

Challenges of Enforcing Anti-cyber Bullying Laws on Teen Sexting in South Africa

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Abstract

The protection of children from harmful online content is upheld in international and domestic legal instruments. In South Africa, children enjoy the right to privacy, freedom of expression and protection from exposure to abusive and exploitative materials when they go online. However, in recent years, many South African children have been involved in creating and distributing harmful and illegal messages through the Internet. This prompts the question of whether the South African legal framework is adequate to protect children and shield them from cyberbullying or sexting. This study re-examines the ability of South African anti-cyberbullying laws to protect children online. Cyberbullying takes many forms, and therefore, this study is confined to sexting—the participation in communicating nude pictures through mobile phones. This study is based on the purposive sampling of several well-known cases of sexting that occurred within the South African schooling environment. The findings of the study confirm the view that South African anti-cyberbullying laws are less effective in curbing children’s participation in sexting. In addition, children’s creativity with new age-technologies has tended to complicate and undermine efforts to protect the same children from the harms of sexting. The study concludes that many South African parents appear ill-equipped to teach their children to handle safe sexting and to protect these children from becoming victims of the frequently disastrous consequences of sexting, which may even include suicide.

Keywords: South African legal framework; protection; children; cyberbullying; sexting; disastrous consequences

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Introduction

The Internet originated in the Global North in the late 1990s, and the Internet's transnational identities made it possible for children or learners in secondary schools (who had access to mobile phones) to create, possess and distribute harmful and illegal sexual content. Some scholars have lauded the Internet for its ability to democratise access to data through “intermediaries to provide institutions and individuals working in low-income neighbourhoods with access to neighbourhood-data level resources to effect positive social change” (Treuhart 2006, 5). Other scholars, such as Laidlow (1994), have suggested that the Internet has the power to democratise society. This means the Internet can enable its users to “challenge the frontiers of nation-state” (Kloet 2002, 1). The Internet can also empower citizens to construct multiple narratives that can lead to the “democratisation of politics” (*The Internet and the Democratization of Politics*, Princeton University Press 2004–2008). Users of social media platforms, such as the Internet and mobile phones, can re-imagine and constitute themselves as citizens and not mere subjects. A comparative study on the use of the Internet for democracy conducted in South Africa, Kenya and Zambia concluded that the Internet could “stimulate democratic culture through public discourse and citizen participation” (Janse van Rensburg 2012, 93). Thus, exposure of the population to the Internet can facilitate deliberations and foster social participation in meaning-making processes, although the degree to which the Internet is able to do this depends on numerous variables. These variables can be the differences in the legal frameworks or regulatory schemes of the country and company of origin and the new local cultural context of internet uses (Bulger et al. 2017).

However, other critics warn against the unintended negative impact of the Internet (Alim 2016; Turkle 1996) on children because this mode of communication can alter the type and content of information children share (Badenhorst 2011a). Additionally, some studies show that extending internet rights to people can be subversive of existing social orders because rights “have the capacity to shift the balance of power, and for children, the framing of their rights in constitutional terms has resoundingly dislodged paternalistic approaches in welfarism” (Sloth-Nielsen 2019, 1). A further difficulty in regulating the Internet for the benefit of children online is that the legislative, policy and governance frameworks that determine online access and use remain territorial. The effect of this monopoly of legislative and policy control by foreign nations or companies outside the new African context of the use of Internet technologies is that:

Within the broad domain of Internet governance, distinct cultural and regional differences impact the quality of individual and collective experiences, including those of children. With digital engagement now equally important for the realization of children's rights, the legislative and policy provisions that frame their access and participation require closer scrutiny from a rights-based perspective. (Bulger et al. 2017, 3)

This article analyses the challenges of the South African legal framework in attempting to protect children online from harmful and illegal content. The Constitution of the Republic of South Africa (1996) and its subsidiary instruments affirm children's right to privacy, freedom of expression and protection from exposure to abusive and exploitative materials when they go online. The country's legal instruments tend to criminalise the possession and distribution of harmful online materials. This focus of the law on the possession and distribution of materials considered by adults to be harmful to children ignores the important fact that children's creativity with mobile phones tends to exceed the ability of an offline legal framework to effectively prevent sexting amongst learners in the country's secondary schools. South African learners continue to create harmful content that they share amongst each other online. This has set official policy and children's practice on a collision course. This idea, put differently, suggests that beyond the legal gaps that make effective enforcement of cyber laws difficult to achieve, children's "... own transgressive behaviour can test the boundaries of this protection regime, creating new legal dilemmas for lawmakers" (Bulger et al. 2017, 1). Some studies and critics suggest that anti-sexting laws need to be augmented by a social approach that should foreground parents to play a positive role in directing children to practise "safe sexting" (Patchin and Hinduja 2020, 1). In this social paradigm, children should be taught how to offset the negative impact of the influence of the Internet. Parents ought to be trained through social welfare programmes on how to spot signs of anger, fear, and withdrawal in the behaviour of their children arising from being victimised through sexting. One method implied in the social intervention approach is to encourage children to talk about their online activities to their parents to foster the "principle that the protection of potential victims is the first priority" (Jolicoeur and Zedlewski 2010, 12).

Statement of the Problem

Despite the existence of international and domestic legal restrictions on cyberbullying in South Africa, South African learners are creating, possessing and distributing harmful content through sexting. The South African legal framework that is intended to deal with cyberbullying appears fragmented, seems to have been designed with adults in mind, and underestimates the capacity of learners to create harmful messages. Learners in South African secondary schools engage in sexting, and this undermines the legal instruments intended to protect the children. Instances of sexting that come into the public domain are the tip of an iceberg. The scourge of sexting has become entrenched in secondary schools, and its consequences on victims have been physically and spiritually fatal. Yet, the statutory instruments meant to prevent sexting continue to consider secondary school learners as innocent children. Parents of learners appear ill-equipped to teach their children how to conduct safe sexting and maturely handle the negative impact of sexting on both the individual and the collective. Often, legal remedies for teens who are chronic offenders of sexting tend to be undermined by some parents, politicians, and learners who defend each other and some media outlets that tend to not fully disclose the extent of sexting between male and female learners, male

and male learners and female and female learners (Badenhorst 2011a). Therefore, a holistic approach to ameliorate children’s sexting ought to re-consider expanding, nuancing the parameters of anti-cyberbullying laws, appreciating the extent to which children can manipulate the Internet, and providing parents with educational awareness to teach children how to conduct “safe sexting” (Patchin and Hinduja 2020, 141). They should be empowered to deal with the negative impact of sexting within the context of the recognition of the “protection and autonomy” of a “constitutional child” (Sloth-Nielsen 2019, 514).

Research Questions of the Study

- What is the extent of sexting among school learners in South Africa?
- Why is the South African anti-cyberbullying legal framework failing to effectively protect learners from the scourge of sexting?
- How have learners in the country experienced and responded to sexting?
- What needs to be done to effectively protect learners from sexting?

Methodology of the Study

This study is based on the purposive sampling of some well-known cases of cyberbullying that occurred within the South African schooling environment. These cases are found in the form of official government reports and newspapers, and some cases of sexting that have been broadcast on television as part of news bulletins. Purposive sampling deals with the interface between law and human conduct. Furthermore, qualitative analysis is used in this limited study because this approach enables one to compare the different school contexts and other non-school contexts where the problem of sexting was experienced. This study also relies on secondary sources to carry out a content analysis of the identified cases. According to Hsiu-Fang Hsieh and Sarah E. Shannon (2005), content analysis has three aspects, namely, the conventional content analysis, the directed, and the summative dimensions. With conventional content analysis:

... coding categories are derived directly from the text data. With a directed approach, analysis starts with a theory or relevant research findings as guidance for initial codes. A summative content analysis involves counting and comparisons, usually of keywords or content, followed by the interpretation of the underlying context. (Hsiu-Fang Hsieh and Shannon 2005, 1)

In this study, I shall analyse the content of the South African legal framework for protecting children online, as well as some of the actual stories based on children’s sexting. Some of these stories have been reported in newspapers. Previous scholarly work by Payne (2014, 54) on the nature and impact of cyberbullying among South African youth—and the legal responses to it—was conducted in the context of partial fulfilment of an academic qualification. The critic notes that questions of confidentiality, ethics and approval to discuss this with victims of cyberbullying tend to

impose on the researcher the limitation that names of respondents (and of schools) have to be handled with the strictest regard—even when consent has been given by respondents, their parents and school.

Payne (2014) suggests that there are inherent difficulties in securing ethical clearance for research focusing on sexting because of the sensitivity of the subject in South African secondary schools and society. Therefore, in this current study, I do not use interviews because the cases are already in the public domain. Purposive sampling is appropriate when one seeks to identify patterns in the forms of the content of children's sexting. By working with recorded cases in the public domain, the researcher can interpret not only the motivations of sexting, but also evaluate the consequences of sexting on victims as reported in the official reports and newspaper stories. The cases that are discussed in this study involve sexting among children and between children and adults. Tutsin's (2017) study reveals that despite legal restrictions placed on pornographic material among individuals younger than 18 years, it seems that secondary school learners easily gain access to this material. Tutsin's study also shows that while exposure to pornography occurs both on "... male and female learners in Gauteng" (Tutsin 2017, 5), some previous research on sexting in South Africa and internationally tends to emphasise the negative effects of sexting on girl children (Payne 2014). Harris and Steyn's (2018, 1) study found "gender differences in adolescent online victimisation and sexting expectancies" as critical in determining many victims of sexting from information collected from 83 learners with a mean age of 14.3 years attending two private schools in Gauteng.

Forms of Cyberbullying and Sexting in South Africa

Cyberbullying describes a range of "acts involving bullying and harassment through the use of electronic devices or technologies" (Badenhorst 2011a, 2). Various types of cyberbullying include harassment, impersonation or identity theft, outing, cyber stalking, happy slapping, and sexting. Each of these methods is unique in act and impact (Harris and Steyn 2018; Mori et al. 2019; Patchin and Hinduja 2020; Tutsin 2017). Online cyberbullying is often carried out in the forms of text messages, nude pictures, emails, mobile phones, internet gaming, instant messages, chat rooms, Facebook, Twitter and blogs, amongst many (Badenhorst 2011a; Burton and Mutongwizo 2009; Jorgensen et al. 2018; Schloms-Madlener 2013). Scholars on sexting in South Africa suggest that gender informs and mediates digital sexual communication, although there tends to be research silence on sexting between male learners (Alim 2016; Harris and Steyn 2018; Schloms-Madlener 2013).

However, to the extent that sexting is considered a more destructive social phenomenon, this study focuses on sexting. Sexting has been defined variously as "the sending of self-generated and sexually explicit messages, images or videos using mobile phones or other electronic devices" (Jorgensen 2018, 2); as "sending or receiving of sexually explicit or sexually suggestive images via mobile devices" (Patchin and Hinduja 2020, 1); or the exchange of sexual messages, photos or videos via technical devices (Mori et

al. 2019; Sibisi 2021). Mobile phones seem to be the most popular technology for sexting amongst school learners, perhaps due to their affordability and the low cost of sending messages. What is also striking in the definitions of sexting above, is that they flag sexting as constituted by learners' ability to send self-generating sexually explicit messages (Barry 2020). Yet, it appears that South Africa's anti-cyberbullying laws do not mention children's capacity to create messages that they send online. Transnational theoretical works on children's sexting now accept the fact that learners in schools create images of how they are intimate with each other, and from the point of view of certain critics, criminalisation of children's sexting should include those children who create sexually explicit images, and/or possess and distribute these images online (Badenhorst 2011a; Bulger et al. 2017).

Theoretical and Conceptual Framework on Cyberbullying and Sexting

The United Nations Convention on the Rights of the Child, Article 1 (1989, 2) defines a child as "every human being below the age of 18 years unless under the applicable law to the child, majority is attained earlier." Arguably, the UN Convention provides legal instruments for the protection of the child. Children's rights to freedom of expression of their views, freedom of association, and freedom from arbitrary or unlawful interference with his or her privacy, are asserted in Articles 12, 13, 14, 15 and 16. To this end, the UN Convention encourages the "mass media to disseminate material of social and cultural benefit to the child" (Article 17 a) in accordance with Article 29 (a) and (b) that emphasise the education of the child's personality within the context of the "development of respect for human rights." The protection of the child is articulated in Article 3.3, which states:

States Parties shall ensure that the institutions, services, and facilities responsible ... for the care or protection of the children, shall conform with the standards established by competent authorities, particularly in the areas of safety, health in the number and suitability of staff, as well as their supervision. (UN Convention 1989, Article 3.3)

It is a fact that many countries have established legal frameworks and regulatory bodies that incorporate laws, which the countries enforce as provided in the regulatory laws in the areas, not only of health but of provision, protection, and participation rights (UNICEF Canada 2012). The question as to whether the "protection of children shall conform with the standards established by competent authorities" is one that children's access to the Internet tends to have undermined. Admittedly, most countries implement laws to protect children from exploitation and abuse with measures that criminalise "the creation, distribution, and consumption of Child Sexual Abuse Material (CSAM)" (Bulger et al. 2017, 3). In addition, even though most countries have regulatory bodies or institutions and schemes that restrict access to content that adults view as harmful and illegal, concern over the risk of harm to children continues to be ventilated in international organisations.

For example, the protection of children from sexual offences is affirmed in international instruments such as the UN Convention on the Rights of the Child (1989), especially its “Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.” UNICEF Canada (2012) has proposed and recommended measures necessary to protect children from the physical and psychological harms arising from bullying and cyberbullying. In Europe, the Cybercrime Convention Committee (2018) identifies different forms of cyberbullying, including sexting, shows that women and children tend to be the victims of cybercrimes, and has developed legal frameworks to combat cyberbullying. This Convention Committee amalgamates and consolidates research on cyberviolence against women and children found in the Istanbul, the Lanzarote and Budapest Conventions on the protection of children against sexual exploitation and abuse.

Similarly, the United Nations Office on Drugs and Crime (UNODC 2015) is devoted to the study of the effects of new information technologies on the abuse and exploitation of children. Contact abuse of a child refers to in-person sexual abuse of a child, while non-contact abuse denotes the “producing, possessing or distributing of sexual abuse material, making harassing or sexually suggestive comments to children, advertising sexual services of children on the Internet, and actively employing, or viewing children live online sex shows” (UNODC 2015, 7). By “exploitation” of children, UNODC points to the abuses arising from child labour and child prostitution, which “involve an offender taking advantage of the child’s lack of power and status” (UNODC 2015, 7). The United States of America, the EU and Canada possess some of the most progressive legal instruments for the protection of children from the harms of cyberbullying (Bulger et al. 2017). Yet, even though global legal instruments are available, many international bodies have tended to create a picture that children can merely access, possess and distribute sexually offensive material through the Internet (Badenhorst 2011a). There appears to be scant research on the negative effects of sexting on young teen boys by elderly teen boys (Kheswa and Notole 2014).

Some international bodies—tasked to develop legislative frameworks for the protection of children from the harmful sexual materials distributed on the Internet—continue to be informed by a view that in all cases of child abuse, through exposure to sexually offensive messages or pictures, it is the children who are the victims (UN Convention on the Rights of the Child 1989). Other international bodies have tended to concentrate on developing regulatory frameworks for the protection of women and girl-children at the expense of young boys who are bullied by some older girls and, in many unreported cases, by older boys, via the Internet (Hills 2017; UNODC 2015). These perspectives tend to undermine a nuanced understanding of the fact that the increasing access to mobile phones is making children first offenders in the sense that some of the children create sexual images of themselves, which the children distribute to other children online. As Bulger et al. (2017, 1) argue, the “childhood innocence” paradigm appears to have been overtaken by the fact that children’s “own transgressive behaviour can test

the boundaries of the protection regime, creating new dilemmas for lawmakers the world over.”

Furthermore, some international bodies have overemphasised the “offline” legal regulatory laws to combat “online” cyberbullying and sexting. This approach underestimates the views of children on the need for education and support to prevent or minimise exposure to sexually offensive materials online (Jorgensen et al. 2018), just as the role that parents and the private sector can play in mitigating the negative impact of sexting on children by children and adults, tends to be under-researched (Hills 2017; UNODC 2015). Writing on the scourge of sexting in South Africa, Badenhorst (2011a) has usefully distinguished active participants in contexts of sexting that affect secondary school learners. The critic observed that these gaps in existing regulatory laws and international law are worth noting, as we now proceed to analyse the South African landscape of the Internet. We acknowledge that many of these international legal limitations appear glaring in the South African legal framework for the protection of children against harmful and illegal content that is distributed on the Internet.

Legal Framework against Cyberbullying and Sexting in South Africa

McGrath et al. (2008), on age-at-first-sex (ATS) in rural South Africa, observe that factors associated with age-at-first-sex across gender were peri-urban versus rural. However, studies conducted in urban centres amongst secondary school learners in South Africa revealed that sex is rampant among children. Recent studies (Badenhorst 2011a; Tutsin 2017; Harris and Steyn 2018) clearly show that the Internet, especially on the mobile phone, is the most popular new-age technology with which children can create a virtual world. Sexting is carried out by children of the same age, children of different ages under the age of 18 years, and in many other cases aggravating cases of sexting involve adults and minors. However, as several scholars note, “limited studies have been carried out on sexting in South African secondary schools” (Badenhorst 2011a), and therefore, there is “no legislation or policy that is *directly* aimed at the regulation of cyberbullying at school level” (Hills 2017, V), nor is there clear consensus on how sexting by minors is adjudicated (Lorang et al. 2016). To be more precise, in South Africa, “Child online protection is encompassed within a legislative approach that focuses on children’s general protection, alongside the application of civil and criminal law that is only broadly relevant to ICTs” (Bulger et al. 2017, 5). This means that responses to sexting rely on fragmented legislation and common law definitions of civil and criminal law remedies (Badenhorst 2011a).

“Protection from”—as described in the Harassment Act 17 of 2011—defines sexual harassment as: a) unwelcome sexual attention; b) messages or remarks of a sexual nature; c) implied or expressed promise of reward for complying with a sexually-oriented request; or d) implied or expressive threat of reprisal or promise of threat of reprisal or actual reprisal for refusal to comply with a sexually-oriented request (Hills 2017, 116). Clearly, this piece of legislation can apply to adult cyberbullying or sexting, which is not illegal for adults (Badenhorst 2011a). Section 1 of The Children Act 38 of

2005 describes child abuse as: “(b) sexually abusing a child or allowing a child to be sexually abused; (e) exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally” (Hills 2017, 119). The definitions do not spell out the school context where children create, possess, and can distribute messages of which the content is sexually offensive. The implication, therefore, is a view of an adult as abuser of children; thus, the Act conforms to the view of children as innocent victims of all sexual abuse.

The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 defines child pornography as a criminal offence where it involves:

An image, however created, or any description or presentation of a person, real or simulated, who is or who is depicted or described or presented as being, under the age of 18 years, of an explicit or sexual nature, whether such image, or description or presentation is intended to simulate erotic or aesthetic feelings or not. (Quoted in Hills 2017, 121)

Such persons, liable for criminal prosecution under the Act, may be engaged in acts of sexual penetration (b), sexual violation (c), self-masturbation or unduly displaying genital organs or anus (f), or displaying breasts and displaying the body or parts of the body of a child under the age of 18 with a view to violate or offend the sexual integrity of that person. The importance of Act 32 of 2007 is that if a learner sends a nude image of herself to her boyfriend, the girl is liable for criminal prosecution under child pornography. Furthermore, if the boyfriend sends the girl’s nude picture to another friend, whether a boy or a child, the boyfriend is also liable for criminal prosecution for child pornography (Harris and Steyn 2018). The assumption of the Amendment Act is that children can create and distribute harmful images of themselves. However, the Act does not specify whether a criminal offence will be preferred for a girl who sends her nude picture to her “girlfriend” or a boy who sends his nude picture to his “boyfriend.” There is scant research on the extent and legal consequences of sexting of same-sex images in South Africa (Badenhorst 2011a). Limited research has accumulated on comparative sexting and risky behaviour through photos or messages in relation to mobile phones (Houck et al. 2014) and on the relationship between sexting and mental health or sexual behaviour, which could assist policy makers to “determine if and how public health resources should be devoted to sexting” (Gordon-Messer 2012, 1).

While the Child Justice Act 75 of 2008 deals with situations where the child is in conflict with the law (Hills 2017; Sloth-Nielsen 2019), the Film and Publications Act 65 of 1996 describes pornography in terms of images created, described and presented in such ways as to undermine the sexual integrity of a child under the age of 18 years. It appears that this Act 65 of 1996 may have been established with adults in mind because it refers to persons rather than to children or learners. Furthermore, the Act seems to assume that children under the age of 18 cannot create nude pictures of themselves, which constitutes an offence when placed online. Although Hills (2017) argues that many South African legal regulatory acts tend to not directly aim at protecting children, Hills

(2017, 124) nevertheless stresses that Section (27) (1) of the Act 65 of 1996, can suggest that “learners who create or distribute sexually explicit material may be found guilty of child pornography.”

A major limitation of civil and criminal laws used in South Africa to combat cyberbullying is captured by Badenhorst (2011a, 9), who avers that “South Africa does not have any legislation dealing specifically with the sending or sharing of nude or semi-nude photos or videos and/or sexually suggestive messages of children via mobile phone texting or instant messaging between children.” The key word in the passage is *specifically*, or as one critic states, “directly aimed at the regulation of cyberbullying at school level” (Hills 2017, v). However, in recent times, the State has attempted to revise its “cyberbullying general laws through open public consultation [undertaken] in 2016 to provide some opportunity for children’s use of ICT to be more directly addressed in a balanced way in future amendments” (Bulger et al. 2017, 6). The Government Gazette of the Republic of South Africa, Act No 19 of 2020, Cybercrimes Act 2020, was signed by President Cyril Ramaphosa and assented to on May 26, 2021. The Act aims, amongst many other things, to:

Create offences which have a bearing on cybercrimes; to criminalize the disclosure of data messages which are harmful and to provide interim protection orders; to further regulate jurisdiction in respect of cybercrimes; to impose obligations to report cybercrimes. (Government Gazette Cybercrime Act 19 of 2020, 1)

This Cybercrime Act no 19 of 2020 is probably a piece of legislation in the right direction. However, many of its provisions appear to not speak directly to the need to protect children from sexting online. Part I addresses itself to intellectual property, Part II deals with offences of malicious communications, and Part III focuses on offences against the State, such as incitement. The thrust of Act no 19 of 2020 appears designed to protect the State and not children exposed to sexting. The Act tends to be State-centric.

Some Cyberbullying and Sexting: South Africa Cases

Legal critics have identified further challenges within the South African regulatory framework that might protect children from sexting online. The limited recognition of child safety is regarded as one of the most prominent ones. Where laws exist, they are fragmented and contradictory and not “specifically tailored to children’s protection from the scourge of sexting” (Bulger et al. 2017, 11). The lack of laws specifically designed to protect children from sexting online, means that many cases of child abuse and exploitation through sexting are not easily detected or known at all. Children under the age of 16 may not be prosecuted in criminal or civil courts in South Africa. This means that sexting-related offences committed by children may be moved from Schedule 3 offences (serious offences) to Schedule 1 (less serious) offences. This leads to the diversion of serious child sexting offences. However, where prosecution is preferred for serial child offenders, the “matter will go on trial in a child justice court.

If convicted, the child will be sentenced and will have a criminal record” (Badenhorst 2011a, 14). Few cases of sexting offences between male children or female children are reported in South Africa, unlike in the US (Public Justice, Impact Change 2020). In many cases, in South Africa, parents, village elders, politicians and some officials may choose to ignore the offence because it is believed to bring shame to the offender and the victim (Molosiwa 2014). This has resulted in disastrous consequences when learners commit suicide, as some of the cases involving sexting, briefly discussed below, testify.

For example, on 9 September 2019, one reporter, Nivashini Nair (2019), carried a story titled “KwaZulu-Natal Teacher Suspended over WhatsApp Sexual Scandal.” This story does not divulge the details of the sexual context that an adult sent to a minor at the unnamed school in KwaZulu-Natal. However, the authorities (through the departmental spokesman, Kwazi Mthethwa) said the graphic material included photos and text messages. Therefore, in line with the South African Schools Act, the teacher was suspended pending a thorough investigation. The official lamented that sexting between adults and minors had become pervasive in the province, rendering “schools an unsafe place to be for some of our children, suffocating many of their dreams and reducing the school experience for our children to a battle for survival rather than academic achievement.” The swift suspension of the teacher by the school authorities suggests that there is willpower on the part of the Department of Education and school authorities to act against sexting that involves aggravating factors. However, there is no evidence from the story that the victim received counselling. Badenhorst (2011b) argues that the psychological impact of sexting can be more traumatising than physical bullying because of the extreme public nature of the bullying.

In a recent story of June 2021, titled “Sex Scandal Rocks School,” Ntando Makhubu (2021) reports that the headmaster of Soshanguve Secondary School in the Gauteng Province was arraigned for having sexual relations with five learners. The story broke when five of the learners began to fight amongst themselves in a story of romantic competition to have the closest attention of the headmaster. The headmaster was served with a “precautionary suspension” and the reporter said that the headmaster could be dismissed if found guilty. The learners, whose ages were below 18 years, received counselling and the Department of Education organised a workshop on Child Abuse Protocol. It is interesting to note that the story came into the open not because the children and the headmaster considered the sexual relations with minors as harmful and illegal, but because the children were motivated by jealousy against each other, which led to the fight, resulting in the implication of the headmaster. Van Ouytsel et al.’s (2016) study reveals that one of the reasons that force girls to engage in sexting is that they are afraid of losing their boyfriends. This may not be true of all cases where girls engage in sexting, but in the above case, it seems that the legal implications of the sexual relations between minors and adults were considered a secondary factor by the girls. This might suggest that children may not always be victims because the five learners knew what they were doing was wrong. This is not to absolve the headmaster because,

by virtue of his position, his offence is not difficult to deal with within the framework of available regulatory measures at the school and in the country.

The website, The Cybersmile Foundation (n.d.), carried a story titled, “13-Year-Old Pretoria Girl Kills herself after being Bullied.” The girl took her life after a fellow student had distributed a private image of the girl via the social media app, WhatsApp, to other students. This prompted a tirade of abuse and bullying. The girl reported the incident to her teachers and refused to go back to school because she was afraid of the bullies. This tragic story shows that children created pictures of themselves as nude. However, the remedies available to her appeared inadequate to restore her dignity, which resulted in her taking her own life. Makhitha and Botha’s (2017) study reports on learners in Gauteng who had consensual and non-consensual sex in the school grounds. Also, in the several cases of cyberbullying and sexting that Badenhorst’s study (2011a) reports on, adults are romantically involved with minors. The criminal and civil laws against sexual violation of children are applicable.

In another case that occurred in Springs (Gauteng), the mother of a 16-year-old girl obtained a protection order in terms of section 384 of the Criminal Procedure Act of 1955 against a 16-year-old boy who was humiliating the girl on MXit (Badenhorst 2011b). In yet another case of cyberbullying, in February/March of 2006, three schoolboys aged 14–17 years were charged with defaming their principle and deputy principal through an image the boys had created showing two naked men (Badenhorst 2011c). One of the accused printed the image and placed it on the school’s notice board. The boys were disciplined, they apologised, and the criminal charge was diverted. The above example of the three boys shows that learners themselves are not always innocent because it was the boys who had created and distributed explicit sexual images that injured the reputation of the principle and his deputy. Furthermore, this example shows that learners can test the boundaries of the protection regime that is supposed to protect them (Bulger et al. 2017). Such successful cases of the application of anti-cyberbullying laws can go some way to show that the South African legal framework for the protection of children against sexting online can work when the parents work closely with the courts.

However, not all cases involving cyberbullying can be resolved successfully through the courts. In April 2021, Lufuno Mavhunga, who was a learner at Mbilwi Secondary School outside Thohoyandou in Limpopo, committed suicide (SABC News 2021.) This happened after a video recording of her being assaulted by a fellow learner went viral on social media. The incident triggered a public outcry about bullying in schools. In another reported case arising from bullying, 15-year-old Pholoso Mthembi of Limpopo Education committed suicide after being bullied at school (Katlego 2022). The story reports that the families of the deceased children received counselling from the Department of Social Affairs. This intervention is significant in that it shows that the South African government is serious in seeking to protect children from bullying online. However, the fact that officials tend to intervene after the death of children suggests the

challenges that protection measures offline face against bullying that occurs online and in real time. Even though bullying and sexting are serious misdemeanours, it appears that some officials can use certain methods to eliminate sentencing and, instead, authorise orders relieving a child of the obligation to report as a sex offender (Lorang et al. 2016). It seems cases involving the death of learners that arise from sexting have not been adequately researched, and what is known about them is only the tip of the iceberg (Badenhorst 2011a; Bulger et al. 2017; Kheswa and Notole 2014). However, as Burton and Mutongwizo argue, the patterns of electronic victimisation found in South Africa are also reported in studies conducted in the USA and UK, perhaps confirming the transnational identity associated with sexting crimes.

Discussion and Recommendations

Sexting is rife among learners in South African secondary schools. There is still limited research on the extent of sexting by South African children. Regulatory protection regimes in South Africa tend to be general and not specifically tailored to the protection of children against cyberbullying in general and sexting. Much of the legislative framework in South Africa continues to view children as innocent, since the provisions of South African anti-cyberbullying tend to criminalise the distribution of explicit sexual images and messages online. The reality on the ground is that children can create images of themselves in compromised contexts of nudity, which the same children share online with their teen peers. This fact suggests that South African children tend to be creative with the new-age technologies of the Internet, especially the mobile phones that they have used to test the boundaries of the protection regimes intended to protect them from the harms of sexual messages online. Apart from the problem that arises from the general, fragmented nature of South African anti-cyberbullying laws, there are no remedies outside civil and criminal law that specifically address child offenders. Consequently, remedies tend to be ineffective or are not applied at all for cultural fear of shaming both the child offender and the child who is a victim of sexting. Considering these shortfalls of the South African protection regime and regulatory legal framework, this article recommends that:

- South Africa develops laws that are specifically directed to regulate children's sexting online.
- Parents ought to be involved in educating their children on safe sexting.
- Social workers need to be involved in spreading awareness or intervening through counselling in actual cases involving victims of sexting.
- Children need to be aware that although sexting can affect those who are not practising it, all children should take responsibility for their sexting activities online.
- While offensive sexting can be considered differently by different parents, there ought to be a threshold beyond which children who exceed this limit can be prosecuted.

- Children ought to speak to their parents about cyberbullying or their own sexting online to ameliorate catastrophes (such as suicide) that often arise when children who are victims of sexting feel shamed, betrayed, or abandoned by society.
- The media can play an even more crucial role by reporting cases of sexting that are deliberately hidden from view by society.

Conclusion

This article debated some legal challenges of protecting learners/children from sexting online in South African schools. The article established that the South African legal and protection regime is not directly tailored to protect learners from sexting online. The country's anti-cyberbullying laws tend to be reactive, fragmented, and even contradictory. Many children have access to the Internet and mobile phones, and with these new-age technologies, the children tend to experiment, with the result that their creative effort in sexting online undermines the very laws intended to protect children. Some examples of cases of texting by children in South Africa have shown that children of the same age create and distribute sexually explicit images and messages of themselves and of others on online platforms. Extensive sexting by children occurs within the secluded private context of children's homes. Sexting is now a serious problem at South African secondary schools, and should be viewed as an extension of what happens at home. Aggravating circumstances are also created when adults are involved in sexting the very children that they either teach at school, or when some children share explicit sexual images with adult men and women who are their boyfriends or girlfriends but not at the same schools. The article recommends that the South African authorities should create anti-cyberbullying and sexting laws that specifically protect children. Parents have a role to play in educating their children to practise safe sexting because children's sexting at schools is a reality that cannot be wished away.

References

- Alim, Sophia. 2016. "Cyberbullying in the World of Teenagers and Social Media: A Literature Review." *International Journal of Cyber Behaviour* 6 2): 67–95.
<https://doi.org/10.4018/IJCBPL.2016040105>.
- Badenhorst, Charmain. 2011a. "Legal Responses to Cyber Bullying and Sexting in South Africa." Centre for Justice and Crime Prevention (CJCP), Issue No. 10, August, 1–20.
- Barry, Larry. 2020. "The Quantified Self and the Digital Making of the Subject." In *The Digital Age and Its Discontents: Critical Reflections in Education*, edited by StockSchocetti Matteo. Helsinki, Helsinki University Press, 95–110.
<https://doi.org/10.2307/j.ctv16c9hdw.9>.

- Bulger, Monica, Patrick Burton, Brian O’Neill, and Elizabeth Staksrud. 2017. “Where Policy and Practice Collide: Comparing United States, South Africa, and the European Union Approaches to Protecting Children Online.” *New Media and Society*, 1–15. <https://doi.org/10.1177/1461444816686325>.
- Burton, Patrick, and Tariro Mutongwizo. 2009. “Inescapable Violence: Cyber Bullying and Electronic Violence against Young People in South Africa.” Centre for Justice and Crime Prevention (CJCP), Issue paper No. 8, 1–13.
- Cybercrime Convention Committee. Lanzarote T-CY. 2018. “Working Group on Cyberbullying and other Forms of Online Crimes, especially against Women and Children,” Council of Europe, Strasbourg, France, 1–151.
- Gordon-Messer, Deborah, Jose Arturo Baeurmeister, Alison Grodzinski, and Marc Zimmerman. 2012. *J Adolesc Health* 52 (3): 301–306. <https://doi.org/10.1016/j.jadohealth.2012.05.013>.
- Government Gazette: Republic of South Africa, Act No 19 of 2020: Cybercrimes Act 2020, Cape Town, Vol. 672, No. 324, 1 June 2021, 1–128.
- Harris, Tara, and Francois Steyn. 2018. “Gender Differences in Adolescent Online Victimization, and Sexting Expectancies.” *Child Abuse Research: A South African Journal* 19 (1): 15–29.
- Hills, Anna Catherine. 2017. “Developing a Law and Policy Framework to Regulate the Cyber Bullying in South African Schools.” PhD thesis, Unisa, Pretoria, 1–279.
- Houck, Christopher D., David Barker, Christie Rizzo, Evans Hancock, Alicia Norton, and Larry K. Brown. 2014. *Providence, American Academy of Paediatrics*, 276–282. <https://doi.org/10.1542/peds.2013-1157>.
- Hsiu-Fang, Hsieh, and Sarah E. Shannon. 2005. “Three Approaches to Qualitative Content Analysis.” *Qualitative Health Research* 15 (9): 1277–1288. <https://doi.org/10.1177/1049732305276687>.
- Janse van Rensburg, Alletta H. 2012. “Using the Internet for Democracy: A Study of South Africa, Kenya and Zambia.” *Global Media Journal African Edition* 6 (1): 93–117. <https://doi.org/10.5789/6-1-84>.
- Jolicoeur, Miranda, and Edwin Zedlewski. 2010. *Much Ado About Sexting*. New York. US Department of Justice, 1–16.
- Jorgensen, Clara, Annalise Weckesser, Jerome Turner, and Alex Wade. 2018. “Young People’s Views on Sexting Education and Support Needs. Findings and Recommendations from a UK-Based Study.” *Sex Education*. <https://doi.org/10.1080/14681811.2018.1475283>, 1–21.

- Kheswa, J. G., and M. Notole. 2014. "The Impact of Pornography on Adolescent Male's Sexual Behaviours in the Eastern Cape, South Africa, A Qualitative Study." *Mediterranean Journal of Social Sciences* 5 (20): 2831–2840. <https://doi.org/10.5901/mjss.2014.v5n20p2831>.
- Kloet, J. 2002. "Digitization and its Asian Discontents. The Internet, the Politics and the Hacking in China and Indonesia." *First Monday* 7 (9): 1–6. <https://doi.org/10.5210/fm.v7i9.988>.
- Laidlow, M. 1994. *The Internet as a Democratizing Force*. Cambridge. Cambridge University Press, 1–10.
- Lorang, Mellissa R., Dale E. McNeil, and Renee L. Binder. 2016. "Minors and Sexting: Legal Implications." *Journal of American Psychiatry Law* 44: 73–81.
- Makhitha, Tshildizi Stanley, and Pedro Botha. 2017. "Teenagers Sexual Activities on School Grounds: A Needs for Social Work Support." *Social Work/Maatskaplike Werk* 53 (4&5): 496–515. <https://doi.org/10.15270/53-4-595>.
- Makhubu, Ntando. 2011. "Sex Scandal Rocks School." <https://www.iol.co.za/news/sex-scandal-rocks-school-1076622>. Accessed May 10, 2022.
- McGrath, N., M. Nyiryenda, V. Hosegood, and M-L. Newell, and 2008. "Age at First Sex in South Africa." *BMJ Journals*: 49–55. <https://doi.org/10.1136/sti.2008.033324>.
- Molosiwa, L. Molosi. 2014. "Is Sexting a Criminal Offence?" *De Rebus DR* 34: 1–14.
- Mori, Carmille, Jeff R. Temple, Dilon Browne, and Sheri Madigan. 2019. "Association of Sexting with Sexual Behaviors and Mental Health Among Adolescence: A Systematic Review and Meta Analysis." *JAMA. Pediatr* 173 (8): 770–779. <https://doi.org/10.1001/jamapediatrics.2019.1658>.
- Van Ouysel, Joris, Ellen van Gool, Michel Walrave, Koen Ponnet, and Emily Peeters. 2016. "Sexting: Adolescents' Perceptions of the Use for, Motives for and Consequences and Sexting. Applications." *Journal of Youth Studies*, 1–26. <https://doi.org/10.1080/13676261.2016.1241865>.
- Patchin, Justin W., and Sameer Hinduja. 2020. "It is Time to Teach Safe Sexting." *Journal of Adolescent Health* 66: 140–143. <https://doi.org/10.1016/j.jadohealth.2019.10.010>.
- Payne, Allister. 2014. "The Nature and Impact of Cyber Bullying among South African Youth: An Explanatory Analysis." PhD thesis, University of Cape Town, 1–108.
- Public Justice Impact Change. 2020. "Jury Verdicts and Settlements in K-12 Harassment and Bullying Cases." October Cases edition, *US Cases of Sexting*, Fall Edition 2020, 1–114.

Schloms-Madlener, Kim Cheryl. 2013. "Sexting among Adolescents and Youth Adults: The Prevalence and Characteristics of Sexting Behaviours among Adolescents and Adults in Cape Town, South Africa." Master of Arts dissertation, University of Cape Town, 1–69.

Sibisi, Nomakxosi Nomathemba. 2021. "School Violence in Selected Schools in KwaZulu-Natal." PhD thesis, University of KwaZulu-Natal Press, 1–298.

Sloth-Nielsen, Julia. 2019. "Children's Rights Jurisprudence in South Africa: A 20-year Retrospective." *De Jure Law Journal*: 501–520.

The Constitution of the Republic of South Africa, 1996. Pretoria: Department of Justice and Constitutional Development.

The Internet and the Democratization of Politics. 2004 and 2008. Princeton, Princeton University Press, 1–19.

Treuhaft, Sarah. 2006. "The Democratization of Data: How the Internet is Shaping the work of Data Intermediaries." *Institute of Urban and Regional Development*. University of California, Berkeley, 1–74.

Turkle, Sherry. 1996. "Virtuality and its Discontents." *The American Prospect* 24: 50–57.

Tutsin, D. H. 2017. "Exposure to Online Sexual Content among Secondary School Learners in Gauteng." DLitt, Et Phil Psychology. Bureau of Market Research, College of Economic and Management Sciences, Research Report No. 479, 1–35. Pretoria, Unisa.

UNICEF Canada. 2012. "Bullying and Cyberbullying: Two Sides of the Same Coin." Brief Submitted by UNICEF Canada to the Standing Senate Committee on Human Rights, 28 May 2012, 1–21.

United Nations Office on Drugs and Crime (UNODC). 2015.

United Nations Convention on the Rights of the Child. 1989, 1–15.

Cases of Cyberbullying and Sexting/Rape Analysed

Badenhorst. 2011b. *News24.com*, "MXit Slut List Ends in Court," 8 August 2008. <http://www.news24.com/SouthAfrica/News/MXit-slut-list-endsin-court-20080807>. Accessed June 2, 2011.

Badenhorst. 2011c. *Le Roux and Others v Dey* (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae) 2011 (3) SA 274 (CC). <http://www.centreforchildlaw.co.za/images/le%20roux%20v%20dey-%20final.pdf>. Accessed June 2, 2011.

Katlego, Nyoni. 2022. "Grade 10 Limpopo Learner Commits Suicide after Alleged Altercation with another Pupil" @SABCNews 26 May 2022.
<https://www.sabcnews.com/sabcnews/grade-10-limpopo-learner-commits-suicide-after-alleged-altercation-with-another-pupil/>. Accessed June 7, 2022.

Nivashini, Nair. 2019. "KwaZulu-Natal Teacher Suspended over WhatsApp Sexual Scandal." 9 September, *Sunday Times*. <https://www.timeslive.co.za/news/2019-09-09-kwazulu-natal-teacher-suspended-over-whatsapp-sexting-scandal/>. Accessed June 7, 2022.

SABC News. 2021. <https://www.sabcnews.com/sabcnews/probe-must-be-conducted-to-take-action-against-mbilwi-secondary-bullies-legalwise/>. Accessed 7 June 7, 2022.

The Cybersmile Foundation. (n.d.) "13-Year-Old Pretoria Girl Kills Herself After Being Cyberbullied." <https://www.cybersmile.org/news/13-year-old-pretoria-girl-kills-herself-after-being-cyberbullied>. Accessed June 2022.