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DEEPFAKE PORN AND BNS: IS INDIA READY TO CRIMINALISE AI-GENERATED SEXUAL CONTENT?

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ABSTRACT

The phenomenon of AI-generated sexual content has presented a novel challenge to the Indian criminal jurisprudence. While the progressive Bharatiya Nyaya Sanhita, 2023 [BNS] aims to update the Indian penal code, it does not explicitly criminalize deepfake pornography. The present paper examines if the provisions of the BNS and/or Information Technology Act, 2000 are sufficient to criminalize AI-assisted sexual content. Further, it proposes an amendment to the BNS for the explicit criminalization of deepfake pornography.

1. INTRODUCTION

Deepfake porn is created when Al-based deep learning tools are used to put a person's face or body onto a sexually explicit image or video of someone else, without their consent. According to Sensity Al, almost 96% of all deepfakes found online are pornographic in nature, and out of those, 90% are non-consensual videos that target.

With the recent cases involving Rashmika Mandanna, Katrina Kaif, and Delhi University students, it is no longer a far-fetched issue. The paper asks if BNS, which replaces the Indian Penal Code (IPC) with effect from 1st July 2024, is ready to take on AI-driven sexual harassment.[2]

2. HOW IS DEEPFAKE PORN DIFFERENT?

While conventional "morphed" pornographic images and videos require photo-shopping skills, deepfake pornography has three distinguishing features.

1. Hyper-realism,
2. At scale,
3. No need for explicit image of the victim

These qualities make deepfake pornography a double exploitation as it violates a person's privacy, sexual autonomy, and dignity. [3]

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3.WHAT DOES THE LAW CURRENTLY SAY?

3.1 Bharatiya Nyaya Sanhita, 2023

The BNS does not explicitly mention "deepfake" or "AI pornography." Therefore, the following sections can be used:

1. Section 294 BNS Sale, etc., of obscene objects – this focuses on obscenity rather than consent. [4]
2. Section 79 BNS Word, gesture or act intended to insult modesty – this is a three-year offense. [5]
3. Section 77 BNS Voyeurism – this deals with viewing private acts without consent. In deepfake pornography, there is no "actual" private act. [6]
4. Section 78 BNS Stalking – this deals with repeated contact rather than single incidents. [7]

Limitation: BNS uses the term "real" act or "real" photograph.

3.2 Information Technology Act, 2000

1. Section 66E IT Act Violation of privacy – this deals with "private parts." It does not apply to deepfake pornography as the parts are generated.[8]
2. Section 67 & 67A IT Act Publishing obscene and sexually explicit material – this is the main provision used by the police. However, it does not deal with consent explicitly. [9]
3. Section 67B IT Act Child pornography – this is the strongest provision to date, dealing with "morphed" children. There is no equivalent for adults. [10]

3.3 IT Rules, 2021: Rule 3(2)(b) empowers a person to remove non-consensual sexually explicit material within 24 hours of uploading. [11] This is a takedown notice rather than punishment.

4.WHY THE CURRENT LAW IS INADEQUATE?

1. Lack of consent
   No explicit mention of synthetic content
2. Obscenity is a victim's burden 4. No clarity on the liability of AI

5.COMPARATIVE PERSPECTIVE

Online Safety Act 2023, UK: Sharing of images "artificially created" without consent is punishable by up to two years' imprisonment. [12] In the US, 48 states have laws against deepfake

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pornography, with the DEFIANCE Act 2024 allowing private right of action, and Texas Penal Code § 21.165 making it a crime to create. [13] In South Korea, the creation and distribution was criminalized under the Act on Special Cases Concerning the Punishment of Sexual Crimes with a penalty of up to 7 years after the Nth Room scandal. [14]

6.IS INDIA READY? PROPOSED AMENDMENTS

Proposed Section 79A BNS: "Whoever creates, generates, or causes to be generated by artificial intelligence or other means any obscene or sexually explicit content depicting any person without their explicit consent or distributes, publishes, or threatens to distribute such content, shall be punished…"

Further recommendations include making the creation of content also a punishable offense, platform liability via watermarking, victim-centric approach with in-camera trial under Section 397 BNS, [15] and gender-neutral language.

7.CONCLUSION

While BNS was supposed to be a citizen-centric code, it failed to explicitly criminalize AI-facilitated sexual offenses. Deepfake pornography is not a technological marvel but a form of sexual violence. India may not be ready, but it must be.

FOOTNOTES – BLUEBOOK 21ST EDITION

[1] Henry Ajder et al., The State of Deepfakes: Landscape, Threats, and Impact, Sensity AI (2019) [hereinafter Sensity Report].

[2] Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India) [hereinafter BNS].

[3] India Const. art. 21

[4] BNS § 294.

[5] BNS § 79.

[6] BNS § 77.

[7] BNS § 78.

[8] Information Technology Act, 2000, No. 21, Acts of Parliament, 2000, § 66E (India) [hereinafter IT Act].

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[9] IT Act §§ 67, 67A.

[10] IT Act § 67B.

[11] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 3(2)(b), Gazette of India, Part II, Sec 3(i) (Feb. 25, 2021).

[12] Online Safety Act 2023, c. 50, § 188 (UK).

[13] Defiance Act of 2024, S. 3696, 118th Cong. (2024); Tex. Penal Code Ann. § 21.165 (West 2023).

[14] Act on Special Cases Concerning the Punishment of Sexual Crimes, Act No. 16971, art. 14-2 (S. Kor.).

[15] BNS § 397 (provision for in-camera trial for sexual offences).

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