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FACULTY OF LAW**



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**THE OTHER CHILD: THE PLIGHT OF THE BOY CHILD IN THE CONTEXT OF
DEFILEMENT IN MALAWI**

SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS OF THE DEGREE
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DEDICATION

To my husband Panji and our beautiful children Jemimah and Jason, this is for you!

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ACRONYMS

ACHPR	African Commission on Human and Peoples Rights
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
CCPJA	Child Care, Protection and Justice Act
CRC	Convention on the Rights of the Child
CEDAW	Convention on the Elimination of All forms of Discrimination Against Women
CEDAW Committee	Committee on the Elimination of Discrimination against Women
EA	Employment Act
GEA	Gender Equality Act
IHRDA	Institute for Human Rights and Development in Africa
LAA	Legal Aid Act
LAB	Legal Aid Bureau
MDFRA	Marriage Divorce and Family Relations Act
PC	Penal Code
UN	United Nations
UNICEF	United Nations Children's Fund
UNODOC	United Nations Office on Drugs and Crime
SLC	Special Law Commission
WHO	World Health Organisation
PCAB	Penal Code Amendment Bill

TABLE OF STATUTES AND CONVENTIONS

United Nations

United Nations Convention on the Rights and Welfare of the Child

United Nations Committee on the Elimination of Discrimination against Women and Committee on the Rights of the Child 'Joint general recommendation 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2019) on harmful practices'

United Nations Committee on the Rights of the Child General Comment 4 Adolescent Health and Development in the Context of the Convention on the Rights of the Child

United Nations Committee on the Rights of the Child General Comment 20 on the implementation of the rights of the child during adolescence

United Nations Human Rights Committee General Comment 18 Non-discrimination

African Union

The African Charter on the Rights and Welfare of the Child

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The African Commission on Human and Peoples Rights and the African Committee of Experts on the Rights and Welfare of the Child 'Joint General Comment on Ending Child Marriage

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Malawi

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Penal Code

Penal Code (Amendment) Bill

Child Care, Protection and Justice Act

Marriage, Divorce and Family Relations Act

Gender Equality Act

Employment Act

TABLE OF CASES

African Union

Institute for Human Rights and Development in Africa versus The Government of Malawi (2016)
Communication No. 004/Com/001/2014

Malawi

AJ (a minor) v The State and The State v The Inspector General of Police and the Attorney
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5 of 2021

Hambeyani versus the Republic Criminal appeal No. 19 of 2018

Josphat Mitambo versus Republic Criminal Case No. 5 of 2018

Yamikani Paul versus Republic Criminal appeal No. 16 of 2017

Republic of South Africa

Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional
Development and Another (CCT 12/13) [2013] ZACC 35; 2013 (12) BCLR 1429 (CC); 2014 (2)
SA 168 (CC).

TABLE OF CONTENTS

PLAGIARISM DECLARATION.....	i
DEDICATION.....	ii
ACKNOWLEDGEMENTS.....	iii
ACRONYMS.....	iv
TABLE OF STATUES AND CONVENTIONS.....	v
TABLE OF CASES.....	vi
TABLE OF CONTENTS.....	vii
1. INTRODUCTION.....	1
1.1. Background.....	1
1.2. Problem statement	3
1.3. Significance of the research.....	4
1.4. Research aims and objectives.....	4
1.5. Research question.....	4
1.6. Literature review.....	5
1.7. Methodology.....	8
1.7.1. Doctrinal method.....	8
1.7.2. Socio-legal method.....	8
1.8. Limitations of the study.....	8
1.9. Structure.....	9
2. CHILDHOOD, SEXUALITY AND CRIME: A CONCEPTUAL AND THEORETICAL FRAMEWORK.....	11
2.1. Introduction.....	11
2.1.1. The understanding of childhood in Malawi.....	11
2.2. Childhood and the psychosocial theory of child development.....	13
2.3. The sexuality of the boy child.....	14
2.3.1. The psychosexual stages of development and the boy child's sexuality.....	16
2.4. Crime: a conceptual understanding in relation to the boy child.....	17
2.4.1. The psychodynamic theory of crime committed by the boy child.....	18
2.5. Conclusion.....	20
3. GENDERISED AGE FACTOR UNDER MALAWIAN CHILDREN'S LAWS.....	21
3.1. Introduction.....	21
3.2. Constitutional guarantees for equality and non-discrimination of the boy child.....	21

3.3. Gender discriminatory age categorisation of children in the context of defilement.....	22
3.4. Children’s capacity to enter into marriage: A synopsis of the Marriage, Divorce and Family Relations Act.....	24
3.5. Children and the legal capacity to work in Malawi.....	27
3.6. Conclusion.....	28
4. APPRAISING THE AMENDED AND INCLUDED PROVISIONS OF THE PENAL CODE THAT PROTECT THE BOY CHILD.....	30
4.1. Introduction.....	30
4.1.1. Age of consent raise; is it justified?	31
4.1.2. Introduction of a corresponding section criminalising defilement of the boy child..	34
4.1.3. Close-in-age defence; giving with one arm and taking with the other?	37
4.2. Conclusion.....	40
5. CONCLUSION AND RECOMMENDATIONS.....	41
5.1. Introduction.....	41
5.2. Findings of the study.....	41
5.2.1. Punishment for a developmental childhood phase.....	41
5.2.2. Exclusion from the protective umbrella of the law.....	42
5.2.3. Discrimination of the boy child based on sex.....	43
5.2.4. Exposure to the criminal justice system at a tender age.....	43
5.2.5. Unequal treatment by the law.....	43
5.2.6. Infringement on the evolving capacities of the boy child.....	44
5.3. Recommendations.....	44
5.3.1. Legislative measures.....	45
5.3.2. Institutional measures.....	48
BIBLIOGRAPHY.....	51

1. INTRODUCTION

1.1. Background

The origin of Malawi's current criminal justice system is traceable to the proclamation of the British protectorate rule on Malawi in 1891.¹ The proclamation marked the beginning of the legal colonisation of the country which saw the entire criminal law system based on the common law and local ordinances passed by the protectorate government.² The most important development was the enactment of the penal ordinance in 1929 which survives today as the penal code.³ The principles of criminal liability, the definition of offences and the type and scale of penalties in the penal code made no concession to the Malawian context, rather were reflective of the criminological thinking and substantive law in England.⁴

Interwoven with the idea and phraseology derived from the British penal ordinance is the law on defilement, which survives in Malawi's current day penal code.⁵ As per its inception, this law prohibited boys and men of any age from sexually accessing girls before a certain age.⁶ The law on defilement, forms part of what are broadly understood as the age of consent laws.⁷ These laws are aimed at defining the age at which a person can be deemed to possess the legal capacity to consent to sexual activity.⁸ Originally, the age of consent laws only applied to protect chaste young girls,⁹ usually of the higher class.¹⁰ No comparable protection for young boys could be discerned at all.¹¹ The historical perception of women and girls as special property in need of special protection gave rise to this type of gender-specific legislation.¹²

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- ¹ LC Bande 'History of Malawi's criminal justice system: From pre-colonial to Democratic Periods' (2020) Juta and Company (Pty) Limited 297.
- ² As above 298.
- ³ As above.
- ⁴ S Coldham 'Criminal justice policies in Commonwealth Africa: Trends and prospects' (2000) *Journal of African Law* 219.
- ⁵ HF Morris 'A history of adoption of code of criminal law and procedure in British Colonial Africa' (1974) *Journal of African Law* 16.
- ⁶ GD Kangaude 'Adolescent sex and "defilement" in Malawi law and society' (2017) 17 *African Human Rights Law Journal* 529.
- ⁷ M Waites *The age of consent: Young people, sexuality and citizenship* (2005) 42. According to Waites, the term 'age of consent' is not a legal term, but rather convenient language 'which can be used with caution to describe minimum ages below which certain sexual acts are prohibited'.
- ⁸ As above.
- ⁹ S James 'Romeo and Juliet were sex offenders: An analysis of the age of consent and a call for reform' (2009) *University of Missouri Kansas City Law Review* 245.
- ¹⁰ G Zhu & S Van der Aa 'A comparison of the gender-specificity of age of consent legislation in Europe and China: Towards a gender-neutral age of consent in China?' (2017) *European Journal on Criminal Policy and Research* 526.
- ¹¹ As above.
- ¹² James (n 9) 245.

The colonial age of consent laws, in particular, were inherently patriarchal in their conceptualization and inflected gender-stereotypical views about sexuality.¹³ They attached so much value to female chastity, so that the girl child was subjected to greater scrutiny and control than the boy child.¹⁴ Additionally, they disregarded adolescents' sexual agency and autonomy and forbade sexual activity based on a person's age.¹⁵ The goal of the introduction of the age of consent laws by colonial administrations was not to safeguard young people from harm but rather to further their imperial ambitions.¹⁶ According to Kangaude and Skelton, these interests were generally conceived and designed for the conception of the girl-child as a non-autonomous and sexually passive person.¹⁷ Further, the laws governing the age of consent were passed in order to limit male sex desires, which through the lens of the imperialists, were perceived as aggressive and dangerous.¹⁸ In order to preserve female chastity, boys and men bore the brunt of criminal prosecution.¹⁹

Despite attaining independence, Malawi maintained the colonial version of the age of consent laws.²⁰ The same is reflected in the form of the law on defilement that prohibits sexual conduct with girls below the age of sixteen.²¹ Generally, until the girl reaches the age of sixteen, having sex with her is prohibited regardless of the age of the partner.²² Such crafting and application of the law have sadly resulted in the boy child being arrested, tried and convicted for engaging in sexual activities with her, even where the same was consensual and non-exploitative.²³ The law on defilement has a broad distributive impact on the childhood and development of children, especially the boy child.²⁴ It is a bait for the law's direct intervention in the sexual lives and sexualities of the boy child,²⁵ resulting in the immense violation of his fundamental rights.

¹³ GD Kangaude & A Skelton ' (De)criminalizing Adolescent Sex: A rights-based assessment of age of consent laws in Eastern and Southern Africa' (2018) *SAGE* 4.

¹⁴ As above, 5.

¹⁵ As above.

¹⁶ H Bannerji 'Inventing subjects: studies in hegemony, patriarchy and colonialism' (2002) Anthem Press 13.

¹⁷ Kangaude & Skelton (n 13).

¹⁸ As above.

¹⁹ E Olamijuwon & C Odimegwu 'Saving sex for marriage: An Analysis of Lay Attitudes Towards Virginity and its Perceived Benefit for Marriage' (2021) 26 *Sexuality and Culture* 569.

²⁰ Kangaude & Skelton (n 13) 5.

²¹ Penal Code Laws of Malawi Chapter 7:01 Sec 138.

²² James (n 9) 244.

²³ *AJ (a minor) v The State and The State v The Inspector General of Police and the Attorney General Ex Parte Standford Siliro Shaba on behalf of TS (a minor)* Constitutional Case No. 4 and 5 of 2021.

²⁴ K Sutherland 'From jailbird to jailbait: Age of consent laws and the construction of teenage sexualities' (2003) *Journal of Women and the Law* 313.

²⁵ As above 314.

Malawi is now enjoying a new constitutional dispensation that gives prominence to human rights more specifically, the principles of dignity, equality, and non-discrimination.²⁶ It also prioritises the protection of the children,²⁷ and grants them a comprehensive set of human rights.²⁸ The constitution specifically guarantees that all children are entitled to be protected from treatment that may be harmful to their health or development,²⁹ to equal treatment before the law,³⁰ and to have their best interests be the primary consideration in every decision affecting them.³¹

Each of these rights are also enshrined in international and regional human rights treaties to which Malawi is a party to. In particular, Malawi is a state party to the CRC³² and the ACRWC.³³ These treaties were incorporated into domestic law through the enactment of the CCPJA.³⁴ This Act and other highlighted treaties bind Malawi to undertake all appropriate measures, including adopting or amending legislation, in order to give effect to the rights of all children in Malawi.³⁵ The Act was enacted by the parliament in Malawi on 29th July 2010 with the central objective to provide for children's care and protection, justice, and social development.³⁶

1.2. Problem statement

Despite the constitutional guarantees to equality,³⁷ section 138 of the Penal Code that creates the offence of defilement fails to recognise and protect the rights of the boy child, such as his right to equal status,³⁸ and equal treatment before the law,³⁹ dignity,⁴⁰ and development.⁴¹ A proposed amendment to the section has introduced the defence of being close-in-age with the victim, which a boy child can invoke.⁴² However, the defence will only apply to the boy child who is 2 years or less older than the victim. This means that the boy child who falls outside the age category will be

²⁶ The Constitution of the Republic of Malawi secs 19 and 20.

²⁷ As above sec 13(h) Principles of National Policy.

²⁸ As above sec 23.

²⁹ As above sec 23(5)(c).

³⁰ As above sec 23(1).

³¹ As above.

³² The United Nations Convention on the Rights of a Child (Ratified by Malawi on 2 January 1991).

³³ African Charter on the Rights and Welfare of the Child (Ratified by Malawi on 16 September 1999).

³⁴ Child Care, Protection and Justice Act No. 22 of 2010.

³⁵ n 26 sec 20(2).

³⁶ Act 7 of 2010.

³⁷ n 26 above sec 20(1).

³⁸ n 26 above sec 12(1) (e).

³⁹ n 26 above sec 23(1).

⁴⁰ n 26 above sec 12(1) (d).

⁴¹ *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* (CCT 12/13) [2013] ZACC 35; 2013 (12) BCLR 1429 (CC); 2014 (2) SA 168 (CC); (3 October 2013) Para 45.

⁴² n 21 sec 138(3)(a).

exposed to the harshness of the justice system at a tender age and eventually be punished for exploring his sexuality as part of his development.⁴³

1.3. Significance of the research

A plethora of research over the years has centered on the girl child, neglecting the needs, experiences and perspectives of the boy child.⁴⁴ The boy child is vulnerable because he is not as supervised and protected as the girl child.⁴⁵ However, he is likely to experience comparable physical, mental, and social traumas because of defilement.⁴⁶ Further, the commission of the crime by the boy child may be as a result of several factors, which have not been given any regard within the law on defilement. This study will therefore examine the extent to which the current legislation in Malawi accords the boy child protection and recognition of his rights, and also highlight the implication of the offence of defilement. The findings of this study will act as a point of reference in ensuring that the Malawian boy child is equally protected in pursuance of the government's obligation of promoting human rights and freedoms for everyone, including all children.⁴⁷

1.4. Research aims and objectives

The main aim for this study is to examine whether the rights of the boy child are protected and recognised in the context of defilement in Malawi. This study will therefore be guided by the following objectives:

- To analyse Malawi's legal framework for the protection and recognition of the rights of the boy child in the context of defilement.
- To assess the implication of the law on defilement on the rights of the boy child in Malawi.
- To suggest recommendations to ensure the protection and recognition of the rights of the boy child.

1.5. Research question

⁴³ Kangaude (n 6) 548.

⁴⁴ United Nations Children Fund (UNICEF) <https://data.unicef.org/resources/sexual-exploitation-boys-findings-ethical-considerations-methodological-challenges/> (accessed 4 August 2022).

⁴⁵ L Panicker 'End the silence on the abuse of the male child' <https://www.hindustantimes.com/opinion/end-the-silence-on-the-abuse-of-the-male-child-101616243017098.html> (accessed 4 August 2022).

⁴⁶ United Nations Children Fund (UNICEF) 'The Missing 'C': Sexual Violence against Children in sub-Saharan Africa' <https://www.unicef-irc.org/article/987-the-missing-c-sexual-violence-against-children-in-sub-saharan-africa.html> (accessed 4 August 2022).

⁴⁷ n 26 chapter iii.

The leading research question in this study is whether the rights of the boy child are recognised and protected in the context of defilement law in Malawi. In an attempt to answer this broad question, this study research will also address the following sub-questions:

- Whether Malawi's legal framework adequately provides for the protection and recognition of the rights of the boy child in the context of defilement?
- What are the implications of the law on defilement on the rights of the boy child?
- What recommendations can be suggested to ensure the protection and recognition of the rights of the boy child?

1.6 Literature review

Waites wrote about the age of consent laws and stated that they are aimed at defining the age at which a person can be deemed to possess the legal capacity to consent to sexual activity.⁴⁸ He argued that it is crucial to consider the debates over the age of consent laws because the legal restrictions on children and young people's engagement in sexual activity barely mention children's ability to consent to the sexual behaviour.⁴⁹ His observations will be of significance to this study in examining the notion of childhood because age is an important element in the offence of defilement and serves as a basis on which one is deemed to be capable of giving consent.

Waites further argued that the age of consent laws can be used as tools of oppression, infringing on the rights to privacy and dignity, as well as using sexuality to pursue and maintain social hierarchies.⁵⁰ This study will draw insights from his observation in assessing the implication of the law on defilement on the boy child as he is exposed to the harsh realities of the criminal justice system at a tender age and is punished for exploring his sexuality.

Zhu and Van also discussed the age of consent but pursued the same in relation to the males and females' stereotyped roles.⁵¹ They argued that the boy child is being punished for being sexually active and aggressive, while the girl child is perceived as passive, submissive and weak.⁵² They further argued that these are social constructions that have infiltrated the law and have sadly been used to oppress the boy child.⁵³ In the same vein, Kangaude stated that section 138 of the penal code that creates the offence of defilement is a reflection of cultural and societies'

⁴⁸ Waites (n 7) 18.

⁴⁹ As above.

⁵⁰ As above 19.

⁵¹ Zhu & Van der Aa (n 10) 526.

⁵² As above, 527.

⁵³ As above.

conception about children's sexuality aimed at victimising and disempowering children.⁵⁴ The observations of Zhu, Van and Kangaude will guide this study in analysing the relationship between crime and other disciplines like sociology, psychology and anthropology to understand the motivation behind the commission of the offence of defilement by the boy child. The analysis will also draw insights from Waites who argued that a sociological perspective on childhood and youth has significant ramifications for comprehending discussions about sexuality and age-of-consent laws.⁵⁵

Zhu and Van further observed that the portrayal of a boy child as the aggressor and girl child as the victim does not encompass all situations of child abuse that can actually occur in real life.⁵⁶ In the same vein, Hetherson and Beardsall argue that the societal attitude and perceptions towards the boy child have costed him a great deal.⁵⁷ The direct consequence of such a perception is that the boy child has been left with no protection from any kind of assault irrespective of who perpetuates them.⁵⁸ Their observations will aid this study in questioning whether the proposed amendment to the law on defilement is sufficiently protecting the rights of the boy child in light of the circumstances in which the offence is deemed to have been committed.

Kangaude wrote that children are not passive when it comes to sexuality as the society seeks to portray them.⁵⁹ That perceiving children as such promotes the naturalisation of unequal power relations, even in sexual relationships between a boy child and a girl child.⁶⁰ He faulted the portrayal of children as passive subjects because they limit children's rights to sexual health and sexual rights.⁶¹ His observation on the portrayal of children as being passive however, falls short of showing the implication of disregarding the evolving capacities of children in consenting to sexual activities which this study seeks to highlight.

Kangaude was however, quick to acknowledge that it is quite understandable to discourage early sexual indulgence and goes on to question whether criminal law should be used to regulate

⁵⁴ Kangaude (n 6) 536.

⁵⁵ Waites (n 7) 13.

⁵⁶ Zhu & Van der Aa (n 10) 527.

⁵⁷ J Hetherson & L Beardsall 'Decisions and attitudes concerning child sexual abuse: does the gender of the perpetrator make a difference to child protection professionals? (1998) *Child Abuse Neglect Journal* 1.

⁵⁸ As above.

⁵⁹ Kangaude (n 6) 529.

⁶⁰ As above 543.

⁶¹ As above.

childhood sexual conduct without infringing on the fundamental rights of the child.⁶² Kangaude's inquisition will help the present research when analysing the theories underpinning the interplay between the notion of childhood, sexuality and the commission of the offence of defilement by the boy child.

Parikh discussed the significance of having due regard to the age and circumstances of the victim and perpetrator, as they risk being punished when otherwise safe spaces could have been created for them to explore their sexuality.⁶³ A discussion on this will guide the analysis of the defence of close-in-age, which risks having the boy child being criminally liable for the offence of defilement should his age not be covered by the two years or below bracket.

Lynch wrote about children as victims of crime and analysed the extent to which the international standards on child-to-child victimisation are applied and faulted the portrayal of children as objects of concern rather than rights holders.⁶⁴ She argued that laws, processes and outcomes of any system should promote a child's sense of dignity and worth, with emphasis on human rights and highlighted the parameters and application of the rights framework for the child in conflict with the law.⁶⁵

Lynch's work focused on the child as a victim of an offence in the criminal justice system, but did not elaborate on the treatment of the child as a perpetrator of the offence against a fellow child. Further, her work did not show how the criminal justice system exacerbates the vulnerability of children in a context where one sect of children has their rights protected at the expense of another, just the way it is with the offence of defilement. The present research will therefore fill the lacuna by showing how the law on defilement infringes on the rights of the boy child, when focus is fixated on the offence only and not the peculiar circumstances emanating from the boy child's development and sexuality. Further, this research will draw inspiration from her discussion on the application of a rights-based approach for children in conflict with the law to make recommendations of how best the boy child can be protected in the context of defilement.

⁶² Kangaude (n 6) 544.

⁶³ 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 1.

⁶⁴ N Lynch 'The other child: The rights of the child victim in the youth justice system (2018) 26 *International Journal of Children's Rights* 228.

⁶⁵ As above 233.

1.7 Methodology

1.7.1 Doctrinal method

This study employs a doctrinal method, which is concerned with the analysis of legal doctrine and how it was developed and applied.⁶⁶ This method is of significance to this study as it provides the background to the law on defilement, the developments it has undergone, up to its current state.⁶⁷ The method also helps this study in the evaluation of the law on defilement in Malawi and determine whether any perceived defects are as a result of the nature of the doctrine or the framework for its application.⁶⁸ The method therefore, contributes immensely to the continuity and certainty of the law under focus by providing a basis for suggesting recommendations in this study.⁶⁹

1.7.2 Socio-legal method

This study will lastly employ the socio-legal method upon taking cognizance that law cannot be understood or examined in isolation from its relationship with the society and morality.⁷⁰ This method will therefore be significant in applying a multidisciplinary assessment of other disciplines like sociology, psychology and anthropology in discussing the notions of childhood, sexuality and crime. Such a discussion will be significant in analysing the motivation for the commission of the offence of defilement by the boy child and the implication that this law has on his rights.

The primary sources that will be consulted include the Constitution of the Republic of Malawi, the Penal Code, the Penal Code (Amendment) Bill, the Child Care, Justice and Protection Act, the Gender Equality Act, the Employment Act, the United Nations Convention on the Rights of a Child, the African Charter on the Rights and Welfare of the Child. The secondary sources that will be consulted are journal articles, books, government and other reports, the normative frameworks by human rights institutions and the internet.

1.8 Limitation of the study

The present study is limited to Malawi as a country of focus in analysing the rights of the boy child in the context of defilement. It will involve examining the nature and scope of the law on defilement and the implications it has on the rights of the boy child in Malawi. Further, this study is limited by

⁶⁶ SA Kumar & M Ikramuddin 'Doctrinal and Socio-legal Methods of Research: Merits and Demerits' (2012) 2 *Educational Research Journal* 7.

⁶⁷ T Hutchinson 'Doctrinal Research: Researching the Jury' (2013) in D Watkinson and M Burton *Research Methods in Law* (2013) 132.

⁶⁸ As above 7.

⁶⁹ GR Van & M Hans-W 'Revitalizing Doctrinal Research in Europe: What about Methodology?' (2011) EUI Working Papers Law 2011/05 European University Institute 2.

⁷⁰ L Lammasniemi 'Law dissertations a step-by-step guide' (2018) *Taylor and Francis Group* 74.

the dearth of literature on the rights of the boy child in the context of defilement. As such, the study will draw insight from generalised literature where and as applicable.

1.9 Structure

This research will present five chapters as detailed below:

Chapter one

This chapter outlines the direction of this study. It lays the background of the law on defilement and provides the context. It further discusses the research problem, main aim and objectives of this study and also highlights the methodology applied.

Chapter two

This chapter discusses the concepts of childhood, sexuality and crime as understood within the ambits of this study. Further, it explores the theories underpinning these key concepts, and specifically, the psychosocial theory of child development, the psychosexual theory of development and the psychodynamic theory of crime are discussed. The aim is to provide an overview of the interconnectedness of the concepts of childhood, sexuality and crime, which in this case is the offence of defilement. In pursuance of the same, this chapter explains how childhood is understood in the Malawian society, and relate it to the boy child's sexuality to the extent that what was otherwise to be considered as a normal developmental phase in his sexuality, is disapproved by the society and infiltrated in the law as a crime.

Chapter three

This chapter discusses the gender-discriminatory age categorization of children in Malawi in the contexts of marriage, employment, consent and criminal liability. Under criminal liability, particular focus will be on child-to-child defilement and also the sections proposed to be amended in the penal code. The aim is to demonstrate how the law on defilement unjustifiably encourages differential treatment of the boy child. This will be achieved by analysing issues of consent in the Penal Code, Marriage Act and Employment Act

Chapter four

This chapter will conduct an appraisal of the proposed amendments to section 138 of the Penal Code that provide for the offence of defilement. The aim is to highlight the significant proposed

changes and also flag the legislative gaps that remain, warranting a call for extra efforts in the promotion and protection of the rights of the boy child.

Chapter five

A summary of the key arguments and findings will be highlighted here. The findings of the study will necessitate further reform to the law on defilement to ensure the protection of the boy child in the context of defilement, which the writer will propose and put forward recommendations.

2. CHILDHOOD, SEXUALITY AND CRIME: A CONCEPTUAL AND THEORETICAL FRAMEWORK

2.1. Introduction

The previous chapter set out the background and outlined the scope of this study. To provide further guidance, this chapter expounds the concepts of childhood, sexuality and crime as employed in this study. It will further explore the theories underpinning these key concepts, and specifically, the psychosocial theory of child development, the psychosexual theory of development and the psychodynamic theory of crime are discussed. The aim is to provide an overview of the interconnectedness of the concepts of childhood, sexuality and crime, which in this case is the offence of defilement. In pursuance of the same, this chapter will explain how childhood is understood in the Malawian society and relate it to the boy child's sexuality to the extent that what was otherwise to be considered as a normal developmental phase in his sexuality, is disapproved by the society and infiltrated in the law as a crime.

2.1.1. The understanding of childhood in Malawi

Childhood can be broadly defined as the biological or psychological stage of life that occurs between infancy and adulthood.⁷¹ However, childhood is not that straightforward,⁷² rather, it is regarded as a very complicated social construct, making any attempt to define and distinguish it artificial.⁷³ It can be understood as a social institution, a set of deliberately negotiated social constructs that make up a child's formative years.⁷⁴ As a socially constructed notion, childhood is reflected in multiple conceptions across different cultures, and even within cultures.⁷⁵ Such that the construction of childhood is closely linked to the particular social, cultural and economic features of a particular society.⁷⁶

In the Malawian society, childhood is viewed as a time to learn, develop moral character, and pick up important social and practical skills and also mature into an adult.⁷⁷ Such that in most cultures

⁷¹ J Fionda *Legal concepts of childhood: An introduction in legal concepts of adulthood* (2001) 78.

⁷² T Kaime 'Protecting the rights and welfare of the African Child: An assessment of the contribution of the African Charter on the Rights and Welfare of the Child' PhD thesis University of London (2007) 116.

⁷³ G van Bueren *International law on the rights of the child* (1995) 32.

⁷⁴ Kaime (n 67) 116.

⁷⁵ Kangaude (n 6) 531.

⁷⁶ AT Imoh 'Terminating Childhood: Dissonance and synergy between global children's rights, norms and discourses about the transition from childhood to adulthood in Ghana' (2019) 41(1) *Human Rights Quarterly* 174.

⁷⁷ T Kaime 'The African Children's Charter: Does it represent a relevant vision of childhood and children's rights?' (2009) 29(3) *Children's Legal Rights Journal* 17.

childhood and socialisation education is perceived and shaped as preparation for adult lives and roles.⁷⁸ For instance, amongst the *Lomwe* people, the second largest ethnic group in Malawi mostly found in southern Malawi,⁷⁹ young children are taught to acquire essential skills for married lives as adults.⁸⁰ Depending on the specific set of skills and knowledge being transmitted, the educational tools and techniques may vary, be informal and indirect.⁸¹ Mostly, the childhood education relies on the children's passive and active observations and role-play, where children emulate their parents and older children.⁸²

According to the survey that was conducted by Kaime, the following can be highlighted:⁸³

...[A]mongst the Lomwe people, children as young as six are often left to look after their siblings whilst parents and older children attend to other family chores. Accordingly, boys as young as four-years-old mimic the roles of adult men during play. They acquire wives, build imaginary homesteads, discipline children, organise their "family's" activities, and distribute family wealth. Young, boys are encouraged to be courageous like adult men and they acquire significant knowledge through role play about their physical environment. Further, boys as young as twelve years of age are also taught economically useful skills in addition to household chores. Thus, pubescent boys are expected to contribute materially in their community's and family's economic landscape by labouring to sustain their homestead...

As noted from the extract, the adult world ultimately constructs what childhood is.⁸⁴ Despite the term suggesting a close connection to children, childhood itself is dominated by adults.⁸⁵ They decide its character, constitution, and boundaries.⁸⁶ In some cultures, adults who do not fit the social criteria for being considered an adult continue to be referred to as children notwithstanding their age.⁸⁷ Similarly, children do not acquire personhood upon attaining the age of majority unless

⁷⁸ As above 18.

⁷⁹ GW Kayira & PC Banda 'Materialism and ethnicity: The rise of the Lomwe ethnic consciousness in Malawi 1890-2010' (2013) 66(2) *The Society of Malawi Journal* 41.

⁸⁰ Kaime (n 77) 17

⁸¹ As above,17.

⁸² As above.

⁸³ As above.

⁸⁴ Fionda (n 71) 83.

⁸⁵ Kaime (n 72) 117.

⁸⁶ B Mayall 'The sociology of childhood in relation to children's rights (2008) 8(3) *International Journal of Children's Rights* 244.

⁸⁷ AP Ndofirepi & A Shumba 'Concepts of "child" among traditional Africans: A philosophical purview' (2014) 45(3) *Journal of Human Ecology* 237.

they accumulate knowledge of social values and norms.⁸⁸ Children who fail to conform to a particular model of childhood are constructed as deviant by the society.⁸⁹

2.2. Childhood and the psychosocial theory of child development

Theories of child development concentrate on describing how children change and develop over the course of childhood.⁹⁰ They emphasize different elements of growth, such as social, emotional, and cognitive development.⁹¹ The theories explain why children behave in certain ways and whether their behaviour is related to their age, family and social relationships, or individual temperaments.⁹² In expounding the notion of childhood, this study is guided by the psychosocial theory of development founded by Erik Erikson in the 1950s.⁹³ Erikson built upon Sigmund Freud's theory of psychosexual development that posits that unconscious psychological forces such as hidden desires and motives shape an individual's behaviour.⁹⁴ Erikson expanded it to include the influence of social dynamics as well as the extension of psychosocial development into adulthood.⁹⁵

Erikson argued that children face developmental crises as they grow up that serve as major turning points.⁹⁶ That, successfully managing the crises lead to the attainment of a lifelong psychological virtue,⁹⁷ and believed that social interaction and experience play decisive roles in managing these crises.⁹⁸ For Erikson, these crises are of a psychosocial nature because they involve the individual's psychological needs clashing with the needs of society.⁹⁹

In this study, Erikson's theory helps explain how the boy child is shaped by and reacts to the environment in which he is raised.¹⁰⁰ His identity in the society is reached by attaining goals and

⁸⁸ As above.

⁸⁹ L Holt & S Holloway 'Theorising other childhoods in a globalized world' (2006) 4(2) *Child Geographies* 135.

⁹⁰ LR Allen & BB Kelly (eds) 'Child development and early learning' (2015) *Institute of Medicine National Research Council* <https://www.ncbi.nlm.nih.gov/books/NBK310550/> (accessed 17 September 2022) 3.

⁹¹ SA McLeod 'Jean Piaget's theory of cognitive development' (2018) Simply Psychology www.simplypsychology.org/piaget.html (accessed 17 September 2022).

⁹² KJ Saudino 'Behavioural genetics and child temperament' (2005) *Journal of Developmental and Behavioural Pediatrics* 214.

⁹³ C Normand 'The Two Ericksons: Forgotten concepts and what constitutes an appropriate professional knowledge base (2010) 19(4) *Journal of the Canadian Academy of Child and Adolescent Psychiatry* 248.

⁹⁴ SE Lantz and S Ray 'Freud developmental theory' (2022) *Stat Pearls Publishing* 1.

⁹⁵ Normand (n 93) 248.

⁹⁶ As above.

⁹⁷ C Bishop & KD Keith 'Psychosocial stages of development' (2013) *The Encyclopedia of Cross-Cultural Psychology John Wiley and Sons Inc* 1.

⁹⁸ As above

⁹⁹ As above.

¹⁰⁰ S McLeod 'Erik Erikson's stages of psychosocial development' (2018) [https://www.simplypsychology.org/Erik-Erikson.html](http://www.simplypsychology.org/Erik-Erikson.html) (accessed 17 September 2022).

challenges throughout his childhood that are set by society.¹⁰¹ The boy child grows up being observant of the social surrounding around him which consequently influences his childhood.¹⁰² Erikson's theory further gives a trajectory on the extent of society's contributions towards the boy child's childhood.¹⁰³ The environment in which the boy child is raised, along with his experiences shape the way he views the world, how he thinks and why he responds the way he does.¹⁰⁴ Although societies have unique conceptions of child and childhood, each has a peculiar understanding of a child and share some similarities.¹⁰⁵

For instance, the socialisation of the *Lomwe* boys as previously discussed, can be juxtaposed with that of the boy child belonging to *Ngoni* people, an ethnic group predominantly found in *Mzimba* district in northern Malawi and *Ntcheu* district in central Malawi.¹⁰⁶ Ngoni boys grow up being prepared for war and have to pass tests of hardness and endurance.¹⁰⁷ They are taught that sexual indulgence and loitering around the village admiring women weakens a man and renders him unfit for war.¹⁰⁸ Training a Ngoni boy up to puberty involves gradual assimilation with the male society and its main task, which is war.¹⁰⁹ The emphasis in the Ngoni boy's training is to discipline and strengthen him so that he can participate fully in community life and uphold the ideals of obedience, perseverance, and physical vigour expected of adult men.¹¹⁰

Despite the socialisation in the two cultures being different, the conditions surrounding the boy children's childhood are both created by adults in order to prepare the children for their adult life.¹¹¹ A boy child's childhood and transition into adulthood, therefore, is predominantly dependent on the culture in which he is brought up.¹¹²

2.3. The sexuality of the boy child

¹⁰¹ As above.

¹⁰² M Read 'The Moral Code of the Ngoni and their former military state. The moral code and the community.' (1938) 10(1) *Journal of the International African Institute* 9.

¹⁰³ S Tyler 'Human behaviour and the social environment' (2020) University of Kansas Libraries Press 12.

¹⁰⁴ As above.

¹⁰⁵ Ndofirepi and Shumba (n 87) 233.

¹⁰⁶ S Madise 'The Ngoni of Malawi: A history revisited' (2015) *Social Science Research Network Journal* 1.

¹⁰⁷ Read (n 102)10.

¹⁰⁸ As above

¹⁰⁹ Read (n 102) 11.

¹¹⁰ As above.

¹¹¹ T Kaime 'Vernacularising the Convention on the Rights of the Child: rights and culture as analytic tools' (2010) 18(4) *International Journal of Children's Rights* 642.

¹¹² AH Speier & D Nordboe *Psychosocial issues for children and adolescents in disasters*' (2005) Centre for Mental Health Services 6.

In a broad sense, sexuality refers to how a person perceives and acts as a sexual being.¹¹³ It manifests itself through thoughts, fantasies, desires, beliefs, attitudes, values, behaviors, practices, roles, and relationships.¹¹⁴ While sexuality can include all of these dimensions, they are not always experienced or expressed.¹¹⁵ In terms of the boy child, sexuality is key in characterising his individual behaviours, mental attitudes and processes.¹¹⁶ As he transitions in his childhood, his sexuality is influenced by the interrelationship of biological, psychological and socio-cultural factors, which this study seeks to highlight.¹¹⁷

The physical changes that the boy child experiences such as enlargement of genitals, growth of pubic hair and his responses to sexual stimulation generally constitute the biological aspect of sexuality.¹¹⁸ Although his reproductive function does not begin until puberty, his sexual-erotic functioning is manifested immediately after he is born.¹¹⁹ The physical changes form part of his total personality when they work together with the psychological aspect of sexuality.¹²⁰ For instance, the surge in the boy child's testosterone is associated with the frequency of sexual thoughts, whilst the physiological signs contribute to his attractiveness to others.¹²¹ These physical and hormonal changes determine the boy child's attitude toward sexuality.¹²² They also affect his approach and response to sex as sometimes he might become aggressive due to the changes.¹²³

The psychological factors of sexuality involve the boy child's sense of being.¹²⁴ The thoughts that go through the boy child's mind define his way of acting when interacting with other people in a sexual way.¹²⁵ His attitudes and feelings towards himself and other people begin to develop very early in life and generate profound emotional and psychological responses.¹²⁶ His sexual desire,

¹¹³ SA Rathus *et al* 'Human sexuality in a world of diversity' (2008) Pearson 23.

¹¹⁴ The World Health Organisation 'Defining Sexual Health'
<https://www.who.int/teams/sexual-and-reproductive-health-and-research/key-areas-of-work/sexual-health/defining-sexual-health> (2006) (accessed 6 September 2022).

¹¹⁵ As above.

¹¹⁶ J Grundel 'Sex' (1957) in *Encyclopedia of theology: A Concise Sacramentum Mundi* 1563.

¹¹⁷ Sexuality Information and Education Council of the United States (SIECUS) 'Introducing the dimensions of human Sexuality' (2014) *Jones and Bartlett Learning* 4.

¹¹⁸ As above 5.

¹¹⁹ CE Bruess & E Schroeder *Sexuality education: Theory and practice* (2014) (6th ed) Jones and Bartlett 7.

¹²⁰ As above.

¹²¹ DJ Fortenberry 'Puberty and adolescent sexuality: Hormones and Behaviour' (2013) 64(2) 284.

¹²² SK Kar, A Choudhry and AP Singh 'Understanding normal development of adolescent sexuality: A bumpy ride' (2015) 8(2) *Journal of Human Reproductive Sciences* 71.

¹²³ As above, 72.

¹²⁴ J Bancroft *Human sexuality and its problems* (2002) (3rd ed) Elsevier Science Limited 3.

¹²⁵ CE Leavitt *et al* 'The role of sexual mindfulness in sexual wellbeing, relational wellbeing and self-esteem' (2019) 45(6) *Journal of Sex and Marital Therapy* 498.

¹²⁶ Bancroft (n 124) 3.

sexual activity and sexual satisfaction,¹²⁷ are enhanced when he evaluates a sexual stimulus as good or positive.¹²⁸ Thus, the boy child develops sexual curiosity that may lead to indulgence in sexual activities.¹²⁹

Lastly, the socio-cultural aspect of sexuality is the sum of the cultural and social influences that affect the boy child's thoughts and actions.¹³⁰ His sexual identities and experiences are formed by, and shaped by, a constantly shifting social context.¹³¹ According to social constructionists, the boy child acquires and assembles meanings, skills and values from the people around him.¹³²

2.3.1. The Psychosexual stages of development and the boy child's sexuality

Sigmund Freud is credited for being the first scientist to link sex to healthy development and to recognise children as being sexual in their childhood.¹³³ He focused on psychological influences that affect sexual behaviour and experiences.¹³⁴ Freud believed in psychoanalytical approach and proposed the concept of psychosexual theory of development which this study has relied upon in explaining the sexuality of the boy child.¹³⁵

Freud emphasized the significance of and centrality of sexual urges in human existence, acts, and behaviour.¹³⁶ He stated that children have discernible sexual desires from birth.¹³⁷ He believed that events in childhood have a great influence on children and shape their personality as adults.¹³⁸ In terms of the boy child, Freud's psychosexual theory helps project the social or environmental factors in the development of the boy child's sexuality.¹³⁹ The parenting and family structures and societal norms surrounding him have a bearing on his sexual behaviour and also influence his self-confidence and interactional competence.¹⁴⁰

¹²⁷ J Carvalho & P Nobre 'Biopsychosocial determinants of men's sexual desire: Testing an integrative model' (2011) (8) *The Journal of Sexual Medicine* 755.

¹²⁸ A Dosch *et al* 'Psychological factors involved in sexual desire, sexual activity and sexual satisfaction: A multi factorial perspective' (2016) 45(8) *Archives of Sexual Behaviour* 20.

¹²⁹ Kar (n 122) 72.

¹³⁰ Parikh (n 63) 6.

¹³¹ L Tiefer *Sex is not a natural act* (1995) Westview Press 3.

¹³² H Elkatawneh 'Freud's psychosexual stages of development' (2013) <https://ssrn.com/abstract=2364215> (accessed 21 September 2022).

¹³³ A Grzybowski and J Zolnierz 'Freud Sigmund 1856-1939' (2021) 268(6) *Journal of Neurology* 1.

¹³⁴ Dosch *et al* (n 128) 23.

¹³⁵ As above.

¹³⁶ S Stoléru 'Reading the Freudian theory of sexual drives from a functional neuroimaging perspective' (2014) 8 *Frontiers in Human Neuroscience* 157.

¹³⁷ As above.

¹³⁸ Leavitt *et al* (n 125) 5.

¹³⁹ Bannerji (n 16) 71.

¹⁴⁰ J Wamoyi *et al* 'The structural influence of family and parenting on young people's sexual and reproductive health in rural northern Tanzania' (2015) 17(6) *International Journal of Culture, Health and Sexuality* 718.

For instance, according to the survey by Munthali and Zulu,¹⁴¹ the following can be highlighted:¹⁴²

...[A]mongst the Chewa people, who are the majority ethnic group in the central region of Malawi,¹⁴³ sexuality socialisation of the boy child is marked complete by the carrying out of an initiation ceremony. At the initiation ceremony, apart from advising boys to respect parents and elders, and run errands for them, they are also taught how to have sex. Some elders even advise initiates to use condoms while others say no, and also advise that girls should urinate after sex and they will not become pregnant.” After initiation, the boy initiates are told to have sex as a proof they are grown-ups...

As noted, the cultural environment in which the boy child is raised helps him comprehend his sexuality and what is expected of him as a sexual being.¹⁴⁴ Because the initiation ceremonies like the one highlighted above are performed to symbolize that the young boy is not a child anymore, the boy child tends to take this transition to imply he can start having sex.¹⁴⁵ His indulgence in sexual behaviours and activities is therefore sanctioned by his society and he does it in conformity to its norms.¹⁴⁶

2.4. Crime: a conceptual understanding in relation to the boy child

A crime is generally believed to be an act that is either committed or omitted in violation of a public law that forbids or commands it.¹⁴⁷ However, a crime is not only understood as a creation of the law, ignoring its crucial social dimension.¹⁴⁸ In society, some acts are considered as specially reprehensible hence written laws are created to prohibit them.¹⁴⁹ The society develops social and legal control which they use to prevent and sanction acts that violate social standards.¹⁵⁰ Therefore, the laws passed by the state are both shaped and reflect the interests of a particular society.¹⁵¹

¹⁴¹ 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(3) *African Journal of Reproductive Health* 8.

¹⁴² As above 8.

¹⁴³ YM Juwayeyi *Archaeology and oral tradition in Malawi: Origin and early history of the Chewa* (2020) 1.

¹⁴⁴ Munthali and Zulu (n 141)12.

¹⁴⁵ As above.

¹⁴⁶ M Ensminger ‘Adolescent sexual behaviour as it relates to other transition behaviours in youth’ (1987) *National Academies Press* 1.

¹⁴⁷ WH Hitchler ‘The definition of crime’ (1934) 38(4) *Dickinson Law Review* 208.

¹⁴⁸ G Lamond ‘What is crime?’ (2007) 27(4) *Oxford Journal of Legal Studies* 610.

¹⁴⁹ As above.

¹⁵⁰ S Thotakura ‘Crime a conceptual understanding’ (2011) 4(3) *Indian Journal of Applied Research* 196.

¹⁵¹ As above.

As a socio-legal construction, a crime is not merely concerned with a type of behaviour, but also the process by which some types of behaviour come to be defined as criminal whilst others do not.¹⁵² In terms of the boy child, he is not inherently born a criminal, but perceived as such when his behaviour is weighed against societal norms and standards.¹⁵³ The nature of particular behaviours that are termed as criminal only exist because people or the society define that particular behaviour as criminal.¹⁵⁴

For instance, some cultures regulate the sexual conduct of young boys with the aim of preserving the chastity of young girls such that the boy child who has sexual intercourse with an unmarried girl is punished.¹⁵⁵ In such cultures, the sexual conduct of the boy child is heavily penalised for defiling the societal values attached to the girl child's chastity such as pride, respect and dignity.¹⁵⁶ The boy child's behaviour is perceived deviant when a harm such as pregnancy results.¹⁵⁷ The harm is perceived to extend beyond the immediate victim who is the girl child, to all those who perceive themselves as potential victims of the crime such as parents.¹⁵⁸ The boy child is punished by paying hefty damages to the family of the girl child.¹⁵⁹ He may also be asked or forced to marry the girl as society's way of defining his behaviour to be deviant and worth punishing.¹⁶⁰

2.4.1. The psychodynamic theory of crime committed by the boy child

The Psychodynamic theory was originated by Sigmund Freud, the founder of psychoanalysis.¹⁶¹ Freud suggests that an individual's personality is shaped by unconscious mental processes that begin in childhood.¹⁶² Imperative are the three elements or structures that make up a person's

¹⁵² Leavitt *et al* (n 125) 474.

¹⁵³ As above 475.

¹⁵⁴ CJ Przemieniecki 'Social construction of crime' (2017) *The Encyclopedia of Juvenile Delinquency and Justice* 805.

¹⁵⁵ Olamijuwon & Odimegwu (n 19) 568.

¹⁵⁶ As above 569.

¹⁵⁷ Lamond (n 148) 614.

¹⁵⁸ JS Coleman 'Robert Nozick 's *Anarchy, state and utopia*' (1976) 3(3) *Theory and Society* 437.

¹⁵⁹ Kangaude & Skelton (n 13) 4.

¹⁶⁰ As above.

¹⁶¹ KH Deal 'Psychodynamic Theory' (2007) 8(1) *Advances in Social Work* 185.

¹⁶² As above.

personality namely; the identity,¹⁶³ the ego,¹⁶⁴ and the superego.¹⁶⁵ This study draws an insight from the psychodynamics theory in expounding the motivation behind the boy child's sexual behaviour that is deemed to be conflicting with accepted social norms and standards.¹⁶⁶

As he navigates through his childhood, the boy child begins to explore and forge his own individual and community identities based on his interaction with his own family, peers and cultural norms.¹⁶⁷ He experiences the creation of an emergent sense of self, often expressed through different behaviour, both as an individual and through association with his peers.¹⁶⁸ This is a particularly complex process for the boy child who risks being reprimanded should he deviate from the norms of the particular culture that he is trying to identify himself within.¹⁶⁹

As he transitions through childhood, the boy child experiences enhanced cognitive ability to decipher his sexual awareness and would want to satisfy his desires.¹⁷⁰ The socialisation agents such as the family, peers and community therefore, play an important role in prescribing what is deemed as acceptable and unacceptable sexual behaviour.¹⁷¹ For instance, amongst the Chewa people, the boy child is expected to engage in sex as proof that he is no longer a child upon completing his initiation ceremony, even when it is against his will.¹⁷² He is required to adhere to prescribed gender norms of what it means to be a man and he has to engage in sexual activities in order to fit in.¹⁷³ As noted in the example, the boy child's sexual behaviour is based on dominant notions and practices that prevail in the cultural contexts around him and consequently influence

¹⁶³. A Elliot 'Social theory and Psychoanalysis in transition: Self and society from Freud to Kristeva' (2018) Taylor & Francis 34, defines it as a person's mental makeup that is present at birth which Freud believed that it represents the unconscious biological drives for food, sex, and other necessities of life, and is also concerned with instant pleasure or gratification.

¹⁶⁴ DK Lapsley & PC Stey 'Id, ego and superego' in VS Ramachandran (eds) *Encyclopedia of human behaviour* (2011) Elsevier 1, argued that it guides an individual's actions or behaviours to be within the boundaries of society.

¹⁶⁵ MLJ Koenane 'Towards an ethical recontextualization of Freud's theory of personality' (2014) 15(1) *Unisa Press* 3, stated that it focuses on morality and it serves to pass judgment on the behavior and actions of individuals in their desire for instant gratification.

¹⁶⁶ B Karpman 'Criminal psychodynamics- A platform' (1956) 47(1) *Journal of Criminal Law and Criminology* 8.
¹⁶⁷ General Comment 20 on the implementation of the rights of the child during adolescence, CRC Committee (6 December 2016), UN Doc CRC/C/GC/20 (2016) art 10.

¹⁶⁸ As above.

¹⁶⁹ As above.

¹⁷⁰ As above para 9.

¹⁷¹ S *Khumalo et al* 'Intersectionality of cultural norms and sexual behaviours: A qualitative study of young black male students at a university in KwaZulu Natal South Africa' (2020) 17(188) *Reproductive Health* 1.

¹⁷² Munthali & Zulu (n 141) 8.

¹⁷³ *Khumalo et al* (n 171) 1.

his response.¹⁷⁴ However, when his actions are deemed deviant, they are disapproved by the same society and it shames and chastises him.¹⁷⁵

2.5. Conclusion

This chapter has discussed the concepts of childhood, sexuality and crime and also explored the theories underpinning these key concepts. Specifically, the psychosocial theory of child development, the psychosexual theory of development and the psychodynamic theory of crime were discussed. The discussion provided an overview of the interconnectedness of the concepts of childhood, sexuality and crime. The study explained how childhood is understood in the Malawian society and related it to the boy child's sexuality to the extent that what was otherwise to be considered a normal developmental phase in his sexuality, is disapproved by the same society and infiltrated into the law as a crime.

¹⁷⁴ As above.

¹⁷⁵ E Griffiths & JM Chavez 'Longitudinal crime trends at places' in G Bruinsma, G & D Weisburd (eds) *Encyclopedia of criminology and criminal justice* (2014) 8.

3. GENDERISED AGE FACTOR UNDER MALAWIAN CHILDREN'S LAWS

3.1. Introduction

The previous chapter highlighted the key concepts of childhood, sexuality and crime as applied in this study. Further, it discussed the theories underpinning the key concepts in explaining the interconnectedness of the notion of childhood, sexuality and the boy child's involvement in sexual activities. This chapter therefore, discusses the gender-discriminatory age categorisation of children in Malawi in the contexts of marriage, employment, consent and criminal liability. Under criminal liability, particular focus is on child-to-child defilement and also the sections proposed to be amended in the penal code. The aim is to demonstrate how the law on defilement unjustifiably encourages differential treatment of the boy child. This will be achieved by analysing issues of consent in the Penal Code, Marriage, Divorce and Family Relations Act and Employment Act.

3.2. Constitutional guarantees for equality and non-discrimination of the boy child

The Constitution expressly states that it shall be the supreme arbiter and ultimate authority in the interpretation of all laws.¹⁷⁶ This entails that the development and application of any legislative measures must take full account of the fundamental principles upon which the Constitution is founded.¹⁷⁷ One such fundamental principle underlying the constitution is the fact that the inherent dignity and worth of each human being requires that the state and all people should recognize and protect fundamental human rights and also afford fullest protection to those rights.¹⁷⁸

The Constitution also built its foundation on the principle of equality of status of all persons before the law.¹⁷⁹ As such, the only justifiable limitations to lawful rights have been stated to be those that are necessary to ensure peaceful human interaction in an open and democratic society.¹⁸⁰ Further, the Constitution requires that the law prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, and shall be of general application.¹⁸¹

In terms of children, the Constitution specially recognises them as one of the founding principles of national policy.¹⁸² The Constitution emphasises the need for children not to be discriminated

¹⁷⁶ n 26 sec 10(1).

¹⁷⁷ n 26 sec 11(2)(b).

¹⁷⁸ n 26 sec 12(d).

¹⁷⁹ n 26 sec 12(e).

¹⁸⁰ n 26 secs 12(e) and 44(1).

¹⁸¹ n 26 sec 44(2).

¹⁸² n 26 sec 13.

against on any basis and also the need for the law to afford them equal protection.¹⁸³ Specifically, it guarantees equal recognition and protection of every child below the age of eighteen without any differentiation.¹⁸⁴ The Constitution perceives children as one sect requiring equal treatment before the law,¹⁸⁵ equal protection¹⁸⁶ and equal recognition.¹⁸⁷

3.3. Gender discriminatory age categorisation of children in the context of defilement

In prohibiting the defilement of the girl child, section 138 of the penal code provides as follows:¹⁸⁸

(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 a 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.

As noted from the wording of the section and despite the constitutional guarantees of equal status and treatment before the law,¹⁸⁹ the boy child is excluded from the protective umbrella of the law on defilement.¹⁹⁰ By excluding him, the law does not conceive the possibility that a boy child can be a victim of the offence of defilement as well owing to his vulnerability as a child.¹⁹¹ Section 138 offers no reasonable and objective justification for the differential treatment of the boy child,¹⁹² who enjoys protection by the general anti-discrimination clauses of both local and international instruments.¹⁹³

There are legislative efforts to include the prohibition of the defilement of the boy child as noted in the proposed amendments recently tabled in the parliament.¹⁹⁴ However, the proposed

¹⁸³ n 26 secs 20 and 23(1)

¹⁸⁴ n 26 sec 23(6).

¹⁸⁵ n 26 sec 23(1).

¹⁸⁶ n 26 sec 23(4).

¹⁸⁷ n 26 sec 12(e) and 20.

¹⁸⁸ n 21 sec 138.

¹⁸⁹ n 26 sec 23(1)

¹⁹⁰ n 21 sec 138.

¹⁹¹ MX Liu 'Suffering in silence: The failure of Malawi's sexual offense laws to protect children- A human rights report and proposed legislation' (2018) *Wisconsin International Law Journal* 38(3) 583.

¹⁹² As above 586.

¹⁹³ S Marks & A Clapham 'Children in international human rights lexicon' (2005) *Oxford University Press* 26.

¹⁹⁴ Penal Code (Amendment) Bill 26 of 2022 sec 138.

provisions have not taken into consideration the gender dimensions of the offence so as to adequately protect the boy child.¹⁹⁵ Equal protection of children entails that the substantive provisions of the law on defilement should apply to every child equally.¹⁹⁶ This, however, does not mean that every child should be treated in exactly the same way, but that as children they should not be treated differently on irrational and arbitrary grounds.¹⁹⁷ What the proposed amendments have done is to employ a cutting and pasting style of the provisions of the girl child and provide them for the boy child.¹⁹⁸ The children are guaranteed enjoyment of rights and freedoms on an equal footing, yes, but this does not mean identical treatment and provisions in every instance.¹⁹⁹

The law on defilement permits the punishment of the boy child only for pursuing his sexuality development, contrary to the dictates of the Constitution and international human rights instruments on equality and equal status before the law.²⁰⁰ The law makes it an offence to have sex with a girl below the age of sixteen, even where the same was consensual and non-exploitative.²⁰¹ When the defilement involves children, the law only punishes the boy child leaving the girl child scot-free.²⁰²

In remedying the above, the proposed amendments will seek to decriminalise consensual and non-exploitative sex between a boy child and a girl child.²⁰³ This is a step forward towards ensuring the equality of the boy child before the law as guaranteed by the Constitution.²⁰⁴ When passed into law, the boy child will benefit from the impartial application of the law on defilement.²⁰⁵ However, the proposed amendments will still subject the boy child to criminal liability should he fail to satisfy the defence of close-in-age which requires the age gap between him and the girl child not to be beyond two.²⁰⁶

¹⁹⁵ CRC Committee (n 167) art 30.

¹⁹⁶ L Weiwei 'Equality and nondiscrimination under international human rights law' (2004) *Norwegian Centre for Human Rights* 15.

¹⁹⁷ As above.

¹⁹⁸ n 21 sec 138(1) & (2).

¹⁹⁹ General Comment 18, Non-discrimination - General Recommendations Adopted by Human Rights Treaty Bodies, Human Rights Committee, (Month Day 1994) UN Doc HRI/GEN/1/Rev.1 (1994) art 8.

²⁰⁰ n 26 secs 12(e) and 20.

²⁰¹ n 21 sec 138.

²⁰² n 21 sec 138.

²⁰³ n 194 sec 138(3)(a).

²⁰⁴ n 26 sec 20.

²⁰⁵ n 194 sec 138(2).

²⁰⁶ n 194 sec 138(3)(a).

Still on the issue of criminal liability, the law on defilement further creates an injustice to the boy child by prescribing a lower age of criminal liability, it being especially a sexual offence.²⁰⁷ In Malawi, generally, a person under the age of 14 is not criminally responsible for an act or omission unless it is proven that he had the capacity to know that he should not have done the act or made the omission at the time of doing the act or making the omission.²⁰⁸ Without providing any justification, however, the law set another minimum age for the offence of defilement, where a male person of 12 years and above can be held criminally liable for sexual offences.²⁰⁹ This means that a boy child as young as 12 and 13 years of age risks being arrested for the offence of defilement, should it be proved that he had the requisite capacity to know that he ought not to do the sexual act.²¹⁰ The differential treatment of the boy child by lowering the age for criminal liability for sexual offences is unjustified and violates the non-discrimination principle.²¹¹ The boy child suffers discrimination based on sex, a ground which is explicitly prohibited in the Constitution,²¹² and also particularly emphasised in the GEA.²¹³

3.4. Children's capacity to enter into marriage: A synopsis of the Marriage, Divorce and Family Relations Act (MDFRA)

The MDFRA,²¹⁴ is an Act of parliament that makes provision for marriage, divorce and family relations between spouses and unmarried persons, their welfare and maintenance and that of their children, and for connected matters.²¹⁵ It is the product of the SLC that was constituted to undertake a review of the laws on marriage and divorce.²¹⁶ In order to achieve a general gender-based law reform that takes into account the welfare, interests, dignity, and participation of both men and women, the SLC emphasized the following three main principles: non-discrimination in the enjoyment of human rights, equal participation for both men and women, and affirmative action to achieve gender equality and combat discrimination.²¹⁷

²⁰⁷ n 21 sec 14(3).

²⁰⁸ n 21 sec 14(2).

²⁰⁹ n 21 sec 14(3).

²¹⁰ n 21 sec 14(2) & (3).

²¹¹ n 26 sec 20.

²¹² As above.

²¹³ Gender Equality Act 3 of 2013 sec 4.

²¹⁴ Marriage, Divorce and Family Relations Act 4 of 2015.

²¹⁵ As above preamble.

²¹⁶ Established under section 132 of the Constitution with the powers to review and make recommendations regarding any matter pertaining to the laws of Malawi.

²¹⁷ Special Law Commission 'The report on the review of laws on marriage and divorce' (2006) http://www.lawcom.mw/docs/Report_on_the_review_of_Marriage_and_divorce_Act.pdf (accessed 29 September 2022).

One notable thing about the MDFRA is that it raised the minimum age of marriage from 15 to 18 years old for both girls and boys.²¹⁸ The age raise created a gap, especially with regards to the age of contracting a marriage because by then the Constitution defined a child as a person below the age of 16 years.²¹⁹ As per the Constitution, a child between the ages of 15 to 18 could enter into a marriage with consent from parents.²²⁰ The Constitution was later amended in 2017 in order to give effect to the directions by the ACERWC.²²¹ A complaint was filed before the ACERWC by the IHRDA citing the failure of the government of Malawi to protect children between the ages of 16 to 18 as guaranteed by article 2 of the ACRWC.²²²

Raising the age of consent in marriage is a progressive approach in the protection of children.²²³ The raise consequentially prohibited child marriages which are defined as a legal or customary practice where a child below eighteen years of age is forced into or has a marriage arranged for him or her with another child or an adult.²²⁴ In Malawi, child marriages are categorised as harmful cultural practices and are punishable by the law.²²⁵ By raising the age of entering into marriage to eighteen, the law equally accorded protection to both the girl and boy child in recognition of their rights.²²⁶

The issue of age was specifically highlighted as one of the issues for reform.²²⁷ Because only statutory marriages had established the age of eighteen as the minimum age for marriage, the SLC found the lack of consistency regarding the age of marriage among the various regimes of marriage to be undesirable.²²⁸ Both customary marriages and religious marriages had no fixed age requirement and the attainment of puberty was a critical determining factor of the capacity to marry.²²⁹ Before the amendment of the Constitution, a person of 18 years of age would enter into a marriage without first seeking the consent of his or her parents, whilst persons aged between

²¹⁸ n 214 sec 14.

²¹⁹ n 26 sec 23(5) repealed by Act 15 of 2017.

²²⁰ n 26 sec 22(7) Repealed by Act 15 of 2017.

²²¹ Mandated with the promotion and protection of the rights of children under the African Charter on the Rights and Welfare of the Child <https://www.acerwc.africa/mandate/>.

²²² *Institute for Human Rights and Development in Africa v The Government of Malawi* (2016) Communication No. 004/Com/001/2014 Report on consideration of an amicable settlement under the auspices of the Committee before the African Committee of Experts on the Rights and Welfare of the Child (ACERWC).

²²³ n 26 sec 13(h).

²²⁴ J Parsons *et al* 'Economic Impacts of Child Marriage: A review of the Literature' (2015) *THE Review of Faith & International Affairs* 13(3) 2.

²²⁵ n 213 sec 5.

²²⁶ n 26 sec 23(1).

²²⁷ Special Law Commission (n 217).

²²⁸ As above.

²²⁹ As above.

15 and 18 were required to obtain parental consent before they could validly enter into a marriage contract.²³⁰

Following the recommendations by the SLC, the age capacity to marry was duly revised and is now provided for as follows in the MDFRA:²³¹

subject to section 22 of the Constitution, two persons of the opposite sex who are both not below the age of eighteen years, and are of sound mind, may enter into marriage with each other.

As noted from the extract, the MDFRA does not differentiate the capacity of the male and female persons intending to enter into a marriage contract in terms of age.²³² This means that children enjoy equal recognition and protection of their rights and obligations as provided in the MDFRA,²³³ the Constitution²³⁴ and any other related legislation. The children are further subjected to the same treatment when it comes to offences and penalties relating to marriages, should there be a breach.²³⁵ For example, in providing for the offence of unlawful performance of ceremony by a person not legally competent, the Act provides as follows:²³⁶

A person who, knowingly and willfully, celebrates or purports to celebrate a marriage when he or she is not competent under this Act to do so, commits an offence and is liable on conviction to a fine of K100,000 and to imprisonment for five years.

This provision in the MDFRA can be contrasted with the law on defilement on the differential treatment accorded towards the boy child and girl child. Per the reading of section 138 of the PC, 16 years has been put as the threshold on which a girl child is regarded to possess the capacity to indulge in sexual activities.²³⁷ There is, however, no corresponding section providing for the capacity of the boy child to indulge in sexual activities.²³⁸ Further, when known to have engaged in sexual intercourse with a girl of below sixteen years, the law only punishes the boy child by providing for his arrest and trial before the court, leaving the girl child to go scot-free.²³⁹

²³⁰ n 26 sec 22(7) & (8), repealed by Act 15 of 2017.

²³¹ n 214 sec 14.

²³² As above.

²³³ n 214 part ix.

²³⁴ n 26 sec 22.

²³⁵ n 214 part x.

²³⁶ n 214 sec 55

²³⁷ n 21 sec 138.

²³⁸ As above.

²³⁹ As above.

By punishing the boy child only, the law wrongly assumes that he is the only one bearing the capacity to commit the offence of defilement.²⁴⁰ Such perception is unjustified and stems from the society's stereotypical perceptions that portray the boy child as aggressive and the girl child as passive.²⁴¹ Through the law on defilement, the boy child is punished for being sexually active while the girl child is perceived as passive and weak hence protecting her.²⁴² The law on defilement, therefore, is a reflection of societies' conception about children's sexuality and it is being used to discriminate against and oppress the boy child.²⁴³

3.5. Children and the legal capacity to work in Malawi

The legal framework for children in the labour sector is primarily contained in the Employment Act.²⁴⁴ The Employment Act sets the minimum age for admission of a child to employment at 14 years.²⁴⁵ However, exceptions are made for certain work done in some settings like homes, training institutions and vocational schools.²⁴⁶ The Employment Act further prohibits children between the ages of 14 and 18 to carry on employment that is harmful to their health, safety, education, morals, and development, and prejudicial to their education.²⁴⁷ To ensure compliance with the requirements and also the protection of children, employers are required to keep a register of all employees under the age of 18 years.²⁴⁸ It is also worth mentioning that violations of any of the provisions in the Act can result in a fine and 5 years of imprisonment.²⁴⁹

From the few highlighted sections, the Employment Act does not differentiate the treatment of the boy child and girl child in relation to employment by giving them equal recognition.²⁵⁰ The two are accorded equal recognition and protection, firstly because they are both children and secondly they fall within the same age category.²⁵¹ There is basically no distinction as the boy child and girl child enjoy employment-related rights, recognition and protection on an equal footing.²⁵² Actually,

²⁴⁰ Kangaude (n 6) 536.

²⁴¹ Zhu & Van der Aa (n 10) 526.

²⁴² As above 527.

²⁴³ Kangaude (n 6) 536.

²⁴⁴ Act 10 of 2000.

²⁴⁵ As above, sec 21(1).

²⁴⁶ As above.

²⁴⁷ As above sec 22(1)(a) & (b).

²⁴⁸ As above sec 23.

²⁴⁹ As above sec 24.

²⁵⁰ As above secs 21 and 22.

²⁵¹ n 26 sec 23(6) and n 244 above sec 22(1).

²⁵² n 244 above secs 21 & 22.

section 5(1) of the Employment Act explicitly prohibits discrimination, further pursuing the constitutional provisions of equality and non-discrimination.²⁵³

A closer look at the Employment Act, it shares a common determinant with the law on defilement in a way that age is used to determine a person's capacity to engage in employment contracts, just like it is used to determine one's capacity to indulge in sexual activities.²⁵⁴ The only difference, however, is that the Employment Act does not differentiate in terms of its application, that is to say, it does not have a specific group or sex that it targets.²⁵⁵ Under the Employment Act, both the boy child and girl child are subjected to the same scrutiny to establish their legal capacity to be employed.²⁵⁶ Further, in cases of an illegality, both the boy child and girl child are likely to suffer consequences for their actions, not just one sect of children only the way it is with the offence of defilement where only the boy child is punished for the sexual activity while the girl child goes scot-free.²⁵⁷

To ensure equal recognition and protection of the boy child and girl child in the context of employment, the Employment Act is read together with the Gender Equality Act which explicitly prohibits sex discrimination.²⁵⁸ The Gender Equality Act applies to all persons, male and female without any differentiation and also to all matters.²⁵⁹ With the explicit prohibition of sex discrimination, it means the boy child and the girl child are guaranteed equal recognition and protection in employment, in line with the umbrella provisions in the Constitution.²⁶⁰

3.6. Conclusion

All children under the age of 18 are entitled to equal treatment before the law.²⁶¹ They are also guaranteed equal and effective protection against discrimination on any basis including sex.²⁶² The Constitution of Malawi, the Marriage Divorce and Family Relations Act, the Employment Act and the Gender Equality Act all give effect to the provisions aimed at ensuring the equal recognition and protection of children. Despite such guarantees, however, the boy child in Malawi

²⁵³ n 26 sec 20 & n 244 sec 5(1).

²⁵⁴ n 244 sec 21 & n 21 above sec 138.

²⁵⁵ n 244 sect 2.

²⁵⁶ n 244 secs 21(1) & 22(1)(a) & (b).

²⁵⁷ n 244 sect 24.

²⁵⁸ n 213 sec 4.

²⁵⁹ n 213 sec 2.

²⁶⁰ n 26 sec 23 (1).

²⁶¹ n 26 sec 23(1) & (6).

²⁶² n 26 sec 20(1).

is subjected to discrimination under the law on defilement, resulting in the infringement of his fundamental rights.²⁶³ Discrimination based on sex as reflected in the law of defilement is prohibited and regard must be had to the revision of this legislation and its application thereof, so that its content should not be discriminatory.²⁶⁴

²⁶³ n 21 sec 138.

²⁶⁴ n 26 sec 20.

4. APPRAISING THE AMENDED AND INCLUDED PROVISIONS OF THE PENAL CODE THAT PROTECT THE BOY CHILD

4.1 Introduction

The parliament of Malawi has made important strides in the past two decades to protect children who are susceptible victims of sexual abuse, including by bolstering the protection for children in the Penal Code on chapters bordering on sexual offences,²⁶⁵ enacting the CCPJA,²⁶⁶ and the GEA,²⁶⁷ and also raising the age of majority in the Constitution to 18 years old.²⁶⁸ Of interest is the recent PCAB containing proposed amendments to the PC on the law on defilement,²⁶⁹ which the Malawi parliament tabled and awaits adoption.²⁷⁰ The offence of defilement which is provided under section 138 of the Penal Code basically regulates the age of consent to sexual intercourse in Malawi.²⁷¹ The age of consent has been proposed to be revised from 16 to 18 by aligning it with the definition of a child as espoused in the constitution.²⁷² Further, the proposed amendment has introduced a corresponding section criminalising sexual intercourse with a boy child by a female person.²⁷³ Lastly, the proposed amendment has introduced some new defence which can be invoked at trial such as that the perpetrator is a child,²⁷⁴ is close-in-age with the victim,²⁷⁵ and also where the sexual intercourse was consensual.²⁷⁶

The proposed amendments can be commended for steering Malawi towards the progressive promotion and protection of the rights of children. However, this study argues that the proposed amendments fall short of effectuating the full scope of the rights guaranteed to the boy child under Malawi's constitutional and international law obligations. This chapter, therefore, conducts an appraisal of the proposed amendments to section 138 of the Penal Code that provide for the offence of defilement in a bid to highlight the significant proposed changes and flag the legislative

²⁶⁵ Raised the age of consent in defilement from 13 to 16 through Penal Code (Amendment) Bill 1 of 2011 and now proposing to raise the age to 18 through Penal Code (Amendment) Bill 26 of 2022.

²⁶⁶ n 34.

²⁶⁷ n 213.

²⁶⁸ *Institute for Human Right and Development in Africa v The Government of Malawi* (2016) Communication No. 004/Com/001/2014 Report on consideration of an amicable settlement under the auspices of the Committee before the African Committee of Experts on the Rights and Welfare of the Child (ACERWC).

²⁶⁹ n 194.

²⁷⁰ Parliament of Malawi 'Order Paper 49th Session: 6th Meeting' Wednesday 3 August 2022 NA/TOD/06/49 178.

²⁷¹ n 21.

²⁷² n 194 sec 2 and n 26 sec 23(6).

²⁷³ n 194 sec 138(2).

²⁷⁴ n 194 sec 138 (3).

²⁷⁵ n 194 sec 138(3)(a).

²⁷⁶ As above.

gaps that remain, warranting a call for extra efforts in the promotion and protection of the rights of the boy child.

4.1.1 Age of consent raise; is it justified?

As previously indicated, the offence of defilement which is provided under section 138 of the Penal Code basically regulates the age of consent to sexual intercourse in Malawi.²⁷⁷ The age of consent has been proposed to be revised from sixteen to 18 by aligning it with the definition of a child as espoused in the constitution.²⁷⁸ The Constitution of Malawi was amended in 2017 in order to give effect to the directions by the ACERWC.²⁷⁹ A complaint was filed before the Committee by the IHRDA, citing the failure by the government of Malawi to protect children between the ages of sixteen to eighteen as guaranteed under article 2 of the African Charter on the Rights and Welfare of the Child.²⁸⁰ Before then, the Constitution of Malawi defined a child as a person below the age of sixteen years.²⁸¹

In addition to raising the age in the Constitution, the Malawi government also accepted recommendations to harmonise all its domestic legislation on the definition of a child.²⁸² Drawing from this, the MDFRA also raised the age of marriage from 16 to 18.²⁸³ Before the amendments, a person of 18 years of age would enter into a marriage without first seeking the consent of his or her parents, whilst persons aged between 15 to 18 were required to obtain parental consent before they could validly enter into a marriage contract.²⁸⁴

The proposed amendment in the Penal Code to raise the age of consent from 16 to 18 is in tandem with the Constitution.²⁸⁵ Further, it draws its validity from the Constitution because any law that is inconsistent with the provisions of the Constitution is to the extent of the inconsistency be invalid.²⁸⁶

²⁷⁷ n 21 sec 138.

²⁷⁸ n 194 sec 2 & 138.

²⁷⁹ Mandated with the promotion and protection of the rights of children under the African Charter on the Rights and Welfare of the Child <https://www.acerwc.africa/mandate/>.

²⁸⁰ n 268 above.

²⁸¹ n 26 sec 23(5) repealed by Act 15 of 2017.

²⁸² The United Nations Human Rights Council Universal Periodic Review Process 'Outcome of the universal periodic review: Malawi' (2015) <https://www.ohchr.org/en/hr-bodies/hrc/regular-sessions/session30/res-dec-stat> (accessed 11 October 2022).

²⁸³ n 214 secs 2 & 14.

²⁸⁴ n 26 sec 22(7) & (8) repealed by Act 15 of 2017.

²⁸⁵ n 26 sec 10.

²⁸⁶ n 26 sec 5.

The proposed age raise is also reflective of Malawi's commitment to harmonise all its laws pertaining to the definition of the child in furtherance of its international obligations, particularly emanating from the CRC,²⁸⁷ and the ACRWC.²⁸⁸ These two treaties were incorporated into domestic law through the enactment of the CCPJA in providing for child care and protection, child justice, and social development of the child.²⁸⁹

Much as it is a commendable proposal, in raising the age of consent the proposed amendment has given little attention to the evolving capacities of children.²⁹⁰ The principle of evolving capacities of the child, which has profound implications on the rights of the child, is ably recognised under both the CRC,²⁹¹ and ACRWC.²⁹² In providing for the principle of evolving capacities of the child, the CRC states that parental or other adult-provided direction and supervision for a kid must take into account the child's abilities to assert rights on his or her own behalf.²⁹³ Similarly, the ACRWC places a duty on parents and legal guardians to have regard to children's evolving capacities in providing guidance and directions on the exercise of the rights of children.²⁹⁴

This principle recognises that children in various locations and cultures exposed to a variety of life events may develop competencies at varying ages, and their learning of competencies will vary depending on the circumstances.²⁹⁵ It also allows for the fact that children's capacities can vary depending on the type of rights to be exercised.²⁹⁶ Children therefore need diverse levels of protection, involvement, and opportunity for independent decision-making in various circumstances and across various decision-making domains.²⁹⁷

In a Joint General Comment issued in 2017, the ACERWC and the ACHPR' in providing for children's full and free consent, recognised that children may have the capacity to make decisions

²⁸⁷ n 32 art 1 defines a child as every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

²⁸⁸ n 33 art 2 defines a child as every human being below the age of 18 years.

²⁸⁹ n 34.

²⁹⁰ G Lansdown 'The evolving capacities of the child' (2015) Innocent Research Centre ix <https://www.unicef-irc.org/publications/pdf/evolving-eng.pdf> (accessed 15 August 2022).

²⁹¹ n 32 art 5.

²⁹² n 33 art 9.

²⁹³ n 32 art 5.

²⁹⁴ n 33 art 9.

²⁹⁵ n 167 arts 18,19 & 20.

²⁹⁶ As above.

²⁹⁷ As above.

about their lives, including consenting to sex.²⁹⁸ Their age is not the only aspect that influences the children's capacity to make wise judgments; other factors may also play a role.²⁹⁹ When children go through the adolescent phase in their childhood, they experience rapid physical, cognitive and social changes, which include sexual maturation.³⁰⁰ Children need to be protected from sexual abuse and exploitation, but the efforts need to be balanced with their evolving capacities.³⁰¹

The law on defilement can comply with Malawi's constitutional and international obligations only if it balances the need to protect children from sexual abuse and exploitation with the need to respect their evolving capacities to exercise their right to sexual development.³⁰² The Constitution, the CRC and the ACRWC all guarantee that the best interest and welfare of children is a primary consideration in all actions or decisions affecting them, including decisions on their sexual development.³⁰³

Raising the age of consent to eighteen means the boy child will continue to be arrested for having sex with a girl below the proposed age.³⁰⁴ This will surely not be in the boy child's best interest, and he risks suffering a violation of his rights as guaranteed by the Constitution.³⁰⁵ In the South African case of *Teddy Bear Clinic v. Minister of Justice and Constitutional Development*,³⁰⁶ the court held as follows:

"...[I]mposing criminal liability on adolescent sexual conduct that is otherwise normative has the effect of harming the adolescents they intend to protect, in a manner that constitutes a deep encroachment into the rights of the child, including, dignity and privacy, and is against the best interests of the child principle..."³⁰⁷

²⁹⁸ The African Commission on Human and Peoples Rights and the African Committee of Experts on the Rights and Welfare of the Child 'Joint General Comment on Ending Child Marriage' (2017) art 6.
²⁹⁹ E Durojaye 'The potential of the Expert Committee of the African Children's Charter in advancing adolescent sexual health and rights in Africa' (2013) 46(3) *The Comparative and International Journal of Southern Africa* 394.
³⁰⁰ 'General Comment 4 Adolescent Health and Development in the Context of the Convention on the Rights of the Child, CRC Committee (1 July 2003), UN Doc CRC/GC/2003/4 (2003) art 2.
³⁰¹ n 167 art 40.
³⁰² Liu (n 191) 597.
³⁰³ n 26 sec 23(1), n 32 above art 3(1) and n 33 above art 4(1).
³⁰⁴ n 21 sec 138.
³⁰⁵ n 26 sec 23.
³⁰⁶ *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development And Another* (CCT 12/13) [2013] ZACC 35; 2013 (12) BCLR 1429 (CC); 2014 (2) SA 168 (CC); (3 October 2013) para 76.
³⁰⁷ As above.

Efforts to decriminalise factually consensual and non-exploitative sexual activities of children are welcome.³⁰⁸ However, the same can be achieved without necessarily raising the age of consent because proceeding as such will infringe on children's right to development and their evolving capacities to make decisions.³⁰⁹

4.1.2 Introduction of a corresponding section criminalising defilement of the boy child

Despite the constitutional guarantees of equal status and treatment before the law,³¹⁰ the boy child in Malawi has for quite a long time been particularly excluded from the protective umbrella of the law on defilement.³¹¹ As a result, his constitutional and treaty rights to equality and equal protection, privacy, dignity and safety suffered violation.³¹² By excluding the boy child, the law ignored the painful reality that the boy child is sexually abused as well, only that a plethora of research and intervention over the years have centred on the girl child.³¹³

The sexual exploitation of the boy child is far much greater a problem than once thought and he is heavily impacted by it like the girl child, and in some contexts even more.³¹⁴ The boy child is the easier target for perpetrators because he is not as supervised or protected as the girl child.³¹⁵ Despite not being as protected, the boy child is likely to be subjected to comparable physical, psychological and social traumas resultant of abuse.³¹⁶ However, due to stereotypes associated with masculinity, the boy child as a victim of sexual abuse faces particular challenges in reporting such abuse and receiving appropriate assistance.³¹⁷

³⁰⁸ n 194 sec 138,

³⁰⁹ n 167 art 40.

³¹⁰ n 26 sec 23(1).

³¹¹ n 21 sec 138.

³¹² n 26 secs 19(1), 20(1), 21 and 23.

³¹³ UNICEF

<https://data.unicef.org/resources/sexual-exploitation-boys-findings-ethical-considerations-methodological-challenges/> (accessed 4 August 2022).

³¹⁴ African Child Policy Forum, Violence Against Children in Africa : A report on progress and challenges https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/2021/violence_against_children_in_africa_a_report_on_progress_and_challenges.pdf (accessed 4 August 2022).

³¹⁵ L Panicker 'End the silence on the abuse of the male child' <https://www.hindustantimes.com/opinion/end-the-silence-on-the-abuse-of-the-male-child-101616243017098.html> (accessed 4 August 2022).

³¹⁶ UNICEF The Missing 'C': Sexual Violence against Children in sub-Saharan Africa <https://www.unicef-irc.org/article/987-the-missing-c-sexual-violence-against-children-in-sub-saharan-africa.html> (accessed 4 August 2022).

³¹⁷ The African Commission on Human and Peoples' Rights 'Guidelines for combating sexual violence and its consequences in Africa' https://www.achpr.org/public/Document/file/English/achpr_eng_guidelines_on_combating_sexual_violence_and_its_consequences.pdf (accessed 6 August 2022) 16.

In Malawi, sexual abuse against the boy child is grossly under-acknowledged, and the victims often experience extreme shame and stigma.³¹⁸ The misguided view that boys cannot be sexually abused is pervasive in the Malawian culture such that public reports of their sexual abuse are oftentimes met with resentment and disbelief.³¹⁹ The Malawian culture does not encourage male survivors to report their experiences of sexual abuse, operating on the norms that males are strong, do not get emotional and cannot be subjected to any suffering.³²⁰

Unfortunately, these cultural norms and harmful stereotypes are codified in the Malawian law as reflected in the law creating the offence of defilement.³²¹ Up until the proposed amendments, section 138 of the Penal Code read as follows:³²²

- “(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 of shall be guilty of a 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.

Thus, according to section 138, the law does not conceive the possibility that a boy child can be a victim of the offence of defilement.³²³ However, a female person who forces or coerces a boy child into having sex with her will not be treated as a defilement offender by the criminal justice system, should the law not be amended as proposed.³²⁴ Further, the survivor of the defilement who happens to be a boy child will not have an effective remedy by a court of law for acts violating his rights and freedoms granted to him under the Constitution or any other law.³²⁵ This legislative gap, does not only perpetuate the harmful stereotype that only the boy child can be the aggressor; but it also blinds the judiciary and the society at large on the prevalence and severity of the sexual abuse of the boy child and its implications on his rights.³²⁶

³¹⁸ Liu (n 191) 583.

³¹⁹ As above.

³²⁰ As above.

³²¹ n 21 sec 138.

³²² As above.

³²³ Liu (n 191) 583.

³²⁴ As above, 584.

³²⁵ n 26 sec 41(3).

³²⁶ Liu (n 191) 584.

Defilement of the boy child results in a violation of his right to safety and security, and to be free from sexual abuse as guaranteed by Malawi's Constitution,³²⁷ and by Malawi's obligations under international law. For instance, the CEDAW Committee and the Committee on the Rights of the Child issued a joint General Recommendation and General Comment where, among others, it recognised that boys must have their rights protected because they are also victims of abuse, destructive behaviours, and bias.³²⁸ Further, the ACRWC also calls on Malawi to protect all boy children from all forms of sexual exploitation and abuse, and to take steps to prevent the inciting, coercing, or encouraging of a boy child to engage in any sexual activity.³²⁹

Section 138 of the Penal Code as it is, promotes discrimination against the boy child based on his sex, a ground which is prohibited by the Constitution.³³⁰ Further, the CRC specifically, obligates Malawi to uphold the rights therein without discrimination of any kind, irrespective of the child's sex.³³¹ Additionally, the ACRWC requires that every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the ACRWC irrespective of the child's sex and other status.³³²

The rights to equality and non-discrimination are also a bedrock of the Malawi Constitution.³³³ Therefore, all boys and girls under the age of 18 are entitled to equal treatment before the law.³³⁴ Further, all persons are guaranteed equal and effective protection against discrimination on the basis of sex.³³⁵ By leaving him entirely outside the scope of the law, section 138 discriminates against the boy child.³³⁶ Up until the proposed amendments, a female person who would defile a boy child would only be prosecuted under section 155 of the Penal Code which provides for the offence of indecent assault.³³⁷ This is a mockery to the boy child as the offence of indecent assault carries a significantly lighter sentence of maximum seven years imprisonment upon conviction,

³²⁷ n 26 sec 23(4).

³²⁸ Joint general recommendation 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child' (2019) on harmful practices, CRC Committee & CEDAW Committee (6 May 2019), UN Doc CEDAW/C/GC/31/Rev.1–CRC/C/GC/18/Rev.1 (2019) art 4.

³²⁹ n 33 art 27(1)(a).

³³⁰ n 26 sec 20.

³³¹ n 32 art 2(1).

³³² n 33 art 3.

³³³ n 26 sec 12(e).

³³⁴ n 26 sec 23(1).

³³⁵ n 26 sec 20(1).

³³⁶ n 21 sec 138.

³³⁷ n 21 sec 155.

as compared to the maximum punishment of life imprisonment for the defilement of the girl child.³³⁸

Further, the offence of indecent assault is only limited to sexual assaults on boys under the age of 14 years, which means that the boy child belonging to the age group of 14 to 18 is not protected within the ambit of the law.³³⁹ The gender gap in the Penal Code provision on defilement not only fails to protect the boy child from sexual abuse, but it also perpetuates the stereotype that boys can never be victims of sexual offences.³⁴⁰ Further, by bringing their matter under a different and lesser law of indecent assault, the law is not providing equal treatment and protection to the boy child by virtue of being a child.³⁴¹

There is therefore an apparent need to protect the boy child from defilement as a form of sexual abuse by having a corresponding section in the Penal Code. However, the same should take into consideration the gender dimensions of the abuse so as to adequately protect the boy child, not just cutting and pasting the provision for the girl child as it has been done in the wording of the proposed amendment.³⁴² The Committee on the Rights of the Child rightly observed the same when it called on State Parties, Malawi inclusive, to implore measures to address the boy child's rights violations and to challenge negative perceptions of boys, by promoting positive masculinities, overcoming cultural values based on machismo and promoting greater recognition of the gender dimension of the abuses they experience.³⁴³

4.1.3 Close-in-age defence; giving with one arm and taking with the other?

The proposed amendment to section 138 has introduced some defences which can be invoked where the perpetrator of the offence is a child,³⁴⁴ is close-in-age with the victim,³⁴⁵ and also where the sexual intercourse was consensual.³⁴⁶ Up until the proposed amendments, a person accused of defilement could escape a conviction if he could show the court that he believed the girl victim to be sixteen years old or older, and that he had reasonable cause to believe so.³⁴⁷ A defendant

³³⁸ n 21 secs 138 and 155.

³³⁹ n 21 sec 155.

³⁴⁰ Liu (n 191) 593.

³⁴¹ n 26 secs 12(e) and 23(1).

³⁴² n 194 sec 138.

³⁴³ n 298 art 30.

³⁴⁴ n 194 sec 138 (3).

³⁴⁵ n 194 sec 138(3)(a).

³⁴⁶ n 194 sec 138(3)(a).

³⁴⁷ n 21 sec 138 (2); *Josphat Mitambo versus Republic* Criminal Case No. 5 of 2018.

needed not show that he was deceived as to the girl's age or even that he took any steps to ascertain it, an accused person was only required to demonstrate that he had a reasonable cause to believe that the girl victim was 16 years or older.³⁴⁸ In *Hambeyani v the Republic*,³⁴⁹ the High Court of Malawi dismissed an appeal of a conviction because the appellant had clearly formed a view that the victim could be below 16 years and stated that it could have been different had he told the court that he truly believed that she was above 16 years.

The law provides for statutory defence as a matter of ensuring that a fair trial is accorded to a defendant.³⁵⁰ In *Yamikani Paul v Republic*,³⁵¹ Justice Kamwambe of the High Court of Malawi quashed the appellant's conviction and set aside his sentence because the lower court did not explain the statutory defence to him, hence he was not accorded a fair trial. It is therefore justified to have the proposed defence in the amendment, which reads as follows:³⁵²

(3) It shall be a defence to a charge under subsection (1) or subsection (2) if it is proved to the court that the male person or female person so charged is a child and-

(a) the age difference between the person so charged and the female child or male child against whom the offence is alleged to have been committed is two years or less; and

(b) the female child or male child against whom the offence is alleged to have been committed consented to the sexual intercourse.

From the reading of section 138 however, the boy child still risks being exposed to the criminal justice system at a tender age because there is no corresponding provision on how to treat the boy child when he invokes the proposed defence.³⁵³ Indeed, the law is silent whether the boy child will be discharged from the offence or not because defilement is excluded from the offences that qualify for diversion under the CCPJA.³⁵⁴

Further, as per the proposed amendment, a boy child who has sex with a girl child below the age of 18 could be arrested and tried, should the age gap between him and the girl child be above two years.³⁵⁵ Recently, on 9 September 2022 one of the radio stations in Malawi reported the

³⁴⁸ As above.

³⁴⁹ Criminal appeal No. 19 of 2018.

³⁵⁰ The African Commission on Human and Peoples' Rights 'Principles and guidelines on the right to a fair trial and legal assistance in Africa' Part O.

³⁵¹ Criminal appeal No. 16 of 2017.

³⁵² n 194 sec 138.

³⁵³ As above.

³⁵⁴ n 34 sec 112(e) and fourth schedule.

³⁵⁵ n 194 sec 138 (3)(a).

arrest of a 15-year-old boy child on allegations that he had sex with a 12-year-old girl child.³⁵⁶ The matter is awaiting trial in court, but from the wording of the proposed amendments, this boy child risks not benefiting from the proposed defence because of the age disparity which is beyond two years, despite him being a child and also the girl having allegedly consented to the sexual activity.³⁵⁷

The heavy arm of the law on defilement fails to differentiate between exploitative sex between adults and children, and consensual sex between children who are peers.³⁵⁸ While the intention of the law was to bring to book paedophiles, older men preying on young girls,³⁵⁹ in reality, the average age of males charged with defilement is much lower.³⁶⁰

Indeed, the CCPJA generally provides robust protection for children in conflict with the law.³⁶¹ Particularly, section 88 of the CCPJA recognises the need to give primary consideration to the rights of the children when dealing with them as offenders or in need of protection.³⁶² However, and to the dismay of the boy child, the offence of defilement is listed as a serious offence.³⁶³ This means therefore that the boy child who is arrested for defilement is not eligible for diversion, which is a referral away from the formal court proceedings, under the CCPJA.³⁶⁴ The boy child will therefore be exposed to the harshness of the justice system at a tender age and eventually punished for exploring his sexuality as part of his development.³⁶⁵

Further, the boy child will be subjected to unequal treatment by the law.³⁶⁶ Children who are responsible for non-serious offences might be released from police custody, either by a police officer, a probation officer or a magistrate with only a warning before a proceeding goes before a child justice court.³⁶⁷ This legal mechanism does not exist for the boy child who had sex with a

³⁵⁶ YONECO FM
<http://www.yonecofm.com/index.php/2022/09/09/teenager-arrested-for-defilement/#:~:text=Police%20in%20Blantyre%20have%20arrested,standard%206%20at%20the%20school>
(accessed 13 October 2022).

³⁵⁷ n 21 sec 138.

³⁵⁸ Liu (n 191) 584.

³⁵⁹ Parikh (n 63) 1

³⁶⁰ As above.

³⁶¹ n 34 part III.

³⁶² n 34 sec 88(b).

³⁶³ n 34 sec 112 and fourth schedule.

³⁶⁴ As above.

³⁶⁵ Kangaude (n 6) 548.

³⁶⁶ n 26 sec 23(1).

³⁶⁷ n 34 sec 94(1)(a), (4) A police officer may divert a case, and caution and release the child. Sec 99(1)(2)(4)(b) A magistrate may divert a matter during a preliminary inquiry. Sec 112(e)A child may be eligible for diversion if the offense is not one of the serious offences listed in Schedule Four.

girl below the age of 16 even if the sex was consensual.³⁶⁸ As a result, the boy child's constitutional and treaty rights to equal status and treatment before the law and equality are violated.³⁶⁹

4.2 Conclusion

The proposed amendments to section 138 of the Penal Code that provide for the offence of defilement are commendable and progressive. The raising of the age of consent to eighteen will be in harmony with the constitutional and international obligations for the rights of children. However, there is a need to devise measures to ensure that in raising the age of consent, a child's evolving capacities are not infringed upon. Further, the inclusion of a corresponding section criminalising the defilement of the boy child will accord him equal protection before the law. However, the same should take cognisance of the gender dimension of the sexual abuse that the boy child is subjected to. Lastly, the amendments will decriminalise consensual and non-exploitative sex between children. However, the boy child who will not be covered within the defence of close in age still risks arrest and imprisonment, should the same not be revised.

³⁶⁸ As above.
³⁶⁹ n 26 secs 12(1)(e), 20 and 23(1).

5. CONCLUSION AND RECOMMENDATIONS

5.1. Introduction

This study has interrogated the extent to which the rights of the boy child are recognised and protected in the context of defilement in Malawi. Chapter one laid the background of the study and proceeded on the assumption that the law does not recognise and protect the rights of the boy child to the same extent as it does with the girl child. This happens despite the Constitution of Malawi guaranteeing the boy child's equal recognition, treatment, and protection by the law. Chapter 2 discussed the key concepts of childhood, sexuality and crime that underlie the offence of defilement. It further explored the theories underpinning these key concepts, and specifically discussed the psychosocial theory of child development, the psychosexual theory of development and the psychodynamic theory of crime. The aim was to provide an overview of the interconnectedness of the concepts of childhood, sexuality, and crime, which in this case is the offence of defilement. In pursuance of the same, this chapter explained how childhood is understood in the Malawian society and related it to the boy child's sexuality to the extent that what was otherwise to be considered as a normal developmental phase in his sexuality, is disapproved by the society and infiltrated into the law as a crime. Chapter three discussed the gender-discriminatory age categorization of children in Malawi in the contexts of marriage, employment, consent, and criminal liability. Under criminal liability, particular focus was on child-to-child defilement and the discussion demonstrated how the law on defilement unjustifiably encourages differential treatment of the boy child. Lastly, in chapter four, the study did an appraisal of the amended and included provisions of the Penal Code that protect the rights of the boy child, with a particular focus on section 138 which creates the offence of defilement. To that end, an analysis of the proposed new age of consent, the corresponding section criminalising defilement of the boy child and the close-in-age defence was carried out. This final chapter, therefore, revisits the main findings of the study and offers recommendations based on the findings.

5.2. Findings of the study

5.2.1. Punishment for a developmental childhood phase

This study has found that the boy child is held criminally liable and is punished for a sexual conduct that is otherwise normative as a phase in his childhood. Generally, childhood is an

explorative phase of human development.³⁷⁰ According to Scardamalia and Bereiter, children are continuous knowledge and information seekers.³⁷¹ This inquisitiveness, in most cases, is what drives children to ignorantly, try many things, including sex.³⁷² Punishing the boy child when pursuing his sexuality negatively impacts his right to dignity and development as guaranteed in the constitution.³⁷³ Aware of the one-sidedness of criminal liability in children's sex offences, the government of Malawi is currently revising its laws to decriminalise consensual and non-exploitative sex between children as reflected in the proposed amendments to the Penal Code.³⁷⁴ These are commendable and recognise the need to move away from punishing the boy child in this context. However, the boy child will still be criminally liable if his age falls outside the ambit of being close-in-age with the victim.³⁷⁵ The boy child risks being arrested and imprisoned for reasons bordering on his sexuality, should the proposed amendments be effected.³⁷⁶ He will therefore be exposed to the harshness of the justice system at a tender age, and eventually punished for exploring his sexuality as part of his development.³⁷⁷

5.2.2. Exclusion from the protective umbrella of the law

This study has found that despite the constitutional guarantees of equal status and treatment before the law,³⁷⁸ the boy child in Malawi has for quite a long time been particularly excluded from the protective umbrella of the law on defilement.³⁷⁹ As a result, his constitutional and treaty rights to equality, equal recognition and protection by the law suffered violation.³⁸⁰

Further, the study found out that by excluding the boy child, the law ignored the painful reality that he can be sexually abused as well, only that a plethora of research and intervention over the years have centred on the girl child.³⁸¹ The defilement of the boy child results in a violation of his right to safety and security, and to be free from sexual abuse as guaranteed by Malawi's

³⁷⁰ A Gopnik 'Childhood as a solution to explore-exploit' (2020) Royal Society of London Biological Sciences 2.
³⁷¹ M Scardamalia & C Bereiter 'Higher levels of agency for children in knowledge building: A challenge for the design of new knowledge media' (1991) The Journal of the Learning Sciences 37.
³⁷² SA Gelman 'Learning from others: Children's construction of concepts' (2009) Annual Review of Psychology 115.
³⁷³ n 26 secs 19, 21 and 23(5)(c).
³⁷⁴ n 194.
³⁷⁵ n 194 sec 138.
³⁷⁶ As above.
³⁷⁷ Kangaude (n 6) 548.
³⁷⁸ n 26 sec 23(1).
³⁷⁹ n 21 sec 138.
³⁸⁰ n 26 secs 19(1), 20(1), 21 and 23.
³⁸¹ United Nations Children's Fund
<https://data.unicef.org/resources/sexual-exploitation-boys-findings-ethical-considerations-methodological-challenges/> (accessed 4 August 2022).

Constitution,³⁸² and by Malawi's obligations under international law.³⁸³ The proposed inclusion of a corresponding section criminalising the defilement of the boy child is commendable and will accord him equal protection before the law. However, the same should take into consideration the gender dimension of the sexual abuse that the boy child is subjected to and adequately provide it within the ambits of the law.³⁸⁴

5.2.3. Discrimination of the boy child based on sex

The gender gap in the Penal Code provision on defilement not only fails to protect the boy child from sexual abuse, but it also perpetuates the stereotype that boys can never be victims of sexual offences.³⁸⁵ Further, by leaving him entirely outside the scope of the law, section 138 discriminates against the boy child based on his sex. The rights to equality and non-discrimination are a bedrock of the Malawi Constitution.³⁸⁶ Therefore the boy child below the age of eighteen is entitled to equal treatment before the law in his capacity as a child.³⁸⁷ Further, all persons are guaranteed equal and effective protection against discrimination on the basis of sex.³⁸⁸

5.2.4. Exposure to the criminal justice system at a tender age

From the reading of section 138, the boy child still risks being exposed to the criminal justice system at a tender age.³⁸⁹ This is because there is no corresponding provision on how to treat the boy child when he invokes the proposed defence, meaning that he will still have to undergo a criminal trial. The law is silent whether the boy child will be discharged from the offence or not because as it is defilement does not qualify for diversion under the Child Care, Protection and Justice Act.³⁹⁰

5.2.5. Unequal treatment by the law

The Child Care, Protection and Justice Act (CCPJA) generally provides robust protection for children in conflict with the law.³⁹¹ However, this study found that contrary to this guarantee, the offence of defilement is listed as a serious offence.³⁹² This means therefore that the boy child who

³⁸² n 26 sec 23(4).

³⁸³ n 32 art 3(1); n 33 art 27.

³⁸⁴ n 167 art 30.

³⁸⁵ Liu (n 184) 593.

³⁸⁶ n 26 above sec 20(1).

³⁸⁷ n 26 sec 23(1).

³⁸⁸ n 26 sec 20(1).

³⁸⁹ n 21 sec 14.

³⁹⁰ n 34 sec 112(e) and fourth schedule.

³⁹¹ n 34 part III.

³⁹² n 34 sec 112 and fourth schedule.

is arrested for defilement is not eligible for diversion, which is a referral away from the formal court proceedings, under the CCPJA.³⁹³

Further, the boy child will be subjected to unequal treatment by the law.³⁹⁴ Children who are responsible for non-serious offences might be released with only a warning before a proceeding goes before a child justice court, either by a police officer, a probation officer, or a magistrate.³⁹⁵ This legal mechanism does not exist for the boy child who had sex with a girl below the age of sixteen, even if the sex was consensual.³⁹⁶ As a result, the boy child's constitutional and treaty rights to equal status and treatment before the law, and equality are violated, hence the need to amend the law so as to accord the boy child equal treatment and status.³⁹⁷

5.2.6. Infringement on the evolving capacities of the boy child

This study has established that the offence of defilement infringes on the boy child's evolving capacities. The offence of defilement wrongly assumes that children are passive, asexual and incompetent, hence need to be protected by restraining them from indulging in sexual activities. However, operating on such an assumption is wrong and affects the development and transition of children from childhood to adulthood. The same will be exacerbated should the age of consent be raised to eighteen as proposed. Defilement is detrimental to a boy child's development and a serious violation of his rights, particularly his right to privacy and to be treated with dignity.³⁹⁸

The proposed amendments to section 138 of the Penal Code that provide for the offence of defilement are commendable and progressive. The raising of the age of consent to eighteen will be in harmony with the constitutional and international obligations for the rights of children. However, there is a need to devise measures to ensure that in raising the age of consent, the children's evolving capacities are not infringed upon.

5.3. Recommendations

The government of Malawi is obligated to actively adopt and implement policies and legislation that are progressive and aimed at promoting the welfare and development of the people of

³⁹³ As above.

³⁹⁴ n 26 sec 23(1).

³⁹⁵ n 34 sec 94(1)(a)(4) A police officer may divert a case, and caution and release the child, sec 99(1)(2)(4)(b) A magistrate may divert a matter during a preliminary inquiry, sec 112(e) A child may be eligible for diversion if the offense is not one of the serious offences listed in Schedule Four.

³⁹⁶ As above.

³⁹⁷ n 26 secs 20 & 23(1).

³⁹⁸ n 41 para 76.

Malawi.³⁹⁹ More particularly, the government is tasked with encouraging and promoting conditions conducive to the full development of children as healthy, productive and responsible members of society.⁴⁰⁰ In view of the findings of this study and in pursuance of these highlighted obligations, this study will make the following recommendations:

5.3.1 Legislative measures

Amend the Penal Code in terms of the punishment for the offence of defilement

This study recommends an amendment to the Penal Code in terms of the punishment for the offence of defilement. That the law should differentiate the punishment for child-to-child offenders from that of adult offenders. Where the boy child is not covered within the ambits of the proposed defence, he is expected to undergo trial. This study, therefore, recommends that the boy child should be subjected to a different punishment, and not the same as provided for adult offenders or paedophiles.⁴⁰¹ For instance, non-custodial options which emphasise the value of restorative justice should be given primary consideration when it comes to sentencing the boy child, such as probation, care, guidance and supervision orders, and counselling.⁴⁰²

Amend the age of criminal liability in the Penal Code

The African Children's Charter provides for a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.⁴⁰³ In pursuance of the same, Malawi set the general age of criminal liability for any person to be fourteen years, unless it is proved that at the time of doing the act or making the omission a person had the capacity to know that he ought not to do or omit it.⁴⁰⁴ Without providing any justification, however, the law set another minimum age for the offence of defilement, where a male person from the age of twelve years can be held criminally liable for sexual offences.⁴⁰⁵ This means that a boy child of twelve and thirteen years of age risks being arrested for the offence of defilement should it be proved that he had the requisite capacity to know that he ought not to do the sexual act.

This study recommends that the age of criminal liability should be revised to fifteen to be in line with the provisions of the African Commission on Human and Peoples' Rights which provides that

³⁹⁹ n 26 sec 13.
⁴⁰⁰ n 26 sec 13(h).
⁴⁰¹ Parikh (n 63) 1.
⁴⁰² n 350 part O (o) (2) and (3).
⁴⁰³ n 33 art 17(4).
⁴⁰⁴ n 21 sec 14(2).
⁴⁰⁵ n 21 sec 14(3).

the age of criminal responsibility should not be fixed below 15 years of age and that no child below the age of 15 shall be arrested or detained on allegations of having committed a crime.⁴⁰⁶

In the same vein, this study further recommends that the amendment to the Penal Code should remove the differentiation for the sexual offence age liability that is currently at twelve.⁴⁰⁷ Malawi is being implored to enact laws and procedures that define a minimum age below which children are deemed to generally lack the mental capacity to violate any law.⁴⁰⁸ In pursuance of the same, it should do away with the differential treatment in the age of criminal liability for sexual offences which has proven to discriminate against the boy child.

Recognition of the evolving capacities of the child in maintaining the current age of consent

This study recommends that the age of consent should not be revised from sixteen to eighteen as proposed despite the fact that the realignment would be at par with the definition of the child in the Constitution.⁴⁰⁹ The law on defilement can still comply with Malawi's constitutional and international obligations on protecting children from sexual abuse by balancing measures with the children's evolving capacities to exercise their right to development.⁴¹⁰ Raising the age of consent will not be in the interests of the children as they risk being arrested upon engaging in consensual and non-exploitative sex, but are not covered within the ambits of the proposed defence of close-in-age.⁴¹¹ The Constitution, the CRC and the African Children's Charter all guarantee that the best interest and welfare of children is a primary consideration in all actions or decisions affecting them, including decisions on their sexual development.⁴¹² Hence sixteen should be maintained as the age of consent.

Acknowledge and criminalise all sexual abuse against boys occurring in different contexts

The society's attitude and trivialisation of the sexual abuse that the boy child is subjected to needs to change.⁴¹³ The Committee on the Rights of the Child, in its General Comment No.20 on the Implementation of the Rights of the Child During Adolescence, recognised that boys' rights may

⁴⁰⁶ n 350 part O(d).

⁴⁰⁷ n 21 sec 14(3).

⁴⁰⁸ n 350 part O(d).

⁴⁰⁹ n 194 secs 2 and 138.

⁴¹⁰ Liu (n 191) 597.

⁴¹¹ n 194 sec 138(3)(a).

⁴¹² n 26 sec 23(1), 32 art 3(1); n 33 art 4(1).

⁴¹³ K Chitundu *et al* 'Community attitudes towards child sexual abuse: A case of Chawama, Lusaka Zambia' (2020) 10(1) *Open Journal of Psychiatry* 25.

be jeopardised by archaic ideas of masculinity and gender norms associated with aggression and power.⁴¹⁴ Further that boys have ubiquitous and major obstacles to accessing sexual and reproductive health information, goods, and services due to the denial of their vulnerability to abuse and exploitation, which results in a shortage of protective services.⁴¹⁵

This study has noted that some cultures in Malawi actively encourage young boys to have sex with adult women as part of their initiation into adulthood.⁴¹⁶ This was revealed by the CEDAW Committee in its periodic review when it asked the government of Malawi to indicate measures that were taken to address the practice of encouraging young boys to have sex with older women or young girls to become men.⁴¹⁷ This is a harmful cultural practice that is circumscribed by the Gender Equality Act and not reflected in the Penal Code.⁴¹⁸ Under the Gender Equality Act, any person who commits any harmful practice which includes a social, cultural or religious practice that results in sexual harm, is liable to a fine and to a five-year term of imprisonment.⁴¹⁹

The same provision is specifically reiterated under the CCPJA where any person who subjects a child to a social or customary practice that is harmful to the health or general development of the child is liable for a ten year term of imprisonment.⁴²⁰ While these two provisions add some measure of protection for the boy child who may be a victim of sexual abuse because of cultural and traditional initiation rites, they in no way remedy the large gap in the Penal Code, which does not protect boys from all forms of sexual abuse committed by females.⁴²¹

Amend the Child Care, Protection and Justice Act to allow the offence of defilement to qualify for diversion

The Child Care, Protection and Justice Act explicitly prohibits the imprisonment of children.⁴²² Contrary to this however, it proceeds to treat defilement as a serious offence such that the boy child who is arrested for this crime is not diverted from the criminal justice system.⁴²³ There is

⁴¹⁴ n 167 art 29.

⁴¹⁵ As above.

⁴¹⁶ Committee on the Elimination of Discrimination against Women “List of issues and questions in relation to the Seventh periodic report for Malawi” (2015) <https://www.ohchr.org/en/press-releases/2015/11/committee-elimination-discrimination-against-women-considers-report-malawi> (accessed 11 October 2022) art 32.

⁴¹⁷ As above.

⁴¹⁸ n 213 sec 3.

⁴¹⁹ n 213 sec 5 (2).

⁴²⁰ n 34 secs 80 and 83.

⁴²¹ Liu (n 184) 593.

⁴²² n 34 sec 140.

⁴²³ n 34 sec 112(e) and fourth schedule.

need to amend section 112 and the Fourth Schedule in the CCJPA that provide for diversion so that defilement as an offence should qualify for diversion. Removing the offence of defilement from the Fourth Schedule will exempt the boy child from being exposed to the harsh realities of the criminal justice system at a very tender age and also prevent his imprisonment.

Amend the Child Care, Protection and Justice Act to provide for the discharge of the boy child

Despite the Child Care, Protection and Justice Act providing for the robust protection for all children in conflict with the law,⁴²⁴ it excludes the boy child from benefiting from some procedural court mechanisms that it guarantees. Under the CCJPA, children who are responsible for non-serious offences might be released with only a warning before a proceeding goes before a child justice court, either by a police officer, a probation officer, or a magistrate.⁴²⁵ This legal mechanism does not exist for the boy child who had sex with a girl below the age of sixteen, even if the sex was consensual.⁴²⁶ This study, therefore, recommends that the CCJPA be amended so that it includes the offence of defilement as one of the offences where the boy child can benefit from a discharge, in order to uphold his rights to equal status and treatment before the law.

Provision of legal aid, assistance and representation to every child who comes in contact with the law

The Constitution of Malawi, guarantees every suspected, arrested and detained person, the right to a fair trial.⁴²⁷ In pursuance of the same, the Constitution provides for the right to legal representation of one's own choice where one can manage, or at the State's expense where the interests of justice so require.⁴²⁸ Particularly for children, the CCPJA guarantees every child the right to legal representation,⁴²⁹ and provides circumstances in which this right can be invoked.⁴³⁰ Both the Constitution and CCPJA's provisions however, require the fulfilment of some criteria before this right can be invoked, especially in a situation where the State has an obligation, under law, to carter for the expenses.⁴³¹ This entails that in the context of defilement, the boy child stands

⁴²⁴ n 34 part III.

⁴²⁵ n 34 sec 94(1)(a), (4) A police officer may divert a case, and caution and release the child. Sec 99(1)(2)(4)(b) A magistrate may divert a matter during a preliminary inquiry. Sec 112(e)A child may be eligible for diversion if the offense is not one of the serious offences listed in Schedule Four.

⁴²⁶ As above.

⁴²⁷ n 26 above sec 42(1)(c).

⁴²⁸ As above.

⁴²⁹ n 34 sec 127(1)(a).

⁴³⁰ n 34 sec 127.

⁴³¹ As above.

to benefit from the State-sponsored legal aid or representation only in circumstances where he is remanded in custody awaiting trial,⁴³² where it will be in his best interests,⁴³³ and also he or his parents cannot afford to engage a legal representative.⁴³⁴

This study, therefore, recommends the amendment of section 42 of the Constitution and section 127 of the CCJPA to make it obligatory for the State to provide legal aid, assistance and representation to every child who comes in contact with the law. Such an amendment will enable the boy child who is suspected to have committed the offence of defilement to be guaranteed of assistance and representation in court when undergoing trial, since the offence of defilement does not qualify for diversion or discharge under the CCJPA.⁴³⁵ Thus, the legal aid will enable the boy child to have appropriate assistance in the preparation and presentation of his defence in court.⁴³⁶

The study further recommends the removal of the prerequisite conditions in the CCJPA in order to make it obligatory for the state to extend legal aid to every child who comes in contact with the law, irrespective of the offence and his circumstances. More particularly, section 4 of the Legal Aid Act,⁴³⁷ which establishes the Legal Aid Bureau, a State Department that is mandated with providing legal aid to all people and matters, should be amended as well in relation to the amendments in the Constitution and CCJPA. The amendment should specifically highlight the entitlement of every child to legal aid, assistance and representation in any matter and further abolish the requirement of fulfilling the prerequisite conditions to determine their eligibility.⁴³⁸

5.3.2 Institutional measures

Invest in judicial training and capacity building

The judiciary is tasked with independently and impartially interpreting, safeguarding, and upholding the Constitution and any legislation that adheres to it.⁴³⁹ This being the case, judicial officers need to be trained on how best to handle the boy child both as a victim and as a perpetrator of the offence of defilement to ensure that his rights are recognised and protected in either capacity.

⁴³² n 34 sec 127(1)(a).

⁴³³ n 34 sec 127(1)(c).

⁴³⁴ n 34 sec 127.

⁴³⁵ n 34 Part III Division 5.

⁴³⁶ M Moore and B Randel 'Protecting children's rights in the criminal justice system: A training manual and reference point for professionals and policy makers' (2013) Penal Reform International 74.

⁴³⁷ Legal Aid Act 28 of 2010.

⁴³⁸ As above sec 4.

⁴³⁹ n 26 sec 9.

The African Commission on Human and Peoples' Rights in providing for judicial training stated as follows:⁴⁴⁰

- (a) states shall ensure that judicial officials have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of accused persons, victims and other litigants and of human rights and fundamental freedoms recognized by national and international law.

Throughout their careers, judicial officers need to acquire ongoing training and education including on issues of children's rights and gender sensitisation.⁴⁴¹ Such training will help them to adapt to children's rights and needs, and prevent their re-victimisation in the criminal justice system.⁴⁴² Such training will also erode any personal biases and stereotypes that could mar their reasoning in sexual offences as the focus shifts from perceiving the boy child as the aggressor to a victim of abuse.⁴⁴³

Training of law enforcement officers

The Malawi Police Service is mandated by the Constitution to provide for the protection of the rights of persons in Malawi in accordance with the prescription of the Constitution and any other law.⁴⁴⁴ Law enforcement officers must be adequately trained to deal with children who come in contact with the criminal justice system professionally and sensitively, whether as suspects, accused individuals, complainants, or witnesses.⁴⁴⁵ The Malawi Police Service has been singled out because it is key in the prevention and response to all forms of violence through its Victim Support Unit.⁴⁴⁶ In most cases, law enforcement officers are the first to come in contact with the victims, witnesses and perpetrators of the offence of defilement.⁴⁴⁷ They need to be trained on how to handle the boy child with respect for his dignity in his either capacity.⁴⁴⁸

Word count 19,489

⁴⁴⁰ n 350 part B.

⁴⁴¹ As above.

⁴⁴² United Nations Office on Drugs (UNODC) and Crime and United Nations Children's Fund (UNICEF) 'Training programme on the treatment of child victims and witnesses of crime for prosecutors and judges' (2015) United Nations Office iii.

⁴⁴³ Chitundu *et* (n 398) 25.

⁴⁴⁴ n 26 above sec 153(1).

⁴⁴⁵ n 350 part O(c).

⁴⁴⁶ United Nations Children's Fund (UNICEF) 'Child Protection and Victim Support Services' (2018) <https://www.unicef.org/malawi/media/1196/file/Child%20Protection%20and%20Victim%20Support%20Services%20Brochure.pdf> (accessed 17 October 2022) 1.

⁴⁴⁷ As above.

⁴⁴⁸ n 33 art 17(1).

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