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Childhood sexuality in Africa: A child rights perspective

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Summary: *It is an undeniable fact that children in Africa face many challenges in their sexual health and development trajectories. One of the challenges that children face is ideological, that is, the social construction of childhood sexuality and the effects of that construction on law and policy and on what information and services children may access regarding sex and sexuality. Adults tend to represent children as sexually innocent and incompetent, and their actions toward children focus on preserving this sexual innocence and averting sexual risks.*

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The article discusses how this ideological positioning of children shapes sexuality education, and the criminalisation of sexual conduct between consenting adolescents. Legal instruments and related interpretive instruments such as court judgments and the General Comments and Recommendations of treaty-monitoring bodies play an important role as they construct meanings of childhood sexuality that align with or contradict dominant representations of childhood as sexual innocence which has effects for children's sexual rights. The article analyses how General Comments of the Committee on the Rights of the Child and the African Committee of Experts have represented childhood sexuality. It argues for the transformation of views about children toward perceiving children as having sexual agency to the extent of their evolving capacities, as a prerequisite to addressing challenges that children face in Africa relating to sexuality. It recommends that the African Committee of Experts should, in its interpretation of the African Children's Charter, construct childhood sexuality positively to represent children as sexual agents rather than positioning them as sexually innocent which also implies viewing any sexual activity of the child as inherently harmful or as a mark of deviance or corruption.

Key words: *African Committee of Experts on the Rights and Welfare of the Child; childhood sexuality; sexuality education; criminalisation of adolescent sexuality; African Charter on the Rights and Welfare of the Child*

1 Introduction

Children in Africa continue to face many challenges related to sexuality, such as child marriage, early childbearing, sexually-transmitted infections (STIs) including HIV, sexual violence, and child abuse.¹ Sexual violence is widespread, especially against girls. The gender disparity arises from a complex set of factors including traditional beliefs and cultural attitudes to gender roles that influence how families treat and relate to girls.² The transition from childhood to early adolescence is a critical period as this is the time when social norms and expectations intensify to shape the sexual life trajectories

1 DY Melesse et al 'Adolescent sexual and reproductive health in sub-Saharan Africa: Who is left behind?' (2020) 5 *BMJ Global Health* 1; E Tarkang et al 'Risky sexual behaviours among young people in sub-Saharan Africa: How can parents use the Ottawa Charter for Health Promotion for change?' (2019) 16 *Journal of Social Aspects of HIV/AIDS Research* 77; African Child Policy Forum *Breaking the silence: Violence against children with disabilities in Africa* (2010) 12.

2 African Child Policy Forum *Childhood scars in Africa: A retrospective study on violence against girls in Burkina Faso, Cameroon, Democratic Republic of the Congo, Nigeria and Senegal* (2010) iv.

of adolescents.³ Research reveals that sexual violence increases from the age of 10, and the most at risk ages are between 14 and 17.⁴

The responses to childhood sexual behaviours such as early romantic relationships, and to challenges including sexual abuse of children are based on shared beliefs that people have about the sexual nature of the child, especially whether and to what extent a child has the capacity to exercise sexual agency. Russell defines sexual agency as the 'individuals' beliefs in their ability to act upon sexual needs in a relationship, such as enjoying sex, refusing unwanted sex, or insisting on the use of protection.⁵ These beliefs about the sexual nature of a child underlie how people think and talk about childhood sexuality and represent the child through language and symbolic systems such as texts, including policy and legal instruments.⁶ This article examines and challenges dominant representations of the child as sexual in legal texts. The most important of these, for the African child, is the African Charter on the Rights and Welfare of the Child (African Children's Charter),⁷ as well as the General Comments of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee).⁸

The article aims to create a balance in discussion on the entrenched beliefs and assumptions about childhood innocence and vulnerability, on the one hand, and sexual agency, on the other, in the African context and children's rights. The way in which people think, talk and represent the sexual child has implications for children's sexual rights. For instance, if a child is imagined as sexually innocent, comprehensive sexuality education (CSE) is limited, as it is perceived as tainting the sexual innocence of the child. This has further implications because poor or inadequate sexual health education impacts negatively on the rights of the child to information about sexual health.⁹ Therefore, to realise the right to sexual health goes beyond recognising that children have the right to sexual health, and to recognise that the child is a sexual being with capacity to exercise

3 RW Blum et al 'It begins at 10: How gender expectations shape early adolescence around the world' (2017) 61 *Journal of Adolescent Health* S3.

4 African Child Policy Forum *Breaking the silence: Violence against children with disabilities in Africa* (2010) 14.

5 ST Russell et al 'Sexuality development in adolescence' in LM Carpenter & J Delamater (eds) *Sex for life: From virginity to Viagra, how sexuality changes throughout our lives* (2012) 74.

6 V Burr *Social constructionism* (2015) 21.

7 Organisation of African Unity (OAU) African Charter on the Rights and Welfare of the Child 11 July 1990, CAB/LEG/24.9/49 (1990).

8 The African Children's Committee is a treaty-monitoring body created by art 32 of the African Children's Charter, and its mandate is described in arts 37 to 45.

9 C Kennedy & K Covell 'Violating the rights of the child through inadequate sexual health education' (2009) 17 *International Journal of Children's Rights* 143.

sexual agency to the extent of the child's evolving capacities. The article, therefore, promotes a shift in representation of children in laws and policies that impact on their sexuality in two areas, namely, sexuality education and non-exploitative sexual intercourse or activity between children.

In the article a child is defined in terms of article 2 of the African Children's Charter to mean a person below the age of 18 years. The status of childhood in law covers a range of developmental stages categorised broadly in three stages: early childhood, middle childhood and adolescence.¹⁰ Adolescence, defined by the World Health Organisation (WHO) as the ages between 10 and 19, is marked by the transition from childhood to adult sexuality.¹¹ However, children have an evolving capacity for sexual agency and autonomy from early childhood.

The article uses the term 'age of consent' (to sexual intercourse or sexual activity) to describe the minimum age below which certain sexual acts are prohibited. Most laws do not explicitly prescribe an age of consent. Rather, they specify the minimum age, usually in criminal provisions. For instance, in Malawi sections 138, 160A and 160B of the Penal Code prohibit sexual intercourse or activity with a person of below the age of 16, implying that 16 is the age of consent. Age of consent laws have been misunderstood as meaning that children below the age of consent can have no sexual agency. Age of consent is a legal fiction designed to protect children from sexual exploitation by older persons, but this does not mean that the child has zero sexual agency.

The article applies a critical sexualities approach to analyse prevailing discourses of childhood sexuality, and shows how the dominant discourse of childhood innocence appearing in legal and policy texts represents the child as without sexual agency, and its implications for the rights of the child especially in relation to sexuality education and laws on age of consent to sex. It discusses the effect of the dominant representation of 'childhood innocence', and the construction of the child, especially the girl, as always vulnerable and the victim in any sexual encounter.¹² The article argues that in

10 Education Encyclopaedia 'Stages of growth in child development' <http://education.stateuniversity.com/pages/1826/Child-Development-Stages-Growth.html#ixzz0j0jMHgRB> (accessed 15 November 2020).

11 World Health Organisation The health of youth (Document A42/Technical Discussions/2) (1989).

12 KH Robinson *Innocence, knowledge and the construction of childhood: The contradictory nature of sexuality and censorship in children's contemporary lives* (2013) 11.

interpreting the African Children's Charter, the African Children's Committee should facilitate a shift from the dominant discourse of child as sexually innocent to children as sexually agentic, to promote the rights of the child relating to sexuality.

The African Children's Committee has the important role of guiding the implementation of the African Children's Charter. The African Children's Committee established 'Agenda 2040: Fostering an Africa fit for children' (Agenda 2040) to facilitate the effective implementation of the African Children's Charter. Aspiration 1 of the 10 aspirations of the Agenda 2040 is for the African Children's Charter to provide an effective continental framework for advancing the rights of the child. Aspiration 2 of the Agenda is for member states to have effective child-friendly national legislation, policy and institutional frameworks. One area that needs greater visibility is laws and policies that have an impact on childhood sexuality. This article highlights the importance of recognising children as sexual beings to facilitate the realisation of rights relating to their sexuality.

2 Sexuality and the images of childhood in Africa

The meaning of child as sexual or asexual is reflected in a people's world view and cultural knowledges and practices. Through a new sociology of childhood studies, this part discusses shifts in the way in which societies in their cultural imaginaries construct the child as sexual, and the status of childhood in relation to sexuality.¹³

Children's positions as blank slates, passive and docile is being reformulated to one that conceptualises children as active and autonomous agents.¹⁴ In Africa, a new focus on children as social actors who navigate social and economic circumstances is evident as many scholars address children's attempts to survive war, conflict, poverty and HIV.¹⁵ Much of the research has stressed development goals and a rights-centred approach as children endure and negotiate treacherous circumstances and structural inequalities. Considering these conditions, Cheney suggests that African children have been

13 A James et al *Theorising childhood* (1998); J Qvortrup *Studies in modern childhood: Society, agency, culture* (2005).

14 As above.

15 C Campbell et al 'Re-thinking children's agency in extreme hardship: Zimbabwean children's draw-and-write about their HIV-affected peers' (2015) 31 *Health and Place* 54; Y Ofofu-Kusi *Children's agency and development in African societies* (2017); P Mizen 'Bringing the street back in: Considering strategy, contingency and relative good fortune in street children's access to paid work in Accra' (2018) 66 *The Sociological Review* 1059; D Bhana *Childhood sexuality and AIDS education: The price of innocence* (2016).

perceived as in need of being rescued and objectified as such in development programmes.¹⁶ This is especially the case in relation to development aid that reproduces children's construction as victims.

Notwithstanding a rights-based framing committed to children's self-determination in much of Africa, two overlapping themes continue to frame the image of African childhoods and function to deny children's agency, and this has negative effects for children's sexual rights and autonomy. Abebe and Ofosu-Kusi refer to these themes as attempts to indigenise and victimise children.¹⁷ The first theme draws from a homogenous account of African childhoods as exotic and indigenous. This fuels a differentiated consideration of childhoods in Africa as other, exotic and subordinate to Western childhoods.¹⁸ In other words, African childhoods are perceived as traditional and cultural and thus separate from Western sexualities and norms. These traditional/indigenous norms and cultures are used to prop up arguments that focus on 'risky cultural practices' that create harm for children.¹⁹

Overlapping with the construction of childhood as indigenous and traditional in Africa is the recurrent theme focusing on children as victims. Childhood and children in the literature have come to symbolise social stress, suffering from disease, malnutrition and hunger, overpopulation, crime and anarchy, war and poverty.²⁰ Children are seen as pitiful objects, withering away in circumstances not of their own doing, displaced by war and facing death. In this, children are seen as innocent victims needing protection.²¹ Dependence on external funding and aid to deal with everyday problems further instantiates children as victims to be rescued from dire conditions.²² While social, political and economic circumstances in reality do place limits on children's rights and chances to achieve their full potential, the effect of the routine position of children as victims remains powerful and limiting.

Abebe and Ofosu-Kusi point out that as a result of this victim discourse, African childhoods often are represented as catastrophic and in a state of collapse.²³ The preoccupation with 'unchildlike'

16 KE Cheney 'Deconstructing childhood vulnerability: An introduction' (2010) 2 *Childhood in Africa* 5.

17 T Abebe & Y Ofosu-Kusi 'Beyond pluralising African childhoods: Introduction' (2016) 23 *Childhood* 304; See also A Mbembe *On the postcolony* (2001).

18 Abebe & Ofosu-Kusi (n 17).

19 Bhana (n 15) 107.

20 Mbembe (n 17).

21 Abebe & Ofosu-Kusi (n 17) 303-304.

22 Cheney (n 16) 6.

23 Abebe & Ofosu-Kusi (n 17) 304.

experiences inevitably has led to the construction of sexuality and children within the realm of passivity, innocence, vulnerability and suffering.²⁴ This position remains a striking feature of childhoods in Africa neglecting children's own agency, capability in and the negotiation of their social environments. Indigeneity and victimisation converge to produce dominant narratives of childhood sexuality in Africa based on ignorance and innocence, reinforcing gender binaries and male sexual power.²⁵ Sexuality tends to be viewed as cultural and indigenous especially around the construction of a hypersexualised masculinity and suffering femininity.²⁶

An abiding concern in the literature has been a focus on gender inequalities, and girls' vulnerability to sexual danger, disease and sexual victimisation.²⁷ Scholarship has emphasised the ways in which girls' sexuality in Africa is predicated upon notions of vulnerability, victimisation, gender inequalities and sexual innocence.²⁸ Indeed, much of the research focused on childhood sexuality and girls, in particular where it concerns rape, sexual coercion, child marriage, early child bearing and the risk to unsafe sexual practices in the context of HIV.²⁹ In this regard, the optic in the research is especially focused on sexual danger, sexual and reproductive health, the inability of girls to control and negotiate sex, resulting in poor sexual health outcomes.³⁰ In this context, sexual docility remains profound in the depiction of girls' sexuality.³¹ Instead of focusing on girls' own account of sexuality, they are seen as passive receivers of culture,

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- 24 SC Aitken 'Global crises of childhood: Rights, justice and the unchildlike child' (2001) 33 *Area* 120.
- 25 See A Mama *Women's studies and studies of women in Africa during the 1990s* (1996) 9, where it is asserted that historically, African sexualities have been framed within racist colonial narratives based on sexuality as primitive and exotic.
- 26 See, eg, S Tamale 'Researching and theorising sexualities in Africa' in S Tamale (ed) *African sexualities: A reader* (2011) 15 which argues that the construction of a male sexual predator is linked historically to the framing of African sexualities as exotic and othered.
- 27 J Parkes *Gender violence in poverty contexts: The educational challenge* (2016); FK Muhanguzi 'Gender and sexual vulnerability of young women in Africa: Experiences of young girls in secondary schools in Uganda' (2011) 13 *Culture, Health and Sexuality* 71 3; MLJ le Mat 'Sexual violence is not good for our country's development'. Students' interpretations of sexual violence in a secondary school in Addis Ababa, Ethiopia' (2016) 28 *Gender and Education* 562.
- 28 Bhana (n 15) 11; J Heslop et al 'Sexuality, sexual norms and schooling' in J Parkes (ed) *Gender violence in poverty contexts: The educational challenge* (2015) 135-136.
- 29 N Ansell 'Challenging empowerment: AIDS-affected South African children and the need for a multi-level relational approach' (2014) 19 *Journal of Health Psychology* 22; Campbell et al (n 15).
- 30 Le Mat (n 27); C Mitchell 'Challenging turbulent times: Towards a framework for girl-led transnational dialogues to combat sexual violence' (2018) 16 *Journal of Social Policy Studies* 519-520; Melesse et al (n 1) 7.
- 31 Le Mat (n 27) 565.

gender and male power where African men and boys are assumed to be all-powerful.

The persistent focus on girls and children more generally as innocent and victims of sexuality in Africa has produced an environment that has not sufficiently addressed children's own sexual cultures and the ways in which they negotiate sexuality amid the constraints. As Bhana illustrates, missing in African research around childhood sexuality is the attention to gender, culture and social values through which both boys and girls actively produce sexuality beyond danger.³² Indeed, it is the very disturbing sexual context which demands that we recognise children with rights, as promulgated in countries across the continent, so that we can hear from children themselves about the issues that matter to them. Danger discourses have done little to address children's vulnerability to sexual harm. What is required is attention to children's own standpoints and recognising their agency including in matters relating to their sexuality development.

3 Law as discourse

The images of childhood and sexuality reflect in law and legal discourse. The authors take the position that law is discourse as it shapes meanings including those about childhood sexuality. In everyday usage, the term 'discourse' refers to conversations or discussions that people have. Language as one form of communication is an important aspect of discourse. In social theory, discourse takes on a more complex meaning.³³ Foucault defined discourse as 'practices that systematically form the objects of which they speak'.³⁴ Discourse, therefore, refers to some form of communication through what people say or do. This communication creates and sustains knowledge or 'truth' by which people live.³⁵ As Scheider has explained, 'things people say or write draw from a pool of generally accepted knowledge in a society, while at the same time feeding back into society to shape or reinforce such knowledge'.³⁶ In similar words, Baxter defines discourse as

forms of 'knowledge' – powerful sets of assumptions, expectations, explanations – governing mainstream social and cultural practices.

32 D Bhana 'Love, sex and gender: Missing in African child and youth studies' (2017) 42 *Africa Development* 253.

33 N Fairclough *Language and power* (2001).

34 M Foucault *The archaeology of knowledge* trans SMA Smith (1972) 49.

35 Fairclough (n 33).

36 F Scheider 'Getting the hang of discourse theory' 6 May 2013, <http://www.politicseastasia.com/studying/getting-the-hang-of-discourse-theory/> (accessed 11 July 2020).

They are systematic ways of making sense of the world by determining power relations within all texts, including spoken interaction.³⁷

Knowledge is always related to another important aspect of discourse, namely, power. Power is the ability of groups to enforce their version of knowledge to count as true.³⁸ In Foucauldian discourse theory, truth is a human and social construction, rather than a transcendental reality.³⁹ Power shapes how adults think and talk about children and represent them as incapable of sexual agency even when children contradict these assumptions. Dominant discourses about childhood sexuality influence the formulation and enforcement of age of consent laws resulting in the idiosyncratic effect of disempowering children and perpetuating gender stereotypical assumptions about childhood sexuality.⁴⁰ This is observed in the Kenyan Court decision of *Martin Charo v Republic*⁴¹ where a judge suggests that an adolescent girl (in this case a 14 year-old girl) who voluntarily engages in sexual activity should not be protected by a defilement law despite the fact that this law was designed to protect children from harmful sexual conduct.

Court judgments such as the Charo case demonstrate that laws are discursively produced and both shape and reflect ideas about sexuality, age and gender.⁴² As Kessler describes, 'law as discourse shapes consciousness by creating the categories through which the social world is made meaningful'.⁴³ Also, law 'legitimizes and reinforces existing relations of domination by constituting these relations in ways that give them the appearance of being natural and unexceptional'.⁴⁴ Laws, therefore, do not merely represent social reality, but actively construct the objects of which they speak, that is, they signify, and constitute social identities, subjectivities, power relations and knowledge, for instance, about the sexual nature of children. Therefore, beyond prescribing the minimum age for sex and proscribing illegal sexual acts, age of consent laws enforce what is believed to be honourable, natural and objective. Age of consent laws may make it seem natural that children are sexually passive,

37 J Baxter *Positioning gender in discourse* (2003) 46.

38 N Gavey 'Feminist poststructuralism and discourse analysis: Contributions to feminist psychology' (1989) 13 *Psychology of Women Quarterly* 462.

39 As above.

40 S Angelides 'Feminism, child sexual abuse, and the erasure of child sexuality' (2004) 10 *GIQ: A Journal of Lesbian and Gay Studies* 142.

41 Criminal Appeal 32 of 2015; [2016] eKLR (High Court of Kenya).

42 J Niemi-Kiesiläinen et al 'Legal texts as discourses' in Å Gunnarsson et al (eds) *Exploiting the limits of law: Swedish feminism and the challenge to pessimism* (2007) 69.

43 M Kessler 'Lawyers and social change in the postmodern world' (1995) 29 *Law and Society Review* 772.

44 As above.

or the laws are applied rationally and objectively when they punish children for non-exploitative sex with peers.⁴⁵

This idea of law as discourse applies to all legal texts including national laws and international legal texts such as the Convention on the Rights of the Child (CRC) and the African Children's Charter. These legal documents draw from prevailing discourses to create versions of 'truth' about childhood sexuality. However, they may contain both dominant and marginal discourses, that is, the notions of children as sexually innocent, but also children as sexually agentic.

4 Discourses of childhood in the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child

The CRC and the African Children's Charter are the two important legal instruments that create and reflect constructions of meanings of childhood. The child rights treaties draw from other discursive resources and embody various competing meanings of childhood.⁴⁶ Holzcheiter analysed CRC and identified four representations of childhood in international politics that are reflected in CRC.⁴⁷ Her analysis also applies to the African Children's Charter because its substantive provisions are similar to those of CRC. She describes these discourses as the unruly or irrational child, the immanent child, the innocent child and the evolving child.⁴⁸ These discourses are to be understood as fluid and, therefore, shifting, overlapping and interacting, even as they reflect fairly fixed and identifiable meanings of childhood as understood in a particular context.⁴⁹

The discourse of the unruly or irrational child emphasises the child as immature, irresponsible, irrational, vulnerable and as an object of parental or state protection.⁵⁰ It is reflected in international politics in welfarist and paternalistic approaches to dealing with children.⁵¹ In cultural practices it is reflected in the ways in which adults think and represent children as requiring adults' assistance to make health

45 See ZR Eisenstein *The female body and the law* (1988) 43.

46 A Holzcheiter *Children's rights in international politics* (2010).

47 Holzcheiter (n 46) 99.

48 As above.

49 K Sherbine 'Emerging childhoods and immanent becomings: Considering difference in one child's encounters with popular culture' (2016) 37 *Discourse: Studies in the Cultural Politics of Education* 3.

50 Holzcheiter (n 46) 163.

51 As above.

decisions or guided or taught how to behave properly.⁵² In the child rights treaties it is reflected in the principle of best interests of the child, and in articles that recognise children as needing protection such as protection from child labour (article 32 of CRC; article 15 of the African Children's Charter); sexual exploitation (article 34 of CRC; article 27 of the African Children's Charter); and armed conflict (article 38 of CRC; article 22 of the African Children's Charter).

The discourse of immanent child emphasises the child as an incomplete or future adult.⁵³ As a future adult the child needs to be trained and prepared to become a responsible member of society. This discourse strikes the greatest resonance with the idea that education is an important aspect of child development, as enshrined in article 29 of CRC and article 11 of the African Children's Charter.⁵⁴

The discourse of childhood innocence emphasises the childhood as a blissful state of innocence and purity, thereby placing a duty on adults to do everything to preserve this state.⁵⁵ It is imagined that children 'lose' this innocence as they grow up, but then they could lose it too soon if they know or get involved in 'adult things' such as that of a sexual nature, before they are old enough, or what Egan and Hawkes have called improper sexualisation.⁵⁶ The discourse of the innocent child provides powerful motivations for adults to shield the children from sexual experiences that are deemed harmful to them such as sexual practices or knowledge. This discourse inspired strong reactions against sexuality education on the African continent.⁵⁷ It is also the reason why children have been punished

52 D Lupton 'The reproductive citizen: Motherhood and health education' in K Fitzpatrick & R Tinning (eds) *Health education: Critical perspectives* (2014) 49; S Lyle 'The construct of the child: The "C" in PwC' in B Anderson *Philosophy for children: Theories and praxis in teacher education* (2016) 31.

53 Holzscheiter (n 46) 102 describes the notion of immanent child as tracing back to John Locke, and meaning "adult-to-be", that is, 'a human being with potential – incomplete and yet to be' – which is utterly ignorant and unreasonable and moves towards reason while becoming an adult'. See also P Moss & P Petrie *From children's services to children's spaces: Public policy, children and childhood* (2002) 58.

54 Holzscheiter (n 46) 166.

55 S Brennan & J Epp 'Children's rights, well-being, and sexual agency' in A Bagattini & C Macleod (eds) *The nature of children's well-being: Theory and practice* (2015) 299.

56 G Hawkes & RD Egan 'Landscapes of erotophobia: The sexual(ised) child in the postmodern Anglophone West' (2008) 12 *Sexuality and Culture* 199.

57 The African Group at a 65th UN General Assembly on 25 October 2010 rejected the idea that there is a right to comprehensive sexuality education when this was proposed in the interim report of the Special Rapporteur on Education, Mr Vernor Muñoz. See the media report International Service for Human Rights 'Majority of GA Third Committee unable to accept report on the human right to sexual education' 26 October 2010, <https://www.ishr.ch/news/majority-ga-third-committee-unable-accept-report-human-right-sexual-education> 26 October 2010 <https://www.ishr.ch/news/majority-ga-third-committee-unable-accept-report-human-right-sexual-education> (accessed 17 October 2010).

harshly for engaging in consensual sex in the name of protecting their innocence.⁵⁸

There is also the discourse of the evolving or agentic child which represents the child as having an evolving capacity for autonomy, for responsibility, and for forming views to which adults must have due regard. This perspective is an important paradigm shift that CRC entrenches in that children who were perceived as mute, and as primarily an object of charity and protection, now are perceived as having agency to participate in shaping their social world.⁵⁹ In particular, article 12 of CRC and article 7 of the African Children's Charter embody this novel vision of the child who is understood as capable of forming his or her own views and as possessing the right to express their views freely on issues affecting them.

In matters pertaining to sexuality, the discourse of childhood as innocent tends to be dominant while the discourse of childhood as agentic is marginal. In Uganda section 129A of the Penal Code proscribes consensual sex between children. In Kenya section 8 of the Sexual Offences Act 2006 has been interpreted as prohibiting sex for children below the age of 18.⁶⁰ The underlying belief is that children are incapable of sexual agency. According to some court judgments,⁶¹ which are analysed later, children must not and cannot engage in sexual intercourse or activity. This is how the judge in this article, are interpreting the law to mean that children are sexually innocent and incompetent and cannot or should not have sexual desires.⁶²

As will be elaborated below, the General Comments of the CRC Committee and the African Children's Committee reveal an interplay of these representations of childhood sexuality as unruly, immanent, innocent and agentic. The discussion in this article focuses on the child as sexually agentic which is a marginal discourse in the texts produced by the two committees, and the implications on advancing the rights of the child in Africa.

2019); see also M Kahi'u 'Bishops in Kenya renew campaign against comprehensive sexuality education commitment' Association for Catholic Information in Africa, 24 May 2020, <https://www.aciafrica.org/news/1388/bishops-in-kenya-renew-campaign-against-comprehensive-sexuality-education-commitment> (accessed 14 November 2020).

58 See, eg, *CKW v Attorney-General and Director of Public Prosecutions* [2014] eKLR, Petition 6 of 2013 (High Court of Kenya) discussed in more detail later in the article.

59 Holzscheiter (n 46) 166.

60 See *CKW v AG* case described later in this article.

61 See, eg, *Martin Charo v The Republic* Criminal Appeal 32 of 2015; [2016] eKLR (High Court of Kenya).

62 *Criminal Appeal 32 of 2015*; [2016] eKLR (High Court of Kenya).

In General Comment 7 the CRC Committee discusses the implications of CRC on young children. The Committee exhorts state parties to fully recognise young children as rights holders.⁶³ It encouraged state parties to adopt a positive agenda for young children in the early childhood phase of below the age of eight years.⁶⁴ The Committee encouraged state parties to shift away from traditional beliefs that consider early childhood as a state of immaturity and passive learning, and to view every child as an individual human being with his or her 'own interests, concerns and points of view'.⁶⁵

Similarly, the General Comments of the African Children's Committee reveal competing discourses of childhood. In General Comment 3 on article 31 on the responsibilities of the child, the African Children's Committee addresses how state parties should understand and balance the responsibilities of the child and the enjoyment of rights by the child.⁶⁶ The text of the General Comment and its focus on responsibilities of the child strongly reflect the discourse of child as immanent, that is, as an adult-to-be. For instance, it states that 'placing responsibilities upon children is underscored by the role that responsibilities play in helping to shape the future of children as responsible adult members of society.'⁶⁷ The General Comment also exhorts States to teach and train children to become responsible citizens of society. However, with regard to when it is that children should make contributions to society, the view of the ACERWC is that children contribute to society 'in the here and now, not only in the future.'⁶⁸ By recognising the here and now, the General Comment mitigates the discourse of child as immanent becomings which emphasises the future over the present. General Comment 3 of the African Children's Committee also makes the link with article 7 of the African Children's Charter on having the views of the child heard.⁶⁹ This means that children should be involved in various aspects of life processes in the present. It is argued in this article, therefore, that issues of sexuality should not be future-orientated, because children are sexually agentic in the here and now, to the extent of their evolving capacities.

63 United Nations Committee on the Rights of the Child (CRC Committee) General Comment 7 (2005) Implementing Child Rights in Early Childhood, 20 September 2006, CRC/C/GC/7/Rev.1 paras 1-2.

64 CRC Committee (no 63) para 5.

65 As above.

66 African Children's Committee General Comment on article 31 of the African Charter on the Rights and Welfare of the Child on 'the responsibilities of the child' (2017) para 1.

67 African Children's Committee (n 66) para 7.

68 African Children's Committee para 11.

69 African Children's Committee para 19.

Representation of children as sexually agentic is marginal in the work of the Committees, and especially the African Children's Committee. However, the General Comments of the two Committees contain text that constructs children as having sexual agency. For instance, the CRC's General Comment 3⁷⁰ recognises that children are vulnerable to HIV/AIDS because they do not have proper information and guidance at their *first sexual experience*;⁷¹ and that girls face challenges because of judgmental attitudes about *their sexual activity*.⁷² The General Comment therefore recommends that states should pay attention to *sexual behaviours of children* even if they do not conform to societal expectations;⁷³ that states should provide appropriate information to children to enable them to *deal positively and responsibly with their sexuality*;⁷⁴ and that states should be supportive to children when they *begin to express their sexuality*.⁷⁵

In General Comment 20,⁷⁶ the CRC Committee recognises that adolescents need support as they *explore their emerging beliefs and identities and sexualities*.⁷⁷ The Committee also recommended that states should *avoid criminalising consensual sex between adolescents*.⁷⁸ The Committee has more pointedly highlighted the same view in its Guidelines on the Optional Protocol on the sale of children, child prostitution and child pornography, issued in 2019. It provides that 'states parties should not criminalise adolescents of similar ages for consensual sexual activity'.⁷⁹ Furthermore, in its General Comment 24 on the rights of children in the child justice system, the Committee reflects on the decriminalisation of status offences which, if committed by adults, are not considered crimes. The Committee points out that 'adolescents who engage with one another in consensual sexual acts are also sometimes criminalised', and the Committee urges state parties to remove such offences from their statute books.⁸⁰ It is notable that the Committee's jurisprudence is paying increasing attention to this issue, and demonstrating recognition of a child as sexually agentic.

70 CRC Committee General Comment 3 (2003) HIV/AIDS and the Rights of the Child, 17 March 2003, CRC/GC/2003/3.

71 CRC Committee (n 70) para 2.

72 CRC Committee (n 70) para 8.

73 CRC Committee (n 70) para 11.

74 CRC Committee (n 70) para 16.

75 As above.

76 CRC Committee General Comment 20 (2016) on the implementation of the rights of the child during adolescence, 6 December 2016, CRC/C/GC/20.

77 CRC Committee (n 76) para 16.

78 CRC Committee (n 76) para 40.

79 CRC Committee Guidelines regarding the involvement of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 10 September 2019, CRC/C/156 para 73.

80 CRC Committee General Comment 24 (2019) on children's rights in the child justice system CRC/C/GC/24, 18 September 2019 para 12.

The 2017 joint General Comment of the African Children's Committee and the African Commission on Human and Peoples' Rights (African Commission)⁸¹ is the only General Comment that has some, albeit few, instances of language that represents the African child as having sexual agency. The General Comment encourages States to provide *sexuality education* and information in schools.⁸² It recommends that the sexuality education should contain information about what constitutes *consent to sex* as distinct from consent to marriage.⁸³ From the perspective of law as discourse, the idea that consent to sex fundamentally differs from consent to marriage perhaps is one of the most powerful statements any General Comment has ever made affirming childhood sexual agency on the African continent.

5 Recognising sexual agency of children

This part discusses how sexual agency has been undermined in the two specific areas of sexuality education and age of consent to sex laws. The article argues that the African Children's Charter could be interpreted to recognise children as sexually agentic to facilitate addressing some of the sexuality-related challenges children face in Africa.

5.1 Sexuality education

Comprehensive sexuality education (CSE) involves the teaching and learning of the psycho-social and physical aspects of sexuality. The basic premise of CSE is to ensure that young people are equipped with knowledge, skills and values that address their sexual health, their rights and gender equality.⁸⁴ Beyond an exclusive focus on sexual danger such as HIV, pregnancy and sexual coercion, CSE seeks to develop healthy sexualities, and equitable and respectful sexual relationships underpinned by the sanctity of children's rights. The roll-out of CSE is based on age and the cultural context.⁸⁵ Unlike traditional versions of sexuality education that promote sexual

81 The African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on The Rights and Welfare of the Child on Ending Child Marriage, 2017.

82 African Commission and African Children's Committee (n 81) para 36.

83 As above.

84 United Nations Educational, Scientific and Cultural Organisation (UNESCO) *International technical guidance on sexuality education. An evidence-informed approach* (2018).

85 As above.

danger and abstinence, CSE recognises children's right to a positive and pleasurable sexuality. This understanding of CSE as a rights-based curriculum intervention is in direct conflict with dominant views around childhood sexual innocence. As a result, there has been a backlash against CSE in South Africa (and other countries) witnessed by vitriolic outbursts by many parents, teachers and civil society attacking CSE as a vehicle that promotes children's premature sexual conduct and in direct conflict with the beliefs, values and religious principles.⁸⁶ Clearly, CSE is highly political and how it is viewed depends on the particular position taken and through which children's rights are denied or advanced.

Comprehensive sexuality education confronts childhood sexual innocence and concomitantly concerns about age are invoked. The United Nations Educational, Scientific and Cultural Organisation (UNESCO) supports the provision of CSE to learners from the age of five years.⁸⁷ In light of the tension that exists between notions of childhood sexual innocence and children's right to CSE, age limits often are advanced to mediate these tensions. The authors of this article take the view that age categories tend to disregard the sexual agency of younger children especially those in the early childhood category.

Educators are both vital in and barriers to implementing a rights-based sexuality education based on the rights of the child to sexual knowledge.⁸⁸ Religious, cultural and normative understandings of sexuality as an adult domain are often reproduced in the teaching of sexuality education. These conservative ideas are premised upon sexual innocence leading to abstract and technical deliberations in the classroom about sexuality rather than a focus on the sexual rights

86 See R Matshili 'Uproar over comprehensive sexuality education's 29 October 2019 IOL', <https://www.iol.co.za/pretoria-news/uproar-over-comprehensive-sexuality-education-36192973> (accessed 14 November 2020); R Matshili 'ACDP march against sex education plan' 19 August 2019, <https://www.iol.co.za/pretoria-news/acdp-march-against-sex-education-plan-30970782> (accessed 14 November 2020).

87 UNESCO (n 84).

88 HK Altinyelken & M le Mat 'Sexual violence, schooling and silence: Teacher narratives from a secondary school in Ethiopia' (2018) 48 *Compare: A Journal of Comparative and International Education* 653; P Iyer & P Aggleton 'Sex education should be taught, fine ... but we make sure they control themselves': Teachers' beliefs and attitudes towards young people's sexual and reproductive health in a Ugandan secondary school' (2013) 13 *Sex Education* 50; N de Lange et al 'Voices of women teachers about gender inequalities and gender-based violence in rural South Africa' (2012) 24 *Gender and Education* 500; Muhanguzi (n 27) 718; LS Young et al 'Feminine sexual desire and shame in the classroom: An educator's constructions of and investments in sexuality education' (2019) 19 *Sex Education* 496-497; FE Leach & C Mitchell *Combating gender violence in and around schools* (2006).

of the child.⁸⁹ Sexual innocence discourses shape educators' delivery of sexuality education programmes. Sexuality education thus is marshalled to accomplish the goals of sexual innocence and sexual ignorance rather than to promote sexual rights and children's best interests in the realm of sexual health and well-being.

Sexuality education is often focused on adults' perception of sex-as-risk rather than an investment in children's own voices about sexuality in ways that matter to them.⁹⁰ Furthermore, it is girls' sexuality that is placed on high levels of scrutiny based on the gender binary which assumes girls' sexual innocence and the ideal around sexual respectability.⁹¹ Boys, on the other hand, are assumed to have sexual agency. Teachers also have difficulty addressing sexuality as pleasure and working with children who express sexual desire.⁹² Adult hierarchies and generational differences do not recognise children as sexual, thus hindering addressing sexuality comprehensively.⁹³

Le Mat found that teachers in Ethiopia often draw on culture to avoid sexuality.⁹⁴ Similarly, Bhana found that teachers in South Africa suggested that the discussion of sex or mentioning the word 'sex' is a cultural violation in relation to generational hierarchies and cultural norms which make discussion of sexuality a taboo.⁹⁵ Studies have also suggested that many teachers on the continent normalise sexual violence and inequalities such that discussions about their interventions show little empathy for children's right to sexual safety.⁹⁶ These studies with teachers show the reinforcement of gender binaries, following the theme of victimisation where boys' expression of sexuality, even in violent ways, is condoned and normalised through biological and sociological definitions around masculinity and sexuality, whereas girls are presumed to be sexually docile.

89 Le Mat (n 27) 576; Bhana (n 15) 99.

90 L. Allen 'Denying the sexual subject: Schools' regulation of student sexuality' (2007) 33 *British Educational Research Journal* 231.

91 S. Lamb 'Feminist ideals for a healthy female adolescent sexuality: A critique' (2010) 62 *Sex Roles* 295.

92 The difficulty to accept children as capable of sexual desire and recognising this as a normal aspect of sexual development not only is confined to the education sector but is pervasive in society. The judge in the case of *Charo*, eg, had found it difficult to believe that a child of 14 could express sexual desire and voluntarily engage in sexual intercourse, and yet be a normal child.

93 D. Bhana 'Discourses of childhood innocence in primary school HIV/AIDS education in South Africa' (2008) 7 *African Journal of AIDS Research* 153; Young et al (n 88) 294.

94 Le Mat (n 27).

95 Bhana (n 15).

96 Lamb (n 91).

What then are the effects of the continued silence and neglect in advancing the rights of children in relation to their sexual health and education? First, by avoiding sex and discussion about sexuality beyond danger, childhood is sanitised and cleansed of the sexual dimension of life. Second, by defining childhood sexuality as innocence and based on age hierarchies, little attention is paid to what really matters to children in relation to sexuality. This means that the environment is not conducive to children raising issues around sexual violence, rape and coercion because any discussion about sex and sexuality is prohibited. Third, by continuing to focus on sex-as-risk, sexuality is framed only within the discourse of contamination, taboo and wrongdoing.⁹⁷ Positive elements of sexuality are dismissed, ignored and attention to sexual health is impaired. Fourth, the inability of children to address parents and teachers about their sexual experiences reproduces sexual shame and secrecy. Sexual violence, therefore, cannot be addressed precisely because children are not given the right to express themselves about sexual matters. This means, finally, that the issues around cultural norms, gender inequalities and socio-political and economic contexts that reproduce girls' vulnerability to sexual risk are not addressed and neither are the norms that reproduce differential ways through which feminine and masculine constructions of sexuality are sustained as a binary.

An emerging body of work on African children's sexual agency acknowledges children's sexual rights, their sexual desires, and investment in relationship dynamics.⁹⁸ This kind of research which addresses children as agents seeks to acknowledge their rights beyond sexual innocence and ignorance about sexual matters and has yielded great insight into what really matters to children.⁹⁹ Future research must continue on this path taking heed of children's rights and ensuring a multidimensional focus on sexuality, gender, class and broader inequalities that shape childhood sexualities.

This article provides a point of departure from the ongoing indigenisation and victimisation of childhood sexuality in Africa fuelled by discourses of sexual innocence, ignorance and inequalities. Instead, the authors argue for advancing sexual rights for children as promulgated in laws and policies. As Abebe and Ofofu-Kusi indicate:¹⁰⁰

97 Altinyelken & Le Mat (n 88); Le Mat (n 27).

98 R Jewkes & R Morrell 'Sexuality and the limits of agency among South African teenage women: Theorising femininities and their connections to HIV risk practices' (2012) 74 *Social Science and Medicine* 1736; Bhana (n 15).

99 D Bhana 'The (im)possibility of child sexual rights in South African children's account of HIV/AIDS' (2006) 37 *IDS Bulletin* 64.

100 Ofofu-Kusi (n 15) 304.

Childhood situated only in dimensions of innocence and vulnerability, while realistic, is only a partial account ... Just as there are hardships and deprivation so too are there opportunities and privileges, especially when the complex social, cultural, economic and political realities, in their multifarious and dynamic forms, are taken into consideration.

Finally, there is a need to create the conditions for addressing children as sexual beings with rights in all social institutions and reconceptualising childhood sexuality in Africa from the hollow depiction of victimisation and vulnerability to sexual agency as children navigate their social and cultural realities. Indeed, as Schalet suggests, when children exercise sexual autonomy they must do so with the necessary skills, knowledge and understanding of their rights about how, when and who they engage with in sexual conduct.¹⁰¹

5.2 Age of consent to sex laws

The authors support the growing consensus to decriminalise non-exploitative sexual conduct between the child and adolescent peers, and this part explains the rationale. Laws that punish children for engaging in non-exploitative sex reinforce notions of childhood sexual innocence in ways that negatively impact on the rights of the child.

The colonial era brought age of consent laws which imposed a conceptualisation of sexuality based on gender, class and racial stereotypes. When age of consent laws were introduced among the colonised peoples, they were not intended to prevent harm to women and girls, whose consent was not considered relevant as they were viewed as non-agentic and sexually passive.¹⁰² In fact, as Bannerji observed, the formulation of these laws was largely in the interests of men as women and girls did not have a say in their formulation.¹⁰³ The aim of these laws, therefore, was to restrain male

¹⁰¹ A Schalet 'Sex, love, and autonomy in the teenage sleepover' (2010) 9 *Contexts* 16.

¹⁰² M Ingram *Carnal knowledge: Regulating sex in England, 1470-1600* (2017) 29-32. Writing about England in the 1500s, Ingram describes that 'men – especially young men and those in the prime of life – were characteristically assumed to be powerfully attracted to women and likely to give vent to their passions if they were not restrained by their own powers of reason and self-control, backed up by the strictures of the law and social pressure. In the act itself, men were conventionally viewed as the prime agents. They had the 'carnal knowledge' or the 'use' of women's bodies; more euphemistically, they 'meddled' or 'lay' with them; in the language of the street, they 'fucked', 'swived' or 'japed' them.' On the other hand, however, '[w]omen were characteristically viewed as more passive yet also powerfully inclined to sexual activity in certain circumstances – most obviously if they were of age to marry and had hopes or expectations of marriage'.

¹⁰³ H Bannerji *Inventing subjects: Studies in hegemony, patriarchy and colonialism* (2001) 83.

sexual behaviour which was viewed as inherently aggressive and dangerous.

In post-colonial Africa some countries, such as Malawi and Zambia, retained the colonially-inherited age of consent laws, while others, such as Botswana, have modified the colonial versions and yet others have undertaken substantive reforms, such as Kenya.¹⁰⁴ There are many variations of age of consent laws, but for the purpose of this discussion what is notable is the restriction of sexual agency of adolescents who engage in consensual sex.

The fundamental idea of criminal law is that a person who harms another should be held responsible. However, meanings of 'harm' vary across cultures, and also change over time. If society views something as harmful, a criminal justice response is likely to follow. However, views about children, myths and morality may also influence what is regarded as harmful.

Historically, myths about childhood innocence and incapacity also shielded sex offenders. Children's incapacity led to legal cautionary rules that their testimony could not be relied upon, allowing perpetrators to escape conviction if there were no other witnesses.¹⁰⁵ Hetero-normative bias also meant that the sexual penetration of a female child constituted rape, whereas the sexual penetration of a male child was a lesser offence.¹⁰⁶ Also, children who were not forcibly raped were seen to have acquiesced, and the idea that children could be 'groomed' was not understood.¹⁰⁷ So clearly, law reforms were necessary. There has been a raft of new sexual offence laws in Africa introducing changes, many of which are necessary to ensure the protection of child victims of sexual abuse.¹⁰⁸ However, some of these laws have also introduced new problems which, although they are intended to assist children, trap children in a non-agentic

104 See table of laws regulating consensual sex of adolescents in G Kangaude & A Skelton '(De)criminalising adolescent sex: A rights-based assessment of age of consent laws in Eastern and Southern Africa' (2018) 8 *SAGE Open* 6.

105 R Meintjies 'A call for a cautionary approach to common sense' (2001) 1 *Child Abuse Research in South Africa* 40.

106 In *Masiya v Director of Public Prosecutions* 2007 (5) SA 30 (CC) the Constitutional Court broadened the definition of rape to include anal penetration of a female child, and shortly afterwards the Criminal Law (Sexual Offences and Related Matters Amendment Act) 32 of 2007 ensured that all penetrative acts were treated on an equal basis.

107 B Pithey & K Muller 'Section 18: Sexual grooming of children' in D Smythe & B Pithey (eds) *Sexual offences commentary* (2011) 11-1.

108 United Nations Population Fund (UNFPA) *Harmonising the legal environment for adolescent sexual and reproductive health and rights: A review in 23 countries in East and Southern Africa* (2017), https://esaro.unfpa.org/sites/default/files/pub-pdf/2017-08-Laws%20and%20Policies-Digital_0.pdf https://esaro.unfpa.org/sites/default/files/pub-pdf/2017-08-Laws%20and%20Policies-Digital_0.pdf (accessed 12 July 2020).

identity, and in some cases criminalise them for acts of which, if they were adults, they would not be guilty. Thus, paradoxically, the very laws that aim to protect them from harm create or result in other harms.

The inclusion in criminal law of an age of sexual consent may be an indication that the law maker considers it to be harmful for a child below a specific age to be engaging in sex with a person over that cut-off age. However, it may also reflect the 'innocent child' if the law punishes children engaging in non-exploitative sex. Regulating sexual conduct with children was not novel in pre-colonial Africa. Without suggesting cultural homogeneity across the African region, it has been observed that puberty and rituals (rather than age demarcations) were the signifiers that a child had become an adult and would now take on adult roles.¹⁰⁹ While dynamic and changing, cultural norms continue to regulate the sexual behaviour of adolescents, with sexual intercourse traditionally considered suitable to those who are married or in permanent relationships. However, noting the heterogeneity in the discursive production of childhood sexuality, there is evidence that some cultures permit or in the past permitted certain types of sexual acts between adolescents.¹¹⁰ Norms regulating young people's sexual conduct were gendered, with boys generally more free to express their sexuality – although pre-marital pregnancy could give rise to a requirement to pay damages to the family of the girl.¹¹¹

In recent years there have been several judgments in African countries that have grappled with the difficult concepts of consent, sexual agency and the need to provide protection of children from adult sexual assault. In *Teddy Bear Clinic v Minister of Justice and Constitutional Development*¹¹² the issue before the South African Constitutional Court was whether sections 15 and 16 of the Criminal

109 Kangaude & Skelton (n 104); see further P Talavera 'The myth of the asexual child in Namibia' in S Lafont & D Hubbard (eds) *Unravelling taboos: Gender and sexuality in Namibia* (2007) 58-68; PM Nyakwaka 'Gender and sexuality among the Luo of Kenya: Continuity and change' in JW Khamasi and SN Maina-Chinkuyu (eds) *Sexuality: An African perspective: The politics of self and cultural beliefs* (2005) 37-50; W Ncube 'The African cultural fingerprint? The changing concept of childhood' in W Ncube *Law, culture, tradition and children's rights in Eastern and Southern Africa* (1998) 11-27.

110 See S Kiragu 'Conceptualising children as sexual beings: Pre-colonial education among the Gikũyũ of Kenya' (2013) 13 *Sex Education* 585; JW Khamasi 'Teachings on sexuality: A case of spilt milk' in JW Khamasi and SN Maina-Chinkuyu (eds) *Sexuality: An African perspective: The politics of self and cultural beliefs* 51; N Erlank 'Missionary views on sexuality in Xhosaland in the nineteenth century' (2001) 11 *Le Fait Missionnaire* 9.

111 E Preston-Whyte, M Zondi & H Gumede 'Teenage pregnancy, whose problem? Realities and prospects for action in KwaZulu-Natal' (1990) 3 *Southern African Journal of Demography* 13.

112 2014 (2) SA 168 (CC).

Law (Sexual Offences and Related Matters) Amendment Act of South Africa were unconstitutional for criminalising consensual sexual conduct between adolescents in the age group 12 to 16. The Court held that by imposing criminal liability on adolescent sexual conduct that is otherwise normative, the provisions had the effect of harming the adolescents they intended to protect in a manner that impugned their rights to dignity, privacy, and the best interests of the child principle. The Court found the law to be unconstitutional and directed Parliament to amend the law to decriminalise consensual sexual activity between adolescents. The subsequent law also had the effect of introducing a non-prosecution rule for 16 and 17 year-olds engaging in consensual sex with adolescents aged younger than 16 years, unless they were no more than two years apart in age.¹¹³

In *CKW v Attorney-General and Director of Public Prosecutions*¹¹⁴ the Kenyan High Court dealt with a challenge to the defilement provisions. Defilement is a statutory offence arising from a consensual act where the law deems the person below the age of sexual consent to be incapable of consent (which is 18 years in Kenya). A 16 year-old boy was facing defilement charges under sections 8(1) and 8(4) of the Sexual Offences Act, 2006 of Kenya (SOA) for having consensual sex with a girl of 16. He petitioned the High Court to declare sections 8(1) and 11 (1) of the SOA invalid to the extent that they were inconsistent with the rights of children as protected under the Constitution of Kenya, for criminalising sexual conduct between adolescents below the age of 18. Despite considering the judgment of the South African Constitutional Court in the *Teddy Bear Clinic* case, the High Court of Kenya decided that the criminalisation of consensual sexual conduct between adolescents was in the best interests of the child, to protect children from harmful acts of sexual activity.

These two approaches, that is, non-criminalisation (South Africa) and criminalisation (Kenya), illustrate the different conceptualisations of childhood sexuality. In the *Teddy Bear Clinic* case Justice Sisi Khampepe, writing on behalf of a unanimous court, views the adolescent holistically, and favours their respect for their privacy and dignity. The adolescent is conceptualised as an agentic and autonomous being for whom sexual curiosity and sexual expression is normative.¹¹⁵ Although the court also engages with the best interests

113 Criminal Law (Sexual Offences and Related Matters) Amendment Act 5 of 2015.

114 Petition 6 of 2013 (High Court of Kenya).

115 The Court described consensual sex between adolescents as 'developmentally normative conduct' in para 75 of the judgment and described autonomy as being intrinsically linked to 'dignity and privacy' in para 65 of the judgment.

of the child concept, it does so in a manner that focuses on harm that the law causes to the adolescents affected by it. First, the provisions increased harm and risk to adolescents by making it difficult for adolescents to seek support and assistance, because any person they told that they were engaging in unlawful sex would have to report this to the police, which would potentially drive adolescent sexual behaviour 'underground'. Second, the Court was concerned that the provisions caused 'a rupture' in family life by breaking down the lines of communication between parent and child. Third, the imposition of criminal liability under the impugned provisions, at worst, may lead to imprisonment and, at best, lead to diversion procedures, and any of these experiences would be traumatic. Fourth, the Court found that it was 'fundamentally irrational to state that adolescents do not have the capacity to make choices about their sexual activity, yet in the same breath to contend that they have the capacity to be held criminally liable for such choices'.¹¹⁶

In the *CKW* case the Court used best interests in a manner that focuses only on the non-agentic 'innocent' child¹¹⁷ – despite the facts of the case which clearly show a consensual relationship between peers. It also puts everything in the 'basket' of children's best interests, whereas the *Teddy Bear Clinic* judgment found that the impugned provision breached several children's rights.

In *State v B Masuku*¹¹⁸ the Zimbabwean High Court reviewed the case of a boy of 17, who had consensual sexual intercourse with his girlfriend of 15 and was consequently convicted of the offence of having sexual intercourse with a young person. In her decision Justice Amy Tsanga commented on the question of criminalisation of adolescent consensual sexual conduct. She was cognisant of the intention of criminal law to protect adolescents from adult sexual predation, to discourage early sexual debut between adolescents, and to protect adolescents from the risks and harms of sexual intercourse, including sexually-transmitted infections (STIs) and teenage pregnancies. However, she observed that an unintended consequence of the criminal law was that it also caught peers in romantic relationships, because the law did not distinguish between the predatory adult, and consenting adolescents. The judge clearly struggled with the problem before her and pointed out that ignoring the reality of consensual sex among teenagers would be an overly

116 A Skelton 'Too much of a good thing? Best interests of the child in South African jurisprudence' (2019) 52 *De Jure* 569.

117 Indeed, in the *Charo* case the reasoning of the judge implied that only children that are sexually non-agentic and innocent were the ones the defilement laws should protect.

118 [2015] ZWHHC 106 CRB B467/14 (High Court of Zimbabwe).

punitive approach. In this regard she even provided advice to law and policy makers – and to society more broadly – that they should accept that teenagers do have consensual sex, and should avoid the dangers that arise from it through availing contraception and providing a more rigorous and open approach to sexual education in schools.

Some countries explicitly criminalise consensual sexual conduct between adolescents, for instance, Uganda. Other countries such as Malawi do not explicitly criminalise or decriminalise adolescent sexual conduct.¹¹⁹ However, to protect adolescents from prosecution requires explicit decriminalisation because adolescents find themselves in a precarious position if the law is ambiguous or silent on whether children would be prosecuted for consensual sex. An example is the case of *YP v Republic*¹²⁰ in which the High Court of Malawi reviewed a case where a boy of 17 years was prosecuted for engaging in consensual sex with a girl of 15. One of the reasons the judge gave for discharging the case was that the boy was a child and therefore entitled to legal protection. The authors make the point here that the law should have been formulated in such a way as to prevent the prosecution of the child in the first place.

6 Conclusion

How the child is perceived and represented as sexual in legal texts such as the African Children's Charter as well as authoritative interpretive documents such as General Comments reflects and constructs dominant childhood discourses that form the basis for social action impacting on the sexual health and well-being of the child. If children are regarded as devoid of sexual agency and positioned always as potential victims of any sexual experience, then social institutions would treat them as such and sustain practices that disempower children. The article discussed ways in which dominant discursive constructs permeate the social and legal terrain to maintain the disempowerment of children because of the failure to recognise their sexual agency. Influential bodies such as the African Children's Committee should play an important role in shaping social discourse and practice about childhood sexuality to emphasise children's sexual rights rather than reinforce childhood sexual innocence. The African Children's Committee should undertake work to engage with the notion of the child as a person with an evolving sexual agency. Failure to engage fully with issues of childhood sexuality for

119 Kangaude & Skelton (n 104).

120 Criminal Appeal 16 of 2017; [2017] MWHC 87 (High Court of Malawi).

fear of raising controversy is complicit with dominant discourses of childhood innocence and undermines the potential of the African Children's Charter to transform the sexual health and well-being of children in Africa.