

**THE DISTINCTION BETWEEN EXPLOITATIVE AND NON-
EXPLOITATIVE UNDERAGE SEX AND ITS EFFECT ON THE
SCOPE OF STRICT LIABILITY UNDER SECTION 8 OF THE
SEXUAL OFFENCES ACT**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School

By

NJUBI JANE WANJIRU

083684

Prepared under the supervision of

MS MUKAMI WANGAI

February 2017

Word count (10886)

Table of Contents

Acknowledgements	v
Declaration.....	vi
Abstract.....	vii
List of Abbreviations	viii
List of Cases	ix
List of Legal Instruments.....	x
CHAPTER 1: INTRODUCTION.....	1
1.1. Background to the study	1
1.2. Statement of the problem	3
1.3. Justification of the study	4
1.4. Statement of objectives	4
1.4.1. General objective.....	4
1.4.2. Specific objectives.....	5
1.5. Hypothesis	5
1.6. Research questions.....	5
1.7. Literature review.....	5
1.8. Research design and methodology	6
1.9. Limitations of the study	7
1.10. Chapter breakdown	7

CHAPTER 2: THEORETICAL FRAMEWORK	9
2.1. Definition of legal realism	9
2.2. Karl Llewellyn on legal realism.....	10
2.3. Legal realism and statutory rape	11
2.4. Legal realism and the age gap approach	13
CHAPTER 3: THE DISTINCTION BETWEEN EXPLOITATIVE AND NON- EXPLOITATIVE UNDERAGE SEX AND ITS EFFECT ON STATUTORY RAPE LAWS.....	15
3.1. Definition of terms	15
3.2. Exploitative versus non-exploitative sex among adolescents.....	17
3.3. Strict liability in statutory rape and its intended punitive target.....	21
3.4. <i>Ultra vires</i> to the intended punitive target	22
CHAPTER 4: COMPARATIVE STUDY OF CANADIAN AND NAMIBIAN PRACTICES: LESSONS FOR KENYA	25
4.1. The Canadian perspective	25
4.1.1. Canadian sexual offences laws	25
4.1.2. Justification for using the Canadian example.....	27
4.2. The Namibian perspective	28
4.2.1. Namibian laws on statutory rape	28
4.2.2. Justification for using the Namibian example	30
4.3. Lessons for Kenya	31
CHAPTER 5: CONCLUSION AND RECOMMENDATIONS.....	33
5.1. Conclusion	33


5.2. Recommendations.....	33
5.2.1. Application of the Fraser guidelines	33
5.2.2. Improvement and proper implementation of sex education in the curriculum .	35
BIBLIOGRAPHY	37

Acknowledgements

I would like to express my sincere gratitude to the Almighty God, my family, my supervisor Ms Wangai, my advisors and my fellow colleagues for their continued support and ceaseless assistance for the entire period of this research. Their input, constructive criticism, tremendous knowledge, and time have been indispensable to the completion of this dissertation.

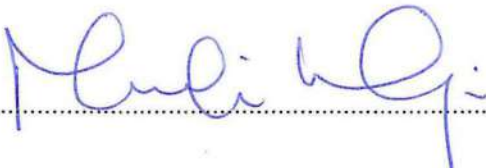
Declaration

I, NJUBI JANE WANJIRU, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: 

Date: 30 . 06 . 2018

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: 

MS MUKAMI WANGAI

Abstract

Section 8 of the Sexual Offences Act of Kenya was passed in 2006 with a view to protect minors from sexual abuse and exploitation. Under this law, consensual sex between minors is also criminalised because the law seeks to protect minors from themselves in terms of the negative effects arising from early sexual debut and activity. However, this law fails to consider the reality that adolescents engage in sexual activity as part of their normal development process and transition into adulthood. Therefore, criminalisation of sexual activity in cases of non-exploitative, consensual sexual activity between adolescents goes *ultra vires* to the intended punitive target of section 8 of the Act. This paper recognises the need to distinguish between exploitative and non-exploitative sexual activity between minors in order to correctly apply the law.

In light of this, this paper seeks to demonstrate how the law can effectively deal with the current lacuna in the criminal justice system using the age-gap approach system. The application of this approach is restricted only to cases of non-exploitative, consensual sexual activity between adolescents of comparable age. This research paper is hinged on the application of the age-gap approach to educate rather than sanction adolescents on sexual and reproductive health in order to maintain the required balance between protection of adolescents from sexual predators as well as the harmful effects of adolescent sexual activity and preservation of their personhood and autonomy during their transition into adulthood.

List of Abbreviations

AIDS	Acquired Immune Deficiency Syndrome
GRP	Gender Research Project
HIV	Human Immunodeficiency Virus
ICL	I Choose Life
KNBS	Kenya National Bureau of Statistics
MHSS Namibia	Ministry of Health and Social Services, Republic of Namibia
MoEK	Ministry of Education Kenya
NARPR	Namibia AIDS Response Progress Report
SEPs	Sexuality Education Policies
SOA	Sexual Offences Act Kenya

List of Cases

B (a minor) v DPP (2000), The United Kingdom House of Lords.

Gillick v West Norfolk & Wisbech Area Health Authority (1985), The United Kingdom House of Lords.

Sweet v Parsley (1970), The United Kingdom House of Lords.

List of Legal Instruments

Combating of Immoral Practices Act, Act No. 21 of 1980 (Namibia)

Combating of Rape Act, Act No. 8 of 2000 (Namibia)

Criminal Code (Canada), 1985

Sexual Offences Act, 2006, Act No. 3 of 2006

The Children Act, 2001, Cap 141

United Nations Convention on the Rights of the Child (20 November 1989)

CHAPTER 1: INTRODUCTION

1.1. Background to the study

The Sexual Offences Act (hereafter SOA) of 2006 was passed in Kenya with its main aim being to protect children from sexual abuse and sexual exploitation. It recognises children as vulnerable members of the society who need to be protected from sexual predators. Moreover, it stresses that children cannot consent to sexual activity of any kind.¹ This is because persons under the age of 18 are not mature enough to understand and appreciate the nature and essence of sexual activity.² This reason justifies the notion of statutory rape as encompassed in the act which classifies the offence of defilement as a strict liability criminal offence. Therefore, if a case of defilement is brought before the Kenyan courts, the requirements that have to be fulfilled in order to occasion a conviction is the proof that the complainant is a child under the age of 18³ and that there was penetration by the offender.⁴

The enactment of this law has gone a long way in protecting children from sexual abuse and sexual exploitation. It has also contributed to the protection of adolescents from themselves meaning their own sexual desires, immaturity, inexperience, susceptibility to manipulation and the adverse and undesirable outcomes of irresponsible adolescent sexual behaviour. Such outcomes include: early and unwanted pregnancies, reproductive health problems, transmission of sexually transmitted diseases as well as physical, psychological and emotional trauma.⁵

Regardless of the fact that children in Kenya are viewed as non-sexual human beings and cannot consent to sexual activity, minors and more specifically adolescents engage in various forms of sexual experimentation as part of their normal developmental process and

¹ Section 43(4), *Sexual Offences Act* (Act No. 3 of 2006).

² Mahery P, Proudlock P, 'Legal guide to age thresholds for children and young people' Children's institute, University of Cape Town, April 2011 <http://www.ci.org.za/depts/ci/pubs/pdf/resources/guides/Ages%20Guide%20April%202011%20e-version.pdf> on 3 December 2016.

³ Section 2, *Children Act* (No. 12 of 2012).

⁴ Section 8(1), *Sexual Offences Act* (Act No. 3 of 2006).

⁵ Ogweno N, 'Sexual activity among school girls in Kisumu County' Published Master's Thesis, University of Nairobi, Nairobi, 2011, 8-12.

transition into adulthood.⁶ Majority of sexually active adolescents partake in sexual experimentation with their age mates and those generally in the same age group with a range of up to 4 years.⁷ In both 2003 and 2008, the Kenya demographic and health survey revealed that the average age of sexual debut in Kenya was 17 years of age.⁸ 4 in every 10 girls between the ages of 15 and 19 are sexually active.⁹ The latest Kenya demographic and health survey of 2014 reported that 12% of girls in the country have had their first sexual encounter by the age of 15. Further, it reports that 37% of girls aged between 15 and 19 years have had sex.¹⁰

In order to protect children from sexual abuse, violence and exploitation, the SOA generalises such offences against children by setting a minimum age of consent. There is no societal agreement as to what is the appropriate age of sexual engagement where one can make a valid and well informed decision to engage in any sexual activity.¹¹ However, the transition from childhood to adulthood does not happen in an instant like a switch turned on when one turns 18 years of age.¹² The transition process is a continuum through one's teenage years and all adolescents traverse the transition, from vulnerability and incapacity to competence and maturity, each at his own rate and therefore, 'any one teen might not fit into the model as prescribed by the law'.¹³

Section 8(1) was passed to protect children and prevent child sexual exploitation, manipulation and violence of any kind. However, statutory rape law is applied and enforced in a blanket manner and fails to distinguish between exploitation and non-exploitation. The application of the law fails to distinguish between the evil that the spirit of the law intended to curb from the natural sexual development into adulthood that

⁶ Walsh K, 'The sexual rights of children and the age of consent' Unpublished PhD Thesis University College Cork, 2010.

⁷ Ogweno N, 'Sexual activity among school girls in Kisumu County' Published Master's Thesis, University of Nairobi, Nairobi 2011, 11.

⁸ Kenya National Bureau of Statistics (hereafter KNBS), *Kenya demographic and health survey, 2008-2009*, 84. KNBS, *Kenya demographic and health survey, 2003*, 95.

⁹ KNBS, *Kenya demographic and health survey, 2008-2009*, 86, 194-206.

¹⁰ KNBS, *Kenya demographic and health survey, 2014*, 61 - 64.

¹¹ High A, 'Good, bad and wrongful juvenile sex: Rethinking the use of statutory rape laws against the protected class', 69:787 *Arkansas Law Review*, 2016, 793.

¹² High A, 'Good, bad and wrongful juvenile sex: Rethinking the use of statutory rape laws against the protected class', 794.

¹³ High A, 'Good, bad and wrongful juvenile sex: Rethinking the use of statutory rape laws against the protected class', 794.

adolescents go through. This current situation has led to the wrongful or flawed convictions for the crime of defilement of many males that engage in consensual, non-exploitative sexual relationships with their female peers. Inasmuch as engaging in sexual activity among minors should be discouraged, the punishment for defilers does not fit the crime of engaging in a non-exploitative consensual relationship with a minor. This goes against the principle of criminal law that the punishment of a crime should fit the offence committed.

This paper recognises that there is a need to distinguish between exploitative and non-exploitative consensual sexual activity between minors and adolescents in particular. The definitions of sexual exploitation and the offence of defilement need to be refined as they are over-inclusive. This paper considers the 'proximity in age' laws, commonly referred to as 'close-in-age' laws or 'Romeo and Juliet' laws and the possible efficiency they could create in filling the gap in the SOA.

This paper seeks to curb the injustice of wrongful convictions for defilement where there is non-exploitative consensual sexual activity among minors by identifying the point at which the offence should be declassified as one of statutory rape and require that the element of intention be proved. In furtherance of this, this paper will study the practices of countries such as Canada and Namibia with an aim of picking out the individual practices of each of these countries that will best suit the interests and protection of minors in Kenya while at the same time ensuring that the minors, their parents and the rest of society do not take advantage of the current loophole in law.

1.2. Statement of the problem

Section 8 of the SOA fails to distinguish between exploitative and non-exploitative consensual sexual activity between minors and adolescents in particular. The definitions of sexual exploitation and the offence of defilement need to be refined as they are over-inclusive. This paper seeks to address the injustice of wrongful convictions for defilement where there is non-exploitative consensual sexual activity among minors by identifying the point at which the offence should be declassified as one of statutory rape and require that the element of intention be proved.

Generally, this paper seeks to achieve a suitable balance between the autonomy and privacy of individual adolescents while simultaneously protecting them from exploitation,

manipulation, and self-destructing decision-making. It also advances the idea that criminalisation of non-exploitative consensual sex among adolescents will not save them from self-destructive decisions that arise from early sexual activity such as unwanted pregnancies and poor sexual and reproductive health.

1.3. Justification of the study

The rationale for the strict liability rule in the SOA is to protect children from sexual predators. It may also be argued that the law seeks to protect children, and more particularly adolescents from themselves.¹⁴ However, in light of the fact that adolescents engage in non-exploitative sexual activity, this law fails to consider that its application cannot be practical yet just at the same time. Although minors need to be protected against all forms of sexual violence, abuse and exploitation, there also needs to be a balance with protecting their privacy and autonomy as they make the transition from childhood into adulthood.

The existing law does not enable judicial officers to make decisions in determining whether each particular case is a romantic relationship or if it is being presented as a defilement case. Further, non-exploitative consensual sexual activity between minors falls outside the ambit of the SOA and therefore should not be met with the same punitive measures. In addition, such excessive punitive measures on sexually active adolescents hinder practice of and access to information on safe sexual and reproductive health services. Application of the age-gap approach system seeks to meet such adolescent activity with education on sexual and reproductive health rather than criminal sanctions.

1.4. Statement of objectives

1.4.1. General objective

The objective of the research is first, to distinguish between exploitative and non-exploitative consensual activity among adolescents. Secondly, this research paper aims to demonstrate how the over-inclusivity of the statutory rape law is *ultra vires* to its intended punitive target. Finally, this paper seeks to analyse how age-gap provisions come in to fill the gap left in between exploitative and non-exploitative consensual adolescent sexual activity with regard to the application of statutory rape laws.

¹⁴ Drobac J, 'Developing Capacity: Adolescent 'Consent' at work at Law, and in the sciences of the mind' *UC Davis Journal of Juvenile Law and Policy*, Vol 10, 2006.

1.4.2. Specific objectives

- a. To distinguish between exploitative and non-exploitative adolescent sexual activity.
- b. To identify the intended punitive target of the SOA and the strict liability requirement in particular.
- c. To investigate whether the SOA's blanket application of strict liability is in accordance with its intended punitive target.

1.5. Hypothesis

The working hypothesis for this dissertation is that statutory rape laws are over-inclusive in terms of defining sexual exploitation and in that way unnecessarily punishes consensual sex between adolescents which invariably is *ultra vires* to the mandate of the SOA.

1.6. Research questions

The questions that this study seeks to answer are:

- a. What is the meaning of sexual exploitation of minors?
- b. What is the distinction between exploitative and non-exploitative sexual activity among adolescents?
- c. What is the intended punitive target of the SOA and the strict liability requirement in particular?
- d. To what extent is the SOA's blanket application of strict liability in accordance with its intended punitive target?

1.7. Literature review

A number of documents have been written regarding the application of statutory rape laws and their effects. This study relies on a few of those documents as discussed in this section.

In the article 'The sexual rights of children and the age of consent' by Kieran Walsh, the issue of a minor's acceptable sexual experimentation is discussed. It projects that society views minors as innocent and non-sexual human beings and any sexual activity on their part is deemed to be unnatural and the fault of some corrupting influence. Yet minors and more specifically adolescents engage in various forms of sexual experimentation from a relatively early age as part of their normal development process.

Shadrack Muyesu of the Nairobi Law Monthly wrote an article titled ‘‘Bad in law’ sums up Chitembwe decision in defilement appeal’. In this article, he analyses the appeal judgement made by Justice Chitembwe in the case of Martin Charo v Republic in the high court of Malindi in 2016. In this decision, the judge acquitted a man convicted of defilement based on the reason that the complainant consented to sexual relations on multiple occasions.

Muyesu discusses how the judge’s inability to distinguish between the legal burden to be discharged by the appellant and the evidential burden to be discharged by the prosecution is the fundamentally flawed understanding that the judge used to acquit the appellant. However, Muyesu recognises that the application of the letter of section 8 of the SOA does not align with the spirit of that same law. He discusses the purpose of the strict liability rule in section 8 of the SOA and states that it is necessary because of the vulnerability of minors and the need to offer them special protection. He argues that it is not proper to classify defilement as a statutory offence simply because a minor cannot give consent.

1.8. Research design and methodology

The general methodology employed in this paper is desktop research. This includes library research, internet searches and desk-based analyses of surveys and literature on current trends. More specifically, desk-based analyses of surveys will entail analyses of the Kenya demographic and health surveys, IPSOS surveys, National Aids Control Council (NACC) reports and National adolescent sexual and reproductive health policy reports among other available surveys to determine the number of sexually active adolescents in Kenya and their sexual behaviour with regard to determining their exposure, knowledge and appreciation of the nature of sexual intercourse in all its aspects.

Desktop research is selected as the ideal methodology because this topic has not been widely considered or researched on in Kenya. However, there is a whole lot of data available to support the hypothesis of this paper. It is therefore effective because it relies on already existing data throughout a given time period which then helps to establish trends of adolescent sexual behaviour over the years along different demographics.

The study also employs the use of a comparative study with Canada and Namibia. This is because Canada is world class example with regard to its sexual offences laws. Namibia follows a completely different but seemingly more effective approach than Kenya

considering its similarities in their adolescent demographics. Chapter 4 goes deeper into analysing the practices of these countries and why Kenya could benefit from learning lessons from them.

1.9. Limitations of the study

The data collected from surveys on adolescent health, sexual and maturity trends such as the Kenya demographic and health survey may be unreliable or invalid due to the time difference between the surveys were conducted and the time of conducting this study.

Moreover, the study relies on the assumption that increased quality education about adolescent sexual and reproductive health can be detected through decreasing rates of teenage expectancy rates, decrease in teenage birth rates, decrease in rates of Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (HIV/AIDS) prevalence among adolescents and increased use of contraceptives among adolescents. While this may be accurate in most cases, it does not represent the case of all adolescents.

1.10. Chapter breakdown

Chapter 1: Introduction

The introduction is the face of the dissertation. It includes the background of the problem, statement of the problem, purpose and justification of the study, research questions, hypothesis, literature review, research design and methodology, limitations of the study and a chapter summary of each chapter in the paper.

Chapter 2: Theoretical framework

This chapter shows how the theory of legal realism underlies this study. It relates the theory of legal realism and the application of the law by judicial officers with regard to cases of non-exploitative consensual sexual relationships as the perspective that the dissertation is based on with regard to addressing the issues that arise from the statement of the problem and the research questions.

Chapter 3: The distinction between exploitative and non-exploitative adolescent sex and its effect on the scope of statutory rape

This chapter contains the presentation of evidence and findings obtained from the research conducted. Thereafter, the chapter reviews and critically analyses the findings of the

research carried out with an aim of responding to the research questions, the objectives and the hypothesis. This chapter makes the distinction between exploitative and non-exploitative adolescent sex. In light of the aforementioned distinction, the chapter scrutinises the application of the strict liability rule in section 8 of the SOA and analyses to what the law acts in line with its mandate. In addition, this chapter also addresses the limitations of the study and how they affect the validity and usefulness of the research and its findings.

Chapter 4: Comparative study: The Canadian and Namibian perspectives and the lessons for Kenya

This chapter contains a comprehensive summary on the approach on statutory rape in both Canada and Namibia. It goes further to show how the sexual offences laws of those particular countries recognise the existence of engagement in non-exploitative consensual sex among minors. Furthermore, this chapter seeks to bring to light how those laws strike a just balance between protecting minors from sexual abuse and exploitation and protecting minors' rights to privacy, autonomy and free-will in their activities as part of their normal developmental process. In addition, the study of these countries' practices highlights the effectiveness of applying age-gap provisions to sexually active adolescents and safeguarding their interests and welfare.

Chapter 5: Conclusion and recommendations

The conclusion includes a summary of the main findings, a concise outline of their discussion and analysis and the possible implications in their consideration and application. Thereafter this chapter outlines recommendations for practice and improvement in the criminal justice system with particular regard to cases on defilement where there has been non-exploitative sexual activity between adolescents.

CHAPTER 2: THEORETICAL FRAMEWORK

The legal theory that underpins and lays the foundation for this research paper is the theory of legal realism. This theory arose in 1881 in the United States of America during the industrial age and the subsequent repeated periodic depressions.¹⁵ This chapter discusses what the theory is about, the views of one of the major forerunners that propagated for the advancement of this jurisprudence, the realism theory vis-à-vis the application of statutory rape laws and finally, a discussion on the theory in support of the adoption of an age-gap approach system to fill the gaps left by the practical application of statutory rape laws.

2.1. Definition of legal realism

Legal realism does not have a single set definition. Kevin Mackey in his article 'The triumph of legal realism' defines the theory as, 'an approach to thinking about and studying the results of the application of law and subsequent social engineering through the systematic and purposeful change of the law'.¹⁶ A set of common essential characteristics have been established in an attempt to define and identify this theory. The first is that it is impossible for abstract laws and rules in terms of theoretical written-down laws to be practically applied in all circumstances. Secondly, judge-made law is the best way to determine what the actual law is. The third characteristic, that seeks to expound on the second, is that law derives from social interests and public policy which should form the courts' basis when making their decisions.

There is more to adjudication than the mechanical application of known legal principles, especially with regard to the controversial cases. This mechanical application is by logically deducing uniquely correct legal conclusions from a set of clear, consistent and comprehensive legal rules. However, the theory of realism advances that deciding cases cannot be reduced to solely applying the letter of the law, to such 'machine-like logic'. The spirit of the law also has to be considered and determined through the ideas of fairness, public policy and general societal interests among others.

¹⁵ Mackey K, 'The triumph of legal realism' Michigan State University Detroit College of Law, 2004, 1.

¹⁶ Mackey K, 'The triumph of legal realism' Michigan State University Detroit College of Law, 2004, 5.

2.2. Karl Llewellyn on legal realism

Karl Llewellyn is arguably one of the most important forerunners in the advancement of the theory of legal realism. He sought to advance this theory as a response to the theory of legal formalism. Llewellyn argued that although written laws and precedents create limits on judicial choice through respect for the letter of the law, judge-made law is an even more important aspect of judicial decision making.¹⁷ He stated that, 'judges make the law by voicing what had not been voiced before, and how they voice it – both in spotting the issue and in phrasing it, as well as in the sharp or loose phrasing of the solving rule, and in the limitation or extension and the direction of the issue and of phrasing it – that 'how' is creation by the judges'.¹⁸ This statement was based on the belief that non-legal factors loomed more important than mere wording of the law because these non-legal factors represent the spirit of the law. It is a tenet of good practice in law to not only follow the letter and wording of the law but also to follow the spirit of the law.¹⁹

Llewellyn emphasises on the spirit of the law especially because he views law as a social science as portrayed in his book 'Legal tradition and social science method – A realist's critique'.²⁰ In this book, he expresses his view that law is a social science, a science of observation that centres its thought and operation on human behaviour and human interactions.²¹ He recognises that rules may remain conceptual conventions but they draw their meaning and their application from pragmatic particulars, that is, the practices, habits and shared conventions of life.²² When the legal system does not keep up with the changes in the society, it becomes an impediment to progress.²³ Following this, there is a need to always consider the evolving society and to keep re-examining the law in order to keep it up with the social needs of human beings. This reflects the need for legal realism. Kevin Mackey, in his article reviewing Karl Llewellyn's theory of realism, identified that the

¹⁷ Twining W, *Karl Llewellyn and the realist movement*, 2nd ed, Cambridge University Press, New York, 2012, 204.

¹⁸ Llewellyn K, 'Law and the social sciences: Especially sociology' 62 *Harvard Law Review*, 1949, 1287.

¹⁹ Muyesu S, 'Bad in law' sums up Chitembwe decision in defilement appeal' *Nairobi Law Monthly*, 2016, 47- <http://46.101.74.131/category/criminal/page/21/?print=print-search> on 30 May 2017.

²⁰ Llewellyn K, 'Legal tradition and social science method-a realist's critique', Brookings Institution: Washington, D.C. in *essays on research in the social sciences*, 1931, 89-90.

²¹ Llewellyn K, 'Law and the social sciences: Especially sociology' 1289.

²² Casebeer K, 'Escape from liberalism: Fact and value in Karl Llewellyn' 1977(671) *Duke Law Journal*, 1977, 672.

²³ Mackey K, 'The triumph of legal realism' Michigan State University Detroit College of Law, 2004, 2.

history and development of the theory of realism arose from pressure to change laws that reflect the realities of changing societies and changing situations and was to be used as a tool for pragmatic change in our laws, systems and institutions.²⁴

Karl Llewellyn advanced that realism's basic tenet was that the letter and wording of the law could be made to fit any set of facts regardless of whether they were straightforward or significantly complicated scenarios.²⁵ This means that it is possible that the spirit of the law can be completely disregarded if the surrounding circumstances of any set of facts are not taken into any account when solely applying the letter of the law. Therefore, what the legal system really needs is a tool of insight to determine the issues that arise from any set of facts, to consider the circumstances surrounding the set of facts, to determine the spirit of the law in light of both the facts and circumstances presented and finally to ensure that both the letter and the spirit of the law are upheld in just and equal balance in order to accomplish the true purpose of the law. Such a tool of insight as recommended by Llewellyn would be that of judicial activism, that is, judge-made law.

2.3. Legal realism and statutory rape

The laws on statutory rape have been implemented in Kenya under the offence of defilement in the SOA. Criminalised sexual activity with a person under 18 years of age in Kenya is generally known as statutory rape, a strict liability offence as distinct from common-law forcible rape.²⁶ Section 44 of the act further clarifies that a child is not capable of giving consent. A child is recognised in Kenya as a person below the age of 18 years.²⁷ The courts have religiously followed the letter of the law through ensuring convictions for the charge of defilement under section 8(1) provided that commission of the offence is proved, that is, that there was penetration and that the complainant was below the age of 18 at the time of commission of offence. Intention of the perpetrator is not an element of the crime thus qualifying it as a strict liability offence, commonly referred to as statutory rape.

²⁴ Mackey K, 'The triumph of legal realism' Michigan State University Detroit College of Law, 2004, 2.

²⁵ Casebeer K, 'Escape from liberalism: Fact and value in Karl Llewellyn' 679.

²⁶ Schulhofer S, 'Taking sexual autonomy seriously: Rape law and beyond' 11 *Law and Philosophy*, 1992, 35, 62.

²⁷ Section 2, *Children Act* (Act No. 12 of 2012).

This law has gone a long way in protecting children from sexual predators and from sexual abuse as well as the subsequent effects of the abuse including physical, emotional and sociological trauma. These effects include: bodily harm and physical injuries, injuries and complications in the victims' reproductive health, emotional and mental trauma, early and unwanted pregnancies, unsafe child abortions, spread of sexually transmitted diseases, increased child mortality rates and poor standards of living among several other adverse effects of child sexual abuse.²⁸

Conversely, there are multiple wrongful convictions of defilement through the operation of our criminal justice system. In this day and age, minors and more specifically adolescents engage in various forms of sexual experimentation as part of their normal developmental process. Majority partake in sexual experimentation with their peers and those in the same age group.²⁹ This situation has led to the conviction for the crime of defilement of many young men that engage in consensual, non-exploitative sexual relationships with their female peers. Inasmuch as engaging in sexual activity among minors should be discouraged, the punishment for defilers does not fit the crime of engaging in a non-exploitative consensual relationship with a minor. This goes against the principle of criminal law that the punishment of a crime should fit the offence committed.

The application of statutory rape laws goes against the theory of legal realism because it fails to recognise the gap between the spirit of the law and the practical and pragmatic application of the same law as well as its subsequent results. Statutory rape laws reflect an extremely one-sided approach and fail to consider the emerging realities of our current society. It fails to realise that adolescents especially from the age of 16 or 17 are sexually active and that their sexual relationships with their peers and members of their particular age groups are non-exploitative and make up a normal part of their development and transition from childhood into adulthood.

²⁸ Ogweno N, 'Sexual activity among school girls in Kisumu County' Published Master's Thesis, University of Nairobi, Nairobi, 2011, 11.

²⁹ Ogweno N, 'Sexual activity among school girls in Kisumu County' Published Master's Thesis, University of Nairobi, Nairobi, 2011, 11.

2.4. Legal realism and the age gap approach

The theory of legal realism seeks to correct the problem of one-sided perspectives.³⁰ Karl Llewellyn recommended that in order to apply the realism theory, one needs a tool of insight to determine the governing rule.³¹ This research paper suggests that such a tool as recommended by Karl Llewellyn to balance the effect of over-criminalisation brought about by the application of statutory rape laws is the age-gap approach system. Age-gap reforms propound the elimination of strict liability for certain degrees of sexual engagement of adolescents in particular within certain specified age differences.

An example of this approach is the application of the 'Romeo and Juliet' laws in the United States of America. For instance, in the state of Texas, sexual activity between adolescents who are 14 years of age or older with a maximum difference of 3 years between their ages is permissible.³² However, this paper's proposition does not completely follow the American approach whereby the age-gap provisions completely eliminate liability.

The approach discussed in this paper seeks to reduce but not eliminate liability.³³ It attempts to leave space for normal adolescent sexuality and some degree of sexual autonomy and privacy, while also safeguarding against age-disparity-based power imbalances that may impact young people as they navigate their sexual development. This approach does not necessarily indicate moral approval of premarital sex among close-in-age teenagers. It merely reflects a prioritisation of coercive sexual relations rather than sex per se as the primary punitive target of statutory rape laws.³⁴ It is a more nuanced approach to recognise that the competence of adolescents to meaningfully and responsibly consent to sex and resist sexual manipulation and coercion is dependent not only on age but also on contextual factors such as the relative ages of the sexual partners and the nature of the relationship in question.

³⁰ Mackey K, 'The triumph of legal realism' Michigan State University Detroit College of Law, 2004, 4.

³¹ Casebeer K, 'Escape from liberalism: Fact and value in Karl Llewellyn' 679.

³² Section 22.011(e) (2), *Penal Code* (Texas).

³³ Cocca C, *Jailbait: The politics of statutory rape laws in the United States*, State University of New York Press, New York, 2004, 12-23.

³⁴ Oliveri R, 'Statutory rape law and enforcement in the wake of welfare reform' 52(463) *Stanford Law Review*, 2000, 485.

The theory of legal realism supports the age-gap approach and its application. This is because the approach seeks for a balance between applying the law in both letter and spirit. It advances that the laws of statutory rape do not consider the circumstances where people under the age of 18 engage in consensual non-exploitative intercourse with their peers in experimentation as part of their developmental transition from childhood to adulthood.

The approach, following the tenets of legal realism, proposes that where both participants are above a certain set age limit and have a specified age-difference between them, then the judges should be given leeway to critically analyse the circumstances surrounding each particular set of facts and finally make a balanced decision based on both the determination of commission of the offence as well as the intention of the alleged perpetrator.

CHAPTER 3: THE DISTINCTION BETWEEN EXPLOITATIVE AND NON-EXPLOITATIVE UNDERAGE SEX AND ITS EFFECT ON STATUTORY RAPE LAWS

This chapter seeks to use the findings of the study as a tool to answer the research questions of the paper. First, this chapter will make the very necessary distinction between exploitative and non-exploitative consensual sexual activity between adolescents. This is necessary so as to determine what correctly falls in the ambit of section 8 of the SOA and what falls outside the scope. This chapter will then go further to identify what exactly is the intended punitive target of section 8 of the SOA with regard to the distinction made that guides what falls within the scope of that law. In light of the above, this chapter will conclude with a demonstration of how the blanket application of section 8 acts *ultra vires* to its intended punitive target with specific regard to non-exploitative activity among adolescents.

3.1. Definition of terms

For the purposes of this study, it is important to define certain terms used in the paper.

i. Statutory rape

Criminalised sexual activity with a person under a specified age or within a specified age range is generally known as statutory rape, a strict liability offense, as distinct from common-law forcible rape.³⁵ The term statutory rape is not used in the law books of Kenya. However, the term defilement is an offence classified under section 8 of the SOA. Section 8(1) defines defilement as ‘an act which causes penetration with a child.’³⁶ This law against defilement is a strict liability offense because the intention to commit the offence is immaterial to the guilt of the offender. Moreover, it is a distinct and separate offense from common-law forcible rape that applies only to persons over the age of 18.³⁷ The most distinguishing factor is the requirement of intention to be proved in the case of rape, as well as the age factor.³⁸ Therefore, in this paper, the two terms are deemed synonymous.

³⁵ Schulhofer S, ‘Taking sexual autonomy seriously: Rape law and beyond’ 11 *Law and Philosophy*, 1992, 35.

³⁶ Section 8(1), *Sexual Offences Act* (Act No. 3 of 2006).

³⁷ Section 3, *Sexual Offences Act* (Act No. 3 of 2006).

³⁸ Section 3(2), *Sexual Offences Act* (Act No. 3 of 2006). Section 43, *Sexual Offences Act* (Act No. 3 of 2006).

ii. Consent

Consent is agreement by choice by someone who has the freedom and capacity to make that choice.³⁹

iii. Exploitation

Sexual exploitation is the sexual abuse of children and youth through the exchange of sex or sexual acts for drugs, food, shelter, protection, other basics of life, and/or money.⁴⁰

iv. Exploitative sexual activity

Child sexual exploitation can be defined as an instance where a minor is coerced into sexual activity against the child's own will and volition. Child sexual exploitation also includes instances when a minor is coerced or persuaded into sexual activity in exchange for, amongst other things; love, attention, money, drugs, alcohol, gifts, affection or status. Moreover exploitation occurs where minors are specifically targeted for sexual activity because of additional vulnerabilities like learning and mental disability, living away from family, missing from home or care, sexuality or cultural issues.⁴¹

v. Non-exploitative sexual activity

Non-exploitative sexual activity in the context of minors and more specifically adolescents refers to when they engage in various forms of sexual experimentation as part of their normal developmental process.⁴² Majority partake in sexual experimentation with their peers.⁴³

vi. Age-gap provisions

An age-gap provision is an affirmative defence approach to the charge of statutory rape. It advances that where there is a certain specified age difference between the alleged

³⁹ Section 42, *Sexual Offences Act* (Act No. 3 of 2006).

⁴⁰ Section 2, *Criminal Law (Sexual Offences) Act* (Act No. 2 of 2017) (Northern Ireland).

⁴¹ The Children's Society, '*Revision of definition of child sexual exploitation*' 11 March 2016, 2, www.childrensociety.org.uk on 16 August 2017.

⁴² Walsh K, 'The sexual rights of children and the age of consent' Unpublished PhD Thesis University College Cork, 2010.

⁴³ Ogweno N, 'Sexual activity among school girls in Kisumu County' Published Master's Thesis, University of Nairobi, Nairobi 2011, 11.

complainant and perpetrator, and the complainant is above a certain specified age then the offence of defilement ceases to be regarded as a strict liability offence.

3.2. Exploitative versus non-exploitative sex among adolescents

Sexual exploitation of minors for the purposes of this study can be defined as the taking advantage and abuse of either one's position, role, influence or physical strength in a minor's life for either one's personal sexual desires or for commercial purposes. The United Nations defines it as any actual or attempted abuse of a position of vulnerability, differential power or trust for sexual purposes including but not limited to: profiting monetarily, socially or politically from the sexual exploitation of another.⁴⁴ Individuals involved in sexual exploitation of minors for their personal desires abuse minors through vile acts such as defilement,⁴⁵ committing indecent acts with a child,⁴⁶ and promotion of sexual offences with a child.⁴⁷ Minors are often the subjects of such exploitation due to their innocent and vulnerable nature. This is the reason the SOA is especially strict on matters of sexual offences when it comes to minors. The law is enacted to protect, among other subjects, those most vulnerable in our society and to ensure that their potential and advancement in life is not hindered by the social evils that they are vulnerable to.

Quite often, sexual exploitation also refers to the commercial exploitation of children. According to the SOA, the forms of commercial exploitation that minors are most vulnerable to include the promotion of sexual offences with a child,⁴⁸ child sex tourism,⁴⁹ child prostitution⁵⁰ and child pornography.⁵¹ Moreover, with regard to this commercial aspect, sexual exploitation can also be manifested in form of sexual abuse through the exchange of sexual activity for money, basic human needs, wants and luxuries, drugs or even protection.⁵²

⁴⁴ https://reliefweb.int/sites/reliefweb.int/files/resources/un_glossary_on_sea.pdf on 10 December 2017.

⁴⁵ Section 8, *Sexual Offences Act* (Act No. 3 of 2006).

⁴⁶ Section 11, *Sexual Offences Act* (Act No. 3 of 2006).

⁴⁷ Section 12, *Sexual Offences Act* (Act No. 3 of 2006).

⁴⁸ Section 12, *Sexual Offences Act* (Act No. 3 of 2006).

⁴⁹ Section 13, *Sexual Offences Act* (Act No. 3 of 2006).

⁵⁰ Section 15, *Sexual Offences Act* (Act No. 3 of 2006).

⁵¹ Section 16, *Sexual Offences Act* (Act No. 3 of 2006).

⁵² 2010 National Survey, 'Violence against children in Kenya' 2012, http://www.unicef.org/esaro/VAC_in_Kenya_pdf on 4 December 2017.

Minors also fall victim to human trafficking where they are transported across borders for the purposes of commercial sexual exploitation. As a matter of fact, Kenya is being used as a route and hub for human and sex trafficking.⁵³ Additionally, she serves as a source, transit and even destination country for commercial sexual exploitation – related activities.⁵⁴

The term non-exploitative refers to a situation of not taking unfair advantage of another but rather involves interaction that is mutual, respectful and collaborative.⁵⁵ Non-exploitative, consensual sexual activity in the context of minors and more specifically adolescents refers to when this category of persons engage in various forms of sexual experimentation as part of their normal developmental process.⁵⁶ Majority of them partake in sexual experimentation with their peers and people who are generally in the same age group.⁵⁷ In Kenya, the average age of sexual debut is 17 years.⁵⁸ However, the statistics vary from region to region with the western part of the country recording the highest numbers of sexually active adolescents and the central part recording among the least.

In a study conducted in 2014 by the Guttmacher Institute in the Nyanza region, the areas with the highest prevalence of sexually active adolescents record the lowest average age of sexual debut.⁵⁹ This particular study focused on school-going youth ranging from the ages of 12 to 17.⁶⁰ This study highlighted that some of the participants debuted at 12 years of age with 36% of them being male and 16% of them being female. The participants that debuted at age 14 consisted of 49% of the male participants and 23% of the female

⁵³ United States Department of State: Diplomacy in action, trafficking in persons report, 4 June 2008 <http://www.state.gov/j/tip/rls/tiprpt/countries/2013/215492.htm> on 4 January 2018.

⁵⁴ United States Department of State: Diplomacy in action, trafficking in persons report, 4 June 2008 <http://www.state.gov/j/tip/rls/tiprpt/countries/2013/215492.htm> on 4 January 2018.

⁵⁵ Merriam Webster dictionary, 11th ed.

⁵⁶ Walsh K, 'The sexual rights of children and the age of consent' Unpublished PhD Thesis, University College Cork, 2010.

⁵⁷ Ogwen N, 'Sexual activity among school girls in Kisumu County' Published Master's Thesis, University of Nairobi, Nairobi, 2011, 11.

⁵⁸ KNBS, *Kenya demographic and health survey, 2008-2009*.

⁵⁹ Tenkorang E, Tyndale E, 'Individual and community level influence on the timing of sexual debut among youth in Nyanza, Kenya' 40 (2) *International Perspectives on Sexual and Reproductive Health*, 2014, 68-78.

⁶⁰ Tenkorang E, Tyndale E, 'Individual and community level influence on the timing of sexual debut among youth in Nyanza, Kenya', 68-78.

participants.⁶¹ Most of the participants cited that one of the reasons they engaged in sexual activity is because they had little or no chance of contracting HIV/AIDS.⁶²

The study also confirmed that religion, religious affiliations or religious teachings on morality are not a significant factor considered by some of the adolescents when making the decision to be sexually active. While Christianity advocates for abstinence and chastity until marriage, most of the sexually active participants identify as Christians with 45% - 51% being of the Protestant denomination and 45% - 48% being Catholic.⁶³ With regard to safe sex practices, the study found that condoms were accessible to 70% of the participants and that the male participants had higher self-efficacy rates of condom use than the female participants.⁶⁴ This data as compared to the statistics drawn from Nairobi shows that the differences are minimal between sexually active adolescents in different parts of the country, both rural and urban.

A study was conducted in four schools in Nairobi county by I Choose Life Africa, a non-governmental organisation that focuses on youth affairs among other issues.⁶⁵ The study found that the average age of sexual debut among adolescents is 12.4.⁶⁶ These statistics are from as early as 2010. Of the participants in the study, a quarter of them had had more than one partner in the 12 months prior to the study being conducted. 9.5% of the participants who were not sexually active planned to begin sexual activity in the following year.⁶⁷ A good number of the students were aware of the concept of abstinence and its effectiveness in preventing Sexually Transmitted Infections (STIs) and unwanted pregnancies.⁶⁸

⁶¹ Tenkorang E, Tyndale E, 'Individual and community level influence on the timing of sexual debut among youth in Nyanza, Kenya', 68 – 78.

⁶² Tenkorang E, Tyndale E, 'Individual and community level influence on the timing of sexual debut among youth in Nyanza, Kenya', 68 – 78.

⁶³ Tenkorang E, Tyndale E, 'Individual and community level influence on the timing of sexual debut among youth in Nyanza, Kenya', 68 – 78.

⁶⁴ Tenkorang E, Tyndale E, 'Individual and community level influence on the timing of sexual debut among youth in Nyanza, Kenya', 68 – 78.

⁶⁵ I Choose Life – Africa (hereafter ICL Africa) and Ministry of Education Kenya (hereafter MoEK), *HIV/AIDS knowledge, attitudes and practices of students in selected high schools in Nairobi, Kenya, 2009 – 2010*, 10.

⁶⁶ ICL Africa and MoEK, *HIV/AIDS knowledge, attitudes and practices of students in selected high schools in Nairobi, Kenya, 2009 – 2010*, 20.

⁶⁷ ICL Africa and MoEK, *HIV/AIDS knowledge, attitudes and practices of students in selected high schools in Nairobi, Kenya, 2009 – 2010*, 20-22.

⁶⁸ ICL Africa and MoEK, *HIV/AIDS knowledge, attitudes and practices of students in selected high schools in Nairobi, Kenya, 2009 – 2010*, 26-27.

These statistics and their similarity in different regions across the country ascertain the fact that adolescents do engage in sexual experimentation with their peers or other minors of comparative age as part of their normal developmental process. These relationships cannot be classified as exploitative as they lack the element of abuse of their partners' vulnerability, trust or authority over them.

Exploitation can be detected not only by commission of mere acts but also by the intention or mental state of the offender including their motives, dispositions, attitudes and feelings towards both the partner and the act itself.⁶⁹ These circumstances can be used to determine the conditions that need to be present for exploitation for example use of force, harm to a minor's physical, reproductive and psychological health and well-being, invalid consent and manipulation of minors' acute vulnerability.⁷⁰

Rather, these relationships can be described as collaborative and mutually agreed upon by both parties. Studies show that motivations for adolescents to engage in sexual activity vary according to each individual's circumstance with physical and emotional desire being the most common at that age.⁷¹ A study conducted in 2017 by the Public Library of Science found that male adolescents' motivations consisted of pleasure and physical desire, love or infatuation, curiosity, availability of leisure time and prove of manliness to their peers.⁷² Similarly, motivations for female adolescents include physical desire, love or infatuation, curiosity and peer pressure.⁷³ Teenagers are undergoing puberty and part of this process includes developing feelings of attraction towards the opposite sex. This quite often leads to teenagers getting into romantic relationships with their peers.

Unfortunately, there is a lot of denial as to the facts of life by the parents and the community at large. This denial is demonstrated mainly through the denial of the

⁶⁹ Logar T, 'Exploitation in personal relationships: From consenting to caring' Published PhD Thesis, Georgetown University, Washington DC, 2009, 19.

⁷⁰ Logar T, 'Exploitation in personal relationships: From consenting to caring' 20.

⁷¹ Knopf A, McNealy K, Al-Khattab H, Harris L, Oruche U, Naanyu V, Draucker C, 'Sexual learning among East African adolescents in the context of generalised HIV epidemics: A systematic qualitative meta-synthesis' 12 (3) *Public Library of Science Journal*, 2017, 36.

⁷² Knopf A, McNealy K, Al-Khattab H, Harris L, Oruche U, Naanyu V, Draucker C, 'Sexual learning among East African adolescents in the context of generalised HIV epidemics: A systematic qualitative meta-synthesis' 39.

⁷³ Knopf A, McNealy K, Al-Khattab H, Harris L, Oruche U, Naanyu V, Draucker C, 'Sexual learning among East African adolescents in the context of generalised HIV epidemics: A systematic qualitative meta-synthesis' 36.

adolescents from sex education. It has long been regarded as a sort of taboo to talk about sex with children and consequently, parents tend to shy away from this responsibility. Moreover there is a lack of sex education even in the school curriculums.

Due to this situation, adolescents get into their romantic relationships with absolutely no guidance with regard to their sexual and reproductive health and the responsibility that arises from that. They end up sourcing for most of their information from either their peers, traditional media e.g. television and magazines or through social media. These sources may be misleading and in some cases quite dangerous especially for the young people.

3.3. Strict liability in statutory rape and its intended punitive target

Criminalised sexual activity with a person under a specified age or within a specified age range is generally known as statutory rape, a strict liability offense, as distinct from common-law forcible rape.⁷⁴ The preamble of the SOA states that the purposes of the Act is to address sexual offences with regard to their definition, prevention and protection of all persons from harm from unlawful sexual acts.⁷⁵ As of 2010, 7% of females aged 18-24 had experienced physically forced sexual intercourse prior to age 18.⁷⁶ These statistics keep rising as the years go by. A significant number of offenders are known by the victims and the community at large.⁷⁷ These circumstances warrant the harsh penalties against convicted offenders, especially in cases of defilement. They are there to ensure that such vices in the community are punished to the fullest extent of the law. Moreover, such harsh penalties also seek to serve as deterrents to prevent or discourage other offenders from committing these crimes.

Statutory offences in criminal law can also be referred to as strict liability offences. They are referred to as such because conviction of such crimes relies only on the proof of commission of the guilty act. The intention of the offender is not subject to any consideration in determining the guilt and liability of the offender. Any sexual activity that

⁷⁴ Schulhofer S, 'Taking sexual autonomy seriously: Rape law and beyond', 11 *Law and Philosophy*, 1992, 35 -62.

⁷⁵ Preamble, *Sexual Offences Act* (Act No. 3 of 2006).

⁷⁶ 2010 National Survey, 'Violence against children in Kenya' 2012, http://www.unicef.org/esaro/VAC_in_Kenya_pdf on 4 December 2017.

⁷⁷ Mutanu B, 'How safe are your kids from sexual abuse while you're away at work' Daily Nation, 14 October 2015, 17.

involves any person below the age of 18 in Kenya is regarded as a statutory offence and therefore a strict liability crime. Section 8 of the SOA prescribes guilt if commission of the act has been proven regardless of the existence of criminal or ill intention. The law does not allow for the consent of minors in sexual activity to have any relevance, the law assumes that the minor has no proper knowledge of what they are consenting to as they lack legal capacity.⁷⁸

However, as Shadrack Muyesu of the Nairobi Law Monthly clarifies, 'it is not proper to classify defilement as a statutory offence simply because a minor cannot give consent. Defilement is a strict liability offence simply because of the vulnerability of minors and the need to offer special protection to them'.⁷⁹ The strict liability rule is employed to ensure and to some extent, guarantee protection of the minor from being physically and mentally exploited. This includes protection of minors from being either lured into giving false and improper consent or coerced into sexual activity.

3.4. *Ultra vires* to the intended punitive target

When it comes to statutory rape, the intention of the legislators is key to remember and always consider. The purpose or intended result anticipated by the legislators in imposing strict liability is what can be used to accurately and objectively confirm the legislators' intentions. In the case of *B (a minor) v DPP (2000)*, it was held that the general principle regarding criminal cases is that there is a rebuttable presumption that criminal intention is required in assessing culpability.⁸⁰ In order to rebut that presumption, one must prove 'a compellingly clear implication' that the legislators' intention was indeed to have that particular offence be one of strict liability.⁸¹ The House of Lords stated that, 'The test is not whether it is a reasonable implication that the Statute rules out criminal intention as a constituent part of the crime. The test is whether it is a necessary implication'.⁸²

This common law principle would lead one to inquire whether the legislators in the Kenyan parliament intended for the criminalisation of non-exploitative sexual activity between adolescents of comparable age. It would require an answer to the question on

⁷⁸ Muyesu S, 'Bad in law' sums up Chitembwe Decision in defilement appeal' 47.

⁷⁹ Muyesu S, 'Bad in law' sums up Chitembwe Decision in defilement appeal' 48.

⁸⁰ *B (a minor) v DPP (2000)*, The United Kingdom House of Lords.

⁸¹ Elliot C and Quinn F, 'Strict Liability' in Elliot C and Quinn F (eds) *Criminal law*, 12th ed, Harlow, Pearson Education, 2012, 36-37.

⁸² *B (a minor) v DPP (2000)*, The United Kingdom House of Lords.

whether the purpose of the law is to protect minors from exploitation or whether their intention was to prescribe a moral standard. Drawing from the Preamble of the SOA, the purpose and main aim of the law is protection and specifically protection from exploitation due to their vulnerability.⁸³ In fulfilling this aim, the law and its implementers are justified in applying the strict liability rule in all matters minors and their involvement in sexual activity.

However, following the intention of the legislators, if the same strict liability rule is applied outside the scope of protecting minors from predators and exploitation then application of the rule can be said to be *ultra vires* to its main purpose. Following this, one can argue that safeguarding morality by prohibiting any sexual activity among adolescents, even those of a comparable age, is a matter of public interest thus justifying the current application of the law. The case of *Sweet v Parsley* (1970)⁸⁴ makes reference to public interest and holds that strict liability is appropriate for regulatory offences meaning offences that cannot be categorised as criminal in nature but must be prohibited due to public interest.⁸⁵ The court went further to clarify that a crime whose impact and sanction is associated with a real social stigma should require proof of criminal intention.⁸⁶

In the Kenyan case, two issues arise with regard to public interest. On one end of the spectrum is 'public morality' whereby the law criminalises and heavily sanctions non-exploitative sexual activity among adolescents of comparable age in an attempt to preserve the morality of the youth.

However, in practice, it is difficult for the State to regulate the private affairs of its citizens. Therefore, criminal charges will not be instituted unless the occurrence of adolescent sex is brought to light as a result of parental disapproval or a sour dispute between the partners or their families.

In the event that this 'crime' continues to go undetected, as has been for years on end owing to the statistics on sexually active teenagers across the country, the emerging results give rise to the second issue on the opposite end of the spectrum. The issue pertains to the far-reaching implications of the combination of criminalisation of normal adolescent

⁸³ Preamble, *Sexual Offences Act* (Act No. 3 of 2006).

⁸⁴ *Sweet v Parsley* (1970), The United Kingdom House of Lords.

⁸⁵ Elliot C and Quinn F, 'Strict Liability' 38, 42.

⁸⁶ *Sweet v Parsley* (1970), The United Kingdom House of Lords.

developmental processes and the excessively harsh criminal sanctions that adolescents would consequently face. This criminalisation and punishment degrades and inflicts an unnecessary state of disgrace upon adolescents involved.⁸⁷

As earlier discussed, there is an intended effect of not only requiring defilement to be a strict liability offence but also the imposition of tough criminal sanctions against convicted offenders. It is to guarantee the protection of minors from sexual predators who exploit them with or without using violence. This rationale is also based on the fact that minors are vulnerable and do not have the capacity to consent to any sexual activity. Therefore, sexual predators are also disarmed from manipulating minors into sexual activity contrary to their will power or their own good. The shame that adolescents may face as a result may have a different effect from the intended one. It may discourage them from practicing safe sex due to association with sexual activity, for example failure to access condoms or education on sexual and reproductive health.

This will eventually lead to an increase in early pregnancies, contraction of sexually transmitted diseases, abortions, abortion-related health complications or even deaths. Many writers have referred to the saying, 'if teenagers are already having sex, at least let them have it safely'.⁸⁸ Therefore, it is of greater public interest to safeguard the reproductive health of the adolescent population. It is also more reasonable to impose laws to control that which is more practical to control than that which is to some extent impractical and no real harm is imminent to the said population.

⁸⁷ Mungai C, 'Why half of Kenyan men should be in jail for sexual offences' Standard Digital, 4 February 2017 - <https://www.standardmedia.co.ke/article/2001228196/why-half-of-kenyan-men-should-be-in-jail-for-sexual-offences> on 14 January 2018.

⁸⁸ Gimase S, 'Kenya: Teens are having sex, so let them have it safely' Voice of Africa, 17 July 2014 - <http://voicesofafrica.co.za/kenya-teens-having-sex-let-them-have-it-safely/> on 24 November 2017.

CHAPTER 4: COMPARATIVE STUDY OF CANADIAN AND NAMIBIAN PRACTICES: LESSONS FOR KENYA

A comparative study is important because it gives different perspectives on foreign concepts or systemic failures in a country. For this purpose, the countries or jurisdictions that are usually selected as subjects of a comparative study are those that have advanced in that particular area or concept in order to give insight into the objectives of a particular study. Therefore, for the purposes of assessing the efficiency of age-gap provisions in filling the gap left by statutory rape laws in Kenya, this study chooses the subjects of its case study to be countries that have already incorporated these age-gap provisions into their sexual offences laws.

This chapter seeks to investigate whether age-gap provisions have successfully promoted the efficiency of sexual offences laws of the countries that have incorporated these provisions. The specific points of comparison that form the basis of this chapter are: definition of terms, age of sexual debut, motivations for adolescent sex, sex education, knowledge and awareness, sexual and reproductive health and enforcement of the act

4.1. The Canadian perspective

4.1.1. Canadian sexual offences laws

The Canadian Criminal Code is the legal authority governing sexual offences in Canada.⁸⁹ Statutory rape as a strict liability offence applies where a complainant is under the age of 16.⁹⁰ Where a person performs any sort of sexual activity with anyone under the age of 16, consent is immaterial regardless of whether the act was consensual or not.⁹¹ This law also applies to the offences of sexual interference⁹² and invitation to sexual touching⁹³ under sections 151 and 152 of the Code respectively. However, to the general laws of statutory rape, there are exceptions. The first is provided for under section 150.1 (2) which states that, 'where an accused is charged with an offence under section 151 or 152, in respect of a complainant who is 12 years of age or more but under the age of 14 years, it is a defence

⁸⁹ Part V, *Criminal Code* (Canada).

⁹⁰ Section 150.1 (1), Part V, *Criminal Code* (Canada).

⁹¹ Section 150.1 (1), Part V, *Criminal Code* (Canada).

⁹² Section 151, Part V, *Criminal Code* (Canada).

⁹³ Section 152, Part V, *Criminal Code* (Canada).

that the complainant consented to the activity that forms the subject matter of the charge if the accused:

- (a) Is less than two years older than the complainant; and
- (b) Is not in a position of trust or authority towards the complainant, is not a person with whom the complainant is in a relationship of dependency and is not in a relationship with the complainant that is exploitative of the complainant'.⁹⁴

The second exception with regard to minors aged between 14 and 15 is provided by section 150.1 (2.1) which states that, 'if an accused is charged with an offence under section 151 or 152 in respect of a complainant who is 14 years of age or more but under the age of 16 years, it is a defence that the complainant consented to the activity that forms the subject matter of the charge if the accused:

- (a) Is less than five years older than the complainant; and
- (b) Is not in a position of trust or authority towards the complainant, is not a person with whom the complainant is in a relationship of dependency and is not in a relationship with the complainant that is exploitative of the complainant'.⁹⁵

The third exception exists for transitional purposes under section 150.1 (2.2) where, 'if the perpetrator is five or more years older than the complainant, it is a defence that the complainant consented to the activity that forms the subject matter of the charge if;

- (a) the accused is the common-law partner of the complainant, or has been cohabiting with the complainant in a conjugal relationship for a period of less than one year and they have had or are expecting to have a child as a result of the relationship; and
- (b) The accused is not in a position of trust or authority towards the complainant, is not a person with whom the complainant is in a relationship of dependency and is not in a relationship with the complainant that is exploitative of the complainant'.⁹⁶

The Department of Justice of Canada defines exploitative sexual activity, for the purposes of sexual offences laws, as any sexual activity involving prostitution, pornography or

⁹⁴ Section 150.1 (2), Part V, *Criminal Code* (Canada).

⁹⁵ Section 150.1 (2.1), Part V, *Criminal Code* (Canada).

⁹⁶ Section 150.1 (2.2), Part V, *Criminal Code* (Canada).

where there is a relationship of trust, authority, dependency or any other situation that is otherwise exploitative of a young person.⁹⁷

4.1.2. Justification for using the Canadian example

A study conducted in Canada from 2014 to 2015 showed a decrease in the prevalence of adolescent sexual activity in various parts of Canada.⁹⁸ Furthermore, there has been an increase in the use of contraceptives among adolescents suggesting that more and more adolescents are practicing safer sex and are more informed about sexual and reproductive health.⁹⁹ With regard to teenage pregnancies, there has been a decline in teen birth rates by 15.6% between 2001 and 2010 within the 15 to 19 year age group.¹⁰⁰ In 2010, teen expectancy rates stood at 28 per every 1000 girls (2.8%).¹⁰¹ The decline was quite steady between 2000 and 2006 because from 2006 until 2010 the decline rate was only 1.5%.¹⁰² This decline is attributed to better access to affordable and effective contraception and reproductive health services as well as the provision of a broadly based sexual health education.¹⁰³

Similarly, rates of abortions among teenagers declined by 24.2%.¹⁰⁴ The study construes this as a sign of reduced unwanted teenage pregnancies based on their working assumption that abortion rates are more likely to refer to unintended and unwanted pregnancies although this is not always the case.¹⁰⁵ With regard to the rates of HIV/AIDS prevalence among adolescents Canada, is generally categorised as a low prevalence area. However, this paper refrains from making a direct comparison with Kenya due to the fact that most studies on the rates of HIV prevalence in Canada categorise those that are 15 years old and above as adults.

⁹⁷ [www.sascwr.org>resources_pdfs.legal](http://www.sascwr.org/resources_pdfs/legal) on 20 September 2017.

⁹⁸ Guttmacher institute, *Adolescent pregnancy, birth and abortion rates across countries; Level and recent trends*, February 2015, 9.

⁹⁹ Guttmacher institute, *Adolescent pregnancy, birth and abortion rates across countries; Level and recent trends*, February 2015, 9.

¹⁰⁰ Mckay A, Trends in Canadian national and provincial/territorial teen pregnancy rates 2001-2010, 21(3-4) *The Canadian Journal of Human Sexuality*, 2012, 164.

¹⁰¹ Mckay A, Trends in Canadian national and provincial/territorial teen pregnancy rates 2001-2010, 164.

¹⁰² Mckay A, Trends in Canadian national and provincial/territorial teen pregnancy rates 2001-2010, 169.

¹⁰³ Mckay A, Trends in Canadian national and provincial/territorial teen pregnancy rates 2001-2010, 170.

¹⁰⁴ Mckay A, Trends in Canadian national and provincial/territorial teen pregnancy rates 2001-2010, 164.

¹⁰⁵ Mckay A, Trends in Canadian national and provincial/territorial teen pregnancy rates 2001-2010, 169.

In Kenya, the rates of unwanted teenage births are quite high and stand at 47% of all births by women in the 15 to 24 age group and this number is slightly increasing.¹⁰⁶ Moreover, girls below the age of 19 account for 17% of all women seeking post-abortion care services and approximately 45% of all severe abortion-related admissions in Kenyan hospitals.¹⁰⁷

The high rates in Kenya vis-à-vis the relatively lower rates in Canada suggest that Canada is taking a much better approach in reducing the negative effects associated with adolescent sexual activity without the use of criminal sanctions. In this regard, Canada serves as an example and the study of its practices informs an approach to the application of sexual offences laws that can have a positive impact on the high levels of teenage expectancy and HIV/AIDS in Kenya.

4.2. The Namibian perspective

4.2.1. Namibian laws on statutory rape

Statutory rape laws in Namibia are governed by the Combating of Rape Act.¹⁰⁸ This is a very comprehensive law that seeks to prevent and punish sexual violence especially among the women and children of Namibia. The offence of rape is covered under section 2 of the Act. Section 2(1) provides that a person is guilty of the offence of rape if, 'any person intentionally under coercive circumstances:

- (a) Commits or continues to commit a sexual act with another person; or
- (b) causes another person to commit a sexual act with the perpetrator or with a third person'.¹⁰⁹

Section 2(2) goes further to describe some of the instances that would constitute coercive circumstances. Section 2(2)(d) specifically gives provisions for statutory rape as it states that coercive circumstances include, 'circumstances where the complainant is under the age of fourteen years and the perpetrator is more than three years older than the complainant'.¹¹⁰

¹⁰⁶ KNBS, *Kenya health and demographic survey, 2008-2009, 2014.*

¹⁰⁷ KNBS, *Kenya health and demographic survey, 2014.*

¹⁰⁸ *Combating of Rape Act (Act No. 8 of 2000) (Namibia).*

¹⁰⁹ Section 2(1), *Combating of Rape Act (Act No. 8 of 2000) (Namibia).*

¹¹⁰ Section 2(2)(d), *Combating of Rape Act (Act No. 8 of 2000) (Namibia).*

In addition, section 3 of the act provides for the penalties that the perpetrators will be subject to. With regard to statutory rape, section 3(a)(iii) specifically provides that where:

‘(bb) the complainant:

(A) Is under the age of thirteen years; or

(B) is by reason of age exceptionally vulnerable;

(cc) the complainant is under the age of eighteen years and the perpetrator is the complainant’s parent, guardian, caretaker or is otherwise in a position of trust or authority over the complainant;

They are liable to imprisonment for a period of not less than fifteen years’.¹¹¹

In summary, the provisions of the act show that a lot of consideration has gone into the regulation of statutory rape. Firstly, strict liability applies when the complainant is 13 years old and below.¹¹² Consent of such a complainant is therefore disregarded as it is rightly considered that anyone who is 13 years old or younger cannot give valid and competent consent to any form of sexual activity. Secondly, the act provides for an age-gap provision in section 2(2)(d) which provides for a 3 year age gap where the complainant is over the age of 14.¹¹³ Finally, the act provides that the law will be applied as a strict liability rule where the complainant is under 18 years old and the perpetrator is in a position of trust.¹¹⁴

The provision of a 3 year age gap in the Namibian sexual offences law is intended to ensure that sexual activity between boys and girls who are in roughly equal positions is not criminalised while still protecting children from exploitation by those who are older, stronger and more mature.¹¹⁵

¹¹¹ Section 3(1)(a)(iii), *Combating of Rape Act* (Act No. 8 of 2000) (Namibia).

¹¹² Section 2(2)(d), *Combating of Rape Act* (Act No. 8 of 2000) (Namibia).

¹¹³ Section 2(2)(d), *Combating of Rape Act* (Act No. 8 of 2000) (Namibia).

¹¹⁴ Section 3(1)(a)(iii)(ccc), *Combating of Rape Act* (Act No. 8 of 2000) (Namibia).

¹¹⁵ Gender research project (hereafter GRP) at the legal assistance centre Namibia, *The age of consent*, 1997, 1.

4.2.2. Justification for using the Namibian example

Namibia is considered a relevant example for Kenya because of the similarities in the average age of sexual debut between the two countries. The debut age in Namibia is 15 to 16 while in Kenya it ranges from 16 to 17.¹¹⁶ In a 1995 survey on sexual knowledge, attitudes and practices among Namibian youth commissioned by the Namibian Network of AIDS Service Organisations (NANASO), it was found that sexual activity typically begins at age 15-16, with boys tending to begin sexual activity at younger ages than girls.¹¹⁷ There were significant numbers of boys who first engaged in sexual intercourse while under the age of 14 – as many as 20% of males in rural and semi-urban areas and 25% of males in the Caprivi/Trans-Caprivi Highway area.¹¹⁸

Furthermore, a 1996 Youth Health Development Survey conducted under the auspices of United Nations Children’s Fund (UNICEF) studied youth in school hostels in Omusati and Caprivi found that 38% of boys aged 12 and below had already had sex, along with 45% of 13-year-old boys and 40% of 14-year-old boys and by age 15, about half of the boys surveyed were sexually active.¹¹⁹ Very few girls aged 14 and below said that they had already has sex but 21% of the girls aged 15 were sexually active and by age 18, 31% of the girls had engaged in sexual intercourse.¹²⁰ Similarities are witnessed in Kenya whereby 12% of girls in the country have had their first sexual encounter by the age of 15. Further, it reports that 37% of girls aged between 15 and 19 years have had sex.¹²¹

However, that’s where the similarities end as Namibia seems to be taking a better approach than Kenya in combating the negative effects associated with adolescent sexual activity. A study conducted in Namibia in 2016 by the National HIV Sentinel Survey showed a decrease in the rates of HIV/AIDS infections among adolescents aged 15 to 19 since as early as the year 2000.¹²² The rates of HIV prevalence between participants aged 15 to 19

¹¹⁶ KNBS, *Kenya demographic and health survey, 2008-2009*.

¹¹⁷ GRP at the legal assistance centre Namibia, *The age of consent*, 1997, 2.

¹¹⁸ GRP at the legal assistance centre Namibia, *The age of consent*, 1997, 2.

¹¹⁹ GRP at the legal assistance centre Namibia, *The age of consent*, 1997, 2.

¹²⁰ GRP at the legal assistance centre Namibia, *The age of consent*, 1997, 3.

¹²¹ KNBS, *Kenya health and demographic survey, 2014*.

¹²² Ministry of Health and Social Services Republic of Namibia (hereafter MHSS Namibia), *Surveillance report of the 2016 national HIV sentinel survey*, November 2016, 46.

was 5.7% ranking them the lowest category in terms of HIV infection rates.¹²³ Moreover, the study showed a decline in HIV infection rates for participants aged 15 to 24 to 8.5% from 10.6% in 2008.¹²⁴ The study also showed a decline in new infection rates for the age group of 15 years and above from approximately 18,000 new infections in 2000 to approximately 7,400 in 2015, suggesting that infection rates among adolescents have significantly reduced.¹²⁵ The study uses the assumption that new infection rates are mostly attributed to adolescents aged 15 to 24 because of their recent debut into sexual activity.¹²⁶

Another revelation of the study was the increase in use of contraceptives and the increase of safe sex practices with regard to the 15 to 19 age group.¹²⁷ The study refers to another study undertaken in 2009 where only 40% of schoolgirls participating in the study used condoms as a measure of safe sex.¹²⁸ Although the contrasting numbers remained low in 2013, it may be beneficial to note that condom use is higher among the 15 to 19 age group.¹²⁹ This can be attributed to increased effectiveness of awareness programs as well as ease of accessibility through the wider distribution of condoms.¹³⁰

4.3. Lessons for Kenya

The major lesson that Kenya can learn from all the practices of these countries is that the law can guide behaviour but that law is unlikely to have any impact unless it bears some relation to social realities where adolescents are sexually active in non-exploitative relationships and as a result are vulnerable to the dangers that come with their activities. Kenya, as a signatory of the UN Convention on the Rights of the Child, should recognise that children need varying levels of direction and guidance in accordance with their 'evolving capacities'.¹³¹

¹²³ MHSS Namibia, *Surveillance report of the 2016 national HIV sentinel survey*, November 2016, 42, 43, 46.

¹²⁴ MHSS Namibia, *Surveillance report of the 2016 national HIV sentinel survey*, November 2016, 42, 43, 46.

¹²⁵ MHSS Namibia, *Surveillance report of the 2016 national HIV sentinel survey*, November 2016, 46.

¹²⁶ MHSS Namibia, *Surveillance report of the 2016 national HIV sentinel survey*, November 2016, 42, 43, 46.

¹²⁷ MHSS Namibia, *Namibia AIDS response progress report (hereafter NARPR) (Reporting period 2013 – 2014)*, March 2015, 33-34.

¹²⁸ MHSS Namibia, *NARPR (Reporting period 2013 – 2014)*, March 2015, 33-34.

¹²⁹ MHSS Namibia, *NARPR (Reporting period 2013 – 2014)*, March 2015, 33-34.

¹³⁰ MHSS Namibia, *NARPR (Reporting period 2013 – 2014)*, March 2015, 33-34.

¹³¹ Articles 5, 14, *UN convention on the rights of the child*, 20 November 1989, 1577 UNTS 3.

In a society where the dangers that sexually active adolescents face include unwanted pregnancies and higher risk of jeopardising their sexual and reproductive health through the contraction of various diseases and health complications, the laws in place should safeguard the subjects of the law from the imminent danger they face. The criminalisation of non-exploitative consensual sexual activity among adolescents contributes to stigmatisation of these youth and this has an impact on their willingness to access and utilise sexual and reproductive health services. This can be construed from the prevalence of HIV/AIDS and teenage expectancy in Kenya.

In contrast, countries that have regard for the sexual and reproductive health of their adolescent population seem to encourage that specific demographic to practice safe, non-exploitative, consensual sexual decisions. Evidence of this can be drawn by the low rates of HIV/AIDS and teenage expectancy in Canada and the declining rates of HIV/AIDS and teenage expectancy in Namibia among the adolescents aged 15 to 19 in both jurisdictions. This suggests that Canada and Namibia are doing something right that's lacking in Kenya.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1. Conclusion

The objective of this paper was to distinguish between exploitative and non-exploitative sex among minors in Kenya. This distinction is necessary to correctly apply the SOA and section 8 of the SOA regarding the offence of defilement in particular. The correct application of this law can only be determined by identifying what exactly the punitive target of that law is and the social disease it is intended to prevent and possibly cure. The distinction that this paper found to be proper for the purposes of interpreting section 8 of the SOA is mainly based on the balance of roles and influences between two minors in each particular situation.

In any given situation where consent and its validity between minors becomes the bone of contention within the criminal justice system, exploitation and culpability can be best determined by not only the commission of the guilty act but also by the mental state and willed intentions of the parties including their motives, dispositions, attitudes and feelings towards each other and the particular sexual relationship.¹³²

The SOA and section 8 in particular was enacted to not only protect minors from sexual predators and exploitation but also, to some extent, to protect minors from themselves. It seeks to protect them from engaging in harmful sexual activity and the negative outcomes of underage sex. It seeks to protect them from the dangers that they may not be aware lie ahead of their actions or from their incapacity to make such decisions due to their age. However, there lacks necessity to regulate the behaviour of adolescents who fall in neither of the two categories discussed above. Therefore, criminalisation and prosecution of the sexual experimentation of adolescents goes *ultra vires* to the punitive target of the SOA.

5.2. Recommendations

5.2.1. Application of the Fraser guidelines

The difference in application of the age-gap provisions lies in the distinction between exploitation and non-exploitation, otherwise referred to as true consent. The line of distinction is not always black and white. In fact, this issue usually falls into a grey area. This paper suggests a mechanism that will help in properly drawing the distinction, not

¹³² Logar T, 'Exploitation in personal relationships: From consenting to caring', 19.

only in the theoretical distinctions in the definition of the two concepts but also in the practical distinction in each case. This recommendation is based on and inspired by the Fraser guidelines.

The Fraser guidelines arose from the case of *Gillick v West Norfolk & Wisbech Area Health Authority*¹³³ which addressed the issue of whether doctors should be able to give contraceptive advice or treatment to under 16 year olds without parental consent. The House of Lords held that, '*...whether or not a child is capable of giving the necessary consent will depend on the child's maturity and understanding and the nature of the consent required. The child must be capable of making a reasonable assessment of the advantages and disadvantages of the treatment proposed, so the consent, if given, can be properly and fairly described as true consent*'.¹³⁴

This decision and the Fraser guidelines arising from Lord Fraser's opinion in particular, have since been used to assess whether a minor has the maturity to make their own decisions and to understand the implications of those decisions.¹³⁵ These guidelines have inspired the approach of various jurisdictions in assessing the risk of coercion in consensual relationships, especially those involving minors.

Such jurisdictions include those featured in chapter 3 of this paper; Canada and Namibia. Canada's framework goes into more detail in the application of the Fraser guidelines. Aside from the age-gap that is permitted by the law, sections 150 to 152 of the Canadian criminal code go further to set aside a caveat that, 'the accused must not be in a position of trust or authority towards the complainant, must not be a person with whom the complainant is in a relationship of dependency and is not in a relationship with the complainant that is exploitative of the complainant'.¹³⁶

Application of the Fraser guidelines calls for the analysis of cases on the consideration of individual situations as opposed to a blanket application applicable to all adolescents. Some of the factors that should be used to detect exploitation, as inspired by the Fraser guidelines include: the age of the minor, the age-gap between the minors, the difference in

¹³³ *Gillick v West Norfolk & Wisbech Area Health Authority* (1985), The United Kingdom House of Lords.

¹³⁴ *Gillick v West Norfolk & Wisbech Area Health Authority* (1985), The United Kingdom House of Lords.

¹³⁵ National society for the prevention of cruelty to children safeguarding information service, *What is Gillick competency? What are the Fraser guidelines?* December 2009, 1.

¹³⁶ Sections 150 – 152, Part V, *Criminal Code* (Canada).

roles and influences by one minor onto another or whether any power imbalances exist between the two minors, for example whether one is in a position of authority or influence over the other.

5.2.2. Improvement and proper implementation of sex education in the curriculum

Sex education or even merely any talk revolving the subject was once regarded as taboo in Kenya. This was especially so when the participants include minors. However, in recognising and acknowledging the fact that adolescents' access to high-quality information and services is necessary in combatting the negative effects of engaging in early and underage sex, policies and programs regarding adolescent sexual and reproductive health were proposed including those related to sex education.¹³⁷

The sexuality education program is run by the government through the Ministry of Education in 56% of schools and by Non-Governmental Organisations in 24% of schools in the country. Moreover, 3/4 of schools in the country involve peer educators to teach sex education.¹³⁸ However, a review carried out by the Guttmacher Institute found that the curriculum in Kenya has quite a number of flaws and is lacking in the most essential aspects. For instance, it emphasised abstinence above everything else, it lacked adequate basic information on contraceptives and sexual health and it excluded key topics such as reproduction, sexually transmitted diseases, abortion, access to condoms and sexual health services.¹³⁹

While the main aim of sexuality education is to teach the practical skills and knowledge needed for adolescents regarding the practice of safe sex and healthy reproductive health, very few students reported being taught practical skills. For example, only 38% of students reported being taught how to talk to a partner about getting tested for HIV, 36% learnt how to recognise forced sexual contact, 25% know what to do if a female student gets pregnant or a male student gets a female student pregnant and only 22% how to communicate with a partner about using contraceptive methods including condoms.¹⁴⁰ The teaching method

¹³⁷ Guttmacher Institute, *From paper to practice: sexuality education policies (hereafter SEPs) and their implementation in Kenya*, 2017, 5.

¹³⁸ Guttmacher Institute, *From paper to practice: SEPs and their implementation in Kenya*, 2017, 22.

¹³⁹ Guttmacher Institute, *From paper to practice: SEPs and their implementation in Kenya*, 2017, 17.

¹⁴⁰ Guttmacher Institute, *From paper to practice: SEPs and their implementation in Kenya*, 2017, 59.

was also found to use prescriptive and fear-based teaching methods and lacked depth in its overall content.¹⁴¹

Comprehensive sexuality education programs should aim to teach adolescents to exercise their sexual and reproductive rights safely and responsibly by recognising that sexual activity at their age is normative.¹⁴² Abstinence-only education programs have shown little evidence of improving sexual and reproductive health outcomes.¹⁴³ To the contrary, comprehensive sex education should acknowledge sexual activity during adolescence as normative behaviour. It should also seek to ensure the safety of such behaviour and to focus on human rights, gender equality and empowerment have demonstrated impact in several areas. They include improving knowledge, self-confidence and self-esteem; positively changing attitudes and gender and social norms; strengthening decision-making and communication skills and building self-efficacy; and increasing the use of condoms and other contraceptives.¹⁴⁴ The effects of such kind of model sex education will decrease the rates in negative and exploitative sex between minors. It will create an enabling environment for the safe and proper transitioning of adolescents from childhood to adulthood.

¹⁴¹ Guttmacher Institute, *From paper to practice: SEPs and their implementation in Kenya*, 2017, 4.

¹⁴² Guttmacher institute, *From paper to practice: SEPs and their implementation in Kenya*, 2017, 26.

¹⁴³ Guttmacher institute, *From paper to practice: SEPs and their implementation in Kenya*, 2017, 4.

¹⁴⁴ Guttmacher institute, *From paper to practice: SEPs and their implementation in Kenya*, 2017, 4.

BIBLIOGRAPHY

Books

Cocca C, *Jailbait: The politics of statutory rape laws in the United States*, State University of New York Press, New York, 2004.

Twining W, *Karl Llewellyn and the realist movement*, 2nd ed, Cambridge University Press, New York, 2012.

Chapter in books

Elliot C and Quinn F, 'Strict liability' in Elliot C and Quinn F (eds) *Criminal law*, 12th ed, Harlow, Pearson Education, 2012, 35-49.

Journal Articles

Casebeer K, 'Escape from liberalism: fact and value in Karl Llewellyn' 1977(671) *Duke Law Journal*, 1977.

Drobac J, 'Developing capacity: adolescent consent at work at law and in the sciences of the mind' *UC Davis Journal of Juvenile Law and Policy*, 2006.

Green M, 'Legal realism as a theory of law' 46 *William & Mary Law Review*, 2005.

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

Knopf A, McNealy K, Al-Khattab H, Harris L, Oruche U, Naanyu V, Draucker C, 'Sexual learning among East African adolescents in the context of generalised HIV epidemics: A systematic qualitative meta-synthesis' 12 (3) *Public Library of Science Journal*, 2017.

Llewellyn K, 'Law and the social sciences: especially sociology' 62 *Harvard Law Review*, 1949.

Mayabi JM, 'The prevalence of sexual activity among secondary school students in Nairobi and Busia counties, Kenya' *Kabarak Journal of Research & Innovation*, 2016.

Oliveri R, 'Statutory rape law and enforcement in the wake of welfare reform' 52(463) *Stanford Law Review*, 2000.

Schulhofer S, 'Taking sexual autonomy seriously: rape law and beyond' 11 *Law and Philosophy*, 1992.

Tenkorang E, Tyndale E, 'Individual and community level influence on the timing of sexual debut among youth in Nyanza, Kenya' 40 (2) *International Perspectives on Sexual and Reproductive Health*, 2014.

Online Journal Articles

Muyesu S, 'Bad in law' sums up Chitembwe decision in defilement appeal' *Nairobi Law Monthly*, 2016 - <http://46.101.74.131/category/criminal/page/21/?print=print-search>

Papers

Llewellyn K, 'Legal tradition and social science method-a realist's critique', Brookings Institution: Washington, D.C. in essays on research in the social sciences, 1931.

Llewellyn K, 'Law and the social sciences: especially sociology' 1289.

Mackey K, 'The triumph of legal realism' Michigan State University Detroit College of Law, 2004.

Newspapers

Mutau B, 'How safe are your kids from sexual abuse while you're away at work' Daily Nation, 14 October 2015.

Online Newspapers

Mungai C, 'Why half of Kenyan men should be in jail for sexual offences' Standard Digital, 4 February 2017 - <https://www.standardmedia.co.ke/article/2001228196/why-half-of-kenyan-men-should-be-in-jail-for-sexual-offences>

Reports

Guttmacher Institute, *From paper to practice: sexuality education policies and their implementation in Kenya*, 2017.

Gender research project at the legal assistance centre Namibia, *The age of consent*, 1997.

I Choose Life – Africa and Ministry of Education Kenya, *HIV/AIDS knowledge, attitudes and practices of students in selected high schools in Nairobi, Kenya*, 2009 – 2010.

Kenya National Bureau of Statistics, *Kenya demographic and health survey*, 2003.

Kenya National Bureau of Statistics, *Kenya demographic and health survey*, 2008-2009.

Kenya National Bureau of Statistics, *Kenya demographic and health survey*, 2014.

National Society for the Prevention of Cruelty to Children Safeguarding Information Service, *What is Gillick competency? What are the Fraser guidelines?* December 2009.

Dissertations

Logar T, 'Exploitation in personal relationships: from consenting to caring' Published PhD Thesis, Georgetown University, Washington DC, 2009.

Ogwen N, 'Sexual activity among school girls in Kisumu County' Published Master's Thesis, University of Nairobi, Nairobi 2011.

Walsh K, 'The sexual rights of children and the age of consent' Unpublished PhD Thesis University College Cork, 2010.

Internet Sources

Gimase S, 'Kenya: Teens are having sex, so let them have it safely' Voice of Africa, 17 July 2014 - <http://voicesofafrica.co.za/kenya-teens-having-sex-let-them-have-it-safely/>.

Mahery P, Proudlock P, 'Legal guide to age thresholds for children and young people' Children's institute, University of Cape Town, April 2011 <http://www.ci.org.za/depts/ci/pubs/pdf/resources/guides/Ages%20Guide%20April%202011%20e-version.pdf>.

Roselyne Obala: MPs throw out proposals to reduce age of consent to 16' *Standard Online Newspaper*, 2 February 2017 <https://www.standardmedia.co.ke/article/2001227977/mps-throw-out-proposals-to-reduce-age-of-consent-to-16>.

The children's society, 'Revision of definition of child sexual exploitation' 11 March 2016, 2, www.childrensociety.org.uk.

United States Department of State: Diplomacy in action, trafficking in persons report, 4 June 2008 <http://www.state.gov/j/tip/rls/tiprpt/countries/2013/215492.htm>.

2010 national survey, 'Violence against children in Kenya' 2012, http://www.unicef.org/esaro/VAC_in_Kenya_pdf.

<http://scholarship.law.wm.edu/wmlr/vol46/iss6/2>.

<http://www.iep.utm.edu/law-phil/>.

https://reliefweb.int/sites/reliefweb.int/files/resources/un_glossary_on_sea.pdf.

<https://www.standardmedia.co.ke/article/2000227952/sex-at-16-why-debate-on-the-age-of-consent-has-gone-a-notch-higher-in-kenya>.

[www.sascwr.org>resources_pdfs.legal](http://www.sascwr.org/resources_pdfs/legal).

Dictionary

Merriam Webster dictionary, 11th ed.