

SUFFERING IN SILENCE: THE FAILURE OF MALAWI'S SEXUAL OFFENSE LAWS TO PROTECT CHILDREN—A HUMAN RIGHTS REPORT AND PROPOSED LEGISLATION

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ABSTRACT

Malawi has a duty to ensure that all Malawian boys and girls are protected from sexual violence and that justice is served on sexual abusers. Yet, sexual violence against children in Malawi is pervasive, and survivors face significant barriers in their quest for justice. The Constitution of Malawi and the country's legal obligations under various human rights treaties necessitate a detailed look at the gaps and inconsistencies in the laws that fuel rape culture and that grant impunity to sex offenders. Interview accounts by affected persons, children's and women's rights

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advocates, community leaders, and other stakeholders in Malawi also sound a chorus of voices calling for legislative change.

This article argues that the current Malawian laws on sexual offenses relating to children—namely the laws in the Penal Code on “defilement” (i.e., statutory rape), incest, and sex with minors under one’s care or protection—fail to protect adequately and equally all girls and boys under the age of 18 from sexual abuse and exploitation. Further, the law on statutory rape over-criminalizes sex between consenting teenagers, and the Child Care, Protection and Justice Act treats consensual teenage sex as a serious offense. This article proposes several key amendments to the Malawi Penal Code and the Child Care, Protection and Justice Act. If enacted, these amendments would help to align the protection of children with their rights guaranteed by the Constitution and international human rights treaties.

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INTRODUCTION AND EXECUTIVE SUMMARY

“It’s like you hear everyday something has happened.”¹

Sexual violence against children in Malawi is pervasive. A 2013 national survey on sexual violence against children found that one in every five young women and one in every seven young men had experienced at least one incident of sexual violence as a child.² This *Violence Against Children Survey* employed a wide-ranging definition of “sexual violence” to capture the full extent of the abuse and exploitation inflicted upon children. According to the survey, “sexual violence” included “sexual abuse” (i.e., physically forced sex, pressured sex, unwanted attempted sex, and unwanted sexual touching), “sexual exploitation” (giving money, favors, or gifts in exchange for sexual intercourse), and “non-contact sexual violence/exploitation” (e.g., child pornography).³ The survey also defined “sex” broadly to include vaginal, oral, or anal sex and the insertion of objects into a vagina or an anus.⁴ The survey findings confirmed the impression of children’s rights advocates and other stakeholders that sexual violence against children in Malawi is a serious problem.

¹ Interview by Allison Carlon with a professor, Malawi University of Science and Technology, in Limbe, Malawi (Mar. 12, 2020) (on file with the IWHRC).

² MINISTRY OF GENDER, CHILDREN, DISABILITY AND SOCIAL WELFARE OF THE REPUBLIC OF MALAWI, UNITED NATIONS CHILDREN’S FUND, THE CENTER FOR SOCIAL RESEARCH AT THE UNIVERSITY OF MALAWI, AND THE CENTERS FOR DISEASE CONTROL AND PREVENTION, *VIOLENCE AGAINST CHILDREN AND YOUNG WOMEN IN MALAWI: FINDINGS FROM A NATIONAL SURVEY 2013 23* (2014) [hereinafter *VIOLENCE AGAINST CHILDREN SURVEY*] (*accessible at* <https://www.togetherforgirls.org/malawi/> [<https://perma.cc/8NW6-YYZZ>]).

³ *Id.* at 17–18.

⁴ *Id.* at 18.

Furthermore, the results of the *Violence Against Children Survey* thrust the current laws on sexual offenses against children under a harsh spotlight. While the survey encompasses a comprehensive range of violent sexual acts and perpetrators against children, the current substantive laws—namely the Penal Code sections on “defilement” (an outdated and offensive term for a crime that is akin to statutory rape), incest, and sex with minors under one’s care or protection—fail to reach beyond a basic collection of sex acts committed by only certain perpetrators against only certain child victims. These laws must change.

This article examines the significant ways that the current substantive laws on statutory rape, incest, and sex with minors under one’s care or protection fall short of protecting all Malawian girls and boys from sexual violence. The scope of this article does not mirror the full scope of “sexual violence” as defined in the *Violence Against Children Survey*; this article focuses on the offenses in the Penal Code that cover penetrative sexual intercourse with children, and not on the broader array of sexual activity such as unwanted sexual touching or non-contact sexual violence. Thus, “sexual violence,” “sexual abuse,” and “sexual exploitation” as used in this article refer to acts involving vaginal, oral, or anal sex or the insertion of objects into a vagina or an anus (whether forced, induced, coerced, or gained through exploitation). In addition, this article examines the failure of the laws (both in the Penal Code and in the Child Care, Protection and Justice Act (“CCPJA”)) to respect the evolving capacities of teenagers, including their right to make decisions about sex.

Part I outlines the research and fact-finding processes that the International Women’s Human Rights Clinic (“IWHRC” or the “Clinic”) undertook, together with its partner—Women Lawyers Association of Malawi (“WLA Malawi”)—to prepare this article. Part II explains the legal framework of children’s rights, including the rights of girls and boys to equality and freedom from sexual violence. It outlines the obligations that Malawi has under international human rights treaties and its Constitution to implement these rights through legislation. Part III details the legislative gaps in the current sexual offense laws that violate the fundamental rights of Malawian girls. Girls in Malawi face sexual abuse and exploitation in all spheres of life, from all types of perpetrators, and in various forms. The current laws relating to sexual violence against female children offer incomplete coverage against this wide universe of threats. Part IV shines a light on Malawian boys, who are currently excluded from the protective umbrella of many of the sex offense laws entirely. As a result, their constitutional and treaty rights to equal protection, safety and

security, and health are grossly ignored. Part V focuses on the competing consideration of the statutory rape law, that is, respecting the evolving capacities of mature teenagers in developing a healthy and responsible sexuality. This section argues that the over-criminalization of consensual teenage sex does not serve the best interest of children, and parental and societal guidance better enables teenagers to make responsible decisions about sex than does criminal prosecution. Finally, Part VI outlines the legislative proposals to the Penal Code and the CCPJA. These proposals would enable Malawi to better protect children from sexual abuse and exploitation and uphold their fundamental rights.

I. METHODOLOGY

The International Women's Human Rights Clinic at Georgetown University Law Center, in partnership with WLA Malawi, collaborated on this article aimed at understanding the protection of children (or lack thereof) from sexual abuse and exploitation by adults under the sexual offense laws in Malawi. The Clinic faculty and student advocates reviewed the substantive laws contained in the Penal Code, primarily on statutory rape (known as "defilement"), incest, and sex with minors under one's care or protection.⁵ The Clinic faculty and student advocates also examined the treatment of consensual adolescent sex between peers under the Penal Code and the CCPJA.⁶

The Clinic faculty and student advocates conducted extensive research on the rights guaranteed by Malawi's Constitution, as well as the rights enshrined in various international and regional treaties to which Malawi is a State Party. To supplement their understanding of the global trends in legislation on these issues, the Clinic faculty and student advocates researched numerous comparative jurisdictions, primarily in sub-Saharan Africa, but also around the world. Through regular partner teleconferences with WLA Malawi, the Clinic faculty and student advocates discussed the application of existing laws and practices, as well as gaps where legislation fails to protect children from sexual abuse and exploitation by adults and fails to provide mature adolescents with the freedom to develop a healthy sexuality.

⁵ See Penal Code §§ 138, 157–58, 159A, amended by Act No. 24 (2012) (Malawi) (*accessible at* https://malawilii.org/mw/consolidated_legislation/701 [<https://perma.cc/P5HV-VYYM>]).

⁶ Child Care, Protection and Justice Act, No. 22 (2010) (Malawi), (*accessible at* <https://malawilii.org/mw/legislation/act/2010/7> [<https://perma.cc/V58D-EQTB>]).

From the 9th to the 13th of March 2020, the IWHRC team travelled to Malawi to conduct an intensive fact-finding investigation in Lilongwe, Blantyre, and Zomba.⁷ IWHRC faculty and student advocates interviewed over seventy stakeholders, including affected persons, community leaders, lawmakers, magistrates and judges, law enforcement personnel, government officials, women's and children's rights advocates, teachers, academics, health professionals, leaders of non-governmental organizations ("NGOs") and international organizations, and other experts.⁸ Lawyers and paralegals from WLA Malawi and Women and Law in Southern Africa–Malawi ("WLSA Malawi") accompanied the IWHRC team members and provided cultural support and translation services where needed.

This article draws on a combination of the IWHRC fact-finding interviews and extensive desk research to highlight the failures of Malawi's laws to protect children from sexual abuse and exploitation and to uphold the rights of mature adolescents to their evolving capacities for sexual decision-making.⁹ These failures violate Malawi's constitutional provisions that provide protections for children and its international and regional treaty obligations. This article also recommends key legislative amendments that would remedy these legal violations.

⁷ The Clinic faculty designed this mission in accordance with the International Human Rights Fact-Finding Guidelines (The Lund-London Guidelines) that were developed by the International Bar Association's Human Rights Institute and the Raoul Wallenberg Institute. *See generally* INT'L BAR ASS'N & RAOUL WALLENBERG INST., GUIDELINES ON INTERNATIONAL HUMAN RIGHTS FACT-FINDING VISITS AND REPORTS BY NON-GOVERNMENTAL ORGANISATIONS (THE LUND-LONDON GUIDELINES) (2009). The research protocol was approved by the Georgetown University Institutional Review Board ("IRB") and the Malawi National Committee on Research Ethics in Social Sciences and Humanities ("NCRSH").

⁸ To protect interviewees, Clinic faculty and student advocates implemented an extensive informed consent process. Interviewees were informed that no direct benefit would arise from their participation in the interview and no harm would come to them if they chose not to participate. Additionally, all interviews were conducted in private locations. Interview notes and audio recordings were stored on secured devices, separate from any identifying information of the interviewee. References to interviewees in this article comply with the precise descriptor approved by the interviewee, including some instances where the interviewee chose to be referred to by a pseudonym or "anonymous" rather than any specific identifier. References also comply with the NCRSH's request that no individual's name or identifying job title be used in the report. For those interviewees who requested during the informed consent process that researchers contact them prior to use in the final report, that approval was sought and received prior to researchers' use herein.

⁹ While the small number of interviews prohibits the researchers from drawing any conclusions regarding any statistical significance, the interviews provided extensive insight into—including first-hand accounts of—the realities on the ground.

II. THE RELEVANT LEGAL FRAMEWORK

*“[E]ach of the rights set out in the Bill of Rights under the Constitution and in international treaties is essential for the realization of men and women’s full spectrum of rights. Human rights must thus be understood to apply universally, to all people, at all times, in all places.”*¹⁰

— Malawi Law Commission

The Constitution of Malawi—the country’s supreme legal authority—declares all girls and boys who are under the age of eighteen to be children, and it grants to each of them a comprehensive set of human rights.¹¹ The constitutional bill of rights specifically guarantees that all children are entitled to live in “safety and security,”¹² to be protected from treatment that may “interfere with their education”¹³ or that may be “harmful to their health . . . or development,”¹⁴ to “equal treatment before the law,”¹⁵ and to have their best interests be “a primary consideration in all decisions affecting them.”¹⁶ In addition, the Constitution grants to every person, including child survivors of sexual abuse, the right of access to and

¹⁰ MALAWI L. COMM’N, REPORT OF THE LAW COMMISSION ON THE DEVELOPMENT OF THE GENDER EQUALITY ACT, Rep. No. 23, 18 (2011), (*accessible at* https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MWI/INT_CEDAW_ADR_MWI_19518_E.pdf [<https://perma.cc/Q2DN-V9G6>]).

¹¹ CONST. OF MALAWI May 18, 1994 (amended 2017) §§ 10(1) (“In the interpretation of all laws and in the resolution of political disputes the provisions of this Constitution shall be regarded as the supreme arbiter and ultimate source of authority.”), 11(1) (“Appropriate principles of interpretation of this Constitution shall be developed and employed by the courts to reflect the unique character and supreme status of this Constitution.”), and § 23(6) (“A child shall be a person under the age of eighteen years.”).

¹² *Id.* § 23(4) (“All children shall be entitled to reasonable maintenance from their parents, whether such parents are married, unmarried or divorced, and from their guardians; and, in addition, all children, and particularly orphans, children with disabilities and other children in situations of disadvantage shall be entitled to live in safety and security and, where appropriate, to State assistance.”).

¹³ *Id.* § 23(5)(b) (“Children are entitled to be protected from economic exploitation or any treatment, work or punishment that is, or is likely to . . . interfere with their education . . .”).

¹⁴ *Id.* § 23(5)(c) (“Children are entitled to be protected from economic exploitation or any treatment, work or punishment that is, or is likely to be harmful to their health or to their physical, mental or spiritual or social development.”).

¹⁵ *Id.* § 23(1) (“All children, regardless of the circumstances of their birth, are entitled to equal treatment before the law, and the best interests and welfare of children shall be a primary consideration in all decisions affecting them.”).

¹⁶ *Id.*

an effective remedy by a court of law for violations of his or her rights and freedoms.¹⁷

Each of these rights is also enshrined in the international and regional human rights treaties to which Malawi is a State Party. In particular, Malawi is a State Party to the Convention on the Rights of the Child (“CRC”)¹⁸ and the African Charter on the Rights and Welfare of the Child (“African Children’s Charter”)¹⁹—treaties that were incorporated into domestic law through the enactment of the CCPJA in 2010.²⁰ Malawi is also a State Party to the African Banjul Charter on Human and Peoples’ Rights (“Banjul Charter”),²¹ the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (“Maputo Protocol”),²² the International Covenant on Civil and Political Rights (“ICCPR”),²³ and the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”).²⁴ These treaties bind Malawi to undertake all appropriate measures, including adopting or amending legislation, to give effect to the rights protected therein.²⁵ In

¹⁷ *Id.* § 41(2)–(3).

¹⁸ Convention on the Rights of the Child, Nov. 20, 1989, U.N. Doc. A/44/49, 1577 U.N.T.S. 3 (acceded to by Malawi on Jan. 2, 1991) [hereinafter CRC].

¹⁹ African Charter on the Rights and Welfare of the Child, Nov. 29, 1999, OAU Doc. CAB/LEG/24.9/49 (ratified by Malawi on Sept. 16, 1999) [hereinafter African Children’s Charter].

²⁰ Child Care, Protection and Justice Act, No. 22 (2010) (Malawi) Third Schedule § 4(c).

²¹ African Charter on Human and Peoples’ Rights (Banjul Charter), June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (acceded to by Malawi on Nov. 17, 1989) [hereinafter Banjul Charter].

²² Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, July 11, 2003 (acceded to by Malawi on May 20, 2005) [hereinafter Maputo Protocol].

²³ International Covenant on Civil and Political Rights, Dec. 16, 1966, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (acceded to by Malawi on Dec. 22, 1993) [hereinafter ICCPR].

²⁴ Convention on the Elimination of All Forms of Discrimination against Women, Sept. 3, 1981, U.N. Doc. A/34/36 (1979), 1249 U.N.T.S. 13 (acceded to by Malawi on Mar. 12, 1987) [hereinafter CEDAW].

²⁵ *E.g.*, CRC, *supra* note 18, art. 4 (“States Parties shall undertake all appropriate legislative . . . and other measures for the implementation of the rights recognized in the present Convention.”); African Children’s Charter, *supra* note 19, art. 1(1) (“Member States of the Organization of African Unity Parties to the present Charter shall recognize the rights, freedoms and duties enshrined in this Charter and shall undertake to the necessary steps . . . to adopt such legislative or other measures as may be necessary to give effect to the provisions in this Charter.”); Maputo Protocol, *supra* note 22, art. 4(2) (“States Parties shall take appropriate and effective measures to . . . (b) adopt such other legislative . . . measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women . . .”); and CEDAW, *supra* note 24, art. 2(f) (“States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (f) to take all appropriate means, including legislation, to

addition, Section 135(a) of the Constitution gives the Law Commission “the powers to review and make recommendations regarding any matter pertaining to the laws of Malawi and their conformity with . . . applicable international law.”²⁶ Thus, Malawian children are legally entitled to be free from the threat of sexual abuse by adults, to see justice done to those who violate that freedom, and to the promotion of conditions that are conducive to their full development as healthy members of society.

The Malawian Parliament has made important strides in the past two decades to protect children from sexual abuse, including by bolstering the protections for children in the Penal Code chapters on sexual offenses, enacting the CCPJA and the Gender Equality Act,²⁷ and raising the age of majority in the Constitution to eighteen years old. However, these changes fall short of effectuating the full scope of the rights guaranteed to all boys and girls under Malawi’s constitutional and international law obligations. Many significant legislative gaps remain, and unless Parliament adopts legislative changes like those proposed in this article, survivors of child sexual abuse and exploitation will continue to suffer in silence.

III. THE LAWS ON STATUTORY RAPE, INCEST, AND SEX WITH MINORS UNDER ONE’S CARE OR PROTECTION FAIL TO PROTECT ALL MALAWIAN GIRLS ADEQUATELY FROM SEXUAL VIOLENCE

According to the *Violence Against Children Survey*, a national survey on sexual violence against children conducted by the Ministry of Gender, Children, Disability and Social Welfare, one in every five young women had experienced at least one incident of sexual abuse as a child.²⁸ The high prevalence of violence against women and girls in Malawi—which includes sexual violence and abuse²⁹—drew the attention and

modify or abolish existing laws . . . which constitute discrimination against women; [and] (g) to repeal all national penal provisions which constitute discrimination against women”)

²⁶ CONST. OF MALAWI May 18, 1994 (amended 2017) § 135(a).

²⁷ Gender Equality Act, No. 3 (2013) (Malawi) (*accessible at* <https://womenlawyersmalawi.files.wordpress.com/2017/06/gender-equality-act.pdf> [<https://perma.cc/Y6AM-MUYG>]).

²⁸ VIOLENCE AGAINST CHILDREN SURVEY, *supra* note 2, at 23. Note that the Violence Against Children Survey employs a broader definition of “sexual abuse” than the focus of this paper, which is primarily on penetrative sexual acts. The survey results do not break out in further statistical detail the kind of sexual abuse experienced by its respondents.

²⁹ G.A. Res. 48/104, Declaration on the Elimination of Violence against Women, art. 2(b) (Dec. 20, 1993) [hereinafter DEVAW] (“*Violence against women shall be understood to encompass, but not*

concern of the UN Committee on the Elimination of Discrimination against Women (“CEDAW Committee”) in 2010, and the CEDAW Committee urged Malawi to address all forms of violence against women.³⁰ Since then, the problem of sexual abuse against girl children has not abated. Of the 1,029 young women and girls surveyed in the *Violence Against Children Survey*, one third of the young women and girls who said that they had sex for the first time before they turned eighteen years old said that the sexual encounter was coerced or forced.³¹ And among the one-in-five young women who had experienced sexual abuse as a child, 68 percent had experienced sexual abuse as a child more than once.³²

The Principal Secretary to the Ministry of Gender, Children, Disability and Social Welfare, Dr. Mary Shawa, stated to the Committee on the Rights of the Child that the government survey had “revealed the magnitude of the problem.”³³ As a result of the survey’s findings, Dr. Shawa reported that the government had “reviewed a number of laws” and that “laws that were weak had been strengthened.”³⁴ However, the number of “defilement” and incest cases reported actually increased from 2013 to 2014.³⁵ Over 600 such cases were reported in 2014, compared to 254 in 2013.³⁶

The current laws on statutory rape, incest, and sex with minors under one’s care or protection still fail to protect girls of all ages from all types of sexual predators and from all kinds of sexually penetrative acts. Section 138 of the Penal Code, which criminalizes statutory rape (i.e.,

be limited to, the following: . . . physical, *sexual* and psychological *violence* occurring within the general community, *including rape, sexual abuse . . .*”) (emphasis added). DEVAW is considered a companion to CEDAW, to which Malawi is a State Party.

³⁰ Comm. on the Elimination of Discrimination against Women, *Concluding Observations: Malawi*, ¶ 23, U.N. Doc. CEDAW/C/MWI/CO/6 (Feb. 5, 2010).

³¹ VIOLENCE AGAINST CHILDREN SURVEY, *supra* note 2, at 23 (“The 2013 Violence against Children and Young Women Survey (VACS) Malawi is the first national survey of violence against children in the Republic of Malawi. Implemented in September and October of 2013, VACS Malawi is a nationally representative household survey of females and males 13 to 24 years of age that is based on a multi-stage cluster design that yields separate estimates of experiences of sexual, physical and emotional violence prior to age 18 years for both females and males in Malawi.”).

³² *Id.*

³³ Comm. on the Rts. of the Child, *Summary Record of the 2185th Meeting: Malawi*, ¶ 67, U.N. Doc. CRC/C/SR.2185 (Feb. 3, 2017).

³⁴ *Id.*

³⁵ Malawi, *List of Issues and Questions in Relation to the Seventh Periodic Report of Malawi: Addendum Replies of Malawi*, Table 2, U.N. Doc. CEDAW/C/MWI/Q/7/Add.1 (July 21, 2015) [hereinafter *Malawi Replies to CEDAW Committee Issues and Questions on 7th Report*].

³⁶ *Id.*

defilement), protects only girls who are under sixteen years old—and not sixteen- or seventeen-year-old girls—from the harms and consequences of sex.³⁷ Section 157 of the Penal Code criminalizes incest, but only between a girl and her father, grandfather, brother, son, or grandson,³⁸ leaving girls vulnerable to sexual abuse by uncles—a core family member in a typical Malawian family.³⁹ Finally, Section 159A of the Penal Code, which prohibits sex with minors under one’s care or protection, including stepdaughters, sets a penalty of up to only five years’ imprisonment—a fraction of the penalty as compared to the offenses of statutory rape and incest.⁴⁰ These provisions provide basic protections to girls against sexual abuse and exploitation, but there exist significant gaps in the laws.

A. THE CURRENT LAWS VIOLATE GIRLS’ RIGHTS TO SAFETY AND SECURITY

*“At the end of the day they suffer in silence.”*⁴¹

The African Children’s Charter obligates Malawi to protect all children from all forms of sexual exploitation and sexual abuse and “to prevent the inducement, coercion or encouragement of a child to engage in any sexual activity”⁴² The treaty also defines a child as a person under the age of eighteen without exception.⁴³ The Maputo Protocol also

³⁷ Penal Code § 138(1), *amended by* Act No. 24 (2012) (Malawi) (“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.”).

³⁸ *Id.* § 157(1) (“Any male person who has carnal knowledge of a female person, who is to his knowledge his grand-daughter, daughter, sister, mother or grandmother, shall be guilty of a felony and shall be liable to imprisonment for five years: provided that if it is alleged in the information or charge and proved that the female person is under the age of sixteen years, the offender shall be liable to imprisonment for life.”).

³⁹ *Id.* See *infra* note 78.

⁴⁰ Penal Code § 159A, *amended by* Act No. 24 (2012) (Malawi) (“Any person who has sexual intercourse with a person under the age of twenty-one years who (a) is the first mentioned person’s stepchild, foster child, dependent or ward; or (b) is, at the time of the intercourse, living with the first mentioned person as a member of that person’s family or is under that person’s care or protection, shall be guilty of an offense and shall be liable to imprisonment for five years.”).

⁴¹ Interview by Amy Uihlein with a manager, Youth Net and Counselling (YONECO), in Zomba, Malawi (Mar. 12, 2020) (on file with the IWHRC).

⁴² African Children’s Charter, *supra* note 19, art. 27(1) (“States Parties to the present Charter shall undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall in particular take measures to prevent: (a) the inducement, coercion or encouragement of a child to engage in any sexual activity”).

⁴³ *Id.* art. 2.

guarantees that every girl “shall be entitled to respect for her life and the integrity and security of her person.”⁴⁴

These rights have been incorporated into the Constitution—Malawi's supreme law. Section 23(4) of the Constitution guarantees that all children are entitled to live in safety and security, and Section 24(2)(a) guarantees that legislation shall be passed to eliminate sexual abuse.⁴⁵ However, these rights have not yet been fully implemented in the criminal code. The gaps and inconsistencies in the Penal Code provisions on statutory rape, incest, and sex with minors under one's care or protection violate girls' rights to safety and security as guaranteed by international law and the Constitution.

1. Girls aged sixteen and seventeen are outside the scope of protection of the statutory rape law, making them prime targets for sexual abuse and exploitation by adult men

Girls aged sixteen and seventeen are prime targets for sexual abuse and exploitation by adult men because they are not protected by the statutory rape law. The statutory rape law protects only girls under sixteen, and any person who has sex with a girl aged sixteen or older could be subject to only the rape law under Section 132.⁴⁶ This lack of protection by the statutory rape law exposes sixteen- and seventeen-year-old girls—considered to be “children” under the Constitution and nearly all of the relevant human rights treaties—to a significant risk of being sexually abused and exploited by adults.⁴⁷

Under the rape law, a prosecutor must prove (a) the identity of the assailant, (b) that there was sexual penetration, and (c) that the victim did not consent (or that the consent was obtained by force, threat, intimidation, or fear of harm).⁴⁸ By comparison, under the statutory rape law, a

⁴⁴ Maputo Protocol, *supra* note 22, art. 4(1).

⁴⁵ CONST. OF MALAWI May 18, 1994 (amended 2017) §§ 23(4), 24(2)(a).

⁴⁶ Penal Code § 138(1), *amended by* Act No. 24 (2012) (Malawi). But note that if the person was a family member or caregiver within the scope of Sections 157 and 159A, those criminal offenses may apply as well.

⁴⁷ It is not surprising, then, that women and girls in Malawi are most likely to experience sexual violence for the first time when they are between the ages of fifteen and nineteen. NAT'L STAT. OFF., MALAWI DEMOGRAPHIC AND HEALTH SURVEY 2010 244 (2011).

⁴⁸ Penal Code § 132 *amended by* Act No. 24 (2012) (Malawi) (“Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent if the consent is obtained by force or means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating

prosecutor need not prove lack of consent; any person who has sex with an underage girl is held liable for the crime (unless he reasonably believed that she was sixteen or older).⁴⁹ Thus, adult men can and do exploit the vulnerabilities of sixteen- and seventeen-year-old girls and coerce them into having sex. By not using force, threats, intimidation, or physical harm and by making it appear that the sixteen- or seventeen-year-old girl “consented,” these adults can avoid prosecution under both Sections 132 and 138.

Sixteen- and seventeen-year-old girls have many of the same vulnerabilities as younger girls with respect to sexual coercion. An officer at River of Life Organization, an NGO working to combat gender-based violence, explained that school is one of the most common places where girls are sexually abused. “You’ll find that a girl is being treated badly at primary [school] at a young age. She goes to secondary school [and] she faces the same problem. She is being sexually abused.”⁵⁰ In 2015, a group of civil society organizations in Malawi brought the issue of sexual abuse by teachers against girls to the attention of the CEDAW Committee. Their joint shadow report revealed that “male teachers force girls to have sexual relations with them on [the] condition that if they do not do so, they will be given a failing grade.”⁵¹ “It’s called ‘sexually-transmitted grades,’” said a professor at a university in Limbe, Malawi, “which means girls are forced to get into sexual relationships with . . . staff . . . or even senior students, and then they are promised they will be helped. For Malawi, it’s a big issue.”⁵²

Others spoke about the phenomenon of “sugar-daddies”—men who buy girls clothes or gifts in exchange for sex. A secondary school teacher explained that teenage girls may not always understand the exploitation inherent in these offers:

her husband, shall be guilty of the felony termed rape.”); *see also* *Mariette v. Republic* (1966) 4 Afr. L. Rep. 119, 127, 130 (High Ct.) (Malawi).

⁴⁹ Compare Penal Code § 132 (“carnal knowledge of a woman or girl, *without her consent*”) with Penal Code § 138 (“carnal knowledge of *any girl under the age of sixteen years*.”) (emphasis added).

⁵⁰ Interview by Amy Uihlein with an officer, River of Life Organization, in Phalombe, Malawi (Mar. 10, 2020) (on file with the IWHRC).

⁵¹ WOMEN & L. IN S. AFR. RSCH. & EDUC. TR. MALAWI & FAC. OF L., CHANCELLOR COLL., UNIV. OF MALAWI FOR MALAWI CSOS, UN CONVENTION ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (CEDAW) CSOS SHADOW REPORT FOR MALAWI 2015 (2015).

⁵² Interview by Allison Carlon with a professor, Malawi University of Science and Technology, *supra* note 1.

Sometimes, because of the issue of the lack of necessities, there is a need. The girl child needs to take care of herself in terms of buying some things like clothes, lotions and cosmetics. At times, people may take advantage of their needs, the likes of these girl-children. So, they may come and say, "I have money. If you want it, then you have to do this." So, being a girl, being a child, you may think that this is the best thing to get an instant thing that I want in my life.⁵³

A coordinator at the Centre for Alternatives for Victimized Women and Children explained that men with resources "have the power to influence girls."⁵⁴ "Sometimes, these young girls sleep with people on agreement. But then still that becomes rape because this particular influential person took advantage of this [girl]."⁵⁵ The process of sexual grooming can start with seemingly innocuous requests by a man to a vulnerable girl. "She is poor. Maybe they only manage a meal a day,"⁵⁶ the coordinator said. A man might ask a girl to sweep outside his house for 500 Kwacha (equivalent to around \$0.68) one day, and then ask her to wash his clothes the next day.⁵⁷ "That's how it starts. And then slowly, since there's this attachment, there's this relationship that's built with this particular person, slowly they start getting inside. Slowly they start . . . taking advantage."⁵⁸ A girl might not even realize that she has been taken advantage of, thinking that the man's advances are justified because "it's someone who supports my family."⁵⁹

A report by Pathfinder International, a sexual and reproductive health rights NGO, found that 66 percent of female adolescents in Malawi reported that they have had sex in exchange for money or gifts.⁶⁰ The report also indicated that "most sexually active adolescent females report having had their first sexual intercourse with a man older than them."⁶¹

⁵³ Interview by Darya Vakulenko with a secondary school teacher, in Lilongwe, Malawi (Mar. 9, 2020) (on file with the IWHRC).

⁵⁴ Interview by Mariame Dangnokho with a coordinator, Centre for Alternatives for Victimized Women and Children, in Blantyre, Malawi (Mar. 13, 2020) (on file with the IWHRC).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ ALISTER C. MUNTHALI, AGNES CHIMBIRI, & ELIYA ZULU, ADOLESCENT SEXUAL AND REPRODUCTIVE HEALTH IN MALAWI: A SYNTHESIS OF RESEARCH EVIDENCE 16 (2004) (citing PATHFINDER INT'L, ASSESSMENT OF YOUTH REPRODUCTIVE HEALTH NEEDS IN MALAWI (1998)).

⁶¹ *Id.*

That sixteen- and seventeen-year-old girls are not protected by the statutory rape law is problematic for bringing offenders to justice in two significant ways. First, many of the scenarios outlined above, while coercive, would likely not be legally sufficient to prove lack of consent under the rape law, which requires force, threats, intimidation, or fear of bodily harm.⁶² However, any significant gap in age, authority, and/or financial means between a girl and an adult offender is usually enough to render her powerless to reject his advances. A girl's supposed consent in these scenarios is not true consent. Second, even in clearly non-consensual situations, sixteen- and seventeen-year-old girls are less likely to receive justice because, under the rape law, prosecutors need to have independent evidence showing that the sixteen- or seventeen-year-old girl did not consent.⁶³ Such a burden puts this subset of girl children at a disadvantage in receiving justice from a criminal trial solely because of their age.⁶⁴ Under both of these scenarios, the statutory rape law fails to protect sixteen- and seventeen-year-old girls adequately from sexual abuse.

A retired magistrate of a Child Justice Court indicated that not only are these girls not protected adequately by the current law on statutory rape, they are specifically being targeted by sex predators because of the current law.⁶⁵ “What these ‘clever’ men have now done is to go for girls who are sixteen, seventeen” she said, “[b]ecause they know that once a girl accepts—consents to . . . sexual intercourse—there will be no offense against the man.”⁶⁶

Leaving sixteen- and seventeen-year-old girls outside the scope of protection of the statutory rape law violates Malawi's constitutional and treaty obligations to protect all girl children from sexual abuse.

⁶² Penal Code § 132, *amended by Act No. 24 (2012)* (Malawi).

⁶³ *See generally Mariette v. Republic* (1966) 4 Afr. L. Rep. 119, 127, 130 (High Ct.) (Malawi) (requiring corroborative evidence for all three elements of rape, including lack of consent).

⁶⁴ An executive of WLA Malawi noted an instance where a teacher who had sexually abused a sixteen-year-old girl was charged with rape, not defilement. “The rape charge is problematic because of the corroboration rule,” she said. Interview by Allison Carlson with an executive, WLA Malawi, in Lilongwe, Malawi (Mar. 8, 2020) (on file with the IWHRC).

⁶⁵ Interview by Darya Vakulenko with a retired magistrate of the Child Justice Court and executive of the Family Rights, Elderly and Child Protection (“FRECHIP”) Trust, in Malawi (Mar. 13, 2020) (on file with the IWHRC).

⁶⁶ *Id.*

2. *The legal defense to statutory rape sets a low bar for sexual abusers to escape criminal responsibility*

Under the Malawian law, a person accused of statutory rape is able to escape conviction if he can show that he believed a girl to be sixteen or older and that he had reasonable cause to believe so.⁶⁷ A defendant need not show that he was deceived as to the girl's age or even that he took any steps to ascertain it.⁶⁸ The vagueness and subjectivity inherent in such a standard lead to perpetrators exploiting the physical maturity of young girls or offering baseless theories to show why they believed she was of age. In a 2016 criminal appeal case, a nineteen-year-old man tried to rely on the assertion that he believed a fifteen-year-old girl was old enough to consent because "her vagina was big which meant that she was twenty-five years old."⁶⁹ While the defendant's reasoning was rejected by the court, the example still illustrates the significant risk that this defense presents in weakening the protections intended to be accorded to girl children by the statutory rape law.

A legal intern expressed her concern that adolescents these days tend to look older than they are. "But they are kids, nevertheless,"⁷⁰ she said:

I feel like it is this guy's responsibility to be sure, to be certain that this is a person of age. Since they are kids, it is not their responsibility to

⁶⁷ Penal Code § 138, *amended by* Act No. 24 (2012) (Malawi) ("Provided that it shall be a sufficient defense 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."); *Mitambo v. Republic* (2018) Crim. Case No. 5 of 2018 1, 2 (High Ct.) (Malawi).

⁶⁸ See *Hambeyani v. Republic* (2018) Crim. App. No. 19 of 2018 (High Ct.) (Malawi) (dismissing Appellant's appeal of a conviction of defilement because he had "clearly formed a view that the victim could be below 16 years" and stating, "[i]t could have been different had he told the court that he truly believed that she was above 16 years."); *Mitambo v. Republic* (2018) Crim. Case No. 5, at 2 (requiring only that a defendant demonstrate that he had reasonable cause to believe that the girl victim was sixteen or older).

⁶⁹ *Kamowa v. Republic* (2017) Crim. App. No. 12 of 2016 (High Ct.) (Malawi) at 5-6 (quoting the lower court: "The accused's reasonable belief is stemming from the fact that when he had sexual intercourse with PW1, he found out that her vagina was big and that meant that she was 25 years old. He did not bring any medical proof to show that a woman's vagina gets big as she grows older and you can ascertain the age of a woman by the size of her vagina." The lower court and the appellate court did not find his reasoning convincing.).

⁷⁰ Interview by Darya Vakulenko with a legal intern of a law firm, in Lilongwe, Malawi (Mar. 8, 2020) (on file with the IWHRC).

show you that I'm a kid. It is your responsibility to be sure that it is a kid you are dealing with. It should not be a defense.⁷¹

A State Advocate in Lilongwe added, "It's important in my opinion that any adult person who makes such advances on a girl should take reasonable steps to finding out . . . the age."⁷²

Aside from the statutory rape law, no other offense in either Chapter XV Offenses Against Morality or Chapter XVA Offenses Against Morality Relating to Children allows such a defense, expressly or otherwise. Section 160G provides that knowledge of age is immaterial to any of the offenses in Chapter XVA Offenses Against Morality Relating to Children.⁷³ Section 152 in Chapter XV Offenses Against Morality also provides that knowledge of age is generally immaterial with respect to those offenses that are committed against girls under a certain age, "except as otherwise expressly stated . . ."⁷⁴ The only other instance where such a defense used to be allowed (in Section 142 of the Penal Code relating to a homeowner who permits defilement of a girl on his premises) was amended in 2011 to eliminate the defense.⁷⁵ The reasonable belief defense in the statutory rape law stands out as an anomaly. And because the defense weakens the protections intended to be accorded to girls by the statutory rape law, it should be eliminated as well.

⁷¹ *Id.*

⁷² Interview by Mariame Dangnokho with a State Advocate, in Lilongwe, Malawi (Mar. 11, 2020) (on file with the IWHRC).

⁷³ Penal Code § 160G, *amended by Act No. 24 (2012) (Malawi)*.

⁷⁴ *Id.* § 152.

⁷⁵ Compare Penal Code § 142, *amended by Act No. 8 (1999) (Malawi)* (*accessible at* https://malawilii.org/system/files/consolidatedlegislation/701/penal_code_pdf_14611.pdf [<https://perma.cc/F32M-QQLW>]) (retaining the reasonable belief defense for an owner or occupier of a premise who induces or allows a girl to be "defiled" there), *with* Penal Code § 142, *amended by Act No. 24 (2012) (Malawi)* (imposing strict liability on such owner or occupier). The special Law Commission on Criminal Justice Reform "strongly felt" that the defense in Section 142 "weaken[ed] the protection intended to be accorded . . . against abuses of young girls." MALAWI L. COMM'N, LAW COMMISSION REPORT ON REVIEW OF THE PENAL CODE 38 (The Malawi Gazette Supplement, 2000).

3. *Fathers, stepfathers, and uncles are common perpetrators of sexual violence against girls, but gaps in the laws on incest and sex with minors under one's care or protection give girls unequal and inadequate protection from these perpetrators*

*"The threats are from within."*⁷⁶

The risk of a girl being sexually abused or exploited does not stop at her front door. According to the *Violence Against Children Survey*, nearly one in four young women who had experienced sexual abuse when they were children said that the experience took place in their own home or in the home of the perpetrator.⁷⁷ The family structure in Malawi often comprises an extended family network of parents, stepparents, aunts and uncles, cousins, and grandparents.⁷⁸ "When there are abuses, usually they are within such aspects [of family relationships],"⁷⁹ said a reproductive health officer in the Ministry of Health. "Those cases keep on increasing,"⁸⁰ said a member of the Southern African Litigation Centre. "Fathers are sleeping with their own children. Stepfathers are sleeping with their stepdaughters. Guardians are taking advantage of the children that they're looking after."⁸¹

The home is one of the most common areas where girls are sexually abused, confirmed an officer at River of Life Organization.⁸² "[M]ost of the young girls, they're not protected,"⁸³ he said. "Fathers,

⁷⁶ Interview by Amy Uihlein with a reproductive health officer, Ministry of Health, in Lilongwe, Malawi (Mar. 10, 2020) (on file with the IWHRC).

⁷⁷ VIOLENCE AGAINST CHILDREN SURVEY, *supra* note 2, at 24.

⁷⁸ Interview by Amy Uihlein with a reproductive health officer, Ministry of Health, *supra* note 76 ("In Malawi . . . we live sort of in extended families. Sometimes you may find maybe the wife living with [her] sister's daughter, or maybe the sister's son, or maybe brothers from her side, or similar, which the father can also live with the brothers or sons or daughters from his side as well."); Interview by Darya Vakulenko with a Program Officer, Every Girl in School Alliance, in Lilongwe, Malawi (Mar. 9, 2020) (on file with the IWHRC) ("What is common is for extended family situation in the house, where you would have an uncle or cousins living with you. Maybe someone needs help. Maybe someone had passed away and left children to be taken care of. I feel that this is very common.").

⁷⁹ Interview by Amy Uihlein with a reproductive health officer, Ministry of Health, *supra* note 76 (clarification added).

⁸⁰ Interview by Allison Carlon with a member of the Southern African Litigation Centre ("SALC") (Mar. 12, 2020) (on file with the IWHRC).

⁸¹ *Id.*

⁸² Interview by Amy Uihlein with an officer, River of Life Organization, *supra* note 50.

⁸³ *Id.*

stepfathers, uncles, . . . these are the first perpetrators.”⁸⁴ He recalled a recent case involving a two-year-old girl. “This uncle abducted [her],” he said, “he took her away to the maize field, defiled her, and brought her back home. It was during the night when the mother was cooking.”⁸⁵

In addition, “a large number of children are raped by their stepfathers,”⁸⁶ said a coordinator at the Centre for Alternatives for Victimized Women and Children. “Everyone I know has spoken about stepfathers,”⁸⁷ echoed an official at the Centre for Youth and Children’s Affairs in Lilongwe. “So many stepfathers. To the point where they are impregnating the stepdaughters.”⁸⁸ A manager at the Centre for Alternatives for Victimized Women and Children in Blantyre also spoke about a three-year-old girl who was in the care of her stepfather when the mother went to fetch water.⁸⁹ The man raped her, the manager said, adding that “when [the mother] came back, she found the baby bleeding and all that and then the man ran away. A few days later, the child passed away.”⁹⁰

Many incidents of sexual abuse are also based on financial coercion. A stepfather or an uncle who pays for a girl’s school fees or her meals—a common financial arrangement in Malawi—can force her to make an impossible choice: either to discontinue her education or to give in to his sexual advances. “Sex would be used to say, ‘If you don’t sleep with me, I’ll stop paying your school fees. I’ll stop helping you,’”⁹¹ explained the Malawi Country Director of an international organization focused on women and girls’ reproductive health. “You’ll know it’s wrong, but you are desperate. So, you would agree and say, ‘OK, because I’ll lose my livelihood.’”⁹²

The Penal Code does not protect all girls from uncles and stepfathers adequately or equally. Because the law on incest in Section

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Interview by Mariame Dangnokho with a coordinator, Centre for Alternatives for Victimized Women and Children, *supra* note 54.

⁸⁷ Interview by Darya Vakulenko with an official, Centre for Youth and Children’s Affairs, in Lilongwe, Malawi (Mar. 10, 2020) (on file with the IWHRC).

⁸⁸ *Id.*

⁸⁹ Interview by Allison Carlon with a manager, Centre for Alternatives for Victimized Women and Children, in Blantyre, Malawi (Mar. 13, 2020) (on file with the IWHRC).

⁹⁰ *Id.*

⁹¹ Interview by Mariame Dangnokho with the Malawi Country Director of an international organization focused on women and girls’ reproductive health, in Lilongwe, Malawi (Mar. 9, 2020) (on file with the IWHRC).

⁹² *Id.*

157(1) is an import of English criminal law, it fails to reflect the composition of a typical Malawian family that is based on extended relations. While a girl is protected from sexual advances by her biological father and grandfather, as well as her brother, she is not protected from sexual advances by her uncle under the incest law.⁹³ The incest law's punishment provisions also discriminate against girl children aged sixteen and seventeen. A father who has sex with his daughter who is under the age of sixteen would be liable to life imprisonment.⁹⁴ However, if his daughter were sixteen or seventeen years old, his penalty would drop to a mere five years' imprisonment.⁹⁵

Furthermore, Section 159A punishes any person who has sex with a minor (i.e., under the age of twenty-one) who is under his care or protection or who lives in his home as part of his family.⁹⁶ However, the penalty for having sex with this minor is a maximum of five years' imprisonment.⁹⁷ A girl of any age who is coerced or induced into having sex with a stepdad (or another guardian) under this section would see her abuser receive a mere fraction of the punishment he would receive under the offenses of statutory rape or incest. These legislative gaps expose girls to significant threats of sexual abuse within their own home environment, violating their rights to safety and security under the Constitution and international law.

4. *The laws on statutory rape and incest do not cover sexually penetrative acts besides penile penetration into a vagina*

Both the statutory rape law and the incest law prohibit the act of "carnal knowledge"⁹⁸—an antiquated and narrow term that means sexual

⁹³ See Penal Code § 157(1), amended by Act No. 24 (2012) (Malawi). While it is possible that such a case could be prosecuted under the offenses of statutory rape or rape, a prosecutor would need to prove that a girl was in fact under the age of sixteen (in the case of statutory rape) or that she did not consent (in the case of rape). In Malawi, it is not always easy to know the real age of a person. "The issue of birth certificates is an issue," said a safe motherhood advocate. Interview by Mariame Dangnokho with a safe motherhood advocate in Lilongwe, Malawi (Mar. 9, 2020) (on file with the IWHRC). In addition, the offense of rape requires a showing of lack of consent, or a showing that her consent was gained through force, intimidation, threats, or fear of bodily harm. Penal Code § 132. This, too, would present an issue in instances of induced or coerced sex.

⁹⁴ Penal Code § 157(1), amended by Act No. 24 (2012) (Malawi).

⁹⁵ See *id.*

⁹⁶ *Id.* § 159A.

⁹⁷ *Id.*

⁹⁸ *Id.* §§ 138(1), 157(1).

intercourse involving a penis and a vagina.⁹⁹ Whereas sexual intercourse involving a penis penetrating a vagina may be the most common form of penetrative sexual abuse against girls, it is not the only form. Sexual penetration using other parts of the body or using foreign objects do occur, and the consequences for girls—physically, emotionally, and mentally—who survive such an act can be similarly traumatic and severe. A Chief Resident Magistrate recounted hearing about a case of a three-month-old baby girl who was suspected of having been raped by her father. “From the examination at the hospital, it appeared like there was more to it than just using sexual objects,”¹⁰⁰ she said. “They thought he may have used other objects to penetrate the little one. And she was seriously injured. It even affected her brain.”¹⁰¹

Under the current law, however, such acts would not be considered “carnal knowledge” warranting a charge of defilement or incest; instead, they would likely be classified as “indecent assault,” a charge that carries a significantly lesser penalty of up to fourteen years’ imprisonment.¹⁰² Thus, criminal charges for these acts would either be downgraded from defilement or incest to a lesser offense or dismissed altogether at court. A retired magistrate of the Child Justice Court said that she once presided over a case involving a seventeen-year-old boy who forcefully inserted a piece of wood into the vagina of a four-year-old girl.¹⁰³ The girl tried to help the boy cover up his act and told her grandmother that she fell from a tree and landed on a piece of wood that the boy had been holding underneath her.¹⁰⁴ “The grandmother did not buy that,”¹⁰⁵ the interviewee said. “There were bruises. Blood was coming

⁹⁹ “Carnal knowledge” means the same thing as “sexual intercourse.” *Carnal Knowledge*, BLACK’S LAW DICTIONARY (11th ed. 2019). See also *Carnal Knowledge*, THE LAW DICTIONARY, <https://thelawdictionary.org/carnal-knowledge/> [<https://perma.cc/SA3R-KQFE>]. *Mariette v. Republic* (1966) 4 Afr. L. Rep. 119, 130 (High Ct.) (Malawi) (“[T]he burden rests upon the prosecution to establish penetration beyond all reasonable doubt, and penetration by the male sex organ, not merely by any part of the male body.”).

¹⁰⁰ Interview by Amy Uihlein with a Chief Resident Magistrate, in Malawi (Mar. 11, 2020) (on file with the IWHRC).

¹⁰¹ *Id.*

¹⁰² Penal Code § 137(1), *amended by* Act No. 24 (2012) (Malawi). “Indecent assault” has been interpreted by courts to mean “any behavior, talk, conduct that offends against accepted standard of decency or morality; or that which is obscene.” *Republic v. Zambia* (2008) Crim. Case No. 49 of 2007 1, 2 (High Ct.) (Malawi).

¹⁰³ Interview by Darya Vakulenko with a retired magistrate of the Child Justice Court and executive of the Family Rights, Elderly and Child Protection (“FRECHIP”) Trust, *supra* note 65.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

out.”¹⁰⁶ The medical report confirmed that there was penetration into her vagina, but there were no traces of semen—not surprising given that the girl was violated by a piece of wood, not a penis.¹⁰⁷ “My hands were tied,”¹⁰⁸ said the former Child Justice Magistrate about her ability to find the boy responsible within the narrow bounds of the offense. “It was not the male organ, but a piece of wood. I ended up acquitting the boy on the offense of defilement and he went free.”¹⁰⁹

In its *Guidelines on Combating Sexual Violence and Its Consequences in Africa*, the African Commission on Human and Peoples’ Rights instructed that “States must provide for penalties that are proportional to the seriousness of the act of sexual violence”¹¹⁰ and penalties must consider, among other things, “the seriousness of the physical or psychological damage caused by the attack.”¹¹¹ Reducing these types of penetrative sexual acts to mere assault is wholly disproportional to the physical, mental, and emotional harm inflicted on girls by these perpetrators. Thus, the failure of the Penal Code sections on statutory rape and incest to protect girls from this kind of sexual abuse is a violation of girls’ rights to safety and security.

B. THE CURRENT LAWS VIOLATE GIRLS’ RIGHTS TO HEALTH

Sexual violence can leave lasting scars on a girl’s body and psyche. And if a girl becomes pregnant as a result of sexual violence, she may suffer serious complications or even death from being pregnant too young or from having an unsafe abortion. In its General Recommendation No. 24 on *Women and Health*, the CEDAW Committee cautioned, “Girl children and adolescent girls are often vulnerable to sexual abuse by older men and family members, placing them at risk of physical and psychological harm and unwanted and early pregnancy.”¹¹²

The failure of the Malawian sexual offense laws to adequately protect girls from sexual violence is a violation of their right to health,

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ AFR. COMM’N ON HUM. & PEOPLES’ RTS., GUIDELINES ON COMBATING SEXUAL VIOLENCE AND ITS CONSEQUENCES IN AFRICA 36–37 (2017).

¹¹¹ *Id.* at 36.

¹¹² Comm. on the Elimination of Discrimination against Women, *General Recommendation No. 24, Women and Health*, ¶ 12(b), U.N. Doc. CEDAW/C/GC/24 (1999).

which is guaranteed by the African Children's Charter,¹¹³ CEDAW,¹¹⁴ the Maputo Protocol, the Banjul Charter,¹¹⁵ and the CRC.¹¹⁶ The African Children's Charter, in particular, guarantees that children "shall have the right to enjoy the best attainable state of physical, mental and spiritual health."¹¹⁷ The Maputo Protocol calls on Malawi to protect girls' right to health, including their sexual and reproductive health.¹¹⁸ The right to health under the Maputo Protocol expressly includes the right to "self-protection and to be protected against sexually transmitted infections, including HIV/AIDS."¹¹⁹ The Malawi Constitution further entitles children to be "protected from . . . any treatment . . . that is, or is likely to . . . be[,] harmful to their health or to their physical, mental or spiritual or social development."¹²⁰

1. Girls who have been sexually abused may suffer tremendous physical and psychological harm

According to the *Violence Against Children Survey*, young women who had suffered sexual abuse in their childhood were significantly more likely than those who had not to report having been drunk in the past thirty days,¹²¹ having suffered "moderate or serious mental distress" in the past thirty days,¹²² and having thought about killing themselves.¹²³ Also, in its Concluding Observations on Malawi's initial periodic report, the African Committee of Experts on the Rights and Welfare of the Child expressed deep concern with the "high rate of HIV

¹¹³ African Children's Charter, *supra* note 19, art. 14(1).

¹¹⁴ CEDAW, *supra* note 24, art. 12(1) ("States parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.").

¹¹⁵ Banjul Charter, *supra* note 21, art. 16(1) ("Every individual shall have the right to enjoy the best attainable state of physical and mental health.").

¹¹⁶ CRC, *supra* note 18, art. 24(1) ("States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.").

¹¹⁷ African Children's Charter, *supra* note 19, art. 14(1).

¹¹⁸ Maputo Protocol, *supra* note 22, art. 14(1).

¹¹⁹ *Id.* art. 14(1)(d).

¹²⁰ CONST. OF MALAWI May 18, 1994 (amended 2017) § 23(5)(c).

¹²¹ VIOLENCE AGAINST CHILDREN SURVEY, *supra* note 2, at 120 (14.9 percent versus 6.8 percent).

¹²² *Id.* (52.6 percent versus 33.1 percent).

¹²³ *Id.* (15 percent versus 6.4 percent).

infection” among fifteen- to seventeen-year-old children.¹²⁴ Indeed, girls aged thirteen to seventeen who were sexually abused in the past twelve months were significantly more likely to have a sexually transmitted infection than those who were not.¹²⁵ Additionally, one in ten young women who had experienced sexual abuse as a child reported having multiple sex partners in the past twelve months—a more than tenfold increase compared to young women with no history of child sex abuse.¹²⁶

2. *Early pregnancy is a significant risk factor for complications in pregnancy and childbirth*

Pregnancy and childbirth complications, together with HIV, are the leading causes of death for fifteen- to nineteen-year-old Malawian girls.¹²⁷ The country also has one of the highest maternal mortality rates in the world.¹²⁸ And, significantly, USAID reports that “[a]dolescent pregnancies comprise 29 percent of all births and 15 percent of maternal deaths” in Malawi.¹²⁹ Due to her physical immaturity, a girl who becomes pregnant and who is not developmentally ready to carry or deliver a baby might face significant health complications or even death. According to the UNFPA (the United Nations sexual and reproductive health agency), girls between the ages of fifteen and nineteen are twice as likely than older females to die during childbirth.¹³⁰

¹²⁴ Afr. Comm. of Experts on the Rts. and Welfare of the Child, *Concluding Observations and Recommendations by the ACERWC on the Initial Report of the Republic of Malawi on the Status of the Implementation of the African Charter on the Rights and Welfare of the Child*, ¶ 24 (Aug. 24, 2018), (accessible at <https://acerwc.africa/wp-content/uploads/2019/07/Malawi%20CO.pdf> [<https://perma.cc/4D97-XB54>]).

¹²⁵ VIOLENCE AGAINST CHILDREN SURVEY, *supra* note 2, at 122 (14.6 percent versus 3 percent).

¹²⁶ *Id.* at 136 (10 percent versus 0.8 percent).

¹²⁷ *Adolescent Pregnancy*, UNFPA MALAWI, <https://malawi.unfpa.org/en/topics/adolescent-pregnancy-2> [<https://perma.cc/JR4T-UV44>].

¹²⁸ WORLD HEALTH ORG. ET AL., TRENDS IN MATERNAL MORTALITY: 2000 TO 2017, 74 (2019). “Maternal mortality refers to the number of deaths due to complications from pregnancy or childbirth.” *Maternal Mortality*, UNICEF, <https://data.unicef.org/topic/maternal-health/maternal-mortality/> [<https://perma.cc/KSK6-ZJ9H>] (last viewed Mar. 21, 2021). In 2017, the maternal mortality rate for Malawi was 349 deaths per 100,000 live births. WORLD HEALTH ORG., at 73. For a comparison of maternal mortality figures by country as at 2017, refer to the downloadable data set provided by UNICEF. See *Maternal Mortality*.

¹²⁹ *Maternal, Neonatal, and Child Health*, USAID, <https://www.usaid.gov/malawi/global-health/maternal-neonatal-and-child-health> [<https://perma.cc/SC7F-Y8QR>] (last updated Jan. 8, 2021).

¹³⁰ *Adolescent Pregnancy*, *supra* note 127.

Pregnant girls aged ten to nineteen also face higher risks of eclampsia (seizures caused by high blood pressure), uterine infection, and systemic infection (infections affecting the entire body) compared to women aged twenty to twenty-four.¹³¹ Many adolescent girls in Malawi also suffer from undernutrition due to poverty and lack of resources, which compounds these risks.¹³² When a girl's pelvis is too small to deliver a baby without medical assistance, she may suffer an obstetric fistula—"an abnormal opening between a woman's genital tract and her urinary tract or rectum."¹³³ Such an injury might leave her with "devastating internal injuries,"¹³⁴ according to the UNFPA.

A Guttmacher Institute study reported that 68 percent of the admissions to the Queen Elizabeth Central Hospital gynecological ward in Blantyre, Malawi in 1994 were due to abortion complications.¹³⁵ Additionally, one-fifth of those patients were between the ages of ten and nineteen and young women accounted for more than half of the deaths due to abortion complications.¹³⁶ The failure of the sexual offenses laws to adequately and equally protect all girl children from sexual violence violates girls' rights to health under the Constitution and international law.

C. THE CURRENT LAWS VIOLATE GIRLS' RIGHTS TO EDUCATION

Sexual abuse against girls violates their rights to education and further entrenches them in a cycle of abuse and male subjugation. The right to education is guaranteed by Article 17(1) of the Banjul Charter,¹³⁷ Article

¹³¹ *Adolescent pregnancy*, WORLD HEALTH ORG. (Jan. 31, 2020), <https://www.who.int/news-room/fact-sheets/detail/adolescent-pregnancy> [<https://perma.cc/8GE5-UYTJ>].

¹³² WORLD BANK GRP., POLICY BRIEF: MALAWI 3 (2016), (*accessible at* <http://documents1.worldbank.org/curated/en/145971467995903427/pdf/106479-BRI-ADD-DOI-SERIES-PU-DATE-ABSTRACT-PUBLIC-adol-girls-in-malawi.pdf> [<https://perma.cc/AED8-9ZT7>]).

¹³³ *Obstetric fistula* WORLD HEALTH ORG. (Feb. 19, 2018), <https://www.who.int/news-room/facts-in-pictures/detail/10-facts-on-obstetric-fistula> [<https://perma.cc/89FT-H7AC>] ("Women who experience obstetric fistula suffer constant incontinence, shame, social segregation and health problems.").

¹³⁴ *Obstetric Fistula*, UNFPA MALAWI, <https://malawi.unfpa.org/en/topics/obstetric-fistula-2> [<https://perma.cc/ML79-8X5H>].

¹³⁵ ALAN GUTTMACHER INST., ADOLESCENTS IN MALAWI: SEXUAL AND REPRODUCTIVE HEALTH 2 (2005) (citing ALISTER C. MUNTHALI, AGNES CHIMBIRI, & ELIYA ZULU, ADOLESCENT SEXUAL AND REPRODUCTIVE HEALTH IN MALAWI: A SYNTHESIS OF RESEARCH EVIDENCE 16 (2004)).

¹³⁶ *Id.*

¹³⁷ Banjul Charter, *supra* note 21, art. 17(1) ("Every individual shall have the right to education.").

11(1) of the African Children's Charter,¹³⁸ Articles 12(1)(a) and (c) of the Maputo Protocol,¹³⁹ and Article 10 of CEDAW.¹⁴⁰ The African Commission on Human and Peoples' Rights has defined the scope of Article 17 to mean that States Parties must "ensure the safety of schoolchildren by taking effective measures to address . . . sexual abuse by other students, teachers, staff or principals."¹⁴¹ Malawi's Constitution also guarantees this right broadly, stating that "children are entitled to be protected from . . . any treatment . . . that is, or is likely to[,] . . . interfere with their education."¹⁴²

The abovementioned gaps in the laws, and the health impacts on girls as a result of sexual abuse, contribute to an unacceptably high dropout rate, as well as to negative interference with a girl's ability to concentrate in school. In the government's seventh periodic report to the CEDAW Committee in 2014, the Ministry of Gender, Children and Social Welfare reported that only 45 percent of schoolgirls made it from standard 1 to standard 8 (the last grade of primary school) for the 2010 reporting year.¹⁴³ Specifically, the report stated:

[W]hen girls reach standard 5 and a little beyond, they reach puberty and are often subjected to sexual harassment and assault both on their way to and from school as well as within the classroom walls from their male peers and teachers. This discourages the girls from continuing with school.¹⁴⁴

The report also cited early pregnancy as one of the main factors of this low retention rate.¹⁴⁵

¹³⁸ African Children's Charter, *supra* note 19, art. 11(1) ("Every child shall have the right to education.").

¹³⁹ Maputo Protocol, *supra* note 22, art. 12(1)(a), (c) ("States Parties shall take all appropriate measures to (c) protect . . . the girl-child from all forms of abuse, including sexual harassment in schools. . .").

¹⁴⁰ CEDAW, *supra* note 24, art. 10 ("States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education. . .").

¹⁴¹ Afr. Comm'n on Hum. and Peoples' Rts., *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights*, ¶ 71(q) (2011), (*accessible at* <https://www.achpr.org/legalinstruments/detail?id=30> [<https://perma.cc/CL7M-UMQB>]).

¹⁴² CONST. OF MALAWI May 18, 1994 (amended 2017) § 23(5)(b).

¹⁴³ Malawi, *Seventh Periodic Report of the States Parties*, ¶ 74, U.N. Doc. CEDAW/C/MWI/7 (July 15, 2014).

¹⁴⁴ *Id.* ¶ 77.

¹⁴⁵ *Id.* ¶ 76.

A primary school teacher in Blantyre spoke about some of the impacts of sexual abuse on a girl's education:

Someone who has been defiled, I don't think that one will concentrate in class. Not at all. And some time is wasted because they have to go somewhere to search for medical treatment . . . By that time, they are absenting themselves from lessons. She will be thinking of that—what happened—always. In the end, we see that particular girl failing exams.¹⁴⁶

A manager at the Centre for Alternatives for Victimized Women and Children added, "Some of them get pregnant and . . . they miss classes because they have to stay at home."¹⁴⁷

Early pregnancy and the threat of sexual abuse present significant obstacles to girls' education in Malawi. Education is also a fundamental human right that "affects the growth, development and welfare of human beings, particularly children and youth."¹⁴⁸ Thus, low educational attainment is both a cause and a consequence of sexual abuse against girls. The current laws on sexual abuse against children fail to uphold the right to education of Malawian girls, and they must be amended in order to stop this cycle of abuse.

IV. THE LAWS ON STATUTORY RAPE, INCEST, AND SEX WITH MINORS UNDER ONE'S CARE OR PROTECTION DO LITTLE TO PROTECT MALAWIAN BOYS FROM SEXUAL VIOLENCE AT THE HANDS OF FEMALE OFFENDERS

*"People don't consider what dangers exist for young boys."*¹⁴⁹

Sexual abuse against boys in Malawi is a serious problem.¹⁵⁰ The *Violence Against Children Survey* found that one in seven young men (out of 1,133 male persons surveyed) had experienced at least one incident of

¹⁴⁶ Interview by Mariame Dangnokho with a teacher, Michiru CCAP Mission School (a private primary school), in Blantyre, Malawi (Mar. 13, 2020) (on file with the IWHRC).

¹⁴⁷ Interview by Allison Carlon with a manager, Centre for Alternatives for Victimized Women and Children, *supra* note 89.

¹⁴⁸ Afr. Comm'n on Hum. and Peoples' Rts., *supra* note 141, ¶ 69.

¹⁴⁹ Interview by Allison Carlon with a high-ranking executive, Gender and Justice Unit, in Lilongwe, Malawi (Mar. 9, 2020) (on file with the IWHRC).

¹⁵⁰ VIOLENCE AGAINST CHILDREN SURVEY, *supra* note 2, at 22.

sexual abuse before he turned eighteen years old.¹⁵¹ And among those one-in-seven young men who had experienced sexual abuse as a child, 74 percent had experienced sexual abuse more than once.¹⁵²

Sexual abuse against boys in Malawi is grossly under-acknowledged, and male survivors of forced or unwanted sex often experience extreme shame and stigma due to their experiences. A Youth Advocate at Ending Violence Against Boys in Malawi explained that the misguided view that men and boys cannot be raped is pervasive in Malawi culture, and public reports of sexual abuse by male survivors is oftentimes met with resentment and disbelief: “That guy wasn’t raped! How can a man be raped? You should be thankful at least you got some.”¹⁵³ For this reason, “we have realized that boys don’t speak out,” she said; based on “the research that was done, only 6 percent reported or sought help.”¹⁵⁴ Many interviewees echoed the concern that the culture in Malawi does not encourage male survivors to report their experiences of sexual abuse. “There is this culture that the boy is the strongest,” said a legal intern of a law firm in Lilongwe; “the boy does not get emotional, the boy cannot suffer—it’s all a girl’s thing. That is holding us back [from] improving our law.”¹⁵⁵

These cultural norms and harmful stereotypes are codified in the law. The Penal Code provision on statutory rape, in stating that “[a]ny person who carnally knows any *girl* . . . shall be guilty of a felony . . . ,”¹⁵⁶ does not conceive of the possibility that a boy child could be a victim of the crime. Likewise, the Penal Code provision on incest states that “[a]ny *male* person who has carnal knowledge of a *female* person . . . shall be

¹⁵¹ *Id.* The Ministry interviewed 1,133 young men between the ages of 18 and 24. “Sexual abuse” was defined to include physically forced sex, pressured sex, unwanted attempted sex, and unwanted sexual touching. *Id.* at 17.

¹⁵² *Id.* at 23. The VIOLENCE AGAINST CHILDREN SURVEY also found that one in eight male respondents had experienced sexual abuse in the twelve months before the survey, and 80 percent of those survivors had also experienced sexual abuse on more than one occasion. *Id.* at 64.

¹⁵³ Interview by Mariame Dangnokho with a Youth Advocate, Ending Violence Against Boys in Malawi (Dream Regrowth Initiative), in Lilongwe, Malawi (Mar. 9, 2020) (on file with the IWHRC).

¹⁵⁴ *Id.*

¹⁵⁵ Interview by Darya Vakulenko with a legal intern of a law firm, *supra* note 70.

¹⁵⁶ Penal Code § 138(1), *amended by* Act No. 24 (2012) (Malawi) (emphasis added). “Even our term of ‘rape’ is something done to girls only. Men cannot be raped. And you’ll find that if a lady per se sexually assaults a young boy, she is charged with having sex with a minor—not raping, not assaulting, or anything. When most people sexually assault a young boy, in most cases they are just fined. They don’t go to jail.” Interview by Mariame Dangnokho with a Youth Advocate, Ending Violence Against Boys in Malawi (Dream Regrowth Initiative), *supra* note 153.

guilty of a felony”¹⁵⁷ Thus, a woman who forces or who coerces a boy child into having sex with her would not be treated as a sex offender by the criminal justice system; and a survivor of rape who happens to be a boy would receive no justice under the law. This legislative gap not only perpetuates the harmful stereotype that only male persons can be aggressors; it also blinds the judicial system and society at large to the prevalence and severity of sexual abuse committed against boys. It also violates the constitutional rights of boys, as well as the rights guaranteed to them under international law.

A. THE CURRENT LAWS VIOLATE BOYS’ RIGHTS TO EQUAL PROTECTION UNDER THE LAW

*“The rights for the girls and for the boys should be the same. The law should be seen as serving all equally.”*¹⁵⁸

Equality under the law and the prohibition of sex-based discrimination are guaranteed by nearly every treaty to which Malawi is a State Party. The ICCPR,¹⁵⁹ the Banjul Charter,¹⁶⁰ and CEDAW¹⁶¹ provide that the human rights contained in each of the treaties must be guaranteed without distinction of any kind, including sex. The CRC obligates Malawi

¹⁵⁷ Penal Code § 157(1) (emphasis added), *amended by* Act No. 24 (2012) (Malawi).

¹⁵⁸ Interview by Allison Carlon with a senior official, Centre for Human Rights Education, Advice and Assistance (“CHREAA”), in Blantyre, Malawi (Mar. 12, 2020) (on file with the IWHRC).

¹⁵⁹ ICCPR, *supra* note 23, art. 2(1) (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as . . . sex. . . .”); *id.* art. 3 (“The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.”); *id.* art. 24 (“Every child shall have, without any discrimination as to . . . sex . . . the right to such measures of protection as are required by his status as a minor, on the part of . . . the State.”); *id.* art. 26 (“All persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as . . . sex. . . .”).

¹⁶⁰ Banjul Charter, *supra* note 21, art. 2 (“Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as . . . sex. . . .”), *id.* art. 3(1) (“Every individual shall be equal before the law.”), *id.* art. 3(2) (“Every individual shall be entitled to equal protection of the law.”).

¹⁶¹ CEDAW, *supra* note 24, art. 15(1) (“States Parties shall accord to women equality with men before the law.”); *id.* art. 1 (“[T]he term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women . . . on a basis of equality of men and women, of human rights and fundamental freedoms. . . .”).

to uphold the rights therein “without discrimination of any kind, irrespective of the child’s . . . sex”¹⁶² Additionally, the African Children’s Charter requires that “every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child’s . . . sex”¹⁶³ The rights to equality and non-discrimination are also a bedrock of the Malawi Constitution. All boys and girls under the age of eighteen are entitled to equal treatment before the law,¹⁶⁴ and all persons are guaranteed equal and effective protection against discrimination on the basis of sex.¹⁶⁵

The Penal Code chapter on sexual offenses, enacted in 1930, views girls and boys through the lens of stereotypical and outdated notions of culpability and vulnerability, and it offers grossly unequal protection for boys as compared to girls with respect to some of the most heinous crimes—statutory rape and incest.¹⁶⁶ The legal protections that exist for girls, and that do not exist for boys, turn on distinctions made solely on the basis of sex.

1. The laws on statutory rape and incest do not recognize boys as victims of sexual abuse

The statutory rape law in Section 138 facially discriminates against boys by leaving them entirely outside the scope of the law.¹⁶⁷ Boys are not protected within the scope of Section 138, and there exists no mirror provision elsewhere in the Penal Code for the same act of adult women having sexual intercourse with boy children.

¹⁶² CRC, *supra* note 18, art. 2(1).

¹⁶³ African Children’s Charter, *supra* note 19, art. 3.

¹⁶⁴ CONST. OF MALAWI May 18, 1994 (amended 2017) § 23(1) (“All children, regardless of the circumstances of their birth, are entitled to equal treatment before the law, and the best interests and welfare of children shall be a primary consideration in all decisions affecting them.”).

¹⁶⁵ *Id.* § 20(1) (“Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition.”).

¹⁶⁶ Penal Code §§ 132–60, *amended by* Act No. 24 (2012) (Malawi). Chapter XV was amended in 2012 but the changes did not dismantle the discriminatory gender dynamics inherent in the offenses of defilement or incest.

¹⁶⁷ *Id.* § 138(1). The researchers note that the rape provision in Section 132 of the Penal Code discriminates against men in the same way that the statutory rape provision in Section 138 discriminates against boys. Although sexual abuse amongst adults (including against men) was not the focus of this article, the researchers note that the proposed legislative amendments that remedy the sex discrimination in the statutory rape law herein should be enacted for the rape law as well.

The incest provision in Section 157 also discriminates against boys because it assumes that a perpetrator of incest is always a male person and the victim of incest is always a female.¹⁶⁸ Female persons who are sixteen years or older and who consent to having sex with their male relative can be prosecuted for incest as well.¹⁶⁹ However, the law implies that her culpability stems from permitting the act of incest to be committed against her by a male relative. Therefore, while girls and women may or may not be prosecuted in a case of incest depending on whether they gave consent, boys and men are always prosecuted in a case of incest because the law does not recognize the possibility that they may have refused sex or been the victim of unwanted sex.

According to a Chief Resident Magistrate, the gender gap is problematic:

[W]e are hearing of cases these days where older women are forcing young children to have sex with them, and [boys], too, need protection. But . . . what is our background? Where are we coming from? We are coming from a situation where we are saying, “a man cannot be raped.” And the definition of rape itself does not include a man being raped. I think it is only a woman who can be “carnally known.”¹⁷⁰

“We do not recognize a female as an aggressive sexual offender,”¹⁷¹ confirmed a lawyer at the Ministry of Justice and Constitutional Affairs in Lilongwe. “At the time [the law] was developed, the view of our society was that these offenses were being perpetrated by a particular sex on a particular sex. Mostly we always recognize men—that they will be the one ‘raping.’ For the female offender, aggressive or not, we are only saying [that] they can ‘assault,’”¹⁷² he said.

¹⁶⁸ *Id.* § 157(1) (“Any male person who has carnal knowledge of a female person, who is to his knowledge his grand-daughter, daughter, sister, mother or grandmother, shall be guilty of a felony and shall be liable to imprisonment for five years.”).

¹⁶⁹ *Id.* § 158 (“Any female person of or above the age of sixteen years who with consent permits her grandfather, father, brother, son or grandson to have carnal knowledge of her (knowing him to be her grandfather, father, brother, son or grandson, as the case may be), shall be guilty of a felony and shall be liable to imprisonment for five years.”).

¹⁷⁰ Interview by Amy Uihlein with a Chief Resident Magistrate, *supra* note 100.

¹⁷¹ Interview by Amy Uihlein with a lawyer, Ministry of Justice and Constitutional Affairs, in Lilongwe, Malawi (Mar. 10, 2020) (on file with the IWHRC).

¹⁷² *Id.*

2. *Women who rape boys are charged with the lesser crime of indecent assault, and they serve significantly lighter sentences than do men who rape girls*

Any “rape” of a boy by an adult woman can only be prosecuted under Section 155 “Indecent Assault,” a crime that carries a significantly lighter sentence of up to only seven years imprisonment and is limited to assaults on boys under the age of fourteen years.¹⁷³ A Child Protection Officer at a One Stop Centre in a hospital recalled a case from 2016 where a magistrate dismissed the charges against a woman who had “defiled” a boy:

We had a case four years ago involving a certain woman who was sleeping with a minor. We lost that case at first because the prosecutor then had to charge the woman with “defilement.” But when we went to court, it was dismissed, because they said, upon [the] definition, it is this boy who raped. For “defilement,” there must be penetration. So, in this process, who penetrated whom? Men cannot be penetrated; it is women who can be penetrated. So, the charges were wrong.¹⁷⁴

A manager at YONECO recounted an instance where an adult woman was convicted of indecent assault for having sex with a young boy and was sentenced to seven years in prison—the statutory maximum for indecent assault but on the low end of sentencing for statutory rape.¹⁷⁵

A State Advocate working in Lilongwe also spoke of a case where a woman was charged with indecent assault for an act that, but for the gender gap in the statutory rape provision, would be considered statutory rape: “I think our legislature was only focusing on protecting the girl child. In doing so, they might have overlooked incidences where adult ladies would commit [these acts] against young boys. She was charged with indecent assault. But I am of the view that, if we are looking at the

¹⁷³ Penal Code § 155, *amended by* Act No. 24 (2012) (Malawi) (“Any person who unlawfully and indecently assaults a boy under the age of fourteen years shall be guilty of a felony and shall be liable to imprisonment for seven years.”).

¹⁷⁴ Interview by Amy Uihlein with a Child Protection Officer at a One Stop Centre in a hospital, in Malawi (Mar. 13, 2020) (on file with the IWHRC). The interviewee recalled that the magistrate said the prosecutor should have brought the charge under “indecent assault” in order for the woman to be prosecuted.

¹⁷⁵ Interview by Amy Uihlein with a manager, Youth Net and Counselling (YONECO), *supra* note 41.

seriousness of the offense, surely, we should have protected the boy child . . . because that's serious—defilement.”¹⁷⁶

As a result of the gender gap in the Penal Code, justice is not served equally for boys who are victims of sexual abuse by adult women. “With boys, it has been a problem to get proper support, proper justice,”¹⁷⁷ said an officer at River of Life Organization. “When it's a woman [who] has done that to a young boy, the woman gets a lesser sentence.”¹⁷⁸

A professional at an international organization working on women's and children's rights made this discrepancy crystal clear when she spoke about media reports of sexual abuse against boys versus girls. “[I]t is reported almost side-by-side sometimes,”¹⁷⁹ she said. She mentioned that she had seen cases recently where, “[I]t was a boy who was raped, and then in the same paper there was a girl who was raped. And, of course, [for] the boy, it was under indecent assault . . . [and] it was a matter of months was the sentence. Whereas for the girl, [the sentence] was in the years. But the impact on the child, of course, it's very similar. The police just don't have another choice though. The police can only work with what's there. So, that's one big gap.”¹⁸⁰

Interviewees from various sectors of society, including lawmakers, judges, magistrates, children's rights advocates, and community and religious leaders, agreed that the Penal Code should protect boys and girls equally. When asked whether the law should be changed to recognize boys as victims of statutory rape, a prosecutor at the Child Justice Court in Lilongwe said, “Yes . . . each and every child is not supposed to be discriminated [against]. If we are removing boys here, without any law that there can be defilement, . . . then it's unfair.”¹⁸¹ A professional at an international organization working on women's and children's rights spoke about the obsolescence of the current law, saying, “They're just old laws that don't reflect [the] current understanding. It's these cultural and social norms that are shifting over time and the law is

¹⁷⁶ Interview by Mariame Dangnokho with a State Advocate, *supra* note 72.

¹⁷⁷ Interview by Amy Uihlein with an officer, River of Life Organization, *supra* note 50.

¹⁷⁸ *Id.*

¹⁷⁹ Interview by Allison Carlon with a professional at an international organization working on women's and children's rights, in Lilongwe, Malawi (Mar. 11, 2020) (on file with the IWHRC).

¹⁸⁰ *Id.*

¹⁸¹ Interview by Allison Carlon with a prosecutor at the Child Justice Court and Inspector in the Malawi Police Service, in Malawi (Mar. 10, 2020) (on file with the IWHRC).

not keeping up with it. Obviously, it's not, because it's 2020."¹⁸² "There is constantly the argument that a boy cannot be defiled,"¹⁸³ said a high-ranking lawyer at the Ministry of Justice and Constitutional Affairs. "It will be a welcomed change."¹⁸⁴ A senior official at CHREAA said, "I can support that because I think, when it comes to rights, we should not isolate the rights. The rights for the girls and for the boys should be the same. The law should be seen as serving all equally."¹⁸⁵

The Committee on the Rights of the Child, in its General Comment No. 20 on the *Implementation of the Rights of the Child During Adolescence*, recognized that "[t]raditional concepts of masculinity and gender norms linked to violence and dominance can compromise boys' rights."¹⁸⁶ The Committee also urged States Parties, including Malawi, "to introduce measures to address such rights violations, and encourage[d] them to challenge negative perceptions of boys, promote positive masculinities, overcome cultural values based on machismo and promote greater recognition of the gender dimension of the abuses they experience."¹⁸⁷ A representative of UNFPA in Lilongwe stated that equality of rights in this area is important. "It helps people to unpack the vulnerability of the male. I think it's very, very important,"¹⁸⁸ she said. "You create the legal space for them to be able to admit their vulnerability and create the grievance mechanism for them to follow."¹⁸⁹

¹⁸² Interview by Allison Carlon with a professional at an international organization working on women's and children's rights, *supra* note 179.

¹⁸³ Interview by Amy Uihlein with a solicitor, Ministry of Justice and Constitutional Affairs, in Lilongwe, Malawi (Mar. 9, 2020) (on file with the IWHRC).

¹⁸⁴ *Id.*

¹⁸⁵ Interview by Allison Carlon with a senior official, Centre for Human Rights Education, Advice and Assistance ("CHREAA"), *supra* note 158.

¹⁸⁶ Comm. on the Rts. of the Child, *General Comment No. 20 (2016) on the Implementation of the Rights of the Child During Adolescence*, ¶ 29, U.N. Doc. CRC/C/GC/20 (Dec. 6, 2016) [hereinafter CRC GC 20], (accessible at https://www.ohchr.org/Documents/Issues/Women/WRGS/GenderDigital/CRC_2.pdf [<https://perma.cc/AS3B-5PS8>] [hereinafter CRC GC 20]).

¹⁸⁷ *Id.* ¶ 30.

¹⁸⁸ Interview by Amy Uihlein with a representative of UNFPA, in Lilongwe, Malawi (Mar. 10, 2020) (on file with the IWHRC).

¹⁸⁹ *Id.*

B. THE CURRENT LAWS VIOLATE BOYS' RIGHTS TO SAFETY AND SECURITY

*“As long as they are children, they should be given protection. Whether it is a girl or a boy, they are just as vulnerable.”*¹⁹⁰

Sexual abuse against boys is also a violation of their right to safety and security guaranteed by Malawi's Constitution¹⁹¹ and by Malawi's obligations under international law. The CEDAW Committee and the Committee on the Rights of the Child have issued a joint General Recommendation and General Comment stating that “the Committees recognize that boys are also the victims of violence, harmful practices and bias and that their rights must be addressed for their protection”¹⁹² The African Children's Charter requires Malawi to protect all boy children from “all forms of sexual exploitation and sexual abuse” and to “take measures to prevent the inducement, coercion or encouragement of a [boy] child to engage in any sexual activity.”¹⁹³

Interviews with stakeholders in Malawi reveal the extent and severity of sexual abuse against boys, namely, the threat of adult women who physically force or coerce boy children into having sex with them. A psychosocial counselor of survivors of sexual assault in Lilongwe recalled an instance where a two-year-old boy was raped by a housemaid. “She was there taking care of the child . . . when the mom [was] away,”¹⁹⁴ the counselor said. “She would tell the kid to sleep on her and then she would try to make [him] move up and down.”¹⁹⁵ The mother eventually noticed behavioral problems with her son and found that his penis had become

¹⁹⁰ Interview by Darya Vakulenko with a women's rights lawyer, in Lilongwe, Malawi (Mar. 9, 2020) (on file with the IWHRC).

¹⁹¹ CONST. OF MALAWI May 18, 1994 (amended 2017) § 23(4) (“[A]ll children . . . shall be entitled to live in safety and security. . .”).

¹⁹² Comm. on the Elimination of Discrimination against Women and the Comm. on the Rts. of the Child, *Joint General Recommendation No. 31/General Comment No. 18, Harmful Practices*, ¶ 4, U.N. Doc. CEDAW/C/GC/31-CRC/C/GC/18 (Nov. 14, 2014), (*accessible at* https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/GC/31/CRC/C/GC/18&Lang=en [<https://perma.cc/92VG-EUUM>])).

¹⁹³ African Children's Charter, *supra* note 19, art. 27(1)(a).

¹⁹⁴ Interview by Mariame Dangnokho with a psychosocial counselor of victims of sexual assault, in Lilongwe, Malawi (Mar. 9, 2020) (on file with the IWHRC).

¹⁹⁵ *Id.*

swollen, among other things.¹⁹⁶ “That’s when they decided to come to the hospital to get the treatment, because it seem[ed] like it wasn’t just once but most of the time,”¹⁹⁷ she said. By the time the family reported the matter, “this housemaid was already gone.”¹⁹⁸

Throughout the fact-finding week, interviewees recounted many stories they had heard of boy children being physically forced or coerced into having sex with adult women, dispelling the notion that sexual abuse is committed only by males against girl children. “Women *do* commit crimes,”¹⁹⁹ said a High Court judge. “And the reasons why women get away with a lot of crimes is [because] everybody perceives, ‘Oh no, it’s a woman. She can’t be that malicious.’ But they are! They *could* be that malicious!”²⁰⁰

A manager at YONECO, a child advocacy organization that runs a national hotline for reporting sexual abuse against children, spoke about a boy who was lured into the bedroom of one of his mother’s friends.²⁰¹ When he got there, she started caressing him and made him erect.²⁰² “Then the woman took him on her lap,” she said, “she sat on the bed, they started having sex, but then the boy was refusing because it was strange for him. But [] she had locked the door.”²⁰³ When he finally got away, he went directly to the police who took him to hospital for treatment.²⁰⁴ “The medical report indicated that . . . he had some bruises on his foreskin.”²⁰⁵ “Actually, there are a lot of boys who have been abused,”²⁰⁶ this manager added. “It’s only that maybe because we talk more about girls, but there are a lot of boys who are victims out there. In reality, they are facing the

¹⁹⁶ *Id.* (“For the mom to know that this child has been going through something, it’s because of how this child was behaving—just showed these up and down movements whenever the child [sat] on maybe any girl or any lady. He just showed those movements as if they [were] humping each other. The mom was like, ‘this is not appropriate.’ That was a behavioral problem that the mother noticed first.”).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Interview by Mariame Dangnokho with a High Court judge, in Malawi (Mar. 12, 2020) (on file with the IWHRC).

²⁰⁰ *Id.* (emphasis added).

²⁰¹ Interview by Amy Uihlein with a manager, Youth Net and Counselling (YONECO), *supra* note 41.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

same challenges that girls are facing, because they are brought up in the same society or in the same community. They are going through the same thing.”²⁰⁷

Older boys are also susceptible to manipulation and coercion by adult women to have sex. Much like adult men who induce girls to have sex with them in exchange for money or gifts, affluent women can and do entice adolescent boys to have sex with them. A sexual and reproductive health specialist at the University of Malawi College of Medicine explained that “these are affluent women and [they] can buy sex with the younger boys. [Boys] are being exploited because there is . . . an economic gap. The boy is a victim in this kind of relationship because there is a great level of enticement.”²⁰⁸

Some cultures in Malawi actively encourage young boys to have sex with adult women as part of their initiation into adulthood. In its most recent periodic review by the CEDAW Committee in 2015, the government was asked to indicate the measures taken to address “the practice of encouraging young boys to have sex with older women or young girls to become men”²⁰⁹ The government, in its replies to the CEDAW Committee, acknowledged that such an initiation rite is a “harmful practice” that is circumscribed by the newly enacted Gender Equality Act and the CCPJA.²¹⁰ Under the Gender Equality Act, any person who commits any “harmful practice,” which includes a social, cultural, or religious practice that results in sexual harm, is liable to a fine and to a five-year term of imprisonment.²¹¹ And under the CCPJA, any person who subjects a child to “a social or customary practice that is harmful to the health or general development of the child” is liable for a ten-year term of imprisonment.²¹² While these provisions add some

²⁰⁷ *Id.*

²⁰⁸ Interview by Amy Uihlein with a sexual and reproductive health specialist, Centre for Reproductive Health at the University of Malawi College of Medicine, in Blantyre, Malawi (Mar. 12, 2020) (on file with the IWHRC).

²⁰⁹ Comm. on the Elimination of Discrimination against Women, *List of Issues and Questions in Relation to the Seventh Periodic Report of Malawi*, ¶ 6, U.N. Doc. CEDAW/C/MWI/Q/7 (Mar. 16, 2015).

²¹⁰ *Malawi Replies to CEDAW Committee Issues and Questions on 7th Report*, *supra* note 35, ¶ 22.

²¹¹ Gender Equality Act, No. 3 § 5 (2013) (Malawi). Section 3(b) of the Act defines “harmful practice” to mean “a social, cultural, or religious practice which, on account of sex, gender or marital status, does or is likely to . . . result in . . . sexual . . . harm to any person. . . .”

²¹² Child Care, Protection and Justice Act, No. 22 §§ 80, 83 (2010) (Malawi). *See also id.* § 23(1)(b) (allowing authorities to take a child who is suspected of being sexually abused at the hands of a parent or guardian into custody).

measure of protection for some boy children who might be victims of sexual abuse because of cultural and traditional initiation rites, they in no way remedy the large gap in the Penal Code, which does not protect boys from all forms of sexual abuse committed by women.²¹³

The gender gap in the Penal Code's provisions on statutory rape and incest not only fails to protect boy children from sexual abuse, it also perpetuates the stereotype that boys can never be victims of sexual offenses. As a High Court judge stated, because both crimes are gender-specific and only protect girls, "You don't get rape of a boy, which we know happens. We don't get defilement of a boy, which we know happens. My biggest problem is our Penal Code is not gender sensitive and it does not take into consideration boy children."²¹⁴ This legislative gender gap violates boys' rights to safety and security and to be free from sexual abuse and exploitation.

C. THE CURRENT LAWS VIOLATE BOYS' RIGHTS TO HEALTH

*"It is like [the] rights of the young boys do not matter at all."*²¹⁵

Sexual abuse against boys is a violation of their constitutional right to be protected from "any treatment . . . that is, or is likely to . . . be harmful to their health or to their physical [or] mental . . . development."²¹⁶ The encouragement and promotion, including by enacting legislation, of conditions that are conducive to children's full development as "healthy, productive and responsible members of society" is a principle of national policy.²¹⁷ The right to health for boy children is also guaranteed under the

²¹³ The Child Care, Protection and Justice Act is additionally limited in its protection of boy children because it still defines "child" to mean a person under the age of sixteen. While the High Court has found this definition unconstitutional, no amendment to the statute has been enacted to date. *Id.* § 2.

²¹⁴ Interview by Mariame Dangnokho with a High Court judge, *supra* note 199.

²¹⁵ Interview by Darya Vakulenko with a legal intern of a law firm, *supra* note 70.

²¹⁶ CONST. OF MALAWI May 18, 1994 (amended 2017) § 23(5)(c).

²¹⁷ *Id.* § 13(h) ("The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals—[. . .] to encourage and promote conditions conducive to the full development of healthy, productive and responsible members of society.").

African Children’s Charter²¹⁸ and the CRC.²¹⁹ The Committee on the Rights of the Child views children’s right to health as an “inclusive right,”²²⁰ meaning that the right encompasses not only preventative, curative, and rehabilitative health services but also “the implementation of programs that address the underlying determinants of health.”²²¹ In its General Comment No. 15 on *The Right of the Child to the Highest Attainable Standard of Health*, the Committee stated that “gender-based discrimination is particularly pervasive” and States Parties must be mindful of the “gender-based practices . . . that are ingrained in traditions and customs and undermine the right to health of . . . boys.”²²²

Sexual abuse of boys results in severe and long-lasting negative health outcomes, including thoughts of suicide, thoughts of self-harm, mental distress, the contraction of STIs, and drug and alcohol abuse.²²³ According to the *Violence Against Children Survey*, nearly one out of every seven boys aged thirteen to seventeen who had experienced sexual abuse in the past year had thought of intentionally hurting himself, and one out of every sixteen boys in the same situation had thought of committing suicide.²²⁴ In addition, 65.5 percent of young men who had experienced childhood sexual abuse had recently experienced moderate or serious mental distress.²²⁵ These figures represent significant increases compared to boys and young men who had not experienced sexual abuse in their childhood.²²⁶

The gender gaps in the Penal Code provisions on statutory rape and incest contribute to the shroud of silence around boys’ pain and vulnerabilities. “Some of them can [feel] isolation from the social world,”

²¹⁸ African Children’s Charter, *supra* note 19, art. 14(1) (“Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.”).

²¹⁹ CRC, *supra* note 18, art. 24(1) (“States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health. . .”).

²²⁰ Comm. on the Rts. of the Child, *General Comment No. 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health*, ¶ 3, U.N. Doc. CRC/C/GC/15 (Apr. 17, 2013).

²²¹ *Id.*

²²² *Id.* ¶ 9.

²²³ VIOLENCE AGAINST CHILDREN SURVEY, *supra* note 2, at 118–23.

²²⁴ *Id.* at 123 (compared to one out of twenty boys who did not experience sexual abuse in the past year who has thought of intentionally hurting himself, and one out of nearly 100 boys in the same situation who has thought of committing suicide).

²²⁵ *Id.* at 121 (compared to 33.3 percent of young men who did not experience sexual abuse in their childhood).

²²⁶ *See id.* at 118–23.

said a psychosocial counselor of victims of sexual abuse in Lilongwe.²²⁷ “They feel weak, easily startled, like you can tell they don’t want to be talked to; they wouldn’t want to be known. Even to tell their parents that, ‘I’ve been raped’ or ‘I’ve been defiled,’ it’s never easy for them.”²²⁸ A Youth Advocate for Ending Violence Against Boys in Malawi spoke about a friend who was sexually assaulted by his older girlfriend.²²⁹ “He couldn’t say anything because ‘men don’t get raped, men don’t get sexually assaulted,’”²³⁰ she explained. “He is afraid of being in a confined space. He spent almost three months before getting out of the house. He is traumatized.”²³¹

The pain and suffering that boys feel usually do not come to light until the situation becomes dire. A reproductive health officer in the Ministry of Health spoke about a twelve-year-old boy who had been living with his widowed aunt who was in her forties.²³² In the course of living together, “they started to have, to her—she said it was a ‘relationship.’”²³³ The boy contracted an STI from the aunt and got very sick.²³⁴ He was “actually discharging pus,” the reproductive health officer said.²³⁵ “The challenge that we normally meet is that males do not report because [there is] social stigma around it, so they just remain quiet,”²³⁶ he explained. “These cases are common, and it is unfortunate that the law does not cover that,”²³⁷ he added. A manager at the Centre for Alternatives for Victimized Women and Children explained that, in many cases, people will tell stories in “WhatsApp chats and all that . . . where maybe their nannies or their maids have been trained to do that to the children and people will testify how they thought it was normal until they grew up and that started affecting them.”²³⁸ “Everybody needs protection,”²³⁹ she added.

²²⁷ Interview by Mariame Dangnokho with a psychosocial counselor of victims of sexual assault, *supra* note 194.

²²⁸ *Id.*

²²⁹ Interview by Mariame Dangnokho with a Youth Advocate, Ending Violence Against Boys in Malawi (Dream Regrowth Initiative), *supra* note 153.

²³⁰ *Id.*

²³¹ *Id.*

²³² Interview by Amy Uihlein with a reproductive health officer, Ministry of Health, *supra* note 76.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ Interview by Allison Carlon with a manager, Centre for Alternatives for Victimized Women and Children, *supra* note 89.

²³⁹ *Id.*

The legislative gender gap in Malawi's sexual offenses laws therefore ignores the harmful impacts on boys' health and violates their rights under international law and the Constitution.

V. THE OVER-CRIMINALIZATION OF CONSENSUAL TEENAGE SEX DOES NOT SERVE CHILDREN'S BEST INTERESTS

Prior parts of this article have focused on protecting all children from sexual abuse and exploitation by adults. While raising the age of consent from sixteen years to eighteen years in the statutory rape law is necessary to uphold the government's obligations to protect all children from such harms, any legislative change must also avoid an over-criminalization of factually consensual sex between adolescent peers.

The current statutory rape law makes it a crime for any person to have sex with a girl who is under the age of sixteen.²⁴⁰ Under the law, therefore, a teenage boy who has factually consensual sex with his fifteen-year-old girlfriend could be arrested for the same crime as a grown man who exploits the same girl for sex. Although the CCPJA prohibits the imprisonment of children,²⁴¹ the law treats statutory rape as a "serious offense" and children and minors who are arrested for that crime may not be diverted away from the criminal system.²⁴² Thus, raising the age of consent to eighteen, without adding an appropriate legal safe harbor, will exacerbate this problem because it will put more teenagers at risk of criminal responsibility.²⁴³

The African Committee of Experts on the Rights and Welfare of the Child, in a 2017 Joint General Comment with the African Commission on Human and Peoples' Rights, recognized that older teenagers may have the emotional maturity to make decisions about their lives, including the decision to have sex.²⁴⁴ The Committee on the Rights of the Child

²⁴⁰ Penal Code § 138(1), amended by Act No. 24 (2012) (Malawi).

²⁴¹ Child Care, Protection and Justice Act, No. 22 § 140 (2010) (Malawi).

²⁴² See *infra* notes 263, 264.

²⁴³ The proposed changes outlined in Part VI of this article, which make the statutory rape provision gender neutral, would also expose girls to criminal responsibility. Therefore, without a legal safe harbor, both boys and girls could become in conflict with the law for having factually consensual sex.

²⁴⁴ Afr. Comm. of Experts on the Rts. and Welfare of the Child & the Afr. Comm'n on Hum. & Peoples' Rts., *Joint General Comment of the ACHPR and the ACERWC on Ending Child Marriage*, ¶ 6 (2017), (accessible at https://www.acerwc.africa/wp-content/uploads/2018/04/ENGLISH_Joint_GC_ACERWC-ACHPR_Ending_Child_Marriage_14_March_2018.pdf [<https://perma.cc/MP2M-VQCY>]).

recognized that adolescence is “a period characterized by rapid physical, cognitive and social changes, including sexual . . . maturation . . .”²⁴⁵ In its 2016 General Comment on the *Implementation of the Rights of the Child During Adolescence*, the Committee on the Rights of the Child reminded States Parties of their obligations to protect all children from sexual abuse and exploitation together with the need to balance the evolving capacities of children.²⁴⁶ The Committee specifically stated that States Parties should “avoid criminalizing adolescents of similar ages for factually consensual and non-exploitative sexual activity.”²⁴⁷ The Committee also stated that States Parties, like Malawi, should “review or introduce legislation recognizing the right of adolescents to take increasing responsibility for decisions affecting their lives.”²⁴⁸

The statutory rape law and the CCPJA can comply with the Constitution and the country's international law obligations only if they balance the need to protect children from sexual abuse and exploitation by adults with the need to respect adolescents' evolving capacities to exercise their right to sexual development. The Constitution, the Convention on the Rights of the Child, and the African Charter on the Rights and Welfare of the Child all guarantee that the best interest and welfare of children is a primary consideration in all actions or decisions affecting them.²⁴⁹ The prosecution and punishment of teenagers for having consensual, non-exploitative sex with their peers violates this right.

A. SEXUALLY ACTIVE TEENAGERS CAN BE PUNISHED HARSHLY UNDER THE STATUTORY RAPE LAW

Pre-marital relations in Malawi are a cultural taboo, but sex between teens is a poorly kept secret. According to the 2015–2016

²⁴⁵ Comm. on the Rts. of the Child, *General Comment No. 4, Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, ¶ 2, U.N. Doc. CRC/GC/2003/4 (July 1, 2003) [hereinafter CRC GC 4].

²⁴⁶ See CRC GC 20, *supra* note 186, ¶ 40.

²⁴⁷ *Id.*

²⁴⁸ *Id.* ¶ 39.

²⁴⁹ CONST. OF MALAWI May 18, 1994 (amended 2017) § 23(1) (“[T]he best interests and welfare of children shall be a primary consideration in all decisions affecting them.”); CRC, *supra* note 18, art. 3(1) (“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.”); African Children's Charter, *supra* note 19, art. 4(1) (“In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.”).

Demographic and Health Survey, the majority of fifteen- to nineteen-year-old teenagers have already had sex.²⁵⁰ Approximately one out of every eight females and one out of every five males surveyed said they had their first sexual encounter at age fifteen.²⁵¹ A Women’s Rights Program Manager at an international organization fighting poverty noted that teenagers in Malawi are becoming sexually active voluntarily at the age of thirteen and up.²⁵² “They are very sexually active,”²⁵³ she said. “You would be surprised.”²⁵⁴ And for many of these teenagers, they are sexually active with a girlfriend or boyfriend who is close in age.²⁵⁵

As mentioned above, the heavy hand of the statutory rape law fails to differentiate between exploitative sex between adults and children and consensual sex between teenage peers. “You are finding that these young boys are actually getting arrested,”²⁵⁶ said the Women’s Rights Program Manager. “They’re just teenagers who have just started to be sexually active, and we are finding them getting arrested because of the issue of defilement,”²⁵⁷ she added. Based on personal experience inspecting prisons around Malawi in 2018, a representative of the Office of the Ombudsman (a public office tasked with assisting persons who have suffered injustice) said that there was a trend of young men—including some who were in their teens—serving lengthy sentences for defilement.²⁵⁸ The representative explained that the intent of the statutory rape law was to “catch the big fish—those big men who have been preying

²⁵⁰ NAT’L STAT. OFF. [Malawi] & ICF, MALAWI DEMOGRAPHIC AND HEALTH SURVEY 2015-16 64 (2017), (*accessible at* <https://dhsprogram.com/pubs/pdf/FR319/FR319.pdf> [<https://perma.cc/T69R-FKSL>]).

²⁵¹ *Id.* The survey included 5,263 females and 1,818 males between the ages of fifteen and nineteen. Of the 5,263 females, 12.8 percent said they first had sex at age fifteen. 48.1 percent of these females said they had never had sex. Of the 1,818 males, 22.2 percent said they first had sex at age fifteen. 46.9 percent of these males said they had never had sex. The survey results did not provide further breakdown by age.

²⁵² Interview by Allison Carlon with a Women’s Rights Program Manager at an international organization that fights poverty, in Lilongwe, Malawi (Mar. 9, 2020) (on file with the IWHRC).

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ Interview by Amy Uihlein with a representative of the Office of the Ombudsman, in Lilongwe, Malawi (Mar. 9, 2020) (on file with the IWHRC). The Office of the Ombudsman was established by the Constitution to “investigate any and all cases where it is alleged that a person has suffered injustices and it does not appear that there is any remedy reasonably available by way of appeal from court or where there is no other practicable remedy.” OFF. OF THE OMBUDSMAN, <https://www.ombudsmanmalawi.org> [<https://perma.cc/8ZBP-2JPM>] (last visited Apr. 3, 2021).

on our little girls.”²⁵⁹ The representative explained, however, that teenage boys having sex with their girlfriends are oftentimes caught by the statutory rape law and subjected to the harsh legal consequences thereunder, some serving sentences as long as ten years.²⁶⁰

The consequences for underage teenagers who are caught having sex can be severe. “It means a boy child who is engaging in normal activities, an adolescent . . . will become a criminal,”²⁶¹ said a member of the Southern African Litigation Centre. A high-ranking executive at the Gender and Justice Unit said that, as the country moves towards having national IDs for all its citizens, “We will get to a space where people will have criminal records and . . . be listed as sexual offenders . . . [Children] who were just teenagers having a sexual relationship—a consensual sexual relationship at that.”²⁶²

Although the CCPJA generally offers robust legal protections for children in conflict with the law, a coarse view of the crime of statutory rape together with spotty enforcement of the CCPJA’s protective provisions means that penalties for teenage boys can be harsh. Under the CCPJA, “defilement” is listed as a “serious offense.”²⁶³ Therefore, children who are arrested for “defilement” are not eligible for diversion (i.e., a referral away from formal court proceedings) under the CCPJA.²⁶⁴ Whereas children who are responsible for non-serious offenses might be released with only a warning before a proceeding goes before a child justice court—either by a police officer, a probation officer, or a magistrate—this legal mechanism does not exist for teenagers who had sex with an underage girl, even if the sex was consensual.²⁶⁵

²⁵⁹ Interview by Amy Uihlein with a representative of the Office of the Ombudsman, *supra* note 258.

²⁶⁰ *Id.*

²⁶¹ Interview by Allison Carlon with a member of the Southern African Litigation Centre (“SALC”), *supra* note 80.

²⁶² Interview by Allison Carlon with a high-ranking executive, Gender and Justice Unit, *supra* note 149.

²⁶³ Child Care, Protection and Justice Act, No. 22 § 2, Fourth Schedule (2010) (Malawi) (“‘serious offense’ in relation to a child means any of the offenses listed in the Fourth Schedule;”).

²⁶⁴ *Id.* § 2 (“‘diversion’ means the referral of cases of child offenders away from formal court proceedings with or without conditions”), § 112(e) (“A child suspected of being responsible for an offense shall be considered for diversion if the offense is not one of the offenses specified in the Fourth Schedule.”), Fourth Schedule (“Children charged with the following offenses shall not be considered for diversion: 4) Defilement of a girl and attempted defilement”).

²⁶⁵ *E.g., id.* § 94(1)(a), (4) (A police officer may divert a case and caution and release the child.); *Id.* § 99(1), (2), (4)(b) (A magistrate may divert a matter during a preliminary inquiry.); *Id.* § 112(e) (A child may be eligible for diversion if the offense is not one of the serious offenses listed in Schedule Four.).

Furthermore, the guarantees that children who are arrested or detained are not mixed with adult offenders are not always upheld in a country with limited resources.²⁶⁶ An official at the Centre for Youth and Children's Affairs spoke about a boy who was traumatized after being arrested and detained by the police for over a week. "In the two weeks of that detention," the official said, "his skin was changing—almost greenish. For that period of time, he had never seen the sun. He was mixed up with adults who were encroaching him. He was afraid of almost everyone."²⁶⁷

Judges have had to rely on emergency safety valves in the law to skirt the severe consequences of the "defilement" offense. In the criminal case of *Republic v. Yamikani Paul*, for example, a nineteen-year-old young man was convicted of defilement and sentenced to prison for having sex with his girlfriend who was fifteen years old at the time.²⁶⁸ On appeal, Judge Kamwambe of the High Court of Blantyre stated, "This is a unique situation He was not taking advantage of the girl [T]his was an innocent affair. We should save him from getting in contact with hardened prisoners."²⁶⁹ The judge relied on Section 337(1)(b) of the Criminal Procedure and Evidence Code, which allows an absolute discharge of an accused person where punishment is not appropriate, to let the boy go.²⁷⁰

"That shouldn't be an offense,"²⁷¹ said a legal researcher of childhood sexuality, when asked about consensual sex between teens. In his view, as shared by many others, the law should treat such sexual acts differently than both coerced or forced sex between children and sex between a child and a much older adult. A high-ranking executive at the Gender and Justice Unit added "There has to be a way of separating out those kinds of nuances and I think the law is not good with nuance."²⁷²

²⁶⁶ *Id.* § 90(e) ("A police officer or any person effecting the arrest of a child shall ensure that the child is not mixed with adults;"), and § 97 ("No child, while in detention in a safety home or reformatory centre or while being conveyed to or from any court or while awaiting before or after attending a criminal court, shall be permitted to associate with an adult, not being a relative, who is charged with an offense other than the offense with which the child is jointly charged with the adult.").

²⁶⁷ Interview by Darya Vakulenko with an official, Centre for Youth and Children's Affairs, *supra* note 87.

²⁶⁸ *Paul v. Republic*, (2017) Crim. App. No. 16 of 2017 (High Ct.) (Malawi).

²⁶⁹ *Id.* at 5–6.

²⁷⁰ *Id.* at 6.

²⁷¹ Interview by Amy Uihlein with a legal researcher on childhood sexuality, in Lilongwe, Malawi (Mar. 8, 2020) (institutional affiliation omitted) (on file with the IWHRC).

²⁷² Interview by Allison Carlon with a high-ranking executive, Gender and Justice Unit, *supra* note 149.

B. PARENTAL AND SOCIETAL GUIDANCE BETTER PROMOTES
HEALTHY ADOLESCENT DEVELOPMENT THAN DOES CRIMINAL
PROSECUTION

The African Charter on the Rights and Welfare of the Child instructs that the “essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, re-integration into his or her family and social rehabilitation.”²⁷³ In addition, the Constitution recognizes the “special needs of children” as accused persons and seeks to promote their “reintegration into society to assume a constructive role.”²⁷⁴ A wide range of stakeholders in Malawi agreed that parental and societal guidance, more so than criminal prosecution, is needed to promote the healthy development of teens. In some cases, a teenager might not have known that he was committing an offense. “We want to promote diversion at that point so that children can be taken out of [the] formal justice system,”²⁷⁵ said an official at the Paralegal Advisory Service Institute, a national organization that provides legal assistance to people awaiting trial.

A professional at an international organization working on children’s rights explained that the issue of teenage sex is “very socially and culturally sensitive.”²⁷⁶ Concerned about the arrest and prosecution of boys and young men, she said, “[t]here needs to be informed public debate and dialogue” about the risks of using the defilement law to curb sexual activity in teens.²⁷⁷ “The criminal justice system [is] being used for something that’s a social issue. If we want to look at kids starting sexual activity later, let’s look at other ways of doing that, not necessarily using a criminal justice system that already struggles to deal with the cases that it has.”²⁷⁸

²⁷³ African Children’s Charter, *supra* note 19, art. 17(3).

²⁷⁴ CONST. OF MALAWI May 18, 1994 (amended 2017) § 42(2) (“Every person arrested for, or accused of, the alleged commission of an offense shall, in addition to the rights which he or she has as a detained person, have the right—. . . (g) in addition, if that person is a person under the age of eighteen years, to treatment consistent with the special needs of children, which shall include the right—(v) to be treated in a manner which takes into account his or her age and the desirability of promoting his or her reintegration into society to assume a constructive role.”).

²⁷⁵ Interview by Darya Vakulenko with an official, Paralegal Advisory Service Institute (PASI), in Lilongwe, Malawi (Mar. 10, 2020) (on file with the IWHRC).

²⁷⁶ Interview by Allison Carlon with a professional at an international organization working on women’s and children’s rights, *supra* note 179.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

In discussing how to help teens develop healthy relationships with their peers, a sexual and reproductive health specialist at the University of Malawi said that “they should not be punished.”²⁷⁹ She described an initiative with an international organization that teaches young adults what it means to have a healthy relationship and a healthy sexuality.²⁸⁰ “When a boy and a girl enter into a relationship,” she said, “most of the time it becomes a sexual relationship. But we should be able to differentiate what is a healthy relationship and what is a sexual relationship.”²⁸¹ While she acknowledged that teens cannot be stopped from having sex entirely, she said, “Their thinking around sexuality can be changed. There are ways of helping them to enjoy their relationships in an appropriate way. It’s not all about sexual intercourse.”²⁸²

A representative of UNFPA emphasized that the educational system, including schools and the community, as well as the interaction that teens have with teachers and parents, are “more relevant in daily life than the legal system.”²⁸³ “The most important thing,” she said, “is how the individual is empowered socially and informed to make the right decision.”²⁸⁴

The Committee on the Rights of the Child has stated that “[a]dolescents need to be recognized by the members of their family environment as active rights holders who have the capacity to become full and responsible citizens, given the proper guidance and direction.”²⁸⁵ As such, parents and other guardians have an obligation to “take into account the adolescents’ views, in accordance with their age and maturity, and to provide a safe and supportive environment in which the adolescent can develop.”²⁸⁶ The promotion of children’s rights stands not at the expense of the rights of others but in furtherance of strengthening the rights of an entire family.²⁸⁷ Supporting the evolving capacities of an adolescent teen encourages his or her full development as a healthy, productive and responsible member of society.

²⁷⁹ Interview by Amy Uihlein with a sexual and reproductive health specialist, Centre for Reproductive Health at the University of Malawi College of Medicine, *supra* note 208.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ Interview by Amy Uihlein with a representative of UNFPA, *supra* note 188.

²⁸⁴ *Id.*

²⁸⁵ CRC GC 4, *supra* note 245, ¶ 3.

²⁸⁶ *Id.*

²⁸⁷ UNICEF, IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD 78–79 (2007).

Over-criminalizing consensual sex between teenagers and treating such an act as a serious offense is not in the best interests and welfare of adolescent children, nor does it respect their evolving capacities and their status as rights holders. Concerned stakeholders across the country echoed the belief that education, parental guidance, and community support—and not criminal prosecution—were the keys to raising healthy and mature young adults. The lack of nuance in the Penal Code on statutory rape and the ineligibility for diversion under the CCPJA fails to serve children's best interests and violates the Constitution and international law.

VI. CHANGES THE MALAWIAN PARLIAMENT SHOULD MAKE TO FULFILL ITS OBLIGATIONS AND BETTER PROTECT THE RIGHTS OF CHILDREN

The legislature has a duty under international law to adopt legislation that upholds the fundamental human rights of children. This article proposes amendments to address and remedy some of the major shortcomings in the current laws on sexual offenses against children.

A. INCLUDE SIXTEEN- AND SEVENTEEN-YEAR-OLD GIRLS IN THE STATUTORY RAPE LAW TO PROTECT ALL GIRL CHILDREN FROM SEXUAL ABUSE BY ADULTS

The statutory rape law should be amended to also protect sixteen- and seventeen-year-old girls from sexual abuse and exploitation. Sixteen and seventeen-year-old girls are highly vulnerable to sexual inducement and coercion by adult men, and the consequences of early sex and sexual abuse can have significant and long-term effects on their safety, health and well-being, and education.

The Constitution recognizes these girls as children,²⁸⁸ as does the African Children's Charter.²⁸⁹ As a State Party to the African Children's Charter, Malawi has an obligation to protect all girl children from sexual exploitation and sexual abuse and to prevent "the inducement, coercion or encouragement of a child to engage in any sexual activity . . ." ²⁹⁰ The Maputo Protocol also obligates Malawi to "adopt such other legislative . . .

²⁸⁸ CONST. OF MALAWI May 18, 1994 (amended 2017) § 23(6).

²⁸⁹ See *supra* notes 42, 43.

²⁹⁰ See *supra* notes 42, 43.

measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence²⁹¹ against girls.

The proposed change to the statutory rape law substitutes “under the age of sixteen” with “under the age of eighteen” (with emphasis added to indicate proposed change):

138. (1) Any person who commits an act of sexual penetration with a person ***under the age of eighteen*** shall be guilty of a felony and shall be liable to imprisonment for life.

The proposed change would harmonize the age of a child in the Penal Code with the Constitution and the African Children’s Charter.

B. PROTECT BOYS EQUALLY UNDER STATUTORY RAPE AND INCEST

The Penal Code chapters on Offenses Against Morality and Offenses Against Morality Relating to Children have already been amended to cover boys under some sexual offenses, but the changes did not include the laws on statutory rape and incest. In the 2012 additions to the Penal Code, which included a new chapter on Offenses Against Morality Relating to Children²⁹² and Section 159A (sex with minors under one’s care or protection), the language used to refer to a child victim is gender neutral.²⁹³ Section 138 on statutory rape must similarly be amended to include boys as victims, using the following language (emphasis added to indicate proposed changes):

138. (1) Any person who commits an act of sexual penetration with ***a person*** under the age of eighteen shall be guilty of a felony and shall be liable to imprisonment for life.

In addition, any attempt to commit statutory rape must also include boys as victims (emphasis added to indicate proposed change):

138. (2) Any person who attempts to commit an act of sexual penetration with ***a person*** under the age of eighteen shall be guilty of a felony and shall be liable to imprisonment for fourteen years.

²⁹¹ Maputo Protocol, *supra* note 22, art. 4(2)(b).

²⁹² Penal Code ch. XVA, *amended by* Act No. 24 (2012) (Malawi) (covering child pornography, as well as sexual activity with a child other than sexual intercourse).

²⁹³ *Id.* §§ 159A, 160A–G.

The sex discrimination inherent in Sections 157 (incest by males) and 158 (incest by females) must also be dismantled. These sections assume that males are always perpetrators of incest—and therefore always culpable—and that females *may* be culpable if they consented to the act. The proposed changes to Sections 157 and 158 make prosecution of males and females (and protection of boys and girls) the same.

<p><u>Incest by males:</u></p> <p>157. (1) <i>Any male person who commits an act of sexual penetration with a female person</i> who is to his knowledge his granddaughter, daughter, sister, mother, grandmother, niece, or aunt shall be guilty of a felony and shall be liable to imprisonment for five years:</p> <p>Provided that if it is alleged in the information or charge and proved that the female person was under the age of eighteen years at the time of the act, the offender shall be liable to imprisonment for life.</p> <p>[. . .]</p> <p>(5) <i>It shall be a defense to a charge under this section to prove that the male person was acting under the force, threat, intimidation, fear of bodily harm, or coercion of another person.</i></p>	<p><u>Incest by females:</u></p> <p>158. (1) <i>Any female person who commits an act of sexual penetration with a male person</i> who is to her knowledge her grandson, son, brother, father, grandfather, nephew, or uncle shall be guilty of a felony and shall be liable to imprisonment for five years:</p> <p>Provided that if it is alleged in the information or charge and proved that the male person was under the age of eighteen years at the time of the act, the offender shall be liable to imprisonment for life.</p> <p>[. . .]</p> <p>(5) <i>It shall be a defense to a charge under this section to prove that the female person was acting under the force, threat, intimidation, fear of bodily harm, or coercion of another person.</i></p>
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C. INCLUDE UNCLES AND AUNTS IN THE LIST OF PROHIBITED
INCESTUOUS RELATIONSHIPS

The Penal Code, having been based on the English Colonial Office model code, was not drafted with the Malawian cultural context in mind. The list of prohibited relationships in the incest provision is one example of the discrepancy between the origin of the law and the community which it seeks to regulate. Sections 157(1) and 158(1) prohibit sex between a person and his or her grandparent, parent, son, daughter, and sibling.²⁹⁴ Notably, they do not prohibit sex between a person and his or her niece or nephew. This discrepancy in the law opens a gap for persons who commit sexual abuse against such extended family members to escape punishment. In the Malawi cultural context, where extended families are often the norm and where uncles play a prominent role in a girl's life, this gap is very wide.²⁹⁵

In the southern and central regions, where the matrilineal system prevails, the mother's brother is the primary adult male in a child's life.²⁹⁶ "The role of uncle is very important," said a representative of UNFPA; "they are the central relationship."²⁹⁷ Especially in the matrilineal context, uncles will often help to pay school fees, make decisions about land use, and decide on family issues. The Penal Code should be amended to protect girls and boys from sexual abuse by their uncles and aunts:

<p>157. (1) <i>Any male person who commits an act of sexual penetration with</i> a female person who is to his knowledge <i>his</i> granddaughter, daughter, sister, mother, grandmother, <i>niece, or aunt</i> shall be guilty of a felony and shall be liable to imprisonment for five years.</p>	<p>158. (1) <i>Any female person who commits an act of sexual penetration with</i> a male person who is to her knowledge <i>her</i> grandson, son, brother, father, grandfather, <i>nephew, or uncle</i> shall be guilty of a felony and shall be liable to imprisonment for five years.</p>
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These changes to the incest provisions are important additions to the suite of provisions that protect children and other young persons from

²⁹⁴ *Id.* §§ 157(1), 158(1).

²⁹⁵ Interview by Amy Uihlein with a manager, Youth Net and Counselling (YONECO), *supra* note 41.

²⁹⁶ Interview by Amy Uihlein with a representative of UNFPA, *supra* note 188.

²⁹⁷ *Id.*

unwanted sex and sexual abuse. While, certainly, some cases of abuse between an uncle and his niece could be prosecuted under the rape law, the statutory rape law, or the sex with minors under one's care or protection law, each of those provisions has limitations which prevent the arm of the law from reaching all vulnerable children and young adults in the country. For example, a rape charge would require proof of lack of consent or a show of force, threat, or intimidation on the part of the uncle. A statutory rape charge would require proof that the niece was underage. And a charge under sex with minors under one's care or protection would require proof that the niece was living with the uncle as part of his family or was under the uncle's care or protection. Thus, a girl who lives with her parents, who lacks a birth certificate and cannot prove that she is underage, and who was coerced or exploited into having sex with the uncle, might receive no justice under the law. The proposed changes to the incest law, however, would protect her.

Nearly all stakeholders expressed support for criminalizing sexual relations between an uncle and his niece (and an aunt and her nephew). "I would think incest is a sexual relationship between relatives—aunts, uncles, and all that,"²⁹⁸ said a religious leader in Malosa. In speaking about the closeness between an uncle and his niece, another religious leader said, "Uncles tend to be very close to their nieces. The kids come there trusting—with total trust—and the trust they have is betrayed."²⁹⁹ The law "needs to cover them,"³⁰⁰ said a High Court judge.

The newly enacted Marriage, Divorce and Family Relations Act, 2015 ("MDFRA") further supports such a change. Under the MDFRA, these extended family members are prohibited from marrying each other.³⁰¹ This prohibition applies to all marriages in the country, without exception.³⁰² The legislature should close the gap in the Penal Code that fails to prohibit sex between an uncle and his niece and an aunt and her nephew.

²⁹⁸ Interview by Amy Uihlein with a religious leader, in Malosa, Malawi (Mar. 13, 2020) (on file with the IWHRC).

²⁹⁹ Interview by Mariame Dangnokho with a religious leader, Archdiocese of Blantyre, in Blantyre, Malawi (Mar. 13, 2020) (on file with the IWHRC).

³⁰⁰ Interview by Mariame Dangnokho with a High Court judge, *supra* note 199.

³⁰¹ Marriage, Divorce and Family Relations Act, No. 4 §§ 15, 26, Third Schedule (2015) (Malawi) ("A marriage celebrated between (a) a man and any of the persons mentioned in the First Column of Parts I, II, and III of the Third Schedule; (b) a woman and any of the persons mentioned in the Second Column of Parts I, II, and III of the Third Schedule, shall not be valid on the ground of kindred or affinity.").

³⁰² *See generally id.*

D. ALIGN THE AGES OF A CHILD AND AGE-DETERMINANT
CRIMINAL PENALTIES IN THE LAWS ON INCEST AND SEX WITH
MINORS UNDER ONE'S CARE OR PROTECTION

The laws on incest and sex with minors under one's care or protection should be changed so that a family member or guardian who sexually abuses a child who is under the age of eighteen faces up to life imprisonment. These laws must be changed so that all children are protected equally, and all perpetrators are punished equally.

Currently, under Section 157(1), a family member would face up to life imprisonment only if the girl child whom he sexually abused was under age sixteen. The proviso to Section 157(1) should be changed as follows and the same proviso should be included in the new Section 158(1) (with emphasis added to indicate proposed changes):

<p>Section 157(1): Provided that if it is alleged in the information or charge and proved that <i>the female person was under the age of eighteen years at the time of the act</i>, the offender shall be liable to <i>imprisonment for life</i>.</p>	<p>Section 158(1): Provided that if it is alleged in the information or charge and proved that <i>the male person was under the age of eighteen years at the time of the act</i>, the offender shall be liable to <i>imprisonment for life</i>.</p>
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In addition, under Section 159A, a guardian or stepparent who sexually abuses a child would face up to only five years imprisonment. A Chief Resident Magistrate noted that the sentencing discrepancy between Section 159A and the sections on incest and defilement could lead to perpetrators getting off easy. "The . . . challenge with [Section 159A] is the sentence—the maximum is five years,"³⁰³ she explained. Prosecutors "have to choose one [crime],"³⁰⁴ and a choice between prosecuting under statutory rape versus prosecuting under this section could yield a vastly different criminal sentence for the same sexual act. A similar proviso should be added to the end of section 159A:

³⁰³ Interview by Amy Uihlein with a Chief Resident Magistrate, *supra* note 100.

³⁰⁴ *Id.*

Section 159A:

Provided that if it is alleged in the information or charge and proved that ***the second mentioned person was under the age of eighteen years at the time of the act***, the offender shall be liable to ***imprisonment for life***.

E. EXPAND THE SCOPE OF PENETRATIVE SEXUAL ACTS THAT ARE COVERED UNDER STATUTORY RAPE, INCEST, AND SEX WITH MINORS UNDER ONE'S CARE OR PROTECTION

The laws on statutory rape and incest still use the outdated term “carnal knowledge,” and the law on sex with minors under one’s care or protection uses the term “sexual intercourse.” Neither of these terms is defined in the Penal Code, and they have been interpreted narrowly to mean only penile penetration into a vagina. The laws should be changed to provide more comprehensive protection to survivors given the wide range of penetrative sexual acts that could inflict harm upon them.

Many African countries that have amended or enacted new laws on sexual offenses since 2000 have moved away from using the outdated term “carnal knowledge,” and many have used more expansive terms which encompass penetrative sexual acts besides only penile/vaginal sex. In its place, these new laws now use the terms “sexual penetration” or “sexual act.”

For example, in 2007, South Africa revised its criminal law on sexual offenses and substituted “sexual penetration” for “carnal knowledge.”³⁰⁵ In effect, the law broadened the scope of sexually penetrative acts to include penetration by genital organs, other body parts, and even objects into genital organs, an anus, or a mouth of another person for purposes of sexual gratification. Eswatini followed suit in 2018,

³⁰⁵ Sexual Offenses and Related Matters Amendment Act 32 of 2007 §§ 1, 3, 12 (S. Afr.) (see § 1 definition of “sexual penetration” as used in § 3 (Rape) and § 12 (Incest)). “Sexual penetration” is defined as: “[A]ny act which causes penetration to any extent whatsoever by—(a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person; (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or (c) the genital organs of an animal, into or beyond the mouth of another person.” *Id.* § 1. See also *Masiya v. State* 2007 (5) SA 30 (CC) ¶¶ 44–45 (The Constitutional Court of South Africa stated that “[t]he extension of the definition of rape to include anal penetration will not only yield advantages to the survivor but will also express the abhorrence with which our society regards these pervasive but outrageous acts.” The Court extended the common law definition of rape to include non-consensual anal penetration of females to further the interests of justice.)

adopting the terms “sexual act” and “sexual penetration” in its Sexual Offenses and Domestic Violence Act, 2018, as well as a nearly identical definition for “sexual penetration.”³⁰⁶ Namibia adopted the term “sexual act” with a similar definition, but the law also made clear that the insertion of an object or a part of the body for medical purposes is not included in the scope of the offense.³⁰⁷

The Chapter on Offenses Against Morality should include the following definition for “sexual penetration”:

131A. In this Chapter—

“**sexual penetration**” includes any act which causes penetration to any extent whatsoever by—

- (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
- (b) any other part of the body of one person or any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person, except where such insertion of any part of the body (other than the penis) of a person or of any object into the vagina or anus of another person is, consistent with sound medical practices, carried out for proper medical purposes; or
- (c) the genital organs of an animal into or beyond the mouth of another person.

“Carnal knowledge” and “sexual intercourse” should also be replaced with “sexual penetration” in the statutory rape, incest, and sex with minors under one’s care or protection sections.

By adopting these changes, the legislature could apply the statutory rape, incest, and sex with minors under one’s care or protection

³⁰⁶ The Sexual Offenses and Domestic Violence Act, (2018) §§ 2–4 SWAZ. GOV’T GAZETTE EXTRAORDINARY Vol. LVI No. 111 (Swaz.) (*accessible at* https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=108709&p_count=21&p_classification=01 [<https://perma.cc/4DRL-6HQ7>]) (refer to § 2 definitions of “sexual act” and “sexual penetration,” as used in §§ 3–4).

³⁰⁷ Combating of Rape Act 8, (2000) §§ 1–2 GOV’T GAZETTE OF THE REPUBLIC OF NAMIB. 2326 (Namib.) (*accessible at* <https://laws.parliament.na/annotated-laws-regulations/law-regulation.php?id=370> [<https://perma.cc/VV82-8MKX>]).

provisions to invasive penetrative sexual acts beyond just sexual intercourse involving penile/vaginal penetration. This change would thus impart the heightened penalty within these crimes to other penetrative sexual acts committed against children.³⁰⁸

Stakeholders in Malawi support this change. An officer at the River of Life Organization confirmed that sexual penetration using objects happens in Malawi. "We have had women and some girls that have been violated sexually by penetration using an object,"³⁰⁹ he said. "But the one challenge was the charge sheet in court or the police that they provide was just being 'assaulted' or 'bodily harm.'"³¹⁰ When asked whether the statutory rape provision should cover those acts, he replied, "That can be great. I think that can help to deter that because it's happening."³¹¹ A religious leader in the Archdiocese of Blantyre added, "If defilement is just using the penis, then there's a problem there. It means that you can have that kind of harm or some sort with a lesser penalty. If the intention was to do what he would have done with his penis, but he has taken another object and is doing that . . . I think the effect is the same."³¹² Finally, a Program Officer at Every Girl in School Alliance stated, "I believe all forms of sexual activity, even using objects on other people, should be a part of that [law]. I don't know what people get off from, maybe penetrating something into someone is sexual pleasure to someone, but still you are violating this child."³¹³

F. ELIMINATE THE REASONABLE BELIEF DEFENSE THAT WEAKENS THE PROTECTIONS INTENDED TO BE ACCORDED BY THE STATUTORY RAPE LAW

The current law on statutory rape allows an offender to escape conviction if he can show that he had reasonable cause to believe, and did

³⁰⁸ The researchers note that other sections of the Penal Code chapter on Offenses Against Morality also use the term "carnal knowledge," including the rape provision in Section 132. See Penal Code § 132, *amended by* Act No. 24 (2012) (Malawi). Those other sections are also problematic for the same reasons. However, as the focus of this article is on sexual abuse against children, the other sections are not addressed.

³⁰⁹ Interview by Amy Uihlein with an officer, River of Life Organization, *supra* note 50.

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² Interview by Mariame Dangnokho with a religious leader, Archdiocese of Blantyre, *supra* note 299.

³¹³ Interview by Darya Vakulenko with a Program Officer, Every Girl in School Alliance, *supra* note 78.

believe, that the girl was of age. This defense stands in contrast to the general rule that knowledge of age is immaterial to criminal liability for any of the offenses in the Penal Code chapters on Offenses Against Morality and Offenses Against Morality Relating to Children.³¹⁴ In addition, no other offense in either chapter retains a similar loophole for accused persons, including those other offenses that depend on a girl being underage and that impose a penalty of up to life imprisonment.³¹⁵ This defense in Section 138 must be eliminated in order to strengthen the protections for children under the statutory rape law. By eliminating this defense, the crime of defilement will become a strict liability offense and would encourage persons to take steps to be sure that his or her sex partner is not underage.

G. CREATE A LEGAL CARVEOUT FOR CONSENSUAL SEX FOR
SIXTEEN- AND SEVENTEEN-YEAR-OLDS; ALLOW DIVERSION
AWAY FROM THE FORMAL JUSTICE SYSTEM FOR OTHER
SEXUALLY ACTIVE TEENS

The current statutory rape law views all persons who have sex with underage girls in the same light—as criminals who have committed a serious offense. However, while the law should come down heavily on adults who abuse their power to sexually abuse or exploit young children, it should also build in an exception for teenagers who are entitled to explore their adolescent sexuality in a healthy environment. Creating a legal carveout for consensual teenage sex within a certain age range and promoting diversion for other sexually active teens will help to balance these two considerations of the law.

The proposed change to the Penal Code would enable teenagers who are sixteen and seventeen years old to have limited legal ability to consent to sex. Only adults (persons aged eighteen and above) would have full legal ability to consent to sex. The relevant amendments are as follows (with emphasis added to indicate proposed changes):

138. (1) Any person who commits an act of sexual penetration with a person *under the age of eighteen* shall be guilty of a felony and shall be liable to imprisonment for life.

³¹⁴ Penal Code § 152, *amended by* Act No. 24 (2012) (Malawi) (“Except as otherwise expressly stated. . . .”); *Id.* § 160G.

³¹⁵ *See id.* § 157 (A reasonable belief that a girl was sixteen or over is not a defense under the law on incest, which imposes a penalty of life imprisonment if the girl was underage).

(3) Provided that it shall not be an offense under this section if the child with whom the accused person had sexual penetration is within two years of age of the accused person and, when the sexual penetration occurred, both persons were of or above the age of sixteen years and there was full and free mutual consent to have sexual penetration;

There are a few key differences between the current law and the proposed amendment. Under the current law, once a girl turns sixteen, she is legally able to consent to sex with anyone who is also sixteen or above—no matter if that person is sixteen or sixty. Under the proposed amendments, once a boy or girl turns sixteen, he or she would be legally able to consent to have sex with someone who is within two years of his or her age (and who is also sixteen or above). Once that child becomes a legal adult, he or she would then have full legal ability to consent to sex. The proposed amendment would thus prohibit much older adults from having sex with children, but it would also allow sixteen- and seventeen-year-old teens to decide whether to have sex with a close-in-age peer. A lawyer in Lilongwe supported the age gap exception, saying, “We cannot be hypocrites that any young person will not engage in sex until they are eighteen, but maybe the issue should be who they are engaging in sex with. If it is with people of the same [or] similar ages, like teenagers, you should expect that to happen. But the moment it is somebody older, then you see that there is some exploitation.”³¹⁶

Removing “defilement” from the list of serious offenses in the CCPJA (i.e., the Fourth Schedule) is also necessary in order to avoid over-criminalizing factually consensual sex between teens. The change to the CCPJA would allow a minor who is caught in the crosshairs of Section 138(1) of the Penal Code and who is not saved by the close-in-age defense in 138(3) to be diverted from the criminal justice system.³¹⁷ That minor would then be eligible to receive the full range of diversion options under the Fifth Schedule of the CCPJA: options that include a formal caution, positive peer association and mentoring, referral to counselling or therapy,

³¹⁶ Interview by Darya Vakulenko with a women’s rights lawyer, *supra* note 190.

³¹⁷ The Child Care, Protection and Justice Act allows a child who is suspected of being responsible for an offense to be referred away from formal court proceedings with or without conditions if the offense is not a serious offense listed in the Fourth Schedule. Child Care, Protection and Justice Act, No. 22 §§ 2, 112, Fourth Schedule, Fifth Schedule (2010) (Malawi).

and many other child-friendly alternatives to criminal responsibility.³¹⁸ This change would alleviate the concerns shared by stakeholders that younger teens who are sexually active are being punished too severely under the law. And because the protections of the CCPJA can be extended to persons who are under twenty-one, this change would also benefit older teens and other young adults who have consensual sex with younger peers but who are not within two years of age.

A High Court judge is just one of the stakeholders who supported this proposal: “The biggest thing for me is teaching police officers to start avoiding arresting people and saying, ‘Look, you can caution these children and send them home, and let the parents mediate on how best to deal with this aftermath.’”³¹⁹ A women’s rights lawyer in Lilongwe also supported more nuance in the treatment of statutory rape, saying, “[A] girl—fifteen, a boy—sixteen, they are really playing, they are just kids. You cannot associate that with any *mens rea*. When they are both young, they are both not able to decipher what is right, what is wrong. Why punish the other one? They are both children.”³²⁰

The 2015 amendment to the South African sexual offenses law ensures that children of certain ages are not held criminally accountable for having factually consensual sex with each other.³²¹ The South African law allows a child who is between the ages of twelve and fifteen to consent to have sex with another child who is also between the ages of twelve and fifteen.³²² The law also allows a sixteen- or seventeen-year-old child to have consensual sex with another child who is younger than him or her but not by more than two years.³²³ Similar close-in-age defenses (with various age ranges) can be found in the sexual offense laws of Guyana,³²⁴ Lesotho,³²⁵ and Namibia³²⁶—all countries that have amended their sexual offenses laws in the last twenty years.

³¹⁸ *Id.* Fifth Schedule.

³¹⁹ Interview by Mariame Dangnokho with a High Court judge, *supra* note 199.

³²⁰ Interview by Darya Vakulenko with a women’s rights lawyer, *supra* note 199.

³²¹ Sexual Offenses and Related Matters Amendment Act 5 of 2015 (S. Afr.).

³²² *Id.*

³²³ *Id.*

³²⁴ The Sexual Offenses Act 7, (2010) §§ 14–15 THE OFF. GAZETTE OF GUY. (Guy.).

³²⁵ Sexual Offenses Act 3, (2003) § 8(4) LESOTHO GOV’T GAZETTE EXTRAORDINARY Vol. XLVIII No. 29 (“[I]t shall be a defense where a person who is below the age of 18 years commits a sexual act with a child with that child’s consent.”).

³²⁶ Combating of Immoral Practices Amendment Act 7 (2000) § 14 REP. OF NAMIB. ANN. STATS., (amending Combating of Immoral Practices Act 21 of 1980) (“Any person who (a) commits or attempts to commit a sexual act with a child under the age of sixteen years . . . and who (i) is more

These changes would add much needed nuance to the law on statutory rape, and they would help to balance protecting children from sexual abuse by adults and enabling them to make responsible and healthy choices for themselves.

H. MISCELLANEOUS AMENDMENTS

Finally, Parliament should accept a number of other relevant amendments to the Penal Code to remedy sentencing and age discrepancies and to eliminate sex discrimination.

The term “defilement” should be changed to “statutory rape.” The current term is a legal relic that depicts children—especially girls—as property. A Chief Resident Magistrate explained that the law on “defilement” against girls shares the same cultural background as property laws—in that girls, like other property, could be sullied or made unclean.³²⁷ Much like if an item or object is defiled, the family of a girl who was impregnated could sue for damages under the civil law.³²⁸ The Chief Resident Magistrate, like many other interviewees, supported changing the term to “statutory rape” so that a girl (or boy) can be treated “as a person in their own right.”³²⁹

Section 14(3) on age of criminal responsibility must be amended to say that both boys *and* girls under the age of twelve years are presumed to be incapable of committing an act of sexual penetration.

Section 141 on procuring defilement by threat or fraud or administering drugs requires corroborative evidence by statute. The proviso should be deleted as part of the abolition of the corroboration rule for all sexual offenses.

Section 155 “Indecent assault on boys under fourteen” should be amended so that the text mirrors Section 137 “Indecent assault on females.” Section 137 protects all females (regardless of age), while Section 155 protects only boys under the age of fourteen. Section 155 also carries a sentence of up to seven years imprisonment, while the penalty under Section 137 is double that. Section 155 should be amended to protect all males (regardless of age) and the sentence should be changed to up to fourteen years imprisonment.

than three years older than such a child . . . shall be guilty of an offense and liable on conviction to a fine . . . or to imprisonment. . . .”)

³²⁷ Interview by Amy Uihlein with a Chief Resident Magistrate, *supra* note 100.

³²⁸ *Id.*

³²⁹ *Id.*

The CCPJA and Chapters XV (Offenses Against Morality) and XVA (Offenses Against Morality Relating to Children) of the Penal Code contain a number of provisions that protect children up to the age of sixteen. All of these age limits should be raised to age eighteen so that they are in harmony with the Constitution and the African Children's Charter.

These changes, taken together, will bring Malawi into greater compliance with its Constitution and its obligations under international law, as they relate to sexual offenses against children.

VII. CONCLUSION

Sexual violence against girls and boys is prevalent in Malawi, and child survivors of sexual abuse by adults are unable to realize their rights to safety and security, health, and education. The current criminal laws on sexual offenses against children in Malawi provide inadequate protection for both boys and girls from sexual abuses committed against them by adults, including by their own family members. Furthermore, the law treats teenagers who have consensual sex with a close-in-age peer as tantamount to sexual abuse committed by adults against young children.

Malawi has an obligation under its Constitution and international human rights law to protect all boys and girls under the age of eighteen equally from the threats of sexual abuse by adults, as well as to recognize and respect the evolving capacities of maturing adolescents. By enacting changes to the Penal Code and the Childcare, Protection, and Justice Act such as the ones proposed in this article, the Malawi Parliament can strengthen the legal protections for children and uphold the government's commitments under international law to furthering children's fundamental human rights.