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Gender, law and revenge porn in Sub-Saharan Africa: a review of Malawi and Uganda

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ABSTRACT The spread of information and communication technologies (ICT) in Sub-Saharan Africa has provided a new arena for gender-based violence (GBV). Unfortunately, the growth of ICT has out-paced legal developments to regulate it. In this article we explore the legal responses to the phenomenon of nonconsensual pornography—more commonly known as revenge porn—in the global south. We use case studies from Malawi and Uganda to illustrate the incidence of revenge pornography in a non-western context and to discuss the (in)adequacy of the legal regimes to deal with this new form of GBV. At the time of writing neither country has laws dealing specifically with revenge pornography, although both Malawi and Uganda have anti-pornography or anti-obscenity provisions in the law. The question that arises is whether such existing laws are adequate to combat incidences of revenge porn/nonconsensual pornography. We suggest that revenge porn, and indeed other forms of “cyber violence” against women, require specific legislation or a nuanced interpretation of existing laws to curb their incidence rates and to ensure redress for victims. This is an imperative subject and requires lawmakers to grapple with emerging issues of internet freedoms and the possible role that the law can play in regulating cyberspace in a way that protects the rights of women, freedom of expression but also the privacy rights of all. This article is published as part of a collection on gender studies.

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Introduction

The connection between technology and people's personal lives has increased the number of moments recorded for posterity (Bolton, 2014). However, while there is widespread cultural acceptance and even endorsement of digital intimacy, paradoxically there is equally widespread scorn and disdain for those unfortunate individuals whose sexually explicit images end up splashed across the web or the tabloids (Burris, 2014). This article explores the legal responses to the phenomenon of revenge pornography in the global south. The authors use case studies from Malawi and Uganda to illustrate the incidence of revenge porn in a non-western context; and to discuss the (in)adequacy of the legal regimes to deal with this new form of gender-based violence (GBV). At the time of writing neither country had laws dealing specifically with revenge porn, although both Malawi and Uganda have anti-pornography or anti-obscenity provisions in the law. The question that arises is whether such existing laws are adequate to combat incidences of revenge porn/ nonconsensual pornography.

Digital intimacy is commonplace, particularly in this age of the smartphone and the multiplicity of avenues that exist for digital sharing. This article looks at current definitions of the phenomenon in an effort to clarify why this is an issue and why it matters, and furthermore to point out that the current legal framework in Malawi and Uganda are ill-equipped and unwilling to provide legal sanctions for revenge porn. Harmful digital behaviours, such as revenge porn, are often framed as a problem of user naiveté rather than GBV. Meanwhile, new technologies are used to facilitate or perpetrate sexual violence or harassment against women (Henry and Powell, 2014). Thus, the issue of criminalising nonconsensual pornography, commonly referred to as "revenge porn", is increasingly pertinent across Sub-Saharan Africa. Much has been written about revenge porn from the perspective of and with reference to its incidence in the so-called global north. This article represents the perspective from and about the global south in an effort to spark meaningful discussion about gender, law and society in two African countries. The key point that this article is intended to impart is that existing legal provisions are not being utilized and may not be adequate to combat revenge porn. Furthermore, this is an issue of women's rights and GBV. If clearly recognized as such this could potentially create a platform to tackle the problem and unlock the legislative and constitutional protections that are available, perhaps even open the door for the promulgation of revenge-porn specific provisions.

The article sets out a working definition of revenge porn and offers a brief analysis of the gendered impact of revenge porn. The authors acknowledge that revenge porn affects both men and women, however women are disproportionately affected. This is largely because of the patriarchal norms that govern sexual behaviour and activity in Africa and indeed much of the world. Some would argue that both men and women are vulnerable to unwelcome privacy invasions in cyberspace. However, as Allen points out, women in cyberspace do not enjoy the same level and types of desirable privacy that men do: "women face special privacy problems in cyberspace because there, too, they are perceived as inferiors, ancillaries, and safe targets and held more accountable for their private conduct" (Allen, 1999–2000). While revenge porn affects both male and female individuals, evidence to date indicates that the majority of victims are female, and that female victims often face more serious consequences as a result of victimisation. Nonconsensual pornography—like domestic violence, rape and sexual harassment—thus disproportionately harms women and girls and undermines gender equality (Cyber Civil Rights Initiative, 2015). The article goes on to provide an outline of the legal framework in Malawi and Uganda indicating

that the laws in both countries are ineffectual to address the problem. The authors determine that revenge porn, and indeed other forms of "cyber violence" against women, require specific legislation or a nuanced interpretation of existing laws to curb the incidence of revenge porn and to ensure redress for victims. The harmful and lasting effect that revenge porn has on the lives of affected individuals demand a swift and specific response to counter this growing scourge.

Defining "revenge porn"

According to Burris, at its core nonconsensual pornography is involuntary pornography—the primary issue being the lack of consent: someone publically distributes sexually graphic images or video of an adult without their consent (Burris, 2014). Franks provides a succinct definition of revenge porn in her guide for legislators, simply stating that "nonconsensual pornography refers to sexually explicit images disclosed without consent and for no legitimate purpose", (Franks, 2014). So called "revenge porn" occurs when adult sexual partners distribute sexually explicit images that were initially shared with the expectation that they would remain private. Nonconsensual pornography is frequently a form of domestic violence, as abusers threaten to expose intimate pictures to prevent a partner from exiting a relationship, reporting abuse, or obtaining custody of children. It is also a tool of sex traffickers, who use compromising images to trap unwilling individuals in the sex trade, as well as rapists who record images of sexual assaults to further humiliate victims and to discourage them from reporting the crime. (Cyber Civil Rights Initiative, 2015).

The majority reaction to revenge porn is slut-shaming,¹ blaming the victim (whose nakedness is now widely known) for their participation, in an act that occurred within the context of (what she/he most likely thought to be) a trusting relationship. Often the images were published with neither the knowledge nor the consent of the individual shown. Suddenly they become an internet sensation of scandalous notoriety. Online search engines will immediately pull up images of their most private self. Furthermore, once an image is uploaded onto the internet, it is virtually impossible to remove; the images are easily copied and saved by third parties, only to be shared again once the original has been removed (Matsui, 2015). Including identifying information within the search terms ensures that internet searches of the victim's name will produce the image, which increases the chances that the victim's employers, friends, and family will also be exposed to the humiliation (Burris, 2014). Overall, it is a violation of privacy that is practically impossible to rectify.

In this article, the authors have adopted the term nonconsensual pornography to describe the incidence of so-called revenge porn. Mary Franks explains how the term "revenge porn" is misleading: first, perpetrators are not always motivated by revenge, many acting out of a desire for profit, notoriety or entertainment; and second, it implies that taking a naked picture of oneself or allowing someone else to do so is a pornographic act. Creating an explicit image in the expectation that it is being shared within a private intimate relationship is NOT creating pornography; however, the act of disclosing that private sexually explicit image to someone other than the intended audience is! This action can accurately be described as pornographic as it transforms a private moment into public sexual entertainment: hence the use of the term "nonconsensual pornography" (Franks, 2014).

The gendered impact of nonconsensual pornography

Nonconsensual pornography is symptomatic of the prevalence and persistence of patriarchy in which female chastity is valued.

Women who are perceived as deviating from this norm, for example, by “allowing” themselves to be photographed naked, are derided and chastised in the court of public opinion. Malawian and Ugandan laws are unsympathetic to victims of nonconsensual pornography, particularly where they consented to the production of the sexually explicit media. Nishant Shah succinctly describes the ways in which victims of nonconsensual pornography become “sluts” and are shamed for their involvement in these digital forms of sexual expression:

Those identified as “victims” of revenge pornography are sluts, not because they are necessarily engaged in slutty practices. In fact, most of them are defined as “good” women engaged in intimate activities with men whom they trust. They become “slutty” as their images migrate and reproduce by the perpetual memory machine of the Web. The lack of agency, however, is not in the women’s relationship with the images but with the ways in which these images are read. Women in these videos are identified as “sluts” and subsequently shamed. In the interventions that emerge, these women are only portrayed as victims of nonconsensual pornography, denying them agency in their sexual practices and precluding them from negotiating with these images. In this double denial of agency, these “sluts” are then shamed for putting themselves in situations which make them precarious and subject to technologies of sharing and distribution beyond our control (Shah, 2015).

Strict anti-pornography provisions can be used to fuel gender discrimination, particularly where the laws do not take into account the circumstances under which the sexually explicit images are produced and distributed (including situations such as forced prostitution where women have little or no say in the production and usage of images of their bodies).

In Malawi and Uganda, nonconsensual pornography has yet to be widely recognized and/or acknowledged as a gendered issue. Consequently, it remains below the radar of most activists and prominent gender advocates. Globally however, there is growing recognition that digital technology such as email, the internet and mobile phone technologies are being used as a tool to harass, intimidate, humiliate, coerce and blackmail women (Henry and Powell, 2014). High levels of GBV offline in both Malawi and Uganda crossover to cyberspace (World Wide Web Foundation, 2015).² Malawian and Ugandan women access and use information and communication technologies (ICTs) less than men, curtailing their opportunities of empowerment through these technologies. However, accessing ICTs is only the first step: once connected, Ugandan women also face all kinds of difficulties and threats. Cyberspace can be a women-unfriendly environment enabling GBV such as nonconsensual pornography. The online and offline environments are fundamentally intertwined, gender-based power structures have real-world implications regardless of platform.

Private, intimate and explicit images involuntarily published on social media can cause severe and lasting damage to a person’s reputation, jeopardizing relationships, employment and well-being—oftentimes the victims of nonconsensual pornography are identified by name and even details of their locations and places of work/education are published. Burriss (2014) notes that the affected individuals can readily be “classified” as victims because of the stigmatization, the harassment, the violence and the extreme loss of privacy that follows the publication of their sexually explicit images. However, women in Malawi and Uganda who are victims of nonconsensual pornography are vilified rather than offered sympathy or justice. This is because one of patriarchy’s tools for the creation and maintenance of gender

hierarchy in African societies is the enshrouding of sexuality in secrecy and taboos (Tamale, 2007). Women whose intimate images are published transgress this taboo, and norms dictate that this is at their own peril. Thus the only law in Uganda that explicitly addresses nonconsensual pornography, seeks to punish rather than provide redress for victims.

Interestingly, our Ugandan case study illustrates an instance when the female “victim” exercised agency over the images released and shifted the public narrative of the nonconsensual pornography. Uganda’s case study will show how local pop star LD was able to use nonconsensual pornography published to humiliate her to enhance her publicity and her music career. LD’s case is far from the norm, she was able to access and manipulate the social capital afforded to her by stardom and the notoriety that comes with a life lived in the public eye. In the Malawian case study both the woman and the man whose images were nonconsensually released were affected by the scandal—further illustrating that both men and women can be affected.

Case studies

Malawi. In July 2008, the police in Malawi arrested two people for allegedly acting in and distributing pornographic material. The two individuals, the man a chief executive officer and banker (GN) and the woman (TM) an auditor at a multinational firm, were arrested following the widespread online distribution of their sexually explicit pictures and video clips. Street vendors were even selling the sex-tapes of their adulterous transgression on the streets. They did not send the images out themselves, GN had recorded his sexual interactions with several women besides TM, and all this sexually explicit content was on his computer. The computer developed a fault and was handed over to an IT specialist who found the video clips and images and sent them out. What followed was the first “viral” nonconsensual pornography situation in Malawi. The images were forwarded to everyone with an email address, and the two prominent faces featured in the images were arrested. GN and TM were likely charged under the obscenity provisions of section 179 of the Malawian Penal Code which criminalizes obscene matters or things. Section (1)(a) thereof specifically details an offence committed by any person who—

makes, produces or has in his possession any one or more *obscene* writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, photographic negatives or prints, cinematograph films, gramophone records or other contrivances for the reproduction of sound or any other *obscene objects* or any other *objects tending to corrupt morals*;

Such an individual, if convicted, is liable to a fine and to imprisonment for two years. These obscenity provisions rendered illegal the (consensual) sexual expression and (by focusing on the “obscene”) rendered invisible the nonconsensual publication and distribution of the images and films; an act that the parties themselves neither consented to, nor participated in. Instead the media coverage and public discussion was largely about the extra-marital affair, the perceived promiscuity, and (particularly her) behavioural impropriety.

TM left the country after the ordeal, a self-imposed exile; Meanwhile, GN’s surname has become the vernacular (Chicheŵa) slang word for pornography. They were arrested, their careers were jeopardized (both were fired following the publication of the images and videos), as were their marriages, family trust; and the respect of their communities, as well as the entire country. Even now, 8 years later, if you Google their names the first hits are images of the two barely dressed and smiling into

the camera.³ They were two consenting adults who used digital technology as a part of their romantic liaison, there was no element of revenge or desire for notoriety involved in the publication of their pictures and films, just a disgraceful and disturbing breach of privacy.

This first and perhaps most prominent case in Malawi was certainly not the last. There have been many such incidences where sexually explicit images and/or videos of individuals are published online. Often the content is accompanied by personal details of the individuals—names, occupations and locations. The damage caused by nonconsensual pornography is immense and (often) indelible: With their names and employment details often being released alongside their sexually explicit images, the victims suffer an unalterable loss of privacy—their families, friends and communities are also deeply affected by the indiscriminate publicizing of their intimate images. So far there haven't been any criminal charges (let alone convictions); nor any real repercussions for perpetrators. In its place, the public largely scorns and shames the female victims, women whose lives are already irreparably changed.

What follows is a general review of the current laws and policies that may potentially apply to nonconsensual pornography, specifically to explore what (if any) victim protections exist in the current legal system. The current and democratic Constitution of Malawi (1994) contains extensive protections for privacy, dignity, and the rights of women. Malawi is also signatory to many international human rights treaties that protect the rights of women and require states parties to strive for gender equality. Of particular relevance are the obligations under the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and its African equivalent, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, better known as the Maputo Protocol. The rights and freedoms enshrined in the Bill of Rights are all fully justiciable, but if the laws are not in place to operationalize them, it falls upon the victim to place herself at the mercy of the legal system so as to claim these lofty protections. If the victim was herself arrested (as was the case for TM) should she then bear the onus of trusting the same system that treated her as the villain and not the victim she was (indeed they both were)? In addition, any form of court action is usually expensive, time-consuming and would almost certainly serve to draw even wider public attention to the nonconsensual pornography—all of these are significant obstacles to accessing justice.

There are instances where nonconsensual pornography is used as a form of intimate partner violence, in which case a victim might look to the 2010 Prevention of Domestic Violence Act for protection. The law defines "domestic violence" as any criminal offence arising out of physical, sexual, emotional or psychological, social, economic or financial abuse committed by a person against another person *within a domestic relationship*. The victim can potentially apply for a protection order against the individual who published the sexually explicit images—BUT once shared or posted or uploaded such images are almost impossible to remove. How would a protection order solve this? The Act is not sensitive to nonconsensual pornography as a means of violence and accordingly there is nothing in the provisions that would adequately meet the peculiarities of electronic GBV. Sadly the victim bears the burden of showing that the non-consensual pornography was part of a pattern of conduct directed at the victim with intent to distress or harm—the Act defines emotional or psychological abuse as a *pattern* of behaviour of any kind, the purpose of which is to undermine the emotional or mental well-being of a person. Furthermore, the Prevention of Domestic Violence Act does not apply to those perpetrators who are not in

any domestic relationship with the victim and are motivated by a desire for money or notoriety rather than revenge.

Censorship laws enacted under Malawi's first post-colonial leader Dr Hastings Kamuzu Banda (whose presidency spanned 30 years: 1964–1994) focused on prohibiting the import of undesirable publications, pictures, statues and records. Section 23(2)(a) of the 1968 Censorship and Control of Entertainments Act, defines a publication as "undesirable" if it or any part thereof is indecent or obscene or is offensive or harmful to public morals. The proffered rationale for the strict censorship was to protect the national culture from pollution by immorality. The law was enacted to isolate the citizenry from "undesirable" external influences. The provisions of the censorship legislation provide little comfort to victims and similarly fail to stipulate repercussions for a perpetrator. The power created under this Banda era law is that of control over citizens' access to information, particularly information from abroad. In today's democratic, globalized and connected Malawi these objectives have long lost their relevance and are certainly not applicable to instances of nonconsensual pornography—most likely created using a mobile phone and thereafter shared across the country and the world with a simple swipe of a touchscreen. There is nothing contained in the Act that would help a victim.

There is the 1998 Communications Act which was enacted to regulate communication services in Malawi—telecommunications, posts and broadcasting. The law contains a code of conduct for licenced broadcasters (radio, television—any service consisting of the diffusion of sound or television programmes for general reception by the public). The code and the duties that flow thereunder are based on the individual's right to be informed and to freely receive and disseminate opinions (section 1 of the Third Schedule: Code of Conduct for Broadcasting Services.). The code outlines the obligations of broadcasters not to broadcast any material which is *indecent or obscene or offensive to public morals* and furthermore to exercise due care and sensitivity in the presentation of material, which depicts or relates to obscenity (Section 2 of the Code). Lastly, the Code requires that broadcasters respect the privacy of individuals. Broadcasters are charged with exercising "exceptional care and consideration in matters involving the private lives and private concerns of individuals, but may however bear in mind that the right to privacy may be overridden by a legitimate public interest". The authors contend that nonconsensual pornography does not represent any legitimate public interest and that licenced broadcasters in Malawi would violate the legislative code of conduct in instances where they publish nonconsensual pornography. "Since the publication of a revenge porn image is not likely to advance any public interest, however, it is highly unlikely that freedom of expression will justify publication in most cases" (Matsui, 2015). However, as long as the general public does not see nonconsensual pornography as harmful wrongdoing, then it is unlikely that the broadcaster involved would be called upon to answer for violations of the code—unless the victim motivated for such an action. Thus placing the burden of accessing justice upon the very person that most needs the protection of the law.

Recognizing the limitations of the current laws and policies, the statutory regulatory body MACRA (the Malawi Communications Regulatory Authority) has spearheaded the promulgation of the Electronic Transactions Bill also referred to as the "e-legislation" that would deal with issues of cybersecurity, cybercrimes and other electronic transactions. If enacted, the law would protect the individual right to privacy with respect to the processing of data and ensures that personal data is only processed in accordance with the legal requirements (MACRA—Malawi Communications Regulatory Authority, 2014). One of the specified objectives of the

law is to “address ethical issues in the use of information and communication technology in order to protect the rights of children and the under-privileged” (Section 3(a)(ii)); and furthermore, to “ensure that information and communication technology users are protected from undesirable impacts of information and communication technology, including the spread of pornographic material” (Section 3(b)).

In the Electronic Transactions Bill, pornography is defined as “material that visually depicts images of a person engaged in sexually suggestive or explicit conduct” (Section 2). This definition potentially limits the right to freedom of expression (Section 35 of the Constitution of Malawi)—a right that arguably includes the freedom of sexual expression; particularly where the material is produced in the context of a consenting adult sexual encounter. The criminalization of pornography would also be applicable to children or young persons involved in the commonplace practice of sexting. Charmain Badenhorst explains how “sexting—‘texting’ and ‘sex’—involves the sending of nude or semi-nude photos or videos and/or sexually suggestive messages via mobile phone texting or instant messaging” (Badenhorst, 2011: 2). She goes on to point out that the sexually explicit texts or sexually explicit images of minors are sent to other minors, and that these images may in some instances be classified as child pornography. The e-legislation has yet to be passed. However, under the pornography provisions of the current Child Care, Protection and Justice Act of 2010, sexting teenagers (below the age of 16) could be considered victims of sexual abuse or even declared “children in need of care and protection” a status that activates the state’s protective machinery and could lead to the removal of said child from the family home.⁴

The Bill establishes a takedown notification process which would possibly enable victims to ask service providers to have their pictures and/or explicit videos removed. However, despite this provision, the somewhat promising objectives and a few other provisions of the Bill, it does not offer any practical protections for victims of nonconsensual pornography. Rather, the definition of pornography and the prohibitions (against pornography in electronic form) that the Bill places upon the possession, production, reproduction, distribution and/or transmission broadly criminalize *all* forms of electronic sexual expression. The provisions referred to above appear under section 88, which deals with the “prohibition of child pornography in electronic form”; however, the word “child” is omitted in several subsections, including those that criminalize the production of pornographic material for the purpose of distribution (and similar offences).

The e-legislation, in its current form, would create criminals out of both the perpetrators *and* the victims of nonconsensual pornography, as well as out of all the consenting adults who capture “sexy” images or videos as a part of their sexual relationship. “Shaming people for engaging in consensual, adult sexual activity has no legal, moral, or logical basis” (Cyber Civil Rights Initiative, 2015). If convicted under the Bill the victims, the perpetrators, and all those who possess/produced/reproduced/distributed would face a fine *and* a 15 year jail sentence (Section 88). This broad criminalization is reminiscent of Kamuzu Banda’s preoccupation with controlling sexuality and morals and flies in the face of the freedoms that the democratic Constitution protects—in particular the rights of women.

Over the past decade a gender-related law reform process has resulted in a distinctive set of gender justice laws.⁵ The most specific of these is the 2012 Gender Equality Act (the GEA). The GEA represents a concerted effort to promote gender equality in Malawi; to meet constitutional and international obligations to enact (and effectively implement) laws that remove

discriminatory practices; and, to fill perceived gaps in the legal protections available. This specificity is clear right from the stipulated aim of the GEA, which is to “promote gender equality, equal integration, influence, empowerment, dignity and opportunities for men and women in all functions of society, to prohibit and provide redress for sex discrimination, harmful practices and sexual harassment”. The provisions target existing and ongoing gender equality challenges that Malawi faces. Achieving gender equality is a strong founding principle of the democratic Malawi—one that is enshrined in the Constitution and is further captured by international commitments; Malawi is a state party to key regional and international human rights instruments (in particular the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa and the Convention on the Elimination of all Forms of Discrimination Against Women) that are committed to addressing and correcting the lack of gender equality. The GEA expressly prohibits *harmful practices* (Section 5) which are defined as any: “social, cultural or religious practice which on account of sex, gender or marital status, does or is likely to undermine the dignity, health or liberty of any person; or, result in physical, sexual, emotional, or psychological harm to any person”. Contravention of this prohibition is an offence, punishable by a fine and to a term of imprisonment for 5 years. The prohibition of harmful practices was mainly promulgated to criminalize harmful traditional/cultural practices—for instance female genital mutilation.⁶ Nevertheless, the provision offers a glimmer of hope to victims of nonconsensual pornography. The GEA applies to all persons and to all matters, binding even the Government to comply with its provisions. The Act, if properly enforced, would establish gender equity for all Malawians and provide protection and redress for victims of nonconsensual pornography.

Uganda. The prevalence and perniciousness of technology related violence against women was highlighted when a female pop singer, LD, became a victim (Onyango, 2014). Lewd photographs and a sex tape were published on social media by her former lover. In the furore that followed the publication of the images and footage there were calls from some religious leaders to have her arrested and prosecuted (Mubajje, 2014). She was vilified and denigrated and the images were viewed and shared. Eventually LD published an apology on her Facebook page in which she apologised to her mother, her daughter, her fans and the Ugandan public at large stating that she regretted her folly in agreeing to being photographed or filmed in a state of undress (Ouga, 2014). The scandal came to the attention of then Minister for Ethics and Integrity, whose response obscured key legal issues such as the violation of LD’s right to privacy and that she had never consented to the publication of the images. It was announced by the Minister that the State was considering instituting criminal charges against LD under the Anti-Pornography Act (Anonymous, 2014). LD was not subsequently charged with any criminal offence. Perhaps the publicity generated by her contriteness and apology helped to turn public sympathy in her favour. “The Ugandan public is very forgiving”, observed one commentator (Onyango, 2014), “especially towards one who apologises and makes a public show of contrition”. There was intense speculation about whether this was the end of her music career. However, LD is now more popular than she was before the scandal. This illustrates the contradictions inherent in the patriarchal regulation of female sexuality, where women in show business can and do exploit their sexuality for commercial gain and may simultaneously be vilified for public displays of their sexuality.

LD's case highlighted the challenges of regulating ICT in Uganda, especially when it presents a new arena for the perpetuation of GBV. A key public contention was whether she was a victim or a culprit: did she deserve sympathy and justice or shame and punishment? The juxtaposition of these issues is illustrative of the regulatory gaps on nonconsensual pornography in Uganda. Given the prevalence and legitimization of GBV in Uganda, what options for redress are available to victims of nonconsensual pornography? There is a need for nonconsensual pornography to be articulated and conceptualized as a form of GBV. In LD's scenario, she was widely regarded as deserving of punishment, while there was negligible public outcry about her lover. LD was blamed for allowing herself to be photographed, but also for dating a "foreigner".⁷ The Uganda Women's Movement was conspicuously silent in coming to her defence. This could have been due to LD's pop-star celebrity status; indeed, in spite of the initial negative reaction, she rode the wave of (negative) publicity and eventually emerged on the other side of the scandal with her pop-star and diva image probably stronger than it was before. But what about women who are neither pop stars, nor celebrities, such as TM in the Malawi case study above? Is any real redress available to them?

Uganda ratified the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), and has a duty to protect and ensure redress for women victims of violence. Furthermore, the Constitution of Uganda guarantees the rights of women: Principle XV of the Directive Principles and National Objectives of State Policy emphasizes that the State shall recognize the significant role that women play in society. Article 21 enshrines the principle of equality under the law and prohibits discrimination based on sex. Crucially, Article 33 makes special provision for the rights of women:

Women shall be accorded full and equal dignity of the person with men. The State shall provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realize their full potential and advancement.

The State shall protect women and their rights, taking into account their unique status and natural maternal functions in society.

Women shall have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities.

Without prejudice to article 32 of this Constitution, women shall have the right to affirmative action for the purpose of redressing the imbalances created by history, tradition or custom.

Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this Constitution.

Article 33 of the Constitution was celebrated as a key milestone in the realization of women's rights in Uganda. It is indeed a progressive provision that enjoins the State and society at large to respect the status and dignity of women, and it is wide enough in its ambit to encompass the criminalization of revenge porn, which has a deleterious effect on women. A number of policies such as National Action Plan on Women, the Gender Policy, and the National Action Plan on Sexual and GBV have provisions promoting women's equality and aimed at reducing GBV. Yet the laws and policies amounted to mere rhetoric made clear by the prevalence of gender-discriminatory norms and attitudes throughout the country.

The Anti-Pornography Act of Uganda is currently the only law, which directly addresses nonconsensual pornography, although its intent is to punish those whose images are published, not to

enable them to access justice if they had not consented to such publication. Pornography is defined in Section 2 as:

any representation through publication, exhibition, cinematography, indecent show, information technology or whatever means, of a person engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a person for primarily sexual excitement.

Section 13 provides,

A person shall not produce, traffic in, publish, broadcast, procure, import, export, sell, or abet any form of pornography.

Upon conviction a person who commits the offence is liable to a fine, imprisonment of up to 10 years or both. Commentators have decried the discriminatory effect of the Anti-Pornography Act on women's rights in Uganda. Especially when, in the immediate aftermath of the passing of the law, women wearing short skirts were stripped and humiliated by youth mobs in the centre of Uganda's capital, Kampala. (Oloka-Onyango, 2014). The Act legitimizes abuses against women and provides a legal cover for the perpetuation of patriarchal ideals about female modesty. (Amnesty International, 2014). The Act was nicknamed the "Mini-Skirt Law", a name attributed to the vagueness of the provisions criminalising "any representation of the sexual parts of a person for primarily sexual excitement". This law that was ostensibly passed to protect women's rights, instead fuelled the sexual objectification and degrading of women's bodies (Tamale, 2015).

Another legal provision that is relevant to nonconsensual pornography in Uganda is section 148 of the Penal Code Act on Indecent practices which stipulates that:

any person who, whether in public or in private, commits any act of *gross indecency* with another person or procures another person to commit any act of gross indecency with him or her or attempts to procure the commission of any such act by any person with himself or herself or with another person, whether in public or in private, commits an offence and is liable to imprisonment for seven years.

The above provisions have the potential to further victimize persons whose images were publicized without their consent. That the criminal justice system can be used to penalize victims as opposed to enabling them to access justice is symptomatic of entrenched gender discrimination. As Salter observes:

... gendered biases ... are evident not only in the perpetration of revenge porn but also in the criminal justice (non)response to victims. Female social status has historically been closely tied to chastity and modesty and women are particularly vulnerable to humiliation when their "private" sexual life is made "public". In revenge porn, male offenders seek to instrumentalise double standards in sexual mores to punish an ex-partner for leaving them. However, these double standards are also evident in the lacklustre response to victim reports (Salter, 2013).

The adequacy of current formulations of gender-based and intimate partner violence in Uganda's legal system in addressing nonconsensual pornography is debateable. Section 2 of the Domestic Violence Act of 2010 defines domestic violence as,

Any act or omission of a perpetrator which

- (a) harms, injures or endangers the health, safety, life, limb, or well-being, whether mental or physical, of the victim or tends

- to do so and includes causing physical abuse, emotional, verbal and psychological abuse and economic abuse;
- (b) harasses, harms, injures or endangers the victim with a view to coercing him or her or any other person related to him or her to meet any unlawful demand for any property or valuable security;
 - (c) has the effect of threatening the victim or any person related to the victim by any conduct mentioned para (a) or (b);
 - (d) otherwise injures or causes harm whether physical or mental, to the victim.

Emotional, verbal or psychological abuse is defined under the same section as;

A pattern of degrading or humiliating conduct including repeated insults, ridicule, or name calling, repeated threats to cause emotional pain and the repeated exhibition of possessiveness or jealousy which is such as to constitute a serious invasion of the victim's privacy, liberty, integrity or security.

While it might be possible for the above provisions to be interpreted in favour of victims of nonconsensual pornography, it is obvious that nonconsensual pornography was not envisaged as form of domestic or intimate partner violence when the law was enacted.⁸ The Act envisages “a pattern” and “repeated” behaviour, whereas nonconsensual pornography is usually a one-off instance of publishing images.⁹

A possible route for redress could be a civil petition for violation of the right to privacy as guaranteed under 1995 Constitution of Uganda, article 27. This right has been articulated and enforced in the case of *Victor Juliet Mukasa and Yvonne Oyo v Attorney General* (2008) AHRLR 248 (UgHC 2008). The case involved the invasion of the petitioners' home and unlawful search and seizure of their property, as well as mistreatment by public officials and law enforcement agencies that harassed them physically and sexually. Pertinently, the judge recognized their treatment as a form of GBV when she invoked Article 3 of CEDAW. The article provides that women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, and civil or any other field. In addition, women are entitled to equal protection under the law. However, a civil petition places the (actual, financial and emotional) burden of seeking redress squarely upon the victim—who may not wish to have further attention brought to the case through the court process.

The Uganda Communications Act of 1997 provides that any person who, without lawful excuse intercepts and divulges any communication except where permitted by the originator, commits an offence and is liable on conviction to a penalty (Section 7). A person who sustains loss or damage as a result of any act or omission contrary to the Act may sue for loss or damage suffered (Section 74). On the face of it, these provisions could be invoked in cases of revenge porn. However, their usefulness is questionable, given that the purpose and spirit behind the Act is not primarily to protect individual rights, but is indicative of the government's emphasis on developing investment in the Communications sector by strengthening the possibilities for ICT in business.

Similarly, the Data Protection and Privacy Bill of 2014 is described in its long title as;

an Act to protect the privacy of the individual and personal data by regulating the collection and processing of personal information, to provide for the rights of the persons whose data is collected and the obligations of data collectors and data processors; to regulate the use or disclosure of personal information; and for related matters.

The Act envisages situations in which government agencies collect personal information about citizens and seeks to regulate the instances in which such information may be released to third parties. It does not envisage cyber-crimes or sexual content.

In theory, a victim of nonconsensual pornography could also seek to limit circulation of the images through the Copyright and Neighbourhood Act of 2006. The law provides for the protection of literary, scientific and artistic intellectual works of authors. An author means the physical person who created or creates work protected under Section 5 of the Act. Section 5 catalogues protected works, which includes audio-visual works and sound recording, including cinematographic works and other work of a similar nature. The Act protects the economic right of the author to produce, reproduce and broadcast the work by any means including the internet (Section 8 of the Copyright and Neighbourhood Act of 2006). It also protects the author's moral right to be acknowledged as the author or work, and to withdraw the work from circulation (Section 9). Crucially, the Acts recognizes co-authors, stating that “where work is created by more than one person and no particular part of the work is identified to have been made by each person, such that the work is indistinguishable, all the authors shall be co-owners of the economic rights and the moral rights relating to that work and the co-owners shall have equal rights in that work” (Section 11). In practice, however, using the law of copyright to protect personal images and photographs is limited by a number of factors. A crucial one is the formalities of registration (something that is unlikely to occur to sexting lovers who capture and share images of each other in the heat of the moment). A victim of nonconsensual pornography would only resort to Copyright Law after the proverbial cat had been let out of the bag. Moreover, the protection offered for audio-visual works, such as sex tapes, would only last for 50 years; after which they would become available to the public (Section 13(5)).

Given the shortcomings and pitfalls of the provisions discussed above, it would appear that victims of nonconsensual pornography currently have little to no recourse under Uganda's current legal regime. This situation needs to be rectified in light of Uganda's international obligations to end gender-based discrimination under the CEDAW, and in compliance with the 1995 Constitution of Uganda, which gives special recognition to women and promises protection from harmful practices.

Conclusion

Within the Sub-Saharan region obscenity laws have often been used to muzzle dissent. Colonial laws that prohibit “obscene and indecent” publications and so on. are perverted to criminalize the media, the opposition or non-state actors who dare to question the ruling party. Article 19, a regional organization dedicated to protecting freedom of speech, carried out a review of obscenity provisions across the region—noting that “many of these laws date from the colonial period while others were passed during periods of one-party rule. These laws, along with a number of others restricting freedom of expression, remain in place despite their dubious constitutionality” (Article 19, 2000).¹⁰ Obscenity laws are so widely crafted that they run afoul of freedom of expression protections, but also offer no victim protection or prosecution of perpetrators alone, having been crafted in such a way that the victim is also cast a criminal accomplice in the very act that harmed her. The paradox is that whilst freedom of sexual expression ought to be protected as the constitutional right it is, this protection must be weighed against the privacy infringements that occur when sexually explicit images are published without the consent of the person(s) involved. Barmore (2015) simplifies the response to such freedom of speech challenges by pointing

out that there is no Constitutional right to distribute pornography without the consent of all the participants.

When it comes to nonconsensual pornography, the prevailing and predominant legal discourse in both Malawi and Uganda is concerned with regulating sexuality and controlling women's bodies. The openly accessible female body, representing both the crime and the criminal, is constructed in legal language of obscenity, undesirability, depravity, gross indecency and the corruption of morals. These terms work to legitimate slut-shaming and electronic sexual violence. In this manner the justice system is only put in motion to prosecute rather than to protect. If we accept that nonconsensual pornography represents a form of GBV, and we accept that GBV is a significant threat to achieving gender equality, then it follows that countries like Malawi and Uganda must take concrete steps to prevent this form of violence from occurring, to protect the survivors of nonconsensual pornography and to punish the perpetrators.

Our discussion has shown how the legal frameworks in both Malawi and Uganda are inadequate to protect victims or prevent incidences of nonconsensual pornography. The current laws do not meet international women's rights obligations nor do they give effect to constitutional provisions that promote gender equality in both countries. The focus of any legal responses should not be on the original consensual *creation* of the image, but on the nonconsensual *distribution* of the image (Henry and Powell, 2014). The laws should not assume that an individual who agrees to being viewed sexually in one private context also agrees to being viewed in other public contexts. Clearly sharing intimate pictures or videos within the context of a trusting relationship differs from sharing those same images or videos with the entire world (Burris, 2014). Burris addresses the issue of what a reasonable person might expect after sharing sexually explicit images in a private relationship: "in a private relationship, a reasonable individual can expect that intimate photos shared confidentially should be kept private" (Burris, 2014). In the English case of *Contostavlos v Mendahun* (2012) EWHC 850 (QB), Mr Justice Tugendhat addressed the issue of the reasonable person

The first question that a court has to ask itself is whether a person has a reasonable expectation of privacy. In *Campbell v MGN* (2004) 2 AC 457 at para 49 the House of Lords formulated the test as follows: "The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the Claimant had faced the same publicity" (paragaph 24)

Details of a person's sexual life have thus been recognised for very many years as high on the list of matters which may be protected by non-disclosure orders. It has also long been recognised that photographs are more intrusive than a verbal or written description (paragaph 25)

One of the glaring injustices of nonconsensual pornography is that it promotes misperceptions of victims as both vacuous "sluts" and depraved villains. We need to challenge the slut-shaming and victim-blaming narrative that masks the sexual violence and abuse of women's safety and privacy online. In Malawi and in Uganda the legal responses lag behind the technological advances in ICT and the associated abuses:

[w]hile the technology does not produce new criminal offences, it does provide a new medium for the facilitation of these behaviours. Equally though, these technologies also represent new tools for the expression of a digital or intimate citizenship. A key challenge for law reform efforts then is to

simultaneously protect individuals from emerging sexually based harms at the same time as not encroaching on the freedom of (consensual) sexual expression that all people should be entitled to enjoy. (Henry and Powell, 2014: 12)

Although there are criminal provisions that could potentially capture the behaviours in question, the reality is that public opinion vilifies the victim for their complicity in the producing the sexually explicit images. As such, the conduct is not recognizable as the criminal act it arguably is. Furthermore, the potential complexity of policing and prosecuting such conduct would likely result in significant inconsistencies in how the law is used (if ever) to target *undesirable* activities. Where it falls upon the courts to craft the elements of the offence through their interpretation of existing laws, the danger is that the victim and future victims are reliant upon the one judicial officer. Who may well create bad precedent if they hold that majority view that the victim is largely to blame for her fate; this would have the disastrous effect of implicitly condoning this most vicious type of attack. On the other hand, clumsy, heavy-handed or overbroad provisions that seek to police sex and sexuality at the expense of freedom of expression run the risk of further victimising the victim—she would now face criminal sanctions as well as the impact of the nonconsensual pornography incident. Franks (2014) has pointed out that many revenge porn laws suffer from "overly burdensome requirements, narrow applicability, and/or constitutional infirmities" to counteract these pitfalls, she reiterates the well-recognized principles that a strong law must be clear, specific, and narrowly drawn to protect both the right to privacy and that of freedom of expression. In sub-Saharan Africa we have the advantage of being able to learn from the legislative efforts that have been made elsewhere as we contemplate crafting local responses to nonconsensual pornography.

Revenge porn, and indeed other forms of "cyber violence" against women, require specific legislation or a nuanced interpretation of existing laws to curb their incidence and to ensure redress for victims. The harmful and lasting effects that revenge porn has on the lives of affected individuals demand a swift and specific response to counter this growing issue. This is an imperative subject and requires lawmakers to grapple with emerging issues of internet freedoms and the possible role that the law can play in regulating cyberspace in a way that protects the rights of women, freedom of expression but also the privacy rights of all.

Notes

- 1 "Slut-shaming" is the term used to describe the public exposure and shaming of individuals for their (perceived or actual) sexual behaviour.
- 2 In countries such as Malawi where the users of popular social media sites such as Facebook still only represent less than 2% of the population, nonconsensual pornography is fuelled by the usage of the mobile messenger application WhatsApp and the popularity of certain newspapers such as the Red Pepper (Uganda) and Nyasa Times (Malawi).
- 3 "It also is difficult, if not impossible, to delete information from the Internet, even with the consent of the party who posted it and the help of the site on which it sits, because the zeroes and ones may exist in a cache owned by a search engine such as Ask, Google, or Yahoo! Information also may reside in the server of a firm that collects and sells customer information. In fact, some companies, such as Spokeo or DoubleClick, specialize in 'data aggregation'—that is, the scouring of social media websites, such as Facebook, for personal information about users and the sale of that information to a company that uses it to offer you particular goods or services. In an age when 2.8 billion people are connected to the Internet and 'you are what Google says you are', the permanence of unflattering information about us on the Internet poses a troubling prospect for us all" (Larkin, 2014: 60)
- 4 Under section 23 of the Act, a child is defined as having been "sexually abused if the child has taken part, whether as a participant or an observer in any activity which is sexual in nature for the purposes of any pornographic or indecent material, photograph, recording, film, videotape or performance".

- 5 Examples include the Prevention of Domestic Violence Act (2006); the Child Justice and Protection Act (2010); and, the Deceased Estates (Wills, Inheritance and Protection) Act (2011).
- 6 FGM is an uncommon practice in Malawi—it is simply used here to illustrate the kinds of practices that the drafters predominantly sought to address. At the time of writing the authors could not find any instances of criminal charges brought under the Gender Equality Act
- 7 LD's ex-lover was a Nigerian Citizen. The case study therefore represents an interesting interplay of gender violence and xenophobia (Onyango, 2014).
- 8 As is the problem with the Malawian domestic violence protections reviewed in the preceding section.
- 9 Albeit with the inherent ability to multiply the negative impact of the publication through multiple viewings
- 10 The Article 19 study exposes the gap between national human rights standards and the restrictions of obscenity laws.

References

- Allen AL (1999–2000) Gender and privacy in cyberspace. *Stanford Law Review*; **52**, 1175–1200.
- Amnesty International. (2014) "Rule by Law"—Discriminatory Legislation and Legitimised Abuses in Uganda. Amnesty International: London.
- Anonymous. (2014) *Luzinda Faces 10 Year Jail Sentence Over Nude Pictures*. The New Vision: Kampala.
- ARTICLE 19. (2000, January) Media Law and Practice in Southern Africa. Obscenity Laws and Freedom of expression: A Southern African perspective, <https://www.article19.org/data/files/pdfs/publications/obscenity-law-paper.pdf>, accessed 27 December 2015.
- Badenhorst C (2011) Legal responses to cyber bullying and sexting in South Africa. *Centre for Justice and Crime Prevention, Issue Paper*(10): 1–20.
- Barmore C (2015) Criminalization in context: Involuntariness, obscenity, and the first amendment. *Stanford Law Review*; **7** (2): 447–478.
- Bolton R (2014) The right to Be forgotten: Forced Amnesia in a technological age. *The John Marshall Journal of Information Technology & Privacy Law*; **31** (2): 133–144.
- 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.
- Campbell v MGN*. (2004) 2 AC 457.
- Contostavlos v Mendahun*[(2012)] EWHC 850 (QB).
- Cyber Civil Rights Initiative. (2015) End Revenge Porn: 26 States have Revenge Porn Laws, <http://www.endrevengeporn.org/revenge-porn-laws/>, accessed 23 December 2015.
- Franks MA (2014) Drafting an effective "Revenge Porn" law: A guide for legislators. Retrieved from SSRN 2468823.
- Henry N and Powell A (2014) Beyond the "sext": Technology-facilitated sexual violence and harassment against adult women. *Australian & New Zealand Journal of Criminology*; **0** (0): 1–15.
- Larkin PJ (2014) Revenge porn, state law, and free speech. *Loyola of Los Angeles Law Review*; **48** (1/2): 57–118.
- MACRA—Malawi Communications Regulatory Authority. (2014) Cybersecurity Malawi MACRA, <http://www.aicto.org/wp-content/uploads/2014/09/CYBERSECURITY-MALAWI-MACRA.pdf>, accessed 12 November 2015.

- Matsui S (2015) The criminalization of revenge porn in Japan. *Washington International Law Journal*; **24** (2): 289–318.
- Mukasa and another v Attorney-General*. (2008) AHRLR 248 (UgHC 2008).
- Mubajje S (2014) *Mufti Calls for Desire Luzinda Arrest*. The Red Pepper: Kampala, Uganda.
- Oloka-Onyango J (2014) *Understanding the Genesis and Impact of Recent Legislation in Uganda*; (676), 2014-05-01 Pamabazuka News: Kampala, Uganda.
- Onyango IK (2014) Desire Luzinda: Is this the end of her music career? In: Onyango P (ed). *The New Vision*. The New Vision: Kampala, Uganda.
- Ouga S (2014) *Desire Luzinda Pologises Over Leaked Nude Images*. The New Vision: Kampala, Uganda.
- Salter M (2013) Responding to revenge porn: Gender, justice and online legal impunity *Whose Justice? Conflicted Approaches to Crime and Conflict*. University of Western Sydney: Sydney, Australia.
- Shah N (2015) Sluts "r" us: Intersections of gender, protocol and agency in the digital age. *First Monday*; **20** (4): 1–5.
- Tamale S (2007) Out of the closet: Unveiling sexuality discourses in Uganda In: Cole CM (ed) *Africa after Gender*. Indiana University Press: Bloomington and Indianapolis, p 18.
- Tamale S (2015) Crossing the bright red line—the abuse of culture and religion to violate women's sexual and reproductive health rights in Uganda In: Chesler EA (ed). *Women and Girls Rising—Progress and Resistance Around the World*. Routledge: London and New York, pp 144–159.
- World Wide Web Foundation. (2015) Uganda urgently needs to prioritise gender equality online, <http://webfoundation.org/2015/09/uganda-urgently-needs-to-prioritise-gender-equality-online/>, accessed 2 December 2015.

Data availability

Data sharing not applicable to this article as no datasets were generated or analysed during the current study.

Additional information

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