

***Draft Report***

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# **The Indian Judiciary's Tryst with Online Gender-Based Violence**

An Empirical Analysis of Indian Cases

**Case Law Research Report**

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**IT for Change – 2022**

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# **Chapter I**

## **1. Introduction**

The Indian criminal justice system is a combination of British-era legislation and post-independence legal interpretations and context added by the judiciary. The Constitution added key elements in the form of fundamental rights, like the right to equality, life and personal liberty, as well as right against self incrimination. The contours of many of these laws and rights were added by the courts – including the right to a free, fair and speedy trial. Courts, thus, use their orders and judgments as a means to communicate the law, making the language of these verdicts significant.

The Indian Penal Code (IPC) has several dedicated portions to punish specific offences committed on grounds of gender. Gendered violence, especially in the public sphere, is understood as a form of control over women and other marginalized groups, and is often normalized.<sup>1</sup> The introduction of the internet and the online spaces paved the way for newer forms of engagement and a new public sphere, which also meant that the structures of the offline world shifted to the online space.<sup>2</sup> These new forms of violence on the online space have come to be known as either Technology facilitated gender-based violence (TFGBV) or online gender-based violence (OGBV). Research suggests that women are both disproportionately targeted and suffer serious consequences as a result of online violence.<sup>3</sup>

Online or technology-facilitated gender-based violence is a form of gender injustice and discrimination that takes place in online spaces, that results in (or is likely to result in) physical,

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<sup>1</sup> Council of Europe. (n.d.) *What causes gender-based violence?*. <https://www.coe.int/en/web/gender-matters/what-causes-gender-based-violence>.

<sup>2</sup> Mudgway, C, & Jones, K. (2020, April 9). As use of digital platforms surges, we'll need stronger global efforts to protect human rights online. *The Conversation*. <https://theconversation.com/as-use-of-digital-platforms-surges-well-need-stronger-global-efforts-to-protect-human-rights-online-135678>.

<sup>3</sup> Office of the United Nations High Commissioner for Human Rights (2018). *Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective*. United Nations. <https://digitallibrary.un.org/record/1641160>.

sexual, psychological or economic harm or suffering and may include the exploitation of the individual's circumstance, characteristics or vulnerabilities.<sup>4</sup> This type of online violence can include stalking, gender trolling, harassment, cyber bullying, and unsolicited pornography, among other actions.<sup>5</sup> A brief by UN Women on Online and ICT-facilitated violence against women and girls during COVID-19 defines online violence as extending to “*any act of gender-based violence against women that is committed, assisted or aggravated in part or fully by the use of ICT, such as mobile phones and smartphones, the Internet, social media platforms or email, against a woman because she is a woman, or affects women disproportionately*”.<sup>6</sup>

After March 2020, the COVID-19 pandemic, resulted in an exponential increase in violence against women.<sup>7</sup> Owing to the pandemic and the consequent quarantining and self-isolation measures, internet usage increased between 50% - 70%.<sup>8</sup> In India, there has been almost a 37% increase in the internet user base by December 2021 when compared to 2019.<sup>9</sup> Women and girls are using the internet with greater frequency during the pandemic even as there is a digital

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<sup>4</sup> Council of Europe. (n.d.) *Cyberviolence* <https://www.coe.int/en/web/cyberviolence>.

<sup>5</sup> Sanusi, T. (2021, 17 November). Online Gender-Based Violence: What You Need to Know. *Global Citizen*. <https://www.globalcitizen.org/en/content/what-is-online-gender-based-violence-2/>.

<sup>6</sup> United Nations Women. (2020). *Online and ICT-facilitated violence against women and girls during COVID-19*. <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2020/Brief-Online-and-ICT-facilitated-violence-against-women-and-girls-during-COVID-19-en.pdf>.

<sup>7</sup> United Nations Women. (2020). *Policy Brief: The Impact of COVID-19 on Women*. <https://www.unwomen.org/en/digital-library/publications/2020/04/policy-brief-the-impact-of-covid-19-on-women>.

<sup>8</sup> Beech, M. (2020, 25 March). COVID-19 Pushes Up Internet Use 70% And Streaming More Than 12%, First Figures Reveal. *Forbes*. <https://www.forbes.com/sites/markbeech/2020/03/25/covid-19-pushes-up-internet-use-70-streaming-more-than-12-first-figures-reveal/?sh=4dc2bf433104>.

<sup>9</sup> Nielsen. (2022). *Nielsen's Bharat 2.0 Study reveals a 45% growth in Active Internet Users in rural India since 2019*. <https://global.nielsen.com/news-center/2022/niensens-bharat-2-0-study-reveals-a-45-growth-in-active-internet-users-in-rural-india-since-2019/>.

gender divide.<sup>10</sup> In this context, there has also been a resultant exponential surge in instances of gendered violence and harassment of women in online spaces.<sup>11</sup>

Online forms of violence against women and girls are associated with psychological, social, and reproductive health impacts, and often with offline physical and sexual violence for victims/survivors.<sup>12</sup> The persistence of violence against women in online spaces results in the creation of a chilling effect and restriction of women from online spaces. Research suggests that women tend to self-censor and restrict their access online upon facing online violence.<sup>13</sup> This is often in large part due to the socio-cultural factors, including reputation of their family, scope of revictimization or further victimization at the police station, as well as not believing their complaint or minimizing its seriousness, that act as additional barriers against approaching legal recourses.<sup>14</sup> Despite the evident rise in OGBV, violence against women online is often trivialised with poor punitive action taken by authorities, further exacerbated by victim blaming. Indian Courts have failed to even mention the terms ‘online gender-based violence’ or ‘technology facilitated gender-based violence’ or similar terms while deciding cases. The bulk of the literature available on OGBV in India is in the form of studies conducted by civil societies and policy actors.

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<sup>10</sup> Organisation for Economic Co-operation and Development. (2018). *Bridging the Digital Gender Divide: Include, Upskill, Innovate*. <https://www.oecd.org/digital/bridging-the-digital-gender-divide.pdf>.

<sup>11</sup> Research conducted by International Center for Research on Women (ICRW) and Quilt.AI in 2020 on online violence in India showed that online violence on Twitter tripled during the pandemic from 26% to 74%. More importantly, the study found that even when people are searching for help, they are met with limited local resources. Instead, they are redirected to foreign websites or taken to local services like law firms and the Indian government cybercrime websites. International Centre for Research on Women, & Quilt.AI. (2021). *COVID-19 and Online Violence in India: Digital Intelligence Report*. <https://www.icrw.org/wp-content/uploads/2021/10/Online-Violence-Full-Report-Quilt.AI-and-ICRW.pdf>.

<sup>12</sup> Backe, E. L., Lilleston, P., & McCleary-Sills, J. (2018). Networked individuals, gendered violence: a literature review of cyber violence. *Violence and Gender*, 5(3), 135–145. <https://doi.org/10.1089/vio.2017.0056>.

<sup>13</sup> Pasricha, J. (2016) ‘Violence’ Online in India: Cybercrimes Against Women & Minorities on Social Media. *Feminism in India*. <https://www.comminit.com/content/violence-online-india-cybercrimes-against-women-and-minorities-social-media>.

<sup>14</sup> The Leaflet. (2022, 22 March). Emerging challenges on women and law in India – II: challenges for women in criminal law. *The Leaflet*. <https://theleaflet.in/emerging-challenges-on-women-and-law-in-india-ii-challenges-for-women-in-criminal-law/>.

In December 2021, India's Ministry of Home Affairs set up a Committee for Reforms in Criminal Laws. While this committee is trying to factor in the evolving language of hate speech, especially in the digital space, it has overlooked one critical aspect of reform of legacy laws. *"Any effort to reform India's Criminal Laws will fail without a feminist review of laws that are blind to the reality of spatial fluidity in a post-digital society."*<sup>15</sup> The existing patchwork of laws is inadequate to sufficiently address the complexities of the lived realities of violence in the digital sphere. The current legal provision on hate speech – Section 153A of the Indian Penal Code – does not mention gender expressly as one of its protected categories. In the absence of a specific legal provision to address gender trolling, the only resort for the police is to deploy sections of the Indian Penal Code, 1860 (IPC) pertaining to criminal defamation (Section 499 and 500) or criminal intimidation (Section 506). But these sections have a high legal threshold and the police may find it difficult to establish a case that stands in court.<sup>16</sup>

In order to make online spaces safe for women, governments must review and update legislation and policies to fully protect people from OGBV. Current laws pre-date important technological advances and do not adequately respond to the internet's global and ever-evolving nature. In many cases, amendments to laws have happened more than a decade or more ago – for instance, the gender-focused criminal law amendments happened in 2013<sup>17</sup>, and digital evidentiary requirements took place in 2000.<sup>18</sup> For a country that is looking at a 900 million active internet user base by 2025<sup>19</sup>, a 45% increase in 5 years, outdated laws can often

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<sup>15</sup> Jha, B. (2020, 21 October). What's So Private about Online Sexual Harassment?. *Bot Populi*.  
<https://botpopuli.net/whats-so-private-about-online-sexual-harassment/>.

<sup>16</sup> Gurumurthy, A., Vasudevan, A., & Chami, N. (2019). *Born digital, Born free? A socio-legal study on young women's experiences of online violence in South India*. IT for Change.  
[https://itforchange.net/sites/default/files/1662/Born-Digital\\_Born-Free\\_SynthesisReport.pdf](https://itforchange.net/sites/default/files/1662/Born-Digital_Born-Free_SynthesisReport.pdf).

<sup>17</sup> The Criminal Law (Amendment) Act. No. 13 of 2013. <https://www.iitk.ac.in/wc/data/TheCriminalLaw.pdf>.

<sup>18</sup> The Information Technology Act. No. 21 of 2000.  
[https://www.indiacode.nic.in/bitstream/123456789/13116/1/it\\_act\\_2000\\_updated.pdf](https://www.indiacode.nic.in/bitstream/123456789/13116/1/it_act_2000_updated.pdf).

<sup>19</sup> Economic Times Tech. (2021, 3 June). India to have 900 million active internet users by 2025, says report. *Economic Times*. <https://economictimes.indiatimes.com/tech/technology/india-to-have-900-million-active-internet-users-by-2025-says-report/articleshow/83200683.cms>.



lead to inadequate resolution of emerging issues like online harassment<sup>20</sup>. To adequately address the rampant sexism and misogyny prevalent online, states must apply a human rights-based approach<sup>21</sup> in policies and practices to protect users from harm.

Numerous international human rights instruments guarantee, among other things, rights to privacy, and freedom from violence and abuse, like Article 12 of the The Universal Declaration of Human Rights, which recognizes a person's right to protect themselves against privacy violations.<sup>22</sup> They also impose obligations on States to honor and protect those rights, and in some cases, to ensure that Non-state actors such as corporations, respect them as well. The United Nations (UN) Human Rights Council and the General Assembly have confirmed that "*the same rights that people have offline must also be protected online.*"<sup>23</sup>

### 1.1 Objective of the Study

Through a thorough reading and analysis of our set of cases<sup>24</sup>, we have attempted to understand judicial attitudes towards cases of OGBV. The study offers empirical evidence in the form of court orders to show that existing concerns of access to justice in the offline space are also replicated in cases of online violence.

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<sup>20</sup> Bhargava, Y. (2017, 5 October). 8 out of 10 Indians have faced online harassment. *The Hindu*. <https://www.thehindu.com/news/national/8-out-of-10-indians-have-faced-online-harassment/article19798215.ece>.

<sup>21</sup> UN Population Fund. (n.d.). *The Human Rights-Based Approach*. <https://www.unfpa.org/human-rights-based-approach>.

<sup>22</sup> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks. United Nations. (1948). *Universal Declaration of Human Rights*. <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

<sup>23</sup> Coombs, E. (2021, ). Human Rights, Privacy Rights, and Technology-Facilitated Violence. *The Emerald International Handbook of Technology-Facilitated Violence and Abuse*, 475-491. <https://www.emerald.com/insight/content/doi/10.1108/978-1-83982-848-520211036/full/html>.

<sup>24</sup> We have analyzed over 400 cases out of which 93 cases have been used in this study. Refer to the Methodology chapter for more details.

At a time when OGBV continues to increase<sup>25</sup>, especially in India - it is crucial to understand how justice can be achieved. The Recognize, Resist, Remedy Project<sup>26</sup> offers us that platform to understand the legal and institutional frameworks which address online violence, particularly gendered hate speech. To this end, we have attempted to analyze the judiciary's response to cases of OGBV, thereby allowing us to see how remedies are granted to the victims of online violence.

The law comes to life through individual cases. Thus, research which focuses on an analysis of court orders – detailed in the next chapter – indicates trends in the interpretation of the law. Such a remedy-based approach allows one to understand how online violence is quantified and perceived in courtrooms.

This study is also draws from the foundational value that laws on OGBV should be rooted in gender just and feminist principles of substantive equality – the recognition that individuals and groups may have special needs that must be addressed in order to achieve equality in outcome, rather than formal equality which assumes all people and groups should be treated exactly the same way – dignity, and privacy that includes aspects of personal autonomy, bodily integrity and informational privacy.<sup>27</sup> These three cornerstones are at the core of this report and the subsequent chapters.

### 1.1.1 Key Research Questions

The key questions this study attempts to answer are:

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<sup>25</sup> United Nations Women. (2020). *Online and ICT-facilitated violence against women and girls during COVID-19*. <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2020/Brief-Online-and-ICT-facilitated-violence-against-women-and-girls-during-COVID-19-en.pdf>.

<sup>26</sup> The Recognize, Resist, Remedy Project supported by the [International Development Research Centre \(IDRC\), Canada](#) is a research project aiming to combat gender-based hate speech against women in Brazil and India. IT for Change. (2020). *Recognize, Resist, Remedy: Addressing Gender-Based Hate Speech in the Online Public Sphere*. <https://itforchange.net/online-gender-based-hate-speech-women-girls-recognise-resist-remedy>.

<sup>27</sup> Gurumurthy, A., & Vasudevan, A. (2017, 4 December). Equality, Dignity and Privacy are cornerstone principles to tackle online VAW. *Women, Peace and Security, LSE Blogs*. <https://blogs.lse.ac.uk/wps/2017/12/04/equality-dignity-and-privacy-are-cornerstone-principles-to-tackle-online-vaw/>.

1. How are courts adjudicating cases of OGBV?
2. Do existing laws offer adequate protection against cases of OGBV? What are the legal frameworks in use while deciding these emerging offences?
3. How do courts address cases of online violence in the context of patriarchal norms and existing gendered stereotypes?
4. What kinds of societal inequalities impact cases of OGBV? What trends are visible?
5. What are the emerging challenges with the criminal justice system regarding cases of OGBV?
6. What are the roles and responsibilities of online intermediaries in the process of adjudication of OGBV?

In the following chapters, we have tried to answer some of these questions. Chapter 2 provides an in-depth view of the methodology followed to analyze the case orders and includes the limitations of the study. Chapter 3, discusses six key findings arising from our study. They include:

- Finding 1 (Adjudication of OGBV by the Indian Judiciary): Understanding forms of OGBV and adjudication in courtrooms.
- Finding 2 (Courts Engaging with the Right to Privacy In OGBV Cases): Role of core constitutional principles of the right to privacy and dignity in addressing cases of OGBV.
- Finding 3 (Unmasking the Misogyny, Sexism and Patriarchal Attitudes in Courtrooms): Review of judicial attitudes and gender stereotyping while adjudicating cases of OGBV.
- Finding 4 (Power Imbalance): Issues and significance of power imbalance in the online sphere, that lead to vulnerabilities for women and minors.
- Finding 5 (Issues with the Criminal Justice System): Challenges within the criminal justice system including high threshold for burden of proof, digital evidentiary standards, and bail reasoning and orders for OGBV cases.

- Finding 6 (Social Media Governance and Power of Courts): Correlation between courts and intermediaries, particularly, social media platforms in cases of OGBV.

In Chapter 4, this study concludes with a few key observations/recommendations based on the empirical evidence noted. We explore the multiple emergent access to justice issues in court orders including sexist courtrooms, lack of training in feminist points of view, cis-gender focused provisions in law resulting in more cis-het-women filing cases as opposed to other gender identities and those from marginalized communities. We observed that while Courts have started to hold platforms accountable for third party content hosted on their platforms despite the sweeping safe harbor provisions in the IT Act, we argue that more responsibility needs to be attributed to intermediaries using the inherent powers available with Courts. We found that courts are increasingly aware of the violation of privacy rights of survivors through instances of OGBV, although in a handful of cases. This is a positive development in the push to recognize core rights violations, instead of relying on patriarchal tropes of modesty that are peppered in the text of Indian criminal law. A stark observation is the lack of recognition of gendered hate speech as a concept which is a result of the systemic exclusion of gender as a qualifier for hate speech cases and the normalization of abuse, misogyny, and power imbalance online.

## **Chapter II**

### **2. Methodology**

#### **2.1 Scope of the Research**

The objective of this study is to investigate what types of OGBV cases are filed at the first instance in courts in India and understand the different types of judicial responses towards these cases. This study intends to discern how the judiciary responds to cases of online violence being filed by women and the kind of patterns that emerge out of these cases. Given

the global increase<sup>28</sup> in violence facilitated by technology, it is imperative to glean how the Indian judicial system recognizes and deals with these emerging types of violence. The modest scale of the research we were able to undertake through two weeks of data collection, in the form of case laws, is a humble attempt at finding qualitative insights about existing access to justice challenges and identifying recurring patterns.

### 2.1.1 Deciding on a Methodology

1st level	2nd level	3rd level
mobile phone		vulgar
facebook	husband	filthy
upload	woman	abuse
"social media"	wife	indecent
message	girl	"outrage the modesty"
posting	boyfriend	defamatory
email	girlfriend	sexism
"blue film"	sexual orientation	obscene
emoji	gender identity	offend
internet	victim	harassment
online	prosecutrix	insult
twitter	complainant	modesty
whatsapp	daughter	immoral
trolling		pornographic
photo		sexually explicit
nude video film		hate
camera		incitement to hate
capture of images		stalking
		voyeurism
		criminal intimidation
		grossly offensive
		menacing character
		identity theft
		violation of privacy
		cruelty
		sexual favour
		sexually coloured
		lewd
		humiliate
		dignity
		honour/honor
		blackmail

An attempt to decode the court orders was done by the team in early 2021, where the researchers segregated cases using an Indian Kanoon API that extracted cases based on certain keywords that are commonly referenced in online violence cases:

This approach yielded a result of 26 relevant cases where the researcher attempted to understand certain key questions including where in the digital the violence took place, how through the digital, who is targeted, why they are targeted, why did they approach the court and the outcome of the case.

However this approach studied only High Court cases and not district court cases as it was difficult to source lower court cases. Additionally, the High Court cases revolved around cases that went on appeals or applications for bails. A lot of the cases were intimate partner violence cases and for those cases that did address OGBV, had not reached a decisional stage at the HC when the study was undertaken.

As the above method offered limited results, we chose the methodology given below and proceeded with the research.

<sup>28</sup> United Nations Women. (n.d.). *Facts and figures: Ending violence against women*.

<https://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures>.

## 2.2 Sample Selection

The first step in our research process was to identify the platform to access digital copies of public record cases. We had three options before us which included Indian Kanoon<sup>29</sup> (open source platform), the e-Courts website<sup>30</sup> (official website maintained by the Department of Justice, Government of India) and SCC<sup>31</sup>/Manupatra<sup>32</sup> (paid private online databases of cases). We faced limitations in accessing court orders from e-Courts as there was a requirement of details including party names, case type, year and case number, which restricted any possibility of searching based on a set of chosen criteria. SCC and Manupatra also had their limitations not only in terms of being proprietary and paid, but also in terms of availability of district court cases as they primarily house High Court or Supreme Court cases. We chose Indian Kanoon for two reasons – first, it was a free and open source platform, and second, it allowed us to use filter searches to identify the type of cases required for this study, i.e., those that dealt with OGBV.

### 2.2.1 Filtering Criteria

On the platform, we relied on a four-step filtering process to obtain OGBV cases. The sampling was purposive, which was essential to finding the type of cases required for this study. We selected cases based on the court from which the order was obtained, a specified time period to which the search was restricted, a set of legal provisions that would lead to the kinds of cases this study required, and finally, a few keywords to narrow the scope of the search. Each criterion is detailed below:

1. **Types of Courts:** We wanted to find more district court cases to trace how justice is delivered as the Trial or District Courts, also known as the ‘court of first instance’ are the courts in which most criminal and civil cases commence.

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<sup>29</sup> Indian Kanoon. <https://indiankanoon.org/>.

<sup>30</sup> E-Courts Website. [https://ecourts.gov.in/ecourts\\_home/](https://ecourts.gov.in/ecourts_home/).

<sup>31</sup> SCC Online. <https://www.scconline.com/>.

<sup>32</sup> Manupatra. <https://www.manupatrafast.com/>.

2. **Time Period:** We used the time frame of cases between January 2015 - November 2021 as we wanted to identify cases that came after the *Shreya Singhal* case that struck down Section 66A of the Information Technology Act, 2000, relating to restrictions on online speech, as unconstitutional on grounds of violating the freedom of speech guaranteed under Article 19(1)(a) of the Constitution of India.
3. **Legal Provisions:** India addresses OGBV through two main laws - the Indian Penal Code, 1860 and the Information Technology Act, 2000. We used the relevant sections of these laws and also used two related laws which were prevalent for finding patterns of violence – defamation law (Section 499, Indian Penal Code, 1860) and Indecent Representation of Women law (some states like Tamil Nadu, have enacted state legislations on this).
  - a. Information Technology Act, 2000 - Section 66C [Punishment for identity theft], Section 66D [Impersonation], Section 66E [Punishment for violation of privacy], Section 67 [Punishment for publishing or transmitting obscene material in electronic form], Section 67A [Punishment for publishing or transmitting of material containing sexually explicit act, etc., in electronic form], Section 67B [Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc., in electronic form].
  - b. Indian Penal Code, 1860 - Section 354 [Assault or criminal force to woman with intent to outraging her modesty], Section 354A [Sexual harassment and punishment for sexual harassment], Section 354C [Voyeurism], Section 354D [Stalking], Section 499 [Defamation], Section 292 [Sale, etc., of obscene books, etc.], Section 506 [Punishment for criminal intimidation] and Section 509 [Word, gesture or act intended to insult the modesty of a woman].
  - c. The Indecent Representation of Women (Prohibition) Act, 1986- Section 4 [Prohibition of publication or sending by post of books, pamphlets, etc., containing indecent representation of women].

4. **Keywords:** We chose 7 primary keywords [Sexual Harassment, Hate Speech, Internet, Social Media, Defamation, Threats and Intimidation, Cyber Violence] as filters as we wanted to define the scope of the search to these particular subject matters. We also wanted to see how the Courts were using these terms in their orders.

We later expanded our scope to include High Court cases as there was a difficulty with finding district court cases in India as they are not deemed to be ‘court of records’. A court of record is a court whose proceedings are enrolled for perpetual memory and testimony. As per the Indian Constitution<sup>33</sup>, only the Supreme Court and High Courts are deemed to be court of records - hence the unavailability of district court cases in multiple Indian legal platforms or databases. For district courts, we were restricted to Delhi and Bangalore on Indian Kanoon. Within High Court cases we were able to find scenarios of online violence through references of the fact situations within the orders. We did not restrict ourselves to a particular type of case; our data sample includes appeals, original petitions, bail orders, and anticipatory bail orders.<sup>34</sup>

We worked on extracting cases for a period of two weeks – the last week of November 2021 and the first week of December 2021, which gave us a sample size of 93 cases that fit our parameters.

### 2.2.2 Collection of Data Points

After we listed the cases, we reviewed the orders to scrape the following data points:

- **Case/ Order Title:** Recording the full case name/title.
- **Year:** Noting the year the order was passed.
- **Court:** Noting down the Court that passed the order which could be district court or High Court of a particular state.

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<sup>33</sup> The Constitution of India. (1950). arts. 129 & 215. <https://legislative.gov.in/sites/default/files/COI.pdf>.

<sup>34</sup> Refer to Point 2.2.3 for more details.



- **Decision/Outcome:** Including the kind of order was passed by the court, in the nature of bail order passed, protection order passed, etc.
- **Is this an appeal:** Specific to high courts or Supreme Court cases, this was to capture whether there were associated lower court cases -[Yes or No].
- **Law/Sections:** Recording the laws/provisions used in the order for adjudication.
- **What is the Case About** - Explaining in brief the facts of the case and the online violence element.
- **Relevant Parts of Case:** Noting the key lines or paragraphs in the order for quick reference.
- **Primary Filters:** Listing which 7 primary keywords [Sexual Harassment, Hate Speech, Internet, Social Media, Defamation, Threats and Intimidation, Cyber Violence] was used to find the case.
- **Gender of Judge:** Recording the gender of the judge passing the order in the case.
- **Where in the Digital:** Identifying the medium through which the offence was perpetrated, for example, platforms like Whatsapp, Facebook, Twitter, YouTube.
- **How Through the Digital:** Noting the mode used to enable violence, like through video, photo, recording, MMS, messages etc.
- **Who is Targeted:** Recording who the survivor was, for example, a woman, a minor, LGBTQIA+ etc
- **Why are they Targeted:** Wherever available in the order, we recorded potential reasons for the offence, including social inequalities, like caste, or power imbalance arising from the location of the perpetrator, like employer or teacher etc.
- **Why did they approach the Court:** We recorded why the plaintiff/petitioner came to the Court for reasons including seeking punishment, compensation, regular bail, anticipatory bail etc.

### 2.2.3 Courts and Types of Orders

After the data was collected, we were able to finalize the sample data based on the courts from which the order was received and the types of orders that were extracted:

#### A. Courts:

<b>Court</b>	<b>Number of orders from the Court</b>
Allahabad High Court	2
Andhra Pradesh High Court	2
Bangalore District Court	4
Bombay High Court	3
Calcutta High Court	3
Chhattisgarh High Court	2
Delhi District Court	17
Delhi High Court	10
Gujarat High Court	1
Himachal Pradesh High Court	2
Jharkhand High Court	2
Karnataka High Court	4

Kerala High Court	10
Madhya Pradesh High Court	8
Madras High Court	8
Odisha High Court	4
Patna High Court	5
Punjab and Haryana High Court	3
Supreme Court	3
Telangana High Court	1
<b>Total</b>	<b>93</b>

*B. Type of Cases:*

- Bail (Anticipatory Bail and Regular Bail),
- Substantial Trials in District Courts,
- High Court Cases (Appeals, Writs and Original Suits, Revision), and
- Supreme Court Cases (PILs (Public Interest Litigations) and Appeals).

After finalizing the set of cases and filling in the relevant data given in Table 1, we thematically categorized these cases based on the recurring patterns that emerged while perusing them. These themes were arrived at inductively through multiple rounds of review.

## 2.3 Thematic Classification of Cases and Confirming the Reliability of Grouping

Our initial grouping was based on 6 trends that emerged while collecting data. We grouped cases into these emerging themes based on certain criteria, given below:

Emerging Theme	How the Classification was done
<b>Privacy Violations</b>	Is the case about right to privacy or does the judge mention it, actual instances of privacy violation like cases of voyeurism, sharing photos/non consensual Images.
<b>Online Gender Based Violence (OGBV)</b>	Cases of hate speech, gender trolling, hateful comments against a person on social media, using social media to write hateful language, defamatory statements online, threats and Intimidation to publish private images and videos online, image based sexual abuse; any instances of hate or harm directed at women on the online public sphere/social media - this can also include trolling, hateful words used against women etc.
<b>Issues with the Criminal Justice System</b>	Concerns around digital evidence, burden of proof, bail, anticipatory bail.
<b>Social Media Governance</b>	References to social media, social media as a means to perpetrate violence on the internet, social media platform involvement, platform regulation & accountability by courts.
<b>Sexism, Patriarchy,</b>	Judicial stereotyping, sexist arguments from lawyers, forms

<b>Misogyny</b>	of sexism - benevolent sexism on the reputation, marital status of women, protectionist attitude from judges.
<b>Power Imbalance</b>	Cases related to minors, any fiduciary relationships, occupational relationships, absence of autonomy.

By the end of the initial grouping stage, each case was individually appraised by four coders. Where disagreements about the classification based on the themes arose, these were resolved by a process of discussion among the coders. We also agreed that there would be an overlap in situations where a case could fall under any of the 6 themes and in such situations, we ensured that if a case fit in any theme, then it could be classified there in that theme. For example, a case could be an issue directly pertaining to the sexism, misogyny category but could also fall under the theme of power imbalance.

Based on the first round of verification of the classification, a set of sub-themes emerged under each parent theme. For the second round of verification, along with the first level classification, the sub-theme grouping was also verified. The classification was approved if there was at least a 75% agreement (3 of the 4 coders agreed to the classification). Otherwise, it was removed from that theme and sub-theme.

## 2.4 Sub-theme Categorization and Analysis of Cases

After agreeing on the theme wise split of the cases, we were able to categorize 93 cases within each theme. The sub-themes discussed below emerged from patterns that were noticed within the initial theme. The sub-themes provided us indicators for analyzing the cases in depth:

### 2.4.1 For Online Gender-based Violence (OGBV)

Under this theme, the prevalent classification became the type of violence being perpetrated.

- Non-Consensual Intimate Image Distribution Cases (NCIID)

- Hate Speech and Gender Trolling Cases
- Other Cases (Other Crimes)

#### 2.4.2 For Privacy Violations

For issues of privacy violations, the theme that emerged was cases that expressly mentioned or discussed breach of this right. So the themes became:

- Cases which explicitly mentioned the right to privacy or recognized a violation of privacy
- All other cases where privacy violations were not recognized but should have been (inherent privacy violations)

#### 2.4.3 Regarding Sexism, Misogyny and Patriarchy

For this theme, we classified cases based on who made the statement in a particular case. This was done to identify the various avenues which often make courtrooms difficult spaces to navigate. As is clear from the classification below, there were cases where both judges and lawyers made statements that were rooted in stereotypes:

- Statements by Judges
- Statements by Lawyers

#### 2.4.4 For Power Imbalance

This theme offered a view into the different types of relationships/situations through which such violence is perpetrated:

- Minor Young Adult Harm
- Harms within Workplaces
- Familial relationship other than spouse
- Ex-spousal relationships

#### 2.4.5 For Issues with the Criminal Justice System

Under this theme, we observed a few types of cases emerge, as given below:

- Digital evidence
- Bail Orders

#### 2.4.6 For Social Media Governance

Within this theme, we observed two types of cases:

- Cases which recognized role of Social Media
- All Cases which mentioned violence on social media

At this stage, after multiple rounds of inductive classification, we were able to form conclusions regarding our sub-theme categorizations as we were able to deeply study the patterns in cases within a theme. It is based on the sub-theme classification that we were able to identify indicative trends, patterns, and findings for this research study, details of which are included in the following chapters.

### **2.5 Limitations of the Study**

A primary limitation in our study is the small sample size. Due to the challenge of accessing court orders, we were able to work with a limited sample size as Indian Kanoon also did not have a repository of cases across all courts. For example, in District Courts we were only able to search within 2 cities, Delhi and Bangalore. Further finding an open source legal database apart from Indian Kanoon was also not an option for us as we could not rely on the reliability of the same. We also faced several limitations in terms of obtaining district court cases as they are not deemed court of record in Indian law. This only restricted our sample size further. This is also reflective of the lack of digitalization in district courts, and the limited resources that these courts have to work with.

The second concern was around defining what constituted an online gender-based offence. This was addressed through using provisions of law that focused on technology and using

keywords. This often led to situations where there were multi-layered offences with impact both offline and online. In several situations, threats to publish intimate content online coerced women to engage in further sexual activity. In effect, most cases in our study have hybrid offences – a mix of offline and online – making it difficult to classify cases as solely those of online violence. In many ways, this bolsters the argument that the online and offline spaces behave as a continuum, each with specific concerns, but also with significant overlap with the other.

Further, because of the variety of legal provisions that are present in the Indian legal system, we were unable to find direct cases of online gendered hate speech in courtrooms. We believe this is not only due to the absence of a specific law but also due to related issues in accessing justice including the difficulty in filing cases, delays in courtrooms, high burden of proof in such cases etc.

We also found that most of the cases that came to courtrooms were ones where the victims were cis-het women and did not include other gender identities or persons with disabilities. While there were a few cases with provisions of the The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, these did not recognize the relationship between gendered offences and caste hierarchies. Further, we did not see any recognition of class or religion as a factor in determining the cases in the study. This limitation is also indicative of how access to justice for intersectional and marginalized groups is a concern in the judicial system.

Despite the small sample size, we believe that the indicative trends are important to note, especially at a time when the online world continues to develop and present newer challenges to effective law enforcement. These themes are proof of existing theories of the gendered issue of access to justice, but also the inability of the justice system to account for the particular challenges of the online public sphere.

Through the research findings we present below, we hope to indicate how the judicial system deals with different issues of OGBV and trending patterns which were visible within courts.



## **Chapter III**

### **3.1 Finding 1: Adjudication of OGBV by the Indian Judiciary reveals gaps in understanding of the online public sphere as well as an absence of gendered hate speech**

The core aim of this study is the assessment of OGBV cases in Indian courts. Through analysis of the 93 cases before us, we have witnessed several trends that are indicative of not just the limitations of the law, but also the positive steps that the judiciary has taken in the last few years with regard to these offences.

OGBV has been defined earlier in this report as *‘any act of gender-based violence against women that is committed, assisted or aggravated in part or fully by the use of ICT, such as mobile phones and smartphones, the Internet, social media platforms or email, against a woman because she is a woman, or affects women disproportionately.’*<sup>35</sup> Our list of OGBV cases included aspects of NCIID, threats of NCIID and intimidation, gender trolling, creation of fake accounts on social media etc. These were often combined with offline offences like rape, sexual assault. Through the cases we studied, we witnessed certain trends that have been captured in this section, which are specific to OGBV cases.

From our list of cases, we observed the following overarching trends:

- Absence of recognition of the online-offline continuum, and the real-world impact of online violence
- Lack of an understanding of gendered hate speech, especially since legislations do not define such an offence
- NCIID as the prevalent and recurring offence across the cases studied.

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<sup>35</sup> United Nations Women. (2020). *Online and ICT-facilitated violence against women and girls during COVID-19*. <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2020/Brief-Online-and-ICT-facilitated-violence-against-women-and-girls-during-COVID-19-en.pdf>.

### **3.1.1 The Judiciary fails to recognize the online-offline continuum and tends to prioritise offline offences in cases where both occur**

As more and more women are accessing cyberspace, OGBV is also seeing an analogous rise.<sup>36</sup> There is nothing that is purely virtual about online violence, especially as its impact is increasingly spilling offline, sometimes with severe consequences. Correlations between in-person abuse and technology facilitated violence has been documented through multiple studies including a UNESCO study<sup>37</sup> that demonstrated that 20% of women journalists reported being targeted with offline abuse and attacks that they believe were connected with online violence they had experienced. However, an important observation from our study is that Indian Courts ignore the online-offline continuum in which OGBV takes place. The gravity of online offences is disregarded until an offline crime occurs, and often, online harms result in offline offences. In many cases, where both online and offline offences are leveled against the accused, courts focus more on the offline offences.

In the case of *Shameer A v. State of Kerala*<sup>38</sup>, the accused trespassed into the house of the complainant threatening to post her intimate images online and then raped her. In *Raja Kumar v. State of Bihar*<sup>39</sup>, the accused administered an intoxicant to the complainant, recorded an intimate video of her, and subsequently demanded money from her to not circulate the same on social media. Both cases demonstrate the overlap of online and offline facets of a crime. In

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<sup>36</sup> Mudgway, C, & Jones, K. (2020, April 9). As use of digital platforms surges, we'll need stronger global efforts to protect human rights online. *The Conversation*. <https://theconversation.com/as-use-of-digital-platforms-surges-well-need-stronger-global-efforts-to-protect-human-rights-online-135678>.

<sup>37</sup> Posetti, J., Shabbir, N., Maynard, D., Bontcheva, K., & Aboulez, N. (2021). *The Chilling: Global trends in online violence against women journalists*. United Nations Educational, Scientific and Cultural Organization. <https://unesdoc.unesco.org/ark:/48223/pf0000377223/PDF/377223eng.pdf.multi>.

<sup>38</sup> Shameer A. v. State of Kerala, Bail Appl. No. 4800. (2020).

<sup>39</sup> Raja Kumar v. State of Bihar, P.S. case No. 288. (2018).

*State v. Raj Babbar @ Raj*<sup>40</sup>, and in *State v. Lalit Kumar*<sup>41</sup>, the accused were tutors who assaulted their minor students and threatened to circulate the pictures on the internet. Several cases including *State v. Azhar Ali Bhutto*<sup>42</sup>, *M. Parimala v. The Secretary to Government*<sup>43</sup>, *Bhagwan S/O Digamber Devde and Ors v. State of Maharashtra & Ors.*<sup>44</sup> involved an accused assaulting or raping the complainant and circulating or threatening to circulate the video/images on social media. All these cases demonstrate the continuum in which cyber crimes take place, yet they are often not given the importance or seriousness that they deserve.

One of the cases in our study, particularly addresses the direct question of whether the online public sphere is considered a “public place” as per the Indecent Representation Act. In 2018, the Madras High Court presided over a case *Logeswaran v. State*<sup>45</sup> where harassment took the form of a series of vulgar messages received by the victim via mobile phone while she was in her home. The court, interpreting the phrase “any other place” in Section 4 of the TN Prohibition of Harassment of Women Act, reasoned that the meaning of the phrase could not be extended to the home of the victim. The court observed that a detailed description in Section 4 signals that it should only be applied when harassment takes place in a “similar public place”. For this reason, messages sent through a mobile phone would not fall under Section 4 of the TN Act, the court reasoned. It is clear that existing interpretations of public place in law no longer hold true in a digital world and it is necessary for the judiciary to update its interpretation of these categories.<sup>46</sup>

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<sup>40</sup> *State v. Raj Babbar @ Raj*, F.I.R. No. 90/15. (2015).

<sup>41</sup> *State v. Lalit Kumar*, S.C. No. 140/14. (2016).

<sup>42</sup> *State v. Azhar Ali Bhutto*, S.C. No. 79/14. (2016).

<sup>43</sup> *M. Parimala v. The Secretary to Government*, H.C.P. No. 2863. (2019).

<sup>44</sup> *Bhagwan S/O Digamber Devde & Ors. v. State of Maharashtra & Ors.*, CrI. W.P. No. 1105. (2015).

<sup>45</sup> *Logeswaran v. State*, CrI. M.P. Nos. 5328 & 5329. (2017).

<sup>46</sup> Jha, B. (2020, 21 October). What's So Private about Online Sexual Harassment?. *Bot Populi*.  
<https://botpopuli.net/whats-so-private-about-online-sexual-harassment/>.

One of the biggest hindrances in tackling cyberviolence is that it is considered less serious or “less real” than offline crimes.<sup>47</sup> Cyberviolence is often treated as a non-corporeal crime since the image that emerges is of mental trauma and not physical aggression. Herring explains that while we are accustomed to perceiving offline violence as harmful, online violence is “*less prototypical*” and is perceived as unintentional and fairly harmless.<sup>48</sup> However, in reality, technology can accelerate or facilitate traditional human behavior and crimes against women. Additionally, online violence can have severe consequences as demonstrated by a study where the survivor pleaded that on every viewing of contents which constituted cyber-violence “her whole body shivered and cringed” on seeing the obnoxious comments.<sup>49</sup> Through threatening and coercion, online violence could lead to violence or rape in the physical world thereby creating “embodied harms”, and completing the continuum of violence against women, which ranges from “choice to pressure to coercion to force”.<sup>50</sup> As Sharad Chauhan observes, “*Contrary to geospatial crimes, in techno-social crimes the extent, nature and spread are unknown. The huge limitless formless online space creates a force multiplier effect where damage is done by multiple offenders on multiple victims, enjoyed by multiple beneficiaries, and tolerated by multiple bystanders.*”<sup>51</sup> Our study revealed that the cases always had multi-layered offences with impact both offline and online - the violence targeted towards women through the digital rendered the divisions meaningless. In several situations, threats to publish intimate content online coerced women to engage in further in person sexual activity. The impact of the online on the offline is not easy to separate. However, it only proved the false separation between the

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<sup>47</sup> Herring, S. C. (2002). Cyber Violence: Recognizing and Resisting Abuse in Online Environments. *Asian Women*, 14 (Summer), 187-212. <https://ella.sice.indiana.edu/~herring/violence.html>.

<sup>48</sup> Herring, S. C. (2002). Cyber Violence: Recognizing and Resisting Abuse in Online Environments. *Asian Women*, 14 (Summer), 187-212. <https://ella.sice.indiana.edu/~herring/violence.html>.

<sup>49</sup> Sarkar, S., & Rajan, B. (2021). Materiality and Discursivity of Cyber Violence Against Women in India. *Journal of Creative Communications*. <https://doi.org/10.1177%2F0973258621992273>.

<sup>50</sup> Kelly, L. (1987). The continuum of sexual violence. In J. Hanmer & M. Maynard (Ed.), *Women, Violence and Social Control*, (pp. 46-60). Palgrave Macmillan.

<sup>51</sup> Chauhan, S. S. (2021). Cyber Violence against Women and Girls (CVAWG), The Algorithms of the Online- Offline Continuum of Gender Discrimination. *International Journal of Humanities and Social Sciences*, 10 (2): 85. <https://dx.doi.org/10.2139/ssrn.3953292>.

two, and the fact that the online-offline space is much more of a continuum, replicating similar predicaments.

The online public sphere, an extension of the offline interactions we have, replicates the hierarchical structures of the offline.<sup>52</sup> They feed off each other, and can transcend from one to the other (from online to offline or vice versa).<sup>53</sup> Just as women faced backlash and violence when they entered traditionally ‘male spaces’, their participation online is also fraught with everyday sexism and violence - often minimized as something they have to deal with if they engage on social media.<sup>54</sup> Women in courtrooms, in cases with elements of OGBV, face similar conundrums. The prevalence of this continuum necessitates cyber gender sensitization of the police and judiciary to help them understand the true scope of the problem and deal sensitively with the problem within the scope of the present laws.

### **3.1.2 The judiciary does not recognize online gender-based hate speech which is a result of the lack of legal recognition of the concept**

Through our study, we saw a variety of cases including cases of NCIID, intimate partner violence but were unable to see a single case that referred to the term ‘Online gender based hate speech’ or ‘hate speech’. 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”

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<sup>52</sup> Gurumurthy, A., & Jha, B. (2020, 9 October). Articulating a Feminist Response to Online Hate Speech: First Steps. *Bot Populi*. <https://botpopuli.net/articulating-a-feminist-response-to-online-hate-speech-first-steps/>.

<sup>53</sup> IT for Change. (2016). *Part I. Comments from IT for Change on the draft update for General Recommendation No.19 (1992) on gender based violence against women*. <https://itforchange.net/sites/default/files/IT%20for%20Change%20-%20Submission%20-%20CEDAW%20GR%2019%20-%20September%202016.pdf>.

<sup>54</sup> Gurumurthy, A., & Vasudevan A. (2019). *Masculinity, Femininity, Equality - Gender Scripts in the Lives of the Born Digital*. IT for Change. <https://itforchange.net/masculinity-femininity-equality>.

(such as caste, gender, religious identity).<sup>55</sup> 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 - by disparagement and vilification, it results in hostility towards such a group.<sup>56</sup> The Council of Europe's Additional Protocol to the Convention on Cyber-crime, defines 'sexist hate speech' as "expressions which spread, incite, promote or justify hatred based on sex".<sup>57</sup> In India, the 267th Law Commission Report, defines hate speech as "*Hate speech generally is an incitement to hatred primarily against a group of persons defined in terms of race, ethnicity, gender, sexual orientation, religious belief and the like (Sections 153A<sup>58</sup>, 295A<sup>59</sup> read with Section 298<sup>60</sup> IPC). Thus, hate speech is any word written or spoken, signs, visible representations within the hearing or sight of a person with the intention to cause fear or alarm, or incitement to violence.*" However, despite such a working definition in India, in practice, hate speech is traditionally seen as a problem in relation to national security, terrorism and public order. Even though 2-3 cases in our study fit the general qualifiers of hate speech definitions given above and did in fact target a particular gender, courts did not recognize them as such for the reason that Indian legislation on hate speech is not seen as an issue that affects 'gender' - as opposed to national interests or public order issues.

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<sup>55</sup> Raghavan, A. (2021). *The Internet-enabled Assault on Women's Democratic Rights and Freedom*. IT for Change. <https://itforchange.net/sites/default/files/1738/The-internet-enabled-assault-on-womens-dem-rights-anti-raghavan-dec-21.pdf>.

<sup>56</sup> Raghavan, A. (2021). *The Internet-enabled Assault on Women's Democratic Rights and Freedom*. IT for Change. <https://itforchange.net/sites/default/files/1738/The-internet-enabled-assault-on-womens-dem-rights-anti-raghavan-dec-21.pdf>.

<sup>57</sup> Policy Department for Citizens' Rights and Constitutional Affairs. (2018). *Cyber violence and hate speech online against women*. European Parliament. [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604979/IPOL\\_STU\(2018\)604979\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604979/IPOL_STU(2018)604979_EN.pdf).

<sup>58</sup> Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony.

<sup>59</sup> Deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs.

<sup>60</sup> Uttering, words, etc., with deliberate intent to wound the religious feelings of any person.

Given below are some cases from our sample where cases of gendered hate speech occurred but Courts failed to recognize them:

Case Name	Short Summary	Additional Note
<i>Sasikala Pushpa v. Facebook India And Ors</i> <sup>61</sup>	The plaintiff in the case had alleged that the circulation of a photo of her with a man from a rival political party was defamatory. The photos were uploaded on and circulated through the social media i.e. Facebook, Twitter, YouTube, and WhatsApp. The plaintiff argued that allowing further publicity to the content of such a photograph/video would only be for sensational and salacious purposes, and would amount to a gross and irreparable violation of an individual's privacy; it would be per se defamatory.	Case was adjudicated keeping in mind 'defamation' provisions under the law. It was not considered to be hate speech.

<sup>61</sup> Sasikala Pushpa v. Facebook India & Ors., C.S.(O.S.) No. 510. (2016).

<p><i>Nimisha Bhagat v. Sneha Mahajan Nee Dogra</i><sup>62</sup></p>	<p>Defendants engaged in mudslinging against the plaintiff on various Facebook groups. They created and posted provocative, derogative, and threatening comments on WhatsApp groups, while also circulating the plaintiff's phone numbers to strangers (doxxing) which led to her facing trolling.</p> <p>Defendants started to misuse social media platforms by posting selective slices of video recordings, prompting and instigating others to send violent, abusive, threatening and derogatory responses thereby defaming the plaintiff. Defendants managed to elicit unwarrantedly abusive, repulsive and threatening posts/responses from their several facebook friends. This caused alarm to the plaintiff about her life and safety.</p>	<p>The Court did not consider it to be a gendered hate speech case and even though elements of hateful behavior, vilification, and targeted abuse were present - they were not seen to be prosecuted as hate speech.</p> <p>Additionally it is imperative to note that the Court noted “<i>The fundamental right of speech and expression does not cover abusive, threatening and vituperative messages on social media sites or otherwise. Therefore, the stand of the defendants, as set out in their pleadings, that their fundamental right to freedom of speech and expression justifies it cannot be accepted.</i>”</p>
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<sup>62</sup> Nimisha Bhagat v. Sneha Mahajan Nee Dogra, C.S. No. 20. (2020).



	This was a case for recovery of damages and for an injunction to prevent further hate online.	
The Present Petition Has Been ... v. Unknown <sup>63</sup>	This is a bail appeal for a case of gender trolling, where the petitioner using his Facebook and Twitter accounts, had spread fake and scandalous news against women (more women belonging to the media).	The court rejected the anticipatory bail request stating that in such a case the “larger interest of the public” required consideration “as opposed to the demand of individual liberty”, but did not recognize the same as a case of gendered online hate speech.

The lack of identification of gendered hate speech cases within our sample set of cases can be directly attributable to the lack of legal recognition of gendered online hate speech in India. Since the legislative intent for hate speech is oriented towards targeting ‘promoting enmity’ between communities, gendered and misogynistic hate is often overlooked. There is a need to acknowledge that online violence faced by women and non-binary people is usually because of their gender, an extension of the violence they face offline as well.<sup>64</sup> The 267th Law

<sup>63</sup> The Present Petition Has Been ... v. Unknown, Crl. O.P. No.12604/2020.

<sup>64</sup> Salim, M. (2018). Online Trolling of Indian Women Is Only an Extension of the Everyday Harassment They Face. *The Wire*. <https://thewire.in/women/online-trolling-of-indian-women-is-only-an-extension-of-the-everyday-harassment-they-face>

Commission report provides hope for such recognition, but this must happen at the earliest as the Internet is not going away any time soon, and neither is misogyny.

### **3.1.3 Majority of the cases of OGBV within this study relate to non-consensual intimate image distribution and use legal provisions which are patriarchal in their construct**

A primary observation for us in this study was the recurrence of NCIID across most of the cases in our sample. *“Non-consensual distribution of intimate images occurs when someone shares an intimate image, usually an image of another person in the nude or engaging in sexual activity, without that person’s consent”*, usually shared with “friends, employers, and family members of the person in the images in an effort to humiliate that person.”<sup>65</sup> Out of our list of 93 cases, 71 (~75%) had an element of non-consensual sharing of intimate images. These included cases where men committed sexual assault on women by threatening to publish intimate or personal images of the women, which were in many cases taken without consent. It is relevant to note that the Indian law doesn’t recognize the phrase “non-consensual intimate image” sharing or distribution. Instead, there are a combination of legal provisions that can be used to address these cases. For our purposes, we ascribed the tag of NCIID to any case where an image-based offence – in the form of sharing, or threats using such an image – had taken place in our sample of cases.

We analyzed these NCIID cases on two axes:

- The various legal provisions used to prosecute NCIID cases in Indian jurisprudence
- Prevalence of some particular provisions of law and reasons to do so

These have been explained in greater detail in the following sections.

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<sup>65</sup> Dunn, S., & Petricone-Westwood, A. (2018). More than ‘Revenge Porn’ Civil Remedies for the Non-consensual Distribution of Intimate Images. *2018 38th Annual Civil Litigation Conference*.  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3772050](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3772050)

### 3.1.3.1. Legal provisions used to prosecute cases of NCIIID

Since the phrase NCIIID is not identified in Indian law, provisions of voyeurism under the IPC, or violation of privacy (in a limited definition of physical privacy) under the IT Act are used in cases where sensitive images of women are taken and/or transmitted on the internet without their consent. Given that we used legal provisions to shortlist potential cases of OGBV, the number of times these provisions were used became a good indicator to understand which laws were used in cases of NCIIID. Aside from the provisions chosen to shortlist cases, which are captured in the methodology section, several other provisions of law showed up in the list of cases. Outside of the IPC, the IT Act, and the Indecent Representation of Women Act, which were the primary laws we focused on to arrive at the sample set of cases, laws like the Protection of Children from Sexual Offences Act, the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, and the Tamil Nadu Prohibition of Harassment of Woman Act also came up. The first ten provisions that were invoked the most number of times are listed below.<sup>66</sup>

Specific provisions	Short title of the provision	Number of times the provision was invoked in cases
IPC 506	Punishment for criminal intimidation	41
IPC 376	Punishment for rape	26
IT Act 67	Punishment for publishing or transmitting obscene material in electronic form	24
IT Act 67A	Punishment for publishing or transmitting of material	22

<sup>66</sup> It is to be noted that multiple provisions are used in a single case.

	containing sexually explicit act, etc., in electronic form	
IPC 354C	Voyeurism	16
IPC 292	Sale, etc., of obscene books, etc	14
IT Act 66E	Punishment for violation of privacy	13
IPC 354	Assault or criminal force to woman with intent to outrage her modesty	12
IPC 509	Word, gesture or act intended to insult the modesty of a woman	11
IPC 354D	Stalking	10

This table offers insight into the key provisions of law that are used in OGBV cases, specifically when image-based abuse is identified. The reasons for the prevalence of some of these provisions is discussed in the next section.

### 3.1.3.2. What do the prevalent provisions of law in cases of NCIIID indicate?

From our sample, we observed that in 41 instances, punishment for criminal intimidation was invoked. The next highest provision that was invoked in these cases was that of punishment for rape - which was absent in our initial shortlist of provisions for potential OGBV cases. A lot of the other provisions in the list above are related to outraging modesty, obscenity, sexually explicit material, etc. These are relevant observations, for the following reasons.

- Criminal intimidation: As mentioned above, the list of NCIIID cases we collected included cases where a threat of publishing online an intimate photograph was issued. In common parlance, criminal intimidation is not understood as an online offence. This is

a significant finding, as this provision straddles the fine line between the online and offline spaces. The offence itself may not have an online presence yet, but the vast potential of the internet to spread intimate images, and the potential impact of such virality creates a potent threat that can lead to coercion on many levels.<sup>67</sup> In *Shemeer v. State of Kerala*<sup>68</sup>, the bail petitioner was accused of taking nude photographs of the victim, threatening her of uploading the same on social media, trespassing into her house, and raping her. Similar circumstances were observed in *Bhagwan v. State of Maharashtra*<sup>69</sup>, where the accused threatened to upload a naked photograph of the victim on the internet, and on the basis of such threat, committed rape on her. The prevalence of these cases offers another insight into the nature of online violence and NCIID specifically, as discussed below.

- Real world impact of threats to publish intimate photos online: Our cases show that threats to publish intimate photographs online are a common way to exploit victims and coerce them into sexual activity. The high number of cases of criminal intimidation along with the number of cases of rape corroborate this statement. Given that the threat of publication of an intimate image can lead to grave offences like rape, it is worth exploring whether threat to publish intimate images online should be a recognized online offence. This is also a clear indication of the online-offline continuum discussed earlier in this chapter. This is not in any way to say that purely online offences have any less impact. Online gender-based offences are known to affect the mental health of survivors – often leading to “stress, anxiety, panic attacks, powerlessness and loss of confidence”.<sup>70</sup> However, it is important to recognize that none of these offences

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<sup>67</sup> Dodge, A. (2019). Nudes are Forever: Judicial Interpretations of Digital Technology’s Impact on ‘Revenge Porn’. *Canadian Journal of Law and Society*, 34(1). 121-143.

[https://www.researchgate.net/publication/330401076\\_Nudes\\_are\\_Forever\\_Judicial\\_Interpretations\\_of\\_Digital\\_Technology%27s\\_Impact\\_on\\_Revenge\\_Porn](https://www.researchgate.net/publication/330401076_Nudes_are_Forever_Judicial_Interpretations_of_Digital_Technology%27s_Impact_on_Revenge_Porn).

<sup>68</sup> Shemeer A. v. State of Kerala, Bail Appl. No. 4800. (2020).

<sup>69</sup> Bhagwan S/O Digamber Devde & Ors. v. State of Maharashtra & Ors, CrI. W.P. No. 1105. (2015).

<sup>70</sup> Amnesty International. (2018). *Toxic Twitter – The Psychological Harms of Violence and Abuse Against Women Online*. <https://www.amnesty.org/en/latest/news/2018/03/online-violence-against-women-chapter-6/>

occur in siloes, and the online public sphere is as real and impactful, if not more, in cases of gendered violence.

- Patriarchal construct of NCIIID provisions: The phrase NCIIID is coined centering consent and is divested from moral judgement, while Indian provisions of law on the matter are far from being so. Several provisions in the list above focus on outraging the modesty of the woman, publishing or transmitting obscene material or a sexually explicit act. Even the violation of privacy provision under Section 66E is very narrow, related only to physical or bodily privacy. The issue is similar with the voyeurism provision, which punishes non-consensual taking and transmitting images of women where they had a reasonable expectation of privacy – but this privacy is limited to “*victim’s genitals, posterior or breasts are exposed or covered only in underwear; or the victim is using a lavatory; or the victim is doing a sexual act that is not of a kind ordinarily done in public*”. These provisions of law tend to fail to emphasize rights of a woman being violated in these cases, and instead focus on a more protectionist and moral stance. The impact of the provisions is that it also leads to judgments being crafted in a manner that is distanced from fundamental rights of privacy and dignity of women in these cases. This has been further elucidated in a subsequent chapter on privacy in this report.

Cases of OGBV in courtrooms are, in many ways, evolving, even if a little behind the technology of our times. The sections above are proof that there are nuances within the broad scope of OGBV that need to be identified for the judiciary to be able to offer justice to those who are subjected to this violence. The initial study of OGBV within our set of cases offered insight into addressing some of these nuances, including issues of sexism in courtrooms, the lack of emphasis on right to privacy of the woman as the core violation in these cases, the need for governing social media and seeking accountability, the concerns around the criminal justice system, and the recognition of existing power differentials. The following chapters delve into greater detail along each of these lines.

### **3.2 Finding 2: Courts have increasingly begun to recognize and implement the right to privacy in OGBV Cases, following the *Puttaswamy* ruling of the Supreme Court in 2017**

The right to privacy has been much contested and debated in the Indian judiciary from the 1950s, especially since it was not expressly included within the ambit of fundamental rights of the Constitution of India. Over the years, it has not only become a cornerstone of dignity of individuals, but also now resides firmly as a fundamental right necessary for life and personal liberty, affirmed in 2017 by a nine-judge bench of the Supreme Court in the case of *K.S. Puttaswamy v. Union of India*<sup>71</sup>.

*“Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution. Elements of privacy also arise in varying contexts from the other facets of freedom and dignity recognised and guaranteed by the fundamental rights contained in Part III,”* the court held, in its seminal 2017 judgment. In this manner, the right to privacy becomes an inherent and fundamental right of an individual, and includes three groups of rights<sup>72</sup>:

- Informational privacy, which relates to control of personal data;
- Physical privacy, which is the right to bodily integrity against unlawful intrusions, and
- Decisional privacy, which offers protection to the personal autonomy of a person from various kinds of unreasonable external influence.

Privacy is also one of the three core principles in understanding rights of women and gender minorities in cases of OGBV. These three principles - equality, dignity, and privacy - are significant to the central argument to this study.

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<sup>71</sup> Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

<sup>72</sup> Gurumurthy, A., Vasudevan, A., & Chami, N. (2018). *Examining Technology-Mediated Violence against Women through a Feminist Framework: Towards Appropriate Legal-Institutional Responses in India*. IT for Change <https://itforchange.net/e-vaw/wp-content/uploads/2018/03/ITFC-DISCUSSION-PAPER.pdf>.

Indian legislations have also referred to privacy on occasion, like Section 66E<sup>73</sup> of the IT Act, which was included in 2009, Section 509<sup>74</sup> of the IPC, and more recently, Section 354C<sup>75</sup> of the IPC, added through the 2013 amendment<sup>76</sup> to criminal law. All of these provisions have a limited scope of what privacy means - through references to the body and 'private area', or of a woman's 'modesty'. This is a protectionist approach that focuses on the woman's body, and negates women's agency, rather than focus on their rights, or provide a holistic reading of privacy as discussed above.<sup>77</sup> Narrow definitions of privacy are no more in consonance with India's fundamental rights jurisprudence, and the case analysis in the following sections discusses the same.

Through our study, we attempted to parse how common is the use and understanding of privacy, especially for cases with OGBV. As mentioned in earlier chapters, a large set of these cases revolve around non-consensual intimate image distribution (NCIID) - which is an inherent violation of privacy for the woman who is victimized by these offences. The key finding

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<sup>73</sup> Punishment for violation of privacy: Whoever, intentionally or knowingly captures, publishes or transmits the image of a private area of any person without his or her consent, under circumstances violating the privacy of that person, shall be punished with imprisonment which may extend to three years or with fine not exceeding two lakh rupees, or with both.

<sup>74</sup> Word, gesture or act intended to insult the modesty of a woman - Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

<sup>75</sup> Voyeurism: Any man who watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image shall be punished on first conviction with imprisonment of either description for a term which shall not be less than one year, but which may extend to three years, and shall also be liable to fine, and be punished on a second or subsequent conviction, with imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine.

<sup>76</sup> The Criminal Law (Amendment) Act, which amended laws on sexual offences. No. 13 of 2013.  
<https://www.iitk.ac.in/wc/data/TheCriminalLaw.pdf>.

<sup>77</sup> Gurumurthy, A., Vasudevan, A., & Chami, N. (2018). *Examining Technology-Mediated Violence against Women through a Feminist Framework: Towards Appropriate Legal-Institutional Responses in India*. IT for Change  
<https://itforchange.net/e-vaw/wp-content/uploads/2018/03/ITFC-DISCUSSION-PAPER.pdf>.



here was to identify whether courts recognized this inherent right to privacy in cases of NCIIID and similar offences.

For the purposes of this study, and this section in particular, cases were considered to be privacy violations when one of the following offences took place:

- Non-consensual sharing of intimate images or videos
- Creation of morphed photos or fake profiles
- Sexual assault based on taking non-consensual intimate images and threatening to share them

Out of the 93 cases that formed part of the core of this study, the researchers identified 65 (70%) that fell within the ambit of a privacy violation with the above parameters. Out of these, only 11 cases (17%) had an explicit mention of the term privacy or even considered the said offences to be privacy violations. There are a few aspects that immediately emerged with regard to these cases:

- Most of the cases that refer to privacy after 2017 do so in reference to the *Puttaswamy* decision.
- Among the limited number of cases that refer to privacy pre-2017, this happened when provisions specifically calling out privacy is used, like Section 66E of the IT Act or, Section 119(b)<sup>78</sup> of the Kerala Police Act 2011.
- The notion of privacy, especially in cases of non-consensual distribution of intimate images, is limited. There were 8 cases that had references to Section 66E of the IT Act, and were largely related to bail petitions. In these cases, courts did not delve into the

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<sup>78</sup> Punishment for atrocities against women. – (1) Any person who - (b) takes photographs or records videos or propagates them at any place in a manner affecting the reasonable privacy of women, shall, on conviction, be punished with imprisonment which may extend to three years or with fine not exceeding ten thousand rupees or with both.

details of the case<sup>79</sup>, and consequently on issues of privacy – which could have been an expected course of action in reasoning for bail orders.

Based on the above, two key questions arise that need deeper analysis.

- Is privacy understood as an inherent right being violated or is it only in cases where such a right is expressly identified (As in Section 66E, or the Kerala Police Act provisions)?
- Do courts identify what informational privacy is - or do they understand privacy as a limited bodily construct (as in the phrasing of 66E)?

### **3.2.1 While the *Puttaswamy* decision recognizes privacy as an inherent right, courts adjudicating OGBV cases rely on paternalistic concepts such as modesty and honor**

The *Puttaswamy* decision was landmark not only for the recognition of the fundamental right to privacy, but also because it offered a holistic and interconnected framework of the right to privacy – one that connects privacy with the fundamental right of equality, and right to life with dignity. The decision paved the way for the set of rights that we believe protect rights of individuals in cases of OGBV. Our study shows that cases that discuss privacy after 2017 have done so on the foundation of *Puttaswamy*. Cases referring to privacy pre-2017 are reliant on legal provisions that specifically mention privacy, like Section 66E of the IT Act or Section 509 of the IPC. However, even in these cases where there is explicit recognition, we wanted to understand how courts refer to privacy, and if their perspective is progressive or paternalistic.

Non-consensual distribution of intimate images, one of the largest types of cases observed in our study, can be a traumatic experience for the victims.<sup>80</sup> Data from an IT for Change survey suggests that out of a total of 326 respondents who suffered from various forms of

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<sup>79</sup> Sayyam Khurana v. State of Himachal Pradesh, Cr. M.M.O. No. 12. (2017).; DR Madhusudanan VV v. State of Kerala, Bail Appl. No. 7025. (2014).; Akhil Krishnan v. State of Kerala, Bail Appl. No. 6138. (2019).; Abrar Yusuf Pandrowala v. State of Karnataka, CrI. P. No. 2399. (2020).

<sup>80</sup> Bates, S. (2016). Revenge porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors. *Feminist Criminology*. 12(1). 22-42.  
<https://doi.org/10.1177%2F1557085116654565>.

cyberviolence, 30% have been victims of NCIID.<sup>81</sup> Similar numbers (28.5%) were noted in another study conducted in a Canadian University.<sup>82</sup> However, in most cases, the language of the laws protecting against this offence is often based on patriarchal stereotypes of morality and modesty. ‘Outraging the modesty of a woman’ is a Victorian refrain that has remained in Indian statute books (Section 354<sup>83</sup>, Section 509). These provisions are also frequently used in cases where NCIID takes place. While privacy has been introduced in the IPC in Section 354C, Section 509, in the IT Act through Section 66E, or the Kerala Police Act, these are often reduced to refer to ‘private areas’ of the body, or a woman’s modesty. It is also curious that while courts often refer to a woman’s modesty, there is no concrete definition of modesty available that doesn’t sound patently patriarchal. In 1966, the Supreme Court, while hearing a case of sexual assault of a 7.5 month infant, noted that “*the essence of a woman's modesty is her sex. Even a female of tender age from her very birth possesses the modesty which is the attribute of her sex.*”<sup>84</sup> Subsequent cases have looked at the Oxford dictionary for a definition of modesty – “*womanly propriety of behavior: scrupulous chastity of thought, speech and conduct (in man or woman); reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions*”<sup>85</sup> or interpreted these together to arrive at the “*the ultimate test for ascertaining whether modesty has been outraged*”, that is, “*the action of the offender such as could be perceived as one which is capable of shocking the sense of decency of a woman.*”<sup>86</sup> It is clear that modesty cannot serve as the benchmark on which gendered offences can continue to be judged, given

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<sup>81</sup> Gurumurthy, A., Vasudevan, A., & Chami, N. (2019). *Born digital, Born free? A socio-legal study on young women's experiences of online violence in South India*. IT for Change.

[https://itforchange.net/sites/default/files/1662/Born-Digital\\_Born-Free\\_SynthesisReport.pdf](https://itforchange.net/sites/default/files/1662/Born-Digital_Born-Free_SynthesisReport.pdf).

<sup>82</sup> Karasavva, V., & Forth, A. (2021). Personality, attitudinal, and demographic predictors of non-consensual dissemination of intimate images. *Journal of Interpersonal Violence*.  
<https://journals.sagepub.com/doi/full/10.1177/08862605211043586>.

<sup>83</sup> Assault or criminal force to woman with intent to outrage her modesty - Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

<sup>84</sup> State of Punjab v. Major Singh, 1967 AIR 63.

<sup>85</sup> Raju Pandurang Mahale v. State of Maharashtra, (2004) 2 SCR 287.

<sup>86</sup> Rupan Deol Bajaj v. Kanwar Pal Singh Gill, (1995) SCC (6) 194.

the archaic understanding of the word. Unfortunately, it was evident through our study that courts tend to take the modesty approach even today. In that backdrop, we argue that violation of privacy - in its holistic definition - becomes a better measure or benchmark to test offences as opposed to traditional notions of modesty.

The *Puttaswamy* decision is a significant verdict on privacy, which moves the definition beyond the realm of mere bodily privacy, to one that recognizes dignity and inviolable rights. The Supreme Court notes, “*Privacy enables the individual to retain the autonomy of the body and mind. The autonomy of the individual is the ability to make decisions on vital matters of concern to life...Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one’s mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination... Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised.*” It goes on to hold that “*privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life...Privacy attaches to the person since it is an essential facet of the dignity of the human being.*” Couched in these terms, recent decisions discussed below have been open to recognizing violation of privacy in cases of NCIIID.

The case of *Subhranshu Rout v. State of Orissa*<sup>87</sup> is one such case where the Odisha High Court is cognizant of the privacy of the victim in a case of NCIIID. The court observes, “*There is an unprecedented escalation of such insensitive behavior on the social media platforms and the victim like the present one could not get those photos deleted permanently from the server of such social media platforms like Facebook. Though the statute prescribes penal action for the accused for such crimes, **the rights of the victim, especially, her right to privacy** which is intricately linked to her right to get deleted in so far as those objectionable photos have been left unresolved.*”

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<sup>87</sup> Subhranshu Rout v. State of Orissa, Bail. Appl. No.4592. (2020).

In *X v. YouTube*<sup>88</sup>, the Delhi High Court provided interim protection to the victim and ordered the defendants to remove content that violated her privacy, given that she had not consented to them being shared. The court noted, “*the “right to privacy” includes the right to be forgotten and the right to be left alone as “inherent aspects”, this Court is also of the opinion that the **right to privacy of the plaintiff is to be protected, especially when it is her person that is being exhibited, and against her will.** In the circumstances and in view of the fact that the plaintiff is entitled “to be left alone” and “to be forgotten”, she is entitled to protection from invasion of her privacy by strangers and anonymous callers on account of such publication/streaming/transmission of the suit videos by the defendants.*”

However, there is still a long way to go to a scenario where the right to privacy becomes the sole reason a victim or survivor receives protection in cases of online violence in the nature of NCIIID, morphing, etc. In some of the cases that referred to privacy, court orders still held a paternalistic tone towards the survivor.

In *Smt Qamar v. State of Telangana*<sup>89</sup>, the Telangana High Court recognizes the harm to a woman’s right to privacy when intimate images are published without her consent, but also brings in concepts like “honor” and “sanctity of a female”. It quashes the writ petition challenging a detention order against the accused, and notes, “*Sexual violence against women, apart from being a dehumanizing act, is an **unlawful intrusion into the right to privacy and sanctity of a female.** It is a serious **blow to her supreme honor** and offends her self-esteem and dignity. It degrades and humiliates the victim and leaves behind a traumatic experience... Sexual abuse not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm. A murderer destroys the physical body of the victim, but a sexual assaulter **degrades the very soul of a helpless female.** The Courts, therefore, shoulder a great responsibility while trying an accused on charges of sexual abuse. Sexual abuse against*

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<sup>88</sup> *X v. YouTube*, C.S.(O.S.) No. 392. (2021).

<sup>89</sup> *Smt Qamar v. State of Telangana*, Bail No. 3669. (2021).

*women needs to be dealt with sternly and severely. To show mercy in such heinous crimes would be a travesty of justice and the plea for leniency would be wholly misplaced.”*

In fact, the Allahabad High Court, in the case of *Guruvinder Singh v. State of Uttar Pradesh*<sup>90</sup>, states unequivocally that the role of the court is to act as a guardian of a woman’s rights - which is admirable - and also refers to the right of privacy guaranteed under fundamental rights because of *Puttaswamy*. However, it finally ends up relying on the tropes of “outraging the modesty of the woman”. The court observes, “**no person much less a woman would want to create and display gray shades of her character**. In most of the cases, like the present one, the women are the victims. Capturing the images and videos with consent of the woman cannot justify the misuse of such content once the relation between the victim and accused gets strained as it happened in the present case. In matters like the present one, any accused will surreptitiously **outrage the modesty of the woman** and misuse the same in the cyber space unhindered...the Court in such type of cases cannot close its eyes and being *parens patriae* and protector of fundamental rights, the Court should come forward to protect the right of the subject and similarly the Court should stringently deal with the person concerned.”

Of the cases that do discuss privacy, ones like *Guruvinder Singh* or *Subhrangshu Rout* stand out, as they referred to privacy within the ambit of the fundamental right to life under Article 21, as per the *Puttaswamy* decision. This is a significant development and a step in the right direction for cases of OGBV, especially where there is a breach of consent and violation of privacy of an individual through NCIIID.

Within the ambit of our research, there are 54 other cases of various types of online violence where a per se violation of privacy takes place, but courts don’t recognize them as such. A primary reason for this could be that the provisions of law under which these cases are filed do not refer to a violation of privacy explicitly – like Section 354D (stalking), or restrict themselves to Section 67 (publication of obscene material) or 67-A (punishment for transmitting sexually explicit material) of the IT Act, or provisions of the POCSO Act. This reflects a gap in the legal

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<sup>90</sup> *Guruvinder Singh v. State of Uttar Pradesh*, Bail Appl. No. 3430. (2021).

system where privacy violations are not recognized as an offence or breach on their own. In criminal cases, it becomes significant to use provisions that explicitly mention privacy – especially for a district court to take cognizance in the first instance. The concerns then arise at the stage of registering an FIR, or filing a chargesheet, or framing charges, as to whether the right provisions are being used in these stages. In some cases, the facts may not allow for a privacy-based offence to be used, because of limitations with the definitions of these offences. However, this does not necessarily prevent courts from exercising their powers to note in their orders how a particular instance of online violence violates a woman's right to privacy.

As a result, in the larger scheme of the rights of women, it is imperative that we advocate for a more democratized reading of the law. Every case of a non-consensual distribution of an intimate image, or coercion through threats to release sensitive photographs is a violation of the survivor's right to privacy and needs to be recognized as such. While the scope for such a reading of the case may be limited at the trial court stage, it is worth noting that High Courts are well-equipped to recognize violation of privacy through an interpretation of fundamental rights of women even in the absence of a legal provision that refers to privacy. They have begun to do so in a handful of cases, as discussed above.

### **3.2.2 Courts tend to understand privacy in a narrow manner, rather than its holistic definition which includes informational, physical and decisional privacy.**

The second question is how courts understand privacy and whether issues of informational privacy are recognized by the court. Informational privacy, as mentioned before, refers to control over one's personal data. This could include information like one's phone number, residential address, place of work, etc. In the cases studied, issues of doxxing or revealing of personal information of individuals were not prevalent. There were cases where fake social media or matrimonial website profiles were created.

In most of the cases for this study, online violence was often of a sexual nature. In such cases, courts were limited to the physical privacy of the individual. While many courts were cognizant

of the mental anguish these cases can cause, those overlapping with recognition of privacy violations were few. For example, even in the 2020 case of *X v. State & Ors*<sup>91</sup>, the Delhi High Court directed online intermediaries to remove content that qualified as child pornography, because of non-consensual distribution of a teen girl's photographs. However, the question of violation of her privacy did not come up. Similarly, in *Mohammad Nasar v. State of Andhra Pradesh*<sup>92</sup>, the Andhra Pradesh High Court denied anticipatory bail to the accused against whom there were multiple complaints of NCIID. Again, the violation of privacy was not a consideration, even though the court was cognizant of the seriousness of the offence.

In cases where there was no sexual element, or the case was of purely an informational privacy related issue, courts had other considerations. The Delhi High Court, in *Sasikala Pushpa v. Facebook India*<sup>93</sup>, did not recognize an inherent right of privacy over one's photographs, or informational privacy, especially if they are in public life. The plaintiff in the case had alleged that the circulation of a photo of her with a man from a rival political party was defamatory. The court considers whether the photographs are defamatory, or morphed, forged or fabricated to decide if circulation could be valid, but does not find the content to be defamatory or violating her privacy. The court holds, "*the public interest in knowing the meeting of the plaintiff at her residence with a man belonging to a rival political party far outweighs the private interest of the plaintiff of keeping the same hidden from public eyes.*" However, it is submitted that if the legal system identified the sanctity of informational privacy, then a case could have been initiated under that provision.

The jurisprudence on issues like NCIID has a chequered presence globally. Several countries have witnessed litigation against this type of online violence. For instance, in the Philippines, 42 perpetrators of different kinds of OGBV were indicted or brought to trial in 2021.<sup>94</sup> In South

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<sup>91</sup> *X v. State & Ors*, W.P. (Crl.) 1080. (2020).

<sup>92</sup> *Mohammad Nasar v. State of Andhra Pradesh*, Crl. P. No. 3125 (2020).

<sup>93</sup> *Sasikala Pushpa v. Facebook India*, C.S. (O.S.) 510. (2016).

<sup>94</sup> Foundation for Media Alternatives. (2022). *Online Gender-based Violence in the Philippines: 2021 Year-end Report*. <https://fma.ph/2022/01/28/online-gender-based-violence-in-the-philippines-2021-year-end-report/>.



Korea, a series of amendments to criminal and civil laws were made to account for widespread online violence against women and children – informally known as the ‘Nth rooms Prevention Act’.<sup>95</sup> However, the holistic notion of privacy to protect rights of the survivor are at a nascent stage. There are provisions like Section 33 of the UK Criminal Justice and Courts Act, which criminalises disclosure of ‘private sexual photographs and films’ without the express consent of the person in such photograph or video, and with the intent to cause them distress. While this provision is devoid of a per se paternalistic tone, the requirement of an ‘intent to cause distress’ takes away from the right to privacy of an individual. For the EU, informational privacy is now also protected under the General Data Protection Regulation. However, in cases of OGBV, there is still considerable development required.

The key takeaway from this discourse is the need for a holistic and rights-based approach towards OGBV. In the context of Indian jurisprudence, this approach can be rooted in the right to privacy. It is imperative that the higher courts - both the Supreme Court and the state High Courts - emphasize the role of privacy in cases of OGBV, as an increasing number of such cases have begun to come before courts. This will allow a fair, just, and equitable jurisprudence to develop – one that is separated from patriarchal notions and paternalistic overtones of modesty and obscenity. From our research, the case of *Robin Sharma v. State of Punjab*<sup>96</sup> is a good example – in a case of anticipatory bail against various forms of online violence, the Punjab and Haryana High Court notes the necessity for prompt investigation, especially in cases of “unwanted intrusion into privacy of a woman.”<sup>97</sup> The recognition of a holistic right to privacy will ensure that survivors can receive justice on counts of their dignity, rather than outdated notions of morality. The Puttaswamy decision provided a great path to achieve this, and while courts have begun this journey, there is still a lot of ground to cover.

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<sup>95</sup> Lee, E. (2022, April 11). The Nth Rooms and the Ungovernable Digital Bodies. *Bot Populi*. <https://botpopuli.net/the-nth-rooms-and-the-ungovernable-digital-bodies/>.

<sup>96</sup> *Robin Sharma v. State of Punjab*, CRM-M-13861. (2020).

<sup>97</sup> The court also makes one reference to culture, which is discussed in the chapter on sexism.

### **3.3 Finding 3: Courtrooms continue to be sexist and patriarchal spaces for survivors of OGBV cases, thereby perpetuating common judicial stereotypes and impacting access to justice**

A key attribute to the framework of understanding rights affected in cases of OGBV is dignity. The Cambridge Dictionary defines dignity as “the importance and value that a person has, that makes other people respect them or makes them respect themselves.”<sup>98</sup> The value being referred to here is innate and intrinsic to a person on account of being a human being, and is captured in various human rights frameworks<sup>99</sup>, including the fundamental rights guaranteed by the Indian Constitution. The nine-judge bench of the Supreme Court in *Puttaswamy* noted that, “*dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence...Privacy ensures the fulfillment of dignity and is a core value which the protection of life and liberty is intended to achieve.*” Given that these rights are enshrined under Article 21 of the Constitution, these extend to non-citizens also.<sup>100</sup>

However, dignity has not always been accorded in the same way to marginalized groups. Marginalization and its impact could vary based on geographic location, social context, and background.<sup>101</sup> On the basis of gender, patriarchy and sexism have been instrumental in establishing who deserves dignity in a gendered society. Sylvia Walby (1989) defined patriarchy

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<sup>98</sup> Cambridge Dictionary. (n.d.). Dignity. In *Cambridge Dictionary*. Retrieved 28 July, 2022, from <https://dictionary.cambridge.org/dictionary/english/dignity>

<sup>99</sup> United Nations. (1948). *Universal Declaration for Human Rights*. Preamble and art. 1. <https://www.un.org/en/about-us/universal-declaration-of-human-rights>; United Nations. (1966). *International Covenant on Civil and Political Rights*. Preamble and art. 10. <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>; United Nations, (1966). *International Covenant on Economic, Social, and Cultural Rights*, Preamble and art. 13. <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>.

<sup>100</sup> The text of Article 21 applies to all persons, including non-citizens. The Constitution of India. (1950). art. 21. <https://legislative.gov.in/sites/default/files/COI.pdf>.

<sup>101</sup> Liberties. (2021). *What is Marginalization? Definition And Coping Strategies*. European Union. <https://www.liberties.eu/en/stories/marginalization-and-being-marginalized/43767>.

as “a system of social structures, and practices in which men dominate, oppress and exploit women.”<sup>102</sup> Any perceived transgressions to these social structures open women up to harassment, ridicule, abuse, assault or even death, in extreme situations.<sup>103</sup> These gender roles and expectations intersect with other marginalizations, like those along the lines of gender identity, caste, class, race, religion, sexuality, disability etc. When someone has multiple of these intersections, they face the possibility of increased vulnerability.<sup>104</sup>

Sexism can be usually defined on two components – “hostility towards women and endorsement of traditional gender roles”.<sup>105</sup> Courtrooms also replicate these structures, especially in gendered offences. Pratiksha Baxi<sup>106</sup> notes that “the rape trial does not merely reflect patriarchal norms, but it also imparts a ‘specific disqualification of women and women’s sexuality.’” The evidence in the case law research pointed towards not just hostile or casual instances of sexism, but also benevolent sexism – which emphasizes men’s role as protectors of women.<sup>107</sup> While the judiciary is intended to protect the rights of all people, this role often gets rooted in existing notions of gender and protection of patriarchal qualities such as “honor” and “modesty” in cases of online gender-based offences.<sup>108</sup> The judiciary is also a very non-

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<sup>102</sup> Walby, S. (1989). Theorising Patriarchy. *Sociology*, 23(2) 213-234. <https://www.jstor.org/stable/42853921>.

<sup>103</sup> Sekyiamah, N. D., Medanhodzic, L., & Ford, L. (2017, 29 November). Remembering women killed fighting for human rights in 2017. *The Guardian*. <https://www.theguardian.com/global-development/2017/nov/29/remembering-women-killed-fighting-for-human-rights-in-2017>.

<sup>104</sup> Kothari, J., Ganesan, D., Dadoo, S., Mandakini, J., & Mysore, D. (2019). *Intersectionality: A Report on Discrimination based on Caste with the intersections of Sex, Gender Identity and Disability in Karnataka, Andhra Pradesh, Tamil Nadu and Kerala*. Centre for Law & Policy Research. <https://clpr.org.in/wp-content/uploads/2019/08/Intersectionality-A-Report-on-Discrimination-based-on-Caste-with-the-intersections-of-Sex-Gender-Identity-and-Disability-in-Karnataka-Andhra-Pradesh-Tamil-Nadu-and-Kerala.pdf>.

<sup>105</sup> Glick, P., & Fiske, S. (1997). Hostile and Benevolent Sexism: Measuring Ambivalent Sexist Attitudes towards Women. *Psychology of Women Quarterly*, 21. 119-135. <https://courses.washington.edu/pbafhall/563/Readings/glick%20fiske.pdf>.

<sup>106</sup> Baxi, P. (2014). *Public Secrets of Law: Rape Trials in India*. (p. xxviii). Oxford University Press.

<sup>107</sup> Mastari, L., Spruyt, B., & Siongers, J. (2019). Benevolent and Hostile Sexism in Social Spheres: The Impact of Parents, School and Romance on Belgian Adolescents' Sexist Attitudes. *Frontiers of Sociology. Sec. Gender, Sex and Sexualities*. <https://www.frontiersin.org/articles/10.3389/fsoc.2019.00047/full>.

<sup>108</sup> Poddar, R. (2021). Gender Stereotyping: Paternalism By Courts Erodes Trust in Judicial Institutions. *The Wire*. <https://thewire.in/law/gender-stereotyping-paternalism-by-courts-erodes-trust-in-judicial-institutions>.

inclusive space, where women usually don't make up for 10% of the numbers . In our study of 93 cases, 81 were men and 12 were women. We used their formal honorifics (Hon'ble Mr Justice or Ms Justice) used in court orders to identify their gender.

The other prominent issue is that given that the Indian criminal justice system is based on colonial legislations, which are still in use with limited amendments – like the Indian Penal Code, 1860, with amendments in 2013 on sexual offences, or the Indian Evidence Act 1872, with some additions on electronic evidence. As a result, the legal system came with Victorian biases. This introduced a dual discrimination in how women were treated in cases of sexual assault in India – one that drew on “imperial patriarchies” and the second that deemed a native woman's testimony non-credible.<sup>109</sup> So much so, that the ‘immoral character’ of women was once hard-coded in the Indian Evidence Act in the now-deleted Section 155(4) of the Indian Evidence Act which stated, “when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character”. This was used as a means of discrediting a woman's testimony. While this provision was repealed in 2002<sup>110</sup>, the use of a woman's sexual history to question the integrity of her evidence continues to be a factor in cases of sexual offences, whether offline or online. Rape law specifically suffers from severe stereotyping<sup>111</sup> and patriarchal markers of typifying the “ideal victim” (or victims whom courts will believe<sup>112</sup>) and requirements of “sterling testimony”<sup>113</sup>. These have also led to the perpetuation of rape

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<sup>109</sup> Baxi, P. (2014). *Public Secrets of Law: Rape Trials in India*. (p. 64). Oxford University Press.

<sup>110</sup> The Evidence (Amendment) Act. No. 4 of 2003. <https://indiankanoon.org/doc/1555515/>.

<sup>111</sup> Satish, M. (2017). *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India*. (p. 47). Cambridge University Press.

<sup>112</sup> Satish, M. (2017). *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India*. (p. 108). Cambridge University Press.

<sup>113</sup> The Supreme Court, in *Rai Sandeep @ Deepu v. State of NCT of Delhi*, (2012) 8 SCC 21, held that, “In our considered opinion, the 'sterling witness' should be of a very high quality and calibre whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-

myths – “prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists.”<sup>114</sup> Below is a list of some common rape myths identified by Jennifer Temkin, that Mrinal Satish quotes in his book *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India*:

- Rape by a stranger is more traumatic than rape by an acquaintance;
- Genuine rape victims report the incident to authorities without delay;
- Victims of rape are visibly emotional when recounting their experience;
- Women frequently make false allegations of rape,
- Women always physically resist rape, which leads to injuries to their bodies and genitals

During the course of this study, a key observation was that sexist stereotypes continue to prevail – both from the judges and the lawyers arguing before them. This aligns with previous studies that have established the patently hostile spaces courtrooms can be for women in cases of sexual violence.<sup>115</sup> The language of court orders is an important facet to understand innate judicial biases.<sup>116</sup> Written orders and judgments of courts hold them accountable, especially since they are capable of scrutiny through further court processes like reviews and appeals, or public critique.<sup>117</sup> The content of these orders, including the direct decision and

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-examination of any length and strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it.”

<sup>114</sup> Satish, M. (2017). *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India*. (p. 106). Cambridge University Press.

<sup>115</sup> Nigam, S. (2017). *Fighting for the Justice in the Patriarchal Courts*. [Independent]. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3028829](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3028829).

<sup>116</sup> Studies like the Feminist Judgments Project and its Indian counterpart show that efforts are underway to identify alternative ways of reviewing court rulings, especially from a feminist lens. Berger, L. L., Stanchi, K. M., & Crawford, B. J. (n.d.). Learning from Feminist Judgments: Lessons in Language and Advocacy. *Texas Law Review*, 98. <https://texaslawreview.org/learning-from-feminist-judgments-lessons-in-language-and-advocacy/>; Chandra, A., Sen, J., & Chaudhary, R. (2021). Introduction: the Indian feminist judgements project. *Indian Law Review*, 5(3) 261-264. <https://www.tandfonline.com/doi/full/10.1080/24730580.2021.1996077>.

<sup>117</sup> *Salimbhai Hamidbhai Memon v. Niteshkumar Maganbhai Patel S.L.P. CrI. Appeal No. 884 (2021)*.

reasoning, then become significant. Changes to sexist judicial language, to enable a more gender-just space, have also been requested by stalwarts of the feminist movement in India like Indira Jaising, in her open letter to the Chief Justice of India.<sup>118</sup>

This is not to say that the judiciary is oblivious to the issue of sexism towards survivors of gender-based offences. In March 2021, the Supreme Court in *Aparna Bhat v. State of Madhya Pradesh*<sup>119</sup> set down guidelines to ensure bail conditions imposed by courts did not include compromise between the accused perpetrator and the victim. Additionally, the Supreme Court asked all courts to be sensitive towards victims in cases of gender-based violence to avoid traumatization of the victim during the proceedings or the arguments. The court goes on to state that in cases of sexual violence, women also get blamed for the attack, especially given the prevalence of myths and stereotypes. *“Judges can play a significant role in ridding the justice system of harmful stereotypes. They have an important responsibility to base their decisions on law and facts in evidence, and not engage in gender stereotyping. This requires judges to identify gender stereotyping, and identify how the application, enforcement or perpetuation of these stereotypes discriminates against women or denies them equal access to justice,”* the court verdict observed. This is a welcome decision from the highest court in the country and needs to be incorporated by the judiciary in letter and spirit.

Of the 93 cases, 27 (29%) were identified as using some sort of sexist or patriarchal statement in the cases of online gender-based offences. This was done by reviewing court orders, and separating arguments of lawyers and decisions by judges contained within the court orders. In the first instance, statements were considered to be sexist or patriarchal when they met one of the following conditions:

- Statements referred to modesty, chastity, or goodness of women

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<sup>118</sup> Jaising, I. (2019, 8 March). Eliminate sexist language in courts: Indira Jaising pens open letter to CJI. *Bar and Bench*. <https://www.barandbench.com/columns/eliminate-sexist-language-in-courts-indira-jaising-pens-open-letter-to-cji>.

<sup>119</sup> *Aparna Bhat v. State of Madhya Pradesh*, CrI. Appeal No. 329. (2021).

- Statements that referred to certain qualities attributed to women that are based in stereotypes

Based on these statements by the court, the following is an attempt to draw out some recurring patterns that rely on gendered stereotypes, which become counter-productive to foster and safeguard rights of women in cases of online violence.

3.3.1 Where court orders had overtones of benevolent sexism

3.3.2 Where the court makes an unreasoned assumption about the woman's actions

3.3.3 Where the court in its order focuses on the age, occupation, marital status of the woman

3.3.4 Where the court expects certain 'typical' reactions from the victims/women

3.3.5 Where lawyers discredit the woman's testimony through existing stereotypes

3.3.6 Where lawyers use sexist tropes to argue for the woman

3.3.7 Where lawyers use the social standing of the accused to argue in his favor

### **3.3.1 Where Court Orders had Overtones of Benevolent Sexism**

In many cases, courts are cognizant of the harms of sexual violence, including their perpetration online. However, the court's concern arises from a paternalistic and patriarchal sense of protecting women rather than safeguarding their inherent rights of privacy, dignity, and equality. This is often classified as benevolent sexism – conceptualized by Glick and Fiske to refer to seemingly positive statements about women that arise out of paternalistic notions.<sup>120</sup> Statements that fall within the ambit of benevolent sexism are usually not overtly misogynistic or hateful towards women, but are rooted in “a desire to protect and preserve women.”<sup>121</sup> Cases of benevolent sexism are usually decided in favor of the survivors – and this

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<sup>120</sup> Good, J. J. (n.d.). *Benevolent Sexism*. New York University.  
<https://pages.nyu.edu/jackson/sex.and.gender/Readings/AmbivalentSexism-Sage17.pdf>.

<sup>121</sup> Grubbs, J. B. (n.d.) *Ambivalent Sexism*. New York University.  
<https://pages.nyu.edu/jackson/sex.and.gender/Readings/AmbivalentSexism-Sage17.pdf>.

is the same when courts consider online gender-based offences, but the reasoning is flawed and steeped in patriarchal and paternalistic notions of protection of women. This takes away from the hard-fought agency of a woman, and fails in providing an equal interpretation of the law. For instance, the case of *Robin Sharma v. State of Punjab*<sup>122</sup> is of anticipatory bail by the accused in a case registered under Sections 354-D<sup>123</sup>, 503<sup>124</sup>, 509<sup>125</sup>, 384<sup>126</sup> and 511<sup>127</sup> of the IPC and Sections 66D<sup>128</sup>, 67<sup>129</sup> and 67A<sup>130</sup> of the IT Act, on a survivor's complaint of harassment, extortion, using WhatsApp to send objectionable, vulgar messages, as well as morphed photographs, and making unwanted voice and video calls. The accused eventually withdrew the petition. Yet, even in an anticipatory bail order, the court noted the severity of the offences alleged against the accused and the need for prompt investigation by the police. The court specifically noted the importance of immediacy in cases where a woman's privacy is affected, which is commendable and much needed. However, the court also makes a reference to culture, which leads to a traditionalist and paternalistic reading for these offences. The court states, *"In this land of ancient civilization and rich culture governed by fundamental principle that no society can prosper without respect for women expressed by sanskrit shalok 'Yatra naryastu pujiyante ramante tatra Devata' (gods reside where women are worshipped), women are now victims of heinous crimes and subjected to domestic violence, cruelty/maltreatment and sexual harassment and due to these evils, need effective protection of law administered by all agencies of State with an iron hand."* While the court's approach as such is one of relevance for the jurisprudence argued in this paper as well – one that rests on the inherent right to privacy

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<sup>122</sup> Robin Sharma v. State of Punjab, Crl.M.M. No. 13861. (2020).

<sup>123</sup> Stalking.

<sup>124</sup> Criminal intimidation.

<sup>125</sup> Word, gesture or act intended to insult the modesty of a woman.

<sup>126</sup> Punishment for extortion.

<sup>127</sup> Punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment.

<sup>128</sup> Punishment for cheating by personation by using computer resource.

<sup>129</sup> Punishment for publishing or transmitting obscene material in electronic form.

<sup>130</sup> Punishment for publishing or transmitting of material containing sexually explicit act, etc., in electronic form.



of women – the understanding that women need worshipping arises from the lens of benevolent sexism.

- The case of *Lalit Bhola v. State*<sup>131</sup> was a request for quashing of an FIR complaining of creation of fake accounts on grounds of a settlement. The Delhi High Court noted the request of the woman to not pursue the proceedings, and says, “[F]acts of the case show how big the heart of a woman is. She even after being humiliated at the hands of her husband is willing to forgive him and forget his conduct.” The reason for the settlement was an ongoing matrimonial dispute, but supposed concepts like the big heart of a woman reflect an ingrained sense of traditional gender roles, as is common with benevolent sexism, where women are expected to be maternal and caring.<sup>132</sup>
- In the *Present Petition v. Unknown*<sup>133</sup>, the Madras High Court rejected a petition for anticipatory bail in a case of online trolling through derogatory and scandalous tweets and posts. However, the court couched its concern about such online violence in the context of outdated concepts like chastity and honor. The court says, “[E]ven a bare reading of the said posts leaves a sour taste in the mouth of this Court, as those statements are overly derogatory in nature and it demeans, the modesty and chastity of the women folk. It is to be pointed out that our country is a land where women are worshipped and are held in utmost reverence. But, day-in and day-out, the way in which the women folk are treated, reveals that the the way in which the women were looked at has withered from the sense of the citizens and they are not given the requisite space...It has been oft said that the essence of a woman's modesty is her sex... Modesty is an attribute associated with female human beings and it is a virtue which attaches to a female owing to her sex.” The court is cognizant of the constitutional rights of women that are impacted by such violence, and refers to the violation of the right to equality. Yet, the

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<sup>131</sup> Lalit Bhola v. State CrI.M.C. 5266. (2018).

<sup>132</sup> Good, J. J. (n.d.). *Benevolent Sexism*. New York University.  
<https://pages.nyu.edu/jackson/sex.and.gender/Readings/AmbivalentSexism-Sage17.pdf>.

<sup>133</sup> The Present Petition Has Been ... v. Unknown, CrI. O.P. No.12604. (2020).

language of the order betrays a paternalistic outlook when it says, “[T]he act of the petitioner in posting the alleged posts not only portrays his devious mind towards the persons of opposite sex, but his intention is also writ large on posting such materials against women, more especially the women folk in media, which creates not only insecurity for such of those individuals, but also acts negatively against the freedom of equality to women enshrined in the Constitution.”

- In *Guruvinder Singh v. State of Uttar Pradesh*<sup>134</sup>, the Delhi High Court observed that women are usually victims of NCIIID. It even identifies that photographs taken with the consent of the woman in an intimate relationship cannot be misused after a break between the two individuals. However, the court, with the best intentions, noted, “No person much less a woman would want to create and display gray shades of her character. In most of the cases...women are the victims...In matters like the present one, any accused will surreptitiously outrage the modesty of the woman and misuse the same in the cyberspace unhindered. Undoubtedly, such an act will be contrary to the larger interest of the protection of the woman against exploitation and blackmailing, as has, *prima facie*, happened in the present case.”

It is important to discuss even seemingly positive cases, with outcomes in favor of the survivor, especially if the reasoning is patriarchal and protectionist. This allows the needle to be moved in the discourse on more equal application of the law within a rights-based framework.

### **3.3.2 Where The Court Makes an Unreasoned Assumption about the Woman’s Actions**

Gendered stereotyping can take many forms. In the case of judicial orders, ascribing value or meaning to a woman’s actions, without adequately explaining the surrounding fact situations,

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<sup>134</sup> *Guruvinder Singh v. State of Uttar Pradesh*, Bail No. 3669. (2021).

or underlying reasoning of the judge, can reflect bias or a sexist assumption. In the cases we studied, there were a handful of orders that had such observations from courts.

- Baxi notes that courtrooms often see compromise as false cases.<sup>135</sup> A similar example was observed in the case of *Shafeer v. State of Kerala*<sup>136</sup>, where in the case of publication of morphed nude photographs and creation of false social media accounts, the survivor sought to not pursue the criminal case filed against the accused under Sections 65, 66E, 67A of IT Act. The court recorded this decision of the survivor to settle the dispute despite the “very serious allegation”, and observed, “*she seems to have condoned the conduct of the petitioner (accused) herein.*” This statement, without additional context, appears to be an averment that the court makes on behalf of the woman. Settling a case does not mean condoning of an offence, and even if so, should not be for the court to assume. At the very least, the court should record its reasons for arriving at such a statement, without which it feels like a comment on the survivor herself.
- In *State v. Mool Chand s/o Nathu Lal*<sup>137</sup>, the court deemed the delay of filing a case after a month’s delay as material and noted that the prosecution was unable to explain this delay. In fact, the court observed that the woman came forward with allegations of sexual assault only after receiving a legal notice of a cheque dishonor. The court, in its order, says, “*The thought of lodging a complaint against the accused entered the mind of the prosecutrix only after receipt of the legal notice Ex. PW2/D1 from the accused regarding the dishonour of the cheque of Rs. Five lacs which she had handed over to the accused.*” This aspect noted by the court reads like conjecture rather than reasoning or reconstruction of the fact situation.

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<sup>135</sup> Baxi, P. (2014). *Public Secrets of Law: Rape Trials in India*. (p. xiii). Oxford University Press.

<sup>136</sup> *Shafeer v. State of Kerala*, CrI.MC.No. 6490. (2018).

<sup>137</sup> *State v. Mool Chand s/o Nathu Lal*, S.C. No. 01. (2016).

### 3.3.3 Where The Court in its Order Focuses on the Age, Occupation, Marital Status of the Woman

Sexual victimization is impacted by aspects like age, marital status, with younger, unmarried/separated women at higher risk.<sup>138</sup> In fact, studies show that typical rape victims – whom courts generally believe – are likely to be sexually inexperienced who lead ‘respectable lifestyles’.<sup>139</sup> This creates scope for a situation where older women, especially those who are married, are considered less likely to be victims of sexual offences. Additionally, marriage exerts control over a woman’s sexuality<sup>140</sup>, and in India, leads to expectations of how a married woman would behave<sup>141</sup> – seeking permission from family elders to step outside their home, gender segregation, control over economic resources. This creates a situation where violating these inherent societal codes of behaviour can earn social reprisal.<sup>142</sup> Through the case law research, we noticed that courts often noted the marital status or occupation of the woman without providing any specific reason to do so – contextually, these statements were not placed along with the facts of the situation. For this study, focusing on a woman’s age, marital status, and occupation seemed relevant to understand if they created bias against women who raised complaints of sexual violence.

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<sup>138</sup> Siddique, J. A. (2015). Age, Marital Status, and Risk of Sexual Victimization: Similarities and Differences Across Victim–Offender Relationships. *Journal of Interpersonal Violence*. 31(15) 2556-2575. <https://doi.org/10.1177%2F0886260515579507>.

<sup>139</sup> Satish, M. (2017). Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India. (p. 109). Cambridge University Press.

<sup>140</sup> Kalra, G., & Bhugra, D. (2013). Sexual violence against women: Understanding cross-cultural intersections. *Indian Journal of Psychiatry*. 55(3) 244-249. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3777345/>

<sup>141</sup> Desai, S., & Andrist, L. (2010). Gender Scripts and Age at Marriage in India. *Demography*. 47(3) 667-687. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3000052/>.

<sup>142</sup> Gurumurthy, A., Vasudevan, A., & Chami, N. (2019). *Born digital, Born free? A socio-legal study on young women's experiences of online violence in South India*. IT for Change. [https://itforchange.net/sites/default/files/1662/Born-Digital\\_Born-Free\\_SynthesisReport.pdf](https://itforchange.net/sites/default/files/1662/Born-Digital_Born-Free_SynthesisReport.pdf).

- In *Pratima Kerketta v. State of Jharkhand*<sup>143</sup>, the court notes the following facts about the woman. “*The petitioner is matured woman, she is not a minor. In fact, she is a teacher in a school. She had met opposite party No.2 initially via Facebook, then physically met, and a friendship developed between them. ...She does not report the matter, in the first instance, it may be understandable, but opposite party No.2 allegedly again raped her over a period four more times. Still she does not report the matter to anybody or the Police. Her allegations are now somewhat stretched.*” Not only is the failure to report a matter used against the woman in case, her job as a teacher and her maturity are made into considerations to negate her testimony. The court goes on to record that her own mother, uncle, or cousin didn’t come forward to corroborate her story. Of course, this case is an appeal against an acquittal by the trial court, where High Courts are required to be more circumspect about reversing the verdict.<sup>144</sup> However, the factors noted here also fall prey to the rape myths identified above, by emphasizing on the delay in complaint.
- In the case of *Sajeev v. State of Kerala*<sup>145</sup>, the Kerala High Court notes that both the survivor woman and the perpetrator are married, without any written reason for doing so, after observing that the accused was on “friendly terms” based on photographs. The case is of anticipatory bail, and is straightforward in that the bail is granted with standard conditions. Recording the woman’s marital status, at this stage, does not seem to be relevant, especially in the absence of any specific reason for doing so.
- In *Anand Mohan v. State of Bihar*<sup>146</sup>, the Patna High Court granted bail to the accused, while noting that, “*it appears that the victim, who is a married woman, developed friendship with the petitioner and on whose request, she went to the house of the*

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<sup>143</sup> *Pratima Kerketta v. State of Jharkhand*, CrI. M.P. No. 2888. (2017).

<sup>144</sup> Satish, M. (2017). *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India*. (p. 24). Cambridge University Press.

<sup>145</sup> *Sajeev v. State of Kerala*, Bail Appl. No. 2690. (2019).

<sup>146</sup> *Anand Mohan v. State of Bihar*, CrI. M. No. 35856 (2020).

*petitioner on the eve of marriage of his sister but she alleged that on 12.03.2019 the petitioner along with his brother-in-law forcibly established physical relation with her. Even on the next day, the informant (prosecutrix) did not inform the police. She kept mum and allowed the petitioner to have physical relation for more than a year. Thereafter the victim filed the case. On the face of it, it appears that the victim, who is a major married lady, had consensual sex with the petitioner although the petitioner denied the allegation.”* The court noted the delay as a factor that seemed to cast doubt on the woman’s complaint. Additionally, it also called out the marital status of the woman twice, without an express reason to do so, for seemingly no other reason but to show that she was capable of making her choices which would not have resulted in rape. This is also in line with research that shows that courts are more sympathetic towards those who are considered sexually inexperienced<sup>147</sup> – and the court noting the marital status is proxy for a sexual history.

- A similar view is taken in *State v. Azhar Ali Bhutto*<sup>148</sup>, where the trial court noted that the woman was 39 years old at the time of the incident and the mother of two children. The relevance of these facts on the case are not clear from the court’s order.

### **3.3.4 Where the Court Expects Certain ‘Typical’ Reactions from the Victims/Women**

Typical reactions in cases of sexual violence are based in stereotypes and myths. Common rape myths have been discussed earlier in this section. The Supreme Court, in *Aparna Bhat*, identifies the following gendered stereotypes that courts should avoid using: “(i) *women are physically weak and need protection*; (ii) *women are incapable of or cannot take decisions on*

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<sup>147</sup> Satish, M. (2017). *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India*. (p. 108). Cambridge University Press.

<sup>148</sup> *State v. Azhar Ali Bhutto*, S.C. No. 79. (2014).

*their own; (iii) men are the “head” of the household and should take all the decisions relating to family; (iv) women should be submissive and obedient according to our culture; (v) “good” women are sexually chaste; (vi) motherhood is the duty and role of every woman, and assumptions to the effect that she wants to be a mother; (vii) women should be the ones in charge of their children, their upbringing and care; (viii) being alone at night or wearing certain clothes make women responsible for being attacked; (ix) a woman consuming alcohol, smoking, etc. may justify unwelcome advances by men or “has asked for it”; (x) women are emotional and often overreact or dramatize events, hence it is necessary to corroborate their testimony; (xi) testimonial evidence provided by women who are sexually active may be suspected when assessing “consent” in sexual offence cases; and (xii) lack of evidence of physical harm in sexual offence case leads to an inference of consent by the woman.”* While this list is not exhaustive of all types of stereotypes, it provides a clear view of the kinds of gendered notions that persist in society and in courtrooms. In this section, the case law research showed us the kinds of reactions courts considered to be standard and expected from women who have faced sexual violence.

- In *Mohammad Nasar v. State of Andhra Pradesh*<sup>149</sup>, the court denied anticipatory bail to the accused - but in doing so, noted that *“no prudent woman would post her nude photographs in social media.”* The Court notes that this is a repeat offence, which is sufficient grounds to reject grant of anticipatory bail. The observation of what a ‘prudent woman’ would or would not do arises from a victim blaming mindset, where those who share their photographs on social media voluntarily and suffered an NCIIID attack would be considered less deserving of the same judicial intervention.<sup>150</sup>

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<sup>149</sup> Mohammad Nasar v. State of Andhra Pradesh, CrI. P. No.3125 (2020).

<sup>150</sup> Centre for International Governance Innovation. (2021). Non-consensual Intimate Image Distribution: The Legal Landscape in Kenya, Chile and South Africa.

[https://www.cigionline.org/static/documents/SaferInternet\\_Paper\\_no\\_2\\_SuBHPxy.pdf](https://www.cigionline.org/static/documents/SaferInternet_Paper_no_2_SuBHPxy.pdf).

- In the case of *Sri Rakesh B v. State of Karnataka*<sup>151</sup>, the Karnataka High Court granted bail in a complaint under Sections 376<sup>152</sup>, 420<sup>153</sup>, and 506<sup>154</sup> of IPC and Section 66B<sup>155</sup> of the IT Act. In its reasons for granting bail, the court observed that there is doubt regarding the survivor's statements about rape on the false promise of marriage, especially if a compromise is reached. This is in line with Baxi's observations on how courts view compromise cases, as mentioned above. The court also notes that the delay in filing a complaint for forced sex. Finally, the court also reveals what it believes to be how women should act, by saying, "*nothing is mentioned by the complainant as to why she went to her office at night ie., 11.00 p.m.; she has also not objected to consuming drinks with the petitioner and allowing him to stay with her till morning; the explanation offered by the complainant that after the perpetration of the act she was tired and fell asleep, is unbecoming of an Indian woman; that is not the way our women react when they are ravished.*" The notion that an Indian woman will have an expected reaction to rape reflects deep set patriarchal undertones. The use of the word 'ravished' is also outdated, and minimizes the assault in the form of rape, even at this preliminary stage.
- In the case of *State v. Azhar Ali Bhutto*<sup>156</sup>, the district court finds inconsistencies in the woman's testimony. However, the aspects noted by the court are reminiscent of the rape myths discussed above. The court finds it material to note that not informing her husband via her mobile phone, raising an alarm or alerting nearby people of her abduction was grounds to discredit her testimony. "*Now the question arises when the accused had abducted her why she did not inform her husband. Her testimony shows that she remained in the hotel for few hours and she never complained to the hotel staff that*

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<sup>151</sup> Sri Rakesh B v. State of Karnataka, Crl. P. No. 2427. (2020).

<sup>152</sup> Punishment for rape.

<sup>153</sup> Cheating and dishonestly inducing delivery of property.

<sup>154</sup> Punishment for criminal intimidation.

<sup>155</sup> Punishment for dishonestly receiving stolen computer resource or communication device.

<sup>156</sup> State v. Azhar Ali Bhutto, S.C. No. 79. (2014).



*she was abducted by the accused... she had traveled from Delhi to Ambala by Bus with the accused but surprisingly she did not complain to the bus driver / conductor of the passengers traveling in the bus.”* The trial court also records her statement given to the police at a later date where she says that her husband forced her to file the complaint of rape. While this evidence would be sufficient to acquit the accused, the court chose to highlight the lack of a visible resistance on the woman’s part to lower the credibility of her statement.

- In *State v. Mool Chand s/o Nathu Lal*<sup>157</sup>, the court questioned the veracity of the woman’s testimony because she stated that the accused had threatened her to have sexual intercourse with two other men, but dropped her home after she refused. The court noted, *“It is evident from the aforesaid testimony of the prosecutrix that when she refused to engage in physical intercourse with the friends of the accused in the hotel room at Gurgaon, the accused dropped her peacefully at her home. No threats had been issued by the accused to her at that time.”* The court went on to add that the fact that she didn’t inform her parents or brothers of the rape raised doubt on the truthfulness of her testimony. Most of all, the court called her refusal to offer sex audacious and asked why she hadn’t refused in earlier cases. *“It is also not understandable as to when she had the temerity of refusing to sexually oblige the friends of the accused in the hotel room, why she did not show such courage in refusing to permit the accused to have physical relations with him either in the hotel room or at her residence.”* Additionally, the court does not find her deposition of informing her fiancée true. *“Further she has deposed in her cross examination that she narrated the incidents of rape to her fiancée in the month of February 2015. Even at that time also no complaint was lodged by her against the accused in the police station. No call at telephone No.100 was made by her or by her fiancée. She has stated that her fiancée told her that FIR cannot be registered without the support of her parents which appears to be highly unbelievable. If at all she would have apprised her*

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<sup>157</sup> State v. Mool Chand s/o Nathu Lal S.C. No. 01. (2016).

*fiancee about her plight, it would have sent chills down the spine of her fiancée and he would have definitely encouraged her to report the matter to the police.”* Such a moralistic view of relying on her fiancée should not form the crux of how the court reviews these cases. While the combined weight of evidence before a court, including the fact of the woman being an LIC agent, possibly offers a deeper view of the case in hand, the statements used by the court to dismiss testimony are rooted in the same rape myths.

### **3.3.5 Where Lawyers Discredit The Woman’s Testimony Through Existing Stereotypes**

Defence lawyers tend to use several ways of disproving the authenticity of the complaint. A common one is the state that the woman is filing a false case. This is based in the rape myth that women frequently make false complaints of rape (or sexual offences). In the cases studied, we also noticed a trend of using personal relationships to discredit the complaint of the woman. As discussed in a subsequent chapter, personal relationships often come with inherent power imbalances.

- The myth of women filing false cases was observed in the case of *Mohammad Nasar v. State of Andhra Pradesh*<sup>158</sup>, where the defence lawyer – here, appearing in an anticipatory bail petition for the accused – claimed that the woman had filed a similar case in 2019, and again in 2020, which were false allegations aimed at harassing the accused.
- In *Vikash Rajak v. State of Madhya Pradesh*<sup>159</sup>, the lawyer for the bail applicant –who was in custody for offences under IPC, POCSO Act, and IT Act – claimed that the applicant has been falsely implicated in the case and that the complainant is a relative of the

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<sup>158</sup> Mohammad Nasar v. State of Andhra Pradesh, Crl. P. No.3125 (2020).

<sup>159</sup> Vikash Rajak v. State of Madhya Pradesh, M.Cr.C. No. 15291. (2021).

accused (applicant). This argument of the defence lawyer (applying for bail on behalf of his client) plays to both types of stereotypes - one that women make false complaints, and two, that there cannot be an offence of gender-based violence if there is a familial relationship. The two statements do not have any seeming correlation for being presented together, aside from discrediting the woman's complaint based solely on her social location, and not any other fact.

- In *Suryakant Yadav v. State of Madhya Pradesh*<sup>160</sup>, the anticipatory bail applicant's lawyer said that the woman and the accused were friends. The photographs sent were 'out of this friendship'. The lawyer argued that the applicant accused was anticipating arrest based on a false case.

### 3.3.6 Where Lawyers use Sexist Tropes to Argue for the Woman

It is not always just defence lawyers who rely on dated and paternalistic concepts of honor. In several cases, it was the lawyers representing the women or the lawyer for the state (prosecutor) who chose to use protectionist and stereotypical tropes to possibly elicit a positive response from courtrooms in gendered offences.

- In the case of *Pratima Kerketta v. State of Jharkhand*<sup>161</sup>, the prosecution lawyer argued for reliance on the sole testimony of the survivor by saying, "*if an Indian woman alleges rape, it should be accepted as such because why will she put her own reputation, dignity and name at stake.*" The statement, while good in its intent, creates a valorized view of Indian women, constructing a false dichotomy with women from other nationalities. It also offers proof that courtrooms are inherently sexist spaces, so much so that even the prosecution believes that the way to prove a woman's honesty in a case is to invoke moralistic notions of her honor and reputation.

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<sup>160</sup> *Suryakant Yadav v. State of Madhya Pradesh*, M.Cr.C. No.26996. (2020).

<sup>161</sup> *Pratima Kerketta v. State of Jharkhand*, Cr.M.P. No. 2888. (2017).

- In *Smt Qamar v. State of Telangana*<sup>162</sup>, the government lawyer, while opposing the accused's request to be released from preventive detention, argued about the impact of the actions of the accused (who had complaints of repeat offences of stalking women, calling them on WhatsApp, taking their intimate pictures, and threatening to publish them on social media) on the women he targeted. *"He has been habitually involving in stalking of women...and also extort money under the pretext of posting them in social media and thereby insulting the **modesty of college going girls and even married women** and thus creating large scale fear and panic among the general public, **especially college going girls and married women**, and acting in a manner prejudicial to the maintenance of public order, apart from disturbing peace, tranquility in the society. The series of crimes allegedly committed by the detenu were sufficient to affect the even tempo of the society and create a feeling of insecurity in the minds of the people at large, **especially college going girls and married women**,"* the court order noted the government lawyer saying. The emphasis on the 'modesty' of college going girls and married women' reflects the reliance on the antiquated notion of modesty; the repetition of college going girls and married women also creates an unnecessary categorization among adult women in the case of sexual offences. It infantilizes women in college – as most of them are likely to have reached the age of majority (18 years) by this time and focuses on the marital status of others for no apparent reason.

### 3.3.7 Where Lawyers use the Social Standing of the Accused to Argue in his Favor

The tonal change in what is respectable for a woman vis-a-vis a man is seen in cases of sexual offences, especially in the bail related cases in this study. Arguments made by lawyers for men accused of sexual offences often suggest that their good name will be tarnished because of confinement. It also pits a woman's right to dignity and ability to access justice with a man's

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<sup>162</sup> *Smt Qamar v. State of Telangana* W.P. No. 6562. (2021).

right to reputation. As such, conditions for bail are straightforward (discussed in a subsequent chapter), and bringing aspects of honor and social reputation of the accused seem irrelevant.

- In *Vikash Rajak v. State of Madhya Pradesh*<sup>163</sup>, the lawyer for the bail applicant/accused called him a “young boy aged 21 years”. “If he will remain in custody, then the future of his family will become spoiled,” the lawyer argued, as per the court order.
- Similarly, in *Suryakant Yadav v. State of Madhya Pradesh*<sup>164</sup>, the lawyer for the accused argues that “[C]onfinement would bring social dispute and personal inconvenience.”

The key outcome from this section is that courtrooms continue to be sexist spaces, which perpetuate the same gendered myths and stereotypes that have existed for many decades. This only exacerbates the challenges that the online space brings – for instance, quick dissemination of non-consensual intimate images, or availability of personal information of potential victims. When seen from a paternalistic or patriarchal lens, these offences can be made out to be the survivor’s fault – as seen in cases where the woman was married, or shared images with an intimate partner privately. The inability of a courtroom to be sensitive as well as fair and feminist in its outlook is a major obstacle towards achieving effective access to justice for women. Even in cases where courts are cognizant of the impact of gendered offences, it is imperative that verdicts remain rooted in rights-based principles rather than stereotypical and paternalistic tropes. The way forward has to be training judges and lawyers early on to identify these myths and stereotypes to prevent them from being repeated and perpetuated – this is also a recommendation from the Supreme Court in *Aparna Bhat*. Curriculum must not shy away from adopting a fair, just, and equitable framework for rights of women, especially from marginalized locations – rights that are embedded in constitutional principles of equality, right to life with privacy and dignity, and freedom of thought and

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<sup>163</sup> *Vikash Rajak v. State of Madhya Pradesh*, M.Cr.C. No. 15291. (2021).

<sup>164</sup> *Suryakant Yadav v. State of Madhya Pradesh*, M.Cr.C. No. 26996. (2020).

expression. It is important for judges to be cognizant of their unconscious biases and the impact those may have in the important work of providing justice.

### **3.4 Finding 4: Courts fail to recognize power differentials among perpetrators and survivors in OGBV cases**

The digital sphere, which is a breeding ground for patriarchy, reinforces power structures typically seen in real-life society. The ubiquitous online world has resulted in newer opportunities for perpetrators to attack women using technology leading to increased risk for women using the internet,<sup>165</sup> as can be seen from the cases in our research study. Forms of sexual violence and harassment stem from socially constructed beliefs and attitudes about gender and sexuality which allow perpetrators motivations for power and control to also be fulfilled. The Supreme Court in the case of *Aparna Bhat v. The State Of Madhya Pradesh*<sup>166</sup> noted that the “*causes and factors of violence against women include entrenched unequal power equations between men and women that foster violence and its acceptability, aggravated by cultural and social norms, economic dependence, poverty etc.*” The systemic gender gap along with years of patriarchal and social forces allow some individuals to exercise power over others thereby exerting control over even the simplest of relationships in society including teacher-students, relatives-children and within family and love relationships.

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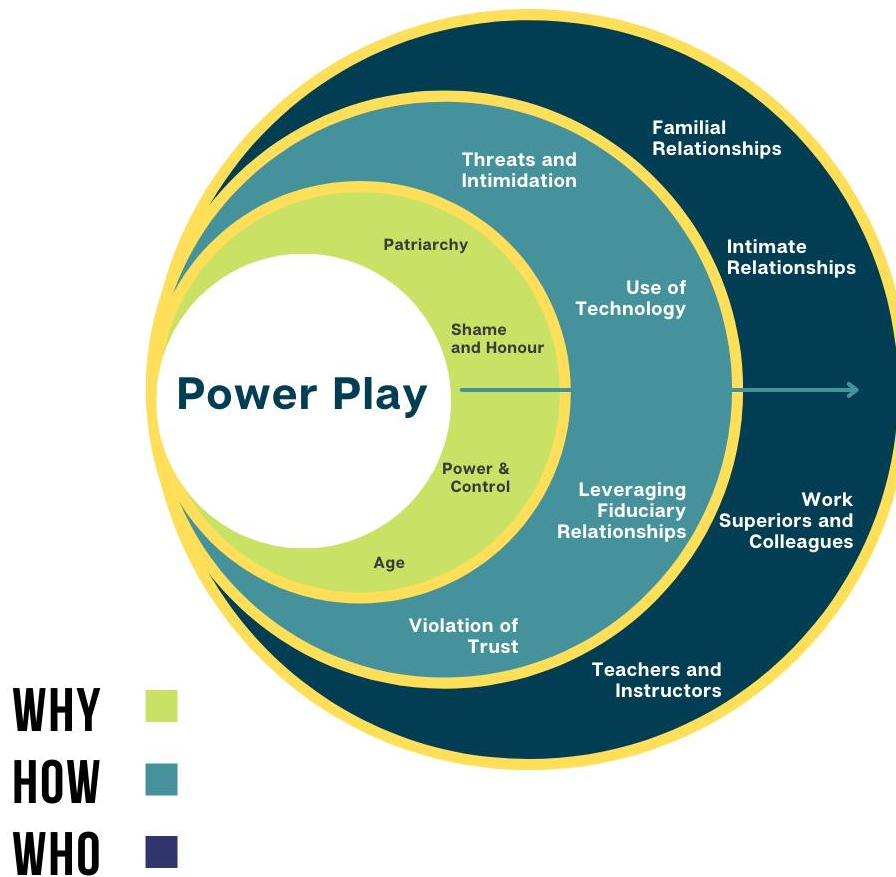
<sup>165</sup> Policy Department for Citizens’ Rights and Constitutional Affairs. (2018). *Cyber violence and hate speech online against women*. European Parliament.

[https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604979/IPOL\\_STU\(2018\)604979\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604979/IPOL_STU(2018)604979_EN.pdf);

Guterres, A., (2020). *The gender power gap*. United Nations. <https://www.un.org/sg/en/content/sg/articles/2020-03-02/the-gender-power-gap>.

<sup>166</sup> *Aparna Bhat v. The State Of Madhya Pradesh*, CrI Appeal No. 329 (2021).

## POWER PLAY: WHY, HOW, WHO



Description: Based on the types of relationships we have identified from our case collection, we have categorized the types of reasons, how violence is perpetrated and in what kind of relationships power is misused

The most common theme emerging from all the cases we reviewed was the misuse of the fiduciary relationship by an older man against a younger person, in some cases minors and mostly women. For instance, in the case of *State v. Pankaj*<sup>167</sup>, the accused was the elder brother-in law, in another case *Susil Kumar Mohanty v. The Victim*<sup>168</sup>, the age difference between the

<sup>167</sup> State v. Pankaj, S.C. No. 262 (2017).

<sup>168</sup> Susil Kumar Mohanty v. The Victim, CrI. Appeal No. 841. (2019).

accused and victim was 15 years and in other cases<sup>169</sup> minor girls between the ages of 13-16 were primarily victims.

Fiduciary relationships are “relationships based on trust<sup>170</sup> or where confidence is reposed by one on another and that leads to a “*transaction in which there is a conflict of interest*”.<sup>171</sup> The law places a duty on the person in whom such confidence is reposed - as can be seen in laws like The Protection of Children from Sexual Offences Act, 2012<sup>172</sup> - thus creating a fiduciary relationship. These duty holders include family members, teachers, superiors/colleagues at work and persons in positions of power like police officers. In most cases, we found that there was a direct misuse of these positions of power resulting in violations or lack of free consent. In *Amit Raosao Patil v. State of Maharashtra*, a case before the Bombay High Court,<sup>173</sup> observations were made that when consent is induced from a person due to the nature of a fiduciary relationship, this will not be treated as free consent on the part of the victim. The lack of autonomy for women and girls to stand up for themselves or stop the abuse of such positions is difficult in our rigid patriarchal societies.

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<sup>169</sup> Prashant Parashar v. The State Of Madhya Pradesh, M.Cr.C. No. 9720. (2017). (Asked 13-year-old to share nude pictures on social media); Basanagouda S/O Chandanagouda v. State Of Karnataka, CrI P. No.101126. (2021). (Sexual assault of 13 year old and non consensual recording of video); State vs Raj Babbar @ Raj, F.I.R. No. 90. (2015). (Non consensual image sharing of 16-year-old).

<sup>170</sup> Raha, S., Giliyal, A., Sajjanshetty, G., & Ramakrishnan. S. (2015). *Frequently Asked Questions On The Protection Of Children From Sexual Offences Act And Rules, 2012 And The Criminal Law (Amendment) Act, 2013*. Centre for Child and the Law, National Law School of India University.

<https://sje.rajasthan.gov.in/siteadmin/uploads/201908261611310791pocsoact2013.pdf>.

<sup>171</sup> “The fiduciary relationship may arise in the context of a jural relationship or it may not. Where confidence is reposed by one in another, and that leads to a transaction in which there is a conflict of interest and duty in the person in whom such confidence is reposed, fiduciary relationship immediately springs into existence.” as defined by the Madras High Court in the case of Nellie Wapshare & Ors. v. Pierce Leslie & Co. Ltd. & Ors, AIR 1960 Mad 410.

<sup>172</sup> Sexual assault by those who are related to the child by blood or in a position of power becomes aggravated sexual assault. The Protection of Children from Sexual Offences Act. No. 32 of 2012. ss. 5(n), 5(p), 9(n), 9(p). <https://wcd.nic.in/sites/default/files/POCSO%20Act%2C%202012.pdf>

<sup>173</sup> *Amit Raosao Patil v. State of Maharashtra*, 2020 SCC OnLine Bom 917.



Through the findings given below we hope to identify the common relationships where there are power dynamics. The following are relationship groups we have identified in the cases perused:

**3.4.1 Familial Relationships:** Relationships within families or related by marriage, blood or adoption.

**3.4.2 Intimate Relationships:** Relationships between partners including unmarried couples with promises to marry etc.

**3.4.3 Workplace Relationships:** Relationships between people in workplaces including colleagues, or superior/juniors at workplaces.

**3.4.4 Teachers/Instructors and Students:** Relationships between a teacher and a student, like tuition teachers and minors.

### 3.4.1 Familial Relationships

Modern gender-structured family systems still unjustly distribute the burdens and benefits based on gender roles.<sup>174</sup> The proximity of committing a crime also increases inside family systems where older men in positions of power take advantage of their position to threaten and intimidate younger members, usually women, to carry out acts which they wouldn't do otherwise.<sup>175</sup> Given below are some instances we identified from our research where there was an abuse of power within families:

- ❖ In a Delhi District Court case known as *State v. Pankaj*<sup>176</sup>, the accused stalked and threatened his wife's minor sister (victim) to engage in sexual relations with him. The

<sup>174</sup> Cerrato, J., & Cifre, E. (2018). Gender Inequality in Household Chores and Work-Family Conflict. *Frontiers in Psychology*, 9(1330). <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6086200/>.

<sup>175</sup> Langen, T. (2005). Gender power imbalance on women's capacity to negotiate self-protection against HIV/AIDS in Botswana and South Africa. *African Health Science*. 5(3) 188-197. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1831928/>.

<sup>176</sup> *State v. Pankaj*, S.C. No. 262. (2017).

accused threatened the victim on the pretext of sharing non-consensual intimate photos and videos of her resulting in rape.

- ❖ In *Vikash Rajak v. The State of Madhya Pradesh* case<sup>177</sup>, the accused, a relative of the victim, made a fake Facebook ID and circulated the same to defame her.
- ❖ In *Mool Chand v. Nathu Lal*<sup>178</sup>, a woman (victim) alleged that her cousin's husband (accused) took blank cheques from her regarding an LIC claim, then set up dishonour of cheque cases against her and used them to commit sexual assault and rape on her. He also threatened to release intimate photos of her on the internet if she told anyone.

These examples of carefully constructed situations are developed in the backdrop of the concept of “shame” within the family and society - which directly link back to the positions of power held by perpetrators (who are generally men, based on the findings of this study). Perpetrators use the threat of releasing intimate photos on the internet to shame women or with the intent to defame women, knowing in full that this would bring their families embarrassment or humiliation<sup>179</sup> in the patriarchal set up of the society. Consequently, the women feel coerced into silence to avoid such ignominy.

Further, age differences between members in a family create power imbalance<sup>180</sup> in relationships, particularly in patriarchal societies where age and seniority demand higher levels of respect in society.<sup>181</sup> Many women enter into a relationship with the mindset that

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<sup>177</sup> Vikash Rajak v. The State of Madhya Pradesh, M.Cr.C.15291. (2021).

<sup>178</sup> State v. Mool Chand S/O Nathu Lal, S.C. No.01. (2016).

<sup>179</sup> Laidlaw, E. (2017). Online Shaming and the Right to Privacy. *Laws* 6(1) 3.

[https://www.researchgate.net/publication/313581719\\_Online\\_Shaming\\_and\\_the\\_Right\\_to\\_Privacy](https://www.researchgate.net/publication/313581719_Online_Shaming_and_the_Right_to_Privacy).

<sup>180</sup> Gurumurthy, A., Vasudevan, A., & Chami, N. (2019). *Born digital, Born free? A socio-legal study on young women's experiences of online violence in South India*. IT for Change.

[https://itforchange.net/sites/default/files/1662/Born-Digital\\_Born-Free\\_SynthesisReport.pdf](https://itforchange.net/sites/default/files/1662/Born-Digital_Born-Free_SynthesisReport.pdf).

<sup>181</sup> Singh, A., & Chokhandre, P. (2022). Development of the India Patriarchy Index: Validation and Testing of Temporal and Spatial Patterning. *Social Indicators Research*. 159(1) 1-27.

[https://www.researchgate.net/publication/353142525\\_Development\\_of\\_the\\_India\\_Patriarchy\\_Index\\_Validation\\_and\\_Testing\\_of\\_Temporal\\_and\\_Spatial\\_Patterning](https://www.researchgate.net/publication/353142525_Development_of_the_India_Patriarchy_Index_Validation_and_Testing_of_Temporal_and_Spatial_Patterning)

people senior to themselves in age or rank should always be treated with deference or respect and that failure to show them the prescribed forms of etiquette, or to carry out their reasonable requests, may be regarded as reprehensible and punishable. This means that in any form of familial relationship where one partner is relatively older than the other, the younger member often feels bound by tradition to honor, obey, and submit to the authority of the older person. As can be seen from the cases given above, all the perpetrators were men who targeted younger women and girls within their family.

### 3.4.2 Intimate Relationships

A study done by the European Institute for Gender Equality (EIGE) noted by the OECD discusses how gender-based violence including intimate partner violence affects women disproportionately, as it is a manifestation of the power imbalance between women and men.<sup>182</sup> Even today, globally, women are an overwhelming majority of the victims of intimate partner violence.<sup>183</sup> Partner violence against women is more prevalent in patriarchal societies<sup>184</sup> and is a result of unequal power relations that emphasize gender roles including a man's dominance over women. From our case studies, we were able to observe that partners issued threats, made false promises, and used intimidation through different modes of technology, to coerce their partners to do something or commit direct acts of violence.<sup>185</sup> Given

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<sup>182</sup> Rosco, J., & Lane, S. (2020). *Statistical Insights: EIGE's Intimate Partner Violence data collection*. Organization for Economic Co-operation and Development. <https://www.oecd.org/sdd/statistical-insights-eiges-intimate-partner-violence-data-collection.htm>

<sup>183</sup> World Health Organization. (n.d.). Intimate partner violence. [https://apps.who.int/iris/bitstream/handle/10665/77432/WHO\\_RHR\\_12.36\\_eng.pdf;sequence=1](https://apps.who.int/iris/bitstream/handle/10665/77432/WHO_RHR_12.36_eng.pdf;sequence=1)

<sup>184</sup> Mshweshwe, L. (2020). Understanding domestic violence: masculinity, culture, traditions. *Heliyon* 6(10) e05334. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7599123/>.

<sup>185</sup> Vyas, S., & Jansen, H. (2018). Unequal power relations and partner violence against women in Tanzania: a cross-sectional analysis. *BMC Women's Health*. 18(185). <https://bmcmwomenshealth.biomedcentral.com/articles/10.1186/s12905-018-0675-0>.

below are some examples by which perpetrators used technology to inflict violence and assert control over women:

- ❖ In *Mrs. Rehana Begum v. The Inspector Of Police*, the accused and victim had met via a matrimonial website. The accused had sent abusive messages and threatened to upload obscene images online. The court granted the accused bail with a stipulation that he should refrain from contacting the victim.<sup>186</sup>
- ❖ In *Smt. Ranjana Chaudhari v. State Of U.P. & Another*, the accused was married, but promised to marry the victim once she turned 18. Once she found out about his marriage, she refused. However, he threatened to upload an intimate video of the victim.<sup>187</sup>
- ❖ In *Pachipala Prabhakara Rao, v. State Of Andhra Pradesh*, the accused told the victim, who was his colleague, that he loved her and wanted to marry her while suppressing that he was married. They engaged in sexual intercourse on his promise to marry her, and later, he got access to her intimate photographs. Once the victim got to know about the marital status of the accused, she wanted to complain to higher-ups but the accused shared the images on WhatsApp groups with their superiors to shame her. He also used a caste slur while sharing the image.<sup>188</sup>
- ❖ In *Ms X v. State & Ors.*, the case is related to the removal of web pages with sexual content. The victim had met the accused in school and became close friends. The accused was possessive of her, did not let her talk to others, and often snatched her phone to check messages. She alleged that the accused started emotionally blackmailing her and compelled her to send her intimate photographs to him. He

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<sup>186</sup> *Mrs. Rehana Begum v. The Inspector Of Police*, CrI.O.P.No.6642. (2021).

<sup>187</sup> *Smt. Ranjana Chaudhari v. State Of U.P. & Anr.*, CrI. Revision No. 4162. (2017).

<sup>188</sup> *Pachipala Prabhakara Rao v. State Of Andhra Pradesh*, CrI P. No.5736. (2019).

threatened that if she didn't, he would commit suicide. She succumbed to these tactics and sent him her intimate pictures. She states that the relationship with the accused was very abusive, and therefore, she broke up her relations with him. The accused threatened her and followed her to the place of her higher studies.<sup>189</sup>

- ❖ In *Mohammad Nasar v. The State Of Andhra Pradesh*, the accused took nude images of the victim during their intimate relationship and posted the same on social media. The victim filed a case; he threatened to release more pictures once released on bail and later uploaded additional images on a fake social media profile.<sup>190</sup>

As examined through multiple studies, victimization in intimate relationships are more common among women with lower levels of power in their relationships.<sup>191</sup> Further, with the advent of IoT - devices, applications, social media and internet platforms are used as tools of oppression by partners to cause harm.<sup>192</sup> Even if the victims increase their privacy settings or block such perpetrators, the degree of personal information shared through intimate relationships are higher as compared to interactions with strangers.<sup>193</sup> Threats and intimidation through the use of technology in order to assert control<sup>194</sup> over partners are prevalent among the cases of intimate partner violence.

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<sup>189</sup> Ms X v. State & Ors., W.P. (CrI.) 1089. (2020.)

<sup>190</sup> Mohammad Nasar v. The State Of Andhra Pradesh, CrI. P. No. 3125. (2020).

<sup>191</sup> Conroy, A. (2013). Gender, Power, and Intimate Partner Violence: A Study on Couples From Rural Malawi. *Journal of Interpersonal Violence*. 29(5) 866-888. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3946893/>

<sup>192</sup> Women's Aid. (n.d.). Online and digital abuse. <https://www.womensaid.org.uk/information-support/what-is-domestic-abuse/onlinesafety/>

<sup>193</sup> Anderson, J., & Lee, K. (2017). The Internet & Intimate Partner Violence: Technology Changes, Abuse Doesn't. *Strategies*. 16. <https://aequitasresource.org/wp-content/uploads/2018/09/The-Internet-and-Intimate-Partner-Violence-Technology-Changes-Abuse-Does-Not-Issue16.pdf>

<sup>194</sup> Freed, D., Palmer, J., Minchala, D., Levy, K., Ristenpart, T., & Dell, N. (2018). "A Stalker's Paradise": How Intimate Partner Abusers Exploit Technology. *CHI '18: Proceedings of the 2018 CHI Conference on Human Factors in Computing Systems*. Paper No. 667. 1-13. <https://doi.org/10.1145/3173574.3174241>.

### 3.4.3 Workplace Relationships

Sexual Harassment at the workplace is a form of violence where the perpetrator - who can be of any position at a workplace - becomes emboldened to exert a form of power to commit harassment.<sup>195</sup> Quid pro quo sexual harassment works on the premise of exerting power in exchange of a benefit at the workplace or to prevent harm at the workplace, thereby creating hostile workplaces for victims.<sup>196</sup> Such an example was found in our research as well.

- ❖ In *State v. Ajay*, the accused had drugged and sexually assaulted the victim, and a week later accused informed that he had made an intimate video of her and would release it or kill her if she complained.<sup>197</sup>

Harassment by a person in a position of power can have potentially significant harmful consequences for victims as opposed to being harassed by someone without power.<sup>198</sup> For instance, in a 2014 case before the Kerala High Court<sup>199</sup> known as *Crime No. 1021/2015 Of v. By Adv. Sri.Sasthamangalam*, two doctors had filmed the filmed delivery of babies and distributed it on social media, WhatsApp, and visual channels. The perpetrators who held a fiduciary position were respectively a gynecologist and an anesthesiologist – who eventually got bail for the case.

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<sup>195</sup> Karen HigginBottom. (2018, June 11). The Link Between Power And Sexual Harassment In The Workplace. *Forbes*. <https://www.forbes.com/sites/karenhigginbottom/2018/06/11/the-link-between-power-and-sexual-harassment-in-the-workplace/#3bf2baa8190f>.

<sup>196</sup> United Nations Women. (n.d.). *What is Sexual Harassment*. <https://www.un.org/womenwatch/osagi/pdf/whatish.pdf>

<sup>197</sup> *State v. Ajay*, Sessions Case No.285. (2013).

<sup>198</sup> Hango, D., & Moyer, M. (2018). *Harassment in Canadian workplaces*. Statistics Canada. <https://www150.statcan.gc.ca/n1/pub/75-006-x/2018001/article/54982-eng.htm>.

<sup>199</sup> *Crime No. 1021/2015 Of ... v. By Adv. Sri.Sasthamangalam Bail Appl. No. 7025*. (2014).

Abuse of power to control and sustain power inequalities have been a concern in many workplaces.<sup>200</sup> In 1992, Bhanwari Devi, a Dalit woman, who was a social worker employed with the Rural Development Programme of the Government of Rajasthan, was gang raped. This highlighted the extent of sexual harassment incidents in India's workplaces. It struck a chord with the nation and revealed the hazards faced by working women in the workplace. The writ petition was taken up in Supreme Court<sup>201</sup> - popularly known as the *Vishaka* case which introduced guidelines for sexual harassment at workplace. This was the foundation for the 2013 law known as The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act. It tried to account for the practical issues arising out of vertical [with managers, superiors] and horizontal [between colleagues] power dynamics. In *Apparel Export Promotion Council v. A.K. Chopra*<sup>202</sup>, the Supreme Court upheld the dismissal of a superior officer of the Delhi-based Apparel Export Promotion Council for sexual harassment. The court expanded the definition of sexual harassment to state that "physical contact is not always essential for an act amounting to workplace sexual harassment." This also plays a significant role these days as sexual harassment also can exist within the online public sphere and can be any 'unwelcome' act.<sup>203</sup>

Unsafe work environments where men hold positions of power over women and misuse the same lead to hostile work environments. Further, research shows how the intersection of gender and power in the workplace results in women being targets of harassment particularly when they step out of perceived gender norms, such as by moving into positions of authority and/or historically male occupations.<sup>204</sup> This has a resultant trickle down effect among the

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<sup>200</sup> Donnelly, G. (2018, 13 December). Anita Hill: Companies Should Treat Sexual Harassment as an Abuse of Power.. *Fortune*. <http://fortune.com/2018/12/12/anita-hill-sexual-harassment/>.

<sup>201</sup> *Vishaka & Ors. v. State of Rajasthan*, AIR 1997 SC 3011.

<sup>202</sup> *Apparel Export Promotion Council v. A.K. Chopra*, AIR 1999 SC 625

<sup>203</sup> Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act No. 14 of 2013. s. 2(o), <https://legislative.gov.in/sites/default/files/A2013-14.pdf>

<sup>204</sup> McLaughlin, H. Uggen, C., & Blackstone, A. (2012) Sexual Harassment, Workplace

entire work culture as can be seen from multiple Indian cases<sup>205</sup> including examples of *Tarun Jit Tejpal vs The State Of Goa*<sup>206</sup> or *Mobashar Jawed Akbar v. Priya Ramani*<sup>207</sup> as well as public narrations of hostile work cultures like Susan Fowler's experience at Uber.<sup>208</sup>

### 3.4.4 Teachers/Instructors and Students

At the heart of education, exists spaces historically rooted within systems of power. The role of a teacher or instructor in Indian culture comes from a form of authoritarianism where the student is placed in an inferior status or position to ensure that they receive a good education. Students are taught to hold teachers in a very high regard with utmost respect regardless of their competence or behaviour.<sup>209</sup> Our case study revealed to us instances where teachers, be it in schools or private tuitions, misused their position of power to inflict harm on their students, oftentimes minors.

- ❖ In *Sharat Babu Digumarti v. Govt Of Nct Of Delhi* , the accused took photos of the prosecutrix, a 16-year-old- whom he was supposed to be tutoring - holding a beer, and

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Authority, and the Paradox of Power. *American Sociological Review*.

<https://doi.org/10.1177%2F0003122412451728>.

<sup>205</sup> Vishaka v State of Rajasthan, 1997 6 SCC 241; Union of India & Ors v. Mudrika Singh LL 2021 SC 705; P.S. Malik vs. High Court of Delhi & Anr., W.P. (C) No. 705. (2018.) (Delhi High Court), Global Health Private Limited v. Local Complaints Committee, District Indore and Ors. 2020 LLR 40 (Madhya Pradesh High Court), Prasad Pannian v. The Central University of Kerala & Ors. 2021LLR384. (Kerala HC). These cases are related to the sexual harassment at the workplace, wherein the perpetrator stands at a higher position than the victim.

<sup>206</sup> Tarun Jit Tejpal v. The State Of Goa, Crl. Appeal No. 1246. (2019.) Arising out of S.L.P. (Crl.) No.1383. (2018).

<sup>207</sup> Mobashar Jawed Akbar v. Priya Ramani, Complaint Case No. 05 of 2019, decided on 17-02-2021.

<sup>208</sup> Fowler, S. (2017, 19 February.) Reflecting on one very, very strange year at Uber. *Susan Fowler*. <https://www.susanfowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber>

<sup>209</sup> Vanderbilt Centre for Teaching. (n.d.). *Critical View of Power & Authority*. Vanderbilt University. <https://my.vanderbilt.edu/femped/habits-of-heart/power-authority/>



then threatened her to release that photo on the internet if she didn't meet him. When she met the accused, he committed sexual assault on her.<sup>210</sup>

- ❖ In *State v. Lalit Kumar*, a tuition teacher, the accused, sexually harassed victim, a minor student, and sent her messages via phone and Facebook. The accused also threatened a witness with 'dire consequences' for backing the victim.<sup>211</sup>

In these cases, it is evident that apart from the misuse of the fiduciary position, threats and intimidation tactics have been used to solicit a coerced response from the student. A study by the Women and Equalities Committee of the UK Parliament reported in 2016 that “29% of 16–18-year-old girls had experienced unwanted sexual touching at school” (WEC 2016). In India, an analysis<sup>212</sup> of India's National Family Health Survey found over 10 million women in India were sexually abused by a teacher when they were in school. Routine sexual harassment from those with positions of authority, trust and power over students are common in India.<sup>213</sup> Further, public discussion of sexual matters, especially relating to children, is largely taboo, and such violence is a barrier to increasing girls' educational participation in India. Despite the child sexual abuse law in India addressing teachers<sup>214</sup> in particular, to address the coercive power they have over minor students, there exists very little protection to students from abuses of power in places like tuition centers where supervision is minimal and interactions

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<sup>210</sup> Sharat Babu Digumarti v. Govt of NCT of Delhi arising out of S.L.P. (CrI) No. 7675. (2015).

<sup>211</sup> *State v. Lalit Kumar*, S.C. No. 140. (2014)., F.I.R. No. 366 (2014).

<sup>212</sup> Crawford, L., & Hares, S. (2020, 6 March.) There's a Global School Sexual Violence Crisis and We Don't Know Enough About It. *Centre for Global Development Blog*. <https://www.cgdev.org/blog/theres-global-school-sexual-violence-crisis-and-we-dont-know-enough-about-it>.

<sup>213</sup> National Crime Records Bureau (NCRB) reveals a 400 per cent jump in cyber crimes against children in India in 2020 from the previous year. NCRB 2020 data reveals, there is a sharp rise (over 400 per cent) in cyber crimes (registered under the Information Technology Act) committed against children in comparison to the last year. In 2019, 164 cases of cyber crimes against children were reported while in 2018, 117 cases of cybercrimes were committed against children and 79 such cases were registered in 2017. 1. Choudhry, V., Dayal, R., Pillai, D., Kalokhe, A., Beier, K., & Patel, V.. (2018). Child sexual abuse in India: A systematic review. *PLoS One*. 13(10). <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6177170/>.

<sup>214</sup> National Institute of Public Cooperation and Child Development. (n.d.). *Handbook on Implementation of POCSO Act, 2012 for School Management and Staff*. <https://www.nipccd.nic.in/file/reports/pocso12.pdf>

are one-on-one.<sup>215</sup> Teachers and instructors have significant power over students. We witnessed a common trend where tuitions teachers used technology to shame adolescent girls into sexual activity with threats of ‘sharing on the internet’.

### **3.5 Finding 5: OGBV cases illustrate concerns of digital evidence and lack of understanding while issuing specific bail orders thus reflecting challenges arising due to emerging technology within the criminal justice system**

Cases of OGBV are governed by the criminal jurisdiction of courts. Most offences are recognized by the Indian Penal Code as well as the IT Act. In India, there isn’t a civil remedy that can be pursued in these cases. What this means is that the burden of proof – that is, the responsibility of the prosecution to prove a charge – required in these cases is much higher.<sup>216</sup> The role of evidence, thus, is key to prove the guilt of a perpetrator in these cases. However, given the high burden of proof needed to establish that the accused committed an offence through evidence<sup>217</sup>, several cases in our study were unable to meet this threshold in terms of proving an OGBV. For example, in *State v. Azhar Ali Bhutto*<sup>218</sup>, the judge notes that ‘*Mere suspicion, however strong or probable it may be, is no effective substitute for the legal proof required to substantiate the charge of commission of a crime and grave the charge is greater should be the standard of proof required.*” There are multiple challenges including bringing in expert

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<sup>215</sup> Huges, C. (2020). Addressing violence in education: From policy to practice. *PROSPECTS*, 48 23-38.  
<https://link.springer.com/article/10.1007/s11125-019-09445-1>.

<sup>216</sup> In criminal law cases, the burden of proof is expected to be “beyond reasonable doubt” of guilt of the accused, See University of Minnesota. (n.d.). Criminal Law. <https://open.lib.umn.edu/criminallaw/chapter/2-4-the-burden-of-proof/>.

<sup>217</sup> District Court Bhandara. (n.d.). Work-Shop Summary/Gist Of All The Papers Of First Workshop Held On 10th January, 2015. <https://www.studocu.com/in/document/karnataka-state-law-university/bba-llb/burden-of-proof-ffffffffffff/10952123>.

<sup>218</sup> *State v . Azhar Ali Bhutto*, Page No. 1/20. (2016).

testimony, relying on witnesses, offering the right documentary evidence, and more which continue to be hindrances to an effective outcome of justice. For instance, in the case of *State of Karnataka v. Sudeep*<sup>219</sup>, the prosecution failed to bring in an expert witness that was able to prove that the accused created a fake account. The court noted that, the “*prosecution has not showed any person in the list of witnesses, who is well versed in ascertaining the aspect as to in what way the fake account has been created and by using which IP address the alleged messages have been sent to PW-1 etc.*” In essence, evidence plays a key role in criminal cases, and in online gender-based offences, these are often digital in nature. There are unique challenges to electronic evidence that we noticed in our sample of cases, which have been discussed in section 3.5.

Aside from issues of evidence, another key theme that emerged from the study was bail-related concerns. From our research, it appears that a lot of cases of OGBV, especially at the High Court level, are at initial stages of bail, etc. These bail orders reflect the gap between the general understanding of gendered online violence vis-a-vis actual impact. While bail in criminal cases has to be the rule, there are elements of bail conditions that may be necessary in cases of online violence to reduce harm. To summarize, based on the insights from the 34 cases which included bail, anticipatory bail and some trial cases, we were able to identify two main issues in cases of OGBV:

1. Difficulty in access and admission of digital evidence.
2. Sexist bail reasonings and bail conditions which did not keep the online public sphere in mind.

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<sup>219</sup> *State of Karnataka v. Sudeep or (Represented By The Learned App) v. For The Offences Punishable Under 1 C.C. 5747. (2021).*

### **3.5.1 Courts do not uniformly recognize digital evidence in OGBV cases and often reject cases at a preliminary level because of certification requirements**

The foundation for a sound criminal trial rests on the evidence produced to prove charges against the accused. This evidence can be both oral – through witness statements – or documentary. The Indian Evidence Act, 1872, included the electronic records within the definition of evidence in 2000, after the Information Technology Act was enacted.<sup>220</sup> This has had a far reaching impact, and continues to become more relevant in today’s rapidly digitizing world.

Digital evidence or electronic evidence is crucial in cases of OGBV, since the record of the wrongdoing or harm caused is captured on a device or the internet alone. Through the course of this study, we found several trial court cases where digital evidence played a role. The challenges faced while introducing digital evidence have been captured below.

The adage “the Internet never forgets” has become a common one.<sup>221</sup> However, when it comes to evidentiary value in the Indian context, the collective memory of the internet seems to be valid only if the original computer source is produced (primary evidence), or secondary evidence – copies of the electronic record printed on paper, stored, recorded or copied in CDs, etc – supported by a certificate under Section 65B of the Indian Evidence Act is provided. The expanse of these provisions, especially Section 65B, is such that the Supreme Court has referred to the provision as a “complete code in itself”.<sup>222</sup> The text of Section 65B(4), which specifically deals with the certificate, is given below.

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<sup>220</sup> Note: The erstwhile Section 92 and Second Schedule of the Information Technology Act, 2000, made all relevant amendments to the Indian Evidence Act to include digital records. .

<sup>221</sup> A Google search of the phrase offers ~79,50,000 results.

<sup>222</sup> Anvar P.V. v. P.K. Basheer, Civil Appeal No. 4226. (2012).

*In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say, --*

*(a) identifying the electronic record containing the statement and describing the manner in which it was produced;*

*(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;*

*(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,*

*and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.*

How electronic evidence needs to be produced before courts, especially with regard to the requirement of the certificate under Section 65B(4), has now been settled through two important Supreme Court cases – *Anvar v. Basheer*<sup>223</sup> (2014) and the more recent *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal*<sup>224</sup> (2020). In the first instance, a case of electoral impropriety, the failure to provide this certificate rendered all of the evidence adduced invalid. The Supreme Court stated that this could have been avoided by including the original or primary evidence, “by making available evidence, the CDs used for announcement and songs (of alleged objectionable content).” The Supreme Court, in *Anvar*, clarified that the process for producing the Section 65B(4) certificate was to ensure the source and authenticity of the electronic evidence, given that digital evidence is “more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof

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<sup>223</sup> *Anvar P.V. v. P.K. Basheer*, Civil Appeal No. 4226. (2012).

<sup>224</sup> *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal*, Civil Appeal Nos. 20825-20826. (2017.)

of electronic records can lead to travesty of justice.” The second case, *Arjun Panditrao Khotkar*, clarified the position of the certificate as being necessary and to only apply in cases of secondary evidence. It also overturned the decision<sup>225</sup> in an earlier case, *Shafhi Mohammad v. State of Himachal Pradesh*<sup>226</sup>, which was decided by a smaller bench of the Supreme Court. The Supreme Court, in *Arjun Panditrao Khotkar*, established that especially in cases where a certificate is demanded but not provided by an authority or person, the requesting party can apply to the court to receive this certificate. Additionally, it noted the power of courts under the Code of Criminal Procedure (CrPC) to direct that the Section 65B(4) certificate be produced, to enable accessing the electronic evidence.

It’s also interesting to note that this provision is drawn from Section 5 of the UK Civil Evidence Act 1968.<sup>227</sup> This provision was repealed in the UK in 1995.<sup>228</sup> From that perspective, the Indian law, included by an amendment nearly 20 years ago, before the recent technological updates, is quite antiquated – especially where it refers to the source computer which was used to generate and process this information. Although court decisions and interpretations have granted clarity, it cannot compare to the more updated provisions, as seen, for example, in the US Federal Rules of Evidence, that saw an amendment in 2017, according to the Supreme Court.<sup>229</sup> *Khotkar*’s concurring decision by Justice Ramasubramanian notes that the recent amendments as in the case of the US evidentiary rules have ensured that “a lot of options have been made available to litigants seeking to rely upon electronically stored information...This

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<sup>225</sup> *Shafhi* held that the certificate would not be required if the evidence was introduced by a party not in possession of the device from which the record is produced. “The applicability of requirement of certificate being procedural can be relaxed by Court wherever interest of justice so justifies,” the court had noted.

<sup>226</sup> *Shafhi Mohammad v. State of Himachal Pradesh*, S.L.P. (CrL.) No. 2302. (2017.)

<sup>227</sup> Rules of evidence in criminal proceedings are governed by Police and Criminal Evidence Act, 1984.

<sup>228</sup> Repealed by the UK Civil Evidence Act, 1995.

<sup>229</sup> The amendment to the US Federal Rules of Evidence in 2017 clarified the self-authentication of several documents, including a “certified records generated by an electronic process or system” and “certified data copied from an electronic device, storage medium, or file” when appropriate certification was produced by a qualified person, as well as the requirement to give notice to the other party of such electronic record being produced.

development of law in the US demonstrates that, unlike in India, law has kept pace with technology to a great extent.”

For the purposes of our study, we reviewed the trial court cases across Delhi and Bengaluru district courts within our sample to understand the role of digital evidence and the law governing it. Our set of cases provided us 17 trial court decisions of online gender-based evidence which dealt with digital evidence. Through these cases, we noticed the following trends, which will be detailed in the following pages.

- Cases where no certificate was asked for
- Cases where the court dismissed evidence for lack of a certificate
- Cases where digital evidence was not considered

It must be noted that there were a few cases where the Section 65B certificate was duly produced and the evidence considered. These have not been included below for the sake of brevity.

#### 3.5.1.1 Cases where no certificate was asked for

Out of our set of trial court cases, courts reviewed the digital evidence in four cases, but did not require the certificate under Section 65B(4).<sup>230</sup> This was in keeping with the requirement that in case of primary electronic evidence being produced, like mobile phones or computers, no certificate would be required. This reflects the position established by *Anvar v. Basheer* in 2014, that only secondary electronic evidence will need the certificate. This is a straightforward position of law and as such, causes no concerns for the judicial process in cases of OGBV.

#### 3.5.1.2 Cases where the court dismissed evidence for lack of Section 65B(4) certificate

This section refers to cases where because of lack of the requisite certificate, the electronic evidence was not considered by the court. The landmark case of *Arjun Panditrao Khotkar* emphasizes the role and power of courts within the CrPC to call for such evidence. However,

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<sup>230</sup> CBI v. Harinder Singh, CrI. Appeal No. 200. (2017.); State v. Deepak, S.C. No. 9419. (2016.); State v. Kartik Kuila, S.C. Nos. 19. (2014). & 1242 (2016); State v. MG Suni, New Case No. 63. (2016.)

the cases in our study did not have any such examples – likely also because these were pre-2020 cases, i.e. before *Khotkar* was decided.

- In *State v. Lalit*<sup>231</sup>, where the accused was charged with harassing a minor by calling her and sending messages, photocopies of the messages, and call detail records of a particular mobile number were not considered by the court for lack of an accompanying Section 65B(4) certificate. The court, in fact, notes that the investigation was shoddy and the investigating agency “tried to give benefit to the accused”, but does not do anything further. The accused was acquitted of all charges.
- In the case of *State by Sampigehalli Police Station, Bengaluru v. Faiz Ahamed*<sup>232</sup>, the accused was charged with taking intimate photographs of the survivor who was unconscious at the time after consuming a spiked drink. The accused subsequently asked to marry the survivor, but when her father refused, he threatened the father and sent him a naked photo of his daughter. The electronic evidence was provided through CDs, copies of email, color photocopies of the photographs, and print-outs. The trial court noted the absence of the certificate under Section 65B(4) for secondary evidence of this nature, and dismissed the evidence as per the ruling in *Anvar v. Basheer*. The accused was acquitted in this case.

These examples show that a procedural issue related to a certificate on digital evidence caused the cases to be decided differently and indicates a key concern in delivery of justice. “The production of secondary electronic evidence in courts of law should not be prohibitively difficult for victims of technology-mediated VAW (violence against women).”<sup>233</sup> The certification required under Section 65B(4) has been mandated to ensure authenticity of the document provided, but can hinder the process of the trial altogether. This requires course

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<sup>231</sup> State v. Lalit S.C. No. 140. (2014.)

<sup>232</sup> State by Sampigehalli Police Station, Bengaluru v. Faiz Ahamed C.C. No. 5392. (2012.)

<sup>233</sup> Gurumurthy, A., Vasudevan, A., & Chami, N. (2018). *Examining Technology-Mediated Violence against Women through a Feminist Framework: Towards Appropriate Legal-Institutional Responses in India*. IT for Change <https://itforchange.net/e-vaw/wp-content/uploads/2018/03/ITFC-DISCUSSION-PAPER.pdf>.



correction, and to some extent, the *Khotkar* decision is able to do that by focusing on the court's power to summon evidence and the certificate to arrive at a just decision.

### 3.5.1.3 Cases where digital evidence was not considered

In a few cases, despite the presence of electronic evidence, the court did not consider the same. In cases of OGBV, this approach is harmful since the site of the commission of the offence is more easily accessible in these cases. When such evidence is ignored, it does not serve the purpose of justice.

- In *State v. Ajay*<sup>234</sup>, a case with charges of rape, intimidation, and creation and sharing of an intimate video, the focus of the case was completely on physical evidence, and oral testimonies. The electronic evidence, which was a video taken on a mobile phone, was not discussed as such in the court's order, aside from mentions in the oral testimonies.
- The complaint in *State v. Narender Singh*<sup>235</sup> was about criminal intimidation and sending an "obscene message" and uploading "obscene content" on the survivor's profile. However, the court order does not refer to any of these in its order acquitting the accused. This could also be in part because of the prosecution failing to include these in the evidence. The prosecution only had four witnesses – two public witnesses, an aid to the investigating officer, and the duty officer. Even the survivor was not examined by the prosecution.

These instances show that even in cases where there is a digital trail of evidence in the form of a video, message, or photograph, courts are not always focused on them. In some cases, like the first one above, the physical offence takes precedence over the digital offence. In others, like the second, the prosecution is unable to help the court with the evidence, and the court

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<sup>234</sup> *State v. Ajay*, Sessions Case 285. (2013).

<sup>235</sup> *State v. Narender Singh*, F.I.R. No. 880. (2007).

also only acts in its role as a neutral arbiter, rather than pushing itself to ask for requisite evidence for effective adjudication.

### **3.5.2 With advances in technology, courts will have to grapple with the definition of primary and secondary digital evidence in OGBV cases**

A significant question in today's highly digital world, then, is what constitutes primary and secondary evidence in the case of electronic evidence. Seemingly the answer is straightforward - if one can produce the original laptop or mobile, then that's primary evidence, but print outs and other recordings of a computer output are considered secondary.

The Punjab and Haryana High Court, in *Rakesh Kumar Singla v. Union of India*<sup>236</sup>, refused to accept screenshots of WhatsApp messages without a Section 65B certificate. This raises interesting questions - would having the mobile phone where the WhatsApp number is active be primary evidence? Would using WhatsApp Web to access messages from any laptop make the evidence primary? What happens, say, in the case of a deep fake of a woman in India that is created in one location outside the territory of India, bounced off several servers, and accessible on the internet across multiple jurisdictions? Would all versions of the deep fake be considered primary evidence if shown on a computer, which is not the original computer? How should this be classified - these may be questions that courts have to grapple with in the coming years.

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<sup>236</sup> *Rakesh Kumar Singla v. Union of India*, Crl.M.M. No. 23220. (O&M). (2020).

The Supreme Court, in *Khotkar*, directed framing of rules on retention of data in trial cases, as well as, for preservation, retrieval, and production of electronic record, under Section 67C<sup>237</sup> of the IT Act. These have not been done yet. Justice Ramasubramanian, in his concurring decision in *Khotkar*, also called for a review of Section 65B of the Indian Evidence Act, given that it had been 20 years since its introduction. It is also important that the law keeps up with technological advances, rather than continue to play catch up overtime thereby impeding access to justice.

### **3.5.3 Courts need to revisit how to impose bail orders which acknowledge the online public sphere as well as the use of technology in OGBV cases**

Bail, in law, means procurement of release from prison of a person awaiting trial or an appeal, by the deposit of security to ensure his submission at the required time to legal authority.<sup>238</sup> The Code of Criminal Procedure, 1973 has defined offences under law into two categories - bailable and non-bailable offences.<sup>239</sup> Most of the offences under the Indian Penal Code, 1860

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<sup>237</sup> Preservation and retention of information by intermediaries. The Information Technology Act. No. 21 of 2000. s. 67C. [https://www.indiacode.nic.in/bitstream/123456789/13116/1/it\\_act\\_2000\\_updated.pdf](https://www.indiacode.nic.in/bitstream/123456789/13116/1/it_act_2000_updated.pdf).

<sup>238</sup> Sreenu, M. (2017.) *Bail, Anticipatory Bail, Mandatory Bail & Bail After Conviction*. <https://districts.ecourts.gov.in/sites/default/files/6-Bail%20Anticipatory%20Bails%20-%20Sri%20M%20Sreenu.pdf>.

<sup>239</sup> Bailable offence means an offence which is shown as bailable in the First Schedule of the Code of Criminal Procedure 1973 or which is made bailable by any other law in force. Bailable offences are regarded as less grave and less serious. For bailable offences, getting bail is a right and the accused can directly enforce this right. However, as a condition for release, the person needs to give security/money to the court, which assures the court that the accused will appear before the court whenever required, and will not commit any crimes outside prison.

that are used in OGBV are bailable in nature with the exception of Section 354 (assault or criminal force to woman with intent to outrage modesty) which is used commonly in cases of sexual harassment.<sup>240</sup>

Most of the cases we studied in this report were criminal cases, which went on to the appeal stage to the High Courts as regular or anticipatory bail applications. The common underlying trend we witnessed included the receptive structures of bail conditions which were granted to the accused and the nature of reasonings provided for bail applications to justify the same. One prominent observation that we noted was the sexist and patriarchal reasonings given by Courts to grant bail as well as the bizarre conditions imposed on the accused while granting such bail. The sexism or judicial stereotyping in the bail reasonings was obvious through the focus on the character of the complainant as opposed to the behavior of the accused or description of the crime committed. These observed trends, are captured in the cases give below to indicate how sexism within bail orders is pervasive and how a procedural function such as bail has also been clouded by biases, which often leads to a miscarriage of justice for the survivor.

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The court usually fixes a standard threshold monetary amount to grant bail for various offences. In some cases, where the accused does not have the bail money, the court may also grant bail based on a personal bond, which is a personal promise the accused makes. Non-Bailable Offence means any other offence where bail is not a matter of right. For non-bailable offences, getting bail depends on the discretion of the court. The possibility that a court will grant bail to the accused depends on various factors. The court considers gender, health and age while granting bail.

<sup>240</sup> Other non-bailable crimes are noted in the First Schedule of the Code of Criminal Procedure Act No. 2 of 1974. s. 437(1). <https://districts.ecourts.gov.in/sites/default/files/classification.pdf>. Non-bailable offences (committed against the body) include: (1) Murder (s. 302, I.P.C.), Dowry death (304 B) , (2) Abetting the commission of suicide (s. 306, I.P.C.), Attempt to murder(s. 307 I.P.C.) (3) Attempt to commit suicide (s. 309, I.P.C.), (4) Causing miscarriage without woman's consent (s. 313, I.P.C.), (5) Assault or criminal force to woman with intent to outrage her modesty (s. 354, I.P.C.), (6) Kidnapping for ransom (s. 364A, I.P.C.), (7) Rape (s. 376, I.P.C.), (8) Gang Rape (s. 376D, I.P.C.), (9) Unnatural Offences (s. 377, I.P.C).

In the table given below we have noted the reasons and conditions given by courts across various bail orders. Some were based on the principles of bail reasonings as mentioned above, while others are cases where Courts placed bizarre conditions based on manifestly patriarchal/sexist reasonings.

Case Name	Brief Facts	Bail Status	Bail Conditions	Reasons
Chhotel al v. The State Of Madhya Prades, 2019	The applicant allegedly took the prosecutrix's mobile phone, removed the memory card, and did not return it on her request. Later, he made a fake facebook account and uploaded objectionable photographs of prosecutrix on that account,	Granted	1. Applicant to furnish personal bond of Rs.30,000/-  2. The applicant shall abide by the conditions as enumerated under Section 437(3) of the Cr.P.C.	The applicant is a <b>young boy</b> who has no criminal antecedents.

	<p>leaving it open so that the public could view the photographs. It is the case of the applicant that he has been falsely implicated and has been in custody for two weeks.</p>			
<p>Vikash Rajak v. The State of Madhya Pradesh, 2021</p>	<p>The accused/applicant is accused of having made a fake facebook ID and circulating the same to defame the prosecutrix/victim. It is the case of the applicant that he has been</p>	<p>Granted</p>	<p>1. Bail bond of Rs. 1,00,000/-</p> <p>2. The applicant will cooperate in the trial;</p> <p>3. He will not indulge himself in extending inducement, threat or promise to any person acquainted with the fact of the case to dissuade him from disclosing such facts to the Court or to the Police Officers;</p>	<p>The accused has been in jail for 5 months, has no criminal antecedent, charge-sheet has been filed, there is no probability of his absconding or tampering with the prosecution evidence, the trial will take sufficient time for final disposal due to the pandemic, so it is not appropriate to keep the applicant in jail during whole trial.</p>

	falsely implicated.		<p>4. He will not commit any similar offence;</p> <p>5. He will not seek unnecessary adjournments during the trial; and</p> <p>6. He will not leave India without previous permission of the Court</p> <p>In view of the outbreak of 'Corona Virus disease (COVID-19)' the applicant shall also comply the rules and norms of social distancing.</p>	
Sajeev v. State of Kerala, 2019	The petitioner is accused of having taken the mobile phone of the de facto complainant and copying the photos from it, to subsequently	Granted	<p>1. Bail bond of Rs. 50,000/-</p> <p>2. The petitioner shall not be involved in any criminal offences of similar nature.</p> <p>3. The petitioner shall fully co-operate with the investigation.</p>	The Court stated that mere use of abusive words will not by itself will not attract the offence as envisaged in Sec.294(b) of the IPC and also that the criminal defamation cannot be prosecuted on the basis of Police charge sheeted case and same can be maintained on the private criminal complaint of the person, who is personally aggrieved by

	threaten her that the photos will be morphed and published on social media. According to the petitioner, he was on friendly terms with the complainant.		<p>4. The petitioner shall report before the Investigating Officer as and when required in that connection.</p> <p>5. The petitioner shall not influence witnesses or shall not tamper or attempt to tamper evidence in any manner whatsoever.</p>	the defamation. The Court made the observation that “ <b>It appears that the petitioner is a married man. So also the lady de facto complainant is also a married woman.</b> ” Based on the facts and circumstances, the Court inclined to consider the plea for anticipatory bail.
Abrar Yusuf Pandro wala v. The State of Karnataka, 2020	The accused was in a live-in relationship with the complainant for the last two months. Due to his harassment, the complainant shifted to Bengaluru and stopped all contact with	Granted	<p>1. The petitioner accused shall surrender himself before the Investigating Officer within seven days of the date of receipt of the order and shall execute a personal bond for a sum of Rs. 1,00,000/- (Rupees one lakh only) with one surety.</p> <p>2. The petitioner shall appear before the Investigating Officer every day between 10:30</p>	<p>The alleged offence took place on 13.02.2020 and though the complainant claimed that she had lodged a complaint on 14.02.2020, the complaint actually was filed on 21.02.2020 as per the records. The complainant’s allegation that the accused attempted to have sexual intercourse with her is inconsistent with the medical records furnished by the High Court Government Pleader.</p> <p>The petitioner placed on record WhatsApp chat between the</p>



	<p>him. The accused barged into her house, forcibly snatched her personal phone and when she resisted, beat her brutally and sexually assaulted her. The accused misused her personal data and leaked her private pictures, chats, and personal information to various people. The complainant further alleged that the accused also transferred a sum of Rs.61,000/-</p>		<p>a.m. and 2:00 p.m. until the conclusion of the investigation and shall cooperate with the Investigating Officer in concluding the investigation.</p> <p>3. The petitioner shall not tamper with the prosecution witnesses or destroy any prosecution material.</p> <p>4. The petitioner shall not intimidate or confront or threaten the complainant.</p> <p>5. The petitioner shall not leave the jurisdiction of the Trial Court without prior permission of the Court until the conclusion of the investigation.</p>	<p>petitioner and the complainant and a few photographs which indicate the intimate relationship. However, this in itself cannot be set up as a defense, against a woman who claims to have cut off all relationship with the petitioner.</p>
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	from her bank account to the account of the accused through a mobile banking app.			
Keshav Kumar @ Raja Choudhary v. The State of Bihar, 2020	There was a previous dispute between the husband of the informant and the accused. The petitioner along with the co-accused fraudulently created a fake Facebook account of the informant and uploaded her picture along with some other persons depicting the woman as	Granted	1. Bail bond of Rs. 10,000/-.	Based on the facts and circumstances, the Court has granted bail.

	immoral. It is the case of the petitioner that he has been falsely implicated and has been in custody for 3 months.			
Anand Mohan v. The State of Bihar, 2021	The informant is a married lady and has two children. She developed a friendship with the petitioner about three years ago through Facebook. On 12.03.2019 petitioner called her on the eve of the marriage of his sister. At about 11:00 in the	Granted	<ol style="list-style-type: none"> <li>1. Bail bond of Rs. 10,000/-</li> <li>2. Compliance with conditions as laid down under Section 438(2) of the Code of Criminal Procedure.</li> </ol>	The Court stated that the victim, <b>who is a married woman</b> , developed friendship with the petitioner and on his request, she went to the house of the petitioner on the eve of marriage of his sister where she alleged that the petitioner along with his brother-in-law forcibly established physical relation with her. The prosecutrix did not inform the police. <b>She kept mum and allowed the petitioner to have physical relation for more than a year before filing the case. The Court said that it appears that the prosecutrix who is a major married lady had consensual sex with the</b>

	<p>night, the petitioner gave a cold drink to the informant and after consuming it, she became unconscious. Thereafter, the petitioner and his brother-in-law established physical relations with her and video recorded it. She further alleged that Anand Mohan blackmailed her and also extracted Rs.5 lacs. They also threatened to kill her and her children. The petitioner alleges that</p>			<p><b>petitioner</b> although the petitioner denied the allegation.</p>
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	<p>they were in a consensual relationship.</p> <p>The informant filed the case for rape after more than one year only to extract money from the petitioner and pressurize him to marry.</p>			
<p>Dharmendra Babubhai Chamthai v. State of Gujarat, 2020</p>	<p>The present application has been filed seeking bail in the case registered for offences punishable under Sections 354C, 498(A), 500, 504, 509 read with 114 of the Indian</p>	<p>Granted</p>	<ol style="list-style-type: none"> <li>1. Bail bond of Rs. 10,000/-</li> <li>2. The applicant shall not take undue advantage of liberty or misuse liberty;</li> <li>3. He shall not act in a manner injurious to the interest of the prosecution;</li> <li>4. He shall surrender passport, if any, to the</li> </ol>	<p>The present applicant was not named in the original FIR. The case is based upon the documentary evidence i.e., electronic record of WhatsApp in mobile phone and alleged mobile phone has been recovered from the main accused and mobile phone of present applicant was also recovered by the police on the day of his arrest. Husband of the prosecutrix is the cousin of the</p>

	Penal Code and Sections 66E, 67 and 67A of the Information Technology Act, 2000.		<p>lower court within a week;</p> <p>5. He shall not leave the State of Gujarat without prior permission of the Sessions Judge concerned;</p> <p>6. He shall furnish latest and permanent address of residence to the Investigating Officer and also to the Court at the time of execution of the bond and shall not change the residence without prior permission of the learned Sessions Court concerned;</p>	applicant. There is no evidence against the present applicant.
Sri Rakesh B v. State of Karnataka, 2020	The complainant has alleged that she was subjected to rape on the false promise of marriage.	Granted	<p>1. Bail bond of Rs.1,00,000/- (Rupees one lakh)</p> <p>2. Petitioner shall cooperate in the investigation/further investigation at all times and appear before the</p>	<p>1. The Court said that even though the offences are of a serious nature, seriousness alone is not the criteria to deny liberty to the citizen when there is no prima facie case from the side of the State Police.</p> <p>2. The Court finds it hard to believe the complainant's</p>

		<p>jurisdictional police, if &amp; when, so directed;</p> <p>3. He shall not leave the jurisdictional limits of the trial Court without its prior permission;</p> <p>4. He shall mark his attendance in the jurisdictional Police Station every second and fourth Saturday of the calendar month between 9.00 am and 3.00 pm;</p> <p>5. He shall not tamper the evidence or influence/deter the witnesses/victims; nor shall he do anything prejudicial to peace &amp; order in the civil society;</p> <p>6. It is open to the jurisdictional police or the complainant to seek cancellation of bail if and when the petitioner commits breach of any of the above conditions or</p>	<p>allegation of rape given there is a letter allegedly written by the complainant to the effect that she was ready to withdraw the complaint if a compromise is brought about, especially when the complainant had employed the services of the petitioner for the last two years or so. <b>She should have come to the Court when the petitioner was allegedly forcing her for sexual favours.</b></p> <p>3. The Court has also questioned why she went to her office at night i.e., 11.00 p.m.; <b><i>“she has also not objected to consuming drinks with the petitioner and allowing him to stay with her till morning; the explanation offered by the complainant that after the perpetration of the act she was tired and fell asleep, is unbecoming of an Indian woman; that is not the way our women react when they are ravished”</i></b></p>
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			perpetrates any offence hereafter.	4. The Court also stated that it had to consider the threat of infection to the detenues in prison due to COVID-19.
Rajesh v. The State of Madhya Pradesh , 2019	The complainant lodged the FIR against the petitioner alleging that she received a threatening call from the petitioner (bail applicant) demanding Rs. 50,000/- otherwise objectionable material will be uploaded on the website. After the investigation, it was found that the mobile belonged to the	Granted	1. Personal bond of Rs. 50,000/- and future good conduct.  2. He shall abide by all the conditions enumerated under Section 437(3) of the Cr.P.C .	The Court granted bail since the complainant turned <b>hostile</b> .



	<p>applicant and he was arrested. The application has been filed after recording the statement of the complainant in which she has turned hostile and she has denied that the photographs available in the case-diary belong to her. The Public Prosecutor for the State opposed the application by submitting that the photo was sent from the mobile of the applicant, but the</p>			
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	complainant has turned hostile.			
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### 3.5.3.1 Reasoning for Bail Orders

Unlike the Magistrate's court, which has limited powers for granting bail, High Courts have broad powers and can grant bail for all offences.<sup>241</sup> In *Rao Harnarain Singh v. State of Punjab*<sup>242</sup>, it was observed that Courts have to consider several factors while granting bail including the enormity of the charge, the nature of accusation, severity of the punishment which the conviction will entail, nature of evidence in support of the accusation, danger of the applicant absconding if released on bail, danger of witnesses being tampered with, protracted nature of the trial, opportunity to the applicant to prepare for his defence and access to a lawyer, and the health, age and sex of the accused. The Supreme Court in *Gudikanti Narasimhulu v. Public Prosecutor*<sup>243</sup> also held that the previous criminal history of an accused must factor in while granting bail. While granting bail to an accused, the court also imposes certain conditions on the accused which are to be complied with, and the violation of the same would result in the cancellation of the bail.

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<sup>241</sup> The power of a Magistrate to grant bail in cases of non bailable offences is restricted if the offence is punishable with death or imprisonment for life.

<sup>242</sup> *Rao Harnarain Singh v. State of Punjab*, AIR 1958 P&H 123.

<sup>243</sup> *Gudikanti Narasimhulu and Ors. v. Public Prosecutor*, High Court of Andhra Pradesh, 1978 SCR (2) 371.

The immense discretion that courts have in granting or denying bail to an accused in cases of non-bailable offences also comes with a certain cost.<sup>244</sup> The usual bail order looks like a facsimile of the same manuscript enlisting a few platitudinous conditions.<sup>245</sup> But every once in a while, a bail order is passed containing some bizarre bail conditions. In July 2020, in the case of *Vikram v. State of Madhya Pradesh*, a bail order caused quite a furore when the Madhya Pradesh High Court ordered the accused to get a rakhi tied by the complainant as a bail condition.<sup>246</sup> Almost a year later, the Supreme Court in *Aparna Bhat v. State of Madhya Pradesh*<sup>247</sup> set aside the paternalistic and manifestly sexist order, while also issuing a set of guidelines for Courts to follow while dealing with sexual crimes:

*“(a) Bail conditions should not mandate, require or permit contact between the accused and the victim. Such conditions should seek to protect the complainant from any further harassment by the accused;*

*(b) Where circumstances exist for the court to believe that there might be a potential threat of harassment of the victim, or upon apprehension expressed, after calling for reports from the police, the nature of protection shall be separately considered and appropriate order made, in addition to a direction to the accused not to make any contact with the victim;*

*(c) In all cases where bail is granted, the complainant should immediately be informed that the accused has been granted bail and copy of the bail order made over to him/her within two days;*

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<sup>244</sup> Satish, M. (2017). *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India*. (p. 19). Cambridge University Press.

<sup>245</sup> The Code of Criminal Procedure Act, 1973 No. 2 of 1974. s. 437(3).  
<https://legislative.gov.in/sites/default/files/A1974-02.pdf>.

<sup>246</sup> *Vikram v. The State of Madhya Pradesh*, M.Cr.C. 23350. (2020).  
[https://www.livelaw.in/pdf\\_upload/pdf\\_upload-379375.pdf](https://www.livelaw.in/pdf_upload/pdf_upload-379375.pdf) >

<sup>247</sup> *Aparna Bhat v. State of Madhya Pradesh*, 2021 SCC OnLine SC 230.

*(d) Bail conditions and orders should avoid reflecting stereotypical or patriarchal notions about women and their place in society, and must strictly be in accordance with the requirements of the Cr. PC. In other words, discussion about the dress, behavior, or past “conduct” or “morals” of the prosecutrix, should not enter the verdict granting bail;*

*(e) The courts while adjudicating cases involving gender related crimes, should not suggest or entertain any notions (or encourage any steps) towards compromises between the prosecutrix and the accused to get married, suggest or mandate mediation between the accused and the survivor, or any form of compromise as it is beyond their powers and jurisdiction;*

*(f) Sensitivity should be displayed at all times by judges, who should ensure that there is no traumatization of the prosecutrix, during the proceedings, or anything said during the arguments, and*

*(g) Judges especially should not use any words, spoken or written, that would undermine or shake the confidence of the survivor in the fairness or impartiality of the court.”*

These orders listed above make it abundantly clear that there are several extraneous considerations while considering applications for bail, both regular and anticipatory. In *Sajeev v. State of Kerala*<sup>248</sup> as well as in *Anand Mohan v. The State of Bihar*<sup>249</sup>, the “married” status of the woman has significantly played a role in granting bail. As mentioned in the earlier chapter on Unpacking Sexism, Misogyny and Patriarchy in courtrooms, controlling women through social structures of marriage is deeply ingrained in society and is often reflected in courtrooms as well.<sup>250</sup> *Sri Rakesh B v. State of Karnataka*<sup>251</sup> also goes on to question the conduct of an Indian

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<sup>248</sup> *Sajeev v. State of Kerala*, Bail Appl. No. 6954. (2013).

<sup>249</sup> *Anand Mohan v. The State of Bihar*, Crl. M. No.35856 (2020).

<sup>250</sup> Gurumurthy, A., Vasudevan, A., & Chami, N. (2019). *Born digital, Born free? A socio-legal study on young women's experiences of online violence in South India*. IT for Change.

[https://itforchange.net/sites/default/files/1662/Born-Digital\\_Born-Free\\_SynthesisReport.pdf](https://itforchange.net/sites/default/files/1662/Born-Digital_Born-Free_SynthesisReport.pdf).

<sup>251</sup> *Sri Rakesh B v. State of Karnataka*, Crl. P. No. 2427. (2020).

woman by stating that *“she has also not objected to consuming drinks with the petitioner and allowing him to stay with her till morning; the explanation offered by the complainant that after the perpetration of the act she was tired and fell asleep, is unbecoming of an Indian woman; that is not the way our women react when they are ravished”*. The *Aparna Bhat* case aimed to address this exact question - judicial stereotyping of women in adjudication of cases. It cautioned that *“the use of reasoning/language which diminishes the offence and tends to trivialize the survivor, is especially to be avoided under all circumstances. Thus, the following conduct, actions or situations are hereby deemed irrelevant, e.g. - to say that the survivor had in the past consented to such or similar acts or that she behaved promiscuously, or by her acts or clothing, provoked the alleged action of the accused, that she behaved in a manner unbecoming of chaste or “Indian” women, or that she had called upon the situation by her behavior, etc. These instances are only illustrations of an attitude which should never enter judicial verdicts or orders or be considered relevant while making a judicial decision; they cannot be reasons for granting bail or other such relief.”*

#### 3.5.3.2 Conditions for Bail

On similar lines, particularly keeping in mind OGBV offences, the discourse in the manner of imposing bail conditions requires a revisit. Through our cases, we were able to see that a similar format or general trend of conditions were repeatedly used, not accounting for the online public sphere and the role of technology in mediating the violence. These general conditions or similar formats include:

- Abiding by specified restrictions on personal associations, place of abode, or travel;
- Avoiding all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offence;

- Reporting on a regular basis to a designated law enforcement agency;
- Refraining from possessing and surrendering if in possession of any firearm, ammunition, destructive device, or other dangerous weapon;
- Undergoing available medical, psychological, or psychiatric treatment, and remaining in a specified institution if required for that purpose;
- Satisfying any other condition that is reasonably necessary to secure the appearance of the person as required, and to ensure the safety of any other person and the community
- Surrendering of passport or travel document in the possession of the accused. In case the accused does not have one, he may be prohibited from obtaining one;
- Seeking or maintaining employment or entering into any educational programme;
- Refraining from attending such premises or any other place as the court may specify;
- Abiding by any restriction on travel or movement; or
- Abiding by specific restrictions on speech and expression

None of the cases had any peculiar condition pertaining to the internet, social media platforms, or technology/communication devices. Bail orders do not seem to have been yet customized to the unique requirements of cases of OGBV. This is not to say that courts aren't cognizant of use of social media or placing restrictions on the same, especially when they are of a political nature. Courts have often shown a keen sense of creativity in bail orders in cases that do not have an aspect of gendered violence. The Madras High Court in *Jabin Charles v. State of Tamil Nadu*<sup>252</sup> in 2019 imposed a condition of staying away from social media for one year for granting anticipatory bail to a Tamil Nadu resident who was booked for an alleged derogatory Facebook post against the Indian Prime Minister. However, this move was criticized as a violation of citizens' fundamental right to free speech. Such peculiar bail orders are not unique to the

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<sup>252</sup> Jabin Charles v. State of Tamil Nadu, CrI. O.P.(M.D.) No. 15967. (2019.)

Indian context. Jimmy Lai, one of Hong Kong's most vociferous anti-government voices was charged under China's new law<sup>253</sup> to quell protests in December, 2020. Later in the month, a Hong Kong judge granted the media tycoon bail, but only after imposing extensive restrictions barring him from using social media, giving interviews, or leaving his home, evoking concerns of deterioration of free speech.<sup>254</sup> The Madhya Pradesh High Court came up with several peculiar bail orders over the course of the pandemic. In *Arvind Patel v. State of Madhya Pradesh*<sup>255</sup>, it directed two accused to install coloured LED TV at a local District Hospital, manufactured anywhere but in China, as a pre-condition for bail. The Court ordered another accused to register as a COVID warrior in the case of *Badal Singh & Ors. v. State of MP & Anr.*<sup>256</sup> and in *Jujhar v. The State Of Madhya Pradesh*<sup>257</sup> to donate masks and sanitizers.

While imposing conditions in bail orders, Courts must ensure that the conditions have nexus with the crime or with the attendance of the accused during trial or with the fair conduction of the trial. In the case of *Narasimhulu v. Public Prosecutor*<sup>258</sup>, Justice Krishna Iyer iterated that, "*It is imperative that discretion must be exercised with caution and care and must be applied by balancing the interests of both justice and personal liberty of individuals. It must not be arbitrary, vague, and fanciful, but legal and regular. Conditions may be hung around bail orders, not to cripple but to protect.*"

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<sup>253</sup> Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region.

<sup>254</sup> May, T. (2021, 28 May). Hong Kong Media Tycoon Jimmy Lai Is Freed on Bail. *The New York Times*.  
<https://www.nytimes.com/2020/12/23/world/asia/jimmy-lai-hong-kong-bail.html>

<sup>255</sup> Arvind Patel v. State of Madhya Pradesh, Case No. M.Cr.C. No. 19127. (2020).

<sup>256</sup> Badal Singh & Ors. v. State of Madhya Pradesh & Anr, Cr.A. No. 2929. (2020).

<sup>257</sup> Jujhar .v The State Of Madhya Pradesh, M.Cr.C. No. 25862. (2020).

<sup>258</sup> Gudikanti Narasimhulu and Ors. v. Public Prosecutor, High Court of Andhra Pradesh, 1978 SCR (2) 371.

*Aparna Bhat* highlights how bail conditions that tend to condone or diminish the harm caused by the accused have the effect of potentially exposing the survivor to secondary trauma, such as mandating mediation processes in non-compoundable offences, mandating as part of bail conditions, community service or requiring tendering of apology once or repeatedly, or in any manner getting or being in touch with the survivor. The objective of the bail order should not supersede any role by the Court to permit any conduct, where the survivor can potentially be traumatized many times over or be led into some kind of non-voluntary acceptance, or allow any condonation of the behavior by the accused.

In *Jameel Ahmad v. Mohammed Umair Mohammad Haroon & Anr*<sup>259</sup>, the Supreme Court stated that although the grant of bail is a discretionary order, Courts must exercise this discretion judiciously while applying certain settled parameters. The overarching powers granted under Section 437(3) of the CrPC to impose “any condition” must not be regarded as conferring absolute power on a court of law to impose any condition that it chooses to impose. In *Joginder Kumar v. State of U.P.*<sup>260</sup>, the Court observed that the condition must be in consonance with the object and purpose of grant of bail and any condition not having an iota of nexus with the very objective of granting bail cannot be imposed. Courts need to revisit how to impose bail conditions which acknowledge the online public sphere as well as the use of technology while keeping in mind the principles of fair bail conditions which do not violate fundamental rights. We were unable to find any definitive patterns in our case sample where the Courts tried to do this, thus highlighting the gap in acknowledgment of online crimes at the stage of bail hearings.

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<sup>259</sup> *Jameel Ahmad v. Mohammed Umair Mohammad Haroon & Anr.*, S.L.P. CrI. 245. (2022).

<sup>260</sup> *Joginder Kumar v. State of Uttar Pradesh*, (1994) 4 SCC 260.



*“Law should not sit limply, while those who defy it go free and those who seek its protection lose hope”.*<sup>261</sup> Criminal law and the criminal justice system has the ultimate aim of protecting the right to personal liberty against the invasion by others and to protect the weak against the powerful and the influential. To protect these rights, the state prescribes rules of conduct, sanctions for violations, machinery to enforce the same, and procedures to protect machinery<sup>262</sup>, but what happens when biases come into the world of criminal justice?

Many women and marginalized groups hesitate to file complaints for reasons including apprehension of injustice and hesitancy in filing complaints<sup>263</sup> and stigma, sexism and misogyny in approaching courts.<sup>264</sup> Further, miscarriage of justice for reasons including lack of filing procedural Section 65B certificates for electronic evidence or making sexist remarks on the victim to grant bail to the accused, are two of the important trends we were able to see within our study.

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<sup>261</sup> Jennison v. Baker, (1972) 1 All ER 997.

<sup>262</sup> Committee on Reforms of Criminal Justice System. (2003). *Report, Volume I*. Ministry of Home Affairs, Government of India. [https://www.mha.gov.in/sites/default/files/criminal\\_justice\\_system.pdf](https://www.mha.gov.in/sites/default/files/criminal_justice_system.pdf)

<sup>263</sup> IT for Change. (2017). *Submission on Online Violence Against Women to the Special Rapporteur on Violence Against Women*. <https://itforchange.net/submission-on-online-violence-against-women-to-special-rapporteur-on-violence-against-women>. Note: A Press Information Bureau release indicates that from July 2016 to July 2017, 97 complaints relating to online trolling/harassment were received by the WCD Ministry. While it is true that women do hesitate to register complaints or make public the sexual harassment they suffer, (and in this case, those who did decide to complain may have also reached out to the local police), the complaints mechanisms of the Ministry seem to be used by very few women for seeking redress.

<sup>264</sup> Inputs from case law research project [ongoing]; *Aparna Bhat v. The State Of Madhya Pradesh*, CrI. Appeal No. 329. (2021).

### **3.6 Finding 6: Courts are attempting hold platforms accountable in OGBV cases, leading to emerging jurisprudence on social media governance in India**

“The technological age has produced digital platforms – not like the railway platforms where trains were regulated on arrival and departure. These digital platforms can be imminently uncontrollable at times and carry their own challenges. One form of digital platforms are the intermediaries that claim to be providing a platform for exchange of ideas without any contribution of their own. It is their say that they are not responsible for all that transpires on their platform; though on complaints being made, they do remove offensive content based on their internal guidelines. The power and potentiality of these intermediaries is vast, running across borders. These are multinational corporations with large wealth and influence at their command. By the very reason of the platform they provide, their influence extends over populations across borders. Facebook is one such corporation.”

- *Ajit Mohan v. Legislative Assembly, NCT & Ors* (8 July, 2021).

The escalation of online violence based on gender is a global phenomenon growing by the day. These supposedly ‘neutral forces’ known as social media have been a breeding ground for violence for years. Evidence of companies like Facebook, Twitter, and YouTube hosting and fostering violence including the circulation of rape videos and revenge porn have existed from as early as 2014.<sup>265</sup> Women who have come out in the public sphere to recount their

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<sup>265</sup> Buni, C., & Chemaly, S. (2014, 9 October). The Unsafety Net: How Social Media Turned Against Women. *The Atlantic*. <https://www.theatlantic.com/technology/archive/2014/10/the-unsafety-net-how-social-media-turned-against-women/381261/>; In Re: Prajwala, S.M.W. CrI. No. 3. (2015). This matter was initiated in 2015 in view of child pornography and rape videos being circulated on communication apps and social media platforms. During

experiences, have only been targeted more - be it Thorlaug Agustsdottir – who reported a Facebook group that shared pictures of beaten/chained women as well as a morphed bruised image of her face with comments such as “Women are like grass, they need to be beaten/cut regularly.”<sup>266</sup>, Anita Saarkesian<sup>267</sup> who received overwhelming hate including virtual game bludgeoning for developing a feminist YouTube series, Sagarika Ghose – an activist who receives regular threats of being gang raped and stripped on Twitter for her “anti-right wing [sickular] views<sup>268</sup>, and Meena Kandasamy, a Dalit poet and activist who was threatened with “live-telecasted gang-rape and being torched alive and acid attacks” when she tweeted about attending a beef-eating festival in Kerala, India.<sup>269</sup> Studies including the Twitter Study by IT for

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the course of hearings (in 2017), the Supreme Court directed the constitution of the Ajay Kumar Committee to make recommendations on how to stop the circulation of such content, while protecting the identity of victims.

<sup>266</sup> Hudson, L. (2013, 7 January). Facebook Apologizes for Tolerating Violent Imagery Toward Women. *Wired*. <https://www.wired.com/2013/01/facebook-violence-women-2/>.

<sup>267</sup> Webber, J. E. (2017, 16 October). Anita Sarkeesian: ‘It’s frustrating to be known as the woman who survived #Gamergate’. *The Guardian*. <https://www.theguardian.com/lifeandstyle/2017/oct/16/anita-sarkeesian-its-frustrating-to-be-known-as-the-woman-who-survived-gamergate>

<sup>268</sup> Arya, D. (2013, 8 May). Why are Indian women being attacked on social media? *BBC Hindi*. <https://www.bbc.com/news/world-asia-india-22378366>; Mandal, S. S., & Chattopadhyay, S. (2018). *Digital Misogyny as Hate Speech: Exploring Legal Implications, National Dialogue on Gender-based Cyber Violence*. IT for Change. [https://itforchange.net/e-vaw/wp-content/uploads/2018/01/SrijanSandipMandal\\_-\\_SreeparnaChattopadhyay.pdf](https://itforchange.net/e-vaw/wp-content/uploads/2018/01/SrijanSandipMandal_-_SreeparnaChattopadhyay.pdf).

<sup>269</sup> Arya, D. (2013, 8 May). Why are Indian women being attacked on social media? *BBC Hindi*. <https://www.bbc.com/news/world-asia-india-22378366>; Mandal, S. S., & Chattopadhyay, S. (2018). *Digital Misogyny as Hate Speech: Exploring Legal Implications, National Dialogue on Gender-based Cyber Violence*. IT for Change. [https://itforchange.net/e-vaw/wp-content/uploads/2018/01/SrijanSandipMandal\\_-\\_SreeparnaChattopadhyay.pdf](https://itforchange.net/e-vaw/wp-content/uploads/2018/01/SrijanSandipMandal_-_SreeparnaChattopadhyay.pdf).

Change<sup>270</sup>, BBC Panorama Study<sup>271</sup>, Equality Labs<sup>272</sup>, and Amnesty's Toxic Twitter Report<sup>273</sup> have also shown that women in public life face more volume of violence on social media platforms. Courts play a big role in acknowledging how such platforms foster violence, and what pivotal steps need to be taken in order to effectively remove harmful content.

It is a well-known fact that social media platforms profit immensely from high user engagement on content. It is also documented<sup>274</sup> that virality of hateful content is also a profiteering mechanism. In India, where Facebook has the largest market share of users, virality of hate as a tool to increase engagement has been seen through an incident that gained popularity when Kapil Mishra, an Indian politician, incited violence<sup>275</sup> through his Facebook page, which led to the riots in the capital, New Delhi. The interactions on his Facebook page

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<sup>270</sup> IT for Change. (2022). *Profitable Provocations: A Twitter-based Study of Abuse and Misogynistic Trolling Directed at Indian Women in Public-political Life*. <https://itforchange.net/profitable-provocations-a-twitter-based-study-of-abuse-and-misogynistic-trolling-directed-at-indian>.

<sup>271</sup> Loffhagen, E. (2021, 19 October). Is this a watershed moment for social media hate after BBC Panorama investigation?. *The Standard*. <https://www.standard.co.uk/comment/social-media-hate-misogyny-bbc-panorama-sir-david-amess-facebook-instagram-b961282.html>.

<sup>272</sup> Soundararajan, T., Kumar, A., Nair, P., & Greely, J. (2019). *Facebook India: Towards The Tipping Point of Violence Caste and Religious Hate Speech*. Equality Labs. [https://static1.squarespace.com/static/58347d04bebafbb1e66df84c/t/5d0074f67458550001c56af1/1560311033798/Facebook India Report Equality Labs.pdf](https://static1.squarespace.com/static/58347d04bebafbb1e66df84c/t/5d0074f67458550001c56af1/1560311033798/Facebook+India+Report+Equality+Labs.pdf)

<sup>273</sup> Amnesty International. (2018). *Toxic Twitter — A Toxic Place for Women*. <https://www.amnesty.org/en/latest/research/2018/03/online-violence-against-women-chapter-1/>

<sup>274</sup> Joseph, S. (2018, 2 April). Why the business model of social media giants like Facebook is incompatible with human rights. *The Conversation*. <https://theconversation.com/why-the-business-model-of-social-media-giants-like-facebook-is-incompatible-with-human-rights-94016>.

<sup>275</sup> Purkayastha, P. (2020, August 31). Facebook's Business Model Thrives on the Virality of Hate, Citizen Truth. *Citizen Truth*. <https://citizentruth.org/facebooks-business-model-thrives-on-the-virality-of-hate/>.

“grew from a couple hundred thousand interactions a month to more than 2.5 million.”<sup>276</sup> Even more shocking were the revelations by the United Nations which found that Facebook had been a major platform for spreading hatred against the Rohingya in Myanmar<sup>277</sup>, which in turn led to ethnic cleansing of the community in the form of crimes against humanity.

Courts have the power to acknowledge and address these deliberate choices taken by social media platforms to further harmful content for the sake of virality. The adverse impact that gender-based cyberviolence has on victims and society at large was given recognition by the Kerala High Court in *P. Sreekumar v. State of Kerala*<sup>278</sup> in 2019, echoed in *Sreeja Prasad v. State of Kerala* in May 2020<sup>279</sup>, where the court noted with concern the increase in intolerance and othering manifested in social media discourse. In July 2021, the Supreme Court in the case of *Ajit Mohan v. Legislative Assembly*<sup>280</sup> recognized that in the modern technological age, the defense of being a neutral conduit and a mere platform for exchange of ideas is not tenable, given their business models. The court highlighted 1) the concerns expressed globally by Governments and the need for greater accountability by intermediaries which have large influence over millions of people 2) how independent democracies are leading movements to ensure that these mediums do not become tools of manipulative power structures 3) Platforms are by no means altruistic in character but rather employ business models that can be highly privacy intrusive and have the potential to polarize public debates. In the case, Facebook had themselves acknowledged that they removed 22.5 million pieces of hate

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<sup>276</sup> Purkayastha, P. (2020, August 31). Facebook’s Business Model Thrives on the Virality of Hate, Citizen Truth. *Citizen Truth*. <https://citizentruth.org/facebook-business-model-thrives-on-the-virality-of-hate/>.

<sup>277</sup> BBC News. (2018, 6 November). Facebook admits it was used to 'incite offline violence' in Myanmar, *BBC*. <https://www.bbc.com/news/world-asia-46105934>.

<sup>278</sup> *Sreekumar V. v. State of Kerala*, 2019 (2) KLT 642: 2019 (2) KLJ 832.

<sup>279</sup> *Sreeja Prasad v. State of Kerala*, Bail Appl. No. 2459. (2020).

<sup>280</sup> *Ajit Mohan vs Legislative Assembly*, NCT & Ors., W.P. (C) No.1088. (2020).

speech content in the second quarter of 2020, reflecting their substantial degree of control over the disseminated/online content.

This chapter, through its analysis of 30 cases, will attempt to parse how social media is used and acknowledged in courts. We argue that it is important to hold big, global social media entities and intermediaries, which have a high level of influence, accountable for their duty to care for their users. It is equally, if not more, important for the Indian judicial machinery to exercise their powers to observe critical aspects of online violence arising out of the cases that are placed before them and devise effective ways to tackle further violence, and adding to and updating Indian cyber law jurisprudence.

### **3.6.1 Courts have to grapple with a myriad of online offences perpetrated on social media including NCIIID, gender trolling**

From our research, the violence perpetrated on the online public sphere covered a range of offences including instances where:

- In *Kishore K Swamy v. State*, the accused posted abusive messages on Twitter and Facebook with an intention to defame the woman and also cyber stalked her.<sup>281</sup>
- In *The Present Petition Has Been v. Unknown*, the accused through his Twitter and Facebook profile made obscene comments and posts about several women.<sup>282</sup>
- In *X v. Union of India and Ors*, photographs and images that a woman had posted on her private social media accounts on Facebook and Instagram have been taken

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<sup>281</sup> *Kishore K Swamy v. State* By: Inspector Of Police, CrI.O.P. 8400. (2021).

<sup>282</sup> *The Present Petition Has Been ... v. Unknown* CrI.O.P. No.12604. (2020).

without her knowledge or consent and have been unlawfully posted on a pornographic website by an unknown entity called 'Desi Collector' whereby the petitioner's photographs and images have become offensive by association.<sup>283</sup>

- In *X v. Youtube*, the petitioner raped the victim and recorded the same in his mobile phone. He threatened to kill her and make the photos/videos viral. He made a fake Facebook ID and uploaded the photos.<sup>284</sup>
- In *Bijo v. State of Kerala*, the accused posted a pornographic video of a naked woman to a WhatsApp group.<sup>285</sup>

Recurring offences visible through our sample size using social media included non-consensual intimate image distribution cases (NCIID) which resulted in image-based sexual abuse, posting private photos online, uploading images to pornographic websites, followed by many cases of illegal recordings and uploading of pictures/images/videos, fake account creation, intimidation and extortion, gender trolling, cyber stalking, and targeted abuse and hateful comments using social media.

#### 3.6.1.1 What are the common platforms being used based on our sample of cases?

From our sample study, a majority of cases were primarily based on offences committed through the use of Facebook, Twitter, and Whatsapp. However, we also found cases where violence was perpetrated on Instagram, Youtube as well as other platforms like targeted websites created for the purpose of NCIIID, or pornographic websites, to name a few.

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<sup>283</sup> *X v. Union of India and Ors*, W.P.(Crl.) 1082. (2020). & Crl. M.A. Nos. 9485. (2020)., & 10986-87. (2020).

<sup>284</sup> *X v. YouTube*, 2021 SCC OnLine Del 4193

<sup>285</sup> *Bijo KP v. State of Kerala*, Crl.M.C. No. 2962. (2021).

### **3.6.2 Courts are attempting to hold platform intermediaries responsible for prompt takedowns of violent content in OGBV cases**

In a 2020 Madras High Court case, known as *The Present Petition Has Been ... v. Unknown*<sup>286</sup>, which came as an bail appeal for a case of gender trolling, the petitioner using his Facebook and Twitter accounts, had spread fake and scandalous news against women (more women belonging to the media), the court recognized:

1. The nature of the posts (including vernacular derogatory posts), the social media accounts they are being posted on (Facebook and Twitter)
2. How women even today are not given the requisite space online to express themselves which is a constitutional guarantee of the woman based on the right to equality.
3. The disregard for women that the accused displayed, including his ‘crooked and vulgar mind’, while posting the tweets.

The court rejected the anticipatory bail request stating that in such a case the “larger interest of the public” required consideration “as opposed to the demand of individual liberty.”

In another case that came before the Orissa High Court in a 2020 known as *Kalandi Charan Lenka v. State Of Odisha*<sup>287</sup>, the accused was being charged for multiple crimes including cyberstalking (Section 354 D, IPC), Section 67-A of the IT Act for circulating obscene images, the court recognized how the accused misused cyber space to commit a crime. Even though this case was an appeal for bail, the court recognized the right to dignity of a woman under

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<sup>286</sup> The Present Petition Has Been ... vs Unknown CrI. O.P. No. 12604. (2020).

<sup>287</sup> Kalandi Charan Lenka v. State Of Odisha Bail Appl. No. 7596. (2016).



Article 51-A of the Constitution of India, 1950 by stating “*stalking or opening of fake Facebook accounts or obscene representation including morphed naked photographs are a menace to society and the right of the woman.*” Eventually, even though stringent bail orders were passed, the court went one step ahead to recognize the harm and violence caused due to the innumerable obscene messages and fake accounts created by the harasser.

Through the research, we were able to observe that only a few cases actively acknowledged the nature of the cyber crime on social media platforms as harmful or as a concern. Further, regarding cases that involved violence on online intermediaries, very few from our sample recognized the role of social media platforms or the relevant intermediaries themselves, and requested their involvement in taking down offensive content.

Particularly, two cases that recognized social media governance issues as well as the challenges faced by courts in working with intermediaries are worth highlighting:

#### 3.6.2.1 Inability to completely remove violent content<sup>288</sup>

In a 2021 case before the Delhi High Court known as *X v. Union Of India And Ors*, the social media accounts of the petitioner despite having the requisite 'privacy settings' were compromised, and her photographs and images were taken and placed on a pornographic website.

What was evident from the court order were the challenges of cross functioning between the state, intermediaries including social media platforms and websites, and courts in enforcing effective content takedown orders.

The court noted some key points in the order through the course of hearings:

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<sup>288</sup> *X v. Union of India and Ors.*, W.P.(Crl) 1082 (2020) & Crl.M.A. Nos. 9485. (2020)., 10986-87. (2020).

- The Cyber Prevention Awareness and Detection Unit (CyPAD) expressed their willingness to obey the court orders of removing/disabling offending content but they also expressed their inability to fully and effectively remove it in compliance with court directions.
- During the course of the case, errant parties merrily continued to re-post and re-direct such content from one website to another and from one online platform to another, thereby ‘cocking- a- snook’ at directions issued against them in pending legal proceedings.
- The issue of removing offending content is equally, if not more, significant at the time of interim orders when a case is taken up by the court. If the court is not in a position to pass effective and implementable orders, and is unable to ensure that such orders are complied with at the interim stage, subsequent adjudication of the matter could well be rendered infructuous.
- The court cannot permit itself to resign to the cat-and-mouse game of errant parties evading court orders by re-posting offending content across the world-wide-web, in an act of defiance and contumacy.

The court acknowledged its own role in effective content takedown orders and went a step ahead to institute specific and pointed instructions to the parties in the case. The court emphasized that even if the offending content cannot be completely removed from the world-wide-web, offending content can be made unavailable and inaccessible by making such content “non- searchable” by de-indexing and de-referencing it from the search results of the most widely used search engines. The court issued a direction to:

- Search Engines: The search engines Google Search, Yahoo Search, Microsoft Bing, and DuckDuckGo, were directed to globally de-index and de-reference from their search results the offending content as identified by its Web URL and Image URL, including de-indexing and de-referencing all concerned web-pages, sub-pages or sub-

directories on which the offending content is found, forthwith and in any event within 24 hours of receipt of the judgment.

- Police: The Delhi Police were directed to obtain from the concerned website, namely [www.xhamster.com](http://www.xhamster.com) and from the search engines Google Search, Yahoo Search, Microsoft Bing, DuckDuckGo (and any other search engines as may be possible) all information and associated records relating to the offending content such as the URL, account ID, handle name, Internal Protocol Address, hash value, and other such information as may be necessary, for investigation of case within 72 hours of receipt of the judgment.

The court consciously noted that even though no untenable burden should be cast upon an intermediary, the order has to be complied with. It is pertinent for courts to highlight consequences of non-compliance of such orders by:

1. Forfeiting the safe harbor exemption available to intermediaries under Section 79(1) of the IT Act and as specified by Rule 7 of the 2021 Rules<sup>289</sup>.
2. Holding an intermediary entity and its officers liable for action as mandated by Section 85 of the IT Act.

It is essential to have a proper and efficient mechanism to implement a content takedown order. In courtrooms, intermediaries using the defense of a “lack of technical ability” to remove content cannot be encouraged. As seen in this particular case, the court appointed an amicus curiae<sup>290</sup> to come up with the most effective solution in tackling content takedown issues. The objective of the court should be to ensure that there is no restriction on the freedom of speech and expression which is a constitutional right guaranteed to every gender identity.

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<sup>289</sup> The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules. G.S.R. 139(E). (2021).  
<https://mib.gov.in/sites/default/files/IT%28Intermediary%20Guidelines%20and%20Digital%20Media%20Ethics%20Code%29%20Rules%2C%202021%20English.pdf>.

<sup>290</sup> Latin for “friend of the court”, who is usually a lawyer who acts in an independent and neutral capacity to help the court with the case at hand.

These issues including content takedowns, must be juxtaposed with the rights guaranteed to individuals and courts must carve relevant jurisprudence and effective orders to ensure an online public sphere without violence or hate speech. Further, courts should note displacement of marginalized voices from the online public sphere due to violence is a violation of various fundamental rights. Courts have the inherent power to identify such rights, discuss possible solutions, and come up with effective orders where the orders must be clearly defined and any vagueness or ambiguity in the orders must be removed.

### 3.6.2.2 Safe Harbor Arguments in Courtrooms<sup>291</sup>

The Delhi High Court, in *Sasikala Pushpa v. Facebook India*<sup>292</sup>, the plaintiff in the case had alleged that the circulation of a photo of her with a man from a rival political party was defamatory. The photos were uploaded on and circulated through the social media i.e. Facebook, Twitter, YouTube, and WhatsApp. The plaintiff argued that allowing further publicity to the content of such a photograph/video would only be for sensational and salacious purposes, and would amount to a gross and irreparable violation of an individual's privacy; it would be per se defamatory. While the case was later purely adjudicated as an issue of whether the content was defamatory, it is imperative to see the arguments put forth by Facebook India in this context. Facebook had filed a written statement in the case pleading that:

1. It is an intermediary as defined under Section 2(1)(w) of the IT Act and is omitted from any liability arising from third party content posted to the Facebook Services as per Section 79 of the IT Act.
2. Section 79(1) of the IT Act has an overriding effect by virtue of Section 81 of the IT Act.

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<sup>291</sup> Sasikala Pushpa v. Facebook India & Ors. C.S.(O.S.) 510. (2016).

<sup>292</sup> Sasikala Pushpa v. Facebook India & Ors. C.S.(O.S.) 510. (2016).

3. Facebook Inc. as an intermediary has no role in sharing, transmitting, selecting the receiver of any transmission, and/or selecting or modifying the information contained in any information of a third party.
4. There is no averment in the plaint regarding any failure of Facebook Inc. to comply with Section 79(2) or 79(3) of the IT Act and does not even allege that the protection under Section 79 of the IT Act is not available to Facebook Inc.
5. As per the dicta of the Supreme Court in *Shreya Singhal v. Union of India*<sup>293</sup>, the liability of an intermediary arises only where the intermediary upon receiving actual knowledge from a valid court order or otherwise, that unlawful acts relatable to Article 19(2) of the Constitution of India are going to be committed, fails to expeditiously remove or disable access to such material.
6. Facebook Inc., as on 30th June, 2018, had over 2.23 billion active users of its Facebook Service worldwide and every day billions of pieces of content are posted and shared on the Facebook Service; it is impractical and not possible for the Facebook Inc. to sift through all the aforesaid content to find the content impugned by the plaintiff.
7. Facebook Inc. is neither the author nor the publisher of any third party content including the content impugned in this suit.

Mark Bartholomew<sup>294</sup>, a professor of law at the University at Buffalo, notes that “*the more we think about Facebook as a business run by people with their own biases and motivations, and not simply a neutral conduit for information, the better.*” The basis for safe harbor is the idea that intermediaries are dumb conduits for the distribution of the speech of their users, rather than speakers themselves. However, this argument of intermediaries being dumb conduits is no longer tenable and should not be encouraged in courts. Most, if not all, intermediaries affirmatively shape the form and substance of user content through the use of AI systems and

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<sup>293</sup> *Shreya Singhal v. Union of India* (2015) 5 SCC 1.

<sup>294</sup> Stern, R. (2016, 20 May). Facebook is not neutral, UB privacy and social media expert says. *UB Now*. <http://www.buffalo.edu/ubnow/stories/2016/05/bartholomew-facebook-neutrality.html> .

design interventions - so how can it be neutral or dumb or any other fashionable metaphor signify their lack of involvement? A user interface itself is deterministic and affects the nature and content within a platform – for example, Twitter’s own syntax and vocabulary for replies (140-character limitation (now 280)), likes, retweets, and hashtags. Platforms must be held to stringent legal standards that are commensurate with this immensely consequential societal function they fulfill. Based on our observations from our sample of cases, we submit that the focus should be on acknowledging and addressing the virality of content rather than regulating it on an individualistic level. Recognizing the virality of hate and algorithmic amplification of content while looking beyond the individualistic frame of the victim-perpetrator binary is essential. As we have seen through our case laws, Section 79 of the IT Act (India safe harbor provision) needs to be revisited and only courts have the power to enforce effective orders highlighting consequences of non-compliance by taking away the exemption if required.

Impleading intermediaries and social media platforms in cases should be a “best practice” for courts<sup>295</sup>, under the Code of Civil Procedure Order 1, Rule 10. This enables the court to add any person as party to the case at any stage of the proceedings, if the person whose presence before the court is necessary to enable the court to effectively and completely adjudicate upon and settle all the questions involved in the case. For instance, in a Public Interest Litigation in 2017 initiated by an NGO, Prajwala, the Supreme Court took cognizance of the circulation of videos of rape online, and made Facebook, Yahoo, Google, and Microsoft respondents to the case.<sup>296</sup> This practice will enable courts to help the victim more effectively to pass effective orders to prevent repeated violence online in cases like NCIIID.

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<sup>295</sup> Ahmad, S. A. (2016). *Impleadment Of Third Parties Vis-A'-Vis Doctrine Of Dominus Litus*. <https://districts.ecourts.gov.in/sites/default/files/Impleadment%20of%20third%20parties%20by%20Sri%20Athaeque%20Ahmad.pdf>.

<sup>296</sup> In Re: Prajwala S.M.W. (Crl.) No. 3. (2015). and Sabu Mathew v. Union of India W.P.(C) No. 341. (2008)., the Supreme Court broke away from this precedent by hauling up digital corporations such as Facebook, Twitter,

Globally, the governance and regulatory approaches for social media differ from country to country. Germany, for instance, requires social media companies to quickly take down “manifestly illegal” content<sup>297</sup>, including hate speech, or face large fines. This is a similar approach taken by Australia<sup>298</sup> where platforms are required to quickly remove “abhorrent violent material” or face large fines. However, such strict liability measures or increased regulation are not present in the United States, as can be evidenced from incidents including the Capitol Riots<sup>299</sup> in 2021 which fomented on social media.

India is the world’s biggest internet-enabled nation, with over 800 million online.<sup>300</sup> Keeping in mind the unprecedented growth of social media users, the Government in 2021 implemented the much debated Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. The 2021 Rules mandate significant social media intermediaries to enable

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Microsoft etc., for failing to take action against the spread of rape videos and for allowing pre-natal sex determination adverts on their platforms.

<sup>297</sup> In 2017, Germany passed the Network Enforcement Act (Netzwerkdurchsetzungsgesetz, NetzDG) (also called the “Facebook Act”). The law did not create any new duties for social media platforms but did impose high fines for noncompliance with existing legal obligations. The Network Enforcement Act is applicable only to social media networks that have 2 million or more registered users in Germany. It obligates the covered social media networks to remove content that is “clearly illegal” within 24 hours after receiving a user complaint. If the illegality of the content is not obvious on its face, the social network has seven days to investigate and delete it. A social media network may be fined up to 50 million euros (about US\$59.2 million) for noncompliance.

<sup>298</sup> Cave, D. (2019, 3 April). Australia Passes Law to Punish Social Media Companies for Violent Posts. *The New York Times*. <https://www.nytimes.com/2019/04/03/world/australia/social-media-law.html>.

<sup>299</sup> Frenkel, S. (2020, 6 January). The storming of Capitol Hill was organized on social media. *The New York Times*. <https://www.nytimes.com/2021/01/06/us/politics/protesters-storm-capitol-hill-building.html>.

<sup>300</sup> Chandrashekar, R. (2020, 6 September). It's time for India to regulate the internet and social media platforms. *Live Mint*. <https://www.livemint.com/opinion/online-views/it-s-time-for-india-to-regulate-the-internet-s-social-media-platforms-11599402786379.html>.

the identification of the first originator<sup>301</sup> of the information if an order is passed by the court or authority in connection with rape, sexually explicit material, or child abuse material.<sup>302</sup> However, this responsibility reflects how the legislature views social media regulation as an individual as opposed to a collective problem. The objective of finding a sole perpetrator or originator, does not address the role played by the social media entity in creating and benefiting from viral violent content nor does it address anything new or significant regarding exemption for such entities.<sup>303</sup> What it intended for in terms of prevention of online gender-based violence has only turned into a cat and mouse game, thus not really addressing the widespread powers with social media entities. Here, courts, especially at the High Court level, play a significant role in addressing the overall harm and collective solutions required to prevent OGBV.

Through our study, we were encouraged by the acknowledgement from courts to hold intermediaries liable and this will result in steps for reduction of violence that will enable better access to justice for survivors.

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<sup>301</sup> The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules. G.S.R. 139(E). (2021). Rule 4(2).  
<https://mib.gov.in/sites/default/files/IT%28Intermediary%20Guidelines%20and%20Digital%20Media%20Ethics%20Code%29%20Rules%2C%202021%20English.pdf>.

<sup>302</sup> Proviso to Rule 4(2), The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021: Provided that an order shall only be passed for the purposes of prevention, detection, investigation, prosecution or punishment of an offence related to the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, or public order, or of incitement to an offence relating to the above or in relation with rape, sexually explicit material or child sexual abuse material, punishable with imprisonment for a term of not less than five years.

<sup>303</sup> Raghavan, A. (2021). *The Internet-Enabled Assault on Women's Democratic Rights and Freedoms*. IT for Change.  
<https://itforchange.net/sites/default/files/1738/The-internet-enabled-assault-on-womens-dem-rights-arti-raghavan-dec-21.pdf>



## **Chapter IV**

### **Conclusion and Recommendations**

This empirical investigation has attempted to understand judicial responses to cases of OGBV in India. The cases that we were able to study during this time showed a variety of concerns, a majority of which have been captured in this report. As we went through the cases, we came to understand the need to engage with regressive social norms that still persist in judicial systems. Judicial stereotyping has played a significant role in the outcome of justice for cases. The non-recognition of the online continuum in courtrooms along with the judicial attitudes towards online crimes is a significant finding when seeking to unravel complexities in accessing justice. While addressing the multiple barriers to accessing justice for women including sexist courtrooms, multilayered power differentials and lack of recognition of emerging gendered hate speech offences, legal institutional challenges need to be all encompassing and recognize the additional challenges burdens offered by the online public sphere. Despite the rights of privacy and dignity being recognized through landmark cases like *Puttaswamy*, our judicial institutions are failing women – the combination of factors right from the outdated text of the legislations to the social mores that pervade courtrooms are causing these seemingly improved circumstances for women to take a backseat in cases of gender-based violence. The conversation is also framed in the binary because our laws fail to recognize the additional layers of discrimination transgender and other gender identities face.

The massive scale of the issue of normalization of online violence, including lack of effective redressal mechanisms, low enforcement by the government, and options afforded by the anonymized internet, has incentivized a multiplicity of violent online behavior. The challenges of hegemonic cultures of misogyny in the online public sphere requires appropriate legislation as well as institutional changes that keep up with the challenges of a digitally mediated society.

In order to keenly understand the concerns of adjudicating OGBV, it is imperative to realize the structures of society at play. Some of this has been discussed in previous chapters, but in essence, women's right to participate in the online public sphere is constantly at odds with society's need to control them. Finding a safe space and a voice online is often fraught with risk for women, especially those who face multiple marginalizations in the form of caste, religion, race, gender identity, sexual orientation, and disability.<sup>304</sup> In the absence of a space space, survivors of online violence are also unable to access the justice system in an effective way to address their concerns. This is despite the fact that it is the judiciary that has often laid out in detail the rights afforded to all people by our constitutional regime.

As such, the sum and substance of the rights of individuals, especially women, non-binary persons, and other marginalized groups, has already been captured in the Indian Constitution. Articles 14 and 21 elucidate the rights to equality and equal treatment before the law, and the right to life and personal liberty. These rights have been given their contours and nuances through several landmark cases, including the *NALSA* decision (on recognition of rights of transgender people), *Puttaswamy* (right to privacy), *Vishakha* verdict (protection from sexual harassment at workplace), *Suresh Koushal* (reading down of Section 377 IPC to prevent harassment of LGBTQIA+ individuals).

What we witness, then, as a failure and an impediment to justice is a misrecognition<sup>305</sup> of pre-recognized rights. Courts as institutions of justice should not obfuscate a violation of privacy

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<sup>304</sup> Salim, M. (2021). *How Women from Marginalised Communities Navigate Online Gendered Hate and Violence*. IT for Change. <https://itforchange.net/sites/default/files/1883/Mariya-Salim-Rethinking-Legal-Institutional-Approaches-To-Sexist-Hate-Speech-ITfC-IT-for-Change.pdf>.

<sup>305</sup> Misrecognition, according to Fraser, is the inability of an individual to achieve parity of participation because of existing "institutionalized hierarchies of cultural value that deny them the requisite standing". Cited in James, D. (2015). How Bourdieu bites back: recognising misrecognition in education and educational research, *Cambridge Journal of Education*, 45:1, 97-112. DOI:10.1080/0305764X.2014.987644

by qualifying it through patriarchal provisions of modesty, or making an overreaching sexist interpretation of the modesty of the woman ought not to be the direction of court decisions. Existing rights are unsettled and destabilized in the process, defeating the discourse of a rights-based approach to gender based violence. This study offers proof that when courts move to understand societal harm perpetrated through online gendered violence on the foundation of established rights, rather than on social, moral, and patriarchal norms, there is a glimmer of justice for the survivors of such harm.

While rethinking the legal-institutional responses to effectively address the systemic violence online, some core concepts of law that regulate issues of OGBV need to be questioned. The following are some overarching areas where we need corrective steps based on this study.

#### **4.1 Courts must recognize the importance of the online public sphere and give equal importance to online gendered offences**

1. The study showed that in many cases of mixed online and offline offences, the focus shifted to the offline. This traditional understanding of the harm that is focused only on visible injury cannot be the driving force in judicial decisions any more in today's time. There is an urgent need to address the online-offline continuum in courts and give equal importance to the two types of offences while adjudicating a case. This will ensure that OGBV is not invisibilized or trivialized especially in cases with mixed offences.
2. Courts must recognize the nature of the online public sphere with greater detail as well as nuance, and keep up with the technological advancements, so that issues like defining the public sphere does not get relegated to more traditional boundaries

## **4.2 Courts should recognize the need to put an immediate stop to online violence by using their inherent powers**

1. Superior courts are slowly recognizing the need to pass effective orders to minimize online recirculation of non-consensual, sexually explicit videos and images. A handful of orders in our sample of cases noted the challenges to putting a swift stop to these photographs, especially given the coordination required between state agencies and online intermediaries. While these are legitimate concerns, courts are also known to be prompt about taking down content violating copyrights.<sup>306</sup> It may be time to assess if similar processes can be established in cases of OGBV cases as well.
2. Courts have to keep abreast of potential technological challenges while addressing NCIID cases.

## **4.3 Courts must move beyond antiquated notions in OGBV cases, and deliberate on much needed reforms in institutional process, and procedure**

1. While courts are required to follow the letter of the law, High Courts and the Supreme Court have often interpreted legal provisions to meet the requirements of fundamental rights of citizens and questions of constitutionality in keeping with the times. In that regard, it is high time that courts rethink the use of provisions that refer to outraging the modesty of a woman. These provisions are based on antiquated notions arising from a protectionist point of view. As mentioned earlier in this report, it is necessary for courts to retain the essential characteristics of the rights it has already recognized for

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<sup>306</sup> Indian copyright jurisdiction has seen several developments including introduction of John Doe orders for content takedown, as well as the more recent dynamic injunctions granted to Disney in order to block content that can re-emerge as a redirecting, mirror or alphanumeric website. Correspondent. (2020, 14 January). India: Court issues first dynamic injunction. *Managing IP*. (2020).

<https://www.managingip.com/article/b1kblk4hwfls04/india-court-issues-first-dynamic-injunction>.

its citizens, like privacy. Courts should focus on upholding the right to privacy of a woman in cases of OGBV, which would retain her dignity and agency in these situations.

2. Finally, there is a need to review the requirement for a new law to address OGBV. As discussed in earlier chapters, there are several lacunae in the existing legal matrix to address all types of OGBV, as well as several outdated provisions that rely on patriarchal notions of honor and modesty. An updated law could help address these concerns. However, any such overhaul of laws needs to be after thorough consultations and discussions with women's rights groups, civil society organizations, and survivor groups. The central government has in the past initiated amendments to criminal law legislations, and faced backlash for failing to be inclusive.<sup>307</sup>

#### **4.4 Courts must not let procedural hurdles including digital evidence certification impede proper justice delivery and must contextualize bail orders for the online space**

1. The Supreme Court has outlined the contours of a certificate for secondary electronic evidence for cases, including highlighting the power of courts to call for evidence and direct production of the certificate under the CrPC. This can, at a preliminary level, prevent evidence from being dismissed at the first instance. It is necessary that courts enable better admission of digital evidence and recognize its challenges.
2. Courts must increasingly use contextual conditions pertaining to the internet, social media platforms, or technology/communication devices while passing bail orders as they currently are not customised to the unique requirements of cases of OGBV.

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<sup>307</sup> Mahuli, V. (2020). Why Is the Home Ministry's Committee on Criminal Law Reform Functioning in Secrecy? *The Wire*. <https://thewire.in/law/criminal-law-reform-committee-transparency>.

#### **4.5 Courts must move beyond the ‘dumb conduit’ approach and hold platforms liable for profitable viral content**

1. There is a great role that intermediaries play in the spread of online violence. Given their engagement-based business model, they aren’t dumb conduits for transmitting information, as courts have also begun to recognize. In that regard, there needs to be an examination of the extent of responsibility that needs to be imposed on intermediaries. The 2021 IT Rules have done this in some form. Yet, the accountability and liability regime for intermediaries needs to consider safeguards against a privatized censorship regime or a state surveillance model to protect those on the margins.
2. Courts must recognize the importance of platform accountability as being the larger end-goal and also acknowledge the role of virality of hate and algorithmic amplification of content which perpetuates violence on the online public sphere.

#### **4.6 Courts need to be inclusive spaces for marginalized groups and must be cognizant of several cultural aspects outside of the formal process of law in OGBV cases**

1. Courts have to be cognizant of ensuring that they become safe spaces for women, non-binary people, and other marginalized groups including those persecuted for their caste, for seeking justice. It is the responsibility of the judiciary to recognize patterns of sexism and judicial stereotyping in courtrooms, as the Supreme Court did in the case of *Aparna Bhat*, and sensitize itself to these issues. This also has to extend to all other wings of the criminal justice system, including defence lawyers, and the police, to ensure that there is no re-victimization of survivors and women are believed when they bring complaints of online violence against them.

In tackling OGBV cases, we suggest that the most effective manner would be a comprehensive legislation targeted at platforms rather than individual offenders. We also recognize the power of Courts to hold intermediaries responsible for reducing damage and harm. This approach would automatically take aim at issues of virality, amplification and deplatforming, rather than getting mired in irresolvable legal contradictions about where to draw the regulatory line in the sand in the individual cases of violence. Central to this perspective for us has been the need to dismantle the legal fiction of the platform as a passive intermediary or a “dumb conduit”. By foregrounding the algorithmic processes of curation, recommendation, hiding of content, we draw attention to the many ways in which platforms *already* regulate content, in the pursuit of very specific (profit-oriented) goals. Our position therefore has been that Courts must recognize the online public sphere’s role in cases that come before them and that platforms must be held to stringent legal standards that are commensurate with this immensely consequential societal function that they fulfill.

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