

7 Revenge pornography as a form of sexual and gender-based violence in Ghana

Emerging judicial issues

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Introduction

Technological advancements in the 21st century have greatly influenced the dynamics of social life, particularly intimate relationships. Digital intimacy has been culturally embraced, leading to an alarming increase in “sexting” (Burris, 2014; Bates, 2015; Chisala-Tempelhoff & Kirya, 2016; Ngo et al., 2017).¹ However, this cultural endorsement of digital intimacy runs a risk of destructive and enduring consequences for those whose sexually explicit images end up on the internet.

One morning in January 2018, Ghanaians woke up to a leaked sex video that made waves on social media. The infamous “kitchen stool” sex video featured the headmaster (school principal) of Adumanu D/A Basic School, Robert Sepey, and his former student girlfriend having sex on a kitchen stool (*My Newsgh*, 2018).² The 4-minute, 16-second video, which went viral, was said to have been recorded a year prior to the leakage. The recording was made at a time when the headmaster and his former student were in the prime of their romantic relationship. The lovers voluntarily agreed to record this intimate sexual act, which they intended to watch at a later time in admiration of their sexual prowess. Unfortunately for the two, the video landed in the hands of the wrong persons, leading to the scandal.³ Preliminary investigations conducted by the Ghana Education Service (GES) revealed that the young lady’s brother’s friends were behind the leakage as payback for her refusing their love proposals (*My joy online*, 2018).

In the past, heart-broken and rejected lovers simply wallowed in self-pity or discarded all memories, including photos of their beloved. Today, through technology, there is a more pernicious payback option: revenge porn. Revenge porn simply means non-consensual, involuntary pornography (Burris, 2014). Unfortunately, the “kitchen stool” sex scandal is just one example of the increasing spread of non-consensual pornography over the internet in Ghana. There are at least three revenge porn posts on social media every day, a majority of the victims being women and girls (*News Ghana*, 2017).

Shortly after the release of the “kitchen stool” sex video, there was parliamentary debate as to whether rigorous legislation was necessary to deal with the menace. The then majority leader of parliament, Osei Kyei Mensah Bonsu, was

of the view that appropriate legislation was needed to combat revenge porn and its related activities. He advocated that criminalizing revenge porn and related activities would protect the constitutional right to privacy of all Ghanaians. On the other hand, the then minority leader, Haruna Iddrisu, disagreed with a legislative approach to addressing revenge porn and relied on self-discipline as the key to overcoming the menace. To him, “the best way to avoid this scandal is self-discipline. Privacy must be respected and protected, but I am afraid legislation may not be able to resolve it. We must ensure conscious use of the mobile phone and stop the continuous abuse of these gadgets” (Parliament of Ghana, pp.455–446).

This discussion on the floor of parliament reflects the ongoing debates surrounding the classification of revenge porn: that is, whether revenge porn is simply a matter of user naivety calling for self-discipline or a form of violence requiring legislation (Chisala-Tempelhoff & Kirya, 2016).

This chapter looks at revenge porn from a gender perspective and makes a case for considering it as a women’s rights issue and a form of gender-based violence. The chapter argues that framing revenge porn as a women’s rights issue will positively impact the course of any future legislation to protect women, who comprise the bulk of revenge porn victims in Ghana. The role of the courts in contributing to this gendered perspective of revenge porn matters is examined. The chapter offers suggestions to address the issues raised.

The chapter progresses in four parts. The first part explains the concept of revenge porn by defining it and exploring the nature of “consent” as it pertains to revenge porn, and looks at the gendered context of revenge porn. The second part focuses on revenge porn in Ghana. It gives a brief background on the revenge porn spree in Ghana and assesses the socio-legal consequences of revenge porn. The third part contains an overview of the existing legal framework, that is, the judicial response and legislative framework relating to revenge porn in Ghana, and exposes the inadequacies in addressing the problem. The fourth part discusses the critical role of the court in addressing revenge porn-related issues, particularly through a gender-conscious lens. The discussion in this part is set against the backdrop of inadequate legislation on the matter. The fifth part concludes the chapter.

The concept of revenge porn

Defining revenge porn

Revenge porn has been defined as “non-consensual, involuntary pornography” (Burris, 2014, p.2327) or “sexually explicit images disclosed without consent and for no legitimate purpose” (Franks, 2015). Usually, some personal information accompanies the images, such as the name, address, and social media profiles of the victim (Arimoro, 2015; Poole, 2014).

Revenge porn is considered a form of cyber-harassment (Arimoro, 2015, p.76; Dickson, 2016)⁴ because the sexually explicit images are disclosed to an audience other than the intended private audience (Burris, 2014). The images may have

been originally created or obtained with or without the consent of the subject (Citron & Franks, 2014; Kitchen, 2015).

Although the most common form of revenge porn is that induced by failed intimate relationships and scorned ex-lovers, there are other forms of involuntary porn not triggered by revenge per se (Chisala-Tempelhoff & Kirya, 2016; Martinez, 2014; Quiles, 2016). The sexually explicit images may be “acquired through hacking, theft by repair people, or false personal ads” (Martinez, 2014). Perpetrators may engage in non-consensual pornography for earning, notoriety, or sheer amusement (Chisala-Tempelhoff & Kirya, 2016). Its distribution may also result from negligence, recklessness, or inadvertence (Burriss, 2014).

There have also been recent variants of non-consensual pornography such as “parasite porn”—where harmless images of victims are copied without their consent and uploaded onto pornographic sites—and “morph porn” or edited portrayals—where the victim’s face, without consent, is cropped from a harmless picture and pasted onto the body of another person engaging in sexual activity (Dickson, 2016; Goudsmit, 2017; *My joy online*, 2017; *GhanaWeb*, 2014).⁵

In light of the broad and evolving meaning of “revenge porn,” some scholars prefer to use the term “non-consensual pornography” instead of “revenge porn,” as the latter is considered to be misleading (Chisala-Tempelhoff & Kirya, 2016; Dickson, 2016, p.46; Goudsmit, 2017, pp.26–27; Quiles, 2016).⁶

This chapter, however, uses the terms interchangeably, as “revenge porn” is now a generic term for all forms of non-consensual pornography regardless of the fact that the act may not have been purely motivated by revenge (Burriss, 2014; Citron & Franks, 2014).

Revenge porn in a gendered context

Women and girls are the primary targets of non-consensual pornography (Citron & Franks, 2014). Thus, in African societies where there are strong traditional patriarchal attitudes that hold women to a higher standard of sexual morality than men, female revenge porn victims are vilified. They are slut-shamed, sternly criticized, condemned, and mocked in the court of public opinion. It is this unsympathetic attitude toward the autonomy of women that pushes back at any attempt to frame non-consensual pornography as gender-based violence (GBV). However, given the increasing use of technology and the internet to facilitate harassment against women, and the resultant gender inequality in cyberspace, revenge porn can be nothing short of GBV (Chisala-Tempelhoff & Kirya, 2016).

Gender-based violence refers to abuse or harm directed against a person or group of persons that is associated with the normative perception of their gender.⁷ Accordingly, gender-based violence is experienced by both men and women, although women are the mainstream victims of gender-based violence, especially where the violence is sexual in nature. Gender-based violence is engrained in gender inequalities, which are tolerated by society, in that men often use violence

as a means of asserting their authority or chastising the alleged transgressions of gender roles (Bott, Morrison, and Ellsberg, 2005). The United Nations General Assembly in 1993 defined violence against women as “any act of gender-based violence that results in, or is likely to result in physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivations of liberty, whether occurring in public or private life” (UN, 1993). As a form of sexual violence against women in the cyberworld, revenge porn cannot be recognized apart from the societal normative understanding of gender roles that affects women’s vulnerability to violence. It should therefore be classified as a form of gender-based violence.

Throughout history, women have had to fight for their rights to be acknowledged and their sexual boundaries respected. Yet, the apathy toward women’s rights and sexuality still persists. The apathy extends to revenge porn, which affects more women than men (Citron & Franks, 2014). It is this apathy that influences the decision to classify revenge porn as a consequence of user naivety rather than a gendered issue. However, such an assumption in itself is a form of discrimination against women, because it shames women when their sexual activities are made public. When it comes to sexual activities, men are acclaimed, but women are judged; men are “studs,” but women are “sluts.” It takes a legal intervention, such as laws against revenge porn, to gradually address and deal with such discriminatory attitudes toward women’s sexuality (Poole, 2014).

The threat of revenge porn is consistently being used as a tool to perpetrate cyber-stalking and cyber-rape against women. The threat of revenge porn is also used by sex offenders such as rapists, who record their rape episodes in order to silence their victims from reporting them to the police. Sex traffickers also use the threat of revenge porn to compel reluctant persons to engage in the sex trade (Chisala-Tempelhoff & Kirya, 2016; Burris, 2014).

Revenge porn is also a form of domestic violence, as intimate male partners often silence and coerce their female partners through the threat of public distribution of intimate images. Often, the images are coercively obtained by the abuser. As a result of such threats, women are unable to report abuses, leave the abusive relationship, or fight for the custody of their children. Where the abused partner musters the courage to break out, the abuser makes good his threats (Chisala-Tempelhoff & Kirya, 2016; Citron & Franks, 2014).

Irrespective of the moral position one may take on revenge porn, the fact that people, especially young women, are being subjected to severe and lasting harm is real (Martinez, 2014). It is essential, therefore, that revenge porn is viewed as a form of gender-based violence that denies women their capacity to fully control their bodies and guard their reputation, with the ultimate effect of ruining their lives (Chisala-Tempelhoff & Kirya, 2016; Burris, 2014). With this in mind, judicial processes should be sensitive to the pressing need to protect women’s rights in order to lead to positive judicial outcomes that will advance justice to female victims of revenge porn, and influence future legislation.

Revenge porn in Ghana

The revenge porn spree in Ghana

In Ghana, there are at least three revenge porn posts on social media every day, the majority of the victims being women and girls. There are also records of female revenge porn victims in Ghana committing suicide. There are over 20 revenge porn sites currently operating in Ghana (*News Ghana*, 2017; Mensah & Donkor, 2017).

The rising spree of revenge porn in Ghana can be managed by introducing specific laws to address the nuances of the phenomenon. Prior to and immediately after the infamous “kitchen stool” sex video referenced earlier, there have been increased records of non-consensual pornography.

For example, in 2013, one Henry Alibah, a student, uploaded nude photos of his ex-girlfriend on Facebook (*Citifmonline*, 2014).⁸ In 2016, a young lady committed suicide after her boyfriend leaked her sex video on the internet (*News Ghana*, 2017). In the first quarter of 2017, two young men were arrested for posting nude pictures of a young girl on Facebook after she broke up with one of them, who was her ex-boyfriend (*My joy online*, 2017).⁹ Later that year, in December, a video showing 7 teenage boys gang-raping an 18-year-old girl at Bantama in Kumasi was circulated on social media platforms (Mensah & Donkor, 2017).

In all these cases, the reactions of government and law enforcement personnel have been ad hoc, leading to inconsistencies while the unresolved issues remain. In order to completely stamp out the growing plague of revenge porn and provide the needed support to its victims, judicial intervention and comprehensive legislation are essential.

The damaging consequences of revenge porn

The damaging consequences of revenge porn are numerous. They transcend the digital world into real life, making it even more difficult for revenge porn victims to cope. Chief among them is public humiliation and embarrassment. The distribution of sexually explicit images of revenge porn victims “converts unwilling citizens into sexual commodities” who are vilified. Revenge porn victims, particularly female victims, are slut-shamed and are featured in false prostitution ads on the internet, which further deepens the humiliation. They are also exposed to rape, cyber-stalking, sexual harassment, and domestic violence (Burris, 2014; Citron & Franks, 2014; Chisala-Tempelhoff & Kirya, 2016; Dickson, 2016; Martinez, 2014; Scheller, 2015, p.553).

Revenge porn does not only denigrate its victims sexually; it also denigrates them professionally and domestically. Some victims have lost educational opportunities. In some cases, the humiliation is extended to the victim’s close family relations, friends, and employers. It comes as no surprise, therefore, that revenge porn victims are often either dismissed by their employers or coerced to resign

from their jobs. Relationships are broken and friendships lost (Burriss, 2014; Citron & Franks, 2014; Dickson, 2016).

For the most part, sexually explicit images, once they hit the internet, cannot be blotted out. The harm caused to victims is perpetual. To end the humiliation, therefore, some revenge porn victims have been forced to take on a new identity and re-locate. In extreme cases, others have contemplated suicide, while some have actually committed suicide to end it all (Burriss, 2014; Dickson, 2016; Martinez, 2014).

Aside from these personal consequences for the victims, the betrayal implicit in non-consensual pornography imperils societal values such as human intimacy, gender equality, and privacy (Burriss, 2014).

These consequences may be even more damaging in closely communal societies. In Ghana, for example, the communal residential arrangements, the extended family systems, as well as the religious environment mean that revenge porn information will spread not only to strangers but to family, friends, co-tenants, neighbors, and religious group members that the victim encounters on a regular basis. Public humiliation and embarrassment are likely not to be borne by the victim alone but by the victim's entire family, friends, and other close relations. In very traditional settings, the embarrassment and humiliation may eventually lead to the victim's family being negatively tagged, and they may be cut off from participating in certain communal activities and public appearances. In religious organizations, revenge porn could lead to the loss of members, as many of them would not want to be associated with an organization that is named and shamed. Conversely, revenge porn victims may also suffer a more brutal backlash from among their closest family and religious members of the community, who may dissociate themselves from and shun victims, pushing the victims further away into a lonely space.

These adverse effects hardwired into non-consensual pornography warrant the need for active judicial intervention and revenge porn-specific legislation.

The judiciary and the application of existing Ghanaian laws on revenge porn

In Ghana, some parts of the existing law loosely apply to revenge porn, such as the constitutional provisions on privacy and dignity as well as the traditional criminal laws against obscenity. Tort, copyright, and family law also offer some civil remedies to revenge porn victims, although not in all cases. The consequence is that judicial intervention in revenge porn cases can only go as far as these existing laws permit. The changing legal complexities of non-consensual pornography cannot be fully addressed by the current existing pieces of law—the reason why a comprehensive and specific legislation is necessary to enable the judiciary to be more effective in adjudicating cases involving revenge porn. This part offers an overview of the existing Ghanaian laws as they could be applied to revenge porn while pointing out the inadequacies. It also assesses how the judiciary has applied these laws in its decisions where applicable.

Constitutional law

Article 18 (2) of the 1992 Constitution of Ghana protects the right to privacy: “[n]o person shall be subjected to interference with the privacy of his home, property, correspondence or communication except in accordance with law as may be necessary in a free and democratic society.” By this constitutional provision, sexually explicit images taken by a revenge porn victim are protected, since the images are her property. Likewise, nude pictures that are exchanged between lovers are also protected, since their distribution amounts to interference with the privacy of the victim’s correspondence or communication.

The protection of privacy under the constitution of 1992 is, however, limited. For example, where the sexual images were not taken by the victim and so are not the victim’s property, or where the images were inadvertently posted on a public platform by the victim, the distribution will technically not be an interference of the victim’s privacy of property or communication. In these instances, a victim may rely on the constitutional right to dignity, which is inviolable (1992 constitution, Art. 15 (1)).¹⁰ Additionally, a victim may make a case for violation of her rights based on the importation clause under Article 33 (5) of the constitution, which imports all other rights not specifically mentioned in the constitution that are “inherent in democracy and intended to secure the freedom and dignity of man.” Thus, failing any domestic laws to protect, a victim may look to international human rights law for protection, including such rights as the right to be forgotten¹¹ (Fiedler, 2014).

While these constitutional protections are remarkable, their application, interpretation, and enforcement require judicial intervention. However, the judiciary may sometimes grapple with understanding the mechanics of the conduct that may give rise to revenge porn (Citron & Franks, 2014), and so the judiciary will need the assistance of specific legislative intervention to clear any ambiguities and ensure uniformity in judicial decisions.

Criminal law

The criminal laws of Ghana are limited in addressing revenge porn. The current criminal law tackles revenge porn only to the extent that it falls within the scope of the conventional laws against obscenity and indecency or where revenge porn is carried out for the purposes of extortion. Section 278 of the Criminal Offences Act 1960 (Act 29) makes it a misdemeanor to publicly and willfully engage in a grossly indecent act. A misdemeanor is punishable by a term of imprisonment not exceeding three years. Sections 280 and 281 also criminalize the publication, sale, distribution, advertising, importation, or exportation of obscene materials. Section 101A (1) of Act 29 (as amended) makes it an offense to sexually exploit a person.¹² Sexual exploitation has been defined to mean the use of a person for sexual activity that causes or is likely to cause serious physical and emotional injury or in prostitution or pornography (Act 29, s. 101A (1)).

From this law, it is evident that so far as revenge porn results in pornography or distribution of obscene images leads to, or is likely to lead to, physical or emotional harm, a perpetrator may be criminally liable under the criminal laws of Ghana. Such a scenario was seen in 2017, when it was reported that two persons had been arrested by the Somanya District Police Command for circulating nude pictures of a young lady. The young lady lodged a complaint with the police concerning her nude pictures, which were circulating on Facebook. She reported that her ex-boyfriend and another were responsible for the circulation. The police arrested the duo and charged them with circulation of obscene material and abetment of crime, and they were arraigned before the Somanya circuit court (*My joy online*, 2017). All the same, the inadequacies of the criminal laws on obscenity and indecency are exposed by other aspects of non-consensual pornography, which are not covered by the criminal laws. Take, for example, the distribution of sexually explicit images that are not intended to cause harm but for entertainment, or cases of “morph porn.” In such situations, the criminal laws of Ghana on obscenity and indecency fall short in addressing these possibilities (Rackley & McGlynn, 2018).

The criminal laws on extortion may also be applicable to revenge porn where a perpetrator threatens to distribute nude photos or videos of a person for purposes of extorting property from the victim. Section 151 of Act 29 provides that a person who extorts property from any other person by means of threat commits a second-degree felony. A person convicted of second-degree felony is liable to a term of imprisonment not exceeding ten years. The challenge with this extortion law in relation to revenge porn is that it excludes liability where threats of criminal assault or bodily harm to the person threatened is used; thus, it limits the acceptable forms of threats in cases of revenge porn to only threat of distribution and not threat of harm (Act 29, s. 151 (2)). This state of the law on extortion is principally because extortion as mentioned in s. 151 of Act 29 is closely linked with robbery under s. 150 of Act 29, such that the use of threat of violence to obtain property such as money is considered as robbery and not extortion.

Also, under the Electronic Transactions Act, 2008 (Act 772), s. 136 on child pornography could be applied to revenge porn cases where the victim is a child, that is, a person below 18 years. Child pornography includes, among other things, materials that visually depict a child engaged in sexually explicit conduct or images representing a child in such a manner and unauthorized images of nude children. A person who intentionally publishes, produces, procures, or possesses child pornography in a computer system or electronic record storage medium is liable to a fine or a term of imprisonment of not more than ten years or both.

Aside from the challenges mentioned earlier, the current state of the laws that could possibly impose criminal liability are also limited because they do not specifically categorize non-consensual pornography as a sexual offense. The lack of express law that classifies non-consensual pornography as a sexual offense makes victims more vulnerable, as they do not have any form of anonymity in open court, which is often available in sexual offense cases. Although the criminal sanctions that the current criminal laws impose on perpetrators are moderate, the

criminal justice system alone cannot offer complete satisfaction to revenge porn victims. Consider, for instance, a 60-day imprisonment for a revenge porn perpetrator¹³ as opposed to a lifetime of humiliation, tarnished reputation, and loss of educational and employment opportunities. These loopholes therefore signal the need to consider the viability of civil law remedies as well.

Civil law

Moving away from criminal law, which focuses predominantly on perpetrators, I now turn to assess the adequacy or otherwise of Ghanaian civil laws, particularly tort, copyright, and family law, which are more victim oriented.

Tort law

For a revenge porn victim, tort law may allow reliefs for physical injury, economic injury, emotional distress, and possibly invasion of privacy and damage to reputation. Civil remedies for physical and economic injury resulting from revenge porn are often non-contentious, as they are relatively easier to prove. However, remedies in tort law for emotional distress, invasion of privacy, and damage to reputation are not easily forthcoming due to the nature of such injuries. These remedies will be the focus of this part.

Emotional distress to a revenge porn victim must be intentionally inflicted and calculated to cause harm in order to warrant a remedy under tort law (Birmingham & Brennan, 2010; *Wilkinson v. Downton*, 1897). Thus, where emotional distress was not intentionally inflicted, such as where the distribution of the intimate photos or videos was inadvertent or negligent, there will be no remedy for the victim. Additionally, in common law, conduct that is calculated to cause distress and inflicts emotional distress without more is not tortious (Birmingham & Brennan, 2010; *Wainwright v. Home Office*, 2003). This means that a revenge porn victim who suffers emotional distress or humiliation alone is unlikely to successfully establish liability of the perpetrator. Hence, no remedy.

Although in some common law jurisdictions there is an incremental development toward a tort of privacy invasion,¹⁴ it is alien under traditional common law, which forms part of the common law of Ghana. In *Wainwright*, the absence of a tort of privacy under the common law was made clear by the House of Lords.

Instead of a tort of privacy, English courts have adapted the equitable action for breach of confidence, which allows persons to be held liable for publicly disclosing information which they “knew or ought to have known that there was a reasonable expectation that the information would be kept confidential or private” (Applegarth, 2009). It seems to be the case that while a revenge porn victim may claim infringement of privacy under the Ghanaian constitution, she cannot do so under the law of torts, though the equitable remedy for breach of confidence is attainable.

A revenge porn victim may initiate a defamation action for damage to her reputation. The chances of such an action succeeding are, however, slim, since

in most cases, the image or video involved depicts the truth; the truth being that the victim is the one engaging in the sexual act in the photograph or video. Truth is a complete defense to a claim of defamation (Birmingham & Brennan, 2010; Quiles, 2016). That notwithstanding, a defamation action is more likely to be successful in instances of “morph” porn, which involves false images.

Copyright law

The possible reliefs under copyright law for non-consensual pornography are narrow at best. Generally, a person may bring an action for copyright claims where that person is the author, co-author, or joint author of the work in question (Copyright Act 690, s.1). Thus, where a revenge porn victim did not take the nude images or record the sex video either singularly or jointly with another, the victim has no remedy under copyright laws (Burris, 2014; Citron & Franks, 2014).

Revenge porn images and videos fall under artistic works and/or audio-visual works under the copyright laws of Ghana (Copyright Act 690, s.1 (1)). Artistic works include photographs “not comprised in an audio-visual film” (Copyright Act 690, s.76), meaning that a still image from a film is not a photograph and cannot be the subject matter of a copyright action. In this regard, a perpetrator who takes still nude images from an audio-visual work¹⁵ created by a revenge porn victim cannot be held liable under the copyright laws of Ghana.

Another downside of applying copyright laws to revenge porn is that it reduces gender-based violence to a battle of property rights. It shifts the focus from the gendered issues of cyber-violence to the ownership of images that victims are not proud of. Copyright law, in revenge porn matters, will undoubtedly be a good servant but a bad master. Its place should be supplementary at best (Citron & Franks, 2014; Levendowski, 2014).¹⁶

Family law

Revenge porn victims also stand the chance of bringing claims against perpetrators with whom they had or continue to have a domestic relationship.¹⁷ Section 1 of the Domestic Violence Act, 2007 (Act 732) criminalizes acts, or threats to commit acts, likely to result in physical abuse, emotional abuse, verbal abuse, or psychological abuse. Thus, where the threat of publicizing nude photos or sex videos is used as a basis for domestic violence, it is possible for the perpetrator to be found guilty of committing a criminal offense (Act 732 s. 3(2)). Protection orders may also be made against the perpetrator (Act 732, ss. 11–22).

Civil claims are available in addition to criminal actions. A finding of domestic violence can be made whether the act or threat of non-consensual pornography is a single act or repeated acts (Act 732, s. 5).

In February 2014, the Accra circuit court relied on the combined effect of sections 1 and 3 (2) of the Domestic Violence Act to sentence 21-year-old Henry Alibah to six months’ imprisonment for uploading nude photos of his ex-girlfriend

in a Facebook post that portrayed her as a prostitute. The post was a result of the victim ending the romantic relationship with the accused. The presiding judge, Ms. Ellen Vivian Amoah, found the accused guilty on the grounds of causing emotional, verbal, or psychological abuse under the Domestic Violence Act. Justice Amoah also relied on a number of foreign legal authorities from other Commonwealth jurisdictions and the United States of America in arriving at her decision. The heavy reliance on foreign authorities that have a persuasive effect in Ghanaian courts is a glaring sign of the inadequate Ghanaian authorities, both legislation and case law, relating to non-consensual pornography.

Clearly, there is limited protection for revenge porn victims under the existing Ghanaian legal framework and equally limited judicial intervention. So far, revenge porn liability has been shoehorned into existing laws by the Ghanaian courts where cases have been brought before them, but a lot of the details remain unaddressed. It is the responsibility of the state to “cultivate among all Ghanaians respect for fundamental human rights and freedoms and the dignity of the human person” (1992 constitution, Art. 35 (4)). To effectively discharge this constitutional responsibility in relation to victims of non-consensual pornography, the judiciary has a key role to play, failing comprehensive legislation. The nature and extent of this role is discussed in the next section.

The role of the court in addressing revenge porn

“The prophecies of what the courts will do in fact and nothing more pretentious are what I mean by the law.” This legendary quote by Oliver Wendell Holmes Jr.¹⁸ captures the role of the courts in addressing revenge porn. As a common law country, Ghanaian courts have a significant role to play in shaping the legal regime concerning revenge porn and related offenses both pre- and post-specific legislation.

In the absence of specific revenge porn laws, there is the need for a lot more judicial activism. The courts will have to extrapolate prohibitions of revenge porn and related offenses from the existing legal framework. For example, the courts will have to broadly and purposively interpret the constitutional right to privacy under Article 18 and the importation clause under Article 33 (5) of the 1992 constitution in order to offer some form of protection and assistance to revenge porn victims. The constitution is the supreme law of the land, and if applied appropriately by the courts, its provisions will serve as a great tool for dealing with issues of non-consensual pornography.

Additionally, the courts will have to work with the traditional criminal provisions on obscenity, indecency, and extortion to sanction revenge porn perpetrators. In construing these provisions, the courts under section 4 (1) of Act 29 are required not to do so strictly but to construe them amply and beneficially for giving effect to the purposes of the Act. In extremely challenging revenge porn cases where ample and beneficial construction of Act 29 would be impracticable, the courts may possibly use their judicial decisions as a conduit to alert parliament to the inadequacies of the existing law and the need for legislation on the subject.

It is believed that by the courts adding their voice in this way, parliament may eventually have its attention drawn once again to the urgent need for legislation and may act accordingly.

Laws are hardly sufficient on their own to cause change. Thus, once laws on revenge porn and related offenses are passed in the future, more activism from the bench will be necessary to facilitate the implementation of the law. The application of and interpretation given by the courts to the letter of the law will enhance clarity. It is also of utmost importance that decisions that are brought before the courts are delivered promptly. Swift delivery of judgment will not only help with closure for victims but will also add to the body of judicial precedent on the subject, which will lead to greater certainty and predictability of the law.

In performing their judicial functions, both pre- and post-specific legislation, the courts will have to be gender conscious. Due to the fact that the majority of revenge porn victims are female, it is essential that judges exercise sensitivity to the peculiar needs of the female gender. It is recommended that there should be awareness, education, and training of judges on gender-based stereotypes and attitudes. Regardless of the high standard of fairness that judges must adhere to, they are still part of society and have consciously or unconsciously imbibed certain gender-based attitudes from society's structure and cultural norms. Therefore, in order to overcome the influences of these overt and indirect gender-based stereotypes and attitudes that they may have taken in, creating awareness about these gender attitudes is important to ensure fair delivery and administration of justice. While the gender attitudes education and training should be for all judges, attention should be given to creating awareness for male judges as well as female judges who are not gender sensitive (Dawuni, 2016; Huhtanen & Halilović, 2014).

In pre-trial stages, for example, judges could consider asking victims about their fears and the basis for their fears, being mindful of the fact that some female victims may not be as expressive due to several factors, including the extent of trauma or fear and cultural barriers. Where there has been an application for bail, judges could notify victims of the bail application and the implications it may have for their safety if granted. They may also ask female victims about their opinion on the likelihood that the perpetrator would adhere to the release conditions. Rather than offering women protection in a paternalistic manner, these measures afford female victims an outlet to effectively engage with and build trust in the justice system while preparing them to confidently participate in the trial itself (UNODC, 2019).

Judges, by virtue of their position, have the ability to take measures to protect and ensure the safe engagement of female victims of revenge porn during trial by issuing protection orders as seen in the Domestic Violence Act against perpetrators. Again, immediate judicial orders requiring perpetrators and service providers to take down and desist from distributing revenge porn images or videos is relevant in protecting female victims and empowering them to fully cooperate with the justice system. The judicial orientation in matters of non-consensual pornography must be that of affirmative action—seeking to correct past and present discriminations and biases against women and girls. Doing so will bring about holistic justice.

As Ghana is a common law country, the courts should take advantage of the vast case law resources in other advanced common law jurisdictions in deciding revenge porn cases. Although foreign cases have only a persuasive effect, they have the potential of guiding the judiciary's decision-making process especially in an area such as non-consensual pornography, where the Ghanaian law is limited.

Also, preserving the anonymity of female victims in revenge porn cases throughout the trial process is essential. Judges can ensure this by making orders that will prohibit the media, for example, from publishing the names and other details that may expose the identity of victims in news reports on such cases while pending in court (UNODC, 2019). Female victims may also be allowed to use aliases throughout the trial. Such anonymity is important to encourage victims to develop trust in the formal justice system, and also goes a long way toward presenting the police and the courts to victims as a welcoming and safe platform for reporting their cases.

Furthermore, the courts should also allow a multi-jurisdictional approach to handling revenge porn cases, that is, there should be room for civil actions in addition to criminal ones. A hybrid approach by the courts is essential for the following reasons. Criminal actions serve as a deterrent by imposing stringent sanctions on perpetrators that stay on their record for life (Burris 2014; Citron & Franks, 2014). It sends a message that demands respect for the sexuality of persons, particularly women, and condemns objectifying them. Yet, it is not victim oriented. It focuses on the perpetrator to the detriment of the victim, who perhaps only needs an apology.

Civil actions, on the other hand, are more victim oriented¹⁹ and offer a wider range of remedies, yet these remedies are modest and do not serve as a deterrent to perpetrators, unlike criminal penalties. They also come at a high cost, which most victims cannot afford, because they may have lost their jobs as a result of the distribution of their explicit photos. Civil actions also rob victims of their anonymity, as they will have to pursue the case with their real names (Burris, 2014; Citron & Franks, 2014). Thus, a hybrid approach will better address the identified complexities of adjudicating revenge porn cases. The court would exercise its judicial discretion in determining which approach to use.

Where revenge porn cases are less aggravated, the courts could direct that such cases should be resolved through alternative dispute resolution mechanisms such as negotiation, mediation, and arbitration. In the absence of comprehensive legislation, determining which revenge porn cases are aggravated and which are not is a matter that would be largely left to the discretion of the judiciary. In Ghanaian law, however, the term "aggravated" and its terms of reference are not novel. In the Domestic Violence Act, for example, the term "aggravated" is used to describe offenses that are punishable by more than three years' imprisonment. On this basis, it can be deduced, for example, that revenge porn liabilities that could be premised on the offenses of obscenity and indecency under s. 278 of Act 29 could be classified as non-aggravated because they are punishable by not more than three years' imprisonment, while those premised on extortion under s. 151 of Act 29 could be classified as aggravated.

Judges should be guided by this existing standard to determine the level of aggravation of revenge porn cases. Also, the 1992 Constitution of Ghana provides guidelines for exercising discretionary powers, which include a duty to be fair and candid; avoidance of arbitrary, capricious, or biased exercise of discretionary power due to either resentment, prejudice, or dislike; and adherence to due process. It is believed that these constitutional guidelines will also check the adverse use of judicial discretion against victims.

Despite the significance of the court in tackling revenge porn, there is a fundamental limitation. The performance of the courts is dependent on persons submitting cases to it. There will be no cases to decide unless victims and/or prosecutors institute actions. For instance, in the case of the “kitchen stool” scandal, although the headmaster, Mr. Sepey, was eventually dismissed by the GES for breaching its Code of Professional Conduct, there is no record of a court action instituted against the distributors of the video. To offset this challenge, it is recommended that the courts liaise with both government institutions such as the police (particularly, the cyber-crime unit of the Criminal Investigation Department (CID)) as well as civil society organizations to ensure first, that cases are reported, and second, that those cases reported at these institutions and organizations find their way into the courtroom.

In less severe cases, court-connected settlements can be used. The judiciary, working together with the institutions mentioned, for example, could send out notices to the general public through various media outlets about their renewed commitment to take on reported revenge porn cases seriously, and handle them sensitively by guaranteeing anonymity, respecting privacy, waiving filing fees, and waiving other court fees on an as-needed basis. These assurances will go a long way toward persuading more victims to report their cases and pursue them through the court system. Engaging in such collaborations will ultimately enhance the courts’ role in addressing issues of non-consensual pornography.

Another challenge is that the few revenge porn cases that have found their way into the courtroom have been decided by lower courts, that is, circuit courts and district courts, which in Ghana are not courts of record. The implication is that the decisions made by these courts do not have an extensive reach and may often fade out with time. It is necessary that actions involving non-consensual pornography are filed at superior courts of records, particularly the High Court, as its decisions have a binding effect on lower courts and will remain in the judicial archives for posterity. The High Court is a court of general jurisdiction in both civil and criminal matters. It also has jurisdiction to enforce fundamental human rights and freedoms (1992 constitution, Art. 140: courts Act, s. 15). As a result, the High Court is a welcoming forum for filing revenge porn claims, be they criminal, civil, or constitutional. While in some cases, revenge porn claims may be filed at the district or circuit court due to territorial jurisdiction, it is submitted that the judicial service of Ghana should encourage prosecutors as well as litigants and their lawyers to file revenge porn cases at the High Court, which has original jurisdiction in all matters, or better still, frame their claims in terms of fundamental human rights, such as the right to privacy, since such cases can be filed at the High Court. Filing revenge porn cases in human rights terms could be set as a judicial

agenda for a period, say two years, with the sole aim of promoting and increasing the number of judicial decisions by courts of record regarding revenge porn.

Conclusion

Revenge porn constitutes a “disturbing niche of the vast and untamed world of amateur erotica” that has damaging and enduring consequences, especially for women and girls (Calvert, 2015, pp.676–677). That the scourge of revenge porn has finally caught the attention of the Ghanaian courts and parliament is a sign of hope that the crime will be addressed through judicial and legislative means. This chapter has made a case for revenge porn to be framed as gender-based violence, since women are the primary targets. The chapter has also highlighted the shortcomings of the existing laws in addressing revenge porn and the role of the Ghanaian courts in addressing revenge porn, which is critical, especially within the current limited legislative milieu. A cursory call for specific legislation was also made. Legislation is only a first step toward the fight against revenge porn. More importantly, effective law enforcement and support systems need to be in place and running in order to give life to the law. Otherwise, the law will only be protecting revenge porn victims in theory. The courts stand to play important roles both prior to specific laws being passed and after such laws are passed. Taking into account the measures outlined earlier, the courts can play a critical role in alleviating the malaise of revenge porn in Ghana.

Postscript

While the book was in press, Ghana passed the Cybersecurity Act 2020 (Act 1038) which contains some express provisions, in sections 67 and 68, on non-consensual pornography. The said provisions share in some of the limitations of existing laws discussed earlier including restraining revenge porn to distribution of intimate images with the intent to cause serious emotional distress only (excluding to the exclusion of entertainment intents or “morph porn” cases), and the absence of civil remedies. The chapter should therefore be read with this recent development in mind.

Notes

- 1 These authors define “sexting” as a portmanteau of “sex” and “texting,” which involves sending, receiving, or posting sexually explicit images or sexually suggestive messages via cell phone or other forms of electronic communication.
- 2 A kitchen stool is a portable wooden low bench usually used as a seat in the kitchen.
- 3 The video was on the young lady’s cell phone. Her brother saw it when he took the lady’s phone to transfer songs. Her brother’s friends then saw the video and leaked it.
- 4 Some scholars advocate for calling “revenge porn” “image-based sexual exploitation” or “image-based sexual abuse.” Arimoro (2015) explains that revenge porn can take

place both online (on the internet) and offline (by showing the hardcopy or electronic copy to another person).

- 5 In 2017, one Desmond Attipoe was arrested in Kumasi for engaging in edited portrayals of women following a report to the police by one of his female targets. In 2013, former President John Dramani Mahama fell victim to morph porn when Mr. Omari Wadie, a member of the New Patriotic Party, a political party then in opposition, posted a nude photo of a man having sex with a woman in an office edited to depict the former president as the man in the picture. Mr. Wadie admitted on Radio Gold on May 22, 2013 to posting the picture on Facebook but added that he was not the creator of the photograph.
- 6 Goudsmit (2017) explains that the term “non-consensual pornography” also has its flaws in that it waters down the distinct nature of “revenge porn,” eliminates “revenge,” and lumps it in with other forms of non-consensual pornography. Thus, all concepts under non-consensual pornography must be clearly defined so that they are distinguished from each other.
- 7 Gender refers to the roles assigned to men and women by the socio-cultural demands of society.
- 8 He was sentenced to six months’ imprisonment by the Accra circuit court in February 2014.
- 9 The two young men were charged with circulating obscene materials and abetment of crime.
- 10 In April 2014, a circuit court in Accra sentenced a 24-year-old laborer to 60 days’ imprisonment for posting nude pictures of his ex-girlfriend on Facebook. The circuit court indicated that the publication of the nude photos was a gross violation of the victim’s right to privacy and dignity. He was charged with causing emotional, verbal, and psychological abuse to the victim
- 11 This right allows a person to start afresh by wiping out any digital dirt or humiliating information. The right prevents others from associating a person with her past.
- 12 The offense is punishable by a minimum of 5 years’ and a maximum of 25 years’ imprisonment if the victim is not a child. The minimum sentence is seven years if the victim is a child.
- 13 See note 9.
- 14 The United States, New Zealand, and the Province of Ontario, Canada are some common law jurisdictions building on a tort of privacy. Under Australian law, a tort of privacy was introduced by the decision in *Jane Doe v. Australian Broadcasting Corporation* [2007] VCC 281.
- 15 An audio-visual work is “a work that consists of a series of related images which impart the impression of motion, with or without accompanying sounds, susceptible of being made visible, and where accompanied by sounds susceptible of being made audible.”
- 16 Conversely, Levendowski (2014) argues that copyright law provides all the desirable remedies revenge porn victims seek, such as takedowns, civil liability for perpetrators, and money damages. In short, copyright can combat revenge porn.
- 17 Section 2 of Act 732 defines domestic relationship broadly to include not only familial or marital relations but also other intimate or romantic ties as well as live-in house helps.
- 18 Oliver Wendell Holmes Jr. was an American jurist and former Associate Justice of the Supreme Court of the United States from 1902 to 1932.
- 19 Dunlap (2016) argues that in civil courts victims have much more control, since they appear for themselves and not as mere witnesses as is the case in criminal courts.

Laws and statutes

Constitution of the Republic of Ghana of 1992.

Copyright Act of 2005, Act 690.

Courts Act of 1993 (as amended), Act 459.
 Criminal Offences Act of 1960, Act 29.
 Criminal Offences (Amendment) Act of 2012, Act 849.
 Domestic Violence Act of 200, Act 732.

Cases

Jane Doe v. Australian Broadcasting Corporation [2007] VCC 281.
Wainwright v. Home Office (2003) UKHL 53.
Wilkinson v. Downton (1897) 2 QB 57.

Books

Bermingham, V., & Brennan, C. (2010). *Tort Law: Directions*. Oxford: Oxford University Press.
 Tamale, S. (2018) *When Hens Begin to Grow: Gender and Parliamentary Politics in Uganda*. New York: Routledge.
 United National Office on Drugs and Crime (2019). *Handbook for the Judiciary on Effective Criminal Justice Responses to Gender-based Violence against Women and Girls*. Vienna: English, Publishing and Library Section.

Articles, Monographs and Other Scholarly Works

Applegarth, P. (2009). The tort of privacy invasion in Australia after Jane Doe. Supreme Court of Queensland Library. Retrieved from <http://www5.austlii.edu.au/au/journals/QLdJSchol/2009/9.pdf>.
 Arimoro, A. (2015). Applying the law to tackle the menace of revenge porn in Nigeria: Lessons from the United Kingdom. *Journal of Humanities and Social Science*, 20, 75–80.
 Bates, S. (2015). "Stripped": An Analysis of Revenge Porn Victims' Lives after Victimization (Masters dissertation). Retrieved from http://summit.sfu.ca/system/files/iritems1/15668/etd9124_SBates.pdf
 Bloom, S. (2014). No vengeance for 'revenge porn' victims: Unraveling why this latest female-centric, intimate-partner offense is still legal, and why we should criminalize it. *Fordham Urban Law Journal*, 42, 233–289.
 Bott, S., Morrison, A., & Ellsberg, M. (2005). *Preventing and Responding to Gender-based Violence in Middle and Low-Income Countries: A Global Review and Analysis*. World Bank Policy Research Working Paper No. 3618. Retrieved from <https://ssrn.com/abstract=754927>.
 Burris, A. (2014). Hell hath no fury like a woman porned: Revenge porn and the need for a federal nonconsensual pornography statute. *Florida Law Review*, 66, 2325–2359.
 Calvert, C. (2015). Revenge porn and freedom of expression: Legislative pushback to an online weapon of emotional and reputational destruction. *Fordham Intellectual Property, Media and Entertainment Law Journal*, 24(3), 673–702.
 Chisala-Tempelhoff, S., & Kirya, M.T. (2016). Gender, law and revenge porn in Africa: A review of Malawi and Uganda. *Palgrave Communications*, 2, 1–9. <http://dx.doi.org/10.1057/palcomms.2016.69>
 Citron, D. K., & Franks, M. A. (2014). Criminalizing revenge porn. *Wake Forest Law Review*, 49, 345–391.

- Dawuni, J.J. (2016). To “mother” or not to “mother”: The representative roles of women judges in Ghana. *Journal of African Law*, 60(3), 419–440. Doi:10.1017/S0021855316000115.
- Dickson, A. (2016). “Revenge porn”: A victim-focused response. *UniSA Student Law Review*, 2, 42–69.
- Fiedler, L. (2014). Public shaming in the digital age: Are criminal laws the most effective means to regulate revenge porn? *Loyola of Los Angeles Entertainment Law Review*, 34(2), 155–192 <http://digitalcommons.lmu.edu/elr/vol34/iss2/2>.
- Franks, M.A. (2015). Drafting an effective “revenge porn” law: A guide for legislators. SSRN. Retrieved from <http://dx.doi.org/10.2139/ssrn.2468823>.
- Giliker, P. (2015). A common law tort of privacy? The challenges of developing a human rights tort. *Singapore Academy of Law Journal*, 27, 761–788.
- Goudsmit, M. (2017). *Revenge pornography: A conceptual analysis: Undressing a crime of disclosure* (Master’s dissertation). Retrieved from https://openaccess.leidenuniv.nl/bitstream/handle/1887/47472/20170127%20MG%20Revenge%20pornography%20a%20conceptual%20analysis_Redacted.pdf?sequence=4.
- Holmes, O.W. (1897). The path of the law. *Harvard Law Review*, 10, 457.
- Huhtanen, H., & Halilović, M. (2014). Gender stereotypes and attitudes within the judiciary of Bosnia and Herzegovina: A case for increased awareness and education. *International Journal of the Legal Profession*, 21(3), 319–331. doi: 10.1080/09695958.2015.1047841
- Kirchengast, T. (2016). The limits of criminal law and justice: ‘Revenge porn’ criminalisation, hybrid responses and the ideal victim. *UniSA Law Review*, 2, 96–101.
- Kitchen, A.N. (2015). The need to criminalize revenge porn: How a law protecting victims can avoid running afoul of the first amendment. *Chicago-Kent Law Review*, 90, 247–299. <http://scholarship.kentlaw.iit.edu/cklawreview/vol90/iss1/11>.
- Levendowski, A. (2014). Using copyright to combat revenge porn. *New York University Journal of Intellectual Property and Entertainment Law*, 3, 422–446.
- Martinez, C. (2014). An argument for states to outlaw ‘revenge porn’ and for congress to amend 47 U.S.C. 230: How our current laws do little to protect victims. *Journal of Technology Law and Policy*, 14, 236–252.
- Ngo, F., Jaishankar, K., & Agustina, J.R. (2017). Sexting: Current research gaps and legislative issues. *International Journal of Cyber Criminology*, 11, 161–168.
- Poole, E. (2014). Fighting back against non-consensual pornography. *University of San Francisco Law Review*, 49, 181–214.
- Quiles, A. (2016). *Revenge porn* (Dissertation) Retrieved from, http://scholarship.shu.edu/student_scholarship/832
- Scheller, S.H. (2015). A picture is worth a thousand words: The legal implications of revenge porn. *North Carolina Law Review*, 93, 551–595.
- United Nations (1993). *Declaration on the Elimination of Violence Against Women*. New York: United Nations Department of Public Information.

Internet sources

- 10 facts about the headmaster and student: ‘Kitchen stool’ sex scandal. (2018). *My Newsgh*. Retrieved from <https://mynewsgh.com/10-facts-about-the-headmaster-and-student-kitchen-stool-sex-scandal/>
- Dunlap, B. (2016). 3 ways revenge porn is already illegal. *Rolling Stone*. Retrieved from <https://www.rollingstone.com/culture/culture-news/3-ways-revenge-porn-is-already-illegal-113689/>

- Entamoty media to launch campaign against revenge porn in Ghana. (2017). *News Ghana*. Retrieved from <https://www.newsghana.com.gh/entamoty-media-to-launch-campaign-against-revenge-porn-in-ghana/>
- GES begins probe into viral 'kitchen stool sex tape'. (2018). *My Joy Online*. Retrieved from <https://www.myjoyonline.com/news/2018/january-24th/ges-begins-probe-into-viral-kitchen-stool-sex-tape.php>
- Man jailed for posting ex-girlfriend's nude photos on Facebook. (2014). *My Joy Online*. Retrieved from <https://www.myjoyonline.com/news/2014/April-12th/man-jailed-for-posting-ex-girlfriends-nude-photos-on-facebook.php>
- Man jailed for posting ex-girlfriend's nude pictures. (2014). *Citifmonline*. Retrieved from citifmonline.com/2014/02/18/man-jailed-for-posting-ex-girlfriends-nude-pictures
- Mensah, M., & Donkor, B. (2017). Police arrest 3 teenagers involved in gang-rape. *Graphic Online*. Retrieved from <https://www.graphic.com.gh/news/general-news/police-confirm-arrest-of-3-members-of-gang-rapists.html>
- Nude picture scammer busted. (2017). *My Joy Online*. Retrieved from <http://m.myjoyonline.com/marticles/news/nude-picture-scammer-busted>
- Parliament to ban nudes, revenge porn and secret recordings. (2018). *GhanaWeb*. Retrieved from <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Parliament-to-ban-nudes-revenge-porn-and-secret-recordings-622883>
- Pastor's wife who sent her nudes on church Whatsapp platform attempts suicide. (2018). *Ghanaweb*. Retrieved from <https://mobile.ghanaweb.com/GhanaHomePage/NewsArchive/Pastor-s-wife-who-sent-her-nudes-on-Church-WhatsApp-platform-attempts-suicide-621960>
- Rackley, E., & McGlynn, C. (2018). 'Upskirting' and 'revenge porn': The need for a comprehensive law. *The Conversation*. Retrieved from <https://theconversation.com/upskirting-and-revenge-porn-the-need-for-a-comprehensive-law-98403>
- The intersection of communication and law: Revisiting *Wadie v. The Republic of Ghana* through the lens of American jurisprudence. (2014). *GhanaWeb*. Retrieved from <https://mobile.ghanaweb.com/GhanaHomePage/NewsArchive/The-Intersection-of-Communication-and-Law-299329>
- Two arrested for circulating nude photos of SHS graduate. (2017). *My Joy Online*. Retrieved from <https://www.myjoyonline.com/news/2017/april-26th/two-arrested-for-circulating-nude-photos-of-shs-graduate.php>

Other sources

- Parliament of Ghana. (2018). Parliamentary debates: Official report. Retrieved from <https://www.parliament.gh/epanel/docs/pb/1%20Feb%20%202018.pdf#viewer.action=download>