

A feminist framework to situate the critique

1 Introduction

One of feminism's enduring challenges has been to understand how gender inequality is produced and sustained. This inquiry inevitably leads to questions about what it means to be a woman; how femininity is constructed in society.¹ In seeking to explain gender inequality, feminist thought has developed into a rich tapestry of perspectives: liberal, Marxist, radical, post-modern and intersectional. Each perspective offers distinct accounts of the roots of oppression and possible paths to justice.² Despite differences and conflicts between these perspectives, they share a commitment to addressing the lived realities of women and to challenging the structures that uphold gender inequality.³

Central to the feminist debate is the category of 'woman' itself, its meaning, its scope, and its relationship to sex, gender and sexuality. Feminist theorising has revealed that identities such as *woman* or *girl* are not fixed or natural but socially constructed and maintained through systems of power and discourse.⁴ The feminist perspective is especially relevant to the analysis of laws and policies that not only reflect gendered societal norms, but also actively shape and enforce them.⁵

In this book, I use feminist post-structural theory to interrogate how legal and policy frameworks construct childhood sexuality and gender. Childhood sexuality is approached in this book not as a reference to sexual behaviour alone, but as a socially and legally constructed field through which meanings about children's bodies, capacities, vulnerability and agency are produced and regulated. Feminist post-structuralism is understood as a theoretical approach that examines how identities, meanings and social categories are produced through discourse and

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

2 R Tong & TF Botts *Feminist thought: A more comprehensive introduction* (2024).

3 B Hooks *Feminist theory: From margin to centre* (2000) 26.

4 Lorber (n 1) 8.

5 C Smart *Feminism and the power of law* (1989).

power relations, rather than being treated as fixed or natural attributes. Feminist post-structuralism treats law not as a neutral system of rules, but as a discourse embedded in power relations, a discourse that participates in the production and regulation of gendered identities.⁶ Feminist post-structuralism, thus, offers an alternative to traditional doctrinal methods, by allowing for an analysis of how legal texts and practices normalise dominant conceptions of gender and sexuality.⁷

By framing law as political, and as productive, this theoretical approach informs the analysis developed in this book, highlighting the role of law in shaping who can be recognised as a legal subject, and the terms under which this recognition occurs.⁸ In post-structuralism, 'legal subject' is not a pre-existing individual simply recognised by law, but a form of subjectivity produced through legal categories, norms and practices. Therefore, the law does not merely regulate but generates meanings and identities.

Drawing on interdisciplinary work from gender studies, childhood studies and legal scholarship, this analysis underscores the dynamic interplay between legal norms and social identities. Feminist post-structuralism, as developed by thinkers such as Judith Butler and Carol Smart, enables a critique of how legal and cultural discourses condition the possibilities for identity, particularly in the case of children.⁹

The feminist theoretical framework also shapes the methodological approach of this book. As Burns and Walker explain, feminist methodology 'involves a critique of unexamined assumptions about women and dominant forms of knowing and doing; it involves a commitment to improve life chances for girls and women.'¹⁰ By analysing cultural and legal discourses to examine how children come to understand themselves as gendered beings, this study explores how law can either reinforce or disrupt the power relations that shape identity and sexuality.

6 F Nollaig & F Elichaoiff 'Feminist postmodernism, poststructuralism, and critical theory' in SN Hesse-Biber (ed) *Feminist research practice: A primer* (2013) 42.

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

8 Å Persson 'An apparent boundary between law and politics' in Å Gunnarsson and others (eds) *Exploiting the limits of law: Swedish feminism and the challenge to pessimism* (2007) 51; M Davies *Asking the law question* (2017) 45.

9 Smart (n 5); J Butler *Gender trouble* (1999).

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

In doing so, it contributes to thinking about how power relations could be reorganised to enhance gender equality for children.

2 Feminism and post-structuralist theory

Feminism and post-structuralism emerge from different intellectual traditions, yet their convergence has offered powerful tools for analysing how gender and power operate through language, norms and institutions.¹¹ Feminist scholars began engaging with post-structuralist theory in response to the limitations of earlier frameworks that assumed stable categories of identity. By challenging essentialist notions of 'woman', feminist post-structuralists shifted attention to how identities are produced and regulated within specific historical and discursive contexts.

Post-structural theory foregrounds the idea that power is not simply repressive or top-down, but also productive and diffuse, shaping subjectivities and social realities through discourse.¹² Feminist post-structuralists draw on this insight to show how gender norms are constructed and enforced by everyday practices, cultural narratives and institutional mechanisms, including the law. In legal studies, the post-structuralist perspective postulates that law does more than codify social norms; it actively participates in constructing the subjects it claims to regulate.¹³ Legal norms related to sex and gender, for instance, do not merely reflect pre-existing social categories; they help produce and stabilise those categories through processes of classification, interpretation and enforcement. Feminist legal scholars such as Smart have shown how the law mediates women's self-understanding, particularly in areas such as sexual consent, credibility and culpability in rape trials, thereby illustrating how law embeds gendered assumptions in its discursive operations.¹⁴

11 N Frost & F ElichaoFF 'Feminist postmodernism, poststructuralism, and critical theory' in Hesse-Biber (n 6) 14-42.

12 E Barvosa-Carter 'Strange tempest: Agency, poststructuralism, and the shape of feminist politics to come' (2001) 6 *International Journal of Sexuality and Gender Studies* 123; J Williams *Understanding poststructuralism* (2005).

13 J Niemi-Kiesiläinen and others 'Legal texts as discourses' in Å Gunnarsson and others (eds) *Exploiting the limits of law: Swedish feminism and the challenge to pessimism* (2007) 69.

14 Smart (n 5) 26.

A feminist post-structural approach is especially useful for interrogating how legal frameworks shape the identities and sexual subjectivities of children. Rather than treating categories such as 'boy' or 'girl' as biologically determined, feminist post-structuralism examines how children negotiate cultural and institutional discourses to make sense of themselves.¹⁵ This approach also reveals how legal practices and policies are implicated in reinforcing or challenging these constructions. For example, policies concerning sex education or age of consent laws embed normative assumptions about childhood, gender and sexuality that often mirror broader societal anxieties and power dynamics.¹⁶

A feminist post-structural framework also allows for a critique of the law's claim to neutrality and objectivity, understood here as law's self-presentation as apolitical and value-free. From a post-structuralist perspective, law cannot be meaningfully separated from politics; rather, it itself is a political practice through which power operates, and meanings are produced and contested. This perspective challenges traditional doctrinal accounts, which portray legal reasoning as autonomous from broader social and power relations.¹⁷

2.1 A background to post-structural theory

Post-structuralism is situated within the broader framework of post-modernist theory. This part provides a background to post-structuralism to support an appreciation of the intellectual turn associated with postmodernism, including the emergence of post-structuralism. A convenient starting point is to explore the meaning and context of modernism, which serves as the stepping stone to post-modernism. While modernism refers to a set of intellectual and cultural movements grounded in Enlightenment rationality, modernity denotes the broader sociohistorical condition shaped by these ideas, including the development of capitalist economies, nation states and dominant forms of knowledge.

Modernism is an intellectual and cultural movement that emerged in Western Europe during the late nineteenth and early twentieth

15 M Halim and others 'The roles of self-socialization and parent socialization in toddlers' gender-typed appearance' (2018) 47 *Archives of Sexual Behaviour* 2277.

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

17 Persson (n 8).

centuries.¹⁸ Hamilton describes the Enlightenment as the period in which a new framework of ideas about humanity, society and nature was established, thereby challenging the prevailing traditional ideas that had been dominated by religion.¹⁹ Alternatively, modernity may be described as the socio-historical epoch under the influence of a modernist intellectual outlook, initially defined by the radical shift from mythology, magic and religious dogma to the belief in empirical science as the new paradigm of truth, and belief in human reason as the key to progress.²⁰ In the nineteenth century, modernity became identified with the development of global capitalist economic systems, technological advancement, industrialisation, and the rise of modern nation states.²¹ This period also saw the expansion of European power and domination over other cultures through exploration, exploitation and colonisation.²² Modernising social forces created social forms and institutions, while developing philosophical thought consolidated European cultural expansion and worldwide influence.²³

These modernising social forces arose as philosophical thought began to articulate new visions of social advancement. Modernist theories, such as liberal feminism and Marxist feminism, reflect the Enlightenment belief in human reason, progress and universal truths. For instance, liberal feminism treats gender as a stable identity and frames inequality as the result of unequal access to rights and opportunities. Social progress, from this perspective, is achieved through legal and policy reforms that promote individual rights and inclusion in existing institutions.²⁴ By contrast, Marxist feminism situates women's oppression in the capitalist mode of production, and argues that gender inequality arises from material conditions, particularly the sexual division of labour and the

18 A Eysteinnsson *The concept of modernism* (2018) 2.

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

20 S Grieshaber & GS Cannella 'From identity to identities: Increasing possibilities in early childhood education' in S Grieshaber & GS Cannella (eds) *Embracing identities in early childhood education: Diversity and possibilities* (2001) 6-7.

21 T Smith 'Rethinking modernism and modernity now' (2014) 35 *Filozofski Vestnik* 277-278.

22 B Ashcroft and others *The post-colonial studies reader: Key concepts* (2007) 131.

23 Ashcroft and others (n 22) 132.

24 R Tong & TF Botts *Feminist thought: A more comprehensive introduction* (2018).

exploitation of women's unpaid reproductive work.²⁵ Social progress is viewed as achievable through the transformation of the economic system and the abolition of class-based exploitation.

Post-modernity represents a shift in socio-historical epoch from a modernist philosophical outlook, and reflects a different type of theorising, distinguishable from modernist thought.²⁶ Post-modernism emerged in reaction to the perceived failures of the social progress and liberation promised by modernism and the theories associated with it.²⁷ Sim has described post-modernism as advancing scepticism against 'truth claims' made by modernist thinkers regarding human nature and society.²⁸ One of the most influential articulations of this scepticism is found in the work of Jean-François Lyotard, whose *The postmodern condition*²⁹ is widely regarded as a foundational text of post-modern critique. In this work, Lyotard challenges modernist grand narratives that sought to provide overarching explanations of social reality and promised universal solutions to social problems, such as the Marxist claim that class inequality would ultimately be resolved through the dissolution of class structures. *The post-modern condition* critiques the legitimating myths of modernity, including the belief that science would inevitably lead to progressive human liberation and that philosophy could produce a unified and totalising account of human knowledge. Post-modern theory, thus, came to be associated with a sustained critique of universalising knowledge claims and the epistemological foundations upon which assertions of truth are made.³⁰

Post-structuralism is a subset of post-modern philosophy. It is primarily concerned with language as expressed in texts, including signs, symbols and images, and with how such forms of meaning organise social life and are linked to broader social, political, and economic institutions.³¹

25 AM Jaggar *Feminist politics and human nature* (1983).

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

27 Critics argue that modernism contributed to alienating and repressive societies, which caused the growth of economic disparities both within and between nations, and environmental degradation (Smith (n 21) 280).

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

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

30 Sim (n 28) 3.

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

Post-structuralism is related to structuralism, an intellectual school of thought premised on the idea that meaning is relational. Structuralist thinkers emphasise that meaning does not reside in things themselves but in their relations to other things. As Danaher and others have explained, ‘events, ideas and activities didn’t “mean anything” in themselves – they only made sense when related to other events, ideas and activities.’³²

Another vital contribution of structuralism is its challenge to the idea of absolute freedom, emphasising that individuals do not produce meaning independently of the political, social and cultural structures in which they are embedded; rather, their beliefs and actions are shaped by these very structures.³³ The impossibility of absolute freedom, however, does not imply the absence of agency. As discussed further below, post-structuralism recognises that subjects can exercise agency even within constraints; a view that contrasts with the grand narratives of modernism, which often assume the limitless freedom of rational and autonomous individuals.

2.2 Key concepts of post-structuralism

2.2.1 *Language*

In post-structural theory, language is an important factor in the analysis of social organisation, social meanings, individual consciousness and issues of power.³⁴ Scott describes the post-structuralist meaning of language as follows:

[Language] is used to mean not simply words or even a vocabulary and set of grammatical rules but, rather, a meaning-constituting system: that is, any system – strictly verbal or other – through which meaning is constructed and cultural practices organized and by which, accordingly, people represent and understand their world, including who they are and how they relate to others.³⁵

32 G Danaher and others *Understanding Foucault* (2000) 7.

33 Danaher and others (n 32) 8.

34 C Weedon *Feminist practice and poststructuralist theory* (1987) 21.

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

Language, broadly understood as all symbolic systems, not just written or spoken words, enables relationships, facilitates action, and profoundly shapes understandings of the self and social world.³⁶ But how exactly does language 'do' things? How is it related to objects or ideas? In modernist thinking, language is understood to reflect ideas and a pre-existing world of things. A post-structuralist view, however, is influenced by Ferdinand de Saussure's theory of language. De Saussure argued that language does not simply name things in the world but operates as a structured system of signs. A sign is made up of two elements, a *signifier* (a sound or a written image) and a *signified* (the meaning or concept) associated with it.³⁷ The relationship between the signifier and the signified is arbitrary, rather than natural. This means that there is nothing inherent in the word *dog* that connects it to a four-legged canine; different languages use entirely different sounds to refer to the same concept. Meaning, therefore, arises not from a natural link between words and things, but from the way signs relate to one another within a linguistic system.

Another key point in De Saussure's work is that 'in language there are only differences ... a difference generally implies positive terms between which the difference is set up; but in language there are only differences *without positive terms*'.³⁸ The relationship between signs is not intrinsic but relational. As Weedon put it, '[e]ach sign derives its meaning from its difference from all the other signs in the language chain'.³⁹ The idea that 'meaning in language derives from the relationships of difference and similarity between terms, and not from the terms themselves'⁴⁰ is at the heart of structuralism. One of the most revolutionary implications of De Saussure's theory is that language does not name pre-existing things, but functions as a system of differences, where words have no intrinsic meaning but derive significance through contrast with other terms.⁴¹ As Scott puts it, meaning arises through opposition: any definition is shaped by what it excludes or represses.⁴²

36 C Belsey *Poststructuralism: A very short introduction* (2002) 6.

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

38 De Saussure (n 37) 120.

39 Weedon (n 34) 23.

40 BE Harcourt 'An answer to the question: "What is poststructuralism?"' *University of Chicago Public Law & Legal Theory Working Paper* 156 (2007) 4.

41 C Belsey *Critical practice* (2002) 33.

42 Scott (n 35) 285.

Building on De Saussure, Derrida postulates that there are no fixed signifiers or *signifieds*. Through the concept of *différance*, Derrida explains that the meanings of words derive from a dual process: The first is their *difference* from others, and the second is that meaning is always *deferred* and never fixed.⁴³ In any representation where it appears that meaning is fixed, this is only a temporary, retrospective stabilisation. Weedon explains that this means that the meaning of a word depends upon its discursive context and, therefore, would change depending on the context.⁴⁴

When applied to law, this understanding of meaning has significant implications for how legal texts are interpreted and understood. This insight is foundational for post-structuralist analyses of law, which examine how legal meaning is constructed through language rather than simply discovered in legal texts.

Post-structuralism does not deny the existence of an external reality; rather, it emphasises that people's experience of this reality is mediated through language and the meanings they give to their world.⁴⁵ Ascribing meaning involves acts of valuation. The act of giving meaning in which some terms are privileged over others makes language a social and political tool. As Weedon observes: 'Once language is understood in terms of competing discourses, competing ways of giving meaning to the world, which imply differences in the organization of social power, then language becomes an important site of political struggle.'⁴⁶

This dynamic can be illustrated through the legal construction of realities such as 'child' or 'adolescent' or 'girl'. The terms are not merely biological labels but stand for various realities and remain open to interpretation and reinterpretation depending on the discursive relations in which they are situated.⁴⁷ In a given society, for example, a girl of 17 might be recognised as a child in accordance with legal definitions that fix childhood at under 18. Yet, a girl of 15 who is known to be sexually experienced might be perceived as *not-a-child*, or at least a different kind of child. An illustration of this is how Chitembwe J in *Charo* used language to describe a sexually active 14 year-old girl. In describing her,

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

44 Weedon (n 34).

45 Butler (n 9).

46 Weedon (n 34) 24.

47 Weedon (n 34) 25.

the judge says, '[i]t is clear to me that although PW1 was a young lady aged 14 years; she was behaving like a full grown-up woman who was already engaging and enjoying sex with men'.⁴⁸

One way in which to read this statement is that it is a mere description of a pre-existing reality encountered by the judge. A post-structuralist perspective, however, reads it differently. The statement is understood as an act of valuation through which the judge attributes particular meanings to the sexual experiences of a 14-year-old girl. By positioning her as a woman rather than a child, the judge, through the authority of law, invites others to affirm this mode of recognition, both within the legal system and in wider society. This has material implications for the girl. Although the law is designed to protect children, the judge's reasoning effectively excludes her from those protections by constructing her as a child unlike other children – one whose sexual experience renders her less deserving of the law's protection.

The development of the Convention on the Rights of Persons with Disabilities (CRPD) serves as another example of how language shapes the social world.⁴⁹ Historically, persons with disabilities have been constructed through shifting discourses: as possessed by evil, as objects of pity or charity, as subjects of medical intervention, and, more recently, as bearers of human rights.⁵⁰ CRPD is widely understood to mark an important paradigm shift by entrenching a social model of disability.⁵¹ Within this framework, disability is not treated as an inherent attribute of the individual, but as a relational condition that emerges from how difference is named, valued, and responded to within social, legal and institutional contexts.

CRPD accomplishes this shift through language that reconstitutes how disability is understood. In its Preamble, the Convention recognises that 'disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder

48 *Martin Charo v Republic* Criminal Appeal 32 of 2015 (High Court of Kenya) (Charo).

49 Convention on the Rights of Persons with Disabilities, United Nations General Assembly (13 December 2006, entered into force 3 May 2008), A/RES/61/106 (2006) (CRPD).

50 CW Munyi 'Past and present perceptions towards disability: A historical perspective' (2012) 32 *Disability Studies Quarterly*.

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

their full and effective participation in society on an equal basis with others'.⁵² In doing so, CRPD does not deny the reality of physical, mental, intellectual or sensory impairments.⁵³ Its political force lies in reconstructing disability as the product of social barriers rather than the limitations of individual biology.⁵⁴ The Convention then reformulates the language of traditional human rights to emphasise that persons with disabilities are subjects of human rights on an equal basis with others.

This example demonstrates how language transforms the social world of persons with disabilities by reassigning meaning. It is not the pre-existing reality that changes; it is the way society relates to that reality, through a transformative process mediated by language.

Taken together, these examples illustrate how language operates as a constitutive force in law. In both the judicial construction of the sexually active girl and CRPD's reconceptualisation of disability, the pre-existing reality does not change; rather, what changes is how that reality is understood, valued and responded to. Through acts of naming, classification and interpretation, law mediates social relations and determines not only who is recognised as a legal subject, but what forms of agency are available, constrained or denied, and how rights and duties are allocated. When applied to law, this understanding of the politics of legal interpretation has significant implications for how legal and ethical frameworks are used, contested and reimagined in the pursuit of justice.

2.2.2 *Discourse*

Foucault's concept of discourse, developed in his *Archaeology of knowledge*, and elaborated on in other works, including *History of sexuality*, is essential to understanding post-structural theory.⁵⁵ Discourse is used here to refer not simply to language or speech, but to structured systems of meaning and practice through which knowledge, subjects and social realities are produced and regulated. One way in which to understand what discourse means is to consider the generic question

52 CRPD (n 49) Annex I, Preamble.

53 CRPD (n 49) art 1.

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

55 M Foucault *The archaeology of knowledge* trans SMA Smith (1972); Foucault (n 16).

that Foucauldian discourse analysis seeks to answer: 'How did it come about that some particular way of organising thinking, talking, and doing around a selected topic took the form and content that it did?'⁵⁶

In post-structuralist theory, discourse is understood as a key analytical entry point because it connects language with broader systems of power and knowledge. As Bové puts it, discourse offers

a privileged entry into the post-structural mode of analysis because it is the organized and regulated, as well as the regulating and constituting, functions of language that it studies: its aim is to describe the surface linkages between power, knowledge, institutions, intellectuals, the control of populations, and the modern state as these intersect in the functions of systems of thought.⁵⁷

People manipulate their worlds through discourse, especially within institutional practices embedded in organisational settings. Institutions, such as law, are socially legitimated systems of expertise enacted by authorised individuals, such as judges, within organisational settings like courts. These institutions play an essential role in the social construction of reality.⁵⁸ Language is the primary means by which institutions and organisations create a coherent social reality. In other words, institutions are constructed, and reconstructed, through discursive practices. According to Myr, '[this view of discourse as constituting social reality ... assigns discourse an important role in shaping reality, creating patterns of understanding, which people then apply in social practices]'.⁵⁹ Indeed, for Foucault, discourse, in the sense of a general concept, comprises 'practices that systematically form the objects of which they speak' meaning that discourse does not merely describe reality but actively participates in bringing particular objects, subjects and relations into being.⁶⁰

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

57 P Bové 'Discourse' in F Lentricchia & T McLaughlin (eds) *Critical terms for literary study* (1990) 54-55. Danaher and others also state that '[d]iscourses can be understood as language in action: they are the windows, if you like, which allow us to make sense of, and "see" things. These discursive windows or explanations shape our understanding of ourselves, and our capacity to distinguish the valuable from the valueless, the true from the false, and the right from the wrong' (Danaher and others (n 32) 31).

58 M Agar 'Institutional discourse' (1985) 5 *Text* 164-165. Agar distinguishes institutions (eg, law, medicine, religion) from the organisations (eg, courts, hospitals, churches) that operationalise them in specific contexts.

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

60 Foucault (n 55) 49.

Fairclough suggests that Foucault provides two important insights into discourse. First, discourse actively constitutes and constructs society in various dimensions, including objects of knowledge, social subjects, subjectivities, social relationships and conceptual frameworks.⁶¹ The second insight is that discourse practices of an institution or society are interdependent in that they always draw upon contemporary and historical discourse, and are formed through a combination of discourses and defined in relation to others.⁶²

Mills identifies key features of discourse.⁶³ First, institutions and the social context play a crucial role in the development, maintenance and circulation of discourse. For instance, religious institutions often reinforce the discourse of childhood innocence through sermons and imagery, such as depictions of baby angels, that appeal to cultural and moral imaginations. These representations help to sustain the belief that children are asexual, a belief that operates not as a neutral description but as a powerful normative discourse about childhood. This understanding of childhood sexuality is frequently reinforced in legal frameworks that aim to protect children. Such frameworks often do so by prohibiting a wide range of sexual behaviours, including those that may be developmentally normative for a child's age, rather than distinguishing between non-exploitative conduct and sexual harm.

Second, discourses do not occur in isolation; they always exist in relation to other discourses, and most often in contrast and opposition to them.⁶⁴ For example, a heteronormative discourse constructs heterosexuality as natural, moral and socially acceptable, and often positions homosexuality as deviant or pathological. By contrast, a gay liberation discourse challenges these assumptions by affirming same-sex desire as legitimate, natural, and deserving of legal and social recognition. These discourses are not merely opposing viewpoints; they are competing systems of meaning that attempt to define social norms, legal standards and moral boundaries. Discourses, therefore, are always sites of contestation over meaning and power. As Mills put it, 'ideological struggle is at the heart of discourses'.⁶⁵

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

62 As above.

63 S Mills *Discourse* (2004) 10.

64 Mills (n 63) 10.

65 Mills (n 63) 12, 14.

Third, discourses tend to be organised around practices of exclusion.⁶⁶ Discourses regulate what can be said and thought, and what cannot be said or is unthinkable, at a particular time and in a particular context. So, for instance, the current discourse of childhood innocence, in the context of Malawi and probably in other African settings, portrays sex in relation to the child, and associated social practices only in negative terms, such as abuse and the need to protect the child from sexual experience.⁶⁷ This stands in contrast to perspectives that acknowledge children as capable of sexual agency, exercised in age-appropriate ways and according to their evolving capacities.⁶⁸ The discourse of childhood innocence is reinforced by legal frameworks that position the child primarily as a victim in need of protection from any sexual experience, rather than as a sexual subject with related rights and whose sexual capacities are evolving.⁶⁹

Fourth, discourses are not mere groupings of statements. More than that, discourses carry meaning, force and social effect.⁷⁰ For instance, consider the words of a priest or pastor who utters, 'I now pronounce you husband and wife'. These words have significant effects on how the two people relate from then on. Words have power through social attribution of meaning.

The same is true of judicial language. For instance, when Chitembwe J, in the *Charo* case, described a sexually active 14 year-old girl as 'behaving like a full grown-up woman', his words did more than express an opinion. Spoken from the authoritative position of the Court, his words shaped what would be recognised as the girl's legal rights and entitlements and correspondingly reconfigured the duties and obligations of those responsible for her protection.

Discourses shape attitudes and practices in ways that render the attitudes and practices normal, thus making it difficult for individuals to think beyond the taken-for-granted or common sense dominant

66 Mills (n 63) 11.

67 GD Kangaude and others 'Childhood sexuality in Africa: A child rights perspective' (2020) 20 *African Human Rights Law Journal* 688.

68 M Hulth and others 'Child sexuality and interdependent agency in sexuality education texts for Swedish preschool practitioners 1969–2021: Three discourses on children's sexual play' (2024) 24 *Sex Education* 678.

69 S Angelides 'Feminism, child sexual abuse, and the erasure of child sexuality' (2004) 10 *GLQ: A Journal of Lesbian and Gay Studies* 141.

70 Mills (n 63) 11.

frameworks.⁷¹ Yet, as constraining as discourses might be, the subject is never entirely subjected by them. There is always the possibility of resistance, transformation or rupture. These possibilities are discussed in greater detail later in the chapter.

2.2.3 *Subjectivity*

A theory of subjectivity is important for explaining relationships of power, such as those constructed between men and women, or between adults and children. The notion of subjectivity refers to the ways in which individuals understand themselves and experience their relationship to the social world, encompassing both conscious and unconscious dimensions.⁷² For feminism, an essential aspect of subjectivity is agency, since any theory of subjectivity must also account for how it is possible for people to resist or transform power relations, such as by moving out of positions of marginalisation.

A post-structuralist theory of subjectivity is best explained by contrasting it with the liberal-humanist perspective.⁷³ As Adam and Pierre explain, the liberal-humanist individual is understood to be ‘a conscious, stable, unified, rational, coherent, knowing, autonomous, and ahistoric individual.’⁷⁴ The individual is the centre and agent of social phenomenon and productions, including knowledge. Weedon contrasts the humanist and post-structuralist understandings of the subject: ‘Unlike humanism, which implies a conscious, knowing, unified, rational subject, post-structuralism theorizes subjectivity as a site of disunity and conflict, central to the process of political change and to preserving the status quo.’⁷⁵ Weedon’s insight highlights why post-structuralist approaches are important to analysing the politics of childhood sexuality.

Post-structuralism conceptualises subjectivity as unstable and continuously produced through discursive practices, socially and historically situated activities that construct meaning, identity and

71 Weedon (n 34) 76-77.

72 Weedon (n 34) 32.

73 V Walkerdine ‘Developmental psychology and the child-centred pedagogy: The insertion of Piaget into early education’ in W Hollway and others (eds) *Changing the subject: Psychology, social regulation and subjectivity* (2004) 90.

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

75 Weedon (n 34) 21; Walkerdine (n 73) 90.

power.⁷⁶ Who one *is*, according to this model, is always an open question with a shifting answer depending upon the positions made available within one's own and others' discursive practices and within those practices and spaces.⁷⁷

Persons are shaped by discourse, by how they are positioned in particular discourses, and these discourses can be contradictory. This decentring of the subject, and the recognition that there is no essential subject, are important for feminist post-structuralism, as they create the conditions under which agency can emerge. In post-structuralism, choices are understood as constrained rather than proceeding from absolute freedom. As Davies explains, the act of choosing is shaped by one's position within discourse, 'because one has been subjectively constituted through one's placement within that discourse to *want* that line of action', and not by the function of pure rational choice.⁷⁸

At first glance, post-structuralism appears to advance a deterministic account of subjectivity, in which individuals are constituted through social forces and claims to rational autonomy are revealed as illusory. However, it is precisely the rejection of an essential, rational self that opens the possibility of agency within post-structuralist theory. From this perspective, agency does not arise from an autonomous individual acting outside power, but from the subject's capacity to recognise and navigate and rework the discourses that constitute them, and to move within and between those discourses.

76 B Davies & C Banks 'The gender trap: A feminist poststructuralist analysis of primary school children's talk about gender' (1992) 24 *Journal of Curriculum Studies* 1-25. Discursive practices are meaning-making activities through which subjectivity is constituted. Young defines them as 'the construction and reflection of social realities through actions that invoke identity, ideology, belief, and power' (R Young *Discursive practice in language learning and teaching* (2009) 1-2). These practices are always context-bound, as they occur within 'a network of physical, spatial, temporal, social, interactional, institutional, political, and historical circumstances'. Eg, the primary classroom serves as a site where children learn through everyday teaching and learning practices to enact gendered identities.

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

78 B Davies 'The concept of agency: A feminist poststructuralist analysis' (1991) 30 *Social Analysis: The International Journal of Social and Cultural Practice* 46. In other words, 'rather than being the free and active organisers of society, we are products of discourses and power relations, and take on different characteristics according to the range of subject positions that are possible in our socio-historical context' (G Danaher and others (n 32) 118).

In contrast to liberal-humanist accounts of agency, post-structuralist agency emerges from the understanding that, although subjects are constituted through discourse, they can take up, resist or rework the subject positions made available to them. Discourses, therefore, are constraining, but not determinative. They shape the field of possible action while still allowing room for manoeuvre. This tension between constraint and possibility constitutes the central political significance of the post-structuralist theory of agency.⁷⁹

Understanding how discourse shapes subjectivity is essential because discourse moulds the subjectivities of children from birth, thus influencing what choices they make about who they become. Adults often unwittingly shape children to take up gender inequitable norms rather than to challenge them.⁸⁰ Transforming social norms toward gender equality requires an understanding of this process of subjectification.

2.2.4 *Knowledge, truth and power*

One of the most influential applications of the Foucauldian notion of discourse has been in relation to the knowledge-truth-power triad. Discourses are more than ways of producing meaning and thinking. Weedon describes discourses as ‘ways of constituting knowledge, together with the social practices, forms of subjectivity and power relations which inhere in such knowledges and the relations between them.’⁸¹ Power is a relational struggle over who gets to define the meanings people assign to their lived experience. As MacNaughton wrote, power is ‘a battle to authorise the truth’.⁸²

Post-structural theory understands knowledge as contingent and socially produced, and rejects the idea that there are absolute, universal, and transcendental truths that account for social reality. Feminists are wary of the absolute and universal truth because the dominant conceptions of reality in the Western tradition have been male constructions and reflect and perpetuate male interests.⁸³ Post-

79 Adams & Pierre (n 74) 502.

80 D Bhana ‘Children are children: Gender doesn’t matter’ (2003) 17 *Agenda* 37.

81 Weedon (n 34) 108.

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

83 N Gavay ‘Feminist poststructuralism and discourse analysis’ (1989) 13 *Psychology of Women Quarterly* 462.

structuralist feminism, therefore, understands knowledge not as neutral but as always associated with power.⁸⁴ Power is the ability to determine what knowledge counts as true, credible or authoritative, and what knowledge does not. Truth, therefore, is a human and social construction, and not some reality that exists in a transcendental way. As Gavey puts it, those 'who have the power to regulate what counts as truth are able to maintain their access to material advantages and power'.⁸⁵

Feminist post-structural theorising consequently is not an endeavour to discover ultimate truth; it is an endeavour to understand the workings of power in constructing certain truths that are oppressive to women, and to resist or disrupt these claims to truth or knowledge.⁸⁶ If anything, 'truths' are always partial, rather than absolute, and claims to absolute truth are constituted through the exclusion or marginalisation of alternative truths.

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

Truth makes relationships of power appear natural, inevitable and beyond contestation. That is, truth naturalises relations of power so that, for instance, truths about gender produce categories of gender that are oppressive to some, seemingly as part of the natural order of things.⁸⁷ When these truths join into discourses, they form what Foucault refers to as 'regimes of truth' and produce relations in which some people dominate others.

Discursive labels illustrate how regimes of truth operate in everyday social life. For instance, the label 'pregnant mother' assigned to a

84 As above.

85 As above.

86 Gavey (n 83) 463.

87 MacNaughton (n 82) 16.

pregnant survivor of sexual violence suggests that the pregnant girl or woman naturally wants and will carry the pregnancy to term.⁸⁸ Similarly, the label 'teen pregnancy' is often framed as a marker of moral failure or social degeneration, reinforcing the idea that the adolescent girl or woman herself is inherently problematic, rather than questioning the broader social, cultural and economic contexts in which her pregnancy occurs.⁸⁹

Foucault showed that these regimes of truth are grounded in dominant institutions, justified by science and rationality, and backed by the law and by state power to form interlinking patterns of knowledge and control.⁹⁰ Each institution draws its authority from its capacity to speak the truth on particular issues about which the institution is recognised as positioned to make those truth claims. So, for instance, the court will speak about the truth of rape or abuse in its deliberations on sexual offences.⁹¹ In *Charo*, the judge proclaims such 'truths', for instance, where he says: 'It is true that under the Sexual Offences Act [Kenya], a child below 18 years old cannot give consent to sexual intercourse' and 'children are not meant to enjoy sexual intercourse'.

Yet, these statements are not transcendental truths; they are but socially and legally constructed. Indeed, a child below the age of 18 in Kenya could, hypothetically, be recognised as capable of consenting to sexual activity in another jurisdiction, such as South Africa, where the age of consent to sex is 16 years.⁹² This comparison is not an exercise in legal relativism, but rather an illustration that legal statements about children, even when they are valid within a particular legal system, are socially and culturally constructed. Legal statements about children are not fixed or universal, and can, and should, be subject to change, especially when they conflict with principles of justice.

88 M Foucault *Power/knowledge: Selected interviews and other writings, 1972-1977* trans C Gordon and others (1980) 133; MacNaughton (n 82) 16.

89 C Macleod 'Teenage pregnancy and the construction of adolescence: Scientific literature in South Africa' (2003) 10 *Childhood* 419.

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

91 Danaher and others (n 32) 37.

92 Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (South Africa) sec 15.

2.2.5 Power, resistance and freedom

Traditionally, power has been understood as a fixed possession, something one holds and imposes over another who is without it. However, according to Foucault, power is not about the domination of one group over another.⁹³ Instead, he speaks of relations of power, because power inheres, is present and operational, only in the context of relationships in which the exercise of power and freedom necessarily coexist. In the following quotation from an interview, Foucault explains what he understands as the meaning of power:

[W]hen one speaks of *power*, people immediately think of a political structure, a government, a dominant social class, the master and the slave, and so on. I am not thinking of this at all when I speak of *relations of power*. I mean that in human relationships ... power is always present ... in different forms; these power relations are mobile, they can be modified, they are not fixed once and for all.⁹⁴

Walkerline's research on teacher-child relationships in nursery school illustrates what Foucault means. She recorded a scenario in which two boys taunted their teacher with comments that she should show her knickers and bum.⁹⁵ While it is normally assumed that nursery schoolteachers hold power over their young learners, Walkerline illustrates how power can shift in surprising ways. In one classroom interaction, boys temporarily seized power through language by invoking cultural discourses of masculinity and sexuality. Though institutionally subordinate, they resisted being positioned as passive subjects and reconstituted their teacher not as an authority figure, but as a woman and the object of a sexist discourse, momentarily undermining her institutional role.⁹⁶

Several summary points can be made about Foucauldian power. Power should not be understood simplistically as present in the dominant group

93 Foucault (n 16) 92.

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

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

96 See V Burr *An introduction to social constructionism* (1995) 102; Walkerline & University of London Girls Mathematics Unit (n 95) 65. Walkerline analyses a classroom moment in which boys, despite their young age and subordinate institutional roles, assert power by re-signifying their teacher as a woman within a sexualised discourse, thereby demonstrating how subject positions and power circulate discursively.

and absent in a marginalised one. People are not passive recipients of power; they are active participants and play a role in the forms of their relationships with others and institutions. They are the 'place' where power is exercised, enacted or resisted.⁹⁷ Power is not just repressive; rather, it is productive.⁹⁸ Power is not merely the constraining of freedom. On the contrary, power coexists with freedom. Power is productive in that it brings about forms of behaviour and events, which also explains why people conform to or resist certain discourses.⁹⁹ The resistance to dominant forms of knowledge at the individual level sets the stage for the production of alternative forms of knowledge.¹⁰⁰

Chitembwe J in *Charo* and Magistrate Daniels in *Gondwe* describe the power of the girls in that they left their parents' homes and went to have sex with their boyfriends. One way of looking at this is that, despite the constraints of their social and cultural contexts, the girls resisted the dominant forms of knowledge, such as that expressed by Chitembwe J, that children are not meant to enjoy sex. By writing about these girls' expressions of sexual agency disparagingly, the courts attempted to reassert the dominant knowledge and, in so doing, they attested to the power the girls had to resist.

This perspective on power gives insight into how persons think of themselves as dominant or marginalised and has implications for the ideas of freedom and resistance. In post-structuralist thought, all individuals are enmeshed in power relations, which are the effects of discourse. Since individuals are born into pre-existing structures that constitute them, and from which they cannot escape, no one is truly 'born free'.¹⁰¹

The idea that persons are not born free may initially appear deterministic and, thus, in tension with human rights discourse. It might seem to foreclose the possibility of transforming oppressive social conditions. However, it is from this very insight that feminist post-structuralism draws hope for political engagement and transformation through resistance. Feminist post-structuralism recognises that totalising ideas of transformation, revolution, emancipation and reform are illusory. Freedom does not lie in throwing off the structures that constitute

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

98 Foucault (n 16) 10-11.

99 Mills (n 97) 36.

100 Weedon (n 34) 111.

101 Adams & Pierre (n 74) 492.

subjects, since this is impossible. Rather, freedom is understood as an ongoing practice of resistance: a continuous and situated struggle against the ways in which human beings have been, and continue to be, constituted as subjects through discourse.¹⁰²

Among other interventions, this book contributes to a critique of dominant ‘truths’ and knowledges about childhood sexuality. My analysis contrasts the disparaging accounts offered by Chitembwe J, Magistrate Daniels and others, including parents, teachers, peers, healthcare providers and pastors, whose ways of thinking about and responding to sexually active girls position them as deviant, abnormal or morally deficient.

2.3 African feminist and post-structuralist thinkers

There is a rich and diverse body of work by African scholars engaging with a wide range of issues, from broad themes such as gender and sexuality¹⁰³ to more specific concerns like adolescent pregnancy¹⁰⁴ and childhood sexuality,¹⁰⁵ some of which have already been referenced above. I use these terms ‘feminist’ and ‘post-structuralist’ descriptively rather than as identity labels. While many of these scholars may not explicitly identify as *feminist* or *post-structuralist*, their work nonetheless draws on post-structural insights to critically examine the construction of gender, sexuality and power in African contexts. Their analyses often confront the enduring legacies of colonialism, including the ways in which colonial legal and cultural systems imposed rigid gender categories and moral frameworks that continue to shape African societies today, particularly in relation to how childhood sexuality is constructed and regulated in law and social practices.¹⁰⁶

This book draws on post-colonial and feminist decolonial approaches that share important affinities with post-structuralist thinking, particularly in their rejection of fixed, universal truths and their attention to how power operates through discourse and representation. Post-

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

103 O Oyěwùmí *The invention of women: Making an African sense of western gender discourses* (1997).

104 C Macleod ‘Adolescence, pregnancy and abortion: Constructing a threat of degeneration’ (2011).

105 D Bhana *Gender and childhood sexuality in primary school* (2016).

106 S Tamale *Decolonisation and Afro-feminism* (2020).

colonial and decolonial refer to approaches that interrogate how colonial power continues to structure knowledge, identity and institutions, and that seek to unsettle Eurocentric epistemic authority in the production of theory and policy. Post-structuralism offers the theoretical tools to deconstruct dominant narratives, such as those of race, gender and sexuality, that were solidified during the colonial encounter and continue to shape institutional practices in formerly colonised societies.

In *Adolescence, pregnancy and abortion: Constructing a threat of degeneration* Macleod interrogates how pregnant and abortion-seeking adolescents are represented, and reveals the discursive constructions that frame these adolescents as threats to societal morality.¹⁰⁷ By deconstructing ‘adolescence’ as a historically produced category, marked by ambiguity and instability, Macleod shows how young women are pathologised when they engage in sex, and are cast as irresponsible and morally degenerative.¹⁰⁸ Her work interrogates biomedical, pedagogical and moralistic discourses that pathologise adolescent sexuality and limit reproductive autonomy.¹⁰⁹

Macleod’s contribution is particularly significant for understanding how legal and policy discourses not only regulate behaviour, but also shape how young women come to see themselves and their reproductive choices in broader racialised, classed and gendered contexts. Her work reveals how colonial notions of girlhood, respectability and reproduction persist in law and policy, thus framing adolescent sexuality as a problem. This framing often shifts blame onto the adolescent herself, obscuring the structural conditions that, for instance, render some pregnancies unsupportable.¹¹⁰ If adolescence were substituted for childhood, the two would appear to occupy similar positions; however, the child may be in a more precarious position, as children are not expected to be sexual in the first place.

107 Macleod (n 104) 2.

108 Macleod (n 105) 24–25.

109 C Macleod ‘Danger and disease in sex education: The saturation of “adolescence” with colonialist assumptions’ (2009) 11 *Journal of Health Management* 375.

110 CI Macleod ‘Public reproductive health and “unintended” pregnancies: Introducing the construct “supportability”’ (2016) 38 *Journal of Public Health* e384; I Lynch and others ‘Vulnerable youth or vulnerabilising contexts? A critical review of youth sexual and reproductive health and rights (SRHR) policies in Eastern and Southern Africa’ (2024) 22 *Sexuality Research and Social Policy* 1058.

Oyěwùmí's *The invention of women: Making an African sense of Western gender discourses* offers a foundational critique of Western gender epistemologies, that is, the taken-for-granted ways of knowing and organising social life through binary sex/gender categories, and provides a powerful entry point into how colonialism reshaped African subjectivities. Challenging the assumed universality of gender, Oyěwùmí argues that the binary categories of 'man' and 'woman' central to Euro-Western thought were foreign to pre-colonial Yoruba society.¹¹¹ Colonialism, she contends, imposed a biologically determined gender order, through legal, administrative, educational and economic systems, that fundamentally restructured indigenous social organisation and produced new gender inequalities.¹¹²

Decolonial approaches build on critiques such as Oyěwùmí's by demanding not only the interrogation of dominant frameworks, but also epistemic disobedience and the subversion of Eurocentric modes of knowing.¹¹³ A key site of this struggle is research on children's normative sexuality, meaning, age-appropriate, non-exploitative sexual expression and behaviour, which remains severely underdeveloped, not because there is no need, but because colonial legacies, sometimes reproduced through institutionalised 'ethical concerns' continue to shape what is considered researchable.¹¹⁴ Decolonising research processes and implementation is essential for producing scholarship that reflects African realities and priorities.

Tamale combines post-structural critique with decolonial analysis to agitate for the transformation of gender and power relations distorted by the colonial encounter. In *Decolonisation and Afro-feminism*, Tamale exposes how African legal systems, shaped by colonial legislation and Christian missionary values, continue to regulate sexual and gendered bodies according to Eurocentric moral codes.¹¹⁵ She critiques the ways in which law constructs normative African identities by criminalising

111 Oyěwùmí (n 103).

112 Oyěwùmí (n 103) 123.

113 T Naidu 'Epistemic disobedience – Undoing coloniality in global health research' (2024) 4 *PLOS Global Public Health* e0003033.

114 E González Ortega 'Research on childhood sexuality: Limitations and recommendations' (2020) 17 *Summa Psicológica UST* 62; J Alomà 'Child sexuality: A scientific aporia' [pre-print] (2024). Although these are not necessarily from Africa, they point to epistemic challenges relevant to Africa.

115 Tamale (n 106).

certain sexual expressions, marginalising non-heteronormative identities and reinforcing patriarchal control. Tamale's approach is feminist, post-structuralist and decolonial. It traces how law and discourse co-produce subjectivities while advancing a politic that reclaims indigenous knowledge and liberatory sexualities.

To conclude this part, I turn to the work of Bhana, whose scholarship was pivotal in shaping my engagement with the study of childhood sexuality. Her work challenged my earlier assumptions, which had formed under the influence of colonial discourses that render children as asexual and passive, and opened my mind to understanding children as sexual subjects. In *Gender and childhood sexuality in the primary school*, Bhana employs a Foucauldian discourse analysis to examine how children are regulated through heteronormative scripts embedded in curriculum, teacher practices and peer interactions.¹¹⁶ This mode of analysis is particularly useful for my purposes because it shows how regulation is enacted through ordinary institutional routines rather than only through formal legal prohibitions. Her work critically explores how moral and institutional discourses govern childhood sexuality in ways that reflect and reproduce broader social anxieties around gender, power and innocence. Bhana's scholarship is essential for understanding how children come to occupy gendered and sexual subject positions, often subtly yet profoundly, through the routine operations of school life and the normative expectations it imposes.

This part has highlighted several scholars whose work offers a contextual understanding of gender and sexuality in African settings. Their work provides essential insights for this book's analysis of how laws and policies construct and regulate childhood sexuality through intersecting discourses of power, morality, and identity.

3 A framework for analysing sex and gender equality law in relation to childhood sexuality

This part draws upon feminist post-structuralist principles to critique sex and gender equality law in relation to childhood sexuality. In this book, 'sex and gender equality law' refers broadly to constitutional, statutory and policy frameworks that address equality, non-discrimination and

116 Bhana (n 104).

related rights in relation to sex, gender and sexuality. I apply feminist post-structuralist principles to examine how sex and gender equality law constructs childhood, gender and sexuality, and how power operates through law to authorise certain meanings while marginalising others. In doing so, the part highlights the importance of an interdisciplinary approach to understanding the discursive conditions under which sex and gender equality law shapes the possibilities for children's and adolescents' sexual subjectivities, with implications that extend into adulthood.

3.1 Bringing feminist post-structuralism to bear on childhood

Feminism arises in response to the patriarchal structure of society.¹¹⁷ It identifies patriarchy as a system of social relations and institutions through which men's interests are prioritised. Patriarchal power rests on the meaning it gives to biological sexual difference, through discourses of masculinity and femininity.¹¹⁸ Feminist post-structuralism is useful in addressing questions about how power is exercised and how social relations could be transformed to achieve equality. As Baxter has stated, '[t]he connection between post-structuralist and feminist perspectives lies in their mutual interest in deconstructing systems of power that work to deny individuals a voice because they identify as women (or men) within particular contexts'.¹¹⁹

Language is central to feminist post-structuralism because it is the means through which social meanings are produced, reproduced and reshaped within social institutions and practices, including the family and school. From a post-structuralist perspective, individuals are not the authors of those meanings, but are subjects through which these meanings are reproduced or challenged.¹²⁰ As children acquire language, they take up meanings through which they are constituted as subjects, offering a structure for understanding their experience in specific ways.

117 Weedon (n 34) 2.

118 As above.

119 J Baxter *Women leaders and gender stereotyping in the UK press: A poststructuralist approach* (2018) 15.

120 Weedon (n 34) 25. Another scholar who has critiqued the idea that gender is based on biological traits is Judith Butler who, in her seminal work, *Gender trouble*, has argued that both sex and gender are not some traits that one can locate in some reality outside discourse but are both functions of and constituted in discourse. Gender, therefore, is not a free-floating attribute but is performatively produced by regulatory practices (Butler (n 9) 13, 33).

However, some discourses dominate in offering more attractive subject positions as they are backed by institutional authority, be it religious, legal, academic, parental or adult authority. In reality, one's experience is primarily shaped by dominant discourses that reflect particular values and interests, making it appear that this is the only legitimate way one ought to experience and interpret reality. As Weedon explains, gendered subject positions are constituted through dominant discourses that prescribe how individuals should appear, behave and experience pleasure, often presenting these expectations as natural and inevitable.¹²¹ Weedon further argues that academic, medical and legal discourses, in particular, give such constructions the appearance of truth, relying on 'scientific, medical or legal guarantee[s] of truth' to reinforce gender norms based on assumed biological facts and their supposed social implications.

Discourses shape subjectivity. This has implications for childhood sexuality and gender in the formative years and in institutions such as in early childhood settings, including pre-school and the early years of primary schooling.¹²² First, patriarchy shapes female children through the double discourse of feminisation and infantilisation, positioning them as sexually passive, immature, irrational and irresponsible in relation to the adult male, who is posited as the pinnacle of maturity, rationality, and responsibility.¹²³ In this way, the early socialisation of children establishes a foundation for gendered expectations and hierarchies that continue to shape their identities and relationships.

Second, in addition to patriarchy, power operates through generational relations between adults and children. In this structure, adults subordinate the interests of children to their own, based on the meanings they assign to the generational difference between those considered children and those regarded as adults.¹²⁴ Prout describes modernist sociology as having conceptualised childhood in a dichotomised manner, highlighting distinctions such as the agency of children versus childhood as a structure; childhood as a social construct versus childhood as natural; and childhood as being versus childhood

121 Weedon (n 34) 99.

122 M Blaise 'A feminist poststructuralist study of children "doing" gender in an urban kindergarten classroom' (2005) 20 *Early Childhood Research Quarterly* 85-108.

123 E Burman *Developments: Child, image, nation* (2008) 105.

124 L Alanen & B Mayall 'Explorations in generational analysis' in L Alanen & B Mayall (eds) *Conceptualizing child-adult relations* (2001) 11.

as becoming.¹²⁵ In explaining childhood as a social construct versus childhood as natural, Prout says that both adulthood and childhood are effects of discursive acts, produced through language, social practices, and institutions rather than determined by nature.

However, the challenge with this perspective is that the emphasis on discourse makes it sound abstract and undermines the fact that children are corporeal beings. In seeking to counter biological reductionism, social constructionism risks moving to the opposite extreme by neglecting corporeality. To preserve the central insight of post-structuralism while recognising that children are also biological beings, Prout addresses this tension by proposing the 'excluded middle'. The excluded middle straddles the dichotomies so that childhood is conceptualised as a complex phenomenon not readily reducible to one side, namely, biology, or to the other side, namely, discourse, of the dichotomy.¹²⁶ The child is both a social construction and a corporeal reality. However, the concept of 'childhood', just like the categories 'girl', 'boy' and 'adolescent', nevertheless is an effect of discourse and the effect of power.

In this book, feminist post-structuralism provides the critical framework through which social meanings of gender and sexuality are examined as they intersect with constructions of childhood. Feminist post-structuralism forges a new understanding of childhood and 'provides an invaluable approach to dealing with diversity and difference with both adults and children, and allows for an understanding of how inequalities are played out differently in different situations'.¹²⁷ Indeed, 'woman' or 'girl' should not be treated as a unitary subject but rather as a complex subject of post-structural theory and analysis, where gender is but one aspect of social identity that intersects with other aspects such as sexuality, class, race, ethnicity, disability and age.¹²⁸ On this basis, the book examines how the concepts of gender, sexuality and childhood are articulated within sex and gender equality law, informing a reading of

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

126 Prout (n 125) 8.

127 Robinson & Jones Diaz (n 31) 16.

128 N Fraser & LJ Nicholson 'Social criticism without philosophy: An encounter between feminism and postmodernism' in LJ Nicholson (ed) *Feminism/postmodernism* (1990) 34-35.

legal texts attentive to the power dynamics through which law constructs and regulates childhood sexuality.

3.2 Critiquing sex and gender equality law

I critique gender equality law through a post-structural lens to generate some insights about positive approaches to childhood sexuality. In doing so, I assume that gender equality law is a form of discourse.¹²⁹ I agree with Kessler who views

law as a discourse that shapes consciousness by creating the categories through which the social world is made meaningful. From an ideological perspective, there is no useful distinction between law and society. Rather, law is part of social life, not an entity that stands above, beyond, or outside of it. Law and society are inseparable and mutually constituting so that the focus is not on law's impact on society, but rather on how law operates in society.¹³⁰

Considering law as discourse has several implications for analysis. The first concerns reflexivity, which is central to feminist post-structural approaches to critiquing law. Reflexivity here refers to the critical awareness through which one recognises how discourse shapes subjectivity, including one's own, and thereby opens space for alternative ways of being.¹³¹ Feminist approaches aim to challenge and transform dominant practices and understandings, and I adopt this orientation to reshape how childhood and gender are conceptualised and addressed.¹³²

An important point Patterson makes is that the 'criticism of existing practices must issue from within those very practices. In other words, "going local" entails holding in place the very practices of understanding being challenged.'¹³³ There is no 'out there' – no disinterested observer's post from which to launch critique. All critique occurs within language and discourse, the very systems that constitute people as subjects. It is impossible to step outside these systems to make claims untouched by their influence. To imagine otherwise is to fall into the modernist illusion

129 Niemi-Kiesiläinen and others (n 13).

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

131 B Davies and others 'The ambivalent practices of reflexivity' (2004) 10 *Qualitative Inquiry* 385.

132 D Patterson 'Postmodernism/feminism/law' (1992) 77 *Cornell Law Review* 308.

133 As above.

of a 'God' position, a disembodied, neutral vantage point that simply does not exist.

For the post-modernist, the art of critique is necessarily reflexive, requiring a self-aware use of language that recognises how authors shape the meaning they produce. As Hall notes, social explanations do not offer absolute truths but reflect the standpoint of the author and must be offered as provisional and persuasive interpretations rather than definitive answers.¹³⁴

A reflexive approach has two essential aspects for authors. First, an author must understand which discourses are available to them, and which ones they use when engaging in critique. Second, an author owns up to their points of view, perspectives, aims and political positions within the power relations that they bring to the context, and reflects on these in the process of analysis.¹³⁵

I approach this analysis as a black African male and as a lawyer, positions that confer both privilege and complicity. Law is a field historically aligned with state authority and elite discourse; legal training, supported by institutions such as courts, grants access to powerful narratives that often marginalise or silence. Law's authority lies not only in its institutional power but also in its self-referential capacity to define what counts as truth within its own field.¹³⁶ That is why a judge such as Chitembwe can proclaim, confidently, that 'children below 18 have no capacity to consent to sex', thereby presenting a socio-legal construct as if it were a transcendental truth.

At the same time, being a man in a patriarchal context affords me power within discourses that routinely marginalise women and girls. In this respect, my capacity to resist gendered and exclusionary knowledge could be limited, because I do not, and cannot, fully know what it is like to be positioned on the other side of that marginality. Yet, as Chiweshe argues, African men engaging in feminist inquiry must navigate and disrupt the very systems of patriarchal and epistemic privilege that they

134 S Hall 'Introduction' in S Hall & B Gieben (eds) *Formations of modernity* (1992) 12.

135 Baxter (n 119) 78-79.

136 P Bourdieu 'The force of law: Toward a sociology of the juridical field' (1987) 38 *Hastings Law Journal* 805.

inhabit, while maintaining vigilance to not silence women's voices.¹³⁷ It is from this intersection of privilege and limitation that I present my critique.

Patterson writes that '[t]o force critical reflection on the juridical categories of gender relations, feminist jurisprudence must retell the stories of gender in ways that enable people both to see the old in new ways and to make sense of the new'.¹³⁸

Reflexivity, therefore, enables the researcher to maintain awareness that their role is not limited to explaining or describing social reality, but also involves producing knowledge that may either resist or reinforce hegemonic discourses.¹³⁹ Researchers must remain aware of their capacity to authorise knowledge, and of the responsibility that comes with it. This power can be exercised in ways that either reinforce dominant discourses or create space for marginalised perspectives to emerge.

One way in which I have attempted to enact such critical reflection is through the practice of humility. In this context, humility means allowing oneself to sit with perspectives that unsettle or disturb and resisting the comfort of dominant discourse. It involves a willingness to imagine non-normative scripts, for example, to question the assumption that motherhood automatically attaches to a girl or woman who is pregnant, or even that a person who is pregnant must necessarily be a woman. Practising humility, then, becomes an epistemological stance: It is about making space for marginalised knowledges and resisting the urge to stabilise meaning prematurely, or permanently.

A second implication of understanding law as discourse concerns law's power to constitute social relations and practices. This implies that law is not just a set of rules but a symbolic system that helps define what is legitimate, rational, natural and lawful; shaping how people think, behave and interact.¹⁴⁰ Kessler describes how law asserts its authority by

137 M Chiweshe 'African men and feminism: Reflections on using African feminism in research' (2018) 32 *Agenda* 81.

138 Patterson (n 132) 309.

139 Niemi-Kiesiläinen and others (n 13) 80.

140 See how law operates discursively to regulate thought, behaviour and social norms in ZR Eisenstein *The female body and the law* (1988) 43; M Kessler 'Legal discourse and political intolerance: The ideology of clear and present danger' (1993) 27 *Law & Society Review* 564.

portraying itself as neutral and above politics and culture, even when legal decisions are shaped by social, political and institutional factors.¹⁴¹

Language plays a central role in law's self-legitimation as an authoritative institution.¹⁴² Legal text here refers not only to written or spoken words, such as legislation or court judgments, but also to legal practices and behaviours. As Fairclough explains, texts are products of broader discursive processes that include both their production and interpretation.¹⁴³ Sex and gender equality laws and related texts, therefore, are elements in the discourse on gender equality. This discourse includes other texts, as well as practices such as parliamentary deliberations, reports on the development of legislation, and social and cultural practices.

Using Malawi as an example, the Gender Equality Act (GEA) is accompanied by a body of documentation beyond the legislation itself, including the Law Commission's report, records of parliamentary debates and an implementation plan.¹⁴⁴ The whole bundle of elements, comprised of texts and practices that are part of social communication, constitute a discourse on gender equality, of which the legislation is but one textual instrument.¹⁴⁵

Drawing on these feminist post-structuralist perspectives, legal texts can be understood as sites where meaning is produced and, therefore, as arenas of power struggles using legal language as the medium for negotiating meaning.¹⁴⁶ Rather than functioning as neutral

141 Kessler (n 130) 56 discusses how legal reasoning relies on the 'myth of objectivity' to mask the political and social influences on judicial decisions.

142 See Bourdieu (n 136) 805 on the broad conception of legal text as including institutional behaviours and procedures.

143 See Fairclough (n 61) 43 on the relationship between text and discourse as parts of a social process.

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

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

146 E Felder 'Legal text and meaning: A linguistic perspective on a complex relationship' in JR de Ville (ed) *Memory and meaning: Lourens du Plessis and the haunting of justice* (2015) 123.

representations of social reality, they constitute identities, subjectivities and power relations, particularly in the domains of sex and gender.¹⁴⁷ This understanding is central to the objectives of this book, which critically examines how gender equality laws shape the sexual rights and well-being of the child.

The analysis that follows focuses on how sex and gender equality law shapes understandings of childhood sexuality across different domains of the child's life, including the initiation of sexual conduct, educational institutions and healthcare settings. This requires attention not only to legal rules but to the discursive practices through which law produces meaning, knowledge and subjectivity. The next part, therefore, turns to discourse analysis as the methodological approach through which legal texts and related practices are read and interpreted.

3.2.1 *Analysing discourse*

Discourse analysis examines how language constructs meaning and organises power. Judith Baxter articulates this succinctly: '[D]iscourses are forms of knowledge or powerful sets of assumptions, expectations and explanations, governing mainstream social and cultural practices. They are systematic ways of making sense of the world by inscribing and shaping power relations within all texts, including spoken interactions.'¹⁴⁸

Legal discourses such as legislation, policy and authoritative interpretive documents, such as court judgments, reproduce legal knowledge through social interaction, enacted through the agency of judges, lawyers and legal scholars, who debate, articulate and pronounce legal 'truths'. In this context, 'legal discourse' refers to the ensemble of legal texts and practices through which law produces meaning, and 'legal truths' refer to institutionally authorised interpretations that acquire the status of objective and settled knowledge within the legal field.

Discourse analysis seeks to understand how such texts construct social meanings and identities, and how they organise power relations. It also examines the consequences that these meanings, identities and relations have for the ways in which individuals experience the law.¹⁴⁹

¹⁴⁷ Smart (n 5).

¹⁴⁸ J Baxter *Positioning gender in discourse* (2003) 46.

¹⁴⁹ J Niemi-Kiesiläinen and others 'Legal texts as discourses' in Å Gunnarsson and others (n 13) 80.

However, the legal system is not autonomous; it interacts with and is influenced by other normative systems in society, including cultural norms and practices.¹⁵⁰ Laws often operate in tandem with policies, and the two are usually co-developed and implemented. These laws and policies, as forms of discourse, exercise power over subjects through the production of truth and knowledge. Even if they use language that proscribes or prohibits unacceptable behaviour, laws and policies function through productive as well as restrictive forms of power: They enforce a specific vision of social reality while suppressing others. In doing so, they not only govern behaviour; they also shape how people understand themselves in society. That is, they contribute to subjectivity by positioning individuals within normative discourses about identity, behaviour and power.¹⁵¹

Situated within this broader understanding of discourse, the analysis undertaken here is concerned with reading and interpreting texts based on the idea that discourse constructs social realities such as adolescence, femininity and childhood.¹⁵² Discourse analysis involves a careful reading of text, broadly defined to include documents, spoken interaction and institutional practices, with a view to discerning patterns of meaning, contradictions, consistencies, and inconsistencies.¹⁵³

One aim of critical discourse analysis is to disrupt taken-for-granted patterns of meaning and to illuminate alternative possibilities of interpretation and social organisation. An example given above shows how CRPD, using the medium of language, disrupts an older pattern of meanings of disability. Through a reconstruction, CRPD forges a new

150 Niemi-Kiesiläinen and others describe the social interaction of legal professionals as 'legal interaction' and the interactions between non-legal subjects as 'everyday interaction'. These two interactions themselves interact and influence each other, so that, for instance, in interpreting law, judges will sometimes appeal to the everyday interaction to challenge or reinforce a legal interpretation (J Niemi-Kiesiläinen and others 'Legal texts as discourses' in Gunnarsson and others (n 13) 79-80).

151 EJ Allan 'Feminist poststructuralism meets policy analysis' in E Allan and others (eds) *Reconstructing policy in higher education* (2010) 25; SJ Ball *Education reform: A critical and post-structural approach* (1994) 22 writes: 'We are spoken by policies ... we take up the positions constructed for us within policies.' See also Baxter (n 118) 15 on the interplay between institutional and personal discourses.

152 Niemi-Kiesiläinen and others (n 13) 74.

153 Gavey (n 83) 467.

way of understanding disability that then offers solutions to the historical marginalisation of persons with disabilities.¹⁵⁴

Discourse analysis encompasses a range of approaches. In this book, I draw specifically on feminist post-structural discourse analysis (FPDA), an approach that examines how gendered power relations are produced, negotiated and contested in discourse.¹⁵⁵ I follow Baxter's definition of FPDA, which she distinguishes from other forms of discourse analysis. According to Baxter, the primary interest in FPDA is the deconstruction of gender, that is, analysing how gender categories are produced, stabilised and contested within discourse. Deconstruction, as a technique for analysing discourse, will be further explained below; for feminism, gender identities and the category 'woman' are the areas of contestation.¹⁵⁶ Rather than conceptualising women as perpetually oppressed and men as the oppressors, the FPDA approach disrupts this vision of power relations. It foregrounds an alternative view of social life in which men and women are positioned in multiple ways at different times and possess the agency to negotiate or resist dominant subject positions.¹⁵⁷ I draw on the idea of the varied and fluid positioning of subjects in discourse to examine the gendered relationships between children and others. This includes considering gender through the child-adult binary as it intersects with age-based power relations. The aim is to deconstruct systems of power that marginalise children, particularly where the law positions them as asexual despite their own accounts of embodied feeling, desire, or emerging sexual self-understanding.

3.2.2 *Deconstructing discourse*

This part explains the meaning of 'deconstruction', a term introduced in the preceding part. Deconstruction is most closely associated with the writings of the philosopher Jacques Derrida, and it pertains to his

154 See also F Mégret 'The Disabilities Convention: Human rights of persons with disabilities or disabilities rights?' (2008) 30 *Human Rights Quarterly* 494. Mégret explains how the CRPD reformulates the same language of classical human rights but in ways that forge a renewed understanding of the rights of persons with disabilities.

155 Baxter (n 148) 45.

156 Baxter (n 119) 15.

157 Baxter (n 148) 31.

philosophy of language.¹⁵⁸ The technique of deconstruction is premised on the concept of *différance*, which emphasises that meaning is both relational and endlessly deferred.

According to this theory, texts do not carry singular and fixed meanings. Instead, meaning arises only in relation to other words, while simultaneously remaining unstable and open to continual deferral.¹⁵⁹ A word cannot contain a final meaning, because as soon as one interpretation appears, it immediately points to other possible meanings that undermine its fixity.

This instability is evident in binary oppositions such as boy-girl, man-woman or adult-child. These dyads appear to represent fixed and natural identities, yet they in fact are hierarchical constructions. For example, in patriarchal discourse the term 'man' is positioned as superior to 'woman', just as 'adult' is valued hierarchically over 'child'. At the same time, each term depends upon its counterpart for its very definition: 'Man' can only be understood in relation to 'woman.' This interdependence illustrates Derrida's notion of *différance*, in which meaning arises through oppositions that are relational, unstable and structured by power.¹⁶⁰

Deconstruction involves a temporary reversal of these hierarchies, disrupting the privilege of one term over the other. It is this momentary act of destabilisation that creates the possibility for new insights.¹⁶¹ This theoretical understanding provides a conceptual tool that I return to in later chapters to interrogate how legal texts construct and regulate childhood sexuality.

Balkin explains the importance of deconstruction by starting from the assumption that laws tell stories about social relations and about what people are, or ought to be.¹⁶² Deconstructive critique underscores that the legal system does not describe human nature as it is; rather, it interprets human nature as constructed in language, where certain

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

159 Baxter (n 119) 27.

160 See JJ Mease 'Postmodern/poststructural approaches' in CR Scott & LK Lewis (eds) *The international encyclopedia of organizational communication* (2016) 1898, on *différance* and the hierarchical nature of binary oppositions. See also Burman (n 122) 105, on semiotic linking of 'girls, women and children linked through mutually implicating discourses of feminisation and infantilization'.

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

162 Balkin (n 161) 762.

terms are positionally privileged over others. Sometimes these dominant views are mistaken for 'truth,' yet, as deconstruction insists, there are no absolute truths – only interpretations.¹⁶³

On this basis, deconstruction exploits the concept of *différance* to show that the privileging of one term over another can be reversed, and this can be done as many times as would serve the purpose of searching for alternative possibilities of meaning.¹⁶⁴ Lam applies this technique in the article 'Deconstructing childhood as a way to justice'.¹⁶⁵ Lam demonstrates that childhood, commonly defined as a state of 'becoming,' can be inverted against adulthood, usually seen as the state of 'being complete'. From this perspective, adults, though considered complete, are in many respects still in the process of becoming, while children, though often regarded as incomplete, are in some respects already complete beings.¹⁶⁶ A further illustration comes from Walkerdine's work described above, where she reveals the insights gained from looking at a reversal of power in the teacher-learner relationship.¹⁶⁷

While the examples from Lam and Walkerdine illustrate the uses of deconstruction in general discourse, Balkin highlights its value in legal discourse and in the reading of legislation, policy and court decisions.¹⁶⁸ A deconstructive reading entails more than a conventional interpretation. Ordinary readings often accept the dominant meanings presented by a legal text, meanings usually assumed by subjects expected to conform to the dominant discourse.

By contrast, a deconstructive reading involves what Baxter calls 'reading against the grain,' or a resistive and inversive mode of reading. This approach requires maintaining awareness of the dominant meanings a text offers but choosing deliberately to attend to what the text suppresses – valuing the marginalised and devaluing the dominant.¹⁶⁹

Deconstructive reading has several implications. First, it might perplex those accustomed to reading legal texts in terms of the 'intention of the framer,' because an inversive reading could be subversive of the

163 As above.

164 Balkin (n 161) 763-764.

165 C-M Lam 'Deconstructing childhood as a way to justice' (2013) 17 *Paideusis: The Journal of the Canadian Philosophy of Education Society* 35-36.

166 Lam (n 165) 35-36.

167 Walkerdine (n 95).

168 Balkin (n 161).

169 Baxter (n 119) 3.

framer's intent. This is precisely the point Barthes made in declaring the 'death of the author': that meaning lies not with the author's intentions but emerges from the act of reading and interpretation.¹⁷⁰

From this perspective, deconstruction resonates with Derrida's *différance*. Once the author's words are fixed in text, the text assumes a life of its own, and then it is the reader whose creativity and agency take over as she interprets the text, and not the author's original intent.¹⁷¹ For deconstructive analysis, therefore, what is important is not the will of the author, but the possibilities opened up through the reader's engagement with the text.¹⁷² This mode of reading provides the framework for the analysis of legal texts in this book, enabling an interrogation of how they construct childhood sexuality and the recovery of suppressed meanings that may support a more rights-affirming and just understanding of children. As the later analysis of Malawi's GEA demonstrates, judicial interpretation may activate meanings that the legislative authors did not intend to foreground, underscoring Barthes's insight that meaning emerges in reading rather than residing in authorial intent.

Borrowing from Wright's words, the second implication of resistive reading can be expressed in this way:¹⁷³

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

170 See R Barthes *Image, music, text* trans S Heath (1977) 142, where he writes that 'writing is the destruction of every voice, of every point of origin ... the author enters into his own death, writing begins'.

171 This is not to deny the reality of legislative intent. Legislative drafting, judicial interpretation and legal advising commonly proceeds on the assumption that legal meaning is at least partially anchored in legislative or institutional purpose. Courts routinely rely on purposive and intentionalist interpretive methods, and legal practitioners advise clients on the basis that legal texts carry relatively stable meanings. The point here is not to reject intention as irrelevant, but to highlight the limits of intentional control once a legal text circulates beyond its moment of enactment and is taken up by diverse interpretive communities.

172 Balkin (n 161) 782.

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

This means that the process of reversing dichotomies is not simply about asking which meaning is preferable. Rather, it is about interrogating the very processes by which certain perspectives come to be legitimised, validated or authorised as dominant, while others are marginalised or excluded. In this sense, deconstruction exposes how discursive power sustains hierarchies within language.¹⁷⁴

Johnson explains that deconstruction is not about criticising authors for making mistakes. As she puts it: '[D]econstructive reading does not point out the flaws or weaknesses or stupidities of an author, but the *necessity* with which what he *does* see is systematically related to what he does *not* see.'¹⁷⁵ What matters is not authorial shortcomings, but the way meaning depends on what is excluded or suppressed. Deconstruction, therefore, rejects the modernist assumption that binary oppositions contain fixed, independent and exclusive meanings. Instead, it recognises that the meaning of each term in a dyad depends on the other, bound together in relations of power. The hierarchical privileging of one term over the other reflects precisely these power relations, which deconstruction seeks to reveal in the reading and interpretation of texts.¹⁷⁶

For the purposes of this book, this approach provides a way of uncovering how laws and policies construct childhood sexuality by privileging certain meanings of 'child', 'gender' and 'sexuality', while marginalising or excluding others. It is these suppressed meanings that may hold the potential for revealing insights that could contribute to advancing sexual justice for children.

3.3 Conceptualising the free and agentic subject in relation to ethical sexual agency

The post-structuralist project seeks to unsettle claims to permanent, fixed, ahistorical and transcendental truths. This raises some difficulties in theorising the agentic and autonomous subject, since this theory also questions the conception of the subject as an essential self, and of an

174 J Culler *On deconstruction: Theory and criticism after structuralism* (1982) 179.

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

176 R Cooper 'Modernism, post modernism and organizational analysis 3: The contribution of Jacques Derrida' (1989) 10 *Organization Studies* 483; Baxter (n 148) 63.

unencumbered autonomous ego.¹⁷⁷ A post-structuralist deconstruction of the subject displaces the notion of a stable, autonomous self, presenting the subject instead as a discursive construct, one produced through language and embedded within, rather than outside of, the social structures that constitute meaning.¹⁷⁸ The challenge is how, being subject to discourse, the same subject can be conceptualised as a free and autonomous agent. Clegg notes that this was the dilemma with which Foucault grappled in his later work: how to account for the subject's capacity to resist without reverting to the idea of a fully autonomous self, an idea viewed with suspicion in post-structuralist theory.¹⁷⁹ Women theorists have critiqued Foucault for undermining women's subjectivities because if there is no subject to resist power, then patriarchal domination becomes impossible to challenge.¹⁸⁰

Theorists such as Hartsock have argued for the necessity of theorising power alongside a subject with the capacity of resistance.¹⁸¹ In response to the post-structuralist de-centring of the subject, Davies reimagines a subject whose capacity for autonomous action arises precisely from being constituted in and through discourse. This is 'not authority in the sense of the one who claims and enforces knowledges, dictating to others what is "really" the case, but as a speaker who mobilises existing discourses in new ways, inventing, inventing and breaking old patterns'.¹⁸²

Freedom and agency, in this framing, are not located outside discourse but emerge from the subject's capacity to recognise the discursive conditions of their own constitution and to engage them reflexively.¹⁸³ The agentic subject, then, despite not being free of discourse, nevertheless can exercise the capacity to turn discourse upon itself, disclosing, unsettling and transforming the very structures through which the subject is produced.

177 G Rae *Poststructuralist agency: The subject in twentieth-century theory* (2020) 4, 7.

178 S Clegg 'The problem of agency in feminism: A critical realist approach' (2006) 18 *Gender and Education* 313.

179 Clegg (n 178) 315.

180 T Moi 'Power, sex and subjectivity: Feminist reflections on Foucault' (1985) 5 *Paragraph* 100.

181 N Hartsock 'Foucault on power: A theory for women?' in L Nicholson (ed) *Feminism/postmodernism* (1990) 170-171.

182 Davies (n 76) 51.

183 As above.

Clegg argues that theorising a subject constituted through discourse yet capable of reflexive agency presents a tension in the post-structuralist and deconstructive project, which originally aimed to displace the sovereign ego that claimed to stand outside discourse.¹⁸⁴ While the notion of a consciously reflexive subject may appear to push the boundaries of post-structuralism's scepticism toward essentialist or transcendental selves, it nonetheless provides a strategically valuable concept. It allows for ethical and political transformation without reinstating a fixed or universal subject. Theorists such as Davies conceptualise the subject not as autonomous in spite of discourse, but as agentic because of the capacity to recognise, resist and rework the discourses through which subjectivity is produced.

This kind of freedom or agency recognises the attitudes and practices of sexuality as being shaped by dominant discourses, yet insists that these discourses are not determining: They can be resisted by self-reflexive subjects. It is the recognition of the subject as capable of reflexivity that underpins the notion of ethical responsibility in both social and interpersonal relationships.

In this book I use the term 'ethical sexual agency' as an interpretive concept to describe the conditions under which sexual agency can be exercised with ethical responsibility. In this regard – ethical sexual agency – means an attitudinal orientation that entails care of the self and care for others in ways that respect mutuality, autonomy and dignity.

While ethical sexual agency is most directly exercised within the context of sexual relationships, it can also be supported and affirmed by others, including parents, educators, judges and policy actors, through practices that respect and enable the emergence of ethical sexual subjectivity in young people.¹⁸⁵ For example, in the *Charo* and *Gondwe* cases the judicial officers had the opportunity to resist dominant patriarchal discourses that constructed a sexually active adolescent girl as deviant. They could have authorised a different legal subjectivity by recognising the child as a sexual subject with agency. Instead, they reproduced the dominant discourse that constructed the sexually active adolescent girl as deviant. Language, reflexively deployed by duty bearers

184 Clegg (n 178).

185 I Vanwesenbeeck and others 'Understanding sexual agency: Implications for sexual health programming' (2021) 2 *Sexes* 378.

such as judicial officers, thus becomes key to subverting dominant narratives and enabling more equitable constructions of childhood sexuality.¹⁸⁶ This understanding, grounded in post-structuralist theoretical foundations, provides the framework for critiquing legal texts and for examining how they construct and regulate childhood sexuality.

4 Concluding thoughts

This chapter has laid the theoretical foundation for examining how law and policy discursively construct childhood sexuality within the matrix of gendered power relations. According to feminist post-structuralist theory, categories such as 'child', 'girl' or 'adolescent' do not exist outside discourse; they are the effects of meaning-making practices that circulate in and across institutional contexts such as law, religion, medicine and education. These discursive constructions are neither neutral nor benign. Rather, they produce patterned ways of governing conduct that shape children's subjectivities and delimit the range of what is socially intelligible, legally permissible and morally acceptable. However, at the same time, they may offer possibilities for reform.

Central to feminist post-structuralism is the insight that power operates not only through prohibition but also through production; that is, power produces the very norms, categories and 'truths' through which people come to understand themselves and others, including as sexual subjects. In this chapter I have examined how legal discourse, particularly sex and gender equality law, is implicated in these operations of power. Law, viewed as discourse, is not merely a reflection of societal values, but is an active participant in constructing and legitimising particular understandings of childhood, sexuality and gender. It is in this sense that I have approached law not simply as a set of rules to be interpreted doctrinally, but as a site of epistemic struggle over meaning, identity and legitimacy.

The case of *Charo* exemplifies how legal discourse constitutes children's subjectivities in profoundly gendered and moralising ways. Chitembwe J's characterisation of a 14 year-old girl as 'behaving like a full grown-up woman who was already engaging and enjoying sex with men' is not an incidental comment. It is a discursive move that repositions

186 Davies and others (n 131) 360-361.

the girl from the legal category of 'child' to a morally culpable sexual agent, thus justifying the denial of the harm inflicted on her by an adult man significantly older than her. This judicial discourse does not merely interpret the law; it constructs a particular 'truth' about the child's sexuality that is steeped in adultist, patriarchal and heteronormative assumptions. While judicial utterances often aspire to objectivity, a feminist post-structuralist reading reveals how they may not be fully objective descriptions of reality, but rather institutionally authorised interpretive acts that can reinforce dominant regimes of truth about childhood and sexuality. However, judicial pronouncements can also disrupt dominant regimes of truth and contribute to more just and attentive renderings of children's experiences of sexuality.

This chapter also introduced African feminist post-colonial and decolonial perspectives that offer alternative epistemic vantage points. African scholars have shown how colonial legal and cultural systems imposed rigid gender binaries and sexual norms onto African societies, often displacing more fluid or context-specific indigenous understandings of sexualities. Recognising colonial legacies as contingent, rather than fixed or inevitable, opens space for alternative epistemic claims and contributes to the search for reproductive justice in post-colonial contexts.

The theoretical contributions discussed in this chapter thus serve a dual purpose. First, they provide the analytical tools for interrogating how legal texts construct and constrain the sexual subjectivities of children. Second, they open a space for imagining alternative legal and policy discourses that do not discipline children into silence and passivity, but instead recognise their agency, complexity and evolving capacities.

This book adopts a theoretical framing of the post-structural subject as one capable of disrupting the *status quo* through conscious and reflexive engagement with the discourses that constitute subjectivity. Feminist post-structuralist tools are used to interrogate how sex and gender equality laws, court judgments and institutional practices (re) produce meanings of childhood and sexuality, and how such meanings may be contested and reimagined. Robinson and Jones Diaz highlight that to contribute to social justice for children, gender laws, policies and practices must 'disrupt the normalizing discourses that constitute and

perpetuate social inequalities in society and operate to privilege certain identities and marginalize and silence others'.¹⁸⁷

Sex and gender laws ought not always to affirm dominant discourses. Where it serves the interests of justice, these laws must facilitate critical reflection on what individuals have come to know about themselves and others, so that meaning may be reshaped. This book undertakes an inquiry into childhood and sexuality with that imperative in mind, guided by Prout's observation that '[c]hildhood, then, like all phenomena, is heterogeneous, complex and emergent, and, because this is so, its understanding requires a broad set of intellectual resources, an interdisciplinary approach and an open-minded process of enquiry'.¹⁸⁸

In the following chapter I apply the theories and tools discussed above to undertake a deconstructive and open-minded reading of the gender equality law, to understand how the law positions children as gendered and sexual subjects.

187 Robinson & Jones Diaz (n 31) 24.

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