

Childhood and the foundations for equitable sexual relationships

1 Introduction

At the 1994 International Conference on Population and Development (ICPD), countries adopted the Programme of Action (PoA), a global policy framework on population, development and sexual and reproductive health and rights (SRHR). One of the key challenges identified at the conference was promoting gender equality in sexual relationships. Paragraph 7.34 of the ICPD PoA notes:¹

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

As the above paragraph suggests, the promotion of gender-equitable relations in sexual and reproductive matters is closely linked to how children are understood, supported and engaged during their formative years. Rather than treating childhood as a stage of sexual innocence or deficit, this framing points to the importance of recognising children as sexual subjects whose capacities for ethical reflection, mutual respect, and responsibility are shaped by social, legal, and institutional contexts. In Malawi's legal and policy framework, the Gender Equality Act (GEA) is one of the legal instruments expected to contribute to fostering responsible sexual behaviour, sensitivity and equity in gender relations.

1 United Nations 'Report of the International Conference on Population and Development' UN Doc A/CONF.171/13 (1994) para 7.34.

From a legal doctrinal perspective, the notion 'responsible sexual behaviour' may appear self-evident. However, from a post-structuralist standpoint, this term is not self-evident but discursively produced and contested: Who defines what counts as 'responsible'? Through which discursive regimes are such definitions authorised, normalised and enforced? For instance, both anecdotal reports and research reveal that school-going children have been expelled for actions as benign as kissing.² Are kissing, 'sexual' games and exchanging love letters or texts among 8 year-old children inherently irresponsible,³ or is this behaviour constructed as irresponsible by dominant discourses that seek to regulate childhood sexuality? In this chapter, 'responsible sexual behaviour' is treated not as a neutral moral standard, but as a normative construct produced within legal, educational and cultural discourses.

General Comment 20 of the CRC Committee encourages states and non-state actors to view adolescence as a positive phase of human development, and to facilitate the creation of an enabling environment in which adolescents can explore their emerging identities, beliefs and sexualities, and build their capacity for making positive decisions and life choices.⁴ While this recommendation appears progressive from a human rights or legal doctrinal viewpoint, a post-structuralist analysis reveals that the very notion of 'adolescence' has historically functioned as a regulatory category, to justify surveillance and control. It is saturated with normative assumptions and embedded in relations of power.⁵ This duality calls for a cautious engagement with rights-based frameworks, because even as they promote adolescent autonomy, they may also re-inscribe

2 N Ngubane 'Girls expelled from school for kissing' *GroundUp* (Durban) 14 August 2018, <https://groundup.org.za/article/girls-expelled-school-kissing/> (accessed 25 August 2025); L Asmelash 'A 2nd grader at a Christian school was expelled for telling another girl she had a crush on her, mother says' *CNN (USA)* 29 January 2021, <https://edition.cnn.com/2021/01/29/us/rejoice-christian-school-expel-student-lgbt-trnd> (accessed 25 August 2025); R Silver 'The virgin and the mother: Schoolgirl stories and their implications for girls' lives' (2024) 54 *Compare: A Journal of Comparative and International Education* 172.

3 D Bhana *Gender and childhood sexuality in primary school* (2016). In her research, Bhana demonstrated that, by the age of 8 years, children kissed, played sexual and love games and exchanged love letters.

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

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

the hierarchies they seek to dismantle. These tensions become especially salient when examining how children are discursively constructed as sexual subjects, and how the meaning of sexual consent is produced within these frameworks.

This chapter takes consent to sex as a focal point for examining how the law regulates childhood and adolescent sexuality. By tracing the historical and discursive construction of the age of consent, it interrogates how legal frameworks such as the criminal law and the GEA shape, constrain or could potentially support young people's sexual agency and gender equality.

The meaning of consent to sex is complex and contextual, but it can broadly be understood as a person's voluntary and informed agreement to engage in a sexual act with another individual or individuals.⁶ Consent is a critical communicative tool in relationships. It conveys and affirms respect, sensitivity and equality between parties of similar or different sexual or gender identities. At its core, consent means acknowledging that individuals have the right to control access to their person, including their body and emotional space; these rights are fundamental to human dignity and autonomy.⁷ When used in relation to children, consent is understood in this book, not as an all-or-nothing legal capacity, but as a developing ethical and relational practice shaped by age, context and power.

Consent protects the value of autonomy. As Wertheimer explains, '[w]e protect a person's autonomy by prohibiting actions to which she does not consent and empowering her to engage in actions to which she does consent.'⁸ Since consent is a key component of ethical sexual relationships, it follows that children must be introduced to the concept of consent, to enable them to avoid being harmed or harming others.⁹

6 CL Muehlenhard and others 'The complexities of sexual consent among college students: A conceptual and empirical review' (2016) 53 *Journal of Sex Research* 462; M Willis & R Smith 'Sexual consent across diverse behaviours and contexts: Gender differences and non-consensual sexual experiences' (2022) 37 *Journal of Interpersonal Violence* NP18908.

7 J McGregor *Is it rape? On acquaintance rape and taking women's consent seriously* (2005) 106.

8 A Wertheimer *Consent to sexual relations* (2003) 31.

9 A Devkota and others 'Relationships and consent education for adolescents with intellectual disability: A scoping review' (2025) 5 *Youth* 22.

Such an approach necessarily rests on recognising children as sexual subjects, rather than as sexually innocent or passive beings.

In this regard, laws such as the GEA, policies and institutional practices must facilitate the creation of an environment in which children can take up subjectivities that affirm their comfort and confidence in their sense of legitimacy, safety and agency in relation to their gender and sexuality. Such self-affirmation is foundational to fostering mutual respect in interpersonal and sexual relationships.¹⁰ However, discourses that deny children sexual agency, and which are often encoded in law, religion and institutional practice, pose significant barriers to children experiencing sexuality as a positive and affirming aspect of life.¹¹

Children discursively engage with and interpret messages about gender and sexuality from various sources, including parents, teachers, peers, religious leaders and the media. These sources are embedded in, and legitimated by, institutions such as the family, church, school and the law. Since the GEA aims to promote a gender-equitable society, it must facilitate resistance to discursive and institutional practices that construct children as lacking sexual agency. It must also take account of the political, economic, social and cultural contexts in which children live and through which their gendered and sexual subjectivities are shaped.¹²

As demonstrated in the preceding chapters, law operates as a discursive practice that is never politically neutral, but actively participates in the production and maintenance of gendered norms, sexual scripts and unequal social relations.¹³ In this chapter, I interrogate the historical development of Malawi's age of consent laws, tracing them from their colonial origins and the assimilation of Eurocentric gender norms into post-colonial legislation. I argue that the GEA cannot fully realise its transformative promise without confronting the gendered and sexual stereotypes embedded in Malawi's Penal Code provisions. If the GEA is to meaningfully contribute to reshaping the experience of children, it must be implemented in ways that actively disrupt legal and cultural

10 S Suwarni and others 'Inclusive sexual education: Integrating gender approaches in learning' (2024) 16 *Al-Ishlah: Jurnal Pendidikan* 416.

11 S Angelides *The fear of child sexuality: Young people, sex, and agency* (2019).

12 V Gunasekara *Coming of age in the classroom: Religious and cultural barriers to comprehensive sexuality education* (2017) 17.

13 RJ Cook & S Cusack *Gender stereotyping: Transnational legal perspectives* (2010) 4.

narratives that punish children for sexual behaviour that otherwise is normative.

2 Childhood, gender and sexuality

In chapter 3 I developed a critique of the GEA's discursive construction of children as non-autonomous, passive sexual subjects, that is, as persons capable of developing meanings, boundaries and agency in relation to gender and sexuality. I return to this critique here because it is central to understanding the logic underpinning colonial age of consent laws and their transplantation from Europe into post-colonial legal systems such as that of Malawi. These laws reproduce this view of children as sexually passive and incapable of sexual agency. To interrogate these legal constructions, I draw on interdisciplinary scholarship on childhood, gender and sexuality, with particular attention to insights from childhood studies informed by feminist and post-structuralist theories. A multidisciplinary lens is essential because conceptions of childhood have shaped not only social attitudes, but also the legislative frameworks that govern childhood sexuality and sexual conduct.

2.1 Childhoods: A socio-cultural, historical and political construction

At birth, human beings depend on others for survival during the early period of infancy. Over time, they acquire competencies that enable them to care for themselves, make decisions and participate more fully in social life. During their lives, they contribute to their communities in diverse ways, including through care work, knowledge sharing, creativity, activism, economic participation and the raising or nurturing of others. While this process of human development is rooted in biological change, it is far from a purely natural trajectory. The meanings attached to infancy, childhood, adolescence and adulthood differ across cultures and historical periods. These stages of life are shaped by social norms, institutional arrangements and political forces that assign value to different capacities and behaviours. Thus, although age-related development may be grounded in biological processes, it is always mediated by cultural and

historical interpretations that shape how childhood, adolescence and adulthood are understood and governed.¹⁴

2.1.1 *Dominant Western conceptions of childhood*

The consensus among scholars is that the work by the French historian Philippe Ariès, *Centuries of childhood*,¹⁵ was seminal in suggesting that childhood is a historically and socially constructed concept that varies across time and context.¹⁶ The idea of variable childhoods challenged the assumptions of a stable and universal childhood, which had been exported from the West to other regions of the world.¹⁷

According to James and Prout, the evolutionary developmental model has been the dominant framework structuring Western thought around childhood, particularly the idea of childhood as a state of linear progression from an inferior status to the superior status of adulthood, from 'simplicity to complexity of thought, from irrational to rational behaviour'.¹⁸ This framing of childhood as a state of irrationality and incompetence is taken as natural and, more problematically, universal, so that any child whose behaviour falls outside this normative script is constructed as deviant.

Hendrick has described how the modern understanding of childhood in England is a discursive product of various constructions of childhood that have dominated different periods since the 1800s.¹⁹ These conceptions were influenced by social changes associated with industrialisation. Children were conceptualised either as innocent, and in need of care and protection to preserve their innocence or, at the other

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

15 P Ariès *Centuries of childhood: A social history of family life* (1962).

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

17 A Prout & A James '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) 9; Smith (n 14) 31.

18 A James & A Prout 'A new paradigm for the sociology of childhood? Provenance, promise and problems' in James & Prout (n 17) 10; Smith (n 14) 22.

19 H Hendrick 'Constructions and reconstructions of British childhood: An interpretive survey, 1800 to the present' in James & Prout (n 17) 34.

extreme, as tainted by original sin and requiring discipline and training to shape them into good persons.²⁰

The rise of social class distinctions in the mid-nineteenth century saw the emergence of the concept of delinquency. The notion of the delinquent child arose out of the conflict between innocence and experience because certain experiences were deemed inappropriate for children, particularly those that fostered premature independence. However, in the prevailing social conditions, working-class parents spent most of their time at work in factories, while children were left on their own or neglected or, indeed, were themselves also working. Unsupervised and unemployed children creatively engaged in various activities on the streets, such as begging, gambling and petty crime.²¹

Middle-class social commentators viewed the phenomenon through the lens of childhood innocence. A correctly brought-up child was expected to be dependent, and was not supposed to be streetwise.²² The child who exhibited adult knowledge, and was independent at too young an age, was deemed to have been improperly raised, and was seen as undisciplined and delinquent.²³ In addressing delinquency, social reform campaigns constructed childhood innocence as a return to dependency and incompetence. These social reforms led to the development of legislation on juvenile delinquency.²⁴ Inevitably, and not surprisingly, marginalised and poor children were over-represented among the delinquents. In this way, class-based and moral anxieties were displaced onto the figure of the delinquent child, thereby reinforcing the normative boundaries for who counts as a proper child and who is excluded from the category of the 'innocent child'.

Another meaning of childhood that developed from the mid-nineteenth century was what Hendrick calls the 'schooled child'. The school was initially designed to respond to the needs of middle- and upper-class children following the notion of the child as dependent and incompetent, and as someone who needed to be managed and trained for adult roles and responsibilities. The school, therefore, achieved several things, including reinforcing the child's dependence, taking away children

20 Hendrick (n 19) 40-43.

21 J Muncie *Youth and crime* (2004) 56.

22 Hendrick (n 19) 43.

23 Muncie (n 21) 57.

24 Hendrick (n 19) 43.

from wage-labour, and institutionalising the separation of children from parents. Schooling facilitated the creation of a new kind of child, namely, 'the pupil'.²⁵

Western childhood, therefore, is a composite of various constructions that dominated at different times in history. These constructions include childhood as needing protection; childhood as irrational, mentally immature, and imperfect beings; childhood as innocence; and childhood as a time for training.²⁶ These constructions of childhood were later exported globally through colonialism, shaping legal, educational and social understandings of childhood in colonised societies.

2.1.2 *African childhoods*

Conceptions of childhood in Africa are, in some respects, shaped by locally specific histories, epistemologies and social arrangements, while also sharing elements observed in other parts of the world.²⁷ Sloth-Nielsen observes that in many African contexts, children are often expected to gradually assume adult responsibilities in line with their developmental capacities.²⁸ The termination of childhood is not determined by the attainment of a predetermined age, but by the physical ability to perform acts typically reserved for adults.²⁹ The significance of puberty is that it signals the capacity of the person to assume adult roles, including reproduction and the raising of children.

In this sense, childhood in many African societies was not organised around the idea of a distinct, legally protected phase of physical and psychosocial development as characterised in modern Western childhood.³⁰ Rather, it was understood as a time-limited period

25 Hendrick (n 19) 45-47.

26 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) 17.

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

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

29 Ncube (n 26) 19-20. See also B Rwezaura 'Competing "images" of childhood in the social and legal systems of contemporary sub-Saharan Africa' (1998) 12 *International Journal of Law, Policy and the Family* 253.

30 Sloth-Nielsen (n 28) 118.

of dependency, followed by a gradual assumption of adult roles as children developed the capacity to function independently within their communities.

Welshman Ncube similarly observes that '[c]hildhood is not perceived and conceptualised in terms of age but in terms of inter-generational obligations of support and reciprocity'.³¹ According to Ncube, 'the African "child" is often always a "child" in relation to his or her parents who expect and are traditionally entitled to all forms of support in times of need and in old age'.³²

The child is socialised into relations of subservience to their parents by cultural and religious systems, and sometimes by using intimidation to inculcate the obligation to respect parents. Ncube further notes that parents in Africa exercise tremendous power in disciplining and regulating the behaviour of the child. Another scholar, Miamingi, puts it succinctly when stating that

[c]hildren are active participants producing and reproducing cultural norms in traditional communities in Africa. However, they must participate in a culturally acceptable manner. This delicate balance allows children to think only within culturally acceptable confines, to talk only as permitted by custom, and participate only through acceptable customary means and modes of communication.³³

Sloth-Nielsen and Ncube, therefore, highlight the emphasis in many African cultures on intergenerational reciprocity, responsibility and discipline.

With regard to discipline and responsibility around adolescent sexuality research by Delius and Glaser traced how precolonial African societies engaged in relatively open and structured forms of sexual socialisation.³⁴ They show that adolescent sexuality was not silenced but rather acknowledged as powerful and in need of guidance through intergenerational communication and peer group regulation. Practices such as virginity testing, initiation, and even sanctioned forms of limited intercourse were part of broader strategies to manage youthful sexual desire while maintaining social cohesion.

31 Ncube (n 26) 18-19.

32 As above.

33 Miamingi (n 27) 278.

34 P Delius & C Glaser 'Sexual socialisation in South Africa: A historical perspective' (2002) 61 *African Studies* 30.

Delius and Glaser argue that colonialism, Christianity and capitalist labour systems severely disrupted indigenous systems and undermined peer group regulation, producing a dramatic shift in sexual norms, practices and power relations.³⁵ The result was not only an increase in premarital pregnancies and sexual violence, but also the emergence of masculinities that celebrated domination over women rather than social responsibility. Their historical analysis challenges both the romanticisation of a pre-colonial moral order and the common stereotype of African sexual culture as inherently chaotic or violent.

Despite differing constructions of childhood in Europe and Africa, adult-child relationships have often been characterised by disciplinary forms of control. This includes the gendered structuring of childhood sexuality, whereby at puberty girls are positioned as subjects of reproductive risk and are counselled to avoid pregnancy outside marriage.³⁶ Such positioning constitutes a regulatory discursive practice that both produces and governs the sexuality of girls and women. On the one hand, it functions as a disciplinary mechanism that imposes norms of abstinence and moral propriety onto the bodies of girls, primarily through the prohibition of sexual conduct with boys.³⁷ On the other hand, it participates in the formation of feminine subjectivity by positioning girls as sexual subjects whose legitimacy and social value depend on conforming to ideals of chastity and heteronormative respectability.

This dynamic is further illustrated by Karaian's analysis of institutional responses to teen sexting: She shows how discourses around feminine subjectivity place the responsibility on girls to manage risk.³⁸ At the same time, this positioning reinforces traditional ideals of respectability, thereby shaping sexual subjectivities in ways that silence young people's voices, especially girls, and reinforce power dynamics that create conditions for harm and abuse.

Modern notions of childhood in Africa have been shaped by the forces of colonialism and transnational capitalism.³⁹ As Hendrick has

35 Delius & Glaser (n 34) 36.

36 Macleod (n 5).

37 GD Kangaude and others 'Childhood sexuality in Africa: A child rights perspective' (2020) 20 *African Human Rights Law Journal* 692-695.

38 L Karaian 'Policing "sexting": Responsibilisation, respectability and sexual subjectivity in child protection/crime prevention responses to teenagers' digital sexual expression' (2014) 18 *Theoretical Criminology* 285-287.

39 Ncube (n 26) 23.

shown, modern childhood emerged through the layering and fusion of multiple historical constructions rather than as a single, coherent model.⁴⁰ In a different historical and political context, modern constructions of childhood in Africa have similarly taken shape as a discursive fusion of European and indigenous African notions. Conceptions of childhood in contemporary Africa are by no means uniform, even within a single country. In some localities, communities adhere more closely to customary understandings of childhood, while in others childhood is framed through more explicitly Westernised lifestyles and institutions. Most African communities, however, negotiate hybridised constructions of childhood that combine elements of both European and African traditions.

Pande suggests that one of the challenges in theorising childhood and colonialism is to simultaneously 'critique colonial rule masquerading as a humanitarian mission to rescue women [and children] and to reject cultural nationalisms mythologizing a pre-colonial golden age of egalitarianism while condoning violent patriarchal practices.'⁴¹ Pande cautions against uncritical acceptance of the multiplicity of childhoods. For instance, if the African child is theorised as a version of childhood measured up against the dominant Western childhood, then it carries the danger of cultural relativism that justifies violence against children in the past and present.⁴² Pre-colonial Africa was not necessarily a golden and egalitarian period for children, but neither is post-colonial Africa, despite the globalisation and localisation of the notion of the rights of the child. There is a need, therefore, to forge a conceptualisation of the child that retains positive notions from the current discourses of childhood and resists or discards those that are negative.

Historical accounts of African childhoods and sexuality disrupt dominant representations of pre-colonial African childhood as either idyllic or repressive and instead reveal a complex system of structures in which the youth were simultaneously afforded autonomy within communal rites and tightly regulated by peers and elders.⁴³ While

⁴⁰ Hendrick (n 19) 34.

⁴¹ I Pande "'Listen to the child": Law, sex, and the child wife in Indian historiography' (2013) 11 *History Compass* 689.

⁴² Pande (n 41) 693.

⁴³ OS Okechi 'The indigenous concept of sexuality in African tradition and globalisation' (2018) 6 *Global Journal of Reproductive Medicine* 1.

colonialism dismantled many of these structures, what replaced them was often more punitive and silencing. Thus, efforts to theorise African childhoods must remain alert to historical transformations without falling into either cultural romanticism or uncritical celebration of modernity.

2.2 The invention of adolescence

The stages of human development are commonly represented in biomedical and psychological literature as progressing from infancy to childhood, then adolescence and, finally, adulthood. Within this developmentalist framing, particularly dominant in Western psychology, infancy, childhood and adolescence are constructed as stages of incompetence, while adulthood is positioned as the locus of competence, autonomy and rationality.⁴⁴ The stage of adolescence, in particular, generates social anxiety among adults, not only because of uncertainty about how adolescents should be governed, but also, and perhaps more significantly, because of how the adolescent is imagined and regulated as a sexual subject.

Like childhood, adolescence is a socially and historically constructed concept. In both traditional Europe and traditional Africa, there was no recognised category of adolescence. It was Granville Stanley Hall, dubbed the father of adolescence, who is said to have ‘invented’ adolescence in his treatise *Adolescence*,⁴⁵ when he described the age of adolescence as one characterised by ‘storm and stress’. Of course, Hall did not create adolescence. Rather, his work consolidated and popularised conceptions that were already taking shape and root in his cultural milieu. Earlier strands of Western thought had already begun to conceptualise adolescence as a distinct stage of life. Jean-Jacques Rousseau, for example, is often credited in Western thought with articulating adolescence as a distinct phase of emotional turbulence and developmental upheaval.⁴⁶

44 E Burman *Deconstructing developmental psychology* (2016).

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

46 Skolnick (n 14) 62; Rousseau described adolescence in the following words: ‘As the roaring of the sea precedes a tempest from afar, this stormy revolution is proclaimed by the murmur of the nascent passions. A mute fermentation warns of danger’s approach. A change in humor, frequent anger, a mind in constant agitation, makes the child almost unmanageable. He becomes deaf to the voice

Hall's idea of adolescence as a period of storm and stress gained traction during a period of rapid social change, the industrial revolution. During this time, evolving notions of human development were gaining prominence, primarily influenced by Darwin's theory of evolution. Hall understood adolescence as a time of turmoil but also as a time of opportunity, when society would intervene in the development of adolescents to ensure the development of a healthy and superior race.⁴⁷ The notion of adolescence in Hall's theory was racialised and gendered because he conceptualised adolescent development as

a crucial point at which an individual (and society) jumped to a developed, superior, Western selfhood, or remained arrested in a savage state. Adolescence became the dividing line between rational, autonomous, and moral white bourgeois men, those civilised men who would continue the evolution of the race, and emotional, conforming, sentimental, or mythical others, namely, primitives, women and children.⁴⁸

Hall and his followers, therefore, were interested in the study of children because of its instrumental value in understanding the development of the human species. As child labour began to be restricted in the later industrial era, especially for middle- and upper-class children, schools emerged as institutions to manage and educate the young in line with evolving ideas about childhood. Hall and others took this opportunity to imagine schools as facilities for training children to become morally and physically fit, and productive members of society. Hall, like many other members of the society in which he lived, thought that precocious sexual activity sapped persons of energy and, in order to maintain good health, adolescents should avoid masturbation and other wasteful sexual activities.⁴⁹

The social construction of adolescents as immature, irrational and incompetent, their prohibition from engaging in gainful employment and restriction on sexual conduct are culturally and historically specific interpretations of notions of childhood that have been exported from Europe to Africa. One of the challenges on which this chapter focuses

which made him docile. His feverishness turns him into a lion. He disregards his guide; he no longer wishes to be governed.' J-J Rousseau *Emile: Or, on education* trans A Bloom (1979) 211.

47 N Lesko *Act your age! A cultural construction of adolescence* (2012) 46-47.

48 Lesko (n 47) 46.

49 Lesko (n 47) 47.

is that colonial powers transplanted laws designed for the European socio-historical context, such as age of consent laws, into African societies, thereby imposing alien notions of childhood that not only conflicted with local understandings but also undermined the rights of the child. The process of assimilating such laws, even if they are misfits, is itself highly political and involves various power struggles, including those originating in the relationships between colonisers and natives. It is essential, therefore, to appreciate how colonial legacies continue to structure social, legal and institutional life in post-colonial communities.

This genealogy of adolescence exposes the contingent and political nature of concepts that law often treats as natural. This book takes up that insight to interrogate how gender law may either advance or constrain children's rights in relation to sexuality and gender equality.

3 Age of consent to sexual intercourse and the colonial legacy

Most African countries at independence adopted European penal or criminal codes imposed during colonialism. Morris describes how most of sub-Saharan Africa colonised by Britain inherited criminal laws from the coloniser.⁵⁰ For instance, Malawi's current Penal Code entered into force in 1930, and its origins trace back to English criminal law adapted for Nyasaland (Malawi's former name) by Albert Ehrhardt, who drafted the model penal code used by the British Colonial Office.⁵¹

Since 1930, the Penal Code has been amended in a piecemeal fashion and consequently has retained most of its colonial structure and form. This is reflected in the evolution of section 138 of the Penal Code, which is the main provision regulating sexual relations with and between children. When it was first amended in 2011, it retained stereotypical notions of the gender and sexuality of children because it aimed protecting girls from sexual intercourse with men.⁵² In 2023, the provision was further amended, and this time it protected both girls and boys from sexual conduct with older sexual partners.⁵³ However, it

50 HF Morris 'A history of the adoption of codes of criminal law and procedure in British Colonial Africa, 1876-1935' (1974) 18 *Journal of African Law* 6.

51 Morris (n 50) 22.

52 GD Kangaude 'Adolescent sex and "defilement" in Malawi law and society' (2017) 17 *African Human Rights Law Journal* 527.

53 Penal Code (Amendment) Act 8 of 2023 (Malawi).

created an anomaly by criminalising consensual and non-exploitative sex between adolescents simply because one adolescent is legally defined as an adult at the age of 18 years and the other adolescent is a child at 17 years old. It is necessary to appreciate the historical development of age of consent provisions for sexual intercourse, to benefit from the counsel of the ICPD PoA to promote mutual respect and equality in sexual relationships.

3.1 The development of age of consent laws in Europe

In traditional Europe, the age at which two persons could engage in sexual intercourse was a decision the family made following tribal customs.⁵⁴ That age usually coincided with puberty, although this was not always the case. In most European traditional cultures, the age of consent for girls was set between 12 and 14 years.⁵⁵ The earliest recorded state intervention into sexual unions, in Europe, occurred in the first century in republican Rome during the reign of Augustus Caesar.⁵⁶ A law required that children understood what they were consenting to in marriage, and the age of consent was set at 7 years.⁵⁷

In the sixth century, Emperor Justinian I of the Eastern Roman Empire directed the compilation of a code of law, the *Corpus Juris Civilis*, in which it was stipulated that the age of marriage was 12 for girls and 14 for boys.⁵⁸ This code became influential in the development of European civil law and canon law. However, Bullough makes the point that in traditional Europe the age of consent to sexual intercourse and marriage, which was set between 12 and 14, was made to coincide with puberty.⁵⁹

The age of consent in England, although taking a different trajectory, also traditionally started at puberty. The first statute to articulate a minimum age of consent to sexual intercourse in England was the Statute of Westminster 1275 which prohibited sexual intercourse with 'any

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

55 Bullough (n 54) 27.

56 Bullough (n 54) 29.

57 As above.

58 Bullough (n 54) 30-31.

59 Bullough (n 54) 40; V Bates 'The legacy of 1885: Girls and the age of sexual consent' (2015) *History and Policy*.

maiden within age'.⁶⁰ Scholars have interpreted this age to be 12 per the tradition described by Bullough. In 1576 carnal knowledge with a girl of 10 was made a felony.⁶¹ Sexual behaviour with a child below the age of 12 remained prohibited.⁶²

In England, the Offences Against the Person Act 1828 consolidated various individual legislation relating to unlawful sexual acts into a single piece of legislation, and this Act confirmed that carnal knowledge (a legal euphemism for sexual intercourse) of a girl under 10 was a felony punishable by death, while carnal knowledge with a girl of above 10 but below 12 was a misdemeanour.⁶³ In 1861, the 1828 legislation was repealed and replaced by the Offences of the Person Act 1861. Under the 1861 Act, carnal knowledge of a girl under 10 was a felony (though the death penalty for the offence had been abolished), and knowledge of girls aged 10 to 12 was a misdemeanour. The Offences of the Person Act 1875 elevated the offence to a felony for girls under 12, while sexual intercourse with girls aged 12 to 13 remained a misdemeanour.⁶⁴ The amendment effectively raised the age of consent to sexual intercourse to 12.

The 1885 Criminal Law Amendment Act then criminalised intercourse with girls under 13 as a felony, and those aged 13 to 16 as a misdemeanour, raising the statutory age of consent to 16.⁶⁵ The developments in law on sexual consent, particularly the codification process culminating in the Criminal Law Amendment Act 1885, eventually influenced legal developments in parts of Africa, including Malawi.

60 M Waites *The age of consent: Young people, sexuality and citizenship* (2005) 62.

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

62 Waites (n 60) 63.

63 As above; L Surridge 'On the offences against the Person Act, 1828' in DF Felluga (ed) *BRANCH: Britain, representation and nineteenth-century history* (2013), https://www.branchcollective.org/?ps_articles=lisa-surridge-on-the-offences-against-the-person-act-1828 (accessed 30 January 2020).

64 Waites (n 60) 63.

65 F Mead & AH Bodkin *Criminal Law Amendment Act, 1885, with introduction, notes and index* (1885) 44; Waites (n 60) 63.

3.2 Childhood and regulation of sexual conduct in traditional Africa

Before colonisation by Western states, African communities regulated sexual conduct involving and between children through culturally specific normative systems. During colonialism, Western notions of childhood were imposed and assimilated. Before turning to the regulation of childhood sexual conduct in traditional Malawi, it is therefore necessary to situate the discussion within the epistemological constraints that shape what can be known about African childhoods.

Genealogies of European childhood, such as Bullough's historiographical account, are possible because of the availability of written historical sources, but also because notions of Western childhood were exported to other parts of the world through colonial expansion and cultural imposition. By contrast, the most readily available and accessible sources of information about African childhoods are anthropological rather than historiographical accounts.

Anthropology developed as a discipline concerned with the study of the 'primitive other', emerging within a colonial epistemological framework that treated European culture as the normative standard.⁶⁶ This chapter therefore draws on both anthropological and historiographical work to describe constructions of childhood sexuality in the African context, while remaining attentive to their methodological and ideological limits.

What Bullough says about traditional European societies in mediaeval times is true about pre-colonial and traditional African cultures: Sexual unions were and are still governed by families according to tribal customs.⁶⁷ As in traditional European societies, puberty and the development of secondary sexual characteristics signified the readiness of the child to take on adult sexual roles.

In some ethnic groups in Malawi, such as the Chewa and Yao, initiation rites prepared the child to take on adult sexual roles.⁶⁸ A

66 RB Jones *Postcolonial representations of women: Critical issues for education* (2011) 81.

67 Bullough (n 54) 26.

68 AC Munthali and others *Adolescent sexual and reproductive health in Malawi: A synthesis of research evidence* (2004) 13-14; AJ Chinkuyu & SN Maina-Chinkuyu 'Norms and rituals about sexual practices and behaviours among the Chewa of Central Malawi' in JW Khamasi & SN Maina-Chinkuyu (eds) *Sexuality: An*

report of a study of cultural practices, by the Malawi Human Rights Commission (MHRC), shows that initiation rites are focused on girls, and that they are much more elaborate than the initiation rites for boys.⁶⁹ The main purpose of initiation rites is to prepare the person for adult roles, including reproduction. Teachings and counsel on sexuality are systematically imparted through songs, oral messages, taboos and folklore.⁷⁰

It is debatable whether pre-pubescent boys and girls were recognised as sexual in traditional Africa. While explicit formal surveillance before initiation rites is not well documented, research indicates that among the Chewa in Malawi, pre-pubescent girls (ages 10 to 12) received guidance on sexual matters and were taught appropriate sexual behaviours from parents, guardians and community actors. Adults actively provided informational 'supervision' to discourage sexual curiosity or premature intimacy, suggesting a culturally embedded system of oversight preceding puberty.⁷¹

It can also be inferred, from the values accorded to female chastity in most Malawian cultures, that girls were prohibited by taboos and social sanctions from engaging in pre-marital sexual conduct. Ethnographic accounts suggest that, in the Chewa culture, a girl who became pregnant before marriage would undergo special initiation rites that highlighted that her behaviour brought shame to the family and community.⁷²

While most available sources on African childhoods are anthropological, historiographical accounts are increasingly shedding light on the rich and complex ways in which African communities understood and managed sexuality. As Delius and Glaser observe in their study of sexual socialisation in South Africa, pre-colonial societies were often open in their recognition and discussion of sexual matters. Intergenerational communication and peer-group socialisation played

African perspective (2005) 148; Malawi Human Rights Commission 'Cultural practices and their impact on the enjoyment of human rights, particularly the rights of women and children in Malawi' (2006) 40; EA Pemba 'The changes in the conduct of Yao boys' initiation ceremonies' Master of Social Work dissertation, University of Nordland, 2012.

69 Malawi Human Rights Commission (n 68) 40.

70 Chinkuyu & Maina-Chinkuyu (n 68) 141.

71 A Munthali and others 'Adolescent sexual and reproductive health in Malawi: Results from the 2004 National Survey of Adolescents' Occasional Report 24 (2006).

72 Malawi Human Rights Commission (n 68) 45.

key roles in guiding adolescent sexuality. Among the Zulu, for example, certain sexual practices, such as external intercourse or *hlobonga*, were considered acceptable among the youth.⁷³

Delius and Glaser's work challenge the thinking that African cultures were silent or uniformly punitive regarding the sexuality of young people. This insight underscores the importance of recognising that African communities had their own systems, however patriarchal or heteronormative, for engaging with sexuality, and that the colonial imposition of Western norms for childhood did not replace silence with speech but rather consolidated, formalised and re-authorised existing discourses within new legal and institutional power dynamics.

3.3 Colonial and post-colonial Africa

During colonisation, Europe introduced and imposed colonial legal frameworks in Africa, including criminal or penal codes regulating sexual conduct. As described above, this imposition did not extinguish traditional sexual regulatory practices. Rather, it led to the emergence of multiple regulatory frameworks including the cultural norms of the colonised, Western legislation, and religious norms introduced by missionaries. Tamale observes that these overlapping systems gave rise to pluralistic legal regimes in which indigenous, colonial and religious norms continue to coexist.⁷⁴ The post-colonial state, in Africa, is largely legal pluralist.

In most cases, in the hierarchy of laws, the formal law takes precedence, so that any cultural practices that conflict with it may be unlawful. For instance, in Malawi, the GEA prohibits harmful cultural practices such as those the MHRC has documented.⁷⁵

73 Delius & Glaser (n 34) 33.

74 S Tamale 'Exploring the contours of African sexualities: Religion, law and power' (2014) 14 *African Human Rights Law Journal* 150.

75 The MHRC report comprehensively documents cultural practices that are sexual in nature and their impact on the human rights of girls and women. However, the section of the GEA on harmful cultural practices does not list prohibited cultural practices. The MLC considered whether to include a specific list in the GEB or to leave it open. Its rationale was as follows: 'Upon careful reflection, the Commission however decided to leave out the list and simply describe the harmful practices; leaving the development of examples to civic educators during civic education campaigns and public awareness initiatives. Such an approach will prevent a scenario where some practices which are harmless are included in the list purely on account of their sexual nature' (Malawi Law Commission (n 68) 30).

European formal law introduced age as a site of sexual regulation. In traditional Africa, an adult could engage in sexual conduct with a child if she was deemed an adult, that is, if she had attained puberty and undergone initiation rites.⁷⁶ An essential difference between the formal law and cultural norms is that an infringement of formal law attracted state-backed penal sanction, including imprisonment, while the violation of traditional norms attracted social sanction.

In recent times, some countries have revisited and reformed or overhauled the colonial sexual offences regimes. Malawi is one example of a country that has undertaken piecemeal reforms, while Kenya's legislation is an example of a substantial overhaul. Kenya created a stand-alone sexual offences legislation, that is, a separate statute.⁷⁷ Furthermore, Kenya aimed to align its sexual offences legislation with Kenya's Constitution and with international human rights law. Kenya's sexual offences law is now very different from its colonial roots.⁷⁸

The original version of section 138 of Malawi's Penal Code as it was promulgated in 1930 proscribed sexual intercourse with an underage girl in the following terms:⁷⁹

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

...

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

It is most likely that Malawi's section 138 of the Penal Code was adapted from the 'defilement' provisions in England's Offences against the Person Act 1875, which in England was subsequently replaced by the Criminal Law Amendment Act 1885.⁸⁰ However, while in English law

76 Kangaude (n 52).

77 Sexual Offences Act 3 of 2006 (Kenya).

78 Penal Code (Cap 63, Laws of Kenya) sec 140. This was repealed by the current Sexual Offences Act (n 77).

79 Penal Code 1930 (CAP 7:01 Laws of Malawi) sec 138.

80 Criminal Law Amendment Act 1885, 48 & 49 Vict c 69 (United Kingdom).

criminalisation was two-tiered, in that the higher sentence was reserved for sexual intercourse with a girl of below 13, and a lower sentence for sexual intercourse with a girl of below 16, the framework imposed on Malawi had one age of consent: 13 years. Until 2011, Malawian law did not criminalise sexual intercourse with a girl aged 13 or above.

The provision on 'defilement' was reviewed in 2010 when Malawi's Parliament passed a Bill, enacted in 2011, to amend several provisions including section 138. As amended, section 138 read as follows:⁸¹

- (1) Any person who carnally knows any girl under the age of sixteen years shall be guilty of a felony and shall be liable to imprisonment for life.
- (2) Any person who attempts to have carnal knowledge of any girl under the age of sixteen years shall be guilty of like felony and shall be liable to imprisonment for fourteen years.
- (3) Provided that it shall be a sufficient defence to any charge under this section if it shall be made to appear to the court, jury or assessors before whom the charge shall be brought that the person so charged had reasonable cause to believe and did in fact believe that the girl was of or above the age of sixteen years.

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

A related provision, section 160B, was also introduced into the Penal Code as part of the 2011 amendments. Section 160B provides, in part, that '[a]ny person who engages or indulges in sexual activity with a child shall be guilty of an offence and shall be liable to imprisonment for twenty-one years'.⁸²

Sexual activity is defined in Section 160A to mean 'sexual contact other than sexual intercourse (whether between persons of the same or opposite sex) in the form of genital, oral-genital, anal-genital contact or otherwise, masturbation, touching of genitals, buttocks or breasts, sadistic or masochistic abuse and other deviant sexual behaviour'.⁸³

Raising the age of consent to 16 was intended to align Malawian law with contemporary child-protection standards, particularly by safeguarding persons under the age of 16 from harmful and exploitative sexual conduct. However, in practice, the reform operated in a gender-asymmetrical manner. The law continued to frame protection primarily

81 Penal Code (Amendment) Bill 2009 (Malawi) was assented into law by President Bingu wa Mutharika in Malawi on 27 January 2011.

82 Penal Code (Cap 7:01) as amended by Act 16 of 2011 (Malawi) sec 160B.

83 Penal Code (Cap 7:01) amended (n 82) sec 160A.

through the regulation of heterosexual intercourse involving girls, while boys could be criminally prosecuted for engaging in sexual intercourse with girls who were their peers, even where such relationships were consensual and non-exploitative.

Several of such kinds of cases have come before the courts in Eastern and Southern Africa (ESA), including in Zimbabwe,⁸⁴ Kenya⁸⁵ and Malawi.⁸⁶ In each of these jurisdictions, adolescent boys were deemed to have committed an offence for engaging in consensual, non-exploitative sexual intercourse with their girlfriends.

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

To recapitulate what has been discussed thus far, laws regulating the age of sexual consent are a unique site for examining how childhood, sexuality and legal subjectivity are constructed and contested. Age of consent laws do more than protect children from sexual exploitation: They encode dominant beliefs about gender, sexuality, maturity and the appropriate bounds of childhood. Shaped by moral anxieties, social class concerns and racialised ideas of precocity, these laws often position the child as a non-sexual and vulnerable subject in need of state protection. At the same time, they regulate which children can be recognised as capable of sexual agency, and under what circumstances.

This part examines how, historically, the figure of the child as a sexual subject has been produced within English and African legal contexts. It begins with the development of age of consent laws in late nineteenth-century England and traces their colonial life in African jurisdictions, with particular attention to Malawi.

84 In *State v Masuku* 2015 ZWHHC 106, CRB B467/14, the High Court of Zimbabwe reviewed the case of a boy of 17 years, who had consensual sexual intercourse with his girlfriend of 15 years, and was consequently convicted of the offence of having sexual intercourse with a young person.

85 In *CKW v Attorney General & Director of Public Prosecutions* 2014 eKLR, Petition 6 of 2013 (High Court of Kenya).

86 In *YP v Republic* Criminal Appeal 16 of 2017 MWHC 87, the High Court of Malawi reviewed a case where a boy of 17 years was prosecuted for engaging in consensual sex with a girl of 15 years.

4.1 English law up to 1885

Age of consent laws, first developed in Western jurisdictions and subsequently embedded in African criminal law codes, embody culturally specific understandings of gender, sexuality and childhood. As Waites observes, these laws were 'patriarchal in their conception, embodying male power and control over women and children, embedded in patriarchal heterosexuality understood as a system of social and legal property relationships and sexual relationships'.⁸⁷ Girls were valued for their virginity, and the law sought to preserve female sexual purity through the criminalisation of sexual conduct defined as 'defilement'.

The law was gender-stereotypical and protected only girls because the male-sexual-drive discourse viewed female sexuality as passive and weak against an active male sexuality.⁸⁸ As a result, the boy's sexual agency was recognised and criminalised, while the girl's sexual agency was not recognised by law. Despite the apparent disadvantage this caused for boys, in that only boys were liable for the offence of sexual abuse, the failure to recognise the sexual agency of girls constituted a disadvantage as well. It denied girls the power to self-determine on matters of sexuality.⁸⁹

Conceptions of adolescent sexuality were also racialised and class-based. These class-based views were evident in the campaigns leading up to the 1885 amendments, which raised the age of consent from 13 to 16. The most vocal groups proposed this amendment because of the allegations that young British maidens were being lured into prostitution.⁹⁰ A select House of Lords Committee tasked with investigating the allegations concluded that the allegations were proved. In its report before the House of Lords, the Committee stated these reasons for the increase in prostitution of young girls:⁹¹

A vicious demand for young girls; overcrowding in dwellings, immorality arising therefrom; want of parental control, and in many cases parental example, profligacy, and immoral treatment; residence, in some cases, in brothels; the

87 Waites (n 60) 63.

88 W Hollway 'Women's power in heterosexual sex' (1984) 7 *Women's Studies International Forum* 63.

89 M Fine 'Sexuality, schooling, and adolescent females: The missing discourse of desire' (1988) 58 *Harvard Educational Review* 29.

90 JR Walkowitz *Prostitution and Victorian society: Women, class, and the state* (1982) 246-247.

91 Mead & Bodkin (n 65) 12.

example and encouragement of other girls slightly older, and the sight of the dress and money which their immoral habits have enabled them to obtain; the state of the streets in which little girls are allowed to run about, and become accustomed to the sight of open profligacy; and sometimes the contamination of vicious girls in schools.

It is apparent that these views reflected the anxieties of middle- and upper-class men regarding the perceived threat posed by predatory men, but also by sexually precocious girls – that is, girls who were exposed to sexual activity or knowledge prematurely. Bates observes that prevailing views about gender, race and class shaped such notions of precocity to distinguish respectable girls, white European girls from upper-class families, from undesirable girls, including girls from working-class families.⁹² It was widely believed that precocity was typical of the ‘lower races’ and classes. Girls from these social groups, therefore, were not envisaged as subjects for legal protection. It was also believed that these undesirable girls would have a corrupting influence if they associated with innocent and respectable children, because of their exposure to sexual activity or sexual knowledge.⁹³ These discourses of gender, class and race shaped English age of consent laws, which were then exported to Africa together with their underlying assumptions.

4.2 Consent to sex and gender equality law

When transplanted to Africa, age of consent laws intersected with both colonial and indigenous patriarchies.⁹⁴ In Europe and in African societies alike, the regulation of childhood sexuality had long been oriented towards preserving female chastity. Under colonial rule, however, this regulation was reshaped by an additional racial and economic logic tied to the consolidation of imperial power.

Colonial governance did not operate solely through coercion. While colonial governments sought to exploit African land and labour, they were also compelled to make strategic concessions to avoid sustained resistance. These concessions were negotiated primarily with African men, whose

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

93 B Carpenter and others ‘Harm, responsibility, age, and consent’ (2014) 17 *New Criminal Law Review* 30.

94 Delius & Glaser (n 35).

subjectivity as political and legal actors was selectively recognised, while the subjectivity of women and girls was largely excluded.⁹⁵ As a result, colonial compromises around law and governance frequently aligned with the interests of African men in regulating intimate life, particularly in relation to women and children.⁹⁶ The regulation of gender and sexuality thus reflected a convergence between the colonial imperative to maintain domination and the patriarchal interests of African men, rather than a concern with the autonomy or rights of women and girls.⁹⁷

This dynamic explains the divergence between English and colonial law. In England, the 1885 amendment raised the age of consent to 16, whereas the Malawian Penal Code fixed it at 13. Colonisers assumed that African girls matured earlier and, therefore, did not warrant the same protections as European girls. As Bates notes, this reflected a racialised logic that devalued the sexuality of Black girls.⁹⁸ The law served both the colonisers' interests in domination and the patriarchal interests of native men, while continuing to construct the girl as a passive subject devoid of sexual agency. Age of consent laws, therefore, were not designed to advance the rights of women and girls.⁹⁹

When African states inherited colonial laws regulating sexual conduct, they also inherited the discursive frameworks that gave those laws gendered and racial meanings. Age of consent laws, therefore, operated as a regime of intelligibility: They determined which forms of childhood sexual subjectivity could be recognised in law and which were rendered unintelligible or impermissible. They regulated sexuality through a binary logic of protection and deviance.

When the MLC proposed amendments to the Penal Code in 2000, it adopted the 1885 English model that raised the age of consent to 16 for girls, thereby re-inscribing a colonial gendered logic that foregrounds

95 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.

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

97 O Phillips '(Dis)continuities of custom in Zimbabwe and South Africa: The implications for gendered and sexual rights' (2004) 7 *Health and Human Rights* 87.

98 Bates (n 92) 134. See also the introduction in DE Roberts *Killing the black body: Race, reproduction, and the meaning of liberty* (1997). Roberts describes how black women's sexuality was thought to be different and a debased one.

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

female chastity and male sexual drive as normative truths. The reform reproduced rather than disrupted the regulatory binary of the active male as a perpetrating subject and the passive female as a vulnerable object of male sexual desire.

The 2011 reform that formally raised the age of consent to 16 continued to privilege feminine victimhood and offered no recognition of the adolescent girl's capacity for sexual subjectivity or capacity for consensual desire. Instead, the reform reaffirmed the imperative to regulate the adolescent girl's sexuality through protective prohibition.

In 2023, Malawi enacted another amendment to section 138 of the Penal Code.¹⁰⁰ The amendment departed from the earlier gender asymmetry, which focused on protecting the chastity of girls. The 2023 amendment criminalised sexual intercourse between adults and children under the age of 18, extending legal protection to both male and female children. On its face, the amendment appears to establish a gender-neutral subject of legal responsibility.

The new law also introduced a close-in-age defence for adolescents under 18 who are within two years of each other and whose sexual interaction was consensual. In effect, adolescents who engage in sexual intercourse with one another and satisfy the conditions of the defence avoid criminal liability. Section 138 of the Penal Code, as amended in 2023, provides:¹⁰¹

- 138(1) Any male person who has sexual intercourse with a female child shall be guilty of a felony and shall, upon conviction, be liable to imprisonment for life.
- (2) Any female person who has sexual intercourse with a male child shall be guilty of a felony and shall, upon conviction, be liable to imprisonment for life.
- (3) It shall be a defence to a charge under subsection (1) or subsection (2) if it is proved to the court that the male person or female person so charged is a child and
 - (a) the age difference between the person so charged and the female child or male child against whom the offence is alleged to have been committed is two years or less; and
 - (b) the female child or male child against whom the offence is alleged to have been committed consented to the sexual intercourse.

This reform marks a partial discursive shift: a grudging recognition of adolescent sexual agency within narrowly circumscribed boundaries.

100 Penal Code (Amendment) Act 8 of 2023 (Malawi).

101 Penal Code 1930 (CAP 7:01 Laws of Malawi) sec 138.

Because this recognition operates only through a defence, the adolescent's sexual agency becomes legible to the law only after criminalisation has already occurred. An adolescent must first be charged and prosecuted before invoking the defence in court. The law thus continues to construct adolescent sexual agency in a restricted and conditional manner, treating consensual adolescent sexuality not as a right or entitlement, but as conduct that is tolerated only by exception.

However, a further challenge remains. The law draws a hard legal boundary at the age of 18, a line that constructs a juridical rupture between 'child' and 'adult' as distinct ontological states, that is, as if 'child' and 'adult' are natural kinds rather than legal categories. Within this binary, an 18 year-old who has sexual intercourse with a 17 year-old becomes, through the operation of law, a perpetrator of the offence of having sexual intercourse with a child, regardless of mutual consent or an age difference of less than two years.

Whether this anomaly is the product of legislative oversight or deliberate caution, the result is the same. Laws that criminalise consensual sexual conduct between adolescents tend to disregard young people's lived experiences, reinforcing narratives of danger, deviance and control rather than acknowledging their autonomy, evolving capacities and the complex social realities they navigate. A post-structuralist reading, therefore, requires not only a critique of the law's content, but also an interrogation of the discursive effects through which the law constructs sexuality, agency and deviance in childhood and adolescence.

5 Gender-equitable sexual relationships

Understanding adolescent sexuality through the lens of gender equality requires moving beyond legal discourses that cast children as passive, non-sexual and in need of control. A post-structuralist reading reveals how age of consent and gender laws participate in constructing vulnerability, agency and sexual risk, often in ways that reinforce patriarchal and heteronormative power relations under the guise of protection. In this sub-chapter, I examine how such constructions persist within sexual offences law and related policy frameworks, while also identifying the interpretive openings they create. Focusing on Malawi's GEA, the analysis explores how gender-equality law and SRHR can be mobilised to reshape institutional responses to adolescent sexuality, particularly in relation to the criminal regulation of sexual conduct.

5.1 Gender, sex and sexuality

Colonial age of consent provisions can carry gender-stereotypic meanings. For instance, between 1930 and 2023, section 138 of Malawi's Penal Code protected only girls from sexual intercourse. Within this legal framing, boys' sexual subjectivity is constructed as active and agentic, while girls are positioned as passive sexual subjects. Consent to sex is thus feminised: Female sexuality is imagined as reluctant and reactive, in contrast to male sexuality, which is discursively framed as active and assertive.¹⁰² As a result, girls are not envisaged as eligible to express sexual desire or initiating sexual activity; instead, they are positioned as gatekeepers of sex, responsible for regulating men's sexual access to their bodies, and managing risk.¹⁰³

Such stereotypes are wrongful and patronising because they limit the sexual agency of girls. As Cook and Cusack put it, 'stereotypes infringe unduly on the capacity of individuals to construct and make decisions about their life plans.'¹⁰⁴ This gender stereotyping is also wrongful for boys because it promotes harmful masculinities by attributing sexual knowledge, initiative and superiority to boys regardless of age. These stereotypical views mask power relations that sustain gender inequality in sexual relationships.

These gender and sexual stereotypes also operate in institutions such as education. Sexuality education programmes tend to focus on the negative consequences that girls would suffer if they had sex, including sexually transmitted infections (STIs) and pregnancy. Similarly, in informal sexuality education, such as in initiation rites, girls are the ones who are advised to refrain from having sex with boys, but boys are not advised in the same way about girls.¹⁰⁵ In her article 'Sexuality, schooling, and adolescent females: The missing discourse of desire', Fine drew attention to the fact that formal sex education in the USA suppressed female entitlement to sexual pleasure and desire, and focused instead on danger

102 T Shefer & D Foster 'Discourses on women's (hetero)sexuality and desire in a South African local context' (2001) 3 *Culture, Health & Sexuality* 375.

103 Carpenter and others (n 93) 48.

104 Cook & Cusack (n 13) 11.

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

and disease.¹⁰⁶ She argued that the discourse of sexuality both entrenched traditional notions of males as agentic, and erased female agency. It positioned girls as objects of male sexuality, with the consequence that girls are denied the space and language to explore their sexual desire and, therefore, exercise sexual agency.¹⁰⁷ In her study of how girls articulated sexual desire, Tolman found that their voices expressed '[t]he internalized oppression of their women's bodies; they knew and spoke about, in explicit or more indirect ways, the pressure they felt to silence their desire, to dissociate from those bodies in which they inescapably live'.¹⁰⁸

In a study on adolescent sexual activity and education in Malawi, Grant found that parents perceived their daughters in school as inevitably at risk of succumbing to male sexual desire and becoming pregnant.¹⁰⁹ Parents, therefore, attempted to control the girls by prohibiting association with boys, and even pre-emptively removing them from school before boys had a chance to make them pregnant.¹¹⁰ Girls who 'did not listen' and continued to associate with boys, against their parents' advice, were considered rebellious, disobedient and out of control.

Negative views about adolescent sexuality also pervade medical and health discourses. Irvine argues that the medical model of adolescent sexuality, influential in modern times, reduces adolescent sexuality to biology. She argues that it 'fails to address the complicated historical, political, social, and economic influences that have infused teenage sex with a particular set of meanings'.¹¹¹ She gives the example of how biostatistics has been used to reproduce a discourse around adolescent pregnancy that has inspired solutions that focus mainly on controlling the sexual agency of the girl.¹¹² She observes that such health concerns, including adolescent pregnancy and related outcomes, are not the inherent consequences of adolescence. Instead, they are the 'outcome

106 Fine (n 89) 33.

107 Fine (n 89) 37.

108 DL Tolman 'Doing desire: Adolescent girls' struggles for/with sexuality' (1994) 8 *Gender and Society* 338.

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

110 Grant (n 109) 75.

111 JM Irvine 'Cultural differences and adolescent sexualities' in JM Irvine (ed) *Sexual cultures and the construction of adolescent identities* (1994) 3.

112 Irvine 'Cultural differences and adolescent sexualities' in JM Irvine (ed) (n 111) 7.

of meanings that are attributed to these behaviours within particular historical settings, settings that shape how those meanings will be understood and the responses that they will evoke.¹¹³

Macleod has demonstrated how constructions of adolescence inherited from colonialism continue to operate as regulatory regimes for adolescent sexual behaviour, for instance, through sexuality education programmes in South Africa.¹¹⁴ The design of these programmes imposes views about normal adolescent sexual conduct using the metaphors of danger and disease so that any adolescent who behaves or experiences sexuality outside pre-set social expectations is seen as responsible for the degeneration of society.¹¹⁵ Such views of adolescence contribute to disempowering adolescents by constraining the range of sexual experiences and sexual choices they can make. Indeed, the CRC Committee has observed that adolescence itself has been a source of discrimination, and adolescents have been treated as problems or as dangerous.¹¹⁶ An example is the criminalisation of adolescent consensual sexual conduct.

These concerns are echoed by scholars such as Ngabaza and Shefer who have shown how adolescent girls in South Africa are often framed in both policy and informal discourse as morally vulnerable and sexually irresponsible.¹¹⁷ This mirrors global discourses but is reinforced by local gender norms and post-colonial anxieties about morality and respectability. These constructions silence adolescents' own understandings and desires, rendering adolescents as passive subjects of adult regulation instead of active participants in shaping their sexual lives.

The *Charo* court case is an example of how the law can constitute discourse that constructs childhood sexuality in a manner that limits and constrains what could be experienced as normal. The Court reasoned

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

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

115 Macleod (n 114) 384.

116 Committee on the Rights of the Child (n 4) para 21.

117 S Ngabaza and others "'Girls need to behave like girls you know': The complexities of applying a gender justice goal within sexuality education in South African schools' (2016) 24 *Reproductive Health Matters* 71; S Ngabaza & T Shefer 'Sexuality education in South African schools: Deconstructing the dominant response to young people's sexualities in contemporary schooling contexts' (2019) 19 *Sex Education* 422.

that if the girl voluntarily sought sexual intercourse with the man, then she need not be protected under the law. Her behaviour, according to the Court, was unlike that of a child because she expressed sexual desire. Indeed, Carpenter and others have noted that

[a] child who 'sexually responds to the abuse, or appears flirtatious and sexually aware' is judged against the modern norm of childhood innocence. The 'no longer virginal child becomes damaged goods', and 'violating such a child becomes a lesser offence', with such children often targeted for further abuse.¹¹⁸

Society, therefore, blames social problems such as teenage pregnancies and sexual abuse on the child for being sexually knowledgeable or desirous and, therefore, 'out of line'.¹¹⁹ A good girl is one who lacks sexual agency at whatever age society decides as not the right age. She waits until she is much older or, indeed, married, and under the control of a man. This inequitable social system, which constructs girls as sexually passive, creates the condition in which the girls' sexual desire becomes a source of danger.¹²⁰ It creates an environment in which the girl is blamed for being sexually abused or raped, as was the case in *Charo*. In such an environment, girls find it difficult to report sexual abuse because the authorities do not take them seriously.¹²¹

Age of consent laws that limit children's sexual agency, therefore, are potentially disempowering. By constraining sexual autonomy, such laws reproduce negative constructions of adolescent sexuality and, in so doing, render children vulnerable. In post-structuralist terms, this vulnerability is not incidental but is produced through legal texts and interpretive practices that authorise specific understandings of childhood, sexuality and sexual risk. This condition cannot be remedied through technical judicial interpretation alone, because age of consent laws are embedded

118 Carpenter and others (n 93) 31.

119 Macleod (n 5).

120 Tolman (n 108) 339.

121 This was the complaint of the plaintiffs in *CK (a Child) through Ripples International as her guardian and Next friend) & 11 Others v Commissioner of Police/Inspector General of The National Police Service & 3 Others* 2013 eKLR, Petition 8 of 2012 (High Court of Kenya), namely, that the police did not take the sexual abuse complaints seriously and often interrogated the complainant instead of taking effective steps to pursue the perpetrators. The Court held that the police had failed to conduct prompt, effective, proper and professional investigations into the petitioners' complaints of defilement and other forms of sexual violence. It also found that the police had failed in its duty to enforce the sexual offences law of Kenya.

within broader colonial legal frameworks inherited by most African countries and continue to carry the assumptions and logics that shaped their original formulation.

This does not mean that interpretation is irrelevant or futile. Rather, it suggests that injustice cannot be resolved through narrow, technical readings that treat legal texts as self-contained and historically neutral. A post-structuralist approach instead calls for interpretive practices that are reflexive, context-sensitive, and attentive to the multiple discourses through which childhood and adolescent sexuality are constituted.¹²² Courts, as authorised sites of meaning-making, have the capacity to engage both dominant legal narratives and marginalised knowledges about adolescent experience, vulnerability and agency. In so doing, judicial interpretation can function not as a recovery of fixed meaning, but as a responsible and situated practice aimed at mitigating harm and advancing substantive justice.

The need to rethink how adolescent sexuality is understood is also evident beyond law. As Linders has observed, the moral panic about adolescents becoming too sexual and out of control, necessitating surveillance and restraint, is not caused by adolescents engaging in sex that is riskier than that of adults.¹²³ Rather, the problematisation of adolescent sexuality stems from dominant constructions of adolescence as a chaotic and risky period, constructions that serve to justify the surveillance and even criminalisation of normative sexual behaviours among young people.¹²⁴

The challenge, therefore, is not merely one of legal reform, but conceptual reorientation. Adolescence should be understood differently from dominant constructions that frame it as a period of risk, disorder and sexual danger. This requires a re-valuation of adolescence through shifts in the discourses that give it meaning, as the Committee on the Rights of the Child has advised in General Comment 20.¹²⁵

122 See C Smart *Feminism and the power of law* (1989); B Davies *A body of writing* (2000).

123 A Linders 'Deconstructing adolescence' in AL Cherry and others (eds) *International handbook on adolescent health and development: The public health response* (2016) 22.

124 A Powell *Sex, power and consent: Youth culture and the unwritten rules* (2010) 13.

125 Committee on the Rights of the Child (n 4) para 15.

The Committee emphasizes the importance of valuing adolescence and its associated characteristics as a positive developmental stage of childhood. It regrets the widespread negative characterization of adolescence leading to narrow problem-focused interventions and services, rather than a commitment to building optimum environments to guarantee the rights of adolescents and support the development of their physical, psychological, spiritual, social, emotional, cognitive, cultural and economic capacities.

In the Kenyan context, the case of *CKW v Attorney General & Another*¹²⁶ (*CKW*), a child appellant asked the Kenya High Court why consensual sex between minors is criminalised but not sex between adults. The Court responded that it was for the protection of children. This reasoning reflects the attitude that adolescents are a problematic group whose sexuality must be controlled through the criminalisation of their sexual conduct.

By contrast, in *Teddy Bear Clinic for Abused Children & Another v Minister of Justice and Constitutional Development & Another*¹²⁷ (*Teddy Bear Clinic*) the South African Constitutional Court considered a constitutional challenge to statutory provisions criminalising consensual sexual conduct between adolescents. The Court held that such indiscriminate criminalisation reflected a harmful attitude that constructed adolescents as problematic and in need of control. Instead, it affirmed adolescents' rights to dignity and privacy, finding that the criminal law should not be used to criminalise consensual sexual activity between children aged 12 to 15 years.

As a result, South Africa decriminalised such conduct, setting a progressive precedent grounded in constitutional values.¹²⁸ The legal reform also extended to consensual sexual activity between older adolescents (16 to 17 years) and younger adolescents (12 to 15 years), provided the age difference between partners is no more than two years.¹²⁹ Sexual conduct with anyone below the age of 12 is criminalised.

This decision is important because it shows how an authorised institutional actor, such as a constitutional court, can re-value adolescent

126 *CKW v Attorney General & Director of Public Prosecutions* 2014 eKLR, Petition 6 of 2013 (High Court of Kenya).

127 2014 (2) SA 168 (CC).

128 *Teddy Bear Clinic* (n 127).

129 Z Essack & J Toohey 'Unpacking the 2-year age-gap provision in relation to the decriminalisation of underage consensual sex in South Africa' (2018) 11 *South African Journal of Bioethics and Law* 85.

sexuality by assigning it a meaning different from that which previously dominated legal and social discourse. Adolescent sexuality is no longer constructed as the problem in itself; rather, the focus shifts to the negative ways in which it had been perceived, problematised and governed through fear and criminalisation. By rejecting the assumption that adolescent sexual desire is inherently dangerous or deviant, the Court demonstrated that alternative, less punitive understandings are both possible and legally legitimate, thereby unsettling dominant discourses of adolescent sexuality in the African region.

As I discussed earlier in this chapter, the predominant views about adolescent sexuality, represented by the views of the Court in *CKW*, are that adolescents are sexually incompetent, and that the threats of sexual harms such as STIs and pre-marital pregnancy necessitate limiting the sexual agency of children.¹³⁰ The reasoning of the *Teddy Bear Clinic* judgment, therefore, went against predominant views when the judgment proclaimed that criminalisation of sexual conduct between adolescents infringed on the sexual rights of adolescents.

Crucially, the South African Constitutional Court recognised that supporting adolescents requires more than the removal of punitive laws. It demands institutional and structural reforms, particularly within health and education systems, that acknowledge adolescent sexuality as a normal aspect of development, including adolescents' capacity to experience and reciprocate sexual desire. This recognition does not equate desire with harm or abuse; rather, it challenges dominant assumptions that treat adolescent desire as dangerous and justify its regulation through surveillance and criminalisation. Such an approach supports the provision of comprehensive sexuality education and mentoring to assist adolescents as their capacity for sexual decision-making evolves.

Taken together, these cases illustrate a broader pattern: The colonial and post-colonial age of consent laws in African countries have emphasised protection at the expense of support for sexuality development. The problem is that the age of consent provisions are interpreted to deny children and adolescents sexual agency. In *Charo*, the Court was interpreting the Kenyan age of consent law and, in the Court's opinion, the law meant that children below the age of 18 have no

130 Grant (n 109) 83; Linders (n 123) 22.

capacity for sexual conduct.¹³¹ The interpretation of the sexual offences law regulating sexual intercourse with children advanced in *Charo*, that a child is incapable of sexual desire, was congruent with earlier court decisions. For instance, in *Ezekiel Cheruiyot Koros v Republic*¹³² (*Koros*) the Court expressed the opinion that the Sexual Offences Act set the age of consent at 18 because 'a girl of under the age of 18 years is either not fully mature to consent to and/or engage in sexual intercourse and/or is too vulnerable and/or requires protection of the law from ... immoral sexual acts'.¹³³

The Courts affirm that the Kenyan Sexual Offences Act constructs a girl below 18 either as lacking the autonomy to consent to sex or as too vulnerable to engage in sex. Yet, the girl of 14 clearly expressed sexual desire as she voluntarily chose to go to the appellant's house to have sex. A child may have sexual agency at an age not recognised by law as capable of consenting to sex. This should not be taken to mean that there is something wrong with the child; rather, it reflects a legal framework that fails to accommodate the realities of adolescent sexuality. Further, it does not make the child undeserving of legal protection.

A similar dynamic is evident in Uganda, where the age of consent is set at 18.¹³⁴ Uganda explicitly criminalises sexual conduct between consenting adolescents. Parikh has shown how the law has been used by fathers to control who can sexually access their daughters. For instance, when the boyfriend is impecunious, the father threatens to report him to the police, but when the boyfriend has financial capacity, the father allows the boy or man to access the daughter sexually.¹³⁵ Parikh's study demonstrated how age of consent laws, based on the assumption

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

132 Criminal Appeal 5 of 2010 (High Court of Kenya).

133 *Koros* (n 132). The problem with the line of reasoning of the Court is that it views the child as non-sexual, and this leads to condemning a child who manifests any sexual behaviour. Instead, a child should be recognised as having the capacity to engage in sexual conduct and, because it is an evolving capacity, the child should be protected from abuse by unscrupulous older persons. Recognising that the child is sexual does not make her an adult.

134 Penal Code Act 1950 CAP 120 as amended in 2007 (Uganda) sec 129.

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

that children have no sexual desire, reinforce gender stereotypes that disempower children, especially girls.

The failure to recognise children's sexual agency potentially infringes on their sexual health and rights because, as the Court stated in *Teddy Bear Clinic*, children are denied support such as access to sexual healthcare services and information. Their autonomy is compromised because adults do not allow them to make decisions about their sexuality, for fear that the children would abuse sex or engage in risky sexual conduct. Children's privacy is compromised because adults, under the guise of protecting the child, especially the girl, interfere with the child's decisions about sexuality, for instance, about the choice of intimate friends. Furthermore, adolescents are shamed and disgraced for engaging in normal sexual conduct. However, the root of the problem is the adults' gendered conceptions of the sexuality of adolescents, and not the adolescents themselves. Blanket criminalisation of adolescent consensual sex, therefore, sustains these gendered conceptions and perpetuates the disempowerment of adolescents.

Returning to the situation in Malawi, in the 2015 Concluding Observations on Malawi, the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee) acknowledged the positive developments, including the enactment of the GEA. However, the Committee expressed concern about 'the persistence of discriminatory stereotypes and deep-rooted patriarchal attitudes regarding the roles and responsibilities of women and men in the family and in society'.¹³⁶ The CEDAW Committee recommended that Malawi put in place a comprehensive strategy to eliminate discriminatory practices regarding the roles and responsibilities of men and women in society. This counsel is pertinent to the stereotypes of the sexuality of children and adolescents expressed in age of consent laws.

Before concluding this part, I wish to reflect on how policy and law draw definitive lines around age of consent and adolescent sexuality. While *Teddy Bear Clinic* marked a progressive departure from punitive framings of adolescent sexual behaviour, lingering questions remain about the arbitrariness of the age distinctions the legislature preserves.

¹³⁶ Committee on the Elimination of Discrimination against Women Concluding Observations on the 7th periodic report of Malawi CEDAW/C/MWI/CO/7 (2015) para 20.

Why should a two-year difference between adolescents be permissible, but not two and a half years? What makes the age of 12 a threshold of incapacity and the age 16 one of sexual maturity? These bright-line rules give the impression of legal precision, but they ultimately expose the contingent and socially constructed nature of the very categories they seek to define.

According to post-structuralist theory, the law does not simply uncover pre-existing truth about childhood or sexuality. Instead, law is deeply implicated in the production of 'truth', and the regulation of bodies and desires through normative discourse. These legal boundaries for age and capacity are shaped not by neutral science but by social anxieties, cultural norms and political values. The power to fix meaning, to state what is legitimate desire and what is deviance, is always an exercise in subjectification, with real effects on how young people experience their bodies and their rights.

The law may never be entirely objective in such matters. What is required is first to recognise the law's constitutive role, and then to strive for legal and policy frameworks that are ethical, just, and attuned to the lived realities of children and adolescents. Against this conceptual background, the next part turns to the Malawian legal framework to examine how age of consent law has sought, often imperfectly, to balance the protection of children against coercion with respect for adolescents' emerging sexual autonomy.

5.2 Balancing sexual autonomy and protection against coercion

In the evolution of Malawi's Penal Code, the 2011 reforms of sections 138 and 160B set the age of consent at 16 and were ostensibly aimed at protecting girls from penetrative sexual intercourse and protecting children from sexual abuse.¹³⁷ However, these reforms also constructed children as sexually passive subjects, while imagining girls' bodies in particular as sites of potential abuse and harm. By disregarding children's sexual agency (the capacity to form, express and act on sexual preferences), the law produces conditions of disempowerment, premised on the expectation that children should be sexually inert. This reinforces gender-stereotypical norms that undermine children's rights. A child who

137 See n 79 to n 83.

is sexually knowledgeable is therefore ostracised, as was the girl in *Charo*, who was excluded from legal protection on precisely this basis.

When Malawi reformed section 138 of the Penal Code in 2023 and raised the age of consent to 18, the change might appear to be a progressive shift because it expands 'protection' from sexual access to a wider group of adolescents. However, such a move illustrates how legal change, justified in protective terms, can widen the regulatory reach of the state over adolescent bodies. Rather than signalling an evidence-based rethinking of adolescent development or sexual capacity, the reform reinscribes the idea that young people below 18 are inherently incapable of making sexual decisions. This reasserts a discourse of sexual vulnerability and incapacity, which paradoxically heightens the surveillance of adolescents at the very moment they may be seeking greater autonomy and intimacy. Such discourse operates not outside the law but through the law, reaffirming what Foucault described as the disciplinary techniques through which sexuality is regulated and populations are managed.¹³⁸

If, as Foucault argues, legal regimes do not simply uncover truth but actively produce it through discourse, then the question becomes not whether the age of consent is true or correct, but instead: What kind of subject does this legal framework produce and whose interests does it serve? In this sense, law functions as a mechanism for regulation – drawing arbitrary lines of permissibility and criminality that disproportionately discipline those whose sexualities do not conform to dominant norms. This calls for a more reflexive and justice-oriented approach to law-making.

This is not to suggest that adolescents should be left to navigate sexuality entirely on their own. To do so would be to abdicate the social and ethical responsibility of adults to support the development of young people. There are legitimate reasons to encourage a delaying sexual intercourse, including reducing the risks of unintended pregnancy and STIs.¹³⁹ However, as the courts in South Africa and Zimbabwe have

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

139 A-M Nobelius and others 'Delaying sexual debut amongst out-of-school youth in rural southwest Uganda' (2010) 12 *Culture, Health & Sexuality* 663. This article cites literature that shows that early sexual debut is associated with poor sexual and reproductive health outcomes in later life. However, this may not necessarily mean that delayed sexual debut has long-term benefits. See D Hollander 'Long-term benefits of delaying first sex appear to be limited' (2008) 40 *Perspectives on Sexual and Reproductive Health* 121.

advised, criminalisation of sexual conduct between consenting children or adolescents is not the most effective way of addressing unwanted and unsupported pregnancies of unmarried children or adolescents or to curb the spread of STIs.¹⁴⁰ Criminalisation entrenches stigma, denies agency and erases the diversity of adolescent sexual experience. A more constructive legal framework would aim not at punitive control, but at cultivating ethical responsibility, beginning with recognition of adolescents' evolving sexual agency.

The criminalisation of adolescent sexual conduct does more than impose punitive consequences. It performs a constitutive function by reinforcing dominant discourses that cast childhood and adolescent sexuality as dangerous, shameful or pathological.¹⁴¹ Within these regimes of truth, children and adolescents are not expected to express or experience desires that adults deem sexual. This normative silencing has undesirable implications: the withdrawal of adult support precisely when it is most needed.

Another consequence of criminalising normative conduct is victim blaming, when the failure to meet the ideal of sexual innocence disqualifies the child from being seen as a proper victim. A striking illustration is the *Charo* case. The Kenyan judge framed the adolescent girl as an 'adult woman' and deviant, thus setting the tone for a judgment that failed to hold the adult male fully accountable. Similarly, in *Gondwe*, the Malawian magistrate downplayed the complainant's experience of coercion and instead highlighted that she had gone looking for sex. Such judicial reasoning reflects and reproduces the cultural script in which girls who are sexually active or are perceived to be so are not recognised as deserving of protection.

This denial of support extends beyond the courts. Healthcare providers often refuse to offer adolescents access to contraceptives such as condoms, citing their age or presumed sexual ineligibility. Studies have

140 In *Teddy Bear Clinic* (n 124) para 97, Kampepe J was of the view that the state could pursue its aims to address the harms of sexual conduct, using less restrictive means than criminalisation of adolescents who engage in consensual sex. In *State v Masuku* (n 82) Tsanga J stated: 'To stem the dangers that arise for girls in particular from teenage sex, part of the answer would appear to lie in policy makers and society accepting the prevalence of youth sex and fashioning appropriate interventions. Availing contraceptive protection is one such intervention. A more rigorous and open approach to what is actually taught as sexual education in schools is another.'

141 Waites (n 60) 217.

documented how prevailing social norms about adolescent sexuality constrain young people's access to sexual and reproductive healthcare services.¹⁴² These refusals are not mere bureaucratic lapses but expressions of a moral and cultural logic that treats sexually active young people as problematic.

None of this suggests that criminal law has no place in regulating sexual conduct involving children. Children must be protected from coercive, exploitative or violent sexual experiences. The critical issue is how to strike a balance between protection and empowerment. One way of approaching this balance is through a sexual autonomy framework. Drawing on Schulhofer's conception of sexual autonomy as '[c]ore rights of the person to physical autonomy and to freedom of choice in matters of sexual intimacy',¹⁴³ this framework foregrounds consent and agency, rather than age alone, as the cornerstone of legal evaluation.

For Fischel, the problem with many age of consent laws is not its protective orientation, but the way protection is pursued in forms that foreclose the agency of those it claims to protect.¹⁴⁴ His proposed reforms, which include lowering the age of consent, decriminalising peer sex, codifying close-in-age provisions, and regulating sexual conduct in power-imbalanced relationships, are explored in the following sub-parts.¹⁴⁵

5.2.1 *Lowering the age of consent and decriminalising sex between minors*

Fischel argues for lowering the age of consent where it is set significantly above the age at which adolescent sexual activity commonly occurs.¹⁴⁶ For instance, the 2011 amendments in Malawi raised the age of consent from

142 LR Ninsiima and others 'Factors influencing access to and utilisation of youth-friendly sexual and reproductive health services in sub-Saharan Africa: A systematic review' (2021) 18 *Reproductive Health* 135; L Mashamba and others 'Barriers to the provision of youth-friendly services for adolescents living with HIV and AIDS' (2024) 13 *International Journal of Research in Business and Social Science* 177.

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

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

145 Fischel (n 144) 283.

146 Fischel (n 144) 301.

13 to 16. According to the Malawi Demographic and Health Survey (MDHS) 2016, 19 per cent of boys and 14 per cent of girls aged 15 to 24 reported having had sexual intercourse before age 15.¹⁴⁷ These figures suggest that a significant number of young people in Malawi engage in sex before age 16. The MDHS figures, however, do not indicate the ages of partners and, therefore, do not distinguish between peer sex and sex with much older partners. From a sexual autonomy perspective, lowering the age of consent and decriminalising sex between minors can better protect their choices.

Fischel argues that criminalising consensual sexual conduct between adolescents condemns the sex and not the coercion and, therefore, fails to protect young people's choices, desires and safety.¹⁴⁸ It makes it more difficult for young people to seek support and guidance regarding sex and sexuality.¹⁴⁹ What should be criminalised, therefore, is coercive sex and not sexual conduct *per se*.

Fischel's argument is in line with the reasoning of the CRC Committee in General Comment 20 where the Committee has stated that '[s]tates parties should take into account the need to balance protection and evolving capacities, and define an acceptable minimum age when determining the legal age for sexual consent. States should avoid criminalizing adolescents of similar ages for factually consensual and non-exploitative sexual activity.'¹⁵⁰

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

148 Fischel (n 144) 300.

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

150 Committee on the Rights of the Child (n 4) para 40. The concept of evolving capacities is articulated in art 4 of the CRC as follows: 'States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.' The African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (1990) art 9(2) specifies the following: 'Parents, and where applicable, legal guardians shall have a duty to provide guidance and direction in the exercise of these rights having regard to the evolving capacities, and best interests of the child.' Malawi has ratified both CRC and the African Children's Charter.

The CRC Committee also recognises the child's sexual autonomy and the right of the child to 'control one's health and body, including sexual and reproductive freedom to make responsible choices'¹⁵¹ as the child's capacity and maturity evolve. Setting the age of consent to sexual conduct too high increases the likelihood of infringing on the child's sexual autonomy. However, it should not be set too low either, to avoid exposing young children to coercive sexual conduct. The law should balance protection and nurturance of the child's evolving sexual autonomy. In practice, this should include explicit decriminalisation of consensual sex between adolescents alongside clear prohibitions in circumstances where the risk of harm is high.

It should also be borne in mind that coercion does not only occur across age differentials. Wagman and others' qualitative study in Rakai, Uganda, for instance, shows that adolescent girls often experience sexual coercion from boyfriends and peers.¹⁵² Coercion operated through emotional manipulation, social norms and transactional dynamics. Girls described unwanted sex occurring in contexts shaped by expectations of care, economic exchange and fear of rejection or violence. The study highlights that power in adolescent sexual encounters is exercised not only through age differentials, but through gender roles, material dependence and the affective need for belonging.

Similarly, a study by Selikow and others in Cape Town highlights how intense peer pressure among adolescents drives high-risk sexual behaviour, with young people conforming to harmful norms to gain acceptance or avoid social exclusion.¹⁵³ Both boys and girls were shown to exert pressure on their peers, and sexual activity was often framed as a condition for peer acceptance. These findings affirm that power in adolescent sexual relationships is exercised through multiple axes, not only age, but also gender, social norms, and promises of care, inclusion and identity. Such pressures can blur the line between consent and coercion, especially when

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

152 J Wagman and others 'Experiences of sexual coercion among adolescent women: Qualitative findings from Rakai District, Uganda' (2009) 24 *Journal of Interpersonal Violence* 2089-2093.

153 TA Selikow and others 'I am not "umqwayito": A qualitative study of peer pressure and sexual risk behaviour among young adolescents in Cape Town, South Africa' (2009) 37 *Scandinavian Journal of Public Health* 110-111.

adolescents ‘willingly’ engage in sex under the weight of relational or normative expectations.

Post-structuralist theory does not deny such complexities. Instead, it foregrounds them. Autonomy, from this perspective, is never absolute or disembedded; it is constituted through discourse, material conditions and social relationships. Therefore, protecting adolescent sexual autonomy does not mean ignoring the reality of coercion. It means refusing to treat coercion as a fixed or purely legal category and instead attending to how young people navigate competing discourses and structural constraints.

Criminal law alone cannot resolve these complexities. While law can and should play a role in prohibiting exploitative, coercive or violent sexual conduct, its limitations must be recognised to avoid misuse. Criminal law could reinforce stigma, silence the voices of children and adolescents on sexual matters, and criminalise normative expressions and experiences of sexuality. What is needed is a broader social ethic, one that provides adolescents with information, support and recognition of their emerging capacities.

Even adults experience varying degrees of coercion or manipulation in sexual relationships, shaped by material conditions, affective dependence and social approval. Adolescent sexual experiences must likewise be understood along a continuum of agency and structural constraint.

The issue, therefore, is not simply whether an adolescent is legally capable of consent, but how societies can ethically support young people to make informed, safe and respectful choices in their sexual lives. Criminal law can set boundaries, but it must be complemented by comprehensive sexuality education, access to healthcare services, and social environments that affirm the child’s sexual autonomy and agency in line with evolving capacities and maturity.

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

According to Fischel, close-in-age provisions are premised on two important ideas. First, it is not sex *per se* that should be criminalised, but coercion. Close-in-age provisions signal that there is nothing inherently wrong with sex between peers. Second, age difference can serve as a proxy for unequal power relations, with a wider age gap between the parties

increasing the likelihood of manipulation or coercion.¹⁵⁴ Close-in-age provisions, therefore, acknowledge that sexual conduct between peers is not intrinsically harmful, and that adolescents possess some degree of an evolving sexual agency. These provisions attempt to draw a boundary between mutually consensual sexual exploration and exploitative dynamics, particularly those that emerge when younger people, especially girls, engage with significantly older partners, often in contexts of economic or social dependence.¹⁵⁵

South Africa is one of several countries that have entrenched close-in-age exceptions. Malawi also introduced such provisions in 2023, as discussed above. However, even this progressive reform should not be mistaken for the discovery of a final truth. These legal interventions do not uncover pre-existing truths; rather, they produce them through legal, political and moral discourses, albeit informed by prevailing understandings of human physiological and psychological development. Close-in-age provisions are not reflections of moral certainty, but represent negotiated boundaries within the ongoing interplay of protection, regulation, and the contested meaning of sexual autonomy. These parameters are historically situated and may well shift in the future.

The close-in-age framework could be interrogated further. Why is age difference taken as the only, or primary, indicator of unequal power? Why not also attend to disparities in wealth, emotional maturity, gender socialisation, or normative sexual scripts that position boys as pursuers and girls as passive responders? These other forms of difference can just as easily shape coercion or pressure, even between adolescents who are close-in-age. Thus, while the age-span rule offers a pragmatic legal delineation, it may reinforce the illusion of age as a neutral indicator of vulnerability, concealing the social, cultural and discursive dynamics that structure adolescent sexuality. Addressing such complexities requires recognising children and adolescents as sexually agentic and involving them as fully as possible in shaping solutions aimed at fostering gender-equitable sexual relationships.

154 Fischel (n 144) 311.

155 As above.

5.2.3 *Regulating relationships of trust and dependence*

Fischel argues that age of consent laws should not stop at protecting adolescents when the age difference is wide, but should also centre on power disparities and the potential for abuse in relationships of trust and dependence.¹⁵⁶ This avoids the situation where, to protect the adolescent, the law must construct the adolescent as sexually incapable, inert or undesiring. Indeed, Fischel offers a powerful reconceptualisation of age of consent law, arguing that the problem lies not in young people's capacity to consent *per se*, but in relational contexts that make refusal unreasonable.¹⁵⁷

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

This approach respects the sexual autonomy of adolescents and recognises that they have an evolving capacity to make sexual choices. At the same time, it protects the adolescent from circumstances in which it is doubtful that meaningful choices could be exercised. Therefore, in relationships of trust and dependence, the young person's sexual agency is not erased. Rather, the law targets the conditions that make refusal unreasonable.

Applying Fischel's approach to the case of *Charo* exposes the limits of the Kenyan Court's reasoning. By treating a girl who sought sexual intercourse as a woman, the Court produced a 'child who is unlike a child' – a subject rendered undeserving of protection because she exercised desire. This reasoning illustrates how law can punish sexual agency rather than interrogate relational conditions of harm. An alternative approach would have recognised the child's agency while maintaining that protection attaches not to innocence, but to vulnerability within potentially harmful sexual relations.

Another application of Fischel's reasoning emerges in institutional settings such as orphanages or boarding schools, where adults exercise sustained authority over children's daily lives and emotional worlds.

156 Fischel (n 144) 315.

157 Fischel (n 144) 316.

In such contexts, grooming need not involve overt coercion, but may take the form of gradual normalisation of intimacy, selective care and emotional reliance, with sexual access deferred until formal adulthood. While criminal law can respond once abuse is alleged, this scenario illustrates how consent may appear legally intelligible yet remain deeply structured by dependency. Read through the lens of Fischel's framework, the harm lies not in the timing of sexual activity alone, but in the relational conditions that render refusal unreasonable long before any sexual act occurs.

5.3 Expanding the potential of the gender laws for children

Despite criticisms of the GEA for its limited inclusion of children and its framing of women and girls through normative gendered assumptions, the GEA nonetheless offers significant potential for advancing gender equality and the sexual and reproductive health and rights of children. As post-structuralist theorists have argued, laws are not neutral instruments but discursive sites through which meanings, subjectivities and power relations are constituted. The GEA, therefore, is neither inherently emancipatory, nor are its limits confined to its textual formulation; its potential lies in how it is interpreted, applied and mobilised in relation to other areas of law. When approached through a transformative, child rights-based lens, it may serve as a legal and discursive resource for reimagining childhood sexuality in less restrictive and more just ways.

5.3.1 *Protection from sexual violence*

As discussed in previous chapters, one of the prominent features of the GEA is its prohibition on conduct that undermines or harms the sexual development and dignity of children and young people. It prohibits sex discrimination,¹⁵⁸ harmful practices¹⁵⁹ and sexual harassment.¹⁶⁰ Sex discrimination could be interpreted to mean that a person should not be discriminated against because of sex. Malawi's section 138 of the Penal Code evolved in the right direction from discriminately protecting girls only, to protecting children regardless of gender.

158 Gender Equality Act 3 of 2013 (Malawi) sec 4.

159 Gender Equality Act (Malawi) (n 155) sec 5 as read with sec 3.

160 Gender Equality Act (Malawi) (n 155) sec 6.

However, gender inclusion in legal text does not necessarily translate into gender-equitable outcomes. The *CKW* case is illustrative: Although the reformed law is gender-inclusive in its wording, in practice only the boy was prosecuted. This outcome was shaped not by the letter of the law but by the normative assumptions underpinning its application, assumptions that rely on the male-sexual-drive discourse and cast girls as inherently passive and incapable of sexual agency. At the very least, a gender-inclusive law creates the legal grounds on which discriminatory applications, such as those seen in *CKW*, can be challenged.

In its Concluding Observations for Malawi in 2015, the CEDAW Committee expressed concern about harmful stereotypes.¹⁶¹ The elimination of harmful practices under the GEA should thus be interpreted broadly to include the dismantling of gendered sexual stereotypes – particularly those that construct girls as victims in need of control and boys as aggressors in need of punishment.

These stereotypes do not merely misrepresent reality; they actively harm children by denying them recognition as evolving sexual subjects. Constructing children as non-sexual subjects, and girls as inherently weaker or more vulnerable than boys, restricts children's autonomy, silences their experiences and justifies paternalistic control in the name of protection.¹⁶² A critical and rights-affirming implementation of the GEA could be used to challenge these discourses and reimagine law as a space for recognising children's evolving capacities, agency and rights to bodily integrity and decision making in matters relating to their sexuality.

5.3.2 Sexual health and well-being

The GEA makes a gesture of inclusion of young people, especially unmarried girls who have historically been marginalised, in access to sexual and reproductive health services. Section 20(a) obliges healthcare officers to respect the rights of every person without discrimination, while section 20(c) mandates the provision of services regardless of marital status or spousal accompaniment. These provisions, when read broadly, offer a discursive space for legitimising adolescents' claims to sexual

161 Committee on the Elimination of Discrimination against Women (n 133) para 20.

162 Cook & Cusack (n 13) 27.

healthcare services. They disrupt dominant legal and cultural narratives that tether sexual health to adulthood, marriage, or heteronormative respectability.

As discussed earlier, law operates not only through formal regulation but also through its constitutive effects on social norms and expectations. In the context of adolescent sexual health, these effects have often been constraining.¹⁶³ For instance, while setting the age of consent at 18 may appear protective, the continued criminalisation of consensual sexual conduct between adolescents entrenches a discourse of deviance around adolescent sexuality. Rather than fostering supportive engagement, it signals that adolescent sexual desire is dangerous and must be policed or suppressed.¹⁶⁴

Consequently, the legal framework shapes parental attitudes and professional practices in ways that foreclose adolescent access to care. Parents may regard contraceptive use as legitimising immoral behaviour, reinforcing the belief that ‘good’ girls do not anticipate or prepare for sex.¹⁶⁵ Health providers, caught in the same moral regime, may deny services to or shame adolescents, thus sustaining the silence and the stigma that often surround adolescent sexuality.¹⁶⁶ This reveals how law, even when seemingly neutral or inclusive, can re-inscribe dominant discourses that delegitimise young people’s sexual agency and undermine their access to care. Read through a child-rights and gender-transformative lens, however, the GEA can be mobilised to challenge these discourses by affirming adolescents’ entitlement to confidential, non-judgmental sexual and reproductive healthcare services, irrespective of marital status or perceived sexual respectability.

163 Waites (n 60) 217.

164 Evidence to Action Project ‘Evaluation of youth-friendly health services in Malawi’ (2014). The evaluation found that parents thought it was inappropriate for adolescents who are not married to access sexual healthcare services, and they thought that it encouraged promiscuity. Attitudes of healthcare providers were also negative about adolescents seeking sexual health services.

165 Evidence to Action Project (n 164) 185.

166 DL Mwakawanga and others ‘Would you offer contraception to a 14-year-old girl? Perspectives of health students and professionals in Dar es Salaam, Tanzania’ (2021) 18 *Reproductive Health* 245.

5.3.3 *Gender and sex education*

In conjunction with other modes of engaging young people, formal education remains a crucial site for shaping knowledge, attitudes and practices relating to gender and sexuality. The GEA mandates the state to ensure that school curricula at both primary and secondary levels integrate principles of gender equality and human rights.¹⁶⁷ It also provides that curricula should address the needs of female students through the inclusion of life skills and sex education.¹⁶⁸

As discussed above, by specifying that it is female students who require life skills and sex education, the GEA implicitly constructs girls as uniquely vulnerable and in need of protection, while leaving boys positioned outside the sphere of sexual risk or responsibility. This framing is underpinned by what Connell terms hegemonic masculinity – a dominant cultural narrative that legitimises the authority of certain forms of masculinity over others, and over femininities.¹⁶⁹ Hegemonic masculinity normalises male dominance and constructs boys as naturally assertive, sexually driven and emotionally detached, while positioning girls as passive, emotional and in need of guidance. These norms are not merely attitudes held by individuals; they are also discursively produced through institutions like law, education and the media.

Such constructions have material consequences. When boys are not seen as needing education in life skills and sexuality, they are left without critical tools to interrogate the scripts of power and control that they may internalise or enact in relationships. This perpetuates gender inequality and undermines the potential for mutual respect and consent in sexual encounters. Moreover, isolating girls as the gender in need of special moral or pedagogical attention may appear well-intentioned, but reinforces a view of female sexuality as a site of risk and shame, rather than of agency and pleasure.

A more ethical and effective interpretation of the GEA opens space for educational authorities and curriculum developers to provide comprehensive, inclusive sexuality education for all learners, regardless of gender. Such education should not only focus on biological or

167 Gender Equality Act (Malawi) (n 155) secs 18(1)(a) & (b).

168 Gender Equality Act (Malawi) (n 155) sec 18(1)(b).

169 RW Connell & JW Messerschmidt 'Hegemonic masculinity: Rethinking the concept' (2005) 19 *Gender & Society* 829.

preventive aspects, but should also address how gender discourses shape identities, relations and power. Post-structuralist insights emphasise that education is not a neutral transmission of knowledge but a technology of subjectification. Within such an interpretive frame, educators may be capacitated to facilitate resisting and disrupting dominant gender norms and to foster critical engagement with the ways in which gender and sexuality are constructed.

The significance of formal and informal educational approaches becomes particularly clear in institutional care settings, such as orphanages or boarding schools, where children's social worlds are tightly regulated and relationships of dependency are structurally intensified. Where sexuality is silenced, moralised or excluded from education altogether, children are left without the language or conceptual tools to recognise grooming by those in positions of authority, articulate boundaries including in relation to other students or distinguish care from exploitation. In such environments, abusive dynamics are not anomalous but foreseeable. Education, therefore, functions not merely as a supplement to criminal protection, but as a preventive condition: By recognising children as sexual subjects with evolving capacities, comprehensive sexuality education equips them to navigate intimacy, dependency and power in ways that reduce vulnerability to exploitation.

Training for educators and counsellors may include critical pedagogies that interrogate how gender and sexuality are constructed, how power operates in relationships, and how children are positioned and affected by these discourses. The GEA could thus be interpreted and implemented in ways that address consent to both protect and support the child's and adolescent's sexual autonomy.

6 Concluding thoughts

One of the communicative tools that becomes salient as children enter intimate relationships is consent to sexual intercourse. However, children cannot meaningfully appreciate consent if adults fail to treat them as possessing evolving capacities for sexual agency. Sex and gender laws, therefore, should construct children not merely as vulnerable beings to be protected, but also as subjects who will progressively engage in sexual relationships and who require supportive environments to do so.

In Malawi, the age of consent framework presents several challenges. The law sets the age of consent at 18. This may be too high insofar as it

discursively constructs all persons below that age as lacking the capacity to consent. In doing so, it sustains dominant meanings of childhood and adolescence that frame childhood as a period of sexual incompetence and immaturity and render adolescent expressions of sexual desire or agency as inappropriate or pathological.

These meanings are not historically indigenous to African legal systems. Rather, they were institutionalised through colonial legal regimes that introduced European age of consent doctrines and criminal law frameworks premised on universalised notions of childhood vulnerability, moral danger and protection. Colonial law, thus, reconfigured how childhood and sexuality were legally understood, transforming age into a rigid juridical threshold and adolescent sexuality into a site of criminalisation.

At the same time, pre-colonial African societies were not a 'golden age' of sexual freedom for children or girls. Colonial age of consent norms found resonance with existing patriarchal practices that regulated girls' sexuality through ideals of chastity, sexual purity and family honour, often in contexts where marriage occurred at a young age. Rather than displacing these practices, colonial law interacted with and formalised them, translating social controls over girls' sexuality into criminal law. From a post-structuralist perspective, the construction of children as sexually incompetent and irrational, therefore, is not a neutral assessment of capacity, but a discursive effect of power, comparable to feminist critiques of how women have historically been represented as lacking rational or moral autonomy. These constructions serve regulatory functions that constrain the possibilities for autonomy and self-definition.

Gender laws such as Malawi's GEA aim to positively influence gender relations and promote sexual health, including among children. However, as discussed above, the GEA often conceptualises children as sexually passive, and in need of protection from predatory masculinities. The state's preferred tool for managing sexual harm remains criminal law, which tends to reinforce binary gender roles and pathologise adolescent sexual conduct. Thus, despite its transformative intentions, the GEA, in relation to other areas of law, particularly criminal law, remains entangled in discursive traditions that limit its potential to challenge gender inequality.

Nonetheless, the law is a site of positive possibilities. Even as it constrains, it can be reinterpreted, contested and transformed. As argued in this chapter, the GEA and related sexual offences laws offer an opportunity for rethinking how the law constructs childhood and sexuality. Policy actors, educators and civil society can use such frameworks to advance reforms that align more closely with gender justice. In Kenya, for instance, the *Charo* and *CKW* cases ignited debates over age of consent laws and have led to calls for a legal framework that not only protects all children from harmful sexual conduct, but also recognises their capacity for sexual agency. What is required is not the abandonment of legal protection, but a shift in the underlying assumptions that structure such protection: a shift away from paternalism and towards ethical engagement with the realities of children's lives. In the next chapter, the discussion turns to the school, an important institution in many societies, where children learn and socialise, including about sexuality through both formal curricula and informal peer interactions.