

“REVENGE PORN”, “DOXXING” AND “DOWNSTREAM DISTRIBUTION”: NEED FOR COMPREHENSIVE LEGISLATION IN INDIA

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Introduction

“Revenge porn” is non-consensual dissemination of private sexual images. Generally, the crime of “revenge porn” involves images originally obtained without consent, such as by use of hidden cameras or victim coercion, and images originally obtained with consent, usually within the context of a private or confidential relationship. Once obtained, these images are subsequently distributed without consent.¹

The gist of the definition of “revenge porn” lies in the fact that the victim did not consent to its distribution- though the victim may have consented to its recording or may have taken the photo or video himself/ herself. The rise of revenge porn has gone hand-in-hand with the increasing use of social media

and the internet, on which people constantly exchange ideas and images without seeking permission from the originator.

The term “revenge porn” is in fact misleading in to two respects. Firstly, “revenge” connotes personal vengeance. However, perpetrators/ accused may be motivated by a desire for profit, notoriety, entertainment, or for no specific reason at all. The only common factor is that the perpetrators/ accused act without the consent of the person depicted (victim). Secondly, “porn” misleadingly suggests that the visual depiction of nudity or sexual activity are inherently pornographic.²

It is important to remember that the consent to create and send a photograph or the

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¹ Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. 345, 346 (2014); See: Adrienne N. Kitchen, *The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment*, 90 Chi.-Kent L. Rev. 247, 248 (2015)

² Mary Anne Franks, “Revenge Porn” Reform: *A View from the Front Lines*, 69 Fla. L. Rev. 1251, 1257-58 (2017); See: Diane Bustamante, *Florida Joins the Fight Against Revenge Porn: Analysis of Florida’s New Anti-Revenge Porn Law*, 12 Fla. Int’l. U.L. Rev. 357, 364 (2017)

consent to be photographed by another is one act of consent that cannot be equated with consenting to distribute that photograph to others outside of the private relationship.³ Thus, criminal liability in an offence of “revenge porn” does not depend on whether the image was initially obtained with the victim’s consent; rather, it is the absence of consent to the distribution of the image that renders the perpetrator in violation of law.

So far as “non-consensual pornography” is concerned, often intimate photographs and/or videos are originally created/ obtained with the consent of the subject/ victim within the confines of an intimate relationship. The images need not to have been posted by an ex-lover or friend, in order to seek revenge after a relationship has gone sour⁴ or include nudity in order to be considered “revenge porn”. A hacker or a rapist can also perpetrate revenge porn simply by circulating an explicit image of a person without his/ her consent.⁵

Though non-consensual pornography, that is, “revenge porn” does not involve bodily contact between the victim and the culprit, the harm to the violated party is as stark as that inflicted upon victims of physical sexual

abuse. That in the matter of: *Prosecutor v. Akayesu*⁶, the International Criminal Tribunal for Rwanda observed that, “... *sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.*” Revenge porn, though not a bodily act, is a forced sexual humiliation and it therefore qualifies as a form of sexual violence.

Recently, in the matter of: *People v. Austin*⁷, the Supreme Court of State of Illinois observed that the non-consensual dissemination of private sexual images is not wrong because nudity is shameful or because the act of recording sexual activity is inherently immoral; it is wrong because exposing a person’s body against her will fundamentally deprives that person of her right to privacy.

Key observations in *Austin* (Supra):

Recently, in the matter of *Austin* (Supra) while observing that a statute (Illinois Criminal Code 720 ILCS §5/11-23.5) criminalizing “revenge porn” is not unconstitutional for it does not abridges freedom of speech, the Supreme Court of Illinois observed that:

³ Erica Souza, “*For His Eyes Only*”: *Why Federal Legislation Is Needed to Combat Revenge Porn*, 23 UCLA Women’s L.J. 101, 109-10 (2016)

⁴ Mary Anne Franks, *What is Revenge Porn? Frequently Asked Questions*, Cyber Civil Rights Initiative (2015), <http://www.cybercivilrights.org/faqs>

⁵ Ibid 3

⁶ Case No. ICTR- 96- 4- T

⁷ 2019 IL 123910

- a. The non-consensual dissemination of private sexual images causes unique and significant harm to victims in several respects. Initially, this crime can engender domestic violence. Perpetrators threaten disclosure to prevent victims from ending relationships, reporting abuse, or obtaining custody of children. Sex traffickers and pimps threaten disclosure to trap unwilling individuals in the sex trade. Rapists record their sexual assaults to humiliate victims and deter them from reporting the attacks.
- b. Also, the victims' private sexual images are disseminated with or in the context of identifying information. Victims are frequently harassed, solicited for sex, and even threatened with sexual assault and are fired from their jobs and lose future employment opportunities. Victims additionally suffer profound psychological harm. Victims often experience feelings of low self-esteem or worthlessness, anger, paranoia, depression, isolation, and thoughts of suicide.
- c. Additionally, the non-consensual dissemination of sexual images disproportionately affects women, who constitute 90 percent of the victims, while men are most commonly the perpetrators and consumers.
- d. The literal meaning of the term "disseminate" is "to foster general knowledge of". The term "dissemination" means to broadcast, publicize and spread.
- e. To constitute the offence of "revenge porn", the following ingredients must be fulfilled:
 - i. The images must be "private sexual images" that portray any of several specific features, including the depiction of a person whose intimate parts are exposed or visible, in whole or in part, or who is engaged in a sexual/ carnal activity.
 - ii. The images must be of discreet and personal nature, that is to say, private sexual nature.
 - iii. The person portrayed in the image must be identifiable from the image or information displayed in connection with the image.
 - iv. The image must have been obtained under circumstances in which a reasonable person would

- know or understand that it was to remain private.
- v. The person who disseminates the image must have known or should have known that the person portrayed in the image has not consented to the dissemination.
 - vi. The dissemination of private sexual images must be intentional.
 - f. The purpose behind criminalizing “revenge porn” is to protect individuals from being victimized by harassment, discrimination, embarrassment, and possible violence resulting from the privacy violence occasioned by the non-consensual dissemination of private sexual images.
 - g. The act of sharing an intimate photo that carries a reasonable expectation of confidentiality and privacy does not result in a waiver of all privacy exceptions once the image is in another’s control.

In *Austin* (Supra), it was observed that if two individuals go out on a date, and one later sends the other a text message containing an unsolicited and unappreciated nude photo. The recipient then goes to a friend, shows the

friend the photo, and says, “look what this person sent me”; the recipient would be said to have committed felony, if the recipient knew (or should have known) that the photo was intended to remain a private communication.

Ratio in *Austin* (Supra) challenged before SCOTUS:

That the decision in the matter of *Austin* (Supra) has been challenged before SCOTUS, and the following questions of law are pending consideration before SCOTUS:

- a. Whether strict First Amendment scrutiny applies to a criminal law that prohibits non-consensual dissemination of non-obscene nude or sexually oriented visual material?
- b. Whether the First Amendment requires a law that prohibits non-consensual dissemination of non-obscene nude or sexually oriented visual material to impose a requirement of specific intent to harm or harass the individual(s) depicted?

It would be interesting to see as to how SCOTUS shall balance the conflicting interests arising out of the *free speech argument* pitted against the plea of infringement of *right to privacy* owing to non-consensual dissemination of private sexual images (“revenge porn”).

What is Doxxing?

The dissemination of personal information in connection with pornographic image is called “doxxing”. That coupled with the non-consensual dissemination of a pornographic image, doxxing is a potent weapon for perpetrators, as it makes the images easier to find and easier to attribute to the subject/victim.⁸ Posting personal data in connection with a revenge porn image can exponentially increase the harm suffered by the victim.

Punishment for “revenge porn” in India:

There is no legislation in India that, in particular, covers the law relating to non-consensual dissemination of sexual images. That presently, in India, the crime of “revenge porn” is dealt with and is made punishable by virtue of the provisions of the IPC read with the IT Act. Moreover, to some extent, India has attempted to contain the crime of non-consensual dissemination of sexual images by virtue of Section 4 read with Section 6 of the Indecent Representation of Women (Prohibition) Act, 1986.

That Section 44 of the IPC defines “injury” as follows, “*The word “injury” denotes any harm whatever illegally caused to any person, in body, mind, reputation or property*”. Thus, “revenge porn” is in the nature of injury occasioned or caused

by the accused (disseminator) to the victim (person depicted).

That “revenge porn”, in extremely limited way, is punishable in India by virtue of:

- i. Sections 292 (*Sale, etc., of obscene books, etc.*), 354-A (*Sexual harassment and punishment for sexual harassment*), 354-C (*Voyeurism*), 354-D (*Stalking*) and 509 (*Word, gesture or act intended to insult the modesty of a woman*) of the IPC, and,
- ii. Sections 66-C (*Punishment for identity theft*), 66-E (*Punishment for violation of privacy*), 67 (*Punishment for publishing or transmitting obscene material in electronic form*), 67-A (*Punishment for publishing or transmitting of material containing sexually explicit act, etc., in electronic form*) of the IT Act and 67-B (*Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc., in electronic form*) of the IT Act, and,
- iii. Section 4 (*Prohibition of publication or sending by post of books, pamphlets, etc. containing indecent representation of women*) read with Section 6 (*Penalty*) of the Indecent

⁸ Ibid 3

Representation of Women (Prohibition) Act, 1986, and,

- iv. Section 14 (*Punishment for using child for pornographic purposes*) and Section 15 (*Punishment for storage of pornographic material involving child*) of the Protection of Children from Sexual Offences Act, 2012.

Criticism of present position of law in India dealing with “revenge porn”:

- i. Section 354-C of the IPC is not gender-neutral. Also, the term “dissemination” has not been defined in Section 354-C of the IPC. It is not clear whether only “intentional dissemination” is cognizable and punishable, or even “unintentional dissemination” is cognizable and punishable within the legislative agenda/ framework of Section 354-C of the IPC.
- ii. Section 354-D of the IPC is not gender-neutral. The term “cyber stalking” has not been comprehensively defined regard being had to Sub-clause (ii) of Clause (1) of Section 354-D of the IPC. Section 354-D (1) (ii) of the IPC defines “cyber stalking”

as follows: “*Any man who monitors the use by a woman of the internet, email or any other form of electronic communication commits the offence of stalking*”. That difference between “monitoring” and “harassment” might be thin line, but is no doubt significant; Section 354-D fails to take stock of this. It is essential to bear in mind that “monitoring” which invades privacy is “harassment”.

- iii. Offence under Section 67 of the IT Act is bailable offence while offence under Section 67-A of the IT Act is a non-bailable offence.⁹ Thus, it is plainly discomforting to see that the legislature does not see with the same amount of seriousness the dissemination of “obscene images” as it sees the dissemination of “sexually explicit images”. Moreover, the IT Act and for that matter the IPC does not provide any yardstick on the basis of which an image can be tested for being “obscene” or “sexually explicit”. This particular aspect of law requires reconsideration.

⁹ Section 77-B of the Information Technology Act, 2000

- iv. Curiously, as per the language of Sections 67 and 67-A of the IT Act, if two consenting adults in a relationship with each other share among themselves their intimate images which might for a “reasonable man of ordinary prudence” be obscene or sexually explicit, then such dissemination of images even if done privately between the couple themselves is a punishable offence.
- v. In India, there is no law that defines, describes, prevents and / or punishes the crime of “doxxing”.
- vi. Forensic analysis of electronic evidence and/ or devices is of utmost importance in order to ensure the authenticity and reliability of such evidence. Apprehension with regard to the authenticity of electronic evidence creates a hurdle in relying on such evidence when produced before courts of law. It is necessary that specialized forensic units are set-up to facilitate examination and/ or analysis of electronic evidence. That the High Court of

Calcutta¹⁰, recently, observed that, there is a crying need to train and familiarize members of the police force in the matters of collection, reception, storage, analysis and production of electronic evidence.

The *Animesh Boxi* Case

In the matter of: *State of West Bengal v. Animesh Boxi*¹¹, a district court in West Bengal convicted an engineering student for sharing intimate videos of his ex-girlfriend on a porn website. The court convicted the accused under Sections 354-A, 354-C, 354-D and 509 of the IPC and under Sections 66-C and 66-E of the IT Act. The accused was sentenced to undergo *five years* imprisonment and a fine of Rs. 9, 000/- was imposed upon him. Some of the key observations made by the court as regards “revenge porn” in the afore noted matter are as follows:

- i. When sexually explicit images of a person are posted online without that person’s consent, especially to cause harassment to that person (victim) then the accused who commits such a crime is guilty of the offence of “revenge porn”.

¹⁰ *Subbendu Nath V/s State of West Bengal*, C.R.M. No. 650/ 2019 (Date of Decision: 18.02.2019)

¹¹ GR 1587/ 2017

- ii. “Revenge porn” or “revenge pornography” is the sexually explicit portrayal of one or more individuals that is distributed without their consent via any media/ medium.
- iii. The sexually explicit images or video may be made by a partner of an intimate relationship with the knowledge and consent of the subject/victim, or it may be made without his/ her knowledge and consent.
- iv. The possession of the material (sexually explicit images/ videos) may be used by the perpetrator (accused) to blackmail the subject/ victim into performing other sexual acts, or to coerce the victim into continuing the relationship, or to punish the victim for ending the relationship.
- v. It is a crime to knowingly disclose a visual image of an identifiable person who is engaged in sexual conduct, without his or her consent, with the intent to harm, harass, intimidate, threaten, or coerce the person depicted.

Laws in India are inadequate to combat “revenge porn”:

The wicked feature of “revenge porn” is a process known as “downstream distribution”. That “downstream distribution” is the reposting of images on the internet/ web by third-parties who were not the original posters of the images. Thus, while the initial “revenge porn” post may eventually be removed, the felonious pornographic image can be reposted by others who captured it before its removal, making it virtually impossible for a subject/ victim to completely eradicate the images from the internet once and for all.

There are no laws in India that define “doxxing” or cater to the problem of “downstream distribution”. Several State laws in United States punish only the original publisher of revenge porn, which does nothing to deter “downstream distributors” from continuing to repost images on other platforms. It is essential that we in India work ardently to coin technological and legislative ways to combat this menace of “downstream distribution” to contain and eliminate “revenge pornography”.

Legislative measures India should take:

It is essential that India comes up with a legislation that:

- (1) Is “gender-neutral” regard being had to crime of “non-consensual pornography” and/ or “non-consensual dissemination of private sexual images”.
- (2) Not only defines “revenge porn”, “doxing and downstream distribution but also makes these offences cognizable, to be tried have as warranted cases.
- (3) Focuses on victim compensation and psychological regeneration. For many victims, the effects of “revenge porn” echo for a long time as many lose their jobs, are forced to change their names, and some feel compelled to go into hiding/ isolation for their safety; most of the victims suffer suicidal thoughts.
- (4) Comprehensively defines the following terms: “non-consensual dissemination”, “sexual image”, “cyber stalking” and “cyber bullying”.
- (5) Regulates the content on mobile applications such as *Tik Tok*. Recently, the High Court of Orissa in the matter of: ***Shibani Barik v. State of Odisha***¹², had occasion to observe as follows:

“... Tik Tok Mobile App which often demonstrates a degrading culture and encourage pornography besides causing pedophiles and explicit disturbing content, is required to be properly regulated so as to save the teens from its negative impact. The appropriate Government has got the social responsibility to put some fair regulatory burden on those companies which are proliferating such applications. Though certain sections of the Information Technology Act in conjunction with other Acts in force, do have the teeth to bite such offenders especially Sections 66-E, 67 and 67-A, which stipulates punishment for violation of privacy, publication and circulation of what the Act calls “obscene” or “lascivious” content, but grossly insufficient. The Information Technology Act, 2000 does impose an obligation upon such companies to take down content and exercise due diligence before uploading any content, but India lacks a specialized law to address the crime like cyber bullying.”

- (6) Comprehensively defines “obscenity”, and clearly marks the line of distinction between “obscenity” and “sexually explicit”. The Constitution of India, 1950 guarantees its citizens the fundamental right of free speech and expression. Although the term

¹² BLAPL No. 915/ 2020

“obscenity” is not statutorily defined in India but law against obscenity is constitutional in India. The Supreme Court of India in plethora of precedents has broadly defined the term “obscene” as “offensive to modesty or decency; lewd, filthy and repulsive”. That test of “obscenity” is “changing mores of marching civilization”, but same might not be true for content which is “sexually explicit”. Recently, the High Court of Bombay in the matter of: **Jaykumar Bhagwanrao Gore v. State of Maharashtra**¹³, cryptically differentiating between Sections 67 and 67-A of the IT Act observed as follows:

“... I have perused the obscene images which were sent to the cell phone of the complainant. As per the submissions of learned APP, the images were received by the complainant and it appears that the images were sent from the cell phones mentioned herein. The images do not show the actual act of sexual intercourse, but are of erected penis with hand. Insofar as the meaning of sexually explicit act under Section 67-A is concerned, submissions of learned counsel Mr. Ponda are to be accepted, as he pointed out from the dictionary that “explicit” means “describing

or representing sexual activity in a direct and detailed way”. Thus, sexually explicit activity covered under Section 67-A is necessarily to be lascivious or of prurient interest, but the act within Section 67 though is lascivious not necessary sexually explicit activity. However, it needs to be interpreted further. It does not require a bilateral sexual activity it can be unilateral sexual activity but it should be explicit and not implied. Image exhibiting penis is lascivious, so is covered under Section 67 of the Act which is bailable. The obscene image in the present case of erected handled penis is sexually explicit activity contemplated u/s 67-A of the IT Act and hence, directly falls under Section 67-A of Information Technology Act.” (emphasis supplied)

- (7) Differentiates “revenge porn” from “artistic expression”. Article 19 of the Constitution of India, 1950 protects artistic expression; therefore, artists who create and publish nude images with the consent of the person depicted for creative, arty and theatrical purposes are not in the nature of “non-consensual dissemination of sexual images”. A picture of a nude/semi-nude woman, as such, cannot *per se* be called obscene unless it has the tendency to arouse feeling or revealing an overt

¹³ 2017 SCC Online Bom 7283

sexual desire.¹⁴ The picture should be suggestive of deprave mind and designed to excite sexual passion in persons who are likely to see it, which will depend on the particular posture and the background in which the nude/semi-nude woman is depicted.¹⁵ Nakedness does not always arouse the baser instinct.¹⁶

- (8) Realizes that obscenity is to be judged from the standards of “popular morality” rather than “Constitutional morality”.¹⁷ Popular morality as distinct from constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. The same is not always true for content that is sexually explicit because sexually explicit content has within its breadth that which ekes bestiality, sadistic and masochistic abuse. Something that is seen as obscene today might not be seen as obscene tomorrow regard being had to the principle of “changing mores of marching civilisation”, but this is not true for content that is sexually explicit.

- (9) Recognizes that an important exception to the crime of “revenge porn” is distribution of images in order to bring potentially unlawful conduct to the attention of law enforcement agencies or for legitimate journalistic purposes which serves public interest and should therefore be excluded from potential prosecution.

- (10) Appreciates that the form of evidence in crimes of cyber-pornography is digital/ electronic in nature and thus, adequate procedures are required to be put in place to see that the investigating officers probing the crime have requisite comprehension and expertise to discern as to how to extract, store and preserve the authenticity of the evidence obtained during investigation on the basis of which the prosecution would be presenting its case before the court of law.¹⁸

Concluding Remarks:

India’s ability to contain and combat cyber-crimes particularly in the nature of “revenge porn”, “doxxing” and “downstream

¹⁴ *Roth V/s United States*, 354 US 476 (1957)

¹⁵ *Aveek Sarkar V/s State of West Bengal*, (2014) 4 SCC 257; *Shreya Singhal V/s Union of India*, Writ Petition (Criminal) No. 167/ 2012, Supreme Court (Date of Decision: 24.03.2015)

¹⁶ *Bobby Art International V/s Om Pal*, (1996) 4 SCC 1

¹⁷ W.P. (C) No. 7778 of 2018, High Court of Kerala (Date of Decision: 08.03.2018)

¹⁸ *Vijesh V/s State of Kerala & Anr*, Bail Appl. No. 7022/ 2018, High Court of Kerala (Date of Decision: 02.11.2018)

distribution” is dismal. Further, ability of the police agency in India to extract, store and preserve the authenticity of the digital/electronic evidence collected during investigation has already been questioned on several occasions by different High Courts of the country.

Although, right to privacy in India has been recognized as a fundamental right¹⁹ which protects the inner sphere of an individual

from interference from both State and non-State actors and allows the individuals to make autonomous life choices; this guarantee seems to evaporate in thin air when faced with threats of “revenge porn”. As already delineated above, only legislative improvements (which are “gender neutral”) coupled with technological advancements (which are an answer to “doxxing” and “downstream distribution”) can fill the hole in the lifeboat.

¹⁹ *Justice K.S. Puttaswamy (Retd.) & Anr V/s Union of India & Ors*, Writ Petition (Civil) No. 494/ 2012,

Supreme Court of India (Date of Decision: 24.08.2017)