

Guavas and Genitals

A research study in Section 67 of the Information Technology Act

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Point of View, Mumbai, India

Introduction

Hullabuloo in the guava orchard¹

It all started with a link. Not with a frayed, yellowing newsclip, as it used to in analog times, but an online link to this report: '*Orgy*' video on WhatsApp lands four in the soup²

The report briefly described an event that had taken place in November 2014 in Pune, a thriving city four hours from Mumbai. Four young men, all of 17 years, all just starting college or finishing school or some such, had landed up in a public garden one afternoon for some fun and games. And, apparently, for some guavas. As one of them later told the police:

“Three of us had gone there to eat guavas. But when we reached there we started playing with each others' genitals. We then stopped under a tamarind tree, where two of us had oral and anal sex while the third shot it on his phone. This was repeated on all three. After two hours, we returned home.”³

Let's leave the juicy segue from guavas to tamarind aside for now. When one of the four shared this story with a friend, he wasn't believed. Easy to imagine why; it sounds unbelievable when stated like this. So the young man provided proof – or evidence – in the form most common to the digital age: a video clip filmed on a cellphone. His friend uploaded the clip on the Worldly Affairs WhatsApp group, from where it “spread like wildfire”.

Until someone who saw it called the cops.

The four young men were arrested for circulating content that was *obscene*. They were charged with circulating obscene material under Section 292 of the Indian Penal Code.⁴

¹ Desai, K. (1998). *Hullabaloo in the Guava Orchard*. New York: ATLANTIC MONTHLY PRESS

² Ansari, M. (2014, 26 Nov). ‘Orgy’ video on WhatsApp lands four in the soup. *Pune Mirror*. www.punemirror.indiatimes.com/pune/civic/articleshow/45276484.cms?

³ *ibid.*

⁴ How come the boys weren't arrested under the infamous Section 377 of the Indian Penal Code which deems 'carnal

This unusual case threw up a number of questions. Some related to the incident in the park. *Was this really what had happened? Or had something gotten lost in translation?* Some related to sexuality. *Was this play? Were they gay? Did it matter?* Some related to the sex being filmed. *Was the sex staged for filming? Or was filming part of the erotic charge?* Some related to digital cultures of sharing. *Did the four men know the video was going to be shared by others? Was consent assumed, bypassed, or irrelevant?* And some related to the fluidities of spaces as an act meant for somewhat private consumption became increasingly public with each changing hand. *Was this a public performance, a private act, or something in between? What did this mean, if anything?*⁵

Complementing these questions was another set of concerns: around law, its framing and its application. *How come the four were arrested at all?* They had only shared the video with a friend. *If someone else had shared the video, how were they legally culpable?* The video may have been sexually explicit. *But did that necessarily make it obscene?* It was hard to understand the primary harm in this case. *Who, if anyone, had actually been harmed?* If anything, it seemed like the four young men were *victims* of this video going viral – but they were they seen as perpetrators. *Shouldn't they have been protected from a privacy violation instead of being booked for circulating obscene material?*

All said and done, how can you end up as a criminal when all you've done is share a video with a friend?

So many questions. Such few answers.

intercourse against the order of nature' an 'unnatural offence' and has been used to punish same-sex behaviour?

⁵ As Gender IT editor Namita Malhotra says in a private communication, there is also the implicit understanding that being watched, being filmed is erotic in itself, linked very much to the danger of its leaking but knowing outside the moment that it shouldn't be without your consent. This is often the ignored aspect of the psychic involvement in sex that is about imagining being watched.

Bodies of Evidence

2015 was a bumper year for Section 67. A state in India secured its first-ever IT Act conviction – under this section. A case was filed against India's most famous porn actress – under this section. A comedy crew was booked for roasting famous Bollywood stars. And a few individuals were charged with making fun of politicians – all under this section.

2015 was also the year that Section 66A of the IT Act was struck down for being unconstitutional. The Supreme Court ruled that its wording - 'objectionable' content - was impermissibly vague, in the process dealing a body blow to online censorship. Sec 66A, which had been used, among other things, to arrest two teenagers for sharing and liking a Facebook post, could no longer be used for such things.

This affected Section 67 in ways that had not been foreseen.

What media reports say

After wading through NCRB and Indian Kanoon data, we took a deeper dive into Section 67. We analyzed Indian print media reports of 99 cases filed under Sec 67 in three years.

Years: 2015, 2016, 2017

Cases: 30 cases from 2015, 35 cases from 2016, 34 cases until 31 May 2017.

We located these media reports through customized searches on news.google.com, consistently using the following keyword:

Keyword: “Section 67 information technology act”

We used the exact same phrase on each search, filtered the search query for 'specific dates' and for 'relevance' – thus we were able to create replicable searches and get the same results on

news.google.com each time with little or no variation. On average, we went up to page 8 of the search results, after which there were no entries pertinent to the search query.⁶

We filed each case into one of seven categories. This is what we found in this self-selected sample⁷:

	Type of speech	2015	2016	2017	Total
1	Circulation of vulgar, lewd, obscene words or images	5	9	10	24
2	Circulation of non-consensual intimate images	9	10	9	28
3	Child pornography images	2	0	1	3
4	Religious or political speech	7	8	9	24
5	Porn or online sex sites	3	2	1	6
6	Words related to sex, including sexually-explicit words	3	2	3	8
7	Other, including sexist comments	1	4	1	5
	Total	30	35	34	99

We identified the following patterns from these 99 cases.

Crimes of consent are routinely booked as obscenity offences under Sec 67

Some consent violations that have not been legally recognized are treated as obscenity offences

Section 67 is being used to criminalize political speech

Section 67 is being used to address online harassment

Section 67 and Section 67A are used interchangeably

Section 67 is being used in cases where there is no obscenity

⁶ Each article was logged into an Excel sheet with the following details:

- Date
- Headline
- URL
- Publication
- Location
- Sections used

⁷ All these cases were booked under Section 67 or its sub-sections 67A, 67B. For example, child pornography cases are usually booked under Section 67B, the specific provision related to children. As reported in the previous chapter, none of these sections were used on their own – they were typically used with other sections of the Indian Penal Code.

Each of these is discussed below.

Crimes of consent are routinely booked as obscenity offences under Sec 67

As has been discussed earlier, the 2008 amendments to the IT Act brought in a new provision, Section 66E. “What is most striking about this law is that the requirement of consent is clearly stated,” writes Kaul Padte. “An image exposing certain parts of a person's body '*without his or her consent*' is punishable. In this respect, Section 66E is a progressive clause that places consent at the heart of criminalizing an act.”⁸

A man uploading nude images of his estranged wife⁹. A constable publishing a sex video of himself with a woman. A rejected lover posting photos of his ex-girlfriend on social media. These are some of the images in question. We found numerous cases which had been booked under Sec 67. In some instances, section 66E¹⁰ was used along with section 67, which atleast acknowledges that consent has been violated.” But these are few and far between.

Most of these images fall into one of three categories:

Filmed with consent, distributed without consent

Filmed and distributed without consent

Rape videos

Instead of referring to them as private images, media reports typically describe these images as 'obscene' or 'indecent' images, which only strengthens a morality-laden legal discourse.

Filmed with consent, distributed without consent

In a case in Navi Mumbai, Maharashtra, a man posted intimate videos of his ex-girlfriend on a WhatsApp group of 100 people after she broke off their relationship.¹¹ The videos may have

⁸ Padte, K. (2013). Op.cit.

⁹ Staff. (2016, 30 Jan). Man booked for uploading nude image of wife. *The Tribune*.

www.tribuneindia.com/news/amritsar/man-booked-for-uploading-nude-image-of-wife/189606.html

¹⁰ Section 66(E): “Punishment for violation of privacy: - Whoever, intentionally or knowingly captures, publishes or transmits the image of a private area of any person without his or her consent, under circumstances violating the privacy of that person, shall be punished with imprisonment which may extend to three years or with fine not exceeding two lakh rupees, or with both.”

¹¹ Bhuyan, P. (2015, 25 Apr). Navi Mumbai: Man uploads obscene video of ex-girlfriend, arrested. *Hindustan Times*. www.hindustantimes.com/mumbai/navi-mumbai-man-uploads-obscene-video-of-ex-girlfriend-arrested/story-qWyW

been shot consensually when they were both in a relationship. The main crime here is the violation of consent in sharing the video and **not** the making of the video itself. The man was booked under section 67 and 67(A), which implies that the main crime here is the making of the video. Usage of 67(A) is even more harmful since the section criminalises transmission or publication of “sexually explicit” materials. If it is consensual, there is no real harm in exchange or publication of sexually explicit images, videos etc. Using Sec 67A is a highly problematic way to address cases involving consensual production but non-consensual distribution of intimate images and videos.

Filmed and distributed without consent

In an unusual case¹², a video of childbirth captured by three doctors was uploaded on WhatsApp. It then went viral and was picked up and transmitted by a TV channel. Here, the three doctors were charged under section 67 – even though¹³ the main crime is the shooting and sharing of the video without the consent of the woman. If the absence of consent is one issue, the presence of obscenity is another. Can the definition of obscenity be expanded to include childbirth, of all things? Or is the presence of a vagina in the video that which made it obscene?

Another infamous example of this is the case of the kiss-and-run youth in 2017, who kissed random women and girls on video for a prank YouTube video before bolting.¹⁴ He then claimed that the women were his friends and had consented. If that is untrue, the main crime here is the violation of consent of the women involved, both in being kissed and having the video be put up online. Either which way, there is nothing “obscene” about an on-screen kiss.

[bCs2MvIoR0BvhofHtL.html](#)

¹² Though this case is outside our research’s scope year-wise, we mention it here due to the bizarre usage of section 67 and discrepancies in the people arrested as well as the reasons for their arrest.

¹³ Basheer, K. (2014, 24 Sep). WhatsApp-ing of childbirth lands gynaecologists in trouble. *BusinessLine*. www.thehindubusinessline.com/info-tech/whatsapping-of-childbirth-lands-gynaecologists-in-trouble/article6441414.ece

¹⁴ Staff. (2017, 14 Jan). Kiss-n-run youth caught but the girls were his friends or actors. *The New Indian Express*. www.newindianexpress.com/cities/delhi/2017/jan/13/kiss-n-run-youth-caught-but-the-girls-were-his-friends-or-actors-1559271.html

Rape videos

In 2016, four teenagers raped a 25 year old man, filmed the rape and then circulated it on social media.¹⁵ The perpetrators were charged under section 67. In doing so, the case does not acknowledge the fact that the survivor's consent was violated on multiple levels. A lot of the cases involving rape videos similar to this one are filed under section 67. In repeatedly doing this, the message conveyed is that the multiple violations of consent is not the crime but the fact that it was 'obscene' is the main issue.

Rape videos represent consent being violated thrice over: the rape itself, the filming, and the distribution; a few recent judgements have separated and punished each consent violation. But just as in rape itself, where consent remains a contested issue, leading to a low conviction rate, consent is sometimes contested in rape videos too. In one 2016 case in Muzaffarnagar, a 32-year-old woman filed a complaint after enduring rape and blackmail for years. While the cops arrested the main accused, who were visible in the video, an inspector general told the media that "the case did not stand even in the first stage of investigation" – to the police the videos appeared consensual.

"Can we determine a woman's consent from a video clip, viewed out of context and shared without permission?" asks journalist Nishita Jha. "If the woman's behaviour does not correspond to each viewer's private imagination of what a rape scene should look like, the act on screen is deemed consensual, regardless of what a woman herself says. This is an overruling of her agency, not unlike rape itself.

Many rape videos are used as threats to blackmail those who have been raped into silence, further denying them their right to legal redress. But even in cases where intimate images have been filmed with consent, these images are used to threaten or blackmail women into having sex. When consent is obtained through threats, blackmail and coercion, can it even be called consent?

¹⁵ Staff. (2016, 21 Oct). Ahmedabad: Four teenagers sodomise 25-yr-old man; film the act and circulate on social media. *The Indian Express*. indianexpress.com/article/india/india-news-india/ahmedabad-four-teenagers-sodomise-25-yr-old-man-film-the-act-and-circulate-on-social-media-3094592/

Or should it, more accurately, be labelled coerced sex - or rape?

Using section 67 or 67(A) to book cases in any of these categories overrides consent and strips individuals of their agency. It also propagates the idea that obscenity is the primary harm – or the crime which has to be addressed first.

Some consent violations that have not been legally recognized are treated as obscenity offences

Trawling through media reports, we found two kinds of images that represent legally 'invisible' violations of consent.

Images morphed without consent

Sexual images received without consent

While affected individuals experience these as violations of consent, these have yet to receive legal recognition.

Morphed images

In Kerala, a woman tried to file a case against those who had posted morphed images of her – with someone else's private parts - on Facebook. The police initially refused to file the case claiming that there wasn't sufficient evidence.¹⁶ This is a clear example of how law enforcement authorities dismiss cases involving violations of consent. In some cases, images of politicians have also been morphed and circulated. In 2017, a Congress leader was arrested for circulating a morphed video of singer and politician Satwinder Kaur Bitti on social media and WhatsApp.¹⁷ An image of right-wing Hindu politician Mohan Bhagwat was morphed, combining his image with the torso of a woman clad in brown pants, and circulated on social media.¹⁸ In 2016, a

¹⁶ Staff. (2016, 01 Aug). Police didn't take complaint seriously: Kerala woman whose morphed nude image posted on FB. *The News Minute*.
www.thenewsminute.com/article/police-didnt-take-complaint-seriously-kerala-woman-whose-morphed-nude-image-posted-fb-47462

¹⁷ HT Correspondent. (2017, 6 May). Cong leader held for circulating morphed porn video of party colleague-singer Satwinder Bitti. *Hindustan Times*.
www.hindustantimes.com/punjab/cong-leader-arrested-for-circulating-morphed-video-of-politician-satwinder-bitti/story-iBOCBwPPvrddwvs2mvMm2rJ.html

¹⁸ Ghatwai, M. (2016, 18 Mar). Two jailed in MP for morphed RSS leader Mohan Bhagwat image. *The Indian*

morphed image of Prime Minister Narendra Modi was circulated on a WhatsApp group.¹⁹ In all these cases, the cases were filed under section 67. When these images may have been in poor taste, they are not necessarily obscene. The main crime here is the non-consensual usage of their images.

From the number of morphing cases filed under section 67, it is clear that there is a need for a provision to deal with this issue. Morphing images requires the use of existing images – which is not always done with the consent of the individual in them. With the increasing number of easily usable photoshop software and apps, it is imperative that we have the means and laws to deal with crimes involving misuse and morphing of images and videos.

These cases are currently filed under Sec 67 because there is no other place to file them. Broadening the consent provision - Sec 66E - to recognize and cover this consent violation and misuse of a person's image is one possible option.

Sexual images received without consent

If smartphones have made it incredibly easy to share images with those who want to view them, it has made it equally easy to send images to those who may not want to see them. Unsolicited dick pics, sexual images, porn. “Years ago, the penis-photo-we-did-not-ask-for was a horrifying anomaly,” says artist Whitney Bell. “Today, the dick pic is everywhere, a sinister reminder of sexual harassment's gross ubiquity online. This behavior is so commonplace we have all just accepted it as the norm.” Bell is the woman behind “I Didn't Ask For This,” an exhibition of over 150 real, unsolicited dick pics received by the artist and other women she knows.²⁰

We found several cases of unsolicited sexual images being sent out. Seen another way, these are

Express.

<http://indianexpress.com/article/india/india-news-india/rss-chif-cyber-crime-2-jailed-in-mp-for-morphed-mohan-bhagwat-image/>

¹⁹ Staff. (2016, 28 Nov). Karnataka man arrested for posting obscene photo of PM Modi on Facebook. *The News Minute.*

<http://www.thenewsminute.com/article/karnataka-man-arrested-posting-obscene-photo-pm-modi-facebook-53533>

²⁰ http://www.huffingtonpost.in/entry/dick-pics-art-whitney-bell_us_59399965e4b0c5a35c9d654c

cases of individuals who receive unsolicited sexual images – *without their consent*. For example, the first person to be convicted under the IT Act in Maharashtra had emailed sexual images to a woman he'd met on the social network Orkut, a defunct social networking site.²¹ President Pranab Mukherjee's daughter was sent sexual messages over Facebook. BJP leader Shaina NC was sent 'obscene' messages by a political party worker in an attempt to harass her.²² Two men were arrested for posting obscene images and messages on to a WhatsApp group of Ola and Uber drivers, which could be easily accessed by the others' family and kids.²³

All these are currently filed under Sec 67 in the absence of any other provision. Is it possible to broaden Sec 66E to acknowledge and cover such violations of consent? In a context where the receipt of non-consensual images is as common as their production and distribution, the law needs to recognize that unsolicited sexual images violate the consent of the receiver.

Section 67 is being used to criminalize political speech

From 2015 to 2017, Section 67 was used for censoring tweets, posts and content which spoke out against politicians. More often than not, this content was not obscene. A trader fighting for investor rights was arrested for “hurting the religious sentiments of the Islamic community.” The head of a Muslim political party was arrested for “waging war against India” and “promoting enmity between different groups”. A 17-year-old boy was charged with “sparking communal tension” via a social app. A Muslim journalist was booked for saying that Hindu sadhus were trafficking children. Another journalist, known for writing about the police in a conflict zone, was charged with “circulating obscene material” on WhatsApp.²⁴

²¹ Staff. (2015, 4 Jul). First person in Maharashtra convicted under IT Act. *MidDay*.

<http://www.mid-day.com/articles/first-person-in-maharashtra-convicted-under-it-act/16342199>

²² Naidu, J. (2017, 6 Mar). UP man detained for sending obscene texts to BJP's Shaina NC. *Hindustan Times*.

<http://www.hindustantimes.com/mumbai-news/up-man-detained-for-sending-obscene-texts-to-bjp-s-shaina-nc/story-G3tZqEpOOXHymjt0RcUIVM.html>

²³ Staff. (2017, 26 Feb). Two cabbies held for posting obscene content on WhatsApp. *The Times of India*.

<http://timesofindia.indiatimes.com/city/hyderabad/two-cabbies-held-for-posting-obscene-content-on-whatsapp/article-show/57352944.cms>

²⁴ Kumar, Raksha. (2016, 22 Mar). Journalist arrested in Chhattisgarh for posting comments on WhatsApp. *Scroll.in*.
<https://scroll.in/article/805521/journalist-missing-in-chhattisgarh-after-bastar-police-pick-him-up>

In a particularly egregious example, a WhatsApp group administrator was arrested when a member of the group posted content critical of India's prime minister, Narendra Modi. How can admins, who act as intermediaries, be held responsible for every post on a group? Equally bizarrely, a man was charged with obscenity for posting an image of Maharashtra chief minister Devendra Fadnavis lolling on his yacht with his family – all fully clothed.²⁵ A political comment was all that it was – it certainly couldn't be called lascivious, prurient or obscene by any stretch of the imagination.

In 2017, after the Uttar Pradesh elections which made Yogi Adityanath the Chief Minister of the state, there were a lot of posts and tweets from unhappy citizens who criticised the openly pro-Hindutva xenophobic misogynistic politician. Section 67 has been repeatedly used to target those who spoke up about this publicly. This includes activist Prabha Belavangala²⁶ and poet Srijato Bhattacharya²⁷ among others. Ironically, Srijato too²⁸ used the same provision to counter online harassment from the supporters of Yogi Adityanath, the politician who he had criticised.²⁹

Our analysis of media reports on the usage of section 67 across 2015, 2016 and 2017 shows that it is being used increasingly to silence dissent against politicians and those in power, and as a censorship mechanism on artists, filmmakers, journalists etc. In other words, Section 67 is

²⁵ DNA Web Team. (2015, 10 July). Man booked under IT Act for defamatory tweet against Maha CM Devendra Fadnavis. *DNA*.

www.dnaindia.com/india/report-man-booked-under-it-act-for-defamatory-tweet-against-maha-cm-devendra-fadnavis-2103315

²⁶ PTI. (2017, 21 Mar). Bengaluru woman booked for posting 'objectionable content' about Yogi Adityanath on Facebook. *Huffington Post*.

www.huffingtonpost.in/2017/03/21/bengaluru-woman-booked-for-posting-objectionable-content-about_a_21904458/

²⁷ Staff. (2017, 23 Mar). Poem against Adityanath: Non-bailable warrant against Bengali poet Srijato for 'hurting religious sentiments'. *DNA*.

www.dnaindia.com/india/report-poem-against-adityanath-non-bailable-warrant-against-bengali-poet-srijato-for-hurting-religious-sentiments-2365518

²⁸ Staff. (2017, 23 Mar). Poem against Adityanath: Non-bailable warrant against Bengali poet Srijato for 'hurting religious sentiments'. *DNA*.

www.dnaindia.com/india/report-poem-against-adityanath-non-bailable-warrant-against-bengali-poet-srijato-for-hurting-religious-sentiments-2365518

²⁹ IANS. (2017, 26 Mar). Facebook has removed my poem 'Abhishaap': Poet Srijato Bandyopadhyay. *Financial Express*.

<http://www.financialexpress.com/india-news/facebook-has-removed-my-poem-abhishaap-poet-srijato-bandyopadhyay/602576/>

increasingly becoming a tool of the political elite. This raises a related issue: Is Section 67 being used as a substitute for Section 66A, which was read down in 2015?³⁰ Is 'obscene speech' now being used as a proxy for 'objectionable speech'? As technology lawyer NS Nappinai has asked: Is 67 the new 66A?³¹

Section 67 is also used for censoring artistic content

In 2015, the online comedy group All India Bakchod was charged under section 67 along with other provisions for a knockout roast following an uproar.³² In 2016, Tanmay Bhat, a member of the All India Bakchod core team, made a Snapchat video poking fun at Sachin Tendulkar and Lata Mangeshkar.³³ This was followed by a huge uproar with demands to arrest him and charge him under section 67 of the IT Act, again for 'obscene' content. The roast and Snapchat video may have been tasteless, but were they *obscene*?

Section 67 is being used to address online harassment

In 2015, Swati Chaturvedi, a Delhi-based journalist, faced harassment from a Twitter handle @LutyensInsider, which unleashed a malicious and sexist social media campaign against her.³⁴ Here, the case was filed under section 67. When this may address the sexually-explicit comments which were tweeted about/at her, it does not acknowledge that there are other kinds of harassment, and clubs every thing under one provision. In 2017, poet Srijato used section 67 to file charges against his online harassers who targeted him for his poem, Abhishaap, on UP CM

³⁰ Sriram, J. (2015, 24 Mar). SC strikes down 'draconian' Section 66A. *The Hindu*. <http://www.thehindu.com/news/national/SC-strikes-down-%E2%80%98draconian%E2%80%99-Section-66A/article10740659.ece>

³¹ Nappinai, N.S. (2015, 14 July). Op. cit.

³² Staff. (2015, 13 Feb). AIB roast: Police register FIR against actors, complainant's lawyer says show was 'pre-scripted'. *Firstpost*. <http://www.firstpost.com/living/aib-roast-police-register-fir-against-actors-complainants-lawyer-says-show-was-pre-scripted-2096563.html>

³³ ANI. (2016, 30 May). Former IPS officer YP Singh demands 'custodial interrogation' of Tanmay Bhat for Snapchat video. *DNA*. <http://www.dnaindia.com/entertainment/report-former-ips-offier-yp-singh-demands-custodial-interrogation-of-tanmay-bhat-for-snapchat-video-2218138>

³⁴ Singh, S. (2015, 12 Jun). Swati Chaturvedi Twitter trolling: A much-needed test for laws. *Hindustan Times*. <http://www.hindustantimes.com/india/swati-chaturvedi-twitter-trolling-a-much-needed-test-for-laws/story-w9IglBH2Iz8ztB3UAdB6KJ.html>

Yogi Adityanath.³⁵ Many women have filed cases under Sec 67 against those who harassed them over the phone via SMS, WhatsApp messages or phone calls. Again, is this an appropriate use of a section meant to prohibit that which is lascivious or prurient?

Section 67 and Section 67A are used interchangeably

While Sec 67 regulates 'obscene' expression, Sec 67A is reserved for 'sexually-explicit' expression. This section is sometimes used against porn sites, since pornography is viewed as an aggravated form of obscenity. Obscenity, unlike the “sexually explicit”, at least has some degree of vaguely agreed upon criminality. But what is the harm in that which is 'sexually explicit'? This remains an unresolved issue.

In a strange case of a man who sent out a tweet with the image of Maharashtra Chief Minister Devendra Fadnavis and his family on a yacht during vacation, was charged under section 67 A – which regulates sexually-explicit content.³⁶ Since the family were fully clothed, there was nothing sexually explicit in this image.

Section 67 is being used in cases where there is no obscenity

Across all three years, there were several cases filed under section 67, where the only reason for the usage of section 67 appeared to be the vague usage of technology of some kind in relation to the crime, though not the for committing the crime itself. In 2015, a couple famously known for their Kiss of Love protest image were arrested as a part of a sex racket.³⁷ When they could be charged for a number of crimes, it was not clear why Section 67 as one of the laws for booking them. The only usage of technology in the overall crime was to provide the contact information on a classifieds site called Locanto. This does not come under section 67. In a few other cases, section 67 was used to book websites selling adult sex toys. In one case, involving a “sex racket”

³⁵ IANS. (2017, 26 Mar). Facebook has removed my poem ‘Abhishaap’: Poet Srijato Bandyopadhyay. *Financial Express*.
<http://www.financialexpress.com/india-news/facebook-has-removed-my-poem-abhishaap-poet-srijato-bandyopadhyay/602576/>

³⁶ DNA Web Team. (2015, 10 July). Op. cit.

³⁷ Staff. (2015, 19 Nov). Kiss of Love couple held for sex racket. *Deccan Herald*.
<http://www.deccanherald.com/content/512719/kiss-love-couple-held-sex.html>

in Jammu and Kashmir, the only reason for the usage of section 67 appears to be the fact that a Facebook page was used by clients to contact the escort service.³⁸ Since escort services in the online space seem to exist in the same grey area as sex work in the offline space, usage of section 67 is clearly wrong here. Unless the images used were non-consensually obtained or used, there is no reason to use any provision of the Information Technology Act here.

In one case, a couple in an extra-marital affair killed two people and assaulted the woman's husband.³⁹ There is a mention of videos and intimate messages of the perpetrators, but neither of these are related to the murders or assault. The very presence of the videos and messages seems to have warranted the usage of section 67 in charging them.

There were some cases where fake profiles were made in an attempt to harass and/or defame the survivor, like in the case where an imposter used industrialist Sanjeev Goenka's Twitter account to send out "objectionable content".⁴⁰ Here, section 66C of the Information Technology Act, which deals with identity theft, or 66D, which looks at cheating by personation by using computers, could have been used to file the charges. Why use section 67 instead, when the bigger crime is theft of identity and impersonation? Similarly, in some cases involving minors, section 67 was used in place of section 67B, which is specifically for dealing with transmission and publication of obscene materials involving minors. In one case, a man tricked some girls into sending him their photos, including nude images, promising them a career in modelling.⁴¹ Since these images were for potential modelling opportunities, they are more likely to have been posed, and not obscene. Here, the main crime is deception and not obscenity. Yet, the case was filed under section 67.

³⁸ Staff. (2016, 25 Sept). Sex racket busted in Jammu, social networks used for flesh trade. *The Indian Express*. <http://indianexpress.com/article/india/india-news-india/sex-racket-jammu-social-networks-prostitution-busted-3049786/>

³⁹ Staff. (2016, 19 Apr). Death for techie, lifer for lover in Attingal twin murder. *Deccan Herald*. <http://www.deccanchronicle.com/nation/in-other-news/190416/death-for-techie-lifer-for-lover-in-attingal-twin-murder.html>

⁴⁰ Staff. (2017, 14 May). Imposter tweets as Sanjeev Goenka. *The Times of India*. <http://timesofindia.indiatimes.com/city/kolkata/imposter-tweets-as-sanjeev-goenka/articleshow/58665248.cms>

⁴¹ Staff. (2016, 24 Sept). Man held for hoodwinking unsuspecting girls. *The Navhind Times*. <http://www.navhindtimes.in/man-held-for-hoodwinking-unsuspecting-girls/>

Conclusion

Our analysis of 99 cases filed under Section 67 in 2015, 2016 and 2017 shows that this section is being used in three ways: as intended, questionably, or inappropriately. The section is being used *as intended* in a limited number of cases where there are elements of obscenity, as per the law's vague definition. In 2015, a housewife filed a case against actor and porn star Sunny Leone under section 67 arguing that her pictures and videos on the internet spread “obscenity in the society”.⁴² While this may be within the law's intent, it seems like section 67 is not just being used for censorship but also as a tool for moral policing.

More often than not, the section is being used questionably – or inappropriately. Why is a section meant to control lascivious or prurient material being used to stifle political speech? Why is a section meant to control 'obscenity', no matter how vaguely defined, being used as a tool of censorship? Why is Section 67 – and its offline counterpart - being used when the primary harm lies elsewhere?

The four guava-eating young men in Pune were booked for circulating obscene images – rather than being seen as victims of its rapid circulation, without their consent. As minors, their consent was dismissed,⁴³ even though a policeman told the media that “the acts were done by mutual accord”. Without any pressure. Mutual accord means consent. Why is the law quick to mark offences of 'obscenity' but slow to recognize violations of consent? Writes Brinda Bose:

“...a woman's right not to be exploited, degraded and demeaned by the sexual use of her body is counteracted by her right to consensually expose her body in whatever way she deems fit, as also by her – and everyone else's right to freedom of speech, expression and representation that is guaranteed by democratic constitutions all over the world.”

The low value that is placed on consent was in evidence during our visit to the Mumbai

⁴² India Today. (2015, 28 May). Obscenity charge: Sunny Leone deposes before Mumbai police. *India Today*. <http://indiatoday.intoday.in/story/sunny-leone-fir-obscenity-charge-porn-star-internet-content-mumbai-police/1/440803.html>

⁴³ The age of consent in India was revised upward to 18 in 2013

Cyber-Cell to interview a police official. Although he was well-versed with Sec 67, he had never heard of Sec 66E – the section that deals with consent. “I read about it but can't remember it now,” he told us.

Consent is a critical aspect of expression, and its illegitimate child, sexual expression. “But neither 67 nor 67A allow for the provision that consensual or voluntary publishing of such material is acceptable,” argues Kaul Padte. “Until consent is on the table, women aren't being dealt a fair legal hand.”

The Faultlines of Sexual Expression

Censorship. Legitimacy. Privacy. Consent. Culpability. These are just some of the challenges that sexual expression faces in the digital age, both online and offline. It's 2017, folks. But in India, same-sex relationships are criminalized, right-wing forces malign Hindu-Muslim romances as 'love jihad' and families still don't accept inter-caste marriages. So much for expressing one's sexuality.

Freedom of Expression

In the surreal landscape that is India today, freedom of expression is under threat as never before. Words and images are being detained as dangerous thought-bearing objects every other day. In the last two years, the Censor Board, as it's informally called, tried to ban a film for being too 'lady-oriented' and asked filmmakers to remove the following words from their films: Cow. Gujarat. Hindu India. Communists. PM, short for Prime Minister. Homosexual. Lesbian. Balls. Vagina, Assholes. Oh, and of course, 'intercourse'.

India may be a signatory to the International Covenant on Civil and Political Rights (ICCPR), which guarantees freedom of expression and opinion⁴⁴ under Article 19, with certain restrictions. While Article 19 of the Indian constitution also guarantees freedom of expression, is the criminal justice system over-reading the restrictions for 'decency or morality' to stifle legitimate sexual expression? Via outdated obscenity laws? Do anti-obscenity laws even make any sense?

So many questions. Such few answers.

⁴⁴ Article 19 1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

All said and done, obscenity law is nothing but a form of legal moralism. A few persons decide what values should inform individual lives and what's best for us – and limit freedom of expression in doing so. Is this even justifiable? “The prevention of 'dirt for dirt's sake' is not a legitimate objective to justify the violation of one of the most fundamental freedoms,” writes D Dyzenhaus. Writes Jaising, “The concept of Christianity is a 19th-century Christian concept according to which anything to do with sex is dirty and obscene. To treat a natural instinct, such as sex, as obscene, is obviously outdated. The fundamental basis of obscenity is, therefore, unsustainable.”

Is a world without anti-obscenity laws a world in which sexuality can be more freely expressed? Not necessarily.

Legitimacy

Part of the problem with legitimizing sexual expression is an underlying discomfort with sex and sexuality. In June 2017, an Indian judge publicly lauded the peacock for being 'celibate' and reproducing through an exchange of tears, not sex.⁴⁵ He may have meant the mythical peacock of religious lore, but what he upheld in the process was the value of abstinence. No sex. Not even sex for reproduction, let alone sex for pleasure. That may have been one judge, one instance. Even so, laws and rulings around obscenity have often conflated *sexual expression* with *obscenity*, more so, when it comes to women's bodies.

As feminist lawyer Flavia Agnes has asked in the context of the *Indecent Representation of Women Act*: Is *indecent* being constructed as obscenity + prudish morality? Writes Agnes:

“The puritanical notion of women as asexual beings did not in way help to liberate or empower women. Taken to its logical end, it leads to women's segregation, curtails women's movement and manner of dressing, reinforces the concept of women's chastity and purity

⁴⁵ India Today. (2017, 31 May). Rajasthan High Court judge says peacocks don't have sex: How do you think peacocks reproduce? *India Today*.
<http://indiatoday.intoday.in/story/peacocks-mate-cow-national-animal-rajasthan-judge-sharma/1/967453.html>

and compartmentalises women further as 'good' and 'bad'. It subscribes to and strengthens the patriarchal, reactionary and fundamentalist notions regarding women and their sexuality.”

In the same essay, Agnes demonstrates how the equation of indecency with nudity and sex has allowed “all other portrayals of women to pass off as 'decent'.” As long as women are clad in saris, servile and stereotypically portrayed, it's decent.

These false assumptions around women's sexuality result in laws that construct women as passive victims of sexual expression, not as its proponents or active agents. As Kaul Padte writes in a review of women's laws:

“There is a disproportionate emphasis throughout the Indian legal structure placed on the *representation* of women, women's bodies and their sexuality. The creation, publication or circulation of such imagery is believed by many to contribute to the exploitation of women. In this manner, the protection of a woman is seen as synonymous with the protection of her *image*. But who are these laws really protecting? Is the culprit female sexuality? If so, who is the victim – public morality?”⁴⁶

Like law, media too manifests a moral discomfort with sexuality. The media reports we analyzed regularly referred to images as 'obscene', 'indecent', 'lewd', or 'vulgar' – rather than as merely sexual. In other words, media had judged these images to be obscene even before these cases had been tried. Media reports similarly referred to cases of sexual expression as 'scandals', specially when they were *consensual*. What was it that the media found scandalous? Not that two teenagers were expelled from school for having consensual sex. Not that they became public images of disgrace, the girl more so than the boy. For Indian media, the scandal was the phenomenon of two 17-year-olds *consensually* having sex. And *filming themselves* having sex. Because of this media terminology, this is what still remains enshrined in public memory as the DPS-MMS 'scandal'.

⁴⁶ Padte, R. (2013). Op. cit.

The real scandal, of course, is that the age of consent has gone up from 16 to 18 years in India at a time when young people all over the world are having sex, falling in love, or exploring body possibilities earlier and earlier. The real scandal is that if you consensually circulate sexy pics on your cellphone, you're seen as a *criminal* – and booked under archaic obscenity provisions.

The real scandal is that we have a colonial hand-me-down of an obscenity law created centuries back - when digital technologies were about as feasible as life on Mars. And that law, from two centuries back when photos, films and videos didn't even exist, is being used today to regulate speech in the digital domain. Sex, expression and technology – life itself - may have evolved in the intervening centuries, but law clearly hasn't. If this isn't scandalous, what is?

Consent

When lawmakers do not see sexual expression itself as legitimate, the result is laws that do not distinguish between consensual and non-consensual expressions of sexuality. Between these two lies the faultline of consent. Asks Padte: “Where laws are meant to protect women, what emphasis do they place on consent?...A focus on consent considers the wishes of an individual as having precedence over externally imposed interpretations....Without a provision for consent, can a woman who publishes a 'sexually explicit', 'obscene' or 'indecent' photograph of herself be booked under a series of acts originally designed with the intention to protect her? If so, what is being protected under these laws – *women*, or an *idea of womanhood*?

There is no doubt that the notion of consent itself has become more complicated in the digital age, with its plethora of materials. As digital denizens, we navigate its faultline every moment – when we decide whether or not to send a sexy selfie, when we forward someone else's private image or information, when a dic pick pops up in our messaging app. Without any consciousness, cognizance or consideration of consent.

Consent is not just complex online; it's a conundrum because there are images of consent that

seem non-consensual. And vice versa. There's the 'rape video' which has turned into digital porn for those who consume it. No consent there. There's BDSM – or kink – in which violent sex is typically performed with consent, but which is accused of fuelling rape culture. And then there's 'rape porn' or enacted rapes in porn. Although 'rape porn' *looks* non-consensual, it isn't. It is the consensual enactment of a non-consensual act. It's acting, like a rape scene in a Hollywood film. As queer porn performer Jiz Lee puts it, “Regardless of whether or not the final product depicts a narrative of consensual sex, consent is integral to a commercial pornography shoot, where the sexual activity is a performance of labour.”⁴⁷

Other buried questions of consent have yet to surface. A 2015 #ShameTheRapists campaign circulated images of rapists online from the rape videos (without sharing images of the rapes or the victims). But from the purview of consent, is this kosher? Is it okay to circulate images of rapists online – or does their consent also count? We don't know. We work on gender, sexuality and technology and different parts of us feel differently about this. The women's rights part says: Sure. Why not? Specially if it can help identify and bring the perpetrators to justice? The sexual rights part worries that such actions encourage vigilante justice and strengthens hysteria around 'sex offenders'. This is more worrisome given talk of 'sexual freaks' and of a national registry – or an online database - of sex offenders being created in India.⁴⁸ And the digital rights part feels the internet is a different kind of animal. Printing an image of a 'sex offender' in a newspaper is one thing. Publishing this in a space marked for its virality is quite another. How should we think about consent in such situations?

So many questions. Such few answers.

⁴⁷ Lee, J. (2015). Click “I agree”: Consent and feminism in commercial pornography. In Finlay, A. Ed. *GisWatch*. <https://www.giswatch.org/sites/default/files/gw2015-full-report.pdf>

⁴⁸ Between these modes lies the faultline of consent. As digital denizens, we navigate these faultlines every moment – not just when we decide whether or not to send a sexy selfie, but also when we thoughtlessly forward someone else's private image or information. Without any consciousness, cognizance or consideration of consent.

Culpability

If recognizing the lack of consent is one major barrier to justice, determining culpability is another. In most cases, the cops trace the person who uploaded the video – the original sender. But there's a larger question here: Who should be held culpable when such images circulate – or slip? Can we rely on the concept of the 'original sender' in digital spaces? Does the concept of the original sender truly hold when something is continually in circulation? Or must culpability also be shared, like the material that was circulated? How is culpability to be determined in a situation where person after person who watches a *crime* being committed does nothing to bring this to the law's notice?

In 2016, a social worker in Uttar Pradesh's Muzaffarnagar committed suicide after her rape video continued to circulate in the village. The night before she killed herself, she told her husband about the rape and “expressed her great distress at the video that was circulating.” What is it that constitutes justice for the victim in such cases? Is justice served when the perpetrators of the physical rape are convicted? Or does justice also mean removing the videos in circulation, often on multi-national corporate platforms that pose complex jurisdictional issues?

So many questions. Such few answers.

Does the law even understand – or consider – consent, culpability or sexual expression? Appears not, as the abysmal rate of convictions on rape cases has consistently shown way before digital technologies came into being. It's one thing for individuals to ignore consent or dismiss culpability. It's quite another for the law to do so. When the law ignores the faultlines of expression, it takes away many things. Agency, autonomy, dignity, privacy and subjectivity. Our ability to be who we are. Our imaginations and realizations of our selves and bodies. Our freedom to express love desire sex or pleasure – fearlessly. Our ability to be safe from violence – on our physical or digital selves. Our right to express all aspects of ourselves, including the sexual.

It's 2017, folks. But we're stuck in an epic time-warp around sexual expression. It's time to broaden our understanding of free expression, including sexual expression. It's time we accepted that words and images have always been tools of sexual expression – and that *consensual* sexual expression is as valid a form of expression as any other. It's time we stopped binarizing free expression, by treating political and religious expression as legitimate aspects of freedom of expression, and sexual expression as its illegitimate sibling. It's time we started drawing the faultlines of sexual expression – between the consensual and the non-consensual, between actual and imagined harms, between bodily violations and bodily integrity. Because no one should have to end up behind bars for sharing a sexy video of themselves with their friends. Or because they segued from guavas to genitals in a park one sunny afternoon.