Criminalising consensual sex puts adolescents at risk

A significant number of adolescents in Africa are sexually active by the age of 17. Age of consent laws that criminalise adolescent consensual sex stigmatise normal adolescent behaviour, and are a barrier to access to sexual health information, and services for adolescents.¹ This puts adolescents at risk of teenage pregnancies, and contracting STIs, including HIV.²,³ This policy brief explains why decriminalising adolescent consensual sex would contribute to the elimination of the AIDS epidemic by 2030, and the attainment of the Sustainable Development Goals (SDGs) in Africa.

Age of consent laws may have the legitimate aim of protecting adolescents from harmful consequences of engaging in sexual conduct at an early age. However, consenting adolescents do not need to be prosecuted and/or punished by state law for engaging in consensual sexual activity.⁴ Further, states should invest in comprehensive sexuality education, and access to adolescent friendly health services that promote adolescent sexual health and well-being.⁵

An outmoded colonial inheritance

Most African states inherited age of consent laws through western penal, and criminal codes during the colonial era. Originally, these age of consent laws were designed to preserve the virginity of girls for marriage by prohibiting boys and men from having premarital intercourse with them.⁶ Hence, girls who were sexually active before marriage were considered to have been ‘defiled’. Age of consent laws did not address the question of consensual sex between adolescents because their underlying aim was to shield girls from pre-marital sex.

‘Age of consent’ describes the minimum age below which certain sexual acts are prohibited. Adolescent means persons aged between 10 and 19. Very young adolescents (VYAs) means adolescents aged between 10 and 14

Colonial age of consent laws were based on the gender stereotype that girls have a weaker and passive sexuality that should be protected from male sexuality. These laws do not, therefore, make a distinction between boys and men, so that adolescent boys who have sexual relationships with girls who are their peers are criminalised alongside men who prey on the vulnerability of young girls to have sex with them. The ideologies behind such age of consent laws are therefore contradictory to the obligation of African states to respect, protect and fulfil the rights of the child under their commitments to regional, and international treaties including the African Charter on the Rights and Welfare of the Child (ACRWC), and the United Nations Convention on the Rights of the Child (UNCRC). They also contradict the idea of gender equality as envisaged in the Sustainable Development Goals (SDGs).

Age of consent laws can create challenges for adolescents

Age of consent laws have the legitimate aim to prevent harm to persons considered vulnerable to consequences of sexual conduct because of their young age. Some states, however, exceed this aim and include the criminalisation of consensual sexual conduct between adolescents who are peers in age. Such a rationale was explained by a Kenyan court in the case of CKW. In this case, an adolescent boy of 16 years old was prosecuted for having consensual sex with his girlfriend of the same age, that is, 16.⁷ The Court expressed the view that it was necessary for adolescents of below 18 (age of consent in Kenya) who have consensual sex to face the wrath of the criminal justice system in order to protect the same adolescents from harms associated with early sexual debut. Other courts, however, for example in Zimbabwe,⁸ and South Africa,⁹ have disagreed with the view that it is necessary to punish adolescents in consensual sexual relationships in order to address challenges harmful consequences of early sex such as teenage pregnancies, and HIV.¹⁰

It is counterproductive to adolescent development and well-being to criminalise sex that is consensual between adolescents because it stigmatises normal adolescent sexual conduct. Sexually active adolescents are regarded as criminals for engaging in conduct that is normal to their developmental age. This has prompted judges of the High Court in Kenya to lament on how the prisons are teeming with young men because they have had sexual intercourse with adolescent girls. The judges have questioned the wisdom and justice of the criminal justice system responsible for creating such a tragedy.¹¹ States should indeed be concerned with the problem of underage sex and pursue laws and policies that...
would facilitate delaying sexual debut and protect boys and girls from harm including predatory sex, and the consequences of early sex, such as teenage pregnancies and exposure to HIV. However, an important precondition is an environment in which adolescents are open to one another and adults about matters of sexuality, and can confidently seek education, information and sexual health services from caregivers.

Criminalising adolescents for engaging in consensual sexual conduct creates fear and anxiety for the adolescents to confidently seek guidance on sexuality, and for adults and caregivers to respond to the sexual health needs of adolescents. Further, it unnecessarily exposes adolescents to the harshness of the criminal justice system when the challenges of teenage pregnancies and STIs and HIV could be addressed with less drastic means.

Criminal law impacts on normative adolescent sexual behaviour

In Africa, most adolescents engage in sexual intercourse for the first time between the ages of 15 and 18. A significant number of adolescents are having sexual intercourse by the age of 17.12 Evidence from research such as the Global Early Adolescent Study (GEAS) show that adolescents start to engage in lower hierarchy sexual behaviours such as kissing and petting at earlier ages, so that some Very Young Adolescents (VYAs) are already engaging in sexual activity including sexual intercourse.13 Even if relatively few VYAs engage in sexual activity, they are certainly getting to talking about and contemplating sexual activity.14

In African countries, the ages of consent vary from 11 years in Nigeria to 18 years in countries including Kenya, Uganda, Swaziland, and Tanzania. Some countries are in between, for instance 13 years in Comoros, 14 years in Namibia, and 16 years in Zambia, Zimbabwe and South Africa. Most countries are concentrated in the 16 – 18 range.15 Some countries explicitly criminalise adolescents for having sex, such as Uganda. Most countries do not explicitly state that adolescents below the age of sexual consent would be prosecuted if they have consensual sex. For instance, the sexual offences law in Kenya does not explicitly criminalise adolescents, but the Kenyan High Court in CKW, referenced above, confirmed that adolescents engaging in consensual sex would be prosecuted.

It is normal that as adolescents develop, they would at some point start to think and talk about sex. They would then on go to sexual exploration beginning with low hierarchy sexual behaviours and progressively work their way up to sexual activity, some at an earlier age than others. According to experts in adolescent developmental psychology, early sexual experiences in adolescence have a significant effect on future sexual experiences and outcomes.16 It is therefore critically important to guide and support adolescents to make healthy and informed choices, and to experience sexual development positively.

For this to happen, communication between adults and adolescents on sexual matters should be as open as possible. Comprehensive sexuality education encourages such openness. Most importantly, comprehensive sexuality education has proved to have a positive effect on delaying sexual debut and reducing the risk of teenage pregnancies, HIV and other STIs.17

On the other hand, evidence shows that laws criminalising adolescent sexual conduct have the unintended consequence of creating an atmosphere that discourages adolescents from seeking sexual health information and care. A research conducted in Senegal demonstrated how the age of consent law of Senegal constituted an indirect barrier to access to sexual health information and services for adolescents.18 Article 320 of the Senegalese Penal Code prohibits any sexual activity including kissing or touching with a person of below 16.

It was found that this law is interpreted by young people that persons below 16 cannot have sex, so that sexually active adolescents below this age lead a secretive sexual life to avoid prosecution. When young people seek sexual health services, they are denied because health providers interpret the law as excluding persons of below the age of consent from certain sexual health services.

The intersection of law and sociocultural factors

Criminalisation of adolescent sexual conduct does not operate in a vacuum. There is such an interplay between the law and socio-cultural factors that negative laws tend to reinforce cultural discriminatory attitudes and practices. For instance, an ethnographic study in Uganda explored the unintended consequences of raising the age of consent to 18, and at the same time criminalising adolescent sexual conduct.19

It was found that fathers used the criminal law to control who could have access to their daughters. Fathers would threaten to report poor boys to authorities, or indeed, press charges when a boy impregnated the girl but
could not afford to pay money to the girl's family. They, however, accepted boys or men with financial means to have access to their daughters. The fathers, therefore, used criminal law to control the choices of sexual partners of their daughters. The study in Senegal, referenced above, is also a good example of the interplay between criminal law and culture. According to Senegalese culture and religion (Senegal is predominantly Muslim), unmarried adolescents are not supposed to have sexual intercourse. The prohibition against pre-marital sex is culturally enforced by parents, especially on the girls, to maintain virginity before marriage.

The research found that most of the participants interviewed did not know precisely the age of consent as stipulated in law. Rather, they interpreted the law through their expectations according to cultural and religious beliefs. The age of consent law therefore reflected and reinforced these beliefs about acceptable and unacceptable adolescent sexual conduct. The effect is that parents, peers and caregivers, such as health providers, use the law to justify their judgmental attitudes and discriminatory conduct regarding adolescent sexuality, when in fact they are enforcing cultural and religious beliefs.

Adolescents need support not condemnation

It is a normal trajectory of development that adolescents would start to engage in sexual conduct at some stage, some at an earlier age than others. It is crucial that adolescents, from a very young age, be supported to experience their sexuality positively including to make healthy choices regarding sexual conduct. Criminalising normative sexual behaviour of adolescents does not necessarily result in positive/healthy sexual behaviour among adolescents. It only drives it underground and out of sight. Most importantly, it is a barrier that puts adolescents at risk because it prevents them from seeking sexual health information and services. While delaying sexual debut is a legitimate policy objective, it is important to ensure that adolescents are supported to make informed and healthy choices when they do decide to engage in sexual activity.

Recommendations: A positive approach to adolescent sexuality

Criminalisation of adolescent consensual sex to address harms of early sex or protect adolescent from harm in fact does more harm than good. There are less drastic and more effective measures of addressing these. These measures should also be in line with the obligations of states to respect, protect and fulfil the rights of the child under the ACRWC and UNCRC. This brief therefore makes the following recommendations:

- States should review age of consent laws and explicitly decriminalise sexual conduct between consenting adolescents.
- States should invest in comprehensive sexuality education to empower adolescents with knowledge about sexuality that would enable them to make informed and healthy choices when they decide to engage in sexual activity.
- States should enhance the reach of adolescent friendly sexual and reproductive health information and services to all adolescents, including VYAs.
- Civil society should raise awareness about the harmful impact of criminalising adolescent sex and its consequences to adolescent sexual health and development.
- Development partners and intergovernmental organisations should provide the necessary support to states to ensure that age of consent laws harmonise with human rights and development policies such as the SDGs, to effectively address challenges such as teenage pregnancies and STIs/HIV/AIDS amongst young people.

Conclusion: Decriminalisation would have a positive impact on development

Criminalising adolescent sex to control sexual behaviour of adolescents is unnecessary and does more harm than good. Decriminalising normal sexual conduct would facilitate better communication between adolescents and adults about sex and sexuality which is necessary to enable adults to give optimal support to adolescents. Africa stands to benefit by discarding punitive laws and policies regulating normal adolescent sexual conduct.

This would have a positive impact on adolescent development especially sexual health and well-being, and gender equality. It would greatly contribute to Africa’s efforts to eliminate the AIDS epidemic by 2030, and to achieve the SDGs.

Children are precious members of our society and any law that affects them must have due regard to their vulnerability and their need for guidance. We have a duty to ensure that they receive the support and assistance that is necessary for their positive growth and development. We must be careful, however, to ensure that, in attempting to guide and protect children, our interventions do not expose them to harsh circumstances which can only have adverse effects on their development - Justice Sisi Kampepe in Teddy Bear Clinic.

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As part of our work under the Challenging Criminalisation Globally project, Accountability International, in collaboration with regional partners in Africa, Asia and Latin America, launched regional-focused campaigns.

The Africa Regional Campaign – dubbed ‘Simama’ – aimed to raise awareness on criminalisation in Africa based on identity, sexuality, morality and bodily autonomy, and its impact on the attainment of the global commitments of ending AIDS by 2030 and the related sustainable development goals.

‘Simama’ is a Swahili word for ‘stand up/rise up.’ The campaign focused on criminalisation in 8 areas: adult sex work, abortion, adolescent sexuality, adultery/consensual sex outside of marriage, same-sex sexual activity, gender identity and expression, HIV non-disclosure, exposure, and transmission and personal possession and use of drugs. As part of ensuring the success of Simama, Accountability International assumes that it is important to start by informing and highlighting the importance of challenging criminalisation and its impact on individual lives and their access to social justice, health and human rights.

Further, it becomes it import to demonstrate how failure to challenge criminalisation will impact on the attainment of global commitments. Given the above, Simama put emphasis on providing background on criminalisation and the importance of challenging criminalisation across the continent.

#ChallengeCrim
References

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Accountability International is an African-led civil society organisation that works to improve accountability to the most marginalised. From our head office in South Africa, we conduct research and advocacy that allows us to do our work as a watchdog and hold various leaders accountable.

We conceptualise and implement innovatively designed projects that are led by our collaboration with marginalised communities. We put huge emphasis on needs-based research and community-led advocacy. We have developed more than a dozen scorecards since we began in 2005, all as a means to contribute to the demand for accountability from all leaders, whether at global, regional, national or community level.

We provide technical advice in many spaces, and yet remain committed to ensuring that our spaces, communications and products are all highly accessible to all people. We play a watchdog role and work to enhance the capacity of other civil society actors to also take up their role as watchdogs, for sustainable, resilient and inclusive human rights for all.

We use the Participatory Action Research (PAR) model, a best practice in which communities co-develop and lead the methodology, development of research tools, conduct the research and produce the final analysis & context-specific and advocacy-focused reports.

Partnerships are a fundamental element in our work. Over the years, we have developed excellent partnerships with hundreds of organisations, from major implementing partners to community-based organisations with national or local bases.

Accountability International’s vision is a world where there is accountability for the lives, human rights and wellbeing of all persons, across all spheres of society.