

# Pregnant learners' sexual rights: A constitutional perspective

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## 1 Introduction

In 2001 the South African Department of Health estimated the mean age for sexual debut to be 15 years for girls and 14 years for boys.<sup>1</sup> In 2007, however, Berry and Hall claim that, by the end of their childhood (at 18 years), 42% of South African girls and 63% of boys have had sex. Of these, 6% of girls and 12% of boys will have had sex before their fifteenth birthday.<sup>2</sup> One thing is clear from the statistics above: a substantial number of girls will have their first experience of sexual intercourse while still at school. There are thus a considerable number of girl learners at risk of falling pregnant.

Many adults still struggle to accept the idea of children as rights-holders. To think of children as holders of sexual rights seems almost bizarre and any reference to children's sexual rights causes deep anxiety, because it is equated with social and moral decline.<sup>3</sup> Children are traditionally viewed as non-sexual beings and childhood as the pre-sexual period.<sup>4</sup> It is difficult for parents and educators to think of children as being sexually active. However, the reality of pregnant learners cannot be denied and this reality brings the sexual and reproductive rights of these learners' to the fore.<sup>5</sup> The need to educate girl learners

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<sup>1</sup>Department of Health *Policy guidelines for youth and adolescent health* (2001) 37.

<sup>2</sup>Berry and Hall *Age at sexual debut: HIV and AIDS and STI National Strategic Plan 2007-2011* available at <http://www.childrencount.ci.org.za/uploads/NSP-age-at-sexual-debut.pdf> (accessed 2012-08-12).

<sup>3</sup>Waites *The age of consent: Young people, sexuality and citizenship* (2005) 1.

<sup>4</sup>*Id* 14.

<sup>5</sup>In an article entitled 'A rights-based approach to managing learner pregnancy: An international human rights perspective' (submitted to *Commonwealth Youth and Development* for review and possible publication), I argue that the use of 'sexual rights' may not be conceptually sound because many of the rights claimed to be 'sexual rights' (especially in the international arena) are not legal rights in the true sense of the word. I suggest that, in some instances, it may be more correct to refer to 'rights relating to sexuality' since existing rights are interpreted to address sexuality. In some countries, such

on their sexual rights is thus fairly obvious. Despite this fact, many parents and educators are still reluctant or opposed to educating girls on their sexual rights because they believe to do so will, in effect, permit and encourage girls to become sexually active. This, according to them, will in turn promote promiscuity.<sup>6</sup>

Globally, there is strong advocacy for the recognition and observance of adolescent and youth's sexual and reproductive rights.<sup>7</sup> However, 'sexual rights' is a very contentious issue and there is uncertainty as to precisely how learners' sexual rights should be constituted. This then is the problem discussed in this article. First a brief overview of the international human rights discourse (and sub-discourses) on sexuality, sex and reproduction and the resultant augmentation of sexual rights is given. Then, benchmarked against the international augmentation of sexual rights, the author offers a constitutional perspective on sexual rights which could be used to inform the content of pregnant learners' sexual rights in South African schools.

## 2 International human rights discourse on sexuality, sex and reproduction

Advocacy for the recognition of sexual rights started with advocates of women's rights promoting the use of international human rights instruments to combat gender inequality.<sup>8</sup> At that stage the focus of the discourse was 'sex for reproduction'.<sup>9</sup> The result of these efforts was that the rights of women and girls were recognised as human rights at the Vienna World Conference on Human Rights in 1993.<sup>10</sup> Some of these advocates started to derive reproductive and sexual rights from existing human rights such as the right to security of the person (which includes the right to bodily integrity) and the right to human dignity.<sup>11</sup> This discourse was continued in 1994 at the International Conference on Population and Development held in Cairo.<sup>12</sup>

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as South Africa, some sexual rights are expressly guaranteed. See the introduction to the section on the constitutional perspective on learners' sexual rights.

<sup>6</sup>Wellings *et al* 'Sexual behavior in context: A global perspective' (2006) October *The Lancet Sexual and Reproductive Health Series* available at [http://www.who.int/reproductivehealth/publications/general/lancet\\_2.pdf](http://www.who.int/reproductivehealth/publications/general/lancet_2.pdf) (accessed 2012-08-12).

<sup>7</sup>See the section on the international human rights discourse on sexuality, sex and reproduction.

<sup>8</sup>Lai and Ralph 'Female sexual autonomy and human rights' (1995) 8 *Harvard Human Rights Journal* 201-227 at 204.

<sup>9</sup>Van Zyl 'Beyond the Constitution: From sexual rights to belonging' Paper delivered at the 6<sup>th</sup> Conference of the International Association for the Study of Sexuality and Culture in Society Peru (2007-06-27-29) 18 *The prize and the price* 364 at 367.

<sup>10</sup>UN World Conference on Human Rights (1993-06-14-26) Vienna *Vienna Declaration and Programme of Action* UN Doc A/Conf 157/24 (part 1) 32 *International Legal Materials* 1661 (1993) para 18 available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(symbol\)/a.conf.157.23.en](http://www.unhcr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en) (accessed 2012-08-12).

<sup>11</sup>Lai and Ralph (n 8) 207.

<sup>12</sup>ICPD (1994) International Conference on Population and Development (1994-09-5-13) Cairo *Summary of Programme of Action* DPI/1618/POP United Nations Department of Public Information

Although 'sexual rights' as such are not mentioned in the Programme of Action that was adopted at this conference, reproductive rights were defined for the first time and the emphasis with regard to population and development shifted from fertility control to human beings as sexual beings.<sup>13</sup>

**Reproductive rights** are defined as

... certain human rights that are already recognized in national laws, international human rights documents and other relevant UN consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. They also include the right of all to make decisions concerning reproduction free of discrimination, coercion and violence. Full attention should be given to promoting mutually respectful and equitable gender relations and particularly to meeting the educational and service needs of adolescents to enable them to deal in a positive and responsible way with their sexuality.<sup>14</sup>

From this definition it is evident that the Programme of Action gives express recognition to adolescents as sexual beings.<sup>15</sup>

In 1995 at the Fourth World Conference on Women in Beijing the right of women of all ages to control their sexuality was again recognised as being included in existing human rights.<sup>16</sup> At that stage, the focus was still on procreation, inequality within heterosexual relationships and entrenched forms of discrimination and gender inequality that contribute towards sexual and reproductive ill health.<sup>17</sup>

In 1999 a special session was held in The Hague to review and appraise the implementation of the Programme of Action. During this session The Hague Forum laid out strategies to 'advance sexual rights'.<sup>18</sup> Making the sexual rights discourse part of the human rights discourse on sexual health and reproduction resulted in sexual rights becoming conflated with reproductive rights. This created

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available at <http://www.un.org/ecosocdev/geninfo/populatin/icpd.htm> (accessed 2012-08-12).

<sup>13</sup>Lai and Ralph (n 8) 208; Miller and Roseman 'Sexual and reproductive rights at the United Nations: Frustration or fulfilment?' (2011) 19/38 *Reproductive Health Matters* 102-118 at 104.

<sup>14</sup>ICPD (n 12) ch 7 para A.

<sup>15</sup>ICPD (n 12) ch 6 para B, ch 7 para E.

<sup>16</sup>UN Fourth World Conference on Women: Action for equality, development and peace (1995-09-15) Beijing *Beijing Declaration and Platform for action A/CONF177/20/Add1* paras 23-24 available at <http://www.un.org/womenwatch/daw/beijing/platform/> (accessed 2012-08-12); Klugman 'Sexual rights in Southern Africa: A Beijing discourse on a strategic necessity?' (2000) 4/2 *Health and Human Rights* 145.

<sup>17</sup>UNFPA *United Nations Population Fund's Reproductive rights and sexual reproductive health framework: Making reproductive rights and sexual and reproductive health a reality for all* (2008) 6 available at [http://www.unfpa.org/webdav/site/global/shared/documents/UNFPA\\_SRH\\_Framework\\_FinalVersion.pdf](http://www.unfpa.org/webdav/site/global/shared/documents/UNFPA_SRH_Framework_FinalVersion.pdf) (accessed 2012-08-12); Klugman (n 16) 148; Lai and Ralph (n 8) 202.

<sup>18</sup>IPPF *IPPF Charter on sexual and reproductive rights* (2003) available at <http://ippf.org/resources/publications/ippf-charter-sexual-and-reproductive-rights> (accessed 2012-08-12). Note that the 1996 version was updated, redesigned and reprinted in 2003.

an anomaly, since sexual rights were presented as a category of reproductive rights while, in fact, it is logical to regard reproductive rights as a category of sexual rights. According to Miller, this tendency to conflate sexual rights with reproductive rights inadvertent resulted in the exclusion from human rights protection of non-conforming sexual identities, non-reproductive and non-heterosexual practices.<sup>19</sup> By regarding sexual rights as 'types' of reproductive rights, a conservative stance was taken in that sex is deemed to occur only within heterosexual marriages for the sole purpose of procreation, thereby reinforcing hetero-normative definitions of sexual rights.<sup>20</sup>

The exclusion of what Miller and Roseman refer to as 'geo-politically motivated actors' from the main discourse resulted in the development of various activist discourses on sexuality and sex, each with their own focus and agenda.<sup>21</sup> These discourses were focused on issues such as the de-criminalisation of sex for money (sex workers), the recognition of sexual orientation or gender identity (including gay, lesbian, bisexual and transgender persons), HIV, sexuality education, sexual pleasure and the decriminalisation of abortion.<sup>22</sup> The working ground for these groups was in the non-governmental (NGO) forums whose sessions were held parallel to the international conferences.<sup>23</sup> It was these advocates that argued for the recognition of sexual rights rather than reproductive rights. This resulted in the phrase 'sexual rights' being interpreted to 'signify rights claims *exclusively* for either lesbians, gay, or trans-sexual identities or behaviours'.<sup>24</sup> Lalor concludes: '[t]he discursive terrain in which sexuality operates is extremely broad' and 'difficulties arise when one particular notion or interpretation of sexual behaviour and identity is privileged, essentialised and when rights are attached to this reified construction'.<sup>25</sup> The constituency of sexual rights was informed by these sub-discourses or what Van Zyl calls 'intersecting and conflictual political struggles for control over the discourses around sex, sexuality and reproduction'.<sup>26</sup>

With time, some of these sub-discourses were incorporated in the main human rights discourse on sexual health and reproductive rights. This is evident, for example, from the manner in which the IPPF defined sexual and reproductive rights in 2009. The IPPF reaffirmed that sexual and reproductive rights are part of human

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<sup>19</sup>Miller 'Sexual but not reproductive: Exploring the junction and disjunction of sexual and reproductive rights' (2000) 4/2 *Health and Human Rights* 68-109 at 86, 70.

<sup>20</sup>Van Zyl (n 9) 364.

<sup>21</sup>Miller and Roseman (n 13) 112-114.

<sup>22</sup>*Ibid.*

<sup>23</sup>Bunch 'Beijing, backlash, and the future of women's human rights' (2000) 4/1 *Health and Human Rights* 449 at 451.

<sup>24</sup>Miller (n 19) 75.

<sup>25</sup>Lalor 'Constituting sexuality: Rights, politics and power in the gay rights movement' (2011) 15 *Int Journal of Human Rights* 683 at 684, 685. This is also confirmed by Miller (n 19) 72.

<sup>26</sup>Van Zyl (n 9) 364.

rights, but extended the definition to rights that will ensure not only sexual health, but also sexual autonomy and non-discrimination.<sup>27</sup> The human rights discourse, which started out as a discourse on sexual health and reproductive rights thus developed and culminated in the augmentation of sexual rights.

In this article, the concept of *sexual rights* is used to include reproductive rights. The definition of the World Health Organisation is followed and the concept of *sexual rights* is taken to refer to constitutional rights that would ensure the right to:

- the highest attainable standard of sexual health, including access to sexual and reproductive health care services;
- seek, receive and impart information on sexuality;
- sexuality education;
- respect for bodily integrity;
- choose their partner;
- decide to be sexually active or not;
- consensual sexual relationship;
- consensual marriage;
- decide whether or not, and when, to have children; and
- pursue a satisfying and pleasurable sexual life.<sup>28</sup>

Rightly so, Fried argues that the content of these sexual rights will be influenced by specific cultural, material, socio-economic and political contexts.<sup>29</sup> However, since the South African Constitution is the supreme law of the country, pregnant learners' sexual rights will be interpreted and given content within the ambit of the Constitution and its underlying values and principles.<sup>30</sup>

### 3 Constitutional perspective on sexual rights

The Constitution makes express reference to sexual rights in the following instances:<sup>31</sup>

- Non-sexism (section 1(b)) is one of the values that courts, tribunals and forums must promote when interpreting the Bill of Rights (section 39(1)(a));
- Unfair discrimination on the grounds of gender, sex, pregnancy, marital status and sexual orientation is prohibited (section 9(3), 9(4));
- The right to bodily and psychological integrity which includes the right to

<sup>27</sup>IPPF 'Preamble' in *Sexual rights: An IPPF declaration: Abridged version* (2009) available at <http://jp.ippf.org/NR/rdonlyres/F148EF05-4CB5-4663-8ACB-F9F2DFC6429A/0/SexualRightsShortEnglish.pdf> (accessed 2012-08-23).

<sup>28</sup>WAS World Association for Sexual Health *Sexual health for the Millennium: A declaration and technical document* (2008) 156 available at <http://www2.hu-berlin.de/sexology/BIB/MillDecEN.htm> (accessed 2012-08-12).

<sup>29</sup>Fried 'Sexuality and human rights' (2004) 7/2 *Health and human rights* 273 at 273-274.

<sup>30</sup>Constitution of the Republic of South Africa of 1996 ss 1, 2, 39(1)(a).

<sup>31</sup>*Ibid.* Here sexual rights are taken to refer to legal rights, eg, rights given the force of law.

make decisions concerning reproduction and the right to security in and control over their bodies is guaranteed (section 12(2)(a) and (b)). In *Christian Lawyers' Association v National Minister of Health*<sup>32</sup> the court referred to the fact that, in some foreign jurisdictions (such as the United States and Canada), these rights are not expressly provided for and courts thus develop them through the judicial interpretation of existing rights such as the right to liberty, privacy and security of the person. In South Africa, the judicial interpretation of these rights will not be aimed at developing the right to terminate a pregnancy, but at reinforcing the explicit rights provided for in sections 12(2)(a) and (b) of the Constitution.

- The right to access to reproductive health care (section 27(1)(a)).

In this article Miller's classification of sexual rights: 'integrity/autonomy rights (personhood), bodily integrity/health rights, equality/non-discrimination rights (diversity), and participatory/empowerment rights'<sup>33</sup> is used to structure the discussion of pregnant learners' sexual rights from a constitutional perspective.

### 3.1 Integrity/autonomy rights (personhood)

Freeman<sup>34</sup> wrote:

... we must accept that children are not property ... but individuals whose physical, sexual and psychological integrity is as important as – indeed more important than – that of the adult population.

Finer identifies the recognition of autonomy, decision-making, confidentiality, and consent as crucial for adolescents' ability to exercise their sexual and reproductive rights.<sup>35</sup> Pregnant learners' sexual integrity is constituted by their rights to autonomy, to have their best interest regarded as of paramount importance, to privacy and confidentiality.

#### 3.1.1 Right to sexual autonomy

Children's right to autonomy (including sexual autonomy) is dependent on their evolving capacities and the limitations placed thereupon by law, parental rights and duties, and the child's best interest requirement.

Pregnant girls are bearers of rights because they have the same rights as any other person in terms of the Bill of Rights (except for those rights applicable to adults only) and enjoy, like any other child, special protection in terms of section

<sup>32</sup>[2004] 4 All SA 31 (T) 47.

<sup>33</sup>Miller (n 19) 90.

<sup>34</sup>Freeman 'Child abuse: The search for a solution' in Freeman (ed) *Overcoming child abuse: A window on a world problem* (2000) 9.

<sup>35</sup>Finer 'Many international agreements later, girls and young women worldwide still lack basic rights' (2012) available at <http://www.rhrealitycheck.org/article/2012/03/07/international-womens-day-looking-towards-full-range-reproductive-rights-worldwide> (accessed 2012-08-12).

28.<sup>36</sup> However, that does not mean that section 28 confers a right to individual self-determination on children.<sup>37</sup> Couzens argues that this is also the case regarding the Convention on the Rights of the Child. The Convention recognises children's evolving capacity to gradually acquire full autonomy rather than their self-determination.<sup>38</sup> In addition, Brighthouse confirms that children, as a general rule, do not have, what he calls, 'agency rights'.<sup>39</sup> Recognising a child's autonomy is therefore conditional on the competence of that child to make informed and wise choices, and thus boils down to the recognition of the child's 'evolving capacities' or 'developing rights to autonomy'.<sup>40</sup> The girl's capacity to make informed and wise choices will have to be taken into consideration when her sexual rights, such as the right to reproductive autonomy and bodily self-determination, the right to choose whether or not to marry and to decide whether or when to have children (including whether or not to terminate a pregnancy) are deliberated on.<sup>41</sup>

It is not only a child's evolving capacities that will determine the extent of his or her self-determination, but also the limits the law places on this self-determination.<sup>42</sup> Neethling, Potgieter and Visser state: 'A person's autonomy or the free exercise of his will is related to the freedom of human self-determination within the limits of the law'.<sup>43</sup> For example, a pregnant learner's autonomy to decide whether she wants to terminate the pregnancy or not, is regulated by section 12(2)(a) and (b) of the Constitution and the Choice on Termination of Pregnancy Act 92 of 1996.<sup>44</sup> If a pregnant learner wants to marry the father, the level of autonomy that her decision will be afforded is limited by sections 25 to 27 of the Marriage Act 25 of 1961 and section 18(3)(c)(i) of the Children's Act 35 of 2005.<sup>45</sup> The autonomy and consent to medical treatment of children are regulated by section 27 of the Constitution, section 129 of the Children's Act 35 of 2005, and the National Health Act 61 of 2003.

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<sup>36</sup>Currie and De Waal (2005) *The Bill of Rights handbook* at 600; Department of Education (South Africa) (2002) *Report on protecting the right to innocence: Conference on sexuality education, 2001-08-19-21* (2002) 11.

<sup>37</sup>Currie and De Waal (n 36) 601.

<sup>38</sup>Couzens 'Autonomy rights versus parental authority' in Alen *et al* (ed) *The UN Children's Rights Convention: Theory meets practice* (2007) 419 at 420-421.

<sup>39</sup>Brighthouse 'How should children be heard?' (2003) 45 *Arizona LR* 691 at 694.

<sup>40</sup>*Ibid.*

<sup>41</sup>Constitution (n 30) ss 12, 9(3), 27.

<sup>42</sup>Scheiwe 'Between autonomy and dependency: Minors' rights to decide on matters of sexuality, reproduction, marriage, and parenthood. Problems and the state of debate – an introduction' (2004) 18 *International Journal of Law, Policy and the Family* 262 at 262-263.

<sup>43</sup>*Neethling's Law of personality* (2005) 35.

<sup>44</sup>'Women' is defined in section 1 of the Choice on Termination of Pregnancy Act 92 of 1996 as 'any female person of any age'. In this article the Choice on Termination of Pregnancy Act 92 of 1996 as amended by the Choice on Termination of Pregnancy Amendment Act 38 of 2004 and the Choice on Termination of Pregnancy Amendment Act 1 of 2008 was used.

<sup>45</sup>[http://en.wikisource.org/wiki/Marriage\\_Act,\\_1961](http://en.wikisource.org/wiki/Marriage_Act,_1961) (accessed 2012-08-12).

In any dispute dealing with a child's autonomy, parental rights and responsibilities will also have to be taken into account.<sup>46</sup> One of the principles that guides the implementation of the Children's Act is that a person who has parental rights and responsibilities has to be informed of any action or decision taken in a matter concerning the child which significantly affects the child. This is, however, only required where appropriate in relation to the age, maturity and stage of development of the child.<sup>47</sup> Kruger refers to this principle as the maturation approach to children's right to self-determination.<sup>48</sup> In terms of the maturation approach, children's right to self-determination grows and parental authority over children declines as the child grows older.<sup>49</sup> This approach is in line with the well-known Gillick-competency test. In the English case of *Gillick v West Norfolk and Wisbech Area Health Authority*, Lord Fraser of Tullybelton held that parental rights to control a child do not exist for the benefit of the parent, but for that of the child. With respect to the relation between the evolving capacities of the child and parental rights and duties, the court held (Lord Templeman dissenting) that

[h]aving regard to the reality that a child became increasingly independent as it grew older and that parental authority dwindled correspondingly, the law did not recognise any rule of absolute parental authority until a fixed age. Instead, parental rights were recognised by the law only as long as they were needed for the protection of the child and such rights yielded to the child's right to make his own decisions when he reached a sufficient understanding and intelligence to be capable of making up his own mind.<sup>50</sup>

When a dispute arises, for example if a learner wants to terminate her pregnancy and her parents are not in favour of it, the parents have no constitutional right to veto the child's decision.<sup>51</sup> In such an instance, the child's need for autonomy is balanced against her need for protection<sup>52</sup> and the parents' rights and duties.

Kruger emphasises the need to add a qualification to the Gillick-competency test, namely, that a child may not be allowed to make a decision that is clearly contrary to his or her best interest.<sup>53</sup> Section 28(2) of the Constitution requires that a child's best interest be of paramount importance in every matter concerning the child, and that this also applies to decisions relating to her sexuality. As in the case of the

<sup>46</sup>Couzens (n 38) 420.

<sup>47</sup>Children's Act 38 of 2005 s 6(5). In this article the Consolidated Children's Act as amended by the Children's Amendment Act 41 of 2007 and the Child Justice Act 75 of 2008, updated to GG 33076 2010-04-01, was used.

<sup>48</sup>Kruger 'The protection of children's rights in the South African Constitution: Reflections on the first decade' (2007) 70/2 *THRHR* 239 at 240.

<sup>49</sup>Currie and De Waal (n 36) 602; Scheiwe (n 42) 263.

<sup>50</sup>[1986] 1 AC 112 available at [http://www.hrcr.org/safrica/childrens\\_rights/Gillick\\_WestNorfolk.htm](http://www.hrcr.org/safrica/childrens_rights/Gillick_WestNorfolk.htm) (accessed 2012-08-12); see headnote.

<sup>51</sup>Currie and De Waal (n 36) 601.

<sup>52</sup>*Id* 602. Also see Venter *Die inhoud van ouerlike gesag – Quo vadis?* LLM dissertation Unisa (Pretoria) (2005).

<sup>53</sup>Kruger (n 48) 247.



CRC and ACRWC, the principle of the best interest of the child is not only a right in itself but also a standard that has to be applied in interpreting and determining the ambit and limitations of all other rights.<sup>54</sup> Determining the standard of the child's best interest will depend on the circumstances of each case, 'the needs and rights of the particular child in the "precise real life situation"'.<sup>55</sup> The child is a person in his or her own right and when determining his or her best interest the child should not be regarded as a possession of his or her parents or of the state. Children are holders of rights just like adults and are recognised as legal subjects in their own right.<sup>56</sup>

What if the child's best interest and the parents' views are in conflict? Should the child's best interest be seen as a standard that weakens parental rights and duties and that hampers parents in the exercise of their legal duty to protect their children? South African courts have upheld the paramountcy of the child's best interest. Indeed, this standard was already alluded to by the Appellate Division in *Fletcher v Fletcher*, as long ago as 1948.<sup>57</sup> Foxcroft J also emphasised in *V v V* that '... situations may arise where the best interests of the child require that action is taken for the benefit of the child which effectively cuts across the parents' rights'.<sup>58</sup> The paramountcy of children's best interest was found to outweigh parents' right to freedom of religion in *Christian Education South Africa v Minister of Education*.<sup>59</sup> In *Hay v B* the court held that the child's best interest is: 'the single most important factor to be considered when balancing or weighing competing rights and interests concerning children'. In this case it was held that it is a violation of a child's rights if a parent withholds consent to a blood transfusion for their baby in an emergency solely for religious reasons.<sup>60</sup>

Archard stresses that a consideration that is *paramount* 'outranks and trumps all other considerations'.<sup>61</sup> Logan, on the other hand, emphasises that it is an

<sup>54</sup> *M v The State Centre for Child Law* 2007 JDR 0913 (CC) 18; *Minister of Welfare and Population Development v Fitzpatrick* 2000 7 BCLR 713 (CC) 17; *Du Toit v Minister of Welfare and Population Development* 2002 10 BCLR 1006 (CC) 2; Kruger (n 48) 248; Skelton 'Constitutional protection of children's rights' in Boezaart (ed) *Child Law in South Africa* (2009) 265 at 280.

<sup>55</sup> *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) 18; *AD v DW (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* 2008 3 SA 183 (CC) at 55.

<sup>56</sup> *M v S* 2008 3 SA 232 (CC) 18. Also see the summary of the presentation made by P Newell during a round-table discussion co-hosted by RAPCAN and the SHRC (2006) 2/1 *Article 19* at 6 <http://www.communitylawcentre.org.za/projects/childrens-rights-project/Publications/Article%2019/Volume%202%20Number%201%20-%20May%202006.pdf> (accessed 2012-08-12); Carter and Osler 'Human rights, identities and conflict management: A study of school culture as experienced through classroom relationships' (2000) 30/3 *Cambridge Journal of Education* 335 at 336.

<sup>57</sup> 1948 1 SA 130 (A).

<sup>58</sup> 1998 4 SA 169 (C) 189B-C.

<sup>59</sup> 2000 10 BCLR 1051 (2000-08-18) 41.

<sup>60</sup> 2003 3 SA 492 (W) 71. The Children's Act (n 47) s 129(10) also provides that a parent may not refuse to assist a child or to withhold consent for medical treatment or surgery solely for religious reasons unless a medically acceptable alternative can be suggested.

<sup>61</sup> Archard 'Children's rights' in Zalta *The Stanford Encyclopedia of Philosophy* (2011) available at <http://plato.stanford.edu/archives/sum2011/entries/rights-children/> (accessed 2012-08-12). To determine

'enduring myth' that the child's best interest should be given a disproportionate weight. She stresses that the purpose of the standard is to redress the imbalances which were created as a result of the historical welfare approach to children where children's needs were considered and determined by adults on their behalf. The child's best interest standard is essential for the process of replacing the welfare approach with a rights-based approach where children are considered as having an inherent value and as active participants in the realisation of their rights.<sup>62</sup> Thus, the child's best interest will not *always* trump all other considerations when it is balanced with the constitutional rights of other persons. It should rather be viewed as an invariable qualification to the exercise of parental rights and duties.<sup>63</sup> This right, like all other rights, is not absolute and may be justifiably limited in terms of the limitation clause.<sup>64</sup> In *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* Langa J held that one cannot interpret children's right to have their best interest regarded as paramount to mean that this right 'trumps' all other rights in the Bill of Rights, because such interpretation would be 'alien to the approach adopted by this Court that constitutional rights are mutually interrelated and interdependent and form a single constitutional value system'.<sup>65</sup>

Hammarberg warns against an interpretation and application of the best interest standard that does not serve the sum total of all the child's rights.<sup>66</sup> Examples of such an interpretation are the arguments that girls do not need to be educated because it is in their best interest to learn household and mothering skills or that if an educator rapes a girl learner he is doing her a favour because he is teaching her how to be a good wife in the future. To determine what is in the best interest of a child, the child's views should be taken into account (see the discussion on the child's right to freedom of expression). This brings the child's right to consent into play.

### 3.1.2 Consent

In *Castell v De Greef*, Ackerman J (on behalf of the full bench) stated that the reason for the requirement of informed consent is to give effect to the patient's

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what is in the best interest of a child, the factors listed in s 7(1) of the Children's Act should be taken into consideration.

<sup>62</sup>Logan 'The child's best interest: A generally applicable principle' Janusz Korczak Lecture presented at the conference 'Building a Europe for and with children, toward a strategy for 2009-2011' organised jointly by the Council of Europe and the Swedish Chairmanship of the Council of Europe in Stockholm, 2008-09-09 available at <https://wcd.coe.int/ViewDoc.jsp?id=1341155> (accessed 2012-08-13).

<sup>63</sup>Robinson 'Children's rights in the South African Constitution' (2003) 6/1 *PER* 22/112 at 48/112.

<sup>64</sup>*Sonderup v Tondelli* 2001 2 BCLR 152 (CC) 27-30; *M v The State Centre for Child Law* 2007 JDR 0913 (CC) 18; Davel 'In the best interest of the child: Conceptualisation and guidelines in the context of education' (2007) 4 *Commonwealth education partnerships* 222 at 223 available at <http://www.cedol.org/wp-content/uploads/2012/02/222-226-2007.pdf> (accessed 2012-08-12); Constitution (n 30) s 36.

<sup>65</sup>2004 1 SA 406 (CC) 55.

<sup>66</sup>Hammarberg (2008) 'The best interest of the child – what it means and what it demands from adults' Lecture to the Council of Europe (2008-07-01) *Crinmail* 995 available at [http://crin.org/email/crinmail\\_detail.asp?crinmailID=2831#cou](http://crin.org/email/crinmail_detail.asp?crinmailID=2831#cou) (accessed 2012-08-12).

right to self-determination.<sup>67</sup> Children who lack the capacity to consent will not be able to seek health care services independently and without parental consent (unless in an emergency situation).<sup>68</sup> If a girl is too young or immature to give informed consent, common law requires that consent be given by the child's parents or guardians to regulate the situation.<sup>69</sup> Educators will have to keep this in mind when a pregnant learner asks the educator to help her to obtain health care services, but to keep her parents 'out of the loop'.

In terms of the Children's Act two requirements must be met before a child can independently access medical treatment or surgery: the child must be over the age of 12 years, mature enough and have the mental capacity to understand the benefits, risks, social and other implications of the treatment.<sup>70</sup> In the case of an operation, the child must also be assisted by her parent or guardian and the parent or guardian must have assented to the operation in writing.<sup>71</sup>

Kassan and Mahery link the obligation conferred upon parents and guardians in terms of section 28(1)(b) of the Constitution to parents' and guardians' right to consent to medical treatment or surgical operations by arguing that the requirements of parental consent allow parents to fulfil this obligation.<sup>72</sup> In *Christian Lawyers' Association*, section 5(3) of the Choice on Termination of Pregnancy Act 92 of 1996 was challenged, *inter alia*, on the ground that it infringes sections 28(1)(b) and (d) of the Constitution.<sup>73</sup> The Choice on Termination of Pregnancy Act 92 of 1996 permits girls of any age to consent to an abortion without parental assistance. Section 5(3) requires that the medical practitioner or registered midwife advises the minor to consult her parents, guardian, family members or friends before the pregnancy is terminated. If the child refuses to consult her parent(s), the termination of the pregnancy may, however, not be refused.<sup>74</sup> Mojaelo J emphasised that this right to consent is not unqualified, but that a distinction is made between women who have the capacity to consent and those who do not have the capacity and that such distinction is rational and justifiable. Mojaelo J pronounced section 5(3) constitutional for the following reasons:

- (1) The right of every woman to choose whether to terminate her pregnancy or not, is enshrined in sections 12(2)(a) and (b), 27(1)(a), 10 and 14 of the Constitution. All of those rights are afforded to 'everyone' including girls

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<sup>67</sup>[1994] 4 All SA 63 (C) at 80.

<sup>68</sup>Kassan and Mahery 'Special child protective measures in the Children's Act' in Boezaart (ed) *Child Law in South Africa* (2009) 185 at 207.

<sup>69</sup>*Christian Lawyers' Association* (n 32) 37.

<sup>70</sup>Children's Act (n 47) s 129(2).

<sup>71</sup>Children's Act (n 47) s 129(3)(c); Consolidated regulations pertaining to the Children's Act, 2005 (2010) reg 49.

<sup>72</sup>Kassan and Mahery (n 68) 210. Section 28(1)(b) guarantees every child's right to parental care and s 28(1)(d) the right to be protected from maltreatment, neglect, abuse or degradation.

<sup>73</sup>*Christian Lawyers' Association* (n 32) 48.

<sup>74</sup>Choice on Termination of Pregnancy Act (n 44) s 5(1) and (2).

under the age of 18. They are accordingly also entitled to respect for and protection of their right to self-determination.

- (2) Section 9(1) moreover provides that 'everyone' is equal before the law and has the right to equal protection and benefit of the law [sic]. Section 9(3) goes further to prevent unfair discrimination against 'anyone' *inter alia* on the ground of 'age'.

Any distinction between women on the grounds of their age would infringe these rights.

- (3) It follows that any limitation upon the freedom of any woman, including any girl under the age [sic] of 18 years, to have their *pregnancy terminated*, constitutes a limitation of their fundamental rights. Such a limitation is valid only if justified in terms of section 36(1).<sup>75</sup>

Girls thus have the right to consent and to self-determination with regard to their sexual health, may it be to receive medical treatment related to the pregnancy, abort a pregnancy or give birth. This right to consent and self-determination is however, again subject to the girl's evolving capacities and best interest.

### 3.1.3 Right to privacy and confidentiality

The right to individual autonomy is also constructed from the right to privacy.<sup>76</sup> Currie and De Waal note that 'privacy' is that which 'can reasonably be considered to be private'.<sup>77</sup> In *Bernstein v Bester*, Ackerman J holds that the scope of a person's right to privacy extends 'only to those aspects in regard to which a legitimate expectation of privacy can be harboured'.<sup>78</sup> In *NM v Smith and De Lille*, O'Regan J states:

There can be no doubt that private medical information, of whatever nature, but particularly where it concerns a life-threatening disease, is personal information, which is protected by the right to privacy. Moreover, it is information which the person concerned has the right to decide whether to disclose. If the person does disclose it, he or she is entitled to determine in what circumstances and to whom.<sup>79</sup>

The core of this argument leads to the question whether parents have a right to be informed of pregnancy if a child has confided in an educator and does not want to disclose her pregnancy to her parents. The author contends that the evolving capacities and the child's best interest will impinge on whether a parent should be informed or not. Section 13(1)(d) of the Children's Act provides that children's right to privacy with regard to their health status is protected, but only so far as that maintaining the confidentiality is in the child's best interest.<sup>80</sup> The right to information

<sup>75</sup>*Christian Lawyers' Association* (n 32 at 48). Also see Currie and De Waal (n 36) (n 9) 601-602.

<sup>76</sup>Kruger (n 48) 241.

<sup>77</sup>Currie and De Waal (n 36) 318.

<sup>78</sup>NO 1996 2 SA 751 (CC) at 71.

<sup>79</sup>69/05 [2007] ZACC 6 at 136.

<sup>80</sup>Section 6(5) of the Children's Act (n 47) will again apply. See discussion above.

demands that information of a public nature only be made available on a 'right to know' basis and information of a private nature 'on a need to know basis' (eg, if needed to exercise or protect a right).<sup>81</sup> Currie and De Waal argue that 'rights' in this instance should be interpreted to refer to the fundamental rights included in the Bill of Rights and rights provided for in the law of delict or statutory law.<sup>82</sup> The right to privacy protects all private information and it is not required that the information be potentially damaging to the dignity of a person before it will be protected.<sup>83</sup>

Section 9(b) of the Promotion of the Access to Information Act 2 of 2000 limits the right to access to information if this is in the interest of the reasonable protection of privacy.<sup>84</sup> The right to privacy with regard to sexuality is 'not based on a notion of the unencumbered self, but on the notion of what is necessary to have one's own autonomous identity'.<sup>85</sup> This was again confirmed by the Constitutional Court in *S v Jordan*, where the court had to consider whether the statutory prohibition of prostitution constitutes an unjustifiable limitation of the right to privacy. The court held:

the sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community is dignity-reinforcing to the extent that it contributes to the establishment and nurturing of human relationships and not when a nominally private space is used to perform an 'indiscriminate and loveless' act of commercial sex.<sup>86</sup>

Although one can argue that the girl's pregnancy is an aspect in regard to which she has a legitimate expectation of privacy and that the parents' right to be informed, on the other hand, will fulfil the 'need to know' requirement for disclosure, both these aspects will be dependent on the evolving capacities and the child's best interest.

### 3.2 *Bodily integrity/health rights*

This category of sexual rights includes the constitutional right to life, human dignity and freedom and security of the person, and the right to access to health care.<sup>87</sup>

#### 3.2.1 The right to life and human dignity as sexual rights

The IPPF Charter on sexual and reproductive rights states that 'no woman's life should be put at risk or endangered by reason of pregnancy'. Specific mention is made that avoidable deaths due to high-risk pregnancy, such as those of child

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<sup>81</sup>*Id* 694-695.

<sup>82</sup>*Id* 699.

<sup>83</sup>Currie and De Waal (n 36) 323.

<sup>84</sup>*Id* 695.

<sup>85</sup>*National Coalition for Gay and Lesbian Equality v Minister of Home Affairs NO 1996 2 SA 751 (CC)* 65.

<sup>86</sup>2002 6 SA 642 (CC) 27.

<sup>87</sup>Constitution (n 30) ss 11, 10, 12, 27(1)(a); 28(1)(c).

mothers, should be reduced.<sup>88</sup> The right to life as a sexual right further requires that: 'No person's life should be put at risk or endangered by reason of lack of access to health care services and/or information, counselling or services related to sexual or reproductive health'.<sup>89</sup>

Because the constitutional right to life is textually unqualified,<sup>90</sup> it is generally interpreted as covering only the right to physical existence. However, such view is rejected by O'Regan J in *S v Makwanyane*: '... the right to life was included in the Constitution not simply to enshrine the right to existence'.<sup>91</sup> Because the right to life is intertwined with the right to dignity it qualifies the type of existence as a physical existence that is 'consonant with human dignity'.<sup>92</sup>

The right to life is non-derogable,<sup>93</sup> and as such implies that one's right to life is not qualified by one's actions.<sup>94</sup> According to Bonthuys that is exactly what the Constitutional Court did in the *Jordan case* when it held that sex workers' human dignity is diminished by their occupation:

This argument opens the door to assertions that people who choose to behave in ridiculous and undignified ways could be treated as having a lesser degree of inherent human dignity. However, the question is not whether a person behaves in a dignified manner, but whether or not the law treats all people with due respect for their dignity, irrespective of their position in society, their race, class, age, disability and so on.<sup>95</sup>

Furthermore, all people are equal before the law and have the right to equal protection and benefit of the law.<sup>96</sup> This translates into the full and equal enjoyment of all rights and freedoms.<sup>97</sup> This autonomous identity is linked with the constitutional value of human dignity.<sup>98</sup> Thus a pregnant girl with an immoral lifestyle has the same right to a dignified life and human dignity as any other learner. Adler explains it very well: 'the dignity we attribute to being a person rather than a thing is not subject to differences in degree. The equality of all human beings is the equality of their dignity as persons'.<sup>99</sup>

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<sup>88</sup> IPPF Charter (n 18) 8.

<sup>89</sup> *Ibid.*

<sup>90</sup> Constitution (n 30) s 11; Swanepoel *Law, psychiatry and psychology: A selection of constitutional, medico-legal and liability issues* LLD thesis Unisa (Pretoria) (2009) 204.

<sup>91</sup> *S v Makwanyane* 1995 3 SA 391 (CC) 326-327.

<sup>92</sup> *Id* 217; Currie and De Waal (n 36) 281, 289.

<sup>93</sup> Constitution (n 30) s 37.

<sup>94</sup> Currie and De Waal (n 36) 282.

<sup>95</sup> Bonthuys 'Women's sexuality in the South African constitutional court' (2006) 14 *Feminist Legal Studies* 391 at 398.

<sup>96</sup> Constitution (n 30) s 9(1).

<sup>97</sup> Nieuwenhuis *Growing human rights and values in education* (2007) 177.

<sup>98</sup> See Currie and De Waal (n 36) 319, 322.

<sup>99</sup> Cited in Nieuwenhuis (n 97) 165.

### 3.2.2 Right to freedom and security of the person as a sexual right

Section 12 aims at protecting the right to bodily or physical integrity and bodily self-determination.<sup>100</sup> According to Currie and De Waal, the right to bodily integrity has two components, namely, the right to 'security in' and the right to 'control over' one's body.<sup>101</sup> The power to make decisions about reproduction is a constituting element of the right to control over one's body and as such denotes protection of bodily autonomy or self-determination.<sup>102</sup> If a girl falls pregnant because her male partner had refused to wear a condom, this will constitute an unjustifiable infringement of the girl's right to reproductive autonomy. Kassan and Mahery argue that the right to make decisions with regard to one's body also includes the right to refuse medical treatment. Similarly, the right to access to reproductive services does not mean that the use of such services is compulsory.<sup>103</sup> They contend that the right to consent to treatment or surgery include the right to give informed refusal to treatment or surgery.<sup>104</sup>

A learner's right to 'security in' her bodily integrity will, for example, be infringed when she is molested or raped by an educator. However, should she fall pregnant as a result, it will also constitute an infringement of her right to make decisions about reproduction (that is, whether and when to have children). Should the girl then die while giving birth, this will constitute an infringement of her right to life because it is a violation of her right to a physical existence. Furthermore, one can argue that even if the girl gives birth without complications, it will still constitute a violation of her right to life if she becomes pregnant due to rape. As mentioned above, the right to life includes the right to a dignified physical existence and since early pregnancy has a detrimental effect on the girl's future prospects, early pregnancy will constitute a violation of the right to a dignified existence.

### 3.2.3 Right to health care

Pregnant learners have a right to health care in terms of section 27(1)(a) and section 28(1)(c) of the Constitution. The question can be asked as to whether the content of this right in terms of these two sections differs. Section 28(1)(c) only guarantees children's right to 'basic health care services' and the Constitution does not elaborate on the content of such basic health care services.<sup>105</sup> Moreover, this right is not dependent on the availability of resources (while the

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<sup>100</sup>Currie and De Waal (n 36) 293.

<sup>101</sup>*Id* 308.

<sup>102</sup>*Ibid*.

<sup>103</sup>For more detailed discussion, see Kassan and Mahery (n 68) 216-217.

<sup>104</sup>*Ibid*.

<sup>105</sup>Landman and Henley 'Health care for South Africa's children: Constitutional guarantees and policy options' (1999) 2/1 Spring *Ethics and Health Care Newsletter* available at <http://www.ecu.edu/cs-dhs/medhum/newsletter/v2n1safrica.cfm> (accessed 2012-08-12).

right to access to health care services is).<sup>106</sup> This implies that government has a positive obligation to provide basic health care services to children. That the provision of health care services to children and pregnant women should be made a priority is also echoed in the White Paper on the Transformation of the Health Care Services.<sup>107</sup> Furthermore, the fact that the Children's Charter of South Africa provides that all children have a right to demand health and medical care, and that parental permission is not required,<sup>108</sup> also indicates the urgency with which children's access to health care is regarded. Section 129 of the Children's Act wherein requirements for independent access to medical treatment or surgery are set out is in conflict with this requirement of the Children's Charter.<sup>109</sup>

### 3.3 Equality/non-discrimination rights (diversity)

The realisation of sexual rights can only be accomplished in a society where there is gender equality.<sup>110</sup> It is widely acknowledged that young women in South Africa are subjected to coercive and violent sexual relationships which impacts their right to equality and results in an inability to make decisions concerning their sexuality and reproduction.<sup>111</sup> Learner pregnancy obviously poses a serious threat to gender equality in terms of girls' education because it has a 'far greater impact on the pregnant girl than on the boy who impregnated her'.<sup>112</sup> '[E]quality of rights is simply impossible in an unequal society'.<sup>113</sup> The sexual rights recognised in the Constitution are thus simply not available to all to an equal extent.<sup>114</sup>

Grounds on which unfair discrimination are prohibited relevant to learners' sexual rights include age, gender, sex and pregnancy.<sup>115</sup> Those will be discussed next.

<sup>106</sup>Proudlock and Hall 'Children's right to health' *Children Count* available at [http://childrencount.ci.org.za/rights\\_health.php](http://childrencount.ci.org.za/rights_health.php) (accessed 2012-08-12).

<sup>107</sup>*Ibid.*

<sup>108</sup>Children's Charter of South Africa (1992) item 7(4) available at <http://www.childfriendlycities.org/pdf/africancharter.pdf> (accessed 2012-08-12).

<sup>109</sup>See (n 70) and (n 71).

<sup>110</sup>Sheill 'Sexual rights are human rights' in Cornwall, Corrêa and Jolly *Development with a body: Sexuality, human rights and development* (2008) 45 at 45.

<sup>111</sup>Mswela 'Cultural practices and HIV in South Africa: A legal perspective' (2009) 12/4 *PER* available at [http://www.scielo.org.za/scielo.php?pid=S1727-37812009000400007&script=sci\\_arttext](http://www.scielo.org.za/scielo.php?pid=S1727-37812009000400007&script=sci_arttext) (accessed 2012-08-12); Shefer and Foster 'Discourses on women's (hetero)sexuality and desire in a South African local context' (2001) 3/4 *Culture, Health and Sexuality* 375 at 376.

<sup>112</sup>Panday *et al* *Teenage pregnancy in South Africa: With a specific focus on school-going learners* (2009) (Commissioned by UNICEF on behalf of the Department of Education to HSRC) 4 available at [http://www.hsrc.ac.za/Research\\_Publication-21277.phtml](http://www.hsrc.ac.za/Research_Publication-21277.phtml) (accessed 2012-08-12); Department of Education (Republic of South Africa) *Measures for the prevention and management of learner pregnancy* (2007) para 3.

<sup>113</sup>Neocosmos cited in Beresford, Schneider and Sember 'Constitutional authority and its limitations: The politics of sexuality in South Africa' in Parker, Petchesky and Sember *Sex politics: Reports from the front lines* (2004) 197 at 230.

<sup>114</sup>*Ibid.*

<sup>115</sup>*Ibid.*



Currie and De Waal distinguish between *sex* and *gender*. They describe *sex* as a biological term referring to the biological and physical differences between men and women and *gender* as a social term referring to social and cultural roles.<sup>116</sup> In the IPPF Declaration on Sexual Rights, *gender* is defined as: '... the array of socially constructed roles and relationships, personality traits, attitudes, behaviours, values, relative power and influence that society ascribes to men and women on a differential basis'.<sup>117</sup> The term *sex* is used to differentiate between females and males and the term *gender* is used to distinguish between femininity and masculinity.<sup>118</sup>

Examples of unfair gender discrimination are requiring the consent of the mother but not the father in the adoption of extramarital children and discrimination based on patriarchal thinking and practices, and cultural practices such as virginity testing.<sup>119</sup> Aapola refers to the double standards that prevail regarding adolescent sexual behaviour: '... boys are at the mercy of their "natural desires", whereas girls should act rationally'.<sup>120</sup> Girls are thus expected to 'wait' and 'resist' while boys are expected to have a strong sexual drive from the moment they reach puberty.<sup>121</sup> Bonthuys argues that the judgment in the *Jordan* case illustrates sexual stereotyping and the reinforcement of the 'double standards which render female promiscuity more blameworthy than that of men'.<sup>122</sup> In a Bophuthatswana case, *Mfolo v Minister of Education*, the court held that pregnant students (one married and three unmarried) may not be expelled on ground of pregnancy because that would constitute an infringement of their rights to education and unfair discrimination on the ground of sex.<sup>123</sup> Note that this case was heard in 1992 when pregnancy was not listed in the Bophuthatswana Constitution as a specific ground on which unfair discrimination is prohibited. Thus, in South Africa, discrimination on the grounds of pregnancy may constitute both pregnancy and sex discrimination.

To prevent unfair discrimination, schools should take care to accommodate pregnant learners and to provide, in their codes of conduct, for foreseeable exemptions so that these learners do not suffer unfair discrimination on the grounds of pregnancy. The Constitutional Court's determination in *MEC for Education: KwaZulu-Natal v Pillay* on how schools' codes of conduct should accommodate for various religious apparel is equally applicable to the situation of pregnant girls.

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<sup>116</sup>Currie and De Waal (n 36) 250.

<sup>117</sup>IPPF Declaration (n 27).

<sup>118</sup>WAS (n 28) 156; *Compassito Manual on human rights education for children* ch 7: Gender equality available at [http://www.eycb.coe.int/compassito/chapter\\_5/7.html](http://www.eycb.coe.int/compassito/chapter_5/7.html) (accessed 2012-08-12).

<sup>119</sup>*Fraser v Children's Court, Pretoria North* 1997 2 SA 261 (CC); The Women's Legal Centre uses *sex* and *gender* as synonyms when referring to virginity testing as *sex* (para 67) and *gender* discrimination (para 68).

<sup>120</sup>Cited in Waites (n 3) 13.

<sup>121</sup>Waites (n 3) 13.

<sup>122</sup>Bonthuys (n 95) 398.

<sup>123</sup>1992 3 All SA 990 (B) 996; Nieuwenhuis (n 97) 91.

A properly drafted code which sets realistic boundaries and provides a procedure to be followed in applying for and the granting of exemptions, is the proper way to foster a spirit of reasonable accommodation in our schools and to avoid acrimonious disputes ...<sup>124</sup>

The same requirement applies to schools' policies on pregnant learners. In *Welkom High School v Head of Department: Free State Department of Education* the court held that:

The adoption of appropriate school policies on pregnant female learners is a huge task which should be performed with a great deal of sensitivity, responsibility, transparency and accountability.

and

A sound policy contains some flexible safeguards. Both the adoption and the implementation of a policy should be sufficiently flexible. This has to be so because the adverse impact of teenage pregnancy differs from one pregnant girl to the next.<sup>125</sup>

### 3.4 Participatory/empowerment rights

Recognising women's sexual rights and empowering them are 'fundamental prerequisites to their reproductive health'.<sup>126</sup>

#### 3.4.1 Right to freedom of expression as a sexual right

The right to freedom of expression is regarded as a 'self-asserting right' because it recognises the child as an autonomous, self-asserting, participating individual with integrity and personality.<sup>127</sup> Section 16 of the Constitution provides that every person shall have the right to free speech and expression. Learners are thus entitled to hold diverse opinions. Complete freedom of expression on the part of learners will, however, be inconsistent with the nature and purpose of schools and the right to freedom of expression can thus be limited where the exercise of this right would disrupt the educational process.<sup>128</sup> The right to freedom of expression can be limited if it would lead to 'a material and substantial disruption in school operations, activities or the rights of others'.<sup>129</sup>

<sup>124</sup>(CCT 51/06) [2007] ZACC 21 (2007-10-05) 38.

<sup>125</sup>*Welkom High School v Head of Department: Free State Department of Education* Case number 5714/2010 at 28, 30.

<sup>126</sup>Aniekwu '[En]gendering sexuality: Human rights issues in reproductive and sexual health' Paper presented in July 2006 at the ARSRC Sexuality Leadership Fellowship.

<sup>127</sup>Viljoen 'The African Charter on the Rights and Welfare of the Child' in Boezaart (eds) *Child Law in South Africa* (2009) 314 at 338; Freeman cited in Barratt 'The best interest of the child – where is the child's voice?' in Burman *The fate of the child: Legal decisions on children in the new South Africa* (2003) 145 at 149.

<sup>128</sup>Coetzee (2010) *Organisational behaviour in education and Education Law: Study guide 2 for HBEDOBG* 143.

<sup>129</sup>Department of Education (South Africa) *Guidelines for the consideration of governing bodies in adopting a code of conduct for learners* (1998) para 4.5.1.

What if false rumours are spread regarding a learner's involvement in sexual activity and subsequent pregnancy? Does this constitute 'hate speech'? Hate speech is 'advocacy of hatred on a listed ground, intended to cause harm to dignity'.<sup>130</sup> 'Hatred' should be interpreted to refer to statements that show 'detestation, enmity, ill-will and malevolence'.<sup>131</sup> In *Islamic Unity Convention v Independent Broadcasting Authority*, it was held that '... certain expression does not deserve constitutional protection because, among other things, it has the potential to impinge adversely on the dignity of others and cause harm'.<sup>132</sup> Harm includes psychological and emotional harm and excludes statements that are merely objectionable or offensive. In the light of existing gender discrimination and the practice to condemn girls that are sexually active as 'bad' girls, it could certainly be argued that a false rumour could cause harm. However, each case must be considered on its own merits, because the test to determine whether speech has caused harm is objective.<sup>133</sup> The test is whether a reasonable person

assessing the advocacy of hatred on the stipulated grounds within its context and having regard to its impact and consequences would objectively conclude that there is a real likelihood that the expression causes harm.<sup>134</sup>

The grounds on which hate speech are prohibited are extended in section 1 of the Equality Act to include, *inter alia*, sex, pregnancy, marital status, sexual orientation, and age. Furthermore, it also prohibits expressions that are 'hurtful' (that is, which cause emotional harm).

This right requires that the views of children be heard and appreciated.<sup>135</sup> Once again the child's evolving capacities come into play. Article 12(1) states: 'State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child'.<sup>136</sup> Brighthouse warns that this should not be interpreted to mean that adults should regard children's voices as authoritative, because that would constitute an 'abnegation of our moral responsibilities toward children'.<sup>137</sup> Recognising children's rights does not put them outside the scope of adult protection, because they are not merely passive recipients of adult protective care.<sup>138</sup> The extent to which the child's views will be

<sup>130</sup> Currie and De Waal (n 36) 377. 'Listed grounds' refers to the grounds listed in s 9 of the Constitution.

<sup>131</sup> *Id* 376 (n 89).

<sup>132</sup> 2002 4 SA 294 (CC) 32 available at <http://www.saflii.org/za/cases/ZACC/2002/3.pdf> (accessed 2012-08-12).

<sup>133</sup> *Ibid*.

<sup>134</sup> SAHRC cited in De Waal and Currie (n 36) 377 (n 98).

<sup>135</sup> United Nations Convention on the Rights of the Child, 28 *International Legal Materials* 1448, 1577 UNTS 3 (1989-11-20) art 12(1).

<sup>136</sup> Constitution (n 30).

<sup>137</sup> Brighthouse (n 39) at 694.

<sup>138</sup> Lansdowne *The evolving capacities of the child* (2005) (Save the Children Sweden and UNICEF) 74, 420 available at <http://www.unicef-irc.org/publications/pdf/evolving-eng.pdf> (accessed 2012-08-12).

considered depends on whether he or she is treated with respect (eg, whether he or she has been given the opportunity to express his or her view and whether that view is given due consideration).<sup>139</sup> Lundy adds two more elements, namely, whether the child was facilitated to give his or her view and whether the views were acted upon.<sup>140</sup> Barrat argues that, even if a child is not mature enough and still developing autonomy, it would be beneficial to allow the child to offer her view. This is because, even if the child's view is not taken into consideration, the fact that she is allowed to participate may make her feel that she has control over the situation, will help to keep her informed, and make her feel that she is of importance.<sup>141</sup>

### 3.4.2 Right to information

As we all know, knowledge empowers people. This is also true of sexuality and being informed is an important element of empowering (pregnant) learners<sup>142</sup> to make informed decisions about their pregnancies and to negotiate the best outcome regarding their pregnancies. Section 13 of the Children's Act provides that every child has the right to relevant and accessible information (aimed at prevention and treatment) on sexuality and reproduction. Sachs J has already in 2000 emphasised that courts should take care that a child's voice be heard. He stated that although such voice would not necessarily be decisive, it would enrich dialogue and provide more certainty when a child's rights need to be balanced against another party's rights.<sup>143</sup> There is a strong public opinion that providing learners with information on their sexual rights will encourage them to become sexually active. Jewkes, Morrell and Christofides, however, refer to the fact that the Netherlands – which has the most extensive and open approach to sexuality education – has the best record as far as the prevention of teenage pregnancy is concerned.<sup>144</sup> An investigation into the rights and duties of learners who become fathers could prove to be most informative (this issue falls outside the scope of this article).

## 4 Conclusion

In light of the fact that the mean age for first sexual intercourse falls within children's school going years and that girl learners end up being pregnant emphasises the need for schools to take cognisance of and to observe the sexual rights of those pregnant learners. In this article, I addressed the problem

<sup>139</sup>Barratt 'The best interest of the child – where is the child's voice?' in Burman *The fate of the child: Legal decisions on children in the new South Africa* (2003) 145 at 152.

<sup>140</sup>Lundy "'Voice' is not enough: Conceptualising article 12 of the United Nations Convention on the Rights of the Child' (2007) 33 *British Educational Research Journal* 930 at 930.

<sup>141</sup>Barratt (n 139) at 152-153.

<sup>142</sup>Jewkes, Morrell and Christofides 'Empowering teenagers to prevent pregnancy: Lessons from South Africa' (2009) 11/7 *Culture, Health and Sexuality* 675 at 683.

<sup>143</sup>*Christian Education South Africa v Minister of Education* (n 59) 53.

<sup>144</sup>*Ibid.*

regarding the uncertainty relating to the content of pregnant learners' sexual rights by providing a constitutional perspective on sexual rights which could be used to inform the content of pregnant learners' sexual rights.

It is evident that pregnant learners should be regarded as autonomous right bearers with a right to developing self-determination. Schools will have to consider the evolving capacities of the pregnant learner, the limitations placed upon children's self-determination by law, parental rights and responsibilities and the child's best interest when they have to manage a pregnant learner. Educators need to know when and to what a pregnant learner may lawfully consent and when a learners' right to privacy and confidentiality may justifiably be limited.

The right to life should be interpreted not merely as a right to be alive, but the right to a dignified existence. Pregnant learners' right to have security in and control over their bodies needs to be respected. Schools need to acknowledge pregnant learners' rights to health care, not by providing health care, but by ensuring that learners will be informed of their rights in that regard and by not restricting pregnant learners' access to health and reproductive care.

Since the realisation of sexual rights is dependent on a society where there is gender equality, pregnant learners' right to equality and non-discrimination should be acknowledged. Double standards that exist based on sex and gender, especially in relation to a pregnant girl and the man/boy that impregnated her, should be strongly contested. Schools' codes of conduct should make provision for exemptions that will cater for pregnant learners' special circumstances. As provided in the *Guidelines for the consideration of governing bodies in adopting a code of conduct for learners*: 'A learner who falls pregnant may not be prevented from attending school. A pregnant girl may be referred to a hospital school for pregnant girls.'

Schools' codes of conduct should contain a prohibition of hate speech on the grounds of pregnancy. Allowing a pregnant learner to express her view goes a long way in helping her to cope with her pregnancy. The right to freedom of expression is, again, dependent on the child's evolving capacities. It includes the right to an opportunity to express your view, the right to have your right to express yourself freely facilitated, the right to be listened to, and the right to have your view acted upon.