

HATE SPEECH LAWS IN INDIA FOR THE PROTECTION OF WOMEN: AN EVALUATION FROM IPC TO BNS

Vrinda Sharma
National Law School of India University, Bengaluru

Abstract

This study highlights the ineffectiveness of India's judicial laws in the context of protecting women from hate speech and online harassment, keeping in mind the recent shift to Bharatiya Nyaya Sanhita (BNS) from the now obsolete Indian Penal Code (IPC). Although the BNS has improved the scope of penalties in this regard, its provisions are still far from perfect and face severe shortcomings owing to the inadequacies of the Information Technology Act, specifically with regards to the lack of sufficient moderation by social platforms, to also account for an exponential rise of hate speech against women during the pandemic. The study determines a need for an understanding and a more cohesive approach to be taken both socially and legally, with the aim of not only deterring such cases but also protecting the dignity of women online.

Introduction

Amidst the modern digital landscape, social media has come to be an important space for free speech, political engagement, and networking, changing the ways in which people connect with one another. More importantly, however, this has allowed for a greater number of women to seek online spaces to be a part of supportive communities and utilise the platforms to speak up about their rights. Yet, the very online spaces have also become a hotspot for gender-based abuse through hate speech, cyberbullying, and harassment, detrimentally impacting women; they continue to face a barrage of misogynistic insults, threats, and derogatory remarks, which get further intensified by the anonymous nature and the disposition for virality of these social media platforms (Pathak and Kumar 2023).

The laws on hate speech and online abuse have changed a lot in India with the introduction of the Bharatiya Nyaya Sanhita (BNS) in 2023, which replaces the Indian Penal Code (IPC) of 1860. The framework works together with the Information Technology Act of 2000 and other contextual frameworks in the Constitution over the issues of gender-based hate, the assessing of effectiveness which, in safeguarding women on social media, with respect to the transition between the IPC and BNS, forms the aim of this essay. It argues that despite the updated provisions with the BNS, the laws still fall short due to the outdated aspects of the IT Act and a lack of measures that could specifically address gender-based issues and inconsistencies in enforcement.

The essay argues with reference to the concept of 'digital dignity' in the context of hate speech directed at women, basing its foundations upon the feminist perspective of Catherine MacKinnon, who argues that hate speech is not a neutral expression but a means of control, contributing to gender inequality. It considers hate speech to be a form of discrimination

that requires a legal distinction from free speech, and simultaneously, means to curb it. Subsequently, it recommends for the interpretation of existing laws through a feminist jurisprudence lens, whilst highlighting the inadequacies with the country's developing legal system for the protection of women, in this regard.

Methodology & Literature Review

The essay utilises a doctrinal legal study approach in analysing the important provisions of the Indian Penal Code (IPC), the Bharatiya Nyaya Sanhita (BNS), and the Information Technology Act (IT Act) [Indian Penal Code 1860; Bharatiya Nyaya Sanhita 2023; Information Technology Act 2000], in correspondence with an examination of verdicts on key cases. It also references scholarly articles, case studies, and relevant statistical data collected during the COVID-19 pandemic over the same. These include the works of Maya Mirchandani (2018) on the role of social media in contributing to hate speech, Pathak & Kumar (2023) who present forward the inadequacies with the Indian Penal Code and the Information Technology Act in offering a victim-prioritised resolution amidst the disproportionate gender-based targeting against women, Aakriti Mishra (2023) who cites the concerning rise in cyber-crimes against women during the COVID-19 as well as the problems in the investigation processes, and Arjun George (2023), who highlights the complex weave of patriarchal aspects with regards to women seeking legal assistance against online abuse.

Constitutional and Statutory Framework

The Indian Constitution provides for freedom of expression under Article 19(1)(a), subject to reasonable restrictions stated under Article 19(2) with regards to public order, decency, morality, and incitement to an offence (Constitution of India, *art.19*), previously supplemented by Section 153A of

the Indian Penal Code, which penalised promoting enmity between groups based on religion, race, and other distinctions (Indian Penal Code, s.153A). Hate speech in India has been broadly understood through these provisions. Section 295A of the IPC further targeted acts that outrage religious feelings, potentially relevant for cases of discrimination against women from specific communities (s.295A), while Section 505 criminalised statements that cause public mischief (s.505), with its application to cases of online incitement against women. Section 507 dealt with criminal intimidation through anonymous communication, while Section 509 covered a word or action that insults women's modesty (s.507 & s.509).

Replacing the Indian Penal Code, the Bharatiya Nyaya Sanhita came into effect on July 1, 2024, and updates the provisions addressing hate speech and cybercrimes. Section 196 of the BNS replaces the IPC Section 153A, and updates the provision by including the means of electronic communication over the concern of enmity based on religion, race, and similar factors (Bharatiya Nyaya Sanhita 2023, s.196). Likewise, BNS Section 299 replaces IPC Section 295A for criminalising acts that outrage religious feelings (s.299), and Section 353 replaces the IPC Section 505 in covering statements that cause public mischief (s.353), applying to online incitement as well. However, these sections, like their predecessors, may have a limited applicability in addressing the concerns of gender-specific hate speech. Section 351(1) replaces IPC Section 503, penalising criminal intimidation, including threats of death, serious injury, or harm to reputation made through 'any means', with a penalty of two years imprisonment (s.351(1)), updating it to also be read in cases involving electronic communication, an aspect seemingly unclear in the IPC; it is followed by Section 351(3), which deals with 'anonymous criminal intimidation', allowing for up to seven years in prison (s.351(3)). This provision, thus, can be utilised to specifically address anonymous online threats against women, taken together with BNS Section 356 that replaces IPC Section 499 and 500 in penalising acts that

insult a person's modesty (especially of a woman), including through digital gestures or verbal insults, providing for a sentence up to three years (s.356). The Information Technology Act of 2000 remains the same, but the Information Technology (Intermediary Guidelines) Rules, 2021 mandate the removal of content within 36 hours and also require traceability (Pathak and Kumar 2023). The Act has been supplementary to the IPC and now to the BNS, with specific sections such as Section 67 (regarding obscene material), Section 67A (dealing with sexually explicit content), and Section 66E (addressing privacy violation through unauthorised image capture) [Information Technology Act 2000, s.66–67]. However, the essence of these sections is reactive in nature, focusing mainly on the removal of the content after the event happens, rather than preventive measures in the first place.

Comparatively, the BNS offers incremental improvements over the IPC by explicitly paving the way for incorporating electronic means, potentially better-abled at addressing cases of anonymous online harassment against women. Nevertheless, this modernisation falls short in evaluation; for example, while BNS Section 356 provides enhanced penalties in cases of insulting a woman's modesty (up to three years, versus IPC Section 509's lighter sanctions), it fails to encompass emerging cyber threats such as doxing or sextortion, which disproportionately affect women on a greater scale (Mirutha 2024, b745; Nigam 2024). Unlike the IPC's reactive stance, the BNS could have integrated gender-specific clauses to align with feminist calls for recognising digital harms as extensions of systemic inequality, but its exclusions further perpetuate the existing enforcement gaps (Balabantaray et al. 2023; Nigam 2024).

Enforcement Challenges

Social media platforms themselves have an important role to play in moderating hate speech. The inconsistencies, however, are not dealt over to

a good effect on these platforms. The disposition of algorithms to boost virality often leads to an audience's greater engagement with provocative content, inciting hate speech which may also include gender-specific abuse (Mirchandani, 28), and/or passive harassment through shaming or stereotyping. The aforementioned revised sections under the BNS, however, do not direct for accountability at the intermediaries' part, but instead rely on the relevant frameworks laid by the IT Act. The case of 'Sulli Deals', as Mishra highlights, is notably an unfortunate instance in this regard, wherein the photos of about 80 Muslim women were misused for a 'virtual auction', with the web-platform GitHub failing to timely respond, removing the 'Sulli Deals' app only after much public backlash (Mishra 2023). In addition, the utilisation of Section 79 of the IT Act further enables many platforms to evade liability in such cases (Information Technology Act 2000, s.79), even though the judicial directives mandate rapid removal and de-indexing of such harmful content (*Mrs X v Union of India* 2021). While the updated penalties in the BNS might push platforms to improve their moderation practices, without any comprehensive change to the IT Act, especially Section 79, their accountability would remain, perceptibly, at surface.

The enforcement challenges that have been evident with the IPC are evident with the BNS as well. This has much to do with the implementing agencies themselves. The inculcation of 'electronic means' amongst the revised provisions in BNS calls for a greater technical expertise during investigations (for tracing threats in encrypted platforms, authenticating digital evidence, etc.), as an increasing number of criminal intimidation cases may stem through digital spaces. However, as of the current, there is only a small number of recruited personnel who are trained to handle digital evidence, to mention alongside the lack of apt equipments during investigations, two issues further aggravated by frequent changes in staffs (704). It may further be the case that digital evidence may not be readily available, significantly delaying the investigation processes, as was a highlight

in the ‘Sulli Deals’ case, wherein delays occurred owing to the delays in accessing cross-border data under the Mutual Legal Assistance Treaty (703). Mishra further suggests the prevailing societal biases to be a hurdle for women in reporting abuse, owing to the fear of passive harassment and victim blaming, with less than 10% seeking legal help in cases of online abuse (705). She supports this by citing data from the National Bureau of Economic Research (NBER), which highlights an 184% increase in cybercrime complaints in high-risk areas during the 2020 COVID-19 lockdown (700). While the initiative of cyber help-desks for women in Kolkata has been an encouraging intervention (701), such efforts often have a limited reach, exposing the localised inadequacies with the Indian enforcement frameworks in this regard.

Judicial Interpretations

The Supreme Court’s verdict to prioritise free speech in the case of *Shreya Singhal v Union of India*, while a cautious stance, has also inevitably hindered the legal providence for women seeking justice against hate speech and online abuse. Prior to the Court invalidating the constitutionality of Section 66A of the IT Act owing to its definitive vagueness and its perceptible restriction on free speech (*Shreya Singhal v. Union of India* 2015; Information Technology Act 2000, s.66A), the section allowed a framework for authorities to refer to in taking action against an array of harmful online behaviour, to include, but not limited to, threatening messages, abusive language, harassment, and cyber stalking, even though their qualifying criteria were vague in essence. Post-the section being struck down, however, it arguably left the aggrieved parties, particularly women, to rely upon sections narrower in scope, like IPC Section 509, which addressed insults to modesty, but which also held the potential for failure to account for digital contexts. Throughout past cases then, it could be deduced that often the forms of online intimidation, trolling, or degrading speech have been

seemingly overlooked, placing a heavier burden of proof upon women due to a lack of significant verdicts in favour of more feminist interpretations.

Accordingly, the majority of legal improvements in the BNS seem to naturally build upon past IPC-era decisions; for example, the Sections 356 & 351(1) in their essence can be understood to include the definitions laid down by the verdicts of cases such as the *State of Punjab v. Major Singh*, wherein the Apex Court linked the modesty of a woman to her inherent dignity (*State of Punjab v. Major Singh* 1967), as well as the *Pravasi Bhalai Sangathan v Union of India*, wherein the Court took a balanced approach in interpreting the boundaries of incitement, but also implicitly portrayed an underlying hesitance to widen the scope of such interpretations (*Pravasi Bhalai Sangathan v Union of India* 2014). This only upholds the flux between statutes and verdicts, with newer interpretations following previous ones, and previous ones following the original statutes themselves; no significant reform in statutes can take place if no independent dialogues are introduced. This is also apparent from an indirect standpoint through cases that of *Amish Devgan v Union of India*, whereby the Supreme Court held hate speech to be judged within its specific context (Amish Devgan v. Union of India 2020), and *Anuradha Bhasin v Union of India*, in and through which the court maintained the importance of proportionality in restricting online facets (*Anuradha Bhasin v. Union of India* 2020). The inclination to uphold public order and proportional justice, with this reference, however, may not be sufficient to deal with the unique challenges and vulnerabilities that women face horizontally, especially with the significant lack of gender-specific clauses in the BNS sections that deal with hate speech and online abuse. The concern is crucial as women face a higher degree of personal attacks than surface threats in the events of widespread chaos as well (Mirchandani 2018). To some extent, one may find some encouragement with the verdicts in the cases of *Mrs X v Union of India*, wherein the Delhi High Court mandated for the spontaneous removal and de-indexing of defamatory online content

targeted at the aggrieved woman (*Mrs X v. Union of India* 2023), also leading to the Calcutta High Court directing training for police officers in handling digital evidence (*Subhendu Nath v. State of West Bengal* 2019), and *Subhranshu Rout v State of Odisha*, wherein the Orissa High Court denied bail to the petitioner and upheld the ‘right to be forgotten’ in the situation of cyber-harassment against the victim, as the essence of her right to privacy (*Subhranshu Rout v. State of Odisha* 2020). The utilisation of the reference to these verdicts in similar cases could enable women to efficiently seek the removal of targeted derogatory content, naturally weaving itself into the BNS Section 351(2), which guarantees protection against damages done to one’s reputation (Bharatiya Nyaya Sanhita, 2023, s.351(2)). However, the local application may nonetheless be with limitations due to an absence of significant statutory support in the BNS over the same, and the prevailing precedented and unprecedented inconsistencies in the investigation of online crimes.

Impact on Women

The lack of gender-specific clauses in tackling hate speech against women in both the IPC and BNS, in combination with negligence at the part of online platforms, undermine the efforts of the judicial system. The incapacities in prevention and protection for women in this regard conflicts with their intrinsic rights for safety, dignity, and active participation in online spaces. Mishra suggests that around 58% of women report experiencing online harassment (Mishra, 700), supported by data from the National Crime Records Bureau (NCRB) presenting the enormity of the issue, with the state of Maharashtra alone reporting around 1,126 cases of cyberstalking and bullying against women in two years (702). Oftentimes, abuse itself gets normalised, and leads many women to step away from seeking justice (George 2023). To escape from harassment, many women may choose to self-censor themselves, which includes deleting their social media accounts

or cutting back on their online activities (Mishra, 698), but this self-imposed limitation negatively affects their access to education, networking, and job opportunities; digital harassment reduces the potential of social media in benefitting the self-expression and empowerment of women. The COVID-19 pandemic had only worsened the extent of these challenges as it led to a rise in online abuse during the lockdown operations when more women turned to digital platforms for work, education, and socialising. Many women seeking legal financial assistance face lewd messages and aggression (698), resulting in the discouraging of their digital engagement. Although the BNS has introduced tougher penalties, including a seven-year prison sentence for anonymous threats under Section 351(3), it may but only deter a few offenders (Bharatiya Nyaya Sanhita, 2023, s.351(3)). The absence of immediate civil compensation or an injunctive relief too adds to the issue, leaving women without immediate support/remedy for their suffering (Pathak and Kumar, 251).

In the case of *Joseph Shine v Union of India*, the Supreme Court reflected over the role of societal norms and the inadequate legal structures in leading to persistent gender inequality (*Joseph Shine v Union of India* 2018). Digital abuse, alongside impacting the aggrieved, also strengthens problematic prejudices and stereotypes around social narratives and leads to the maintenance of absurd ones, in light of which, abuse either gets justified or remains un-protested. Women belonging to minority groups (Dalits, Muslims, etc.) may face a form of double-discrimination, wherein hate speech targets both their gender and their social identity, as was also evident in the 'Sulli Deals' case. The applicability of the current hate speech laws over this overlapping issue is difficult to determine, and rarely have there been cases where the verdict has been over such. The problem then continues; a woman might, even if not discriminated against for being a woman, be hated for being a minority. It is further difficult to determine intent and applicability of the BNS provisions with respect to the emerging

facets of deepfake technology and coordinated trolling campaigns. It should then be the case that the BNS be helped from a reading of the existing laws from a feminist-jurisprudent lens, allowing for prioritisation, or if not, then for a more substantiative legal representation for women, and consequently, a space that allows for considering online abuse and hate speech against them as not an expression of dislike towards opinion but of discomfort and disregard of their dignity and existence itself; the constitutional guarantee of dignity under Article 21 is undermined, and so is their humanity, if women are denied equal access to digital spaces (Constitution of India *art. 21*).

Conclusion

The transition from the IPC to BNS is a crucial step towards modernising India's hate speech laws, with Sections 351(3) and 356 aiming at addressing anonymous threats and digital insults against women. However, the effectiveness of these sections would only prove limited with the outdated IT Act rather inadequate to hold social media platforms accountable for cases of online abuse, in addition with the inconsistency in enforcements due to a lack of cyber forensic training and procedural issues. The need is for the legal frameworks to evolve beyond simply criminalising individual acts to address the issues of online abuse by inculcating stronger intermediary obligations and gender-sensitive provisions in the BNS, supplemented by the reading of the present ones from a feminist-jurisprudence lens; bridging of legislative gaps with the reshaping the social attitudes are crucial in safeguarding participation of women in online spaces.

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