

CRIMINALIZATION OF CONSENSUAL SEXUAL ACTS AMONG ADOLESCENTS IN EAST AND SOUTHERN AFRICA

Reasons, Impact and Proposal for a Different Approach

The criminalization of consensual sexual activity of adolescents takes different forms in East and Southern Africa (ESA). Some countries criminalize defilement¹, which can be a consensual act, and this can result in the criminalization of adolescents and young people. South Africa and Kenya were two of several countries that directly criminalized consensual sexual acts among adolescents. In both countries, the legislation was subject to court challenges in 2014. The legal challenge was successful in South Africa and led to legislative amendment in 2015², but failed in Kenya, which means that Kenya continues to treat consensual acts between adolescents below the age of consent as criminal offences. Some approaches to consensual sexual acts among adolescents in the ESA region are set out in table 1.

Table 1: Legal provisions that criminalize adolescent consensual sexual acts in some East and Southern Africa countries.

COUNTRY	LEGAL PROVISIONS THAT CRIMINALIZE CONSENSUAL SEXUAL ACT
BOTSWANA	The Botswana Penal Code was amended in 2018 and has raised the age of consent from 16 to 18. Thus, having sex, including consensual sex, with a person under the age of 18 is an offence. However, the amendment makes provision for two exceptions: where the sex is consensual between persons who are both under 18, or if the sex is consensual between a person who is not more than two years older than the other, it will not be an offence.
KENYA	In terms of the Sexual Offences Act: Defilement - being consensual sexual acts with a person under the age of 18 and among persons under the age of 18 - is criminalized. Furthermore, indecent assault of persons under the age of 18, and among persons under the age of 18, is criminalized.
NAMIBIA	In terms of the Combating Rape Act: Consensual sexual acts with persons under the age of 14 are criminalized. However, there is a close-in-age defence of three years. Meaning that only persons three years older than the younger person will be convicted.
RWANDA	According to Law No 68/2018, if child defilement is committed between children aged at least 14 years without violence or threats, no penalty is pronounced. However, if a child between the ages of 14 and 17 commits child defilement on a child under 14, he/she is punished in accordance with the provisions of Article 54 of this law.
SOUTH AFRICA	In terms of the Sexual Offences and Related Matters Act: Consensual sexual acts among adolescents aged 12 to 16 have been decriminalized. Where the older participant is over 16 years, but under 18 years, there is no prosecution provided that there is not more than a two-year age gap between them.
UGANDA	In terms of the Penal Code Amendment Act: "Child-to-child sex" is criminalized and the children must be dealt with in accordance with the Children's Act.
ZAMBIA	In terms of the Penal Code Act: Same-sex gross indecency among children is criminalized, and the children are liable to community service or counselling upon conviction.

¹ Defilement is defined as sexual intercourse with a person under the set legal age of consent, regardless of whether the person consented or not.

² https://web.archive.org/web/20160706220207/http://www.gov.za/sites/www.gov.za/files/38977_7-7_ActSof2015CriminalLaw_a.pdf

It is important to keep in mind that the original intention of laws that criminalize consensual sex (such as statutory rape or defilement) is to protect minors from adults who seek to engage in sexual behaviour with minors. Criminal law provisions that set the minimum age of consent to sexual activity usually also create a criminal offence when a person over the age of consent engages in sexual activity with a minor below the age of consent. Laws need to be carefully drafted and reviewed to consider whether they have the effect of criminalizing adolescents and young people, rather than the original targets of the law. This technical brief, among other things, presents the consequences of criminalization and encourages law reform that will eliminate, or at least limit, the criminalization of consensual sexual acts between adolescents and young people who are close in age. One of the consequences of the criminalization of consensual sexual acts is that it discourages adolescents from seeking and accessing sexual and reproductive health information and services for fear of being charged with offences.³

Towards the decriminalization of adolescent consensual sexual activity

The criminalization of consensual sexual activities among adolescents and young people is at odds with the approach set out in international treaties insofar as the recognition of adolescents' evolving capacities and the promotion of an educative approach, such as through comprehensive sexual education to adolescent sexual and reproductive health. In particular, the guiding principle of the United Nations Convention on the Rights of the Child (UNCRC) Committee's General Comment on Adolescent Health states that the right of adolescents to access appropriate information is crucial if States Parties are to promote cost-effective measures, including through laws, policies and programmes, with regard to health-related situations.⁴ Furthermore, access to information and services relating to SRHR should be entrenched by States Parties with specific legal provisions in domestic law.⁵

Consequences of criminalization of adolescent consensual sexual activity include:



It may result in adolescents and young people not seeking sexual and reproductive health services in fear of prosecution.



It does not recognize the evolving capacities of adolescents and their normative development insofar as adolescent sexual and reproductive health rights are concerned.



It unnecessarily brings adolescents and young people into the criminal justice system.



It stigmatizes adolescent sexuality.



It infringes other rights such as a right to dignity and privacy.



It may result in gender-skewed convictions.



The General Comment on Adolescent Health emphasizes the need to recognize the evolving capacities of adolescents:

Article 5 of the UNCRC requires States Parties to respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights in the Convention.

The concept of evolving capacities is central to the balance between recognizing children as active agents in their own lives, entitled to be listened to, respected and granted increasing autonomy in the exercise of rights, while also being entitled to protection in accordance with their relative immaturity and youth. It provides the framework for ensuring an appropriate respect for children's agency without exposing them prematurely to the full responsibilities normally associated with adulthood.

³ See Nomdo C "Criminalising consensual activities of adolescents in South Africa" in Article 40 Volume 16 (2014) available at <http://www.childjustice.org/publications/Article%2040%20-2014-1.pdf>.

⁴ General Comment No. 4 (2003): Adolescent Health and Development CRC/GC/2003/4 available at <https://www.refworld.org/docid/4538834f0.html>.

⁵ Ibid.

The **African Youth Charter**⁶ provides for recognition of adolescent sexual and reproductive health and rights and states that in order to realize the right to health of young people, the following action is required:

- Securing the full involvement of youth in identifying their reproductive and health needs and designing programmes that respond to these needs, with special attention to vulnerable and disadvantaged youth.
- Providing access to youth-friendly reproductive health services, including contraceptives, antenatal and postnatal services.
- Instituting programmes to address health pandemics in Africa such as HIV and AIDS and tuberculosis.
- Instituting comprehensive programmes to prevent the transmission of sexually transmitted infections and HIV by providing social and behaviour change communication and awareness-creation, as well as making protective measures and reproductive health services available.
- Expanding the availability and encouraging the uptake of voluntary counselling and confidential testing for HIV.
- Providing timely access to treatment for young people living with HIV and AIDS, including prevention of mother-to-child transmission, post-rape prophylaxis, antiretroviral therapy, and creation of health services specifically for young people.
- Instituting comprehensive programmes, including legislative steps, to prevent unsafe abortions.
- Providing technical and financial support to build the institutional capacity of youth organizations to address public health concerns, including issues regarding youth with disabilities and young people married at an early age.

Recommendations

- ESA countries should consider the decriminalization of consensual sexual acts between adolescents and young people.
- Legislation should clearly differentiate between consensual sexual conduct between adolescents, and adults seeking to engage in sexual activity with minors. Criminalization should be targeted at the latter only.
- In addition, it is recommended that a close-in-age defence is included to avoid criminalization of minors and young people who are close in age.
- The focus of legislation that regulates adolescents' SRHR should be on promoting comprehensive sexuality education that will enable adolescents and young people to make informed choices in relation to their sexual and reproductive health rights and needs.
- Legislative provisions must recognize adolescents' evolving capacities, normative sexual development, and sexual experimentation; protect their dignity and privacy; destigmatize and decriminalize normative consensual behaviour. Criminalization may prevent access to ASRHR services and information and impede informed sexual decision-making due to fear of prosecution.
- Countries need to move away from terms such as "defilement", and adopt more appropriate terminology that specifically delineates concepts such as "child sexual exploitation", "abuse", "rape" or "statutory rape" so as to ensure that there is no confusion as to which acts constitute offences and which ones do not.
- Statutory rape refers to any act of sexual intercourse, including vaginal, anal and oral sex with a minor below the minimum age of consent.
- Statutory sexual assault is any sexual act of touching a minor below the age of consent that does not include intercourse. This includes kissing or touching of breasts or genitalia for the purpose of sexual stimulation. The essential difference between statutory rape and statutory sexual assault is sexual intercourse.

Recommended concepts to be included in legislative provisions relating to sexual behaviours with minors




- Definitions of sexual acts that fall within the purview of the legal framework.
- Adolescents who are both below the age of consent to sexual activity are not charged with crimes arising from their consensual sexual interaction with one another, in line with the age difference as provided by the Romeo and Juliet Clause⁷.
- Where one adolescent is older than the age of consent and the other is younger, there is a 'no prosecution' rule or a legal defence if the age difference between them is no more than two years.
- Statutory rape charges are used where the older person is an adult, not where both are consenting adolescents or are close in age.
- Any sexual act that is not consensual amounts to exploitation or abuse, which is punishable in accordance with the relevant laws.
- If there is a register of sex offenders, consensual acts between adolescents and young people do not result in the listing of those young people on the register.
- Diversion or community-based sentences, as opposed to imprisonment, are available for those adolescents and young people who are convicted of statutory offences because they fall outside of the two years age difference rule.



⁶ Available at https://www.un.org/en/africa/osaa/pdf/au/african_youth_charter_2006.pdf.

⁷ The Romeo and Juliet clause or close-in-age defence refers to when consensual sexual activity between adolescents who are close in age - where one adolescent is below the age of consent for sexual activity and the other is over the age of consent - is not criminalized.

Table 2: Possible best practice clause on sexual acts between consenting adolescents:

 Rwanda	 South Africa	 Botswana
<p>Non-criminalization: According to Law No 68/2018, if child defilement is committed between children aged at least 14 years without violence or threats, no penalty is pronounced. However, if a child aged 14 years but who is not yet eighteen commits child defilement on a child under 14 years of age, he/she is punished in accordance with the provisions of Article 54 of this law. The law says that if children between 14 and 18 have sex, they are not punished. However, a child between 14 and 18 years of age who has sex with a child younger than 14 commits a punishable offence.</p>	<p>Close-in-age defence: In terms of the Sexual Offences Acts of consensual sexual penetration (“statutory rape”) and sexual violation (“statutory sexual assault”) with certain children (statutory rape) are not prosecutable.</p> <p>“A person (‘A’) who commits an act of sexual violation with a child (‘B’) who is 12 years of age or older but under the age of 16 years is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration or violation with a child, unless A, at the time of the alleged commission of such an act, was</p> <ul style="list-style-type: none"> • 12 years of age or older but under the age of 16 years; or • either 16 or 17 years of age and the age difference between A and B was not more than two years.” 	<p>Close-in-age defence: The amended Penal Code raises the age of consent from 16 to 18 years. Thus, sex with a person below the age of 18, with that person’s consent or not, is an offence.</p> <p>The Penal Code makes provision for two exceptions. Consensual sexual activity is not an offence if:</p> <ul style="list-style-type: none"> • It takes place between persons who are both under the age of 18; or • It takes place between a person who is not more than two years older than the other, e.g. a 17- year-old and a 19-year-old.

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