

# Rethinking Legal-Institutional Approaches to Sexist Hate Speech in India

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## Combating Online Sexist Hate Speech: Identifying the Lacunae in Criminal Law

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This paper is part of a series under IT for Change's project, [Recognize, Resist, Remedy: Combating Sexist Hate Speech Online](#). The series, titled Rethinking Legal-Institutional Approaches to Sexist Hate Speech in India, aims to create a space for civil society actors to proactively engage in the remaking of online governance, bringing together inputs from legal scholars, practitioners, and activists. The papers reflect upon the issue of online sexism and misogyny, proposing recommendations for appropriate legal-institutional responses. The series is funded by EdelGive Foundation, India and International Development Research Centre, Canada.

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## Combating Online Sexist Hate Speech: Identifying the Lacunae in Criminal Law

It is almost a norm that whenever women try to raise their voice, express a concern, challenge a thought, or speak their mind on the internet, they invariably invite extreme, negative reactions – including threats and indications of violent acts – which are not reactions to the thought expressed but are targeted towards their gender and identity. Such reactions range from body shaming, humiliating jokes and ridicule from known and unknown sources or fake identities, ‘slut-shaming’, ‘revenge porn’, or offensive comments about their sexual orientation and gender roles; to rape threats and death threats. Black’s Law Dictionary identifies hate speech as the “speech that carries no meaning other than expression of hatred for some group, such as a particular race, especially in circumstances in which the communication is likely to provoke violence”. Thus, the negative reactions that women experience in the online space can be classified as online sexist hate speech.

This violence and abuse not only has a detrimental effect on women’s right to express themselves equally, freely, and without fear, but often leads them to self-censor what they post, limit their interactions, and even drives them off social media completely.<sup>1</sup> Sexist hate speech is a form of violence against women and girls, and perpetuates gender inequality. The lack of adequate legislation to control this online abusive behaviour grants impunity to the actions of the perpetrators. Moreover, online hate speech has its own challenges because of the nature of the medium, such as the content being permanent, its speedy dissemination and circulation having a cascading (network) effect, as well as the internet’s anonymity and complex, cross-jurisdictional character. The appropriate regulation of online hate speech thus carries a special urgency and significance.

While our Constitution has recognised the Right to Equality, Right to Life, and Right to Privacy as basic fundamental rights available to its citizens irrespective of their religion, caste, creed, colour, or gender, the laws have failed to operationalise these rights adequately when it comes to online hate

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<sup>1</sup> Born digital, Born free? A socio-legal study on young women’s experiences of online violence in South India. (2019), available at [https://itforchange.net/sites/default/files/1618/Born-Digital\\_Born-Free\\_SynthesisReport.pdf](https://itforchange.net/sites/default/files/1618/Born-Digital_Born-Free_SynthesisReport.pdf)

speech targeting women. In this paper, I aim to briefly discuss the inadequacies of the present legislation in tackling sexist hate speech online, examine the current state of intermediary regulation, share a proposal for legal-institutional changes, and explore the potential for a multi-stakeholder response.

## Existing Legislation and Its Inadequacies

The existing legislation in India deals with sexual violence and harassment, criminal intimidation, stalking, and pornography in a disconnected and disjointed manner with various legislations having Sections that aim to criminalise such acts and impose punishment in an ad-hoc manner. One has to scan through numerous laws and provisions to find the best fit for online-content-related offences, particularly, online abuse targeted towards women. In addition to the inadequacy of provisions and the punishments, the legislation leans towards intent more than the impact; thereby totally ignoring the loss of dignity and respect suffered by the victim. The Prevention of Sexual Harassment at the Workplace (POSH) Act is the only legislation which is impact-oriented and its success is evident from the number of cases of sexual harassment being reported in organisations for internal redressal.<sup>2</sup>

**The legislation leans towards intent more than the impact; thereby totally ignoring the loss of dignity and respect suffered by the victim.**

Online gender-based sexist hate speech forms a very specific subset of gender-based violence and the need for its regulation is urgent. Any argument trying to shield online gender-based sexist hate speech under the umbrella of Freedom of Speech and Expression is in direct conflict with women's Rights to Equality and Life and hence cannot fall under the category of protected speech.

It is also argued that India has adequate laws to govern sexist hate speech and does not need more laws to specifically regulate online misogyny and sexist hate. To assess the veracity of this claim, it would be necessary to examine the existing laws for other forms of sexual and gender-based violence. The following discussion therefore examines existing laws on gender-based violence to demonstrate the extent to which they include and can be applied to cases of online gender-based sexist hate speech and identifies their inadequacies. It excludes the following provisions of the Indian Penal Code (IPC) that deal with hate speech, as none of them include sex or gender as an element of the offence: Sections 153A, 153B, 295A, 298, 505(1), and 505(2) which declare that the word, spoken or written,

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<sup>2</sup> #MeTooIndia: 54% Rise in Sexual Harassment Reported at Workplaces Between 2014-17. (2018), available at <https://www.indiaspend.com/metooindia-54-rise-in-sexual-harassment-reported-at-workplaces-between-2014-17/>

or employing signs or any kind of visual representation that “promote disharmony, enmity, hatred or ill-will” or “offend” or “insult” on the basis of religion, ethnicity, culture, language, region, caste, community, race etc., as a punishable offence.<sup>3</sup>

A summary of the analysis is presented in [Table 1](#) at the end of the paper.

## Provisions Under the Indian Penal Code

### Section 292: Sale etc. of obscene objects

This Section primarily deals with “obscene” content. The term “obscene” is defined as lascivious or appealing to prurient interests which have an effect of depraving or corrupting a person who sees, hears, or reads the content. Thus, it does not include hateful, threatening, or intimidating content. It focuses on the impact that the content has on the person consuming it and does not consider the impact on who the content is based on (victim).

### Section 354(A): Offence of sexual harassment

This Section primarily deals with any unwelcome act of a sexual nature and includes hateful, threatening or intimidating content which is sexual in nature.

### Section 354(C): Voyeurism

This Section deals with watching and capturing image(s) of a woman in the midst of a private act. However, this is a very narrowly-worded Section because it qualifies the non-consensual capturing of images with the explanation that they should reveal a woman’s sexual organs. A woman’s dignity can be affected by capturing a private act that does not necessarily reveal her sexual organs. It can cover offences such as sextortion and ‘revenge porn’ under its ambit. It includes hateful, threatening or intimidating content of a sexual nature and considers the consent of/impact on the victim.

### Section 354(D): Stalking

This Section primarily deals with the behaviour of following or contacting a woman and monitoring her internet usage against her wishes. It also partially covers hateful, threatening or intimidating content. The consent of/impact on the victim is taken into consideration.

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<sup>3</sup> Law Commission of India, 267th Report on Hate Speech (March 2017), available at <https://lawcommissionofindia.nic.in/reports/Report267.pdf>

**Section 503, 506, and 507: Criminal intimidation and criminal intimidation by anonymous communication**

These Sections primarily deal with criminal intimidation. They also cover hateful, threatening, or intimidating content if it is a deliberate act done with an intention to cause alarm or as an incitement to an offence. Additionally, this Section covers threat to cause death or grievous hurt or impute unchastity to a woman. It prescribes a punishment with imprisonment of up to 7 years for these offences. It also considers the impact on the victim.

**Section 509: Outraging the modesty of a woman**

This Section primarily deals with any word, sound, or gesture uttered with the intention to insult the modesty of a woman or intrude upon the privacy of a woman. It also partially covers hateful, threatening, or intimidating content, also taking into consideration the impact on the victim.

**Section 499: Defamation**

This Section primarily deals with imputation that is meant to harm reputation. It also covers hateful, threatening, or intimidating content and considers the impact on the victim.

**Provisions under the POSH Act: Sexual Harassment at the Workplace**

This statute has provisions which primarily deal with any unwelcome acts or behaviour, whether directly or by implication, which include physical contact and advances, demand or request for sexual favours, making sexually-coloured remarks, showing pornography, any other unwelcome physical, verbal or non-verbal conduct of a sexual nature at the workplace. It is also related to sexual harassment and covers hateful, threatening, or intimidating content which is sexual in nature and considers the impact on the victim.

**Provisions under the Information Technology Act, 2000 (IT Act)****Section 66C: Identity theft**

This Section does not cover hateful, threatening or intimidating content. However, it defines communications under a false identity as an offence.

**Section 66D: Cheating by personation**

Just like Section 66C, this provision also does not cover hateful, threatening, or intimidating content, however it defines communications under a false identity as an offence.

**Section 66E: Violation of privacy**

This Section primarily covers the behaviour of capturing, publishing, or transmitting images of a person's private area without consent. This Section, akin to Section 354C of the IPC on voyeurism, is very narrowly-worded because it focuses only on the private areas of the victim and not the general harm caused. A person's dignity can be affected by an image that does not necessarily reveal their private areas. This Section does try to cover offences such as sextortion and 'revenge porn' in its ambit. It also includes hateful, threatening, or intimidating content which is sexual in nature and considers the consent/impact on the victim.

**Section 67: Transmitting obscene material**

This Section primarily deals with the publication and transmission of obscene material. It also includes hateful, threatening, or intimidating content which is sexual in nature. However, it does not consider the impact on the victim.

**Section 67A: Transmitting material containing sexually explicit acts**

This Section primarily deals with the publication and transmission of a sexually explicit act. It also includes hateful, threatening, or intimidating content which is sexual in nature. However, it does not consider the impact on the victim.

**Section 67B: Transmitting material depicting children in sexually explicit acts**

This Section primarily deals with publication and transmission of a sexually explicit act depicting children, and therefore includes minor girls. It also addresses hateful, threatening, or intimidating content which is sexual in nature as well as considers the impact on the person on whom the content is based.

## **Freedom of Speech and Expression and Sexist Hate Speech**

Section 66A was introduced in the IT Act, 2000 in 2008. It included punishments for sending offensive messages through a communication service. Section 66A had three parts prohibiting: a) posting of offensive or defamatory content; b) acts of spamming, cyberstalking, or cyberbullying; and c) acts of identity theft. Section 66A became notoriously infamous after the police arrested unwary citizens who were voicing their opinions online about the incidents happening around them under this Section. In *Shreya Singhal v. UOI*,<sup>4</sup> the Supreme Court of India struck down Section 66A of the IT Act, 2000 (as amended), which *inter alia* criminalised offensive messages with menacing character, as

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<sup>4</sup> *Shreya Singhal v. UOI* ((2015) 5 SCC 1) <https://indiankanoon.org/doc/110813550/>

unconstitutional. Unreasonable restrictions on free speech, through ambiguous draftsmanship which lends itself to misuse, was at the crux of the reason for this decision. The entire judgment was based on a legal analysis of freedom of speech and expression which has its foundation in three basic concepts – discussion, advocacy, and incitement. The Court observed that the importance of freedom of speech and expression, though not absolute, was necessary because we need to tolerate unpopular views. Mere discussion, or even advocacy of a particular cause, however unpopular, is at the heart of Article 19(1)(a) of the Constitution, which guarantees freedom of speech and expression. It is only when the discussion or advocacy reaches a level of incitement, reasonable restrictions as defined under Article 19(2) of the Constitution apply.

**Mere discussion, or even advocacy of a particular cause, however unpopular, is at the heart of Article 19(1)(a) of the Constitution, which guarantees freedom of speech and expression. It is only when the discussion or advocacy reaches a level of incitement, reasonable restrictions as defined under Article 19(2) of the Constitution apply.**

However, given the pervasive nature of gender-based abuse that women face online, the Supreme Court could have read down the Section rather than striking it off, limiting it to the scope of the reasonable restrictions under Article 19(1)(a) of the Constitution. Acts such as gender-based hate speech, sexual harassment, and criminal intimidation including sexual assault, rape and death threats, would fall under the ambit of Article 19(1)(a), thereby making the Section more concise and effective. Clarity in wording could have brought all the offences such as cyber-defamation, cyberbullying, cyberstalking, spamming, and phishing, and more particularly, offences of online violence against women under one umbrella. This would have made its implementation easier and targeted towards regulating gender-based hate speech.

The decision of the Supreme Court of India in *Shreya Singhal* also impacted users' rights to takedowns from social media platforms. The Information Technology (Intermediaries guidelines) Rules, 2011 (Intermediary Rules) mandated takedowns within 36 hours, *inter alia* by social media platforms, upon obtaining knowledge or when informed by a victim. This Rule was read down by striking down the requirement for Intermediaries to act on user notice (under Rule 3(4) Intermediary Rules) and to make Intermediaries liable for inaction only if the notice came from a government agency (Section 79(3)(b) IT Act) or Court. This change is targeted towards an oversight by the courts, thereby safeguarding against arbitrary takedowns. The challenge posed by this change is the practical difficulty faced by litigants to avail of this remedy from the courts.

## Importance of Regulating Takedowns

Considering the nature of online offences, the speed of the circulation of content and the network effects, its anonymous nature and cross-border jurisdictional challenges, it is important for the legislature to consider that removal of content is the most important and urgent relief that victims require to limit exposure and arrest the cascading effect across multiple platforms. Without a timely takedown response mechanism, the damage caused to a victim is likely to be permanent. Thus, it is important to appoint special adjudicating officers/e-Commissioners with simplified procedures for filing a request for a takedown notice, and to adopt a hybrid model of e-Tribunals and physical tribunals, making timely access to justice a reality.

Further, anonymity presents a unique challenge in dealing with online hate speech. This makes the phenomenon unique because people feel much more comfortable expressing hate online as opposed to offline (disinhibition effects), where they have to deal with the social consequences of what they say. Thus, it is important that the law governs the intermediaries, mandating them to: a) regulate unlawful content; b) disclose originators of such content; and c) pay fines for non-compliance/non-cooperation.

## Recommendations in a Nutshell

The preceding analysis of the existing legal provisions regulating gender-based hate speech clearly indicates that the provisions are scattered and ad hoc. Attempts have been made to criminalise sexual harassment, criminal intimidation, and obscenity, yet there is no law that empowers victims to claim compensation for the losses they have suffered. What is worse, victims have no means to pursue a timely remedy for takedowns. Thus, there is an urgent need to consolidate the provisions about online violence against women which is a substantive criminal and civil law. Such a law should criminalise acts of gender-based hate speech, include provisions for victims to claim compensation, prescribe special procedures for takedowns, appoint protection officers and counsellors, and regulate intermediaries, as listed in greater detail below:

### Separate Legislation

- a. A specific separate legislation should be framed for all forms of online harassment and gender-based violence including sexual harassment and gender-based hate speech.

- b. Specific provisions should be made criminalising the sending of messages and posting of material online that causes serious emotional distress, discomfort, humiliation, and loss of dignity, fear, or incitement to suicide.
- c. The text of these provisions should be impact-oriented.
- d. Robust definitions should be included in the legislation for harmful digital communications.
- e. The legislation should be designed to deter and prevent harmful communications and reduce their impact on victims.
- f. The legislation should also provide adequate civil remedies such as restraining orders, damages, and compensation/fines to victims of cyber violence.
- g. Specific provisions to curb non-consensual distribution of intimate/nude images ('revenge porn') should be included, given that the obscenity provisions fall short in addressing the recirculation of images in cases where consent has been given only to the production of the images, but not their distribution.

### Alternative Dispute Redressal Mechanism

- a. The legislation should establish new dispute redressal systems such as a Special Adjudicating Officers or e-Safety Commissioners who can quickly resolve complaints and remove damaging online material.
- b. It should be possible to seek such urgent relief through an online dispute redressal process.
- c. Alternative dispute resolution mechanisms that shift the focus from court-centric, formal legal proceedings to the settlement of the dispute between parties by way of negotiation, mediation, arbitration, and/or conciliation with adequate safeguards, should be put in place.
- d. Victim-offender mediation, victim-offender panels, victim assistance programs, and community service and plea-bargaining measures in lieu of punishment, should be explored.

### Special Powers

- a. Powers equivalent to Section 144 of Code of Criminal Procedure, Specific Relief Act for passing restraining orders or orders of injunction and other declaratory reliefs should be made available to the Special Adjudicating Officer.
- b. The remedies under such a special powers provision can range from taking down material, publishing a correction or an apology, giving the complainant a right of reply, or releasing the identity of the source of an anonymous communication.

- c. Appointment of protection officers and counsellors can be achieved through a public private-partnership, ensuring the use of state of art technology, access to digital sessions on counselling and victim support, etc.

## Intermediary Regulation

- a. Intermediaries should be regulated more strictly, prescribing severe penalties for non-compliance of Court orders or takedown notices.
- b. Intermediaries should be obligated to use automated technology for filtering unlawful content. Unlawful content should be defined specifically to minimize subjectivity and narrow the scope of interpretation.
- c. Takedown orders should be issued by special authorities appointed under the Act to ensure speedy relief.
- d. Intermediaries should be made liable to disclose the details of the originators of the infringing information and deploy technologies to enable traceability while protecting privacy, when ordered by the Special Adjudicating Officer. Strict penalties should be imposed for non-compliance.
- e. Just as they exist for copyright infringements, mechanisms for the self-regulation of intermediaries for takedown of offensive content, should be instituted.
- f. Community standards and guidelines should be framed to suit the culture, sensitivity, and diversity of the country they operate in.

## Multi-Stakeholder Participation

- a. Public-private partnerships should be initiated for counsellors, victim support, and protection officers.
- b. Special courts and hybrid tribunals (e-Courts and/or physical hearings) for expedient redressal should be established.
- c. There should be collaboration amongst the State Commissions for Women across their jurisdictions and with the National Commission for Women to provide victim support and access to redressal mechanisms.

Table 1. How existing laws pertain to cases of sexist speech online

Legal provision	Is impact on dignity of victim/survivor considered?	Is sexist (non-sexual/non-obscene) content covered?	Are speech acts covered?
<b>Indian Penal Code</b>			
<b>Section 292:</b> Obscenity	No. The consent of the person depicted in content is irrelevant.	No.	Yes.
<b>Section 354(A):</b> Offence of sexual harassment	No.	No.	Yes.
<b>Section 354(C):</b> Voyeurism	Yes, but only as bodily dignity.	No.	Yes, partially.
<b>Section 354(D):</b> Stalking	Yes.	Yes, partially, but limited to communications that seek to foster personal interaction with victim.	Yes, partially, only where repetitive contact with victim is sought to be established.
<b>Section 503, 506, and 507:</b> Criminal intimidation and criminal intimidation by anonymous communication	Yes, but the scope is limited to physical injury or harm.	Yes.	Yes.
<b>Section 509:</b> Outraging the modesty of a woman	Yes, but through the archaic notion of “modesty”.	No.	Yes.
<b>Section 499:</b> Defamation	Yes, but contingent on “reputation”.	Yes, but limited to impact on “reputation”.	Yes, partially, if communication is public.
<b>Prevention of Sexual Harassment at the Workplace Act, 2013 (POSH Act)</b>			
Prevention of Sexual Harassment at the Workplace Act, 2013 (POSH Act)	Yes, but limited to workplace situations.	Yes, but limited to workplace situations.	Yes, but limited to the workplace.
<b>Information Technology Act, 2000 (IT Act)</b>			
<b>Section 66C:</b> Identity theft	No.	Yes.	Yes, partially, when communication is under false pretences.
<b>Section 66D:</b> Cheating by personation	No.	Yes.	Yes, partially, when communication is under false pretences.
<b>Section 66E:</b> Violation of privacy	Yes, only within the narrow idea of bodily privacy.	No.	No.
<b>Section 67:</b> Transmitting obscene material	No.	No.	Yes.
<b>Section 67A:</b> Transmitting material containing sexually explicit acts	No.	No.	Yes.
<b>Section 67B:</b> Transmitting material depicting children in sexually explicit acts	No, only addresses the impact on a “reasonable adult”.	No.	Yes, only when in communication with a minor.

