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The protection of women from online violence in Malawi

**Submitted in partial fulfilment of the requirements of the Master's degree in Human
Rights and Democratisation in Africa**

by

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Date: 29 October, 2021

DECLARATION

I, **SIPHIWE PHOYA**, hereby declare that this dissertation is my original work, and other works cited or used are clearly acknowledged. This work has never been submitted to any University, College or other institution of learning for any academic or other award.

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DEDICATION

I dedicate this dissertation to my late mother, father and brother-in-law. You never stopped believing in me in your living days. To my sisters who raised me as their own, I am forever indebted for your steadfastness, courage and encouragement.

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ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
AIA	Access to Information Act
AU	African Union
AUCCSPDP	African Union Convention on Cyber Security and Personal Data Protection
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
GEA	Commission on Gender Equality
GEA	Gender Equality Act 49 of 2012
HRC	United Nations Human Rights Committee
MACRA	Malawi Communications Regulatory Authority
MHRC	Malawi Human Rights Commission
NSA	National Statistics Act
ICCPR	International Covenant on Civil and Political Rights
NGO	Non-Governmental Organisation
TFVA	Technology Facilitated Violence and Abuse
UDHR	Universal Declaration of Human Rights
UN	United Nations
VAW	Violence against women

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Chapter 1: Introduction

1.1 Background

The term violence against women (VAW) is used in this study over gender based violence (GBV) because it is the preferred term at the African Union (AU) level as evidenced by its use in the protocol to the African charter on human and peoples' rights on the rights of women in Africa (Maputo Protocol). Further, this study targets women and the violence they experience while using the online platform thus the term VAW emphasises the targeted gender.

Due to the increase in cases of VAW in the world, there have been new developments in terms of what constitutes VAW. It now transcends the limited definition that only encompasses the physical forms of VAW and includes online VAW.¹ This has emerged due to the increase in technological development, use and abuse of the internet and social media platforms.² Online violence usually targets a specific group of people because of their uniqueness and is facilitated on the internet to cause harm.³

Online VAW causes as much damage as physical VAW and requires as much attention to ensure protection of women.⁴ Poor regulation of the online platforms results in the infringement of the right to dignity, privacy, health and the right to work, among others, and impacts on their livelihood.⁵ It signifies a continued form of violence or the beginning of VAW which may inflict economic, psychological and physical harm or death.⁶

Women are largely affected by online VAW than men. In Malawi, women go through many forms of online VAW ranging from cyber bullying, cyber harassment, cyber stalking and cyber harassment, among others.⁷ For example, in 2018 over 246 women were labelled 'the easiest

¹ United Nations Committee on the Elimination of Discrimination Against Women (2017): CEDAW General Recommendation 35 on gender-based violence against women, updating General Recommendation 19, art 20.

² L Hinson et al 'Technology-facilitated gender-based violence: What is it, and how do we measure it?' (2018)1 *International Center for Research on Women* at 1.

³ As above.

⁴ UN Women 'Urgent action needed. Cyber violence against women and girls' 24 September 2015 <http://www.unwomen.org/en/news/stories/2015/9/cyber-violence-report-press-release> (accessed 30 July 2021).

⁵ A Van der Wilk & M Niosi '#HerNetHer rights resource pack on ending online violence against women & girls in Europe' November 2017 https://www.womenlobby.org/IMG/pdf/hernetherrights_resource_pack_2017_web_version.pdf (accessed 29 July 2021).

⁶ C McGlynn & E Rackley 'Image-based sexual abuse' (2016) 3 *Oxford Journal of Legal Studies* at para 1.

⁷ S Chisala-Tempelhoff & MT Kirya 'Gender, law and revenge porn in Sub-Saharan Africa: A review of Malawi and Uganda' (2016) 2 *Humanities & Social Sciences Communications Journal* at 3-4.

young women or girls to sleep with' and their phone numbers were leaked.⁸ They experienced cyber bullying, cyber harassment and sexual harassment. After reporting the case to the police, no action was taken.⁹ This case tested the applicability of the law which failed from the reporting stage as the police asked the women to conduct further investigations on their own.¹⁰ In a recent 2021 case, a journalist has been accused of cheating on her boyfriend and her pictures were shared all over the internet.¹¹ This is a form of online harassment and cyber bullying.

Online VAW in Malawi is exacerbated by discrimination against women in the private and public sector and poverty.¹² On the UN Gender Inequality Index, Malawi is ranked at 173 from 188 countries.¹³ During Covid-19 online violence prevalence increased, especially, cyber stalking, cyber harassment, cyber bullying and online sexual exploitation.¹⁴ In a study conducted in 2020, a nurse stated the following:¹⁵

since the coming of COVID-19, I have been receiving abuse and bullying messages on my mobile phone and social media relating to COVID-19. All this was online misinformation trending on social media stating that nurses are at high risks of contracting COVID-19.

In addition, another person stated as follows:¹⁶

With the coming of COVID-19, when you try to open WhatsApp or emails you find messages about women being abused daily, at work, at home, during conferences and even when we have boarded minibuses or any other mode of transport. So, online violence against women has become a norm. It is very disappointing. Sometimes, the attackers take them as jokes, yet we get traumatised.

In 2008, the Police arrested a man and a woman for allegedly distributing and publishing pornographic material.¹⁷ The two were arrested after their sexually explicit videos and pictures

⁸ B Phiri 'How leaking of my contact data triggered an avalanche of online abuse' 18 June 2020 <http://www.genderandjustice.org/how-leaking-my-contact-data-brought-an-avalanche-of-online-abuse/> (accessed 5 August 2021).

⁹ As above.

¹⁰ n 8.

¹¹ Face of Malawi 'TV presenter Priscilla Kayira caught up in "Mesho" scandal, internet reacts' 4 August 2021 <https://www.faceofmalawi.com/2021/08/04/trending-tv-presenter-priscilla-kayira-caught-up-in-mesho-scandal-internet-reacts/> (accessed 5 August 2021).

¹² DF Malanga 'Tackling gender-based cyber violence against women and girls in Malawi amidst the COVID-19 pandemic' (2020) at 3 https://africaninternetrights.org/sites/default/files/Donald_Flywell-1.pdf (accessed 5 August 2021).

¹³ USAID 'Malawi gender equality fact sheet' 26 September 2016 <https://www.usaid.gov/malawi/fact-sheets/malawi-gender-equality-fact-sheet> (accessed 21 October 2021).

¹⁴ Malanga (n 12) 4.

¹⁵ As above.

¹⁶ Malanga (n 12) 5.

were made public and went viral without their consent.¹⁸ An IT specialist working on the man's laptop distributed the pictures.¹⁹ Instead of arresting the IT specialist, the police charged the 2 adults under section 179 of the Penal Code (PC) which criminalises obscene matters.²⁰ The law responded by punishing the victims instead of further investigating the matter.²¹

Malawi has laws and policies that provide for the protection of women from different forms of violence. These laws include the Prevention of Domestic Violence Act 2006 (PDVA), the Gender Equality Act 2013 (GEA), the Marriage, Divorce and Family Relations Act 2015, the Penal Code 1974 (PC) and the Constitution of the Republic of Malawi. The National Plan for Action for Combatting Gender Based Violence 2014- 2020 aimed at ending the increasing levels of VAW at all levels.²² However, none of these laws and policies make provision for protection of women against online VAW. The country also adopted the Electronic Transactions and Cyber Security Act (ET Act) in 2016, which provides for cyber security protection but does not emphasise on VAW.²³

Generally, the laws and policies in Malawi have been criticised since they lack provisions, proper implementation mechanisms and clear rules to tackle online VAW.²⁴ This study therefore assesses whether the current legal regime protects women from online violence in view of the current socio-legal structures and considering their vulnerabilities. It considers processes that can be used to ensure the protection of women from online violence. Considering that this is a new area of the law, the chapter explores how the online platforms can be used to further end VAW and create awareness of the forms of online VAW.²⁵ The discussion uses a feminist and human rights approach while considering the social influences and attitudes that impact on how women are perceived online. The broader perspective is to analyse how to counter online violence.

¹⁷ Chisala-Tempelhoff & Kirya (n 7) 3.

¹⁸ As above.

¹⁹ As above.

²⁰ As above.

²¹ As above.

²² Government of Malawi 'National plan of action to combat gender-based violence in Malawi' (2014 – 2020) 7.

²³ Preamble ET Act.

²⁴ S Stevenson-McCabe & S Chisala-Tempelhoff 'Image-based sexual abuse: A comparative analysis of criminal law approaches in Scotland and Malawi' in J Bailey, A Flynn & N Henry *Emerald International Handbook of Technology-Facilitated Violence and Abuse* (2021) at 518.

²⁵ United Nations Office of the High Commissioner 'New laws needed urgently to tackle online violence against women and girls, says UN rights expert' 20 June 2018

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23231&LangID=E> (accessed 21 October 2021).

1.2 Problem statement

VAW is an increasing problem in Malawi.²⁶ The government and different private entities have tried to combat VAW through several initiatives but the problem persists. Additionally, new forms of VAW have emerged in the name of online VAW also called technology facilitated violence and abuse (TFVA).²⁷ This is due to the increased use and reliance on online services.²⁸ Due to the Covid-19 pandemic, the use of the internet has become very important and has put many more women at risk of facing different forms of online VAW.²⁹ Currently, there is no recorded statistic on the prevalence of online VAW in Malawi which is a shortcoming of this research. Much emphasis is placed on offline VAW, especially physical or visible forms of violence.

The increased use of social media and online platforms in Malawi has exposed many people to online violations including on the basis of gender.³⁰ Online VAW is easily neglected and overlooked by authorities because it is a new form of violence and there is lack of information and education amongst the general public and law enforcers.³¹ They are often trivialised and result in victim shaming where the victim is traumatised.³² Most women end up shunning online platforms and do not freely associate with others on social media.³³ Other women do not report cases of online violence due to lack of knowledge, fear of victimisation and lack of a clearly stipulated and publicised reporting mechanism.³⁴ They suffer silently from anxiety, depression, self-harm and suicidal tendencies.³⁵ Therefore, online VAW has grave effects on women.³⁶

²⁶ Chisala-Tempelhoff & Kirya (n 7) 1.

²⁷ Stevenson-McCabe & Chisala-Tempelhoff (n 24) 513.

²⁸ Malanga (n 12) 1.

²⁹ S Dunn 'Technology, gender-based violence and the shadow pandemic' 14 December 2020

<https://www.cigionline.org/articles/technology-gender-based-violence-and-shadow-pandemic/> (accessed 5 August 2021).

³⁰ Malanga (n 12) 2.

³¹ S Chisala-Tempelhoff 'Malawi: Criminal law responses to non-consensual distribution of intimate images' 15 August 2019 http://www.genderandjustice.org/gjrebels_malawi_criminal_law_responses_to_ncii/ (accessed 30 July 2021).

³² As above.

³³ C Nyst 'Technology-related violence against women: Recent legislative trends' (2014) a briefing paper at 4

https://www.apc.org/sites/default/files/HRC%2029%20VAW%20a%20briefing%20paper_FINAL_June%202015.pdf (accessed 31 July 2021).

³⁴ As above.

³⁵ n 33.

³⁶ As above.

Further, it has been noted that most women in Malawi are illiterate and thus fail to access the internet.³⁷ This means that not all women in Malawi experience online violence. The most affected by online VAW in Malawi are women in urban settings because they can access the internet.³⁸

This new area of law has not been accorded sufficient attention from law makers and scholars in Malawi.³⁹ Most government agencies, women organisations and academic institutions focus on offline VAW instead of online VAW.⁴⁰ Therefore, the victims of online VAW do not get recourse through the law when such violations are committed against them because of either institutional and social barriers that discourage reporting or the lack of knowledge of online VAW by the society.⁴¹ This results in a high risk of neglect of online VAW issues in Malawi. This study focuses on online VAW because there is a gap in the legal protection framework which needs to be assessed.

It is reported that women in politics and other influential positions like civil activists bear the brunt of online VAW.⁴² This necessitates the critical examination of whether the laws in Malawi adequately protect women from online violence which may result in a violation of many other rights. This study assesses the efficacy and adequacy of the law around online VAW. This will assist in formulating a legal framework that adequately provides safeguards and protects women from online violence in Malawi.

1.3 Research question

The main research question is: Does the legal regime sufficiently protect women from online VAW in Malawi? The following are the sub-questions:

- a. What is the extent of online violence against women in Malawi?
- b. What theories underpin and explain the interplay between law and online VAW and its impact on women in society?

³⁷ UNESCO 'Institute for statistics: Adult literacy rate, population, 151 years, male (%)' 2019 b <http://data.uis.unesco.org/index.aspx?queryid5121> (accessed 1 August 2021).

³⁸ RM Bichler 'Southern Africa and the Digital Divide: A Malawian Case Study' (2008)4 *The International Journal of Technology, Knowledge, and Society* at 43.

³⁹ Chisala-Tempelhoff (n 7) 3.

⁴⁰ As above.

⁴¹ As above.

⁴² A Shaw 'The internet is full of jerks, because the world is full of jerks: what feminist theory teaches us about the internet, communication and critical/ cultural studies' (2014)11 *Communication and Critical/Cultural Studies Journal* at 274.

- c. What is the scope and extent of protection against online VAW offered by Malawi's existent legal framework?
- d. What are the shortcomings of the current legal framework to protect women from online violence?
- e. What lessons can Malawi learn from comparative foreign laws to ensure protection of women from online VAW?

1.4 Definition of terms

It is important that before proceeding, the following terms be defined in order to create an understanding of some forms of online VAW referred to in this thesis.

1.4.1 Violence against women

VAW has been described as:⁴³

all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflict or of war.

To highlight the distinction made above, GBV 'involves acts of violence committed against women, men, boys or girls, as a result of social norms about roles and behaviour expected of each gender.'⁴⁴

1.4.2 Online VAW

Online VAW is described as follows:⁴⁵

action by one or more people that harms others based on their sexual or gender identity or by enforcing harmful gender norms. This action is carried out using the internet and/or mobile technology and includes stalking, bullying, sex-based harassment, defamation, hate speech, exploitation and gender trolling.

Online VAW includes, bullying, cyber stalking, cyber aggression, cyber harassment and revenge porn.⁴⁶ It also includes morphing, email spoofing, phishing and trolling.⁴⁷

⁴³ Art 1 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2005.

⁴⁴ B Nkonyane 'What is gender-based violence?' <https://www.up.ac.za/speakoutup/article/2390196/what-is-gender-based-violence> (accessed 29 October 2021).

⁴⁵Hinson (n 2) 1.

⁴⁶ C Badenhorst 'Legal responses to cyberbullying and sexting in South Africa' (2011) Issue paper 10 at 2.

1.4.3 Cyberbullying

Cyberbullying has many aspects to it but includes aggression that the offender purposefully and repeatedly carries out towards a victim or victims online, in order to cause harm against someone who cannot easily defend themselves.⁴⁸

1.4.4 Cyber-harassment

Cyber harassment entails the use of instant messaging, derogatory websites and emails to harass, bully and personally attack a group of people or individuals.⁴⁹ It includes the use of technology to humiliate, attack, threaten, annoy, alarm, offend or verbally abuse people.

1.4.5 Cyberstalking

Cyber-stalking involves continuous and repeated pursuit of an individual with the aid of technology, whether electronic or internet capable, in order to harm them.⁵⁰ Usually, cyberstalking reflects an extension of the ordinary stalking in which the offender uses high-tech to commit the crime.

1.4.6 Revenge porn

This is a form of cyber-harassment which has been on the rise in the criminal and legal sector and involves the publication of explicit sexual images or videos online without the consent of the owner or subject.⁵¹ Revenge porn happens for many reasons ranging from ‘control, extortion, to sexual gratification and is said to be a subset of image-based abuse including non-consensual sharing and creation of sexual images.’⁵²

1.5 Proposed methodology

This study uses a desk-based research methodology. It relies on primary sources such as international and national laws around online and gender related law, which include instruments, acts, bills and case law. The secondary sources include books, journal articles, reports by the government and non-governmental organisations, issue papers and dissertations. A comparative

⁴⁷ S Kumar & Priyanka ‘Cyber-crime against women: right to privacy and other issues’ (2019)1 *Journal of Legal Studies and Research* at 158.

⁴⁸ J Davidson et al ‘Adult online hate, harassment and abuse: A rapid evidence assessment report’ (2019) at 3.

⁴⁹ US legal <https://definitions.uslegal.com/c/cyber-harassment/> (accessed 11 August 2021).

⁵⁰ H Drebing et al ‘Cyberstalking in a large sample of social network users: Prevalence, characteristics, and impact upon victims’ (2014)17 *Cyberpsychol Behav Soc Netw* at 63.

⁵¹ D Citron & M Franks ‘Criminalizing revenge porn’ (2014) 49 *Wake Forest Law Rev* 346.

⁵² Davidson (n 48) 4.

legal research is conducted to learn best practices and draw lessons from foreign jurisdictions on the regulation of online VAW to guide required law development and reforms in Malawi.

1.6 Literature review

There has been concerns about online VAW in Malawi as evidenced by the increase in the number of complaints with the emergence of the Covid-19 pandemic.⁵³ The more technology develops, the more complaints continue to evolve, with emergence of new forms of VAW.⁵⁴ Most of the complaints came in form of violations of rights to privacy, freedom of expression or defamation.⁵⁵

These new forms of VAW have unique terminologies and can be differentiated and not be viewed as a subset of a particular right.⁵⁶ These growing terminologies and the impact of the actions against the vulnerable groups necessitated the development of laws that will protect vulnerable groups.

In Africa and other developing parts of the world, online VAW is a phenomenon that has not been looked at closely and has been neglected with the passing of time.⁵⁷ This is evidenced by the limited literature on online VAW. Below is some information to inform the literature highlighting the status of online VAW in Africa generally, and in Malawi more specifically.

This literature review is grouped into three sub-sections. First, it discusses the forms of violence faced by women when using online platforms. There are many forms of online VAW faced by online users in Africa. Countries such as Nigeria, Kenya and South Africa are becoming centres of online VAW.⁵⁸ Around the world, online VAW was of a heightened concern in 2014 when hundreds of female celebrities were hacked and their nude pictures and explicit pictures were

⁵³ Malanga (n 12) 4-6.

⁵⁴ Association for progressive communications 'Online gender-based violence: A submission from the association for progressive communications to the United Nations Special Rapporteur on violence against women, its causes and consequences' (2017) 10.

⁵⁵ n 31.

⁵⁶ Hinson (n 2) 10.

⁵⁷ Global fund for women 'Online violence: just because it's virtual doesn't make it any less real' 13 April 2015 <https://www.globalfundforwomen.org/latest/article/online-violence-just-because-its-virtual-doesnt-make-it-any-less-real/> (accessed 5 August 2021).

⁵⁸ A Lichtenstein 'Toward a cyberfeminist future: A new study centers African women as protagonists online' 13 April 2020 <https://advox.globalvoices.org/2020/09/30/toward-a-cyberfeminist-future-a-new-study-centers-african-women-as-protagonists-online/> (accessed 1 August 2021).

leaked and went viral.⁵⁹ This included ordinary people.⁶⁰ Women in Malawi have resorted to leaving the country in order to cover the shame and scold associated with online violations such as non-consensual leakage of intimate pictures or pornographic videos.⁶¹ In Malawi, women usually face online violations in form of cyber bullying, cyber harassment, revenge pornography, cyber stalking and online sexual exploitation.⁶²

Second, it assesses the legal status around online VAW in Malawi. Most developments around digital laws in Africa have targeted curtailing citizens' rights online and not mainly the protection of their rights.⁶³ States have used the internet to limit rights that are actually protected outside the online platform.⁶⁴ However, the United Nations Human Rights Council emphasised the importance of recognising rights both online and offline in 2016 and reaffirmed this position in 2018.⁶⁵ This is in line with the 2030 Agenda for Sustainable Development as stipulated in the United Nations General Assembly Resolution 73/218.⁶⁶

The general perspective of Africa is that, there is a lack of clear existing frameworks targeting online VAW.⁶⁷ In Malawi, online VAW is not highlighted in most of the laws that deal with gender and women rights issues. Rather, some aspects of criminal law are drafted in a manner to prosecute women than protect them.⁶⁸ These stem from patriarchal ideas of women's social identity impacting online presence.⁶⁹

In 2013, the GEA was introduced and provided for psychological harm as harmful practices and non-verbal practices that would harm a person.⁷⁰ These could be perceived to have targeted

⁵⁹ R McCormick 'Hack leaks hundreds of nude celebrity photos' 1 September 2014 <https://www.theverge.com/2014/9/1/6092089/nude-celebrity-hack> (accessed 6 September 2021).

⁶⁰ As above.

⁶¹ Chisala-Tempelhoff & Kirya (n 7) 3.

⁶² Malanga (n 12) 4.

⁶³ CIPESA 'Digital rights in Africa: challenges and policy options' March 2019 at 5 https://cipesa.org/?wpfb_dl=287 (accessed 1 August 2021).

⁶⁴ As above.

⁶⁵ United Nations Human rights council on the promotion, protection and enjoyment of human rights on the Internet 2018 <https://undocs.org/en/A/HRC/38/L.10> (accessed 28 July 2021).

⁶⁶ United Nations Resolution 73/218 on information and communications technologies for sustainable development 2018 https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/73/218 (accessed 28 July 2021).

⁶⁷ DM Smit 'Cyberbullying in South African and American schools: A legal comparative study' (2015) 35 *South African Journal of Education* at 2-4.

⁶⁸ Sec 137 PC.

⁶⁹ n 31.

⁷⁰ Secs 3 & 6 GEA.

online VAW, which is a move in the right direction.⁷¹ However, as at 2021, there is no legally binding prosecution that has been conducted in line with online VAW which remains a gap in the system.⁷²

Further, in 2016 the ET Act was introduced whose aim is ‘to ensure that information and communication technology users are protected from undesirable impacts of information and communication technology, including the spread of pornographic material, cyber-crime and digital fraud.’⁷³ This Act protects the plight of women who are the likely victims of online VAW by providing types of offences and punishment. However, the Act has been criticised for failure to provide immediate solutions by requiring ‘continuing’ behaviour to prove a case, which defeats the purpose.⁷⁴

Additionally, the inaction of the Malawi Communications Regulatory authority (MACRA) has been criticised for not promptly acting when triggered.⁷⁵ The Police have also failed to protect victims because after reporting, they have expected the victim to conduct further investigation of the case, personally.⁷⁶ This has made it challenging for victims of online VAW to report because of the challenges they face in reporting and even collecting evidence. As a result, cases are left unresolved.⁷⁷ Therefore, women face continued online and societal shaming which results in prolonged psychological and emotional trauma.⁷⁸

The right to privacy is one of the rights that is effected by online VAW. Kainja acknowledged that some of the legislation that provides for protection of the right to privacy, include the Communications Act, ET Act and the Access to Information Act.⁷⁹ Others have briefly argued that the laws are inadequate and have encouraged academics to write more on the subject.⁸⁰ Online VAW infringes on women’s rights as provided in African Declaration on Internet Rights

⁷¹ n 31.

⁷² Stevenson-McCabe & Chisala-Tempelhoff (n 24) 517.

⁷³ Preamble ET Act.

⁷⁴ Stevenson-McCabe & Chisala-Tempelhoff (n 24) 518.

⁷⁵ n 31.

⁷⁶ S Chisala-Tempelhoff ‘Accessing justice for image-based sexual abuse: A challenge for victims in Malawi’ 4 June 2020 <https://africanfeminism.com/accessing-justice-for-image-based-sexual-abuse-a-challenge-for-victims-in-malawi/> (assessed 30 July 2021).

⁷⁷ n 8.

⁷⁸ As above.

⁷⁹ J Kainja ‘Privacy and personal data protection: challenges and trends in Malawi’ September 2018 9-11 https://cipesa.org/?wpfb_dl=300 (accessed 17 September 2021).

⁸⁰ Kainja (n 79) 18.

and Freedoms such as: ‘gender equality; fostering security, stability and resilience of the internet; privacy and personal data protection.’⁸¹

Third is a discussion on the way forward to ensure an effective legal protection of women from VAW in Malawi. It should be noted that Malawi requires a reform in its approach towards online VAW to ensure that the country eradicates the problem and protects the victims. However, it has been argued that the criminal law system, as it is, is sufficient to handle online VAW and that what matters is implementation and enforcement of the procedures.⁸² The problem is the overreliance on the criminal law system and ignoring other factors that contribute to continued online VAW.⁸³

Others have argued that criminal law has a disproportionate impact on marginalised and minority groups thus the need for long-term social transformation mechanisms to eradicate different forms of VAW.⁸⁴ Apart from the law, others suggest that the government should introduce a cyber-violence policy to emphasise online VAW as a form of violence.⁸⁵ The policy should include strategies suggested by women who are victims of VAW.⁸⁶ This study assesses the legal framework on online VAW in Malawi and answers some of the above questions with regard to the law. It does this by drawing lessons from comparative jurisdictions.

1.7 Limitations of the study

This thesis has some limitations. First, due to the time limitations the research is based on desk research and not quantitative, which affects some perspectives that might not have been reported. However, the researcher tried to find the most recent data possible. Second, online VAW is quite new and there continues to develop new forms of online VAW. As such, it might not be an all-encompassing research. Third, online VAW is considered from a human rights perspective not from a corporate or commercial perspective. Therefore, this paper may not be useful for those who might want to read around commercial perspective on online VAW. Lastly, the research only focuses on online VAW in Malawi even after indicating other forms of violence that are more prevalent.

⁸¹ African Declaration on Internet Rights and Freedoms 2015 <https://africaninternetrights.org/> (accessed 21 October 2021).

⁸² n 31.

⁸³ As above.

⁸⁴ J Bailey & C Mathen ‘Technology-facilitated violence against women & girls assessing the Canadian criminal law response’ (2019) 97 *Canadian Bar Review Journal* at 695.

⁸⁵ Malanga (n 12) 12.

⁸⁶ As above.

1.8 Overview of the chapters

The thesis is structured as follows: The first chapter contains the background of the study and clarifies the research problem that validates the need for this study. It provides the research questions, definition of terms, research methodology, literature review and limitations of the study. The second chapter provides the theoretical framework of the study by discussing the theories providing a relationship between online VAW and the law, including the impact of socio-economic and cultural norms that place other genders as vulnerable members in society. The third chapter articulates the applicable legal framework for protection from online VAW in Malawi including international law. The fourth chapter assesses the adequacy of the existing laws in view of the socio-legal challenges of women in Malawi to identify areas requiring reform and the gaps in the framework. The fifth chapter conducts an examination of relevant comparative jurisdictions to find out how others have dealt with challenges around online gender based violence. The will assist in developing possible law reform areas for Malawi for more effective and adequate laws. Chapter six concludes the thesis through summarising the findings and making necessary recommendations.

Chapter 2: Theoretical framework

2.1 Introduction

This chapter presents the theories that are used in the study and the impact of online violence on different women. Specifically, it discusses several feminist theories that highlight some of the thought process in this study. It also discusses the human rights theories that highlights the application of human rights from different perspectives and how it can be applied in this study. This will create a theoretical framework to be applied in the study.

2.2 The feminist theory

2.2.1. Radical feminism

In some parts of the world, it is reported that most online VAW, such as cyber-stalking, occur from an ex-partner.⁸⁷ Radical feminists have explained this to be a product of patriarchal tendencies that reflect male dominance against women from the physical to the online space.⁸⁸ Men also become more abusive online because they group up to become violent against women resulting into further infliction of pain on women.⁸⁹ This creates a mob mentality against women and thus they are afraid to express themselves freely in all sectors which results in overly self-censoring themselves and often times leaving social media platforms.⁹⁰

In addition, radical feminist believe that patriarchy results in subordination of women and gender inequality to the extent that women are stripped off control of what constitutes their sexuality.⁹¹ Men have so much control over women that they dictate what is acceptable for a woman in society.⁹² This theory is relevant to this study because as observed above, men still want to control how a women should act online and how she is perceived. This results in the patriarchal beliefs being highlighted on the online platforms and may cause online VAW.

⁸⁷ M Breiding 'Prevalence and characteristics of sexual violence, stalking, and intimate partner violence victimization-national intimate partner and sexual violence survey, United States' 2011 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4692457/> (accessed 24 August 2021).

⁸⁸ K Millett *Sexual politics* (2016) 221.

⁸⁹ G Sandoval 'The end of kindness: Weev and the cult of the angry young man' 12 September 2013 at 12 <https://www.theverge.com/2013/9/12/4693710/the-end-of-kindness-weev-and-the-cult-of-the-angry-young-man> (accessed 17 October 2021).

⁹⁰ E Jane 'Online abuse and harassment' in *The International Encyclopedia of Gender, Media, and Communication* (2020) at 88.

⁹¹ M Kambarami 2006. 'Femininity, sexuality and culture: patriarchy and female subordination in Zimbabwe' University of Fort Hare masters thesis 1-2.

⁹² As above.

2.2.2. Intersectional feminism

Intersectional feminism was introduced by Kimberlé Crenshaw in the 1980s.⁹³ She defined intersectionality as:⁹⁴

the interconnected nature of social categorizations such as race, class, and gender as they apply to a given individual or group, regarded as creating overlapping and interdependent systems of discrimination or disadvantage.

It emphasises that people experience different forms of discrimination based on their unique characteristics and how the society perceives them.⁹⁵ It appreciates that women face general societal challenges in other circumstances. However, there are other challenges that are faced by women by virtue of being black; a working class woman and not a stay at home mother; and a woman in an urban setting and one in the rural setting.⁹⁶

The theory aims at removing the barriers for every individual to display their full potential after being afforded a similar playing field of opportunities.⁹⁷ It aims to bring to light dynamics in society that are not being appreciated or highlighted by the law in order to achieve equality such as the economic privilege.⁹⁸ This theory suggests that placing one gender, race or ethnicity as the yardstick for equality in society neglects the cause of the inequality and prevents the possibility of developing remedies.⁹⁹ This treatment conceals legitimate claims that would come from a particular group because of certain experiences.

The theory also provides that laws should recognise the intersectionality in society and provide solutions according to the differences.¹⁰⁰ It provides against the doctrinal treatment of intersectionality which fails to recognise unique and compound errors that need to be addressed

⁹³ J Coaston 'The intersectionality wars' 28 May 2019 <https://www.vox.com/the-highlight/2019/5/20/18542843/intersectionality-conservatism-law-race-gender-discrimination> (accessed 7 September 2021).

⁹⁴ T Hawk 'What is "Intersectional Feminism"?' <https://denison.edu/academics/womens-gender-studies/feature/67969> (accessed 7 September 2021).

⁹⁵ K Crenshaw 'Demarginalizing the intersection of race and sex a black feminist critique of the anti-discrimination doctrine, feminist theory and antiracist politics' (1989) 1 *University of Chicago Legal Forum* at 139-140.

⁹⁶ As above.

⁹⁷ K Crenshaw 'Mapping the margins: Intersectionality, identity, and violence against women of color' (1991) 43 *Stanford Law Review* at 1245.

⁹⁸ B Zinn et al 'The costs of exclusionary practices in women's studies' (1986) 11 *Journal of Women in Culture and Society* 298.

⁹⁹ B Dill and M Kohlman 'Intersectionality: A transformative paradigm in feminist theory and social justice' in *Handbook of feminist research: Theory and praxis* (2012) at 2.

¹⁰⁰ DW Carbado et al 'Intersectionality: Mapping the Movements of a Theory' (2013) 10 *Du Bois Review: Social Science Research on Race* at 3.

by the law.¹⁰¹ In addition, it provides for a bottom-up approach to discrimination not the top-down approach that protects according to the extent of the law, regardless of condition.¹⁰²

It has been observed that public figures, such as politicians and journalists receive most of the wrath online.¹⁰³ In this study, it will be highlighted that different categories of women face different forms of violence online based on their uniqueness such as disability or socio-economic standing in society. Therefore, the law must provide a platform for all women to be protected regardless of their differences.

2.2.3. Cyber feminism

The internet has assisted a community of feminists who use it to create awareness and for activism. A shift from the third to the fourth generation feminists has led to creation of the ‘call out’ culture.¹⁰⁴ The call out culture entails challenging misogyny and sexism to the extent that the perpetrator is publicly shamed.¹⁰⁵ For example, Alanah Pierce, an Australian gamer, tweeted about boys who abused her and received over 11 thousand retweets which was interpreted as support and women standing up for each other online.¹⁰⁶ Others have criticised the call out culture saying that it exposes the perpetrators to harm and marginalisation instead of resolving the issue amicably.

The call out feminists also campaign against corporations that ignore to address online VAW. For example, Facebook was confronted about its rules around gendered hate speech because they did not include images and videos of the abuse of women to be contrary to their terms of service.¹⁰⁷ They also address issues around hate speech targeting Muslims, homosexuals and specific races.¹⁰⁸ However, the lack of political will and representation in issues of online VAW has led to a continued activism with so little impact.¹⁰⁹

¹⁰¹ As above.

¹⁰² As above.

¹⁰³ World wide web foundation ‘The impact of online gender-based violence on women in public life’ 25 November 2020 <https://webfoundation.org/2020/11/the-impact-of-online-gender-based-violence-on-women-in-public-life/> (accessed 21 October 2021).

¹⁰⁴ E Munro ‘Feminism: A Fourth Wave?’ (2013) 4 *Political Insight* at 22–25.

¹⁰⁵ As above.

¹⁰⁶ N Bahadur ‘Game reviewer Alanah Pearce is contacting the mothers of boys who sent her rape threats’ 8 December 2014 https://www.huffingtonpost.co.uk/entry/alanah-pearce-rape-threats-facebook_n_62489282 (accessed 27 August 2021).

¹⁰⁷ CR Carlson and H Rousselle ‘Report and repeat: Investigating facebook’s hatespeech removal process’ (2020) 25 <https://firstmonday.org/ojs/index.php/fm/article/view/10288/8327> (accessed 11 October 2021).

¹⁰⁸ As above.

¹⁰⁹ Munro (n 104) 23.

2.2.4. African feminism

African feminism recognises that tribe, culture language, age, education, race and other beliefs promote practices that entrench VAW.¹¹⁰ This is mirrored in the online platforms that are increasingly being used by women as African societies develop.¹¹¹ The online platform has been weaponised to further infringe on women's freedoms based on the African perspective of a woman in society.¹¹² The discriminatory practices that are formed physically from the social, economic and political structures are reproduced online.¹¹³ The sexism, racism and misogyny is further supported, valued and defended through the use of the internet.¹¹⁴

African feminists also note that different groups of women experience online violence differently. However, an African woman has been depicted to be uncivilised and stagnant thus erasing the multiplicity of women identities online.¹¹⁵ She is marginalised, excluded and suppressed and is unable to contribute and participate in technology development.¹¹⁶

The African feminists support Afrofuturism which is an approach that focuses on a multidisciplinary cultural movement focusing on using technology to promote a positive perception of African cultures to those in the diaspora.¹¹⁷ It believes in making positive changes and progressing with technology.¹¹⁸ Therefore, introducing new perspectives of the internet and creating a safe space for an African woman online is very important.

In this research, the feminist perspectives discussed above will be used to highlight the socio-cultural issues that exist in our societies and entrench online VAW. The theories will be applied in terms of sociology around online VAW, the ideas that entrench online VAW and possibly provide solutions to the arising issues on internet use and safety for all.

¹¹⁰ Shaw (n 42) 270.

¹¹¹ W Wagacha 'Access to information as a driver towards closing of the gender equality gap: the emerging scene in Kenya' (2019) 3 <http://origin-archive.ifla.org/IV/ifla73/papers/149-Wagacha-en.pdf> (accessed 11 October 2021).

¹¹² The women's legal and human rights bureau 'From impunity to justice: Domestic legal remedies for cases of technology-related violence against women' (2015) 2 <https://www.apc.org/en/pubs/impunity-justice-domestic-legal-remedies-cases-tec> (accessed 11 October 2021).

¹¹³ J Kee 'Cultivating Violence Through Technology? Exploring the connections between information communication technologies (ICT) and violence against women' (2005) 14 https://www.apc.org/sites/default/files/VAW_ICT_EN_0.pdf (accessed 17 October 2021).

¹¹⁴ Shaw (n 42) 277.

¹¹⁵ BN Sanya 'Disrupting patriarchy: An examination of the role of e-technologies in rural Kenya' (2013) 18 *Feminist Africa* at 15.

¹¹⁶ PH Collins '*Black feminist thought: knowledge, consciousness, and the politics of empowerment*' (2000) Routledge 13.

¹¹⁷ A Elia 'The Languages of Afrofuturism' (2014) 12 *Lingua e Linguaggi* at 3.

¹¹⁸ As above.

2.3. Human rights theory

This part discusses the theories of universalism and the relativism of human rights and their implications on online VAW. These two theories present main concepts of understanding human rights.¹¹⁹

2.3.1. Universalism theory

The universalist theory is a modern concept of human rights which opines that human rights are moral rights that should be accorded to all, everywhere and every time by virtue of being human.¹²⁰ Universalism provides that human rights are inherent and inalienable therefore, justice should be accorded to all.¹²¹

In terms of online VAW, the universalist theory upholds the rights of women to enjoy a safe online environment regardless of their differences. It emphasises the Universal Declaration of Human Rights as a document that should apply internationally. This will ensure the safety of women online because where domestic laws fail, women can seek regional and global redress. However, imposing the universalist theory hinders dynamism and critical analysis of human rights and culture and imposes nation-state organisational structures.¹²² In addition it emphasises the western-centric conceptualisation of rights and disregards the cultural, ethnic and national relativism.¹²³

2.3.2. Relativism theory

The relativism theory contradicts the universalism theory and opines that morality is influenced by social and historical factors which makes societies different. Moral principles guide human rights. Therefore, different perceptions of what constitutes morality will dictate human rights.¹²⁴ Relativists believe that each society should have the power to create its own human rights.¹²⁵ They argued that universalising human rights impedes the ability of other societies to develop their own concept of human rights based on their morality principles.¹²⁶

¹¹⁹ F Al-Daraweesh & DT Snauwaert 'HRE beyond universalism and relativism' (2015) New York, NY: Palgrave Macmillan 1.

¹²⁰ C Maurice 'What Are Human Rights?' (1973) 2nd ed. London: Bodley Head 36.

¹²¹ Al-Daraweesh & Snauwaert (n 119) 4.

¹²² D Bell 'The East Asian challenge to human rights: Reflections on an East West dialogue' (1996)18 (3) *Human Rights Quarterly* at 660.

¹²³ P Healy 'Human rights and intercultural relations: A hermeneutico-dialogical approach' (2006) 32 *Philosophy & Social Criticism* at 521.

¹²⁴ C Corradetti 'Relativism and Human Rights: A Theory of Pluralistic Universalism' (2009) 2.

¹²⁵ Al-Daraweesh & Snauwaert (n 119) 13-14.

¹²⁶ L Billings & WF Tate 'Toward a critical race theory of education' (1995) 97 *Teachers College Record* at 52.

However, critics of this approach opine that it creates opportunities for the violation of human rights because it provides immunity of states to account for human rights violations.¹²⁷ In addition, it provides a fertile ground for conflict between people who have differences about what constitutes human rights.¹²⁸

In terms of online VAW, this study discusses the cultural and moral aspects that contribute to the violation of human rights online. It also emphasises the requirement to recognise the effects of some beliefs on women's rights online. It recognises the relativism of cultures but emphasises the importance of universalism in order to ensure the protection of women. It does this by considering domestic, regional and global laws that promote and protect human rights and create state obligations to protect women from online violence.

2.4 Conclusion

This chapter discussed two theories around online VAW and technology. The feminist theories considered the plight of women when using technology and discussed issues of equality and differences that reflect on the perception and treatment of all women online and how those can be resolved. The human rights theories discussed the different human rights schools of thought and highlighted how this study will apply them to explain the importance of human rights approach in the protection of women from online violence. The analysis in this study embraces aspects of the theories discussed to come up with a critically analysed answer to the question of whether the current legal regime in Malawi sufficiently protects women from online violence.

¹²⁷ Healy (n 123) 517.

¹²⁸ As above.

Chapter 3: Malawi's legal framework to protect women from online violence

3.1. Introduction

The status of human rights protection in Malawi is poor.¹²⁹ This is characterised by the many human rights related issues such as corruption, arbitrary arrest and detention, harsh prison conditions and poor investigatory and accountability mechanisms on violence against women cases.¹³⁰ In addition, Amnesty International reported a rise in unlawful killings, intimidation of human rights defenders and discrimination against people with albinism.¹³¹

In 2020, rape and defilement cases were on a rise as evidenced by the frequent reporting of arrests and convictions.¹³² In 2021, reports state that 1 in 3 women and girls between the age of 15 to 49 are physically and sexually violated.¹³³ There are efforts from government with the support of NGOs and development partners to end VAW.¹³⁴ These efforts have yielded results in terms of creating awareness and the increase in the number of women reporting cases of violence.¹³⁵ However, a lot needs to be done to improve the situation to protect women from violence.¹³⁶

Apart from offline VAW, online VAW is on the rise and therefore requires a robust legal framework that is contextual and properly formulated to ensure protection. This chapter examines the scope and current legal framework of Malawi and the extent to which it protects women from online violence.

The legal framework on online VAW comprises of the Constitution, applicable acts of parliament, global and regional instruments, and common law. There are some regional and global soft and hard laws that seem to provide some protection against online VAW and can

¹²⁹ Department of state 'Malawi 2020 human rights report' 2020 1 <https://www.state.gov/wp-content/uploads/2021/03/MALAWI-2020-HUMAN-RIGHTS-REPORT.pdf> (accessed 25 October 2021).

¹³⁰ As above.

¹³¹ Amnesty International Report 2020/21 'The state of the world's human rights' 2021 236 <https://www.amnesty.org/en/wp-content/uploads/2021/06/English.pdf> (accessed 25 October 2021).

¹³² Department of state (n 129) 17.

¹³³ W Mtawali 'Malawi to Reflect On Its Fight Against Gender Based Violence' 27 September 2021 <https://allafrica.com/stories/202109270270.html> (accessed 25 October 2021).

¹³⁴ CEDAW Committee on the Elimination of Discrimination against Women Eighth periodic report submitted by Malawi under article 18 of the Convention, due in 2019 received 12 February 2021 11 <https://www.ecoi.net/en/file/local/2047005/N2108118.pdf> (accessed 25 October 2021).

¹³⁵ CEDAW (n 134) 12.

¹³⁶ CEDAW (n 134) 30

provide lessons to Malawi. These include the African Charter on Human and Peoples' Rights,¹³⁷ the Maputo Protocol¹³⁸ and Convention on Elimination of all forms of Discrimination Against Women (CEDAW).¹³⁹ Other international instruments include the International Covenant on Civil and Political Rights (ICCPR),¹⁴⁰ the African Union Convention on Cyber Security and Personal Data Protection (AUCCSPDP),¹⁴¹ and the African Charter on the Rights and Welfare of the Child.¹⁴² However, the latter have not been domesticated in Malawi and therefore their application is not as persuasive because Malawi is a dualist country.¹⁴³ Hence, they are not discussed in this chapter because of the limited space and scope of application.

3.2. The Constitution of the Republic of Malawi

The Constitution of the Republic of Malawi is the supreme law of the country (Constitution).¹⁴⁴ There are many rights provided by the Constitution that are at the core of tackling online VAW. These rights include the right to equality,¹⁴⁵ human dignity and personal freedoms,¹⁴⁶ privacy¹⁴⁷ and the rights of women.¹⁴⁸ The list herein comprises of derogable and non-derogable rights. According to the Malawi Constitution, the rights to privacy and human dignity and personal freedoms can be limited within reasonable, internationally acceptable human rights standards and where it is 'necessary in an open and democratic society'.¹⁴⁹ Emphasising the importance of the right to human dignity, the constitutional court stated as follows in the case of *Mayeso Gwanda v S*:¹⁵⁰

Recognizing a right to dignity of human beings is an acknowledgement of the intrinsic worth of human beings; Human beings are entitled to be treated as worthy of respect and concern.

¹³⁷ The African Charter on human and peoples' rights (adopted in 1981 and entered into force in 1986).

¹³⁸ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted in 2003 and entered into force in 2005).

¹³⁹ Convention on Elimination of all forms of Discrimination Against Women 1979.

¹⁴⁰ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

¹⁴¹ African Union Convention on Cyber Security and Personal Data Protection (adopted 27 June 2014).

¹⁴² African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) CAB/LEG/24.9/49.

¹⁴³ Sec 211 Malawian Constitution; R Matemba, 'Incorporation of international and regional human rights instruments: Comparative analyses of methods of incorporation and the impact that human rights instruments have in a national legal order' (2011) 37 *Commonwealth Law Bulletin* at 438-439.

¹⁴⁴ Sec 10(1) Malawian Constitution.

¹⁴⁵ Sec 20 Malawian Constitution.

¹⁴⁶ Sec 19 Malawian Constitution.

¹⁴⁷ Sec 21 Malawian Constitution.

¹⁴⁸ Sec 24 Malawian Constitution.

¹⁴⁹ Secs 44(1) & (2) Malawian Constitution.

¹⁵⁰ Constitutional case 5 of 2015 4.

This also entails affording women human dignity in online platforms. However, the right to equality cannot be limited and should be enforced at all times. Therefore, the rights of women should be enforced online as much as it is offline. Women's rights online are infringed upon without much recourse.¹⁵¹ The Constitution, as the supreme law of the country, emphasises the requirement of enjoyment of rights for all. The shortfall of the Constitution is that the provisions are rather broad and not specific on online VAW. Therefore, it can be interpreted that the Constitution omitted aspects of online VAW.

3.3. Common law position

Section 200 of the Constitution includes common law in Malawi's legal system. Malawi was a British protectorate and common law application is emphasised in section 10(2) of the Constitution to include provisions of the Constitution.¹⁵² Section 10(2) of the Constitution provides that 'in the application and development of the common law and customary law, the relevant organs of State shall have due regard to the principles and provisions of this Constitution.' This allows for the use of common law rules to adjudicate matters concerning online VAW within the confines of the Constitution.

Although online VAW goes beyond privacy issues, common law has some remedies that could protect the right to privacy which is one of the rights that is breached in such cases.¹⁵³ First, a victim of online VAW can claim compensation for breach of confidence as stipulated in equity or contract laws.¹⁵⁴ Although some may argue that contractual issues arise under situations where one had an obligation to keep the information private, the courts in England and Wales extended the scope to information that one is expected to keep private, not only confidential information.¹⁵⁵ Therefore there is an implied obligation of confidentiality even in personal relationships.¹⁵⁶ Forms of online VAW that can occur through such disclosure include, cyber pornography and sharing of intimate partner images.¹⁵⁷ The courts in Malawi are highly

¹⁵¹ n 31.

¹⁵² RE Kapindu 'Malawi: Legal System and Research Resources' (2009)

https://www.nyulawglobal.org/globalex/Malawi.html#_3.3._Common_Law (accessed 21 October 2021) para 3.3.

¹⁵³ R Wacks 'Why there will never be an English common law privacy tort' in A Kenyon & M Richardson (eds) *New dimensions in privacy law: International and comparative perspectives* (CUP 2006) 154.

¹⁵⁴ T Aplin 'The development of the action of breach of confidence in a post-HRA era' (2007) 1 *Intellectual Property Quarterly* at 19: A v B & C 8 [2002] EMLR 7 (Jack J); [2003] QB 195 (CA).

¹⁵⁵ As above.

¹⁵⁶ As above.

¹⁵⁷ R Warren 'Cycle of shame: Harassed in the street, then again on social media' 8 January 2018

<https://edition.cnn.com/2018/01/08/africa/malawi-cycle-of-shame-asequals/index.html> (accessed 11 October 2021).

persuaded by common law decisions and thus are likely to apply these rules even when handling online VAW cases.¹⁵⁸

Second, common law also introduces defamation in the Malawi legal system. It provides against the unlawful collection of personal information through interference with communication equipment or online.¹⁵⁹ This occurs where the disclosure of such information causes harm to a person's reputation.¹⁶⁰ Lastly, the tort of negligence can be used to tackle online VAW where there was a duty of care which resulted to a breach of that duty.¹⁶¹ Online VAW also occurs in situations where a person owed another a duty of care. For example, a data controller owes a duty of care towards a data subject, arguably, to ensure that their information is not shared without authorisation.¹⁶² There is an inaction in negligence where a defendant who owes a duty of care to a claimant breaches that duty resulting in the claimant suffering loss or damage.¹⁶³ That is why corporations can be sued where breaches occur due to negligence which results in online violations.

3.4. Acts of parliament on online VAW

There are many acts of parliament that provide for online VAW or cases that concern it, with none of them uniquely focusing on online VAW. These pieces of legislation are discussed below.

3.4.1. Gender Equality Act

The GEA was enacted in 2013 with the aim of eradicating and addressing the inequalities that exist between men and women in their day-to-day life.¹⁶⁴ It was introduced with the aim of promoting the following:¹⁶⁵

gender equality, equal integration, influence, empowerment, dignity and opportunities, for men and women in all functions of society, to prohibit and provide redress for sex discrimination, harmful practices and sexual harassment, to provide for public awareness on promotion of gender equality, and to provide for connected matters.

¹⁵⁸ *Kishindo v Kishindo* Civil cause 397 of 2013 (unreported) 6-8.

¹⁵⁹ LA Abdulrauf 'The legal protection of data privacy in Nigeria: Lessons from Canada and South Africa' LLD thesis, University of Pretoria 2015 at 128.

¹⁶⁰ As above.

¹⁶¹ *Thomson v Lujeri Tea Estate* Personal injury case 95 of 2015 (unreported).

¹⁶² As above.

¹⁶³ As above.

¹⁶⁴ Gender Equality Act 3 of 2013.

¹⁶⁵ Long title GEA.

Section 4 of the GEA protects women against sex discrimination. It specifically highlights that a person should not be treated less favourably to the extent that it infringes on their full enjoyment of their rights and is unjustifiable, due to them being male or female.¹⁶⁶ For example, in the case of *Hlongo v Pegas Panel Beaters*, the court held that not providing a changing room for female employees amounted to sex discrimination as provided in the GEA.¹⁶⁷ To emphasise the seriousness of this act, section 4(2) creates an offence of sex discrimination and if a person is found guilty, they are liable to imprisonment of 5 years and a fine of 1 million kwacha (1,227.51 USD).

Further, section 5 prohibits harmful practices and states that a person shall not cause any harm to the other through engaging in the act, subjecting or encouraging it. It also creates an offence with the similar punishment as above. The said provisions highlight the issue of sex discrimination which is a growing concern in Malawi.¹⁶⁸ Many women suffer from different forms of online violence by virtue of being a woman as evidenced by the body shaming of women who do not measure up to the expectations of the society either because of how they look, their mannerisms or their dressing.¹⁶⁹ There is so much censorship of the female sex online which results in violating the rights of women.¹⁷⁰

Lastly, the GEA prohibits sexual harassment in any form, including verbal, nonverbal and physical harassment and creates the same offence as above.¹⁷¹ The provisions in the GEA can be used to handle online VAW offences because most of the offences are focused on women, which highlights sex and gender discrimination. Further, the GEA specifically highlights sexual harassment, which is highly suffered by women online. The only shortfall could be the lack of emphasis on online violations which could be argued away by of section 6 to include nonverbal actions. However, this remains an issue because it is left to public, official or judicial interpretation, which could be to the disadvantage of the victim, in other cases.

3.4.2. Prevention of Domestic Violence Act

The Prevention of Domestic Violence Act (PDVA) was enacted in 2006. It provides ‘for the prevention of domestic violence, for the protection of persons affected by domestic violence;

¹⁶⁶ Sec 4(1) GEA.

¹⁶⁷ Case 563/2007 (IRC) (unreported).

¹⁶⁸ Secs 4 & 5 GEA.

¹⁶⁹ n 157.

¹⁷⁰ As above.

¹⁷¹ Sec 6 GEA.

and for matters connected therewith.¹⁷² A domestic ‘relationship is defined as one between a husband and wife, a parent and a child, people who share a child together, or those in an intimate relationship that has exceeded one year.’¹⁷³ The PDVA further provides that ‘domestic violence is any criminal offence that arises out of social, economic, financial, physical, emotional, psychological and sexual abuse committed in a domestic relationship.’¹⁷⁴

Some forms of the online VAW originate from domestic relationships, especially intimate partner violence (IPV). IPV refers to ‘any behaviour within an intimate relationship that causes physical, psychological or sexual harm to those in the relationship.’¹⁷⁵ In 2018, Malawi had a record of 42% of ever-married women who had reported cases of IPV save for the fact that most cases are not reported.¹⁷⁶ However, practice has indicated that most of the domestic violence cases reported concern physical forms of violence occasioned to women.¹⁷⁷ In a study conducted in 2013, 30% reported physical violence, 25% emotional violence and 18% sexual violence.¹⁷⁸ It concluded that IPV is the most common form of violence experienced by women in Malawi.¹⁷⁹ Most of the literature does not highlight that IPV could be inflicted on a victim online. This must be included in the law.

As a resolve, the PDVA provides that victims can apply for a protection order at a competent court to ensure that they are safe from the present and possible future violence.¹⁸⁰ These protections are provided by the courts in Malawi but enforcement is the problem.¹⁸¹ The problem is bigger for online violations which are coupled with challenges of lack of trained personnel to handle such cases and a non-responsive society.¹⁸²

3.4.3. Electronic Transactions and Cyber Security Act

The ET Act was enacted in 2016.¹⁸³ The objectives of the ET Act are as follows:¹⁸⁴

¹⁷² Long title PDVA.

¹⁷³ Sec 2 PDVA.

¹⁷⁴ As above.

¹⁷⁵ World health organisation, ‘violence against women: key facts’ 9 March 2021 <https://www.who.int/news-room/fact-sheets/detail/violence-against-women> (accessed 14 October 2021).

¹⁷⁶ UNICEF Malawi report ‘Ending violence against women and girls in Malawi: What do we know?’ (2020) 17.

¹⁷⁷ UNICEF Malawi report (n 171) 18.

¹⁷⁸ S Barzargan-Hejai et al ‘Patterns of intimate partner violence: a study of female victims in Malawi’ (2012)5 *Journal of Injury and Violence Research* 139.

¹⁷⁹ As above.

¹⁸⁰ Sec 5-10 PDVA.

¹⁸¹ n 31.

¹⁸² As above.

¹⁸³ Electronic transactions and cyber security Act 33 of 2016.

An Act to make provision for electronic transactions; for the establishment and functions of the Malawi Computer Emergency Response Team (MCERT); to make provision for criminalizing offences related to computer systems and information communication technologies; and provide for investigation, collection and use of electronic evidence; and for matters connected therewith and incidental thereto.

Online VAW matters are covered by this Act under computer systems and communication technologies. This Act is considered the most relevant legislation dealing with online VAW in Malawi because it provides for the types of offences and the criminal implications of such offences.¹⁸⁵ Out of the 104 provisions in the Act, there are some that specifically provide for cybercrimes. It provides for 4 specific areas that relate to online VAW. These are on breach of privacy and data protection, child pornography, cyber harassment and offensive communication. The ET Act has a broad scope because it provides for diverse matters from human rights related provisions to commercial law and criminal law provisions.

First is the breach of privacy provision. The main objective of the ET Act was to establish an ICT law that promotes competition, improvement of ICT and secure the inclusion of Malawi in the technology advancement era.¹⁸⁶ In agreement, other authors have argued that such acts of parliament are enacted to facilitate commerce and not protection of data privacy. However, this is an important discussion regarding online VAW. Sections 71 to 74 provide for the processing of personal data and the duties that are bestowed upon a data processor, the duty to produce information to the subject of the data and the duty to protect the information from unlawful destruction, loss, distribution and access over any network or other forms of processing. Cybercrimes are committed by use of information to hate a particular person.¹⁸⁷ Therefore, these provisions bestow a duty on the data processor to ensure that this does not happen to protect the would be victims.

Second, the ET Act provides for child pornography in section 85. Child pornography is described as follows:¹⁸⁸

¹⁸⁴ Long title ET Act.

¹⁸⁵ n 31.

¹⁸⁶ Art 2(1) E-Bill. See Parliament of Malawi, 'E-Bill' (biz-file, 2012).

¹⁸⁷ Malanga (n 12) 6.

¹⁸⁸ Sec 2 ET Act.

...visual or pornographic material that depicts, presents or represents a person under the age of eighteen engaged in sexually explicit conduct or an image representing a person under the age of eighteen engaged in sexually explicit conduct.

The act prohibits the production, reproduction, offer, exposure, distribution, procurement and possessing of any form of child pornography.¹⁸⁹

Third, the ET Act prohibits cyber harassment under section 86. It provides that any person who uses a computer system with the aim of making obscene requests; threaten to inflict injury to a person; and knowingly permits the use of electronic device to achieve the aforementioned, shall be liable to a fine of 2 Million kwacha (2, 443.49 USD) and imprisoned for 5 years, upon conviction.

Fourth, section 87 of the Act prohibits offensive communication which involves the use of electronic communication with the aim of disturbing the peace, quietness and right to privacy of a person. Further, the ET Act prohibits cyberstalking which involves the 'use of electronic communication to harass a person with the aim of instilling fear for one's safety or relations.'¹⁹⁰ These two offences are punishable with imprisonment for 12 months and a fine of 1 million kwacha (1,227.51 USD).

The ET Act further prohibits attempting, aiding and abetting the mentioned crimes. It provides that a person who attempts to commit an offence and is found guilty upon conviction, shall be punished with a penalty which shall not exceed on half of the intended penalty on that particular crime.¹⁹¹ Where a person is found guilty of aiding and abetting, the person shall be awarded punishment similar to that of the person who actually committed the offence.¹⁹²

The victims of the crimes have been provided with a resolve by the Act by way of complaining to the monitoring body which is responsible for commencing the procedures to assesses the complaint.¹⁹³ Where the complaint is deemed reasonable and relevant, the monitoring body initiates further investigations.¹⁹⁴ The Malawi Communications and Regulatory Authority (MACRA) is the implementation body and was established under the Communications Act

¹⁸⁹ Sec 85(2) ETA Act.

¹⁹⁰ Sec 88 ET Act.

¹⁹¹ Sec 93(1) ET Act.

¹⁹² Sec 93(2) ET Act.

¹⁹³ Sec 96 ET Act.

¹⁹⁴ As above.

whose unit, the MCERT, monitors cyber security.¹⁹⁵ However, most cybercrimes are not handled as provided, one factor being that MCERT is not operational.¹⁹⁶ To execute its duties, MACRA is under the direction of the responsible minister.¹⁹⁷ It is responsible for a number of duties in the communication sector and the president appoints its members.¹⁹⁸

In practice, MACRA forwards online VAW complaints to the police. The challenge is that most of the members of the police are not trained to handle cyber-violence.¹⁹⁹ These police are usually placed in the victim support unit and their focus is on matters they can resolve without cyber expertise. Thus, the fight against online VAW continues to be ineffective.²⁰⁰

3.4.4. Penal Code

The PC is a criminal code which provides for offences and punishments.²⁰¹ It was enacted in the 1930s and later amended in 1999 with subsequent amendments.²⁰² The PC provides for the offence of insulting the modesty of a woman and stipulates as follows:²⁰³

whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture or exhibits any object intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman or intrudes upon the privacy of such woman, shall be guilty of a misdemeanour and shall be liable to imprisonment for one year.

Further, the PC criminalises obscene matters or acts which include ‘making, producing or having in one’s possession any one or more obscene pictures, photographs, photographic negatives or prints, cinematograph films, or any other obscene objects tending to corrupt morals.’²⁰⁴

There are some challenges that have been raised concerning these provisions. First, the provision on insulting the modesty of a woman has been considered to be vague and open to subjective interpretation and can therefore be easily misinterpreted by the public, law enforcement officers or the judiciary.²⁰⁵ In the case of *the State v Officer in Charge of Lingadzji Police Station & Attorney General (ex parte B Mateyu)* the court was supposed to decide on the constitutionality of section

¹⁹⁵ Secs 5 & 6 Communications Act Cap 68:01, Laws of Malawi.

¹⁹⁶ Kainja (n 79) 13.

¹⁹⁷ Sec 5(1) Communications Act.

¹⁹⁸ Sec 8 Communications Act.

¹⁹⁹ n 31.

²⁰⁰ As above.

²⁰¹ LC Bande ‘Criminal law in Malawi’ (2019)1 *Journal of South African Law* at 33.

²⁰² Penal Code Amendment Act 8 of 1999 (PC).

²⁰³ Sec 137 PC.

²⁰⁴ Sec 179 PC.

²⁰⁵ n 31.

137 of the PC but did not proceed due to some procedural irregularities.²⁰⁶ This implies that it is an area of law that needs further examination.

Second, what is obscene remains very subjective as it will depend on what is regarded as moral in a society which may result in the victim being charged as the offender, in some cases.²⁰⁷ This emphasises the need for a more objective provision to ensure protection of women online so that the subjective tests are avoided considering the diversity of the Malawian society.

3.5. Regional and global instruments

3.5.1. African Charter on Human and Peoples' Rights

Malawi ratified the African Charter on Human and Peoples' Rights (the African Charter) on 17 November 1989.²⁰⁸ As a member of the African Union (AU), Malawi has an obligation to 'recognise all rights, duties and freedoms enshrined in the African Charter and undertake to legislative and other measures to fulfil them.'²⁰⁹ In a bid to oversee the implementation of the rights of the African Charter, the latter established the African Commission on Human and Peoples' Rights (Commission).²¹⁰ In the case of *Abdel Hadi, Ali Radi & others vs Republic of Sudan*, the Commission held that 'if a state party fails to respect, protect, promote or fulfil any rights guaranteed in the Charter, this constitutes a violation of article 1 of the African charter.'²¹¹

The AU has also adopted the AUCCSPDP in 2014 as part of the Agenda 2063. The AUCCSPDP has not entered into force and Malawi is not party to the same.²¹² However, the Commission has emphasised the importance of cyber security and data protection through efforts such as working with the Council of Europe. In 2018, they organised a workshop on cyber security and cybercrime policies.²¹³ From the press briefing, it suggests that the discussion was mainly about cybersecurity across and among countries in different transactions and not on

²⁰⁶ Civil cause 869 of 2017 [2020] MWHC 22 (12 June 2020).

²⁰⁷ n 31.

²⁰⁸ The African Charter on human and peoples' rights (adopted in 1981 and entered into force in 1986).

²⁰⁹ Art 1 African Charter.

²¹⁰ Art 30 African Charter.

²¹¹ 368/09 ACHPR 16.

²¹² Y Turianskyi 'Balancing cyber security and internet freedom in Africa' January 2018 occasional paper 275 15 https://media.africaportal.org/documents/OP_275_GAP_Turianskyi_FINAL_WEB.pdf (accessed 14 October 2021).

²¹³ African Union 'AU Commission and Council of Europe join forces on cybersecurity' 12 April 2018 <https://au.int/en/pressreleases/20180412/african-union-commission-and-council-europe-join-forces-cybersecurity> (accessed 7 September 2021).

personal use of the cyber space.²¹⁴ This presents a lost opportunity by the Commission to incorporate online VAW in the discussion to find lasting solutions regionally.

Additionally, the Commission has collaborated with the internet society²¹⁵ to develop Privacy and Personal Protection Guidelines (the guidelines).²¹⁶ One of the recommendations under the guidelines is that states parties should ensure that the digital wellbeing of the citizen is protected by setting up measures, policies or laws that ensure that citizens are not exposed to undue risks of harm online.²¹⁷ Broad interpretation of such recommendation suggests that the states parties to the African Charter are under an obligation to ensure the protection of women from online violence because of its harmful effects.

3.5.2. Maputo Protocol

Malawi ratified the Maputo Protocol on 20 May 2005.²¹⁸ It is considered a comprehensive document to, among others, eradicate VAW through its innovative provisions.²¹⁹ Malawi domesticated the Maputo Protocol through acts of parliament such as the GEA and the PDVA. The Maputo Protocol provides a foundation for women's rights in Africa and buttresses the importance of enhancing African values to achieve equality, peace, freedom and dignity, among others.²²⁰ It encourages African states to adopt policies and legislation that aim at promoting and protecting the rights of women for them to fully enjoy their rights.²²¹

Online VAW is a form of GBV that limits the full enjoyment of rights on the internet due to all forms of harassment that they face. The Maputo Protocol emphasises the rights to equality and equal treatment of women, generally. Malawi is under an obligation to ensure that these rights are protected and promoted. This will enhance the protection of the rights of women as reference will not only be to the domestic laws but also the regional laws. Therefore, where

²¹⁴ As above.

²¹⁵ The Internet Society (founded in 1992) <https://www.internetsociety.org/> (accessed 14 October 2021).

²¹⁶ Personal data protection guidelines for Africa: A joint initiative of the Internet Society and the Commission of the African Union' 9 May 2018 https://www.internetsociety.org/wp-content/uploads/2018/05/AUCPrivacyGuidelines_2018508_EN.pdf (accessed 14 October 2021).

²¹⁷ Personal data protection guidelines for Africa (n 216) 17.

²¹⁸ List of countries that have signed or ratified the Maputo Protocol

<https://au.int/sites/default/files/treaties/37077slPROTOCOL%20TO%20THE%20AFRICAN%20CHARTER20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf> (accessed 21 October 2021).

²¹⁹ A Budoo-Scholtz 'Next steps to getting Africa's protocol on women's rights implemented' 17 January 2018 <https://theconversation.com/next-steps-to-getting-africas-protocol-on-womens-rights-implemented-80406> (accessed 10 October 2021).

²²⁰ Preamble Maputo Protocol.

²²¹ Art 2(a) Maputo Protocol.

violations of rights are neglected by the domestic courts in Malawi, women can claim their rights at regional level by enforcing the protections under the Maputo Protocol.

3.5.3. Convention on the Elimination of All forms of Discrimination Against Women

Malawi ratified CEDAW on 12 March 1987. The CEDAW is an international UN instrument that provides for the protection of rights of woman internationally. It provides that states parties shall take all measures possible to eliminate and condemn discrimination against women.²²² In order to assess and monitor the implementation of the provisions of CEDAW, a 23-member committee was established in article 17 of the document. The Committee on the Elimination of Discrimination against Women (the Committee) placed a duty on states to include in their periodic reports, the status of VAW in specific countries under General Recommendation 19 of 1992 (GR 19). The comments emphasise the duties of the state parties to promote and protect the rights of woman in all forms of GBV.²²³ However, GR 19 does not specifically highlight online VAW which is a gap with regard to this study.

In 2017, the Committee updated GR 19 to General Recommendation 35 on gender-based violence against women (GR 35) after 25 years. The uniqueness of GR 35 is the recognition of the contemporary forms of violence that occur on the internet and digital spaces.²²⁴ It recognises that violence occurs in all spaces of human interaction include technology mediated environments.²²⁵ GR 35 is progressive because it recognises that violence can be done through an omission by the state, an individual or a corporate against an individual or groups of people.²²⁶ In the case of *the State v. Inspector General of Police & others ex-parte M.M. & others*, the court relied on GR 35 where it emphasises state responsibilities to ensure that women are protected from any form of violence.²²⁷ It is important that a legal framework recognising these possibilities is formulated to ensure the protection of women online and to create duties and obligations to individuals, corporates and states when using the internet.

²²² Art 2 CEDAW.

²²³ CEDAW General Recommendation 19 (1992) 4 on violence against women.

²²⁴ United Nations 'Report of the secretary generals in-depth study on all forms of violence against women' (2006). A/61/122/Add 36.

²²⁵ As above.

²²⁶ CEDAW Concluding Observations to Switzerland (2016) CEDAW/C/CHE/CO/4-5; to Germany, 2017 (CEDAW/C/DEU/CO/7-8).

²²⁷ Judicial review cause 7 of 2020 14.

3.6. Conclusion

This chapter has provided the existing legal framework concerning online VAW, specifically, the Constitution, acts of parliament, common law and other regional and international instruments. Although the Constitution provides a broad protection of various rights that tend to be violated online, a lot needs to be done in terms of practice and interpretation by the courts. The Constitution is progressive but does not provide for online violence as a form of violence. The common law is very essential as it provides an alternative to documented practice. As noted, the ET Act is more elaborate on cybercrimes protections as it provides the definitions, scope and the punishments for different offences. The regional and international instruments discussed provide a general scope of VAW and still lack specific reference to online VAW and can only be derived from the permissive drafting that allows broad interpretation of the provisions.

Chapter 4: Challenges in protecting women from online violence in Malawi

4.1 Introduction

Chapter 3 highlighted the legal framework regarding online VAW and confirmed the existence of some legal protections of women against online violence in Malawi. This chapter analyses whether the current legal framework is adequate and effective to protect women from online violence considering the increase in internet usage and the socio-legal context in Malawi.

It starts with a discussion of the issues that affect the socioeconomic, legal and cultural attitudes that have implications on the enjoyment of the online space by women. It further analyses the response mechanism set up to tackle online VAW and the attitudes associated with it in the Malawian context. Lastly, an assessment of the laws of Malawi is conducted with regard to the current risks and challenges brought about by online VAW.

4.2 Socioeconomic status of Malawi as an impediment to prevention of online VAW

The socioeconomic status of a country may affect the extent of socio-legal issues, prioritisation of projects and delivery of services. The socioeconomic context of Malawi remains a concern towards the improvement of services in the country. Malawi is located in the Southeastern part of Africa and is considered a poor country.²²⁸ In 2018, Malawi had a population of 17,563,749. According to estimates, the population in 2022 will grow to 19,400,000 with a weaker socioeconomic muscle.²²⁹

Among the causes of the current socioeconomic status are corruption, climate change, electricity supply shortages and droughts.²³⁰ Efforts have been made to improve the situation through poverty reduction initiatives and economic reforms but they have not yielded significant success.²³¹ With the current situation, it is highly likely that the government will face immense challenges when it comes to protecting women's rights online because enforcement of rights

²²⁸ Government of Malawi 'The Malawi Growth and Development Strategy (2017- 2022)' UNDP, November 2017 http://www.undp.org/content/dam/malawi/docs/UNDP_Malawi_MGDS%20III.pdf (accessed 9 September 2021); World Bank, 'The world by income and region' The World Bank Data Topics, 2017 <https://datatopics.worldbank.org/world-development-indicators/the-world-by-income-and-region.html> (accessed 9 September 2021).

²²⁹ Government of Malawi 'The Malawi growth and development strategy (2017- 2022)' 1.

²³⁰ PE Rasmussen '2018 African Economic Outlook: Malawi' 2018 https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/African_Economic_Outlook_2018_-_EN.pdf. (accessed 14 October 2021).

²³¹ B Chinsinga 'Decentralisation and poverty reduction in Malawi – a critical appraisal' in G Crawford and C Hartmann, decentralisation in Africa (2008) at 77.

requires resources, more specifically financial resources because it is not only a legal matter, it is also technical. Therefore, there is need to strengthen the economic status of the country to improve the situation.

4.3 Motivations and attitudes towards online VAW

There are many factors that influence peoples' motivations and attitudes towards online VAW in Malawi. These can be intrinsic or extrinsic motivations. Intrinsic motivations include religion, cultures and educational attainment while extrinsic motivations include law enforcement, social sanctions and economic incentives.²³² These motivators affect the decisions and attitudes towards particular issues, in this case, online VAW. This section discusses the intrinsic and extrinsic factors that create varying attitudes towards online VAW in Malawi.

4.3.1 Poverty levels

The poverty levels in Malawi are alarming. It is estimated that over 50.7% of the population in Malawi are poor.²³³ Further, over 25% of the population live in extreme poverty and hunger. From 2008 to 2014, there were indicators that the poverty levels in Malawi had improved by 6.1% with each passing year.²³⁴ However, Malawi has continued to be classified as poor because the poverty levels had only improved by 0.8%.²³⁵ The rich people in Malawi continue to be rich while the people living in poverty experience extreme poverty.²³⁶

According to Freedom House, internet access and use for most Malawians is low due to expensive technology purchases and telecommunications subscriptions.²³⁷ As at January 2020, there was an internet penetration rate of 15%, indicating a 4% increase from the records of 2019.²³⁸ The mobile penetration rate is as low as 39% and is said to have reduced due to lack of

²³² RM Ryan & EL Deci 'Intrinsic and Extrinsic Motivations: Classic Definitions and New Direction' (2000) 25 *Contemporary Educational Psychology* at 56-60.

²³³ Rasmussen (n 230) 14.

²³⁴ World Bank and National Statistics Office of Malawi, 'Methodology for Poverty Measurement in Malawi (2016/17)' World Bank 2018 16 <http://documents.worldbank.org/curated/en/575101534874113572/Methodology-for-Poverty-Measurement-in-Malawi> (accessed 12 October 2021).

²³⁵ As above.

²³⁶ R Mussa 'Poverty and inequality in Malawi: Trends, prospects, and policy simulation' MPRA 2017 4 <https://mpira.ub.uni-muenchen.de/75979/> (accessed 14 October 2021).

²³⁷ Freedom house: Malawi 2020 <https://freedomhouse.org/country/malawi/freedom-net/2020> (accessed 9 September 2021).

²³⁸ S Kemp 'Digital 2020: Malawi' 18 February 2020 <https://datareportal.com/reports/digital-2020-malawi> (accessed 9 September 2021).; S Kemp 'Digital 2019: Malawi' 31 January 2019 <https://datareportal.com/reports/digital-2019-malawi> (accessed 9 September 2021).

proper registration of sim cards in use.²³⁹ This implies that the internet penetration levels might not be accurate and the levels of online violations are not properly recorded. Therefore, proper regulation is paramount to cover the percentage that is left out of the statistics. It is highly likely that because of the poverty levels in Malawi, matters of ensuring online safety are not prioritised in the fight against VAW in order to allocate resources to other priority areas.

In addition, poverty is a driver of all sorts of VAW in Malawi.²⁴⁰ Due to the poverty levels and economic divide between men and women, women are placed in a vulnerable position in the society.²⁴¹ Therefore, they may experience online violence because they do not have the technical knowledge to protect themselves and cannot afford to pay for legal expenses.²⁴² Men and women should be provided an equal opportunity in order to enjoy an equal footing in society. Impliedly, the government should endeavour to fill the economic divide through affirmative action towards poverty eradication and women inclusion.

4.3.2 Social inequalities

Recent studies have shown an increase in the levels of inequality in Malawi as evidenced by the gap between the rich and the poor.²⁴³ Malawi faces inequalities in education, economic status and gender.²⁴⁴ This part discusses the inequalities in education, income distribution and generation and gender. It also discusses the digital gender gap and the implications these factors have on online VAW.

First, education inequalities exist in Malawi as a result of a three-way interaction between economic, gender, and spatial inequalities.²⁴⁵ In terms of economic inequalities, people in high income households are more likely to be educated than those in lower income households.²⁴⁶ Therefore, people from high income households tend to be more digitally literate and can easily access internet services and practice online safety than those from lower income households..²⁴⁷

²³⁹ Malawi Profile 'International Telecommunication Union' 2020 https://www.itu.int/itu-d/apis/clients/res/pdf/country_profile/report_M... (accessed 10 September 2021).

²⁴⁰ AC Munthali et al 'Community voices: a contribution towards the situation analysis of women and children in Malawi' (2017) 5.

²⁴¹ n 38.

²⁴² As above.

²⁴³ n 234.

²⁴⁴ Oxfam international report 'A dangerous divide: The state of inequality in Malawi' (2015) 9-13 https://www-cdn.oxfam.org/s3fs-public/file_attachments/rr-inequality-in-malawi-261115-en.pdf (accessed 9 September 2021).

²⁴⁵ Oxfam international report (n 244) 11.

²⁴⁶ National Statistical Office (NSO) 'Survey on access and usage of ICT services in Malawi' (2019) 18.

²⁴⁷ NSO (n 246) 19.

In addition, the low illiteracy levels in the poor households also result into a lack of legal literacy on their rights and protections in terms of online use.²⁴⁸

Second, in terms of inequalities in income distribution and generation, the Government of Malawi was committed to attaining a fair and equitable distribution of income in 2020.²⁴⁹ This goal was not achieved according to Gini coefficient value, a measure used in analysing income.²⁵⁰ As at 2016, the Gini coefficient value was at 44.7,²⁵¹ which is higher than the value of 39 in 2004.²⁵² The lower levels of income also affect individuals' rights to enjoy the use of the internet and protect themselves from abuse. It has also been reported that people who have low income experience many barriers with regards to access to legal representation; access to courts, due to long distances between courts and home; limited legal aid representation for free legal advice; and a language barrier in courts who usually use English as the official language.²⁵³ This means where the poor are able to access the internet, they may face online violation but may not be able to access the courts therefore, suffer silently.

Third, according to radical feminists, gender inequality promotes online VAW because it permits the structural inequalities created by society, such as patriarchy, to prevail over equality principles against VAW. Gender equality is a fundamental human right and is essential for the foundation of a 'peaceful, prosperous and sustainable world.'²⁵⁴ In Malawi, gender equality is a challenge - the World Economic Forum conducted a study in 144 countries and Malawi rated poorly on gender equality.²⁵⁵ Gender inequality is also reflected in the levels of digital access and use. It is recorded that men's digital literacy and access to ICT material and phones is at 52% as compared to that of women which is at 33%.²⁵⁶ This digital divide is more pronounced in rural areas where

²⁴⁸ S Gloppen & FE Kanyongolo 'Courts and the poor in Malawi: Economic marginalization, vulnerability, and the law' (2007) 5 *International Journal of Constitutional Law* at 279.

²⁴⁹ National Economic Council 'Vision 2020: The national long-term development perspective for Malawi' (CEPA 2000) 75.

²⁵⁰ The Gini coefficient value measures levels of inequalities with 0 signifying ideal equality and 100 representing high inequalities. See World Bank 'World Development Indicators 2013' (2013) 36.

²⁵¹ World Bank, 'GINI Index' 2017 <https://data.worldbank.org/indicator/SI.POV.GINI?locations=MW> (accessed September 2021).

²⁵² n 236.

²⁵³ n 248.

²⁵⁴ Sustainable Development Goals 'Goal 5' <https://www.un.org/sustainabledevelopment/gender-equality/> (accessed 9 September 2021).

²⁵⁵ World Economic Forum 'The global gender gap report' (2017) 222-223.

²⁵⁶ C Handforth & M Wilson 'Digital identity country report: Malawi' (2019) 14 <https://www.gsmamobilefordevelopment.com/wp-content/uploads/2019/02/Digital-Identity-Country-Report.pdf> (accessed 10 September 2021).

only 26% of women own mobile phones as opposed to 47% of men.²⁵⁷ However, even the few women who use the internet must be protected by the law.

4.3.3 Culture/values/traditions

Culture is described as ‘a totality of how people live and behave.’²⁵⁸ Agreeing with the human rights theory, culture has overwhelming implications on human rights and what it entails.²⁵⁹ It has implications on how women are perceived and treated offline and online as cultural values affect the users’ attitudes when using the media.²⁶⁰ However, the internet era has introduced some practices that may be strange and new to the way things are normally done in the society.²⁶¹ For example, the digital era disregards the need for group communication or gathering and allows for a more autonomous form of communication which can reach thousands.²⁶² This may challenge an already existing form of communication offline and may result in facing resistance from those who benefit from the offline cultural structures.²⁶³ In Malawi, women are usually treated as subordinate to men. In line with cyber feminism, the online space provides a platform for women to be autonomous, fight for their rights and bring out cases of violations where they are being silenced.²⁶⁴ This can be evidenced by the online movements that have emerged to fight against VAW in Malawi such as #TakeItToTheStreets and #MeToo which is regional.²⁶⁵ The internet can promote VAW while also providing a platform to achieve gender equality and opportunity to overcome entrenched socio- cultural perceptions of women that are in fact aspects of VAW.²⁶⁶

Creating a balance of what is considered to be right online with a different offline reality can be problematic. The challenge is Malawi has many cultures with beliefs that usually do not represent the plight of a women in society. The universalist approach to human rights would require

²⁵⁷ As above.

²⁵⁸ UA Agha ‘Introduction to sociology’ (2014) 38 www.cssforum.com (accessed 15 October 2021).

²⁵⁹ OD Udoh et al ‘The influence of religion and culture on women’s rights to property in Nigeria’ (2020)7 *Cogent Arts & Humanities Journal* at 3.

²⁶⁰ Y Kim et al ‘Cultural difference in motivations for using social network sites: A comparative study of American and Korean college students’ (2011) 27 *Computers in Human Behavior* at 368.

²⁶¹ G Chen ‘The impact of new media on intercultural communication in global context’ (2012)8 1 *China Media Research* <http://www.wwdw.chinamediaresearch.net/index.php/back-issues?id=54> (accessed 15 October 2021).

²⁶² SR Olson & T Pollard ‘The muse pixelipe: Digitalization and media literacy education’ (2014) 48 *American Behavioral* at 250.

²⁶³ Olson & Pollard (n 262) 7.

²⁶⁴ O Eluwole ‘The impact of internet on African education and culture’ (2014)4 at 71 http://www.ijbhtnet.com/journals/Vol_4_No_3_May_2014/10.pdf (accessed 10 September 2021).

²⁶⁵ Human rights watch podcast ‘Offline and online’ 8 March 2021 <https://www.hrw.org/video-photos/audio/2021/03/08/podcast-offline-and-online> (accessed 11 October 2021).

²⁶⁶ As above.

recognising that all human beings are equal and deserve to enjoy human rights equally regardless of the difference in cultures. There is lack of awareness of cyber laws in Malawi therefore, such abuses continue occurring. Even when they occur, the police are not properly trained on cybercrimes thus they result in disregarding the cases based on cultural inclinations. In addition, the society is highly patriarchal and may regard cyber laws that protect women from violence as insignificant and against some patriarchal structures that maintain practices which entrench online VAW.

4.3.4 Disability

People with disabilities are extremely marginalised in Malawi. In 2018, it was reported that 10.4% of the general population comprises of people with disabilities of which 9.7% are male and 11.0% are females.²⁶⁷ Other records show that there is a low school enrolment rate of persons with disabilities, as 35% of them have never enrolled in school.²⁶⁸ As a result, they are usually discriminated against in terms of employment and income generation.²⁶⁹ They have lower levels of digital literacy.²⁷⁰ Persons with albinism in Malawi make up 0.8% of the population.²⁷¹ Even with such records, they ought to be protected specifically due to the online and offline violation that they have faced in recent years.²⁷² In general, the law ought to provide special protections for people with disabilities because they experience cyber bullying and body shaming due to their appearance or impairment. For example, people make cruel comments about their appearance and even call them names.

Persons with disabilities are disadvantaged when dealing with issues of violence. This uniqueness warrants special protections in the laws or policies against online VAW. Currently, the laws and policies in Malawi do not provide for any unique protection for persons with disabilities when using online platforms. The government needs to come up with strategies that are inclusive to guarantee the protection of the rights of persons with disabilities online, especially women. This

²⁶⁷ National Statistical Office 'Malawi Population and Housing Census Report' (2018) 28.

²⁶⁸ A Munthali 'A Situation analysis of persons with disabilities in Malawi' August 2011 at 16 <https://african.org/wp-content/uploads/2015/10/Situation-analysis-of-PWDs-in-Malawi-Final-Report.pdf> (accessed 12 September 2021).

²⁶⁹ Munthali (n 268) 19-20.

²⁷⁰ CIPESA 'Placing ICT access for persons with disabilities at the centre of internet rights debate in Kenya' 11 September 2019 [Placing ICT Access for Persons with Disabilities at the Centre of Internet Rights Debate in Kenya \(cipesa.org\)](https://cipesa.org/placing-ict-access-for-persons-with-disabilities-at-the-centre-of-internet-rights-debate-in-kenya) (accessed 10 September 2021).

²⁷¹ Munthali (n 268) 19.

²⁷² People with albinism in Malawi 'Item 3 Amnesty International's written statement to the 34th session of the UN Human Rights Council (2017)' <https://reliefweb.int/sites/reliefweb.int/files/resources/AFR3656762017ENGLISH.pdf> (accessed 10 September 2021).

agrees with intersectional feminism which states that different groups of women experience discrimination based on their uniqueness and there should be unique solutions to those problems.

4.4 Assessment of the adequacy and efficacy of the Malawi online VAW legislation in tackling contemporary challenges and risks

Adequacy and efficacy of legislation can also be interpreted as the measure of the effectiveness of the law. Xanthaki has described effectiveness of legislation as the extent to which a particular law is seen to achieve its intended purpose and it is the primary indicator of the quality of the legislation.²⁷³ This is characterised by the purpose of the legislation, the goal of the legislation, the adequacy of the information used to measure progress, and the application of the law to practice in real life.²⁷⁴ The adequacy and efficacy of the extant legislation on online VAW will be assessed by looking at the challenges and risks that exist currently.

4.4.1. Safety of social media platforms

After a global study, it was found that the most common platforms where women have suffered violence are 'facebook at 39%, Instagram at 23%, WhatsApp at 14%, snapchat at 10%, twitter at 9% and tiktok at 6%.²⁷⁵ The experiences of discrimination and harassment of women when using online platforms are quite similar. Therefore, it is necessary that the law ensures the safety of all when using social media platforms.

There are no records on the levels of online VAW in Malawi but as indicated, it is a growing issue across world.²⁷⁶ In 2016, the UN declared that online freedom is a human right and every country has an obligation to promote and protect this right.²⁷⁷ Sections 84 to 89 of the ET Act provides for protections from different types of offences and penalties when a person is found guilty. These provisions ensure safety to social media users in terms of providing punishment to perpetrators of online violence. However, these provisions are not enforced. Where they are implemented, not much consideration is given to the effects of the crimes on the victims who

²⁷³ H Xanthaki 'Quality of legislation: An achievable universal concept or a utopia pursuit?' (2011) in L Mader & M Almeida (eds), *Quality of legislation principles and instruments* at 80-81.

²⁷⁴ M Mousmouti 'The "effectiveness test" as a tool for law reform' (2014)1 *LALS Student Law Review* at 25.

²⁷⁵ M Darvey 'Online violence against women 'flourishing' and most common on Facebook, survey finds' 5 October 2020 <https://www.theguardian.com/society/2020/oct/05/online-violence-against-women-flourishing-and-most-common-on-facebook-survey-finds> (accessed 13 September 2021).

²⁷⁶ Plan International 'Free to be online? Girls and young women's experiences of online harassment' (2020) 10.

²⁷⁷ Special rapporteur on the promotion and protection of the right to freedom of opinion and expression 2016.

are mostly left traumatised.²⁷⁸ The Act also seeks to investigate social media content and ensure that it is in line with the provisions of the Act and does not promote any form of abuse, discrimination or violence.

In addition, the ET Act provides for a takedown provision in section 33. It stipulates that it is the responsibility of intermediary service providers to take down unlawful content that violates the human rights of a subject.²⁷⁹ Further, MACRA assumed a role on raising awareness on cyber-crimes following the rise in cases of online VAW in Malawi.²⁸⁰ MACRA is responsible for ensuring that online usage is in line with the laws and regulations. It works with the responsible bodies to ensure safety online and has so far recommended a robust action against online VAW. However, so far, the protections set up to ensure the safety of women when accessing social media in Malawi have proven inadequate due to a lack of an effective system to address these issues.

4.4.2. Weak response mechanism

The online VAW response mechanism leaves many women without resolve against the human rights violation they have suffered. In most circumstances, women who are victims of online violence are villainised and called names such as ‘sluts’ rather than offered sympathy or justice.²⁸¹ When they report, the police dismiss them by either informing them to make an investigation on their own or claiming that they caused the violation on themselves either because of how they presented themselves online or what is morally right.²⁸² Women are left helpless but to handle the situation personally and most usually just become closed up and disassociate themselves from social media since they have no other way to avoid or alleviate the risks.

The current legal framework also provides for the possibility of MACRA ordering non-compliance remedies and damages where there is a presumed risk and a possibility to access the courts for further action.²⁸³ However, this solution is mostly accessible to the rich. The poor and vulnerable mostly suffer consequences and may not access the courts due to lack of finances for

²⁷⁸ n 31.

²⁷⁹ Stevenson-McCabe & Chisala-Tempelhoff (n 24) 7.

²⁸⁰ M Mana ‘MACRA to fight cybercrimes, fake news: to raise awareness’ 8 March 2020 [Macra to fight cyber crimes, fake news: To raise awareness | Malawi Nyasa Times - News from Malawi about Malawi](#) (accessed 13 September 2021).

²⁸¹ Chisala-Tempelhoff & Kirya (n 7) 3.

²⁸² As above.

²⁸³ Secs 173 & 174 Communications Act.

court costs, lack of human rights awareness, distance from court to home and the formal or administrative barriers associated with public interest litigation.²⁸⁴

4.4.3. Uncoordinated procedures

There is a clear lack of properly coordinated procedures to handle online VAW cases. There is a seeming multi-stakeholder approach in which these different stakeholders are involved without clear guidelines in terms of the reporting and proceedings to ensure the case is heard and the victim is followed up and assisted psychologically.²⁸⁵ The current legal framework makes MACRA the sole authority of regulating online or cyber violence and ensuring the implementation of the ET Act provisions. However, MACRA has been found to be non-responsive or slow to react to issues regarding online violations.²⁸⁶ MACRA has the MCERT which is responsible for monitoring cybercrimes but has not been operating since its establishment.²⁸⁷ In addition, MACRA has the function to regulate the communication sector which is another tasking role, it works under the leadership of the responsible minister and the president appoints its members.²⁸⁸ This means the independence of MACRA remains questionable.²⁸⁹

4.4.4. Lack of constitutional backing

The Constitution does not make provision for online VAW. It simply provides for the right to privacy which is sometimes connected to offences related to the use of the internet. However, this provision is narrow in scope according to the Malawian courts as it makes reference to the disclosure of private information only. The information that results to the violation of women online is not only private information, it can also include public information, which is used to stalk, harass and generally attack the integrity of women online. Some have suggested that the limitation placed upon the right to privacy in the Constitution exposes women to violations online.²⁹⁰

²⁸⁴ Bichler (n 38) 46.

²⁸⁵ Spotlight Initiative 'Ending violence against women and girls in Malawi: What do we know?' 2020 https://www.unicef.org/malawi/sites/unicef.org.malawi/files/202007/Spotlight_Ending_Violence_Against_Women_andGirls_v2_15062020_WEB_0.pdf (accessed 13 September 2021) 14.

²⁸⁶ n 31.

²⁸⁷ As above.

²⁸⁸ Sec 5(3) Communications Act.

²⁸⁹ Media handbook for Southern Africa: Malawi (2021)1 370 <https://www.kas.de/documents/285576/11521648/MLHSA+2021+-+8+Malawi+MLHSA.pdf/cc4fe4a6-fd23-919a-dd64-2127b405cb0b?t=1612258528290> (accessed 11 October 2021).

²⁹⁰ Chisala-Tempelhoff & Kirya (n 7) 4.

4.4.5. The reflection of subjective morality in the law

Subjective morality has been evidenced in many areas of the law where it has tried to dictate what is right or wrong in a society based on culture and other patriarchal ideologies. Universalist theories warn against subjective morality and its likelihood to ignore the rights of a specific group in society.²⁹¹ An example is the PC provision which can be interpreted as one that tries to control how a woman is supposed to present herself in a society in terms of controlling their bodies.²⁹² These offline ideologies are reflected online in a much more redefined and sometimes amplified form.²⁹³ This is because, online, people can be very brutal to ensure that the words cause the intended damage and get away with it.²⁹⁴ They also appear online anonymously at times and thus they may be difficult to trace, given the technology in Malawi.²⁹⁵

4.4.6. Increase rate of internet use

The increase rate of internet use has promoted increased sharing of personal information online which fuels online VAW.²⁹⁶ This has resulted in intimidation, stalking, infringement of privacy and harassment of women online.²⁹⁷ In Malawi, women go through such violence, including, being stripped naked and their half-naked pictures being uploaded online without their consent.²⁹⁸ This breaches their right to dignity and privacy. Furthermore, the women exposed to such kinds of treatment are usually not privileged enough to access legal recourse and they may not even know how to use technology to protect themselves.²⁹⁹ The ‘Call out’ culture has encouraged the spirit of women standing up for each other online and speaking against any kind of violence.³⁰⁰ This can minimise the prevalence of cyber bullying and hate speech targeting women online.

4.4.7. Lack of technology to regulate online VAW

Malawi lags behind on technological advancement.³⁰¹ From the operations of MACRA, it can be assumed that is not adequately equipped in terms of machinery to use to ensure the enforcement

²⁹¹ n 120.

²⁹² Secs 137 & 179 Penal Code.

²⁹³ n 8.

²⁹⁴ As above.

²⁹⁵ As above.

²⁹⁶ Z Hamin & W Rosalili ‘Cloaked by cyber space: a legal response to the risks of cyber stalking in Malaysia’ (2018) 12 *International Journal of Cyber Criminology* at 318.

²⁹⁷ S Sissing and J Prinsloo ‘Contextualising the phenomenon of cyber stalking and protection from harassment in South Africa’ (2013) 2 *Acta Criminologica: Southern Africa Journal of Criminology* at 17.

²⁹⁸ n 157.

²⁹⁹ DF Malanga ‘Survey of cyber violence against women in Malawi’ (2021) 1 *Computers and Society* at 631.

³⁰⁰ n 104.

³⁰¹ C Messenger & A Varghese ‘DFID and DAI host Malawi’s first digital development forum’ 10 October 2018 <https://dai-global-digital.com/dfid-and-dai-host-malawis-first-digital-development-forum.html> (accessed 15 October 2021).

of the law. This lack of machinery negatively implicates on the fight against online VAW. It results in many perpetrators getting away with the offences and the continued suffering of the victims who have no resolve to their abuse. There is need to use a human rights-based approach to end gender-based violence without which, sexual and gender based discrimination will persist due to a non-operational system.

4.4.8. Attacks based on intersectionality

There are intersectional attacks that happen online based on either indigene, minority or chosen affiliation.³⁰² Women in these groups carry an additional burden and face different forms of online violation.³⁰³ For example, sexual minorities such as transgender women experience much cyber bullying due to identity issues online.³⁰⁴ This is as a result of societal expectation of what a man or woman should look like which is contrary to the way they may present themselves. In addition, women face online violation based on the political party of their choice. Some prominent figures have been cyber harassed online because on their choice to belong to a specific party and political affiliation.³⁰⁵ Others also face an added disadvantage because of race. Black women are amongst the population that often face online violence than women of other races in other social media platforms.³⁰⁶ A majority of women in Malawi are black, therefore prone to experiencing online violence.

4.4.9. Objective of the ET Act

The ET Act has been mostly highlighted as a tool to further international or external cooperation between Malawi and other countries as it provided for such safeguards.³⁰⁷ It is more commercially oriented and targets group or commercial rights more than individual rights.³⁰⁸ This affects the level of dedication placed upon personal cases than that placed on corporations. Therefore, the lack of a focused concentration on online VAW incidences in the ET Act means women are not adequately protected on online platforms in Malawi.

³⁰² M Vlahakis 'Breaking the silence: Ending online violence and abuse against women's rights activists' 10 October 2018 10 <https://www.womankind.org.uk/wp-content/uploads/2020/08/breaking-the-silence-policy-briefing.pdf> (accessed 11 October 2021).

³⁰³ As above.

³⁰⁴ As above.

³⁰⁵ Nyasa Times 'Kabwila rejects 'judas Scalliot' tag: lashes out at fellow MCP MPs' 2 September 2017 <https://www.nyasatimes.com/kabwila-rejects-judas-scalliot-tag-lashes-fellow-mcp-mps> (accessed 11 October 2021).

³⁰⁶ A Byrd 'New study confirms that black women are most abused group on Twitter' 19 December 2018 <https://www.colorlines.com/articles/new-study-confirms-black-women-are-most-abused-group-twitter> (accessed 15 October 2021).

³⁰⁷ Sec 104 ET Act.

³⁰⁸ AB Makulilo 'Myth and reality of harmonization of data privacy policies in Africa' (2015) 31 *Computer Law & Security Review* at 79.

4.4.10. Extent of application of the law in other statutes

The statutes in Chapter 3 of this study are limited in terms of extent of application. They do not specifically mention online VAW as a specific form of violation, prone to its own causes and implications. Online VAW can be categorised as the ‘forgotten VAW’ and yet it remains a growing pandemic in many societies. Therefore, there is a need to accept the uniqueness of online VAW so that it is dealt with using unique approaches but most importantly, it needs to be emphasised as a form of violation which highly, similarly and to a greater extent, affects human rights, depending on the circumstances of the case.

4.5 Conclusion

This chapter discussed the challenges in protecting women from online violence in Malawi and examined the adequacy and efficacy of the legal framework. It first discussed the motivations and attitudes affecting online VAW in Malawi. Second it exposed the general practice of law enforcers when responding to online VAW cases. Third, it assessed the laws based on some risks and challenges associated with online VAW. From the assessment, it has been found that the risks and challenges associated with online VAW are more pronounced in Malawi because of its social-economic, legal and cultural standing. In addition, there is lack of an effective supervisory and implementing body, especially for the poor. Therefore, this chapter concludes that the legal framework lacks the preventive, protective and prosecution mechanisms to ensure that the protection of women from online violence in Malawi is effective. There is need for the reform and development laws and bodies that will work and target online offences in a robust manner, with the necessary resources and machinery.

Chapter 5: Lessons learnt from other jurisdictions in the protection of women from online violence

5.1. Introduction

It is important to learn from other jurisdictions when reforming and developing laws in order to come up with lessons, apply that which can work in your jurisdiction and avoid copy and paste.³⁰⁹ This chapter will conduct a comparative analysis based on studies of Mauritius and Ghana. These two jurisdictions will be used as lessons to inform the current legal framework in Malawi and future reforms.

5.2. Why Mauritius and Ghana?

Among other reasons, Mauritius has the best cybersecurity record in Africa according to the Global Cybersecurity Index, 2021.³¹⁰ In addition, Mauritius and Malawi are state parties to the Southern Africa Development Community (SADC) and the AU which have similar instruments such as the Convention of the African Union on Cybersecurity and Personal Data (2014). Unlike Malawi, Mauritius ratified the Convention in 2018 but it is not yet in force.³¹¹

In 2020, Ghana was ranked the third in Africa on the comprehensiveness of its cybersecurity framework in the global index on cyber security.³¹² In addition, Ghana has one main legislation on cybersecurity and protections from online violence, namely, the Cybersecurity Act, 2020 (CA).³¹³ Having one piece of legislation that tackles cyber offences is an outstanding feature of the Ghanaian legislation that requires further study.

5.3. Findings from the jurisdictions

5.3.1. Scope of the legal framework of Mauritius

The Constitution of Mauritius provides for the protection of fundamental rights and freedoms of the individual in chapter 2.³¹⁴ It contains provisions that uphold the protection of human rights that are violated when an individual faces online violence. These provisions include

³⁰⁹ AB Makulilo, 'Data protection regimes in Africa: Too far from the European "adequacy" standard?' (2013) 3(1) *International data privacy law* 42 @ 50.

³¹⁰ MT Larnyoh 'Ranked: Top 10 African countries in Global Cybersecurity Index' I July 2021 <https://africa.businessinsider.com/local/markets/ranked-top-10-african-countries-in-global-cybersecurity-index/bfrmkgk> (accessed 12 October 2021).

³¹¹ African Union 'Status of ratification of the Convention' <https://au.int/en/treaties/african-union-convention-cyber-security-and-personal-data-protection> (accessed 12 October 2021).

³¹² n 310.

³¹³ Cybersecurity Act 1038 of 2020.

³¹⁴ The Constitution of the Republic of Mauritius 1968 (rev 2016).

protection for privacy of home or other property;³¹⁵ protection of freedom of expression;³¹⁶ and protection from discrimination.³¹⁷

In addition, Mauritius has the Computer Misuse and Cybercrime Act, 2003 (CMC Act) which was enacted to provide for ‘the repression of criminal activities perpetrated through computer systems.’³¹⁸ This clearly includes online violence experienced by women. Section 11 of the Act provides for the ability of an investigatory authority to apply to a court for a preservation order. This order enables the information that was disclosed or meant to be disclosed to be preserved to protect it from further loss or modification. It further describes information to include subscriber information.³¹⁹ Related to online safety, this provision protects the owner of the information from further online abuse and allows for justice to be served. In terms of investigatory powers, the CMC Act allows the investigatory authority to ‘apply to a Judge in Chambers for the issue of a warrant to enter any premises to access, search and seize such data, where the authority has reason to believe that the stored data will be relevant for the given investigation. Malawi can learn from this provision to have a working investigative authority that does due diligence to accord justice in circumstances of online violations.

Similar to Malawi, the CMC Act is supported by other laws that further provide for online safety, these include: Data Protection Act, 2017 (DPA); Electronic Transactions Act, 2000 (ETA) and the Information Communication Technology Act, 1994 (ITCA). First, the DPA has a number of provisions but its unique feature is the establishment of a public office called the Data Protection Office (DPO).³²⁰ This DPO is mandated to ensure that all data controllers keep peoples data safe and are held accountable where any data invasion occurs. The DPO is headed by a Commissioner who shall oversee many duties of the office. The data holders have the right to institute legal proceedings where they feel that their data has been shared without their consent and has led to a violation of a right and inaction of the DPO.³²¹

The DPO is a very important establishment for Malawi to learn from. Currently, the MACRA is swamped with work because it has multiple mandates. Taking the approach in Mauritius may

³¹⁵ Sec 9 Mauritian Constitution.

³¹⁶ Sec 12 Mauritian Constitution.

³¹⁷ Sec 16 Mauritian Constitution.

³¹⁸ Preamble CMC Act.

³¹⁹ Sec 11(2) CMC Act.

³²⁰ Sec 4 DPA.

³²¹ Sec 51 DPA.

improve effectiveness of the offices that have roles in ensuring data safety, in the end achieve online security. It will lessen pressure on MACRA and provide it another body to collaborate with whilst handling cybercrimes.

Second, the ETA was enacted to ensure that all electronic communications, records and transactions are protected by a legal framework.³²² In relation to online violence, the ETA specifically provides for laws that enable the determination of the time and place an electronic communication was made.³²³ This enables easy tracing of the start, continuation or end of online activities that violated a person's right. It is a safety technique established under law for crimes such as cyber stalking. The legal framework in Malawi is not this specific when dealing with electronic transactions.

The ICTA was enacted to 'regulate and democratise ICT' and related matters'.³²⁴ The ICTA establishes the Information and Communication Technology Appeal tribunal which hears and disposes of appeal applications against the decision of the Authority. This is an essential element in boosting access to justice. In Malawi, all cases are handled by the courts which handle many other cases. This results in a delay of justice which may result in denial of the same. Malawi should learn from Mauritius by establishing a tribunal which will focus on dispensing justice in cyber related cases alone.

However, the ICTA has recently been criticized for curtailing freedom of expression and democracy through its amendments aimed at regulating social media traffic.³²⁵ Malawi should have better safeguards to ensure that the law is not used to infringe the enjoyment of human rights.

5.3.2. Scope of the legal framework of Ghana

The Constitution of Ghana provides for fundamental human rights and freedoms in Chapter 5.³²⁶ These include, respect for human dignity;³²⁷ equality and freedom from discrimination;³²⁸

³²² Preamble ETA.

³²³ Sec 14 ETA.

³²⁴ Preamble ICTA.

³²⁵ CIPESA 'Mauritius: Proposed social media regulation will curtail citizens' fundamental rights' 17 May 2021

<https://ifex.org/mauritius-proposed-social-media-regulation-will-curtail-citizens-fundamental-rights/> (accessed 26 October 2021).

³²⁶ Constitution of Ghana 1992 (as amended).

³²⁷ Sec 15 Ghanaian Constitution.

³²⁸ Sec 17 Ghanaian Constitution.

protection of privacy;³²⁹ and women's rights.³³⁰ The CA was passed by parliament on 6th November 2020 and assented by the President on 29th December 2020. It seeks to protect individuals, private entities and the public when using the cyber space or online platforms and develop a cyber-security ecosystem for Ghana.³³¹

The CA is unique in many ways. First, it has a governance authority as a body corporate called the Cyber Security Authority established under section 2 of the Act. Among others, the purpose of this authority is to monitor all cyber security issues in collaboration with the private, public and the international sectors to ensure cyber safety; create awareness and 'prevent, manage and respond to cybersecurity threats.'³³² The authority is governed by a board comprising 11 members from different ministries, agencies and departments. The head of the authority is the director general who is appointed by the president. This is a very important establishment because it will ensure that the required attention is given to the cyber security issues concerning different sectors without divided attention. The set up in Malawi could be failing because of a lack of coordination between MACRA and the other sectors affected because MACRA has many mandates under it and inadequate resource to enable implementation of all its mandates.

Second, the authority has the mandate to ensure that all critical information infrastructure (CII) are registered to ensure safety of information which could be used to instigate online VAW.³³³ The authority is required to register, upon the Ministers confirmation, and frequently monitor or audit CIIs to ensure they are working within the rules to ensure the economic and social wellbeing of citizens is protected.³³⁴ Further, punishments for CII owners and those who attempt to acquire information illegally is set up in the Act as a deterrent.³³⁵

Third, the Establishment of the MCERTs at national and sectoral level has improved the capacity and the response strategy to cybercrimes.³³⁶ The Act provides that institutions are mandated to report any incident to the national and sectoral bodies within 24 hours after detecting the incident. The MCERT is responsible for collecting and collating information

³²⁹ Sec 18 Ghanaian Constitution.

³³⁰ Sec 27 Ghanaian Constitution.

³³¹ Ministry of communication and digitalisation 'Cybersecurity Act passed to promote & regulate cybersecurity activities' 2020 <https://moc.gov.gh/cybersecurity-act-passed-promote-regulate-cybersecurity-activities> (accessed 27 September 2021).

³³² Sec 2 CA.

³³³ Sec 35 CA.

³³⁴ Secs 35(1)(b) & 35(3) CA.

³³⁵ Secs 39 & 40 CA.

³³⁶ Sec 41 CA.

concerning cyber-issues and taking follow up actions after a threat or violation is believed to have occurred. It does this because it is equipped with the resources both human and machinery to carry out such research.³³⁷ This is a good learning point because it will enable women who have faced online violence to get justice instead of the current practice in Malawi where women are left helpless to investigate cases.

Fourth and more elaborate is the role of the authority on cyber security standards, enforcement and education. Section 60 of the CA provides that ‘the Authority shall carry out programmes to promote public awareness and education on matters relating to cybersecurity.’ It further provides that the Authority shall develop necessary collaborations with different sectors to ensure the dissemination of information on safety of the cyberspace, including in educational institutions.³³⁸ For example, in 2019, the Minister for Communications in Ghana launched a National cybersecurity awareness month aimed at educating the public on cyber security and safety in order to curb the rising cyber threats.³³⁹ In Malawi, MACRA is mandated to conduct awareness activities on online safety but little or nothing has been done around this mandate. Malawi can learn from the provisions in the CA to highlight the roles in the ETA to ensure the obligation is clearly stipulated.

Fifth, the CA has a general provision on the protection of children online from sections 62 to 66. These include provisions detailing the wrongs and the penalties for such which include: exposure of indecent image, sexual abuse, cyberstalking, and sexual extortion of children. As highlighted above, online violence often targets women and girls. Therefore, this provision is very critical because it emphasizes that not only can violence online happen to frequent users of the internet, even innocent children can be abused online. The CA also protects people from IPV, which is a common form of violence that women face online. It provides against the non-consensual sharing of intimate images and the threat to distribute prohibited images or intimate recordings.³⁴⁰ The general and specific approach that the CA took is a point from which Malawi can learn from. This will enable law enforcers and the general public to understand the seriousness of the offence and handle such matters with due diligence.

³³⁷ Sec 43(1) CA.

³³⁸ Sec 61 CA.

³³⁹ Ministry of communication and digitalisation ‘Ministry of communications launches national cyber security awareness month’ 2019 <https://moc.gov.gh/ministry-communications-launches-national-cyber-security-awareness-month> (accessed 14 October 2021).

³⁴⁰ Secs 67 & 68 CA.

The sixth point to learn from is on the scope of the investigatory powers accorded to the investigatory officers. The CA provides that an *ex-parte* application may be made, in camera, to the high court by an investigative officer for a production order in order to access and collect subscriber information or for an interceptor warrant to collect or record content data.³⁴¹ A service provider may be requested by the Authority to install an interception operating system in order to access information, after it has been issued by a court.³⁴² This is an investigatory power that the law in Malawi does not provide. However, it is a very necessary power to be placed in the control of all officers handling cyber issues to ensure a progressive investigation. Currently, investigations go stale because even MACRA, MCERT and the police seem powerless.

Seventh, the CA creates a fund for the Authority to implement its activities in collaboration with the security and law enforcement agencies.³⁴³ This fund is meant to finance all cyber security activities such as research and development, support domestic regional and international initiatives and other arising needs.³⁴⁴ This is very important because cybersecurity requires systems that are updated and robust investigative and research machinery, which can be expensive. The fund will lessen the government burden and ensure a successful implementation of the law.

5.4. Conclusion

This part examined the legal framework around online VAW in Mauritius and Ghana. It can be noted that the legal framework of Mauritius is fragmented in several pieces of legislation but it is very result oriented as it targets the cause and how to address it. Each Act has specific objectives and measures to achieve the intended goal. Unlike Malawi, the fragmentation in the laws in Mauritius is purposeful and ensures that all cyber security threats are provided for. However, such fragmented laws may make applicability and access difficult. Mauritius should consider consolidating its cyber laws.

The Ghana CA is quite comprehensive and is drafted considering the gaps that arise when handling cyber issues including online VAW. It speaks to a number of areas which the Malawi legal framework can improve on. The fact that it is one legal document makes ease of reference.

³⁴¹ Sec 69 CA.

³⁴² Sec 76 CA.

³⁴³ Sec 29 CA.

³⁴⁴ Sec 30(3) CA.

Chapter 6: Conclusions and recommendations

6.1. Summary of conclusions

This research assessed the adequacy and efficacy of Malawi's legal framework on the protection of women from online violence with regard to some legal issues, societal motivations and attitudes in Malawi. Chapter one contained the research background, the gap in literature and the study objectives. Chapter two contained a discussion of the theories that underpin this research process. The third chapter analysed the legal framework on online VAW and the protections that are offered in the law. It found that the law is insufficient in most ways although there are provisions that offer some protections. Chapter four further analysed the law and its application based on social, economic and legal issues pre-existing in Malawi. This highlighted the legal issues that are based on those pre-existing factors and whether the current legal framework is adequate and effective and to what extent. This assisted to identify the gaps and necessitated a further study in terms of comparison. Chapter five contained a comparative study which considered the legal frameworks of Mauritius and Ghana in order to gather lessons and improve the current status of the law based on the approaches in those jurisdictions. This sixth chapter concludes the research by making recommendations on how the current legal framework can be improved to come up with a robust legal framework that tackles the pre-existing issues and future online offences in Malawi.

6.2. Recommendations

6.2.1. Upholding the application of UN Human rights principles

The UN Human rights system is known for being ahead in terms of the protection of human rights. Regarding online VAW, the UN human rights council introduced a resolution which recognises the issue of VAW and discrimination in the digital space.³⁴⁵ This resolution is important because it recognises that the online attacks towards women violate several rights including freedom of expression and the right to privacy. It provides several steps to advance the rights of women and protection of women online, including: encouraging states to take positive steps to ensure a safe space for women online and offline through education activities; taking appropriate measures to ensure that the gender divide is bridged to encourage women to patronise online usage to their benefit; encouraging business enterprises to be a step ahead in terms of upholding online safety rules by applying the UN Guiding Principles on business and

³⁴⁵ United Nations Human Rights Council Resolution 32/19 'Accelerating efforts to eliminate violence against women: preventing and responding to violence against women and girls, including indigenous women and girls' 2016.

human rights; ensuring a robust justice system response by taking to task all those involved in online VAW; and collecting disintegrated data on digital violence. Malawi, being a state party to the UN should uphold these principles by coming up with legislation, policies and systems that work to ensure the protection of women online so that it fulfils its obligations. These efforts shall include action from the Government, NGOs and all bodies involved in upholding human rights.

6.2.2. Ratify and domesticate human rights treaties

Malawi should work towards ratifying the AUCCSPDP. After the ratification, Malawi should domesticate it to make sure it is considered law. In addition, the ICCPR and the ACRWC should be domesticated to ensure sufficient protection of its citizens at all levels. Government bodies that are involved in the support of the poor and vulnerable should be encouraged and empowered to take up cases at regional and international human rights bodies to ensure justice is served at all costs. However, this should only apply where the international law is consistent with the Constitution of Malawi.

6.2.3. Development of a comprehensive online VAW related law

There is need for a law that is directly linked to the protection of people's rights online. The law should be procedurally developed which means conducting comprehensive prior research, including comparative jurisdiction studies, and consultations to come up with recommendations that mirror the needs of the people and a law that is realistic and implementable. Further, the law should be specific on online protections including highlighting the objectives in the content of the long title or preamble. It should be drafted in simple English and translated into local languages so that it is easy to read and can be easily taught. After developing the law, people should be made aware of the existence of the law, its requirements and penalties once in breach. As noted, there are high illiteracy levels in Malawi which requires a robust approach in civic awareness activities. Institutions like the Malawi Law Commission should be used to create awareness on online safety laws.

Among other provisions, the law must specifically recognise online violence, especially online VAW as a type of violence. It should highlight the offences and specify the acts and omissions that determine each offence and punishment. Given the rise in dependence on internet and use, the law must put in protective mechanisms of tracing locations when investigating and clear investigative procedures, where applicable. It should also specifically state the roles of any

individual involved in handling online VAW cases to ensure that there is no clash or duplicity of roles and to maintain proper collaboration between the institutions involved in case management.

6.2.4. Entrenchment and recognition of online VAW as a form of violence

As noted in the previous discussions, online VAW is a new form of violence and is still emerging. Nevertheless, women continue to suffer violence online even though it is a highly disregarded area of the law. A solution would be to include or introduce online VAW as a form of violence in the laws of Malawi. This recognition can start from the Constitution, for this issue to acquire superior status over other laws. However, due to the technicalities involved in amending the Constitution, currently, it can be included in the subsidiary legislation that provides for women rights or rights issues in general. Such as the GEA or, more specifically, the ET Act which is the main Act. This will emphasize the importance of protection of women from this form of violence and the willingness of the country to act on ensuring that the internet is a safe space for all regardless of their gender.

6.2.5. Develop practical and enforceable response plan

Malawi lags behind in terms of the response mechanisms attached to handling online VAW cases. It needs to be more practical and hands on when handling such matters. First, the police should not leave the investigative duties to the claimant, they must refer the matter to MACRA for further handling by the responsible unit. Where such action is not possible, as observed from current practice, Malawi should learn from Ghana and the Mauritius to set up a special institution for cyber or online security purposes which will be responsible to handle all cyber related cases. If resource constraints are raised as drawbacks, Malawi should come up with ways of mitigating such gaps such as establishing a fund to ensure that the institution is always well equipped. In addition, the response sectors should be established at all levels to ensure accessibility to all. For example, in Ghana, they set up the regional and national level cyber emergency response teams to assist the institutional sector which is a systematic way of handling such cases. This will enhance collaboration between all responsible bodies and machinery so as to achieve a safe internet environment and justice where a violation has been suffered.

Others have suggested that law is an instrument of social engineering which may fail to succeed in a society with highly opposing ideologies.³⁴⁶ Therefore, the law must move from just providing stipulations and prohibitions to adopting a culture of mainstreaming measures that can eliminate VAW in all sectors.³⁴⁷

6.2.6. Develop medium and long term strategies and policies by policy makers

It is important that Malawi should come up with medium and long term strategies and policies to find ways in which it can deal with immediate and future challenges that come with the digital era. Strategies and policies by the responsible ministries, departments and agencies should be developed to set targets and goals that need to be achieved at a particular set period of time. This will propel the law in ways that will strengthen the protective role of the law.

6.2.7. Supplementary recommendations

In addition to the above recommendations, first, there is a need for a more concerted and collaborated effort from responsible bodies working on human rights and law enforcement such as the CSOs, human rights activists, Malawi Human Rights Commission, Malawi Law Commission and international organisations. These organisations should work together to emphasise on online safety, especially how to protect women from online violence and create awareness on the common issues.

Second, further research should be conducted on online VAW or online violence. This is due to the lack of literature in this area in Malawi and Africa in general. The studies should highlight the issues from different perspectives such as, culture and online development, gendered approach, constitutional or legal changes to enhance online protection, the balancing act between rights and responsibilities online and international obligations on cyber issues.

Third, school curriculums should include online safety measures and other topics related to the protection of online users in order to enlighten children to be tech aware. The children should learn about the rights and responsibilities of internet users and its implications.

³⁴⁶ O Adekile 'Violence against women: what next for law in Nigeria?' 22 November 2018 <http://www.genderviolence.co.uk/index.php/presentations/20-theme13/13-oluwakemi-adekile-violence-against-women-what-next-for-law-in-nigeria> (accessed 15 October 2021).

³⁴⁷ As above.

Once the above recommendations and suggestions are implemented, Malawi could be heading towards a safe online presence for all genders regardless of the social, economic and cultural issues that exist and hamper progress.

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