

openly into the realm of human rights, but also in that it positively affirmed adolescents as sexual beings who can engage in consensual sexual conduct, and recognised certain forms of state interference with this as a violation of their rights.

One reason why the subject of adolescent consensual sexual conduct found its way to the Court is because South Africa comprehensively reviewed its sexual offences law to align it with human rights, and dealt more elaborately with the issue of adolescent consensual sexual conduct. Many African countries still maintain, in their sexual offences regimes, the so called “anti-defilement laws” that are designed to protect adolescents (and in many cases only adolescent girls) from engaging in sexual relations. These defilement laws regulate adolescent sexuality by proscribing consensual sexual relationships between adolescents. The following provision taken from the Malawi Penal Code is used here for illustration: “Any person who carnally knows any girl under the age of sixteen shall be guilty of a felony and shall be liable to imprisonment for life.”²⁴ “Any person” could be a boy of 15 or 16. This was the issue that the South African Court addressed, whether consenting adolescents engaging in sexual conduct should be punished.

A report by the Law Reform Commission of Tanzania highlighted a high rate of defilement where most of the victims are teenage girls, and the culprits are mostly within the same age-group.²⁵ As experts testified before the court, this high rate of defilement may be a result of the fact that many teenagers engage in consensual conduct amongst themselves. However, the criminal laws of countries such as Malawi and others, punish this conduct. In fact, the Tanzania Law Reform Commission recommended that the age of defilement be raised to 18. The side-effect of this indiscriminate law would be to subject more adolescents to unjustifiable scrutiny, condemnation, and punishment. The South African Court protected the children of South Africa from these undesirable effects.

Although criminal laws have an important role to play, they should not be regarded as best suited to ensure child and adolescent sexual health and well-being. Rather, it is by respecting the rights of the child and the adolescent, including the rights to dignity, privacy, and access to sexuality-related health services and education, that children and adolescents will be given the space and opportunity to enjoy sexual health and well-being as they evolve toward becoming adults.

Teddy Bear Clinic for Abused Children and Another v. Minister of Justice and Constitutional Development and Another
CCT 12/13, [2013] ZACC 35
South Africa, Constitutional Court

COURT HOLDING

Sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (the Act) have the effect of harming the adolescents they intend to protect in a manner that constitutes a deep encroachment in the rights of dignity and privacy, as well as the best interests of the child principle.

The limitations are not justifiable when subjected to the requirements under Section 36 of the Constitution of South Africa (the Constitution).

Sections 15 and 16 of the Act are declared invalid to the extent they impose criminal liability on children under the age of 16 years old, but their invalidity is suspended for 18 months to allow Parliament to remedy the defects of the statute. Effective from the date of the judgment, there is a moratorium on all criminal proceedings and related activities against children under the age of 16 under Section 15 and 16.

Summary of Facts

This was an application for confirmation of a ruling by the North Gauteng High Court in Pretoria that certain provisions of the Act relating to the criminalisation of consensual sexual conduct with and among children of a certain age are constitutionally invalid. The High Court had held that by criminalising consensual contact between children of a certain age, Sections 15 and 16 of the Act infringed on the rights of the child and were therefore invalid. It went on to suggest a remedy by reading certain words into the provisions. Under the terms of Section 172(2)(a) of the Constitution, the High Court's ruling has no force unless and until confirmed by the Constitutional Court.

Issues

The issue before the Court was whether it is constitutionally permissible for children to be subjected to criminal sanctions in order to deter early sexual intimacy and combat the risks associated therewith. More specifically, the Court stated that it would determine the following:

1. Whether any rights were limited by the impugned provisions;
2. If so, whether these limitations were reasonable and justifiable in terms of Section 36 of the Constitution; and
3. If these limitations were neither reasonable nor justifiable, the appropriate remedy.

Court's Analysis

The Court started from the premise that children enjoy fundamental rights guaranteed to "everyone" under the Constitution. If any rights should be limited, the limitation ought to be reasonable and justifiable in terms of Section 36 of the Constitution.

The Court then looked at the Applicants' evidence, which included the expert report of a child psychiatrist and a clinical psychologist, which provided information about child development and the impact of the impugned sections. The report stated that South African children reach maturity between the ages of 12 and 16, and during this time their experiences have long lasting impacts on their adult lives. Adolescents engage in sexual exploration including kissing, masturbation, and sexual intercourse which in circumstances where it is consensual is potentially a normal and healthy experience. At this age, they need guidance and support from adults and caregivers to avoid the negative consequences of sexual behaviour.

The report stated that criminalising such behaviour negatively impacted children, as being charged under the impugned provisions would bring shame, embarrassment, anger, and regret. It could further drive adolescent sexuality underground and make it difficult for adolescents to seek help, and equally challenging for adults and caregivers to support children on sexual matters.

The Court then considered the impact of the impugned provisions on the rights of children. It first justified why the matter to be determined should be the rights of children between 12 and 15, which it referred to as “adolescents,” as distinguished from individuals of 16 and older. The Court relied on the expert evidence that related only to children between 12 and 16, so that its determination was narrowed to this age group.

The Court agreed with the Applicants in applying the principle in *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) (*National Coalition*) that criminalisation of consensual sexual conduct was a form of stigmatisation that was degrading and invasive. Failure by society to respect consensual sex choices diminish one’s innate self-worth. Further, punishing sexual conduct that is otherwise normal disgraces the adolescent. The Court therefore held that the impugned provisions clearly infringed on adolescents’ right to dignity.

The Court also referred to the *National Coalition* case, which stated that the right to privacy protected one’s “inner sanctum,” which included not only one’s intimate relationships but also their sexual preference. The Court held that this also applied to adolescents, and the effects of Sections 15 and 16 infringed upon the right to privacy of adolescents by intruding into their intimate lives.

The Court held that the impugned provisions also infringed on the best interests principle by subjecting adolescents to harm and risk, for instance by driving adolescent sexual behaviour underground and undermining the guidance they need from adults and caregivers in matters of sexuality. The Court also considered the respondents’ arguments that prosecutorial discretion and diversion would mitigate this harmful and negative impact, but dismissed these arguments as untenable.

Having found that Sections 15 and 16 infringed on the rights of children, the Court determined whether the limitation of rights was reasonable and justifiable under Section 36 of the Constitution. The Court found that the legitimate intention of the Act was to discourage adolescents from prematurely engaging in consensual sexual conduct which may harm their development, and from engaging in sexual conduct in a manner that increases the likelihood of the risks associated with sexual conduct. However, the respondents did not proffer any evidence to show how the impugned provisions achieve the intended purpose. Rather, the evidence showed that they increased harm and risk to adolescents. The Court therefore held that there was lack of a rational link between the impugned provisions and their stated purpose, so that Sections 15 and 16 of the Act did not pass constitutional muster. Further, the Court opined that there were less restrictive means to achieve the intended purpose than criminalising wide-ranging behaviour, including behavior that would be regarded as normal.

The Court therefore held Sections 15 and 16 unconstitutional to the extent that they criminalise the consensual sexual conduct among adolescents between the ages of 12 and 16, and declared them invalid. However, it departed from the reasoning of the High Court in determining the appropriate remedy. Rather than using a combination of severance and reading-in, it declared the provisions invalid but suspended the invalidity to allow Parliament to remedy the statutory defect. In order to prevent the provisions from remaining operational in the interim, the Court imposed a moratorium on all investigations into, arrests of, and criminal and ancillary proceedings against adolescents for consensual sexual activities with their peers pending the remedial action of Parliament.

Conclusion

The order of the High Court was set aside and replaced by orders that (i) Sections 15 and 16 were invalidated to the extent that they criminalised consensual sexual conduct between adolescents under 16; (ii) the invalidity of these Sections was suspended for 18 months for Parliament to remedy the defect; (iii) a moratorium was placed on implementing Sections 15 and 16 on adolescents below 16 until Parliament took remedial action; and (iv) the Minister of Justice and Constitutional Development were ordered to expunge from the National Register for Sex Offenders details of a child below the age of 16 convicted under the invalidated provisions and of a child who was issued a diversion order following a charge under the invalidated provisions.

Significance

From the perspective of adolescent sexuality and criminal law, children in Africa are frequently treated as one homogenous and asexual group that should be protected from all forms of sexual behaviour, whether positive or negative, until they are adults or married. Intertwined with this are cultural and religious norms that affect adolescents disparately, depending on which norms take precedence in their social setting. In traditional Africa, puberty is regarded as that milestone where the child becomes an adult. In some cultures, the girl and boy child undergo initiation rituals where they are taught how to behave as adults, including initiation into sexual practices. In settings where Abrahamic religious norms take precedence, the expectation is that persons should not engage in consensual sex until they are married.

The combined effect of social and religious norms and criminal law may impact adolescents' development, especially when the principle of evolving capacities in regards to their sexual development is not adequately taken into account. Children may be introduced to sexual matters too early at initiation rituals; for example, in the Chewa culture (Malawi), girls may be forced to have sexual intercourse with an adult as part of initiation rituals. In circumstances where Abrahamic religious norms are followed, adolescents are prevented from accessing information, education, and health services relating to sexuality because society fears that they will engage in sexual conduct prohibited by religious norms. Anti-defilement laws further impact adolescents when they indiscriminately criminalise consensual sexual behaviour.

In this regard, this South African case is revolutionary because it affirmed adolescents as sexual beings who may engage in consensual sexual conduct among themselves, if they choose. South Africa arrived at this decision using its Constitution and domestic laws. Some African countries still have laws that criminalise consensual sex between adolescents. Yet, girls and boys still engage in some form of sexual conduct. The effect is that since the norms and laws prevent them from getting the necessary support, such as sexual and reproductive health information and services, they are susceptible to unwanted pregnancy, sexually transmitted infections, and unsafe abortions.

The South African case perhaps raises questions about the extent to which African countries are implementing various rights for adolescents. For instance, the African Commission's General Comment on Article 14(1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa discussed wide-ranging human rights principles that impact women's sexual and reproductive rights, including the right to non-discrimination, the right to

health, and the right to sexuality education. These rights should fully apply to adolescents. To ensure realisation of these rights, states are obligated to take steps including transformation of legal and policy frameworks, such as by eliminating laws that indiscriminately criminalise consensual sexual conduct between adolescents.

HIGHLIGHT

ADOLESCENT CONSENSUAL SEXUAL CONDUCT

Social norms, religious norms, and criminal law regulate sexual conduct. In many traditional settings in African countries, a girl matures at puberty, and is prepared for sexual activity thereafter. In settings where certain religious norms take precedence, the person is allowed to engage in sexual activity only after celebration of marriage. States also regulate sexual conduct through criminal laws by setting age of consent to sex.

The two *Teddy Bear* decisions of the South African Courts addressed the criminalization of consensual adolescent sexual conduct. Both courts found that indiscriminate criminalization of consensual sexual conduct infringed upon the rights of children and adolescents. These decisions are revolutionary in positing the idea that adolescent consensual sex should not always be viewed as problematic. In the second *Teddy Bear* case, Justice Sisi Kampepe affirmed that consensual sexual conduct between adolescents may not only be innocuous, but is critical for normal and healthy development.

Treating adolescent sexuality as problematic negatively influences how society addresses adolescent sexuality, especially in health care and educational institutions. Adolescents have been denied sexual health information, education, and services for fear that it would encourage them to engage in sexual conduct. They have been subjected to violations of their rights: for getting pregnant outside wedlock, for instance, girls have been denied the opportunity to continue with education, as in the student pregnancy case in the Constitutional Court of South Africa.²⁶

Further, sex laws are not necessarily benevolent for the adolescent who it is designed to protect from harm. As Justice Kampepe noted in the second *Teddy Bear* case, criminalization drives adolescent sexual behaviour underground. It puts the adolescent through the harsh criminal justice system, when it is really not necessary. The two South African cases invite a reflection on how Africa has used criminal law to disempower adolescents and infringe on their rights, including, the rights to privacy and dignity. It is noteworthy that these criminal regimes reflect problematic conceptions about sexuality of children and adolescents. Instead of using criminalization to protect adolescents from harm arising from consensual sexual conduct, governments can enhance sexuality education programs, counselling, and comprehensive sexual and reproductive health services for adolescents to achieve the same objective but in ways that conform to the rights of the child.²⁷