons based on their real or imputed sexual orientation or gender identity, hereafter 'resolution 275'; calls on State parties to ensure an enabling environment that is free of stigma for sexual minorities.⁸⁵

The implications this has in informing the human rights orientation toward sex and sexuality education are like that stated at the international law level. However, it differs in that the right to education offers a more comprehensive and purpose behind what is expected of a state in assisting a child to participate in society, when juxtaposed against article 11(4) of the African Children's Charter the parent's role is moral and religious education which can be read to be distinct and separate from the obligations under article 11(1) and 11(2)(a). In addition, the obligations imposed by resolution 275 require the education to promote an enabling environment that is free of stigma for sexual minorities.

Another instrument relevant to the human rights orientation toward sex and sexuality is the Protocol to African Charter on Human and Peoples' Right on the Rights of Women in Africa (Maputo Protocol). In terms of article 14 of the Maputo Protocol, state parties are obligated to ensure that the right to health of women which includes sexual and reproductive health, which includes: the right to control fertility, choice of contraception, the right to family planning education.⁸⁶

Another regional instrument the SADC Model Law on HIV in Southern Africa, was created to serve as a collaborative government intervention to the HIV epidemic in the region through legislative means.⁸⁷ In terms of article 5(1) of the Model Law on HIV state parties are required to have their health ministry and education ministry to collaborate in producing instruction on the nature and transmission of HIV and other

⁸⁴ African Children's Committee General Comment no.3 para 66.

⁸⁵ In terms of the African Commission resolution on protection against violence and other human rights violations against persons based on their real or imputed sexual orientation or gender identity

⁸⁶ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa article 14(1).

⁸⁷ Model Law on HIV in Southern Africa Preamble.

sexually transmitted diseases in basic and tertiary education.⁸⁸ The implications on sex and sexuality education is that it is required to be done in collaboration with the South African Ministry of Health.

3.3 Domestic Obligations

At the domestic level section 29 of the Constitution guarantees the right to basic education,⁸⁹ the content of the right to basic education requires one to understand basic education as the education offered to learners to meet the changing requirements of a changing society.⁹⁰ The State is thus required to offer education that is available, accessible, acceptable and adaptable.⁹¹ In South African jurisprudence, the courts adjudicate on the right to education within the prism of the interrelated rights such as the right to access to information and just administration and the best interest standard.⁹² However, where this right differs from socio-economic rights in that it is not a right that is progressively realised, but a right that is meant to be realised immediately.⁹³

Thus, considering the above, South African sex and sexuality education has many obligations that it must meet on the three levels explained above, and at the domestic level this means that the onus falls on the minister of education. In terms of the National Education Policy Act 27 of 1996, the Minister shall determine national education in accordance with the Constitution and the National Education Policy Act by determining a policy for the planning, provision and management of curriculum frameworks and core syllabuses and education.⁹⁴ The principles that inform the directive principles of national education policy is aimed at advancing and protecting the rights enshrined in the Bill of Rights.⁹⁵ In addition, the Children's Act 38 of 2005 (Children's Act) in terms of section 1, the Children's Act defines 'care' as including the guiding, direction and securing the education of a child.⁹⁶ Furthermore, the Children's

⁸⁸ Model Law on HIV in Southern Africa Article 5(1).

⁸⁹ Constitution of the Republic of South Africa 1996 section 29.

⁹⁰ C Churr 'The Realisation of a Child's Right to a Basic Education in the South African School System: some lessons from Germany' (2015) 18(7) *PELJ* p 2413.

⁹¹ Churr (n90 above) p 2414.

⁹² Churr (n90 above) p 2416.

⁹³ Churr (n90 above) p 2416.

⁹⁴ National Education Policy Act 27 of 1996 section 3(4)(l).

⁹⁵ National Education Policy Act 27 of 1996 section 4.

⁹⁶ Children's Act 38 of 2005 section 1(1)(e).

Act codifies the best interests standard in section 9 and therefore the duty to care for children is subject to section 9 of the Children's Act as well.⁹⁷

Almost coming full circle, the expectations of the state have gone from being dictated to the education system and now have become requirements of the education system. The current framework that informs sex and sexuality education is one that places at its core human rights. The nature of the obligations imposed through human rights mechanisms can be construed as a step away from the sexual conservatism of the 19th and 20th Century and a step toward comprehensive information in assisting children to navigate the world of their sex and sexuality in a context that responds to their reality. As will be discussed in subsequent chapters; the issue of sex and sexuality education can now be said to go beyond clinical reproductions of sex as an act but include hygiene, tolerance for sexual minorities, safe sex practices for both heterosexual and sexual minorities in a manner that matches the evolving capabilities of the child in their social context.

⁹⁷ Act 38 of 2005 section 9.

Chapter 3: Sex and sexuality education

1. Introduction

This chapter sets out to analyse understanding the concessions that parents are required to make in the sex and sexuality education of their children. There has been limited litigation on the subject in South African courts that speak directly to sex and sexuality education, however together with what there is; the decisions of the European Court of Human Rights and the courts of neighbouring Southern African countries, specifically Uganda, offer insight. The rights of parents in their say over the content of their children's education is limited, and these analogous jurisdictions offer insights that are equally applicable to the South African situation.

Often, when parents aver a right to have a say in the substance of their children's education they rely on the right to family life, freedom of conscience and privacy. The rights being the source of where the right to have a say in their children's education emerges, such is the case in provisions like article 8 of the European Charter for Human Rights. However, case law shows that the limitation of these rights in the context of comprehensive sex and sexuality education is premised on the State's prerogative to educate its citizens as a matter of public safety and public health.

However, of interest, is the absence of any explicit reference to the 'best interests standard,' in many of these discussions which may add to the South African discussion to the concessions that parents must make to enable effective sex and sexuality education in South Africa.

2. A Child's Right to Sex Education

The child can have a sexual character premised around innocence and ideological chastity. Or in the inverse, where the child is sexually active and not living to the standards set out in the initial a construction; the child is a sexual deviant with negative intentions for any unsuspecting child or adult who is unlucky enough to engage in sexual activities with them.⁹⁸

⁹⁸ G Kangaude *et al* 'Childhood Sexuality in Africa: A Child Rights Perspective' (2020) *African Human Rights Journal* p 689.

In discussing the first construction, children in the African context are uniquely placed in their obstacles around sex and sexuality. One area where this is clear is in the realm of pre-mature child bearing, sexual violence and abuse and the heightened risk of sexually transmitted disease and infection that come about as a result of the former.⁹⁹ Socio-cultural roles have defined innocence and gender roles that see sex as a spoiling agent and thus informs the cultural responses to sexual abuse and primarily the sexual agency of children.¹⁰⁰ 'Sexual agency,' in this instance refers to an individual's belief in their ability to act upon their sexual needs in a relationship, such as enjoying or refusing sex, and insisting on the use of protection and other contraception.¹⁰¹ Most African customs, construe a child as existing without sexual agency, being asexual and sexually inactive.¹⁰² Children are seen as requiring rescue from sex and imposed sexuality and sees these children as victims in any and all sexual encounters.¹⁰³ As a result, sex and sexuality are regarded as being unchildlike and therefore inappropriate for children's sensibilities.¹⁰⁴

In the inverse discussion of sex and sexuality, the sexually active child is a predatory character, who exists with negative intentions. Nowhere is this construction any clearer than in legislation directed toward sexually active children. In South Africa for instance, prior to its invalidation by the Constitutional Court, section 15(1) and 16 of the Sexual Offences and Related Matters (SORMA), criminalised consensual and non-consensual sexual behaviour between to children. Thus, a child who is the victim of sexual violence could face criminal charges for being a minor engaged in sexual activity with another child regardless of consent. The consequence of this comes in the fact that minors who are sexually active who seek assistance in obtaining contraception or the termination of pregnancy and other sexual and reproductive health services are at risk of conviction under these provisions.¹⁰⁵ In addition, still present in the text of SORMA is the defence that can be relied upon in terms of section 56(2), a person may escape criminal liability for having sex with a child where they

⁹⁹ Kangaude (n98 above) p 689.

¹⁰⁰ Kangaude (n98 above) p 690.

¹⁰¹ Kangaude (n98 above) p 690.

¹⁰² Kangaude (n98 above) p 693.

¹⁰³ Kangaude (n98 above) p 693.

¹⁰⁴ Kangaude (n98 above) p 694.

¹⁰⁵ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

were deceived by the child into believing that the child was an adult at the time of the offence.¹⁰⁶

From the two examples above, the South African legal framework concerning age of consent laws reflects an attitude that promotes the idea of children either being asexual and without sexual agency or in the instance where children are sexually active, it is met with criminalisation or the child was out to deceive the major adult into believing that they were of age in the first place. Another example of similar constructions is the case of *Charo v The Republic of Kenya*, in this matter, an adult male had a consensual sexual relationship with the child complainant (14 years old).¹⁰⁷ The appellant Mr Charo relied on the defence that she was deceived into believing that the child was an adult, and the court agreed with him, going as far as to say:

*"She left her parents' home and went to the appellant's house purposely to have sex. The appellant should not be condemned for the voluntary acts of the complainant. The complainant was enjoying the relationship. I do find that the appellant falls within the defence under section 8(5) of the Sexual Offences Act. It is PW1 who behaved like an adult and engaged in sexual intercourse."*¹⁰⁸

The above, again serving as proof of the construction of children who do exercise some form of sexual agency as being 'adult like' and deceptive and malicious in their practice of sex. However, the constructions of who the sexually active child is does not end here. It extends further into the realm of how children perceive themselves with respect to their sexuality. This relates to the content that parents wish to have a say in, in that parents have a vested interest in the idea of their child as living up to the standards established under the former construction as opposed to the latter. This creation of what the sexually active child is, extends to what the parent believes their sexually chaste child should know.

In the South African experience, In *Republican Publications (Pty) Ltd v A Committee of Publications*,¹⁰⁹ brought before the films and publications board; Broadcasting complaints commission of South Africa as well as the Publications Appeal Board a complaint was brought before the Publications Appeal Board, the magazine *Love and*

¹⁰⁶ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 section 56(2).

¹⁰⁷ *Martin Charo v Republic* [2016] eKLR p 1 – 3.

¹⁰⁸ *Martin Charo v Republic* [2016] eKLR p 5.

¹⁰⁹ *Republican Publications (Pty) Ltd v Publications Control Board* 1971 (1) PH M19 (CPD) p 55.

Life published a series of articles and letters to a column titled ‘dear doctor’ that were considered inappropriate. The first letter was titled, “Up with the pill” and was an inquiry into the many forms of contraception available to women. At the crux of the complaint was that the magazine was targeted at a varied audience, which included young women aged 16 and promoted unmarried women to engage in pre-marital sex.¹¹⁰ Another letter asked whether or not a woman could continue to have sex with her partner while she is pregnant and another image featured a woman who is scantily clad also regarded as being highly inappropriate for young women.¹¹¹ In another complaint to the Publications Appeal Board, a cartoon depicted an old man, chased out of bed by his wife and is left to sleep in another room, and then his wife who then proceeds to get into bed with their domestic helper alluding to sexual relations between them. The implication of lesbianism regarded as harmful to society and the target audience which also included 16 year old children.¹¹² In another complaint to the films and publications board, a two videos titled “safer sex 1” and “safer sex 2” which were instructional videos for safe sex between homosexual and heterosexual couples respectively was deemed to be not suitable for general audiences and thus having a limited distribution.¹¹³ In making its decision the Films and Publications Board remarked that:

“In terms of the moral standards of the South African community, sex is a matter of great sensitivity which needs to be handled with care and circumspection.”¹¹⁴

Finally, in *Whittaker v Multichoice*, Multichoice had a complaint to the Broadcasting Complaints Commission of South Africa made against it due an ad for a sex tourism documentary being aired on the National Geographic channel at a time where children could potentially see it, to call for its removal, the sexual nature of the material was discussed and the partial nudity and depictions of sexuality were regarded as inappropriate for children, thus the complaint was upheld.¹¹⁵ In its decision to uphold the complaint the Broadcasting Complaints Commission of South Africa explained that,

¹¹⁰ *Republican Publications (Pty) Ltd v Publications Control Board* p 56.

¹¹¹ *Republican Publications (Pty) Ltd v Publications Control Board* p 57 – 60.

¹¹² *Republican Publications (Pty) Ltd v Committee of Publications* 1990 (1) PH M15 (PAB) p 38.

¹¹³ *Reel Communications v A Committee of Publications* 1993 (2) PH M13 (PAB) p 43 – 44.

¹¹⁴ *Reel Communications v A Committee of Publications* p 43.

¹¹⁵ *Whittaker v Multichoice* [2013] JOL 30326 (BCCSA).

“Sex is regarded as a topic where adult guidance is required. To simply thrust upon younger children promotional material in a programme where there is no age limit, and at that time of the morning, is unsuitable.”¹¹⁶

A cursory view on the nature of the complaints is concerned with the expression of sexuality and the dissemination of information concerning sexuality; be it conventional or even “deviant” sexualities. Their impropriety for the eyes of children being premised around the need for guidance that children require to understand the sex and sexuality information before them. It can further be seen from the complaint against *Love and Life* that elements on sexual morality of unmarried women were also a concern on whether children could see the matter in the publication. The examples are indicative of the fact that not only is sex a taboo for the asexual child, but so is sexuality. This has implications on the understanding of the child’s sexual agency to begin with and what that means. In addition, the fact that these complaints were targeted at the accessibility of information to children as seen in the *Whittaker* case, a part of the complaint was the time that the ad was being run, could have children see the inappropriate content, sees the role of parents in what they wish for their children to know and what they do not wish for their children to know even where it is instructional as seen in the matters concerning the safer sex videos.

From the above, it has been established that children have been constructed to be without agency over their sexuality and sex. The ideal child is sexually inactive; it is the one who lives up to the notions concerning chastity and asexuality and the sexually active child is immoral for acting upon unchildlike acts, worthy of criminalisation. The desire for parents to have a say over their child’s sex education comes from the desire for the child to live up to these values established above. However, as will be further elaborated upon below the interests of the State through the executive are misaligned with those of parents in this regard and this misalignment requires children to know more of sex and sexuality.

¹¹⁶ *Whittaker v Multichoice* para 9.

3. A clash of obligations between the State and parents

Under article 34 of the Convention on the Rights of the child the State has an obligation to protect children from sexual abuse and exploitation.¹¹⁷ The State sees child sex and sexuality differently from individual parents in that the State tends to adopt the mindset of public safety and public health. This manifests in the State introducing sex and sexuality education into school curriculums usually come about as a component of State interventions concerning public safety or public health or both. According to the world health organisation one in five women and one in thirteen men report being sexually abused as children.¹¹⁸ The way this clash manifests itself with the expectations that parents have on what the child's perpetual state of innocence in sex and sexuality is the state's needs to intervene in reducing the spread of sexually transmitted diseases as well as to curb sexual abuse. However, parents feel that it is within their area to discuss these subjects with their children and their response is to remove the child from the class. A discussion of case law domestic and foreign will illustrate this.

AR & LR v Switzerland

AR & LR v Switzerland is an example of the State's interests in public safety clashing with the parent's presupposed role in educating their children on sex and sexuality. In *AR v LR v Switzerland* a Swiss mother had unsuccessfully petitioned the school of her seven-year-old daughter to exempt her from the 'sex education' classes at school.¹¹⁹ The classes were part of mandatory learning objectives for learners between 4 – 8 under a cantonal¹²⁰ directive from the Swiss education department. The parent found that sex education at that age was a pre-mature and its mandatory nature interfered with the parent's role to educate their children. The Swiss Federal Court dismissed their appeal.¹²¹

¹¹⁷ Convention on the Rights of the Child article 34.

¹¹⁸ <https://www.who.int/news-room/fact-sheets/detail/child-maltreatment#:~:text=Key%20facts&text=One%20in%205%20women%20and,form%20of%20forced%20sexual%20contact>. (accessed: 20 September 2024).

¹¹⁹ *AR & LR v Switzerland* ECHR 021 (2018) p 1.

¹²⁰ In Switzerland the provinces are divided into 'Cantons' as opposed to counties, or provincial departments. It is a segmented administrative division.

¹²¹ *AR & LR v Switzerland* p 1.

On appeal to the European Court of Human Rights the applicants relied on article 8 and article 9 of the European Convention on Human Rights namely, the right to family life and freedom of conscience.¹²² Per article 8 of the European Convention on Human Rights, everyone has the right to respect for his or her private and family life, and there shall be no interference by a public authority barring instances where it is prescribed by law that is justifiable in an open and democratic society.¹²³ The court found that article 8(1) did not explicitly provide for a parent's right to educate their children; however, it was not entirely ruled out in its applicability through inference that family life would include the right to teach a child about sex and sexuality.¹²⁴

On the right to family life and privacy, article 8(1) cannot be read in isolation, the court pointed out that the interference in question was done in terms of a law. In this instance a cantonal directive, the federal constitution of Switzerland provided for a mandatory curriculum in state schools including the life sciences curriculum which includes sex education. In addition, sex education sought to protect the health of children in the following ways: sexual abuse poses a real threat to the physical and mental health of children which has to be protected at all ages and thus there is a vested interest in ensuring children have access to such education.¹²⁵ It is more important to bear in mind that children receive all kinds of information on the subject of sex and sexuality from various sources many of which may prove to be unreliable and the government's interference is a means to deliver this information in as objective a manner with all the affected interests considered.¹²⁶ Thus, in the court's view the state's interference has a legitimate aim which would be an intervention that is prescribed by law that is acceptable in an open and democratic society. The law in this instance was aimed at curbing sexual abuse in children and thus aimed at public safety.

In its discussion on the right to family life, the court also raised article 5 of the UNCRC. Per Article 5 of the UNCRC, "States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving

¹²² AR & LR v Switzerland p 6.

¹²³ European Convention on Human Rights article 8.

¹²⁴ AR & LR v Switzerland p 2.

¹²⁵ AR & LR v Switzerland p 2.

¹²⁶ AR & LR v Switzerland p 2.

capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention".¹²⁷ The link that the court has established in this regard shows a link between a child's evolving capacity and parent's freedom to give direction and guidance considering their evolving capacities and therefore explains that the considerations of a child's evolving capacity is not an end but rather an indication of the level of guidance required that is conducive to the child's well-being.¹²⁸ The interpretation is said to be in the spirit of the convention as: education is assigned the role of protecting children against all forms of mental injury or abuse and to prepare children to participate responsibly and live life in a free society.¹²⁹ The court found that these were the aims of the cantonal directive and thus the Swiss government had not overstepped in their mandates per article 5 of the United Nations Convention on the rights of the child and thus their concerns were manifestly ill founded and therefore denied their opposition on the basis of the right to family life.

Insofar as their objections in terms right to freedom of thought, conscience and religion is concerned; the parents raised article 9 of the European Convention on Human Rights. Per Article 9, everyone has the right to freedom of thought and conscience and this right is limited subject to the laws of general application.¹³⁰ The court found that this article can be ruled out for the same reasons that the objections concerned around the right to family life were dismissed.

From what we see in this example, the state's goals concerning public safety and the link that it has with the right to education; a child's evolving capacities and who a child grows into.

Dojan v Germany and 4 Other Applicants

In *Dojan v Germany* the applicants were the parents of children who described themselves as evangelical Baptists with strong convictions; the applicant's children attend a school which sees mandatory sex education from the fourth year of schooling.¹³¹ This sex education is a part of the federally mandated part of the

¹²⁷ United Nations Convention on the Rights of the Child Article 5.

¹²⁸ AR & LR v Switzerland p 12.

¹²⁹ AR & LR v Switzerland p 12.

¹³⁰ European Convention on Human Rights article 9.

¹³¹ *Dojan and Others v. Germany (dec.)* 319/08 p 2.

curriculum known as ‘*Mein Körper gehört mir*’ (my body is mine).¹³² The programme sees sex and sexuality education classes scheduled and accordingly every year and is targeted against informing children to report sexual abuse among a myriad of other topics.¹³³ Accordingly, parents who feel uncomfortable, like the applicants, pull their children from school so that they do not attend the classes.¹³⁴ Their line of reasoning being: their children had been raised free of influences of media and were raised to be modest and chaste and therefore they lacked the maturity to understand the subject matter.¹³⁵ This is a variation of the arguments raised in *AR & LR v Switzerland*. However, this has the caveat of the child’s sources of information, per the parent’s own admission, is limited. The Parents’s continue their objections in explaining that, the content in the books on the subject are pornographic and contrary to Christian sexual ethics which require sex to be limited to matrimony and the sex liberal perspective prematurely sexualises children.¹³⁶ The parent’s approach the European court of Human rights citing the same provisions that were cited in the *AR & LR v Switzerland* mainly, the right to religion and freedom of conscience and the right to family life and privacy.¹³⁷ However, the applicants included an additional ground in stating that they were being discriminated against on the basis of their religion.

The Court found that the German education system seeks to impose federally mandated compulsory elementary school attendance aimed at integrating children with society and preventing the emergence of a parallel society.¹³⁸ Sexual education should encourage tolerance between humans irrespective of their sexual orientation and identity and together with public safety considerations the court found the parent’s arguments to be ill founded.¹³⁹ In this instance the concerns of equality were addressed through identifying the social cohesion as a state interest; and thus the claims of discrimination again were refuted through the lens of state interests as opposed to personal or the best interests of the child.

Centre for Health, Human Rights and Development v Attorney General and Others

¹³² *As above*.

¹³³ *Dojan and Others v. Germany* p 3.

¹³⁴ *As above*.

¹³⁵ *As above*.

¹³⁶ *Dojan and Others v. Germany* p 3 – 4.

¹³⁷ *Dojan and Others v. Germany* p 5 – 9.

¹³⁸ *Dojan and Others v. Germany* p 14.

¹³⁹ *Dojan and Others v. Germany* p 15 – 18.

This is a Ugandan review application done in terms of the Ugandan Constitution to invalidate the ban on comprehensive sexual education in Uganda. This is an example of where the State is in the opposite position to the parents in *Dojan* and *AR & LR v Switzerland*; where the State was the one in favour of the sex education, while the non-governmental organisation is pushing for sexual education's integration. In this matter the Minister of Sport & Education's delay or omission to issue a policy on Comprehensive sexual education due to Parliament's ban on comprehensive sexual education is a violation on the rights to access to information and education.¹⁴⁰

The Centre for Health, Human Rights and Development argued that the ban is bad and leaves young person's vulnerable to: abusive relationships; associated health risks and unintended pregnancy.¹⁴¹ The attorney general deposed the submissions on the basis that the government recognised sex education and not comprehensive sexual education even contending that the latter is bad as it promoted the liberalisation of sex among children and promotes the illicit sexual conduct such as homosexuality and masturbation.¹⁴²

The court found that; Uganda was party to a variety of international conventions coming to the conclusions that comprehensive sexual education is an obligation in terms of these statutes and thus is law and must apply it as a party to these conventions.¹⁴³ Therefore, the rationale behind not recognising comprehensive sexual education is immaterial and therefore there is no justification for the delay by the Ministry.¹⁴⁴

In this example, the State still speaks to concerns of public safety as opposed to that of the best interests of the children in their objection to comprehensive sexual education.

South Africa

In the previous chapter it has been established that there is an existing framework that requires sex and sexuality education to live up to. The case law above, establishes a

¹⁴⁰ Centre for Health Human Rights & Development and 3 Others v Attorney General (CEHURD) (2011) para 1 – 3.

¹⁴¹ As above para 4.

¹⁴² Centre for Health Human Rights & Development and 3 Others v Attorney General para 4.

¹⁴³ As above paras 9 – 17.

¹⁴⁴ As above paras 16 – 18.

basis that sees sex education as a matter of public safety and public health from the public law perspective.

4. Parent-Child relationship and sex education

Finally, parents need to concede on what they assume the rights of parents are in the sex and sexuality education of their children by re-evaluating who their child is in their ideal against who the child is. As established above, the South African child, ideally, is sexually inactive;¹⁴⁵ their knowledge of sex is dictated to them by their parents in the moral background that informs their knowledge on sex, and more importantly, sexuality. The child in the parent's mind has no sexuality and should show no curiosity directed toward that aspect of sex.¹⁴⁶ In reality, sexual curiosity and sexual activity in adolescence is not only developmentally normative, but to render it as illegal or a taboo poses a series of risks to public safety and health as was the discussion in *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another*.¹⁴⁷

In South Africa, sexual behaviour between minors begins well under 16 years of age and young adolescent sexual behaviour correlates with a series of risky sexual behaviour such as unprotected sex; multiple partners and social and emotional difficulties.¹⁴⁸ The aforementioned existing in the same South Africa with socially conservative views on sex and sexuality; young teenagers are definitely exploring a variety of sexual behaviours that are developmentally normative as they discover these on their own or among their peers.¹⁴⁹

The proving that children have sexual identities and agencies that they are exploring and defining in spite of conservative views of their parents or guardians and nowhere is this clearer than in *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another*. In *Teddy Bear Clinic for Abused Children*, the Teddy Bear Clinic approached the Constitutional court to declare

¹⁴⁵ Kangaude (n98 above) p 689.

¹⁴⁶ Kangaude (n98 above) p 690.

¹⁴⁷ *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* (CCT 12/13) [2013] ZACC 35.

¹⁴⁸ R Jewkes and others 'Illegal Yet developmentally Normative' (2013) 13(31) *BMC International Health & Human Rights* p 2.

¹⁴⁹ Jewkes and others (n148 above) p 8.

provisions of the SORMA Amendment Act that criminalised consensual sexual relations between children; the court declared these provisions unconstitutional and suspended any investigations into all prosecutions on minors in consensual sexual relationships.¹⁵⁰ A part of the rationale in criminalising consensual sexual activity between minors as this judgement notes:

“...Adolescents who discuss sex and sexual health with their parents openly are less likely to engage in sexual risk behaviour. Parent-child sexual communication that is open and includes specific information and discussion about risk and risk reduction strategies has been shown to have a positive influence on adolescent sexual behaviour...comprehensive sex education has been found to be more effective than abstinence only or no sex education in reducing [risky sexual behaviour by young people,] including delays in sexual debut, reductions in [the] number of sexual partners, and reductions in pregnancy and diagnosed STIs among youth.”¹⁵¹

Therefore, even the court acknowledged that embracing the sexual agency of children is not only in their interests, but safer in the long term for them and requires parents to let go of their presumptions on abstinence and conservative understandings of sex and child sexual agency. It is not foreign to South African policy making on sexual education to explicitly discuss the matters of sex with children.

South African policy approaches to Gender-Based Violence (GBV) and HIV have largely shaped sex education; working on three dimensions explaining: interventions focused on introducing information giving skills and punishing transgressions; institutional interventions in social engineering to shape social relations and interactions focused on personal and interpersonal relationships.¹⁵² However, this means that interventions have been focused on HIV and GBV but is that comprehensive, and what can the BELA Bill do to resolve these issues?

¹⁵⁰ *Teddy Bear Clinic for Abused Children paras 102 – 104.*

¹⁵¹ *Teddy Bear Clinic for Abused Children paras 98 – 99.*

¹⁵² R Jewkes ‘Where to for Sexual Health Education for Adolescents in Southern Africa’ (2010) 7(6) *PLOS Medicine* p 2.

Chapter 4: Demystifying the BELA Bill and the place it has within sex and sexuality education.

1. Introduction

Sex and sexuality education is an intervention to address social issues related sex and sexuality. In understanding this, it is of paramount importance to understand what sex and sexuality education is aiming to accomplish morally and within the Constitutional dispensation, being the notion of Liberal Sexual Ethics. through a comparative analysis of how sex and sexuality education is applied in: Namibia and India, the insights from those experiences will inform the proposals regarding sex and sexuality education in South Africa, within the context of the underlying premise of Liberal sexual ethics.

This section will continue in understanding that BELA Bill sees a unique place in the discussion concerning sex and sexuality education, as a door to further legislate sex and sexuality education. The BELA Bill contains no provisions that explicitly speak about sex and sexuality education directly, but there is merit to see its indirect application through a wholistic reading of specific provisions of the BELA Bill broader in the legal system in South Africa. This section will discuss those amendments that the Bill proposes that assist in legislating on sex and sexuality education; in directing sex and sexuality education to align with liberal sexual ethics about sex and sexuality education. Read together with the Children's Act 38 of 2005 and the Choice on Termination of Pregnancy Act 92 of 1996, the implementation of sex and sexuality education in South Africa is also discussed as a matter of compliance with broader legislative and Constitutional goals.

2. The law, and Liberal Sexual Ethics

In previous chapters it has been established that comprehensive sex and sexuality education is a requirement considering the Constitution of the Republic of South Africa and its obligations in terms of international law. A reading of these instruments would even see a proposed approach to the foundations that would underlie sex and sexuality education that is compliant with the instruments namely, Liberal Sexual Ethics.

Liberal sexual ethics, is a branch of sexual ethics that constructs morally permissible sex by outlining the conditions when sexual acts are acceptable and those circumstances when sexual acts are unacceptable.¹⁵³ The primary fixation of liberal sexual ethics is the notion of 'self-determination', the idea that all persons must be the sole arbiters of their own fates; in the context of sex it would be: when a person chooses or does not choose to perform sexual acts without the need for further approval of their choices.¹⁵⁴ Flowing from this rationale, is that conduct that undermines the sexual freedom of another would render those sexual acts impermissible and therefore contrary to liberal sexual ethics.¹⁵⁵ The world in the absence of liberal ethics as construed by its proponents is one: where consensual sexual relations are not encouraged; one where consenting unmarried adults would be penalised; the victimisation of same sex relationships and social acceptance of discrimination of non-conforming gender and sexual identities.¹⁵⁶ Therefore, liberal sexual and sexuality education would endow society with an attitude that has a strong aversion for undermining sexual agency and lays the foundation for a strong commitment to sexual self-determination from childhood.¹⁵⁷ Further, sex and sexuality education that has liberal sexual ethics as its foundations would create a society where the rules of sexual engagement are better understood throughout society from childhood.¹⁵⁸

The above is perfectly congruent with the aims of the Constitution of the Republic of South Africa and South Africa's obligations under international law. In terms of section 12(2)(a) and section 12(2)(b): everyone has the right to bodily and psychological integrity which includes the right to make decisions concerning reproduction and security in and control over their body.¹⁵⁹ From the wording of these provisions the security and control over one's body is congruent with liberal sexual ethics as it prioritises the autonomy and agency over one's body, further, the explicit provision for decisions concerning reproduction and its relation to bodily integrity further denotes

¹⁵³ J Sleutel & J De Ruyter 'What Should be the Moral aims of Compulsory Sex Education' (2011) 59(1) *British Journal of Educational Studies* p 77.

¹⁵⁴ Sleutel & De Ruyter (n153 above) p 77.

¹⁵⁵ Sleutel & De Ruyter (n153 above) p 77.

¹⁵⁶ Sleutel & De Ruyter (n153 above) p 78.

¹⁵⁷ Sleutel & De Ruyter (n153 above) p 78.

¹⁵⁸ Sleutel & De Ruyter (n153 above) p 78.

¹⁵⁹ The Constitution of the Republic of South Africa 1996, section 12(2)(a) and 12(2)(b).

the importance of sexual agency in the manner in which sexual acts are done in line that respects self-determination. In more indirect ways, liberal sexual ethics' respect for non-conforming gender identities; consensual sexual activities between unmarried persons and same sex persons aligns with the Constitutional imperatives of non-discrimination in terms of section 9 which prohibits discrimination on the prohibited grounds which would include sex and sexual orientation.¹⁶⁰ In addition it is a well-established principle that where the ground is not present in the list of prohibited grounds of discrimination the right may still be relied upon with the caveat that the one alleging such discrimination must prove that the discrimination is present.¹⁶¹

Under international law, article 4 of the African Charter of Human and People's Rights, hereafter African Charter, every human has the right for respect of their bodily integrity and life.¹⁶² The provisions of the African Charter align with the ethos of liberal sexual ethics in that it shows an appreciation and creates an obligation for the state parties to respect the bodily integrity of persons and life which would be aligned with the preservation of an individual's self-determination, this interpretation of article 4 of the African Charter is supported by in General Comment No. 3 of the African Charter on Human and Peoples' Rights on the Right to life which sees a general interpretation of the right as: a part of the state's duty to ensure the preservation and enjoyment of other rights as a part of ensuring the right to life; therefore a violation of other rights may amount to a violation of the right to life.¹⁶³

Under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, hereafter Maputo Protocol, in terms of article 3(1) every woman has the right to dignity inherent to humans.¹⁶⁴ In addition, article 4(2)(a) of the Maputo Protocol, state parties are required to take appropriate and effective measures to prohibit all forms of violence against women which includes forced sex in public or private.¹⁶⁵ Notwithstanding the above; in terms of articles 6 and 7 of the Maputo

¹⁶⁰ The Constitution of the Republic of South Africa, 1996 section 9.

¹⁶¹ *Harksen v Lane* [1997] ZACC 12; 1997.

¹⁶² African Charter of Human and Peoples' Rights article 4.

¹⁶³ General Comment no. 3 of the African Charter of Human and Peoples' Rights: Article 4 Right to Life paragraph 17.

¹⁶⁴ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa article 3(1).

¹⁶⁵ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa article 4(2)(a).

Protocol respectively, state parties shall ensure that men and women shall enjoy equal rights in marriage which shall ensure that marriage shall take place without the voluntary and full consent of both parties;¹⁶⁶ further, state parties shall ensure that men and women shall have equal rights in the annulment and separation of a marriage.¹⁶⁷ Finally article 14 of the Maputo Protocol, provides for sexual and reproductive rights explicitly which entails the right to ensure that women have the right to control their fertility and the number and spacing of their children.¹⁶⁸ Although geared toward the rights of women, the Maputo Protocol aligns itself with liberal sexual ethics in that it explicitly prioritises a woman's right to self-determination and exercising their sexual agency to the fullest capacity be it through sexual and reproductive rights in controlling fertility which entails the choice to use contraception before sexual acts, the obligation to be protected from sexual violence through forced sex which explicitly undermines sexual autonomy. In addition, it aligns with the right to enter marriage and leave that same marriage in that it provides for the choice one may exercise in their lifelong sexual partners.

In terms of the Convention on the Elimination of all forms of Discrimination Against Women, hereafter CEDAW, article 6 of CEDAW, imposes an obligation on states to take steps to suppress the exploitation of women through prostitution.¹⁶⁹ Furthermore, article 16 imposes the obligation on states to ensure equality between men and women with regard to family relations which includes: ending forced marriages; the provision to allow women to plan the number and spacing of their children.¹⁷⁰ In addition article 16(2) renders all child betrothals void and does not recognise them as resulting in valid marriages.¹⁷¹ The Convention is clear in its alignment to liberal sexual ethics in similar ways to the Maputo Protocol in that article 6 of CEDAW ensures that individual women are not exploited through prostitution and that their sexual agency is theirs alone to exercise for their benefit, in additional the convention in article 16(2) recognises the limited capacity of children to consent to sexual activities and therefore

¹⁶⁶ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa article 6(a).

¹⁶⁷ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa article 7.

¹⁶⁸ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa article 14(1)(a) and 14(1)(b).

¹⁶⁹ Convention on the Elimination of all forms of Discrimination Against Women article 6.

¹⁷⁰ Convention on the Elimination of all forms of Discrimination Against Women article 16(1).

¹⁷¹ Convention on the Elimination of all forms of Discrimination Against Women article 16(2).

undermines any betrothals so as not to undermine their sexual agency in selecting a lifelong sexual partner by reserving it for when they have the capacity. Like the Maputo Protocol there is the position that the number and spacing of children be determined by the woman herself which entails respect for the use of contraception and when sexual acts occur.

More specific to the context of children there are the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. In terms of the Convention of the rights of the child, per article 19 states have an obligation to protect children from all forms of abuse with an explicit duty to protect children from sexual abuse while in the care of an adult who has been charged with the care of a child.¹⁷² Similarly article 16(1) of the African Charter on the Rights and Welfare of the child requires the state to protect children from all forms of abuse, including sexual abuse.¹⁷³ These provisions align themselves with liberal sexual ethics in that they seek to protect children from impermissible sexual conduct through respect for their sexual agency.

Domestically, in terms of legislation, liberal sexual ethics is present in the formulation of the Choice on Termination of Pregnancy Act, specifically in section 4 and section 5 respectively. In respect the above sections the state is to provide with the non-mandatory counselling before and after the termination of a pregnancy, furthermore the act provides that no termination of a pregnancy may occur without the express consent of the person undergoing the termination.¹⁷⁴ The Children's Act requires the best interests of the child to be considered in all matters concerning the child and within and among those circumstances that must be ensuring that a child is not exposed to an environment where they may experience sexual abuse.¹⁷⁵ These serve as further instances of statute conforming with liberal sexual ethics. For similar reasons to the international instruments the children's act respects the sexual agency and self-determination of children by ensuring that they are not in an environment where they may be exposed to sexual abuse which may negatively affect their perceptions of sex and sexuality.

¹⁷² Convention on the Rights of the Child article 19.

¹⁷³ African Charter on the Rights of the Child article 16(1).

¹⁷⁴ Choice on the Termination of Pregnancy Act 92 of 1966 section 4 & 5.

¹⁷⁵ Children's Act 38 of 2005 section 7.

From the discussion above, it is safe to say that liberal sexual ethics aligns with the statutory and international obligations that the state is required to comply with; thus it stands to reason that where the statute, the Constitution and international instruments provide comprehensive sex and sexuality education as a requirement, the foundations of comprehensive sex and sexuality education should be that of liberal sexual ethics. The position is supported in the *ipsissima verba*¹⁷⁶ of the enforceable instruments.

3. Implementing Sex and Sexuality Education: The Competing Interests of the Community considering Liberal Sexual Ethics

In previous sections it was established that the best interests of children insofar as they apply in the discussion of comprehensive sex and sexuality education, should take into account the interests of the children in a fashion where they are consistently applied and appropriately integrated. This means that it is not only sufficient to view these interests as they apply to children in isolation, but as they are integrated in a society. Furthermore, it is required that the best interests of the child should demonstrate the interests have been considered. By comparing India and Namibia to South African experience of implementing sex education; this section will postulate a means of integrating sex and sexuality education in a way that is aligned with the community.

India

In India, broadly speaking, there have been two approaches to sexuality education: the abstinence-based approach as a means of ensuring safe sexual practices and comprehensive sex education.¹⁷⁷ In India, there is a wealth of data that suggests that abstinence based sexual education exposes children to a greater risk of early sexual debut as well as a higher risk of contracting a sexually transmitted infection.¹⁷⁸ This makes India an ideal candidate for comparison in this regard, as it is similarly situated to South Africa which was established in previous sections that South African youth have earlier sexual debuts and are at a higher risk of contracting sexually transmitted infections in spite of abstinence based sex education. However, where India diverges from South Africa comes in the demographic composition and the cultural differences.

¹⁷⁶ The precise words.

¹⁷⁷ A Das 'Sexuality education in India: Examining the rhetoric and rethinking the future' (2014) p 212.

¹⁷⁸ Das (n177 above) p 212.

For instance While 11% of young men engage in pre-marital sexual relations before the age 18, which is similar to South Africa, one fifth of adolescent women in India already have given birth to at least one child by the age of 18, which is not similar to the South African experience.¹⁷⁹ Indian religious leaders render any discussions on comprehensive sex education in India as taboo which creates an environment where young people are exposed to diverse sources of information concerning sex and sexuality and some of that information may not be reliable, which is similar to South Africa.¹⁸⁰

Sex education, abstinence based or not is taught in Indian schooling as a part of the Life Skills curriculum,¹⁸¹ which is akin to how sex education is taught as a part of the Life Orientation curriculum in South Africa. The discussion of sex is reduced to reproduction, which is a clinical discussion of sex and neglects topics like masturbation, sex for pleasure and same sex relationships, which is another similarity that India shares with South Africa.¹⁸² However, a huge departure from South African sex education comes in the form of the 'question box' system which allows learners to ask anonymous questions about sex that they are curious about.¹⁸³ In addition the Indian sex education curriculum discusses the right to marry and the right to not marry; which is discussed in the context of adolescent pregnancy and early marriage given the fact that 48% of young women in India are married before they are 18 years old, as the marriage of adolescent girls is normalised in India.¹⁸⁴ The curriculum also discusses rape and sexual assault within the confines of domestic violence and reporting mechanisms but it neglects to speak of it within the context of acceptable and consensual sexual activities.¹⁸⁵ From the discussion of the Indian experience of sex education it is clear that the Indian experience offers more than the South African sex education regime as it neglects the discussions concerning rape and sexual assault even though it shares that in common with the Indian experience, together with the question box it is a positive addition that South Africa could add to its sex education

¹⁷⁹ Das (n177 above) p 213.

¹⁸⁰ Das (n177 above) p 213.

¹⁸¹ Das (n177 above) p 213.

¹⁸² Das (n177 above) p 215.

¹⁸³ Das (n177 above) p 215.

¹⁸⁴ Das (n177above) p 216.

¹⁸⁵ Das (177 above) p 217.

curriculum. However, that is the limit of what South Africa can learn from the Indian experience.

Namibia

Namibia is a country with a similar demographic composition and history to that of South Africa and thus is a suitable comparison for this discussion. In addition Namibia has a similar culture of sexual conservatism where they understand that children and parents do not speak of sexual and reproductive health because it is a taboo.¹⁸⁶ In addition Namibian church authorities preach abstinence and the virtues of monogamy which deters further discussions of sexual and reproductive health among members of the community.¹⁸⁷

As in the South African case Namibia has an abstinence based approach to teaching sex education which is colloquially known as 'ABC' which is an acronym for Abstinence Be faithful and Condoms.¹⁸⁸ This programme was known for largely being a failure in its attempts to curb the spread of HIV/Aids in 2005, which led to the introduction of comprehensive sex education in their curriculum.¹⁸⁹ The current position in Namibian schools is that schools will teach the basics on reproduction and explain family planning, rape as well as the consequences of statutory rape, which is appropriate for the context wherein teachers and some female learners have sexual relationships with their teachers.¹⁹⁰ In addition, the life skills class is not the only sources for sex education as the life science teachers teach the reproductive aspects of sex and they call in nurses and other health professionals to teach on matters of menstruation, vulnerability to pregnancy and gonorrhoea.¹⁹¹ The Namibian experience of sex education includes limited discussions of sexuality within its curriculum,¹⁹² it is progressive in its discussion of statutory rape and its consequences is an integration that South Africa can implement into its sex education regime.

¹⁸⁶ P Mufune 'Stakeholder perceptions and attitudes towards sexual and reproductive health education in Namibia' (2008) 8(2) *Sex Education* p 145.

¹⁸⁷ Mufune (n186 above) p 154.

¹⁸⁸ Mufune (n186 above) p 153.

¹⁸⁹ Mufune (n186 above) p 145.

¹⁹⁰ Mufune (n186 above) p 150.

¹⁹¹ Mufune (n186 above) p 151.

¹⁹² RK Haitembu 'Gender and Sexual Diversity: Inclusion in the Namibian education context' (2023) *Cogent education* p. 8.

South Africa

In discussing sex and sexuality education a big challenge that South Africa faces by the admission of teaching personnel is that there needs to be training in assisting in the communicating the complicated aspects of the already limited sex education dispensation, which is further complicated by the misalignment of the underlying principles of sex and sexuality education and the personal values of educators.¹⁹³ The current position is still highly reliant on the HIV/Aids policy to configure its sex and sexuality education curriculum.¹⁹⁴

The above filters into the content of sex and sexuality education curriculum the problem of exclusively framing sex in the domain of innocence and suffering as well offering little discussions on pleasure and relationships problematises sex and stunts sex education in South Africa.¹⁹⁵ This creates an environment where sexuality is constructed negatively which is bolstered by the fact that parental guardians see themselves as the sole authority on the subjects to the children in their lives.¹⁹⁶ Finally abstinence only education is a boon that restricts the access to information on sex and sexuality and contraception for children.¹⁹⁷

4. BELA and Comprehensive Sex and Sexuality Education

This brings the discussion to its origin. The Basic Education Law Amendment Bill. The latest in a series of amendments to the South African Schools Act 84 of 1996, hereafter 'the Schools Act' the Bill brings with it several amendments that have sought to centralise more powers regarding schooling and regulations within school. These amendments come off the back of judgments akin to *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others* which dealt with the Department of Education's final decision to admit a learner into the school in excess of what the school prepared for in learner capacity.¹⁹⁸ The

¹⁹³ D Francis 'Sexuality Education in South Africa: Wedged within a triad of Contradictory values' (2011) *Journal of Psychology in Africa* p317.

¹⁹⁴ Francis (n193 above) p 318.

¹⁹⁵ D Bhana *et al* 'Sex, Sexuality and Education in South Africa' *Sex Education* p 362.

¹⁹⁶ T Shefer 'Life Orientation, Sexuality education in South Africa: Gendered norms, Justice and Transformation' (2015) *Perspectives in Education* p 6 – 8.

¹⁹⁷ Shefer (n196 above) p 81.

¹⁹⁸ MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others par 9 – 24.

Constitutional court found that the power of school governing bodies to determine policy must still be read within the context of the Schools Act and thus is subject to the provisions of the schools act in their formulation and application and confirms that the department of education has the most authoritative voice on the subject of school policy.¹⁹⁹ BELA reemphasizes principles with regard to this case; and offers the ministry of education to regulate further on more matters per section 61 of the Schools Act which states: ‘the Minister may make regulations on any matter which must or may be prescribed by regulation under this *Act* (the Schools Act) and any matter which may be necessary or expedient to prescribe in order to achieve the objects of the act.’²⁰⁰ The proposed amendments to this section which is relevant to this discussion is the insertion of a provisions that provides that: “[the minister may make] regulations on the management of learner pregnancy’.²⁰¹

As explained in previous chapters, sex and sexuality education respond to the social context of a given society as well the states aim for the well-being of its citizens in public health and public safety. The BELA Bill in its amendment to give the minister to legislate on the management of pregnant learners is something that points to a door that could assist in sex and sexuality education. In South Africa once a pregnant learner gives birth the probability concerning her return to school is very low.²⁰² This is so because a variety of factors which include: there are no school based services to support pregnant learners, in addition there are few discussions on ensuring the continuity in school for pregnant learners and this disproportionately affects the pregnant learner; as well as the stigma associated with being a pregnant learner within school. ²⁰³Learner pregnancy management should not only be focused on the pregnant learner and keeping them in school, but it should also go a step further and sensitise the schooling community to the issue of learner pregnancy. The aforementioned would obviously require an addition to the curriculum which can be made through this amendment directly without the need for further red tape to achieve the goals of the

¹⁹⁹ MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others par 73 – 79.

²⁰⁰ South African Schools Act 86 of 1996 section 61.

²⁰¹ Basic Education Laws Amendment Bill section 41.

²⁰² J Jochim et al ‘Learner pregnancy of South Africa’s Eastern Cape Factors Affecting Adolescent Girl’s School withdrawal during pregnancy’ (2021) *International Journal of Educational Development* p 6.

²⁰³ J Jochim et al (n50 above) p 6 – 8.

Act. This is but one way in which BELA could create the space for an intervention-based approach to amplify the need for sex and sexuality education in South Africa.

Chapter 5: The future of Sex and Sexuality Education: Conclusion and recommendations

1. Findings

In chapter 2 it was established the relationship between the state's historical relationship with sex and sexuality being informed by the social organisation of South Africa and how that relationship has since defined social relations by intertwining the social and the political and enforcing them through the law. In the 19th century Kwa-Zulu military conscription relied on abstinence policy before and during military service as a means to secure conscripts on the premise that sexual relationships were a source of weakness for young men in the military. Men who broke this rule were faced with capital punishment.

The above being among the earliest examples of the state's interest in sex and sexuality as a source of control for a desired outcome, in this instance a military culture's social alignment intertwining with the military objects of securing soldiers and troops to meet with the political goals associated with military expansion. However, this policy did create loopholes in the form of non-penetrative sexual practices by young men eager to engage in sexual relations but averse to capital punishment.

Another example akin to the first would extend to the early Boer republics of the *Transvaal* and *Orange Free State* and the answer to the 'Native Question' which was a manifestation of their concerns for stability of these newly established settlements. A key intervention was a strict policy of segregation that concretised a manifest social threat in the form of the insatiable sexuality of the native populations and therefore imposed a strict policy of anti-miscegenation, which banned any sexual relationships between native populations and settlers in the Boer republics. Similar to the previous policy by the Zulu Kingdom, this policy was the main deterrent but led to a social response that would define social relations that would extend past the social order of the republics as children who were the byproduct of inter-racial relationships being seen as towing the line between civility and barbarism.

In the Apartheid era South Africa inherited the abstinence approach of the protestant settler colonies, and the staunch anti-miscegenation position that was enforced through legislation in the form of the Immorality Act. The Immorality Act also introduced

the policing of same sex relationships. It was in the Apartheid era when sex education was introduced, primarily focused on preventing the spread of sexually transmitted diseases; and together with the scientific and pathologisation of sexuality also included constructing the threat that black men pose to white women as vessels for sexual disease and well-being. The above is evident of the continuum of the state's objectives aligning with the social and political and sex as a position of control. However, much like the above the resistance to these rules would later define social relations in South Africa in the future. The resistance against Apartheid saw the resistance against the immorality act, particularly its policing of same sex relationships. The political and social resistance against apartheid would see the new democratic government introduce within the right to equality a prohibition against discrimination on the basis of sexual orientation, which may be construed as including sexuality, into the Constitution and this has trickled into post-Apartheid sex and sexuality education.

However, sex education in South Africa, while shedding its racist past still maintains its position as an intervention preventing the spread of sexually transmitted diseases specifically HIV/AIDS. However, since then South Africa under the post-Apartheid dispensation is obligated toward shifting toward a human rights-oriented approach to sex and sexuality education.

South Africa has several domestic and international obligations that see sex and sexuality education as a requirement under the constitutional dispensation and not a political suggestion. Currently, South Africa's goals for governance can be regarded as operating in three modalities. The first modality can be described as domestic Constitutional obligations imposed by the Constitution of the Republic of South Africa and national legislation enacted to give effect to the rights in the Bill of Rights. The second mode of governance can be explained as the regional obligations that South Africa has agreed to abide by in terms of regional treaties in the form of the African Union, (AU), and the Southern African Development Community, (SADC). The final mode that South Africa's overarching governance goals in terms of international law, can be said to operate on is the international level through treaties South Africa has entered at the United Nations, (UN) level. The above being discussed in more detail in chapter two of this paper.

In Chapter 3 the discussion of the parent or guardians voice in the space of the means and discussion of sex and sexuality education was raised. Typical to resistance against sex and sexuality education, parents resort to removing their children from school relying on the rights to freedom of religion; freedom of conscious; the right to family life and private life. The chapter discussed the aforementioned as the subject of plenty of case law from the European Court of Human Rights. This may arise from the manner in which parents have constructed the child having a demure sexual character. The sexually active child in the mind of the parent, is one that is characterised by conventional western virtues on sex and sexuality to begin with. The child may have a sexual character premised around innocence and promotes abstinence combined with an ideological chastity. Conversely, where the child is sexually active, such a child not living to the standards set out in the initial a construction, that child is a deviant. The child as a sexual deviant is regarded as a threat to society with negative intentions for any unsuspecting child or adult who is unlucky enough to engage in sexual activities with them. These constructions create laws that criminalise consensual sexual activity between underage children or disproportionately characterising young women as sexual deviants.

In light of the above, it is clear that the state's own interests clash with these constructions. The state sees underage adolescent sex and sexuality differently from individual parents in that the state tends to adopt the mindset geared toward ensuring public safety and public health. This configuring itself through in the state's introduction sex and sexuality education into school curriculums usually come about as a component of state interventions concerning public safety or public health or both. The way this clash manifests itself with the expectations that parents have on what the child's perpetual state of innocence in sex and sexuality is the state's needs to intervene in reducing the spread of sexually transmitted diseases as well as to curb sexual abuse. Thus, removing the child from the setting where they receive this information is, not only an infringement of rights, but in the state's mind this is a risk to public safety and health. However, parents feel that it is within their area to discuss these subjects with their children and their response is to remove the child from the class.

However, the state's approach should also consider the child as a character with sexual agency and autonomy, as opposed to an extension of their parents or a rogue

element of society to mitigate against. As established above, the South African child, ideally, is sexually inactive; their knowledge of sex is dictated to them by their parents and in the moral background that informs their knowledge on sex, and more importantly, sexuality. The child in the parent's mind has no sexuality and should show no curiosity directed toward that aspect of sex. In reality, sexual curiosity and sexual activity in adolescence is not only developmentally normative, but to render it as illegal or a taboo poses a series of risks to public safety and health. Therefore, it may be better to embrace the sexual agency of adolescents, which requires policy makers, guardians and parents to shift away from the conservative underpinnings that inform sex and sexuality of adolescent children.

The above brings the discussion to Chapter 4, which takes into consideration the legal foundations that informs the Constitutional and international obligation for comprehensive sex and sexuality education and examines the philosophy that should inform sex and sexuality education in South Africa. A reading of the law that informs the obligations, indicates that "liberal sexual ethics" informs the spirit and purport of the obligations imposed by the Constitution and international obligations. In short, Liberal sexual ethics, is a branch of sexual ethics that constructs morally permissible sex by outlining the conditions when sexual acts are acceptable and those circumstances when sexual acts are unacceptable.

Liberal sexual ethics is oriented around the notion of 'self-determination'; in the discussion of sex this focuses on where a person chose to and does not choose to perform sexual acts without the need to have their choices further approved. Following this logic, is that conduct that undermines the sexual freedom of another would render those sexual acts impermissible and therefore contrary to liberal sexual ethics. Therefore, liberal sexual and sexuality education imbues society with an attitude that has a strong aversion for undermining sexual agency and lays the foundation for a strong commitment to sexual self-determination from early adolescents to late adolescents. Further, sex and sexuality education informed by liberal sexual ethics would create a society where the rules of sexual engagement are better understood throughout society.

Liberal sexual ethics as a constitutive part of the sex and sexuality education of young South Africans is perfectly aligned with Constitutional imperatives and the goals

formulated in international treaties. Yet, despite the presence of these international instruments South Africa does not have a sex and sexuality education curriculum that adequately embodies norms that mandate its existence. As established in earlier chapters, South African sex education is too scientific in its approach to discussing sex with an emphasis of sexually transmitted diseases and sex as reproduction. In addition, there has not been a strong enough shift away from abstinence-based education and conservative understandings of the sexual agency of children.

This brought the discussion of the BELA Bill. There are no explicit provisions pertaining to sex and sexuality education in the Bill itself. Instead, a reading of select provisions of Bill together with legislation and the Constitution can render a reading of the Bill as one that can better impart sex and sexuality education that is consistent with the domestic and international legal scaffolding that the state is obligated to organise itself around. Sex and sexuality education is often government intervention toward ensuring a high standard of public health and safety. To those ends, sex and sexuality education respond to the social context of a given society as well the states aim for the well-being of its citizens.

The BELA Bill does this in the following way: through amending the South African Schools Act; to give the minister the authority to create regulations on the managing of learner pregnancy, offers a platform for a broad series of actions aimed at managing learner pregnancy; this includes: training of educators, educating learners on pregnancy and sensitising learners to pregnant learners among a myriad of things, which is responsive to the context of South African adolescents. A reading of this provision in this way could see learner pregnancy management should oriented on more than just the pregnant learner and keeping them in school, it goes a step further and sensitises the schooling community to the issue of learner pregnancy. This would obviously require an addition to the curriculum which can be made through this amendment directly without the need to amend further pieces of legislation achieve the goals of the Schools Act. This is but one way in which BELA could create the space for an intervention-based approach to respond to the need for sex and sexuality education in South Africa, which is responsive to the social context of adolescent South Africans.

2. Recommendations

Throughout the corpus of this dissertation sex and sexuality education's place in South Africa has been adequately oriented and the scope of its application has been delineated. This section proposes recommendations for the future of sex and sexuality education in South Africa to align with the Constitution and the international obligation South Africa is bound to. The recommendations are structured along improving sex and sexuality education through the domestic mechanisms available and improving sex and sexuality education through international mechanisms.

3. Improving domestically

A running motif throughout this dissertation is that sex education should serve as an intervention to respond to the sex and sexuality related issues that adolescent South Africans are faced with, therefore the first recommendation would be to reform sex and sexuality education in South Africa to respond to the context of adolescent South Africans concretely. Such issues would include menstrual poverty; teenage pregnancy; same sex relations; gender and sexuality diversity among other issues. These issues should be incorporated into the curriculum regarding sex and sexuality in South Africa, or as the Department of Education describes it: Comprehensive Sexuality Education.²⁰⁴

Since this dissertation has already established sex and sexuality education as a constitutional requirement supported by our obligations in terms of international law the state should seek to incorporate sex and sexuality education across on all levels of basic education in South African schools. In terms of section 29(1)(a) of the Constitution, everyone has the right to basic education which includes adult basic education,²⁰⁵ the Constitution and the South African Schools Act do not define in concrete terms, what basic education is and what does it entail. However, through the lens of international law the 'World Declaration on Education for All' offers guidance in article 1 which states:

“Every person - child, youth and adult - shall be able to benefit from educational opportunities designed to meet their basic learning needs.

²⁰⁴ <https://www.education.gov.za/Home/ComprehensiveSexualityEducation.aspx> (accessed: 29 August 2024).

²⁰⁵ Constitution of the Republic of South Africa, 1996 section 29(1)(a).

These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning. The scope of basic learning needs and how they should be met varies with individual countries and cultures, and inevitably, changes with the passage of time.”²⁰⁶

Through describing basic education as ‘basic learning needs’ that are context sensitive to individual countries and cultures aligns with other constitutional imperatives centred toward multi-culturalism and inclusivity that the preamble of the Constitution directs. In addition, the guidance offered by the World Declaration on Education for all aligns with the manner in which sex education as a constitutional requirement which makes sense for sex and sexuality education to be more broadly represented throughout basic education.

Another recommendation that the state should incorporate into the education should be more influence over the curriculums of independent institutions. In South Africa when it comes to curriculum setting, South Africa has a highly centralised approach that applies to all public schools which is confirmed in section 61(c) of the South African Schools Act.²⁰⁷ However, the scope of application of the South African Schools Act is limited in its application to the curriculums of independent schools which are determined by the Independent Examinations Board and not the minister of Education, and is established in terms of the Companies Act.²⁰⁸ The implications of this means that sex and sexuality education in independent institutions is not tied to the same obligations as the public schooling regime would otherwise be; given that sex and sexuality education is not legislated upon directly and that South Africa has only bound the state to all of the above mentioned international treaties prescribing comprehensive sex and sexuality education. Therefore, it stands to reason that the child in the independent learning setting has a curriculum that is entirely left to the

²⁰⁶ World Declaration on Education for All article 1.

²⁰⁷ South African Schools Act 89 of 1996 section 61(c).

²⁰⁸ <https://www.ieb.co.za/about-us/profile-2> (accessed: 28 August 2024).

whims of the Independent Examinations Board, which is not necessarily motivated or informed by the Constitution or international obligations, and as a consequence the liberal sexual ethics that underlies such.

In addition, the government should engage in training educators to deal with sex and sexuality as it is experienced by adolescents in South Africa. As established in previous sections, teachers feel uncomfortable to teach sex and sexuality as students may ask questions that they feel that they cannot answer personally. Further, teachers should also be trained in mediating between their personal views on sex and sexuality in light of the interests that the state has in ensuring a high standard of public health and safety. In tandem with training educators to teach sex and sexuality; there should be a drive toward establishing a forum for parents and learners to participate in sex and sexuality education premised on liberal sexual ethics.

4. Strengthen commitments internationally.

The South African Constitution has a human rights focus within its founding premise as enshrined in the preamble of the Constitution which states:

“We, the people of South Africa, Recognise the injustices of our past; Honour those who suffered for justice and freedom in our land; Respect those who have worked to build and develop our country; and Believe that South Africa belongs to all who live in it, united in our diversity. We, therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to - Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights...”

However, the Constitution is an instrument that defines rights broadly and is not specific in its formulations alone. While a reading of the Constitution confirms that sex and sexuality education is a Constitutional requirement the international obligations that the state has bound itself should be incorporated into national law through ratification through the legislature. Therefore, the South African government should make more efforts to ratify international treaties and pass them into law so that these instruments bind the state together with citizens. Specifically, South Africa should pass the following treaties and incorporate them into statute: The Maputo Protocol; The

CEDAW; the international covenant on civil and political rights; the convention on the rights of the child.

5. Conclusion

Sex and sexuality education in South Africa is a constitutional imperative and a part of the obligations that South Africa must meet in terms of international law. Its foundations are in liberal sexual ethics and requires a participatory framing with parents, teachers and learners equally participating in the discussion of sex and sexuality. It is a necessary intervention that is required to ensure the well-being and overall public health of the country and its citizens.

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