

Sexual harassment, modesty and the gender assumptions of criminal law

Should a core criminal law offence addressing sexual harassment continue to restrict victimhood to women alone?



New Criminal Laws

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The ongoing litigation involving Newsland journalists and Abhijit Iyer-Mitra has so far attracted public attention largely because of the allegations and the procedural twists that have followed. A magistrate directed registration of an FIR; the matter subsequently travelled through the sessions court and the Delhi High Court. Most recently, the sessions court characterised the social media posts as a form of poetic expression (*shaayari*) not directed at any particular woman.

Yet, the case is significant for another reason. It brings into view two provisions of the Bharatiya Nyaya Sanhita (BNS), 2023 – Section 75 on sexual harassment and Section 79 on words, gestures or acts intended to insult the “modesty of a woman.” Examined together, these provisions

reveal different legal understandings of gender and harm. Read alongside developments in gender jurisprudence over the last decade, they also expose certain tensions that remain largely unexplored.

Two offences, two models of gender

Section 75 criminalises sexual harassment. The provision is notable for its explicit gender specificity. It identifies a man as the perpetrator and a woman as the victim. The offence is, therefore, gender-specific at both ends: it specifies not only who may suffer the harm, but also who may commit it.

Section 79 operates differently. It criminalises words, gestures or acts intended to insult the modesty of a woman. Here, the victim remains gender-specific, a woman, but the perpetrator is not. The provision applies to “whoever” commits the prohibited conduct. In principle, therefore, the offence may be committed by a man, a woman or any other person.

The distinction reflects different assumptions about the nature of the wrong being addressed. Section 75 is built around a particular understanding of sexual harassment as conduct committed by men against women. Section 79, by contrast, is concerned with a form of injury directed at women regardless of the gender identity of the person causing it.

The provisions differ in another important respect. Section 75 is primarily act-based. It lists specific forms of conduct, including sexually coloured remarks. Once the prohibited act is established, the offence does not depend upon proving intention. Section 79, however, expressly turns on intention. The prosecution must establish that the conduct was intended to insult the modesty of a woman. Thus, *mens rea* is an essential ingredient of Section 79, but not of Section 75.

Stable categories in an unstable landscape

The gender specificity of Section 75 appears straightforward. Yet, the provision raises an interesting question when viewed alongside developments since *NALSA v Union of India* (2014). *NALSA* is often remembered for recognising the rights of transgender persons and affirming self-determination of gender. In doing so, the judgment

introduced a more complex understanding of gender than the binary categories that traditionally structured the law.

Section 75, however, assumes that the categories of “man” and “woman” are sufficiently stable to determine who may be a perpetrator and who may be a victim. In most cases, this presents no practical difficulty. Yet, the provision sits uneasily alongside a legal landscape increasingly called upon to engage claims that challenge the stability of those very categories.

The same difficulty extends to the category of “woman”. If transgender women are legally recognised as women, questions inevitably arise about how gender-specific criminal provisions are to be interpreted and applied.

The significance of the present litigation lies partly in the fact that the allegations are directed against an openly gay man. That fact does not alter the merits of the allegations. It does, however, draw attention to assumptions that ordinarily remain invisible: assumptions that perpetrators of sexual harassment are men and victims are women; that sexual harassment is primarily conceptualised through that relational framework; and that the categories of “man” and “woman” are sufficiently stable for criminal law to assign liability and protection through them. The case, therefore, provides an unusual opportunity to examine the categories on which these offences depend.

Beyond women-only protection?

The case also raises a broader question about the scope of legal protection against sexual harassment. Historically, laws addressing sexual harassment emerged in response to the pervasive harassment experienced by women. That history remains important. Women continue to experience sexual harassment in disproportionate ways and often under conditions of structural inequality.

Contemporary discussions increasingly recognise that harassment is not experienced by women alone. Gay men, transgender persons and gender-non-conforming individuals frequently encounter sexualised forms of abuse rooted in assumptions about masculinity, femininity and sexual conformity.

Section 18 of the Transgender Persons (Protection of Rights) Act, 2019 provides protection against sexual abuse. Yet, that protection operates outside the framework of the BNS, carries a lesser penalty and is confined to transgender persons. Recent amendments have also narrowed the scope of that category, making the relationship between these protections and the broader criminal law framework an increasingly important question. The question raised by Section 75 is, therefore, different: whether a core criminal law offence addressing sexual harassment should continue to restrict victimhood to women alone.

Sexual harassment remains a profoundly gendered phenomenon. But preserving that insight need not require limiting protection to women alone.

The continuing place of “modesty”

If Section 75 invites scrutiny of gender categories, Section 79 invites scrutiny of language. The idea of a woman’s “modesty” is among the most enduring concepts inherited from older criminal law traditions. The term survived the transition from the British colonial Indian Penal Code (IPC) of 1860 to the post-colonial BNS, 2023. Its continued presence from 19th century Victorian perceptions to 21st century India raises obvious questions.

What exactly is being protected when the law protects a woman’s modesty? Is the injury better understood as an affront to the dignity of women?

The distinction is not merely semantic. Modesty reflects an older vocabulary of gendered virtue. Dignity is a constitutional value grounded in rights and equal citizenship.

The continued retention of “modesty” in the BNS suggests that traces of older understandings of gendered injury remain embedded within contemporary criminal law. Whether that vocabulary remains appropriate is a question that deserves serious discussion.

Looking beyond the present dispute

The allegations in the present case will ultimately be determined through legal processes. The merits of those allegations are for courts to consider.

Whatever the outcome of the litigation, it has drawn attention to assumptions about gender and injury embedded in criminal law. Those assumptions are reflected both in the restriction of sexual harassment protections to women under Section 75 and in the continued reliance on the language of a woman's “modesty” under Section 79.

The case suggests that the time may have come to reconsider whether modesty should yield to the constitutional language of dignity, and whether the gender-specific structure of Section 75 should be retained for perpetrators while extending protection to vulnerable victims beyond women alone.

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