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Freedom of expression and Gatekeeper Theory

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ABSTRACT

This paper analysis that access to information and free flow of information needs to be seen as significant part of our freedom of expression jurisprudence. In particular, it highlights the role played by information gatekeepers in the free circulation of information. Starting from the landmark judgment by Supreme Court in which the strict liability of gatekeepers was used to restrict the circulation of obscene material, up to the current system for government ordered blocking of content by internet intermediaries in India, using information gatekeepers to control information access. Our freedom of expression norms need to take this into consideration in addition to their focus on the rights provided by the Constitution to every citizen, since information gatekeepers can be used as tool to censor speech in an opaque fashion stifling the voice of dissent or disagreement or suppressing the democratic right to question the acts, plans and policies of the government that leaves little scope for accountability. The freedom of the press, while not recognized as a separate freedom under Fundamental Rights, is embedded in the freedom of speech and expression. The Supreme Court has described this freedom as the "ark of the covenant of democracy".

INTRODUCTION

The freedom of speech and expression has been defined as "the very life of civil liberty" in the Constituent Assembly Debates.[1] The freedom of the media, while not considered as a separate freedom right under Fundamental Rights'[2] is covered under the freedom of speech and expedition[2] Under Article 19(1)(a) of The constitution of India. The Supreme Court has described this freedom as the "ark of the covenant of democracy".[3]

The freedom of the expression serves the bigger purpose of the rights of people to be informed of a larger band of facts, opinions views. It is the medium through which people gain access to new ideas and information, a fundamental component of a functioning democratic system Thus, "the survival and blossoming of Indian democracy owes a great deal to the freedom and expression of our media."[4]

[1] Constituent Assembly Debates: Official Report, (Delhi, 1946-1950), VII, p. 18.
[2] *BrijBhushan and Another vs. The State of Delhi*, AIR 1950 SC 129; *Sakal Papers (P) Ltd vs. Union of India*, AIR 1962 SC 305.
[3] *Bennett Coleman & Co.* v *Union Of India*, AIR 1973 SC 106.
[4] Amartya Sen, "The glory and the blemishes of the Indian news media", The Hindu, April 25, 2012

The media play a important role in exposure the truth and public opinions, but the fundamental principal of freedom of expression has been misunderstood and misused more each day. Media law covers an area of law which involves media of all types like computers, television, film, music, publishing, advertising, internet & new media, etc., and stretches over various legal fields, including but not limited to corporate, finance, intellectual property, publicity and privacy, Advertising, Broadcasting, Censorship, Confidentiality, Contempt, Copyright, Corporate law, Defamation, Entertainment, Freedom of information, Internet, Information technology, Privacy, Telecommunications etc. According to recent news, Indian Media & Entertainment Industry is to touch 1,457 billion by 2016.

"No right comes as free right every right comes with a duty" The affection to censor speech is not rare to the government in India. From time to time, citizens approach courts claiming, that fellow citizens be protected from the undignified influence of certain kinds of speech. One such citizen, **Kamlesh Vaswani,** has knock the Supreme Court of India to necessitate the Indian government to *make sure* that no online pornography is visible in India[5].

On the plea of Mr. Vaswani's order would be impossible without via Internet intermediaries to regulate substance. This is for the reason that vagueness and the trance-jurisdictional nature of the Internet makes it complicated to spot and trace all the people who circulate pornography on the internet (especially outside the countries) and make them obey the rules with Indian law. Therefore, the only choice before the government is to necessitate Internet intermediaries to make sure that they pass through a filter all pornographic content.

This case brings the **question of online intermediary liability** to filter obscene content from its very source where it all introduced. Intermediary liability was first recognized as a grave issue in India when the judiciary tried with the *Avnish Bajaj* v. *State* case which also referred to as the 'Bazee.com case',[6] which required it to decide whether an intermediary can be held liable when it without knowledge and without intention facilitates the circulation of obscene content. By asking for wide-ranging amputation of pornographic content from the portions of the Internet accessible from India, Vaswani's prediction reopens the Avnish Bajaj question of strict liability of intermediaries.

This paper explores intermediary liability in India from the perspective of the right to freedom of expression and the gatekeeper theory. It begins by stress that preliminary intermediary liability questions arose when the Avnish Bajaj case came up before the High Court of Delhi, and after that discusses intermediary liability of a gatekeeper. This paper then moves on to discuss the legal grounds that were available to the judiciary at the time of hearing Avinash Bajaj.

These legal fundaments were derivated from the Indian Penal Code, 1860 ('IPC'), and from relatively un- interpretation by the IPC in the otherwise widely known Supreme Court judgment in *Ranjit Udeshi*v. *State of Maharashtra* ('Ranjit Udeshi'). [7] It then proceeds to discuss how the 2008 amendment of the Information Technology Act, 2000('IT Act') tried to moderate this information gatekeeper

liability law for Internet mediators by offering them conditional protection. This amendment and its new version of gatekeeper liability applicable to intermediaries are briefly defined in the last part of this paper. Although the Indian Supreme Court's judgment in Shreya Singhal v. Union of India [8]leave it unanswered.

At the end, the paper proceeds to freedom of expression norms and critically analysis that emerging jurisprudence in India needs to focus more on the possessions of gatekeeper liability on the free flow of information. This means making the distinction between original speakers and those who enable their speech to reach a wide audience. Since the focus here is on gatekeeper liability in the context of the free flow of information, this paper proceeds on the assumption that some kinds of speech and content are clearly identifiable as illegal, some are clearly exclusive as absolutely legal while legality and constitutionality of some kinds of speech is difficult to ascertain. The constitutionality and the legitimacy of banning pornography or other obscene content will be considered in my next paper.

WHAT IS GATEKEEPER THEORY?

Kurt Lewin coined the word called "**Gate keeping".** It's nothing but to obstruct unwanted and useless things by using a safety tool called gate. Here the person who makes a decision is called "Gatekeeper". At first it is widely used in the field of communication and later it occupies the field of information technology. Now it's one of the fundamental theories in the information and communication studies.

Concept:

The Gatekeeper should decide what information need to move through groups or individual and what information should not move. Here, the gatekeeper are the decision makers who leasing the whole social system. The gatekeeper is having its own preferences like cultural, ethical, social and political. Based on individual or cultural influences they let the information flow to the group and society. Through this practice the redundant, vulgar, rational and controversial information's are removed by the gate keeper which helps to manage the society or a group and letting them in a right pathway. Through this process the unwanted, provocative and controversial content is removed by the gate keeper, which helps to protect the cultural sensitivities of society or a group and letting them in a right path. In home mother plays the vital role and she has to decide what their kid's needs and what should avoid.

In news medium editor play vital role. He has to decide what kind of news items will publish and what should not. Every day the news channel receives various news items from all over the world. The channel have its own ethics and policies through this the editor decide the news items for publish or aired. In some cases few news items are rejected by the editor due the organizations policy or the news items which are not suitable for publish. The News channel has its own policies and ethics through which the editor decides, which news items to be published or aired. In some cases few news items are discarded by the news editor due the organizations policy and standards.

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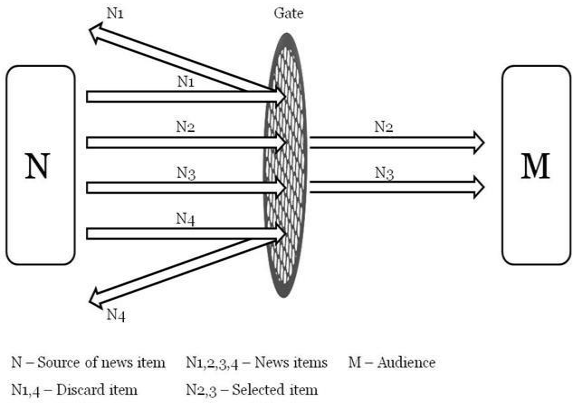

Gate Keeping Theory

LIABILITY OF GATEKEEPER: AN INTRODUCTION

It seems quite often these days that the service providers circulate vulgar pictures, pornographic videos and obscene material openly. Today if a six year old child what than he can easily access these materials. India is the second youngest nation and digital media is influencing our society very much so we need to behave more responsibly rather than self centered

In 2004, we all were shocked when a seventeen year old school boy filmed a sexual act featuring himself and his classmate (also a minor). The video, circulated through mobile phones for some time, eventually ended up listed for sale on Baazee.com. The incident came to be known as the 'DPSMMS Scandal'. [9]Baazee.com was a website owned by Ebay, and which much like Ebay, served as an online platform where sellers and buyer could transact. The person who listed the video for sale online was arrested. However, the Managing Director of the company that owned Baazee.com, Avinash bajaj[10] was also arrested. The judgments resulting from his arrest contain the first prominent consideration of intermediary liability by the Indian judiciary.

The Avnish Bajaj condition was a classic illustration of the online intermediary liability problem. The MMS under question was exactly the kind of material that ought to be removed from the web immediately but in fact It was sold and circulated swiftly through mobile networks and shared by multiple people. Tracking the many individuals who circulated illegal content using market platforms, email, social networks, peer to peer networks or texting services is very difficult, especially if their numbers are multiplying speedily. This can be cumulate if government agencies find that their target-users are located in other countries that are not subject to the jurisdiction power of the judiciary. User vagueness creates an additional layer of difficulty.

Therefore, the legal instrument focuses not only on offenders, but also on the intermediary, without whom the wide circulation of this material would not be feasible. This is in keeping with the principle that when it is difficult to control offensive conduct through the primary misfeasors, [11] it may become necessary to regulate their conduct through intermediaries.[12]

INTERMEDIARIES AS INFORMATION GATEKEEPERS & INDIAN LAW

Making gatekeepers liable for enforcing law is a common choice within legal frameworks. It has been explored in some detail by Reinier Kraakman, who distinguishes it from other kinds of collateral or third party liability by explaining that gatekeepers are private parties who are in a

position to 'disrupt misconduct by withholding their cooperation from wrongdoers'.[13] For example, instead of merely forbidding underage individuals from purchasing alcohol, the law also targets those who sell them the alcohol, since they are gatekeepers facilitating the misconduct; similarly, the prescription system that pharmacists are required to follow leverages their gatekeeping function to control the distribution of certain drugs. It is common enough for states to use 'middle-men' to enforce change in behavior when it is difficult to control the primary offender's conduct directly. For example, since it is difficult to directly compel minors to avoid drinking, the law targets alcohol-sellers, leveraging their gatekeeping function to cut off the supply of alcohol to minors.

Information gatekeepers were used to regulate the flow of information even in the pre-digital world. Publishers and booksellers were held liable for circulating banned publications in many countries including India. India has a particularly pernicious rule criminalizing the circulation of obscene content. This comes from the Supreme Court's judgment in Ranjit Udeshi v. State of Maharashtra, that is well known for its interpretation of obscenity law in the context of D.H. Lawrence's 'Lady Chatterley's Lover'. The other critical element of this judgment received almost no attention – the liability of a bookseller for the circulation of obscene content.

D.H. Lawrence was never prosecuted in India for his book. The 'Lady Chatterley's Lover' case in the Supreme Court was about the liability of the owners of Happy Book Stall, a bookshop at which 'Lady Chatterley's Lover' was sold. The Supreme Court said the booksellers were liable for circulation of the obscene content even if they argued that they were unaware that a book contained such content. Consider what this means: booksellers cannot plead ignorance of obscene content within any of the books they sell, and will be liable nonetheless. The state only has to prove that the booksellers circulated obscene content, and not that they did so knowingly. It is lucky that this part of the Supreme Court judgment went largely unnoticed since it could easily be used by the intolerant file criminal complaints that shut down large bookstores all over the country – all they need to do is look for a few books that the law would categorise as obscene. Booksellers would then have to scour every page and paragraph of each book they sell to weed out the content that might get them arrested – this would make it very difficult to do business.

Although information intermediaries existed in the pre-internet information ecosystem, their role is critical in the context of online content – several intermediaries mediate our access to online content. Some of these, like the gateways through which the Indian network connects to the global network, are located in India, are easy for the government to control since they are subject to onerous licenses, and are few enough in number for the state to be able to control all of them successfully. Other intermediaries like Facebook or Google, are online platforms, and most of these have offices outside Indian jurisdiction.

Discussions about freedom of expression that focus on the direct relationship between the state and the speaker are not helpful in this context. This kind of reasoning tends to ignore the collateral effects of certain kinds of regulation of speech – the 'Lady Chatterley's Lover' case is a

classic illustration of this with its tremendous impact on the liability of all booksellers and later on Baazee.com and other web based platforms.

As the new media make gatekeepers and intermediaries more critical to the controlling the flow of information, we need to focus on other dimensions of freedom of expression if we are ensure that effective safeguards are put in place to protect speech. Our jurisprudence on freedom of the press offers some degree of protection to newspapers so that regulation of their business structure cannot be used to influence their content, but this form of gatekeeper protection is limited to the press. There are information gatekeepers other than the press in India, and it is time that we think carefully about protecting the information ecosystem. Free speech principles need to accommodate themselves to a media ecosystem that is increasingly dependent on information gatekeepers.

Gate- keeping theory should applicable to the Internet has already been discussed in detail by many scholars. [14] In the context of the Internet, intermediary liability is an effort to control online content by leveraging the position of the gatekeepers to flow of information online. The reasoning here is that since online intermediaries such asBaazee.com (or Facebook, Gmail or The Pirate Bay) host and facilitate access to vast amounts of Internet content, and since internet service providers such as Airtel or BSNL physically connect users to the Internet, they are the gatekeepers presiding over the flow of information. Therefore, making these gatekeepers liable for blocking, filtering and removing illegal content, is seen as an effective way to put a stop to the sharing of illegal content. This is particularly appealing in contexts in which the author of illegal content is difficult to identify, or is based in another country, and cannot be located, much less prosecuted, in India. In these contexts, it is very difficult for the government to raise the expected penalties applicable to the wrongdoers. Therefore, direct deterrence becomes ineffective, creating the need to explore third party liability. [15] Reaching the authors or creators of the illegal content would be unnecessary if gatekeepers could be used to ensure that illegal information is not visible in India.

BAAZEE.COM CASE AND INTERMEDIARY LIABILITY IN INDIA

Fortunately, the amendment of the Information Technology Act (IT Act) gave Internet intermediaries immunity from this liability for third party content. The immunity was conditional. Intermediaries that edit or otherwise have knowledge of the content that they transmit are not immune from liability. To remain immune from liability, intermediaries must comply with certain legal obligations to take down content or block it in response to government orders or court orders. These obligations also leverage the gate-keeping function of these intermediaries to regulate online content – internet service providers and online platforms can ensure that certain kinds of content are inaccessible in India

The IT Act, prior to amendment, offered a modicum of immunity from liability to intermediaries. However, this immunity was offered only with respect to liability arising from the IT Act. [16] The implications of only offering intermediaries immunity from liability for offences under the IT Act was that they received

absolutely no protection from liability under other legislation for content that they hosted[17]. This in turn meant that at the time of the DPS MMS Scandal as well as the circulation of the video using Baazee.com, the website was not immune from any liability arising from the IPC.

Many may reason that this ought not to be a problem since the web-based platform did not see the content posted by users, and therefore could not possibly have had any knowledge of the distribution of the DPS MMS video. It is fairly unusual for criminal liability to be imposed without mens rea or actus reus of some kind. However, the Baazee.com case was complicated greatly by the fact that in the context of circulation and distribution of obscene content, the question of knowledge or *science* had been interpreted in a peculiar manner [18] by the Indian Supreme Court in 1964.

Over three decades later, this interpretation ended up affecting the Avnish Bajaj case in a manner that prompted a quick amendment of the IT Act. Baazee.com was subject to a strict liability under Indian law for the distribution of the DPS MMS video. Its lack of knowledge of this distribution was irrelevant in the eyes of the law and the limited immunity from liability provided by the IT Act was inapplicable.

GATEKEEPER'S STRICT LIABILITY

Although the intermediary liability issue has been discussed extensively in the context of the Internet, the gatekeeper liability question has gone largely unnoticed for decades in the context of the traditional sale and circulation of books in India. Section 292 of IPC contains gatekeeper liability: it punishes those who sell, distribute and circulate obscene content. This is similar to the system followed in other countries. [19] However, the law in India is distinct in its application of a *strict liability* standard to anyone who sells or keeps for sale any obscene object as contemplated under this particular part of the penal code.[20]A bookseller's lack of knowledge that there is obscene content in a particular book that it is circulating may at best be seen as a mitigating factor, but will not exclude liability.[21]

The implication of this *strict liability* standard is that the prosecution does not have to demonstrate that a defendant bookseller had any knowledge of the obscenity of the content of books in her possession. [22] This standard effectively places an obligation on booksellers to check the contents of every book that they sell, to ensure that there are no obscene passages within them. In addition to affecting the volume of books that a bookseller may transact in, zealous implementation of section 292 of IPC would result in risk aversion on the part of booksellers and publishers, and a chilling effect on their willingness to publish books. This would affect authors 'access to the public sphere.

In Ranjit Udeshi case (*Ranjit Udeshi* v. *State of Maharashtra*) it was held by the supreme court that freedom of expression norms and argues that emerging jurisprudence in India needs to focus more on the effects of gatekeeper liability on the free flow of information. This means making the distinction between original speakers and those who enable their speech to reach a wide audience[23].

This is a critical judgment not just for the law of obscenity in India, but also for the liability of the gatekeepers of obscene content. The Ranjit Udeshi judgment did not confine itself to the

question of whether the contents of the book were illegal[24]. It also addressed the question of whether the four proprietors of Happy Book Stall might be found liable for the contents of a book that they imported and sold, even if they had no knowledge of such contents. In this context, the Supreme Court of India rejected the proposition that a book seller's lack of knowledge should be taken into account for liability under section 292 of IPC, reasoning that "if knowledge were made a part of the guilty act (actus reus), and the law required the prosecution to prove it, it would place an almost impenetrable defense in the hands of offenders. Something much less than actual knowledge must therefore suffice". [25] Since the focus here is on gatekeeper liability in the context of the free flow of information, this paper proceeds on the assumption that some kinds of speech and content are clearly identifiable as illegal, some are clearly identifiable as perfectly legal while legality and constitutional tenability of some kinds of speech is difficult to ascertain[26.] Neither the constitutionality nor the legitimacy of banning pornography or other obscene content is considered in this paper.

THE STRICT LIABILITY STANDARD AND ITS CONSEQUENSES

This Ranjit Udeshi strict liability standard is what later placed Baazee.com in a very difficult position. The Delhi High Court was bound by the Ranjit Udeshi ruling while considering the potential culpability of Avnish Bajaj, the Managing Director of the company that owned Bazee.com, in the context of the DPS MMS Scandal. [27] The Delhi High Court judgment therefore notes that the "prosecution did not have to prove that the accused had knowledge that the contents of the books being offered for sale were in fact obscene since the deeming provision in §292(1), IPC stood attracted". [28] This was the inevitable consequence given that the intermediaries' immunity did not cover liability under the penal code, and that Ranjit Udeshi had long fixed a strict liability standard in the context of section 292. Luckily for Avnish Bajaj, the Supreme Court acquitted him on procedural grounds that had no bearing on the strict liability question. [29]

TRANSFORMATION FROM STRICT LIABILITY TO DUE DILIGENCE: UNDER IT (AMENDMENT) ACT, 2008

This amendment is significant. It brought the Indian intermediary liability regime, or more specifically, the safe harbor regime, closer to the international standards, particularly in the form contained in the European Union Directive on E-Commerce.[30] Before the amendment, the safe harbor protection was very limited, extending only to protection from liability under the IT Act, which meant that liability under other statutes like the IPC still left intermediaries vulnerable to prosecution. The 2008 amendment ensured that intermediaries received protection from liability 'under any law for the time being in force'. This has finally excluded the application of the IPC, and has therefore excluded the strict liability regime that is attached to it.

The amendment also shifted the burden of proof for the purposes of intermediary liability. Prior to amendment, the intermediary

had to prove that "the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention "to avail of the safe harbor protection. However, the amendment has ensured that the intermediary receives safe harbor protection as long as it does not initiate transmission, select the receiver of the transmission and select or modify information contained in the transmission, and it observes 'due diligence 'while discharging its duties. Therefore, the default position post amendment is that the safe harbor applies without evidence to the contrary. It would be up to whoever brings action against the intermediary to prove that it did not satisfy the conditions for protection from liability.

(a) Section 66A of the Information Technology Act, 2000 is struck down in its entirety, being violation of Article 19(1) (a) and not saved under Article 19(2) (Shreya Singhal v UOI 2015)[31]

(b) Section 69A and the Information Technology (Procedure & Safeguards for Blocking for Access of Information by Public) Rules 2009 are constitutionally valid.

(c) Section 79 is valid subject to Section 79(3) (b) being read down to mean that an intermediary upon receiving actual knowledge from a court order or on being notified by the appropriate government or its agency that unlawful acts relatable to Article 19(2) are going to be committed then fails to expeditiously remove or disable access to such material. Similarly, the Information Technology "Intermediary Guidelines" Rules, 2011 are valid subject to Rule 3 sub-rule (4) being read down in the same manner as indicated in the judgment.

Viewed from this perspective, the IT Act lowers the gatekeeper liability standard in the context of obscene content — it requires 'actual knowledge' (which can be provided to the intermediary via either a government order or a court order [32] for an intermediary to become liable. Unlike publishers and book sellers who continue to be subject to the strict liability principle under S.292of the IPC, Internet intermediaries that meet the conditions listed under S.79of the IT Act are now exempt from liability to the extent that they have no knowledge of infringing content.

The degree of care expected by the use of the phrase 'due diligence' was unclear until the Information Technology (Intermediaries Guidelines) Rules, 2011 were passed, clarifying its meaning. These rules require intermediaries to remove 'grossly harmful, obscene, blasphemous, defamatory, disparaging, harmful to minors and any unlawful content' within 36 hours of receiving actual knowledge that it is being stored, hosted or published on its system. [37]This created a 'notice and take down' regime. The Lok Sabha Committee on subordinate legislation asked that the takedown process be clarified and that safeguards be introduced to protect against abuse of process. [33] Some safeguards were eventually introduced in Shreya Singhal v Union of India[34], in which the Supreme Court clarified that Internet users must give intermediaries notice of a court order requiring removal of content, to obligate intermediaries to comply. This should put a stop to the practice of direct third party notices to intermediaries demanding that they take down content.

CONCLUSION

The problem with the notice and takedown regime, before it was mitigated by the *ShreyaSinghal*ruling[35],was that it created incentives for Internet intermediaries to take down content whenever they received notice. This is because after receiving notice that alleged that particular content was illegal, the intermediary, typically a private party, had to decide whether to take it downer risk liability under the gatekeeper liability system that required it to aid the state in removing illegal content. This makes the intermediaries 'proxy censors'.[36]Private proxy censors tend to be more focused on protecting themselves from liability than on ensuring that speech is not unjustly censored, and are less likely to be held accountable for their decisions to remove content, however disproportionate.[37]

The IPC and the IT Act both attempt to leverage gatekeeper liability to affect the behavior of primary offenders. This is supported by some of Kraakman's criteria for evaluating forced gatekeeping. [38] For example, Kraakman suggests that forced gatekeeping may be warranted where private gatekeeping incentives seem to be missing or inadequate for the large part, and in some cases, when the lack of gatekeeping can result in missing or inadequate incentives. [39] However, forced gatekeeping in the context of flow of information seems to fall short of other factors that Kraakman lays down for the flourishing of a gatekeeper liability system, primarily the requirement that that the gatekeepers should be able to detect misconduct at reasonable cost. [40] There is significant potential social cost and collateral damage in making intermediaries liable for the content they host and transmit, and these social costs need to be considered before such a framework is adopted.[41]

This reasoning maps particularly easily enough onto the intermediaries' regulation by the Indian IT Act since the volume of information passing through these intermediaries is far higher than the volume of information handled by booksellers. Consider the number of users on Facebook or the number of subscribers that access the Internet through Airtel. The intermediaries are not in a position to pay careful attention to each user. The volume of information that they manage is enormous in contrast with the material that the editor of a newspaper sifts through, carefully curetting content and reading every piece that is published. While some websites apply editorial judgment before publishing content, these are consequently difficult to access for a user looking to publish her material.[42]

However gatekeeper liability can take forms other than strict liability. The procedure for taking down content under the Information Technology (Intermediaries Guidelines) Rules, 2011 and the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 both leverage information gatekeepers to control online content. Depending on the nature of the intermediaries involved, gatekeeping may also fall short of another of Kraakman's factors: gatekeepers who can and will prevent misconduct reliably. [43] Several gatekeepers may not have the resources or the technological capacity to achieve the requisite degree of targeted blocking or filtration.

Even with the removal of the part of the burden on intermediaries that amounted to a notice and take down regime, intermediaries still perform a forced gatekeeping function when they block or disable information in response to a government order. Here, the intermediary, not the primary speaker or content-originator, tends to be in the best position to contest a badly reasoned or incorrect order. If the intermediary does not contest the order, and fails to notify the content originator that her content is removed because of a government order rather than on the intermediary's own volition, the content originator would have no basis to contest the government order. Therefore, there remains considerable space for collateral censorship by the government, through which an intermediary is compelled to remove content, but the content-removal looks to content creators and consumers like a private decision by the intermediary.

SUGGESTION

Contemporary debates on freedom of expression make it clear that freedom of expression is not just about the individual speaker or the merits of speech. Consider the manner in which distribution of Wendy Doniger's "The Hindusand Ramanujan's Three Hundred Ramayanas was obstructed. [44] Neither came up before a court of law for a discussion of the merits of the text or the rights of the speaker. Circulation of both was cut off in response to aggressive pressure from other citizens. [45] The decision to censor was taken by publishers who as gatekeepers had significant control over circulation and who being private parties, had no accountability for their decisions. The Doniger and Ramanujan cases do not benefit from freedom of expression discussions that focus on the direct relationship between the law and the speaker: when and how a speaker's rights may (or may not) be reasonably restricted. This approach leaves out the dimension of the right to freedom of expression which protects public discourse, and which focuses on the relationship between speech and its audience in a democracy.[46]

The difference between the two approaches becomes more apparent if one thinks of them as 'individual autonomy' and 'democratic self-government', which Robert Post has described as different constitutional values embedded within the right to freedom of expression. [46] Much of our freedom of expression jurisprudence (with notable exceptions [47]) has tended to evaluate legal principles affecting speech from an individual autonomy perspective. However, the role that speech plays in a democracy is also an important factor to be considered. This dimension of speech is the reason that press freedom is particularly valued in democracies. The informational role of the media, as well as its role in facilitating public reasoning has both been seen as critical to a democracy. [48] It is high time that we acknowledged that information gatekeepers are also critical to our democracy.

If we are to comprehend the dangers of Internet intermediary liability, and the havoc that the Ranjit Udeshi strict liability principle may wreak if left unchecked, we will need to widen the focus of freedom of expression jurisprudence in India. It needs to expand from being built around individual speakers' autonomy to the more audience -centric norms of free flow of information for democratic self-

government. [49] This would imply a greater focus on the effect of law on the 'gatekeepers' of information such as publishers, newspapers, book sellers, television channels and online platforms that are critical to the free flow of information. Law impacting information gatekeepers impacts the flow of information, and must be considered carefully with a view to the audience's right to vibrant public sphere. It is mistake to focus on whether particular instances of obscene speech are necessary to our constitutional values without considering what effects the law that targets this speech through gatekeeper liability has on other forms of speech, which are unambiguously valuable to our democracy.

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[12] Jonathan Zittrain, *History of Online Gatekeeping*, 19 Harvard Journal of Law & Technology 2 (2006) 253; Emily Laidlaw, *Internet gatekeepers, human rights and corporate social responsibilities*. PhD thesis, The London School of Economics and Political Science; Mann & Beazley, *The Promise of Internet Intermediary Liability*, 47 Wm. & Mary L. Rev. 239 (2005).

[13] Kraakman, *supra* note 8, 56 (discusses how direct deterrence is the ordinary strategy for enforcing legal norms, and that third party enforcement becomes a potential solution when too many wrongdoers are unresponsive to direct deterrence).

[14] The Information Technology Act, 2000, §79 (prior to the Information Technology Amendment Act,

2008) stated that: "For the removal of doubts, it is hereby declared that no person providing any service as a network service provider shall be liable under this Act, rules or regulations made thereunder for any third party information or data made available by him if he proves…"

[15] Multiple authors have noted and criticised this. *See* APAR GUPTA, COMMENTARY ON INFORMATION TECHNOLOGY ACT 296 (2011); V.K. Unni, *Internet Service Providers Liability for Copyright Infringement*, 8 Richmond J. L. & Tech. 13 (2001); Diane Cabell, *Unlocking Economic Opportunity In The South Through Local Content Appendix A: Potential Liability Concerns For An Open Content Exchange Network*, , January 2002, available at: ttp://cyber.law.harvard.edu/openeconomies/oknliability.html; Apar Gupta, *Liability of Intermediaries in India: From Troubled Waters to Safe Harbours*, 13(2) C.T.L.R 60, 62, (2007).

[16] Ranjit Udeshi, *supra* note 2. *See, eg.,*The United Kingdom's Obscene Publications Act, 1959. Ranjit Udeshi, *supra* note 2, ¶ 10. *Id. Id.* RanjitUdeshi, *supra* note 2.

[17]
There are however notable exceptions such as K.M Sharma, *Obscenity and the Law: The Indian Experience through the American Looking-Glass*, 6Hous. L. Rev. 425 1968-1969; Anjali Anchayi l& ArunMattamana, *Intermediary Liability and Child Pornography: A Comparative Analysis*, 5 Journal of International Commercial Law and Technology 1 (2010). Ranjit Udeshi, *supra* note 2, ¶ 1.

[18] Sharma, *supra* note 22, 444 444 (It must however be noted that material from the trial is difficult to access, and that the judgment is not a completely reliable source of whether this argument was actually made or not).

[19] Avnish Bajaj, *supra* note1. v. State, 150 (2008) DLT 769.*Id.*,¶6.10.

[20] Since Bajaj's company was never made a party to the litigation, he could not be held liable as a Director without the company also being prosecuted. See Aneeta Hada v. Godfather Travels, (2012) 5 SCC 661. (Is the preceding sentence an observation in the Hada case? CA: No)

[21] *See* Pritika Rai Advani, *Intermediary Liability in India*, XLVIII EPW 50, (2013).

[22] Shreya Singhal v. Union of India, 2015 (4) SCALE 1. Supra 31

[23] Fifteenth LokSabha, Thirty-First Report of the Committee on Subordinate Legislation (2012-2013), ¶ 49. 2015 (4) SCALE 1 2015 (4) SCALE 1.

[24] This term has been borrowed from Seth Kreimer, *Censorship by Proxy: the First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, Penn Law: Legal Scholarship Repository (2006). *Id.*, 27-33.

[25] Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. Econ. & Org. 53, as extracted in Jonathan Zittrain, *A History of Online Gatekeeping*, 19 Harvard Journal of Law and Technology 253, 256 (2006), 256. *Id. Id.* Mann & Beazley, *supra* note 6, 73-74.

[26] Caravan, *CENSORED! RanaAyyub Article on Amit Shah that DNA axed*, July 14, 2014, available at http://caravandaily.com/portal/censored-rana-ayyub-article-on-amit-shah-that-dna-axed/ (Last visited on November 28, 2014); Newslaundry, *DNA Does It Again*, July 11, 2014, available at http://www.newslaundry.com/2014/07/11/dna-does-it-again/ (Last visited on November 28, 2014).

[27] Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. Econ. & Org. 53, as extracted in Jonathan Zittrain, *A History of Online Gatekeeping*, 19 Harvard Journal of Law and Technology 253 (2006), 256. Ibid.

[28] Jack Balkin, *First Amendment as Information Policy*, 41 Hofstra L. Rev. 1 (2012)

[29] Robert Post, *Participatory Democracy and Free Speech*, 97 Virginia L. Rev. 3 (2011).

[30] Indian Express Newspapers v. Union of India, (1985) 1 SCC 641; Secy., Ministry of I&B, Govt. of India v. Cricket Assn. of Bengal, (1995) 2 SCC 161; UoI v. ADR (2002) 5 SCC 294.

[31] Jack Balkin, *First Amendment as Information Policy*, 41 Hofstra L. Rev. 1 (2012). ; *See also*,AMARTYASEN, IDEA OF JUSTICE 321-337 (2009).

[32] Jack Balkin, *First Amendment as Information Policy*, 41 Hofstra L. Rev. 1 (2012).