



UNIVERSITY OF  
**KWAZULU-NATAL**

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**YAKWAZULU-NATALI**

**CONSENT LAWS: SEXUAL REPRODUCTIVE HEALTH RIGHTS FOR  
ADOLESCENTS IN SOUTH AFRICA**

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## **DECLARATION**

I, Maamie Lukhele, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university.

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A handwritten signature in black ink, appearing to read 'A. Strode', with a horizontal line underneath.

**DATE:** 1 July 2019

## **DEDICATION**

I dedicate this dissertation to my loving and supportive parents; Dad, Dr Kwaku Akyeampon Gyima, (who sadly passed away during this study), Mother, Ms G. Lukhele, and to my Grandmother, HRH Princess Fikile Dlamini. Thank you for your words of encouragement and prayers, financial and moral support in my academic life. I will always love you all.

This study is also dedicated to all the young people, women and girls who have suffered injustice through the lack of knowledge of their right to sexual and reproductive health services as well as to those that have been subjected to sexual violation in one way or another. There is hope!

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All the glory and honour to God Almighty who has ushered me into this season of life where I finally complete my Master of Laws degree in Medical Law.

To my parents, in the medical field by profession, my inspiration and pillars. Mom, Lucia Gcabo Lukhele, my anchor and number one supporter, thank you Mhlantiwendlunkhulu for the sacrifices you continue to make to ensure I am comfortable and successful in life. For the prayers, for always believing in me and encouraging me to aim for excellence in my academics, I am eternally grateful.

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## CHAPTER 1

### I. INTRODUCTION

#### *A. Introduction*

Women and children form part of a vulnerable group in society, however, for purposes of this study, focus will be on children (adolescents). This warrants the need to protect children's rights as well as grant them their constitutional identity as individuals. Adolescents are faced with several challenges which are based on sexual and reproductive health issues, for instance teenage pregnancies and the HIV/AIDS pandemic.

#### *B. Background*

All children are entitled to basic human rights meaning, sexual and reproductive health services are no exception. This is enshrined first in the Constitution which warrants the right to self-determination on all persons including children.<sup>1</sup> Within the Constitution is the provision which clearly states that the best interests of children remain of high importance in all matters concerning children.<sup>2</sup> The Children's Act was promulgated in 2005 and its provisions echo the Constitutional rights of children.<sup>3</sup> The Act<sup>4</sup> acknowledges that a child has to be included in decision making processes which involve them (children) with regard to their level of maturity as well as age.<sup>5</sup> South Africa has also incorporated international instruments including the African Charter on the Rights and Welfare of the Child and the United Nations Convention on the Rights of the Child.<sup>6</sup> According to Article 5 of the United Nations Convention on the Rights of the Child places an obligation on governments to support families in their responsibility to care for the child as well as protect their rights.<sup>7</sup> In addition, Article 12 calls for the respect of children's view in matters that affect the child highlighting the fact that such views do not intend to strip off parental responsibilities.<sup>8</sup>

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<sup>1</sup> Constitution of South Africa, 1996 Section 12 (2) Everyone has the right to bodily and psychological integrity, which includes the right- (a) to make decisions concerning reproduction, (b) to security in and control over their body, and (c) not to be subjected to medical or scientific experiments without their informed consent.

<sup>2</sup> Ibid. Note 1. Section 28 (2).

<sup>3</sup> Children's Act 38 of 2005 preamble.

<sup>4</sup> Ibid. Note 3.

<sup>5</sup> Ibid. Note 3. Section 6.

<sup>6</sup> Heaton J. The South African Law of Persons. *Lexis Nexis*. Page 85.

<sup>7</sup> United Nations Convention on the Rights of the Child Article 5.

<sup>8</sup> Ibid. Note 7. Article 12.

Lastly, Article 42 implores governments to ensure that the children's rights enshrined in the Convention are acknowledged by adults and children themselves need to be sensitised about their rights.<sup>9</sup> Over and above, the Constitution also emphasises the importance of the best interests of the child in all matters relating to the child.<sup>10</sup>

This study seeks to unpack the various issues that arise regarding the existing ages of consent which, as to be discussed in detail, turns out to be a barrier for many adolescents' access to sexual and reproductive health services. This negatively which affects governments' vision of an HIV free generation.

### *C. Literature Review*

According to World Health Organisation, adolescent stage ranges between ages 10-19 years.<sup>11</sup> During this period, there are physical and emotional developments that take place in the child's life and it is a stage in life where most children explore different avenues including sexual activities.<sup>12</sup> In the advent of HIV/AIDS, sexual behaviour among adolescents needs to be monitored more stringently to alleviate the escalating HIV rate in adolescents the significance of this study. This has brought about various legislations that regulate the ages of consent to sexual and reproductive health (SRH) issues. Eba, et tal, point out the importance of having adolescent's sexual and reproductive health laws be examined and reviewed.<sup>13</sup>

Statistics show that HIV/AIDS is the leading cause of deaths among adolescents yet there are laws which seem to limit access to HIV health services.<sup>14</sup> It is recommended that the existing ages of consent be lowered to acknowledge early maturity and the current rate at which adolescents quickly develop.<sup>15</sup> Most children in their adolescent stage engage in sexual activities for the first time during this period and this makes them vulnerable to risky sexual behaviour which may lead to HIV infection and teenage pregnancies, inter alia. Currently, there are 2 million adolescents living with HIV world wide and 80% of this population is in Sub-

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<sup>9</sup> United Nations Convention on the Rights of the Child Article 42

<sup>10</sup> Constitution of the Republic of South Africa, 1996 Section 28 (2)

<sup>11</sup> [www.who.org](http://www.who.org) Accessed November 2018.

<sup>12</sup> Ibid Note 6

<sup>13</sup> Eba P.M, Lim H Reviewing Independent Access to HIV Testing, Counselling and Treatment for Adolescents in HIV Specific Laws in Sub-Saharan Africa: Implications for the HIV Response. *Journal of the International AIDS Society*, 2017.

<sup>14</sup> Ibid. Note 13.

<sup>15</sup> Ibid. Note 13.

Saharan Africa.<sup>16</sup> Lack of resources and limited access to sexual and reproductive health services exacerbates the matter in many African countries. This needs to be addressed by reviewing legislations regulating the ages of consent to said services thus aligning them to international standards laid down by international law instruments such as the United Nations.

Strode and Essack allude to the fact that indeed there is a high risk of HIV infection among adolescents coupled by risky sexual conduct and sexually transmitted infections.<sup>17</sup> In this reading the writers call for legislative measures to be taken in ensuring that adolescents have access to sexual and reproductive health services without limitations by the stipulated ages of consent.

Everyone has the right to sexual and reproductive health including access to contraceptives.<sup>18</sup> Some writers emphasise on the importance of informed consent when deciding on sexual and reproductive health. For instance, one article explored forced sterilisation of HIV positive women and the writer is of the view that HIV positive women have the right to decide on sterilisation own without coercion.<sup>19</sup> On the same wavelength, it can be drawn that consent can be vitiated in circumstances where the patient lacks information regarding the proposed procedure, or consent made under duress and where the consenting party lacks the capacity to make such decision on their own.<sup>20</sup>

Singh in his article on “*The ages of consent for Adolescents*” argues that sexual and reproductive health in the advent of HIV/AIDS is vital.<sup>21</sup> He discusses the ethical, legal, cultural and social issues surrounding the stipulated ages of consent for children in sexual reproductive health.<sup>22</sup> In addition, Singh points out that South Africa lacks an age restriction for HIV Post Exposure Prophylaxis, PEP.<sup>23</sup> From this reading, it is apparent that there is no age restriction either for Anti retro viral treatment, it is assumed that everyone will be willing

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<sup>16</sup> Eba P.M, Lim H *Reviewing Independent Access to HIV Testing, Counselling and Treatment for Adolescents in HIV Specific Laws in Sub-Saharan Africa: Implications for the HIV Response*. Journal of the International AIDS Society, 2017.

<sup>17</sup> Strode A, Essack Z *Facilitating Access to Adolescent Sexual and Reproductive Health Services through legislative reform: Lessons from the South African Experience*. September 2017, Vol 107, No 9. *South African Medical Journal*. Page 741

<sup>18</sup> Essack Z, Strode A “I feel like half a woman all the time.” The impacts of coerced and forced sterilisations on HIV-positive women in South Africa”. *Agenda* 2012.

<sup>19</sup> *Ibid.* Note 18.

<sup>20</sup> *Ibid.* Note 18.

<sup>21</sup> Singh J *Age of Consent: Legal, Ethical, Cultural and Social Review-South Africa country Review*. Page 1

<sup>22</sup> *Ibid.* Note 21. Page 1

<sup>23</sup> *Ibid.* Note 22. Page viii.

to undergo such treatment. This tends to undermine the patient's, regardless of age, right to refuse lifesaving treatment.

Strode, et al, argue that individual consent to sexual and reproductive health services is ideal to the effect that when parents are involved this dissuades adolescents from seeking further SRH services.<sup>24</sup> It is common knowledge that adolescents are adamant in discussing their sexual lives with their parents and not all adolescents live with their parents owing to the HIV pandemic and other social dilemmas that ultimately rob them off parents. As a result, there are many adolescents heading their own households, dubbed: "child headed homes" and this worsens the situation as these adolescents are exposed to early adulthood whereby they are forced to engage in early sexual activities. This gives rise to the need for sexual health education and medical services to the same effect.

In this article,<sup>25</sup> the writers pointed out eight sexual and reproductive health related rights as follows:

- i. Contraceptives
- ii. HIV Testing
- iii. Medical Treatment
- iv. Prescribed Drugs
- v. Male Circumcision
- vi. Virginity Testing
- vii. Sterilisations
- viii. Termination of Pregnancy

Children are regarded as having limited capacity to make an informed consent, therefore, they must be protected from their lack of experience and knowledge.<sup>26</sup> The privacy rights of adolescents are overlooked, and this is evident in the scarce literature on the subject.<sup>27</sup>

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<sup>24</sup> Strode A, Essack Z Facilitating Access to Adolescent Sexual and Reproductive Health Services through legislative reform: Lessons from the South African Experience. September 2017, Vol 107. No 9. *South African Medical Journal*. Page 742.

<sup>25</sup> Ibid. Note 24. Page 743.

<sup>26</sup> Strode A, Slack C Child Privacy Rights: Cinderella Issue in HIV Prevention Research. September 2013, Vol 14, No 3. *SAHIVMED*. Page 108.

<sup>27</sup> Ibid. Note 26. Page 108.

Everyone has the right to privacy<sup>28</sup>, including children. In most cases, the right of privacy afforded to adolescents is limited particularly in matters concerning confidentiality.<sup>29</sup>

#### *D. Rationale for this Study*

This study highlights the importance of the right to sexual and reproductive health particularly among adolescents. The rationale is evidenced, in the Constitution<sup>30</sup> which places in highest regard the best interests of the child in all matters involving children.<sup>31</sup> African Charter on the Rights and Welfare of the Child which recognises that children hold a distinguished position in Africa hence they are entitled to legal protection relating to their dignity, freedom and security.<sup>32</sup> The Convention on the Rights of the Child also emphasise the importance of children's rights, by providing mandating governments to ensure that children's rights are protected, respected and fulfilled.<sup>33</sup>

#### *E. Research Questions*

This study aims at answering the following research questions

- i) Whether consent laws act as a barrier to adolescents' access to sexual reproductive health services?
- ii) Whether consent laws are based on the principle of the evolving capacities of adolescents?
- iii) Whether the law is premised on research relating to the developmental stages of adolescents?

#### *F. Chapter Outline*

Chapter one is an introduction to this study which gives a brief background of the rights of children which includes sexual and reproductive health rights to which all children are entitled.

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<sup>28</sup> Constitution of the Republic of South Africa, 1996. Section 14.

<sup>29</sup> Ibid. Note 26. Page 109.

<sup>30</sup> Constitution of South Africa, 1996.

<sup>31</sup> Ibid. Note 30. Section 28 (2)

<sup>32</sup> African Charter on the Rights and Welfare of the Child Preamble.

<sup>33</sup> United Nations Convention on the Rights of the Children. Article 4.

Chapter two focuses on the South African legal framework regulating the ages of consent with reference to sexual and reproductive health rights. This chapter highlights the inconsistencies that exist among various legislative provisions. Chapter three, on the other hand, is an in-depth analysis of the evolving capacities of children, a psychological perspective.

Finally, Chapter 4 is the analysis chapter which concludes and makes relevant recommendations of the entire study on the sexual reproductive health rights of adolescents.

## CHAPTER 2

### II. SEXUAL REPRODUCTIVE HEALTH RIGHTS FOR ADOLESCENT'S: THE SOUTH AFRICAN LEGAL FRAMEWORK

#### *G. Introduction*

In the advent of the constitutional era, South Africa has, in the last 24 years, expressly dealt with sexual reproductive health rights of children and has, in broad terms, set the age of capacity to consent to such choices at 12 years. This chapter, therefore, aims at describing the South African legal framework on sexual reproductive health rights such as access to contraceptives, termination pregnancies, HIV testing, inter alia. (See Table 1 below). Adolescent's behaviour towards sexuality and reproduction has the potential to affect their well-being and this has prompted the promulgation of various laws to educate and regulate reproductive health rights.<sup>34</sup> It is imperative for domestic legal frameworks that govern sexual reproductive health rights to be embodied in an appropriate environment which allows for the full realisation of such rights particularly for adolescents.<sup>35</sup> This view is echoed by international bodies such as the United Nations Development Programme (UNDP) as well as the World Health Organisation (WHO).<sup>36</sup>

Table 1: Ages of consent to the sexual and reproductive health rights of adolescents:

SEXUAL REPRODUCTIVE HEALTH RIGHT	AGE OF CONSENT	STATUTE
Sexual Intercourse	16 years	Criminal Law Sexual and Related Matters Amendment Act of 2007
HIV Testing	12 years	Children's Act 38 of 2005 (section 130)

<sup>34</sup> Dixon-Mueller R, *The Sexuality Connection to Reproductive Health*. Page 271.

<sup>35</sup> Strode A, Sarumi R, Essack Z, Singh P A *Feminist Critique of Legal Approaches to Adolescent Sexual and Reproductive Health Rights in Eastern and Southern Africa: Denial and Divergence versus Facilitation*. *South African Medical Journal*. Page 2.

<sup>36</sup> *Ibid.* Note 35. Page 2.

Contraceptives	12 years	Children's Act 38 of 2005 section 134
Termination of Pregnancy	No set age	Choice on Termination of Pregnancy Act 92 of 1996
Medical treatment	12 years, must have sufficient maturity and mental capacity to understand the benefits, risks and social implications of the proposed treatment. <sup>37</sup>	Children's Act 38 of 2005 section 129
Circumcision	16 years and must have undergone counselling.	Children's Act 38 of 2005 section 12
Virginity testing	16 years, girl child must receive counselling prior to testing.	Children's Act 38 of 2005 section 12
Sterilisation	18 years	Sterilisation Act 44 of 1998

#### *H. Defining Sexual Reproductive Health Rights*

First and foremost, sexual health encompasses multiple elements such as protection from violent abuse and sexually transmitted diseases (STDs), knowledge on sexuality as well as power over sexual interactions.<sup>38</sup> Reproductive health is coupled with elements such as awareness of harmful reproductive contraception methods including knowledge of available and effective contraceptive methods, safe termination of unwanted pregnancies as well as safe pregnancy and delivery.<sup>39</sup> Strobe, et al,<sup>40</sup> use the definition of sexual reproductive health rights found in the report of International Conference on Population and Development (ICDP) which reads as follows:

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<sup>37</sup> The Children's Act 38 of 2005 Section 129 (2) (a) (b).

<sup>38</sup> Dixon-Mueller R, *The Sexuality Connection to Reproductive Health*. Page 277.

<sup>39</sup> *Ibid.* Note 38. Page 277.

<sup>40</sup> Strobe A, Sarumi R, Essack Z, Singh P A *Feminist Critique of Legal Approaches to Adolescent Sexual and Reproductive Health Rights in Eastern and Southern Africa: Denial and Divergence versus Facilitation*. *South African Medical Journal*. Page 2.

...a state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people can have a satisfying and safe sex life and that they have the capacity to reproduce and the freedom to decide whether if, when and how often to do so. (UN, 1994:59)

The UN, ICDP, definition, of sexual reproductive health, arguably, does not encompass the initial right of access to health care services.<sup>41</sup> According to Correa, et al, sexual reproductive health rights are founded upon the ethical principles of bodily integrity, personhood, equality and diversity.<sup>42</sup> These principles are basic human rights that are enshrined in the Constitution<sup>43</sup>. The significance of sexual reproductive health rights lies in the principle of autonomy wherein one can make necessary decisions as to what happens to their bodies in terms of reproduction.

The United Nations Population Fund (UNPF) defines sexual reproductive health as an outright medical condition in all spheres including physical, mental and social well-being.<sup>44</sup> This definition encapsulates the significance of informed consent where one has the liberty to make a choice relating to reproduction, gain information to safe termination of pregnancies as well as access to affordable contraceptives.<sup>45</sup>

## *I. Legal Framework*

### *i) Constitution of the Republic of South Africa, 1996*

Celebrated as one of the most progressive constitutions, the Constitution of South Africa<sup>46</sup> is the highest law in the land and all other laws must be consistent with its provisions.<sup>47</sup> In advancing for human rights, the Constitution upholds the right to equality prohibiting forms of listed grounds of discrimination<sup>48</sup> and also holds in high regard the dignity of all persons.<sup>49</sup>

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<sup>41</sup> Strode A, Sarumi R, Essack Z, Singh P A Feminist Critique of Legal Approaches to Adolescent Sexual and Reproductive Health Rights in Eastern and Southern Africa: Denial and Divergence versus Facilitation. *South African Medical Journal*. Page 2.

<sup>42</sup> Correa S, Petchesky R Reproductive and Sexual Rights: A Feminist Perspective 1994.

<sup>43</sup> Constitution of the Republic of South Africa, 1996.

<sup>44</sup> [www.unfpa.org/sexualreproductivehealth](http://www.unfpa.org/sexualreproductivehealth) Accessed on 16 November 2019.

<sup>45</sup> [www.unfpa.org/sexualreproductivehealth](http://www.unfpa.org/sexualreproductivehealth) Accessed on 16 November 2019.

<sup>46</sup> The Constitution of the Republic of South Africa of 1996.

<sup>47</sup> Ibid. Note 46. Section 2.

<sup>48</sup> Ibid. Note 46. Section 9.

<sup>49</sup> Ibid. Note 46. Section 12.

Children are not an exception in the right to dignity and this was echoed by the learned Constitutional Court in *S v M*<sup>50</sup>, where the court rightly pointed out the following,

Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them.<sup>51</sup>

The Constitution<sup>52</sup> seeks to protect the right to choose as well as the security and control over their bodies.<sup>53</sup> There are specific provisions relating to matters concerning children, emphasising the importance of the best interests of the child.<sup>54</sup>

Relevant rights include firstly, everyone is entitled to the right to bodily as well as psychological integrity which includes the right:<sup>55</sup>

- a) To make decisions concerning reproduction;
- b) To security in and control over their body, and
- c) Not to be subjected to medical or scientific experiments without their informed consent.

It is apparent that consent lies at the heart of every decision-making process, and choices concerning one's body are of no exception. This provision in the Constitution<sup>56</sup> is a clear reflection of its affirmation to the democratic values of human dignity, equality and freedom.<sup>57</sup> The best interests of the child remain of utmost importance in all matters concerning the child<sup>58</sup> and in this way the significance of the evolving capacities of children is realised.

*ii) Children's Act 38 of 2005*

The Act<sup>59</sup> is designed to echo the provisions of the Constitution<sup>60</sup> which holds, in supreme regard, the paramount importance of the best interests of the child.<sup>61</sup> In matters concerning the

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<sup>50</sup> *S v M* 2008 (3) SA 232 (CC).

<sup>51</sup> *Ibid.* Note 50. Para 18-19.

<sup>52</sup> The Constitution of the Republic of South Africa of 1996.

<sup>53</sup> *Ibid.* Note 52. Section 12 (2) (a) (b).

<sup>54</sup> *Ibid.* Note 52. Section 28 (2).

<sup>55</sup> *Ibid.* Note 52. Section 12 (2) (a-c).

<sup>56</sup> *Ibid.* Note 52.

<sup>57</sup> *Ibid.* Note 52. Section 7 (1).

<sup>58</sup> *Ibid.* Note 52. Section 28 (2).

<sup>59</sup> The Children's Act 38 of 2005.

<sup>60</sup> *Ibid.* Note 52.

<sup>61</sup> The Children's Act 38 of 2005 section 9.

child, his or her opinion must be considered, meaning, they are entitled to express their fears and concerns.<sup>62</sup> In this way the Act<sup>63</sup> seeks to promote children’s autonomy in all matters including their sexual reproductive health rights. There are four sexual reproductive health rights that are described in the Act<sup>64</sup> which will be discussed as follows:

- *Medical Treatment*

Sections 129, of the Act<sup>65</sup>, expresses that a child is entitled to consent to medical treatment if s/he is 12 years older and has a certain level of maturity as well as the required mental ability to understand the nature of the proposed treatment, risks and benefits associated therewith.<sup>66</sup> The Act<sup>67</sup> uses the phrase “sufficient maturity”, however, there is no clear definition of this phrase which, arguably, is a relative one as most children evolve differently, psychologically as well as physically. The underlying requirement in the circumstances, according to the Act<sup>68</sup>, is for the consenting child to have the capacity to comprehend the gravity of the proposed medical treatment, risks and benefits of the proposed treatment.

Furthermore, if the child is below 12 years of age, or lacks the required level of maturity, parents, guardians/care-giver, person in charge of the hospital, Minister of health or ultimately the High Court are vested with authority to intervene and give the necessary consent to medical treatment subject to instances where consent is unreasonably withheld at the detriment of the minor.<sup>69</sup> The Superintendent of a hospital or anyone in charge at the said hospital is eligible to grant consent in cases where the proposed medical is vital to save the child’s life or prevent a foreseeable physical injury or disability as well as in emergency cases where seeking consent would pose as a time consuming factor.<sup>70</sup> Where a parent unreasonably withholds consent or does not have the capacity to consent or where parents are deceased, the Act<sup>71</sup> provides that the Minister of Health may consent on behalf of the child as well as in instances where the child <sup>72</sup>him/her-self unreasonably refuses to consent.<sup>73</sup> Ultimately, the High Court or Children’s Court is empowered to grant consent when all the above interventions fail to consent

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<sup>62</sup> The Children’s Act 38 of 2005 section 10.

<sup>63</sup> Ibid. Note 62.

<sup>64</sup> Ibid. Note 62.

<sup>65</sup> Ibid. Note 62. Section 129.

<sup>66</sup> Ibid. Note 62. Section 129.

<sup>67</sup> Ibid. Note 62.

<sup>68</sup> Ibid. Note 62. Section 129.

<sup>69</sup> Ibid. Note 62. Section 129 section (5).

<sup>70</sup> Ibid. Note 62. Section 129 (6).

<sup>71</sup> Ibid. Note 62.

<sup>72</sup> Ibid. Note 62. Section 129.

<sup>73</sup> Ibid. Note 62. Section 129 (7), (8).

for the proposed medical treatment of a child.<sup>74</sup> Medical treatment, in relation to this study, may include pre-exposure prophylaxis (PreP) and post—exposure prophylaxis (PEP) and antenatal care of pregnant adolescents.<sup>75</sup>

- *Surgical Operation*

The Children’s Act<sup>76</sup> states that a child may consent to surgical operation if s/he is 12 years older with the required maturity to understand the risks and benefits of the proposed surgery and such decision is to be done with assistance from the parents or guardian.<sup>77</sup> The requirements for consent to medical treatment of children make no mention of assistance from parents or guardian, however, the Act<sup>78</sup> specifically provides that, for surgical operation, the child must be assisted by either parent or guardian in making the decision.<sup>79</sup> This means that parents are roped in to guide the 12 year old child in arriving at a reasonable decision which ultimately amounts to the child’s consent. It is trite law that a child cannot act alone hence the need for parental support and guidance. In the absence of parents, the Minister of Health as well as the High Court may, consecutively, assist in granting consent for surgery of the 12-year-old child.

- *HIV Testing*

The Children’s Act<sup>80</sup> makes specific provision that a child can consent to HIV testing if s/he is 12 years or older and understands the benefits, risks and social implications of the HIV test.<sup>81</sup> A child under the age of 12 years but has sufficient maturity is eligible to independently consent to HIV testing. However, if s/he lacks understanding thereof, s/he may be assisted by parents/guardians, provincial head of social development, any designated person or the High Court or Children’s Court.<sup>82</sup> In terms of section 133<sup>83</sup>, HIV test results of a child may not be disclosed to any third party, with the exception where such disclosure is in terms of a court

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<sup>74</sup> The Children’s Act 38 of 2005 section 129 (9).

<sup>75</sup> Singh J, Age of Consent: Legal, Ethical, Cultural and Social Review South Africa Country Report. Pages 21, 29.

<sup>76</sup> Ibid. Note 74.

<sup>77</sup> Ibid. Note 74. Section 129 (3).

<sup>78</sup> Ibid. Note 74.

<sup>79</sup> Ibid. Note 74. Section 129 (3) (c).

<sup>80</sup> Ibid. Note 74.

<sup>81</sup> Ibid. Note 74. Section 130.

<sup>82</sup> Ibid. Note 74. Section 130.

<sup>83</sup> Ibid. Note 74.

order, required for legal proceedings such as rape cases, where required by provisions of the Children's Act or in terms of any other law.<sup>84</sup> In this provision, the child is granted full autonomy and the right to privacy without any interference as HIV test results are directly communicated to him/her.

- *Access to Contraceptives and Contraceptive Advice*

Children are granted the liberty to consent without assistance of their parents or guardians when requesting contraceptives from any health facility if that child is at least 12 years.<sup>85</sup> The Act<sup>86</sup> requires assistance by parents or care-giver of a child who is at least 12 years old.<sup>87</sup> In terms of other contraceptive methods, excluding condoms, proper medical advice and examination is carried out to determine any medical reasons why a specific contraceptive should not be administered onto the child.<sup>88</sup> Condoms are the most common and easily accessible form of contraceptive available to all, however, there are certain forms of contraceptives such as injections that require adolescents to seek medical attention at health facilities.<sup>89</sup> In as much as there is no age restriction, the reality of the matter is that many adolescents are keen on approaching health facilities for contraception services, more so because of the discrimination that they encounter from senior medical personnel based on their age.<sup>90</sup> The level of confidentiality is also compromised as many adolescents fear that the attending medical practitioner would divulge information to their parents and they also fear that contraception has a negative effect on their fertility.<sup>91</sup> This calls for contraceptive services to be decentralised and made easily available at community level, both urban and rural areas, to facilitate and ensure the full realisation of the right of access to health care services enshrined in the Constitution.<sup>92</sup>

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<sup>84</sup> The Children's Act 38 of 2005. Section 133.

<sup>85</sup> Ibid. Note 84. Section 134 (1).

<sup>86</sup> Ibid. Note 84.

<sup>87</sup> Ibid. Note 84. Section 134 (2) (a).

<sup>88</sup> Ibid. Note 84.

<sup>89</sup> Singh J, Age of Consent: Legal, Ethical, Cultural and Social Review South Africa Country Report. Page 11.

<sup>90</sup> Ibid. Note 89. Page 11.

<sup>91</sup> Ibid. Note 89. Page 11.

<sup>92</sup> The Constitution of the Republic of South Africa, 1996. Section 27.

iii) *National Health Act of 2003*

The National Health Act<sup>93</sup> upholds the principle of consent of all persons to health services. Section 7 of the Act<sup>94</sup> provides instances where health services without consent may be effected upon a patient, which includes instances where the patient cannot consent on their own behalf and thus mandates another person to consent in proxy, or where a court order allows for such consent or where it is in the interest of the public that treatment be effected without consent of the patient.<sup>95</sup> In addition, the Act<sup>96</sup> provides that if consent is given on behalf of the patient, the consenting party authorised must consult the patient before consenting.<sup>97</sup> In this way, the patient's autonomy is promoted in the sense that s/he is still granted the liberty to have an input on what happens to their body during the process of consenting.

There are instances listed in the Act<sup>98</sup> wherein the minister responsible may refuse to give consent which include where the proposed research poses a serious health risk to the child, or where such research may be successfully carried out on an adult.<sup>99</sup> In this manner, it is evident that children are a vulnerable group in our society, prone to multiple levels of abuse, hence the legislation seeks to protect the interests and welfare of every child by placing strict procedures to be adhered to where children are to participate in research areas.

iv) *The Choice on Termination of Pregnancy Act 92, 1996*

This Act<sup>100</sup> was promulgated to regulate circumstances under which termination of pregnancy may take place and its objective is to repeal the Abortion and Sterilisation Act<sup>101</sup> which restricted access to termination of pregnancy services by ensuring that all women have a right to choose termination of pregnancy as well as promoting reproductive rights.<sup>102</sup> According to the Constitution<sup>103</sup>, the State has a duty to provide health care services in accordance to universal access to reproductive health care services which include, contraception and

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<sup>93</sup> The National Health Act of 2003.

<sup>94</sup> Ibid. Note 93.

<sup>95</sup> Ibid. Note 93. Section 7 (1).

<sup>96</sup> Ibid. Note 93. Section 8 (2).

<sup>97</sup> Ibid. Note 93. Section 8 (2) (a).

<sup>98</sup> Ibid. Note 93.

<sup>99</sup> Ibid. Note 93. Section 71 (3) (b).

<sup>100</sup> The Choice on Termination of Pregnancy Act 92, 1996.

<sup>101</sup> 2 of 1975.

<sup>102</sup> Ibid. Note 100. Preamble.

<sup>103</sup> The Constitution of the Republic of South Africa, 1996.

termination of pregnancy, inter alia.<sup>104</sup> The Act<sup>105</sup> outlines circumstances which warrant a successful termination of pregnancy, that is, during the first 12 weeks of gestation period, 13 weeks up to and including the 20<sup>th</sup> week of the gestation period, if such pregnancy has the potential to cause injury to either the woman or the foetus or where the pregnancy is a case of incest or rape.<sup>106</sup> A termination of pregnancy may take place after the 20<sup>th</sup> week of gestation under circumstances whereby the medical practitioner is satisfied that continued pregnancy poses a risk to the life of the woman, or severe malformation or injury of the foetus.<sup>107</sup> Important to note is the provision of consent in section 5 of the Act<sup>108</sup> which stipulates that no other consent other than the consent of the pregnant woman is required and there is no age restriction.<sup>109</sup> By not setting an age restriction for termination of pregnancy, the Act<sup>110</sup> shows the importance of sexual reproductive health rights for all especially women who are considered a vulnerable group in society. The Regulations under the Act also stipulate that a woman seeking termination of pregnancy shall be required to complete a standard consent form which would also cover consent for any subsequent medical intervention that may follow in the event of a complication arising from the termination.<sup>111</sup>

In relation to the present study on adolescent's rights to sexual reproductive health, the Act<sup>112</sup> provides that a pregnant minor (under the age of 18 years) is entitled to consent to termination of a pregnancy without assistance from parents/guardians or care-giver.<sup>113</sup> However, the medical practitioner shall advise the pregnant minor to consult parents or guardians or other relevant third parties before the termination of pregnancy.<sup>114</sup> By not placing any age restrictions, the Act<sup>115</sup> simply seeks to protect adolescents who might opt for unsafe abortion options, an ordeal that has shattered many young lives as well as compromised adolescent's future chances at reproduction. It is common knowledge that many young girls are subjected early sexual debut which, most often than not, results in unwanted pregnancies and ultimately forces them out of school. In this way, many girls are forced to have "backstreet abortions" for fear of being judged and discriminated against by medical practitioners. To an end, counselling

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<sup>104</sup> The Choice on Termination of Pregnancy Act 92, 1996. Preamble.

<sup>105</sup> Ibid. Note 104. Section 2.

<sup>106</sup> Ibid. Note 104. Section 2 (1) (b) ((i)-(iii)).

<sup>107</sup> Ibid. Note 104. Section 2 (c).

<sup>108</sup> Ibid. Note 104.

<sup>109</sup> Ibid. Note 104. Section 5 (2).

<sup>110</sup> Ibid. Note 104.

<sup>111</sup> Ibid. Note 104. Regulation 7 (a) (b).

<sup>112</sup> Ibid. Note 104.

<sup>113</sup> Ibid. Note 104. Section 5 (2).

<sup>114</sup> Ibid. Note 104. Section 5 (3).

<sup>115</sup> Ibid. Note 104.

is regarded as non-mandatory and termination of pregnancy may not be refused where the pregnant woman opts out of it.<sup>116</sup> In *Christian Lawyers' Association v Minister of Health and Others*<sup>117</sup> it was argued that the Act emphasises on consent, while mum on age, as the major requirement for termination of pregnancy therefore, children below 18 years do not have the necessary capacity to consent to a termination of pregnancy.<sup>118</sup> The particulars of claim lodged by the plaintiffs thus suggested that the Act<sup>119</sup> places children at a vulnerable position as it makes no provision for counselling at any point of termination of pregnancy without protection before and after the procedure.<sup>120</sup>

v) *The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*

This Act does not expressly refer to sexual reproductive health sentries as discussed previously but rather refers to sexual reproductive health rights to a safe and satisfying sex life. Before the promulgation of the amended Act<sup>121</sup> in 2007, sexual criminal matters were governed by the Sexual Offences Act of 1957 which stipulated inconsistent ages of consent to sexual activities. Section 14 of the 1957 Act<sup>122</sup> criminalised sexual interactions with girls below the age of 16 years and the commission of indecent or immoral sexual acts with boys below the age of 19 years.<sup>123</sup> There was a demarcation between heterosexual and homosexual relations in which the age of consent for the former was set at 16 years and 19 years for the latter.<sup>124</sup>

The Sexual Offences Act<sup>125</sup> made provision that made children aged 16 years eligible to consent to sexual intercourse and this covers both homosexual and heterosexual relationships.<sup>126</sup> It is for this reason that ethicist Singh J, acknowledges the 2007 Act<sup>127</sup> for its social inclusion and regard for all sexual relations.<sup>128</sup> However, sexual relations between children who are in the age ranging between 12 and 15 years or if one party is not more than 2

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<sup>116</sup> The Choice on Termination of Pregnancy Act 92, 1996.

<sup>117</sup> 2004 (10) BCLR 1086 (T).

<sup>118</sup> *Christian Lawyers' Association v Minister of Health and Others* 2004 (10) BCLR 1068 (T).

<sup>119</sup> Choice on Termination of Pregnancy Act 92, 1996.

<sup>120</sup> *Christian Lawyers' Association v Minister of Health and Others* 2004 (10) BCLR 1068 (T).

<sup>121</sup> The Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007.

<sup>122</sup> The Sexual Offences Act 1957.

<sup>123</sup> *Ibid.* Note 122. Section 14.

<sup>124</sup> Commentary on re: Section 15 and 15 of the Sexual Offences (and Related Matters) Amendment Act 2007

<sup>125</sup> *Ibid.* Note 122.

<sup>126</sup> The Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007. Section 15 and 16.

<sup>127</sup> *Ibid.* Note 126.

<sup>128</sup> Singh J, Age of Consent: Legal, Ethical, Cultural and Social Review South Africa Country Report. Page 11.

years older than the other partner who may be below 12 years old are not criminalised.<sup>129</sup> Essentially, the age of consent to sexual intercourse is 16 years and any sexual activity involving a child below the age of 2 years amounts to rape.<sup>130</sup> Section 15 provides that it is an offence where one engages in sexual intercourse with a child aged between 12 and 15 years.<sup>131</sup> The exception is where one party is older than 12 years but not more than 16 years, or where the age difference between the parties was not more than 2 years.<sup>132</sup> It is common for young people to experiment sexually with their bodies owing to the physical and emotional changes in their bodies during adolescence and this was echoed in the *Teddy Bear*<sup>133</sup> case.<sup>134</sup> Children are entitled to sexual reproductive health rights in the same manner as their adult counterparts and any restriction to such rights must be on valid and reasonable grounds.<sup>135</sup>

Be that as it may, section 54 of the Act<sup>136</sup> empowers anyone to report to the police cases where adolescents had consensual sexual intercourse, and this has the effect of invading adolescent's right to privacy and dignity which largely encroaches on their right to autonomy. Therefore, the need to review laws that criminalise adolescent sexual conduct.

Criminal laws regulating sexual health rights for adolescents have the potential of limiting access to services such as contraceptives to young girls in society.<sup>137</sup> We live in a patriarchal society where girls are offered little or no opportunity to voice out their opinions and where men dominate in sexual matters. For example, a girl cannot initiate the use of condoms during sexual intercourse with an older man as this may be interpreted as being disrespectful of the girl. This then violates the adolescent girl's right to sexual reproductive health. The criminal laws should aim at protecting such rights by reviewing the current laws. Likewise, young men who are sexually involved with older men are prone to major violations of their right to safe sexual health.

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<sup>129</sup> Sexual Offences and Related Matters Amendment Act 5 of 2015.

<sup>130</sup> Ibid. Note 129.

<sup>131</sup> The Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 section 15.

<sup>132</sup> Ibid. Note 131. Section 15 (1) (a) (b).

<sup>133</sup> *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another*, 2013.

<sup>134</sup> Strode A, Sarumi R, Essack Z, Singh P A Feminist Critique of Legal Approaches to Adolescent Sexual and Reproductive Health Rights in Southern Africa: Denial and Divergence versus Facilitation. *South African Medical Journal*, 2018. Page 6.

<sup>135</sup> *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another*, 2013.

<sup>136</sup> The Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 section 54.

<sup>137</sup> Ibid. Note 134. Page 6.

### *J. Conclusion*

It stands to reason, therefore, that the existing legal framework attempts to protect adolescent's right to sexual health, a milestone which should be thus applauded. Legally, children below the age of 18 years are regarded as minors and do not have the necessary capacity to consent to matters concerning them and thus often require support from either parents or guardians or *curators* appointed by court.<sup>138</sup> The general age of maturity in our society is 18 years old, which implies that, adolescents are denied the right to independently make decisions concerning their sexual health without parental or other third party consent.<sup>139</sup> This notion is oblivious to the fact that children develop differently in terms of physical, psychological as well as emotional changes. The stages of the evolution of children shall be examined in consecutive chapters to this study.

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<sup>138</sup> Strode A, Sarumi R, Essack Z, Singh P A Feminist Critique of Legal Approaches to Adolescent Sexual and Reproductive Health Rights in Southern Africa: Denial and Divergence versus Facilitation. *South African Medical Journal*. 2018. Page 8.

<sup>139</sup> *Ibid*. Note 138. Page 9.

## CHAPTER 3

### III. THE EVOLVING CAPACITIES OF CHILDHOOD

#### *K. Introduction*

The previous chapter dealt with the South African legal framework on sexual reproductive health rights. Different legal provisions were explored such as the Constitution<sup>140</sup>, Children's Act<sup>141</sup> and other legislations dealing with sexual and reproductive health rights with reference to children. This chapter seeks to discuss the evolving capacities of childhood development, regarding the stipulated legal ages of capacity as well as explore the inconsistencies that exist between the existing legal provisions and the evolving capacities of childhood development. Adolescence is a stage of childhood development which involves unique physical, biological, intellectual, behavioural and emotional growth and changes.<sup>142</sup> The evolving capacities of children can be affected by various factors including cultural backgrounds and traditions.<sup>143</sup>

In defining a child, the Constitution<sup>144</sup> define as any person below the age of 18 years. At an international platform, the United Nations Convention on the Rights of the Child (CRC) also defines a child as one under the age of 18 years and acknowledges that other countries can set their own age of adulthood.<sup>145</sup> The term "children" is generally used interchangeably with terms such as adolescent, teenager, youth, pubescent or juvenile. According to the World Health Organisation, adolescence begins from 10 years to 19 years.<sup>146</sup> This chapter therefore explores the issues through which children undergo in their developmental stages and how these issues impact their evolving capacities.

#### *L. The Various Developmental Stages of Childhood*

It is argued that the most significant stage in the development of the human mind occurs in the early years of life, from birth to 18 years.<sup>147</sup> The Children's Act describes early childhood development as the process of emotional, cognitive, sensory, spiritual, moral, physical, social

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<sup>140</sup> The Constitution of the Republic of South Africa, 1996

<sup>141</sup> 38 of 2005.

<sup>142</sup> Southern African HIV Clinicians Society. Guidelines for adherence to Antiretroviral therapy in adolescents and young adults, Johannesburg, South Africa. *Southern African HIV Clinicians Society*, 2017. Page 4.

<sup>143</sup> Lansdown G, Innocenti Insight: The Evolving Capacities of the Child. *Innocenti Research Center UNICEF*. Page 15.

<sup>144</sup> The Constitution of South Africa, 1996 Section 28 (3).

<sup>145</sup> The Convention on the Rights of the Child Article 1.

<sup>146</sup> [https://www.who.int/topics/adolescent\\_health/en/](https://www.who.int/topics/adolescent_health/en/) Accessed

<sup>147</sup> Ogden C.K, *The International Library of Psychology: The Mental Development of the Child*.

and communication development of children from birth to school going age.<sup>148</sup> When a child is born, a document of the South African Department of Health called the Road to Health Booklet is issued. This Booklet serves as an immunisation card as it sets out the manner of care for the child.<sup>149</sup> Professor Sloth-Nielson refers to this Booklet as a child’s passport to “health and development”.<sup>150</sup> The Road to Health Booklet is arguably a document which acknowledges as well as monitor childhood development stages and it is also used as part of entry requirement for prospective scholars. In this way it is evident that the National Department of Health in South Africa acknowledges the evolving capacities of childhood development.

The United Nations Convention on the Rights of the Child<sup>151</sup> (CRC) defines the evolving capacity of children is a procedure that applauds the development of children as well as respect their autonomy.<sup>152</sup> The CRC<sup>153</sup> explains development as an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and to enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realised.<sup>154</sup>

According to one influential theorist, Piaget, there exists assumed stages of childhood development upon which sexual reproductive health services should be promulgated taking into consideration the evolving capacities of children.<sup>155</sup>

Table 2 showing development stages of children according to Piaget<sup>156</sup>

CHILDHOOD STAGE	AGE/LEVEL
Sensory monitor	Birth – 18 months
Pre-operational	18 months – 7 years
Concrete-operational	7 years – 11 years
Formal thinking	11years – older

<sup>148</sup> The children’s Act 38 of 2005 Section 91 (1).

<sup>149</sup> Sloth-Nielson J, The Intersection between Article 6 of the United Nations Convention on the Rights of the Child and Early Childhood Development. 26 *Stellenbosch Law Review* 2015. Page 295.

<sup>150</sup> Ibid. Note 149. Page 295.

<sup>151</sup> The Convention on the Rights of the Child Comment 7.

<sup>152</sup> United Nations Convention on the Rights of the Child. Comment 7.

<sup>153</sup> Ibid. Note 152.

<sup>154</sup> The Convention on the Rights Children and Welfare.

<sup>155</sup> Lansdown G, Innocenti Insight: The Evolving Capacities of the Child. *Innocenti Research Center UNICEF*. Page 15.

<sup>156</sup> Ibid. Note 155. Page 15.

### *K. Sensory Monitor Stage*

Piaget argues that this stage begins at birth of a child until 18 months. In a neo-Piagetian approach to cognition, Piaget assumes that at 2 or 3 months, children react, for instance when they are being rocked to calm down, in a manner which is particular to their stage.<sup>157</sup> Case, et al, make the analogy of how children's eyes seek to spot the direction of the beam before they actually begin to move their head in motion to the beam.<sup>158</sup> He, Piaget, continues to argue that babies younger than 2 or 3 months are not able to visually spot the beam, unsurprisingly, and this is said to mark a change in the development of sensory orienting capabilities.<sup>159</sup> At the age of 4 months, the writers, Case, et al, describe how children begin to use their limbs more than their visual ability.<sup>160</sup>

#### *i) Pre-operational Stage*

Ranging between ages 18 months-7 years, in this stage, the idea is that children begin to understand the link between the visual and physical relationship.<sup>161</sup> Children are more aware of their surroundings and can predict certain actions or movements.<sup>162</sup> Piaget notes that children at this stage fail to process information and they are most often, adamant to consider another person's view, an egocentric trait.<sup>163</sup> By egocentric in this context is meant that thoughts and any form of communication by children is based on themselves.<sup>164</sup> At preoperational stage, children become proficient in using objects, for example flying a pencil to symbolise an airplane.<sup>165</sup> There are, however, contrasting views to Piaget's theory. Writers criticise Piaget's theory in that it tends to focus more on the traits which have not developed in most children.<sup>166</sup> For example, it is argued that the objects used by children to symbolise certain things are not

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<sup>157</sup> Case R, *The Mind's Staircase: Exploring the Conceptual Underpinnings of Children's Thought and Knowledge*, 1984. Page 19.

<sup>158</sup> Ibid. Note 157. Page 19.

<sup>159</sup> Ibid. Note 157. Page 19.

<sup>160</sup> Ibid. Note 157. Page 19.

<sup>161</sup> Ibid. Note 157. Page 24.

<sup>162</sup> Ibid. Note 157. Page 24.

<sup>163</sup> Cherry K, *The Preoperational Stage of Cognitive Development. Theories: Developmental Psychology*. 2018.

<sup>164</sup> McLeod S, *The Preoperational Stage of Cognitive Development*. Retrieved from <https://www.simplypsychology.org/preoperationalstageofcognitivedevelopment>.

<sup>165</sup> Ibid. Note 164.

<sup>166</sup> Ibid. Note 164.

always the same to every child.<sup>167</sup> Martin Hughes argues that most children fail to live up to Piaget's theories simply because they do not understand it.<sup>168</sup> He uses the doll to illustrate how children from age 4 years can comprehend different views thus less egocentric as Piaget suggests.<sup>169</sup> Hart argues that up to 3 years, children do not have the necessary decision making capacity.<sup>170</sup> McLeod argues that children at this stage think more symbolically without the use of mental operations, meaning the child can-not use logical ideas.<sup>171</sup> Another school of thought suggests that between the ages of 6-7 years, there is an evident significant change, physically, which necessitates mental and social competencies.<sup>172</sup>

ii) *Concrete-operational Stage*

More organised and logical thinking, a stage ranging from 7-11 years, which Piaget labels as a turning point in the evolving capacity of childhood development.<sup>173</sup> An observation was made to the effect that in most cases when children are asked a question to which they give an incorrect answer, that question is often repeated in a sense to hint the answer to the child.<sup>174</sup> According to Rose Blank, this is wrong because when she posed a question without repeating it, she discovered that children conserve, for example water, at a younger age.<sup>175</sup> From age 3 years to 11 years, Hart further alludes that children are capable to acknowledge other people's opinion and perspective and ultimately adolescents have the ability to ponder on the positive perceptions as well as integrate morality.<sup>176</sup>

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<sup>167</sup> Ibid. Note 164.

<sup>168</sup> Ibid. Note 167.

<sup>169</sup> Ibid. Note 167.

<sup>170</sup> Hart R, The developing capacities for children to participate, in Stepping Forward, Johnson V et al. *Save the Children IDS/Institute of Education*, London, 1998.

<sup>171</sup> McLeod S, The Preoperational Stage of Cognitive Development. Retrieved from <https://www.simplypsychology.org/preoperationalstageofcognitivedevelopment>.

<sup>172</sup> Lansdown G, Innocenti Insight: The Evolving Capacities of the Child. *Innocenti Research Center UNICEF*. Page 15.

<sup>173</sup> McLeod S.A (2010) Concrete Operational Stage. Retrieved from <https://www.simplypsychology.org/concrete-operational.html>

<sup>174</sup> Ibid. Note 173.

<sup>175</sup> Ibid. Note 173.

<sup>176</sup> Ibid. Note 170.

### iii) *Formal Thinking Stage*

Formal operational thinking is more based on logical thinking flowing from ideas whereas concrete, in contrast, is more based on logical thinking which flows from objects.<sup>177</sup> Piaget summarised this stage as one wherein children think logically and can connect the link between things.<sup>178</sup> However, Robert Siegler argues that mental development in children is based on rules or instructions in complex situations rather than in stages.<sup>179</sup> This is arguably the adolescent stage.

In contrast to Piaget's views, Vygotsky argues that there exists a "zone of proximal development" which presupposes a vacuum between development with and without assistance from parents or guardians.<sup>180</sup> Vygotsky is of the view that mental or cognitive development occurs in this zone which suggests that children's capacities are developed effectively through interplay with other children.<sup>181</sup> Interaction is commonly found in schools wherein children are exposed to various processes of learning which ultimately leads to positive mental development as well as growth in competence through interplay.<sup>182</sup>

Education is by far the most important platform in childhood development and this system is mainly founded on age-associated development.<sup>183</sup> It is in schools that children get to actively participate thus enhancing their level of competence and confidence.<sup>184</sup> On the same wavelength, schools are encouraged to be more accommodative in providing opportunities to develop their mental capacities.<sup>185</sup> It is submitted that up to the age of 16 years, most adolescents fail to foresee the consequences of their decisions at the time of decision making.<sup>186</sup> This is owed to their level of comprehension of their actions. At the age of 14 years, the idea is that children's capacity to make decisions is well developed as that of adults.<sup>187</sup>

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<sup>177</sup> McLeod S.A (2010). *Formal Operational Stage*. Retrieved from <https://www.simplypsychology.org/formal-operational.html>

<sup>178</sup> Ibid. Note 177.

<sup>179</sup> Ibid. Note 177.

<sup>180</sup> Lansdown G, Innocenti Insight: The Evolving Capacities of the Child. *Innocenti Research Center UNICEF* at page 16.

<sup>181</sup> Ibid. Note 180. Page 16.

<sup>182</sup> Ibid. Note 180. Page 16.

<sup>183</sup> Ibid. Note 180. Page 16.

<sup>184</sup> Ibid. Note 180. Page 17.

<sup>185</sup> Ibid. Note 180. Page 17.

<sup>186</sup> Ibid. Note 180. Page 23.

<sup>187</sup> Ibid. Note 180. Page 24.

### *M. The Recognition of Evolving Capacities in Law*

It is trite law that children between ages of 7 and 18 years have limited capacity to act.<sup>188</sup> The law categorises children as infants (below age of 7 years) and minors (between 7 and 18 years).<sup>189</sup> The following discussion investigates the different laws that apply to sexual reproductive health rights for adolescents.

#### *i) Constitution of the Republic of South Africa, 1996*

The Constitution of South Africa<sup>190</sup> describes a child as one who is below the age of 18 years<sup>191</sup> and makes provision on the importance of the best interests of the child.<sup>192</sup> Children are entitled to all human rights enshrined in the Bill of Rights save for those which require them to have attained a certain age, for instance political rights to elections require a person to be 18 years and above.<sup>193</sup> The Constitution<sup>194</sup> allows children the right to make decisions regarding reproduction health care, privacy as well as dignity, the right of access to courts and the right against discrimination based on any of the listed grounds such as age, religion, to name a few.<sup>195</sup> Provisions in the constitution concerning children certainly recognise the evolving capacities of children as they comply with international obligations such as the United Nations Convention on the Rights of the Child which is ultimately referred to as the yardstick against which legislation concerning children is measured.<sup>196</sup> Children are entitled to self-determination, that is, they can make decisions about their lives including lifestyle, religion and relationships. The issue arises between parental intervention and state intervention in decision making.<sup>197</sup> In as much as children are entitled to a certain level of autonomy, they also have the need for parental protection.<sup>198</sup> State intervention is sought when it is necessary to protect children.<sup>199</sup>

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<sup>188</sup> Heaton J, *The South African Law of Persons*. 5<sup>th</sup> ed. *Lexis Nexis*. Page 85.

<sup>189</sup> *Ibid.* Note 188. Page at 84.

<sup>190</sup> 1996.

<sup>191</sup> Constitution of South Africa, 1996 section 28 (3).

<sup>192</sup> *Ibid.* Section 28 (2).

<sup>193</sup> *Ibid.* Section 19 (3) Every adult citizen has the right- (a) to vote in elections for any legislative body established in terms of the Constitution...

<sup>194</sup> Of South Africa, 1996.

<sup>195</sup> Currie I, DeWaal J, *The Bill of Rights Handbook*, 6<sup>th</sup> ed, *Juta*. Page 599.

<sup>196</sup> *Ibid.* Note 195 Page 600-601.

<sup>197</sup> *Ibid.* Note 195. Page 601.

<sup>198</sup> *Ibid.* Note 195. Page 601.

<sup>199</sup> *Ibid.* Note 195. Page 601.

ii) *Children's Act 38 of 2005*

The Children's Act<sup>200</sup> recognises children as persons below the age of 18 years, who at different stages are capable of certain responsibilities before reaching 18 years. For instance, the Act<sup>201</sup> recognises that children must reach a certain level of sufficient maturity and mental capacity for them to have capacity to make decisions concerning medical interventions thus recognising the evolving capacities of childhood development. In another instance, the Act<sup>202</sup> provides that a child may consent to his or her medical treatment or that of his/her child if such child is above the age of 12 years and has sufficient maturity to understand the risks, benefits and consequences of the treatment.<sup>203</sup> However, with reference to decisions concerning surgical operations, a child may be assisted by a parent or guardian.<sup>204</sup> The intervention of parental guidance is evidence that child autonomy, the right to fully make decisions on their own is limited by the evolving capacities of childhood development.

iii) *Choice on Termination of Pregnancy Act 92 of 1996*

The Termination of Pregnancy Act<sup>205</sup> can-not be overlooked in the discussion surrounding the recognition of evolving capacities of childhood development as it also makes provision of the circumstance upon which an unwanted pregnancy may be terminated. A pregnancy may be terminated during the first 12 weeks of gestation period as well as from the 13<sup>th</sup> week up-to the 20<sup>th</sup> week of gestation period.<sup>206</sup> It is axiomatic that the underlying principle in the process of termination of pregnancies is that the woman<sup>207</sup> must have given consent without any assistance.<sup>208</sup> This means that a pregnant adolescent under the age of 18 years may consent to a termination of pregnancy without parental assistance. However, the medical practitioner or midwife is encouraged to advise the minor to consult with parents or guardian before

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<sup>200</sup> 38 of 2005.

<sup>201</sup> The Children's Act 38 of 2005.

<sup>202</sup> Ibid. Note 201

<sup>203</sup> Ibid. Note 201. Section 129 (2).

<sup>204</sup> Ibid. Note 201. Section 129 (3).

<sup>205</sup> Choice on Termination of Pregnancy Act 92 of 1996.

<sup>206</sup> Ibid. Note 205. Section 2 (1) (a) (b).

<sup>207</sup> A woman is any female of any age in the definitions provision Choice on Termination of Pregnancy Act 92 of 1996. Section 1.

<sup>208</sup> Choice on Termination of Pregnancy Act 92 of 1996 Section 5 (1).

terminating the pregnancy.<sup>209</sup> Should the minor refuse to consult parents or guardian, s/he may not be denied the right to terminate said pregnancy.<sup>210</sup>

In *Christian Lawyers Association v Minister of Health*<sup>211</sup> the plaintiffs argued that permitting children below the age of “maturity”, 18 years, to terminate pregnancies without parental guidance was unconstitutional. In response, the court acknowledged that informed consent is the underlying principle of the Act<sup>212</sup> which is founded on knowledge, appreciation and consent.<sup>213</sup> Briefly, by knowledge is meant that the consenting party must have full information of the nature and extent the harm or risk associated with the intervention.<sup>214</sup> Appreciation on the other hand, suggests that the consenting party must have full understanding of the nature as well as the extent of the specific harm involved in the intervention.<sup>215</sup> Lastly, consent suggests that the consenting party must agree to the harm or the risk involved.<sup>216</sup>

In the ground-breaking case on informed consent, *Castell v De Greef*<sup>217</sup>, the court agreed with provisions of the Act<sup>218</sup> of placing no age restriction for termination of pregnancy purposes thus acknowledging the capacities of women both young and old.<sup>219</sup> Taking into consideration the best interests of the child, the court alluded to the fact that it would not be in the best interest of the pregnant child if the Act<sup>220</sup> were to place age as a basis for successful termination of pregnancy without considering the different circumstances on a case-by-case basis.<sup>221</sup> Instead of imposing an age restriction, the Act<sup>222</sup> accepts that the pregnant girl child must be mature enough to make an informed decision. In this way the Act<sup>223</sup>, therefore, recognises the evolving capacity of the person involved regardless of age.<sup>224</sup>

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<sup>209</sup> Ibid. Note 208. Section 5 (3).

<sup>210</sup> Ibid. Note 208. Section 5 (3).

<sup>211</sup> *Christian lawyers v Minister of Health and Others (Reproductive Health as amicus curiae) 2005 (1) SA 509 T.*

<sup>212</sup> Choice on Termination of Pregnancy Act 92 of 1996.

<sup>213</sup> *Christian lawyers v Minister of Health and Others (Reproductive Health as amicus curiae) 2005 (1) SA 515 F.*

<sup>214</sup> *Christian lawyers v Minister of Health and Others (Reproductive Health as amicus curiae) 2005 (1) SA 515 H.*

<sup>215</sup> *Christian lawyers v Minister of Health and Others (Reproductive Health as amicus curiae) 2005 (1) SA 515 I.*

<sup>216</sup> *Christian lawyers v Minister of Health and Others (Reproductive Health as amicus curiae) 2005 (1) SA 515 J- 516 A.*

<sup>217</sup> 1994 (4) SA 408.

<sup>218</sup> Ibid. Note 208.

<sup>219</sup> *Castell v De Greef 1004 (4) SA 528 C.*

<sup>220</sup> Ibid. Note 208.

<sup>221</sup> Kruger 2005 *Codicillus* 12.

<sup>222</sup> Ibid. Note 208.

<sup>223</sup> Choice on Termination of Pregnancy Act 92 of 1996.

<sup>224</sup> Kruger 2005 *Codicillus* 13.

iv) *International Instruments*

International legal commitments require countries not to deprive a child his/her right off access to, inter alia, health care services.<sup>225</sup> In the dawn of a democratic era, South Africa ratified and signed several international law instruments such as the CRC. The CRC stipulates that governments must “respect the responsibilities, rights and duties of parents, (and others acting as parents), in a manner that is consistent with the evolving capacities of the child.”<sup>226</sup> It also places an onus on States to respect children’s capacities and advocates for the full application of autonomy to all children.<sup>227</sup>

The concept of evolving capacities was launched into the human rights sphere in Article 5 of the Convention of the Rights of the Child which emphasises the significance of taking into consideration the evolving capacity of the child.<sup>228</sup> Article 5 of the Convention stipulates as follows,

States parties shall 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 recognised in the present Convention.<sup>229</sup>

This provision recognises that children are raised in different environments, influenced by a variety of traditions and cultural backgrounds which ultimately affects their evolving capacities.<sup>230</sup> In this way, the Convention seeks to establish children as individuals entitled to voice out their views in decisions affecting their lives, autonomy.<sup>231</sup> It is important to note that Article 5 of the Convention of the Rights of the Child does not refer to age as a major determinant of stages of capacities instead this provision highlights that comprehension is key in the implementation of rights.<sup>232</sup> This is contrary to the provisions in legislations (as discussed previously in chapter 2 of this study) which stipulate different ages of consent for sexual

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<sup>225</sup> The Convention on the Rights of the Child, Article 24 (1).

<sup>226</sup> Cook R, Dickens B.M *Recognising adolescent’ ‘evolving capacities’ to exercise choice in reproductive healthcare*. International Journal of Gynaecology and Obstetrics.

<sup>227</sup> UNICEF The Evolving Capacities of the Child (2005) 4.

<sup>228</sup> Lansdown G, Innocenti Insight: The Evolving Capacities of the Child. *Innocenti Research Center UNICEF*. Page 34.

<sup>229</sup> Ibid. Note 228. Page 34.

<sup>230</sup> Ibid. Note 228. Page 34.

<sup>231</sup> Ibid. Note 228. Page 34.

<sup>232</sup> Ibid. note 228. Page 34.

reproductive health rights.<sup>233</sup> The Committee on the Rights of the Child correctly argues that States have a duty to enact laws that are aimed at protecting and acknowledging the various childhood capacities.<sup>234</sup> Coupled with Article 14 of the Convention on the Rights of the Child, Article 5 also recognises that before the age of 18 years, children are eligible to exercise rights and this is when the evolving capacities begin.<sup>235</sup> The Committee on the Elimination of Discrimination against Women, (CEDAW), acknowledges the significance of sexual reproductive health rights of women which include adolescents and thus provides such as follows:

...issues of HIV/AIDS and other sexually transmitted disease are central to the rights of women and adolescent girls to sexual health. Adolescent girls... in many countries lack adequate access to information and services necessary to ensure sexual health...are often unable to refuse sex or insist on safe and responsible sex practices.... States parties should ensure the rights of female and male adolescents to sexual and reproductive health education... in specially designed programmes that respect their rights to privacy and confidentiality.<sup>236</sup>

Article 12 of the Convention of the Right of the Child encourages that the views of children be considered where adults are making decisions on behalf of the children.<sup>237</sup> The involvement of adults in making decisions on behalf of adolescents, particularly in sexual reproductive health matters cannot, arguably, be encouraged entirely based on the fact that most adolescents are adamant to speak out about such issues with anyone, let alone their parents. This calls for the autonomy of adolescents to be respected as they too are entitled to exercise their rights independently.<sup>238</sup> Pertinent to this study, Article 12 rightly stipulates that age should not be used as the ultimate yardstick in the consideration of adolescent's views.<sup>239</sup>

The African Charter on the Rights of the Child and Welfare lays down children's responsibilities to help their family and serve their community with due regard to their age. The Charter<sup>240</sup> further echoes the provisions of the Convention of the Rights of the Child.<sup>241</sup>

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<sup>233</sup> Ibid. Note 228. Page 34.

<sup>234</sup> Ibid. Note 228. Page 34.

<sup>235</sup> Cook R, Dickens B.M Recognising adolescent 'evolving capacities' to exercise choice in reproductive healthcare. *International Journal of Gynaecology and Obstetrics*. Vol.7 2000. Page 15.

<sup>236</sup> Ibid. Note 235. Page 15.

<sup>237</sup> Convention on the Right of the Child, Article 12.

<sup>238</sup> Ibid. Note 237. Article 12.

<sup>239</sup> Lansdown G. The Realisation of Children's Participation Rights. A Handbook of Children and Young People's Participation. Perspective from Theory and Practice. *UNICEF*. Page 34.

<sup>240</sup> The African Charter on Children's Rights and Welfare.

<sup>241</sup> The African Charter on the Rights of the Child. Article 4: If children can voice their opinions, then those opinions should be heard and taken into consideration during legal and administrative proceedings.

Article 7<sup>242</sup> provides that a child capable of expressing his/her own views should be allowed to express his/her opinions freely. Important to note that the Charter makes no mention of age as a determinant of any child's capacity in decision

Children under the age of 18 years are considered incapable of exercising their rights and duties without the assistance of parents or guardians.<sup>243</sup> However, the Children's Act provides that children have a right to voice their views in matters concerning them and said views are to be afforded much consideration in the process.<sup>244</sup>

#### *N. Conclusion*

Legally, age plays a major role in determining whether children can exercise their rights without assistance.<sup>245</sup> It is generally accepted that children portray different levels of competence in different environments.<sup>246</sup> Lansdown points out that most courts erroneously assume that competence comes with age.<sup>247</sup>

Children under the age of 18 years are considered incapable of exercising their rights and duties without the assistance of parents or guardians.<sup>248</sup> However, the Children's Act provides that children have a right to voice their views in matters concerning them and said views are to be afforded much consideration in the process.<sup>249</sup> It is generally accepted that children portray different levels of competence in different environments.<sup>250</sup>

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<sup>242</sup> Ibid. Note 240.

<sup>243</sup> Strode A, Slack C, Essack Z, Child Consent in South African Law: Implications for Researchers Service Providers and Policy Makers. *South African Medical Journal* 2010; 100 (4).

<sup>244</sup> Children's Act 38 of 2005. Section 10.

<sup>245</sup> Lansdown G, Innocenti Insight: The Evolving Capacities of the Child. *Innocenti Research Center UNICEF*. Page 36.

<sup>246</sup> Ibid. Note 245.

<sup>247</sup> Ibid. Note 245.

<sup>248</sup> Ibid. Note 243.

<sup>249</sup> Ibid. Note 244. Section 10.

<sup>250</sup> Ibid. Note 245.

## CHAPTER 4

### IV. ANALYSIS, RECOMMENDATIONS AND CONCLUSION

#### *O. Introduction*

Statistics show an escalating increase in HIV/AIDS infection rates among adolescents world-wide, thus the need to curb this pandemic at grass root level is envisaged in this study. Sexual reproductive health rights (SRHR) remain the underlying solution in the fight against HIV/AIDS, hence the need for a change in the existing consent laws which govern the ages of consent for adolescents in relation to SRHS. A report by the United Nations Populations Fund (UNFPA) reveals that the International Conference on Population and Development held in Cairo, defined sexual reproductive health as a primary health service inclusive of information education and counselling on human sexuality and reproductive health, treatment of reproductive health tract infections, among others.<sup>251</sup>

SRHRs are an integral part in one's life and governments ought to take steps in ensuring the full realisation of this right as stipulated in the Constitution.<sup>252</sup> At the 2005 World Summit, an international platform hosted by the United Nations, it was concluded that universal ingress of SRHRs is crucial and such rights were awarded Millennium Development Goal number 5 (MDG) in the fight against maternal death.<sup>253</sup> It is accepted that reproductive health rights have an impact on the population of a society in terms of mortality, fertility as well as socio-economic dynamics with regard to poverty alleviation strategies and economic development.<sup>254</sup> This further points out the importance of SRHRs and the need to promote such rights particularly in adolescents.

South Africa must be applauded for the positive advances in ensuring accessibility SRHRs to all persons, adolescents included. This is firstly evident in section 27 of the Constitution which affords everyone the right of access to health care services and further in section 12 stipulates

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<sup>251</sup> United Nations Populations Fund (UNFPA) A Making Reproductive Rights and Sexual and Reproductive Health a reality for All. 2008. Page 7.

<sup>252</sup> Constitution of the Republic of South Africa. Section 27 (2). The State must take reasonable legislative and other measures within its available resources to achieve the progressive realisation of these rights.

<sup>253</sup> Ibid. Note 251. Page 7.

<sup>254</sup> Ibid. Note 251. Page 8.

the right to bodily and psychological integrity in that everyone is entitled to make decisions concerning reproduction.<sup>255</sup>

This chapter therefore seeks to lay the various aspects of sexual reproductive health rights in relation to adolescents as far as the regulation of ages of consent are concerned.

### *P. Analysis*

It is trite law that children constitute a valuable and yet fragile population of the society, hence the need to formulate laws that seek to protect, guide and advance the positive development of children with due regard to their evolving capacities.<sup>256</sup> The honourable court, in casu, pointed out clearly the strong need for the promulgation of laws that do not subject children to detrimental consequences of their actions/decisions.<sup>257</sup> In analysis, the legal framework extrapolated in chapter 2 reveals the inconsistencies that exist with regard to the ages of consent for children to sexual and reproductive health rights. One is persuaded to argue that these inconsistencies call for the review of laws in a bid to accommodate the evolving times and capacities of childhood.

The reality remains that children, upon reaching adolescent stage, are prone to experiment with their bodies sexually owing to their physical development. Therefore, the need for laws to acknowledge the different evolving stages of children as individuals stands. For instance, the Sexual Offences Act<sup>258</sup> provides for the criminalisation of children's consensual sexual activities with other children of a certain age which was correctly held as unconstitutional by the court in the matter between the *Teddy Bear Clinic for Abused Children and Minister of Justice*.<sup>259</sup> According to Sexual Offences Act<sup>260</sup> the definition of an adolescent was one between the ages of 12 years and 15 years, which is contrary to the Constitutional definition of a child being one whose is below 18 years old.<sup>261</sup> This means that where parties, 12 years and 15 years respectively, engaged in sexual activities such as kissing, both adolescents would be

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<sup>255</sup> The Constitution of South Africa, 1996. Section 12 (b).

<sup>256</sup> *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division and Others* [2003] ZACC 19; 2004 (1) SA 406 (CC) 2003 (12) BCLR 1333 (CC). Para [63].

<sup>257</sup> *The Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development and Others* [2013] ZACC 35. Para [1].

<sup>258</sup> The Criminal Law (Sexual Offences and Related Matters) Act 32, 2007.

<sup>259</sup> *The Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development and Others* [2013] ZACC 35.

<sup>260</sup> The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32, 2007.

<sup>261</sup> Constitution of the Republic of South Africa, 1996. Section 28 (3).

found guilty of an offences under this Act and prosecuted without the defence of close-in-age.<sup>262</sup> There exists another inconsistency between sexual intercourse and age of consent to contraceptives. For example, the age of consent for sexual intercourse is 16 years, whereas children aged 12 years are eligible to consent for contraceptives and no age restriction is placed for termination of pregnancy. There ought to be a link between sexual reproductive health rights and the ages of consent.

Age restrictions can play a positive role in instances such as prohibiting prosecution for behaviour where children have no competence to understand the consequences of certain behaviour.<sup>263</sup> Children can also be protected from the harsh repercussions of the criminal justice system due to their youthfulness and vulnerability.<sup>264</sup> The basis, mainly, for placing age restrictions on children is commonly necessitated by the assumption of children's incapacity<sup>265</sup> at a certain ages. According to South African law, children under the age of 18 years are considered as minors, incapable of making decisions on their own without assistance from parents or legal guardians.<sup>266</sup> As eluded in chapter 3 of this study, the law acknowledges the evolving capacities of childhood by providing instances whereby children are legally empowered to act without assistance from parents or guardians. This is evidence of the legislator's acknowledgment of the evolving times and capacities of childhood.<sup>267</sup>

On an international front, in the case of *Gillick v West Norfolk and Wisbech Area Health Authority and the DHSS*<sup>268</sup> the British House of Lords acknowledged that children under the age of 16 years are not incapable of making decisions on their own based solely on their age, however, they acquire the capacity once s/he reaches a sufficient understanding as well as intellect which enables them to make up their own mind on matters requiring a decision.<sup>269</sup> With thus said, this decision prompts the urgent assessment of a child's level of maturity, a

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<sup>262</sup> *The Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development and Others* [2013] ZACC 35 at para [21].

<sup>263</sup> Lansdown G, *The Evolving Capacities of the Child*. UNICEF. Page 36.

<sup>264</sup> *Ibid.* Note 263. Page 36.

<sup>265</sup> *Ibid.* Note 263. Page 36.

<sup>266</sup> Strode A, Slack C, Essack Z, *Child consent in South African Law: Implications for researchers, service providers and policy makers*. *South African Medical Journal*. 2010; 100 (4):247.

<sup>267</sup> *Ibid.* Note 266. 247.

<sup>268</sup> 1985 3 All ER 402.

<sup>269</sup> *Gillick v West Norfolk and Wiesbech Area Health Authority and the DHSS* 1985 All ER 402.

conundrum which this study seeks to address by pointing out the need to review certain ages for consent.

i) *Sexual intercourse*

The set legal age for consent to sexual intercourse in South Africa is 16 years, regardless of sexual orientation.<sup>270</sup> Sexual intercourse is defined as any act which causes penetration by genitals of a person into or beyond the genital organs, anus or mouth of another person.<sup>271</sup> Sexual intercourse is a prominent factor in the transmission of HIV and other sexually transmitted diseases in South Africa thus it is imperative to review the impact of the stipulated ages of consent in this regard. Therefore, this calls for a review of the set ages to keep up with current times. However, prior to the effective reviews of the ages of consent, and implementation thereof, it should be noted that the reality is such that adolescents have an early sexual debut generally. This was noted by the learned Constitutional Court in the *Teddy Bear*<sup>272</sup> case wherein the plaintiffs also highlighted that it was only normal for young people to experiment with their bodies owing to their physical and emotional changes as they enter adolescent stage, arguably a clear example of evolving capacity. The issue in the *Teddy Bear* case was the unconstitutionality of sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act<sup>273</sup> in that it criminalises consensual sexual conduct among children.<sup>274</sup> Arguments lodged in favour of these provisions by the respondents was that the provisions were put in place to protect children from consequences and risks of early sexual activities to which the unanimous court ruled that indeed sections 15 and 16 were unconstitutional to the effect that they infringed on adolescent's (12-16 years old) right to privacy and dignity.<sup>275</sup> As a resolution, the court ordered the Parliament to amend the relevant sections 15 and 16<sup>276, 277</sup>.

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<sup>270</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 1977 Section 15 and 16.

<sup>271</sup> Sexual Offences and Related Matters Amendment Act 32 of 1977 Section 1.

<sup>272</sup> *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* (2013) ZACC 35.

<sup>273</sup> 32 of 2007.

<sup>274</sup> Media summary: *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* (2013) ZACC 35.

<sup>275</sup> Media summary: *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* (2013) ZACC 35.

<sup>276</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

<sup>277</sup> Media summary: *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* (2013) ZACC 35.

ii) *Access to Contraceptives*

According to UNFPA South Africa, approximately 65% usage of contraceptives and such contraceptives are available in most of government health facilities country-wide as well as other public for a such as public toilets, clinics, telephone booths and various shops.<sup>278</sup> However, condoms are not yet available in schools, a crucial place where adolescents spend most of their time.<sup>279</sup> Generally, contraceptive means a method of preventing pregnancy, it may be in the form of a pill or injection. Injections and pills on one hand require medical intervention before administered onto a patient unlike condoms which are easily accessible as discussed above.<sup>280</sup> Most adolescents negatively believe that contraceptives cause infertility, as a result, adolescents are adamant on using contraceptives.<sup>281</sup> Culturally, contraceptives are perceived as immoral which explains why most adolescents are not well versed with available contraceptive methods.<sup>282</sup> This can partly be attributed to the patriarchal society we live in where young girls are made to believe that they are inferior to their male counterparts the main reason behind the high prevalent rate of female adolescent school drop-outs. Males are of the view that once a female uses contraceptives, it automatically implies that she will start being promiscuous and the males would not be able to control that behaviour.<sup>283</sup> The reasoning behind this notion falls short of the recognition of equal right to sexual and reproductive health rights thus this study advocates for early knowledge on sexual reproductive health rights for both male and female adolescents.

The Children's Act explicitly points out that where condoms are freely provided, no one may refuse to sell or provide such condoms to a child over the age of 12 years.<sup>284</sup> Other contraceptives, excluding condoms, can be given to a child without consent of parent or guardian if that child is above 12 years, has been given proper medical advice and medical examination must have been conducted to elicit any kind of contraceptive which may not be used on said child.<sup>285</sup> The Children's Act<sup>286</sup> does not make provision for instances where consent is withheld by the parent or guardian, however, the High Court is empowered to

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<sup>278</sup> Singh J, Age of Consent: Legal, Ethical, Cultural and Social Review South Africa Country Report page 11.

<sup>279</sup> Ibid. Note 278. Page 11.

<sup>280</sup> Ibid. Note 278. Page 11.

<sup>281</sup> Ibid. Note 278. Page 11.

<sup>282</sup> Ibid. Note 278. Page 11.

<sup>283</sup> Ibid. Note 278. Page 11.

<sup>284</sup> The Children's Act 38 of 2005 section 134 (1) (a)-(b).

<sup>285</sup> Ibid. Note 284. Section 134 (2) (a-c).

<sup>286</sup> 38 of 2005.

consent where the best interests of the child are established.<sup>287</sup> Where an adolescent is granted any form of contraceptive after following proper and stipulated procedures, which may include medical examinations, such adolescent is entitled to confidentiality.<sup>288</sup>

iii) *Termination of Pregnancy*

The Choice on Termination of Pregnancy Act<sup>289</sup> regulates termination of any pregnancy, stipulating the acceptable time frames upon which such termination may be carried out and it blatantly mentions that there is no age limit for consent. The Act points out that only the consent of the pregnant woman is enough in termination procedures<sup>290</sup>, however, the question then becomes: what is the procedure for young pregnant girls who wish to terminate their pregnancies? In response, the Act<sup>291</sup> encourages the registered nurse or attending midwife to advice the pregnant minor to consider consulting her parents before the termination of the pregnancy.<sup>292</sup> This is to create an awareness of the gravity of the consequences regarding the decision that which the pregnant minor is expected to make on her own.

On the same wavelength, the Act<sup>293</sup> seeks to provide proper medical termination of pregnancies as opposed to the notorious backstreet abortions that is common among adolescent girls. In this study, attention is drawn to the importance of educating young girls on sexual reproductive health rights and services to they are entitled without fear of discrimination or violation of privacy. Every health user is entitled to confidentiality as codified in the National Health Act<sup>294</sup> which clearly states that all information regarding health of a patient remains confidential.<sup>295</sup> Confidentiality is a major barrier for easy access to termination of pregnancy services for adolescents as they fear that the attending health worker may divulge such information to their parents and other staff members which ultimately hinders their access to sexual reproductive

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<sup>287</sup> Heaton J, *The South African Law of Persons*. 5<sup>th</sup> ed, *Lexis Nexis*. Page 104.

<sup>288</sup> Children's Act 38 of 2005 section 134 (3).

<sup>289</sup> 92 of 1996.

<sup>290</sup> Choice on Termination of Pregnancy Act 92 of 1996 section 5 (1).

<sup>291</sup> 92 of 1996.

<sup>292</sup> *Ibid.* Note 290. Section 5 (3).

<sup>293</sup> *Ibid.* Note 290.

<sup>294</sup> National Health Act 61 of 2003.

<sup>295</sup> *Ibid.* Note 294. Section 14.

health services.<sup>296</sup> The Regulations published in the Act<sup>297</sup> echo the provisions of the National Health Act<sup>298</sup> as it advocates for the upkeep of private counselling for the pregnant woman.<sup>299</sup>

iv) *Consent to HIV Testing*

In terms of the Children's Act<sup>300</sup>, children may consent to HIV only if this is in their best interests and where a child is below 12 years old, s/he may consent if s/he possesses sufficient maturity to understand the risks and benefits of the proposed HIV test.<sup>301</sup> Parental consent may be sought if the child is under 12 years and lacks sufficient maturity to understand the implications of the test.<sup>302</sup> In the absence of a parent or guardian, a superintendent of the hospital may give such consent.<sup>303</sup> A Children's court may give consent in circumstances where parental consent is unreasonably withheld or where the parent or care-giver is not competent to consent on behalf of the child.<sup>304</sup>

v) *Medical treatment*

At present, a child may consent to medical treatment if s/he is 12 years, has sufficient maturity and is also required to have the necessary mental capacity to understand the social risks and implications of the medical treatment.<sup>305</sup> Not all medical treatment is necessary as some procedures are purely cosmetic for instance, breast implants. However, treatment such as the antiretroviral treatment for HIV/AIDS is a necessity because there is no cure for the pandemic. In South Africa, there is an Operational Plan for Comprehensive HIV/AIDS Care, Management and Treatment which provides guidelines for the administration of ARV treatment to those infected with HIV including children below the age of 6 years which does not however, make provision for consent to such treatment.<sup>306</sup> Instead, consent to ARV treatment is governed

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<sup>296</sup> Smith P. What do South African adolescents want in a sexual health service? Evidence from the South African Studies on HIV in Adolescents (SASHA) Project. *SAMJ*. 2018.

<sup>297</sup> Choice on Termination of Pregnancy Act 92 of 1996.

<sup>298</sup> 61 of 2003.

<sup>299</sup> Regulations under the Choice on Termination of Pregnancy Act 92 of 1996 Regulation 8 (c).

<sup>300</sup> 38 of 2005.

<sup>301</sup> Children's Act 38 of 2005 section 130 (2) (a) (i-ii).

<sup>302</sup> Ibid. Note 301. Section 130.

<sup>303</sup> Ibid. Note 301. Section 130.

<sup>304</sup> Ibid. Note 301. Section 130.

<sup>305</sup> Ibid. Note 301. Section 129 (2) (a-b).

<sup>306</sup> Singh J, Age of Consent: Legal, Ethical, Cultural and Social Review South Africa Country Report. Page 11.

generally by the Children's Act<sup>307</sup>, this is a clear call for the stipulation of the ages of consent for ARV treatment especially regarding adolescents.

vi) *Male Circumcision*

The Children's Act<sup>308</sup> clearly stipulates that no child may be subjected to cultural or religious practices which are detrimental to their wellbeing.<sup>309</sup> This includes circumcision. The Act<sup>310</sup> also provides that male circumcision of children below the age of 16 years is not allowed unless such circumcision is performed for religious purposes or where it is performed for medical purposes upon the recommendation of a medical practitioner following relevant counselling.<sup>311</sup>

*Q. Conclusion*

In response to this study's research question, I thus conclude as follows:

i) *Whether consent laws act as a barrier to adolescents' access to sexual and reproductive health services?*

It is lamentable to concur that consent laws act as a barrier to adolescents' access to SRHS and these barriers emanate from country laws and policies that are intended to be both punitive and discriminatory as well as restrictive in their application. These age restrictions have created a barrier limiting adolescents from accessing sexual and reproductive health services which has led to an undeniable increase in unwanted pregnancies, sexually transmitted infections and ultimately an increase in the rate of HIV infection among adolescents. The recognition of the evolving capacities of childhood have a positive impact on the autonomy of children. Adolescents are adamant to approach health facilities, particularly public hospitals, for information on their sexual and reproductive health rights.

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<sup>307</sup> 38 of 2005 section 129.

<sup>308</sup> Ibid.

<sup>309</sup> Ibid. Section 12 (1).

<sup>310</sup> Ibid.

<sup>311</sup> Ibid. Section 12(8) (a-b).

- ii) *Whether consent laws are based on the principle of the evolving capacities of adolescents?*

To a large extent, one may argue that the current consent laws are premised on the principle of evolving capacities of adolescents. This is to the effect that there are laws require a child to reach a certain age to consent, whereas, in some medical interventions, adolescents are required to show a certain capacity.<sup>312</sup> For example, consent for HIV testing and contraceptives only requires the adolescents to be 12 years, while consent for medical treatment and surgical operation, adolescents must be 12 years and show a certain capacity (sufficient maturity).<sup>313</sup> In this manner, one observes that the laws governing SRHR for adolescents are indeed founded on the principle of the evolving capacities of adolescents.

- iii) *Whether the law is premised on research relating to the developmental stages of adolescents?*

The legal age of majority in South Africa is 18 years, where upon a person may then be regarded as having gained majority which ultimately warrants them full legal responsibility. Given the common age of 12 years upon which adolescents may consent to certain, but not all, sexual reproductive health services, it stands to reason therefore that there exists an inconsistency in our legal system. For instance, the ambiguity lies where a 12-year-old adolescent is permitted to access contraceptives, yet it is only at 16 years that such adolescent is considered capable of consenting to sexual intercourse. This is a clear call for the review of the stipulated ages of consent to cater for the evolving capacities of children currently. As it was enunciated in the Teddy Bear case, adolescents are bound to experiment with their bodies owing to the physical changes in their bodies can-not be ruled out.

#### *R. Recommendations*

Reflecting on the research questions enunciated in the first chapter of this study, I put forth the following recommendations:

- i) *Sensitising adolescents on Sexual and Reproductive Health Rights*

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<sup>312</sup> Strode A, Slack C, Essack Z Child consent in South African law: Implications for researchers, service providers and policy makers. *South African Medical Journal* 2010; 100 (4). Page 249.

<sup>313</sup> Ibid. Note 312. Page 249.

It is important to facilitate information dissemination on SRHRs to adolescents for them to realise that they are indeed entitled to these rights. This can be executed through carrying out educational programmes in venues where majority of adolescents can be found such as in schools. In the advent of the HIV/AIDS pandemic, South African Non-Profit Organisation must be applauded for programmes such as the Love Life campaign, an initiative aimed HIV prevention measures among the youth.<sup>314</sup> Lovelife carries out outreach programmes to create awareness of positive living among adolescents who are HIV positive and to ensure that there are no new infections in this regard.<sup>315</sup> According to statistics, 66% of South Africa's population is made up of young people therefore the need to protect the future of this country by tackling health issues surrounding young people.<sup>316</sup>

Young people are exposed to a number of risky social ills such as unwanted/ teenage pregnancies, drug abuse, HIV/AIDS, to mention a few, which necessitated the need to educate them more on their rights particularly the avenues where they can get assistance when face with these challenges. Education on SRHRs such as the right to contraceptives and contraceptive advice can help reduce the chances of young people dropping out at schools due to unwanted pregnancies as well as prevent the loss of lives as a result of backstreet abortions.

*ii) Proper execution of existing laws*

The need to give due regard to the provisions of the Constitution cannot be stressed enough as this is the highest law of South Africa. From the foregoing discussion in chapter 2 on the legal framework of South Africa it stands to reason that the provisions on the regulation of consent laws relating to sexual and reproductive health rights for adolescents require uniform application. This calls for the provisions contained in the different legislations to be consistent and reasonable. For example, the provisions in the Sexual Offences Act<sup>317</sup> provide that the legal age for consent to sexual intercourse is 16 years, whereas, the Children's Act<sup>318</sup> provides that a 12-year-old child is at liberty to consent to contraceptives without assistance of parents or guardians. The Parliament needs to review these provisions considering the evolving capacities of children as individuals.

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<sup>314</sup> <https://lovelife.org.za> Accessed 2 March 2019.

<sup>315</sup> <https://lovelife.org.za> Accessed 2 March 2019.

<sup>316</sup> <https://lovelife.org.za> Accessed 2 March 2019.

<sup>317</sup> The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 1977.

<sup>318</sup> Children's Act 38 of 2005.

### iii) *Review of laws*

Many of the current laws regulating the ages of consent to SRHRs for adolescents have been reviewed. For medical treatment, the age of consent was set at 14 years, for operations, it was at 18 years. Currently, the standard age of consent for such medical interventions is at 12 years plus sufficient maturity is required. This is evident that south African legal system has taken a positive stride in the recognition of the evolving capacities of childhood as alluded in chapter 3 of this study. However, there remains a lacuna in terms of clearly explaining for example phrases such as “sufficient maturity”.

There is a need for the laws governing SRHR to be strengthened and monitored in a way that advances protection of adolescents and their rights.

### *S. Conclusion*

Young people are naturally born with the potential to thrive in a successful life with the assistance of parents or guardians. However, there exists social calamities that shatter such success in the form of HIV/AIDS, teenage pregnancies, drugs, to mention a few. There also comes a time where young people need to be granted the liberty to make decisions without any third-party intervention and SRHRs are no exception.

According to the United Nations World Health Organisation, 2 million adolescents (10-19 years), are infected with HIV and a majority lack basic health services such as sexual reproductive health services.<sup>319</sup> It is therefore imperative for adolescents to have easy access to sexual and reproductive services that are tailored to cater for their needs taking into consideration their evolving capacities of childhood.

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<sup>319</sup> from <https://www.who.int/campaigns/aids-day/2013/en/> Accessed 12 December 2018

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