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UNIVERSITY OF PRETORIA  
YUNIBESITHI YA PRETORIA**

**Transactional sexual relationships as obstacles to the full enjoyment of sexual  
and reproductive health and rights of adolescent girls in South Africa**

By

**Karabo Lekomanyane**

**Student number: 16226926**

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Supervisor: Prof Magnus Killander

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## **DEDICATION**

This work is dedicated to adolescent girls who have been victims and who have borne the brunt and experienced the negative consequences of these relationships. To those girls and young women who have been forced into transactional sexual relationships by unfortunate circumstances. To those who also knew better but did not do better due to circumstance, this one is for you too. This research is inspired by the common stories of young South African women and their experiences of how the socioeconomic landscape influences their interpersonal and romantic relationships. Furthermore, this dissertation seeks to strengthen and enrich interventions to prevent exploitative transactional sexual relationships. Moreover, this research comes at a relevant and appropriate time as South African women across all ages and races are currently facing the dangers of femicide and gender-based violence. Ultimately, this project is dedicated to all victims; posthumously and those living.

## **ACKNOWLEDGEMENT**

Not by might nor by power, but by my spirit.

-Zachariah 4:6

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# 1 Background

The African continent bears the highest burden of HIV and accounts for an estimated 25.6 million infections of the global estimate of 38.4 million people living with HIV, as estimated by the World Health Organisation (WHO) at the end of 2021.<sup>1</sup> These high levels of HIV pose a challenge to effectively realising the sexual and reproductive health (SRH) of Africans, because HIV remains a significant public health threat with approximately 420 000 people dying from HIV-related causes in 2021.<sup>2</sup> These high levels of HIV may be attributed partly to unmet sexual and reproductive health and rights' needs (SRHR).<sup>3</sup> This is because SRHR and SRH alike, are intimately linked to HIV where measures that aim to reduce HIV infections could be enhanced if existing sexual and reproductive health-related interventions are strengthened.<sup>4</sup> This becomes particularly important in protecting vulnerable groups such as adolescents against HIV infection and fashioning SRHR interventions specific to their needs. Adolescents are defined by WHO as people between the ages of 10 and 19.<sup>5</sup>

In 1994, the United Nations Population Information Network (POPIN) published a report that reviewed and appraised progress made towards achieving the goals and objectives of the World Population Plan of Action. The report recommended that governments should strengthen programmes aimed towards disseminating information to adolescents on how they could protect themselves against sexually transmitted infections, including HIV.<sup>6</sup> This came after it was recognised at the

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<sup>1</sup> World Health Organisation 'HIV' <https://www.who.int/news-room/fact-sheets/detail/hiv-aids> (accessed 20 November 2022).

<sup>2</sup> World Health Organisation 'Number of people dying from HIV-related causes' [Number of people dying from HIV-related causes \(who.int\)](#) (accessed 20 November 2022).

<sup>3</sup> C Ngwena & E Durojaye E(eds) *Strengthening the protection of sexual and reproductive health and rights in the African region through human rights* (2014) viii.

<sup>4</sup> World Health Organisation 'Making the case for interventions linking sexual and reproductive health and HIV in proposals to the Global Fund to Fight AIDS, Tuberculosis and Malaria' 2010 at 1.

<sup>5</sup> World Health Organisation 'Adolescent Health' [Adolescent health \(who.int\)](#) (accessed 21 November 2022).

<sup>6</sup> United Nations Population Information Network 'Experiences concerning population and development strategies and programmes' (1994) at 102.

International Conference on Population and Development (ICPD) in 1994 that SRH services are essential to all people including adolescents.<sup>7</sup> This recommendation and report has since been given effect with repeated reaffirmations of the need to address the SRHR of adolescents.<sup>8</sup> In addition, there is currently a nearly universal consensus that promoting and protecting adolescent health will bring positive impacts for adolescents in the present, their futures and future generations.<sup>9</sup> However, despite these commitments, reaffirmations and universal consensus, adolescents still do not have their SRHR met and are affected by HIV. This points to obstacles in the achievement of SRHR for adolescents and drivers of the HIV epidemic in adolescent girls. These obstacles and drivers in this paper will be assessed in relation to adolescent girls.

In terms of adolescent SRH in South Africa, much like the rest of the Sub-Saharan African region, transactional sexual relationships have been identified as one of the leading causes of the high HIV incidence among this population group.<sup>10</sup> Transactional sexual relationships may be defined as ‘non-commercial, non-marital sexual relationships motivated by the assumption that sex will be exchanged for material support.’<sup>11</sup> They pose a barrier to the SRHR of adolescents, especially adolescent girls who are disproportionately affected due to their higher biological and social predisposition to HIV and other negative outcomes such as unsafe abortions, STI’s and unwanted and unintended pregnancies amongst other things.<sup>12</sup> However, the focus will only be on HIV. These relationships make them more susceptible to HIV infection because of the gendered power dynamics characterising these relationships. For example, in intergenerational relationships, adolescent girls get infected with HIV where older partners who are most likely more sexually experienced may already be

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<sup>7</sup> D Engel et al ‘A Package of Sexual and Reproductive Health and Rights Interventions What Does It Mean for Adolescents?’ (2019) 65 *Journal of Adolescent Health* at 42.

<sup>8</sup> Engel et al (n 7) 42.

<sup>9</sup> Engel et al (n 7) 42.

<sup>10</sup> K Dunkle et al ‘Transactional sex among women in Soweto, South Africa: prevalence, risk factors and association with HIV infection’ (2014) 59 *Social Science & Medicine* 1588.

<sup>11</sup> K Stoebenau et al ‘Revisiting the understanding of “transactional sex” in sub-Saharan Africa: A review and synthesis of the literature’ (2016) 168 *Social Science & Medicine* 187.

<sup>12</sup> DUBY *et al* ‘From Survival to Glamour: Motivations for Engaging in Transactional Sex and Relationships Among Adolescent Girls and Young Women in South Africa’ (2021) 25 *Aids and Behaviour* at 3283.

infected with HIV.<sup>13</sup> It should however, be duly considered that this would mean only in those cases of transmittable HIV, since individuals who receive antiretroviral treatment and adhere to it may in certain instances achieve an undetectable viral load meaning they cannot sexually transmit the virus to others.<sup>14</sup> Adolescent girls in these relationships have the ability to prevent infection and access SRH services curtailed, thus limiting their sexual and reproductive rights (SRR).

SRHR is an umbrella term that encompasses various human rights provided under various human rights instruments that relate to SRH and SRR. SRH is defined as ‘a state of physical, emotional, mental, and social wellbeing in relation to all aspects of sexuality and reproduction, not merely the absence of disease, dysfunction, or infirmity.’<sup>15</sup> These rights fall within a broader scheme of the right to the highest attainable standard of physical and mental health set out in article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>16</sup> They are fundamental to the health and wellbeing of adolescent girls,<sup>17</sup> and include the right to have one’s bodily integrity, privacy, and personal autonomy respected and the right to have safe and pleasurable sexual experiences.<sup>18</sup> States in this regard have an incumbent duty to fulfil their commitments towards the realisation of the right to health and to take steps necessary for the achievement of SRHR.<sup>19</sup> They have a duty to ensure the availability of quality SRHR services that are accessible, and acceptable.<sup>20</sup> For example, the state has a duty to provide services dedicated to the prevention, detection, and treatment of sexually transmitted infections, including HIV.<sup>21</sup> Therefore, the combination of SRH and SRR form as a whole SRHR. According to a report on SRHR, SRHR ‘[is] fundamental to people’s health and survival, to economic

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<sup>13</sup>K Stefiszyn ‘Adolescent girls, HIV and State obligations under the African Women’s Protocol’ in C Ngwena & E Durojaye (eds) *Strengthening the protection of sexual and reproductive health and rights in the African region through human rights* (2014) at 159.

<sup>14</sup> R Eisinger et al ‘HIV Viral Load and Transmissibility of HIV Infection Undetectable Equals Untransmittable’ (2019) 321 *JAMA* at 451.

<sup>15</sup>A Starrs et al ‘Accelerate progress—sexual and reproductive health and rights for all: report of the Guttmacher–Lancet Commission’ (2018) 391 *Lancet Commissions* 2646.

<sup>16</sup> Starrs et al (n 15) 2644.

<sup>17</sup> Starrs et al (n 15) 2644.

<sup>18</sup> Starrs et al (n 15).

<sup>19</sup> International Covenant on Economic, Social and Cultural Rights Article 12(2).

<sup>20</sup> UN Committee on Economic, Social and Cultural Rights (CESCR) General Comment No. 14: The Right to the Highest Attainable Standard of Health (2000) article 12 of the Covenant) E/C.12/2000/4 at 4.

<sup>21</sup> Starrs et al (n 15).

development, and to the wellbeing of humanity.<sup>22</sup> It encompasses various outcomes such as neonatal mortality in cases where it is preventable, guarantee people's access to sexual and reproductive health services like contraceptives, and address outcomes such as HIV and the SRH needs of adolescents.<sup>23</sup>

In light of all of the above, the main argument of this paper is that transactional sexual relationships are obstacles to the full enjoyment of the SRHR of adolescent girls in South Africa. This will become clearer in the chapters to follow. Furthermore, the researcher endeavours to problematise transactional sexual relationships through a human rights framework. This is apparent in the analysis of the ways in which these relationships hinder the full enjoyment of the SRHR of adolescent girls in South Africa. As already stated, states have a duty to realise the right to health and to take further steps necessary for the achievement of SRHR. This duty falls solely on the state and it may, for example, comply with this obligation by affording rights and entitlements that attempt to realise the right to health and the achievement of SRHR. However, once these rights are afforded, the holder thereof must exercise them and play a role in their enforceability. This is where the full of enjoyment of SRHR comes into play. In light of the above, the full enjoyment of SRHR is framed in this research to mean not only possessing rights, but the ability to enforce, realise, benefit from, and put them into practice in the life of the holder without any arbitrary restrictions.

In making this argument, the researcher is cognisant of the fact that adolescent girls are autonomous beings who possess sexual agency and that these play a crucial and important role in the ability to enforce, claim and realise rights. Furthermore, the research appreciates that, in line with the principle of the evolving capacities of the child, children grow older and their capacity gradually develops. Their intellectual and emotional capacities develop and necessitate their participation in all matters affecting them while taking into consideration the level to which this development has taken place.<sup>24</sup> This principle was affirmed in the *Gillick v West Norfolk and Wisbech Area Health Authority and another* case where the Court held that

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<sup>22</sup> Starrs *et al* (n 15).

<sup>23</sup> M Temmerman *et al* 'Sexual and reproductive health and rights: a global development, health, and human rights priority' (2014) 384 *Lancet* at 30.

<sup>24</sup> J Robinson 'An Introduction to the International Law on the Rights of the Child Relating to the Parent-Child Relationship' (2002) 13 Stellenbosch Law Review at 312.

parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision.<sup>25</sup>

Therefore, as children enter into adolescence, they are likely to exercise their rights, aspire to more personal privacy and assume the decision-making role regarding their relationships with others.<sup>26</sup> However, despite being granted increasing autonomy in the exercise of their rights, they still need protection in accordance with their relative immaturity and youth.<sup>27</sup> Therefore, in the full enjoyment of SRHR, there needs to be appropriate respect for the agency of adolescent girls without exposing them prematurely to full responsibilities that come with adulthood.<sup>28</sup> This supports the need to assess how transactional sexual relationships limit the full enjoyment of the SRHR of adolescents. Furthermore, it is put forth that adolescent girls cannot fully enjoy their SRHR without the unfettered operation of their evolving capacities and unfettered exercise of their autonomy and sexual agency. This argument put forth will be expounded on throughout this paper, through a substantiated appraisal of literature on transactional sexual relationships and regional and international legislative instruments that recognise and protect the SRHR of adolescents in South Africa. These legislative instruments to which South Africa is a party to are: The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (The Maputo Protocol), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child. In addition, an appraisal of the South African policy regime will also be offered to show how the State has attempted to protect, promote and fulfil the SRHR of adolescents.

This is done in hopes of assisting in gaining a better understanding and perspective of transactional sexual relationships, its causes, and its implications for the SRHR of adolescents. This will assist in informing policy and interventions to prevent exploitative transactional sexual relationships and mitigate the effects thereof. This study will be significant to adolescent girls in these relationships because it offers a different perspective from what has been offered before, as it assesses these

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<sup>25</sup> *Gillick v West Norfolk and Wisbech Area Health Authority and another* at 24.

<sup>26</sup> A Skelton 'Constitutional Protection of Children's Rights' in T Boezaart *Child Law in South Africa* (2017) at 342.

<sup>27</sup> G Lansdown *The evolving capacities of the child* (2005) at IX.

<sup>28</sup> Lansdown (n 27) IX.

relationships from a human rights perspective. They further will be reminded of the dangers of such relationships and learn how to protect themselves should they engage in them. It will also be beneficial to parents and guardians because they will learn the causes of these relationships and how to mitigate them before they lead adolescent girls into transactional sexual relationships. Hopefully, the older men who engage in these relationships will also see the effects of their actions and desist from engaging in them. Lastly, it will be significant to the scholars and researchers in this field as it will inform them of the possibility of viewing this discourse through a human rights framework and hopefully prompt them to undertake further research.

## 2 Research problem

Transactional sexual relationships are prevalent in South Africa and are typically characterised by an environment rife with unequal power dynamics.<sup>29</sup> These unequal power dynamics are caused by disparities in age, gender and socio-economic status where the relationship is between older males and adolescent girls. The existence of this unequal power dynamic in transactional sexual relationships places adolescent girls in a position of vulnerability. Therefore, when adolescent girls occupy positions of vulnerability, the operation of their autonomy and sexual agency, which is crucial to the full enjoyment of SRHR, becomes restricted. The result being that where adolescent girls are unable to fully enjoy their SRHR, they become exposed to poor SRHR outcomes, with HIV as a particularly concerning outcome. HIV infections amongst adolescent girls is particularly concerning because adolescent girls form part of an age range between 15 and 24 which accounts for nearly 113 000 new infections per year in South Africa,<sup>30</sup> with nearly 2000 new infections of HIV every week.<sup>31</sup> The susceptibility and vulnerability of adolescent girls to HIV is heightened and exacerbated in transactional sexual relationships where the full enjoyability of SRHR is restricted. For example, adolescent girls in these relationships often have no say

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<sup>29</sup> N Kyegombe et al 'Sexual health of adolescent girls and young women in Central Uganda: exploring perceived coercive aspects of transactional sex' (2020) 28 *Sexual and Reproductive Health Matters* at 240.

<sup>30</sup> R Dellar et al 'Adolescent girls and young women: key populations for HIV epidemic control' (2015) 18 *Journal of the International AIDS Society* at 64.

<sup>31</sup> A Kaida et al 'A high burden of asymptomatic genital tract infections undermines the syndromic management approach among adolescents and young adults in South Africa: implications for HIV prevention efforts' (2018) 18 *BMC Infectious Diseases* at 1.

concerning the use of contraceptives, lack sexual agency in negotiating safe sex practices, and have their right to mutually respectful and equitable gender relations violated.<sup>32</sup> Therefore, the main argument is reaffirmed that transactional sexual relationships are obstacles to the full enjoyment of the SRHR of adolescent girls in South Africa. They operate as obstacles and hinder the full enjoyment of SRHR because they are typically characterised by unequal gendered power dynamics, with disparities in age, gender, and socio-economic status, which limits the autonomy and sexual agency of adolescent girls.

### **3 Research questions**

The main research question of this dissertation is: How do transactional sexual relationships hinder the full enjoyment of SRHR, thereby heightening and exacerbating the risk of HIV infection amongst adolescent girls in South Africa? The following sub-questions will assist in answering this main question:

- a. What is the situational analysis of transactional sexual relationships in South Africa and how do they cause a surge in HIV infections amongst adolescent girls?
- b. Which SRHR of adolescents under various legislative instruments are hindered in by transactional sexual relationships?
- c. How can the SRHR of adolescent girls who engage in transactional sexual relationships be better protected?

### **4 Research method**

The research method used in this paper is a desktop analysis of primary and secondary sources. The primary sources used include legislation, statistics and reports. The legislation will be useful in setting out the nature and contents of SRHR. Secondary sources are in the form of books and journal articles. These will be used mostly to lay theoretical foundations on transactional sexual relationships and SRHR and the various issues concomitant to these two concepts. Furthermore, TV series on

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<sup>32</sup> Starrs *et al* (n 15) 2645.

YouTube were searched for views from people who have engaged in these relationships.

Transactional sexual relationships are typically characterised by unequal power dynamics with disparities in age, gender and socio-economic status. These characteristics and their impact on the experiences of adolescent girls necessitate the adoption of an intersectional feminist theoretical approach. Intersectionality as a concept was first coined in 1989 by Kimberle Crenshaw who offered it as a tool to contextualise the experiences of African-American women and their experiences around sex and race discrimination and their barriers in attempting to redress this.<sup>33</sup> However, intersectionality as an ideology had existed in the feminist movement as early as the 19<sup>th</sup> century prior to Crenshaw coining the term, with the discourse centred around the unique challenges of black women.<sup>34</sup> Crenshaw explained intersectional feminism as 'a prism for seeing the way in which various forms of inequality often operate together and exacerbate each other.'<sup>35</sup> Furthermore, she stated that 'all inequality is not created equal,'<sup>36</sup> and that intersectionality reveals the how and the ways in which people's social identities can overlap and produce compounding experiences of discrimination.<sup>37</sup> Intersectionality when used as an analytical tool and a method of praxis challenges the idea of sameness that contends that women do not all navigate the same version of womanness.<sup>38</sup> It takes into consideration that 'differently situated women encounter inequality in different ways.'<sup>39</sup> Patricia Hill Collins referred to intersectionality as

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<sup>33</sup> Imkaan The Value Of Intersectionality In Understanding Violence against Women and Girls (VAWG) (2019) EU/UN Women's Programme on Ending Discrimination and VAW: 'Implementing Norms, Changing Minds' at 3.

<sup>34</sup> KE Odada 'Maternal health financing and obstetric violence in Kenya: A case study of postpartum detention in hospitals for non-payment of user fees' Masters' dissertation, University of Pretoria, 2020 at 8.

<sup>35</sup> TIME 'She Coined the Term 'Intersectionality' Over 30 Years Ago. Here's What It Means to Her Today' <https://time.com/5786710/kimberle-crenshaw-intersectionality/> (accessed 20 November 2022).

<sup>36</sup> TIME (n 35).

<sup>37</sup> UN Women 'Intersectional feminism: what it means and why it matters right now' [Intersectional feminism: what it means and why it matters right now | UN Women – Headquarters](#) (accessed 20 November 2022).

<sup>38</sup> Imkaan (n 33) 3.

<sup>39</sup> Imkaan (n33) 3.

particular forms of intersecting oppressions, for example, intersections of race and gender, or of sexuality and nation. Intersectional paradigms remind us that oppression cannot be reduced to one fundamental type, and that oppressions work together in producing injustice.<sup>40</sup>

Therefore, intersectionality in this context helps us understand adolescent girls' experiences when simultaneous oppressions of age, class, race and gender intersect and how these influence their ability to fully enjoy their SRHR. It forces us to recognise that adolescent girls do not just engage in transactional sexual relationships that heighten their risk to HIV infection, it prompts us to think about why and how disparities and inequalities produce vulnerability. It illuminates that 'these issues and how they intersect is integral to individual's positions in the social world.'<sup>41</sup>This perspective is particularly important because there are indications that in South Africa, there exists a strong linkage between economic status and ethnicity and female sexual health problems like HIV/AIDS,<sup>42</sup> furthermore, HIV as an SRH concern is prevalent among low-income South African women.<sup>43</sup>

## 5 Scope and limitation of study

In order to accurately assess and substantiate that transactional sexual relationships are obstacles to the full enjoyment of the SRHR of adolescent girls, it is imperative that there be limitations to the research. At the outset, the research adopts a cisgender heteronormative femininity as the first limitation. This normative construction is chosen first, because cisgender girls are more susceptible to poor sexual health outcomes such as the acquisition of HIV.<sup>44</sup> This is because of the biological susceptibility of their sex organs to infections during heterosexual sexual intercourse.<sup>45</sup> Though the findings of this paper focus on cisgender heterosexual adolescent girls, the findings can still be

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<sup>40</sup> P Collins 'The politics of black feminist thought' In P Collins *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (Routledge: New York 1990) at 18.

<sup>41</sup> M Berger & K Guidroz (eds) *The intersectional approach transforming the academy through race, class, and gender* (2009) at 1.

<sup>42</sup> E Lesch & L Kruger 'Mothers, daughters and sexual agency in one low-income South African community' (2005) 61 *Social Science & Medicine* at 1073.

<sup>43</sup> Lesch & Kruger (n 42) 1072.

<sup>44</sup> M Nduna *A magnifying glass and a fine-tooth comb: understanding girls' and young women's sexual vulnerability* (2020) at 42.

<sup>45</sup> Nduna (n 44) 43.

used to understand broader SRHR issues related to adolescent girls in all their diversity as a whole.

Secondly, this research focuses solely on the experiences of adolescent girls. Notwithstanding that adolescents of both genders form part of vulnerable groups that remain underserved in the realm of SRHR, which continue to face significant obstacles in accessing SRH care.<sup>46</sup> Furthermore, there are approximately 580 million adolescents globally and many still have their sexual and reproductive health and rights compromised.<sup>47</sup> However, the need to strengthen and protect the SRHR of adolescent girls is greater than that of their male counterparts. Research has shown that despite measures being put in place to ensure access to SRH services, adolescent girls still struggle in accessing these services due to social stigma, societal values and morals.<sup>48</sup> As a result of this, HIV prevalence is higher in adolescent girls than in boys.<sup>49</sup> This is not just a South African issue but a global issue where adolescent girls are disproportionately impacted by HIV.<sup>50</sup> Adolescent girls face greater risks in terms of poor SRH outcomes. This being a consequence of 'their different status in terms of gender, gender inequality and gender role socialisation.'<sup>51</sup> Therefore, the findings of this paper will not encompass, reflect, or extend to older women. However, this is not to say that the findings should not be applied but rather that the findings are only known to be true and reflective of the experiences of adolescent girls.

## 6 Definition of main terms

Adolescent: 'individuals in the 10-19 years age group.'<sup>52</sup>

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<sup>46</sup> N Nowshin et al 'Sexual and reproductive health and rights of "last mile" adolescents: a scoping review' (2022) 30 *Sexual and Reproductive Health Matters* at 1.

<sup>47</sup> K Santhya et al 'Sexual and reproductive health and rights of adolescent girls: Evidence from low- and middle-income countries' (2015) 10 *Global Public Health* at 190.

<sup>48</sup> P Mahery 'Special child protective measures in the Children's Act and beyond' in T Boezaart *Child Law in South Africa* (2017) at 279.

<sup>49</sup> Mahery (n 48) 279.

<sup>50</sup> A Wilson et al 'Sexual and reproductive health among adolescent girls and young women in Mombasa, Kenya' (2020) 28 *Sexual and Reproductive Health Matters* at 303-304.

<sup>51</sup> Nduna (n 44) 45.

<sup>52</sup> Public Health 'WHO and the United Nations Definition of Adolescent' [WHO and United Nations Definition of Adolescent - Public Health](#) (accessed 10 August 2022).

Blesser: 'blesser is a modern-day sugar daddy.'<sup>53</sup>

Cisgender: 'a person whose sense of personal identity and gender correspond with their birth sex.'<sup>54</sup>

Heterosexual: 'sexually attracted to people of the opposite sex.'<sup>55</sup>

Sexual and reproductive health: 'is a state of physical, emotional, mental, and social wellbeing in relation to all aspects of sexuality and reproduction, not merely the absence of disease, dysfunction, or infirmity.'<sup>56</sup>

Sexual and reproductive rights:

the universal human rights relating to sexuality, including the right to sexual autonomy, sexual integrity and safety of the body, the right to sexual privacy, the right to make free and responsible reproductive choices, the right to sexual information based on scientific enquiry, and the right to sexual health care.<sup>57</sup>

Sexual vulnerability: 'susceptible to being wounded or hurt sexually.'<sup>58</sup>

Sugar daddy: 'a man who offers money or gifts to a younger woman for companionship or intimacy'<sup>59</sup>

Transactional sexual relationships: 'non-commercial, non-marital sexual relationships motivated by the assumption that sex will be exchanged for material support.'<sup>60</sup>

Transactional sex: 'consensual sexual activities with the implicit or explicit understanding to access material or non-material benefits.'<sup>61</sup>

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<sup>53</sup> B Frieslaar *et al* 'Blessings or curses? The contribution of the blesser phenomenon to gender-based violence and intimate partner violence' (2021) 77 *HTS Teologiese Studies/Theological Studies* at 1.

<sup>54</sup> Nduna (n 44) ix.

<sup>55</sup> Bing 'The meaning of heterosexual' [heterosexual meaning - Search \(bing.com\)](https://www.bing.com/search?q=heterosexual+meaning) (accessed 19 June 2022).

<sup>56</sup> Starrs *et al* (n 15) 2646.

<sup>57</sup> Law Insider 'Sexual and reproductive rights definition' [Sexual and reproductive rights Definition | Law Insider](https://www.lawinsider.com/dictionary/sexual-and-reproductive-rights-definition) (accessed 15 July 2022).

<sup>58</sup> Nduna (n 44) ix.

<sup>59</sup> J Gobind *et al* 'Sugar Daddy: The Student Attraction' (2015) 13 *Gender & Behaviour* at 6720.

<sup>60</sup> J Pulerwitz *et al* 'A man without money getting a sexual partner? It doesn't exist in our community': male partners' perspectives on transactional sexual relationships in Uganda and Eswatini.' (2021) no volume *Culture, Health & Sexuality* at 1.

<sup>61</sup> L Jacobson *et al* 'Transactional sex in the wake of COVID-19: sexual and reproductive health and rights of the forcibly displaced' (2020) 28 *Sexual and Reproductive Health Matters* at 77.

## 7 Literature Review

There are various SRHR issues that arise out of transactional sexual relationships, particularly for adolescent girls. A study undertaken in 2021 revealed that adolescent girls in South Africa who engage in transactional sex experience poor SRH outcomes.<sup>62</sup> These poor sexual health outcomes include but are not limited to sexually transmitted infections, including HIV, unsafe abortions, unwanted and unintended pregnancies.<sup>63</sup> The focus of this paper, however, is mainly on HIV as a negative outcome. The issue in this regard and of relevance to this paper is that 'transactional sex carries a higher transmission risk for women than non-transactional sex.'<sup>64</sup> This association between HIV and transactional sex persists in the presence of power disparities in relationships.<sup>65</sup>

Many studies have highlighted gendered power dynamics as a problem in transactional sexual relationships. The studies have observed that adolescent girls often lack agency in negotiating safe sex practices owing to the manner in which gender inequality plays out in the realm of intimacy.<sup>66</sup> The age disparity in these transactional relationships inevitably create gendered power dynamics that give male partners much more power in relationships.<sup>67</sup> For example, a report on sexual relations in Sub-Saharan Africa revealed that women with a partner more than 5 years older than them were 35% less likely to discuss HIV. Furthermore, women in this situation again were also less likely to suggest condom use.<sup>68</sup> The lack of condom use and lack of agency in deciding one's sexual and reproductive matters owing to this power dynamic leads to HIV infection.

The gap in literature surrounding transactional sexual relationships is that what has always been assessed are the health implications of these relationships as they relate to SRH in terms of HIV. The discourse does not consider how rights in the context of these relationships are restricted nor consider SRHR implications holistically. In

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<sup>62</sup> Duby *et al* (n 12) 3238.

<sup>63</sup> Duby *et al* (n 12) 3283.

<sup>64</sup> Dunkle (n 10) 1588.

<sup>65</sup> Dunkle (n 10) 1589.

<sup>66</sup> R Jewkes & R Morrell 'Sexuality and the limits of agency among South African teenage women: Theorising femininities and their connections to HIV risk practises' (2012) 74 *Social Science & Medicine* at 1729.

<sup>67</sup> Nduna (n 44) 62.

<sup>68</sup> N Luke & K Kurz 'Cross-generational and Transactional Sexual Relations in Sub-Saharan Africa: Prevalence of Behavior and Implications for Negotiating Safer Sexual Practices' at 17.

essence, the discourse has not been placed within a human rights framework that looks at how these relationships restrict SRHR - and that when SRHR are restricted HIV infection skyrockets in adolescent girls. It is precisely in this context that this paper aims to fill the gap by assessing how transactional sexual relationships operate as obstacles to the full enjoyment of the SRHR of adolescent girls in South Africa. The paper will delineate which rights are being hindered and under which legislative instruments at a regional, and global level.

## **8 Structure**

### **Chapter 1: Introduction**

This chapter is a general outline which includes an introduction, background, literature review and an overview of chapters.

### **Chapter 2: Situational analysis of transactional sexual relationships in South Africa and implications for HIV infection amongst adolescents**

This chapter features a situational analysis of transactional sexual relationships in South Africa. It considers factors that contribute to transactional sexual relationships and HIV as an SRH negative outcome caused by these relationships.

### **Chapter 3: Legislative instruments on sexual and reproductive health and rights**

This chapter maps how transactional sexual relationships operate as obstacles to the full enjoyment of the sexual and reproductive health and rights of adolescents under various legislative instruments at an international, regional, and local level.

### **Chapter 4: Conclusion and recommendations**

Chapter 4 comprises the conclusion and recommendations on how to better protect the sexual and reproductive health and rights of adolescents who engage in transactional sexual relationships.

## Chapter 2: Situational analysis of transactional sexual relationships in South Africa

### 2.1 Introduction

According to Leclerc-Madlala, transactional sexual relationships are not a new phenomenon and have been studied and written about for quite some time. Already with the start of the new century, literature on transactional sex had seen a steady growth. This included a growth in studies on the ways young people in South Africa constructed their sexual identities and conducted their sexual lives.<sup>69</sup> For example, a study in the 1990s revealed that there had been an increased prevalence of age disparate relationships that drove HIV/AIDS.<sup>70</sup> Another study in 2002 analysed the sexual dynamics among township high schoolers. The study revealed that the boys experienced anxiety that the inherent financial element in relationships made them incapable of meeting the financial demands of their girlfriends.<sup>71</sup>

Transactional sex and its norms can be associated with South Africa's historical and political processes of colonisation and apartheid and the waves of globalisation present in the post-apartheid era.<sup>72</sup> Colonial and apartheid laws through the migrant labour system and the segregation of black families created many new sexual behaviours such as increased demands for commercial sex work and infidelity in marriage. These behaviours have then evolved and currently affect South African contemporary sexual behaviour.<sup>73</sup> Furthermore, these behaviours have been identified as key factors propelling transactional sex patterns today.<sup>74</sup> Transactional sexual relationships are heterogenous in nature and the ways in which they are defined, named, and discussed have evolved and continue to evolve.<sup>75</sup> They have taken many names such as sugar daddy relationships and blesser-blesse relationships. What has

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<sup>69</sup> S Leclerc-Madlala 'Transactional Sex and the Pursuit of Modernity' (2003) 29 *Social Dynamics* at 217.

<sup>70</sup> Leclerc-Madla (n 69) 217.

<sup>71</sup> Leclerc-Madla (n 69) 217.

<sup>72</sup> M Leier 'Young women's perceptions and narratives of intergenerational and transactional sexual relationships in Durban, KwaZulu-Natal' at 7.

<sup>73</sup> Leier (n 72) 7.

<sup>74</sup> Leier (n 72) 7.

<sup>75</sup> Y Zembe *et al* "Money talks, bullshit walks" interrogating notions of consumption and survival sex among young women engaging in transactional sex in post-apartheid South Africa: a qualitative enquiry' (2013) 9 *Globalization & Health* at 2.

however remained constant is that material support is exchanged for sexual favours. These exchanges then form part of the organising principles of the relationship.<sup>76</sup>

This chapter features a discussion on the factors that make adolescents susceptible to transactional sexual relationships and will be followed by a section on transactional sexual relationships and their link to HIV transmission in adolescents and a conclusion.

## **2.2 The difference between transactional sexual relationships and commercial sex work.**

Transactional sexual relationships have since the mid-1990s been regarded as an important determinant of HIV transmission in the Sub-Saharan region, however, the meaning and motivations for these relationships continue to elude many.<sup>77</sup> They are often said to be formal or commercial sex work when the two are in fact very different although they are both of equal concern to the transmission of HIV.<sup>78</sup>

These interactions need to be distinguished from sex work, generally they are shaped by a negotiation process that is subtler than sex work and not as clearly defined.<sup>79</sup> In explicating the differences, the point of departure is in noting that the boundary between these concepts is subjective and context dependent.<sup>80</sup> Subjective in how the participants choose to first identify themselves and their partners and secondly, differentiate themselves from sex workers. The participants argue that they view their sexual partners as boyfriends and not clients as the case would be for sex workers.<sup>81</sup> Notwithstanding that these concepts are different; one must acknowledge the similarities and must consider issues of context and its concomitant considerations. A common characteristic is that both are non-marital sexual relations that are marked by an exchange of money or gifts.<sup>82</sup> What then sets them apart making the one

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<sup>76</sup> J Mampane 'Exploring the "Blesser and Blessee" Phenomenon: Young Women, Transactional Sex, and HIV in Rural South Africa' (2018) no volume *Reproductive Health in Sub-Saharan Africa-Original Research* at 1.

<sup>77</sup> Stoebenau *et al* (n 11) 2.

<sup>78</sup> Stoebenau *et al* (n 11) 1.

<sup>79</sup> J Hoss & L Bokland 'Sugar daddies and blesser: A contextual study of transactional sexual interactions among young girls and older men' (2018) 28 *Journal of Community & Applied Psychology* at 307.

<sup>80</sup> DUBY *et al* (n 12) 3249.

<sup>81</sup> Mampane (n 76) 2.

<sup>82</sup> M Hunter 'The Materiality of Everyday Sex: Thinking beyond 'prostitution' (2002) 61 *African Studies* at 100.

commercial sex work and the other a transactional sexual relationship is the type of exchange, the purpose of the exchange, and context within which the exchange takes place. In terms of transactional sexual relationships, several authors have explained the type of exchange and the purpose it serves in transactional sexual relationships. According to Hoss & Bokland "in transactional sexual relationships sexual intercourse is not directly linked to payment but forms an inherent part of an interaction through which the women derive monetary values."<sup>83</sup> Hunter further explains that "the exchange of gifts for sex is part of a broader set of obligations that might not involve a predetermined payment."<sup>84</sup> For example, it may be a practical economic arrangement or a display and symbol of love between the participants.<sup>85</sup> The context within which the exchange occurs thus comes into play. According to Zembe *et al.*, the exchange takes place within a relationship no matter how ambiguous or transitory the relationship is.<sup>86</sup> In commercial sex work, the exchange is casual and there is no relationship, feelings or romance involved.<sup>87</sup> This differs from transactional sexual relationships where research has shown that some girls engage in these relationships for romantic reasons and in pursuit of emotional intimacy.<sup>88</sup>

Briefly, as an issue of relevance to the differences is also clarifying the differences between transactional sexual relationships and other non-marital romantic relationships. According to Duby *et al.*, the key feature in distinguishing the two is that transactional sexual relationships are not only characterised by material exchange but are motivated by it.<sup>89</sup> This differs from non-marital romantic relationships where they may be motivated by factors such as companionship, love, and the prospect of marriage and family life as opposed to just financial or material gain.

It is important that transactional sex be reflected as it is perceived by the participants, in doing so, efforts to curb HIV transmission may be strengthened.<sup>90</sup> This can be achieved through concerted efforts to expand the already existent prevention options

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<sup>83</sup> Hoss & Bokland (n 79) 307 drawing on Y Zembe *et al* "Money talks, bullshit walks" interrogating notions of consumption and survival sex among young women engaging in transactional sex in post-apartheid South Africa: a qualitative enquiry' (2013) 9 *Globalization & Health* 1.

<sup>84</sup> Hunter (n 82) 101.

<sup>85</sup> Zembe *et al* (n 75) 2.

<sup>86</sup> Zembe *et al* (n 75) 2.

<sup>87</sup> Mampane (n 76) 2.

<sup>88</sup> Hoss & Bokland (n 79) 308.

<sup>89</sup> Duby *et al* (n 12) 3283.

<sup>90</sup> Stoebenau *et al* (n 12) 2.

available to adolescent girls in these relationships. This being done through the “development of novel HIV- specific biomedical, structural and behavioural interventions.”<sup>91</sup> Additionally, a clear boundary between the two concepts needs to be drawn and asserted, as a clear distinction and proper definition of transactional sexual relationships may play an important role in strengthening HIV prevention efforts in the sub-Saharan region.<sup>92</sup>

### **2.3 Factors that lead adolescents into transactional sexual relationships**

Transactional sexual relationships are common in both rural and urban areas in South Africa. They are, however, more prevalent in poverty-stricken communities where women (including adolescent girls) engage in it for financial gain and support.<sup>93</sup> However, poverty or poor economic status is not the only reason why adolescent girls engage in transactional sex. Poverty combined with materialistic, consumerist culture underpins the wide prevalence of women's engagement in sexual relationships for conspicuous consumption.<sup>94</sup> Furthermore, despite a tendency to associate transactional sexual relationships with poverty and economic dependence on men, research has shown that material exchange for sex is not always linked to urgent food and shelter needs.<sup>95</sup> These relationships have been shaped by various economic, social, and political conditions and what literature has highlighted is that in the final analysis, these relationships are motivated by either survival or consumption.<sup>96</sup> However, Duby *et al.* problematizes and warns against this categorisation for two reasons. Firstly, because the motivations are not mutually exclusive and adolescent girls<sup>97</sup> are often driven by a combination of subsistence needs and consumerist desires.<sup>98</sup> Secondly, when researchers hierarchically categorise reasons why adolescent girls engage in transactional sex, there exists a danger of misclassifying

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<sup>91</sup> Dellar (n 30) 64.

<sup>92</sup> Stoebenau *et al* (n 11) 2.

<sup>93</sup> Mampane (n 76) 2.

<sup>94</sup> Leclerc-Madla (n 69) 217.

<sup>95</sup> Leier (n 72) 5.

<sup>96</sup> Stoebenau *et al* (n 11) 2.

<sup>97</sup> This term AGYW was used in the specific study by Duby *et al* 2021 and grouped adolescent girls and young women together, however, in keeping with the standards of this paper and for the purposes of uniformity only adolescent girls will be cited.

<sup>98</sup> Duby *et al* (n 12) 3251.

what adolescent girls deem important needs as frivolous luxuries.<sup>99</sup> The consequence of this could lead to interventions that are inappropriately designed according to misconstrued underlying motivations of adolescent girls.<sup>100</sup> For example, there was a television show that aired on SABC 1 that dealt with a range of health and societal issues called *Siyayinqoba - Beat it*.<sup>101</sup> In one episode where the discussion was on transactional sexual relationships, one participant spoke on her relationship and her motivations for being in one. She stated that “he pays my school fees and gives me lunch money and I eat nice things at school.”<sup>102</sup> If one had to classify this motivation, school fees would be viewed as important while eating ‘nice’ things would be classified as a frivolous luxury. This categorisation could potentially be a misclassification in that perhaps the young lady in question views eating nice things as important and as a legitimate need in her life as opposed to just a frivolous luxury.

Notwithstanding the above warning, in terms of this paper, the factors that make adolescent girls susceptible to transactional sex will be grouped to socioeconomic factors such as poverty, socio-behavioural factors such as peer pressure and sociocultural factors such as intergenerational relationships.<sup>103</sup> As a notice, the assertion in this regard is that despite what the motivations for the relationships are, there are still possibilities of sexual and reproductive health and rights violations.

### **2.3.1 Poverty as a socioeconomic factor**

Poverty has been cited as one of the leading propellants of transactional sexual relationships. One study highlighted that the participants lived in poverty and their lives were characterised by social challenges because of a lack of resources. This in turn led them to turn to sugar daddies and blessers for survival.<sup>104</sup> This study also proved an argument made earlier that transactional sex patterns are influenced by historical and political processes of apartheid and its laws and that these processes continue to affect South African contemporary sexual behaviour. The study highlighted that the adolescents that were participants in the study were from a township segregated for

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<sup>99</sup> Duby *et al* (n 12) 3249.

<sup>100</sup> Duby *et al* (n 12) 3249.

<sup>101</sup> *Siyayinqoba- Beat it* Episode 26, 15 August 2012 ([5895](#)) [Epi 26.1 Transactional Relationships - YouTube](#) minute 3:10

<sup>102</sup> *Siyayinqoba- Beat it* Episode 26, 15 August 2012 ([5895](#)) [Epi 26.1 Transactional Relationships - YouTube](#) minute 3:10

<sup>103</sup> Mampane (n 76) 4.

<sup>104</sup> Hoss & Bokland (n 79) 307.

black people by the apartheid government. It further highlights how the townships were under-resourced in the past and continue to be two decades after the end of apartheid.<sup>105</sup> Another study highlighted that adolescent girls from disadvantaged backgrounds, who have deceased parents and have to support siblings and family members, in the context of high unemployment rates and lack of opportunities for income generation, view transactional sexual relationships as legitimate means of attaining material and/or financial support.<sup>106</sup> Another participant in the show cited above<sup>107</sup> stated that:

'If there is no body taking care of me at home, I will have to grow up and make decisions. I might think of prostitution or robbery but then I meet an older man who says he will take care of me, I would take this offer and date him, why would I refuse someone who is going to take care of me? Why not? Go for it.'<sup>108</sup>

### **2.3.2 Social or peer pressure as socio-behavioural factors**

Societal and peer pressure plays a role and influences adolescents motivations for engaging in transactional sexual relationships. Motivations for transactional sexual relationships go beyond basic survival and subsistence needs in circumstances of poverty and are further situated within complex sexual economies.<sup>109</sup> Qualitative research has shown that entrenched social norms that dictate that goods or gifts received from a partner must be reciprocated with sex frame the narrative around transactional sexual relationships to encompass both survival through acquisition of basic needs and gain in social status.<sup>110</sup> For example, a participant in a TV show stated that her friend dated an older man not because they did not have money at home but because she wanted to be on the same level as her friends because they were dating older men.<sup>111</sup> The study by Duby *et al.* indicated that adolescent girls are motivated to engage in these relationships because they seek peer approval, a sense of belonging, prestige, social standing, and desire a modern lifestyle dictated by societal norms and pressures as depicted in the media.<sup>112</sup> This being in line with an earlier

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<sup>105</sup> Hoss & Bokland (n 79) 307.

<sup>106</sup> Duby *et al* (n 12) 3245.

<sup>107</sup> Duby *et al* (n 12) 3245

<sup>108</sup> Siyayinqoba- Beat it Episode 26, 15 August 2012 ([5895](#)) [Epi 26.1 Transactional Relationships - YouTube](#) 1:56 minutes

<sup>109</sup> Duby *et al* (n 12) 3245.

<sup>110</sup> Duby *et al* (n 12) 3245.

<sup>111</sup> Siyayinqoba- Beat it Episode 26, 15 August 2012 ([5895](#)) [Epi 26.1 Transactional Relationships - YouTube](#) min 2:37

<sup>112</sup> Duby *et al* (n 12) 3245.

discussion that highlighted the impact that the wave of globalisation that came with South Africa's political transition had on transactional sex patterns today.

Duby *et al.* showed how these various factors can function simultaneously as motivations for adolescent girls, their formulation although lengthy is thus worth mentioning below in detail:

'For example, fashionable, branded clothing may be deemed 'essential' for preventing social exclusion, which for adolescents and young people, who tend to be highly sensitive to how their physical appearance is perceived by peers, and therefore essential for mental health and self-esteem. Additionally, clothing, and outward appearances are mechanisms through which young people express their identities, and their ability to portray themselves in a 'socially-acceptable' manner may be intricately tied up with self-esteem, which itself is linked with vulnerability to sexual risk.

As our respondents described, peer pressure to conform to these standards was a motivating factor in AGYW engaging in TSR. Using transactional sex as a means of acquiring the material possessions needed to belong and attain peer respect and approval has been found in previous research among young people. In a social and economic context where AGYW's feelings of self-worth and self-esteem are closely associated with their appearance and material possessions, having a means of attaining these items is a pathway for developing their own identity within their peer networks.'<sup>113</sup>

In cases where poverty is absent, transactional sexual relationships are motivated by the need to either attain a better lifestyle or to maintain a certain lifestyle. Masvawure conducted a study amongst university students and observed that:

'Female students from lower middle-class backgrounds used transactional sex to attain an otherwise elusive modern lifestyle, while those from upper middle-class backgrounds used it to maintain an already privileged class position.'<sup>114</sup>

### **2.3.3 Sociocultural factors**

Scripted gender roles are a socio-cultural global phenomenon, with differing expectations across societies. In sub-Saharan Africa men are perceived as providers and women as receivers - creating a female expectation to be materially supported by male partners. The social normative construction in this region frames women as financially dependent on male partners and operates as one of the leading structural

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<sup>113</sup> Duby *et al* (n 12) 3249-2350.

<sup>114</sup> T Masvawure 'I just need to be flashy on campus': female students and transactional sex at a university in Zimbabwe' (2010) 12 *Culture, Health & Sexuality* at 858.

drivers of gendered socio-economic power disparities in the region.<sup>115</sup> Hoss & Bokland assert that the gender inequality in transactional sexual relationships can be seen as symptomatic of a broader set of societal structures and norms.<sup>116</sup> Research has shown that South African men in particular hold a belief that sex is not free and must be met with an exchange of something shows how female sexuality is commodified. These social norms framing gendered power discourse thus function to reproduce unequal gendered power dynamics and gender role expectations.<sup>117</sup>

Financial dependence can only be derived from males who are in better financial standing. This is usually older men as opposed to adolescent boys or young men. A young woman explained in a TV interview that,

“Those men can afford to buy me those things (cosmetics. Boys my age can’t afford to buy me those things.”<sup>118</sup>

In another interview where the participants were between the ages of 18 and 21, various views on transactional sexual relationships were shared. One 19-year-old stated that:

“Sometimes I like dating the old guys because when I date guys my age, they will ask me for money, and I do not have it but when you are dating the old guys everything goes smoothly.”<sup>119</sup>

Therefore, when adolescent girls choose to date older men for financial and material gain, it is a response to their commodified sexuality and entrenched social norms that create an expectation to be supported by males. Hoss & Bokland’s formulation of this response is that women have taken note that their sexuality has economic potential and that they can use it to uplift themselves financially.<sup>120</sup> However, the danger in realising this economic potential and pursuing it reproduces unequal gender power dynamics where the provision of material or financial support must be reciprocated. The created expectation of reciprocity that follows the receiving of benefits heightens the vulnerability of the female therefore limiting their agency.<sup>121</sup> A participant on a TV show explained this expectation of reciprocity and the way she framed her answer

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<sup>115</sup> Duby *et al* (n 12) 3249.

<sup>116</sup> Hoss & Bokland (n 79) 306.

<sup>117</sup> Duby *et al* (n 12) 3249.

<sup>118</sup> [\(5895\) Epi 26.1 Transactional Relationships - YouTube](#) from 1:35

<sup>119</sup> [\(5895\) DO YOU KNOW WHERE THE DANGER? IS FULL VIDEO - YouTube](#) from 0:37

<sup>120</sup> Hoss & Bokland (n 79) 308.

<sup>121</sup> Duby *et al* (n 12) 3245.

shows to that once reciprocity is due and elicited, one has no choice but to comply meaning the decision to reciprocate was not autonomous and was made under limited agency. She stated that:

'He will buy me a lot of things but there will be a day where he will say I have bought you everything you want, so there is something I need you to do for me. I will feel obligated because he buys things for me and does everything I want so why can't I do what he wants? That is how young women end up sleeping with older men. I get everything I want so why should I be stingy with my body? He had a reason for giving you all those things. He wanted something. You also knew when you accepted all those things soon he will want something in return and you will have to give it to him.'<sup>122</sup>

## **2.4 Transactional sexual relationships and increased risk of HIV infection.**<sup>123</sup>

Transactional sexual relationships have been a growing public concern as a contributor to the rise in HIV infection among adolescent girls.<sup>124</sup> In transactional sexual relationships, the risk of HIV transmission is heightened due to unprotected sexual intercourse with multiple concurrent partners and unequal gendered power dynamics. This is both a sexual and reproductive health concern and development issue, where the burden of HIV limits the future prospects of health and wellbeing later in life.<sup>125</sup>

Duby *et al.* in the analysis of their data concluded that the survey data showed an association between HIV infection and reports of transactional sex among adolescent girls. The HIV-positive participants were most likely to report having been in a transactional sexual relationship than those adolescent girls who were HIV negative.<sup>126</sup> Two issues here were reported by the study; the first being the power dynamics and, secondly, unprotected intercourse with multiple concurrent partners. Despite adolescent girls' agency in choosing to engage in age-disparate partnerships that are transactional in nature, age disparity exacerbates unequal gendered power

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<sup>122</sup> [\(5895\) Epi 26.1 Transactional Relationships - YouTube](#) from 3:41

<sup>123</sup> The study by Duby *et al* for the purposes of this section is ideal in expounding the transmission of HIV in transactional sexual relationships. It will thus be cited for a large portion of this section because firstly the sample of the qualitative study fits perfectly within the scope of this paper, secondly, the study covers all aspects relevant the present discussion. Lastly, the study leaves no room for dissenting or opposing views as heightened transmission of HIV in transactional sexual relationships is hardly a contentious issue.

<sup>124</sup> Hoss & Bokland (n 79) 307.

<sup>125</sup> South African Medical Research Council 'Reimagining health annual report 2021/2022' at 130.

<sup>126</sup> Duby *et al* (n 12) 3250.

dynamics and increases the risk of infection where their ability to negotiate condom use is negatively impacted.<sup>127</sup> This is because evidence has shown that men as the financial providers are entitled to dictate the terms of the sexual exchange, this socio-economic power disparity thus operates as a key propellant for adolescent girls' vulnerability to HIV infection in South Africa.<sup>128</sup> Hoss & Blokland provided an example of this where participants in the study reported that in these relationships, the men initially agree to condom use but later expect the sex to be condomless. Furthermore, the participants also felt that they were not able to insist on condoms being used.<sup>129</sup> The study also noted a 'positive association between age-disparate partnerships and HIV-infection risk among adolescent girls.'<sup>130</sup>

The need for multiple concurrent partners is influenced by the current financial status of the man in question and the availability of partners. The principle is that when a blesser or sugar daddy does not have enough resources to fulfil all the needs and desires of the adolescent girl, they attempt to fill this gap through maintaining multiple concurrent relationships.<sup>131</sup> The risk of transmission is not only borne by adolescent girls but also boyfriends or sexual partners who are their age. This is because sometimes, adolescent girls may be in concurrent relationships with blesser while also being romantically involved with boyfriends their age.<sup>132</sup>

In light of the above, it is concluded that transactional sexual relationships are not a new phenomenon in South Africa and are currently a cause for concern owing to their contribution to increasing HIV infection among adolescent girls. They should further be distinguished from commercial sex work and the difference should be assessed in the context of how and where the exchange takes place. Furthermore, they should also be assessed in a subjective manner by considering the perceptions of the adolescent girls engaging in the relationships. Lastly, the factors that lead adolescents into transactional sexual relationships may be grouped into socio-economic, socio-cultural and socio-behavioural factors.

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<sup>127</sup> DUBY *et al* (n 12) 3239.

<sup>128</sup> DUBY *et al* (n 12) 3250.

<sup>129</sup> Hoss & Bokland (n 79) 314.

<sup>130</sup> DUBY *et al* (n 12) 3251.

<sup>131</sup> DUBY *et al* (n 12) 3251.

<sup>132</sup> DUBY *et al* (n 12) 3251.



## **Chapter 3: Legislative instruments on sexual and reproductive health and rights**

### **3.1 Introduction**

The sexual and reproductive health and rights of adolescent girls find application under several international and regional legislative instruments. In addition, their SRHR are also protected and guaranteed under several national policies. However, evolving capacities, autonomy and sexual agency are necessary for the full enjoyment of these SRHR. Therefore, this chapter aims to set out the legislative frameworks that guarantee the SRHR of adolescent girls, assessed at a domestic, regional, and international level. Prior to this, evolving capacities, autonomy and sexual agency and their role in the full enjoyment of SRHR will be set out. Once this has been done, SRHR will then be situated within a broader right to health as envisaged under the International Covenant on Economic, Social and Cultural Rights (ICESCR). This will then be followed by discussions on the Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol). Lastly, the paper will set out national legislative and policy frameworks governing the SRHR of adolescents in South Africa.

### **3.2 Understanding evolving capacities, autonomy and sexual agency and evolving capacities and their role in the full enjoyment of sexual and reproductive health and rights**

The main contention in this section is that evolving capacities, autonomy and sexual agency play a crucial role in the ability to fully enjoy SRHR, as these are tools that adolescent girls can use to claim their SRHR. Adolescent girls cannot fully enjoy their SRHR if they do not possess the above or where they possess them but are limited in their exercise thereof. The research puts forth that the gendered power dynamics and disparities in transactional sexual relationships curtail and hamper with the ability of adolescents whose capacities are constantly evolving, to exercise their autonomy and sexual agency in claiming their SRHR.

Adolescence forms part of childhood and the concept of childhood is not applied uniformly around the world, with no consensus or uniform agreement on the nature of childhood.<sup>133</sup> The central question therefore arises, which questions how governments and the societies they represent, ought to apply and interpret universal human rights standards in the presence of diverse notions of childhood.<sup>134</sup> In this regard, the principle of the evolving capacities of the child as embodied in Article 5 of the CRC, can be used in approaching this question.<sup>135</sup> This principle was first introduced in international human rights law under this treaty mainly to guide its interpretation, however, it has now come to play an important role in the interpretation of children's rights across the board.<sup>136</sup> Article 5 of the Convention states that

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 capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.<sup>137</sup>

The principle in the article concerns itself with the exercise of rights by the child and that in the exercise of these rights there exists an obligation for guidance and direction that must be consistent with these evolving capacities.<sup>138</sup> Furthermore, the principle recognises the relationship between parents and children, where parents and other care-givers are the first line of support for children and that they play an important role in socialising, guiding and protecting children due to their lack of capacity and vulnerability.<sup>139</sup> The principle therefore recognises that this relationship changes as children grow older and focuses on capacity rather than age in the exercise of human rights by children.<sup>140</sup> It fosters that as children grow older and acquire enhanced competencies, there becomes a reduced need for direction and that children should be allowed to exercise their rights based on these capacities.<sup>141</sup> The Committee on the Rights of the Child in General Comment No. 20 on the implementation of the rights

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<sup>133</sup> Lansdown (n 27) vii.

<sup>134</sup> Lansdown (n 27) vii.

<sup>135</sup> Lansdown (n 27) vii.

<sup>136</sup> Lansdown (n 27) IX.

<sup>137</sup> Convention on the Rights of the Child, article 5.

<sup>138</sup> Lansdown (n 27) vii.

<sup>139</sup> Skelton (n 26) 342.

<sup>140</sup> Lansdown (n 27) vii.

<sup>141</sup> B Mezmur 'The United Nations Convention on the Rights of the Child' in T Boezaart *Child Law in South Africa* (2017) at 418.

of the child during adolescence defined evolving capacities in paragraph 18. It defined it as:

an enabling principle that addresses the process of maturation and learning through which children progressively acquire competencies, understanding and increasing levels of agency to take responsibility and exercise their rights.<sup>142</sup>

The evolving capacities function as an enabling principle that recognises that ‘as children grow, develop and mature, they acquire capacities to exercise increasing levels of agency over their rights. It also functions to support and recognise children’s agency in decision-making.’<sup>143</sup> Therefore, this means that evolving capacities bestow on children decision-making power by transferring this responsibility from their parents and caregivers to them.<sup>144</sup> This gradual transfer of responsibility recognises children’s emerging autonomy.<sup>145</sup>

The South African Constitution guarantees the right to bodily integrity in section 12 which grants a person the right to freedom and security of the person. Furthermore, personal autonomy and self-determination in relation to bodily integrity is emphasised under section 12(2). The section provides that ‘everyone has the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction and to security in and control over their body.’<sup>146</sup> Furthermore, in *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development (Teddy Bear Case)*, the Constitutional Court recognised the autonomy of adolescents in that they deserve privacy and dignity in their nascent sexual decision-making.<sup>147</sup> Autonomy may be described in essence as a manifestation of a person’s legal and mental capacity to understand and make informed decisions.<sup>148</sup> It may be limited by things such as age and economic status<sup>149</sup> and it ceases to exist when the decision making role is assumed by another person.<sup>150</sup> Let us take the right to family planning and choosing a method of contraceptive to prevent HIV infection as an example that

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<sup>143</sup> S Varadam ‘The Principle of Evolving Capacities under the UN Convention on the Rights of the Child’ (2019) 27 *International Journal of Children’s Rights* at 317.

<sup>144</sup> Lansdown (n 27) 4.

<sup>145</sup> Lansdown (n 27) 4.

<sup>146</sup> The Constitution of the Republic of South Africa, 1996 sec 12(2).

<sup>147</sup> Skelton (n 26) 342.

<sup>148</sup> S Engelbrecht ‘Can autonomy be limited- an ethical and legal perspective in a South African Context?’ (2014) 32 *Journal of Forensic Odonto-stomatology* at 35.

<sup>149</sup> Engelbrecht (n 148) 35.

<sup>150</sup> Engelbrecht (n 148) 37.

displays autonomy at play. In this case, an adolescent girl would need to exercise their autonomy in deciding for themselves the method of contraception and choose when and how many children to have. However, when adolescent girls engage in transactional sex with an age disparity, the consequences are detrimental to enforcing these SRHR entitlements, as power to negotiate use of family planning, condom use and whether and when to have sexual intercourse is hampered.<sup>151</sup> Therefore, the adolescent girl in this case lacks autonomy because it ceases to exist when someone other than the adolescent assumes the decision-making power in claiming and realising SRHR.

Sexual agency plays an important role in the full enjoyment of SRHR, and is needed in order to ensure that adolescent girls can still maintain the exercise of their rights in transactional sexual relationships. Sexual agency relates to an individual's confidence and freedom to express sexuality in behaviours, including the ability to not engage in sexual behaviours.<sup>152</sup> It also includes the ability to choose the manner in which you want to engage in sexual activity.<sup>153</sup> It reflects a person's desires or pleasurable experiences taken in their best interest.<sup>154</sup> In essence, it is the knowledge of what you want sexually and what you do not want, furthermore, it fosters that a person is capable of making and enforcing decisions about their sex lives.<sup>155</sup> In the same manner as with autonomy, an adolescent would need to exercise sexual agency in claiming their SRHR to decide whether they desire to be sexually active or not and their right to a safe sex life, for example. Furthermore, the test for assessing evolving capacities in relation to the right to health must also be considered in the exercise of sexual agency. In this regard there are central elements of competence for decision-making that must be present; one of them is that the child must possess the ability to think and choose with some degree of independence.<sup>156</sup> That means the child should be able to make a choice without being coerced or manipulated and must further be capable of thinking

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<sup>151</sup> J Wamoyi *et al* 'Is transactional sex exploitative? A social norms perspective, with implications for interventions with adolescent girls and young women in Tanzania' (2019) 14 *PLoS ONE* at 2.

<sup>152</sup> P Averett *et al* 'Young women's struggle for sexual agency: the role of parental messages' (2008) 17 *Journal of Gender Studies* at 332.

<sup>153</sup> Weebly 'What is Sexual agency' [What is Sexual Agency? - Healthy Sexuality \(weebly.com\)](https://www.weebly.com/healthy-sexuality/sexual-agency) (accessed 10 October 2022).

<sup>154</sup> Averett *et al* (n 152) 332.

<sup>155</sup> Weebly 'What is Sexual agency' [What is Sexual Agency? - Healthy Sexuality \(weebly.com\)](https://www.weebly.com/healthy-sexuality/sexual-agency) (accessed 10 October 2022).

<sup>156</sup> Lansdown (n 27) XI.

through the issue independently.<sup>157</sup> However, in transactional sexual relationships, the exercise of sexual agency is limited and curtailed. Agency is located and exercised amid structural constraints influenced by historical, cultural, economic, and political contexts.<sup>158</sup> Furthermore, transactional sex exists and operates on a continuum on which the sexual agency of females becomes more and more constrained by material circumstance.<sup>159</sup> For example, deprivation as a material circumstance may lead an adolescent into transactional sexual relationships, where such lack and deprivation creates a power imbalance that limits the ability to freely consent to sex or to exercise sexual agency.<sup>160</sup>

Evolving capacities, autonomy and sexual agency in this regard do not function separately and are, therefore, interdependent. This is precisely so because the exercise of autonomy requires capacity which means that when autonomy is recognised it is based on a presumption of competence - that a person has agency which is the capacity or capability to make and enforce decisions about their lives. These choices must also be informed and wise.<sup>161</sup> It is imperative to consider that amidst all of the above, evolving capacities, autonomy and sexual agency do not completely remove the need to protect children. The argument is that although the levels of protection children need diminishes in accordance with their evolving capacities, there is still a need to ensure that children are protected from participation in or exposure to activities that are likely to cause them harm.<sup>162</sup> This means that 'the need for protection rights is not dislodged by children's gradually developing autonomy.'<sup>163</sup> This therefore necessitates the research as it analyses how transactional sexual relationships negatively impact adolescent girls despite their evolving capacities, autonomy and sexual agency.

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<sup>157</sup> Lansdown (n 27) XI.

<sup>158</sup> Nduna (n 44) 5.

<sup>159</sup> J Bumet 'Situating Sexual Violence in Rwanda (1990–2001): Sexual Agency, Sexual Consent, and the Political Economy of War' (2012) 55 *African Studies Review* at 97.

<sup>160</sup> K Czechowski *et al* 'Survival sex: Sexual agency and consent in a state of deprivation? A scoping review' (2022) 31 *Canadian Journal of Human Sexuality* at 293.

<sup>162</sup> Lansdown (n 27) x.

<sup>163</sup> Skelton (n 26) 342.

### **3.2 Sexual and reproductive health and rights and their link to the right to health under international human rights law**

SRHR form part of the broader right to health as envisaged under several international and regional instruments such as the ICESCR, the Universal Declaration of Human Rights and the Maputo Protocol. The ICESCR is an international instrument that anchors the right to health in Article 12. Article 12 of the Covenant states that state parties to the Covenant are to recognise the rights of everyone to the highest attainable standard of physical and mental health.<sup>164</sup> Additionally, amongst other things, States are to take steps to achieve the full realisation of this right including, ‘the prevention, treatment and control of epidemic, endemic, occupational and other diseases.’<sup>165</sup>

The Committee on Economic, Social and Cultural Rights expounded on Article 14 in General Comment 14. General Comment 14 recognises sexual and reproductive health and rights in stating that the right to health contains both freedoms and entitlements. The entitlements include the right to control one’s health and body and sexual and reproductive freedom.<sup>166</sup> The General Comment further highlights the interrelatedness of the right to health to other human rights and that its realisation is dependent upon the fulfilment of other rights.<sup>167</sup>

The CRC is an international human rights legislative instrument that sets out various rights pertaining to children. It defines a child under Article 1 as every human being below the age of 18 unless majority is attained earlier.<sup>168</sup> This could potentially cause confusion as to whether the CRC applies to adolescents up to the age of 19 as well because the Convention technically only applies to children under the age of 18. However, the position has been clarified and the CRC can be applied to adolescents up to the age of 19 because

...children’s rights are human rights ..., and because SRHR apply to all, regardless of age, the perspectives in this commentary remain relevant when considering the SRHR of adolescents up to 19 years of age.<sup>169</sup>

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<sup>164</sup> International Covenant on Economic, Social and Cultural Rights, art 12.

<sup>165</sup> International Covenant on Economic, Social and Cultural Rights, art 12 2(c).

<sup>166</sup> International Covenant on Economic, Social and Cultural Rights General Comment 14, para 8.

<sup>167</sup> International Covenant on Economic, Social and Cultural Rights General Comment 14, para 3.

<sup>168</sup> Convention on the Rights of a Child, art 1.

<sup>169</sup> A Buller & M Schulte ‘Aligning human rights and social norms for adolescent sexual and reproductive health and rights’ (2018) 26 *Reproductive Health Matters* at 39.

The right to health in terms of the CRC is set out in Article 24 which guarantees the right of children to enjoy the highest attainable standard of health. It also places an obligation on States to ensure that no child is deprived of their right to access healthcare services.<sup>170</sup>

These provisions bear weight and relevance to this paper because HIV infections within transactional sexual relationships adversely affects the health of adolescent girls. Transactional sexual relationships limit the right to health in this regard by making hindering the state measures that are aimed towards the prevention, treatment, and control of HIV. Transactional sexual relationships act as barriers in adolescent girls' abilities to exercise their freedoms and entitlements in pursuit of realising their right to health. For example, in line with an earlier discussion on sexual agency and disparities, several reports have highlighted the age disparity in these transactional relationships inevitably create gendered power dynamics that give male partners much more power in relationships.<sup>171</sup> This resulting in limited agency in negotiating safe sex practices owing to the manner in which gender inequality plays out in the realm of intimacy.<sup>172</sup>

### **3.3 Regional legislative instruments guaranteeing the sexual and reproductive health and rights of adolescents**

The Maputo Protocol is a regional instrument that safeguards the human rights of women in Africa. The Protocol includes measures to be taken by states in realising the human rights of African women.<sup>173</sup> The Protocol in Article 1 defines women as 'persons of female gender, including girls,'<sup>174</sup> therefore, all the obligations placed on States apply to adolescents.<sup>175</sup>

The Maputo Protocol has been hailed for its innovations beyond existing treaties such as the UN Convention on the Elimination of All Forms of Discrimination Against

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<sup>170</sup> Convention on the Rights of a Child, art 24.

<sup>171</sup> Nduna (n 44) 62.

<sup>172</sup> Jewkes & Morrell (n 66) 1729.

<sup>173</sup> Buller & Schulte (n 169) 38.

<sup>174</sup> Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa: the Maputo Protocol, art 1(k).

<sup>175</sup> In this chapter the terms young women, women and girls may be taken to mean adolescents and as such these terms will be used interchangeably in keeping with the wording of the Protocol.

Women (CEDAW) which was relied upon heavily in the drafting of the instrument.<sup>176</sup> One such innovation is that the Protocol in explicitly including rights relating to HIV is a first in the development of normative standards for the protection of human rights.<sup>177</sup> The instrument is important in guiding state action towards protecting women including adolescents in Africa from HIV infection.<sup>178</sup> The Protocol has many goals, however, ‘the overarching goal of the Protocol is to bring about gender equality in Africa, the converse of which is fuelling the spread of HIV in the continent.’<sup>179</sup> It further addresses various manifestations of gender inequality which are the root cause of the disproportionate spread of HIV in young women.<sup>180</sup> This becomes particularly important when one assesses the gender inequality at play in transactional sexual relationships and their impact on the effectiveness of the rights under this Protocol. The impact needs to be explicated because where the provisions of this Protocol are enforced, progress will be made in addressing the spread of HIV in young women.<sup>181</sup> The Protocol has not only been hailed for being innovative but has also been described as ‘the strongest of any human rights instrument with respect to protecting the sexual health needs of adolescent girls.’<sup>182</sup>

Article 14 of the Maputo Protocol guarantees the right to health of women including sexual and reproductive health and rights. The Article obligates states to ensure that these rights are respected and promoted. Article 14(1)(c) guarantees the right to choose any method of contraception and Article 14(1)(d) guarantees the right to self-protection and to be protected against sexually transmitted infections including HIV/AIDS.<sup>183</sup> Once again, power dynamics and disparities curtail the exercise of these rights in the same manner as explained previously. Where an adolescent is unable to realise their rights under Article 14(1)(c), they inevitably also become unable to realise the rights under Article 14(1)(d). To put it plainly, when adolescents are unable to exercise their right to choose a method of contraception such as condoms, they cannot exercise their right to self-protection against HIV. Furthermore, their right to be

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<sup>176</sup> Stefiszyn (n 13) 159.

<sup>177</sup> Stefiszyn (n 13) 160.

<sup>178</sup> Stefiszyn (n 13) 158.

<sup>179</sup> Stefiszyn (n 13) 158.

<sup>180</sup> Stefiszyn (n 13) 159.

<sup>181</sup> Stefiszyn (n 13) 159-160.

<sup>182</sup> Stefiszyn (n 13) 160-161.

<sup>183</sup> Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa: the Maputo Protocol, art 14.

protected also becomes compromised. This further hampers with the state's obligation under this Protocol to 'create an enabling, supportive, legal and social environment that empowers women to be in a position to fully and freely realise their right to self-protection and to be protected.'<sup>184</sup>

The rights under this Protocol, much like human rights in general, are interrelated. Article 14(1)(d) is intrinsically linked to other rights such as Article 3 on the right to dignity, Article 4 on the rights to life, integrity and security of the person and Article 5 on the elimination of harmful practices. Article 3(4) and Article 14(1)(d) will be used to show this interrelatedness. Article 3(4) obligates states to implement and adopt appropriate measures to ensure the protection of every woman from all forms of violence. Male-perpetrated intimate partner violence is increased in transactional sexual relationships,<sup>185</sup> with girls citing that they were trapped in these relationships with older abusive men by utter desperation.<sup>186</sup> Severe intimate partner violence is not only associated with physical injuries and trauma but sexually transmitted infections and HIV.<sup>187</sup> In a South African context, 'structural drivers of the HIV epidemic include gender inequality, which may give rise to gender-based violence and coercive and unsafe sexual encounters.'<sup>188</sup> In situations such as these it becomes without a doubt difficult for an adolescent who is being abused to enforce her right to self-protection as found under Article 14(1)(d) through condom use for example, out of fear of further abuse.

The African Children's Charter provides explicit protection for the rights of children and is thus the principal human rights instrument in relation to adolescents.<sup>189</sup> It was developed and drafted subsequent to the CRC in the 1990s.<sup>190</sup> It addresses specific shortcomings of the CRC, the most important one being that the disadvantages that influenced the female child were not sufficiently provided for in the CRC.<sup>191</sup> This is

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<sup>184</sup> Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa: the Maputo Protocol General Comment 1.

<sup>185</sup> Zembe *et al* (n 75) 2.

<sup>186</sup> Jewkes & Morrell (n 66) 1730.

<sup>187</sup> S Lutchman 'A contradiction in terms? The promotion of adolescent sexual rights and the prevention of sexual violence' (2020) 63 *Acta Juridica* at 2.

<sup>188</sup> The Department of Basic Education National Policy on HIV, STIs and TB for Learners, Educators, School Support Staff and Officials in all Primary and Secondary Schools in the Basic Education Sector at 16.

<sup>189</sup> J Sloth-Nielsen 'The African Charter on the Rights and Welfare of the Child' T Boezaart *Child Law in South Africa* (2017) at 426.

<sup>190</sup> Sloth-Nielsen (n 189) 430.

<sup>191</sup> Sloth-Nielsen (n 189) 427.

manifested in the Charter's Articles 11(3)(e) and 11(6) in relation to the right to education. In brief Article 11(3)(e) obligates States to take all appropriate measures in achieving the full realisation of the right to education and to take special measures in respect of female children amongst other vulnerable groups.<sup>192</sup> Article 11(6) on the other hand obligates State Parties to take appropriate measures to ensure that children who fall pregnant before completing their education are afforded a chance to continue with their education based on their individual ability.<sup>193</sup>

Article 27 of the Charter deals with the sexual exploitation of children. It places on state parties' duties to protect children from all forms of sexual exploitation and sexual abuse.<sup>194</sup> They must take further measures to prevent 'the inducement, coercion or encouragement of a child to engage in any sexual activity.'<sup>195</sup> Transactional sexual relationships constitute sexual violations of adolescents for two reasons. The first reason is derived from a human rights and child protection perspective, the essence of which avers that:

From a human rights and child protection perspective, sexual exploitation of children and adolescents involves situations, contexts and relationships whereby individuals under the age of 18 ..., receive "something" (e.g. food, accommodation, ..., gifts, money) in return for performing sexual activities and/or having others perform sexual activities on them.<sup>196</sup>

These exchanges are thus, under legislative frameworks that this perspective is derived from such as the CRC and the African Children's Charter, considered to be sexual exploitation because the encounter is between an adult and a person below the age of 18.<sup>197</sup> Secondly, local notions of when transactional sexual relationships are exploitative are also important. The notion is that these exchanges are exploitative where the relationship is based 'on an imbalance of power in terms of age, male economic power and social status.'<sup>198</sup> Furthermore, they are considered to be exploitative because adolescent girls are physically and emotionally immature in contrast to the older man using his money to gain access.<sup>199</sup> The exploitation in this context is taken to mean either the actual or attempted abuse of a position of

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<sup>192</sup> Article 11(3)(e) African Children's Charter

<sup>193</sup> Article 11(6) African Children's Charter

<sup>194</sup> African Charter on the Rights and Welfare of the Child, art 27.

<sup>195</sup> African Charter on the Rights and Welfare of the Child, art 29(a).

<sup>196</sup> Wamoyi *et al* (n 151) 2.

<sup>197</sup> Wamoyi *et al* (n 151) 2.

<sup>198</sup> Wamoyi *et al* (n 151) 1.

<sup>199</sup> Wamoyi *et al* (n 151) 10.

vulnerability, differential power or trust, performed or attempted to be performed for sexual purposes.<sup>200</sup>

Adolescent girls do however tend to display signs of agency in these relationships such as choosing whom to have sex with or getting into relationships and accepting the gifts only from men they like or love.<sup>201</sup> However, despite the presence of such agency, adolescent girls still occupy a disadvantaged position in relationships involving hierarchies of power and disparities in gender, socio-economic status and age.<sup>202</sup> The disadvantaged position is created once an older partner who has money, provides for the financial needs of the adolescent girl, for whatever reason.<sup>203</sup> As a result of this disadvantaged position, the adolescent girl then has less power in influencing the conditions of the relationship and may even engage in a process of bargaining as a display of their agency.<sup>204</sup> However, the agency is limited 'as their scope of action is defined by the larger context that is shaped by gender inequality.'<sup>205</sup> Article 27(a) specifically prohibits inducement, coercion or encouragement. Some girls have reported being coerced into sex after the exchange of gifts had taken place.<sup>206</sup>

### **3.4 An appraisal of national legislative and policy framework on sexual and reproductive health and rights of adolescents**

The national legislative and policy frameworks of South Africa that protect children and guarantee their rights may be understood and construed to be in line with its obligations under the African Children's Charter's implementation clause under Article 1. It states that

State parties are required to recognise the rights, freedoms and duties enshrined in the Charter and to undertake the necessary steps, in accordance with their constitutional process and with the provisions of the Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of the Charter.<sup>207</sup>

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<sup>200</sup> Wamoyi *et al* (n 151) 2.

<sup>201</sup> Wamoyi *et al* (n 151) 10.

<sup>202</sup> Wamoyi *et al* (n 151) 10.

<sup>203</sup> Wamoyi *et al* (n 151) 10.

<sup>204</sup> Hoss & Bokland (n 79) 308.

<sup>205</sup> Hoss & Bokland (n 79) 308.

<sup>206</sup> Wamoyi *et al* (n 151) 10.

<sup>207</sup> Sloth-Nielsen (n 189) 430.

As such, the South African state recognises the SRHR of adolescents as human rights that they are entitled to. The South African Constitution under section 27, mandates the state to take reasonable legislative and other measures, within the limits of available resources, to achieve the progressive realisation of the right to health, including reproductive health.<sup>208</sup> It has given effect to this constitutional protection of reproductive health through international legislative instruments, and through the enactment of legislation and policy in advancing the SRHR of adolescents. However, despite all the state's efforts and recognition of SRHR, adolescents in transactional sexual relationships face considerable obstacles in fully enjoying their SRHR that are protected both domestically and internationally. This being a result of the inherent gendered power dynamics and disparities in transactional sexual relationships.

In terms of the South African legal regime, children under the age of 12 are incapable of consenting to sexual contact with anyone. The *Teddy Bear Clinic* case is the landmark case that led to the position that a child between the ages of 12 and 16 can consent to sexual activity with similar aged children. The position in terms of law is also that children 16 years and older can legally consent to sexual activity with adults. Therefore, anyone above the age of 18 who engages in sexual activity with adolescents under the age of 16 would be committing an offence under sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007. The offences would for example be sexual violation and sexual penetration.

The National Adolescent Sexual and Reproductive Health and Rights Framework Strategy 2014-2019 came into effect in 2015 and its foundations are grounded within a human rights framework. The framework aligns itself to the principles and outcomes of international treaties such as ICESCR and CRC. At a regional level, it is aligned with the principles of the Maputo Protocol and derives its force at a domestic level under the Bill of Rights in the South African Constitution, in protecting SRHR of adolescents.<sup>209</sup> The policy identified several concerning trends amongst adolescents that restricted their ability to fully enjoy their SRHR. One of the identified trends pointed to transactional sexual relationships owing to identified disparities in age and economic benefits derived by the adolescents. The policy identified increasing trends

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<sup>208</sup> L Pizzarossa & K Perehudoff 'Global Survey of National Constitutions: Mapping Constitutional Commitments to Sexual and Reproductive Health and Rights' (2017) 19 *Health Hum Rights* at 283.

<sup>209</sup> National Adolescent Sexual and Reproductive Health and Rights Framework Strategy 2014-2019 at 21.

of sexual relations of an inter-generational nature that were also multiple and concurrent.<sup>210</sup> Furthermore, a perception by teenage mothers that these older partners are economically helpful and that it is this misperception that predisposes them to further health and social risks.<sup>211</sup> These social and health risks include high levels of HIV, increased STI infections amongst adolescent girls and vulnerability and sexual violence.<sup>212</sup>

As a result, the policy was born out of the need to curb the effects of such negative trends and misperceptions and the need to create and or strengthen a responsive policy and planning environment targeted towards the SRHR needs of adolescents.<sup>213</sup> The policy identified gaps and challenges in adolescent SRHR and as such the policy is aimed at addressing these gaps and challenges that hinder adolescent's ability to fully enjoy their SRHR.<sup>214</sup> The policy promotes healthy sexual and reproductive behaviour amongst adolescents, underscores their rights to exercise their sexuality free of violence and coercion, and creates awareness of the negative ripple effects of gender inequality.<sup>215</sup> The policy has 5 priorities in achieving its overall aims, these include

- Priority 1 – Increased coordination, collaboration, information, and knowledge sharing on ASRH&R activities amongst stakeholders
- Priority 2 – Developing innovative approaches to comprehensive SRHR information, education, and counselling for adolescents
- Priority 3 - Strengthening ASRH&R service delivery and support on various health concerns
- Priority 4 – Creating effective community supportive networks for adolescents; and
- Priority 5 – Formulating evidence-based revisions of legislation, policies, strategies, and guidelines on ASRH&R.<sup>216</sup>

Furthermore, the policy recognises the need to address with urgency, gender inequality and sexual and gender-based violence.<sup>217</sup> The term of this policy ended in 2019 and 3 years later, there is no indication as to whether this framework has been

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<sup>210</sup> (n 209) 24.

<sup>211</sup> (n 209) 26.

<sup>212</sup> (n 209) 24.

<sup>213</sup> (n 209) 3.

<sup>214</sup> (n 209) 2.

<sup>215</sup> Lutchman (n 187) 5.

<sup>216</sup> (n 209) 2.

<sup>217</sup> (n 209) 27.

extended or if it has been replaced by another framework. Furthermore, the effectiveness and implementation of this framework has also not been reported on. Nonetheless, this policy was relied upon in the drafting of the next policy forming part of this discussion.<sup>218</sup>

The Department of Basic Education National Policy on HIV, STIs and TB for Learners, Educators, School Support Staff and Officials in all Primary and Secondary Schools in the Basic Education Sector came into effect in 2017 (Department of Basic Education National Policy on HIV, STIs and TB). The policy ‘applies to all learners, educators, school support staff and officials in the Basic Education Sector at all public and independent primary and secondary schools from Grade R to Grade 12 in South Africa.’<sup>219</sup> As a result its principles apply to adolescents as defined in this paper. The policy has a vision to drive response on HIV, STIs and TB, it is aligned to and presents the sector’s contribution towards the National Strategic Plan on HIV, STIs and TB for South Africa, 2017-2022 (the NSP).<sup>220</sup> It replaced the 1999 Department of Education National Policy on HIV/AIDS for Learners and Educators in Public Schools and Students and Educators in Further Education and Training Institutions.<sup>221</sup>

The policy is also grounded within a human rights framework and is an effort to give effect to South Africa’s obligations as a signatory to the CRC, the UN Commission on the Status of Women Resolutions on Women, the Girl Child and HIV and AIDS and the Ministerial Commitment on comprehensive sexuality education and sexual and reproductive health services for adolescents and young people in Eastern and Southern African (ESA) (2012).<sup>222</sup> It strives towards the achievement of the United Nation’s Sustainable Development Goals (SDGs) targets on education, health, and gender equality.<sup>223</sup> The specific SDGs are:

- SDG 1 (end poverty in all its forms everywhere)
- SDG 3 (healthy lives and wellbeing for all at all ages)
- SDG 4 (inclusive and equitable quality education and lifelong learning opportunities for all)

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<sup>218</sup> The Department of Basic Education National Policy on HIV, STIs and TB for Learners, Educators, School Support Staff and Officials in all Primary and Secondary Schools in the Basic Education Sector at 3.

<sup>219</sup> (n 218) 3.

<sup>220</sup> (n 218) 1.

<sup>221</sup> (n 218) 1.

<sup>222</sup> (n 218) 1.

<sup>223</sup>(n 218) 1.

- SDG 5 (gender equality and empower all women and girls)
- and SDG 8 (sustained inclusive and sustainable economic growth, full and productive employment, and decent work for all).<sup>224</sup>

The situational analysis of the policy identified that the vulnerability of adolescents to HIV infection is driven by several behavioural and structural drivers. One of the drivers identified was transactional sex with multiple and concurrent sexual partners, that is also intergenerational.<sup>225</sup> Hence, the policy aims to guide the implementation of HIV, STIs and TB programmes in the Basic Education Sector in combating these diseases and has 4 goals.<sup>226</sup> The goals are

1. Improved coordination and mainstreaming of the Basic Education Sector response to HIV, STIs, TB and unintended pregnancy, to accelerate implementation of a comprehensive strategy for prevention, treatment, care, and support.
2. Increased knowledge, cognitive skills and information about safer sex, life skills in general and HIV, STIs and TB in particular, to inform the life choices of all learners, educators, school support staff and officials and protect them from infection and disease.
3. Improved access to HIV, STIs and TB prevention, diagnosis, treatment and care and support services to reduce the incidence and impact of HIV, STIs, TB and unintended pregnancy amongst learners' educators, school support staff and officials, and unintended pregnancy amongst learners.
4. Increased retention of learners, educators, school support staff and officials in a safe and protective education environment as well as improved reintegration of learners, to improve system efficiency, quality, and output.<sup>227</sup>

In light of the discussion above, it is concluded that evolving capacities, autonomy and sexual agency are crucial to the full enjoyment of the SRHR of adolescent girls. They cannot fully enjoy their SRHR if they do not possess the above or where they possess them but are limited in their exercise thereof. Furthermore, it is evident from this chapter that the SRHR of adolescent girls form part of a broader right to health as found under international and regional human rights law. In addition to the SRHR guaranteed under international and regional law, adolescent girls also enjoy SRHR

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<sup>224</sup> (n 218) 1

<sup>225</sup> (n 218) 16.

<sup>226</sup> (n 218) ii.

<sup>227</sup> (n 218) 3.

under national policies enacted to advance the SRHR needs of adolescents in South Africa.

## Chapter 4: Conclusion and recommendations

Adolescents have the right to the highest attainable standard of health which encompasses sexual and reproductive health and rights. Both these rights are protected and recognised under international, regional and domestic legislative instruments. These instruments include the Constitution of South Africa, ICESCR, CRC, Maputo Protocol, African Children's Charter, the National Adolescent Sexual and Reproductive Health and Rights Framework Strategy 2014-2019 and the Department of Basic Education National Policy on HIV, STIs and TB. In addition to this, adolescent girls are recognised as autonomous beings, whose capacities are constantly evolving and who possess and are able to exercise sexual agency. Their autonomy and sexual agency are afforded both protection and recognition under international instruments. Furthermore, autonomy was recognised by the Constitutional Court in the *Teddy Bear Clinic* case. However, despite all these entitlements and protections, adolescents still do not fully enjoy their SRHR as protected and guaranteed.

This research has found that transactional sexual relationships operate as obstacles to the full enjoyment of these rights. This being a direct result of these relationships being characterised by unequal gendered power dynamics that tamper the ability of adolescents to exercise their autonomies and sexual agency. Therefore, it becomes difficult to enjoy SRHR where autonomy and sexual agency are limited because these entitlements are essential and crucial in claiming, enforcing and realising SRHR. Transactional sexual relationships manifest as a structural inequality driven by discriminatory social norms. Structural inequalities are detrimental to women and adolescent girls alike, harm results as 'gender intersects with existing positions of oppression such as class, age and parity.'<sup>228</sup> Discriminatory social norms such as 'traditional notions of masculinity and femininity and deeply entrenched gender norms limit women and girls' control over their bodily integrity and family planning decisions amongst other things.'<sup>229</sup> They further curtail the ability to access services and

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<sup>228</sup> Odada (n 34) 58.

<sup>229</sup> K Valerio & A Butt 'Intersecting injustices, the links between social norms, access to sexual and reproductive health and rights, and violence against women and girls' at 3.

resources imperative in making autonomous decisions regarding their lives and realising their socio-economic rights.<sup>230</sup>

## 4.1 Recommendations

In order for the South African government to put an end to rising infections of HIV amongst adolescent girls as caused by transactional sexual relationships, the following measures which are based in law are recommended:

- As a point of departure, the author puts forth that South Africa affords its citizens with a host of comprehensive and eclectic legislative instruments that when implemented effectively, could significantly reduce the rate of HIV infection amongst adolescent girls. Therefore, the state needs to strengthen the implementation of these legislative instruments and ensure that they are also implemented effectively.
- The Bill of Rights in the South African Constitution should be a starting point in this exercise, this is because

the Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.<sup>231</sup>

In light of this, the state needs to put stronger measures in place to realise these democratic values with an emphasis on equality. These measures must be designed to eradicate, at faster and more impactful rates, the inequalities that disadvantage adolescent girls. They must be fashioned to produce change across all genders, races and class. These must also be closely aligned to Article 2(1) of the ICESCR on equality and non-discrimination. The state must further attempt, to the greatest extent possible, to implement the recommendations under General Comment No. 22 of the ICESCR in relation to achieving equality between men and women.

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<sup>230</sup> A Butt & K Valerio 'Sexual and reproductive health and rights and gender-based violence' at 5.

<sup>231</sup> Constitution of the Republic of South Africa, sec 7.

- There are not sufficient SRHR educational programmes that specifically deal with the dangers associated with transactional sexual relationships. Therefore, the state needs to allocate more resources towards this goal.
- There is also a need for more HIV preventative programmes to supplement the existing ones.
- In designing and implementing HIV preventative programmes for adolescents, the state needs to employ intersectionality. This will help in showing how factors that adolescents are exposed to intersect and produce undesirable and negative SRHR outcomes.
- These programmes and interventions must be designed to reflect, within context, adolescents' views, understandings and experiences of their sexual behaviours.
- There is not enough protection afforded to adolescent girls once they turn 16, more needs to be done legislatively to protect or at least limit sexual relations between these adolescents and significantly older partners. This can be done through Romeo and Juliet clauses that will ensure that the adolescent is not taken advantage of sexually where, for example, because of transactional sexual relationships they are unable to meaningfully and freely consent.
- The age restriction in these Rome and Juliet laws needs to be decided upon taking into consideration all necessary factors such as the psychological development of the child and maturity as opposed to just the age of the adolescent. The *Christian Lawyers Association v Minister of Health* case provides the perfect template for these factors as the decision of the court was influenced by the concept of autonomy. The court found that
 

the legislation in question, which was based on a girl's capacity to decide rather than a specific age, promoted the best interests of the child, in its flexibility and recognition that decisions to be taken by a minor girl depends on her intellectual, psychological and emotional maturity rather than her chronological age.<sup>232</sup>
- The policy arena is also lacking in terms of creating awareness of the dangers of transactional sexual relationships. These policies do not give enough attention to these relationships and merely mention them almost as just a matter of formality. They mention transactional sexual relationships in a

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<sup>232</sup> *Christian Lawyers' Association v National Minister of Health and Others* at 13.

frivolous manner. This needs to change and more attention must be given in ne policies and the existing ones should be amended in line with this.

- There is also not sufficient reporting and monitoring on the implementation of these policies. Reporting must be made compulsory and more needs to be done to monitor the implementation, progress and effectiveness of these policies.
- All of the above should be done in light of not only reducing the HIV rates amongst adolescents and safeguarding their SRHR, but should be done in relentless pursuit of ensuring that the best interests of children as guaranteed by the Constitution are protected and remain of paramount importance.

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