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The Legal, Practical and Policy Dilemmas in Enforcing the Sexual Offences Act of Kenya in Relation to Consensual Adolescent Sex

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Abstract

This article analyses the dilemmas encountered in enforcing the Kenyan law on defilement, focusing specifically on consensual sex between adolescents. It argues that, although punishing adults who have sex with minors is clearly justified, punishment cannot be justified in the case of minors who engage in "experimental" sex with each other. It challenges the current legal regime that allows only one minor (male) to be charged, and not the other (female), noting that neither of the mutual participants would feel vindicated by punishing the other. Similarly, it shows that charging both participants also poses legal and policy challenges. Consequently, it argues that charging adolescents for defilement when they have consensual sex with each other goes against the very policy that informed the adoption of the anti-defilement provisions. The article recommends that Kenya's legislation is reformed to create a legal regime that protects juveniles from sexual violation without victimizing them.

Keywords

Adolescent sex, defilement, diversion, Kenya, Sexual Offences Act of Kenya, *Teddy Bear* case

SETTING THE CONTEXT

Defilement, one of the offences under the Sexual Offences Act of Kenya[1] (SOA), occurs when someone engages in an act that "causes penetration with a

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1 Act No 3 of 2006.

child".[2] Penetration is defined as a "partial or complete insertion of the genital organs of a person into the genital organs of another".[3] Genital organs are defined as "the whole or part of male or female genital organs and for the purposes of [the SOA] includes the anus",[4] and a child means "a human being under the age of eighteen years".[5]

Defilement differs slightly from rape on the basis of the age of the victim. Whereas the victim of rape is an adult, the victim of defilement is a child. Rape occurs when someone "intentionally and unlawfully commits an act which causes penetration with his or her genital organs [when] the other person does not consent to the penetration, or the consent is obtained by force or by means of threats or intimidation of any kind".[6] Consent to sexual intercourse by the complainant is a defence for rape but not for defilement.[7] The SOA does not distinguish between defilements committed by adults and those committed by minors.[8]

In pre-colonial Kenya, sex was regulated by traditional norms and confined within marriage. There was no prescribed minimum age of consent to marriage: adolescents could marry soon after their initiation rites of passage (early adolescence).[9] Statutory laws ("imported" through colonialism) introduced the minimum age of sexual consent, pegging it to the minimum age for marriage. Although the age of sexual consent in Kenya is currently 18 years,[10] it has not always been so. For example, before 2003, section 145(1) of the Penal Code[11] provided that a girl aged 14 years could consent to sexual liaison.[12] This was later raised to 16 years.[13] If the accused was married to the complainant, there was an absolute defence to defilement charges.[14] One

2 SOA, sec 8(1).
3 Id, sec 2.
4 Ibid.
5 Id, sec 2 read with sec 2 of the Children Act, No 8 of 2001; Constitution of Kenya of 2010, art 260.
6 SOA, sec 3(1).
7 Id, secs 42–43(1)(c) and 43(4)(f); *Mtawali Bomu v Republic* [2011] eKLR; *Salim Owino Chitechi v Republic* [2012] eKLR; *David Mwangi Njoroge v Republic* [2015] eKLR; *Eliud Waweru Wambui v Republic* [2019] eKLR.
8 However, SOA sec 8(7) provides that minors found guilty of defiling should be dealt with under the law relating to children in conflict with the law and not be sentenced like adults; *SNN v Republic* [2019] eKLR.
9 Parliament of Kenya *Official Hansards Report* (26 April 2006 pm) at 785; P Miroslava "Talking about sex: Contemporary construction of sexuality in rural Kenya" (2000) 47/3–4 *Africa Today* 83 at 83–84.
10 For example, laws on marriage align with the SOA by prescribing 18 years as the minimum age of consent.
11 Cap 63, Laws of Kenya.
12 *Alfred Kiptanui Kangogo v Republic* [2003] eKLR.
13 Criminal Law (Amendment) Act (No 5 of 2003), sec 19.
14 Penal Code (Kenya), sec 145(1) before its repeal by the SOA in 2003; Parliament of Kenya *Official Hansards Report*, above at note 9 at 785.

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would, however, not sustain an argument that adolescents were more enlightened and / or less sexually vulnerable before the enactment of the SOA.

Currently, unlike under traditional norms, the older cohort, especially parents, finds it inappropriate to educate adolescents on sexual liaisons and their associated effects.[15] The contemporary puritanical outlook regarding adolescent sex is said to have inhibited the development of comprehensive sex education curricula for primary and secondary schools in Kenya.[16] The available curricula capitalize on reproductive biology instead of sexual education.[17] Consequently, adolescents' enlightenment on sexual matters comes mostly from their equally naïve peers,[18] the internet, as well as experimental sexual expeditions, which potentially lead them to penal proceedings for sexual offences.

Despite the strict criminalization of sex with minors in Kenya, statistics show that adolescents are frequently involved in sexual liaisons. The demographic and health survey covering 2008 and 2009 established that 22 per cent of men and 11 per cent of women within the 20–49 years age bracket had had sex by the time they attained the age of 15 years.[19] This percentage increased to 58 for men and 47 for women at the time they attained the age of majority.[20] Findings in a similar survey conducted in 2014 were not much different.[21] Both surveys established that only 14 per cent of girls and 1 per cent of boys within the 15–19 years age bracket had engaged in cross-generational sex.[22] This trend clearly indicates that most acts of underage sexual intercourse are between minors. It also echoes the position stated by the Committee on the Rights of the Child (CRC) that adolescents undergo rapid biological, cognitive and emotional growth, leading to the propensity for experimental sex.[23]

Furthermore, an audit in 2016 on the criminal justice system in Kenya revealed that 15 per cent of juveniles remanded in nine sampled children homes in 2013 and 2014 had been charged with defilement or attempted

15 Ministry of Health "Adolescent and youth sexual and reproductive health evidence-based interventions in Kenya" (2013) at 17; Miroslava "Talking about sex", above at note 9 at 88–90.

16 Parliament of Kenya *Official Hansards Reports* (27 April 2005 pm) at 987; EM Sidze et al "From paper to practice: Sexuality education policies and their implementation in Kenya" (April 2017, Guttmacher Institute) at 18–19, available at <https://www.guttmacher.org/report/sexuality-education-kenya> (last accessed 25 May 2021).

17 Sidze et al, ibid.

18 Miroslava "Talking about sex", above at note 9 at 88–90.

19 *Kenya Demographic and Health Survey 2008–09* (2010, Kenya National Bureau of Statistics and IFC Marco) at 197.

20 Ibid.

21 *Kenya Demographic and Health Survey 2014* (2014, Kenya National Bureau of Statistics) at 60.

22 Id at 251–52; *Kenya Demographic*, above at note 19 at 205.

23 "General comment no 20 (2016) on the implementation of the rights of the child during adolescence" (2016, CRC), paras 9–10; H Saba "Adolescent: An age of storm and stress" (2013) 2/1 *Review of Arts and Humanity* 19 at 22 and 26; *POO (A Minor) v DPP and Senior Resident Magistrate, Mbita Law Courts* [2017] eKLR.

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defilement.[24] About 38 per cent of these were 17 years old.[25] Additionally, data collected from the Milimani and Tononoka children's courts showed that 30 per cent of criminal cases instituted against children in those stations in 2013 and 2014 related to sexual offences, predominantly defilement.[26] Some of those cases were consensual, such that they would be lawful had both participants been adults.[27] Some involved desired and planned "marriages"[28] that are, nonetheless, illegal in Kenya.[29]

The prohibition of sex with children in Kenya is founded on the need to protect them from sexual invasions and premature sexual experiences said to be detrimental to their development.[30] Minors are, for this reason, presumed incapable of consenting to sex.[31] Anti-defilement laws seek to protect children from danger, such as pregnancy, venereal disease, and the physical and psychological harm that may arise from their lack of mature judgment.[32] According to the Kenyan High Court, such laws embody a general societal puritanical norm that minors should never engage in sex at all because they lack sexual autonomy and agency before they attain the age of majority.[33] In this regard, paedophiles and violent or exploitative adolescents were the main targets of the anti-defilement provisions, as revealed in the parliamentary records pertaining to the enactment of the SOA.[34]

This article focuses on adolescents aged between 14 and 18 years, and is inspired by the judicial reasoning that a child aged 14 years has the capacity to testify without necessitating *voir dire* [a separate hearing to determine whether evidence is admissible].[35] Further, as stated in the English case of *C*

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24 *Criminal Justice System in Kenya: An Audit* (2016, National Council on the Administration on Justice) at 144–49.

25 Ibid.

26 Id at 136.

27 For example, *WKN v Republic* [2016] eKLR; *Martin Charo v Republic* [2016] eKLR; *CMK v Republic* [2015] eKLR; and *Chitechi*, above at note 7.

28 For example, arguments that marriages existed were raised in: *MDT v Republic* [2014] eKLR; *Chitechi*, above at note 7; *Mohammed Makokha v Republic* [2013] eKLR; *Duncun Mwai Gichuhi v Republic* [2015] eKLR; *CMK*, above at note 27; and *Charo*, above at note 27.

29 See Constitution of Kenya, art 45(2); the Marriage Act (No 4 of 2014), sec 4; and Children Act, sec 14.

30 Parliament of Kenya *Official Hansards Report* (27 April 2005 am) at 985–88; *CKW v The Honourable Attorney General and DPP* [2014] eKLR, citing the South African *Teddy Bear* case, below at note 41; A High "Good, bad and wrongful juvenile sex: Rethinking the use of the statutory rape laws against the protected class" (2016) 69/3 *Arkansas Law Review* 787 at 799.

31 See SOA, sec 43(1)(c), read with sec 43(4)(f); *Luka Waithaka Ndegwa v Republic* [2017] eKLR; *Bomu*, above at note 7; *Chitechi*, above at note 7.

32 See *Luka Waithaka Ndegwa*, ibid; C Carpenter "On statutory rape, strict liability, and the public welfare offense model" (2003) 53/2 *American University Law Review* 313 at 334.

33 *CKW*, above at note 30. See also Miroslava "Talking about sex", above at note 9 at 88.

34 Parliament of Kenya *Official Hansards Report* (3 November 2014 pm) at 3989; Parliament of Kenya *Official Hansards Report* (Hansard 27 April 2005 pm) at 985–1007; Parliament of Kenya *Official Hansards Report* (26 April 2006 pm) at 743.

35 *Samuel Warui Karimi v Republic* [2016] eKLR; *Patrick Kathurima v Republic* [2015] eKLR; *Kibangeny Arap Koril v Republic* [1959] EA 92.

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(A Minor) v DPP,[36] 14 years has been regarded as the age of discretion since the 17th century. Therefore, a person aged at least 14 years is not completely naïve and agentless.

This article shows that there are lacunae in the law arising from the lack of statutory "offender-victim" differentiation that, if present, would ease apportionment of blame in cases of mutual adolescent sex.[37] These lacunae cause dilemmas in the enforcement of the law on defilement in cases of consensual sex between adolescents who are close in age. Such participants are insufficiently mature to be sexual predators on each other, are not strictly in a position of trust and / or duty over each other, and do not even have the requisite legal capacity to consent to sex. Therefore, they cannot ideally be presumed to have solicited for sex.[38] Most importantly, they are not coerced, lured, manipulated or intimidated into the act. Their mutual participation can properly be described as "double or mutual defilement" where both are offenders and victims simultaneously "defiling each other".[39]

Enforcers are thus tasked with a delicate judicious balancing of competing factors, such as who should be charged and who should not. Other questions relate to the utility of the probable proceedings, sustainability of such proceedings, demands of justice and compliance with the principle of acting in the best interests of the child. This balancing has resulted in divergent judicial opinions from the courts of record (High Court and Court of Appeal) on the same or similar legal issues, thus making the law amorphous. Further, some minors have been victimized in the process, yet the law on defilement is supposedly designed to protect them. Consequently, it is imperative to develop a legal regime that protects children from sexual violations without victimizing them, encouraging their sexual deviancy or causing procedural difficulties whenever underage sexual offenders are indicted.

This article addresses three main aspects in relation to the problem. First, it demonstrates the policy and legal dilemmas caused by the lacunae alluded to above. It then explores possible solutions to the problem. Finally, it provides recommendations on how the lacunae can be addressed.

DILEMMAS IN HANDLING CASES OF MUTUAL ADOLESCENT SEX IN KENYA

Dilemma as to who should be charged

In *CKW v The Honourable Attorney General and Director of Public Prosecutions*[40] the Kenyan High Court (sitting as a Constitutional Court) was petitioned to declare

36 [1995] UKHL 15.
37 *SNN*, above at note 8; *WKN*, above at note 27.
38 See *MDT*, above at note 28; *WKN*, ibid; *GO v Republic* [2017] eKLR; and *POO*, above at note 23.
39 *POO*, ibid.
40 Above at note 30.

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section 8 of the SOA unconstitutional because it criminalizes consensual sex between adolescents who are close in age. The petitioner relied on the jurisprudence of the South African Constitutional Court developed in the celebrated *Teddy Bear* case,[41] in which sections 15 and 16 of the South African Criminal Law (Sexual Offences and Related Matters) Amendment Act[42] were declared unconstitutional for criminalizing consensual penetrative sexual acts between adolescents aged between 12 and 15 years. These two provisions of the South African law were subsequently amended, as discussed further below.[43] Before the amendment, South African law had had an effect similar to that of section 8(1) of the SOA in Kenya in respect of consensual adolescent sex.

However, the Kenyan Constitutional Court was not persuaded by the South African precedent. It ruled that criminalizing consensual sex between minors in Kenya is in their best interests, as it protects them from harmful sexual conduct directed at them by adults or other adolescents. Although the Kenyan court could not then be persuaded by the landmark *Teddy Bear* decision, it is submitted that the South African precedent is more relevant in Kenya now than it was, or seemed to be, when it was rejected. This follows, as shown below, policy and legislative developments, as well as the express views of Kenya's chief justice, suggesting a reconsideration of how properly to handle cases alleging sexual offences, including defilement, involving children with each other. It is noteworthy that these developments came after the rejection of the *Teddy Bear* precedent by the Kenyan High Court.

Regarding enforcement of section 8(1) of the SOA, the court posited that the act is gender-neutral, such that both males and females can be prosecuted for defilement.[44] However, boys have been disproportionately prosecuted, with girls not prosecuted in cases of "mutual" defilement.[45] This has caused

41 *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* (CCT12/13) [2013] ZACC 35.

42 Act No 32 of 2007.

43 See below at note 65.

44 *CKW*, above at note 30.

45 See, for example, *POO*, above at note 23, in which a boy aged 16 years was charged for having consensual sex with a minor girl. The court observed that both should have been charged together for mutual defilement or, alternatively, be sent to a counsellor. The court found that the petitioner had been discriminated against on the basis of sex / gender upon being charged alone. In *GO*, above at note 38, the appellant was aged 16 and two months when he engaged in penetrative sex with a girl aged 17 years. The court remarked that it was discriminatory to accuse only the boy. In *WKN*, above at note 27, the court took judicial notice that the "male child" is usually punished in cases where two teenagers engage in sex. In *CMK*, above at note 27, it was held that enforcement of anti-defilement laws should not discriminate against the boy child. In *Wambui*, above at note 7, it was noted that it is a tragedy that Kenyan prisons are teeming with young men serving lengthy sentences for having had sexual intercourse with adolescent girls whose consent is considered immaterial simply because they were under 18 years.

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apprehension among legal practitioners that the law on defilement has been applied discriminatively in such situations.[46] For example, when still in office, Kenya's former chief justice, David Maraga, once noted expressly that the current regime on sexual offences in Kenya discriminates against boys. He referred to an "obvious injustice [in] filling up the jails with teenage offenders [boys] who get intimate with fellow teenagers [girls] as they experiment in their adolescence".[47]

After the rejection of the *Teddy Bear* precedent, the Kenyan High Court has variously indicated that diversion rather than criminal sanctions is more appropriate in "mutual defilement" cases and that, where resort is taken to criminal proceedings, both mutual participants (boy and girl) should be prosecuted.[48] However, these suggestions have inherent limitations, both in law and in practice, as explained below.

Diversion

The Office of the Director of Public Prosecutions in Kenya (O-DPP) has adopted two policy documents relevant to diversion: the National Prosecution Policy[49] and the Diversion Policy.[50]

Diversion entails resolving criminal cases without resorting to full judicial proceedings.[51] It can take the "form of a simple caution or warning, an apology to the victim, payment for the damage done, referral to a structured diversion programme or restorative justice process or similar scheme".[52] The two policies are consistent with the provisions of article 159(2)(c) of the Kenyan Constitution of 2010 (the Constitution) that enjoins the promotion of alternative dispute resolution. In respect of juvenile delinquents, diversion would therefore entail a waiver of penal proceedings against such children, to enable exploration of alternative rehabilitative models, such as guidance and counselling.[53]

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46 A Ochieng "Lawyers see bias in application of sexual offences law" (1 February 2016) *Daily Nation* (Kenya), available at: <https://nation.africa/kenya/news/lawyers-see-bias-in-application-of-sexual-offences-law-1166068> (last accessed 25 May 2021).

47 B Mutanu "Sexual offences law discriminative to boys, CJ Maraga says" (17 May 2019) *Daily Nation* (Kenya), available at: <https://www.businessdailyafrica.com/bd/news/sexual-offences-law-discriminative-to-boys-cj-maraga-says-2250604> (last accessed 10 June 2021); K Muthoni "CJ Maraga calls for change of law criminalizing teen sex" (17 May 2019) *Standard Digital* (Kenya), available at: <https://www.standardmedia.co.ke/article/2001325822/maraga-relook-law-on-sexual-offences> (last accessed 25 May 2021).

48 *POO*, above at note 23; *GO*, above at note 38; *WKN*, above at note 27; *CKW*, above at note 30, holding that there is no legal provision barring prosecution of both participants in cases of double mutual defilement.

49 O-DPP "National prosecution policy" (2015) part B, para 6(b).

50 O-DPP "Diversion policy" (2019), para 6.

51 Ibid.

52 Id, paras 8 and 46.

53 O-DPP "National prosecutions policy", above at note 49, part B, para 6(b); O-DPP "General prosecutions guidelines" (2015), chap 5, paras 22 and 24; *POO*, above at note 23; *GO*, above at note 38; *WKN*, above at note 27.

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However, diversion can be resorted to once there is sufficient evidence to support an accused's culpability[54] and, most importantly, the accused has admitted criminal responsibility.[55] Further, admission to diversion is at the discretion of the prosecutor handling the matter.[56] Therefore, diversion is not an automatic procedure in Kenya.

Section 8(7) of the SOA requires minors first to be adjudicated delinquent before juvenile rehabilitative models are considered under the Borstal Institutions Act[57] and the Children Act.[58] In particular, it provides that, where the person charged with and convicted of any offence under the SOA is under 18 years, the court should sentence them in accordance with the provisions of these two laws. Thus, criminal proceedings against minors suspected of defilement supersede other procedural considerations under the current regime.

There is, however, a draft Children Bill (2017 version)[59] that would, if approved by the National Assembly, repeal the current Children Act. The bill proposes that diversion should be formalized to supersede judicial proceedings and any other statutory provisions to the contrary when minors are charged with crimes.[60] However, if the bill is enacted in its current form, the resultant law would, just like the two policy documents noted above, still demand unequivocal admission of criminal responsibility by the minor before the application of diversion. This is still problematic, as shown below.

The diversion provisions in the draft Kenyan Children Bill entail a position that is substantially similar to that in the South African Child Justice Act[61] and was one of the issues scrutinized in the *Teddy Bear* case.[62] The issue was whether, in proceedings where adolescents (between 12 and 15 years) engaging in consensual sex are charged with statutory rape or sexual assault, resort to diversion procedures under the Child Justice Act would be sufficient to ensure that the child's best interests are protected. The court ruled that, much as it removes the proceedings from ordinary criminal procedures, diversion fails adequately to protect the child's right to privacy and physical integrity. The reason is that the diversion proceedings still force the child into conflict with the law, among other ways, in acknowledging responsibility for the offence before a magistrate, prosecutor and probation officer. In

54 O-DPP "Diversion policy", above at note 50, para 44(a).
55 Id, paras 7, 12(a) and 44 (c).
56 O-DPP "Diversion policy guidelines and explanatory notes" (2019), para 7.
57 Cap 92, Laws of Kenya.
58 Act No 8 of 2011 of Laws of Kenya. Note that cap 141 referred to in SOA, sec 8(5) was repealed by the Children Act, but SOA has not been amended to reflect that position.
59 See The Children Bill (Kenya) 2019 available at: <http://www.socialprotection.go.ke/wp-content/uploads/2020/06/Children-Bill.pdf> (last accessed 10 June 2021).
60 The Children Bill, clauses 228 and 230–33.
61 Child Justice Act 75 of 2008, chap 8.
62 Above at note 41.

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addition, up until the time diversion is considered, the child in conflict with the law will have already interacted with arresting and investigating police officials, etc, thereby compromising the child's rights to privacy and integrity.[63] The court concluded that not even diversion under the Child Justice Act could save the impugned provisions from being declared unconstitutional.[64] Accordingly, the relevant provisions of the South African Sexual Offences Act were amended in 2015 to give effect to this judgment.[65]

Joint or double prosecutions

There has been no recorded case in Kenya in which minors alleged to have defiled each other have both been charged, whether jointly or separately, although, as already shown, this is a position that the High Court has suggested. This suggestion echoes the position in South Africa before the 2015 amendments.[66] However, charging both participants, whether jointly or separately, would still pose policy contradictions and evidential difficulties, as demonstrated below.

Policy contradiction

There is no Kenyan jurisprudence on the policy ramifications of prosecuting a person for a protective offence committed against him or herself. However, there is relatively rich jurisprudence from the UK, a comparative common law jurisdiction. Although under the common law doctrine of *stare decisis* [precedent], Kenyan courts are not bound by decisions of UK courts, UK judicial decisions, just like those from other common law jurisdictions, have a persuasive effect on Kenyan courts. Thus, the UK case of *R v Tyrell*[67] sets out the leading case law. The material facts in this case were as follows. The law prohibited carnal knowledge of girls aged under 16 years.[68] However, a girl of the protected age solicited for and had sex with an adult male. She was convicted and sentenced for aiding, abetting, counselling and procuring the commission of that offence by a man upon her. She appealed successfully. The appellate court rendered that the offence in issue was legislated to protect underage

63 Id, para 74.
64 Id, para 102.
65 See the Criminal Law (Sexual Offences and Related Matters) Amendment Act, No 5/2015, sec 3. For more details, see GD Kangaude and A Skelton "(De)criminalizing adolescent sex: A rights-based assessment of age of consent laws in eastern and southern Africa" 8/4 *SAGE Open* 1; P Mahery "The 2015 Sexual Offences Amendment Act: Laudable amendments in line with the Teddy Bear clinic case" (2015) 8/2 *South African Journal of Bioethics and the Law*, available at: <https://www.researchgate.net/publication/285543262_The_2015_Sexual_Offences_Amendment_Act_Laudable_amendments_in_line_with_the_Teddy_Bear_clinic_case> (last accessed 25 May 2021); A Skelton "Child justice in South Africa: Application of international instruments in the Constitutional Court" (2018) 26/3 *International Journal on Children's Rights* 391 at 405–10.
66 *Teddy Bear* case, above at note 41, paras 11, 13, 19–24 and 77.
67 [1894] 1 QB 710, facts extracted from *R v Gnango* [2011] UKSC 59.
68 The Criminal Law Amendment Act of 1885, sec 5.

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girls from sexual violation and exploitation and that it was not the legislative intent to have a member of the protected category punished for that protective offence committed on her.

The rule was codified into a statutory provision in the UK in 2007 to the effect that a protected person should not be charged for a protective offence committed, attempted or intended against them.[69] The statute defines a protective offence as an offence legislated to protect a particular category of persons.[70] The policy underlying the rule was subsequently discussed in *R v Gnango*[71] in an inquiry as to whether someone can be convicted, by virtue of transferred malice, for the murder of a third person committed by his or her adversary in an affray such as a gun fight. The UK Supreme Court ruled that someone can be guilty of murder in such a case, as the rule in *R v Tyrell* is applicable only to protective offences and not general offences against persons or offences aimed at preserving public order. A "protective offence" was held to mean an offence legislated to protect a certain class of people, such as the underage.

Addressing instances in which persons who would otherwise be liable for complicity are exempt from punishment, Professor Glanville Williams termed and propagated the rule in *R v Tyrell* as the "victim rule". He noted that "the best example is the victim rule, where the courts perceive that the legislation is designed for the protection of a class of persons. Such people should not be convicted as accessories to an offence committed in respect of them when they co-operate in it. Nor should they be convicted as conspirators".[72]

He indicated that the rule has wider acceptance in common law jurisdictions, despite originating from a single UK decision.[73] The "victim rule" has also been advanced by Baker, who argues that a "party to a crime cannot be an accomplice if she was the victim of the offence".[74] He also asserts that the rule exempts from liability only "those within the protective class whom the particular legislation aims to protect".[75] Equally, he postulates that protective laws are purposed as "shields" and should not be used as "swords" against the protected class of persons.[76]

Thus, the "victim rule" represents a proper criminal justice policy. As it suggests, it is clearly a contradiction, even in Kenya, for someone to be charged for defilement committed against him or her. Even the current Kenyan National

69 The Serious Crimes Act, cap 27, sec 51(1).
70 Id, sec 51(2).
71 Above at note 67.
72 G Williams "Victims and other exempt parties in crime" (1990) 10/3 *Legal Studies* 245 at 245.
73 Ibid.
74 DJ Baker *Reinterpreting Criminal Complicity and Inchoate Participation Offences* (2016, Routledge) at 148, citing Williams, id at 245; and *R v Tyrell*, above at note 67.
75 DJ Baker "Liability for encouraging one's own murder, victims, and other exempt parties" (2012) 23/3 *King's Law Journal* 256 at 279.
76 High "Good, bad and wrongful", above at note 30 at 799, 817 and 826.

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Adolescent Sexual and Reproductive Policy of 2015[77] places emphasis on, inter alia, the promotion of adolescents' reproductive health and rights, rather than punishing them for defiance of sexual prohibitions. The aim is to ensure "full realization of adolescents' potential in national development".[78] Criminalizing and punishing mutual adolescent sex definitely discourages adolescents from seeking relevant services, due to probable stigmatization. This resonates with the court's reasoning in the *Teddy Bear* case[79] that criminalization of mutual adolescent sexual conduct does not eradicate early intimacy, but drives it underground with riskier practices.

Evidentiary challenges

Supposing that the policy contradiction above is disregarded, prosecutorial decisions would range from charging each participant in consensual adolescent sex for defiling the other, or charging one for defiling, and charging the other either for soliciting the other to defile him or her or for aiding and abetting the other in defiling him or her.[80] A joint arraignment (as co-perpetrators) would appeal to most, as the offences are of the same character and would have been committed in complicity and in the course of the same course of transactions, warranting joinder of counts[81] and persons.[82] However, arraigning both participants as co-perpetrators would lead to charging "both complainants", leaving the case without a chief witness.[83]

Further, supposing the joinder is sustained, the liability of one co-accused would depend on the conviction of the other. Theoretically, someone would incriminate him or herself if he or she alluded to consensual sexual intercourse in his or her testimony against the other. However, evidence of both or either would be essential, particularly on the element of penetration, since that cannot be inferred in the absence of an allegation by the complainant.[84] The dilemma is compounded further by the constitutional protection

77 Ministry of Health "National adolescent sexual and reproductive health policy" (2015).

78 Id, part 5.

79 Above at note 41, para 89.

80 Kenya Penal Code, sec 20(1). *Republic v Mohammed Wanyoike and Another* [2017] eKLR, holding that one becomes a principal offender by actually committing, or soliciting another to commit, or aiding and abetting the commission of an offence. *Republic v David Ruo Nyambura and Four Others* [2001] eKLR, noting that, unlike in Kenya, jurisdictions such as England and the USA classify principal offenders into "first degree offender" (one who actually commits the offence) or "second degree offender" (one who solicits, aids or abets the commission of the offence). *Pethad Ramnik Shantilal and Another v Republic* [2015] eKLR cemented that there is no differentiation of culpability in cases of principal offenders in Kenya.

81 Criminal Procedure Code (Kenya), sec 135(1).

82 Id, sec 136(a)(b) and (c).

83 The term "chief witness" was used in *Republic v Laban Kimondo Karanja* [2006] eKLR and in *Republic v Faith Wangoi* [2015] eKLR to distinguish the person who lodges a complaint from the state that initiates criminal proceedings.

84 *Mwangi Gakuo v Republic* [2015] eKLR, holding that penetration should be proved beyond reasonable doubt.

that shields accused persons against both coercion to testify and self-incrimination.[85] Denial of penetration by both participants, which is more likely than not, would defeat the prosecution's case, even when armed with evidence of a medical expert.[86]

Gendered definition of the term penetration

The SOA contains a textually and contextually gendered definition of the term "penetration".[87] For the purposes of defilement, penetration requires the "insertion" of the genital organs of the perpetrator into the genital organs of the victim.[88] Given the sexual anatomy of females, it is indeed true that penetration is an act achievable only by males.[89]

There is no proof that the "problematic" definition of the term "penetration" is the reason for the disproportionate prosecution of boys for defilement. However, the problem cannot be totally disregarded, given that the legislature conspicuously omitted the phrase "with his or her genital organs" after the phrase "causes penetration" in defining defilement in section 8(1) of the SOA but applied it in section 3(1)(a) in the definition of rape. Most importantly, section 2(1) of the SOA commands that an act alleged to have caused penetration must be an act contemplated under its provisions. Therefore, the legislature must have consciously intended the stated omission. Causing penetration in the definition of defilement was, thus, left to what is biologically possible. The argument would be different if the penetration were defined also to encompass the use of something else other than a genital organ.

Had the legislature intended the offence of defilement to be attributable to both genders, it would have adopted (just as it did with rape) the phase "with his or her genital organs" after the phrase "causes penetration". Further, had the definition of the term penetration tended towards gender neutrality, there would have been no need to add the words "with his or her genital organs" to the definition of rape. Given that the legislature left no ambiguity in the definition of defilement, its interpretation must not deviate from the plain and ordinary meaning of the words used.[90] The legislature must be taken to

85 The Constitution, arts 49(1), (b) and (d), and 50(2)(i) and (l).

86 *Kassim Ali v Republic* [2006] eKLR; and *Geoffrey Anaya Alias Kibito v Republic* [2016] eKLR, in which the High Court ruled that to prove penetration in the absence of evidence of the medical expert, there must be sufficient and trustworthy evidence from the complainant. However, there are no precedents suggesting that penetration may be proved by medical experts without allegations by the complainant in person or through an intermediary.

87 *CMK*, above at note 27.

88 SOA, sec 2.

89 *CMK*, above at note 27. See also Parliament of Kenya *Official Hansards Report* (27 April 2006) at 782, 788–89 and 993–94; KW Kiarie "The Sexual Offences Act: Omissions and ambiguities" *Kenya Law*, available at: <http://kenyalaw.org/kl/index.php?id=1894> (last accessed 25 May 2021).

90 See M Jefferson *Criminal Law* (6th ed, 2003, Pearson Education Limited) at 17–18; PB Maxwell *On the Interpretation of Statutes* (2nd ed, 1883, Maxwell and Sons) at 318–19; RA

have meant what it wrote and to have written what it intended.[91] Consequently, therefore, although the law recognizes that males can be defiled or raped depending on the victim's age, it textually and contextually operates on a notion that they can only be victimized by other males.

Section 14(3) of the Penal Code of Kenya states expressly that boys aged 12 years and above are capable of having carnal knowledge, but it is silent about girls. Therefore, it cannot be clearly argued whether, within that framework, girls are capable of carnal knowledge and, if they are, when they are deemed to assume that capacity. That provision of the law cannot be ignored, given that other sections of the Penal Code that previously related to culpability in sexual offences were repealed by the SOA[92] except for this provision. The provision was enacted when penetrative sexual offences were considered to be female violations.[93] For instance, section 145(1) of the Penal Code then enacted that "any person who unlawfully and carnally knows any girl under the age of sixteen years is guilty of a felony and is liable to imprisonment with hard labour for life".

It has been propagated that boys who were capable of carnal knowledge could, in that historical time, engage in sex so long as their female partners were mature.[94] However, assuming this was the actual position, then the law had nothing to proscribe for females in relation to carnal knowledge. However, the provision does not fit well in a generally gender-neutral sexual offences regime like the one legislated in the SOA. Section 14(3) of the Kenyan Penal Code entails two archaic and stereotypical perspectives. First, males, even underage boys, are sexual aggressors and should be deterred by criminal sanctions so as not to sexually violate others, especially girls.[95] Secondly, females are sexually naïve and passive, thus more prone to sexual abuse, necessitating stricter legal protection than their male counterparts.[96] These perspectives are problematic, because they fail to appreciate that there are sexual offenders from both divides and that everyone requires equal protection of the law.[97] Therefore, it is submitted that section 14(3) of the Penal Code of Kenya should be repealed.

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Posne "Statutory interpretation: In the classroom and in the courtroom" (1983) 50/2 *The University of Chicago Law Review* 800 at 805.

91 *Aids Law Project v Attorney General and Three Others* [2015] eKLR; *Michael Waweru Ndegwa v Republic* [2016] e KLR, citing with approval *Connecticut National Bank v Germain* 503 US 249 (1992).

92 Before the SOA was enacted, sexual offences were provided for under chap XV (secs 139–69) of the Penal Code, entitled "offences against morality". SOA, second sched repealed secs 139–45, 147–49, 161, 164 and 166–68 of the Penal Code.

93 KL Levine "No penis, no problem" (2006) 33/2 *Fordham Urban Law Journal* 100 at 104–06.

94 Id at 108–09.

95 Id at 107–08.

96 Ibid.

97 Id at 101–03 and 109–16; the Constitution, art 27(1).

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The SOA does not use the term "carnal knowledge". However, its relevance was stated in *Alexander Likoye Malika v Republic*[98] when the Court of Appeal of Kenya held that the term, as traditionally used, encompasses the meaning ascribed to the term "penetration" under the SOA. Further, in *Nzioka Kilonzo v Republic*[99] the Kenyan High Court held that having carnal knowledge simply meant having sexual intercourse. The same meaning is given in *Black's Law Dictionary*.[100]

It can therefore be noted that, in *Irene Atieno Ochieng v Republic*,[101] the Kenyan High Court confirmed the conviction of the unrepresented appellant (an adult female) for defiling a boy aged 17 years and six months with whom she had lived as "a husband and a wife" for about five months. She was accused of having "intentionally caused the penis of MOO, a boy aged 17 years, to penetrate her vagina". The complainant's evidence was that he was the one who seduced the appellant and that he was "careful enough" to wear a condom when having intercourse with her. However, it is debatable whether "allowing penetration" bears the same legal meaning as "causing penetration". In upholding the conviction, the High Court did not analyse how and with what, in view of the definition of defilement, the female appellant "caused" penetration. Unfortunately, the aspect of causation was not among the grounds of appeal raised. Had that analysis been done, the outcome of the appeal would probably have been different.

Utility dilemma

As previously indicated, sex with minors is prohibited to protect them from harms of premature sexual experience, whether visited on them by adults or other minors. However, the sexual vulnerability associated with adolescents is generalized.[102] Some adolescents, such those entering early marriage, desire and actively engage in sex consciously and willingly.[103]

Adolescence is associated with rapid biological, cognitive and emotional development, bringing the propensity of experimental sex.[104] It has been noted that analytical and evaluative capacities in this regard are more enhanced in late adolescence (between 15–19 years).[105] The South African

98 [2015] eKLR.

99 [2007] eKLR.

100 HC Black *Black's Law Dictionary* (6th ed, 2nd reprint, 1990, West Publishing Co) at 213–14.

101 [2017] eKLR.

102 High "Good, bad and wrongful", above at note 30 at 794; *Teddy Bear* case, above at note 41, para 97.

103 In *Makokha*, above at note 28, the complainant testified that the appellant was her husband, that they had previously had sex with each other until she became pregnant, and that she knew it was wrong to get married before the age of majority but had done so nevertheless. In *Chitechi*, above at note 7, the complainant tried to commit suicide when her parents objected to her marriage to the appellant.

104 "General comment no 20", above at note 23, paras 9 and 10; Saba "Adolescent", above at note 23 at 22 and 26; *POO*, above at note 23; *Teddy Bear* case, above at note 41, paras 43–46.

105 *The State of the World's Children 2011* (2011, UN Children's Fund) at 22 and 26.

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Constitutional Court observed that it is developmentally normal for adolescents to be sexual and that it is unwarranted to punish them once they explore their sexuality.[106] On the contrary, they should be supported and guided by the older generation. This observation was premised on a report compiled by child psychiatric and mental health experts. The report found that most children in South Africa (and by implication in Kenya) attain physiological sexual maturity in their early adolescence (between the ages of 12 and 16 years).[107] In this regard, it has been noted that "consensual" sexual acts among adolescents have been an inescapable reality since time immemorial and, therefore, it is inappropriate to criminalize their sexual explorations solely to render them sexual offenders.[108] Similarly, Talavera submits, in the Namibian context, that it is a myth to assume that children (adolescents) are asexual, since sexuality is a step-by-step inner personal experience running from birth to death.[109] Therefore, adolescents should not be taken as completely lacking agency when they actively engage in wilful and conscious sex. It is hence debatable whether all adolescents should be presumed vulnerable to warrant blanket protection.

It has also been contended that the inflexible age of consent restricts otherwise "mature" (near adult) adolescents from exercising their sexual autonomy.[110] Arguably, prosecuting and convicting presumed adolescent offenders, who engage in sex with their equal peers, turns the presumed adolescent victims into jail bait. Consequently, as shown below, there is one school of thought that supports the traditional comprehensive protection of minors against sexual intercourse, while another advocates the assessment of actual victimhood on a case-by-case basis.

Comprehensive protection approach

This approach requires that a conviction for defilement should ensue upon proof of three things (penetration, juvenility of the victim at the time of penetration and the identity of the perpetrator), unless the defence provided for under section 8(5) of the SOA (reproduced below) is pleaded and proved. This approach calls for a strict interpretation of the legal text without considering peripheral factors, such the wilful participation of the presumed victim

106 *Teddy Bear* case, above at note 41, paras 43–46 and 55–57.

107 Id, paras 43–47.

108 P Stevens "Decriminalizing consensual sexual acts between adolescents within a constitutional framework: *The Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Others* case 73300/10 [2013] ZAGPPHC 1 2013" (2013) 26/3 *South African Journal of Criminal Justice* 41 at 46, 52 and 54.

109 P Talavera "The myth of the asexual child in Namibia" in *Unravelling Taboos: Gender and Sexuality in Namibia* S Lafont and D Hubbard (eds) (2007, Legal Assistance Centre) 58 at 65–67.

110 N Phillis "When sixteen ain't so sweet: Rethinking the regulation of adolescent sexuality" (2011) 17/2 *Michigan Journal of Gender and Law* 271 at 278–79; RL Christopher and KH Christopher "The paradox of statutory rape" (2012) 87/2 *Indiana Law Journal* 505 at 514–15.

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or his or her previous sexual experience.[111] To benefit from section 8(5) of the SOA, the defendant should demonstrate the steps that he or she has taken to ascertain whether the complainant was an adult at the time of penetration, as demanded by section 8(6). These sub-sections provide:

> "(5) It is a defence to a charge under this section if -
> (a) it is proved that such child deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
> (b) the accused reasonably believed that the child was over the age of eighteen years.
> (6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant."

It is not the minor's assent to sex or deceit that he or she is an adult that exonerates the offender, but the offender's reasonable belief, held after exercising due diligence, that the victim was an adult.[112] This defence presupposes that some adolescents may desire sex and mischievously solicit for or assent to it, but still places the burden of avoiding that mischief on the other probable participants. The burden almost certainly leads to injustice when the supposed offender is a minor. Indeed, there is no reasonable basis for a minor to inquire whether his or her sexual partner has attained the age of majority when he or she is already incapacitated: a blind person does not lead another blind person.

It is submitted that there is no certainty of actual "victimhood" when the supposed victim in consensual adolescent sexual actively engages in conscious and wilful sex. There is, however, a societal duty to protect him or her from his or her own juvenility and also the assumption of what is virtuous.[113] This gives credence to opinions that mechanical interpretations of the SOA sometimes lead to the punishment of some otherwise "innocent" people.[114] It is acknowledged that inflexible anti-defilement laws are, sometimes, used for ulterior purposes such as vindicating parents of non-offended "victims" and that they carry the danger of punishing adolescents and young adults alongside (if not more than) paedophiles.[115]

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111 *Luka Waithaka Ndegwa*, above at note 31, holding that defilement is complete once it is proved that the complainant was below the age of 18 years; it is immaterial that she or he consented to sex. In *Muthoka Mwalya v Republic* [2015] eKLR, it was held that the fact that the complainant had been married and had had sex previously did not negate the offence of defilement committed by the man who subsequently had sex with her.

112 *Luka Waithaka Ndegwa*, ibid.

113 *CKW*, above at note 30; *Luka Waithaka Ndegwa*, ibid.

114 *Ali Kazunguzeth v Republic* [2015] eKLR; M Jefferson *Criminal Law* (9th ed, 2009, Pearson Education Limited) at 139.

115 See, generally, SA Parikh "They arrested me for loving a schoolgirl: Ethnography, HIV, and a feminist assessment of the age of consent law as a gender-based structural

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The conviction and sentencing of a presumed offender may lead to psychological victimization of the presumed victim in some circumstances. For instance, the complainants in the defilement cases of *James Mburu Githua v Republic*[116] and *JNN v Republic*[117] regretted that they had led to incarceration of the appellants. The complainant in *State v Gillson*[118] condemned the incarceration of her fiancé saying, "thanks to the court system, I have lost the love of my life and the father of my unborn baby".[119] Lack of actual "victimhood" is certainly one of the reasons, if not the sole reason, why some presumed victims turn hostile when called to testify.[120] The involved adolescents most certainly end up victimized in the process. As concluded in the *Teddy Bear* case, involvement in a variety of consensual sex is normal among adolescents and a form of sexual expression in the course of their development. Criminalizing such expression entails a "form of stigmatization which is degrading and invasive" and the effect of which is to "degrade and inflict the state of disgrace on adolescents".[121]

Assessing actual victimhood

Punishment for defilement is severe. Consequently, it has been contended that "the court must be convinced that what happened was defilement and not an act of exploration by the alleged complainant".[122] This contention seeks consideration of other factors in addition to age before finding the presumed victim vulnerable. These factors include wilful marriage, engaging in explorative sex and the sexual experience of the presumed victims.

For instance, the complainants in *Salim Owino Chitachi v Republic*,[123] *Mohammed Makokha v Republic*,[124] *Martin Charo v Republic*[125] and *Duncan Mwai Gichuhi v Republic*[126] were all minors. Therefore, under the law none of them could have legally consented to sex. All the appellants had been convicted by subordinate courts for defilement purely on that account, even though evidence clearly showed that each of complainants had actively,

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intervention in Uganda" (2012) 74/11 *Social Science and Medicine* 1774; Stevens "Decriminalising consensual sexual acts", above at note 108 at 53.

116 [2016] eKLR.

117 [2015] eKLR.

118 587 N.W.2d 214, as cited in K Sutherland "From jailbird to jailbait: Age of consent law and the construction of teenage sexualities" (2003) 9/3 *William & Mary Journal of Women and the Law* 313 at 316 and 331.

119 Sutherland, id at 316.

120 *Luka Waithaka Ndegwa*, above at note 31.

121 *Teddy Bear* case, above at note 41, para 55. In support, see also Kangaude and Skelton "(De)criminalizing adolescence sex", above at note 65 at 7–10, advancing a human rights-based approach in favour of decriminalizing consensual sex between adolescents.

122 *Kazunguzeth*, above at note 114.

123 Above at note 7.

124 Above at note 28.

125 Above at note 27.

126 Above at note 28.

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consciously and willingly participated in sex, with some having cohabited.[127] On appeal, the High Court noted the fact that those complainants had no capacity in law to consent to sex. However, in each case, the appellate judge interpreted the prevailing circumstances to have demonstrated that the complainants had behaved maturely as they were objectively conscious of their actions and the probable consequences. The judges invoked section 8 (5) of the SOA in the appellants' favour, yet none of the appellants had pleaded or proved at the trial stage that they had honestly believed that the complainants were adults, as required by section 8(6).[128]

The determinations in these cases do not reflect the letter of the law. Some have been criticized for being improper.[129] However, they are all objectively fair in noting that the appellants would have spent years behind bars without there being any actual offender-victim binary in the circumstances of the cases.[130] Therefore, the court, similarly constituted or inclined, would not hesitate to acquit a minor in cases of double mutual defilements. Although criticized by some quarters in Kenya, these decisions reflect the recommendation by the CRC that, while undertaking the protection of adolescents, states should take into account their "evolving capacities".[131]

Culpability dilemma

Minors, other than those considered incapable of committing wrongs (*doli incapax*) under section 14 of the Penal Code of Kenya,[132] can be found guilty of defilement. The only leniency, found under section 8(7) of the SOA, relates to retribution after an adjudication of delinquency. The general proposition is that defilement is designed to protect minors from adults and other

127 This cannot be regarded as marriage, for underage marriage is prohibited in Kenya. See the Constitution, art 45(2); The Marriage Act No 4 of 2014, sec 4.

128 A similar move was made by the Court of Appeal in *Meshack Nyongesa v Republic* [2016] eKLR.

129 See, for example, *Luka Waithaka Ndegwa*, above at note 31; W Okech "Outrage as judge sets free defiler because 'girl was willing'" (2 May 2016) *The Standard* (Kenya), available at: <https://www.standardmedia.co.ke/article/2000200296/outrage-as-judge-sets-free-defiler-because-girl-was-willing> (last accessed 25 May 2021).

130 High "Good, bad and wrongful", above at note 30 extensively used "victim-offender binary" as a quotient to describe offensive sexual encounters, alluding that there are no actual victims in cases of sexual liaison between equally placed adolescents.

131 "General comment no 20", above at note 23, para 40.

132 Sec 14 provides that persons younger than eight years are not criminally responsible for any act or omission. Sec 14(2) provides that persons aged between eight and 12 years are not criminally responsible for any act or omission but that the presumption can be rebutted if it is shown that the offender had capacity to know that he or she ought not to have acted, in case of offences by commission, or ought to have refrained, in case of offences by omission. Sec 14(3) provides that males aged below 12 years are incapable of having carnal knowledge: *Republic v JO and Another* [2015] eKLR; *Republic v EM* [2015] eKLR. Persons who are considered incapable of committing offences are said to be *doli incapax*, while those considered capable of committing offences are said to be *doli capax*.

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minors.[133] As shown above, minors have been charged with and convicted of defilement.[134] However, it would be appropriate for that general notion to be applied against minors when they defile viciously or exploitatively.

It is submitted that the same incapacitation presumed in respect of "consenting victims" of defilement should be extended to the "consenting offenders" of similar age.[135] The rationale is that it is contradictory to propagate that adolescents cannot consent to sex as they lack the rational capacity to understand the nature and probable consequences of sexual intercourse, but that they are sufficiently rational to defile upon engaging in mutual sex.[136] For instance, in *Erick Idd Shatala v Republic*,[137] the Kenyan High Court held that the foolishness of minors who assent to sex should never be mistaken for consent. It is thus fair if the same finding of foolishness should attach to all adolescents who engage in mutual sex.

Besides, if one minor is presumed to have rational capacity to defile the other, then the mutual counterpart should also be presumed to have rational capacity to consent to sex, hence no offence would be committed. In *WKN v Republic*[138] and *MDT v Republic*,[139] the High Court held that it is inappropriate to charge minors who engage in mutual sex. The appellant in the first case had just turned 18 years when he defiled a girl aged 17 years. He was a standard eight (primary school) pupil and the girl was a form three (secondary school) student. He pleaded guilty but the facts read by the prosecution indicated that the sexual intercourse by the duo was consensual. He appealed against his sentence. The appellate court opined that it was absurd to consider the girl a "victim" and the boy a "villain" in the circumstances of the case. Allowing the appeal, the court stated that the offence of defilement is aimed at punishing adults who sexually prey on children and not teenagers who engage in mutual sex. Further, the court observed that there is a lacuna in the law regarding how to handle cases of consensual sex between teenagers.[140] In the second case, *MDT v Republic*, the applicant was 17 years old when he married and defiled a girl aged 15 years. Revising the sentence, the High Court observed that both the applicant and complainant were minors and neither could have consented to sex.

133 *CKW*, above at note 30; JL Kern "Trends in teen sex are changing, but are Minnesota's Romeo and Juliet laws?" (2013) 39/5 *William Mitchell Law Review* 1607 at 1607; High "Good, bad and wrongful", above at note 30 at 800, citing the decision of Utah's Court of Appeal in *State ex rel ZC v State* 128 P.3d at 566.

134 *POO*, above at note 23; *GO*, above at note 38; *CMK*, above at note 27.

135 *CKW*, above at note 30 noted that "consent by victim" is negated once a complaint is made, as it should be taken to connote some element of coercion or deceit on the part of the party complained against. However, the judge failed to take judicial notice that most complaints, if not all, are made by concerned adults, such as parents of presumed victims, as allowed by SOA, sec 2(1).

136 *Teddy Bear* case, above at note 41, para 79.

137 [2015] eKLR.

138 Above at note 27.

139 Above at note 28.

140 A similar position was adopted in *Ali Kazungu v Republic* [2015] eKLR.

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The two decisions are open to criticism. First, one need not be an adult to be guilty of defilement. It suffices that one is aged at least 12 years, thus *doli capax*.[141] Section 8(7) of the SOA attests that *doli capax* minors can be adjudicated delinquent for sexual offences. Secondly, consent per se is not a defence to accusations of defilement. Concern about how to treat minors who may inadvertently contravene the SOA was raised during its enactment, but it was remarked that there is a provision for committing delinquents to Borstal institutions.[142] Therefore, the law must have been intended to punish minors who engage in mutual sex with their peers. However, it is clear that the two judgments were rendered on good conscience, as the norm of finding adolescents culpable for engaging in mutual sex defeats the presumption of their immaturity. The norm is certainly unjust, given that defilement is a strict liability offence.[143] The two judgments are, therefore, consistent with the CRC's recommendation to avoid criminalizing "adolescents of similar ages for factually consensual and non-exploitative sexual activity". [144]

One of the philosophical foundations of strict liability offences is the supposition that strict offenders voluntarily assume the penal risk associated with engaging in dangerous activities that are proscribed by law.[145] Strict liability offenders are thus assumed to have preferred wrongs to rights. Therefore, adjudicating a minor as liable for defilement is similar to finding him or her sufficiently rational to have assumed the penal risk attached to having sex with another minor. Such an elevated legal consideration is faulty, except where the offence is committed in a vicious or exploitative manner.

In essence, the "victim-offender binary" is non-existent in situations of a double mutual defilement.[146] This is, however, not to argue that premature sex has no detriment to the growth and development of the minors involved. It is a fact that a number of adolescent girls in Kenya become pregnant, leading to teenage parenthood.[147] Nevertheless, there is no reasonable justification for rendering one minor a "wrongful aggressor or victimizer" in cases of mutual sex.[148]

There have been several calls, from both the Bench and the Bar, for legislative reform to cater for that lacuna.[149] These much-needed reforms should,

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141 Penal Code Act, (cap 63, Laws of Kenya), sec 14(3). However, as discussed earlier, the position is disputable with respect to girls.

142 Parliament of Kenya *Official Hansards Report* (27 April 2006 pm) at 790–92 and 801.

143 *Fred Omar Omondo v Republic* [2014] eKLR; *R v G* [2008] UKHL 37; Phillis "When sixteen ain't so sweet", above at note 110 at 277–79; Carpenter "On statutory rape", above at note 32 at 334–36 and 350–51.

144 "General comment no 20", above at note 23, para 40.

145 Carpenter "On statutory rape", above at note 32 at 319–20, 353 and 361.

146 High "Good, bad and wrongful", above at note 30 at 790 and 801–02.

147 The complainants in *Makokha*, above at note 28, and *Chitechi*, above at note 7, were expectant, while the complainant in *CMK*, above at note 27, was already a teen mother.

148 High "Good, bad and wrongful", above at note 30 at 790 and 801–02.

149 *Criminal Justice System in Kenya*, above at note 24 at 136, 142 and 342–43; *CKW*, above at note 30; *CMK*, above at note 27; *Meshack Nyongesa v Republic* [2016] eKLR; *POO*, above at note 23; *Wambui*, above at note 7; *SNN*, above at note 8; P Ogemba "Judges in Kenya root for review

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inter alia, address the obvious discrimination against boys in the current law on defilement. The reforms should also guard against exposing minors to paedophiles or sexual victimization by other minors or encouraging minors to have sex.

POSSIBLE SOLUTIONS AND RECOMMENDATIONS

The dilemmas alluded to above and consistent calls for reform led to an attempt at a legislative amendment through the Statute Law (Miscellaneous Amendment) Bill, 2016.[150] The amendment, according to the bill's memorandum of objects and reasons, would have, inter alia, reduced the age of consent to 16 years. This would have reinstated the position that had been enacted through section 145(1) of the Kenyan Penal Code[151] before its repeal by the SOA.

However, the proposed amendments were opposed to ultimate withdrawal.[152] It was particularly contended that adjusting the age of consent would have exposed children to paedophiles.[153] Further, it was reasoned that minors aged 16 years may look biologically mature but socially immature to handle the consequences of their biological activities.[154] Adjusting the age of consent was recommended by the National Council on Administration of Justice[155] and the High Court in *Martin Charo v Republic*.[156] The former recommended a change to 16 years while the latter left it open, but its common reasoning was that a number of jurisdictions have minimized the age of sexual

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of Sexual Offences Act to end unfair penalties" (3 October 2016) *Standard Digital* (Kenya), available at: <https://www.standardmedia.co.ke/article/2000218183/judges-in-kenya-root-for-review-of-sexual-offences-act-to-end-unfair-penalties> (last accessed 25 May 2021).

150 National Assembly Bills No 45.

151 As amended by Criminal Law (Amendment) Act, No 5 of 2003, sec 19. This amendment adjusted the age of consent by girls (the law on defilement was gendered, as only girls would have been victimized under that regime) from 14 to 16 years.

152 J Ngirachu "State abandons push to lower consent age from 18 to 16 years" (9 February 2017) *Daily Nation* (Kenya), available at: <https://nation.africa/kenya/news/state-abandons-push-to-lower-consent-age-from-18-to-16-years-359054> (last accessed 25 May 2021); R Obala "MPs throw proposals to reduce age of consent to 16" (2 February 2017) *Standard Digital* (Kenya), available at: <https://www.standardmedia.co.ke/article/2001227977/mps-throw-out-proposals-to-reduce-age-ofper cent20consent-to-16> (last accessed 25 May 2021).

153 Parliament of Kenya *Official Hansards Report* (1 February 2017 pm) at 16 and 25, available at: <http://www.parliament.go.ke/sites/default/files/2017-05/Hansard_Report_-_Wednesday_1st_February_2017_P_1.pdf> (last accessed 25 May 2021).

154 Id at 29.

155 *Criminal Justice System*, above at note 24 at 142 and 343. The jurisdictions of Botswana, Namibia, South Africa, Zambia and Zimbabwe were cited in support of the recommendation.

156 Above at note 27. The jurisdictions of Spain, South Africa, Austria, Belgium, Bulgaria, Switzerland, Czech Republic, Germany, UK, Hungary, Denmark, Slovenia, Ukraine and Estonia were cited in support of the recommendation.

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consent in response to the social reality that minors become sexually active before attaining the age of 18 years. The amendment was opposed on the basis of societal fear, but with no solution to the problem under discussion.

Even after the withdrawal of the bill, the Court of Appeal rekindled the debate in *Eliud Waweru Wambui v Republic*.[157] It opined that the SOA requires serious, sober and pragmatic re-examination. Further, the court seemed to propose, albeit implicitly, by drawing examples from comparative jurisdictions, that the age of sexual consent should be reduced from 18 to 16 years. That proposal followed the court's opinion that a person is more likely, for the purposes of the deception contemplated under section 8(5) of the SOA, to be deceived into believing that a child is older than 18 years if the child is aged between 16 and 18 years. That proposal received serious criticism.[158] Recently, the Kenyan High Court, in *SNN v Republic*,[159] added weight in calling for provisions that would guide the handling of cases of sexual liaison between adolescents differently from those involving adults and adolescents.

Available literature demonstrates that "age gap" provisions and "Romeo and Juliet" provisions are formulae that some jurisdictions have adopted in solving this problem.[160] They both operate on age differentials between the victim and the offender,[161] and are consistent with the CRC's recommendation that consensual sex between adolescents should not be criminalized.[162]

Age gap provisions

These are laws designed to absolve or lessen criminal liability in cases of consensual sex involving minors who are close in age.[163] They criminalize mutual sex between minors only if one of them is, at least, "a specified number of years older" than the other.[164] Consequently, they clarify the "victim–offender

157 Above at note 7.

158 See, for example, J Masiga "Proposal to lower age of consent unfortunate" (2 April 2019) *Standards Digital* (Kenya), available at: <https://www.standardmedia.co.ke/article/2001319060/proposal-to-lower-age-of-consent-unfortunate> (last accessed 25 May 2021); C Luchetu "Age of sexual consent should be 20: Knut official" (10 April 2019) *The Star Digital* (Kenya), available at: <https://www.the-star.co.ke/counties/western/2019-04-10-age-of-sexual-consent-should-be-20–knut-official> (last accessed 25 May 2021); G Aradi "Opposition grows over judges' proposal to lower age of sex consent" (1 May 2019) *Standards Digital* (Kenya), available at: <https://www.standardmedia.co.ke/article/2001323445/opposition-grows-over-judges-proposal-to-lower-age-of-sex-consent> (last accessed 25 May 2021).

159 Above at note 8.

160 Kern "Trends in teen sex", above at note 133 at 1611–13; D Flynn "All the kids are doing it: The unconstitutionality of enforcing statutory rape laws against children & teenagers" (2013) 47 *New England Law Review* 681 at 686–87.

161 Kern, ibid; High "Good, bad and wrongful", above at note 30 at 795–97.

162 Ibid.

163 Ibid. Flynn "All the kids", above at note 160 at 687.

164 Kern "Trends in teen sex", above at note 133 at 1611–12.

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binary" by "deeming the elder the offender".[165] Accordingly, regimes that have age gap provisions target punishing sexual victimization and exploitation but not sex per se.[166] Age differentials are normally slight, to shield participants from probable power and experience imbalances.[167] Accordingly, potential violations by paedophiles are curbed.

These provisions are founded on the understanding that the transition from childhood to adulthood is a gradual evolution of capacities and not a switch.[168] Cognition is that people have different rates at which they navigate the transition "from vulnerability and immaturity to autonomy and competence".[169] This must have been the understanding of the Kenyan Court of Appeal, in *Eliud Waweru Wambui v Republic*,[170] when it stated that there is a mystery of growing up, which is a "process and not a series of disjointed leaps", and that some minors may attain the age of discretion and be able to make intelligent and informed decisions about their lives and their bodies before they reach the age of majority. In this regard, the CRC has implored recognition that "individual experience and capacities" also affect development and evolution in adolescents.[171] It is thus deceptive to suppose that there is a single day in one's life, such as the 18th birthday, that catapults one from sexual vulnerability to sexual invulnerability; the assumption of a single inflexible age of consent can either be under-inclusive or over-inclusive depending on the individual.[172]

Further, it has been contended that sexual decisions and freedom are not exclusively dependent on the age of the giver of the consent. Other factors, such as the age of one's sexual partner are also influential. Basically, the chances of predation and exploitation, which the law should curb, are higher in minor-adult than in minor-minor relationships.[173] Therefore, consent by minors in cases of wider age differentials would be presumed invalid.[174]

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165 High "Good, bad and wrongful", above at note 30 at 827.

166 Id at 794–96; Flynn "All the kids", above at note 160 at 688.

167 High "Good, bad and wrongful", above at note 30 at 794–96.

168 Ibid.

169 Id at 794.

170 Above at note 7. In making that decision, the Court of Appeal of Kenya was persuaded by *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 ALL ER 402 (in which the court held at 422 that: "If the law should impose on the process of 'growing up' fixed limits where nature knows only a continuous process, the price would be artificiality and a lack of realism in an area where the law must be sensitive to human development and social change") and by Chief Justice Lord Parker who, in *R v Howard* [1965] 3 ALL ER 684, held at 685 that, "where he ruled that in the case of prosecution charging rape of a girl under 16 the crown must prove either lack of her consent or that she was not in a position to decide whether to consent or resist" and added that "there are many girls who know full well what it is all about and can properly consent".

171 "General comment no 20", above at note 23, para 20.

172 KK Ferzan "Consent, culpability, and the law of rape" (2016) 13/2 *Ohio State Journal of Criminal Law* 397 at 419–20.

173 High "Good, bad and wrongful", above at note 30 at 794–96.

174 Ibid; Flynn "All the kids", above at note 160 at 688; *SNN*, above at note 8.

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The rider is that there is an age below which the latitude should never extend, due to the extremity of the immaturity.[175] For instance, in *SNN v Republic*,[176] the Kenyan High Court observed that a child aged six years was too young to have consented to sex with an adolescent aged 16 and, for that reason, charging the boy was proper. In particular, the court distinguished that case from *POO (A Minor) v DPP & Senior RM*[177] and *GO v Republic*[178] in which adolescents involved in sexual liaison were teenagers who were close in age.

Section 15 of the South African Sexual Offences Act,[179] as amended following the decision in the *Teddy Bear* case, is a classic example of age gap provisions. It prescribes an offence of having mutual sexual intercourse with a minor (statutory rape) if the consenting minor is "12 years of age or older but under the age of 16 years". However, it is not an offence if both mutual participants are members of that age bracket.[180] Equally, it is not an offence if the older participant is aged either "16 or 17 years and the age difference between [the two] is not more than two years".[181]

The Romeo and Juliet provisions

These are laws formulated to offer defence or mitigation in cases of mutual sex between adolescents who are close in age.[182] The age differentials, as with age gap provisions, are slight such that they are at times used interchangeably.[183] However, while the age gap provisions decriminalize sexual involvement or lessen attached criminal liability, the Romeo and Juliet provisions provide an affirmative defence or mitigation.[184]

These provisions are generally not titled Romeo and Juliet provisions in statutes but are referred to as such by reference to William Shakespeare's play of

175 High "Good, bad and wrongful", above at note 30 at 797 and 800–01; *SNN*, ibid.

176 Above at note 8.

177 Above at note 23.

178 Above at note 38.

179 Act No 32 of 2007, as amended by Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act No 5 of 2015.

180 Id, sec 15(1)(a); ZE Bhamjee and AE Strode "Amendments to the Sexual Offences Act dealing with consensual underage sex: Implications for doctors and researchers" (2016) 106/3 *South Africa Medical Journal* 256 at 257.

181 Criminal Law (Sexual Offences and Related Matters) Amendment Act of South Africa, Act No 5 of 2015, sec 15(1)(b); Bhamjee and Strode, ibid.

182 Kern "Trends in teen sex", above at note 133 at 1613–14; Flynn "All the kids", above at note 160 at 689–91.

183 Kern, id at 1613; High "Good, bad and wrongful", above at note 30 at 797 (comment at footnote 40); Flynn, id at 689. The interchangeable application of the age gap provisions and Romeo and Juliet provisions was also apparent in *WKN*, above at note 27, para 8, when the court stated that, in progressive jurisdictions, "age gap is considered as a mitigating factor or a defence as the courts do consider the level of culpability where the victim and offender are almost of the same age; as this is significantly different and with situations where an adult exploits the vulnerability of a much younger victim".

184 Kern, id at 1613–14; Flynn, id at 689–91.

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that title.[185] The characters of Romeo and Juliet were teen lovers and protagonists in the play.[186] Juliet was slightly younger than 14 years.[187] However, her mother was wishful that she would marry soon, just as she did to Juliet's father when she (Juliet's mother) was about 12 years old.[188] Romeo is described to have been youthful.[189] Commentators note that Romeo and Juliet would be sexual offenders in contemporary society.[190] Consequently, these laws are designed to excuse youthful love affairs, just like the one of Romeo and Juliet.[191]

The notion behind the Romeo and Juliet provisions is that both adolescents are in the social wrong but their actions are understandable.[192] Although Kenya does not have Romeo and Juliet provisions, the High Court, in *JNN v Republic*,[193] described the concept as "the age difference between the appellant and the complainant was 4 years … akin to that of Romeo and Juliet: they were consumed with passionate love that they did not give a damn to what others thought of them, including the fact that the complainant was a teenage child".[194]

The age gap provisions, just like the Romeo and Juliet provisions, entail a fundamental recognition that there is an age under which it would be absurd to imagine that the child would even have the slightest autonomy.[195] The rationale for the decision in *SNN v Republic*[196] still applies in this regard.

The US state of Texas employs Romeo and Juliet provisions. It is a sexual assault in that state for someone to engage in penetrative sex with a child.[197] The child is, for the purpose of the offence, a person aged 17 years or below.[198] However, it is an affirmative defence if the offender is "not more than three years older than the victim at the time of the offence".[199] The victim should be aged at least 14 years for the defence to operate.[200] The accused should also not be related to the victim within the

185 J Franklin "Where art thou, privacy? Expanding privacy rights of minors in regard to consensual sex: Statutory rape laws and the need for a 'Romeo and Juliet' exception in Illinois" (2012) 46/1 *John Marshal Law Review* 309 at 317–18.
186 W Shakespeare *Romeo and Juliet* (ed HH Furness, 7th ed, 1899, JB Lippincott & Co).
187 Id at 41–43 (act 1, scene iii).
188 Ibid.
189 Id at 76–77 (act 1, scene v).
190 Franklin "Where art thou", above at note 185 at 317–18.
191 Ibid.
192 Above at note 121.
193 Ibid.
194 Ibid.
195 Kern "Trends in teen sex", above at note 133 at 1609–10.
196 Above at note 8.
197 Penal Code (Texas) cap 22, sec 22.011(a)(2)(A)–(E).
198 Id, sec 22.011(c)(1).
199 Id, sec 22.011(e)(2)(A).
200 Id, sec 22.011(e)(2)(B)(i).

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degrees prohibited for marriage.[201] Lastly, the accused must not be a repeat offender.[202]

CONCLUSION

This article has analysed the law on defilement in Kenya, specifically focusing on how it currently applies to adolescent consensual sex. The discussion has revolved around the flawed formulation of the provisions on defilement enforcement. It has been shown that there are indeed challenges in enforcing the Kenyan law on defilement in cases of consensual adolescent sex. Further, judicial determinations have failed to adopt a definite approach on the issue of adolescents engaging in conscious, wilful mutual sex. The mechanical application of the SOA in "double mutual defilements" results in the victimization of those the legislature sought to protect and for imaginary utility in some cases. Although there is a need to enforce the law, there is also a need to be just. It is apparent that there is a need to consider other prevailing factors besides penetration and the juvenility of the presumed victim unless the matter involves a child of tender years. Lastly, it should be appreciated that penal legislation alone is not enough in addressing issues of adolescent sex. Social intervention is equally (and sometimes even more) appropriate in this regard. Kenya should have regard to the CRC's recommendations and emulate the South African example informed by the *Teddy Bear* decision by decriminalizing consensual, non-exploitative sex between adolescents of a similar age. Adoption of either "age gap" or "Romeo and Juliet" provisions would avail the much-needed remedy.

CONFLICTS OF INTEREST

None

201 Id, sec 22.011(e)(2)(B)(ii).
202 Id, sec 22.011(e)(2)(A)(i) and (ii).

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