



Recognize, Resist, Remedy: Addressing Gender-  
Based Hate Speech in the Online Public Sphere

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**The Internet-Enabled  
Assault on Women's  
Democratic Rights  
and Freedoms**

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# The Internet-Enabled Assault on Women's Democratic Rights and Freedoms

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*"We're told they're 'only words', but we live and die by them. We're born into them and made out of them. They welcome us to the world – whether harshly or warmly – and, if we're lucky, at the end of our days, they may help to ease our way as we leave it. In between, they undo and remake us, destroy and sustain us. They are never simply the construction we choose to put on things. They are our inheritance and our legacy, our ancestors and our descendants, our past, our future, and who we are now."<sup>1</sup>*

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## Introduction

In early July 2021, a number of prominent Muslim women from India discovered that they were being “put up for sale” in a fake online auction through an app titled “Sulli Deals” (a communal slur).<sup>2</sup> It was a brazen act, targeted at a number of vocal, prominent Muslim students, professionals, activists and journalists. A database of photographs and information of over 80 Muslim women was created for the auction.

The app was created on a web-based platform known as GitHub. It appears that an FIR (First Information Report) has been lodged by the Delhi police against (as yet) unidentified persons who created the application.<sup>3</sup> The app was taken down by GitHub after public outrage, but it was

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<sup>1</sup> Susan Brison, ‘We Must Find Words or Burn’: Speaking Out Against Disciplinary Silencing, 3 FEMINIST PHIL. Q. no. 2, 2017, at 1, 9-10.

<sup>2</sup> Asmita Bakshi, “Sulli Deal: Indian Women Offered for Sale in ‘Auction’”, Al Jazeera, 12 July 2021, <https://www.aljazeera.com/news/2021/7/12/sulli-deals-a-virtual-auction-of-indian-muslim-women>

<sup>3</sup> “Delhi Police files FIR against 'Sulli Deals' app creators; pulls up GitHub”, Mint, 8 July 2021, <https://www.livemint.com/news/india/delhi-police-files-fir-against-sulli-deals-app-creators-pulls-up-github-11625749303054.html>

functional for long enough to send out a chilling message to Muslim women on the internet: that their visibility and participation was unwelcome. Unfortunately, “Sulli Deals” was not an outlier, but just one of many such online spaces that have platformed and amplified such communal, misogynistic hatred.<sup>4</sup>

Recently, there have been reports about the vilification of women on the platform Clubhouse. A group of women in Kerala created discussion groups that focused on female sexuality, women’s sexual emancipation and their education.<sup>5</sup> Predictably, there was backlash from the community. This included harassment of the participants through the circulation of images and recordings of the discussion, and the formation of ‘meninist’ groups on Clubhouse that denounced and derided the open discussion of female sexuality.<sup>6</sup> Not only was the privacy of the women compromised; their attempts at taking control of the predominantly patriarchal narrative relating to sexuality and sexual freedom was thwarted by the very platform that enabled women to venture into such topics.<sup>7</sup>

Online gender-based violence – which has been acknowledged across jurisdictions as a serious issue<sup>8</sup> – has escalated globally over the course of the pandemic.<sup>9</sup> India has been no exception in this regard.<sup>10</sup> A recent study by Amnesty International observed that Indian women politicians received substantially more abuse online than their counterparts in the United Kingdom and the United States of America.<sup>11</sup> Even amongst Indian women politicians active on social media, higher levels of abuse were faced by women from religious minorities, marginalized castes, and from political parties other than the ruling party.<sup>12</sup> Separately, in late October 2020, there was a published account of how

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4 Asmita Bakshi, “Sulli Deal: Indian Women Offered for Sale in ‘Auction’”, *Al Jazeera*, 12 July 2021, <https://www.aljazeera.com/news/2021/7/12/sulli-deals-a-virtual-auction-of-indian-muslim-women>

5 Anjana George, “Let’s talk sex: Malayali women are using Clubhouse to break taboos”, *The News Minute*, 1 July 2021, <https://www.thenewsminute.com/article/lets-talk-sex-malayali-women-are-using-clubhouse-break-taboos-151544>

6 *id.*

7 Sukanya Shaji, “Clubhouse: Popular Audio App Facilitates Agency But Fails To Create Safe Spaces”, *Feminism in India*, 24 August 2021, <https://feminisminindia.com/2021/08/24/clubhouse-popular-audio-app-misogyny-trolling/>

8 UN Broadband Commission for Digital Development (2015), “Cyber Violence Against Women and Girls: A World- Wide Wake-Up Call”, available at: [http://www.unwomen.org/~media/headquarters/attachments/sections/library/publications/2015/cyber\\_violence\\_gender%20report.pdf?v=1&d=20150924T154259](http://www.unwomen.org/~media/headquarters/attachments/sections/library/publications/2015/cyber_violence_gender%20report.pdf?v=1&d=20150924T154259)

9 Ingrid Brudvig, Chenai Chair and Adriane van der Wilk, “Covid-19 and increasing domestic violence against women: The pandemic of online gender-based violence”, World Wide Web Foundation <http://webfoundation.org/docs/2020/07/WWWF-Submission-COVID-19-and-the-increase-of-domestic-violence-against-women-1.pdf>

10 “Cyber crimes against women on the rise”, *The Hindu*, 20 August 2020, <https://www.thehindu.com/news/national/andhra-pradesh/cyber-crimes-against-women-on-the-rise/article32399536.ece>

11 <https://amnesty.org.in/trolling-verified-troll-patrol-indias-findings-on-online-abuse-twitter/> Amnesty International, *Troll Patrol India: Exposing Online Abuse Faced by Women Politicians in India*, (2020). C.f. <https://amnesty.org.in/wp-content/uploads/2020/01/Troll-Patrol-India-Findings.pdf>;

See also Amnesty Global Insights. (2017). *Unsocial Media: Tracking Twitter Abuse Against Women MPs*. Retrieved from <https://medium.com/@AmnestyInsi>

12 Amnesty International, *Troll Patrol India: Exposing Online Abuse Faced by Women Politicians in India*, (2020). C.f. <https://amnesty.org.in/wp-content/uploads/2020/01/Troll-Patrol-India-Findings.pdf>, at pp. 6, 30

prominent women journalists grapple with relentless rape and death threats and abuse over the internet (and specifically over social media platforms), often directed at them by accounts with “blue ticks” (those vetted by the social media companies).<sup>13</sup> The impunity with which such acts are perpetrated is borne out by their conspicuousness: acts of violence do not necessarily shelter behind the anonymity of the internet, and very often leverage the visibility or public profile of their perpetrators to ensure the virality of such messages (and consequently the normalization of such actions).<sup>14</sup>

Incidents like “Sulli Deals” represent the techno-political moment that we are confronted with: while the internet presents a unique opportunity by giving a voice to marginalized and oppressed groups, it has also enabled the normalization and widespread dissemination of various forms of vitriol and violence that reinforce and perpetuate structural forms of oppression that exist in society.

There is no dearth of literature and research on the ubiquity (and steady escalation) of online violence along gendered lines across jurisdictions.<sup>15</sup> While the incidence of gendered violence online is acknowledged and well-documented, what is perhaps less understood is the unique nature of internet-enabled gender abuse (both in terms of causes and consequences). This paper seeks to demonstrate how it would be incorrect to see such abuse as merely a reflection of the misogyny and gender violence in the physical world. It is imperative that gendered abuse on the internet is analyzed as a distinct beast, and that the causes and effects of such content be properly understood before deploying regulatory tools to counter such abuse. The failure of the State to understand the causes and wide-ranging effects of gender-based abuse online is what has resulted in the impotence of the extant regulatory mechanisms that deal with such content.

This paper identifies online gender-based violence as a form of hate speech. However, it considers online hate speech *sui generis* in nature, in light of both its causes and effects. The paper seeks to demonstrate the implications of such misogynistic speech beyond just its chilling effect on women’s freedom of speech and expression, including the manner in which it profoundly impairs women’s exercise of citizenship rights and their democratic participation. The paper argues for regulatory intervention in curbing such speech, but seeks to demonstrate how the historic emphasis on criminalizing speech and regulating it through a victim-perpetrator binary is wholly inadequate. The

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13 Samar Halarnkar, “The Widening War Against India’s Women Journalists”, 24 October 2020 (c.f. <https://scroll.in/article/976611/the-widening-war-against-indias-women-journalists>).

14 Rituparna Chatterjee, “What The Trolling Of Gurmehar Kaur Says About How Indian Men View Women With Opinion”, *Huffpost*, 27 February 2017, <https://www.huffpost.com/archive/in/entry/what-the-trolling-of-gurmehar-kaur-says-about-how-indian-men-vie-a-21722477>

15 Worldwide Web Foundation, *Survey - Young people’s experience of online harassment*, (2020). [http://webfoundation.org/docs/2020/03/WF\\_WAGGGS-Survey-1-pager-1.pdf](http://webfoundation.org/docs/2020/03/WF_WAGGGS-Survey-1-pager-1.pdf)

regulatory intervention must instead reckon with the *deliberate* enablement of such speech by internet platforms (for profit motives). The paper, however, cautions that any feminist advocacy for legal reform and intervention must account for the inherently patriarchal (and violent) nature of the State and its laws.

**Section I** of this paper discusses the concept of misogynistic hate speech, and highlights the extent of the harms caused by it. **Section II** of the paper discusses the various inadequacies in the framework of law in India that deals with hate speech. This section argues that these lapses and omissions in the law result in according *de facto* protection to hate speech (in particular misogynistic/gendered hate speech). **Section III** then examines the unique nature of misogynistic speech on the internet. It highlights both the unique harms caused by such speech, and the distinctive factors that facilitate and aggravate the production of hate speech online (including features such as anonymity, instantaneousness and the development of communities). **Section IV** demonstrates how online abuse and vitriol is *consciously enabled* by internet platforms and intermediaries, and puts forward a case for why any regulatory framework dealing with online abuse must account for the role of internet platforms. It also discusses how the existing legal framework overlooks the culpability of internet platforms. **Section V** maps an alternative approach to addressing misogynistic speech on the internet. It suggests rejecting the victim-perpetrator binary of the criminal justice system, and makes a case for focusing regulatory efforts on de-platforming harmful content, and stemming its virality and circulation.

## I. Misogynistic Hate Speech and its Harms

This section discusses the concept of hate speech and identifies the harms caused by it. In the context of hate speech targeted at women (which this paper refers to as misogynistic hate speech), it discusses the immediate and long-term harms arising from such speech, including its implications on the rights and participation of women in a democratic state.

Women represent a section of society that have been historically subordinated, oppressed and marginalized. This fact bears emphasis in understanding the implications of hate speech directed at them. Misogyny is commonly understood (and defined) as the “hatred of, aversion to, or prejudice against women.”<sup>16</sup> It would be incorrect, however, to view it as an individual psychological state or

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<sup>16</sup> *Misogyny*, Merriam-Webster Dictionary, available at: <https://www.merriam-webster.com/dictionary/misogyny>.

phenomenon,<sup>17</sup> when it is in fact an entrenched socio-political ideology reflected in patterns of dominance.<sup>18</sup> Misogyny assumes many forms, including male privilege, gender discrimination, sexual harassment, vilification and belittlement of women, violence and abuse, and sexual objectification.<sup>19</sup>

It is not the prejudice nursed by a few social outliers or fringe elements, but in fact an intrinsic reality of our patriarchal society.<sup>20</sup> The notion of misogyny being the “property of individual misogynists” has been rejected by feminist scholars such as Kate Manne.<sup>21</sup> Manne refutes the notion of misogyny as hatred, but instead sees it as a manifestation of power.<sup>22</sup> She describes misogyny to be the “law enforcement branch of patriarchy”, where girls and women are subjected to “surveillance, scrutiny and suspicion”.<sup>23</sup> Misogyny serves the “social function” of preserving the patriarchal order (and the accompanying gender hierarchies).<sup>24</sup>

Women have historically been excluded from the public by deprivation of access to resources and means of production, and through various forms of structural oppression, including laws. As a result, their individual and collective participation in the public sphere has been stymied. The increasing visibility of women on internet platforms thus presents a challenge to the patriarchal order. Their public participation, acts of resistance or visible denouncement of patriarchal values of family honor and modesty invites an inevitable (and sometimes violent) backlash from patriarchal forces.<sup>25</sup> It is a direct result of the increasing presence of women in the public sphere. Patriarchy seeks to reduce women to their basic biological and reproductive function, and through the weapon of misogyny, preserves the patriarchal order by challenging their entitlement to public participation and resources.<sup>26</sup> Misogyny performs the gatekeeping function of shutting women out of social, political and professional opportunities and preserving the patriarchal status quo.<sup>27</sup> Misogyny takes various

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17 Lynne Tirrell, “Toxic Misogyny and the Limits of Counterspeech”, *Fordham Law Review*, 2019 (at p. 2439) available at: <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5607&context=flr>

18 Andrea Dworkin, *Women Hating*, 17 (1974). Plume

19 Code L. *Encyclopedia of Feminist Theories*. London: Routledge; 2000. p. 346, available at: [https://books.google.co.in/books?hl=en&lr=&id=WwSFAGAAQBAJ&oi=fnd&pg=PP1&ots=SVn087aQwI&sig=5xxTx6P2ml1YennGrVkJw7N4Kg&redir\\_esc=y#v=onepage&q&f=false](https://books.google.co.in/books?hl=en&lr=&id=WwSFAGAAQBAJ&oi=fnd&pg=PP1&ots=SVn087aQwI&sig=5xxTx6P2ml1YennGrVkJw7N4Kg&redir_esc=y#v=onepage&q&f=false); Kramarae C. *Routledge International Encyclopedia of Women*. New York: Routledge; 2000. pp. 1374–7, available at: [https://books.google.co.in/books?hl=en&lr=&id=7InHBQAAQBAJ&oi=fnd&pg=PP1&ots=as6WPI-0zG&sig=no9pXITxcsKhrTrsiaajBH40j8&redir\\_esc=y#v=onepage&q&f=false](https://books.google.co.in/books?hl=en&lr=&id=7InHBQAAQBAJ&oi=fnd&pg=PP1&ots=as6WPI-0zG&sig=no9pXITxcsKhrTrsiaajBH40j8&redir_esc=y#v=onepage&q&f=false)

20 supra note 16 at p. 2440

21 Kate Manne, *Down Girl: The Logic of Misogyny*, 79-80 (2018). Oxford University Press

22 id. at 263 – 267

23 id. at 64

24 id. at 63

25 Amanda Hess, “Why women aren’t welcomed on the internet”, *Pacific Standard*, 14 June 2017, <https://psmag.com/social-justice/women-arent-welcome-internet-72170>.

26 *Gender Hate Online*, Eds Debbie Gings, Eugenia Siapera, Palgrave Macmillan 2019, at Chapter 2 “Online Misogyny as Witch Hunt: Primitive Accumulation in the Age of Technocapitalism” at p. 38.

27 Karla Mantilla, *Gendertrolling: How Misogyny Went Viral*, (2015). Praeger.



forms, including physical and sexual violence or abuse, oppression through laws, and oppression through speech. This paper focuses on harmful speech that is targeted at women, and results in the preservation and perpetuation of patriarchy.

Hate speech is a category of speech under law, that by virtue of certain harms it is recognized to cause, is not accorded protection under the laws that protect free speech and expression. Hate speech is directed against a specific or identified individual or group. The group is identified on the basis of “an arbitrary and normatively irrelevant feature”<sup>28</sup> (such as caste, gender, religious identity). It vilifies or stigmatizes the target group by implicitly or explicitly ascribing undesirable qualities to them that would make them the target of hostility or discrimination.<sup>29</sup> Hate speech does not necessarily incite violence against the target group, or directly affect public order.<sup>30</sup> Instead, by disparagement and vilification, it results in hostility towards such a group.

For speech to warrant regulatory intervention, it is necessary to recognize that it must not merely be offensive, but it must vilify and target a person (or group) that is recognized as being socially and politically vulnerable. Speech that inspires hostility towards a dominant group or community has different implications from that which targets a marginalized or oppressed group. An essential aspect in distinguishing hate speech from other forms of vilifying speech is the authority of the speaker, and the relative position of subordination of the subject.<sup>31</sup>

Hate speech has immediate disabling effects,<sup>32</sup> including reactions such as fear, anxiety, distress and mental anguish, or contributing to the intimidation of the recipient(s). It also has silencing or chilling effects (both immediate and long-term), as a result of the intimidation or erosion of self-esteem that the targets or other members of the targeted community may experience.<sup>33</sup> In the context of the internet, the implications are particularly unfortunate, as marginalized voices (who have been kept out of traditional platforms) are also denied the opportunities and aspirations represented by participation in the internet.<sup>34</sup>

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28 Bhikhu Parekh, “Is There a Case for Banning Hate Speech” in *The Content and Context of Hate Speech* (Eds. Michael Herz and Peter Molnar; Cambridge University Press, 2012), at p. 41.

29 *id.* at p. 41.

30 *id.* at p. 38.

31 Catharine A MacKinnon, *Only Words*. (1993), Harvard University Press. at p. 31

32 Caroline West, “Words That Silence? Freedom of Expression and Racist Hate Speech” in *Speech and Harm: Controversies Over Free Speech*, Ishani Maitra and Mary Kate McGowan (Eds), Oxford University Press, 2012 (at p. 222 – 248).

33 Caroline West, “Words That Silence? Freedom of Expression and Racist Hate Speech” in *Speech and Harm: Controversies Over Free Speech*, Ishani Maitra and Mary Kate McGowan (Eds), Oxford University Press, 2012 (at p. 222 – 248).

34 Kiruba Munusamy, “Intersection of identities: Online gender and caste based violence”, GenderIT.org, 7 June 2018, <https://www.genderit.org/articles/intersection-identities-online-gender-and-caste-based-violence>

In addition to these effects, speech (which includes words, text and images) is also *constitutive* in nature.<sup>35</sup> This means in addition to its more immediate, proximate effects, speech *constitutes or constructs* social structures, and fortifies or reinforces social hierarchies.<sup>36</sup> Words and images are how people are placed in hierarchies, how social stratification is made to seem inevitable and right, how feelings of inferiority and superiority are engendered, and how indifference to violence against those on the bottom is rationalized and normalized.<sup>37</sup>

There is considerable scholarship globally that identifies how speech that targets vulnerable groups may cause or constitute subordination.<sup>38</sup> Speech can identify a group as inferior, it can justify their subordination, or it can bring into existence structural subordination. For instance, violent pornography that portrays the subjugation of women *identifies* women as sexual objects (and accordingly, as inferior beings).<sup>39</sup> It also *normalizes or legitimizes* violence against women, through such a portrayal of women as sexual objects.<sup>40</sup> Further, through the sexual objectification of women and treatment of women as objects for men's sexual pleasure, it justifies shaming women for exercising sexual agency or autonomy.

Hate speech not only has the effect of subordinating the target group, but also results in the devaluation of the *speech* of members of a target group.<sup>41</sup> As a result, not only does speech that targets women proceed on the premise of the subordinate or inferior status of women in society, it also creates conditions in which listeners devalue the speech of women.<sup>42</sup> A classic manifestation of this problem can be seen in the context of communicating sexual consent. When speech (whether in the form of violent pornography, or text or visuals) encourages men to ignore verbal and non-verbal cues, or more insidiously, promotes stereotypes about the diffident woman for whom "no means

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35 Speech and Harm: Controversies Over Free Speech, Ishani Maitra and Mary Kate McGowan (Eds), Oxford University Press, 2012

36 Mari J Matsuda et al (eds), (1993) Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment, Westview Press

37 Catharine A MacKinnon, (1993) Only Words, Harvard University Press, at p. 31

38 Rae Langton, 'Speech Acts and Unspeakable Acts' in Rae Langton (ed), Sexual Solipsism: Philosophical Essays on Pornography and Objectification (Oxford University Press, 2009) 25; Anjalee Da Silva, "Addressing the Vilification of Women: A Functional Theory of Harms and Implications for Women", Michigan University Law Review, Vol 43(3): 987.

39 Helen E Longino, 'Pornography, Oppression, and Freedom: A Closer Look' in Laura Lederer (ed), Take Back the Night: Women on Pornography (William Morrow, 1980) 40, 45-7

40 Rae Langton, 'Speech Acts and Unspeakable Acts' in Rae Langton (ed), Sexual Solipsism: Philosophical Essays on Pornography and Objectification (Oxford University Press, 2009) 53.

41 This is referred to as the concept of "illocutionary disablement". Speech is unable to achieve its aim on account of the distortions created by hate speech. (C.f. Rae Langton, Speech Acts and Unspeakable Acts, 22 PHIL. & PUB. AFF. 293, 300-328 (1993);

42 Charles R Lawrence III, 'If He Hollers Let Him Go: Regulating Racist Speech on Campus' in Mari J Matsuda et al (eds), Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment (Westview Press, 1993), at p. 79.

yes”, it results in a “no” from women often being construed as consent.<sup>43</sup> Hate speech thus blunts or impairs the *effectiveness* of the speech of the target group. In the context of hate speech targeting women, it does so by reinforcing patriarchal notions and tropes in the minds of listeners and consumers of the speech, who internalize the message and enact it in their social encounters. This aggravates the democratic deficit for marginalized groups targeted by hate speech. The dominant speech or frameworks are reinforced, and subaltern or alternative frames are stifled and deprived of the status of legitimate discourse.

Linked to this is the problem of a “credibility deficit” created by hate speech.<sup>44</sup> In the context of women, the consequence is that the gravity, legitimacy and credibility assigned to women’s speech and accounts is undermined as a result of hate speech. Indian jurisprudence on rape victimology is a classic example of the manifestation of this credibility deficit: the jurisprudence around the concept of a “sterling witness” in a rape trial,<sup>45</sup> the discounting of testimony of women on the basis of their sexual history,<sup>46</sup> and stereotypes associated with normative victimhood<sup>47</sup> can reasonably be attributed to misogynistic discourse that gives shape to these patriarchal notions. Judgments such as that of the trial court in Taron Tejpal’s rape trial<sup>48</sup> do not arise in a vacuum: they must necessarily be viewed as products of a society where misogynistic speech is not just unregulated, but in fact given the imprimatur of the law.

Hate speech that targets women therefore has a profound effect on women’s everyday life, and their exercise of democratic rights and freedoms. Even if individual women are not the targets of online (or offline) hate speech, the widespread circulation of misogynistic speech could result in women’s credibility in society being undermined, and their social and political subordination being reinforced. The implications of this problem for the political participation of women in a democracy are acute, and it only serves to further undermine their efforts at securing substantive equality under the Indian Constitution. It limits their ability to express and articulate harms that they experience, and seek the

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43 C.f. Rae Langton, *Speech Acts and Unspeakable Acts*, 22 PHIL. & PUB. AFF. 315-316 (1993); A prominent example of this was the outcome of the testimony of Dr. Christine Blasey Ford against Supreme Court of the United States nominee Brett Kavanaugh. The fact that the testimony did not affect Kavanaugh’s candidature, and was deemed inadequate absent corroboration, points to the ‘credibility deficit’ that women’s speech suffers from. (C.f. Lynne Tirrell, “Toxic Misogyny and the Limits of Counterspeech”, *Fordham Law Review*, 2019 (at p. 2444) available at: <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5607&context=flr>)

44 Miranda Fricker, (2017). *Epistemic Justice: Power and the Ethics of Knowing*, 17

45 Abhinav Sekhri, “The Tarun Tejpal Judgement – where do we go from here?” *Kafila*, 1 June 2021, <https://kafila.online/2021/06/01/the-tarun-tejpal-judgement-where-do-we-go-from-here-abhinav-sekhri/>

46 Preeti Pratishruti Dash (2020): Rape adjudication in India in the aftermath of Criminal Law Amendment Act, 2013: findings from trial courts of Delhi, *Indian Law Review*; <https://www.nls.ac.in/wp-content/uploads/2021/04/Indian-Law-Review-Published.pdf> (at p. 7, 15);

47 See for instance, Savyasachi Rawat, “The “ideal” rape victim in the eyes of the courts’ Bar and Bench, 8 July 2020, <https://www.barandbench.com/columns/the-ideal-rape-victim-in-the-eyes-of-the-court>; and Anupriya Dhonchak and Namita Bhandare, “Courts’ Misogynistic Rules For Rape Survivors” Article 14, 29 June 2020, <https://www.article-14.com/post/the-indian-courts-misogynistic-handbook-for-rape-survivors>

48 Judgment dated 21st May, 2021 in Sessions Case (Ors) No. 10/2014 before the Court of District and Sessions at Panaji.

intervention of the State to address these harms through effective regulatory and policy interventions.

## II. De Facto Legal Protection Accorded to Hate Speech

This section discusses how laws (both by design and omission) perpetuate structures of oppression.

**Part A** of this section discusses how speech laws in India are predominantly indifferent to and fail to account for relative positions of power of the speaker and target. It also examines the limited laws that have been enacted for the purported purpose of protecting certain vulnerable communities from hate speech, and discusses the reasons for the failure of these laws. **Part B** discusses how the legal apparatus has in fact been co-opted as a patriarchal instrument of oppression. It is essential to foreground any discussion on feminist legal reform with an understanding of the inherently patriarchal ways in which laws are enacted and enforced. **Part C** highlights the inadequacies of the Indian Constitution in recognizing the extent of harms caused by hate speech and lending constitutional protection to laws that seek to regulate such speech.

### A. Power-Agnostic Nature of Speech Laws in India

India, like much of the world, is a society deeply divided by power. Communities and groups are oppressed on the basis of caste, religion, class, gender, sex and disability, amongst other factors. What is relevant for the purpose of this paper is the reality that India continues to be a patriarchal society, where oppression on the basis of gender is a reality. Consequently, speech that vilifies men on the basis of their gender cannot be seen to have the same societal impact or consequences as speech that vilifies women on the basis of their gender or sex. The implications of speech differ on the basis of the relative power and social status of the author or speaker.

However, the framework of existing speech laws in India functions substantially in a power-agnostic manner. Provisions of law including those of the Indian Penal Code, 1860 (“IPC”) that criminalise speech that targets certain members of society do not take into account power differentials.<sup>49</sup> For instance, provisions of the IPC relating to acts that offend religious sentiments<sup>50</sup> apply regardless of the relative social status of the accused and the alleged target group. Similarly, Section 153A of the IPC that relates to acts that promote feelings of enmity or disharmony between classes or communities also does not recognize or consider the relative power of the speaker and class that is targeted.

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49 Section 153A, 153B, 295, 295A, 298 and 505; *See also* Section 123A and 125 of the Representation of People Act, 1986

50 Chapter XV of the Indian Penal Code 1860.

This approach is also reflected in the recently introduced IT Rules, that provides (in the context of curated online content) that “A publisher shall take into consideration India’s multi-racial and multi-religious context and exercise due caution and discretion when featuring activities, beliefs, practices, or views of any racial or religious group.”<sup>51</sup> The power-agnostic nature of these provisions has serious implications: (i) the provisions lend legal sanction to a culture of intolerance and taking offence by groups that are not historically marginalized; (ii) they inevitably lead to such dominant communities (who have superior access to the law enforcement apparatus) invoking or weaponizing such laws to stifle content that offends them; and (iii) significantly, by not taking into account either the relative positions of power of the speaker(s) and affected audience, it erases the distinction as to the degree of social, cultural and political harm caused by speech that vilifies marginalized or historically vulnerable groups.

In 2011, the Supreme Court in *Pravasi Bhalai Sangathan v Union of India*,<sup>52</sup> defined hate speech as an effort to marginalize individuals based on their membership in a group. The proceedings before the Supreme Court in this matter arose specifically in the context of such hate speech by political parties, and whether it should become grounds for the Election Commission disqualifying a party or candidate for such hate speech acts. The Court observed<sup>53</sup>:

**“Hate speech is an effort to marginalise individuals based on their membership in a group. Using expression that exposes the group to hatred, hate speech seeks to delegitimise group members in the eyes of the majority, reducing their social standing and acceptance within society. Hate speech, therefore, rises beyond causing distress to individual group members. It can have a societal impact. Hate speech lays the groundwork for later, broad attacks on vulnerable that can range from discrimination, to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide. Hate speech also impacts a protected group’s ability to respond to the substantive ideas under debate, thereby placing a serious barrier to their full participation in our democracy.” (Emphasis added)**

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<sup>51</sup> Section II of the Code of Ethics of the IT Rules.

<sup>52</sup> 2011 (4) SCC 477

<sup>53</sup> *Pravasi Bhalai Sangathan v Union of India*, 2011 (4) SCC 477, at paragraph 7

The Court in *Pravasi Bhalai Sangathan v Union of India*<sup>54</sup> referred the matter to the Law Commission to define the expression “hate speech”. The Report by the 267<sup>th</sup> Law Commission on the subject of hate speech acknowledged the standard laid down by the Supreme Court.<sup>55</sup> The report notes that “*One of the criticisms of free speech doctrine is that in an unequal society free speech often conflicts with the commitment to non-discrimination. Affording protection to all kinds of speech, even offensive ones, many times vilifies the cause of equality.*”<sup>56</sup>

The Court also referred to Canadian jurisprudence in understanding the boundaries of hate speech.<sup>57</sup> It observed that:

“The question courts must ask is whether a reasonable person, aware of the context and circumstances, would view the expression as exposing the protected group to hatred. Second, the legislative term “hatred” or “hatred or contempt” must be interpreted as being restricted to those extreme manifestations of the emotion described by the words “detestation” and “vilification”. This filters out expression which, while repugnant and offensive, does not incite the level of abhorrence, delegitimization and rejection that risks causing discrimination or other harmful effects. Third, tribunals must focus their analysis on the effect of the expression at issue, namely whether it is likely to expose the targeted person or group to hatred by others. The repugnancy of the ideas being expressed is not sufficient to justify restricting the expression, and whether or not the author of the expression intended to incite hatred or discriminatory treatment is irrelevant. The key is to determine the likely effect of the expression on its audience, keeping in mind the legislative objectives to reduce or eliminate discrimination.

(Emphasis added)

The Court *in theory*, recognized the delegitimizing effect of speech, and considered it imperative that the speech be scrutinized to understand the potential harmful effects it could have on the community. However, the Court (and Law Commission in its 267<sup>th</sup> Report) failed to address certain

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54 2011 (4) SCC 477

55 267<sup>th</sup> Law Commission Report, March 2017, available at <https://lawcommissionofindia.nic.in/reports/Report267.pdf>

56 Para 4.15 of the Law Commission Report

57 See judgment in *Pravasi Bhalai Sangathan v Union of India*, 2011 (4) SCC 477 that refers to *Canada (Human Rights Commission) v. Taylor*, (1990) 3 SCR 892 and *Saskatchewan (Human Rights Commission) v. Whatcott* 2013 SCC 11.

significant factors. *First*, it fails to account for the relative power of the speaker(s) and target. The definition of hate speech proposed by the Law Commission in its Report is also power-agnostic.<sup>58</sup> The proposed definition identifies certain factors (religion, race, caste, community, sex, gender identity, sexual orientation, place of birth, residence, language, disability or tribe), and proscribes hate speech that is based on these grounds. There is a complete failure to account for the reality that not all sexes, castes, genders and communities are equally situated. There is also a failure to account for how extant speech laws have often been *misused* by communities that are dominant and powerful (on the pretext of such content being prejudicial or offensive to members of that community), and used to stifle the freedom of speech and expression.<sup>59</sup>

There are, however, two exceptions to the power-agnostic nature of Indian speech laws: (i) laws that criminalise hate speech targeted at members of marginalized castes, and (ii) laws that ostensibly protect women from harmful speech.

In respect of the first category, the Protection of Civil Rights Act, 1955 and the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (“**Prevention of Caste Atrocities Act**”) both proscribe verbal casteist abuse (or what could be defined as hate speech directed at members of oppressed castes). These laws, however, have signally failed to protect people belonging to these castes. The law has remained a mute spectator to the continued oppression and violence against persons from oppressed castes, with the State itself being the prime perpetrator of caste-based violence.<sup>60</sup> The National Human Rights Commission has itself characterized the State law enforcement machinery as being the chief perpetrator of caste atrocities (including through custodial torture and violence, criminalization of communities, and raids on scheduled caste areas).<sup>61</sup> When caste atrocities have been perpetrated by non-state actors, the apathy from the law enforcement authority at the stage of registration of offences, investigation and subsequent prosecution has led to abysmally low conviction rates.<sup>62</sup> The caste bias of the prosecution and the judiciary has been identified as a

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58 Annure A to the 267<sup>th</sup> Law Commission Report (at pp. 51 – 53). See also Para 5.6 at p. 34 of the 267<sup>th</sup> Law Commission Report does make a reference to the ‘status of the author’, in determining the legality of the limitation imposed by the State on Speech under the European Commission for Human Rights (but the Law Commission of India chose not to adopt this approach).

59 See for instance (i) “‘Tandav’ row: SC stays arrest of Amazon Prime India head Aparna Purohit”, 5 March 2021, Scroll, <https://scroll.in/latest/988434/tandav-row-sc-stays-arrest-of-amazon-prime-india-head-aparna-purohit>; (ii) “16 scenes hurting Brahmins sentiments to be cut in ‘Pogaru’” 25 February 2021, The Hans India, <https://www.thehansindia.com/cinema/sandalwood/16-scenes-hurting-brahmins-sentiments-to-be-cut-in-pogaru-673907>; (iii) Abhinav Sekhri, “Why Faruqui’s Bail Hearing Is A Theatre Of The Absurd”, 29 January 2021, Article 14, <https://www.article-14.com/post/why-faruqui-s-bail-hearing-is-a-theatre-of-the-absurd>

60 Smita Narula, (2008), Equal by Law, Unequal by Caste: The “Untouchable” Condition in Critical Race Perspective, 26 Wis. Int’l L.J. 255, <https://digitalcommons.pace.edu/lawfaculty/1127/> (See Chapter IV, at pp. 295-296)

61 Report on Prevention of Atrocities against Scheduled Castes, (2004) National Human Rights Commission. Section 1: Violence: The Social Edifice; [https://nhrc.nic.in/sites/default/files/reportKBSaxena\\_1.pdf](https://nhrc.nic.in/sites/default/files/reportKBSaxena_1.pdf), at p. 114 – 117.

62 id. at pp. 117 – 119.

contributing factor in this situation.<sup>63</sup> One of the most striking instances of this caste bias was a judgment of the Supreme Court in 2018, diluting the provisions of the Prevention of Caste Atrocities Act on the (entirely unsubstantiated<sup>64</sup>) basis that these provisions were being misused to blackmail innocent citizens and public servants.<sup>65</sup> While a subsequent amendment to the Prevention of Caste Atrocities Act effectively reversed the effects of this Supreme Court judgment,<sup>66</sup> the prejudicial effects of such stereotypes in a pronouncement by the highest constitutional court of the country cannot be understated.

In addition to the weak enforcement of these punitive laws, there has been a failure of social welfare legislation that is meant to assist in the empowerment and upliftment of marginalized castes. For instance, the rehabilitation, alternative employment and monetary benefits that are contemplated under the Bonded Labour System (Abolition) Act, 1970 suffer from serious implementation failures.<sup>67</sup> Land reform laws met with the same fate.<sup>68</sup> The inordinate emphasis on emancipation through legislation (in the absence of executive and bureaucratic will) has thus failed to achieve social justice. The failure to address the oppressive nature of the State apparatus and the inadequate implementation on welfare legislation leads to the continued victimization of marginalized castes.

This bears a striking similarity with the narrative of how the Indian State has failed to address hate speech directed along caste and gender lines. Much like the laws enacted to protect scheduled castes and tribes, laws enacted with the ostensible purpose of addressing forms of violent patriarchy (such as laws that criminalise dowry harassment) have been judicially watered down on the purported basis of its misuse, and on the (unsubstantiated) pretext of false cases.<sup>69</sup> The judiciary thus itself partakes in creating and perpetuating harmful stereotypes about oppressed and vulnerable communities misusing the law. This results in the law and its implementers (executive and judiciary) speaking with a forked tongue: while the *letter* of the law recognizes the vulnerability of groups such as scheduled castes, scheduled tribes and women, this legal protection and dignity is stripped away by the judiciary and executive through words and actions that further perpetuate the oppression of these groups.

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63 supra note 59 at pp. 299-300. See also, Anurag Bhaskar, "When It Comes to Dalit and Tribal Rights, the Judiciary in India Just Does Not Get It" The Wire, 3 May 2020, <https://thewire.in/law/when-it-comes-to-dalit-and-tribal-rights-the-judiciary-in-india-just-does-not-get-it>

64 Arefa Johari, "Supreme Court says SC/ST Atrocities Act is misused. So what explains the low conviction rates?" Scroll, 24 March 2018, <https://scroll.in/article/873072/supreme-court-says-sc-st-atrocities-act-is-misused-so-what-explains-the-low-conviction-rates>

65 Dr. Shubash Kashinath Mahajan v. State of Maharashtra & Anr., (2018) 6 SCC 454

66 Legality of SC/ST Amendment: Prithvi Raj Chauhan v. UOI, Supreme Court Observer, <https://www.scobserver.in/court-case/challenge-to-sc-st-atrocity-act-amendment/sc-st-amendment-plain-english-summary-of-judgment>

67 supra note 60, at pp. 109, 111, 125.

68 supra note 59 (See Chapter IV, at p. 301)

69 Rajesh Sharma v. State of U.P., 2017 SCC OnLine SC 821; See also recent instances such as the judgment of the Delhi High Court dated 16th August, 2021 in Vimlesh Agnihotri & Ors. v. State and Anr., available at [https://www.livelaw.in/pdf\\_upload/smp16082021clmm15242021205048-398725.pdf](https://www.livelaw.in/pdf_upload/smp16082021clmm15242021205048-398725.pdf)



As discussed in **Part B** of this section, in addition to the problem of weak enforcement, laws enacted to purportedly protect women from harmful speech unfortunately proceed on the same patriarchal footing that underpins misogynistic hate speech.

## B. Law as an Instrument of Patriarchy

In the Indian context, the patriarchal nature of law manifests in several ways: in substantive legal provisions that discriminate against women,<sup>70</sup> in poor enforcement of progressive legislation on account of a lack of gender sensitivity in the judiciary (both in terms of composition and socio-cultural predisposition),<sup>71</sup> a lack of access to justice, resulting in greater impunity when it comes to violence against women,<sup>72</sup> and through the law's failure to recognize and regulate the harms caused by certain actions (including harm caused by misogynistic hate speech).

In terms of misogynistic hate speech, there is a failure of the law to account for the full extent of the harm caused by such speech, and a consequent reluctance to regulate such speech. For instance, despite scholarship and research over decades identifying the harms arising from violent, degrading porn, there continues to be a strong liberal defense for such pornography under the liberal umbrella of free speech.<sup>73</sup> This only serves to indicate the reluctance of states (and by implication, societies) across the world to account for the harms caused to women as a result of even more overtly misogynistic forms of speech. This is a regulatory reluctance that would need to be contended with while addressing online gender-based violence.

Jurisdictions that do regulate such violent pornography or harmful speech directed at women tend to do so on the touchstone of "morality", choosing to classify content as obscene, and appealing to prurient interests. In the Indian context, this is reflected in the statutory provisions and jurisprudence around the obscenity provisions in the Indian Penal Code, 1860 and the Indecent Representation of Women (Prohibition) Act, 1986 ("**IRWA**"). The latter defines the indecent representation of women to mean "*the depiction in any manner of the figure of a woman; her form or body or any part thereof in such way as to have the effect of being indecent, or derogatory to, or denigrating women, or is likely to deprave, corrupt or injure the public morality or morals*".<sup>74</sup> The IRWA, that was enacted more than a

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70 See for instance Disha Madhok, "These nine laws make Indian women less equal than men", July 1 2014, Scroll, <https://scroll.in/article/668709/these-nine-laws-make-indian-women-less-equal-than-men>

71 Arti Raghavan, "Of Men Like Mice: The Legal System's Historic Apathy Towards Gender Justice", 11 July 2020, The Wire, <https://thewire.in/law/of-men-like-mice-the-legal-systems-historic-apathy-towards-gender-justice>

72 Shireen Vakil, "Teach the Justice System to Be More Aware of Women", 12 December 2019, The Wire, <https://thewire.in/women/justice-system-women-rape>

73 See Sections 292 and 294 of the Indian Penal Code, 1860

74 Section 2(c) of the Indecent Representation of Women (Prohibition) Act, 1986.

century after the IPC (and its provisions on obscenity), continued to suffer from the same patriarchal foundations. These laws are founded on the notion that sexually provocative or explicit images are necessarily insulting to Indian womanhood, and morally corrupting. The female body is viewed as needing protection by concealment.<sup>75</sup>

The implications of laws that have such patriarchal underpinnings are serious. Activists who are part of progressive movements (such as Rihana Fathima in the context of the legal battle to permit women's entry into the Sabarimala temple,<sup>76</sup> and in the context of her video that attempted to prompt a discussion on desexualizing women's bodies<sup>77</sup>) are met with retribution in the form of criminal charges.<sup>78</sup> Threats to women's online safety are often met with greater surveillance from the State (both online and offline)<sup>79</sup>. In the Indian context in particular, it is important to bear in mind the patriarchal nature of the State (and the law)<sup>80</sup> when considering responses to online gender-based abuse and violence. The 'protection' offered to women by the law often undermines feminist struggles, and reinforces patriarchal tropes such as honor, modesty and virtue associated with women, and therefore does not present any easy solutions to countering misogyny.

The patriarchal underpinnings of such laws make them ill-equipped to address the real harms arising from such speech, i.e., the reinforcement of patriarchal structures of oppression and discrimination against women. The inherent subjectivity of terms such as "decency" lend themselves to being co-opted for patriarchal purposes. These laws deny and negate women's autonomy and sexual agency. It is essential that this paper (which seeks to make a case for a legal framework that addresses misogynistic hate speech) also accounts for the patriarchal nature of the law.

### C. Absence of Constitutional Vocabulary for Gendered Hate Speech

Various jurisdictions that recognize and uphold the freedom of speech and expression qualify the right and prohibit the expression of certain ideas. These include expressions of ideas relating to homophobia, negationism (such as Holocaust denial), or ideas of religious hate or racial

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75 Richa Kaul Padte, "Keeping women safe? Gender, online harassment and Indian law", 29 June 2013, Internet Democracy Project, <https://internetdemocracy.in/reports/keeping-women-safe-gender-online-harassment-and-indian-law/>

76 "Activist Rehana Fathima climbs down from Sabarimala, but this was another bid to break the glass ceiling", 19 October 2018, Indian Express, <https://indianexpress.com/article/india/who-is-rehana-fathima-sabarimala-activist-5408576/>

77 "Kerala: Activist Rehana Fathima surrenders before Ernakulum Police in body art video case", 9 August 2020, Scroll, <https://scroll.in/latest/969839/kerala-activist-rehana-fathima-surrenders-before-ernakulum-police-in-semi-nude-video-case>

78 J. Devika et. al. "Walking on Eggshells A study on gender justice and women's struggles in Malayali cyberspace", IT for Change 2019, [https://itforchange.net/sites/default/files/1618/Kerala-Report\\_Righting-Gender-Norms.pdf](https://itforchange.net/sites/default/files/1618/Kerala-Report_Righting-Gender-Norms.pdf)

79 NC Asthana, "The Ulterior Motives Behind Madhya Pradesh Govt's Proposal on Women Safety", 18 January 2021, The Wire, <https://thewire.in/government/madhya-pradesh-women-tracking-safety-marriage-age>

80 Augustine Aboh, "Between Limited Laws and Conservative Patriarchal System", Global Media Journal, Volume 16, October 2018, available at: [https://www.researchgate.net/publication/329574160\\_between-limited-laws-and-conservative-patriarchal-system-why-the-indian-security-and-justice-system-is-less-effective-to-prevent-g](https://www.researchgate.net/publication/329574160_between-limited-laws-and-conservative-patriarchal-system-why-the-indian-security-and-justice-system-is-less-effective-to-prevent-g)

inferiority/superiority.<sup>81</sup> However, the expression of ideas of gender hatred and gender-based subordination is yet to gain recognition as a form of hate speech that deserves regulation and legal intervention. Globally, hate speech laws fail to acknowledge how such speech reinforces structures of oppression and discrimination on the lines of gender.<sup>82</sup> In the context of gender harms, academics have referred to this failure to identify and regulate the harms of misogynistic hate speech as a sex-based gap in anti-vilification laws.<sup>83</sup>

In India, too, there is no specific law in force that recognizes the vilifying speech targeted at women (whether online or offline) as a form of hate speech. While a disparate set of legal provisions address various speech acts that harm women,<sup>84</sup> the overwhelming emphasis of the law is to prevent speech that is not considered *decent* (IRWA), or law that is in furtherance of patriarchal notions such as the protection of women's *modesty* (Section 509 of the IPC).

The freedom of speech and expression is a fundamental right under the Indian Constitution.<sup>85</sup> The only constitutionally sanctioned grounds for the restriction of this fundamental right are laws that impose reasonable restrictions in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.<sup>86</sup> A majority of the laws that proscribe forms of hate speech have been upheld as constitutional on the touchstone of "public order".<sup>87</sup> Others have been upheld on the basis of morality and decency.<sup>88</sup>

For hate speech that does not incite violence, but reinforces structures of subordination or oppression, the Indian Constitution lacks a vocabulary and an imagination to address the harms caused by such speech, and to constitutionally protect any regulation of it. "Public order" has been judicially defined to mean imminent threats to peace and tranquility, akin to a spark in a powder keg.<sup>89</sup> Regulation of speech that does not affect public order, but causes other forms of harm such as hurt or emotional distress, has been justified on the basis of being a reasonable restriction in the

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81 See European Convention on Human Rights; See also pp. 17 – 25 of the 267th Law Commission Report.

82 Tanya D'Souza et al, "Harming Women with Words: The Failure of Australian Law to Prohibit Gendered Hate Speech" (2018) 41(3) University of New South Wales Law Journal, at p. 939;

83 Anjalee Da Silva, "Addressing the Vilification of Women: A Functional Theory of Harms and Implications for Women", Michigan University Law Review, Vol 43(3):987, a p. 992.

84 See IRWA; Sections 354A, 354C, 354D and Section 509 of the Indian Penal Code;

85 Article 19(1)(a), Constitution of India.

86 Article 19(2) of the Constitution of India

87 Siddharth Narrain, 'Hate Speech, Hurt Sentiment, and the (Im) Possibility of Free Speech' (2016) 51(17) Economic and Political Weekly 119, p. 122.

88 Gautam Bhatia, *Offend, Shock, or Disturb: Free Speech under the Indian Constitution* (Oxford University Press 2016), p. 159.

89 S. Rangarajan v. P. Jagjivan Ram, 1989 SCR (2) 204.

interest of decency or morality.<sup>90</sup> Decency and morality, however, by its plain meaning and import, do not capture the objective or interest sought to be achieved by the regulation of speech that subordinates historically oppressed or marginalized groups. The Indian Constitution thus *conceptually* fails to acknowledge the deeply discriminatory implications of speech, and as a charter of rights fails to accord protection to vulnerable groups against the pernicious effects of hate speech.

### III. The *Sui Generis* Nature of Online Gender-Based Violence

As set out above, there is no legal framework that squarely addresses misogynistic hate speech in India (whether online or offline). The preceding sections address the general nature of misogynistic hate speech and its harms. Section III, however, seeks to demonstrate how online misogynistic hate speech is *sui generis*. It highlights the manifestation of online misogyny, and discusses why as it is unique (as a category of hate speech), both in terms of causes and consequences/harms.

#### A. Manifestations of Misogyny Online

Understanding the structural nature of misogyny and misogynistic hate speech is imperative while examining the problem of misogynistic hate speech on the internet and online gender-based abuse. As discussed in Section I, misogyny ought not to be viewed as the deviant views or actions of fringe elements, but is in fact a manifestation of dominant, patriarchal forces in society that seek to preserve *status quo*. On the internet, this structural nature of misogyny (and its deployment to preserve the patriarchal order) is evident in its almost inevitable escalation in response to any progressive socio-political or legal outcome for feminism. This phenomenon (also discussed as ‘anti-feminism’) has assumed various forms online.<sup>91</sup> As far back as in 2013, there was the episode of ‘dongle-gate’, where Adria Richards’s tweets about sexual comments at a tech conference (that prompted the firing of the two men engaging in it) resulted in a considerable backlash against Richards (and women in technology).<sup>92</sup> Similarly, when a Google engineer was fired for a memo that expounded a theory that

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90 Siddharth Narrain, ‘Hate Speech, Hurt Sentiment, and the (Im) Possibility of Free Speech’ (2016) 51(17) Economic and Political Weekly 119, p. 120; Gautam Bhatia, *Offend, Shock, or Disturb: Free Speech under the Indian Constitution* (Oxford University Press 2016), p. 75.

91 Alice Marwick, ‘Donglegate: Why the Tech Community Hates Feminists’, March 29, 2013, Wired, <https://www.wired.com/2013/03/richards-affair-and-misogyny-in-tech/>.

92 id.

women were not adept at computer sciences on account of their biology, it unleashed misogynistic vitriol online, targeting the perceived phenomenon of “uncontrolled feminism.”<sup>93</sup>

There are specific communities (which are often transnational in their member profile), hashtags and activities such as men’s rights activists, incels, “pick-up artists”, “Meninism”, “the Red Pill”, #YourSlipisShowing, #gamergate and “Men Going Their Own Way” (MGTOW) that are dedicated to misogynistic, anti-feminist agendas.<sup>94</sup> These communities appear to be prompted by a sense of entitlement to the status quo of patriarchy and threatened by the increasing visibility of women in public spheres. Despite continued male dominance in institutions of power, they unleash misogynistic hate to harass and silence women transnationally over the internet.<sup>95</sup> Misogyny online assumes an almost systematic pattern of harassment, with the agenda of inhibiting and shaming women who participate in the public sphere.<sup>96</sup> This is done typically by content that threatens their safety, such as sexualized content, or comments directed at their body and physical appearance.<sup>97</sup> Attempts by women to assert sexual agency and autonomy are undermined by the attention economy (that commoditizes sexuality, while shaming agency).<sup>98</sup> Such instances of online violence and abuse can also have grave implications for women’s safety in the physical world.<sup>99</sup>

Online gender-based violence assumes a number of forms. It includes acts such as cyberstalking, rape and death threats, and non-consensual sharing of intimate images and personal information. There is also the circulation of content that sexually objectifies women and promotes various harmful gendered stereotypes. In addition to these, the internet presents women with a “constant undercurrent of ‘banal’ everyday misogynisms”.<sup>100</sup> A lot of this content is disguised as innocuous (or ‘cool’ or ‘humorous’), but it in fact perpetuates harmful, sexist or sexualized stereotypes of women (including memes, commonly-used sexist terms and acronyms)<sup>101</sup>. This results in the mainstreaming

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93 Gender Hate Online, Eds Debbie Gings, Eugenia Siapera, Palgrave Macmillian 2019, at Chapter 2 “Online Misogyny as Witch Hunt: Primitive Accumulation in the Age of Technocapitalism” at p. 25

94 Page (x) of the FOREWORD BY SORAYA CHEMALY in Gender Hate Online, Eds Debbie Gings, Eugenia Siapera, Palgrave Macmillian 2019, at p. 25

95 *id.*

96 *supra* note 26 at Chapters 2 and 5.

97 *id.*

98 Leora Tanenbaum (2015), *I Am Not a Slut: Slut-Shaming in the Age of the Internet*, Harper Perennial

99 See for instance, Jon Boone, “She feared no one! the life and death of Qandeel Baloch”, 22 September 2017, *The Guardian*, <https://www.theguardian.com/world/2017/sep/22/qandeel-baloch-feared-no-one-life-and-death>.

100 Gings, D. (2018). Neologising Misogyny: Urban Dictionary’s Folksonomy of Sexual Abuse, paper presented at Console-ing Passions, Bournemouth University, July 12; Gender Hate Online, Eds Debbie Gings, Eugenia Siapera, Palgrave Macmillian 2019, at Chapter 2 “Online Misogyny as Witch Hunt: Primitive Accumulation in the Age of Technocapitalism” at p. 26.

101 “Examples abound, from expressions such as “tits or GTFO” and “send nudes” to “make me a sammich”; memes from the “overly attached girlfriend” to “feminazis”, from the “annoying Facebook girl” to the more recent “Did you just assume my gender”; various random comments referring to “sluts”, “bitches” and “whores” but also Urban Dictionary-style definitions and abbreviations”. (C.f. Gender Hate Online, Eds Debbie Gings, Eugenia Siapera, Palgrave Macmillian 2019, at Chapter 2 “Online Misogyny as Witch Hunt: Primitive Accumulation in the Age of Technocapitalism” at p. 26.)

of misogyny in a manner that ‘normalizes’ it on account of its widespread prevalence. Attempts to criticize such content is more often than not met with further ridicule and misogyny, thus feeding into a vicious cycle of gendered hate. What makes the battle against such content particularly fraught is that it is often generated by persons in positions of power: political leaders, academics and media persons.<sup>102</sup> Some of this content is exchanged through private channels of online communication, while other forms of speech are widely circulated over online platforms.

## B. Distinctive Triggers and Harms of Online Hate Speech

Online hate speech (whether targeted at women, sexual minorities, vulnerable ethnicities, religious minorities, etc.) has some unique or *sui generis* characteristics. The non-visual nature of most online communication (the absence of a face-to-face dimension) results in speech being created without the “...normal social-psychological cues of empathy and censure that tend to keep harmful or antisocial behavior in check.”<sup>103</sup> Ease of access and reach, and the anonymity and invisibility of audience and speaker also distinguishes it from offline hate speech.<sup>104</sup>

Another unique aspect of online hate speech is its proliferation as a result of *community*.<sup>105</sup> The internet enables individuals to effortlessly create, identify and/or participate in communities that echo (and consequently normalize) their views, no matter how hateful or pernicious they may be.<sup>106</sup> Given the geographic and numerical reach of the internet, these communities are significantly larger than those that can be created in offline or physical spaces. The targets or intended audience of the hate speech generated in such communities are often not a vulnerable group or demographic, but other potentially like-minded individuals who may join the community. Internet communities encourage *recruitment* and *discussion* amongst individuals, allowing them to freely ventilate thoughts and ideas that are potentially problematic. In the process, such communities co-opt (through the normalization of hate) individuals who may otherwise have not subscribed to the hateful views expressed.<sup>107</sup>

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102 Gender Hate Online, Eds Debbie Gings, Eugenia Siapera, Palgrave Macmillian 2019, at Chapter 2 “Online Misogyny as Witch Hunt: Primitive Accumulation in the Age of Technocapitalism” at pp. 29-31.

103 However, anonymity or invisibility is not the preserve of online communication alone: techniques like leaflets and graffiti have also historically relied on these aspects while being used to disseminate hate speech. (See Alexander Brown, “What is so special about online (as compared to offline) hate speech?”, *Ethnicities* Vol 18, Issue 3, 2018, at p. 300; See also Danielle Keats Citron, *Hate Crimes in Cyberspace*, (Harvard University Press, 2014), at p. 59.

104 Alexander Brown, “What is so special about online (as compared to offline) hate speech?”, *Ethnicities* Vol 18, Issue 3, 2018, at p. 306

105 *id.* at p. 301

106 Soraya Chemali, “Fake news and online harassment are more than social media byproducts — they’re powerful profit drivers”, 17 December 2016, Salon, <https://www.salon.com/2016/12/17/fake-news-and-online-harassment-are-more-than-social-media-byproducts-theyre-powerful-profit-drivers/>

107 Fisher M, Taub A, “How Everyday Social Media Users Become Real-World Extremists”, 10 October 2018, *New York Times*, <https://www.nytimes.com/2018/04/25/world/asia/facebook-extremism.html>

Similarly, the *instantaneous* nature of the internet is also observed to *encourage* ill-considered, instant responses and reactions. The point that researchers emphasize is that the instantaneous nature of the internet is not an innocuous feature that merely *facilitates* the circulation of such instantaneous hateful speech, but in fact *encourages* it.<sup>108</sup> The cycle of instant speech (and counter-speech) increases the volume and virality of content on the internet (and as a result, also amplifies harmful content such as hate speech).

The volume and virality of hate speech on the internet produce unique harms: the volume and frequency of even seemingly innocuous messages is what lends it its potency and toxicity. The volume and virality of such content (prompted by the instantaneous nature of such communication, and the phenomenon of internet communities) greatly increases the propensity to normalize and further entrench hatred towards vulnerable groups (in this instance, women). A demeaning message about women and their body types by an anonymous teenage boy on a chat site may not by itself have an immediately subordinating effect on women; it is the social and cultural context<sup>109</sup> in which such speech occurs that is relevant. The authoritativeness of such a message is derived from the fact that there are *countless* similar messages on the internet, the *cumulative* effect of which is to lend authoritativeness to the message, and result in a subordinating effect.<sup>110</sup> Such content underscores the lower status of women, diminishes their authority and autonomy and erodes their right to full citizenship.<sup>111</sup>

Another feature of online violence is its seemingly non-tactile nature. This non-corporeal form of harm caused does not immediately result in it being identified as a form of violence. Further, in the context of speech that is directed at vilifying or denigrating women, there is often a focus (by the law) on the immediate effects of such communication. As a result, the wider, long-term ramifications of such speech are ignored and unaddressed by the law. It is imperative to view online misogyny not merely in terms of individual harms (including mental health implications, its chilling effect on speech, or trauma as a result of such speech), but also understand and account for its wider ramifications. This includes accounting for how such speech impedes women's participation in decision-making and democracy and their exercise of full citizenship. It also demands accounting for how such speech affects the distribution of resources in society, and affects access to means of production.<sup>112</sup> In the

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108 *supra* note 103 at p. 304.

109 *supra* note 27, at pp. 45-46.

110 *supra* note 82, at p. 1013.

111 *supra* note 16 at p. 2445

112 *Gender Hate Online*, Eds Debbie Gings, Eugenia Siapera, Palgrave Macmillian 2019, at Chapter 2 "Online Misogyny as Witch Hunt: Primitive Accumulation in the Age of Technocapitalism" at p. 31.

context of the digital age, the implications for women are not just their exclusion from existing structures, processes and resources, but also a denial of the opportunities and potentials of the online space.

## IV. The Enablement of Hate by Internet Platforms

This section seeks to demonstrate how online vitriol, violence and abuse (and in particular, misogyny) is *consciously enabled* by internet platforms (that in fact profit from it), and why the law must account for this. **Part A** briefly discusses how social media platforms are designed to prompt and provoke toxic forms of online engagement (and how intermediaries benefit from it). **Part B** discusses the myopia of the law in accounting for the role and culpability of intermediaries in the creation of hate speech.

### A. Architecture of Internet Platforms

The justification for placing the regulatory burden on internet companies and platforms when it comes to hate speech ought not to stem from any deference to their technological superiority or specialization (as some commentators such as Alexander Brown have suggested).<sup>113</sup> Nor should it stem from a perceived moral responsibility of such platforms for having facilitated such content.<sup>114</sup>

The basis for placing the regulatory burden on internet platforms ought to arise from the fact that the toxicity of such platforms is a result of *deliberate* choices that have *directly enriched* these companies.

There is considerable research and evidence on the techno-architecture of internet platforms fueling or encouraging hate speech (including misogynistic content). The most central distinguishing feature of online hate speech is how it is enabled by *design*.<sup>115</sup> Large social media platforms, by their design, algorithms, and platform politics, implicitly support toxic techno-cultures that amplify hate speech.<sup>116</sup>

There have been several studies of the architecture of large social media platforms to demonstrate how their business models heavily benefit from hate-fueled content (which discourages any investment of effort or resources into curbing such harmful content).<sup>117</sup> Social media platforms benefit from maximum user engagement with content. Content that is recognized as prompting

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<sup>113</sup> supra note 103, at p. 310.

<sup>114</sup> id.

<sup>115</sup> Arti Raghavan, "Legislating an Absolute Liability Standard for Intermediaries for

Gendered Cyber Abuse", IT for Change, 2021, [https://itforchange.net/sites/default/files/1883/Arti-Raghvan-Rethinking-Legal-Institutional-Approaches-to-Sexist-Hate-Speech-ITfC-IT-for-Change\\_0.pdf](https://itforchange.net/sites/default/files/1883/Arti-Raghvan-Rethinking-Legal-Institutional-Approaches-to-Sexist-Hate-Speech-ITfC-IT-for-Change_0.pdf)

<sup>116</sup> Adrienne Massanari, "#Gamergate and The Fapping: How Reddit's algorithm, governance, and culture support toxic technocultures", new media and society, 2017, Vol. 19(3) 329-346

<sup>117</sup> Joe Kukura, "Facebook Employee Raises Powered by 'Really Dangerous' Algorithm That Favors Angry Posts", 24 September 2020, SFist, <https://sfist.com/2020/09/24/facebook-employee-raises-powered-by-really-dangerous-algorithm-that-favors-angry-posts/>



maximum engagement is prioritized (and given the most visibility through algorithmically curated feeds).<sup>118</sup> Emotive content<sup>119</sup> (particularly negative, toxic or hate-fueled content) is observed to prompt more engagement and user activity,<sup>120</sup> thus providing a compelling disincentive for these platforms to remove such speech or content. User engagement directly translates to revenues for intermediaries (through both user data and advertising revenues), thus providing a further incentive to promote hateful and toxic content.<sup>121</sup>

There has, however, been no serious regulatory reckoning of the role played by internet intermediaries (particularly large social media corporations) in fueling hate speech.

## B. The Extant Regulatory Framework for Online Hate Speech

**Part B** critiques the existing jurisprudence and framework of laws that regulate online hate speech, and identifies the inadequacies in these laws.

For the first time in July 2021, the Indian Supreme Court recognized that Facebook had become a platform for “...*disruptive messages, voices and ideologies.*”<sup>122</sup> This was in the context of adjudicating a petition challenging the summons issued by the Peace and Harmony Committee of the Legislative Assembly of Delhi, to investigate the role of the intermediary in the Delhi riots of 2020. The Supreme Court confirmed that the Assembly did have the power to issue such summons, despite the legislative competence to enact laws relating to intermediaries vesting with the Union Government. The Court expressed its concerns about the implications of such disruptive misinformation on the functioning of democracies. It also appears to have rejected Facebook’s contention that it was merely a platform posting third-party information,<sup>123</sup> and has alluded to the fact that algorithms used by platforms such as Facebook are not objective. In rejecting the notion that intermediaries play an innocuous role in the dissemination of third-party information, the Court has also relied on the approach adopted by

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118 Jamie Seidel, “How Facebook, Google algorithms feed on hate speech, rage”, 6 September 2020, NZ Herald, <https://www.nzherald.co.nz/business/how-facebook-google-algorithms-feed-on-hate-speech-rage/W7LPGNG6SKGN6Q6FN2O3HW6WVM/>

119 Tobias Rose-Stockwell, “This is how your fear and outrage are being sold for profit”, 28 July 2017, Quartz, <https://qz.com/1039910/how-facebooks-news-feed-algorithm-sells-our-fear-and-outrage-for-profit/>

120 Joe Kukura, “Facebook Still Grappling With How Misinformation and Hate Speech Are Very Profitable for Them”, 24 November 2020, SFist, <https://sfist.com/2020/11/24/facebook-grapples-with-how-misinformation-and-hate-speech-are-very-profitable-for-them/>; see also, supra note 117

121 Kris Shaffer, “The business of hate media”, 24 April 2017, Data for Democracy, <https://medium.com/data-for-democracy/the-business-of-hate-media-47603a5de5f4>

122 Para 2, Judgment of the Supreme Court in *Ajit Mohan & Ors. vs Legislative Assembly National Capital Territory of Delhi & Ors.* Writ Petition (C) No. 1088 of 2020

123 Para 4, Judgment of the Supreme Court in *Ajit Mohan & Ors. vs Legislative Assembly National Capital Territory of Delhi & Ors.* Writ Petition (C) No. 1088 of 2020

other democracies such as the United Kingdom, Australia, the United States of America and the European Union.<sup>124</sup>

However, for now, the Supreme Court’s observations about the role of large social media platforms appears to be sound and fury. In terms of actual steps towards fastening platform accountability for the erosion of democratic protections, the Indian state appears to be largely unconcerned.

In India, the legislative priorities were evidenced in the recently notified Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (“**IT Rules**”). It represents a strong and unwarranted encroachment upon digital news media and “online curated content: (a vague, over-broad category of content providers that have now been subjected to equally vague, over-broad regulations that could potentially have a chilling effect).<sup>125</sup> In the aftermath of the notification of the IT Rules, the State’s energies appear to be channeled towards questioning the momentary suspension of a former Minister’s Twitter account,<sup>126</sup> and seeking to have content that was uncomfortable for the ruling dispensation at the Centre and in the state of Uttar Pradesh labelled as “manipulated media”.<sup>127</sup>

While the IT Rules (and limited amendments to the IPC)<sup>128</sup> do attempt to address violence and abuse on the internet, these attempts are misguided and their priorities misplaced for the reasons discussed below.

The regulatory framework dealing with misogynistic hate speech on the internet primarily focuses on individual acts of speech and its effects. Gendered cyber-violence is primarily addressed by certain provisions of the Information Technology Act, 2000 (“**IT Act**”)<sup>129</sup>, the IT Rules,<sup>130</sup> and the IPC.<sup>131</sup>

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124 Para 4 and 7, Judgment of the Supreme Court in *Ajit Mohan & Ors. vs Legislative Assembly National Capital Territory of Delhi & Ors.* Writ Petition (C) No. 1088 of 2020; Also referred to Digital, Culture, Media and Sport Committee, U.K. House of Commons, Disinformation and 'fake news': Final Report, 20-44 (18/02/2019), accessible at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmcomeds/1791/1791.pdf>

125 See Malavika Raghavan, “India’s new Intermediary & Digital Media Rules: Expanding the Boundaries of Executive Power in Digital Regulation”, 10 June 2021, Future of Privacy Forum, <https://fpf.org/blog/indias-new-intermediary-digital-media-rules-expanding-the-boundaries-of-executive-power-in-digital-regulation/>; See also Internet Freedom Foundation, “Explainer: Why India’s new rules for social media, news sites are anti-democratic, unconstitutional” 27 Feb 2021, Scroll, <https://scroll.in/article/988105/explainer-how-indias-new-digital-media-rules-are-anti-democratic-and-unconstitutional>

126 “Twitter blocks Ravi Shankar Prasad’s handle over violation of copyright norms; unblocks later”, 25 June 2021, Mint, <https://www.livemint.com/news/india/twitter-blocks-ravi-shankar-prasad-s-handle-over-violation-of-copyright-norms-11624616188732.html>

127 “Astounding that Twitter defies Intermediary Guidelines, while calling itself flag bearer of free speech: Ravi Shankar Prasad”, 16 June 2021, Indian Express, <https://indianexpress.com/article/technology/tech-news-technology/astounding-that-twitter-defies-intermediary-guidelines-while-portraying-itself-as-flag-bearer-of-free-speech-rs-prasad-7361453/>

128 Sections 345A – 345D of the Indian Penal Code, 1860.

129 Sections 66E, 67, 67A and 67B of the Information Technology Act, 2000.

130 Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. [https://www.meity.gov.in/writereaddata/files/Intermediary\\_Guidelines\\_and\\_Digital\\_Media\\_Ethics\\_Code\\_Rules-2021.pdf](https://www.meity.gov.in/writereaddata/files/Intermediary_Guidelines_and_Digital_Media_Ethics_Code_Rules-2021.pdf)

131 Sections 345A – 345D of the Indian Penal Code, 1860.

However, the focus of these laws is on proscribing and criminalizing *individual acts* of gendered cyber-violence, and fails to address or account for the systemic nature of misogyny, or the enablement of hate by internet platforms and intermediaries.

The recently notified IT Rules mandate that significant social media intermediaries that provide primarily messaging services enable the identification of the first originator of the information on its computer resource in certain circumstances.<sup>132</sup> These circumstances include when an order is passed by a competent court or authority in connection with offences relating to *rape, sexually explicit material or child abuse material*. Here, one sees that the differential burden of “additional due diligence” placed on significant social media intermediaries is to surveil *individual* transgressions. For instance, the widespread circulation of a message inciting rape falls under the regulatory scanner primarily for the purpose of identifying (to potentially prosecute) the originator of the message. However, each recipient/viewer of such a message is affected: through the normalization of sexual violence on account of its wide circulation, and by the reinforcement of structures of subordination of women. The law signally fails to account for this and contain the harm caused. Instead, the IT Rules seek to use the circulation of such harmful content as the pretext to invade privacy, and potentially intercept private communication for the ostensible purpose of identifying the sole perpetrator: the originator. The role of large intermediaries in the virality of harmful content, and its impact both in terms of normalizing hate and reinforcing structures of social subordination, is erased.

The IT Rules also carry an entreaty to significant social media intermediaries to deploy artificial intelligence (“AI”) tools to pro-actively remove content that depicts or simulates rape, child sexual abuse or conduct.<sup>133</sup> Notably, this is not a strict legal mandate that results in penal consequences. Further, it limits the obligation to putting in place AI techniques to monitor content, despite overwhelming evidence of the need for highly qualified, trained human content moderators.<sup>134</sup>

Any attempts at regulating misogynistic speech online must account for and address the role of intermediaries.

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132 Proviso to Rule 4(2) of the IT Rules.

133 Rule 4(4) of the IT Rules.

134 Note that content moderation is seen to have seriously detrimental consequences on those who are engaged in it. It is essential that the human cost of this exercise is accounted for, and that platforms be regulated to ensure that individuals engaged in the content moderation activities are not exploited. [See Andrew Arshat and Daniel Etcovitch, “The Human Cost of Online Content Moderation”, 2 March 2018, Jolt Digest, <https://jolt.law.harvard.edu/digest/the-human-cost-of-online-content-moderation>; Marc Kaplan, “Re-Humanizing Social Networking Platforms: The Importance Of Content Moderation” 21 April 2021, BW Disrupt, <http://bwdisrupt.businessworld.in/article/Re-Humanizing-Social-Networking-Platforms-The-Importance-Of-Content-Moderation/21-04-2021-387287/> ;

Tarleton Gillespie, “Content Moderation, AI and the Question of Scale”, Big Data and Society, July-December 2020, 1-5, <https://journals.sagepub.com/doi/full/10.1177/2053951720943234>

## V. Regulating Online Misogynistic Speech: Moving beyond the Victim–Perpetrator Binary

This Section discusses the case for a non-retributive approach to misogynistic hate speech in light of two significant factors: (i) the virality and reach of misogynistic speech on the internet, and (ii) the active role played by internet intermediaries and platforms in the creation and circulation of misogynistic content.

The ubiquity of misogyny (particularly online) is very often the reason for its invisibility. It is so deeply enmeshed in the fabric of our society and polity that it is often difficult to discern, let alone counteract.<sup>135</sup> It is witnessed in advertisements that bombard our feeds, and is entrenched in journalistic practices, art, science, entertainment and literature.<sup>136</sup> This omnipresent, systemic and power-driven nature of misogyny makes it difficult to apply in the context of criminal law.

As discussed above, gendered abuse faced by women online is not the result of the jaundiced views of a few internet trolls, but is in fact the manifestation of patriarchal forces that seek to police women and their views. It is also driven by conscious design features of internet platforms (anonymity, instantaneousness, community and the rewards for higher engagement, as discussed above in Section IV (A)). For instance, viral content that body-shames or sexualizes women is not necessarily created or circulated with the pre-meditated intent of vilifying or subordinating women, or inflicting harm on them. It is an enactment of social scripts<sup>137</sup> which gains traction and wider circulation on account of the architecture of internet platforms. Seen in this context, it is clear that a focus on individual speech acts and their criminalization is ineffective.

At best, the criminal justice system – with its solution of deterrence and punishment through incarceration – addresses merely the symptoms of misogyny. It completely ignores both the causes and harms. For instance, the emphasis on identifying and punishing the originator of messages (discussed above in Section IV(B)) ignores the role of platforms that circulate and amplify harmful content, and the culpability of each person who shares such information. The law does not curb or stem the harm caused by such circulation, nor the normalization of hateful views that such toxic speech may contribute to.

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135 Ranjana Kumari, “Patriarchal Politics: The Struggle for Genuine Democracy in Independent India”, 26 February 2014, available at <https://www.boell.de/en/2014/02/26/patriarchal-politics-struggle-genuine-democracy-contemporary-india>;

136 supra note 16 at p. 2434

137 id. at p. 2441

Subjecting each of the participants in such a scenario to prosecution under the criminal justice system is also not a solution. Criminal law demands proof of *intent* or *mens rea*. In the case of misogyny and gendered hate speech online, not only is such intent difficult to establish, but it may also not exist, given that toxic speech online is often a product of the techno-architecture of platforms.

Another drawback of the criminal justice system is how it treats victims of gender crimes. Victims are often put on trial, with the process of prosecution being a punishment for the complainant/victim.<sup>138</sup> Further, the high burden of proof under criminal law (beyond reasonable doubt) and the requirement of establishing intent, both of which are necessary safeguards to preserve the liberty of persons, make a criminal law framework ill-suited to tackle a deeply socially-embedded phenomenon such as misogyny and misogynistic speech.

But misogynistic content undoubtedly harms women profoundly (as demonstrated above), and warrants regulatory intervention. The ubiquity of such content and the fact that it does not meet the standards of a criminal offence does not automatically imply that such speech deserves legal or constitutional protection.

### The Banality of Misogyny and Drawing the Regulatory Line

The case for regulating more aggressive forms of misogyny (such as threats, cyberstalking or revenge porn) is easier to make. The banal forms of misogyny are what give rise to one of the central issues in regulating misogynistic hate speech, i.e., identifying the boundaries of permissibility. Should ‘misogynistic hate speech’ include certain *ideas* (for instance, regarding the inferiority of women, or sexual/physical subjugation of women, or the untrustworthiness of women), or should it be limited to only certain manners and modes of *expression* (such vitriolic, threatening or abusive speech)?

In the context of online misogynistic speech or gendered hate speech in particular, it is particularly difficult to draw the regulatory line. Individual speech acts that are given cultural or social sanction (e.g., ‘wife jokes’ or stereotypes about ‘women of easy virtue’) may not in themselves lead to the discrimination or subjugation of women. They are not necessarily (and ought not to be) prosecutable. But cumulatively, they contaminate the public sphere, and underscore the lower status of women, diminish their authority and autonomy and erode their right to full citizenship.<sup>139</sup> Tropes such as the

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138 “Everyone Blames Me”, Barriers to Justice and Support Services for Sexual Assault Survivors in India, 8 November 2017, Human Rights Watch, <https://www.hrw.org/report/2017/11/08/everyone-blames-me/barriers-justice-and-support-services-sexual-assault-survivors>; See also,

Priyangee Guha, “India’s justice system hardly cares about what the victim wants, and this must change”, 17 April 2018, The News Minute, <https://www.thenewsminute.com/article/india-s-justice-system-hardly-cares-about-what-victim-wants-and-must-change-79736>

139 supra note 16 at p. 2445

nagging wife and the hapless husband feed into the social conscience. They have a direct bearing on shaping public views and perception on the necessity for laws such as criminalizing marital rape.

These effects of milder forms of misogynistic speech online – given volume, virality and reach – is what makes it necessary to widen the regulatory net with respect to what qualifies as misogynistic hate speech. Attempting to restrict regulation of hate speech to only its most virulent forms (death or rape threats, expletives, and violent or abusive language) would result in ignoring some of the most pernicious forms of speech that affect the rights of women. An emphasis on the *manner* of expression of ideas (i.e., a law that flags out only extreme forms of expression) will defeat the purpose of regulating misogynistic speech online. In the context of language and speech, gradations and shades are often counter-productive. The ‘toxicity’ of speech does not require that it is expressed in expletives, or that it has violent overtones. It becomes essential that the law engages with thorny issues of virality, volume and the normalization of harmful ideas.

Under liberal free speech ideals (such as in the United States of America), the proscription of the expression of certain *ideas* is an unreasonable restriction on the freedom of speech and expression. Restriction of content and certain viewpoints was held to be a violation of the First Amendment rights.<sup>140</sup> In order to qualify as hate speech, the United States of America has applied the test of “clear and present danger”, requiring that there be a threat of *imminent lawlessness*.<sup>141</sup>

The Supreme Court in its judgment in *Pravasi Bhalai Sangathan* appears to have prescribed an effects test that examines the societal impact of speech. The Law Commission has restricted the proposed definition to speech that *incites hatred* or causes fear, alarm or provokes violence.<sup>142</sup> Online hate speech directed at marginalized groups and communities (such as women) does not readily lend itself to a cause-and-effect test. The societal impact of individual speech acts on the internet is difficult to trace or readily discern. Individual tweets that target and vilify women, or sexually objectify them may not *by themselves* rise to the level of hate speech. Each individual message does not necessarily, on its own steam, “*lay the groundwork for later, broad attacks.*” This is why regulatory intervention of hate speech on the internet must account for the *virality* of speech and its wide reach (in terms of both members of the target group and society in general).

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140 R. A. V. v. City of Paul, 505 U.S. 377 (1992).

141 Schnek v. United States, 249 U.S. 47 (1919).

142 267th Law Commission Report at pp. 51 – 52.

A more suitable focus therefore would be to arrest the virality of misogynistic content, and to focus regulatory efforts on *de-platforming* misogynistic speech (instead of criminalizing it). This could be through many measures including:

- i. Imposing greater responsibility on platforms to review and moderate content that is created or shared by accounts with greater visibility and a high number of followers (such as blue-tick accounts). For instance, a misogynistic remark about women's tendency to make false complaints that is made from an account that enjoys a high degree of visibility and engagement must warrant prompter regulatory intervention.
- ii. Devising mechanisms for civil society engagement in the process of content moderation, to ensure that it is sensitive to various axes of oppression including gender, caste, race, sexual orientation, etc.
- iii. Members of internet communities and groups that have been flagged or reported for their toxic/misogynistic views could be subjected to greater scrutiny, or issued alerts that threaten suspension or deactivation of accounts if they persist.
- iv. A strong system of monetary penalties should be formulated to ensure that intermediaries take the exercise of content moderation seriously. The need for both human and artificial intelligence measures to review and moderate content must be emphasized by such regulation (on account of its inherently subjective nature).

These are, of course, obligations that cannot be foisted upon smaller internet platforms or intermediaries that lack the resources to carry out these exercises. The regulatory requirements could perhaps be restricted to intermediaries with user bases of a certain size and that have certain levels of revenue.

Concerns regarding private censorship of speech by internet platforms and intermediaries are indeed legitimate. However, the solution for it is not to allow content to be uploaded and circulated in an unrestrained manner, but instead to call for increased accountability and transparency in de-platforming decisions and takedown of content. Similarly, the takedown of content on the orders of government or judicial authorities must also be on a transparent basis and should be subject to further scrutiny and challenge by a judicial body.

One casualty in a regulatory framework such as the one proposed above is the lack of redress for individual acts of trolling and misogyny. As discussed above, the existing criminal justice system is often hostile to victims of gendered crimes, and is ill-equipped to address the harms of such crimes. The answer, perhaps, lies in looking for solutions beyond the legal system. For harms caused by

deeply embedded social problems such as patriarchy, the solutions often are in structures of support and empowerment, and the creation of communities of care. Anti-carceral feminism offers some insights into methods of accountability and healing outside the familiar systems of prisons and courts.<sup>143</sup> These systems often focus on addressing the root cause of oppressive actions, i.e., inequality, instead of directing regulatory energies at individual wrongdoers.

## Conclusion

The perception of the internet (and social media platforms in particular) as a democratizing force is one that greatly serves the interests of large internet companies. This perception helps perpetuate the notion of their benign, community driven goals of facilitating communication and access to information globally.<sup>144</sup> However, shorn of these lofty mission statements, at the heart of these enterprises is the exploitation of individuals for profit, and the whittling away of critical fundamental rights in democracies.<sup>145</sup> Privacy, dignity, freedom from discrimination, and ironically, even the freedom of speech and expression, have been trammled upon as a result. The digital era has also vested virtually uncanalized powers of censorship and content control into the hands of a small number of powerful internet corporations.

The last decade has demonstrated how profoundly online interactions affect our physical world. The internet era has also made citizens vulnerable to a degree of surveillance that is unprecedented.<sup>146</sup> The crisis of ‘fake news’ and misinformation has wrecked incalculable damage on citizens across the world.<sup>147</sup> It has precipitated human rights disasters (including genocide)<sup>148</sup> and compromised the

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143 Sanjukta Bose, “Carceral Feminism and Ideas of Justice In India”, 24 October 2020, Critical Edges, <https://criticaledges.com/2020/10/24/carceral-feminism-and-ideas-of-justice-in-india/>

144 See for instance, Jill Lepore, “Facebook’s Broken Vows”, 26 July 2021, The New Yorker, [https://www.newyorker.com/magazine/2021/08/02/facebooks-broken-vows?utm\\_source=nl&utm\\_brand=tny&utm\\_mailing=TNY\\_Daily\\_073021&utm\\_campaign=aud-dev&utm\\_medium=email&utm\\_bxid=5f893b5466af4c770360d2ab&cndid=62463121&hasha=828a5a2800c0af02e14d7c6574e54051&hashb=fa8176d6cb2c1d84afb55de79e9f5de8fd04378&hashc=c528e7bb4b6ffaf99b3fb96cb16c8b94badab07bf88bb1cdeac1d323056a69cf&esrc=lgw-register&utm\\_content=A&utm\\_term=TNY\\_Daily](https://www.newyorker.com/magazine/2021/08/02/facebooks-broken-vows?utm_source=nl&utm_brand=tny&utm_mailing=TNY_Daily_073021&utm_campaign=aud-dev&utm_medium=email&utm_bxid=5f893b5466af4c770360d2ab&cndid=62463121&hasha=828a5a2800c0af02e14d7c6574e54051&hashb=fa8176d6cb2c1d84afb55de79e9f5de8fd04378&hashc=c528e7bb4b6ffaf99b3fb96cb16c8b94badab07bf88bb1cdeac1d323056a69cf&esrc=lgw-register&utm_content=A&utm_term=TNY_Daily)

145 “Your Data Is Shared and Sold...What’s Being Done About It?”, 28 October 2019, Knowledge@Wharton, <https://knowledge.wharton.upenn.edu/article/data-shared-sold-whats-done/>; See also, Nishant Sharma, “Indian Entities Spent \$1.6 Billion On Facebook And Google Ads In 2018-19”, 14 February 2020, Bloomberg Quint, <https://www.bloomberquint.com/business/indian-entities-spent-dollar16-billion-on-facebook-and-google-ads-in-2018-19>

146 Cameron F. Kerry, “Why protecting privacy is a losing game today—and how to change the game”, 12 July 2018, Brookings, <https://www.brookings.edu/research/why-protecting-privacy-is-a-losing-game-today-and-how-to-change-the-game/>; See also, Alina Selyukh, “Internet Freedom Wanes As Governments Target Messaging, Social Apps”, 14 November 2016, NPR All Tech Considered, <https://www.npr.org/sections/alltechconsidered/2016/11/14/500214959/internet-freedom-wanes-as-governments-target-messaging-social-apps>; See also, Siddharth Varadarajan, “Pegasus Project: How Phones of Journalists, Ministers, Activists May Have Been Used to Spy On Them”, 18 July 2021, The Wire, <https://thewire.in/government/project-pegasus-journalists-ministers-activists-phones-spying>

147 Farhad Manjoo, “How the Internet Is Loosening Our Grip on the Truth”, 2 November 2016, The New York Times, [https://www.nytimes.com/2016/11/03/technology/how-the-internet-is-loosening-our-grip-on-the-truth.html?\\_r=0](https://www.nytimes.com/2016/11/03/technology/how-the-internet-is-loosening-our-grip-on-the-truth.html?_r=0)

148 Alex Warofka, “An Independent Assessment of the Human Rights Impact of Facebook in Myanmar”, 5 November 2018, Facebook, <https://about.fb.com/news/2018/11/myanmar-hria/>



fairness and outcome of elections in democracies.<sup>149</sup> The reach and penetration of the internet (and social media in particular) has made it indispensable for political leaders as a tool of mass communication, but also lends itself to manipulation, misinformation and vitriolic campaigns.<sup>150</sup>

India reports an internet penetration of approximately 45%.<sup>151</sup> The inordinate emphasis on developing governance tools that rely upon the internet has affected access to basic rights and entitlements including education, health, and social security entitlements for those who do not have access to the internet.<sup>152</sup> These millions of citizens have never been afforded an opportunity to test the (purported) democratizing potential of the internet. Even citizens who have access to the internet are deprived of it through internet shut-downs enacted under the pretext of national security concerns.<sup>153</sup>

As discussed above, misogynistic hate speech hinders women's democratic rights, and thwarts any attempts to seek recognition and protection from the State. Not only does the toxicity of hate speech contaminate the public sphere (thus blunting the effectiveness of women's attempts at political, social, economic or cultural assertion), it increases the vulnerability of the weakest members of the group. In the context of the digital age, however, this vulnerability is exaggerated. Online violence and hate speech targeted at vulnerable communities and groups has directly threatened their physical and lived reality, and shaped the world they live in (for the worse). This also holds true for women deprived of access to the internet, who additionally must face the consequences of an altered, increasingly misogynistic reality that is a result of unchecked online gender-based violence.<sup>154</sup>

The regulation of content on the internet presents unprecedented challenges. It tests the extra-territorial reach of sovereign governments, as the actions and actors sought to be regulated are often beyond the jurisdiction of individual states. While governments across the world have been locked in

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149 Thomas B. Edsall, "Democracy, Disrupted", 2 March 2017, The New York Times, [https://www.nytimes.com/2017/03/02/opinion/how-the-internet-threatens-democracy.html?rref=collection%2Fcolumn%2Fthomas-b-edsall&action=click&contentCollection=opinion&region=stream&module=stream\\_unit&version=latest&contentPlacement=1&pgtype=collection&r=0](https://www.nytimes.com/2017/03/02/opinion/how-the-internet-threatens-democracy.html?rref=collection%2Fcolumn%2Fthomas-b-edsall&action=click&contentCollection=opinion&region=stream&module=stream_unit&version=latest&contentPlacement=1&pgtype=collection&r=0)

150 Joel Stein, "How Trolls Are Ruining the Internet", 16 August 2018, Time, <https://time.com/4457110/internet-trolls/>

151 Sandhya Keelery, "Internet penetration rate in India from 2007 to 2021", 27 April 2021, Statista, <https://www.statista.com/statistics/792074/india-internet-penetration-rate/>

152 Mahima Jain, "Why India's digital divide is hampering vaccine access", 20 May 2021, Devex, <https://www.devex.com/news/why-india-s-digital-divide-is-hampering-vaccine-access-99943>; See Rakshitt Bajpai, "Right to Education & Emergence of a Digital Divide in Digital India", 23 September 2020, Oxford Human Rights Hub, <https://ohrh.law.ox.ac.uk/right-to-education-emergence-of-a-digital-divide-in-digital-india/>; See also Kundan Pandey, "COVID-19 lockdown highlights India's great digital divide", 30 July 2020, Down to Earth, <https://www.downtoearth.org.in/news/governance/covid-19-lockdown-highlights-india-s-great-digital-divide-72514>

153 "India had world's highest number of internet shutdowns in 2020: Report", 4 March 2021, Scroll, <https://scroll.in/latest/988517/india-had-highest-number-of-internet-shutdowns-in-2020-report>

154 Mitali Nikore, "India's gendered digital divide: How the absence of digital access is leaving women behind", 22 August 2021, Observer Research Foundation, <https://www.orfonline.org/expert-speak/indias-gendered-digital-divide/>

battle with social media giants for accountability and regulation,<sup>155</sup> it is interesting to observe what the site of contestation is, and to what concerns short shrift is being given. The regulatory battle sites include those related to (i) misinformation and fake news (and contests over who is a suitable arbiter for it); (ii) concerns surrounding the private censorship of speech by intermediaries and platforms; (iii) privacy and surveillance; and (iv) online violence and abuse. It is interesting to observe that while States are often concerned with private content regulation (especially when it affects the government's control over news narratives), it is less concerned with fixing accountability and stemming the harms arising from the techno-architecture of platforms that enable viral hate.<sup>156</sup>

Any attempt to have the law recognize and address the causes and harms of online misogynistic speech is one that pits one of the most historically oppressed and marginalized sections of humanity (women), against two of the most powerful forces in our democratic State: patriarchy and capital. Mercifully, these are forces that feminist struggles are well acquainted with, and have in the past prevailed against.

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155 Tow Center for Digital Journalism, "Facebook, Twitter, Google under fire across the pond", Columbia Journalism Review (n.d.), <https://us3.campaign-archive.com/?u=a23440a018c7ba0619c6f01e6&id=cfb95d5d1&e=6ab3ae33dc>

156 Heather Barr, "As Online Gender-Based Violence Booms, Governments Drag Their Feet", Human Rights Watch (n.d.), <https://www.hrw.org/world-report/2021/essay/online-gender-based-violence-booms-governments-drag-feet>

