

## NOTES / AANTEKENINGE

### AFRICAN CHILDREN AND SEXUALITY: A PERSPECTIVE ON TRADITIONAL AND CONTEMPORARY APPROACHES

#### 1 Introduction

For many years in South Africa, sexual acts with, and between children under the age of sixteen, were regarded as a sexual offence, even if consensual. A twist to this legal position was brought about by the case of *Teddy Bear Clinic for abused Children v Minister of Justice and Constitutional Development* (2013 (12) BCLR 1429 (CC)), where the Constitutional Court decriminalized consensual sexual activity between children of certain age-ranges, starting from the age of twelve. Prior to serving before the Constitutional Court, this case was heard by the North Gauteng High Court (*Teddy Bear Clinic for abused Children and Another v Minister of Justice and Constitutional Development*, case number: 73300/10 (unreported)). The application brought before the High Court challenged the constitutional validity of sections 15 and 16 of the Sexual Offences and Related Matters Act (32 of 2007) in as far as the said provisions criminalize a range of consensual sexual activities between children of a certain age (see par 1–2; and see also par 23). Sections 15 and 16 respectively criminalize acts of consensual sexual penetration and sexual violation between children (par 16).

The court's decision of decriminalizing consensual sexual acts of children of certain ages has created a space for a discourse on children and their decision-making on sexual matters. The court's decision further paved way for a reflective discussion of traditional and contemporary approaches used in conscientizing children about their sexuality. As discussed below, the said approaches immensely influence the decisions that children make in sexual matters that affect them.

It is asserted in this article that, while legal developments in the contemporary society (see below discussion of the Childrens Act 38 of 2005 and the *Teddy Bear Clinic for abused Children v Minister of Justice and Constitutional Development* decision) emphasize the individualistic nature of a child when dealing with matters of his sexuality, it is argued that this approach cannot be the sole basis in dealing with sexuality of children. This is because the Constitution (Constitution of the Republic of South Africa, 1996) which serves as a bedrock of our legal system recognizes customary law as a distinct component of the South African legal system (s 39(2)). It further recognizes the multi-cultural nature of the society within which children are raised. It provides that everyone has the right to participate in the cultural life of their choice, guided by the dictates of the Bill of Rights (s 30).

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This article seeks to explore the extent to which the Constitution, in as far as it recognizes the pluralist nature of our society, is assimilated in legislation and case law when dealing with the sexuality of children.

## **2 The indigenous African value-system**

Customary law recognizes the communal system of living as a core basis for the indigenous African value-system. According to this system, children are dependent on family, including members of the extended family, and the greater community, for livelihood and well-being (Himonga "African Customary Law and Children's Rights: Intersections and Domains in a New Era" in Sloth-Nielsen (ed) *Children's Rights in Africa: A Legal Perspective* (2008) 79). Children are also encouraged to recognize the significance of the family and the community in their upbringing (Himonga in Sloth-Nielsen (ed) *Children's Rights in Africa: A Legal Perspective* 79). Both domestic and regional laws afford recognition to the communal way of life practised by indigenous African people. The African Charter on the Rights and Welfare of the Child (OAU Doc.CAB/LEG/24.9/24.9 (1990)) imposes an obligation on children to respect culture and tradition. It provides that a child has the responsibility to preserve and strengthen African cultural values in his relations with other members of society in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of society (Article 31(d)). The Children's Act (38 of 2005) on the recognition of the indigenous African value-system also provides that, when applying the best interests of the child standard factors that must be considered include: the need for the child to remain in the care of his or parent, family and *extended family*; and to maintain a connection with his or her family, *extended family, culture or tradition* (s 7(1)(f)) (author's emphasis added).

Research shows that irrespective of the modern lifestyle adopted by Africans in general, there is still a substantial number that still lives according to the dictates of the Indigenous African culture, even if in its evolved state. These are predominantly in rural areas, and children constitute a large percentage of them. Statistics show that 54.1% (an equivalent of almost 10 million) of South African children live in rural areas (Hall "Housing and services-Urban-rural distribution" 2009 [http://childrencount.ci.org.za/uploads/factsheet\\_13.pdf](http://childrencount.ci.org.za/uploads/factsheet_13.pdf) (accessed 2013-03-15)). For this reason, it is important to consider the manner in which sexuality of children is fostered under indigenous African law and how developments within the South African legal system have affected its traditional ways.

## **3 Sexuality under indigenous African law**

In terms of indigenous African culture, the welfare of children is not separable from the family group (Bennett *Customary Law in South Africa* (2004) 295). Furthermore, sexuality is viewed as central to the development of every child and there are structures in place aimed at fostering the development of children and their sexuality. It is important to note that in terms of tradition parents are not directly involved in mentoring their children about sexuality. In fact, it is considered a taboo to discuss matters of sexuality with one's own parents (Bastien, Kajula and Muhwezi "A Review of

Studies of Parent-Child Communication about Sexuality and HIV/AIDS in Sub-Saharan Africa” 2011 *Reproductive Health* 2).

Nonetheless, like in many other indigenous African aspects, mentoring of children about sexuality is a collective responsibility (Wickström “Virginity Testing as a Local Public Health Initiative: A ‘Preventative Ritual’ more than a ‘Diagnostic Measure’” 2010 16 *Journal of the Royal Anthropological Institute* 543). Designated members of the community mentor children on sexual matters and eventually usher them into adulthood. Such mentorship is usually carried out by uncles, aunts and grandparents. Young maidens (called *izinkehli* and *amaqhikiza* in *isiZulu*) and older boys who are not yet married, but had already acquired knowledge and some experience on sexual matters, also play an active role in the process of mentorship.

Mentors have regular conversations with girls and boys about various stages of their physiological development and matters of a sexual nature (Martin and Mbambo “An Exploratory Study on the Interplay between African Customary Law and Practices and Children’s Protection Rights in South Africa” 2011 45 <http://resourcecentre.savethechildren.se/library/exploratory-study-interplay-between-african-customary-law-and-practices-and-childrens> (accessed 2014-05-06)).

Discussions on sexual matters are generally not embarked upon on an *ad hoc* basis. Children as a group and their mentors embark on this journey of discovery as a collective. Most of it happens at age-grade level, for instance, for girls, group discussions on sexual matters would take place mainly during wood- and water-collection sessions, and for boys, during livestock herding (Delius and Glaser “Sexual Socialisation in South Africa: A Historical Perspective” 2002 61(1) *African Studies* 31).

Although virginity in respect of young girls and boys is held with high regard, the indigenous African system does recognize restrictive sexual acts. In Nguni languages these are referred to as *ukusoma*, *ukuhlobonga* or *ukumetsha*. For instance, mentors, particularly the peers, are also responsible for monitoring the behaviour of older girls and boys towards one another during courtship. This is done in order to prevent the youth from indulging in any prohibited sexual behaviour, such as full penetrative sex (Mudhovozi, Ramarumo and Sodi “Adolescent Sexuality and Culture: South African Mother’s Perspective” 2012 16 *African Sociological Review* 121). If it happens that they, nevertheless, engage in prohibited sexual behaviour, measures would be taken to restore the social equilibrium. (In order to restore the social equilibrium, the girl who had engaged in a prohibited sexual act would be required to answer to the elders as well as her own age-mates about the incident. Thereafter a delegation would be sent to the boy’s homestead to demand a beast in respect of loss of the girl’s virginity (called *ingquthu* beast). In addition, another beast (called *isihewula isidwangu*) is payable to the girl’s family as damages (Bennett, Mills and Munnick “The Anomalies of Seduction: A Statutory Crime or an Obsolete, Unconstitutional Delict” 2009 25 *SAJHR* 332 and 338).

Periodically, rituals are performed to celebrate various stages of the child’s development. (Martin and Mbambo <http://resourcecentre.savethechildren.se/library/exploratory-study-interplay-between-african-customary-law-and-practices-and-childrens> (accessed 2014-05-06)). Rituals are particularly

important in that they are deemed symbolic actions which either bring forth a desired or expected situation or prevent undesired situations (Van Niekerk *The Interaction of Indigenous Law and Western Law in South Africa: A Historical and Comparative Perspective* (1995) 203). Kinship rituals which comprise life-cycle rites are of particular significance in the marking of transition to the different cycles of life and endorsing the change in personal status (Van Niekerk *The Interaction of Indigenous Law and Western Law in South Africa* 204). *Umemulo* for instance is a ritual practised by *amaZulu* to mark the transition of a girl from the stage of childhood to the phase of adulthood (Wickström "'Lungisa' – Weaving Relationships and Social Space to Restore Health in Rural KwaZulu Natal" 2014 *Medical Anthropology Quarterly* 13). During this ritual the elders of the girl express their gratitude to their daughter for entering the phase of adulthood without having brought shame to the family, such as losing her virginity or falling pregnant (Mathonsi and Gumede "Communicating through Performance: Izigiyo Zawomame as Gendered Protest Texts" 2006 24 *Southern African Linguistics and Applied Language Studies* 484). Similar rituals are also found amongst the *vhaVenda* people. The *vhusha* ritual is attended by girls immediately after their first menstrual cycle followed by the *domba*. During this ritual, girls are introduced to a set of rules, referred to as *milayo*, in respect of the developmental phase that they had entered (Anareily "The Ethnographic Enterprise: Venda Girls' Initiation Schools Revisited" 1998 7 *British Journal of Ethnomusicology* 51). The purpose of the *domba* is to prepare both girls and boys for marriage life (Mulaudzi "The Domba Variety: An Initiation Language for Adulthood" 2001 1 *South African Journal of African Languages* 9). During the proceedings, the girls (initiates) are taught about different aspects of life, including sexual acts and restrictions within which sexual engagement had to take place (Mulaudzi 2001 1 *South African Journal of African Languages* 10). Among the Nguni people (with the exception of *amaZulu*), initiation into manhood took place through circumcision followed by seclusion from public participation during the proceedings as part of introduction to adulthood.

The above discussion clearly shows that initiation schools had a tremendous influence on the manner in which members of community conducted themselves. They set standards and values for that particular community (Kuzwayo *Call Me Woman* (1986) 254). It can therefore be said that traditional African structures aimed at fostering the development of children's sexuality yielded positive results.

However, the infiltration of Western ideologies, even during the traditional times of indigenous African law, posed a threat to the latter's structures. The first missionaries, who came into contact with the traditional system aimed at fostering sexuality of children, stigmatized this system. Practices under the traditional system were denounced (Erlank "Missionary Views on Sexuality in Xhosaland in the Nineteenth Century" 2001 11 *Le Fait Missionnaire* 25). Any form of sexual engagement prior to marriage, even within the limitations set by the traditional system, was prohibited. Although the missionaries generally did not comprehend the custom of *ukusoma* or *ukuhlobonga* (*isiZulu*) or *ukumetsha* (*isiXhosa*)), as part of their policy of cultural imperialism, they demonized these noble practices together with many other indigenous acts which they also prohibited, such as polygyny, virginity in-

spection and circumcision. They perceived the African indigenous practices as a violation of the youth (Erlank 2001 11 *Le Fait Missionnaire* 26). In an attempt to uproot the tradition of circumcision of boys, the missionaries condemned this practice as perpetuating polygyny, and consequently, the corruption of girls (Erlank 2001 11 *Le Fait Missionnaire* 29).

In order to mitigate the consequences of eroding the indigenous African structures, the missionaries insisted that dialogues on sexual matters should not be facilitated amongst peers. Such dialogues should be between parents and their children. Basically, they sought to transfer the responsibility of mentorship on sexual matters from peers, as the indigenous African system dictated, to parents (Wickström 2010 16 *Journal of the Royal Anthropological Institute* 543). Furthermore, the negative publicity that has been drawn to the practices of virginity inspection and male circumcision maimed the traditional structures. It cannot be denied that the misuse of these practices, outside the indigenous African contexts led to unwarranted ills in communities, leaving the African youth without the vital principles to guide their sexual decision-making.

Needless to say, the traditional system crumbled. Moreover, attempts to push parents into the centre of mentorship on sexual matters were not successful after the missionaries had completely destroyed the intervention powers of traditional structures. Because of their traditional backgrounds, parents could not discuss sexual matters with ease in the absence of the indigenous environment in which the system thrived. The present *status quo* has led to deficiency in the transmission of information to children. The teachings of the missionaries interfered with the natural, practical and regular flow of guidance that young boys and girls received from their peers. Subsequently, the sometimes abstract dialogues that are artificially developed between parents and children on sexual matters have had a minimal success rate.

Gradually a generation without concrete ideologies on their sexuality emerged. Kuzwayo notes with disgruntlement the effects of disregard of African peoples' culture. When she was posted to a small community in Transkei to work as a social-work student, she learnt of the impact of an indigenous community's sex-education initiatives which had a positive influence on youth development where extra-marital pregnancy was almost unknown (Kuzwayo *Call Me Woman* 257). The same can hardly be said about settings in the contemporary society that is devoid of indigenous values following their destruction by missionaries in South Africa.

#### **4 Legal developments and contemporary society**

In light of the above discussion, it follows that a reflection should be made on contemporary approaches adopted by South Africa on sexual matters affecting children.

South Africa is a pluralist society. The post-1994 Constitution recognizes both the customary law and common law, which are mainly informed by Western norms, as legitimate components of the legal system. Therefore customary law exists alongside the common law within the confines of the Constitution. The content of each legal component is generally expressed

through legislation and interpreted through case law. It is the significance of legislation and case law on sexual matters relating to children that will be discussed in this section.

While indigenous African practices such as *ukusoma*, *ukuhlobonga* or *ukumetsha* were less resilient to the onslaught by missionaries, virginity inspection and circumcision survived. Focus has thus shifted from the practices of *ukusoma*, *ukuhlobonga* or *ukumetsha* as these are no longer perceived as a threat to young girls and boys as virginity inspection and circumcision are. The latter practices therefore became subject to regulation. Virginity inspection and circumcision are regulated under the Children's Act. There has been a dramatic shift in the manner in which virginity inspection was contextualized from the traditional to contemporary times. In terms of legislation, age is a determining factor of when virginity inspection can be conducted (s 12 of the Children's Act). The focus is not on the stage of the child's state of maturity and her level of understanding of sexual matters, as it was the case during the African traditional times (such maturity was achieved as a result of constant mentorship). Section 12 provides that virginity inspection of children below the age of sixteen is prohibited. It further provides conditions under which such inspection can be conducted in respect of children of sixteen years and older (ss 12(4)–(6)). Similarly the circumcision of male children below the age of 16 is prohibited, unless if it is for the purposes of religious practices or for medical reasons (s 12(8)). Children of sixteen years and older can be circumcised, also, if the child's consent has been obtained, proper counselling has been conducted and the circumcision is conducted in a prescribed manner (ss 12(8)–(9)); and see also Davel "General Principles" in Davel and Skelton (eds) *Commentary on the Children's Act* (2007) 2–18).

#### 4 1 *Application of Teddy Bear Clinic for abused Children v Minister of Justice and Constitutional Development*

The discourse on sexuality of children is further enriched by the case of *Teddy Bear Clinic for abused Children v Minister of Justice and Constitutional Development* which appeared before our courts and challenged the constitutionality of sections 15 and 16 of the Sexual Offences and Related Matters Act. Sections 15 and 16 deal with consensual acts of sexual penetration and sexual violation in respect of children within the age group of 12–15. Section 15 of this Act provides that consensual sexual penetration or sexual violation, between an adult (a person of 18 years and older) and a child (aged 12–15 years) is an offence. This conduct falls within the scope of statutory rape and it was also punishable under the old criminal law (Sexual Offences Act 23 of 1957).

Furthermore, sections 15 and 16 of the Act also criminalize consensual acts of sexual penetration and sexual violation between a child within the age range of 16 and 17, and a child aged 12 to 15 years; or two children aged 12 to 15 years. It is the criminalization of these consensual sexual acts between children that the applicants in the case of *Teddy Bear Clinic for abused Children v Minister of Justice and Constitutional Development* sought to be declared unconstitutional (par 23–24). The applicants argued

that subjecting consenting children to criminal prosecution was unconstitutional (par 32). They further argued that the different age-ranges in terms of which consensual sexual acts of children were criminalized were discriminatory in that an older child who engaged consensual sexual acts with a younger child was generally subjected to prosecution, and not the younger child (par 32).

The court found that to criminalize consensual sexual acts between children undermined the best-interests-of-the-child principle. Such criminalization also violates children's constitutional rights to autonomy, dignity and privacy (par 83). On the basis of the broad scope of the definition of sexual penetration and sexual violation, the court highlighted that the Act even criminalizes many forms of consensual sexual play and exploration, including kissing and light petting, which cannot cause pregnancy or transmission of sexual disease, and form part of a child's development (par 84).

The Constitutional Court held that the provisions of sections 15 and 16, in as far as they criminalize consensual sexual acts between children within certain ranges of age, were invalid (par 119). In arriving at its decision the court rightfully considered many factors, including upholding the paramountcy of the best interests of the child, and the fact that laying a charge and subjecting consenting children to the processes of the criminal system are detrimental to them (par 87–88). Also, as discussed above, sexuality is part of every child's development and part of their autonomy. The respondents also rightfully submitted that children do make uninformed decisions in as far as sexual matters are concerned, and these too, have detrimental effects on them (par 35).

It is agreed that the main concern of the court in this case was "whether it is constitutionally permissible for children to be subject to criminal sanctions in order to deter early sexual intimacy and combat the risks associated therewith" (par 3). However, the fact that the case delved on promoting children's autonomy on sexual decisions, naturally the discussion on whether or not children should engage in sexual acts arises. This is especially so for a country such as South Africa that is already ravaged by unacceptably high volumes of teen pregnancies and sexually transmitted infections, including HIV/AIDS. While the traditional system provided space and regulations within which children could express their sexuality, there are no comparable measures in contemporary society. The earlier discussion about the non-existence of teen pregnancies compared to today's high prevalence of such pregnancies has reference.

#### *4.2 Analysis of the contemporary approach*

The contemporary approach presupposes that matters affecting children and their sexuality fall outside the scope of the family domain. Possible family interventions to such matters are treated with caution as if they were presupposed not to contribute positively to the child's well-being. Interventions that are deemed primary in as far as the well-being of a child is concerned are those that relate to parental responsibilities and rights and these are explicitly explained in the Children's Act. In order to illustrate this point certain provisions of the Children's Act will be considered.

The Children's Act is the mother legislation on matters relating to children. It assimilates the principles of the Constitution and responds to the socio-economic challenges facing South Africa's children today. The Act regulates the parent-and-child relationships as well. It makes provision for parental responsibilities and rights. These are, namely, to care for the child, to maintain contact with the child, to act as guardian of the child, and to contribute to the maintenance of the child (s 18(1)–(2)). In greater detail, parental responsibilities and rights entail: assuming responsibilities in respect of the child's upbringing, health, education, safety and welfare; maintaining a personal relationship with the child and communicating with the child on a regular basis; safeguarding the child's property interests and representing the child in legal matters; and supporting the child financially (Heaton "Parental Responsibilities and Rights" in Davel and Skelton (eds) *Commentary on the Children's Act* (2007) 3-4 to 3-5).

However, with regard to provisions on sexual matters, children are referred to in isolation from their parents or caregivers. An individualistic approach can be detected from the phrasing of certain provisions contained in the Children's Act. Involvement of parents and/or caregivers on sexual matters is suddenly minimized. Certain provisions explicitly state that children have a right to gain access to contraceptives even without consulting or obtaining consent from a parent or caregiver (s 134(2)). The provision on access to reproductive health care serves as a good example in this regard (s 134). The Children's Act provides that no person may refuse to sell or provide condoms to a child who is above the age of 12 (s 134(1)). Furthermore, the Act qualifies circumstances under which a child, who at least has reached the age of 12, may gain access to contraceptives upon request and without the consent of his or her parent or caregiver (s 134 (2)). Unlike in indigenous African culture, where the foundation for equipping children to make informed decisions on their sexuality was resilient and continuous, in contemporary society initiatives aimed at assisting children in this regard are shaky and the responsibility of engaging children on sexual matters is confined to parents whilst that very parents' role is not perceived as primary when the child exercises his rights on sexual and related matters. Children who have not been exposed to solid and correct discourses on sexual matters, and whose cultural background inhibits them from discussing sexual matters with their parents, are likely to make ill decisions on such matters. This is aggravated by the fact the law does not enforce active involvement of parents or caregivers in such serious matters involving decisions about their sexuality.

## 5 Concluding remarks

Although the indigenous African structures are founded on firm communal values, they have gradually been eroded and underplayed by Western ideologies (Martin and Mbambo <http://resourcecentre.savethechildren.se/library/exploratory-study-interplay-between-african-customary-law-and-practices-and-childrens> (accessed 2014-05-06)).

The evolution in our legal system and the adoption of modern lifestyles has had an adverse impact on the traditional approaches to African children and their sexuality. The structures within which children were sensitized and



educated about their sexuality are no longer as functional as they used to be. Furthermore, communal interests, which are fundamental to group solidarity in indigenous African culture, are constantly challenged on the basis of rights bestowed to children as individuals and autonomous beings (Himonga in Sloth-Nielsen (ed) *Children's Rights in Africa: A Legal Perspective* 80). Although cultural rights are endorsed in the Constitution, legislation emphasizes the autonomous nature of children's rights over their cultural right to collectively belonging together with the other members of their families.

There is therefore a cultural chasm between the provisions of the Children's Act and those of customary law on matters relating to sexuality of children. This in turn creates a discontentment that deprives such children of adequate support on the development of their sexuality.

Although the Constitutional Court in *Teddy Bear Clinic for abused Children v Minister of Justice and Constitutional Development* stated from the onset that the case was not about whether or not children should engage in sexual conduct, or whether Parliament may set a minimum age for consensual sexual conduct (par 3), as stated above, the court did consider the best-interests-of-the-child principle and the autonomy of children on sexual matters. Consideration of these factors opens a dialogue of the very aspects that the court stated did not form basis of the case, which the court, nevertheless, discussed. It is on the basis of issues that the court deliberated on, namely, the best-interests-of-the-child principle and the consideration of the autonomy of the child, when dealing with matters of sexuality, that the pluralist nature of our society is considered, and the indigenous African value-system is discussed.

Having said that, it is also submitted that, while the indigenous African structures are commended for the extensive support they offered to children as they entered various stages of sexual development, these structures also have shortcomings which cannot be ignored. For instance, the emphasis that is put on marriage as if it were the ultimate goal of one's development, is unfounded, particularly in these contemporary times.

In light of the *Teddy Bear Clinic for abused Children v Minister of Justice and Constitutional Development* decision, which is generally perceived as a licence to uncontrolled sexual engagement amongst children (Sowetan Live "Hug, Kiss and Have Sex, says Court" 3 October 2013 <http://www.sowetanlive.co.za/news/2013/10/04/hug-kiss-and-have-sex-says-court>), adequate structures for supporting children's sexual development should be put in place. Ills that exist within the indigenous African structures should be discarded and useful principles be adopted in the interest of the well-being of children.

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