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## **An Examination of the offence of “Non-Consensual Pornography”: In search of an Effective Law**

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### **Abstract**

This paper conducts a comprehensive analysis of revenge porn legislation, focusing on essential components such as *actus reus* and *mens rea* of the offence, platform liability, victim protection, and the remedies and penalties available. Non-consensual pornography, commonly referred to as “revenge porn,” has experienced a concerning increase across multiple jurisdictions, resulting in significant and often catastrophic consequences for its victims. The study examines the laws of the United States, the United Kingdom, Singapore, India, and Sri Lanka, revealing both similarities and differences in their approaches. Although the *actus reus* component of these legal frameworks demonstrates a certain level of consistency, notable differences arise concerning the *mens rea* requirement. Jurisdictions like the UK and US demonstrate restricted scopes, a limitation further exacerbated in the US by the granting of special immunities to Internet Service Providers (ISPs) and website/platform hosts. The paper underscores the necessity of implementing a comprehensive dual strategy that includes both civil remedies and criminal legislation to effectively combat NCP. This paper seeks to offer a comprehensive analysis of the most effective legal strategy concerning the key components identified, against the backdrop of prevalent challenges arising from the intrinsic characteristics of NCP in the digital era.

**Keywords:** Key elements of the offence, Non-consensual pornography, Revenge porn, Victim protection & reliefs

### **Introduction**

There is an inseparable connection between humans and technology in the modern digital world. Be it, business, work or daily life of individuals, use of internet has become an integral part of them all. This proliferated use of internet has not only made life convenient for individuals but posed many threats, concerns and challenges. One such undesirable phenomenon triggered by the use of internet is the occurrence of various forms of online misconducts such as harassing, intimidating, stalking and extorting individuals, which could collectively be termed as ‘online harassment’. Non-consensual Pornography

(NCP), commonly known as ‘revenge porn’ is such threatening phenomenon, identified thereunder.

NCP is characterized as the unauthorized dissemination of sexually explicit or intimate images or videos of individuals through online platforms. This inevitably infringes upon the privacy and dignity of those individuals as such publication and dissemination occurs in the absence of their explicit consent. NCP often occurs following broken relationships where resentful individuals seeking revenge from their ex-partners by maliciously disseminating intimate content on digital platforms such as social media. It is such that the content may have been consensually obtained but the act of dissemination is without the consent of the victim (Sales & Magaldi, 2020). Furthermore, NCP even extends beyond interpersonal conflicts, as perpetrated by individuals completely unacquainted with the victims. In such instances, perpetrators may resort to invasive methods, including hacking into the victims’ electronic devices, accessing cloud storage, intercepting communications through various software devices, or secretly recording the victim through unauthorized filming or photography (Poole, 2014). Moreover, NCP might sometimes occur in the form of manipulation of content by interposing/ photoshopping the victim’s face on to images that portrays individuals engaged in sexual activities (Halder & Jaishankar, 2013). This form of picture alteration intensifies the infringement of the victim’s privacy, as it entails the unauthorised and misleading utilisation of the victim’s likeness to produce sexually explicit or compromising visual content (Halder & Jaishankar, 2013).

The underlying objective of this paper is to study the offence of NCP using a comparative approach where the related laws in the United States, the United Kingdom, Singapore, India and Sri Lanka are inquired into. The need for such analysis of the different approaches taken by different jurisdictions is demanded by the surveys and studies which indicate gravity of this offence. As categorically recognized in the US Cyber Civil Rights Initiative report, behind NCP is a variety of incentives, including financial gain, notoriety, content exploitation for entertainment, and to obtain social media validation through likes and online engagement (Kitchen, 2015). While vengeance remains a major motive, it shall also be noted that that ‘sharing content with friends’ is yet another frequently cited reason for perpetrating NCP (Bates, 2016).

While NCP may be prevalent as such its consequences and impact are far reaching. Many studies have shown that NCP can cause psychological, bodily, and socioeconomic harm to victims (Henry et al, 2019; Kitchen, 2015; Bates, 2016). Thus, many researchers believe NCP can leave victims ‘emotionally and psychologically paralyzed’ and ‘socially and professionally ostracized’ (Beyens & Lievens, 2016). NCP victims often feel shame, humiliation, personal violation, and powerlessness (Kitchen, 2015). NCP victims also experience hypervigilance online (checking websites for new images), trust issues, sleeplessness, depression, anxiety, low self-esteem, maladaptive coping mechanisms, and suicidal thoughts (Bates, 2016). One study found that revenge porn had similar mental health effects on female survivors as rape (Bates, 2016). Many NCP victims are also threatened by strangers approaching them

with sexual advancements (Bates, 2015). Many NCP victims also suffer education/career disruptions, permanent reputation harm, and damage to their relationships with spouses, family, and friends, as well as future work opportunities (Olivarius, 2016). Academics observe that ‘downstream distribution’, meaning the re-posting of images & videos of NCP victims by third parties, entails ‘perpetual re-victimization.’ In many instances, victims may be unable to completely remove photographs or other content from the Internet, as they may have been disseminated across various websites (Kamal & Newman, 2016; Criddle, 2020).

A 2023 survey in the United States conducted by the Centre for Innovative Public Health Research indicates that approximately 10.4 million Americans, constituting around 4% of the population, having faced threats or actual experiences of explicit image postings without their consent. A study by the Cyber and Law Foundation indicates that 27% of internet users aged 13 to 45 in India have fallen victim to revenge porn. The National Crime Records Bureau (NCRB) reports a rise in revenge porn in India, based on cases initiated for electronically publishing obscene material rising from 1,111 in 2018 to 1,814 in 2020. In the UK, around 2,050 NCP related complaints were made to the UK’s government-funded revenge porn helpline in 2020, a 22% rise from the previous year (Criddle, 2020). The reported data is also suggestive of how women are more likely to be victims of NCP in comparison to men (Office of the eSafety Commissioner, 2017; Chandan, 2021; Desmond Ng, 2020; Agarwal, 2017). Meantime, some scholars argue that statistics on revenge porn are rare and underestimated

as victims fear to file complaints out of shame and humiliation (Citron, 2009). These figures might also be underestimated as they only consist of data from those victims who have become aware that their images have been created and/or distributed without consent. Thus, the actual figure is likely to be much higher’ (Henry *et al*, 2019).

Thereby, the existing literature identifies the nature, prevalence and impacts of NCP and exemplifies how NCP has become a growing menace causing serious damages to its victims. The serious nature of NCP has prompted legal systems worldwide to implement diverse ways to address this menace in order to efficiently reduce and ultimately eliminate it, and to offer redress to its victims. As such and as reiterated above, the objective of this paper is to conduct a comprehensive examination of the law relating to the offence of NCP to assess the effectiveness and adequacy of those laws and to discern the key components integral to formulating an efficient and targeted legal response to combat NCP. For this purpose, NCP laws from the United States, the United Kingdom, Singapore, India and Sri Lanka have been selected. Among this selection are the jurisdictions which have some targeted laws for NCP and some which are still using the traditional criminal law offences to defeat NCP.

## Research Methodology

To fulfil the primary objective of this article, to study the offence of NCP and to discern the key components integral to formulating an efficient and targeted legal response to combat NCP, the research will conduct a

comprehensive examination of the legal frameworks established in five jurisdictions, namely, the United States of America (referred to as the US), the United Kingdom (referred to as the UK), Singapore, India and Sri Lanka. The United States and UK have been selected for this study with the objective of gaining an understanding of the western approach to tackling NCP while the legal frameworks in Singapore, India and Sri Lanka are examined to gain an understanding of the relatively conventional Asian approach to tackling NCP.

This study adopts a library-based methodology, involving an in-depth analysis of both primary and secondary legal sources within the aforementioned jurisdictions. Primary sources include statutory provisions, legislative acts, and judicial decisions pertinent to NCP legislation. Secondary sources encompass legal commentaries, scholarly articles, and reports offering insights into the historical development, challenges, and implications of NCP laws in each jurisdiction. This study seeks to analyse legal sources to identify the strengths and weaknesses of existing legislative frameworks, highlight similarities and differences across jurisdictions, and ultimately clarify the key components of an effective legal strategy to combat Non-consensual Pornography.

### **Key elements of laws relating to NCP**

Demanded by its high-rising prevalence and the appalling effects it brings about on the victims and the society, countries have adopted various mechanisms to fight against NCP. While some have specific and more recent legislation to address the issue, some make use of older statutes with broader

offences. Furthermore, in most cases they rely on offences found in a series of laws such as penal code and other laws relating to online safety, sexual offences, obscene publications and information technology. As such, the forthcoming sections of this paper will focus critically evaluating the NCP laws with respect to its recognized key elements.

### **Offence of NCP: *Actus Reus***

At the outset, the act of NCP involves a person publishing private, intimate content of another person without the consent of the latter. This can clearly be seen covered in all most all laws that are particularly designed to fight NCP. For instance, Section 20 of Sri Lanka’s Online Safety Act 2024 although not limited in its scope to fight NCP reads that “*Any person, ... who willfully makes or communicates a statement, with intention to cause harassment to another person .... by publishing any private information of the target person... commits an offence*”. In its illustrations, the Section also refers to situations of NCP caused by ex-partners (Section 20, Illustrations (a) & (b), Act 2024). Here, a ‘*private information*’ is defined to include personal information, including “any image, audio or video details, that any person may reasonably expect to remain private” (Section 20(2)(a), Act 2024). However, a deeper examination of the conduct of NCP suggests that it is not adequate to cover only the publishing of material, but also a ‘threat to publish’. Most laws also seem to reflect the same. For instance, Section 66B introduced to the *Sexual Offences Act 2003 (England and Wales)* by the *Online Safety Act of 2023* criminalizes both sharing or threatening to share intimate photos or films of others without consent. Moreover,

US prosecutors utilise federal offences such as blackmail and extortion to prosecute perpetrators of NCP and as such a person who *publishes or threatens to publish* private, intimate photos or videos of another with the intention of extracting money or otherwise forcing the victim into prescribed conduct the victim would not have otherwise engaged in, is charged with extortion (18 U.S.C. § 875). In the case of Sri Lanka ‘*threats to publish*’ is not seen as a part of the offence itself. However, a general provision on ‘*attempt to commit the offence*’ on all offences created under the Act, although not treated equally with the offence in terms of its punishment (Section 40, Act 2024), could arguably be extended to cover ‘threats to publish’. However, Sri Lanka is yet to see some progressive interpretations by the courts using this new law. This extension of the *actus reus* is demanded in light of the harm inflicted upon the victim. Although less palpable than the actual, the distress, anger and harm caused by a threat to publish private material is unquestionable. It should further be noted that ‘privacy’ of the victim is undeniably compromised by such action. Thus, whether there has been an ‘actual’ disclosure or a ‘threat’ it shall be regarded as incriminating behaviour.

While that may be settled to a greater extent, some state laws in US (such as California, Connecticut, Utah and North Dakota) require proof of actual harm or emotional distress caused to the victim as an additional element in the *actus reus* (California Penal Code, s 647(j)(4) (2014); North Dakota Century Code, s 12.1- 17-07(2015); Utah Code, s 76-5b-203 (2019)). However, such requirement might be problematic for several reasons. Firstly, it displays a failure on the part of the legislature

to recognize the magnitude of harm caused to individuals by NCP despite the extensive studies conducted worldwide and has also demonstrated above. Secondly, it also fails to recognize the inherent wrongfulness of the perpetrator’s conduct which amounts to a serious violation of privacy. Further, requiring that the victim testify and be subject to cross-examination on their emotional suffering has the effect of discouraging victims from reporting and participating in NCP prosecutions (Pollack, 2014). Thus, rather than requiring proof of harm for conviction, it is suggested that the harm caused to the victim could instead be considered in sentencing, as an aggravating factor (Henry *et al*, 2019).

Another key concern in this regard is the scope of ‘intimate content’. While content featuring the actual victim is quite straightforward, the question arises whether the altered images shall also be treated equally within NCP. Most laws answer this question affirmatively. Singaporean law has a comprehensive definition of ‘*intimate images*’ inclusive of altered images where they lead to a reasonable belief that the person depicted in the image is the victim (Penal Code of Singapore 1971, s 377BE(5)(b)). However, if the altered image does not lead to such a belief, (like in a situation of a face cropped into cartoon) such photos would not be classified as intimate photographs under this clause (s 377BE(5) (b) Illustration (a) & (b)). This position on ‘altered content’ is commendable in light of the effect it has on the victim, as the victim goes through the same amount of emotional distress, humiliation and harassment. Conversely, in England, Wales, and Northern Ireland, images or videos that become sexual in nature due to alteration may not be construed as ‘private and sexual’ under



their respective laws. Certain jurisdictions lack explicit references to modified content and do not include specific exclusions for such material. Thus, it is plausible that altered content may fall under the scope of the applicable NCP laws. This situation is even more aggravated with the use of artificial intelligence in editing photos and videos which appears natural and the quality of their creations gets better by the day. For clarity and efficacy in addressing the intricacies of NCP, it is crucial that altered sexual photographs and recordings are explicitly acknowledged as constituting sexual content, regardless of their initial nature. This would enhance a more comprehensive and nuanced legal approach for addressing NCP across jurisdictions.

Moreover, it is settled that, victim’s initial consent given for creating any intimate material or sharing them with specific individuals does not constitute a blanket authorization for their widespread dissemination. This could even be seen explicitly recognised in laws of some jurisdictions (15 U.S. Code § 6851 para (b)).

Additionally, Section 2 of the Obscene Publication Ordinance No. 4 of 1947, as amended in 1983 and 2005, criminalizes the creation, production, or possession for commercial purposes, distribution, or public exhibition of obscene writings, drawings, prints, photographs, cinematographic works, etc. This section seems sufficiently expansive to encompass both individuals who hold intimate photographs/videos of others with the intent to publicly display them on various platforms, as well as those who manage the sites where individuals can upload such content. Consequently, this clause may be employed to punish offenders who disseminate

photographs and videos, with or without consent, as well as those who manage revenge porn databases (Harasgama & Selvakkumaran, 2020). The primary aim of the Ordinance is to safeguard public morals, rather than to uphold the dignity, autonomy, or privacy of people featured in such content. In instances of NCP, prosecutors may seek to invoke these prohibitions when personal photos or videos are distributed without consent. However, the Ordinance’s applicability is constrained as the offence only pertains to the obscenity of the material rather than the absence of consent from the individual featured in the material. Consequently, it can be argued that the legislation fails to sufficiently acknowledge the damage inflicted upon victims when private photos are disseminated online without their consent.

### **Offence of NCP: *Mens Rea***

Having evaluated the *actus reus* element of NCP, this section examines an equally important element of the offence: *mens rea*. A study of the related laws in many jurisdictions reveals that *mens rea* in NCP exists in a spectrum. On one end there are laws which requires intention to cause alarm or distress to the victim and on the other end laws only require knowledge, or recklessness on the part of the perpetrator to hold him guilty. In United States’ Federal Civil Cause of Action (15 U.S. Code § 6851 para (b)) in relation to disclosure of intimate images, refers to the perpetrator’s knowledge or reckless disregard to the consent of the victim when publishing intimate content. Similarly, the Illinois law’s *mens rea* is whether the defendant knew or should have known the victim had not consented to the dissemination of the offending images (720 Ill. Comp.

Stat., s 5/11-23.5 (2015)). The New Jersey statute’s *mens rea* is that the defendant knew that he or she was not licensed or privileged to disclose the images (New Jersey Revised Statutes, s 2c:14-9 (2013)). However, the NCP laws some other states in US (e.g.: Colorado, Florida, Kansas, Kentucky, Louisiana, Maine, Montana etc.), on the other hand, require proof of an additional *mens rea*, that is the defendant had an intent to harass, threaten, intimidate, humiliate, damage or harm the victim; or knowledge or reckless disregard that that such disclosure would cause harm (Colorado Revised Statutes, s 18-7-107, § 18-7-108 (2014); Florida. Statutes, s 784.049 (2015); Kansas Statutes, s 21- 6101(a)(8) (2016); Kentucky Revised Statutes, s 531.120 (2018); Louisiana Statutes, s 14:283.2 (2015); Maine Statutes. tit. 17-A, s 511- A (2015); Montana Revised. Statutes, s 573.110 (2018)).

In UK, a lower threshold is introduced with Section 66B of the Sexual Offences Act 2003, ‘*lack of a reasonable belief that the person depicted in the photo/film was consenting*’ instead of the earlier provisions in the *Criminal Justice Act*: the requirement of an intention to cause distress. Furthermore, NCP laws in Australia also reflect the view that the ‘intent to distribute’ and the ‘absence of consent’ is sufficient to constitute the offence and do not require a *mens rea* element relating to the harm to the victim such as ‘intent to cause harm or distress’. Singaporean Penal Code provides provisions that may settle in between. It provides that a person shall be guilty of an offence if he/she intentionally or knowingly distributes/threatens to distribute an intimate image without the second person’s consent to the distribution and knows or has reason to believe that the distribution/threat

will or is likely to cause humiliation, alarm or distress to the person depicted in the image/ recording (section 377BE). Sri Lankan law also requires proving ‘intention to cause harm’ by virtue of Section 20 in the Online Safety Act 2024.

Several issues could be noted in this context. One issue with the requirement of proving intent to harm/harass is that it may be difficult to establish that a perpetrator did have the requisite intention to cause harm/distress. Arguably, no further intention should be required, as ‘there can be no innocent intent’ in publishing such material. The only inference available is that the person intended harm, as there can be no other reason for distributing such content’ (Crofts & Kirchengast , 2019). Despite such assertion, at times, disclosure and distribution might not imply intention to cause harm although distress etc. may be a natural and probable consequence of such conduct. For instance, sometimes the images may be distributed with an intention of just having ‘fun’ rather than with an intention of causing harm to the victim. However, letting perpetrators avoid liability since they lacked ‘intent to cause harass/harm/distress’ would not serve the purpose of law. Moreover, requiring proof of intention to harm tends to disregard the critical point that ‘the disclosure of a person’s private photographs without his/her consent is in violation of their expectation that the image shall be kept private’ (Delfino, 2019). Thus, replacing ‘intention’ with alternative *mens rea* categories such as ‘knowledge’ which involves a person’s awareness ‘that it is practically certain that the conduct will cause such result’ or with ‘recklessness’ which is composed of the conscious disregard of ‘a substantial and unjustifiable risk that the material harm

exists or will result from his conduct’ (Model Penal Code, s 2.02 (1985)), would impose a reasonable threshold and would also serve as an acceptable limitation on the scope of NCP statutes.

On a further note, and a much stricter approach it could also be considered whether NCP as an offence should be treated as one that needs no proof of *mens rea*; ie: strict liability. Proponents of a strict liability framework for non-consensual pornography contend that the law should emphasise the prevention of irreversible harm rather than the prosecution’s capacity to establish intent (Carey, 2018). As also demonstrated in the foregoing sections of this paper, they assert that once personal photographs are circulated online, the harm to the victim is rapid, frequently irreversible, and usually unaffected by the perpetrator’s mental state. Thus, a strict liability, especially regarding the initial act of sharing, serves as an effective and essential deterrence. This could also tackle the logistical and evidentiary obstacles of demonstrating a perpetrator’s explicit purpose to inflict distress, a barrier that can render prosecutions inefficient and ineffectual. This will inevitably redirect the emphasis from the perpetrator’s intentions to the absence of victim’s consent which is a more accurate reflection of the fundamental injustice of the crime. Moreover, it could be argued that where the gravity of the potential harm is considered as in offences such as child pornography or statutory rape, which is so substantial that it justifiably supersedes the requirement to demonstrate the offender’s intent, thereby establishing a strict liability standard as both suitable and essential.

However, it is also acknowledged that the standard of strict liability may be too stringent to be applied on second-hand sharers; ie; where the perpetrators are other than those who are involved in the initial sharing of the content.

### Platform liability

One of the prerequisites for NCP is publishing of private material in an online platform, making it pertinent to inquire into whether the platforms shall also be liable for the harm caused by NCP. This becomes relevant especially in the context of the massive audience the platforms could carry such content to, which inevitably intensifies the impacts of NCP. However, upon analysing the legal provisions relating to NCP in various jurisdictions, it reveals that online platforms are generally not liable to any such harm.

For instance, Section 230 of the US Communication Decency Act 1996 provides that no provider or user of an interactive computer service shall be held liable for the content provided by a third party. However, it also expresses that a provider or user of an interactive computer service may take any action in good faith to restrict access to or availability of material for various reasons such as obscenity or being excessively violent (Section 230(c), 1996). Yet, doing so is not obligatory. However, although most states in compliance with the federal law exempt platforms from liability in this regard, a few states have made it clear that Internet Service Providers (ISPs), website providers etc. could be liable for engaging in ‘unprotected’ conduct. For example, Vermont holds



websites and platforms criminally liable for soliciting or accepting payment from victims for removing, deleting or refraining from posting NCP images (13 Vermont Statutes, S. 2606 (2020)). Georgia specifies that prosecutors can rebut the presumption that service providers did not know the content of posts submitted by other parties in order to hold service providers liable (Georgia Code, S. 16-11-90(f) (2019)). In all these instances, even though the service providers are not directly related to content creation they could still be held liable for actively facilitating such conduct or knowingly aggravating the harms caused. As such, in cases like *GoDaddy.com, LLC v. Touts* (429 S.W.3d 752, (Tex. App. 2014)) courts have dismissed the case against the website operators of websites on the basis of immunity provided by section 230. However, US Courts appear to take a stricter stance regarding the ISPs and interactive computer service providers which contribute to the creation of illegal content by third parties or solicit offensive content from third parties. Accordingly, in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC* (521 F.3d 1157, (9th Cir. 2008)), the Ninth Circuit held that Roommates.com cannot claim Section 230(c) immunity since the website ‘materially contributed’ to the allegedly illegal content, as opposed to providing ‘neutral’ tools for communicating information. The Court further reasoned that the Communications Decency Act was ‘not meant to create a lawless no-man’s-land on the internet’. These cases are exemplary of the Court’s willingness to hold the platforms liable where necessary, owing to their awareness of the nature of modern-day communication, technology and the depressing impacts NCP brings out. Similarly, UK law also excludes

service providers from liability through Section 66D (3) of the Sexual Offences Act 2003 which provides that a provider of an internet service shall ‘not to be regarded as a person who shares it’. Sri Lankan law also coincides with the same in Section 27 of the Online Safety Act (No. 9 of 2024). However, it also provides that in certain situations service providers may not be exempted (Section 27(3), Online Safety Act 2024).

Although a general exemption as to the liability of the platform operators and service provider may be acceptable, as exemplified by the laws above, there shall be provisions in law to make them liable in circumstances where they actively facilitate the commission of NCP. For this purpose, an ‘active facilitation’ may be direct conduct by the platform operator by demanding payments to remove content or indirect conduct such as refraining from deleting or removing content, not having mechanism to report such content etc. As such, the platform operators should be treated as accomplices to NCP and be imposed with equal sentencing as the primary offender.

### **Victim protection & available reliefs**

NCP uncontestably causes immeasurable harm on the victim. It is therefore pertinent to inquire into how the NCP laws have addressed this issue and what reliefs have been made available to the victims. At the outset, some laws make provisions for legal guardians or representatives to bring action on behalf of the victim where the victim may be incapacitated for some reason (15 U.S. Code § 6851 para (b)). This is indeed welcome as it ensures broader level access to justice in cases of this nature. On a further note, civil actions relating

to NCP looks at recovery of damages for the harms suffered by the victim. Consequently, while traditional civil remedies like *actio injuriarum* under Roman Dutch Law as applicable in Sri Lanka, are relevant, as they can be employed to address the reputational and dignity-related damages inflicted by NCP (Jayamaha et al, 2021). Similarly, the US law provides for the recovery of actual or liquidated damages and cost of the action. However, whether these civil remedies alone are broader enough to capture the gravity of the offence and the harm suffered by the victim is questionable. Additionally, it also provides for, equitable relief such as a temporary restraining order, a preliminary injunction or permanent injunction where appropriate (15 U.S. Code § 6851 para (b)). While the damages would monetarily compensate the victim for the harm suffered (just as in any civil action), the injunctive relief is more notable and an appropriate addition to prevent any further dissemination of the explicit content, thereby causing further harm. The importance of this in the context of social media is increased given that the content may be shared with a massive audience in just a few clicks and seconds. Thus, it is important to have injunctive relief for the court to order removal of content, place restraining order on the perpetrators, preventing them from purporting any further harmful conduct and etc.

Contrarily, the Singaporean law has limited civil approach to NCP and places more emphasis on the penal laws of the country to tackle NCP. Therefore, it does not offer remedies such as making provisions for the removal of the content or requiring the perpetrator to refrain from doing a particular act or compel the performance of a particular

act etc. This is unfavourable considering the harm caused by NCP, as it lacks regard to victim compensation and victim protection in the context. Thus, it is suggested that a comprehensive legal framework against NCP, should have a combination of both civil and penal laws, which would not only punish the wrongdoer but also provide reliefs for the victim.

### Penalties

It is pertinent to inquire into the penalties attached to NCP as a crime, as evidence of the extent to which different jurisdictions condemn NCP. Under the Singaporean law, Section 377BE(3) of the Penal Code Ordinance 4 of 1871(as amended by the Criminal Law Reform Act No.15 of 2019) an offender can be sentenced to up to 5 years’ imprisonment, fined or caned (or any combination of these). This is equally applicable to both an actual commission NCP and merely a threat which is never carried out. However, it makes provision for a higher punishment, where the victim is below 14 years of age or the crime is racially or religiously aggravated (ibid, s 377BC(4) and 377BE(4)). In India, under Section 66E of the Information Technology Act 2000 provides that offenders who have intentionally or knowingly captured, published or transmitted the image of a private area of any person without his or her consent, shall be punished with imprisonment which may extend to three years and/or with fine not exceeding two lakh rupees. In addition to that, Section 67A of the Act imposes a much greater punishment with a maximum of seven years imprisonment and a fine which may extend to one million rupees for a similar conduct done in the electronic form. This coincides with magnitude of harm

NCP creates when conducted in an online platform. In most above laws, ‘threat to publish’ is also treated equally as the actual commission. In contrast, ‘threat to publish’ is treated differently with a lesser punishment in Sri Lanka. While the commission of the actual publishing shall be punished with a maximum of five years of imprisonment and/or to a fine not exceeding five hundred thousand rupees, sentence for attempts to commit the crime (arguably where the ‘threats’ may fall in) is just half of the commission of the principal offence (Section 40, Online Safety Act 2024). Furthermore, Sri Lankan law makes provisions to impose penalty twice the regular penalty in the event of any subsequent conviction, which is rarely seen in laws. Moreover, where the situation involves a child, the penalty is aggravated to a imprisonment of maximum of twenty years and/or a fine not exceeding one million rupees (Section 21(2), Online Safety Act 2024).

An evaluation of the penalties demonstrates that the state in general acknowledges the degrading nature of NCP. It is further noted that some laws go beyond, by imposing higher punishments in aggravated circumstances such as involvement of children, racially and religiously aggravating circumstances, electronic forms of sharing and etc. This indeed is a commendable position when considering the aggravated impact such situations contribute to. Furthermore, some laws have used ‘canning’ as an additional sentence, which is justified by the need to condemn the act of NCP. Such intense penalties invariably serve as an effective deterrence to the society, thereby reducing the occurrence of NCP.

## Conclusions and Recommendations

### Conclusions

The aim of this study was to examine the law addressing NCP, with respect to its recognised key elements and proposing recommendations for an effective law. The study demonstrates that different states have adopted various means of fighting against NCP. While some have latest legislation precisely dealing with NCP, some resort to broader offences contained in much older statutes. The analysis revealed that, all jurisdictions have settled with the notion that NCP is ‘a person publishing private, intimate content of another person without the consent of the latter’. Although there is consensus on that, there is difference of opinion as to whether ‘a threat to publish’ in the same context shall be treated as fulfilling the *actus reus*. It was noted that the majority of the laws treat a ‘threat’ equally to that of the actual commission which is the welcoming position. The approach is even more diverse in respect of the *mens rea* of the offence. While some emphasise on the intention to cause harm other just settle with knowledge or recklessness on the part of the perpetrator as to the obvious harm it inflicts on the victim. It is stated that it would be unwise to require ‘intention’ rather a less threshold of ‘knowledge’ may be more appropriate considering the harms caused.

More common approach can be seen in respect of platform liability where the platform operators are exempted from liability. However, a better position could be seen in some laws where the platform operators are also made liable where there is evidence of active facilitation of NCP. Most laws are also seen as more or less similar in terms of

victim support, damages and injunctive relief to remove the explicit content and also in respect of criminal sanctions involving both imprisonment and fines. Some even includes castration as a form of criminal sanctions which demonstrates the gravity of NCP as acknowledged by those laws. The study further concludes that refining legislation with broader definitions, strengthening victim support mechanisms to encourage reporting.

While the paper provides an extensive analysis as to those components of laws and the desirability of different approaches taken by the states, it should not be disregarded that there are some common challenges to face in fighting against NCP. This mainly includes the struggle to keep pace with rapidly evolving technology which leads to gaps and unintended consequences. Moreover, the cross-border nature of NCP in online platforms also poses difficulties in bringing the perpetrators to face trial and ultimately sentencing them. Thus, efforts to fight NCP, should not be limited to jurisdictional level but go beyond the borders and be achieved through political, legal, and technical cooperation. The need for ongoing legislative refinement, international collaboration, and a comprehensive, victim-centric approach, is evident, to effectively combat the challenges posed by NCP in the digital age.

## Recommendations

An effective law aimed at combatting NCP shall be tailor-made and be characterized as follows. In terms of the *actus reus*, the law shall be clearly defined to cover both actual publication of the material concerned and attempts or threats to publish the same.

specify that the perpetrator. This is simply due to the fact that the threats could cause unquestionable distress and compromise victim privacy, regardless of whether actual disclosure occurs or not.

The law shall further refrain from requiring the establishment of actual harm to the victim as an element of *actus reus* as it necessarily fails to recognise the inherent wrongfulness of privacy violations, ignore established understandings of NCP's harm, and discourage victim participation by subjecting them to cross-examination on their emotional suffering. In fact, this can be considered as an aggravating factor which could be considered in deciding the sentencing rather than in the decision of culpability.

An effective law should also explicitly define the scope of “intimate content” to include altered images and edited videos where they reasonably depict the victim, while excluding those that do not. This is necessary in the wake of advancing AI capabilities, to ensure that vulnerable victims are afforded with comprehensive legal protection. It is even more important that the law is clear that initial consent for creation or limited sharing of the content, does not constitute consent for widespread dissemination. Thus, bringing in clarity as to how the perpetrator obtained the content is immaterial to the culpability rather the act of dissemination is the central question.

With regards to the *mens rea* element of the offence, the strict liability be used as the standard to incriminate under NCP but confining strict liability to the “initial sharer” defined as an individual who either captured the intimate photograph personally or obtained

it directly from the victim. This justification is based on proportionality and practical efficacy as as content becomes nearly impossible to recover once posted and therefore prevention of its first distribution is crucial. It is argued that imposing strict liability on subsequent sharers would be excessive and therefore they should be incriminated based on an intention to cause harm, knowledge and the likelihood of the harm as appropriate to the circumstances. On the other hand, an effective law could also investigate the alternative of placing the burden of proving the lack of intention to harm the victim rest on the respondent as an element of defence, rather than a requirement of proving the commission of the offence.

A comprehensive and an effective law shall also provide for rules that could be utilized in terms of determining culpability of platform operators and service providers. While it is suggested that as a general rule, they may be exempted from liability, but they shall be accountable in situations where they deliberately enable the perpetration of NCP. For this reason, ‘active facilitation’ may involve direct actions by the platform operator, such as soliciting payments for content removal, or indirect actions, such as failing to delete content or lacking mechanisms for reporting such content. The platform operators should be regarded as accomplices to NCP and subjected to equivalent sentence as the principal perpetrator in such given circumstances.

The law shall also have a combination of both civil and criminal reliefs available for the victims, having in mind the gravity of the offence and the necessity of victim reparation. It shall, therefore, encompass

civil remedies such as financial restitution via actual or liquidated damages, equitable redress including injunctions and restraining orders, the latter is considered especially crucial in the digital era, as it enables courts to mandate the removal of content and avert further distribution. It is also important to have criminal sanctions owing to the severity of the consequences and to have better deterrent effect. A combination of both thereby, offering immediate, tangible relief and protection to the victim. Additionally, stipulations for legal agents to represent incapable victims could also be something that a comprehensive law might also want to incorporate.

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