



LEGAL PERSPECTIVES REGARDING ONLINE HARASSMENT OF WOMEN

Dr. Lina Acca Mathew
Assistant Professor,
Govt Law College, Ernakulam

Abstract

There are various cybercrimes of online harassment of women-pornography, morphing, fake profiles, harassment, stalking etc. The Information Technology Act as well as the Indian Penal Code lay down the substantive law to curb such offences. Online harassment of women is a problem which deserves special consideration, as section 66A of the Information Technology Act was struck down by the Supreme Court of India in 2015. This paper discusses the problem of online harassment and its legal solutions through statutes and case law, as well as criminological aspects from a victim's perspective from existing literature. More importantly, this paper attempts to throw light on the fundamental flaws of the Indian legal system embodied in its adversarial approach, and recommends certain systemic changes as part of corrective measures.

Key Words: online harassment- cyber bullying- morphing- fake profiling- cyber stalking-impersonation- identity theft- defamation- violation of body privacy-online fraudsters-gendered cyber hate- casting aspersions on women

1. INTRODUCTION

Violence against women has acquired new forms in the digital space. It can also be seen that women and other marginalised sections are also globally resisting and protest on digital platforms, as seen in the #metoo movement. However commendable these efforts are, ultimately it is the law that needs to be strengthened in order to bring offenders to book. There are many legal provisions in India for



tackling cybercrimes like online harassment of women. But we can see that loss of confidence in the legal system even results in citizens taking law into their own hands. Such vigilantism is against the Rule of Law. This paper examines whether there is need for a systemic shift in order to address various fundamental failures in our justice delivery system. In this context, this could be through better laws and policies, as well as methods of better police supervision through shifting from an adversary system of prosecution to an inquisitorial system of prosecution, or giving a statutory role to the office of the Directorate of Prosecutions to supervise the police.

This article seeks to examine these possibilities through an exploration of the law in India regarding cybercrimes against women with emphasis on online harassment of women.

2. CYBERCRIMES AGAINST WOMEN AND THE LAW REGARDING ONLINE HARASSMENT

The cyberspace regime is the brave new world of today- unknown, without borders, dynamic, ever expanding, and a place where anonymity can be preserved if necessary. In this new world, risks faced by women are considerably high. These risks involve online harassment or cyber bullying, morphing, fake profiling, cyber stalking, impersonation, identity theft, defamation, violation of body privacy, exposure to online fraudsters, gendered cyber hate, casting aspersions on women targets in a most indecent manner, workplace harassment with digital aid etc. The Indian Penal Code 1860 and the Information Technology Act 2000 are the main legislations dealing with offences in this regard. The Protection of Children Against Sexual Offences Act 2012 also has provisions to curtail cybercrimes of sexual nature against children.

Online harassment or Cyber bullying would mean an overt, intentional act of aggression towards another person online, or a wilful and repeated harm inflicted through the use of computers, cell phones and other electronic devices. Morphing, on the other hand, involves editing the original picture by an unauthorized user so as to create a fake identity. In cyber stalking, the stalker or predator follows the victim's movements in cyberspace and continually engaging in mental assault by posting defamatory/abusive messages on social media or bulletin boards frequented by the victim, entering live chat rooms where the victim is present and sending abusive messages. The stalker impersonates the victim online – by creating a separate e-mail account and sending abusive e-mails or fraudulent spam in the



victim's name, or by creating fake profiles on social media and divulging personal details like phone number and address, with sexual solicitation to meet the victim in real-time. The stalker can commit identity theft through unauthorised entry or damage to data or equipment, whereby the password of the victim is hacked and information is gathered for harassment. Voyeurism, capturing images of private body parts, disseminating these images online without her consent, creating pornographic images of women and speaking of women in a derogatory or lascivious manner are other wrongs against women.

Trolling women through threatening, extremely graphic and violent cyberhate, the posting of deliberately inflammatory material to provoke responses and emotional reactions in targets is another phenomenon. Gendered cyberhate is another term used to refer to a range of phenomena occurring at the gender-technology-violence nexus. It includes sexually graphic rape and death threats, and/or persistent, unwanted sexual advances from senders who tend to become aggressive if they are ignored or rebuffed. Signal characteristics of the discourse include profanity and violent sexualised rhetoric. The intelligence, mental health, sexual attractiveness of the targets is discussed in a derogatory manner, with targets being appraised of their capacity to engage in different kinds of sexual intercourse (Jane, 2020).

The reasons for these risks are many. The transcendental nature of the internet itself, with no boundaries, ever changing, contributes to these risks. The low equipment cost of tools, and easy concealment of offender due to anonymity offered by the internet design itself are contributing factors. The existence of numerous vulnerable and easy targets helps to aggravate the problem. Loneliness is a prime cause as many female students and staff live away from family and work for long hours over the computers and use mobile phones for communication. Thereby computers and mobile phones become their trusted pals. Most of the cybercrimes against women remain unreported due to hesitation and shyness of the victim and her fear of defamation of her name and her family's name.

2.1 LAWS ON ONLINE HARASSMENT OF WOMEN IN INDIA

The Budapest Convention on Cyber crime is the world's first international treaty on cyber crime which entered in to force in 2004. However, India is not a signatory to it, hence this paper does not discuss this convention domestic Indian law, section 66A of the Information Technology Act 2000 made it an offence to send offensive messages through a computer resource or communications device which included any information that is grossly offensive or menacing character. Punishment was laid down as imprisonment for a term up to three years and with



fine. However, this provision was struck down in entirety by the Supreme Court of India in *Shreya Singhal v. Union of India* (2015) upon the reasoning that the terms ‘grossly offensive’ or ‘has menacing character’ have not been defined by legislature and hence impinge upon the fundamental free speech guarantees granted under Article 19 of the Constitution of India. However, this has led to lacuna in the legal framework to mete out punishment to an online bully of women, as there is need to resort to multiple provisions in the Indian Penal Code under Section 354A IPC relating to sexual harassment, section 509 IPC relating to uttering word, gesture or act intended to insult the modesty of a woman, sections 499, 500 IPC regarding defamation, section 503 IPC regarding criminal intimidation and section 507 IPC regarding criminal intimidation by an anonymous communication. It would have been appropriate for the Supreme Court to strike down those parts of the provision which would infringe upon free speech guarantees, while retaining the remainder of the provision in order to provide relief to sexually harassed women online.

However, the Kerala High Court has responded pro-actively to problems of online harassment of women.

In *Hareesh v. State of Kerala* (2018), the applicant created a fake Facebook profile, posted morphed obscene photographs of the victim online, posted her mobile number under the said obscene post in order to enable strangers to contact her. Thereafter, an anticipatory bail application was made by the applicant apprehending arrest in respect of offences punishable under Section 354(D) of IPC and Sections 67 and 67A of the IT Act. The Kerala High court denied the application for anticipatory bail on the ground that materials on record affirmed the involvement of the applicant in the offences and it would not be proper for the court to interfere with the investigation.

In *Majeesh K. Mathew v. State of Kerala* (2018), the accused posted certain pictures of the complainant and her husband on Facebook with accompanying comments containing sexually-explicit content. The court opined that the Facebook posts amounted to online sexual abuse and harassment of the complainant. The court said that the accused’s abusive behaviour was a form of cyber bullying, cyber misogyny and cyber sexism.

2.2 AN OVER VIEW OF THE ADVERSARIAL SYSTEM FOLLOWED IN INDIA

A solution proposed at the onset itself for eliminating arbitrariness of police functioning within the Indian legal framework is to evolve methods of better police supervision through shifting from an adversary system of prosecution to an



inquisitorial system of prosecution, or giving a statutory role to the office of the Directorate of Prosecutions to supervise the police.

To elucidate further on this, India follows the adversarial system of prosecution and trial, as part of the common law legacy left by our colonial masters. This means that rather than actively participating in the forensic discussion in court, the judge serves as a neutral arbitrator who maintains the balance between the opposing rivals. The adversarial system assumes that the best way to get to the truth of a matter is through a competitive process between the prosecution and the defence to determine the facts and application of the law accurately.

In the adversarial system, the judge's job is to serve as an independent umpire who determines whether the prosecution has established its case beyond a reasonable doubt. The burden of proof rests with the prosecution to establish guilt. The principle of orality, which states that evidence should typically be received through the live, oral testimony of witnesses in court, is at the heart of the case. The evidence presented by the parties is essentially what the court will consider. The criminal justice system is also typically seen as a structure to enable a dispute between the state and the accused because it is conceptualised as an offence against the state. As a result, the victim is inevitably left out. In an adversarial system, the parties cross-examine witnesses to disprove the other side's claims and unearth material that the other side has not raised. Therefore, we can conclude that in the adversarial system, parties have a great deal of freedom in how they present their evidence, which mostly covers how witnesses are cross-examined. The judge plays a passive role in the adversarial system since he is not required to actively seek for the truth. The judge does not participate in the investigation or offer the prosecution any directions.

In adversarial systems, the emphasis of trial is upon procedural correctness. Because the adversarial system demands rigorous obedience to the law's procedural requirements, there is less room for the state to be prejudiced against the accused. It offers plenty of chances to learn the truth in a courtroom laboratory. This concept enables both parties to completely vent their complaints and have a judge who is unbiased and impartial reach a decision. The fundamental benefit of this approach is that the judge is not directly involved in the investigation since otherwise, his decision-making would be biased. The best protection for a person's right to privacy is provided by it. There is, in essence, a guarantee of a fair trial.

This system's primary flaw is that it disproportionately favours the accused and is oblivious to the needs and rights of the victim. The majority of legal matters



in this system do not proceed to trial, which might result in serious injustice when the accused is represented by an inexperienced or overburdened advocate. Complex technical issues like those involving science, technology, or tax or accounting requirements are not accurately resolved. We can claim that justice delayed is justice denied because too much emphasis on procedure may cause needless delay. Without a voice or a place in the system, the victim serves as the prosecution's witness, and as a result, he ends up being the criminal justice system's forgotten object and subject.

On the other hand, an inquisitorial system has prevalence in countries which follow the civil law system or the continental law system which basically relates to the Romano Germanic system of law. The accused is presumed to be innocent in an inquisitorial system, and it is the judge's responsibility to ascertain the truth. The judge's inner satisfaction or conviction is the necessary standard of proof. The parties' only responsibility in an inquisitorial system is to submit potential questions for the witnesses to answer. There is no formal cross-examination; the judge asks the witnesses the questions.

In this system a preliminary investigation is conducted by a Judge of Instruction or the investigating magistrate as a means of seeking the truth. The investigating magistrate is actively involved in overseeing an investigation of the facts of a case and has the authority to seek out specific evidence, direct lines of inquiry in favour of the prosecution or defence, question complainants, witnesses, and suspects, and ultimately decide whether there is enough evidence to proceed to trial. The trial judge is then given a dossier, which the investigating magistrate has prepared. As a result, the prosecutor's discretion is limited, and the defendant typically cannot enter a guilty plea.

The prosecutor, the police, the defence attorney, and the court work together to achieve justice. The court can take an active part in gathering evidence, looking into the matter, and questioning witnesses. In an inquisitorial proceeding, the judge serves as the main interrogator of the defendant and witnesses and is required to take testimony until the truth is established. Here, the judge's assessment of the evidence's relevance determines whether it is admissible. Thus, as long as the Judge finds the evidence to be pertinent, it will probably be permitted regardless of its veracity and potential for prejudice. However, the defence only has a limited ability to suggest questions to the judge in an inquisitorial system. The Judge has the discretion to determine whether to accept the suggestions or not. The emphasis of trial is upon factual certainty.



The accused, the victim, and the judge are all entitled to attend the hearing before the trial. However the involvement of the parties is constrained to suggesting the questions that may be presented to the witnesses. There is no formal cross-examination; the judge is the one asking the witnesses' questions.

In an inquisitorial system, victims have a more official involvement in the pre-trial investigation stages, including the legal right to demand specific lines of inquiry or to take part in interviews by the investigating authority. During the trial phase, the victim may also be represented by counsel in several civil law jurisdictions. The victim of the crime is a full party and participates in the pre-trial investigation and trial as a "partie civile," as well as having the criminal proceedings decide on his request for civil relief (arising from the crime). The right to seek restitution for harm done gives birth to the civil party's ability to take legal action.

An advantage of shifting to an inquisitorial system is that such would provide for a preliminary judicial screening before cognizance is taken by the judge of the offence. It is a system which does not exempt anyone or provide special treatment to some, and thereby reduces the advantage of wealth within the justice system. It features independent review of all teams, and makes distortion of evidence easier to detect. Through the inquisitorial system, an indirect check or screening on police action is brought about by the investigating judge.

The disadvantage of the inquisitorial system is that there is an inherent likelihood of bias as the court itself participates in the investigation proceedings. The cardinal principle of proof beyond reasonable doubt may tend to get compromised in such a system and result in justice being denied to the accused.

Striking a balance between adversarial and inquisitorial systems

Before the Code of Criminal Procedure was re-enacted in 1973, the police themselves acted as prosecutors representing the state. This practice was stopped and Public Prosecutors were appointed in order to bring about a separation between judicial and executive functions. However, the power to pick and choose the evidence that goes before the public prosecutor lies within the absolute domain of the police, unfettered by any external control- mechanism. Currently, the prosecution has no supervisory role in monitoring the investigation and the documents gathered by the police. This results in various procedural lapses. So within the adversarial system itself, without making a tremendous shift towards an inquisitorial system of prosecution, a system of checks and balances upon police powers and action can be devised, by providing by means of statute, a supervisory role to the office of the



Director of Public Prosecutions. The Directorate can overlook the functioning of the police from the onset of the case to before filing of charge-sheet in order to bring about accountability in the actions of the police. This would be in the lines of the functioning of the office of the District Attorney in the USA.

3. SOCIAL SCIENCE EVIDENCE REGARDING PERSPECTIVES OF A VICTIM OF ONLINE SEXUAL HARASSMENT

It can be seen from facts laid down in section 2.2. that the adversarial system in place today is not designed to defend minorities, indigenous people, or weaker communities. The adversarial system makes access to justice impossible for the underprivileged since it entails a high standard of proof and hefty costs. Numerous thousands of people are awaiting trials in courts due to the lengthy adversarial process, which also adds to the trial length.

This contextual framework let us explore victim's perspectives on online sexual harassment, where the perpetrator is not physically present, yet the anguish suffered by the victim is multiplied as she is constantly surrounded and reminded by harmful content. Feelings of despair and helplessness enfold the victim, as it is evident that our legal machinery is not tuned to offer immediate relief.

This section lays down the motive for cybercrimes as sexual harassment and exploitation, proceeds to the definitions of various crimes of gendered cyberhate, discusses the economic and psychological harms of gendered cyberhate and finally proceeds to the responses of women towards these abuses.

3.1 Motives for Online Sexual Harassment

The National Crime Records Bureau publishes a set of reports for each year titled "Crime in India." In its 2012 Report, it was stated that among the 96 cases registered under cybercrimes in Kerala, the motive was harassment of women. In 2019, among the various motives for commission of cybercrimes, sexual exploitation was seen in 2266 of the crimes reported for the whole of India, and in 70 of the cases reported from Kerala.

3.2 Definitions of Online Sexual Harassment

A paper published by Sethi and Ghatak (2018) defines Cyber Sexual Harassment (CSH) as the use of the internet to make uninvited advances, communications or interactions with any other person or entity, in the form of unsolicited posts and comments on social media sites, emails, texts, graphic images and posts directed



at the victim, instant messaging etc. Jane (2020) enumerates the manifestations of gendered cyberhate into Cyber bullying, doxxing, cyberstalking, Google bombing, identity theft and impersonation, rape video blackmail, revenge pornography, sextortion, swatting, Wikipedia vandalism and mob attacks.

3.3 Effects of harms caused by Online Sexual Harassment

The study by Sethi and Ghatak (2018) focussed on gauging the awareness levels on gender-based cyber sexual harassment so that the perception of women on cybercrime with reference to the Indian psyche could be evidenced. Effects of cyber sexual harassment on the victims were identified as two-(1) mental torture and (2) damage to personal relationships due to lack of support and trust from partners.

Jane (2020) lays down the harms of gendered cyberhate. Gendered cyberhate results in economic loss, affecting women's ability to find and keep jobs, to market their personal brands and businesses, to network socially and professionally. Loss of reputation has repercussions for future employment and career building prospects. Mental trauma is caused by debilitating fear, feelings of anxiety, sadness, shame, isolation, vulnerability, unsafeness, distress, pain, shock, terror and violation. These factors can lead to anxiety disorder, depression, panic attacks, agoraphobia, self harm and psychological breakdown.

3.4 Women's Responses to Online Sexual Harassment

The study by Sethi and Ghatak (2018) proposed a preliminary self-help model to follow-identifying the act of cyber sexual harassment, blocking the harasser and reporting him to social media platforms and seeking assistance from the cyber police. Pursuing legal action is of last resort, and the authors suggest filing a public interest litigation to challenge governmental policies and procedures and to provoke the political system into responding to a problem that has been hitherto ignored. Such a public interest litigation would be advantageous as it would raise awareness and save costs as a large number of the public were affected by the act of cyber sexual harassment.

However, Jane (2020) makes a statement that many women are reclaiming a sense of power and agency by using a range of strategies to fight back against and sometimes enact revenge on their male attackers. Jane (2020) outlines various coping strategies of women to deal with online sexual abuse:

1. Distancing
2. Rationalising



3. Practicing technological hygiene
4. Restricting internet use to avoid interaction with strangers
5. Reporting
6. Confronting attackers whether by similarly abusive tactics, reason, humour, good natured appeals to assailants as fellow internet users
7. Traditional awareness –raising and advocacy activism like writing/speaking about cyberhate, signing or launching petitions, lobbying platforms and policy makers, rallying support from online and/or offline communities, providing assistance to other female targets, forming or joining activist groups, archiving received cyberhate for activist purposes
8. Engaging in performance based activism
9. Engaging in online vigilantism aka digilantism-extrajudicial practices intended to punish attackers or otherwise bring them to account-calling out, or naming and shaming online attackers, and/or attempting to bring antagonists to account by contacting their employers or family members and/or hunting down and confronting them offline.

Even though digilantism offers many benefits and is understandable given the dearth of insitutional interventions, Jane (2020) warns about the risks that individual activists can consequentially face, namely, contribute to an escalating cycle of amplifying aggression online and thereby involve large groups of digilantes engaging in excessive forms of retaliation.

3.5 Potential Remedies to the Menace

Jane (2020) discussed various strategies to curb the menace of online harassment of women. Fines can be levied for recognised offences. Civil remedies like protection orders and litigation can be tools against individual offenders. Class action law suits against software designers and platform operators who create and maintain unsafe environments can be initiated. Platform operators and technology designers can be urged to implement measures such as a ban on instant/disposable and/or anonymous accounts. It may be noted here that a similar action was taken in India when a fine of Rs. 10 lakh was imposed by the court on intermediaries for disclosing the victim's identity in the *Kathua* case. Jane (2020) suggested that software designers and platform managers who do not take responsibility for designing safer spaces-like the safety built into offline environments- could face potential fines, liability and even criminal sanctions if their users are harmed. Ethics



could be taught to engineering and design students for making value-sensitive designs. Jane (2020) succinctly pointed out that the most comprehensive and multifaceted response to gendered cyberhate cannot succeed without a concomitant shift in the inequitable treatment of women and girls in the broader culture

CONCLUSION

The systemic lacuna in the Rule of Law framework not only exists in Kerala and in the rest of India, but also in different countries across the globe.

There is an established cyber law frame work in India which has to be strengthened through bringing to life the system of cyber courts as clearly laid down in the Information Technology Act 2000. Section 66A of the Information Technology Act should be re-enacted in words that specifically punish online harassment. There can be imposition of heavy fines upon platforms like Facebook, You Tube, Twitter etc for perpetration of online harassment of women.

There are many legal provisions in India for tackling gendered cyber hate. However it is to be understood that a continued adherence to the accusatorial system of prosecution has its own flaws. It is high time to make a more fundamental shift to an inquisitorial system of prosecution, or give the public prosecutor's office a supervisory role over the police in order to address various systemic failures in justice so that people do not lose faith in the Rule of Law.

Notes

1. Such messages can include (1) any information that is grossly offensive or has menacing character or (2) any information which the sender knows to be false, but persistently uses the computer resource or communication device for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation or cause enmity or hatred or ill will or (3) any message to cause annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages.
2. Srikrishna, B. N. (2008) "The Indian Legal System," *International Journal of Legal Information*: 36(2) Article 8 242-244
3. Jonathan Doak (2008) *Victims Rights, Human Rights and Criminal Justice (USA: Bloomsbury)* at 34.
4. Deshmukh, Anand K (2020). *Adversarial and Inquisitorial Models of Criminal Justice System: A Comparative Analysis. International Journal of Legal Science and Innovation* 2(2) 70-77 at 71.
5. Ibid
6. Ibid at 72
7. Ibid at 73



References

1. Deepa Sethi and Sanchita Gharak (2018). Mitigating Cyber Sexual Harassment: An Insight from India. *Asian Themes in Social Sciences Research* 1(2): 34-43
2. Deshmukh, Anand K. (2020). Adversarial and Inquisitorial Models of Criminal Justice System: A Comparative Analysis. *International Journal of Legal Science and Innovation* 2(2) 70-77
3. Emma A. Jane (2020). Online Abuse and Harassment. Karen Ross, Ingrid Bachmann, Valentina Cardo, Sujata Moorti, and Marco Scarcelli (Eds.) *The International Encyclopedia of Gender, Media, and Communication*. John Wiley and Sons.
4. Jonathan Doak (2008) *Victims Rights, Human Rights and Criminal Justice* (USA: Bloomsbury)
5. National Crime Records Bureau "Crime In India"- Cyber Crimes- Cyber Crimes against Women
6. Srikrishna, B. N. (2008) "The Indian Legal System," *International Journal of Legal Information*: 36(2) Article 8 242-244

Email: linamathew@gmail.com