

THE RISE OF NON-CONSENSUAL PORNOGRAPHY IN NIGERIAN CYBERSPACE: IMPERATIVES FOR STATUTORY CRIMINALISATION*

Abstract

Taking intimate pictures of oneself or partner may be part of a healthy relationship and has become increasingly common. However, a disturbing trend has emerged in the Nigerian cyberspace of circulation of pornographic images of rape victims, victims of sexual assault, and non-consensual pornography. Nigerian law suffers from a lacuna in regulating these pornographic activities. While statutes regulating similar activities such as the Obscene Publications Act exist, there are gaps yet to be addressed. This article identifies the rise in the publications of such grossly indecent and obscene material especially on the internet and other media, classifies the crimes falling under non-consensual pornography, examines the status quo, the existing legal structure for regulating publication of obscene materials and proposes reforms to criminalise revenge porn and non-consensual pornography specifically in Nigeria.

Keywords: pornography, revenge, obscenity, reforms, legislation, cybercrimes

1. Introduction

Sometime in the last quarter of the year 2011, internet and social media users particularly in Nigeria realized that their devices were awash with disturbing images of an actual rape video depicting 5 males who had brutally raped a young woman in turns somewhere in Nigeria. From the audio dialogue on the video, it was apparent that these were 5 young Nigerian male undergraduates raping a young Nigerian woman somewhere in eastern Nigeria and at the same time recording the sordid act. The video elicited shock from Nigerians who expressed anger at the incident. To worsen the situation, subsequently, more rape videos flooded the internet¹. Eventually, suspects in the gang-rape video were arrested but the Nigerian police declared the investigations over within a short period as the victim had not come forward². An activist who petitioned the Inspector General of Police (IGP) cited several provisions of the penal code which the suspects could have breached although rape was the focus of both the petition and the investigation³. The focus on rape as the primary offence is not without its own shortcomings. This is because of the many hurdles to proving the offence of rape in Nigeria⁴. Eventually, the outcry that accompanied the revelation and circulation of the video died out and much has not been heard about the video or the perpetrators of the heinous act anymore till date. Obviously, the failure of the victim to come forward could have made it difficult for the prosecutors to obtain a conviction without proof beyond reasonable

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¹'gang rapes: after Abia, more rape videos flood Nigerian varsities' www.vanguardngr.com/2011/09/gang-rapes-after-abia-more-rape-videos-flood-nigerian-varsities/ -last accessed 20/8/2016

²'police arrest suspects in Abia gang-rape video, as activist petitions IGP' www.dailytrust.com.ng/sunday/index.php/news/9842-police-arrest-suspects-in-abia-gang-rape-video-as-activist-petitions-igp -last accessed 20/8/2016

³note3

⁴To secure a conviction for rape requires proof beyond reasonable doubt that (a) An accused had sexual intercourse or penetrated the woman(Nigerian law recognizes that only males are capable of committing this offence); (b) That it was done against her will, and; (c) That she was not his wife.

doubt of the elements of the offence of rape and may have informed the decision to end investigations as the charges would not be substantiated.

The most alarming realization was that while the case had elements of non-consensual pornography, the focus of the investigation was not obscenity or non-consensual pornography at all. This immediately reveals a lacuna. It is clear that the culprits in that very offensive act could walk away unscathed under favourable circumstances. Indeed it appears that they walked scot-free. This is so because, in Nigeria, there is a constitutional protection of individual privacy but no specific legislation proscribing and sanctioning the production and publication of photo/video recordings depicting rape scenes and the publication of revenge pornography and as has happened elsewhere.

It is often said that where there is no law, there is no crime and when there is no statutory provision for an offence, the courts are often left with no choice than to dismiss charges⁵. Another scandal occurred in 2015, Former Miss Anambra State, a victim of revenge pornography, found herself embroiled in a scandal after a sex tape made of herself and a friend of hers was leaked online. The sex tape was said to have been made public by some men who blackmailed her with it, even after she reportedly paid them to stop the tape from being made public.⁶ On the 17th of January, 2017 she appeared in a Lagos State High Court for the arraignment of one of people allegedly behind the non-consensual sextape scandal⁷. Again, on the 6th of December, 2016, Motunrayo Fela Kuti, daughter of Late Fela Anikulapo-Kuti, was a victim of yet another revenge pornography as her boyfriend threatened to publish a sex tape of her on the internet.⁸

It is the remediation of these lacunae that this article is focused on because the realisation that in Nigeria, Non-Consensual Pornography (NCP) and rape porn is a new phenomenon and cyber-crime which must be confronted squarely.

2. Non-consensual Pornography

Non-consensual pornography (the most common form of which is known as ‘revenge porn’) involves the online distribution of sexually graphic photographs or videos without the consent of the individual in the images⁹. The perpetrator is often an ex-partner who obtains images or videos in the course of a prior relationship, and aims to publicly shame and humiliate the victim, in retaliation for ending a relationship or other reasons. However, perpetrators are not necessarily partners or ex-partners and the motive is not always revenge¹⁰. Victims of Non-consensual pornography are devastated by it and often suffer depression, and severe anxiety. They lose their jobs and may have

⁵See. S.36(12) of the Constitution of the Federal Republic of Nigeria 1999; *Faith Okafor v. Lagos State Government and Anor.* (2016) LPELR-41066(CA); *United States v Baker* 1997 Fed. App 0036P (sixth circuit Court of Appeals 1997) www.laws.lp.findlaw.com

⁶ Non-consensual leaked sex video of Chidinma Okeke, Miss Anambra- (<http://www.buzznigeria.com>)- last accessed 10/12/ 2016

⁷ Punch Newspaper, *Sex Scandal: ChidinmaOkeke, ‘blackmailer’ appear in Lagos Court*, Simon Ejembi, 17th January, 2017- <http://www.Punchng.com> – last accessed 18th January 2017

⁸Sharing private video threat: Fela’s daughter blasts ex-boyfriend- (<http://www.vanguardngr.com>>news)- last accessed 10/12/2016

⁹D.K. Citron & M.A Franks, *Criminalizing Revenge Porn*, (2014) 49 *Wake Forest L.Rev.* pp.345-346

¹⁰European Institute for Gender Equality; cyber violence against women and girls (2017) p.2

difficulty getting new jobs¹¹. As exemplified in the introduction, there have been many incidents of victims of non-consensual pornography in Nigeria in recent years. Evidently, majority of the victims are female. This is coupled with the trend of sharing incidents of rape and assault on social media.

3. Conceptual Clarifications

The scenarios vary in content which ranges from photos/videos made with consent of the actors but released without consent as was the case in the Former Miss Anambra scandal to assault and rape videos/photos as in the Abia State Undergraduates rape video. It is therefore important to make some conceptual clarifications as it is important to call the different concepts by different names as far as practicable.

Consensual pornography:

The differences between consensual pornography and non-consensual pornography can be understood from the definition of ‘pornography’ alone. Consensual pornography is focused on consenting adults; this sets it apart from non-consensual pornography. *Pornography* is defined as ‘printed or visual material containing the explicit description or display of sexual organs or activity, intended to stimulate sexual excitement’¹². Following that definition, it is apparent that pornography is intended to stimulate sexual excitement in the viewer. Pornography therefore focuses on a target audience for which it is intended. It is with the intent that a third party can view it and (maybe) find it sexually stimulating. The most important factor in determining what constitutes pornography would be the *intention* of the maker and the fact that it is *made* for a target *audience*. It is this type of pornography that is usually referred to as consensual pornography.

Non-consensual Pornography:

Non-consensual pornography is a wide term encompassing: revenge pornography, uninvolved revenge pornography, non-voluntary pornography and morphing¹³. The term non-consensual pornography is often used interchangeably with revenge pornography, though it is recognized as broader than revenge porn¹⁴. Non-consensual pornography is not always pornographic unlike consensual pornography which is pornographic from the moment it is made. Non-consensual pornography becomes pornographic upon publication. The material is not regarded as pornographic before it is published because it does not fit into the definition of ‘pornography’ which is made with a certain intent and targeted at a certain audience. An image not designed to arouse or excite the audience sexually is not intrinsically pornographic though it may be obscene. Publication and disclosure to an audience can make it pornographic even if it is without the consent of the individual(s) in the image (this is usually the case apparently).

¹¹Danielle Keats Citron, *Hate Crimes in Cyberspace 6-10 (2014)*

¹²‘Pornography,’ (2016) in *Oxford Dictionaries*, online resource

¹³Morphing is a special-effects process or a computer technique used for graphics and films, in which one image is gradually transformed into another image without individual changes being noticeable in the process. - <https://www.google.com.ng/amp/s/www.collinsdictionary.com/amp/English/morphing-> last accessed 11/8/2017

¹⁴Mary Anne Franks, ‘drafting an effective revenge porn law: A guide for legislators, 2016, -available at: <https://www.cybercivilrights.org/wp-content/uploads/2016/09/Guide-for-Legislators-9.16.pdf>.p.2 ; Danielle Keats Citron and Mary Anne Franks, ‘Criminalizing Revenge Porn,’ *Wake Forest Law Review* 49,(2014),, p.346.

Revenge pornography:

This is the all-encompassing term for capturing situations where sexually explicit images of a person is posted *online* without that person's consent especially as a form of revenge or harassment and posting sexually explicit material or images of a person without their consent and for the purpose of causing distress and embarrassment. It is a situation in which intimate pictures or films have been made with the consent of the individual shown therein, but which have been disclosed by the person to whom they were entrusted without the consent of the individual shown. Revenge pornography is the publication of images or films of a private, intimate, and sexual nature; made with the consent of the individual(s) shown therein for purposes unconnected with third-party sexual gratification or mass publication by an individual to whom the images were entrusted, without the consent of the depicted individual(s). This definition is adopted because the images used in revenge pornography are usually made with the consent of the persons depicted therein at a time when future publication is not envisaged and with no anticipation whatsoever that confidentiality and trust may be breached. 'Publication' is indeed the definitive feature of revenge pornography.

***Uninvolved revenge pornography*¹⁵**

This definition is quite the opposite of revenge pornography. In this situation, sexually explicit images are either obtained by someone who it was never entrusted to at all and published or it may be an existing image or video obtained by chance, theft or hacking. It might also involve situations where images or videos are created without the knowledge of the person depicted in it even if it is by someone who is intimate with him.¹⁶ The striking difference between this and *revenge porn* is that uninvolved revenge pornography does not involve the knowledge or consent of the victim at any time.

Non voluntary pornography

This refers to situations in which intimate, private and sexually explicit images or films are made without the consent of the depicted individual(s) and published without the consent of the individual. This would directly apply mostly to secret recordings.

Morphing

Morph refers to the process of changing smoothly from one image to another by gradual steps using computer animation techniques¹⁷. Morphing involves the editing of images to sexualize persons who are not in the actual video or image. The original image may be ordinary but morphed to look sexual.

¹⁵This nomenclature was used by Marthe Goudsmit at page 27 of an unpublished thesis titled: *Revenge Pornography: A conceptual Analysis* which was submitted at Leiden university in partial fulfillment of the requirements of the masters programme in Philosophy of Law at Leiden University January 2017. The author has somewhat widened the scope as used by Goudsmit.

¹⁶For example, in late 2016 nude images purporting to be of the PDP chairman in Edo State Dan Orbih was circulated online through a facebook page called 'corruption concern' with the caption 'see what our so called leaders become in the hands of prostitutes. This is a lesson to all of us. This is the PDP Chairman in Edo State they said he refused to pay the lady and she waited for him to snore and took this picture in the hotel and ran away...' <http://www.nigerianmonitor.com/naked-photo-edo-pdp-chairman-dan-orbih-leaked-alleged-prostitute-goes-viral/amp/> last accessed 9 October 2018 8.44 am

¹⁷2017 Oxford Dictionaries an online resource- last accessed 11/8/2017

Summary

The sub heads above are all distinguishable concepts that are vital to the discourse on non-consensual pornography. As is seen above, the absence of consent to make or publish is essential in non-consensual pornography. This is different from consensual pornography or pornography properly so-called. Again, it is important to note that there can be no intimacy in pornography while most aspects of non-consensual pornography violate high level intimacy. Of course it is trite that pornography goes through an intentional film production process designed for third party consumption while most images and videos that become tools of non-consensual pornography are made by the persons themselves (except those created secretly in cases of non-voluntary pornography or uninvolved non-consensual pornography) without any intent to distribute same to third parties.

4. Response by law enforcement agencies

The first high-profile case of non-consensual pornography in Nigeria was in 2011 when undergraduates from a Nigerian university made a video as they took turns to rape and assault a young lady in a most despicable way. When the video went into circulation, the initial response of the Nigeria police was incoherent and haphazard. In fact, there was no actual investigation into the matter. It took many months of posting pictures online, and petitions by activists for the police to make arrests in the case¹⁸. Finally in September 2011, arrests were made¹⁹. But in a bizarre twist, the police had declared the investigation of the crime over within a very short period. This birthed another series of petitions and finally, the National Assembly had to order the investigation to be reopened. From the initial police reaction, it would seem that the police officers involved in the case were not aware that certain provisions of the criminal code had been breached as there is the offence of Criminal Defamation which is provided for in the Criminal code²⁰. Criminal Defamation can be against the living or the dead and is defined in Section 373 of the Criminal Code as a... ‘matter likely to injure the reputation of a person by exposing him to hatred, contempt, or ridicule, or likely to damage any person in his profession or trade by an injury to his reputation’. The punishment ranges from one to seven years imprisonment. Publication alone attracts 1 year imprisonment, while publication with fore knowledge of the falsity of the publication attracts 2 years imprisonment. Threatening to publish with the intent to extort attracts the maximum 7 years imprisonment. However fair comment made for public benefit is a defence when the matter published is true. In the Northern part of Nigeria where the penal code applies, criminal defamation is provided for in Sections 391-395 of the Penal code which is similar to the criminal code provisions except that the maximum punishment is 2 - year imprisonment. This evinces acute ignorance on the part of the police and highlights the need for increased and improved training for police officers on these matters in Nigeria.

In the wake of the ChidimmaOkeke non-consensual video scandal, the police denied knowledge of the case²¹ although many months later, arrests were made and at least one suspect was charged with

¹⁸<https://allafrica.com/stories/201110031771.html> last accessed 9 October, 2018 8.50am

¹⁹www.dailytrust.com.ng/sunday/index.php/news/9842-police-arrest-suspects-in-abia-gang-rape-video-as-activist-petitions-igp -last accessed 20/8/2016

²⁰Sections 373-381 of the Criminal Code

²¹<http://thenationonlineng.net/anambra-beauty-queens-sexgate-police-not-aware-cp/> last accessed 11/8/2017

the offence in court²². The Former Miss Anambra non-consensual video scandal rocked Nigeria in 2016 when Former Miss Anambra, a victim of revenge pornography, found herself in a scandal after a lesbian sex tape made of herself and another person was leaked online. The sex tape was said to have been made public by some men who blackmailed her with it, even after she reportedly paid them to stop the tape from being made public.²³ On the 17th of January, 2017 she appeared in a Lagos State Court for the arraignment of one of people allegedly behind the sex scandal.²⁴ Again, on the 6th of December, 2016, another lady was shamed and blackmailed with revenge pornography as her boyfriend threatened to publish a sex tape of her on the internet.²⁵

5. The Current Situation

Nigeria labours under the weight of inadequacy of legislation and effective measures against non-consensual pornography. Nigeria has criminalized the display of obscene publications or access to obscene publications through a plethora of laws and regulatory bodies but these efforts are impeded by a major inadequacy of legislation and current measures against non-consensual pornography despite the enactment of numerous legislation touching on the subject albeit inadequately²⁶. The Most recent law that criminalizes revenge pornography in Nigeria is the Cybercrimes (Prohibition, Prevention, etc) Act of 2015. In S.24 of the Act, it goes a step further to criminalize bullying, harassment, and threats of harm to a person, their property or reputation. Penalties under the Cybercrimes Act are quite deterrent with imprisonment terms of up to 10 years and fines up to twenty-five million naira. The current Nigerian landscape provides inadequate protection for victims of non-consensual pornography. In the case of the gang- rape victim at Abia State, south-eastern Nigeria, it took very substantial media attention, petitions from human rights activists and even the intervention of the national assembly for police to rise to the occasion and to conduct what was at best a lacklustre investigation into the case. The police could only make arrests after pictures and addresses of the perpetrators were made available by rights advocates. As is seen from the cases that have come to public notice in Nigeria and other climes, most of the victims are female²⁷. It seems that there are no effective tools and methods for combating this specie of crime and in particular, there is no specific legislation on the matter. It is remarkable that matters of a serious nature such as non-consensual pornography and revenge pornography are not properly criminalized by the Nigerian State. This lack of criminalisation must be the consequence of a lack of appreciation and Understanding of the problem. Existing obscenity laws do not in the first place seek to protect the individuals depicted in the offensive publications but rather, the public at large.

²²<http://punchng.com/sex-scandal-chidinma-okeke-appears-court-blackmailers-arraignment/> -last accessed 11/8/2017

²³ Non-consensual leaked sex video of Chidinma Okeke, Miss Anambra- (<http://www.buzznigeria.com>)- last accessed 10/12/2016

²⁴Punch Newspaper, *Sex Scandal: Chidinma Okeke, 'blackmailer' appear in Lagos Court*, Simon Ejemi, 17th January, 2017- <http://www.Punchng.com> – last accessed 18th January 2017

²⁵Sharing private video threat: Fela's daughter blasts ex-boyfriend- (<http://www.vanguardngr.com>>news)- last accessed 10/12/2016

²⁶ The obscene publications Act (1961), Children and Young Persons (Harmful Publications) Act (1961), Constitution of the Federal Republic of Nigeria (1999) (as amended), Information Technology Act (2000), The Criminal Code (2004), ECOWAS Directives on Fighting Cyber Crime (2011), African Union Convention on Cyber security and Personal Data Protection (2014), Cybercrimes (Prohibition, Prevention, etc) Act (2015),

²⁷Information from Cyberbullying research center available at: <https://cyberbullying.org/revenge-porn-research-laws-help-victims>- last accessed 11/8/2017 7.56pm WAT

Good reasons exist for the criminalisation of revenge pornography, and the depicted individual(s) should be the focal point of legislative and law enforcement protection; although these laws would in addition to victims, benefit the public. The public shall be protected through the preventive incentive that comes from criminalisation: revenge pornography is less likely to occur if it is criminalised, which leads to anyone being less likely to become a victim of revenge pornography. If revenge pornography is criminalised, victims of revenge pornography are able to show that the perpetrator wronged them, as the perpetrator faces criminal charges. This is opposed to the current situation where victims do not get redress for their misfortune, which is implied through the lack of (effective) criminalisation. It is not clear at this time why the legislature has not criminalized revenge pornography, but apparently the fact that there is not much advocacy against non-consensual pornography in Nigeria. While the failure to legislate specifically on this problem is not to be taken as intentional, it reinforces the position of the perpetrators who will go about destroying victims without let or hindrance. It is up to various state and federal legislators to take a standpoint with regard to the criminalization of non-consensual pornography.

6. Conclusion and Recommendations

Nigerian law suffers from a lacuna in regulating these non-consensual pornographic publications. While statutes regulating similar activities such as the Obscene Publications Act exist, there are gaps yet to be addressed. This article identified the rise in the publications of such grossly indecent and obscene material especially on the internet, social and other media. It also classified the crimes falling under non-consensual pornography and examined the status quo and the existing legal structure for regulating publication of obscene materials. It finally proposed reforms to criminalise revenge porn and non-consensual pornography specifically in Nigeria. Nigeria has a wide body of legislation aimed at protecting citizens from unwanted encounters with obscenity and pornography. Offensive Explicit images are outlawed to protect the public, but this does not in itself cover the entire gamut of possible offences. The laws regulating the display of obscenities or pornography do not necessarily protect the victims of non-consensual pornography. There is an urgent need to provide current robust legislation to govern this area of law. The Government at all levels must strengthen operations of the law enforcement agencies to build capacity for prevention and detection of the instant specie of crime. The law enforcement agencies must also be equipped to combat this specie of crime especially as it relates to distribution through the internet and social media; and a failure in this regard would exacerbate rather than abate the ugly trend.