

Children's sexual agency and gender equality law

1 Introduction

Thorne, a feminist scholar, noted that although feminism theorises social change, its focus remained largely on adults, with little attention to children.¹ Even as sophisticated critiques of masculine dominance developed, adult-centric assumptions about children went largely unchallenged.² James and Prout make a similar claim in *Constructing and reconstructing childhood* that, in the history of social science research, children (and women) had been muted groups. They observe that, although there has been interest in children, the voice that has articulated these interests is not the voice of the children themselves.³

Some scholars have criticised the process of law making regarding children in the development of the United Nations (UN)'s Convention on the Rights of the Child (CRC) for representing the interests adults have about children, rather than the interests of children.⁴ The evidence reveals that adult interests often ignore children as agentic subjects of gender and sexuality, despite that children, as part of normative human development, actively engage in gendered relations of power, and invest in sexual relationships, pleasure and desire.⁵ As autonomous subjects,

1 B Thorne 'Re-visioning women and social change: Where are the children?' (1987) 1 *Gender & Society* 85.

2 Thorne (n 1) 86.

3 A James & A Prout 'A new paradigm for the sociology of childhood? Provenance, promise and problems' in A James & A Prout (eds) *Constructing and reconstructing childhood: Contemporary issues in the sociological study of childhood* (1997) 7.

4 A Gadda 'Rights, Foucault and power: A critical analysis of the United Nations Convention on the Rights of the Child' *Edinburgh Working Papers in Sociology* 31 (2008) 6. Indeed, this criticism could also be levelled against the African Charter on the Rights and Welfare of the Child.

5 D Bhana 'Love, sex and gender: Missing in African child and youth studies' (2017) 42 *Africa Development* 251-252; see also P Talavera 'The myth of the asexual child in Namibia' in S LaFont & D Hubbard (eds) *Unravelling taboos: Gender and sexuality in Namibia* (2007) 61-62, 66. In his research, Talavera found that children in the Ovahimba and Ovaherero cultural groups of Namibia play games

children actively interpret, negotiate, and sometimes resist the norms that seek to organise their gendered and sexual lives.

As stated in the introductory chapter, this book uses Malawi's sex and gender equality legislation, particularly the Gender Equality Act (GEA), to demonstrate a deconstructive reading of the law. The analysis in this chapter is broken down into three parts. The first part critiques the methodological process as stipulated in the Malawi Law Commission (MLC)'s report on the development of the GEA (GEA Report).⁶ The second part examines the theoretical framework underpinning the GEA, which reveals how the law constructs the gendered world.

The third part examines how the GEA constitutes children's subjectivities, that is, how it positions children as agents capable of contributing to the achievement of its aims, particularly in relation to matters of gender and sexuality. It also considers the silences in the GEA: how the law fails to recognise children as sexual subjects or omits possibilities for their participation in shaping decisions that affect their sexual and gendered lives.

In this chapter, 'children's sexual agency' refers to children's and adolescents' capacity, within their evolving capacities and social constraints, to interpret, negotiate and communicate boundaries, desire and meaning in relation to their bodies and relationships. This usage does not assume adult forms of autonomy; rather, it foregrounds the ways in which agency is exercised within, and sometimes against, the norms and institutions that govern childhood.

2 A case study: Deconstructing Malawi's gender equality law

2.1 Background

The GEA is primarily the product of legal research and review conducted by the MLC, pursuant to its constitutional mandate which includes proposing draft legislation for consideration by the executive and

that may involve sexual acts. However, the adults do not consider the children to be sexual.

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

legislature.⁷ The terms of reference guiding the MLC in developing the GEA included reviewing Malawi's gender equality policy and legal framework, considering relevant international law and policy documents, and consulting with a range of stakeholders.⁸ The process culminated in the GEA Report, which included a proposed draft of the Gender Equality Bill (GEB). The significance of the GEA Report lies in its revelation of how the MLC privileged certain meanings of gender and sexuality over others. Further, the report also reveals how it positions children in relation to gender and sexuality.

While any Bill proposed by the MLC is subject to revision at various stages of the law-making process, the GEB drafted by the MLC was enacted without substantive modification. This renders the MLC's GEA Report central to understanding the theoretical and political considerations underlying the GEA. Accordingly, the analysis that follows proceeds on two assumptions: first, that the GEA Report represents a synthesis of multiple preparatory processes, including reviews of legal and policy frameworks and consultations with stakeholders. Second, the report embodies the theoretical and political orientations that inform the GEA.

2.2 A critique of the legal research methodology

Methodology in legal reform refers to the procedures and justificatory logics a law reform commission employs in developing legislation.⁹ However, methodology also includes the theoretical foundations that guide these procedures, and the assumptions that inform how problems are defined and solutions imagined. These foundations are sometimes assumed rather than explicitly stated.¹⁰ This was the case with the GEA Report, where the MLC largely relied on implicit assumptions about gender and equality. By critiquing the MLC's methodology, this book

7 Secs 133 and 135 of the Constitution of Malawi empower the Law Commission to appoint experts to review specific areas of law and to make recommendations on the conformity of laws – including the Constitution itself – to constitutional and international standards. The Commission reports its findings to the Minister of Justice, who must publish and submit these to Parliament.

8 The full terms of reference are on pages 6 and 7 of the GEA Report.

9 D Watkins & M Burton 'Introduction' in D Watkins & M Burton (eds) *Research methods in law* (2013) 2.

10 As above.

seeks to surface the underlying premises shaping the law's development. Such a critique enables an assessment of whether the GEA genuinely challenges social relations and institutions that privilege men or reproduces them.

The structuring of the sub-headings below is not intended to mirror how the MLC conceived its methodology. Rather, it reflects my interpretive reading of the GEA Report. As noted above, within a deconstructive approach, the author's intentions in drafting legal instruments do not fix meaning; instead, meaning is shaped through the readers' interpretation.

2.2.1 Comparative legal method

One of the methodologies used by the MLC was comparative legal research.¹¹ But what does legal comparison entail? According to Legrand, comparative law is not only a method but also a perspective that allows one to critically illuminate a legal system under study.¹² Legrand suggests that comparative research has two central characteristics: an explicit commitment to theory and an explicit commitment to interdisciplinarity.¹³ Comparative law involves more than the descriptive collection of legal materials from another jurisdiction. The aim of comparison is to generate analytical insights that cannot be obtained by examining jurisdictions in isolation.¹⁴ A researcher adopting a comparative approach must, therefore, demonstrate sensitivity to the cultural and legal contexts within which the object of study is situated.¹⁵ As Samuel has observed: 'Legal texts are not to be treated as objects in themselves – things capable of being transplanted from one system to another – but as signifiers for something culturally more profound about the other.'¹⁶ For instance, notions such as gender equality may not carry the same meanings or cultural intelligibility in Norway as they do in Malawi.

11 Malawi Law Commission (n 6) 15, 23, 41, 67, 71.

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

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

14 G Samuel 'Comparative law and its methodology' in Watkins & Burton (n 9) 110.

15 Samuel (n 14) 102-104.

16 Samuel (n 14) 103.

Assessing the comparative analysis purportedly undertaken by the MLC requires attention to how meanings of gender equality are produced and understood within the cultural contexts under comparison, particularly if such analysis is to generate context-sensitive knowledge. A comparative legal approach is necessarily interdisciplinary because the tools for analysis are not the exclusive domain of pure doctrinal legal research.¹⁷ Accordingly, such an approach entails making explicit the theoretical orientations that are implicit in the legal texts under comparison, rather than treating those texts as self-contained or culturally neutral.

The MLC's comparative legal analysis was one factor that influenced its selection of the legislation's title.¹⁸ It also informed its proposal for the institution that would be responsible for the enforcement of the GEA.¹⁹ However, these elements appear marginal to the substantive challenge of defining and realising gender equality. From a feminist post-structuralist perspective, the analysis that follows does not seek to extract neutral knowledge from the MLC's use of comparative law. Rather, it interrogates how knowledge about gender equality was constituted through the comparative legal method. Specifically, it asks which discourses and understandings of gender equality were enabled, or constrained, by the MLC's reliance on legal comparison. This inquiry reflects a broader concern with how legal methodologies participate in the construction of normative frameworks, and with whose voices, experiences and epistemologies are legitimised or excluded in that process.

This framing becomes apparent in how the MLC reviewed the nomenclature of gender laws across several jurisdictions. The comparison appears largely formalistic, focusing on titles without undertaking a deeper analysis of how terms such as 'gender equality' or 'gender justice' are contested, situated or legally operationalised in those contexts. The MLC does not appear to have drawn on comparative experiences in which gender equality has been substantively linked to issues such as the criminalisation of same-sex sexuality or the legal recognition of marital rape. Yet, such issues are central to debates about sex-based and gender-based discrimination. By not engaging these dimensions, the MLC's

17 Samuel (n 14) 104.

18 Malawi Law Commission (n 6) 15.

19 Malawi Law Commission (n 6) 23.

comparative approach reflects a restricted legal imagination – one that privileges formal legal structures over inquiry into the power-laden discourses through which gender equality is lived and contested.

The MLC's role was key in shaping the meanings about sexuality and gender equality that the GEA would carry. The GEA Report reflects the meanings the MLC chose to make explicit, those it rendered marginal, and those it suppressed through silence. This also shows how legal methodologies are not neutral but participate in the construction of discourses about gender and sexuality. This insight underpins the central concern of this book: how legal texts and practices constitute childhood sexuality.

2.2.2 Doctrinal legal analysis

Doctrinal legal analysis constitutes the core methodology within the discipline of legal research. It is pre-eminently the method that defines the activity as legal research, and the product, such as a proposal for legal reform, as legitimately derived from legal research. Hutchinson defines doctrinal legal research as 'a critical conceptual analysis of all relevant legislation and case law to reveal a statement of the law relevant to the matter under investigation'.²⁰ It is primarily an internal method, working within recognised legal sources and interpretive conventions to state what the law is, and how it coheres. In doctrinal research, the sources of law are the primary data, and the crucial step for the researcher is to read and analyse the data, and link what is not yet known, or what the researcher wants to know, with what is already known.²¹

Doctrinal legal research, when used for the purpose of recommending law reform, usually involves identifying legal principles in an existing body of law, such as legislation, human rights treaties and case law, and analysing how these align, or fail to align, with the law under consideration. The goal is typically to ensure consistency with established legal regimes.²² From the structure and content of the MLC's report, it is evident that this was its primary methodology.

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

21 T Hutchinson 'Doctrinal research' in Watkins & Burton (n 9) 13.

22 PC Westerman 'Open or autonomous? The debate on legal methodology as the reflection of the debate in law' in M Hoecke (ed) *Methodologies in legal research*

The GEA Report includes a systematic review of legal sources at international, regional and national levels to extract legal principles relevant to gender equality. These include the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) and various national constitutions and equality laws, notably the Constitution of Malawi. These principles are analysed and applied to justify the inclusion of corresponding provisions in the draft law the MLC proposed. For instance, the MLC cites article 16 of CEDAW on the rights of women to decide on the number and spacing of children and to choose a sexual partner, as well as the rights recognised under article 14 of the African Women's Protocol, to justify the inclusion of the provision on sexual and reproductive health and rights (SRHR) in the GEA.²³

The gender equality law, as framed in the GEA Report, embodies international and regional norms of equality between women and men, including sexual and reproductive autonomy, together with constitutional principles of non-discrimination. In this way, the GEA is situated within a broader rights-based framework and, on its face, has a strong normative basis for advancing gender equality, including SRHR.

Graycar and Morgan, however, question the reliance on the doctrinal legal method in law reform processes, particularly when the method aims to tackle complex social issues such as gender equality. They observe and take issue with the belief that every law reform process should be entrusted primarily to lawyers. They argue that lawyers are unlikely to perceive their role as reconceptualising or reimagining social issues beyond the traditional legal paradigm.²⁴ Yet, developing legislation on sexuality and gender demands exactly such innovation.

Further, there is over-reliance on traditional legal material such as court judgments.²⁵ Indeed, this is apparent in the MLC's report where, for instance, it adopted the definition of sex proposed in the English

which kind of method or what kind of discipline? (2011) 89.

23 Malawi Law Commission (n 6) 60.

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

25 As above.

court decision of *Corbett v Corbett*.²⁶ The MLC states that 'in accordance with the English common law, sex of a natural person is determined at birth. Therefore, any person who later undergoes sex change surgery or is a practicing transsexual shall be deemed to maintain their sex at birth.'²⁷

This statement exemplifies the legitimating function of self-referential legal discourse.²⁸ A position is framed as authoritative largely because it is grounded in precedent, specifically in English common law dating back to the twentieth century. By invoking *Corbett*, a 1970 English decision, as though it were universally valid and temporally neutral, the MLC forecloses engagement with contemporary, contextually relevant understandings of sex and gender.

Yet, this approach silences alternative epistemologies, particularly those offered by psychological, sociological and human rights-based perspectives, which could have offered more context-sensitive and inclusive understandings of sex and gender in contemporary Malawi. From a feminist post-structuralist standpoint, this choice reveals how legal discourse operates to stabilise contested categories such as 'sex' by invoking precedent, while marginalising or excluding more dynamic, socially grounded perspectives that acknowledge lived experience and identities. As Cooper has shown in her analysis of the debates about legal classification in Britain, legal formalisation often secures certain meanings while simultaneously foreclosing others, illustrating how law privileges fixed categories at the expense of more fluid, socially embedded understandings.²⁹

Although the GEA rests on a strong normative basis, a feminist post-structuralist reading cautions that such a foundation does not in itself guarantee justice. The law not only produces silences but also stabilises explicit meanings of sex and gender that constrain how childhood sexuality is understood. It is these constructions and omissions, and their

26 Malawi Law Commission (n 6) 14. The MLC cites *Corbett v Corbett* (1888) 13 PD 136, but it does so in error because the 1888 judgment bears no relationship to what the Commission says about the determination of sex at birth. It appears that the MLC is in fact referring to a similarly titled judgment – *Corbett v Corbett (otherwise Ashley)* 1970 (2) All E R 33.

27 Malawi Law Commission (n 6) 14.

28 L Cheng & D Machin 'The law and critical discourse studies' (2022) 20 *Critical Discourse Studies* 245.

29 D Cooper 'What does gender equality need? Revisiting the formal and informal in feminist legal politics' (2022) 49 *Journal of Law and Society* 800.

implications for childhood sexuality and agency, that are the focus of this book.

2.2.3 *Interdisciplinarity*

Legal research for purposes of creating legislation to influence social relationships has evolved to become interdisciplinary, in order to enhance its social relevance. Legal researchers, therefore, utilise non-doctrinal legal methods, or at least use the results of such techniques, to bolster their doctrinal legal research.³⁰ The MLC did employ extra-legal methods, including soliciting submissions from the public on the subject-matter of the reform. It held consultative workshops on the proposed recommendations before finalising the report and the draft GEB.

However, it does not appear from the report that the MLC consulted or considered the diversity of stakeholders with a direct interest in gender equality. For instance, the report does not reveal evidence that members of the lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) community were consulted on issues such as sex, gender discrimination and sexual harassment. Here, 'consultation' is taken to mean more than attendance at public meetings; it entails purposive engagement capable of capturing the perspectives of groups directly affected by how sex, gender and sexuality are legally defined. The GEA Report does not record any consultations with children.

It may have been assumed that children could not add anything meaningful to what adults had already presented on their behalf and on behalf of everyone. Yet, this assumption itself reproduces the very problem: By treating children as incapable of contributing to debates on gender and sexuality, the process undermines their agency and silences their perspectives. From the standpoint of this book, incorporating children's voices is not simply a matter of consulting them, but a means of unsettling the dominant narrative that children cannot understand, or speak to, their own experiences of sexuality.

30 TC Hutchinson 'The doctrinal method: Incorporating interdisciplinary methods in reforming the law' (2015) 8 *Erasmus Law Review* 130.

3 Creating law and constructing gendered subjects

I structure the analysis below according to several themes identifiable in the GEA. The MLC conceptualises the aim of the GEA as redressing the disadvantaged position of women in relation to men. The GEA Report posits women and children as similarly positioned, especially when discussing sexual violence. Indeed, as Thorne notes, political theories have often lumped women and children together and relegated them to the margins, while positioning men as autonomous actors who occupy the centre stage.³¹ The analysis below aims to deconstruct the GEA's positioning of children in the gender discourse.

3.1 Conceptualising gender, sex and power

3.1.1 Gender

The MLC adopted the United Nations Educational, Scientific and Cultural Organisation (UNESCO)'s definition of gender as the socially ascribed differences between men and women based on sex; these differences vary across cultures and change over time.³² The MLC also adopted the definition of gender equality from the same source, and proposed that gender equality means that men and women freely develop their capabilities and make choices without the constraints of gender stereotypes and prejudices.³³ The MLC thus theorised gender primarily through sexual difference, treating 'sex' as the stable biological foundation upon which gendered social roles are built.

Feminism has criticised the sexual-difference approach because, by theorising gender as a social construction based on biological sex, the theorisation of gender remains limited by biological sex.³⁴ This limitation is addressed by other theoretical approaches, such as queer theory, which

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

32 Malawi Law Commission (n 6) 12. The definition is taken from UNESCO *Gender equality and equity: A summary review of UNESCO's accomplishments since the Fourth World Conference on Women* (2000) 6.

33 Malawi Law Commission (n 6).

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

conceptualises sexual difference without tying it to biological sex.³⁵ The MLC's theoretical basis, therefore, is potentially biased against differently gendered subjectivities, including transgender persons. The MLC adopted this position even though the LGBTIQ community in Malawi was, at the time, actively drawing attention to the marginalised status of those who do not conform to traditional notions of gender and sexuality.³⁶

The MLC recognised that hegemonic masculinities impact both men and women.³⁷ The concept of hegemonic masculinities, as developed by Connell, explains how masculinities operate to marginalise not only women but also men who do not conform to masculinity norms. Fundamental elements of hegemonic masculinity include the construction of women as potential sexual objects for men, and the negation of men as potential sexual partners for other men.³⁸ The subordination of women and the denigration of men who do not conform to heterosexual masculinities are the hallmarks of hegemonic masculinities.³⁹ Therefore, hegemonic masculinity is a cultural ideal that oppresses both women and non-heterosexual men. There is thus a close relationship between homophobia and misogyny.⁴⁰ Tamale similarly draws attention to how African heteropatriarchal systems are maintained through institutional and cultural mechanisms that stigmatise and criminalise non-conforming sexualities, thereby reinforcing the very gender and sexual hierarchies on which hegemonic masculinity relies.⁴¹

However, the MLC did not pursue the implications of hegemonic masculinities, particularly considering Malawi's criminalisation of same-sex sexual conduct. Consequently, the proposed GEB aligns

35 Queer theory offers a critical framework for understanding non-heteronormative gender identities and sexualities. It challenges the notion that gender roles, identity and sexual orientation are biologically determined binaries. Instead, it posits that these categories are socially constructed and thus open to interrogation and subversion. See JL Nagoshi and others *Gender and sexual identity: Transcending feminist and queer theory* (2014) 21-23.

36 The Other Foundation 'Canaries in the coal mines: An analysis of spaces for LGBTI people activism in Malawi' Country Report (2017) 12.

37 Malawi Law Commission (n 6) 12.

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

39 As above.

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

41 S Tamale 'Exploring the contours of African sexualities: Religion, law and power' (2014) 14 *African Human Rights Law Journal* 176.

with a heteronormative ideology that reproduces the very hegemonic masculinities the GEA purportedly challenges. Therefore, the GEA fails to offer a radical view of a social world that would facilitate resistance by children to discourses of gender inequality. On the contrary, the GEA positions a heteronormative society as the ideal, such that it rewards children who position themselves as heteronormative and sanctions those who differ or, indeed, defer (in Derrida's sense of *différance*).

3.1.2 Sex

Basing itself on the *Corbett* decision, which defined sex as determined at birth, the MLC proposed that sex is permanent regardless of whether a person undergoes surgical reassignment later in life.⁴² In entrenching a rigid definition of sex, and conceptualising sex in terms of the male-female binary, the MLC proposed a law that excludes other sex identities, such as intersex.⁴³ This is particularly crucial for children because intersex characteristics are often observable from early childhood. Although civil society organisations in Malawi have been advocating the recognition of the challenges faced by intersex children, the MLC ignored this issue in the GEA Report.⁴⁴

Sex-based discrimination is an important aspect of gender equality that the GEA addresses. The GEA's treatment of sexual coercion of women and children reflects insights drawn from liberal and radical feminist critiques of laws and practices that entrench a double standard of sexual morality. For example, prostitution laws were historically grounded in essentialist views that framed men's sexuality as uncontrollable and women's as passive, thereby penalising women who sold sex while excusing men who bought it.⁴⁵

⁴² Malawi Law Commission (n 6) 14.

⁴³ Malawi Law Commission (n 6).

⁴⁴ Centre for Human Rights and Rehabilitation & Centre for the Development of People 'The situation of intersex children in Malawi' (2016). This is an NGO shadow report to the Committee on the Convention on the Rights of the Child.

⁴⁵ M Rahman & S Jackson *Gender and sexuality: Sociological approaches* (2010) 21. See also M Ingram *Carnal knowledge: Regulating sex in England, 1470-1600* (2017) 29-32, which describes how early legal and cultural norms depicted men as sexually assertive and women as passive or transactional, thereby reinforcing a moral double standard in laws such as those on prostitution.

MacKinnon suggested that sexuality is a form of power through which male dominance is exercised and institutionalised.⁴⁶ Within heterosexual marriage, the failure to criminalise rape does not simply leave a legal gap; it reinforces masculinised norms of entitlement and access that render women's sexual consent fragile or negotiable. In this way, law participates in normalising non-consensual sexual access, prompting MacKinnon to describe sexuality as the 'linchpin' of gender inequality.⁴⁷

Another feminist, Adrienne Rich, used the term 'compulsory heterosexuality' to explain how patriarchy creates social and sexual practices that maintain women's subjugation under men.⁴⁸ Compulsory heterosexuality as a social and political institution privileges and rewards certain cultural practices, such as marriage and heterosexual sexual relations, and punishes others such as sex outside marriage and same-sex sexual relations.

The GEA Report reflects a negotiated compromise in which feminist ideas coexist with, and are constrained by, prevailing cultural and legal orthodoxies. For instance, in 2000 the MLC recommended the criminalisation of female same-sex sexual conduct.⁴⁹ Furthermore, the MLC had considered criminalising marital rape, but opted against it.⁵⁰ From radical feminist perspectives, the criminalisation of gay and lesbian sexuality and the failure to legislate against marital rape are manifestations of patriarchal domination and conspire to sustain the differences in social power that undermines gender equality. From a feminist post-structural reading, although the GEA attempts to constitute a gender-equitable world, it still retains elements of a gender-discriminatory world: It privileges masculinities and heteronormativity over femininities and non-heterosexual identities and ways of being.

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

47 MacKinnon (n 46).

48 A Rich 'Compulsory heterosexuality and lesbian existence' (1980) 5 *Signs* 631.

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

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

3.1.3 Power

The MLC also understood gender to be about relations of power, and that gender equality is about addressing inequality in power relations.⁵¹ Despite this recognition, the MLC does not offer deeper theorisation about the meaning of power and its implications. Power is central to gender inequality. Gender theory examines how power produces inequality and how it can be resisted by marginalised groups such as women, LGBTIQ persons and children.

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

For instance, in the GEA Report, the MLC purports to offer a holistic approach to gender equality by including men as participants in social transformation.⁵² This move is framed as a departure from what it describes as gender equality initiatives that 'continue to focus on women rather than trying to transform the unequal gender relations that drive and maintain women as the weaker partner in their interaction with men.'⁵³ This appears to be a progressive repositioning, one that acknowledges the structural dynamics that disadvantage women and challenges the binary view of men as always powerful.

However, a closer reading of the text reveals that the GEA Report sustains conventional representations of women and children as vulnerable, as lacking agency, and as passive recipients of the harms generated by male behaviour. For example, the report states:⁵⁴ 'Making men more aware of the costs of conventional forms of masculinity, both

51 Malawi Law Commission (n 6) 12.

52 As above.

53 As above.

54 As above.

for themselves and for women and children is an important step towards challenging gender inequalities.’

Here, the onus of transformation is placed squarely on men, who are asked to become conscious of the negative consequences of masculinity. Women and children are not presented as partners in that transformation, but rather as the ones who *bear* the costs. In this construction, women and children exist only in relation to men – as those harmed by male dominance and as those who stand to benefit from male enlightenment. The language does not consider that women and children may possess knowledge or agency in challenging dominant gender norms themselves.

Moreover, the discursive pairing of ‘women’ and ‘children’ throughout the GEA Report flattens the differences in their social positions and experiences. It positions them as equally vulnerable, thereby collapsing the distinct ways in which women and children may encounter and negotiate gendered power. The phrase ‘the weaker partner in their interaction with men’ reduces women to a static position within heterosexual relationships, thereby ignoring the potential for agency, subversion or resistance.⁵⁵ Likewise, children are never positioned as social actors capable of participating in or contesting the meanings of gender and sexuality.

Elsewhere, the GEA Report asserts that ‘[m]en may thus also be vulnerable as orphans or refugees, they may be unemployed or homeless; they may be dying of (AIDS-related infections)’⁵⁶

This framing illustrates that men’s vulnerability is presented as situational and contingent, while the vulnerability of women and children is presumed. The fact that men’s vulnerability is spelled out, specified and contextualised, while women’s and children’s vulnerability is simply assumed, exposes a fundamental asymmetry in how the report positions men, women and children in relations of power.

From a post-structural perspective, the report’s conceptualisation of gender inequality rests on a power binary: men as the source of gendered

55 The MLC (n 6) 12 frames this observation in a seemingly gender-equality-affirming way: ‘Unfortunately, many gender equality initiatives continue to focus on women rather than trying to transform the unequal gender relations that drive and maintain women as the weaker partner in their interaction with men.’ Yet, in articulating what should not be done, the MLC unwittingly reproduces the very assumption it seeks to critique, namely, that women are positioned as the weaker partner within gender relations.

56 Malawi Law Commission (n 6) 12.

harm and women and children as those harmed. This view does little to disturb the foundational assumptions of heteropatriarchal power, which depend on the positioning of children as innocent, dependent and sexually passive. Notably absent is any recognition of children as subjects embedded in discourse, capable of experiencing, interpreting and even resisting the gendered expectations that structure their lives.

Therefore, while the GEA Report positions itself as facilitating gender equality through inclusivity, its symbolic architecture maintains a hierarchical logic that privileges adult male subjectivity and silences the voices of children. The radical potential of the GEA is thus undermined by its failure to imagine children as anything other than passive recipients of adult actions. This raises the critical question: What forms of subjectivity are foreclosed when law and policy construct 'women and children' as a category whose only available position is that of the vulnerable?

This model of power has been challenged by post-structuralist theorists, particularly those influenced by Foucault, who reconceptualise power not as a substance possessed by some and withheld from others, but as diffuse, relational and embedded within discourse. Angelides, for instance, argues that power relationships should be understood not as a relationship in which some have power and others lack power, but as a relationship in which 'each subject is differentially marked and positioned in power and discourse structures',⁵⁷ so that '[d]ominance and submission are not fixed positions determined by the presence and absence of power'.⁵⁸ Making this argument in the context of child sexual abuse, Angelides suggests that conceptualising children as lacking knowledge about sexuality, and as powerless in relation to adults, not only misconstrues the power relationship but also disempowers children by erasing their autonomy and agency.⁵⁹ Paradoxically, this disempowerment may increase children's vulnerability to sexual abuse, as it reinforces the very power differentials that abusers exploit.

Building on this insight, my analysis acknowledges that dominant social discourses do indeed privilege men over women, adults over children, and heteronormative subjects over those who do not conform

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

58 Angelides (n 57) 152.

59 Angelides (n 57) 158.

to normative sexualities or gender identities. These privileges are supported and maintained by institutional structures, including the law. However, post-structural thought rejects the notion that privilege entirely determines agency. Subjects positioned as marginal or subordinate are not devoid of power; rather, they can and do navigate, resist and, at times, subvert dominant discourses.

From this perspective, for the GEA to truly support the transformation of the social world in which children live, it must recognise children as subjects within discourse. They are not passive objects of protection but capable of meaning-making, exercising agency, and resisting dominant discourses. Rather than merely shielding children from the effects of gender inequality, the GEA should enhance children's opportunities to exercise power in ways that challenge and disrupt norms that sustain inequality.

3.2 Men and women

The extended title of the GEA expresses the GEA's aim to 'promote gender equality, equal integration, influence, empowerment, dignity and opportunities, for men and women'.⁶⁰ The choice of words 'men and women' should not be assumed to be the natural way of categorising and naming human beings, because, as post-structuralists have cautioned, language is rarely objective but tends to express ideology and power.⁶¹ As noted above, the MLC defines gender as biological sexual difference and sex as a permanently determined biological condition.⁶² This position stands in tension with post-modernist accounts of fluid, shifting and multiple subjectivities, which better reflect the reality of diversity within the human population than the perspective advanced by the MLC.

60 The long title of the Gender Equality Act, 3 of 2013 (Malawi) reads: 'An Act to promote gender equality, equal integration, influence, empowerment, dignity and opportunities, for men and women in all functions of society, to prohibit and provide redress for sex discrimination, harmful practices and sexual harassment, to provide for public awareness on promotion of gender equality, and to provide for connected matters.'

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

62 The GEA Report says that the 'sex of a natural person is determined at birth. Therefore, any person who later undergoes sex change surgery or is a practicing transsexual shall be deemed to maintain their sex at birth.' Malawi Law Commission (n 6) 14.

Further, the GEA Report recognises that women 'come from many different cultures, races and faiths; ... occupy different class and economic positions; ... have different sexualities; ... may be able-bodied or with disabilities; ... may be married or single; ... may be prisoners; and vary in ages'.⁶³

Although the GEA Report recognises that women are not a homogenous group, the MLC did not conceive of all women as equally deserving of the opportunity to develop their capabilities as per its vision of gender equality. The MLC, for example, has previously proposed 'the introduction of an offence to punish acts of indecency among female persons, in public or *private*'.⁶⁴ The gender discourse in the GEA Report did not challenge this position. As a result, it is likely that in its claim to promote gender equality for men and women, the report implicitly places heterosexual women in a privileged position compared to non-heterosexual women.

Post-modern feminists criticised modernity's humanism, including human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR), for privileging a masculine worldview.⁶⁵ Post-structuralism has also critiqued the use of binary terms such as male-female, man-woman and adult-child as masking power relations. It is apparent from reading the GEA that the use of the binary man-woman term or, indeed, the male-female term, more than acknowledges that women have suffered male oppression, but the GEA also constructs women and children as subjects without agency and autonomy in opposition to men, who are accorded agency and autonomy. In the MLC's consultative process, traditional leaders, most of whom are male, are put forward as the voice contributing to understanding harmful practices that oppress women and children.⁶⁶ Interestingly, this mirrors how the British colonialists dealt with regulating family and native intimacy in their colonies: by colluding with male elders who eventually proposed a customary colonial law that marginalised women.⁶⁷

63 Malawi Law Commission (n 6) 14.

64 Malawi Law Commission (n 50) 39 (my emphasis).

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

66 Malawi Law Commission (n 6) 28.

67 M Chanock 'Neither customary nor legal: African customary law in the era of family law reform' (1989) 3 *International Journal of Law, Policy and the Family* 76; O Phillips '(Dis)continuities of custom in Zimbabwe and South Africa: The

Another instance where the law portrays female subjects as lacking agency appears in section 18(1)(3) of the GEA, which states that the curriculum should ‘address the special needs of female students by incorporating life skills, including sex education.’⁶⁸ This phrasing constructs the female student as a ‘special needs’ subject defined by lack and vulnerability, whose needs are to be identified and met by institutional authority. The law does not imagine female students as already knowledgeable or as agents in their own development; instead, the law positions female students as deficient subjects requiring a corrective curriculum to equip them with skills presumed absent. This stands in contrast to the treatment of male students.

From a posts-structuralist perspective, this is a paradigmatic instance of subjectification, the process by which institutional discourse produces the girl not as an agent but as a governed subject. Her sexuality is not seen as an area of agency or expression; instead, it is perceived as a site of risk to be managed. Even the inclusion of sex education is framed not in terms of empowerment or relational knowledge, but as a life skill to meet ‘special needs’, suggesting that female sexuality is both exceptional and problematic.

This framing also forecloses the possibility that girls might already be negotiating their own understandings of gender and sexuality within and beyond the school. By fixing the female student in a developmental narrative of lack, the law privileges adult and male institutional knowledge over the lived realities and meaning-making capacities of girls themselves. What results is not a curriculum that supports gender justice, but one that re-inscribes paternalistic power under the guise of protection and equality.

The GEA positions men as agentic protectors of women, reaffirming dominant discourses that cast women as vulnerable and in need of protection, while erasing their agency and silencing their voices. By privileging what men think about women and children, the GEA frames gender inequality through a paternalistic lens – imposing solutions from above rather than co-creating them with those most affected. This framing marginalises women and girls in legal and policy processes and

implications for gendered and sexual rights’ (2004) 7 *Health and Human Rights* 87.

68 Gender Equality Act 3 of 2013 (Malawi) sec 18(1)(c).

shapes how the GEA is likely to be interpreted and applied: reinforcing a legal and institutional order that regulates gender through elite, state-driven discourses, rather than enabling transformative engagement from below.

Such top-down regulation risks silencing the voices of those at the margins, particularly girls and women in subordinated positions, by denying them the space to articulate and act on their own experiences of subordination. This concern echoes Spivak's critique of how dominant regimes of knowledge render the subaltern unintelligible within official discourse.⁶⁹ For example, when children are forbidden to speak about sex, love or romance in their own terms, even ostensibly protective interventions, such as the GEA's aim to protect girls through life-skills education, can become tools of silencing rather than transformation.

3.3 Development

Malawi's conceptualisation of development provides an important context for understanding the enactment of the GEA. Gender equality is framed as a key component of national growth, progress and poverty reduction, and is presented as instrumental to development.⁷⁰ However, the meanings attributed to terms such as 'development', 'growth' and 'progress' are not neutral. They derive from global, imperial and colonial discourses that have long shaped Malawi's understanding of gendered relations.

As discussed in chapter 2, feminist post-structuralist analysis insists that such terms must be read as discursive constructs that organise power, rather than as self-evident policy goals. Appreciating this historical and discursive context, therefore, is essential to any critical evaluation of what promoting gender equality means in post-colonial Malawi.

One enduring effect of colonialism is the imposition of racialised and gendered hierarchies that legitimised white men's dominance over both native men and women, with Black women occupying the most marginalised position.⁷¹ Colonial representations cast Black women as

69 GC Spivak 'Can the subaltern speak?' in PH Cain & M Harrison (eds) *Imperialism: Critical concepts in historical studies volume III* (Routledge 2023) 171-219.

70 Malawi Law Commission (n 6).

71 RB Jones *Postcolonial representations of women: Critical issues for education* (2011) 17.

sexually debased, promiscuous and perpetually available.⁷² To regulate the sexuality of the colonised, colonial administrators introduced Western-derived legal systems governing reproduction and sex, grounded in Victorian and patriarchal moralities. Female sexuality was constructed as passive and derivative, existing primarily in relation to male sexual desire. In Malawi, where British colonialism operated largely through indirect rule, colonial authorities collaborated with male elders to codify customary law governing marriage and sexual relations.⁷³ The resulting legal regimes, colonial and customary, reflected the patriarchal interests of both the coloniser and the colonised.

These legal interventions were historically justified through the discourse of the *white man's burden*, which positioned colonial governance as a civilising mission directed at supposedly backward and infantile natives.⁷⁴ Within this framework, gendered relations were regulated in the name of development. As feminist post-structuralist scholars argue, and as elaborated in chapter 2, law does not merely regulate conduct; it produces meaning and subjects through the discourses it authorises. Colonial legal regimes thus constituted gender and sexuality as sites requiring discipline, surveillance and control, while simultaneously presenting such regulation as benevolent and necessary for societal advancement.

Contemporary development and human rights discourse sometimes reproduces these colonial logics, particularly where laws grounded in patriarchal and colonial assumptions continue to govern sexual and gender relations. In this context, gender equality is instrumentalised, that is, invoked as a justificatory discourse to extend legal control and punishment, rather than pursued as a substantive project aimed at transforming historically unequal power relations.⁷⁵ Equality becomes a means rather than an end: a legal technique through which domination is re-articulated under the guise of progress and inclusion.

72 Jones (n 71) 16.

73 Chanock (n 67); Phillips (n 67).

74 Jones (n 71) 25.

75 See E Vogel-Polsky 'The conception and instrumentalisation of legislation on equal opportunities for men and women: Programmed not to succeed' (1996) 2 *Transfer: European Review of Labour and Research*, 349-381, critiquing the reduction of gender equality to a functional legal tool rather than a substantive right.

This instrumentalisation coexists uneasily with the persistence of colonial era laws. In 2011, for example, the criminalisation of same-sex conduct was extended to include women, ostensibly in the name of gender equality, so that women could now be punished in the same way as men.⁷⁶ Rather than dismantling heteronormative and patriarchal regulation, the law merely expanded its reach.

Similarly, Malawi's abortion law, another colonial legacy, remains highly restrictive, criminalising women who terminate pregnancies except when they face a risk to their life.⁷⁷ Framed as morally neutral or protective, the law entrenches state control over women's reproductive autonomy and reinforces women's subordination through legal and moral sanction.

Taken together, these examples expose a deeper tension: Even as Malawi adopts progressive gender equality commitments through frameworks such as the GEA, its legal infrastructure continues to enforce patriarchal, heteronormative and colonial norms. Development policy may speak the language of inclusion and equality, but when colonial era laws remain intact, they undermine the very goals of gender justice they claim to advance. This tension illustrates how equality discourse can be mobilised to stabilise existing power relations rather than to disrupt them.

Katenga-Kaunda, writing in relation to the education sector, reaches a similar conclusion regarding the enduring influence of colonialism and questions whether colonial history alone should be blamed for contemporary social harms.⁷⁸ While assigning blame to history may be of limited utility, a post-colonial approach demands a critical re-examination of what it means to remedy historical marginalisation in ways that actively disrupt enduring colonial logics. Such an approach would foreground women's and children's agency and their capacity to resist residual forms of colonial governance. The MLC's limited engagement with post-colonial and decolonial analysis in the development of the

76 Malawi Law Commission (n 50) 39. See also GD Kangaude 'A review of the role of Malawi's law reform agency in criminalization and decriminalization of female same-sex sexual conduct' (2019) *Journal of Lesbian Studies* 306.

77 GD Kangaude & C Mhango 'The duty to make abortion law transparent: A Malawi case study' (2018) 143 *International Journal of Gynecology & Obstetrics* 409.

78 APK Katenga-Kaunda 'Are we right to blame it all on colonialism? The subject of history and gender in schools in a Malawian context' (2015) 2 *Journal of Comparative Social Work* 20.

GEA deprived the reform process of a powerful critical lens through which to interrogate the instrumentalisation of gender equality and the persistence of colonial legal logics.

3.4 Education

Education is one of the key themes in the conceptualisation of the GEA.⁷⁹ Education is linked to personal development and to the development of the country. The GEA Report constructs girls' education as a pathway to social and economic empowerment and, ultimately, to gender equality.⁸⁰ Yet, the idea of education as a tool for socio-economic transformation should be examined critically in the context of globalisation and post-colonialism.

Although independent Africa was encouraged by actors such as the UN, the World Bank and Western development experts to invest in education as the primary tool for achieving personal and national social and economic transformation, the fruits reaped from this investment have been dismal.⁸¹ Metzler attributes this failure to a colonial legacy that shaped education based on colonialist capitalist interests that included securing raw materials to support industrialism, but with little investment in social structures in the colonised lands.⁸²

Even when there was investment in education, it was not designed to promote the interests of the native; education was designed to serve colonial ideologies and imperialism, so that, for instance, education was intended to reinforce European cultural superiority and denigrate African culture.⁸³ One enduring legacy of colonialism is the enforcement of heteronormative sexual norms that construct girls as sexually passive

79 Malawi Law Commission (n 6) 74.

80 Malawi Law Commission (n 6) 74: 'Education is ... a prerequisite for the enjoyment of social, economic and political rights by women ... Further, education ends generational cycles of poverty and disease and provides a foundation for sustainable development ... Education is also vital for women to engage in viable economic activities including access to higher levels of income and loan facilities. Hence, education has a central role under any poverty reduction strategy.'

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

82 Metzler (n 81) 279.

83 Metzler (n 81) 284; RA Shahjahan 'Decolonizing the evidence-based education and policy movement: Revealing the colonial vestiges in educational policy, research, and neoliberal reform' (2011) 26 *Journal of Education Policy* 196-197.

subjects. Girls who demonstrate sexual agency are correspondingly disciplined, including through legal regulation.

The GEA and other texts purport to eliminate gender inequality using an appropriately oriented school curriculum. Under the provision entitled 'General duties in relation to curriculum', the GEA directs the government to take 'active measures' to ensure that curricula at all levels of primary and secondary educational institutions integrate 'principles of gender equality' into what it terms the 'spiritual, moral, cultural and mental development' of students.⁸⁴ These terms mark the site of education as one of normative governance, where the child subject is produced through the state's pedagogical intervention. The same provision further directs the state to integrate gender equality principles and human rights in relation to education.⁸⁵

The GEA identifies the school as a site where students are to be morally and mentally shaped in line with predetermined principles of gender equality. Yet, these principles are not presented as contested, emergent or locally negotiated; instead, the principles of gender equality are to be 'integrated' into students' development, as if gender equality were a settled ideal to be internalised. This framing exemplifies what Foucault describes as subjectification, whereby individuals are constituted as subjects not through repression, but through the internalisation of norms and disciplinary regimes that render them intelligible and governable within the dominant social order.⁸⁶

As discussed above in this chapter, the GEA constructs the female student as a vulnerable subject requiring sex education.⁸⁷ Yet, feminist post-structuralism cautions that framing girls' sexuality as a site of risk to be managed exposes them to disciplinary control. A striking example is the expulsion of girls in a boarding school for allegedly engaging in forbidden intimacies, euphemistically termed 'bed camping'.⁸⁸ With the assistance of an investigative journalist, I examined this case and found

84 Gender Equality Act 3 of 2013 (Malawi) sec 18(1)(a).

85 As above.

86 M Foucault 'The subject and power' (1982) 8 *Critical Inquiry* 777-795.

87 Gender Equality Act 3 of 2013 (Malawi).

88 Correspondent 'Schoolgirls exiled for bed camping' *Nation Online* (Blantyre) 4 June 2025, <https://mw.nation.com/schoolgirls-exiled-for-bed-camping/> (accessed 25 August 2025).

that the expulsions were based on rumour and hearsay, fuelled by a moral panic that led to unjust treatment of students.

Further, the 'bed-camping' case reveals that students of same-sex orientation would most likely be discriminated against in such school settings. Yet, the GEA claims to integrate gender equality and human rights in educational institutions.⁸⁹ Paradoxically, therefore, even as the GEA aims to protect girls through education, its construction of girls as vulnerable subjects requiring sex education risks reinforcing patriarchal regulation and control, precisely what feminist post-structuralism cautions against.

In recommending the enactment of the GEA, the MLC had stated that 'the proposed legislation should consider not only eliminating negative stereotypical material but should also include specific topics aimed at maintaining enrolment rates and equipping the girl-child especially ... with relevant life skills'.⁹⁰

However, this formulation remains conceptually under-theorised. In practice, 'life skills' have been interpreted narrowly to mean job readiness or HIV prevention. A more expansive and critical curriculum would engage with the social and discursive structures that perpetuate gender inequality. As childhood scholars such as Bhana have shown, these patterns take root early, in families and in educational institutions, where gendered power relations are actively reproduced.⁹¹

Promoting gender equality and sexual well-being in schools is not only about protection but about enabling agency. From a feminist poststructuralist perspective, any law aiming to transform gender equality through education requires affirming students, from pre-school level, as sexual subjects to counter dominant discourses of patriarchal regulation.

89 Gender Equality Act 3 of 2013 sec 18(1)(b).

90 Malawi Law Commission (n 6) 79.

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

3.5 Harmful practices

3.5.1 Defining 'harmful practices'

The eradication of harmful social and cultural practices is one of the core elements of the GEA.⁹² The GEA Report captures an extensive discussion of the concept of harmful practices, which culminated in the MLC proposing the following definition of a 'harmful practice':⁹³

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

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

The definition of a harmful practice is broad and implicates a wide array of social, cultural and religious practices. In its discussion of the concept, the MLC starts with a broad description of harmful practices as those practices that 'may be based on tradition or culture, custom, religion or the crystallisation of social habits'.⁹⁴ The MLC then turns to a discussion of 'traditional cultural practices' that violate the dignity of women and children, based on sex and gender.⁹⁵ The discussion draws upon practices identified as harmful and described in a factsheet published by the UN Human Rights Office of the High Commissioner, which mentions practices such as 'early marriage, forced sex during initiation rites; practices that allow a man to marry his wife's younger sisters; nutritional taboos and traditional birth practices; son preference and its implications for the status of the girl child; early pregnancy; and dowry'.⁹⁶

The GEA Report lists several cultural traditions in the Malawian context that are harmful, including widow inheritance (*chiharo*); widow cleansing (*kulowa kufa*); initiation sexual intercourse (*fisi*);

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

93 Malawi Law Commission (n 6) 31.

94 Malawi Law Commission (n 6) 26.

95 Malawi Law Commission (n 6) 26-30.

96 Malawi Law Commission (n 6) 27. See United Nations 'Fact Sheet No 23, Harmful traditional practices affecting the health of women and children', <https://www.ohchr.org/Documents/Publications/FactSheet23en.pdf> (accessed 7 November 2019).

spouse swapping (*chimwanamaye*);⁹⁷ procuring a girl, usually a virgin, to have sexual intercourse with a guest to the family as part of hospitality (*Bulangete la amfumu*);⁹⁸ and boys going to a girl's residence to have forced sexual intercourse with her (*gwamula*).⁹⁹ All these practices involve coercive sexual intercourse with a girl or a woman.

Although the MLC ended up defining harmful practices broadly, the GEA Report reveals a focus on traditional or cultural practices of a nature involving sexual coercion affecting girls and women. However, the definition of harmful practices in the GEA is wide enough to capture other practices that are not necessarily traditional or cultural.

3.5.2 *Traditional and cultural versus civilised and modern*

Post-colonial theorists are wary of concepts such as 'traditional' or 'cultural' because these terms have historically been mobilised to construct non-European societies as the 'Other' – marginal, uncivilised, and backward – against a European culture that colonial discourse positioned as superior, civilised and modern. As Said has shown in *Orientalism*, such representations did not describe 'truth' but rather reinforced a hierarchy that naturalised colonial authority.¹⁰⁰

Critiquing the development of the idea of 'harmful traditional practices' at UN platforms, Winter and others argue that the conceptualisation of traditional practices mirrored the historical and colonial hierarchisation where culture and tradition were constructed as non-Western and inferior to Western culture.¹⁰¹ The authors reject the familiar trope that harmful traditional practices are a hallmark of 'non-Western' societies. They expose the flawed logic that equates modernity with women's liberation, as if casting off such practices would automatically free women from oppression.¹⁰²

97 Malawi Law Commission (n 6) 27.

98 Malawi Law Commission (n 6) 28.

99 Malawi Law Commission (n 6) 30.

100 E Said *Orientalism* (1979) 7.

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

102 Winter and others (n 101) 76-77; J Tobin 'The international obligation to abolish traditional practices harmful to children's health: What does it mean and require of states' (2009) 9 *Human Rights Law Review* 382.

This assumption not only ignores the persistence of gender inequality in Western societies, but also reproduces a colonial narrative in which the West is imagined as the benchmark of gender justice.¹⁰³ The notion of 'traditional' thus carries colonial assumptions of cultural inferiority.¹⁰⁴ These ideas are prevalent in Malawi, where 'traditional' is synonymous with 'rural', 'remote', 'uneducated' and 'backward', in contrast to the Malawian who is educated, lives in the metropole, and has adopted a Western lifestyle.¹⁰⁵

While it is undeniable that traditional institutions and practices shape power relations, modern institutions, such as Western-derived laws, do so as well. The traditional-modern dichotomy might create a biased focus on traditional or cultural practices as obstacles to gender equality, but it also obscures other equally harmful social practices that reproduce gender inequalities, such as political, economic and structural factors.¹⁰⁶ The traditional practice of *kulowa kufa* contributes to disempowering women because it exposes women to coercive sex. Similarly, colonial era law derived from Western legal traditions, such as the criminalisation of same-sex sexual conduct between women, also disempowers women by constructing a social order in which women's sexual agency is recognised only in relation to men.

Post-structuralists have suggested that binaries, such as the traditional-modern dichotomy, conceal a power relationship. Interestingly, the MLC's view was that the GEA should prohibit harmful practices as cultural sensitivities make such practices difficult to prosecute under the Penal Code.¹⁰⁷ Yet, in the earlier review of the Penal Code, when the MLC considered the issue of criminalising marital rape, the MLC

103 Winter and others (n 101) 83.

104 SE Merry 'Human rights law and the demonisation of culture (and anthropology along the way)' (2003) 26 *Political and Legal Anthropology Review* 60.

105 Katenga-Kaunda (n 78) 5.

106 Merry (n 104) 63.

107 The GEA Report (MLC (n 6) 27) states that '[t]he Commission noted that forcing any person to undergo a sexual act against that person's will is already prohibited under the Penal Code. The Commission found that under the Penal Code, such practices fall within the definition of rape on account of the absence of consent or misrepresentation as to the nature of the act. The Commission nonetheless found that there is need to develop specific provisions in the Gender Equality Bill which would supplement the general provisions under the Penal Code. It was the Commission's view that such provisions prohibiting harmful practices involving non-consensual sexual intercourse would not be an unnecessary duplication. Whilst the criminal law is of general application, the forced acts perpetrated under

recommended that marital rape should not be criminalised because doing so would open up matters of private relations to the public.¹⁰⁸ In other words, the same cultural sensitivities that justify criminalising certain 'traditional' practices are invoked to avoid criminalising non-consensual sex within marriage.¹⁰⁹ The MLC's inconsistent reasoning is also revealed where the MLC proposed criminalisation of non-coercive sexual practices, namely, the criminalisation of homosexuality, based on Eurocentric Victorian values. Here the MLC was appropriating oppressive Western values and holding them as superior to local values. Historically, many African societies did not penalise same-sex sexual conduct in the ways later codified under colonial rule.¹¹⁰

Tamale critiques the tendency to portray culture, in the name of tradition, as opposed to human rights. Such portrayals cast traditional social practices as static, backward and uniformly harmful, foreclosing the possibility of change unless communities abandon culturally meaningful practices in favour of externally defined human rights norms.¹¹¹ As Tamale argues, such framing risks provoking resistance rather than transformation.¹¹² A more productive approach is to negotiate change from within cultural discourses themselves, including through critical engagement with how norms around sexuality are articulated and contested in everyday social institutions such as schools.

This insight is particularly salient in relation to the regulation of childhood and female sexuality. Colonial legacies intersect with contemporary cultural justifications for policing sexual conduct, and these intersections are reflected in both law and institutional practice.

harmful cultural practices have peculiar sensitivities that may make the successful prosecution of an offence under the Penal Code very difficult.'

108 MLC Report of the Law Commission (n 49) 38) states that '[r]elated to the issue of rape, the Commission also considered the proposal to introduce marital rape, that is, a husband being charged with raping his wife, which at present is not the position in the criminal law of Malawi. Again, after detailed discussions, the Commission decided to maintain the status quo, partly for reasons that this offence might have the effect of opening up to the general public the private relations of husband and wife which for valid social and family reasons need to be strongly protected.'

109 Malawi Law Commission (n 6) 17, 27.

110 T Msibi 'The lies we have been told: On (homo)sexuality in Africa' (2011) 58 *Africa Today* 55.

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

112 Tamale (n 111) 55.

The expulsion of girls for so-called 'bed camping', for example, illustrates how Western-derived legal and moral frameworks cast certain sexual behaviours as deviant and punishable, particularly when enacted by female students. In this way, both 'traditional' and 'modern' discourses converge to constrain childhood and female sexuality, constituting girls not as agentic subjects but as subjects of regulation and discipline. Addressing this challenge requires more than implementing human rights norms. It requires critical engagement with the cultural frameworks through which girls' sexual expression and behaviour are governed.

3.6 Envisaging transformative change

Recognising the limit of penal law to change beliefs and social practices, the MLC suggested that legal interventions be supported by socialising men and women to change their behaviour, and by civic education and raising the awareness of the public.¹¹³ However, the transformative potential of these strategies to change attitudes and practices is assumed rather than critically interrogated. For instance, to what extent would civic education on sexual violence lead to its reduction or elimination? How would the socialisation of men and women lead to gender equality?

These questions become even more pressing when the issues concern childhood sexuality. If adult-oriented strategies already rest on fragile assumptions, what chance is there that they can meaningfully address the more contested and silenced terrain of children's sexual agency? I critically examine how the law purports to address gender inequality through socialisation and civic education, and its implications for children.

3.6.1 Socialisation

The GEA Report reveals a recurring reliance on the discourse of civic education and socialisation as a mechanism for gender transformation; a normative framework that constructs both women and men as subjects in need of correction by exposure to the norms of socially desirable behaviours. This is most evident in two illustrative passages.

First, the MLC states that

113 Malawi Law Commission (n 6) 29-30, 105-106.

[t]he Commission was of the view that ... problems associated with [certain cultural] practices can be overcome through civic education initiatives aimed at demystifying the practices and helping men to accept that sterility is not to be equated with emasculation ... It is only after men are socialized to accept sterility that they will be empowered to come out in the open to enforce their rights.¹¹⁴

Second, the Commission extends this corrective socialisation idea to women:¹¹⁵

Participants were concerned that whilst many efforts are being made to ensure women equal status with men, experience has shown that in some cases, women are unwilling to promote each other and in fact tend to pull each other down ... [T]his ... can only be addressed if women are socialized to value each other's contributions and to promote each other ... These attitudes which usually stem from low self-esteem and lack of confidence will fade away.

Both passages assume that gender transformation can be achieved by top-down interventions aimed at cultivating appropriate attitudes and behaviours. In assuming this, the MLC reduces complex gender dynamics to matters of individual psychology and interpersonal adjustment. The proposed solution, socialisation through civic education, constructs both men and women as deficient in their understanding of their gendered selves and envisages that training can transform people into better versions of gendered subjects. This reasserts the socialisation-theory logic, which feminist post-structuralist thinkers have long critiqued for failing to account for the contradictions, negotiations and resistances that characterise the formation of subjectivity.¹¹⁶ Theories about subjectivity development must account both for the contradictions in gender development and for agency.¹¹⁷

Butler's notion of gender performativity underscores how these civic education initiatives seek to enforce a normative gender script: women who uplift and support each other, and men who stoically accept reproductive limitations.¹¹⁸ These 'correct' gendered responses are framed not as culturally situated ideals, but as universally desirable endpoints, thus erasing the material and discursive conditions that produce feelings of insecurity, competition or shame.

114 Malawi Law Commission (n 6) 29.

115 Malawi Law Commission (n 6) 106.

116 Rahman & Jackson (n 45) 158-159.

117 RW Connell *Gender* (2002) 79.

118 J Butler *Gender trouble* (1999).

Socialisation, in the MLC's framing, does not open space for new forms of being. It seeks to reposition individuals within existing discursive frameworks that privilege certain behaviours and marginalise others. Women who do not promote one another or men who feel emasculated by sterility are not viewed as subjects negotiating complex social expectations, but as failed subjects in need of correction.

African post-structuralist scholars such as Bhana and Macleod have demonstrated the limits of socialisation theories that treat the subject as shaped primarily by internalised norms, rather than as constituted within relations of power. In her work on childhood and schooling, Bhana shows how children do not simply internalise cultural norms, but actively and reflexively engage with gendered scripts, sometimes conforming, and at other times resisting.¹¹⁹ Macleod, in her analysis of adolescent pregnancy and abortion, critiques policy discourses that pathologise young women for failing to live up to respectable femininity, and demonstrates how such discourses silence the complexity of the women's lived experiences.¹²⁰ In both cases, agency is not something that emerges from proper socialisation, but from navigating, resisting and reworking dominant discourses.

The MLC's civic education provisions can be seen as attempts to manage gender rather than transform it. By adopting a pedagogical model that treats subjectivity as an object of formation rather than a site of contestation, the MLC operates within a governmental logic that limits the transformative potential of the proposed reforms. Empowerment is articulated through techniques of discipline that encourage the internalisation and performance of gendered norms, rather than their disruption.

According to Grieshaber and Cannella, post-structuralism conceptualises persons as 'dynamic and multiple and always positioned in relation to particular discourses and the practices produced by the discourses'.¹²¹ Such an understanding of subjectivity challenges essentialised notions of childhood, which are often treated as unitary

119 Bhana (n 91).

120 C Macleod *'Adolescence', pregnancy and abortion: Constructing a threat of degeneration* (2011).

121 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) 13.

and simple rather than complex and multiple. This theoretical shift, from viewing childhood as a fixed developmental category to understanding it as a discursively constituted subject position, allows for a reconceptualisation of children as agentic rather than passive beings.

3.6.2 Civic awareness

Throughout the GEA Report, civic education is positioned as the primary vehicle for achieving gender equality. For instance, the MLC recommends ‘intensive civic education campaigns to ensure that these *indunas* are engendered’, yet simultaneously expresses doubt about the effectiveness of such interventions, given the deeply entrenched patriarchal nature of traditional leadership structures.¹²² Similarly, civic education is positioned as a solution to interpersonal tensions, as reflected in the MLC’s view that women’s reluctance to support one another is rooted in issues such as low self-esteem and lack of confidence – problems it suggests can be overcome through awareness-raising initiatives.¹²³

This persistent reliance on civic education reveals several assumptions. First, it assumes that lack of knowledge is the primary barrier to gender equality. Second, it assumes that citizens, particularly women and men in rural or traditional settings, are passive recipients of enlightenment, awaiting proper instruction so that they abandon discriminatory beliefs or practices. Third, it assumes that attitudinal change will naturally lead to behavioural and structural change, without accounting for the social, political or economic interests that sustain gender hierarchies.

Yet, the MLC itself recognises that civic education often fails to achieve its goals. In relation to harmful practices, it admits that ‘numerous awareness and civic education campaigns ... have so far had limited impact’.¹²⁴ The MLC’s insistence on pairing statutory regulation with civic education acknowledges the limitations of civic education yet simultaneously defers much of the transformative burden onto civic education. A similar tension arises in the MLC’s proposal that civic education be used to galvanise public action to address barriers to gender equality, with the expectation that meaningful progress could be

122 Malawi Law Commission (n 6) 21.

123 Malawi Law Commission (n 6) 106.

124 Malawi Law Commission (n 6) 28.

achieved within a twenty-year timeframe.¹²⁵ This is an ambitious timeline but one that quietly displaces the urgency of addressing institutional and structural inequality in the present.

The problem is not civic education *per se*, but its positioning as a primary or sufficient strategy for change, and the model of subjectivity it presumes. The citizen is imagined not as a complex subject embedded in discourses of gender, tradition and power, but as someone who can be transformed through exposure to correct information. As Foucault has postulated, knowledge is never neutral but bound up with power. The assumption is that awareness leads directly to transformation, a model reminiscent of what Freire critiqued as the 'banking' approach to education.¹²⁶ In this model, teachers deposit knowledge in passive subjects without critical engagement.

A more transformative approach would move beyond this assumption to ask how people come to understand themselves as gendered subjects: what forms of agency they are offered or denied, and how institutional norms sustain inequality. From a post-structuralist perspective, subjectivities are constituted through discourse and can be reconstituted only through contestation, by unsettling dominant meanings and opening space for alternative ways of being. As Kenway and others note, gender reform is not simply about swapping positions in the binary, but about changing meanings through 'inter-discursive work', disconnecting concepts from old frameworks and rearticulating them into new, more inclusive ones.¹²⁷

The GEA operationalises civic education through section 21, directing educators to promote awareness and disseminate information about gender. However, without acknowledging the contested and political nature of knowledge, civic education risks reinforcing patriarchal and heteronormative norms even as it claims to promote equality. This concern is particularly acute when the subject is childhood sexuality, where civic education often positions children as passive recipients of protective knowledge rather than as autonomous subjects. Situating civic

125 Malawi Law Commission (n 6) 106.

126 P Freire 'The banking concept of education' in EB Hilty (ed) *Thinking about schools* (2014) 154-155.

127 J Kenway and others 'Making "hope practical" rather than "despair convincing": Feminist post-structuralism, gender reform and educational change' (1994) 15 *British Journal of Sociology of Education* 189-190.

education within law, policy and practice thus raises critical questions about how children's sexual agency is either silenced or enabled.

3.7 Sexual health and sexual rights

The GEA Report discusses sexual and reproductive health and rights (SRHR) extensively and recognises that SRHR is an important aspect of gender equality.¹²⁸ The report presents SRHR within a doctrinal legal framework that affirms internationally accepted rights and state obligations to realise those rights (for instance, CEDAW, the African Women's Protocol). The language is normative and rule-based, and affirms principles such as equality, non-discrimination, informed consent and access to services. It frames the state's role in terms of fulfilling obligations, aligning national law with international standards, and improving systems for SRHR service delivery.

The GEA Report observes the structural shortcomings in Malawi's health system, including underfunding, inadequate infrastructure and denial of services, such as access to contraception without a spouse.¹²⁹ It also highlights challenges such as high maternal mortality rates, forced sterilisation and the denial of abortion care.

The report defines sexual rights broadly and progressively and notes the internationally agreed framing of SRHR as including the right to 'a pleasurable and safe sexual life', consensual sexual activity, and an autonomous choice in contraception, marriage and reproduction.¹³⁰ It also acknowledges the sexual and reproductive needs of specific groups, including adolescents, unmarried women, sex workers and refugees.¹³¹ Despite this doctrinal assertion, the GEA Report does not examine these rights in depth, and ignores how the rights are contested socially, culturally and politically.

A telling part of the GEA Report is its evasion and deferral of dealing resolutely with the topic of abortion. The report acknowledges that unsafe abortion has gendered impact: that this is a 'gender concern and a human rights issue that can no longer be ignored'. After an extensive

128 Malawi Law Commission (n 6) 47-61.

129 Malawi Law Commission (n 6) 63.

130 Malawi Law Commission (n 6) 58.

131 As above.

review of the abortion law, however, the MLC ultimately deferred legislative responsibility, stating:¹³²

After lengthy deliberations during which the Commission contemplated providing for safe abortion within the Gender Equality Bill, the Commission concluded that the reason comparable foreign jurisdictions dedicate separate legislation to abortion is that it is a highly specialized area, requiring detailed input, expertise and research.

The gesture of acknowledging abortion as a gender and human rights issue is simultaneously undermined by removing it from the GEA's remit. The implication is that gender equality can be pursued without addressing abortion, a foundational contradiction that undermines the GEA's emancipatory claims.

By framing abortion as controversial and multifaceted and relocating it outside the GEA's ambit, the MLC re-inscribed state control over the meaning of abortion and over who is authorised to speak about it, thereby closing the discursive space for women and girls to articulate their own experiences.

Ironically, a later judicial interpretation unsettled this attempted deferral. Although the MLC did not conceive abortion as falling within the remit of the GEA, the High Court of Malawi subsequently read the legislation as encompassing access to safe abortion as an integral component of sexual and reproductive health and rights.¹³³ This interpretive move exemplifies what Barthes famously described as the 'death of the author': the displacement of legislative intent and silence through deconstructive reading.¹³⁴ Once enacted, the GEA assumed a juridical life beyond the vision of its framers, enabling the recovery of the meanings that the MLC had attempted to marginalise and defer.

The language of neutrality and proceduralism that the GEA Report used to defer dealing with abortion masked a political decision on

132 Malawi Law Commission (n 6) 67.

133 See *AC (a minor), acting through her Litigation Guardian Mr CJ v Mr Jenala Solomon, Blantyre District Council (One Stop Centre at Chileka Health Centre), the Attorney General (Minister of Health), and the Human Rights Commission* Civil Cause 162 of 2023. The High Court of Malawi affirmed that a child survivor of sexual violence had the right to access safe abortion in accordance with secs 19 and 20 of the Gender Equality Act.

134 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'.

one of the most contested aspects of SRHR. The avoidance itself was not without consequence. It had the effect of reinforcing dominant ideologies around gender, sexuality and morality. Yet, as the MLC made this deference, minor girls facing unsupportable or high-risk pregnancies resulting from rape were being denied access to safe abortion, with tragic consequences. The High Court of Malawi has reshaped the legal landscape, at least for child survivors of sexual violence.

Post-structuralism compels attention not only to what is said but also to what is left unsaid, to how meaning is constructed and structured, and to how power is embedded in the production of that meaning. From this perspective, the language the MLC uses around SRHR and abortion reveals tensions between the stated commitments to rights and the discourse and institutional frameworks that constrain them.

For instance, the report states: 'Sexual and reproductive health is a state of physical, emotional, mental and social well-being in relation to sexuality ... it requires a positive and respectful approach to sexuality and sexual relationships ... free of coercion, discrimination and violence.'¹³⁵

On the surface, this language appears emancipatory and progressive, but this invocation of rights may be more rhetorical than it is a substantive commitment. Post-structural theory invites an interrogation of how this 'positive and respectful approach' is institutionally anchored, within what social, legal, or moral frameworks, and what kinds of sexualities are rendered intelligible, legitimate or governable within this framing. Is such a positive and respectful approach envisioning consensual sex between adolescents or consensual sex between same-sex persons? Feminist and queer theorists have shown how discourses of sexual and reproductive rights often establish normative hierarchies, constructing adult, heterosexual, monogamous, reproductive sex as 'healthy', while marginalising or erasing queer, adolescent or non-reproductive sexualities.¹³⁶

The MLC purports to extend help to the groups it recognises as marginalised. It suggests that the concept of sexual rights should be understood to entail certain principles for governmental action, including

135 Malawi Law Commission (n 6) 57.

136 AM Miller 'Uneasy promises: Sexuality, health, and human rights' (2001) 91 *American Journal of Public Health* 863. See also GS Rubin 'Thinking sex: Notes for a radical theory of the politics of sexuality' in R Parker & P Aggleton (eds) *Culture, society and sexuality* (1998) 143.

'to offer everyone, including adolescents, unmarried women, sex workers, refugees and other marginal groups equal access to healthcare and to address the unique health needs of women and men'.¹³⁷ Although this statement appears as a gesture to inclusivity and equality, a closer reading reveals the subtle reproduction of the very marginalisation it purports to address.

First, the use of the term 'marginal groups' is itself a discursive act that creates and stabilises certain identities as always 'outside' or 'other' to the normative subject. These identities – adolescents, unmarried women, sex workers, refugees and others – are not merely named: They are constituted through this naming as lacking, vulnerable, and in need of state intervention and correction. From a Foucauldian perspective, the relevant questions are: What power-knowledge regimes or discourses make it possible to define these subjects as marginal? What institutional practices produce and sustain this naming, and to what effect?¹³⁸

Second, this enumeration functions to reify a victim position. These groups are framed as populations to be included in a health system that continues to exclude them, often through the very apparatuses of state and law that the MLC represents. This is the paradox of liberal inclusion: The state asserts itself as benevolent, while refusing to confront its own role in the structural production of inequality. In this sense, the state offers a promise of care while simultaneously disavowing its complicity in producing the harms that make such care necessary. For instance, the MLC expresses care and concern for women in relation to abortion, but refuses to commit to addressing it, instead preferring to defer commitment.

As Butler might put it, these subjects, adolescents, unmarried women, sex workers, refugees, are interpellated, that is, they are called into being by discourse in a way that fixes them as always dependent and vulnerable.¹³⁹ There is no account here of their agency, of resistance, or of the structural power relations – economic, legal, institutional – that render them marginal in the first place. The statement thus conceals more

137 Malawi Law Commission (n 6) 58.

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

139 N Davis 'Subjected subjects? On Judith Butler's paradox of interpellation' (2012) 27 *Hypatia* 881.

than it reveals; it masks the asymmetries of power with the language of equality.

Moreover, by setting up a binary between 'marginal groups' and the generic category of 'women and men', the statement subtly suggests that marginal groups are outside the normative categories of gendered citizenship. The needs of men are described as unique and, implicitly, already legible within the health system. By contrast, women and children are framed as marginal groups requiring special attention. This contrast rests on the presumption that the health system itself is neutral, and that it is women and children, rather than the system organised around male norms, who are exceptional and, therefore, in need of adjustment.

Miller's analysis of how sexual rights discourses normalise certain forms of sexuality, heterosexual, adult, reproductive, monogamous, is particularly relevant here.¹⁴⁰ Groups are marked precisely because they transgress dominant norms: adolescents who are sexually active, women who engage in sex outside marriage and sex workers who monetise sexuality. Refugees, by contrast, are marked not through sexual transgression but through a precarious legal status that disrupts nationalist logics. Post-structuralist theory shows how these identities are constituted through discourse and institutional practices that produce them as 'other', vulnerable and in need of regulation.¹⁴¹ Yet, the MLC does not interrogate the norms or how they produce exclusion. Instead, it presents inclusion as a matter of access rather than of structural transformation.

In sum, the discussion and analysis of sexual rights and related language in the GEA Report may appear coherent when viewed through a legal-doctrinal lens. However, a feminist and post-structuralist analysis of the document reveals that the GEA Report is deficient in critically engaging with the discourses, institutions and laws that render certain subjects as marginal. The report fails to address how governmental power simultaneously defines and disciplines these identities while presenting itself as their saviour. This discussion is particularly pertinent to the ways in which the GEA constructs children as subjects of gender equality law.

140 Miller (n 136).

141 Foucault (n 138); Butler (n 118).

4 Where is the child in sex and gender equality law?

The preceding parts have shown how the GEA participates in the broader discourse on gender and how it contributes to shaping a gendered social order in Malawi. Although the GEA explicitly mentions children only sparingly, such as in reference to the right of people to bear children or in discussing access to education for boys and girls, its language consistently uses inclusive terms such as 'all persons' or 'everyone', which would, by legal interpretation, extend to children. Even terms such as 'men' and 'women' are taken to encompass boys and girls in certain contexts. Yet, such inclusions, while formally expansive, do not necessarily equate to discursive recognition of children as agents or subjects with their own standpoint. This partial visibility invites critical attention: It is through these moments of semi-visibility that the GEA participates in constituting children's subjectivities in gendered terms.

Moreover, as discussed above in this same chapter, the GEA invests heavily in education and socialisation as key mechanisms for addressing gender inequality. These strategies implicitly centre children and adolescents as both the targets of intervention and as future bearers of the gender-equitable society that the law envisions. The part below both explores how the GEA discursively constitutes children, not only in what it says, but also in what it does not say, and reflects on the implications of this positioning for facilitating a deeper paradigm shift in gender and childhood.

4.1 The gender equality law's vision of children as subjects

Understanding how the GEA constructs children requires an examination of the GEA Report, which serves as the interpretive foundation for the GEA. The report frames children predominantly in a protectionist paradigm and presents them as passive recipients of adult influence and as sites where harmful gender norms are absorbed and later replicated. This can be noted in the following statement:¹⁴²

The Commission was aware of certain songs aired on the radio and television that are degrading to women and denigrating of their right to dignity. The Commission bemoaned this practice which exposes young children to unsuitable

142 Malawi Law Commission (n 6) 92.

messages about the female sex so that they grow up perpetuating learned gender-based prejudice.

On the surface, the statement appears to critique gender stereotyping. However, it simultaneously constructs children as empty vessels into which social messages are poured, lacking the capacity to resist, reinterpret or contest those messages. The use of 'exposes' implies a one-way transmission that effaces the child's interpretive agency. The phrase 'grow up perpetuating' posits a linear and deterministic model of development in which childhood is merely preparatory to an adult future that has already been ideologically shaped.

From a post-structural perspective, this formulation produces children as effects of discourse rather than as subjects capable of engaging with or disrupting dominant meanings. It treats power as external to the child, locating it in the 'unsuitable messages' rather than in institutional structures, such as family, religion or law, that define and enforce what is suitable. Moreover, the notion of 'unsuitable messages about the female sex' is left undefined, which obscures how the idea of the female sex itself is already a discursive construct, subject to normative regulation.

A feminist post-structural reading would question: Who gets to define what is 'unsuitable', and how does this re-centre adult authority under the guise of protecting the child? The figure of the child becomes a rhetorical device, a future risk to be managed, thus justifying normative interventions, for instance, in the problem framed as 'teenage pregnancies'.¹⁴³ In this way, the GEA Report reifies a moralising discourse in which children are regulated to secure a desirable adult subject.

Consider another statement from the GEA Report: 'Making men more aware of the costs of conventional forms of masculinity, both for themselves and for women and children is an important step towards challenging gender inequalities.'¹⁴⁴

Here, children appear alongside women as those affected by the harms of masculinity and are positioned as vulnerable and passive in contrast

143 C Macleod & K Durrheim 'Psycho-medical discourse in South African research on teenage pregnancy' (2003) *Transformation: Critical Perspectives on Southern Africa* 74. The authors show how scientific discourse constructs adolescence as a category of risk and deviance, thereby producing teenage pregnancy as a disciplinary problem that legitimises interventions by the state and by medical authorities.

144 Malawi Law Commission (n 6) 12.

to autonomous male actors. The GEA Report thereby frames men as the primary agents capable of action and transformation, while women and children are situated as subordinate beneficiaries of this hoped-for change.

At first glance, such a framing may appear unproblematic, insofar as it acknowledges the impact of hegemonic masculinities. However, when legal discourse systematically constructs children as non-autonomous subjects, it forecloses alternative subject positions, including that of the sexually agentic child. This narrowing of subjectivity limits how children's capacities to engage with their gendered and sexual lives can be imagined and supported.

General Comment 7 of the CRC Committee underscores this tension. It affirms young children as social actors from the beginning of life and cautions against the routine denial of their agency on the basis of age or presumed immaturity.¹⁴⁵ The Committee noted that the agency of children as social actors and participants in family, community and society is frequently undermined on grounds that the Committee held were inappropriate, that is, on the grounds of age and immaturity.¹⁴⁶ Although the CRC Committee's General Comment 20 does not explicitly address sexuality, its call for a holistic understanding of the child necessarily encompasses sexuality development in childhood and adolescence.¹⁴⁷

To reiterate, the GEA and its foundational report do more than reflect social norms; they actively participate in the construction of the gendered social order. By selectively rendering children as passive and in need of protection, or by specifying female students as uniquely in need of sex education, these legal texts contribute to shaping a social imaginary that stunts children's potential for agency, particularly in relation to gender and sexuality. From a post-structuralist perspective, what the law renders absent or marginal, is as constitutive as what it makes visible or explicit. In this way, post-structural analysis opens space to question not only what the law says, or fails to say, about children, but also how it produces what children are allowed to be.

145 Committee on the Rights of the Child General Comment 7: Implementing child rights in early childhood CRC/C/GC/7/Rev.1 (20 September 2006) paras 1-2.

146 CRC Committee (n 145) para 14.

147 CRC Committee General Comment 20: The implementation of the rights of the child during adolescence UN Doc CRC/C/GC/20 (6 December 2016) para 15.

4.2 The meaning of childhood

It is necessary to approach the concept of childhood from an interdisciplinary perspective to appreciate the implications of the GEA's vision of the child. One of the central contributions of sociology, supported by African childhood studies, is the insight that childhood is not a natural or universal category but a socially constructed one.¹⁴⁸ What is considered 'childhood' reflects the status ascribed by adults to non-adults within historical, cultural and institutional contexts. As Fonda observes, '[c]oncepts of who and what children are and what childhood consists of are ... constructed artificially in and by the adult world to define a discrete social group'.¹⁴⁹

To say that childhood is socially constructed is not to deny the existence of children as lived, embodied persons. Rather, it is to question the assumption that children are objective realities in the world, fully knowable and discoverable by adults outside social interpretation. As Jenks has noted, the knowledge adults have of the child is a function of 'the predispositions of a consciousness constituted in relation to our social, political, historical and moral context'.¹⁵⁰ This perspective rejects taken-for-granted meanings of childhood, that tend to naturalise and essentialise children's capacities, vulnerabilities and needs.

From a post-structuralist standpoint, children are better understood as symbolically constituted subjects: Childhood is produced through language, institutions and practices that make versions of 'the child' intelligible.¹⁵¹ In this sense, discourse does not replace the child but

148 A James & A Prout 'A new paradigm for the sociology of childhood? Provenance, promise and problems' in James & Prout (n 3) 10; L McNee 'The languages of childhood: The discursive construction of childhood and colonial policy in French West Africa' (2004) 7 *African Studies Quarterly* 20; B Thorne "'Childhood': Changing and dissonant meanings' (2009) 1 *International Journal of Learning and Media* 19-20.

149 J Fonda 'Legal concepts of childhood: An introduction' in J Fonda (ed) *Legal concepts of childhood* (2001) 3.

150 C Jenks 'Sociological perspectives and media representations of childhood' in Fonda (n 149) 31. Jenks has also said elsewhere: 'Children, quite simply, are not always and everywhere the same thing; they are socially constructed and understood contextually' (C Jenks 'Constructing childhood sociologically' in MJ Kehily *An introduction to childhood studies* (2015) 54).

151 E Burman 'Childhood, sexual abuse and contemporary political subjectivities' in P Reavey & S Warner (eds) *New feminist stories of child sexual abuse: Sexual scripts and dangerous dialogue* (2003) 37; Thorne (n 148) 20.

mediates how children are seen, governed and acted upon. Childhood operates both as an institution that organises social relations and as a set of ideas through which the lives of actual children are interpreted and regulated.

This helps explain why childhood is associated with powerful and recurring images – immaturity, passivity, innocence, asexuality and incompetence – that justify intervention, protection and control in the name of care and best interests.¹⁵² These images have colonial echoes. Colonial rule relied on analogies between Africans and children, positioning both as lacking agency and autonomy, thereby legitimising governance framed as benevolent guidance rather than domination.¹⁵³

A further contribution of sociology has been its critique of socialisation theory, particularly influential in developmental psychology. Classical socialisation models treated children as passive recipients of adult norms, especially in relation to gender, and understood development as a linear process through which children gradually became competent adults. In contrast, sociologists of childhood, such as Prout and James, emphasise that children are active participants in shaping their own social worlds, including how they come to understand and perform gender.¹⁵⁴ Older theories assumed childhood to be a state of disability or inadequacy compared to adults.¹⁵⁵

Socialisation theories then explained how the child gradually became an adult through a learning process in which the child adopted society's norms and values. These theories were premised on the adult-child dichotomy and treated the socially developing child as passively internalising social values to bridge that dichotomy.¹⁵⁶ As Jenks famously remarked, '[w]hat is highly instructive in all manifestations of the model of the socially developing child (that is, socialization theory), as they have

152 Thorne (n 148) 21-22.

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

154 A Prout & A James 'A new paradigm for the sociology of childhood? Provenance, promise and problems' in James & Prout (n 3) 8-9.

155 C Jenks 'Constructing childhood sociologically' in Kehily (n 150) 60.

156 A Prout & A James 'A new paradigm for the sociology of childhood? Provenance, promise and problems' in James & Prout (n 3) 12; Committee on the Rights of the Child (n 145) para 5.

appeared in many forms of sociology, is that they have little or no time for children.¹⁵⁷

It was precisely this marginalisation that led Thorne to pose the question: Where are the children? – a question that has since animated what is often described as the new sociology of childhood and related work in critical psychology. These approaches do not ask merely how children become adults, but how children live, act and make meaning within the social worlds they already inhabit.

Within this social constructionist framework, Woodhead identifies three interrelated themes that help re-centre the child. First, this body of scholarship recognises that the dominant, globally circulating image of childhood, largely shaped by Western developmental science, emerges from a particular historical and cultural context and often reveals little about children's lived realities elsewhere.¹⁵⁸ Such universalised models frequently obscure African constructions of childhood that may emphasise responsibility, contribution to household labour, or spiritual and ancestral relationships.¹⁵⁹

Second, children are understood as creative social actors who actively participate in shaping both their social environments and their own childhoods. They do not merely internalise adult values but engage reflexively with gendered and social expectations, sometimes conforming and sometimes resisting. This reconceptualisation has shifted research practices toward engaging children as participants rather than as objects of adult observation.¹⁶⁰

Third, and following from the first two themes, scholars argue that childhood cannot be meaningfully studied in isolation from adulthood. Childhood is constituted through intergenerational relationships and, while children are increasingly recognised as agentic and rights-bearing, scholars such as Woodhead and Mayall caution that adult perceptions

157 C Jenks 'Constructing childhood sociologically' (n 150) 64.

158 M Woodhead 'Childhood studies: Past, present and future' in Kehily (n 150) 23.

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

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

and institutional power continue to play a decisive role in shaping how childhood is understood and governed.¹⁶¹

4.3 Children as agents and gendered subjects

Based on her research with children under the age of 10 in South Africa, Bhana demonstrates how adults' constructions of childhood actively shape the gendered attitudes and behaviours taken up by children. According to the views of primary school teachers regarding their young learners, as captured in Bhana's research, "gender, doesn't matter to young children", "children are children" [and they are] "just kids, still young".¹⁶² With the metaphor of childhood as pre-social and innocent, the teachers envisioned children as non-gendered and asexual. However, this attitude masks the operation of power because, as Bhana observed, the teachers 'cannot see the child as sexual/gendered and constructing sexuality and gendering with others, nor can they challenge the continual naturalisation of gender differences and unequal relations of power'.¹⁶³

The discourse of childhood innocence justifies unwarranted control to protect children from the perceived dangers of sexual corruption, for instance, by avoiding addressing the topic of sexuality.¹⁶⁴ Yet, although the teachers constructed children as non-gendered, Bhana found that the teachers ascribed certain behaviours as natural to boys and others as natural to girls. Boys were perceived to be naturally aggressive, adventurous and better at mathematical subjects, while girls were constructed as shy, reserved and more talkative. By naturalising behaviours as masculine or feminine, the teachers unwittingly reinforced hegemonic masculine dominance and the subjugation of girls, on the basis that gender inequality is sanctioned by nature, and efforts to transform it would be futile.¹⁶⁵

While adult attitudes and practices may contribute to shaping the gendered and sexual world for children, children are far from being passive subjects. 'Rather, children themselves are producing and regulating

161 B Mayall *A history of the sociology of childhood* (2013) 2; M Woodhead 'Early childhood and primary education' Background paper prepared for the Education for All global monitoring report 2015 (2015) 26.

162 Bhana (n 91) 27.

163 As above.

164 Bhana (n 91) 28.

165 Bhana (n 91) 29.

gender by taking part in constantly “doing” and “redoing” femininities and masculinities.¹⁶⁶ In her interaction with 3 and 4 year-olds, Blaise found that these children understood gender and sexuality in ways that were shaped by social discourses of heteronormativity. However, children do not just passively take in what adults say or do; they engage with the prevailing discourses and articulate their understanding of gender and sexuality.¹⁶⁷ Children do not just play along with the dominant discourses. They negotiate their way through them, sometimes resisting them.¹⁶⁸ In their study, Robinson and Davies interviewed adult women regarding their earliest childhood experiences of being gendered subjects, to explore how they constructed and negotiated gender. One interviewee who described herself as having grown up as a tomboy – a girl who exhibits masculine behaviour – recalled how, despite the expectations that she should exhibit feminine behaviour, she found ways to maintain masculine interests and sometimes hid her interests from adults to avoid their judgmental gaze.¹⁶⁹

Yet, such nuanced understandings of childhood agency are largely absent in the GEA. Where children do appear, such as in the provisions on education, they are cast in passive roles as targets of civic education or as girls in need of protection. The GEA fails to engage with children as already active participants in the gendered social world. In this way, the law, like the teachers in Bhana’s study, reproduces the fiction of the innocent, pre-gendered child, thereby closing off the possibility of recognising or supporting children’s gendered and sexual agency.

4.4 Re-envisioning children as sexual and gendered subjects

Children develop their gender and sexual identities in a highly interactive process with adults, through discourses prevailing in society.¹⁷⁰ These

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

167 Blaise (n 166) 7-8.

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

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

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

discourses operate through rewards and sanctions, positioning individuals in places of privilege or marginalisation. For instance, discourses that offer masculinity as desirable and pleasurable are readily taken up by boys in the school playground, where acts of dominance over girls are performed as affirmed expressions of gender identity. An important question, then, is how to disrupt and transform such gender-discriminatory attitudes and behaviours.

The GEA is expected to contribute to facilitating such a paradigm shift, to transform relations of power to create a gender-equitable society. This part uses MacNaughton's work with children in elementary school, captured in *Rethinking gender in early childhood education*, to appreciate the challenges that implementers of the GEA should anticipate, particularly as the GEA envisages education as a means for engaging children to take up gender-equitable attitudes and practices. MacNaughton uses a post-structural approach to analyse power and gender relationships in the early childhood setting.

In her work, MacNaughton describes the efforts of a teacher to change the sexist behaviour of boys in a block play area, which had resulted in girls leaving the block play to boys because the girls perceived it as a masculine activity. The teacher tried to change this attitude by encouraging girls and attempting to diffuse the dominance of boys, but her efforts failed because no amount of socialisation could get the girls to take up block play confidently. In her analysis, MacNaughton attributed the failure of the teacher's intervention to her philosophy of gender learning: that children would become gender empowered through socialisation. MacNaughton explains that children's subjectivities are influenced by different messages they receive from multiple sources in society about what it means to be a normal boy or girl. However, the girls do not just passively absorb gender norms; they negotiate their way through the norms, deciding whether and how they would play along with dominant understandings of being a normal girl, or choose alternative or resistive modes.¹⁷¹ The teacher needed to engage more deliberately with this process of identity formation in order to have an impact on how the girls, and boys, would reshape their gender identities.

171 MacNaughton (n 168) 21-22.

Drawing on a post-structuralist perspective of the formation of subjectivities, MacNaughton suggested a more transformative approach to promoting gender-equitable play and relationships between boys and girls:¹⁷²

Specific strategies could include:

- giving a voice to all children about gender irrespective of their gender, race, class or ability;
- checking to see whose voices about gender are silenced, marginalised and trivialised in the group;
- exploring multiple ways of creating dialogue about who children are and how they see themselves and their genders;
- knowing which stories about gender are narrated in the group and which children narrate these;
- reflecting on how race, class, gender, disability and sexuality feature in children's narrations, who features them, how do they and how do others react encouraging children to evaluate their own and other people's gender stories;
- helping all children practise being spectators, commentators and narrators.

MacNaughton's strategies are not as simplistic as envisaged by socialisation-based interventions as solutions to gender inequality: First, children are active and creative subjects in the formation of their identities. Second, interventions involve considerable interaction between adults and children, and between children themselves. The aim of that interaction would not be to change the child directly, but to engage in a dialogue that offers the child an expanded vision of seeing and doing gender.¹⁷³

The insights from MacNaughton's work have important implications for how the GEA is interpreted and implemented. The GEA's commitment to promoting civic awareness, gender equality in education and the elimination of harmful social and cultural practices can be aligned with such a transformative, dialogic approach to gender identity development. Implementers of the GEA, including educators, curriculum designers and public officials, could go beyond didactic instruction and instead cultivate participatory environments that support children in naming, challenging and reshaping dominant gender narratives.

172 MacNaughton (n 168) 33.

173 As above.

However, such efforts presuppose a discursive environment that allows for critical and inclusive engagements. The criminalisation of same-sex intimacy, for instance, privileges heterosexuality and hegemonic masculinities. It would be challenging, therefore, to provide children with an expansive vision of being gendered and sexual when the broader legal and social framework excludes certain identities and expressions as illegitimate or immoral. Thus, for the GEA to truly facilitate a paradigm shift, its implementation must be attuned to the need for legal coherence and inclusive discourse across sectors. This includes aligning the GEA with reforms in education, health and criminal law that affirm diverse gender and sexual subjectivities, rather than reinforce heteronormative hierarchies and exclusions.

5 Concluding thoughts

The GEA's aim to transform Malawi into a gender-equitable society is both noble and ambitious, given that gender inequality is deeply entrenched and often upheld by institutional forces, including cultural norms and the law itself. Gender-inequitable discourses are reproduced across generations, as they are taken up and reshaped by children in schools, homes and communities. Reforming this trajectory requires more than civic instruction; it demands a discursive shift that enables children to inhabit diverse and affirming subject positions. This means, for example, creating space for boys to explore femininities without stigma, and for girls to embrace masculinities without disapproval or risk of exclusion.

This chapter undertook a post-structural deconstruction of the GEA and its discursive foundation, the GEA Report, to show how legal and policy instruments that claim to advance gender equality must themselves be read critically. A post-structuralist understanding of these texts recognises that they may simultaneously enable and constrain transformation, including for children. As discussed in chapter 2, feminist post-structuralism offers a vital framework for interrogating legal discourse, not only in terms of what it says, but also in how it produces meanings, silences and possibilities.

As the preceding critical and deconstructive analysis of the GEA and its foundational report has shown, legal texts, once enacted, are no longer bound by their drafters' intentions, even though attention to those intentions may remain instructive. Instead, interpretation unfolds

within contested spaces where meaning is continually negotiated. A linear reading of such legal texts risks reproducing dominant discourses and obscuring the richness and transformative potential contained in the multiple meanings gender equality laws such as the GEA make possible.

Although feminist influences are visible in the GEA's efforts to address women's subordination, the GEA largely retains masculinity inclusive of heteronormativity as an unchallenged frame for gender and sexuality. This sustains rigid norms that reinforce inequality and marginalise children whose gender and sexual subjectivities fall outside the normative binary.

Moreover, the GEA's implicit construction of children as passive recipients of adult knowledge and protection reflects a social imaginary that limits children's agency. Children are not merely socialised into gendered worlds. They actively participate in constructing them. A failure to recognise children as co-creators of social reality undermines the transformative potential of the GEA.

This chapter demonstrates how a feminist post-structuralist approach enables a reading of gender equality law that moves beyond doctrinal legal analysis to interrogate how law operates as a discursive and symbolic force. Through a critical examination of the GEA and its foundational report, the chapter has demonstrated how the GEA participates in constituting a gendered social order, including understandings of children, sexuality and agency. By tracing both the limits and openings within the GEA's normative framework, the analysis highlights that legal reform is never merely a matter of revising rules, but also of reshaping the symbolic order through which subjects are made intelligible and governed.

This insight provides the conceptual foundation for the chapters that follow, which apply the feminist post-structuralist framework developed here to three thematic areas. These chapters examine how the GEA enables, or constrains, the possibility of equitable sexual relations from the formative years, and the conditions under which children's sexual health, rights and well-being are recognised, supported and realised within educational and health institutions.