

# GATEKEEPER LIABILITY AND ARTICLE 19(1)(A) OF THE CONSTITUTION OF INDIA

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*This paper argues that access and free flow of information need to be seen as significant parts of our freedom of expression jurisprudence. In particular, it highlights the role played by information gatekeepers in the free circulation of information. Starting from Ranjit D. Udeshi v. State of Maharashtra, 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, information gatekeepers are used to control information. Our freedom of expression norms need to take this into account besides their focus on the rights of primary speakers, since information gatekeepers can be used to censor speech in an opaque fashion that leaves little room for accountability.*

## I. INTRODUCTION

The inclination to censor speech is not exclusive to the government in India. From time to time, citizens approach courts demanding that fellow citizens be protected from the corrupting influence of certain kinds of speech. One such citizen, Kamlesh Vaswani, has asked the Supreme Court of India to require the Indian government to ensure that no online pornography is visible in India.<sup>1</sup> Complying with Mr. Vaswani's demand would be impossible without using internet intermediaries to regulate content. This is because anonymity and the cross-jurisdictional nature of the internet make it difficult to identify and locate all the people who publish pornography on the internet (especially those in other countries) and make them conform to Indian law. Therefore, the only option before the government is to require internet intermediaries to ensure that they filter out all pornographic content.

This case brings the question of online intermediary liability for obscene content right back to where it all began. Intermediary liability was first

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<sup>1</sup> Firstpost, *This cultural pollution has to stop, says lawyer who filed anti-porn PIL*, April 18, 2013, available at <http://tech.firstpost.com/news-analysis/this-cultural-pollution-has-to-stop-says-lawyer-who-filed-anti-porn-pil-213585.html> (Last visited on November 27, 2014).

acknowledged as a serious issue in India when the judiciary was confronted with *Avnish Bajaj v. State (NCT of Delhi)*<sup>2</sup> ('Avnish Bajaj'), also referred to as the 'Bazee.com case', which required it to determine whether an intermediary can be held responsible when it unknowingly and unintentionally facilitates the distribution of obscene content. By asking for comprehensive removal of pornographic content from the portions of the internet accessible from India, Mr. Vaswani's petition inevitably reopens the Avnish Bajaj question of strict liability for 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 highlighting the initial intermediary liability questions that arose when Avnish Bajaj came up before the High Court of Delhi, and then discusses intermediary liability as a form of gatekeeper liability. The paper then moves on to discuss the legal principles that were available to the judiciary when Avnish Bajaj was heard. These legal principles were derived from the Indian Penal Code, 1860 ('the IPC'), and from a relatively inconspicuous interpretation of the IPC in the otherwise widely known Supreme Court judgment in *Ranjit D. Udeshi v. State of Maharashtra*<sup>3</sup> ('Ranjit Udeshi').

The second part of this paper teases out the Indian legal system's dangerous approach to information gatekeepers' liability for obscene content by discussing the influence of the Supreme Court's Ranjit Udeshi ruling on the Delhi High Court's decision in Avnish Bajaj. It then proceeds to discuss how the 2008 amendment of the Information Technology Act, 2000 ('the IT Act') tried to mitigate this information gatekeeper liability law for internet intermediaries by offering them conditional immunity. This amendment and its new version of gatekeeper liability applicable to intermediaries are discussed in the third part of this paper. Although the Indian Supreme Court's judgment in *Shreya Singhal v. Union of India*<sup>4</sup> ('Shreya Singhal') came out after this paper was written, the paper has been updated wherever possible without substantial rewriting.

The indiscriminate imposition of gatekeeper liability to control information flows may explain why our legal institutions have continuously made poor decisions about gatekeeper liability from 1964 (when the Supreme Court ruled on Ranjit Udeshi) right up to 2015. Online intermediaries received some respite from this poor decision-making in 2008, when the IT Act was amended to offer them immunity from liability under certain conditions. However, this is limited respite and gatekeeper liability continues to threaten online content. The fourth part of this paper discusses the wisdom of gatekeeper liability in

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<sup>2</sup> *Avnish Bajaj v. State (NCT of Delhi)*, (2005) 116 DLT 427; (2005) 79 DRJ 576.

<sup>3</sup> *Ranjit D. Udeshi v. State of Maharashtra*, AIR 1965 SC 881; (1965) 1 SCR 65.

<sup>4</sup> *Shreya Singhal v. Union of India*, (2013) 12 SCC 73.

the context of internet intermediaries, including the potential impact of such liability on the free flow of information.

In conclusion, the paper returns to 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. Since the focus of this paper is 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. Neither the constitutionality nor the legitimacy of banning pornography or other obscene content is considered in this paper.

## II. INTERMEDIARY LIABILITY AND INFORMATION TECHNOLOGY ACT: AN INTRODUCTION

In 2004, a seventeen-year-old school boy filmed a sexual act featuring himself and his classmate (also a minor). The video was circulated through mobile phones for some time and eventually ended up listed for sale on Baazee.com. The incident came to be known as the ‘DPS MMS Scandal’.<sup>5</sup> Baazee.com was a website owned by eBay, which much like eBay, served as an online platform where sellers and buyer could transact. The person who listed the video for sale online and the Managing Director of the company that owned Baazee.com, Avnish Bajaj, were arrested.<sup>6</sup> The judgments resulting from the latter’s arrest contain the first prominent consideration of intermediary liability by the Indian judiciary.

The Avnish Bajaj situation was a classic illustration of the on-line intermediary liability dilemma. The content under question was exactly the kind of material that ought to be removed from the web immediately. It was circulating swiftly through mobile networks and the internet, thanks to the multiple people sharing it. Tracing the many individuals who distribute illegal content using market platforms, email, social networks, peer-to-peer networks or texting services is very difficult, especially if their numbers are multiplying rapidly. This can be compounded if government agencies find that their target-users are located in other countries that are not subject to the jurisdiction of the national government. User anonymity creates an added layer of difficulty.

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<sup>5</sup> Indian Express, *Sex scandal: Boy who shot MMS clip held*, December 19, 2004, available at <http://expressindia.indianexpress.com/news/fullstory.php?newsid=39787> (Last visited on November 27, 2014).

<sup>6</sup> *Id.*

Therefore, the legal mechanism focuses not merely on offenders, but also on the middle-man or the intermediary, without whom the wide circulation of this material would not be possible. This is in keeping with the principle that when it is difficult to control offensive conduct through the primary malfeasors,<sup>7</sup> it may become necessary to regulate their conduct through intermediaries.<sup>8</sup> Circulation of the content on the internet is dependent on more than one intermediary. Internet Service Providers such as Hathway, Airtel, and Vodafone help us to physically connect with the internet. Web-based service providers and platforms such as Gmail, Amazon, Facebook and WordPress enable us to share content. The essential characteristic of these intermediary entities is that they function as gatekeepers to the undesirable conduct. Intermediary liability is therefore a form of gatekeeper liability, which is used as a governance instrument in multiple contexts.

### A. INTERMEDIARIES AS GATEKEEPERS

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’.<sup>9</sup> 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.

Gatekeeping theory as applicable to the internet has already been discussed in detail by more than one scholar.<sup>10</sup> It has parallels with other kinds of information gatekeeping, such as the function of publishing houses, journalists or editors.<sup>11</sup> Those who edit and sell are crucial to the route that information takes to the public sphere. This is apparent from the consequences of

<sup>7</sup> See Ronald J. Mann & Seth R. Belzley, *The Promise of Internet Intermediary Liability*, 47 WM. & MARY L. REV. 239, 253 (2005) (for a discussion of primary malfeasor liability).

<sup>8</sup> *Id.*, 259-262.

<sup>9</sup> Reinier Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2(1) JOURNAL OF LAW, ECONOMICS, & ORGANIZATION 53, 54 (1986).

<sup>10</sup> See e.g., Jonathan Zittrain, *History of Online Gatekeeping*, 19(2) HARVARD JOURNAL OF LAW & TECHNOLOGY 253 (2006); Emily Laidlaw, *Internet gatekeepers, human rights and corporate social responsibilities*, PhD thesis, The London School of Economics and Political Science, January 2012, available at [http://etheses.lse.ac.uk/317/1/Laidlaw\\_Internet%20Gatekeepers%2C%20Human%20Rights%20and%20Corporate%20Social%20Responsibilities.pdf](http://etheses.lse.ac.uk/317/1/Laidlaw_Internet%20Gatekeepers%2C%20Human%20Rights%20and%20Corporate%20Social%20Responsibilities.pdf) (Last visited on May 22, 2015); Mann & Belzley, *supra* note 7.

<sup>11</sup> Laidlaw, *supra* note 10, 47; See also Lewis A. Coser, *Publishers as Gatekeepers of Ideas*, 421(1) ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 14 (1975).

the publishing house Penguin's decision to stop publishing Wendy Doniger's book,<sup>12</sup> and from Amazon's negotiating tactics<sup>13</sup> which consisted of tinkering with the accessibility to Hachette publications on its platform.

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 as Baazee.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.<sup>14</sup> 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.

## B. BAAZEE.COM AND INTERMEDIARY LIABILITY IN INDIA

At the time when the Avnish Bajaj case came before the judiciary, the law in India had serious flaws. 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.<sup>15</sup> The implications of only offering intermediaries immunity from liability for offences under the IT Act was that they received absolutely no protection from liability

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<sup>12</sup> British Broadcasting Company, *Wendy Doniger Hindu's book: Penguin India defends recall*, February 14, 2013, available at <http://www.bbc.co.uk/news/world-asia-india-26184819> (Last visited on November 27, 2014).

<sup>13</sup> The New York Times, *Hachette says Amazon is delaying delivery of some books*, May 8, 2014, available at [http://www.nytimes.com/2014/05/09/technology/hachette-says-amazon-is-delaying-delivery-of-some-books.html?\\_r=0](http://www.nytimes.com/2014/05/09/technology/hachette-says-amazon-is-delaying-delivery-of-some-books.html?_r=0) (Last visited on November 27, 2014).

<sup>14</sup> Kraakman, *supra* note 9, 56 (He 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).

<sup>15</sup> The Information Technology Act, 2000, §79 (prior to the Information Technology Amendment Act, 2008 it 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 prove...").

under other legislation for content that they hosted.<sup>16</sup> 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 scienter 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 scienter had been interpreted in a peculiar manner<sup>17</sup> 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.

### III. STRICT LIABILITY OF GATEKEEPERS OF OBSCENE CONTENT

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. §292 of the IPC contains gatekeeper liability: it punishes those who sell, distribute and circulate obscene content. This is similar to the system followed in other countries.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup>

<sup>16</sup> 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(2) RICHMOND J. L. & TECH. (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 <http://cyber.law.harvard.edu/openeconomies/oknliability.html> (Last visited on May 22, 2015); Apar Gupta, *Liability of Intermediaries in India: From Troubled Waters to Safe Harbours*, 13(2) C.T.L.R 60, 62 (2007).

<sup>17</sup> Ranjit D. Udeshi v. State of Maharashtra, AIR 1965 SC 881: (1965) 1 SCR 65.

<sup>18</sup> See, e.g., The United Kingdom's Obscene Publications Act, 1959.

<sup>19</sup> Ranjit D. Udeshi v. State of Maharashtra, AIR 1965 SC 881: (1965) 1 SCR 65, ¶10.

<sup>20</sup> *Id.*

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.<sup>21</sup> This standard effectively places an obligation on booksellers to check the contents of every book that they sell and to ensure that there are no obscene passages within them. In addition to affecting the volume of books that a bookseller may transact in, a zealous implementation of §292 would result in risk aversion on the part of booksellers and publishers, and a chilling effect on their willingness to sell or publish books. This would affect authors' access to the public sphere.

### A. *RANJIT UDESHI AND THE STRICT LIABILITY STANDARD*

The construction of third-party liability in §292 to mean that the third parties are strictly liable has its origins in Ranjit Udeshi. This was a landmark case involving D.H. Lawrence's novel 'Lady Chatterley's Lover', and is central to any discussion of obscenity law in India. Although Ranjit Udeshi has been widely criticised for its application of the Hicklin test, the damage inflicted by its rather outlandish strict liability standard for intermediaries went largely unnoticed.<sup>22</sup>

One wonders if the four owners of Happy Book Stall on Colaba Causeway ever expected to become a part of one of India's landmark cases, a permanent fixture in our free speech history. It was Gokuldas Shamji who sold a copy of Lady Chatterley's Lover to a man calling himself 'Ali Raza Sayeed Hasand', 'the bogus customer', in the 1950s.<sup>23</sup> The Shamjis and their fourth partner Ranjit Udeshi soon found themselves tried for possession and sale of an obscene book. Crucially, the owners of Happy Bookstall did not write or publish Lady Chatterley's Lover but D.H. Lawrence could hardly have been dragged to India for a trial. Therefore, those who circulated his book were targeted. Ranjit Udeshi was, therefore, about the gatekeeping function of Happy Book Stall. 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. 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

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<sup>21</sup> *Id.*

<sup>22</sup> There are however notable exceptions such as K.M. Sharma, *Obscenity and the Law: The Indian Experience through the American Looking-Glass*, 6 HOUS. L. REV. 425 (1968-1969); Anjali Anchayil & Arun Mattamana, *Intermediary Liability and Child Pornography: A Comparative Analysis*, 5(1) JOURNAL OF INTERNATIONAL COMMERCIAL LAW AND TECHNOLOGY 48 (2010).

<sup>23</sup> Ranjit D. Udeshi v. State of Maharashtra, AIR 1965 SC 88: (1965) 1 SCR 65, ¶1.

knowledge should be taken into account for liability under §292, 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 defence in the hands of offenders. Something much less than actual knowledge must therefore suffice”.<sup>24</sup>

Although the Supreme Court in *Ranjit Udeshi* considered the freedom of expression implications of the obscene content ban, the judgment did not evidence any weighing of the freedom of expression implications of third-party strict liability. Some even argue that §292 may have been more effectively assailed if the argument focused on the strict liability issue and used it to argue that §292 imposed an unreasonable restriction on the freedom of expression.<sup>25</sup>

## B. CONSEQUENCES OF THE STRICT LIABILITY STANDARD

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 Baze.com, in the context of the DPS MMS Scandal.<sup>26</sup> 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”.<sup>27</sup> 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 §292. Luckily for Avnish Bajaj, the Supreme Court acquitted him on procedural grounds that had no bearing on the strict liability question.<sup>28</sup>

Although the IT Act was eventually amended to offer internet intermediaries some respite from this standard, the strict liability regime continues to apply to book sellers. Fortunately, this has not yet resulted in any prominent prosecution of bookshops in the recent past. However, the *Ranjit Udeshi* ruling lies dormant and available to any intolerant Indian that wishes to have a bookshop owner charged for a few explicit pages in one among many

<sup>24</sup> *Id.*

<sup>25</sup> Sharma, *supra* note 22, 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).

<sup>26</sup> Avnish Bajaj v. State, (2008) 150 DLT 769; (2008) 105 DRJ 721.

<sup>27</sup> *Id.*, ¶6.10.

<sup>28</sup> 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 also* Aneeta Hada v. Godfather Travels, (2012) 5 SCC 661.



books. The lack of attention paid to the strict liability element of the Ranjit Udeshi ruling may be a good thing from this perspective – publicity may encourage more people to use the law to attack bookstores and libraries.

#### IV. AMENDING THE INFORMATION TECHNOLOGY ACT

The DPS MMS Scandal took place before the IT Act was amended. The 2008 amendment of the IT Act has been attributed to the Baazee.com quandary.<sup>29</sup> This amendment is significant as it brought the Indian intermediary liability regime, or more specifically, the safe harbour regime, closer to international standards, particularly in the form contained in the European Union Directive on E-Commerce.<sup>30</sup>

Before the amendment, the safe harbour 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 the 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 the safe harbour protection. However, the amendment has ensured that the intermediary receives safe harbour 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 harbour 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.

Viewed from this perspective, the IT Act lowers the gatekeeper liability standard in the context of obscene content – it requires ‘actual

<sup>29</sup> See Martin Hvidt Thelle, Jan-Martin Wilk, Bruno Basalisco & Katrine Ellersgaard Nielsen, *Closing the Gap—Indian Online Intermediaries and a Liability System Not Yet Fit for Purpose*, Copenhagen Economics, prepared on behalf of the Global Network Initiative, available at [http://www.globalnetworkinitiative.org/sites/default/files/Closing%20the%20Gap%20-%20Copenhagen%20Economics\\_March%202014\\_0.pdf](http://www.globalnetworkinitiative.org/sites/default/files/Closing%20the%20Gap%20-%20Copenhagen%20Economics_March%202014_0.pdf) (Last visited on May 22, 2015), 18; Anchayil & Mattamana, *supra* note 22; Pritika Rai Advani, *Intermediary Liability in India*, 48(50) EPW 120 (2013).

<sup>30</sup> See *Id* Pritika Rai Advani, *supra* note 29.

knowledge' (which can be provided to the intermediary via either a government order or a court order<sup>31</sup>) for an intermediary to become liable. Unlike publishers and book sellers who continue to be subject to the strict liability principle under §292 of the IPC, internet intermediaries that meet the conditions listed under §79 of the IT Act are now exempt from liability to the extent that they have no knowledge of infringing content.

### A. MOVING FROM STRICT LIABILITY TO DUE DILIGENCE

The concerns based on which the Supreme Court chose its Ranjit Udeshi strict liability standard were also voiced by the Standing Committee in its examination of the IT Amendment Act. The Committee asked if "it would not be extremely difficult to establish conspiracy or abetment in order to sue the intermediaries/service providers",<sup>32</sup> and wanted to explore the possibility of minimum obligations for intermediaries whose platforms were being used to transmit obscene or objectionable content.<sup>33</sup> Although the Standing Committee did not insist on embedding a strict liability standard similar to §292 in the safe harbour provision of the IT Act, it did reinstate the 'due diligence' requirement that now remains a condition for intermediaries to receive safe harbour protection.<sup>34</sup> This was contrary to the recommendations of the Department of Information Technology. The Committee's reasoning was that this might go some way in ensuring that if "the intermediaries can block/eliminate the alleged objectionable and obscene contents with the help of technical mechanisms like filters and inbuilt storage intelligence, then they should invariably do it".<sup>35</sup>

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 thirty-six hours of receiving actual knowledge that it is being stored, hosted or published on its system.<sup>36</sup> 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

<sup>31</sup> *Shreya Singhal v. Union of India*, (2013) 12 SCC 73.

<sup>32</sup> Standing Committee on Information Technology, Fourteenth Lok Sabha, *Report on the Information Technology (Amendment) Bill, 2006*, Fiftieth Report, ¶54, September, 2007.

<sup>33</sup> *Id.*, ¶55.

<sup>34</sup> *Id.*, ¶10.

<sup>35</sup> *Id.*

<sup>36</sup> Information Technology (Intermediaries Guidelines) Rules, 2011, Rule 3(4) (for a detailed discussion of this, see Pritika Rai Advani, *supra* note 29).

process.<sup>37</sup> Some safeguards were eventually introduced in *Shreya Singhal*,<sup>38</sup> 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.

Although the current intermediary liability system under the IT Act (even in its new avatar after the Supreme Court's amendments through *Shreya Singhal*) is far from perfect, the §79 safe harbour has brought about a significant improvement by doing away with the strict liability requirement contained in §292 of the IPC. If Avnish Bajaj were to be tried for the DPS MMS incident under the present §79 of the IT Act read with the Information Technology (Intermediaries Guidelines) Rules, 2011, he would not have to contend with strict liability. He would instead deal with a regime in which prosecution has to establish actual knowledge of the infringing content, or obtain a court order asking for the illegal content to be removed, under the IT Act framework.

The problem with the notice and takedown regime, before it was mitigated by *Shreya Singhal*, 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 down or risk liability under the gatekeeper liability system that required it to aid the State in removing illegal content. This makes the intermediaries 'proxy censors'.<sup>39</sup> 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.<sup>40</sup> This is discussed in more detail below.

## V. INFORMATION GATEKEEPING AND THE CAPACITY TO MONITOR CONTENT

The narrative above has outlined two different examples of gatekeeper liability – strict liability which would place a very high monitoring burden on gatekeepers, and due diligence which is a softer, if more ambiguous, standard.

<sup>37</sup> COMMITTEE ON SUBORDINATE LEGISLATION, Fifteenth Lok Sabha, Thirty-First Report on the Rules framed under the Information Technology Act, March, 2013, ¶49.

<sup>38</sup> *Shreya Singhal v. Union of India*, 2015 (4) SCALE 1, ¶117: (2013) 12 SCC 73.

<sup>39</sup> 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: FACULTY SCHOLARSHIP (2006), available at [http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1126&context=faculty\\_scholarship](http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1126&context=faculty_scholarship) (Last visited on May 22, 2015).

<sup>40</sup> *Id.*, 27-33.

The IPC and the IT Act both attempt to leverage gatekeeper liability to affect the behaviour of primary offenders. This is supported by some of Kraakman's criteria for evaluating forced gatekeeping.<sup>41</sup> 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.<sup>42</sup> 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 the gatekeepers should be able to detect misconduct at a reasonable cost.<sup>43</sup> 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.<sup>44</sup>

This reasoning maps particularly easily enough onto the intermediaries' regulation by the IT Act since the volume of information passing through these intermediaries is far higher than the volume of information handled by booksellers. Considering 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 curating 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.

Web-based platforms offer users unprecedented access to the public sphere. As long as the gatekeepers permit it, anyone anywhere can publish on the internet. This ensures that information that is usually missing from the public sphere finds its way online. For example, journalist Rana Ayyub found her piece for the Daily News & Analysis ('DNA') newspaper removed suddenly and without explanation from its website.<sup>45</sup> There is very little that she could have done to make DNA or any other newspaper put her piece back in circulation. However, the internet ensured that the piece ended up published in

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<sup>41</sup> Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2(1) J.L. ECON. & ORG. 53 (1986), as extracted in Jonathan Zittrain, *A History of Online Gatekeeping*, 19(2) HARVARD JOURNAL OF LAW AND TECHNOLOGY 253, 256 (2006).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Mann & Belzley, *supra* note 7, 73-74.

<sup>45</sup> Caravan, *CENSORED! Rana Ayyub 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).

multiple blogs,<sup>46</sup> taking advantage of the easy accessibility of online platforms. Indian audiences did not therefore lose access to this information.

A strict liability regime of any kind is out of question. The collateral damage that results in terms of heavily restricted flows of information is a very high social cost. However, it is important to bear in mind that the existing strict liability standard for booksellers also remains damaging to the flow of information, even if the quantity under question is not quite the same as for online intermediaries.

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.<sup>47</sup> 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 a part of the burden on intermediaries (that amounted to a notice and takedown 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 like a private decision by the intermediary to content creators and consumers.

Private censorship tends to be invisible and over-broad since the intermediary is incentivised to avoid expensive litigation, whether or not the speech is lawful.<sup>48</sup> In the context of the old notice and takedown regime, this was borne out by study conducted in India by sending flawed takedown notices to seven prominent intermediaries – it emerged that six out of seven

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<sup>46</sup> See, e.g., Communalism Watch, *India: The Importance of being Amit Shah*, July 9, 2014, available at <http://communalism.blogspot.in/2014/07/india-importance-of-being-amit-shah.html> (Last visited on November 28, 2014).

<sup>47</sup> Kraakman, *supra* note 41.

<sup>48</sup> Kreimer, *supra* note 39, 28.

intermediaries over-complied even when the notices had prominent flaws.<sup>49</sup> This demonstrated that the notice and takedown regime also had obvious drawbacks resulting in high social costs that should cause us to question its utility as a governance mechanism. If intermediaries over-complied with private party notices, one can reasonably conclude that they are at least equally likely comply with government notices. This raises serious questions about the impact of government content-removal and blocking notices to intermediaries on authors' and speakers' right to access the public sphere. Government blocking and takedown of content remains overwhelmingly opaque in India and can impact the diversity of information visible to all users of the internet in India.

## VI. CONCLUSION: FREEDOM OF EXPRESSION AND THE FREE FLOW OF INFORMATION

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 Hindus' and Ramanujan's 'Three Hundred Ramayanas' was obstructed.<sup>50</sup> Neither came up before a court of law for a discussion on 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.<sup>51</sup> 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.<sup>52</sup>

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

<sup>49</sup> Rishab Dara, *Intermediary Liability in India: Chilling Effects on Free Expression on the Internet*, April 10, 2012, available at <http://cis-india.org/internet-governance/intermediary-liability-in-india> (Last visited on November 30, 2014).

<sup>50</sup> The Guardian, *Outcry as Penguin India pulps 'alternative' history of Hindus*, February 13, 2014, available at <http://www.theguardian.com/world/2014/feb/13/indian-conservatives-penguin-hindus-book> (Last visited on May 22, 2015); The Sunday Guardian, *Ramanujan & the Ramayana*, October 30, 2011, available at <http://www.sunday-guardian.com/artbeat/ramanujan-a-the-ramayana> (Last visited on May 22, 2015); The Hindu, *Oxford University Press under pressure of Ramanujan essay row*, November 27, 2011, available at <http://www.thehindu.com/news/international/oxford-university-press-under-pressure-over-ramanujan-essay-row/article2663318.ece> (Last visited on May 22, 2015).

<sup>51</sup> *Id.*

<sup>52</sup> Jack Balkin, *First Amendment as Information Policy*, 41 HOFSTRA L. REV. 1 (2012).

embedded within the right to freedom of expression.<sup>53</sup> Much of our freedom of expression jurisprudence (with notable exceptions<sup>54</sup>) 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, and its role in facilitating public reasoning, have both been seen as critical to a democracy.<sup>55</sup> 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.<sup>56</sup> This would imply a greater focus on the effect of law on the 'gatekeepers' of information such as publishers, newspapers, booksellers, 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 a vibrant public sphere. It is a 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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<sup>53</sup> Robert Post, *Participatory Democracy and Free Speech*, 97(3) VIRGINIA L. REV. 477 (2011).

<sup>54</sup> *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; *Union of India v. Association for Democratic Reforms*, (2002) 5 SCC 294.

<sup>55</sup> Balkin, *supra* note 52; *see also* AMARTYA SEN, IDEA OF JUSTICE 321-337 (2009).

<sup>56</sup> Balkin, *supra* note 52.