

## **GENDER AND THE LAW: THE AGE OF CONSENT (part 2)**

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*Under existing law, girls under the age of twelve and boys under the age of seven are considered to be too young to give meaningful consent to sexual intercourse. A draft rape statute proposed by the government would make the age of consent 12 for both boys and girls, provided that the perpetrator is at least three years older. This provision would be supplemented by the lesser offence of "statutory rape", which makes it illegal for males to engage in sexual activity with girls under the age of 16, regardless of consent. The previous column discussed data on when boys and girls in Namibia actually begin sexual activity and pointed to the alarmingly high incidence of forced sex among boys and girls. This column looks at other aspects of the issue.*

### **OTHER AGE MILESTONES**

In general, our laws recognise the onset of different stages of maturity for the purpose of different kinds of decision-making. The legal age of consent for sexual activity should fit logically into this spectrum.

Boys and girls legally become adults at age 21. This is the age of majority for the purpose of legal acts such as signing contracts and bringing court cases independently. It is also the age at which parental authority over a child legally comes to an end. Persons must be 21 in order to be elected to public office.

The UN Convention on the Rights of the Child defines a "child" as a person under the age of 18. In terms of the Namibian Constitution, boys and girls acquire the right to vote at age 18. They are treated as juvenile offenders under the criminal law if they are under age 18. A person must be at least 18 years old to purchase alcohol legally. Boys and girls under the age of 21 need the consent of their parents in order to marry, and boys and girls under the age of 18 need the consent of the state as well.

Boys and girls are considered competent to make wills and to apply for licences for firearms at age 16. Children under the age of 16 enjoy Constitutional protection against economic exploitation and hazardous employment

The law makes an assumption that children under the age of 14 are incapable of wrongdoing. This means that a child under the age of 14 can be convicted of a crime only if the state can prove that the child knowingly intended to do wrong and understood the consequences of his or her actions. The Labour Act makes it illegal to employ a child under the age of 14 for any purpose.

No child under the age of seven can be convicted of a crime under any circumstances.

### **AGE OF CONSENT IN OTHER COUNTRIES**

There are a number of countries with situations similar to the existing position in Namibia – a common-law age of consent for rape, supplemented by an offence of "statutory rape" with a higher age of consent.

For example, in South Africa, the age of consent in respect of the common-law crime of rape is the same as in Namibia at present – 12 for girls and seven for boys – although reform is expected in future. This position is supplemented by a Sexual Offences Act which makes it an offence for men or women to have sexual intercourse with persons of the opposite sex who are under the age of 16 years, regardless of consent. The relevant age in respect of homosexual contact between two males or two females is 19. No age gap is specified for either offence.

Similarly, in Zimbabwe, the common-law age of consent for rape is 12, but is supplemented by “statutory rape” which covers persons under the age of 16.

A different approach has been taken in Canada, which has been a world leader in rape law reform. There, the general age of consent is set at 14 for both boys and girls. However if the victim is between the ages of 12 and 14, consent can be a defence to a charge of simple sexual assault if the perpetrator is between the ages of 12 and 16, is less than two years older than the victim, *and* is not in a position of trust or authority towards the victim.

This narrowly-circumscribed possibility of consent as a defence does not extend to the more serious offences of sexual assault with a weapon and aggravated sexual assault. It is no defence to any of these charges that the accused believed that the other party was over the age of 14 at the time, unless the accused took all reasonable steps to discover the actual age of the complainant. There has been some recent protest about the existing legal position in Canada, and a petition arguing that the age of consent should be raised from 14 to 16 is currently being circulated.

The age of consent is 16 in most states in the United States, although this has been modified in many states by the introduction of rules about age gaps between the two parties. In many cases, the age gap between the complainant and the perpetrator determine not only whether a crime has been committed, but also the seriousness of the offence. Where there are such age gaps, they are typically 3-4 years.

For example, in New York it is an offence of first degree rape for a person of any age to have sexual intercourse with a child under the age of 11. An offence of second-degree rape is committed if the victim is under the age of 14 and the perpetrator is 18 or older, and an offence of third-degree rape is committed if the victim is under the age of 17 and the perpetrator is 21 or older.

In other states the age rules are simpler. For example, in Montana, sexual assault is committed if the victim is under 16 and the perpetrator is three or more years older.

In Australia, there are different laws on sexual offences in the different provinces but the age of consent for heterosexual intercourse is 16-17 years in most parts of the country.

## **POLICY ISSUES TO CONSIDER**

Historically, laws on sexual offences in many countries have given greater protection to young girls than to young boys. One difficulty with attempting to extend equal protection to boys and girls is determining who is exploiting whom when there is no evidence of force or threats. For example, suppose that a law makes it illegal for any person to engage in sexual intercourse with any other person under the age of 16. In such a case, two 15-year-olds who have consensual sexual intercourse would both be guilty of a crime.

This is one reason why age gaps have been introduced. Where youth is the only factor pointing to sexual exploitation, the law assumes that the older and more mature person is taking advantage of the youth and immaturity of the other party. It would not seem to serve any useful social purpose to criminalise innocent sexual experimentation between persons who are roughly equal in age and experience. Age may not be a very precise measure of experience, but laws do use age as the basis for rules for all sorts of rights, privileges and protections -- for lack of any better options.

Another policy issue to consider is whether the law should create overlapping crimes with different degrees of seriousness. For example, consider two cases involving 13-year-old girls: one where the perpetrator is a 30-year-old man and one

where he is a 15-year-old boy. Should there be different crimes to cover these two situations, or should the differences in maturity be taken into account only in respect of the sentences which are imposed?

It must be remembered that age will be irrelevant whenever force or threats are present. For example, suppose the age of consent for the crime of rape is 12 as proposed. A schoolteacher who threatens to fail a 13-year-old girl unless she sleeps with him could still be found guilty of rape. The function of the age of consent is to make it illegal to engage in sexual intercourse with a person below that age *even if there are no threats and no use of force*. The idea is that it is simply not possible for a child below a certain age to understand the implications of sexual intercourse, or to understand how to deal with a “request” for sexual relations.

## **A PROPOSAL FOR NAMIBIA**

I would propose that sexual intercourse with a child under the age of 14 by a person who is at least two years older be treated as rape. This seems more consistent with the other age milestones than the proposed age of 12. For example, if the law assumes that a person below the age of 14 does not know the difference between right and wrong and is not old enough to work, surely that same child is not old enough to give meaningful consent to sexual intercourse. This also seems more consistent with the data discussed in the previous column on the ages at which girls and boys begin to engage in sexual intercourse, by taking setting the age of consent at an age slightly below the most common age for the beginning of sexual activity.

I would also propose that the crime of rape be supplemented by the lesser crime of “sexual exploitation of a minor” which would protect all boys and girls under the age of 16 from being taken advantage of by any person who is at least three years older. Such a crime should replace the existing crime of “statutory rape” in the Combating of Immoral Practices Act. It would differ from the existing provision on “statutory rape” by extending protection to young boys, and by introducing an age gap to ensure that only the behaviour of the more mature party was criminalised.

Why have two different crimes? Firstly, the new law on rape proposes stiff minimum sentences which will ensure that rape is treated with the seriousness it deserves. This makes it especially important to ensure that only situations which warrant treatment as rape are included in the definition of the crime. Secondly, the overlap between the two offences would give prosecutors and courts discretion to turn to the lesser offence in cases where this is warranted by the circumstances – such as cases where the parties fell within the required age groups but were not so actually far apart in maturity. Thirdly, the two-tier approach would reflect the fact that children between the ages of 14 and 16 are still vulnerable to exploitation, but perhaps not so easily taken advantage of as children under 14.

This proposal put forward here is similar in principle to the government’s proposal. However, it suggests raising the age of consent for rape proposed by the government and narrowing the requisite age gap, in an effort to give children a greater degree of protection.

It is very difficult to decide upon appropriate ages for laws on sexual activity. Individual children reach physical and mental maturity at different ages. Different families and communities also have differing ideas about when children are old enough to make their own decisions about sex. This is why wide public debate on the question will be helpful. The proposed law on rape should be coming before Parliament this session. Consider the issue and make your own input.