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**A feminist post-structuralist critique of the
transformative potential of Malawi's gender equality law
to promote adolescent sexual health**

by

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Summary of thesis

The Gender Equality Act (GEA) aims to address gender inequality and promote sexual health and rights. Indeed, despite Malawi's commitment to promoting adolescent sexual health, a significant proportion of adolescents continue to face challenges such as unwanted pregnancies, coerced sex, and sexually transmitted infections (STIs). Gender inequitable social norms are an important root cause of such adverse sexual health outcomes and trajectories, which disproportionately impact on the girl. The GEA is an important law because it is the primary legislation that specifically addresses gender inequality and recognises sexual health rights. However, gender norms continue to prevail and pose challenges to its implementation.

The thesis discusses what it would take for the GEA to be transformative for children and adolescents. A feminist post-structuralist method of inquiry is adopted, to analyse the GEA which is understood as a legal text that is constituted in, but also constitutes a culture dominated by gender inequality. The thesis explores the possibilities of the GEA successfully creating a radical world in which society recognises adolescents as social actors and agents who play a crucial role in constituting their gendered and sexual worlds. Enabling the GEA to be transformational requires policy actors to interpret and implement the GEA to open new possibilities for adolescents. Only then could the GEA transcend its existential predicament of itself being an artefact of cultural discourse and, strive to transform the very culture of which it is a product.



Declaration of originality

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Declaration:

1. I understand what plagiarism is and am aware of the University's policy in this regard.
2. I declare that this thesis is my own original work. Where other people's work has been used (either from a printed source, Internet or any other source), this has been properly acknowledged and referenced in accordance with departmental requirements.
3. I have not used work previously produced by another student or any other person to hand in as my own.
4. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.

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Professor Ann Skelton

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I thank my wife Lumbani Kangaude for her tremendous and unwavering support and sacrifice.

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Dedication

For my daughters and son

Michelle Lukhanda,

Wayanga Kangaude,

Mphukira Kangaude.



Abbreviation and acronyms

ACERWC:	African Committee of Experts on the Rights and Welfare of the Child
ACHPR:	African Commission on Human and Peoples' Rights
ACRWC:	African Charter on the Rights and Welfare of the Child
African Women's Protocol:	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
CA:	Conversation Analysis
CBDA:	Community Based Distribution Assistant
CDA:	Critical Discourse Analysis
CEDAW:	Convention on the Elimination of All Forms of Discrimination Against Women
Constitution:	Constitution of the Republic of Malawi
CRC:	Convention on the Rights of the Child
CRPD:	Convention on the Rights of Persons with Disabilities
FPDA:	Feminist Poststructural Discourse Analysis
FWCW:	Fourth World Conference on Women ¹⁵⁶
GEA report:	Report of the Law Commission on the Gender Equality Act
GEA:	Gender Equality Act
GEAS:	Global Early Adolescent Study
GEB:	Gender Equality Bill
HIV:	Human Immunodeficiency Virus
HSA:	Health Surveillance Assistant
ICCPR:	International Covenant on Civil and Political Rights



ICPD:	International Conference on Population and Development
LGBTIQ:	Lesbian, Gay, Bisexual, Transgender, Intersex, Queer
MHRC:	Malawi Human Rights Commission
MLC:	Malawi Law Commission
MoEST:	Ministry of Education, Science and Technology
MoGCDSW:	Ministry of Gender, Children, Disability and Social Welfare
ECD Policy:	The National Policy on Early Childhood Development
PfA:	Platform for Action
PoA:	Program of Action
SRGBV:	School-related gender-based violence
SRHR:	Sexual and reproductive health and rights
STI:	Sexuality Transmitted Infection
UN:	United Nations
UNGASS:	United Nations General Assembly Special Session
WHO:	World Health Organisation
WID:	Women in Development
YFHS Evaluation:	Evaluation of Youth-Friendly Health Services in Malawi
YFHS Standards:	National Standards on Youth Friendly Health Services
YFHS:	Youth Friendly Health Services



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PART I: CONCEPTUAL FOUNDATIONS

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1 Introduction

Very early adolescence, defined as the ages between 10 and 14, is a critical phase of physical, cognitive, emotional and social development when social influences beyond the immediate family begin to play an increasingly prominent role in shaping the life course of the adolescent, including sexual health and well-being.¹ Gender inequity is a key determinant of poor sexual health outcomes, and is manifested in discriminatory laws, policies and sociocultural practices.² These gender inequitable norms are sustained by social actors such as parents, educators, healthcare providers and

¹ V Chandra-Mouli *et al* 'Implications of the global early adolescent study's formative research findings for action and for research' (2017) 61 *The Journal of Adolescent Health* s5; C Lane *et al* 'Why we must invest in early adolescence: Early intervention, lasting impact' (2017) 61 *The Journal of Adolescent Health* s10.

² V Chandra-Mouli *et al* (2017) s5.

judges, in their interaction with children and adolescents, through the various social institutions including the family, schools, health facilities and courts of law.

Globally, progress toward the realisation of the right to the highest attainable standard of sexual health for adolescents has been slow despite political commitments to advancing sexual health and rights of adolescents.³ The scenario is no different in Malawi despite the fact that since the late 1990s, Malawi has progressively adopted policies on adolescent sexual and reproductive health and rights, and has shown commitment to fulfilling its obligations under the various international policy and legal instruments to advance sexual health of adolescents. As is recognised in health science research and legal scholarship, sociocultural norms sustain gender inequalities and sexual health inequities and constitute a critical barrier to sexual health and rights of children and adolescents.⁴

Malawi enacted the Gender Equality Act (GEA) in 2013 aimed at promoting gender equality.⁵ Amongst others, the GEA recognises and provides for the right to adequate sexual and reproductive health.⁶ However, the GEA is designed to regulate social life, but it is at the same time an artefact arising out of the very culture it purports to transform. This thesis uses legal and feminist theories to analyse the question of how the GEA, as a legal but also a cultural instrument, could change the normative environment and contribute toward advancing the sexual health of children and adolescents.

³ C Barroso 'Beyond Cairo: Sexual and reproductive rights of young people in the new development agenda.' (2014) 9 *Global Public Health* 641.

⁴ RW Blum *et al* 'It begins at 10: How gender expectations shape early adolescence around the world' (2017) 61 *Journal of Adolescent Health* s3-s4; E Durojaye 'Realizing access to sexual health information and services for adolescents through the Protocol to the African Charter on the Rights of Women' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 147; D Shaw 'Access to sexual and reproductive health for young people: Bridging the disconnect between rights and reality' (2009) 106 *International Journal of Gynecology & Obstetrics* 132.

⁵ Gender Equality Act 3 of 2013 (Malawi). The Gender Equality Act became enforceable in 2014.

⁶ Gender Equality Act (Malawi) sec 19(1).

2 Background

The 1994 International Conference on Population and Development (ICPD) marked a significant paradigm shift from population control policies and programs to adopting a broader-based human rights framework for advancing development and health.⁷ The 179 countries represented at the ICPD, including Malawi, endorsed the ICPD Program of Action (PoA), a consensus policy and political document that articulated the agenda for a rights-based approach to development including the promotion of sexual and reproductive health.⁸ Apart from defining reproductive health and reproductive rights, a striking feature of the ICPD PoA is its emphasis on the centrality of gender equality and the empowerment of girls and women in the advancement of sexual and reproductive health.⁹ The ICPD PoA urges states to promulgate, enforce and implement national laws and international conventions including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) to advance gender equality and the rights of women.¹⁰

The ICPD PoA also encourages states to work with adolescents to promote gender equality and sexual and reproductive rights. It urges states to allow participation of adolescents in planning and implementation of programs and services that have an impact on their lives, such as sexual and reproductive health and sexuality education.¹¹ States are asked to promote gender-equitable relations amongst adolescents, and provide educational and health services “to enable them to deal in a positive and responsible way with their sexuality.”¹² The ICPD PoA comprehensively

⁷ S Sippel 'ICPD beyond 2014: Moving beyond missed opportunities and compromises in the fulfilment of sexual and reproductive health and rights' (2014) 9 *Global Public Health* 620.

⁸ United Nations Population Fund *Program of Action of the International Conference on Population and Development Cairo, 5–13 September 1994 (20th Anniversary Edition)* (2014).

⁹ S Sippel (2014) 621.

¹⁰ United Nations Population Fund (2014) 29.

¹¹ United Nations Population Fund (2014) 50.

¹² United Nations Population Fund (2014) 60. The ICPD PoA was cognisant of the challenges that populations face due to “inadequate levels of knowledge about human sexuality and inappropriate or poor-quality reproductive health information and services; the prevalence of high-risk sexual behaviour; discriminatory social practices; negative attitudes towards women and girls; and the limited power many women and girls have over their sexual and reproductive

discusses the sexual and reproductive health needs of adolescents including that they are provided with information and services to enable them to understand their sexuality to protect themselves from harms and risks of sexual conduct. “This should be combined with the education of young men to respect *women’s self-determination* and to share responsibility with women in matters of sexuality and reproduction (emphasis supplied)”.¹³ The ICPD PoA stipulates actions that states should undertake to provide sexual and reproductive health services to adolescents through education and health institutions and to remove the legal, regulatory and social barriers that hinder access to services and information.¹⁴

Coincidentally, in 1994, Malawi underwent a political paradigm shift when it transitioned from an autocratic government to a multiparty democracy. A famous landmark in this transition was the adoption of a provisional Constitution of the Republic of Malawi (Constitution) by the Malawi National Assembly, on 16th May 1994, which was adopted permanently on 17th May 1995 following some amendments.¹⁵ The democratic Constitution reintroduced a Bill of Rights, which, amongst other rights, recognises the rights of women.¹⁶ The first part of Section 24 of the Constitution states that “Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender ...”.¹⁷

Following its commitment to the ICPD PoA and reinforced by an environment in which human rights including women’s rights are nationally recognised, in 1997, Malawi embarked on a program to provide sexual and reproductive health and rights (SRHR) services through the Reproductive Health Directorate of the Ministry of Health. Since then, there has been a development and proliferation of policies and strategies on

lives” and noted that adolescents, and especially girls were most vulnerable.

¹³ United Nations Population Fund (2014) 74. The ICPD PoA recognises that self-determination, especially of girls and women is critical to advance sexual and reproductive health.

¹⁴ United Nations Population Fund (2014) 75.

¹⁵ P Mutharika 'The 1995 Democratic Constitution of Malawi' (1996) 40 *Journal of African Law* 205.

¹⁶ DM Chirwa *Human rights under the Malawian Constitution* (2011) 4. On attaining independence from the colonial government in 1964, Malawi adopted a constitution that contained a Bill of Rights. At attaining a republic status in 1966, the Bill of Rights was dropped. The Bill of Rights was reintroduced in the Constitution in 1994.

¹⁷ Constitution of the Republic of Malawi, 1995, sec 24 (1).

SRHR. These include the 2016 National Sexual and Reproductive Health and Rights Policy¹⁸, and policies specific on adolescents such as the National Strategy for Adolescent Girls and Young Women 2017 – 2020,¹⁹ and the National Standards on Youth Friendly Health Services.²⁰

Apart from these developments in the health sector, parallel events have occurred in the development of laws on gender that reflect the political will of the government to advance sexual health and rights. The Law Commission (Malawi) (MLC), an institution created by the Constitution, whose mandate is to review and recommend laws that are in conformity with the Constitution and international law embarked on a project, in 2001, to review gender-related laws with the view to promote gender equality and women's empowerment.²¹ An essential outcome of the project was the development of the GEA.

3 Review of literature

Adolescence is a critical period of transition during which the individual undergoes changes in the physiological, physical, biological, cognitive, psychological, and social aspects of life. These changes, marked by the event of puberty, have important implications in the life trajectories of young people, including sexual health.²² Globally, amongst the list of leading health challenges affecting young people are sexual and reproductive health issues such as pregnancy-related conditions and sexually transmitted infections (STIs).²³ A complex mix of contextual and individual factors

¹⁸ Ministry of Health *National sexual and reproductive health and rights (SRHR) policy 2017-2022* (2017).

¹⁹ Government of Malawi *National strategy for adolescent girls and young women 2017 – 2020*.

²⁰ Ministry of Health *National standards on youth friendly health services 2015-2020* (2018).

²¹ Malawi Law Commission *Overview and issue of gender-based law reform in Malawi* (2003) 5. The Law Commission is created under Section 132 of the Constitution. Its powers are stipulated under Section 135 and include “to review and make recommendations regarding any matter pertaining to the laws of Malawi and their *conformity with this Constitution and applicable international law* (emphasis supplied).”

²² AO Fatusi & MJ Hindin 'Adolescents and youth in developing countries: Health and development issues in context' (2010) 33 *Journal of Adolescence* 500.

²³ RW Blum & K Nelson-Mmari 'The health of young people in a global context' (2004) 35 *Journal of Adolescent Health* 409-412.

contribute to sexual health-related morbidity and mortality.²⁴ However, Blum commented that “[w]hat distinguishes the causes of death of young people is that most deaths have behavioural causes exacerbated by national policy or failures of health service delivery systems or both.”²⁵

Countries have tended to focus on addressing the sexual health needs of older adolescents. However, the emerging evidence shows that it is important for policies and programs to meet the specific needs of very young adolescents. It is critical to meet the needs of very young adolescents not only because they are also at risk, but because early experiences have a significant impact on later life.²⁶ Taking the perspective of a life course trajectory, studies such as the Global Early Adolescent Study (GEAS), led by the Johns Hopkins Bloomberg School of Public Health and the World Health Organization, have generated evidence showing that social and gender norms are important determinants of health inequities and that these exert a life-transforming influence on adolescents from as early as the age of 10.²⁷ In a commentary on the study, Chandra-Mouli *et al.* describe that gender norms influence sexual health trajectories of adolescents differentially, and create disproportionate

²⁴ V Chandra-Mouli *et al* 'Twenty years after international conference on population and development: Where are we with adolescent sexual and reproductive health and rights?' (2015) 56 *Journal of Adolescent Health*. The authors refer to contextual factors such as peer pressure, early sexual debut, individual factors such as disability, and other factors such as financial constraints.

²⁵ RW Blum 'Young people: not as healthy as they seem' (2009) 374 *Lancet* 853.

²⁶ K Mmari *et al* 'Exploration of gender norms and socialization among early adolescents: The use of qualitative methods for the global early adolescent study' (2017) 61 *Journal of Adolescent Health* s13. The life trajectory model is explained by Laura Carpenter in her article 'Gendered sexuality over the life course: A conceptual framework' (2010) 53 *Sociological Perspectives*. She says that “sexual beliefs and behaviors result from individuals’ lifelong accumulation of advantageous and disadvantageous experiences” 157. See also MK Johnson *et al* 'Insights on adolescence from a life course perspective' (2011) 21 *Journal of Research on Adolescence*. The authors explain that the basis of the life course model is that development is life long and that a life stage such as adolescence should not be seen in isolation of the preceding life stages of early adolescence and childhood.

²⁷ RW Blum *et al* (2017).

sexual health risks for girls.²⁸ Gender norms prescribe differential status and power to adolescents according to cultural expectations about feminine and masculine behaviour, and these shape the social interactions and relationships, and sexual practices and behaviours between adolescents and with adults.²⁹

Weiss *et al.* describe the differential impact of gender norms in their analysis of the influence of social and cultural norms on susceptibility to HIV amongst adolescents.³⁰ Weiss *et al.* explain that prevailing constructions of male and female sexuality reproduce power imbalances and perpetuate gender inequalities.³¹ According to gender norms, girls are expected to be sexually chaste and preserve their virginity for marriage, while boys are encouraged to have sexual intercourse to prove their masculinity. Weiss *et al.* cite a study in Zimbabwe that found that boys accepted multiple sexual partners as normal, but rejected the idea that girls are also entitled to multiple sexual partners.³² The implications of these gender norms and associated practices include that it heightens men's risk of STI/HIV because it valorises risky behaviour as masculine. At the same time, this behaviour increases the risk of HIV infection of the female counterparts because women fail to negotiate safe sexual practices, due to the expectation that women should not express an active sexual desire.³³ Emphasis on chastity and virginity for girls is a barrier to knowledge about their bodies and sexuality. For instance, health providers withhold vital information and education for fear that they would encourage girls to engage in sexual conduct and lose their chastity and virginity.³⁴ Girls also fear to raise the subject of sexual desire with potential sexual partners, including the use of condoms, for fear that they would be thought of as inappropriately sexually active or promiscuous.³⁵

²⁸ V Chandra-Mouli *et al* (2017) s5.

²⁹ A Kågesten *et al* 'Understanding factors that shape gender attitudes in early adolescence globally: A mixed-methods systematic review' (2016) 11 *PLoS ONE*.

³⁰ E Weiss *et al* 'Gender, sexuality and HIV: Making a difference in the lives of young women in developing countries' (2000) 15 *Sexual and Relationship Therapy* 234.

³¹ E Weiss *et al* (2000) 235.

³² E Weiss *et al* (2000) 236-237.

³³ E Weiss *et al* (2000) 237.

³⁴ E Weiss *et al* (2000) 237-239.

³⁵ E Weiss *et al* (2000) 237-239.



The pervasive influence of social norms that constrain the sexual agency of girls has also been researched and written about by feminist scholars such as Deborah Tolman. In *Dilemmas of Desire*, Tolman describes a study of sexual desire amongst high school girls which reveals how gender norms impact on the experience and expression of feminine sexual desire.³⁶ According to Tolman, the stories told by these girls revealed their struggle with accepting their sexual desire and feelings as a normal and an integral part of their being female.³⁷ The struggle was a result of girls being socialised to distrust their sexual desire, to treat sexual desire as dangerous, and regard it as an aspect of their being that logically leads to trouble, such as unwanted pregnancy and STIs. These girls learned that sexual desire ought to be suppressed. This denial, suppression or dissociation from sexual feelings and desires is disempowering because it takes away their power to make positive sexual choices.³⁸

Anthropological studies indicate that gender norms operate similarly in Malawi to constrain female sexual agency. In some cultures, especially those that practice initiation rites for pubescents, sex and sexual desire is explicitly talked about with the initiates by the traditional counsellors. However, as Munthali *et al.* have observed, boys and girls are counselled differently about sex.³⁹ Girls are advised to refrain from sex while boys are expected and encouraged to prove masculinity by having sex. It is a general trend across Malawian cultures, whether they do practice initiation rites or not, that cultural expectations apply to constrain the sexual agency of girls while boys are allowed relative freedom. One finding from the GEAS is that adolescents across the globe seem not to receive holistic guidance and counsel about sexuality in ways that would empower them because it is assumed that they are not supposed to know

³⁶ DL Tolman *Dilemmas of desire: Teenage girls talk about sexuality* (2005) 16-19.

³⁷ DL Tolman (2005) 44.

³⁸ DL Tolman 'Doing desire: Adolescent girls' struggles for/with sexuality' (1994) 8 *Gender and Society* 340.

³⁹ AC Munthali & EM Zulu 'The timing and role of initiation rites in preparing young people for adolescence and responsible sexual and reproductive behaviour in Malawi' (2007) 11 *African Journal of Reproductive Health* 159-160.

about and have sex. Therefore, adults provide only limited support and information regarding sexual conduct.⁴⁰

The resources discussed so far from the beginning of this literature review, have been predominantly from the paradigm of the social sciences. The following part turns to consider literature from the legal discipline, the primary paradigm from which this thesis draws its perspective.

In *Gender stereotyping: Transnational legal perspectives*, Cook and Cusack address the impact of gender inequalities and discuss the concept of stereotyping as a basis for reproducing gender inequality. They define a stereotype as a “generalised view of preconception of attributes or characteristics possessed by, or the roles that should be performed by, members of a particular group (e.g. women, lesbians and adolescents).”⁴¹ Stereotypes are shared social constructions of identities, and they can be harmful when they are assigned to individuals in a manner that disregards their characteristics, wishes, needs and in so doing limit or constrain their true potentialities.⁴² For instance, women are constructed as sexually passive in relation to men, and this creates expectations that they would not initiate sex. One implication is that girls have challenges to be in control of their sexuality in their sexual encounters with boys, for instance, to negotiate condom use, because they are not expected to take the initiative to carry or discuss condoms.

Durojaye observes that gender inequality is an important barrier to adolescents accessing sexual health information and services. He notes that “[g]irls generally, unlike boys who can flaunt their sexuality, are expected to be sexually passive and are not expected to exhibit any knowledge about their sexuality.”⁴³ The sentiments are echoed by Savage-Oyekunle and Nienaber who describe social and cultural norms as

⁴⁰ Evidence to Action Project *Evaluation of youth-friendly health services in Malawi* (2014). The findings of this evaluation support this assertion because amongst other findings, it captured negative views from parents about adolescent accessing sexual health services because they are young and not married.

⁴¹ RJ Cook & S Cusack *Gender stereotyping: Transnational legal perspectives* (2010) 9.

⁴² RJ Cook & S Cusack (2010) 20.

⁴³ E Durojaye 'Access to contraception for adolescents in Africa: A human rights challenge' (2011) 44 *The Comparative and International Law Journal of Southern Africa* 14.

fostering gender inequality, including demonising girls who engage in pre-marital sex.⁴⁴ The social construction of girls as sexually passive has negative implications related to sexual health including that parents and adults may avoid providing girls with information about sex, and healthcare providers resist providing condoms to adolescents for fear that it would encourage them to be sexually active. Consequently, girls are disempowered because of social views and attitudes about their sexuality and have relatively less control of sexual conduct in their relationships with boys because decision-making about sex is deferred to the boys. As a result, girls have challenges negotiating sex and end up shouldering the burden of unwanted pregnancies, and a high rate of STIs.⁴⁵ In other words, the differential experiences between girls and boys cannot be simply attributed to biology. Sociocultural factors play an important role.

Both legal and social or public health scholarship appreciate the role of gender norms in shaping sexual behaviour and determining the sexual health outcomes for adolescents. Legal scholars recognise that boys and girls are influenced by gender norms and this impacts on the realisation of the right to sexual health. Therefore, transforming gender norms is not just a matter of enacting a law. An important area of inquiry should include how it is that the law could contribute to making any difference at all. Such an inquiry should necessarily go beyond the law to engage with questions about the meaning of gender and sexuality, the meaning of being a man or woman, and the regulation of sexuality in a changing and evolving world.⁴⁶ It requires understanding concepts that imply power relations such as sexuality, gender and adolescence and their relationship to legal and cultural tools such as the GEA that have potential to shift power relations and have implications on sexual health trajectories of adolescents. Miller, for instance, analyses the contested concept of sexuality and its connection to underlying power dynamics in society.⁴⁷ Miller and

⁴⁴ OA Savage-Oyekunle & A Nienaber 'Female adolescents' evolving capacities in relation to their right to access contraceptive information and services: a comparative study of South Africa and Nigeria' (2015) 48 *The Comparative and International Law Journal of Southern Africa* 113.

⁴⁵ E Durojaye (2009) 149; OA Savage-Oyekunle 'Adolescents' access to emergency contraception in Africa: An empty promise?' (2017) 17 *African Human Rights Law Journal* 498.

⁴⁶ CS Vance 'Pleasure and danger: Toward a politics of sexuality' in *Pleasure and danger: Exploring female sexuality*, ed. Vance CS (1984) 2.

⁴⁷ AM Miller 'Sexual but not reproductive: Exploring the junction and disjunction of sexual and

Vance have said that sexuality carries with it “powerful assumptions and self-evident “knowledge” that may be misleading, biased, or inaccurate”.⁴⁸ They claim that sexuality can have hidden connections to power that are contrary to human rights values of dignity and equality, for instance, state and social control over the sexual agency of the adolescent. Indeed, the power of gender and sexual stereotypes is that they influence and are sustained through powerful institutions, including the law.⁴⁹ It is, however, not surprising that laws can perpetuate gender inequality, because laws are a human institution and they are instruments for constructing human reality which includes shaping power relations.⁵⁰ Laws, however, can also be transformative when they construct group and individual identities in ways that recognise their potential, needs and desires. This thesis explores the potential of the GEA as a legal but also cultural instrument to transform power relationships in a manner that would improve the sexual health of adolescents.

4 Research problem

The GEA cannot be assumed to be a transformative instrument simply because it aims to change gender relations. The GEA is a product of culture and is therefore not entirely free of the influence of gender norms that perpetuate stereotypical meanings of gender and sexuality. Even if it were to be free of such influence, it is expected to be implemented by social actors such as health providers who are themselves under the powerful influence of these gender norms. Such power of social norms to influence social relationships even in the face of consensus agreements and legal commitments is the reason “Twenty years after Cairo, young people across the globe – especially adolescent girls and young women – still face formidable social and psychological barriers to the exercise of a healthy and pleasurable sexuality.”⁵¹ For instance, an evaluation of the implementation of the Youth Friendly Health Services (YFHS)

reproductive rights' (2000) 4 *Health and Human Rights* 68.

⁴⁸ AM Miller & C Vance 'Sexuality, human rights and health' (2004) 7 *Health and Human Rights Journal* 5.

⁴⁹ RJ Cook & S Cusack (2010) 25.

⁵⁰ J Niemi-Kiesiläinen *et al* 'Legal texts as discourses' in *Exploiting the limits of law: Swedish feminism and the challenge to pessimism*, ed. Gunnarsson Å *et al* (2007) 69.

⁵¹ C Barroso (2014) 641.

program in Malawi revealed that young people still face barriers in accessing SRH services and information because of social factors such as attitudes of parents about adolescent sexuality.⁵²

The interaction between legal and human rights norms, and social and cultural norms that shape both the behaviours of adolescents, and the behaviours of social actors, and institutions towards adolescents regarding their sexuality presents an interesting problem. Adults fail to provide sexual health information and services for fear that adolescents would become sexually active. Girls are expected to be sexually passive. This contributes to their being unprepared or unable to negotiate safe sex when they engage in sexual intercourse with boys.

Even legal institutions and social actors that are expected to facilitate the transformation of gender inequitable norms are not free of the pervasive influence of these powerful norms. An example of this influence is the institutional responses to adolescent sexuality in policies that criminalise consensual sex between adolescents. Most African countries, including Malawi, adopted colonial age of consent laws in their criminal and penal codes, and these were based on sex and gender stereotypical views that disregarded the sexual agency of adolescents and viewed women's sexuality as passive.⁵³ The court's determination of a 'defilement' case in *Martin Charo v Republic*⁵⁴ highlights the impact of social, cultural attitudes and practices regarding adolescent sexuality influenced by gender and sexual stereotypes. In this case, the judge expressed the view that a sexually active 14-year-old girl should not benefit from the protection of the sexual offences law that prohibited sexual relations with children because she voluntarily engaged in sex. An analysis of his reasoning reveals underlying stereotypical views about the sexuality of adolescents and, in this instance, the sexuality of female adolescents.

Questions about how laws could transform gender norms may, therefore, not be answered simplistically just by locating and analysing legal principles within legal texts and applying them to solve adolescent sexual health challenges. Even if the GEA prohibits discrimination against adolescents seeking sexual healthcare services, girls

⁵² Evidence to Action Project (2014).

⁵³ M Waites *The age of consent: Young people, sexuality and citizenship* (2005) 69, 97.

⁵⁴ *Martin Charo v Republic* Criminal Appeal no 32 of 2015 (High Court of Kenya).

still fail to access condoms because of stereotypical views about sexuality. Therefore, this thesis explores the issues of power surrounding social relationships, how they influenced the creation of the GEA and how they would also influence its implementation. This requires employing theoretical frameworks that would have explanatory power regarding the relationship between the law and social phenomena, to understand how the law influences and is influenced by the very social norms which it sets out to transform.

The kind of inquiry the thesis pursues bears resemblance with Anton Kok's research on the potential of the Equality and Prevention of Unfair Discrimination Act 4 of 2000 to transform South African Society. Kok discusses in-depth the question of whether the law is an effective tool for social change.⁵⁵ This thesis does not delve into the analysis of the law as a tool for social change but shares Kok's pessimism that the transformative potential of the law is often overestimated.⁵⁶

5 Research aim and questions

The research addresses how the GEA, itself being a product of a culture in which gender inequitable norms are pervasively influential, would transform these gender norms specifically for adolescents. To achieve transformational change, the GEA would have to engage with power dynamics that put children and adolescents in vulnerable positions regarding their sexual health and well-being. The research, therefore, puts the GEA to a conceptual test to analyse its potential to transform power relations in a manner that would create a gender equitable environment and one in which children and adolescents would realise the right to sexual health.

The main research question, therefore, is how the GEA would transform gender norms for children and adolescents to realise sexual health and rights in Malawi. In other

⁵⁵ JA Kok, "A socio-legal analysis of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000," 2007, 34. For a more succinct treatment of the question of whether the law can change society, see also, A Kok 'Is law able to transform society?' (2010) 127 *South African Law Journal*.

⁵⁶ A Kok (2010) 61. In another article, Kok sceptically notes: "Law seems to be the quickest and cheapest way in changing a society and that is why governments too readily turn to the law when it wishes to dispose of a social ill. In this belief governments are probably usually mistaken." A Kok 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Proposals for legislative reform' (2008) 24 *South African Journal on Human Rights* 458.

words, how would the GEA be expected to make a difference given that gender norms are so pervasive that they have influenced the very constitution of the GEA, its aims and implementation?

The main question is broken down into the following secondary questions:

- How is the GEA designed and formulated to address gender inequitable norms and the underlying power dynamics that reproduce inequalities?
- What meanings of gender, sexuality, childhood and adolescence are assumed by the GEA and what are the implications for power relations?
- What contextual factors influenced the development of GEA and its definitions of the problems it set out to address?
- How could the GEA be implemented to transcend the negative influence of prevailing gender norms on the GEA itself?

6 Significance

Despite starting out with some scepticism as to the transformative effect of the GEA, this thesis is nevertheless optimistic that, potentially, the GEA could facilitate change for gender equality and sexual health for children and adolescents. This assumption underlies the motivation of this research project. However, the GEA cannot be expected to achieve its aim in a straightforward manner because, first, the GEA is an instrument borne out of culture, and there is need to understand how it might itself inflect gender norms that perpetuate stereotypes.

Secondly, there are certain ways of thinking about the sexuality of children and adolescents that influence social attitudes and practices, for instance, the idea that children should not engage in sexual conduct until they are married or older. Therefore, even if the GEA states that sexual health services should be provided to adolescents, it faces resistance from health providers and community members, including parents.

An important outcome of the research, therefore, is that it would generate knowledge about the role of laws and legal institutions such as the courts in transforming social and cultural norms that sometimes are contradictory to human rights values of equality and non-discrimination. Such cultural norms pervasively influence individual and institutional attitudes and practices. It is, therefore, an important endeavour to critically

appreciate, at a conceptual level, how the law advancing human rights norms interacts with social and cultural norms, when creating legislation, but also when legislation is implemented by agents of the state and other duty-bearers. The findings of this research, therefore, could inform the process of ensuring that legislation achieves its transformative aims. The findings are also relevant for institutional bodies responsible for creating and reviewing laws because the very process of creating law can be influenced by the social norms that the law intends to transform.

Even though the primary focus of analysis is a law in the jurisdiction of Malawi, lessons learnt from this analysis could apply to other jurisdictions, so that this research could encourage the cross-fertilisation of ideas on how laws designed to transform gender norms should be created and implemented to ensure optimum transformational impact. Treaty-monitoring bodies interpreting legal texts such as the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), and the Committee on the Rights of the Child (Committee on CRC) would also benefit from the insights generated from this research.

7 Methodology

7.1 Interdisciplinary approaches

To achieve an analysis of the complex sexual politics that adolescent sexual health and rights involve, the research employs a combination of traditional legal and non-legal approaches. The first is the legal doctrinal methodology which is core in the legal discipline and the primary paradigm within which this thesis is situated. The legal methodology can have various objectives, but one that would best characterise this research is the quest to gain a deeper understanding of the law as a social construct itself constituted by, and yet constitutive of, relations of power, taking into account historical, philosophical, linguistic and social perspectives.⁵⁷

The second approach is a feminist inquiry. A feminist methodology is employed in this research because it “involves a critique of unexamined assumptions about women and dominant forms of knowing and doing; it involves a commitment to improve life

⁵⁷ T Hutchinson & N Duncan 'Defining and describing what we do: Doctrinal legal research' (2012) 17 *Deakin Law Review* 101-102.

chances for girls and women.”⁵⁸ Within the realm of feminism, this research focuses on the strand that subscribes to the poststructuralist approach and therefore described as a feminist poststructuralist approach. Poststructuralism challenges the idea that categories and identities such as woman or man, boy or girl, are fixed and unchanging. According to poststructuralism, such categories are socially constructed and maintained by underlying power relations.⁵⁹ A feminist poststructuralist approach is appropriate for this thesis because the research explores power relations that have disproportional consequences on the sexual health of adolescents, especially adolescent girls. It provides the analytical framework to analyse the GEA’s role in shaping or reshaping power relations to improve the sexual health of adolescents.

7.2 Methods and techniques

The first method, which is the core method of research in the legal discipline is the legal doctrinal method.⁶⁰ The second method is a technique extrinsic to the legal discipline described as the discourse analysis method. Employing these interdisciplinary methods enables the research to take two perspectives of the law simultaneously, an insider perspective from within the legal discipline, but also an outsider perspective from a non-legal discipline.⁶¹ Both methods contribute to the outcomes of the research which is a critical review of the GEA but at the same time make recommendations on how the GEA could achieve its aim to advance gender equality within the legal system. An assumption which is central to this thesis is that even though the GEA is borne out of a culture that is prejudicial to adolescent sexuality, the GEA, both as a legal and cultural instrument could potentially transform social relationships to improve sexual health trajectories of adolescents.

⁵⁸ D Burns & M Walker 'Feminist methodologies' in *Research methods in the social sciences*, ed. Somekh B & Lewin C (2005) 66.

⁵⁹ F Nollaig & F Elichaoiff 'Feminist postmodernism, poststructuralism, and critical theory' in *Feminist research practice: A primer* ed. Hesse-Biber SN (2013).

⁶⁰ D Watkins & M Burton 'Introduction' in *Research methods in law*, ed. Watkins D & Burton M (2013) 9.

⁶¹ TC Hutchinson 'The doctrinal method: Incorporating interdisciplinary methods in reforming the law' (2015) 8 *Erasmus Law Review* 132-133.



7.2.1 Legal doctrinal method

In the traditional legal method, legal norms, primarily in legislation, or as interpreted in authoritative legal texts such as court judgments, are critically examined to lay bare the essential elements that are then recombined or synthesized to establish a correct and complete statement of the law applicable to an issue in question.⁶² The primary data that are analysed are legal norms in legal and related texts, such as the GEA. It would include regional and international human rights treaties and authoritative legal texts that interpret the national, regional and international laws, such as court judgments and recommendations issued by treaty monitoring bodies. This data is obtained using desk research.

The outcome of the analysis is the identification of the legal norms in the body of national and international laws that should guide institutional and individual practices to ensure that the right to the sexual health of adolescents would be respected. The assumption is that a correct application of these norms would produce gender-equitable outcomes, including the realisation of sexual health for adolescents.⁶³

7.2.2 Discourse analysis

In addition to the legal doctrinal method, this research adapts discourse analysis as a conceptual framework for investigating constructions of gender through legal structures, especially the GEA.⁶⁴ Discourse analysis is an umbrella term that covers

⁶² T Hutchinson 'Doctrinal research' in *Research methods in law*, ed. Watkins D & Burton M (2013) 9-10.

⁶³ This thesis does not go into depth discussion of what the law is. For a more in-depth discussion of the meaning of law in relation to social change, see A Kok (2007) 34-40.

⁶⁴ Here it is worth commenting on the difference in methodology between Kok's socio-legal approach, and the poststructuralist discourse analysis approach adopted in this thesis, to address a similar problem about law and social change. A socio-legal approach is what could be described as an insider's view of the law, which makes Kok's analysis mainly legal even if it uses social science tools and concepts to understand the workings of the law. The assumption in this thesis that law is discourse and the use of poststructural analysis shifts the focus to view the law from the outside, and takes a more conceptual focus, while Kok pursues a pragmatic analysis. One obvious difference between the two approaches is that this thesis engages much fewer legal instruments and legal processes such as case or treaty law. Yet, despite the two very different approaches, the studies arrive at a similar conclusion about the law's potential to contribute to social change.

several traditions for analysing text or discourse.⁶⁵ It was developed in the social sciences and humanities to analyse language, written or spoken, to investigate how meanings and power relations are produced and constituted within texts.⁶⁶ There are several strands of discourse analysis including Critical Discourse Analysis (CDA) and Feminist Poststructuralist Discourse Analysis (FPDA). This research follows the FPDA approach as described by Judith Baxter to read and analyse the GEA and other relevant documents.⁶⁷

This research does not strictly follow any prescribed methodology for conducting FPDA. Rather, it draws upon its principles for reading texts to understand how texts construct reality. This allows for what is called a deconstructive reading of texts.⁶⁸ Deconstruction is a method of making explicit assumptions that are implicit in a text, such as legislation and court judgments, which persuade the reader to take positions posited as the whole truth about a social reality when in fact they are only presenting partial constructions of the social reality. In deconstructive analysis “the researcher tries to identify both what truths are being produced and what alternative perspectives or discourses are being negated or marginalized.”⁶⁹ This provides a critical perspective to analysing the GEA which the doctrinal legal method does not afford.

The primary data selected for the analysis are the GEA and the report of the Law Commission on the development of the GEA (GEA report). Other relevant documents are also consulted where needed, such as the Gender Equality Bill (GEB). This data has been obtained through desk research. The outcome of the analysis is a description of how the GEA is constituted by but also constitutive of power relationships, and to

⁶⁵ C Macleod 'Deconstructive discourse analysis: Extending the methodological conversation' (2002) 32 *South African Journal of Psychology* 17.

⁶⁶ L Cosgrove & M McHugh 'A post-Newtonian, postmodern approach to science: New methods in social action research' in *Handbook of emergent methods*, ed. Hesse-Biber SN & Leavy P (2008) 78.

⁶⁷ J Baxter *Women leaders and gender stereotyping in the UK press: A poststructuralist approach* (2018).

⁶⁸ C Macleod (2002) 19.

⁶⁹ L Cosgrove & M McHugh (2008) 78.

open possibilities for reading the GEA differently to reconstruct the gendered world of children and adolescents.

8 A note on usage of the terms child and adolescent

World Health Organisations (WHO) defines adolescence as the age range between 10 and 19.⁷⁰ The African Charter on the Rights and Welfare of the Child (ACRWC), like the Constitution of Malawi defines a child as a person below the age of 18.⁷¹ This research focuses on the child, which includes adolescents up to the age of 18. However, literature reveals a bias in that sexuality tends to be associated with adolescence, while childhood tends to be thought of as a pre-sexual phase. These demarcations are political in nature, and one problem with these boundaries is that children below the age of 10 are ignored in discussions about sexuality, and even discussions on gender. Yet, as this thesis discusses in the later chapters, gender and sexuality structure the experiences of children below the age of 10.

This thesis is therefore deliberately biased towards very young adolescents and children, those that society treat as too young for sexuality and gender to mean anything for them. Children may not be sexual in the same way as adults, but they are nevertheless sexual beings and they possess capacity for sexual agency. It is important that however sexual they may be at their age, they should experience sexuality positively because this has a bearing on their sexual health trajectory.

The thesis therefore sometimes uses child and adolescent interchangeably, but at other times, one term is emphasised for reasons including that in a discussion, the literature the discussion draws from uses child, for instance, childhood studies will use the term child in discussing gender and sexuality. On the other hand, public health literature is biased towards using the term adolescent when discussing sexual health of persons below 18.

⁷⁰ World Health Organization Young people's health – a challenge for society Report of a Study Group on Young People and Health for All by the Year 2000, Technical Report Series, No 731. Geneva: World Health Organization; 1986. <http://whqlibdoc.who.int/trs/WHO_TRS_731.pdf> (Accessed 7 November 2019).

⁷¹ ACRWC, art 2; Constitution of the Republic of Malawi sec 23 (6).



9 Scope and limitations

9.1 Scope

Regarding the scope, the focus of this thesis is on sexual health. Sexual health is just one aspect of the broader health profile of adolescents. Taken in perspective, sexual health is only one of several interrelated health domains including nutrition, mental health and infectious diseases.⁷² Though it is not within the scope of the thesis to address the complicated relationship between sexual health and other health domains, the thesis acknowledges that the interrelationships amongst these various domains are such that successful intervention in sexual health depends upon successful interventions in other related areas. The only reason the other fields are not considered in depth or at all in this thesis is because of scope rather than an indication of their relative importance.

Second, there are a complex set of factors that determine sexual health outcomes of adolescents beyond gender norms, that interact with gender norms, for instance, economic conditions of the population. The thesis emphasises on gender norms and plays down or does not consider other factors in any depth because it would be too complex a project to deal with in one thesis.

Third, adolescents are not a homogenous group because of individual differences such as disability and gender, but also social and cultural differences such as social and geographical location, which impacts on their life trajectories. Though this thesis considers all adolescents, it pays more attention to analysing the GEA from the perspective of girls because they are disproportionately affected by gender inequitable norms. It is beyond the scope of this thesis to address the needs of all adolescents in their unique positions so that for instance, the thesis does not address the intersection between adolescent sexual health and disability in any exhaustive depth.

9.2 Limitations

A male subject is conducting this research, which employs a feminist perspective. While the researcher aims to produce knowledge that questions power relations that

⁷² SM Sawyer & GC Patton 'Health and well-being in adolescence: A dynamic profile' in *Handbook of adolescent development research and its impact on global policy*, ed. Lansford JE & Banati P (2018) 37-38.

keep the female gender subjugated, good intentions do not necessarily relieve the male-subject researcher's bias that comes from his position in society as a male subject. The positionality of the researcher and the inevitability of masculinist bias is therefore acknowledged. The challenge of bias is less complicated than it would have been, for instance, if the research involved obtaining and interpreting primary data from and about female subjects. In any case, the knowledge generated in this research can only be a partial contribution to the body of knowledge generated by other scholars and is open to review and critique by those who might not have the challenge of an inherent masculinist bias.

Another limitation is also in the methodology of the discourse analysis, which is based on the premise that meaning is never fixed. One challenge, therefore, is where to end the investigation of meanings such as sexuality and gender if one can never arrive at a final analysis. Another problem is that there is not one method of discourse analysis and scholars have taken divergent ways of conducting the investigation. This thesis does not follow any prescribed steps of discourse analysis.

Finally, this research is a conceptual rather than an empirical study and therefore, does not collect and analyse field data such as interviews. The challenge is that it may tend towards abstraction even as it attempts to connect with the lived reality of the law in the lives of children and adolescents. However, the conceptual research nevertheless contributes to advancing knowledge about how to design, interpret and apply laws to promote gender equality and sexual health for children and adolescents.

10 Outline of chapters

The thesis is made up of 7 chapters grouped into three parts.

Part I: Conceptual foundations

Part I is foundational and groups together chapters that explain the research design and the theoretical and conceptual grounding of the research. Chapter 1 is the 'Introduction' and gives the background and literature review that identifies and delimits the area of focus and the subject matter of the research. It explains the research problem, describes the research methodology and the tools for investigation

Chapter 2 is the 'conceptual framework' and articulates feminist poststructuralism, the theory that forms the basis of the thesis's outsider's critique of the law. It describes



feminist theory and its relationship to poststructuralism, and the twin tools for analysis; discourse analysis and deconstructive reading of texts. This chapter explains why feminist poststructuralism is the theoretical framework of choice for exploring power relationships that impact on adolescent sexual health. The chapter also expands on the discussion on discourse theory as an aspect of feminist poststructuralism.

Chapter 3 re-envision the GEA for children. It examines the theoretical and ideological foundation of the GEA through MLC's GEA report. It critiques the concepts that the GEA uses, including its definitions of sex and gender and concepts such as, socialisation and sexual health. It discusses the meaning of childhood as a socially constructed concept. The analysis enables an appreciation of how the GEA constructs the social and gendered world for children, and how the GEA is itself a site for power negotiation. That the GEA constitutes power relationships is discernible in the language and the choice of the use of words and concepts the GEA uses to construct a world that it imagines would shift power relations towards equality.

Part II: Thematic areas on adolescence, gender and sexuality

Three thematic areas are identified a priori which are the focus of analysis, and they are discussed in the three chapters that comprise part II. Chapter 4 focuses on how society understands the sexuality of children and adolescents as through criminal law regulation of consensual sex between adolescents. In Malawi, sexual conduct with persons below 16 is prohibited by law, but then it also criminalises consensual sex for persons below 16. The chapter examines the effects on child sexual wellbeing of criminalising sexual conduct that is normative. Though the GEA itself is not the primary instrument that sets the age of consent to sex, its intention to promote gender equality means that issues of power in relationships, regulated by criminal law, also come under its purview.

Chapter 5 explores how the GEA problematises gender in education to promote gender equality in the educational sector, including in schools. Schools, including pre-school, are an important environment for adolescents because gender norms shape relationships in schools. Schools are an important space to promote the free and full development of personality, yet they are also spaces known to sustain and reproduce



gender inequalities thus prohibiting full development of personality, especially for students whose gender or sexuality does not conform to dominant social expectations.

Chapter 6 focuses on institutions for sexual health. It analyses the concept of access to sexual health services as envisaged in the GEA. It uses the evidence on access to sexual health services to explore the challenges that young people face based on descriptions of the experiences of young people by young people themselves, and adults in the communities. Ultimately, the research contributes to a deeper understanding of what it would entail for the GEA to transform the social and cultural environment for adolescents to improve access to sexual health services.

Part III: Conclusion

Part III is the concluding part of the thesis which draws on the feminist poststructuralist critique of the GEA to generate possible solutions to the challenges raised in part II. Drawing on discourses from which the GEA is constructed, chapter 7 explores ways in which policy actors could interpret and apply the GEA to have an impact on the social worlds of children, to create the possibility for gender equality. It concludes the discussions in the previous chapters and makes recommendations on how policy actors could better implement the GEA.



CHAPTER 2: FEMINIST POSTSTRUCTURAL THEORY

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1 Introduction

The GEA aims to promote gender equality in the relationships between men and women.¹ The memorandum to the GEB submitted to the Parliament of Malawi noted that women in Malawi are disadvantaged in all sectors of life.² However, this thesis

¹ The full name of the Gender Equality Act No 3 of 2013 (Malawi) is “An Act to promote gender equality, equal integration, influence, empowerment, dignity and opportunities, for men and women in all functions of society, to prohibit and provide redress for sex discrimination, harmful practices and sexual harassment, to provide for public awareness on promotion of gender equality, and to provide for connected matters.”

² Gender Equality Bill (2012) (Malawi).

raises a question about the GEA, in the words of Barrie Thorne in “Re-Visioning Women and Social Change: *Where are the Children?* (emphasis added)”.³ Thorne observes that in the development of knowledge using feminist critical methodologies, “[b]oth feminist and traditional knowledge remain deeply and unreflectively centered around the experiences of adults”⁴; that “[o]ur understanding of children tends to be filtered through adult perspectives and interests.”⁵ This thesis bases itself on the premise that children are marginalised subjects in gender equality and sexual health rights. Gender law and policy, and social practice tends to be biased towards adults and ignores the agency of children. Adults imagine that sexuality and gender is not the domain of children but adults.⁶ Powerful institutions such as the legal system reflect this marginalisation of children. For instance, in the criminal justice system, children are prosecuted for engaging in consensual sexual conduct because society believes sexual conduct is for adults, not children.⁷ Such practices contribute to sustaining gender discriminatory attitudes and behaviours. Therefore, to promote gender equality, the implementation of the GEA should pay attention to such social practices that marginalise children and unwittingly contribute to sustaining gender unequal relationships and adverse sexual health trajectories for children.⁸

The central question to this thesis then is how the GEA contributes to improving sexual health trajectories of children. To address this question implies inquiring into the influence of gender inequitable norms that shape attitudes and behaviours from early childhood. It also raises questions about the meanings of childhood concerning gender and sexuality.

³ B Thorne 'Re-visioning women and social change: Where are the children?' (1987) 1 *Gender & Society*.

⁴ B Thorne (1987) 86.

⁵ B Thorne (1987) 86.

⁶ D Bhana 'Children are children: Gender doesn't matter' (2003) 17 *Agenda* 41-43; D Bhana *Gender and childhood sexuality in primary school* (2016) 25.

⁷ GD Kangaude & A Skelton '(De)criminalizing adolescent sex: A rights-based assessment of age of consent laws in Eastern and Southern Africa' (2018) 8 *SAGE Open* 1-2.

⁸ D Bhana 'Love, sex and gender: Missing in African child and youth studies' (2017) 42 *Africa Development* 251.

In classical common law theory, laws are a special kind of social norms, separate from other social regulatory systems, to which decision-making institutions have recourse in determining legal matters. Such institutions are understood to be objective judges and interpreters of the law.⁹ However, this thesis takes a hybrid approach. While not altogether abandoning the traditional legal theory and its assumption of a clear distinction between law and politics, it draws upon feminist theory of law which takes the view that the law is not separate from politics.¹⁰ It adopts feminist poststructural theory to supplement a doctrinal legal analysis of the GEA, to question the potential of the GEA to transform social politics when it is itself a product of the same social politics. Feminist poststructuralism also facilitates an interdisciplinary approach to researching on childhood, gender and sexuality. Various disciplines also employ poststructural theory including childhood, gender and legal studies. Some of the works in the African region that use poststructural method include Bhana's research on childhood, gender and sexuality in primary school, and Macleod's research on adolescence, pregnancy and abortion.¹¹

2 Feminism and poststructuralist theory

Feminism and poststructuralism are two different things. Their coming together is a result of the effort of some feminist thinkers who believe that adapting a poststructural theoretical perspective to feminist theory enriches the feminist goal to advance gender and social equality. Social theorists whose work is considered foundational to poststructuralism include the philosophers Michel Foucault, Jacques Derrida, and Judith Butler.¹² This thesis explains the usefulness of feminist and poststructuralist theory to analysing the GEA to come up with insights on how it could be read and interpreted to advance gender equality and sexual health for children. This thesis

⁹ Å Persson 'An apparent boundary between law and politics' in *Exploiting the limits of law: Swedish feminism and the challenge to pessimism*, ed. Gunnarsson Å et al (2007) 51; MJ Davies *Asking the law question*, Fourth ed. (2017) 45.

¹⁰ MJ Davies (2017) 45.

¹¹ D Bhana (2016); C Macleod 'Adolescence', *pregnancy and abortion: Constructing a threat of degeneration* (2011).

¹² See E Barvosa-Carter 'Strange tempest: Agency, poststructuralism, and the shape of feminist politics to come' (2001) 6 *International Journal of Sexuality and Gender Studies*; J Williams *Understanding poststructuralism* (2005)

employs a feminist poststructural approach because it enables an analysis of power relations in men/women and adult/child relations. Indeed, the GEA aims to manipulate such power relationships to achieve gender equality.

To transform societal norms, the GEA should work with people's beliefs about who they are (identity), their understanding of the meaning of being who they are in relation to other identities (difference) and how inequality results from power relations between groups of people. The GEA must facilitate people's understanding of how they become who they are, for instance, how boys become masculine. This process is not just biological but involves children drawing on cultural resources to shape their identities. The GEA should explain how this power is sometimes available to people, and other times not, and how through this understanding of power relations children can be part of the process of change the GEA aims to achieve. The power of a feminist poststructural theory is that it enables such an analysis.

Feminism, as a theory and a political movement, seeks to transform power relations between men and women that structure all areas of life, including health, education, work, and leisure.¹³ Feminists challenge the inequalities between men and women that characterise relations in many societies. Feminists do not accept unequal gender relationships as natural and inevitable.¹⁴ Though feminists have the common agenda to realise a gender-equal society, how to achieve this has generated divergent thoughts and strategies so that there are several strands of feminism. The varieties of feminism reflect different social, political and intellectual perspectives and commitments.¹⁵ Feminism has also been characterised into broad categories; first, second, and third waves, and possibly a fourth wave.¹⁶ These waves, however, are not to be understood as a historical progression, but as varieties of feminism

¹³ C Weedon *Feminist practice and poststructuralist theory* 1.

¹⁴ S Jackson & J Jones 'Thinking for ourselves: An introduction to feminist theorising' in *Contemporary feminist theories*, ed. Jackson S & Jones J (1998) 1.

¹⁵ EA Flynn *Feminism beyond modernism* (2002) 21; R Tong & TF Botts *Feminist thought: A more comprehensive introduction* (2018). Tong and Botts describe several of these including liberal, radical, Marxist, socialist, postcolonial and psychoanalytic feminisms.

¹⁶ In her book, Rivers announces the arrival of the fourth wave of feminism (N Rivers *Postfeminism(s) and the arrival of the fourth wave: Turning tides* (2017)).

categorised primarily by their ideological preoccupations around the common goal to advance the interests of women. These waves, therefore, coexist for the very reason that the succeeding waves have not entirely abandoned the ideological positions that spur the earlier waves.¹⁷

One of the questions that feminism has had to grapple with is the question of how gender inequality comes about in the society. To address such a question entails addressing other related questions such as what it means to be a woman, and the meaning of femininity. The quest to understand and explain gender inequality brings into play a variety of feminist perspectives. The various strands of feminism entail diverse and competing theories to explain gender inequality and propose solutions. Feminist theorising is not, therefore, just an abstract intellectual activity but is committed to responding to the lived realities of women.¹⁸ One of the reasons feminist theories are diverse is that the subject of feminist theory, the category 'woman', and its relationship to the world eludes simple explanation. Feminist theorising, therefore, has produced complex understandings of the meaning of 'woman', and related to these, views about sex, sexuality and gender.¹⁹ One productive approach to engaging the development of feminist thought, that also facilitates interdisciplinary dialogue, is to distinguish between modern and postmodern feminism because this theoretical divide is recognised in other disciplines such as childhood studies.²⁰

¹⁷ W Stainton Rogers & R Stainton Rogers *The psychology of gender and sexuality: An introduction* (2001) 123.

¹⁸ S Jackson & J Jones (1998) 1.

¹⁹ J Lorber *The variety of feminisms and their contributions to gender equality* (1997) 8.

²⁰ This in many ways is a simplistic divide. This is not to suggest that those lumped together under the modernist and postmodernist labels have minimal differences between them or that they have sufficient commonalities between them. However, for the purposes of this thesis, it suffices to discuss these under the two labels as it is not the aim to discuss in depth all the feminisms but to build a picture that is clear enough to appreciate the importance of feminist poststructural theory in thinking about gender equality and children.



2.1 Feminism, modernism and postmodernism

2.1.1 Fundamental definitions

Though the terms postmodernism and related terms are widely used in scholarship, what they mean precisely is not yet settled.²¹ This section clarifies the words that are central to understanding feminist poststructural theory while at the same time acknowledging that there is no consensus amongst scholars about the meanings of these terms.

A convenient starting point then is to define modernism and its related term, modernity. Modernism is defined as an intellectual or philosophical outlook that emerged in the period of the Enlightenment at the turn of the 18th century in Western Europe. Hamilton describes Enlightenment as the period in which a new framework of ideas about humanity, society and nature was established that challenged the prevailing traditional ideas dominated by religion.²² On the other hand, modernity could be described as the sociohistorical epoch under the influence of a modernist intellectual outlook initially characterised by the radical shift from mythology, magic and religious dogma to the belief in empirical science as the new paradigm of truth, and belief in human reason as the key to progress.²³ In the 19th century, modernity became identified with the

²¹ Judith Butler a scholar associated with the postmodernist theorising previously proclaimed “I don't know what postmodernism is, but I do have some sense of what it might mean...” (J Butler 'Contingent foundations: Feminism and the question of "postmodernism"' in *Feminist contentions: A philosophical exchange*, ed. Benhabib S *et al* (1995) 51.)

²² P Hamilton 'The enlightenment and the birth of social science' in *Formations of modernity*, ed. Hall S & Gieben B (1992) 23.

²³ S Grieshaber & GS Cannella 'From identity to identities: Increasing possibilities in early childhood education' in *Embracing identities in early childhood education: Diversity and possibilities*, ed. Grieshaber S & Cannella GS (2001) 6-7. Modernism placed trust in science and rationality as the tools for individual freedom, social progress and the development of a better world. Habermas and Ben-Habib captures this mentality as follows: “The project of modernity formulated in the 18th century by the philosophers of the Enlightenment consisted in their efforts to develop objective science, universal morality and law ... according to their inner logic.” Science and rational thought would “promote not only the control of natural forces, but would also further understanding of the world and of the self, would promote moral progress, the justice of institutions, and even the happiness of human beings”; Modernity gave rise to the optimism that science and autonomous individual consciousness would secure human progress and



development of global capitalist economic systems, technological advancement and industrialisation, and the rise of modern nation-states.²⁴ This period also saw the expansion of European power and its domination of other cultures through exploration, exploitation and colonisation.²⁵ The modernising social forces that created social forms and institutions were accompanied by the development of philosophical thought which served to consolidate European cultural domination and worldwide influence.²⁶

Postmodernism refers to cultural products that are distinct from modernism. Postmodernity, therefore, is a sociohistorical epoch shift from modernist philosophical outlook and represents a new type of theorising that is distinct from modernist thought.²⁷ In fact, if postmodernism could be described as a philosophical endeavour, it is one that emerges in reaction to the perceived failures of social progress and liberation promised by modernism.²⁸ Stuart Sim has described postmodernism as advancing scepticism against 'truth-claims' made by modernist thinkers regarding human nature and society.²⁹ One of the notable figures in articulating this scepticism is Jean-François Lyotard, whose book *The postmodern condition*³⁰ is widely acclaimed as representing the core postmodern critique of liberal and humanistic world views.

advancement, and that everything would eventually become better in time. (J Habermas & S Ben-Habib 'Modernity versus postmodernity' (1981) *New German Critique* 9.)

²⁴ Modernity has had a long and complex evolution and is described by Hall et al as a sum of different forces that that shaped various processes including "the political (the rise of the secular state and polity), the economic (the global capitalist economy), the social (formation of classes and an advanced sexual and social division of labour), and the cultural (the transition from a religious to a secular culture). S Hall *et al* 'Introduction' in *Modernity and its futures*, ed. Hall S *et al* (1992) 2; T Smith 'Rethinking modernism and modernity now' (2014) 35 *Filozofski Vestnik* 277-278.

²⁵ B Ashcroft *et al* *The post-colonial studies reader* (2007) 131.

²⁶ B Ashcroft *et al* (2007) 132.

²⁷ G Ritzer *Postmodern social theory* (1997) 5-6.

²⁸ Modernism has been blamed for "creating alienating, repressive societies that are increasingly divided between rich and poor, for accelerating the inequities between nations and for wide-scale environmental destruction." (T Smith (2014) 280.)

²⁹ S Sim 'Postmodernism and philosophy' in *The Routledge companion to postmodernism*, ed. Sim S (2011) 3.

³⁰ J-F Lyotard *The postmodern condition: A report on knowledge*, trans. Bennington G & Massumi B (1984).

Lyotard reacts to the modernist 'grand narratives' that attempted to explain the world and predicted fantastic resolutions to social problems such as the prediction of the demise of the class structure as foresaw by Marxism. *The postmodern condition* attacked the truth-claims or legitimating myths that science would lead to progressive human liberation, and that philosophy would lead to the unity of human knowledge that would have one totalising explanation for everything. Postmodern theory, therefore, became associated with a critique of universal knowledge and the foundations of claims to truth.³¹

Poststructuralism is related to postmodernism because it is a subset of postmodern discourses, and it is primarily concerned with language as it is expressed in various texts including signs, symbols and images, which organises social life and is linked to the broader social, political and economic institutions that make up the social body.³² Poststructuralism is in turn related to structuralism. Structuralism's main idea is that meaning is relational. "In other words, events, ideas and activities didn't 'mean anything' in themselves—they only made sense when related to other events, ideas and activities."³³ Another vital contribution of structuralism is the idea that people are not free to produce meanings because their beliefs and actions are but products of the structure (political, social, cultural) in which they are embedded.³⁴ This insight is essential for the thesis as it relates to the central problem of inquiry which is that how can the GEA be transformational when it is limited by the context to which it owes its existence, for it might not create any new meaning. A further insight is that for the GEA to be transformational, it must create new meanings because this is the basis for any change.

2.1.2 Modernist feminism

Feminism is interested in human nature and social relationships. Feminist movements and theories have necessarily been influenced by modernist and postmodernist perspectives of human nature and social relationships. Modernist conceptions of

³¹ S Sim (2011) 3.

³² KH Robinson & C Jones Diaz *Diversity and difference in early childhood education: Issues for theory and practice* (2005) 16.

³³ G Danaher *et al Understanding Foucault* (2000) 7.

³⁴ G Danaher *et al* (2000) 8.



human nature were profoundly influenced by Descartes whose philosophy emphasises reason and rationality as the essence of being human, and the only secure foundation of knowledge.³⁵ Related to this is the idea that the individual is situated prior to society and is the starting point of all knowledge and action, and cannot be subject to any higher authority.³⁶ This Cartesian philosophy is the basis of liberal humanism, that is, the combination of the idea that the human being is the centre of the world and is not subject to any other authority, individual or collective, and the idea that freedom is the most important value of the individual.³⁷ Human rights, therefore, derive from the idea that these are necessary if individuals are to be free. The importance of individual freedom forms the basis for modern social and political rights.

Despite that the language of humanity and rationality was assumed to encompass all human beings because they share the same essence of rationality equally, the idea of a rational being was confined to a man and excluded the woman.³⁸ Modernist varieties of feminism developed in response to this exclusion of women. First wave feminism challenged the exclusion of women from voting, education, and owning

³⁵ For Descartes the human capacity to reason is what enables human to arrive at truth through the rational processes of subjecting evidence to reason and therefore discerning what is true from what is false. The assumptions that flow from this include that every human being possesses reason in equal measure, and that the mind which is the seat of reason is necessarily distinct from the body which is inferior to the mind. EA Flynn (2002) 28; A Jaggar, M. *Feminist politics and human nature* (1983) 29.

³⁶ P Hamilton (1992) 21-22. Patterson captures what has been described in the previous sentences in what he calls the three axes of modernism which provide a three-dimensional perspective of modernism. He calls the first axis epistemological foundationalism meaning that knowledge can only rest on indubitable foundations, which for Descartes is possible when the belief is subjected to reason. The second axis is the theory of language which in modernist thought represents ideas or objects on the world, or the attitudes of the speaker. "If language is a medium for referring to objects in the world, then knowledge of what something is can be gleaned from that object's representation in language." The third axis is that society is best understood as an aggregation of rational individuals. (D Patterson 'Postmodernism/Feminism/Law' (1992) 77 *Cornell Law Review* 263-268.)

³⁷ A Jaggar, M. (1983) 28-29.

³⁸ C Beasley *Gender and sexuality: Critical theories, critical thinkers* (2005) 18.

property.³⁹ Liberal feminism's theorisation of women's exclusion was based on the liberal standard of the primacy of a rational human being. The feminist movement sought to claim equal rights for women, such as the right to education because women had similar capacity for rationality as men and should, therefore, be accorded the same opportunities to education as the men.⁴⁰

Second wave feminism, including radical feminism, focused on critiquing patriarchal structures that oppressed women. It advanced an emancipatory agenda theoretically grounded in modernist understandings of human and social nature. Beasley describes four elements of this emancipatory perspective.⁴¹ First, modernist feminism aims to unlock the universal truth that is key to women's emancipation and the attainment of a gender-egalitarian society. Second, feminism understood power to be a possession of some over others, and that in the patriarchal order, men possess power over women. In this view, women would need to overthrow men's power over them to be free. The last element is the conceptualisation of an individual as made up of an essential self that can be freed from the oppressive power of others. The feminist project, therefore, aligned with the modernist emancipatory project to secure the freedom of the individual in a just and democratic society. Social power was conceived as external and oppressive on the individual, and liberation was conceptualised as the process of freeing the individual 'self' from the trappings of this power.⁴² Psychological sciences developed as the body of knowledge about the 'self', its development and liberation. Analogously, sociological sciences would plot the development of the society towards an egalitarian end. In the modernist worldview, theorists of gender

³⁹ C Beasley (2005) 18. Tong and Botts describe the feminist waves, their time lines and their ideological focus in brief, as follows: "Liberal feminism originated during the "first wave" of feminist activity, roughly from the mid-nineteenth century through the 1950s; came into full flower in the so-called "second wave" of feminist activity, roughly from the 1960s through the 1980s; and began to transform and restructure itself at the start of the so-called "third wave" of feminist activity, approximately from the 1990s to the present. The first wave of liberal feminism centered on women's suffrage; the second wave concentrated on gender equity and equal opportunity for women; and the third wave shifted focus to egalitarian concerns, equality of outcome, and intersectionality theory." (R Tong & TF Botts (2018) 17.)

⁴⁰ R Tong & TF Botts (2018) 20.

⁴¹ C Beasley (2005) 19.

⁴² C Beasley (2005) 20.

and sexuality would devise emancipatory socio-political projects to upset power that oppresses women and other marginalised groups.

2.1.3 Postfeminisms

The subheading is entitled 'postfeminisms', a term this thesis borrows from Ann Brooks. It is another contentious term. This chapter eschews the political debates around the meaning of the term in favour of adopting Brooks' definition of postfeminism as the expression of an evolutionary stage of feminist thought. Some feminists have received it negatively, but it is now understood to be a "useful conceptual frame of reference encompassing the intersection of feminism with a number of other anti-foundationalist movements including postmodernism, post-structuralism and post-colonialism."⁴³ This intersection between postmodernism and the other various perspectives has influenced a paradigm shift in feminist theorising, away from relying on modernist conceptualisations of the world and social relationships to adopting critical theoretical perspectives advanced by social theorists such as Michel Foucault. These social theorists have individually and collectively mounted scathing critiques on conceptual frameworks on which earlier feminisms had relied upon to articulate their emancipatory strategies.⁴⁴ The impact and meaning of the encounter between feminism and postmodernism can, therefore, be understood in terms of its critique of modernist theorising. It suffices for this thesis to describe features of this critique briefly. The section below on feminist poststructuralism further discusses the influence of postmodernism on feminism.

One of the features of postfeminism is that it critiques identities based on the Cartesian notion of 'self' conceptualised as the innermost core of the individual and believed to be the basis of one's identity as a man or woman. Identities such as gender identity

⁴³ A Brooks *Postfeminisms: Feminism, cultural theory, and cultural forms* (1997) 1. In the same year Brook's book was published, the authors Heywood and Drake, who identify as third-wave feminists, in their publication express the following sentiments: "Let us be clear: "postfeminist" characterizes a group of young, conservative feminists who explicitly defined themselves as against and criticize the feminists of the second-wave." (L Heywood & J Drake 'Introduction' in *Third wave agenda: Being feminist, doing feminism*, ed. Heywood L & Drake J (2003) 1.)

⁴⁴ M Barrett 'Words and things: Materialism and method in contemporary feminist analysis' in *Destabilizing theory: Contemporary feminist debates*, ed. Barrett M & Phillips A (1998) 201.

are assumed to be stable, enduring and fixed, and therefore essential. Postfeminism critiques gender essentialism and questions the very constructions of the rigid binary categories of man and woman.⁴⁵ Further, postfeminism distrusts fixing identity as it tends to result in constraining who the person can be. For instance, if one says, 'you are a woman', it comes with expectations that 'you can' do certain things but not others, which frequently slips into, 'you should' do certain things and not others. Fixing identity is, therefore perceived as an authoritarian and constraining practice.⁴⁶ Postfeminists argue instead that identity is the effect of power relations rather than that there is some stable essence at the core of the individual. Postfeminism is therefore said to de-centre the primacy of the individual.

Postfeminists also conceptualise the role of language differently from modernists. In modernism, language is assumed to reflect an external reality out there. Postmodernism argues that reality or meaning is constructed by language and not as modernists claim, that language describes objects in the world. Postmodernism claims that there is no reality outside language. In other words, an attempt to explain a phenomenon using language fails to take off because there is no distinction between the explanation and the phenomenon to be explained.⁴⁷

Another essential feature of the postfeminisms is the relationship between power, knowledge and truth. For postfeminism, the rational individual is no longer the secure basis of knowledge because the individual is but an effect of power relations. Contrary

⁴⁵ C Beasley (2005) 24. Zalewski puts this in simple terms as follows: "If modernists think of the human subject like an apple, with a vital core, then postmodernists think of the subject more like an onion - peel away the layers and there is nothing there at the end or at the core. This doesn't mean that human subjects (people) don't exist or are not important. It is to do with questions about what forms human subjects and what constitutes the basis of them." (M Zalewski *Feminism after postmodernism: Theorising through practice* (2000) 23-24.)

⁴⁶ M Zalewski (2000) 24.

⁴⁷ D Patterson (1992) 274-275. Citing another philosopher by the name of Wittgenstein, Patterson says that "All understanding occurs *in language*. Language is the universal medium within which we think, act, and understand. The idea that language "corresponds" to something outside itself can never be fleshed out, because all talk about language itself remains *use of language*. No part of language can be torn from the whole and valorized as a meta-language, super-language, or "language about language (Emphasis in the original)."

to what Descartes assumed, the individual is not in control of the world but is an artefact constituted in language or discourse.⁴⁸ What then becomes of truth, that which purportedly could be discovered by the reasoning and rational individual? According to postfeminists, truth claims are but an exercise of power. So, for instance, those who define “child” are but exercising power which is what makes their definition ‘true’.⁴⁹

2.2 Key concepts of poststructuralism

2.2.1 Language

In poststructural theory, language is an important factor in the analysis of social organisation, social meanings, individual consciousness and issues of power.⁵⁰ Scott describes the poststructuralist meaning of language as follows:

(Language) is used to mean not simply words or even a vocabulary and set of grammatical rules but, rather, a meaning-constituting system: that is, any system - strictly verbal or other - through which meaning is constructed and cultural practices organized and by which, accordingly, people represent and understand their world, including who they are and how they relate to others.⁵¹

Language is crucially important as it ‘does’ things for people; it enables relationships and facilitates action.⁵² How exactly does language ‘do’ things? How is language related to things or ideas? In modernist thinking, language reflects ideas and the world of things. A poststructuralist view, however, is influenced by Ferdinand De Saussure’s theory of language. According to De Saussure, language is a structure consisting of

⁴⁸ D Patterson (1992) 278.

⁴⁹ Postfeminists are not interested in whether a claim is true or false. “A postmodern feminist task is not then to find out what woman is, but to expose the power/truth/knowledge game that goes on in defining what woman is.” M Zalewski (2000) 28.

⁵⁰ C Weedon (1987) 21.

⁵¹ JW Scott 'Deconstructing equality-versus-difference: Or, the uses of poststructuralist theory for feminism' in *The postmodern turn: New perspectives on social theory*, ed. Seidman S (1994) 283.

⁵² “Most of the time the language we speak is barely visible to us. We are more concerned with what it can do: buy us a train ticket; persuade the neighbours to keep the noise down; get us off the hook when we’ve done something wrong. And yet few issues are more important in human life. After food and shelter, which are necessary for survival, language and its symbolic analogues exercise the most crucial determinations in our social relations, our thought processes, and our understanding of who and what we are.” C Belsey *Poststructuralism: A very short introduction* (2002) 6.



chains of signs. A sign is made up of two parts, a *signifier* (a sound or a written image) and a *signified* (the meaning).⁵³ The relationship between the signifier and signified is arbitrary and not a natural one. For instance, there is no natural connection between the signifier 'dog' and the signified, that is, the four-legged canine.

Another point De Saussure makes is that "in language there are only differences, ... a difference generally implies positive terms between which the difference is set up; but in language there are only differences *without positive terms* (emphasis in original)."⁵⁴ The relationship between signs is not intrinsic but relational, that is, "[e]ach sign derives its meaning from its difference from all the other signs in the language chain."⁵⁵ The idea that "meaning in language derives from the relationships of difference and similarity between terms, and not from the terms themselves"⁵⁶ is at the heart of structuralism. The most revolutionary implication of De Saussure's theory is that language is not a way of naming things which already exist but is instead a system of differences in which the words have no positive content.⁵⁷

Building on De Saussure, Derrida postulates that there are no fixed signifiers or *signifieds*. Through the concept of *différance*, Derrida explains that the meanings of words derive from a dual process: First is their *difference* from others, and second is that meaning is always *deferred* and never fixed.⁵⁸ In any representation in which it appears that meaning is fixed, this is only a temporary retrospective fixing.⁵⁹ Weedon explains that this means that the meaning of a word depends upon its discursive context and would, therefore, change depending on the context.

⁵³ F de Saussure *Course in general linguistics*, trans. Baskin W (1959) 65-67.

⁵⁴ F de Saussure (1959) 120.

⁵⁵ C Weedon (1987) 23.

⁵⁶ BE Harcourt *An answer to the question: 'What is poststructuralism?'* (2007) 4.

⁵⁷ C Belsey *Critical Practice* (2002) 33. Scott puts the same idea in this way "meaning is made through implicit or explicit contrast, that a positive definition rests on the negation or repression of something represented as antithetical to it. Thus, any unitary concept in fact contains repressed or negated material; it is established in explicit opposition to another term." JW Scott (1994) 285.

⁵⁸ J Derrida *Positions* (1981) 26-29.

⁵⁹ C Weedon (1987).

Poststructuralism does not deny that there is an external reality; it just makes the point that people's experience of this reality is mediated through language, through the way people give meaning to their world. Ascribing meaning involves acts of valuation. The act of giving meaning in which some terms are privileged over others makes language a social and political tool. "Once language is understood in terms of competing discourses, competing ways of giving meaning to the world, which imply differences in the organization of social power, then language becomes an important site of political struggle."⁶⁰ For instance, the words 'child' or 'adolescent' or 'girl' are not merely biological labels, but stand for various things and are open to interpretation and reinterpretation depending on the discursive relations in which they are located.⁶¹ An example is that in a given society a girl of 17 might be recognised as a child in accordance with the law that defines a person under 18 as a child, yet a girl of 15 who is known to be sexually experienced might be considered not-a-child, or in the least, a different kind of child. An illustration of this is how the judge in the case of *Martin Charo v Republic* uses language to describe a sexually active 14-year old girl. In describing her, the judge says "It is clear to me that although PW1 was a young lady aged 14 years; she was behaving like a full grown up woman who was already engaging and enjoying sex with men."⁶² One way to think about this statement is that it is merely an opinion about a reality the judge encounters. However, a poststructural perspective would give it a different significance. The judge engaged in an act of valuation, through attributing meaning to the experience of the female aged 14. How the judge 'sees' her as a woman, not a child, has implications on what he believes about how the institution of the law should treat her.

The development of the Convention on the Rights of Persons with Disabilities (CRPD) serves as another example of how language shapes the social world. Historically, persons with disabilities have been perceived in various ways; as evil, deserving pity, objects of welfare, objects of medical intervention and more recently as subjects of human rights. The CRPD is said to have accomplished an important paradigm shift by

⁶⁰ C Weedon (1987) 24.

⁶¹ C Weedon (1987) 25.

⁶² *Martin Charo v Republic* (2015)

entrenching a social model of disability.⁶³ In this model, disability is perceived not as something inherent in the individual, but in the manner society values persons based on the difference of ableness. The CRPD effectively uses language to recreate a social world in which society perceives persons with disabilities in a new way. The CRPD accomplishes this by giving disability a novel meaning by recognising in the preamble that “disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.”⁶⁴ Yet, the CRPD does not ignore the reality of long-term physical, mental, intellectual or sensory impairments of persons with disabilities.⁶⁵ The CRPD’s political clout lies in reconstructing disability to mean social barriers created by society, rather than limitations of individual biology.⁶⁶ The CRPD then reformulates the language of traditional human rights to emphasise that persons with disabilities are subjects of human rights like everyone else. This example demonstrates how language transforms the social world of persons with disabilities by the reassigning of meaning.

2.2.2 Discourse

Foucault’s concept of discourse is essential to poststructural theory. One way to understand what discourse means is to consider the generic question that Foucauldian discourse analysis seeks to answer, that is, “how did it come about that some particular way of organising thinking, talking, and doing about some selected topic took the form and content that it did?”⁶⁷ The importance of discourse which also links it to language is that it is

a privileged entry into the poststructural mode of analysis because it is the organized and regulated, as well as the regulating and constituting, functions of language that it studies: its aim is to describe the surface linkages between power, knowledge, institutions,

⁶³ A Kanter *The development of disability rights under international law: From charity to human rights* (2015) 7-8.

⁶⁴ UN General Assembly, Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106, Annex I, preamble.

⁶⁵ CRPD (2006) art. 1.

⁶⁶ A Lawson & M Priestley 'The social model of disability: Questions for law and legal scholarship?' in *Routledge handbook of disability law and human rights*, ed. Blanck PD & Flynn E (2017) 6.

⁶⁷ A Hunt & G Wickham *Foucault and law: Towards a sociology of law and governance* (1994) 7.

intellectuals, the control of populations, and the modern state as these intersect in the functions of systems of thought.⁶⁸

People manipulate their world using language through discourse within the context of institutional practices. Institutions play an essential role in the social construction of reality.⁶⁹ Language is the primary means by which institutions create a coherent social reality. Institutions are constructed and reconstructed in discourse practices. “This view of discourse as constituting social reality ... assigns discourse an important role in shaping reality, creating patterns of understanding, which people then apply in social practices.”⁷⁰ According to Foucault, discourse is “practices that systematically form the objects of which they speak.”⁷¹ Norman Fairclough suggests that the two important insights from Foucault on discourse are first that discourse actively constitutes and constructs society in various dimensions including objects of knowledge, social subjects, subjectivities, social relationships and conceptual frameworks. The second insight is that discourse practices of an institution or society are interdependent in that they always draw upon contemporary and historical discourse; they are generated out of a combination of discourse and defined in relation to other discourse.⁷²

Sara Mills further describes five features of discourse. First, institutions and the social context play an important role in the development, maintenance and circulation of discourse. Second, discourses do not occur in isolation but always in relation to other

⁶⁸ P Bové 'Discourse' in *Critical terms for literary study*, ed. Lentricchia F & McLaughlin T (1990) 54-55. “Discourses can be understood as language in action: they are the windows, if you like, which allow us to make sense of, and ‘see’ things. These discursive windows or explanations shape our understanding of ourselves, and our capacity to distinguish the valuable from the valueless, the true from the false, and the right from the wrong.” (G Danaher *et al* (2000) 31.)

⁶⁹ Agar defines an institution as “a socially legitimated expertise together with those persons authorized to implement it.” M Agar 'Institutional discourse' (1985) 5 *Text* 164. In the following quote, Agar distinguishes between an institution and an organisation or its organisation: “The relationship of *Institution* to its *organizational context* also awaits clarification. Most of the institutions reported on in this article – medicine, law and government – have been examined in organizational contexts—hospitals, courts and meeting rooms.” 165.

⁷⁰ A Mayr *Language and power: An introduction to institutional discourse* (2008) 5.

⁷¹ M Foucault *The archaeology of knowledge*, trans. Smith SMA (1972) 49.

⁷² N Fairclough *Discourse and social change* (1992) 39-40.



discourses, and more often in contrast and opposition to them.⁷³ A discourse of homosexuality, for example, involves some groups saying that homosexual conduct is immoral and should be illegal, and others saying it is not immoral and should not be unlawful. Discourses are therefore always in conflict with others because discourses are sites of contestation of meanings. As Mills put it, “ideological struggle is at the heart of discourses.”⁷⁴ Third, discourses tend to be organised around practices of exclusion.⁷⁵ Discourse regulate what can be said and thought and what cannot be said or is unthinkable. So, for instance, the discourse of childhood innocence allows sex and the child to be talked about only on negative terms of abuse and the need to protect children from it. For instance, anybody that dares to speak of sexual pleasure of children risks being considered as perverted. Fourth, discourse is not mere groupings of statements, but over and above that, they have a meaning, force and effect within a social context.⁷⁶ For instance, consider the words of a priest or pastor who utters ‘I now pronounce you husband and wife’. The effects of these words have significant consequences on how the two people relate from thereon.

Discourse shape attitudes and practices so that they are seen as ‘normal’ and therefore making it challenging for people to think outside the dominant discourse. However, though people are subject to discourse, they are not determined by discourse because, despite that discourse shapes subjectivity, there is always the possibility to manoeuvre and to choose an action that might be resistive of the dominant discourse. It is possible to negotiate one’s position in discourse because subjects have the capacity for agency.

2.2.3 Subjectivity

A theory of subjectivity is important to explain relationships of power, for instance, between men and women, and adults and children. The notion of subjectivity describes one’s sense of self that constitutes the basis for one’s relationship to the world. An essential aspect of subjectivity for feminism is agency because a theory of

⁷³ S Mills *Discourse* (2004) 10.

⁷⁴ S Mills (2004) 12, 14.

⁷⁵ S Mills (2004) 11.

^{s76} S Mills (2004) 11.

subjectivity must also explain how it is possible for persons to change power relationships, for instance, to move out of a position of marginalisation.

A poststructuralist theory of subjectivity is best explained by contrasting it to the liberal-humanist perspective.⁷⁷ The liberal-humanist individual is understood to be “a conscious, stable, unified, rational, coherent, knowing, autonomous, and ahistoric individual.”⁷⁸ The individual is the centre and agent of social phenomenon and productions, including knowledge.⁷⁹ “Unlike humanism, which implies a conscious, knowing, unified, rational subject, poststructuralism theorizes subjectivity as a site of disunity and conflict, central to the process of political change and to preserving the status quo.”⁸⁰ Poststructuralism conceptualises subjectivity as unstable and a continuous process of constitution and reconstitution through discursive practices.⁸¹ Within this model, who one *is*, always is an open question with a shifting answer depending upon the positions made available within one's own and others' discursive practices and within those practices.⁸² Persons are shaped by discourse, by how they are positioned in particular discourses, and these discourses can be contradictory. It is this ‘de-centring’ of the subject and recognition that there is no essential subjectivity,

⁷⁷ V Walkerdine 'Developmental psychology and the child-centred pedagogy: the insertion of Piaget into early education' in *Changing the subject: Psychology, social regulation and subjectivity*, ed. Hollway W *et al* (2004) 90.

⁷⁸ E Adams & S Pierre 'Poststructural feminism in education: An overview' (2000) 13 *Qualitative Studies in Education* 500.

⁷⁹ V Walkerdine (2004) 90.

⁸⁰ C Weedon (1987) 21.

⁸¹ B Davies & C Banks 'The gender trap: a feminist poststructuralist analysis of primary school children's talk about gender' (1992) 24 *Journal of Curriculum Studies* 2. Discursive practices are meaning-making activities in which people engage. Richard Young in defines practice as “the construction and reflection of social realities through actions that invoke identity, ideology, belief, and power” R Young *Discursive practice in language learning and teaching* (2009) 1. These discursive practices take place a specific context, meaning in a “network of physical, spatial, temporal, social, interactional, institutional, political, and historical circumstances” R Young (2009) 2. For instance, a primary classroom experience provides a context in which boys and girls learn ways of being boys and girls through the operation of teaching and learning practices.

⁸² B Davies 'The discursive production of the male/female dualism in school settings' (1989) 15 *Oxford Review of Education* 229.

that is important for feminist poststructuralism because this explains agency. In poststructuralism, choices are understood to be ‘forced choices’ because one’s act of choosing is really a function of one’s position in discourse “because one has been subjectively constituted through one’s placement within that discourse to *want* that line of action” (emphasis in the original), and not the function of pure rational choice.⁸³ Poststructuralism, it would appear, advances a deterministic view, that subjectivity is constituted through social forces in which one’s claim to be a rational chooser is but an illusion. However, it is precisely this failure of the essential rational self that for poststructuralism presents the opportunity for true agency. In this view, the subject who is aware of the discourses that constitute him or her, can move within the discourses to use the terms of one discourse to counter, modify, reject, or support the other, both in terms of one’s experienced subjectivity or in relation to the experience of different subjectivities.

In contrast to the liberal-humanist agency view, agency does not arise from the certainty of the rational being possessing agency as an inherent feature, but from the fact that though constituted in discourse, the subject can take up or resist subject-positions made available to the individual. Poststructuralism acknowledges that discourses are limiting, but this does not eliminate agency, because while discourses and cultural practices indeed subject the individual, at the same time the individual has room to manoeuvre by taking up or resisting those available discourses and cultural practices.⁸⁴ The fact that people are constrained by discourse and yet they also are free is the crucial political import of poststructuralist theory of agency in feminism. It explains how women have been subjected to oppressive practices, despite the promise of freedom in the perspective of the liberal-humanist tradition. It also explains how, despite the constraints on women’s subjectivity, there are always possibilities for self-determination.

⁸³ B Davies 'The concept of agency: A feminist poststructuralist analysis' (1991) 30 *Social Analysis: The International Journal of Social and Cultural Practice* 46. In other words “rather than being the free and active organisers of society, we are products of discourses and power relations, and take on different characteristics according to the range of subject positions that are possible in our socio-historical context” (G Danaher *et al* (2000) 118.)

⁸⁴ E Adams & S Pierre (2000) 502.



Understanding how discourse shapes subjectivity is essential for this thesis because discourse moulds the subjectivities of children from the time they are born, influencing what choices they would make about who they would become. Adults can unknowingly, as Bhana found out about teachers in primary school, contribute to encouraging children to take up gender inequitable norms rather than to challenge them.⁸⁵ Transforming social norms requires an understanding of how children take up or resist social norms.

2.2.4 Knowledge and truth

The most productive use of the Foucauldian notion of discourse has been in relation to the 'knowledge/truth/power' triad. In this section, the discussion focuses on knowledge and truth. Discourses are more than ways of producing meaning and thinking; discourses "are ways of constituting knowledge, together with the social practices, forms of subjectivity and power relations which inhere in such knowledges and the relations between them."⁸⁶ Power is a relationship of struggle to dominate the meanings people give to their lives. It is as MacNaughton has put it, "a battle to authorise the truth."⁸⁷

Poststructural theory understands knowledge as contingent and socially produced, and rejects the idea that there are absolute, universal and transcendental truths that explain social reality. Feminists especially are wary of the absolute and universal truth because of the observation that dominant conceptions of reality in the Western tradition have been male constructions and reflect and perpetuate male interests.⁸⁸ Feminism (poststructuralist) therefore understands knowledge not as neutral but as always associated with power.⁸⁹ Power is the ability to determine what knowledge counts as true and what knowledge does not. Truth, therefore, is a human and social construction, rather than some reality that exists in a transcendental way. It is those "who have the power to regulate what counts as truth [that] are able to maintain their

⁸⁵ D Bhana (2003).

⁸⁶ C Weedon (1987) 108.

⁸⁷ G MacNaughton *Doing Foucault in early childhood: Applying poststructural ideas* (2005) 21.

⁸⁸ N Gavey 'Feminist poststructuralism and discourse analysis' (1989) 13 *Psychology of Women Quarterly* 462.

⁸⁹ N Gavey (1989) 462.



access to material advantages and power.”⁹⁰ Feminist poststructural theorising, therefore, is not an endeavour to discover ultimate truth, but to understand the workings of power in constructing certain truths that are oppressive to women and to resist or disrupt these claims to truth or knowledge.⁹¹ If anything, truths can only be partial, rather than absolute, and claims to absolute truth are most likely constructed by marginalising or excluding other truths.

The most powerful discourses in society tend to have institutional bases in religion, law, education, medicine and politics. For instance, discourses of childhood sexuality or childhood innocence are backed by potent symbols of the ‘holy innocents’ in religion, the concept of ‘defilement’ in law, the de-sexualised pupil in education, and exclusion or marginalisation of teenage sex and sexuality in sexual and reproductive health programs. It is therefore sometimes challenging to ‘see’, ‘speak’ or ‘think’ things differently because dominant discourses are well established in knowledge and truth systems backed by such powerful social institutions.

Truth makes relationships of power to seem natural, that is, it naturalises relations of power so that for instance, truths about gender produce categories of gender that are oppressive to others, but then this seems to be the natural order of things.⁹² When these truths join together into discourses, they form what Foucault refers to as ‘regimes of truth’ and produce relations in which some people dominate others. For instance, it makes it seem that it is natural that women be subservient to men, or that adolescents are problem children.⁹³ Foucault showed that these regimes of truth are grounded in dominant institutions, and justified based on science and rationality, and backed by the law and state power to form interlinking patterns of knowledge and control.⁹⁴ Each institution draws its authority from its capacity to speak the truth on a particular issue of which it is recognised as positioned to make those truth-claims. So,

⁹⁰ N Gavey (1989) 462.

⁹¹ N Gavey (1989) 463.

⁹² G MacNaughton (2005) 16.

⁹³ M Foucault *Power/knowledge: Selected interviews and other writings, 1972-1977*, trans. Gordon C *et al* (1980) 133; G MacNaughton (2005) 16.

⁹⁴ G Turkel 'Michel Foucault: Law, power, and knowledge' (1990) 17 *Journal of Law and Society* 172.

for instance, the court will speak about the truth of rape or defilement in its deliberations on sexual offences.⁹⁵

2.2.5 Power, resistance and freedom

Traditionally, power has been understood to mean a possession that one has over another who is 'powerless', that is, is without power. However, according to Foucault, power is not about the domination of one group over another.⁹⁶ He rather speaks of relations of power because power inheres and is present and operational only in the context of relationships in which the exercise of power and freedom necessarily coexist. In the following quote from an interview, Foucault explains what he understands is the meaning of power:

[W]hen one speaks of *power*, people immediately think of a political structure, a government, a dominant social class, the master and the slave, and so on. I am not thinking of this at all when I speak of *relations of power*. I mean that in human relationships ... power is always present ... in different forms; these power relations are mobile, they can be modified, they are not fixed once and for all.⁹⁷

Walkerdine's research on teacher-child relationships in nursery school is an illustration of what Foucault means. She recorded a scenario in which two boys taunted their teacher with comments that she should show her knickers and bum.⁹⁸ While it is normally understood that nursery-school teachers are always in a position of power in relation to their young learners, Walkerdine shows how in this particular interaction there was a momentary reversal of power in which the boys, using the medium of language, drew upon cultural discourses about men's and women's sexuality, to exercise power over their teacher.⁹⁹

⁹⁵ G Danaher *et al* (2000) 37.

⁹⁶ M Foucault *The history of sexuality: An introduction*, trans. Hurley R (1978) 92.

⁹⁷ M Foucault & P Rabinow *Ethics: Subjectivity and truth* (1997) 291-292.

⁹⁸ V Walkerdine & University of London Girls Mathematics Unit *Counting girls out* (1998) 64-65.

⁹⁹ V Burr *An introduction to social constructionism* (1995) 102. Walkerdine's analysis of what was going on there could best be left in her own words: "People who have read this transcript have been surprised and shocked to find such young children making explicit sexual references and having so much power over the teacher. What is this power, and how is it produced? Here, although the teacher has an institutional position, she is not uniquely a teacher, nor are the boys *just* small boys. Particular individuals are produced as subjects *differently*. A particular subject



Several summary points can be made about power. Power should not be understood simplistically as present in the dominant group and absent in a marginalised one. Persons are not passive recipients of power, but active participants and play a role in the forms of their relationships with others and institutions; they are the 'place' where power is exercised, enacted or resisted.¹⁰⁰ Power is not just repressive; rather, it is productive.¹⁰¹ Power is not merely the constraining of freedom. On the contrary, power coexists with freedom. Power is productive in that it brings about forms of behaviour and events, which also explains why people conform or resist certain discourses.¹⁰² It is through resistance to dominant forms of knowledge at the individual level that sets the stage for the production of alternative forms of knowledge.¹⁰³

This perspective of power has implications about how persons think of themselves as dominant or marginalised, and the ideas of freedom and resistance. In poststructuralist thought, all individuals are enmeshed in power relations, that are the effects of discourse. Since individuals are born into already pre-existing structures that constitute them, and from which they cannot escape, no one is truly 'born free'.¹⁰⁴ The idea that persons are not born free might sound deterministic and a situation of no hope for transforming oppressive social conditions. However, it is from this very insight

has the potential to be 'read' within a variety of discourses. Here the teacher is a woman, and while that itself is crucial, it is only because of the ways in which 'woman' signifies that we can understand the specific nature of the struggle. The boys' resistance to her can be understood as an assertion of their differences from her and their seizing of power through constituting her as the powerless object of sexist discourse. Although they are not physically grown men, they can take the position of men through language and in so doing gain power, which has material effects. Their power is gained by refusing to be constituted as the powerless objects in *her* discourse and recasting her as the powerless object in their – 'woman-as-sex-object'. Of course, she is still a teacher, but it is important that she has ceased to *signify* as one: she has become the powerless object of male sexual oppression. The boys' resistance takes the form of a seizure of power in discourse, despite their institutional positions." (V Walkerdine & University of London Girls Mathematics Unit (1998) 65.)

¹⁰⁰ S Mills *Michel Foucault* (2003) 35.

¹⁰¹ M Foucault (1978) 10-11.

¹⁰² S Mills (2003) 36.

¹⁰³ C Weedon (1987) 111.

¹⁰⁴ E Adams & S Pierre (2000) 492.

that feminist poststructuralism draws hope for political engagement and change through the concept of resistance. Feminist poststructuralism recognises that totalising ideas of transformation, revolution, emancipation, and reform are illusory and may not be achieved. Freedom is not throwing off the structures that constitute subjects, because that is impossible. Rather, freedom is an ongoing resistance; a continuous rebelling against how human beings have been and continue to be constituted as subjects in discourse.¹⁰⁵

3 A framework for the analysis of the gender law

This section draws upon the principles of poststructuralism from the perspective of feminism to discuss their application in analysing the GEA from the perspective of childhood. Applying principles of poststructuralism also demonstrates the importance of interdisciplinarity in analysing the potential impact of gender law and policy to influence change in the lives of children and adolescents, which implicates the lives of adults.

3.1 Bringing feminist poststructuralism to bear on the intersection of gender and childhood

Weedon describes the starting point of feminism as the patriarchal structure, and by patriarchy, she means the relations of power in which women's interests are subjugated to men's interests. Patriarchal power rests on the meaning it gives to biological sexual difference, through discourses of masculinity and femininity.¹⁰⁶ Feminist poststructuralism is useful to address questions about how power is exercised and how social relations could be transformed to achieve equality. As Baxter has stated, "[t]he connection between poststructuralist and feminist perspectives lies in their mutual interest in deconstructing systems of power that work to deny individuals a voice because they identify as women (or men) within particular contexts."¹⁰⁷

Language is important in feminist poststructuralism because it is the means through which social meanings are produced and reproduced or reshaped through social

¹⁰⁵ J Rajchman *Michel Foucault: The freedom of philosophy* (1985) 62.

¹⁰⁶ C Weedon (1987) 2.

¹⁰⁷ J Baxter (2018) 15.

institutions and practices including the family and school. Here, individuals are not the authors of those meanings but are agents through which these meanings are reproduced or challenged.¹⁰⁸ As children acquire language, they take up meanings that offer them the structure through which to understand their experience in specific ways. However, some discourses dominate in offering more attractive subject positions as they are backed by authority, whether be it religious, legal, academic and parental or adult authority. In practice, people's experience is primarily shaped by dominant discourses that reflect particular values and interests, making it appear that this is the only way one ought to experience reality. Weedon observes that

Gendered subject positions are constituted in various ways by images of how one is expected to look and behave, by rules of behaviour to which one should conform, reinforced by approval or punishment, through particular definitions of pleasure which are offered as natural and imply ways of being a girl or woman and by the absence within particular discourses of any possibility of negotiating the nature of femininity and masculinity. Academic, medical and legal discourses offer reasoned accounts of the naturalness of the modes of femininity within which the individual is constituted as gendered subject. A scientific, medical or legal guarantee of truth helps create acceptance of the implications of particular discourses but the justification of gender norms always involves unquestioned assumptions. Particular 'facts' are taken as given, for example, that the meaning of biology is natural and has inevitable social implications.¹⁰⁹

That discourses shape subjectivity has implications on childhood. First, the patriarchal structure that feminism resists impacts on adults as well as it does on children; it starts to shape behaviour and practice from the moment the child is born. The child is nurtured in discourse, and as the child acquires language, verbal and nonverbal, so does the effect of discourse magnify its shaping of the individuality of the child, and in gendered ways.

¹⁰⁸ C Weedon (1987) 25. Another scholar who has critiqued the idea that gender is based on biological traits is Judith Butler, who in her seminal work *Gender Trouble* has argued that both sex and gender are not some traits that one can locate in some reality outside discourse but are both functions of and constituted in discourse. Gender is therefore not a free floating attributed but performatively produced through regulatory practices (J Butler *Gender trouble* (1999) 13,33.

¹⁰⁹ C Weedon (1987) 99.



Second, apart from the patriarchal structure, another power relationship is the generational structure by which adults make the interests of children subordinate to those of adults based on the meaning that adults give to the generational difference between persons considered children and those that are said to be adults. Prout describes modernist sociology as having introduced childhood in a dichotomised manner. He highlights the following dichotomies: agency of children vs childhood as a structure; childhood as a social construct vs childhood as natural, childhood as being vs childhood as becoming.¹¹⁰ In explaining childhood as a social construct vs childhood as natural, Prout says that both adulthood and childhood are effects of discursive acts. However, the challenge with this perspective is that privileging discourse might sound very abstract and undermine the fact that children are beings with bodies. To counter biological reductionism, social constructionism completely ignores corporeality. In line with poststructural theory, Prout proposes to include the 'excluded middle' so that instead of grappling with the dichotomies, childhood can be conceptualised as a complex phenomenon not readily reducible to one or the other side of the dichotomy.¹¹¹ In other words, the child is both a social construction but also a corporeal reality. The concept 'childhood', just like the categories, 'girl', 'boy' and 'adolescent' is nevertheless an effect of discourse and the effect of power.

Feminist poststructuralism is therefore deployed here to challenge social meanings of gender and sexuality that intersect with the meanings of childhood. Feminist poststructuralism forges a new understanding of childhood and "provides an invaluable approach to dealing with diversity and difference with both adults and children, and allows for an understanding of how inequalities are played out differently in different situations."¹¹² Indeed, 'woman' or 'girl' should not be treated as a unitary but rather a complex subject of poststructural theory and analysis, where gender is but one aspect of social identity that intersects with other aspects such as sexuality, class, race, ethnicity and age.¹¹³ This thesis therefore employs a feminist poststructural analysis to examine further the interaction of the concept of gender, sexuality and

¹¹⁰ A Prout 'Taking a step away from modernity: Reconsidering the new sociology of childhood' (2011) 1 *Global Studies of Childhood* 6.

¹¹¹ A Prout (2011) 8.

¹¹² KH Robinson & C Jones Diaz (2005) 16.

¹¹³ LJ Nicholson & N Fraser in *Feminism/postmodernism*, ed. Nicholson LJ (1990) 34-35.

childhood to shed insights on how the GEA could be implemented to reshape power relations in ways that would impact positively on the sexual health trajectories of children and adolescents.

3.2 Undertaking a feminist poststructural critique of the Gender Equality Act

This thesis undertakes an analysis of the GEA to say something fresh about children and gender. In conducting the critique, this thesis makes the important assumption that the GEA as law is itself discourse.¹¹⁴ This thesis therefore views

[L]aw as a discourse that shapes consciousness by creating the categories through which the social world is made meaningful. From an ideological perspective, there is no useful distinction between law and society. Rather, law is part of social life, not an entity that stands above, beyond, or outside of it. Law and society are inseparable and mutually constituting so that the focus is not on law's impact on society, but rather on how law operates in society.¹¹⁵

Considering law as discourse has several implications, the first of which is that a poststructural critique of the GEA invites reflexivity. Feminism is interested in changing current practices and understanding, and this thesis adopts this mode of action to change practices and knowledge about childhood and gender.¹¹⁶ However, an important point that Patterson makes which informs this endeavour is that "criticism of existing practices must issue from within those very practices. In other words, "going local" entails holding in place the very practices of understanding being challenged."¹¹⁷ There is no 'out there' or some disinterested observer's post to position oneself for the critique.¹¹⁸ For the postmodernist, the art of critique is, therefore, necessarily reflexive,

¹¹⁴ J Niemi-Kiesiläinen *et al* (2007).

¹¹⁵ M Kessler 'Lawyers and social change in the postmodern world' (1995) 29 *Law & Society Review*. 772.

¹¹⁶ D Patterson (1992) 308.

¹¹⁷ D Patterson (1992) 308.

¹¹⁸ This relates to the fact that all critique happens in language and discourse in which all persons are constituted, and it is impossible to step outside and perform critique from a disinterested vantage point not already shaped by the same language and discourse that one wants to say some new thing about. Failure to appreciate this fact might create the illusion that one would discover some ultimate truth about social reality. This is the illusion of modernism. It is an untenable "God" position, not available to humankind.

which means exercising prudent self-consciousness in using language to ‘authorise’ new perspectives.¹¹⁹ A reflexive approach is essential to understand what discourses are present to the author, then, in which the author undertakes the critique. Secondly, the author owns up to their points of view, perspectives, aims and political positions within the power relations that they bring to the context, and reflect on these in the process of analysis.¹²⁰ As Patterson puts it: “To force critical reflection on the juridical categories of gender relations, feminist jurisprudence must retell the stories of gender in ways that enable people both to see the old in new ways and to make sense of the new.”¹²¹ Reflexivity, therefore, enables the researcher to maintain awareness that their role is not only explaining or describing social reality but is also contributing to creating knowledge which might support or resist hegemonic positions.¹²²

The second implication of law as discourse is to recognise its power to constitute social relations and practices.¹²³ Kessler describes how the law vests itself with such power

¹¹⁹ A good description of the exercise of reflexivity for an author is given by Stuart Hall in the following words: “Authors are constantly aware that it is they who impose a shape on events; that all accounts, however carefully tested and supported, are in the end ‘authored’. All social science explanations reflect to some degree the point of view of the author who is trying to make sense of things. They do not carry the impersonal guarantee of inevitability and truth. Consequently, arguments and positions are advanced ... in a more tentative and provisional way. It is more a choice between convincing accounts, which deal persuasively with all the evidence, even the part which does not fit the theory, than a simple choice between ‘right’ and ‘wrong’ explanations.” (S Hall ‘Introduction’ in *Formations of modernity*, ed. Hall S & Gieben B (1992) 12.)

¹²⁰ J Baxter (2018) 78.

¹²¹ D Patterson (1992) 309.

¹²² J Niemi-Kiesiläinen *et al* (2007) 80.

¹²³ M Kessler ‘Legal discourse and political intolerance: The ideology of clear and present danger’ (1993) 27 *Law & Society Review* 564. Eisenstein describes this power as follows: “Recognizing law as a discourse calls attention to how law establishes regulations, thoughts, and behavior and institutes expectations of what is legitimate and illegitimate behavior, what is acceptable and unacceptable, what is criminal and legal, what is rational and irrational, what is natural and unnatural. Therefore, the study of law as a discourse is not limited to specific laws or to the activity of litigation or litigators; rather it is the study of these laws as they operate as symbols for what is legal, honorable, natural, objective, and so on.” (ZR Eisenstein *The female body and the law* (1988) 43.)

to portray itself as objectively above politics and culture.¹²⁴ Further, the role of language is central to the law's self-legitimation as an authoritative institution, that creates and interprets legal text, where text is understood both as a body of written or spoken text as well as legal practice.¹²⁵ The GEA and other related texts are therefore elements in the discourse on gender equality, the discourse of which includes other texts but also practices such as the deliberations on the GEA in Parliament, the GEA report, and social and cultural practices. Then there is the implementation plan of the GEA and institutional practices that are based on the interpretation of the GEA.¹²⁶ The whole bundle of elements comprised of texts and practices that are part of social communication constitute gender discourse, of which the GEA is but one text.¹²⁷

Legal texts such as the GEA are sites for the production of meanings, and therefore sites of power struggle. As sites for political struggle, such legal texts cannot be neutral

¹²⁴ M Kessler (1993) 565. "Legal decision makers accomplish this ... in part by employing in their discourse what Kairys (1990) calls "the myth of legal reasoning." Although legal cases often involve significant social, economic, and political conflicts and decisions are determined at least in part, by personal, political, and institutional factors, legal outcomes "are expressed and justified and largely perceived by judges themselves, in terms of 'facts' that have been objectively determined and 'law' that has been objectively and rationally 'found' and 'applied'" (ibid., p. 4)."; J Niemi-Kiesiläinen *et al* (2007) 81.

¹²⁵ P Bourdieu 'The force of law: Toward a sociology of the juridical field' (1987) 38 *Hastings Law Journal* 808. Text is defined broadly by Bourdieu to include not only records of the spoken or written word, such as legislation court record, commentaries and so on, but also behaviours and procedures characteristic of the legal domain. A description of the relationship between discourse and text by Norman Fairclough serves to explain the same: "A text is a product rather than a process – a product of the process of text production. But I shall use the term discourse to refer to the whole process of social interaction of which a text is just a part. This process includes in addition to the text the process of production, of which the text is a product, and the process of interpretation, for which the text is a resource." (N Fairclough (1992) 43.)

¹²⁶ Two institutions, the Malawi Human Rights Commission (MHRC) and the Ministry of Gender, Children, Disability and Social Welfare (MoGCDSW) are tasked with implementing the Act. The two institutions came up with a monitoring and implementation plan to guide the interpretation and application of the GEA by policy actors such as teachers and health care workers.

¹²⁷ Borrowing the words of Andruszkiewicz, discourse on a particular subject, for instance, in this case, gender, could be understood as "a network of connected texts with similar subject matter, created by subjects which are a part of communication." (M Andruszkiewicz 'Post-structuralist inspirations in legal discourse' (2011) 26 *Studies in Logic, Grammar and Rhetoric* 64.)

documents or instruments that merely represent social reality through words. They are themselves political documents that signify, construct, and constitute social identities, subjectivities, power relations and knowledge in a particular way. The GEA, therefore, does not just represent intentions of Parliament explicitly stated as to achieve gender equality between men and women. Rather, from a feminist poststructural perspective, the GEA must be viewed as constructing meanings of sex, gender, sexual and gendered subjects, and power relations. Further, it draws upon discourses circulating in society. The potential of the GEA to influence change therefore largely depends on what meanings of gender it emphasises or suppresses.

This thesis aims to analyse the GEA to explore its potential influence in three domains of the adolescent's sexual life as constructed through the law on sexual consent, education and health institutions. The analysis would contribute toward thinking how the GEA constructs meanings of childhood and gender, and whether this could be different. While the analysis starts from the GEA, it would draw on any other related text or discourse which gives the GEA its political context. The thesis adopts two techniques described in the two subsections below that feminist poststructural discourse theorists have used to conduct analysis.

3.2.1 Analysis of discourse

Discourse analysis is a technique of analysing discourse. This quote from Judith Baxter reiterates that:

Discourses are forms of 'knowledge' – powerful sets of assumptions, expectations, explanations – governing mainstream social and cultural practices. They are systematic ways of making sense of the world by determining power relations within all texts, including spoken interaction.¹²⁸

Legal discourse such as the GEA create legal knowledge in social interactions through the agency of judges, lawyers, legal scholars, including the author of this thesis, who debate upon, articulate or pronounce legal 'truths'. Discourse analysis of legal and related texts such as legislation, policy, and court judgements aims to understand how these cultural products construct social meanings, social identities and determine

¹²⁸ J Baxter *Positioning gender in discourse* (2003) 46.

power relations, and the consequences these meanings have.¹²⁹ However, the legal system is not autonomous because it interacts with and is influenced by other normative systems in society, including cultural norms and practices.¹³⁰ Indeed laws tend to go hand in hand with policies so that they are usually co-developed and implemented. These laws and policies as discourse exercise power on subjects through the production of truth and knowledge. Even if laws and policies might use language that proscribes or prohibits unacceptable behaviour, policies and laws as discourse function through positive and productive means because they ‘enforce’ a specific vision of social reality while suppressing others. They also shape how people understand who they are in society.¹³¹

Discourse analysis is concerned with reading and interpreting texts based on the idea that discourse constructs social identities such as adolescence, femininity and social reality.¹³² Discourse analysis involves a careful reading of text. Text is broadly defined to include not only transcripts of conversations or documents but also social practices, with the view to discern patterns of meanings, contradictions and consistencies and inconsistencies in them.¹³³ The aim is to disrupt one pattern of meanings to facilitate

¹²⁹ J Niemi-Kiesiläinen *et al* (2007) 80.

¹³⁰ Niemi-Kiesiläinen *et al* describe the social interaction of legal professionals as ‘legal interaction’ and the other interactions between non-legal subjects as ‘everyday interaction.’ These two interactions themselves interact and influences each other, so that for instance, in interpreting law, judges will sometimes appeal to the everyday interaction to challenge or reinforce a legal interpretation. (J Niemi-Kiesiläinen *et al* (2007) 79-80.)

¹³¹ EJ Allan ‘Feminist poststructuralism meets policy analysis’ in *Reconstructing policy in higher education: Feminist poststructural perspectives* (2010) 25. Ball makes the same point when he says: “We do not speak a discourse, it speaks us. *We are* the subjectivities, the voices, the knowledge, the power relations that a discourse constructs and allows. We do not ‘know’ what we say, we ‘are’ what we say and do. In these terms we are spoken by policies, we take up the positions constructed for us within policies.” (emphasis in the original) (SJ Ball *Education reform: A critical and post-structural approach* (1994) 22.) Laws and policies as institutional discourses act as regulatory forces when they apply pressure to individuals to conform with socially approved patterns of speech and practices. These are interwoven with personal, social and community discourse, sometimes in conflict and other times in support of each other. (J Baxter (2018) 15.)

¹³² J Niemi-Kiesiläinen *et al* (2007) 74.

¹³³ N Gavey (1989) 467.

the reconstruction of a different pattern to offer solutions by bringing out a different vision of social reality. An example given above is how the CRPD, using the medium of language disrupts an older pattern of meanings of disability, and through a reconstruction forges a new way of understanding disability that then offers solutions to the historical marginalisation of persons with disabilities.¹³⁴

Discourse analysis is an umbrella term for a variety of approaches which include Conversation Analysis (CA), Critical Discourse Analysis (CDA) and Feminist Poststructural Discourse Analysis (FPDA).¹³⁵ This thesis subscribes to Judith Baxter's FPDA, which she distinguishes from other forms of discourse analysis.

The primary interest in FPDA is the deconstruction of gender. Deconstruction as a technique for analysing discourse will be further explained below, suffice to say at this point that for feminism, gender identities and the category 'woman' are the areas of contestation.¹³⁶ Rather than conceptualising women as perpetually oppressed and men as the oppressors, the FPDA approach disrupts this vision of power relations, and instead, foregrounds another vision of social life in which men and women are seen as positioned in multiple ways at different times, and as possessing the agency to negotiate or resist dominant subject positions.¹³⁷ This thesis draws on this idea of varied and fluid positioning of subjects in discourse to discuss the gendered relationships of children with adults and with other children. It examines gender as it intersects with the structure of age considered in the child/adult binary and aims to deconstruct systems of power that marginalise children, for instance, because they happen to identify as sexual when the law positions them as asexual.

3.2.2 A deconstructive reading

This section explains the meaning of deconstruction, a term introduced in the preceding sections. The popularisation of deconstruction is associated with the

¹³⁴ See also F Mégret 'The Disabilities Convention: Human rights of persons with disabilities or disabilities rights?' (2008) 30 *Human Rights Quarterly*. Mégret explains how the CRPD reformulates the same language of classical human rights but in ways that forge a renewed understanding of the rights of persons with disabilities.

¹³⁵ J Baxter (2003) 45.

¹³⁶ J Baxter (2018) 15.

¹³⁷ J Baxter (2003) 31.



writings of the philosopher Jacques Derrida, and it pertains to his philosophy of language.¹³⁸ The technique of deconstruction is premised on the concept of *différance*, a term already described above, which is the idea that texts do not carry singular but multiple meanings because of the character of language whereby the meaning of a word can only be understood in difference with another, and at the same time the meaning is infinitely deferred.¹³⁹ A word cannot contain a meaning because as soon as one meaning appears it cannot be fixed. In binary oppositions such as boy/girl, man/woman, adult/child and so on, the two terms in the dyad have the appearance of representing fixed identities. Further, the opposing terms reveal a hierarchical ordering. Take the example man/woman, the term 'man' in patriarchal discourse is superior to 'woman', and likewise, 'adult' 'is valued over 'child', and so on. Yet, there is co-dependence in the meanings of these terms because one cannot define the privileged term without using the inferior term, so that for instance, the term man cannot be defined in isolation from the term woman and so on.¹⁴⁰ Deconstruction then involves a temporary reversal of the hierarchy, and the trick is that it is this momentary disruptive act that allows for new insights.¹⁴¹

Balkin explains the importance of deconstruction starting from the fact that laws tell stories about social relations; about what people are and should be. Deconstructive

¹³⁸ GC Spivak & J Derrida *Of grammatology* (1998). See Spivak's translators preface.

¹³⁹ J Baxter (2018) 27.

¹⁴⁰ "[T]he primary relationship between words was one of opposition or distinction, meaning that words gain meaning through juxtaposition. He [Derrida] called this *différance*. However, juxtaposed pairs are not neutral; they establish hierarchical relationships in which one term of the pair is privileged over the other. For example, masculinity is often privileged over femininity, rationality over emotionality, development over nature, speech over text, etc. Thus, the deconstruction of text often involves the inversion of the hierarchical pairings embedded in language to reveal the arbitrary and power-laden constructions of language." JJ Mease 'Postmodern/Poststructural Approaches' in *The International Encyclopedia of Organizational Communication*, ed. Scott CR & Lewis LK (2016) 1898. Noteworthy, as Burman has observed, "We can note here that "Girls, women and children are semiotically linked through mutually implicating discourses of feminisation and infantilization" Girls, women and children are defined in relation to their opposing terms boys, men and adults. (E Burman *Developments: Child, image, nation* (2008) 105.)

¹⁴¹ JM Balkin 'Deconstructive practice and legal theory' (1987) 96 *The Yale Law Journal* 746.



critique reminds us that the system of laws does not refer to what human nature is like but rather, interprets human nature as constructed in language, and in which some terms are privileged over others. Sometimes, the dominant views are mis-taken as 'truth'. Yet there are no truths, only interpretations.¹⁴² Deconstruction, therefore, exploits the concept of *différance* to show that the privileging of one term over another can be reversed, and as many times as would serve the purpose of searching for different human possibilities.¹⁴³ Chi-Ming Lam's article, as the title suggests, 'Deconstructing childhood as a way to justice', is an example of the application of this technique. Lam shows that childhood as becoming, and adulthood as a completed being, could be reversed to show that in fact, despite that adults are defined as complete, they are in many respects still in the process of becoming. On the other hand, even if children are considered as incompetent and in the process of becoming, they are also in some respects completed beings.¹⁴⁴ Another example is Walkerdine's case described above, where she demonstrates the insights gained from looking at a reversal of power in the teacher/learner relationship.

While the above examples by Lam and Walkerdine show the uses of deconstruction in general discourse, Balkin explains its usefulness in legal discourse and especially in reading and interpreting legal texts, be it legislation or policy, or court decisions. A deconstructive reading entails doing more than regular reading. A regular reading, usually, is an interpretation that accepts the dominant position the text offers, that which is usually assumed by subjects that are positioned 'to toe the line' in the discourse. A deconstructive reading involves what Baxter terms 'reading against the grain,' resistive or inersive reading. It calls for maintaining awareness of the dominant meanings the text offers but choosing deliberately to attend to the meanings that are suppressed, to value the marginalised and devalue the dominant.¹⁴⁵ This kind of reading has several implications. First, it might perplex those accustomed to reading legal texts along the intention of the framer, because an inersive reading could be subversive of the framer's intent. However, this is the point that Roland Barthes made

¹⁴² JM Balkin (1987) 762.

¹⁴³ JM Balkin (1987) 763-764.

¹⁴⁴ C-M Lam 'Deconstructing childhood as a way to justice' (2013) 17 *Paideusis* 35-36.

¹⁴⁵ J Baxter (2018) 3.



when he proclaimed the death of the author.¹⁴⁶ Due to the free play of the text (Derrida's *différance*), as soon as the author authorises, the text assumes a life of its own, and then it is the reader whose creativity and agency matters as she interprets the text, and not the intention of the author. From a deconstructive perspective, what is important is not the intention of the author but the interpretation of the reader.¹⁴⁷

Borrowing Jan Wright's words, the second implication of resistive reading of texts could be stated as follows:

Since a fundamental assumption of poststructuralism is that individuals in constituting texts draw on discourses (some dominant and others marginal) which are already circulating in particular social and cultural contexts, the task when working from this direction is to determine where these are found, who else is articulating them, with what power do they speak (or write) and with what effects.¹⁴⁸

What this means is that the process of reversing the dichotomies is not to merely lead one to question which meaning is better than the other, but to ask more fundamental questions about the processes that lead to the legitimation, validation or authorisation of those perspectives that produce these differences making one interpretation dominant and another marginal.¹⁴⁹ Related to this is the point Barbara makes about what is *not* the aim of deconstructive reading: "deconstructive reading does not point out the flaws or weaknesses or stupidities of an author, but the *necessity* with which what he *does* see is systematically related to what he does *not* see." (emphases in the original)¹⁵⁰ A deconstructive reading avoids the modernist assumption that binary

¹⁴⁶ Barthes proclaims "... writing is the destruction of every voice, of every point of origin. Writing is that ... space where our subject slips away, the negative where all identity is lost, starting with the very identity of the body writing. As soon as a fact is *narrated* no longer with a view to acting directly on reality but intransitively, that is to say, finally outside of any function other than that of the very practice of the symbol itself, this disconnection occurs, the voice loses its origin, the author enters into his own death, writing begins (emphasis in the original), R Barthes *Image, music, text*, trans. Heath S (1977) 142.

¹⁴⁷ JM Balkin (1987) 782.

¹⁴⁸ J Wright 'Post-structural methodologies: The body, schooling and health' in *Body knowledge and control: Studies in the sociology of education and physical culture*, ed. Evans J et al (2004) 24.

¹⁴⁹ J Culler *On Deconstruction: Theory and Criticism after Structuralism* (1982) 179.

¹⁵⁰ J Derrida *Dissemination*, trans. Johnson B (1981) xv.

oppositions are comprised of terms that have fixed, independent and exclusive meanings but recognises that the meaning of the opposing term depends on the other term and vice-versa, so that they are held in a bond which cannot be taken as simply meaning that the one-term is superior to the other. The human act of privileging the one term over the other is what is in issue for deconstruction because it reflects power relations, and that is what deconstruction seeks to expose in reading and interpreting text.¹⁵¹

4 Conclusion

To reiterate what has been discussed thus far, public health and social scientists have observed the general trend in many societies, including Malawi, that gender inequitable norms intensify their impact on adolescents, especially at puberty. These norms contribute to sexual health trajectories that are disproportionately negative for adolescent girls. In 2013, Malawi enacted the GEA to promote gender equality between men and women. The realisation of gender equality is intricately related to realising sexual health. The GEA does not explicitly address gender equality for children. It is assumed that the definition of men and women includes males and females of any age. However, it is most likely that children are invisible as actors in gender equality. This thesis highlights the child as an important actor and should be recognised as such in gender equality discourse.

Primarily, the thesis employs the traditional legal doctrinal method of analysis, which proceeds by identifying norms in the bodies of norms created by norm-making and norm-interpreting institutions. It assumes that law and politics are separate entities. However, the thesis also adopts a poststructuralist view which assumes that law and politics are not separate entities. In other words, legal norms and practice, and social practice are in the same web of discourse. With such a view then, a legal doctrinal approach becomes almost too simplistic an approach to imagining the role of laws in transforming social practices. Therefore, this thesis draws upon principles of feminist poststructural analysis to provide a more robust critique of the GEA. It employs the techniques of discourse analysis and deconstructive reading to read and interpret the GEA and other related text, defined broadly to include social and institutional practices,

¹⁵¹ J Baxter (2003) 63; R Cooper 'Modernism, post modernism and organizational analysis 3: The contribution of Jacques Derrida' (1989) 10 *Organization Studies* 483.

to explore the possibilities of achieving more gender equitable relations for children, of which one effect would be more positive sexual health trajectories for children and adolescents.

The thesis envisages a GEA that would contribute towards achieving social justice for children, meaning it should “disrupt the normalizing discourses that constitute and perpetuate social inequalities in society and operate to privilege certain identities and marginalize and silence others.”¹⁵² Children are amongst the groups that have been marginalised in society through ‘truths’ perpetuated by modernist views of childhood, and institutionalised amongst others in educational, criminal justice and health systems. Gender norms pervasively influence social and institutional practices, amongst parents, educators, legislators, law enforcers, and health providers. To reshape power relations that sustain gender inequality, the GEA must challenge knowledge that has been uncritically assumed to be the universal truth about social life, for instance, about children as incompetent. The GEA must, therefore, interfere with the sometimes tenaciously held individual and collective belief systems and common-sense ways of looking at the world, for example imagining and treating girls as different from boys because they have a different sexuality. These perspectives or ‘truths’ have been supported by various social institutions of which the law is one. The GEA should disrupt what individuals have come to know about themselves and others within the social discourses that have shaped their understanding about the meaning of their being different from others, including the meaning of childhood.¹⁵³ As Prout has said, “Childhood, then, like all phenomena, is heterogeneous, complex and emergent, and, because this is so, its understanding requires a broad set of intellectual resources, an interdisciplinary approach and an open-minded process of enquiry.”¹⁵⁴ In the next chapter, the thesis takes on the GEA to critique its construction of social reality and childhood.

¹⁵² KH Robinson & C Jones Diaz (2005) 24.

¹⁵³ KH Robinson & C Jones Diaz (2005) 24.

¹⁵⁴ A Prout *The future of childhood: Towards the interdisciplinary study of children* (2005) 2.



Chapter 3: RE-VISIONING CHILDREN'S SEXUAL AGENCY IN INTERPRETING THE GENDER EQUALITY ACT

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1 Introduction

The previous chapter began with Thorne's concern about the 'missing' children in feminist theorising. Thorne observed that while feminism has pursued complex critiques of masculine dominance, feminist theorising had uncritically assumed adult-centric knowledge regarding children.¹ James and Prout make a similar claim in *Constructing and reconstructing childhood*, that in the history of social science research, children (and women) had been 'muted' groups. They observe that though there has been interest in children, the voice that has articulated these interests is not that of the children themselves.² Some scholars have criticised the process of law-making about children in the development of the United Nations (UN) Convention on the Rights of the Child (CRC) for representing the interests adults have about children, rather than the interests of children.³ Research has shown that adult interests about children often ignore children as agentic subjects of gender and sexuality despite the fact that children do actively engage in gendered relations of power and invest in sexual relationships, pleasure and desire.⁴ In pursuing the aim of this thesis to analyse the transformative potential of the GEA to advance the sexual health of children, this chapter explores the extent to which the GEA imagines children as sexual and gendered subjects. Drawing from the perspective that the GEA and related documents including the GEA report are part of a discursive framework that contributes to shaping the social reality, the chapter seeks to understand what kind of world the GEA constitutes concerning children.

¹ B Thorne (1987) 86.

² A James & A Prout 'Introduction' in *Constructing and reconstructing childhood: Contemporary issues in the sociological study of childhood*, ed. James A & Prout A (1997) 7.

³ A Gadda *Rights, Foucault and power: a critical analysis of the United Nation Convention on the Rights of the Child* (2008) 6. Indeed, this criticism could also be levelled against the ACRWC.

⁴ D Bhana (2017) 251-252; P Talavera 'The myth of the asexual child in Namibia' in *Unravelling taboos: Gender and sexuality in Namibia*, ed. LaFont S & Hubbard D (2007) 61-62, 66. In his research, Talavera found that children amongst the Ovahimba and Ovaherero cultural groups of Namibia play games that involve may involve sexual acts. However, adults do not consider children as sexual.

The analysis in the chapter is broken down into three parts. The first is a critique of the methodological process as stipulated in the MLC's GEA report.⁵ The second part looks at the theoretical framework underpinning the GEA, which reveals how the GEA constructs the gendered world. The third part examines how the GEA constitutes children's subjectivities, and to what extent it allows children to have a voice in contributing to the achievement of the GEA's aim.

2 The Malawi Law Commission's report of the GEA

2.1 Background

The GEA is primarily the product of legal research conducted by the MLC.⁶ The terms of reference of the MLC included examining the policy and legal framework in Malawi on gender equality, examining international law and policy documents and engaging in consultations with various stakeholders.⁷ The process culminated in the GEA report in which is included a proposed draft of the GEB. The significance of the GEA report, therefore, is that it reveals how the MLC conceptualised and created the GEA.

While any bill proposed by the MLC is amenable to revision at any point along the law-making process, the draft GEB proposed by the MLC was passed almost as was originally drafted by the MLC without substantive modifications. The fact that it passed without amendments makes the GEA report central to understanding the theoretical and ideological framework underlying the GEA. Therefore, in conducting the three-part analysis below, the following assumptions are made. First, the MLC's GEA report

⁵ Malawi Law Commission *Report of the Law Commission on the development of the Gender Equality Act* (2011).

⁶ Section 133 of the Constitution of Malawi provides for the appointment of persons with expert knowledge of an area of law that the Law Commissioner would like to review. Section 135 stipulates the following powers of the Law Commission (a) review and make recommendations regarding any matter pertaining to the laws of Malawi and their conformity with this Constitution and applicable international law; (b) review and make recommendations regarding any matter pertaining to this Constitution; (c) receive any submissions from any person or body regarding the laws of Malawi or this Constitution; and (d) report its findings and recommendations to the Minister for the time being responsible for Justice who shall publish any such report and lay it before Parliament.

⁷ The full terms of reference are set on pages 6 and 7 of the GEA report.



is a synthesis of multiple preparatory documents including reports of reviews of legal and policy documents as well as reports of meetings with stakeholders. Second, the GEA report embodies the theoretical and ideological framework that underlies the GEA.

2.2 A critique of the methodology

Methodology in the process of legal reform is understood to be the set of procedures a law reform commission employs in developing legislation.⁸ However, methodology in terms of the thought process about the methods, or the thinking underlying the practical aspects of the research project, that is the theoretical basis, are sometimes assumed rather than articulated.⁹ This is true for the GEA report because the MLC mostly assumed rather than explicitly articulated the theoretical premises of the GEA. The structuring of the subheadings below is not meant to mirror how the MLC conceived its methodology. Rather, this is an interpretation of the GEA report by the author of the thesis. From the perspective of a deconstructive reading, it is the reader's interpretation that matters rather than authorial intention.

2.2.1 Comparative legal method

One of the methodologies used by the MLC was comparative legal research.¹⁰ But what is a comparative study in law? According to Pierre Legrand, comparative law is not just a method, but also a perspective that allows one to critically illuminate a legal system under study.¹¹ Legrand suggests that comparative research has two central characteristics; commitment to theory, and commitment to interdisciplinarity.¹² Comparative law is more than just obtaining descriptive data from another jurisdiction. The aim of comparison should be to draw out from the comparative research knowledge that could otherwise not be obtained from examining separately the jurisdictions under contrast.¹³ Further, a researcher pursuing the comparative

⁸ D Watkins & M Burton (2013) 2.

⁹ D Watkins & M Burton (2013) 2.

¹⁰ Malawi Law Commission (2011) 15,23,41,67,71.

¹¹ P Legrand 'Comparative legal studies and commitment to theory' (1995) 58 *Modern Law Review* 264.

¹² P Legrand 'How to compare now' (1996) 16 *Legal Studies* 238.

¹³ G Samuel 'Comparative law and its methodology' in *Research methods in law*, ed. Watkins D &



approach should show a scientific appreciation of the cultural context or legal culture of the legal object of study.¹⁴ For instance, notions such as gender equality might not have the same meaning or cultural intelligibility in Norway as in Malawi. “Legal texts are not to be treated as objects in themselves – things capable of being transplanted from one system to another – but as signifiers for something culturally more profound about the other.”¹⁵ It would be useful to include an analysis of the meanings of gender equality in the cultural contexts under comparison to understand ‘gender equality’ in a way that would contribute meaningfully towards advancing new knowledge. A comparative legal approach is necessarily interdisciplinary because the tools for analysis are not the purview of pure legal doctrinal methodology.¹⁶ Also, this methodology would involve making explicit any theoretical approaches implicit in the legal texts under comparison.

MLC’s legal comparison influenced its selection of the title of the legislation,¹⁷ and its proposal of the institution that would be responsible for the enforcement of the GEA.¹⁸ However, these are rather marginal to the substantive issue of gender equality. The crucial question is: What new knowledge and insights about gender equality did the MLC gain from employing the comparative legal research methodology? Reviewing nomenclature of gender laws across several jurisdictions to pick a suitable name for Malawi’s law, without any more in-depth analysis, for instance, of the meanings of the terms, was rather superficial. Presumably, the MLC was aware, for example, that some jurisdictions have legislated against marital rape, or decriminalised same-sex sexuality as part of addressing sex and gender discrimination. Comparative research on issues such as the relationship between (de)criminalising same-sex sexual conduct and gender (in)equality could have been more meaningful to understanding gender equality in Malawi.

Burton M (2013) 110.

¹⁴ G Samuel (2013) 102-104.

¹⁵ G Samuel (2013) 103.

¹⁶ G Samuel (2013) 104.

¹⁷ Malawi Law Commission (2011) 15.

¹⁸ Malawi Law Commission (2011) 23.

2.2.2 Legal doctrinal analysis

Doctrinal legal analysis is the research methodology that is the domain of law research. It is pre-eminently the method that defines the activity as legal research, and the product, such as a proposal for legal reform, as legitimately deriving from legal research. Hutchinson defines (legal) doctrinal research as “a critical conceptual analysis of all relevant legislation and case law to reveal a statement of the law relevant to the matter under investigation”.¹⁹ In doctrinal research, the sources of law are the primary data, and the crucial step for the researcher is to read, analyse and link what is not yet known, or what the researcher wants to know, with what is already known.²⁰

Legal doctrinal research, for purposes of recommending law reform, usually involves identifying legal principles in an existing body of law, such as legislation, human rights treaties and case law, and describing how these fit (or do not fit) in the new legislation in the making, and eventually how the proposed law should integrate such principles to be consistent with a prior established legal regime.²¹ From the MLC’s report, it is evident that this was its preeminent methodology. The MLC extensively reviewed sources of legal principles in various international, regional and national legal texts to discern and deduce legal norms that the new law would include.

Graycar and Morgan, however, raise some challenges associated with the doctrinal method in law reform. They highlight especially the widespread belief that every law reform process should be entrusted primarily to lawyers. First, they argue that lawyers are unlikely to view their role as reconceptualising and rethinking social problems in new ways than in the traditional legal paradigm.²² Developing legislation on sexuality and gender generally pose such kind of challenges. Second, there is over-reliance on

¹⁹ TC Hutchinson 'Valé Bunny Watson? Law librarians, law libraries and legal research in the post-internet era' (2014) 106 *Law Library Journal* 584.

²⁰ TC Hutchinson 'Doctrinal Research' in *Research methods in law*, ed. Watkins D & Burton M (2013) 13.

²¹ PC Westerman 'Open or autonomous? The debate on legal methodology as the reflection of the debate in law' in *Methodologies in legal research which kind of method or what kind of discipline?* (2011) 89.

²² R Graycar & M Jenny 'Law reform: What's in it for women?' (2005) 23 *Windsor Year Book of Access to Justice* 407.

traditional legal material such as court judgments.²³ Indeed, this is apparent in the MLC's report, where for instance, it adopted the definition of sex proposed in the English court decision of *Corbett v Corbett*.²⁴ Arguably, non-legal perspectives from the sociological sciences would probably have provided more productive perspectives on the meaning of sex in the context of contemporary Malawi than the 1970 court decision of England.

2.2.3 Interdisciplinarity

Legal research for purposes of creating legislation to influence social relationships has evolved toward interdisciplinarity, to enhance its social relevance. Legal researchers have therefore utilised non-legal doctrinal methods, or at least, used the results of such techniques to bolster their legal doctrinal research.²⁵ The MLC did use extra-legal methods including soliciting submissions from the public on the subject-matter of the reform. It held consultative workshops on the proposed recommendations before it finalised the report and draft GEB.

It is questionable whether the MLC consulted or considered the diversity of stakeholders that are interested in gender equality. For instance, the report does not reveal evidence that members of the Lesbian, Gay, Bisexual, Transgender, Intersex, and Queer (LGBTIQ) community were consulted on issues such as sex and gender discrimination and sexual harassment, or if they were, the GEA report does not include their voice. Indeed, neither were children and adolescents consulted about issues that affected them regarding gender and sexuality.

3 Theory and discourse in the making of the GEA

The thesis structures the analysis below according to several themes identifiable in the GEA. The MLC conceptualises the aim of the GEA as redressing the disadvantaged position of women in relation to men. The GEA report posits women

²³ R Graycar & M Jenny (2005) 407.

²⁴ Malawi Law Commission (2011) 14. The Law Commission cites *Corbett v. Corbett* (1888) 13 P.D. 136, but it does so in error because the 1888 judgment bears no relationship to what the Commission says about the determination of sex at birth. It appears that the Commission is in fact referring to a similarly titled judgement in *Corbett v. Corbett (otherwise Ashley)* [1970] 2 All E R 33.

²⁵ TC Hutchinson (2015) 130.

and children as similarly positioned, especially when discussing sexual violence. Indeed, as Thorne notes, political theories have often lumped women and children together as relegated on the margins while men are the autonomous actors that occupy the centre stage.²⁶ The analysis aims to deconstruct GEA's position of children in the gender discourse.

3.1 Defining gender

3.1.1 Gender

The MLC adopted UNESCO's definition of gender as socially ascribed differences between men and women based on sex, which vary across cultures and change in time.²⁷ The MLC also adopted the definition of gender equality from the same source, which it proposed should mean that men and women freely develop their capabilities and make choices without the constraints of gender stereotypes and prejudices.²⁸ The MLC therefore, just like the first and second-wave feminism, theorises gender as sexual difference, that is, arising from biology. Feminism has criticised the sexual difference approach because, by theorising gender as a social construction based on biological sex, its potential to theorise gender is limited and constrained by biological sex.²⁹ To avoid this limitation, other theories such as queer theory have come up that explain sexual difference in ways that avoid tying it to biological sex.³⁰ MLC's theoretical basis is therefore potentially biased against differently gendered subjectivities. The MLC took such a stance despite that the LGBTIQ community in

²⁶ B Thorne 'From silence to voice: bringing children more fully into knowledge' (2002) 9 *Childhood* 251.

²⁷ Malawi Law Commission (2011) 12. The definition is taken from UNESCO, 2000, *Gender Equality and Equity: A Summary Review of UNESCO's Accomplishments Since the Fourth World Conference on Women*, p. 6.

²⁸ Malawi Law Commission (2011).

²⁹ T De Lauretis *Technologies of gender: Essays on theory, film, and fiction* (1987) 1-2.

³⁰ Queer theory is a crucial theory about non-heteronormative gender identity and sexuality. Queer theory challenges the idea that gender roles, gender identity and sexual orientation can only be understood as a biologically based binary. Queer theory proposes that gender roles, gender identity and sexual orientation are socially constructed, and therefore open to question and subversion. See JL Nagoshi, CT Nagoshi & S Brzuzu *Gender and sexual identity: Transcending feminist and queer theory* (2014) 21-23.

Malawi had, at the time the MLC was conducting its research, been active in highlighting the socially disadvantaged positions of persons who do not conform to the traditional notions of gender and sexuality.³¹

The MLC recognised that hegemonic masculinities impact on both men and women.³² The concept of hegemonic masculinities, as developed by Raewyn Connell, explains how masculinities operate to marginalise women but also men who do not conform to masculinity norms. A fundamental element of hegemonic masculinity is that women exist as potential sexual objects for men, and the negation of men as potential sexual partners for other men.³³ The subordination of women and the denigration of men who do not conform to heterosexual masculinities are the hallmarks of hegemonic masculinities.³⁴ Therefore hegemonic masculinity is a cultural ideal that oppresses both women and the non-heterosexual men. There is thus an intimate relationship between homophobia and misogyny.³⁵ However, the MLC did not pursue the implication of the idea of hegemonic masculinities especially in the light of Malawi's criminalisation of same-sex sexual conduct. This failure means that the MLC proposed a GEB that aligns with a heteronormative ideology that maintains the very hegemonic masculinities the GEA purportedly challenges. Therefore, the GEA fails to offer a radical view of a social world that would facilitate children to resist discourses of gender inequality. On the contrary, it positions a heteronormative society as the ideal, so that it rewards children who would position themselves as heteronormative and sanctions those who do not.

3.1.2 Sex

Basing itself on the court decision of *Corbett v Corbett* which defined sex as determined at birth and permanent, the MLC proposed that sex is permanent regardless of whether the person would undergo surgical reassignment later in life.³⁶

³¹ The Other Foundation *Canaries in the coal mines: An analysis of spaces for LGBTI people activism in Malawi* (2017) 12.

³² Malawi Law Commission (2011) 12.

³³ M Donaldson 'What is hegemonic masculinity?' (1993) 22 *Theory and society* 645.

³⁴ M Donaldson (1993) 645.

³⁵ R Dunphy *Sexual politics: An introduction* (2000) 79.

³⁶ Malawi Law Commission (2011) 14.

In entrenching a rigid definition of sex, and conceptualising sex in terms of the male/female binary, the MLC proposed a law that excludes other sex identities such as intersex.³⁷ This is particularly crucial for children because intersex characteristics tend to be observable from early childhood. Although the non-governmental organisation (NGO) community in Malawi has been advocating for the recognition of the challenges faced by intersex children in Malawi, the MLC ignored addressing this issue in the GEA report.³⁸

It is evident from the GEA report that sex-based discrimination is an important aspect of gender equality that the GEA addresses. The GEA's treatment of sexual coercion of women and children is reminiscent of liberal and radical feminism. These strands of feminism criticised laws and practices for advancing a double-standard morality such as prostitution laws based on the essentialist views that men's sexuality was uncontrollable while women's sexuality was passive, and therefore penalising the woman who sells sex, but not the man who buys sex.³⁹ Catherine Mackinnon suggested that sexuality is a form of power through which male dominance is

³⁷ Malawi Law Commission (2011).

³⁸ CHRR & CEDEP, "The situation of Intersex children in Malawi," (Lilongwe: CHRR and CEDEP, 2016). NGO Shadow report to the Committee on the Convention on the Rights of the Child.

³⁹ M Rahman & S Jackson *Gender and sexuality: Sociological approaches* (2010) 21. See also M Ingram *Carnal knowledge: Regulating sex in England, 1470-1600* (2017) 29-32. Writing about England in the 1500s, Ingram describes that "men – especially young men and those in the prime of life – were characteristically assumed to be powerfully attracted to women and likely to give vent to their passions if they were not restrained by their own powers of reason and self-control, backed up by the strictures of the law and social pressure. In the act itself, men were conventionally viewed as the prime agents. They had the 'carnal knowledge' or the 'use' of women's bodies; more euphemistically, they 'meddled' or 'lay' with them; in the language of the street, they 'fucked', 'swived' or 'japed' them"(30) On the other hand, however, "Women were characteristically viewed as more passive yet also powerfully inclined to sexual activity in certain circumstances – most obviously if they were of age to marry and had hopes or expectations of marriage; if they were already married but had unfulfilled desires for children; or if they were widows whose sexual desires had been previously aroused but were now frustrated. Some women, generally viewed with disfavour in these sources, were seen as lusty individuals with an insatiable appetite for sex. A much larger group was thought to be willing, either for greed or need, to sell their bodies for money or other benefits" (30).

exercised and institutionalised.⁴⁰ So, for instance, in a heterosexual marriage, failure to legislate against rape ensures that men can sexually access women even against their will. Mackinnon has therefore described sexuality as the “linchpin of gender inequality.”⁴¹

Another feminist, Adrienne Rich, coined the term ‘compulsory heterosexuality’ to explain how patriarchy creates social and sexual practices that maintain women’s subjugation under men.⁴² Compulsory heterosexuality as a social and political institution privileges and rewards certain cultural practices such as marriage, heterosexual sexual relationships, and punishes others, such as sex outside marriage, and same-sex sexual relations.

If the GEA report is pro-feminist, it can only be inconsistently so because the MLC also has taken positions that contradict feminism, for instance, in 2000, the MLC recommended criminalisation of female same-sex sexual conduct.⁴³ Further, the MLC had previously considered whether to criminalise marital rape but opted against it.⁴⁴ From radical feminist perspectives, criminalisation of gay and lesbian sexuality, and failure to legislate against marital rape are manifestations of patriarchal domination and conspire to sustain differences in social power that undermine gender equality. From a feminist poststructural reading, though the GEA attempts to constitute a gender equitable world, it still retains elements of a gender-discriminatory world when it offers masculinities and heteronormativity privileged positions over femininities and non-heterosexual identities and ways of being.

3.1.3 Power

The MLC also understood gender to be about relations of power, and that gender equality is about addressing inequality in power relations.⁴⁵ Despite this recognition, it

⁴⁰ CA MacKinnon 'Feminism, Marxism, method, and the state: An agenda for theory' (1982) 7 *Signs: Journal of Women in Culture and Society* 533.

⁴¹ CA MacKinnon (1982).

⁴² A Rich 'Compulsory heterosexuality and lesbian existence' (1980) 5 *Signs*.

⁴³ Malawi Law Commission *Report of the Law Commission on the Criminal Justice Reform on the Review of the Penal Code (CAP 7:01)* (2000) 39.

⁴⁴ Malawi Law Commission *Report of the Law Commission on the review of the laws on marriage and divorce* (2006).

⁴⁵ Malawi Law Commission (2011) 12.

does not theorise any more in-depth about the meaning of power and its implications. Power is indeed at the core of gender (in)equality. Theories on gender grapple with power to understand how it works to produce inequalities, and how this can be resisted by groups that have been marginalised such as women and LGBTIQ persons. Power is also at the centre of the marginalisation of the child.

The GEA report reflects radical feminist meanings of power, especially in the way it addresses sexual coercion. Radical feminism theorises power as oppressive and possessed by males as a group and used to oppress women and children, who are conceptualised as lacking that power. Notions such as ‘patriarchy’ and ‘compulsory heterosexuality’ carry this meaning of power. Radical feminists, therefore, proposed criminal law solutions to curb men’s power over women and children, such as sexual harassment and sexual abuse legislation. In discussing sexual coercion, the GEA report constructs women and children as powerless and sexually passive or asexual subjects in the face of male sexual power.

This model of power has been criticised by postmodern theorists who have instead followed Foucauldian and poststructuralist conceptions of power. Steven Angelides, for instance, argues that power relationships should be understood not as a relationship in which some have power and others who lack power but where “each subject is differentially marked and positioned in power and discourse structures,”⁴⁶ so that, “[d]ominance and submission are not fixed positions determined by the presence and absence of power.”⁴⁷ Making this argument in the context of child sexual abuse, Angelides suggests that conceptualising children as lacking knowledge about sexuality, and powerless in relation to adults, not only misconstrues the power relationship but disempowers children by erasing their autonomy and agency.⁴⁸

This thesis acknowledges that prevailing discourses privilege men over women, adults over children, and heteronormative persons over non-heteronormative persons and that this privileging affords more opportunities for those privileged to exercise power over those who are not. Institutions including the law, support the privileges. However,

⁴⁶ S Angelides 'Feminism, child sexual abuse, and the erasure of child sexuality' (2004) 10 *GIQ: A Journal of Lesbian and Gay Studies* 151.

⁴⁷ S Angelides (2004) 152.

⁴⁸ S Angelides (2004) 158.

those who are not privileged, nevertheless, have agency and do have opportunities to exercise power. For the GEA to facilitate the transformation of the social world of children, it must recognise children as having such agency and as capable of exercising power. The GEA should enhance the opportunity for children to exercise power in ways that resist gender inequality.

3.2 Men and women

The language used in the extended title of the GEA expressing its aim is that it would “promote gender equality, equal integration, influence, empowerment, dignity and opportunities, for men and women...”.⁴⁹ The choice of words ‘men and women’ should not be assumed to be neutral, because as poststructuralists have warned, language is rarely objective but tends to express ideology and power.⁵⁰ As noted above, the MLC defines gender as sexual difference and sex as a permanently determined biological condition.⁵¹ This position represents a view contrary to postmodernist views of shifting, fluid, and multiple subjectivities which better reflects the reality of diversity amongst the human population rather than MLC’s position. Further, in as much as the GEA report recognises that women are not a homogenous group, that they “come from many different cultures, races and faiths; ... occupy different class and economic positions; ... have different sexualities; ... may be able-bodied or with disabilities; ... may be married or single; ... may be prisoners; and vary in ages”⁵², the MLC did not conceive of all women as equally deserving of the opportunity to develop their capabilities as per its vision of gender equality. The MLC has, for example, previously proposed “the introduction of an offence to punish acts of indecency among female

⁴⁹ The long title of the Gender Equality Act, No. 3 of 2013 (Malawi) reads: “An Act to promote gender equality, equal integration, influence, empowerment, dignity and opportunities, for men and women in all functions of society, to prohibit and provide redress for sex discrimination, harmful practices and sexual harassment, to provide for public awareness on promotion of gender equality, and to provide for connected matters”

⁵⁰ A Loomba *Colonialism/postcolonialism* (2015) 53.

⁵¹ The GEA report says that “sex of a natural person is determined at birth. Therefore, any person who later undergoes sex change surgery or is a practicing transsexual shall be deemed to maintain their sex at birth.” Malawi Law Commission (2011) 14.

⁵² Malawi Law Commission (2011) 14.



persons, in public or *private*, (emphasis supplied).⁵³ Therefore, though the gender discourse in the GEA report claimed to promote gender equality for men and women, it positions heterosexual women in a privileged position compared to lesbians.

Postmodern feminists criticised modernity's humanism, including human rights instruments, such as the International Covenant on Civil and Political Rights (ICCPR) for privileging a masculine worldview.⁵⁴ Poststructuralism has also critiqued the use of binary terms such as male/female, man/woman, adult/child as masking power relations. It is apparent from reading the GEA that the use of the binary man/woman more than acknowledges that women have suffered male oppression but constructs women (and children) as subjects without agency and autonomy in opposition to an adult man who is accorded agency and autonomy. In MLC's consultative process, the voice that is put forward as contributing towards understanding harmful practices, that oppress women and children, is that of traditional leaders who are mostly male.⁵⁵ Interestingly, this mirrors how the British colonialists dealt with family and native intimacy regulation in their colonies, by colluding with male elders who eventually proposed a hybrid customary colonial law that marginalised women.⁵⁶ In dealing with harmful sexual practices, the GEA report captures a predominantly male adult voice, while silencing the views of women and children. The GEA has therefore been designed primarily based on what males think about women and children. The absence of women's and children's voices cannot be non-consequential. The marginalisation of women and children has implications on how the policy actors who implement the GEA would interpret and apply the norms of the GEA.

⁵³ Malaŵi Law Commission *Law Commission report on review of the Penal Code* (2000) 39.

⁵⁴ H Charlesworth 'What are "women's international human rights"' in *Human rights of women*, ed. Cook RJ (1994) 60.

⁵⁵ Malawi Law Commission (2011) 28.

⁵⁶ O Phillips '(Dis)continuities of custom in Zimbabwe and South Africa: The implications for gendered and sexual rights' (2004) 7 *Health and Human Rights* 87; M Chanock 'Neither customary nor legal: African customary law in the era of family law reform' (1989) 3 *International Journal of Law, Policy and the Family* 76.



3.3 Development

Malawi's development as a country is palpably the primary motivation for the development of the GEA. Gender equality is regarded as a key component in the country's national growth, progress and development, and is implicated in the efforts to address poverty.⁵⁷ However, the meanings of the rhetorical terms, 'development', 'growth' and 'progress' derive from global, imperial and colonial discourses that have shaped Malawi's understanding of gendered relationships. Globalisation, imperialism and colonialism have impacted on how Malawi has addressed the marginalisation of women and children since independence. It is, therefore, necessary to appreciate the historical context of these terms and to enable a critical discussion of the meaning of promoting gender equality in postcolonial Malawi.

One effect of colonialism is that it created racial and gendered hierarchies that justified the white man's rule and dominance over native men and women, and in which the black women occupied the most marginalised position.⁵⁸ Colonialism assumed and represented black women as sexually debased and promiscuous so that they were imagined to readily avail themselves sexually.⁵⁹ The white man introduced a Western-derived legal system and laws on reproduction and sex to manage sexuality of the natives. The colonial laws regulating sex reflected a patriarchal and Victorian morality, in which female sexuality was constructed as passive and activated only at the instance of male sexual desire for the female. In Malawi, where the British colonialists instituted indirect rule, the colonialists colluded with male elders to create traditional law to govern marriage and sexual relationships. The colonial and customary law regimes inevitably reflected the patriarchal interests of both the coloniser and colonised.⁶⁰ Apart from the plunder of resources in colonised territories, such legal interventions that deeply impacted on the gendered relations of Malawians were justified in the names of development and progress by the discourse of the white man's burden. This is the obligation the white man took upon himself to develop and civilise the natives because natives were constructed to be backward, infantile, uncivilised

⁵⁷ Malawi Law Commission (2011).

⁵⁸ RB Jones *Postcolonial representations of women: Critical issues for education*, vol. 18 (2011) 17.

⁵⁹ RB Jones (2011) 16.

⁶⁰ O Phillips (2004); M Chanock (1989).

and doomed to developmental failure unless rescued by the white man.⁶¹ Current development rhetoric sometimes reproduces the colonial essentialist views about women, especially when the same kind of laws that were developed in a patriarchal and colonial context continue to regulate sexual and gender relations today. Katenga-Kaunda having come to a similar conclusion about the continuing influence of colonialism in the education sector, asks the question whether, therefore, colonialism should be blamed for current social ailments.⁶² It might not be helpful to blame history. A postcolonial approach should inspire a critical re-examination of what it entails to remedy historical marginalisation in ways that disrupt the enduring colonial logic and allow women and children the agency to resist residual forms of colonialism. Failure of the MLC to include a postcolonial analysis in the development of the GEA deprived the whole endeavour a potentially powerful basis for mounting such a critique.

3.4 Education

Education is a recurring theme in the conceptualisation of the GEA. Education is linked to personal development and in turn to the development of the country. Such an approach assumes that educating the girl would lead to her social and economic empowerment and contribute to gender equality. Again here, the idea of education as a tool for socio-economic transformation needs to be examined critically in the context of globalisation and postcolonialism. Though independent Africa was encouraged by actors such as UN, World Bank and Western development experts to invest in education as the tool for personal and national social and economic transformation, there have been dismal fruits reaped from this investment.⁶³ John Metzler attributes this to a colonial legacy that shaped education based on colonialist capitalist interests that included securing raw materials to support industrialism, but with little investment in social structures in the colonised lands.⁶⁴ Even when there was an investment in education, it was designed not to promote the interests of the native, but to serve the

⁶¹ RB Jones (2011) 25.

⁶² APK Katenga-Kaunda 'Are we right to blame it all on colonialism?: The subject of history and gender in schools in a Malawian context' (2015) 10 *Journal of Comparative Social Work* 20.

⁶³ J Metzler 'The developing states and education: Africa' in *International handbook of comparative education*, ed. Cowen R & Kazamias AM (2009) 277.

⁶⁴ J Metzler (2009) 279.

colonial ideologies and imperialism, so that for instance, education was intended to reinforce European cultural superiority and denigrate African culture.⁶⁵ Education, therefore, served the purpose of inculcating male hegemony and the undermining of gender equality. It is a legacy that still undermines gender equality in education.

The MLC recommended that “the proposed legislation should consider not only eliminating negative stereotypical material but should also include specific topics aimed at maintaining enrolment rates and equipping the girl-child especially and subsequently the young woman with relevant life skills.”⁶⁶ Its language to eliminate harmful stereotypical material could have been couched in stronger terms to recognise the powerful neoliberal colonial discourses that continue to impact on gender relationships in Malawi. In the context of Malawi, relevant life skills should not be interpreted narrowly to mean only the skills that enable one to get a job or avoid HIV. The education system needs to engage in depth with the discourses that perpetuate gender inequality. Studies by scholars on childhood such as Bhana have shown that gender inequality practices start to impact on children very early in life. Apart from the family institution, power relations that reinforce masculine dominance are enacted and reproduced in schools. Transforming relations of power should, therefore, start early in childhood in schools including pre-school. It is not enough to rework the school curriculum but to build the capacity of teachers to challenge unfair gender practices amongst learners. Teachers could play an essential role to create possibilities for children to disrupt the culturally dominant patterns of gender inequality.

3.5 Harmful practices

3.5.1 Defining ‘harmful practices.’

Eradication of harmful social and cultural practices is one of the core elements of the GEA.⁶⁷ The GEA report captures an extensive discussion of the concept of harmful

⁶⁵ J Metzler (2009) 284; RA Shahjahan 'Decolonizing the evidence - based education and policy movement: Revealing the colonial vestiges in educational policy, research, and neoliberal reform' (2011) 26 *Journal of Education Policy* 196-197.

⁶⁶ Malawi Law Commission (2011) 79.

⁶⁷ Part of the long title of the GEA reads, “to prohibit and provide redress for sex discrimination, harmful practices and sexual harassment”.

practices which culminated in the MLC proposing the following definition of harmful practice(s):

a social, cultural or religious practice which, on account of sex, gender or marital status, does or is likely to –

- (a) undermine the dignity, health or liberty of any person; or
- (b) result in physical, sexual, emotional or psychological harm to any person;

The definition of harmful practices is arguably broad (if not overbroad) and implicates a wide array of social, cultural and religious practices. In its discussion of the concept, the MLC starts with a panning description of harmful practices as those practices that “may be based on tradition or culture, custom, religion or the crystallization of social habits.”⁶⁸ It then narrows down to a lengthy discussion of ‘traditional cultural practices’ that violate the dignity of women (and children) based on sex and gender.⁶⁹ The discussion draws upon practices identified as harmful and described in a factsheet published by the UN Human Rights Office of the High Commissioner, which mentions practices such as;

early marriage, forced sex during initiation rites; practices that allow a man to marry his wife’s younger sisters; nutritional taboos and traditional birth practices; son preference and its implications for the status of the girl child; early pregnancy; and dowry⁷⁰

The GEA Report lists a number of cultural traditions in the Malawi context that are harmful including, widow inheritance (*chiharo*), widow cleansing (*kulowa kufa*), initiation sex (*fisi*) and spouse swapping (*chimwanamaye*)⁷¹ and the procurement of a girl, usually a virgin to have intercourse with a guest to the family as part of hospitality

⁶⁸ Malawi Law Commission (2011) 26.

⁶⁹ Malawi Law Commission (2011) 26-30.

⁷⁰ Malawi Law Commission (2011) 27. See UN Fact Sheet No. 23, *Harmful Traditional Practices Affecting the Health of Women and Children*, <https://www.ohchr.org/Documents/Publications/FactSheet23en.pdf> (Accessed 7 November 2019).

⁷¹ Malawi Law Commission (2011) 27.



(*Bulangete la amfumu*)⁷², and the practice where a group of boys go to a girl's residence to have forced sexual intercourse with her (*gwamula*).⁷³ All these practices involve coercive sexual intercourse of a girl or woman.

Though the MLC ended up defining harmful practices broadly, the GEA report reveals a focus on 'traditional' or 'cultural' practices, and of a nature involving coercive sex against girls and women. However, the definition of harmful practices in the GEA is wide enough to capture other practices that are not necessarily 'traditional' or 'cultural'.

3.5.2 Traditional/Cultural vs Civilised/Modern

Postcolonial theorists are wary of the meaning of concepts of 'traditional' or 'cultural' because they have been used to define non-European cultures as 'Other' and marginal, backward and uncivilised, in relation to European culture which is regarded as superior, civilised and modern.⁷⁴ Critiquing the development of the idea of 'harmful traditional practices' at UN platforms, Winter *et al.* argue that the conceptualisation of traditional practices mirrored the historical and colonial hierarchisation where the cultural and traditional were constructed as non-Western culture and inferior to Western culture.⁷⁵ Winter *et al.* are critical of the portrayal of harmful traditional practices as characteristically 'non-Western', and the assumption that when non-Western states do become modern to the level of the Western counterparts by discarding these traditional practices, they would also liberate women from oppression.⁷⁶ Winter *et al.*, first of all, do not agree that harmful traditions only apply to the non-Western countries, otherwise Western countries would have been havens for women's equality, but that is not the case.⁷⁷ Further, the notion of 'traditional' evokes the colonial perspectives of non-Western cultures as inferior to Western culture.⁷⁸

⁷² Malawi Law Commission (2011) 28.

⁷³ Malawi Law Commission (2011) 30.

⁷⁴ E Said 'Orientalism' (1979) 199 *New York: Vintage* 7.

⁷⁵ B Winter *et al.* 'The UN approach to harmful traditional practices: Some conceptual problems' (2002) 4 *International Feminist Journal of Politics* 76.

⁷⁶ B Winter *et al.* (2002) 76-77; J Tobin 'The international obligation to abolish traditional practices harmful to children's health: What does it mean and require of states' (2009) 9 *Human Rights Law Review* 382.

⁷⁷ B Winter *et al.* (2002) 83.

⁷⁸ SE Merry 'Human rights law and the demonisation of culture (and anthropology along the way)'

These ideas are prevalent in Malawi where the 'traditional' is synonymous with 'rural', 'remote' 'uneducated' 'backward' while the Malawian who is educated and lives in the metropolis and has adopted a Western lifestyle is not 'traditional.'⁷⁹ Undeniably, traditional institutions and practices are part of the discourse that shapes power relationships, but so are modern institutions and practices, such as the western derived law that Malawi adopted. The traditional/modern dichotomy might create a biased focus on traditional or cultural practices as obstacles to gender equality but obscures other equally harmful social practices that reproduce gender inequalities such as political, economic and structural factors.⁸⁰ The traditional practice of *kulowa kufa* contributes to disempowering women because it exposes women to coercive sex. But so is the law that criminalises same-sex sexual conduct between women disempower women because it constructs a social world in which women can only be sexually available for men.

Poststructuralists have suggested that the binaries such as traditional/modern conceal a power relationship. Interestingly, the MLC's view was that the GEA should prohibit harmful practices on the justification that cultural 'sensitivities' make such practices challenging to prosecute under general criminal law. Yet in the earlier review of the Penal Code⁸¹, when the MLC considered the issue of criminalising marital rape, it recommended that marital rape should not be criminalised because doing so would open up matters of private relations to the public.⁸² The MLC's double standard is revealed further where it has proposed criminalisation of non-coercive sexual practices based on Eurocentric Victorian values (criminalisation of homosexuality), therefore appropriating and holding oppressive Western values as superior to local values. Yet, historically, societies in Africa had not penalised homosexuality.⁸³

Sylvia Tamale thus critiques the portrayal of culture in the name of 'tradition' in opposition to 'human rights' as problematic because it casts traditional social practices

(2003) 26 *Political and Legal Anthropology Review* 60.

⁷⁹ APK Katenga-Kaunda (2015) 5.

⁸⁰ SE Merry (2003) 63.

⁸¹ Penal Code 1930, Cap 7:01 Laws of Malawi.

⁸² Malawi Law Commission (2011) 17, 27.

⁸³ T Msibi 'The lies we have been told: On (homo) sexuality in Africa' (2011) 58 *Africa Today*.



as ossified and non-changing, and always in a negative light.⁸⁴ It therefore precludes the possibility of change, unless communities strip themselves of social practices that are meaningful to them and replace them with 'human rights'.⁸⁵ Such approaches may provoke resistance rather than transformation. A better approach would be to negotiate change from within the cultural discourses.

3.6 Transforming attitudes and behaviour

Recognising the limit of penal law to change beliefs and social practices, the MLC suggested that legal interventions be supported by socialising men and women to change behaviour, and through civic education and awareness-raising of the public.⁸⁶ However, the transformative potential of these strategies to change attitudes and practices is assumed rather than critically interrogated. For instance, to what extent would civic education of people about sexual violence lead to its reduction? How would the socialisation of men and women lead to gender equality?

3.6.1 Socialisation

While the GEA report assumes that socialisation of men and women would change gender relationships, the socialisation paradigm that assumes that people would take up desirable gender positions through top-down learning has mostly been abandoned.⁸⁷ Theories about subjectivity development must account for both the contradictions in gender development and also agency.⁸⁸ Social constructionist and postmodernist perspectives provide alternatives to top-down models of socialisation. Ethnomethodology has been used to explain how social and individual identities develop through interpersonal relationships and the medium of language.⁸⁹ Symbolic interactionism has focused on how meaning is created through the process of social

⁸⁴ S Tamale 'The right to culture and the culture of rights: A critical perspective on women's sexual rights in Africa' (2008) 16 *Feminist Legal Studies* 52-53.

⁸⁵ S Tamale (2008) 55.

⁸⁶ (2011) 29-30, 105-106; Malawi Law Commission (2011).

⁸⁷ M Rahman & S Jackson (2010) 158-159; RW Connell *Gender* (2002) 77-78.

⁸⁸ RW Connell (2002) 79.

⁸⁹ C Brickell 'The sociological construction of gender and sexuality' (2006) 54 *The Sociological Review* 94.

interaction⁹⁰ Ethnomethodology and symbolic interactionism have been applied to understanding how children become gendered and sexual. Studies by Bhana and others illustrate that children do not merely internalise cultural, gender and sexual norms. Children actively and reflexively engage with gendered and sexual scripts to make meaning of the world around them. This process involves opportunities for both conformity but also resistance, and for constructing and modifying what gender and sexuality mean to them.⁹¹

Additionally, postmodernism and post-structuralism conceptualise persons as “dynamic and multiple, and always positioned in relation to particular discourses and the practices produced by the discourses.”⁹² Such an understanding of subjectivities challenges essentialised identities, for instance, childhood, and the tendency to think of identities as unitary and simple, rather than as complex and multiple, thus allowing for a reconceptualisation of children as agentic rather than non-agentic subjectivities.

3.6.2 (Civic) sex and gender education

Similar arguments could be made for civic education that is conceptualised as top-down and one-way gender learning in an educator/learner relationship. The GEA report conceives that knowledgeable educators transmit gender knowledge to passive learners. It also assumes that knowledge about gender would transform the learner into a gender-equitable person. Ethnomethodologists and symbolic interactionists suggest that social interactions are crucial to the transmission of social values. Postmodernist theory suggests that society should pay attention to the discursive environment that structures identities and subjectivities, because, for instance, if masculinities continue to be privileged, men and boys would take up such positions to make the best of this privilege, and it would make little difference if society educates them about gender equality.

The GEA report acknowledges the high prevalence of gender-based violence in schools and recommended gender education in the curriculum. But it falls short of appreciating the fact that the school usually operates as a site for the propagation of

⁹⁰ C Brickell (2006) 94.

⁹¹ M Rahman & S Jackson (2010) 174.

⁹² S Grieshaber & GS Cannella (2001) 13.

social, political and moral values of dominant groups.⁹³ Schools regulate sexuality by promoting certain discourses and suppressing others, for instance, by teaching about safe sex but refusing to dispense condoms in schools, they signal that an ideal student may know about sex but is not expected to be sexually active. This has practical implications because it marginalises those who are sexually active. Girls are at a disadvantage over boys because they can become pregnant.⁹⁴ Societies have regulated sexuality by treating pregnant learners harshly to make an example of them to deter others.

Schools, however, can also be sites of resistance against hegemonic values and are opportune environments to disrupt hegemonic masculinities. As Nielsen and Davies have put it,

[C]lassrooms can be sites where a specific gender order is made to seem intractable: a binary and hierarchical order between girls and boys, and a shifting array of hegemonic or marginalized positions within each gender group. Classrooms may also be sites where students discover ways of talking and being that liberate them from more conventional forms of gender, and where they develop a reflexive awareness of the power of discourse to shape identities.⁹⁵

Teachers especially have an essential role in recognising and intervening in gender performances to disrupt hegemonic attitudes and practices amongst students and in their day to day relationships with students.

3.7 Sexual health and sexual rights

The MLC proposed provisions on sexual and reproductive health and rights.⁹⁶ The MLC was of the view that the concept of sexual rights should be understood to entail

⁹³ KH Robinson 'In the name of childhood innocence': A discursive exploration of the moral panic associated with childhood and sexuality' (2008) 14 *Cultural Studies Review* 117-118.

⁹⁴ L Allen 'Denying the sexual subject: schools' regulation of student sexuality' (2007) 33 *British Educational Research Journal* 230; T Shefer *et al* 'Teenage pregnancy and parenting at school in contemporary South African contexts: Deconstructing school narratives and understanding policy implementation' (2013) 31 *Perspectives in Education* 4-5.

⁹⁵ HB Nielsen & B Davies 'Discourse and the construction of gendered identities in education' in *Encyclopedia of language and education*, ed. Hornberger NH (2008) 159.

⁹⁶ The concept of sexual and reproductive health and rights gained traction from the 1980s and was popularised at the International Conference on Population and Development (ICPD) of 1994.

certain principles for governmental action including “to offer everyone, including adolescents, unmarried women, sex workers, refugees and other marginal groups equal access to health care and to address the unique health needs of women and men.”⁹⁷ Alice Miller, however, cautions that “ ‘Health’ cannot be presumed to be a safe site for sexuality – especially homosexuality”.⁹⁸ She supports her statement with several arguments. The first is that even as better care is promised under health care services, the institution of medicine can also be a regime for control, and sometimes in partnership with the legal institution. For instance, the idea that homosexuality is a disorder got much credence because it was backed by the powerful institution of medicine. Second, ‘health’ may not contain all the domains of sexuality; for instance, sexual wellbeing would not include same-sex intimacy in Malawi. Finally,⁹⁹

concepts of “sexual health” and “healthy sexuality” have dangerous tendencies to slide from denoting sexual behaviors carried out without coercion, violence, or exposure to disease to connoting “normal, naturalized” sex, and creating a hierarchy that excludes diverse—or to some, perverse—sexuality.

Indeed, the Malawi Penal Code criminalises same-sex sexual conduct. It also criminalises sexual conduct with a person below the age of 16. Therefore, despite that the GEA makes the promise of aiming at equality of access to sexual health services, the law discriminates against homosexual and sexually active children and therefore marginalises them even before they seek sexual health services.

4 The place of children in the Gender Equality Act

The above sections describe how the GEA is part of the discourse on gender and how it contributes to constituting a gendered world. As already alluded to, the GEA

Advocates for women’s rights championed sexual and reproductive rights because consequences for failure to realise these rights primarily impacted on women, for instance, unwanted pregnancies, injury and death from childbirth, spacing of children, and unsafe abortion. It is this connection between gender inequality and sexual and reproductive rights that prompted the Commission to recommend recognition of sexual and reproductive rights. The discussion in this chapter, and thesis, is confined to sexual health and rights.

⁹⁷ Malawi Law Commission (2011) 58.

⁹⁸ AM Miller 'Uneasy promises: sexuality, health, and human rights' (2001) 91 *American Journal of Public Health* 863.

⁹⁹ AM Miller (2001) 863.

constructs children as passive subjects in the gendered and social world. It also relies a great deal on socialisation and education as the processes that would contribute to transforming Malawi's gender inequitable environment. This last section focuses on exploring how the GEA constitutes children's subjectivities and the implication of facilitating a paradigm change.

4.1 The GEA's vision of children as subjects

The GEA explicitly mentions children only in a few places. It mentions 'child' or 'children' in reference to the right of persons to have children.¹⁰⁰ Elsewhere it mentions boys and girls in terms of equitable access to health services.¹⁰¹ Though the GEA does not explicitly refer to children, this in itself does not mean that the GEA excludes children or that the GEA is not relevant for children.¹⁰² This thesis assumes that wherever the GEA uses inclusive terms like 'everyone' or 'all persons', this includes children. Also, the terms 'men' and 'women' are interpreted to include boys and girls.

As said already above, the GEA report is an essential and foundational document for understanding the GEA's vision, including how it constructs children. The GEA report perceives children through the dominant paradigm that children are passive, without agency and as vulnerable and powerless. For instance, consider the following statement from the GEA report: "The Commission bemoaned this practice which exposes young children to unsuitable messages about the female sex so that they grow up perpetuating learned gender-based prejudice."¹⁰³ The statement suggests that young children would passively absorb these gender-based norms through messages and therefore perpetuate them during adulthood.

¹⁰⁰ Gender Equality Act, 2013 (Malawi) sec 19(1)(e) and 19(2)

¹⁰¹ Gender Equality Act, 2013 sec 14(2).

¹⁰² As mentioned in Chapter one of this thesis, the thesis is biased towards younger children because they are usually marginalised in discussion regarding sexuality. On the other hand, the GEA report does mention 'adolescents' or 'adolescence' in a number of places such as at page 58 where it discusses sexual and reproductive health. This reflects the bias that this thesis addresses, so that children are recognised as having sexual agency even if their capacity to be sexual is an evolving one and differs due to age.

¹⁰³ Malawi Law Commission (2011) 92.



Consider another statement: “Making men more aware of the costs of conventional forms of masculinity, both for themselves and for women and children is an important step towards challenging gender inequalities.”¹⁰⁴ Here, children feature alongside women as vulnerable and powerless in the face of masculinities. The autonomous actors are men. The GEA report recognises women and children as subordinate to self-sufficient men.

Now, in themselves, there is nothing problematic with the two statements quoted above, if the statements reflect just one of the possible ways in which children are positioned in discourse. However, if the law constructs children as fixed in a position of non-autonomy, then it is problematic because it limits the possibilities for children to, for instance, exercise sexual agency.

One of the objectives of General Comment 7 of the Committee on CRC was to “encourage recognition of young children as social actors from the beginning of life.”¹⁰⁵ The Committee noted that the agency of children as social actors and participants in family, community and society is frequently undermined on grounds the Committee held were inappropriate, that is, the grounds of age and immaturity.¹⁰⁶ Though the Committee does not explicitly mention sexuality, the Committee has encouraged addressing the child and adolescent holistically, and this should necessarily include sexuality development.¹⁰⁷

To reiterate, the GEA and the GEA report are part of the discursive framework on gender in that they are not simply texts that describe some reality out there. These legal texts actively constitute the social world. By selectively choosing to ‘see’ and emphasise children as passive subjects, vulnerable and powerless, they create such a social world by downplaying other versions of reality in which children can have agency and autonomy.

¹⁰⁴ Malawi Law Commission (2011) 12.

¹⁰⁵ UN Committee on the Rights of the Child (CRC), *General comment No. 7: Implementing child rights in early childhood*, 20 September 2006, CRC/C/GC/7/Rev.1 paras 1 – 2.

¹⁰⁶ CRC Committee, *General Comment No 7* para 14.

¹⁰⁷ UN Committee on the Rights of the Child (CRC) *General Comment 20: The implementation of the rights of the child during adolescence*, 6 December 2016, CRC/C/GC/20 para 15.

4.2 The meaning of childhood from the perspective of the new sociology

It is necessary to understand the concept of childhood from an interdisciplinary perspective to appreciate the implications of the GEA's vision of the child. One of the important contributions of the sociological sciences to understanding children is that childhood is not a natural and universal category but a social construction.¹⁰⁸ The notion of childhood is the status ascribed by adults to non-adults in however manner these are defined in a particular context. As Julia Fonda has put it, “[c]oncepts of who and what children are and what childhood consists of are ... constructed artificially in and by the adult world to define a discrete social group.”¹⁰⁹ Therefore, children are not ‘natural’ in the sense that they are some objective reality in a natural world discoverable by adults. The knowledge adults have of the child is a function of “the predispositions of a consciousness constituted in relation to our social, political, historical and moral context,”¹¹⁰ a perspective which rejects taken-for-granted meanings of childhood, that tend to naturalise and essentialise childhood. Rather, children are discursively constructed subjectivities; in other words, childhood is an effect of discourse. As discourse, childhood is the institution and set of ideas through which the reality of the actual child is made intelligible, but also through which other social realities are articulated.¹¹¹ Because childhood is a complex institution, it is the reason the notion of childhood conjures up powerful images such as immaturity, helplessness, passivity, asexuality, innocence and irresponsibility, incompetence, that justify control under the guises of saving, protecting, best interests and caring.¹¹² For

¹⁰⁸ A James & A Prout (1997) 10; B Thorne “‘Childhood’: Changing and dissonant meanings’ (2009) 1 *International Journal of Learning and Media* 19-20.

¹⁰⁹ J Fionda 'Legal concepts of childhood: An introduction' in *Legal concepts of childhood*, ed. Fionda J (2001) 3.

¹¹⁰ C Jenks 'Sociological perspectives and media representations of childhood' in *Legal concepts of childhood*, ed. Fionda J (2001) 31. Chris Jenks has also said elsewhere “Children, quite simply, are not always and everywhere the same thing, they are socially constructed and understood contextually” (C Jenks 'Constructing childhood sociologically' in *An introduction to childhood studies, 3rd edition*, ed. Kehily MJ (2015) 54).

¹¹¹ E Burman 'Childhood, sexual abuse and contemporary political subjectivities' in *New feminist stories of child sexual abuse: Sexual scripts and dangerous dialogue*, ed. Reavey P & Warner S (2003) 37; B Thorne (2009) 20.

¹¹² B Thorne (2009) 21-22.

instance, the white colonialist man justified treating Africans in the way he did because he positioned Africans as children, as deficient in agency and autonomy.¹¹³

Another important contribution of sociology is the critique of the concept of socialisation, which refers to the process through which children learn to conform to social norms. How children learn gender is relevant to this thesis because it critiques and challenges earlier approaches that conceptualise gender learning as a passive process for children.¹¹⁴ Older theories assumed childhood to be a state of disability or inadequacy in relation to adults.¹¹⁵ Socialisation theories then explained how the child gradually became an adult through a learning process in which the child adopted society's norms and values. The socialisation theories were premised on the adult/child dichotomy and treated the socially developing child as passively

¹¹³ WB Cohen 'The colonized as child: British and French colonial rule' (1970) 3 *African Historical Studies* 427-431.

¹¹⁴ Prout and James articulate six key features of the paradigm: "1. Childhood is understood as a social construction. As such it provides an interpretive frame for contextualizing the early years of human life. Childhood, as distinct from biological immaturity, is neither a natural nor universal feature of human groups but appears as a specific structural and cultural component of many societies. 2. Childhood is a variable of social analysis. It can never be entirely divorced from other variables such as class, gender, or ethnicity. Comparative and cross-cultural analysis reveals a variety of childhoods rather than a single and universal phenomenon. 3. Children's social relationships and cultures are worthy of study in their own right, independent of the perspective and concerns of adults. 4. Children are and must be seen as active in the construction and determination of their own social lives, the lives of those around them and of the societies in which they live. Children are not just the passive subjects of social structures and processes. 5. Ethnography is a particularly useful methodology for the study of childhood. It allows children a more direct voice and participation in the production of sociological data than is usually possible through experimental or survey styles of research. 6. Childhood is a phenomenon in relation to which the double hermeneutic of the social sciences is acutely present (see Giddens, 1976). That is to say, to proclaim a new paradigm of childhood sociology is also to engage in and respond to the process of reconstructing childhood in society." (A James & A Prout 'A new paradigm for the sociology of childhood? Provenance, promise and problems' in *Constructing and reconstructing childhood : contemporary issues in the sociological study of childhood*, ed. Prout A & James A (1997) 8.)

¹¹⁵ C Jenks (2015) 60.

internalising social values to bridge that dichotomy.¹¹⁶ But then as Chris Jenks points out,

[w]hat is highly instructive in all manifestations of the model of the socially developing child (that is, socialization theory), as they have appeared in many forms of sociology, is that they have little or no time for children.¹¹⁷

The marginalisation of children is what prompted Barrie Thorne to ask: “Where are the children?” How to recognise the autonomy of children is a question that has preoccupied the new paradigm of child sociology and critical psychology. Woodhead summarises three themes of childhood that come out of a social constructionist perspective that addresses the deficiencies of the old school child sociology and developmental psychology. First, it recognises that the dominant vision of childhood that is circulated globally and promoted through developmental science comes out of a specific historical and cultural setting and says little about the actual child.¹¹⁸ Second, it recognises that children are creative social actors, and contribute to shaping the social world and their childhoods. They are therefore not passive objects of socialisation. The idea of children as social actors has encouraged research and studies that approach children as partners rather than as objects of adult actions.¹¹⁹ The third follows from the two themes, that studying children and childhood in isolation from adults and adulthood has limited value, and that there is more value in studying childhood as an intergenerational relationship. Such studies have therefore addressed the adult-child binary which itself is but a socially constructed relationship.¹²⁰

¹¹⁶ A James & A Prout (1997) 12; CRC Committee, *General Comment 7* para 5.

¹¹⁷ C Jenks (2015) 64.

¹¹⁸ M Woodhead 'Childhood studies: Past, present and future' in *An introduction to childhood studies*, ed. Kehily MJ (2015) 23.

¹¹⁹ L Alanen & B Mayall 'Explorations in generational analysis' in *Conceptualizing child-adult relations*, ed. Alanen L & Mayall B (2001) 12.

¹²⁰ M Woodhead (2015) 26. Woodhead points out that adults play a significant role in shaping childhood even if children are recognised as agentic and subject of rights; B Mayall *A history of the sociology of childhood* (2013) 2. Mayall expresses the view that “it is important, both socially and politically, to bring sociological thinking to childhood in order to give due recognition to children as important members of society, not as pre-social objects of socialization, but as contributing agents to the welfare of society. There are advantages to all generations and



4.3 Children as agentic subjects

In her research with children below the age of 10 in South Africa, Bhana shows how adult's constructions of children contributed to ensuring that children take up gendered attitudes and behaviours. According to the views of primary school teachers regarding their young learners, "gender, doesn't matter to young children', 'children are children' [and they are] 'just kids, still young'."¹²¹ Through the metaphor of childhood as pre-social and innocence, the teachers envisioned children as non-gendered and asexual. However, this attitude masks the operation of power because the teachers "cannot see the child as sexual/gendered and constructing sexuality and gendering with others, nor can they challenge the continual naturalisation of gender differences and unequal relations of power."¹²² Further, the discourse of childhood innocence justifies unwarranted control to prevent children from perceived dangers of (sexual) corruption, for instance avoiding addressing the topic of sexuality.¹²³ Yet, despite that the teachers constructed children as non-gendered, Bhana found that the teachers ascribed certain behaviours as natural to boys and others natural to girls. Boys were perceived to be naturally aggressive, adventurous and better at mathematical subjects, while girls were constructed as shy, reserved and more talkative. By naturalising behaviours as masculine or feminine, the teachers unwittingly reinforced hegemonic masculine dominance and the subjugation of girls, on the basis that gender inequality is sanctioned by nature, and efforts to transform it would be futile.¹²⁴

While adult attitudes and practices may contribute to shaping the gendered and sexual world for children, children are far from being passive subjects. "Rather, children themselves are producing and regulating gender by taking part in constantly 'doing' and 'redoing' femininities and masculinities."¹²⁵ In her interaction with three- and four-year-olds, Blaise found that these children understood gender and sexuality, in ways

societies if we acquire greater understanding of and respect for children and for childhood (just as feminism has altered understandings of women)."

¹²¹ D Bhana (2016) 27.

¹²² D Bhana (2016) 27.

¹²³ D Bhana (2016) 28.

¹²⁴ D Bhana (2016) 29.

¹²⁵ M Blaise 'Kiss and tell: Gendered narratives and childhood sexuality' (2010) 35 *Australasian Journal of Early Childhood* 2.

shaped by social discourses of heteronormativity. However, children did not just passively take in what adults say or do; they engage with the prevailing discourses and articulate their understanding of gender and sexuality.¹²⁶ Children do not just play along with the dominant discourses. They negotiate their way through them, sometimes resisting them.¹²⁷ In their study, Robinson and Davies interviewed adult women regarding their earliest childhood experiences about being gendered subjects to explore how they constructed and negotiated gender. One of interviewee's who described herself as having grown up as a tomboy (a girl who exhibits masculine behaviour) recalled how despite the expectations that she should exhibit feminine behaviour, she found ways to maintain masculine interests and sometimes hiding her interests from adults to avoid their judgemental gaze.¹²⁸

4.4 Re-envisioning children in the GEA

Children develop their gender and sexual identities through a highly interactive process with adults through discourses prevailing in the society.¹²⁹ These discourses offer rewards or sanctions, a position of privilege or marginalisation. For instance, discourses that offer masculinity as desirable and pleasurable are taken up by young boys in the school playground who take pleasure in dominating girls. An important question then is how to change such gender discriminatory attitudes and behaviours. The GEA is expected to contribute to facilitating such a paradigm shift. This section uses MacNaughton's work with children in elementary school, captured in *Rethinking gender in early childhood education*, to appreciate the challenges that implementers of the GEA should envisage. MacNaughton's work is apt because she uses a poststructural approach to analyse power and gender relationships in the early childhood setting.

¹²⁶ M Blaise (2010) 7-8.

¹²⁷ G MacNaughton *Rethinking gender myths in early childhood education* (2000) 21.

¹²⁸ K Robinson & C Davies 'Tomboys and sissy girls: Exploring girls' power, agency and female relationships in childhood through the memories of women' (2010) 35 *Australasian Journal of Early Childhood* 27.

¹²⁹ W Simon & J Gagnon *Sexual conduct: The social sources of human sexuality*, 2nd ed. (2017). Simon and Gagnon explain through scripting theory how children become gendered and sexual and the complex interaction between adults and children which facilitates the acquisition of identity.



In this work, MacNaughton describes the efforts of a teacher to change the sexist behaviour of boys in a block play area which resulted in girls leaving the block play to boys because girls perceived it as a masculine activity. The teacher tried to change this attitude by encouraging girls and attempting to diffuse the dominance of boys, but her efforts failed because no amount of socialisation could get the girls to take up block play confidently. In her analysis, MacNaughton attributed the failure of the teacher's intervention to her philosophy of gender learning, that children would become gender empowered through socialisation. MacNaughton explains that children's subjectivities are influenced by different messages they receive from multiple sources in society about what it means to be a normal boy or girl. However, the girls do not just passively absorb gender norms, they negotiate their way through, deciding whether and how they would play along with dominant understandings of being a normal girl or choose alternative or resistive modes.¹³⁰ Such is the process of identity formation that the teacher needed to engage to have an impact on how the girls (and boys) would reshape their gender identities.

Drawing from a poststructuralist perspective of the formation of subjectivities, MacNaughton suggested a more transformative approach to promoting gender-equitable play and relationships between boys and girls;

Specific strategies could include:

- giving a voice to all children about gender irrespective of their gender, race, class or ability
- checking to see whose voices about gender are silenced, marginalised and trivialised in the group
- exploring multiple ways of creating dialogue about who children are and how they see themselves and their genders
- knowing which stories about gender are narrated in the group and which children narrate these

¹³⁰ G MacNaughton (2000) 21-22.



- reflecting on how race, class, gender, disability and sexuality feature in children's narrations, who features them, how do they and how do others react encouraging children to evaluate their own and other people's gender stories
- helping all children practise being spectators, commentators and narrators.¹³¹

As can be noted in MacNaughton's suggestions, these are not as simplistic as envisaged by socialisation-based interventions. First, they are based on an understanding of children as active and creative subjects in the formation of their identities. Second, interventions involve considerable interaction between adults and children but also children and children, and the aim of that interaction would not be to change the child directly but to work a dialogue that offers the child an expanded vision of seeing and doing gender.¹³² However, this presupposes a discursive framework that provides the child with expansive freedoms. The criminalisation of same-sex intimacy, for instance, privileges heterosexuality and hegemonic masculinities. It would be challenging, therefore, to provide children with an expansive vision of being gendered when gender discourse precludes same-sex sexuality.

5 Conclusion

The GEA's aim to transform Malawi into a country that is gender equitable is at once a noble and tough call, because gender inequality is deeply entrenched, and has institutional backing including through legal institutions. The discourses prevailing in society are taken up by the younger generation. To reverse this requires substantial investment to reshape gender identities of children, to offer them diverse subject-positions that are attractive for them to take up. It means, for instance, offering boys opportunities to explore femininity without making it look unattractive for them, and for girls to explore masculinity without attracting social disapproval.

This thesis explores the GEA's potential to facilitate transformation for children because as has been discussed in the first chapter, studies have shown that gender norms influence children from an early age which impacts on their sexual health trajectories. The second chapter laid down the conceptual framework that this thesis uses to interrogate the GEA. The third chapter pries open the GEA through the GEA report to understand the theories and ideologies underlying the GEA. These are not

¹³¹ G MacNaughton (2000) 33.

¹³² G MacNaughton (2000) 33.

necessarily the intention of the authors of the GEA report and the GEA, but the interpretation of the author of this thesis.

Feminist approaches are palpable in the GEA as it addresses how society could achieve equality for women, who are perceived to be in a disadvantaged position relative to men. The GEA however, maintains heteronormativity as a privileged position of gender and sexual relationships, or at least, it does not challenge such a perspective. Discourses that privilege heterosexuality and devalue other gendered and sexual ways of being tend to align with rigid gender norms that support gender inequality. Such discourses, for instance, create expectations that children ought to grow up to be sexually attracted to the opposite sex. Those who find themselves attracted to the same sex are placed in a precarious and marginalised position.

The GEA's conceptualisation of children as passive actors in the gendered world reflects social constructions that are very limiting of the potential of children. Children are co-creators of social reality with adults. Failure to perceive children as such implies that the GEA does not envisage facilitating engagement with children as active participants in constructing social reality, including by doing gender. This impacts on the potential of the GEA to transform the social world. However, this does not spell doom to the GEA as yet, because policy actors could interpret and apply the GEA in ways that envision children as creative co-actors in the construction of the social reality of gender. The next three chapters address how the GEA could be interpreted to facilitate transformation in the three specific areas of children's sexuality, gender relations in schools, and sexual health.

PART II: THEMATIC ANALYSES



CHAPTER 4: THE LAW OF CONSENT TO SEXUAL INTERCOURSE AND ITS IMPLICATIONS ON WELLBEING AND RIGHTS OF THE CHILD

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1 Introduction

At the ICPD, one of the challenges countries addressed is gender equality in sexual relationships. Paragraph 7.34 of the ICPD's PoA notes that:

Human sexuality and gender relations are closely interrelated and together affect the ability of men and women to achieve and maintain sexual health and manage their reproductive lives. Equal relationships between men and women in matters of sexual relations and reproduction, including full respect for the physical integrity of the human body, require mutual respect and willingness to accept responsibility for the consequences of sexual behaviour. Responsible sexual behaviour, sensitivity and equity in gender relations, particularly when instilled during the formative years, enhance and promote respectful and harmonious partnerships between men and women.¹

To achieve its aim of creating a gender-equitable social world, the GEA has a vital role to play to engage children. As the above-quoted paragraph of the ICPD PoA suggests, to promote equal relations between men and women, the GEA as part of the broader legal and policy framework should contribute to fostering responsible sexual behaviours, sensitivity and equity in gender relations during the formative years. Indeed, experts in adolescent developmental psychology have said that early sexual experiences in adolescence have a significant effect on future sexual experiences and outcomes.² In General Comment 20, the Committee on CRC encourages states and non-state actors to regard adolescence as a positive phase of human development, and to facilitate the creation of an enabling environment in which adolescents can explore their emerging identities, beliefs and sexualities, and build their capacity for making positive decisions and life-choices.³

As discussed in chapters 2 and 3, the GEA and other related texts form part of the discourses on gender and sexuality. These texts create an environment in which children are encouraged or discouraged to take up various subjectivities, and this is

¹ Report of the International Conference on Population and Development (ICPD) UN Doc A/CONF.171/13 (1994).

² Anik Gevers and Alan Flisher, Expert opinion: Submission to the Portfolio Committee on Justice and Correctional Services Relating to the Criminal Law [Sexual Offences and Related Matters] Amendment Act Amendment Bill [B18-2014], <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/150310anik.pdf> (Accessed 25 September 2019).

³ CRC Committee, *General Comment* 20 para 15.

dependent in part on the social world the discourses create, and the choice of the child to take up or resist the dominant discourses.

The GEA must create an environment in which children are encouraged to take up subjectivities in which they would be comfortable with their gender and sexuality because this facilitates respect for others. The discourses that deny children sexual agency are a significant barrier to adolescents experiencing sexuality positively. Children get messages about sexuality from multiple sources including parents, media, and caregivers such as teachers. These are backed by institutions such as religion, education and laws. Since the GEA aims to create a gender equitable world, it should resist individual and institutional practices, including laws, that perceive children as without sexual agency. These include age of consent provisions in Sections 138 and 160B of the Penal Code of Malawi. These sections reflect patriarchal and sexist discourses of gender and sexuality because they construct girls as sexually passive and therefore vulnerable and in need of protection while boys are sexual actors. Constructing girls as sexually submissive creates the perception that boys are potential sexual predators while girls are the victims.⁴ Such a world cannot be gender equitable.

The law as discourse can also align with dominant discourses that perpetuate gender stereotypes.⁵ This chapter explores the historical development of the age of consent provisions in the Penal Code, their introduction during colonialism, and the process of assimilation where colonial notions of gender equality have been incorporated and sustained in post-colonial legislation. It is argued that the GEA cannot realise its full potential to promote gender equality and sexual health of children unless the Penal Code provisions are reviewed and the gender and sexual stereotypes they embody are addressed. If the GEA is to contribute toward the positive transformation of the sexual experience and sexual health of children, it would have to be implemented to facilitate the transformation of these gender and sexual stereotypes. The GEA's implementation has to draw on the legal norms articulated in the Constitution, human rights norms in the CRC, the ACRWC as well as other relevant treaties such as

⁴ RW Blum *et al* (2017) S3.

⁵ RJ Cook & S Cusack (2010) 4.

CEDAW and the Protocol to the African Charter on the Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol).

2 Childhood gender and sexuality

Chapter 3 critiqued the development of the GEA for constructing children as non-autonomous and passively gendered and sexual subjects. This critique is taken up again here as it is central to understanding the development of the age of consent laws in Malawi, which reflect a similar trend of constructing children as sexually passive. This chapter builds upon the concept of childhood from knowledge generated in interdisciplinary childhood studies. A multidisciplinary approach is crucial because it is the conceptions of childhood that have shaped legislation on childhood sexual conduct.

2.1 Childhoods: A sociocultural, historical and political construction

At birth, human beings are dependent on adults to take care of them to survive the period of infancy. Then they gradually attain competence to take care of themselves until at a later stage, they become autonomous and independent. In the cycle of life, they would later contribute to reproducing and raising the next generation of human beings. This biological inevitability is common sense and a fact of nature. However, these facts of nature are and have been interpreted differently across cultures and in time, so that the journey from infancy to adulthood is experienced differently from culture to culture and is shaped by social and historical processes. Therefore, human age-wise development is at once natural because it is based on biological processes but is also 'doctored' or socially constructed by the cultural forces that imbue the biological processes with context-specific meanings.⁶

2.1.1 Western (dominant) conceptions of childhood

The consensus amongst scholars is that the work by the French historian, Philippe

⁶ A Skolnick 'The limits of childhood: Conceptions of child development and social context' (1975) 39 *Law and Contemporary Problems* 43-44; K Smith 'Deconstructing discourses to rapture fairytales of the "ideal" childhood' in *Handbook of childhood and youth studies*, ed. Wyn J & Cahill H (2015) 25.

Ariès, *Centuries of childhood*,⁷ was seminal in suggesting that childhood is a historically and socially constructed concept that varies in time and context.⁸ The idea of variable childhoods challenged the assumptions of a stable and universal childhood. These assumptions in conceptualising childhood were exported from the West to other regions on the globe.⁹

According to James and Prout, the evolutionary developmental model has been the dominant framework that has structured Western thought around childhood, and especially the idea of childhood as a state of linear progression from an inferior status to the superior status of adulthood, from “simplicity to complexity of thought, from irrational to rational behaviour”.¹⁰ The conception of childhood as a state of irrationality and incompetence is assumed to be natural, and further, construed to be universal, that is, applying to all children everywhere and at all times, so that any child whose behaviour is deemed outside this worldview, is considered to be abnormal.

Harry Hendrick has described how the modern understanding of childhood in England is a discursive product of various constructions of childhood that dominated during various periods since the 1800s.¹¹ These conceptions were influenced by social changes associated with industrialisation. Children were conceptualised as innocent and needing care and protection to preserve their innocence, and on the other extreme, as tainted by original sin and requiring disciplining and training to turn them into good persons.¹² The rise of the social class distinctions in the mid-nineteenth-century saw the emergence of the concept of delinquency. The notion of the delinquent child arose out of the conflict between innocence and experience because certain experiences were not meant to be experienced by children, such as those that made

⁷ P Ariès *Centuries of childhood; a social history of family life* (1962).

⁸ H Cunningham 'Histories of childhood' (1998) 103 *The American Historical Review* 1197.

⁹ A James & A Prout (1997) 9; K Smith (2015) 31.

¹⁰ A James & A Prout (1997) 10; K Smith (2015) 22.

¹¹ H Hendrick 'Constructions and reconstructions of British Childhood: An interpretive survey, 1800 to the present' in *Constructing and reconstructing childhood : contemporary issues in the sociological study of childhood*, ed. James A & Prout A (1997) 34.

¹² H Hendrick (1997) 40-43.

them independent too soon. However, in the prevailing social conditions, working-class parents now spent most of their time at work in factories, while children were left on their own or neglected, or indeed were themselves also working. Children, unsupervised and unemployed creatively engaged in various activities on the streets such as begging, gambling and petty crimes.¹³ However, middle-class social commentators interpreted the phenomenon through the lens of notions of childhood innocence. A child correctly brought up was expected to be dependent, and not supposed to be 'streetwise'.¹⁴ The child who exhibited 'adult' knowledge and was independent at too young an age was deemed to have been improperly raised, undisciplined and delinquent.¹⁵ Social reform campaigns to address delinquency imagined returning the child to a state of innocence, meaning to dependency and incompetence. These social reforms led to the development of legislation on juvenile delinquency.¹⁶ Inevitably, and not surprisingly, marginalised and poor children were over-represented amongst the delinquents.

Another meaning of childhood that developed from the mid-nineteenth century was what Hendricks calls the 'schooled child'. The school was initially designed to respond to the needs of the middle and upper-class child in accordance with the notion of a child as dependent and incompetent, who needed to be managed and trained for adult roles and responsibilities. The school, therefore, achieved several things including reinforcing the child's dependence, taking away children from wage-labour, and institutionalised separation of children from parents. Schooling facilitated the creation of a new kind of childhood, the 'pupil'.¹⁷

Western childhood, therefore, is a composite of various constructions that dominated various times in history, including childhood as needing protection, childhood as irrational, mentally immature and imperfect beings, childhood as innocence, and

¹³ J Muncie *Youth & crime* (2004) 56.

¹⁴ H Hendrick (1997) 43.

¹⁵ J Muncie (2004) 57.

¹⁶ H Hendrick (1997) 43.

¹⁷ H Hendrick (1997) 45-47.

childhood as a time for training.¹⁸ This is the conception of childhood that has been exported globally.

2.1.2 African childhood

The idea of childhood in Africa is, in some respects, uniquely African but also has elements that are common with other global cultures.¹⁹ Julia Sloth-Nielsen posits that children in Africa were from an early age expected to gradually take up adult responsibilities according to their development capacity.²⁰ Termination of childhood had little to do with the attainment of a predetermined age but with the physical ability to perform acts which are typically reserved for adults.²¹ Puberty was significant because it signalled the capacity of the person to take up the adult role of reproducing and raising children.

While Sloth-Nielsen suggests that in Africa, childhood was not a protected phase of physical and psycho-social development, this should not be interpreted to mean children were not subject to control. As Welshman Ncube points out, “childhood is not perceived and conceptualised in terms of age but in terms of inter-generational obligations of support and reciprocity.”²² Therefore, “the African ‘child’ is often always a ‘child’ in relation to his or her parents who expect and are traditionally entitled to all forms of support in times of need and in old age.”²³ The child is socialised to be subservient to their parents through cultural and religious systems, and sometimes using intimidation to inculcate the obligation to respect parents. Ncube further notes

¹⁸ W Ncube 'The African cultural fingerprint? The changing concept of childhood' in *Law, culture, tradition, and children's rights in eastern and southern Africa*, ed. Ncube W (1998) 17.

¹⁹ AP Ndofirepi & A Shumba 'Conceptions of “child” among traditional Africans: A philosophical purview' (2014) 45 *Journal of Human Ecology* 241. For a more thorough treatment of an African Childhood see RPD Miamingi, "Constructing a conception of childhood in Africa," 2014.

²⁰ J Sloth-Nielsen 'Modern African childhoods: does law matter?' in *Current legal issues, volume 14: Law and childhood studies*, ed. Freeman M (2012) 117.

²¹ W Ncube (1998) 19-20. See also B Rwezaura 'Competing 'images' of childhood in the social and legal systems of contemporary sub-Saharan Africa' (1998) 12 *International Journal of Law, Policy and the Family*; B Rwezaura (1998).

²² W Ncube (1998) 18-19.

²³ W Ncube (1998) 18-19.

that parents in Africa exercise tremendous power in disciplining and regulating the behaviour of the child. Remember Miamingi puts it succinctly when he says that

Children are active participants producing and reproducing cultural norms in traditional communities in Africa. However, they must participate in a culturally acceptable manner. This delicate balance allows children to think only within culturally acceptable confines, to talk only as permitted by custom, and participate only through acceptable customary means and modes of communication.²⁴

Therefore, despite the differing constructions of childhood, both in Europe and Africa, the relationships between adults and children have been characterised by disciplinary control. This includes the gendered structuring of the experiences of sexuality of the child, so that for instance, at puberty, girls would be counselled to avoid getting pregnant before marriage, which often means prohibiting unmarried girls from engaging in any sexual conduct with boys.

The modern notions of childhood in Africa have been influenced by the forces of colonialism and transnational capitalism.²⁵ However, just as Hendrick has described of Europe, the modern constructions of childhood in Africa are a discursive fusion of Western and African notions of childhood. Constructions of childhood in contemporary Africa are by no means uniform even within countries. In some localities, communities adhere more strictly to traditional notions of childhood than in other locales that have adopted a more westernised lifestyle. However, in most cases, African communities have adopted hybridised notions of childhood that are a mix of European and traditional African.

One of the challenges, in theorising childhood and colonialism, is how to simultaneously “critique colonial rule masquerading as a humanitarian mission to rescue women [and children] and to reject cultural nationalisms mythologizing a pre-colonial golden age of egalitarianism while condoning violent patriarchal practices.”²⁶ Ishita Pande, therefore, cautions against uncritical acceptance of the multiplicity of

²⁴ RPD Miamingi, "Constructing a conception of childhood in Africa," 2014, 278.

²⁵ W Ncube (1998) 23.

²⁶ I Pande "Listen to the child': Law, sex, and the child wife in Indian historiography' (2013) 11 *History Compass* 689.

childhoods, for instance, in which the African child is theorised as a version of childhood measured up against the dominant western childhood, because it carries the danger of cultural relativism that justifies violence against children in the past and present.²⁷ This thesis acknowledges that pre-colonial Malawi was not necessarily a golden and egalitarian age for children. Neither is post-colonial Malawi despite the globalisation and localisation of the notion of the rights of the child. There is need therefore to forge a conceptualisation of the child that retains positive notions from the current discourses of childhood and to discard those that are negative.

2.2 The meanings of adolescence

The course of human development is understood to comprise various stages beginning with infancy, childhood, adolescence and finally, adulthood. The stages of infancy, childhood and adolescence are distinguished from adulthood because they all have incompetence as the common denominator, while adulthood is the stage characterised by competence. The stage of adolescence is one that tends to cause immense anxiety in society, because of the question of what to do with, or perhaps even more importantly, how to think about the sexually mature child.

Like childhood, adolescence is a socially and historically constructed concept. In both traditional Europe and Africa, adolescence was 'non-existent', and sexual maturation of children did not cause much anxiety in society. It was Granville Stanley Hall, dubbed the father of adolescence, who is said to have invented 'adolescence' when in his treatise, *Adolescence*,²⁸ he described the age of adolescence as one characterised by 'storm and stress'. Of course, Hall did not create adolescence. Rather, his work consolidated and popularised conceptions that were already taking root in his cultural milieu. In fact, it is Jean-Jacques Rousseau who, in the Western world, is credited with introducing the idea of adolescence as a period of emotional instability.²⁹

²⁷ I Pande (2013) 693.

²⁸ GS Hall *Adolescence: Its psychology and its relations to physiology, anthropology, sociology, sex, crime, religion and education (Vols I & II)* (1904).

²⁹ A Skolnick (1975) 62. Rousseau described adolescence in the following words: "As the roaring of the sea precedes a tempest from afar, this stormy revolution is proclaimed by the murmur of



Hall's idea of adolescence as a period of storm and stress gained traction in a period of rapid social change, during the industrial revolution, during which interrelated concepts of human development were being fashioned, and primarily influenced by the Darwinian theory of the evolution of species. Hall understood adolescence as a time of turmoil but also as a time of opportunity, where society would intervene in the development of adolescents to ensure the development of a healthy and superior race.³⁰ The notion of adolescence in Hall's theory was also racialised and gendered because he conceptualised adolescent development as:³¹

[A] crucial point at which an individual (and society) jumped to a developed, superior, Western selfhood, or remained arrested in a savage state. Adolescence became the dividing line between rational, autonomous, and moral white bourgeois men, those civilised men who would continue the evolution of the race, and emotional, conforming, sentimental, or mythical others, namely, primitives, women, and children.

Hall and his followers were interested in the study of children because of its instrumental value for understanding the development of the human species. As already noted above, one of the developments in the industrial era was the development of the school institution, which originated as a response to the need to manage children of the middle and upper classes now that child labour was prohibited. Hall and others took this opportunity to imagine schools as facilities for training children to become morally and physically fit, and productive members of society. Hall, like many other members of the society in which he lived, thought that precocious sexual activity sapped persons of energy, and to maintain good health, adolescents should avoid masturbation and other wasteful sexual activities.³²

The social construction of adolescents as immature, irrational and incompetent, their

the nascent passions. A mute fermentation warns of danger's approach. A change in humor, frequent anger, a mind in constant agitation, makes the child almost unmanageable. He becomes deaf to the voice which made him docile. His feverishness turns him into a lion. He disregards his guide; he no longer wishes to be governed." J-J Rousseau *Emile: Or, on education*, trans. Bloom A (1979) 211.

³⁰ N Lesko *Act your age! : A cultural construction of adolescence*, Second ed. (2012) 46-47.

³¹ N Lesko (2012) 46.

³² N Lesko (2012) 47.



prohibition from engaging in gainful employment, and the imposition of a moratorium on sexual conduct are culturally and historically specific interpretations of notions of childhood that have been exported from Europe to African countries. One of the challenges this chapter focuses on is that by transplanting laws designed for the European sociohistorical context, such as age of consent laws, Malawi uncritically introduced alien notions of childhood that not only conflicted with local notions but were contrary to the rights of the child. The process of assimilating such laws, even if they are a misfit, is itself highly political and involving various power relations including those originating in the relationships between colonisers and natives. It is essential therefore to appreciate these relationships and how postcolonial communities in Malawi continue to be shaped by residual colonialism through such laws.

3 Age of consent to sexual intercourse and colonial legacy

The current Penal Code of Malawi entered into force in 1930, and its origins trace to English criminal law adapted for Nyasaland (Malawi's former name) by Albert Ehrhardt.³³ Over the years, the Penal Code has been amended in a piecemeal fashion with the consequence that it has mostly retained its colonial structure and form. The provisions that are of interest for this chapter are Sections 138 and 160B that regulate sexual relations with and between children. Though Section 138 was amended in 2011, the provision retains stereotypical notions of gender and sexuality of children. Section 160B, though newly introduced with the 2011 amendments, adopts a similar perspective. This negativity of the law toward adolescent sexuality contributes towards sustaining gender and sex inequality by ignoring the agency of children in constructing meanings of sexuality, and in ways that reproduce hegemonic notions of masculinities. It is necessary to appreciate the historical development of age of consent provisions to sexual intercourse, to benefit from the counsel in paragraph 7.34 of the ICPD's PoA (to promote mutual respect in sexual relationships) and achieve the aim of the GEA to advance gender equality and sexual health for children. Policy actors should interpret the GEA to shift how society thinks about children and sexuality.

³³ HF Morris 'A history of the adoption of codes of criminal law and procedure in British Colonial Africa, 1876–1935' (1974) 18 *Journal of African Law* 22.



3.1 Development of age of consent laws in Europe and England before 1800s

In traditional Europe, the age at which it was determined that two persons could engage in sexual intercourse was a decision the family made following tribal customs.³⁴ That age usually coincided with puberty, although this was not always the case. In most European traditional cultures, the age of consent for girls was set between 12 and 14.³⁵ The earliest recorded state intervention into sexual unions, in Europe, occurred in the first century in republican Rome during the reign of August Ceaser.³⁶ It became a law that children were required to understand what they were consenting to in marriage, and the age of consent was set at 7.³⁷

In the sixth century, Emperor Justinian I of the Eastern Roman Empire, directed the compilation of a code of law, the *Corpus Juris Civilis*, in which it was stipulated that the age of marriage was 12 for girls and 14 for boys. This code became influential in the development of European civil law and canon law.³⁸ However, the point Bullough makes is that historically, in traditional Europe, the age of consent to sexual intercourse and marriage was set between 12 and 14 and that it was made to coincide with puberty.³⁹

The age of consent in England, though taking a different trajectory, developed in the context described by Bullough above. The first statute to articulate a minimum age of consent to sexual intercourse in England was the Statute of Westminster 1275 which prohibited sexual intercourse with “any Maiden within age.”⁴⁰ Scholars have interpreted this age to be 12 per the tradition described by Bullough. The law

³⁴ VL Bullough 'Age of consent: A historical overview' (2005) 16 *Journal of Psychology & Human Sexuality* 26.

³⁵ VL Bullough (2005) 27.

³⁶ VL Bullough (2005) 29.

³⁷ VL Bullough (2005) 29.

³⁸ VL Bullough (2005) 30-31.

³⁹ VL Bullough (2005) 40; V Bates 'The legacy of 1885: Girls and the age of sexual consent' (2015) *History and Policy*.

⁴⁰ M Waites (2005) 62.



developed further in 1576 when carnal knowledge with a girl of 10 was made a felony.⁴¹ However, sexual behaviour with a child below the age of 12 remained prohibited.⁴² The Offences Against the Person Act 1828 was the first to consolidate various individual Acts relating to unlawful sexual acts under a single Act, and it confirmed that carnal knowledge of a girl under 10 was a felony punishable by death, while carnal knowledge with a girl of below 12 was a misdemeanour.⁴³ In 1861, the 1828 legislation was repealed and replaced by the Offences of the Person Act 1861 which maintained carnal knowledge of a girl under 10 as a felony, but by then the punishment of death penalty in respect of that crime had been abolished. Carnal knowledge of a girl of below 12 remained a misdemeanour. The Offences of the Person Act 1875 amended the provisions on sexual offences relating to children. Carnal knowledge with a girl of below the age of 12 was made a felony, while carnal knowledge with a girl of above 12 and below 13 was made a misdemeanour.⁴⁴ The amendment effectively raised the age of consent to sexual intercourse to 13. The law was further amended by the Criminal Law Amendment Act 1885 which made carnal knowledge with a girl below 13 a felony, and carnal knowledge with a girl of between 13 and below 16 a misdemeanour.⁴⁵ For purposes of the thesis, the developments in law on sexual consent especially the codification process culminating in the Criminal Law Amendment Act 1885 are what eventually influenced legal developments in Malawi.

⁴¹ Colonial America adopted the language of the English provisions. Some states set the age of consent to sex at 10 and others at 12. However, as Cocca notes, these laws were mainly to protect the value of chastity than to recognise the girl's capacity (or lack thereof) to consent to sex. C Cocca *Jailbait: The politics of statutory rape laws in the United States* (2004) 11.

⁴² M Waites (2005) 63.

⁴³ M Waites (2005) 63; L Surridge "On the Offences Against the Person Act, 1828." *BRANCH: Britain, Representation and Nineteenth-Century History* ed. Felluga DF https://www.branchcollective.org/?ps_articles=lisa-surridge-on-the-offences-against-the-person-act-1828 (Accessed 30 January 2020).

⁴⁴ M Waites (2005) 63.

⁴⁵ F Mead & AH Bodkin 'Criminal Law Amendment Act, 1885, with introduction, notes and index' (1885) 44; M Waites (2005) 63.

3.2 Regulation of childhood sexual conduct in traditional Malawi

Before the colonisation by Western states, African communities regulated sexual conduct with and between children through cultural norms. However, during colonialism, notions of western childhood were exported through imposition and assimilation. Before discussing the regulation of childhood sexual conduct in traditional Malawi, a note about sources of information is required. Genealogies of European childhood, such as Bullough's historiographical account, are possible because of the availability of written historical sources, but also because notions of Western childhood were exported to other parts of the world through colonial expansion. The readily available and accessible sources of information about Malawi's childhoods are mostly anthropological rather than historiographical accounts because anthropology developed as a science of the study of the primitive 'other' by Europeans who assumed their culture to be superior.⁴⁶ This chapter draws on anthropological rather than historiographical work to describe constructions of childhood in the past and present traditional Malawi.

There are several ethnic groupings in Malawi, and customary practices regarding sexuality do vary according to ethnicity. However, there are also similarities in the gender and sexual norms so that for purposes of discussion, the ethnic variations will be overlooked, unless there is a specific ethnic practice that might need to be highlighted.

What Bullough says about traditional European societies in mediaeval times is true about pre-colonial and traditional African cultures, that sexual unions were and are still governed by families according to tribal customs.⁴⁷ And again, just as in traditional European societies, puberty and the development of secondary sexual characteristics signified the readiness of the child to take on adult sexual roles. In some ethnic groups in Malawi, such as the Chewa and Yao, the child was prepared to take on adult sexual roles through initiation rites.⁴⁸ A report of a study of cultural practices conducted by the

⁴⁶ RB Jones (2011) 81.

⁴⁷ VL Bullough (2005) 26.

⁴⁸ AJ Chinkuyu & SN Maina-Chinkuyu 'Norms and rituals about sexual practices and behaviours

Malawi Human Rights Commission (MHRC) shows that initiation ceremonies are more focused on girls, and that they are much more elaborate than the initiation rites for boys.⁴⁹ The main purpose of initiation rites is to give instruction and counsel to the child who is now recognised as having attained the capacity to take up adult roles including sexual roles. Teaching and giving counsel on sexuality are systematically imparted through songs, oral messages, taboos and folklore.⁵⁰ It is debatable whether pre-pubescent boys and girls were recognised as asexual. However, in Chewa culture, for instance, adolescent boys and girls were kept under surveillance to prevent them from having physical sexual contact with one another. It can also be inferred from the values accorded to female chastity in most Malawian cultures, that girls were prohibited from engaging in pre-marital sexual conduct through taboos and social sanctions. In fact, in the Chewa culture, a girl who became pregnant before marriage would undergo special initiation rites that highlighted that her behaviour brought shame to the family and community.⁵¹

3.3 Colonial and post-colonial Malawi

By the time European nations undertook their colonising projects, they had developed codified regulatory frameworks for sexual conduct. During colonialism, these codes were imposed on countries such as Malawi by the colonial governments. However, the imposition did not extinguish traditional sexual regulatory practices. Rather, the introduction of Western law created an environment where multiple regulatory frameworks coexisted which included the cultural norms of the natives, Western legislation and but also norms introduced by Western grown religions. Following the end of formal colonisation, like many other African countries, Malawi appropriated

among the Chewa of Central Malawi' in *Sexuality: An African perspective*, ed. Khamasi JW & Maina-Chinkuyu SN (2005) 148; EA Pemba, "The changes in the conduct of Yao boys' initiation ceremonies" 2012; Malawi Human Rights Commission *Cultural practices and their impact on the enjoyment of human rights, particularly the rights of women and children in Malawi* (2006) 40; AC Munthali *et al Adolescent sexual and reproductive health in Malawi: A synthesis of research evidence* (2004) 13-14.

⁴⁹ Malawi Human Rights Commission (2006) 40.

⁵⁰ AJ Chinkuyu & SN Maina-Chinkuyu (2005) 141.

⁵¹ Malawi Human Rights Commission (2006) 45.

Western law as its formal law. Malawi is, therefore, a legal pluralist country because the formal Western law and the informal regulatory framework of cultural norms coexist and govern social relationships. However, in the hierarchy of laws, the formal law takes precedence, so that any cultural practices that contradict formal law risk infringing on formal law. For instance, the GEA prohibits harmful cultural practices such as those the MHRC has documented.⁵²

European formal law introduced age as a site of sexual regulation. In traditional Malawi, an adult could engage in sexual conduct with a child if she was deemed an 'adult', that is, if she had attained puberty and undergone initiation rites. An essential difference between the formal law and cultural norms is that an infringement of formal law attracted state-backed penal sanction including imprisonment, while violation of traditional norms attracted social sanction.

The original version of Section 138 of the Penal Code as it was promulgated in 1930 proscribed sexual intercourse with an underage girl in the following terms:

(1) Any person who unlawfully and carnally knows any girl under the age of thirteen years shall be guilty of a felony and shall be liable to imprisonment for life, with or without corporal punishment.

...

Provided that it shall be a sufficient defence to any charge under this section if it shall be made to appear to the court, jury or assessors before whom the charge shall be brought that the person so charged had reasonable cause to believe and did in fact believe that the girl was of or above the age of thirteen years.

It is most likely that Section 138 of the Penal Code was adapted from the 'defilement'

⁵² Malawi Human Rights Commission (2006). The MHRC report comprehensively documents cultural practices that are sexual in nature and their impact on the human rights of girls and women. The provisions of the GEA on harmful cultural practices however does not set out a list of prohibited cultural practices. The MLC considered whether it should include a specific list in the GEB or to leave it open. Its rationale was as follows: "Upon careful reflection, the Commission however decided to leave out the list and simply describe the harmful practices; leaving the development of examples to civic educators during civic education campaigns and public awareness initiatives.⁹⁴ Such an approach will prevent a scenario where some practices which are harmless are included in the list purely on account of their sexual nature." MLC page 30.

provisions in the Offences against the Person Act 1875 as amended by the Criminal Law Amendment Act 1885. However, while in English law criminalisation was 2-tiered, in that the highest sentence was reserved for carnal knowledge with girls of below 13, and a lower sentence for sexual intercourse with a girl of below 16, the framework imposed on the colony had one age of consent: 13. It was not an offence to engage in sexual intercourse with a child of 13 and above.

The provision on defilement adopted from the colonial Penal Code was not reviewed until in 2010 when Parliament passed a bill, which was enacted in 2011, to amend several provisions including Section 138. It currently reads as follows:

(1) Any person who carnally knows any girl under the age of sixteen years shall be guilty of a felony and shall be liable to imprisonment for life.

(2) Any person who attempts to have carnal knowledge of any girl under the age of sixteen years shall be guilty of like felony and shall be liable to imprisonment for fourteen years.

Provided that it shall be a sufficient defence to any charge under this section if it shall be made to appear to the court, jury or assessors before whom the charge shall be brought that the person so charged had reasonable cause to believe and did in fact believe that the girl was of or above the age of sixteen years.

This amendment effectively raised the age of consent from 13 to 16.

A related provision is Section 160B which was introduced in the Penal Code as part of the 2011 amendments, and the first part of which reads:

Any person who engages or indulges in sexual activity with a child, shall be guilty of an offence and shall be liable to imprisonment for twenty-one years.

...

Sexual activity is defined in Section 160A to mean:

[S]exual contact other than sexual intercourse (whether between persons of the same or opposite sex) in the form of genital, oral-genital, anal-genital contact or otherwise, masturbation, touching of genitals, buttocks or breasts, sadistic or masochistic abuse and other deviant sexual behaviour.

Raising the age of consent to 16 is more aligned to contemporary practices so that



younger adolescents are protected from harmful sexual conduct. However, it is the interpretation of the provision that is problematic, because it has been interpreted to exclude sexual agency of persons below the age of 16. As a result, adolescents who engage in consensual sexual conduct are being prosecuted.⁵³

4 The child as a sexual subject in age of consent laws

4.1 English law up to 1885

The age of consent laws from the Western countries that eventually found their way into Malawi's law through the colonial Penal Code reflect culturally specific notions of gender and sexuality about the child. As Waites comments, these laws were "patriarchal in their conception, embodying male power and control over women and children, embedded in patriarchal heterosexuality understood as a system of social and legal property relationships and sexual relationships."⁵⁴ The girl was valued as a property for exchange, and her value depended on her maintaining her virginity. The law was therefore designed to protect the girl, to preserve her value of chastity or sexual innocence from being 'defiled' by boys and men.

The law was gender stereotypical and protected only girls because it was believed that their sexuality is passive and weak against active male sexuality. Only the sexual agency of the boy was recognised and not that of the girl. Despite the apparent disadvantage this caused to the boys, in that only they were liable to the offence of defilement, failure to recognise the sexual agency of the girl is a disadvantage because it removes the power from girls to self-determine on issues of sexuality.

Conceptions of adolescent sexuality were also racialised and class based. These class-based views were evident in the campaigns leading up to the 1885 amendments

⁵³ Only anecdotal evidence is available as present such as this media piece: Fifteen years Malawian boy fined MK50, 000 for defiling a 14 year old girl, Maravi Post (12 April 2019) <https://www.maravipost.com/fifteen-years-malawian-boy-fined-mk50-000-for-defiling-a-14-year-old-girl/> (Accessed 25 September 2019); Patrick Ndawala, Boy, 15, fined K50, 000 for defiling girl, 16, MANA Online, (12 April 2019) <http://www.manaonline.gov.mw/index.php/national/general/item/12191-boy-15-fined-k50-000-for-defiling-girl-16> (Accessed 25 September 2019).

⁵⁴ M Waites (2005) 63.



that saw the increase of the age of consent from 13 to 16. The most vocal groups proposed this amendment because of the allegations that young British maidens were being lured into prostitution. A select House of Lords Committee tasked to investigate the allegations found that they were proved. In its report before the House of Lords, the Committee stated it had found these reasons for the increase in prostitution of young girls:

A vicious demand for young girls; overcrowding in dwellings, immorality arising therefrom; want of parental control, and in many cases parental example, profligacy, and immoral treatment; residence, in some cases, in brothels; the example and encouragement of other girls slightly older, and the sight of the dress and money which their immoral habits have enabled them to obtain; the state of the streets in which little girls are allowed to run about, and become accustomed to the sight of open profligacy; and sometimes the contamination of vicious girls in schools.

These views reflected anxieties of middle and upper-class men regarding the perceived threat posed by predatory men, but also sexually precocious girls, that is, girls who were exposed to sexual activity or knowledge prematurely. However, as Victoria Bates has discussed, prevailing views about gender, race and class shaped such notions of precocity to distinguish respectable girls, white European girls from the upper-class families, from undesirable girls, including girls from working-class families. It was widely believed that precocity was typical for the lower races and classes and girls from these social groups were therefore not envisaged as subjects for legal protection.⁵⁵ It was also believed that these undesirable girls would have a corrupting influence if they associated with innocent and respectable children because of their exposure to sexual activity or knowledge.⁵⁶

Social and historical discourses, therefore, shaped laws on age of consent in Europe about gender, sexuality and childhood. They were designed to protect girls from boys and men, and control female sexuality through the notion of precocity.⁵⁷ The colonial and post-colonial governments adopted these colonial laws and they are now in the

⁵⁵ V Bates 'The child as risk: Precocious girls and sexual consent in late Victorian Britain' (2017) 7 *Law, Crime & History Law, Crime and History* 132.

⁵⁶ B Carpenter *et al* 'Harm, responsibility, age, and consent' (2014) 17 *New Criminal Law Review* 30.

⁵⁷ V Bates (2015).

current Malawian Penal Code. The original Section 138 of the Penal Code, therefore, imported meanings of childhood gender and sexuality that prevailed in the late 1800s in England.

4.2 Malawi's sex and gender equality law

The age of consent law of the late 1800s of England served the patriarchal interests of middle and upper-class men, whose intention was to control sexual access to their girl-children to preserve their virginity. As discussed above, traditional and pre-colonial Malawi regulated sexuality of children, and there were similarities with the regulation of childhood sexuality in traditional Europe in that they both reflected patriarchal interests of society, including to keep girls chaste. The imposition of colonial age of consent laws, therefore, created continuities and discontinuities in the social construction of adolescent sexuality in the cultures of Malawi.

During colonialism, another dimension of power relationship came into play reflecting the anxieties of the colonisers about the sexuality of the natives, but regarding native labour. The colonial government's primary interest was domination and exploitation of the natives for labour to sustain the capitalist and imperialist economy. The colonial government, therefore, was careful not to disrupt the lives of the natives and to avoid revolt.⁵⁸ The colonial government's strategy⁵⁸ was to concede to certain demands of the natives. However, in the negotiations for power, the colonial government recognised the subjectivity of men only, and not women and girls. On the other hand, the native men resisted governmental control of their intimate lives, and so the negotiation of laws that impacted on gender and sexuality of women and children tended to reflect the interest of the colonial government to dominate Africans, but also the interest of male natives to maintain control over native women and children.⁵⁹ The interests of the colonial government reflected in the age of consent laws exported to Africa. While the 1885 amendment in England raised the age of consent to 16, the colonial Penal Code had maintained 13, most likely reflecting a compromise in the cultural environment in which it was imposed, because, in traditional Malawi, a girl who had

⁵⁸ T Barnes 'The fight for control of African women's mobility in colonial Zimbabwe, 1900-1939' (1992) 17 *Signs* 589.

⁵⁹ M Chanock (1989) 76; O Phillips (2004) 87.

reached puberty was considered mature. Also, the colonisers did not wish to provoke resistance from the natives, and the strategy was therefore to formulate laws that minimally interfered with sexual affairs between African men and women, and girls. Age of consent laws, therefore, were not designed to advance the rights of women and girls.⁶⁰ The colonial law was accepted and appropriated because it served both the interests of the coloniser to dominate the natives and of the colonised to control their women and children. However, Bates suggests that one reason for the low age of consent adopted in the colonies was that native girls were perceived by European colonisers to be physically precocious before the age of 13 so that raising the age of consent would not serve the purpose of protecting at-risk girls because they matured early anyway.⁶¹ In other words, the colonisers cared less about the native girls, for reasons including that the sexuality of black girls was deemed not worth protecting.⁶²

When Malawi retained the colonial law, it also adopted the colonial logic underlying the formulation and development of the colonial age of consent laws. When the MLC proposed the amendments in 2000, it took after the 1885 developments in the UK as its standard and raised the age of consent to 16 for girls. However, this also meant that it maintained the gender and sex stereotypes that underlie the colonial law.

Section 160B (which criminalises sexual activity with a child of below 16) was introduced to address the gap in Section 138 since the latter only deals with 'carnal knowledge', that is, penile-vaginal sexual intercourse with a girl. Section 160B as read with other sections including 160A (which defines sexual activity as a variety of sexual activities except for sexual intercourse) then patches that gap. However, because there are no explicit provisions that decriminalise consensual conduct between peers who are below the age of consent, these provisions have been interpreted to mean that adolescents should not have any sexual conduct with other adolescents.

⁶⁰ H Bannerji *Inventing subjects: Studies in hegemony, patriarchy and colonialism* (2001) 83.

⁶¹ V Bates (2017) 134.

⁶² See also the introduction in DE Roberts *Killing the black body: Race, reproduction, and the meaning of liberty* (1997).. Roberts describes how black women's sexuality was thought to be different and a debased one.

5 Empowering children to pursue gender equitable relationships and realise rights related to sexuality

5.1 Gender equality and sexuality

Age of consent provisions in the Penal Code are gender-stereotypic, and this is evident in Section 138 of the Penal Code, which ‘protects’ only girls from sexual intercourse. Boys are imagined as having an active sexual desire that should be held in check. Consent to sex is imbued with a feminine character because female sexuality is supposed to be passive and resistant rather than active and pursuant which is the characteristic assigned to male sexuality. Therefore, girls are not supposed, for instance, to express sexual desire or initiate sex, but rather, to be the gatekeepers of sex and regulate men’s sexual access to them.⁶³ Such stereotypes are wrongful and patronising because they limit the sexual agency of girls. As Cook and Cusack put it, “stereotypes infringe unduly on the capacity of individuals to construct and make decisions about their life plans.”⁶⁴ It is also wrongful for boys because it promotes harmful masculinities by suggesting that boys of any age are all-knowledgeable and positioned above girls in matters of sexuality, and therefore do not need any support except punishment when they transgress. These stereotypical views mask power relationships that sustain the disempowerment of both boys and girls.

These gender and sexual stereotypes also operate in institutions such as education. Sexuality education programs tend to focus on the negative consequences that girls would suffer if they have sex, including STIs and pregnancy. Similarly, in informal sexuality education, such as in initiation rites, girls are the ones that are advised to refrain from having sex with boys, but boys are not advised the same about girls.⁶⁵ In her article ‘Sexuality, schooling, and adolescent females: The missing discourse of desire,’ Michelle Fine drew attention to the fact that formal sex education in the USA suppressed female entitlement to sexual pleasure and desire, and focused instead on

⁶³ B Carpenter *et al* (2014) 48.

⁶⁴ RJ Cook & S Cusack (2010) 11.

⁶⁵ JC Njeula 'A study on influence of traditional initiation practices to reduce spread of HIV and AIDS in Chileka, a rural area in Blantyre in Malawi' (2014) 1 *International Journal of Research and Review* 24.



danger and disease.⁶⁶ She argued that the discourse of sexuality entrenched traditional notions of males as agentic and erased female agency. It positioned girls as objects of male sexuality, with the consequence that girls are denied the space and language to explore their sexual desire and therefore control their sexuality.⁶⁷ In her study of how girls articulated sexual desire, Deborah Tolman found that girls spoke about sexual desire as problematic rather than empowering. Their voices expressed:

The internalized oppression of their women's bodies; they knew and spoke about, in explicit or more indirect ways, the pressure they felt to silence their desire, to dissociate from those bodies in which they inescapably live.⁶⁸

In a study on adolescent sexual activity and education in Malawi, Monica Grant found that parents saw their girl child as inevitably at risk of succumbing to male sexual desire and getting pregnant.⁶⁹ Parents, therefore, attempted to control the girls by prohibiting association with boys, and even pre-emptively removing them from school before anybody got a chance to make them pregnant.⁷⁰ Girls who 'did not listen' and continued to associate with boys, against their parents' advice, were considered rebellious, disobedient and out of control.

Negative views about adolescent sexuality also pervade medical and health discourses. Janice Irvine raises the concern that the medical model of adolescent sexuality, which is quite influential in modern times, presents a perspective that reduces adolescent sexuality to biology. She argues that it "fails to address the complicated historical, political, social, and economic influences that have infused teenage sex with a particular set of meanings."⁷¹ She gives the example of how

⁶⁶ M Fine 'Sexuality, schooling, and adolescent females: The missing discourse of desire' (1988) 58 *Harvard Educational Review* 33.

⁶⁷ M Fine (1988) 37.

⁶⁸ DL Tolman (1994) 338.

⁶⁹ MJ Grant 'Girls' schooling and the perceived threat of adolescent sexual activity in rural Malawi' (2012) 14 *Culture, Health & Sexuality* 77-79.

⁷⁰ MJ Grant (2012) 75.

⁷¹ JM Irvine 'Cultural differences and adolescent sexualities' in *Sexual cultures and the construction*

biostatistics has been used to reproduce a discourse around adolescent pregnancy that has inspired solutions that focus mainly on controlling the sexual agency of the girl.⁷² She observes that these health challenges are not the inherent consequences of adolescence. Rather, they are the "... outcome of meanings that are attributed to these behaviours within particular historical settings, settings that shape how those meanings will be understood and the responses that they will evoke."⁷³ Catriona Macleod has demonstrated how constructions of adolescence inherited during colonialism continue to operate as regulatory regimes regarding adolescent sexual behaviour for instance, through sexuality education programs in South Africa. The design of these programs impose views about normal adolescent sexual conduct using the metaphors of danger and disease so that any adolescent who behaves or experiences sexuality outside pre-set social expectations is seen as contributing to the degeneration of society, and is sanctioned.⁷⁴ Such views of adolescence contribute to disempowering adolescents by constraining the range of sexual experiences and sexual choices they can make. Indeed, the Committee on CRC has observed that adolescence itself has been a source of discrimination, and adolescents have been treated as problems or dangerous.⁷⁵ A good example is the criminalisation of adolescent consensual sexual conduct.

The Kenyan Court decision of *Martin Charo v Republic* (cited above) is an example of how the law can constitute discourse that constructs childhood sexuality in a manner that limits and constrains what could be experienced as normal. In this case, the Court overturned the conviction of a man of 24 who was convicted for the offence of defilement under Kenyan law, for having sexual intercourse with a girl of 14. The Court reasoned that if the girl voluntarily sought sexual intercourse with the man, she ought not to be protected under the law. Her behaviour was, according to the Court, unlike

of adolescent identities, ed. Irvine JM (1994) 3.

⁷² JM Irvine (1994) 7.

⁷³ CA Nathanson *Dangerous passage: The social control of sexuality in women's adolescence* (1991) 18.

⁷⁴ C Macleod 'Danger and disease in sex education: The saturation of 'adolescence' with colonialist assumptions' (2009) 11 *Journal of Health Management* 376-377.

⁷⁵ CRC Committee, *General Comment 20* para 21.

that of a child, because she expressed sexual desire. Indeed, Carpenter et al. have noted that

[a] child who "sexually responds to the abuse, or appears flirtatious and sexually aware" is judged against the modern norm of childhood innocence. The "no longer virginal child becomes damaged goods," and "violating such a child becomes a lesser offence," with such children often targeted for further abuse.⁷⁶

Society, therefore, blames social problems such as teenage pregnancies and sexual abuse on the child for being sexually knowledgeable or desirous, and therefore 'out of line'.⁷⁷ A good girl is one that does not have sexual agency at whatever society defines is not the right age. She waits until she is much older or indeed, married, and under the control of a man. Yet, it is the inequitable social system, and not their being sexual, that creates the condition in which their sexual desire becomes a source of danger.⁷⁸ It creates an environment in which the girl is blamed for being sexually abused or raped just like in *Martin Charo*. In such an environment, girls find it difficult to report sexual abuse, because the authorities do not take them seriously.⁷⁹ Age of consent laws that limit the sexual agency of children are therefore potentially disempowering, because they constrain the sexual autonomy of children, rendering them vulnerable because of negative views regarding adolescent sexuality. This situation cannot be made right merely by enforcing the existing age of consent laws. The GEA would not adequately address the system of social inequality that disempowers girls and renders them vulnerable to sexual harms by creating more offences. This thesis argues that the GEA must address the root of the problem, that is, the gender and sexual stereotypes underlying public policy.

⁷⁶ B Carpenter *et al* (2014) 31.

⁷⁷ See chapter 4, C Macleod (2011).

⁷⁸ DL Tolman (1994) 339.

⁷⁹ This was the complaint of the plaintiffs in *C.K. (A Child) through Ripples International as her guardian and Next friend) & 11 Others v. Commissioner of Police/Inspector General of The National Police Service & 3 Others* [2013] eKLR, Petition No. 8 of 2012 (High Court of Kenya), that the police did not take the sexual abuse complaints seriously and often interrogated the complainant rather than take effective steps to pursue the perpetrators. The Court held that the Police had failed to conduct prompt, effective, proper, and professional investigations into the petitioners' complaints of defilement and other forms of sexual violence. It also found that the police failed in its duty to enforce the sexual offences law of Kenya.



Moral panic about adolescents becoming too sexual and out of control unless put under surveillance and restraint is not because, as Annulla Linders has observed, adolescents are engaged in more risky sex than adults. Rather, their sexuality is problematised based on the construction of adolescence as a problematic and chaotic period that justifies the criminalisation of normative sexual conduct.⁸⁰ Malawi's regulation of sexual conduct of adolescents through Sections 138 and 160B of the Penal Code reflects such an ideology. The challenge, therefore, is to reconceptualise adolescence differently, as the CRC has advised in General Comment 20.⁸¹

In *CKW*,⁸² a child appellant asked the Court why consensual sex between minors is criminalised but not sex between adults. The Court responded that it was for the protection of children. Its reasoning reflects the attitude that adolescents are a problematic group that need to be controlled by the indiscriminate criminalisation of their sexual conduct. South Africa, however, guided by the Constitutional Court's decision in *Teddy Bear Clinic for Abused Children and Another v. Minister of Justice and Constitutional Development and Another*⁸³ decriminalised consensual sexual conduct between adolescents of between the ages of 12 and 16. This decision is important because it reconceptualised adolescent sexuality. Adolescent sexuality is not imagined as the problem. It is normal for an adolescent to be sexual in the sense that they may have sexual desire. This was a revolutionary decision and one that continues to challenge dominant discourses of adolescent sexuality in the African region. As has been discussed earlier in the chapter, the predominant view around adolescent sexuality, represented by the views of the Court in *CKW*, is that adolescents are sexually incompetent and that the threats of sexual harms such as STIs and pre-marital pregnancy require limiting the sexual agency of children.⁸⁴ The

⁸⁰ A Linders 'Deconstructing adolescence' in *International handbook on adolescent health and development: The public health response*, ed. Cherry A et al (2016) 22; A Powell *Sex, power and consent: Youth culture and the unwritten rules* (2010) 13.

⁸¹ CRC Committee *General Comment 20* para 15.

⁸² *C.K.W. v. Attorney General & Director of Public Prosecution* [2014] eKLR, Petition 6 of 2013 (High Court of Kenya).

⁸³ *Teddy Bear Clinic v. Minister of Justice and Constitutional Development* 2014 (2) SA 168 (CC).

⁸⁴ MJ Grant (2012) 83; A Linders (2016) 22.



reasoning of *Teddy Bear Clinic* judgement, therefore, went against the grain when it proclaimed that criminalisation of sexual conduct between adolescents infringed on the sexual rights of adolescents. However, the critical point the Court made is that adolescents need support and guidance. On the part of the government, this means making institutional and structural changes regarding the treatment of children in institutions such as health and education. It means recognising adolescents as capable of sexual desire, as well as capable of being desired sexually by others. It requires the state to provide appropriate sexuality education for the guidance of adolescents, including mentoring adolescents as their capacity to make decisions about sexual relationships evolves. To truly transform attitudes, the GEA must transform institutions and structures, and especially how gender and sexuality are conceptualised in these institutions. It must transform the legal institutions including age of consent laws that sustain gender and sexual stereotypes.

The colonial and postcolonial age of consent laws in Malawi have emphasised protection at the expense of support for sexuality development. The problem is that the age of consent provisions in Malawi's Penal Code are interpreted to mean adolescents should not have sexual agency. In the *Martin Charo* case, the Court was interpreting Kenyan age of consent law, and in its opinion, the law meant that children below the age of 18 as having no capacity for sexual conduct.⁸⁵ The interpretation of the defilement law in *Charo*, that a child is incapable of sexual desire was congruent with other earlier court decisions. For instance, in *Ezekiel Cheruiyot Koros v Republic*,⁸⁶ the Court expressed the opinion that the Sexual Offences Act set the age of consent at 18 because "a girl of under the age of 18 years is either not fully mature to consent to and/or engage in sexual intercourse and/or is too vulnerable and/or requires protection of the law from ... immoral sexual acts."⁸⁷ The courts affirm that

⁸⁵ Sexual Offences Act 3 of 2006 (Kenya). Section 8(1) of the Act provides that: - 'a person who commits an act that causes penetration with a child is guilty of an offence termed defilement.' Penetration is defined under Section 3 of the Act as 'the partial or complete insertion of the genital organs of a person into the genital organs of another person.'

⁸⁶ Criminal Appeal No. 5 of 2010 (High Court of Kenya).

⁸⁷ *Ezekiel Cheruiyot Koros v Republic* (2010). It should be emphasised here that the problem with the line of reasoning of the Court is that it views the child as completely asexual, and this leads

the Sexual Offences Act constructs a girl of below 18 either as lacking the autonomy to consent to sex or as too vulnerable to engage in sex. Yet the girl of 14 clearly expressed sexual desire as she voluntarily chose to go to the appellant's house to have sex. A child might have the sexual agency at an age at which the law may not recognise the capacity to consent to sex. But then this does not mean that there is something 'legally' wrong with the child.

In Uganda, the age of consent is set at 18.⁸⁸ Uganda is one of the few countries that explicitly criminalises sexual conduct between consenting adolescents. Parikh has shown how the law has been used by fathers to control who can sexually access their daughters. When the boyfriend is impecunious, the fathers threaten to report to the police, but where the boyfriend has the financial capacity, the fathers allow the boy or man to access their daughters sexually.⁸⁹ Her study demonstrated how age of consent laws, based on the assumption that children have no sexual desire reinforce gender stereotypes that disempower children, and especially girls.

Failure to recognise children's sexual agency potentially infringes on their sexual health and rights, because, as it has been stated in the case of *Teddy Bear Clinic*, they are denied support such as access to sexual health services and information. Their autonomy is compromised because adults do not allow them to make decisions about their sexuality for fear that they would abuse sex or engage in risky sexual conduct. Their privacy is compromised because adults, under the guise of protecting their child, especially the girl, interfere with their decisions about sexuality, for instance, the choice of intimate friends. Further, adolescents are shamed and disgraced for engaging in normal sexual conduct. However, the root of the problem is the adults' gendered

to condemning a child who manifests any sexual behaviour. Rather, a child should be recognised as having capacity to engage in sexual conduct, only that, because it is an evolving capacity, the child should be protected from abuse by unscrupulous older persons. Recognising that the child is sexual does not then make her 'adult'.

⁸⁸ Section 129 (as amended in 2007) of the Penal Code Act (CAP 120) 1950 (Uganda)

⁸⁹ SA Parikh "' They arrested me for loving a schoolgirl" : Ethnography, HIV, and a feminist assessment of the age of consent law as a gender-based structural intervention in Uganda' (2012) 74 *Social Science and Medicine* 1779.

conceptions of the sexuality of adolescents, and not the adolescents themselves. Blanket criminalisation of adolescent consensual sex, therefore, serves to sustain these gendered conceptions and perpetuates the disempowerment of adolescents.

In the Concluding Observations to Malawi of 2015, the Committee on CEDAW acknowledged the positive developments including the enactment of the GEA. However, it expressed the concern about “the persistence of discriminatory stereotypes and deep-rooted patriarchal attitudes regarding the roles and responsibilities of women and men in the family and in society.”⁹⁰ The Committee exhorted Malawi to put in place a comprehensive strategy to eliminate discriminatory practices regarding the role and responsibilities of men and women in society. This counsel is very pertinent to the stereotypes around the sexuality of children and adolescents expressed in the current sexual offences regime. It is therefore submitted that Malawi should decriminalise adolescent consensual sexual conduct and raise awareness about harmful stereotypes surrounding adolescent sexuality.

5.2 Balancing sexual autonomy and protection against coercion

While the aim of Sections 138 and 160B of the Penal Code is presumably to protect children from sexual abuse, they construct children as sexually passive, and their bodies as objects waiting to be defiled (girls) or abused. The disregard of the sexual agency of the child creates conditions for the disempowerment of the child, because the child is expected to be sexually innocent, and this reinforces gender-stereotypical norms on sexuality that undermine the rights of the child. A child who is sexually knowing is ostracised, just as the girl in *Martin Charo* was legally ostracised for expressing sexual agency. Children do need protection from sexual abuse and coercion, but at the same time, their sexual agency should not also be undermined.

This thesis is not arguing that adolescents be ignored or left alone regarding sexual matters. This would be tantamount to abdication of the responsibility of adults to provide guidance and support to children. There may be good reasons for encouraging

⁹⁰ Committee on the Elimination of Discrimination against Women, *Concluding observations on the seventh periodic report of Malawi*, CEDAW/C/MWI/CO/7 (2015) para 20.

children to delay their sexual debut.⁹¹ Children certainly need to be protected from the harmful consequences of sexual conduct, including teenage pregnancy and STIs. However, as the courts in South Africa and Zimbabwe have advised, criminalisation of sexual conduct between consenting children or adolescents is not the most effective way of addressing unwanted pregnancies among unmarried children or adolescents or to curb the spread of STIs.⁹²

Criminalisation of adolescent sexual conduct also has a constitutive effect in that it reinforces cultural and social views that are negative about childhood and adolescent sexuality.⁹³ Children and adolescents are expected not to show or experience behaviour that adults deem is sexual. An important implication, therefore, is that adults fail to support children when they need such support. An example is victim-blaming for children who experience abuse. Another is when health providers deny children or adolescents access to condoms because they are too young.

However, this is not to suggest that criminal law does not have a useful role. Children need to be protected from coercive sexual conduct perpetrated by others, and regulation through criminal law is necessary. The critical question, however, is how to

⁹¹ A-M Nobelius *et al* 'Delaying sexual debut amongst out-of-school youth in rural southwest Uganda' (2010) 12 *Culture, Health & Sexuality* 663. This article cites literature that shows that early sexual debut is associated with poor sexual and reproductive health outcomes in later life. However, this may not necessarily mean that delayed sexual debut has long term benefits. See D Hollander 'Long-term benefits of delaying first sex appear to be limited' (2008) 40 *Perspectives on Sexual and Reproductive Health*.

⁹² In *Teddy Bear Clinic*, Justice Kampepe was of the view that the state could pursue its aims to address harms of sexual conduct, using less restrictive means than criminalisation of adolescents who engage in consensual sex, *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* CCT 12/13 [2013] ZACC 35 (Constitutional Court of South Africa) para 97; In *State v Masuku*, Justice Tsanga said that "To stem the dangers that arise for girls in particular from teenage sex, part of the answer would appear to lie in policy makers and society accepting the prevalence of youth sex and fashioning appropriate interventions. Availing contraceptive protection is one such intervention. A more rigorous and open approach to what is actually taught as sexual education in schools is another" [2015] ZWHHC 106, CRB B467/14 (High Court of Zimbabwe).

⁹³ M Waites (2005) 217.

balance protection and empowerment, to protect young people from the harms of sexual conduct, while recognising their sexual agency. Stephen Schulhofer suggests that criminal law should protect sexual autonomy, which he understands to be “[c]ore rights of the person to physical autonomy and to freedom of choice in matters of sexual intimacy.”⁹⁴ Joseph Fischel adopts Schulhofer’s concept of sexual autonomy to develop arguments on how to protect personal choices in sexual relationships between or with adolescents. Fischel suggests that it is the infringement of choice that should determine what constitutes a sexual wrong.⁹⁵ This chapter adopts Fischel’s combination of suggestions to reform Malawi’s age of consent laws using sexual autonomy as the guiding principle. Fischel’s argues for lowering the age of consent, decriminalising sexual intercourse between adolescents, codifying close-in-age provisions, and regulating relationships of trust and dependence with adults.⁹⁶ Fischel’s suggestions are explored below.

5.2.1 Lowering the age of consent and decriminalising sex between minors

Fischel argues for the lowering of the age of consent where the age of consent is significantly higher than the age at which many adolescents are having sex.⁹⁷ The 2011 amendments in Malawi raised the age of consent from 13 to 16. According to the Malawi Demographic and Health Survey of 2016, 19% of boys and 14% of girls aged 15-24 have sexual intercourse before age 15.⁹⁸ These percentages indicate that a significant number of young people engage in sex before the age of 16. Though the statistics do not show the age of sexual partners, it is assumed that it does not distinguish between sex with peers or sex with much older persons. The principle of sexual autonomy requires lowering the age of consent and decriminalising sex

⁹⁴ SJ Schulhofer 'Taking sexual autonomy seriously: Rape law and beyond' (1992) 11 *Law and Philosophy* 94.

⁹⁵ JJ Fischel 'Per se or power? Age and sexual consent' (2010) 22 *Yale Journal of Law & Feminism* 294.

⁹⁶ JJ Fischel (2010) 283.

⁹⁷ JJ Fischel (2010) 301.

⁹⁸ National Statistical Office (NSO) & ICF *Malawi demographic and health survey 2016-15* (2017) 210.

between minors to protect their choices. Fischel argues that criminalising consensual sexual conduct between adolescents condemns the sex and not the coercion, and therefore fails to protect young people's choices, desires and safety.⁹⁹ It makes it more difficult for young people to seek support and guidance.¹⁰⁰ What should be criminalised, therefore, is coercive sex and not sexual conduct *per se*.

Fischel's argument is in line with the reasoning of the Committee on CRC in General Comment 20 where the Committee has said that:

States parties should take into account the need to balance protection and evolving capacities, and define an acceptable minimum age when determining the legal age for sexual consent. States should avoid criminalizing adolescents of similar ages for factually consensual and non-exploitative sexual activity.¹⁰¹

The Committee on CRC also recognises the sexual autonomy and the right of the child to "control one's health and body, including sexual and reproductive freedom to make responsible choices"¹⁰² as the child's capacity and maturity evolves. Setting the age of consent to sexual conduct too high is more likely to erode into the child's sexual

⁹⁹ JJ Fischel (2010) 300.

¹⁰⁰ This resonates with the reasoning of Justice Sisi Kampepe in the *Teddy Bear Case* that children need support and guidance, and that criminalisation of consensual sexual conduct deters children from seeking such guidance from adults.

¹⁰¹ CRC Committee General Comment 20: The implementation of the rights of the child during adolescence U N Doc CRC/C/GC/20 (6 December 2016) para 40. The concept of evolving capacities is articulated in art 4 of the CRC as follows: 'States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.' In the African Charter on the Rights and Welfare of the Child (ACRWC), it is defined in art 9(2) as follows: 'Parents, and where applicable, legal guardians shall have a duty to provide guidance and direction in the exercise of these rights having regard to the evolving capacities, and best interests of the child.' Malawi has ratified both the CRC and the ACRWC.

¹⁰² CRC Committee General Comment 15: The right of the child to the enjoyment of the highest attainable standard of health (art. 24) UN Doc CRC/C/GC/15 (17 April 2013) para 24.

autonomy. However, it should not be set too low either to avoid exposing children to coercive sexual conduct. The law should balance protection and nurturance of the child's evolving sexual autonomy, and this should mean explicitly decriminalising sex between adolescents and prohibiting sexual conduct in circumstances where the risk of harm to the adolescent is too high.

5.2.2 Close-in-age (age-span) provisions

According to Fischel, close-in-age provisions should be motivated by two reasons. First, it should not be sex *per se* that is punished. Close-in-age provisions signal that there is nothing intrinsically wrong with sex between peers. The second idea follows logically from the first that it is coercive sex that should be punished and not sex itself. Fischel argues that in this regard, age difference could be an adequate proxy for the coercive sexual relationships, so that the wider the age difference, the higher the probability for coercion.¹⁰³ The underlying assumptions of these close-in-age provisions are that young people, particularly girls, are economically and socially pressured to be involved in relationships with older men, that there are differences of sexual experience and knowledge between young and older persons, and that young people have sexual agency rather than that they are incapable and incompetent.¹⁰⁴

The South African law is one example in the African region that has decriminalised sex between adolescents in the 12-16 age-range, and employed close-in-age provisions that allow sex between an adolescent of above 16 and a younger adolescent but only when the age gap is not more than 2 years.¹⁰⁵ It is not sex itself that should be punished, but the coercive sexual conduct.

5.2.3 Regulating relationships of trust and dependence

¹⁰³ JJ Fischel (2010) 311.

¹⁰⁴ JJ Fischel (2010) 311.

¹⁰⁵ Secs 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 as amended by the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act 5 of 2015 (South Africa).

Fischel argues that age of consent laws should not just stop at protecting adolescents when the age difference is wide but should centre on power disparities and the potential for abuses in relationships of trust and dependence.¹⁰⁶ This avoids the situation where to protect the adolescent the law has to construct the adolescent as sexually incapable, inert or undesiring. Also:

[t]he law would no longer assume that young people cannot say yes to sex, but that in certain relations of dependence they cannot reasonably say no. Thus the law would no longer convey to young people, *you cannot know what you want, and you do not want sex, but rather, whatever you want, there are certain relations where the ambiguity is too great, where exit options are too few, and where harm and/or coercion is too likely to legally permit unregulated sex* (emphasis in the original).¹⁰⁷

This approach respects the sexual autonomy of adolescents and recognises that they have an evolving capacity to make sexual choices. At the same time, it protects the adolescent from circumstances in which it is doubtful that meaningful choice could be exercised. Therefore, in relationships of trust and dependence, the sexual agency of the young person is not obliterated. So, like in the case of *Martin Charo*, the Court's construction of the sexuality of the girl was disempowering of the child, because in its opinion, a girl who seeks sexual intercourse should be treated like a woman, that is, should not be protected by the sexual offences law because she is a child who is unlike a child because she exercised sexual agency. The Court could have recognised the sexual agency of the child, but then, emphasised that any child whether he or she exercises sexual agency or not would be protected by law from sexual conduct that is potentially harmful because of the age difference with the perpetrator.

5.3 Expanding the potential of the GEA for children

Despite the criticism advanced toward the GEA in this thesis, regarding the inclusion of children and women as gendered and sexual subjects, the GEA has several opportunities for promoting gender equality and sexual and reproductive health and rights of children. It is the interpretation and implementation of the GEA that would

¹⁰⁶ JJ Fischel (2010) 315.

¹⁰⁷ JJ Fischel (2010) 316.

expand its potential to address sexual health and rights of children.

5.3.1 Protection from sexual violence

As has been discussed in previous chapters, one of the prominent features of the GEA is the criminalisation of conduct that impacts on the sexuality development of young people. It prohibits sex discrimination¹⁰⁸, harmful practices¹⁰⁹, and sexual harassment.¹¹⁰ Sex discrimination could be interpreted to mean that a person should not be discriminated because of sex. It has been argued in this chapter that Section 138 of the Penal Code discriminates based on sex because it only targets girls for protection and leaves out boys. This discrimination could be corrected by making it gender-inclusive to protect any child of whatever gender identity from sexual violation. However, gender inclusion might not necessarily mean gender-equitable application, as was the case in *CKW* where only the boy was prosecuted despite that the law prescribed prosecution for the parties involved in the sexual conduct. However, a law that is gender-inclusive would create an opportunity for persons to challenge it when it is applied in a discriminatory manner as was the case in *CKW*.

In its Concluding Observations to Malawi, the Committee on CEDAW expressed concern about the “the persistence of discriminatory stereotypes and deep-rooted patriarchal attitudes regarding the roles and responsibilities of women and men in the family and in society.”¹¹¹ The elimination of harmful practices should be interpreted to include elimination of gendered sexual stereotypes that operate to limit the agency of children. These stereotypes harm children by constructing them as asexual, and the sexuality of girls as being weaker than that of boys. Such stereotyping only serves to justify the constriction of the sexual autonomy of children.¹¹² To eliminate such harmful views, policy actors should review the sexual offences regime in Malawi to remove gendered sexual stereotypes that reflect colonial ideologies.

¹⁰⁸ Gender Equality Act, 2013, sec 4.

¹⁰⁹ Gender Equality Act, 2013, sec 5 as read with sec 3.

¹¹⁰ Gender Equality Act, 2013, sec 6.

¹¹¹ CEDAW Committee, *Concluding observations on the seventh periodic report of Malawi* para 20.

¹¹² RJ Cook & S Cusack (2010) 27.

5.3.2 Sexual health and well-being

The GEA has made efforts to include young people, and especially unmarried girls, who historically have been marginalised in the provision of sexual health services. Section 20 (a) of the GEA obliges health officers to respect the rights of every person without discrimination, while Section 20(c) requires services to be provided to everyone regardless of marital status or whether they are accompanied by a spouse. These provisions should be interpreted to create an enabling environment for access to sexual health services for adolescents. As Waites has said, laws tend to be constitutive in that they influence and shapes gender norms, meaning that:

The law may not exert much direct influence on the agency of young people, but it does play a more indirect role in defining a framework for expectations and norms for parents and professionals working with young people, which informs how they seek to shape and influence young people's behaviour.¹¹³

An example of this constitutive role of the law, operating negatively, is the effect of the law in shaping parental attitudes and expectations around access to contraceptives by girls. While setting the age of consent to sexual intercourse and sexual conduct to 16 is commendable, failure to decriminalise sexual conduct when it involves consenting adolescents reinforces negative attitudes about adolescent sexuality and impacts on adolescent's access to services, because parents would think it is inappropriate for adolescents to engage in pre-marital sexual intercourse or conduct.¹¹⁴ It creates conditions in which girls lack the confidence to access services such as condoms because 'good' girls do not seek or prepare for sex.¹¹⁵

5.3.3 Gender and sex education

In conjunction with other ways of interacting with adolescents, education can

¹¹³ M Waites (2005) 217.

¹¹⁴ Evidence to Action Project (2014). The evaluation found that parents thought it was inappropriate for adolescents who are not married to access sexual health services and they thought it encouraged promiscuity. Attitudes of health providers were also discouraging for adolescents seeking sexual health services.

¹¹⁵ Evidence to Action Project (2014) 185.

contribute to raising awareness of the influence of gender discourses and enable resilience of adolescents. The GEA provides that the government should take measures to ensure that the curriculum for primary and secondary schools integrates principles of gender equality and human rights,¹¹⁶ and address the needs of female students by incorporating life-skills and sex education.¹¹⁷ This thesis submits that while the GEA meant to be sensitive to the particular challenges of girls, associating only female students with the need for life-skills and sex education is based on gender-stereotypical assumptions that girls are vulnerable to sexual encounters and boys are not. This perpetuates constructions of hegemonic masculinities. Boys need life-skills and sex education to address harmful masculinities that promote ideas such as that girls ought to be under the control of boys in sexual relationships. Isolating girls as the gender that especially needs sex education might sound sensitive, but it perpetuates attitudes that disempower girls. The GEA could be interpreted to facilitate the training of educators to implement the GEA in a manner that does not perpetuate such gender stereotypes.

6 Conclusion

The GEA seeks to create a gender equitable world and promote harmonious sexual relationships in which persons respect each other. But then the current age of consent framework is a hindrance because it is based on stereotypical views of adolescents, and especially girls, that are disempowering. It sustains meanings of childhood and adolescence that conceptualise childhood as an age of sexual incompetence and immaturity, and as an age at which children should not express sexual agency. Such notions of childhood were culturally and historically specific to Europe, but they found resonance in Malawi in a patriarchal environment in which girl-children were controlled to preserve their virginity. Constructing children as incompetent and irrational is an effect of power akin to constructing women as ‘the weaker sex’, and is aimed at regulating the conduct of children, but in ways that are constraining.

The GEA aims to positively influence gender relationships and promote sexual health,

¹¹⁶ Gender Equality Act, 2013, sec 18(1)(a) and (b).

¹¹⁷ Gender Equality Act, 2013, sec 18(1)(b).

including amongst children. As discussed in chapters two and three of this thesis, above, the GEA has challenges in that it largely conceptualises children (and women) as sexually passive rather than autonomous in relation to men, and the state has recourse to criminal law to protect girls and women from harms related to sexual conduct. Then Sections 138 and 160B of the Penal Code draw from colonial and cultural views of childhood sexuality that do not recognise children and women as having sexual agency. Therefore, despite the good intentions of the GEA, its aim to transform gender inequality are compromised because of the challenges noted above. However, the GEA could still offer an opportunity for transformation, perhaps to provide a rationale for policy actors to push for law reforms that align sexual offences laws with gender equality. There are already some positive aspects of the GEA. The GEA articulates the protection of children from sex discrimination, sexual harassment and harmful practices. It also recognises that children have the right to non-discriminatory sexual health services. The GEA recognises that there is a need for gender transformative practices in schools. These are potential entry points into transforming attitudes and behaviours regarding childhood gender and sexuality.



CHAPTER 5: FACILITATING THE TRANSFORMATION OF SCHOOL CULTURES

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1 Introduction

One of the important aims of child education, according to the CRC, is the “development of the child’s personality, talents and mental and physical abilities to their fullest potential.”¹ School-based education is an essential platform for transforming sexual health and well-being of children and adolescents. Schools, including pre-schools, are crucial sites for enacting gender practices that have implications for present and future sexual health and well-being of students. The

¹ CRC Article 29(1)(a).



school is for many children and adolescents, the next most significant institution, after the family. The school is where children and adolescents develop their relational skills and practices as they expand the circle of relationships beyond the family. It is for this reason that the obligation of the government to undertake measures to inculcate human rights norms and principles in schools assumes great significance. Studies show that curriculum-based sexuality and gender education that address gender norms and issues of power in relationships contribute to positive sexual and reproductive health outcomes.²

In developing the GEA, the MLC took cognisance of the importance of education, a human right recognised in the Constitution, for achieving gender equality. As the Committee on Economic, Social and Cultural Rights has said, “[e]ducation is both a human right in itself and an indispensable means of realizing other human rights ... Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy ...”³ The Committee on CRC has also said that education should be designed to strengthen the capacity of the child to enjoy the full range of human rights, to develop skills but also develop other capacities including for human dignity, self-esteem and self-confidence.⁴ Further, children should learn life skills such as “the ability to make well-balanced decisions; to resolve conflicts in a non-violent manner; and to develop a healthy lifestyle,[and] good social relationships.”⁵ Education can only achieve this vital role if it also addresses inequitable gender norms in the school setting. The GEA report recognised the challenge of unequal educational opportunities between girls and boys, and the unique needs of girls due to their historical marginalisation.⁶ This was reflected in the drafting of the GEA which conceives gender

² NA Haberland 'The case for addressing gender and power in sexuality and HIV education: A comprehensive review of evaluation studies' (2015) 41 *International Perspectives on Sexual and Reproductive Health* 38.

³ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10 para 1.

⁴ CRC Committee *General Comment 1* para 2.

⁵ CRC Committee *General Comment 1* para 9.

⁶ Malawi Law Commission (2011) 78.



equality in education as primarily an issue of parity and the marginalisation of girls.⁷

However, addressing gender parity alone and encouraging equal access to educational opportunities for girls and boys would not necessarily transform gender equality in education.⁸ It is well documented in the literature that schools are hardly gender-neutral or equitable environments, and they can even be dangerous places for some groups of students. Research shows that gender-based violence, sexual harassment and hegemonic masculinities practices are ubiquitous in school cultures.⁹ Indeed, gender-based violence, especially against girls, is endemic in Malawian schools.¹⁰ In developing the GEA, the MLC did recognise the challenge of sexual harassment in schools and its negative impact on students and the educational environment.¹¹ In proposing the GEA to address sex discrimination including sexual harassment, the MLC had in mind to address the plight of girls in schools.¹²

Laws and policies have a crucial role to play to eliminate gender-based violence in schools. Even though countries have made remarkable progress in formulating policy to address gender in education, there is no evidence that gender-based violence in schools is reducing. Jenny Parkes believes that one of the challenges with policy is

⁷ The Gender Equality Bill that was discussed in Parliament listed the key issues in the Bill, the key issue was stated as “equality of access to education and training”.

⁸ Swedish Agency for Development and Evaluation *Gender equality in and through education* (2011) 8.

⁹ D Bhana 'Girls negotiating sexuality and violence in the primary school' (2018) 44 *British Educational Research Journal* 80; M Dunne *et al* 'Gender violence in schools in the developing world' (2006) 18 *Gender and Education* 75.

¹⁰ P Burton 'Suffering at school' (2005); Ministry of Gender Children Disability and Social Welfare *et al. Violence against children and young women in Malawi: Findings from a national survey, 2013* (2014); DevTech Systems, "The safe schools program Malawi assessment report October 25th – November 5th, 2004," (Devtech Systems, 2004); T Bisika *et al* 'Gender-violence and education in Malawi: A study of violence against girls as an obstruction to universal primary school education' (2009) 18 *Journal of Gender Studies* 287.

¹¹ Malawi Law Commission (2011) 86-87.

¹² “In order to avoid girls from suffering in their education and the rights of women and men being violated at the workplace, the Commission recommends the incorporation of provisions prohibiting sexual harassment in the Gender Equality Bill.” Malawi Law Commission (2011) 87.



how it conceptualises the problem of gender-based violence. She observes that policies tend to conceive gender violence narrowly rather than as embedded in social norms and manifest in the everyday social interactions that sustain intersecting inequalities.¹³ In a case study on Liberia, she found that while there was a political will to address gender-based violence against women and girls, there was no attention paid to violence in schools. Further, gender equality in schools was conceptualised as a problem about gender parity. However, the policies failed to address the “difficult issues about power and to create pedagogies, curricula, and school systems that foster inclusive and equitable beliefs and practices.”¹⁴

On the other hand, as Jenny Parkes has observed, South Africa has an impressive policy and legal framework addressing sexual violence in schools, yet there is no evidence that these have improved the situation.¹⁵ Parkes attributes this failure to both practical and conceptual challenges in the policy enactment processes. The practical challenges of policy enactment include inconsistencies in the formulation of the law and its application by various institutions, weak institutional structures, failure of responsible authorities to act for various reasons, including neglect and fear for their safety. The conceptual challenges include the fact that policymakers focus narrowly on the issue of parity in schools rather than on transforming school cultures to address structural gender inequality.

Well-designed and implemented laws and policies on education could play an important role in recreating school environments to become spaces in which students develop their capacities in freedom, as envisaged by the Committee on CRC.¹⁶ The law needs to serve protective and supportive purposes. On the one hand, the law should protect students from bad experiences of school-related gender-based violence (SRGBV), and on the other, the law should facilitate the learning of new ways of relating. This chapter analyses the GEA’s conceptualisation of gender inequality in

¹³ J Parkes 'The evolution of policy enactment on gender-based violence in schools' (2016) 46 *PROSPECTS* 97.

¹⁴ J Parkes (2016) 98.

¹⁵ J Parkes (2016) 93.

¹⁶ CRC Committee, *General Comment* para 1.



education and how it could be effectively implemented to shape gender relations in schools to have a positive impact on the well-being of children and adolescents in Malawian schools.

2 Conceptualising sex/gender inequality in schools

2.1 Legislative enactment and problematisation

National and international laws are increasingly being relied upon as part of broader public policy frameworks to address gender inequality, including gender-based violence in schools. Parkes *et al.* use the concept of policy enactment to analyse the effectiveness of public policy in addressing gender violence in schools.¹⁷ The term policy enactment refers to the fact that policy is not merely what policymakers create and then give over to specified policy actors to implement. Rather, it involves a creative process of interpretation, translation and contextualisation of the policy document by a diverse range of policy actors in the school environment.¹⁸ In this process, teachers, workers and students are not merely objects of policy but are central to the creative and discursive processes of policy enactment. Policy enactment, therefore, includes the negotiations involved in policy design and formulation by the diverse range of policy actors.¹⁹

The concept of legislative enactment could be defined analogously to policy enactment as described by Braun *et al.* and Parkes *et al.* 'Enactment' concerning legislation ordinarily means the point at which the legislature passes a bill into law. However, legislative enactment should be understood as the whole creative process involving multiple stakeholders from conceptualisation of the bill to be passed into law to the time that it becomes law.

A critical step in legislative enactment is the framing of the problem the law intends to

¹⁷ J Parkes *et al.* 'A rigorous review of global research evidence on policy and practice on school-related gender-based violence,' (University College London, 2016), 5.

¹⁸ A Braun *et al.* 'Policy enactments in the UK secondary school: Examining policy, practice and school positioning' (2010) 25 *Journal of Education Policy* 549.

¹⁹ J Parkes *et al.* 'A rigorous review of global research evidence on policy and practice on school-related gender-based violence,' 5.



address, or in other words, the problematisation. Problematisation is critical because it has implications for translating the law into practice. Bacchi has cautioned that even when policy is well-intentioned, it tends to perceive the problem it attempts to address in a biased manner, because “all policies and policy proposals rest upon culturally influenced presuppositions and assumptions (‘unexamined ways of thinking’).”²⁰ Policy-making is a discursive process because persons involved in creating policy draw upon available discourses to construct the problem that the policy should address. The process of selective problematisation allows specific knowledge or ways of looking at a problem to be privileged over others. The process of legitimising and restricting what can be considered in problematisation can be conscious or unconscious. Problematisation or problem representation does have material effects because it can influence what gets recognised and what gets ignored, how people feel, or how they react to an issue, or what they think about themselves or others.²¹

An interesting parallel could be drawn between Bacchi’s problematisation and Kok’s view about the relationship of the law to the problems it attempts to address, captured in these words: “Problem-solvers considering the use of law to solve a particular problem may not adequately grasp the problem.”²² Kok states the problem as to do with its comprehension by whoever wants to solve it, the law reformer or the legislature. Bacchi’s perspective is that there is an inherent bias, and this bias could be because law reformers as part of the society are unlikely to propose or enact a law that strays too far from existing customs.²³ It would seem to be a challenge that could never be unsurmountable, for instance, to enact laws that trouble societal views about the sexuality of children and adolescents. This thesis would like to suggest an optimistic view that it is possible for policy actors to resist dominant discourses in problematisation or legislative enactment, if the process would be one that is critically reflexive. As Parkes *et al.* have put it, legislative enactment to address gender inequality should be about “reflecting on our deeply held beliefs and practices, through

²⁰ C Bacchi 'Poststructuralism, discourse and problematization: Implications for gender mainstreaming' (2010) 4 *Kvinder, Koen & Forskning* 62.

²¹ C Bacchi (2010) 64.

²² A Kok (2010) 65.

²³ A Kok (2010) 65.



which we knowingly and unknowingly collude with gender-based violence.”²⁴

The MLC plays a crucial role in facilitating legislative enactment processes, in choosing how to represent a problem that legislation should address. It shapes the discussions in the consultative meetings as well as the debates in the legislative house. It was, therefore, crucial for the MLC to adopt a reflexive process in the development of the GEA, especially because this legislation attempts to reshape power relationships, including in the education sector. The limitations in the development of the GEA in conceptualising gender inequality in education were both methodological and conceptual. In the methodology of its work, the MLC undertakes consultations with stakeholders on the issues it identifies as necessary to discuss. However, in its report, the voices of teachers and students about gender inequality in schools are muted. This absence has implications on how the GEA would be applied in the context of the school. Due to the methodological approach of this thesis, this chapter focuses on analysing the conceptual challenges, that is, how the GEA creates a gender-equitable social world in the school setting.

2.2 The meaning of gender inequality in education

This section explores the meaning of the GEA for gender inequality in schools through the analysis of three terms and concepts the GEA uses; gender equality, sexual harassment and harmful practices.

2.2.1 Gender equality

The MLC dedicated section 6 of the GEA report to discussing education and training. Noteworthy is that the MLC drew upon Goal 2 of the Millennium Development Goals (MDGs) whose target was to achieve universal completion of primary school for boys and girls. It also drew inspiration from Goal 3 of the MDG, one of the objectives of which was to ensure gender parity in education.²⁵ The MLC also dedicated a large part of the discussion on education and training to describing the marginalisation of girls and women by the education system which has led to a disparity in enrolment and

²⁴ J Parkes (2016) 103.

²⁵ Malawi Law Commission (2011) 74.



educational attainment. Based on this problematisation, the MLC recommended that the GEA should address the unequal enrolment of girls at all education levels and pay attention to the specific needs of girls. It also proposed that this problem be addressed through the curriculum. It recommended that

[i]n addressing the issue of curriculum, the proposed legislation should consider not only eliminating negative stereotypical material, but should also include specific topics aimed at maintaining enrolment rates and equipping the girl child especially and subsequently the young woman with relevant life skills.²⁶

MLC's recommendation is reflected in Part V of the GEA comprising of Sections 14 to 18. Sections 14 to 17 focus on equal access to education and training for boys and girls. Section 18 introduces measures that government would take to address gender equality in education, and these include that the curriculum "integrates principles of gender equality within the spiritual, moral, cultural and mental development of students at the school, society and experience of life after completion of school with specifications on gender equality."²⁷ The curriculum is also expected to introduce human rights and gender issues.²⁸ Further, the government is mandated to specifically address the needs of girls in life skills and sex education.²⁹

The GEA recognises gender equality in the narrow terms of promoting girls to achieve educational attainment at the same levels as boys. In considering the problem of gender inequality to address in schools, the GEA was influenced by global discourses. Elaine Unterhalter describes four frameworks that have influenced policy-making on gender and development across the globe, and the two that appear to have influenced the MLC are the Women in Development (WID) and the Human Development frameworks.³⁰ The WID framework stresses the expansion of education access to girls and women. "In the WID approach, 'gender' is equated with women and girls, who are

²⁶ Malawi Law Commission (2011) 79.

²⁷ Gender Equality Act sec 18(1)(a)

²⁸ Gender Equality Act sec 18(1)(b)

²⁹ Gender Equality Act sec 18(1)(c)

³⁰ E Unterhalter 'Fragmented frameworks? Researching women, gender, education, and development' in *Beyond access*, ed. Aikman S & Unterhalter E (2005) 14.



identified descriptively in terms of biological differences. ‘Education’ is understood as schooling.”³¹ One of the reasons the WID framework has been dominant is because it approaches gender in a non-complicated manner and suggests easily comprehensible steps on what needs to be done to reap the benefits. Educate the girl and, “the society as a whole is more likely to improve in areas such as health, nutrition, general income and living standards and population fertility rates.”³² Education “ends generational cycles of poverty and disease and provides a foundation for sustainable development.”³³

According to the GEA, to address gender inequality in education, the proportion of girls completing school must be equal to the proportion of boys. Sections 14 to 17 of the GEA seem to have been based on this notion of gender equality in education. The GEA, therefore, represents gender inequality in education as the problem of girls not completing school to the same extent as boys. However, Jessica Ringrose’s analysis of the experience of the United Kingdom is instructive to the challenges of conceptualising gender equality only in terms of equality of access. Ringrose shows the limits of thinking in terms of boy/girl binary in her analysis of the success story of feminist-driven policy in the 90s in the UK to promote the education of girls. When the girls outcompeted the boys, it led to a moral panic about the failure of boys that fostered debates about girls achieving at the expense of boys. Ringrose situates the discussion in the complex relationships between feminist discourses and neoliberal economic policies that have shaped the understanding of gender and education. She argues that the conceptualisation of gender by liberal feminism as “an abstract, stand-alone ‘variable’ organized around a male/female binary” has contributed to the pitting of boys against girls in debates on education, and the thinking that when girls achieve in school this alone would advance gender equality in education.³⁴ Ringrose’s concern with such a narrow conceptualisation of gender is its concealment of how “issues of equality for boys and girls in school are much wider than gendered achievement, and

³¹ E Unterhalter (2005) 18.

³² Malawi Law Commission (2011) 74.

³³ Malawi Law Commission (2011) 74.

³⁴ J Ringrose 'Successful girls? Complicating post-feminist, neoliberal discourses of educational achievement and gender equality' (2007) 19 *Gender and Education* 473.



how achievement is related to issues of class, race, ethnicity, religion, citizenship and space/location of schools, as well as to gender.”³⁵ She argues that taking gender as a single axis of analysis of educational achievement serves to “decontextualize gender from all class, cultural, racial and economic dimensions through which gender manifests as an axis of experience and identity.”³⁶ The cyclical debates about girls’ versus boys’ educational achievement ignore the fact that many girls still endure violence in schools and are left alone to deal with it because it is ‘proven’ that one can make it if one works hard as other girls have done.³⁷ Therefore, the challenge with the GEA is that its representation of the problem of gender inequality in education glosses over the complexity of gender, especially the intersectionality of gender with other dimensions of inequality including disability, race, and social class.³⁸

2.2.2 Sexual harassment

In developing the GEA, the MLC was cognisant of sex discrimination and sexual harassment that occurs in the school. The MLC recognised that “sexual harassment is a manifestation of an imbalance in power relations and is likely to occur in the workplace as well as in other relationships involving trust such as that of *a teacher and a student* (emphasis supplied).”³⁹ It further acknowledges that “sexual harassment can affect an individual’s work or school performance and can create an intimidating, hostile or an offensive environment.”⁴⁰

The MLC, therefore, proposed that the GEA proscribe sex discrimination and sexual harassment generally. It is assumed that by addressing sexual harassment broadly, it would translate into addressing sexual harassment in the specific environment of the school. However, the architecture of the GEA is not very effective to address gender inequality in schools for several reasons. First, focusing on sex discrimination and sexual harassment alone leaves out other features of gender violence that are part of the school culture. Second, gender violence in schools tends to be normalised and

³⁵ J Ringrose (2007) 473.

³⁶ J Ringrose (2007) 480.

³⁷ J Ringrose (2007) 480.

³⁸ E Unterhalter (2005) 19.

³⁹ Malawi Law Commission (2011) 82.

⁴⁰ Malawi Law Commission (2011) 82.



invisible so that unless specifically targeted, discrimination and violence in schools can easily be overlooked. The latter can be dealt with at the practical level of translating the law into action, for instance, creating school regulations that contextualise the GEA. The former, however, is a limitation that may need the development of a more precise policy or legal framework.

Sex discrimination and sexual harassment in schools is part of SRGBV. The term SRGBV comprehensively captures gender inequality “manifested in physical, sexual, and psychological acts of violence, and underpinned by norms, stereotypes, inequalities, and exclusion.”⁴¹ Dunne *et al.* make a distinction between implicit and explicit gender violence. They describe as implicit gender violence those institutional practices that discriminate based on gender but are difficult to identify as such because they are assumed to be part of normal social interaction, so that the “gendering is ‘buried’ in the normality of school life.”⁴² Implicit violence includes “corporal punishment, bullying, verbal and psychological abuse, teachers’ unofficial use of pupils for free labour and other forms of aggressive or unauthorised behaviour that is gender-specific.”⁴³ On the other hand, explicit violence refers to practices that are overtly gendered and sexual in nature, such as sexual harassment, abuse, intimidation, assault and rape.⁴⁴

Though males are commonly the perpetrators of SRGBV, and the victims are primarily females, research has uncovered previously unacknowledged patterns of violence among males and females. For instance, one of the findings from the component of the GEAS implemented in Malawi that collected data from adolescents between 10 and 14, was that as boys and girls start to get into intimate relationships, a significant number of them experience intimate partner violence as victims and as perpetrators. According to the data, 65% of boys and 56% of the girls had ever experienced intimate partner violence, while 54% of the boys and 45% of the girls had ever perpetrated

⁴¹ J Parkes (2016) 93.

⁴² M Dunne *et al* (2006) 81.

⁴³ M Dunne *et al* *Gender and violence in schools: Paper commissioned for the EFA global monitoring report 2003/4, the leap to equality* (2003) 2.

⁴⁴ M Dunne *et al* (2006) 81.



intimate partner violence.⁴⁵ Evidence from other studies also reveals that violence tends to be directed against persons of non-heterosexual orientation or gender-nonconforming students. Such violence may not be physical, but symbolic, expressed as “exclusion of anything other than heteronormative versions of gender and sexual identities and relations within educational discourse and curriculum texts.”⁴⁶

2.2.3 Harmful practices

Chapter 3, under section 3.5, discussed harmful practices as defined by the GEA. To recapitulate, the GEA defines a harmful practice as a practice that on account of sex or gender is likely to undermine the dignity, health or liberty of a person, or result in physical, sexual, emotional or psychological harm to any person.⁴⁷ This thesis criticises the GEA for failing to address the complexity of gender in school cultures. However, the concept of harmful practices could be an entry point for addressing gender inequalities in school cultures. SRGBV is any harmful practice in the school setting perpetrated against a person on account of their sex or gender or both, that impacts on the physical and emotional wellbeing of the person. This thesis argued in chapter 2 that perceiving harmful practices mainly as traditional practices may lead to obscuring of non-traditional cultures as places of perpetration of gender inequalities.

The modern school as a system of age-based education is an institution introduced in Africa during colonialism. It is, therefore, a non-traditional institution. The treatment of pregnant learners is an illustration of how a discriminatory practice in this non-traditional institution had been ‘invisible’ for a long time. A media story about 30 boys and girls suspended from school for pregnancy in Malawi in 2016, captures a recent event of this discriminatory practice.⁴⁸ Not too long ago, the policy and practice of

⁴⁵ Global Early Adolescent Study, "Blantyre summary report," (2018).

⁴⁶ F Leach *et al*, "School-related gender-based violence: A global review of current issues and approaches in policy, programming and implementation responses to school - related gender - based violence (SRGBV) for the education sector," (2014), 8.

⁴⁷ See the definition of harmful practices under Section 5 of the Gender Equality Act.

⁴⁸ Owen Khamula, Malawi court suspends 32 students over pregnancy: Sexual activity rise in Nkhatabay among teens, Nyasa Times (May 4, 2016) <https://www.nyasatimes.com/malawi-court-suspends-32-students-over-pregnancy-sexual-activity-rise-in-nkhatabay-among-teens/>



expelling girls from school when they became pregnant were not even questioned as an instance of gender discrimination.⁴⁹ For most girls, becoming pregnant while in school spelt the end of their schooling. This discrimination is a practice that could come under the GEA's definition of a harmful practice. Macleod explains that pregnancy of adolescents is considered a threat to social values because of the assumptions inherent in the concept of adolescents introduced together with the notion of school in Africa during colonialism.⁵⁰ This example also illustrates the complexity of the issue of gender in schools that the WID-approach, discussed above, is most likely to gloss over. Addressing such harmful practices in schools requires an understanding of the meaning of adolescence in relation to gender and sexuality.

3 Understanding school sexuality cultures

Despite the conceptual limitations of the GEA in failing to perceive SRGBV, the GEA has the necessary ingredients for policy actors to contextualise and translate the GEA into practices and actions to enhance addressing SRGBV. The process of legislative enactment should be reflexive and involve both a reconceptualisation and recontextualisation to bring the law to bear on SRGBV in schools.

3.1 Sex, gender and education

In her article 'Reconceptualizing the gendered body: Learning and constructing masculinities and femininities in school' Carrie Paechter discusses the impact of the Cartesian body/mind dualism and its lasting influence on how the relationship between sex and gender is understood in the education sector. She especially focuses on the construction of the pre-adolescent school subject. Gender, like mind, is assumed to be the inner identity of the person, while sex is analogous to 'body' which in Cartesian thinking is inferior to mind.⁵¹ Sex represents the corporeal and outward identity while gender is the ethereal and the inner identity which is superior to the corporeal. Such

(Accessed 29 September 2019).

⁴⁹ See Malawi Human Rights Commission and Southern Africa Litigation Centre, "Towards a human rights-based approach to learner pregnancy management in Malawi," (2017) 21.

⁵⁰ C Macleod (2011) 23-25.

⁵¹ C Paechter 'Reconceptualizing the gendered body: learning and constructing masculinities and femininities in school' (2006) 18 *Gender and Education* 123.



an understanding of human nature has led to the idea that sex is biological while gender is social. One lasting influence of this thinking on the education system is that sex and sexuality are irrelevant to moral advancement. Rather, the focus is on mind.⁵² This has implications for how society conceptualises identity. Gender identity is assumed to be stable regardless of what happens to the body. However, Paechter argues that the body is not just an immutable fact, but is itself socially constructed.⁵³ She also explains that the experience of masculinities or femininities cannot be totally delinked from bodily form and experience, because “[e]ven if the core identity of being male or female can be seen as independent of the sex of the body, we experience and construct those identities through our bodies, and our bodies are constructed through them.”⁵⁴

The importance of Paechter’s article, however, is its implications on how schooling constructs bodies of children as sites for enforcement of disciplinary action and restraint, so that the body does not interfere with the main aim of schooling which is the training of the mind.⁵⁵ Schools, therefore, have had an uncomfortable and problematic relationship with bodies and sex, and this manifests itself in diverse ways including failure to teach sexuality education comprehensively, and the discriminatory treatment of pregnant girls.⁵⁶ The sexuality and bodies of pre-adolescents in schools are treated as unproblematic and neutral because before puberty, the bodies of boys and girls are undifferentiated.⁵⁷ Yet, as Paechter describes, “This overt treatment of students as sexually neutral ... allows schools to claim that they do not discriminate according to sex when they are at the same time constantly constructing gender differences.”⁵⁸ Research has shown that teachers construct children based on gender difference to discriminate based on sex, so that for instance, instead of grouping

⁵² C Paechter (2006) 123.

⁵³ C Paechter (2006) 126.

⁵⁴ C Paechter (2006) 126.

⁵⁵ C Paechter (2006) 127-128.

⁵⁶ LY Bay-Cheng 'The trouble of teen sex: The construction of adolescent sexuality through school-based sexuality education' (2003) 3 *Sex Education* 1.

⁵⁷ C Paechter (2006) 26.

⁵⁸ C Paechter (2006) 126.; See also D Bhana (2016).



students according to interests, for example, interest in playing football, teachers group students by separating boys from girls and treating them as homogenous groups.⁵⁹ Schools therefore

constantly collapse gender, which could be read as being about masculine or feminine behaviour and preferences, into sex, that is, bodies, by treating children not according to their actual needs and interests, but according to those ascribed to them as sexed beings.⁶⁰

Though gender does not simply collapse into sexuality, nor is it a natural expression of sexuality, it is the compulsory and institutional nature of heterosexuality that makes it appear that way.⁶¹

While laws and policies treat children as neutral and non-sexual, teachers treat children according to gendered expectations based on social norms and discourses rather than on the abilities and capacities of children. The GEA should, therefore, also target early childhood educational institutions because the culture of gender inequality pervades all institutions including pre-school.

3.2 Schools as productive of student sexual identities

Sexuality is repressed through curricula that avoid or circumscribe the subject, and through disciplinary practices to control the expression of sexuality in schools.⁶² An essential role of the school management appears to be to manage students (and teachers) in such a way that the school environment is de-sexualised.⁶³ In reality, sexuality in schools is never repressed. On the contrary, schools are sites for the production of many different identities, and sexuality is central to identity formation.⁶⁴

⁵⁹ C Paechter (2006) 129.

⁶⁰ C Paechter (2006) 130.

⁶¹ D Mellor & D Epstein 'Appropriate behavior? Sexualities, schooling and hetero-gender' in *The SAGE handbook of gender and education*, ed. Skelton C *et al* (2006) 383.

⁶² D Mellor & D Epstein (2006) 383.

⁶³ C Haywood & MMA Ghail 'The sexual politics of the curriculum: Contesting values' (1995) 5 *International Studies in Sociology of Education* 223.

⁶⁴ D Epstein & R Johnson *Schooling sexualities* (1998) 116.



Identity formation is an active process of self-representation and representation of self to others in one's trajectory of growing up. However, this is a discursive process of subject formation constituted in prevailing discourses. Discourses offer the person certain possibilities and conceals others, or they appear in a less attractive light for the person. This is the material on which the person draws upon in the process of developing one's identity.⁶⁵ Identity formation, therefore, is a performance in that "we produce ourselves through what we do/tell ourselves/think."⁶⁶

Schools as sites of regulation and production of social identities contribute towards shaping sexual and gendered identities of both students and teachers in ways that entrench social inequalities.⁶⁷ Although schools appear to function as spaces that have done away with sexuality or have it under control, schools promote particular forms of institutional and gendered heterosexuality through disciplinary and regulatory practices. Mellor and Epstein have stressed that this "'heterosexual economy' is salient within the discursive practices and meanings of the official curriculum and the values of institutions, but also exists as a dominant regulatory force within the everyday cultures of school."⁶⁸ The production of sexuality identities starts in pre-school and goes on through the various stages of educational institutions up to higher education. Because this thesis focuses on children up to 18 years of age, it will only concentrate on schooling stages up to secondary school.

The research relied upon for the discussion on the production of sexuality identities in schools comes mostly from the Global North, but some research has also been done in Africa, mainly in South Africa. Due to the globalisation of culture, and the fact that historically, the school system was exported to Africa during colonialism, there will be similarities in the discourses that have influenced sexualities in schools, though there will also be contextual differences that can only be elicited with further research in the Malawian context. Research from elsewhere coupled with the literature on aspects of schooling in Malawi nevertheless enables a conceptual appreciation of school cultures

⁶⁵ D Epstein & R Johnson (1998) 116,152.

⁶⁶ D Epstein & R Johnson (1998) 116.

⁶⁷ D Epstein & R Johnson (1998) 106,108.

⁶⁸ D Mellor & D Epstein (2006) 381.



in Malawi.

3.2.1 Pre-school and primary school sexualities

Earlier research on gender and sexuality in schools had focused on secondary schools as this was the environment where it was thought one would most likely ‘find’ sexuality, rather than in pre-adolescent children in pre-school or early years of primary school because it is assumed that gender and sexuality do not matter for the younger ones.⁶⁹ Behind the common-sense views and assumptions that gender and sexuality do not matter for younger children is the discourse of childhood innocence that is prevalent in Western but also Malawian culture. Educators and policy actors believe kindergarten and early primary school are non-gendered spaces where sexuality is either non-existent, especially on the part of the students, or is on hold for the teaching staff.⁷⁰ Sexuality education is perceived to be irrelevant and inappropriate for younger children, who are not supposed to know about sex or be sexual.⁷¹ Teachers consider and treat children as subjects whose sexual innocence needs to be protected by controlling knowledge about sexuality and repressing any behaviour that might be too sexual for the teachers’ comfort. Paradoxically, however, “in all this anxiety, surveillance and regulation concerning the supposed risk of sexuality to children and young people, normative ideas about gender remain largely unchallenged”.⁷² Schools, therefore, become complicit in sustaining and producing hegemonic notions of (hetero)sexualities.

Bhana discusses how interrelated discourses of childhood innocence and natural gender difference create regimes of truth that shape how teachers think about and interact with young children in ways that reproduce gendered heterosexuality.⁷³ Teachers facilitate the reproduction of gendered heterosexuality by believing that

⁶⁹ D Bhana (2016).

⁷⁰ D Mellor & D Epstein (2006) 382.

⁷¹ G Chirwa & D Naidoo 'Structural and social constraints in the teaching of Life Skills for HIV/AIDS prevention in Malawi primary schools' (2014) 4 *South African Journal of Childhood Education* 75.

⁷² D Mellor & D Epstein (2006) 383.

⁷³ D Bhana (2016) 27.



gender does not matter and yet treating boys and girls differentially because the teachers also believe boys and girls are naturally different. Further, children are thought to be passive and non-agentic in matters of sexuality.⁷⁴ Assuming that children are not sexual, and that the difference between boys and girls is natural allows teachers to believe that they are only neutral in how they treat boys and girls. The teachers believe that it is nature that is in control of how girls and boys turn out, that is, 'boys will be boys'. Bhana exposes this thinking as deeply problematic because "[i]t mis-recognises the position of children. Absent in the 'just kids' discourse are the gender and sexual dynamics of children and the play of power in children's cultures."⁷⁵ It masks the power of teachers over children in manipulating and shaping the children's identity construction because by regarding them as innocent, teachers can then justify how they treat them. By relating to children as naturally masculine or feminine, teachers shape and encourage gender performances that are aligned with hegemonic masculinities and femininities.⁷⁶ As Bhana discovered during her research, teachers thought boys are naturally aggressive and better at maths, while girls were perceived to be more docile and better at reading. This fixing and normalising of identities mean that a girl or boy whose behaviour does not conform to his or her expected gender would be perceived as deviating from the normal, for instance, an aggressive girl or a docile boy. Children who persistently fail to conform to their gender roles are regarded as deviant or abnormal and risk being marginalised.⁷⁷ The policing of gender and sexuality, by teachers and peers, that validates heteronormative practices and illegitimatises non-heteronormative behaviour reproduces the dominant heteronormative cultural forms.

While teachers and society have constructed children, especially pre-adolescents in the early years of schooling, as sexually (and gender) passive, research reveals the contrary. Children are in the everyday interactions and relationships in the school actively engaged in negotiating and constructing their gendered sexual identities

⁷⁴ D Bhana (2016) 27.

⁷⁵ D Bhana (2016) 28.

⁷⁶ D Bhana (2016) 28.

⁷⁷ KH Robinson *Innocence, knowledge and the construction of childhood: The contradictory nature of sexuality and censorship in children's contemporary lives* (2013) 65.



drawing on the discourses available to them. The expression of sexuality, however, “involves tension and contradictions and is marked by gender power imbalances. Boys’ tensions involve contradictory association with girls, invoking sexuality, power and misogyny. Girls’ desires tend to be already in the service of the heterosexual male gaze.”⁷⁸ In the performance of becoming the heterosexual boy, “boys construct, define and maintain their heterosexual identities through compulsory heterosexuality, misogyny and homophobia.”⁷⁹ As boys learn to use their power to exert dominance, it sets the stage for the use of violence as a tool for control and domination.

In her ethnographic studies, Bhana shows how classrooms and playgrounds are sites where children in their everyday relationships negotiate heterosexual power relationships, through self-policing and policing of others.⁸⁰ She describes the phenomenon through the “heterosexual matrix” defined by Judith Butler as: “the grid of intelligibility through which bodies, genders, and desires are naturalized.”⁸¹ The heterosexual matrix is the regulatory framework through which performances of gender or doing gender reproduce heterosexuality, masculinity and femininity as the appropriate ways of being.⁸² Through games such as kissing games, writing ‘love’ letters, heterosexual teasing, and other heterosexual rituals and practices, pupils constitute themselves and are constituted boys and girls, and affirm masculinities and femininities. Bhana observes that children engage in these heterosexual rituals or games in ways that reinforce gendered and sexual hierarchies.⁸³

What Bhana and others have shown through their ethnography studies of primary schooling is the richness of the sexual worlds of children, that adults would never stifle,

⁷⁸ D Bhana (2016) 79.

⁷⁹ E Renold "Coming out': Gender, (hetero)sexuality and the primary school' (2000) 12 *Gender and Education* 318. See also M Mac an Ghail *The making of men: Masculinities, sexualities and schooling* (2003).

⁸⁰ K Robinson & C Davies 'Sexuality education in early childhood' in *The Palgrave handbook of sexuality education*, ed. Allen L & Rasmussen ML (2017) 230.

⁸¹ J Butler (1999) 194.

⁸² D Bhana (2016) 180.

⁸³ D Bhana (2016) 184.



even though they wished to, because the existence of this world for children is secured through discourses that are part of the social fabric. As Bhana cogently puts it “talk about marriage, caring, kissing and fucking are not rare and unexceptional moments in the lives of children, but part of the mundane complexity through which they live their everyday lives.”⁸⁴ Policies should therefore enable pre-school and primary school communities to acknowledge the reality of sexuality and appreciate how relationships are structured by gender norms.

3.2.2 Secondary school sexualities

In contrast to the young children, older children from ages of 10 and over are considered to have entered the transitional period to adulthood. Of course, there is no perfect demarcation of maturity in terms of age or level of schooling because children will mature at discrepant ages, and some will still be in primary school when they engage in sexual conduct. However, primary school sexual culture will generally be different from the secondary school culture because of the assumption that in secondary school, children have consolidated their knowledge about sexuality, and are more experienced in performing gendered masculinities and femininities so that they can express themselves sexually more overtly. Also, by the time children get to secondary school, the secondary sex characteristics have become more visible, and this contributes to making the sexual more overt.

Therefore, what happens in primary school continues in secondary school but is more enhanced. One difference is that while in earlier years, boys construct masculinity identities by contradicting their association with girls, in the older years, heterosexual boys begin to affirm their masculinity in establishing relationships with girls. Another difference is that both boys and girls have more access to resources, including their pubescent bodies, which they can use to bolster their masculinities and femininities. Their changing bodies increase their capacity to exercise power; for instance, girls can use their bodies to enhance their feminine appeal to boys (though this is something

⁸⁴ D Bhana (2016) 195.



that girls can still do even before secondary sex characteristics appear).⁸⁵ For example, Leach *et al.* found that one of the complaints in schools in Malawi was that girls behave in a manner that teachers found provocative in the way they used their bodies and dress.⁸⁶ Boys, on the other hand, can use physical strength to bolster masculine dominance. Leach *et al.* also found that boys would write love letters to girls, that in some instances would include threats if the girl refused a boy's love proposal.⁸⁷ When girls tried to assert themselves, by rejecting the sexual advances of boys, the boys asserted their power by putting down girls through intimidation, humiliation and harassment.⁸⁸ In reacting this way, boys draw upon the available discourses that allow them to take such positions of dominance in relation to girls.

School cultures, therefore, impact on girls and boys differentially in their shaping of masculinities and femininities. One of the challenges it creates which is peculiar for girls is a double standard about feminine sexuality. Girls are not supposed to resist male sexual advances, as this attracts harassment, but at the same time, they are not supposed to readily express sexual desire for boys as this would irk boys because girls are supposed to be sexually passive.⁸⁹ This double standard is also enforced by teachers and parents when they strictly police the sexual behaviours of girls but are lax with boys. Monica Grant's research in Malawi revealed that parents police their daughters about sexual relationships and do not allow them to maintain relationships with boys for fear that they would have sex and become pregnant.⁹⁰ The double standard operates to deny girls autonomy and sexual agency. One of the consequences is that it diminishes the power of girls to negotiate safe sex because girls are supposed to be sexually modest and are expected to consent to the advances of boys. Unfortunately, when girls do have sex and get pregnant, it becomes an individual problem of the girl who is supposed to have avoided sex in the first place. School cultures, therefore, force girls to negotiate their sexuality in a narrow corridor,

⁸⁵ E Renold (2000) 312.

⁸⁶ FE Leach *et al* *An investigative study of the abuse of girls in African schools* (2003) 77.

⁸⁷ FE Leach *et al* (2003) 78.

⁸⁸ FK Muhanguzi 'Gender and sexual vulnerability of young women in Africa: Experiences of young girls in secondary schools in Uganda' (2011) 13 *Culture, Health & Sexuality* 717.

⁸⁹ FK Muhanguzi (2011) 717.

⁹⁰ MJ Grant (2012).



fraught with dangers on both sides, and with little support if anything goes wrong.

4 Translating the Gender Equality Act into policy actions and practices to promote sexual well-being in schools

4.1 Exposing the experience of discrimination structured by gender norms

SRGBV is largely a manifestation of an underlying problem, that school communities are unable to perceive the discriminatory effects of gender inequitable norms. This allows SRGBV to be hidden and yet manifest in ways that school communities fail to deal with. SRGBV is assumed to be normal, that is, it is normalised.

The relationships in the school reproduce gendered and hierarchical structures that characterise the family institution. Adult authority over children and men's power over women are taken to be a normal part of life.⁹¹ Gender identities and relations in the school reflect the socially sanctioned inequalities that are assumed to be normal in everyday practice in the family. The acceptance of inequality and discrimination as part of school culture normalises gender violence in the school. The gendered discrimination intersects with other identities such as race and ethnicity, sexual orientation, and contextual factors such as poverty to impact on students disparately, making some students more vulnerable to violence than others.⁹²

Legal interventions such as envisaged by the GEA might prove ineffective if they fail to perceive this discrimination and violence in the mundane practices in the school. If laws focus on the occasional extraordinary event that makes sensational headlines such as "teacher impregnates student", they would misperceive the nature and extent of the violence.⁹³ Further, aiming at the extraordinary might create the impression that enhancing criminal law is the solution to the problem. However, criminal law alone is

⁹¹ F Leach *et al.* "School-related gender-based violence: A global review of current issues and approaches in policy, programming and implementation responses to school - related gender - based violence (SRGBV) for the education sector," 2014, 4.

⁹² F Leach *et al.* 2014, 3.

⁹³ Here is an example of one such article that come up every once in a while in the media in Malawi: Owen Khamula, 'Malawi teacher jailed for 13 years for sexual activity with school girl' Nyasa Times (18 April 2016) <https://www.nyasatimes.com/malawi-teacher-jailed-for-13-years-for-sexual-activity-with-schoolgirl/> (Accessed 29 September 2019).



unlikely to change SRGBV unless it is part of broader and holistic interventions that should, amongst others, engage teachers, school workers and students themselves to transform school cultures. Lessons can be learnt from countries like Sweden that have passed laws explicitly addressing the discriminatory treatment of children in schools. Yet, as Gillander Gådin and Stein found, the normalising practices of SRGBV are still difficult to address even in a country such as Sweden that is recognised as one of the countries with good indicators on gender equality. They discuss a case in which a girl who was sexually harassed had made several attempts to alert the school authorities, but they failed to take immediate action. The school authorities avoided taking a strong stance against the perpetrator. They did not see this as an organisational problem. Instead, the school authorities viewed it as an individual failure of tolerance by the victim and shifted blame to the victim because she was the only one amongst the students who had complained about the boy's behaviour. The school authorities explained away the harassment as just a joke by the perpetrator.⁹⁴ According to these authors, the excuses and delaying tactics were the effect of the normalisation of SRGBV in the school. It took the persistence of the victim and the action of the Ombudsman against Discrimination to take this up in court. Gillander Gådin and Stein suggest that the challenge of normalisation of SRGBV could be addressed by the strengthening of the organisational capacity of the school to respond to SRGBV, ensuring that school staff take up their responsibility to curb SRGBV, and raising awareness of the nature of SRGBV in school communities.⁹⁵

To impact on SRGBV in Malawi, the GEA should 'see' through the ubiquity of harmful practices in schools. Focusing on the extraordinary or sensational such as sexual assault or rape might focus all the energy on the tip of the iceberg. The next step would be to engage school communities as part of policy actors, to raise awareness about gendered practices in schools, and to build their capacity in responding to SRGBV. Criminalising harmful practices, or sexual harassment by itself would not achieve much unless policy actors in the school communities are involved in translating the

⁹⁴ K Gillander Gådin & N Stein 'Do schools normalise sexual harassment? An analysis of a legal case regarding sexual harassment in a Swedish high school' (2019) 31 *Gender and Education* 928-932.

⁹⁵ K Gillander Gådin & N Stein (2019) 932.



GEA to address SRGBV.

4.2 Curriculum transformation

The GEA provides that sex education be included in the curriculum, but this is envisioned as pertaining more to girls, rather than boys. The GEA constructs gender inequality as being the consequence of lack on the part of the girls. A curriculum that positions girls as victims and by implication, boys as the perpetrators, supports discourses of hegemonic masculinities in which girls are constructed as weak and unable to exercise agency. Such positioning would not be transformed by life skills education alone. Further, as studies described above have shown, all persons in the school play a role in reproducing gender inequalities in the school. Therefore, despite that a higher proportion of girls are victimised than boys, the girls still retain agency, no matter how subtle or fleeting, and they too play an active role in sustaining or challenging gender inequality.

An essential aspect of the curriculum is sexuality education. In Malawi, this is delivered through life skills education. Literature has cited several challenges regarding its implementation, including, financial and structural reasons and the impact of underlying determinants such as poverty.⁹⁶ However, other critical analyses offer a different perspective, including that official sexuality education, is itself embroiled in discourse. This impacts on its effectiveness to create a positive environment for the development of sexual identities. Louisa Allen argues that discourses that deny the sexuality of students “work to ultimately deny young people as sexual subjects and divest them of the kind of agency necessary to look after their sexual well-being.”⁹⁷ Official curricula create conditions for this denial by advancing pedagogies that focus on sex as the biological problem that is responsible for disease and unwanted pregnancies.⁹⁸

Macleod argues that infusing school-based sexuality education with metaphors of disease and illness severely limits the transformative potential of sexuality education.

⁹⁶ G Chirwa & D Naidoo (2014) 62.

⁹⁷ L Allen (2007) 222.

⁹⁸ D Epstein & R Johnson (1998) 180.



Studying school sexuality education manuals in South Africa, Macleod finds that in the attempt to regulate the behaviour of learners, certain conditions such as teenage pregnancy are portrayed only in negative terms using metaphors of danger and disease.⁹⁹ The selective focus on the negative aspects of adolescent pregnancy maintains the values and interests of dominant groups to control adolescent sexuality.¹⁰⁰

‘Male-sexual-drive’ discourses that construct boys as possessing an insatiable and uncontrollable sex drive and position girls as objects of male sexual desire reproduce hegemonic masculinities ideals.¹⁰¹ The male sex-drive discourse creates opportunities for boys to live up to the masculinity ideals of being the pursuers of girls.¹⁰² The effect on girls is to burden them with the responsibility to avoid sex, and with it, disease and pregnancy. Rather than focusing on danger and disease, sexuality education should be tailored at facilitating self-knowledge and address issues that are important for boys and girls, such as sexual desire and relationships. Sexuality education should provoke students to think critically about ethical sexual conduct. As the Committee on CRC has said, education of the child should include life skills that promote good social relationships, responsibility and critical thinking.¹⁰³

In General Comment 3, the ACERWC exhorts states to teach and train children to become responsible citizens of society. The ACERWC also mentions specifically that “children should be taught and encouraged to avoid xenophobic, discriminatory and disrespectful attitudes and practices in all settings, as they detract from the moral well-being of society.”¹⁰⁴ One way to address gender stereotypes about sexuality that

⁹⁹ C Macleod (2009) 379-380.

¹⁰⁰ AT Geronimus 'Damned if you do: Culture, identity, privilege, and teenage childbearing in the United States' (2003) 57 *Social Science & Medicine* 881.

¹⁰¹ W Hollway 'Women's power in heterosexual sex' (1984) 7 *Women's Studies International Forum* 63.

¹⁰² D Epstein & R Johnson (1998) 180.

¹⁰³ CRC Committee, *General Comment 1* para 9.

¹⁰⁴ African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment on Article 31 of the African Charter on the Rights and Welfare of the Child on “the responsibilities of the child”* (2017) para 78.



promote discriminatory conduct is through appropriately tailored sexuality education. In the Concluding Observations on Malawi issued in 2017, the Committee on CRC observed that there was a lack of age-appropriate education on sexual and reproductive health rights and family planning.¹⁰⁵ The Committee requested Malawi to ensure that sexual and reproductive health education is mandatory in public and private schools and should address early pregnancies and STIs.¹⁰⁶

4.3 Criminal law and student discipline approaches

The GEA criminalises harmful practices and sex discrimination. These provisions could be used to curb perpetration of SRGBV and deter those contemplating acts that are proscribed. Both teachers and students perpetrate SRGBV in schools. This section primarily focuses on students rather than teachers.

Though criminalisation could play an essential role in curbing SRGBV, its potential to transform school cultures is limited because criminalisation would not by itself change the discursive fields that shape gender inequalities in the school.¹⁰⁷ Criminal laws might punish and put away individual perpetrators, but school cultures would continue to shape students into potential harassers. In other words, criminal law would not inspire the structural change required to address SRGBV. Rather, criminal law “operates most effectively at the level of the symbolic, by naming individual offenders as morally defective, and using them as scapegoats, and only incidentally as a useful tool for community security.”¹⁰⁸ However, criminal and disciplinary approaches could contribute to addressing SRGBV when used with other interventions such as curriculum transformation.

¹⁰⁵ UN Committee on the Rights of the Child (CRC), *Concluding observations on the combined third to fifth periodic reports of Malawi*, CRC/C/MWI/CO/3-5, (2017) para 34.

¹⁰⁶ CRC Committee (2017) para 35.

¹⁰⁷ Aya Gruber describes the limitations of using criminal law to advance gender inequality: A Gruber 'The feminist war on crime' (2007) 92 *Iowa Law Review* 750; A Gruber 'A "neo-feminist" assessment of rape and domestic violence law reform' (2012) 15 *Journal of Gender Race and Justice* 611.

¹⁰⁸ DL Martin 'Retribution revisited: A reconsideration of feminist criminal law reform strategies' (1998) 36 *Osgoode Hall Law Journal* 160.



School discipline rules and procedures could operate both as prevention and as remedial actions to address behaviour that disrupts peaceful co-existence. School policies could also facilitate linkage with criminal law interventions in cases of behaviour that triggers the threshold of criminal law such as sexual assault. School policy on SRGBV and disciplinary procedures should align with the GEA, the Constitution, the Penal Code, and other relevant laws, to operate effectively. They must also comply with the recognised rights of the child.

Historically and culturally, school discipline modes were influenced by authoritarian practices where teachers had the privilege of enforcing discipline without question.¹⁰⁹ It has been a challenge, not only for Malawi but other countries as well, to shift from authoritarian disciplinary practices to approaches that integrate human rights and democratic practices. Susanna Coetzee believes that “it is not a human rights culture that leaves the educators feeling helpless, but a lack of knowledge and skills to create a disciplined school or classroom within a human rights framework.”¹¹⁰ Coetzee suggests how the state (Nigeria) could integrate child rights in its disciplinary approaches. However, a post-structural approach would give a different explanation for the helplessness school management teams feel in addressing SRGBV. It is because school disciplinary practices are embedded in the heterosexual matrix that reproduces hegemonic masculinities and femininities. These practices have been the only way the school management have viewed the gendered world so that despite human rights discourses prohibiting acts such as corporal punishment, teachers still resort to this mode of discipline or shift to alternative forms of SRGBV.¹¹¹

¹⁰⁹ P Namphande *et al* 'Education for democratic citizenship in Malawian secondary schools: Balancing student voice and adult privilege' (2017) 47 *Compare: A Journal of Comparative and International Education* 716.

¹¹⁰ S Coetzee 'Discipline in Nigerian schools within a human rights framework' (2010) 10 *African Human Rights Law Journal* 479.

1 ¹¹¹ Ministry of Gender Children Disability and Social Welfare, Centre for Social Research, and Centres for Disease Control and Prevention, “Violence against Children and Young Women in Malawi: Findings from a National Survey, 2013.” 157; See also anecdotal source: Samson Kukogho, ‘47-yr-old teacher tastes jungle justice after bruising ‘noisy’ pupil’s eye in school’ Pulse (29 September 2015) <https://www.pulse.com.gh/communities/in-malawi-47-yr-old-teacher-tastes-jungle-justice-after-bruising-noisy-pupils-eye-in/d9n31n5> (Accessed 30 January 2020).



It is important, however, for policy actors to recognise that criminal law or tough disciplinary measures would not always be the most effective means to address the various manifestations of SRGBV. First, some manifestations of SRGBV do not trigger the threshold of criminal sanction. Second, criminal punishment might not change fundamental attitudes. Take the example of the love letter that a boy writes to propose love to a girl and containing threats if she does not respond positively. It might not be effective to merely punish the boy for writing such a letter. It might be more transformative to teach the boy how to write a respectful love letter, and to appreciate that the girl has the choice to refuse the proposal. The school education should also help boys (and girls) to deal with disappointment in relationships without resorting to violence. Such an approach would require the school management to be open about issues of sexuality, intimacy and love, and to understand how gender norms structure the experience of sexuality, for example, why boys resort to aggression in dealing with a frustrated love proposal. Exposing SRGBV then does not mean deferring to criminal law to solve all problems about gender and sexual relationships. In this regard, it is important for policy actors to not rely too much on criminal law and harsh or penal disciplinary measures to inculcate a culture of human rights amongst children and adolescents in schools.

4.4 Toward the foundational step of involving children

Robinson has suggested that “[a]nti-homophobia and anti-heterosexist education needs to be included in sexuality education curricula from an early stage, as processes of prejudice, hatred and discrimination are already well underway in the early years of children’s lives.”¹¹² She makes these suggestions based on the research conducted in Australia. One of the challenges for Malawi is that there is little research in childhood gender and sexuality from which to fashion solutions that address the complex nature of the problem of pervasive gender norms. Most research in Malawi has demonstrated the problem of SRGBV, but there is a need to generate evidence that would inform a radical transformation of social and policy practice. Recently, following the GEAS, Promundo and the College of Medicine (Malawi) produced a teaching manual entitled

¹¹² KH Robinson (2013) 85.



Very young adolescence 2.0: A curriculum to promote gender equality and sexual and reproductive health as one of the actions flowing from the research finding that gender norms start to influence children from very early. However, this curriculum has not yet been adopted by the Ministry of Education Science and Technology (MoEST). An important step, therefore, is to convince policymakers of the need to address gender inequalities in school cultures, and especially from elementary classes including pre-school.

There are two major policy actors whose role is to facilitate the implementation of the GEA: The Ministry of Gender, Children, Disability and Social Welfare (MoGCDSW) and the Malawi Human Rights Commission (MHRC).¹¹³ The MoGCDSW developed the National Policy on Early Childhood Development (ECD Policy).¹¹⁴ The ECD Policy, however, does not articulate the involvement of children as agents in addressing gender inequality. An essential step for the MoGCDSW, in collaboration with the MoEST, could be to motivate the research community and commission research on understanding gender inequality from the perspective of young children. The evidence from this research could feed into the ECD Policy as well as the curriculum for early childhood schooling. The ECD Policy and research evidence on childhood, gender and sexuality, could be foundational steps to enhance uptake of solutions to the challenges of gender inequality, such as the curriculum proposed by Promundo and the College of Medicine.

5 Conclusion

The school is important because, for many children, it is an integral part of the formative years and the development of personality. It is not by chance that the school happens to play a critical role in the formation of sex and gender identities. Its very conceptualisation invests it with such power as to shape personal identities. For a long time, its role in shaping gender and sexual identities was not recognised. All the while it was thought that the central role of the school was to educate and train individuals

¹¹³ The MHRC is designated the enforcer of the GEA and is conferred with various powers and duties under sections 8, 9 & 10 of the GEA. It is envisaged that the MHRC would collaborate closely with the MoGCDSW the line ministry responsible for gender issues in Malawi.

¹¹⁴ Ministry of Gender, Children, Disability and Social Welfare, *National policy on early childhood development* (2017).



for the industry. The school system does indeed produce skilled individuals for the job market. But it also contributes towards sustaining gender inequalities if nothing is done to influence school cultures to promote gender equality.

The chapter reveals that school environments are critical for the elimination of gender inequality, and to the advancement of sexual health and wellbeing. Working with children to address gender norms should start at the earliest stage of pre-school. All education institutions, therefore, must take measures to address gender inequality right from pre-school institutions and through primary schools to secondary schools.

Teachers play an important role in fashioning the type of environment in which identities are nurtured and develop. However, teachers themselves, most times unknowingly, have been complicit in sustaining gender inequality in schools. Even with the advent of human rights and sexuality education, school cultures have remained unchanged, sometimes actively resisting interventions for positive change. Some of the reasons teachers have failed to challenge gender inequitable performances is not being able to recognise harmful behaviour¹¹⁵ or ignoring or trivialising behaviour that is harmful to others, or in worst cases, being consciously involved in perpetrating SRGBV on students or fellow teachers.¹¹⁶ To shift mindsets and to disrupt the heteronormative framework that reproduces gender inequalities requires working with teachers to understand and appreciate their own gender performances and how they are shaped by discourse to reproduce inequality in the school. Education and early childhood policies should be redrafted and developed to provide for the introduction of critical courses for all teachers that would address their essential role in student identity formation and how they would position themselves to disrupt gender inequitable performances.

Harmfulness of school cultures affects individuals differently. It is possible from the same school environment to have some students who would achieve academically

¹¹⁵ E Lahelma 'Gendered conflicts in secondary school: Fun or enactment of power?' (2002) 14 *Gender and Education* 303.

¹¹⁶ M Dunne 'Gender, sexuality and schooling: Everyday life in junior secondary schools in Botswana and Ghana' (2007) 27 *International Journal of Educational Development* 508.



despite SRGBV, and others who would fail to thrive because of the same SRGBV. Statistical comparisons on academic achievement may, therefore, mask the real effects of SRGBV in the student community. Indeed, as Youdell has observed, “education policy or curricular changes that may (or may not) have improved girls’ educational achievement have not simultaneously simply freed-up or expanded *who* or *how* girls can be (emphasis in original).”¹¹⁷ The question of who one can become is deeper than academic achievement. The impact of harmful school cultures may also have hidden effects on achieving students, whose success may be at the cost of losses that are not acknowledged, such as self-esteem.

The GEA aims to transform gender equality in Malawi. It is the primary piece of legislation addressing gender equality in the school. As described in preceding chapters, the conceptual grounding of the GEA followed the WID framework, and the sections pertaining to education and training have focused on achieving equal proportions of boys and girls in school, rather than addressing the complexities of gender in education. The sections on addressing sex discrimination are useful in engaging SRGBV, but they must be contextualised and translated to be understood as pertaining to school cultures. Alternatively, Malawi could create legislation specifically addressing SRGBV.

This chapter has relied a great deal on research that has been conducted elsewhere to explain childhood gender and sexuality. However, the GEAS is one of the first studies in Malawi that has shown the impact of gender norms on young people. It prompted Promundo and the College of Medicine to develop a curriculum to transform gender norms for young adolescents. However, there is a need for further exploratory research on involving children to transform gender norms and to influence education and early childhood policies. The GEA is, therefore, a powerful motivating instrument which policy actors could utilise to enhance its reach into school cultures. Achievement in education should not be measured in terms of academic success alone, but in terms of the freedom of boys and girls to “develop their personal abilities and make choices

¹¹⁷ D Youdell 'Sex–gender–sexuality: How sex, gender and sexuality constellations are constituted in secondary schools' (2005) 17 *Gender and Education* 268.



without the limitations set by stereotypes, rigid gender roles and prejudices.”¹¹⁸

¹¹⁸ Malawi Law Commission (2011) 13.



CHAPTER 6: CULTURAL CONSTRUCTIONS OF CHILD AND ADOLESCENT SEXUALITIES AND THE MEANING OF YOUTH-FRIENDLY SEXUAL HEALTH SERVICES

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6 Introduction

The ICPD and the 1995 Fourth World Conference on Women (FWCW) affirmed sexual and reproductive health as a fundamental human right of every person. The ICPD PoA and the FWCW’s Platform for Action (PfA) recognises the importance of gender equality and the empowerment of girls and women to the realisation of human



development.¹ These conferences generated consensus around reproductive (and sexual) health and rights of young people. The ICPD PoA recognised the need to “promote to the fullest extent the health, well-being and potential of all children, adolescents and youth,”² that young people be involved in the development of services for them including sexual and reproductive health services. Further, “[a]ccess to, as well as confidentiality and privacy of, these services must be ensured with the support and guidance of their parents and in line with the Convention on the Rights of the Child.”³ Because the GEA draws upon these consensus documents and international legal instruments, it is an essential vehicle for translating internationally recognised sexual health and rights of the child into tangible and nationally realisable rights.

There is a high level of global consensus around sexual and reproductive health and rights, such as family planning. However, areas of contestation persist because sexuality and reproduction touch on deeply held sociocultural norms and values. One of the contested areas is access to sexual health services for unmarried young people, rooted in the denial of the child or adolescent as a sexual being. Another is the recognition of sexual conduct as a normative aspect of their development.⁴ Prevailing discourses that construct the child or adolescent as nonsexual until puberty interfere with the development of sexual agency and autonomy of the child even beyond the stage when the adolescent is later accepted as a sexual. Consequently, although the ICPD promised sexual health and rights of everyone including the child and adolescent, young people continue to face barriers to realise sexual health and rights because of negative constructions of their sexualities.⁵

In developing the GEA, the MLC was cognisant of the importance of adopting a positive approach to human sexuality and understanding the complex factors that

¹ United Nations *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995* (1995); United Nations Population Fund (2014).

² United Nations Population Fund (2014) para 6.7.

³ United Nations Population Fund (2014) para 6.15.

⁴ C Barroso (2014) 641.

⁵ SJ Jejeebhoy *et al* 'Meeting the commitments of the ICPD Programme of Action to young people' (2013) 21 *Reproductive Health Matters* 21-22.



shape human sexual behaviour because: “These factors address the question whether the expression of sexuality leads to sexual health and well-being or to sexual behaviour that puts people at risk or makes them vulnerable to sexual and reproductive ill-health.”⁶ Presumably, the MLC had in mind every person, including the child, when recommending the enactment of Sections 19 and 20 of the GEA. However, though the GEA recognises rights relating to sexual health for all persons, to realise sexual health for the child would involve successfully negotiating social and cultural norms that constitute barriers to the child’s sexuality development. This chapter aims to explore how the GEA could negotiate with social norms to successfully advance the sexual health of the child and adolescent.

An essential antecedent to advancing sexual health and rights of the child is the free and full development of sexual autonomy during the period of growing up, during which the child learns about sexuality through social interactions. However, sexual autonomy of the child tends to run up against parental and state control because, “adults seek to block their access to crucial aspects of sexual scripts, thus making the acquisition of sexual knowledge and coming to terms with their own sexuality far more problematic than it might otherwise be.”⁷ Parental control potentially limits the realisation of sexual health and rights for the child. The advancement of sexual health and freedoms of the child would have to involve negotiating the tension between, on the one hand, the recognition of sexual autonomy and agency as the necessary pre-condition for the child to enjoy sexual health and rights, and on the other, the exercise of parental control and state regulation that tends to limit the realisation of sexual health of the child. Roger Levesque summarises the law’s limitation of the agency of the child which applies to sexual agency.⁸ First, laws explicitly or implicitly recognise the parental presumption, so that the state is reluctant to interfere into how parents treat their child, for instance, what kind of information on sexuality, if any, they will provide to the child. Second, even where parents are not involved, the state may through its power of

⁶ Malawi Law Commission (2011) 57.

⁷ L Allen & T Ingram "Beiber fever": Girls, desire and the negotiation of childhood sexualities' in *Children, sexuality and sexualization*, ed. Renold E et al (2015) 42-43.

⁸ RJR Levesque *Adolescents, sex, and the law: Preparing adolescents for responsible citizenship* (2000) 35.



parens patriae assume parent-like authority over the child. Third, the state has broad policing powers over adults and children alike and can create laws that may limit sexual agency, for instance, age of consent laws that prohibit consensual sexual conduct between adolescents, which can impact on access to sexual health services.⁹ Levesque claims that “although adolescents’ rights have been recognized, they have not been fashioned in ways that substantially alter the distribution of power between adolescents, parents, and state: Parents and the state largely control the content and expression of adolescents’ rights.”¹⁰ It is a claim that should be taken seriously when analysing how the GEA could transform sexual health for the child and the adolescent.

Agency or autonomy is not a zero-sum game the precondition of which is independence from others. Subjectivities of children, just as of adults, are constituted in discourse. Autonomy is not borne out of independence but interdependence.¹¹ The child’s autonomy, just as the adult’s, is achieved through the interdependent relationships in which the child is situated. Agency, therefore, has been conceptualised not as an essential property of the individual but rather a property of networks of dependency.¹² To support the sexual agency of children and adolescents the GEA must transform the relationship between adults and children. This is an essential element to realising the sexual health and rights of the child and adolescent.

The enactment of the GEA signalled the state’s willingness to recognise the agency of the child by deliberately using language that impliedly acknowledges a child’s agency, for instance, when it states in Section 20 (1) (a) that healthcare providers should provide services without discrimination. Also, Section 20 (1) (c) states that healthcare providers should provide family planning services regardless of whether the person is unmarried or does not come with a spouse. Therefore, the GEA, could be interpreted as aiming to ensure that children have access to sexual health services without undue hindrance. However, whether the initiative of the state would translate into the

⁹ United Nations Population Fund *Harmonizing the legal environment for adolescent sexual and reproductive health and rights: A review in 23 countries in East and Southern Africa* (2017).

¹⁰ RJR Levesque (2000) 35-36.

¹¹ J Nedelsky 'Reconceiving autonomy: Sources, thoughts and possibilities' (1989) 1 *Yale Journal of Law and Feminism* 20.

¹² N Lee 'Towards an immature sociology' (1998) 46 *The Sociological Review* 459.



realisation of sexual health and rights of the child depends on how the GEA enables sexual agency of the child. This chapter uses the findings from an evaluation of the youth-friendly health services program to discuss how the GEA could transform relationships between adults and children to advance the sexual health and rights of the child.

7 The Youth Friendly Health Services (YFHS) program in Malawi

The concept of adolescent-friendly health services was drafted into a programming document by the World Health Organisation (WHO) in 2002 and has since gained wide acceptance.¹³ However, the idea of facilitating the inclusion of young people in health services was articulated earlier, at the ICPD. It is from the ICPD PoA and commitments made by governments at the United Nations General Assembly Special Session on HIV and AIDS (UNGASS) of June 2001, and inspired by the WHO program guidance, that Malawi developed the National Standards on Youth Friendly Health Services (YFHS Standards). Malawi has implemented the YFHS program since 2007. The YFHS program aims to increase the acceptability and access to health services by young people.¹⁴ The YFHS Standards articulates five standards that would guide the implementation: (1) Health services are provided to young people in accordance with existing policies at all service delivery points; (2) young people are able to access health services that address their needs; (3) all young people are able to obtain health information relevant to their needs, circumstances and stage of development; (4) health providers have the requisite knowledge, skills and positive attitudes to provide the health services to young people; and, (5) health information on young people is collected and analysed for purposes of decision-making.¹⁵ The YFHS Standards is one policy document amongst others that constitute the policy framework on adolescent sexual health, including the National Policy on Sexual and Reproductive

¹³ World Health Organisation *Adolescent friendly health services. An agenda for change* (2002); World Health Organisation *Global standards for quality health-care services for adolescents* (2015).

¹⁴ Ministry of Health (2018) 14.

¹⁵ Ministry of Health (2018) 21-22.



Health and Rights,¹⁶ and the National Youth Friendly Health Services Strategy.¹⁷ However, for purposes of analysis, this chapter focuses on the YFHS Standards and the program based on these standards, especially as they pertain to sexual health.

An evaluation of the YFHS program was completed in 2014, and the results were reported in the Evaluation of Youth-Friendly Services in Malawi (YFHS Evaluation).¹⁸ The YFHS Evaluation is the focus of this chapter especially the findings regarding the personal, social and structural barriers affecting the agency of the child in the uptake of YFHS because they reveal the social and cultural norms that the GEA must engage. The chapter, therefore, does not touch on the financial, political or governance challenges about YFHS, not because they are not relevant, but because the focus of this thesis is on the interaction of social and cultural norms with the GEA.

The YFHS Evaluation captured information from young people aged between 10 and 24, and the report discusses the findings in accordance with the age categories of 10-14, 15-19 and 20-24. The discussion in this chapter is limited to the experience of the child as defined in Malawi law, that is, persons below 18. Because of inevitable overlaps across the ages, it would not be feasible to isolate discussion from the YFHS Evaluation that only pertains to the child. The discussion, therefore, inevitably includes the experience of older adolescents. However, this does not upset the aim of the chapter to show how social-cultural norms impact on sexual health and rights of the child.

7.1 The sexual experience of adolescents as revealed by an evaluation of the youth-friendly health services program

The YFHS Evaluation reports that 72 per cent of adolescents aged 10-14 had heard or talked about sex, and 12.6 per cent had had sex.¹⁹ Not surprisingly, the percentage of those becoming sexually active increases with age. Almost 52% per cent of

¹⁶ Ministry of Health (2017).

¹⁷ Ministry of Health *National youth friendly health services strategy 2015-2020* (2015).

¹⁸ Evidence to Action Project (2014).

¹⁹ Evidence to Action Project (2014) 51.



adolescents aged 15-19 had had sex. The median age of having had sex for both males and females was 16.²⁰ Of the sexually active youth aged 10-24, almost 50 per cent used contraceptives of which the most common was the male-condom. The most popular facilities at which male-condoms were obtained were government facilities - hospitals, health centers, outreach posts, from Health Surveillance Assistants (HSAs) or Community Based Distribution Assistants (CBDA). About 25 per cent obtained contraceptives from the market or shops.

Another finding of the YFHS Evaluation, reported with some element of surprise by the authors of the evaluation report, was that “[a]wareness about sex is high, *even among the youngest age group*—those 10-14 years old (emphasis supplied).”²¹ Indeed, globally, there is a growing recognition of the importance of catering for the younger adolescents.²² Children have sexual health concerns and needs even if they are different from those of older children who have begun to have sex. Early adolescence is a critical age of physical, social, emotional and cognitive development, and it is the crucial time to lay the foundations for sexual health and well-being. Just as the YFHS Evaluation and other studies have revealed, though most younger adolescents have not started to engage in sexual intercourse yet, they have started talking about sex. Some are already participating in non-coital activities such as kissing, heavy petting and fondling, while others are already beginning to engage in sexual intercourse.²³

The YFHS program focuses on the child or adolescent from the age of 10.²⁴ However, setting such age boundaries might have challenges, despite that developmental approaches have established differences between a child in the 10-14 age bracket and younger children. Despite this distinction, sexuality development is characterised better as continuity rather than discontinuity as suggested by the bright line at 10. Such

²⁰ Evidence to Action Project (2014) 51.

²¹ Evidence to Action Project (2014) 12.

²² V Woog & A Kågesten *The sexual and reproductive health needs of very young adolescents aged 10–14 in developing countries: What does the evidence show?* (2017) 4.

²³ V Woog & A Kågesten (2017) 14.

²⁴ V Chandra-Mouli *et al* (2015) S5.



a boundary might suggest, wrongly, that a child of above 10 is sexual and the one below that age is nonsexual or pre-sexual. Children may be sexual at any time, and their capacity is evolving.²⁵ A child below 10 might not understand the meaning of sexuality in the same way an older child does. However, children, from an early age, and in accordance with their capacity, already grasp and appreciate meanings of sexuality through cultural scripts from their social interaction with adults.²⁶ The view that children below 10 are not concerned with sexuality or are nonsexual is borne out of the dominant discourse of childhood innocence that ignores the capacity of very young children to appreciate meanings of sexuality as their capacity for comprehension of language develops.²⁷

In view of the finding that very young adolescents talk about sex, and some of them engage in sex, the authors of the YFHS Evaluation, recommended the review of the content of sex education to ensure that it provides sufficient information for young adolescents to understand issues of sex, “particularly those related to misconceptions about sex, contraception, and pregnancy.”²⁸ While it is essential to provide information on the risks and dangers of sex, it is equally important to focus on helping young people to develop sexual agency and autonomy, because this is the foundation for them taking responsibility for their sexual conduct and sexual health. When children and adolescents are constructed as nonsexual, or when their sexual development is imagined to be problematic, it becomes difficult for adults to provide the support that children and young adolescents need as their capacity for sexual agency evolves.

7.2 The struggle of adolescents for sexual agency against adult fears and anxieties of sexualisation

Sexual agency is an important concept that permeates this thesis and is taken up here in the discussion on the findings of the YFHS Evaluation regarding sociocultural factors that interfere with the sexual agency of the child, and in which parents,

²⁵ D Bhana (2017) 251.

²⁶ S Jackson & S Sue 'A sociological history of researching childhood and sexuality: Continuities and discontinuities' in *Children, Sexuality and Sexualization*, ed. Renold E et al (2015) 43.

²⁷ J Kitzinger 'Defending innocence: Ideologies of childhood' (1988) 28 *Feminist Review* 77-78.

²⁸ Evidence to Action Project (2014) 14.



community gatekeepers and healthcare providers are tremendously influential. These sociocultural factors are explained through the concept of sexualisation, which could be described as the idea of the transition of a child from a pre-sexual phase to becoming sexually mature as understood by adults in a particular context.

The perspective of parents and other adults captured in the YFHS Evaluation regarding the sexual behaviour of adolescents is also interesting. In one focus group discussion (FGD), parents expressed the following sentiments:²⁹

“[Sexual] problems arise from girls who put on miniskirts with the aim of seducing boys to have sex with them with this resulting in transmission of HIV/STIs. Government should introduce punishments for these girls and they should be jailed for one week”

Elsewhere in the YFHS Evaluation, adults express similar sentiments in the following manner:³⁰

“Today, girls go on their own to their boyfriends’ houses. There are some old men who have sexual relationships with them and when they become pregnant the men abandon them. This is seen as a big problem because children’s rights are being abused”

Just as in the previous quote, the parents or community gatekeepers express anxiety about the sexual behaviour of girls. Girls who are openly sexually agentic are perceived as dangerous as seducers of men, or as endangered because they would become victims of sexual acts, for instance, as when men abandon them when they are pregnant. These attitudes reveal discourses of childhood innocence, whereby ‘good’ girls are not supposed to express sexual desire or agency, and any such expression of sexual agency would be understood to be premature, precocious, deviant and consequently ‘bad’.³¹

Sexuality, as described by Hawkes and Egan,

²⁹ Evidence to Action Project (2014) 162.

³⁰ Evidence to Action Project (2014) 163.

³¹ S Jackson & S Sue (2015) 143.



has come to symbolically represent and to operate as the key dynamic in the naturalization of fears about risks posed to children by the prevailing social environment. Sexualization is thus emblematic of instability and danger, both for the individual and the social order.³²

Views that capture the sexualisation fears in the YFHS Evaluation include sentiments from parents that “[sexual] problems arise from girls who put on miniskirts with the aim of seducing boys”³³; “The youth of today are not scared of having relationships with old people”³⁴; “Youth nowadays like sexual intercourse and as a result they differ from the traditional ways of our community which emphasizes abstinence”³⁵; “Young girls are not dressing well—you see them in miniskirts, surging cloths, and when you try to talk to them they answer back that it is their right”³⁶. Parents complained that the YFHS program was providing sexual health services that they did not want their wards to access, and that the presence of these services encourage young people’s defiance of cultural values.³⁷

These sentiments reveal the anxieties adults have when confronted with the sexual agency of the child or adolescent. Agency has been defined as “a level of self-consciousness and independence from and even resistance to restricting social structures within which the agentic individual is positioned.”³⁸ Agency, therefore, entails choice, and one may choose to conform to existing structures, to resist them or modify them. The development of sexual agency, that is, the capacity to define oneself sexually in relation to the pre-existing structure, which entails the possibility of young people to resist social structures, has been the cause of anxiety not only in the Anglophone West, which is the society that Hawkes and Egan primarily write about, but is evident in Malawi as from the statements captured in the YFHS Evaluation.

³² G Hawkes & RD Egan 'Landscapes of erotophobia: The sexual(ized) child in the postmodern Anglophone West' (2008) 12 *Sexuality & Culture* 194.

³³ Evidence to Action Project (2014) 162.

³⁴ Evidence to Action Project (2014) 162.

³⁵ Evidence to Action Project (2014) 166.

³⁶ Evidence to Action Project (2014) 167. “Surging cloths” in the context in which it was said appears to mean “sagging pants.” This, however, is the interpretation of the author of the thesis and has not been verified.

³⁷ Evidence to Action Project (2014) 166.

³⁸ G Hawkes & RD Egan (2008) 195.



Hawkes and Egan observed that in Anglophone Europe, much as sexualisation is constructed as a danger to young people, the risk and danger of sexualisation is confined mainly to girls.³⁹ This observation resonates with the findings in the YFHS Evaluation. Most of the concerns of the parents were with the girls; such as the 'daring' girls who seduce boy and men, and girls who behave raunchily and dress provocatively.

Monica Grant's study is also used here to explain the concept of sexualisation.⁴⁰ This chapter is interested in the meaning parents attached to the sexual maturation of school-going adolescent girls which reveals a tension between the sexual agency of girls and parental control through sexualisation anxiety. According to Grant, parents tended to overestimate the prevalence of pregnancy as the reason for the drop out of girls from school, but did not appreciate how their own anxiety played a role in constraining the choices of their daughters.⁴¹ Parents attempted to control their daughters by forbidding their relationships with boys for fear that they will inevitably have sex, become pregnant, and drop out of school. Girls who resisted such control and continued to have relationships with boys were considered stubborn or rebellious. Grant describes the various factors that influenced how parents perceived the sexually mature girl, and amongst these was poverty.⁴² One explanation of how poverty contributed to failure of parents to support girls was that parents preferred to use the limited resources to support the boy. However, Hawkes and Egan offer a different perspective. Female sexuality has always been pathologised regardless of the economic status of parents. The experience in the West is not unlike what the 2014 YFHS Evaluation or Grant's study reveals in Malawi, that it is the girl child's sexuality that is the subject of the anxiety of sexualisation. This is not surprising because Malawi and the West are connected through colonialism and globalisation. The historical meaning of adolescence and the ideology of schooling derived from the West as an institution to manage adolescents for a capitalist economy, coupled by the subjugation of black female sexuality during colonialism contributes to the prevailing meanings of

³⁹ G Hawkes & RD Egan (2008) 195.

⁴⁰ MJ Grant (2012). The study is first referenced at page 119 of the thesis, above.

⁴¹ MJ Grant (2012) 76.

⁴² MJ Grant (2012) 84.



female adolescence.⁴³ Therefore, the pathologisation of female sexuality described by Hawkes and Egan is evident in Malawi.

The concept of sexualisation is an important factor in any analysis of the challenges that children and adolescents in Malawi face in accessing sexual health services. Sexualisation anxiety is expressed in the resistance of parents to sexuality education, in the moral panics about young people's sexual knowledge and behaviour which parents interpret as being stubborn, rebellious, becoming sexual too soon, departing from traditional norms, and so on. As Egan and Hawkes have shown, and indeed is the case in the two studies, the YFHS Evaluation and the study by Grant, sexualisation reveals a gender bias. Parents and adults are stricter on the girls than on the boys.

As Robinson and Davies have observed, "through the repressive regulations around children's access to sexual knowledge, society contributes to children's misinformation around sexuality, their increased vulnerability to sexual exploitation and abuse, and to their potential lack of sexual health and well-being."⁴⁴ Grant's study demonstrates well that parental anxiety was the barrier that constrained the potential of girls. Parents failed to support girls, who otherwise would continue with schooling, because of the fear or anxiety that girls who have become sexually agentic are doomed to becoming pregnant. Similarly, the YFHS Evaluation shows that parents and communities resist girls' access to knowledge about sexuality. Those adolescents who persisted in demonstrating sexual agency, whether in continuing intimate relationships or accessing services, were considered rebellious, dangerous or deviant.

The rights recognised in the GEA have a horizontal application and require that third parties, including parents, respect the rights of the child. But this is a challenge because the state tends to give parents leeway in how they deal with their child regarding sexuality. Courts have, however, recognised the limits of parental control. In

⁴³ A Coetzee & L Du Toit 'Facing the sexual demon of colonial power: Decolonising sexual violence in South Africa' (2018) 25 *European Journal of Women's Studies* 216-217; N Lesko (2012) 10-11; C Macleod (2009) 381.

⁴⁴ K Robinson & C Davies 'Docile bodies and heteronormative moral subjects: Constructing the child and sexual knowledge in schooling' (2008) 12 *Sexuality & Culture* 223.



the widely cited case of *Gillick v. West Norfolk and others*,⁴⁵ a parent challenged the treatment protocol that allowed a doctor to provide contraceptive advice and services to a girl of 16 without parental consent. The court held that if the health provider could establish that the adolescent had sufficient maturity and competence to appreciate the nature and meaning of the treatment, the adolescent would not need parental consent to access contraceptive advice and treatment.

The Committee on CRC has confirmed that the right to health of children entails freedoms and entitlements that increase in importance with the growing capacity and maturity. These include the right to control one's health and body, and to make sexual and reproductive decisions.⁴⁶ Though the Committee does not mention this explicitly, this would include decisions about whether to have sex or not, what kind of sex and who to have sex with, and decisions regarding access to sexual health goods and services including contraceptives. The Committee also expressed the view that children are entitled to access health services without the consent of a third party, in accordance with the child's evolving capacity, if the health provider believes it would be in the best interest of the child.⁴⁷

It is difficult to enforce these rights against parents because the home environment in which parents exercise tremendous power is not readily accessible to the state. For example, a parent may deny a child access to resources to visit a sexual health clinic or might not allow the child to go to the clinic unless the child gives an acceptable explanation. There are therefore subtle means by which parents may exercise control that compromises the child's access to sexual health services, and in which the state may not have a compelling reason to intervene. It is therefore crucial that programs such as the YFHS go beyond putting up physical structures for young people to access services. The YFHS program should address the barriers adults erect against children and adolescents concerning their exercise of agency about sexuality. The GEA could play an essential role in addressing these barriers.

⁴⁵ *Gillick v. West Norfolk and Wisbech Health Authority and Department of Health and Social Security* [1986] 1 AC 112.

⁴⁶ CRC Committee, *General Comment 15*, para 24.

⁴⁷ CRC Committee, *General Comment 15*, para 31.



8 The concept of sexual health and rights and the GEA

The GEA could play a significant role in advancing the sexual agency of the child, especially through the concept of sexual rights. The MLC proposed Sections 19 and 20 of the GEA based on the following definition of sexual (and reproductive) health and rights:

[a] subset of human rights that are already recognized in national laws, international human rights law and other consensus statements. They include the right of all persons, free of coercion, discrimination and violence, to__

- (a) the highest attainable standard of sexual health, including access to sexual and reproductive health care services;
- (b) seek, receive and impart information related to sexuality;
- (c) sexuality education;
- (d) respect for bodily integrity;
- (e) choose their sexual partner;
- (f) decide to be sexually active or not;
- (g) have consensual sexual relations;
- (h) enter into consensual marriage;
- (i) decide whether or not and when, to have children; and
- (j) pursue a satisfying, safe and pleasurable sexual life.⁴⁸

Sections 19 and 20 of the GEA are potentially radical because they recognise the sexual agency of everyone. However, the challenge is in making these practicable. It is the role of the major policy actors to facilitate the practical application of the GEA to adolescent sexual health and rights. This thesis contributes to that endeavour by generating ideas about possibilities for practical application by undertaking a conceptual exploration of the meanings of Sections 19 and 20 of the GEA in relation to childhood (and adolescence), gender and sexuality.

⁴⁸ Malawi Law Commission (2011) 58.



Just as the definition of sexual rights recognises that these are rights already anchored in national and international law and consensus statements, Section 20 of the GEA restates the principles of non-discrimination and dignity which are core human rights values that apply to all human beings including children. The critical question in this analysis is what this means for children, for the YFHS program and other community and school programs linked or related to the YFHS program.

8.1 Equality and non-discrimination

Section 20 (1) (a) stipulates that the sexual and reproductive health and rights of every person should be respected without discrimination. Non-discrimination is prohibited under the right to equality, as is recognised in Section 20 of the Constitution which states that:

Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status.

The constitutional provision further states that:

Legislation may be passed addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices and may render such practices criminally punishable by the courts.

The Human Rights Committee has defined discrimination as:

Any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.⁴⁹

More grounds for discrimination have since been recognised including age, disabilities, ethnicity, sexual preferences and others. Various human rights treaties

⁴⁹ UN Human Rights Committee (HRC), CCPR General Comment No. 18: Non-discrimination, 10 November 1989, para 7 available at: <http://www.refworld.org/docid/453883fa8.html> (Accessed 21 August 2018).



have been developed to address specific grounds or indeed, intersecting grounds of discrimination including the CRC, CEDAW and CRPD. One such definition is the definition of sex and gender discrimination by the African Commission on Human and Peoples' Rights (ACHPR) and the ACERWC:

Sex and gender based discrimination include any distinction, exclusion or restriction or any differential treatment which is based on sex or gender and which has the objective or effect of compromising or destroying the recognition, enjoyment or exercise of a human right or a fundamental freedom.⁵⁰

Malawi is a party to these treaties and therefore is obligated to realise the right to non-discrimination on grounds established by these treaties, including discrimination that children experience because of their age, but also the intersection with other grounds such as sex and gender.

8.1.1 The dimensions of substantive equality

Non-discrimination law is described as having two elements. The first is the prohibition of direct discrimination; that is, two individuals should be treated similarly. One should not be treated less favourably than the other because of a character he or she possesses.⁵¹ States are obligated to ensure that laws and policies do not discriminate on prohibited grounds, so that for instance, a girl seeking contraceptives should not be refused contraceptives because she is not yet married, or because of her age, because it would mean she is being treated less favourably because of her marital status or age. In this instance, a healthcare provider satisfies the obligation not to discriminate when she or he does not take any positive action to treat a person differently. For instance, girls come to seek contraceptives, and the healthcare provider provides the contraceptives to any girl without questioning marital status or age. A healthcare provider therefore directly discriminates if by her or his deliberate action,

⁵⁰ African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on ending child marriage* (2017) para 11.

⁵¹ M Liebel *et al* 'Introduction' in *Children and non-discrimination: Interdisciplinary textbook*, ed. Kutsar D & Warming H (2014) 16.



he or she prevents an adolescent from accessing contraceptives because she is not married, did not come with a spouse, or is adjudged to be too young.

The second element of non-discrimination is the prohibition of indirect discrimination; that is, two dissimilarly situated individuals should be treated differently to achieve equality which would otherwise not be attained if they are treated similarly.⁵² Treating persons equally, regardless of background differences may entrench inequality. For instance, even if contraceptives are made available at health facilities, because of prejudicial attitudes toward sexuality of the child, especially girls, children may not have the same confidence levels as adults to approach the health clinic for contraceptives. Only making contraceptives available then does not address discrimination in access to sexual health commodities. The 2014 YFHS Evaluation revealed such indirect discrimination because despite sexual health services and commodities being available in public facilities, young people, especially girls, faced barriers such as prejudicial attitudes from the community or healthcare providers, for instance, that non-married children should not access condoms or that it is against culture for children to access condoms.⁵³ In order to ensure that children have access to sexual health services, the state should take measures to address such prejudices because they prevent adolescents, especially younger adolescents, from accessing sexual health services on an equal basis with others.

Fredman has argued that the notion of equality should be conceptualised as having four dimensions.⁵⁴ The first is the *redistributive dimension* of equality, whereby equality aims at breaking the cycle of disadvantage associated with status.⁵⁵ Disadvantage has predominantly been understood in terms of the distribution of resources, for instance, failure to allocate material resources to the YFHS program, including training of adequate personnel. Fredman, however, says that this ignores other aspects of disadvantage, for instance, domination or structures of power which exclude people

⁵² M Liebel *et al* (2014) 16.

⁵³ “Parents cannot be happy with youth accessing RH services and the whole community cannot accept the idea that youth should access such services” (participant, FGD with male parents, Phalombe)” Evidence to Action Project (2014) 170.

⁵⁴ S Fredman *Discrimination Law* (2011).

⁵⁵ S Fredman (2011) 26.



or undermine their self-determinative capacities. An example from the YFHS program is the dominant discourse that the child is nonsexual, which undermines children's sexual self-determination. Without transforming power relations that limit the child's sexual agency, the YFHS program may have limited relevance for the child or adolescent.

The second dimension is the *recognition dimension*, whereby equality aims at promoting respect for dignity, thereby redressing stigma, stereotyping, humiliation and violence because of one's identity.⁵⁶ This aspect of equality will be discussed further in section 3.2 below on dignity.

The third is the *transformative dimension*, whereby equality aims to accommodate difference and achieve structural change rather than promote conformity.⁵⁷ Children may face challenges to access sexual health services because they lack confidence, or because they do not have the resources that adults have, and because of the prejudicial views of adults that prevent adolescents from seeking support from them. The critical question therefore for the YFHS programmers is what measures to take to accommodate children.

The fourth dimension is participative, where equality should promote the full participation of marginalised groups.⁵⁸ For children to benefit most from the YFHS program, they need to participate in creating an environment in which the YFHS program would be accessible for them. As the YFHS Evaluation showed, prejudicial views of adults about children's sexuality constitute a significant barrier. If children were to tell adults not to hinder their access to services, their voice would most likely be muffled, just like the voice of the adolescent in the *CKW* case who challenged discriminatory practices against sexually active adolescents was 'silenced' by the court of adults.⁵⁹ The state should, therefore, take measures to promote the voice of the child in the development of the YFHS program. Linkages with school or community

⁵⁶ S Fredman (2011) 28.

⁵⁷ S Fredman (2011) 30.

⁵⁸ S Fredman (2011) 31.

⁵⁹ See *CKW* page 122 above.



programs on sexuality education could be one way to encourage such participation. These can constitute spaces where young people interact with each other, but also with adults, in a context that allows full expression of their voice on matters of sexuality and sexual health. As the Committee on CRC has stated, states should recognise the dignity and agency of adolescents, and their participation in improving their own lives.⁶⁰

8.1.2 Discrimination as processual rather than a single event

The discrimination that young people face in accessing services, in their communities and health facilities as was found in the YFHS Evaluation could best be understood as a process rather than an event. According to Timo Makkonen, the predominant understanding of discrimination tends to focus on single events traced to someone's bad intention. However, discrimination is sometimes a complex mix of direct and indirect discrimination, institutional and personal, so that the 'bad intention' is diffusely located in several institutions than precisely locatable in one entity.⁶¹ As the YFHS Evaluation shows, children are discriminated against because of prejudicial views about sexuality, of parents and the broader community. Therefore, though Section 20 (2) of the GEA imposes criminal liability on the health provider who discriminates in providing sexual health services, the limitation on the agency of the child because of both direct and indirect discrimination has a genealogy rooted in various institutional actors and spread out in diverse acts. This thesis agrees with Makkonen that "acts and situations of victimization often form a continuum in which one act follows another, and in which the totality becomes worse than the sum of its constituent parts."⁶² The failure of the YFHS program may therefore not be attributed entirely to the bad intentions of health providers at the point of care, or to parental control. Dominant discourses around childhood sexuality are perversely prevalent in social institutions, including the legal, for instance, the defilement law that conceptualises all girls below the age of 16 as sexually incompetent. It is therefore unlikely that the discrimination children face in accessing the YFHS program would be addressed by prosecuting healthcare

⁶⁰ CRC Committee, *General Comment 20* para 4.

⁶¹ T Makkonen *Multiple, compound and intersectional discrimination: Bringing the experience of the most marginalized to the fore* (2002) 5.

⁶² T Makkonen (2002) 5.



providers who discriminate at the point of care, because the discrimination is largely processual rather than a single event arising from their action alone. Of course, health providers ought to be held accountable if they discriminate, but so should teachers who limit sexual agency by not providing comprehensive sexuality education, and so should the state be held accountable for putting in place defilement laws that suggest to society that sexual conduct in children below 16 is always not normal.

8.1.3 Intersectionality and discrimination

Children are discriminated against not only because of age but intersecting grounds, for instance, disability, gender, sexual orientation, social and economic status, social location and other grounds. The YFHS Evaluation noted gender as one of the grounds for discrimination. The findings revealed that parents would tolerate boys accessing contraceptives but not girls.⁶³ Prejudicial attitudes and practices toward the sexuality of girls contribute to girls having less confidence and less support to access sexual health services than boys.⁶⁴ This experience of girls can be attributed, not to inherent shyness of girls, but to the “male drive” discourses that constitute girls as sexually passive. Girls who attempt to position themselves differently, as sexually active and assertive, face resistance. Dealing with this shyness entails shifting power relations that positions girls as sexually passive.

The YFHS Evaluation did not collect data on children and adolescents with disabilities. It is not the case that there are no young people with disabilities in the communities that were surveyed. Amongst adolescents with disabilities, girls face intersecting discrimination based on gender and disability.⁶⁵ The training manual developed to facilitate the training of healthcare providers in the YFHS program does not mention disability at all. Instead, it refers to “special needs” of young people, which is an ambiguous term. It is not recognised in disability rights and, in any case, is an ineffective euphemism to use for including persons with disabilities.⁶⁶

⁶³ Evidence to Action Project (2014) 170.

⁶⁴ Evidence to Action Project (2014) 170.

⁶⁵ UNFPA Malawi, “Taking SRHR to Young People Living with Disabilities,” 2018, <https://malawi.unfpa.org/en/news/taking-srhr-young-people-living-disabilities>. (Accessed 30 September 2019)

⁶⁶ Ministry of Health *Youth friendly health services manual* (2016).



8.2 Dignity

Section 20 (1) (b) of the GEA stipulates that healthcare providers shall “respect the dignity and integrity of every person accessing sexual and reproductive health services.” The right to dignity is also recognised in the Constitution under Section 19. The right to dignity does not render itself to an easy or precise definition in law. Rinie Steinman identifies three elements of dignity from scholarship on jurisprudential development and use of the term in courts and tribunals.⁶⁷ The first is the ontological claim that the human individual is a priceless, unique and irreplaceable being. The second is that the human person deserves respect and recognition as such kind of being. The third is that the inherent dignity of the individual demands that the state creates the minimum conditions in which the individual should flourish.⁶⁸ The right to dignity, therefore, means that the person has the right to the fullest development of personality and autonomy, to have control over oneself, to make and execute one’s choices. This development of independence takes place in the context of relationships of interdependence, and in which the state plays a crucial enabler role.

Applying dignity rights to children, as McGuirk and Mills have argued, several facts should be borne in mind. First, the right to dignity applies to children of any age as it applies to adults. Second, the fact that children are entirely or partly dependent on adults means that infringements of their rights that result in deprivation of an environment in which children can flourish or interfere with the development of autonomy have a more severe impact on their dignity.⁶⁹ The vulnerability of children requires that the state pays more considerable attention to ensuring that the rights of children impacting on autonomy and agency are not infringed.

⁶⁷ R Steinmann 'The core meaning of human dignity' (2016) 19 *Potchefstroomse Elektroniese Regsblad* 2.

⁶⁸ R Steinmann (2016) 6-7.

⁶⁹ M McGuirk & B Mills, "Climate change and the dignity rights of the child," https://www.ohchr.org/Documents/Issues/ClimateChange/RightsChild/Dignity_Rights_Project.pdf.



According to Fredman the aim of equality is to achieve dignity by addressing prejudicial treatment, harmful stereotypes, stigma, humiliation and violence on protected grounds including age, disability, race, social and economic status and so forth.⁷⁰ The *Teddy Bear Clinic*⁷¹ is an example of a court applying dignity to the sexuality of the child, and the court did so in the manner described above by Steinman, and McGuirk and Mills, that the right to dignity applies to the child just as it does to adults. The reasoning of the Court also resonates with Fredman's view that treating the child differently from adults and preventing the exercise of sexual agency of the child, by criminalising or stigmatising developmentally normal sexual expression, interferes with the development of autonomy and therefore erodes on their dignity.⁷² Recognising dignity, therefore, means that the development of the child's sexual autonomy, sexual choices and preferences must be respected. Respecting a child's autonomy does not mean that the child ought to be left alone to do what they want. It means that even as the child is dependent on the guidance of adults in the community, their sexual autonomy should be respected in accordance with their evolving capacities. In contrast to the *Teddy Bear Clinic* case, the *CKW*⁷³ case is an example of infringement of the dignity of the child. In this case, a child of 16 raised the question of why children should be criminalised for conduct that is not criminalised for adults. Why treat children differently, and in a way that demeans and degrades their sexual choices, preferences and actions of children? Unfortunately, the Court in *CKW*⁷⁴ decided to uphold the discriminatory law. Such laws support discourses that undermine the sexual agency of children. They have a constitutive effect; they entrench power relations whose material effects are the barriers children experience from parents and adults to access YFHS services, despite that the government specifically designed these for the adolescent.

⁷⁰ S Fredman (2011) 29.

⁷¹ *Teddy Bear Clinic v. Minister of Justice and Constitutional Development* 2014 (2) SA 168 (CC).

⁷² *Teddy Bear Clinic* case para 55.

⁷³ [2014] eKLR, Petition 6 of 2013 (Kenya, High Court).

⁷⁴ [2014] eKLR, Petition 6 of 2013 (Kenya, High Court).



8.3 Access to sexual health services, family planning, contraception and control of fertility

Section 19(1) (a) and (b) of the GEA recognises every person's right to adequate sexual and reproductive health which includes the right to access sexual and reproductive health services, and access to family planning services. Two of the most critical concerns for sexually active adolescents are the prevention of sexually transmitted infections and unwanted pregnancies. However, adolescents face prejudicial views about sexual activity that present barriers to their access to contraceptives. As the YFHS Evaluation revealed, the predominant view of adults was that children should not engage in sexual intercourse until they are older or married and that to allow them to access condoms is to encourage them to engage in sex.

The question of what age the child can engage in sex is problematic when adults specify an age that does not resonate with the sexual agency of the child. Though the Penal Code of Malawi sets the age of consent to sex at 16, the 2014 YFHS Evaluation revealed that 20.3% of males and 5.3% of females aged between 10-14 had already engaged in sex.⁷⁵ Delaying sexual debut is beneficial for young people. However, using punitive approaches to enforce such a policy position runs the risk of infringing on the rights of the child, because of the direct policy effects, such as the prosecution of the adolescent, and indirect effects such as stigmatisation of adolescent sexual conduct. More importantly, spending energy on stopping adolescents from having sex misfocuses on what they need, which is to support their evolving sexual agency.

Not all children experience barriers in the same way. Some may be in circumstances where there are less or no restrictions, for instance understanding parents, or indeed, absent parental care. However, it is younger adolescents who are most impacted by the stigmatisation of sexual conduct. Girls experience the stigma more than boys because of the expectations of a passive sexuality. Children with disability experience another layer of discrimination because of the stigma associated with sexuality and disability. To ensure equality and dignity of access to sexual health services, the GEA needs to inspire the YFHS program to address the intersecting discrimination against

⁷⁵ Evidence to Action Project (2014) 52.



the child and adolescent.

8.4 Protection and self-protection from sexually transmitted infection

Section 19 (1) (c) and (d) of the GEA recognises the right to protection and the right to self-protection from STIs. In proposing these provisions, the MLC drew upon Article 14 (1) (d) of the African Women’s Protocol, which recognises the right to self-protection and to be protected against STIs, including HIV/AIDS. The MLC had in mind that legislation should not assume “an idealized world in which everyone is equal and free to make empowered choices and can opt to abstain from sex, stay faithful to one’s partner or use condoms consistently.”⁷⁶ The MLC, therefore, envisaged the GEA to be one of the statutes that “address the critical role that gender relations plays in sexual and reproductive life and how it affects HIV prevention.”⁷⁷

To understand the obligations of the state to realise these rights, Malawi could look to the first General Comment of the ACHPR on the interpretation of the right to self-protection and to be protected from sexually transmitted infections.⁷⁸ The ACHPR recognised that:

[t]here are multiple forms of discrimination based on various grounds such as: race, sex, sexuality, sexual orientation, age, pregnancy, marital status, HIV status, social and economic status, disability, harmful customary practices and/or religion. In addition, the African Commission recognises that these forms of discrimination, individually or collectively, prevent women from realising their right to self-protection and to be protected.⁷⁹

The ACHPR believes that realisation of this right entails the obligation of the state to foster “an enabling, supportive, legal and social environment that empowers women to be in a position to fully and freely realise their right to self-protection and to be

⁷⁶ Malawi Law Commission (2011) 70.

⁷⁷ Malawi Law Commission (2011) 70.

⁷⁸ African Commission on Human and Peoples’ Rights General Comments No.1 on Article 14 (1)(d) and (e) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 6 November 2012.

⁷⁹ ACHPR, General Comment No 1 para 4.



protected.”⁸⁰ Creating such a conducive environment for children requires nurturing sexual agency while simultaneously protecting the child from harms of early sexual debut.

As is has been discussed above in this thesis, children such as pre-schoolers are not blank about sex and love. It is not that they understand sex and sexuality in the same way as adults do, but they do draw upon sexual meanings in their society and around them to make sense of their world according to their cognitive and affective capacity.⁸¹ It has also been shown that children can engage in sexual games which they pursue because of sexual pleasure.⁸² However, their experience of sexual contact or conduct in these instances differs from adult sex. Society must refrain from shaming children who might be involved in sexual conduct even if, ideally, they should delay sexual debut. Indeed, children have been shamed even in legal institutions that are expected to uphold the rights of the child, for instance, the Court’s reasoning in the *Charo* case shamed the girl for being sexually active at 14.

The obligations of states stated in the first General Comment of the ACHPR could be restated to apply to YFHS program as follows: The obligation to respect means Malawi should refrain from interfering directly or indirectly with the right to be protected and to self-protection (from STIs); the obligation to protect means Malawi should take measures to prevent third parties from interfering with these rights; the obligation to promote means Malawi should create the legal, social and economic conditions that enable children to exercise their rights in relation to sexual and reproductive health.⁸³ The General Comment advises that this would involve “engaging in sensitisation activities, community mobilisation, training of healthcare workers, religious, traditional and political leaders on the importance of the right to protection”.⁸⁴ The state would need to take measures to address prejudicial attitudes towards child and adolescent sexuality that constitute barriers to them accessing YFHS, to realise sexual health for

⁸⁰ ACHPR, General Comment No 1 para 10.

⁸¹ S Jackson & S Sue (2015) 51.

⁸² P Talavera (2007) 63.

⁸³ ACHPR *General Comment no 1* para 23.

⁸⁴ ACHPR *General Comment no 1* para 23.



children,

9 Toward the inclusion of children in sexual health programming

9.1 The politics of ‘sexuality’ and ‘health’

The above discussion raises the fundamental question about the extent to which the GEA envisages the inclusion of children and adolescents as subjects of sexual (and reproductive) health rights. In conceiving the GEA, the MLC was cognisant of the role of sexuality in advancing sexual health and well-being. The MLC recognised the importance of sexuality and the need to understand the complexity of factors that shape human behaviour. However, sexuality and health are political terms and must be recognised as such.

This thesis refers to the analysis by Miller and Vance of the concept of sexuality in the health and human rights discourse to describe this politics.⁸⁵ Miller and Vance commented on the expanding sexual (health) rights claims advanced by advocacy movements across the globe, that they reveal a complex and political nature of sexuality. One of the issues Miller and Vance raise, which is pertinent to child sexuality, is the concept of sexual hierarchy, a sociocultural device for evaluating sexual relationships, expression and behaviours. Some sexual relationships or conduct are considered less legitimate than others, or illegitimate, in a hierarchical system of valuation. As the YFHS Evaluation revealed, sexual relationships are generally not expected of adolescents who are not in a married relationship, so that sexual conduct between adolescents outside marriage is considered illegitimate and is not supported by most parents. Health workers frequently adopt similar attitudes toward adolescent sex and sexuality. Such attitudes and practices constitute barriers to access to sexual health services for children and adolescents, especially girls.

Apart from ‘sexuality,’ another important political term is ‘health’. The term health has been used strategically by advocates to advocate for the right to sexual health. However, the interpretation of ‘health’ may be used to exclude sexual practices that are not normative, such as same-sex intimacy.⁸⁶ Health in relation to the sexuality of

⁸⁵ AM Miller & C Vance (2004). Referenced on page 11 above of the thesis.

⁸⁶ AM Miller & C Vance (2004) 863.



adolescents is ambiguous given the cultural climate in which adolescent sexuality is perceived negatively. The challenge is that adolescent sex is treated as inherently risky. In the imagination of adults, the problems young people face such as teen pregnancies and STIs flow logically from the fact that adolescents are engaging in sex. Consensual sex between adolescents may, therefore, be excluded from the domain of 'health' or 'healthy'. Other sexualities such as homosexuality may also be condemned as 'unhealthy'. For an adolescent with a disability, sexual conduct may be categorised as 'unhealthy' not because it is intrinsically unhealthy, but because of negative perceptions about sexualities of disabled persons. Whether sexuality is healthy or unhealthy may depend on what society thinks is morally acceptable. If adolescent sexuality is morally unacceptable in society, adolescent sexual conduct is bound to be categorised as 'unhealthy' and at best, tolerated.

9.2 Accepting children as sexual, and sexual conduct between adolescents as a normal part of development

In most cultures, pre-pubescent children are imagined to be pre-sexual. However, commenting on Sigmund Freud's influence on childhood sexuality, Simon and Gagnon affirm that, "we do not become sexual all at once at puberty; there is a significant level of continuity with the past."⁸⁷ The child learns about sexuality and makes sense of sexuality through communicative processes with adults. As the child's cognitive and language skills develop, so does their grasp of the meanings of sexuality from their interactions with adults evolve. The child learns about sexuality from what the parents express verbally, but also from the reaction of parents to behaviours of children that are perceived to be sexual by the parents.⁸⁸ During childhood, therefore, the child is on a steep learning curve and actively draws from the sexual scripts provided, consciously or not, by adults.

The importance of adolescence is not so much in the physiological changes that accompany puberty, but rather, in the recognition by society of the adolescent's sexual status.⁸⁹ Adolescent sexuality acquires its meaning from social recognition and the

⁸⁷ W Simon & J Gagnon (2017) 21.

⁸⁸ W Simon & J Gagnon (2017) 23.

⁸⁹ W Simon & J Gagnon (2017) 37.



invention or imparting of cultural conventions of sexual maturity on the person. It is this process of social validation and conferment of social status by peers and adults and “the entry into the new social status that triggers an increase in the rates of overt sexual behavior and the attribution and integration of new meanings for the behavior.”⁹⁰ The gradual integration of behaviours defined as sexual through cultural sexual scripts leads to the emergence of the sexual adult.⁹¹ There is, therefore, continuity in the development of sexuality from childhood to adulthood, and cultural discourses of sexuality play an important role in shaping individual identities following bio-physiological cues signalling the maturation of the sexual faculties. The journey from childhood to adulthood is a process whereby

[p]reviously learned moral categories and oppositions (good and evil, purity and degradation, modesty) and gender role activities (aggression and submission, control and freedom, needs for achievement and affiliation) are integrated into new scripts, at first private and then collective, which contain new meanings to be applied to organs, orifices, activities, and people that make up the conventional sociosexual drama.⁹²

It follows from this understanding of sexuality development that adolescence is discursively produced through social practices. Promoting sexual health of children and adolescents, requires the inventing of a different sort of child and adolescent, one who is recognised as sexual from infancy, and recognising that a repertoire of forms of sexual conduct with self or others are developmentally normative for the child and the adolescent.⁹³

This part of the chapter draws lessons from the experience of the Netherlands in promoting adolescent sexual health. Berne and Huberman observe that Netherlands,

⁹⁰ W Simon & J Gagnon (2017) 37. This could very well explain the effect of sexual initiation as described in AC Munthali & EM Zulu (2007). At initiation rites, it is the act of recognition of the new sexual status of the initiates by adults and peers that empowers the initiates to go out and pursue sex.

⁹¹ W Simon & J Gagnon (2017) 38.

⁹² W Simon & J Gagnon (2017) 38.

⁹³ Anik Gevers and Alan Flisher, Expert opinion: Submission to the Portfolio Committee on Justice and Correctional Services Relating to the Criminal Law [Sexual Offences and Related Matters] Amendment Act Amendment Bill [B18-2014], <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/150310anik.pdf> (Accessed 25 September 2019).



Germany and France have been more successful at promoting adolescent sexual health as compared to the United States because these societies have a culture of openness and acceptance of adolescent sexuality. Increasing the provision of services alone cannot advance adolescent sexual health. An essential precondition to facilitating access to and uptake of services by adolescents is “the openness and the acceptance that young people will have intimate sexual relationships without being married and that these relationships are normal and contribute to maturing into a sexually healthy adult.”⁹⁴

Amy Schalet investigated in depth the cultural differences between the Netherlands and the United States, being countries of comparable wealth, reproductive technologies and education, and yet have a significant disparity in rates of teen pregnancy. The Netherlands has the lowest, and the United States the highest rates of teen pregnancy in the Western world.⁹⁵ Schalet’s finding regarding the difference in parental attitudes could be summarised as follows: “Dutch parents tend to 'normalize' adolescent sexuality and include it in the family while American parents 'dramatize' adolescent sexuality and exclude it from the family.”⁹⁶ Schalet noted that American parents approached adolescent sexuality negatively, conceptualising puberty as a difficult time in which the young person is at the mercy of the sexual drive or raging hormones, that are disruptive of the life of the adolescent.⁹⁷ American parents did not view sexual conduct of adolescents as relational and having the potential for love and commitment. Rather, adolescent sexuality was perceived as physically driven, experimental, promiscuous and immoral. American parents also viewed sex as dangerous because it inevitably led to bad consequences such as unwanted pregnancies. For American parents, therefore, puberty is a cause for anxiety and fear about how their child would pull through unscathed.

⁹⁴ L Berne & B Huberman *European approaches to adolescent sexual behavior and responsibility* (1999) v-vi.

⁹⁵ AT Schalet 'Raging hormones, regulated love: adolescent sexuality and the constitution of the modern individual in the United States and the Netherlands' (2000) 6 *Body & Society*; AT Schalet 'Must we fear adolescent sexuality?' (2004) 6 *Medscape General Medicine*.

⁹⁶ AT Schalet (2000) 76.

⁹⁷ AT Schalet (2000) 82.



The Dutch counterparts, however, approached adolescent sex and sexuality as normal and not inevitably problematic. Dutch parents also believed their adolescent was capable of love and commitment in a relationship and would accept the fact that when an adolescent decides to have sex, it is their considered decision which the parents would not interfere with unduly.⁹⁸ Dutch parents are therefore less worried about whether their adolescent is having sex, and more concerned about ensuring that the adolescent takes responsibility for his or her actions.

To draw out parental preconceptions about adolescent sexuality and conduct, Schalet asked parents the 'provocative question' of whether they would allow their adolescent to spend a night with an intimate partner in the home. The general response from Dutch parents was that they would permit it while American parents said they would not.⁹⁹ The reason the Dutch parents gave was that it was the choice of their adolescent, and that if they wanted to have sex, they would have it anyway, so it was more sensible for the parents to allow it than fight against it.¹⁰⁰ Going by the findings of the YFHS Evaluation and other studies about parental attitudes toward adolescent sexuality in Malawi, most Malawian parents would not side with the Dutch position, at least not openly. The extent to which Malawian parents accept, or perhaps, tolerate, adolescent sexual conduct may be open to debate. In cultures that conduct initiation rites, for instance, adolescents are expected to start experimenting with sex after the initiation, especially the boys.¹⁰¹ Munthali *et al.* comment that "although premarital sexual intercourse is disapproved of in many Malawian communities, studies have shown that many adolescents initiate sex at an early age."¹⁰² Disapproval of adolescent sexual conduct, therefore, does not necessarily stop adolescents from engaging in sex when they want and have the opportunity to do so. The only difference between the adolescents in Netherlands and Malawi is that in the former context, the adolescent develops a stronger sense of relational autonomy, is likely to make better

⁹⁸ AT Schalet (2000) 85.

⁹⁹ AT Schalet (2000) 76.

¹⁰⁰ AT Schalet (2000) 90-91.

¹⁰¹ AC Munthali & EM Zulu (2007) 166.

¹⁰² AC Munthali *et al* (2004) 4.



decisions about their sexuality and take responsibility of their sexual conduct. In Malawi, with little or no support, the adolescent has challenges taking charge of their sexual conduct.

One of the critical factors that have contributed toward better sexual health statistics for adolescents in the Netherlands could be summarised as follows: “the Dutch ... expend less time and effort trying to prevent young people from having sex and more time and effort in educating and empowering young people to behave responsibly when they decide to have sex.”¹⁰³ Dutch adolescents differ from Malawian adolescents because of the discursive practices that have shaped Dutch adolescents to accept themselves as sexual, and this allows them to exercise greater autonomy, and, therefore, responsibility for their sexual behaviour and acts. In the Netherlands, adolescents are supported by their community and social environment to use sexual health services and commodities, while in Malawi, adolescents’ exercise of sexual agency and autonomy is smothered by adult attitudes and practices.

Advancing sexual health of children and adolescent, therefore, necessitates going beyond the provision of services at YFHS facilities. The GEA should transform social norms that sustain gender inequality and conditions in which children and adolescents, especially girls, have challenges to exercise sexual agency and be responsible for their sexual health. The state has an obligation to create a conducive environment in which the person can exercise self-determination regarding sexuality. sj Miller defines self-determination as “the right to make choices to self-identify in a way that authenticates one’s self-expression, and which has the potential for the embodiment of self-acceptance.”¹⁰⁴ Feminist theorists have conceptualised self-determination, agency or autonomy, not as a possession of the individual, but as Lee has put it, “the powers of the human agent, though apparently concentrated in individual persons, are derived from a distributed network of materials, texts, bodies and persons. *Agentic independence is an emergent property of patterns of dependency* (emphasis

¹⁰³ L Berne & B Huberman (1999) v.

¹⁰⁴ sj Miller 'A queer literacy framework promoting (a)gender and (a)sexuality self-determination and justice' (2015) 104 *English Journal* 38.



supplied).”¹⁰⁵ It is out of dependence that the capacity of independent decision-making about sexuality is given meaning and supported. Dependency therefore does not defeat independence. Caregivers such as health providers need to provide the necessary support to children and adolescents as their capacity to make decisions regarding sexuality evolves. The GEA should be interpreted to allow such kind of a relationship between caregivers and children and adolescents.

9.3 Reconceiving the YFHS program to adopt positive approaches to adolescent sexuality and sexual conduct

In the YFHS Standards, adolescent sexuality is cast largely negatively. Whenever sex or sexual conduct is mentioned, it is in association with the risk of danger and disease. An example is this statement from the policy document: “Reasons for early sexual encounters include curiosity, peer influence, expectation of gifts/money (poverty) and coercion. Young people therefore need skills to deal with these pressures and expectations without putting themselves at risk.”¹⁰⁶ This statement precludes any suggestion that young people also pursue values such as intimacy, relationships and love, and that sex can be an aspect of their normative development. The YFHS program conceptualises sex as the problem, or indeed, the adolescent as the problem. In so doing, it misses the adolescent, his or her sexual feelings, wants and desires. In failing to address the adolescent’s reality, the YFHS program marginalises adolescents even before they set foot at the health facility.

To ensure that adolescents who need the services of the YFHS program do benefit from it, the YFHS program must recognise sexuality as a positive aspect of childhood and adolescence. Indeed, as the MLC has said, “[s]exual and reproductive health requires a positive approach to human sexuality and an understanding of the complex factors that shape human sexual behavior.”¹⁰⁷ The YFHS program should shift from addressing the ‘problem’ of sex to supporting the evolving sexual autonomy of the adolescent. Paying attention to the complex factors that shape sexual behaviour, entails integrating the physical, psychological, societal, cultural, educational,

¹⁰⁵ N Lee (1998) 459.

¹⁰⁶ Ministry of Health (2018) 6.

¹⁰⁷ Malawi Law Commission (2011) 57.



economic, and the spiritual in sexual health modelling and programming. Further, feminist scholars argue that such sexual health programs must take into account the gender dimension because when it is left out, the programs fail to address patriarchal ideologies that influence sexual behaviours and sexual health outcomes.¹⁰⁸ Such a critique is important for the YFHS programming in relation to the GEA because the aim of the GEA is to transform relationships between men and women.

Schalet proposes what she describes as an ABC and D conceptual model to guide policy on adolescent sexual health, which is used here for purposes of illustrating how the YFHS program could be reconceptualised to integrate an approach that respects the sexual health and rights of adolescents.¹⁰⁹ The A stands for (sexual) *autonomy*. For the adolescent to make decisions about sexuality competently and confidently, it is crucial that they develop a strong sense of autonomy, to acknowledge their sexual feelings and desires, and to be able to discern between what they want and what others want from them.¹¹⁰ Adolescents with a strong sense of sexual autonomy have more control and with it greater responsibility of their sexual conduct, such as the use of contraceptives, and are better able to recognise and manage risk associated with sexual conduct. For an adolescent with a strong sense of autonomy, sex is most likely planned and prepared for, while for an adolescent with a poor sense of autonomy sex is experienced as something outside of their control. One of the findings in a study that asked about the experience of first intercourse for girls was that “it just happened” to them, showing that they had little control over the events that culminated into the sexual act.¹¹¹

B is for *building* relationships. As adolescents develop and start to get into intimate

¹⁰⁸ DL Tolman 'Femininity as a barrier to positive sexual health for adolescent girls' (1999) 54 *Journal of the American Medical Women's Association* (1972); DL Tolman *et al* 'Gender matters: Constructing a model of adolescent sexual health' (2003) 40 *The Journal of Sex Research*.

¹⁰⁹ AT Schalet 'Beyond abstinence and risk: a new paradigm for adolescent sexual health' (2011) 21 *Womens Health Issues* s5.

¹¹⁰ AT Schalet (2011) s6.

¹¹¹ E Impett *et al* 'To be seen and not heard: femininity ideology and adolescent girls' sexual health' (2006) 35 *Archives of Sexual Behavior* 141.



relationships, they need assistance to develop the skills to build relationships that would enhance the development of their personality. Such skills include building trust, negotiating power, dealing with conflict, and how to have fun and enjoy oneself.¹¹² Skills building should address gender norms, harmful masculinities and femininities that position males as possessing an uncontrollable sex drive, and women as having a passive sexuality which makes it difficult for girls to negotiate sex, and for boys to assume that aggressive sexual behaviour is normal.¹¹³ Gender is an important dimension to facilitate the development of identities in which both boys and girls could learn sexual assertiveness rather than timidity or aggression.¹¹⁴

C is for *connectedness* with parents, caregivers and other adults. The development of autonomy very much depends on positive relationships with adult mentors and caregivers, with whom adolescents can speak openly and frankly about sexuality without fear.¹¹⁵ As discussed above, criminalising adolescent sexual conduct is an important barrier to such openness.

D stands for two notions, *diversity* and *disparity*. Young people are not a homogenous group, they comprise of diverse identities and subjectivities.¹¹⁶ The YFHS program should proactively address the needs of adolescents that have been historically marginalised, for instance, adolescents with disabilities.

Schalet proposes that policies and programs should address disparities. Poverty is one of the important factors influencing sexual health and well-being.¹¹⁷ If adolescents lack the basic necessities for survival such as in situations of conflict and humanitarian crises, they will have challenges in developing a strong sense of autonomy. While economic factors are important for creating an enabling environment in the realisation of adolescent sexual health, this is not addressed in any depth in this chapter and thesis, not because it is less important, but because it is beyond the focus of the thesis.

¹¹² AT Schalet (2011) s6.

¹¹³ DL Tolman *et al* (2003) 6.

¹¹⁴ DL Tolman *et al* (2003) 11.

¹¹⁵ AT Schalet (2011) s6.

¹¹⁶ AT Schalet (2011) s6.

¹¹⁷ AT Schalet (2011) s6.



The GEA is a potential bulwark for the protection of the sexual health and rights of the adolescent. The GEA could inspire the transformation of programmatic interventions in adolescent sexual health, and promote a positive approach toward adolescent sexuality, so that children and adolescents may be treated as dignified sexual subjects rather than as problems to be fixed or victims to be saved.

10 Conclusion

Cultural discourses about childhood sexuality impact on how sexual health services are provided and accessed by adolescents. Cultural norms around sexuality create conditions in which the adolescent fails to access services despite having the structures in place, such as health facilities. Most adolescents, especially girls have challenges to meaningfully make use of the YFHS program and all its purported benefits. Healthcare providers themselves are part of the cultural machinery that make the YFHS facilities structures of marginalisation and exclusion because adolescent sexuality and the sexual conduct of unmarried adolescents is denied or discredited.

Simon and Gagnon have elaborated that children develop sexual agency by actively drawing upon meanings of sex and sexuality from cultural scripts, through which they come to understand themselves and others as sexual. They describe a sexual learning process as one that reveals an undercurrent intergenerational tussle between children and adults, because while children are learning adult sexuality through cultural scripts available to them, adults are anxious about the sexuality development of the child and mostly react negatively to the child's expression of sexual agency. This struggle between adults and child about sexuality may have the consequence of constraining the free development of the personality of the child. Despite this, children find ingenious ways to survive as they make it towards adulthood, for instance, lying about their movements, hiding the fact that they have a sexual partner, defying parental advice, or indeed acquiescing to parental control. Children that openly defy parental expectations of sexual innocence and are sexually agentic are deemed rebellious, bad, deviant, victims or immoral, especially girl-children.

Egan and Hawkes and others have described parental attitudes toward adolescent sexuality through the concept of sexualisation, which when applied to the findings of



the YFHS Evaluation reveals the anxious concern of parents about the sexual conduct of adolescents, but also a negative construction of adolescent sexuality. Such constructions result in discursive practices that constrain sexual agency of the adolescent, for instance, parents withholding support for the education of their girl-child for fear that she would get pregnant.

Stereotypical attitudes about child and adolescent sexualities, and perceiving children and adolescents largely as “problems” or “victims”, harm their sexual health and well-being. Such attitudes and the practices they engender are harmful as envisaged in Section 3 of the GEA which defines a harmful practice as a social or cultural practice that on account of sex or gender does or is likely to undermine the dignity, health and liberty of the person, or result in physical, sexual, emotional, or psychological harm to any person. Denying that a child is sexual and expressing disapproval of adolescent sexual conduct is the basis for the infringement of their sexual health rights because it justifies the withholding of sexual health services, information and other support. The existence of YFHS facilities of themselves would not guarantee access to services for the child or adolescent. The GEA must inspire a transformation of mindsets and facilitate honest and frank discussions about adolescent sex and sexuality between adults and children. This is the route to the meaningful realisation of sexual and reproductive rights for adolescents and young people. Only in such an open society would sexuality education and promotion of condoms, and the YFHS program translate into benefit for adolescents. The GEA might have to inspire potentially subversive interventions, to subvert dominant discourses of childhood sexuality.¹¹⁸

For the GEA to impact positively on sexual health and wellbeing of children, a crucial foundational role it must play is to transform the relationship between adults and children, because it is the quality of that relationship that creates an agentic adolescent who would most likely be responsible for his or her sexual health and that of his or her

¹¹⁸ See IAD Lydia & G Marina Bernal 'Youth, Sexuality, and Human Rights: Some Reflections from Mexico' (2004) 7 *Health and Human Rights*. The authors share one strategy they used in working with young people in Mexico which involved creating colourful bags containing accurate information. Boys and girls also wore a condom around the neck to facilitate open discussions about sex and sexuality that would involve condom use, but to also show others that they are sexually active and it is okay to be sexually active (p.223).



partner. Further, it is more likely that such an adolescent, and later adult, would support the sexual agency and autonomy of the next generation of children and adolescents.



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PART III: CONCLUSION

CHAPTER 7: CONCLUSIONS AND RECOMMENDATIONS

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11 Introduction

Malawi enacted the GEA in 2013 to promote gender equality. The inquiry the thesis undertook was on how the GEA would achieve its aim for children and adolescents. The study adopted a critical perspective on using the law as an instrument for social change. In traditional legal theory, legal rules are a special body of norms governing social life. Legal rules are conceived to be apart from other regulatory systems such as religion, morality, traditions and customs. Courts of law, tribunals or quasi-judicial bodies such as treaty monitoring bodies are institutions that would objectively interpret and apply these rules to specific situations, for instance, to determine whether a child of a particular age could legally access condoms without parental consent. In traditional legal theory, the law is separate from politics. This thesis, however, adopted the view that the law is not separate from politics, despite that it operates differently from other regulatory systems. On the contrary, the law is embroiled in politics.

The thesis explained the political nature of the law using feminist poststructural theory and through the concept of discourse. Discourses shape how persons experience and act in their social world. The law is itself part of the discursive framework that constructs the social world. The GEA is, therefore, a legal instrument constructed out

of circulating discourses, and thus draws upon dominant discourses about childhood gender and sexuality. The thesis, in its discussion of the GEA, demonstrates that the law is discourse and the GEA's conceptualisation of childhood and gender draws on other discourses.

It is from this idea of the law as discourse that the central question of the thesis addressed arose, which is: How can the GEA, itself fashioned out of dominant discourses on gender and sexuality, hope to contribute to bringing about change in gender relations for children and adolescents. To answer the question, the thesis adopted a feminist poststructural theoretical framework for analysis because it foregrounds the assumption of the discursive nature of the law. The GEA is, therefore, a political instrument that reflects dominant 'truths' about gender and sexuality.¹ However, at the same time, it offers a way of thinking about how the GEA could be implemented to transform relations of power despite that it is an instrument created out of the very discourses it seeks to change.

Having critiqued the GEA, but at the same time recognised its potential to shift the gender paradigm in Malawi, the concluding chapter highlights the roles of the main policy actors who must facilitate an interpretation and implementation of the GEA to achieve its aim to change power relations. The GEA assigns these roles to the MHRC, designated as the enforcer of the GEA, and the MoGCDSW, the line ministry responsible for gender with which the GEA envisages would collaborate closely with the MHRC.² The transformative potential of the GEA not only depends on the ideology in the GEA but on the roles that these main policy actors could play to realise the potential of the GEA. The GEA could facilitate the reconstruction of the social world

¹ Here, 'truths' is put in parenthesis because it is understood in poststructural theory as that which dominant groups have made up and accept to be truth. It is not understood as objective transcendental truth about the world, because for poststructural theory, such claim would be illusory.

² The role of the MHRC is described under Part III of the GEA under the heading 'Enforcement'. According to Section 9 of the GEA, the MHRC has the mandate to protect and promote gender equality. Amongst the powers vested in the MHRC to carry out this mandate, includes, monitoring and evaluating the policies and practices of government organs, agencies and public bodies, including the private sector. Section 10 of the GEA provides that the MHRC would collaborate with the responsible Minister (MoGCDSW), for instance, to establish mechanisms aimed at progressively realising gender equality.

for children, a world in which children would not experience discrimination because of their gender identity, and a world in which children are recognised as sexual beings with the agency to make decisions regarding sexuality.

12 Summary of the study and its findings

12.1 Conceptual foundations

Chapter one described the social and political context and the question that the thesis has addressed. In the chapter, it was observed that Malawi has the political will to implement the various commitments made under consensus agreements such as the ICPD PoA to promote gender equality and sexual and reproductive health and rights for everyone including children and adolescents. Malawi's enactment of the GEA also reflects this political will. The literature review, however, showed that adolescents still face challenges regarding sexual health. Gender inequitable norms underlie this experience. The central question of the thesis, therefore, was, how the GEA would be applied to transform the social world for children, given that the GEA is a social tool constructed in gender discourses in which the dominant social norms militate against the redistribution of power. Chapter one also explained the method of inquiry. It was explained that the thesis adopted a hybrid approach and used a traditional legal method of inquiry in combination with a feminist poststructuralist methodology.

The second chapter explained the theoretical framework for conducting a critique of the GEA. It emphasised the poststructural theory for analysing discourse. The feminist poststructuralist theory was adopted because feminism is a theoretical position and movement that focuses on challenging gender inequitable relations. Feminist theory provided the basis for understanding how gender inequality is reproduced in society. The poststructuralist aspect of feminist theory was the basis for discussing what it means for the GEA to be considered as discourse. It was explained in chapter 2 that the GEA is part of a broader discursive framework, meaning that the GEA draws from existing discourses on childhood, gender and sexuality. Though the GEA draws on already existing dominant and marginal discourses that shape it, the GEA's potential to contribute to change relations of power would come from how the policy actors read and interpret the GEA to resist dominant discourses. Such a reading and interpretation would offer other possible ways of structuring social relations than those enabled by

dominant discourses. Chapter 2 concluded with how the GEA could be analysed to exploit its potential to restructure social relationships.

Chapter 3 inquired into how the GEA conceptualises childhood, gender and sexuality, and what solutions it proposes to address gender inequality. Chapter 3 found that the MLC conceptualised children largely as without sexual agency and as nonautonomous. The GEA, therefore, imagines the sexual and gendered world to be an adult world, and one in which adults relate to children in such ways as to encourage children to take up subject-positions offered by dominant gender discourses. Dominant gender discourses structure relations in such a way that boys take pleasure in behaving in masculine ways, for example, in aggressive play, while girls believe that a normal girl should behave within prescribed feminine bounds. Deviation from these positions, for example, a boy who behaves in a feminine manner, invites social disapproval or negative sanction. Further, the MLC imagined that gender equality and sexual health would be addressed through correct socialisation of boys and girls. However, literature, especially coming from critical sociological studies show that older theories of socialisation fail to account for how children take up masculine and feminine attitudes and behaviours. Newer sociological theories have shown that first, discursive frameworks provide the structure through which experience is processed. Second, children do not just passively learn gendered ways of behaving from adults. Children negotiate their way in the discursive framework taking up some positions and resisting others to shape their identity. This is how discourse works to structure experience. This also explains why persons do not adopt gender-equitable behaviour merely by taking lessons on gender. The process of developing one's subjectivity involves discourses that structure experience and the agency of the subject, who actively chooses how to engage the discourses and take up specific positions that the discourses offer.

12.2 Thematic areas: Sexuality, gender in education, and sexual health

12.2.1 Decriminalisation of adolescent sexuality

The GEA should facilitate the acknowledgement that children are sexual beings. It is normal that children at some point would start to engage in overt sexual behaviour such as consensual sex. However, a significant challenge for children is that adults



deny them the opportunities to experience sexuality positively. Criminal law exacerbates this denial of adolescent sexuality by using penal sanctions to deter children from engaging in consensual sexual conduct. Chapter 4 focused on analysing how Malawi's Penal Code provisions regulating sex with children are overbroad because instead of only protecting children from sex with older persons, it also catches children who have consensual sex with each other. Criminal law, therefore, acts to entrench the dominant discourses of childhood innocence which view children as asexual, or pre-sexual. By denying the sexuality of children, adults fail to provide the support children need to experience sex positively which is crucial to enable them to build positive sexual relationships with peers, but also to access the services they need to maintain sexual health.

The criminalisation of adolescent sexual conduct in Malawi also reveals constructions of gender inequality. Section 138 of the Penal Code criminalises sex with the girl. There is no similar provision for boys. Section 138 of the Penal Code draws from the belief that girls have a passive and fragile sexuality relative to boys. However, the law is not reflecting the world out there. Rather, the law constructs the girl as a perpetual victim of sexual conduct. The law does this by offering girls subject-positions of sexual passivity and modesty while offering boys subject-positions of sexual autonomy and agency. The law, therefore, contributes to structuring sexual relations. For instance, a girl in a sexual relationship with a boy would think that a normal girl defers decision-making around sexual matters to the boy.

12.2.2 Gender in education

Chapter 5 explored gender in education. The first observation made was that the GEA conceptualises gender in education as mainly about educating and keeping girls in school on an equal basis with boys, that is, parity. While this is important, educational achievement is not all there is to advancing gender equality, though educating the girl contributes to the welfare of women generally. The chapter, instead, focused on SRGBV, which is one of the manifestations of gender inequitable norms in school cultures. The nature of SRGBV is largely invisible and therefore trickier to address. It was argued in the chapter that the GEA's focus on the more visible aspects of SRGBV such as sexual harassment limits its potential to address insidious aspects of SRGBV, such as bullying someone because they do not behave in accordance to gender expectations, for example, an effeminate boy.

A significant obstacle to recognising the place of sexuality and gender in schools is the belief that the mind is superior to the body, and that the body corrupts the soul.³ So sexuality, represented and expressed in corporeality, tends to be excluded and suppressed in official discourses in schools. However, despite that school managements ignore or suppress sexuality, sexuality in the schools is present but hidden and unacknowledged. By default, sexuality tends to be influenced by dominant gender discourses, which, just like sexuality, are not acknowledged. The combination of the suppression of sexuality and the unacknowledged dominance of gender inequitable discourses creates the condition for making SRGBV invisible. An essential role of the main policy actors, therefore, could be to implement the GEA to make SRGBV visible.

12.2.3 Sexual health

Malawi would tremendously improve the sexual health trajectories of children and adolescents if adolescents could readily access accurate information about sex and sexuality, and sexual health services and commodities when they need them. The GEA recognises that everyone has the right to sexual and reproductive health, including access to services. The GEA articulates access to health using the core human rights principles of dignity and non-discrimination. Chapter 6 explains in greater depth the meaning of applying these human rights norms to children and adolescents. It describes how the dominant discourse of childhood innocence manifests itself as sexualisation anxiety in gendered ways. The chapter reiterates the thread that runs through the two chapters on sexuality and on gender in education, which is that adults tend to deny the sexuality of children and younger adolescents. Even for older adolescents, society treats them with some ambivalence, or as problems to be managed.

Further, gender discourses structure and shape the experience of children and adolescents mostly in invisible ways, because dominant discourses are not questioned but assumed as 'truth'. For instance, no one questions a boy who is sexually attracted to a girl. It is only when a boy is sexually attracted to a boy that society subjects him to an inquiry. To transform gender relations, therefore, requires that policy actors use

³ This is the Cartesian philosophy which emphasises that the mind is the most real thing and that the body is subject to the authority of the mind.

the GEA to reshape the experience of children and adolescents, so that children can experience being sexual and being gendered in ways that offer possibilities of choosing who they want to be, without attracting discrimination for choosing differently than what society expects.

13 Recommendations

Much as the discussion in this thesis is largely conceptual, it nevertheless provides practical suggestions on how policy actors could make a deliberate effort to shift the position of the GEA in the broader gender discourse, enabling it to be transformational.

Following the principles articulated in chapter 2 regarding reading and interpreting legal texts, an important role of the MHRC and the MoGCDSW is to facilitate a reading and interpretation of the GEA that resists dominant discourses about childhood, gender and sexuality. These discourses construct a child as immature, vulnerable, nonsexual or pre-sexual. The GEA should be implemented to change these views. It is undeniable that children are different from adults. However, the difference should not be an occasion for discrimination. The GEA should, therefore, be implemented to change attitudes about children. Policies and institutional practices should regard children as having sexual agency, and that children make choices about sexuality in ways structured by gender discourses. The role of the major policy actors of the GEA is to influence change in how gender structures the sexual experience of children.

13.1 Childhood, gender and sexuality

An important step towards transforming the world for children is to recognise that they are sexual beings and that they have sexual agency. As has been demonstrated in chapter 4, laws and policies that punish adolescents for engaging in consensual sexual conduct deny the sexuality of children, and in so doing, create conditions in which children are excluded from the support they need to experience their sexuality positively. One recommendation, therefore, is that the main policy actors of the GEA should interpret the GEA to recognise the sexual agency of children. This would include reviewing age of consent laws to expressly decriminalise consensual sexual conduct between consenting children because these laws reinforce attitudes and practices that deny the sexuality of children. When age of consent provisions do not explicitly provide that children are excluded from criminalisation, policy actors tend to interpret the law to mean that children should not engage in sexual conduct. The

implications include that children are denied access to sexual health information, services and commodities.

This thesis drew upon research with children from outside Malawi, such as research conducted by Bhana in South Africa to discuss childhood gender and sexuality. There is need for Malawi to address the lack of research evidence on how discourses of gender and sexuality impact on childhood. The MHRC and MoGCDSW should commission and encourage research on childhood gender and sexuality in Malawi to understand better how discourses operate to enable or disable children as they choose what kind of person they would want to be. Well-designed research would also contribute to developing better policies on childhood, gender and sexuality, such as how to reframe age of consent laws that protect children from harmful sexual conduct, but without denying the sexuality of children.

13.2 Gender in education

This thesis has demonstrated how school cultures are important in reproducing gender inequality because of two simultaneous processes. The first is the denial of the sexuality of children and adolescents, and the second is the structuring of attitudes and behaviours by dominant gender discourses. These make SRGBV invisible in school cultures, and at the same time, it is considered normal that boys will display masculine behaviours, while girls will be feminine. Hegemonic masculinities are therefore never challenged. The GEA should be implemented to encourage children, through their interaction with educators, to challenge and disrupt gender inequitable norms that thrive in the invisibility of sexuality and gender. The ECD Policy could be an important entry point for engaging children in gender and sexuality in school settings.⁴ Even if it is about children, the ECD Policy is mostly about what adults think they should do for children rather than conceptualising how to work with children. It does not conceptualise children as having sexual agency and as autonomous actors in their gendered world. When the ECD policy comes up for revision in 2022, the policy actors could influence the reformulation of the language of the policy to one that recognises the agency of children in reshaping gender norms. Teachers and educators

⁴ Ministry of Gender Children Disability and Social Welfare (2017).

should see children not as objects they can manipulate through the curriculum, but as partners in the project to recreate a more gender equitable social world.

As it has been already acknowledged in chapter 5 above, the curriculum could play an important role in reshaping power relations in schools. Promundo and the College of Medicine have proposed a curriculum aimed at achieving such an objective. It has not yet been adopted at policy level. The main policy actors of the GEA could work with the MoEST to adopt curriculums that would be transformative of gender equality. However, for a curriculum to be transformative, it needs a change-agent who has some capacity for reflexive engagement with children. Reflexivity is an important principle in feminist poststructuralism because whoever wants to engage in transforming discourse must first understand how their own subjectivity is a product of the very discourses they want to change. A change-maker should not assume that they are outside the forces that are actively shaping everyone else. A change-agent must realise that they are involved in resisting some discourses and accepting others and that change comes from working within existing discourses because one cannot exist outside discourse. Change involves selecting that 'truth' to which one chooses to commit, to the exclusion of other 'truths'. That is the process of creating a different version of reality that the change-agent must engage in and facilitate for others, in this case, for children. This thinking is therefore different from the idea that a curriculum is an instrument for socialisation understood as passive learning. A reflexive teacher acknowledges both the teacher's agency and the agency of the learner, and is able to engage the learner in such a way as to encourage the learner to confidently take up different subject-positions in discourse, for example, a boy who wants to behave in a feminine manner is affirmed rather than corrected, because the teacher understands the influence of dominant discourses but nevertheless opens up an opportunity for the boy to challenge the dominant discourse.

Another importance of reflexive engagement is that this is one way to make visible that which is taken for granted or assumed, such as SRGBV. Dominant discourses are not challenged because people do not need to question them. Sexuality is invisible because, teachers and students, do not acknowledge its presence. Reflexivity increases one's awareness of discourse and one's position in those discourses. Reflexivity, therefore, is a necessary condition for challenging dominant discourses.



A concrete recommendation here, therefore, is that training of teachers must include building the capacity of teachers to interact reflexively with children on matters of gender and sexuality. Capacity for reflexivity is a necessary condition for a change-agent to facilitate transformation using tools such as the curriculum. In other words, a transformative curriculum is by itself useless unless there is a change-agent who can implement the curriculum in a transformative manner.

13.3 Access to sexual health information, commodities and services

As has already been discussed above, children face attitudinal barriers to access sexual health information, commodities and services, because adults deny the sexuality of children. The challenge for younger adolescents is even greater because of the thinking that it is too early for them to engage in sexual intercourse. Indeed, they may not have reached puberty so that their sexual organs are not mature. But then sexuality is not just about sexual intercourse. Children start to understand meanings of sexuality and engage with discourses of sexuality long before their sexual organs mature. The GEA should be implemented to recognise children as having various capacities to understand sexual meanings, so that caregivers must help children experience sexuality positively at their level of understanding. For instance, children in pre-school play kiss and tell games. It makes a difference if a teacher ignores them and does not engage, or discourages them, or if the teacher reflexively engages them to help them get a positive experience from the game. Again, the ECD Policy is an important policy document in which could be included issues of sexuality. Early positive experiences of sexuality influence and have an impact on future behaviour. For instance, early positive experiences of sexuality may contribute to increased confidence in the use of sexual health services.

It is also necessary, just like for teachers and educators, to build the capacity of healthcare providers to engage reflexively with children, so that they could support the evolving confidence of the child to demand and use sexual health services and commodities.

14 Conclusion

Feminist poststructural theory is sceptical about grand transformations such as what traditional Marxist theory had envisaged about how society would eventually throw off capitalist oppression and everyone would be equal, or the idea of some strands of

feminism, that in some future patriarchy would be overthrown and men and women would be equal. The thesis has grappled with the question of whether the GEA has potential to change power relations. The thesis acknowledges that the policy actors leading in the implementation of the GEA have a mammoth task before them. It is not easy to radically shift power relations. For instance, a large proportion of adults in Malawi would not want to imagine or believe that their 13-year-old daughter could be sexually active, or that a girl could be sexually attracted to another girl. Such beliefs maintain certain relations of power that sustain discriminatory attitudes and social practices. To achieve gender equality, the main policy actors in implementing the GEA, the MHRC and the MoGCDSW would have to implement the GEA to resist these discourses that construct children as asexual or pre-sexual. Challenging power and going against the grain is a difficult political endeavour because society tends to oppose what it interprets to be radical shifts.

The thesis critiqued the position of the GEA because it draws from and sides with some dominant discourses, and because of this, it weakens the GEA's power to resist them. Despite its inherent and structural weaknesses, the GEA articulates and adopts some potentially powerful positions to resist dominant discourses such as its position against harmful practices, sexual harassment and sex discrimination. It also strongly affirms that everyone has the right to sexual and reproductive health, including access to services. It secures the right with penal sanctions directed to any health provider who provides services in a manner that is discriminatory. It implicitly, therefore, recognises that children have capacity to be sexual. However, the GEA cannot implement itself to radically change power relations. It is the role primarily assigned to the MHRC and MoGCDSW to realise the potential of the GEA.

Malawi demonstrated political will to change gendered power relations by enacting the GEA, but there is need for the main policy actors to take up this political will to realise the change the GEA promises. The thesis has offered some insights and recommendations that could enable the policy actors to realise the change of power relations that would contribute towards improving the sexual health trajectories of children. Perhaps Malawi should not expect the GEA to cause a seismic shift in gender relations any time soon. However, any shift, even if small, toward recognising that children have sexual agency, and toward building the capacity of service providers such as teachers and healthcare professionals to engage reflexively with children to



disrupt dominant gender norms, might be just what is needed to change things in very significant and meaningful ways for children.



BIBLIOGRAPHY

Cases

Martin Charo v Republic Criminal Appeal No. 32 of 2015 (High Court of Kenya).

Corbett v. Corbett (otherwise Ashley) [1970] 2 All E R 33.

C.K. (A Child) through Ripples International as her guardian and Next friend) & 11 Others v. Commissioner of Police/Inspector General of The National Police Service & 3 Others [2013] eKLR, Petition No. 8 of 2012 (High Court of Kenya).

C.K.W. v. Attorney General & Director of Public Prosecution [2014] eKLR, Petition 6 of 2013 (High Court of Kenya).

Teddy Bear Clinic v. Minister of Justice and Constitutional Development CCT 12/13 [2013] ZACC 35.

Ezekiel Cheruiyot Koros v. Republic Criminal Appeal No. 5 of 2010 (High Court of Kenya).

State v. Masuku [2015] ZWHHC 106, CRB B467/14 (High Court of Zimbabwe).

Gillick v. West Norfolk and Wisbech Health Authority and Department of Health and Social Security [1986] 1 AC 112.

Legislation

Gender Equality Act 3 of 2013 (Malawi).

Gender Equality Bill (2012) (Malawi).

Penal Code 1930 (CAP 7:01) Laws of Malawi.

Sexual Offences Act 3 of 2006 (Kenya).

The Penal Code Act (CAP 120) 1950 (as amended in 2007) (Uganda).

Government policy documents

Government of Malawi *National strategy for adolescent girls and young women 2017 – 2020* (Lilongwe: Government of Malawi).



Ministry of Gender, Children, Disability and Social Welfare, *National policy on early childhood development* (Lilongwe: Ministry of Gender, Children, Disability and Social Welfare, 2017).

Ministry of Gender Children Disability and Social Welfare, Centre for Social Research, & Centres for Disease Control and Prevention *Violence against children and young women in Malawi: Findings from a national survey, 2013* (Lilongwe: Government of Malawi, 2014).

Ministry of Health *National youth friendly health services strategy 2015-2020* (Lilongwe: Ministry of Health, 2015).

Ministry of Health *Youth friendly health services manual* (Lilongwe: Ministry of Health, 2016).

Ministry of Health *National sexual and reproductive health and rights (SRHR) policy 2017-2022* (Lilongwe: UNFPA, 2017).

Ministry of Health *National standards on youth friendly health services 2015-2020* (Lilongwe: Ministry of Health, 2018).

Treaties

Convention on the Rights of Persons with Disabilities (2006).

African Charter on the Rights and Welfare of the Child (1999).

Elimination of All Forms of Discrimination Against Women (1981).

Convention on the Rights of the Child (1990).

African Charter on the Human and Peoples' Rights on the Rights of Women in Africa (2005).

Treaty and consensus documents

African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *Joint General Comment of the African Commission on Human and Peoples' Rights*

(ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on ending child marriage (2017).

African Commission on Human and Peoples' Rights, *General Comments No.1 on Article 14 (1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (6 November 2012).

African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment on Article 31 of the African Charter on the Rights and Welfare of the Child on "the responsibilities of the child"* (2017).

Committee on the Elimination of Discrimination against Women, *Concluding observations on the seventh periodic report of Malawi*, CEDAW/C/MWI/CO/7 (2015).

UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)* E/C.12/1999/10 (8 December 1999).

UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination* (10 November 1989).

UN Committee on the Rights of the Child (CRC), *General Comment 20: The implementation of the rights of the child during adolescence* UN Doc CRC/C/GC/20 (6 December 2016).

UN Committee on the Rights of the Child (CRC), *General comment No. 7: Implementing child rights in early childhood*, CRC/C/GC/7/Rev.1 (20 September 2006).

UN Committee on the Rights of the Child *General Comment 15: The right of the child to the enjoyment of the highest attainable standard of health (art. 24)* UN Doc CRC/C/GC/15 (17 April 2013).

United Nations *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995*: United Nations, 1995).



United Nations Population Fund *Program of Action of the International Conference on Population and Development Cairo, 5–13 September 1994 (20th Anniversary Edition)*: UNFPA, 2014).

Books

Alanen, L, & B Mayall 'Explorations in generational analysis'. In *Conceptualizing child-adult relations*, edited by Alanen, L & B Mayall, 11-22. (London Routledge/Falmer, 2001).

Allan, EJ 'Feminist poststructuralism meets policy analysis'. In *Reconstructing policy in higher education: Feminist poststructural perspectives*, edited by Allan, E, SVD Iverson & R Ropers-Huilman, 11-35 (New York: Routledge, 2010).

Allen, L, & T Ingram "Beiber fever': Girls, desire and the negotiation of childhood sexualities'. In *Children, sexuality and sexualization*, edited by Renold, E, J Ringrose & RD Egan, 141-158. (New York: Palgrave Macmillan, 2015).

Ariès, P *Centuries of childhood; a social history of family life* (New York: Knopf, 1962).

Ashcroft, B, G Griffiths, & H Tiffin *The post-colonial studies reader* (London: Routledge, 2007).

Ball, SJ *Education reform: A critical and post-structural approach* (Buckingham: Open University Press, 1994).

Bannerji, H *Inventing subjects: Studies in hegemony, patriarchy and colonialism* (London: Anthem Press, 2001).

Barrett, M 'Words and things: Materialism and method in contemporary feminist analysis'. In *Destabilizing theory: Contemporary feminist debates*, edited by Barrett, M & A Phillips, 201-219. (Cambridge: Polity Press, 1998).

Barthes, R *Image, music, text* Translated by Heath, S. (London: Fontana Press, 1977).

Baxter, J *Positioning gender in discourse* (New York: Palgrave Macmillan, 2003).



- Baxter, J *Women leaders and gender stereotyping in the UK press: A poststructuralist approach* (Birmingham: Palgrave Macmillan, 2018).
- Beasley, C *Gender and sexuality: Critical theories, critical thinkers*: Sage, 2005).
- Belsey, C *Critical Practice* (London: Routledge, 2002).
- Belsey, C *Poststructuralism: A very short introduction* (Oxford: Oxford University Press, 2002).
- Berne, L, & B Huberman *European approaches to adolescent sexual behavior and responsibility* (Washington DC: Advocates for Youth, 1999).
- Bhana, D *Gender and childhood sexuality in primary school* (Singapore: Springer, 2016).
- Bové, P 'Discourse'. In *Critical terms for literary study*, edited by Lentricchia, F & T McLaughlin, 50-65. (Chicago: University of Chicago Press, 1990).
- Brooks, A *Postfeminisms: Feminism, cultural theory, and cultural forms* (London: Routledge, 1997).
- Burman, E 'Childhood, sexual abuse and contemporary political subjectivities'. In *New feminist stories of child sexual abuse: Sexual scripts and dangerous dialogue*, edited by Reavey, P & S Warner, 34-51. (London: Routledge, 2003).
- Burman, E *Developments: Child, image, nation* (London: Routledge, 2008).
- Burns, D, & M Walker 'Feminist methodologies'. In *Research methods in the social sciences*, edited by Somekh, B & C Lewin, 66-73. (London: SAGE Publications, 2005).
- Burr, V *An introduction to social constructionism* (London: Routledge, 1995).
- Burton, P *Suffering at school: Results of the Malawi gender-based violence in schools survey* (Pretoria: Institute of Security Studies, 2005).

Butler, J 'Contingent foundations: Feminism and the question of "postmodernism"'. In *Feminist contentions: A philosophical exchange*, edited by Benhabib, S, J Butler, D Cornell & N Fraser, 35-57. (New York: Routledge, 1995).

Butler, J *Gender trouble* (New York: Routledge, 1999).

Charlesworth, H 'What are "women's international human rights"' in *Human rights of women*, edited by Cook, RJ, 58-84. (Philadelphia: University Pennsylvania 1994).

Chinkuyu, AJ, & SN Maina-Chinkuyu 'Norms and rituals about sexual practices and behaviours among the Chewa of Central Malawi'. In *Sexuality: An African perspective*, edited by Khamasi, JW & SN Maina-Chinkuyu, 141-161. (Eldoret, 2005).

Chirwa, DM *Human rights under the Malawian Constitution* (Cape Town: Juta & Co., 2011).

Cocca, C *Jailbait: The politics of statutory rape laws in the United States* (Albany: State University of New York Press, 2004).

Connell, RW *Gender* (Cambridge: Polity Press, 2002).

Cook, RJ, & S Cusack *Gender stereotyping: Transnational legal perspectives* (Philadelphia: University of Pennsylvania Press, 2010).

Cosgrove, L, & M McHugh 'A post-Newtonian, postmodern approach to science: New methods in social action research'. In *Handbook of emergent methods*, edited by Hesse-Biber, SN & P Leavy, 73-86. (New York: Guilford Publications, 2008).

Culler, J *On Deconstruction: Theory and Criticism after Structuralism* (New York: Cornell University Press, 1982).

Danaher, G, T Schirato, & J Webb *Understanding Foucault* (St Leonards: Allen & Unwin, 2000).



Davies, MJ *Asking the law question* Fourth ed. (Sydney: Thomson Reuters Australia, Limited, 2017).

De Lauretis, T *Technologies of gender: Essays on theory, film, and fiction* (Bloomington: Indiana University Press, 1987).

de Saussure, F *Course in general linguistics* Translated by Baskin, W. (New York: Philosophical Library, 1959).

Derrida, J *Dissemination* Translated by Johnson, B. (London: Athlone Press, 1981).

Derrida, J *Positions* (Chicago: University of Chicago Press, 1981).

Dunphy, R *Sexual politics: An introduction* (Edinburgh: Edinburgh University Press, 2000).

Eisenstein, ZR *The female body and the law* (Berkeley: University of California Press, 1988).

Epstein, D, & R Johnson *Schooling sexualities* (Buckingham: Open University Press, 1998).

Fairclough, N *Discourse and social change* (Cambridge: Polity Press, 1992).

Fionda, J 'Legal concepts of childhood: An introduction'. In *Legal concepts of childhood*, edited by Fionda, J, 3-17. (Oxford: Hart Publishing, 2001).

Flynn, EA *Feminism beyond modernism*: Southern Illinois University Press, 2002).

Foucault, M *The archaeology of knowledge* Translated by Smith, SMA. (New York: Pantheon Books, 1972).

Foucault, M *The history of sexuality: An introduction* Translated by Hurley, R. (New York: Pantheon Books, 1978).

Foucault, M *Power/knowledge: Selected interviews and other writings, 1972-1977* Translated by Gordon, C, L Marshall, J Mepham & K Soper. (New York: Pantheon Books, 1980).

Foucault, M, & P Rabinow *Ethics: Subjectivity and truth* (New York: New Press, 1997).

Fredman, S *Discrimination Law* (Oxford: Oxford University Press, 2011).

Gadda, A *Rights, Foucault and power: a critical analysis of the United Nation Convention on the Rights of the Child*: Sociology subject Group of Social & Political Studies, University of Edinburgh, 2008).

Grieshaber, S, & GS Cannella 'From identity to identities: Increasing possibilities in early childhood education'. In *Embracing identities in early childhood education: Diversity and possibilities*, edited by Grieshaber, S & GS Cannella, 3-22. (New York: Teachers College, Columbia University, 2001).

Hall, GS *Adolescence: Its psychology and its relations to physiology, anthropology, sociology, sex, crime, religion and education (Vols I & II)* (New York: D. Appleton and Company, 1904).

Hall, S 'Introduction'. In *Formations of modernity*, edited by Hall, S & B Gieben, 1-16. (Cambridge, UK: Polity Press, 1992).

Hall, S, D Held, & G McLennan 'Introduction'. In *Modernity and its futures*, edited by Hall, S, D Held & AG McGrew, 1-11. (Cambridge: Polity Press, 1992).

Hamilton, P 'The enlightenment and the birth of social science'. In *Formations of modernity*, edited by Hall, S & B Gieben, 17-69. (Cambridge: Polity Press, 1992).

Harcourt, BE *An answer to the question: 'What is poststructuralism?'* (University of Chicago Public Law & Legal Theory Working Paper No. 1562007).

Hendrick, H 'Constructions and reconstructions of British Childhood: An interpretive survey, 1800 to the present'. In *Constructing and reconstructing childhood: Contemporary issues in the sociological study of childhood*, edited by James, A & A Prout, 34-62. (London: Falmer Press, 1997).

- Heywood, L, & J Drake 'Introduction'. In *Third wave agenda: Being feminist, doing feminism*, edited by Heywood, L & J Drake, 1-24. (Minneapolis: University of Minnesota Press, 2003).
- Hunt, A, & G Wickham *Foucault and law: Towards a sociology of law and governance* (London: Pluto Press, 1994).
- Hutchinson, T 'Doctrinal research'. In *Research methods in law*, edited by Watkins, D & M Burton, 7-33. (London: Routledge, 2013).
- Ingram, M *Carnal knowledge: Regulating sex in England, 1470-1600* (Cambridge: Cambridge University Press, 2017).
- Irvine, JM 'Cultural differences and adolescent sexualities'. In *Sexual cultures and the construction of adolescent identities*, edited by Irvine, JM, 3-28. (Philadelphia: Temple University Press, 1994).
- Jackson, S, & J Jones 'Thinking for ourselves: An introduction to feminist theorising'. In *Contemporary feminist theories*, edited by Jackson, S & J Jones, 1-11. (Edinburgh: Edinburgh University Press, 1998).
- Jackson, S, & S Sue 'A sociological history of researching childhood and sexuality: Continuities and discontinuities'. In *Children, Sexuality and Sexualization*, edited by Renold, E, J Ringrose & DR Egan, 39-55. (London: Palgrave Macmillan, 2015).
- Jaggar, A, M. *Feminist politics and human nature* (Sussex: Rowman & Allanheld, 1983).
- James, A, & A Prout 'Introduction'. In *Constructing and reconstructing childhood: Contemporary issues in the sociological study of childhood*, edited by James, A & A Prout, 7-33. (London: Falmer Press, 1997).
- James, A, & A Prout 'A new paradigm for the sociology of childhood? Provenance, promise and problems'. In *Constructing and reconstructing childhood:*



- contemporary issues in the sociological study of childhood*, edited by Prout, A & A James, 7-32. (London: Falmer Press, 1997).
- Jenks, C 'Sociological perspectives and media representations of childhood'. In *Legal concepts of childhood*, edited by Fionda, J, 21-42. (Oxford: Hart Publishing, 2001).
- Jenks, C 'Constructing childhood sociologically'. In *An introduction to childhood studies, 3rd edition*, edited by Kehily, MJ, 53-70. (Maidenhead: Open University Press, 2015).
- Jones, RB *Postcolonial representations of women: Critical issues for education* Vol. 18: Springer Science & Business Media, 2011).
- Kanter, A *The development of disability rights under international law: From charity to human rights* (London: Routledge, 2015).
- Lawson, A, & M Priestley 'The social model of disability: Questions for law and legal scholarship?'. In *Routledge handbook of disability law and human rights*, edited by Blanck, PD & E Flynn, 3-16. (London: Routledge, 2017).
- Lesko, N *Act your age! : A cultural construction of adolescence* Second ed. (New York: Routledge, 2012).
- Levesque, RJR *Adolescents, sex, and the law: Preparing adolescents for responsible citizenship* (Washington DC: American Psychological Association, 2000).
- Liebel, M, K Luhamaa, & K Gornischef 'Introduction'. In *Children and non-discrimination: Interdisciplinary textbook*, edited by Kutsar, D & H Warming, 13-30 (Tartu: University Press of Estonia, 2014).
- Linders, A 'Deconstructing adolescence'. In *International handbook on adolescent health and development: The public health response*, edited by Cherry, A, V Baltag & ME Dillon, 15-28. (Cham: Springer, 2016).
- Loomba, A *Colonialism/postcolonialism* (London: Routledge, 2015).



- Lorber, J *The variety of feminisms and their contributions to gender equality* (Oldenburg: BIS, Bibliotheks- und Informationssystem der Universität Oldenburg, 1997).
- Lyotard, J-F *The postmodern condition: A report on knowledge* Translated by Bennington, G & B Massumi. (Manchester: Manchester University Press, 1984).
- Mac an Ghail, M *The making of men: Masculinities, sexualities and schooling* (Buckingham: Open University Press, 2003).
- Macleod, C *'Adolescence', pregnancy and abortion: Constructing a threat of degeneration* (London: Routledge, 2011).
- MacNaughton, G *Rethinking gender myths in early childhood education* (St Leonards, N.S.W.: Allen & Unwin, 2000).
- MacNaughton, G *Doing Foucault in early childhood: Applying poststructural ideas* (London: RoutledgeFalmer, 2005).
- Makkonen, T *Multiple, compound and intersectional discrimination: Bringing the experience of the most marginalized to the fore* (Finland: Abo Akademi University: Institute for Human Rights, 2002).
- Malawi Law Commission, *Overview and issue of gender-based law reform in Malawi* (2003)
- Mayall, B *A history of the sociology of childhood* (London: Institute of Education Press, 2013).
- Mayr, A *Language and power: An introduction to institutional discourse* (London: Continuum, 2008).
- Mellor, D, & D Epstein 'Appropriate behavior? Sexualities, schooling and hetero-gender'. In *The SAGE handbook of gender and education*, edited by Skelton, C, B Francis & L Smulyan, 378-391. (London: SAGE Publications Ltd, 2006).



- Metzler, J 'The developing states and education: Africa'. In *International handbook of comparative education*, edited by Cowen, R & AM Kazamias, 277-294. (Dordrecht: Springer Netherlands, 2009).
- Mills, S *Michel Foucault* (London: Routledge, 2003).
- Mills, S *Discourse* (London: Routledge, 2004).
- Muncie, J *Youth & crime* (London: SAGE Publications, 2004).
- Munthali, AC, A Chimbiri, & E Zulu *Adolescent sexual and reproductive health in Malawi: A synthesis of research evidence* (New York: The Alan Guttmacher Institute, 2004).
- Nathanson, CA *Dangerous passage: The social control of sexuality in women's adolescence* (Philadelphia: Temple University Press, 1991).
- National Statistical Office (NSO), & ICF *Malawi demographic and health survey 2016-15* (Zomba [Malawi] and Maryland [USA]: NSO and ICF, 2017).
- Ncube, W 'The African cultural fingerprint? The changing concept of childhood'. In *Law, culture, tradition, and children's rights in eastern and southern Africa*, edited by Ncube, W, 11-27. (Aldershot: Ashgate/Dartmouth, 1998).
- Nicholson, LJ, & N Fraser. In *Feminism/postmodernism*, edited by Nicholson, LJ, 19-38. (New York: Routledge, 1990).
- Niemi-Kiesiläinen, J, P Honkatukia, & M Ruuskanen 'Legal texts as discourses'. In *Exploiting the limits of law: Swedish feminism and the challenge to pessimism*, edited by Gunnarsson, Å, EM Svensson & M Davies, 69-87. (London: Ashgate, 2007).
- Nollaig, F, & F Elichaoff 'Feminist postmodernism, poststructuralism, and critical theory'. In *Feminist research practice: A primer* edited by Hesse-Biber, SN, 24-72. (Los Angeles: SAGE Publications, 2013).



- Persson, Å 'An apparent boundary between law and politics'. In *Exploiting the limits of law: Swedish feminism and the challenge to pessimism*, edited by Gunnarsson, Å, E-M Svensson & M Davies, 51-68. (Aldershot: Ashgate, 2007).
- Powell, A *Sex, power and consent: Youth culture and the unwritten rules* (Cambridge: Cambridge University Press, 2010).
- Prout, A *The future of childhood: Towards the interdisciplinary study of children* (London: RoutledgeFalmer, 2005).
- Rahman, M, & S Jackson *Gender and sexuality: Sociological approaches* (Cambridge: Polity Press, 2010).
- Rajchman, J *Michel Foucault: The freedom of philosophy* (New York: Columbia University Press, 1985).
- Ritzer, G *Postmodern social theory* (New York: McGraw-Hill, 1997).
- Rivers, N *Postfeminism(s) and the arrival of the fourth wave: Turning tides* (Cham, Switzerland: Springer International Publishing, 2017).
- Roberts, DE *Killing the black body: Race, reproduction, and the meaning of liberty* (New York: Pantheon Book, 1997).
- Robinson, K, & C Davies 'Sexuality education in early childhood'. Chap. 217-242 In *The Palgrave handbook of sexuality education*, edited by Allen, L & ML Rasmussen, 217-242. (London: Palgrave Macmillan, 2017).
- Robinson, KH *Innocence, knowledge and the construction of childhood: The contradictory nature of sexuality and censorship in children's contemporary lives* (Oxon: Routledge, 2013).
- Robinson, KH, & C Jones Diaz *Diversity and difference in early childhood education: Issues for theory and practice* (Maidenhead: Open Society Press, 2005).
- Rousseau, J-J *Emile: Or, on education* Translated by Bloom, A. (New York: Basic Books, 1979).

Said, E 'Orientalism' (1979) 199 *New York: Vintage*.

Samuel, G 'Comparative law and its methodology'. In *Research methods in law*, edited by Watkins, D & M Burton, 100-118. (New York: Routledge, 2013).

Sawyer, SM, & GC Patton 'Health and well-being in adolescence: A dynamic profile'. In *Handbook of adolescent development research and its impact on global policy*, edited by Lansford, JE & P Banati, 27-45. (New York: Oxford University, 2018).

Scott, JW 'Deconstructing equality-versus-difference: Or, the uses of poststructuralist theory for feminism'. In *The postmodern turn: New perspectives on social theory*, edited by Seidman, S, 282-298. (Cambridge: Cambridge University Press, 1994).

Sim, S 'Postmodernism and philosophy'. In *The Routledge companion to postmodernism*, edited by Sim, S, 3-14. (London: Routledge, 2011).

Simon, W, & J Gagnon *Sexual conduct: The social sources of human sexuality* 2nd ed. (New York: Routledge, 2017).

Sloth-Nielsen, J 'Modern African childhoods: does law matter?'. In *Current legal issues, volume 14: Law and childhood studies*, edited by Freeman, M, 117-132. (Oxford: Oxford University Press, 2012).

Smith, K 'Deconstructing discourses to rapture fairytales of the "ideal" childhood'. In *Handbook of childhood and youth studies*, edited by Wyn, J & H Cahill, 21-33. (Singapore: Springer, 2015).

Spivak, GC, & J Derrida *Of grammatology* (Baltimore; London: The Johns Hopkins University Press, 1998).

Stainton Rogers, W, & R Stainton Rogers *The psychology of gender and sexuality: An introduction* (Maidenhead: Open University Press, 2001).

- Talavera, P 'The myth of the asexual child in Namibia'. In *Unravelling taboos: Gender and sexuality in Namibia*, edited by LaFont, S & D Hubbard, 58-68. (Windhoek: Legal Assistance Centre, 2007).
- Tolman, DL *Dilemmas of desire: Teenage girls talk about sexuality* (Cambridge: Harvard University Press, 2005).
- Tong, R, & TF Botts *Feminist thought: A more comprehensive introduction* (New York: Routledge, 2018).
- Unterhalter, E 'Fragmented frameworks? Researching women, gender, education, and development'. In *Beyond access*, edited by Aikman, S & E Unterhalter, 13-35. (Oxford: Oxfam Publishing, 2005).
- Vance, CS 'Pleasure and danger: Toward a politics of sexuality'. In *Pleasure and danger: Exploring female sexuality*, edited by Vance, CS, 1-27. (Boston: Routledge & K. Paul, 1984).
- Waites, M *The age of consent: Young people, sexuality and citizenship* (Hampshire: Palgrave Macmillan, 2005).
- Walkerdine, V 'Developmental psychology and the child-centred pedagogy: the insertion of Piaget into early education'. In *Changing the subject: Psychology, social regulation and subjectivity*, edited by Hollway, W, C Venn, V Walkerdine, J Henriques & C Urwin, 148-198. (London: Taylor & Francis, 2004).
- Walkerdine, V, & University of London Girls Mathematics Unit *Counting girls out* (Bristol: Falmer Press, 1998).
- Watkins, D, & M Burton 'Introduction'. In *Research methods in law*, edited by Watkins, D & M Burton, 1-6. (New York: Routledge, 2013).
- Weedon, C *Feminist practice and poststructuralist theory* (Oxford: Blackwell, 1987).
- Westerman, PC 'Open or autonomous? The debate on legal methodology as the reflection of the debate in law'. In *Methodologies in legal research which kind*

of method or what kind of discipline? edited by Hoecke, M, 87-110. (Oxford: Hart, 2011).

Woodhead, M 'Childhood studies: Past, present and future'. In *An introduction to childhood studies*, edited by Kehily, MJ, 19-33. (Maidenhead: Open University Press, 2015).

Woog, V, & A Kågesten *The sexual and reproductive health needs of very young adolescents aged 10–14 in developing countries: What does the evidence show?* (New York: Guttmacher Institute, 2017).

World Health Organisation *Adolescent friendly health services. An agenda for change* (Geneva: World Health Organisation, 2002).

World Health Organisation *Global standards for quality health-care services for adolescents* (Geneva: World Health Organisation, 2015).

Wright, J 'Post-structural methodologies: The body, schooling and health'. In *Body knowledge and control: Studies in the sociology of education and physical culture*, edited by Evans, J, B Davies & J Wright, 19-32. (London: Routledge, 2004).

Young, R *Discursive practice in language learning and teaching* (Malden, MA: Wiley, 2009).

Zalewski, M *Feminism after postmodernism: Theorising through practice* (London: Routledge, 2000).

Articles

Adams, E, & S Pierre 'Poststructural feminism in education: An overview' (2000) 13 *Qualitative Studies in Education* 477-515.

Agar, M 'Institutional discourse' (1985) 5 *Text* 147-168.

Allen, L 'Denying the sexual subject: schools' regulation of student sexuality' (2007) 33 *British Educational Research Journal* 221-234.



- Andruszkiewicz, M 'Post-structuralist inspirations in legal discourse' (2011) 26 *Studies in Logic, Grammar and Rhetoric* 63-76.
- Angelides, S 'Feminism, child sexual abuse, and the erasure of child sexuality' (2004) 10 *GIQ: A Journal of Lesbian and Gay Studies* 141-177.
- Bacchi, C 'Poststructuralism, discourse and problematization: Implications for gender mainstreaming' (2010) 4 *Kvinder, Koen & Forskning* 62-71.
- Balkin, JM 'Deconstructive practice and legal theory' (1987) 96 *The Yale Law Journal* 743-786.
- Barnes, T 'The fight for control of African women's mobility in colonial Zimbabwe, 1900-1939' (1992) 17 *Signs* 586-608.
- Barroso, C 'Beyond Cairo: Sexual and reproductive rights of young people in the new development agenda.' (2014) 9 *Global Public Health* 639-646.
- Bates, V 'The legacy of 1885: Girls and the age of sexual consent' (2015) *History and Policy*.
- Bates, V 'The child as risk: Precocious girls and sexual consent in late Victorian Britain' (2017) 7 *Law, Crime & History Law, Crime and History* 126-144.
- Bay-Cheng, LY 'The trouble of teen sex: The construction of adolescent sexuality through school-based sexuality education' (2003) 3 *Sex Education* 61-74.
- Bhana, D 'Children are children: Gender doesn't matter' (2003) 17 *Agenda* 37-45.
- Bhana, D 'Love, sex and gender: Missing in African child and youth studies' (2017) 42 *Africa Development* 251-264.
- Bhana, D 'Girls negotiating sexuality and violence in the primary school' (2018) 44 *British Educational Research Journal* 80-93.

- Bisika, T, P Ntata, & S Konyani 'Gender-violence and education in Malawi: A study of violence against girls as an obstruction to universal primary school education' (2009) 18 *Journal of Gender Studies* 287-294.
- Blaise, M 'Kiss and tell: Gendered narratives and childhood sexuality' (2010) 35 *Australasian Journal of Early Childhood* 1-9.
- Blum, RW 'Young people: not as healthy as they seem' (2009) 374 *Lancet* 853-854.
- Blum, RW, K Mmari, & C Moreau 'It begins at 10: How gender expectations shape early adolescence around the world' (2017) 61 *Journal of Adolescent Health* S3-S4.
- Blum, RW, & K Nelson-Mmari 'The health of young people in a global context' (2004) 35 *Journal of Adolescent Health* 402-418.
- Bourdieu, P 'The force of law: Toward a sociology of the juridical field' (1987) 38 *Hastings Law Journal* 805-813.
- Braun, A, M Maguire, & SJ Ball 'Policy enactments in the UK secondary school: Examining policy, practice and school positioning' (2010) 25 *Journal of Education Policy* 547-560.
- Brickell, C 'The sociological construction of gender and sexuality' (2006) 54 *The Sociological Review* 87-113.
- Bullough, VL 'Age of consent: A historical overview' (2005) 16 *Journal of Psychology & Human Sexuality* 25-42.
- Carpenter, B, E O'Brien, S Hayes, & J Death 'Harm, responsibility, age, and consent' (2014) 17 *New Criminal Law Review* 23-54.
- Carpenter, LM 'Gendered sexuality over the life course: A conceptual framework' (2010) 53 *Sociological Perspectives* 155-178.



- Chandra-Mouli, V, M Plesons, E Adebayo, A Amin, M Avni, JM Kraft, C Lane, *et al.* 'Implications of the global early adolescent study's formative research findings for action and for research' (2017) 61 *The Journal of Adolescent Health* S5-S9.
- Chandra-Mouli, V, J Svanemyr, A Amin, H Fogstad, L Say, F Girard, & M Temmerman 'Twenty years after international conference on population and development: Where are we with adolescent sexual and reproductive health and rights?' (2015) 56 *Journal of Adolescent Health* S1-S6.
- Chanock, M 'Neither customary nor legal: African customary law in the era of family law reform' (1989) 3 *International Journal of Law, Policy and the Family* 72-88.
- Chirwa, G, & D Naidoo 'Structural and social constraints in the teaching of Life Skills for HIV/AIDS prevention in Malawi primary schools' (2014) 4 *South African Journal of Childhood Education* 61-79.
- Coetzee, A, & L Du Toit 'Facing the sexual demon of colonial power: Decolonising sexual violence in South Africa' (2018) 25 *European Journal of Women's Studies* 214-227.
- Coetzee, S 'Discipline in Nigerian schools within a human rights framework' (2010) 10 *African Human Rights Law Journal* 478-514.
- Cohen, WB 'The colonized as child: British and French colonial rule' (1970) 3 *African Historical Studies* 427-431.
- Cooper, R 'Modernism, post modernism and organizational analysis 3: The contribution of Jacques Derrida' (1989) 10 *Organization Studies* 479-502.
- Cunningham, H 'Histories of childhood' (1998) 103 *The American Historical Review* 1195-1208.
- Davies, B 'The discursive production of the male/female dualism in school settings' (1989) 15 *Oxford Review of Education* 229-241.

- Davies, B 'The concept of agency: A feminist poststructuralist analysis' (1991) 30 *Social Analysis: The International Journal of Social and Cultural Practice* 42-53.
- Davies, B, & C Banks 'The gender trap: a feminist poststructuralist analysis of primary school children's talk about gender' (1992) 24 *Journal of Curriculum Studies* 1-25.
- Donaldson, M 'What is hegemonic masculinity?' (1993) 22 *Theory and Society* 643-657.
- Dunne, M 'Gender, sexuality and schooling: Everyday life in junior secondary schools in Botswana and Ghana' (2007) 27 *International Journal of Educational Development* 499-511.
- Dunne, M, S Humphreys, & F Leach 'Gender violence in schools in the developing world' (2006) 18 *Gender and Education* 75-98.
- Durojaye, E 'Realizing access to sexual health information and services for adolescents through the Protocol to the African Charter on the Rights of Women' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 135-172.
- Durojaye, E 'Access to contraception for adolescents in Africa: A human rights challenge' (2011) 44 *The Comparative and International Law Journal of Southern Africa* 1-29.
- Fatusi, AO, & MJ Hindin 'Adolescents and youth in developing countries: Health and development issues in context' (2010) 33 *Journal of Adolescence* 499-508.
- Fine, M 'Sexuality, schooling, and adolescent females: The missing discourse of desire' (1988) 58 *Harvard Educational Review* 29-53.
- Fischel, JJ 'Per se or power? Age and sexual consent' (2010) 22 *Yale Journal of Law & Feminism* 279-341.

- Gavey, N 'Feminist poststructuralism and discourse analysis' (1989) 13 *Psychology of Women Quarterly* 459-475.
- Geronimus, AT 'Damned if you do: Culture, identity, privilege, and teenage childbearing in the United States' (2003) 57 *Social Science & Medicine* 881-893.
- Gillander Gådin, K, & N Stein 'Do schools normalise sexual harassment? An analysis of a legal case regarding sexual harassment in a Swedish high school' (2019) 31 *Gender and Education* 920-937.
- Grant, MJ 'Girls' schooling and the perceived threat of adolescent sexual activity in rural Malawi' (2012) 14 *Culture, Health & Sexuality* 73-86.
- Graycar, R, & M Jenny 'Law reform: What's in it for women?' (2005) 23 *Windsor YearBook of Access to Justice* 393-419.
- Gruber, A 'The feminist war on crime' (2007) 92 *Iowa Law Review* 741-833.
- Gruber, A 'A "neo-feminist" assessment of rape and domestic violence law reform' (2012) 15 *Journal of Gender Race and Justice* 583-615.
- Haberland, NA 'The case for addressing gender and power in sexuality and HIV education: A comprehensive review of evaluation studies' (2015) 41 *International Perspectives on Sexual and Reproductive Health* 31-42.
- Habermas, J, & S Ben-Habib 'Modernity versus postmodernity' (1981) *New German Critique* 3-14.
- Hawkes, G, & RD Egan 'Landscapes of erotophobia: The sexual(ized) child in the postmodern Anglophone West' (2008) 12 *Sexuality & Culture* 193-203.
- Haywood, C, & MMA Ghail 'The sexual politics of the curriculum: Contesting values' (1995) 5 *International Studies in Sociology of Education* 221-236.
- Hollander, D 'Long-term benefits of delaying first sex appear to be limited' (2008) 40 *Perspectives on Sexual and Reproductive Health* 121-122.



- Hollway, W 'Women's power in heterosexual sex' (1984) 7 *Women's Studies International Forum* 63-68.
- Hutchinson, T, & N Duncan 'Defining and describing what we do: Doctrinal legal research' (2012) 17 *Deakin Law Review* 83-119.
- Hutchinson, TC 'Valé Bunny Watson? Law librarians, law libraries and legal research in the post-internet era' (2014) 106 *Law Library Journal* 579-592.
- Hutchinson, TC 'The doctrinal method: Incorporating interdisciplinary methods in reforming the law' (2015) 8 *Erasmus Law Review* 130-138.
- Impett, E, D Schooler, & D Tolman 'To be seen and not heard: Femininity ideology and adolescent girls' sexual health' (2006) 35 *Archives of Sexual Behavior* 131-144.
- Jejeebhoy, SJ, AJF Zavier, & KG Santhya 'Meeting the commitments of the ICPD Programme of Action to young people' (2013) 21 *Reproductive Health Matters* 18-30.
- Johnson, MK, R Crosnoe, & GH Elder, Jr. 'Insights on adolescence from a life course perspective' (2011) 21 *Journal of Research on Adolescence* 273-280.
- Kågesten, A, S Gibbs, RW Blum, C Moreau, V Chandra-Mouli, A Herbert, & A Amin 'Understanding factors that shape gender attitudes in early adolescence globally: A mixed-methods systematic review' (2016) 11 *PLoS ONE* e0157805.
- Kangaude, GD, & A Skelton '(De)criminalizing adolescent sex: A rights-based assessment of age of consent laws in Eastern and Southern Africa' (2018) 8 *SAGE Open* 1-12.
- Katenga-Kaunda, APK 'Are we right to blame it all on colonialism? The subject of history and gender in schools in a Malawian context' (2015) 10 *Journal of Comparative Social Work*.
- Kessler, M 'Legal discourse and political intolerance: The ideology of clear and present danger' (1993) 27 *Law & Society Review* 559-597.

- Kessler, M 'Lawyers and social change in the postmodern world' (1995) 29 *Law & Society Review*. 769-790.
- Kitzinger, J 'Defending innocence: Ideologies of childhood' (1988) 28 *Feminist Review* 77-87.
- Kok, A 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Proposals for legislative reform' (2008) 24 *South African Journal on Human Rights* 445-471.
- Kok, A 'Is law able to transform society?' (2010) 127 *South African Law Journal* 59-83.
- Lahelma, E 'Gendered conflicts in secondary school: Fun or enactment of power?' (2002) 14 *Gender and Education* 295-306.
- Lam, C-M 'Deconstructing childhood as a way to justice' (2013) 17 *Paideusis* 27-37.
- Lane, C, CL Brundage, & T Kreinin 'Why we must invest in early adolescence: Early intervention, lasting impact' (2017) 61 *The Journal of Adolescent Health* S10-S11.
- Lee, N 'Towards an immature sociology' (1998) 46 *The Sociological Review* 458-481.
- Legrand, P 'Comparative legal studies and commitment to theory' (1995) 58 *Modern Law Review* 262-273.
- Legrand, P 'How to compare now' (1996) 16 *Legal Studies* 232-242.
- Lydia, IAD, & G Marina Bernal 'Youth, Sexuality, and Human Rights: Some Reflections from Mexico' (2004) 7 *Health and Human Rights* 217-230.
- MacKinnon, CA 'Feminism, Marxism, method, and the state: An agenda for theory' (1982) 7 *Signs: Journal of Women in Culture and Society* 515-544.
- Macleod, C 'Deconstructive discourse analysis: Extending the methodological conversation' (2002) 32 *South African Journal of Psychology* 17-25.

- Macleod, C 'Danger and disease in sex education: The saturation of 'adolescence' with colonialist assumptions' (2009) 11 *Journal of Health Management* 375-389.
- Martin, DL 'Retribution revisited: A reconsideration of feminist criminal law reform strategies' (1998) 36 *Osgoode Hall Law Journal* 151-188.
- Mégret, F 'The Disabilities Convention: Human rights of persons with disabilities or disabilities rights?' (2008) 30 *Human Rights Quarterly* 494-516.
- Merry, SE 'Human rights law and the demonisation of culture (and anthropology along the way)' (2003) 26 *Political and Legal Anthropology Review* 55-76.
- Miller, AM 'Sexual but not reproductive: Exploring the junction and disjunction of sexual and reproductive rights' (2000) 4 *Health and Human Rights* 68-109.
- Miller, AM 'Uneasy promises: sexuality, health, and human rights' (2001) 91 *American Journal of Public Health* 861.
- Miller, AM, & C Vance 'Sexuality, human rights and health' (2004) 7 *Health and Human Right Journal* 5-15.
- Mmari, K, RW Blum, R Atnafou, E Chilet, S de Meyer, O El-Gibaly, S Basu, *et al.* 'Exploration of gender norms and socialization among early adolescents: The use of qualitative methods for the global early adolescent study' (2017) 61 *Journal of Adolescent Health* S12-s18.
- Morris, HF 'A history of the adoption of codes of criminal law and procedure in British Colonial Africa, 1876–1935' (1974) 18 *Journal of African Law* 6-23.
- Msibi, T 'The lies we have been told: On (homo) sexuality in Africa' (2011) 58 *Africa Today* 55-77.
- Muhanguzi, FK 'Gender and sexual vulnerability of young women in Africa: Experiences of young girls in secondary schools in Uganda' (2011) 13 *Culture, Health & Sexuality* 713-725.

- Munthali, AC, & EM Zulu 'The timing and role of initiation rites in preparing young people for adolescence and responsible sexual and reproductive behaviour in Malawi' (2007) 11 *African Journal of Reproductive Health* 150-167.
- Mutharika, P 'The 1995 Democratic Constitution of Malawi' (1996) 40 *Journal of African Law* 205-220.
- Namphande, P, L Clarke, S Farren, & A McCully 'Education for democratic citizenship in Malawian secondary schools: Balancing student voice and adult privilege' (2017) 47 *Compare: A Journal of Comparative and International Education* 703-721.
- Ndofirepi, AP, & A Shumba 'Conceptions of "child" among traditional Africans: A philosophical purview' (2014) 45 *Journal of Human Ecology* 233-242.
- Nedelsky, J 'Reconceiving autonomy: Sources, thoughts and possibilities' (1989) 1 *Yale Journal of Law and Feminism* 7-36.
- Njeula, JC 'A study on influence of traditional initiation practices to reduce spread of HIV and AIDS in Chileka, a rural area in Blantyre in Malawi' (2014) 1 *International Journal of Research and Review* 16-28.
- Nobelius, A-M, B Kalina, R Pool, J Whitworth, J Chesters, & R Power 'Delaying sexual debut amongst out-of-school youth in rural southwest Uganda' (2010) 12 *Culture, Health & Sexuality* 663-676.
- Paechter, C 'Reconceptualizing the gendered body: learning and constructing masculinities and femininities in school' (2006) 18 *Gender and Education* 121-135.
- Pande, I "'Listen to the child': Law, sex, and the child wife in Indian historiography' (2013) 11 *History Compass* 687-701.
- Parikh, SA "' They arrested me for loving a schoolgirl": Ethnography, HIV, and a feminist assessment of the age of consent law as a gender-based structural intervention in Uganda' (2012) 74 *Social Science and Medicine* 1774-1782.

- Parkes, J 'The evolution of policy enactment on gender-based violence in schools' (2016) 46 *PROSPECTS* 93-107.
- Patterson, D 'Postmodernism/Feminism/Law' (1992) 77 *Cornell Law Review* 254-317.
- Phillips, O '(Dis)continuities of custom in Zimbabwe and South Africa: The implications for gendered and sexual rights' (2004) 7 *Health and Human Rights* 82-113.
- Prout, A 'Taking a step away from modernity: Reconsidering the new sociology of childhood' (2011) 1 *Global Studies of Childhood* 4-14.
- Renold, E 'Coming out': Gender, (hetero)sexuality and the primary school' (2000) 12 *Gender and Education* 309-326.
- Rich, A 'Compulsory heterosexuality and lesbian existence' (1980) 5 *Signs* 631-660.
- Ringrose, J 'Successful girls? Complicating post-feminist, neoliberal discourses of educational achievement and gender equality' (2007) 19 *Gender and Education* 471-489.
- Robinson, K, & C Davies 'Docile bodies and heteronormative moral subjects: Constructing the child and sexual knowledge in schooling' (2008) 12 *Sexuality & Culture* 221-239.
- Robinson, K, & C Davies 'Tomboys and sissy girls: Exploring girls' power, agency and female relationships in childhood through the memories of women' (2010) 35 *Australasian Journal of Early Childhood* 24-31.
- Robinson, KH 'In the name of 'childhood innocence': A discursive exploration of the moral panic associated with childhood and sexuality' (2008) 14 *Cultural Studies Review* 113-129.
- Rwezaura, B 'Competing 'images' of childhood in the social and legal systems of contemporary sub-Saharan Africa' (1998) 12 *International Journal of Law, Policy and the Family* 253-278.

Savage-Oyekunle, OA 'Adolescents' access to emergency contraception in Africa: An empty promise?' (2017) 17 *African Human Rights Law Journal* 475-526.

Savage-Oyekunle, OA, & A Nienaber 'Female adolescents' evolving capacities in relation to their right to access contraceptive information and services: a comparative study of South Africa and Nigeria' (2015) 48 *The Comparative and International Law Journal of Southern Africa* 98-123.

Schalet, AT 'Raging hormones, regulated love: adolescent sexuality and the constitution of the modern individual in the United States and the Netherlands' (2000) 6 *Body & Society* 75-105.

Schalet, AT 'Must we fear adolescent sexuality?' (2004) 6 *Medscape General Medicine*.

Schalet, AT 'Beyond abstinence and risk: a new paradigm for adolescent sexual health' (2011) 21 *Womens Health Issues* S5-7.

Schulhofer, SJ 'Taking sexual autonomy seriously: Rape law and beyond' (1992) 11 *Law and Philosophy* 35-94.

Shahjahan, RA 'Decolonizing the evidence - based education and policy movement: Revealing the colonial vestiges in educational policy, research, and neoliberal reform' (2011) 26 *Journal of Education Policy* 181-206.

Shaw, D 'Access to sexual and reproductive health for young people: Bridging the disconnect between rights and reality' (2009) 106 *International Journal of Gynecology & Obstetrics* 132-136.

Shefer, T, D Bhana, & R Morrell 'Teenage pregnancy and parenting at school in contemporary South African contexts: Deconstructing school narratives and understanding policy implementation' (2013) 31 *Perspectives in Education* 1-10.



- Sippel, S 'ICPD beyond 2014: Moving beyond missed opportunities and compromises in the fulfilment of sexual and reproductive health and rights' (2014) 9 *Global Public Health* 620-630.
- sj Miller 'A queer literacy framework promoting (a)gender and (a)sexuality self-determination and justice' (2015) 104 *English Journal* 37-44.
- Skolnick, A 'The limits of childhood: Conceptions of child development and social context' (1975) 39 *Law and Contemporary Problems* 38-77.
- Smith, T 'Rethinking modernism and modernity now' (2014) 35 *Filozofski Vestnik* 271-319.
- Steinmann, R 'The core meaning of human dignity' (2016) 19 *Potchefstroomse Elektroniese Regsblad* 1-32.
- Tamale, S 'The right to culture and the culture of rights: A critical perspective on women's sexual rights in Africa' (2008) 16 *Feminist Legal Studies* 47-69.
- Thorne, B 'Re-visioning women and social change: Where are the children?' (1987) 1 *Gender & Society* 85-109.
- Thorne, B 'From silence to voice: bringing children more fully into knowledge' (2002) 9 *Childhood* 251-254.
- Thorne, B "'Childhood": Changing and dissonant meanings' (2009) 1 *International Journal of Learning and Media* 19-27.
- Tobin, J 'The international obligation to abolish traditional practices harmful to children's health: What does it mean and require of states' (2009) 9 *Human Rights Law Review* 373-396.
- Tolman, DL 'Doing desire: Adolescent girls' struggles for/with sexuality' (1994) 8 *Gender and Society* 324-342.
- Tolman, DL 'Femininity as a barrier to positive sexual health for adolescent girls' (1999) 54 *Journal of the American Medical Women's Association* (1972) 133-138.



Tolman, DL, MI Striepe, & T Harmon 'Gender matters: Constructing a model of adolescent sexual health' (2003) 40 *The Journal of Sex Research* 4-12.

Turkel, G 'Michel Foucault: Law, power, and knowledge' (1990) 17 *Journal of Law and Society* 170-193.

Weiss, E, D Whelan, & GR Gupta 'Gender, sexuality and HIV: Making a difference in the lives of young women in developing countries' (2000) 15 *Sexual and Relationship Therapy* 233-245.

Winter, B, D Thompson, & S Jeffreys 'The UN approach to harmful traditional practices: Some conceptual problems' (2002) 4 *International Feminist Journal of Politics* 72-94.

Youdell, D 'Sex–gender–sexuality: How sex, gender and sexuality constellations are constituted in secondary schools' 2005) 17 *Gender and Education* 249-270.

Reports

CHRR, & CEDEP. "The situation of Intersex children in Malawi." Lilongwe: CHRR and CEDEP, 2016.

DevTech Systems. "The safe schools program Malawi assessment report October 25th – November 5th, 2004." Devtech Systems, 2004.

Dunne, M, S Humphreys, & F Leach *Gender and violence in schools: Paper commissioned for the EFA global monitoring report 2003/4, the leap to equality* (Paris: The United Nations Educational, Scientific and Cultural Organization, 2003).

Evidence to Action Project *Evaluation of youth-friendly health services in Malawi* (Washington DC: Evidence to Action Project, 2014).

The Other Foundation *Canaries in the coal mines: An analysis of spaces for LGBTI people activism in Malawi* (Johannesburg: The Other Foundation, 2017).

Global Early Adolescent Study 'Blantyre summary report' 2018.

Leach, F, M Dunne, & F Salvi. "School-related gender-based violence: A global review of current issues and approaches in policy, programming and implementation responses to school - related gender - based violence (SRGBV) for the education sector." 2014.

Leach, FE, V Fiscian, E Kadzamira, E Lemani, & P Machakanja *An investigative study of the abuse of girls in African schools* (London: Department for International Development, 2003).

Malawi Human Rights Commission *Cultural practices and their impact on the enjoyment of human rights, particularly the rights of women and children in Malawi* (Lilongwe: Malawi Human Rights Commission, 2006).

Malawi Human Rights Commission and Southern Africa Litigation Centre. "Towards a human rights-based approach to learner pregnancy management in Malawi." 2017.

Malawi Law Commission *Report of the Law Commission on the Criminal Justice Reform on the Review of the Penal Code (CAP 7:01)* (Lilongwe: Malawi Law Commission, 2000).

Malawi Law Commission *Report of the Law Commission on the review of the laws on marriage and divorce* (Lilongwe: Malawi Law Commission, 2006).

Malawi Law Commission *Report of the Law Commission on the development of the Gender Equality Act* (Lilongwe: Malawi Law Commission, 2011).

Malawi Law Commission *Law Commission report on review of the Penal Code:* (Lilongwe: Malawi Law Commission, 2000).

Mead, F, & AH Bodkin 'Criminal Law Amendment Act, 1885, with introduction, notes and index' (1885).

Ministry of Gender Children Disability and Social Welfare, Centre for Social Research, and Centres for Disease Control and Prevention, "Violence against Children and Young Women in Malawi: Findings from a National Survey, 2013."

Parkes, J, J Heslop, F Johnson Ross, R Westerveld, & E Unterhalter. "A rigorous review of global research evidence on policy and practice on school-related gender-based violence." University College London, 2016.

Swedish Agency for Development and Evaluation *Gender equality in and through education* (Karlstad: SADEV, 2011).

United Nations Population Fund *Harmonizing the legal environment for adolescent sexual and reproductive health and rights: A review in 23 countries in East and Southern Africa* (South Africa: UNFPA, 2017).

Encyclopaedias

Mease, JJ 'Postmodern/Poststructural Approaches'. In *The International Encyclopedia of Organizational Communication*, edited by Scott, CR & LK Lewis, 1-21. (New York: John Willey & Sons Inc, 2016).

Nielsen, HB, & B Davies 'Discourse and the construction of gendered identities in education'. In *Encyclopedia of language and education*, edited by Hornberger, NH, 910-921. (Boston, MA: Springer US, 2008).

Theses

Kok, JA. 'A socio-legal analysis of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000' Unpublished LLD thesis, University of Pretoria, 2007.

Miamingi, RPD 'Constructing a conception of childhood in Africa' Unpublished LLD thesis, University of Pretoria, 2014.

Pemba, EA 'The changes in the conduct of Yao boys' initiation ceremonies', Unpublished Master of Social Work thesis, University of Nordland 2012.

Web sources

Anik Gevers and Alan Flisher, Expert opinion: Submission to the Portfolio Committee on Justice and Correctional Services Relating to the Criminal Law [Sexual Offences and Related Matters] Amendment Act Amendment Bill [B18-2014],



<http://pmg-assets.s3-website-eu-west-1.amazonaws.com/150310anik.pdf>
(Accessed 25 September 2019).

Fifteen years Malawian boy fined MK50, 000 for defiling a 14 year old girl, Maravi Post (12 April 2019) <https://www.maravipost.com/fifteen-years-malawian-boy-fined-mk50-000-for-defiling-a-14-year-old-girl/> (Accessed 12 April 2019)

Lisa Surridge "On the Offenses Against the Person Act, 1828." *BRANCH: Britain, Representation and Nineteenth-Century History* ed. Felluga DF https://www.branchcollective.org/?ps_articles=lisa-surridge-on-the-offenses-against-the-person-act-1828 (Accessed 30 January 2020).

McGuirk, M, & B Mills. "Climate change and the dignity rights of the child." https://www.ohchr.org/Documents/Issues/ClimateChange/RightsChild/Dignity_Rights_Project.pdf.

Owen Khamula, 'Malawi teacher jailed for 13 years for sexual activity with school girl' Nyasa Times (18 April 2016) <https://www.nyasatimes.com/malawi-teacher-jailed-for-13-years-for-sexual-activity-with-schoolgirl/> (Accessed 29 September 2019).

Patrick Ndawala, Boy, 15, fined K50, 000 for defiling girl, 16, MANA Online, (12 April 2019) <http://www.manaonline.gov.mw/index.php/national/general/item/12191-boy-15-fined-k50-000-for-defiling-girl-16> (Accessed 12 April 2019).

Samson Kukogho, '47-yr-old teacher tastes jungle justice after bruising 'noisy' pupil's eye in school' Pulse (29 September 2015) <https://www.pulse.com.gh/communities/in-malawi-47-yr-old-teacher-tastes-jungle-justice-after-bruising-noisy-pupils-eye-in/d9n31n5> (Accessed 30 January 2020).

UN Fact Sheet No. 23, *Harmful Traditional Practices Affecting the Health of Women and Children*, <https://www.ohchr.org/Documents/Publications/FactSheet23en.pdf>

UNFPA Malawi, "Taking SRHR to Young People Living with Disabilities," 2018, <https://malawi.unfpa.org/en/news/taking-srhr-young-people-living-disabilities> (Accessed 30 September 2019).

World Health Organization Young people's health – a challenge for society Report of a Study Group on Young People and Health for All by the Year 2000, Technical Report Series, No 731. Geneva: World Health Organization; 1986. <http://whqlibdoc.who.int/trs/WHO_TRS_731.pdf> (Accessed 7 November 2019).