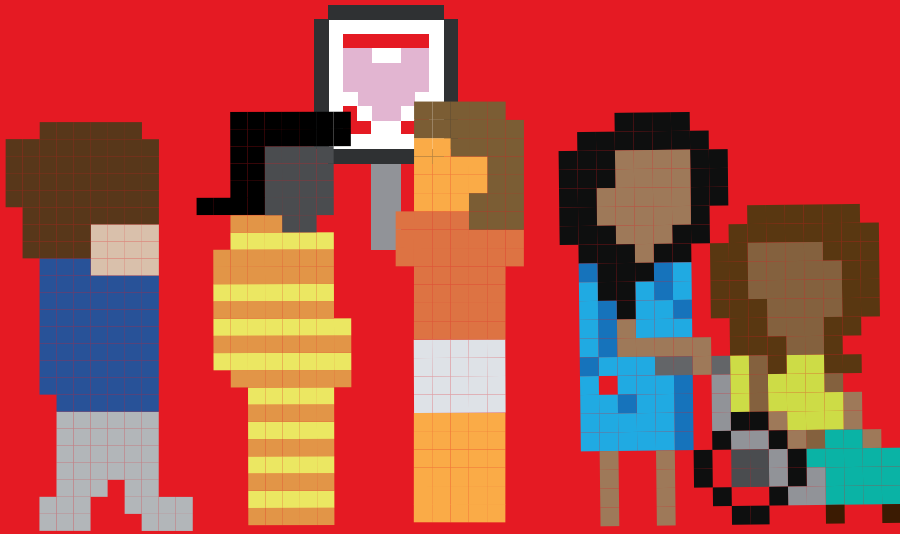


://EROTICS

Sex, rights and the internet



EROTICS South Asia exploratory research: Sex, rights and the internet



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Between November 2016 and July 2017, APC carried out multi-country research exploring the information and communications technology (ICT) legal, policy and socio-cultural landscape related to sexuality on the internet in Nepal and Sri Lanka, and how Indian law constructs "digital obscenity". This publication is the result of the final reports from that research project.

To read more on this subject, please visit erotics.apc.org or www.genderIT.org

EROTICS (Exploratory Research on Sexuality and ICTs) is a global network of activists, academics and organisations working on sexuality issues including LGBTIQ rights, sex work, sex education, sexual and reproductive health and rights (SRHR) and gender-based violence, in addition to internet freedom advocates, policy experts and techies. The objective of the network is to promote inter-movement collaboration on sexual rights and internet rights, highlight technology-related violations against sexual rights activists, and build their capacity in the design, usage and governance of the internet.

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In plain sight: On sexuality, rights and the internet in India, Nepal and Sri Lanka

by hvale vale

EROTICS is an exploration of the internet and its multi-layered relationship with sexuality, rights and sexual expression, and is a space/place of practices and a network of people which started in 2008. Its purpose was and is to look into the obscure, the unexpected and the obvious. The internet is a fast-paced world, known for accelerations but also broken links, unfinished architectures, truly a network of networks. Nine years could sound like a long-term research project, but actually it is only enough to just land somewhere.

On the internet, features and products appear, disappear, come and go unnoticed and are forgotten, but learning the machine is different. Learning the machine is understanding how the machine we are all in and out of at the same time, learns about us. And who are we? Because we are many, really many, yet still there are more in the immediate vicinity of the machine unable to input as they wish, while fascinated by and signified within and by the machine itself.

A feminist framework at the intersection of the internet with sexuality and rights

How to make sense of what we experience? How to use evidence to transform? Which frameworks to use? And why a feminist framework? The first, most simple and direct answer would be: Why not?! EROTICS work fits within the Feminist Principles of the Internet, which want to “provide a framework for women’s movements to articulate and explore issues related to technology and to offer a gender and sexual rights lens on critical internet-related rights.”¹

In 2014 the Association for Progressive Communications Women’s Rights Programme (APC WRP) brought together 52 women’s rights, sexual rights and internet rights activists from six continents in Malaysia to #imagineafeministinternet.² Many at

this meeting were part of the first iteration of the EROTICS global network that had led research on sexuality in seven countries. The questions raised at the meeting were: What does it take to create a feminist internet? Is a feminist internet possible? How has the internet shifted the way we understand power, politics, activism and agency?³ There was a need felt to have a political compass around the internet, on how to use and share, to build upon while contributing to movement building, proposing legislation, creating new narratives.

In 2015 a second convening⁴ expanded the Feminist Principles of the Internet after an intense year of local conversations, suggestions, insights. The EROTICS network participated again, bringing its spirit, knowledge, evidence and practices. The conversation deepened and five clusters grouped 17 principles: access, movement, economy, expression and agency, which in 2017 during the third Making a Feminist Internet meeting became embodiment.

One of the elements of any political vision is the perspective, the space/place or the location from where we look at and interrogate the world. Rosi Braidotti, in her *Nomadic Subjects*, talks about “a sustainable modern subjectivity as one in flux, never opposed to a dominant hierarchy yet intrinsically other, always in the process of becoming, and perpetually engaged in dynamic power relations both creative and restrictive.”⁵ This becomes important in today’s world dominated by those living in the global North. What it underlines is that embodiment is not merely a theoretical or rhetorical device, but an important element of lived experiences and our shared politics. Quoting bell hooks in *Feminist Theory: From Margin to Center*:

Living as we did – on the edge – we developed a particular way of seeing reality. We looked

1 www.feministinternet.net

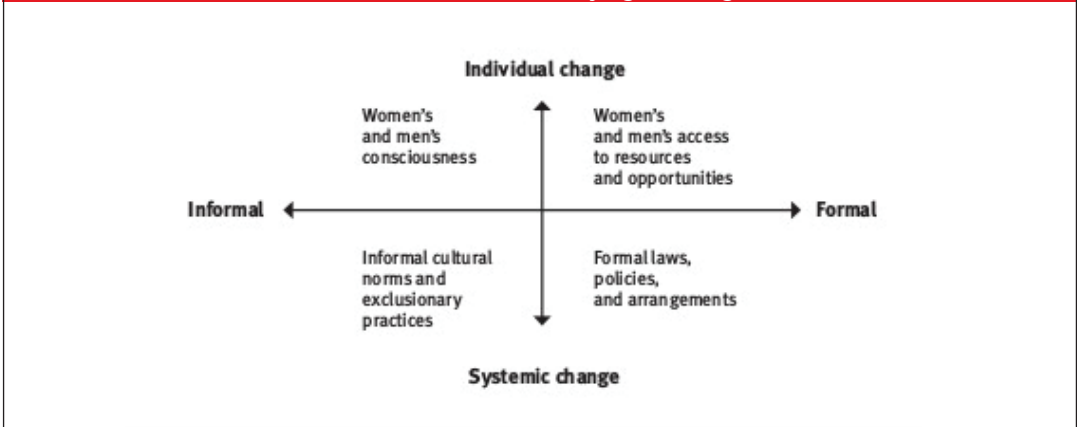
2 Fascendini, F. (2014, 14 April). What does it take to create feminist internet? *GenderIT.org*. <https://www.genderit.org/feminist-talk/what-does-it-take-create-feminist-internet>

3 Fascendini, F. (2014, 14 April). Panel on “Power, Politics and Agency” to #imagineafeministinternet. *GenderIT.org*. <https://www.genderit.org/feminist-talk/panel-power-politics-and-agency-imagineafeministinternet>

4 <https://www.genderit.org/edition/three-key-issues-feminist-internet-access-agency-and-movements>

5 Braidotti, R. (1994). *Nomadic Subjects*. Columbia University Press.

FIGURE 1. Gender at work framework what are we trying to change?



from both the outside in and the inside out. We focused our attention on the center as well as the margin. We understood both. This mode of seeing reminded us of the existence of a whole universe, a main body made up of both margin and center.⁶

It is a quote that resonates with understanding the internet – where margins and centre are revolving because of very complex and intrinsic relationships.

Research can be approached in different ways and with different purposes. If the purpose is transformation, then it is important to set the ground. A good way to visualise online social construction with “gender norms, stereotypes and inequality that exist offline” is to use the Gender at Work framework,⁷ illustrated in Figure 1.

The four-quadrant framework distinguishes two polarities: (1) individual and systemic change, and (2) formal (visible) and informal (hidden) experience.⁸ Having said that, to generate changes all quadrants need to be engaged. It is important to pay attention to the left hand quadrant to understand:

[...] the largely invisible and expensive-to-track areas of individual attitudes and collective norms and values that ultimately influence our choices, our attitudes and our actions. There are two dimensions to monitoring and changing individual

attitudes that perpetuate gender discrimination on the internet (the upper left-hand quadrant). Firstly, there is the power of the internet to track and change the attitudes of those who actively promote or enable gender discrimination, both online and offline; secondly, there are the attitudes of women themselves, who can encounter both empowerment and disempowerment within the power of the internet.⁹

Understanding and recognising the existence of hidden normative experiences at individual and collective level is necessary to understand how and what obstructs change, how transformation moves from individual to collective awareness, then to consciousness and eventually leads to change in behaviour and discourse. This is a way to acknowledge the existence of visible, invisible and hidden powers. But this is not enough, because the internet has its own super-power and cannot be dismissed. Following Jac sm Kee’s classification there are five layers of power relevant and specific to the internet:

Structural power: The internet is about connecting end-users. This tells us that access poses the issue of structural power. Who has the power to land the cables, the satellites, the drones? Who decides about the last mile, the costs of the services? Who has no say in tariffs, kinds of access, broadband and flat rate vs data and Wi-Fi? It can enact very conservatively but can be very innovative if we think of the power to create community-owned infrastructure that is outside the mainstream internet, that can stay off-grid or connect to other similar collective-owned infrastructures shaped by very specific local needs.

6 https://en.wikipedia.org/wiki/Feminist_Theory:_From_Margin_to_Center#CITEREFhooks2000

7 <http://www.genderatwork.org/OurWork/OurApproach/GWFramework.aspx>

8 Sandler, J. (2013). The online terrain for women’s rights. In Finlay, A. (Ed.), *Global Information Society Watch 2013: Women’s rights, gender and ICTs*. Association for Progressive Communications. https://www.giswatch.org/en/report-introduction/online-terrain-women-s-rights#_ftn1

9 Ibid.

Discursive power: "Discourse is more material"¹⁰ than ever and the internet gives us "the capacity to create our own truths. Our own knowledge. Have *unknown histories and practices* be collectively shaped and known. From indigenous communities to queer communities."¹¹

If we think retrospectively it was very difficult to find women in STEM (science, technology, engineering, mathematics), but nowadays there are timelines, stories, books, comics of women from all over the world innovating and contributing to this field. So that Ada Lovelace can be a Lego kit. The internet enables the "ability to participate in influencing discourse, shaping culture, which is arguably one of the most important shifts in power. Because it's about what is invisible: our understanding, attitudes, beliefs, that then influences our practices."¹²

Economic power: The power of generating economic models and revenue, from the first eBay to the last start-up. Here also we need to look at which kind of models are proposed. Capitalist, based on generating high profit and controlling an entire market like Amazon, or developing different economic models such as crypto-currency (bitcoins) with collective mining, elimination of traditional intermediaries, or free/libre and open source software where the technical solution, the code, is open, and collective intelligence becomes the common pond for a mutual exchange between the individual and the community.

Embodied power: Internet and pleasure, internet as space/place to overcome limitations of mobility, accessibility from the simple creation of a mailing list, organising of communities with disability to remote-controlled sex-toys to erotic chats. Different ways of experiencing pleasure that trouble the notion of pornography itself: feminist porn awards that celebrate consent, good labour practices in the porn industry, etc.

Anonymity online makes the exercise of autonomy, agency and dignity more possible, allowing for people to explore, to seek community, to push the envelope of respectability and of social norms. This is the story of many queer communities around the world. But a body on or in the internet means data, and there are extensive national ID projects and biometrics where individuals become what their data says about them. What is the implication of these multiple data sets, and what mechanisms are available or what rights are there when errors are made? How does all this impact the lives of people?

Networked power: The last and the most celebrated, the one everyone recognises as the superpower of the internet, the power of connecting and creating networks. Quoting Jac sm Kee:

Most importantly, it connects us. Allows us from becoming weird atomised individuals to find others who are interested in, care about, concerned about the same things. Enables us to organise, have conversations, plan for collective action, take things to different spaces, make shifts across the different layers of power, occupy different spaces. Because the characteristic of the internet, is essentially one that is networked. It is about connections. And the freedom to make connections, towards the shift and change we collectively believe in, is an important one.¹³

To transform the internet, to generate the changes necessary to intersect sexuality, rights and the internet, we use the Feminist Principles of the Internet (FPIs). Their function is to give to researchers, activists and users a compass or a reading key. The five main clusters of access, expression, participation and building of movements, economy and embodiment¹⁴ help in orientating ourselves, but the principles can be combined and referred to each other. Consent read along with access to infrastructures is already providing an understanding of who is the subject and what is meaningful and relevant access. Further in the introduction, some of the principles are named and linked to specific points made by the researcher, but the best way of using them is as spectacles or a magnifying glass while reading the research, letting them resonate in the experience of the reader, the personal and the collective.

The research: India, Nepal, Sri Lanka

Because of the internet multiverse, each EROTICS iteration surfaces and resurfaces questions, issues, strategies, and they intersect with each other. As a multiverse, the internet resonates, expands and contracts around the lived experience of its inhabitants. So, what did this last exploration add to the previous ones from India, Brazil, Lebanon, South Africa and the US?

Since its inception in 2008, EROTICS research "aims to bridge the gap between policy and legislative measures that regulate content and practice on the internet, and the actual lived practices, experiences and concerns of internet users in the exercise

10 Kee, J. (2017). Five layers of power. Presentation at the Stockholm Internet Forum 2017.

11 Ibid.

12 Ibid.

13 Ibid.

14 <https://feministinternet.org>

of their sexual rights. It aims to promote evidence-based policy making by engaging in on-the-ground research with a range of internet users – especially those most affected by internet regulation measures, including young women and people of diverse sexualities – to inform and guide policy making for a more accountable process of decision-making.”¹⁵

But also to “demonstrate the key function of the internet in the exercise of sexual citizenship and the advancement of sexual rights, especially for persons who are socially and politically excluded due to their sexual identity, beliefs or practices.”¹⁶ This was done through infographics like “Love in the time of Internet, a storytelling of love, sex, and exploration in the digital era”¹⁷ and through research and studies. The research in South Africa¹⁸ focuses on a popular transgender site which served as a place of encounter to share struggles and solutions. The Lebanon report¹⁹ highlighted the registration of www.gaylebanon.com, the risks of legal prosecution in the country, as well as the beginning of an organised movement. The Brazilian report²⁰ focused on the “Mega No” online campaign against a proposed law impacting the free flow of information on sexuality and sexual health online and told the story of civil society engagement and mass mobilisation of support through the internet. The India report²¹ gave an account of how young women push the boundaries of cultural and social barriers that monitor their sexuality. Last but not least, the US report²² reflected on library filtering and users, particularly young people among them.

EROTICS in its second iteration, first of all, included two new countries: Nepal and Sri Lanka, and these form an important baseline from South Asia that looks at internet-related challenges and opportunities experienced by women, LGBTIQ (lesbian, gay, bisexual, transgender, intersex, queer) and sexual rights advocates. Legal frameworks, regulation, experiences and strategies to respond to challenges as well as use of the “power” of the internet. Additionally, EROTICS includes a breakthrough study

from India on “digital obscenity”, or obscenity involving the use of a digital device.

The reports from Nepal and Sri Lanka bifurcate into two. The main research from Nepal is titled “The internet and sexual expression: Exploring the use of the internet among gender equality and sexual rights advocates in Nepal” and this is followed by a supplementary report addressing specifically “Online violence against women: A continuum of offline discrimination”. The Sri Lanka report is in two parts: “Virtually queer: Human rights of LGBTIQ Sri Lankans in the online space” and “Lesbian women and their use of the online space”.

These reports were interested in understanding use and perception of the internet, to provide an account of regulation and legal frameworks that shape the “dos and don’ts” of the internet in both countries and then look at users’ strategies. All three country reports have a long list of essential recommendation that interrogate and ask to reform norms from penal and criminal codes and to create or reform ICT legislations.

How do women’s rights, sexual rights and LGBTIQ advocates search for information, amplify their own messages and respond to challenges and threats they are confronted with from inside and outside their communities? That is the overarching question of all EROTICS explorations.

When looking at the use of the internet within a larger community, such as the one of women and LGBTIQ persons, new questions emerge. Communities are not homogeneous, they can appear homogeneous only to distant, external eyes. The recognition that discrimination, exclusion, marginalisation is not a one-colour blanket is not a surprise but, in research, assumptions need to be verified or addressed when challenged.

So apart from confirming the existence of what Sara Hlupekile Longwe²³ calls Patriarchal Belief,²⁴ what do the reports confirm and/or establish?

The system of belief that serves to legitimise male domination and gender discrimination. It relies on patriarchal interpretations of biblical/religious texts, beliefs in male biological superiority (sexism) claiming that the unequal gender division of rights and duties is either natural (biological), or God-given, or too difficult to change because they are irretrievably embedded in culture.

15 Kee, J. (Ed.) (2011). *EROTICS: Sex, rights and the internet. An exploratory research study*. Association for Progressive Communications. https://www.apc.org/sites/default/files/EROTICS_0.pdf

16 <https://www.genderit.org/newsletter/sexuality-and-internet>

17 <http://erotics.apc.org/tags/infographic>

18 http://www.genderit.org/sites/default/upload/erotics_finalresearch_apcwmsp.pdf#southafrica

19 http://www.genderit.org/sites/default/upload/erotics_finalresearch_apcwmsp.pdf#lebanon

20 http://www.genderit.org/sites/default/upload/erotics_finalresearch_apcwmsp.pdf#brazil

21 http://www.genderit.org/sites/default/upload/erotics_finalresearch_apcwmsp.pdf#india

22 http://www.genderit.org/sites/default/upload/erotics_finalresearch_apcwmsp.pdf#usa

23 https://en.wikipedia.org/wiki/Sara_Hlupekile_Longwe#cite_note-FOOTNOTEProfile_of_an ICT_Champion-2

24 Hlupekile Longwe, S. (2002). *Spectacles for Seeing Gender in Project Evaluation*. http://www.genderevaluation.net/gem/en/understanding_gem/longwe.htm

Looking at the subjects that compose this vast community of women's rights, sexual rights and LGBTIQ activists, the first consideration is about intersection: how within these communities people define themselves through a constellation of other identities. These fluid and shifting constellations of identity show how individuals are not a single point but three-dimensional mosaics – and this is what the feminist legal scholar, critical race theorist, and civil rights advocate Kimberlé Williams Crenshaw²⁵ named as intersectionality.²⁶ Intersectionality is an open call to give visibility and to question powers and privileges. Intersectionality is also a feminist political practice of recognising or its obverse of denouncing, and transforming. If we do not understand this, the risk is that we will have a new aesthetic of privileges that limits itself to the description and retires when transformation asks for reconsideration of personal positions of privileges, or generates unease. It also means to give significance to what hides in plain sight.

To address **intersectionality** in the trinomial of sexuality, rights, in_on the internet is essential. **EROTICS** uses an overall rights framework to unpack, organise or cluster these relations around the FPIs: access, expression, participation and building of movements, economy and embodiment. And we look at both the relation of privileges and power between the society at large and the community of women's rights, LGBTIQ and sexual rights advocates, and the relation of privileges and power within the members of this specific community.

If it is generally true that we are all equals but some are more equal than others, it is also true that within a community that faces discrimination there are also various degrees of inequality. If we do not accept the challenge to call out the existing privileges within communities too, we risk misinterpreting data and as consequence holding, halting the transformation we would like to see happening as a result of our politics. So, **EROTICS research practice** is to bring into plain sight all the visible, invisible and hidden intersections and dimensions from the cross-point of sexuality.

Key recurrent themes surfaced by the research are: access, namely **access to infrastructure (connectivity) and access to information**, creation of content as a way to share and promote narratives that are sex-positive and promote freedom of expression.

Key themes the research discovers as absent from ICT legislative frameworks are **privacy and consent**, completely obscured by an exhausting preoccupation around indecency, morality and obscenity. What

is also found is a diffused self-censorship stimulated by the general social hostility towards diversity, reinforced by existing discriminatory norms in penal and criminal codes and confirmed by ICT legislation, and this is along with peer and public surveillance that is almost impossible to pin down.

An underlying concern but not completely spelt out is the whole question of **data**. Bits of the selves transferred, stored, exposed, meshed up and morphed. Bits that need to be controlled and secured at continuous risk of being lost, robbed. From this arises the fear of many people of extortion and blackmail even when handing over devices for repair, while relying heavily and almost exclusively on the cloud of private networks on social media and especially hookup and dating sites. The research also points out that people are at the mercy of unclear legislations with lack of accountability both from institutional, local and global service providers. All the research is about data, the joy, the trouble, the politics, the necessity of ensuring ownership, preventing harm, asserting and respecting freedom, ensuring privacy, safety.

Use and perception of the internet: A story to be told many times

A good start is to look for what and how members of the community use the internet and how they understand it. Looking at use is a perfect opening to understand power and technology and start appreciating the complexity: use, access, power, discourse are interlinked to each other. These in turn promote business, innovation and obviously technology and further innovation. It is a cycle, more like a sphere where dimensions are not linear any more but 3D, in a continuum that spirals and spirals, again and again to the indefinite or the infinite.

There is no binary between internet and life – it is not onground, and then a vacuum, and at the end of it the virtual. There is a spectrum instead, and along the spectrum there are users. The spectrum too has to be understood as multidimensional because of the intersectionality, the identities assumed or projected/mirrored on each other or against/vs. each other. For this reason going back to use is necessary and important – it is to situate the self/selves at a cross-point. And it is important also to call it a cross-point instead of a point of entry, because of the many relationships that each specific point is embedded in. Some of those cross-points look very material: cables, devices, data; some others are of a different fabric, the fabric of a society, a language, a gender, more genders.

Access to the internet is far more complex than connectivity, or better to say we should never reduce connectivity to a deployment of the last-mile cable

²⁵ https://en.wikipedia.org/wiki/Kimberlé_Williams_Crenshaw

²⁶ <https://en.wikipedia.org/wiki/Intersectionality>

or antenna. Connectivity, to bring meaningful access, calls immediately for an understanding of who has the power to create, control and develop the infrastructure. **Connecting via broadband, or through a phone, on pre-paid or post-paid data packages, on public Wi-Fi tells us a lot about the power of the user, their embedded privileges or none.** The research tells us women, LGBTIQ and sexual rights advocates are on the internet. They do use it and with intention: an intention of justice but also an intention of love, curiosity, pleasure. They are ready to invest to ensure their access but they do not have equal power to ensure that it is stable, high quality, fast and safe.

Individuals online also provide personal data, identity data that give them the rights to own, register, pay online. Transactions of this nature make each and everyone very visible and confined by legal and social norms. **Trans women and trans men do not have the same ease or possibility to have their own personal access to the internet because their given names and genders do not respond to their lived experience and so they are confronted both by legal contractual norms and social stigma.** They often have to rely on friends, relatives, or find ways around, which implies precariousness and a form of dependency based on unequal powers. Women and girls face similar challenges because of their gender and the fear around their sexuality that entitle parents, husbands, family and relatives at large to **question their rights to have they own devices.** This puts them in a precarious situation of being constantly monitored by family, the most effective surveillance mode, and this in turn often leads to self-censorship. Regardless of these barriers and the relative privileges of gay men, LBT advocates and women from less privileged classes/castes access the internet and use it intensively for personal and social purposes.

Privileges: We are all unequal but some are more unequal than others

The relationship between access and gender matters. A male will more easily access education and in many cases, will get access by default. He is less likely to face judgement about having or using devices or the internet. Some heterosexual women from dominant castes as in the case of Nepal have access to certain privileges, because the societal system of power generates a sense of belonging. But here also is a very grey line that can be trespassed at any given moment.

As long as as the woman exercises her voice within the gender binary and heteronormativity, she does not threaten to transform the world and dismantle patriarchy, but focuses on diminishing inequality. As long as she is using a narrative of empowerment more than one of challenging the

inequality of powers, the society will leave her in peace, and the exclusion of non-heterosexual and non-dominant castes will remind hidden to her.

It is important to understand that both **gay men and heterosexual women live in a sort of limbo, a discrimination on stand-by, ready to rise and take them by storm as soon as they walk out, break the silence or expose their non-conformity.** That is why intersectionality matters and it is important to recognise that discrimination, everyday sexism, homophobia and all the practices from belittling to intimidation to violence are part of the continuum of online_onground life of women and LGBTIQ advocates. But there are grievances related to the increased amount of non-conforming variables that constitute the 3D mosaic of their individual identities.

Lines of tension

To be online is part of what people do. It is considered essential, and women's rights activists see in the online space a public arena for their quest for justice. There is no doubt it is also a dangerous space with its specific risks, but not intrinsically different from the known dangers of patriarchal society. The pace is certainly different, but is not something absolutely new, similar to moving from a remote place to a busy hyperconnected one.

The research highlights and shows lines of tension. What emerges from the research is that expression around sexuality accelerates reactions. Talking, living, expressing one's sexuality except the one of heterosexual men is constantly under screening,²⁷ so that the curiosity, the pleasure has to continuously account for strategies and choices. Nothing is forbidden but everything, potentially, has a price, a label, a backlash. Lines of tension, polarisations, different perspectives that translate into holding back, silence, not antagonising, and not using the online space to advocate for sexual expression as an integral part of the freedom of expression. All of it and the many nuances and explanations participants provide come up in many places in the EROTICS research.

It is not an easy finding to elaborate but it is a necessary one. There is a separation, a gap, a rupture between self-identified feminist and women's rights advocates. From one side there is a difficulty of understanding the wholeness of the internet within the world, as an intrinsic component of human interaction, and on the other side there is the difficulty of recognising the same legitimacy and wholeness of initiatives articulated online in contrast with the relevance reserved for those onground.

The rupture is also here multi-layered, once more and once again intersectional: there are *women's*

27 Shephard, N. (2016). *Big data and sexual surveillance*. Association for Progressive Communications. https://www.apc.org/sites/default/files/BigDataSexualSurveillance_0.pdf

*rights established professionals often recognised as leaders of formal institutions. And there are individual activists, often referred to as online activists as if deprived of a touchable body, or free radicals.*²⁸ The latter have been described by Jac sm Kee as:

[...] new and emerging actors who are part of feminist organising, but remain outside of the more familiar format of organisations. Some of them are content creators, some are social media activists, some are part of interest-driven collectives, some are feminist techies, and some are what I like to call “free radicals” – nodes that connect between formal organising and informal networks who act as key bridge builders and interlocutors of different actors and different spaces.²⁹

Some of them are what the internet recognises and celebrates as influencers, some are just emerging and becoming visible because of a trending hashtag.

There are also advocates belonging to dominant castes or classes and advocates from lower class, minority groups. And gender-conforming individuals versus gender-non-conforming individuals. Other factors that play a role include age, education, numbers of foreign languages spoken, and so on.

Those privileges and concomitant power are all very real, material and hide in plain sight, but the divergence named is about legitimacy and supremacy of onground vs online. What else are our bodies online than material data of the same selves effectively and destructively linkable to our shared/owned devices, homes, footsteps, ways of walking, faces?

So the internet has debunked some privileges. Technology, with its own bias, expensive and precarious, still gives to the individual the opportunity to express oneself for pleasure or politics in visible-to-others spaces. I refrain from labelling them as fully public since often the spaces/places where interaction happens are walled gardens owned by private corporations. What is important is that the transaction to access those spaces/places has already happened and is not tangled with legitimacy or permission to have a say, or receive a voice from the established professionals in the women’s rights movement. **Sexual expression online becomes the divider of the women’s/feminist movement.** What truly happens is that diversity of voices, tones, pace and styles occupy the same space in a by-default two-way horizontal communication and the onground/online antagonism tells us of many constraints but

also of privileges, powers, accountability, strategies and eventually transformation.

Both the established professionals and the explorers are fluid characters embedded in the same patriarchal infrastructure, and their particular privileges as well as their struggles are held in the power of the dominant patriarchal infrastructure. The kind of space/place where these “clashes of silences, lack of sorority, judgmental and preaching practices” happen is a space that is fed by accelerated conversations and dualistic antagonism. The internet of likes and follows has only one binary: the against/for of viral escalation that brings profits to its owner.

We must add that among women’s rights advocates there are big, unresolved differences on how to approach sexuality in a patriarchal world. It is not difficult to see how the existing divergence of these assumed politics, going from sex-positive to anti-pornography, are exacerbated and exploited by the specific technological architecture/design of social media. **Backlashes are hosted, welcomed, promoted and exacerbated by those platforms built on click-revenue business models that prefer simplification over complexity, virality and velocity over deepening and slower pace.** Still, because of the internet, different narratives and conflating discourses are brought alive in the visible space and augmented, amplified and able to reach out potentially to any other self-identified women’s rights, LGBTIQ and sexual rights advocates.

The right to sexuality in_on the internet is a way of expressing the self and represents at the same time exploration, affirmation, resistance and transformation. We all need to understand it and stand by it. Support should not be denied and should be the political practice of any advocate. And this is when a feminist perspective of intersectionality, solidarity and transformation helps to orient us in the noise generated by the overwhelming horizontally participatory conversations enhanced and amplified on_in the internet.

For a dialogue the space/place of the internet needs to be integrated, enriched and not limited or concentrated on social media. Deep conversations require far more flexible spaces/places to accommodate the different pace of the participants in the conversation. They need respectful and ethically built spaces/places to host dissent and provide the necessary privacy, avoiding the performance and per-formative modality privileged by social media. The internet is a terrain of freedom and this is unequivocally shown throughout the research. It is a space/place of learning in the privacy of personal searching, moving through languages, resources and peer-to-peer conversation. **The internet is a space/place of playfulness, of detachment from the given to move toward the chosen.** This is established

28 Kee, J. (2017, 10 November). Making a feminist internet: Movement building in a digital age. *GenderIT.org*. <https://www.genderit.org/editorial/editorial-making-feminist-internet-movement-building-digital-age>

29 Ibid.

once more by all the concern around fake Facebook profiles and the question posed by respondents and researchers: which handle/profile is fake and which is true? And for whom does the authentication (the famously known real name policy of Facebook) work? Is it a business trick to get better quotations for shareholders because only real customers can bring real profit? And is not this also very vague and more and more irrelevant for a world that is detaching printed moneys from digital and financial transactions in favour of cryptocurrency from Bitcoin to Monero, from Yota to Ethereum?

Living dangerous ordinary lives

One thing that is clear is that online avenues of freedom are constantly under threat. Sexuality on the internet counts on armies of vigilantes set to the task of ensuring family honour, religious tradition or nationalism. Patriarchy with its arsenal of control over female and women's bodies, stigmatisation and persecution of homosexuality, obstinacy to sanitise, standardise, simplified male/female in a binary representation is the norm, counter-discourse the brilliant, inspiring and searched exception.

That is why it is important to understand gendered and sexualised experiences of lesbian women in Sri Lanka to see how the awareness of surveillance permeates their online participation and embodiment. What emerges, within the acknowledging of the many constraints, is refreshing as it shows fluidity, ability to change, transform and confront. There is acknowledgement that Facebook, the most popular and populated space online, is not *amicus* i.e. impartial, but is a space/place of surveillance. Of the surveillance of the system, of the family and of the public,³⁰ and an awareness of the self, of seeing and being seen, understanding reputation risks, and the prudent pushbacks and steps to acquire autonomy and personal voices. It is all about hacking, from exploiting the privacy setting in any possible way to ensure unwanted family members are blocked from seeing, to create a hierarchy of seeing and not seeing, to confine to specific posts/views, to open it up totally. There is discontent, and tiredness of having this mindset of looking for the backlash, for what can happen, what can be said, who can be harmed. There is care but also unbearable pressure that pushes to ask for "delinking" of content production and recognitions online. There is the expectation of fun with a solidarity approach towards the sharing of self-taught tactics, tips and ways to be safer within the Facebook machine. All is embodiment, including the prudence. **It is a vindication of agency, a way of reclaiming a different narrative instead of the defeat of self-censorship.**

³⁰ Shepard, N. (2016). Op. cit.

The same willingness and urgency to understand is behind the choice of looking more closely at the issue of violence against women and lesbian, bisexual and trans (LBT) persons in Nepal. Both components of the Nepal and Sri Lanka research should be looked at/understood as the first result of both research studies while still in progress. Deepening, additional exploring comes from recognising and acknowledging the existence of blind-spots. When working under a timeline, the decisions around asking one more question or not, convening one more focus group or not, running a survey one more time or not, are important decisions. They are political decisions and EROTICS South Asia has valued additional explorations as crucial. Research reports very rarely tell the story of the researching team, the learning from the questions asked, the back and forth from assumption to implementation. Reading the reports would be important to think of this, to understand the relevance of blind-spots and how much work is necessary to put them into plain light. So why is it so important to pause and look into an absence and why is it necessary to tell the story now and not in the near future?

All reports, from Nepal, Sri Lanka and India, tell us about the many lines of tension that formalised afterwards in threats, censorship and surveillance practices of different weight, from different actors. These exist everywhere, we knew it and the research was not looking for a sensational discovery but more for an understanding of their formation, dissemination, efficiency and effectiveness. It is true that norms to be cogent, to work need to be perceived as actual by community members themselves. But it is also true that when norms are part of formal regulation and legal frameworks, then to remove them there is a need for new tides to rise, relegating such laws and norms to archives and history.

Social networks remain the difficult sea women's and sexual rights activists have to navigate, with the tools they are able to get, even though harassment and outing are a common experience for the majority of respondents. From awkwardness and discomfort, to harassment and violence, there is a very tiny line. Articulating one's own sexuality or taking a position around sexuality is entering a perilous sea where attack and revenge can be enacted at any moment. And this is a gendered, sexualised and raced experience as shown by 88% of Nepal respondents.

Decency, morality, obscenity or the alienation of your own persona for the greater good

Looking at the world from the perspective of sexuality is a game changer. Sexuality is attached to pleasure or sexual orientation, but even now carries discomfort and stigma, and is used with caution. **I say mainstream as a place of power, not necessarily**

as a **place of majority**. In the world the majority struggle to have their voices heard. It is the privileged minority that scream and cover everyone else's voices.

Sexuality, because of sex at its root, is regarded as a subject "to be handled with care", a slippery floor, an unstable sort of element that can explode and create trouble at any time. Just to set a common ground, let's have a look at two basic, generally used if not accepted, definitions of sexuality, the first one comes from the western Merriam-Webster dictionary:

Definition of sexuality: the quality or state of being sexual:

a : the condition of having sex

b : sexual activity

c : expression of sexual receptivity or interest especially when excessive.³¹

And the second one, the Wikipedia entry (which, when exploring the internet, is probably one of the most searched, consulted):

Human sexuality is the quality of being sexual, or the way people experience and express themselves as sexual beings. This involves biological, erotic, physical, emotional, social, or spiritual feelings and behaviors. Because it is a broad term, which has varied over time, it lacks a precise definition.³²

The second definition is somehow open ended, while the first is a quick a, b, c with c giving a taste of the fear existing around this term. Sexuality as excess, as indecency, lack of taste, immorality, obscenity, perhaps even blasphemy. All very subjective terms, that can be understood and experienced with infinite nuances. But it also must be located historically and contextually within the geopolitics of power, control and subjugation, which includes the hegemony of cultural white western European colonialism that was then reinvigorated as US imperialism, but also the hegemony exercised locally by the dominant elite, ethnicity, religion, race or caste on its own population.

On the origins of obscenity and classification

For all these reasons it is important to reflect on the origins of obscenity and all the definitions and classification that surround the word and how it acts upon sexuality. One of the findings of *Guavas and Genitals* is that unclear, stereotypical and biased definitions and classifications are used by National Crime Records Bureau (NCRB) data to classify cybercrimes. In their study, Point of View researchers noticed how cybercrimes were classified into a system of "motives". In 2014, for the first time in the NCRB's history, a new category of suspect was introduced: the sexual freak. That very same year, the NCRB classified 163 individuals as sexual freaks.

Similarly, in Sri Lanka, obscenity, profanity and public performance laws such as the Obscene Publications Act are used to control, censor and criminalise "carnal intercourse against the order of nature" and "acts of gross indecency". Classification on public websites could help de-stigmatise and offer verified information on sexuality and sexual orientation, but these remain generic, not intended to help people, offering "limited perspectives of the public health framework, which has cemented layers of stigma and discrimination, especially through the close association of LGBTIQ Sri Lankans with HIV and other sexually transmitted infections."

The spectrum of meanings highlights when some of these meanings and associations originate from a specific view of the world and the related bias. Until then, their domain remains incredibly vast and so we see how decency, morality and their linkage to obscenity and public interest travel from colonial time, permute to present time, and there, through cables and wires, onground realities move online in an indissoluble continuum. Decency, morality and obscenity are not just floating, they are attached to a very specific representation of bodies, usually female. Sexual expression again and again is at the centre, but what we discover is that it has become a simulacrum, that answers to a very specific political project of silencing dissent.

Holding ground while building momentum for policy changes

Women's rights, LGBTIQ and sexual rights activists are on the internet because it belongs to them. The internet is one of the spaces/places of their personal lives as well as the site of their campaigns, activities. They are constantly searching, learning, connecting and networking while producing, sharing and advocating. And all this in a continuum of personal and collective strategies, that are shared, re-shared, remixed, mashed up and shared again in a peer-to-peer transmission, sometimes a viral one. Even as

³¹ <https://www.merriam-webster.com/dictionary/sexuality>

³² https://en.wikipedia.org/wiki/Human_sexuality

onground or embodied strategies are necessary, vital and brilliant, they are not enough. The system perpetuates discriminatory law, originated in a colonial time and then re-appropriated by dominant elites, and these laws have their foundation in very vague and subjective terms such as obscenity, morality, prurience. This vagueness is also transferred into the new legislation around the internet, giving higher and unrestricted powers. Strategies focusing on amplification of voices and creation of alternative narrative are not enough. This is a moment that asks for engaging with the formal, the institution, and using the evidence to create new policy which will reform bad laws and inform new ones.

In Sri Lanka, any citizen can be subject to surveillance:

Under section 67(2), the attorney general (AG) or any police officer of/above the rank of superintendent may also require telecommunications authorities to deliver “documents” [...] this requirement may be unilaterally bypassed if an investigator believes, for instance, that “the investigation needs to be conducted urgently” or that “there is a need to maintain confidentiality” without any obligation for the telecom or the ISP to inform the subject of this action and without any liability.

LGBTIQ people, especially transgender people, are in an even weaker position due to the still existing provision of the Penal Code where a person can be arrested by any police officer if suspected of “cheat by personation” or “act of gross indecency”. Their personal data and logs are easily and secretly accessible at any moment by any police officer. This shifts the focus from obscenity and profanity and instead

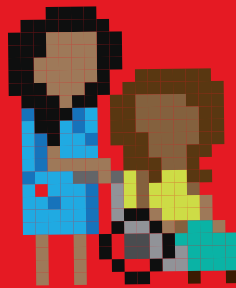
of focusing the entire institutional response on public morality, look at privacy and most of all consent and harm and create laws that *criminalise the unauthorised disclosure and/or publication of content shared between private individuals*.

What is needed is to create systems of accountability where each node of the internet infrastructure can respond and oppose, and not be put in a position of forcibly being made to comply with any requests of providing information on their “customers”. Note that these “requests” are coming from the same body that issues their licenses, or simply local police officers that only have to state urgency for their request to be considered essential under law.

Policy work is delicate, sophisticated and long. That is why it is important for users to move from being “customers” of services to be netizens, citizens of the internet, and address the functioning and interconnection of the overall infrastructure in its continuum of cable, servers, regulations and content. Policy is the necessary scale-up of resistance, it is what will ensure that the right of any minorities be equal before the law and that the exception can be constitutive of the norm. Exploration is like charting an uncharted territory to give visibility to the communities which inhabit it and their customs. Once the lines are drawn, it is important to establish the best possible rule of law for all communities in their diversities.

The wild west of the internet that all EROTICS research depicts is reinforced by the enforcement of the most restrictive interpretation of colonialist patriarchal legislation on sexuality. Because of this we cannot rest on the practices and strategies of resistance, but need to engage with the institutions.

INDIA



Guavas and genitals

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Introduction

A hullabaloo in the guava orchard¹

It all started with a link. Not with a frayed, yellowing newsclip, as it used to in analogue times, but an on-line link to this report: "'Orgy' video on WhatsApp lands four in the soup".²

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 17 years old, 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

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*

1 Desai, K. (1998). *Hullabaloo in the Guava Orchard*. New York: Atlantic Monthly Press.

2 Ansari, M. (2014, 26 November). '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 intercourse against the order of nature" an "unnatural offence" and has been used to punish same-sex behaviour?

5 In a private communication with GenderIT.org (<https://www.genderit.org>) editor Namita Malhotra, she says that 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.

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. So few answers.

Methodology

That troubled word, obscenity

Obscenity. What a troubled word. What a preoccupation down the ages. It's not fully clear if the roots of "obscenity" lie in 16th century Latin or in ancient Greece. By and large, the Latin word *obscenum*, meaning offensive, boding ill, or inauspicious, and itself a combination of *ob* (in front of) and *caenum* (filth), is considered the rightful parent of "obscene".⁶

However, it's possible that the concept has deeper roots in the ancient Greek dramatic convention of keeping sex and violence "*ob skena*" – or *off-stage*.⁷ *Ob skena* referred to that which was either *sexual* or *violent*. But down the ages obscenity – as a concept – has increasingly come to be associated with words or images that are *sexual*.

Our interest in obscenity – or more specifically, digital obscenity – stems from the anomalies in the case described above. We understand digital obscenity as that which involves the use of a digital device, such as a computer or a mobile phone. As such, "digital obscenity" is a sub-set of "obscenity in the digital age", which also takes place in physical settings without the presence of digital devices. (Yes, this still happens.)

Against this backdrop, *Guavas and genitals* explores this domain of "digital obscenity", or obscenity involving the use of a digital device. Through the study, we explore one overriding question:

- How does Indian law construct digital obscenity?

We delve into this larger question through a series of sub-questions:

- Why and how are sexual words and images, including those that are deemed obscene, produced and circulated?
- How, when and why did some sexual words and images emerge as "obscene"? What are the historical roots of obscenity?
- How does Indian law define, view and address obscenity in digital and physical realms? What are the contemporary meanings and practices associated with obscenity?
- How do laws on obscenity in the digital and physical realms relate to each other? Are they similarly or differently defined and applied?
- What are the implications and consequences, intended and unintended, of these legal framings and applications?
- How do these legal framings, understandings and applications strengthen or diminish women's rights, sexual rights and digital rights?

In India, digital obscenity is regulated by Section 67 of the Information Technology Act, which holds that: "whoever publishes or transmits or causes to be published or transmitted in the electronic form, any material which is *lascivious* or appeals to the *prurient* interest or ... tends to *deprave* and *corrupt* persons ... shall be punished ..."⁸ This provision is at the centre of our study.

Mixed methods and triangulation

Guavas and genitals starts by locating sexual words and images within two streams of theory and practice: that of sexual expression and that of digital photography. We then dive deep into the roots of Section 67, which regulates obscenity in digital domains. When, where and why did this section come into being? What were its origins? What is its social lineage, its legal pedigree? We go backward in time, to the 1800s when the first anti-obscenity provision was introduced into the Indian Penal Code⁹ during

6 www.etymonline.com/index.php?term=obscene

7 www.biblioklept.org/tag/ob-skena

8 Ministry of Law and Justice (Legislative Department). (2009). *The Information Technology (Amendment) Act, 2008*. www.meity.gov.in/writereaddata/files/itact2000/it_amendment_act2008.pdf

9 Law Commission of India. (1860). *The Indian Penal Code, 1860*. www.ncw.nic.in/acts/THEINDIANPENALCODE1860.pdf

colonial rule: Section 292. We spend some time analysing Section 292 – which regulates obscenity in spaces other than the digital.

From here, we move to studying Section 67 via a mixed methodology built on triangulation. In the social sciences, triangulation refers to the application and combination of several research methods in the study of the same phenomenon.¹⁰ We use multiple data sources to map out Section 67 and analyse it from different vantage points. More specifically, we use the following complementary quantitative and qualitative methods to dig into this legal provision:

Quantitative

- NCRB data: A 14-year review of publicly available National Crime Records Bureau (NCRB)¹¹ data on Section 67. Data is gathered and analysed from 2002, the first year when this data is available until 2015, the last year for which this data is currently available.
- Indian Kanoon: A review of legal documents filed in 99 cases under Section 67 in the year 2014. These documents have been accessed from the publicly available legal database at the site indiankanoon.org.¹²

These quantitative methods have certain limitations. While NCRB data claims to be comprehensive, this does not mean it is rigorously gathered, compiled or analysed. The Indian Kanoon data is self-selected and does not claim to be comprehensive. These limitations are further discussed in the relevant chapters.

Qualitative

- Literature review: A literature review of the historical and legal roots of Section 67 of the Information Technology Act and of Section 292, its counterpart in the Indian Penal Code. Since both these sections are based on language that is almost identical, what holds for one, holds for the other – up to a point.
- News reports of cases: An analysis of media reports of 99 cases filed under Section 67 in the years 2015, 2016 and 2017. These cases were obtained via customised searches using the site news.google.com.¹³

- Interviews: Interviews with key informants, including lawyers, policemen, and the Cyber Crime Investigation Cell, Mumbai.¹⁴

As researchers, we bring a triangle of interests, expertise and perspectives to our analysis: those related to the domains of gender, sexuality, and technology. As sex-positive feminists, we believe that sexual expression is as political and as vital as any other form of expression. And that protecting freedom of all expression, including the sexual, online is every bit as important as preserving it offline. Given our interests, we explore not just the legal implications of Section 67, but its implications for gender, sexuality, technology, society and rights – in the 21st century.

In writing *Guavas and genitals*, we intentionally slant it towards stonification, while maintaining a rigorous grip on research protocols and methods. We believe this will attract more readers and make the study more relatable to broader audiences – both online and offline.

Chapter 1 Sexting the cherry

Image, technology, expression

How do we locate this hullabaloo in the guava orchard? Should we think of this as sexual expression, no different from a kiss or a cuddle, except for the video? Absolutely. Words and images – both moving and still – have always been tools for personal expressions of sexuality. Think of the painstakingly crafted Victorian love letter. Or of folded chits, surreptitiously passed between lovers in the making. Of handwritten entries in locked diaries and awkwardly-posed studio photos of couples. Of tattoos in secret places which can't be easily removed when a relationship has died.

Love. Sex. Desire. Pleasure. Sexual expression has always been tied to technology, be it the pen, the camera or the cellphone. Some of the most commonly exchanged intimate images in the pre-smartphone era in India were those related to marriage – specially arranged marriages. Think of the classic studio portrait of a young woman whose parents will send her image to the “boy’s family” to create a match. You can almost see the technology behind her at work. The studio. The zoom lens. The lights. The formality of it all. And the social mores, the invisible parental hand guiding her to it.¹⁵

¹⁰ www.qualres.org/HomeTria-3692.html

¹¹ www.ncrb.gov.in

¹² www.indiankanoon.org

¹³ news.google.com

¹⁴ www.cybercellmumbai.gov.in

¹⁵ Kaul Padte, R. (2016, 11 May). Why I Share My Favourite Porn with Other Women. *Buzzfeed*. www.buzzfeed.com/richakaulpadte/why-i-share-porn-with-other-women?utm_term=.vs8meKPVo#_sk1qz3MKd

If the possibility of exchanging a nude selfie with one's lover didn't exist in analogue days, it's largely because the technology to do so didn't exist. Think of the dubious prospect of trundling down to the neighbourhood camera shop to get your nude image developed and printed by another. Not an option. As much as nude selfies – or sexts – are tied to “technologies of the self”,¹⁶ they're also tied to technologies of the digital. To cellphones that enable one to image and share one's body in relative privacy. Without going through an intermediary.

What the Pune boys sent to their friends was a sext. A sexual selfie – or a nudie – as it's sometimes been called.¹⁷ In formal terms, the nudie is almost the exact opposite of the arranged marriage portrait. It's home-made, by the subject themselves, often without the paraphernalia of professional photography. Sometimes it's badly shot but that hardly matters. Its bare-boned beauty and raw imperfection marks the emergence of the “sexual subject” in image-making in a manner that is worlds removed from the posed perfection of the “marital subject”. Both these images are almost on opposite ends of the arc of sexual expression – not just in terms of form and content, but also in terms of the agencies and subjectivities that lurk below their surfaces.

New media scholar Amy Adele Hasinoff refers to sexting as a technology-enabled form of sexual expression in the digital age.¹⁸ “Sexting is a practice of personal sexual media production,” she writes in her book *Sexting Panic*. “Consider sexting as the latest version of love letters, diary entries, suggestive Polaroid photos, camcorder recordings and phone sex. Consider that sexting is at once a sex act and a speech act.”¹⁹ In Hasinoff's book, sexting is not inherently deviant or pathological. But there are serious problems when personal sexual images are rooted in coercion, violate privacy, transgress consent or are used to harass. Writes Hasinoff: “Sexting is neither inherently liberating nor is it necessarily coercive. The act of sharing an explicit photo of oneself can be done under extreme duress or with as much free will as any other choice.”²⁰

Except it isn't always seen like that, of course. The prospect of young people exchanging intimate images – particularly nude ones – typically produces shock, horror and moral outrage, especially among parents, police and policymakers. Sexting is often seen as an irresponsible teenage practice and made exceptional,²¹ placed in a category by itself, somewhat like pornography, which is also rarely seen as legitimate media production.

In some parts of the world, sexting is seen as a crime. In the United States, where the age of consent is 16, but child porn laws apply to those below 18 years.²² This means that two 17-year-olds can legally have sex with one another, but not legally make or share a digital image of themselves having sex. Not even with each other, let alone others – that would qualify as child porn. US law does not use consent as a yardstick for establishing harm – or criminality – when it comes to teenagers: both consensual and non-consensual sexting among teens is criminalised. This has led to situations of extreme legal absurdity. In one teen sexting case, a bewildered judge asked the prosecutor: “It seems like the child here is the victim, the perpetrator and the accomplice. Does that make any sense?”²³

In June 2017, the US House of Representatives further criminalised sexting. The house passed a law that would put sexting teens in jail for 15 years – including teenagers who consensually send sexy photos to their friends or to each other. Teen sexting is neither considered private communication nor legitimate sexual expression and legally protected. It's criminalised.

Imagine that. Fifteen years of jail for exchanging an image of yourself having sex with the person with whom you had sex – consensually.

I photograph, therefore I am.

I am a camera. These are the words novelist Christopher Isherwood presciently wrote in the 1930s. “I am a camera with its shutter open, quite passive, recording, not thinking. Recording the man shaving at the window opposite and the woman in the kimono washing her hair.”²⁴ When he wrote this, there was no internet. No cell phones. No social media.

16 Foucault, M. (1988). *Technologies of the Self: A Seminar with Michel Foucault*. Massachusetts: University of Massachusetts Press.

17 www.urbandictionary.com/define.php?term=nudys

18 Hasinoff, A. (2015). *Sexting Panic: Rethinking Criminalization, Privacy, and Consent*. Chicago: University of Illinois Press.

19 Ibid.

20 Ibid.

21 Ibid.

22 Alseth, B. (2010). Sexting and the Law - Press Send to Turn Teenagers into Registered Sex Offenders. *American Civil Liberties Union of Washington*. www.aclu-wa.org/blog/sexting-and-law-press-send-turn-teenagers-registered-sex-offenders

23 Miller et al. v. Skumanick. 62. Temporary Restraining Order Hearing. (M.D. Pa. 2009). www.aclupa.org/download_file/view_inline/587/230/

24 Isherwood, C. (1939). *Goodbye to Berlin*. London: The Hogarth Press. www.youblisher.com/p/827019-GOODBYE-TO-BERLIN

Photography was all about recording today for tomorrow, creating visual memories to be privately savoured at a later date. As Isherwood went on to write, "Some day, all this will have to be developed, carefully printed, fixed."

Photography remained more or less the same until Isherwood died in the 1980s. Film. Develop. Print. The only technology to challenge this was the Polaroid, which immediately, instantaneously spewed out what it shot, earning it the moniker of the "instant camera". In the 1960s and 1970s Polaroid ruled the "instant photo" market. Its users included legendary pop artist Andy Warhol, who has been called the first Instagrammer²⁵ for obsessively shooting more than 20,000 Polaroid images of himself and his friends.²⁶

If there is any phenomenon that depicts the changing relationship between technology, expression and life, perhaps it is photography. Writes art historian Geoffrey Batchen: "The shift in the photograph's status from a static documentary record of a past moment to a ubiquitous mode of immediate communication allows us to perform versions of ourselves for a vast new public."²⁷

Images are no longer always about "fulfilling a mummification desire to embalm the past."²⁸ Images are about the here and now, shared the moment they're shot as part of the digital eco-system of "rapid delivery, ubiquitous availability and the instant gratification of desires."²⁹

This unending flow of images is now such an everyday means of communication that it is being likened to oral speech. Communications researcher Mikko Villi likens the "streams of short-lived, transitory, ephemeral, 'throwaway' images"³⁰ to words

during a phone call. Larsen notes that image exchanges, like spoken words, are not meant to be archived. Writes Lister: "[When] the rapid and continuous exchange of online photography becomes like a kind of speech, then this speech would be composed of little exclamations, oohs and ahs, nods, chuckles, pointings in several directions, silent mutterings to the self."³¹

If we're talking through images as much as words, it's largely because of the ubiquity of the cellphone. When the cellphone is always at hand, life is lived through images and vice versa, eerily evoking Baudrillard's "simulacra"³² and Debord's "spectacle".³³ "Today many people regard the camera as a part of their daily lives, almost an extension of their bodies," write media professors Jonas Larsen and Mette Sandbye.³⁴ Visual culture theorist Martin Lister talks of the "living of life" collapsing into the "making of photographs". "Photographs matter not as much as finite products but because they provide the occasion for taking photographs: for walking, for wandering, for being alert to opportunities, for 'being in the moment'."³⁵

In other words, I photograph, therefore I am.

Nothing exemplifies this more than the selfie. The selfie – which became the Word of The Year in 2013³⁶ – is many things, all in the same moment. A way to reveal oneself to oneself – and to others. A digital construction of identity. A way to harness fame. And a way to produce sociability. Aka, friendship.

Performing friendship through photography

In 2004, months after the United States invaded Iraq, essayist Susan Sontag wrote an impassioned article on how the Iraq war was being imaged. Photographing war used to be the province of photo-journalists, she wrote in *Regarding The Torture of Others*. But now soldiers are themselves photographers.

25 Duell, M. (2015, 20 August). The very first 'Instagram account': Andy Warhol's 'visual diary' of Polaroid photos of celebrities including Jack Nicholson and Dolly Parton set to be illustrated in new book. *MailOnline*. www.dailymail.co.uk/news/article-3204240/The-Instagram-account-Andy-Warhol-s-visual-diary-Polaroid-photos-celebrities-including-Jack-Nicolhson-Dolly-Parton-set-illustrated-new-book.html

26 Despite its technological innovation, Polaroid failed. It filed for bankruptcy in the early 2000s just as digital photography was coming into its own.

27 Batchen, G. (2014). Foreword. In J. Larsen & M. Sandbye (Eds.), *Digital Snaps: The New Face of Photography*. London: I. B. Tauris & Co. Ltd.

28 Larsen, J., & Sandbye, M. (2014). Introduction. In J. Larsen & M. Sandbye (Eds.), *Digital Snaps: The New Face of Photography*. London: I. B. Tauris & Co. Ltd.

29 Larsen, J. (2014). The (Im)mobile Life of Digital Photographs: The Case of Tourist Photography. In J. Larsen & M. Sandbye (Eds.), *Digital Snaps: The New Face of Photography*. London: I. B. Tauris & Co. Ltd.

30 Villi, M. (2014). Distance as the New Punctum. In J. Larsen & M. Sandbye (Eds.), *Digital Snaps: The New Face of Photography*. London: I. B. Tauris & Co. Ltd.

31 Larsen, J. (2014). The (Im)mobile Life of Digital Photographs: The Case of Tourist Photography. Op. Cit.

32 Baudrillard, J. (1994). *Simulacra and Simulations*. Ann Arbor: University of Michigan Press.

33 Debord, G. (1994). *The Society of the Spectacle*. New York: Zone Books.

34 Larsen, J., & Sandbye, M. (2014). Op. cit.

35 Lister, M. (2014). Overlooking, Rarely Looking and Not Looking. In J. Larsen & M. Sandbye (Eds.), *Digital Snaps: The New Face of Photography*. London: I. B. Tauris & Co. Ltd.

36 Oxford Dictionaries. (2013, 18 November). The Oxford Dictionaries Word of the Year 2013 is 'selfie'. *Oxford Dictionaries*. www.blog.oxforddictionaries.com/2013/11/word-of-the-year-2013-winner/

"Soldiers now pose, thumbs up, before the atrocities they commit, and send off the pictures to their buddies," writes Sontag. And elsewhere: "The pictures were meant to be circulated and seen by many people; it was all fun."³⁷

What the soldiers are performing through these image exchanges is friendship – or "friendship photography" as media theorist Joanne Garde Hanses refers to it.³⁸ We once talked on the telephone – we now talk through our images. We mark friendships by sharing and commenting on images. And we update our friendships as we update our image streams. "After a year a smartphone is outdated, you have to get a new one," writes Alain Bieber, curator of the photographic show *Ego Update*. "It is the same with the way you portray yourself, you have to be constantly renewing yourself."³⁹

But what exactly is "friendship photography"? Based on her research with teenagers in England, Garde Hansen writes about it thus:

This new audience of lay or friendship photography demands the ordinary ... The teenagers' photographs that were shown to me during the focus groups for my research (taken of domestic spheres, out and about, during daily routines or of one-off adventures) were aesthetic, spontaneous, dull, enviable, repetitive, creative, uninhibited, crowded, contrived and familiar in their non-eventness. They called *my attention* and called *attention* to ordinary lives turned into *events* in the moment of viewing ... Friendship photography, then, ... seeks to make an emotional connection in the present, establish a social tie, perform intimacy and joint memory as simultaneously offline and online.⁴⁰

Building friendship via photography is also a tightrope walk – between sharing too much and revealing too little, self-disclosure and vulnerability, what to keep private and what to make public. Garde-Hansen believes that friendship photography has collapsed the private/public barrier. "[It] has an integrated sense of sharing built in, which moves it very quickly from personal to public," she writes. "The concept that 'we are all friends online',

alongside the proliferation of the domestic sphere into online spaces and the technologisation of the home in real space, serves to reinforce the notion that what is private is also (by rights) public."⁴¹

Other digital researchers argue that teens go to great lengths to manage their privacy among networked publics. "Every teenager wants privacy," writes Danah Boyd in *It's Complicated*, her seminal study of teens and social media. "Teens' desire for privacy does not undermine their eagerness to participate in public. There's a big difference between being *in* public and *being* public." While research shows that sexual privacy remains at the top of most privacy lists, Boyd suggests that paradoxically, social media or "the networked publics they inhabit allow [teens] a measure of privacy and autonomy that is not possible at home where parents and siblings are often listening in."⁴²

Perhaps the question is not so much whether digital technologies are reconfiguring the private and the public, but *how* they are doing so. And what are the consequences of this reconfiguration? Anybody can reach into the stream of images and grab fragments of the lives of self and others, writes researcher Louise Wolthers.⁴³ The maker has little control left. Personal photographs are becoming more public and transitory, less private and durable, says information scholar Nancy Van House. "Whereas printed images and negatives are under the control of the owner, digital photographs have slipped the bounds of materiality and may have a life of their own outside the control of their makers."⁴⁴

Which may explain why there was a scandal when American soldiers' personal images from the Iraq war landed up on social media.

All of which may somewhat explain why there was a scandal when four young men in Pune shot and shared their sex play with their friends – and with a whole bunch of others.

37 Sontag, S. (2004, 23 May). Regarding the Torture of Others. *The New York Times Magazine*. www.nytimes.com/2004/05/23/magazine/regarding-the-torture-of-others.html

38 Garde-Hansen, J. (2014). Friendship Photography: Memory, Mobility and Social Networking. In J. Larsen & M. Sandbye (Eds.), *Digital Snaps: The New Face of Photography*. London: I. B. Tauris & Co. Ltd.

39 Meier, A. (2015, November). "I Document, Therefore I Am". *Goethe Institut*. www.goethe.de/en/kul/med/20640599.html

40 Garde-Hansen, J. (2014). Op. cit.

41 Ibid.

42 Boyd, D. (2014). *It's Complicated: The Social Lives of Networked Teens*. New Haven: Yale University Press. www.danah.org/books/ItsComplicated.pdf

43 Wolthers, L. (2014). Virtual Selves: Art and Digital Autobiography. In J. Larsen & M. Sandbye (Eds.), *Digital Snaps: The New Face of Photography*. London: I. B. Tauris & Co. Ltd.

44 Van House, N. (2011). Personal photography, digital technologies and the uses of the visual. *Visual Studies*, 26(2), 125-134. www.tandfonline.com/doi/full/10.1080/1472586X.2011.571888?scroll=top&needAccess=true

Chapter 2 A short history of obscenity

From sin to crime

*What harm has the sex act, so natural, so necessary, and so lawful, done to humanity, that we dare not speak of it without shame, and exclude it from serious and orderly conversation? We boldly utter the words "kill", "rob", "betray"; and the other we only dare utter under our breath.*⁴⁵

Philosopher Michel de Montaigne, France,
16th century

The legal roots of obscenity in India are found amidst the social, political and technological changes of the 18th and 19th centuries. In 1727, for the first time, obscenity, previously defined as a "sin" – or a private immoral act for the spiritual courts to rule on – emerged in England as a "crime", or a public offence. An English common law court ruled that printer Edmund Curll's translated publication of *Venus in the Cloister*⁴⁶ was guilty of "obscene libel".⁴⁷ "What made Curll's action criminal in the view of the judges was a contingent technological circumstance: the publication was a *printed work*, and as such it was *capable of widespread public distribution*."⁴⁸

And just like that, as mass print and commercial presses gave wider access to books and ideas, new anxieties surfaced – and a new offence was born. Obscenity.

Early obscenity laws were used to control explicit sexual writing that satirised and criticised the church, the state, and the monarchy.⁴⁹ In other words, early obscenity laws were used to control

obscenity, defamation and blasphemy – or sexual and (conventionally) political speech.⁵⁰ In 1868, a Protestant publisher was prosecuted for circulating a pamphlet⁵¹ showing how Catholic priests extracted erotic confessions from female penitents.⁵² Ironically, he was charged with obscenity while trying to expose the "obscenity" of priestly practice.⁵³ The judge in the landmark *Regina v Hicklin* case ruled thus:

I think the test of obscenity is this: whether the tendency of the matter charged as obscenity is to *deprave* and *corrupt* those whose minds are open to such immoral influence, and into whose hands a publication of this sort may fall.⁵⁴

And just like that, a new test of obscenity emerged, not just in Britain, but in its colonies. The Hicklin test, named after the magistrate who had ordered the pamphlets to be seized. Who could have then imagined that this test would decide what was obscene in India for two more centuries?⁵⁵

Clean up the muck

*It would not be an exaggeration to say that obscenity is the national vice of the Bengalis.*⁵⁶

By the mid 1800s, regulating obscenity had broadened from a limited national project to an imperial preoccupation, as part of England's bigger project of "purifying empire".⁵⁷ The Obscene Publications Act had just been passed after a stiff battle in the British Parliament. During the debate, the bill's proponents

45 Montaigne, M. (1580). *Upon Some Verses of Virgil*. Bordeaux: Simon Millanges, Jean Richer. www.gutenberg.org/files/3595/3595.txt

46 In *Venus In The Cloister* aka *The Nun In Her Smock*, two young nuns Angelica and Agnes – enjoy sexual relations with one another and, peripherally, with men. "What the state punished was not the representation of sex, but the representation of sex – lesbian sex in particular – that was not punished intratextually. The result is the incorporation of pornography into a conservative and, to risk cliché, hegemonic penal apparatus."

47 No one was libelled in the modern sense of the word. However, the crime was defined as one of disturbing the King's peace through an obscene publication which harmed public morality. Pettit, A. (2001). Rex V. Curll: Pornography and Punishment in Court and on the Page. *Studies in the Literary Imagination*, 34(1). <https://www.questia.com/library/journal/1G1-769979751/rex-v-curll-pornography-and-punishment-in-court>

48 Saunders, D., & Williamson, D. (1993). *On Pornography: Literature, Sexuality and Obscenity Law*. London: Palgrave Macmillan.

49 Malhotra, N. (2010). *Pornography and the Law*. Bangalore: Centre for Internet Studies. cis-india.org/raw/histories-of-the-internet/blogs/law-pornography

50 Sexual speech is also political, hence the use of the term "conventionally political".

51 Scott, H. (1867). *The Confessional Unmasked: Shewing the Depravity of the Romanish Priesthood, the Iniquity of the Confessional and the Questions Put to Females in Confession*. London: The Protestant Electoral Union. <https://catalog.hathitrust.org/Record/001935730>

52 Malhotra, N. (2010). Op. cit.

53 Mazzarella, W. (2013). *Censorium: Cinema and the Open Edge of Mass Publicity*. Durham: Duke University Press.

54 Mazzarella, W. (2011). The Obscenity of Censorship: Re-thinking a Middle Class Technology. In A. Bavisar & R. Ray (Eds.), *Elite and Everyman: The cultural politics of the Indian middle classes*. London: Routledge. www.academia.edu/612164/The_Obscenity_of_Censorship_Re-thinking_a_Middle_Class_Technology

55 Bhatia, G. (2016). *Offend, Shock, Or Disturb: Free Speech Under the Indian Constitution*. India: Oxford University Press.

56 Ramnarine, T. (2001). *Creating Their Own Space: The Development of an Indian Caribbean Musical Tradition*. Kingston: University of West Indies Press.

57 Heath, D. (2010). *Obscenity and the Politics of Moral Regulation in Britain, India and Australia*. Cambridge: Cambridge University Press.

invoked the 1857 revolt in India to bolster their cause. Writes Heath:

It strengthened the resolve of Evangelical interventionists to purify the home society to make it worthy of its imperial mission. It also immensely hardened the general public mood against “sentimentality” in matters of social control, including the sexual.⁵⁸

In Australia, the discourse of “imperial hygiene” cast obscenity as a form of contagion, and censorship as sanitation.⁵⁹ Dirty. Clean. In British India, it resulted in the Contagious Diseases Act of 1864, which aimed to keep British soldiers clean of sexually-transmitted diseases by locking up “infected” prostitutes.⁶⁰ Dirty. Clean. Josephine Butler, a prominent feminist who protested against this act, did so not because prostitutes were being randomly detained, but because other “innocent” women were being inspected. The Association for Moral and Social Hygiene in India, that she founded, was active in anti-obscenity campaigns.⁶¹ Dirty. Clean.

It was the age of Queen Victoria, a time when an “assertive prudishness had become a part of the paraphernalia of respectability,”⁶² writes scholar Sumanta Banerjee. Victorian morality laid an emphasis on constraining the body – don’t place your elbows on the table, walk without swinging your hips, don’t chew loudly, don’t snort or pant. Where sex was concerned, “there was the same stress on closing up and limiting the body’s confines.”

A somewhat different attitude to the body prevailed then in India, where the body – and its satisfaction in everything from food to sex – was a staple of folk and popular culture. Bengali poems frankly and erotically described the various stages

of lovemaking. Popular songs mocked the human body to the point of the grotesque, marking “its degeneration and decrepitude.”⁶³ Hindu gods were sometimes represented as human beings, occasionally even depicted with their genitals on display.⁶⁴

The concept of “obscenity” was irrelevant in this cultural milieu. It emerged as Christian missionaries, English educationists and administrators mingled with Brahminism, social reform and *bhadralok*, or the respectable gentry. These groups “perceived the social world as frighteningly lacking in normative regulation and moral authority,” writes Banerjee. Ergo, obscenity.

It was, literally, a new concept.

So much so, that it emerged on the streets in song and verse:

*“There’s a new frenzy in town, my brother Never
before have we heard this word, obscenity.”⁶⁵*

The first obscenity laws in India appeared around this time, spanning all cultural forms – from performance to print – that were then in existence. There were anti-obscenity provisions in the Indian Penal Code,⁶⁶ the Post Office Act,⁶⁷ the Sea Customs Act⁶⁸, and the Dramatic Performances Act.⁶⁹ Between them, they prohibited every possible mode by which sexual ideas could be transmitted: distribution, circulation, sale, public exhibition, hire, conveyance, importation, exportation, advertise, even possession with a view to sell.

Almost everything, except personal consumption. You could only legally read an “obscene” book through a miracle. Or if you wrote it. Since you couldn’t legally borrow, buy,⁷⁰ hire or steal it.

Section 292 of the Indian Penal Code – under which four young guava-eating men would be

58 Ibid.

59 The Contagious Diseases Act was passed in England in 1864 allowed police officers to arrest women suspected of being prostitutes in certain ports and army towns. The women were then subjected to compulsory checks for venereal disease. If a woman was declared to be infected, she would be confined in what was known as a lock hospital until she recovered or her sentence finished. The original act only applied to a few selected naval ports and army towns, but by 1869 the acts had been extended to cover 18 “subjected districts”.
www.en.wikipedia.org/wiki/Contagious_Diseases_Acts

60 The Contagious Diseases Act. (2009). *The Victorian Web*.
www.victorianweb.org/gender/contagious.html

61 Heath, D. (2010). Op. cit.

62 Banerjee, S. (1987). Bogey of the Bawdy-Changing Concept of Obscenity in 19th Century Bengali Culture. *Economic & Political Weekly*, 22(29). www.epw.in/journal/1987/29/special-articles/bogey-bawdy-changing-concept-obscenity-19th-century-bengali-culture

63 Ibid.

64 Among other examples, Banerjee writes about a 19th century Kalighat pat, showing a pot-bellied Shiva, forgetful of his slipping tiger-skin loincloth, quite uninhibitedly showing his genitals.

65 *Shahorey ek nutun hujuk uthechhey re bhai Ashleelta shabdo mora agey suna nai*

66 Law Commission of India. (1860). *The Indian Penal Code, 1860*.
www.ncw.nic.in/acts/THEINDIANPENALCODE1860.pdf

67 Department of Posts, India. (1898). *The Indian Post Office Act, 1898*. www.indiapost.gov.in/VAS/DOP_RTII/TheIndianPostOfficeAct1898.pdf

68 Department of Revenue, India. (1878). *Sea Customs Act, 1878*. www.indiapost.gov.in/VAS/DOP_RTII/TheIndianPostOfficeAct1898.pdf

69 Government of India. (1876). *Dramatic Performances Act*.
www.wipo.int/edocs/lexdocs/laws/en/pk/pk046en.pdf

70 Although purchase was not deemed illegal, sale was, making it all but impossible to legally purchase.

charged with obscenity 150 years later – was born in this colonial era of frenzied lawmaking.⁷¹

Eroticism for the masses

*If you discuss 84 postures, 72 kisses, 128 types of embraces ... what young man would not read your book with deep engrossment?*⁷²

Anonymous, June 1925

Anxieties around sexual literature intensified in the early 20th century, as offset printing presses flooded the market with everything from “penny dreadfuls”⁷³ to erotic sex manuals, “surreptitiously disturbing the dominance of ‘clean’ literature”.⁷⁴ While these erotic publications fed into female and male sexual fantasies and desires, sanitised literary norms were becoming markers of culture and civilisation. Erotic poetry was deemed a threat to civilisation and sensual Hindu temple sculptures were labelled “impure”. While sex for reproduction was considered healthy and legitimate, sex for pleasure was branded unhealthy and obscene. Writes historian Charu Gupta:

In the discourse of the nation, non-reproductive and hedonistic sexual behaviour came under extraordinary negative pressures, resulting in a near exclusion of all non-reproduction-oriented sexualities ... Wherever sexual descriptions celebrated desire or eroticism for its own sake, they became unacceptable or obscene.⁷⁵

The representation of women also took a turn in this morally-purifying scheme of things. Women in high Hindi literature were no longer represented as erotic, sexually-active *nayikas* or heroines. They now became chaste, virtuous Hindu wives and mothers. Writes Gupta:

The dominant image of women as sexual beings was reversed and transformed into an ideology

of female passionlessness, framing an oppositional womanhood against colonial designations of derelict sexuality ... The taboos on her behaviour were aimed to enclose and discipline female bodies, to ensure a new social and moral hierarchy of power, and to integrate chastity with middle-class identity.⁷⁶

Misgivings about “dirty literature” soon mutated into a full-scale war on smut. Mahatma Gandhi decried the “filth” in literature. “To excite lasciviousness is the only business of poets,” lamented a fellow poet.⁷⁷ Books, pamphlets, postcards and pictures were confiscated.⁷⁸ Publications on birth control were banned, books on homosexuality became taboo, and shops were warned against stocking the *Kama Sutra*.⁷⁹ Railway bookstalls were not allowed to keep “objectionable” material. Bookstores were searched, publications coming from Europe were seized, and booksellers, presses and publishers were prosecuted under new anti-obscenity laws.

All because of one overriding anxiety: technology was enabling the masses, including the “lower classes” to access sexually-explicit materials. Writes Gupta:

Their market was not limited to the literati ... but extended to an increasing class of functionally literate people, including clerks, shopkeepers, traders and students ... These authors tested the boundaries of decency and were thought incompatible with the new ideals of nationhood and civilisation ... The trouble with eroticism for the masses was its subversion of the usual rules of order and propriety.⁸⁰

Amidst all this, the first international conference against obscenity was held in 1925 and Section 292 was amended to exempt religious books. It was under this amended section that two reputed Indian novelists were charged with obscenity in the 1940s. One was the Urdu writer, Saadat Hasan Manto. During one trial, when a witness claimed he had used the “obscene” word “bosom”, Manto jumped up

71 It was one of the sections listed under the category of Offences affecting the Public Health, Safety, Convenience, Decency and Morals in the newly-formulated Indian Penal Code of 1860.

72 Gupta, C. (2000). ‘Dirty’ Hindi Literature: Contests About Obscenity in Late Colonial North India. *South Asia Research*, 20(2). https://www.researchgate.net/profile/Charu_Gupta13/publication/249748785_%27Dirty%27_Hindi_Literature_Contests_About_Obscenity_in_Late_Colonial_North_India/links/557f905b08ae26eada8f5ad3/Dirty-Hindi-Literature-Contests-About-Obscenity-in-Late-Colonial-North-India.pdf?origin=publication_detail

73 Flanders, J. (2014, 15 May). Penny dreadfuls. *Discovering Literature: Romantics and Victorians*. <https://www.bl.uk/romantics-and-victorians/articles/penny-dreadfuls>

74 Gupta, C. (2000). Op. cit.

75 Ibid.

76 Ibid.

77 Gupt, M. (1937). *Bharat Bharati*. Jhansi. 14th edition.

78 In ‘Dirty’ Hindi Literature: Contests About Obscenity in Late Colonial North India, Gupta describes how printed sex manuals tried to camouflage themselves by saying they were highlighting the “scientific” facts of sexual life, and were not “obscene”.

79 www.archive.org/details/kamasutraofvatsy00vatsuoft

80 Gupta, C. (2000). Op. cit.

and asked: "What else did you expect me to call a woman's breasts – peanuts?"⁸¹

The other was Ismat Chughtai, whose short story *Lihaaf* (The Quilt)⁸² explored an erotic relationship between two women below a quilt. Both of them won their cases after long, highly-publicised trials, but that is not the only thing of note. As legal scholar Ratna Kapur writes of Chughtai's case, "As is the effect of most obscenity trials, it left the stain of immorality and stigma on both the sexual speech, as well as the sexual conduct, that was impeached."⁸³

Tentatively establishing that the legal ride from "sexual speech" to "obscenity" is a short one.

Chapter 3 Bodies of evidence I

"What is this obscenity you have brought?"

Fast forward to the 21st century. In 2004, two school students in Delhi, a boy and a girl, filmed themselves having sex. Like the Pune guava-eaters, the boy was 17, the girl was 16. They'd filmed themselves for their own pleasure, but the boy shared the MMS clip with his friend in an early manifestation of the internet phrase, "Pics or it didn't happen". When a tabloid found this being sold online as "DPS girls having fun", the law creaked into motion. An engineering student was arrested for uploading the "obscene" clip, as was the head of the company that ran the site.⁸⁴

They were arrested under a relatively new provision: Section 67 of the Information Technology Act. A provision that carried a colonial mindset into the digital age by using the same legal language.

The IT Act, as it is popularly called, had rolled in just five years after the internet was publicly launched in India – on Independence Day, 15 August 1995.⁸⁵ Those were the days of TCP/IP, slow speeds, unstable dial-ups, and internet evangelists. In his declaration of independence, John

Perry Barlow urged "Governments of the World, you weary giants of flesh and steel" to stay clear of "CyberSpace, the new home of Mind." Wrote Barlow: "On behalf of the *future*, I ask you of the *past* to leave us alone. You are not welcome among us. You have no sovereignty where we gather."⁸⁶

It was that utopian moment when promise and possibility outweighed porn and peril. Or did it?

"Within months of the immense popularity came a headache," wrote two technology journalists. "Pornography." At 2:00 a.m. one night, the telecom minister called the ISP head. "He asked in a very unhappy tone 'Yeh kya ashleelta laye ho?' (What is this obscenity you have brought), referring to the pornography that came with access." A women's rights group protested outside the telecom operator's office. "They wanted people to show them the internet so they could burn it down."⁸⁷

Technology. Access. Obscenity. The more things change, the more they remain the same.

What the numbers say

The year 2004 is a watershed year in India's internet history. It was the year that Section 67 was first mentioned in mainstream Indian media. It was also the year that the term "intermediary liability"⁸⁸ entered public consciousness – as the cops booked the head of the site on which the DPS-MMS clip had been uploaded.⁸⁹ 2004 was also one of the first years in which obscenity showed up as the highest-reported digital offence.

Or so it appeared from the data provided by the National Crime Records Bureau.⁹⁰ The NCRB, as it is popularly referred to, is the government agency responsible for collecting and analysing crime data from the Indian Penal Code – and from the Information Technology Act of 2000. The NCRB acts as an aggregator of sorts, compiling country-wide data of cognisable offences based on reports from different

81 Bhatia, G. (2015, 18 February). Vulgarly vs obscenity. *Livemint*. www.livemint.com/Politics/HUdmFlzTs3F2xJhuLuBPSK/Vulgarly-vs-obscenity.html

82 Chughtai, I. (1941). *Lihaaf*. *Adab-i-Latif*. [https://archive.org/stream/LihaafTheQuiltIsmatChughtaiLihaaf%20\[The%20Quilt\]%20-%20Ismat%20Chughtai_djvu.txt](https://archive.org/stream/LihaafTheQuiltIsmatChughtaiLihaaf%20[The%20Quilt]%20-%20Ismat%20Chughtai_djvu.txt)

83 Kapur, R. (2000). Law and the Sexual Subaltern: A Comparative Perspective. *Cleveland State Law Review*. 48(1). engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1424&context=clevstlrev

84 DPS MMS Scandal. www.en.wikipedia.org/wiki/DPS_MMS_Scandal

85 Ghosh, S., & Mishra, A. (2015, 30 June). The birth of the Internet in India. *Livemint*. www.livemint.com/Industry/R3kgewhlhKsbiELV1sHZM/The-birth-of-the-Internet-in-India.html

86 Barlow, J. (1996, 8 February). A Declaration of the Independence of Cyberspace. www.eff.org/cyberspace-independence

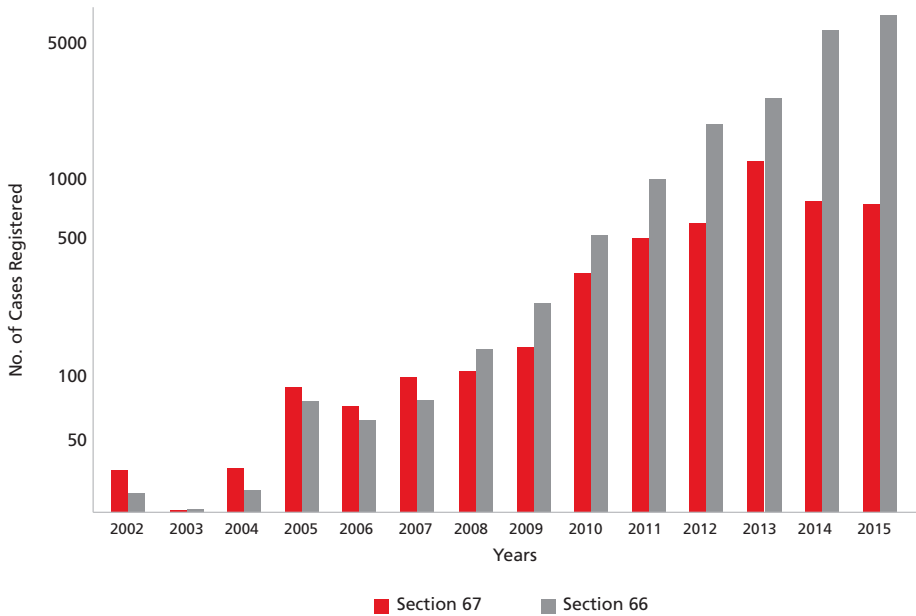
87 Ghosh, S., & Mishra, A. (2015, 30 June). Op. cit.

88 Chawla, K. (2014, 7 October). Intermediary Liability – An Explanation. *Tech Law Forum @ NALSAR*. www.techlawforum.wordpress.com/2014/10/07/intermediary-liability-an-explanation/

89 The use of Section 67 and the term "intermediary liability" were triggered by the same case: the "DPS girls having fun" clip which was sold for Rs 125 on E-bay's India site, baazee.com. Kallender, P. (2004, 20 December). Ebay 'outraged' at CEO arrest in India. *Macworld*. www.macworld.com/article/1041519/ebay.html

90 The NCRB was set up in 1986 and initially classified crimes based on the Indian Penal Code. It started classifying crimes from the Information Technology Act in 2002.

FIGURE 1. Cases filed under Section 66 and Section 67



The quantum of obscenity-related cases has increased exponentially – 36 times – over 14 years, while its percentage share has dropped.

states. These are published in the compendium, *Crimes in India*, which serves as a national repository of crimes in India.⁹¹

We went through NCRB data for the Information Technology Act from 2002 to 2015⁹², the first and last years for which this data is currently available. This is what we found.

Section 67 is the second-most used section in the Information Technology Act

From 2002 to 2015, Section 66 was the most used section in the IT Act; Section 67 was the second-most used section. This can be divided into two phases:

- 2002-2007 – Section 67 is most-used section each year barring one year
- 2008-2015 – Section 66 is the most-used section each year.

From 2008 to 2015, the number of cases filed under Section 67 grew steadily from 105 to 749, while

those filed under Section 66 grew from 138 to a whopping 6,567.⁹³

For the full period from 2002 to 2015, Section 66 grew at a compound annual growth rate (CAGR) of 53% in terms of cases filed, while Section 67 grew at 28% – roughly half that of Section 66 (see Figure 1). Since no data is available for the use of Section 292, it is not possible to compare the growth of “offline” obscenity during the same period.

The number of cases filed under Section 67 rose sharply from 33 in 2002 to 1,203 in 2013, then dropped to 749 in 2015. During this time, the total number of cases filed under the IT Act also increased sharply from 70 in 2002 to 8,045 in 2015. The greatest rise was recorded from 2009, the year when the Android phone came to India,⁹⁴ exponentially increasing the number

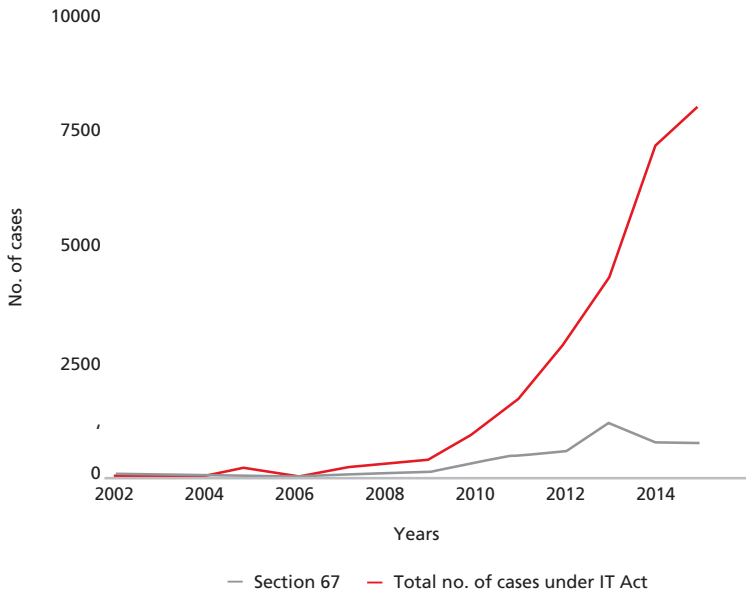
⁹³ As per the NCRB, the bureau follows the “Principal Offence Rule” for counting of crime. “Hence among many offences registered in a single case, only most heinous crime has been considered as counting unit, thereby representing one case.” (Compendium 2014). Thus it is not clear if these cases are also registered under sections of the Indian Penal Code.

⁹⁴ Radhakrishnan, A. (2009, 23 June). First Android Phone in India launched today. *The Economic Times*. www.economicstimes.indiatimes.com/tech/hardware/first-android-phone-in-india-launched-today/articleshow/4689118.cms

⁹¹ National Crime Records Bureau. *Crimes in India*. www.ncrb.nic.in/StatPublications/CII/ciimainpage.htm

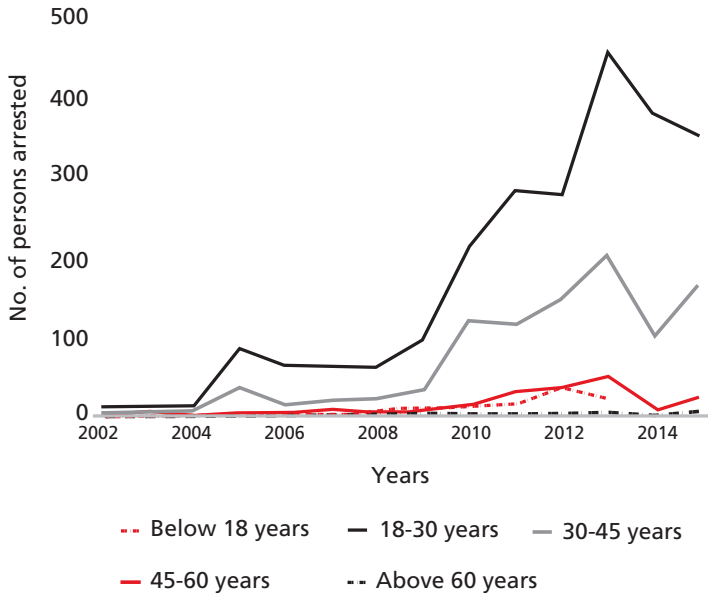
⁹² NCRB Crimes in India Reports www.ncrb.nic.in/StatPublications/CII/PrevPublications.htm

FIGURE 2. Cases under Section 67 vs. total number of cases under IT Act



Young adults comprise the biggest category of arrests for obscenity-related offences.

FIGURE 3. Age distribution of persons arrested under Section 67



of internet users. This was also the year when the 2008 amendments to the IT Act came into effect.⁹⁵

Even though the *absolute* number of cases filed under Section 67 has increased each year, its percentage share of cases has declined – from 47% of all cases filed under the IT Act in 2002 to 10% in 2015 (see Figure 2). This drop in percentage share occurs in four distinct phases.

Share of cases filed under Section 67 as percentage of cases filed under IT Act:

- 2002-2007 – more than 45% (barring 2003)
- 2008-2010 – 30-40%
- 2011-2013 – 20-30%
- 2014-2015 – 10%.

It is not clear why this happened.

In terms of age, 18- to 30-year-olds constitute the biggest category of those arrested under Section 67 from 2002 to 2015 – both in absolute and relative terms. The number of 18- to 30-year-olds arrested increased from eight in 2002 to 352 in 2015. The 30- to 45-year age group made up the second-highest category of arrests (see Figure 3).

In percentage terms, 18- to 30-year-olds comprise more than half the arrests under Section 67 each year from 2004. In six of these years, they constitute 60% to 70% of those arrested under this section; in three of these years, they constitute 70% to 80% of those arrested under this section. This is consistent with internet use; 18- to 30-year-olds are within the age group with the highest internet use in India.⁹⁶

In some years, the number of arrests made outstrips the number of cases registered for obscenity, raising the possibility of multiple offenders.

Data and its discontents

One question repeatedly cropped up during our research: Is NCRB data reliable? Is it accurate? Is it comprehensive? This question is even more compelling since numbers are often used by policymakers and politicians as rationale for laws and policies.

In other words, data is political.

Lawyers, criminologists and researchers are starting to question NCRB data. In August 2017, a noted feminist lawyer argued that this data was being misread to roll back a law against domestic violence.⁹⁷ NCRB data has also been challenged for under-reporting farmer suicides, rapes, and crimes in India's largest state.⁹⁸ In 2016, a criminology professor noted that some states under-report "juvenile" crimes due to political pressure – this results in other states being projected as juvenile crime hubs. "It is time the NCRB took onus for the data it publishes and strived for authenticity instead of 'statistical consistency'," Asha Mukundan wrote. "Until then, handle NCRB data with care."⁹⁹

Where cybercrime is concerned, other data tells a different tale. In 2015, the NCRB reported a total of 11,592 cybercrime cases – that same year the Indian Computer Emergency Response Team (CERT-IN) tracked 49,455 cyber-security incidents and a minister told parliament that 27,205 websites had been hacked.¹⁰⁰ That's 76,660 cases of just two cybercrimes against NCRB's tally of 11,660 IT Act cases. A police officer informally told us that there is massive under-reporting of cybercrimes in India. According to him, many constables aren't familiar enough with the IT Act to book crimes under this act – so cybercrimes are often not registered. And even when they are registered, it is often not under the IT Act.¹⁰¹

95 Press Trust of India. (2009, 27 October). Amended IT Act to prevent cyber crimes comes into effect. *The Hindu*. www.thehindu.com/news/national/Amended-IT-Act-to-prevent-cyber-crime-comes-into-effect/article16888817.ece

96 The Hindu. (2013, 24 August). India is now world's third largest Internet user after U.S., China. *The Hindu*. www.thehindu.com/sci-tech/technology/internet/india-is-now-worlds-third-largest-internet-user-after-us-china/article5053115.ece

97 Jaising, I. (2017, 2 August). Victim in the dock. *The Indian Express*. www.indianexpress.com/article/opinion/columns/victim-in-the-dock-law-of-cruelty-against-women-supreme-court-judgment-rajesh-sharma-and-ors-v-state-of-up-and-anr-4777931

98 Tiwary, D. (2016, 16 September). NCRB data: The odd case of crime in Uttar Pradesh, IPC rate very low, overall very high. *The Indian Express*. www.indianexpress.com/article/explained/ncrb-data-uttar-pradesh-crime-rate-up-police-3033360; Saha, D. (2015, 21 July). No one believes NCRB's farmer suicide data, not even NCRB. *Hindustan Times*. www.hindustantimes.com/india/no-one-believes-ncrb-s-farmer-suicide-data-not-even-ncrb/story-yOEgCC8nNZkZ10KwE7TQOI.html; Himabindu, B. L., Arora, R., & Prashanth, N. S. (2014). Whose problem is it anyway? Crimes against women in India. *Global Health Action*, 7(1). www.ncbi.nlm.nih.gov/pmc/articles/PMC4107300

99 Mukundan, A. (2016, 9 September). NCRB data: handle with care. *The Hindu*. www.thehindu.com/opinion/op-ed/NCRB-data-handle-with-care/article14628673.ece

100 Press Trust of India. (2017, 9 February). CERT-In reports 50,362 cybersecurity-related incidents in India during 2016. *BGR*. www.bgr.in/news/cert-in-reports-50362-cybersecurity-related-incidents-in-india-during-2016

101 In India, a crime can be registered in one of three legal baskets: the Indian Penal Code, special and local laws which vary from state to state, or the Information Technology Act. Naidu, J. (2017, 7 August). Cybercrime on the rise in Mumbai, but experts still not geared up. *Hindustan Times*. www.hindustantimes.com/mumbai-news/cybercrime-on-the-rise-in-mumbai-but-experts-still-not-geared-up/story-cyPSifOcyCq3cdhthNNJ.html

While classifying crimes, the NCRB typically classifies each case under “the offence that is more heinous or attracts greater punishment”.¹⁰² This means interpreting crime data, bringing in an element of subjectivity to the analysis. In this study, we have mitigated some of the risk of using NCRB data by analysing multiple qualitative and quantitative sources of data.

After trawling through NCRB data, another question looms large. How has Section 67 been used since its inception? Writes technology lawyer N.S. Nappinai, “Early day offences under Section 67 of the IT Act were of jilted lovers or refused proposals resulting in posting of obscene content online or of the personal and contact details of women online, on solicitation websites or banners, which resulted in the women being harassed by callers making vulgar or obscene comments.”¹⁰³

That was then. There were no provisions to address privacy violations. So when a woman’s address was posted on a sex site online, Section 67 was pressed into action. In the absence of a specific provision, privacy-related offences were booked as obscenity offences.

In 2008, a new section was introduced into the IT Act: Section 66E. This regulates the capture, publication or transmission of “the image of a *private area* of any person without his or her consent, under circumstances violating the *privacy* of that person.”¹⁰⁴

Granted. The wording of Section 66E is not great. The emphasis on “private area” seems to leave out the face, which features in many digital offences, including morphing. Even so, it recognises the right of an individual to their privacy and agency in deciding how their images are taken or used. When education minister Smriti Irani found herself being surreptitiously filmed in the changing room of a clothing store, Section 66E was infamously invoked.¹⁰⁵

The irony is that it’s rarely used otherwise.

Section 67 continues to rule in cases where there’s a toss-up between privacy and obscenity. And it’s increasingly being used in other kinds of cases. Since 2015, Section 67 has been used against comedians like All India Bakshod,¹⁰⁶ porn stars like Sunny Leone,¹⁰⁷ and quasi-religious figures like Messengers of God. It’s been mobilised to block trolls, curb “hate speech”, block escort services, clamp down on morphed images, “vulgar” pictures, revenge porn, rape videos, and what not. We explore this in more detail later in this study.

In short, Section 67 has become a catch-all category, almost like a garbage dump for offences, some of which have little connection with “obscenity”.

Chapter 4 Lascivious and prurient

To treat a natural instinct, such as sex, as obscene is obviously outdated. The fundamental basis of obscenity is, therefore, unattainable.

Indira Jaising, Lawyer and former Additional Solicitor-General, India

Lascivious. Prurient. Deprave. Corrupt. These are the four words on which obscenity has rested in India since 1969.¹⁰⁸ Section 292 of the Indian Penal Code defines obscenity as that “which is *lascivious* or appeals to the *prurient* interest or if its effect is such as to tend to *deprave* and *corrupt* person...” The same wording is used in its electronic avatar, Section 67 of the Information Technology Act.

Offences under both Section 292 and Section 67 are cognisable¹⁰⁹ and bailable. While the use of Section 292 results in a jail term up to two years and a fine up to Rs 2000 the first time around, the use of Section 67 results in a jail term up to three years

102 Tiwary, D. (2016, 16 September). Op. cit.

103 One of the earliest such cases, which was probably also the fastest to be investigated, tried and convicted, was that of State of Tamil Nadu v. Suhas Katti. In this case a Mumbai-based boy created a fake email identity, and using this, uploaded the contact details of a former colleague, who had relocated to Chennai, under a solicitation banner. The victim came to know of the post after receiving multiple calls of solicitation.”

104 Aarora, N. (2009, 28 October). IT Amendment Act, 2008 notified w.e.f. 27/10/2009. *A Platform to discuss & analyse cyber law, cyber crime, cyber forensics & cyber warfare*. www.neerajaarora.com/it-amendment-act-2008-notified-w-e-f-27102009

105 India Today. (2015, 11 April). CCTV camera in FabIndia trial room: Goa Police crack case. *India Today*. indiatoday.intoday.in/story/fabindia-trial-room-case-cctv-camera-go-police/1/429689.html

106 Firstpost. (2015, 13 February). AIB roast: Police register FIR against actors, complainant’s lawyer says show was ‘pre-scripted’. *Firstpost*. www.firstpost.com/living/aib-roast-police-register-fir-against-actors-complainants-lawyer-says-show-was-pre-scripted-2096563.html

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

108 Ranjit Udeshi v. Maharashtra (1965). Two bookstall owners were convicted for possessing the “unexpurgated” edition of DH Lawrence’s novel, *Lady Chatterley’s Lover*.

109 Nappinai, N.S. (2015, 14 July). A Gross Misuse of the IT Act by Mumbai Police. *The Wire*. www.thewire.in/6390/mumbai-polices-gross-misuse-of-the-it-act/

and a fine up to Rs 5 lakhs first time around.¹¹⁰ A subsequent conviction ups the maximum jail term to five years in both sections. But while the fine goes up to Rs 5000 under Section 292, it goes up to Rs 10 lakhs in Sec 67.¹¹¹ While exceptions for scientific, literary, artistic or religious purposes are allowed under Section 292, they're not allowed under Section 67.¹¹² All these seem to indicate that online obscenity is viewed as a more serious crime than its offline counterpart. As writer and researcher Richa Kaul Padte notes, "The seriousness with which the crime of obscenity is viewed is heightened by the change in medium."¹¹³

While Section 292's siblings (Sections 293, 294 and 295) prohibit different forms of obscenity, Section 67 has child provisions. Section 67A prohibits the publication or transmission of sexually explicit material, while Section 67B prohibits the depiction of children in sexually explicit acts in an electronic form. Both these sections deal with pornography, which the Supreme Court considers an "aggravated form of obscenity".¹¹⁴ Laws such as the Indecent Representation of Women (Prohibition) Act and the Sexual Harassment at Workplace Act also address offences similar to obscenity.

Two new words enter the law

Since India's independence in 1947, practically every representational form has been charged with obscenity. Scientific journals. Newspaper articles. Short stories. Novels. Playing cards. Films. Advertisements. Magazines. Photographs. Blue films. Miss World beauty pageants. Cable channels. Letters. Paintings. Poems. *Lady Chatterley's Lover*. Satyam Shivam Sundaram. Prajapati.

Section 292 has been challenged for being an unconstitutional, impermissible and vague restriction on constitutionally-protected freedom of speech and ex-

pression.¹¹⁵ In a landmark 1960s case, a bookseller was charged with possessing an "unexpurgated" version of D.H. Lawrence's *Lady Chatterley's Lover*. His lawyers argued that Section 292 was unconstitutional. That the novel, taken as a whole, is not obscene. And that the "immature teenager" can't be the standard used to decide whether material is obscene or not.¹¹⁶

The Supreme Court disagreed. Finding the bookseller guilty, the Court noted that "obscenity" without a social purpose is not constitutionally protected under Article 19. And that where art and "obscenity" are mixed, art must significantly overshadow obscenity. Poor D.H. Lawrence. The judgement went on to say that "treatment of sex in a manner offensive to public decency and, judged by our national standards, considered likely to pander to lascivious, prurient or sexually-precocious minds, must determine the result..."¹¹⁷

And just like that, 150 years after the Hicklin test had already defined obscenity as that which could *deprave or corrupt*, two new words were added to the mix. *Lascivious*. And *prurient*. Both equally subjective.

Vagueness redux

Lascivious. Prurient. Deprave. Corrupt. All four are equally vague.¹¹⁸ Material that appears liplickingly lascivious to one may be pure boredom to another, since humans aren't necessarily sexual clones. Material that may "deprave" one reader or viewer may have zero effect on another. Yet, this one-size-fits-all law assumes a commonality of response, centred on the mythical notion of the "reasonable man". Reasonable. Note how yet another subjective term enters the law to clarify this abundance of subjectivity.

The test of the reasonable man is a double-edged sword, handing over complete control to the judge, who can easily substitute his or her opinion for that of the "reasonable man". Writes legal researcher Lawrence Liang: "Did the venerable Justice

110 Hindsight being 20:20 and all that, it's interesting to conjecture why the fines weren't higher and the jail terms shorter in Section 292, since "obscenity" is quite different from many crimes that base their reformative impulses on imprisonment. Given that the harm itself is so amorphous, should obscenity even be a crime? Or a civil offence at best?

111 www.lawsonline.com/bareacts/indian-penal-code/section292-indian-penal-code.htm

112 The Law Commission of India. (1860). Op. cit.

113 Kaul Padte, R. (2013). *Keeping women safe? Gender, online harassment and Indian law*. Internet Democracy Project. <https://www.internetdemocracy.in/reports/keeping-women-safe-gender-online-harassment-and-indian-law>

114 Nappinai, N. S. (2017). *Technology Laws Decoded*. India: LexisNexis.

115 Bhatia, G. (2015). If You Mock Gandhi, Other 'Historically Respectable Personalities', Get Ready to Go to Jail. *The Wire*. www.thewire.in/1725/no-more-free-speech-on-historically-respectable-personalities

116 Narrain, S. (2009, 20 June). Obscenity under the law: A review of significant cases. *InfoChange*. www.infochangeindia.org/component/content/article/309-media/broadcast-laws-and-regulations/7811-obscenity-under-the-law-a-review-of-significant-cases

117 Chandrakant Kalyandas Kakodar v. The State of Maharashtra and Ors. (1969). *Supreme Court of India judgement 1970 AIR 1390*. www.indiankanoon.org/doc/25099

118 Sahu, M. (2012, 18 November). Cyber Obscenity. *Be Legal, Be Intelligent*. www.newindialaw.blogspot.in/2012/11/v-behaviour/defaultvml0.html

get turned on when he read *Lady Chatterley's Lover*? Trivial as it may sound, the question has serious implications ... If he did not get turned on when he read the book, then clearly the book did not contain any material which could be termed offensive. However, if he did get turned on, then he had ceased being a "reasonable man" whose mind was free from corruption, and was therefore no longer in a position to judge the book."

This subjectivity, perhaps, is one reason why many lawyers, legal commentators and scholars consider these anti-obscenity provisions to be "seriously defective".¹¹⁹ "The present provision is so vague that it becomes difficult to apply it" argued a judge in 2000. "The predominant characteristic of the definition is its vagueness," notes Indira Jaising, former Additional Solicitor-General, India. "For no one has yet been able to define what it is that has a 'tendency to deprave and corrupt'."¹²⁰ A similar subjectivity is found in other jurisdictions, including the United States, where a judge famously defined pornography¹²¹ thus: "I know it when I see it".¹²²

Closer to home, police officials or constables who book offences are unable to comprehend what "lascivious" or "prurient" even mean. At the Mumbai Cyber-Cell, a member of the police force knew of Section 67, but had no clue how to pronounce or understand these strange colonial words, which do not translate easily into Indian languages. The continued usage of this colonial terminology makes little sense in independent India.

Imagined and actual harms

Unlike in many other crimes, in obscenity, the harm has, as yet, not been clearly defined. What is the harm caused by the "obscene"? And who does it harm? The individual? Society? Who? Is it meant to protect one from oneself – or others from oneself? Is it a private or a public harm?

Legal scholar Andrew Koppelman argues that obscenity law aims to prevent "moral harm". "Obscenity law aims at preventing the formation

of certain thoughts – typically, erotic ones – in the minds of willing viewers,"¹²³ writes Koppelman.¹²⁴ Just as certain books or movies promote moral character and are good for us, some are bad and harm us. Koppelman recognises that reader responses differ and that "what is bad for one reader is not necessarily bad for another." And that even if moral harm does exist, the law can't identify such harm. "Discerning the moral context of texts is too complex a task for the law to undertake."

But do books and videos truly cause such "moral" harms – or are the vast majority of these imagined?¹²⁵ "Harms" related to obscenity are often abstract (not concrete), centred on an amorphous public (not specific individuals) and anticipated (in the near future), rather than having occurred in the near past. These harms have not yet come to be. What harm can a book that has just been published and hardly read cause? And even if millions read it, how many of them will read it in a way that can be considered depraving, corrupting – or harmful? Is it really dangerous to hold certain thoughts, as Koppelman argues?

In the absence of a specific harm, it is hard to know what the law regulates: the "obscene"? Or the sexual itself? "The legal regulation of sexual speech is based on a conservative sexual morality that views sex as a bad and corrupting influence that ought to be contained," writes law professor Ratna Kapur.¹²⁶

The test, which has been consistently followed in the case law ever since [1964], reveals the assumptions which inform the law of obscenity – that is, any representation of sex and sexuality is bad; sexually-explicit representations are immoral; and sex and sexuality are not a normal part of our humanity, but an

119 Sharma, V., & Woolridge, F. (1973). The Law Relating to Obscene Publications in India. *The International and Comparative Law Quarterly*, 22(4). www.jstor.org/stable/757659

120 Mazzarella, W. (2015). A Different Kind of Flesh: Public Obscenity, Globalisation and the Mumbai Dance Bar Ban. *South Asia: Journal of South Asia*, 38 (3). www.scribd.com/document/278653664/Mazzarella-Different-Flesh

121 Pornography is often regulated through anti-obscenity statutes.

122 Nawi, D. (2001, 8 April). SOAPBOX: 'I Know It When I See It'. *The New York Times*. www.nytimes.com/2001/04/08/nyregion/soapbox-i-know-it-when-i-see-it.html

123 Koppelman, A. (2005). Does Obscenity Cause Moral Harm? *Columbia Law Review*, 105(05-02). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=665705

124 Koppelman lists the following characteristics that might be thought to make literature morally harmful: the reduction of human beings to objects, the tendency of sexual arousal to destroy people's discernment and judgement, damage to children's moral development, offensiveness, the alleged worthlessness of sexual fantasy, the association of sex with violence. But he concludes that none of them provides a legal standard that enables the courts to recognise moral harm.

125 Ghosh, S. (2011). The secret life of film censorship. *Infochange Agenda*, 22. www.infochangeindia.org/downloads/agenda_22.pdf

126 "Carnal" comes from Old French *carnal* meaning "physical, human, mortal," and directly from Medieval Latin *carnalis*, meaning "natural, of the same blood". From the early 15th century, it meant "sensual", and from the mid-15th century, "worldly, sin". www.etymonline.com/index.php?term=carnal

evil, corrupting, poisonous influence from which “decent people” must be protected. These assumptions run through the case law, and ensure that virtually any sexually explicit representation is found by the courts to be obscene ... In fact, sexual explicitness often becomes a proxy for obscenity.¹²⁷

Because of its inherent subjectivity, the law on obscenity in India has evolved case by case. In 1986, a Bengali author was acquitted as the judge ruled that his novel was “vulgar”, but not obscene.¹²⁸ What’s the difference? According to the judge, “vulgarity arouses a feeling of disgust and revulsion and also boredom but does not have the effect of depraving, debasing and corrupting the morals of any reader of the novel.” Note the added number of subjective words in his judgement: vulgarity, disgust, revulsion, boredom, debasing. Note also how a High Court judge found this text obscene, while a Supreme Court judge found it merely vulgar.¹²⁹ As noted by Kaul Padte, laws like these create “a large breadth of interpretative space as per the personal values, views and perspectives of individuals.”¹³⁰

In 2007, in an eerie throwback to the colonial past, obscenity law was invoked for political purposes. The case in question was artist M.F. Husain’s painting of a nude woman, titled *Bharat Mata*, or *Mother India*.¹³¹ Husain was acquitted, with the judge ruling that nudity does not equal obscenity. But in the ensuing furore, it was claimed that what was at stake was not just any old nude body – but the nude body of the nation-state, *Mother India*. And that the depiction by this Muslim artist would hurt the sentiments of “Hindus and patriotic Indians”.¹³² It was 1868’s *Regina v. Hicklin* all

over again, albeit in a slightly different form, with Hindus and Muslims replacing the Protestants and Catholics of yore.

The archaic Hicklin test was finally dumped in 2014 when the Supreme Court, for the first time, applied another obscenity test – the contemporary community standards test.¹³³ It wasn’t a giant leap forward, but it was still a step away from antiquity. As lawyer Gautam Bhatia wrote after the judgement, “There is a long way to go before India’s obscenity laws are truly speech-protective, but perhaps we have at last stopped moving backwards.”¹³⁴

Chapter 5 Bodies of evidence II

Almost 5,000 cases have been filed under Section 67 in the last 15 years. It’s not clear how many of them have been “disposed of”, to use legal parlance. The Indian legal system is notoriously sluggish, with more than 22 million cases pending in the district courts, 4.5 million waiting to be heard in the high courts, and 60,000 in the Supreme Court.¹³⁵ The 2004 case against Avnish Bajaj, CEO of the site that hosted the “DPS-MMS sex scandal” clip, was only resolved eight years later – in 2012.¹³⁶ Many of the 5,000 cases filed under Section 67 are still making their way through the legal system.

Unfortunately, this also means that few judgements related to Section 67 are available for research (or for anything else). Given the paucity of accessible or available material, we made a pit stop at Indian Kanoon,¹³⁷ a website that hosts judgements and bail applications. We looked at judgements and bail applications filed in 99 cases under Section 67 in the years 2013 and 2014 consistently using the following search configuration:

- Keyword: Section 67
- Auto-complete to: Information Technology Act
- Filter by: Document type – “only judgements”.

127 Kapur, R. (2008). The profanity of prudery: The moral face of obscenity law in India. *Women: A Cultural Review*. 8(3). [dx.doi.org/10.1080/09574049708578318](https://doi.org/10.1080/09574049708578318)

128 *Samaresh Bose and anr. v. Amal Mitra and anr.* (1972). Calcutta High Court judgement. Cr. A. No. 106 of 1969. www.sclt.in/content/samaresh-bose-and-anr-vs-amal-mitra-and-anr?qt-cases=1#qt-cases

129 Jaising, I. (1986). Obscenity: The Use and Abuse of the Law. In B. Bose (Ed.), *Gender and Censorship*. New Delhi: Women Unlimited.

130 Kaul Padte, R. (2013). Op.cit.

131 Handique, M. (2006, 23 August). Who named controversial painting ‘Bharatmata’? Not MF Husain. *The Indian Express*. www.archive.indianexpress.com/news/who-named-controversial-painting--bharatmata---not-mf-husain/11208/

132 In 1996, the film *Bandit Queen* was cleared of obscenity; the judge ruled that it’s legal for a film on a “social evil” to show the “social evil”, in this case nudity during rape.

133 Indian Constitutional Law and Philosophy. (2014, 7 February). Obscenity: The Supreme Court discards the Hicklin Test. <https://indconlawphil.wordpress.com/2014/02/07/obscenity-the-supreme-court-discards-the-hicklin-test>

134 Ibid.

135 Ganz, K. (2012, 7 June). Supreme Court’s Battle Against Backlog in Cases. *LiveMint*. www.livemint.com/Politics/ziffwni3N64eFBcaVZobtl/Supreme-Court8217s-battle-against-backlog-in-cases.html

136 Press Trust of India. (2012, 27 April). SC quashes case against Ebay chief in MMS scam. *The Times of India*. timesofindia.indiatimes.com/nri/other-news/SC-quashes-case-against-Ebay-chief-in-MMS-scam/articleshow/12900396.cms

137 www.indiankanoon.org

TABLE 1. Number of orders analysed in Indiantkanoon.org	
Year	Number of orders
2013	52
2014	139
Total cases (relevant sample)	99

The number of documents we analysed on the site is illustrated in Table 1.

The cases we analysed were filed in the states illustrated in Table 2.

We recognise that this is a self-selected sample that is not comprehensive. Even so, we were able to discern certain patterns from these cases – which were then cross-verified via a review of cases covered in Indian print media. From the Indian Kanoon database, we found that:

TABLE 2. Number of cases analysed per state	
Name of state	Number of cases
Punjab and Haryana (north)	38
Uttarakhand (north)	20
Kerala (south)	4
Gujarat (west)	14
Bihar (east)	9
Madhya Pradesh (central)	6
Karnataka (south)	6
Uttar Pradesh (north)	2
Total	99

Section 67 is rarely used on its own. In 98 out of 99 cases we analysed, this section was used in combination with 52 other provisions of the Indian Penal Code or the IT Act (see Figure 4).

FIGURE 4. IPC sections used in cases filed under Section 67.

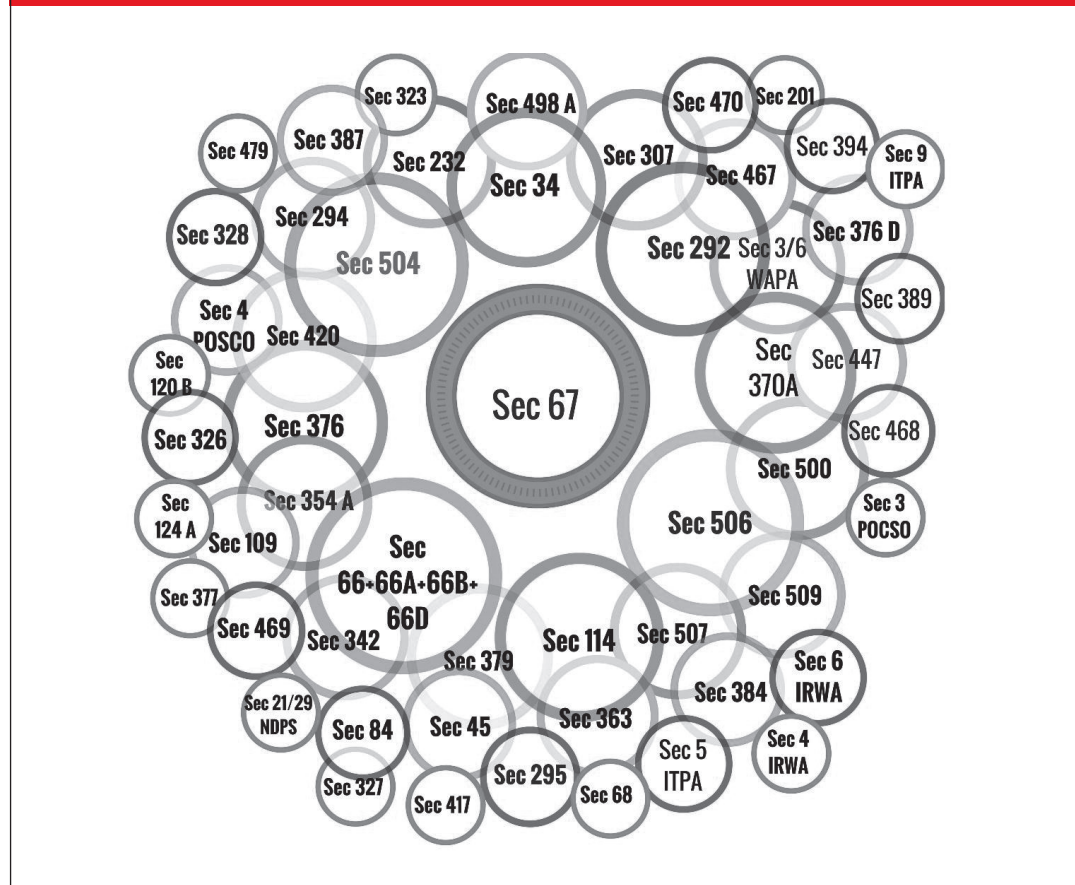


TABLE 3. Indian Penal Code sections used in combination with Section 67		
IPC section	Offence	Number of times used in sample of 99
376	Rape	16
292	Obscenity	14
114	Abetment	13
506	Criminal intimidation	13
504	Breach of peace	13
370	Slavery	10
34	Common intention	10

Section 67 was used most with the sections illustrated in Table 3.

Since we were analysing bail applications from the Indian Kanoon database, the cases filed were not described in detail. However, by reading the combination of legal sections used in each case, we could extrapolate what had happened in many of these cases.

Data tells its own story

Rape

In 16 cases where Section 67 was used with a section punishing rape (Section 376) the patterns were self-evident. For example, in a case in the northern state of Haryana, these two sections were used with provisions related to kidnapping and wrongful restraint. The document mentioned that this was a gang rape. We read these to indicate that the victim was kidnapped, held somewhere, gang raped, and filmed while being raped – hence attracting Section 67.

Section 506 – criminal intimidation – was used alongside Section 67 in four cases, possibly indicating the use of threats or blackmail related to these “rape videos”. The use of POCSO – Protection of Children from Sexual Offences Act – in one case indicated that the victim was a minor. Provisions related to extortion, slavery, cheating via impersonation, and obscene songs were used in a few cases, providing further leads. One case was filed under Section 376D, which relates to rape in hospitals.

Although all these cases related to “rape videos” only one case was filed under Section 66E of the IT Act, which criminalises transmission of images of private parts without consent. Then too it was filed under both Sections 66E and 67, legally marking it as a consent violation and an obscenity offence. In four other cases, Section 66 was used, but the sub-section was not specified.

The question this raises for us is this: Why were the majority of these “rape video” cases not filed

under Section 66E of the IT Act, which explicitly punishes the filming or distribution of “images of private parts without his or her consent”? Why were they filed as “obscenity” offences, when the primary harm is clearly multiple violations of consent – in the rape itself (which the law addresses), in its filming, and then its distribution?

Obscenity

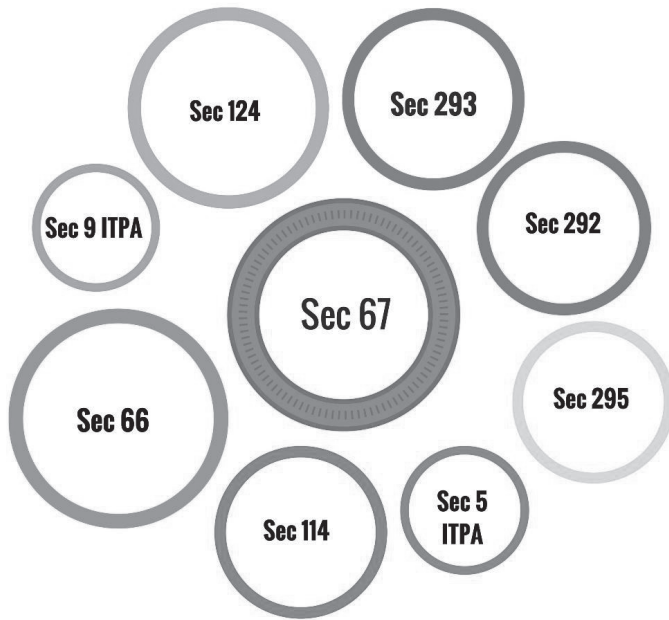
In the 14 cases where Section 67 was combined with its offline counterpart, Section 292, there were no clear patterns. However, two cases are of interest. Both emerge from the western state of Gujarat, and involve the use of numerous sections, along with the digital and physical anti-obscenity sections. These include: sections of the Immoral Traffic Prevention Act, abetment, counterfeiting of Indian coins, defiling a place of worship, and in one case, sedition, which is a very serious offence. While the Indian Kanoon data indicated the involvement of sex workers, money, and a place of worship, it did not provide any further leads into what might be considered obscene. We verified these media reports, which revealed a “sex scandal”. A Hindu priest – sadhu – was being secretly filmed and blackmailed for bringing sex workers into the religious institution – or ashram. Numerous charges, including obscenity, were filed against those who videoed and blackmailed him (see Figure 5).¹³⁸

Abetment, criminal intimidation and breach of peace

These three sections – Sections 116, 504 and 506 – were each used 13 times, along with other sections. While the charge of abetment indicates that more than one person was involved in these cases, it is not clear why the other two sections were used.

¹³⁸ www.youtube.com/watch?v=9mo64b86okg

FIGURE 5. IPC sections used with Section 67 in the case of the Hindu priest “sex scandal”



Slavery

In 10 cases, Section 370 – which prohibits buying or disposing of a person as a slave – was used. In some of these cases, the section against kidnapping is also used, offering further cues on what may have taken place. In one case, POCSO is used, indicating that the victim was below 18 years of age, or below the age of consent. In two of these cases, the provision against rape was also used.

Obscenity: A women’s provision?

Almost half the 99 cases that we analysed from the Indian Kanoon database relate to women. This is evident from the use of other “gendered” provisions and acts along with Section 67. These include Section 354 (outraging the modesty of a woman), Section 498A which prohibits dowry, Section 376 which prohibits rape, the Women’s Atrocities Prohibition Act, the Immoral Traffic Prevention Act, the Indecent Representation of Women Act.

All this seems to indicate that Section 67 is turning into a women’s provision – a section that is increasingly being used to deal with offences related to women.

But does the increasing use of Section 67 as a “women’s provision” actually empower women?

Does it increase women’s agency – and enable women to assert and access their rights? We would argue that it does the exact opposite: while it aims to “protect” women, it actually folds women into patriarchy’s legal gaze. And treats them as objects to be controlled, not as subjects in control of their own sexual destinies. Almost like children in need of a parent. As cultural theorist Brinda Bose writes in the introduction to *Gender and Censorship*:

[T]he ambiguities inherent to a government desire to “safeguard generally accepted standards of morality and decency” are in reality totally subservient to its desire to safeguard the “well recognised interests of the State”, however they may be defined. In both these contexts, however, at points where sexuality and/or sexual representation are an issue, the object of control is the woman ... It is the woman who represents both the threat of transgression in Indian society, and the need for its control, and her *body* is the single signifier that sums up the problematic.¹³⁹

139 Bose, B. (2006). *Gender and Censorship*. New Delhi: Women Unlimited.

CHAPTER 6 Perverts and sexual freaks

In looking at NCRB data, we also noticed two broader trends that have an impact on the way cybercrime – including Section 67 – is characterised, understood and addressed.

Cybercrimes are classified into a system of “motives”

Each year, NCRB creates a public record of cybercrimes through statistical data. As has been earlier described, these include the number of cases filed under each provision of the IT Act, arrests made under each section, including their age break-up.¹⁴⁰

The cases are further sub-divided by “motives” and “suspects”. Until 2013, NCRB classified cases into the following seven motives:

- 1) Revenge/settling scores
- 2) Greed/money
- 3) Extortion
- 4) Cause disrepute
- 5) Prank/satisfaction of gaining control
- 6) Eve teasing/harassment
- 7) Others.

In 2014, the number of “motives”, according to NCRB, doubled and was overhauled as follows:

- 1) Emotional motives like anger, revenge
- 2) Fraud/illegal gain
- 3) Insult to modesty of women
- 4) Sexual exploitation
- 5) Political motives
- 6) Inciting hate crimes against community
- 7) Inciting hate crimes against country
- 8) Disrupt public services
- 9) Sale/ purchase of illegal drugs/items
- 10) For developing own business/interest
- 11) For spreading piracy
- 12) Serious psychiatric illness viz perversion
- 13) Steal information for espionage
- 14) Motives of blackmailing.

This system of classification itself raises a number of questions. One, it is not clear why motives need to be identified or classified at all, specially since NCRB includes motives only for cybercrimes booked under the IT Act – not for crimes booked under the Indian Penal Code. Why is cybercrime being treated differentially or being exceptionalised? Since there can be numerous overlapping motives for a criminal act, why have only these particular motives been

foregrounded? This system of classification seems almost as subjective as Section 67 itself.

Strangely enough, half the crimes remain unclassified under “other motives”. For example, in 2013, 4,175 of 5,693 cybercrime cases were filed under “Other” – that’s 73% of the total cases filed under the Act. Even in 2014, when the classification system was expanded to 14 motives, “Other” motives still remained at 4,822 of 9,622 cases. This represents 50% of the motives and the single biggest category. What is the point of a classification system in which the vast majority of motives are classified as Other?

As is often the case, a single case may represent mixed motives, another factor that the classification ignores. Leaving that aside, the categorisation itself seems subjective and biased. For example, can one take seriously a category called “serious psychiatric illness viz perversion”? While this categorisation may seem laughable, it is actually dangerous, revealing enormous stereotypes and biases in the State’s understanding of both mental health (“psychiatric illness”) and sexuality (“perversion”).

It is not clear how a random categorisation of motives – in this manner – contributes to understanding or reducing cybercrimes. “Each standard and each category valorizes some point of view and silences another,” write informatician Geoffrey Bowker and sociologist Susan Leigh Star in *Sorting Things Out*, their seminal work on how information is classified. “This is not inherently a bad thing – indeed it is inescapable. But it is an ethical choice, and as such it is dangerous – not bad, but dangerous.”

In 2014, a new category of cyber “suspect” was introduced into NCRB data: the sexual freak

In 2014, several changes were introduced into the NCRB’s collection and classification of “cybercrimes”, as the bureau refers to them. IT Act Sections were further sub-classified and data collected for each sub-section. As part of this, cases related to Section 67 were further sub-classified into sub-sections: Sections 67A, B and C. New motives for cybercrimes were introduced.

For the first time in the NCRB’s history, a new category of suspect was introduced: the sexual freak. That very same year, the NCRB classified 163 individuals as sexual freaks.

The sexual freak emerged in a table that “profiled” those arrested for or accused of cybercrimes. But is “profiling” of an accused a legitimate goal to begin with? Profiling has itself been critiqued for being suspect and subjective.

¹⁴⁰ NCRB collates this data from 36 states and union territories and 53 mega-cities.

Table 18.8 Profile of persons arrested in connection with Cyber Crime during 2015									
S. No.	State/UT	Foreign national					Indian national		
		Foreign national (Total)	Sexual freak	Cracker/ Hacker	Cyber terrorist	Others	Indian national (Total)	Employed/ disgruntled employee	Business competitor
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
STATES									
1	Andhra Pradesh	0	0	0	0	0	522	9	9
2	Arunachal Pradesh	0	0	0	0	0	4	0	0
3	Assam	0	0	0	0	0	457	6	24
4	Bihar	0	0	0	0	0	1567	35	1278
5	Chhattisgarh	1	0	1	0	0	98	0	1
6	Goa	0	0	0	0	0	5	1	0
7	Gujarat	1	0	0	0	1	271	1	41
8	Haryana	2	0	0	0	2	203	13	16
9	Himachal Pradesh	0	0	0	0	0	38	0	4
10	Jammu & Kashmir	0	0	0	0	0	12	0	0

Table 18.8 (Concluded)											
S. No.	State/UT	Indian National									Total persons arrested
		Neighbours friends & relatives	Sexual freak	Student	Persons with psychological disorder	Cyber terrorist	Professional computer geek/hacker/cracker	Political person	Religious person	Others	
(1)	(2)	(11)	(12)	(13)	(14)	(15)	(16)	(17)	(18)	(19)	(20)
STATES											
1	Andhra Pradesh	99	9	156	0	0	65	0	3	172	522
2	Arunachal Pradesh	0	0	0	0	0	0	0	0	4	4
3	Assam	173	78	48	0	9	17	0	0	102	457
4	Bihar	95	1	42	0	0	50	0	0	66	1567
5	Chhattisgarh	13	9	3	5	0	0	0	0	67	99
6	Goa	3	0	0	0	0	0	0	0	1	5
7	Gujarat	49	21	12	3	0	18	0	1	125	272
8	Haryana	10	5	26	1	1	7	1	3	120	205
9	Himachal Pradesh	2	0	1	0	0	0	0	1	30	38
10	Jammu & Kashmir	2	0	0	0	0	0	0	0	10	12

Screenshots of tables with profiles of persons arrested, NCRB Crimes in India 2015¹⁴¹

Cybercrime suspects are first categorised either as “foreign nationals” or as “Indian nationals”. Foreigners are further subdivided into: the following categories – sexual freak, cracker/hacker, cyber terrorist, other. Indians are further subdivided into

many more categories: employee/ disgruntled employee, business competitor, neighbours/friends and relatives, sexual freak, student, persons with psychological disorder, cyber terrorist, professional computer geek/hacker/cracker, political person, religious person, other.

This whole system of categorisation reveals underlying biases and stereotypes around discourses of nationalism, sexuality, and yes, technology. Why separate foreigners and Indians, and then assign random

¹⁴¹ National Crime Records Bureau, Government of India. ncrb.nic.in/StatPublications/CII/CII2015/FILES/Statistics-2015_rev1_1.pdf

categories to each? What can one make of the casual use of terms like cyber “terrorist” – or the inclusion of “students, neighbours and friends” in a criminal category? Are categories of “political persons” and “religious persons” meaningful? Once again, the futility – and short-sightedness of this mode of classification is revealed in the data itself, where the category “Others” ranks highest, with 4,157 of 5,752 suspects. That’s 72%. What is the use of a system of classification that categorises only a small percentage of that which it seeks to categorise?

In the preface to *The Order of Things: An Archaeology of the Human Sciences*, social theorist Michel Foucault demonstrates the arbitrary nature of classification itself. He quotes a fictional taxonomy created by Argentinian writer Jorge Luis Borges:

This passage [in Borges] quotes a “certain Chinese encyclopedia” in which it is written that “animals are divided into: (a) belonging to the Emperor, (b) embalmed, (c) tame, (d) sucking pigs, (e) sirens, (f) fabulous, (g) stray dogs, (h) included in the present classification, (i.) frenzied, (j) innumerable, (k) drawn with a very fine camelhair brush, (l) et cetera, (m) having just broken the water pitcher, (n) that from a long way off look like flies.”¹⁴²

While this classification of animals seems almost as ludicrous as the “sexual freak”, Foucault uses it to deconstruct taxonomy – or systems of classification. He goes on to make the point that systems of classification are not objective, but function as cultural codes of interpretation.

In *Prejudices and Antipathies*, his seminal critique of the United States Library of Congress’ catalogue headings, radical librarian Sanford Berman noted the biases of that classification system. Writes Berman, in a magnificent indictment:

The headings that deal with people and cultures – in short, with humanity ... can only “satisfy” parochial, jingoistic Europeans and North Americans, white-hued, at least nominally Christian (and preferably Protestant) in faith, comfortably situated in the middle and higher-income brackets, largely domiciled in suburbia, fundamentally loyal to the Established Order, and heavily imbued with the transcendent, incomparable glory of Western civilization.¹⁴³

He goes on to add that the catalogue headings reflect “a host of untenable – indeed, obsolete and arrogant – assumptions with respect to young people and women. And exudes something less than sympathy or even fairness towards organised labour and the sexual unorthodox or avant-garde.” One such example he cites is the prime category “Sexual perversion” under which “Lesbianism” and “Homosexuality” were placed. “The referent smears and blemishes ...,” writes Berman. The habits of gay and lesbian men and women may be different “but not therefore more dangerous, disagreeable, or censurable, than those of the heterosexual majority.”¹⁴⁴

Something similar is going on with the National Crime Records Bureau’s classification of cybercrime. If nothing else, it shows the unease that digital technologies produce in the annals of law and order. Legal researcher Lawrence Liang once wrote that “the law is governed by a deep suspicion of the image.” Seems like the suspicion extends to the internet as well.

Chapter 7 Bodies of evidence III

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 sending up 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. Section 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 analysed Indian print media reports of 99 cases filed under Section 67 in three years.

Years: 2015, 2016, 2017

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

142 Foucault, M. (2002). *The Order of Things: An Archaeology of the Human Sciences*. Hove: Psychology Press.

143 Berman, S. (1993). *Prejudices and Antipathies: A tract on the LC Subject Heads Concerning People* Jefferson: McFarland & Company.

144 Ibid.

Table 4. Type of speech involved in cases reported by media					
	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 located these media reports through customised 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.¹⁴⁵

We filed each case into one of seven categories. What we found in this self-selected sample is illustrated in Table 4.¹⁴⁶

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 recognised are treated as obscenity offences.
- Section 67 is being used to criminalise 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.

Each of these is discussed below.

¹⁴⁵ Each article was logged into an Excel sheet with the following details: date, headline, URL, publication, location, sections used.

¹⁴⁶ 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.

Crimes of consent are routinely booked as obscenity offences under Section 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."¹⁴⁷

A man uploading nude images of his estranged wife¹⁴⁸. 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 Section 67. In some instances, Section 66E¹⁴⁹ was used along with Section 67, which at least 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.

¹⁴⁷ Kaul Padte, R. (2013). Op.cit.

¹⁴⁸ The Tribune. (2016, 30 January). 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

¹⁴⁹ 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."

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.¹⁵⁰ The videos may have 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 Sections 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 Section 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 case¹⁵¹, 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 though¹⁵² 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.¹⁵³ 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.

Rape videos

In 2016, four teenagers raped a 25 year old man, filmed the rape and then circulated it on social media.¹⁵⁴ 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? Or should it, more accurately, be labelled coerced sex – or rape?

150 Bhuyan, P. (2015, 25 April). 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-qWYwBcs2MvIoR0BvhofHTL.html

151 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.

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

153 New Indian Express. (2017, 14 January). 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

154 Indian Express. (2016, 21 October). 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

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 recognised 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.¹⁵⁵ 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.¹⁵⁶ 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.¹⁵⁷ In 2016, a morphed image of Prime Minister Narendra Modi was circulated on a WhatsApp group.¹⁵⁸ 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 Section 67 because there is no other place to file them. Broadening the consent provision – Section 66E – to recognise 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 behaviour 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.¹⁵⁹

We found several cases of unsolicited sexual images being sent out. Seen another way, these are 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 Orkut, a defunct social networking site.¹⁶⁰ 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.¹⁶¹ Two

155 News Minute. (2016, 1 August). 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

156 Hindustan Times. (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-iBOCBwPPvrdrwws2mvMm2rJ.html

157 Ghatwai, M. (2016, 18 March). Two jailed in MP for morphed RSS leader Mohan Bhagwat image. *The Indian Express*. indianexpress.com/article/india/india-news-india/rss-chif-cyber-crime-2-jailed-in-mp-for-morphed-mohan-bhagwat-image/

158 News Minute. (2016, 28 November). Karnataka man arrested for posting obscene photo of PM Modi on Facebook. *The News Minute*. www.thenewsminute.com/article/karnataka-man-arrested-posting-obscene-photo-pm-modi-facebook-53533

159 Brooks, K. (2017, 9 June). How 150 Unsolicited Dick Pics Are Bringing Women Artists Together. *Huffington Post*. www.huffingtonpost.in/entry/dick-pics-art-whitney-bell_us_59399965e4b0c5a35c9d654c

160 MidDay. (2015, 4 July). First person in Maharashtra convicted under IT Act. *MidDay*. www.mid-day.com/articles/first-person-in-maharashtra-convicted-under-it-act/16342199

161 Naidu, J. (2017, 6 March). UP man detained for sending obscene texts to BJP’s Shaina NC. *Hindustan Times*. www.hindustantimes.com/mumbai-news/up-man-detained-for-sending-obscene-texts-to-bjp-s-shaina-nc/story-G3tZqEpQOXHYmj0RcU1VM.html

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.¹⁶²

All these are currently filed under Section 67 in the absence of any other provision. Is it possible to broaden Section 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 recognise that unsolicited sexual images violate the consent of the receiver.

Section 67 is being used to criminalise 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.¹⁶³

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.¹⁶⁴ 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 Belavangala¹⁶⁵ and poet Srijato Bhattacharya¹⁶⁶ among others. Ironically, Srijato too¹⁶⁷ used the same provision to counter online harassment from the supporters of Yogi Adityanath, the politician who he had criticised.¹⁶⁸

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 against artists, filmmakers, journalists etc. In other words, Section 67 is increasingly becoming a tool of the political elite. This raises a related issue: Is Section 67 being used a substitute for Section 66A, which was read down in 2015?¹⁶⁹ Is "obscene speech" now being used as a proxy for "objectionable speech"? As technology lawyer NS Nappinai has asked: Is 67 the new 66A?¹⁷⁰

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 (a comedy event where a celebrity is mocked) following an uproar.¹⁷¹ In 2016,

162 Times of India. (2017, 26 February). Two cabbies held for posting obscene content on WhatsApp. *The Times of India*. timesofindia.indiatimes.com/city/hyderabad/two-cabbies-held-for-posting-obscene-content-on-whatsapp/articleshow/57352944.cms

163 Kumar, R. (2016, 22 March). Journalist arrested in Chhattisgarh for posting comments on WhatsApp. *Scroll.in*. scroll.in/article/805521/journalist-missing-in-chhattisgarh-after-bastar-police-pick-him-up

164 DNA. (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

165 PTI. (2017, 21 March). 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/

166 DNA. (2017, 23 March). 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

167 Ibid.

168 IANS. (2017, 26 March). Facebook has removed my poem 'Abhishaap': Poet Srijato Bandyopadhyay. *Financial Express*. www.financialexpress.com/india-news/facebook-has-removed-my-poem-abhishaap-poet-srijato-bandyopadhyay/602576

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

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

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

Tanmay Bhat, a member of the All India Bakchod core team, made a Snapchat video poking fun at Sachin Tendulkar and Lata Mangeshkar.¹⁷² 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.¹⁷³ 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 Yogi Adityanath.¹⁷⁴ Many women have filed cases under Section 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 Section 67 regulates “obscene” expression, Section 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.¹⁷⁵ 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 this section appeared to be the vague usage of technology of some kind in relation to the crime, though not 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.¹⁷⁶ 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” 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.¹⁷⁷ 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.¹⁷⁸ 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

172 DNA. (2016, 30 May). Former IPS officer YP Singh demands ‘custodial interrogation’ of Tanmay Bhat for Snapchat video. *DNA*. www.dnaindia.com/entertainment/report-former-ips-officer-yp-singh-demands-custodial-interrogation-of-tanmay-bhat-for-snapchat-video-2218138

173 Singh, S. (2015, 12 June). Swati Chaturvedi Twitter trolling: A much-needed test for laws. *Hindustan Times*. www.hindustantimes.com/india/swati-chaturvedi-twitter-trolling-a-much-needed-test-for-laws/story-w9lg|BH2lz8ztB3UAdB6KJ.html

174 IANS. (2017, 26 March). Op. cit.

175 DNA. (2015, 10 July). Op. cit.

176 Deccan Herald. (2015, 19 November). Kiss of Love couple held for sex racket. *Deccan Herald*. www.deccanherald.com/content/512719/kiss-love-couple-held-sex.html

177 Indian Express. (2016, 25 September). Sex racket busted in Jammu, social networks used for flesh trade. *The Indian Express*. indianexpress.com/article/india/india-news-india/sex-racket-jammu-social-networks-prostitution-busted-3049786/

178 Deccan Chronicle. (2016, 19 April). Death for techie, lifer for lover in Attingal twin murder. *Deccan Chronicle*. www.deccanchronicle.com/nation/in-other-news/190416/death-for-techie-lifer-for-lover-in-atingal-twin-murder.html

out “objectionable content”.¹⁷⁹ 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.¹⁸⁰ 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.

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”.¹⁸¹ 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,¹⁸² 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 recognise 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.¹⁸³

The low value that is placed on consent was in evidence during our visit to the Mumbai Cyber-Cell to interview a police official. Although he was well versed with Section 67, he had never heard of Section 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.”

Chapter 8 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 criminalised, 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:

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

180 Navhind Times. (2016, 24 September). Man held for hoodwinking unsuspecting girls. *The Navhind Times*. www.navhindtimes.in/man-held-for-hoodwinking-unsuspecting-girls/

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

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

183 Bose, B. (2006). Op. cit.

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 opinion¹⁸⁴ 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. Few answers.

All said and done, obscenity law is nothing but a form of legal moralism. A few people 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 legitimising 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.¹⁸⁵ 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 *indecenty* being constructed as obscenity + prudish morality? Writes Agnes:

The puritanical notion of women as asexual beings did not in any 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 and compartmentalises women further as "good" and "bad". It subscribes to and strengthens the patriarchal, reactionary and fundamentalist notions regarding women and their sexuality.¹⁸⁶

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?¹⁸⁷

Like law, media too manifests a moral discomfort with sexuality. The media reports we analysed regularly referred to images as "obscene", "indecent", "lewd", or "vulgar" – rather than as merely sexual. In other words, the 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

184 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.

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

186 Agnes, F. (2006). *Indecent Representation of Women*. In B. Bose (Ed.), *Gender and Censorship*. New Delhi: Women Unlimited.

187 Kaul Padte, R. (2013). Op. cit.

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 the 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”.

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 cell-phone, 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 Kaul 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?¹⁸⁸

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 dick pic pops up in our messaging app. Without any consciousness, cognisance 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.”¹⁸⁹

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.¹⁹⁰ 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 viral nature is quite another. How should we think about consent in such situations?

So many questions. Few answers.

189 Lee, J. (2015). Click “I agree”: Consent and feminism in commercial pornography. In A. Finlay (Ed.), *Global Information Society Watch 2015*. Johannesburg: APC and Hivos. www.giswatch.org/sites/default/files/gw2015-full-report.pdf

190 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, cognisance or consideration of consent.

188 Kaul Padte, R. (2013). Op. cit.

Culpability

If recognising 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. Few answers.

Does the law even understand – or consider – consent, culpability or sexual expression? It 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 realisations 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 binarising 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.

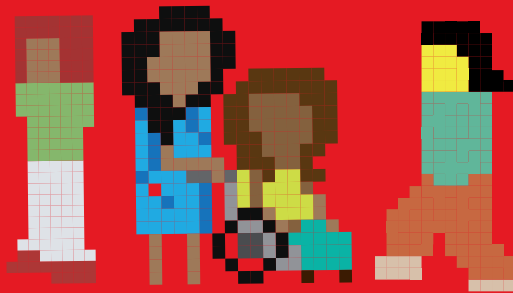
Recommendations

After exploring the concept of "digital obscenity" and its expression and use in Section 67 of the Information Technology Act through multiple methodologies, we would like to make the following recommendations. These recommendations are designed to ensure that this section upholds the rights of women, facilitates sexual expression, and is consistent with internet rights.

1. Sexual expression is often viewed as an illegitimate form of expression – or not accepted as legitimate expression. All stakeholders need to understand the vital role that sexual expression plays in the lives of individuals, and view this as a legitimate (albeit stigmatised) aspect of expression.
2. In the digital age, friendship is performed through streams of words and images on platforms using digital devices. These contemporary forms of friendship need to be accepted as legitimate forms of social behaviour, instead of being treated as lesser or inherently irresponsible activities.
3. An antiquated concept of obscenity resting on colonial or archaic moralities – lascivious, prurient, deprave, corrupt – has no place in contemporary society. Obscenity, as a concept, needs to be re-framed in the context of today's realities and technologies.
4. Section 292 of the Indian Penal Code and Section 67 of the Information Technology Act, which are based on archaic, colonial concepts, need to be read down or revised dramatically to reflect contemporary standards, concerns and experiences.
5. Laws related to obscenity and related offences must be based on consent. Adult consensual sexual expression cannot be treated as an offence; laws must safeguard individuals against non-consensual expression or violations of consent. Consent provisions must be built into existing laws to prevent consensual sexual expression from being criminalised.

6. Using consent as a legal standard necessitates using Section 66E of the Information Technology Act in cases where images of private parts have been published or transmitted – without consent. Using consent as a legal standard means that violations of consent cannot be booked only as obscenity offences.
7. Several consent violations have yet to receive legal recognition. These include morphed images and non-consensual receipt of sexual images, both of which are common in the digital age. We recommend that Section 66E of the Information Technology Act be expanded to include other consent violations, including these.
8. In 2013, the age of consent in India was increased from 16 to 18 in India. Does this make sense in the digital age, where teenagers are exposed earlier to new ideas, agencies, and the complexities of making their own decisions? The age of consent needs to be reconsidered in this light.
9. Given the current age of consent, young people between 16 and 18 years need to be legally treated with due consideration when they are consensually expressing their sexual selves, through activities on and offline, including sexting. Only non-consensual or coercive expressions in this realm need to be treated as violations.
10. The National Crime Records Bureau currently aggregates data on cybercrimes in India. We recommend that this data be recorded using objective parameters, and that subjective categories and classifications related to motives, and profiles be dropped entirely.
11. The police, investigating authorities and judges at different levels must be rigorously trained in the concepts of “obscenity” and “consent” underlying Sections 67 and Section 66E, so that they are able to routinely file consent violations under Section 66E, where they belong.
12. Finally, Section 67 has currently become a dumping ground for all sorts of offences that have absolutely nothing to do with obscenity. These include political speech, criticism, dissent and so forth. This must be stopped. This is not just misuse of the law, but a complete perversion of the law and a miscarriage of justice.

NEPAL



Exploring the use of the internet among gender equality and sexual rights advocates in Nepal

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Executive summary

This report is based on exploratory research conducted to examine everyday use of the internet among gender equality and sexual rights advocates in Nepal. The three main areas of inquiry were: the use and perception of the internet, the understanding and exercise of sexual rights and sexual expression on the internet, and risks and strategies for safety on the internet.

The study finds that the internet is an important part of the personal and professional lives of gender and sexual rights advocates. The internet is understood as a public space where actions and behaviour are subject to policing, regulation and censorship in the same way as occurs in physical offline spaces. Drawing on the work of Ahearn on agency and love, Liechty on expectations of women in the face of modernity and Tamang on the expression of female sexuality, the paper shows that the internet is a space entrenched in heteronormative biases and values. These values play out in ways that prevent meaningful access and participation for marginalised groups with non-heteronormative sexuality and non-dominant ethnicities.

The use of the internet is indispensably linked to organisational communication, social networking and consumption of content. There is no notable variance on the amount and purpose of use against education level, age and ethnicity.

There was a variance among participants with various sexual orientations in exploration of intimacy online. Self-identified gay men use the internet extensively for dating and sexual encounters and have adapted strategies such as the creation of fake profiles to protect their identities. Young heterosexual women explore intimacy and interaction with members of the opposite sex as well but are subject to monitoring and surveillance from friends and family who fear impropriety.

The study finds that the perception of the internet, its role in society and its safety is varied among

the participants. While the usefulness of the internet in modern life is not contested, participants had polarised opinions on its safety and potential for anonymity. These views could be affected by those who have faced negative experiences online and those who regard the internet in its potential as a gender-neutral space.

Violence on the internet is an overwhelming theme with 88% of respondents reporting that they have witnessed someone being subjected to violence on the internet and 52% of respondents saying they have experienced such violence personally. Gender, class, sexual orientation and caste underpin these experiences, with a disproportionately high number of people reporting online violence identifying as same-sex sexuality, transgender and Dalit women. These findings show that class, caste and sexual inequalities of the offline world are replicated online.

The experience or witness of violence causes users to withdraw from participation or to censor themselves online. Users who experienced violence themselves noted psychological impacts including mental distress, anxiety and feelings of guilt.

Most participants have never taken a digital security course, and lack the technical capacity and awareness of threats on the internet to protect themselves. The lack of technical knowledge and language to politicise internet rights as human rights also limits the ability of gender equality and sexual rights advocates to create strategies for navigating online threats. There is an attempt by law enforcement to counter online gender-based violence but applicable laws are vague and conflicting and are prone to misapplication resulting in the ban of legitimate and free expression based on normative prejudice and bias.

Introduction

In 2008, the Association for Progressive Communications (APC) started the EROTICS¹ (Exploratory Research on Sexuality and the Internet) project to explore the use of the internet from a perspective of sexuality and sexual rights. The EROTICS network – consisting of researchers, academics, writers and activists in the field of sexuality, sexual rights and the internet – conducted the first round of exploratory research in India, Brazil, South Africa, Lebanon and the United States. The project was guided by two beliefs: a) sexual content is the basis for inter-

net regulation in many countries, founded on real and perceived harm, and b) the resulting regulation directly impacts the ability of individuals to exercise their sexual rights.

APC is currently working with partners in Nepal, Sri Lanka and India to explore the use of the internet and its impact on sexual and reproductive health rights.² LOOM Nepal is the partner of the EROTICS network in Nepal, and conducted this research with the aim of examining whether existing policies and programmes allow for a free and safe environment to exercise sexual rights on the internet. This research sought to answer the following questions:

- What are the ways in which gender equality and sexual rights advocates use the internet in Nepal?
- What is the nature of online regulation in Nepal and how does this impact the freedom of sexual expression and assertion of sexual rights?
- What are the threats to the freedom of sexual expression and assertion of sexual rights on the internet and how do gender equality and sexual rights advocates navigate and respond to these threats?

This study is guided by the belief that the internet can play a role in the fulfilment of sexual rights through the free flow of information, democratisation of participation and its role in challenging dominant values to allow for a variety of expression and practices. The ability to freely access information is the first step to understanding and exercising sexual rights and expression. Meaningful access and participation in online spaces allow individuals to exercise their right to self-determination and bodily integrity. Whether it is through accessing information on sexual health, the exploration of pleasure through erotic content, or the opportunity to choose partners through dating apps, the internet plays an important role in contemporary sexual lives.

Sexuality permeates the discussion of internet regulation in important ways through content regulation and the policing of online expression and behaviour. A range of laws in Nepal regulates sexual content deemed “offensive or contrary to morality”.³ Public offence laws are used to police activities online and offline. The assumption of heteronormativity in policies and programmes further

1 <https://www.apc.org/en/project/erotics-exploratory-research-project-sexuality-and-internet>

2 <https://www.apc.org/en/project/building-erotics-networks-india-nepal-and-sri-lanka>

3 Freedom Forum. (2016). *Freedom of Expression on the Internet in Nepal*. Kathmandu: Freedom Forum.

regulates sexual content and expression, especially limiting the rights of those who are also marginalised in offline spaces.

This study aims to provide evidence of everyday use of the internet among gender equality and sexual rights advocates so that future policies can address actual needs and concerns. It also aims to provide guidance in identifying opportunities for engagement and advocacy of sexual rights using the internet. To a limited extent, it helps to examine actual risks, rather than perceived harm, for gender equality and sexual rights activists on the internet, so that appropriate action can be taken to support them in exercising their rights.

Background

According to the Nepal Telecom Authority, the regulatory body for internet service providers (ISPs) and telecoms in Nepal, there is 51.68% internet and data penetration in Nepal with over 13 million subscribers⁴ as of September 2016. While this is not a true indication of access for 51% of the population, nor does it take into account the urban-rural, mountainous-plain region user concentration and gender disaggregation, the figure – up from 43.17% in the same month in 2015 – demonstrates a brisk increase. Similarly, users on popular platforms have registered firm growth. Facebook currently boasts 6.2 million users from Nepal, up from 880,000 in 2011.⁵ E-commerce has grown with new platforms like Sastodeal.com and Kyamu.com coming into operation in the last five years. The government has increased its presence on the internet, and introduced e-services such as passport application and vital registration.

Pandey and Raj argue that the focus on the number of subscriptions overlooks the quality of access and participation on the internet.⁶ The majority of internet access in Nepal is through data on mobile phones, and household internet access is paltry with only 8.9% penetration.⁷ There is a marked difference in the quality and cost of access between data packages on mobile phones and internet through cable and broadband. The numbers thus presented are useful in showing a trend in consumption and we

hope that this study will contribute to the discussion on what meaningful participation means. The study also looks at external circumstances such as societal values, production of knowledge and legislative environments that can affect meaningful participation.

Sexuality and the internet

What is the role of the internet in the fulfilment of sexual rights? Jac sm Kee writes:

The internet, because of its unique characteristics, has provided a critical space for the proliferation of multiple discourses that can act to challenge and rupture normative ideals of sexual hierarchies. It has become an important avenue to interrogate existing standards of sexual legitimacy, and to raise broader questions around justice, equality and non-discrimination. Due to its relatively low barriers to access and dissemination (as compared to, for example, traditional mainstream media), the internet enables perspectives and voices from the margins to infuse and trouble dominant discourses that anchor normative sexual hierarchies.⁸

Technology plays a significant role in modern life and culture including the area of contemporary sexual experience. Studies show curiosity and interest among young people around dating, sex and sexuality regardless of the sociocultural and religious beliefs of their respective societies. In the absence of “formal” spaces to access information on sex and sexuality, mass media and the internet are commonly reported sources of information on sexual and reproductive health.⁹ When and if available, “formal” spaces such as health centres often cater to married women, leaving the needs of other demographics unfulfilled. For the lesbian, gay, bisexual, trans, intersex and queer (LGBTIQ) population the internet has become an increasingly significant space to explore sexuality.¹⁰ A 2014 survey of Nepal’s LGBTIQ groups found that access to mobile phones and the internet was higher among this group compared with others.¹¹

4 This figure is much higher than the internet penetration rate of 17.6% cited by World Bank.

5 Joshi, R. (2011, 14 March). Facebook users in Nepal. *Internet Marketing*.

6 Pandey, S., & Raj, Y. (2016). Free Float Internet Policies of Nepal. *Studies of Nepali History and Society*, 21(1), 1-60.

7 Ibid.

8 Kee, J. (ed.). (2011). *EROTICS: Sex, rights and the internet*. Johannesburg: APC. <https://www.apc.org/en/pubs/erotics-research>

9 UNFPA. (2016). *Sexual and reproductive health of unmarried young people in Asia and the Pacific*.

10 Wolf, J. M. (2012). *Technosexuality: Technology, Sexuality, and Convergence*. urface.syr.edu/cgi/viewcontent.cgi?article=1088&context=com_etd

11 UNDP & Williams Institute. (2014). *Surveying Nepal's Gender and Sexual Minorities: An Inclusive Approach*. Bangkok: UNDP.

The ability to freely access information is a primary step to understanding and exercising sexual rights and expression. Meaningful access to and participation in online spaces allows individuals to exercise their “right to self-determination and bodily integrity”.¹² Sexual rights are “inextricably connected to the economic, social and political rights of a person; when one is violated, the others are affected.”¹³ For example, restrictions on sexual content online can prevent individuals from seeking information on sexuality-related issues. Disapproval of certain online behaviour, such as chatting or dating, may prevent them from seeking help if they face abuse or violence. Regulation of online behaviour may limit the ability of a person to exercise their sexual rights fully, such as dating to pursue loving relationships.

Content regulation

The regulation of content, to determine obscene and harmful content, is one of the approaches employed to suppress content on sexuality on the internet. In Nepal, the Public Offence Act is used to limit a wide range of behaviour that the ruling group,¹⁴ made up of the majority of the bureaucracy and administration, deems unacceptable. In addition, most legal instruments pertaining to freedom of expression have a “public decency and morality” clause. Freedom Forum, an organisation working on the freedom of expression in Nepal, notes, “Obscenity is one of the major excuses to criminalise freedom of expression in general and online in particular in Nepal.”¹⁵

The International Covenant on Civil and Political Rights (ICCPR) is the key document that provides guiding principles for freedom of expression and opinion. Articles 17 and 19 of the Constitution of Nepal ensure freedom of opinion and expression and the right to communication as fundamental rights of all citizens. Provisions qualifying both of the above articles say that the state may impose restrictions on “any act, which may be contrary to public morality and decency”. This restriction is “vague in

nature, beyond what is permitted in the ICCPR and open to arbitrary interpretations.”¹⁶

The Electronic Transactions Act (ETA) criminalises publication and display of “any material in the electronic media including computer, internet ... which may be contrary to the public morality or decent behaviour”.¹⁷ This act also criminalises certain forms of expression. The National Broadcasting Regulation bans materials that may jeopardise “decency, morality of the general public”.¹⁸ The Press and Publication Act prohibits the publication of any material that hurts “the decency, morals and social honour of the people”.¹⁹ The Online Media Directive released in 2016 and withdrawn for revision after opposition also had a clause banning publication and broadcast of materials “against public protocol or morality”.

Similarly, license agreements between ISPs and the National Telecom Authority contain a provision that asks them to remove “any obscene content that is termed as obscene by the prevailing law of the land, any act which may be contrary to decent public behaviour or morality”.²⁰ As a result, over 100 websites, primarily containing pornography, remain banned in Nepal.²¹ Instead of working through judicial authority to issue takedown orders that are clear, unambiguous and follow due process, the government instead appoints private companies to act as arbitrary referees of content safety, directly impacting the rights of the users.²²

The effect of such legislation and policies is to censor and police a wide range of activities and voices that pertain directly to sexual rights and the freedom of expression. The history of censorship and offline and online moral policing in Nepal shows an attempt to ban or regulate a wide range of behaviours pertaining to expression and sexuality. In 2013, over 300 young men with long hair and earrings were arrested under the Public Offence Act, and some had their hair forcibly sheared.²³ Police have also arrested young men and women in school uniform for going to the cinema.²⁴

12 Kee, J. (2011). Op. cit.

13 Forum for Women, Law and Development. (2007). *Women and Sexuality in Nepal*.

14 The ruling group of Nepal able to impose their values through legislation and bureaucracy has historically been the caste hill Hindu elite i.e. Brahmin and Chhetris as noted by Lawoti and Hangen. Lawoti, M., & Hangen, S. (eds.) (2013). *Nationalism and ethnic conflict: Identities and mobilization after 1990*. Oxford: Routledge.

15 Freedom Forum. (2016). Op. cit.

16 Acharya, U., & Sigdel, S. (2016). *Press Freedom in Constitution of Nepal 2015*. Kathmandu: Center for Media Research Nepal.

17 Article 47 (1), The Electronic Transactions Act 2063. (2008).

18 Article 9 (c), The National Broadcasting Regulation, 2051. (1995).

19 Article 16 (e), Press and Publication Act 2048. (1991).

20 Freedom Forum. (2016). Op. cit.

21 Freedom Forum. (2016). Op. cit.

22 For baseline safeguards and best practices on intermediary liability, see the Manila Principles of Intermediary Liability.

23 Nepal News. (2013, 8 April). Supreme Court orders police to stop crackdown on men with long hair. *Nepalnews.com*.

24 Setopati. (2016, 4 February). Bhaktapur Police to arrest students bunking classes. *Setopati*.

Unmarried couples staying in hotels are arrested on a regular basis.²⁵

Heteronormativity and online policing

The moralising and policing of expression can be understood through historical anxiety around sexuality, particularly female sexuality, in the belief that “if women’s sexuality is not tightly constrained then chaos and social anarchy will result.”²⁶ Women are disciplined to follow regimens of patriarchy that control, monitor and impose surveillance on their sexuality and their bodies throughout their lives. Liechty has argued that modernity “is an external condition”²⁷ and the freedom it provides is at once seen as “fundamental understanding of self as modern, but also a source of fear.”²⁸ The fear of the potential of modern technology to disrupt is seen as *bikriti* – “a state of deterioration that can connote disease, degeneracy, deformation and malformation”.²⁹ Media reports of sexual harassment, trafficking and online predators further compound this fear.

Tamang writes that honour, *ijjat*, is considered as the most critical aspect of the South Asian cultural and value system.³⁰ In Nepali society, the *ijjat* of the family and men in particular depends on how the women of the family exhibit qualities of moral, sexual and social propriety³¹ including “dressing and acting in a modest fashion”, and marrying a person chosen by family at an “appropriate” age.³² In the digital age, it can extend to the content and photos women post online, who they may “friend” and with whom they may “chat”. Technology is blamed as a reason for a myriad of actions that are seen as harming family propriety or *ijjat* such as love mar-

riage.³³ In problematising the medium rather than the intent, love and the exploration of intimacy are viewed as paradoxes, in the sense that they give people agency over everything except love itself, as Ahearn writes.³⁴ Therefore, love and by extension exploration of intimacy and sexuality, is seen as being uncontrollable.

In this context, what parents and wider society have sought control over is access to technology and content, which may facilitate the process of unsanctioned courtship and intimacy. The heteronormative value system is also reflected in laws and policies that regulate freedom of expression and bodily autonomy. Recent examples include discriminatory citizenship laws and a right to inheritance based on marital status.³⁵

In a reflection of worldwide trends,³⁶ sexual rights programmes in Nepal are implemented from a vantage point of reproductive health vis-à-vis married women, family planning and gender violence.³⁷ While framing rights to reproductive health within a bodily autonomy and wellness agenda, the opportunity to address critical issues of sexuality and sexual freedom, gender expression, self-esteem and relationships has been missed. Policies and programmes related to sexual and reproductive health and rights fail to account for the needs of people from diverse communities such as queer groups, women living with HIV and AIDS, women with disabilities, women who use drugs, unmarried/ single women, adolescent boys and girls to name a few. Existing programmes focus

25 Nepal Monitor. (2015, 25 February). Republica: Chitwan hoteliers shut shop over arrest of married couples. <https://nepalmonitor.org/reports/view/5118>

26 Forum for Women, Law and Development. (2007). Op. cit.

27 Liechty, M. (2001). Women and Pornography in Kathmandu: Negotiating the “Modern Woman” in a New Consumer Society. In S. Munshi (ed.), *Images of the ‘Modern Woman’ in Asia: Global Media/Local Meanings*, 34-54. London: Curzon Press.

28 Liechty, M. (2010). *Out Here in Kathmandu: Modernity on the Global Periphery*. Kathmandu: Martin Chautari Press.

29 Greene, S. (2015). *Gender and Sexuality in Nepal: The Experiences of Sexual and Gender Minorities in a Rapidly Changing Social Climate*. SIT Digital Collections.

30 Tamang, S. (2003). Patriarchy and the Production of Homo-erotic Behaviour in Nepal. *Studies in Nepali History and Society*, 8(2), 225-258.

31 Rankin, K. N. (2010). Cultures of Economies: Gender and socio-spatial change in Nepal. *Gender, Place and Culture: A Journal of Feminist Geography*, 10 (2), 111-129.

32 Greene, S. (2015). Op. cit.

33 Parents often blame mobile phones and mass media for the rise in child marriages. See for example, Save the Children, Plan International & World Vision International (2012). *Child Marriage in Nepal: Research Report*.

34 Ahearn, L. M. (2004). *Invitations to Love: Literacy, Love Letters and Social Change in Nepal*. Ann Arbor: University of Michigan Press.

35 The Constitution of Nepal discriminates against women by preventing them from passing on citizenship to their children, affecting single women with children, women married to non-Nepali nationals and those in same-sex partnership disproportionately. Property inheritance laws also regulate women’s sexuality by denying married woman the right of inheritance on parental property, and women also fall much further behind in line of succession. Same-sex couples do not have the spousal rights enjoyed by heterosexual couples. Devoid of legal protections, same-sex couples are unable to legally raise a family and ensure that their children have citizenship. They risk being forced to give up their rights to property when they split up or their partner passes away.

36 Varma, A., & Das, K. (2015). *Bridging the Divide: Thematic Paper Series on Linking Gender, Poverty Eradication, Food Sovereignty and Security, and Sexual and Reproductive Health and Rights*. Kuala Lumpur: Asian-Pacific Resource and Research Centre for Women (ARROW).

37 Interview, September 2016.

on the medical and treatment dimension of sexuality and focus on the above groups as transmitters of diseases that threaten the wider population. A review of studies on the sexual and reproductive health of unmarried adolescents found that their needs were ignored, as sexual rights are linked only with marriage and reproduction. The review also shows that unmarried women seeking abortion services experienced stigma and negative responses.³⁸

Beyond regulations, spaces where women and LGBTIQ groups participate are controlled in other ways. Harassment, abuse, manipulation, exclusion, and discrimination that occur offline also exist online.³⁹ Those whose voices are suppressed and silenced offline are also targeted online. Women (including activists) who are vocal about their opinions and views, have received death and rape threats.⁴⁰ There is no specific regulatory provision in Nepal to deal with online gender-based violence. Existing laws pertaining to gender-based violence such as the Domestic Violence Act, the Workplace Harassment Act and the Human Trafficking Act deal with specific categories of violence against women.⁴¹ The law enforcement agencies often invoke rules under ETA⁴² to deal with a wide range of crimes including gender-based violence on the internet. However, the act's vagueness and incompatibility with other freedom of expression laws makes it prone to misapplication.

Surveillance is another tool deployed to monitor actions and behaviour online. Regulators and service providers can track online behaviour both at user and provider end through requirements such as know-your-customer laws. Often introduced under the guise of public safety and security, these tools can be used to monitor individuals, organisations and their activities, especially in the absence of privacy laws in Nepal. Although the constitution has guaranteed privacy, there is no specific law regulating the collection and sharing of personal information by the government or private organisations.

Research methodology

This is exploratory research, conducted with the aim of providing preliminary evidence concerning the use of the internet among sexual and gender rights advocates in Nepal. This group was selected as a sample because they are at the forefront of sexual rights activism in Nepal and their experience, comprehension and perception is relevant to understanding the evolution of policies and programmes in this area. The bias in sampling resulted from our limitations but is intentional in that it allows us to speculate the productive potential of *what if* the sample included respondents from other social groups among the wider population. With proximity to urban bureaucratic centres, access to technology, skills and tools to politicise their experience, the sample is unique in that the opportunities and risks they face are both markers of their privilege and vulnerabilities.

The research used both quantitative and qualitative methods for data collection. Quantitative surveys allowed for a wider assessment of trends, while qualitative data provided rich narratives to inform findings. The data collection was conducted between July and November 2016 in Nepal's capital, Kathmandu. The research design and tools are adapted from APC's research framework "End violence: Women's rights and safety online" published in 2013.⁴³

The data for the study was gathered using the following tools:

- A mapping of regulations and laws regarding the internet and sexual and reproductive health and rights (SRHR) in Nepal, review of articles and literature to examine emerging discourses and current trends in the implementation of laws.
- A self-administered quantitative survey of 99 gender equality and sexual rights advocates in Kathmandu to understand their use of and experiences on the internet. While 105 people participated in the survey, six responses were discarded as incomplete.

The questionnaire was available online in English on the survey platform LimeSurvey and in paper forms in Nepali. Of the respondents, 95 completed the paper forms and the responses were entered into the online platform by the research team. The respondents for the sample

38 UNFPA. (2016). Op. cit.

39 Asian-Pacific Resource & Research Centre for Women. (2016). Sexuality, Sexual and Reproductive Health and Rights, and the Internet. *Arrow for Change*, 22 (1).

40 Ibid.

41 The Asia Foundation. (2010). *Nepal: Preliminary Mapping of Gender Based Violence*. Kathmandu: The Asia Foundation.

42 In *The Government of Nepal v. Bikash Thapa*, the defendant was charged under ETDSA for harassing a female colleague with sexually explicit images through email over a sustained period of time. The defendant was acquitted, as the court was unable to establish the charge due to insufficient evidence.

43 Athar, R., & Women's Legal and Human Rights Bureau Inc. (2013). *End violence: Women's rights and safety online*. Johannesburg: APC. https://www.genderit.org/sites/default/upload/flow_end_vaw_research_design_final.pdf

were selected based on their affiliation with an organisation that works on gender equality and sexual rights. Individual activists without affiliation were also invited to participate. An effort was made to include individuals affiliated with organisations working with LGBTIQ groups. Participation in the survey was voluntary, and respondents were assured of their confidentiality. The results were analysed using STATA.

- In-depth interviews with 25 internet rights and gender equality and sexual rights advocates in Kathmandu to understand their advocacy priorities, strategies for furthering their agendas on the internet and the legal and policy landscape on internet and SRHR. The research team at LOOM Nepal selected the interviewees and the lead researcher conducted the interviews. Interviews took place at their place of work or at a public space chosen together by both researcher and the interviewee. Interviews often lasted about an hour and were free flowing with a set of guiding but not restrictive questions. An effort was made to include advocates working on a diversity of issues including LGBTIQ, single women (widows),⁴⁴ workers in the entertainment sector and people with disabilities.
- Two focus groups were conducted with volunteers and staff members of organisations working with LGBTIQ groups and entertainment sector workers to gain an in-depth understanding of how they use the internet in their work and personal lives. Focus groups were hosted by the organisation working to support and advocate for the rights of these two groups. The number of participants in each focus group was between eight and 10. Discussions lasted for about an hour and discussions were guided by a set of pre-selected questions but allowed for free-flowing discussions.

The participants in survey and key informant interviews overlapped. There was an exception among key informant interviews who were selected for their technological or legal expertise and did not work in the area of sexual rights and gender equality.

The focus group discussions were conducted because early data collection processes showed that the two groups whose perspective would be crucial to inform our findings might not be able to

complete self-administered surveys. The two groups were selected because they are active on the internet and initial key informant interviews showed that they have specific language, connections and approaches to use of and experience on the internet that the methodologies employed up to that point would have been unable to capture.

Limitations of the study

While the respondents work in some aspect of gender equality and sexual rights, generalising the outcome for the entire sector of sexual rights is not possible as they come from a variety of backgrounds and areas of work.

Due to resource and time limitations, the research focused on the Kathmandu valley. The concentration and quality of internet service and the respondents' ability to afford it means that that the results cannot be generalised among the same category of people based outside Kathmandu.

The research team went through the survey with respondents when requested. Due to the nature of self-administered surveys and the somewhat technical aspect of the questions, the results need to be reviewed with this in mind. For future research we recommend an in-person approach as much as possible to prevent false reporting intentionally or otherwise.

A female researcher conducted the focus group discussion with the gay men in the research sample. While we do not believe that this changed the responses, it is possible that a trusted male researcher may have elicited richer responses.

Terminology

Gender

When referring to gender rights and gender equality, this research questions the norm of gender binary prevalent in Nepal's women's rights movement. Rooted in queer feminist philosophy, gender in this research refers to "socially produced structures, meanings and relations that depend on, deepen and transform, but are not fully explained by, or reducible to, biological sex differences."⁴⁵ Gender rights do not refer to women's rights only; the term refers to socially constructed gender identity going beyond biological identity.

⁴⁴ Because of the stigma attached with the word "widow", advocates working in support for the women prefer to use "single women" to denote their marital status.

⁴⁵ Cited in Tamang, S. (2000). Legalizing state patriarchy in Nepal. *Studies in Nepali History and Society*, 5(1), 127–156.

Sexual rights

As used by the Forum for Women, Law and Development: "Sexual rights are human rights that include the right to sexual pleasure without fear of infection, diseases, unwanted pregnancy; the right to sexual expressions and to make sexual decisions; right to sexual and reproductive health care and information and education; right to bodily integrity; right to enter into, maintain or discontinue marital relationships; right to privacy as to sexuality and reproductive choices, health care services."⁴⁶

Sexuality

The most-accepted definition of sexuality, as defined by World Health Organisation (WHO), is "a central aspect of being human throughout life" that encompasses "sex, gender identities and roles, sexual orientation, eroticism, pleasure, intimacy and reproduction." Sexuality is influenced by the interaction of biological, psychological, social, economic, political, cultural, ethical, legal, historical, religious and spiritual factors.⁴⁷

Sexual minority, queer, LGBTIQ

The Constitution of Nepal has recognised equal rights and protection for sexual minorities but does not define the group of people it refers to under this category. The term is widely used to refer to lesbian, gay, bisexual, transgender, queer and intersex (LGBTIQ) people.

In this research report, we use the term LGBTIQ to refer to non-heteronormative sexualities and gender identities. While we recognise that this term may not capture the full spectrum of sexual and gender fluidity, we use this term as it is used and understood locally to refer to non-heteronormative sexualities and gender identities.

While not used extensively in this report, we would like to insert a note on the use of the term queer. Examining the intersection of gender, capitalism, hetero-normativity and identity, queer theory questions gender binary and hierarchy of gender. In Nepal, the use of term queer as an encompassing category for non-heteronormative sexualities and gender identities (instead of LGBTIQ) raises complex questions. Those who self-identify as queer may not necessarily adhere to queer politics, which is primarily to reject gender binary and hierarchy. For example, a gay man who self-identifies as queer may

be patriarchal in his beliefs and this could manifest in the way he treats women. In this report, we use the term queer to refer to the political theory.

This research uses the terms lesbian, gay, bisexual and transgender when the individuals or groups mentioned self-identified in those categories.

Findings and discussion

The following discussion of the findings relates to three main areas of enquiry: a) overview of online activity and perception, b) intimacy and agency on the internet, and c) online risks and strategies for safety.

Overview of online activity

The respondents could be broadly categorised into two groups: a) established professionals with senior leadership positions in mainstream women's rights organisations; b) young people with an extensive online presence. This research also identifies a subset within the second category for further analysis, which are young gay men.

The majority (76%) of survey respondents were below 34 years old, with a postgraduate degree and were employed. They also had easy access to the internet with personal devices (most more than one) and had been using the internet for 10 years or more. Most of the respondents identified as heterosexual and female. Half of the sample comprised of Brahmin-Chhetri and about a quarter were Newar. Both these groups "have been privileged in terms of access to state power, authority and benefits" – Newars because they are "indigenous to the Kathmandu Valley", the seat of power, and Brahmin-Chhetri because they belong to the high-caste Hindu community historically in power in state structures.⁴⁸

Participants in the focus groups were below 30 years of age. While they all worked and lived in Kathmandu, most of them had recently moved to the city or still considered their primary domicile outside the valley. Their education level was lower than the survey participants and/or key informants, with only a few having undergraduate degrees. Employment and income generation was a major issue for this group. They accessed the internet on their mobile phones only or occasionally through a public computer in cyber cafes. Among gay men, the cost of accessing the internet was an issue but they considered internet access a fundamental need and spent a significant amount every month purchasing data for their phones.

46 Forum for Women Law and Development. (2007). Op. cit.

47 WHO. (2002.), *Defining sexual health: Report on a technical consultation of sexual health*. World Health Organisation. Geneva.

48 Tamang, S. (2009). The politics of conflict and difference or the difference of conflict in politics: the women's movement in Nepal. *Feminist Review*, 91(1) 61-80.

The established professionals

We use the term “established professionals” to describe individuals in leadership positions affiliated with mainstream women’s rights groups who can be “considered collectively as an influential, indeed primary, force in shaping the discourse and agenda around women in Nepal.”⁴⁹ While this group represented a small percentage in our sample, their voices are prominent because they have direct access to bureaucracy, have consultative roles in policy making and receive regular funding from donors. Most of the respondents in this group were above 35 years of age, with an exception of one. Respondents in this group belonged to Brahmin-Chhetri and Newar ethnicity, with an exception of one who belonged to the Janjati (indigenous) category.

For this group, the internet is an essential tool for work, and used for organisational communications, donor relations management, report writing and day-to-day record keeping. They are connected on Facebook and other messaging apps which they use for personal reasons such as keeping in touch with friends and family. If they are on Facebook and connect with a colleague, it will be for unofficial reasons, such as sharing photos. Social media is also used to organise events, but not to share official communication about the organisation.

This group has a critical approach to the use of the internet evaluating the usefulness and harm on the internet. They frame the internet as a “force for good” if used properly but also see it as a danger as women can be “lured” into violent and abusive situations. Examples of such danger include reports of women being trafficked after being contacted through social media, and women being in abusive relationships after meeting partners online. Other potential dangers include the creation of “fake identities” and “abusive behaviour” targeted at women. The reasons for believing that women were targeted differed, with some pointing to women’s inability to properly exercise their agency and others noting the lack of “awareness” and “education”:

- Illiteracy and lack of awareness are reasons for not using something properly. People without [the] right information or who are illiterate are

49 We use Pudasaini’s term “mainstream women’s rights groups” referring to those who can be “considered collectively as an influential, indeed primary, force in shaping the discourse and agenda around women in Nepal.” Cited in Sharma, M., & Tamang, S. (Eds.) (2016). *The Difficult Transition: The Nepal Papers*. New Delhi: Zubaan Books.

often vulnerable. Such vulnerable people are often exploited by other people.⁵⁰

- The experience online depends on how we use it. We could watch porn or talk with strangers and be involved in negative things.⁵¹
- There is this notion that only bad girls use Facebook or stay online late at night.⁵²

Regulation of the internet is seen as a key strategy to prevent online abuse. They use the term “cyber-crime law” frequently to refer to a clause in the ETA that criminalises certain online activities. They are also more likely to approach law enforcement for redress when online violence has occurred, although without an expectation of a solution owing to a lack of trust in law enforcement agencies to deal with gender-based violence effectively.

With the possibility for tracking online behaviour and surveillance, this group is not overtly concerned about privacy. Only two participants noted that their organisation had a policy for data security and confidentiality. With a history of surveillance of NGOs and human rights activists in Nepal,⁵³ this is rather disconcerting and could be explained by a low expectation of privacy in society in general or in the belief that they have nothing to hide.

Young explorers

A category of respondents is the younger group who we call “young explorers” for experimenting with technology as well as testing the boundaries of existing norms on sexuality. Born in the 80s and 90s, this group is comfortable with technology but may not be categorised as digital natives⁵⁴ as the adoption of the internet in Nepal only began in mid-90s.⁵⁵

There was a marked class and caste difference between two groups in the younger group. Young professionals with college degrees, some of them from abroad, belong to Brahmin-Chhetri and Newar caste, speak English fluently and experiment

50 Interview with executive director of an organisation, October 2016.

51 Interview with senior manager of an organisation, September 2016.

52 Interview with executive director of an organisation, July 2016.

53 Bohara, R. (2016, 26 November). Surveillance State. *Nepali Times*.

54 Digital native is a term used to describe the demographic that was born in and grew up with digital technology.

55 Darbha, S., & Rao N. S. (2016). The Concept of Digital Natives & Digital Immigrants in Context of India. *International Journal of Managerial Studies and Research* 4 (4), 1-5.

confidently with new technology. This group is also more likely to create content to counter patriarchal narratives both online and offline.

The second group belongs to the working class, a majority of whom were Janajati, and moved to the city for education or jobs. They speak little or no English, have high school or lower education and are without full-time stable jobs. They follow trends and popularity while choosing a platform on the internet and are most active on social media and messaging apps.

Both groups use the internet for entertainment and staying in touch with friends and family. The former use it to be in touch with friends and family in western countries, while the latter use it to remain in touch with friends and family who have migrated to the Gulf or South East Asia for jobs.

Both groups look for community online for like-minded people and develop friendships that are sometimes exclusively online. They have a good understanding of dangers on the internet, and are vigilant of threats and harassment online. They quickly develop their own mechanisms for safety online, whether through control of certain behaviour online (not posting on certain platforms) or by supporting each other within their own social circles and choosing only safe spaces to participate in. Their perception of the internet is different from that of the “established professionals” in that they speak of their own online experiences, rather than the experiences of others.

They are sceptical of content regulation as a method for safety and demonstrate a nuanced understanding of technology and control mechanisms. They, however, did see a role of law enforcement in certain circumstances such as violence online. When it comes to sexual rights and sexuality, very few women in this group publicly engage in issues such as creating content for fear of being seen as “not serious” or “inviting harassment”. An activist spoke of her inability to seek help while facing online harassment:

I don't even like talking about the harassment I faced online because I would not want my parents to know that their daughter was harassed.⁵⁶

They explore intimacy in private spaces such as chatting and dating apps. However, they are also aware of being chastised for talking to strangers or members of the opposite sex, and were therefore less likely to report it to law enforcement or seek support from their social circle while facing a negative experience

such as being blackmailed or harassed. A focus group participant said:

My sister was talking to this guy on Facebook chat. After a while she wanted to stop but he didn't. He started sending her messages saying he would photoshop her pictures on nude photos. It was a year before she told the family because she couldn't take it anymore.⁵⁷

This group is more likely to raise privacy as a concern and is aware that family and friends monitor their online activities. They have little expectation of privacy and see monitoring as a part of being online. A focus group participant discussed how family and friends track her posts:

My brother looks at my Facebook photos and will ask me not to post a certain photo of myself as it could invite unwanted attention. Some of my friends also do the same.⁵⁸

They are used to the physical invasion of privacy that stems from traditional practices of surveillance of women, as well as spatial considerations stemming from lack of resources. It was not uncommon for young women in the second group to share their phones with other members of the family. This group was not aware of surveillance and data gathering by platforms themselves.

Fakebookers

The subset of the second group with a significantly different approach to technology and internet are gay men. The men interviewed for this research interact online with men who identify as gay, as well as those who seek sex with men who do not identify as gay. This research presents findings from the perspective of self-identified gay men.

Apart from social networking and content consumption, gay men also participate in online dating and chatting extensively. Facebook and dating apps such as Grindr and Planet Romeo are popular. For intimate connections, most of them create and use profiles with false information, a method also known as creating “fake profiles”. The prevalence of fake profiles in interactions among men seeking sex with men is so high that Facebook is known in this group “Fakebook”.

The first point of entry for online intimacy is Facebook, and then they move on to dating apps.

⁵⁷ Focus group discussion, October 2016.

⁵⁸ Focus group discussion, October 2016.

⁵⁶ Interview with an activist, September 2016.

The choice of Facebook as a first point of entry indicates that they want to use this platform to establish comfort in their sexual identity through a fluid communication approach before moving on to platforms that are exclusively used for hook ups and sexual encounters.

These users have full or part-time jobs and spend a large chunk of their income on data packages. One participant used up to NPR 6,000 (USD 60) per month.⁵⁹ They speak little or no English. The respondents in our sample belonged to heterogeneous caste groups but they identified themselves as lower middle class and a majority had migrated to the capital. They referred to the difference between “paisawala” (rich) men who seek sexual relationships with other men and themselves saying “paisawala” men were tied by their family prestige and values to explore their sexuality freely.⁶⁰ In this way, interactions on the internet are inherently entrenched in dialogues and modes of relationship around class as well.

They view a lack of social acceptance of their sexuality as the biggest challenge and the driver for creating fake profiles. Even though they adopt this strategy, they remain at risk of being exposed by people they interact with on these platforms. They have heard of reports of others’ sexual orientation or HIV status being outed without their consent on online public groups, and pictures being stolen for blackmailing. These stories do not necessarily cause them to modify their behaviour online as it is seen as a crucial, if not only, platform for intimacy and support, and calculated the risk as being worth any negative outcomes. They are aware of physical monitoring and surveillance on their devices and use methods such as password protection and disguising of apps on their mobile phones to prevent intrusion.

The perception of the internet

For all respondents, the internet is an integral part of their life, and represents a reality that they could no longer do without. While the quality of the internet connection affected their use, most were connected online for 40 hours a week or more. Focus group participants, and key informant interviewees spoke of how their lives have been altered because of the internet:

- If there is no internet for an hour, our work comes to a standstill.⁶¹
- If there was no internet, it would have been really hard to get in touch with other gay guys. I suppose we would have to go back to the analog era. One of our dai⁶² said that before the internet you needed extra special gaydar⁶³ to identify other gay guys in a crowd. We would all have to go to physical cruising sites like [the] public toilet in Ratna Park.⁶⁴
- Social media has made communication easier for the disabled. Before they could not read newspapers. Now they hear it through assisted phones. FM radio has also played a big role in this. They can hear it on their mobile phones. It is private. No one knows what they are listening to.⁶⁵
- Everyone uses Facebook even if they are illiterate. They are able to create an account, upload pictures and even read online articles and news.⁶⁶

These responses demonstrate varying levels of dependency and ways in which the internet has been a part of their life. There are two main ways in which the internet is used: firstly for personal activities such as consumption of content, news and entertainment, and secondly for social activities, connecting with colleagues, friends and families and for seeking intimacy or sexual encounters.⁶⁷

Increased interpersonal connectivity is a major effect of the increase in access to mobile phones and the internet. This connectivity not only reinforces existing social ties, but also expands social networks through shared interests. In a professional setting, the internet reinforces connectivity and communication with donors, colleagues, allies and beneficiaries. Voice over internet protocol (VoIP) calling platforms, such as Skype, are important tools for staying in touch with donors in other countries. Social media is used to update followers of organisational activities. Organisational emails work both as a record and reinforce personal communication.

61 Interview with executive director of an organisation, July 2016.

62 *Dai* means older brother in Nepali and is used colloquially to address someone who is older.

63 Gaydar is a slang used to refer to a person’s ability to accurately assess someone’s sexual orientation.

64 Focus group discussion, October 2016.

65 Interview with an expert, October 2016.

66 Interview with an executive director of an organisation, July 2016.

67 Zhao, S. (2006). Do Internet Users Have More Social Ties? A Call for Differentiated Analyses of Internet Use. *Journal of Computer-Mediated Communication* 11, 844–862.

59 According to the UN, per capita income in Nepal as of 2014 was USD 692.

60 Focus group discussion, September 2016.

Focus group discussions showed that mobile phones and the internet are important tools for reinstating ties within existing social networks that have been disrupted through migration or other social reasons such as marriage. Communication between those who have migrated and those who remain behind becomes an important channel of information. As Nepal is a remittance economy, connecting with friends and family who have migrated for work abroad is an important reason for using the internet. This migrant group in turn supports the increase in access by returning home with electronic devices. The communication and connectivity facilitate mobility of people allowing “creation and assertion of new forms of individualism that challenge traditional norms and values.”⁶⁸

The mobility, interconnectivity and financial independence allow them to challenge traditional norms, and in regards to sexual rights, enable them to delay marriage or explore sexual desires and pleasures.⁶⁹ A young gay man explained how he had found a supportive network online that assisted in his move to the capital:

I grew up outside Kathmandu. I had a feminine personality and I felt like a girl. I used to hate myself. I didn't know why I felt different. I met a friend on Facebook who was like me and I came to Kathmandu. They helped me by giving me a place to stay and later I found this LGBT support organisation.⁷⁰

When establishing contact outside their existing social network, the authenticity of the interaction varies according to user group and situations. The “established professionals” are more likely to view the authenticity of interaction online with caution and spoke about the need for personal restraint. The “explorers” are more likely to assess authenticity on a case-by-case basis and establish trust over time. This may be a reflection of the fact that “established professionals” started using the internet later in life and are likely to view the online world as less real or as a performance, while the “explorers” are more comfortable with technology and view interactions online as an extension of the offline world. There was an exception among some “young explorers”,

some of whom mentioned a fatigue of online social networking sites and opted to log out of such platforms for a number of reasons including the feeling that the space made them perform certain roles and was too narcissistic.

The perception of the internet shaped the way in which individuals sought to form online identities, create communities and engage in interactions by shaping the frequency, quality and instances of online engagement. Most respondents agree that the internet has given them more freedom and has helped them find like-minded people. However, women in particular, have polarised views when asked if the internet was a safe space to express themselves. This division may be a result of the perception of some respondents who view the internet as a potential gender-neutral space and others who have faced the negative reality of their experiences. The majority agreed that women were more likely to face harassment online. This perception pushed women in particular to censor themselves online and limit their participation but they viewed this as a conscious strategy made for peace of mind, not because of an act of silencing.

Networking and activism

In this section we look at the ways in which gender equality and sexual rights advocates and allies are using the internet specifically and technology in general to counter patriarchal narratives, to organise for change, to discuss and share ideas, and pursue acts of sexual dissidence.

Feminist activism

During the Occupy movements that took place worldwide, feminist activists in Nepal led a campaign called Occupy Baluwatar, staging a protest in front of the prime minister's residence in Baluwatar, Kathmandu.⁷¹ The campaign was launched in reaction to a report of a returnee migrant worker being robbed and raped at Kathmandu's international airport. The case became representative of violence against women at the hand of the state and was used an example in a lobby for action against impunity. The Occupy Baluwatar campaign has been called the first “social media campaign” and utilised a host of platforms on the internet.⁷²

Other campaigns have followed suit. *Citizenship In Mother's Name* (#citizenshipinmothersname) was

68 Coyle, D., & Boyce, P. (2015, February). *Same-sex sexualities, gender variance, economy and livelihood in Nepal: Exclusions, subjectivity and development*. Brighton: Institute of Development Studies.

69 Ibid.

70 Focus group discussion, September 2016.

71 Koyu, P., & Pokharel, A. (2014, December). Occupy Baluwatar: A reflection. *Studies in Nepali History and Society*, 19(2), 347–372.

72 Ibid.

organised by a loose network of activists in the lead up to the promulgation of the new constitution in Nepal, urging the Constituent Assembly to ensure that women are able to pass citizenship on to their children. Online activism took place alongside a series of events and protests organised in Kathmandu. The Constitution did not address this demand, and the hashtag gets reactivated when events and programmes are organised.

Younger activists have also found new and creative ways of reclaiming both online and offline spaces. Chaukath is a feminist organisation that organises events in public spaces as a way of reclaiming these spaces. Their email list is also a safe space where young feminists participate in discussions and organise campaigns.⁷³ Maker Ketu inspires women to participate in the maker movement and particularly seeks to demystify technology and challenge the gendered perspective of technology.⁷⁴ Girls in Technology and Women in Stem support young women to code and create new technology. Boju and Bajai is a podcast that deals with a range of issues in the everyday lives of women such as sexual harassment at work and the portrayal of women in media.⁷⁵ Mahilakhabar.com is a news portal that covers the women's rights beat exclusively.⁷⁶

Networking is a big part of activism and technology has helped a diverse range of women to find like-minded people and maintain connections with them. An organisation that supports widowed women in rural areas found that when the social mobilisers were given a phone, women reached out to them more and had a connection even if they had never met. A senior manager of a women's rights organisation spoke of the way in which mobile technology had impacted their work and findings:

We initiated a campaign in 2009 in which we distributed cell phones to our social mobilisers. We distributed 7 to 80 phones in the villages. Before, when we had to call single women in villages we had to call her relatives and family members to reach her, which could restrict her from speaking truth about her condition. We acknowledged this situation and distributed phones to them. It was easier for social mobilisers to reach those women in the villages and they became familiar with each other and started opening up about

their problems. As a result of this intervention we found out about the violence they face within their families.⁷⁷

A smaller group also created content through blogging, writing online as well as using the internet as a tool of campaign and activism. There was some introspection about the utility of social media in particular in campaign and activism. There is also a division made by use of language and the connotation of privilege it represents.

Facebook is mainly used for events, and organising events. Using social media for an intellectual discussion – there is doubt how much intellectual that debate is going to be. But any debate is better than no debate. On Twitter, it is upper level intelligentsia who have fixed views.⁷⁸

Urban younger groups use mainly English in their interactions on social media, know each other outside of social media and meet regularly for talks, protests and campaigns.⁷⁹ They are privileged in the Nepali context where they can exercise their right to mobility and express their opinion openly, although they are limited in number.

When it comes to sex and sexuality, however, activism in Nepal has been limited. Kee notes that such limitations could arise from a range of issues including "fragmented civil society, gender bias and assumption of heteronormativity, technical language in both sexuality and the internet that required level of familiarity and politicisation."⁸⁰ Our respondents pointed to heteronormative assumption and gender bias when asked if they wrote about, discussed or created content relating to female sex and sexuality. An activist said:

I would never feel comfortable discussing sexuality online. Because I have my parents, my grandmother and my family on Facebook so I would not discuss sexuality on social media. I don't even like talking about the harassment online because I would not want my parents to know that their daughter was harassed. I'm pretty sure that a lot of powerful men would feel comfortable around me. I have been followed by ministers and famous social figures online. The fact that I have been followed is probably because I exhibit the figure of a role model. I have

73 <https://chaukathnetwork.wordpress.com>

74 <https://www.facebook.com/MakerKT>

75 <https://soundcloud.com/bojubajai>

76 mahilakhabar.com

77 Interview with acting director of an organisation, August 2016.

78 Interview with an expert, 5 October 2016.

79 Pudasaini, S. (2016). Op. cit.

80 Kee, J. (2011). Op. cit.

even had people telling me that they wish they had a daughter like me.⁸¹

Although women use online tools and participate in online spaces, they weigh risks of using these tools in discussions around sexuality. Women have the burden of proving they are not sexually immoral and a marker of a woman with "ijjat" is not talking about sexuality.

LGBTIQ networking

The Constitution of Nepal enshrines protection for sexual minorities, the first country to do so in Asia. Article 18 of the constitution states that gender and sexual minorities will not be discriminated against by the state and the judiciary in the application of laws. Article 42 lists gender and sexual minorities among the groups that have a right to participate in state mechanisms and public services to promote inclusion. Article 12 states that citizens will be allowed to choose their preferred gender identity (male, female or other) on their citizenship document.

These gains in the LGBTIQ rights movement were made because of activism "ignited" by one of the key figures in the movement, Sunil Babu Pant, who established the Blue Diamond Society (BDS) in 2003.⁸² Pant went on to become a Constituent Assembly member that ensured rights of LGBTIQ people in the constitution. Over 56 organisations and collectives have sprung up since the BDS was set up.⁸³

The movement gained momentum at the same time internet access started becoming accessible to the wider population allowing individuals to explore their identities and desires. "The gay scene exploded with the internet,"⁸⁴ writes Seira Tamang, as it allowed people to explore their sexuality, express themselves, socialise and network in privacy. A gay man in his late twenties spoke about his experience on the internet:

I started exploring my sexuality through the internet from the age of 15. Back then, Nepalnews chat room was very popular among gay men. Gay men like me would enter the chat room with conspicuous nicknames like Boys2men, Man4Man, King4Prince,

etc. This allowed gay men to message each other in private. I met about 9 to 10 guys through this chat room and also had my first genuine sexual experience with a man.⁸⁵

Men seeking sex with men, whether identifying as gay or not, were networking on the internet and finding each other before "social networks" became popular in Nepal. Chat rooms in websites like Nepalnews.com and Sajha.com were popular as well as Yahoo and MSN. The trend for socialisation online has changed with the popularity of the medium. Chat rooms gave way to Facebook and online dating apps such as Manjam, Planet Romeo and Gay Romeo towards the end of last decade. Trends in dating apps have also changed with Grindr and Scruff gaining popularity in the recent years.

LGBTIQ people have also found support and help through networks cultivated online. Facebook pages like "Gay Nepal" promise to provide support to individuals "struggling with their sexual identity".⁸⁶ "Gay Nepal" provides uplifting stories on queer communities around the world. "Gay Confessions Nepal"⁸⁷ is a Facebook page where users post anonymous stories and thoughts. Localised Facebook communities such as "Gay & Bi from Pokhara Nepal"⁸⁸ and "Gay from Morang, Nepal" provide spaces to seek intimacy in their local areas. On these pages news such as Ricky Martin's engagement and a YouTube video of a young man coming out have gone "viral":

Queer groups are doing advocacy anonymously. When Ricky Martin came out as gay, it was a huge thing but no one dared to share it in their real Facebook accounts but they shared it in fake groups. About 7 to 8 months earlier, there was a huge sensation about a Nepali guy who came out on YouTube but nobody shared it. They shared it their fake accounts.⁸⁹

For the LGBTIQ population, the internet is an intricate part of their lives and a medium that allows them to exercise their identity and express themselves. This expression although done in private, for individual purpose, plays a role in public activism of the queer agenda by increasing the visibility of the community.

For individuals seeking support or looking to explore their sexuality, these pages provide a point of entry into the queer world on Facebook. Our gay male respondents said that relationships developed

81 Interview with an activist, August 2016.

82 Knight, K. (2014, 1 March). The Spark: How Sunil Babu Pant ignited a queer movement in Nepal. *The Caravan*. www.caravanmagazine.in/reportage/spark

83 UNDP & USAID. (2014). *Being LGBT in Asia: Nepal Country Report*. https://www.usaid.gov/sites/default/files/documents/1861/Being_LGBT_in_Asia_Nepal_Country_Report.pdf

84 Tamang, S. (2003). Op. Cit.

85 Interview with a researcher, November 2016.

86 <https://www.facebook.com/search/groups?q=gay%20nepal>

87 <https://www.facebook.com/gayconfessionnepal>

88 https://www.facebook.com/groups/1452773761630163/?ref=br_rs

89 Interview with a researcher and activist, November 2016.

online were a crucial part of their support systems, and also went from online to real-life friendships.

LGBTIQ people are finding intimacy, support and exploring their individual sexuality on the internet, while activism and networking in an organised manner is most visible offline. Pride parades, beauty pageants for transwomen are events that gain coverage in mainstream media. Our respondents said that only a certain group of, often transgender, LGBTIQ people are publicly visible. Even though the LGBTIQ movement has legally secured recognition in the Constitution, the difference in visibility offline and online and use of anonymity to find each other points to a lack of acceptance in the society and a fear among the group to openly come out.

Intimacy and agency

This section will examine the intersection of body politics and the internet and spaces for furthering sexual rights agenda through the internet. We examine the ways in which societal views on sexuality affect discussions both offline and online. We assert that such perceptions feed directly into regulations and examine how advocates react to challenges to this space.

Sexual expression and the internet

The presentation of women and bodies on the internet explicitly started through the websites Cybersansar and CyberNepal that were targeted at a specific audience to provide a form of visual pleasure towards women's bodies. The websites, launched in 1997, gave aspiring models the opportunity to seek modelling contracts. The websites used images of women to increase income through GoogleAds, and this trend spread to district-specific websites that such as DharanGirls and PokharaGirls.

There was no specific response to such representation from the established women's rights movement or sexual rights advocates but the uneasy relationship between patriarchy, women's freedom and their bodies was laid stark when an actress committed suicide when her nude photo was published in a newspaper in 2002. Mishra wrote that the incident "represents the moral confusion of many up and coming urban Nepali women – their desire for freedom but unwillingness to stand up and fight for their rights, their enthusiasm to participate in consumerist culture but lack of knowledge and courage to redefine their body and sexuality."⁹⁰

The uneasy relationship between established women's rights advocates and women's sexuality can in part be explained by the "dominant patriarchal culture" espoused by the representatives of this group who themselves belong to the ruling class. This is exemplified in the way in which the SRHR agenda has been pushed forward as a matter of reproductive health for married women.⁹¹ The reluctance to mainstream sexual health rights of unmarried or widowed women, freedom to pursue intimacy outside marriage, or right to choose sex work as labour rights can be viewed through the standards of acceptability that has been codified into laws and policies by the ruling class. The women's rights movement, led by middle-class urban women, has put protection at the centre of its agenda while simultaneously representing the heteronormative values of the urban middle-class.⁹² On the one hand, it seeks to protect women who are considered vulnerable and in fact, they might be seen as unable to exercise any agency because of their vulnerability. On the other hand, it seeks to moralise actions of women and their exercise of agency through the lens of "acceptable femininity".⁹³

- The "established professionals" in our research spoke openly of women's rights and bodily autonomy, but at the same time set standards for women who they see as capable of exercising their rights. Lack of education and awareness was used as a measure of how well a woman could exercise her rights and agency. Individuals in senior leadership positions in established women's rights organisations frequently expressed these views:
- Rather than seeing it as the product of patriarchy, we should also examine how much freedom we can exercise? Yes, we have our rights. If I have a boyfriend and I live in together with him it should not be a topic of concern for media or

90 Mishra, P. (2002, 12 December). Patriarchy, female freedom Shrisa Karki. *Nepali Times*. www.nepalitimes.com/news.php?id=4364-.WDZsj4Wp3V0

91 In a reflection of worldwide trends, sexual rights programmes in Nepal are implemented from a vantage point of reproductive health vis-a-vis married women, family planning and gender violence. By framing rights to reproductive health within a bodily autonomy and wellness agenda, other critical issues including a discussion of sexuality and sexual freedom, gender expression, self esteem and relationships are missing from this conversation. Policies and programmes related to sexual and reproductive health and rights fail to account for the needs of people from diverse communities like: sexual and gender minorities, women living with HIV and AIDS, women with disabilities, women who use drugs, unmarried/ single women, adolescent boys and girls to name a few.

92 Tamang, S. (2009). Op. cit.

93 Liechty, M. (2010). Op. cit.

society. But, what would it be if I date five men at one time? Despite being open to the issue of sexual rights, I don't think having five or six sexual partners is a good thing. I think it's like harassing her body.⁹⁴

- Based on the social values, sexual or reproductive rights are ensured for only married women such as marital rape, sexual assault, abortion law. There exactly isn't any specific law for unwed mothers. It is an area that needs to be worked on. We, as women's rights activist, should also think about our society. We definitely need rights but it is also important to know the population who can use their rights and among them how many of them will properly use their rights or misuse them like Facebook.⁹⁵
- If someone is earning a living through advertisements or by being portrayed as sex objects in media with their own will then it's their right. There are Marxists feminists who view that women are portrayed as sex objects in media. They even created complications to conduct Miss Nepal for two/three years. But girls who participate on those pageants themselves are happy and participate on their own will. It's very important that they themselves should be self-aware about how they are being used and harassed.⁹⁶

These comments show various standards set for women while exploring their sexuality. It is also important to note that the examples used to define these standards refer to physical spaces rather than online. The respondents equate the internet with physical spaces and the standard set on women seek to control their access and approach to using this public space.

In the last few years, a diverse group of women have started challenging traditional notions linking sexuality to marriage, and are engaged in strategies to express thoughts and ideas around their bodies. Madalenas theatre group stages Vagina Monologues, even while receiving abuse on social media. Young bloggers write about their bodies and sexualities. *Tinder Games* is a column in a weekly magazine *Movers and Shakers* written by a young woman experimenting on Tinder and this in itself was done as a backlash against the stigma around sexuality.

94 Interview with the director of an organisation, September 2016.

95 Interview with the senior manager of an organisation, October 2016.

96 Interview with the executive direction of an organisation, September 2016.

Much of the feminist conversation in Nepal revolves around equal rights but there is almost no talk about women's sexuality, particularly in regard to a woman's pleasure. Thus far, "progressive sexuality" 'is confined to matters of reproductive health, and women and sex is still mostly centred around giving into the "needs" of a man – wives must fulfill their "duties" in the bedroom. Men are known to be sexual beings, but any woman associated with the same are shamed, reprimanded, and heavily looked down upon. These double standard – leniency for the men and severe repercussions for women – have persisted for far, far, far, too long.⁹⁷

Except for these pockets of dissent, the framework of sexuality is limited to reproduction and bodily wellbeing rather than a comprehensive approach that includes sexual freedom, intimacy and access to sexual information, among other issues. Women's sexuality, in particular, is still a stigma even in private online spaces and moralising of this space is high. The internet is blamed for trafficking, child marriage,⁹⁸ and overwhelmingly people said it needed to be regulated. Even among advocates working on these issues they spoke about hesitations in openly promoting sexual expression and sexuality:

- An organisation that provides legal support to transgender sex workers said they couldn't openly advocate for rights of sex workers for fear of being as seen as encouraging people to be sex workers.⁹⁹
- An organisation that provides support to sexual minorities says they could not advocate for freedom of sexual expression or openly discuss issues of sexuality for fear of not being accepted by the society. "In order to be accepted we need to follow the values of the society," a representative said.¹⁰⁰
- An individual online activist said she would not include sexual rights and sexuality in her online work because she wouldn't want her parents to see her discuss such matters openly and so that her political views would be accepted by her audience.¹⁰¹

97 Savitri, S. (2016, 22 July). *A Girl on Girl Thing. Movers and Shakers Magazine.*

98 Human Rights Watch. (2016). *Our Time to Sing and Play: Child Marriage in Nepal.* New York: Human Rights Watch.

99 Interview with the deputy director of an organisation, September 2016.

100 Interview with the director of an organisation, September 2016.

101 Interview with an activist, September 2016.

These statements are strategies adopted for organisational goals balanced with what they can accomplish with an idealist agenda. At the same time, it is telling that the organisations and activists working on sexual rights and gender equality point to heteronormative standards of wider society as limitations to their work. After all, they are best placed to challenge the norms that prevent them from achieving their ideals.

The repercussions of the heteronormative values are harder on individuals who face further marginalisation because of their sexual orientation, marital status and disabilities. In the same way widows face barriers while “accessing care for their sexual and reproductive health: fear of being suspected of having a sexual relationship” they face similar barriers while accessing the internet.¹⁰² “Single women (*referring to widows*) don’t want to open accounts on Facebook because others think that they will meet guys in Facebook if they open an account. To avoid further stigma, they don’t want to start using it.”¹⁰³

Societal attitudes determine attitudes towards sexuality and access to sexual health facilities in spite of technological innovations. In 2012, the Supreme Court issued a directive to the government to ensure every hospital provides special birthing beds and sign language facilities for speech impaired in order to increase accessibility to health services for women with disabilities. This did not however improve services for this group, which were rooted in discriminatory social attitudes. “Disabled women who aspire to be mothers were treated really badly by health professionals and their family. Their ability to be a mother was questioned. It wasn’t their physical ability to be a mother, their nurturing capabilities were questioned.”¹⁰⁴

Online intimacy

The internet has changed the exploration of sexuality, practice of courtship and even marriage in the same way that literacy changed courtship practices in the past.¹⁰⁵ The ease of use and increase in access, the internet has facilitated romantic connections complimenting, and sometimes overriding, the need

for physical meetings and courtships. This presents a new worry for parents concerned with the novelty and unknown world of technology, it has similar “ramifications on the conception of agency” as literacy did and needs to be examined from perspective of agency and personhood.¹⁰⁶

Among our sample, we recognised trends among young heterosexual women and gay men that help us glean some aspects of intimacy using the internet. Quantitative surveys showed that majority of women were not dating online, however, focus group discussion and key informant interviews show that the internet plays a role in the exploration of intimacy and practice of courtship. For future research, we recommend an in-person approach in order to explore this fully.

Gay men

Gay men, in particular, almost exclusively find relationships, casual encounters and hook-up opportunities through the internet. For someone new to the online gay community, the interactions start with a search for a queer group. You then request to be friends with the members of the group. Sometimes, you may also cruise accounts and add someone that you think may be gay.

I always knew I was different than normal male friends. I initially started watching porn in cybercafés. I got curious and searched in Google for gay porn and more curiosity led me to get in touch with foreign guys. I got connected into Yahoo Messenger where they referred me to use Facebook. I got into this circle from internet only. I have created accounts in other several apps, which are used in other parts of world too by searching in Google.¹⁰⁷

Unlike on dating platforms, such as Planet Romeo where acquaintances are matched by the platform based on the profile information, users themselves vet and build trust through prolonged conversations to match their interests.

When I had a fake account, I used to talk to 14 or 15 guys a day. The conversation starts normally with a hello and it develops with other normal talks about study, work, etc. Not all conversation concludes to a solid friendship. Only 1 out of 50 or 60 conversation stands out as a friend. During the three years I spend on “Fakebook” I made

102 Haviland, M. J., et al. (2014). Barriers to sexual and reproductive health care among widows in Nepal. *International Journal of Gynecology and Obstetrics*, 125(2). <https://www.ncbi.nlm.nih.gov/pubmed/24559862>

103 Interview with the acting director of an organisation, September 2016.

104 Interview with an expert, October 2016.

105 Ahearn, L. M. (2004). Op. cit.

106 Ibid.

107 Focus group discussion, September 2016.

two or three people whom I am a still friends with. That is out of talking to over 400 guys. I probably met 20 guys in real life, some for hook ups and others just for a chat.¹⁰⁸

After gaining experience in online communication through Facebook, they may move to the dating apps targeted to men who are seeking to meet other men such as Grindr or Planet Romeo. A number of factors propel this move including comfort in their sexuality, willingness and readiness to move directly to dating or sex, and confidence in using technology and familiarity with the language used in online dating.

The popular apps now are mainly Planet Romeo, Grindr, We Chat, Viber, and WhatsApp. Most of my friends use Imo where you can live stream and see each other's face. Some even use WhatsApp contacting them by using the number obtained from fake accounts. I prefer Planet Romeo and Grindr. However, as a beginner everyone starts getting in touch from Facebook, and that's how they learn about other apps available.¹⁰⁹

A couple of respondents reported having found long-term partners through these platforms. For most respondents, seeking successful romantic relationships was not part of the goal of online dating. The majority have not come out to their family and some were married to the opposite sex upon their family's wishes.

The fluidity of the sexual relationships does not mean a contradiction for the respondents, and they see online dating as a platform to have fun, seek sexual encounters and pleasures.

Heterosexual women

Survey respondents showed that a very small percentage of women were dating online. However, focus group and key informant respondents said that they were exploring intimacy that may not always end in romantic encounter whether online or offline. Among the respondents, only one who used Tinder talked of an online conversation resulting into an offline meeting. Others said they hadn't pursued it themselves but had heard of others who had met through Facebook or random phone calls and had married as a result.¹¹⁰

Being "sexy" or posting "*ramro* photo" (nice photos) is also an important aspect of young women's

online identity. The reason for this is to get more "likes" on the photo. "Sometimes you have to phone a friend and ask them to like your photo or friends get mad when you don't like their photo," said a respondent.¹¹¹ While the respondents said they themselves didn't do this, they said their friends put sexy photos to attract others, as they explore new online relationships as they receive and accept "friend requests" from unknown people.

Women said they didn't go looking for these conversations but if someone struck up a conversation they were open to chatting with them. These that said they pursued these chats also said they stopped talking to them after it turned sour. One respondent said someone had requested a nude photo of her, and she tried to reason with him but when he wouldn't let go she blocked him. Another respondent said someone she has been conversing with through Facebook Messenger wanted to meet her, and she decided she didn't want to take it beyond online chats.

Young women were open to the idea of meeting someone online and that meeting turning into a committed or real relationship offline. But this happens if they get more information about the person online.

Based on news reports about online relationships that turned out to be bad, friends and family monitor their profiles online and ask young women to remove certain images that may be seen as violating propriety. The online spaces where women participate and upload content are policed in similar ways as the appearance of women in physical spaces are controlled. In a recent report, Human Rights Watch asked interviewees for their views on the causes of the increased number of love marriages among young adults. They blamed modern technology – including mobile phones and Facebook – saying it encouraged romantic relationships between young people that would not have happened previously.¹¹²

The different reactions to the pursuit of intimacy between women and gay men also shows an acceptance for exploration and discussion for male sexuality, while women's sexuality is viewed even within the movement cautiously as a "danger" to themselves and the society at large. While a search on Facebook resulted in dozens of groups for gay men in Nepal or of Nepali origin, there was only one result for women seeking women.¹¹³ While our research did not capture this, it is possible that women

108 Interview with a researcher and activist, November 2016.

109 Focus group discussion, September 2016.

110 A person randomly dials a number and a relationship is forged between the two callers.

111 Focus group discussion, September 2016.

112 Human Rights Watch. (2016). Op. cit.

113 Facebook search conducted in October 2016.

are not using the internet to seek intimacy but do it in person within the realm on face-to-face relationships instead of venues that provide anonymity, and risks of unwanted exposure.

Tamang has written about the gendering of sex and the domination of patriarchy in Nepal arguing, "Women are regulated through the tool of sexual reputation, "ijjat" with the negative labelling of an active, desiring female sexuality and positive labelling of active male sexuality".¹¹⁴ Gay men have the ability to go out, meet in public spaces like bars, explore their sexuality and seek intimacy even if they are not out to their parents. In the same way they are able to explore their sexuality on the internet without the same level of surveillance as women. As Tamang notes "the privileging of men over women, and the privileging of the masculine over the feminine, is a dominant feature, if not cornerstone, of hegemonic patriarchy in Nepal in homoerotic as well as heterosexual relations."¹¹⁵

Online harm and safe spaces

In this section we examine the risks and negative experiences faced by our respondents while using online spaces. A note on methodology is relevant here. While designing the questionnaire for the quantitative survey, we used the framework of online violence and categories of devised by APC.¹¹⁶ Based on our previous experience and desk reviews, we distilled a short list of types of online violence we felt was relevant in Nepal's context. In the design of the questionnaire, however, we did not frame these terms as "online violence" or ask respondents if they had experienced "online violence". Rather, we asked if they had witnessed or experienced any of the listed incidents. By asking them to report a particular kind of incident rather than broad category termed "violence" we aimed to prevent any leading answers as well as varying interpretation of online violence.

The options available for survey participants were: infringement of privacy, surveillance and monitoring, harassment, damage to reputation or credibility, direct threats of violence and targeted attacks against a community.

Violence on the internet

While technology may seem like a neutral space made up of machine parts, wires and software, Cockburn

contests that it has been historically and socially constructed as a masculine sphere embodying patriarchal values.¹¹⁷ This gendering happens through the celebration of men's contribution to technology and sidelining women's achievements, and through reinforcing gender stereotypes such as it was in the case of the telephone operators. For an examination of the public discourse that happens online, Enloe's inquiry into the "public" and "private" nature gendered relation is also relevant. Online spaces where public discourse take place are often an extension of *chiya pasals* (tea shops) where men's dominance can be obvious and unquestioned, as evidenced by a female activist's experience of trolling on the internet:

We started to realise it late that a lot of people who were getting trolled online were all women. The majority of this country's men hold the political opinion that we do. But none of those men were trolled. We started to notice this three or four months after we had started to debate. We thought why it is only the women who are the point of discussion and why is it always the women who are trolled?¹¹⁸

Among our survey sample, an overwhelming majority (88%) said they had witnessed an incident of violence against another person online. Gender, class and ethnicity underpin these experiences. A smaller proportion of men said they had witnessed incidents of online violence, while a majority of women, all transgender and all Dalit respondents said they had witnessed an incident of violence against someone on the internet.

More than half (52%) said they had experienced at least one incident of online violence themselves. All transgender respondents reported having been subjected to violence online compared to 50% of women and 40% of men. And 84% of those identifying as gay, lesbian, bisexual or other non-heterosexual orientation reported having been subjected to online violence. More Dalit reported experienced violence compared to Janjati and Brahmin reiterating social inequalities.

These findings indicate that the internet, and social media, where a majority of social interactions happen, is a contested space for those who do not represent dominant values.¹¹⁹ In Nepal's current po-

114 Tamang, S. (2003). Op. cit.

115 Ibid.

116 Athar, R., & Women's Legal and Human Rights Bureau Inc. (2013). Op. cit.

117 Cited in Grint, K., & Gill, C. (Eds.). (1995). *The Gender-Technology Relation: Contemporary Theory and Research*. London: Taylor and Francis.

118 Interview with an activist, 9 September 2016.

119 Lawoti, M., & Hangen, S. (2013). Op. cit.

litical context characterised by a vigorous debate around identity politics, online participation by individuals from non-dominant groups can be challenging in two ways. There are persistent attacks against women who are asserting their identities and fighting for equality and women who represent the “established” group, have hesitated to extend solidarity, if not participating in subjugation themselves. On the other hand, individual women from marginalised ethnic groups who may vocally oppose identity politics are subjected to attacks from members of their own community.

The most common types of incidents reported were harassment, infringement of privacy, and damage to reputation and credibility. Harassment is characterised by abusive comments and shaming of women for expressing views that are not normative. Infringement of privacy by sharing sexualised content without consent, and manipulating private data or threats to do so, was another tactic. Efforts to damage reputation by spreading rumours or threats to damage reputation by manipulating private data were cited as one of the top concerns among our respondents.

I know a girl who was harassed on social media with a photoshopped image of her having a sexual relationship with a man. The image had her face but someone else’s body. The person who was harassing her through messages and posting pictures in her profile was someone she knew before and wanted to take out his ire and frustrations on her. In the other case, the girl was harassed by an unknown guy with messages and tagging her in obscene images.¹²⁰

Our respondents reported that there was a higher risk of harassment, abuse, and risk of manipulation from people they knew or had some contact with before, rather than from strangers. Several queer respondents said that it is not uncommon to see ex-partners venting about their partners in public groups. Some have their sexual orientation or medical history outed publicly. Several women reported receiving sexualised images and content without consent from people they had spoken to before.

The physical, psychological and emotional impact of online violence is severe. Many respondents reported to feeling mental effects such as depression and a feeling of shame and guilt. The effect ultimately pushed women to censor themselves or

limit their participation online. This also affects the motivation of others to participate and contribute to conversations. An activist who had faced sustained attacks and harassment on the internet spoke of how it affected her life and choices as a result:

There was a campaign to attack and shame me. I had to call my friends and ask them to report pages, which were spreading malicious information about me. It was humiliating. I started losing weight. I broke out in hives all over my body. I was depressed for a while. That experience made me take a step back on social media. Now I don’t debate or engage. I only post pictures of sunsets and flowers. It also made me rethink my career as a writer and change my career track.¹²¹

Our survey shows that there are not systemic targeted attacks against the SRHR community, such as efforts to hack accounts and servers of organisations with the purpose of shutting them down. That is not to say hacks have not happened. Occupy Baluwatar and Mahilakhabar.com both reported multiple efforts to hack their sites but were unable to track down those responsible or assign motivations. Respondents noted that the nature of attacks is targeted at individuals because they cross the limit of prescribed behaviour for particular group of women. Women’s bodies have been the sites of arbitration of acceptability, as women who engage in discourse of body politics are targeted, and the shaming of women also happens using their bodies.

There is a woman who is active on Twitter, who runs a travel agency and is married. She writes very openly about things related to sexuality. So a lot of people say nasty things to her in the comments. And there is this guy who is businessman and also has more than 46,000 followers on Twitter. He posts nude pictures of others every now and then, but still no one trolls him. His hashtag is #uthauyuwa (innuendo for a hard-on). This shows that if a boy does this its normal and when a girl does it it’s taken in a negative way. When talking about the woman, we perceive that she has a husband, she has a family and because she comes from a decent family background, she should not do these things. It’s a perception dominated by patriarchy.¹²²

120 Interview with the executive director of an organisation, July 2016.

121 Interview with an activist, September 2016.

122 Interview with a media researcher, October 2016.

Strategies for safety

Even though respondents spoke at length about risks online, they did not automatically label the internet as a dangerous place. Instead they found strategies to be safe online such as blocking people, or rejecting friend requests after a brush with harassment. Our respondents said witnessing or experiencing violence did not lead them to completely sign out from the internet, rather they evaluated and selected platforms and communities they wanted to engage with carefully.

Mainly, we prefer using fake accounts for getting in touch in our community. We also use privacy settings to limit exposure of our friend list and activities. We also prefer apps lock in our mobile phones to maintain security and to keep our messages, galleries, apps safe from being seen by others.¹²³

One of the ways they are creating safe spaces online is nurturing a community of like-minded people through creation of Facebook groups, group chats on Twitter and apps. A young feminist group, for example, collaborates online and develops a strategy privately before engaging in public areas. Some had decided to move conversations exclusively online in order to maintain meaningful engagement with a small group of like-minded people, after assessing that public spaces were too polarised.

The challenge here then is how to counter normative narratives if the safe spaces are just inward looking like an echo chamber. There have been some individual efforts to push back. A young trans activist has started a page that exposes sexual harassers.¹²⁴ When a vocal young woman was attacked, individuals who opposed her views also came together to report the page to Facebook that eventually removed it.

Respondents across the entire survey sample referred to regulation and law enforcement as a strategy to remain safe and combat online violence. Although it was a minority, individuals have gone to the police to report online violence. The expectation for a solution was low which is based on general perception of police in Nepal. Groups who had frequent contact with the police were outwardly hostile and said they would not go to the police for fear of being subjected to further harassment.

Organisations that monitor GBV did not specifically monitor online violence as a category, although

they had received some requests for help and referrals. Organisations working on GBV did not fully comprehend the ways to assist, and looked to law enforcement for help. A senior women's rights defender spoke of her experience with law enforcement:

A guy used to send me messages on Facebook even when I didn't reply anything. Once, he sent me a nude photo and called me at 2 p.m. The next day I went to the Cybercrime branch in Teku to complain about him and also gave that photo to the police. After that, police sent a warning message to that person but said they couldn't do much because he was in Korea. I sent a message to him myself warning him to never underestimate women like myself. I could have blocked him and forgotten about it but I wanted to go to the police so I could send a message to people like him.¹²⁵

Respondents were aware that regulations governing IT were lacking, but did not have the specific understanding of why the existing laws were insufficient. While asking for new regulations, they also were fully versed in the contradictory nature of some of the demands. For example, "established" groups saw users with fake identities or anonymous profiles as one of the "evils" that needed to be banned without considering that anonymity could be a tool used by minorities for activism and to exercise their rights in a suppressive environment. Their understanding of harm was also heteronormative, viewing women from a perspective of victimhood.

For example, a majority of the respondents were not aware that over 100 porn sites are currently banned in Nepal. The arbitrary and randomness of the policy and practice that led to such content blocking was not a concern for them.

All respondents, however, showed a sparse knowledge or and concern for surveillance and monitoring conducted by government, hackers, platforms themselves. Even with media reports of NGOs being under surveillance from police and other government agencies, they did not raise this as a concern.¹²⁶ Respondents also did not raise privacy concerns that could result from data gathering, tracking and sharing done by devices and platforms like Facebook. They were aware of the physical invasion of privacy that stems from traditional practices of surveillance of women and minorities, and raised infringement of privacy as a major concern. As 82% of survey

123 Focus group discussion, October 2016.

124

125 Interview with a senior manager of an organisation, October 2016.

126 Bohara, R. (2016, November). Op. cit.

respondents had never received any digital security training they demonstrated a lack of technical knowledge and language for politicisation of these issues.

Conclusion

Our research shows that the internet is an indispensable tool for gender and sexual rights activists. They have higher than average access to the internet and the ability to use it for a variety of personal and professional activities. The access to the internet and technology has given them a platform from which to exercise their freedom of speech and expression. At the same time, their participation is conditioned by the same values and modes of behaviour of the offline world. That the interactions and power dynamics online mirror those encountered offline is not unique to Nepal. What is notable is the pace at which the internet has facilitated and shaped consumption of content, dialogues and the formation of relationships.

The rapid uptake of the internet for knowledge consumption and social connectivity has bred efforts to moderate the dialogue, performance and community formation in the same ways as it is in the physical world. Lietchy's assessment that women's appearance in public spaces must adhere to certain "acceptable values" can be used to evaluate the conditions in which women's access to this public space is moderated while Tamang's analysis of hegemonic patriarchy's labelling of sexuality can explain the approaches to the regulation of sexual expression online.

The research found no notable variance on the amount and purpose of use against education level, age and ethnicity. It noted that the use of the internet to explore their sexuality is of particular prevalence among gay men. Women use the internet to seek intimacy to a lesser extent possibly a consequence of the sustained surveillance of their activities.

The discourse around sexuality and sexual expression online can be characterised as nascent and is also framed by the traditional approach to SRHR agenda in Nepal that has focused on a reproductive health perspective. There are sparks of efforts to challenge traditional norms around sexual rights through the creation of content and efforts to increase participation of women and LGBTIQ persons online. The research noted hesitation among sexual rights and gender equality activists to push for online dialogue and knowledge production from this perspective due to the negative labelling of sexuality.

Violence on the internet is an acute issue noted by respondents across the board. Over 80% of respondents had witnessed violence against someone

else on the internet while more than half reported experiencing it themselves. The patterns of violence – harassment, infringement of privacy and threats being the most reported types of incidents – show an attempt to silence their voices and curtail their participation online. Surveillance of online activities has a similar effect and is a common tool used to regulate women's activities in particular.

Ethnic minorities and LGBTIQ people are disproportionately targeted for violence online, a finding that reflects the inequalities of the offline world. Targeted violence is often a tool used to silence others and in this regard shows an attempt to suppress dissidence, whether social, political or sexual.

Laws and policies mirror heteronormative values espoused by those in leadership roles in government, law enforcement and even in the sexual rights movement. Vaguely worded, ambiguous and inconsistent legal provisions are used arbitrarily to police a wide range of behaviours. A lack of understanding of internet politics poses a challenge for sexual rights gender equality activists to approach these issues from a rights-based perspective. A limited awareness of technological aspects has in some cases led to oversimplification of the dynamics of the internet and led to protectionist strategies that actually sap individual agency.

Recommendations

Based on our research and conclusion, these are some recommendations for the promotion of sexual rights and freedom of expression online:

For the government of Nepal

- Ensure that constitutional provisions abide by the core principles of the ICCPR on the right to freedom of opinion and expression and follow the legitimate restrictions provisions of the UN Human Rights Council. Only discriminatory activity and expression should be restricted.
- The Electronic Transactions Act criminalises certain forms of expression and is inconsistent with freedom of expression legislation. The ETA is not synonymous with a cyberlaw. The government must create a separate cyberlaw and internet governance policies that regulate online violence with specific attention to women and girls from a rights perspective and not a protectionist lens.
- Involve more civil society, women's rights activists and sexual rights activists in formulating internet governance policies.

- Public offence laws are used to police activities online and offline and further regulate sexual content and expression. The government needs to revise the public offence laws, articulate their limitations and be precise on what they entail without compromising human rights.

For the police

- Adopt a gender-sensitive response system for dealing with incidents of cyberviolence.

For the Nepal Telecom Authority and internet service providers (ISPs)

- Respect the rights and privacy of internet users and follow the mandate of the resolution of the UNHRC on human rights and business.

For researchers:

- Conduct further research related to online violence against women and young girls and their roles in internet governance.

For activists:

- Upgrade knowledge and skills on digital security of individuals and community.
- Form alliances and create an open space for activists to engage and discuss emerging issues around the internet, freedom of expression online, violence and sexual rights.
- Conduct advocacy on matters of internet governance from a feminist perspective and engage directly with internet rights activists. Promote cross-movement collaboration among women's rights, LGBTIQ rights and internet rights activists.

Online violence against women: A continuum of offline discrimination

Authors:

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This study examines understandings of online violence against women and girls as a continuum of offline discrimination.

The common forms of violations and the mapping of harm (violence against women) related to technology were adopted from *End Violence: Women's rights and safety online*, written by Rima Athar and the Women's Legal and Human Rights Bureau, Inc. and commissioned by the Association for Progressive Communications in 2013.

The results of this research are expected to prompt discussions on online violence as a continuum of offline discrimination and violence, and inform activists about emerging trends in the changing political context of Nepal.

This small-scale study was conducted to complement the recent larger research on the usage of the internet and sexual freedom in Nepal. Building on this, national-level research will be carried out in 2018.

The objectives of the research are:

- To understand if the internet is a gendered space where the freedom of expression of sexual rights activists is compromised.
- To shed light on online violence against women and girls as a continuum of offline discrimination and violence.

Methodology

The research follows a deductive approach with qualitative research design.

Primary data was collected through three focus group discussions with 26 women's rights, lesbian, bisexual, trans women, trans men and young women activists. Of these, seven were young women activists,

nine were LGBTI rights activists and 10 were women's rights activists. Two interviews with key informants were followed by a survey with three young women activists in the form of a questionnaire. Secondary data included articles, reports, journals, blogs and research papers.

Introduction

The Constitution of Nepal (2015) guarantees limited rights to Nepali women. Its antiquated, patriarchal stance on women's citizenship, and its discriminatory provisions stem from a lack of reluctance to effect cultural and social change in favour of women in the country.

Globally, patriarchal nation-building ideologies subject women and young girls to levels of discrimination and inequality that compromise their freedom. Violence against women and girls sees no boundaries; it permeates across race, culture, gender, disability and geography, amongst others, harming and destroying individuals, families and society.

In 2016, WOREC, a women's rights organisation, documented 1,775 cases of violence against women of which 1,300 admitted having suffered from some form of domestic violence; 75% of these women were physically abused by their husbands while 35% were sexually abused by either their partners or persons they knew.¹

The growing reach of the internet, the rapid spread of mobile communications and the wide diffusion of social media have presented new opportunities and enabled various efforts to address violence against women and girls.² On the flip side,

1 Dulal, P. (2016, 26 November). Women suffered more violence at home than outside last year: Worec report. *The Kathmandu Post*. www.kathmandupost.ekantipur.com/printedition/news/2016-11-26/women-suffered-more-violence-at-home-than-outside-last-year-worec-report.html

2 UN Broadband Commission for digital development working group on broadband and gender. (2015, October). *Cyber violence against women and girls, A worldwide wake-up call*. UN Broadband Commission for Digital Development and Working Group on Broadband and Gender, version 2, 1. www.broadbandcommission.org/Documents/reports/bb-wg-gender-discussionpaper2015-executive-summary.pdf

it also regulates women's freedom of expression by shrinking democratic spaces, and diminishing the agency of women.

Today, technology-related violence against women is a distinct phenomenon because of the medium, mode and place of its commission. The characteristics of information, communication and technology (ICT) are that it is borderless in nature, has a fluidity of digital personhood, absence of physicality, and offers anonymity and intractability. This has changed not only the manner by which violence against women is being committed and perpetrated, but also its effects and consequences.³

The internet and freedom of expression in Nepal

The internet is a pivotal "public domain" within the information and communications technology (ICT) sphere that has penetrated our "personal" lives. It has carved layers of digital spaces that connect friendship, activism, love and relationships, recreation and commerce, among others. Recognised as a basic human right by the United Nations Human Rights Council in June 2016, a resolution affirmed that the same rights that are offline must also be protected online, in particular freedom of expression online, security, accountability for human rights violations, access and the expansion of internet services for those not for whom it is unavailable.

Three years after the invention of the World Wide Web by British scientist Tim Berners Lee in 1989, Nepal received its first email in 1992.⁴ Although Nepal had its first exposure to computer and computer systems as early as 1971,⁵ it was only in 1995 that the internet first penetrated its society when Mercantile Communications became the first internet service provider (ISP) in the country.⁶

In recent years the internet has become a powerful tool for self-expression. However, despite the existence of international and national instruments

which safeguard fundamental freedoms, the state and other mechanisms have increasingly curtailed our freedom of expression.

The political change and opening of democratic spaces in 1990 was a benchmark in the history of freedom of expression in Nepal. For the first time the state recognised freedom of expression as a fundamental right of all citizens.⁷ The ratification of the International Covenant on Civil and Political Rights (ICCPR) in 1991 and the Universal Declaration of Human Rights (UDHR) by the government of Nepal further ensured the right to freedom of expression in the country.⁸ Following the people's movement of 2006 and the vibrant role of the media in encompassing people's voices across the country, the Interim Constitution of Nepal (2007) guaranteed every citizen's right to freedom of expression and opinion through Article 12(3).⁹ These legal instruments talk about freedom of expression; however, they do not address it explicitly in relation to the internet.¹⁰ This right was reasserted by the Constitution of Nepal in 2015 which has attempted to extend freedom of expression to include the scope of the internet by explicitly mentioning the phrase "online".¹¹

Freedom of expression, despite being a fundamental right, becomes a fallacy when it is violated by actions of the state and other parties. Online it is controlled and regulated legally, by means of restrictions on online content, online violence and surveillance among others. Article 17, section 2a(1) of the Constitution of Nepal, 2015 poses reasonable restrictions on freedom of expression online under the name of defamation of character or an act which may be contrary to public decency and morality.¹²

The code of conduct of the 2017 local election issued by the government had specific clauses which put restrictions on citizens' freedom of expression.

3 Athar, R., & Women's Legal and Human Rights Bureau, Inc. (2013). *End Violence: Women's rights and safety online*. Johannesburg: APC. www.genderit.org/onlinevaw/docs/FLOW_End_VAW_research_design_FINAL.pdf

4 LOOM. (2017). *Guff Gaff Report on Gender and Internet*. LOOM.

5 Shrestha, P. (Ed). (2006). *Cyber Cafes of Nepal; Passage to Cyber Crime?* Lalitpur: SAP International and Bellanet Asia, 1. www.sapi.org.np/uploads/publications/2008021314214615.pdf

6 Kathmandu Today. (2015, 20 February). Internet access reaches to one-third population in Nepal. *Kathmandu Today*. www.ktm2day.com/2015/02/20/internet-access-reaches-to-one-third-population-in-nepal

7 www.nepaldemocracy.org/documents/national_laws/constitution1990.htm - 3

8 Kandel, N. D. (2017). Standard Review of Freedom of Expression and Censorship in Nepal. *International Journal of Culture and History*, 3(1). www.ijch.net/vol3/078-SD0021.pdf

9 Article 19, et al. (2008). *An Agenda for Change; The Right to Freedom of Expression in Nepal*. London: Article 19, Freedom Forum and Federation of Nepali Journalists., 19. www.article19.org/data/files/pdfs/publications/nepal-agenda-for-change.pdf

10 Dahal, T., & Ghimire, N. P. (2016). *Freedom of expression on internet in Nepal*. Kathmandu: Freedom Forum. www.ifex.org/nepal/2016/08/05/nepal_freedom_expression_internet_freedomforum.pdf

11 Ibid.

12 Ministry of Law, Justice and Parliamentary Affairs. (2015). *The Constitution of Nepal*. Nepal Gazette. www.extwprlegs1.fao.org/docs/pdf/nep155698.pdf

For instance, the code of conduct restricted users of social media and mobile phones not only from posting any kind of news, status or comments against or in support of any election candidate or political party but they were also not allowed to disseminate any such contents through Viber or SMS. Those who did not adhere to the code of conduct were to be charged a fine of up to 1 lakh rupees.¹³

Recently the Nepal Telecommunication Authority (NTA) was ordered to block over 100 websites in Nepal.¹⁴ On March 2017, a young LGBTI activist who is vocal about LGBTI issues online and offline was blocked from commenting, liking and posting anything on Facebook after being reported by a group of other users. She was repeatedly harassed with abusive photos and messages for being “too expressive” online.

Gender and access

In 2013 the government of Nepal commemorated international girls in ICT for the first time, aiming to encourage and build the ICT skills of young girls and women. There are no binding clauses to validate the efforts, as the ICT policy from 2000 is not explicit about gender, equality and women, but several attempts have been made to encourage and empower participation of and roles for women of all ages in ICT.

According to Nepal Telecom Authority statistics, almost 70% of the Nepali population has access to mobile phones with 3G, GPRS and CDMA facilities,¹⁵ while 40% of the population is connected to the internet.¹⁶ The internet is accessed primarily using mobile phones. However, gender-disaggregated data on the internet and mobile phone use in Nepal is not available.

Occupational representation and the participation of women in decision making positions in the ICT and media sector are essential for ensuring the rights of women on the internet, especially to control the online gender based discrimination and violence. Technology has always been considered as men's forte and thus, only 5% to 10% of the workforce in IT in Nepal is represented by women.¹⁷

According to a report, Nepal Telecom Corporation (NTC) had only 12% women employees in 2013 with very few women in decision making positions.¹⁸

Online violence against women and girls

Based on our interviews and focus group discussions with women and sexual rights activists, online forms of violence against women and girls stem from the reluctance to accept their agency, and the fear of dishonour to the family and society attached to the mobility and sexuality of a woman.

From 2014 to 2015 the Metro Police Crime Division in Kathmandu registered 309 cases of online offences of which 12 offenders were booked under cyber crime and public offence. Similarly, 830 cases were registered in 2015 to 2016 of which 17 offenders were booked followed by 657 cases of “dishonour” in 2016 to 2017 amongst which nine offenders were booked respectively.¹⁹ The systemic cases filed ranged from cases of dishonour, extortion through email and SMS, use of fake social accounts, abusive SMSs, website hacking, anti-social websites and copyright infringement. The division has developed a monitoring system that monitors triannual cybercrimes but lacks a gender disaggregated data system.

Findings

Online violence must be perceived as a continuum of violence against women, and understand the demarcation between freedom of expression and cyber harassment.

Respondent

The internet is a strategic medium to promote human rights and exercise the right to information, and the freedom of expression

Activists access the internet for information on global politics, national news, e-commerce, entertainment, networking, research, online courses, data collection and communication. Information that is not easily available offline is accessed online. The most used applications are Facebook, Twitter, Viber, Skype, WhatsApp and Emo. On an

13 www.recentnepal.com/news/26960/फेसबुकद्वाराव्यवहार-चलाउ.html

14 Dahal, T., & Ghimire, N. P. (2016). Op. cit., 35

15 www.nta.gov.np

16 Kathmandu Post. (2015, 19 June). 40pc of Nepalis connected to Internet. *The Kathmandu Post*. www.kathmandupost.com/printedition/news/2015-06-18/40pc-of-nepalis-connected-to-internet.html

17 Perry, S. (2017, 27 April). Women in ICT: Future looks bright for Nepalese women in ICT field. *APNIC*. www.blog.apnic.net/2017/04/27/women-ict-future-looks-bright-nepalese-women-ict-field/

18 Finlay, A. (Ed.) (2013). *Global Information Society Watch 2013: Women's rights, gender and ICTs*. Johannesburg: APC & Hivos, 172. <https://www.apc.org/en/pubs/global-information-society-watch-2013-womens-right>

19 Dhungana, S. (2017, 3 May). Public awareness against cyber crimes increasing in Nepal. *My Republica*. www.myrepublica.com/news/19376

individual level, the internet is used for networking, contacting friends and families and marketing and on an organisational level, research, knowledge and advocacy are the core reasons for accessing the internet.

Participants stressed that having an online presence allowed them to remain anonymous and private. It gave them a sense of power, and freedom to scroll for information on sexual rights that they would not try to locate offline. But, some added that the internet is also a gendered space in terms of access to technology, control of online content and ownership of ISPs, among others. The coping mechanisms included creating a private group, and selecting viewers and readers as per preference. At times, they also feel like minor celebrities on applications like Facebook where their happiness was determined by the number of likes and dislikes received.

Lesbian, bisexual and trans (LBT) women activists access the internet to date and find partners. Viber, Google, EMO, WhatsApp, Grinder and YouTube are the most used programmes. They spent around 1,500 to 5,000 rupees per month on their data.

Online advocacy and activism

Freedom of expression online comes with a tag.
Respondent

The respondents stated that 70% of the information shared is for activism and advocacy. Opinions, thoughts, and free speech are expressed by sharing posts and writing online stories and blogs. Sometimes discussions are prompts to question stereotypes on sex, gender and politics. They stated that Information opens opportunities to update themselves with ideas and creativity to further fuel their advocacy and activism.

However, online freedom of expression comes with a tag. Young women activists expressed that their personal opinions receive a backlash being seen as “too vocal” or big activism, whilst sharing and updating information composed by others receives zero responses. Others also use this pretext as a way to harass young women activists for their inability to find a partner or to sexually harass them. A young LBT blogger was frequently harassed with disturbing pictures and messages for being “too vocal” online. Another LBT activist faces a similar situation every now and then when she regularly updates events and information regarding LGBTI issues on her organisation’s social media pages.

The coping mechanisms included creating a private group, and selecting viewers and readers as per preference.

On an organisational level, online advocacy is done through sharing a common agenda; advocacy events are created, and more viewers’ attention attracted. Few LBT rights activists used the internet for advocacy for the rights of women and LGBTI people, while others refused to post and were scared of being harassed.

A respondent shared that online advocacy has ripple effects; for example last year an online news story fabricated stories of women’s rights activists, slandering their work and reputations. In response, numbers of women’s organisations came together, and hosted press conferences followed by incidents of activism both online and offline. As a result, the first draft of the Press Council’s Code of Conduct regarding women’s news dissemination for both printed and online news came out on 15 December 2016. Another participant shared an online campaign that she had launched with a hashtag #kathmandu-withmadhesh²⁰ to prompt debates among people of Kathmandu who remained nonchalant about the movement for identity in Madhesh.²¹

Similarly, online expression that challenges stereotypes on class, caste, gender, ethnicity, is often ignored by the mainstream media. In such situations, authentic and factual information posted online assists to clear up misunderstandings and prejudices. The big media houses did not cover the factual information on an incident of indiscriminate killing in the Saptari district during the election campaign of the Communist Party of Nepal – Unified Marxist Leninist (CPN-UML). Newsfeeds blamed the people of Saptari instead of the political party which also played a role in fuelling tensions.

Exploring sexual rights online

Sexual rights is our fundamental human right. Online access allows us to understand about sex, sexuality, orgasm and pleasure.
Respondent

Young women activists were aware of the dating site Tinder, and at least four have used it. Some stressed that they have watched porn out of curiosity to better understand sex. The interest remains the same but now the visuals are analysed to understand the politics of race, identity and sexuality. Another respondent shared that viewing porn was labelled bad, and there were numerous rumours that users are monitored by Nepal Telecommunication. It was

20 www.facebook.com/kathmanduwithmadhesh/

21 Hulaki News. (2017, 17 June). Identity Struggle of Madhesh. *Hulaki News*. www.hulakinews.com/identity-struggle-of-madhesh

complemented with another rumour that if users are found watching porn then their mobiles will become defunct, and their computers will cease to work. Most young users refrained from watching porn because of a fear of being monitored and reprimanded.

It is not possible to locate information on sex and sexuality offline and bookshops hardly sell them, and asking a shopkeeper is next to impossible.

Respondent

Reading erotic stories through websites such as literotica.com was another way to understand sex, sensuality, orgasm, love among others as such resources are not available online, and no one talks about these things.

Family and societal presence on social media impedes young women's freedom of expression on sexual rights and reproductive rights. While posts on similar issues are shared and updated, they filter contents on topics of sex and pornography as they do not want to be harassed by questions on maintaining family honour. A respondent shared her experience about a durex condom advertisement in India; she loved the promotion called "do the rex" and shared it on her Facebook personal wall. Within few days, she received a call from her uncle in the United States questioning her choice of newsfeed, and how she should "think" about her family, relatives and friends. Now she does not post unless her posts are "user friendly" and "acceptable".

Young women activists reiterated that there is no point in expressing views which will be attacked and misunderstood. The coping strategy would be to adjust the viewers and customise the posts for relevant people. Most invest much time on posts about contentious issues considered taboo in society. They also create private messages amongst friends to talk about such things rather than posting.

For LGBTI rights advocates the internet has become an important platform for exploring their sexuality. One of the respondents stated that she didn't know about her sexuality in the beginning and that she used to visit gay porn sites to find pleasure as she thought she was gay. It was only later that she discovered that she is a transgender, when she read information about LGBTI issues via the internet.

Online violence and consequences

Online violence is another form of violence against women.

Respondent

Online violence is another form of violence against women; offline violence against women is often

ignored and outside the periphery of the justice mechanisms, and online violence follows a similar trend. The cyber crime unit is not gender sensitive, and the police on duty are more interested in finding out about contents not relevant to registration. Their perceptions and attitudes usually place the blame and burden on the traits of the person reporting the violence rather than the perpetrators.

The process is disturbing, and the disempowering environment encourages those complaining to withdraw. At least one organisation received legal counselling on such incidences. Facebook also has reporting mechanisms and policies on its pages. Some respondents shared that they remove controversial comments from the threads, as it is not possible to respond to everyone. It is essential that evidence is tracked, screenshots taken and comments printed and stored.

Respondents added that our phones and laptops are interconnected to the internet, and the information we access gets linked and shared on social media without us realising it, as if machines have taken over our lives. The shared realities are a culmination of personal and professional experiences.

Most said that random people sent friend requests, and approval is given after checking mutual friends, and verifying visits of profiles. Mutual friends tend to harass at times and someone shared an incident of how a mutual friend had expressed his love, and requested sexual intercourse.

Another respondent shared her rendezvous with online crime and a nexus of gangs that tricked people by informing them that a parcel had been delivered in their name, and when notified about the arrival, they were made to pay to access it. Meanwhile, there was no parcel and instead victims ended up paying for nothing.

The creation of a fake profile with identify theft in an account added another dimension to online forms of violence. At least three activists had experienced a fake account created in their names. The fake account blocked the users when they reported it, so instead they alerted their friends. Another respondent told of the experience of her friend in whose name a fake account was created, using her photo (cropped) in a bikini. The incident was reported at a police unit where someone guided her on how to block the user instead of filing a complaint.

In addition, a respondent shared a positive response of the cybercrime police who expedited the justice process. Someone had cropped a picture of her friend, and pasted it onto someone's naked

body. Her phone number was also uploaded. The culprit was caught and imprisoned. But the trauma left her friend scarred and she did not access Facebook for a year. Likewise, single mothers face cyber bullying and harassment; receiving friend requests and invitations for sexual acts. Many individuals are unable to respond to incidences alone, and refer them to organisations.

One of the respondents stated "although women in general face these problems, it is the lesbians and transgender women who have to face more of these challenges". A mere upload of a video of a LBT woman dancing could result in comments such as "Chakka", "Hijra" (a trans person) and so on. Almost all the focus group participants had received messages from random people sending them sex videos, pictures of their genital organs and vulgar text messages. Taking screenshots and posting them on their wall, threatening the perpetrator for using those screenshots to report a case, deactivating the account or removing oneself from the internet for a while and ignoring the harassment have been used as coping mechanisms to deal with such situations.

Blackmailing is another form of online violence found against LBT women. A lesbian couple in Hetauda was blackmailed for releasing their intimate video by a guy who had stolen the video camera from their shop. Others complained that their personal pictures were used as bait by previous partners to have sex.

LBT women are approached by men to engage in sexual favours once they reveal their identity. One of the respondents stated: "People send us friend request thinking that we are women but later when they find out that we are transwomen, we are abused and harassed. As soon as we reveal our sexual identity, they directly send us sex proposals."

Many respondents are not comfortable sharing their real gender and sexual identity on their social media pages. They fear that as soon as they change their gender option to "transwoman, others" category they will get harassing messages from men sending them vulgar pictures and sex videos.

Online violence has offline mental impact.

Respondent

The gravity of violence, and culture of tolerance and normalisation of violence makes it difficult to open up about it. We cannot share it with our family members and friends. Online violence is not even recognised as violence against women.

When we resort to uploading our anger in a status update, it is usually received with mixed reactions. It is frustrating and agonising but where do we vent? The question here is: what is a safe space? Safe spaces allow freedom of expression but what about when they are loaded with judgments and prejudices? Young women activists who work on sexuality are labelled as shameless, vulgar and sluts. When we choose or take an initiative to chat with someone or random people at any time we become whores for them, getting comments like "Who chats so late at night?" or "Do you want to have sex?" It affects us and questions our choices and decisions and makes us wonder if we need to lower our freedom bar (Is there a degree?). We are unable to have productive days, the incidences linger, and we lose our confidence leading to emotional breakdowns. Are women seen merely as entertainers for men?

The respondents shared that they are unable to distinguish between the intention of the behaviour to interact and harassment, and tend to normalise it leaving them ashamed and with low self-esteem. Perpetrators can be anyone in the family, relatives, close friends and it becomes difficult to face them online and offline.

A respondent went to the cyber crime unit to report an incident with her friend. She found the unit to be disturbing in terms of lack of confidential space, and the professionalism of the police. The officer who registered the report was not attentive, and the other officers around him were curious with questions that were not their concern.

Harassment of women online is at risk of becoming an established norm in our digital society. What starts off as a harmless intellectual debate soon develops into a string of personal attacks eventually becoming obnoxious.²² Historically women have faced reprisals, slander, stigmatisation, excessive use of force and defamation for expressing thoughts and beliefs that someone did not approve of or refused to permit. Online violence is an extension of offline patriarchal and misogynistic discrimination. Harassment, abuse and bullying occur in cyber space because society does not approve of our freedom to express our opinions except in this instance the perpetrator is "invisible", unchecked and fluid. The impact is the same, threats of physical violence, psycho-social harassment, often leading to self-censorship.

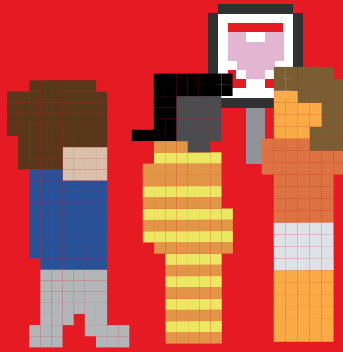
22 Shrestha, A. (2016, 14 July). Settling scores: Online harassment. *The Himalayan Times*. www.thehimalayantimes.com/opinion/settling-scores-online-harassment

Recommendations

Inform yourself and others about digital security, and understand the boundaries between freedom of expression and harassment.

- Collect and store incidences of online violence for advocacy. Screenshot comments and evidence or hide and delete inappropriate comments. Create a small support group to vent, and seek advice.
- Avoid posting personal stories of family and friends without their consent, and maintain confidentiality.
- Engage with a women's organisation to prompt discussions on online violence as violence and discuss it at a policy level.
- Mental health is ignored within the realm of violence and must be recognised and addressed.

SRI LANKA



Virtually queer: Human rights of LGBTIQ Sri Lankans in the online space

Lead researchers:

P. M. Deshapriya and J. M. Mendis

Section 1: Introduction

The internet is hailed as a “vital communications medium”¹ that allows people to “seek, receive and impart information and ideas of all kinds.”² Its most remarkable contribution has been to make public discourse far more inclusive than ever before. The internet allows flows of information at much lower costs, over much longer distances, and with much less delay than any other communications medium in history, allowing more people to enjoy the benefits of communication, access to information, self-expression and social networking. Moreover, the internet has “multiplied and amplified the capacity of the most diverse groups to get information, engage in exchanges, politically mobilise and overcome the passive mode of reception that characterised the past logic of public sphere dynamics.”³

Indeed, the UN Special Rapporteur on the Freedom of Expression has reiterated that “the framework of international human rights law, in particular the provisions relating to the right to freedom of expression, continues to remain relevant and applicable to the internet. Indeed, by explicitly providing that everyone has the right to freedom of expression through any media of choice, regardless of frontiers, Articles 19 of the Universal Declaration of Human Rights and the International Covenant

on Civil and Political Rights were drafted with the foresight to include and accommodate future technological developments through which individuals may exercise this right.”⁴

Evidently the internet plays a vital role in improving the lives of all people. Yet, to lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) Sri Lankans, the internet is especially important. For them, it facilitates friendships and relationships that are otherwise systematically obstructed in the offline world. In stark contrast to this offline world, the internet also provides these people with unprecedented opportunities to express themselves and build their identities, both individually and collectively. As a source of information, the internet disrupts and undermines the wilful exclusion of LGBTIQ Sri Lankans from public discourse. LGBTIQ people online are also able to access a global body of queer art, while other representations of non-heterosexual and non-cisgender people in the mainstream media in Sri Lanka continue to be flat and harmfully stereotypical. At the same time, many who are engaged in a “movement” for LGBTIQ rights in Sri Lanka bemoan the individualism engendered by the internet, and the adverse impacts this exerts on community organising and community mobilising. Indeed, although it is widely said of the internet that, “The virtual and the ‘real’ cannot be separated [...] as discrete spheres of social activity,”⁵ and that, “online and offline interactions and experiences are seamless,”⁶ the findings of the present study on how the internet is significant in the lives of LGBTIQ Sri Lankans throw those claims into some doubt.

The first part of the study is presented in three substantive sections. *Background* provides a collated overview of the socio-political environment in which

1 La Rue, F. (2011). *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*. www.ohchr.org/Documents/Issues/Opinion/A.66.290.pdf

2 Ibid.

3 Corrêa, S. et al. (2011). Internet regulation and sexual politics in Brazil. In J. Kee (Ed.), *EROTICS: Sex, Rights and the Internet*. Johannesburg: APC, 27. www.apc.org/en/pubs/erotics-research

4 La Rue, F. (2011). Op. cit., 14.

5 Corrêa, S. et al. (2011). Op. cit., 23.

6 Ibid.

LGBTIQ Sri Lankans live. The second section, *Sexuality and the Online Space in Sri Lanka*, discusses the substantive findings of the survey questionnaire, focus-group discussion and individual interviews. The third, *Law and Policy*, deals with issues in the legal framework that contribute to and compound the issues discussed in the preceding section.

The second part of the study is a dedicated analysis looking at how lesbian women engage with the online space. As one-on-one interviews and a focus group discussion showed, lesbian women's online engagements demanded to be treated as specifically gendered and sexualised experiences, while being classed, race based and so on. Their approach to the online space was traced through with the awareness that they had to negotiate being hailed by a patriarchal and heterosexist social system.

The outline of the research objectives, methodology and key limitations follows:

Objectives

- To explore how the online space and services are utilised by LGBTIQ Sri Lankans to enjoy their human rights.
- To explore the limitations and restrictions faced by LGBTIQ Sri Lankans in their use and enjoyment of the online space in furtherance of their human rights.
- To identify key policy reforms that could ameliorate the conditions of use and enjoyment of the online space by LGBTIQ Sri Lankans.

Methodology

The study used a mix of research methodologies, both quantitative and qualitative, which included:

- A desk review of internet policies, relevant legislative and license of internet service providers (ISPs) in order to understand the existing attitude to access, and a review of the legal framework relating to LGBTIQ people in Sri Lanka.
- Semi-structured interviews with a cross-cutting range of 10 stakeholders including the government sector (Law enforcement, National Child Protection Authority, Sri Lanka Computer Emergency Readiness Term), the private sector (ISPs), civil society, for example LGBTIQ organisations, groups and individuals and human rights activists.
- A focus group discussion with the members of the LGBTIQ community and LGBTIQ organisations in Sri Lanka. Venasa trans network, DAST

group, Heart to Heart and Youth Voice Count were among the organisations at the discussion. Apart from those groups, members representing academia, advertising, modelling and LGBTIQ activists also took part in the discussion. Of 14 participants there were four trans people, six gay men, two lesbians and two bisexual men.

- An online survey of 85 responses to better understand how LGBTIQ people use and access the internet and what knowledge they have about online safety. The survey was designed in consultation with community members and LGBTIQ organisations. A total of 32 female, 46 male, three trans and two gender non identifying people responded to the survey. Respondents were reached through LGBTIQ organisations and groups. The survey was conducted online to maintain the anonymity of the participants.
- The research was conducted by two (one male and one female) researchers. Both researchers have a positive rapport with the LGBTIQ community in Sri Lanka and are recognised as advocates for the decriminalisation of homosexuality and upholding the human rights of sexual minority groups. Both researchers were present at all the interviews except for one semi-structured interview in which the respondent requested to be interviewed by the female researcher.

Social media platforms and non virtual forums held in Colombo – i.e. a cyber exploitation policy briefing by the United Nations and Sri Lanka, an online action group by the Child Protection authority – were also studied to gather information. The findings of the desk review were cross-checked during the focus group discussion and semi-structured interviews and were used to formulate the survey. Different sources of data were woven together for the purpose of this report therefore the different methodologies do not stand alone in the report but as a combination of all.

Constraints and limitations

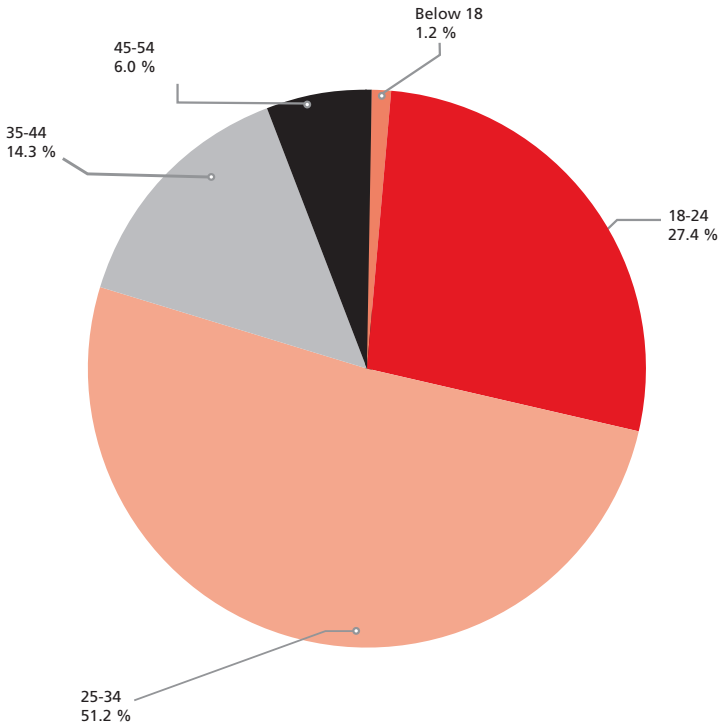
- Information on government surveillance was unavailable due to legal restrictions and there was no meeting with government representatives responsible for digital infrastructure and implementation. Requesting an interview on LGBTIQ concerns was not appreciated and was mostly neglected by the government representatives.

- Due to the uneven representation in the survey, cross-community comparisons were not feasible. Reaching out to the trans community proved difficult, possibly due to their lack of access to the internet. Some of the difficulties in reaching the relevant demographic arose from the perceived criminality of homosexuality in Sri Lanka, which has driven most non-heterosexual and non-cisgender Sri Lankans into lives of secrecy and silence, insulated from the outer world.
- Despite efforts made, the research team was unfortunately unable to interview Equal Ground – one of the leading LGBTIQ groups in Sri Lanka. This created a gap in the report especially in terms of cyber violence incidents that this organisation records.
- The research team was unable to incorporate the discussion and events which took place in January 2017 on decriminalising homosexuality due to time constraints.

FIGURE 1. Demographics

The survey was dominated by men, at 59.5% while 34.5% were women. Only 3 trans persons participated in the survey.

More than half of the respondents are between the ages of 25 and 34.



Responding to the question on sexual orientation, most of the respondents (59.5%) stated that they are only attracted to members of the same sex; 28.6% stated that they are bisexual while 9.5% of the respondents said that the sex of a person is not relevant. Two trans respondents stated that they are heterosexual.

Most respondents had higher education qualifications, with 47.8% with a bachelor's degree and 15.5% having a master's degree. Only 11.9% stated that they had only passed an ordinary level exam.

Key findings

The survey covered 85 respondents (see Figure 1).

Section 2: Background

Sexuality in Sri Lanka

In Sri Lanka, non-heterosexual and non-cisgender people, identified as LGBTIQ Sri Lankans in this paper, continue to live under a shroud of invisibility. Despite the continuous struggle for legal recognition and reforms since the early 1990s, many people with these alternate identities continue to live their lives in secrecy, away from government contact, beyond the reach of community organisations and most importantly apart from each other.

This state of invisibility and isolation is broadly a result of Sri Lankan “conservatism”, in which attitudes towards and discourses on sexuality and sexual relationships are heavily controlled by societal and cultural forces opposed to sexual and gender diversity.

Sexual conservatism in Sri Lanka regulates individuals through gender roles based on a rigid, male/female binary construct; sex is restricted by a “logic of reproduction”⁷. Sexuality is restricted to marriage, and those who pursue sexual activity outside the confines of a marriage, especially women, are vilified. Sexual issues are “privatised” to such an extent that discussion in the public sphere is discouraged. Sex education in public schools is virtually non-existent and only exists in a few private schools.⁸

This conservatism exerts a significant influence on many aspects of public life, especially in areas of legal and policy reform. However, behind this conservatism the private lives of many Sri Lankans who do not seem to conform to such values continues. According to the Family Health Bureau, Sri Lanka records the best family planning performance in the region, with the contraceptive (all methods) prevalence rate among “eligible families”⁹ registered

with public health midwives at 64.9%.¹⁰ For our discussion, the high contraceptive prevalence rate indicates that sexual activity among couples (married or living together) clearly takes place outside the expectation of reproduction.

In 2011, the Ministry of Transport reported that one in four women experienced sexual harassment while using public transport. Later that year, the Legal Aid Commission suggested that over 70% of women (between the ages of 15 and 45) were subject to sexual harassment while using public transport. In 2015, the United Nations Population Fund (UNFPA) Sri Lanka claimed that this number had increased to over 90%. Dr Sisira Liyanage, director of the National HIV Programme, stated that in 2015 23 students in schools became HIV positive through unprotected sex, with 22 students contracting HIV in 2014.¹¹ Mapping studies estimate that there are approximately 35,000 to 47,000 female sex workers and 24,000 to 37,000 men who have sex with men in Sri Lanka.

In this context, prevalent narratives on sexuality and gender in Sri Lanka are constructed around the false assumption that all people are either male or female, which is determined exclusively by their genitalia, and that attraction to members of the opposite gender is the “*natural*” sexual inclination of all people.

These assumptions have enabled widespread stigma and discrimination against non-heterosexual and non-cisgender people, succeeding in driving many of them underground, stifling their sexual expression and relationships, marginalising them from accessing essential services like healthcare, access to justice, education, etc., and condemning the most vulnerable of them to lives of socio-economic and personal insecurity.

Homosexuality and the law

The key indicator of this stigma and discrimination lies in the Penal Code provisions, Sections 365 and 365A.

The first section criminalises “carnal intercourse against the order of nature”, and the second criminalises “acts of gross indecency” between persons. These laws have been criticised for decades, and there have been repeated calls for their repeal since

7 Groundviews. (2016, 25 August). Submission on LGBTIQ Persons and Transitional Justice Mechanisms. *Groundviews*. groundviews.org/2016/08/25/submission-on-lgbtiq-persons-and-transitional-justice-mechanisms/

8 Women and Media Collective. (2015, 6 March). Country Profile on Universal Access to Sexual and Reproductive Health: Sri Lanka. *Women and Media Collective*. womenandmedia.org/country-profile-on-universal-access-to-sexual-and-reproductive-health-sri-lanka/

9 Eligible Family is defined as a family either legally married or living together where the woman is between 15 to 49 years and/or has a child under five years. A family with a pregnant or cohabiting woman irrespective of marital status and age and single women (widow, divorced, separated) are also considered under eligible family.

10 Family Health Bureau, Ministry of Health Sri Lanka. (2013). *Annual Report on Family Health 2013*. Colombo. http://medicine.kln.ac.lk/depts/publichealth/Fixed_Learning/annual_report_2013.pdf

11 www.bakamoono.lk/en/hiv/30/how-does-accurate-and-comprehensive-sexuality-education-help-prevent-hiv

the mid 1990s.¹² Although the provisions remain formally unenforced since independence in 1948,¹³ the necessity of their standing to preserve “public order and morality” has been touted by the government before the Human Rights Committee in Geneva as recently as 2014,¹⁴ Even by the end of 2016, the police continued to question and apprehend individuals under the provisions to the extent that these are “valid” laws of the land.¹⁵

A situation analysis by Equal Ground highlights Sections 365 and 365A as a “tool to target and harass the LGBTIQ community”.¹⁶ However, the analysis also stresses that, “parental, communal, and cultural surveillance... entangle with the law to maintain gender stereotypes and suppress expressions of alternate sexuality”.¹⁷ The report provides a concrete example of such “surveillance” on Sri Lanka: police consider themselves authorised to arrest gender non-conforming people because the differences in their sexual and gender expressions indicate, to them, the “likelihood” of engaging in either “carnal intercourse against the order of nature” under section 365,¹⁸ or “acts of gross indecency” under section 365A. However, due to the practice of not formally charging people suspected of committing the offences, the “enforcement” of Sections 365 and 365A enables the police to subject individuals to arbitrary arrests, extortion, forced sexual favours, and sometimes even rape.¹⁹ Further, the existence of these laws prevents survivors of such violence from

reporting the crimes to the police or accessing other remedial mechanisms.

The law also enables many discriminatory acts beyond law enforcement, such as the refusal of accommodation by prospective landlords,²⁰ the refusal of job opportunities,²¹ and even, as one writer reports, the refusal of advertising space in mainstream newspapers for LGBTIQ events.²² Thus, the impact of the law reaches speech and conduct well beyond the acts specifically prohibited in the law. In fact, due to the generally private contexts in which most sexual acts take place, Sections 365 and 365A are nearly ineffective against the criminalised acts themselves. Still, even without enforcement, the laws act to suppress the identities and relationships of people with alternative sexual orientation and/or gender identities.

Section 399 of the Penal Code makes it an offence to cheat by impersonation. A person is said to “cheat by impersonation” if he pretends to be someone else, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is. The police have been said to arrest transgender people under this law.²³ It has been noted that “In some cases it appears that rape of [trans women and cross-dressing people] by police officers may be informally institutionalised.”²⁴ The Vagrants Ordinance of 1841 is also used in a similar manner to arbitrarily arrest or hassle LGBTIQ Sri Lankans in public spaces.

Stigma and discrimination

The stigma and discrimination experienced by LGBTIQ Sri Lankans is not limited to the unenforced, draconian Penal Code provisions. Quite independently of them, many LGBTIQ Sri Lankans continue to face discrimination in areas such as housing, employment, education, and access to essential public services. More importantly, they also experience discrimination in their personal lives.

12 Baudh, S. (2013). Decriminalisation of consensual same-sex sexual acts in the South Asian Commonwealth: Struggles in Context. In C. Lennox & M. Waites (Eds.), *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth: Struggles for Decriminalisation and Change*. London: Institute of Commonwealth Studies, Human Rights Consortium.

13 “There have been no convictions under 365 and 365A since Sri Lanka gained independence in 1948.” See: Equal Ground et al. (2013, December). *Human Rights Violations Against Lesbian, Gay, Bisexual, and Transgender (LGBT) People in Sri Lanka*. [tbinternet.ohchr.org/Treaties/CCPR/Shared Documents/LKA/INT_CCPR_ICO_LKA_15986_E.pdf](http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/LKA/INT_CCPR_ICO_LKA_15986_E.pdf)

14 OutRight Action International. (2014, 20 October). Sri Lanka Government says LGBT Rights are Constitutionally Protected. *OutRight Action International*. www.outrightinternational.org/content/sri-lanka-government-says-lgbt-rights-are-constitutionally-protected

15 DIG Ajith Rohana, speaking at an event, High-level Dialogue on Human Rights and Constitutional Reform, organised by FPA Sri Lanka and others, Colombo, 16 December 2016.

16 Thangarajah, P. (2013). *Strengthening of Legal Protection for LGBT in Sri Lanka: Road to Decriminalization*. Equal Ground GROUND. issuu.com/equalground/docs/situation_analysis

17 Ibid. Emphasis added.

18 Ibid.

19 Equal Ground et al. (2013, December). Op. cit.

20 Equal Ground. (2012). *Towards a Lesbians, Gays, Bisexuals, Transexuals and Transgendered (LGBT) Stigma and Discrimination Index for Sri Lanka*. Equal Ground. issuu.com/equalground/docs/the_lgbt_stigma_and_discrimination_

21 Ibid.

22 Baudh, S. (2013). Op.cit.

23 Human Rights Watch. (2016). *All Five Fingers are Not the Same: Discrimination on Grounds of Gender Identity and Sexual Orientation in Sri Lanka*. Human Rights Watch. www.hrw.org/report/2016/08/15/all-five-fingers-are-not-same/discrimination-grounds-gender-identity-and-sexual

24 Nichols, A. (2010). *Dance Ponnaya, Dance! Police Abuses Against Transgender Sex Workers in Sri Lanka*. Sage, 5(2), 195, 214. grassrooted.net/wp-content/uploads/2010/08/Nichols-Dance-Ponnaya-Dance.pdf

A Stigma Index²⁵ published by Equal Ground reports data collected in a survey of 119 LGBTIQ respondents. Some of the findings are extracted below (figures reflect percentages of 119 respondents and refer to occurrences in the two years leading up to the survey):

- 11.76% were excluded from religious places/activities at least once.
- 21.85% were excluded from family gatherings at least once.
- 24.37% had to change residence or were unable to rent accommodation at least once.
- 25.21% lost their jobs.
- 28.57% were excluded from social gatherings/activities at least once.
- 36.97% had been victims of physical abuse, harassment, threats, assaults, rape and/or battery.
- 62.18% had been verbally insulted, harassed and/or threatened.
- 62.18% had faced some form of psychological or emotional trauma or abuse.
- 74.79% were aware of being the subject of gossip at least once.

Even where a majority of respondents said they had “never” experienced the type of discrimination or stigmatisation asked about, subsequent responses indicate that many respondents also live lives of near-absolute secrecy, choosing not to disclose their sexual orientation or gender identity to family members, employers or even healthcare professionals. Thus, there may be a relationship between the visibility of a person’s sexual orientation and/or gender identity (whether voluntary or not) and their vulnerability to stigma and discrimination in society.

At the same time, it must be stated that most studies undertaken by researchers, like the Stigma Index discussed here, avoid presenting their research findings as “statistical” data. Most studies conducted on LGBTIQ issues in Sri Lanka face structural difficulties in reaching their subjects. The index published by Equal Ground had 119 respondents to their survey after quality control. The study *Not gonna take it lying down* by the Women’s Support Group had interviewed 33 LGBTIQ people. The *All Five Fingers Are Not the Same* publication by Human Rights Watch had involved 61 participants. The present

study only saw the participation of 70 people in its quantitative survey.

According to Equal Ground:

One of the main challenges associated with this research is sampling. LGBTIQ related stigma is so prevalent that LGBTIQ people do not want to be known as LGBTIQ people within their wider communities. They fear being discriminated against and are convinced that the less people know about their sexual orientation and/or gender identity the less chance they have of facing any form of discrimination.²⁶

While independent researchers face difficulties in studying LGBTIQ issues from a sociological perspective, LGBTIQ Sri Lankans also continue to be invisible in the eyes of the Sri Lankan government. The only official/government data publicly available on these Sri Lankans is in the references to “homosexuality” and “men who have sex with men” in the Ministry of Health’s report to UNAIDS. Although the Census and Statistics Department conducted a national survey on self-reported health for the first time in 2014, it did not incorporate any issues relevant to sexual- and reproductive health. The same department conducts a quarterly survey of the Sri Lankan labour force (since 1990), but despite several reports flagging issues of workplace discrimination experienced by non-heterosexual and non-cisgender Sri Lankans, it has also avoided issues relevant to sexual orientation and gender identity in their questionnaires.

Media

The media plays an important role in perpetuating stigmatisation of and discrimination against LGBTIQ Sri Lankans.

In 1999, a mainstream English language daily and weekend newspaper, *The Island*, published an op-ed protesting against a lesbian conference that was to be held in Colombo.²⁷ At the end of the article, the writer called for the police to “let loose convicted rapists among the jubilant but jaded jezebels when their assembly is in full swing so that those who are misguided may get a taste of the real thing.”²⁸ A complaint against the newspaper was lodged with the Sri Lanka Press Council, averring that the publication of

25 Equal Ground. (2012). *Towards a Lesbians, Gays, Bisexuals, Transexuals and Transgendered (LGBT) Stigma and Discrimination Index for Sri Lanka*. Op. cit.

26 Equal Ground. (2012). *Towards a Lesbians, Gays, Bisexuals, Transexuals and Transgendered (LGBT) Stigma and Discrimination Index for Sri Lanka*. Op. cit.

27 Alles, P. (1999, 20 August). Lesbian Conference in Colombo? *The Island*

28 Ibid.

the letter amounted to the promotion of “sadism, violence or salacity”,²⁹ which is explicitly prohibited under Rule 9 of the Code of Ethics for Journalists enforced by the council. However, as Amnesty International reports, “the Press Council refused to condemn the newspaper and ruled that the author had the right to offer his point of view, and that his view was justified because lesbianism is an ‘act of sadism’ and was an offence under the country’s penal code. The Press Council also stated that lesbianism is ‘at least an act of gross indecency’ and ‘unnatural’ and that ‘misguided and erratic women should be corrected and allowed to understand the true sense and reality of life’.”³⁰ The Council dismissed the complaint and also ordered the complainant to pay costs on behalf of the respondent. A prominent gay rights organisation at the time, *Companions on a Journey* (COJ), had appeared as complainant.

In 2010, the *Daily Mirror*, a widely read English language daily in Sri Lanka, ran a scandalised editorial titled, *A tide against the natural* ...³¹ describing a conspiracy by “undesirable elements” to “piggy back on the political dialogue on human rights”. The editorial highlighted that “controversial moves are being made by groups within the Colombo social circles along with a few diplomats and leading civil society figures to create an impression that heterosexuality is an out-dated, obsolete disposition. Most of these individuals one-time heterosexuals turn gays. [sic]” In 2011, the *Rivira* newspaper (a Sinhala language daily) ran a series of “scathing”³² exposés on the HIV prevention work of COJ, which had involved the distribution of condoms and lubricant sachets in specific public spaces pre-identified as “cruising spots”. Although COJ had been working under the auspices of a GFATM-funded³³ project

implemented through the Ministry of Health, as a response to the pushback generated by the *Rivira* articles, the office of the president called for an investigation, intensifying “a sense of fear and discrimination ... and forcing both the closure and/or suspension of several NGOs,”³⁴ including, by some accounts, COJ itself.

As *Lakbima News*, a Sinhala language newspaper, reported, the *Rivira* journalist who wrote the series had “hoodwinked a counselling officer with a concocted personal tale. He befriended the counsellor, took pictures of [him] and then abused his trust by publishing the pictures without his consent.”³⁵ The article also reported that the victimised officer had lost his place of accommodation as a direct result of the *Rivira* episode: “I have been kicked out of my boarding place. My landlord saw my pictures which appeared along with the story in the newspaper. He showed me the newspaper and asked me to vacate my room.”³⁶

Post-war context

The climate of stigma and discrimination faced by non-heterosexual and non-cisgender people is also impacted by the militarisation seen in Sri Lankan society through three decades of war that ended in 2009.

In 2016, a group of people identifying themselves “as lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ), as family members and friends of LGBTIQ people, and as individuals/communities coming forward in support of Sri Lankans who wish to acknowledge and break the silence surrounding a people whose rights have been denied through the mechanisms and institutional structures of a democratic state,” made a submission to the Zonal Task Force and the Consultation Task Force for Reconciliation Mechanisms,³⁷ in which they wrote:

The war created a climate of insecurity which was attributable in part to decades of militarisation and the resulting breakdown of democratic norms and the rule of law. Militarisation creates and boosts very stark models of masculinity and femininity and forces people into adopting extreme binary gender-conforming roles. This

29 PlanetOut. (2000, 5 June). Sri Lankan’s Media Complaint Backfires. *Glappn*. www.glappn.org/sodomylaws/world/sri_lanka/slnews006.htm

30 Amnesty International. (2008). *Love, Hate and the Law: Decriminalizing Homosexuality*. London: Amnesty International Publications, 17. d21zrvtkxtd6ae.cloudfront.net/public/uploads/2016/11/12125724/Love-hate-and-the-law-Decriminalizing-homosexuality.pdf

31 Liyanaarachchi, C. (2010, 29 July). A tide against the natural.... *Daily Mirror*. <https://thesakhicollaboration.wordpress.com/2010/08/11/bent-reasoning/>

32 Sarma, N., & Billimoria, H. (2013). *Strengthening the Role of Media Advocacy in Sri Lanka through a Critical Analysis of News Media Coverage*. Bangkok: UNDP. www.asia-pacific.undp.org/content/rbap/en/home/library/democratic_governance/hiv_aids/stigma--discrimination-and-key-affected-populations--strengtheni.html

33 Funded by the Global Fund to fight AIDS, Tuberculosis and Malaria

34 Ibid.

35 Jayasuriya, R. (2011, 6 November). Disgraceful media bigots hound a gay man. *Lakbima News*.

36 Ibid.

37 Various. (2016, 25 August). Submission on LGBTIQ persons and transitional justice mechanisms. *Groundviews*. groundviews.org/2016/08/25/submission-on-lgbtiq-persons-and-transitional-justice-mechanisms/



The majority of the survey respondents stated that they use a combination of devices to access the internet. Over 50% selected “My own tablet/smart phone, work laptop/desktop” or “My own tablet/smart phone, My own laptop/desktop”. This may not indicate the socioeconomic status of the survey participants; however, it is an indication of increased levels of access.

is particularly limiting for people who do not conform to such gender roles. In addition, militarisation paves the way for these rigid gender norms to be connected to reproductive sexuality (where sexuality is confined to the logic of reproduction – within marriage and the monogamous heteronormative family unit) and its role in the rhetoric of ethno-nationalism. The difficulty in asserting sexual and gender diversity and expression that differ from the prescribed norms was evident during the war and continues today.³⁸

During wartime (and in the years following), LGBTIQ Sri Lankans were made particularly vulnerable by heightened security in public spaces. Gender non-conforming people were exposed to risk at checkpoints, for instance, when their chosen attire or other gender expressions did not reflect the stated gender in their identification documents. Such encounters often resulted in harassment and intimidation.³⁹ Government scrutiny of LGBTIQ groups and organisations, including requirements to submit “work plans to the government”,⁴⁰ was another way in which LGBTIQ people were placed under surveillance by Sri Lanka’s state security.

38 Ibid.

39 Ibid.

40 Ibid.

Section 3: Sexuality and the online space in Sri Lanka

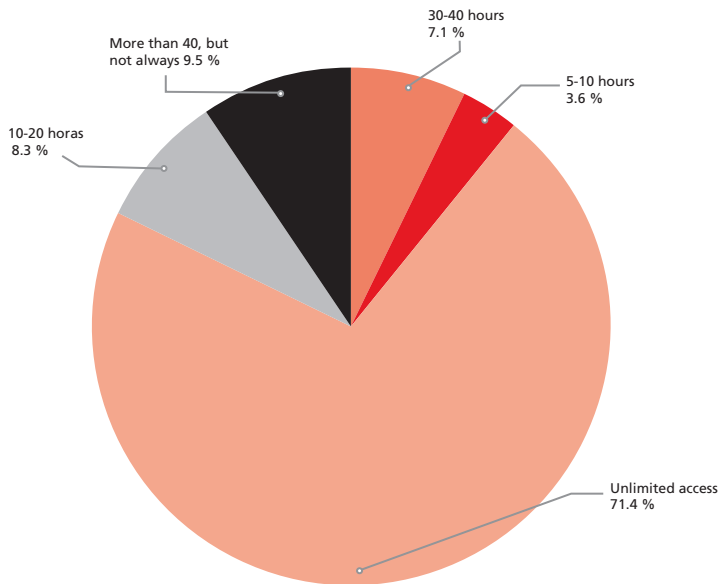
In this section, the findings of the study are organised along the three main framings of use, access and safety. While the authors analysed the data, a number of subordinate themes emerged and each is discussed in turn and related to one of the framings. The implications of the study’s findings on Sri Lanka’s legal and policy framework (including the human rights analysis) will be discussed in the next section. It must be noted that although the discussion deploys the framings of use, access and safety, there is significant overlap between those framings in terms of the issues highlighted (see figure 2).

Use: Access to information

The internet has significantly improved the ability of LGBTIQ Sri Lankans to access vital information. Previously, the demure silence surrounding topics of sexuality in Sri Lanka meant that LGBTIQ people had few sources of information on their own sexual orientation or gender identity. They struggled to understand their place in a social narrative that assumes all people to be heterosexual and cisgender. Access to accurate information in such a context can greatly assist them in coming to terms with their sexuality and gender identity.

In interviews with LGBTIQ individuals, it was recalled how either they themselves or others they

FIGURE 2. Access



knew had, having grown up in a time before the internet, been completely unaware of homosexuality as a “phenomenon” or a “concept”. Mahela,⁴¹ a gay man interviewed individually, recalled how he had believed for a long time that his same-sex sexual attraction was unique, and that he was the “only person in the world” to be going through the experience.⁴² It was only after he stumbled across the entry for “homosexuality” in an encyclopedia at home, at the age of 20 in the year 1990, and proceeded to read further on the subject at the British Council’s library in Colombo, that he came to appreciate the “commonness” of his nature. He says the discovery of this information was the first step in a process of self-acceptance for him. It highlights, for our purposes, the importance of reliable information for people who struggle to understand their sexual orientation or gender identity. Mahela also recounts how the indexing system of the library he visited played a role in his discovery of further information on homosexuality, he could manually search for books under categories like “Gay”, “Gay autobiographies”, etc.

41 All names have been changed, unless context provides otherwise.

42 Interview with Mahela.

In contrast, Mahela noted how younger LGBTIQ Sri Lankans who had grown up with some access to the internet are less likely to be unaware of homosexuality or transgenderness. While this may be true, it must be emphasised that knowledge of the phenomena does not mean automatic self-acceptance; however, the broader accessibility of the knowledge that homosexuality and transgenderness is common all over the world, means that younger LGBTIQ Sri Lankans are less likely to grow up believing they are alone. The internet pierces through powerful assertions of heteronormativity and cisnormativity in Sri Lanka, and provides LGBTIQ Sri Lankans with various types of vital information, including scientific advances in understanding human sexuality, observations of sexual diversity in other species, as well as the social transformations taking place elsewhere in the world in terms of sexual orientation and gender identity. Moreover, access to information on the Internet is hugely simplified through the function of search engines, which index web-content and produce suggestions to a searched query, ranked according to relevance. In this sense, search engines are a parallel to Mahela’s experience with the library’s cataloguing system; younger LGBTIQ people benefit from the ready accessibility of information about sexual orientation through search engines.

TABLE 1. Have you ever accessed information relating to any of the following themes on the internet? Select all that apply.		
LGBT related news from around the world	79	93%
LGBT themed art (movies, TV shows, stories, etc.)	67	79%
Legal and policy information related LGBT issues in Sri Lanka	68	80%
LGBT organisations	62	73%
Sexually transmitted infections	57	67%
Safe sex practices	55	65%

However, the arrival of the internet in Sri Lanka has not *normalised* alternative sexual orientations or gender identities in the country. Media reports and independent research show this is clearly not the case.⁴³ The internet is generally a ready source of information for those who seek it, but many who perceive alternative sexual orientations and gender identities as deviant or unacceptable do not ordinarily seek out information contradicting those views.

Non-recognition of alternative orientations and identities creates obstacles to LGBTIQ Sri Lankans' ability to access information. For example, where a library does not include cataloguing based on topics related to these matters, individuals seeking information on such topics are unable to use that library conveniently. In this context the internet has transformed the information landscape available to LGBTIQ Sri Lankans. A clear majority of the survey respondents indicated their use of the internet to access "LGBTIQ related news from around the world", "LGBTIQ themed art (movies, TV shows, stories, etc.)", "Legal and policy information related LGBTIQ issues in Sri Lanka", "LGBTIQ organisations", "Sexually transmitted infections", and "Safe sex practices." Figures show the number of people who responded positively to the question and the percentage this made up (see table 1).

However, despite bringing about an "information revolution", the internet is seriously compromised by a large amount of unreliable, unverified or patently falsified information. This raises issues of information accuracy and media literacy observed at different levels even within the sample group surveyed for this study. For instance, asked to describe the steps they take to ensure that "the information [they] access on the internet is accurate", the majority of respondents indicated they would either read multiple sources to compare information, or only accept information from "reputed sources", with some relying on a combination of both. Worryingly, about

17% of respondents indicated that they took no steps at all. Some mentioned checking with friends and even directly contacting relevant persons to seek verification. While some respondents mentioned preferring "official" sources, at least one said they would prefer to use government resources as a source of accurate information.

Most platforms on the internet cater predominantly to an English-reading audience, with most sources of LGBTIQ-related information being foreign to Sri Lanka. There is a clear need for more resources in Sinhala and Tamil (Sri Lanka's two main vernacular languages), as well as resources that specifically cater to Sri Lankan audiences – at least in essential areas such as healthcare.

Despite the high preference for "official" sources of information, few such sources seem to exist, especially catering to a Sri Lankan LGBTIQ audience. The National STD/AIDS Control Programme (NSACP), the national body in Sri Lanka "responsible for planning and implementing STI/HIV prevention and control activities",⁴⁴ is the only online source this study could identify as a government source that explicitly recognised LGBTIQ issues; however the quality of discussion and presentation in the website leaves much to be desired.

It is no coincidence that the only official resource from the state recognising and discussing LGBTIQ issues in Sri Lanka is the NSACP. The government has long viewed LGBTIQ individuals from the limited perspectives of the public health framework, which has cemented layers of stigma and discrimination, especially through the close association of LGBTIQ Sri Lankans with HIV and other sexually transmitted infections.

Besides the NSACP, a number of unofficial yet Sri Lanka-specific sources of information, such as (for example) the Sakhi Collaboration, "Accept – Sri Lanka", and Equal Ground, are available online.

43 See previous *Media* section in this report.

44 www.aidscontrol.gov.lk/web/index.php/en/about-us/overview-history

A review of the NSACP website

It is beyond the scope of this study to offer a comprehensive review of the publications available on the NSACP website; however, some preliminary issues are flagged from an access-to-information perspective.

The website provides many different types of resources – spanning a spectrum from informational to administrative – all under the same, first-level category, “Resources”. These resources are further organised under a second level of categorisation that focuses on the formats of the featured document, differentiating “Publications”, “Circulars”, “Slides”, “Public Q&A”, etc. Under the sub-category, “Publications”, annual reports, administrative reports, research publications etc. are presented side-by-side with guidelines for male-condom demonstrations and a “Hospital infection control manual”. A key document relevant to LGBTIQ communities is found in this section, labelled, “No One Left Behind”,¹ which provides a useful and accessible overview of concepts relating to alternative sexual orientation and gender identities (SOGIs). However, the document’s label lacks context at first glance and is indistinguishable from others featured in the same section.

Under the sub-category, “Slides”, a number of PowerPoint presentations and PDFs are available; the links are preceded by the note, “It is very important to customize [sic] and update your presentations according to the target audience. You can make use of these slides to create your own style of presentations,”² giving the strong impression that the target audience of the resources section is not the general public. Based on the labelling of the documents available, the

documents most relevant to a SOGI topic are two identical documents titled, “Men Sex with Men [sic]”,³ each offered in one of the two vernaculars. The sub-category “Public Q&A” focuses exclusively on issues surrounding STD awareness, and does not offer specific acknowledgement or reassurances to people with alternative SOGIs, despite the many social factors deterring their access to sexual health services.

It becomes clear, as one observes the structure and presentation of the entire “Resources” section, that even where some state-sanctioned information for LGBTIQ Sri Lankans is available online, that information is not being disseminated to members of the community (or even the general public) in any deliberate manner. Documents relevant to SOGI issues are indistinguishable from those that are not: none of the documents are accompanied by explanatory notes, abstracts, preview images, or keywords. Even though some documents do exist on the website on LGBTIQ issues, they are unreachable through the website’s own search engine. Not only should all documents be search-engine optimised, such optimisation should also ensure that documents in all three languages are accessible through in-site search functions, and in a way that is mindful of the difficulties in typing vernacular languages. The categorisation of resources would do well to abandon its focus on format to embrace a more substantive, thematic focus, organised and presented in a manner where those who need the information the most may access it with minimum effort. It would also be appropriate to ensure that the presentation of information does not perpetuate stigmatisation or discrimination (e.g. highlighting the sexual act in “Men Sex with Men”, for instance, instead of a more comprehensive focus on sexual orientation and gender identity).

1 Vidanapathirana, J. et al. (2016). *No One Left Behind – Understanding Key populations: Achieving Triple Zeros by 2030*. Nugegoda: National STD/AIDS Control Programme & United Nations Population Fund. www.aidsdatahub.org/no-one-left-behind-understanding-key-populations-achieving-triple-zeros-2030-vidanapathirana-jh

2 www.aidscontrol.gov.lk/web/index.php/en/resources/slides

3 Ibid.

While Sakhi and Accept operate on Facebook, Equal Ground maintains its own website in addition to its social media presence. Sakhi operates through a personal profile on Facebook, sharing informative posters on LGBTIQ issues, circulating local and international news on the topic, critiquing mainstream media handling of LGBTIQ-related news, as well as creating informational content, such as a condom-use demonstration through photos offered in all three⁴⁵ languages. Unlike Sakhi, Accept operates through a “page”, allowing any Facebook user to view its content without sharing their own profiles’ content with the platform. Its main project seems to be an outreach campaign, featuring LGBTIQ-supportive quotes from well-known Sri Lankan personalities, such as actors, novelists and human rights activists. The page also features “memes” incorporating Sri Lankan current affairs, designed in a manner to promote LGBTIQ rights and to challenge established notions of “cultural” values in the country. The page also circulates local and international news postings. Unlike Sakhi and Accept, which are both operated by voluntary “admins” working in their personal capacities, Equal Ground’s platforms are run by a non-governmental organisation by the same name, featuring a number of research publications, periodicals, and advocacy materials, most of it being available in all three languages. A key limitation of the website is that most documents may only be opened through a third-party platform (www.issuu.com), on which both navigation and downloading of documents are significantly restricted.

Use: Self-expression and identity building

The internet constitutes an unprecedented platform for self-expression and identity building. More people than ever before are afforded the ability to express themselves, to share ideas, opinions and narratives, and to do so through a mixture of mediums, including words, sounds, images etc. Previous mediums of communication, such as television, are considered “vertical”, i.e. transmitting from one person to many others. By contrast, “the use of the internet ... is ... horizontal ... from *many to many*.”⁴⁶ Older communications are also “oppositional”, in-

volving a “passive mode of reception”,⁴⁷ whereas internet communications depend on the will of each individual that participates in the conversation.

The qualities of the internet mentioned above benefit all people. Yet, to LGBTIQ Sri Lankans they are especially empowering. In a context where LGBTIQ Sri Lankans are silenced and excluded from public discourses, and where stigma and discrimination against them are perpetuated through freely circulated and harmful stereotypes, misconceptions and myths, the internet affords them the ability to interrogate and counter prevailing narratives, and to work to expand the public’s understanding of Sri Lanka’s sexual and gender diversity.

When a group of LGBTIQ Sri Lankans and their allies wrote to the Public Representations Committee on Constitutional Reforms (PRC), the full text of their submissions was subsequently published on *Groundviews*, an award winning and widely read citizens’ journalism platform operating online. In their submission, the signatories identified themselves as “a community of Sri Lankans who *wish to acknowledge and break the silence* surrounding a people whose rights have been denied through the mechanisms and institutional structures of a democratic state.”⁴⁸

In addition to disrupting this imposed silence, online self-expressions by LGBTIQ Sri Lankans also have the ability, merely by existing, to broaden the space for (and participation of) LGBTIQ voices in public discourses. As signatories to another, similar submission to the PRC asserted, “we come with the authority of our own lived realities as [LGBTIQ] persons, with the hope that speaking our truth to power will give way to the creation of a space where others like us can follow suit.”⁴⁹

Social media is a crucial development in this function of the Internet. Mitya, a trans woman participating in the focus group discussion, described how she uses her Instagram account to express what being a trans woman means to her. She uses images of herself to spread the idea that “#transisbeautiful”, noting that when more people see more images of her expressing her trans identity, this increases the impact she can have on normalising trans people in society and

45 i.e., English, Tamil & Sinhalese

46 Tubella, I. (2005). Television and Internet in the construction of Identity. In M. Castells and G. Cardoso, G (Eds.), *The Network Society From Knowledge to Policy*. Washington DC: Johns Hopkins Centre for Transatlantic Relations; see also La Rue, F. (2011). Op. cit.: “The Internet should ... be seen as a complementary medium to mass media that has been based on a one-way transmission of information.”

47 Ibid.

48 Groundviews. (2016, 28 March). A Meaningful Right to Equality and Non-Discrimination: Recognising Sexual and Gender Identities. Groundviews.org/2016/03/28/a-meaningful-right-to-equality-and-non-discrimination-recognising-sexual-and-gender-identities/. Emphasis added.

49 Queerrightslka. (2016, 14 March). On the Constitutional Rights of LGBTIQA Individuals. queerrightslka.wordpress.com/2016/03/14/on-the-constitutional-rights-of-lgbtiqa-individuals/

I share LGBT-related content publicly on my profile feed (e.g. wall, timeline).	39	46%
I share LGBT-related content on my profile feed, but I limit visibility to my “friends”, or specific “friend” circles/lists.	15	18%
I never share LGBT-related content on my own profile feed.	19	22%
I share LGBT-related content within specific groups, but rarely on my own profile feed.	11	13%

showcasing how they are beautiful, too. According to her, while there needs to be a balance between posting naked photos and ones of being fully clothed, she believes that “uncovering” her body and presenting her nudity is an important part of her message of destigmatising trans bodies, which she does not shy away from. With nearly 5,000 followers on Instagram from all over the world, her message is not limited to changing Sri Lankan attitudes, but those of the whole world. On the other hand, Sachintha, a gay man participating in the focus group discussion, also uses social media, especially Facebook, to publicly share LGBTIQ-related content and engage in conversations on LGBTIQ rights in Sri Lanka. However, he was careful not to overstate his expectations: “I don’t expect a huge revolution to happen from sharing such content; I don’t have some grand, conscious intention or motivation behind sharing publicly; I do it, and sometimes there could be some small benefit coming out of someone else seeing that post, or engaging in a conversation about it.”

However, though the internet has great potential in empowering LGBTIQ self-expression and social engagement, that potential is limited by how many LGBTIQ Sri Lankans censor themselves online and on social media in various ways. Nearly 46% of those responding to the survey indicated they share LGBTIQ-related content “publicly” on their social media profiles. Not all respondents are as forthright in their sexual or gender expressions on social media: 18% indicated they share LGBTIQ-related content under limited visibility settings, limiting visibility to either “friends” or specific friend “circles” or “lists”; still another 13% of respondents indicated that, though they rarely share such content on their own profile feeds, they do share the same within specific groups; 22% said they would “never share LGBTIQ-related content” on their own profiles (see table 2).

Posts on one’s own profile or on groups is not the only way a person may speak out about sexual orientation and gender identity (SOGI) issues on social media. Another important site of social media engagement is the comments sections under individual posts. There, a user has much less control over who sees and reacts to what they share on social media.

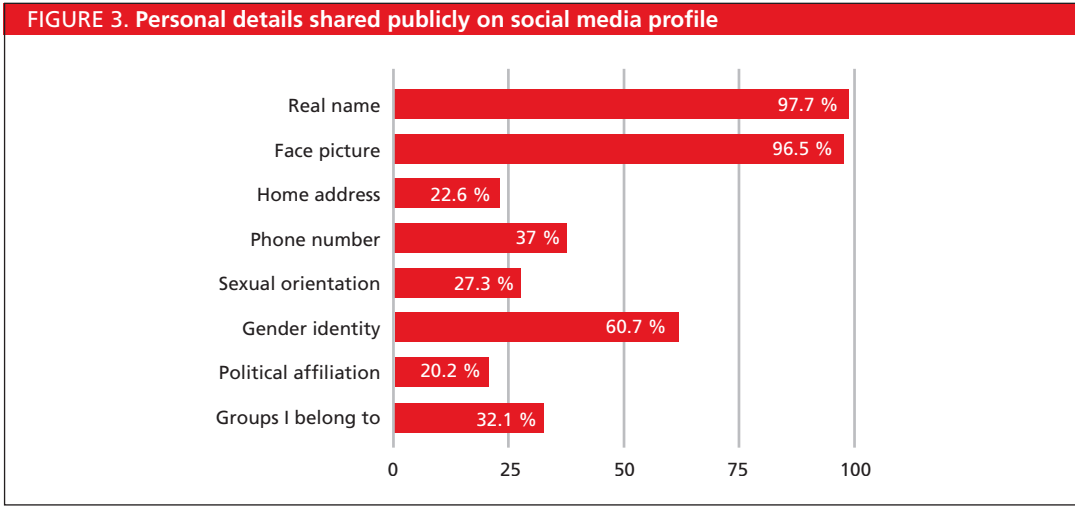
Facebook, for example, allows users to control the privacy of their own posts, but the same level of

control is not available for one’s comments and reactions under someone else’s post. Instead, Facebook actively broadcasts comments and reactions to an audience beyond those who are immediately engaged in the conversation, by pulling the comment or reaction out of its original context and featuring it as a snippet in others’ news-feeds. Since only the specific comment or reaction of a larger conversation is featured in such a manner, users coming across the comment on their news-feeds are required to click and expand the entire conversation to understand the full context. Twitter, on the other hand, does not incorporate a comments section at all; instead, those who wish to respond to an individual post (aka a “tweet”) must create their own post as a reply, causing an automatic link to the original post, and thus creating a “conversation” consisting of multiple, individual posts. Often, when a user makes a reply to a “trending” post, their followers are notified of this act in a “digest” of trending activity. Instagram also features a similar, digest-like page; however, a user must actively navigate to this page if they wish to view other users’ activity. By contrast, on Facebook, such updates appear on the main page of the platform, and on Twitter, the updates are “tailored” for individual users and delivered to them as generic notifications.

Thus, LGBTIQ Sri Lankans are less likely to comment on and engage with others’ posts if they feel their words will be broadcast to more people than they intend. Indeed, while 31% of respondents stated they would mention their sexual orientation or gender identity in posts and comments in any situation they felt like, an equal number of respondents said they would “never” mention their SOGI in posts and comments. Of the respondents, 38% would only mention their SOGI “in certain limited circumstances”, whereas 4% said they maintain a SOGI that is “different to what [they] privately identify with”. All responses were in relation to posts and comments made on “real” profiles (i.e. profiles featuring respondents’ “real”⁵⁰ names and/or images of themselves) (see table 3).

50 In this study, “real name” was defined as “how you introduce yourself to most people” and distinguished from a legal name, which was defined as “your given name in the birth certificate and other documents”.

TABLE 3. I would mention my sexual orientation and/or gender identity in my social media posts and/or comments...		
...in any situation that I feel like mentioning it in	26	31%
...in certain limited circumstances	32	38%
I would never mention my sexual orientation and/or gender identity in my social media posts and/or comments	24	28%
I maintain a sexual orientation and/or gender identity in my social media posts and comments that is different to what I privately identify with	3	4%



Similarly, the number of respondents who include their sexual orientation in their public profiles is relatively low; more respondents share their phone number publicly than share their sexual orientation. While a considerable number of respondents share their gender identity, the lack of sufficient participation of trans Sri Lankans in the survey makes it impossible to draw conclusions on gender expression based on the data (see figure 3).

Asked whether they limit their social media participation (posts and comments) fearing a number of specified factors, the respondents reported as follows (see table 4):

Eight of the respondents, however, felt that the question did not apply to them. Two others opted to provide their own answers, and stated, "I am worried about the stigma my family may face if I am open about my sexuality", and "I'm worried about what my colleagues/

TABLE 4. In terms of the social media profiles that include your real name and/or images of yourself, do you limit your participation on social media (posts and comments) fearing any of the following factors? Please choose the three most relevant choices.		
I am afraid of other people finding out about my sexual orientation or gender identity	22	26%
I am afraid of what other people's comments would be	16	19%
I am not interested in displaying my sexual orientation or gender identity	29	34%
I am not sure whether it is legal to post such topics	5	6%
I am afraid it might result in violence against me in the physical world	15	18%
I am afraid the government might find out about my sexual orientation or gender identity	5	6%
I am afraid it might affect my job	15	18%
I don't think anybody should talk about their sexuality and gender issues on social media platforms	5	6%

TABLE 5. Social media profile strategies

TOTAL = 85	All of my profiles on the same platform feature my real name and/or images of my face.	I have many profiles; only one or some of my profiles feature my real name and/or images of my face.	I only have one profile per platform. It features my real name and/or images of my face.	I only have one profile per platform. But it does not include my real name and/or images of myself.	I don't have any profiles on any social media platform.
I have more than one profile, but not for any reason related to my SOGI	7	6	0	0	0
I have more than one profile, for reasons related to my sexual orientation or gender identity.	7	11	0	0	0
I don't have more than one profile on any social media platform.	0	0	54	0	0

friends/ relatives' comments would be," respectively. One respondent also stated, simply, that, "I participate where I feel okay to participate in 'those' discussions."

Self-censorship extends to the creation and use of anonymous profiles. An important phenomenon among LGBTIQ Sri Lankans is the widespread use of anonymous and pseudonymous profiles to navigate stigma and discrimination on social media (see table 5).

From an analysis of the survey data, it is clear that all respondents had at least one profile with their "real" name and images of themselves. If any of them had profiles without their real name or face pictures, such profiles were always in addition to a "real" profile. Nearly a quarter of the respondents indicated they have more than one profile on their preferred social media platform, for a reason related to their SOGI. This is 18 out of 85 eligible responses. Of them, seven respondents said all their profiles on the same platform featured either their real name or portrait, or both. The other 11 indicated that, "only one or some ... profiles feature my real name and/or images of my face". Another 15% of the respondents said they have more than one profile, but not for any reason related to their sexual orientation or gender identity. The majority, 64% (54) of the respondents, only had one profile

on their preferred social media platform, which included their real name and/or images of their face.

According to the respondents, the following are some of the reasons for their use of profiles that do not feature their real name or image of their face (see table 6).

TABLE 6. Reasons for anonymity

Because my sexual orientation is considered to be illegal.	16	19%
Because I am afraid of my family finding out about my sexual orientation or gender identity.	14	16%
Because I am afraid of my friends finding out about my sexual orientation or gender identity.	14	16%
Because I am afraid of my employer or work colleagues finding out about my sexual orientation or gender identity.	13	15%
I do not have any profiles that do not include my real name and images of myself.	47	55%

Respondents could select more than one standard answer, as well as provide their unique answers. One such unique response asserted, "It is almost

impossible to find people for sexual encounters in using real profile." Another user-typed answer stated, "to be outspoken about things (e.g., to post content such as a very bad review on a restaurant, a service provider etc.)." Two respondents also stated, "for stalking purposes," while one of them also added "spying".

There were a number of difficulties in framing the questions on "fake" and "real" profiles, though those labels were frequently heard during the research interviews across a spectrum, from LGBTIQ activists to law enforcement officials. The main difficulty was in how different individuals had different criteria for what amounted to a "fake profile". The most common criterion was whether the profile was under the person's real name or not, but this is clearly inadequate from the perspective of LGBTIQ issues in Sri Lanka, where some LGBTIQ people have adopted names for themselves that are different to what was given them at birth. To such individuals, the newer name was more "real" than the older one. This is especially true of trans Sri Lankans. On the other hand, some discussants at the focus group discussion and individual interviews (all of them, incidentally, gay men) said they had multiple profiles under their given name and with images of their face, with one profile maintaining a heterosexual performance to friends and relatives who did not know the person's true sexual orientation, while the other was to maintain existing friendships as well as find new friendships within the LGBTIQ community. For such individuals, the "fake" profile was the heterosexual one. However, to those who maintained an anonymous, or pseudonymous profile without images of their face, their "straight" profile was the real profile, usually because it was the only profile with their name, their face picture, and their friends and relatives from the physical world.

For these reasons, in the section of the survey comparing "real" profiles with "fake" profiles, the first question was a statement to either agree with or disagree with: "My real name (how I introduce myself to most people) is the same as my legal name (the given name in the birth certificate, etc.)," with the implication that all other questions referring to the "real" name relied on this definition (how one introduces themselves to most people). All but five respondents said their real name was the same as their legal name. Since the concepts of "real name" and "legal name" were most relevant to the trans community, responses were also cross-tabulated with the gender identification of respondents: four of the five respondents who indicated that their

real name was different from their legal name were "Male," whereas one respondent was "Trans MTF." The gender identifications of all other respondents (i.e. those who said their real name and legal name were the same) are disaggregated as follows: female (30), male (45), gender non-identifying (2), trans MTF (1), and trans FTM (1).

Rajesh is a gay man who participated in the focus group discussion. Being Tamil, he has a relatively longer and more formal given name that he does not use in his everyday dealings. He said, "On Facebook, I have two profiles. One is under my given name, which is where I add my family members and family friends; but all my friends from the community associate me through a second profile which is under the shorter name that everybody knows me by. If someone from my family sends me a request on the second profile, I quickly add them from the other profile where all the family members and family friends are."

Similarly, Manju, a trans man participating in the focus group discussion, recounted how he has three profiles, each created for a specific purpose, and each of them featuring his face and the name he adopted after his physical transition. He explained the purpose of each as follows: "One profile is to engage and link up with members of the community; one profile is to network and remain in touch with different activists and organisers I have met through attending international conferences on LGBTIQ issues. The reason I separate these two purposes is because I need to use English with my international colleagues, but I want to connect with my community through Sinhala. My third profile is for a completely different reason: I engage in some personal animal welfare work, and I promote animal welfare issues there, and the profile is very useful for that work. Because the animal welfare audience is different from the LGBTIQ community, I don't want posts I would make about LGBTIQ issues to have an effect on my ability to talk about animal issues, or how what I say is received by that audience."

It was observed during interviews as well as the focus group discussion, that many individuals regarded the notion of "fake profiles" with either disapproval or at least disdain. In an interview with an officer of the Cyber Crimes Unit, when asked about the kinds of situations in which the police carry out surveillance on social media profiles, the most immediate answer was "fake profiles". This was explicitly qualified when he added that the police do not crack down on fake profiles in general, but only on those profiles regarding which complaints

had been made for “harassment”, “extortion”, etc. Krishna, a gay man participating in the FGD argued at some length that, “Fake profiles are not progressive.” Similarly, in an individual interview with David, who is a gay man, reference was made to how fake profiles were usually a double-edged sword. According to him, anonymous profiles allow individuals to express themselves without any accountability, and sometimes this can have a negative reflection on the “movement” for LGBTIQ rights in Sri Lanka. He also mentioned how he was part of an online LGBTIQ community initiative that actively cracked down on “fake profiles” that posted nude content publicly on Facebook, especially when such profiles interacted with their initiative’s dedicated profile. The measures taken against such profiles included, first, engaging with them one-on-one through the Facebook profile to encourage them to stop posting such content and, second, to report their content and/or profiles to Facebook’s community standards mechanism.

Use: Forming and maintaining relationships

Meeting each other has always been difficult for Sri Lankan LGBTIQ people, and continues to be so even today. Rampant stigma and discrimination, and the associated fears of exposure, exclusion, and harm, deter many LGBTIQ Sri Lankans from publicly seeking out the company and friendship of others who think and feel like them. The lack of tolerant, safe spaces to meet and socialise with each other exacerbates this issue; public spaces are heavily policed for “decency” in Sri Lanka, even for heterosexual couples,⁵¹ but people perceived to be “homosexual” face the possibility of arrest, or at least extortion under threat of arrest. Such prohibitive realities force many LGBTIQ people to navigate public spaces with extreme care, exerting an adverse effect on their willingness and ability to seek out friendships and relationships with other members of the LGBTIQ community.

Before the internet became accessible for general consumption in 1995, LGBTIQ Sri Lankans arguably experienced these constraints more intensely than

they do now.⁵² Through the focus group discussion, as well as individual interviews, it appeared that – beyond serendipity – there were not many ways LGBTIQ people could meet each other, especially not in the way heterosexual Sri Lankans were able to.

Cruising is one way gay and bisexual men met each other,⁵³ but such encounters generally tended to be hurried, spontaneous, anonymous, with the main (if not the only) purpose of the encounter being the performance of a sexual act.⁵⁴ Drop-in centres and social gatherings organised by LGBTIQ advocacy groups, including lesbian support groups,⁵⁵ were another way LGBTIQ Sri Lankans met each other. Luke, a long-time member of the now-defunct *Companions on a Journey* (COJ), speaking at the focus group discussion, recounted how there were monthly community meetings, especially for newcomers, held every *Poya Day* (a public holiday in Sri Lanka on account of a full moon). Even though the meetings were held for “newcomers”, older members were also “so excited” to meet them, and would attend the meetings, too – sometimes to the point of straining the organisation’s capacity to host the events. Both requests to be invited and the invitations themselves were communicated via the general post. Luke described the process in some detail: “Those days, it wasn’t like now, it wasn’t so easy to meet another gay man, so there was a kind of desperation. We used to promote our organisation, different members appeared a few times on TV and radio to talk about the organisation, and this would set off many letters, people secretly reaching out to us, asking if there are any events they could attend. We kept a list of addresses and always informed them of the next date and venue of the social gathering through letters. We didn’t use letter-heads or official envelopes, the letters were always plain, made to look like personal letters from friends, simply giving the details of a time and place to meet up, the way any letter from a friend could those days. There were so many who came to those social gatherings, more than a hundred at a time even, and we could hardly manage the space.”

51 See, for instance, Piyumi Fonseka, P. (2016, 06 March). Occupy the Square against removal of couple. *Daily Mirror*. www.dailymirror.lk/106449/Occupy-the-Square-against-removal-of-couple and (2010, 10 June). Sri Lanka arrests kissing couples. *The Courier Mail*. www.couriermail.com.au/news/breaking-news/sri-lanka-arrests-kissing-couples/news-story/c6aec24aed22e6924834b02833d4469e

52 Interview with Mahela.

53 Interview with David. Cruising is the practice of loitering in public spaces, such as parks, shopping malls, or public toilets, for the purpose of meeting another cruiser or passerby who may be interested in a casual sexual encounter.

54 No negative value judgment of quick, anonymous sexual encounters is intended; the only intended implication is that such encounters were not conducive to the formation of long-lasting friendships and other relationships.

55 Interview with Maryanne.

The arrival of the internet allowed members of the community to form and sustain relationships in ways that were not possible until then. According to the focus group discussion, general chat rooms saw their use by gay and bisexual men to meet each other as early as the mid 1990s. Spanning international brands such as *Yahoo!* as much as local brands like *kaputa.com*, these chat rooms allowed individuals to sign in anonymously with a username and engage in conversations carried out by all members of the room, or to initiate conversations between individual users privately. On *Kaputa*, users also had the option of creating a temporary, single-use username, which assured optimum anonymity. Around this time, a chat room service specifically designed for the Sri Lankan LGBTIQ community was launched, known as *Sri Connect*. Though the service was considered successful and was well-received by members of the community, it appears the platform eventually ran into problems with the law and was discontinued. According to Deshan, a gay man participating in the focus group discussion, another, more recent way to meet each other was “chain SMS meetups”, where one person would initiate an SMS specifying a location, usually a public space, with a time to meet up, and this SMS would be forwarded by recipients to other recipients.

The ability to *maintain* friendships and relationships is just as important as forming them, and “keeping in touch”⁵⁶ is an important part of that process. Before the internet, methods of communication in Sri Lanka presented many obstacles to maintaining a new friendship between two or more LGBTIQ persons. Methods such as “snail mail”, fixed landlines, mobile phones, and even the rare email account, came with technical and economic limitations that added to the reality of stigma and discrimination to dissuade LGBTIQ people from relying on them. Mobile phones were prohibitively expensive;⁵⁷ fixed landlines had months-long (if not years-long) waiting lists. Email addresses were available usually through one’s place of employment. The most commonly available means of communication, i.e. posted letters and phone calls to land lines, were almost always shared with family members or

other housemates, since such services were provided at the level of the household, and not at the level of the individual. This meant that LGBTIQ people, who generally fear exposure especially to family members, were deterred from relying on such methods of communication to maintain friendships and relationships with other LGBTIQ people because of privacy concerns.

Today, online platforms that facilitate the formation and sustenance of relationships constitute a diverse landscape. From social media accounts to online personal ads, many people use the internet as a means to meet new people, particularly for physical and emotional relationships. In Sri Lanka, and within the LGBTIQ community, social media platforms such as Facebook loom large. The ability to share content and socialise online, the ability to carry on private conversations away from the wider online community, the ease with which new connections can be made, and the considerably large network of anonymous LGBTIQ profiles that exist on Facebook, mean that such social media platforms provide a convenient and (mostly) safe alternative to the risks of socialising and seeking partners in the physical world, which is remarkably hostile to sexuality and gender minorities.

In addition to social media platforms, however, applications specifically designed for “dating” and “hooking up” have also emerged, combining geolocation technology with photo-sharing and instant messaging technologies, allowing individuals to meet each other based on a combination of their preferences and their physical proximity to each other. While most such platforms exist for people of all sexual orientations and gender identities, platforms specifically targeting LGBTIQ people also exist. These platforms, especially in a context where LGBTIQ Sri Lankans do not have access to public spaces in the physical world as social and sexual beings, have proved to be useful in multiple ways (see table 7).

Use: Community organising

The internet also has great potential in serving community organising efforts, especially in a context where a movement exists for the repeal of persecutory laws and other policy reforms. Social media platforms and instant messaging services, for instance, have proved useful in community outreach efforts by LGBTIQ activists. Many such activists participating in the FGD indicated the use of such platforms to spread awareness on various issues, as well as to provide vital information to members of the community.

56 Perhaps relevantly, “keep in touch” (KIT) was the brand slogan for what became the fastest-growing prepaid mobile phone service in the early 2000s.

57 Gunawardane, N., & Wattedgama, C. (2001). Internet in Sri Lanka: The First Five Years. in S. Ramanathan & J. Becker (Eds.), *Internet in Asia*. Singapore: Asian Media Information and Communication Centre.

TABLE 7. Thinking about dating and hook-up platforms (Tinder etc.), please select all the statements relevant to you.

	Male	Female	Trans M to F	Trans F to M	Non-	Total
I have found friends on such platforms.	38	5	2	0	1	46
I have found partners for sexual encounters on such platforms.	36	4	0	0	1	40
I am in or have had a romantic relationship with someone I met on such a platform.	18	4	1	0	1	21
I left those platforms because I did not find them useful.	9	7	0	0	0	13
I have never been on such platforms.	4	11	0	1	1	13
I have attended events promoted/communicated on such platforms.	8	1	0	0	1	9
I promote events organised by me or someone I know through such platforms.	5	1	1	0	0	6
I find clients for commercial sex work on such platforms.	1	1	0	0	0	2

Kavinga, a gay man who is active in the field of HIV prevention and awareness efforts, mentioned how his visibility on social media as an openly gay and HIV-positive activist attracts many personal messages requesting information on issues surrounding HIV, such as locations of gay friendly clinics and other services.

Similarly, Manju, a trans man active in the field of FTM trans issues related how individuals needing information on hormonal therapy or contacts of issue-sensitive doctors have reached out to him privately through Facebook, as a result of his visibility through his multiple Facebook accounts.

Rajesh, Luke and Krishna, all gay men participating in the focus group discussion, mentioned the various ways in which they had used social media to reach and inform LGBTIQ Sri Lankans of events organised by their groups and organisations.

Facebook also provides a platform for community discussions in the form of “groups”. A key benefit in this regard is the levels of privacy afforded to groups: whereas “open” groups are public with posts and discussions being broadcast in others’ news-feeds, “closed” groups are more limited, with posts and discussions only being visible to members, though the group itself and its membership is visible to anyone who searches for the group. “Secret” groups, on the other hand, are completely hidden, and their discussions are only visible to the members. Secret groups are also unsearchable, and new members can only be added by current administrators of the group. (Open and closed groups, on the other hand, allow anyone to either join or request to join, respectively.) These

features are highly useful to the Sri Lankan LGBTIQ community, allowing them to strategically use available online discussions spaces, to control the audiences of their various discussions, as well as to encourage otherwise hesitant members of the community to join in conversations about various initiatives and incidents without censoring themselves. In this regard, however, a key concern is that, while secret groups are the most useful in the context of LGBTIQ Sri Lankans, that category of groups also affords a significant amount of moderating powers to group admins, allowing them to choose new members, ban current members, and even delete posts. While these functions are essential, they have the potential to lead to arbitrary decisions, which can be, in the context of the nascence of the Sri Lankan LGBTIQ movement, detrimental. Another concern is the fact that most Facebook groups are highly conducive to discussions in English, whereas discussions in Sinhala or Tamil require the taking of additional steps on the part of the discussants. This may have an impact on the participation levels and inclusiveness of many discussions that take place in such groups.

During the discussion with the focus group, however, an intense debate emerged on the possibility of adverse impacts on the LGBTIQ movement in Sri Lanka from the spread of internet use in community organising efforts.

The crux of the proposition was that online participation in LGBTIQ activism only encourages a certain superficial level of engagement. Mitya, a trans woman, framed this argument as follows:

"There is a regression in community organising because of the internet. A majority are only heroes on social media. They are very forward on social media, whether it is to speak up or to have sex, but they don't come out to speak up. The arrival of social media means that people no longer come together. Everybody only speaks from the outside, from their own comfort zones. This affects the involvement, there's an emotional contact that is missing. They all sort out their own needs from within their own comfort zones, and talk about whatever issues from their social media profiles, but they don't come out and get involved; only a few put their necks on the line and speak up and try to organise and make a change, but if something goes wrong, they would be on their own, and everybody else will remain hiding behind their social media profiles."

Manju said, "Participation in community events is declining because, with the demands of peoples' busy lives, they settle for social media interactions with the community as the adequate level of interconnection. This affects the movement; the movement has certain targets, a struggle for attaining 'freedom'; this can't be achieved when everybody is at home posting on Facebook. Where's the strength in our demands, if we can't even show a photo of more than 10 or 15 people at an event? But, at the same time, there are some things that you can't talk about, face to face: private things, secret things, individual issues. For those, Facebook is ideal. Even in the trans FTM community, this happens. They reach out to us to ask about hormonal therapy, how to grow a beard, which doctor to meet, and that's all – then they disappear, and you never hear from them again. They make use of us for their personal needs, but they don't understand how their indifference and apathy to the community's needs affects them and everybody else."

Deshan provided an interesting perspective on how social media has undercut the relevance of LGBTIQ organisations. "Social media is ideal for individual users. Individual needs can easily be served through Facebook, all the way up to a hook-up. But if you talk about the movement, there's a conflict between that benefit and the interests of the community. In the 1990s, gay organisations had more membership than today, and more participation in their events, even when those days the climate was more dangerous for the community. This is because social gatherings and other events by organisations were one of the few ways that we could meet each other. Now, membership in organisations and participation in their events has rapidly declined. Because

the community can meet each other directly, online, through fake profiles etc. They don't need organisations any more. But the issue is making friends privately won't build a community, and building a community is important for securing the rights of everybody. But people don't realise this, because their individual needs are being met."

However, an alternative viewpoint came from Duminda, a gay man. He was of the view that, "Comparison with the past is futile; we can't get trapped in nostalgia; the reality is that the internet is here and has changed the environment. We need to figure out how to make use of the internet for the movement in the present." Similarly, Krishna, also a gay man, said, "We don't need to be pessimistic about the role social media can play in the movement; it is enough to simply say the role needs to be diversified. For example, in the most recent movie gathering we had, there were 50 people, and 30 of them were newcomers. There were also some that had known each for many years through social media without ever meeting in person, and the movie night was the first time they met. Social media [and the internet] provides useful tools. It is up to community leaders and organisations to make use of them to strengthen the movement and bring people together. There needs to be a balance between what we do on social media and what we do in the physical world. If it is a purely 'virtual' or 'online' struggle for equality, it's not going to work out. Bringing the struggle to the physical world is a must. But that doesn't mean online spaces have no role to play."

Safety: Safety of content

A major stumbling block in the use and enjoyment of the internet is the lack of security for content stored and shared on the Internet. LGBTIQ Sri Lankans, because of their general vulnerability to stigma and discrimination, suffer acutely from this insecurity.

During the FGD, a number of such experiences came to light. Deshan, a gay man who was involved in the production of a Youth LGBTIQ video within the Asia-Pacific region with his partner, recounted how their private photos were used in political pages attacking the sitting prime minister, captioning the photos with questions like "Do you want your children to be like this?". Deshan said, "They used our pictures politically and it went around on Facebook. So I had to remove everyone except my close friends from my profile. Even now I don't put a picture of my partner and myself as the profile picture because it attracts unnecessary trouble. It doesn't matter to

us personally, but it affects our family, nephews and nieces, it can affect their future, especially their married life, so I have to be careful." Luke, another gay man, recounted a similar experience: "Once someone used a picture of me and one of my colleagues celebrating the first day at office by the traditional ritual of boiling milk in a pot. The picture was widely circulated on social media with the caption, 'two homosexuals boil milk.' They said we were trying to be cultural while destroying the culture because we are gay." Mitya, a trans woman, recounted how someone had attempted to blackmail her with her Instagram posts: "Someone took screenshots of my Instagram photos and threatened to publish them as a porn star. I told them to go ahead and publish it because I had already put them on Instagram for everyone to see. They tried to blackmail me, but at the end it stopped. If we get scared, they try to push it more."

While the homophobic/transphobic slant in these incidents is clear, sometimes such incidents originate from within the Sri Lankan LGBTIQ community, too. Rajesh, for instance, recounted the following incident: "Once a drag party I participated in was photographed and put on Facebook. I received many calls from different people who had seen my drag pictures online. So I immediately called [a senior police official who was a friend of mine] and told him what had happened. He advised me to make a complaint to the Peliyagoda police station. But then, I don't know who specifically did it, but I knew it had to be someone from our own community. If we went to the police they will get into trouble. So I decided not to."

Mayantha, also a gay man, recounted how his phone was added to a Viber group (of gay and bi men) without his consent by an unknown person. "Then someone shared a picture I had shared privately with my ex-boyfriend and asked me if that was me. This was someone completely unknown to me. I have no idea how this random guy got that picture. For me it was a threat to my career, because I work in the media."

According to Deshan, such violations of privacy are not only carried out by members of the community, but even organisations that purport to work for LGBTIQ rights in Sri Lanka: "Some organisations publish photos of their events with community members but they do not ask for consent. It happened to me personally also." He also indicated that such an organisation violated a non-disclosure agreement signed with him by publishing a video interview he participated in on YouTube.

Safety: Safety of devices

In addition to content shared through the internet, individuals also have negative experiences and/or fears of negative experiences in terms of content stored in devices (i.e. potential risks even where content is not shared with someone else, but is consumed privately).

At the focus group discussion, Mitya highlighted the risks of using electronic devices to store important content. "We save our passwords on mobile apps. If we lose the phone, whoever finds it can access everything that we were doing on the phone. We don't logout from phone apps. How many apps do we use? It's impossible to logout of all of them, one by one, every day. I have a pattern-lock on my touch-screen, but it is very easy to crack because the pattern is visible as a smear on the screen."

In Sri Lanka, a trend has emerged where many phone repairmen extract intimately private content on their customers' phones and distribute it on the internet. The fear imposed by such incidents pervades the LGBTIQ community as well. For instance, at the focus group discussion Deshan explained his fear of repairing a broken tablet: "I have a tab where the screen broke recently. But I can't give it to be repaired, because it has all the pictures of my vows' ceremony with my partner. I am scared that the pictures will go public if I gave it to someone to repair."

Insecurity of devices is also related to arbitrary policing. Sayuri, a trans woman who also happens to be a commercial sex worker, indicated that the police checked her phone while she was standing on the road. "When the police jeep stopped in front of me, and asked to go through my phone, what else can I do? They wanted to look at my photos, so I said that they can only check my gallery. There were nude photos in the gallery, but they didn't say anything. They went through everything and gave it back to me and drove off."

A related issue in terms of devices is the location of the device. As will be discussed under the "Access" section below, various reasons compel individuals to use devices that do not personally belong to them. In such cases, LGBTIQ Sri Lankans can be particularly vulnerable in terms of their privacy. As Mitya explained, "If we use Facebook at the office desk, anyone can fiddle with our account when we are not at the table. If we are trying to keep our identity secret, this becomes a huge problem; anyone who comes to our seat can see what we do. If I had a dating site open, they would see that also."

Rajesh recounted similar concerns in terms of internet cafes: "Once at an internet cafe, as soon

TABLE 8. Have you experienced or personally known someone who experienced any of the following? Please select all that apply.		
Online harassment (bullying, name-calling, condemnation, etc.)	49	58%
Pictures exposing your or someone else's sexual orientation/gender identity posted online or shared with a third party without consent	37	44%
Sexual orientation or gender identity being publicised online without consent	35	41%
Verbal threats to do any of the above	35	41%
Videos exposing your or someone else's sexual orientation/gender identity posted online or shared with a third party without consent	27	32%
The experience of violence in the physical world	17	20%
I have not experienced any of the above.	24	28%
Law enforcement officials checking a person's mobile phone, laptop, internet account etc. without their consent	11	13%
I don't know anyone who has experienced any of the above.	4	5%

as my friend who was using the computer next to me finished up and left, the owner of the cafe came and checked the browsing history. When I looked at him, he said that my friend always looks at the same thing. I asked him what his problem was to look into someone else's browsing history. Then he said sometimes the police comes and checks the history and questions him. So he checks the history and deletes it if there is anything unnecessary. I stopped going to that cafe after that experience."

Krishna, a gay man who is also an academic in a public university, recounted how he censors his online communications, even on his own devices, if the device is connected to a university network. He explained, "When we access the internet from a shared network at the office there is a possibility of others seeing my chats. So I choose not to say certain things via my office network, especially if it's related to my LGBTIQ activism. You never know who the network administrator is, but you know that they are monitoring the content. So I have to be discreet when using my devices on their network."

Safety: Adverse online experiences

As is evident, the online space, especially social media platforms, can be remarkably hostile to sexuality and gender minorities. These hostilities stifle the full use and enjoyment of the internet by LGBTIQ Sri Lankans; many LGBTIQ Sri Lankans either censor themselves or are forced to resort to pseudonymous profiles in their daily use of online platforms. Based on the above discussion on safety issues at the focus group discussion, the questionnaire listed a number of adverse online experiences and asked respondents to indicate which of them they or someone they knew personally had

experienced. (Note that the listed experiences were not exhaustive, and were representative of issues emerging from the discussion and, to some extent, the literature review.) The results were as follows (see table 8).

Only one of the participants had not heard of anyone who has experienced any form of online violence mentioned in the survey and only 24 participants said they have never experienced any form of violence online themselves. "Online harassment" is the most frequent form of violence experienced or witnessed by the respondents, while exposing one's sexual orientation or gender identity by using pictures is the second highest response. Of the participants 20% have experienced or personally know someone who has experienced violence in the physical world based on online content related to their sexual orientation or gender identity, 41% have experienced or know someone who has experienced "outing" without their consent, while 13% have experienced or personally know someone who has experienced law enforcement officials checking their digital devices (see table 9).

In response 79% of participants identified Facebook as the platform mostly impacted by the identified experiences. (Indeed, Facebook use has a high prevalence in Sri Lanka, with over 3.5 million Facebook users and counting. All participants (100%) said they use Facebook frequently, with WhatsApp coming in at a close second (82.1%).) Dating apps designed for LGBT people are the second most impacted platforms according to the data; however, at 20%, the gap of frequency between the most impacted and second-most impacted platforms is worthy of notice (see table 10).

TABLE 9. What are the platforms mostly impacted by the experiences you identified above?		
Facebook	67	79%
Dating apps specially designed for lesbian, gay, bisexual or trans People	15	18%
FB Messenger	14	16%
Whatsapp	11	13%
LGBT groups	7	8%
LGBT-themed blogs	5	6%
Viber	4	5%
Email	4	5%
Discussion forums	4	5%
This question is not applicable to me	9	11%
Instagram	3	4%
General dating apps, such as Tinder	3	4%
Imo	2	2%
Twitter	1	1%
Snapchat	1	1%

TABLE 10. Thinking of the person or people responsible for the incident(s), how did they relate to the person affected?		
A stranger/someone unknown	31	36%
Friends	29	29%
Someone with a sexual involvement	15	18%
I don't know the real identity of the person or people	18	21%
An acquaintance	15	18%
Someone with a romantic involvement	12	14%
This question does not apply to me	15	18%
Immediate family member	5	6%
Relative	3	4%

While 36% of participants said “someone unknown” was responsible, 29% of participants reported that “friends” were responsible. Three people have faced or know someone who has faced adverse online experiences inflicted by a relative, whereas eight participants said that this question did not apply to them. Sexual partners were responsible, said 18% and 14% said that romantic partners were responsible for the violence (see table 11).

Unfriending and blocking appear to be the most common action taken by victims of adverse online experiences (45%), followed by deactivating or deleting the account (32%). Reporting to the relevant platform administrators is the third most common action against adverse online experiences, amounting to only 29%. This may be an indicator of the lack of knowledge on reporting tools of social media platforms. The data shows that reporting to law enforcement is not a choice of many victims,

with only three participants reporting or knowing someone who reported such experiences to law enforcement. Interestingly, 22% have said they did not respond at all (see table 12).

A majority of participants said they did not receive a satisfactory resolution, whereas 24 participants said they did. This is an interesting finding yet not surprising due to the gaps in community standards of social media platforms.

Safety: Literacy in online safety

In an online landscape riddled with privacy and surveillance issues, measures individuals can take to protect themselves against such risks have an important role to play. However, this is only possible where such users are adequately educated and made aware of the existing threats and possible techniques against them. Indeed, the Special Rapporteur on the freedom of expression has underscored “the importance of educating individuals about internet safety and security,

TABLE 11. How did you or the person affected respond to the experience? (Select all that apply.)		
Unfriended or blocked the person	38	45%
Deleted/deactivated the profile on that platform	27	32%
Reported the person responsible to the platform	25	29%
Did not respond	19	22%
Confronted the person either privately or in the comments	21	25%
Was forced to create a new profile on that platform	8	9%
Made a post publicising the wrongdoer and their actions	11	13%
This question does not apply to me	12	14%
Reported the problem to law enforcement	4	5%
Confronted the individuals concerned personally in the physical world	2	2%

TABLE 12. Did you/they receive a satisfactory resolution?		
No	51	60%
Yes	24	28%
I don't know the result yet	15	18%
Did not respond	7	8%
This question does not apply to me	12	14%

TABLE 13. Do you use any of the following tools and methods to increase your security online?		
Using strong passwords for your email or other internet accounts	69	81%
Using only platforms which provide encryption services	15	18%
Using anti-virus software	49	58%
Keeping your operating system updated with the latest security patches and updates	30	35%
Using internet protocol (IP) disguisers/blockers	5	9%
Using anti-censorship software	1	1%
Using a virtual private network (VPN)	1	5%
I have heard of some of these tools, but I don't know how to use them	12	14%

including fraud, potential consequences of revealing private information on the internet and the use of encryption or circumvention technologies to protect information from unwarranted interference.⁵⁸

Significant gaps in this awareness were revealed in both the focus group discussion and the survey. As Krishna noted at the discussion, "Whatever we do online is recorded somewhere. Some people cover their laptop's camera (by sticking a plaster) because cameras can be turned on remotely by someone else. Sometimes Google accounts require telephone numbers to verify the account, but you can skip this step without giving the number. But those who don't know that they can skip the step give their telephone numbers thinking it is mandatory."

Another example is observed in how Sumith, a gay man who is also a sex worker, explained his reasons for using video calls. "Video calls are important for finding partners," Sumith said. "It's very convenient,

because I can talk and present myself to the client on video apps like Imo before we meet up. The client only has to come to physically meet me if he is satisfied with my appearance as seen through the video call." When asked if video calls are also important because they are safer than sending an image of himself that can be downloaded and saved in a potential client's phone, he insisted that video calls are preferred only for their convenience, and that in any case photos are also sent as part of the initial invitation to meet.

Patterns of literacy in online safety were also demonstrated in their awareness of the survey participants on some common tools used in online contexts to protect privacy (see table 13).

Another such indicator could be the practices surrounding the sharing of pictures on dating and hook-up platforms (see table 14 and 15).

In addition to the photos they share, how and where individuals meet physically for the first time off a dating app is also crucial to their safety. The lack of public spaces for LGBTIQ Sri Lankans to socialise

58 La Rue, F. (2011). Op. cit., 47.

TABLE 14. Thinking about dating and hook-up platforms (Tinder etc.), please select all the statements relevant to you.

I share my face publicly	39	46%
I only share my face privately	23	27%
I have never been on such platforms.	20	24%
I never share my face	3	4%

TABLE 15. Thinking about dating and hook-up platforms (Tinder etc.), please select all the statements relevant to you.

I share non-nude pictures publicly, but I also share nude pictures privately.	28	33%
I share only non-nude pictures, both publicly and privately.	25	29%
I have never been on such platforms.	22	26%
I share nude pictures both publicly and privately.	6	7%
I don't share any pictures on such platforms.	4	5%

TABLE 16. Fill in the blank with the statement most appropriate to you. When I meet someone new from such a platform for the first time, "_____"

I always meet them in a public space (a main road, a restaurant, a park).	22	26%
Sometimes I meet them in a public space, sometimes I meet them directly in my place, their place, or a friend's place.	17	20%
I have never been on such platforms.	22	26%
I always video call them and see their face before I meet them.	12	14%
I don't meet people from such platforms in person.	12	14%
I always invite them over directly, or I always go to their place, or we always meet at a friend's place, directly.	7	8%
We sometimes meet directly in a hotel/rented room.	5	6%
I always meet them with someone else I know.	2	2%

has already been highlighted. As the following table indicates, the absence of such tolerant spaces also has the possibility of endangering the lives and physical safety of LGBTIQ Sri Lankans, with more and more of them choosing to meet a relative stranger directly in a private space for the first time (see table 16).

Considering the needs of the Sri Lankan LGBTIQ community in literacy on online safety, targeted interventions within the community on the subject appear imperative. Indeed, although 22% (19) respondents to the survey indicated they had participated in some kind of "digital safety training courses, seminars or workshops," 78% (66) of respondents indicated that they had not.

Access: Obtaining services

A key issue in terms of online rights is the availability, affordability and quality of access to the internet. This theme has a number of dimensions to it, namely, technological, economic and linguistic limitations to access. Indeed, these dimensions also overlap and intersect with each other.

While several such issues on access were flagged during the focus group discussion, prime among them was how certain documentary requirements in purchasing new broadband or mobile connections indirectly discriminated against LGBTIQ Sri Lankans. In 2009, the Telecommunications Regulatory Commission of Sri Lanka issued regulations requiring registration of all new connections to be linked to the subscriber's national identity card (NIC) number.⁵⁹ Accordingly, Sayuri, who is a trans woman, recounted how an agent of an ISP refused to sell her a SIM card, because her NIC reflected her assigned gender: "The agent looked at the NIC and at me, and said, 'This isn't you.' I said, 'No, it *is* me,' but he kept insisting that it wasn't. I didn't want to cause a scene, because his shop was on the sidewalk and there were so many people around, and all of them would have laughed at me if I had kept insisting that it was me. So I left the place. Since then, I had to use a friend's spare

⁵⁹ GSMA. (2013, 3 July). Dialog Connect: A Case Study. GSMA. www.gsma.com/identity/dialog-connect-a-case-study.

SIM, but that SIM is registered under his name, and if I need to access services, I need him physically or a letter from him. On top of it all, he's about to leave the country soon for employment in the Middle East, and I am not sure what I will do when he's gone. Maybe if I go to a principal service centre instead of a street agent, I won't have this problem."

Manju, a trans man, also recounted a similar encounter. He had owned a SIM card for 10 years, one he had purchased and had been using since before his physical transition. All the documentation on the SIM reflected his previous identity, and he needed to update it to reflect his post-transition details, including his new name. He had approached a customer care point and lied, saying the SIM was officially under his twin sister's name and ID card, but that she was currently abroad. He had requested a "transfer" in ownership, saying that though his "sister" had purchased the SIM, it had always been him that had used it. The customer care representative had requested him to come back with a signed letter from the sister, which he had promised to do, but had not ultimately got around to doing. However, some time later, he had noticed that the connection had been updated to reflect his current details. He believes that although the customer care representative had requested an official letter, he had made the changes anyway.

In addition to the requirement of an NIC, customers purporting to purchase post-paid connections are also required to produce a recent utility bill as proof of billing address. Here, the general requirement is that the address on the utility bill is reflected in the address on the NIC. However, if the NIC's address is out-dated (NICs are first issued to citizens at the age of 16), a customer may simply ensure that the address on the application form for the connection is the same as that on the utility bill.⁶⁰ If an individual lives in rented housing, they are required to accompany the proof of billing with a letter from the landlord, as utility bills for rented houses reflect the landlord's identity. Deshan, a gay man, elaborated on how these rules impact on sexuality minorities. He said, "Many gay people, especially middle-aged and older gay people, live away from their families, but also live in rented homes. Most service providers, when you're trying to get wi-fi or a fixed line connection, require the homeowner to make the purchase under their name. Many gay people don't have their own, permanent place to live. I have had

to buy such services through my mother and her home address."

Access: Owning devices

As mentioned in the section above on "Safety of devices", another issue in terms of access is how some individuals are required to access the internet on devices and/or networks that belong to others, such as their workplaces and or proprietors of internet cafes. While many individuals use devices and networks not belonging to them *in addition* to their own devices and networks, some have online access only through facilities owned by others. Considering the sensitive nature of internet consumption related to one's sexuality, especially where one's sexuality is stigmatised in society, the non-ownership of devices and networks directly hinders the individual's ability to enjoy their online human rights, including the ability to meet new people, maintain relationships, as well as engage in various discussions and discourses related to their sexual orientation or gender identity.

Access: Language

Language is another limiting factor affecting the accessibility of online content. As mentioned before, many sources of information cater to an English-reading audience. Moreover, most devices are designed, in terms of their "input" functions, for the English language by default. Although post-purchase modifications are possible to expand the devices' functionality to either Sinhala or Tamil, these modifications are limited in scope and lack the same functionality of the English features. Although Sri Lanka features high literacy rates in the general population, English literacy is not reflected in such indicators. More importantly, individuals are entitled to the right to access information and engage in communications in the language of their choice.

Access: Quality of service

Finally, data speed and quality of service is an important aspect of online accessibility.⁶¹ However, as Manju pointed out during the focus group discussion, "Sometimes data is so slow and expensive that, when you're trying to load a page, you run out of prepaid credit while the pinwheel simply turns without ever loading. You could reload the account and try again, and sometimes the credit runs out all over again. This is especially true if

60 This information is based on calls to customer care hotlines of prominent ISPs in Sri Lanka.

61 La Rue, F. (2011). Op. cit., 63.

you own a low-feature phone instead of a fully-fledged smart phone.” Indeed, such constraints are compounded by the significant increase in taxes on data consumption in Sri Lanka since November 2016,⁶² which, according to a senior legal officer of an ISP interviewed confidentially for this study, amounts to approximately 35% to 49% of the raw user rate. Indeed, according to said interviewee, some ISPs also employ various tactics to counter the decrease in data consumption that corresponds to a significant hike in taxes, by lowering the speed of the connection at specific data consumption milestones of the consumer.

Section 4: Law and policy

Many human rights are relevant when considering LGBTIQ Sri Lankans in the online space. In the previous section, issues discussed were framed in terms of use, safety and access; as regards “law and policy”, we mainly look at the relation between those issues and the human rights of the freedom of expression, the right to information, the freedom of association, and the right to privacy.

LGBTIQ Sri Lankans enjoy the *right to information* through their use of the internet. They access information of vital importance to their personal growth, health and well-being through the internet; the types of information accessed span across categories like news, art, health information, legal information, etc. At the same time, issues of media literacy, lack of recognition in official/government resources, as well as limitations to access in terms of linguistic, technological, financial issues were also touched upon.

LGBTIQ Sri Lankans enjoy the *freedom of expression* through the internet. They use the internet to raise awareness, to engage with local discourses on sexuality, to break stereotypes, to advocate their rights, and even simply to exist. They also use the internet to engage in one-on-one and group conversations, to share ideas, and even for intimate expressions.

LGBTIQ Sri Lankans enjoy the *freedom of association* through the internet. The internet has been positively instrumental in the formation of new relationships among members of the LGBTIQ community, as well as sustaining both old and new relationships. These relationships could be emotional, romantic,

casually sexual, platonic, amicable, acquaintances, etc. The internet has also facilitated the creation of networks of community members, which is crucial to advocacy efforts.

The internet also impacts *the right to privacy* of LGBTIQ Sri Lankans. Anonymity and pseudonymous profiles feature in the lives of many LGBTIQ people in the country. At the same time, the safety of their content and devices from illegal intrusions and state surveillance is a matter of concern to LGBTIQ Sri Lankans.

These rights are generally considered “civil and political.”⁶³ This is not to say that socioeconomic rights related to the issues discussed in this study are negligible. In fact, the right to health, the right to education, the right to science and culture, etc., are also arguably relevant to a general discussion of LGBTIQ Sri Lankans’ internet rights. However, given the limited recognition of socioeconomic rights in the Sri Lankan Constitution,⁶⁴ as well as a general tendency to focus on internet rights through the lens of civil and political rights even within the international human rights mechanisms, this study will also follow the same approach.

In Sri Lanka, it is widely believed that homosexuality is criminalised under the law. This belief, its accuracy aside, creates a remarkable interface between the criminal law of the country, the telecommunications regulatory framework and internet governance, which renders LGBTIQ Sri Lankans vulnerable to both law and society in their use of the internet.

The human rights framework in the Constitution

Articles 3 and 4

Article 3 of the Constitution states, “In the Republic of Sri Lanka sovereignty is in the people and is inalienable. Sovereignty includes the powers of government, *fundamental rights* and the franchise.” (Emphasis added.) This provision is a foundational aspect of the Constitution, as it cannot be amended, and laws inconsistent with it cannot be passed by parliament, without resorting specially restricted procedures, including the requirement of a two-thirds majority in parliament, as well as a simple majority in a referendum. In this way, the

62 Lanka Business Online. (2016, 11 November). Sri Lanka budget 2017: tax and revenue proposals. *Lanka Business Online*. www.lankabusinessonline.com/sri-lanka-budget-2017-tax-and-revenue-proposals

63 For instance, they all find expression in the International Covenant on Civil and Political Rights.

64 See, generally, Gunatilleke, G.D. (2010). Judicial Activism Revisited: Reflecting on the Role of Judges in enforcing Economic, Social and Cultural Rights. 1 Junior Bar Law Review 21, 28-30.

Constitution expressly ensures that fundamental rights issues are beyond the tyranny of the (simple) majority, and that laws affecting core fundamental rights guarantees are not possible without broad political consensus.

Article 4 requires “all organs of government” to observe both negative obligations (i.e. to *not* to do certain things) and positive obligations (to take steps, to *do* things) in relation to the fundamental rights declared in the Constitution.⁶⁵ The significance of this provision is that it envisages all organs of government to play a proactive role in guaranteeing citizens’ fundamental rights. Indeed, it could be argued that, the reference to positive obligations recognises that state *omissions* violate fundamental rights just as much as state *actions* do. However, this aspect of Article 4(d) has received little attention in domestic jurisprudence.

Articles 10 to 14

Of the specific fundamental rights recognised in the Constitution, the freedoms of thought and conscience,⁶⁶ and of expression⁶⁷ and association,⁶⁸ are particularly relevant to the present discussion. In May 2015, the Constitution was also amended to declare and recognise the “right of access to information”.⁶⁹

However, neither the right to privacy,⁷⁰ nor the broader right to liberty⁷¹ (both of which have been instrumental in vindicating the sexuality rights in other parts of the world), is explicitly mentioned in Sri Lanka’s fundamental rights chapter. Nor does the Constitution include any explicit protections against arbitrary searches and seizures by law enforcement officials.

However, explicit mention in the Constitution *per se* is not always necessary to judicially enforce a right. For instance, in a landmark judgment,⁷² the Supreme Court once declared the right to life as implicit under Article 13(4), which reads, “No person shall be punished with death or imprisonment

except by order of a competent court, made in accordance with procedure established by law.” At the same time, Article 12(1), which guarantees “equality before law” and “equal protection of law” to all persons, is generally regarded as broad in scope,⁷³ guaranteeing against concepts such as unreasonableness, arbitrariness, etc., and has been instrumental in recognising “implied” rights in the Constitution.⁷⁴

The Constitution does not explicitly mention “sexual orientation” or “gender identity” as categories protected from discrimination either, though other categories such as “race, religion, language, caste” etc. are mentioned. However, in October 2014, the Government of Sri Lanka took the position before the Human Rights Committee (HRC) in Geneva (HRC) that, “Article 12(2) of the Constitution ensures that no citizen shall be discriminated, inter alia, on ground of sex. In this context, it [is] noted that laws discriminatory of a person on the grounds of sexual orientation would not be constitutional.”⁷⁵ Though this position comports with the jurisprudence of the HRC,⁷⁶ its domestic legal status remains in doubt. Firstly, because only the Supreme Court is vested with the jurisdiction to interpret the Constitution;⁷⁷ and secondly, because the Government of Sri Lanka has expressly contradicted its position in subsequent domestic forums.⁷⁸

Article 15

The Constitution allows reasonable restrictions of certain fundamental rights through Article 15. The *general* principle of this article has been noted by the Supreme Court for its resonance with Article

65 Article 4(d), Constitution of Sri Lanka.

66 Article 10, Constitution of Sri Lanka.

67 Article 14(1)(a), Constitution of Sri Lanka.

68 Article 14(1)(c), Constitution of Sri Lanka.

69 Article 14A, Constitution of Sri Lanka.

70 *Toonen v. Australia*. Communication No 488/1992. HRC., 31 March 1994); *Dudgeon v. the United Kingdom*. App. No. 7525/76. ECtHR., 22 October 1981); *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others* [1998]. ZACC 15. (9 October 1998)

71 *Lawrence v. Texas*. 539 U.S. 558 (2003) in the United States; *Naz Foundation v. Delhi and Others* [2009] 4 L.R.C. 838 in India.

72 *Sriyani Silva v. Iddamalgodha* (2003) 2 S.L.R. 63.

73 Udayanganie, U.A.T. (2013, October) Expanding the Scope of Judicial Review using Constitutional Interpretation in Sri Lanka: A Comparative Study of the Development of Judicial Review in UK. GSTF International Journal of Law and Social Sciences (IJLSS) Vol.3 No.1, 51-54

74 See e.g., *VisalBhashithaKaviratne et al. v. Commissioner-General of Examinations et al. (The Z-Score Case)* S.C. (F.R.) Application No. 29/2012.

75 Human Rights Committee. (2014, 7 October). Consideration of the Fifth Periodic Report of Sri Lanka on the Implementation of the Provisions of the International Covenant on Civil and Political Rights (Transcript of relevant part). www.youtube.com/watch?v=iHcREEWl6G8&feature=youtu.be&t=6232

76 See *Toonen v. Australia*. Communication No 488/1992 (HRC, 31 March 1994)

77 Article 125(1), Constitution of Sri Lanka, which reads, “The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution...”

78 *Samarakoon, S.* (2017, 26 January). Homosexuality I “Threw out” – Can the President control a person’s sexual orientation? *Vikalpa*. www.vikalpa.org/?p=29311

29(2) of the Universal Declaration of Human Rights,⁷⁹ which provides a three-pronged test to assess the permissibility of a restriction of a right by the State: to be permissible, any restriction of a human right must (a) be prescribed by law, (b) be in the pursuit of a legitimate state interest, and (c) be necessary in a democratic society.⁸⁰

In interpreting Article 15, the Court has followed the approach of the three-pronged test. In *Joseph Perera v. A.G.*,⁸¹ a full bench of the Supreme Court held that “it is competent to the Court to question ... whether there is a proximate or rational nexus between the restriction imposed [...] and the object sought to be achieved by [it].”⁸²

Much later, in *Sunila Abeysekera v. Ariya Rubasinghe*,⁸³ counselling against “looking at one’s own Constitution wearing blinkers,”⁸⁴ the Court explicitly adopted the three-pronged test of international human rights law as the suitable yardstick to assess rights-restrictions under the Constitution.⁸⁵

The “prescribed by law” prong ensures, as a baseline, that all restrictions of rights (except those enforced during declared states of emergency) will always be implemented through legislation only. However, the requirement also imposes certain qualitative criteria on the law imposing the restriction. For example, the European Court of Human Rights (ECtHR) has held that under “prescribed by law”, a restriction of a human right must satisfy two “substantive” qualities: “Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances,

the [legal] consequences which a given action may entail.”⁸⁶ In the United States, the Supreme Court follows a similar approach known as the “void-for-vagueness doctrine” under the due process clause: “[G]enerally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offence with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”⁸⁷

The other two limbs of the three-pronged test ensure the principle of proportionality, which requires the state to balance any legitimate aims it pursues through rights-restrictions with the burdens they impose on individuals. Under this approach, known as the proportionality test, the state is to consider such aspects of a given restriction as: the availability of relevant and sufficient reasons justifying the measure; the availability of less intrusive measures; the incorporation of adequate safeguards against abuse, etc. If a restriction fails to satisfy any limb of the three-pronged test, it is held to be impermissible under human rights law.

Thus, the significance of this provision is that, even where fundamental rights protect the words, conduct, etc. of a person, the government may still restrict them, through criminal law, civil law, or even administrative action. However, in order to be considered legal, such restrictions need to satisfy the three criteria outlined above.

Article 16

A major limitation in the Constitution’s human rights framework is that it precludes “judicial invalidation” of rights-violating legislation through Articles 16(1) and 80(3). In other words, courts are precluded from “striking down” laws found to be inconsistent with fundamental rights.

79 Universal Declaration of Human Rights, Article 29(2): “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”

80 *Sunila Abeysekera v. Ariya Rubasinghe* (2000) 1 SLR 314.

81 *Joseph Perera v. A.G.* (1987) 1 S.L.R. 199.

82 *Ibid.*, 216–17. Emphasis added. Edited. Although the cited passage refers to Emergency Regulations, the present submission will justify the extension of its meaning to cover ordinary legislation as well.

83 *Sunila Abeysekera v. Ariya Rubasinghe* (2000) 1 SLR 314.

84 *Ibid.*, 351.

85 *ibid.*, 356–85.

86 *Sunday Times v. The United Kingdom* (No. 1) App. No. 6538/74 (ECtHR, 26 April 1979), Emphasis added. However, the ECtHR, went on to state, “Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.” See, also, *Ontario Film and Video Appreciation Society v. Ontario Board of Censors* (1983) 31 O.R. (2d) 583 (Ont. H.C.), p. 592: “It is accepted that law cannot be vague, undefined, and totally discretionary; it must be ascertainable and understandable. Any limits placed on the freedom of expression cannot be left to the whim of an official; such limits must be articulated with some precision or they cannot be considered to be law.”

87 *Kolender v. Lawson*. 461 U.S. 352, 357 (1983).

However, the Supreme Court has made significant inroads to this limitation, for example when it declared a statutory provision unconstitutional and, without invalidating it, refused to give effect to it.⁸⁸ Incidentally, the impugned statutory provision in that case is part of the same 1995 legislation that amended the provisions of the Penal Code relevant to LGBTIQ Sri Lankans: Sections 365 and 365A.

Substantive law framework

Sections 365/365A of the Penal Code are at the top of a pyramid of laws directly infringing LGBTIQ Sri Lankans' human rights. Criminalising "carnal intercourse against the order of nature" and "acts of gross indecency", respectively, these provisions are abjectly vague, and appear to capture many sexual acts committed between persons, irrespective of their age, their genders, or the existence of consent between them. Section 365A is particularly broad, covering not only the commission of an act, but also the procurement and the attempt to procure the commission of such acts. By criminally sanctioning certain sexual acts, the provisions directly interfere with how individuals express their identity, how they express themselves sexually, and who they form intimate relationships with.

They also exert an undue influence on other laws. This was seen in 1999, when the Sri Lanka Press Council arbitrarily conflated "gross indecency" under Section 365A with "sodism" under Rule 9 of the Code of Ethics for Journalists. It was also seen in how, under the Penal Code, perpetrators of the non-consensual, predatory sexual offences are treated differently based on the sex of the victim, with the mandatory minimum sentence being relaxed where the victim is female, and enforced strictly where the victim is male.⁸⁹ Here, again, the court deploys vague references to Sections 365 and 365A as justifying their differential treatment, and here again, the decision-making body's interpretations of the provisions were arbitrary and had no authority in law.⁹⁰ For one, sentencing disparities in child abuse law enforcement to this extent discriminates against *both* girls and boys.

In addition to Sections 365 and 365A, obscenity, profanity and public performance laws are the other laws that impact sexuality and sexual expressions in Sri Lanka. A key characteristic of these laws is that they either do not define the scope of the offence, or when they do, they often couch the offence in broad, vacant language. The Obscene Publications Ordinance No. 4 of 1927 makes it an offence to produce, possess, import, export, carry on, take part in a business or advertise the availability of obscene publications. However, the act does not define the term "obscenity". The Profane Publications Act No 41 of 1958 makes it an offence for any writer, publisher, printer or distributor to write, produce, print, publish, sell, distribute or exhibit any profane publication. A profane publication is defined to mean any newspaper, book, picture, film or other visible representation containing an insult to the founder of any religion, any deity, saint or person venerated by the followers of any religion, or any religious belief or any representation that ridicules any figure, picture, emblem, device or other thing associated with or sacred to the following of any religion.⁹¹ But, again, profanity itself is left undefined.

Though none of the laws have been enforced in connection with the internet (or even in general, in some cases), "their mere existence warrants concern."⁹² Laws restricting human rights must be, among other things, accessible and foreseeable, so that those affected by the law may know the extent of their legal obligations. However, in terms of the network of vague legal provisions discussed above, most LGBTIQ Sri Lankans remain unaware of the exact scope of the prohibition of "homosexuality". Moreover, the laws are also vague in their potential applications on the internet: almost all the provisions mentioned include words such as "engage", "procure", "publish," and it is unclear how this language could be applied to expressions and encounters taking place in the online space.

Vagueness also confers broad discretionary powers to law enforcement officials, enabling them to abuse laws and enforce them selectively. As mentioned before, a requirement under the three-pronged test is that there are adequate safeguards against abuse of a particular restriction. Together, non-vagueness and procedural safeguards ensure

88 Supreme Court Reference No. 03 of 2008, decided on 15 October 2008.

89 Supreme Court Appeal No. 17 of 2013, decided on 12 March 2013 and Court of Appeal No. 150 of 2010, decided on 16 July 2014.

90 "Section 365 and 365A [were made] wide enough with amendments to include 'unnatural offences and grave sexual abuse ... This court cannot show any leniency on any account, in view of the serious nature of the offence..., mainly to protect the society from such mentally disordered offences.'" (S.C. Appeal 17/2013, note 102, above.)

91 See, in general, Centre for Policy Alternatives. (2011). *Freedom of Expression on the Internet in Sri Lanka*. Colombo: Centre for Policy Alternatives. www.cpalanka.org/freedom-of-expression-on-the-internet-in-sri-lanka/

92 Ibid.

that citizens know their legal obligations and that those obligations will be fairly and equally enforced to all citizens. However, the fact that the impugned laws operate under a procedural framework with barely any safeguards against abuse compounds the adverse effects of their vagueness. Not only do LGBTIQ Sri Lankans not know the extent of their obligations, they are also constantly under the threat of legal surveillance with little possibility of prior notice or judicial oversight.

Procedural law framework

A significant aspect of online rights, particularly in terms of the right to privacy in the digital age, is the powers of the state to carry out investigations and surveillance on individuals' activities on the internet. In Sri Lanka, no consolidated law exists governing this aspect of the state's powers. In interviews with key informants, such as an officer of the Cyber Crimes Division of the Criminal Investigations Department, as well as a senior official of the National Child Protection Authority, the Computer Crimes Act No 24 of 2007 and the Code of Criminal Procedure were mentioned as the main laws governing the police's procedural powers in online criminal investigations. Both interviewees also averred that the Computer Crimes Act provided the necessary powers to investigate crimes committed on the internet and that it was fully compliant with the Convention on Cybercrime (to which Sri Lanka is a State party).

The Code of Criminal Procedure (CPC) provides the general procedure applicable in criminal matters, and was first enacted in Sri Lanka in 1889. While the code provides for various investigatory powers, the provisions pertaining to searches of "documents and other things" are the most relevant to the present discussion: firstly, under Section 66(1), a relevant court may require any person to produce "any document or other thing [that] is necessary or desirable for the purpose of any proceeding under [the CPC]." Secondly, under Section 67(1), any court can require the Department of Posts and Telecommunications to deliver "any book, letter, post card, telegram or other document" in their custody if the court wants it "for the purpose of any investigation or proceeding under [the CPC]."

This latter power is not limited to the exclusive jurisdiction of courts: under Section 67(2), the attorney general (AG) or any police officer of/above the rank of superintendent may also require telecommunications authorities to deliver "documents" in that manner. Sections 66 and 67 represent the means by which a court or other investigating

official may require entities to make documentary disclosures for the purpose of an investigation. It is only if these measures are not complied with that a search warrant issued by a court is necessary to compel the search or seizure of the documentary evidence sought.

The Computer Crimes Act No 24 of 2007 (CCA) provides a specific scheme of offences, such as crimes related to hacking, infecting computers with viruses, unauthorized interception of data, etc. Section 2 of the act specifically states that it applies only in relation to the offences specified in the act, and subsequent provisions specify a number of investigatory powers. Key examples of such powers are the ability to "obtain any information including subscriber information and traffic data in the possession of any service provider"⁹³ and "to intercept any wire or electronic communication including subscriber information and traffic data, at any stage of such communication."⁹⁴ Though the general rule is that an investigator may only access such information under a warrant issued by a magistrate, this requirement may be unilaterally bypassed if an investigator believes, for instance, that "the investigation needs to be conducted urgently"⁹⁵ or that "there is a need to maintain confidentiality"⁹⁶ (hereinafter referred to as "extenuating circumstances"). Section 21(1) provides that, "Any police officer may, in the course of an investigation under this act, exercise powers of arrest, search, or seizure of *any information* accessible within *any premises*." The only qualifying requirement is that such an officer is certified by the inspector-general of police as "[possessing] adequate knowledge and skill in the field of information communication technology and is thereby possessed of the required expertise to perform such a function."⁹⁷ Section 24(1) requires all officers engaged in investigations under the act to "maintain strict confidentiality with regard to all information" that comes to their knowledge during the investigation.

In order to respect the right to privacy, all surveillance powers of the state must satisfy minimum criteria, whether under the CPC or CCA. One such criterion is the requirement of the state to be proportionate in restricting individual human rights. However, both the CPC and CCA only require the information sought to be necessary for the purposes

93 Section 18(1)(i), CCA.

94 Section 18(1)(ii), CCA.

95 Section 18(2)(a), CCA.

96 Section 18(2)(c), CCA.

97 Section 21(2), CCA.

of the investigation. Considerations such as whether the person being searched is suspected of an offence, the availability of alternative methods of investigation, the scope of the surveillance measure and whether it accesses more information than is necessary for the investigation, are not expressly required under the statutes.

Another criterion is the availability of judicial oversight over any determinations related to surveillance measures. As seen above, under the CPC, judicial oversight in issuing an order to disclose is only mandatory when the order is directed to a “person”. The AG or an adequately senior police officer may issue an order directly to the Departments of Posts and Telecommunications to deliver documents in their custody without judicial oversight. In either case, a “warrant” to compel search or seizure is only necessary if the person or the department refuses to comply with the initial order made by a court, a police officer or the AG (as the case may be). Even where a court issues an order, the CPC only mandates courts to evaluate the necessity of the measure for *the purpose of an investigation*. Broader considerations, including the human rights of those affected by the measure, are not expressly required under the law. By contrast, under the CCA, an investigator may bypass judicial oversight altogether, even as regards “persons”, by adducing reasons for extenuating circumstances. Moreover, though the CCA does not mention the Department of Posts and Telecommunications, it does explicitly recognise “service providers.” This allows police officers a wider power than under the CPC to directly order disclosures by internet service providers (ISPs), without judicial oversight or departmental intervention, provided there are extenuating circumstances to do so. The only avenue of judicial redress in such instances seems to be to challenge the police officers’ assessment of the existence of extenuating circumstances.

The recognition of “service providers” under the CCA is a crucial development, as it specifically addresses the issue of internet intermediaries. Under the CPC, ISPs may be considered as falling under the general term “persons,” allowing only a court to require production of “documents” by them; the AG or a senior police officer may not directly order disclosures of ISPs under this interpretation.

On the other hand, an ISP’s subscriber data could be considered to be “documents” in the “custody” of the “Department of Posts and Telecommunications,” in which case, the AG or a senior police officer may require the Telecommunications Regulatory Commission (TRC) to compel productions by an ISP without judicial oversight in the first instance.

However, under either approach, an ISP may refuse to comply with such a request, insisting on a warrant to submit to a search or seizure by the police. ISPs may also choose to cooperate with law enforcement officials, volunteering the requested information without insisting on any further judicial review. ISPs are not precluded from notifying customers affected by an order made under the CPC, but such notification is not mandatory either. Under the CCA, in cases where the police have unilaterally overridden judicial oversight by adducing extenuating circumstances, ISPs come directly under the power of the police, and are not only bound to comply with police orders to disclose, but are also bound to maintain the confidentiality of ongoing investigations. They may not notify their customers of any measures being taken against them. Section 24(3) of the CCA exempts service providers from liability for any disclosures they make under the law for the purpose of an investigation.

By comparison, the CCA provides far more extensive investigatory powers to police officers in investigations than does the CPC, and, perhaps for this reason, explicitly provides that the specific powers apply only to offences defined under that act. In the interviews with the CID and NCPA officials, however, it appeared that the powers recognised under the CCA were considered as indivisible from the powers under the CPC, rather than as the CCA establishing a special investigatory framework for a special area of criminal law. Neither of the officials could recall the contents of Sections 66 or 67 of the CPC, or Section 18 of the CCA during their interviews.

Telecommunications regulatory framework

Despite the subtle distinctions in how the different statutes govern the Department of Posts and Telecommunications, both interviewees as well as a senior legal officer interviewed from an ISP could not clearly identify the scope of the TRC’s regulatory power over ISPs in practice. The Department of Posts and Telecommunications mentioned under the CPC was first established in 1896, and continued in that form until, in 1980, its focal areas of posts and telecommunications were separated. In 1991, the Department of Telecommunications was further “transformed into a government owned corporation called Sri Lanka Telecom”⁹⁸, while an “office of the Director General of Telecommunications was established at the same time to serve as the regulatory

98 Gunawardane, N., & Wattagama, C. (2001). Op. Cit, 6.

body.”⁹⁹ In 1996, the director general’s office was restructured as the Telecommunications Regulatory Commission (TRC) of Sri Lanka.

Both interviewees as well as the senior legal officer of an ISP noted that subscriber data may be acquired either through an order addressed directly to the ISP or through a request communicated to the ISP through the TRC. The approach followed depends on the circumstances of the case, though no clear framework exists to guide that choice of approach.

None of the interviewees were able to specify the legal provisions under which these powers were being exercised. The Sri Lanka Telecommunications Act, no 25 of 1991, which establishes the TRC, specifies the powers and duties of the TRC in section 5. Section 5(f) allows the commission to “take such measures ... to comply with any general or special directions that may be given to it from time to time by the government of Sri Lanka in the interest of national security, public order and the defence of the country.” Also, Section 5(x) authorises the commission “to do all ... acts which may be incidental or conducive to, the attainment of the objects of the omission or the exercise or discharge of its powers and duties under this act.” The commission may, under Section 7(b), also require any “person” to “furnish to the commission ... any document ... which is in [that person’s] custody or control [which is needed by the commission] for the purpose of exercising, performing and discharging its powers, functions or duties under the act.” None of these provisions (or any other provisions of the act) specifically state that the disclosure of an ISP’s subscriber data can be compelled through the TRC. However, the existence of such a practice was clearly stated during interviews.

A key function of the TRC is to issue licenses to ISPs to operate in Sri Lanka. As such, most ISPs are dependent on their relationship with the TRC for the stability of their legal environment, and the senior legal officer interviewed from an ISP acknowledged the TRC’s “broad discretionary powers” in the area. Challenging orders to disclose subscriber data requires case-by-case litigation, which ISPs consider odious, especially in the highly competitive market environment of telecoms services in Sri Lanka. This fact, coupled with the absolute lack of a legal requirement to notify customers of surveillance measures they are being subjected to, ensures that ISPs simply comply with requests.

The need for positive reforms for protection

As seen above, in Sri Lanka, the online space is significantly vulnerable to arbitrary policing, based on the many levels of weaknesses that exist in the procedural and regulatory framework for surveillance in the country. These weaknesses impact the online rights of *all* Sri Lankans. However, Sections 365 and 365A of the Penal Code (and the arbitrary interpretations of those laws) interact with various other laws and institutions to make LGBTIQ Sri Lankans vulnerable in many aspects of their socio-political life in Sri Lanka, and the internet proves to be another such aspect. The existence of many vague laws affecting sexuality and sexual expression compounds this vulnerability, especially in terms of obscenity and profanity laws. That these laws have not been positively enforced remains immaterial, as they instil fear and uncertainty in the minds of LGBTIQ Sri Lankans who wish to exercise their rights (such as the freedom of expression), and leads to self-censorship and non-participation by them in many online contexts.

However, the critique of the legal framework in Sri Lanka does not end with a discussion of already existing laws that violate human rights. It must include a note on the laws that *do not exist* to protect human rights, as well. Though the internet provides an excellent platform for self-expression, access to information, and relationship-building, those uses are dependent on the freedom of users to participate in and engage with the platform. This unquestionably requires the elimination of laws that unduly restrict human rights, such as those laws mentioned in the preceding sections. But it also requires the *promulgation of new laws and policies* to facilitate participation and engagement by marginalised groups such as LGBTIQ Sri Lankans.

For instance, a significant barrier to open participation in online discussions is the fear of abuse and hate speech that might be levelled against an LGBTIQ person. In such cases, laws that positively identify hate speech based on sexual or gender identity as an offence, and which are used to prosecute the most egregious instances of such hate speech, will signal a policy of no-tolerance by the government that will serve to encourage more participation and engagement by LGBTIQ Sri Lankans in online spaces, as well as the reportability of such incidents. On the other hand, the lack of comprehensive laws on hate speech on diverse communities, as well as the continued existence of laws that purport to “criminalise”

99 Ibid.

homosexuality not only instil fear in LGBTIQ Sri Lankans of abuse and hate speech, they also work to legitimise the words and actions of the abusers.

Another barrier to participation in the online space is the lack of safeguards for content shared or stored by LGBTIQ Sri Lankans. For example, according to the senior official of the National Child Protection Authority (NCPA), a significant lacuna is the absence of laws adequately addressing the unauthorised distribution of private content. For the NCPA, the phenomenon is seen in the context of how adolescent girls share pictures of themselves in varying degrees of nudity with their “boyfriends,” only to have that trust violated by said boyfriends, who share those pictures with their friends or even submit them to various porn sites.¹⁰⁰ The NCPA official interviewed

for this study bemoaned the fact that the only avenue of redress is under the Obscene Publications Act (discussed above), which focuses exclusively on the “obscenity” aspect of such incidents and not on the aspects of abuse, exploitation and breach of trust that victims experience. While the NCPA has taken an initiative to reform the law to target non-consensual distributions and breaches of confidence in relation to intimate images,¹⁰¹ the authority is significantly restricted by its statutory mandate of child protection.

It is imperative, especially given the findings of this study, that the relevant reforms are not limited to the context of children, but apply broadly and equally to all people who perpetrate unauthorised disclosures or distributions of intimate content created by a third party.

100 For an overview of the phenomenon, see Billimoria, H. (2017, 27 January). Investigating Sri Lanka’s nude culture. *openDemocracy 50/50*. www.opendemocracy.net/5050/hans-billimoria/investigating-sri-lanka-s-nude-culture

101 NCPA. (2015, 18 June). Task Force to combat the growing threat to children. *NCPA*. www.news.lk/news/political-current-affairs/item/8260-task-force-appointed-to-combat-threat-to-children-via-social-media-sites

Lesbian women and their use of the online space

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Introduction

The objective of this section of the study is to offer a “thick” account of how lesbian women engage with the online space. The rationale for devoting a separate section to this arose from the data. As one-on-one interviews and a focus group discussion showed, lesbian women’s online engagements demanded to be treated as specifically gendered and sexualised experiences, while being classed, race based and so on. Their approach to the online space was traced through with the awareness that they had to negotiate being hailed by a patriarchal and heterosexist social system. We felt that this understanding called for a dedicated analysis.

Lesbian women’s responses are discussed under three framings: use, safety and access, as in the broader framework of the study. In addition, the analysis also highlights something which the data yielded, which is the emphasis that many women placed on *surveillance*. If not a separate frame, this was a prominent cross-cutting theme that many participants spoke to when they discussed use and safety, and it nuanced those two framings.

Surveillance is a historic tool of control and is experienced uniquely by women. Anja Kovacs of the Internet Democracy Project (India), writes:

Indeed, surveillance of women is a long-standing practice in our society as elsewhere – and one that women from all castes, classes and religions are too familiar with, even if it affects them differently ... And for centuries, women’s experiences have provided a wealth of information on what happens to those who are surveilled yet deviate

from the norm – online abuse targeted at women exemplifies this today again so very well.¹

Because “surveillance” is of particular importance to women – and even more perhaps to lesbian women – and because the conversations with our respondents confirmed this, we were keen to examine “surveillance” as a cross-cutting point of concern.

On the use of the term “lesbian women”

We use the term throughout this paper because we want to signal both gender and sexuality as important to their narratives; we are not being prescriptive as far as a norm of “lesbian” or “woman” identities are concerned. Broadly, we use this term – while acknowledging its inadequacy and understanding that is merely approximate – to refer to a participant group of women who desire and love women.

Methodology

A focus group discussion which brought together six lesbian women, 16 responses to the online survey, from lesbian women (in English and Sinhala), and one-on-one interviews held with three lesbian women.

Additional research on gendered and sexualised perspectives of surveillance and online violence against LGBT persons in Sri Lanka (citations provided).

Use

Lesbian women’s responses from the focus group discussion and the one-on-one interviews indicated that they have three main and overlapping uses for the online space: as an “information tool”, a “social networking tool”, and an “advocacy tool” for

1 Kovacs, A. (2017, February). Reading Surveillance through a Gendered Lens: Some Theory. *Gendering Surveillance*. <https://genderingsurveillance.internetdemocracy.in/theory/>

social justice issues, including feminist and LGBTIQ issues (Gayani). The majority of these engagements were on social media platforms like Facebook, while a few spoke in relation to their use of Twitter, Instagram, and Snapchat. Other uses that were not cited as much but were still important, were work related, involving sharing and promoting one's work and following international professional communities.

A number of respondents said that they use the online space, mostly Facebook, to search for and stay updated on current affairs, including LGBTIQ-related news. Online spaces are used in a variety of ways to obtain LGBTIQ news. For instance, some subscribe to prominent overseas LGBTIQ news magazines and keep track of the work of local LGBTIQ organisations via their online posts. Others, like Gayani, are very deliberate in using online resources for news and information. She said:

I think it [Facebook] is my primary source of information. The newsfeed is very important to me. [...] I very strategically subscribe to organizations, news sites and groups so as and when things happen it's always there. I check Facebook on a regular basis, the news feed, not just to be like "Ok who is having a party?" But as an information tool, where we are constantly consuming information like BBC and National Geographic or whatever is going on, the New Yorker, the Economist, everything is happening for me at the same time. So it's fantastic as a tool because I don't have to individually go for those sites to get those information – it is there. If there is something I actively want to pursue I have my information organized in such a way on Facebook that I can always follow those threads and then kind of enquire further. So information can be from what is happening in politics, to world affairs, to philosophy to arts and culture, theatre, everything. So it is really my primary source of information. More so than a social networking tool.

Gayani's responses also indicated that the online space is facilitating to the extent that it could create a loop where these three uses, information seeking, networking and advocacy, come together. She said, "if you are friends with activists, then you know what is going on ... like marriage equality and decriminalization ... through Facebook primarily ... and you support their campaigns and write about it on Facebook." Online news was not just viewed as content that was posted by designated and authoritative news sites. Being able to learn from the exchange of information and ideas amongst ordinary people whom one would not

usually find focusing on LGBTIQ topics, was also treated as part of obtaining news online. Speaking of a Sri Lankan Facebook groups, Mali said:

The value of it is that LGBT and straight people meet online and have a discussion on that group. So I think that this doesn't usually happen in the world face to face. But because we share issues on Facebook, people start talking about what they are actually thinking about, instead of just going to a demonstration and standing there. So we can see this discussion formulating and an exchange of information.

"Family surveillance" and "public surveillance"

If this describes a scenario of lesbian women becoming agentive in the online space by accessing, consuming and producing news and doing advocacy on LGBTIQ and other issues, Gayani and others were also quick to qualify and problematise that narrative. They noted that the space for "self-expression" (Gayani), to initiate, and to engage dynamically, was often contingent on and constrained by their consciousness of surveillance. Many stated that they were troubled by the sense of having to negotiate "family surveillance" and "public surveillance" (Shami). In this dual understanding of surveillance, "family surveillance" was broadly understood as the feeling of being subject to scrutiny online by family members. Essentially, this meant "in terms of what you share, what your thoughts are" there is "the worry: Who in the world is going to see? This aunty?" (Gayani). "Public surveillance" was understood as "the government or other persons are surveilling us through different mediums [and] without us knowing, reading what we are writing" (Rekha).

Both types of surveillance affected how lesbian women used online space as an information tool (and in some instances, to do advocacy) but not everyone was equally affected. For instance, some feared online public surveillance more and dismissed being impacted by family surveillance, while others felt affected by both types. Those who were "out" to their family, or refused to be subject to family control, rejected family surveillance but were nevertheless concerned about public surveillance.

These views highlight the fact that the policing and control of lesbian women's online engagements by their families is an issue of some significance. As established by a previous study which focused on the offline space, retaining autonomy within the family unit can be a problem for some lesbian women, not

least because women's personal independence is often not recognised, and also because family honour and reputation are perceived to rest on women's proper conduct in matters of gender and sexuality.² Echoes of this appear in lesbian women's narratives about online space. Two narratives highlighted the family's attempts to surveil and manipulate lesbian women's online engagements so that they do not compromise either the woman's or the family's reputation or image. Kala said:

I mean you don't have to wear a t-shirt and say I am gay and proud and walk around with that but in terms of what you share, what your thoughts are, the need to restrain yourself is so much – for me I found it to be very oppressive in the past ... There was a time in the past, I did this whole drag king kind of thing, like absolutely fantastic, and I had that as my profile picture and obviously this aunty calls my mother saying "Something has happened to your daughter, she has become a weirdo". And then my mother calls, saying "You need to change your profile picture".

Kala resented her family's presumed prerogative to have a say in what she did with her gendered and sexualised self-expression online, stating, "it becomes everyone's business". Furthermore, she also saw this as her family's attempt to make her adhere to gender and sexual norms in the online space and to deny her her right to define who she was and express herself as she wished. Another participant cited a similar scenario of her family intervening in ways that made her modify her online interactions:

Before I came out to my family, there was a point when I had told them and they weren't happy about it. My mother actually Googled the word "gay" and my name and there were so many posts that came up and she was horrified. Like even things that I had done voluntarily for an organisation and all these articles or whatever that I had written on it. So then I actually had to write to Google and get them to get it off the cache and all sorts of madness. So that was whole drama until I got it off.

Again, this participant was forced to literally digitally erase a history of her subjective involvement with LGBTIQ issues – her activist and academic work – due to her family's "horror" that such things were visible online.

Family surveillance, as these women understand it, is a means of disciplining them and curtailing their online visibility and expression. Their families' desire that no one should be able to see their "queer" markers is clearly not just a technical issue of making them scrub and sanitise their online engagements. Family surveillance did not always operate through incidents. It was manifest through a more generalised consciousness of surveillance, in the sense of an awareness of what their families would disapprove of their doing online, such as being "publicly" and visibly queer, being involved in LGBTIQ advocacy and academic work, and so on.

It is important to record that this was not every woman's experience. Some, like Rekha, pushed back against the idea that family could be inhibiting in the online space, saying "I am an adult now so I don't have my parents looking into my business". Others, like Pushpa, did not feel inhibited because they put their faith in knowing and trusting their families: "In my family there are a few people who know about me. They don't know that I am lesbian but they accept the way I am. Because of that they have no issues. They are all on my Facebook. Because they love me I don't think that they are surveilling me. I know that within my family how they think about me so because of that." Still others, like Thusitha, asserted their agency fiercely and refused to recognise the possibility of feeling inhibited by family: "I have added my family members onto my Facebook. If they have a problem with it then it's their problem and not mine. If they want to remove me they can ... I think because there was no issue for me from home ... I think let anyone think what they want it doesn't matter to me. I was like that then and I am still like that now. I don't restrict myself when I need to express myself, just because my friends or family are on Facebook."

It is important to record that, for some participants, family surveillance was felt affectively, as "oppressive", as a matter of forcing one to "restrain" oneself, because the issue at stake, as Kala noted, is nothing less than the question of "how open you are about who you are ... your authenticity". Family surveillance was seen to disrupt this capacity. As Kala noted about the affective toll it took on her after she had to change her online engagement at her family's request:

2 Women's Support Group. (2014). *Not Gonna Take It Lying Down*. Colombo: Women's Support Group. <https://www.scribd.com/document/214827257/Not-Gonna-Take-It-Lying-Down-English>

After that I was very careful as to what I put out there. It was fun for me, for me it was a form of self-expression, like it's tough, it's a constant balance, it is at a psychological level, you're always making those choices. And I think as a gay person it is unfortunate, in a sense, that you have to do that because a lot of other people will not think of it at that micro level, as to what the hell they are doing every time they post something on Facebook.

Similarly, Kishani, was also concerned about her family finding out via Facebook about her relationship with another woman. "I worry about it because that's not the way I want them to find out," she said. "Especially Facebook, it doesn't feel like it would have my back at any point. The most I protect myself is on Facebook."

Family surveillance: "Fun"/"authentic"

These views also provide an important insight into a certain understanding of online family surveillance that requires interrogation. In attempting to represent that surveillance, participants such as the one quoted above, tended to construct the online space as an arena of being playful, ironic, and provisional about one's expression of gender and sexuality, and the family as the disciplinarians who constrained that possibility because they take everything that is said online at face value and in earnest and miss the point that "play" and "fun" are defining features of online interactions.

There is a complex set of assumptions behind this understanding. One strand concerns the presumption that family surveillance is associated with the family's lack of social media literacy. This is the rather condescending idea that older members especially, perhaps because they are from an "analogue" generation, misread the operation of digital signifiers of gender and sexuality in the online space and are unable to grasp that the drag king outfit "was fun for me, it was a form of self-expression" rather than a strict expression of gender or sexual identity. In other words, they do not "get" the notion that the online space is the space of performativity – what you see is not what you get, but only a curated version, one product of an attempt to express oneself. Intersecting with this is also another condescending idea about older family members (the snooping "aunty"), which is that they are not *au fait* with queer politics and performativity.

These assumptions highlight the intersections of gender, sexuality, generational politics, assumptions

about social media performativity, and so on, in the construction of family surveillance. They also highlight what appears to be an important point of incoherence, which is in the juxtaposition of the performative and the "authentic" in Kala's understanding. Kala's emphasis on the idea that she was having "fun" with her drag king costuming, which was misread as her "real" identity by an "aunty" and her mother, brings in her desire to assert the element of gender performativity in the face of what she sees as an older generation's inept reading of how people "do" gender on social media. However, this is curiously out of step with a more essentialist assertion, which is that family surveillance intervenes in "who you are ... your authenticity".

Family surveillance: Changes and shifts

A further crucial insight about perceptions of family surveillance, is that it changes and shifts over time. Those who were not now overly concerned with family surveillance observed that this had not always been so, and that it had changed over time due to various factors such as being "out" to their families and their families gradually coming to some acceptance; being older and, and so on. Lara, who is now out and not overly concerned about family surveillance, recalled how, "a few years ago, I wasn't too cool at that point in my life. I wasn't out. I mean I was out but to closer friends. And I remember a friend made a comment on Facebook [that said I was a lesbian], and I lost it! This is on a platform where everyone else can see it and home can see it."

Shami's mother's pressure had forced her to go the lengths of asking Google to delete any LGBTIQ-related post associated with her (perhaps similar to activating the right to be forgotten), but her circumstances had changed since then. She noted that, now, "rather than family surveillance my fear is of public surveillance. About sharing something that is queer. Or making a post etc. So the public surveillance is more fearful because it is also related to my work and I don't want to be outed at the moment. I am out to my family so it is not an issue at all."

Perceptions and subjectively felt experiences of family surveillance also change over time based on how lesbian women manipulate their online interactions with family members. Mali, Lara and Kishani were representative of a number of lesbian women who chose to manipulate standard Facebook repertoires to send the message that the family did not have the prerogative to observe them, and that, in fact, they could turn the tables and make the family

the object of surveillance. This included selectively adding or not adding family members; adding family but keeping them on limited profile; only adding the “second generation: cousins, my uncle’s son, my uncle’s daughter” (Mali); ignoring family members who posted homophobic posts, and so on. When Mali found “what is known as casual homophobia, I see it in their feeds”, she was incensed. Initially she decided that, for her, “family surveillance ... is about keeping family at bay”. However, she accidentally stumbled upon the fact that “liking” her family’s posts quite intensively could shift the surveillance from her on to them, and make them feel observed, in an aggressively “nice” way. Because of this reversal, the family member in question “stopped kind of posting those comments”, so, “people can also change over time on Facebook”.

What should also not be underestimated in this discussion is the importance of affective changes which are connected to lesbian women coming into their own. Gayani recalled that, “when some injustice happens maybe in relation to a friend or something, I used to speak out because there is an audience usually on Facebook.” She qualified that by recalling her initial apprehensions that, “the issue with Facebook is that you have your aunts and uncles and neighbours and everybody and then you are like hmmm.” But looking back now, she felt that she had grown out of feeling the pressure of family surveillance as she had before, by a sense of being an older woman and not as easily inhibited or intimidated. Describing that process of coming into her own, she said:

There was a point in time in my life where when I was younger that I was very scared to speak out on LGBTIQ stuff because I knew my aunts and uncles were on Facebook. I did not want to put like let’s say a gay pride flag or my profile picture or something because I did not want to be outed. So that was an issue. But now I am like what the fuck, kind of thing. So it’s interesting how that evolves over time, the experience. Now that I have passed 30, I am less scared to talk on Facebook. I don’t bother anymore with restricted lists [when I post comments].

Public surveillance

Narratives about public surveillance were also closely associated with what many lesbian women said about their use of the online space for information seeking, networking and advocacy. Concerns about how their professional lives might be affected were

voiced by many. Again, Facebook was cited by most participants, as the site which they had to use very carefully because of potential surveillance by colleagues and others connected to their workplace. A common anxiety was about never being sure (or able to ensure) that they could filter their audiences appropriately in each instance that they might post something that could be the object of surveillance by their workplace and result in dire consequences. Rapti said:

How do you then filter your audiences depending on the kind of work you do as well? I think in my profession, in terms of the content that I post and people getting to know ... and the legal and social background in this country ... I am a very passionate person, I feel strongly about things. Not that I vocalize them, but in terms of what I share I don’t necessarily think much about it. But that does come into mind quite a bit, in terms of how that then translates into reality, for my lived experiences.

Similarly, Mali said:

I have added those who work with me, on Facebook. I am not constantly thinking about if they are there or not but it’s something that I do know is at the back of my mind. Because you think about how much the people in your workplace need to know about you. This is something you need to think about all the time.

These responses highlighted an interesting insight, chiefly that lesbian women did see that the issue of public surveillance was not just a matter of malicious actors or authoritarian states, and that it went well beyond any technical issues of knowing how to protect oneself by adjusting privacy settings. They spoke about it in a much broader sense, in terms of the nature and politics of social media. They had a consciousness that “Facebook is a medium of surveillance”, and not a neutral platform on which a few aberrant actors will create problems by keeping tabs on what others do: “there is a constant surveillance, you’re watched, you’re judged, right, I mean like you said even if it is a political post, even if it is a comment” (Gayani).

There is a range of ways in which participants negotiate this understanding. A number of lesbian women indicated that taking a technical approach to ensuring safety from surveillance is exhausting because they have to think about who their audience

should be each time they post something. This was also not viable for everyone, for the very important reason that the technical solution of adjusting privacy settings is easier to do on laptops and is more fiddly with smartphones, and many lesbian women in the study did not own a laptop or did not frequently use one they owned. It was because she knew that she could not always change her privacy settings easily on her smartphone that Lara, for instance, decided to take a different approach, ensuring that she added certain people when she felt she could not, but placing them permanently on limited profile.

For Thusitha, holding back is not an option. She “is not afraid to publish” information from LG-BTIQ magazines on her Facebook page, and posts her personal information (including her telephone number), with the attitude that not holding to ideas of privacy and accepting that surveillance is built into Facebook is part of the contract that has always already been signed by all Facebook users. But hers was not a fatalistic acceptance. Rather, she felt that the feeling of being cowed by surveillance was not a realistic option if one wanted to use Facebook, since part of the ways of using Facebook was for the user to constantly negotiate with surveillance. “If you are scared, why are you on Facebook?”, she asked.

Others had more ambivalent responses. A number of participants said that they were guarded in how they posted on Facebook, and were not very active around LGBTIQ issues because of concerns about public surveillance. Some, like Lara and Harshi, said that they could not be bothered to do so. “It’s not that I don’t want to be open but I don’t have the energy. I kind of refrain from being too open on Facebook,” said Harshi. Hiranthi recalled that she had much less freedom now than before, to post LGBT information, because of changes in her personal circumstances. She observed:

Because I have become a public figure I am not as out as I was before. So I don’t post as many LGBT or queer posts, whether sharing something or an article I have read or whatever, I am more careful about what I post and what I comment on. And that is something I am juggling with at the moment. So I just want to add that also.

Concurring with her, Rekha said:

I am also involved in public service, our institution has a Facebook page. But I do not like get added onto it because this would directly affect

my job. So there are issues like this when I am using the internet. So I cannot share anything related to LGBT even if I wanted to. I am not free in that sense and there are problems for me like that. And it would be great if these are resolved so that it wouldn’t be an issue for us. I like to share information

At the same time, Rekha also posts her telephone number on her Facebook profile.

A noteworthy aspect of this evolution in how lesbian women experience public surveillance in their use of the online space, pertains to how they themselves subjectively come to terms with it and resourcefully tackle it. Rapti, for instance, who is an instructor at an educational institution, was initially concerned about whether her colleagues or others would see what she posted. She said,

There are people from my institution who have added me on Facebook for a long time ... then after a while then that means they know what I am posting. So that is a bit problematic for me. For a long time because of that I censored myself quite strictly. But now my approach within my institution, is about how to be open minded and critical, like if you cannot handle that on Facebook, then, you know “tough” kind of attitude.

Social networking and dating

Making friends and sustaining friendships are two other central uses of the online space, chiefly Facebook. Some, like Pushpa, said that they “use Facebook mainly to find friends, especially LGBT friends that will be coming through friends of mine, because most of the friends on my list are lesbians.” Others, like Lara, said that they do not actively search for friends on Facebook, and that they usually “friend” people that they already know. Facebook was also used for maintaining a “network” of LGBT friends from different parts of the world. Gayani said, “In terms of LGBT, I think having a network of people at the international level is enabled through Facebook, because I have lived in several countries and then you have friends in several countries.”

Dating

The study probed into whether women used the online space for dating purposes. The general view emerging from the focus group discussion (and confirmed by the online survey), was that online dating in general, and the use of dating apps more

specifically, was not common amongst lesbians, as far as women were aware of the behaviour in their circles. This was confirmed across different age groups. Except for two participants, the others said that they had not and did not actively use Tinder or any other dating apps.

One of the factors cited by a few of the women in the study was that they were in a “committed relationship” (Thusitha) with another woman, which implied that they were not looking to date. However, this was not the only factor, not least because not all women were partnered. Attitudes to dating apps were hinted at as one aspect of it. Mali wanted to affirm that although dating apps were not used, there was nothing to show that lesbians were necessarily averse to them or looked down on women who used them. Citing a small number of cases of some lesbians who were comfortable with using dating apps and had found them fulfilling, she took the view that it offered a space for women to find other women to date. Although this was not entirely free from issues of politics or safety, she felt that that did not entirely gainsay the value of such a space, especially when the space for women to meet one another offline was restricted by structural factors. Thus, “even though we don’t use it, I think it’s a good thing”. Ratna also thought that dating apps were useful as one way for women to find other women to date, saying “I don’t use dating sites, but I have gone to them and searched them and taken a look at them.” Conversely, the views of a few women implied that they were neither aware of nor curious about dating apps; many also didn’t seem to know that there were international dating apps for women only; there was some uncertainty about whether these apps could be used locally.

Dating apps did not receive much emphasis from most of the women in the study, but this did not mean that they did not use the online space for forming emotional and sexual connections. Some stated that they had used the online space quite heavily to date and form relationships. For one woman who had a long distance relationship with her partner, platforms such as Skype, Gchat and Facetime were extremely important to maintain the relationship. Two of the respondents in our interviews – a couple – met and began their relationship online, though not through a dating site or app. They “followed” each other professionally online for a while and then started chatting via platforms like Facebook.

Reputation

There was some anxiety about others’ estimation of you depending on what you post and share, and through the politics you publicly share online etc. A certain amount of caution and forethought is practiced by some of the respondents when it comes to assessing what specific posts may or may not “say” about them to others. This safeguarding of reputation also translates into a sense of surveillance for some, although the implications are very different from what we have discussed above.

Referring to her social media circles, Mali took the approach that “people are very self conscious on Facebook”, and that she was constantly mindful of that when she posted anything, knowing that what she said would affect how her politics were seen and evaluated. She said:

When I share LBT issues on Facebook, I know that there are people who are watching what we share. We have a peer group and they are most often trying to see or they say “ah, you shared this? No point, this is fake news” or this news is “ara anthavadi patthen inna kattiya liyana ekkak” [it’s written from an extremist or regressive point of view] or this information is correct from this side of politics but incorrect from another side of politics.

This sort of surveillance entailed that “we need to think about these things at least three to four times before we share something, because we first think about what people may think about our politics and then act on Facebook. I know”. Mali explained that “this is why I share everything very carefully, because what people think of you also changes when you share something.”

One of the underlying assumptions in this form of surveillance, is that the social media profile is a direct reflection of one’s “real” self and one’s “real” politics. Kala disputed this attempt to form quick and categorical impressions, saying, “people are always going to be like, ‘what is this person about’ every time you say something, post something. Have a cat picture? You become a cat person!”

Anxieties about one’s reputation or how one is perceived – or how one perceives oneself in these spaces – seems also connected to one’s “safety”. One participant deliberately stays out of the way of confrontation because it makes her feel unsafe but also because she believes herself to be someone who cannot win in such a confrontation.

But because I don't actually have the tools to take part in a conversation and defend it in a way that is *intellectual* or where I can definitely be confident about making the point very clear, I don't take part. But just reading somebody else's comment – just reading itself is harassment. that's enough, that's the most I can take (laughs). (Kishani)

Safety

It became clear to us that many of the lesbian women we spoke with did not approach online "safety" in a traditionally technical sense. There were certainly anxieties about risk in terms of online engagements, but what we highlight is the fact that most emphasised the value of prudence in their approach, which included the technical but was not limited to it. A more integrated understanding of being prudent in one's online engagements was seen as a more empowering perspective for lesbian women over approaches that encouraged technical measures that were defensive or encouraged feelings of being victimised and afraid.

It was evident that many of the respondents were consciously prudent in their use of various apps and social media platforms for different purposes, particularly in terms of sharing content privately or for holding private group chats. They were clearly well-aware of privacy concerns around platforms such as Facebook. For instance, Pushpa highlighted how her group of lesbian friends began connecting with one another through a space like Facebook which facilitated such networking but was known to be relatively "unsafe". Once trust had been formed and an offline meeting had taken place, they deliberately exited their Facebook group, transitioning the conversation to another online space which was perceived to be one that they had more control over, and which was more private and "safer", such as Viber. This was only one example of how most of the participants creatively manipulated multiple online platforms synergistically for their varied purposes.

It is important to note that, except for one participant, none of the other lesbian women had attended digital safety trainings, as stated in the online survey. It is safe to assume that their knowledge of online privacy and safety is almost exclusively derived from experience, both personal and collective. For instance, Pushpa said:

In terms of those lesbian women who are on Facebook or on the internet, if there is some kind of issue, say we hear of such an issue, we tell

them what they should do. And many times I have told people to adjust their privacy settings. I know a lot of people who get on Facebook and still don't know how to adjust their privacy settings. So for them I would make a step-by-step screenshot and send it to them to make their privacy settings. So the group of friends that are with me have adjusted their privacy settings accordingly, and even though I haven't faced any issues, I know of the issues faced by my friends. Because of that I have given them advice on how to adjust their privacy settings. Who should they accept on Facebook and who they shouldn't and what they should do etcetera. I have informed them of it."

Strategies

We observed that their "prudence" has led to many of these women developing simple and very "practical" approaches and strategies to remain safe online. Some of these strategies were:

- Adding family members on limited profile
- Adding only "second generation" relatives (i.e. their peer group), not older relatives
- Adding someone only if there are mutual friends or if there are connections amongst the mutual friends
- Not adding relatives / family members at all
- Holding back on engaging / commenting in conversations about sexuality
- Holding back on posting content about sexuality
- Holding back on engaging / commenting on posts made by family members or relatives which oppose their own views (e.g. Religious posts)
- "Liking" political posts/content by others which reflect what one would want to say, in lieu of actually commenting
- Keeping posts pithy and short in order to avoid being drawn or baited on them
- Not taking objectionable comments head on, but using an oblique discourse which makes the point but is more legible to one's peer group than to the person making the comment
- Setting up collective action – "alarming" other friends if there is someone suspicious online

- Giving each other tips on things such as “privacy settings”
- Making judgements about not imperilling other lesbian women by posting content which identifies them

Conclusion

We found that many, if not all, of the lesbian women we spoke to, hold perspectives on their online safety which perhaps run contrary to the stereotypical narratives and beliefs about how women/women with diverse sexual orientations and gender identities, approach online engagements.

A number of them acknowledged that their online engagements were constrained, and that these were specifically gendered and sexualised experiences. Some of the respondents were not actively advocating on right-based topics online, or sharing or commenting explicitly on content directly related to sexuality and sexual rights on a frequent basis. They simply did not engage with these conversations online, sometimes out of an anxiety about facing homophobic trolling, but also because this was not how they used those tools.

However, while these constraints shaped how they engaged online, at personal, affective and structural levels, many also took pains to tease out the different strands in their experiences, so that we did not simply get a homogeneous and monolithic picture of oppression and struggle. They were particularly adept at showing how power flowed in uneven ways in the constraints placed on them, and how they were able to manipulate, disrupt, negotiate and manage their use of the online space in those interstices.

They focused on the importance of being well-informed; pragmatic about surveillance and constraints; not giving into fear; being prudent about safety, rather than defensive and victimised; being vigilant when they had to be without over-emphasising it; understanding that their own consciousness of the constraints (particularly surveillance) also shifted over time and was not eternal; taking a holistic view to surveillance, including recognising that there were structural factors that enabled it on social media, and so on.

What is important is to note that none of the group had any experiences with digital safety trainings, as we said before, and their knowledge seemed to come from a more subjective place, honed through lived experience and learning from others.

If we were to examine traditional digital safety trainings and how they are carried out, they largely follow a strictly “technical” approach to safety.

Trends have changed in digital safety trainings, of course; increasingly trainers are adopting “holistic” or “integrated” training practices: “The blending of digital, physical and psycho-social aspects of security may be called ‘holistic’ or ‘integrated’ security”.³ But these are new practices; until recently, the prevailing attitude among many digital safety trainers was that the solution is purely technical.

Traditional digital safety trainings typically “include hands-on installation and use of tools.”⁴ A critical research about digital safety trainings for human rights defenders (cited in this paper), produced some findings about the ways in which traditional digital safety trainings are carried out and some of the perceived causes behind their reduced efficacy.

“The most overwhelming and common finding across both studies was that digital security has to be taught within communities and within existing networks and collaborative structures,” writes Stephanie Hankey, from the Tactical Technology Collective. “In our view, the research showed that digital security taught in a one-off encounter, or on an individual basis rarely works. Community or collective learning is an essential element on multiple levels.”⁵

In a sense, her words echoed one of our key findings: the lesbian women we spoke with learned to look at “safety” from their own experiences but also largely through sharing experiences, tips, knowledge and a sense of collective responsibility for each other’s safety as well as their own.

In the Tactical Tech research, they observe how the traditional “fear-based, tool-centric” model of digital safety trainings is already being reconceptualized in many circles, as this model of training has proven over time to be ineffective and unethical.

In addition, we would also like to offer up the notion that this traditional model of “fear-based, tool-centric” digital safety trainings is gender-blind and inherently male-centric in its approach to technology and digital safety, often leaving out a range of lived experiences and knowledge of diverse peoples, on navigating and managing technological tools and digital spaces.

Findings which emerge from studies like this one show us a contrary picture; that so-called

3 Waters, C. (n/d). *Digital Security Trainers’ Practices and Observations*. Berlin: Tactical Technology Collective. <https://secresearch.tacticaltech.org/digital-security-trainers-practices-and-observations>

4 Ibid.

5 <https://secresearch.tacticaltech.org/background>

“marginalised” persons, such as the lesbian women in this study, use the internet and online tools every day in multiple ways, while thinking creatively and practically about their safety and the safety of others in their communities. It was clear that these strategies are constantly evolving in ways that align dynamically with changes in their everyday lives, as well as in their practices and habits online.

Digital safety strategies and narratives which do not address everyday realities and the specific ways in which lesbian women use the internet, will not feel relevant to them. Furthermore, for many of the women, the technical approach to safety did not adequately address the broader issue of the gendered and sexualised surveillance of women.

Privacy and safety concerns were clearly prevalent in our respondent group but what we found was that more often than not, they relied on a number of self-taught tactics – and not only the technology – to come to their aid. The lived experiences and knowledge of women such as those in this study need to find their way into how technologies are designed and managed; how digital safety is conceptualized and how digital safety trainings are designed and implemented; and finally, into policy around digital safety, privacy and autonomy.

Recommendations

To the Government of Sri Lanka

- Repeal Sections 365 and 365A of the Penal Code.
- Reform Section 399 of the Penal Code to explicitly exclude transgender persons from the scope of “cheat by personation”.
- Clarify the offences contained in obscenity and profanity laws, and their applicability to the online space.
- Ensure that all laws affecting online speech and online privacy are “necessary in a democratic society”, even if this means, in some cases, total abolition.
- Amend the Telecommunications Regulatory Commission Act (as amended in 1996), to specifically exclude the commission’s power to oversee surveillance measures in individual cases. Require any general evaluation of an internet service provider’s (ISP) compliance with surveillance requests, if provided for, to be transparent and in the public domain.
- Establish a separate body, either judicial or quasi-judicial in nature, to oversee ISP compliance with surveillance measures. Ensure that such a body will be comprised of individuals with adequate expertise in human rights and law enforcement and that its members will be independently appointed and secure in their tenure. Ensure the availability of judicial review against any measures authorised by such a body. Subject the body’s conduct to a general periodic review by the Human Rights Commission of Sri Lanka.
- Ensure that *all* online surveillance measures are subject to the approval of an independent body, such as the body recommended above; in no case should an investigating official have unilateral authority to order or initiate online surveillance measures; if exceptions are made for exigent circumstances requiring quick action, ensure that subsequent judicial or similar independent approval of such action is mandatory, within at least 48 to 72 hours of such time the action first goes into operation.
- Ensure that surveillance measures carried out through intermediaries (such as ISPs) are only allowed where necessary, after less intrusive alternatives have been considered and shown to be ineffective or in some other way detrimental to the legitimate aims pursued by the measure.
- Enact legislation requiring ISPs to notify users of surveillance measures as the general rule; if exceptions are to be applied to this general rule, ensure that the application of exceptions is authorised by an independent body based on their necessity, and that the applicability of the exceptions is reviewed periodically. In no case should an exception be applied indefinitely or terminally.
- Ensure full compliance with the Convention on Cybercrime and the International Bill of Rights in all laws related to internet regulation and surveillance.

Law enforcement agencies

- Enact laws that guarantee the safety and inclusiveness of the online space, including laws that penalise *persistent and/or particularly egregious harassment of individuals based on their identity* (such as race, religion, gender identity, sexual orientation, national origin). Ensure that such laws adequately define the prohibited types of speech and provide intentionality as an essential element of the offence. Ensure that the penalties imposed

on wrongdoers are proportionate, and serve the purpose of promoting public order and respect for others' rights in the online space.

- Enact laws that criminalise the unauthorised disclosure and/or publication of content shared between private individuals. Ensure that such laws focus on and criminalise the aspects of abuse, harassment and exploitation related to such acts, and the violation of privacy related to such acts. Shift the focus away from notions of "obscenity" and "profanity," in such cases.
- Strengthen existing redress agencies (such as SLCERT) to record and respond to online harassment faced by people of diverse sexualities and gender identities in Sri Lanka with full confidentiality. Ensure that victims seeking redress may hold such agents to account (through judicial review or otherwise), in terms of how reports by victims are received, and what actions are taken in response to such reports.
- Develop and implement guidelines for CID Cyber Crime Division that guarantees non-discrimination based on gender identity and sexual orientation and protects confidentiality.
- Investigate complaints of online harassment or threats against people of diverse sexual orientations and gender identities and ensure fair and impartial investigations of the complaints that hold perpetrators accountable to the fullest extent of the law.
- Take measures to ensure that all law enforcement officers respect the right to non-discrimination on grounds of sexual orientation and gender identity.

Internet service providers

- Develop and implement guidelines that are non-discriminatory on grounds of sexual orientation and gender identity, particularly when transgender persons obtain services, and where sexuality or gender minorities are affected by adverse legal procedures.
- Link regulatory compliance with ISPs' overall branding strategy (albeit in a manner respecting the privacy rights of individual customers). Ensure that the public is informed of the government's various surveillance powers and measures; adopt policies that prioritise the rights of the customer in all cases except where government agencies have followed and complied with the necessary procedural requirements.

Civil society organisations

- Document both online and offline experiences of people of diverse sexualities and gender identities and advocate with the Government of Sri Lanka for legal and policy reform related to the rights of people of diverse sexualities and gender identities in Sri Lanka.
- Strengthen partnerships and referral systems with government agencies that provide redress for online harassment.
- Develop more effective information, education and communication around existing laws, policies and services that are related to internet use, so that people of diverse sexualities and gender identities in Sri Lanka know when their rights are violated online and are able to seek redress when required.
- Develop strategies to increase knowledge on cyber safety among people of diverse sexualities and gender identities in Sri Lanka.
- Adopt a general trilingual policy in all online communications and interventions to ensure inclusiveness.



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