

Image Based Sexual Abuse: The Effectiveness of Malawi's Legal Framework

By

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Table of Contents

List of Abbreviations	1
Chapter One: Introduction	2
Introduction	2
Limitations.....	3
Research Questions.....	3
Justification and Significance.....	4
Research Objectives	4
Methodology.....	4
Structure of the Dissertation	5
Chapter Two: Conceptual and Theoretical Framework.....	6
Introduction	6
Feminist Legal Theory.....	6
Image Based Sexual Abuse	8
Image Based Sexual Abuse Defined.....	8
Image Based Sexual Abuse as Sexual Violence	10
Gender Equality.....	12
Conclusion	16
Chapter Three: Malawi’s Legal Framework: An Effective Tool against Image Based Sexual Abuse?.....	17
Introduction	17
International and Regional Legal Framework.....	18
The International Right to Privacy	25
The International Right to Freedom of Expression.....	28
Malawi’s Domestic Legal Framework	31
Legislation for IBSA.....	31
Gender Equality Act.....	33
Electronic Transactions and Cyber Security Act	34
Malawi’s Constitutional Rights to Privacy and Freedom of Expression	36
The Right to Gender Equality in Malawi	37
The Right to Privacy in Malawi	38
The Right to Freedom of Expression in Malawi	40
Further Reflections on the Effectiveness of Malawi’s Domestic Legal Framework	41
Conclusion.....	42

Chapter Four: Responses to Image Based Sexual Abuse across Jurisdictions: Lessons for Malawi?	44
Introduction	44
Civil and Criminal Responses to Image Based Sexual Abuse across the Globe: A Snapshot	44
The Limitations of Criminal and Civil Remedies.....	49
Remedies beyond the Law	51
Recommendations	52
Conclusion.....	55
Chapter Five: Conclusion.....	56

List of Abbreviations

AU	African Union
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
IBSA	Image Based Sexual Abuse
ICCPR	International Covenant on Civil and Political Rights
MWHC	Malawi High Court
SADC	Southern African Development Community
UDHR	Universal Declaration of Human Rights
UN	United Nations

Chapter One: Introduction

Introduction

The prevalence of technology and social media has resulted in gender-based violence going beyond the physical and into the digital space.¹ Violence against women which occurs online or with the use of technological means is referred to as technology-facilitated violence, a term which includes a plethora of actions such as harassment and image based sexual abuse.² Image based sexual abuse (IBSA) is “non-consensual sharing of images or videos- real or fake- that are either sexually suggestive or sexually explicit.”³ Although non-consensual sharing of images is certainly not a new phenomenon, increased use in social media and technology contributes to IBSA becoming more widespread, and women are on the receiving end of the majority of image based sexual abuse.⁴

IBSA infringes on the right to privacy because the pictures which are shared are sexual or intimate in nature and they are directed at an unintended audience without consent.⁵ Rackley and McGlynn argue that such a violation is two-fold. Firstly, it may occur where a perpetrator breaches the trust of a victim and non-consensually distributes images that were consensually created; and secondly, such a violation may occur where the image is both created and disseminated without consent.⁶ Rackley and McGlynn also argue that in both instances, the right to privacy is not derived from the intimate nature of the image, but from a breach of the victim’s trust.

The right to privacy is constitutionally protected in Malawi.⁷ Section 21 of the Constitution states, “Every person shall have the right to personal privacy”. Women’s right to privacy is in constant threat with the prevalence of IBSA. Malawi is no exception to this phenomenon, and the question arises whether the Malawian legal framework addresses IBSA.

Malawian women whose privacy is violated because of IBSA are usually unable to seek redress because as Chisala-Templehoff argues, many people do not know about Malawi’s laws

¹ C McGlynn and E Rackley 'Image-Based Sexual Abuse' (2017) 37(3) Oxford Journal of Legal Studies 534–561 at 534.

² J Bailey, N Henry and A Flynn *Technology-Facilitated Violence and Abuse: International Perspectives and Experiences* (2021) at 2.

³ M Hall, J Hearn and R Lewis *Image-Based Sexual Abuse: Online Gender-Sexual Violations* (2023) at 3227.

⁴ McGlynn and Rackley op cit note 1 at 534.

⁵ M Musoni 'The Criminalisation of “Revenge Porn” In South Africa' (2019) 40(1) *Obiter* 61-74 at 66.

⁶ McGlynn and Rackley op cit note 1 at 546.

⁷ Constitution of the Republic of Malawi, 1994.

that have potential to addresses IBSA and the legal framework does not directly address IBSA.⁸ This results in some women leaving social media and others fleeing the country because of the shame associated with having their pictures shared online without their consent.⁹ It is therefore necessary to interrogate Malawi’s legal framework and identify how it can be made more effective in addressing IBSA.

This dissertation asks the question whether Malawi’s legal framework addresses IBSA. In answering this question, this dissertation firstly analyses the concepts of IBSA and gender equality. Secondly, Malawi’s domestic and international legal frameworks and their effectiveness in addressing IBSA are examined. Lastly, this dissertation analyses civil and criminal law responses and non-legal responses to IBSA across jurisdictions.

Limitations

The limitations to this dissertation are that it focuses specifically on IBSA as opposed to technology-facilitated violence. While both are important areas of research, given the restrictions of the minor dissertation, this dissertation confines itself to IBSA to provide an in-depth and comprehensive analysis of the abuse. Further limitations include the lack of Malawian case law on the matter. In order to address this limitation, this dissertation relies on case law from other jurisdictions. IBSA is a relatively new phenomenon in Malawi, therefore Malawian courts have not dealt extensively with the issue of IBSA. Lastly, this dissertation limits its scope to women’s rights. Although the non-consensual sharing of images also affects other groups such as children and is an equally serious issue in that regard, the constraints of this minor dissertation dictate that the dissertation focuses on one demographic, which for this dissertation is women.

Research Questions

The main research question is whether Malawi’s legal framework addresses IBSA. In answering this question, this dissertation firstly asks what IBSA is. Secondly, this dissertation asks what Malawi’s legal framework is in relation to IBSA. Lastly, this dissertation asks what the responses to IBSA are in various jurisdictions including the Philippines, Canada, England, and the United States.

⁸ S Stevenson-McCabe and S Chisala-Templehoff ‘Image-Based Sexual Abuse: A Comparative Analysis of Criminal Law Approaches in Scotland and Malawi’ (2021) *The Emerald International Handbook of Technology-Facilitated Violence and Abuse* 513–532 at 515.

⁹S Chisala-Templehoff and M T Kirya ‘Gender, law and revenge porn in Sub-Saharan Africa: a review of Malawi and Uganda’ (2016) *Palgrave Communications* 2(1):16069 DOI:10.1057/palcomms 2016 at 3.

Justification and Significance

Although there is discourse around gender-based violence and advocacy efforts to combat it, emerging forms of violence such as those facilitated by technology receive less attention. It is also important to note that those who engage in studies relating to IBSA often solely focus on criminal law as an effective mechanism to combat it. A human-rights approach to IBSA has not been extensively explored, therefore this dissertation intends to highlight the ways in which the human rights framework, in addition to other remedies, can effectively provide redress to victims of IBSA. This dissertation is also important because it highlights the inadequacies of the Malawian legal framework as it relates to IBSA, in the hope of bringing those inadequacies to the forefront. The dissertation intends to be a catalyst in the advocacy against technology-facilitated violence in Malawi, with the goal of ensuring that the legal system keeps up with the times and does not leave anyone behind in its quest to end all forms of violence against women and girls. Additionally, this dissertation intends to be a springboard for further academic study in IBSA in Malawi.

Research Objectives

The main objective of this dissertation is to examine the effectiveness of Malawi's legal framework in addressing IBSA. To achieve the main objective, the specific objectives of this dissertation are firstly to analyse the concept of IBSA, secondly to examine legal responses to IBSA across various jurisdictions including the Philippines, Canada, England, and the United States and, thirdly to determine whether Malawi's existing legal framework effectively addresses IBSA. The fourth objective of this dissertation is to make recommendations for Malawi to improve its legal framework in order to effectively address IBSA.

Methodology

The dissertation relies on desk-based research and adopts a doctrinal research methodology, which is defined as the analysis of substantive legal doctrines, principles, concepts, legislation, and judicial pronouncements.¹⁰ This dissertation analyses the Malawian Constitution and various statutes, as well as international human rights instruments which Malawi has ratified. This dissertation also relies on case law, both from Malawi and foreign jurisdictions and international tribunals. Additionally, this dissertation relies on secondary sources such as reports, journals and books.

¹⁰ T Hutchinson *The Doctrinal method: Incorporating Interdisciplinary Methods in Reforming the Law* (2015).

Structure of the Dissertation

The dissertation is divided into five chapters including the present chapter. This is followed by chapter two, which provides the theoretical and conceptual frameworks of feminist legal theory, IBSA, and gender equality. Chapter three provides Malawi's legal framework in relation to IBSA, including the rights to privacy and freedom of expression, and examines whether the framework effectively addresses IBSA. Chapter four provides a discussion on responses to IBSA and offers recommendations for Malawi's legal framework to effectively address IBSA. Chapter five concludes the dissertation with a summary of the main points.

Chapter Two: Conceptual and Theoretical Framework

Introduction

This chapter provides the conceptual and theoretical framework for this dissertation. The concepts and principles discussed in this chapter are instrumental not only as a tool for interpretation, but also in forming the basis of the arguments in this dissertation. This chapter firstly discusses feminist legal theory, which is critical because women are the subject of this dissertation and the analyses in this dissertation are therefore done through a feminist lens. Thereafter, this chapter analyses the concept of image based sexual abuse (IBSA) as used in this dissertation. Lastly, the chapter explores the concept of gender equality, which is also essential to this dissertation as IBSA disproportionately affects women.

Feminist Legal Theory

Feminist legal theory is a key component of this dissertation because as mentioned in chapter one, IBSA disproportionately affects women.¹¹ IBSA must therefore be analysed through a feminist lens. By using feminist legal theory, this dissertation demonstrates how male-centered the Malawian legal framework is in its failure to effectively address IBSA.

Feminism is a direct response to women's oppression and is a broad concept which has been defined by various scholars. Hooks defines feminism as a women's movement geared towards eradicating oppression and sexism.¹² Feminism is also described as a tool for analysing gender and social inequalities with the objective of empowering women and dismantling patriarchal systems.¹³

Women have been subjugated based on sex since time immemorial as a result of patriarchal societies in which men hold the power.¹⁴ The extent of women's subjugation varies amongst societies and over time periods. An example of this is the rise of technology which has taken place over time and resulted in violence against women taking various forms in the digital realm. The evolution of feminism is therefore categorized in "waves" to reflect various time periods. This categorisation serves as a model through which history and the economic, social and political status

¹¹ McGlynn and Rackley op cit note 1 at 534.

¹² B Hooks *Feminism is for Everybody* 2000 at 8.

¹³ M Fineman 'Feminist Legal Theory' (2005) 13(1) *American University Journal of Gender, Social Policy & the Law* 13-24 at 14.

¹⁴ R Lee and R Daly 'Man's Domination and Woman's Oppression: The Question of Origins' (1987) in *Beyond Patriarchy: Essays by Men on Pleasure, Power and Change* (Kauffman, M., ed.), 30-44 at 30.

of women are examined.¹⁵ The first wave of feminism began in the 19th century and its main concern was achieving equal rights for women and men, particularly with respect to voting.¹⁶ The second wave notably included women of colour and began in the 1960s, and is characterized by advocacy for women's rights and social equality.¹⁷ In the 90s, the third wave began and emphasised the importance of intersectionality and how different factors such as race and disability impact women.¹⁸

In 2012, the fourth and most recent wave of feminism began¹⁹ and this wave is central to this dissertation. The fourth wave recognises that technology and the internet can be used for feminist advocacy but also recognises that technology can be used to perpetrate violence against women.²⁰ Cochrane identifies four issues which are central to the fourth wave of feminism, namely intersectionality, humour, online feminism, and rape culture.²¹ The fourth wave of feminism informs this dissertation as IBSA is exacerbated by the internet and social media.

Feminist legal theory is premised on the idea that we live in a patriarchal society in which men hold the privilege and power, which in turn influences how laws are made and applied.²² At its core, feminist legal theory is used to analyse the relationship between women's position in society and the law.²³ Feminist legal theory is therefore a useful tool in analysing Malawi's legal framework with respect to IBSA and demonstrating the interplay between the law and gender.

Feminist legal theory is preferred in this dissertation over other legal theories such as positivist legal theory. The theory of legal positivism, as posited by Hart, defines law as a set of rules handed down from a sovereign to its subjects.²⁴ Positivist legal theory is somewhat relevant to this dissertation because the dissertation analyses the laws which provide for the right to privacy, freedom of expression, and IBSA. However, positivist legal theory is inadequate for the purposes

¹⁵ AK Householder, 2015. 'Girls, Grrrls, Girls: Lena Dunham, Girls, and the Contradictions of Fourth Wave Feminism' In *Feminist Theory and Pop Culture*, edited by Adrienne Trier-Bieniek 19–33. London:BrillSense. at 20.

¹⁶ H Mohajan 'Four Waves of Feminism: A Blessing for Global Humanity' (2022) 1(2) *Studies in Social Science & Humanities* 1-8 at 3.

¹⁷ Ibid.

¹⁸ S Benjamin and K Schwab 'Navigating the Waves of Feminism(s): A Duo Ethnography of Two Feminist Travellers' (2023) 26(3) *Annals of Leisure Research Journal* 396-413 at 398.

¹⁹ Ibid at 399.

²⁰ Ibid.

²¹ K Cochrane *All the Rebel Women: The Rise of the Fourth Wave of Feminism* (2013) at 60.

²² N Levit et al *Feminist Legal Theory: A Primer* (Second Edition) (2015) at 12.

²³ H Barnett *Sourcebook on Feminist Jurisprudence* (1997) at 59.

²⁴ M Stubbs 'Feminism and Legal Positivism' in *Sourcebook on Feminist Jurisprudence*, H Barnett (1997) 303-309 at 305.

of this dissertation because it does not take into account the patriarchal society in which we live or the impact of laws on women because legal positivism presents the law as an apolitical system separate from society.²⁵ Unger argues that legal positivism leaves no room for critical analysis of the law because positivism treats the law like an autonomous system that is not involved in other facets of society.²⁶ On the other hand, feminist legal theory rejects the apolitical and formalistic point of view of legal positivism by recognising that the law is not gender-neutral, nor is it neutral with respect to class, race, and other such factors.²⁷ The distinction between the two legal theories is therefore important because it highlights that feminist legal theory is more relevant to this dissertation as it takes into account gender relations and how they intertwine with the law.

Using feminist legal theory as a theoretical foundation, this dissertation argues that Malawi's legal framework does not effectively address IBSA. This has a negative impact on Malawian women's position in society and perpetuates the subjugation of women. If the patriarchal nature of the law is to be dismantled, Malawi's legal framework must be examined considering feminist legal theory.

Image Based Sexual Abuse

The concept of image based sexual abuse (IBSA) is central to this dissertation. This section therefore defines IBSA and places it within the framework of sexual violence. This section aims to provide a deeper understanding of the concept of IBSA.

Image Based Sexual Abuse Defined

IBSA, with the rise in technology and social media, has become a common form of sexual abuse. Hall describes IBSA as the sharing of images without consent, and states that such images are of a sexually suggestive nature and are typically shared with unknown people.²⁸ Other scholars are of the view that IBSA consists of three main components, namely the act of obtaining or creating nude or sexual images without consent, the dissemination of such nude or sexual images without consent, and threatening to distribute such images.²⁹

²⁵ RM Unger, *Knowledge and Politics* (1975) at 72.

²⁶ Ibid.

²⁷ Barnett op cit 23 at 59.

²⁸ Hall, M.; Hearn, J.; Lewis, R. 'Image-Based Sexual Abuse: Online Gender-Sexual Violations' (2023) *Encyclopedia*, 3, 327–339. <https://doi.org/10.3390/encyclopedia3010020> at 327.

²⁹ Powell, A et al 'Image-based sexual abuse: The Extent, Nature, and Predictors of Perpetration in a Community Sample of Australian Residents' (2019) *Computers in Human Behavior* 393-402.

IBSA is often used interchangeably with the term revenge pornography. The UK Parliament aptly defines revenge pornography as the non-consensual taking or disseminating of images that are private and sexual.³⁰ Citron & Franks similarly define revenge pornography as the dissemination of a sexual image of another individual without their consent.³¹

However, there is considerable debate regarding the use of revenge pornography instead of IBSA. Henry et al argue that although the term revenge pornography helps bring awareness to the issue of non-consensual distribution of sexual images, it is a misnomer because it does not consider that IBSA is about more than just revenge and occurs in a wide range of contexts.³² They cite instances such as those in which the motivation or intention of the perpetrator is extortion, sexual gratification, voyeurism, monetary gain, and not just revenge.³³ Feminist scholars similarly argue that using the term revenge pornography is misleading and does not encompass the full nature of the phenomenon as indicated above.³⁴

Rackley and McGlynn posit that the more appropriate term is IBSA and not revenge pornography because revenge centers on the motives of perpetrators, as opposed to the harm caused to victims.³⁵ They further argue that the term pornography is misleading as people equate pornography with consensual sexual gratification. As such, they are of the view that this poses challenges both to the public and to law-makers as they engage in legislative debate in that they are unable to see that sharing intimate images without consent amounts to abuse.³⁶ On the other hand, scholars such as McKinnon contend that all pornography is abusive.³⁷ Although McKinnon did not discuss pornography in the context of technology or IBSA, some could use such reasoning to maintain the terminology of 'revenge pornography' as the term already encompasses an element of abuse or violence. It is worth noting, however, that McKinnon's work was written during the second wave of feminism, before the prevalence of social media and consequently technology-facilitated violence. As such, it is not known whether McKinnon herself would have advocated for

³⁰ UK Parliament, 2015, at 34-35.

³¹D K Citron and MA Franks 'Criminalising Revenge Porn' (2014) 49 Wake Forest Law Review, 345.

³² N Henry et al 'Image-Based Sexual Abuse: Victims and Perpetrators' (2019) Trends & Issues in Crime and Criminal Justice No. 572 at 2.

³³ Ibid.

³⁴ N Henry and A Powell 'Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law' (2016) 25(4) Social and Legal Studies 1-22 at 7.

³⁵ McGlynn and Rackley op cit note 1 at 536.

³⁶ Ibid.

³⁷ C MacKinnon 'Not a Moral Issue' (1984) 2 Yale Law and Policy Review 321- 345 at 326.

the use of the term revenge pornography. Additionally, her work was published before certain conceptualizations of pornography and women's bodily autonomy. As such, she may not have held the view that pictures taken and disseminated through technology by women themselves are inherently abusive or objectify women.

The distinction between revenge pornography and IBSA, and the implications of using these terms interchangeably is key to the discussion at hand. As the above scholars contend, using revenge pornography limits the motives of the perpetrator, and using the broader term IBSA avoids such limitations. It is also critical to use the term IBSA as it acknowledges that IBSA is a type of sexual violence and abuse, enabling it to be incorporated into sexual offence laws and policies, as well as advocacy at large. It is for these reasons that this dissertation uses IBSA and not revenge pornography.

Image Based Sexual Abuse as Sexual Violence

There is a wide debate about IBSA being considered sexual abuse or sexual violence. Dworkin and MacKinnon acknowledged IBSA as far back as 1998, albeit not with that exact terminology.³⁸ Dworkin and MacKinnon refer to the sharing of sexually explicit photographs without consent as abuse, stating that men often take pictures of their partners with their partner's consent, but end up publishing the photographs in retaliation.³⁹

Kelly's concept of the continuum of sexual violence is also useful to this debate. Kelly argues that a concentration on only violent and severe forms of sexual violence causes forms considered non-physical and less severe to be ignored, resulting in some women's experiences not being taken seriously or regarded as sexual abuse.⁴⁰ The idea that sexual violence is a spectrum which includes non-physical abuse is important to this dissertation as it acknowledges that IBSA is sexual violence although it is not physical. Douglas et al also recognise that IBSA constitutes sexual violence, arguing that a perpetrator's use of technology to inflict sexual and emotional harm gives the perpetrator a sense of superiority and power over the victim, something which is central to sexual violence.⁴¹

³⁸ A Dworkin and C MacKinnon *Pornography and Civil Rights: A New Day for Women's Equality* (1998).

³⁹ *Ibid* at 70.

⁴⁰ L Kelly and J Radford 'Sexual Violence against Women and Girls: An Approach to an International Overview' in R. E Dobash and R. P. Dobash (eds.) *Rethinking Violence against Women* (1998) at 74.

⁴¹ H Douglas, B A Harris and M Dragiewicz 'Technology-Facilitated Domestic and Family Violence: Women's Experiences' (2019) 59(3) *British Journal of Criminology* 551-570 at 552.

In *Buturuga v Romania*,⁴² the applicant experienced domestic violence and argued that her husband had logged into her social media without her consent or knowledge and retrieved private images and documents. The European Court of Human Rights held that this constituted domestic violence and emphasised that domestic violence is multifaceted and can occur in the digital space. The Court further stated that domestic violence includes logging into someone's social media and digital devices and sharing their images.⁴³

In addition to the contention whether IBSA is sexual violence or not, others such as McGlynn et al argue that the requirement that images be considered of a sexual nature in order to be considered IBSA is limiting.⁴⁴ McGlynn et al suggest that the term "sexually explicit" is restrictive in that it limits the images to those that involve some form of nudity, therefore overlooking images that may be intimate or private in nature despite the woman being clothed.⁴⁵ Powell and Henry prefer the term image-based sexual exploitation, which also highlights the element of abuse.⁴⁶

It is imperative to critically analyse terminology and different conceptualizations of IBSA because it has a bearing on the way legal systems address and respond to IBSA. When a definition is too narrow, this restricts redress and support for victims as their circumstances may not fit into the narrow definition.

In Malawian literature, there have been some attempts to critically examine IBSA, albeit without referring to it as IBSA. Chisala and Kirya for instance adopt the term non-consensual pornography.⁴⁷ They too echo sentiments of the misleading nature of the term revenge pornography firstly, due to the fact that such acts are not always rooted in revenge, and secondly, because it carries the implication that taking a naked picture is a pornographic act.⁴⁸ They argue that taking an explicit image with the expectation that it will be shared within a private intimate relationship does not constitute pornography but the act of sharing such an image with someone

⁴² [2015] European Court of Human Rights, Application no. 56867/15.

⁴³ Ibid para 74.

⁴⁴ C McGlynn 'Beyond 'Revenge Porn': The Continuum of Image Based Sexual Abuse' (2017) 25(3) Feminist Legal Studies 25-46 at 30.

⁴⁵ Ibid.

⁴⁶ N Henry and A Powell 'Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law' (2016) 25(4) Social and Legal Studies 1-22.

⁴⁷ Chisala-Templehoff and Kirya op cit note 9 at 1.

⁴⁸ Ibid 2.

other than the intended audience does.⁴⁹ They further highlight that Malawian laws are generally unsympathetic to victims of nonconsensual pornography, especially in instances in which the victims consent to the production of the sexually explicit images in question.⁵⁰ Other Malawians, such as Malanga, also prefer the term non-consensual pornography, defining it as the sharing of images that are sexually graphic online without consent.⁵¹

It is clear from the above discussion that image-based sexual abuse is a form of sexual violence which disproportionately affects women. As such, the concept of gender equality is key to this dissertation as it offers a framework for understanding the position of Malawian women in society and the impact of IBSA. The concept of gender equality also provides a background for the legal framework for women's rights.

Gender Equality

Gender is defined as rules, responsibilities and entitlements that are associated with men, women or gender-diverse people.⁵² Gender is socially constructed, as opposed to sex which is the biological categorisation of men, women and intersex people based on their reproductive potential.⁵³ Definitions of gender as well as perspectives on gender relations vary according to different factors such as culture, age, disability, and sexual orientation.⁵⁴

Gender equality is relevant to this dissertation because IBSA disproportionately affects women and therefore aggravates gender inequality, as well as normalising and enabling patriarchal violence and misogyny.⁵⁵ The Special Rapporteur on Violence against Women notes that violence in the digital space is prevalent, particularly against women and girls, and further emphasises that violence in the digital realm is gendered because of systemic inequality and patriarchy.⁵⁶

Equality is an essential component of international human rights, despite instruments generally referring to it in a broad manner and rarely defining it. Friedman and Goldblatt note that

⁴⁹ Ibid.

⁵⁰ Ibid at 3.

⁵¹ D Malanga 'Survey of Cyber Violence against Women in Malawi' (2021) paper presented at the 1st Virtual Conference on Implications of Information and Digital Technologies for Development, Malawi, 2021 at 631.

⁵² USAID Gender Equality and Women's Empowerment Policy (2023) at 6.

⁵³ P Eckert and S McConnell-Ginet *Language and Gender* 2nd Edn (2013) Cambridge University Press, New York at 2

⁵⁴ USAID op cit note 53 at 6.

⁵⁵ A Berryhill and L Fuentes *Technology-Facilitated Violence against Women: Taking Stock of Evidence and Data Collection* (2023) UN Women, World Health organization at 4.

⁵⁶ Special Rapporteur on Violence against Women, *Its Causes and Consequences Report on Online Violence against Women and Girls from a Human Rights Perspective* (2018) para 25.

the central human rights instruments refer to state obligations to ensure human rights without “distinction”, “discrimination”, “exclusion”, or “restriction” or “on the basis of equality” between men and women.⁵⁷ The instruments refer to these terms without providing comprehensive definitions.

On an international level, the Universal Declaration on Human Rights (UDHR)⁵⁸ states, “every human being is entitled to all the rights and freedoms within the Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.⁵⁹ The UDHR is not a legally binding document.⁶⁰ However, it is important because it was the first universal instrument of human rights. The UDHR is relevant to this section of the chapter because it provides a basis for gender equality by prohibiting discrimination against women. The International Covenant on Civil and Political Rights (ICCPR)⁶¹ similarly calls on states to respect and ensure the rights in the Covenant without any distinction, including on the grounds of sex.⁶² The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁶³ draws its focus to women and states that discrimination against women is:

“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, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”⁶⁴

⁵⁷ S Friedman and B Goldblatt, Discussion Paper on Gender Equality and Women’s Rights in Progress of the World’s Women 2015-2016 (2015) UN Women at 1.

⁵⁸ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html> [accessed 5 January 2024].

⁵⁹ Article 2, UDHR.

⁶⁰ I Zamfir *The Universal Declaration of Human Rights and its relevance for the European Union* 2018 at 1.

⁶¹ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <https://www.refworld.org/docid/3ae6b3aa0.html> [accessed 5 January 2024].

⁶² Article 2, ICCPR.

⁶³ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at: <https://www.refworld.org/docid/3ae6b3970.html> [accessed 5 January 2024].

⁶⁴ Article 1, CEDAW.

On a regional level, article 1 of the Maputo Protocol requires states to “combat all forms of discrimination against women through appropriate legislative, institutional and other measures.”

Feminist scholars state that the essential aspect of gender equality is that both women and men should be able to fully enjoy their rights and opportunities without being treated differently.⁶⁵ Gender equality has also been defined as men and women’s equal ability to contribute to development and to fully benefit from it.⁶⁶ Gender equality is about societies recognising that men and women have equal value despite having biological differences.⁶⁷ The Council of Europe defines gender equality as follows:

“[Gender equality involves] an equal visibility, empowerment and participation of both sexes in all spheres of public and private life ... [Equality] is not synonymous with sameness, with establishing men, their life style and conditions as the norm ... it means accepting and valuing equally the differences between women and men and the diverse roles they play in society.”⁶⁸

The two distinct forms of equality are formal and substantive. The basis of formal equality is that people’s entitlement to certain rights should not be determined by individual or personal characteristics, and that society should be guided by merit.⁶⁹ An example of formal equality is article 2 of the ICCPR which requires states to respect the human rights of every person “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” This demonstrates formal equality by requiring that all people be treated the same. Some argue that formal equality is merely an illusion because people and institutions are not impartial therefore they will treat people differently regardless of what the law says.⁷⁰

⁶⁵ R Wodack Discourse. In P Essed, DT Goldberg, & A Kobayashi (Eds.) *A Companion to Gender Studies* (2005) Malden, MA: Blackwell Publishing at 520.

⁶⁶ UNESCO Gender Mainstreaming Implementation Framework (2003) at 17.

⁶⁷ UNESCO Gender Mainstreaming Implementation Framework (2003) at 17.

⁶⁸ Council of Europe *Gender Mainstreaming. Conceptual Framework, Methodology and Presentation of Good Practices. Final Report of Activities of the Group of Specialists on Mainstreaming* (1998) (98)2 at 7-8.

⁶⁹ Equal Rights Trust *The Ideas of Equality and Non-Discrimination: Formal and Substantive Equality* (2007) at 2.

⁷⁰ OM Fiss ‘Groups and the Equal Protection Clause’ (1976) 5 *Philosophy and Public Affairs* at 107.

Substantive equality entails considering that some groups are marginalized and taking positive action to ensure that everyone is treated fairly.⁷¹ Such positive action is defined by the British Department for Communities and Local Government in the following terms:

“Positive action means offering targeted assistance to people, so that they can take full and equal advantage of particular opportunities. Positive discrimination means explicitly treating people more favourably on the grounds of race, sex, religion or belief, etc. by, for example, appointing someone to a job just because they are male or just because they are female, irrespective of merit.”⁷²

Gender equality is also espoused by the Beijing Declaration and Platform for Action, the main objective of which is the empowerment of all women.⁷³ The Beijing Declaration and Platform for Action states, “the full realisation of human rights and fundamental freedoms of all women is essential for the empowerment of women.”⁷⁴

Gender equality is not only of use to the human rights but is also of importance in relation to development. In the 2030 Sustainable Development Agenda, gender equality is Sustainable Development Goal number five.⁷⁵ Ten other goals encompass benchmarks relating to gender, exemplifying the link between women’s empowerment and development.⁷⁶ Gender equality also promotes sustainable development in various dimensions, including ending poverty, conservation of the environment and building inclusive societies.⁷⁷ If women and girls are unable to fully enjoy rights and opportunities, the 2030 Agenda and sustainable development in its entirety is in jeopardy.⁷⁸

⁷¹ Equal Rights Trust op cit note 71 at 4.

⁷² Department for Communities and Local Government ‘Discrimination Law Review, A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain, a consultation paper’ (2007) at 61.

⁷³ Beijing Declaration and Platform for Action, Paragraph 9.

⁷⁴ Ibid.

⁷⁵ UN General Assembly, Transforming our world : the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1, available at: <https://www.refworld.org/docid/57b6e3e44.html> [accessed 4 September 2023].

⁷⁶ UN Women ‘In focus: Sustainable Development Goal 5’, published on 23 August 2022, available at https://www.unwomen.org/en/news-stories/in-focus/2022/08/in-focus-sustainable-development-goal-5?gclid=Cj0KCQjwgNanBhDUARIsAAelcAuOjCA_iKwRx4d9Fb_0i13uld-OJFHDJtH8KfB-V-Wi9mDPwMLF8d4aAjaFEALw_wcB [accessed 4 September 2023].

⁷⁷ UN Women *Why Gender Equality Matters Across all SGDs: An Excerpt of Turning Promises into Action: Gender Equality in the 2030 Agenda for Development* (2018) UN Women , United States at 4.

⁷⁸ Ibid.

One of the biggest threats to gender equality is gender-based violence and UN Women has emphasised that violence against women takes many forms, including technology-facilitated violence.⁷⁹ This buttresses why the concept of gender equality is so essential to this dissertation. The eradication of IBSA would enable women to fully enjoy their human rights without fear of being discriminated against because of their sex.

Conclusion

This chapter provided the theoretical and conceptual framework of this dissertation which includes feminist legal theory and the concepts of gender equality and IBSA. In assessing whether Malawi's legal framework addresses IBSA, feminist legal theory will be of great significance as various laws are analysed in light of how they impact on women's rights. Additionally, the concept of gender equality buttresses why there is a need to advocate for legal responses to IBSA. Having analysed the theoretical and conceptual framework on which this dissertation is based, the next chapter analyses Malawi's international and regional obligations and its domestic legal framework in relation to IBSA and determines the effectiveness of the legal framework.

⁷⁹ Ibid at 20.

Chapter Three: Malawi's Legal Framework: An Effective Tool against Image Based Sexual Abuse?

Introduction

This chapter examines Malawi's legal framework and whether it effectively addresses image based sexual abuse (IBSA). Firstly, this chapter analyses Malawi's international and regional obligations as well as its domestic legal framework in relation to violence against women and IBSA. In analysing the regional and international framework, this chapter focuses on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),⁸⁰ the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol),⁸¹ and the Southern African Development Community Protocol on Gender and Development (SADC Protocol)⁸² because these instruments are the most critical international instruments on women's rights and gender-based violence that Malawi has ratified.⁸³

In considering Malawi's domestic legal framework, attention is given to the Constitution,⁸⁴ the Electronic Transactions and Cyber Security Act⁸⁵ and the Gender Equality Act⁸⁶ because although there is no singular legislation which addresses IBSA in Malawi, the aforementioned laws can potentially be used to address IBSA.

This chapter then examines Malawi's international and regional obligations with respect to the right to privacy and the right to freedom of expression as they relate to image-based violence. In doing so, the International Covenant on Civil and Political Rights (ICCPR)⁸⁷ and the Universal Declaration of Human Rights (UDHR)⁸⁸ are considered as they have comprehensive provisions on the rights to privacy and freedom. This chapter then considers the African Charter on Human and

⁸⁰ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at: <https://www.refworld.org/docid/3ae6b3970.html> [accessed 4 January 2024].

⁸¹ African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003, available at: <https://www.refworld.org/docid/3f4b139d4.html> [accessed 4 January 2024].

⁸² Southern African Development Community (SADC) Protocol on Gender and Development, 2008.

⁸³ UN Women *Republic of Malawi Country Gender Profile* (2020) African Development Bank at 30.

⁸⁴ Constitution of the Republic of Malawi 1994.

⁸⁵ Chapter 74:02, Laws of Malawi.

⁸⁶ Chapter 25:06, Laws of Malawi.

⁸⁷ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <https://www.refworld.org/docid/3ae6b3aa0.html> [accessed 4 January 2024].

⁸⁸ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html> [accessed 4 January 2024].

People's Rights (African Charter),⁸⁹ the African Charter on the Rights and Welfare of the Child (African Children's Charter),⁹⁰ the African Union Data Protection Convention (AU Data Protection Convention),⁹¹ and the African Union Personal Data Protection Guidelines.⁹² This chapter subsequently looks at Malawi's domestic legal framework on the right to privacy and the right to freedom of expression. Throughout this chapter, it will be ascertained whether Malawi is fulfilling its international and regional obligations relating to IBSA, and whether Malawi's legal framework effectively addresses IBSA.

Mader argues that the effectiveness of a law is determined by the law's ability to achieve its goals.⁹³ Allot similarly posits that a law is considered effective when it is able to do what it was designed for and when it fulfils its objectives.⁹⁴ Mousmouti is of the view that effectiveness is concerned with the direct results of the law regarding the problem the law seeks to solve.⁹⁵ It is against this background that this chapter analyses whether Malawi's legal framework effectively addresses IBSA.

International and Regional Legal Framework

Malawi is a dualist state,⁹⁶ and Sections 11 and 211 of Malawi's Constitution make international law applicable in Malawi. Section 11(2) (c) states, "in interpreting the provisions of this Constitution, a court of law shall, where applicable, have regard to current norms of public international law". Section 211 provides, "binding international agreements entered into before the

⁸⁹ Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <https://www.refworld.org/docid/3ae6b3630.html> [accessed 4 January 2024].

⁹⁰ Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990), available at: <https://www.refworld.org/docid/3ae6b38c18.html> [accessed 4 January 2024].

⁹¹ African Union Convention on Cyber Security and Personal Data Protection EX.CL/846(XXV) available at <https://ccdcoe.org/sites/default/files/documents/AU-270614-CSConvention.pdf> (accessed 29 August 2023).

⁹² Internet Society and the Commission of the African Union 'Personal Data Protection Guidelines for Africa', 9 May 2018 available at <https://iapp.org/resources/article/personal-data-protection-guidelines-for-africa/> (accessed 29 August 2023).

⁹³ L Mader, "Evaluating the Effects: A Contribution to the Quality of Legislation" (2001) 22(2) *Statute Law Review* 119 at 126.

⁹⁴ A Fluckiger, "Effectiveness: a new Constitutional principle" (2009) 50 *Legislaçao: cadernos de ciencia de legislaçao* 183 at 190.

⁹⁵ M Mousmouti 'Making Legislative Effectiveness an Operational Concept: Unfolding the Effectiveness Test as a Conceptual Tool for Lawmaking' (2018) 9(3) *European Journal of Risk Regulation* 445-464 at 449.

⁹⁶ R E Kapindu J 'The Relevance of International Law in Judicial Decision-Making in Malawi' in A Meerkotter *Using the Courts to Protect Vulnerable People: Perspectives from the Judiciary and Legal Profession in Botswana, Malawi and Zambia* (2014) 74-84 at 78.

commencement of this Constitution shall continue to bind the Republic unless otherwise provided by an Act of Parliament.”

Historically, violence against women that was perpetrated by non-state actors within the confines of the home and was not considered a human rights violation.⁹⁷ This stance changed considerably in the 1980s and 1990s, during which this interpretation of human rights came under fire from the feminist movement for encouraging women’s rights violations and misogyny.⁹⁸ This change in perspective regarding women’s rights meant that state obligations now extended to human rights violations in the home or within private settings.

One of the most essential international instruments with respect to women’s rights and gender-based violence is CEDAW, which some call “the international bill of women’s rights”.⁹⁹ Malawi ratified CEDAW in 1987. CEDAW is relevant to this discussion because it places obligations on Malawi with respect to gender-based violence, which as discussed in chapter two, includes IBSA. CEDAW notably does not have provisions on IBSA, which is understandable because CEDAW came into force in 1981, long before technology was as widespread as it is now. Despite this, the CEDAW Committee published General Recommendation No. 35 in 2017,¹⁰⁰ in which it expanded violence against women to include violence that is perpetrated in the digital sphere and on online platforms.¹⁰¹ Additionally, the CEDAW Committee in General Recommendation No. 36,¹⁰² brought to light the prevalence of the dissemination of images and videos of a sexual nature without consent.¹⁰³ In this general recommendation, the CEDAW Committee requires states to criminalise harassment and violence perpetrated through technology.¹⁰⁴

⁹⁷ W Kalin and J Kunzli *The Law of International Human Rights Protection* 2009 At 32.

⁹⁸ United Nations *Women’s Rights are Human Rights* (2014) Geneva at 26.

⁹⁹ R Reddock ‘CEDAW and Violence Against Women: Reflections After 40 Years’ (2022) 28(2) *Violence Against Women* 1723-1727 at 1723.

¹⁰⁰ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 35, Updating General Recommendation No. 19: Violence against women*, 2017, available at: <https://digitallibrary.un.org/record/1305057?ln=en> [accessed 25 October 2023].

¹⁰¹ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 35, Updating General Recommendation No. 19: Violence against women*, 2017, available at: <https://digitallibrary.un.org/record/1305057?ln=en> [accessed 25 October 2023] Para 20.

¹⁰² UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 36: Right of women and girls to education*, 2017, available at: UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 33: Women’s access to justice*, 2015, available at: <https://digitallibrary.un.org/record/807253?ln=en> [accessed 25 October 2023].

¹⁰³ *Ibid* at para 70.

¹⁰⁴ *Ibid* at para 72.

General Recommendations 19¹⁰⁵ and 35 are also important because they highlight the interconnectedness between gender-based violence and discrimination. In General Recommendation 19, the CEDAW Committee notes that gender-based violence is a form of discrimination that “seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men.”¹⁰⁶ The Committee further demonstrates how gender-based violence is rooted in discrimination as it stems from traditional attitudes which regard women as subordinate to men and perpetuate gendered stereotypes that are harmful to women.¹⁰⁷ Such attitudes and norms result in gender-based violence. General Recommendation 35 further emphasises that gender-based violence perpetuates discrimination by maintaining women’s subordinate position in society and hindering women from enjoying their rights on an equal basis with others.¹⁰⁸ As the CEDAW Committee notes, gender-based violence and discrimination influence and reinforce each other. As such, the state obligations regarding gender-based violence go hand in hand with their obligations regarding non-discrimination.

The link between gender-based violence and discrimination is important to this study because it demonstrates the impact that IBSA has on women’s ability to enjoy their human rights on an equal basis with others. It also demonstrates how discriminatory attitudes and norms contribute to IBSA and exacerbate violations of women’s privacy and autonomy.

Article 2¹⁰⁹ of CEDAW provides a comprehensive overview of obligations and places multifaceted duties on Malawi, stating:

“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: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate,

¹⁰⁵ UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 19: Violence against women, 1992, <https://www.refworld.org/legal/resolution/cedaw/1992/en/96542> [accessed 25 June 2024] at para 1.

¹⁰⁶ Ibid n100.

¹⁰⁷ Ibid n105 at para 11.

¹⁰⁸ Ibid n100 at para 10.

prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g) To repeal all national penal provisions which constitute discrimination against women.”

Article 2(e), which is also known as the due diligence obligation, is at the heart of CEDAW. It requires states to act with due diligence in order to prevent violations of rights or to investigate and punish acts of violence, and to provide compensation to victims of gender-based violence.¹¹⁰ This obligation plays a key role in ensuring that states not only put in place laws, but also ensure that where these laws are violated, perpetrators are punished and victims can be adequately compensated. This contributes to an effective legal system in which women are not only protected on paper, but also in reality.

The obligations in article 2 are with respect to equality and discrimination against women and do not specifically refer to IBSA. However, the obligations in article 2 are nonetheless relevant because IBSA is a direct product of misogyny and discrimination against women.¹¹¹ Perpetrators, the majority of which are men, are driven by a wide range of motives stemming from their sense of superiority and wanting to control women because they deem them to be inferior, sexual gratification, attempting to cause distress or humiliation to women, and entitlement on the basis of them being men.¹¹² As such, there is a need to first discuss Malawi’s obligations under article 2.

Firstly, article 2 of CEDAW obligates Malawi to incorporate the principle of equality of men and women into its national constitution “or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical

¹¹⁰ Ibid n105 at para 9.

¹¹¹ MB Andreasen at al *The Gendered Experiences of Image-based Sexual Abuse: State of the Research and Evidence-based Recommendations* (2022) DCU Anti-Bullying Centre (ABC) at 16.

¹¹² Ibid.

realisation of this principle”. Malawi has done this in section 20 of the Constitution which prohibits discrimination on the basis of sex, and therefore prohibits actions such as IBSA, which stem from discrimination. Article 2 also requires Malawi to ensure “the legal protection of women’s rights on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination”. As previously stated, Malawi’s Constitution prohibits discrimination against women, thus offering legal protection from IBSA. However, Malawi falls short on ensuring the protection of women through competent national tribunals and other public institutions and throughout the research for this dissertation, there has been nothing to indicate that Malawi has taken any steps in ensuring its tribunals and public institutions are addressing IBSA. As such, it has failed to fulfil this obligation.

As discussed previously, the CEDAW Committee stated that gender-based violence is a form of discrimination against women that hampers the women’s ability to fully enjoy their rights on an equal basis with others.¹¹³ In this regard, the Committee emphasises that states have a duty to protect women from gender-based violence by taking effective measures to eradicate gender-based violence and by providing effective remedies to women who have experienced violence.¹¹⁴ Malawi took steps to protect women from violence by prohibiting discrimination against women in sections 20(1)¹¹⁵ and 24¹¹⁶ of its Constitution, as well as other legal provisions which are discussed in the next part of this chapter. However, Malawi has neither taken action to specifically protect women from IBSA, nor has it provided effective remedies for victims of IBSA. Although victims of IBSA can rely on broader provisions which prohibit discrimination such as section 20 of the Constitution, these remedies have not been utilized by women who have experienced IBSA in seeking legal redress. Effective remedies must be affordable, accessible, timely, and must offer appropriate reparation.¹¹⁷ Victims of IBSA in Malawi face challenges in accessing remedies because law enforcement officers are reluctant to take on such cases and often have discriminatory

¹¹³ UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 19: Violence against women, 1992 at paragraph 6.

¹¹⁴ Ibid at paragraph 24.

¹¹⁵ Section 20(1) states, “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, nationality, ethnic or social origin, disability, property, birth or other status.”

¹¹⁶ Section 24 states, “Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status which includes the right”.

¹¹⁷ Scottish Human Rights Commission Adequate and Effective Remedies for Economic, Social and Cultural Rights: Background Briefing Paper for the National Taskforce on Human Rights Leadership (2020) at 3.

attitudes towards women.¹¹⁸ In addition to this, the criminal justice process is said to be traumatizing as it sometimes involves mediation between the perpetrator and the victim.¹¹⁹ Public institutions including the Malawi Human Rights Commission also fail to provide effective remedies to IBSA victims, with it being reported that they do not act upon complaints made to them.¹²⁰ Malawi has evidently not fulfilled its obligations under CEDAW to provide effective remedies to protect women from IBSA.

Lastly, Malawi has an obligation to ensure that judicial and law enforcement officers undergo gender-sensitive training so that they are able to appropriately handle instances of gender-based violence.¹²¹ The Malawi Police Service (MPS) participated in trainings on cyber-crime protection in 2018,¹²² but there is no information available pertaining to the content of the training and whether it incorporated IBSA. Furthermore, there is no evidence to show that judicial and law enforcement officers have undergone gender-sensitive training, specifically on IBSA, therefore it would appear that Malawi has not fulfilled its obligation to conduct gender-sensitive training of judicial and law enforcement officers with respect to IBSA.

Malawi has also ratified regional women's rights instruments which place obligations on Malawi in relation to IBSA as well as gender-based violence. One such instrument is the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (the Maputo Protocol).¹²³ Article 2 of the Maputo Protocol requires states to "combat all forms of discrimination against women through appropriate legislative, institutional and other measures." Additionally, article 4 of the Maputo Protocol places a duty on states parties to:

"[E]nact and enforce laws to prohibit all forms of violence against women... adopt such measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against

¹¹⁸ S Chisala-Templehoff *Accessing Justice for Image-Based Sexual Abuse A Challenge For Victims in Malawi* published on AfricanFeminism on June 4, 2020 available at <https://africanfeminism.com/accessing-justice-for-image-based-sexual-abuse-a-challenge-for-victims-in-malawi/> [accessed on 4 January 2024].

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 19: Violence against women, 1992 at paragraph 24.

¹²² High Commission of India, Press Release on Training Programme For Malawi Police Officers in Cyber Crime Protection, published January 4 2018

https://www.hcilongwe.gov.in/newslmage/1515130842_2615_Press%20Release%20-%20NIB%20officials.pdf.

¹²³ African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003, available at: <https://www.refworld.org/docid/3f4b139d4.html> [accessed 25 October 2023].

women... establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women.”

As discussed in the analysis of Malawi’s obligations under CEDAW, Malawi has legal provisions which prohibit violence against women, which includes IBSA. However, Malawi has not established “mechanisms and accessible services for effective information”, as required by article 4 of the Maputo Protocol. The government has not taken any steps to disseminate information about IBSA, thus falling short of this obligation placed on it by the Maputo Protocol. With respect to rehabilitation of victims, in 2008 the Malawi Police Service put in place victim support units (VSUs) which offer support and counselling to victims of gender-based violence.¹²⁴ A victim of IBSA can therefore make use of VSUs. Malawi has consequently fulfilled its obligation in the Maputo Protocol to provide rehabilitation of victims of gender-based violence.

Another key regional instrument is the Southern African Development Community (SADC) Protocol on Gender and Development.¹²⁵ Article 20 of the SADC Protocol places an obligation on states to take legislative measures to address gender-based violence. The SADC Model Law on Gender-Based Violence,¹²⁶ which is aimed at guiding SADC Member States in the development of policies and laws on gender-based violence, acknowledges that bullying and cyber-crimes, as well as IBSA, constitutes violence against women.¹²⁷

As discussed previously, Malawi took some legislative measures to address gender-based violence including inserting sections 20 and 24 into its Constitution and the enactment of laws such as the Electronic Transactions and Cyber Security Act¹²⁸ and the Gender Equality Act¹²⁹ which are discussed below. Malawi has therefore fulfilled its obligations under the SADC Gender Protocol to take legislative measures to address gender-based violence. The common theme amongst Malawi’s regional and international obligations appears to be the requirement that Malawi should put in place legislation to address discrimination against women and gender-based violence.

¹²⁴ UNICEF *Child Protection and Victim Support Services* 2018.

¹²⁵ SADC Protocol on Gender and Development, 2008.

¹²⁶ SADC Parliamentary Forum *SADC Model Law on Gender-Based Violence* 2022.

¹²⁷ *Ibid* Article 6(3)(k).

¹²⁸ Chapter 74:02, Laws of Malawi.

¹²⁹ Chapter 25:06, Laws of Malawi.

IBSA impacts the right to privacy, therefore there is a need to discuss Malawi's international and regional obligations as well as its domestic legal framework for the right to privacy as it relates to IBSA. The right to freedom of expression is then analysed because it is a right that needs to be limited in order to stop perpetrators from disseminating images without consent. Malawi's international and regional obligations and its domestic framework in relation to freedom of expression will then be discussed.

The International Right to Privacy

When one's picture or video of a sexual nature is disseminated without their consent, this is a violation of their privacy as they did not intend for their images to be shared with the public.¹³⁰ This impact on one's privacy is particularly detrimental in a digital age in which images can be swiftly and widely shared online at the click of a button.¹³¹ Rackley and McGlynn also highlight the relevance of privacy in the context of IBSA, stating that an image must be private for its dissemination to constitute IBSA, as opposed to sexual images that are created to be shared publicly.¹³² They further suggest that all images of a sexual nature must be presumably private unless the person in the image states otherwise or consents to the image being shared¹³³

In international law, the right to privacy is contained in Article 17 of the ICCPR and similarly in Article 12 of the UDHR. Article 17 of the ICCPR states:

“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) obliges Malawi to respect and to ensure to all individuals the rights recognised in the ICCPR without distinction based on, *inter alia*, sex. Article 2(2) of the ICCPR goes a step further and gives Malawi the positive obligation to, in compliance with its constitutional processes and provisions of the

¹³⁰ M Sepec 'Revenge Pornography or Non-Consensual Dissemination of Sexually Explicit Material as a Sexual Offence or as a Privacy Violation Offence' (2019) 13(2) 9 International Journal of Cyber Criminology 418-438 at 422.

¹³¹ *Ibid.*

¹³² McGlynn and Rackley *op cit* note 1 at 341.

¹³³ *Ibid.*

Covenant, adopt laws or other measures necessary to give effect to the rights in the Covenant. With respect to the right to privacy, Malawi is fulfilling its obligation in article 2(2) by guaranteeing the right to privacy in section 21 of its Constitution, as well as enacting laws which protect the right to privacy, some of which are discussed in the next part of this chapter. Although Malawi has not specified the link between the right to privacy and IBSA in its laws, the inclusion of the right in the Constitution provides a legal basis and redress for those who want to take action against the violation of their right to privacy through IBSA.

Article 2 of the ICCPR also places obligations on states to ensure that individuals whose rights under the ICCPR are violated have an effective remedy; to ensure that such a remedy consists of “competent judicial, administrative or legislative authorities”; and to develop judicial remedies. As discussed previously, when analysing Malawi’s obligations under CEDAW and the Maputo Protocol, Malawi’s legal remedies under its domestic laws for victims of IBSA are not effective because law enforcement officers have patriarchal attitudes and the legal process itself can be traumatizing for victims by forcing them to recount their experiences and because of the discriminatory attitudes within the judicial system.¹³⁴ Furthermore, institutions including Malawi Human Rights Commission do not act with a sense of urgency when it comes to cases of technology-facilitated violence and often leave those who have filed complaints in the dark by not responding to them.¹³⁵

The Human Rights Committee, has interpreted the right to privacy under Article 17 of the ICCPR and reiterated that states parties are obligated to “provide the legislative framework prohibiting violations of the right to privacy”.¹³⁶ The Committee also requires states to use the law to regulate the “gathering and holding of personal information on computers and other devices”, as well as a duty to take effective measures to ensure that information concerning a person’s private life does not reach the hands of persons who are not authorised by law to receive, process and use it.¹³⁷ Malawi fulfilled this obligation, notably by enacting the Electronic Transaction and Cyber

¹³⁴ Chisala-Templehoff op cit 117.

¹³⁵ Ibid.

¹³⁶ UN Human Rights Committee (HRC), *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988 at Paragraph 9.

¹³⁷ UN Human Rights Committee (HRC), *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988, at Paragraph 10.

Security Act. By prohibiting the sharing of data without consent, the Act protects the privacy of individuals from IBSA.

The right to privacy is surprisingly missing from the African Charter on Human and People’s Rights (African Charter). This is despite 52 African states having the right to privacy in their constitutions.¹³⁸ Singh and Power observe that this omission is felt now more than ever, as increased use of technology and digital media necessitates a strong regional framework for the right to privacy.¹³⁹ However, the absence of the right to privacy in the African Charter is not reflective of the entire African legal framework as it is protected in article 10 of the African Children’s Charter,¹⁴⁰ which provides:

“No child shall be subject to arbitrary or unlawful interference with his privacy ... provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children.”

There are also regional guidelines and agreements which include the right to privacy. The 2014 African Union Convention on Cyber Security and Personal Data Protection (AU Data Protection Convention)¹⁴¹ is one such worthy intervention in the African region. Article 8(1) of the AU Data Protection Convention provides the main objective of the Convention which is to establish “a legal framework aimed at strengthening fundamental rights and public freedoms, particularly the protection of physical data, and [to] punish any violation of privacy.” Regrettably, despite the AU Data Protection Convention’s promising potential, only 14 countries have ratified it, not including Malawi. This means that the Convention cannot come into force as article 36 of the Convention requires the ratification of 15 member states for it to be operational. Victims of IBSA in Malawi therefore cannot benefit from the protections offered by the Data Protection Convention because it is not yet in force. In addition to the AU Data Protection Convention, the

¹³⁸ A Singh and M Power ‘The Privacy Awakening: the Urgent Need to Harmonise the Right to Privacy in Africa’ (2019) 3 African Human Rights Yearbook 202-220 at 203.

¹³⁹ Ibid at 204.

¹⁴⁰ Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990), available at: <https://www.refworld.org/docid/3ae6b38c18.html> [accessed 29 August 2023].

¹⁴¹ African Union Convention on Cyber Security and Personal Data Protection EX.CL/846(XXV) available at <https://ccdcoe.org/sites/default/files/documents/AU-270614-CSConvention.pdf> (accessed 29 August 2023).

African Union in 2018 published the Personal Data Protection Guidelines for Africa,¹⁴² of which the objectives, *inter alia*, are to ensure “trust, privacy, and responsible use of personal data.”

The African Children’s Charter, the AU Data Protection Convention and the Personal Data Protection Guidelines can therefore be praised for their protection of the right to privacy. Still, with the exception of the African Children’s Charter, the right to privacy is not recognised by Africa’s leading human rights treaties.

Although Malawi has not ratified the AU Data Protection Convention, it is for the most part fulfilling its regional and international obligations with respect to the right to privacy by guaranteeing the right to privacy in section 21 of the constitution, by enacting laws such as the Electronic Transactions and Cyber Security Act which contain provisions which impact the right to privacy, and by putting in place institutions like the Malawi Human Rights Commission which are tasked with protecting the right to privacy. This is a positive step in addressing IBSA as it shows Malawi’s commitment to protecting the right to privacy. However, the implementation of these privacy laws with respect to IBSA is unsatisfactory because law enforcement officers appear to not have the capacity to properly deal with such cases and the Malawi Human Rights Commission are not enthusiastic in dealing with such cases.

The International Right to Freedom of Expression

Another right that is of relevance to this dissertation is the right to freedom of expression. States appear to be reluctant to interfere and limit the right where a matter is considered to be of a private nature.¹⁴³ Calvert convincingly argues that this has dire consequences for victims of IBSA.¹⁴⁴ Calvert notes that the reluctance of courts to limit freedom of expression with respect to private matters enables perpetrators of IBSA to disseminate images without a person’s consent because they deem it within their rights to do so.¹⁴⁵

¹⁴² Internet Society and the Commission of the African Union ‘Personal Data Protection Guidelines for Africa’, 9 May 2018 available at <https://iapp.org/resources/article/personal-data-protection-guidelines-for-africa/> (accessed 29 August 2023).

¹⁴³ *Snyder v Phelps* (2011) 131 S. Ct. 1207, 1215–1216 at 1215.

¹⁴⁴ C Calvert ‘Revenge Porn and Freedom of Expression: Legislative Pushback to an Online Weapon of Emotional and Reputational Destruction’ (2015) 24 *Fordham Intell. Prop. Media & Ent. L.J.* 673-701 at 675.

¹⁴⁵ *Ibid* at 676.

Some argue that the sharing of intimate images is a way of them expressing themselves because people are entitled to deal with data in their possession in any way they see fit.¹⁴⁶ Perpetrators therefore believe that laws which outlaw IBSA violate their right to freedom of expression.¹⁴⁷ Social media corporations including Facebook and X, formerly known as Twitter, on whose websites image based abuse is prevalent, also argue that prohibiting IBSA can result in over-regulation of content and thus violates the right to freedom of expression.¹⁴⁸ Similarly, advocates for freedom of expression argue that putting in place laws to prohibit IBSA is an excessive measure which violates freedom of expression, and they instead advocate for equipping users with tools to block and report IBSA.¹⁴⁹

Limiting the right to freedom of expression is critical because without doing so, individuals will feel even more entitled and justified in disseminating images without consent.¹⁵⁰ Additionally, if freedom of expression is not limited, misogynistic attitudes will be enabled as people will continue to believe that if a woman consents to be photographed or consensually shares an image with another person, they also consent to the other person doing what they please with the image.¹⁵¹ Therefore, it is essential that this chapter considers Malawi's obligations relating to freedom of expression. Through this analysis, it will be ascertained whether Malawi has adequate limitations on the right to freedom of expression such that women are protected from IBSA.

The importance of the right to freedom of expression is emphasised by various courts. The African Commission laments its importance, stating that freedom of expression is important for one's personal growth and development, and is a catalyst in a person's participation in public affairs.¹⁵² Furthermore, the High Court of South Africa stresses that democracy and freedom of expression are linked, emphasising the importance of the right in holding those in power

¹⁴⁶ R Rosenberg and H Dancig-Rosenberg 'Revenge Porn in the Shadow of the First Amendment' (2022) 24 University of Pennsylvania Journal of Constitutional Law 1285-1328 at 1294.

¹⁴⁷ Ibid at 1294.

¹⁴⁸ Layla Goldnick, 'Coddling the Internet: How the CDA Exacerbates the Proliferation of Revenge Porn and Prevents a Meaningful Remedy for its Victims' (2015) 21 Cardozo Journal of Law & Gender at 583.

¹⁴⁹ M Daniels, 'Chapters 859 & 863: Model Revenge Porn Legislation or Merely a Work in Progress?' (2014) 46 McGeorge Law Review at 297-320 at 297.

¹⁵⁰ J D Dawkins IV 'A Dish Served Cold: The Case for Criminalising Revenge Pornography' (2015) 45 Cumberland Law Review 395-447 at 439.

¹⁵¹ Ibid at 402.

¹⁵² African Commission: Constitutional Rights Project v Nigeria Communication Nos 140/94, 141/94 and 145/95 (1999) para 36.

accountable.¹⁵³ Freedom of expression is guaranteed in various international and regional instruments and forms part of customary international law.¹⁵⁴ Article 19 of the UDHR protects freedom of expression by providing:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

Freedom of expression is further protected in Article 19 of the ICCPR. Although Article 19 of the ICCPR has similar wording to Article 19 of the UDHR, it goes further in providing limitations to the right. Article 19(3) of the ICCPR states:

“The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- a. For the respect of the rights or reputations of others;
- b. For the protection of national security or of public order (ordre public), or of public health or morals.”

In interpreting the right to freedom of expression, the Human Rights Committee emphasises that states have an obligation to see to it that individuals are protected from “acts of third parties which may affect the enjoyment of the freedom of expression.” States are further required to ensure that the domestic law of the state gives effect to the right to freedom of expression in a way that is consistent with the Committee’s guidance provided on the general obligations of States Parties to the Covenant.¹⁵⁵ In Malawi, freedom of expression is a constitutionally guaranteed right in section 35 which states, “Every person shall have the right to freedom of expression.” The right to freedom of expression is subject to the limitations set out in

¹⁵³ *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) at 609.

¹⁵⁴ South African Litigation Centre and Media Legal Defence Initiative *Freedom of Expression: Litigating Cases of Limitations to the Exercise of Freedom of Speech and Opinion* (2016) at 11.

¹⁵⁵ UN Human Rights Committee (HRC), General comment no. 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34 , available at: <https://www.refworld.org/docid/4ed34b562.html> [accessed 7 September 2023] at paragraphs 7/8.

section 44 of the Constitution, thus striking an equilibrium between individual's right to express themselves, and the right for women to be free from IBSA.¹⁵⁶ More information about the right to freedom of expression and the limitations contained in section 44 of Malawi's Constitution is provided in the next section. Suffice to say, Malawi is fulfilling its obligations in the ICCPR by providing constitutional protection for the right to freedom of expression.

At a regional level, the African Charter provides for the right to freedom of expression. In article 9, the African Charter states, "Every individual shall have the right to receive information ... Every individual shall have the right to express and disseminate his opinions within the law." Article 9 of the African Charter notably does not have specified grounds for limitation in the way that the ICCPR does. Article 9 of the African Charter does, however, provide that the right to express and disseminate opinions ought to be within the law. Although the African Charter does not elaborate on what it means for the right to be "within the law", the African Commission attempted to define it. In the case of *Malawi African Association v Mauritania*,¹⁵⁷ the Commission expressed that within the law entails that a limitation must take into consideration international norms for it to be permissible.¹⁵⁸ The African Court of Human and People's Rights echoed these sentiments in *Konate v Burkina Faso*.¹⁵⁹

Malawi's Domestic Legal Framework

This section analyses Malawi's domestic legal framework for IBSA. It takes into consideration the Gender Equality Act, Electronics Transactions and Cyber Security Act, as well as Malawi's human rights framework in relation to the right to privacy and the right to freedom of expression.

Legislation for IBSA

Malawi does not have a singular act of parliament for IBSA. Malawi's legal framework also neither makes specific mention of IBSA, nor does it mention any other terms that are synonymous with IBSA such as revenge pornography. This is the major pitfall of the Malawian domestic legal framework as it relates to IBSA.

¹⁵⁶ Section 35.

¹⁵⁷ African Commission: *Malawi African Association v Mauritania* Communication Nos 54/91, 61/91, 98/93, 164-196/97 and 210/98 (2000).

¹⁵⁸ *Ibid* at paragraph 102.

¹⁵⁹ African Court: *Konaté v Burkina Faso* Application No 004/2013 (2014) at paragraph 129.

Citron and Franks observe that reluctance to legislate against IBSA is because of several factors. They note that one of the reasons for lack of comprehensive legislation is that there is not enough understanding regarding the gravity and scope of IBSA.¹⁶⁰ This can be attributed to the reluctance of victims to report and speak out about their experiences.¹⁶¹ Such reluctance stems from the fear of not being believed, lack of trust in law enforcement, the stigma of sexual violence, as well as a myriad other factors.¹⁶²

Citron and Franks also observe that the reluctance of lawmakers to outlaw IBSA is rooted in the historical attitudes toward women's autonomy which are marred with indifference and hostility.¹⁶³ As discussed in chapter two, women have been subjected to patriarchy since time immemorial.¹⁶⁴ This resulted not only in misogynistic attitudes which permeate the legislative process, but also in the reluctance of the state to get involved in issues concerning violence against women.¹⁶⁵ Lastly, Citron and Franks observe that the reluctance to legislate against IBSA comes from misconceptions about privacy.¹⁶⁶

There is no evidence that highlights the reasons for the lack of a singular piece of legislation on IBSA in Malawi, and the failure to mention IBSA in existing Malawian legislation. However, the observations of Citron and Franks with respect to lack of understanding on issues to do with IBSA, disregard for the gravity of IBSA, lack of trust in law enforcement, patriarchal attitudes and misconceptions about privacy are all reflected in the Malawian context to some extent. In the absence of evidence to the contrary, one may infer that the reluctance to legislate stems from these reasons.

Misconceptions about privacy were evident in the interpretation of the right to privacy by the Malawian High Court in the case of *Esther Chiunjiza v The Attorney General and Malawi Police Service*.¹⁶⁷ The High Court held that where nude pictures are taken by a person other than the person in the picture, the pictures are no longer private in nature because they have entered the

¹⁶⁰ Citron and Franks op cit note 31 at 346.

¹⁶¹ Ibid.

¹⁶² Sonke Gender Justice and Health-E News *Reporting on Gender-Based Violence: A Guide for Journalists and Editors* (2017) Sonke Gender Justice and Health-E News, Cape Town: South Africa at 16.

¹⁶³ Citron and Franks op cit note 31 at 346.

¹⁶⁴ Lee and Daly op cit note 14 at 30.

¹⁶⁵ Citron and Franks op cit note 31 at 346.

¹⁶⁶ Ibid.

¹⁶⁷ High Court Civil Appeal Cause No.1 of 2020 (Unreported).

public domain therefore the applicant's right to privacy was irrelevant to the matter.¹⁶⁸ Such a stance by the Court can result in reluctance of states to legislate against IBSA because they do not consider non-consensual image sharing a violation to one's privacy.

Law enforcement in Malawi has on certain occasions also demonstrated disregard for the gravity of technology-facilitated violence. Given that it is a relatively new phenomenon, there is not much evidence with respect to how law enforcement handles IBSA cases. However, in 2018 for example, a group of more than 200 young women had their phone numbers leaked by a young man who claimed that the women were "easy to sleep with".¹⁶⁹ This resulted in the women receiving a barrage of hateful messages and phone calls, as well as harassment both online and offline. Although this case did not involve IBSA, it exemplifies the ways in which law enforcement can sometimes act towards women as victims of cyber offences. The police refused to investigate the case when it was reported, stating that all the women had to file a report together, which was a nearly impossible task because the women lived in different districts and did not have the means to travel.¹⁷⁰ Despite all the evidence that was readily available, the police were quick to dismiss the women, seemingly displaying patriarchal attitudes and a reluctance to prosecute cyber offences. This is a demonstration of a way in which law enforcement officers in Malawi may sometimes act towards women.

Despite there not being a specific law or statutory provision for IBSA, there are some statutes that can be relied on for prosecuting perpetrators of IBSA, including the Gender Equality Act which is discussed below.

Gender Equality Act

The Gender Equality Act of 2013¹⁷¹ brought with it a promising legal framework for women's rights in Malawi. The objectives of the Act are "to promote gender equality, equal integration, influence, empowerment, dignity and opportunities, for men and women in all functions of society, to prohibit and provide redress for sex discrimination, harmful practices and sexual harassment."¹⁷² The Act is one of a few statutes that has the potential to adequately address IBSA. The other

¹⁶⁸ Ibid at 5.

¹⁶⁹ B Phiri 'How Leaking of my Contact Data Triggered an Avalanche of Online Abuse' Blog post published on 1 June 2020, available at <https://africanfeminism.com/how-leaking-of-my-contact-data-triggered-an-avalanche-of-online-abuse/> [accessed on 6 September 2023].

¹⁷⁰ Stevenson-McCabe and Chisala-Templehoff op cit note 8 at 519.

¹⁷¹ Chapter 25:06 Laws of Malawi.

¹⁷² Gender Equality Act, Chapter 25:06, Laws of Malawi, Preamble.

statutes are discussed in the later part of this section. Section 6(1) of the Gender Equality Act states:

“A person commits an act of sexual harassment if he or she engages in any form of unwanted verbal, non-verbal or physical conduct of a sexual nature in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated.”

The offence provided for in section 6(1) is punishable by a fine of MWK1, 000,000 and imprisonment of five years. Section 6 is one of the provisions of the Gender Equality Act which is most relevant to IBSA because IBSA is comprised of the same elements of the sexual harassment as provided in section 6. Firstly, IBSA constitutes “unwanted non-verbal conduct of a sexual nature” because it involves the sharing of one’s images of a sexual and private nature without their consent.¹⁷³ Secondly, IBSA also fits the description of sexual harassment because the sharing of private images is offensive and humiliating to the victim, and often involves intimidation or blackmail.¹⁷⁴ Disappointingly though, the Act’s potential is stunted as there have been no IBSA persecutions under section 6 to date, due to unknown reasons.¹⁷⁵ Section 6 has not translated into real impact on the ground and providing redress for victims of IBSA.

Electronic Transactions and Cyber Security Act

The Electronic Transactions and Cyber Security Act,¹⁷⁶ an innovation in Malawi’s legal landscape due it being the first act to comprehensively address technology-related issues, aims:

“(b) To ensure that information and communication technology users are protected from undesirable impacts of ... the spread of pornographic material ... (c) to put in place mechanisms that safeguard information and communication technology users from ...reach of privacy, misuse of information and immoral behaviour brought by the use of information and communication technology.”¹⁷⁷

¹⁷³ McGlynn and Rackley op cit note 1 at 537.

¹⁷⁴ E Bond, K Tyrell ‘Understanding Revenge Pornography: A National Survey of Police Officers and Staff in England and Wales’ (2018) *Journal of Interpersonal Violence*, 1-16 at 4.

¹⁷⁵ Stevenson-McCabe and Chisala-Templehoff op cit note 8 at 517.

¹⁷⁶ Chapter 74:02, Laws of Malawi.

¹⁷⁷ Section 3.

The Electronic Transactions and Cyber Security Act is relevant to IBSA because sections 84 and 87 of the Act respectively criminalise unauthorised interference, disclosure and access of data and the infringement on the right to privacy by use of electronic communication. Section 84 states “Any person who intentionally accesses or intercepts any data without authority or permission to do so, or who exceeds the authorised access, commits an offence and shall, upon conviction, be liable to a fine of K2,000,000 and to imprisonment for five years.” Section 84 is applicable to IBSA as it can be used to persecute perpetrators who gain access to images without consent with the intention of sharing them. Section 87 states, “Any person who wilfully and repeatedly uses electronic communication to disturb or attempts to disturb the peace, quietness or right of privacy of any person with no purpose of legitimate communication whether or not a conversation ensues, commits a misdemeanour and shall, upon conviction, be liable to a fine of K1, 000,000 and to imprisonment for twelve months.” Section 87 can be used to persecute perpetrators of IBSA because sharing of intimate images without consent disturbs the peace of the victim and infringes on their right to privacy, as will be discussed in the next section of this chapter. Therefore, the Electronic Transactions and Cyber Security Act provides a framework for addressing IBSA although it does not directly refer to it.

Just like the Gender Equality Act, the Electronic Transactions and Cyber Security Act does not appear to be yielding commendable results as only a few victims of IBSA have been able to obtain justice through criminal prosecution under the Electronic Transactions and Cyber Security Act. The cases include one in 2021 in which a magistrate’s court ordered a man to pay a fine of MWK100, 000 after he created a Facebook account and uploaded nude photos and videos of his ex-girlfriend.¹⁷⁸ More recently, in May 2023, a man posted nude pictures of his girlfriend on social media without her consent after they had a disagreement. The magistrate’s court ordered the man to pay a fine of MWK400, 000, failing which he would spend 8 months in prison with hard labour. The man failed to pay the fine and has been in prison as of June 2023.¹⁷⁹

The Electronic Transactions and Cyber Security Act appears to have great potential in addressing IBSA. In a world in which technology-facilitated violence is prevalent, there is clearly

¹⁷⁸ Malawi 24 ‘Man fined K100,000 over ex-girlfriend’s nude photos’ published on February 13 2021 available at <https://malawi24.com/2021/02/13/man-fined-k100000-over-ex-girlfriends-nude-photos/> [accessed on 9 September 2023].

¹⁷⁹ R Kondowe ‘Man fined K400,000 for sharing nude pictures of girlfriend’ published on June 20 2023 available at <https://malawi24.com/2023/06/20/man-find-k400000-for-sharing-nude-pictures-of-girlfriend/> [accessed on 9 September 2023].

a need for legislation like the Electronic Transactions and Cyber Security Act which is driven by the need to safeguard users of technology. Furthermore, sections 87 and 84 are provisions that can be used to prosecute perpetrators of IBSA and ensure that victims can get justice when their privacy has been breached. However, as seen by the low number of prosecutions under the Electronic Transactions and Cyber Security Act, it is not living up to its potential and is not effectively addressing IBSA.

In light of the above, Malawi's domestic legal framework has to some extent made commendable strides in protecting women from discrimination and IBSA. The constitutional protections in sections 20 and 24 as well as the offence of sexual harassment in section 6 of the Gender Equality Act, and the offences in sections 84 and 87 of the Electronic Transaction and Cyber Security Act demonstrate the potential of the domestic framework in addressing IBSA. However, as evidenced by the insufficiency in prosecutions under the aforementioned provisions, the implementation of the domestic legal framework is lacking. Other integral parts of Malawi's legal framework include its constitutional obligations to ensure the rights to privacy and freedom of expression in relation to IBSA, which is discussed next.

Malawi's Constitutional Rights to Privacy and Freedom of Expression

The ushering in of multiparty democracy in Malawi was coupled with a new Constitution in 1994 which included the bill of rights.¹⁸⁰ The bill of rights includes a myriad of civil and political rights including the right to freedom of expression¹⁸¹ and the right to privacy.¹⁸² Section 44 of the Malawian Constitution provides for limitations to the rights in the Constitution, including the right to privacy and the right to freedom of expression. Section 44 states:

“Without prejudice to subsection (1), no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognised by international human rights standards and necessary in an open and democratic society.

¹⁸⁰ MR Phooko 'Homosexuality and Privacy: Rep V Soko & Another under the Magnifying Glass' (2011) 5(1) Malawi Law Journal 55-74 at 69.

¹⁸¹ Section 35.

¹⁸² Section 21.

3. Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, shall be of general application.”

In the *Gwanda* case,¹⁸³ Kalembera J reiterated the four-pronged test for human rights limitations and stated that a supposed infringement of a right is permissible depending on the following:

- i) “whether the violation of the right is prescribed by a law of general application;
- ii) whether the violation is reasonable and necessary in an open and democratic society;
- iii) whether the violation “meets international human rights standards; and
- iv) Whether the violation “negates the essential content of the right in question”.

In *S v Makwanyane*,¹⁸⁴ Chaskalson P stated that in order to determine the limitation of a constitutional right, there is a need to balance competing values and to make an assessment that is grounded in proportionality. Constitutional limitations to human rights are relevant to IBSA, and particularly so with respect to freedom of expression. As will be discussed below, people who share images non-consensually usually claim that it is within their right to freedom of expression to do so.¹⁸⁵ Constitutional limitations in this respect are therefore important because they ensure that perpetrators of IBSA cannot use such excuses to cause harm to victims by sharing their images without their consent.

The Right to Gender Equality in Malawi

Section 20 of the Malawian Constitution provides, “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...sex...” It is important to bring attention to this constitutional guarantee of gender equality because women are disproportionately affected by IBSA¹⁸⁶ therefore the violations of their right to privacy do not exist in a vacuum. Violations of the right to privacy

¹⁸³ *Mayeso Gwanda v The State*, Constitutional Cause No. 5 of 2015, High Court of Malawi (Unreported).

¹⁸⁴ *S v Makwanyane and Another* (CCT 3/94) [1995] ZACC 3 (6 June 1995).

¹⁸⁵ Rosenberg and Dancig-Rosenberg op cit note 146 at 1294.

¹⁸⁶ McGlynn and Rackley op cit note 1 at 534.

and abuses of the right to freedom of expression within the context of IBSA are gendered in nature because they discriminate against women.

The Right to Privacy in Malawi

Sepec argues that the right to privacy is violated when one shares the images of another person without their consent.¹⁸⁷ Thus, a strong domestic legal framework for the right to privacy is key for addressing IBSA. Chirwa argues that the right to privacy entails that individuals should be free to do what they please and to make personal decisions with respect to their identity or personality...¹⁸⁸ The right to privacy is guaranteed by Section 21 of the Malawian Constitution, which states:

“Every person shall have the right to personal privacy, which shall include the right not to be subject to a. searches of his or her person, home or property; b. the seizure of private possessions; or c. interference with private communications, including mail and all forms of telecommunications.”

The right to privacy also has statutory backing in Malawi, despite there being no single legislation for the right to privacy or for data protection with respect to IBSA. Of relevance are the Communications Act,¹⁸⁹ the Access to Information Act,¹⁹⁰ and the Electronic Transactions and Cyber Security Act.¹⁹¹ The Communications Act criminalises the unlawful interference and disclosure of data without authorization under the Act.¹⁹² The Access to Information Act, although only applicable to the public and private bodies which the Act itself specifies, provides that where a third-party requests confidential information, this information shall not be disclosed until it is determined whether the disclosure is harmful as well as whether the information is indeed confidential.¹⁹³ Section 29 of the Access to Information Act prohibits information holders from disclosing personal information unreasonably. The Electronic Transactions and Cyber Security

¹⁸⁷ Sepec op cit note 130 at 422.

¹⁸⁸ DM Chirwa *Human rights under the Malawian Constitution* (2011) (Cape Town: Juta & Co Ltd, 2011) at 159.

¹⁸⁹ Chapter 68:01, Laws of Malawi.

¹⁹⁰ Act 13 of 2017 (16 February 2017) Malawi Gazette Supplement (AIA).

¹⁹¹ Chapter 74:02, Laws of Malawi.

¹⁹² Section 176(2).

¹⁹³ Section 20.

Act criminalises unauthorised interference, disclosure, and access of data¹⁹⁴ and infringement on the right to privacy by use of electronic communication.¹⁹⁵

Despite the above array of domestic laws that have an impact on privacy, Malawian courts have been inconsistent in their interpretation of the right to privacy. This is particularly the case with respect to the dissemination of private data or images. In the case of *Kimu v Access Malawi Limited and Others*,¹⁹⁶ which concerned the right to privacy, the defendant, a telecommunications company, was ordered by the Malawi Communications Regulation Authority (MACRA) to give details of their customers. The defendant sent a communication to its customers stating that it would have to comply with MACRA's request. The plaintiff sued Access Malawi, the telecommunications company, for breaching their right to privacy. The High Court held that the sharing of the plaintiff's details was a violation of their constitutionally protected right to privacy and reiterated that the right can only be limited according to the constitutional limitations provided in Section 44 of the Constitution. The constitutional limitations did not apply in this case because the violation of the plaintiff's right to privacy was not "prescribed by a law of general application...reasonable and necessary in an open and democratic society... [did not meet] international human rights standards; and negated the essential content of the right in question."

In the case of *Chitekwe v Horizon Health*,¹⁹⁷ the defendant used the plaintiff's image in their diaries without the plaintiff's consent for commercial purposes. The High Court held that this was a violation of the plaintiff's constitutional right to privacy because there was no express or implied consent for the use of the image. This is relevant to IBSA as it confirms that where a woman does not provide consent to her image being shared, the dissemination is a violation of her right to privacy. However, the High Court's insinuation that there can be implied consent for the use of an image is problematic in the context of IBSA. Although the High Court was not referring to IBSA, it is worth noting that such reasoning creates a loophole for perpetrators to claim that there was consent even if the victim did not express such consent.

Another case dealing with the constitutionally protected right to privacy involved a policewoman whose nude pictures were circulated on social media without her consent.¹⁹⁸ She

¹⁹⁴ Section 84.

¹⁹⁵ Section 87.

¹⁹⁶ Commercial Case 54 of 2011 (unreported).

¹⁹⁷ Civil Cause 297 of 2019 [2019] MWHC 123 (27 March 2019).

¹⁹⁸ *Esther Chiunjiza v The Attorney General and Malawi Police Service*, High Court Civil Appeal Cause No.1 of 2020 (Unreported) at 5.

subsequently faced disciplinary action with the Malawi Police Service, despite the images being disseminated without her consent. The High Court in this matter held that the fact that the appellant's picture was taken by someone else meant that it was no longer a private matter and had entered the public domain. As such, the High Court held that the right to privacy was not applicable. This decision of the court is problematic because if the sharing of intimate images is not considered private, this means that victims of image based violence cannot rely on the constitutional protection of the right to privacy. This limits the legal remedies available for IBSA victims.

Having considered Malawi's domestic laws' impact on privacy as well as the interpretation of the right to privacy by the courts, there appears to be a gap between what is on paper and what is happening in practice. The Court's reluctance to consider images of a sexual nature a private matter simply because the pictures were shared by the individual in the images weakens all efforts to address IBSA. Although this is only the view of one court and not a reflection of the entire judicial system, it provides a glimpse into how the laws on the right to privacy are interpreted in Malawi. Malawi's domestic legal framework effectively addresses IBSA by protecting the right to privacy in a number of laws. However, there appears to be no guarantee that the court will consider the right to be applicable when it has a matter of IBSA before it.

[The Right to Freedom of Expression in Malawi](#)

The right to freedom of expression is relevant to IBSA because some individuals believe that sharing images- even without consent- is a form of expression.¹⁹⁹ Freedom of expression is constitutionally protected in Malawi. Section 35 of the Constitution states "every person shall have the right to freedom of expression." This right to freedom of expression is subject to the limitations clause in Section 44, which was discussed previously in this chapter.

As stated in the previous section of this chapter, women are the most affected by IBSA and it is therefore gendered in nature. Therefore, is important to analyse the right to freedom of expression alongside the constitutional protections for women's rights to understand the gendered context within which the right to freedom of expression exists. The Malawian Constitution extensively protects women's rights and promotes gender equality. Section 13 of the Malawian Constitution provides gender equality as one of the principles of national policy, and Section 24

¹⁹⁹ Rosenberg and Dancig-Rosenberg op cit 146 at 1294.

of the Constitution states that women have the right “not to be discriminated against on the basis of their gender”. Gender equality is also guaranteed by Section 20 of the Constitution which prohibits discrimination of, including based on sex. Section 24(2) of the Constitution states: “Any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women, particularly practices such as - a. sexual abuse, harassment and violence”.

It is evident that the drafters of the Constitution intended for the Constitution to protect women and to ensure that women can fully enjoy their rights and to live a life free from sexual abuse, harassment and violence as demonstrated by section 24(2). Therefore, having looked at the constitutional guarantees for women’s rights and gender equality, it is certainly misguided to suggest that a person disseminating images of a woman without their consent is the type of freedom of expression envisaged by the Malawian Constitution. The context in which the right to freedom of expression exists is one in which one cannot use the right as a justification to cause harm to women because that is a blatant violation of women’s right to equality and to be free from violence.

[Further Reflections on the Effectiveness of Malawi’s Domestic Legal Framework](#)

While a legal framework that appears to be strong on paper is commendable, a good law is determined by its effectiveness. Therefore, the fact that Malawi has strong constitutional protections for the rights to privacy and freedom of expression, as well as statutory provisions that can be relied on by victims of IBSA is not a victory in itself. On paper, Malawi’s domestic legal framework has good laws that have the potential to be used by victims of IBSA to seek redress. However, a common obstacle in the effectiveness of these laws is the inadequacy of their implementation, as discussed throughout this chapter. Although there have been some cases of IBSA that have been prosecuted, the number should be higher given the prevalence of IBSA. The disconnect between what the laws say on paper and the extent to which the laws are actually being used raises the issue of formal and substantive equality in the context of Malawi’s domestic laws as they relate to IBSA.

Formal equality, as discussed in chapter 2, underlies Malawi’s laws as discussed above because the laws advocate for equality and equal protection of human rights. However, there are several barriers which make it difficult for victims of IBSA to rely on Malawi’s laws, despite being promising on paper. Several factors make justice inaccessible for victims of gender-based violence including the sexist nature of the criminal justice system, secondary victimisation and high costs

of litigation.²⁰⁰ This means that even if the laws were able to achieve formal equality, the barriers to justice would make it impossible for victims of IBSA, who are also victims of gender-based violence, to obtain legal redress. An example of these barriers is the lack of a case management system which allows for the prioritization of cases involving gender-based violence in Malawi.²⁰¹ Additionally, criminal justice agencies in Malawi do not have policies in place for the equal representation of men and women within those criminal justice agencies, particularly in decision-making positions.²⁰² This lack of women within the criminal justice space could possibly impact the way in which cases are handled as some cases may be viewed solely through the male lens. The absence of women working in the criminal justice system may contribute to its sexist nature and the sexist attitudes which are perpetuated against victims of IBSA.

Chisala argues that Malawian laws leave much to be desired in addressing IBSA because laws such as the Electronic Transaction and Cyber Security Act are not being put to use to effectively address IBSA.²⁰³ Some argue that there is a need to enact new legislation, specifically focusing on IBSA, but Chisala begs to differ and argues that enacting new legislation would be redundant because issues such as lack of access to acts of parliament will still serve as impediments, even if new laws are enacted. There therefore exists a need to work towards strengthening the implementation of the current laws.²⁰⁴

Conclusion

An analysis of the effectiveness of Malawi's legal framework necessitates an examination of Malawi's domestic laws, as well as its international and regional obligations with respect to IBSA. As such, this chapter provides an overview of Malawi's legal framework with respect to IBSA, including the rights to privacy and freedom of expression. It also considers Malawi's obligations arising from international and regional instruments. Malawi is faring well in fulfilling its regional and international obligations, especially regarding laws which address gender-based violence, and the rights to privacy and freedom of expression. Laws such as the Electronic Transactions and Cyber Security Act do not address the rights to privacy and freedom of expression, however, they

²⁰⁰ M Mukhopadhyay and S Quintero 'Gender and Access to Justice in Sub-Saharan Africa' Report on the KIT-CALS Conference held 29-30 October 2008 in Johannesburg, South Africa (2008) at 7.

²⁰¹ UNODC 'Report on Criminal Justice System Responses to Gender-Based Violence in the SADC region' (2021) at 26.

²⁰² Ibid at 27.

²⁰³ Stevenson-McCabe and Chisala-Templehoff op cit note 8.

²⁰⁴ Ibid at 525.

impact these rights by creating offences for conduct that violates these rights. For instance, section 87 of the Electronic Transactions and Cyber Security Act makes it an offence to use technology to violate someone's right to privacy. However, the implementation of the laws which impact the rights to privacy and freedom of expression is lacking because as illustrated in this chapter, institutions such as the Malawi Police Service have not undergone any training or capacity building on IBSA and are therefore not well equipped to handle IBSA cases. Additionally, there is neither a single piece of legislation for IBSA, nor is it directly referred to in existing legislation. This chapter has shown that an effective law must go beyond the confines of parliament. While Malawi's legal framework is promising in that it constitutionally guarantees the right to privacy and freedom of expression as well as providing redress to victims of IBSA through the Electronic Transactions and Cyber Security Act and the Gender Equality Act, victims of image based sexual laws which can be used to address IBSA, as well as sexist attitudes in law enforcement which act as deterrents to anyone seeking redress for IBSA.

Having analysed Malawi's legal framework and its effectiveness or lack thereof in addressing IBSA, the question arises about what Malawi can do to make its legal framework more effective. This involves an examination of various responses to IBSA in different jurisdictions, which is the subject of discussion in the next chapter, to determine what lessons Malawi can learn from those responses to resolve the inadequacies in its own legal framework.

Chapter Four: Responses to Image Based Sexual Abuse across Jurisdictions: Lessons for Malawi?

Introduction

This chapter provides an overview of both legal and non-legal responses to image based sexual abuse (IBSA) by using examples from across the globe that Malawi can draw lessons from. The countries that are considered in this chapter are the Philippines, Israel, Japan, Canada, Nigeria, South Africa, United States of America, United Kingdom, and Uganda. It examines both civil and criminal law responses and the limitations of both in effectively addressing image based violence. This chapter then explores possible responses to IBSA that go “beyond the law” and concludes that there is a need to use a hybrid approach in addressing image based abuse which involves legal responses as well as non-legal responses. This chapter hopes to highlight the various responses that Malawi could potentially learn from and implement to effectively address IBSA.

Civil and Criminal Responses to Image Based Sexual Abuse across the Globe: A Snapshot

There are attempts by some countries to address the prevalence of IBSA through a reform of their criminal and civil laws to ensure that there are remedies for women who experience IBSA.²⁰⁵ These countries include Philippines, Israel, Japan, Canada, England, USA, South Africa, Nigeria and Uganda, and their responses to IBSA are considered in the following sections.

The Philippines was the first jurisdiction to introduce laws to combat IBSA with the Anti-Photo and Video Voyeurism Act of 2009²⁰⁶ which made the creation or distribution of a photo or video of a sexual nature without a person’s consent an offence punishable by a seven year prison sentence and a fine of ₱500,000.²⁰⁷ Israel amended its Prevention of Sexual Harassment Law²⁰⁸ in 2014 to prohibit the online distribution of sexual images without consent. The maximum sentence of this offence is five years.²⁰⁹ In 2014, Japan also made the publishing of a private image of a sexual nature an offence punishable by a maximum fine of ¥500,000 or a maximum sentence of three years through its Act on Prevention of Victimization Resulting from Provision of Private Sexual Image.²¹⁰ Just as the aforementioned countries have done, Malawi can put in place

²⁰⁵ N Henry, A Flynn and A Powell ‘Responding to ‘Revenge Pornography’: Prevalence, Nature and Impacts’ Report to the Criminology Research Advisory Council (2019) at 48.

²⁰⁶ Republic Act No. 9995.

²⁰⁷ Section 4, 5.

²⁰⁸ 5758-1998.

²⁰⁹ Section 3(a)(5a).

²¹⁰ Law No. 126 of 2014.

legislation that specifically targets IBSA and imposes hefty fines and prison sentences on perpetrators. This will demonstrate how seriously Malawi takes technology-facilitated violence.

Increased cases of IBSA in Canada prompted the government to introduce the Protecting Canadian from Online Crime Act in 2014.²¹¹ The Act amended the Criminal Code of Canada and introduced the offences of cyberbullying and IBSA, amongst others. Section 161 of the Act provides that publishing or distributing an image of an intimate nature without the consent of the person in the image is an indictable offence punishable by a maximum of five years in prison. The Act commendably goes a step further in addressing IBSA and entitles courts to prohibit the offender from using the internet or other digital network unless under conditions specified by the court.²¹² Malawi does not have such legislation and does not impose such punishments in existing legislation that prohibits IBSA. As such, Malawi could benefit from also punishing offenders by prohibiting them from using the internet and digital networks, and imposing conditions for use.

Additionally, the Protecting Canadian from Online Crime Act empowers courts to make orders for the images to be removed from the internet as well as the reimbursement of costs incurred by the victims in the process of getting the pictures removed from the internet. The Canadian laws on IBSA are admirable and should be emulated in Malawi because not only do they recognise IBSA as an offence they also center the victim and ensure that the victim suffers no further harm from the non-consensual dissemination or creation of their images by barring the perpetrator from using digital devices. Canadian courts have also shown a willingness to prosecute image-based violence cases. For example, in *R v AC*,²¹³ a man was charged under the Protecting Canadian from Online Crime Act for sharing videos and pictures of a woman on the internet without her consent. The defendant pled guilty and was sentenced to five months in prison.

England and Wales also address IBSA through the Criminal Justice and Courts Act,²¹⁴ which was enacted in 2015. Section 33 of the Act criminalises the disclosure of “private sexual photographs or films” if the person in the pictures does not consent and if the intention of the perpetrator is to cause distress to the victim. The offence is punishable by a maximum of two years in prison. While this Act can certainly be lauded for criminalising IBSA, the element of “intention to cause distress to the victim” is problematic. The Act fails to take into account the various other

²¹¹ S.C. 2014, c. 13.

²¹² Section 166.2(1).

²¹³ 2017 ONCJ 317.

²¹⁴ Criminal Justice and Courts Act 2015 c.2, United Kingdom.

intentions that a perpetrator could have when disclosing images without consent, such as mere gratification. As such, the Criminal Justice and Courts Act limits the scope of IBSA and makes it easier for perpetrators to claim that causing distress to the victim was not their intention. In order to avoid enacting such restrictive IBSA laws, Malawi should ensure that when it does put in place legislation, the elements of the offence should be broad enough to encompass all aspects of IBSA, including the myriads of reasons behind it.

In contrast, IBSA is not a specific federal criminal offence in the United States. In 2017, the Ending Non-Consensual Online User Graphic Harassment (ENOUGH) Bill was introduced to address the non-consensual sharing of images of an intimate nature.²¹⁵ However, the Bill was not signed into law. Despite IBSA not being criminalised at a federal level, several jurisdictions in the United States have legislation which addresses IBSA. The Illinois Criminal Code,²¹⁶ for example, classifies as a felony the “non-consensual dissemination of private sexual images”, making it punishable by a maximum sentence of three years and a maximum fine of \$25,000.²¹⁷ In New Jersey, making or disclosing a non-consensual recording of one’s “intimate parts” or showing an individual engaging in a sexual act without consent is a crime. It constitutes a criminal invasion of privacy, and the offence is punishable by a maximum of five years imprisonment.²¹⁸ Placing such hefty fines as punishment for IBSA sends a message to offenders and to the general public that IBSA is considered a serious offence. Malawi could also consider putting in place larger fines to deter would-be offenders and to demonstrate the seriousness of the crime.

In South Africa, disseminating images that are sexually explicit without one’s consent is a criminal offence. Section 16 of the Cybercrimes Act²¹⁹ criminalises the “unlawful and intentional disclosure of an intimate image where the person displayed in the image does not consent to such disclosure and has a reasonable expectation of privacy.” The Act defines an intimate image as a “depiction of a person, real or simulated, in which such person is, *inter alia*, nude or their genital organs are displayed.”²²⁰ Under the Act, IBSA is punishable by imprisonment of up to three years

²¹⁵ M Buxton ‘There's Finally A Bill To Fight Perpetrators Of Revenge Porn’ published on 28 November 2017, available at <https://www.refinery29.com/en-us/2017/11/182783/enough-act-revenge-porn-bill-2017> [accessed on 7 August 2023].

²¹⁶ (720 ILCS 5/) Criminal Code of 2012.

²¹⁷ §11-23.5, Illinois Criminal Code.

²¹⁸ NJ Rev Stat § 2C:14-9 (2013).

²¹⁹ Act 19 of 2020.

²²⁰ Section 16.

or a fine.²²¹ The Act not only makes the actual sharing of the image an offence as it relates to the main perpetrator, it also prohibits “aiding, abetting, inducing, inciting, instigating, instructing, commanding or procuring to commit an offence”.²²² This means that even those who re-share the non-consensual images may be liable for sanction. South Africa’s Cybercrimes Act is commendable because it takes into account the nature of social media, through which people forward images on platforms such as Whatsapp. If Malawi were to take a similar approach, it would deter people who receive images that are a product of IBSA and share them even further. It would establish a sense of individual responsibility by ensuring that anyone who receives such pictures does not play a role in their further dissemination. Additionally, the Act refers to both real and simulated pictures. As technology advances, IBSA has grown to include artificially generated images such as deep fakes. Malawi should therefore take that into consideration to keep up with changes in technology.

Nigeria neither has a specific act of parliament which addresses IBSA, nor does it specifically provide for the offence of non-consensual sharing of images. However, section 24 of the Nigerian Cybercrimes (Prohibition, Prevention, etc.) Act²²³ criminalises “the dissemination of matter by means of computer systems or networks that are grossly offensive, pornographic or of an indecent, obscene or menacing character”. This offence is punishable by a maximum fine of N7, 000,000.00 or imprisonment of a maximum of three years. The implications of this provision on IBSA are that it can be used to prosecute perpetrators who use computer systems or networks to disseminate images of a sexual nature because such images are, as described the Cybercrimes Act, “grossly offensive, pornographic or of an indecent, obscene or menacing character”.

While the above jurisdictions have taken legal steps to address IBSA and other violence perpetrated against women online, Uganda is an interesting case as it did the opposite and used the law to further subjugate women. Bigirwa observes that the sharing of non-consensual sexual images is prevalent in Uganda, particularly on online platforms including Whatsapp making it easy to circulate images and difficult to trace their origin.²²⁴ An example of this is the non-consensual

²²¹ Section 19(7).

²²² Section 17.

²²³ Nigerian Cybercrimes (Prohibition, Prevention, etc.) Act of 2015.

²²⁴ T Bigirwa 'Twice Shamed: The Use of Uganda's Anti-Pornography Act to Turn Revenge Pornography Non-Consensual Image Distribution Victims into Villains' (2021) 22 *Geo J Gender & L* 565 at 579.

sharing of Ugandan pop star Desire Luzinda's nude photographs online in 2014 which caused an uproar in the country, and resulted in the Minister for Ethics calling for her arrest.²²⁵

Despite the prevalence of IBSA, Uganda enacted the Anti-Pornography Act in 2014,²²⁶ which instead of protecting IBSA victims, further entrenched victimisation and discrimination against women. The Anti-Pornography Act defines pornography as any “representation of a person engaged in real or stimulated explicit sexual activities or any representation of the sexual parts of a person for primarily sexual excitement.”²²⁷ Section 13 of the Act states “a person who produces or participates in the production of, or traffics in, publishes, broadcasts, procures, imports, exports or in any way abets pornography contrary to subsection (1) commits an offence.” This offence is punishable by a maximum sentence of ten years or a fine of 500 currency points.

The criminalisation of pornography under the Act is not limited to non-consensual “pornography”, meaning even the victims of IBSA could be liable for the offence under section 13. Although the offence is seemingly gender-neutral, women are the majority of victims of IBSA.²²⁸ In 2021, Uganda's Constitutional Court held that some parts of the Anti-Pornography Act were unconstitutional as they infringed an individual's right to freedom of expression, including section 13.²²⁹ The implications of this ruling were that IBSA victims are no longer liable for the offence under section 13. Uganda demonstrates the negative impact of laws that re-victimises victims. Malawian IBSA laws must therefore desist from perpetuating patriarchal notions of bodily autonomy, or lack thereof, otherwise they run the risk of being legally challenged like the law in Uganda was. Malawi can prevent such a response by ensuring that the IBSA laws are gender-sensitive and do not target women themselves.

It is evident from the above overview that jurisdictions across the world use civil and criminal laws to address IBSA. This necessitates an analysis of both criminal and civil laws in order to ascertain the limitations of each in addressing IBSA. In the next part of this chapter, the drawbacks of both criminal and civil remedies are discussed.

²²⁵ E Alexander 'Ugandan pop star Desire Luzinda could be arrested over 'revenge porn' nude pictures' Published on 12 November 2014, available at <https://www.independent.co.uk/news/people/ugandan-pop-star-desire-luzinda-could-be-arrested-over-revenge-porn-nude-pictures-9855957.html> [accessed on 8 September 2023].

²²⁶ Anti-Pornography Act, Act 1 of 2014.

²²⁷ Section 2.

²²⁸ Bigirwa op cit note 225 at 591.

²²⁹ *Centre for Domestic Violence Prevention and Others v Attorney General of Uganda* (Constitutional Petition 13 of 2014) [2021] UGCC 20 at paragraph 59.

The Limitations of Criminal and Civil Remedies

As discussed in chapter two of this dissertation, substantive equality is important to ensure that women fully realize their human rights and that equality in the law results in equality on the ground.²³⁰ Achieving substantive equality requires states to take positive actions such as removing impediments to access to justice.²³¹ Consequently, although the various legal responses to IBSA are commendable in that they show the willingness of states to protect women, there is a need to examine the impediments that exist in both civil and criminal laws in relation to women's access to justice for IBSA. This is instrumental to the question of whether criminal and civil remedies can actually provide redress to victims of IBSA.

In the previous part of this chapter, some criminal law responses across jurisdictions were considered, and included the criminalization of IBSA. While there is consensus regarding the violent nature of IBSA and the harm caused by it, there are different views with respect to whether criminal law is the appropriate legal route to address it.

Several impediments in the criminal justice system pose challenges for women trying to obtain justice when they face violence, including IBSA. Firstly, criminal laws themselves can pose a challenge when they discriminate against women. This is exemplified in the Ugandan Anti-Pornography Act²³² as discussed above, which *prima facie* appeared to be gender-neutral, but in reality disproportionately affected women as they make up a majority of victims of IBSA.²³³ Furthermore, some feminists argue that criminal laws are inherently sexist and are “a gendered tool that has been shaped by men's needs and men's experiences.”²³⁴

Secondly, the criminal justice system is male-centered as seen in the reluctance and failure of judicial and law enforcement officers to listen to women, its lack of consideration for women as victims, and its failure to make sure that women are active participants in the criminal justice process.²³⁵ This male-centeredness results in women being traumatized not only by the act of IBSA itself but also by their negative experiences in the criminal justice system, also known as secondary

²³⁰Equal Rights Trust op cit note 71 at 4.

²³¹ Council of Europe 'Towards Guaranteeing Equal Access to Justice For Women' Report of the 3rd Conference of the Council of Europe Network of National Focal Points on Gender Equality (2015) Bern, Switzerland at 5.

²³² Anti-Pornography Act, Act 1 of 2014.

²³³ Bigirwa op cit note 225 at 591.

²³⁴ M Mukhopadhyay and S Quintero 'Gender and Access to Justice in Sub-Saharan Africa' Report on the KIT-CALS Conference held 29-30 October 2008 in Johannesburg, South Africa (2008) at 7.

²³⁵ P Carbo et al 'A Feminist Law Meets an Androcentric Criminal Justice System: Gender-Based Violence in Spain' (2020) 15(1) Feminist Criminology 70–96 At 75.

victimisation.²³⁶ Secondary victimisation is defined as “the attitudes, processes, actions and omissions that ... contribute to the re-victimisation of a person who has experienced a traumatic incident as a victim.”²³⁷ Furthermore, female victims who go against gendered expectations by engaging in “un-ladylike” behavior such as taking nude pictures of themselves, are not seen as “genuine” victims.²³⁸ With respect to IBSA, women whose pictures were consensually taken or sent to someone by the women themselves are often blamed for the dissemination of the images, even if the dissemination is without their consent.²³⁹ This results in victims of IBSA being reluctant to make a police report and take up a criminal case against the perpetrator, as well as resulting in the criminal justice system not providing redress to victims.

In addition to criminal law remedies through which a perpetrator of IBSA is prosecuted, remedies also exist in civil law. Some victims demand compensation for the violation of their right to privacy, while others file copyright claims as authors of the image in question and therefore owners of the copyright.²⁴⁰ However, Sepec observes that civil law may not be an effective way to address IBSA because many victims are either unwilling to go through the lengthy civil process to gain compensation or do not have adequate financial resources to pursue a civil claim.²⁴¹ Sepec also argues that some perpetrators may have little to no assets, making satisfying a judgment impossible.²⁴²

Citron and Franks contend that civil action is inadequate in addressing IBSA. They suggest that the repercussions of IBSA often include victims losing their jobs due to the publication of their “inappropriate” pictures or videos, leaving them with limited sources of income and unable to pay for lawyers.²⁴³ Citron and Franks further note that many lawyers may not be willing to take up IBSA cases because they are not familiar with the appropriate laws relating to online

²³⁶ Department of Justice and Constitutional Development, South Africa ‘Understanding the South African Victims Charter: A Conceptual Framework’ (2008) at 28.

²³⁷ Ibid.

²³⁸ K Hohl, C Cote-Lussier and J D David ‘Disadvantage, Crime, and Criminal Justice’ in C Cote-Lussier, D Moffette, and J Piche (Eds.) *Contemporary Criminological Issues: Moving Beyond Insecurity and Exclusion* (2020) Ottawa, Canada: University of Ottawa Press 237-267 249.

²³⁹ A Flynn et al ‘Victim-Blaming and Image-Based Sexual Abuse’ (2023) 56(1) *Journal of Criminology* 7–25 at 9.

²⁴⁰ Y Lee ‘Delivering (Up) a Copyright-Based Remedy for Revenge Porn’ (2019) *Journal of Intellectual Property Law and Practice* 14(2) 99-111 at 11.

²⁴¹ Sepec op cit note 151 at 429.

²⁴² Ibid.

²⁴³ Citron and Franks op cit note 31 at 112.

harassment.²⁴⁴ Citron and Franks therefore recommend that there be training on IBSA for various stakeholders and actors, including lawyers, in order for them to be better equipped to handle IBSA cases.²⁴⁵

As discussed above, there are limitations to both criminal and civil remedies. There is, however, a unique perspective offered by some, such as Henry et al, who believe that we must go “beyond the law” if we are to effectively address IBSA. The next part of this chapter considers the responses to IBSA that are outside the ambit of criminal and civil remedies.

Remedies beyond the Law

Henry et al offer three solutions that are non-legal and could potentially address IBSA, namely corporate responsibility, victim support, and education.²⁴⁶ With respect to corporate responsibility, Henry et al note that when images are non-consensually shared, they are disseminated through third party websites and online platforms. There is therefore a need to engage the corporations which own these platforms to ensure that IBSA is prevented and that they are providing effective remedies such as taking down the images and barring perpetrators from using their platform.²⁴⁷ Henry et al also argue that resources must be made available to victims of IBSA to inform them of all their available options in seeking redress, and that there must be victim support by way of legal aid and health services such as mental health support for their emotional harm.²⁴⁸ Lastly, Henry et al advocate for putting in place strategies to ensure that there is civic education on IBSA, making use of both traditional and digital media.²⁴⁹

Bigirwa is also of the view that IBSA cannot be addressed by legal means alone. Bigirwa posits that one way of effectively addressing IBSA is through transformative justice.²⁵⁰ This entails engaging both the victim and the perpetrator and attempting to resolve the matter without involving the formal court system, in an attempt to center the needs of the victim.²⁵¹ Bigirwa also emphasises the need to engage the media for the sake of transforming the narrative around image based violence, because the media is one of the key influences in shaping societal norms and attitudes.²⁵²

²⁴⁴ Ibid.

²⁴⁵ Ibid.

²⁴⁶ Henry, Flynn and Powell op cit note 206 at 69-71.

²⁴⁷ Ibid at 70.

²⁴⁸ Ibid at 71.

²⁴⁹ Ibid.

²⁵⁰ Bigirwa op cit note 225 at 598.

²⁵¹ Ibid.

²⁵² Ibid.

Another measure that states have taken in addressing image based violence is establishing hotlines which victims can call to access remedies including legal services and psychosocial support. In the United Kingdom for instance, the Revenge Porn Hotline was established in 2015 and offers confidential advice, assistance with the removal of non-consensually shared images, advice on filing complaints to social media, and legal advice.²⁵³ In the United States, the Cyber Civil Rights Initiative similarly has a crisis helpline for victims of IBSA through which they provide advice, referrals, support and information 24 hours a day and in various languages.²⁵⁴

In Australia, one way of combatting IBSA is through the office of the e-safety commissioner whose role is “leading, coordinating, and advising” on online safety issues to protect people in the digital sphere.²⁵⁵ In 2017, the e-safety commissioner partnered with Facebook to establish a program that allows victims of IBSA to file a complaint with the e-commissioner who then liaises with Facebook to ensure that the image is not published on Facebook.²⁵⁶

Corporations such as X, formerly known as Twitter, have also taken steps to protect people from IBSA by putting in place a Non-Consensual Nudity Policy which prohibits the non-consensual sharing of sexually explicit images or videos.²⁵⁷ The policy also states that perpetrators will have their X accounts immediately and permanently suspended.²⁵⁸

Recommendations

Having analysed Malawi’s regional and international obligations and its legal framework in chapter three, as well as the responses to IBSA across the globe in this chapter, some recommendations are made in respect of remedies for IBSA. The aim of these recommendations is to ensure that Malawi takes a holistic approach in combatting IBSA and these recommendations are made with the hope that Malawi can make up for the inadequacies of its legal framework to ensure more effective responses to IBSA.

²⁵³ <https://revengepornhelpline.org.uk/>

²⁵⁴ <https://cybercivilrights.org/ccri-crisis-helpline/>

²⁵⁵ Office of the eSafety Commissioner *Submission: Review of the Enhancing Online Safety Act 2015 and the Online Content Scheme* (2018) at 4.

²⁵⁶ Y Redrup ‘Facebook and eSafety Commissioner join forces to stop revenge porn in Australia’ published on Financial Review on November 2 2017 available at <https://www.afr.com/technology/facebook-and-esafety-commissioner-join-forces-to-stop-revenge-porn-in-australia-20171101-gzcc0y> [accessed on 3 January 2024].

²⁵⁷ X, Non-Consensual Nudity Policy, available at <https://help.twitter.com/en/rules-and-policies/intimate-media> [accessed on 3 January 2023].

²⁵⁸ Ibid.

As discussed in chapter three, Malawi failed to discharge some of its regional and international obligations, and for it to effectively address image based violence, Malawi needs to align its efforts with those obligations. Firstly, in line with its obligations in article 2 of CEDAW, Malawi must strengthen its national tribunals and public institutions and make sure that they are able to effectively combat IBSA. Malawi can strengthen these institutions by building their capacity in terms of knowledge on IBSA and reiterating the roles of each institution in eradicating gender-based violence as a whole as well as IBSA. In fulfilling its CEDAW obligations, Malawi also ought to ensure that remedies for IBSA are effective. This entails making sure that the Malawi Human Rights Commission and such institutions are able to handle complaints swiftly, unlike the slow manner in which they currently handle complaints of technology-facilitated violence.²⁵⁹ This also entails that the Malawi Police Service must be equipped with the capacity to handle IBSA in a gender-sensitive manner which centers the victim and their needs.²⁶⁰

Malawi must also put in place accessible services and information which addresses IBSA. This is in line with their obligation under article 4 of the Maputo Protocol which requires that states parties, in eradicating gender-based violence, ought to establish “mechanisms and accessible services for effective information”.

In addition to fulfilling its international and regional obligations, Malawi ought to strengthen its legal framework as well as the application and interpretation of the legal framework. As discussed in chapter 3, the Gender Equality Act²⁶¹ has not been made use of in IBSA cases despite it containing a provision on sexual harassment which is applicable to the sharing of images without consent.²⁶² Therefore, in order for the Gender Equality Act to register real impact, there is a need for the government to raise awareness on section 6 which prohibits sexual harassment and its applicability to IBSA. In this way, people will become aware of the Gender Equality Act and potentially make use of it if they experience IBSA.

Malawi can also draw lessons from Canada’s response to IBSA by ensuring that the punishment of perpetrators includes the removal of the non-consensually shared images from the internet as well as the perpetrator being banned from using digital devices or accessing particular social media platforms.

²⁵⁹ Chisala-Templehoff op cit 117.

²⁶⁰ Ibid.

²⁶¹ Chapter 25:06, Laws of Malawi.

²⁶² Section 6.

Another weakness in Malawi's legal framework, as mentioned in chapter three, is that courts have not interpreted the right to privacy in a way that protects victims of IBSA. It is thus recommended that Malawian judicial officers be sensitized on IBSA as a privacy issue in order for the right to privacy to be given effect.

Additionally, and perhaps most importantly, Malawi needs to go "beyond the law" if it is to effectively address IBSA. This is because Malawi has a strong legal framework on paper which is failing to translate to real justice on the ground. Firstly, as Bigirwa argues, there is a need for civic education with respect to IBSA.²⁶³ This is even more so in Malawi, a country in which only 14% of the population uses the internet and only 52% of the population have mobile phones.²⁶⁴ Therefore, a large sect of the population may not be aware of the prevalence or nature of IBSA. Raising awareness on IBSA and its impact would enable attitudes around IBSA to change, resulting in people taking it more seriously and being deterred from perpetuating it. Given the lack of access to technology in Malawi, this awareness raising would have to be through both traditional and digital media. Civic education efforts could consist of community interventions, capacity building workshops, radio and television adverts, and other such messaging disseminated to the public.

Secondly, the Malawian government ought to engage corporations to address IBSA, particularly those which own platforms on which IBSA is prevalent in Malawi such as Facebook and WhatsApp. This entails calling upon the corporations to put in place mechanisms for the prevention of IBSA and ensuring the provision of effective remedies when such abuse takes place.²⁶⁵ This may broaden the range of options available to a victim of IBSA in that they can directly use the digital platforms themselves to act upon the sharing of their images without their consent. Additionally, Malawi should ensure that those corporations who do have policies in place to combat IBSA such as X, are abiding by those policies.

Thirdly, the Malawian government has to strengthen support for victims of IBSA through provision of legal aid and health services. This enables victims who would otherwise not be able to afford taking legal action do so, and also ensures that their psychosocial needs are cared for.²⁶⁶

²⁶³ Bigirwa op cit note 225 at 598.

²⁶⁴ Malanga op cit note 52 at 2.

²⁶⁵ Henry, Flynn and Powell op cit note 206 at 70.

²⁶⁶ Ibid at 71.

Malawi can establish hotlines for victims of IBSA, similar to those in the United States and the United Kingdom.

Conclusion

To ensure that IBSA is addressed in Malawi's legal framework, it is important to consider IBSA laws from across the globe. This gives Malawi the benefit of learning from the mistakes of others, but also drawing inspiration from commendable laws from various jurisdictions. There are laudable efforts to address IBSA across the world, with jurisdictions such as Canada not only making IBSA an offence but going further and ensuring that they center the needs of the victim in the measures taken against the perpetrator. On the other hand, countries such as Uganda have a long way to go in dismantling misogynistic norms and attitudes which re-victimise victims of IBSA. Although criminal and civil laws are an admirable first step in addressing IBSA, they have their limitations as discussed in this chapter. To compensate for the limitations, there is a need to take other measures such as civic education, victim support, and corporate responsibility in addition to criminal and civil law responses.

As this chapter reveals, Malawi has several areas for improvement in effectively addressing IBSA. For instance, Malawi ought to align with its obligations in CEDAW and the Maputo Protocol by ensuring that there are effective remedies for victims of IBSA, and that institutions are well-equipped to handle such cases. Additionally, it is recommended that Malawi make information about IBSA accessible to all. Furthermore, Malawian courts need to make use of the right to privacy to protect victims of IBSA. Moreover, Malawi must take measures outside of the legal realm such as engaging social media corporations, facilitating civic education and establishing psychosocial support for victims through support helplines. In these ways, Malawi can effectively address IBSA and fulfil its obligation to protect, promote and respect human rights in relation to IBSA.

Chapter Five: Conclusion

Technological advancements have transformed our world and unfortunately for women, this has meant that they are now faced with technology-facilitated violence. IBSA has affected women in many ways and lead to the perpetuation of discrimination against women. It is against this background that this study asked the question whether Malawi's legal framework addresses IBSA. This dissertation is a journey involving the examination of Malawi's international and regional obligations and its domestic legal framework in relation to image based sexual abuse (IBSA). It includes a critical analysis of responses to IBSA across a plethora of jurisdictions. This has all been to answer the main research question whether Malawi's legal framework addresses IBSA.

As discussed at length in this dissertation, increased use of technology threatens women's rights and their ability to live free from violence. IBSA is prevalent across the world, including in countries like Malawi in which a majority of the population does not even have access to mobile devices.²⁶⁷ This speaks to how deeply rooted IBSA is. Centuries of the subjugation of women have resulted in the shape –shifting of violence against women, such that it is changing forms alongside technological developments.

The fourth wave of feminism, which acknowledges that technology is a tool through which violence against women is perpetrated, has opened the world's eyes to the dangers faced by women.²⁶⁸ It has also prompted the use of feminist interpretation in analysing IBSA. Through the lens of feminist legal theory, this dissertation highlights the deeply entrenched and inherently sexist nature of the law. This is seen through laws such as Uganda's Anti-Pornography Act of 2014 which limits women's autonomy and rights. This is also reflected in the misogynistic ways in which victims of IBSA are treated when they seek redress, as well as the secondary victimisation they face at all levels.²⁶⁹

Chapter three analyses Malawi's regional and international obligations in relation to gender-based violence and IBSA, and illustrates that Malawi has an extensive duty to ensure that its citizens are protected from gender-based violence as a whole, and IBSA more specifically. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),²⁷⁰ the

²⁶⁷ Malanga op cit note 52 at 2.

²⁶⁸ Benjamin and Schwab op cit note 18 at 399.

²⁶⁹ Carbo et al op cit 236 At 75.

²⁷⁰ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at: <https://www.refworld.org/docid/3ae6b3970.html> [accessed 4 January 2024].

Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol),²⁷¹ and the SADC Protocol on Gender and Development (SADC Protocol)²⁷² all place a duty on Malawi to put in place laws which protect women from gender-based violence and to offer them effective remedies. While Malawi put in place laws which align with these obligations, it has fallen short by not living up to its obligation to strengthen its national tribunals and institutions to play an active role in the eradication of IBSA.

Chapter three also examines Malawi's international and regional obligations regarding the rights to privacy and freedom of expression as they relate to image-based violence. This includes an analysis of the right to privacy in the International Covenant on Civil and Political Rights (ICCPR),²⁷³ the Universal Declaration of Human Rights (UDHR),²⁷⁴ the African Charter on Human People's Rights (African Charter),²⁷⁵ the African Charter on the Rights and Welfare of the Child (African Children's Charter),²⁷⁶ the African Union Data Protection Convention (AU Data Protection Convention),²⁷⁷ and the African Union Personal Data Protection Guidelines.²⁷⁸ Malawi fulfilled its obligations to put in place legislation aimed at protecting the rights to privacy and freedom of expression as provided in the above-mentioned instruments. By constitutionally guaranteeing the rights to privacy and freedom of expression, and by putting in place legislation which protects the right to privacy, Malawi has shown commitment to its international and regional human rights obligations, which is in turn beneficial for the fight against IBSA.

²⁷¹ African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003, available at: <https://www.refworld.org/docid/3f4b139d4.html> [accessed 4 January 2024].

²⁷² Southern African Development Community (SADC) Protocol on Gender and Development, 2008.

²⁷³ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <https://www.refworld.org/docid/3ae6b3aa0.html> [accessed 4 January 2024].

²⁷⁴ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html> [accessed 4 January 2024].

²⁷⁵ Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <https://www.refworld.org/docid/3ae6b3630.html> [accessed 4 January 2024].

²⁷⁶ Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990), available at: <https://www.refworld.org/docid/3ae6b38c18.html> [accessed 4 January 2024].

²⁷⁷ African Union Convention on Cyber Security and Personal Data Protection EX.CL/846(XXV) available at <https://ccdcoe.org/sites/default/files/documents/AU-270614-CSConvention.pdf> (accessed 29 August 2023).

²⁷⁸ Internet Society and the Commission of the African Union 'Personal Data Protection Guidelines for Africa', 9 May 2018 available at <https://iapp.org/resources/article/personal-data-protection-guidelines-for-africa/> (accessed 29 August 2023).

Chapter three further considers Malawi's domestic legal framework in relation to IBSA, particularly the Malawian Constitution²⁷⁹ and the Electronic Transactions and Cyber Security Act.²⁸⁰ Malawi has a commendable framework for the rights to privacy and freedom of expression, both of which are constitutionally guaranteed and subject to constitutional limitations. The right to privacy is further protected in the Electronic Transactions and Cyber Security Act. However, some Malawian courts are not making use of the privacy laws based on their view that IBSA is not related to privacy.

Chapter four of this dissertation analyses both legal and non-legal remedies for IBSA in a plethora of jurisdictions including the Philippines, Israel, Japan, Canada, Nigeria, South Africa, United States of America, United Kingdom, and Uganda. These responses include criminal and civil legal remedies as well as non-legal responses which involve civic education, putting in place support hotlines for victims, and social media corporations acting against IBSA. Having analysed these responses, this dissertation recommends that Malawi fulfils its obligations in CEDAW and the Maputo Protocol by ensuring effective legal remedies for victims of IBSA, and equipping law enforcement institutions to handle IBSA cases through training and capacity building. It is also recommended that Malawian courts interpret the right to privacy in a manner that ensures protection for victims of IBSA. Lastly, Malawi must take measures outside of the legal realm such as engaging social media corporations, facilitating civic education, and establishing psychosocial support for victims of IBSA through support helplines.

As the quest for justice for victims of IBSA continues, there is a need for research in the area of IBSA to grow. This is particularly the case in countries such as Malawi, where technology-facilitated violence is often overlooked by academia, civil society, and the government itself. Opportunities for further research include the impact of IBSA on children's rights, as well as a more in-depth analysis of the non-legal responses and how they can be used to effectively address IBSA. Additionally, research directly involving victims and perpetrators of image-based violence in Malawi is necessary for the purposes of future research as it will contribute to scholarship on IBSA by providing first hand insights and experiences of those affected by IBSA. The aforementioned further studies on IBSA will contribute to advocacy efforts in bringing awareness

²⁷⁹ Constitution of the Republic of Malawi, 1994.

²⁸⁰ Chapter 74:02, Laws of Malawi.

to IBSA and will highlight further areas which require attention if we are to make cyberspace safe for all.

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