

Internet Democracy Project

# WHAT'S SEX GOT TO DO WITH IT?

Mapping the Impact of Questions of Gender and Sexuality on the Evolution of the Digital Rights Landscape in India



Vrinda Bhandari & Anja Kovacs

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an initiative at



## **About Us**

The Internet Democracy Project works towards realising feminist visions of the digital in society, by exploring and addressing power imbalances in the areas of norms, governance and infrastructure in India and beyond.

The Internet Democracy Project is an initiative at Point of View.

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## **Design**

Kritika Trehan and team

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# Table of contents

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Table of abbreviations	05
<b>1. Introduction</b>	<b>06</b>
<b>2. Methodology</b>	<b>09</b>
<b>3. Lay of the legal land</b>	<b>11</b>
3.1 Legal foundations and fundamental rights and freedoms	
3.2 Governance of online and networked spaces	
3.3 Sectoral laws	
3.4 Other laws	
3.5 Draft laws	
<b>4. Women as objects of state control</b>	<b>20</b>
4.1 Monitoring the representation of women online: The broadening of censorship	
4.1.1 <i>Justice for Rights Foundation</i> and the regulation of OTT platforms	
4.1.2 <i>Kamlesh Vaswani</i> and the crusade to prohibit pornography	
4.2 Monitoring online harmful content: Encouraging proactive censorship by weakening the intermediary liability regime	
4.2.1 <i>In re Prajwala</i> and the promotion of proactive intermediary censorship	
4.2.2 <i>Sabu Mathew George</i> and the doctrine of “auto block”	
4.3 <i>Muhammed Shifas</i> and the broadening of censorship through bail conditions	
<b>5. Women as subjects of state control</b>	<b>41</b>
5.1 <i>Faheema Shirin</i> and the fight for the right to Internet access	
5.2 Monitoring women’s behaviour online: The chilling effect on free speech	
5.2.1 The moral panic over TikTok	
5.2.2 <i>Rehana Fathima</i> and the control over women’s expression	
5.3 Monitoring the reporting of online allegations of sexual harassment: Whose right to anonymity, whose right to be forgotten?	
5.3.1 Anonymous allegations and #MeToo: A tale of two gag orders	
5.3.2. <i>Zulfiqar Khan</i> and the right to be forgotten	
5.4 Monitoring the non-consensual sharing of intimate images online: <i>Animesh Boxi</i> and a case for re-imagining privacy and bodily integrity online	
<b>6. Conclusion</b>	<b>73</b>
About the authors	77

# Table of abbreviations

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AI	Artificial Intelligence
CBI	Central Bureau of Investigation
CrPC	Code of Criminal Procedure, 1973
CSAM	Child Sexual Abuse Material
DoT	Department of Telecom
GDPR	General Data Protection Regulation
IPC	Indian Penal Code, 1860
IAMAI	Internet and Mobile Association of India
ISP	Internet Service Provider
IT ACT	Information Technology Act, 2000
MeitY	Ministry of Electronics and Information Technology
MMS	Multimedia Messaging Services
NGO	Non-Governmental Organisation
OTT	Over-the-Top
PDP Bill	Personal Data Protection Bill, 2019
PIL	Public Interest Litigation
POCSO Act	Protection of Children from Sexual Offences Act, 2012
POSH Act	The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013
PNDT Act	The Pre-Conception and Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994
SOP	Standard Operating Procedure
TRAI	Telecom Regulatory Authority of India

PART 1  
**INTRODUCTION**

INTRODUCTION

METHODOLOGY

LAY OF THE LEGAL LAND

WOMEN AS OBJECTS OF STATE CONTROL

WOMEN AS SUBJECTS OF STATE CONTROL

CONCLUSION

*Control over women's sexuality is the key patriarchal assumption that underlies family and marriage ... But, in adjudicating on the rights of women, the Court is not taking on a paternalistic role and "granting" rights .... The enforcement of forced female fidelity by curtailing sexual autonomy is an affront to the fundamental right to dignity and equality.*

**SUPREME COURT OF INDIA IN JOSEPH SHINE  
V UNION OF INDIA WHILE DECRIMINALISING ADULTERY<sup>1</sup>**

*Her [i.e. the victim's] conduct during the alleged ordeal is also unlike a victim of forcible rape and betrays somewhat submissive disposition..... Instead of hurrying back home in a distressed, humiliated and a devastated state, she stayed back in an around the place of occurrence ... Her confident movements alone past midnight, in that state are also out of the ordinary... The medical opinion that she was accustomed to sexual intercourse when admittedly she was living separately from her husband for one and a half years before the incident also has its own implication.*

**SUPREME COURT OF INDIA IN RAJU V STATE OF KARNATAKA WHILE  
DISREGARDING THE TESTIMONY OF A GANG RAPE SURVIVOR AND ACQUITTING  
ALL THE ACCUSED PERSONS<sup>2</sup>**

The contrasting observations about women made by the Supreme Court exemplify a deep tension running through Indian jurisprudence: that between the constitutional guarantee of equality, including gender equality, and the profound gender discrimination that results from traditional concerns about women's sexuality and reputation in what remains in large part a socially conservative society. A similar tension also runs through the various provisions of digital rights related legislations, most notably the Information Technology Act, 2000 (IT Act), that is concerned with questions of obscenity, morality, and sexuality at the intersection of criminal law and digital rights.

The interplay of socio-cultural norms, religious values, and caste politics has promoted a stereotype of an Indian woman as pure, "unsex-ed", innocent, fragile, and feeble, dependent on her husband or father for protection - referred to in Hindi as "*adarsh bharatiya nari*".<sup>3</sup> These patriarchal norms are replicated online, such that efforts at "protecting" women, making them *objects* of state control, even when well-intentioned, often end up undermining their digital rights. For instance, the controversial section 66A of the IT Act, which prohibited the sending of "offensive messages", was justified by the government as an essential tool in fighting the online harassment of women.<sup>4</sup> Instead, it enabled widespread censorship, often targeted at women, and was finally struck down by the Supreme Court in *Shreya Singhal v Union of India*<sup>5</sup> in 2015 for being vague and unconstitutional.

<sup>1</sup> *Joseph Shine v. Union of India*, (2019) 3 SCC 39.

<sup>2</sup> *Raja & Ors. v. State of Karnataka*, (2016) 10 SCC 506.

<sup>3</sup> Adrija Bose, A Comprehensive Guide on How to Be an Adarsh Bharatiya Nari, *News18* (15 November 2017), <https://www.news18.com/news/india/a-comprehensive-guide-on-how-to-be-an-adarsh-bharatiya-nari-1576537.html>. See also Ramya Chandrasekhar, Policing Online Abuse or Policing Women? Our Submission to the United Nations on Online Violence against Women, Internet Democracy Project (2018), <https://internetdemocracy.in/reports/un-srvaw-report/>.

<sup>4</sup> Richa Kaul Padte and Anja Kovacs, Keeping Women Safe? Gender, Online Harassment, and Indian Law, Internet Democracy Project (2013), <https://internetdemocracy.in/reports/keeping-women-safe-gender-online-harassment-and-indian-law/>.

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

Given the culturally sensitive nature of questions surrounding gender and sexuality, what happens to women who attempt to challenge social mores and the stereotype of an “ideal Indian woman”? Women who have approached the courts raising questions about access to the Internet and the freedom to represent and express themselves online have driven a number of key cases in recent years, making them *subjects* of state control. These cases, too, have affected the evolution of gender and sexuality rights as well as digital rights in the country.

In fact, as we will see, this is an important difference between existing law at the intersection of gender, sexuality and digital rights and case law on these issues: while existing law focuses on these issues in a narrow sense, the culturally sensitive nature of questions of gender and sexuality has meant that case law, including interim orders in ongoing cases, has the potential to affect the evolution of the digital rights landscape in India in general.

Issues relating to gender and sexuality, thus, have a considerable, but as yet undocumented, importance in digital rights related law in India, in some cases expanding such rights, but often reducing avenues of free speech, privacy, and anonymity for women online. However, so far, this intersection has not been systematically documented or analysed in any way. It is this substantial and important gap that this report seeks to address.

The report is divided into six sections. In section 2, we lay out the methodology that we have used while writing this report. For those who are not conversant with the Indian legal landscape, we elaborate on the legal framework that affects gender and sexuality rights and digital rights in India in section 3. Sections 4 and 5 form the core of this report and examine in detail how gender and sexuality issues have driven the development of digital rights related law in India. Section 4 interrogates the intersection of gender, sexuality, and digital rights in cases where litigants have viewed women as *objects* of state control, to be protected for their own safety, to safeguard public morality, and to uphold values of “Indian culture”. Our analysis will show that the interventions by the courts, even when well-meaning, have weakened the protections for online free speech, privacy, and the intermediary liability regime, thereby affecting women’s expression on the Internet as well as expression more broadly. Section 5 interrogates the intersection of gender, sexuality, and digital rights in cases where the conduct of women online, their deviation from stereotypical conceptions of an “ideal” daughter, wife, mother, and victim, and attempts at upending existing power dynamics has made them the *subject* of social and legal control. In these cases, we find that the record of the courts has been mixed: both expanding and restricting the freedom of speech and expression, privacy, anonymity, and the right to be forgotten online. In both section 4 and 5, our analysis of each concern first lays out the broad context in which the case or cases has to be situated, then discusses the specific judicial or executive decision, and finally outlines the importance of the case. Based on this analysis, we conclude in section 6.

We recognise that the categorisation of women as the object and subject of state control is not rigid, and has considerable overlap; however, as we hope this report will illustrate, we believe that it provides us a convenient way to think through different intersections between gender and sexuality rights and digital rights.



PART 2  
**METHODOLOGY**

INTRODUCTION

**METHODOLOGY**

LAY OF THE LEGAL LAND

WOMEN AS OBJECTS OF STATE CONTROL

WOMEN AS SUBJECTS OF STATE CONTROL

CONCLUSION

To research and write this report, we have examined two types of primary sources. First, we have systematically outlined the provisions of Indian law that specifically concern the intersection of gender and/or sexuality and digital rights, so as to be able to examine whether their treatment strengthens or undermines digital rights. We have then mapped cases before the Supreme Court of India and various High Courts in which questions of gender and sexuality are informing, or have informed, judicial decisions that affect digital rights. These cases were found using a combination of media reports and searches on legal news portals and online legal databases. Search terms used included women and morality, censorship, #MeToo, surveillance, intermediary liability, cyber bullying, revenge porn, non-consensual sharing of sexual images online, TikTok, Over-the-Top (OTT) platforms, pornography, sex, sexuality, nudity, obscenity, surveillance, CCTV, privacy, anonymity, access to the Internet and mobile phones.

From amongst the search results, we shortlisted a select number of cases for deeper analysis so as to better understand the nexus of gender and sexuality rights and digital rights. These cases were motivated by, or related to, protecting and promoting the rights of women, and promoted a gendered reading of digital rights and/or expanded or restricted digital rights in general. Cases that had reasoned orders were preferred.

After finalising the cases to be included in this report, we divided them using the object and subject classification mentioned above. Wherever relevant, we have linked the development in the jurisprudence to on-going developments in the executive and legislative arms of government as well.

The cases discussed here stem from concerns of sexual expression, harmful or vulgar content, and representation of, and by, women online, and have affected a range of digital rights - including access, freedom of expression, privacy, anonymity, the right to be forgotten, and the relation of several of these to intermediary liability. Although we recognise that the continued expansion of the state's surveillance powers, including on the grounds of ensuring the safety of women,<sup>6</sup> is harmful, often discriminatory and disproportionately affects marginalised and vulnerable groups of society,<sup>7</sup> we did not find a case that sufficiently considered the impact of placing women or gender or sexual minorities under electronic surveillance on gender and sexuality rights or on digital rights.

To analyse the impact of court cases concerning gender and sexuality on digital rights, it is important, however, to first understand the law at the intersection of women's rights and digital rights. This will be especially important for those who may not be conversant with the Indian legal framework, since the laws described here are relevant to the cases discussed later. In the next section, we adapt CYRILLA's five-category framework of laws that affect digital rights to provide an outline of the Indian legal landscape.<sup>8</sup>

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<sup>6</sup> *Inspector General of Police v. S. Samuthiram* (2013) 1 SCC 598, para 34. See also Tripti Jain, Submission in Response to the Draft Unmanned Aircraft System Rules 2020, Internet Democracy Project (2020), <https://internetdemocracy.in/reports/submission-in-response-to-the-draft-unmanned-aircraft-drone-rules-2020/>.

<sup>7</sup> Anja Kovacs, Reading Surveillance through a Gendered Lens: Some Theory, Internet Democracy Project, Gendering Surveillance (February 2017), <https://genderingsurveillance.internetdemocracy.in/theory/>; Anja Kovacs, When Our Bodies Become Data, Where Does That Leave us?, *Deep Dives* (28 May 2020), <https://deepdives.in/when-our-bodies-become-data-where-does-that-leave-us-906674f6a969>. See also Neil Richards, Dangers of Surveillance, 126 Harv. L. Rev. 1934 (2013).

<sup>8</sup> Jessica Dheere, A Methodology for Mapping the Emerging Legal Landscapes for Human Rights in the Digitally Networked Sphere, in *Unshackling Expression: A Study on Laws Criminalising Expression Online in Asia* (Association for Progressive Communications, 2017), [https://giswatch.org/sites/default/files/gw2017\\_special\\_methodology.pdf](https://giswatch.org/sites/default/files/gw2017_special_methodology.pdf).

## PART 3

# LAY OF THE LEGAL LAND

## 3.1

Legal foundations & fundamental rights and freedoms

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## 3.2

Governance of online & networked spaces

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## 3.3

Sectoral laws

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## 3.4

Other laws

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## 3.5

Draft laws

# 3.1 Legal foundations and fundamental rights and freedoms

## THE CONSTITUTION OF INDIA, 1950

The foundation of the Indian legal system lies in the Constitution of India, 1950, adopted three years after India gained independence. Part III of the Constitution, which guarantees fundamental rights to Indian citizens, lays down the general limits on state power.

Article 14 guarantees the right to equality to all persons before the law. Article 15(1) of the Constitution prohibits discrimination against any citizen on the grounds of sex, while Article 15(3) permits the State to make special provisions for women and children.

Article 19(1)(a) guarantees the freedom of speech and expression to all Indian citizens, and has been consistently interpreted to include the right to receive and communicate information in any medium, including the electronic medium.<sup>9</sup> Under Article 19(2), the State can restrict the exercise of this fundamental right only through a law that imposes reasonable restrictions in the interests of decency or morality, the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, or in relation to contempt of court, defamation or incitement to an offence. Recognising that communication through the Internet has gained “contemporary relevance” and is one of the “major means of information diffusion”, the Indian Supreme Court in *Anuradha Bhasin* ruled that “the freedom of speech and expression through the medium of Internet is an integral part of Article 19(1)(a) and accordingly, any restriction on the same must be in accordance with Article 19(2) of the Constitution.”<sup>10</sup>

Article 21 guarantees the right to life and personal liberty to all persons, which cannot be deprived by the State without following a due process of law that is just, fair, and reasonable.<sup>11</sup>

In a landmark judgment in 2017, a nine judge bench of the Indian Supreme Court in *K.S. Puttaswamy* held that the right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III (Articles 19(1)(a) and 19(1)(d) of the Constitution).<sup>12</sup>

Together, Articles 14, 19, and 21 are referred to as the “golden triangle” that lay down the foundation for liberty, equality, dignity, and fraternity under the Indian Constitution.<sup>13</sup> These provisions, and particularly Article 21, have been subject to expansive interpretation, through the courts’ jurisprudence in Public Interest Litigations (PILs).

<sup>9</sup> *Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India*, (1985) 1 SCC 641 (SC), para 68; *Ministry of Information and Broadcasting, Govt. of India v. Cricket Assn. of Bengal*, (1995) 2 SCC 161, para 43; *Shreya Singhal v. Union of India*, (2015) 5 SCC, para 30-31.

<sup>10</sup> *Anuradha Bhasin v. Union of India*, (2020) 3 SCC 637.

<sup>11</sup> *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

<sup>12</sup> *K. S. Puttaswamy v. Union of India*, (2018) 1 SCC 809.

<sup>13</sup> *T.R. Kothandaraman vs T.N. Water Supply & Drainage Board*, (1994) 6 SCC 282.

PILs refer to litigation undertaken before a constitutional court (High Court, under Article 226 of the Constitution, or the Supreme Court, under Article 32 of the Constitution) in public interest. Any “public spirited” individual or organisation may file a PIL, or even send a letter to the Chief Justice on an issue of “substantive public interest” (which will get treated as a PIL), as long as it is not for “personal gain or for any oblique motive”.<sup>14</sup>

PIL jurisprudence in India emerged as a response to the judiciary’s failure to act amidst the declaration of a national emergency between 1975-1977 and an attempt to restore the legitimacy of the courts through judicial populism. Thus, through the PIL route, courts began adopting a more rights-oriented discourse by relaxing the rules of standing and procedure in order to protect the marginalised and vulnerable classes and improve access to justice. The orders passed by the courts in PILs are often “activist” in nature and may dilute the separation of powers.

The initial wave of PILs in the 1970s and 1980s was concerned with ensuring the right to legal aid, speedy trial, access to justice, better conditions of prisons, and the end of bonded labour. Over the years, however, PILs have slowly transformed into a good governance and “urban governance” tool that has subsequently been used against the poor, such as in slum demolition and sealing drive cases.<sup>15</sup> In the last decade, PILs have been used in digital rights litigation - often by self-appointed activists as “Publicity Interest Litigations” - as a tool for what we term “moral governance” (e.g. PILs filed to ban pornography, ban TikTok, or regulate the content on OTT platforms) as well as to seek a variety of other objects, such as regulating WhatsApp Pay; mandating the linking of India’s biometric identity, Aadhaar, with social media; protecting financial data stored on Unified Payment Interface platforms; or challenging the constitutionality of the surveillance regime in India.<sup>16</sup>

## CRIMINAL LAW

Criminal law in the country is governed by the Indian Penal Code, 1860 (IPC), the Indian Evidence Act, 1872, and the Code of Criminal Procedure, 1973 (CrPC). The first two laws are legacies from the colonial period, and in many instances, reflect outdated Victorian notions of morality. The IPC contains provisions specifically criminalising speech that is obscene (sections 292 and 294), defamatory (section 500), insults the “modesty” of women and intrudes upon their privacy (section 509), while also punishing anonymous criminal intimidation (section 507), sexual harassment (section 354A), voyeurism and non-consensual sharing of sexual images online (section 354C),<sup>17</sup> and digitally-enabled stalking (section 354D).

<sup>14</sup> *State of Uttaranchal v Balwang Singh Chauhan*, (2010) 3 SCC 412.

<sup>15</sup> Anuj Bhuwania, *Courting the People: Public Interest Litigation in Post Emergency India* (CUP, 2016). See also Lavanya Rajamani, Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability, 19(3) J. of Env. L. 293 (2007).

<sup>16</sup> *Infra*, sections 4.1, 4.2, and 5.2. See also Aditi Agrawal, WhatsApp Questions the Suitability of Petitioner Who Filed a PIL against WhatsApp Pay, *Medianama* (3 June 2020), <https://www.medianama.com/2020/06/223-whatsapp-pay-affidavit-good-governance-chambers/>; Nilashish Chaudhary, PIL in SC Seeks Protection from Misuse of Data Collected on UPI Platform; Alleges Whatsapp, Google, Amazon Allowed to Operate without Scrutiny, *LiveLaw* (10 September 2020), <https://www.livelaw.in/top-stories/pil-in-sc-seeks-protection-from-misuse-of-data-collected-on-upi-platform-alleges-whatsapp-google-amazon-allowed-to-operate-without-scrutiny-162731>.

<sup>17</sup> Section 354C states: “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....”

...Explanation 2: Where the victim consents to the capture of the images or any act, but not to their dissemination to third persons and where such image or act is disseminated, such dissemination shall be considered an offence under this section.”

Explanation 2 makes it clear that it covers the non-consensual sharing of sexual images online. In fact, section 354C goes beyond “revenge porn” as colloquially understood by courts in India (see *Animesh Boxi*, *infra*, section 5.4), since it does not restrict the offence to acts motivated only by revenge, while also bringing the issue of consent at the forefront.

In some cases, states have recognised new harms caused due to technology-based sexual violence and criminalised these actions.<sup>18</sup> For instance, in 2020, Jammu and Kashmir became the first State/Union Territory in India to criminalise the act of “sextortion”, which it defined as the abuse of authority or fiduciary relationship or misuse of official position to employ “physical or non-physical forms of coercion to extort or demand sexual favours from any woman”.<sup>19</sup> The State of Chhattisgarh also introduced an amendment to the IPC, albeit using broad and vague terms, criminalising sexual harassment by electronic mode. This punishes “obscene, lewd, lascivious, filthy or indecent” communications online, made with an intent to “harass or cause annoyance or mental agony” to a woman.<sup>20</sup>

The IPC applies to criminal activities both online and offline, and classifies offences based on whether they are cognizable/non-cognizable or bailable/non-bailable. Serious offences are classified as cognizable, which means that the police can arrest an individual without judicial authorisation. Non-bailable offences are those where a person who has been arrested by the police does not have an automatic right of bail and requires a judicial order to be released from prison. As a general rule, most serious offences are cognizable and non-bailable, although there are exceptions.<sup>21</sup>

The IPC and the CrPC interact in cases of pre-trial bail, when an accused has been arrested and seeks release from prison, or is anticipating arrest and moves the court for protection against arrest. In deciding whether or not to grant bail, courts are meant to consider the nature of the crime and the likelihood of the accused to flee the jurisdiction, intimidate witnesses, and tamper with evidence.<sup>22</sup> As we shall see in Rehana Fathima’s case below, the courts’ hesitation in applying these principles to grant bail can lead to a chilling effect and stifle free speech.<sup>23</sup>

## THE CRIMINAL LAW REFORM COMMITTEE

In May 2020, the government set up an expert committee comprising of only upper caste, Hindu men to suggest reforms to criminal law, including sexual offences against women and speech-based offences such as obscenity and defamation. While the lack of diversity on such committees is cause for concern at all times, these are matters that intimately affect women and gender and sexual minorities, revolve around their lived experiences, and on which women and gender and sexual minorities are likely to have a unique perspective. Consequently, the lack of representation of women and LGBTQIA+ persons, as well as Dalits (former untouchables, who occupy the lowest position in the caste hierarchy and who were traditionally deprived of any

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<sup>18</sup> Under the Indian legal structure, criminal law and criminal procedure is under the “concurrent list”, which means that both the Centre and the States can pass laws on the issue. Hence, although the IPC is a central law, states have the ability to amend specific provisions to modify their application to the state.

<sup>19</sup> Section 354E, IPC, as introduced by the Jammu and Kashmir Reorganisation (Adaptation of Central Laws) Order, 2020, defines sextortion as “(1) Whoever,— (a) being in a position of authority; or (b) being in a fiduciary relationship; or (c) being a public servant, abuses such authority or fiduciary relationship or misuses his official position to employ physical or non-physical forms of coercion to extort or demand sexual favours from any woman in exchange of some benefits or other favours that such person is empowered to grant or withhold, shall be guilty of offence of sextortion. Explanation: For the purpose of this section, ‘sexual favour’ shall mean and include any kind of unwanted sexual activity ranging from sexually suggestive conduct, sexually explicit actions such as touching, exposure of private body parts to sexual intercourse, including exposure over the electronic mode of communication.” See also Benjamin Wittes, Cody Poplin, Quinta Jurecic and Clara Spera, Report on Sextortion: Cybersecurity, Teenagers, and Remote Sexual Assault, *Brookings* (11 May 2016), <https://www.brookings.edu/research/sextortion-cybersecurity-teenagers-and-remote-sexual-assault/>.

<sup>20</sup> Section 509B, IPC as inserted via Chhattisgarh Act 25 of 2015. For more details on prosecutions under Section 509B, see Rishabh Bailey and Vrinda Bhandari, Towards Holistic Regulation of ‘Online Hate Speech’, IT for Change Roundtable on Combating Sexist Hate Speech Online (2020) (*forthcoming*).

<sup>21</sup> For instance, section 143, IPC, which criminalises membership of an unlawful assembly and section 148, which criminalises rioting, armed with a deadly weapon are cognizable, but bailable. Similarly, section 137, which punishes the negligence of a master in allowing a deserter to be concealed on board a merchant vessel is non-cognizable and bailable.

<sup>22</sup> Sections 437-439, CrPC, 1973. For greater understanding of how pre-trial detention works in India, see Vrinda Bhandari, Pretrial Detentions in India: An Examination of the Causes and Possible Solutions, 11(2) *Asian J of Criminology* 83 (2015).

<sup>23</sup> *Infra*, section 5.2. *Rehana Fathima v. State of Kerala*, 2018 SCC OnLine Ker 21246.

economic, social, and political rights),<sup>24</sup> Adivasis (persons belonging to tribal communities),<sup>25</sup> religious minorities, and persons with disabilities on the Committee has been severely criticised, as has the nature of consultation process followed.<sup>26</sup> These vulnerable and marginalised groups are most likely to come in contact with criminal law or be the subject of control through criminal law, and will, thus, be most affected by the Committee's recommendations.

It is worth noting that India does not have any separate laws that operationalise the right to freedom of expression or privacy from a civil law perspective. Laws dealing with the governance of online and networked spaces and sectoral laws are aimed at protecting the rights of women primarily through the criminalisation of certain activities.

## 3.2 Governance of online and networked spaces

The Indian Parliament, recognising that new laws were needed to govern the digitally networked sphere, passed the Information Technology Act, 2000. Section 67 of the Act criminalises the publication or transmission of obscene material in electronic form, imposing a stricter punishment than the IPC which contains a similar offence.<sup>27</sup> Research has demonstrated that section 67 is being used as a catch-all offence along with other provisions of the IPC, covering cases that often have very little to do with obscenity but instead relate to, for example, political speech, criminal intimidation, and breach of peace.<sup>28</sup>

The IT Act was amended in 2008 to insert section 67A, prohibiting the publication or transmission of material containing sexually explicit acts or conduct in electronic form. This was a new offence, since no offline equivalent existed in the IPC. Under section 67A, however, the viewing of sexually explicit material is permissible. Section 67B goes further and prohibits not only the publication or transmission of electronic material depicting children engaged in sexually explicit acts, but also the browsing and downloading of electronic material depicting children in an obscene or indecent or sexually explicit manner.

The offences under sections 67, 67A, and 67B are cognizable and non-bailable, and all three sections create exceptions for publication that is proved to be justified for the public good in the interest of science, literature, art, or learning, or other objects of general concern, or if used for *bona fide* religious or heritage purpose.<sup>29</sup> Consent does not play a role in determining the applicability of any of these offences.

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<sup>24</sup> Dalit is a Marathi term which means broken or crushed people. It was first used in the 1920s by several people, including Ambedkar in his writings in the weekly magazine Janata, for describing the untouchables. The term Dalit, as a self-chosen name, was revived by the Dalit Panthers movement in the 1970s. The Indian State, however, for all policy purposes refers to the Dalits as Scheduled Castes. With thanks to Dr. Sumeet Mhaskar for providing these definitions and clarifications.

<sup>25</sup> The Indian State refers to Adivasis as Scheduled Tribes.

<sup>26</sup> The constitution and details of the Committee can be found at <https://criminallawreforms.in/questions-pdf/Questionnaires-for-Consultation-on-Substantive-Criminal-Law.pdf>. The objections to the Committee constitution and consultation process can be found at <https://www.theleaflet.in/prominent-women-lawyers-highlight-lack-of-diversity-in-committee-on-criminal-law-reform-committee-issues-statement/#> and <https://www.livelaw.in/news-updates/severely-exclusionary-queer-feminists-activists-seek-disbanding-of-criminal-law-reforms-committee-165193>.

<sup>27</sup> The punishment under section 67 of the IT Act for publishing or transmitting obscene material in electronic form is up to three years imprisonment and fine up to Rs. 5 lakhs on first conviction. The punishment under section 292 of the IPC for distributing an obscene book is up to two years imprisonment and fine up to Rs. 2000 on first conviction.

<sup>28</sup> Bishaka Datta, Guavas and Genitals: A Research Study, in *EROTICS South Asia Exploratory Research: Sex, Rights and the Internet* (Association for Progressive Communications, 2017), [https://www.apc.org/sites/default/files/Erotics\\_1\\_FIND.pdf](https://www.apc.org/sites/default/files/Erotics_1_FIND.pdf).

<sup>29</sup> Section 67B Proviso and Section 77B, IT Act.

The 2008 amendment, however, also introduced a consent-based offence for the violation of privacy. Section 66E punishes the non-consensual capture, publication, or transmission of the image of a private area of any person, for violating the privacy of that person. Unfortunately, it is not used much in practice, with the police often preferring the more broadly worded provisions of sections 67 and 67A.<sup>30</sup>

In addition, section 69A of the IT Act authorises the government to block online content and websites if it is necessary or expedient “in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order, or for preventing incitement to the commission of any cognizable offence relating to above”. Notably, these grounds do not include decency or morality.<sup>31</sup> The power under section 69A was exercised in 2020 by the government to block apps such as TikTok, Likee, and Bigo in India.<sup>32</sup>

The intermediary liability regime in India is built upon section 79 and its accompanying rules, which have been used by the government to direct intermediaries to block access to, for example, certain pornographic websites. Under section 79 of the IT Act, intermediaries have a duty to observe due diligence and disable access to unlawful content upon receiving actual knowledge. The Supreme Court in *Shreya Singhal (supra)* read down the term “actual knowledge” in section 79(3)(b) to mean that an intermediary must expeditiously disable or remove access to materials being used to commit an unlawful act only if it receives actual knowledge from a court order or a government agency.<sup>33</sup> This effectively ended the notice and takedown regime in place until then: users now do not have the option of writing to an intermediary to ask them to take down content they believe is inappropriate, obscene, or illegal. Specifically for Internet service providers (ISPs), section 25 of the IT Act provides for the suspension of their license in case of violation of the terms of license or failure to comply with the provisions of the Act.

The Protection of Children from Sexual Offences Act, 2012 (POCSO Act), was enacted by the government to combat the production, dissemination and consumption of child sexual abuse images, including in online and networked spaces.<sup>34</sup> In 2020, the government notified new rules under the Act, requiring intermediaries who had received information about pornographic material being stored or circulated on their platform to report the matter to the police and hand over the necessary material, including the source from which such material may have originated, to the police.<sup>35</sup>

The Pre-Conception and Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (PNDT Act), specifically prohibits advertisements relating to pre-natal determination of the sex of a child, including on the Internet.<sup>36</sup> The section was the focus of litigation in *Sabu Mathew George v. Union of India*, in which the Supreme Court developed the “auto-block” doctrine for proactive censorship by intermediaries. We will discuss this case later in this report.<sup>37</sup>

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<sup>30</sup> Datta, *supra* note 28.

<sup>31</sup> Section 69A, IT Act, 2000, read with Rules 9 and 10 of IT (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009. Prior to the 2008 IT Act Amendment, the government had much wider, unconstrained powers to block websites, including on grounds of obscenity, and blocking took place under the old section 67 read with section 88 of the IT Act along with the Procedure for Blocking of Websites, GSR 181(E) dated 27 February 2003 notified by the by the government in consultation with the Cyber Regulation Advisory Committee. As Manoj Mitta points out, “the change is thanks to a critical difference between section 69A and the earlier version of section 69. Under the old provision, the government could ban websites to prevent “incitement to the commission of any cognizable offence” including obscenity, a charge liable to be made against porn websites. But the new provision takes a more pragmatic approach as it limits the power to ban websites to offences relating to five specific grounds.” See Manoj Mitta, Govt. Can’t Ban Porn Websites for Obscenity, *Economic Times* (11 February 2010), <https://m.economictimes.com/tech/internet/govt-cant-ban-porn-websites-for-obscenity/articleshow/5558340.cms>.

<sup>32</sup> *Infra*, section 5.2.

<sup>33</sup> (2015) 5 SCC 1, para 124.3. See also Information Technology (Intermediaries Guidelines) Rules, 2011.

<sup>34</sup> Sections 11, 13, and 15 of the POCSO Act, 2000.

<sup>35</sup> Rule 11(2), POCSO Rules 2020.

<sup>36</sup> Section 22, PDNT Act.

<sup>37</sup> (2017) 2 SCC 514.



## 3.3 Sectoral laws

Under the Telegraph Act of 1885, the Central Government has the power to grant licenses. Consequently, the Department of Telecommunication has entered into a Unified License Agreement with various ISPs, granting a twenty year license to the ISPs to operate, under certain conditions. These conditions require the ISPs to block websites in national security or “public interest” and prevent the carriage of “objectionable, obscene, unauthorised” content. ISPs are not expected to act proactively: their obligation under the License is to take necessary action only after a specific instance of infringement is reported by the government or a law enforcement agency.<sup>38</sup>

The Telecom Regulatory Authority of India (TRAI), established by the Telecom Regulatory Authority of India Act, 1997, has the powers to regulate the telecommunications sector and telecom service providers. It has published multiple consultation papers on the regulatory framework for OTT services as well as recommendations on privacy, security, and ownership of data in the telecom sector.<sup>39</sup> In September 2020, TRAI submitted a report to the Department of Telecommunication, Government of India, that it is not an opportune moment to recommend a comprehensive regulatory framework for OTT services and that market forces may be best placed to respond to the situation.<sup>40</sup> In section 4, we examine the slew of cases that have been filed before multiple Indian courts praying for the regulation and licensing of OTT platforms such as Netflix, Amazon Video, and Hotstar, on the ground that they showcase vulgar content that degrades Indian women and culture.

## 3.4 Other laws

The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services), 2016, which provides the legal basis for the country’s controversial unique biometric identity project (and failed to substantially alleviate concerns about privacy violations surrounding Aadhaar), guarantees special protections for women, among other groups, although it does not specify the nature of protection contemplated.<sup>41</sup> No orders operationalising this provision have been passed yet.

## 3.5 Draft laws

Over the last few years, the government has proposed amendments to various laws that will have a direct impact on gender rights in the digital sphere, if passed. There are three laws or amendments to laws that may be in the pipeline that we should keep a watch on in particular, given their potential impact on digital rights as well as gender rights.

<sup>38</sup> Section 4 of the Telegraph Act read Clause 7.12 and 38.1 of the USL, [https://dot.gov.in/sites/default/files/Unified%20Licence\\_0.pdf](https://dot.gov.in/sites/default/files/Unified%20Licence_0.pdf).

<sup>39</sup> TRAI, Consultation Paper on Regulatory Framework for OTT Services (2015), <https://traigov.in/sites/default/files/OTT-CP-27032015.pdf>; TRAI, Consultation Paper on Regulatory Framework for OTT Communication Services (2018), <https://traigov.in/sites/default/files/CPOTT12112018.pdf>; and TRAI, Recommendations on Privacy, Security, and Ownership of Data in the Telecom Sector (2018), [https://www.traigov.in/sites/default/files/RecommendationDataPrivacy16072018\\_0.pdf](https://www.traigov.in/sites/default/files/RecommendationDataPrivacy16072018_0.pdf).

<sup>40</sup> TRAI, Press Release: TRAI Releases Recommendations on “Regulatory Framework for OTT Communication Services” (2020), [https://www.traigov.in/sites/default/files/PR\\_No.69of2020.pdf](https://www.traigov.in/sites/default/files/PR_No.69of2020.pdf).

<sup>41</sup> Section 5, Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services), 2016.

The draft Prohibition of Indecent Representation of Women and Children Bill, 2012, proposes to amend the Indecent Representation of Women (Prohibition) Act, 1986. It seeks to widen the scope of the prohibition against “indecent” representation of women to include the Internet under the purview of this law and has been critiqued for the same.<sup>42</sup>

In 2018, the government issued the draft Information Technology [Intermediaries Guidelines (Amendment) Rules] (the draft Intermediary Guidelines) to impose a raft of obligations on intermediaries. Under the proposed amendment, intermediaries must enable tracing of the originators of information and deploy technology-based automated tools or appropriate mechanisms, with appropriate controls, for “proactively identifying and removing or disabling public access to unlawful information or content.”<sup>43</sup> By encouraging intermediaries to proactively remove unlawful content, the draft Rules have the potential to undermine free speech by encouraging over-censorship, especially for content that may be considered obscene or sexually explicit from the perspective of stereotypical and patriarchal notions of morality. This *prima facie* seems contrary to the judgment of the Supreme Court in *Shreya Singhal (supra)*, which had expressly rejected a notice and takedown regime in which intermediaries had the final word in deciding what content to take down.

The proposed Rule 3(8) of the draft Intermediary Rules states that, on receiving actual knowledge in the form of a court order or a government agency notice, an intermediary shall remove or disable access to “unlawful acts” relating to Article 19(2) of the Constitution, including on grounds of decency and morality, within 24 hours. The specific inclusion of decency and morality within the rule notified by the Executive undermines the express decision taken by Parliament to exclude these terms while specifying the powers of the government to block websites or online content under section 69A.

The traceability requirement in the draft Intermediary Rules has also raised concerns about increasing the powers of the government to conduct surveillance and introduce backdoors to encryption models that power a free and open Internet, without the necessary accountability mechanisms.<sup>44</sup> This will particularly affect women, who greatly benefit from the anonymity and privacy that the Internet has to offer.<sup>45</sup> Based on the comments received, the government is reportedly planning to further amend these Rules, although no official notification has been issued.<sup>46</sup>

The Personal Data Protection Bill, 2019, was introduced in the lower house of Parliament (Lok Sabha), and has now been referred to a Joint Parliamentary Committee for discussion. As a data protection legislation, the Bill impacts the exercise of the right to privacy in the digital sphere, while also exempting law enforcement agencies from the rigours of its application. Studies have shown that the notion that privacy is not a strong cultural value in India and that Indians

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<sup>42</sup> The Indecent Representation of Women (Amendment) Bill, 2012. [https://www.prsindia.org/sites/default/files/bill\\_files/The\\_Indecent\\_Representation\\_of\\_Women\\_%28Prohibition%29\\_Amendment\\_Bill%2C\\_2012.pdf](https://www.prsindia.org/sites/default/files/bill_files/The_Indecent_Representation_of_Women_%28Prohibition%29_Amendment_Bill%2C_2012.pdf). See also Disha Choudhari, Analysing The Indecent Representation of Women (Prohibition) Bill 2012, *Feminism in India* (9 February 2017), <https://feminisminindia.com/2017/02/09/indecnt-representation-women/>. The 1986 Act has also been critiqued extensively. See, for example, Flavia Agnes, Indecent Representation of Women, in *Gender & Censorship* (Brinda Bose ed, Women Unlimited, 2006).

<sup>43</sup> The Information Technology [Intermediaries Guidelines (Amendment) Rules] 2018, [https://www.meity.gov.in/writereaddata/files/Draft\\_Intermediary\\_Amendment\\_24122018.pdf](https://www.meity.gov.in/writereaddata/files/Draft_Intermediary_Amendment_24122018.pdf).

<sup>44</sup> If the traceability requirement is interpreted by the government or the court for intermediaries to change their platform architecture by building a backdoor or weaken their encryption models, it would undermine the security and authentication systems (and therefore data protection and privacy) for all users of the platform, while raising concerns about the expansion of the surveillance state. For more details, see Vrinda Bhandari, Rishab Bailey and Faiza Rahman, Backdoors to Encryption: Assisting an Intermediary’s Duty to Provide Technical Assistance, Data Governance Network Working Paper (2021). See also, Anja Kovacs, Internet Democracy Project Joins Global Coalition that Urges India to Withdraw Proposed Amendments to Intermediary Guidelines, *Internet Democracy Project* (16 March 2019), <https://internetdemocracy.in/2019/03/Internet-democracy-project-joins-global-coalition-that-urges-india-to-withdraw-proposed-amendments-to-intermediary-guidelines/>.

<sup>45</sup> Lina Sonne, What Do We Know about Women’s Mobile Phone Access and Use? A Review of Evidence, Dvara Research Working Paper Series No. WP-2020-03 (August 2020), <https://www.dvara.com/research/wp-content/uploads/2020/06/What-Do-We-Know-About-Womens-Mobile-Phone-Access-Use-A-review-of-evidence.pdf>.

<sup>46</sup> Aditi Agarwal, Supreme Court to MeitY: What’s the Status of Intermediary Guidelines? Tell Us by Oct 15, *MediaNama* (26 September 2019), <https://www.medianama.com/2019/09/223-supreme-court-to-meity-intermediary-guidelines-status/>.

do not “care” about privacy is misplaced: people, particularly women, care about the loss of privacy and the associated reputational cost, and hence often self-censor.<sup>47</sup> However, seeing the impact of large scale data processing permitted by the Bill, the absence of any accountability mechanism to regulate state surveillance, the lack of independence in the functioning of the proposed regulator, and the weak enforcement mechanism, the Bill may not truly operationalise the right to privacy and dignity for all.<sup>48</sup>

In addition to these three draft laws, new amendments to the laws of obscenity and sexual harassment under the IPC and the IT Act may also be in the offing, based on the forthcoming report of the Criminal Law Reform Committee discussed above.

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<sup>47</sup> Privacy on the Line: What People in India Think about Their Data Protection and Privacy, Dvara Research (2017), <https://www.dvara.com/research/wp-content/uploads/2017/11/Privacy-On-The-Line.pdf>.

<sup>48</sup> Nayantara Ranganathan, Solving for Data Justice: A Response to the Draft Personal Data Protection Bill, Internet Democracy Project (2018), <https://internetdemocracy.in/reports/datajustice/>. See also Vrinda Bhandari, Data Protection Bill: Missed Opportunity for Surveillance Reform, *The Quint* (28 July 2018), <https://www.thequint.com/voices/opinion/personal-data-protection-bill-2018-draft-srikrishna-committee-loopholes-surveillance>.

## PART 4

# WOMEN AS OBJECTS OF STATE CONTROL

## 4.1

Monitoring the representation of women online:  
The broadening of censorship

4.1.1 *Justice for Rights Foundation* and the regulation of OTT platforms

4.1.2 *Kamlesh Vaswani* and the crusade to prohibit pornography

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## 4.2

Monitoring online harmful content: Encouraging  
proactive censorship by weakening the intermediary  
liability regime

4.2.1 *In re Prajwala* and the promotion of proactive intermediary censorship

4.2.2 *Sabu Mathew George* and the doctrine of "auto block"

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## 4.3

*Muhammed Shifas* and the broadening of censorship  
through bail conditions

The Indian Constitution may have removed the formal barriers supporting institutionalised discrimination against women, but patriarchal mindsets prevail. Modernisation has not ousted misogyny. If anything, the Internet has provided a new avenue for attempts at controlling women's bodies. As the Supreme Court has observed, "the days of yore when women were treated as fragile, feeble, dependent and subordinate to men, should have been a matter of history, but it has not been so, as it seems."<sup>49</sup>

In this section, we will discuss three sets of cases that will help contextualise the norms that have been created by courts while dealing with broad issues relating to gender and sexuality in the online space. Despite the Supreme Court's observation above, each set of cases tells a common story: of how concerns about protecting "Indian culture" or protecting women, even when well-intentioned, ended up reinforcing traditional stereotypes about "fragile, feeble, and dependent" women, widening censorship, and consequently, undermining digital rights. The cases discussed here are mostly in the nature of PILs. Unlike the next section, which focuses on the experience of women who sought to challenge the existing discourse about the role of women and upend power structures, this section analyses the norms of morality and safety used by courts to broaden censorship by treating women as a class as *objects* of state control.

First, we look at attempts by middle class gatekeepers of morality to regulate and censor online content that "degrades Indian culture" by filing PILs, and their potential to restrict the diversity of content available online. This involves PILs filed by "public-spirited" persons and organisations across multiple High Courts seeking pre-certification of content available on OTT platforms such as Netflix, Hotstar and Amazon Prime, as well as Kamlesh Vaswani's ongoing PIL before the Supreme Court to ban the private consumption of pornography.

Second, we analyse two cases where the Supreme Court has been asked to monitor online harmful or illegal content: by the NGO, Prajwala Foundation, in the case of gang rape videos and child sexual abuse material (CSAM) circulating online; and by Sabu Mathew George, in the case of advertisements for sex determination online. The Court's orders, although intended to safeguard women and children, have unwittingly undermined the intermediary liability regime in the long run.

Third, we examine new forms of censorship that have emerged from bail conditions, such as those imposed by the Kerala High Court prohibiting Muhammed Shifas, accused of raping a girl and sharing her nude pictures online, from using all forms of social media, for any purpose, till the conclusion of trial.

In all three sets of cases, the courts have been focused on the immediate need for regulation, without considering the impact of their decision on the freedom of speech and expression and the privacy of women online. Consequently, the impact of these decisions has been to restrict free speech on the Internet.

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<sup>49</sup> *Charu Khurana v. Union of India*, (2015) 1 SCC 192.

## 4.1 Monitoring the representation of women online: The broadening of censorship



### JUSTICE FOR RIGHTS FOUNDATION AND THE REGULATION OF OTT PLATFORMS

**CONTEXT** Leila. Sacred Games. Made in Heaven. Paatal Lok. Sex Education. Ghoul. Four More Shots Please.

These are just some of the shows created specifically for OTT platforms such as Netflix and Amazon Prime Video, and available for streaming in India. OTT platforms have led to an explosion of diverse content that goes beyond mainstream narratives and addresses what are often considered controversial issues, such as the policing of women’s bodies, gay relationships, sex, sexual pleasure, masturbation, and a lot of nudity. This has expanded the choice of content available both for content creators and for viewers, broadening the freedom of speech and expression online. For example, for decades, Bollywood movies did not show any kisses, which were instead implied through two flowers touching or the camera zooming away.<sup>50</sup> Only recently, has there been an increase in the depiction of erotic kissing or sex scenes, although nudity and sexual pleasure for female characters is still largely implied, and is often controversial when represented.<sup>51</sup> For the first time possibly in Indian cinematic and television history, OTT platforms have allowed and encouraged shows to celebrate the female body, female sexuality, and female agency openly.

Many people are unhappy. The rising popularity of OTT platforms has been accompanied by an unsurprising backlash and a fear that such an unrestrained celebration of the female body will degrade Indian culture and corrupt its citizens. Over the last few years, multiple PILs have been filed, seeking what we have termed “moral governance” by the courts over the content broadcast on streaming platforms. Unfortunately, the judicial response has been mixed.

<sup>50</sup> Rachel Dwyer, *Why Bollywood Gave the Kiss a Miss*, *Times of India* (9 November 2014), <https://timesofindia.indiatimes.com/home/sunday-times/Why-Bollywood-gave-the-kiss-a-miss/articleshow/45085156.cms>.

<sup>51</sup> “Veere Di Wedding”, a 2018 movie, is one of the first movies to depict a female character using a vibrator and masturbating, and the actor Swara Bhaskar has regularly been criticised and trolled by a section of society for performing the scene. See Quint Entertainment, *Trolled on Polling Day for Masturbation Scene, Swara Hits Back*, *The Quint* (30 April 2019), <https://www.thequint.com/entertainment/celebrities/swara-bhaskar-trolled-polling-day-masturbation-scene>.

**CASES** One of the first cases on this issue emerged from a PIL filed by an NGO, Justice for Rights Foundation, before the Delhi High Court in *Justice for Rights Foundation v Union of India*. The PIL prayed for the framing of guidelines to regulate the content broadcast on OTT platforms and to direct the government to pass necessary directions to all online platforms “to remove legally restricted content”.<sup>52</sup> The Petitioner NGO was reportedly aggrieved by the “uncertified, sexually explicit, and vulgar” content shown on OTT platforms, with shows such as Sacred Games and Game of Thrones containing “vulgar, profane, sexually explicit, pornographic, morally unethical and virulent” content which often “depict[s] women in objectifying manner”.<sup>53</sup>

At the first hearing, the High Court did not issue notice on the petition, meaning that it did not yet agree to hear the matter, but directed the Ministry of Information and Broadcasting to provide an explanation of the governing legal regime.<sup>54</sup> The Ministry clarified that OTT platforms are not regulated by it, and hence, do not require a license prior to broadcasting content. The Ministry of Electronics and Information Technology, too, stated that they do not regulate content over the Internet or organisations that put up content on the Internet. They highlighted provisions of the IT Act, which has specific offences for content that is obscene (section 67) or sexually explicit (sections 67A and 67B); empowers the government to intercept/monitor/decrypt (section 69) and block content (section 69A); and suspend licenses in case of non-compliance with provisions of the Act (section 25).<sup>55</sup> The Ministry argued that these provisions allow the government to intervene in necessary cases, and no further regulation is required.

Thus, while there is no general power under the IT Act to monitor content on the Internet, the Act allows an aggrieved party to take action in case unlawful content is broadcast online. In fact, many complaints and petitions have been filed against specific programs broadcast on OTT platforms for violating extant laws in India.<sup>56</sup> Keeping this in mind, the Delhi High dismissed the *Justice for Rights* petition in February 2019, noting that:

*In a public interest litigation, this Court cannot issue a mandamus for framing general guidelines or provisions when there are stringent provisions already in place under the Information and Technology Act.*

Similar PILs have been filed in other High Courts throughout the country, specifically before the Bombay, Karnataka, Madhya Pradesh and Madras High Courts, and another PIL before the Delhi High Court seeking pre-screening certification for all shows streamed online on account of the “vulgar” language and “sexually unpleasant and indecent scenes” that would lead “youngsters.... [down] into wrong path”. The Bombay High Court adjourned the matter indefinitely once the

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<sup>52</sup> *Justice for Rights Foundation v Union of India*, WP (C) No. 11164/2018, orders dated 08.02.2019 read with 12.03.2019 (Delhi High Court).

<sup>53</sup> Press Trust of India, HC Dismisses PIL to Regulate Netflix, Amazon Content, *Deccan Herald* (8 February 2019), <https://www.deccanherald.com/national/hc-dismisses-pil-regulate-717407.html>.

<sup>54</sup> *Justice for Rights Foundation v Union of India*, WP (C) No. 11164/2018, order dated 14.11.2018 (Delhi HC). However, in a subsequent order, the Court stated that it had issued notice in the first order, thus creating some confusion.

<sup>55</sup> *Justice for Rights Foundation v Union of India*, WP (C) No. 11164/2018, order dated 08.02.2019 (Delhi HC).

<sup>56</sup> See also The Wire Staff, Complaint against Netflix for “Defaming” India, Hurting Hindu Sentiments, *The Wire* (4 September 2019), <https://thewire.in/politics/shiv-sena-netflix-complaint>; Quint Entertainment, Legal Notice Sent to Anushka Sharma for Slur in ‘Paatal Lok’, *The Quint* (21 May 2020), <https://www.thequint.com/entertainment/hot-on-web-gorkhas-offended-by-casteist-slur-in-paatal-lok-demand-apology>.

Supreme Court began considering the issue (see below), while the Karnataka High Court and Delhi High Court dismissed the PILs. The Madhya Pradesh High Court and the Madras High Court are hearing the cases and have not made a final adjudication yet.<sup>57</sup>

Meanwhile, the Justice for Rights Foundation filed a petition to appeal the Delhi High Court judgment before the Supreme Court, reiterating that the remedies under the IT Act were only available after content had been broadcast, and did not enable pre-censorship for content that was “morally unethical”, “sexually explicit, violent, and vile” and “show[ed] women in a bad light and merely as an object, violative of their fundamental right to live with dignity.”<sup>58</sup> Thus, the entire appeal (filed through the NGO’s twenty four year old male President) was predicated on monitoring and protecting the representation of women online.

In May 2019, the Supreme Court issued notice, consenting thereby to hear the matter. Things got even more complicated when more than a year later, in October 2020, a different set of judges in the Supreme Court<sup>59</sup> issued notice on a PIL filed by two male lawyers seeking regulation of OTT platforms by an autonomous body headed by a government bureaucrat. The lawyers were concerned that the lack of censorship had allowed an “exploitation of creative liberty” that violated social mores regarding nudity, sex, drugs, and smoking.<sup>60</sup>

**IMPORT** The multiplicity of petitions seeking regulation of OTT platforms raises cause for concern, both on procedural and substantive grounds. The procedural concerns arise from the risk of conflicting judgments on account of the fact that two separate benches of the Supreme Court are hearing the same issue and may decide the cases differently. Additionally, given that the Supreme Court is considering the necessity for regulation of OTT platforms, it is surprising that High Courts such as the Madras High Court have continued to hear the issue in parallel, given that this violates judicial discipline and judicial propriety by creating a risk of inconsistent decisions.

It is further concerning that the PILs and the courts have failed to consider the rights of women actors, producers, and directors consensually participating in movies and shows on OTT platforms and of the users who watch such movies and shows in the privacy of their homes.

There are also important substantive concerns that arise from throwing open the issue of censorship of OTT platforms, and what impact that may have on digital rights in general and on women in particular. First, by issuing notice and deciding to hear the PILs, the Supreme Court has sent a signal about the types of matters in which it is willing to intervene. The recent trend of admitting PILs to regulate OTT platforms is an instance of “moral governance” by the courts, which sits in stark contrast to the more noble origins of such suits. The courts have agreed to hear petitions filed by individuals (usually men) and NGOs that seek to reinforce a patriarchal view of society: the PILs are framed in terms of the protection of women, but are actually concerned with “degrading morals” and “cultural pollution” in Indian society.

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<sup>57</sup> *Divya Ganeshprasad Gontia v. Union of India*, PIL No. 127/2018, orders dated 05.10.2018 and 05.02.2020 (Nagpur Bench of the Bombay High Court); *K. Suthan v Secretary to Govt, Govt of India*, WP No. 10180/2020, order dated 05.08.2020 (Madras High Court); *Nikhil Bhalla v Union of India*, WP (C) No. 7123/18, order dated 09.04.2019 (Delhi High Court). See also, Akshita Saxena, Madhya Pradesh HC Issues Notice on Plea for Regulation of Web Streaming Platforms, *LiveLaw* (25 September 2019), <https://www.livelaw.in/news-updates/madhya-pradesh-hc-issues-notice-on-plea-for-regulation-of-web-streaming-platforms-148415?infinitiescroll=1>.

<sup>58</sup> *Justice for Rights Foundation v Union of India*, SLP (C) No. 10937/19, order dated 10.05.2019 (Supreme Court of India). The SLP copy is on file with the authors.

<sup>59</sup> Unlike in the U.S., where the entire Supreme Court sits *en banc*, i.e. sits as a whole to hear all cases together, in India different cases get heard by different two judge or three judge benches. Hence, the composition of the judges who issued notice in *Justice for Rights’* petition to appeal is different from the composition of judges who issued notice in the fresh PIL.

<sup>60</sup> *Shashank Shekhar Jha v Union of India*, WP (C) No. 1080/2020, order dated 15.10.2020 (SC). Copy of the petition is available [https://www.livelaw.in/pdf\\_upload/pdf\\_upload-382891.pdf](https://www.livelaw.in/pdf_upload/pdf_upload-382891.pdf).



Second, the Delhi High Court judgment in *Justice for Rights* is important because it clearly recognises that the current legal framework under the IT Act is sufficient to deal with any individual cases of sexually explicit or obscene content. TRAI in its latest recommendations released in September 2020 has also taken the view that no comprehensive regulatory framework is currently required, beyond the extant laws and regulations, to regulate OTT services.<sup>61</sup> In light of this, the Supreme Court's decision to consider whether OTT platforms should be regulated is surprising, considering that it conflicts with the separation of powers doctrine enshrined in the Constitution. It also risks reducing the diversity of content available online and may even lead to self-censorship by OTT platforms. What makes the Court's intervention particularly problematic is that the women who are likely to be most affected by its decision, including women artists, curators, and viewers, are not even being heard.

Third, considering additional regulation on the online representation of female sexuality (to make sure it is consonant with what a particular section of society views as "Indian culture"), when it is already heavily regulated in India, risks strengthening the claims of public morality in the law. Even though India has had a long tradition of eroticism and sexuality in art, literature, and sculpture, Indian social conservatism that views sexuality as a taboo and only meant to serve male desire has strongly influenced its legal culture. As Richa Kaul Padte and Anja Kovacs have explained elsewhere:

*...throughout the Indian legal system, a disproportionate emphasis has been placed on the representation of [women's bodies and their sexualities]. As the creation, publication or circulation of such imagery is believed by many to contribute to the exploitation of women, the protection of a woman is argued to be synonymous with the protection of her image. But who are these laws really protecting? As will become clear from our analysis, if female sexuality is the culprit, public morality is the victim.<sup>62</sup>*

Thus, as discussed earlier, the IT Act over-regulates sexual expression under sections 67 and 67A, both through its language (of material being "lascivious" or having an effect that "tend(s) to deprave and corrupt persons") and by removing any consideration of consent. Historically, the Central Board for Film Certification (colloquially referred to as the "Censor Board") and its allies have served as the "middle class gatekeepers of Indian culture"<sup>63</sup> in expression, entrenching the view that sexuality is an inherently corrupting influence "from which 'decent people' must be protected".<sup>64</sup> Most of the PILs want to create a body akin to the Censor Board that will pre-certify the content available on OTT platforms. This will replicate the problems with censorship in broadcasting and cinema and will diminish the ability to create unconventional, exploratory and innovative content.

As for the Supreme Court, over the last fifty years its jurisprudence on obscenity has evolved, but it still remains grounded in middle class prudish values. In 1965, in *Ranjit. D. Udeshi v State of Maharashtra*, the Court, applying the infamous Victorian-era *Hicklin* test, viewed obscenity from

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<sup>61</sup> TRAI, Recommendations on Regulatory Framework for Over-The-Top (OTT) Communication Services, (2020), [https://traai.gov.in/sites/default/files/Recommendation\\_14092020\\_0.pdf](https://traai.gov.in/sites/default/files/Recommendation_14092020_0.pdf).

<sup>62</sup> Kaul Padte and Kovacs, *supra* note 4.

<sup>63</sup> Kaul Padte and Kovacs, *supra* note 4. See also Brinda Bose, Introduction, in *Gender and Censorship* (Brinda Bose ed., Women Unlimited, 2006); William Mazzarella, *Censorium: Cinema and the Open Edge of Mass Publicity* (Duke University Press, 2013).

<sup>64</sup> Ratna Kapur, The Profanity of Prudery: The Moral Face of Obscenity Law in India, 8(3) *Women: A Cultural Review* 293 (2008).

the perspective of its “potentiality... to deprave and corrupt by immoral influences”, focusing on the subjective point of view of those people who were most likely to be corrupted or depraved.<sup>65</sup> It was only in 2014 that the Court in *Aveek Sarkar* abandoned the *Hicklin* test and held that mere nudity was not obscene – only those sex related materials that had the “tendency of exciting lustful thoughts” would be obscene, although the obscenity had to be judged “from the point of view of an average person by applying contemporary community standards”.<sup>66</sup> It is a reflection of how antiquated our notions of obscenity were, that there was celebration and relief when the Court articulated the community standards test in *Aveek Sarkar*, even though the Court took as a given that the “tendency of exciting lustful thoughts” was inherently worthy of criminal sanction. Consequently, this standard is equally vague and reflects paternalism from the courts, as they continue to view obscenity as a weapon for social regulation to combat the cultural pollution of society. After all, a “contemporary community standard” will most likely reflect the dominant morality of the “average person” that has historically been imposed on women, which will be apt to be hostile to anything outside the traditional view of sex and sexuality.<sup>67</sup>

The response of the courts to petitions endorsing mainstream conservative sexual morality and treating women as objects of state control has already had a troubling knock-on effect in terms of self-censorship (styled as self-regulation) and potential government intervention.<sup>68</sup> In September 2020, all major OTT platforms in India, including Disney Hotstar, Amazon Prime, and Netflix, joined the Internet and Mobile Association of India’s (IAMAI) “Universal Self-Regulation Code for Online Curated Content Providers”.<sup>69</sup> Platforms such as Amazon Video and Netflix had not joined IAMA’s previous “Code for Self-Regulation of Online Curated Content Providers”, but they had also already been engaging in self-censorship of content in India.<sup>70</sup> The developments with respect to self-censorship, possibly to avoid judicial or executive action, should be tracked carefully. Self-censorship is a slippery slope, and will only increase demands for censorship over time, either by relying on the precedents set by the OTT platforms or by arguing that the self-censorship has not gone far enough.<sup>71</sup> The fact that the platforms have reportedly informally sought the approval of the Ministry of Information and Broadcasting and the Ministry of Electronics and Information Technology for their Code dilutes the dividing line between government-imposed and self-imposed censorship.<sup>72</sup>

The PILs filed to regulate the content on OTT platforms advance a narrative of protecting Indian women and Indian culture from “vulgar” content. Even though the Supreme Court has not passed a detailed judgment on these issues, its mere consideration of these PILs implicitly ends up endorsing such narratives, all the while ignoring the perspective of women creators and consumers. The cumulative impact of these developments threatens to reduce the innovative and diverse content that is being produced on such platforms.

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<sup>65</sup> *Ranjit D. Udeshi v State of Maharashtra*, AIR 1965 SC 881. See also Gautam Bhatia, *Offend Shock or Disturb* (Oxford University Press, 2016).

<sup>66</sup> *Aveek Sarkar v. State of West Bengal*, (2014) 4 SCC 257.

<sup>67</sup> Bhatia, *supra* note 65. See also Arti Gupta, *The Uttarakhand High Court and Pornography*, *Indian Constitutional Law and Philosophy* (19 September 2019), <https://indconlawphil.wordpress.com/2019/09/19/the-uttarakhand-high-court-and-pornography/>.

<sup>68</sup> Harveen Ahluvalia and Vandana, *Say No to Indian Censorship: Netflix, Hotstar and Co. Form a Code of Honour*, *The Ken* (16 January 2019), <https://the-ken.com/story/video-streaming-self-regulation/>.

<sup>69</sup> *Self-Regulation for Online Curated Content Providers* (2020), <https://www.medianama.com/wp-content/uploads/IAMAI-Digital-Content-Complaint-Council-NEW.pdf>. See also IAMA, *Online Curated Content Industry Unveils “Universal Self-Regulation Code for OCCPs”* (4 September 2020), <https://cms.iamai.in/Content/MediaFiles/dcc7639e-9917-4f8f-8ffa-d0e61bd3dc36.pdf>.

<sup>70</sup> Ahluvalia and Vandana, *supra* note 68. See also Lata Jha and Varun Sood, *Amazon Prime Video Is Self-Censoring Hindi Movies, Netflix Isn’t*, *LiveMint* (8 January 2019), <https://www.livemint.com/Companies/9PdgnyzBvQqGxsrKKKoM9N/Amazon-Prime-Video-is-self-censoring-Hindi-movies-Netflix-i.html>; Arpita Biswas, *Streaming Platforms and Self-Censorship: An Indian Perspective*, Centre for Communication Governance (2017), <https://ccgnludelhi.wordpress.com/2017/07/05/streaming-platforms-and-self-censorship-an-indian-perspective/>.

<sup>71</sup> In November 2020, as this report was readied for publication, a Cabinet Secretariat Notification dated 9 November 2020 was published in the Gazette of India, bringing “films and audio-visual programmes made available by online content providers” under the Ministry of Information and Broadcasting. See <http://egazette.nic.in/WriteReadData/2020/223032.pdf>. This development, too, widely seen as a precursor to regulation, deserves close monitoring and only further buttresses our point here.

<sup>72</sup> Shuchi Bansal, *OTT Platforms in Search of a Viable Regulatory Code*, *LiveMint* (1 October 2020), <https://www.livemint.com/opinion/columns/opinion-ott-platforms-in-search-of-a-viable-regulatory-code-11601520787467.html>.



## KAMLESH VASWANI AND THE CRUSADE TO PROHIBIT PORNOGRAPHY

**CONTEXT** The Internet has provided new avenues and opportunities for sexual expression and sexual pleasure for women, who consensually participate in the making, and viewing, of pornographic material online. The intermediary liability regime, which provides safe harbour for intermediaries such as Google and YouTube by absolving them from legal liability for the content placed on their platforms by third parties, has been central to this development. However, all this could change, if Kamlesh Vaswani has his way.

**CASE** In 2013, lawyer Kamlesh Vaswani filed a PIL before the Supreme Court of India seeking a ban on all online pornography and to treat the watching and sharing of porn videos as cognizable and non-bailable offences, since they “affect peace of mind, health, and wellness of individuals”. He argued that pornography increases sexual violence against women and turns sex into commodity which is capable of being “commercially exploited”.<sup>73</sup> The petition thus, sought a prohibition on even the private consumption of pornography, which has so far, been legal in India. In addition, he prayed for directions to be issued to ISPs and intermediaries to block all pornography websites, platforms, and links, in order to prevent “easy access in private or public”; and to declare sections 66, 67, 69, 71, 72, 75, 79 and 80 of the IT Act unconstitutional (he did not elaborate on why these provisions should be struck down, or how that would safeguard the rights of women).<sup>74</sup> Vaswani argued that the consumption of pornography cannot be protected under the freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution because it would create a “dent in the national character or the moral spine of the nation”, since pornography is “worse than Hitler, worse than AIDS, cancer or any other epidemic” and an “insult to the dignity” of the women.<sup>75</sup>

Later, an intervention application was filed by the Supreme Court Women Lawyers’ Association to issue appropriate directions to the Ministry of Electronics and Information Technology to

<sup>73</sup> This Cultural Pollution Has to Stop, Says Lawyer Who Filed Anti-Porn PIL, *Firstpost* (18 April 2013), <https://www.firstpost.com/tech/news-analysis/this-cultural-pollution-has-to-stop-says-lawyer-who-filed-anti-porn-pil-2-3623919.html>. Petition on file with the authors.

<sup>74</sup> *Kamlesh Vaswani v. Union of India*, (2016) 7 SCC 592. See also Sarjjeet Singh, Cannot Block All Pornographic Material over the Internet: Centre Informs SC, *CCG Blog* (29 August 2014) <https://ccgnludeli.wordpress.com/2014/08/29/cannot-block-all-pornographic-material-over-the-internet-centre-informs-the-sc/>.

<sup>75</sup> *Firstpost*, *supra* note 73. See also Chinmayi Arun, Blocking Online Porn: Who Should Make Constitutional Decisions about Freedom of Speech?, *Scroll* (3 February 2015), <https://scroll.in/article/703746/blocking-online-porn-who-should-make-constitutional-decisions-about-freedom-of-speech>; Apar Gupta, 3 Legal Cases That Threaten Open Internet, *DailyO* (20 September 2016) <https://www.dailyo.in/politics/sc-kamlesh-vaswani-porn-ban-sabu-mathew-female-infanticide-harvinder-chowdhry-santa-banta-jokes/story/1/13010.html>.

take “strict measures to prevent distribution and access to pornography” and improve the “effectiveness of blocking child pornography on the Internet.” It also sought directions against the Ministry of Human Resource Development to install jammers inside school premises and on school buses, to prevent access to porn sites on the mobile phones of the bus driver or attendant.<sup>76</sup>

During the course of the hearings, Vaswani provided the government with a list of 857 websites alleged to be pornographic websites. Based on this, and without any independent verification of the material on these websites, the Department of Telecom (DoT) issued a confidential order under section 79(3)(b) of the IT Act on 31 July, 2015, directing all ISPs to disable access to these 857 websites, on the ground that their content was covered under the morality and decency exception provided in Article 19(2) of the Constitution.<sup>77</sup> However, Article 19(2) merely lists the grounds under which a law can restrict fundamental rights. As stated above, the IT Act does not incorporate the “decency” or “morality” clause as a ground to justify the blocking of websites. Further, section 69A read with section 79 of the IT Act requires the government to follow certain due process norms before directing an intermediary to take down a website for unlawful content. These were not followed in this case. For these reasons, in addition to the general public and media outcry caused by free speech and privacy concerns, the ban was subsequently watered down four days later.<sup>78</sup> The ISPs were told that they were free to enable any one of the 857 URLs, provided they did not have CSAM content.<sup>79</sup>

The government then filed a status report in Court on the steps taken by it to stop CSAM, and the Court invited the parties to file suggestions to ensure that there was a “complete mechanism” in this regard.<sup>80</sup> The case was last listed on 21 August, 2017, when the Supreme Court indicated that it would consider the status report and Mr. Vaswani’s reply in October.<sup>81</sup> Since then, the matter seems to have gone into cold storage, and there have been no further hearings. However, the relief sought by Kamlesh Vaswani, including the criminalisation of the voluntary and private viewing of pornography, remains pending, to be considered at some point in the future.

**IMPORT** The Supreme Court’s response to Kamlesh Vaswani’s PIL impacts digital rights and gender and sexuality rights in three important ways. First, Vaswani’s PIL is predicated on the notion that “watching porn itself puts the country’s security in danger, encourages violent acts, unacceptable behaviour in society, exploitation of children....” and that its easy availability online has fuelled a “pornography addiction” that forms the “basis for unequal treatment of women”.<sup>82</sup>

<sup>76</sup> IA No. 6/2015, as discussed in (2016) 7 SCC 592. Copy of the application on file with authors.

<sup>77</sup> Order No. 813-7/25/2011-DS (Vol. V) dated 31-7-2015. The list of websites include nonvegjokes.com; 3rat.com; 4hen.com; africansexvideos.net; bananabunny.com; cutepornvideos.com; desimurga.com; desisexclips.com; and dslady.com. The order is available at <https://cis-india.org/Internet-governance/resources/dot-morality-block-order-2015-07-31/view>. An order under section 79(3)(b) requires an intermediary to take down “unlawful content”. The government presumably drew its authority for the “unlawfulness” of the content from section 67’s prohibition on the transmission and publication of sexually explicit material. It bears reiteration that Vaswani wanted to go a step further and make even the storage and viewing of pornography illegal.

<sup>78</sup> Madhav Chandavarkar, A Worrying Ban, *The Hindu* (29 March 2016), <https://www.thehindu.com/opinion/op-ed/a-worrying-ban/article7508586.ece>; See also David Barstow, India Blocks 857 Pornography Websites, Defying Supreme Court Decision, *New York Times* (3 August 2015), <https://www.nytimes.com/2015/08/04/world/asia/india-orders-blocking-of-857-pornography-websites-targeted-by-activist.html>.

<sup>79</sup> Gijra Shankar Kaura, After Rethink, Government to Unblock Sites without Child Porn Content, *Tribune* (4 August 2015), <https://www.tribuneindia.com/news/archive/nation/after-rethink-govt-to-unblock-sites-without-child-porn-content-115658>.

<sup>80</sup> WP (C) No. 177/13, order dated 14.07.2017 (Supreme Court of India).

<sup>81</sup> WP (C) No. 177/13, order dated 21.08.2017 (Supreme Court of India).

<sup>82</sup> Abhishek Saha, Meet Kamlesh Vaswani, the Lawyer behind India’s Porn Ban, *Hindustan Times* (5 August 2015), <https://www.hindustantimes.com/india/meet-kamlesh-vaswani-the-lawyer-behind-india-s-porn-ban/story-wtOXhFy9O5vEyC9Boz3GcN.html>. See also Geetha Hariharan, Our Unchained Sexual Selves: A Case for the Liberty to Enjoy Pornography Privately, 7 NUJS L. Rev. 89 (2014).

Even though the Supreme Court has yet to decide this matter, merely by issuing notice on the PIL (instead of outrightly dismissing it) and conducting twenty five hearings over five years despite its heavy case backlog, the Court has signalled that it is willing to engage in “moral governance” and view women as objects of state control.

Mr. Vaswani’s petition treats all forms of pornography as evil and worthy of an outright ban, without any nuance about the distinction between consensual pornography, non-consensual sexual material, and CSAM. The PIL completely ignores the element of consent involved in the consumption and production of pornography by women. In addition, as Vaswani himself admits, his PIL suffers from a line drawing problem: of distinguishing between content that is obscene, vulgar, or pornographic.<sup>83</sup> It is worth noting that the evidence regarding the impact of pornography on society and sexual violence is complex, and inconclusive,<sup>84</sup> with research in fact demonstrating that the Internet has provided an empowering avenue for women and sexual minorities to engage in new forms of sexual expression and autonomy.<sup>85</sup> The government’s own view is that a complete prohibition on viewing all forms of pornography online would be an overreach, difficult to implement, and amount to moral policing.<sup>86</sup>

However, none of these factors seem to have been considered by the Supreme Court, which is not surprising considering that women’s interests and perspectives were not represented, and hence, not considered by the Court. Instead, by giving a detailed (on-going) hearing on merits to his petition, the Court is at risk of undermining the limited progress that has been made since *Aveek Sarkar* articulated the contemporary community standards test and of returning to the *Ranjit D. Udeshi* standard of obscenity, meaning “offensive to modesty or decency; lewd, filthy and repulsive.”<sup>87</sup>

The Supreme Court’s decision to hear the *Kamlesh Vaswani* case is all the more interesting given multiple High Courts have held that simply viewing obscene content or a “blue film” is permitted.<sup>88</sup> In 2010, the Bombay High Court dismissed a PIL seeking a blanket ban on pornographic websites on the grounds that:

*By the present petition what the petitioner seeks is that this court which is a protector of free speech to the citizens of this country, should interfere and direct the respondents to make a coordinated and sustained efforts to close down the websites as aforesaid.... Courts in such matters, the guardian of the freedom of free speech, and more so a constitutional court should not embark on an exercise to direct State Authorities to monitor websites. If such an exercise is done, then a party aggrieved depending on the sensibilities of persons whose views may differ on what is morally degrading or prurient will be sitting in judgment, even before the aggrieved person can lead his evidence and a competent court decides the issue....”<sup>89</sup>*

<sup>83</sup> Firstpost, *supra* note 73.

<sup>84</sup> Ronald Weitzer, *Pornography’s Effects: The Need for Solid Evidence*, 17(5) *Violence Against Women* 666 (2011); Rae Langton, *Whose Right? Ronald Dworkin, Women and Pornographers*, 19(4) *Philosophy & Public Affairs* 311 (1990).

<sup>85</sup> Manjima Bhattacharjya and Maya Indira Ganesh, *Negotiating Intimacy and Harm: Female Internet Users in Mumbai*, in *EROTICS South Asia Exploratory Research: Sex, Rights and the Internet* (Association for Progressive Communications, 2017), [https://erotics.apc.org/sites/erotics.apc.org/files/erotics\\_finalresearch\\_apcwnsp.pdf](https://erotics.apc.org/sites/erotics.apc.org/files/erotics_finalresearch_apcwnsp.pdf); Anja Kovacs, *The Naked Truth: Why Banning Online Pornography Is a Bad Idea*, *Internet Democracy Project* (2 August 2013), <https://internetdemocracy.in/2013/08/the-naked-truth-why-banning-online-pornography-is-a-bad-idea/>; Soutmitra Das, *Banning Pornography: Is It the Solution to Sexual Violence*, *Symposium Workshop*, 59 *Indian J Psychiatry* S2 154-66 (2017).

<sup>86</sup> Sarvejit Singh, *We Are Not a Totalitarian State and Cannot Be Asked to Moral Police: AG Tells SC in the Porn Petition*, *CCG Blog* (10 August 2015), <https://ccgnludelhi.wordpress.com/2015/08/10/we-are-not-a-totalitarian-state-and-cannot-be-asked-to-moral-police-ag-tells-the-sc-in-the-porn-petition/>.

<sup>87</sup> (1965) 1 SCR 65.

<sup>88</sup> *Chandrakant Mansaram More v. State of Maharashtra*, WP (CrI) No. 1577 of 2010 (Bom); *V. Sundarajan v. State of Madras*, Cri PC No. 376 of 1978; *Jagdish Chavla v. State of Rajasthan*, 1999 Cri LJ 2562.

<sup>89</sup> *Janhit Manch & Ors. v. Union of India*, Bombay High Court order dated 03.03.2010 in PIL No. 155/2009.

Second, as Anuj Bhuwania has detailed, PILs that are filed on narrow issues can take on a life of their own through multiple interim orders and transform into “omnibus”<sup>90</sup> cases that may have unintended consequences. We see this in *Kamlesh Vaswani* as well, where the Petitioner was permitted to give a list of 857 websites that purportedly related to pornography, which were then blocked on the orders of the government without independent verification. Even though the July 2015 order was subsequently modified and only CSAM (colloquially referred to by the court as “child pornography”) websites had to be blocked, the government order was used three years later by the Uttarakhand High Court in *In the matter of incidence of gang rape in a boarding school Bhuwala Dehradun v State of Uttarakhand*, to direct ISPs to block all 857 websites or lose their license.<sup>91</sup>

The case started in September 2018, when the Uttarakhand High Court took *suo motu* cognizance of a minor student being raped on the school premises by four other students, against whom criminal proceedings had been initiated. The Court took judicial notice of the fact that sexual assaults against minors were increasing and reports that the minor boys had seen porn movies before sexually assaulting the victim. Consequently, it observed, “unlimited access to these pornographic sites is required to be blocked/curbed to avoid adverse influence on the impressionable mind of the children.” The Court further referred to the inadequate compliance by the intermediaries to the government order dated 31 July 2015, for blocking 857 websites, and directed all ISPs to obey the order from that date and to thus “block the publication or transmission of obscene material in any electronic form, transmitting of material containing sexually explicit act or conduct and also publishing or transmitting of material depicting children in sexually explicit act or conduct forthwith”. The government was directed to suspend the licenses of the ISPs if this order was not complied with.<sup>92</sup>

The Uttarakhand High Court’s directions to block access to pornographic websites - based on its observations linking access to pornographic content to violence - miss the real problem. In a country where sex education has been banned by many states, and discussions on sexuality are widely considered taboo, there is a dearth of education about sex, sex-related behaviour, and consent.<sup>93</sup> Sexual violence is motivated by power, domination, and control, whose roots can be traced back to India’s patriarchal societal structure. Banning porn websites, apart from having an inconclusive correlation with sexual violence, will hinder discussions on consent and positive sexuality and reduce opportunities for women and gender and sexual minorities to experience sexual pleasure online.

The government later filed a counter affidavit, bringing on record the proceedings pending in *Kamlesh Vaswani*, and the DoT’s new order passed on 4 August 2015, limiting the blocking directions to CSAM websites. Based on these facts, the Uttarakhand High Court eventually disposed of the writ petition, without confirming its earlier order.<sup>94</sup> In the interim, however, that earlier order led to many pornographic websites being blocked by ISPs, even though they were

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<sup>90</sup> Bhuwania gives an example of how a PIL filed by MC Mehta meant to deal with the pollution caused by stone crushing units in Delhi eventually transformed into a case about pollution in the Yamuna river and slum demolition. See Bhuwania, *supra* note 15.

<sup>91</sup> W.P. (PIL) No. 158/18, order dated 27.09.2018 (Uttarakhand High Court).

<sup>92</sup> *Id.*

<sup>93</sup> Joyoti Chowdhury, Why Is Sex or Sexuality Education in Indian Schools Still a Taboo? *Feminism in India* (9 March 2020), <https://feminisminindia.com/2020/03/09/why-sex-sexuality-education-indian-schools-taboo/>.

<sup>94</sup> *In the matter of incidence of Gang Rape in a Boarding School Bhuwala, Dehradun v State of Uttarakhand*, W.P. (PIL) No. 158/2018, order dated 07.12.2018 (Uttarakhand High Court).

not hosting CSAM. In fact, in April 2019, much after the High Court had disposed of the writ petition, many porn websites continued to be blocked, while others were blocked haphazardly: i.e. they were available on one ISP, but not another.<sup>95</sup>

Third, “moral governance” by the court treats intermediaries as gatekeepers responsible for enforcing the law, and uses intermediary liability as a tool to police, monitor, and block undesirable conduct.<sup>96</sup> The law in India is very clear. The private viewing of sexually explicit or adult pornographic material in India is permitted. ISPs can only block content under section 69A or section 79(3)(b) of the IT Act if they are directed by the government or by a court. After *Shreya Singhal*, proactive blocking by ISPs or blocking based on user complaints is not permitted, since to do so would force the intermediary to act as a “judge as to which of such [millions of user] requests are legitimate and which are not.”<sup>97</sup> However, when courts decide to hear petitions seeking to ban all pornography or take up the issue of CSAM and direct ISPs to block websites that do not host any CSAM content, this may encourage ISPs to err on the side of caution and proactively block porn websites that they now believe to be illegal, even when not ordered by a court to do so. This has wider ramifications for the freedom of speech and expression in society.

In fact, courts are not alone in attempting to regulate pornography and CSAM websites. The issue of regulating pornography has been considered time and again by the Parliament. In 2013, on the basis of a petition sent to it by a Jain monk, the Rajya Sabha (Upper House) Committee on Petitions decided to undertake consultations on the “steps to be taken to check cyber pornography”.<sup>98</sup> In its report presented in August 2015, the Committee recommended the Government take legal and technological measures to curb pornography online, as well as constitute a “neutral ombudsman” to decide on complaints regarding the transmission of “obscene and objectionable pornography material”. The Committee also expressed its support for data localisation as a means to reduce online access to porn in India.<sup>99</sup>

More recently, in February 2020, the Adhoc Committee of the Rajya Sabha published its report “to study the alarming issue of pornography on social media and its effect on children and society as a whole”. The Committee recommended amendments to the IT (Intermediary Guidelines) Rules to hold intermediaries responsible for proactively identifying and removing CSAM and for gateway ISPs to bear “significant liability” to detect and block CSAM websites. The Committee also recommended breaking end-to-end encryption to trace distributors of CSAM and the mandatory installation of apps on all devices sold in India to monitor children’s access to pornographic content.<sup>100</sup> Even wider obligations have independently been recommended by the Ministry of Electronics and Information Technology in the draft Intermediaries Guidelines Rules, 2018, requiring all intermediaries to deploy “technology based automated tools” or appropriate mechanisms, with appropriate controls, for “proactively” identifying and removing or disabling public access to “unlawful information or content.”<sup>101</sup>

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<sup>95</sup> For instance, Pornhub’s mirror site was not accessible for Bharti Airtel and Reliance Jio customers, but it was working for customers of Vodafone and ACT Fibernet. See Kunwar Singh, *After India Ban on More than 800 Porn Sites, Crackdown Intensifies*, *Scroll* (23 April 2019), <https://scroll.in/article/920918/after-india-ban-on-more-than-800-porn-sites-crackdown-intensifies>.

<sup>96</sup> Jonathan Zittrain, *A History of Online Gatekeeping*, 19 *Harvard J. of L. and Tech.* 253 (2006); Chinmayi Arun, *Gatekeeper Liability and Article 19(1)(a) of the Constitution of India*, 7 *NUJS L. Rev* 73 (2014).

<sup>97</sup> (2015) 5 SCC 1, para 122.

<sup>98</sup> Rajya Sabha Press release setting up the committee: [http://164.100.47.5/newcommittee/press\\_release/Press/Committee%20on%20Petitions/Cyber.pdf](http://164.100.47.5/newcommittee/press_release/Press/Committee%20on%20Petitions/Cyber.pdf). The Petition is available at [https://rajyasabha.nic.in/rsnew/Committee\\_site/Committee\\_File/ReportFile/8/11/152\\_2019\\_4\\_15.pdf](https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/8/11/152_2019_4_15.pdf).

<sup>99</sup> Hundred and Fifty Second Report on Petition Praying to Put a Check on Cyber Pornography by Amending the Information Technology Act, 2000 (2015), <http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Petitions/152.pdf>.

<sup>100</sup> Report of the Ad Hoc Committee of the Rajya Sabha to Study the Alarming Issue of Pornography on Social Media and Its Effect on Children and Society as a Whole (2020), [https://rajyasabha.nic.in/rsnew/Committee\\_site/Committee\\_File/ReportFile/71/140/0\\_2020\\_2\\_16.pdf](https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/71/140/0_2020_2_16.pdf).

<sup>101</sup> Rule 3(9), The Information Technology (Intermediaries Guidelines (Amendment) Rules), 2018.

Both the Rajya Sabha's report as well as the government's proposed amendment to the Intermediary Guidelines Rules stem from a concern of protecting women and children and fighting fake news online.<sup>102</sup> However, the proactive monitoring obligations sought to be imposed on intermediaries, apart from violating the *Shreya Singhal* judgment,<sup>103</sup> will likely lead to over-censorship of legitimate content. Intermediaries in India will be more likely to take down photos such as the "Napalm girl" photo from Vietnam (as Facebook did globally in 2016, only reversing its decision after widespread criticism over its censorship),<sup>104</sup> especially considering that the sheer volume of data uploaded makes it practically impossible for intermediaries to verify whether content uploaded is legal or unlawful. For instance, more than 500 hours of fresh content are uploaded on YouTube every minute, which means more than 82.2 years of new video are uploaded to YouTube *daily*.<sup>105</sup> The use of AI ("technology based automated tools") for automated content filtering raises additional concerns about the type of content that will be proactively blocked by intermediaries, given documented gender, race, colour, and other body-related biases bias in the algorithms on social media platforms, which discriminate against under-represented communities, especially women of colour and persons of the LGBTQIA+ communities.<sup>106</sup>

The upshot of the courts' treatment of the PILs filed to regulate content over OTT platforms and to prohibit the consumption of online pornography has been to endorse dominant patriarchal moral beliefs. Every time women are treated as objects of such state control, it helps reinforce Indian middle class values of sexuality and the role of an "ideal" Indian woman (or "*adarsh bharatiya nari*"), which as we shall see in section 5, makes it harder for women who want to challenge these stereotypes to express themselves online.

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<sup>102</sup> Anandita Singh and Mankotia, Ravi Shankar Prasad to "Quickly" Table Protection Bill, Notify Norms, *Economic Times* (1 June 2019), <https://economictimes.indiatimes.com/tech/internet/priority-to-quickly-take-data-protection-bill-to-parliament-new-it-minister-ravi-shankar-prasad/articleshow/69596440.cms?from=mdr>.

<sup>103</sup> Principle 1(d) of the Manila Principles states, "Intermediaries must never be made strictly liable for hosting unlawful third-party content, nor should they ever be required to monitor content proactively as part of an intermediary liability regime."

<sup>104</sup> Sam Levin, Julia Carrie Wong, and Luke Harding, Facebook Backs Down from "Napalm Girl" Censorship and Reinstates Photo, *The Guardian* (9 September 2016), <https://www.theguardian.com/technology/2016/sep/09/facebook-reinstates-napalm-girl-photo>.

<sup>105</sup> James Hale, More than 500 Hours of Content Are Now Being Uploaded to YouTube Every Minute, *Tubefilter* (7 May 2019), <https://www.tubefilter.com/2019/05/07/number-hours-video-uploaded-to-youtube-per-minute/>.

<sup>106</sup> Jamie Condliffe, The Week in Tech: Algorithm in AI Is Bad, Uncovering It Is Good, *New York Times* (15 November 2019), <https://www.nytimes.com/2019/11/15/technology/algorithmic-ai-bias.html>; Surya Deva, Addressing the Gender Bias in Artificial Intelligence and Automation, *Open Global Rights* (10 April 2020), <https://www.openglobalrights.org/addressing-gender-bias-in-artificial-intelligence-and-automation/>; Nathaniel Swinger et al., What Are the Biases in My Word Embedding? *Arxiv* (27 December 2019), <https://arxiv.org/pdf/1812.08769.pdf>.



## 4.2 Monitoring online harmful content: Encouraging proactive censorship by weakening the intermediary liability regime



### **IN RE PRAJWALA AND THE PROMOTION OF PROACTIVE INTERMEDIARY CENSORSHIP**

**CONTEXT** The Internet, while providing an important avenue for women to express themselves freely on issues of sexuality and sexual pleasure, has in many ways also replicated offline patriarchal structures. One of the ways in which men seek to assert their power and dominance over women is by recording videos of rapes, particularly gang rapes, and sexual assaults and threatening to share the videos online if the victims complain to their family or the police. In many cases, the videos are circulated and sold regardless of any complaint being filed. Over the last few years, there has been an increase in such intimidation tactics and in the online circulation and sale of rape and gang rape videos, with the faces of the women clearly visible, and inadequate action to take down such content.<sup>107</sup>

**CASE** Taking cognizance of this problem of dissemination of rape videos online, the Supreme Court in *In Re: Prajwala Letter Dated 18.2.2015 Videos of Sexual Violence and Recommendations* asked the government to frame guidelines to “eliminate” rape images and videos on content hosting platforms.<sup>108</sup> The case began in 2015 when an NGO, Prajwala, addressed a letter to the Chief Justice of India bringing to his attention the circulation of rape videos on the Internet and their further distribution through WhatsApp, and suggesting, among other things:

- (i) A CBI Probe into all such videos with the findings being made public....
- (v) Tie-up of the Ministry of Home Affairs with Youtube and Whatsapp so that dissemination of offensive videos and material relating to sexual crimes is curbed and penal action taken against the offenders.....<sup>109</sup>

<sup>107</sup> Asad Ashraf, A Dark Trade: Rape Videos for Sale in India, *Al Jazeera* (31 October 2016), <https://www.aljazeera.com/features/2016/10/31/a-dark-trade-rape-videos-for-sale-in-india>; Rama Lakshmi, Video Recordings of Gang Rapes on Rise in India in Effort to Shame, Silence the Victim, *Washington Post* (14 August 2014), [https://www.washingtonpost.com/world/video-recordings-of-gang-rapes-on-rise-in-india-in-effort-to-shame-silence-the-victim/2014/08/13/41d8be42-3360-4081-9ff0-dee2df54f629\\_story.html](https://www.washingtonpost.com/world/video-recordings-of-gang-rapes-on-rise-in-india-in-effort-to-shame-silence-the-victim/2014/08/13/41d8be42-3360-4081-9ff0-dee2df54f629_story.html).

<sup>108</sup> *In re: Prajwala letter dated 18.12.2015 videos of sexual violence and recommendations & Anr*, SMW (CrL) No. 3/2015, order dated 11.12.2018 (Supreme Court).

<sup>109</sup> A “CBI” probe refers to a probe by the Central Bureau of Investigation, which is India’s most prominent investigating agency. *In re: Prajwala letter dated 18.12.2015 videos of sexual violence and recommendations & Anr*, SMW (CrL) No. 3/2015, order dated 27.02.2015 (Supreme Court).

Taking into account the “serious nature” of the concerns raised, the Court took cognizance of the issue and registered a petition based on the contents of the letter.<sup>110</sup> It subsequently issued notice to Microsoft, Google, Yahoo!, Facebook, and WhatsApp and impleaded them in the matter.<sup>111</sup> They were asked to respond to the suggestion of the counsel that instead of blocking objectionable videos, intermediaries block the uploading of videos in the first instance and only upload it after the person informs them that the video is copyrightable or they hold the copyright.<sup>112</sup> The Court constituted a committee, headed by a bureaucrat and including all the parties to the litigation, to examine the feasibility of “ensuring” that videos depicting rape, gang rape, and CSAM are not available to the public.<sup>113</sup>

The Committee’s Report contained eleven proposals, that were agreed to by all members and endorsed by the Supreme Court. This included proposals for content hosting platforms and search engines to work with the government to formulate processes for “proactively verifying, identifying and initiating take down” of all CSAM and rape/gang rape content. The parties also agreed on the need for further research and development of AI, deep learning, and machine learning based techniques for identifying CSAM and rape/gang rape content at the stage of uploading to enable real time filtering.<sup>114</sup>

During the course of the hearings, the government argued that intermediaries needed to :

- i. Set up proactive monitoring tools for auto deletion of unlawful content by deploying Artificial intelligence based tools.*
- ii. Deployment of trusted flaggers for identifying and deletion of unlawful content.*
- iii. Setting up of 24X7 mechanism for dealing with requisitions of law enforcement agencies*
- iv. Appointment of India based contact officer and escalation officers (with name, designation, email, mobile number*
- v. Prompt disposal of requisitions of Law Enforcement Agencies to remove unlawful contents.*<sup>115</sup>

The Supreme Court directed each of the intermediaries to provide a proposed standard operating procedure (SOP) to implement these suggestions and directed the government to frame the necessary guidelines/SOP and “implement them within two weeks so as to eliminate child pornography, rape and gang rape imageries, videos and sites in content hosting platforms and other applications.”<sup>116</sup> Interestingly, two weeks later, the government released the Draft Intermediaries Guidelines Rules, 2018, that, as we have explained above, will change the face of intermediary liability as we know it in India. Thus, there is ground to believe that the notification of these draft Rules is a direct result of the proceedings before the Supreme Court in *Prajwala*.

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<sup>110</sup> *Id.*

<sup>111</sup> SMW (CrL) No. 3/2015, order dated 05.12.2016 (Supreme Court). WhatsApp was impleaded subsequently *vide* order dated 11.04.2017.

<sup>112</sup> SMW (CrL) No. 3/2015, order dated 01.02.2017 (Supreme Court).

<sup>113</sup> The Committee was chaired by Dr. Ajay Kumar, Additional Secretary, Ministry of Electronics and Information Technology, and contained various other government representatives, intermediary representatives, and the Petitioner’s counsel and amicus curiae. SMW (CrL) No. 3/15, order dated 22.03.2017 (Supreme Court).

<sup>114</sup> SMW (CrL) No. 3/2015, order dated 23.10.2017 (Supreme Court).

<sup>115</sup> SMW (CrL) No. 3/2015, order dated 28.11.2018 (Supreme Court).

<sup>116</sup> SMW (CrL) No. 3/2015, orders dated 06.12.2018 and 11.12.2018 (Supreme Court).

After directing the government to frame guidelines to eliminate child porn, rape, and gang rape videos in December 2018, the Supreme Court did not list the matter for over a year till February 2020, when it was simply adjourned.<sup>117</sup>

**IMPORT** There is a clear need to remove the CSAM and rape videos being circulated online. However, the Supreme Court's ongoing interventions in *Prajwala* raise substantive and procedural concerns. While the Court's interventions may have been well-intentioned, they arguably opened the door to the substantive questioning of the intermediary liability regime in India. This found expression in the draft Intermediary Guidelines Rules, which will pave the way for proactive (over) censorship by intermediaries. This will undermine the safe harbour provisions guaranteed under section 79 the IT Act, which are amongst the most important legal protections for free speech online, because they allow intermediaries such as YouTube and WhatsApp to host user-generated content without permitting them to determine the desirability of such content. As Seth Kreimer notes, when private actors such as intermediaries act as "proxy censors", their interests lie in protecting themselves from legal exposure rather than ensuring free expression, especially since there are very few institutional accountability mechanisms to serve as a check on their actions.<sup>118</sup> This is not just a hypothetical concern. Research has shown that under the pre-*Shreya Singhal* notice and takedown regime, intermediaries in India tended to over comply with requests for blocking access to content.<sup>119</sup> A return to this position will have a significant impact on the freedom of speech and expression online and render inaccessible vast swathes of the Internet, which may specifically affect the experience of women and sexual minorities accessing and/or sharing information online.

How did the Supreme Court go wrong? Part of this can be explained by its lack of discussion of the need for due process (such as the right to be heard and the right to appeal a decision by an intermediary), accountability, and transparency to check over-censorship by intermediaries.<sup>120</sup> Additionally, the Court also accepted the benefits of AI-based "real time filtering" uncritically, without considering how the gender and other biases inherent in algorithms may affect the treatment of sexual content uploaded by women, especially women who are not white, thin, or cis-gendered.<sup>121</sup> Nor did the Court consider how the exceptions of "science, literature, art or learning or other objects of general concern" to the application of section 67, 67A, or 67B could be applied - and even, who would determine their applicability. A total block of rape, gangrape, and CSAM imagery and videos through proactive filtering or auto-deletion by intermediaries is difficult to achieve: it will simultaneously be overbroad (i.e. cover "legal" or legitimate content) and under-inclusive (i.e. miss out some rape videos or CSAM content). Whether motivated by pressure from the state, human mistakes (e.g. errors in interpretation of the nature of content), technical limitations (e.g. a key word filter system that misses the context of the communication or search), or profit considerations, intermediaries are likely to over-censor content if they are made responsible for guaranteeing our fundamental rights.<sup>122</sup> Instead of engaging in these complex questions, the Supreme Court's blanket interventions in *Prajwala* almost certainly prompted or expedited the release of the proposed amendments to the Intermediary Guidelines,<sup>123</sup> which demonstrate a similar lack of consideration for due process or concerns over censorship.

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<sup>117</sup> SMW (CrL) No. 3/2015, order dated 11.02.2020 (Supreme Court).

<sup>118</sup> Seth Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155(11) *Univ. of Penn. L. Rev.* 11 (2006).

<sup>119</sup> Rishab Dara, *Intermediary Liability in India: Chilling Effects on Free Expression on the Internet*, Centre for Internet and Society (2011), <https://cis-india.org/internet-governance/intermediary-liability-in-india.pdf>.

<sup>120</sup> Chandrasekhar, *supra* note 3. See also Anja Kovacs and Nayantara R, India, in *Unshackling Expression: A Study on Laws Criminalising Expression Online in Asia* (Association for Progressive Communications, 2017), [https://giswatch.org/sites/default/files/gw2017\\_special\\_methodology.pdf](https://giswatch.org/sites/default/files/gw2017_special_methodology.pdf).

<sup>121</sup> Lacey-Jade Christie, *Instagram Censored One of These Photos but Not the Other. We Must Ask Why*, *The Guardian* (19 October 2020), <https://www.theguardian.com/technology/2020/oct/20/instagram-censored-one-of-these-photos-but-not-the-other-we-must-ask-why>.

<sup>122</sup> Kovacs, *supra* note 85. See also Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, UN General Assembly Human Rights Council (16 May 2011), [https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27\\_en.pdf](https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf); James, Vincent, *Attempts to Filter the Internet in Other Countries Show the Difficulties for David Cameron's Plans*, *The Independent* (24 July 2013), <https://www.independent.co.uk/life-style/gadgets-and-tech/attempts-filter-internet-other-countries-show-difficulties-david-cameron-s-plans-8729820.html>.

<sup>123</sup> For a comparison of the Court's orders and the provisions of the proposed amendments, see Anusha Das, *Regulate Social Media? It's Not as Easy as It Seems!* *IPRMentLaw* (9 January 2019), <https://iprmentlaw.com/2019/01/09/regulate-social-media-its-not-as-easy-as-it-seems/>.



## SABU MATHEW GEORGE AND THE DOCTRINE OF “AUTO BLOCK”

**CONTEXT** Another case that has been motivated by concerns of harmful content online but has raised questions about the intermediary liability regime in India is that of *Dr. Sabu Mathew George v Union of India*.<sup>124</sup> India has long struggled with a problem of female foeticide and a resultant imbalanced sex ratio, emanating from a strong cultural desire amongst many families for a son. The misuse of prenatal diagnostic techniques for determining the sex of the foetus led to the enactment of the PNDT Act in 1994. Section 22 of the Act prohibits online and off-line advertisements of pre-natal diagnostic techniques for detection and determination of sex, in a bid to check the incidence of female foeticide. However, this prohibition has not always been effectively enforced.

**CASE** Dr. Mathew, a “public spirited” male doctor, filed a writ petition (in the nature of a PIL) directly before the Supreme Court in 2008 for the effective implementation of the PNDT Act, specifically of section 22’s prohibition on advertisements. His broadly worded prayers were to block all websites, including those of Microsoft, Google, and Yahoo!, and to stop all forms of promotion of sex selection through advertisements that were entertained by these intermediaries “directly or indirectly” in violation of section 22.<sup>125</sup>

During the proceedings, the government held a meeting with the three intermediaries and asked them to respond to questions such as:

*(c) Whether the respondents are ready to block “autocomplete” failure for “keyword” searches which relates to pre-conception and/or pre-natal determination of sex or sex selection? (sic)*

*(d) Whether the words/phrases relating to pre-conception and pre-natal determination of sex or sex selection to be provided and regularly updated by the Government for the “keyword search” or shall it be the onus of the respondents providing search engine facilities?<sup>126</sup>*

<sup>124</sup> (2018) 3 SCC 229.

<sup>125</sup> *Id.* Section 22 states:

Section 22. Prohibition of advertisement relating to pre-conception and pre-natal determination of sex and punishment for contravention.—

(1) No person, organisation, Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, including Clinic, Laboratory or Centre having ultrasound machine or imaging machine or scanner or any other technology capable of undertaking determination of sex of foetus or sex selection shall issue, publish, distribute, communicate or cause to be issued, published, distributed or communicated any advertisement, in any form, including Internet, regarding facilities of pre-natal determination of sex or sex selection before conception available at such Centre, Laboratory, Clinic or at any other place.

(2) No person or organisation including Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic shall issue, publish, distribute, communicate or cause to be issued, published, distributed or communicated any advertisement in any manner regarding pre-natal determination or pre-conception selection of sex by any means whatsoever, scientific or otherwise.

(3) Any person who contravenes the provisions of sub-section (1) or sub-section (2) shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees.

Explanation.—For the purposes of this section, “advertisement” includes any notice, circular, label, wrapper or any other document including advertisement through Internet or any other media in electronic or print form and also includes any visible representation made by means of any hoarding, wall-painting, signal, light, sound, smoke or gas.

<sup>126</sup> *Dr. Sabu Mathew George v Union of India*, WP (C) No. 341/2008, order dated 16.02.2017 [(2017) 7 SCC 657].

The government further argued that Microsoft, Google, and Yahoo! are “bound” to develop a technique of “auto block” such that the moment a search is made based on certain keywords, intermediaries will automatically block any resulting content that is prohibited under section 22 from being displayed. The list of forty two words and phrases proposed by the government to be included in the auto-block feature included “gender selection”, “gender selection technique”, “prenatal diagnostic”, “early gender test”, “scientific sex determination and sex selection” and “prenatal conception test”. The Court agreed and passed an interim order requiring the intermediaries to ensure that the “doctrine of auto block” is applied within a reasonable period of time.<sup>127</sup> In subsequent hearings, the Court went even further – directing the intermediaries to appoint an in-house expert body to take steps “on its own understanding” to see if *any* word (even apart from the proposed keywords) on the Internet “which has the potentiality to go counter to section 22” of the PNDA Act or violate its “letter and spirit”, should be deleted forthwith.<sup>128</sup> This is despite the intermediaries submitting that completely removing information about such an important issue from the Internet would violate Article 19(1)(a) of the Constitution.

The Supreme Court eventually disposed of the writ petition after recording the intermediaries’ statement that they will not sponsor any advertisements under section 22 of the PNDA Act and will block any offensive material that is communicated to them by the Nodal Officer of the Nodal Agency of the Union of India.<sup>129</sup> The Court explained that if an individual intends to search for “medical tourism in India”, they can do so, as long as the content “does not frustrate or defeat” the restrictions under section 22, since only violations of section 22 are stayed. It directed an Expert Committee to hold meetings with the parties and arrive at a constructive solution to the issue and disposed of the matter.<sup>130</sup>

**IMPORT** Although the Court backtracked from the auto block suggestion, confusion remains about its final directions.<sup>131</sup> Will the Nodal Agency simply use the keywords to direct intermediaries to block content? Who will be responsible for drawing the line between what constitutes an advertisement and what constitutes information? Do sponsored advertisements have to be treated the same way as advertisements that show up as a result of organic searches? What is the constitution of the in-house expert body created by the intermediaries, and what accountability or transparency mechanisms does it follow? Will the Nodal Agency created by the executive pursuant to the directions of the Court effectively undermine the statutory review mechanism and the due process safeguards that have been built into the Blocking Rules notified under section 69A of the IT Act? What will happen to the right to hearing that is provided under the IT Act to the intermediaries and the owners of content? Unfortunately, the Court has not provided any guidance or engaged in a discussion of these issues.

Both the cases discussed in this section demonstrate the willingness of the Supreme Court, motivated by concerns about the rights of women, to impose additional obligations on intermediaries beyond what the law currently requires or permits, slowly normalising the idea of proactive censorship. Interestingly, these orders do not even discuss the legal regime for blocking under section 69A of the IT Act nor do they engage in a rigorous analysis of how the

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<sup>127</sup> *Id.*

<sup>128</sup> WP (C) No. 341/2008, orders dated 19.09.2016 and 16.02.2017 [(2018) 3 SCC 229].

<sup>129</sup> Pursuant to the Court’s direction, the Ministry of Health and Family Welfare designated a “Nodal Agency” as a single point of contact for all complaints on violations of section 22 of the PNDA Act. It provided an email address of this Agency, as well as the designation, email id and mobile number of the Nodal Officer.

<sup>130</sup> *Dr. Sabu Mathew George v Union of India*, WP (C) No. 341/2008, order dated 13.04.2017.

<sup>131</sup> Amrita Vasudevan and Anita Gurumurthy, *Costly Ambiguities: A Gender-Based Reading of the Latest Order of the Supreme Court in the Sabu Mathew George v. Union of India case*, IT for Change, <https://itforchange.net/index.php/gender-based-reading-of-the-Sabu-Matthew-Case>. See also Kovacs and Nayantara R., *supra* note 120.

orders can be implemented. The effect of the Supreme Court’s interventions, whether directly or indirectly (through the publication of the proposed amendments to the Intermediaries Guidelines in 2018), has been to place intermediaries as gatekeepers policing the content posted on their platforms.<sup>132</sup> However, attempting to proactively block all illegal content will only result in over-censorship, catching within its ambit sexual content that has artistic, literary, or educational value or that is consensual. It also has an effect of normalising such overreaching judicial orders that can have a knock-on effect on free speech and expression in other areas online. For instance, in a petition arising out of a PIL praying for mandatory linking of India’s biometric identity, Aadhaar, with social media accounts, the Supreme Court began considering whether the encryption services on platforms such as WhatsApp should permit “traceability”, to find the originator of content. The Court subsequently adjourned the matter, awaiting the notification of the IT (Intermediary Guidelines [Amendment] Rules).<sup>133</sup> In contrast, in cases concerning national security, the Supreme Court has refused to exercise its powers of judicial review. Thus, the Union Territory of Jammu & Kashmir has had restricted mobile Internet access (limited to 2G speeds) for more than 16 months, but the legality of the Internet shutdown orders have still not been decided by the Supreme Court.<sup>134</sup>

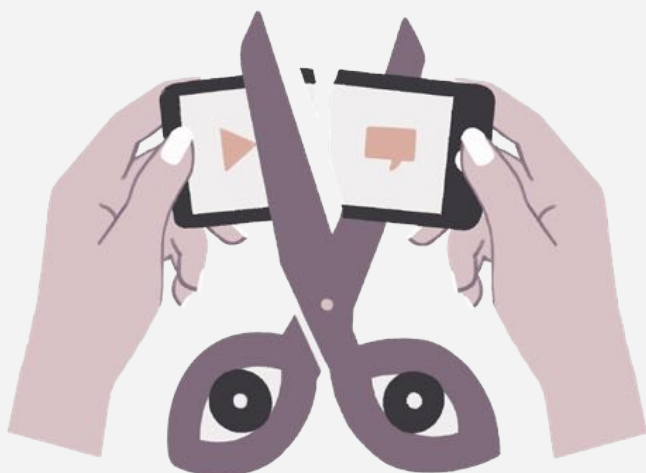
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<sup>132</sup> Varun Sen Bahl, Faiza Rahman and Rishab Bailey, Internet Intermediaries and Online Harms: Regulatory Responses in India, Data Governance Network Working Paper 06 (March 2020), [https://datagovernance.org/files/research/BahlRahmanBailey\\_-\\_Paper\\_6-2.pdf](https://datagovernance.org/files/research/BahlRahmanBailey_-_Paper_6-2.pdf).

<sup>133</sup> Gurshabad Grover, A Judicial Overreach into Matters of Regulation, *The Hindu* (27 August 2019), <https://www.thehindu.com/opinion/op-ed/a-judicial-overreach-into-matters-of-regulation/article29262148.ece>.

<sup>134</sup> For a timeline of the case in Jammu & Kashmir, see Devdutta Mukhopadhyay and Apar Gupta, Jammu & Kashmir Internet Restrictions Cases: A Missed Opportunity to Redefine Fundamental Rights in the Digital Age, 9 *Indian J. of Const. L.* 207 (2020). In August 2020, the government decided to restore 4G mobile Internet access in two out of the twenty districts in Jammu & Kashmir on a “trial basis” and informed the Supreme Court. The remaining eighteen districts continue to have 2G mobile Internet access. See order dated 11.08.2020 passed by the Supreme Court of India in *Foundation for Media Professionals v Ajay Kumar Bhall & Ors*, Cont. Pet. (C) No. 411/2020 in WP (C) (Diary No.) 10817/20 (Supreme Court).

## 4.3 *Muhammed Shifas* and the broadening of censorship through bail conditions



**CONTEXT** The law protects the anonymity of victims of sexual assault and provides for criminal action to be taken against the non-consensual circulation of videos of such assaults or videos including the private areas or involving private acts of a woman.<sup>135</sup> These videos are often circulated using social media platforms such as WhatsApp and YouTube, and various attempts have been made to curb this practice. On one end, as in *Prajwala*, the Supreme Court’s attempt at “eliminating” the circulation of such videos have ended up promoting over-censorship by intermediaries. On the other end, courts have also dealt with the non-consensual sharing of sexual images online through the application of bail law, specifically through the conditions imposed while granting bail. However, similar to *Prajwala* and *Sabu Mathew George*, such attempts at “protecting” women fail to consider free speech concerns, and eventually extend censorship to new areas more broadly. This is best demonstrated in the Muhammed Shifas case.

**CASE** Shifas was accused of raping his girlfriend and taking nude photos of her. He then threatened to circulate those photos online if she spoke to anyone about the rape. Using the photos as leverage, he was accused of raping her six more times subsequently. He then created a fake Facebook account and posted her nude photos and demanded INR 1 lakh (about USD 1350) to delete the photos. The Kerala High Court in *Muhammed Shifas v State of Kerala*<sup>136</sup> granted bail to Shifas, based on the fact that he was only twenty three years old, the victim had admittedly declared her love for him, the Supreme Court had issued directions to minimise the number of inmates in prison during the COVID-19 pandemic, and because bail is the rule and jail the exception. However, since Shifas was demanding money and threatening to publish more photos, he was granted bail subject to the condition that he would not use any social media accounts till the conclusion of trial:

<sup>135</sup> Sections 228A and 354C, IPC and section 66E, IT Act.

<sup>136</sup> Bail Application No. 5831/2020, order dated 17.09.2020 (Kerala HC). Shifas was accused of the commission of offences under sections 370, 376, 376(2) (n), 509, 506 IPC and section 6 r/w section 5, 5(l), 13, 14 and 15 of the POCSO Act, 2012 and section 66E of the IT Act.

*In such circumstances, there is nothing wrong in imposing a condition that the accused shall not use social media like FaceBook, Whatsapp, Twitter, Instagram etc.... till the investigation is completed. I also make it clear that ... the above condition will continue till the trial of the above case is over. With such a condition, this bail application can be allowed. Heavens will not fall down if a condition is imposed in a bail order restraining the accused in a rape case in using social media, especially when it is to protect the victim girl's privacy.*

**IMPORT** The bail condition is unnecessarily restrictive and is both under-inclusive and over-inclusive. It is under-inclusive since it does not contain any conditions that the accused will not contact the victim, speak about her, or post any photographs related to her on social media. It is simultaneously over-inclusive, since the blanket prohibition on the use of *all* social media accounts is not relatable to the offence of rape or the non-consensual sharing of sexual images online of which Shifas is accused. The bail conditions undermine Shifas' freedom of speech and expression by prohibiting him from engaging in any conversation on any social media platform, but do not in any way protect the victim's privacy, which is the stated purpose of the Court's order. They also impede his ability to communicate with friends, whether about the weather or politics, or use platforms such as LinkedIn or Twitter for any career-related work. In this manner, the Court actually treats the offence of non-consensual sharing of sexual images online as primarily speech-based, rather than a violation of bodily integrity or privacy.<sup>137</sup>

Unfortunately, the Kerala High Court is not alone in imposing such a condition. Various other High Courts have begun imposing conditions of "digital detoxification",<sup>138</sup> restricting or prohibiting the accused's use of social media for the duration of the trial, leading to the Supreme Court to consider the legality of such restrictions as a ground for bail.<sup>139</sup>

While we await a substantive hearing on this issue by the Supreme Court, it is important to remember that the sharing of views and expression of opinion on social media platforms is an important facet of the rights guaranteed under Article 19(1)(a) of the Constitution. Although the application of bail law is discretionary, bail law is not meant to be punitive in nature. The imposition of a blanket restriction on social media access for the duration of the trial (which often takes many years in India) does not serve the purpose of bail conditions, viz. to secure the presence of the accused during trial, nor does it protect the privacy of the victim. A far more suitable bail condition in cases of non-consensual sharing of sexual images online is to restrict the accused from contacting the victim or sharing any photos or videos of her.

The cases discussed under this part - concerning the regulation of OTT platforms and the prohibition of pornography, the monitoring of harmful online content, and social media restrictions imposed during trial- stem from the desire of the courts and litigants to protect the values of "Indian culture" or ensure the safety of women. However, while treating women as *objects* of state control, the courts' approach in each case has facilitated the expansion of censorship, without considering any safeguards that may prevent over-censorship and may protect women's right to have unrestricted access to the entire Internet.

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<sup>137</sup> The issue of non-consensual sharing of sexual images and the violation of bodily integrity is discussed in more detail *infra*, section 5.4.

<sup>138</sup> Radhika Roy, Can Trial Courts Impose Restrictions on Social Media Use as a Bail Condition? SC to Examine, *LiveLaw* (10 July 2020), <https://www.livelaw.in/top-stories/can-trial-courts-impose-restrictions-on-social-media-use-as-a-bail-condition-sc-to-examine-159707>.

<sup>139</sup> *Id.* The Supreme Court issued notice on the petition, although substantive hearings on the issue need to be conducted. A copy of the petition is available at [https://www.livelaw.in/pdf\\_upload/pdf\\_upload-378052.pdf](https://www.livelaw.in/pdf_upload/pdf_upload-378052.pdf).



## PART 5

# WOMEN AS SUBJECTS OF STATE CONTROL

## 5.1

*Faheema Shirin* and the fight for the right to Internet access

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## 5.2

Monitoring women's behaviour online: The chilling effect on free speech

5.2.1 The moral panic over TikTok

5.2.2. *Rehana Fathima* and the control over women's expression

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## 5.3

Monitoring the reporting of online allegations of sexual harassment: Whose right to anonymity, whose right to be forgotten?

5.3.1 Anonymous allegations and #MeToo: A tale of two gag orders

5.3.2 *Zulfiqar Khan* and the right to be forgotten

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## 5.4

Monitoring the non-consensual sharing of intimate images online: *Animesh Boxi* and a case for re-imagining privacy and bodily integrity online

The identities of women and gender and sexual minorities are, at least in part, crafted and policed through their bodies. In section 4 we saw how censorship of “vulgar” shows on Netflix, pornographic movies, rape videos or the non-consensual sharing of sexual images online is often motivated by the courts’ desire to protect women. In most cases discussed, however, the courts were hearing PILs that raised these issues more generally, without impugning the action of a specific woman. Section 4 thus demonstrated how women’s sexuality and bodies have traditionally been the *object* of state control, often based on an idealised notion of their role in society.

As Shilpa Phadke, Sameera Khan, and Shilpa Ranade have argued, the notion of women deserving extra protection is linked to their performative femininity and conformity to cultural norms of sex and gender: the recognition of their bodily integrity is made contingent on the lack of any perceived transgression from the norms of society.<sup>140</sup> What happens when women, who may otherwise occupy marginalised positions, try to create space for themselves online by challenging the stereotypes of an ideal Indian woman? There is all too often a backlash and an attempt by the family, the community, and the general public to *subject* these women to state control and regulate their actions.

This section explores the differing response of courts to cases where women defy the dominant narrative of femininity of an “*adarsh bharatiya nari*” by seeking equal access to the Internet; questioning the overt sexualisation of the female body; leveraging the power of anonymity on the Internet to challenge entrenched power structures that perpetuate sexual harassment; and fighting back against the non-consensual sharing of sexual images online. We examine the impact of judicial decisions in each of these cases and the effect it has on gender and sexuality rights and digital rights more broadly.

We begin by understanding how Faheema Shirin R.K.’s challenge to the attempts at restricting women’s access to mobile phones at her college hostel resulted in the Kerala High Court declaring the right to Internet access a fundamental right.

Second, we consider the chilling effect on freedom of expression that results from the monitoring of women’s behaviour online. We examine how society and the judiciary have responded to women from smaller towns and lower castes who break ossified socio-cultural norms (rooted in misogyny, caste, and class bias) by using the opportunity provided by apps such as TikTok and Likee to find fun, fame, and even fortune online. For a mixture of geopolitical and privacy concerns, these apps were banned by the Indian government in 2020, which conveniently ended the debate about the use of such apps by these women.

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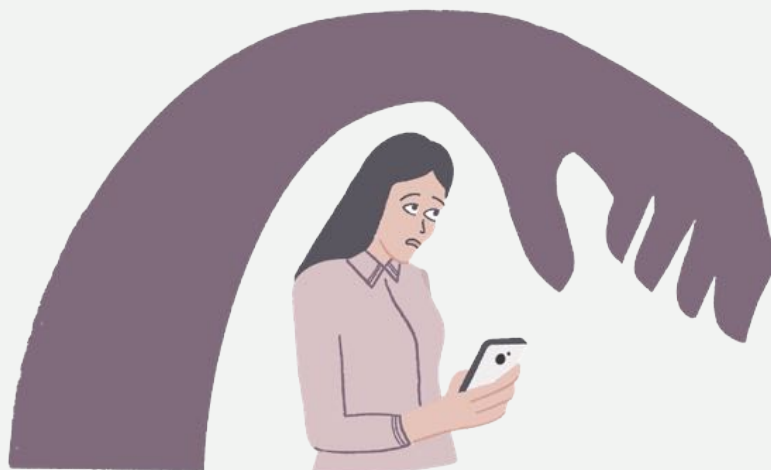
<sup>140</sup> Shilpa Phadke, Sameera Khan, and Shilpa Ranade, *Why Loiter: Women and Risk on Mumbai Streets* (Viking by Penguin Books, 2011). See also Elizabeth Loeb, Cutting It Off: Bodily Integrity, Identity Disorders, and the Sovereign Stakes of Corporeal Desire in U.S. Law, 36 (3/4) *Women’s Studies Quarterly* 44 (2008).

We also look at how the court's notion of an ideal mother conflicted with the actions of Rehana Fathima, who uploaded a video of her minor children painting on her semi-naked upper body and ended up in prison after being charged under the POCSO Act's provisions for "use of a child for pornographic purposes". The video was titled "Body Art and Politics".

Third, we analyse how the courts' failure to consider the structural issues and power dynamics that forced women to remain anonymous while levelling allegations of sexual harassment during the #MeToo movement resulted in a slew of gag orders restraining the publication of these allegations. The courts' patent distrust of anonymous sexual harassment allegations and the ensuing gag orders have created a situation where women are effectively being forced to choose between retaining their privacy and anonymity or retaining their right to tell their story.

Finally, to excavate the emerging recognition of the harm to bodily integrity, we discuss the conviction of Animesh Boxi for the non-consensual sharing of a woman's sexual images online, described by the Trial Court in West Bengal as an act "revenge porn" akin to "virtual rape".

## 5.1 *Faheema Shirin* and the fight for the right to Internet access



**CONTEXT** In July 2019, the Thakor community in Gujarat’s Banaskantha district, comprising twelve villages, unanimously banned unmarried women from carrying mobile phones, so that these adult college-going women could focus on their studies rather than making videos or “wasting” time on their phones. As an alternative, the community pledged to provide tablets and laptops to help them in their studies. The local political representative of the district, also a woman from the Thakor community, supported this decision, stating that there was nothing wrong with “college-going daughters” being asked to stay away from technology in favour of studies.<sup>141</sup> Needless to say, no similar restrictions were imposed on the unmarried men in the Thakor community. While the enforceability, or even legal validity, of such an order is suspect, it is part of a larger trend over the last decade of communities and villages in northern India prohibiting or severely restricting the use of mobile phones amongst unmarried women in particular.<sup>142</sup>

It comes as no surprise then that India ranks amongst the lowest on indexes measuring women’s access to the Internet. Women in India have significantly lesser access to phones than men; and even when they have access, they are restricted in terms of where, how long, and for what purpose they can use their phones.<sup>143</sup> The power dynamics in India’s patriarchal society have meant that even this limited usage, especially by unmarried women, is monitored and controlled for fear that the “girls” will ape “western” notions of morality or compromise family honour.<sup>144</sup>

<sup>141</sup> Press Trust of India (PTI), Thakor Community Bans Cellphones for Unmarried Women in Gujarat Villages, *Hindustan Times* (17 July 2019), <https://www.hindustantimes.com/india-news/thakor-community-bans-cellphones-for-unmarried-women-in-gujarat-villages/story-HsUAjyDDcRjziKHL1Z5WgL.html>.

<sup>142</sup> Anja Kovacs, “Chupke, Chupke”: Going Behind the Mobile Phone Bans in North India, Internet Democracy Project, Gendering Surveillance (February 2017), [https://genderingsurveillance.internetdemocracy.in/phone\\_bar/](https://genderingsurveillance.internetdemocracy.in/phone_bar/); Kayleigh Lewis, Girls and Unmarried Women in India Banned from Using Mobile Phones to Prevent “Disturbance in Society”, *Independent* (22 February 2016), <https://www.independent.co.uk/news/world/asia/girls-and-unmarried-women-india-forbidden-using-mobile-phones-prevent-disturbance-society-a6888911.html>.

<sup>143</sup> As per the GSMA Mobile Gender Gap Report (2020), <https://www.gsma.com/mobilefordevelopment/wp-content/uploads/2020/05/GSMA-The-Mobile-Gender-Gap-Report-2020.pdf>, mobile phone ownership stands at 79% for men and 63% for women in India, with the gender gap at 20%. The gender gap for mobile Internet use is at 50%, with 42% of men and 21% of women accessing the Internet. See also Sonne, *supra* note 45.

<sup>144</sup> Kovacs, *supra* note 142. See also Girogia Barboni et al., A Tough Call: Understanding Barriers to and Impacts of Women’s Mobile Phone Adoption in India, Harvard Kennedy School: Evidence for Policy Design (2018), [https://epod.cid.harvard.edu/sites/default/files/2018-10/A\\_Tough\\_Call.pdf](https://epod.cid.harvard.edu/sites/default/files/2018-10/A_Tough_Call.pdf).

In stark contrast with the government's expansive "Digital India" vision,<sup>145</sup> the mobile phone is, thus, used as a tool to control women's access to the Internet, which in turn, affects the free expression, agency, and privacy of women.

**CASE** The issue of access to mobile phones came to a head in *Faheema Shirin R.K. v State of Kerala*,<sup>146</sup> in which the Kerala High Court became the first court in India to recognise a *right* to access the Internet. Faheema was a third semester B.A. student in Sree Narayanaguru College, Chelannur, Kozhikode in Kerala. During term time, she lived in the college-run girls hostel, to save time travelling 150 kilometre daily to attend classes. The girls hostel, however, prohibited the students from using their mobile phones from 6 pm to 10 pm on all seven days. The restriction was earlier from 10 pm to 6 am, but this was changed because of parental complaints about "the excessive usage of mobile phones in the hostel for women." Faheema along with other students unsuccessfully petitioned the authorities to relax these restrictions. Arguing that the mobile phone restrictions impacted the quality of her education, Faheema submitted a written statement communicating her unwillingness to abide by them. Consequently, she was expelled from her hostel, which also made it difficult for her to attend college, on account of the long commute.

Faheema then challenged her hostel expulsion before the Kerala High Court on the grounds that the restriction on using her mobile phone was discriminatory; infringed her fundamental rights to free speech, privacy, and education; and denied her right to acquire knowledge through the Internet. According to her, the right to access the Internet formed part of her freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution and the restrictions imposed by the college were not covered by Article 19(2). Further, as an adult, nobody had the authority to interfere with her freedom to use her mobile phone, and any forceful seizure of mobile phones, based on parental complaints, was a violation of her privacy and personal autonomy. Finally, Faheema pointed out that the hostel restrictions were at odds with the State of Kerala's Digital Vision Policy, which encouraged access to the Internet.

In response, the college argued that study time prescribed for hostel students (referred to as "inmates") was from 6 pm to 8 pm and from 9 pm to 10 pm. To accommodate parental concerns about excessive mobile usage, the college decided to prohibit mobile phone usage from 6 pm to 10 pm "in order to see that students are utilising their study time for study purposes only." Interestingly, despite seemingly being motivated by parental concerns, the college also argued that when the Deputy Warden of the hostel informed Faheema's father about her disobedience, he was "rude"; said that he had no problem if she used her mobile phone during that time; and "accused" the college of having banned the usage of mobile phones in today's modern age. The college also argued that at the time of her admission, Faheema had agreed to follow hostel rules and hence, she had been rightfully expelled for violating them. In any event, since the college library has more than 30,000 books, and since Faheema can always use her laptop, restricting the acquisition of knowledge through the Internet between 6 pm and 10 pm was not unreasonable.

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<sup>145</sup> Digital India is a flagship programme of the Government of India with a vision to transform India into a digitally empowered society and knowledge economy. See <https://www.digitalindia.gov.in/>.

<sup>146</sup> (2019) 4 KLJ 634.

The college further justified the restrictions in the girls hostel by arguing that there were restrictions in the boys hostel as well: between 6 am and 9 am and from 4 pm to 6.30 pm on all days except Sunday, and post 10 pm on all days. The judgment is unclear about why the college followed different rules for the boys and girls hostel and does not go into the reasonableness of the restrictions in the boys hostel, since that was not under challenge.

The Kerala High Court held that the enforcement of discipline by restricting the use of mobile phones unreasonably curtailed the right of students to acquire knowledge by different means and quashed the college's decision to expel Faheema from the hostel. The Court's decision is predicated on its view that mobile phones, which were earlier a luxury, are now part and parcel of daily life, and are "unavoidable to survive with dignity and freedom". Additionally, the use of mobile phones *per se* did not cause any harm to anyone, nor had there been any specific complaint against Faheema that could have justified her expulsion.

Moreover, the Court held, students in a college hostel are adults, perfectly capable of taking decisions as to how and when they have to study. They should not be compelled to use or be restrained from using their mobile phones. The college authorities and the parents must appreciate the innumerable advantages of the Internet and its role in facilitating education and exchange of ideas. As the Court observed, "when one student may be interested in garnering knowledge by reference of books in libraries, one may be interested in referring to e-books or downloading data." Depriving students of a particular technological means of obtaining information is an unreasonable restriction.

Finally, the Court observed that misuse of mobile phones can happen before 6 pm or after 10 pm and can happen with laptops also. In fact, in comparison to laptops that are expensive and may not be owned by everyone, mobile phones are multi-functional, have many apps, are portable, handy, and make connectivity feasible for all.

Taking note of UN Human Rights Council resolutions, adopted in 2013 and 2014, that call upon States to facilitate equal participation in access to the Internet, the Court ruled:

*The right to have access to Internet becomes the part of right to education as well as right to privacy under Article 21 of the Constitution of India..... The total restriction on its use and the direction to surrender it during the study hours is absolutely unwarranted. When the Human Rights Council of the United Nations have found that right to access to Internet is a fundamental freedom and a tool to ensure right to education, a rule or instruction which impairs the said right of the students cannot be permitted to stand in the eye of law.*

Thus, relying on its finding that the hostel rules infringed the fundamental freedoms as well as the privacy of students and would adversely affect their future and careers, the High Court ruled that the restrictions on use of mobile phones cannot be enforced by the girls hostel.

**IMPORT** The Court does strike a discordant note by suggesting that the students should be given counselling to inculcate self-restraint in the use of mobile phones, to make them aware of the consequences of misuse, and to make them “capable of choosing the right path” - implying that there is a preferred, “right” way of using one’s mobile phone.

However, by and large, the judgment of the Kerala High Court is progressive and expands the contours of freedom of speech and expression online. It is important because it affirms the value of access to mobile phones to learn and communicate online. In doing so, it links the right to Internet access to the right to education and privacy, and brings all these rights within the fold of Article 21 of the Constitution. Moreover, the COVID-19 pandemic has once again demonstrated the importance of meaningful Internet connectivity, and the judgment provides the language and the jurisprudential foundation for articulating a positive right to Internet access. Although arising in the context of women’s access to their mobile phones, it has general applicability in affirming the right to Internet access for all and towards democratising access to information and knowledge.

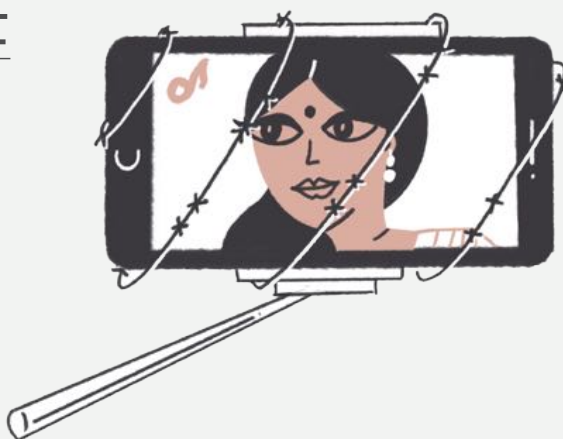
Nevertheless, we should not be too quick to celebrate, because the long-term impact of the High Court’s judgment remains to be seen. The Supreme Court, while hearing a subsequent challenge to the months’ long Internet shutdown in Jammu and Kashmir in *Anuradha Bhasin*, did not refer to *Faheema Shirin* despite being commended by the Petitioners before it.<sup>147</sup> The Supreme Court in *Anuradha Bhasin* declared that the right to freedom of speech and expression over the Internet enjoys constitutional protection under Article 19(1)(a) of the Constitution, but did not go so far as to recognise a freestanding right to Internet access.<sup>148</sup> However, *Faheema Shirin*’s positive articulation of the right to Internet access provides an important alternative lens, that could still have a significant impact in the future adjudication of the legality of Internet shutdowns and digital rights in general.

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<sup>147</sup> One of the authors, Vrinda Bhandari, was representing one of the applicants before the Supreme Court in *Anuradha Bhasin*, *supra* note 10.

<sup>148</sup> *Id.*

## 5.2 Monitoring women's behaviour online: The chilling effect on free speech



### THE MORAL PANIC OVER TIKTOK

**CONTEXT** The community diktat in Gujarat, the hostel order in *Faheema Shirin*, and similar orders in other college hostels<sup>149</sup> illustrate how access to mobile phones by unmarried women is controlled in order to restrict their access to the Internet. Simultaneously, attempts have also been made to monitor women's use of particular social media apps, such as TikTok, Likee, Vigo Video, and Bigo Live, in order to control the content that they post. These attempts seem to have been primed towards married women, with reports about women being divorced for posting "obscene" videos that were "damaging to family values" on TikTok, to being murdered by their husbands over their use of TikTok.<sup>150</sup> Many politicians have also pushed for a ban on TikTok for its "objectionable" videos, "cultural degradation", and for leading "youngsters towards [an] unproductive life".<sup>151</sup> Incidentally, all these apps have now been banned by the Indian government.

Facebook and Instagram cater to elite, urban, middle class India. By contrast, apps such as TikTok gained tremendous popularity amongst a different, less affluent class of people, including women, living in small towns and rural areas, who may not be highly literate or comfortable with English. These women, whose primary identity has been expected to be tied to their home (whether as a mother or a wife), defied societal expectations in their embrace of apps such as TikTok and the online fun, fame, and fortune that accompanied their use. The simple visual interface, vast choice of language alternatives, and an algorithm that opened "new routes to serendipitous discovery" reduced language and literacy barriers and made TikTok easy to

<sup>149</sup> *M. Palanisamy v. State of Tamil Nadu*, WA (MD) No. 1460/2017, order dated 23.02.2018 (Madras HC), although not directly relating to this issue, arises in a factual background where the Deputy Warden of the Ladies Hostel of the Government Law College, Tiruchirappalli had called the parents of two girls, who had been caught using a mobile phone; and the Deputy Warden had then set out to verify which students were using phones and to "enlighten" them about the ill-effects of the phone. The issue was eventually settled, and hence only provided a factual background in this case.

<sup>150</sup> Petiee Peter, Woman Chooses TikTok over Spouse after He Objects to Her Raunchy Videos, *Bangalore Mirror* (6 February 2020), <https://bangaloremirror.indiatimes.com/bangalore/others/bengaluru-woman-chooses-tiktok-over-spouse-after-he-objects-to-her-raunchy-videos/articleshow/73975214.cms>; Santraj Thakur, Ghaziabad: Missed Wife's Addiction to TikTok, Husband Seeks Divorce, *Navbharat Times* (26 January 2020), <https://navbharattimes.indiatimes.com/state/uttar-pradesh/ghaziabad/wife-used-to-make-tiktok-video-husband-wants-divorce/articleshow/73620709.cms>; Ashish Pandey, Husband Asks Wife Not to Post TikTok Videos, She Refuses. He Then Kills Her, *India Today* (8 November 2019), <https://www.indiatoday.in/crime/story/husband-asks-wife-not-to-post-tiktok-videos-she-refuses-he-then-kills-her-1616927-2019-11-08>; TN Man Kills Wife for Uploading TikTok Videos, *IndiaGlitz* (4 June 2019), <https://www.indiaglitz.com/coimbatore-man-stabs-wife-to-death-uploading-tiktok-videos-refusing-to-attend-calls-tamil-nadu-tamil-news-237524>.

<sup>151</sup> Tribune News Service, Will Write to Govt to Ban TikTok India; Women's Commission Chief, *Tribune India* (19 May 2020), <https://www.tribuneindia.com/news/nation/will-write-to-govt-to-ban-tiktok-india-womens-commission-chief-86897>; Julia Alexander, Indian Lawmakers Call for TikTok Ban, Alleging Spread of "Cultural Degradation" among Teens, *The Verge* (13 February 2019), <https://www.theverge.com/2019/2/13/18223590/tiktok-india-ban-legislation-government-teens>.



use, resulting in 610 million lifetime downloads in less than three years of launching in India.<sup>152</sup> Women engaged with the app by posting videos of themselves lip syncing or dancing to its large library of popular Bollywood songs and winning fans and likes. This was accompanied by a misogynistic backlash from the flagbearers of Indian morality, who accused these women of being promiscuous, behaving like prostitutes, and morally corrupting the life of their husbands and families.<sup>153</sup> In short, they were upset at the women for upending the traditional stereotype of an “ideal wife”, and believed that access to apps such as TikTok should be subject to state control.

**CASES** Some of these concerns were also litigated before courts. In April 2019, relying on statements made by politicians advocating a ban on TikTok, a PIL was filed by a lawyer before the Madras High Court in *S Muthukumar v TRAI*, praying for TikTok to be banned. The petition alleged that TikTok was “degrading culture” (since “young girl’s steps in front towards the camera taking attention away”), creating “social stigma”, and encouraging pornography and paedophiles.<sup>154</sup> Even though the PIL made no reference to any legal provisions and did not make out a case for violation of existing law, the High Court passed an interim order prohibiting the download of the app or the telecast of videos made using the app. Three weeks later, on 24 April, the Court reversed the ban on TikTok, based partly on the content moderation mechanisms put in place by the company and its removal of six million videos with “doubtful” content from the app. At the same time, the High Court expressed its concern over the possibility of women and children being “sexually abused by video sharing” and treated the reply filed by TikTok as an undertaking “that negative and inappropriate or obscene materials would be filtered”, and added that any violation of this direction would amount to contempt of court.<sup>155</sup> One is of course left to wonder what types of videos the judge had in mind when he directed that “negative” and “inappropriate” material be filtered, given the complete absence of discussion about the agency and autonomy of the women making these TikTok videos. A similar PIL was later filed before the Bombay High Court, although no comprehensive orders have been passed as yet.<sup>156</sup>

In May 2020, the Odisha High Court expressed similar reservations about TikTok in *Shibani Barik* while considering the bail plea for Barik, who had been accused of abetting her husband’s suicide since her former lover (and co-accused) had sent him private TikTok videos of them being intimate together.<sup>157</sup> It is not immediately clear from the facts of the case why Barik should be criminally charged with abetment to suicide simply for exercising her agency and making an intimate video with her lover. However, keeping in view that Barik had been in judicial custody for over four months and that the content of the videos had not been brought before it, the High Court granted her bail, but not before making the following observations:

*This kind of transmitting Tik Tok videos with offensive content to harass victims are on prowl and are gradually on the rise. Large number of people, especially the youth, both in rural and urban areas, are vulnerable to such troubling trend... Tik Tok Mobile App which often demonstrates a degrading culture and encourage pornography besides causing pedophiles and explicit disturbing content, is required to be properly regulated so as to save the teens from its negative impact. The appropriate Government has got the social responsibility to put some fair regulatory burden on those companies which are proliferating such applications...*

<sup>152</sup> Connie Chan, When AI Is the Product: The Rise of AI-Based Consumer Apps, *Andreessen Horowitz* (2018), <https://a16z.com/2018/12/03/when-ai-is-the-product-the-rise-of-ai-based-consumer-apps/>; Kian Vestinnson, India’s TikTok Ban Tightens the Government’s Grasp on the Internet, *The Diplomat* (30 July 2020), <https://thediplomat.com/2020/07/indias-tiktok-ban-tightens-the-governments-grasp-on-the-internet/>; Snigdha Poonam and Samarth Bansal, TikTok Is Taking over India, *The Atlantic* (15 November 2019), <https://www.theatlantic.com/international/archive/2019/11/india-tiktok-stars-are-outshining-traditional-celebrities/602059/>.

<sup>153</sup> Nilesh Christopher and Varsha Bansal, Meet the Rising Stars of India’s Video Apps, *Rest of World* (12 May 2020), <https://restofworld.org/2020/india-video-apps-influencers/>.

<sup>154</sup> A copy of the petition is available at <https://sfc.in/madras-high-court-bans-downloading-tiktok>.

<sup>155</sup> *S Muthukumar v. TRAI*, W.P.(MD) No. 7855/19, order dated 24.04.2019, (Madras HC).

<sup>156</sup> *Heena Darvesh v. Union of India*, PIL No. 143/2019, orders dated 17.12.2019 and 05.03.2020 (Bombay High Court).

<sup>157</sup> *Shibani Barik v. State of Odisha*, MANU/OR/0086/2020, <https://indiankanoon.org/doc/26296367/>.

**IMPORT** There are certainly valid objections to various videos posted on TikTok, such as those glorifying rape and promoting acid attacks, or even to TikTok’s perceived limited content moderation efforts.<sup>158</sup> However, these legitimate concerns with the functioning of certain aspects of the app should not be conflated with an objection to the *entire* platform itself. Doing so ignores the multitude of remedies available under Indian law, including the IPC and IT Act, that deal with obscene, sexually explicit, and non-consensual content, as well as under TikTok’s community guidelines, even if not always promptly enforced.

Additionally, a blanket ban on a platform such as TikTok ignores its value in giving a voice and opening up parts of the Internet for groups that have traditionally been ignored by the Indian upper caste and class for being “cringey”.<sup>159</sup> In India’s highly stratified class and caste society, TikTok was a “glass ceiling breaker” that enabled many women to step outside the gendered and patriarchal norms of small town India while engaging with the Internet.<sup>160</sup> For many women from small towns or lower castes, in particular, TikTok was their first point of entry to the Internet, and became a source of entertainment, fame and sometimes, income. In addition, it gave many women self-confidence and an independent sense of identity, distinct from their marital status.<sup>161</sup> Conversations around regulating or banning TikTok that do not take these aspects into account therefore reinforce a dominant patriarchal and classist narrative that stifles women’s right to expression - as if to punish them for deviating from acceptable modes of self-representation online. In fact, the class element may explain why despite repeated criticism for allowing hateful content on its platform or its poor and biased content moderation efforts, there has been little conversation around possibly banning Facebook. The use of the Internet by women and gender and sexual minorities who claim a different online public space from the privileged, elite majority needed to be celebrated, not regulated. The diversity of people offline should be reflected in the diversity of content produced and consumed online.

On 29 June 2020, in view of the “emergent nature of threat” posed by Chinese apps such as TikTok, Likee, Vigo Video, and Bigo Live, the Indian government exercised its powers under section 69A of the IT Act to ban these apps, along with fifty five others, for being engaged in activities “prejudicial to sovereignty and integrity of India, defence of India, security of state and public order” and for their threats to the data security and privacy of Indians.<sup>162</sup> This was followed by a ban of forty seven clone apps and later, 118 mobile apps, including WeChat work, Alipay, Baidu, and gaming apps such as PUBG Mobile, for similarly vague reasons.<sup>163</sup>

On the face of it, the ban is completely unconnected to apprehensions expressed about the impact of TikTok on women and Indian culture. It purportedly relates to privacy concerns about

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<sup>158</sup> Prasham Parikh, TikTok Faces Severe Backlash in India over Poor Content Moderation, *Mashable* (May 2020), <https://in.mashable.com/tech/14132/tiktok-faces-severe-backlash-in-india-over-poor-content-moderation>.

<sup>159</sup> Christopher and Bansal, *supra* note 153. See also Jyoti Yadav, TikTokers Dubbed “Shudras of Internet”: Indians Didn’t Spare Even Social Media from Casteism, *The Print* (9 March 2020), <https://theprint.in/opinion/pov/tiktokers-dubbed-shudras-of-internet-indians-didnt-spare-even-social-media-from-casteism/377759/>.

<sup>160</sup> TikTok, Now Banned in India, Gave Rural Women Fame, Fun and More, *Japan Times* (23 July 2020), <https://www.japantimes.co.jp/news/2020/07/23/asia-pacific/tiktok-india-ban/>; Raymond Zhong and Kai Schultz, With India’s TikTok Ban, the World’s Digital Walls Grow Higher, *New York Times* (11 July 2020), <https://www.nytimes.com/2020/06/30/technology/india-china-tiktok.html>.

<sup>161</sup> Christopher and Bansal, *supra* note 153.

<sup>162</sup> Press Information Bureau Press Release, Government Bans 59 Mobile Apps Which Are Prejudicial to Sovereignty and Integrity of India, Defence of India, Security of State and Public Order, *Press Information Bureau* (29 June 2020), <https://pib.gov.in/PressReleaseDetail.aspx?PRID=1635206>.

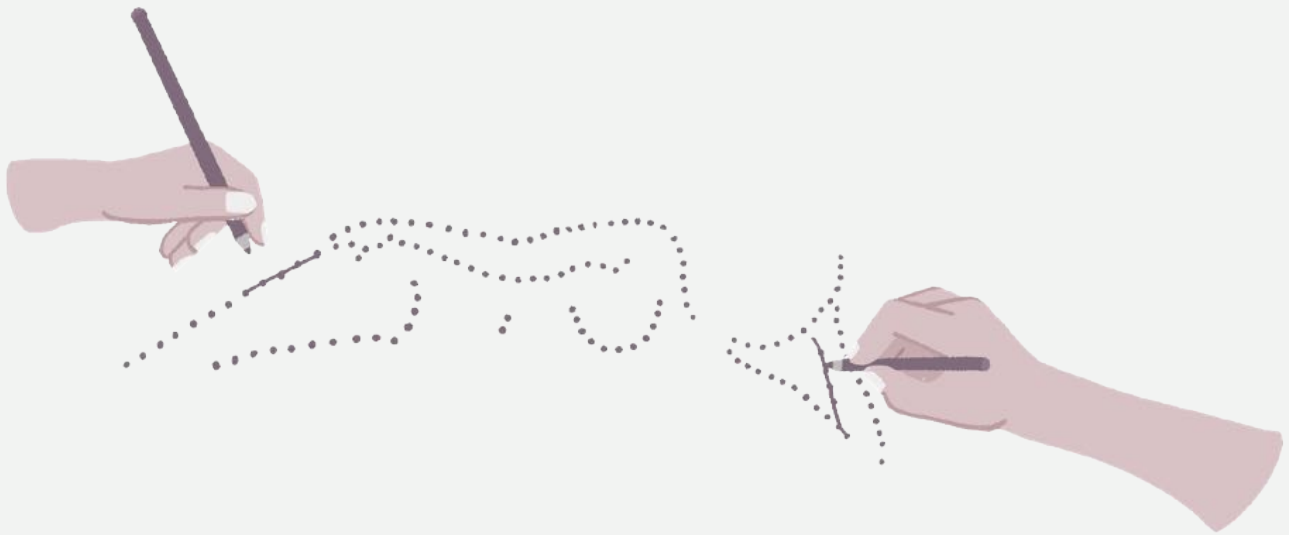
<sup>163</sup> Press Information Bureau Press Release, Government Blocks 118 Mobile Apps Which Are Prejudicial to Sovereignty and Integrity of India, Defence of India, Security of State and Public Order, *Press Information Bureau* (2 September 2020), <https://pib.gov.in/PressReleasePage.aspx?PRID=1650669>; India Bans 47 More Chinese Mobile Apps, 250+ Apps Reportedly under Scanner over Privacy Concerns, *Financial Express* (27 July 2020), <https://www.financialexpress.com/industry/technology/india-bans-47-more-chinese-mobile-apps-250-apps-reportedly-under-scanner-over-privacy-concerns/2036181/>.

the data of Indian users and, perhaps more concretely so, unstated apprehensions about rising geopolitical tensions with China.<sup>164</sup> Given the government's poor track record in respecting the privacy of its citizens, and its continued failure to implement a data protection law, the privacy and data security justifications for the ban ring hollow. But by placing a digital wall around a part of the Internet, the ban has had a disproportionate impact on some of the less privileged sections of Indian society, many of whom have lost an important means of self-expression, public validation, content creation, and revenue stream without, for the moment, any comparable alternative platform having taken its place.<sup>165</sup> Thus, while the ban has been justified as protecting the privacy of Indians, it has effectively undermined free expression for a large section of Indian society. The class, caste, and gender dynamics probably explain why the ban on TikTok and similar apps went relatively uncontested in India. This makes it a gender and class issue as much as a digital rights and human rights issue.

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<sup>164</sup> Shubangi Agarwalla and Siddharth Sonkar, Where Does India's Ban on Chinese Apps Fit into the Global Trade Debate, *The Wire* (5 July 2020), <https://thewire.in/tech/india-china-apps-global-trade-debate>.

<sup>165</sup> Reports have indicated that while some TikTok users are moving to YouTube, Instagram, and other apps, the transition has been far from smooth. Influencers have lost followers and revenue, while others find the alternatives harder to navigate. See Abhijit Ahaskar, Indian TikTok Influencers Scramble for Earnings, Followers after App Ban, *LiveMint* (2 August 2020), <https://www.livemint.com/companies/news/indian-tiktok-influencers-scramble-for-earnings-followers-after-app-ban-11596345861028.html>; Nitish Pahwa, What Indians Lost When Their Government Banned TikTok, *Slate* (7 August 2020), <https://slate.com/technology/2020/08/tiktok-india-ban-china.html>.



## REHANA FATHIMA AND THE CONTROL OVER WOMEN'S EXPRESSION

**CONTEXT** Many people would agree that if a woman takes a nude selfie and sends it to her partner who then shares it online without her consent, this is a violation of her privacy and sexual autonomy. What happens if a woman posts a video online of another person painting her naked upper body? What if that other person is her minor child; and what if she had uploaded such a video to start a conversation about the overt sexualisation of women's bodies?

**CASE** It is in this complex and contested domain that we need to look at the case of Rehana Fathima. Rehana is an outspoken feminist activist in Kerala, with a history of speaking out against patriarchal, Brahmanical notions of morality, body discrimination, and the hyper-sexualisation of women in society. She was part of the "Kiss of Love" movement in 2014, a non-violent protest against moral policing, and participated as the only woman in a traditional men-only tiger dance performed during a religious festival in Kerala. In 2018, she tried to enter the famous Sabarimala temple in Kerala, after the Supreme Court passed its landmark ruling allowing, contrary to tradition, women of menstruating age to enter the temple, although she was stopped by protestors.<sup>166</sup>

In the tradition of this activism, in 2019, Rehana uploaded a video on her YouTube channel, in which her fourteen year old son and eight year old daughter were painting a phoenix and flowers on her semi-nude body, which was naked above the navel. The children were fully clothed throughout the video. The video was uploaded with the title "Body Art and Politics" along with a detailed note that explained her actions. In the note, Rehana spoke about the problem that "within the current family situation of our society, there is only little room for openness associated with sexuality or nudity... Its high time that you need to be open-up and open-about what the female body is all about and what Sex & Sexuality really means". She also wrote that "no child who has grown up seeing his mother's nakedness and body can abuse another female body".<sup>167</sup> Based on the video and note, a criminal case was registered against

<sup>166</sup> Anureet, Rehana Faithima and Her Struggle against Gender Stereotypes, *She the People* (14 September 2020), <https://www.shethepeople.tv/feminism/rehana-fathima-gender-stereotypes-struggle-against/#:-:text=Fathima%20advocates%20gender%20equality%20and,bail%20from%20a%20special%20court>.

<sup>167</sup> The text of the accompanying note can be found at *Fathima A.S. v State of Kerala*, Bail App. No. 3861/2020, order dated 24.07.2020 (Kerala High Court), [https://www.livelaw.in/pdf\\_upload/pdf\\_upload-378769.pdf](https://www.livelaw.in/pdf_upload/pdf_upload-378769.pdf).

Rehana for offences relating to CSAM content (“use of child for pornographic purposes” and “storage of pornographic material involving child”) under sections 13, 14, and 15 of the POCSO Act, 2012; section 67B of the IT Act; and section 75 of the Juvenile Justice (Care and Protection of Children) Act, 2015.

Fearing arrest, Rehana moved the Kerala High Court for pre-emptive protection against arrest or “anticipatory bail”. She explained that the video and the accompanying message were meant to start an open conversation about female bodies and body parts, so that children could grow up viewing the body other than as a mere sexual tool. Her actions could not be viewed and judged from the lens of Brahmanical conceptions of morality, decency, and obscenity. The resulting outrage and public outcry, she argued, along with a private complaint from a local male political leader, did not justify the initiation of criminal prosecution against her, especially on charges of using a child for pornographic purposes.

Rejecting her argument and dismissing her anticipatory bail petition, the Kerala High Court stated:

*According to the petitioner, she is teaching her children sex education by uploading this video. As I said earlier, if this painting on the naked body of the petitioner happened inside the four walls of the house of the petitioner, there cannot be any offence... The petitioner, when shot and uploaded these videos in social media, she also claims that she wants to teach sex education to the children in the society. I cannot accept this stand of the petitioner...*

The Court’s observations – although they fail to elaborate on why Rehana’s stand is unacceptable – raise an important question. Is it the act of her children painting on her semi-naked body that attracted Rehana’s prosecution under the POCSO Act; the fact that she made a video of it; or the fact that it was uploaded on social media for others to watch?

Section 13 of the POCSO Act<sup>168</sup> seems to indicate that an act covered by the provision would be an offence regardless of whether it was done within the confines of one’s home or whether a video was made and/or uploaded. The key question then is whether Rehana’s act is covered by section 13’s prohibition against using a child “for sexual gratification”, including for an “indecent or obscene representation of the child”. The Court was of the *prima facie* opinion that the “children are represented in the video uploaded in an indecent and obscene manner because they are painting on a naked body of their mother” and that the “expression of the petitioner, while the children are painting on her breast” was also important. There is no further explanation of what her expression was; why it was important; or even why the act of painting on the semi-naked body of their mother would attract the harsh sanction of these laws, which have a maximum punishment of five years for first time offenders.

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<sup>168</sup> Section 13 of the POCSO Act states “13. Use of child for pornographic purposes.—Whoever, uses a child in any form of media (including programme or advertisement telecast by television channels or Internet or any other electronic form or printed form, whether or not such programme or advertisement is intended for personal use or for distribution), for the purposes of sexual gratification, which includes— (a) representation of the sexual organs of a child; (b) usage of a child engaged in real or simulated sexual acts (with or without penetration); (c) the indecent or obscene representation of a child, shall be guilty of the offence of using a child for pornographic purposes. Explanation.—For the purposes of this section, the expression ‘use a child’ shall include involving a child through any medium like print, electronic, computer or any other technology for preparation, production, offering, transmitting, publishing, facilitation and distribution of the pornographic material.”

Section 67B of the IT Act criminalises persons that “facilitate abusing children online”, unless it is in the interest of science, literature, art or learning or other objects of general concern. For reasons similar to its analysis under the POCSO Act, the Court said that it could, *prima facie*, not rule out the commission of offences under section 67B, although it did not even mention the exception to decide whether that could *prima facie* be invoked.

The Rehana Fatimah case is complex because it seemingly pits the rights of women and objection to state control over their bodies against the rights of children, who may be participating in the making of, or in the viewing of the video. The discussion may have been completely different if Rehana’s husband, rather than her children, was painting on her semi-naked body, although the State may very well have prosecuted Rehana and her husband for obscenity under sections 67 and 67A of the IT Act in that case.<sup>169</sup> However, certain child rights activists expressed apprehension about the impact of uploading the video on Rehana’s children, who were exposed to the vile comments on the videos and could potentially be bullied by their peers. More worryingly, they questioned whether the minor children had the agency to consent to their mother’s actions and whether the video, divorced from Rehana’s reasons for making it, could fall under the ambit of grooming.<sup>170</sup>

Notably, the High Court does not engage with any of these concerns in any detailed manner. For one, there is no mention of whether Rehana’s children had consented to the video being uploaded or even had agency to consent to such an act. Nor is there any discussion about any potential mental or psychological trauma that could have been or was suffered by her children. The Court’s concerns seem to stem primarily from the video being uploaded online, and not from the act of making the video or its impact on her children. Instead we have the Court’s view, without any accompanying explanation, that after placing itself in the position of Rehana and the potential audience for the video, and “after applying my judicial mind, I am not in a position to say that, there is no obscenity in the video when it is uploaded in the social media.” Incidentally, YouTube categorised Rehana’s video as an age-restricted video.<sup>171</sup>

Moreover, the Court’s order contains a detailed exposition on the role of the mother and her “duty and responsibility” to serve as an “emotional anchor” for her children and to build their “moral compass”:

*The concept of mother in our society is always great. The role of mother is always important in the life of a child. The mother will be a pillar of emotional support to the child... A good mother has outstanding qualities. No one can replace her in life to her children. Deep love for her children, sacrifice and dedication, protection and security etc.. are the qualities of a mother... The outlook that the child will form towards life depends a lot on the mother. His attitude, his views – religious or otherwise – his perspective on life and its goals will all be gained from her... It is usually said that, the mother will be the window of the child to the world.*

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<sup>169</sup> See Datta, *supra* note 28 for the kinds of prosecutions under section 67, IT Act.

<sup>170</sup> Meghana Kurup, Rehana Fathima Case: Punishment in Search of a Crime?, *Asiaville News* (30 July 2020), <https://www.asiavillenews.com/article/rehana-fathima-case-punishment-in-search-of-a-crime-53420>.

<sup>171</sup> Sridip Nambiar, Body, Mother, Child and the State: Rehana Fathima’s Video and Us, *Feminism in India* (20 July 2020), <https://feminisminindia.com/2020/07/20/body-mother-child-state-rehana-fathimas-video/>.

The Court also cites the ancient legal and religious texts for Hindus (Manusmriti) and Muslims (the Holy Qur'an) to state that while both parents are important, "the mother is singled out as she bears a greater responsibility". The Court finally concludes that it "is not in a position to agree with the petitioner that she should teach sex education to her children in this manner". The Supreme Court dismissed Rehana's petition to appeal, stating that there was no need to interfere with the High Court's order.<sup>172</sup>

**IMPORT** After reading this, we can only wonder whether the judgment would have read differently if the uploaded video had Rehana's children painting on the semi-naked body of their father. Is the Court's concern about Rehana being semi-naked (and failing her role as a mother) or her children being represented indecently or obscenely for "sexual gratification"? Rehana's video and accompanying message was predicated on the idea that the bodies of women, and their breasts, need to be viewed no differently in sexual terms as compared to the bodies of men, and their chest, especially in the eyes of children, if one is to counter the societal expectation of "perfection" and hyper-sexualisation of women.<sup>173</sup> After all, as Rehana pointed out, lower caste women in Kerala have had to fight for the right to cover their breasts in public; body painting on men is an accepted tradition of the Pulikali festival in Kerala; and the idols and murals of goddesses in Kerala are traditionally depicted with bare breasts.<sup>174</sup> The Kerala High Court too, in a previous judgment held that a magazine cover with a mother breastfeeding her baby cannot be considered obscene.<sup>175</sup> What then, was so materially different about what Rehana had done?

The Court's focus on the role of the mother, apart from being completely misplaced and steeped in patriarchal morality, belies any concern it may have about the impact on Rehana's children. The Supreme Court too, while dismissing her petition, reportedly commented (although this does not find place in the judgment) on what kind of culture children would perceive from such actions. It is perhaps ironic that it is the children who have suffered most as a consequence of this order: not only did their mother have to go to jail for a short period of time, but her laptop, which was being used by them to attend online classes at school, was also seized by the police.<sup>176</sup>

Interestingly, throughout the order there is no discussion on *why* the High Court considers the video to be an "indecent or obscene representation" of Rehana's children; how the act may constitute child pornography; and why the nudity of the mother constitutes an indecent representation of her child. We also do not know from whose perspective the Court viewed the uploading of the video or the standard of obscenity applied to *prima facie* conclude that the offences under the POCSO and IT Act may be made out, and hence, deny anticipatory bail to Rehana. We only know that the Court eventually concluded that that it disagrees with Rehana that she "should teach sex education to her children in this manner". Kanchan Mathur points out how the female body remains a site where power is played out and it is "constantly under pressure to conform and mould into prescribed social and cultural roles".<sup>177</sup> It was precisely to counter such pressures that Rehana believed her video and the detailed accompanying message were important - although both the courts gave short shrift to her views.

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<sup>172</sup> *Fathima A.S. v State of Kerala*, SLP (Cri) No. 3480/20, order dated 07.08.2020 (Supreme Court).

<sup>173</sup> *Fathima A.S. v State of Kerala*, Bail App. No. 3861/2020, order dated 24.07.2020 (Kerala High Court).

<sup>174</sup> V Venkatesan, Rehana Fathima's Struggle against Gender Stereotypes Should Be Celebrated, Not Punished, *The Wire* (29 July 2020), <https://thewire.in/women/rehana-fathima-pocso-body-painting>.

<sup>175</sup> *Felix M.A. v. P.V. Gangadharan*, W.P 7778/2018, order dated 08.03.2018 (Kerala High Court).

<sup>176</sup> Nambiar, *supra* note 171; Venkatesan, *supra* note 174.

<sup>177</sup> Kanchan Mathur, *Body as Space, Body as Site: Bodily Integrity and Women's Empowerment in India*, 43(17) *Econ. and Pol. Weekly* 54 (2008).

Finally, there is no explanation for why custodial interrogation of Rehana was necessary given the nature of the offence and the fact that there was no apprehension, even discussed, of Rehana fleeing the jurisdiction of the court, tampering with evidence, or intimidating witnesses.

Although a judgment on bail is not intended to conclusively determine the innocence or guilt of a person, a court cannot simply make *prima facie* observations about the applicability of the charging provisions without giving a sufficient explanation. The position of law after *Aveek Sarkar*<sup>178</sup> is clear that nudity per se cannot be treated as obscene, unless it excites “lustful thoughts”. In a previous judgment, the Supreme Court has also recognised that nakedness does not always arouse the baser instinct.<sup>179</sup> The Court should, thus, have justified why such a position would not apply in the present case, and explain why the involvement of her fully clothed children changed the nature of the material to child pornography. By privileging public morality, the Court has further blurred the lines between criminality and morality, despite, as Andrew Ashworth notes, criminal liability being “the strongest formal condemnation the society can inflict”.<sup>180</sup> There is a labelling and signalling effect on terming an individual a criminal in the eyes of the law and a threat of a severe deprivation of the ordinary civil liberties of the accused.

At the end of the day, we have to reckon with the fact that the prosecution of a woman who failed to live up to the standard of an “ideal mother” by uploading a video of her fully clothed children painting over her semi-naked body, combined with the courts’ observations while denying anticipatory bail, will have the effect of shutting down necessary conversations about the role of the female body; chill free speech; and reinforce stereotypical notions of public morality, gender roles, and gender autonomy. As Meghana Kurup puts it, Rehana Fathima’s case is about punishment in search of a crime.<sup>181</sup>

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<sup>178</sup> *Aveek Sarkar v. State of West Bengal*, (2014) 4 SCC 257.

<sup>179</sup> *Bobby Art International v Om Pal Singh Hoon*, (1996) 4 SCC 1; *Felix M.A. v. P.V. Gangadharan*, W.P 7778/2018, order dated 08.03.2018 (Kerala High Court).

<sup>180</sup> Andrew Ashworth *Principles of Criminal Law* (Oxford University Press, 2006) at 1. For further discussion on public and constitutional morality, Bhatia, *supra* note 65.

<sup>181</sup> Kurup, *supra* note 170; Nambiar, *supra* note 171.



## 5.3 Monitoring the reporting of online allegations of sexual harassment: Whose right to anonymity, whose right to be forgotten?

### ANONYMOUS ALLEGATIONS AND #METOO: A TALE OF TWO GAG ORDERS

**CONTEXT** Under Indian law, the identities of victims of sexual violence cannot be made public and must remain anonymous.<sup>182</sup> What happens when a woman wishes to remain anonymous but reveals an incident of sexual harassment and names the alleged perpetrator? This is the world of #MeToo, which exists outside formal legal and institutional processes, although many of the alleged perpetrators use the legal system to initiate civil or criminal actions of defamation against the survivors and/or file a civil suit for injunction to restrain the publication of the anonymous sexual harassment allegations. Should the survivor be allowed to remain anonymous and have her story reported or should news reporting be restrained until she reveals her identity? The right of a survivor to tell her story anonymously and have it circulated online collides with the entrenched power structures that emphasise the reputation of influential perpetrators while ignoring the factors that force her to remain anonymous. For the sake of simplicity, we use the terms “survivor” and “perpetrator” in a broad manner, to respectively refer to the women who have spoken about being sexually harassed or assaulted and the persons accused by these women of sexual harassment. The use of these terms is not a determination that the women referred to have, as a matter of fact and law, been sexually harassed by the accused.<sup>183</sup>

Why have many survivors chosen to remain anonymous during the #MeToo movement? To understand the refuge of anonymity, it is important to appreciate the barriers to coming forward with an allegation against a powerful man. First, allegations of sexual harassment by men in power and/or prominence often get ignored, taken lightly (including at the workplace), or disbelieved. When complaints are placed before the sexual harassment committees that are intended to protect women at the workplace (if they have been constituted),<sup>184</sup> the civil institutional mechanisms often fail to provide adequate redress. This could be due to non-compliance with due process norms; lack of impartiality of the committee or worse, a pro-management bias; and re-victimisation, caused by a hostile and intimidating environment designed to fluster the survivor and question her character.<sup>185</sup> In addition, the law provides for

<sup>182</sup> Section 228A of the Indian Penal Code, 1860, section 327 of the Code of Criminal Procedure, 1973. See also *Nipun Saxena v. Union of India* (2019) 2 SCC 703.

<sup>183</sup> Netta Barak Corren and Daphna Lewinsohn-Zamir, What's in a Name? The Disparate Effects of Identifiability on Offenders and Victims of Sexual Harassment, 16(4) *J of Empirical Legal Studies* 955 (2019).

<sup>184</sup> The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 is a law to provide protection against sexual harassment of women at the workplace and for the prevention and redressal of complaints of sexual harassment. Section 2(n) of the Act is concerned with the issue of privacy of women and sexually explicit speech in the workplace.

<sup>185</sup> Namrata Bhandare and Ashwaq Masoodi, Gaps Emerge in Dealing with Sexual Harassment Complaints, *LiveMint* (25 July 2015), <https://www.livemint.com/Politics/B1noOqzN9z2QAWccDLCKiO/Gaps-emerge-in-dealing-with-complaints.html>; M Neelika Jayawardene, Anonymity Is a Necessary Tool for India's #MeToo Movement, *Al Jazeera* (14 October 2019), <https://www.aljazeera.com/opinions/2019/10/14/anonymity-is-a-necessary-tool-for-indias-metoo-movement/>; Laxmi Murthy, India's #MeToo Moment, *HimalMag* (13 November 2018), <https://www.himalmag.com/india-laxmi-murthy-metoo-me-too/> points out how Tanushree Dutta had made a complaint about the actor Nana Patekar about sexual harassment on a file set before the Cine and TV Artists' Association, but they had failed to take any adequate action.

action to be taken against women who make false and malicious complaints.<sup>186</sup> Some of these aspects played out in the treatment of allegations of sexual harassment made by an employee of the Supreme Court in 2019 against the then-sitting Chief Justice of India, which resulted in the Court setting up a three member panel to investigate the complaint that included the Chief Justice and exonerated him.<sup>187</sup>

Second, even after women come forward, they face the threat of harassment, being discredited, labelled as “kill joys” or “too difficult”, and a potential career upheaval. Empirical research has demonstrated that as compared to anonymity, the identification of a female survivor works to the benefit of the alleged perpetrator because the survivors suffer a loss of perceived credibility and increased blameworthiness.<sup>188</sup> This has a demonstrable deterrent effect for women to come forward.<sup>189</sup>

Third, there is a real prospect of lengthy and costly litigation if the alleged perpetrator files a civil lawsuit or a criminal complaint for defamation against the survivor. Under the Indian judicial system, with its long delays and multiple hearings, the process is often the punishment for the survivor who has to undergo the harassment, stress, and expense of a trial.<sup>190</sup>

It is no surprise then, that many women have chosen to remain anonymous to make their allegations during the #MeToo movement. However, while the #MeToo movement may exist outside the formal legal and institutional processes, many of the alleged perpetrators use the legal system to restrain the publication of the sexual harassment allegations. In this section, we will restrict our analysis to two cases in which powerful men succeeded in using the judicial system to obtain gag orders against the publication of anonymous sexual harassment allegations, and the impact of the courts’ unsatisfactory treatment of the cases in further reinforcing the power hierarchies existing within the victims’ industries.

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<sup>186</sup> Section 14, Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

<sup>187</sup> Pallavi Pundir, India’s #MeToo Moment Was Groundbreaking, But What Has Changed a Year after? *The Vice* (8 October 2019), <https://www.vice.com/en/article/pa7mbv/metoo-movement-india-one-year-later-impact>; Jhalak Jain, India and Its #MeToo Movement In 2020: Where Are We Now?, *Feminism in India* (3 February 2020), <https://feminismindia.com/2020/02/03/india-metoo-movement-2020/>.

<sup>188</sup> Barak Corren and Lewinsohn-Zamir, *supra* note 183. In contrast, identification by first name only, without any other supporting information, always works to the benefit of the male offender, as compared to the female victim.

<sup>189</sup> Elizabeth H. Dodd et al., Respected or Rejected: Perceptions of Women Who Confront Sexist Remarks, 45 *Sex Roles* 567 (2001).

<sup>190</sup> B. Uma Devi, *Arrest, Detention, and Criminal Justice System: A Study in the Context of the Constitution of India* (OUP, 2012). See also Aalok Chauhan, Rise of Instant Justice as Faith in Justice Delivery System Fades Away, *The Leaflet* (2 August 2020), <https://www.theleaflet.in/rise-of-instant-justice-as-faith-in-justice-delivery-system-fades-away/#>.



**CASE 1: SUBODH GUPTA AND HERDSCENEAND** In 2018, during the height of the #MeToo movement, an anonymous Instagram handle, @herdsceneand, sprung up with the aim of providing a safe space for survivors in the art world to speak out. The tag line on the Instagram handle is “Cutting through BS in the Indian Art world, one predator and power play, at a time. Current posts from our personal experiences. We choose anonymity”.<sup>191</sup>

Amongst the revelations that surfaced on the Instagram account were multiple allegations, in December 2018, of sexual harassment against world-renowned artist Subodh Gupta. This was widely reported by the print and electronic media. More than ten months later, Gupta filed a suit before the Delhi High Court for “token” damages of INR 5 crore (about USD 672,000) from the Instagram account @herdsceneand for defamation and libel; and to restrain @herdsceneand, Instagram, Facebook, Google and others from publishing or re-publishing the allegedly defamatory posts or any other posts “similar in content and nature” concerning allegations of sexual harassment against him. Gupta refuted the veracity of the anonymous allegations, which he claimed were part of a “smear campaign” against him that adversely impacted his career and his reputation.<sup>192</sup>

<sup>191</sup> <https://www.instagram.com/herdsceneand/>. See also Aastha Atray Banar, Anonymous Instagram Account Aims to Call out Sexual Perpetrators in Art World, *Midday* (16 December 2018), <https://www.mid-day.com/articles/anonymous-instagram-account-aims-to-call-out-sexual-perpetrators-in-art-world/20107177>.

<sup>192</sup> Copy of the petition on file with the authors.

At the first date of hearing, the Court passed an *ex parte* order restraining @herdsceneand from posting any content relating to Gupta on its Instagram account and directing Google, Facebook, and Instagram to take down a total of eighteen URLs provided by Gupta, containing reports about the allegations. The Court also directed Instagram to furnish “the particulars of the person/entity behind the Instagram account @herdsceneand” in a sealed envelope, noting that:

*Prima facie, it appears that the allegations as made in the allegedly defamatory contents, cannot be permitted to be made in public domain/published without being backed by legal recourse. The same if permitted, is capable of mischief.*<sup>193</sup>

While awaiting Instagram’s response, the Court asked @herdsceneand at a subsequent hearing to clarify whether it was representing the survivors, who it claimed had sought anonymity. When the lawyer representing @herdsceneand stated that they were not representing the survivors, the Court made it clear that the survivors would then have to be made parties to the litigation, although if necessary, “confidentiality with respect to their identity” would be maintained by holding proceedings *in camera*.

Unfortunately, whether through a sealed envelope or *in camera* proceedings the Court’s orders do not elaborate on how “confidentiality” would have been maintained: i.e. would the identities of the survivors be protected only from the press and public (and revealed to the Court and Subodh Gupta) or would they also remain anonymous *qua* Gupta (and only be provided to the Court).<sup>194</sup>

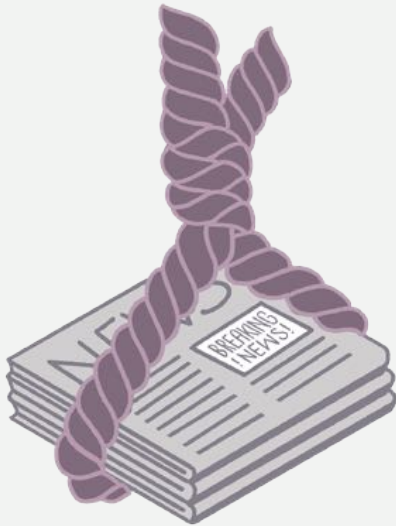
Before the Court could conclusively resolve these issues, the parties entered into a compromise. The Instagram account @herdsceneand agreed to withdraw all the posts containing sexual harassment allegations against Subodh Gupta and “express regret for the same”, and agreed to the decree of mandatory and permanent injunction being passed with respect to taking down any articles in reference to the sexual harassment allegations against Gupta. In return, Subodh Gupta agreed that the identity of the Instagram handle @herdsceneand would remain anonymous and dropped his claim for damages. He did not press for taking down any further content beyond the original eighteen URLs. The Court decided the suit on these terms. By virtue of the settlement, the survivors, too, continue to remain anonymous.

The compromise between the parties means that questions relating to the right of anonymity of survivors, the anonymity of an account such as @herdsceneand, as well as the right of journalists to report on the allegations remain undecided. What is noteworthy, however, is that the Court did not press for the identity of the survivors or the @herdsceneand account to be revealed immediately, and allowed the latter to contest the suit anonymously while Instagram’s reply was awaited.<sup>195</sup> The Court’s decision to allow @herdsceneand to maintain its anonymity in the interim can be considered a significant victory. At the same time, as we shall see in *Luv Ranjan’s* case below, the Court has also continued to rely on its original interim orders to injunct further publication of anonymous allegations of sexual harassment. This is troubling.

<sup>193</sup> *Subodh Gupta v Herdsceneand & Ors*, CS (OS) No. 483/2019, order dated 18.09.2019 (Delhi High Court). This was reiterated *vide* order 30.09.2019 in CS (OS) No. 483/2019.

<sup>194</sup> CS (OS) No. 483/19, order dated 22.01.2020 in (Delhi High Court).

<sup>195</sup> Apoorva Mandhani, What Artist Subodh Gupta’s Case against Anonymous #MeToo Posts Achieved – and Didn’t, *The Print* (21 February 2020), <https://theprint.in/india/what-artist-subodh-guptas-case-against-anonymous-metoo-posts-achieved-and-didnt/368411/>.



**CASE 2: LUV RANJAN AND MIDDAY INFOMEDIA LTD** In October 2018, the newspaper *Midday* published an article containing an anonymous complaint of sexual harassment against Luv Ranjan, a film director, along with his denial of the allegations.<sup>196</sup> This was picked up by other media houses, some of whom reported the allegations of sexual harassment without including his denial. More than a year after the publication of the original news report, Ranjan moved the Delhi High Court in *Luv Ranjan v Midday Infomedia Ltd & Ors* and pressed for an *ex parte* injunction restraining the media houses from publishing or re-publishing “any news articles/ comments” relating to him that are based on the anonymous complaint of sexual harassment originally reported in *Midday*.

Relying upon its orders in *Subodh Gupta*, the Delhi High Court passed an interim order restraining the media houses from publishing any articles based upon “any” anonymous complaints against Ranjan in the following manner:

*In view of the above, and keeping in mind the orders and judgment of Coordinate benches cited by Mr. Kaul, I am of the view that the plaintiff has made out a prima facie case for an ex-parte injunction against the defendants from further publishing/ re-publishing articles or comments based upon any anonymous complaints against him. Given the potential damage to the plaintiff's reputation from the aforesaid publication/re-publication in the circumstances detailed by Mr.Kaul, the balance of convenience is also in favour of an injunction being granted to this extent. I am satisfied that the plaintiff would suffer irreparable loss and injury, if further publications of this nature are not enjoined.*<sup>197</sup>

The matter is currently pending before the Delhi High Court, with the interim order holding the field. Meanwhile, on an application filed by Twitter, the Court has clarified that, being an intermediary, Twitter will only take down or block any content after being directed by the Court.<sup>198</sup>

<sup>196</sup> Aastha Atray Banan, “Luv Ranjan Asked Me to Strip during My First Look Test”, Actor Accuses Pyaar ka PUNCHAMA Director, *Midday* (12 October 2018), <https://www.mid-day.com/articles/luv-ranjan-asked-me-to-strip-during-my-first-look-test-actor-accuses-pyaar-ka-punchama-director/19884165>.

<sup>197</sup> *Luv Ranjan v. Midday Infomedia Limited & Ors.*, CS (OS) 535/19, order dated 21.10.19 (Delhi High Court).

<sup>198</sup> CS(OS) No. 535/19, order dated 21.01.2020 (Delhi High Court).

*Luv Ranjan* brings an added element of complexity to the issues surrounding the reporting of anonymous sexual harassment allegations – that of delay. Ranjan’s counsel made it clear that because the original publication was more than one year old, he would not press for an *ex parte* injunction for taking down any publications already present on the Internet. Instead he sought an *ex parte* injunction against the future publication of any articles or comments based upon the original anonymous complaints published in 2018. Not only did the Court grant this relief, but it also went beyond and restrained the publication of articles or comments based upon “any” anonymous complaints against Ranjan. This is an extraordinarily wide relief since it restricts the reporting of any new anonymous allegations of sexual harassment against Ranjan as well.

**IMPORT OF BOTH CASES** Why should we care about the interim orders passed by the Delhi High Court in *Subodh Gupta* and *Luv Ranjan*, given that the first case was settled and the second one is ongoing? For one, these orders are not solitary instances, but are part of a larger trend of courts being used by powerful perpetrators to ensure that gag orders are passed that restrain media houses from reporting on anonymous sexual harassment allegations, without providing these media houses a proper hearing.<sup>199</sup> Thus, there are procedural due process issues that come into play. Courts should be wary of directing intermediaries such as Google to take down these articles, especially without hearing the specific websites and authors or without examining the content of the article, given that the perpetrator may include a number of unrelated or fairly reported articles in his list of URLs sought to be taken down, as happened in *Subodh Gupta*, and cause over-censorship.<sup>200</sup>

Another procedural issue relates to the continued reliance on these interim orders by the High Court in subsequent cases, which will effectively force survivors to choose between revealing their identity or their story. For instance, in *Zulfiqar Ahmed Khan*, the Delhi High Court restrained the publication of anonymous sexual harassment allegations against a top media executive, noting “The [#MeToo] campaign cannot become a ‘Sullying #UToo’ campaign forever. If re-publication is permitted to go on continuously, the Plaintiff’s rights would be severely jeopardised.”<sup>201</sup> Similarly, in *Sunil Sachdeva v Owner of Domain Name www.Cjr7.com*<sup>202</sup> the Court relied on *Subodh Gupta* to suggest that anonymous allegations can never be permitted to be made:

*I have in Subodh Gupta Vs. Herdsceneand MANU/DE/3168/2019 also observed that without the accuser identifying himself/herself, allegations in the public domain cannot be permitted to be made without being backed by legal recourse, and the same, if permitted, is capable of mischief. In Ritesh Properties & Industries Ltd Vs. YouTube LLC 2019 SCC Online Del 10454, I have held that none can be condemned publicly, without having an opportunity to defend him/herself.*

<sup>199</sup> NWMI, “Rising Trend of Powerful Men Seeking Gag Orders”: Read NWMI’s Statement on Muzzling of Media in Cases of Sexual Assault, Harassment, *FirstPost* (17 October 2020), <https://www.firstpost.com/india/rising-trend-of-powerful-men-seeking-gag-orders-read-nwmis-statement-on-muzzling-of-media-in-cases-of-sexual-assault-harassment-8923681.html>.

<sup>200</sup> For instance, one of the articles that Gupta’s counsels had provided Google as part of a list of articles that required de-indexing referred to the Kochi Biennale Foundation dropping its inquiry into the sexual misconduct allegations against another artist, Riyaz Komu, and made no reference to Subodh Gupta or the charges against him. IFF, Indian Journalists Union Defends Media’s Right to Report on MeToo Allegations, Internet Freedom Foundation (January 2020), <https://internetfreedom.in/indian-journalists-union-defends-right-of-journalists-to-report-on-metoo-allegations/>.

<sup>201</sup> CS(OS) No. 535/19, order dated 21.10.2019 (Delhi High Court).

<sup>202</sup> *Sunil Sachdeva v. Owner of Domain Name “www.cjr7.com”*, CS (OS) 385/2019, order dated 13.11.2019 (Delhi High Court).

In addition, there are substantive concerns with the impact of the Court's orders. Although the right to anonymity may not be absolute in India, in the context of sexual harassment, where the survivor is not litigating the issue, a contextual consideration of the barriers discussed earlier that deter survivors from speaking out is required. As Piyasree Dasgupta points out, #MeToo gave a new language to Indian women, albeit mostly upper caste women, to cultivate solidarity and speak out about abuse.<sup>203</sup> In many cases, the allegations were made anonymously and in some instances, the perpetrators acknowledged or apologised for their actions.<sup>204</sup> However, the summary treatment by the courts of the anonymous complaints made by survivors of sexual harassment, as capable of creating "mischief" or becoming a "Sullying #UToo" campaign, sidesteps this discussion entirely. The unstated assumption by the courts seems to prioritise the reputation of the alleged perpetrators rather than the privacy and anonymity of the survivors. It also ignores the power structures that allow the perpetrators to use laws such as defamation to intimidate and deter women from coming forward and use the remedy of injunction to push for a right akin to the right to be forgotten by restraining publication. The courts' orders reflect their inherent distrust about the anonymous allegations of sexual harassment, without considering the reasons why some women feel the need to resort to anonymity.

How courts should deal with anonymous allegations of sexual harassment is, thus, a complex question that requires accounting for the privacy and anonymity concerns for survivors; the reputational rights of the perpetrators; the free speech rights of the journalists; and the right of the public to know. It also requires accounting for other factors such as the delay in the perpetrator approaching the courts, any possible justification for the same, whether the defamation and injunction proceedings are being used by perpetrators to implement a type of right to be forgotten, and a consideration of the journalistic ethics followed in the news reporting.

The orders and observations of the courts on any of these counts are, however, far from satisfactory. What are possible ways ahead? In case a survivor initiates criminal or civil proceedings against a perpetrator, due process requires the accused to be able to confront his accuser and hence permitting anonymity *qua* the accused may not be permissible. But perhaps an account such as @herdsceneand should be treated like a whistleblower and given anonymity protection during the proceedings. Moreover, if the perpetrator initiates judicial action to restrain the publication of anonymous sexual harassment allegations, the mere fact of anonymity should not disentitle media reporting on the issue as long as it is done fairly, responsibly, and in compliance with journalistic ethics standards (as would be followed, for instance, in cases of reporting whistleblower corruption allegations). This would require, for instance, that journalists present allegations as allegations, and not as proven facts, and allow the person accused of any wrongdoing to present their own narrative as to the events that transpired. Other factors that may be taken into consideration include whether the publisher has verified the story and

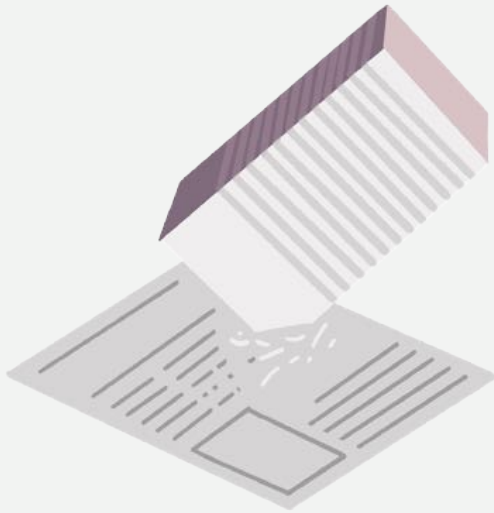
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<sup>203</sup> Piyasree Dasgupta, "Eta Ki #MeToo?": Did Indian Women Find a New Language to Speak about Abuse, *Huffington Post India* (3 October 2019), [https://www.huffingtonpost.in/entry/metoo-india-women-language\\_in\\_5d94a29ee4b0ac3cddb1913d](https://www.huffingtonpost.in/entry/metoo-india-women-language_in_5d94a29ee4b0ac3cddb1913d). See also Emma Hyndman, The Invisible #MeToo: How Anonymous Testimony Can Help Survivors of Sexual Abuse, *Open Democracy* (16 November 2017), <https://www.opendemocracy.net/en/5050/invisible-metoo-anonymous-testimony-sexual-abuse/>.

<sup>204</sup> Nehmat Kaur, Dark Underbelly of Indian Media Revealed as Scores of Journalists Say #MeToo, *The Wire* (6 October 2018), <https://thewire.in/women/indian-media-metoo>.

vetted the complaint (for example, by investigating if the survivor had discussed the incident with anyone in private); the specificity of the complaint (such as details of the time or place of the incident); whether the offender has been given a chance to rebut the story and provide his own version of the incident; and any delay by the offender in approaching the courts for reliefs such as injunction or damages. As these examples illustrate, a more rounded consideration of all the factors involved should make it possible to find ways forward that take into account the concerns and constraints of all parties involved.





## ZULFIQAR KHAN AND THE RIGHT TO BE FORGOTTEN

**CONTEXT** In several #MeToo cases, the questioning of the anonymity of the survivor by the courts has gone hand in hand with its consideration of a right to be forgotten for the perpetrator. The right to be forgotten has different meanings in different contexts. Following the decision of the Court of Justice of the European Union (CJEU) in the landmark case of *Google Spain v Costeja*,<sup>205</sup> it vests individuals in the EU with the right to demand search engines to de-list certain types of personal information about them that may be false, inaccurate, outdated, excessive, irrelevant, inadequate or taken out of context. The right can be defined in a narrow manner, as comprising the right to delisting, or be viewed in a broader context as comprising the protection of reputation, dignity, and honour, and thus necessitating the erasure of information online. However, it always has to be balanced against the competing right of free speech and expression.<sup>206</sup>

Unlike in the EU, there is no statutory basis for the right to be forgotten in India, nor is there a well-defined understanding or a detailed judicial pronouncement considering its nature and scope. To the extent that the proposed Personal Data Protection Bill, 2019, will apply, it allows the data principal to request an end to the continued disclosure of their data, while requiring the data principal to show that his right in preventing such continued disclosure “overrides” the right to freedom of speech and expression and the right to information of any other citizen. However, the Bill creates an exception to the application of the right to be forgotten if the processing of personal data is necessary for, or relevant to, journalistic purposes.<sup>207</sup> The Delhi High Court is currently deciding the question of whether the right to privacy includes the right to be forgotten in *Laksh Vir Singh Yadav*.<sup>208</sup> Other High Courts have considered the right to be forgotten in the context of delisting information or masking names from search results of judicial orders, but there is no unanimous trend in the treatment of such cases nor has there been any deep jurisprudential analysis excavating the contours of the right.<sup>209</sup> The decision of the Delhi High Court in *Zulfiqar Ahmed Khan* is the first case in India that adapts the right to be forgotten to the #MeToo movement and the making of anonymous sexual harassment allegations.

<sup>205</sup> *Google Spain v. AEPD and Mario Costeja Gonzalez*, Case No. C-131/12 dated 13.05.2014 (Court of Justice of European Union).

<sup>206</sup> The “Right to Be Forgotten”: Remembering Freedom of Expression, Article 19 (2016), [https://www.article19.org/data/files/The\\_right\\_to\\_be\\_forgotten\\_A5\\_EHH\\_HYPERLINKS.pdf](https://www.article19.org/data/files/The_right_to_be_forgotten_A5_EHH_HYPERLINKS.pdf).

<sup>207</sup> Clause 20 and 36, Personal Data Protection Bill, 2019.

<sup>208</sup> *Laksh Vir Singh Yadav v Union of India*, WP (C) No. 1021/16 (Delhi High Court).

<sup>209</sup> The Karnataka High Court passed a summary order in 2017, where it directed that the Petitioner’s daughter’s name be masked in the cause title and the body of the order since she feared a loss of reputation in society and since “this would be in line with the trend in the Western countries where they follow this as a matter of rule ‘Right to be forgotten’ in sensitive cases involving women in general and highly sensitive cases involving rape or affecting the modesty and reputation of the person concerned”. In contrast, the Gujarat High Court dismissed the petition of a man seeking restraint on the publication of an unreported judgment acquitting him, on the ground that the Petitioner had failed to show any legal provision that authorised such an exercise of power. *X v Registrar General of High Court of Karnataka*, WP (C) No. 62038/16, order dated 23.01.2017 (Karnataka High Court); *Dharamraj Bhanushankar Dave v. State of Gujarat*, SCA No. 1854 of 2015, order dated 19.01.2017 (Gujarat High Court). In 2017, the Kerala High Court had asked the legal portal, *IndianKanoon*, to remove the name and personal details of a rape victim from a judgment. See MA Rashid, Right to Be Forgotten: Kerala HC Asks Indian Kanoon to Remove Name of Rape Victim from Judgment, *Livelaw* (1 March 2017), <https://www.livelaw.in/news-updates/digital-online-media-brought-under-purview-of-mib-165764?inifinitescroll=1>.

**CASE** In December 2018, Zulfiqar Ahmed Khan, the Managing Director of a “highly reputed media company” filed a suit before the Delhi High Court for injuncting the online news website *The Quint* from continuing to publish two articles containing allegations of sexual harassment by three anonymous individuals against him. These allegations were made against Khan as part of the #MeToo campaign, and he argued that *The Quint* had published the two offending articles after giving him only a few hours to respond. In response, *The Quint* clarified that they had followed all the basic reporting guidelines and conducted the requisite verification before publication, and sought time to place on record the material collected by them prior to publication.

The Court saw the impugned articles and observed that while the allegations were “no doubt” serious, the women who made the allegations had remained anonymous. Given that the articles could severely damage Khan’s reputation, it directed the articles to be taken down “while the court is examining the veracity of the allegations” till the next date of hearing.<sup>210</sup> The gag order continued in the next hearings as well, with the Court emphasising that the three survivors had “chosen to remain anonymous”. It directed that:

*The [#MeToo] campaign cannot become a “Sullying #UToo” campaign forever. If re-publication is permitted to go on continuously, the Plaintiff’s rights would be severely jeopardised. .... Accordingly, recognising the Plaintiff’s Right to privacy, of which the “Right to be forgotten” and the “Right to be left alone” are inherent aspects, it is directed that any republication of the content of the originally impugned articles dated 12th October 2018 and 31st October 2018, or any extracts/ or excerpts thereof, as also modified versions thereof, on any print or digital/electronic platform shall stand restrained during the pendency of the present suit.*<sup>211</sup>

**IMPORT** The parties eventually reached a compromise and entered into a settlement agreement,<sup>212</sup> leaving open once again the question about the legal value and implications of a survivor of sexual harassment choosing to remain anonymous. However, while the Court recognised Khan’s right to privacy, which includes the right to be forgotten and right to be left alone, it completely ignored the survivor’s right to anonymity. There is no discussion on why the survivor’s right to anonymity would not include *her* right to be forgotten and why the perpetrator’s rights were privileged over hers. Further, unlike in Europe, where the cases concern delisting search results from Google (with the original website retaining the impugned content), in *Zulfiqar Ahmed Khan*, the Court used the right to be forgotten to restrain even the original website, i.e. *The Quint*, from publishing the impugned content.<sup>213</sup>

Given that India does not have a statutory basis for the right to be forgotten, we are left to wonder whether judicial pronouncements that summarily refer to the right to be forgotten to justify restraint on publication, such as in *Zulfiqar Ahmed Khan*, undermine constitutionally guaranteed

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<sup>210</sup> *Zulfiqar Ahmed Khan v. M/s Quintillion Business Media Pvt Ltd & Ors.* CS(OS) No. 642/18, order dated 14.12.2018 (Delhi High Court).

<sup>211</sup> CS(OS) No. 535/19, order dated 21.10.2019 (Delhi High Court).

<sup>212</sup> CS (OS) No. 642/18, order dated 02.12.2019 (Delhi High Court).

<sup>213</sup> Devika Agarwal, What Does “Right to Be Forgotten” Mean in the Context of the #MeToo Campaign, *FirstPost* (19 June 2019), <https://www.firstpost.com/news-analysis/what-does-right-to-be-forgotten-mean-in-the-context-of-the-metoo-campaign-6846401.html>.

free speech rights in India. While applying the right to be forgotten, courts must ask themselves about the legal basis for such a right; the public persona of the claimant and power dynamics in play; the public interest in retaining the information online; whether the harm sought to be remedied could have been addressed by existing laws such as defamation or injunction; and how the conflicting rights are to be balanced against each other.<sup>214</sup> While performing such a balancing act, courts must also consider whether the alleged perpetrators are using the legal system to intimidate the survivors and using prayers for civil or criminal defamation to ensure the accommodation of their right to be forgotten claims, thus effectively silencing the survivor.

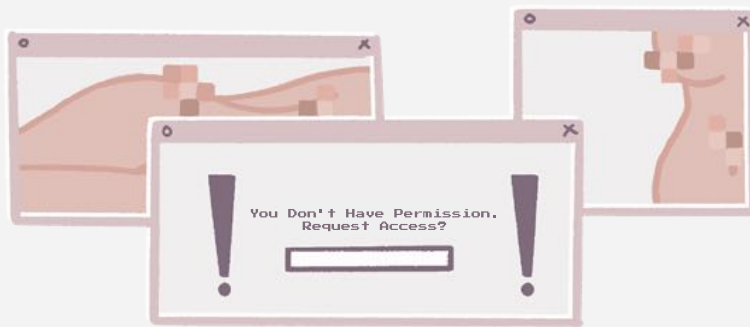
Courts should take into account that the right to anonymity is used to protect vulnerable and marginalised people online, and if at all, they should be considering how the right to be forgotten can be used in aid of that. However, when a court uses the right to be forgotten to erase information about anonymous allegations of sexual harassment against an influential perpetrator at the behest of this perpetrator, they are effectively removing any allegations of wrongdoing and giving him a clean chit. The right to be forgotten is thus undermining the right to free speech and expression, given the discernible public interest in the reporting of sexual harassment allegations against prominent persons. Courts should therefore be wary of invoking this right without any statutory basis in India, especially in cases concerning public interest, so as to alleviate concerns of Internet censorship. The impact of the CJEU ruling in Europe cannot be understated: in 2018, Google revealed that in the four years since the CJEU recognised the right to be forgotten, it has received over 650,000 requests to take down content.<sup>215</sup> The Delhi High Court's decision in *Zulfiqar Ali Khan* may thus, create a chilling effect that will further increase the number of defamation suits filed by aggrieved men and/or increase the number of settlements between parties, while disincentivising women and gender and sexual minorities from speaking out against sexual harassment and media outlets from reporting such incidents. This will eventually undermine both digital rights and gender rights.

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<sup>214</sup> Agustina Del Campo, Towards an Internet Free of Censorship II: Perspectives in Latin America, Centre for Studies in Freedom of Expression and Access to Information (14 April 2016), <http://cyberlaw.stanford.edu/files/publication/files/Europe%E2%80%99s%E2%80%9CRight%20to%20Be%20Forgotten%E2%80%9D%E2%80%9Cin%20Latin%20America.pdf>.

<sup>215</sup> James Doubek, Google Has Received 650,000 "Right to Be Forgotten" Requests since 2014, *National Public Radio* (28 February 2018), <https://www.npr.org/sections/thetwo-way/2018/02/28/589411543/google-received-650-000-right-to-be-forgotten-requests-since-2014>.

## 5.4 Monitoring the non-consensual sharing of intimate images online: *Animesh Boxi* and a case for re-imagining privacy and bodily integrity online



**CONTEXT** In 2004, a student from an elite Delhi school shot a video on his phone of his girlfriend (a fellow student) giving him a blowjob, which he then uploaded and shared with his friends on Multimedia Messaging Service (MMS). Even though this incident predated social media or WhatsApp, the 2 minutes 37 seconds MMS clip was one of the first videos in India to go viral, being shared amongst school children, and after being uploaded on the Internet, shared nationally and internationally. Thus was born the “DPS MMS Scandal”, which was splashed across the Indian print and electronic media, became the subject of innumerable dining table and party conversations, and entered our collective consciousness.<sup>216</sup> The prevailing commentary around the time viewed the incident as a “porn scandal” or a “sex scandal”, where the female student had engaged in “lewd” acts with her classmate, and was thus, suspended from school and eventually sent to Canada.<sup>217</sup> Wikipedia’s entry still refers to the incident as the DPS MMS “Scandal”, reflecting the moral judgment cast on the female student’s “behaviour”. What was largely missing, however, was a discussion of the violation of her consent and the harm it caused her.

The DPS MMS Scandal was perhaps one of the first publicised cases in India of non-consensual sharing of intimate or sexual images online, but by no means is it the last.<sup>218</sup> In May 2020, a private Instagram group, comprising of mostly teenage boys belonging to the elite schools of Delhi shared nude photographs of girls, including minors, without their consent. It was later revealed that the group, known as “Bois Locker Room”, would routinely share and comment on such photos, objectify the girls, and discuss how they would sexually assault them.<sup>219</sup>

<sup>216</sup> Richa Kaul Padte, What the DPS MMS Tells Us about Consent in the Digital Age, *Times of India* (20 May 2018), <https://timesofindia.indiatimes.com/home/sunday-times/what-the-dps-mms-tells-us-about-consent-in-the-digital-age/articleshow/64238647.cms>; Pallavi Pundir, The Bois Locker Room Case Would Have Been a “Sex Scandal” a Decade Ago. Today, It’s a #MeToo Moment, *The Vice* (7 May, 2020), <https://www.vice.com/en/article/y3zmxxy/metoo-bois-locker-room>.

<sup>217</sup> Coomi Kapoor, Porn Scandal Rocks Delhi, *The Star* (20 December 2004), <https://www.thestar.com.my/opinion/letters/2004/12/20/porn-scandal-rocks-delhi>.

<sup>218</sup> Neha Dixit, “Why Did You Let Him Shoot That?": An Indian Woman’s Story of “Revenge Porn”, *Scroll* (12 February 2017), <https://scroll.in/magazine/829028/why-did-you-let-him-shoot-that-an-indian-womans-story-of-revenge-porn>; Piyashee Dasgupta, Be It 18, 23 or 40, Some Men Don’t Grow out of “Boys’ Locker Rooms”, *Huffington Post India* (7 May 2020), [https://www.huffingtonpost.in/entry/be-it-18-23-or-40-some-men-don-t-grow-out-of-bois-locker-rooms\\_in\\_5eb3d316c5b646b73d282acc](https://www.huffingtonpost.in/entry/be-it-18-23-or-40-some-men-don-t-grow-out-of-bois-locker-rooms_in_5eb3d316c5b646b73d282acc); *Ms X v State & Ors*, WP (CrI) No. 1080/20, order dated 20.10.2020 (Delhi High Court).

<sup>219</sup> Mahender Singh Manral and Somya Lakhani, Bois Locker Room Case: 15-Year-Old Held in South Delhi, Police Probe Online Chats, *Indian Express* (5 May 2020), <https://indianexpress.com/article/cities/delhi/bois-locker-room-scandal-fir-against-south-delhi-teens-for-obscene-instagram-chatter-6393840/>; Jyoti Yadav, Delhi Women’s Commission Wants “Bois Locker Room” Probed, Sends Notice to Instagram, Police, *The Print* (4 May 2020), <https://theprint.in/india/delhi-womens-commission-wants-bois-locker-room-probed-sends-notice-to-instagram-police/414350/>; Jyoti Yadav, Locker Room Boys to IT Cell Men: India’s Rape Culture Grows without Shame or Consequences, *The Print* (5 May 2020), <https://theprint.in/opinion/pov/locker-room-boys-it-cell-men-india-rape-culture-grows-shame/414502/>.

The objectification, sexualisation, and pattern of disrespect against women in India is not new, and has been perpetuated through media, popular culture, and the prevailing attitude of toxic masculinity and “boys will be boys” attitude.<sup>220</sup> What has changed perhaps with the explosion of the Internet, is that we now have started to develop a new language to express the nature of the harm experienced by the victim due to the non-consensual sharing of their intimate or sexual images online, and perhaps, a bit more empathy. A more nuanced understanding of data as being intimately entangled with our bodies, rather than being something completely disembodied or distinct from us,<sup>221</sup> has given us a better way to document the harms experienced by the victims.

**CASE** It is well known that social stigma, deep-seated patriarchy, and a long drawn and often humiliating investigation and trial process make India’s criminal justice system notoriously difficult for women to navigate and results in under-reporting sexual offences.<sup>222</sup> What happens when a victim decides to take action against the violation of her consent and bodily integrity and files a complaint against the non-consensual sharing of her sexual images online? The judgment of the Trial Court in Medinipur District, West Bengal in *State of West Bengal v Animesh Boxi*,<sup>223</sup> which is amongst the first court cases in the country to decide this issue (colloquially referred to as “revenge porn”), provides an insight on how to think about the nuances of the problem.

Here, the victim, at the request of the accused, sent him some “personal private photos” (the Court does articulate the nature of these photos further). He then wanted to go on an “outing” with her, and when she refused, he threatened to post these photos on social media. The accused further obtained her phone password from her diary, accessed certain nude photos and videos of her that he had asked her to take, and uploaded them on the website Pornhub. While doing so, he used the search key words “Victim’s name daughter of victim’s father name along with nick name” as a specific unique string, so that people could easily find the video of the victim while using these words, be informed of her identity and the identity of her father, and connect her face to a name. The name of the victim is not disclosed in the judgment so as to protect her identity and privacy.

In March 2018, the Judicial Magistrate in Tamluk, Medinipur in West Bengal, the court of first instance,<sup>224</sup> convicted the accused under sections 354A (sexual harassment), 354C (voyeurism), 345D (stalking) and 509 (insulting the modesty of a woman) of the IPC and sections 66E (violation of privacy), 66C (identity theft), 67 (electronically publishing obscene material) and 67A (electronically publishing material containing sexually explicit act) of the IT Act and sentenced him to five years imprisonment, along with a INR 9,000 (about USD 120) fine. The victim was also entitled to get compensation under the victim compensation scheme.

<sup>220</sup> Himashree Patowary, Portrayal of Women in Indian Mass Media: An Investigation, 1(1) J. of Education & Social Policy, 84 (2014), [http://jespnet.com/journals/Vol\\_1\\_No\\_1\\_June\\_2014/12.pdf](http://jespnet.com/journals/Vol_1_No_1_June_2014/12.pdf); Rama Jha, *Women and the Indian Print Media* (Northern Book Centre, 1992); Sharada J. Schaffter, *Privileging the Privileged: Gender in Indian Advertising* (Promila & Co., 2006); Namrata Sandhu, Fuelling Gender Stereotypes: A Content Analysis of Automobile Advertisements (15 April 2019), <https://journals.sagepub.com/doi/abs/10.1177/2278533719833815>; Saba Dewan, Of Chick Charts, Hen Charts and Other Such Women’s Stories, *Kafila* (8 May 2012), <https://kafila.online/2012/05/08/st-stephens-college-the-class-of-85-saba-dewan/>; Paromita Vohra, Bois Locker Room Case Underscores Vital Need for Radical, Political Reimagining of an Education that Liberates Us, *Firstpost* (12 May 2020), <https://www.firstpost.com/india/bois-locker-room-case-underscores-vital-need-for-radical-political-reimagining-of-an-education-that-liberates-us-8358001.html>.

<sup>221</sup> Anja Kovacs and Tripti Jain, Informed Consent – Said Who? A Feminist Perspective on Principles of Consent in the Age of Embodied Data. Data Governance Network Working Paper 13 (November 2020), <https://datagovernance.org/report/informed-consent-said-who-a-feminist-perspective-on-principles-of-consent-in-the-age-of-embodied-data>.

<sup>222</sup> Vrinda Bhandari, Kathua and after: Why the Death Penalty for Child Rape Will Not Deter Offenders, *The Wire* (7 May 2018), <https://thewire.in/law/kathua-and-after-why-the-death-penalty-for-child-rape-will-not-deter-offenders>.

<sup>223</sup> *State of West Bengal v. Animesh Boxi @ Ani Boxi*, Case No. GR: 1587/17, order dated 07.03.2018 (Court of Judicial Magistrate, First Class, 3<sup>rd</sup> Court Tamluk, Purba Medinipur, West Bengal).

<sup>224</sup> Under the Indian criminal justice system, cases first get adjudicated at the “Trial Courts”, which are the courts of first instance. Against an order of conviction or acquittal from such courts, an appeal may be filed before the High Court, and eventually, the Supreme Court.

The judgment is particularly interesting because of the manner in which the judge deals with the issue of non-consensual sharing of sexual images online, which the Court likened to “virtual rape”. The Court notes that since the victim had refused to go on an outing with the accused, he held a grudge, and acted out of revenge by posting her nude videos and photos, with her name and her father’s name, online. Terming this act as “revenge porn”, it explains:

*Sexually explicit images of a person posted online without that person’s consent especially as a form of revenge or harassment. Revenge porn or revenge pornography is the sexually explicit portrayal of one or more people that is distributed without their consent via any medium. The sexually explicit images or video may be made by a partner of an intimate relationship with the knowledge and consent of the subject, or it may be made without his or her knowledge. The possession of the material may be used by the perpetrators to blackmail the subjects into performing other sex acts, to coerce them into continuing the relationship, or to punish them for ending the relationship.*

While revenge may certainly be a motivating factor in the non-consensual sharing of sexual images online, as we saw in the DPS MMS incident and the Bois Locker Room case, it is not the only factor. Sexual or intimate images of women are also shared non-consensually online as a demonstration of power and dominance more generally. Moreover, both the terms “revenge” and “porn” are really misnomers here. The term “revenge” implies that the victim’s behaviour may have warranted some response from the accused. The use of “porn” masks the issue of (lack of) consent, abuse, and the violation of bodily integrity and sexual autonomy that accompanies the sharing of these intimate images online.<sup>225</sup>

The court does not delve into these issues further, however, except when it discusses the quantum of sentence to be fixed for the accused and refers to his act as “virtual rape”:

*Crimes against women are increasing day by day even in the virtual world and this is high time when stringent measures are to be adopted to suppress this menace..... In this instant case the convict Animesh Boxi @ Ani Boxi @ Ani Bokshi by uploading the nude pictures and videos of the victim of this case in the virtual world is not only restricted to India but is available all over the world and everyday virtual rape is committed against the victim of this case when someone sees the video in the virtual world. Even for sake the contents are removed from the virtual world but what will happen if anybody had already downloaded those and again it will spread in the virtual world and it will never end and virtual rape will be committed against the victim till the last day of her life.*

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<sup>225</sup> Richa Kaul Padte, Let’s Not Call It Porn, *Livemint* (2 April 2015), <https://www.livemint.com/Leisure/ZLo2IxUsX5Ax4F4WrG5LkO/Lounge-opinion-Lets-not-call-it-porn.html>.

**IMPORT** The term “virtual rape” has no statutory meaning under Indian law and the seemingly all-encompassing nature of the term suffers from definitional problems. Under Indian law, physical bodily contact into the vagina, urethra, anus, or mouth of a woman is required to constitute rape, with the focus on the violation of the sexual autonomy of the woman.<sup>226</sup> Thus, the use of the term “virtual rape” does not fit the legal offence, as defined under the law, and is liable to create confusion about its meaning, intent, and implication. For instance, what kind of activity is liable to be characterised as “virtual rape”, in contrast with virtual sexual assault, virtual outraging of modesty, or virtual voyeurism? There are also questions about whether describing such an incident as “virtual rape” diminishes the harm or the experience of rape victims. These are complex issues that require further deliberation.

Nevertheless, the judgment and the above quoted paragraph in *Animesh Boxi* needs to be commended, both for what it said, and what it did not say. In a country where courts sometimes rely on the “unbecoming” nature of a woman’s conduct or the lack of any obvious “distress or humiliation” after being raped to disbelieve her story,<sup>227</sup> the judgment in *Animesh Boxi* is significant because the judge did not discuss or apply this standard of morality to the facts of the case. The judgment merely describes the facts, without any hint of victim shaming or moral policing.

Even when the judge spoke, while his terminology of “virtual rape” may not be satisfactory, it attempted to reduce the gap between online and offline gender-based violence that currently incorrectly shapes our thinking about such violations. Non-consensual sharing of sexual images online has traditionally been viewed through the lens of privacy violation and the need to protect the sexual privacy of individuals.<sup>228</sup> But there is an emerging view that a feminist approach to bodily integrity may map better onto the experiences of the victims.

Feminist critiques of the privacy framework are not new. Privacy is often used in India, as elsewhere, to reinforce patriarchal notions of the role of women in society; to deny them sexual expression; and to shield their abusers from the law and social mores.<sup>229</sup> This is not a hypothetical concern. Research indicates that the prevailing attitude in India, amongst men and women, holds women responsible for sending nude selfies and that “the reputational harm resulting from leaked pictures ... was too costly and engaging with sexual desires online was, therefore, not worth it.”<sup>230</sup> Viewed from a contextual lens of privacy as boundary management that gives women breathing room to act, the fact that a woman shares nude selfies with her partner does, of course, not mean that she is comfortable with these images being shared with third parties or that such non-consensual sharing is justified. The first act of sharing sexual images with a man is one that takes place on her own terms, while his subsequent sharing it online does not. But prevailing attitudes would often simply blame her for having been “careless”<sup>231</sup> enough to share such images at all. This “information”, it is often argued, should have been kept private.

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<sup>226</sup> Section 375, IPC. See also Mrinal Satish, *Laws Relating to Sexual Violence in India: Constitutional and Human Rights Dimensions*, 15 J of National Human Rts Comm 225 (2016).

<sup>227</sup> Geeta Pandey, *Outrage as Indian Judge Calls Alleged Rape Victim “Unbecoming”*, *BBC News* (3 July 2020), <https://www.bbc.com/news/world-asia-india-53261239>.

<sup>228</sup> Danielle K. Citron and Mary A. Franks, *Criminalising Revenge Porn*, 49 *Wake Forest L. Rev.* 345 (2014).

<sup>229</sup> Anita L. Allen and Erin Mack, *How Privacy Got Its Gender*, University of Pennsylvania Law School Faculty Scholarship Paper 1309 (1991), [https://scholarship.law.upenn.edu/faculty\\_scholarship/1309](https://scholarship.law.upenn.edu/faculty_scholarship/1309).

<sup>230</sup> Anita Gurumurthy et al., *Getting It Right Online: Young Women’s Negotiations in the Face of Cyberviolence in Karnataka*, IT for Change (2019), [https://itforchange.net/sites/default/files/1618/Karnataka\\_Report\\_Righting-Gender-Wrongs\\_1.pdf](https://itforchange.net/sites/default/files/1618/Karnataka_Report_Righting-Gender-Wrongs_1.pdf).

<sup>231</sup> Kovacs, *supra* note 7.

The bodily integrity framework, in contrast, foregrounds the deeper nature of the harm as experienced by victims, who often do not distinguish between digital representations of their body and the body itself and view their nude images being circulated non-consensually online as an “embodiment” of themselves.<sup>232</sup> The act of sharing or viewing a private photo non-consensually is, thus, not merely an act of violence that entails a privacy violation. Many victims experience the act as “forcible ownership of [my] body” and the “passing my body around”, i.e. as a bodily violation and a loss of self-determination that is *akin* to rape or sexual assault, even if it remains distinct from that.<sup>233</sup> In *Animesh Boxi*, the Court correctly notes that the nude pictures and videos of the victim were available to anyone in the world, and every time someone watches the video, the victim experiences a fresh violation of her bodily integrity. Even if the video is taken down, anyone who has downloaded it can view and share it, thus multiplying the instances of harm committed to the victim and causing an injury to her “mind and reputation”. It is almost irrelevant whether she is aware of the identity of the people watching her nude videos since as the victim explained in her testimony:

*...I can show it before the court today that the link containing my video is still available with my name and my father's name. I had seen my video yesterday evening that the link is still alive. Today my personal nude photos are spreading every where in this world and it is now impossible for me to live in this world.*<sup>234</sup>

*Animesh Boxi* thus proves to be an interesting case study because it involves the victim taking action by pursuing the case doggedly and the judge beginning to unpack the nuances behind the harms experienced by her and the development of the language of bodily integrity in the context of digital sexual expression, without passing any moral judgment on her sexual expression. To that extent, it expands the right to freedom of speech and expression for women on the Internet.

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<sup>232</sup> P.J. Patella-Ray, *Beyond Privacy: Bodily Integrity as an Alternative Framework for Understanding Non-Consensual Pornography*, 21(5) *Info., Communication and Society* 786 (2018).

<sup>233</sup> Erica Fink and Laurie Segall, *Revenge Porn Victim: My Naked Photos Were Everywhere*, *CNN Tech* (7 March 2016), <https://money.cnn.com/2015/04/26/technology/revenge-porn-victim/index.html>; Leah Juliett, *My Body Is Not Sorry*, *MTV News* (20 January 2017), <http://www.mtv.com/news/2973612/my-body-is-not-sorry/>; Jennifer Lawrence Looks Back on a Career-Changing “Yes-or-No Question”, *Fresh Air* (21 December 2015), <https://www.npr.org/2015/12/21/460272795/jennifer-lawrence-looks-back-on-a-career-changing-yes-or-no-question>.

<sup>234</sup> *State of West Bengal v. Animesh Boxi @ Ani Boxi*, Case No. GR: 1587/17, order dated 07.03.2018 (Court of Judicial Magistrate, First Class, 3<sup>rd</sup> Court Tamluk, Purba Medinipur, West Bengal).



PART 6

# CONCLUSION

INTRODUCTION

METHODOLOGY

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WOMEN AS OBJECTS OF STATE CONTROL

WOMEN AS SUBJECTS OF STATE CONTROL

CONCLUSION

While decriminalising adultery in *Joseph Shine*, the Supreme Court recognised that State policies and judicial decisions have the power to create and ascribe gender roles and gendered identities based on existing societal stereotypes or expand the space for the exercise of women’s agency and self-expression.<sup>235</sup> In this report we have tried to map the impact of judicial decisions that have expanded or contracted digital rights based on whether they rejected or reinforced traditional stereotypes of an ideal Indian woman (“*adarsh bharatiya nari*”). We did this by dividing the cases loosely based on the attempts made by litigants or the general public to treat women as objects or subjects of control.

Section 4 of the report dealt with cases where the sexuality or sexual representation of women were the *objects* of state control, to be protected for their own safety or for the safety of Indian culture. The provisions of the IT Act, specifically sections 67 and 67A, reflect outmoded Victorian notions of conservative sexual morality that view the essence of a woman’s modesty as her sex, and seek to ensure a sanitised representation of women online. Hence, any sexuality or sexual representation is perceived as immoral and vulgar. As Brinda Bose explains, “it is the woman who represents both the threat of transgression in Indian society, and the need for its control, and her body is the single signifier that sums up the problematic.”<sup>236</sup>

We see this tension between law and morality in the PILs filed to regulate the content on OTT platforms as well as Kamlesh Vaswani’s PIL to ban the private consumption of pornography. These PILs, filed ostensibly to protect the dignity of women, are really aimed at protecting Indian culture and middle class values. The resulting “moral governance” by the courts, by entertaining these PILs and giving detailed hearings, threatens to increase the censorship of sexual expression, and expression more broadly, on the Internet. Even when the interventions by courts have been well intentioned, as in the cases of *Prajwala* and *Sabu Mathew George*, they have ended up deviating from the *Shreya Singhal* standard and undermining the intermediary liability regime in the long run. The upshot of this is that the judicial response, while framed as a protector of women’s rights, has laid the groundwork for increased censorship that restricts the free speech and expression of women and gender and sexual minorities who rely on the Internet for access to information and new experiences. Moreover, the norms for censorship created by judicial interventions can easily extend to hitherto unknown areas, as we saw in *Muhammed Shifas’* case, where broad restrictions on social media use were imposed as conditions for bail, even where there was no correlation between the two.

Mobile phones are often used as tools for exclusion, control, and surveillance of women in order to ensure compliance with gender norms that require purity for marriage, subservience, and fulfilling the role of a caregiver (whether as a wife or mother).<sup>237</sup> But just as access to the Internet can empower women to expand their personal and sexual expression online, the regulation of such access can lead to women emerging as *subjects* of state control. Section 5 of this report examines cases where women challenged or subverted the dominant narrative about their role in society, and interrogates how the mixed response of the courts expanded or contracted digital rights more broadly.

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<sup>235</sup> *Joseph Shine v. Union of India*, (2019) 3 SCC 39.

<sup>236</sup> Bose, *supra* note 63.

<sup>237</sup> Kovacs, *supra* note 142. See also Lina Sonne, Controlling Women’s Mobile Phone Access and Use, *Dvara Blog* (27 August 2020), <https://www.dvara.com/blog/2020/08/27/controlling-womens-mobile-phone-access-use/>; Barboni et al, *supra* note 144.

We explored how Faheema Shirin's successful attempt at challenging her college hostel's attempt to regulate the mobile phone access of women students led to the articulation of a positive right to Internet access by the Kerala High Court. In contrast, the government ban on apps such as TikTok and Likee went relatively uncontested because it was popular with women from lower castes and less affluent class in villages and small towns, and was not valued as a gateway to the Internet by the elite upper class in India.

While Faheema Shirin was able to take a stand against the discriminatory nature of the regulations governing mobile phone use, Rehana Fathima was not so lucky. Her attempt at shaking the conversation on body politics and sexuality, by having her children paint on her naked breasts, got her sent to jail because the High Court was of the view that she had failed in her role of an "ideal mother". This will have a chilling effect on the freedom with which women express themselves online.

Women may also be careful in how they make allegations of sexual harassment on the Internet, because anonymous allegations are viewed by the courts with distrust. The courts are ready to pass gag orders restraining the publication of the allegations, without taking into consideration the power dynamics that force survivors to take refuge under anonymity and allow the perpetrators to use the legal system, including the right to be forgotten, to their advantage. The Delhi High Court's orders in *Subodh Gupta*, *Luv Ranjan*, and *Zulfiqar Khan* end up forcing a survivor to decide whether to reveal her identity (and lose her privacy and anonymity) or reveal her story.

However, we end on a more positive note with the Trial Court in *Animesh Boxi* recognising a new form of harm and a new language of bodily integrity in cases involving non-consensual sharing of sexual images online. The case shows that for harms such as non-consensual sharing of sexual images, we do not need a new law, but rather we need to develop a new language under sections 354C and 509 IPC and section 66E IT Act to deal with technologically-facilitated sexual violence.

As this report has shown, all too often, anxieties surrounding women's sexuality continue to justify court cases and jurisprudence that are geared towards protecting middle class morality and a very narrow vision of "Indian culture" rather than gender and sexuality rights. Whether women are objects or subjects of state control, the effect on the right to freedom of expression in particular is often far-reaching, but even the lopsided ways in which the right to anonymity and to be forgotten are evolving in Indian jurisprudence is deeply reflective of this dynamic. However, another way is possible. When courts put gender and sexuality rights front and centre, as was done by the Kerala High Court in deciding on women's access to mobile phones or by the Judicial Magistrate in Tamluk when considering the problem of non-consensually shared sexual images, possibilities to meaningfully exercise our rights immediately expand.

So what does sex have to do with digital rights? Evidently a whole lot.

## About the authors

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Vrinda Bhandari is a Delhi-based litigator, specialising in the field of digital rights, technology, and privacy. She has been an integral part of many landmark digital rights cases, including a challenge to India's biometric identity system (Aadhaar); the restoration of Internet in Jammu & Kashmir; the mandatory deployment of India's contact tracing app, Aarogya Setu; and a challenge to the surveillance framework in India. She was recently called by the National Commission for Women to Parliamentary Standing Committee on Information Technology for a Regional Consultation on "Cyber Crime against Women - Do Indecent Representation of Women's Act, Information Technology Act and Other Prevailing Laws Suffice?" Vrinda is Rhodes Scholar, who graduated from the University of Oxford with a double Masters in Law and Public Policy, and received her undergraduate law degree from National Law School of India University, Bangalore.

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