

Rethinking Legal-Institutional Approaches to Sexist Hate Speech in India

Decoding Law Enforcement Against Online Misogyny

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Decoding Law Enforcement Against Online Misogyny

In 1997, Jaques Attali, a French economic and social theorist, said, “Internet is the new continent... A virtual continent where a new economy is developing without the burdens of the physical world.”¹ More than two decades later, the internet has evolved into an intoxicating, high-speed communication tool allowing omnipresent access with complete anonymity. The advancement of the digital technological paradigm and an increasing dependency on digital communications has seen a commensurate increase in new avenues of abuse, enabling a growing tribe of misogynists on the net. The law and the law makers recognise misogyny, understand the need to address it, and in some cases, also attempt prosecuting it. Unfortunately, however, within the current legal framework and protocols, it is nearly impossible to provide redressal to a victim of online abuse with the needed alacrity. This paper attempts to briefly capture the legal regime of this redressal process, suggesting some recommendations on the way forward.

The Law

Sociological theory suggests that the misogynistic mind stems from deep-rooted patriarchal notions that have seeped into our systems. Pre-modern laws and scriptures that inform social norms and beliefs are filled with misogynistic narratives about women.² The law, which is a representation of societal notions, has, therefore, also developed with protectionist, patriarchal approaches towards women’s rights.³ It has had a trajectory where the focus has been on maintaining the patriarchal status quo rather than on addressing the rights of women who have faced violations. For example, a law introduced to address “obscenity”, ‘The Indecent Representation of Women Act’, addresses the problem from the deemed impact it has on the consumer of the material, rather than the person objectified or victimised.

¹ <https://archive.nytimes.com/www.nytimes.com/library/cyber/euro/082697euro.html>

² Scriptures across cultures and religions have relegated women as lowly objects with some even attributing extremely negative characteristics to women.

³ See Sections 292, 293, 294 of the Indian Penal Code.

In the Indian Penal Code, many sections related to violence against women are set in patriarchal stereotypes. Till 2013, sexual violence was defined within a narrow spectrum, from “rape” (interpreted as penetrative non-consensual sex) on the one side to “outraging the modesty of a woman” on the other. None of the provisions could remotely provide suitable redressal for the fast-rising cases of online abuse. The lone provision that could be used to address online violence was Section 509.⁴ The prescribed punishment was a maximum of one year⁵ with no minimum sentence, and it was possible that even if the perpetrator was prosecuted, he could get away with a fine.

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Following the Nirbhaya case in 2012, the government introduced drastic amendments to the Penal Code whereby a diverse range of sexual violence related offences were introduced. These provisions address sexual innuendo (termed sexual harassment),⁶ voyeurism,⁷ and stalking,⁸ and carry increased punishment with imprisonment, for subjecting women to abusive language and gestures.⁹ Under the IPC, misogynistic content online can be charged under a combined reading of Sections 503¹⁰ and 509 of the Penal Code, but the challenge to navigate through a criminal justice system ill-equipped to respond to the particularities of online sexist hate, continues to daunt women.

The Information Technology Act 2000

In 2000, the Information Technology Act was introduced in order to facilitate and enable financial transactions electronically.¹¹ The tone and tenor of the Act largely kept to its objectives, and in the initial version, there was one Section that dealt with “obscene” content (Section 67). This Section was

⁴ “Word, gesture or act intended to insult the modesty of a woman”.

⁵ Post the Criminal Law Amendment of 2013, the maximum punishment for Section 509 has been increased to three years. Also, some state amendments have specifically included online abuse. For instance, 509B - Sexual harassment by electronic mode has been included in the IPC by Chhattisgarh Act 25 of 2015.

⁶ Section 354A.

⁷ Section 354C.

⁸ Section 354D.

⁹ Section 509.

¹⁰ Threatening another with injury to his person, reputation or property.

¹¹ The preamble to the Act describes it as, “An Act to provide legal recognition for the transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as “Electronic Commerce”, which involve the use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filings of documents with the Government agencies and further to amend the Indian Penal Code, Indian Evidence Act, 1872, The Bankers’ Books Evidence Act, 1891, and the Reserve Bank of India Act, 1934, and for matters connected therewith or incidental thereto.”

consistent with the standard set at the time which was limited to targeting content whose “effect is such as to tend to deprave and corrupt persons”, and gave little or no attention to the impact it may have on the women depicted.¹² Given the business and financial focus of the Information Technology Act, adequate attention was not paid to the manner in which the vast tentacles of this relatively nascent technology can develop, the ways in which it can be abused, and the adverse impacts of such abuse on women’s lives. The Act underwent significant changes in 2009, and what is of relevance for the present purposes is the statement of objects and reasons for the amendment:

A rapid increase in the use of computer and internet has given rise to new forms of crimes like publishing sexually explicit materials in electronic form, video voyeurism and breach of confidentiality and leakage of data by an intermediary, e-commerce frauds like personation commonly known as phishing, identity theft and offensive messages through communication services. So, penal provisions are required to be included in the Information Technology Act, the Indian Penal Code, the Indian Evidence Act and the Code of Criminal Procedure to prevent such crimes.

In 2008, amendments were made to the definition of “intermediaries” and Sections 66 and 67 were expanded to address a range of offences intended to tackle online abuse and violence. Guidelines were also introduced to prescribe how intermediaries can operate and be held accountable. Subsequently, in *Shreya Singhal versus Union of India*, Section 66A of the Act – “punishment for sending offensive messages through communication service, etc.” – was struck down by the Supreme Court, and Section 79 dealing with intermediary liability, was read down. Consequently, law enforcement agencies requiring information from intermediaries as part of their investigation require to produce a court order.

Shreya Singhal Myths

Free speech advocates have celebrated the judgement of *Shreya Singhal* as the ultimate victory for the right to freedom of speech and expression. Within the confines of the celebration lies the misconstrued victory of the platform intermediaries who think they can absolve themselves from any accountability under the camouflaged cloak of free speech.

Freedom of speech and expression is not absolute in any jurisdiction, and it comes with a responsibility of not transgressing others’ right to not be violated. As early as 1964, the Supreme Court of India had held that laws relating to obscenity met the test of reasonable restriction imposed under Article 19(2) of the Constitution of India.¹³ Misogyny and hate speech against women clearly fall

¹² Section 67 of the IT Act 2000 before the 2009 amendment.

¹³ *Ranjit Udeshi v. State of Maharashtra*, 1965 SCR(1)65.

within the understanding of “obscenity”, and may even travel beyond, in cases where there is an implicit threat to the life and liberty of the intended recipient. While all misogynistic speech cannot necessarily be categorised as illegal content, a significant proportion does constitute illegal content. The *Shreya Singhal* judgement does not protect illegal content. Even under the protection provided to intermediaries under Section 79 of the IT Act, there is a very clear exception for illegal content. The Section actually expects that “the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.” In addition to this, the Section also states that the exemption available to intermediaries for third party content shall not apply if:

Upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource, controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

While reading down Section 79(3)(b), the Supreme Court held “Unlawful acts beyond what is laid down in Article 19(2) obviously cannot form any part of Section 79.” This essentially means that if the messaging/content can be categorised as ‘illegal’ under any law, an offence can be made out, and the intermediaries can be held liable for harbouring the perpetrator.

Another noteworthy aspect is that the *Shreya Singhal* judgement did not change in any substantive way the intermediary’s obligations arising from existing provisions in the law, including with regard to pornography, online abuse of women, transmission of misogynistic content, as well as child pornography under Protection of Children from Sexual Offences Act, 2012 (POCSO).¹⁴ The intermediary cannot, therefore, claim the protection of Section 79 in these cases.

Prajwala Case

In 2015, Sunita Krishnan, the founder of Prajwala, an anti-trafficking organisation working on the issue of sex trafficking and sex crimes, received, through WhatsApp, a series of violent real-life videos of ghastly sexual violence against women and children. She initiated a ‘Shame the Rapist’ campaign and the case reached the Supreme Court. After much persuasion over many hearings, the Government of India agreed to set up an exclusive portal to deal with Rape and Gang Rape (RGR) and Child Sexual Abuse Material (CSAM).¹⁵ The portal <cybercrime.gov.in> is currently the reporting platform for all

¹⁴ This Act requires intermediaries to “mandatorily report” all content relating to child pornography to the authorities mentioned under that Act. In the *Prajwala* case, all the intermediaries have on affidavit stated that they have not complied with it and have also argued that they will not comply with it. Instead, they have advised the Government of India to take other steps to collect data.

¹⁵ SMW (crI) 3 of 2015 In re: *Prajwala*. The author is the lawyer representing the case for Prajwala in the Supreme Court.

abusive content online, including misogynistic content. The portal has the option for making complaints anonymously.

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The *Prajwala* case opened an adversarial dialogue with intermediaries when they, for the first time, stated on affidavits the limitations of their mechanisms in dealing with illegal content. Stating on oath in the Supreme Court that they do not have the technology to pre-empt offensive content, the intermediaries¹⁶ exposed their double standards in selectively deploying algorithms to spaces and subjects that suit them while refusing to cultivate safe spaces for women. It was clear that dominant platforms are active facilitators of crimes against women.

Challenges in Navigating Enforcement/Prosecution

Across all platforms, hate speech and misogynistic speech are on the rise at alarming rates. Most of this material is platform-agnostic, and the platforms have made export of material between and amongst them seamless. However, the corresponding response to its removal, blocking and reporting is filled with hurdles, since each platform has its own response mechanism, response time, and “community standards”. Transmission of material happens in seconds, but its removal, if at all, may take up to 36 hours, by which time enormous harm is already inflicted on the recipient. With newer technologies being introduced to make content disappear, and end-to-end encryption, victims of misogyny face serious hurdles in engaging with law enforcement agencies. Not only do police officers have a limited grasp of and sensitivity to misogyny, but they are also dependent on the platforms for information about the genesis of the content, thus making it easier for perpetrators to operate with impunity. Law enforcement officers often complain about the total lack of cooperation from some intermediaries and ISPs, even in cases related to child pornography. In many cases, citing lack of jurisdiction, the intermediaries refuse to cooperate with the investigating agencies.

The cybercrime.gov.in portal that has been set up post the *Prajwala* case has its own limitations.¹⁷ It operates in a complex web of three different government agencies and at least one intermediary in each instance of a complaint, thereby prolonging the response time. A typical complaint registered on the portal, now expanded to include crimes other than rape/gang rape and child sexual abuse

¹⁶ Yahoo, Facebook Ireland, Facebook India, Whatsapp, Google, Youtube, Microsoft have all participated in the proceedings of the court. See respondents: <https://indiankanoon.org/doc/164354026/>

¹⁷ Prajwala has filed an application renewing its original prayer to hand over the management of the portal to the CBI.

material, can take up to two years before a resolution, and in some cases the complaint merely gets transferred to the local cyber police cells who are unclear about the manner in which the investigation has to be conducted by them.¹⁸ As against this, a complaint made directly to the regular cyber cell in the state, with proper follow-up, takes much less time, and in some cases, the police are able to identify the genesis of even deleted accounts within a couple of days.

Way Forward

The responsibility of effective intervention in cases of online misogyny, owing to their nature, volume and expanse, cannot be exclusively placed on the women targeted by the misogyny. To be effective, any redressal mechanism must be as effortless as the posting of misogynistic content. Until the time such systems are created, there will be an unequal balance favouring misogynists. In the past, concerted policy actions in certain sectors have helped address exploitative practices significantly. For example, in the case of harassment by collection agents employed for debt recoveries, the executive stepped in firmly and took corrective action. The legislature, executive and the judiciary collectively ensured that the system stopped, and over time, there was a decrease in the number of complaints of harassment. Similarly, unsolicited sales calls and the harassment that followed also reduced to a significant extent with the firm intervention of the executive. This happened with the cooperation of private players who had considerable financial interest at stake in curtailing these calls. Platform intermediaries have much more expansive resources than telecom service providers ever did, and have a responsibility to step in and actively engage in addressing the pervasive problem of misogynistic hate. The suggestion is not foreign to them since they are already engaged in a robust partnership with the National Centre for Missing and Exploited Children (NCMEC), and the Federal Bureau of Investigation, USA to address CSAM since 2012. The following recommendations are made with a view to suggest changes to the existing legal-institutional framework and address the systemic imbalance favouring misogynists.

¹⁸ Prajwala reported various cases on the portal to test the created mechanism. In one case reported in 2018, which was a clear case of RGR received through WhatsApp, the police have registered a case under Sections 376D (gang rape) and 354C (voyeurism) of the Penal Code. No reference to the IT Act has been made in the FIR. There is no discernible progress till date (October 15, 2020) about mechanisms to detect the genesis of the content, its presence on other platforms or any other step to indicate if this video is still in circulation.

Recommendations

A. Intermediaries

I. Intermediaries should be legally obligated to:

- a. share user details of the perpetrator with law enforcement agencies in every case of reported online misogyny. In cases where any user has been found to be guilty of posting misogynistic material by the courts of law, there has to be a mechanism to track and block such users.
- b. take preventive steps to ensure that their platforms do not foster or become a breeding ground of misogynistic content by actively co-operating with law enforcement agencies.

II. In their protocols, intermediaries should:

- a. consider expanding their 'keyword search' to 'key phrase search' which will help them block content at the threshold by putting words within the context of their usage.
- b. operate helplines for people to complain about online content instead of the current mechanical process which has its limitations both in terms of takedown turnaround time and a platform's understanding of the context of a complaint.
- c. have an automated cross-platform complaint-sharing mechanism, enabling a person to complain across multiple platforms for a single post.
- d. build interfaces on the platform for ease of registration of complaints.

B. Law Enforcement

Law enforcement agencies should:

- a. make complaints registration processes more accessible. Upon receipt of complaint, if the content is found to be offensive, agencies must take action including prosecution, with or without the complainant.
- b. have a standard protocol across the country for the purposes of investigation of the crimes.
- c. register all reports of misogyny even if all of them are not prosecuted.

C. Government of India

The Central Government should:

- a. set up a review mechanism for recognising emerging trends of online abuse in partnership with intermediaries, law enforcement agencies and civil society organisations working on preventing online abuse.

- b. explore starting an exclusive chapter on online misogyny/hate speech in the Crimes in India report collated by the National Crime Records Bureau.
- c. create a standard protocol for investigating such crimes.
- d. undertake a needs-assessment for a capacity-building exercise for law enforcement officers.
- e. allocate necessary resources for building institutional capacities to combat online misogyny.
- f. engage and create a cadre of officials who are trained and exposed to global standards of dealing with online abuse.
- g. enable compilation of data that can help generate preventive mechanisms.
- h. create audio-visual material for dissemination to educate people on the impact of misogyny.

D. Judiciary

The Judicial Services Authorities should:

- a. provide training for all judicial officers on technology and emerging trends.
- b. develop material in multiple languages for judges, enabling them to effectively deal with cases of online abuse.
- c. compile a best practices manual for use by judges.

E. Educational Institutions

Education Departments across the country should:

- a. create a curriculum to understand safe online behaviour and the impact of misogyny to educate students of all ages.
- b. review existing academic material, identify stereotypes that foster misogyny and remove them.
- c. engage and encourage dialogue amongst students to steer them away from misogynistic behaviour and language.
