

To

Ms. Dubravka Šimonović
Special Rapporteur on Violence against Women
OHCHR-UNOG,
Geneva, Switzerland

New Delhi, 2 November 2017

Sub: Submission by the Internet Democracy Project on online violence against women

Dear Madam,

In response to your call for submissions on existing good practices on law regulating violence against women and sexual harassment online, the Internet Democracy Project would like to make the attached submission, which was prepared by my colleague Ramya Chandrasekhar.

The Internet Democracy Project is a not-for-profit initiative based in New Delhi, India (<http://internetdemocracy.in>). We work for an Internet that supports freedom of expression, democracy and social justice, in India and beyond, through research, advocacy and debate. Among other topics, our work covers issues around gender and surveillance, studying the numerous ways in which digital surveillance shapes and harms women in India (<http://genderingsurveillance.in/>). We were also the first in India to do detailed research on online abuse, in 2012-2013. We continue to work on this important issue to this date.

In India, there is a fairly comprehensive legal framework that addresses different facets of online abuse, and penalises violations. However, there is a severe problem of implementation of these laws, in important part owing to entrenched socio-cultural norms that adversely affect women's expression. What is primarily needed in India, therefore, is more discourse, more awareness and a variety of non-legal measures, so as to challenge and ultimately displace these socio-cultural norms. We believe that measures to tackle online abuse must go hand-in-hand with measures to protect women's expression.

We hope our comments will be taken into consideration.

Thanking you,

Yours Sincerely,



Dr. Anja Kovacs
Director, Internet Democracy Project

Submission by the Internet Democracy Project

(www.internetdemocracy.in)

**in response to the Special Rapporteur on violence against women, its causes and consequences' call
on online violence against women**

2 November 2017

Before providing specific responses to the issues highlighted by you, we think it's important to situate these issues within the Indian and South Asian context.

In 2013, Internet Democracy Project conducted field research on verbal online abuse faced by women in India, and the strategies deployed by women to combat this abuse. We published its findings in a report titled "Don't Let It Stand!: An Exploratory Study of Women and Verbal Online Abuse in India". In our extensive research, we were the first to voice out the startling similarities between the way women experience the internet and the way they experience physical public spaces - as gender-unequal spaces. As stated in this report -

"What is central to the idea of gender in public spaces – whether online or offline – is as the blogger above says, about occupying space. The male dominated nature of public spaces also means that women's presence in them should be justified with a purpose. Women are on a street because they are going home, shopping in the market, or doing something. Conjuring up an image of an Indian street, whether in a town, city, or village, its most visibly idle inhabitants are men. Sitting. Standing. Talking. Smoking. Sleeping. The street, as it is mediated through gender unequal power relations, belongs to men, temporarily on loan to the women who need it for a specific reason. In this context, the entering into public space by women without reason is a transgression of an unwritten rule."¹

At the heart of women's experiences therefore, on both the internet and in physical public spaces, are relationships of power and domination. A horrific example is the mass molestation of women in Bangalore, Karnataka at a New Year's Eve carnival last year - because revelry on the streets is considered the right of men, and women who were 'dressed up', consuming alcohol and participating in such revelry do not 'belong' there.² Similarly, women who identify as such on the internet, women who are 'opinionated' on the internet are viewed as a 'threat', and online abuse targeted at such women is a way by which men seek to reaffirm their power, and consequently, their control over the online space. Such

¹ See Anja Kovacs, Richa Kaul Padte and Shobha SV, 'Don't Let It Stand: An Exploratory Study of Women and Verbal Online Abuse in India' (2013) (available from <https://internetdemocracy.in/wp-content/uploads/2013/12/Internet-Democracy-Project-Women-and-Online-Abuse.pdf>)

² See Shruti Dhapola, 'Lesson from Bengaluru, and earlier Lucknow: The streets are not for women', Indian Express (Jan 3, 2017) <http://indianexpress.com/article/opinion/web-edits/lesson-from-bengaluru-and-earlier-lucknow-the-streets-are-not-for-women/>

abuse seeks to make the online space intimidate women, make the space inhabitable for them, and transfer hegemony over the space back to men.³

And within this gender-unequal space that is the internet, women are caught in a web of socio-cultural norms that are manifest in offline spaces as well. The creation of these norms, their substance, and the varying degrees to which they affect women and their lives are important, since these norms shape online abuse as well responses that women adopt to address online abuse.

On the one hand, a patriarchal culture rooted in a strict public/private divide has made it harder for women enter 'public spaces' such as streets and workspaces. On the other hand, women's identities are often crafted for them through their body. The woman's body is caught in a dichotomy, created and fuelled by mythology, culture and advertising – that she is either a "pure mother-like" figure or a sexualized symbol of both desire and obscenity. This notion of purity, derived from a mix of religious values and a politics of caste, sees the woman as devoid of any sexual expression and being the "unsex-ed" creator of life. Any woman who does not measure up to this standard of purity is labeled as the "sexed" obscene woman, the undesirable woman – because possession of sexual desire is unbecoming of a woman. But Indian cinema, particularly Bollywood, and Indian advertising, glorifies this "sexed" woman as an object of desire, designed for consumption by men.

It is this this dichotomy that women are caught within, even on the internet.⁴ Images of women, particularly in 'western' or 'revealing clothing', are often the site of online abuse that seeks to shame women for being 'impure', since these images of their bodies reflect possession of sexuality in itself. The captain of the Indian women's cricket team was on the receiving end of such kind of moral policing for uploading a picture of herself wearing a tank top.⁵ Morphing of images of women into nude images is another way in which women are shamed.⁶ But even women who engage in counter-majoritarian speech or women who call out public figures as misogynists, receive similar online abuse. Women with opinions, similar to women who engage in any form of sexual expression on the internet, are labeled 'deviant' and 'impure', 'sluts' and 'whores'. At the same time, men on the internet also objectify women and treat them as sexual objects that exist for the sole satisfaction of these men's sexual desires.

³ Phadke, *supra* n. 13 at p. 54,55

⁴ Our report on online abuse has testimonies of women bloggers who have faced verbal online abuse that clearly falls within the mother/whore dichotomy described above. See Anja Kovacs, Richa Kaul Padte and Shobha SV, Don't Let It Stand!: An Exploratory Study of Women and Verbal Online Abuse in India 14-17 (2013) *available at* <https://internetdemocracy.in/wp-content/uploads/2013/12/Internet-Democracy-Project-Women-and-Online-Abuse.pdf>

⁵ See 'Mithali Raj trolled: 'Are you porn star?' Twitter shames her, questions dress sense', Hindustan Times (Sep 8, 2017) <http://www.hindustantimes.com/cricket/mithali-raj-body-shamed-yet-again-on-social-media-for-indecent-dressing/story-X6sqJQUXS7eziMTNKqOTRO.html>

⁶ In October of this year. a photographer was arrested in Kolkata for morphing images of his clients into nude images, and circulating them online. See 'Kolkata photographer arrested for posting 'nude' images of women clients online', Hindustan Times (Oct 30, 2017) <http://www.hindustantimes.com/kolkata/photographer-arrested-for-morphing-pictures-of-women-police-write-to-google-on-how-he-circulated-photos/story-A7f1DuoX26qD0m459AFy3J.html>

Another form of online abuse is also prevalent in India. Non-consensual disclosure of consensually captured images of women and girls are being increasingly published by their ex-partners, and thereafter used to blackmail these women and girls.⁷ And while India has an extremely strong legislative provision that criminalizes such abuse, as detailed in the section below, the notion that men have proprietary rights over women and girls continues to be pervasive. But more importantly, the consequences of abuse such as this are far more severe for women and girls in conservative families, since the abuse is viewed as harm to the reputation of their entire family. These images themselves are treated as evidence of the women or girls being “sex-ed”, and therefore of “bad repute”, which is reflective of the influence of the aforementioned cultural norms on families in India.

But access to the internet, and the internet itself, makes a significant difference to the lives of women. Easier access to information spurred by internet communication technologies (ICTs), greater reach of their voices, and the ability to interact and find solidarity by sharing their experiences with other women, are only some of the unquestionable benefits that the internet has provided to women. One way, in which women try to continue utilizing these benefits within a patriarchal culture that seeks to stop them doing so, is by being anonymous. Women, under the garb of anonymity, can speak more freely and without heightened fear of backlash.

Certain identities act as a barrier for expression by persons possessing these identities, due to a variety of socio-political factors. For example, women who are Dalits (an umbrella term for members of many low-caste groups), Muslims, sex workers, LGBTQI and activists are often targets of online abuse because of their identities. For these women, anonymity acts as an enabler and allows them to access and inhabit online spaces with less a far lesser degree of fear. Anonymity has also allowed women to reclaim power on the online space by posting accounts of online abuse as well as publicly naming and shaming harassers, without fear of backlash. A public Google Spreadsheet of professors who have harassed women students in India was able to come to light and garner much needed attention, because the creator of this list accepted anonymous messages that named many of these professors as harassers.⁸ While anonymity is also used by harassers and abusers to perpetrate online abuse without fear of sanction, anonymity allows for women and members of marginalised communities to both circumvent social restrictions as well as transform them – an aspect of anonymity which is often ignored by the law and policy makers when dealing with online abuse.

In fact, what is often the focus of all parties involved with the law – parliamentarians, intermediaries as well as civil society organizations - , is the demand for more specific laws to address online abuse. At one level, there is a lack of discourse on the structural continuities between offline and online abuse, since

⁷ The most recent arrest of a man for engaging in non-consensual disclosure of consensually captured images occurred in Bangalore, Karnataka in September of this year. See Narayan Namboodiri, [Bengaluru student held for posting nude pictures of ex-girlfriend online](https://timesofindia.indiatimes.com/city/bengaluru/bengaluru-student-held-for-posting-nude-photos-of-ex-girlfriend-online/articleshow/60848567.cms), Times of India (Sep 27, 2017)

⁸ See Maanvi, [Whisper Network & Discomfort: Lessons From a FB List of Harassers](https://www.thequint.com/voices/opinion/sexual-harassment-list-facebook-raya-sarkar-universities-academics-kafila), Quint (Nov 1, 2017)

such discourse is an important tool to challenge cultural norms that affect women in both these space. This is exacerbated by a lack of awareness, on the part of state functionaries as well as civil society members, to treat online abuse as a systemic problem, since they continue to view each incident of online abuse as a discrete incident.⁹ No analysis has been provided either by the legislature or the judiciary in India as well, in cases of online abuse, wherein the rationale behind the abuse itself is examined through a structural lens.

Linked to this issue, at another level, is the fact that the Indian legal framework for online abuse is fairly comprehensive, in text. The main problem lies in faulty implementation. This stems in part , which stems from patriarchal socialisation of the actors who implement the law – the police, for example. As with other crimes, women often don't report online abuse , as with other crimes, to the police for , from fear of victim-blaming. All too often, these women are also morally policed when they do complain, in many cases, notably in cases of revenge porn, – where women are instructed not to engage in 'immoral' activities, such as sharing of nude pictures with their partners, in the future. But even police officers, who actively try to assist women, are restricted by technicalities such as the lack of jurisdiction over some cybercrimes and the lack of evidence owing to the deletion of material. Many of them also often lack the capacity to undertake proper investigations into cybercrimes. For example, police officers are often unclear on how to gather and store evidence of cybercrimes.

Even if new laws are created, specifically to address online abuse, these problems will continue to persist. The existence of these new laws does not automatically change the cultural norms that influence the implementation of these laws. Unless the culture of victim-blaming is addressed, for example, the likelihood of more women reporting online abuse to the police is still a distant possibility.

It is therefore imperative that along with a push from stronger implementation of existing laws, a variety of non-legal measures be adopted to effectively address structural inequalities that lie at the heart of online abuse. Discourse generation and rehabilitative efforts need to be undertaken, to ensure attitudinal and behavioural changes in Indian men as well as Indian society. One example is a helpline, known as 1090 or the Woman Power Helpline, created by the state government of Uttar Pradesh in 2012.¹⁰ Either a woman or her relatives can lodge a complaint using this helpline. Even anonymous complaints can be lodged. However, the helpline operators try to solve the issue at hand by counseling the accused and/or the family of the accused without filing a formal complaint. Only if this counseling fails on more than three

⁹ A useful legal comparative, that treats violence as a structural issue, is the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 198 ('SC/ST Atrocities Act'). The Statement of Objects and Reasons appended to this legislation recognized caste-based violence as a structural issue, and situates this form of violence as a product of various historical, social and economic narratives. This rationale has also been used by the Delhi High Court to hold that posting on casteist slurs on a woman's Facebook 'wall' would be a violation of the SC/ST Atrocities Act. This judgment can be found here: http://lobis.nic.in/d_dir/dhc/VSA/judgement/03-07-2017/VSA03072017CRLW30832016.pdf

¹⁰ As part of a case study on mobile phone bans in certain states in India, for our project on Gendering Surveillance, the Internet Democracy Project analysed the working of the Woman Power Helpline in Uttar Pradesh. The case study can be found here: https://genderingsurveillance.internetdemocracy.in/phone_ban/
A brief overview of what the helpline seeks to do can be found here: <http://uphome.gov.in/women-power-line-1090.htm>. More information can be found on the official website of the helpline: <http://1090up.in/>.

occasions, is legal action undertaken.¹¹ Fear of tarnishing the “honour” of the family, as well as of the women and girls who are on the receiving end of online abuse, often stop these women from registering formal complaints. And therefore, the methodology adopted by the Woman Power Helpline is extremely necessary, to provide justice to these women and girls while at the same time, preventing any backlash to them.

Another example is an initiative undertaken by the Internet Democracy Project itself – an online community and website under the name ‘Don’t Let It Stand’. This website, which is soon to be launched, seeks to serve as a resource for women who are on the receiving end of online abuse. The website documents 12 different strategies that women in India have adopted to tackle online abuse, of which only one is a legal strategy. Other strategies that women have adopted include calling out and publicly shaming the abuser, approaching the abuser’s family, and adopting anonymity or pseudonymity.

Against this background, our specific responses are as follows -

Existing legislative models, criminal or administrative, on prosecuting and punishing various forms of online violence against women

As stated above, contrary to what is widely believed, the legal framework in India to tackle online abuse is a fairly comprehensive one.¹²

The Information Technology Act, 2002 (‘IT Act’) is a specific legislation, which governs various aspects of the online space. The most well-known and widely used provisions under this legislation are section 67 (which criminalizes the publication or transmission of obscene material) and 67A (which criminalizes the publication or transmission of sexually explicit material) of the IT Act also pertain to visual/image-based online abuse.¹³

Obscenity laws in India, however, have a long history of being used to censor and control women, and free speech on the whole. Section 67 of the IT Act mirrors Section 292 of India’s substantive criminal law, the Indian Penal Code (‘IPC’), which criminalizes the sale of obscene publications. Another legislation, the Indecent Representation of Women Act, 1986 (‘IRWA’) penalizes any representation of women on print media that is “indecent, or derogatory to, or denigrating women, or is likely to deprave, corrupt or injure the public morality or morals”.¹⁴ Finally, Section 66A of the IT Act criminalized the sending of any “grossly

¹¹ The user manual of the helpline explains the non-legal process followed, when complaints of online abuse are received, in a concise manner. The manual can be accessed from here: <http://1090up.in/Home/UserManual>

¹² Online abuse, for the purpose of detailing this framework, can be classified under four broad heads – verbal/text based (which includes abuse through messages, comments, rape threats, sly commenting and sock puppetry), visual/image based abuse (which includes morphing of images of women’s bodies, non-consensual disclosure of images and videos of women’s bodies, and revenge porn), conduct –based online abuse (which includes cyber-stalking, cyber-voyeurism and blackmailing), and anonymous or pseudonymous online abuse (which includes any or all of the above committed through an anonymous or pseudonymous identity). Often however, women are targets of more than one kind of online abuse.

¹³ *Id.*, § 67, 67A

¹⁴ Indecent Representation of Women Act, § 2(c) (1986), available at <http://www.wcd.nic.in/act/indecent-representation-women>

offensive” messages or messages that caused “annoyance” or “ill will”. All of these legislations, which prima facie seek to provide recourse to women, have instead been used against women to curtail their expression, particularly their sexual expression. For example, in one of the most famous cases, two young women in Maharashtra were arrested, under Section 66A, in relation to a Facebook post criticizing a city-wide shutdown imposed in Mumbai, Maharashtra to mourn the passing of a regional right-wing politician, in 2015.¹⁵ Such callous misuse of obscenity laws are particularly more worrying considering the high punishments prescribed for offences under such laws. Section 67 of the IT Act prescribes imprisonment of up to three years for first time offenders, and imprisonment of up to five years for repeat offenders, along with imposition of fines in both cases (maybe also add that this is a higher sentence than what the IPC provides?). Similarly, even the IRWA prescribes different periods of imprisonment and fines for first-time offenders and repeat offenders.¹⁶

As explained earlier, women’s sexuality is considered “impure”, since majoritarian patriarchal narratives require women to be “unsex-ed”. Additionally, women’s sexual expression is also considered “immoral” in such narratives, a label particularly espoused by radical Hindu conservatives. This collective morality of the majority, which seeks to rob women of their sexual expression, has driven the application of all obscenity laws in India. And such actions harm women, as analysed earlier. The judiciary has, to some extent, checked such a narrow, community-driven interpretation of some obscenity laws. In a landmark case issued in 2015, the Supreme Court of India struck down Section 66A of the IT Act, owing to overbroad terms contained in this provision that allowed for an abuse of the same.¹⁷ Further, as will be discussed later, the judiciary has also provided standards for a more liberal application of obscenity laws. However, their potential for abuse continues to remain a grave danger. As a consequence, their ability to effectively address online abuse, instead of curbing women’s expression, remains questionable.

Another set of laws that suffer from similar problems are hate speech laws in India. Section 153A of the IPC criminalizes any speech, either verbal or visual, which –

*promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities.*¹⁸

In 2012, a bill was circulated to amend the IRWA and, inter alia, include “indecent representations” of women on media circulated ICTs within the ambit of the Act. See The Indecent Representation Of Women (Prohibition) Amendment Bill, 2012, Bill No. LXX of 2012, Rajya Sabha §2(aa), 2(c), 2(g) (2012), available at [http://www.prsindia.org/uploads/media/Indecent_Representation_of_Women/The_Indecent_Representation_of_Women_\(Prohibition\)_Amendment_Bill,_2012.pdf](http://www.prsindia.org/uploads/media/Indecent_Representation_of_Women/The_Indecent_Representation_of_Women_(Prohibition)_Amendment_Bill,_2012.pdf)

¹⁵ See Ragini Vaidyanathan, ‘India Facebook arrests: Shaheen and Renu speak out’, BBC (Nov 26, 2012) <http://www.bbc.com/news/world-asia-india-20490823>

¹⁶ IRWA, *supra* n. 26, § 26.

¹⁷ *Shreya Singhal v. Union of India* AIR [2015] SC 1523, ¶ 83 (available at <http://meity.gov.in/writereaddata/files/Honorable-Supreme-Court-order-dated-24th-March%202015.pdf>)

¹⁸ Indian Penal Code, § 153A(a) (1860), available at <http://lawmin.nic.in/ld/P-ACT/1860/186045.pdf>

What is starkly missing from this provision is hate speech targeted at a person's gender identity. While a residuary category is encapsulated within Section 153A – the promotion of hatred on “any other ground whatsoever” could be used to make this provision applicable in cases of gender-based hate speech, the same has not happened so far. Taking partial cognizance of this issue, an expert committee constituted by the government in 2015 recently proposed an amendment of Section 153A and the introduction of a new hate speech provision in the IPC, - both of which explicitly address both gender-based hate speech and online hate-speech.¹⁹ This is a step forward, since it provides the room for treatment of gender-based hate speech as a structural issue, as is done with caste-based violence. Unfortunately, however, both these proposed provisions also continue to couch hate speech within overbroad terms such as “highly disparaging” information, which allows for continued misuse of these provisions against women. It is therefore of utmost importance that these proposal be reformed, and the ambiguous terms described be discarded.

Section 66E of the IT Act, on the other hand, is one of the strongest legal provisions to tackle visual/image based online abuse.²⁰ This provision makes the intentional and non-consensual capture, publication and transmission of private parts of a person's body an offence. It is the only provision in the IT Act to refer to consent, and couches the said offence as a violation of privacy. Further, it provides strict punishments, including both imprisonment and payment of a fine. Additionally, section 67 (which criminalizes the publication or transmission of obscene material) and 67A (which criminalizes the publication or transmission of sexually explicit material) of the IT Act also pertain to visual/image-based online abuse.²¹

The IPC also has certain provisions that provide effective remedies against certain kinds of online abuse. Section 354D of the IPC criminalizes cyber-stalking, and lays down a concise definition of cyber-stalking.²² Further, Section 354C penalizes cyber-voyeurism, and couches this offence as a violation of a woman's legitimate expectation of privacy.²³ Section 354C also addresses non-consensual dissemination of consensually recorded private acts to some extent, if it can be argued that there was a legitimate expectation of privacy at the time of recording of the said act. Both these provisions also stipulate longer periods of imprisonment where the offences have been committed by repeat offenders.

Even provisions within the IPC that do not clearly acknowledge the online space as the site of abuse can be used to address certain kinds of online abuse. For example, Sections 499 (which criminalises defamation), 502 (which penalises criminal intimidation), 507 (which penalises anonymous criminal intimidation) and 509 (which criminalises the usage of words or gestures to insult the modesty of women) of the IPC can be used to tackle certain kinds of online abuse.

¹⁹ The text of these recommendations can be accessed from here:

<https://internetfreedom.in/files/documents/recommendations.of.t.k.visanathan.committee.pdf>

²⁰ Information Technology Act, § 66E (2000), available at

http://www.meity.gov.in/writereaddata/files/itact2000/it_amendment_act2008.pdf

²¹ *Id.*, § 67, 67A

²² Indian Penal Code, §354D (1860), available at <http://lawmin.nic.in/ld/P-ACT/1860/186045.pdf>

²³ *Id.*, §354C

Within this entire basket of laws, what is perhaps most striking is that only two provisions - Section 66E of the IT Act and Section 354C of the IPC, are based on the concept of 'consent'. 'Consent' is one of cornerstones of feminist legal discourse, and is necessary to protect women's expression. Majoritarian notions of morality, which control women's bodies and sexualities, can only be dismissed when the law itself recognises consent as pivotal.²⁴ A robust legal framework for combating online abuse must also acknowledge and protect women's sexual expression, which can be done by recognising consent.

Existing policies that allow identification, reporting and rectification of incidents of harassment or violence against women via the internet services providers

Many of the intermediaries that have a big presence in India - such as Facebook, Twitter, YouTube and Instagram - have separate mechanisms to address online abuse. One such mechanism is the ability for women to 'block abusers'. By 'blocking' online abusers, the abuser is denied access to the online presence of the woman who blocked him.

Most intermediaries also have certain rules with regard to the content that is permissible. Facebook terms these rules as 'Community Guidelines', while Twitter terms them as 'Twitter Rules'. If any user of an intermediary believes that a particular piece of content is violating the said rules, then she can report the content to the intermediary itself. If the intermediary also believes that the content is violative of its rules, then it can either remove the said content, or temporarily freeze the content creator's account, or ban the content creator from using the intermediary's platform. The choice of action depends upon the severity of the violation, as well as the number of times the content creator has committed a violation.

Users can report any content that they believe violates the abovementioned rules, and the procedure for reporting generally is fairly simple and accessible - the result of extended activism in India and abroad. For example, Twitter provides a simple questionnaire for reporting any violation of its Twitter Rules, and asks users to provide a URL to the content being reported.

The problem however, is that in some cases, the rules tend to work against women who report online abuse to intermediaries. One problem in this regard is the perpetuation of online verbal abuse in a variety of regional languages. Expletives in Indian languages, with culture-specific meanings, are commonly thrown at women. Administrators of intermediaries frequently are not equipped to understand and situate such speech within the umbrella of online abuse, since administrators often are not of the same ethnicity or nationality as the woman reporting the abuse and may not be proficient in the language in question.

In other cases, where women publicly decide to shame harassers and make public abusive content, their accounts and profiles get suspended or removed, instead of any action being taken against the perpetrator. Women, therefore, are penalised, while their abusers are not. For example, Raya Sarkar, the law student who created the public list of male professors who are sexual harassers in universities, had

²⁴ See Padte, *supra* n. 18, at 1.3

her profile removed from Facebook a few hours after publication of the same.²⁵ While her profile was made active soon after, because of the efforts of many activists who reached out to individuals at Facebook, many other women do not receive similar treatment since they lack access to such contacts.

Many of these problems can be ascribed to both the ambiguous drafting of content rules and to their mechanical application. Content rules are often framed in overbroad manners. They also are seemingly inconsistent in the kinds of speech that is identified as problematic. For example, Facebook's Community Guidelines explicitly disallows nudity (except for pictures of breastfeeding), while certain kinds of violent content are permissible. Further, these content rules are applied in a mechanical manner, instead of situating the reported abuse within the socio-political context of the country from where the abuse has originated. The threshold to ban speech, even by intermediaries, is when the said speech causes direct and immediate harm to a person or a community. But in the absence of any effort by intermediaries to understand territorial cultural norms, and situate reported content within these norms to identify whether any harm has been caused by virtue of that content, a mechanical application of the rules is bound to occur. And as detailed earlier, such an application would work against women and censor their speech.

One way in which intermediaries can understand the cultural landscapes of the countries they have a presence in, is by conducting open consultations with civil society members in these countries. Regular consultations of this kind, which are open to all instead of only a few civil society organizations that are chosen in an arbitrary fashion by the intermediaries, would be extremely useful.

Women who have anonymous or pseudonymous online profiles are also adversely affected by the policies of certain intermediaries. A prime example is Facebook's 'Real Name' policy.²⁶ Women, especially activists, who choose to remain anonymous on Facebook often get reported by harassers for possessing a 'fake' profile. And instead of any action being taken against the harassers, these women are required to disclose their identities and risk further harm to themselves. For this reason, the policy has come under severe criticism from civil society groups.²⁷ Responding to these criticisms, Facebook changed the policy, and now requires complainants to provide some amount of proof when alleged that an account is

²⁵ See Aihir Sur, 'Facebook access restored after company's staff in Palo Alto was contacted: Raya Sarkar', The New Indian Express (Oct 26, 2017) <http://www.newindianexpress.com/nation/2017/oct/26/facebook-access-restored-after-companys-staff-in-palo-alto-was-contacted-raya-sarkar-1683449.html>

²⁶ As per the erstwhile 'Real Name Policy', users were to only use their 'real names' if they wished to have a Facebook account. Further, anyone could report an account alleging it to be fake. But a complainant did not need to provide any proof, while the person against whom the complaint was made had to provide any government ID as proof of their identity.

²⁷ Internet Democracy Project was one of the signatories to an open letter to Facebook, criticising its Real Name Policy and proposing certain changes. See Rajat Rai Handa, 'Open letter to Facebook about its 'real name' policy', Internet Democracy Project (Oct 6, 2015) <https://internetdemocracy.in/2015/10/open-letter-to-facebook-about-its-real-name-policy/>

fake.²⁸ While these changes are a step forward, they have not yet assisted in effectively curtailing this kind of abuse.

In fact, intermediaries across the world are not sensitive to the nuances that surround anonymity and pseudonymity. While anonymity provides a veil for harassers, and makes it harder to identify and take action against them, anonymity and pseudonymity are also crucial facets of privacy and freedom for women. Women navigate a variety of barriers which prevent them from fully accessing the Internet, such as gender, sexual orientation, class, caste and disability, by being anonymous or pseudonymous, as detailed earlier.

Internet Service Providers ('ISPs'), a particular type of intermediaries, are also important stakeholders in the debate on online abuse, albeit in a passive manner. Also known as 'gatekeepers' of the internet, ISPs usually do not undertake any action against abusive content on their own, but are asked by the Central government to restrict access to such content. Orders to block content can be issued under Section 69A of the IT Act, which allows the Central government to call for such blocks in the interest of 'public order', among others. However, orders issued under Section 69A are secretive affairs: they are not published online and are sent only to the concerned ISPs. Therefore, it is impossible to ascertain if blocking orders are issued only in relation to issues mentioned under Section 69A or whether this ambit is exceeded.

An example of how problematic this can be, is a petition filed in 2013 by a Delhi-based lawyer in the Supreme Court of India, requesting the court to ban not only the transmission and publication of pornography, but also its access and/or consumption.²⁹ The petitioner in this case argued that pornography promoted violence against women and is obscene, and should therefore be banned. In 2015, following this rationale, the Ministry of Communication and Information Technology issued a notification mandating internet service providers to ban access to over 800 websites that hosted pornographic content.³⁰ The blocking of pornographic content does not fall under any of the categories specified under Section 69A, since it is neither a matter of national security nor does it disturb public order. It is also not clear how such content constitutes incitement to the commission of any offence, since no evidence was provided by the government to explain the causal nexus between access to pornography and commission of violence against women.

What in fact is reality is the use of censorship under the garb of 'protection' of women. The government mistakenly imputes a causal relation between certain kinds of content and violence against women, which is then used as a rationale to censor content. On the one hand, this causal nexus itself is formulated through a culture-specific patriarchal lens, similar to the treatment accorded to 'obscene' material in India. All

²⁸ The policy of Facebook, as it stands now, requires that users have an account under a name that they use daily. The policy can be accessed from here: https://www.facebook.com/help/112146705538576?helpref=faq_content Further, in cases of complaints against their account, they can provide even certain kinds of non-governmental documents (such as yearbooks and library memberships) as proof. The list of acceptable IDs can be accessed from here: https://www.facebook.com/help/159096464162185?helpref=faq_content

²⁹ The petition filed can be accessed from here: https://docs.google.com/document/d/1ZyBevXbdC-FXzkSNA9itU5oFjhwO7CNSmZ7_H0Ji_B0/edit

³⁰ A copy of this government notification can be accessed from here: <https://cis-india.org/internet-governance/resources/dot-morality-block-order-2015-07-31/view>

sexual content is viewed as 'immoral', and women need to be protected from access to such content lest they become 'immoral' themselves. On the other hand, adopting censorship itself as the go-to policy always adversely affects the women that such action seeks to help. Women are also consumers of pornography in India, but this aspect is never considered since lawmakers continue to believe that women's sexuality does not exist and should not exist. In addition, bans on such images also affects women who which to engage in sexual expression themselves.

This 'porn ban' was therefore heavily criticised, although criticism arose more from the perspective of pornographic content being legitimate speech and this move being an unreasonable restriction of the same.³¹ But nonetheless, the government later revoked the ban on pornographic content, and mandated ISPs to only block access to websites that hosted child pornography. But actions that would prevent a porn ban in the future from taking place - such as guidelines that put in place a clear and transparent procedure for issuance of blocking orders - have not been undertaken. Government officials, too, are members of Indian society who have been socialised in certain ways. Discourse generation, in a manner that is accessible by all, that addresses and seeks to correct such socialisations is therefore extremely important.

Existing jurisprudence from international, regional, and national courts, on prosecution or administrative proceedings in such cases

While legislations in India are slightly nuanced in their understanding and treatment of online abuse, judicial decisions regarding the same are not always so. A telling example is the body of jurisprudence pertaining to intermediary liability in India. Section 79 of the IT Act makes intermediaries liable for content of third parties in two scenarios: - where the intermediaries have had aided in the publication of the unlawful third party content, and where the intermediaries do not comply with a government order requiring the removal of certain third party content. The Supreme Court of India, in *Shreya Singhal v. Union of India*, read down Section 79, and states that intermediaries can only be made liable for non-compliance with court orders or government notifications that require them to remove certain content.

Different standards for intermediary liability were prescribed by the Supreme Court in two cases. In the first case, filed in 2008, the petitioner sought removal of advertisements for sex-identification of fetuses. Such sex-identification is illegal in India. While this case is still pending in the court, many interim orders were issued. In one order, the Court directed the three search engines who were parties to this case (Google, Microsoft and Yahoo) to adopt a mechanism known as "auto-block". The court laid down a list of keywords, which when typed, could have the potential of displaying the aforementioned advertisements on the search engine. The search engines were thus required to constantly monitor content, and immediately remove links that show up against these keywords.³² The court also required search engines to set up an "in-house expert body" that would automatically add new keywords to the said list, as and when new advertisements were detected. In another order, the court also created a Nodal Agency, run by government officials. This agency was set-up to receive complaints from the public about

³¹ See Nadia Khomami, 'India lifts ban on internet pornography after criticism', The Guardian (Aug 5, 2015) <https://www.theguardian.com/culture/2015/aug/05/india-lifts-ban-on-internet-pornography-after-criticisms>

³² Sabu Mathew George v. Union of India and Ors, WP (Civil) 341 of 2008 (SC 2016), available from <http://supremecourtindia.nic.in/jonew/ropor/rop/all/827774.pdf>

any advertisements, and pass these complaints on to the search engines so that the illegal advertisements could be removed.³³

Both these orders, while well-intentioned, have enabled over-censorship. For example, the list of keywords that was laid down by the court contains vague terms such as “Gender Test” and “Early Gender Test”, owing to which, links to information such as research papers were removed by the search engines. In one order, the Supreme Court addressed a similar challenge raised by the search engines. The search engines contended that the keyword “Medical Tourism in India” should not be added to the list of keywords specified above. The court agreed with the search engines’ contention, and stated that:

“To elaborate, if somebody intends to search for 'Medical Tourism In India' is entitled to search as long as the content does not frustrate or defeat the restriction postulated under Section 22 of the Act. It is made clear that there is no need on the part of anyone to infer that it creates any kind of curtailment in his right to access information, knowledge and wisdom and his freedom of expression.”

In fact, none of these orders address the risks associated with blocking of search results on the basis of list of keywords. Blocking search results are not fool-proof measures of ensuring against sex-identification in India. The Supreme Court’s orders required search results to be removed only for users in India – which means users can resort to using tools such as proxy networks or Virtual Private Networks (‘VPN’) to hide their location. Further, since these orders are directed only against three companies – Google, Yahoo and Microsoft, search engines run by other companies aren’t technically bound to follow these orders and therefore, could provide access to the very same advertisements.

In another case, which pertained to the circulation of rape videos and child pornography on the internet, the Supreme Court again issued orders against Google, Facebook and Whatsapp to remove access to such content.³⁴ The court also required these intermediaries to use AI systems to screen content and remove content at the stage of their upload, if this content contains rape videos or child pornography.

In both these cases, the Supreme Court has imposed higher degrees of liability on intermediaries for the ‘protection’ of women. Removal of content in these cases is certainly required, since the content in question – be it advertisements that allow for female foeticide or rape videos or child pornography, is content that must not be circulated and easily accessible. However, clearer safeguards must also be mandated in such cases, to prevent over-censorship. The right to free speech and access to information cannot be undermined in the name of ensuring women’s rights. Instead, courts must strive to ensure a fair balance between the two.

Another example of the disjunct between legal text and judicial interpretation is the body of case-law on ‘obscenity’. In a string of cases pertaining to circulation of allegedly obscene material via print media, the

³³ This order can be accessed from: <http://supremecourtfindia.nic.in/jonew/ropor/rop/all/892164.pdf>

³⁴ In Re: Prajwala Letter Dated 18.2.2015 Videos Of Sexual Violence And Recommendations, SMW (Crim) 3 of 2015 (SC 2017) (available from http://supremecourtfindia.nic.in/supremecourt/2015/6818/6818_2015_Order_23-Oct-2017.pdf)

Supreme Court of India adopted an extremely broad definition of obscenity - one that allowed any material containing nudity to be treated as obscene. This definition underwent a change, in the landmark case of *Aveek Sarkar and Anr v. State of West Bengal and Ors*, which pertained to articles in two Indian magazines - both of which had a picture of Boris Becker (tennis player) and Barbara Feltus (an actress) posing nude as a statement against apartheid. The court laid down a new standard for evaluation of obscenity under the IPC - the 'community standards' test.³⁵ The court mandated evaluation of nudity in the context in which it is portrayed. It also mandated labelling of material of 'obscene' only if it has "a tendency of exciting lustful thoughts", and the same has to be judged through the lens of an average person. The community standard test was further upheld as the right test to be used in cases of obscenity, by the Supreme Court of India in *Shreya Singhal v. Union of India*. The definition of obscenity underwent another change, in a case wherein the accused man posted pictures of the complainant along with lewd comments about her body in online chatrooms. The district court in this case convicted the accused for circulating obscene material and therefore violating Section 67 of the IT Act.

While these judgments have progressively heightened the bar for what amounts to 'obscene', they still provide plenty of room for misuse. None of these judgments provide protection against such constructions of 'obscenity', since the definitions provided by the courts are not watertight. For example, the Supreme Court in the *Aveek Sarkar* case borrowed the definition of 'obscenity' from an American Supreme Court case titled *Roth v. United States*. However, the definition of obscenity laid down in *Roth* is three-fold - that the concerned content is "patently offensive", that it possesses no "redeeming social value", and that it has been evaluated using the community standards test. Such a definition is a clear definition of 'obscenity', since the first and second part of the definition reduces the possibility of cultural subjectivities creeping in. In *Aveek Sarkar* however, the Indian Supreme Court did not incorporate these two parts of the definition, and only used the third part of the definition provided in *Roth*. As explained before, cultural norms in India are such that even slightly suggestive sexual expression by women is considered 'lustful' and therefore 'obscene'. And this continues to remain a risk, because of the partially borrowed, and therefore weaker, definition of 'obscenity'.

As a result therefore, a better framework for women to receive justice in cases of online abuse would be to file charges under provisions that do not refer to obscenity. For example, a provision that must be used more, wherever applicable, is Section 66E of the IT Act. In fact, in a case before a district court in Maharashtra, the court convicted the accused under Section 66E, even though such a charge was not formulated by the police.³⁶ This case is also one of the few in which cases, where Section 66E was used to tackle non-consensual sexual images. The accused and the complainant, in this case, were engaged to be married, but the marriage did not materialise. Following this, the accused sent a series of nude images of the complainant to her, and was convicted for the same.

³⁵ *Aveek Sarkar and Anr v. State of West Bengal and Ors* [2014] 4 SCC 257, ¶ 24 (available from <http://supremecourtfindia.nic.in/jonew/judis/41203.pdf>)

³⁶ *The State (Cyber Cell) v. Yogisha @ Yogesh Pandurang Prabhu*, C.C. NO. 3700686/PS/2009 (Chief Met. Mag Bom 2015)

The recent recognition of the right to of privacy as a fundamental right under the Indian constitution by the Supreme court provides further impetus for the use of provisions, such as Section 66E of the IT Act, that treat non-consensual disclosure of images of a woman's private parts as a violation of her privacy. In this landmark case, the court recognises that privacy is a multi-faceted right, and includes the right to bodily integrity as well as informational privacy.³⁷ The court, in elaborating on the doctrinal foundations of the right to privacy, also refers to the feminist critique of privacy. The court is also cognizant of the use of privacy as a shield to engage in patriarchal practices, including violence against women, and warns against continued use of the right in such a manner.

What is therefore the need of the hour, is greater legal literacy of women in India, that would enable them to use the legal provisions to their advantage. Along with all the other suggestions made throughout this submission, legal awareness programmes, undertaken by civil society groups in collaboration with government officials, is one more suggestion that would significantly aid in empowering women to fight online abuse in India.

³⁷ Justice K S Puttaswamy (Retd.), and Anr v. Union of India and Ors. WP(C) 494 of 2012, 198-199 (SC 2017) (available from http://supremecourtfindia.nic.in/supremecourt/2012/35071/35071_2012_Judgement_24-Aug-2017.pdf)