

A study to examine the responses of the Criminal Justice System to revenge pornography in India: Effective measures for reformation and sensitisation

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Abstract

Image based sexual abuse, commonly known as 'Revenge pornography' refers to the act of non-consensual dissemination of sexually explicit visuals and texts of someone else in order to cause them distress or embarrassment. Fuelled by the advancement in information technology, the practice of revenge pornography that involves sexual as well as psychological abuse has spread like wildfire. Such material may be obtained by an intimate partner with the knowledge and consent of the subject, or it may be made without his or her knowledge. Indian women are in the throes of the dichotomy of sexual liberation and being punished for such liberation both in cyberspace and otherwise. While majorly this crime is perpetrated against women, there is also a large community of LGBTQ victims of revenge porn targeted either because of their gender identity or sexuality. Currently, the law relating to revenge pornography in India has not been categorically defined as an offence in any of the statutes. The laws that come closest to the topic are Section 354C and 509 of the Indian Penal Code 1860, Section 66E, 67 and 67A of the Information Technology Act 2000 and Right to Privacy enshrined in Article 21 of the Constitution of India. The role of Law of Copyright against Revenge porn is still emerging. However, none of these laws contain express provisions related to the revenge aspect. The first part of this paper deals with the problems pertaining to the loopholes in the Indian legal system which necessitates reformation and with the jurisprudence on this subject especially in the light of the Right to Privacy Judgement. The second part examines the recent legislative developments in other countries and their role in paving the way for amendment of existing laws in India. Time is of the essence for the criminal justice delivery system to respond to this crime due to the viral nature of the Internet. Our criminal justice system that aims to prevent crimes and provide moral support for victims has generated sporadic responses to the offence of revenge pornography. The third part addresses the need for sensitization of the primary institutions such as the Police, Cyber Cell, Prosecution and courts. The paper concludes by stipulating that implementation of existing laws by a receptive system need not be overlooked while deliberating the reasons to legislate new offences.

Introduction

The modern Indian woman who chooses to express her sexuality, within a relationship or out of it, is punished by the society. Her intimate images, sent to a person she trusts under a reasonable expectation of privacy, are shared and the society that deems such women less worthy of protection proceeds to shame her. 'Revenge porn' is classically understood as the unauthorised and malicious dissemination of intimate images on the Internet to humiliate and embarrass former sexual partners. The accessibility of Internet and the viral nature of social media have changed the character of its perpetrators and the consequences for its victims. Prior to the digital revolution, only popular celebrities were at risk.

'Revenge porn' is a media tag given to this offence when the issue came to notice in 2010. It has become synonymous with the non-consensual distribution of private intimate images over the internet and has gathered the attention of the global media and various governments. This paper prefers the term Image based sexual abuse coined by McGlynn and Rackley. They say that 'revenge porn' focuses on the motivations of the perpetrator and not at the consequences faced by the victims, whereas the term 'image-based sexual abuse' captures the nature and injury done through the non-consensual creation and distribution of private sexual images.¹

Sexting is quite a common practice in the era of digital dating; it involves sharing intimate images, videos or texts via electronic means. Its quite prevalent in adolescents, they share flirty and sexual images with intimate friends presuming that they won't be shared. When the recipient is not trustworthy, the photos get shared with others. They are also disseminated after the breakdown of a relationship.

As per a survey conducted by the authors with 120 urban Indians in the age group of 15-30 years old, 45% people admitted to sending an intimate image while 73% people admitted to receiving such image. While around 60% of such Sexting was with a monogamous partner, rest was between strangers and other sexual partners. 12% of the heterosexual females were victims of IBSA whereas 8% heterosexual males were victimised. 20% of the LGBTQ survey takers admitted to be victims of IBSA.² Therefore, the problem of IBSA cannot be examined with a

¹ Clare McGlynn, Erika Rackley, Image-Based Sexual Abuse, OJLS, V.37, I.3, 2017
<https://doi.org/10.1093/ojls/gqw033>

² Accessible at https://www.academia.edu/41998982/Image_based_Sexual_abuse_Survey

gender-blind lens; the victimisation through IBSA is gendered. The groups that face censorship and shaming for their expression of sexuality are targeted more.

The cybercrime and sexual harassment laws do not provide coverage to the nuances of image based sexual abuse. There is a lack of sensitivity and understanding on the ground level in execution. The legislative responses to tackle IBSA have been sporadic and inconsistent. This paper provides a critical analysis of the responses of the criminal justice system to the offence of IBSA. It concludes by proposing amendments for the existing loopholes and preventive measures to combat IBSA, and cementing the cracks in the criminal justice system.

IBSA and the Indian Legal System

The major Indian laws that deal with the offence of IBSA are Indian Penal Code³ and Information Technology Act⁴. Section 354C⁵ of IPC states that if a man watches or captures the image of any woman or disseminates such image of her involved in a private act, where she would not expect to be watched or captured by anyone, would be said to commit the offence of Voyeurism. It is important to understand here that even if the victim consents to get clicked but does not consent to the dissemination of the image, such dissemination would also fall under the preview of voyeurism. While Section 509⁶ of the same Act punishes whoever intends to insult the modesty of a woman through words or gestures or intrudes the privacy of a woman with imprisonment upto one year and with fine.

Further, whoever knowingly or with intent captures, publishes or transmits the image of a private area of an individual without his or her consent and thus violating the privacy of such person shall be punished with an imprisonment upto three years and fine under Section 66E⁷ of the IT Act. Section 67⁸ and 67A⁹ punishes whoever publishes or transmits in the electronic form any material which is lascivious or obscene material or causes to do so which may tend to deprave the corrupt persons or which contains sexually explicit act or conduct.

³ The Indian Penal Code, 1860

⁴ The Information Technology Act, 2000

⁵ The Indian Penal Code, 1860, Chapter XVI, Section 354C

⁶ The Indian Penal Code, 1860, Chapter XXII, Section 509

⁷ The Information Technology Act, 2000, Chapter XI, Section 66E

⁸ The Information Technology Act, 2000, Chapter XI, Section 67

⁹ The Information Technology Act, 2000, Chapter XI, Section 67A

In the case of Justice K. S. Puttaswamy v. Union of India¹⁰, the Supreme Court held unanimously that the right to privacy was protected by the Constitution in India; it is incidental to other freedoms guaranteed by the Indian Constitution. The Court reasoned that privacy includes at its heart the protection of privacy safeguards, personal intimacies, sexual orientation, and individual autonomy; it affirms the ability of the individual to control substantial aspects of his or her life. While, the reasonable expectation of privacy may vary from the intimate to the private arena and from the private to the public zones, it is necessary to underline that privacy is not surrendered just because any person is in a public place.

The Copyright Act¹¹ protects the copyright of the person who took the photograph or filmed the video. For victims of IBSA, where an intimate selfie or self-filmed video is involved, copyright law may be a remedy. Also, criminal defamation under Section 499¹² of IPC and civil defamation are available against IBSA.

On the eve of International Women's Day in 2018, a court in Bengal's East Midnapore district served justice to a 20 year old victim of IBSA by sentencing Animesh Boxi, a college student, to five years in jail. The court found him guilty under Sections 354A¹³, 354C¹⁴, 354D¹⁵ and 509¹⁶ of the IPC and Sections 66C¹⁷, 66E¹⁸ and 67¹⁹/67A²⁰ of the IT Act. The court also ordered the State's Victim Compensation Scheme to pay compensation to the victim. The judge coined the term 'virtual rape' and suggested that since the video was published on a website available globally, every time someone saw the video, the victim's dignity was violated and she suffered virtual rape.²¹

¹⁰ K.S. Puttaswamy (Retd) v. Union of India, 2017 10 SCC 1

¹¹ The Copyright Act, 1957

¹² The Indian Penal Code, 1860, Chapter XXI, Section 499

¹³ The Indian Penal Code, 1860, Chapter XVI, Section 354A

¹⁴ The Indian Penal Code, 1860, Chapter XVI, Section 354C

¹⁵ The Indian Penal Code, 1860, Chapter XVI, Section 354D

¹⁶ The Indian Penal Code, 1860, Chapter XXII, Section 509

¹⁷ The Information Technology Act, 2000, Chapter XI, Section 66C

¹⁸ The Information Technology Act, 2000, Chapter XI, Section 66E

¹⁹ The Information Technology Act, 2000, Chapter XI, Section 67

²⁰ The Information Technology Act, 2000, Chapter XI, Section 67A

²¹ State of Bengal v. Animesh Boxi, Case no. GR: 1587/17 <https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2018/06/State-of-West-Bengal-v.-Animesh-Boxi.pdf>

IBSA legislations across the world

While IBSA may pervade across international lines, still there is no global policy action towards it. European countries such as the UK, France and Germany have enacted national laws post-2015 that serve to criminalise IBSA, punish the perpetrators and some even compensate the victim for the hardship faced. 39 States of USA have also enacted varying provisions against IBSA. Japan and Canada also have stringent laws framed in the year 2014 and 2015 respectively. Scotland laws provides for imprisonment upto twelve months or fine and imprisonment upto five years for repeat offenders as punishment for IBSA. The offence covers anyone who distributes or threatens to distribute an image which shows or is morphed to show another person in an intimate situation to cause such person fear, alarm or distress provided that the image has previously not been published.²²

The General Data Protection Regulation of Germany²³ on the protection of natural persons with regard to the processing of personal data and on the free movement of such data offers protection to IBSA victims. A person also has rights available against unauthorised dissemination or public display of their images under the German Art Copyright Law.²⁴

Moreover, Germany's highest Court (Bundesgerichtshof) upheld a ruling made by a Court in Koblenz, Western Germany against a professional photographer who had taken intimate photos of a woman during their extra marital affair. The court held that individuals have the right to compel their former sexual partners to delete intimate images of them even though it was clear to both the parties that they had been made for private use, and not for publication or dissemination. Even though the possession and reproduction of the images and videos by the defendant did not initially constitute an infraction as they were created with her consent. However, the consent to the production of the photographs in question does not preclude a revocation of consent in the future. This revocation extended to the photos taken by the photographer and those taken by her. Since the images were taken in the context of a personal

²²Abusive Behaviour and Sexual Harm Act, 2016, Part 1, Section 2, <http://www.legislation.gov.uk/asp/2016/22/section/2/enacted>

²³ Regulation (EU) 2016/679 (General Data Protection Regulation), <https://dsgvo-gesetz.de/>

²⁴ Urheberrechtsgesetz, 1965, <https://www.gesetze-im-internet.de/urhg/BJNR012730965.html>

relationship, the Court said that deleting the pictures neither infringed his creative freedom nor his rights to carry out his profession.²⁵

The law in Minnesota State of USA creates a cause of action against a person for the non-consensual dissemination of personal sexual images when the person is identifiable and the image was obtained under a reasonable expectation of privacy. The fact that the person in the image consented to the creation or there was voluntary private transmission of the image is not available as a defence to the perpetrator.²⁶

Canada defines "intimate image" as a visual recording of anyone made by any medium inclusive of a photographic, film or video recording in which person is nude or his or her genital organs or anal region or her breasts are exposed or engaged in explicit sexual activity; and that at the time of the recording, there were conditions that there was a reasonable expectation of privacy; and the person in the image retains a reasonable expectation of privacy at the time of commission of offence. The punishment for non consensual or reckless dissemination of such an intimate image is imprisonment for a term upto five years.²⁷

Japan also allows Internet service providers to delete suspected intimate images without the uploader's consent wherever the victim notifies the ISP of the existence of the image and the provider had requested the consent of the uploader to delete the image and the uploader did not respond or delete such image. Moreover, the Act directs the national and local governments to ease victims' embarrassment when they report the crime. For young potential victims, the Act lays obligations on the governments to educate people on how to prevent IBSA.²⁸

²⁵ Im Namen Des Volkes Urteil Holmes Justizangestellte als Urkundsbeamtin der Geschäftsstelle, BGH, VI ZR 271/14, GG Art. 2 Abs. 1, Art. 1 Abs. 1; BGB § 823 (Bf), § 1004, 2015, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&Seite=0&nr=73173&pos=24&anz=585>

²⁶ Delaware Code, Title 11, Crimes and Criminal Procedure, § 1335 Violation of privacy, <https://codes.findlaw.com/de/title-11-crimes-and-criminal-procedure/de-code-sect-11-1335.html>

²⁷ Bill C-13, Protecting Canadians from Online Crime Act, Section 162.1, <https://www.cba.org/CMSPages/GetFile.aspx?guid=2f73fcf2-a04e-402a-97e8-de9d56b0ba1a>

²⁸ Shiji seiteki gazou kiroku no teikyou tou ni yoru higai no boushi ni kansuru houritsu, 2014, http://www.shugiin.go.jp/internet/itdb_gian.nsf/html/gian/honbun/houan/g18701017.htm

Lacunae in the Indian Criminal Justice System

As already mentioned, there are certain laws that deal with certain aspects image based sexual abuse in India. However, there are loopholes that exist in the criminal justice system related to this offence. In the IPC, Section 354C²⁹ does not envisage the incidents where the victim forwards their intimate selfie to someone they trust and then that person disseminates the pictures. Such scenarios keep happening in modern Indian society but no dedicated law has been enacted to target this particular issue. The only right the victims have is against the infringement of copyright of the image sent by them in cases of selfies as the photographer has the copyright. But as we all know, the law of copyright lacks strength and cannot bring justice to such victims. In the IT Acts, the law talks about punishment for people that send obscene or sexually explicit images but cases where the victim themselves had sent their images which might be exposing their private parts and the person it was sent to disseminates it, both of them shall commit the same offence. Even though the victim's right to privacy has been infringed they would be discouraged to report the crime in the very first place.

A criminal justice system should not just be efficient to catch the perpetrators but also should work towards preventing the crime from happening in the first place. Liability of the search engines, social media platforms and internet service providers should also be fixed regarding this particular law to stop any such content from getting uploaded and even if it does, to take down such content from the internet in a limited time period. In the aforementioned survey³⁰ conducted by the authors, 32.8% of the people were aware of the offence of IBSA while 39.3% of the people were not at all aware of the offence. The remaining 27.9% were partially aware of IBSA. Thus we can say that education can be a key factor in stopping the offence at the very beginning.

²⁹ The Indian Penal Code, 1860, Chapter XVI, Section 354C

³⁰ Accessible at https://www.academia.edu/41998982/Image_based_Sexual_abuse_Survey

Proposed amendments to IBSA laws in India

Amendments to IPC

The explanation (ii) of the Section 354C³¹ should be amended as following:

Where the victim consents to the capture of the images or any act, *or herself captures or transmits such image*, but does not consent to their dissemination to third persons and where such image or act is disseminated, such dissemination shall be considered an offence under this section.

Section 509³² could explicitly state the capture, creation or transmission of an image that insults the modesty of a woman:

“Word, gesture or act intended to insult the modesty of a woman.—Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, *captures, creates or transmits any image*, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object *or image* shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished...”

Amendments to the IT Act

In Section 66E³³, the phrase "the image of a private area" to be omitted and be replaced with "an intimate image" and explanation (c) to be omitted and replaced with:

““intimate image” means an image or an altered image that shows or appears to show a person's private parts, or a person engaged in a private act, where person has a reasonable expectation of privacy.”

Apart from this, the Personal Data Protection law should hold the Internet service providers and search engines liable for misuse of intimate personal data and that imposes legal obligations to screen uploads, have transparent removal policies which work within reasonable time frames. There should be no burden of proof on the victims for proving intention in such cases because once the crime takes place it is irrelevant whether it was done intentionally or not.

³¹ The Indian Penal Code, 1860, Chapter XVI, Section 354C

³² The Indian Penal Code, 1860, Chapter XXII, Section 509

³³ The Information Technology Act, 2000, Chapter XI, Section 66E

Measures for effective implementation of existing IBSA laws in India

There are several steps that need to be taken to afford a greater measure of protection to the women and in particular to prevent incidence of crimes against them. In 2017, the Ministry of Home Affairs in a letter to all states and Union Territories suggested certain guidelines related to investigations in cases that pertain to crimes against women which should be followed³⁴. These advisories, inter-alia, include gender sensitization of the police personnel, adopting appropriate measures for swift and salutary punishment to public servants found guilty of custodial violence against women, minimizing delays in investigations of murder, rape and torture of women and improving its quality, setting up a 'crime against women cell' in districts where they do not exist, providing adequate counselling centers and shelter homes for women who have been victimized, setting up of special women courts, and improving effectiveness of schemes developed for the welfare and rehabilitation of women who are victimized with greater emphasis on income generation to make the women more independent and self-reliant. In cases of IBSA, certain aspects of investigation that need special attention are:

- The police officials should be sensitised in dealing with the victims of IBSA
- A dedicated section of the cyber cell should deal with this offence. Help line numbers of these dedicated cyber cells should be displayed in schools, colleges, hospitals and other prominent places.
- There should be no delay in registration of FIRs and there should be empowerment of courts and police to compel individuals to take all reasonable steps in consultation with search engines and social media platforms to remove, delete or destroy non-consensual nude or sexual images.
- Following the footprints of Vishakha Guidelines³⁵, Internal Complaints Committee should be formed in schools where there are chances of victims and perpetrators being juvenile.
- Thorough counselling through professionals should be provided to support the victim and family members.

³⁴ Government of India, Ministry of Home Affairs, File No. 15011/21/2004-SC/ST Cell, <https://mha.gov.in/commoncontent/crime-against-women>

³⁵ Vishaka & Ors. V/S State of Rajasthan, AIR 1997 SC 3011, 1997

- Any person receiving threats should be allowed to get their intimate pictures deleted from the electronic devices of their perpetrators.

Conclusion

The above proposals and suggestions aim to combat the diverse and complex behaviours of IBSA. The survey found that sexting within digital dating is rampant, approximately half of the people surveyed admitted to either sending or receiving intimate images. Moreover, the study found that one in ten of those surveyed were victimised by IBSA. While a major portion of IBSA victims were heterosexual females, LGBTQ people had a higher rate of victimisation. The survey carried out by the authors also mentioned that more than 50% of the people had not reported the crime to anyone³⁶. Thus education and awareness against these crimes could prove to be of immense importance which could be done at various levels starting with home, schools, colleges and programmes carried out by government and NGOs.

As a society, we should work together in diluting the stigma attached to various crimes especially against women where attempts are made to tarnish the dignity of someone. The major reason for these crimes is not the accessibility of the image but the corrupt mind-set of the perpetrators. One of the major reasons for crimes like IBSA to take place is the feeling of control or ownership that the perpetrators believe they have over the victims.

There is a need for further research into the peer support and encouragement that allows IBSA to be treated as a joke shared between friends. It is hoped that the suggestions and ideas presented here will expand the understanding of IBSA in India.

³⁶ Accessible at https://www.academia.edu/41998982/Image_based_Sexual_abuse_Survey