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From the Editors' Desk

We are extremely excited to launch the inaugural volume of the NLUD Journal of Legal Studies. The Journal is the product of over three years of meticulous conceptualisation and consultations on its scope and policies. We hope that it emerges as a leading forum for students, academics and professionals to engage in discussions on varied issues of contemporary importance in domestic and international law and policy in the future. In line with our vision of making research accessible and encouraging debate around questions of law, the Journal has also been made available, sans paywall, on the National Law University, Delhi website (https://nludelhi.ac.in/). Additionally, the Journal would soon be available for reading on HeinOnline.

The Journal benefited from a team of experienced and dedicated editors, who have subjected the submissions to rigourous scrutiny in addition to providing constructive suggestions to authors. This inaugural volume would have been impossible without their support and time, and working with each of them has been an enriching learning experience. We are indebted to our faculty advisors, Mr. Anil Kumar Rai (Professor, NLU Delhi) and Mr. Sarvjeet Singh (Director, Centre for Communication Governance) for their guidance on broader policy questions as well as on the granular details of the Board's operations. The launch of this Journal would have been impossible without their constant support and guidance through every hurdle. We thank them for giving a patient ear to all our requests and doing their best to accommodate them.

We take this opportunity to extend our sincere gratitude to Prof. (Dr.) Ranbir Singh, Prof. (Dr.) G. S. Bajpai, and Dr. Sidharth Dahiya for believing in our team and our processes, and extending their enthusiastic support and patronage in every way possible. We would also like to express our gratitude towards the faculty at the University- Dr. Mrinal Satish for administering a bespoke selection process, Dr. Arul George Scaria for his inputs on our copyright policy, and Dr. Aparna Chandra for helping us in drafting our constitutional document. Lastly, we would be remiss if we did not acknowledge the contribution of the Editorial Boards of the NLUD Student Law Journal; their vision and mentorship have formed the bedrock of the NLUD Journal of Legal Studies.

The inaugural volume of the NLUD Journal of Legal Studies features critical insights into diverse areas of law and policy. From questioning the applicability and scope of the strict liability doctrine in contemporary Indian law, outlining a framework for intermediary regulation, critiquing the party funding regime, to addressing the challenges posed by fake news, these articles subject complex questions of law to methodical and critical analysis. We hope that these articles will inspire readers to add to the academic discourse on these issues and lend their unique perspectives in the process. The rigour of scholarship, the diversity of topics, as well as their divergence from the topics and methods that form a part of traditional law school curricula would certainly point readers towards worlds to traverse. We hope that the Journal encourages law students, researchers, and practitioners to explore myriad emerging questions in the fields of law and policy - not to derive satisfaction from straitjacket answers, but to learn from the process and to contribute to the discourse.

We hope that the inaugural volume is the first in a series of enriching, thought-provoking editions. We wish every success to future Editorial Boards of the Journal with the firm belief in their ability to realise the vision behind its creation and take it to new heights of scholarship and

reach. Most importantly, we hope that this volume is as engaging and enriching an experience for the readers as it has been for us.

Tanaya Rajwade, *Editor-in-Chief*

Pallavi Mishra, *Managing Editor*

August 2019

Contents

THE PUBLIC SPHERE (FORGED) IN THE ERA OF FAKE NEWS AND BUBBLE FILTERS: THE BRAZILIAN EXPERIENCE OF 2018

Eduardo Magrani*, Renan Medeiros De Oliviera**

'Physical facts could not be ignored. In philosophy, or religion, or ethics, or politics, two and two might make five, but when one was designing a gun or an aeroplane they had to make four'.

George Orwell

In this article we intend to explore, through the bibliographical review and the study of poll of voter intentions in Brazil, a little of the new technological phenomena that, together, affect the way in which the citizen forms his opinion about the everyday facts significant for public life, in general, the electoral process and the candidates, in a discerning way. Firstly, we take into account a brief approach to the theoretical framework in which we are based to think of a communicative, rational public sphere and in which the ideal situation of speech is sought. Secondly, we deal with fake news - which is about false news that desires to influence the way the population looks at a particular candidate - and deep fakes - which have a similar goal but act by altering the reality in a

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more profound way. Finally, we approach how the algorithms, especially the use of bots, are acting in order to create a forged public sphere which does not match the real desire and the real need of individuals. In addition, we deal with how the thinking of individuals is being distorted in the filter bubble scenario, which potentialises the effects of the phenomena studied in the preceding items. Throughout the development of this study and through the hypothetical-deductive method, we will seek to demonstrate that the new technologies have a great potential of impact on the electoral will, although this potential has not yet been explored in all its extension. It walks into a scenario where the electoral process is hackable.

I. Introduction

Fake news has previously demonstrated itself to be a powerful influencer in the electoral process. At the moment of forming his opinion, the voter suffers the impact of news whose truthfulness is not investigated, creating a judgment in relation to the candidates and the democratic process based on false news. It is not possible to affirm the exact dimension exercised by the fake news in the electoral process, but it is a fact that they exercise some influence.

The probable harmfulness of fake news is exponentiated when we consider how the new technologies are being used together. Deep fakes, algorithms, the filter bubble, among others, define the way you view reality, affecting aspects of life that go beyond elections. Questioning the status quo and the veracity of incidents is positive and essential in a democracy. However, it is necessary to have minimal consensus on facts, especially those of public interest. The great volume of news that puts in doubt the way things have been given in reality decreases the ability of people to differentiate the real from the invented.[1] It is indispensable that basic ethical standards are respected in order to ensure a minimally healthy democratic environment.

The scenario aggravates when one takes into consideration that traditional media, especially television, is losing space and confidence. The citizen does not believe in all that is said on TV anymore, believing the contents to be biased and out of context.[2] Television, in addition, exercises a significant role, but it must be taken into account that this role is

1 Natalia Viana and Carolina Zanatta, 'Deep Fakes are Threatening on the Horizon, But They Are Not Yet a Weapon for Elections, Says Expert' *The Public* (16 October 2018) <https://apublica.org/2018/10/deep-fakes-sao-ameaca-no-horizonte-mas-ainda-nao-sao-arma-para-eleicoes-diz-especialista> accessed 25 October 2018 (Viana and Zanatta).

2 The data demonstrated a clear generational distinction in relation to sources of obtaining information: the higher the age, the greater the use of television as the main means of communication. Up to 24 years of age, more than half of young people use the Internet as their main means. See the data of the Brazilian Media Survey 2016 (*Pesquisa de Media*, 2016) <https://bit.ly/2YH6udr> accessed 29 October 2016.

being downgraded and the space is being given to the internet, focusing on social networks. However, although the internet is a source of tireless content and allows the search for information on the part of the user, the phenomenon that was perceived as 'filter bubble' creates obstacles to a healthy and democratically desirable online dialogical environment.

In this article, we attempt to explore, a little of the phenomena that, together, impact the way in which the citizen forms his opinion regarding the everyday facts important to public life and the electoral process and candidates. Firstly, we briefly outline the approach to the theoretical framework in which we think about a communicative, rational public sphere and in which the ideal situation of speech is sought. Secondly, we deal with *fake news* and *deep fakes*. In a few words, fake news is that news that seeks to affect the way the population looks at a given candidate. Deep fakes have a similar objective, they purely act by altering reality in a deeper way. Finally, we approach how algorithms, specifically the use of bots, are acting in order to create a forged public sphere which does not match the real desire and the real need of individuals. In addition, we deal with how the thinking of individuals is being distorted in the filter bubble scenario, which potentialises the effects of the phenomena studied in the preceding items.

For the purposes sought here, we will broadly rely on the literature review on fake news, deep fakes, bots and filter bubble and on the impact of these phenomena in the elections and in the formation of the opinion of individuals. We will also be resorting to the survey of the intent of votes. Thus, we will seek to demonstrate, throughout the development of this study and through the hypothetical-deductive method, that the new technologies have a great potential to impact the electoral will, although this potential has not yet been explored fully. It envisages a scenario where the electoral process is hackable.

II. Brief Theoretical Note: The Virtual Public Sphere

One of the aims of this study is to point out the need for minimum ethical standards in the use of new technologies and mechanisms to circumvent the abuses arising from the utilitarian perspective, preventing the use of a person as a means and not as an end in itself. With this, we want to avert forms of manipulation of real profiles or the use of bots in order to create priorities forged in the public agenda. We can think of the most appropriate ethical perspective to deal with technology in a context in which democratic procedures and actions are related to the complex world of data and constant man-machine interaction in which we live. It is therefore essential to be ethical and moral, not only on to the purpose, but also to the entire procedure and range of actions.

For this,[3] we understand that it is necessary to take into account the complete and complex theoretical perspective of Jürgen Habermas, which allows us to think about the

3 The main concepts and formulations of Jürgen Habermas and their relation with the internet platforms can be checked in a study by Eduardo Magrani, *Connected Democracy: The Internet as a Tool for Political-Democratic Engagement* (Juruá 2014) (Magrani).

advancement of this new world of data in a dialogical and participatory way to achieve more legitimate and consensual regulatory proposals.

The German thinker, born in 1929, experienced in post-war Germany, with the Nuremberg trials, the depth of the moral and political failure of Germany in the realm of National Socialism.[4] Habermas stood out in the academic world by analysing the development of the bourgeois public sphere from its origins in the halls of the eighteenth century, until its transformation through the influence of media directed by capital.[5]

For Habermas, the legitimacy of norms and the political system in contemporary Western capitalist societies depends on the acceptance of norms by the citizens.[6] This occurs through successive attempts at justification in which each citizen must freely bind his will to the content of the norm through a rational and dialogical process of argumentation, that is, of reflection and conviction.[7]

In this type of society, the public sphere is precisely understood as a set of spaces that allow the occurrence of dialogical processes of communication, of articulation of opinions and reflective reconstructions of values, moral and normative dispositions that guide social coexistence. It is in the public sphere that the different constitutive groups of a multiple and diverse society share arguments, formulate consensus and construct common problems and solutions.[8]

The public sphere of Habermas comprises a zone of interchange between, on the one hand, the system –depicted as the world of work, guided by the logic of money and power, as an instrumental world of strategic action, non-communicative, oriented by the market and bureaucracy[9] - and, on the other hand, the public and private spaces of the world of life - characterised as the world of interaction between people, which are organised communicatively through the ordinary language, enabling communicative action without a strategic action, oriented only to intersubjective understanding that ideally leads to agreement or leads to consensus.[10]

Habermas excelled in the academic world by evaluating the development of the bourgeois public sphere from its origins in the halls of the eighteenth century to its

4 James Bohman and William Rehg., 'Jürgen Habermas' *The Stanford Encyclopedia of Philosophy* (2007) <https://plato.stanford.edu/entries/habermas/> accessed 29 July 2019.

5 With the publication in 1962 of his habilitation, Jürgen Habermas, *Strukturwandel der Öffentlichkeit (Structural Transformation of the Public Sphere)* (English edn, Polity 1989).

6 Jürgen Habermas, *Law and Democracy: Between Facticity and Validity*, vol 2 (2nd edn, Tempo Brasileiro 2003) 16 (Habermas).

7 Joshua Cohen, 'Deliberation and Democratic Legitimacy' in James Bohman and William Rehg (eds), *Deliberative Democracy: Essays on Reason and Politics* (MIT Press 1997) 29.

8 Magrani (n 3).

9 Jürgen Habermas, *The Theory of Communicative Action*, vol 2 (Beacon Press 1987) 113-197; Craig Calhoun (ed), *Habermas and the Public Sphere* (MIT Press 1992) 1-51.

10 Habermas, *Law and Democracy* (n 6) 107.

transformation through the influence of media directed by capital. The colonisation would be the result of the meddling of politics and economy in the world of life, responsible for the reduction of citizenship and the transformation of the citizens into clients of social welfare services, that being the hallmark of modernity. In this scenario, the power of economic capital and politics invades the world of life destructively. According to Habermas, systemic intervention has a destructive impact on cultural reproduction, social integration and socialisation as components of the world of life.[11]

While the author has not specifically and deliberately addressed the topic of the internet, we advocate the prospect of understanding digital platforms as abstract public spheres with great communicative and democratic potential.[12] We find in the digital spaces a public sphere in which individuals communicate regularly, through discussion forums, social networks, or platforms for exchanging messages that nearly approach the conception of the public sphere drawn by Habermas on a smaller scale.

However, with the advancement of the most recent digital technologies, we have also followed the transformation of these connected spaces, and it is possible to envisage a possible reduction in their communicative democratic potential.

Today, we observe the predominance in the connected spheres of profitable business models based on algorithmic filtration with the objective of conducting microtargeting practices, profiling, among others, directing the sale of products and services in a way optimised for e-consumers. These current practices are based on the use, to a large extent, of the personal data of users and generate the aggravation of the effect called 'filter bubble', having harmful effects on democracy and breaking the enthusiasm about the democratic role of the internet as a public sphere for contemporary societies. In the following items, we considered some of these mechanisms and their ethical implications for the democratic context as a whole and for the elections in a specific way.

III. Fake News And Deep Fakes: Do They Really Exist?

The fake news calls, fake news created for the purpose of misinforming, are hitting users with greater precision than expected. The type of content sent can also take into account the personal profile of those who will read the news in order to cause a more direct impact, which is delivered by the microtargeting technique.

The fact is increasingly apparent that data produced by users on the internet is being

11 Although Habermas predicts that there is no complete shielding of the life-world of systemic logic, he believes that this logic can be nullified by the very dynamics of the world of life, based on communicative action.

12 For an in-depth treatment of this defense, cf. Magrani (n 3) 25ff. The Habermasian theory alone does not sufficiently help us to deepen the possible solutions to these problems, since it was thought mainly to measure and induce the behavior of the rational and dialogic human agent that interacts in the public sphere. However, it serves as an excellent paradigm for analysing the real possibilities of building a dialogue and speech scenario in the *online* context.

collected in some way by third parties. Not only personal data, but also what they read, research, and specifically, their consumption habits. At the same time, the internet enables the massive uptake of this data if it is processing on a large scale. This large volume of data – structured, semi-structured or unstructured[13] – forms big data, the technology that allows people to know more and more individuals, and can even identify them personally by observing their habits, preferences and desires.

The richness of this information is such that it becomes inevitable to question how users allow such collection by consenting, for example, with the terms of use of websites and applications. It happens, firstly, that the terms of use are usually extremely technical and unintelligible to the general population, which makes the given consent not completely conscious. Secondly, the performance of the companies itself is not always made transparent, that is, often the real purpose destined to the data is hidden from the users.[14]

With this and the increasing amount of data produced daily, the management of this information by third parties is worrisome. This is because big data goes far beyond a tangle of data: it is essentially relational. As individuals do not have control of their own personal data, it can be said that it belongs to those who collect them, creating a harmful vertical relationship.

Such technology opens an opportunity that has not gone unnoticed in the market. With this volume of data, there is a possibility of automatic personalisation of content on digital platforms, including directing this filtering through targeted advertising, made possible through the tracking of cookies and by processes of re-targeting, or programmatic media (behavioural re-targeting).

Companies observe the inputs generated by this data to guide their market policy in order to achieve the desires and habits of consumers, through techniques such as tracking, profiling and targeting. This is done according to the behavioural trends analysed, which leads to a targeting, therefore, of the market choices through the creation of targets. Today, we observe the predominance of the connected spheres of profitable business models based on algorithmic filtration in order to direct the sale of products and services to e-consumers optimally.

The microtargeting technique is a digital strategy for establishing the target audience through the collection of data from this audience so that the company can thoroughly know the profile in question. The strategy is done on top of a database assembled with information such as age, gender, hobbies, behaviour, among others. In principle, *microtargeting* was used in advertising marketing for the enhancement of products and services. Now there is talk of political marketing as it assists candidates to define a niche of specific voters by

13 Julia Lane and others (eds), *Privacy, Big Data and the Public Good: Frameworks for Engagement* (CUP 2014).

14 About the terms of use on the internet, see Eduardo Magrani and others, *Terms of Service and Human Rights*: *An Analysis of Online Platform Contracts* (Revan 2016).

mapping possible supporters.

One of the advantages of microtargeting is that it allows the anticipation of results that can be achieved at the end of the advertising or political project, delivering savings of time and money on the part of the agents, since their focus will be qualitative over what the targets actually want or need, dispensing with random attempts. These current practices, therefore, are guided by the use, to a large extent, of user data through big data that, in addition to making dishonest use of personal information, it can also generate political consequences, such as the worsening of the effect called 'filter bubble', harmful to the democratic role of the internet as a public sphere, and the potentialisation of false news.[15]

On this political-democratic context, some examples can help you comprehend how microtargeting is used to leverage false news. The paradigmatic case is that of the 2016 elections in the United States, hard impacted by fake news. It is stated that the rumours largely assumed a negative content regarding the Democratic candidate Hillary Clinton, in contrast to encouragement for the conduct of the Republican candidate, Donald Trump. Fact is that, in 2016, 33 of the 50 false news articles on Facebook in the US, dealt with the political context.[16]

Some false news has had such repercussions that they have run the world, like, for instance, that Pope Francis – and, therefore, the Roman Catholic Church – supported Donald Trump's candidacy, which would give him even greater support from the layers conservatives of American society. The rumour was disclaimed only when the Vatican spokesman made a public announcement saying that the pope never manifested such support and, neither, intends to take political positions.

Countries like Russia have also influenced the American electoral process. Among the rumours scattered, an army of 'Russian trolls' published news that Hillary Clinton would be involved with satanic ritual practices. One of the narrative lines affirmed, upon alleged e-mails leaked between Hillary and her campaign manager, John Podesta, that they participated in rituals with a priestess who adored the demon. It was, however, a performance of the artist Marina Abramovic on Spirit Cooking, which was challenged in

15 On the relationship between fake news and elections, it is recommended to read the open letter advocated by the Coalition of Rights in the Network group, which provides guidelines on the subject. Open letter from civil society representatives from Latin America and the Caribbean on concerns about the fake news and elections, Coalition of Rights on the Network, 'Fake News and Elections' (*Rights on the Net*, 2017) <https://direitosnarede.org.br/p/carta-aberta-americalatinaecaribe-igf2017/> accessed 29 October 2017.

16 Craig Silverman, 'Here Are 50 of the Biggest Fake News Hits on Facebook From 2016' (*BuzzFeed News*, 30 December 2016) <https://www.buzzfeednews.com/article/craigsilverman/top-fake-news-of-2016#.nl712lkw2> accessed 29 October 2018; 'There are 7 Types of Fake News. Do You Know Them All?' (*Magic Web Design*, 19 March 2018) <https://www.magicwebdesign.com.br/blog/internet/existem-7-tipos-fake-news-voce-conhece-todos/> accessed 29 October 2018.

one of the hacked emails of the campaign.[17] Later, US intelligence discovered that e-mails were hacked into an operation orchestrated by the Kremlin.[18]

However, a recent case that became emblematic and, in fact, aroused attention on how microtargeting can be used to disseminate false news, is that of the company Cambridge Analytica, appointed as one of the main vectors of viralisation of fake news, as well as Donald Trump's victory in the elections.

The case begins with the creation of an application that ran on Facebook, 'This Is Your Digital Life', created by Cambridge Analytica scholar, Dr. Aleksandr Kogan, active at the University of Cambridge, with the objective of developing academic research. For this, the app collected private information from the profiles of 270,000 users, with their consent, which until then was allowed and was in accordance with the terms of use of Facebook. It happens that, in 2015, the social network in question was informed that Cambridge Analytica had shared the data collected with a third party, the company Eunoia Technologies, which aimed at commercial purposes, in disagreement with the terms of use of the platform.[19] Facebook demanded that the information provided to third parties be destroyed, but it was later discovered that Cambridge Analytica and other companies did not eliminate the information, which is why they would be suspended from operating on the platform from that moment on. At this point, nonetheless, the data of about 50 million Facebook users had already been compromised.

The scandal only came to the public in March 2018, when Christopher Wylie, who worked to get data from users on Facebook and passed it on to Cambridge Analytica (which was contracted internationally by several politicians in electoral times), issued statements to the press, revealing that the profiles were gathered for the purposes of political manipulation in the connected public sphere.[20]

This case raises attention to some important factors. The app, 'This Is Your Digital Life', functioned as a personality test that also financially rewarded those who agreed to participate. This represents a strong appeal to the user of social networks, who tends to want to satiate the curiosity of the results of these tests, which have become so common,

17 Benjamin Lee,'Marina Abramović Mention in Podesta Emails Sparks Accusations of Satanism' *The Guardian* (4 November 2016) <https://www.theguardian.com/artanddesign/2016/nov/04/marina-abramovic-podesta-clinton-emails-satanism-accusations> accessed 29 October 2018.

18 'How Russia-Linked Hackers Stole the Democrats' Emails and Destabilized Hillary Clinton's Campaign' *ABC News* (5 November 2017) <https://www.abc.net.au/news/2017-11-04/how-russians-hacked-democrats-and-clinton-campaign-emails/9118834> accessed 29 October 2018.

19 'Privacidade No Facebook: o que aprender com a Cambridge Analytica' (*Irisbh*, 19 March 2018) <http://irisbh.com.br/privacidade-no-facebook-cambridge-analytica/> accessed 28 October 2018.

20 Carole Cadwalladr and Emma Graham-Harrison, 'Revealed: 50 million Facebook Profiles Harvested for Cambridge Analytica in Major Data Breach' *The Guardian* (17 March 2018) <https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election> accessed 29 April 2017.

even more by the possibility of earning some profit from it. In a masked manner, therefore, the company managed to collect a large amount of data, in a way that was consented to the use of a distinct purpose.

The secret purpose, it was later found out, was to collect data to chart voter profiles in order to use them for electoral marketing. This is nothing more than a microtargeting strategy, making use of the technology of big data to attain a more refined material, suitable for producing even more precise results.

The company spent about US $1 million in data collection and to send messages directed to specific voters, manipulating their political opinion through an algorithm that could analyse individual profiles and determine personality traits linked to the online behavior of the voter, as well as his feelings and fears and directed the content of sociopolitical manipulation based on these components. Therefore, an esteemed range of data collected by Cambridge Analytica was sold to political parties to produce fake news capable of reaching the voter in what is most important to him/her; that is, corroborating or attacking their more rooted positions, with the objective of dissuading them, with the certainty of success.

With this, it is essential to be clear that, in the final analysis, big data is the individual in all its complexity and, therefore, one must have a critical conscience and think possibilities of regaining control over personal data.[21] It is necessary to address judicial and extrajudicial forms of data protection and of the accountability of companies that carry out such activity. And, above all, to build a conscious use of the platforms in the users, so that they do not so easily give away their information in false exchanges of benefit, that turn against them in a way so painful for the society and the democracy in general.

Similar to the Donald Trump campaign in 2016, the Jair Bolsonaro campaign in 2018 in Brazil used several fake news to promote the candidate. The strategy became public when the press disclosed the existence of contracts of the candidate with private companies totalling about 12 million reais through which companies bought packets of message shots against the opposite party (PT) in WhatsApp, which comprised of the disclosure of false news.[22] The candidate also counted on the participation of groups of volunteers who organised the creation and circulation of fake news.[23] The false news with the greatest

21 Eduardo Magrani and Renan Medeiros de Oliveira, 'We are Big Data: New technologies and Personal Data Management' (2018) 5 CyberLaw 10-33 <http://www.cijic.org/publicacao/> accessed 29 July 2019.

22 Pedro Ortellado, 'Bias on the Internet Does Not Seem to Be Caused by "Bubbles"'(*Folha de São Paulo*, 2018) <https://www1.folha.uol.com.br/colunas/pablo-ortellado/2018/02/polarizacao-na-internet-nao-parece-ser-causada-pelas-bolhas.shtml> accessed 29 October 2018; Patricia Campos Mello, 'Entrepreneurs Campaign Against the PT by WhatsApp' (*Folha de São Paulo*, 18 October 2018) <https://www1.folha.uol.com.br/poder/2018/10/empresarios-bancam-campanha-contra-o-pt-pelo-whatsapp.shtml> accessed 29 October 2018.

23 Mariana Simões, 'Pro-Bolsonaro Groups on WhatsApp Orchestrate Fake news and Personal Attacks on the Internet, Research Says' *El País* (24 October 2018) <https://brasil.

repercussion during the elections concerned the 'Gay Kit' and the fraud in the polls, and other news that circulated less dealt with the accusation that Fernando Haddad (PT) was a paedophile and that Jair Bolsonaro (PSL) would want to change the patroness of Brazil.[24]

Another way to subjugate the electorate is by using deep fakes. The technologies already allow the recording of audios with imitation almost similar to the voice of people and the editing of videos in which the face of an individual who has never been in the situation appears as a participant. If in the daily scenario of non-public people, this is already extremely harmful to honour and image, this risk grows exponentially when we talk about public personalities. Audios and edited videos can be used, for instance, to defame the image of a certain candidate to an electoral position.

A recent case illustrates this possibility. On October 23, 2018, a video was circulated on the internet in which, supposedly, the candidate for governor of the state of São Paulo, João Doria (PSDB), appeared in intimate scenes with several women. Five days after the second round of elections, the circulation of a video like this is enormously damaging to the image of the applicant, especially when considered that Doria is a defender of the traditional family. The then-candidate filed for investigation in the Electoral Court. Initially, the investigation in relation to the video indicated that it would be assembly or simulation: expert report stated that the face of the candidate had been wrongly inserted into the video, putting him in a situation in which he did not participate.[25] Subsequently, a new report punctuated the truthfulness of the video.[26]

This is a definitive case of deep fakes. Moreover, reality itself is called into question, and what is true or false is no longer known. This creates a mental confusion in the electorate, which happens to believe in one side without any solid ground. All being questionable, the human desire for an answer grasps at any clue of truthfulness - whether this clue is supported by some proven fact or only in self-deception.[27]

After the video was released, the voting intentions surveys showed some variation in the percentage points of each candidate. According to Datafolha's survey, on October

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elpais.com/brasil/2018/10/23/politica/1540304695_112075.html?id_externo_rsoc=FB_BR_CM&fbclid=IwAR05Mw9zXzmjDbYv5OkjAm1hVipWBURMCPyiOORIaxSsy_qNxEjzrpHKxfQ> accessed 29 October 2018.

24 '"Voter Fraud" and "Gay Kit" Have a Greater Impact than Other Fake Twitter, Facebook and Youtube News' (*FGV DAPP*, 1 November 2018) <https://observa2018.com.br/posts/fraude-nas-urnas-e-kit-gay-tem-maior-impacto-que-outras-noticias-falsas-em-twitter-facebook-e-youtube/> accessed 29 October 2018.

25 Sérgio Quintella, 'Expertise Reveals Report on Intimate Video Attributed to JoãoDoria' *Veja São Paulo* (24 October 2018) <https://vejasp.abril.com.br/blog/poder-sp/pericia-aponta-montagem-em-video-intimo-atribuido-a-joao-doria/> accessed 29 October 2018.

26 Redação Pragmatismo, 'Intimate video of JoãoDoria is true, new report points out' (*PragmatismoPolítico*, 26 October 2018) <https://www.pragmatismopolitico.com.br/2018/10/video-intimo-joao-doria-verdadeiro-pericia.html> accessed 29 October 2018.

27 Eduardo Gianetti, *Lies We Live By: The Art of Self-deception* (Companhia das Letras 2005).

25 2018, Doria had 52% of votes, while on the 27th of that month it had fallen to 49%.[28] Considering the intensity of the campaigns in the days immediately preceding the elections and the profusion of information that is disclosed, we can not affirm that the video was directly responsible for this fall. In addition, the first forensic report disclosed indicated that the video would be an assembly or simulation, which may have caused more doubts in the voter. Fact is that the disclosure of this deep fake, accompanied by expert reports that did not indicate a single solution, was not enough to prevent the victory of the candidate, who won with 51.77% of the valid votes. Note, however, that we can affirm that the video was an important factor to be faced in the final moments of the campaign. In the current context, citizens are aware that there is an indiscriminate disclosure of fake news, so that they can consider, without any evidence in any of the senses, that the disclosure of the video was merely a ruse of the opposition to discredit the adversary. Thus, they ignore whether the video was indeed true or false and cling to the beliefs already formed - which are often based on fake news.

In this context,[29] there are bills that seek to criminalise the disclosure of false facts during the electoral year, such as House Bill No. 9973/2018, 10292/2018, 9931/2018 and 9532/2018. The Senate Bill No. 246/2018 is broader and seeks to insert in the Civil Framework of the internet 'measures to combat the disclosure of fake content or offensive internet applications.' In addition, there are groups intended to accomplish fact-checking. But in a scenario where everything is questionable, who will check the truthfulness of the check on reality? The profusion of true and false information could lead to an 'infocalypse,' as Aviv Ovadya[30] warns. That is why we affirm above that it is essential to guarantee a minimum level of consensus on reality and respect for fundamental ethical principles.

The impacts of this manipulation of the public sphere go far beyond the elections. In the long term, it may be that the elaboration of public policy-making is based on a forged popular will, generating state expenditures that do not meet the real needs of citizens. Moreover, the constant legitimacy of the actions of politicians can be forged, even if unattractive public policies are put into practice. In the following item, we made some considerations about the filter bubble and its impact on the opinion formation of individuals and the configuration of the public sphere.

28 Gabriela Fujita,'SP: Datafolha shows France with 51% and Doria, 49%; Ibope brings 50% for each' *UOL* (Sao Paulo, 27 October 2018) <https://noticias.uol.com.br/politica/eleicoes/2018/noticias/2018/10/27/datafolha-ibope-sp-doria-franca.htm> accessed 29 October 2018.

29 An exhaustive enumeration and detailed presentation of all bills on the subject would require its own study and would go beyond the limits of this article.

30 Aviv Ovadya, 'What's Worse Than Fake News? The Distortion Of Reality Itself' [2018] 35(2) New Perspectives Quarterly 43-45.

IV. The Public Sphere Forged by Algorithms and the Personal Conviction in the Filter Bubble Age[31]

'Filter Bubble'[32] can be defined as a set of data produced by all the algorithmic mechanisms used to make an invisible edition aimed at the customisation of online navigation. In other words, it is a kind of personification of the contents of the network, made by certain companies like Google, through its search engines, and social networks, like Facebook, among several other platforms and providers. It is then formed, from the navigation characteristics of each person, a particular online universe, conditioning their navigation. This is done by tracking various information, including the user's location and cookie registration.[33]

With these techniques that generate the bubble filters, the internet would be transforming into a space in which is shown what is thought to be of interest to us. Thus, we are almost always hidden from what we really want or eventually need to see. Thus, it can be said that the filter bubble is paternalistic and prejudicial to the debate and the formation of consensus in the connected public sphere. It is even possible to question its constitutionality, since it can suggest restrictions to fundamental rights, like access to information, freedom of expression, as well as the autonomy of individuals.[34]

Filtering has emerged as a necessity and is often considered welcome, generating a great deal of comfort for the user, who quickly and efficiently finds, in most cases, the information or any other content that he wants to access. This is Netflix's business model, for instance, which allows the user to have at his disposal a collection of movies based solely on his profile through the suggestion of personalised titles and filters, in order to improve his experience.

Though, beyond convenience, the problem lies in the form and in the excess of filtering, both by the companies and by the individuals themselves, who, unconsciously, restrict themselves and move away from contradictory perspectives, impoverishing, the value of the debate in the virtual public sphere. Consequently, filter bubbles limit users to what they wish (or would like) according to, most often, an algorithmic prediction.[35] This creates a problem in accessing the information that should be seen to enrich the democratic debate.

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31 Some of the considerations made in this chapter were explored in Eduardo Magrani, 'The Internet of Things: Privacy and Ethics in the Age of Hyperconnectivity' (Pontifical Catholic University of Rio de Janeiro 2018); See also Magrani, *Connected Democracy* (n 3).

32 Eli Pariser, *The Filter Bubble: What the Internet is Hiding from You* (Penguin Press 2011).

33 As Tim Wu notes in Tim Wu. *The Master Switch*: *The Rise and Fall of Information Empire* (Vintage 2011), 'Cookies are, in a nutshell, access data that consist of the "digital footprints" left when passing through and manifesting through online environments.'

34 A peremptory statement in this direction would require further study, so that the specific approach of this point would go beyond the limits of this study.

35 Evgeny Morozov, *To Save Everything, Click Here*: *The Folly of Technological Solutionism* (Public Affairs 2013).

Furthermore, from another perspective, the internet user, when navigating the most well-known sites, is today the target of a torrent of targeted advertising that signifies the commercial interest behind this filtering and personalisation mechanism.

The internet is plastic and alterable, and the reality that we involuntarily become hostage to the algorithms that insert us into these bubbles, has been seen as one of the most drastic but subtle changes because they are often indistinguishable. The filter bubble's premise is that the user does not unintentionally decide what appears to him within the bubble, nor does he have access to what is left out.

The information curation executed by traditional media, including offline media, already materialises the concept of content filtering by choosing and separating a series of information. Habermas, as well as other Frankfurt School theorists, such as Adorno and Horkheimer,[36] was in advance attentive to the traditional media force and its effect on modern democracy.[37] Nevertheless, internet platforms are often deficient in sufficient transparency in their informational and algorithmic clipping, giving consumers a false idea that information has a neutral and free flow. In addition, algorithm filtering in online environments allows for a degree of customisation and targeting on a much larger scale,[38] which tends to accelerate with the coming of the Internet of Things,[39] given that with more and more intelligent devices connected around us, we will have even more personal data being collected, stored and treated.

In light of the above, the idea that internet infrastructure as a public sphere has the potential to allow the discussions to be strong enough to reach different segments and different interest groups, replicating through the various networks of people who make up society, may be an increasingly distant reality. This is due to the fact that the expressions are often restricted to the same network of people with common interests and communication channels easily negotiated by the platform holders. The conclusion of this is the broadening of communication fragmentation and the polarisation of public debate.[40]

In a Habermasian view of legitimising the political-democratic system, this scenario is unacceptable, since the minimally free communication flow must be preserved in the public space, allowing all those who may be reached to have a voice and participate in

36 Rolf Wiggershaus and others, *The Frankfurt School: Its History, Theories, and Political Significance* (MIT Press 1995).

37 Habermas, *Law and Democracy* (n 6) 99.

38 Magrani, *Connected Democracy* (n 3).

39 See Eduardo Magrani, *The Internet of Things* (FGV Editora 2018).

40 As Cass Sunstein notes in Cass Sunstein, *Republic.com 2.0* (Princeton University Press 2009) and Cass Sunstein, *Republic.com* (Princeton University Press 2001), filter bubbles would be a serious risk to the potential of the connected public sphere due to the lack of contact with dissenting opinions and the polarisation of discourses leading to radicalism. This would be a problem with trends not to its resolution, but to its aggravation, from the sophistication of content customisation algorithms.

an increasingly direct way in decisions, whether appropriate to their private or political context in the public sphere. A quintessential example of this is the case of Cambridge Analytica, depicted in the previous item.

With the gain of greater sophistication and free-will of the technologies, our interaction with these agents will become more and more complementary and complex, bringing to the surface, still, a greater capacity of manoeuvring our thought and behaviour.

We must add to this—as a negative thing—the reality, that we often do not know how the algorithms of the intelligent objects we use and the virtual spaces in which we interact—work.[41] Each time, these new non-human agents produce effects on our actions or even make significant decisions in our place through the customisation of the information that is offered to us.[42]

Broadly speaking, decision-making and communicative democratic interaction today are undergoing an intensified transformation, as they suffer the intermediation and agency of non-human agents, such as robots or algorithms equipped with some degree of artificial intelligence. These elements are influencing our interaction and our discourse with the capacity to produce significant political-democratic material effects, and therefore they should be better comprehended for regulatory purposes.

In political discussions, robots have been used across the party spectrum not only to win followers but likewise to conduct attacks on opponents and forge discussions. They manipulate debates, produce and circulate false news, and influence public opinion by posting and replicating messages on a prominent scale. Many bots[43] have reproduced

41 Frank Pasquale, *The Black Box Society*: *The Secret Algorithms that Control Money and Informatio*n (Harvard University Press 2015) criticises this situation by treating today's algorithms as black boxes and shedding light on the effects of this on a society guided in several areas by algorithmic data and decisions.

42 In 2017, in Wisconsin in the US, a judge awarded a six-year prison sentence, taking into account not only the defendant's criminal record, but also his COMPAS score (Correctional Offender Management Profiling for Alternative Sanctions), which is a tool algorithm that aims to predict the risk of recidivism of an individual. The score suggested that the defendant had a high risk of committing another crime; so his sentence was six years. The defendant appealed the ruling, arguing that the judge's use of the predictive algorithm in his sentencing decision violated due process and is based on the opacity of the algorithms. See Adam Liptak, 'Sent to Prison by a Software Program's Secret Algorithms' *The New York Times* (1 May 2017) <https://www.nytimes.com/2017/05/01/us/politics/sent-to-prison-by-a-software-programs-secret-algorithms.html?mtrref=www.google.com.br&gwh=B3F9140AAAB1DACDFCE11CBD55F4DB8F&gwt=pay> accessed 29 October 2017. The case went to the United States Supreme Court, which denied the writ of certiorari, refusing to consider the case.

43 The term Bot, short for Robot (or Internet bot or web robot), is a software application that aims to provide an automated service to perform generally predetermined tasks. They mimic human behavior and are being used in politics and elections to influence opinion in digital networks, such as social networking platforms, instant messaging, or news sites. A conceptualisation of the term can be found in Clara Velasco and Roney Sundays, 'What is a Web Robot and How Can it Influence the Debate in Networks? Experts Explain' (*G1*, 2017) <https://g1.globo.com/

hashtags on Twitter[44] and Facebook[45] that gain eminence by massaging automated posts in order to strangle sudden debates on a particular topic.

Firstly, automated accounts can even confer positively to some aspects of life on social networks. The chatbots,[46] for instance, streamline customer service and, in some cases, even help consumers process their requests and get more information. Nevertheless, an increasing number of robots act with spiteful purposes in the public sphere. The social bots (social robots) are accounts controlled by software, which artificially generate content and establish interactions with non-robots. They attempt to imitate human behaviour and to pass as such in order to interfere in legitimate and voluntary debates and produce forged discussions.[47]

The growth of robot-led action thereupon represents a real danger to public debate, representing hazards to democracy itself, interfering with the process of consensus building in the public sphere, and in choosing representatives and government agendas.[48]

economia/tecnologia/noticia/o-que-e-um-robo-na-web-e-como-ele-pode-influenciar-o-debate-nas-redes-especialistas-explicam.ghtml> accessed 29 October 2017.

44 According to the PEGABOT project, from the Institute of Technology and Society of Rio de Janeiro (ITS Rio) and the Institute of Equity and Technology, '[A] Twitter Bot is an account controlled by an algorithm or script, usually used to perform tasks for example, retweet content containing particular keywords, respond to new followers, and send direct messages to new followers. Twitter Bots complex blogs can participate in online chatting and, in some cases, behave very much like human behavior. Bot accounts make up 9 percent to 15% percent of all active Twitter accounts, but more in-depth studies indicate that this percentage may be even greater because of the difficulty of identifying complex bots. Twitter bots are generally not created with malicious intent; they are often used to improve online interaction or service delivery by companies, governments and other organisations, so it's important to separate good bots from bad bots'. <https://pegabot.com.br> accessed 27 October 2018.

45 Robots are easier to spread on Twitter than on Facebook for a variety of reasons. An explanation on the subject can be found in Marco Aurélio Ruediger, 'Robots, Social Networks and Politics in Brazil: Study on Illegitimate Interference in the Public Debate on the Web, Risks to Democracy and the Electoral Process of 2018' (*FGV DAPP*, 2018) <http://dapp.fgv.br/en/robots-social-networks-politics-fgv-dapp-study-points-illegitimate-interference-public-debate-web/> accessed 29 July 2019 (Ruediger).

46 Institute of Technology and Equity, 'Experts Explain How the Robot can Influence the Debate in Networks' (*Medium*, 15 December 2017) <https://medium.com/@tecnoequidade/especialistas-explicam-como-o-robô-pode-influenciar-o-debate-nas-redes-3a844f911849> accessed 29 October 2017.

47 Ruediger (n 45).

48 Bots account for more than 50% of the internet traffic around the world. Some bots are intended, for example, to require accountability of politicians, to root out causes for gender equality, or to help organise the (many) daily tasks of their users. Already other bots are aimed at spreading lies to influence conversations in the public sphere, a phenomenon that since 2014 has been gaining global scale. These bots are out there and hardly anyone knows how they work, who develops them and who they are funded. To illustrate this point, recent research has shown that the repercussion of the cancellation of the Queermuseu event, thoroughly commented on in the national press, has been inflated by robots on the internet. Of the more than 700 thousand tweets analysed, 8,69% were triggered by bots, hampering public discussion. 'While the decision to cancel exposure has taken other factors into account, it is possible to say that bot action has

For no other rationale, there are bills in Brazil at the federal level to discourage the use and contracting of bots for electoral objectives, such as Senate Bill No. 413/2017, which strives to criminalise 'the supply, hiring or the use of an automated tool that simulates or can be confused with a natural person to generate messages or other interactions, through the Internet or other communication networks, in order to impact the political debate or to interfere in the electoral process.'

Confirming the thesis of risk to democracy, the Directorate for Public Policy Analysis (DAPP) of the FGV disclosed illegitimate interference in the online debate through the use of the 2018[49] and 2014 elections[50] and in public debates in general.[51] Scheduled accounts for massive postings have become a tool for manipulating social media debates. Here, it is significant to highlight that traditional media, especially television, have been suffering a constant process of wear and tear and discredit on the part of citizens. In this context, individuals to an increasing degree are using the Internet to acquaint themselves and trust in data obtained through the computer is superior to other media, such as newspapers, radio and television.[52] However, the *online* scenario is diffused by bots and algorithms that forge debate and change the priority of themes. In the course of the electoral race of 2018, automated accounts were responsible for 12.9% of interactions on Twitter.[53] In 2014, the first presidential election in which the robots had more meaningful performance, the interference was similar. The bots accounted for more than 10% of interactions on Twitter. Formerly during the Impeachment process of previous President Dilma Rousseff, the robots were answerable for 20% of the debate between supporters of Dilma. In the second round of the 2014 elections, 20% of the interactions in favour of Aécio Neves were brought forth by robots.[54]

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impacted on the way the debate was conducted, and its practical consequences. (...) The use of the bots causes a polarisation environment, since the internet has an increase in the flow of messages with the same content'. In this scenario, says the researcher, it is difficult to come up with a spontaneous debate, with discordant and moderate ideas. 'This kind of action makes it difficult for more moderate positions to emerge. The search for a consensus is hampered because the robots can hijack part of the debate. 'See 'Research Shows that the Repercussion of the Cancellation of the Queermuseu was Inflated by Robots on the Internet' (*G1*, 2017) <https://g1.globo.com/rs/rio-grande-do-sul/noticia/pesquisa-demonstra-que-repercussao-do-cancelamento-do-queermuseu-foi-insuflada-por-robos-na-internet.ghtml> accessed 2 March 2017.

49 Ruediger (n 45).

50 'Robots, Social Networks and Politics in Brazil: Analysis of Interferences of Automated Profiles in the 2014 Elections' (*FGV DAPP*, 2018) <http://dapp.fgv.br/en/bots-social-networks-politics-brazil/> accessed 29 July 2019.

51 Ruediger (n 45).

52 Special Secretariat of Social Communication, Presidency of the Republic of Brazil, 'Brazilian Media Research 2016: Habits of Media Consumption by the Brazilian Population' (2016).

53 'Robot-Influenced Debate Reaches 10.4% on Twitter' (*FGV DAPP*, 19 October 2018) <https://observa2018.com.br/posts/debate-influenciado-por-robos-volta-a-crescer-e-chega-a-104-das-discussoes-sobre-os-presidenciaveis-no-twitter/> accessed 29 October 2018.

54 Ruediger (n 45).

With this kind of maneuvering, robots produce the false sense of broad political support for a specific proposal, idea or public figure, alter the direction of public policies, interfere with the stock market, spread rumors, false news and conspiracy theories, produce inaccurate information and content, as well as entice users to hateful links that steal personal data, among other risks.[55] Note, nevertheless, that saying that these bots work in favor of a given agenda does not mean that they 'entirely dominate the network, nor that the consequent perception of the larger part of the people will be the straight result of the influence of these devices'.[56] What we ask to highlight are the dangers previously attained through the use of robots and the probable risks that are more and more close and reckless.

By interfering in developing debates on social networks, robots are directly reaching political and democratic processes through the influence of public opinion. Their actions may, for instance, create an artificial opinion, or unreal dimension of a certain opinion or public figure, by sharing versions of a particular theme, which expand in the network as if there were, among the part of society represented there, a very powerful opinion on a specific subject.[57]

The study of the use of robots already establishes clearly the adverse potential of this practice for the political dispute and the public debate.[58] One of the most apparent conclusions in this sense is the concentration of these actions in poles located at the extreme of the political spectrum, artificially promoting radicalisation of the debate in the filter bubbles and, thereupon, undermining potential bridges of dialogue between the different political fields constituted. Therefore, the role of robots not only circulates false news, which can have damaging effects on society but also actively looks up to prevent users

55 On the existence today of an 'army' of false profiles, cf. Juliana Gragnani, 'Exclusive: Investigation Reveals Army of Fake Profiles Used to Influence Elections in Brazil' *BBC News* (London, 8 December 2017) <https://www.bbc.com/portuguese/brasil-42172146> accessed 14 March 2018.

56 Ruediger (n 45) 8.

57 Yasodara Cordova and Danilo Doneda, 'A Place for the Robots (In the Elections)' (*JOTA*, 20 November 2017) <https://www.jota.info/opiniao-e-analise/artigos/um-lugar-para-os-robos-nas-eleicoes-20112017> accessed 9 March 2018.

58 According to the research in Ruediger (n 45) 8 "The detection through machine learning occurs with the coding of behavior patterns from the collection of metadata. In this way, the system is able to automatically identify humans and robots based on the behavioral pattern of the profile. User metadata is considered one of the most predictable aspects of human and robot differentiation and can contribute to a better understanding of how sophisticated robots work. Identifying these robots or hacked accounts, however, is difficult for these systems. In addition, the constant evolution of robots causes the system, built from a static database, to become less accurate over time. However, it allows you to process a large number of complex correlations and patterns, as well as analyze a large number of accounts. The most efficient identification mechanisms combine different aspects of these approaches, exploring multiple dimensions of profile behavior, such as activity and time pattern. These systems take into account, for example, that real users spend more time on the network exchanging messages and visiting the content of other users, such as photos and videos, while robots accounts spend their time searching profiles and sending friendship requests".

from informing themselves suitably.

Another familiar strategy of automated profiles is the sharing of spiteful links, which are targeted at the theft of personal data or information. This information - such as profile photos - can be used to produce new robotic profiles that have features that help them start connections on networks with real users. A common action, which generally generates distrust about the performance of robots, is the marking by an unrecognised user.

This kind of action indicates that social networks, used by so many people for information purposes, may certainly and paradoxically contribute to a less informed society by manipulating public debate. Taken together, these risks and others represented by the action of non-human artefacts (such as bots) are more than enough to shed light on a real threat to the quality of debate in the public sphere,[59] especially since non-human artefacts have been gaining momentum, autonomy and behavioural unpredictability.[60]

V. Final Considerations

The latest developments in the new technologies addressed in this study alert us to the fact that the democratic role of the connected public sphere begins to run into risks and obstacles that can totally degrade its potential and should not be scrutinised enthusiastically as the panacea for salvation and legitimacy of the modern political system.

The hypertrophic impact of the market and bureaucratic economic rationality of the political system in the spheres of the world of life is seen by Habermas as one of the main pathologies of modernity, leading to loss of freedom and meaning in society.

Thus, the initial frenzy with the ideal of democratic virtual spheres and decolonisation of the world of life provided by the new digital environments has lost its breath. Now that

59 According to Habermas, *Law and Democracy* (n 6) 28-30, we must maximise the ideal speech conditions, that is, create an environment of democratic deliberation in which everyone has a voice. Faced with a scenario of crisis of representativity, the internet should be used as a tool for citizens to exercise their citizenship in an active way. According to Habermas, for democratic deliberation to occur, there are at least four conditions. These conditions, which characterize an "ideal speech situation", are basically linked to the need to guarantee the best conditions for deliberation and concern with the way the debate process is organised. They are: (i) each person must be able to express their own ideas openly and criticize those of others; (ii) the association of concepts of power and power with social status must be eliminated; (iii) arguments based on the appeal to tradition or dogma need to be exposed; and, as a consequence, the truth is achieved through the search for consensus.

60 In this sense, it is paradigmatic the example of the robot Tay, chatbot with capacity of deep learning created in 2016 by Microsoft. The experiment proved to be disastrous and the robot had to be deactivated within 24 hours of its start: Tay began to disseminate hate speech against historically marginalised minorities, stating for example that Hitler was right and that she hated Jews. About Robot Tay, cf. Isabela Moreira, 'Microsoft has Created a Robot that Interacts on Social Networks - and it has Become a Nazi' (*Galileo*, 24 March 2016) <https://revistagalileu.globo.com/blogs/buzz/noticia/2016/03/microsoft-criou-uma-robo-que-interage-nas-redes-sociais-e-ela-virou-nazista.html> accessed 29 October 2018.

algorithms and other non-human agents are participating and influencing discourses in the public sphere, it is the question: will they be obligated to act morally and rationally-dialogically so that they do not negatively affect the ideal speech situation?

Many times there is critical awareness of how the algorithms that make up the technologies work and how they can offer us personalised information from our personal data or even play upon our political vision. It is important to keep in mind that this operation often addresses political disputes or private business models that ask to maximise profit and not necessarily realise fundamental rights such as access to information, expression, and culture.

The Habermasian theory based on the logical and dialogical communicative concepts of the public sphere and ideal speech situation assists us to comply with how far we are distancing ourselves from a positive scenario from the perspective of democratic legitimacy. By this examination, we can conclude that the present situation is a colonisation of the world of life established by non-human agents (bots, algorithms with artificial intelligence, among others) - and likewise by human agents, insofar as individuals also share and produce fake news and deep fakes-producing harmful consequences aggravated by the filter-bubble effects and the radicalisation of discourses. Legal regulation must be attentive to these effects, seeking to correct them.

In the electoral context of 2018, fake news, in particular, and new technologies, in general, proved to be a challenging problem. On the one hand, controlling the broadcast and circulation of false news after its publication would be awfully dubious, given the rapid speed with which information is circulated in the context of the information society. On the other hand, prior analysis of the truthfulness of the news stories could imply institutionalised forms of censorship.

It is mandatory, therefore, to formulise institutional forms of combat against fake news without one of the fears mentioned above materialising. Thus, indirect regulations are more likely to be effective in countering fake news, such as banning countless fake accounts and setting ethical standards for the use of algorithms and artificial intelligence.

Note, nevertheless, that legislating on these issues is extremely complicated, as we are dealing with essential principles of democracy, such as freedom of expression and right of access to information. But this still seems to be the most appropriate alternative in the short and medium-term. There are technologies that can be used in smartphones and computers to realize the truthfulness of some information.[61] However, it is a technology of high value, which demands infrastructure and the replacement of devices that already circulate today. That is, it is a long-term measure and with many difficulties to be faced, such as those related to the privacy of technology users.

As we can observe, every day the new technologies are applying a greater influence on

61 Viana and Zanatta (n 1).

the life of the citizens and in the way they look at the facts. This impact expands more and more into all areas of our lives and has recently hit the elections thoroughly. Although it is not yet possible to say that algorithmic manipulation, bot use, fake news and deep fake disclosure are largely responsible for the election results, we can say that we are moving towards a scenario where it would be possible to hack the electoral process.

MAPPING INDIAN JUDICIARY'S APPROACH TO INVESTMENT TREATY ARBITRATION

James J Nedumpara*, Aditya Laddha** and Sparsha Janardhan***

Recent judicial decisions in India suggest that the Indian courts have taken a pro-arbitration stance in cases of investor protection claims under a Bilateral Investment Treaty (BIT). These decisions indicate a reluctance on the part of Indian courts to grant anti-arbitration injunctions ensuring limited judicial intervention in arbitration proceedings. The article analyses the approach of the Indian judiciary by mapping some of the recent disputes. Additionally, the article examines the mechanism of enforcement of investment treaty awards in light of the 'commercial reservation' that India has taken in the New York Convention. It also examines 'public policy' as a ground for refusing enforcement of investment treaty awards. The article concludes by observing that Indian courts have been favorable towards investor state arbitration proceedings. In doing so, however, courts have ousted the applicability the Arbitration & Conciliation Act leading to a legal vacuum for regulation of arbitration proceedings and enforcement of investment arbitration awards in India.

I. Introduction

Arbitration is a private system of adjudication. Arbitration as a means of resolution of disputes is well entrenched in most judicial systems. There are three well-recognised systems of arbitration, namely, domestic arbitration, international commercial arbitration and investment arbitration.

International commercial arbitration (hereinafter, "ICA") follows a private form of adjudication which involves an agreement between the parties to submit private law disputes

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to arbitration.[1] Investment arbitration, on the other hand, involves Capitalise bilateral and investment Treaties (hereinafter, "BIT") which are signed between two countries and provide guarantees for the investments of investors from one of the contracting states in the other contracting state.[2] BITs are the most important source of contemporary international investment law. The investment treaty regime allows private investors from any of the contracting states to pursue legal action directly against the host state for an alleged infringement of the standards of investment protection guaranteed under the treaty.[3] This procedure is often also known as the investor-state dispute settlement (hereinafter, "ISDS") mechanism.

India's legal approach to foreign investment regulation is two-fold: stand-alone investment agreements and investment chapters in Comprehensive Economic Cooperation Agreements (hereinafter, "CECA").[4] These investment agreements and chapters contain investment protection provisions such as national treatment, fair and equitable treatment, expropriation etc. Most importantly, however, these agreements contain an investor-state arbitration mechanism or ISDS, which enables the investor to directly enforce their rights against the state.

There has been a steady increase in the number of ISDS disputes globally.[5] This has resulted in a backlash against international investment law due to the adjudication of a range of sovereign regulatory measures by ISDS tribunals, the independence and impartiality of the ISDS mechanism and issues concerning conflict of interests.[6] India reacted to this and the ISDS cases against it (most notably, the *White Industries* case[7]) by reviewing its BITs and adopting a Model BIT in early 2016.[8] There has been a lot of criticism against the Model BIT and this article does not delve into that aspect. The focus of this article is to rather to examine the approach of the Indian judiciary towards claims under India's BIT.

The fundamental issue is that of Indian courts' jurisdiction to entertain any dispute in matters involving BIT arbitrations. However, the permissibility of intervention of Indian

1 Alan Redfern and others, *Redfern and Hunter on International Arbitration* (5th edn, New York: OUP 2009).

2 Rudolf Dolzer and Christoph Schreur, *Principles of International Investment Law* (2nd edn, OUP 2012) 13.

3 Jan Paulsson, 'Arbitration Without Privity' (1995) 10 ICSID Review 232.

4 Prabhash Ranjan and Deepak Raju, 'The Enigma of Enforceability of Investment Treaty Arbitration Awards in India' (2011) 6 Asian Journal of Comparative Law 1, 6 (Ranjan and Raju).

5 UNCTAD, *Investment Dispute Settlement Navigator* <http://investmentpolicyhub.unctad.org/ISDS> last accessed August 5 2019. As of December 31, 2018, the total number of known treat-based ISDS cases was 942.

6 Ranjan and Raju (n 4) 5-7.

7 *White Industries Australia Limited v Republic of India*, UNCITRAL, Final Award (30 November 2011) (White Industries Case).

8 Model Text for the Indian Bilateral Investment Treaty 2016, (http://www.dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf> accessed 5 August 2019.

courts in investment treaty arbitration disputes by remains unclear due to lack of legislative guidelines. This has led to conflicting decisions on issues concerning anti-arbitration injunctions, enforcement of investment arbitral awards, etc. Certain recent judgements bode well for investment arbitration in India and appears to be in line with the recent trend of Indian courts honouring the jurisdiction of international tribunals.

In the backdrop of a changing BIT landscape in India and increasing investment arbitrations filed against India, it is essential to examine the response of the Indian judiciary towards investment treaty arbitration. The purpose of this article is to analyse the reasoning of the Indian courts while dealing with questions related to investor-state arbitral proceedings. This article is divided as follows: Part II deals with the approach of the courts while dealing with anti-arbitration injunction sought by India against investment arbitration proceedings initiated by the investors. Part III deals with the issue of enforcement of investment arbitration awards in India, and Part IV concludes.

II. Anti-Arbitration Injunctions

The incidents of domestic courts issuing anti-arbitration injunctions in investment arbitration is scant in India. An anti-arbitration injunction stays the arbitration proceedings and restores the parties to the position where the suit does not potentially become infructuous, unconscionable or oppressive.[9] The Indian courts are increasingly adopting a pro-arbitration approach when dealing with such injunction applications in the context of ICA.[10] However, there is an absence of judicial clarity with respect to international investment arbitration in India. The critical issues in cases relating to anti-arbitration injunction in investment arbitration are whether Indian courts have the jurisdiction to issue anti-arbitral injunctions and what the limits are in relation to granting such anti-arbitration injunctions. This raises another critical question which concerns the absence of any legislative framework for regulation of BIT arbitration in India. Specifically, the applicability of the Indian Arbitration and Conciliation (hereinafter, "A&C") Act to BIT arbitration is still debated.

So far, there have been three disputes decided by the Indian courts related to anti-arbitration injunctions - *The Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS* (*Louis Dreyfus*),[11] *Union of India v. Vodafone Grp. Plc U.K. & Anr.* (*Vodafone*),[12] and *Union of India v. Khaitan Holdings (Mauritius) Limited & Ors.* (*Khaitan*

9 Anujay Shrivastava and Anubhav Khamroi, 'Anti-arbitration Injunctions in International Investment Arbitration: An Indian Overview' (India Corp Law 25 December 2018) <https://indiacorplaw.in/2018/12/anti-arbitration-injunctions-international-investment-arbitration-indian-overview.html> accessed 22 July 2019.

10 *McDonalds India Private Limited v Vikram Bakshi* (2016) 232 DLT 394.

11 *The Board of Trustees of the Port of Kolkata v Louis Dreyfus Armatures SAS and Others* 2014 SCC OnLine Cal 17695 (Louis Dreyfus).

12 *Union of India v Vodafone Group Plc UK and Another* IA9461/2017 in CS(OS) 383/2017, 2017 SCC OnLine Del 9930 (India v Vodafone 2017); *Union of India v Vodafone Group Plc UK and*

Holdings)[13]. The article now turns to an analysis of the reasoning adopted by Indian courts in each of these disputes. Subsequently, the article address the question of applicability of the A&C Act to BIT arbitration.

1. *Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS*

An Indian Court issued an anti-arbitration injunction in investor-state arbitration for the first time in 2014 in *Louis Dreyfus.* In this case, the petition before the Calcutta High Court was an application for injunction seeking to restrain the respondent from taking further steps on the claim under the BIT between the Government of India and the Government of France.

The genesis of the dispute is the awarding of a contract executed by Kolkata Port Trust (KPT) in favour of the Haldia Bulk Terminals Private Limited (hereinafter, "HBT") for operation and maintenance of berth nos. 2 and 8 of the Haldia Dock Complex of the Port Trust.[14] Louis Dreyfus Armatures SAS (hereinafter, "LDA") a French investor, held 49 per cent shares in the Indian joint venture company HBT.[15] The dispute was also a subject matter of domestic commercial arbitration between HBT and KPT. On 11 November 2013, LDA issued a notice of claim against Republic of India, State of West Bengal and KPT under Article 9 of the India–France BIT. Before the High Court of Calcutta, KPT argued against the jurisdiction of the arbitral tribunal and the admissibility of the claim. Additionally, KPT also argued that LDA could not make KPT party to the investment arbitration as it is not party to the India-France BIT.[16]

The Court held that 'unless the facts and circumstances of a particular case demonstrate that the continuation of such foreign arbitration would cause demonstrable injustice, a civil court in India would not exercise its jurisdiction to stay the foreign arbitration'.[17] It further observed that a BIT, which has been entered into by two sovereign nations, creates rights for the investor of a contracting party and, therefore, cannot be questioned by KPT.

The court also laid down three circumstances under which an anti-arbitration injunction can be granted:

1. If an issue is raised whether there is any valid arbitration agreement between the parties and the Court is of the view that no agreement exists between the parties;

Another IA9460/2017 in CS(OS) 383/2017, 2018 SCC OnLine Del 8842 (India v Vodafone 2018).

13 *Union of India v Khaitan Holdings (Mauritius) Limited and Others* IAs 1235/2019 and 1238/2019 in CS (OS) 46/2019, 2019 SCC OnLine Del 6755 (Khaitan Holdings).

14 *Louis Dreyfus* (n 11).

15 Harisankar K Sathyapalan, 'Indian Judiciary and International Arbitration: A BIT of a control?' (2017) 33 Arbitration International (OUP) 503-518, 516.

16 LDA in the notification of claim has referred to KOPT as an organ of Union of India.

17 *Louis Dreyfus* (n 11).

2. If the arbitration agreement is null and void, inoperative or incapable of being performed; or
3. If the continuation of foreign arbitration proceeding might be oppressive or vexatious or unconscionable.[18]

The court further noted that if the foreign arbitral tribunal considers the parallel and continuing arbitral proceedings might lead to conflicting decisions, then it may on a principle of comity of court and the avoidance of inconsistent judgments restrain its proceedings till the completion of the Indian court proceedings. The Court, relying on the Supreme Court of India's judgment in *Enercon (India) Ltd. v Enercon GMBH*, held that it is a well-recognised principle of arbitration jurisprudence in almost all the jurisdictions, especially those following the UNCITRAL Model Law, that the courts play a supportive role in encouraging the arbitration to proceed rather than letting it come to a grinding halt.[19] Furthermore, the 'least intervention by courts' is an equally well recognised principle in almost all jurisdictions.

The Court granted an anti-arbitration injunction restraining LDA from continuing the proceedings against KPT as it was not a party to the BIT. It noted that KPT could not espouse the cause of Union of India in BIT proceedings. It found that the continuation of any proceeding against KPT would be oppressive.

2. *Union of India v. Vodafone Grp. Plc U.K. &Anr.* (August 22, 2017 & May 7, 2018)

On 8 May 2007, M/s Hutchinson Telecommunications International Limited earned capital gains on the sale of stakes to Vodafone International Holdings B.V (hereinafter "VIHBV") in an Indian company by the name of Hutchinson Essar Limited (hereinafter "HEL") for a consideration of $11.1 billion. The acquisition of stake in HEL by VIHBV was held liable for tax deduction at source under section 195 of the Income Tax Act, 1961. Since VIHBV failed to honour its tax liability, a demand under section 201(1)(1A)/220(2) for non-deduction of tax was raised on VIHBV.

However, the Indian Supreme Court quashed the tax demand.[20] Subsequently, a retrospective amendment was brought to section 9(1) and section 195 of the Income Tax Act which, read with section 119 of the Finance Act, 2012 re-imposed the liability on VIHBV.[21] Due to its retrospective effect, on 3 January, 2013, the Indian tax authority demanded that Vodafone pay □142 billion in taxes on profits it made from transactions with a telecommunications company in 2007.[22]

18 ibid.

19 ibid.

20 *India v Vodafone 2017* (n 12).

21 ibid.

22 Ting-Wei Chiang, 'Anti-Arbitration Injunctions In Investment Arbitration: Lessons Learnt From The India v Vodafone Case' (2018) 11(2) Contemporary Asia Arbitration Journal 251, 253 (Ting-Wei Chiang).

On 17 April, 2014, VIHBV initiated the first arbitration proceedings against India under the India–Netherlands Bilateral Investment Protection Agreement (hereinafter, "BIPA") (hereinafter, "Vodafone v. India - I"). Subsequently, on 24 January, 2017, Vodafone Group Plc (hereinafter, "VG") and Vodafone Consolidated Holdings Limited (hereinafter, "VCHL") instituted a separate arbitration against India under the India–UK BIPA. The Indian government considered the second arbitration as a flagrant abuse of the arbitral process. Consequently, it filed an interim measure application before the *Vodafone v. India - I* Tribunal on 21 July, 2017. It also filed a civil suit in order to restrain VG and VCHL from initiating arbitration proceedings under the India-U.K. BIPA on August 22, 2017 before the High Court of Delhi.

The High Court of Delhi granted an *ex parte* interim anti-arbitration injunction in favor of India without prior notice to VG and VCHL. However, on 7 May, 2018, the High Court of Delhi vacated the 22 August, 2017 decision and rejected India's plea for anti-arbitration injunction. The article proceeds to analyse both the decisions of the High Court of Delhi.

2.1. *Union of India v. Vodafone Grp. Plc U.K. &Anr.* (August 22, 2017)

Before the High Court of Delhi, India argued that the both the arbitrations are based on the same cause of action and seek identical reliefs but from two different tribunals constituted under two different investment treaties against the same host-state. According to India, this amounted to 'abuse of law' or 'abuse of process'.[23] India relied on the ICSID tribunal's decision in *Orascom TMT Investments S.ar.l. v. People's Democratic Republic of Algeria* to support its argument. The ICSID tribunal in this case held that:

> the purpose of investment treaties, which is to promote the economic development of the host state and to protect the investments made by foreigners that are expected to contribute to such development. If the protection is sought at one level of the vertical chain, and in particular at the first level of foreign shareholding, that purpose is fulfilled. The purpose is not served by allowing other entities in the vertical chain controlled by the same shareholder to seek protection for the same harm inflicted on the investment. Quite to the contrary, such additional protection would give rise to a risk of multiple recoveries and conflicting decisions, not to speak of the waste of resources that multiple proceedings involve. The occurrence of such risks would conflict with the promotion of economic development in circumstances where the protection of the investment is already triggered. Thus, where multiple treaties offer entities in a vertical chain similar procedural rights of access to an arbitral forum and comparable substantive guarantees, the initiation of multiple proceedings to recover for essentially the same economic harm would entail the exercise of rights for purposes that are alien to those for

23 *India v Vodafone 2017* (n 12).

which these rights were established.[24]

India also argued that the subject matter of the arbitration involved issues of taxation which are beyond the scope of arbitration provided under the BIPA. Taxation is a sovereign function and the same can only be adjudicated before the Indian constitutional courts. The High Court of Delhi held that the commencement of the second arbitration constitutes a duplication of the parties and the issues.[25] The court also considered that India constituted the natural forum for the litigation of the defendants' claim against the plaintiff.[26] Further, since the claimants in the two arbitral proceedings form part of a single corporate entity, governed and managed by the same set of shareholders, they cannot file two independent arbitral proceedings as that amounts to abuse of process of law.[27] The court observed that there is a risk of parallel proceedings and inconsistent decisions by two separate arbitral tribunals in the Vodafonedispute. The court considered that it would be 'inequitable, unfair and unjust to permit the defendants to prosecute the foreign arbitration'.[28]

2.2. *Union of India v. Vodafone Grp. Plc U.K. &Anr.* (May 7, 2018)

The Delhi High Court judgment dated May 7, 2018 in *Vodafone* dispute, *inter alia,* dealt with the jurisdiction of state courts to deal with BIT arbitrations and the issue of multiplicity of proceedings.

2.2.1 Jurisdiction of National Courts

The defendants, VG and VCHL, argued that Indian courts inherently lacked subject matter jurisdiction because the dispute arose from a Treaty between two sovereign countries, i.e., India–U.K. BIPA.[29] Since the BIPA laid out the dispute resolution procedure between a U.K. investor and India, any conduct by Indian courts which interfered with the process is a violation of the Treaty.[30]

The Indian government, on the other hand, relied on *World Sport Group (Mauritius) Limited v. MSM Satellite (Singapore) Pte Limited*[31] and countered by arguing that the court has subject matter jurisdiction to grant anti-arbitration injunctions under section 9 of the Code of Civil Procedure (hereinafter, "CPC"). Section 9 of the CPC stipulates that Indian

24 *Orascom TMT Investments S.a.r.l. v People's Democratic Republic of Algeria* ICSID Case NoARB/12/35, Award (31 May 2017).

25 *India v Vodafone 2017* (n 12).

26 The Indian Supreme Court in *Modi Entertainment Network and Another v WSG Cricket Pte Limited* (2003) 4 SCC 341, after referring to a large number of foreign judgments, has held that a court of natural jurisdiction may issue anti-suit injunction even against foreign court having exclusive jurisdiction if the said forum is oppressive or vexatious.

27 *India v Vodafone 2017* (n 12).

28 ibid.

29 ibid [6].

30 ibid [13].

31 (2014) 11 SCC 639.

courts 'have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred?' Moreover, India argued that Indian courts have personal jurisdiction over the defendants under section 20(c) of the CPC since the cause of action arose within the jurisdiction of the Court.[32]

Section 20 of the CPC is common law provisions, which provides the rights to the plaintiff to institute suit proceedings at a place where the defendant(s) are actually and voluntarily residing or carry on the business for gain. Section 20 reads as follows:

> Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction-
>
> (a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or
>
> (b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or
>
> (c) the cause of action, wholly or in part, arises.

The court held that it has personal jurisdiction over the defendants as the cause of action arose within the Indian jurisdiction under section 20(c) of the CPC. Additionally, the defendants personally worked for profit within the Indian jurisdiction under section 20(a) of the CPC. Moreover, the court considered VG, VCHL and VIHBV and its Indian subsidiary as one single economic entity which actually and voluntarily resides in India within the meaning of section 20(a) of the CPC. The court also noted that the agreement to arbitrate between an investor and the host state is not itself a treaty but falls in a *sui generis* category.[33] The Supreme Court of India clearly stated in *Modi Entertainment v. W.S.G. Cricket Pte. Ltd.* that 'the courts in India have power to issue ant-suit injunction to a party over whom it has personal jurisdiction, in an appropriate case'.[34] Lastly, the court also noted that the jurisdiction of India courts could be ousted if 'there is an express provision of law or is clearly implied'.[35] In India, it is pertinent to note that there is no law which prohibits the courts to intervene in a BIT arbitration.

2.2.2 Abuse of Process and Parallel Proceedings

32 *India v Vodafone 2018* (n 12) [35].

33 ibid [83].

34 *Modi Entertainment Network and Another v WSG Cricket Pte Limited* (2003) 4 SCC 341, 345.

35 *India v Vodafone 2018* (n 12) [76].

The High Court of Delhi also held that it has 'the jurisdiction to restrain investment treaty arbitrations which are oppressive, vexatious, inequitable or constitute an abuse of the legal process'.[36] In BIT arbitration, however, the courts should exercise its jurisdiction to grant anti-arbitration injunctions with great caution and self-restraint.[37] The court observed that national courts will exercise 'great self-restraint and grant injunction only if there are very compelling circumstances and the Court has been approached in good faith and there is no alternative efficacious remedy available'.[38]

Despite the foregoing, the Court refused to grant anti-arbitration injunction as the initiation of the parallel BIPA arbitration by Vodafone group did not amount to an abuse of process or was *per se* vexatious or oppressive. The court reasoned that since India had already challenged the jurisdiction of *Vodafone v. India - I* Tribunal over the tax dispute, there is a valid reason for defendants to bring the *Vodafone v. India - II* arbitration.[39] Moreover, the Court did not consider the inconvenience or cost of litigation before two arbitral tribunals as 'oppressive'. This is surprising as the developing countries have been consistently arguing that the cost of litigation in BIT arbitrations is exorbitantly high. Moreover, it remains unclear what might amount to 'oppressive' to trigger the jurisdiction of the Court to grant anti-arbitration injunction.

3. *Union of India v. Khaitan Holdings (Mauritius) Limited & Ors.*

Khaitan Holdings (Mauritius) Limited (hereinafter, "Khaitan Holdings"), a Mauritian entity, had investments into Loop Telecom and Trading Limited ("Loop"), an Indian entity. Loop had applied for 21 Unified Access Services (hereinafter, "UAS") Licenses with the Department of Telecommunications, Government of India. Letters of Intent for the licenses were issued to Loop Telecom on 25th January, 2008. However, pursuant to the 2012 judgment of the Supreme Court of India in *Centre for Public Interest Litigation v. Union of India*, all the 21 UAS licenses granted to Loop Telecom were cancelled.[40]

Upon the cancellation of licences by the Supreme Court, Kaif Investments Limited ("Kaif Investments") and Capital Global Limited ("CGL") that held substantial interest in Loop issued a notice to India under Article 8.13 of the BIT seeking settlement of disputes.[41] Over time, the shareholding of Loop was restructured. Kaif Investment, which held a substantial interest in Loop Telecom merged with Khaitan Holdings. On September 30, 2013, notice of arbitration under Article 8.2 of the BIT Agreement was issued by Khaitan Holdings on the ground that it held 26.95% equity in Loop Telecom and being a company

36 *India v Vodafone 2018* (n 12) [104].

37 ibid [114]-[115].

38 ibid [148].

39 Ting-Wei Chiang (n 22) 251, 253; ibid [122]-[123].

40 *Khaitan Holdings* (n 13) [5].

41 ibid [7].

based in Mauritius, it is entitled to claim compensation.[42] On January 27, 2019, Union of India filed a suit against Loop, Khaitan Holdings, the Khaitans and Ruia seeking various declaratory reliefs, with an interim application to urgently restrain the arbitral proceedings.[43]

The Court observed that arbitral proceedings under BIT is a separate specie of arbitration.[44] The Court placed reliance upon *Union of India v. Vodafone Group* (May 7, 2018) judgment and held that the jurisdiction of courts in relation to arbitral proceedings under BIT would be governed by Code of Civil Procedure, 1908 ("CPC").[45] The Court held that in the present case, the Mr. Ishwari Khaitan and Ms. Kiran Khaitan were residents of Delhi and *prima facie* owners of Khaitan Holdings. Loop was an entity incorporated in Delhi and the subject matter of dispute were the investments in Loop. Hence, the Court stated that it has jurisdiction to entertain the suit filed by Union of India.[46] The Court also held that the anti-arbitration injunction application should be decided by the Arbitral Tribunal as it seized of the dispute. It held that 'the proceedings which are already underway cannot be termed as being oppressive, vexatious or an abuse of process at this stage'.[47]

The Indian judiciary in all the three aforementioned disputes seems to have adopted a pro-arbitration stand and has respected the principle of limited intervention in arbitration proceedings. However, the courts have formulated vague and undefined threshold such as the investment arbitrations should be 'vexatious, oppressive, inequitable or abuse of process' in order to grant anti-arbitration injunctions.

Additionally, the multiple arbitrations instituted by Vodafone Group only highlights an issue where the same group of investors initiate arbitration proceedings under different treaties. There are several disputes where investors have commenced investor state arbitration against India when domestic proceedings against investors are pending before Indian courts. This has led to a situation of parallel proceedings. For instance, in 2005, Antrix Corporation Limited (hereinafter, "Antrix") granted a contract to Devas Multimedia Private Limited (hereinafter, "Devas") for the lease of Space Segment Capacity on ISRO/ Antrix S-Band Spacecraft. The contract, unfortunately, was terminated by Antrix in 2011. Subsequently, Devas invoked arbitration clause in its contract with Antrix and obtained, in its favour, an arbitral award for more than USD 500 million plus interest. Currently, the challenge to the arbitral award is pending before Indian courts. Meanwhile, however, Mauritian and German investors who held shares in Devas have commenced independent arbitration proceedings under India-Mauritius BIT and India-Germany BIT. To resolve this, anti-arbitration injunction could be considered as a powerful tool.

42 ibid.

43 ibid [14].

44 ibid [1].

45 ibid [29] - [30].

46 ibid.

47 ibid [54].

4. Applicability of the Arbitration and Conciliation Act, 2015

The A&C Act does not specifically mention that it will be applicable to investment arbitration awards and its applicability for the resolution of the investment disputes is still to an extent disputable. The Delhi High Court in *Union of India v. Vodafone Group* (22 August, 2017) while passing an *ex-parte* order restraining the Vodafone Group from pursuing an investment treaty arbitration claim against India presumed the applicability of the A&C Act. Similarly, the Calcutta High Court in *Louis Dreyfus* presumed the applicability of the Act while passing an injunction order in favour of KPT. But in both cases, the courts did not give any reason for their extension of the A&C Act to investment arbitration awards. Scholars, while discussing these judgments, have noted that the court should have discussed the doctrinal basis for the applicability of the A&C Act to BIT arbitrations since the nature of a BIT arbitration is different from domestic and ICA.[48]

However, the Delhi High Court in its final judgment in *Union of India v. Vodafone Group* (May 7, 2018) concluded that the BIT arbitration is fundamentally different from ICA. The BIT arbitrations are treaty based arbitrations and the cause of action for arbitration is not 'commercial' in nature. The Delhi High Court judgment has been received with much appreciation. Scholars have noted that treating ICA and BIT arbitrations as same would lead to conceptual and normative problems.[49] It has also been observed that the exclusion of BIT arbitration from the scope of the A&C Act may be problematic. It creates a legal vacuum for governance of BIT arbitrations in India. Furthermore, the exclusion of BIT arbitrations from A&C Act assumes gravity at the stage of enforcement of a BIT award.[50]

III. Enforcement of Investment Arbitral Awards

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards[51], also known as the New York Convention, obligates every Member State to recognize an agreement to arbitrate and to enforce an arbitral award rendered in another Member State.[52]

Contracting States are permitted to make two reservations as to the scope of the

48 Prabhash Ranjan and Pushkar Anand,'Vodafone Versus India: A BIT of Confusion' *The Wire* (12 September, 2017) <https://thewire.in/176371/vodafone-versus-india-a-bit-of-confusion> accessed 28 July 2019.

49 Prabhash Ranjanand Pushkar Anand, 'Vodafone Versus India — BIT by BIT, International Arbitration Becomes Clearer' *The Wire* (17 May, 2018) <https://thewire.in/business/vodafone-versus-india-bit-international-arbitration> accessed 28 July 2019.

50 Kshama Loya Modani, Ashish Kabra and Mohammad Kamran, 'In Line With Vodafone, Delhi High Court Refuses Another Anti-Bit Arbitration Injunction' (*Nishith Desai Associates*, 15 February 2019) <http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/in-line-with-vodafone-delhi-high-court-refuses-another-anti-bit-arbitration-injunction.html?no_cache=1&cHash=443d45f51c28bd330adb0d908bd39a9e> accessed 28 July 2019.

51 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) 330 UNTS 3 (New York Convention).

52 New York Convention, art I-III.

applicability of the Convention. The first limitation is one of reciprocity - a Contracting State can provide that it will apply the Convention only to awards that are made in the territory of another Contracting State. The second permitted reservation is that a Contracting State may 'declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial'.[53] India is a party to the New York Convention and has made reservations on both these grounds.

Part II of the Arbitration and Conciliation A&C Act addresses the enforcement of foreign awards. Under this, Chapter 1 deals with the New York Convention awards and Chapter II with awards under the 1927 Geneva Convention. Section 48 of the Arbitration and Conciliation Act lists the grounds on which the enforcement of a New York Convention award may be refused and is based on Article V of the New York Convention.[54]

The regime for the enforcement of awards rendered under the International Centre for the Settlement of Investment Disputes (ICSID) Conventionis different. Under article 54 of the ICSID Convention, awards are to be recognised as binding and their pecuniary obligations are to be enforced in the same way as the final domestic judgements in all states parties to the Convention. The domestic court may not even examine whether the award is in conformity with the forum state's *ordre public* (public policy). The domestic court or authority is limited to verifying whether the award is authentic.[55] As a consequence, the scope for an enforcement challenge under the New York Convention is greater than in the case of the ICSID Convention.[56] However, India is not party to the ICSID Convention and hence investment treaty awards would have to be enforced under the New York Convention.

Though investment disputes have a strong commercial aspect, they differ significantly from ICA disputes.[57] International investment disputes, unlike ICA disputes, do not arise from a freely negotiated contract but from international treaty obligations accepted by the host state with the foreign investor's home state.[58] Claims under BITs usually relate to sovereign regulatory measures such as environmental policy, taxation, monetary policy, etc.[59] It has been argued that since international investment disputes involve public policy

53 New York Convention, art I(III).

54 Anirudh Krishnan and Anirudh Wadhwa, *Bachawat's Law of Arbitration and Conciliation* (5th edn, Lexis Nexis 2010) 2260.

55 Rudolf Dolzer and Christoph Schreur, *Principles of International Investment Law* (2nd edn, OUP 2012) 310.

56 Alan S Alexandroff and Ian A Laird, 'Compliance and Enforcement' in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds), *The Oxford Handbook of International Trade Law* (OUP 2008) 1173.

57 Ranjan and Raju (n 4) 9 (The authors argue that in India, the key distinction has not been fully understood and appreciated, and thus problems will arise in the enforcement of investment treaty arbitration awards in India).

58 Stephan W Schill (ed), *International Investment Law and Comparative Public Law — An Introduction* (OUP 2010) (Schill).

59 *Metalclad Corporation v United Mexican States* ICSID Case No ARB(AF)/97/1, (2000) 5 ICSID 236; *Occidental Exploration and Production Company v The Republic of Ecuador*, LCIA Case

issues, these disputes are also political in nature.[60] Additionally, an investment arbitral award has the potential to affect the concerns of the citizenry of the host state.[61]

Certain authors have expressed the view that the New York Convention, when drafted was not meant to be used in the context of investment treaty arbitrations.[62] Professor Sornarajah, while recognizing that many treaties make a reference to the New York Convention, expresses doubt over whether the Convention, which was designed for the enforcement of arbitral awards made in pursuance of disputes arising from private traders can be used for purposes of disputes involving sovereign states.[63] He argues that disputes arising from legislation in pursuance of governmental policy implicates political interference and hence ceases to be commercial disputes, thereby excluding application of the New York Convention.[64] Alternatively, Berg argues that though nothing in the Convention explicitly refers to States, there is no doubt that it permits enforcement as against sovereign states.[65] This difference of opinion warrants an analysis of how the Indian judiciary has interpreted the commercial relationship reservation to the New York Convention.

1. Commercial relationship reservation

There is no definition of 'commercial' provided in the New York Convention, the law of the enforcing jurisdiction determines what is commercial. Further, there does not appear to be a uniform understanding of the meaning of 'commercial'. In general, however, criminal matters and family matters, such as divorce, custody, and adoption, as well as wills and trusts, are not considered commercial.[66]

In India, International commercial arbitration as defined under the A&C Act relates to disputes that arise from a legal relationship which is considered as 'commercial'. The Supreme Court has given a wide meaning to the term 'commercial' to include all kinds of

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No UN3467(2004).

60 Jeswald W Salacuse, *The Law of Investment Treaties* (1st edn, Oxford University Press 2010) 355 (Salacuse 2010).

61 Schill (n 58).

62 MIM Aboul Enien, 'Responses to the New Challenges and Changing Circumstances' in Albert Jan Van den Berg (ed.), *New Horizons in International Commercial Arbitration and Beyond* (Kluwer Law International 2005)188; Augustus A Agyemang, 'The Suitability of Arbitration for Settling "Political" Investment Disputes Involving African States' (1988) 22(6) J WORLD TRADE 123.

63 M Soronrajah, *The International Law on Foreign Investment* (2nd edn, CUP 2004) 253.

64 M Soronrajah, *International Commercial Arbitration: The Problem of State Contracts* (Longman Publications1990) 240 for observing that if the issue has arisen as a result of state intervention in the contract, then enforcement under the New York Convention would be very difficult.

65 A Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Wolters Kluwer Publications 1981) 277-82.

66 Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (3rd edn, CUP 2017) 228 (Margaret Moses).

commercial transactions as provided under art 1 of the Model Law 1985.[67] Nevertheless, according to the Supreme Court, non-commercial civil disputes are also arbitrable.[68]

The test of commercial relationship and the requirement of an award to be made in a Convention country was recognised by the Madras High Court as essential in cases of a foreign award for the purposes of application of Part II of the Arbitration Act.[69] In *RM Investment & Trading Co. v. Boeing Company*, the Supreme Court observed that the New York Convention intends to facilitate the speedy settlement of disputes arising out of international trade through arbitration and that consequently, 'the expression "commercial" should be construed broadly, having regard for the manifold activities that are an integral part of international trade today'.[70] Alternatively, the Gujarat High Court in *Union of India v. Lief Hoegh Co*., held that 'commercial relationships' in this context would include 'all business and trade transactions in any of their forms, including the transportation, purchase, sale and exchange of commodities between the citizens of different countries'.[71] This understanding limits the interpretation of the term 'commercial' to a relationship between individuals.[72]

There is thus no uniform understanding of the term 'commercial' under the New York Convention. Consequently, the applicability of the New York Convention to investment treaty awards is left open. Further, BITs do not usually provide much guidance on how an award must be enforced. A study of certain Indian BITs observes that there is no mention in the BITs about how the award has to be enforced or whether the enforcement of the award is contingent on national law.[73] This adds to the existing lacuna in respect of the enforcement of investment awards.

2. Grounds for refusing enforcement of an arbitral award

Another challenge in the enforcement of investment treaty arbitrations is the grounds on which domestic courts can refuse enforcement. The second sub-section of Article V of the New York Convention deals with grounds for enforcement that can be raised by the court *suasponte*. If a court finds that the subject matter of the dispute is not arbitrable under

67 *See footnote to* UNCITRAL Model Law on International Commercial Arbitration (adopted by the United Nations Commission on International Trade Law on 21 June 1985) UN Doc A/40/17, Annex I (Model Law) art 1; Arbitration and Conciliation Act 1996, s 2(1)(f); *RM Investments and Trading Company Private Limited v Boeing Corporation* AIR 1994 SC 1136 (RM Investments).

68 *See H Srinivas Pai and Another v HV Pai* (2010) 12 SCC 521 where the Court opined that 'reference to arbitration and arbitrability depends upon the existence of an arbitration agreement, and not upon the question whether it is a civil dispute or commercial dispute'.

69 *Tamil Nadu Electricity Board v M/S Videocon Power Limited* (2009) 4 MLJ 633.

70 *RM Investments* (n 67).

71 AIR 1983 (Guj.) 34.

72 Siddharth S Aatreya, 'Can Investment Arbitral Awards be Enforced in India?' (*Kluwer Arbitration Blog*, 4 April 2019) <http://arbitrationblog.kluwerarbitration.com/2019/04/04/can-investment-arbitral-awards-be-enforced-in-india/> accessed 28 July 2019.

73 Ranjan and Raju (n 4) 14.

the law of its jurisdiction, or if it finds that enforcement would be contrary to the country's public policy, then recognition and enforcement may be refused.[74]

Both the Model Law and the New York Convention prescribe 'public policy' as one of the grounds for challenging an arbitral award or refusing its enforcement.[75] In the absence of a precise meaning of the term 'public policy', the Supreme Court of India, in the context of enforcing a foreign award, declared that public policy of India is restricted to three components, which are (i) fundamental policy of Indian law, (ii) interests of India, or (iii) justice or morality.[76] The concept of 'patent illegality' was added to the existing components while considering an application under section 34 of the A&C Act.[77] In *Venture Global Engineering v Satyam Computer Services*,[78] the court transcended its boundary in international commercial arbitration matters by setting aside of an award rendered outside India.[79]

The approach of the judiciary transformed with the Supreme Court elucidating the distinction between standards to be applied in the case of enforcement of a foreign award as opposed to annulment of a domestic award. In *Shri Lal Mahal*, the apex court ruled that a broad interpretation of the public policy ground for setting aside a domestic arbitration award could not be extended to the refusal of enforcement of foreign awards in India.[80]As a consequence, the Supreme Court has substantially curtailed the scope of the expression 'public policy'.

A positive development was made through the Arbitration and Conciliation (Amendment) Act, 2015, which provided for an introduction of an explanation in section 48 of the Act to clarify that the test for contravention of the fundamental policy of Indian law shall not entail a review on the merits of the dispute.[81]

The Indian judiciary's approach towards the interpretation of 'public policy' has

74 Margaret Moses (n 66) 241.

75 Model Law, art 36 (1) (b) (ii) (It is a verbatim copy of the New York Convention, art V (2) (b)).

76 *Renusagar v General Electric* AIR 1994 SC 860.

77 *ONGC v Saw Pipes* AIR 2003 SC 2629 (Here, the arbitration under question was a domestic arbitration and not a decision on the enforcement of foreign arbitral award).

78 *Venture Global Engineering v Satyam Computer Services* (2008) 4 SCC 190.

79 Harisankar K Sathyapalan, 'Indian Judiciary and International Arbitration: A BIT of a control?' (2017) 33 Arbitration International (OUP) 503-518, 516.

80 *See Shri Lal Mahal Ltd v Progetto Grano Spa*, (2014) 2 SCC 433. (The Supreme Court clarified that section 48 does not offer an opportunity to have a second look at the foreign award at the enforcement stage, or permit review of the award on the merits. Accordingly, the court held that the meaning of the expression public policy under section 48 is limited to: 1. Fundamental policy of India; 2. Interests of India; 3. Justice and morality) (Shri Lal Mahal).

81 Amendment to section 48: "For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute."

serious implications towards the enforceability of international investment awards.[82] For instance, a challenge against the enforcement of the award in Indian courts in cases where regulatory measures have been adopted in national interest may be considered to be against the 'interests of India.' Therefore, overcoming these grounds for refusal of enforcement of investment treaty awards would result in an additional burden to investors. The change in approach by the Indian judiciary combined with the legislative amendments appear to aid the investor is securing an enforcement of an investment treaty award.

IV. Conclusion

Indian courts, so far, have had limited exposure to investor-state arbitration disputes. These have included instances to pronounce on the issues related to anti-arbitration injunction on the grounds such as abuse of process and parallel proceedings. While the courts have respected the idea of limited judicial intervention to arbitration proceedings when dealing with anti-arbitration injunction disputes, they have failed to formulate definite grounds for granting such injunctions.

The High Court of Delhi in *Vodafone* and *Khaitan Holdings* and the High Court of Calcutta in *Louis Dreyfus* have recognised that the courts retain the power to grant anti-arbitration injunctions. However, the extent to which they can exercise such power remains open to question. Further, the different approaches of the High Courts of Calcutta and Delhi with respect to applicability of A&C Act to investor-state arbitration have created confusion and have given rise to a legal vacuum for regulation of such arbitration disputes. The Calcutta High Court in *Louis Dreyfus* presumed the applicability of the A&C Act without providing any rationale. The Delhi High Court, on the other hand, in *Vodafone* and *Khaitan Holdings* excluded the applicability of the A&C Act as investor-state arbitration are not commercial in nature. The Delhi High Court resorted to section 20 of the CPC to justify the court's jurisdiction.

In terms of enforcement of investment treaty awards, concerns have been raised on the applicability of the New York Convention. India has taken the commercial relationship reservation which complicates the applicability of the Convention as there is no uniform understanding of the term 'commercial.' Further, the enforcement of an award under the New York Convention would be subject to the grounds for refusal of enforcement, in particular, that of 'public policy.'

The extent to which courts should exercise their power to grant relief in cases of investment treaty arbitrations is unclear. To achieve a proper balance between the interaction of courts and foreign investor-state arbitral tribunals, India needs to formulate a legislative framework especially addressing the nuances in BIT arbitrations such as parallel proceedings, setting aside and enforcement of BIT arbitral awards.

82 Ranjan and Raju (n 4) 22.

The Arbitration and Conciliation (Amendment) Bill, 2019 has been introduced in the Rajya Sabha on 15 July, 2019 with the aim of making India a hub of domestic and global arbitration for settling commercial disputes. The 2019 Bill amends the A&C Act to provide for a robust mechanism to deal with institutional disputes and ensures accountability of the arbitrator.[83] Given the difference in the nature of ICA awards and international investment awards, the applicability of the domestic legal regime is not straight-forward. Any amendment to the Arbitration and Conciliation (Amendment) Act, 2015 would have to take into account these concerns and such crucial issues should not be left completely to the mercy of the courts. While it is important to acknowledge that the trend of the judiciary has been pro-arbitration in the case of investment arbitration, there remains an element of uncertainty. Therefore, it is essential to have more clarity in terms of the legal regime applicable to disputes concerning investment treaty arbitrations.

83 'Bill to encourage arbitration of commercial disputes introduced in Rajya Sabha' (*Moneycontrol*, 15 July 2019) <https://www.moneycontrol.com/news/business/bill-to-encourage-arbitration-of-commercial-disputes-introduced-in-rajya-sabha-4206891.html> accessed 28 July 2019. (It provides for the setting up of an Arbitration Council of India, an independent body to frame arbitral institution and accredit arbitrators by laying down norms).

BACK TO THE DRAWING BOARD: WHAT SHOULD BE THE NEW DIRECTION OF THE INTERMEDIARY LIABILITY LAW?

T. Prashant Reddy*

The primary objective of this article is to critically examine the rationale behind the current and proposed standards of legal liability for intermediaries in India. The article places immunities like 'safe harbour' provisions offered to intermediaries in the larger context of liability related law, showcasing them as subsidies suitable at the dawn of the internet era that cannot continue to be retained by today's internet behemoths. The paper progresses to analyse crucial debates surrounding existing Indian provisions on intermediary law, regarding enforceability and 'due diligence' requirements. Through this analysis, the author wishes to draw out inadequacies in the recently introduced Draft Information Technology [Intermediaries Guidelines (Amendment) Rules] 2018 and propose an alternative legislative model that is closely tailored to Silicon Valley's existing encryption and moderation practices.

I. Introduction

In December 2018, the Ministry of Electronics and Information Technology (MeitY) proposed replacing the existing Intermediaries Guidelines Rules, that was notified in 2011, with a new version.[1] The existing Intermediaries Guidelines Rules were drafted under section 79 of the Information Technology Act, 2000 (IT Act) which offers internet intermediaries a large measure of immunities for the acts of users using their services.

As with previous Indian attempts to regulate Silicon Valley, the first source of public information was a press leak just days after the government discussed its plans to reform existing guidelines with representatives from Silicon Valley in closed-door meetings.[2] The

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1 The Information Technology (Intermediaries Guidelines (Amendment) Rules) 2018 (Draft Intermediary Guidelines 2018).

2 Seema Chisti, 'Government moves to access and trace all 'unlawful' content online' *The Indian Express* (New Delhi, 24 December 2018) <https://indianexpress.com/article/india/

resulting press coverage converted a legitimate policy debate of legal liability of billion-dollar data corporations for their contentious communication and media products, into a conversation about censorship of the internet.[3] By framing the issue of intermediary liability as one of censorship rather than liability of the private sector, Silicon Valley, its allies, and its surrogates[4] in India succeeded in obfuscating a much-needed public debate on intermediary liability in the context of new challenges like encrypted mass communication services and poor content moderation practices by Silicon Valley companies.

In this article, I take a look at some critical issues around intermediary liability, starting with the raison d'être for intermediary liability provisions in Indian law and the importance of viewing the immunity to intermediaries as a subsidy offered in the early days of the internet to the now-massive internet companies. It is important to return to these basics as India aims to rework its intermediary liability regime.

I will then proceed to take a closer look at some of the contentious issues in the black letter of Indian law such as the scope of 'due diligence' in section 79, the enforceability of the 'guidelines' under Indian law, and the problematic aspect of the new guidelines along with a discussion on why the 'guidelines' are not the most appropriate method to reform the law. I will then propose an outline for a new legislation on intermediary liability to tackle challenges posed by encryption and Silicon Valley's existing moderation practices.

II. Framing the Liability Debate in the Context of Internet Intermediaries – Is it a Subsidy or a Necessity for the Evolution of the Internet Ecosystem?

One of the biggest risks in launching any new product or service is the issue of legal liability. New products can malfunction causing harm to the customer due to defective designing or poor testing. If such a defective product were to cause harm to a person,

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it-act-amendments-data-privacy-freedom-of-speech-fb-twitter-5506572/> accessed 21 April 2019. For a previous attempt in 2011, see Heather Timmons, 'Chilling impact of India's April internet rules' (*The New York Times-India Ink*, 7 December 2011) <https://india.blogs.nytimes.com/2011/12/07/chilling-impact-of-indias-april-internet-rules/> accessed 21 April 2019.

3 Vindu Goel, 'India proposes Chinese-style Internet Censorship' *The New York Times* (New Delhi, 14 February 2019) <https://www.nytimes.com/2019/02/14/technology/india-internet-censorship.html> accessed 21 April 2019; 'India must resist the lure of the Chinese model of online surveillance and censorship' (*Internet Freedom Foundation*, 24 December 2018) <https://internetfreedom.in/india-must-resist-the-lure-of-the-chinese-model-of-surveillance-and-censorship-intermediaryrules-righttomeme-saveourprivacy/> accessed 21 April 2019; Pranshu Rathee, 'Censorship and privacy worries over new draft IT rules' *Deccan Herald* (Bengaluru, 26 December 2018) <https://www.deccanherald.com/national/national-politics/censorship-privacy-worries-709663.html> accessed 21 April 2019; Amba Kak, 'India attempts to turn online companies into censors and undermines security — Mozilla responds' (*Mozilla*, 2 January 2019) <https://blog.mozilla.org/netpolicy/2019/01/02/india-attempts-to-turn-online-companies-into-censors-and-undermines-security-mozilla-responds/> accessed 21 April 2019.

4 Debarshi Dasgupta, 'Beyond the Searchlight' *Outlook* (28 October 2013) <https://www.outlookindia.com/magazine/story/beyond-the-searchlight/288214> accessed 26 July 2019.

the manufacturer can be held liable for damages under the tort of negligence.[5] Similarly, negligence by a professional during the course of rendering services can result in liability for malpractice.[6] The medical profession, for example, is constantly sued by patients for negligence in providing treatment.[7]

Most businesses will attempt to limit liability with customers through contractual clauses in the sales or service agreement.[8] Such attempts to limit liability can succeed only if there is privity of contract between both parties. Common law has for long recognised, since the famous case of *Donoghue* v. *Stevenson,*[9] that a 'duty of care' exists under tort law even in the absence of any privity of contract. For example, if a manufacturer sells a defective product to a wholesale business who sells it to a retailer, who sells it to a final customer, then the manufacturer owes a duty of care to the final customer despite there being no contract between the manufacturer and the final customer. Thus, businesses owe a 'duty of care' to all those who are likely to be exposed to their products or services. A failure to discharge this 'duty of care' can result in legal liability if the consumer or third-party is harmed by the negligence of the seller or service provider. The party harmed by this negligence can sue for recovery of damages to compensate for the harm suffered by the negligence.[10]

Apart from civil liability, the law may also impose criminal liability for certain acts. The key difference between civil and criminal liability is the nature of the remedy and the standard of proof that needs to be met under the law. Criminal liability can involve a mix of fines and imprisonment and is usually much more difficult to establish than civil liability. This is because the standard of proof required for the former is 'beyond reasonable doubt',

5 Gibson B Witherspoon, 'Manufacturer's Negligence in Products Liability Cases' (1964) 5 Boston College Law Review 585 <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2858&context=bclr> accessed 21 April 2019.

6 *Balram Prasad v Kunal Saha* (2014) 1 SCC 384.

7 Gayathri Vaidyanathan, 'A Landmark Turn in India's Medical Negligence Law' *(The New York Times- India Ink,* 31 October 2013) <https://india.blogs.nytimes.com/2013/10/31/a-landmark-turn-in-indias-medical-negligence-law/>accessed 21 April 2019; Dr. Kunal Saha, 'Are large compensation payouts for medical negligence good?' *The Economic Times* (1 September 2014) <https://economictimes.indiatimes.com/industry/healthcare/biotech/healthcare/are-large-compensation-payouts-for-medical-negligence-good/articleshow/41280942.cms?from=mdr> accessed 21 April 2019.

8 See *Bharathi Knitting Company v DHL Worldwide Express Courier* (1996) 4 SCC 704 for reiteration of the sanctity of limitation of liability clauses in contracts; Emlin McClain 'Contractual Limitation of Liability for Negligence' (1915) 28 Harvard Law Review 550 <https://www.jstor.org/stable/pdf/1326406.pdf> accessed 21 April 2019.

9 *Donoghue v Stevenson* [1932] UKHL 100.

10 See *Rajkot Municipal Corporation v Manjulben Jayantilal Nakum* (1997) 9 SCC 552 for reiteration of the position that the basic principles of the tort of negligence are recognised in India even though it is not a product liability case.

while the latter only requires a 'preponderance of possibilities'.[11]

In order to incentivise the launch of new business models or new products or to lower costs of certain services or products, it is common for lawmakers to reduce legal liability through statutes that cap monetary liability or reduce limitation periods during which lawsuits can be brought.[12] A major component of healthcare reform in the United States was bringing down insurance premiums by limiting the liability of doctors for malpractice.[13] A few examples of Indian legislation that curb liability are the Civil Liability for Nuclear Damage Act, 2010 and the Carriage by Air Act, 1972 (as subsequently amended). Both legislations limit the liability of manufacturers or service providers by capping the amount available for compensation for the persons who have suffered damage due to nuclear accidents or aircraft accidents respectively.[14]

These statutes effectively operate as a form of 'subsidy' for private businesses that are being shielded from financial or criminal liabilities that are faced by all other businesses for failing to meet the duty of care expected of them. By shielding certain players from liability, the state reduces operating costs and insurance premiums thereby increasing the chance of businesses undertaking risky innovation and turning profitable in a shorter time

11 On the distinction between preponderance of probabilities and beyond reasonable doubt, see *Surinder Singh v Hardial Singh* (1985) 1 SCC 91.

12 McClain (n 8); Francis E McGovern, 'The Variety, Policy and Constitutionality of Product Liability Statutes of Repose' (1981) 30 The American University Law Review 579 <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1367&context=faculty_scholarship> accessed 21 April 2019.

13 Kenneth E Thorpe, 'The Medical Malpractice "Crisis": Recent Trends and the Impact of State Tort Reforms' (2004) 23 (Suppl 1: Web Exclusives) Health Affairs <https://www.healthaffairs.org/doi/full/10.1377/hlthaff.W4.20> accessed 21 April 2019; Kathryn Zeiler and Lorian E Hardcastle, 'Do Damages Reduce Medical Malpractice Insurance Premiums? A Systematic Review of Estimates and the Methods Used to Produce Them' in Jennifer Arlen (ed), *Research Handbook on the Economics of Tor*ts (Edward Elgar Publishing 2012) <https://pdfs.semanticscholar.org/146f/cd0e5d71e8b1ef3c84f6bd46964fa9baa214.pdf> accessed 21 April 2019.

14 The Carriage by Air Act 1972 was enacted by Parliament in order to meet India's obligations under the Convention for the Unification of certain Rules relating to International Carriage by Air (entered into force 13 February 1933) (Warsaw Convention) 137 LNTS 11 of 1929 and the Convention for the Unification of Certain Rules for International Carriage by Air (entered into force 4 November 2003 (Montreal Convention) 2242 UNTS 309 of 1999. Schedule I, s 22 caps damages awardable by an air carrier to a passenger at 1,25,000 francs per passenger and 250 francs per kilogram of luggage. The former cap was capable of being surpassed by way of contract between the passenger and the carrier, while the latter cap could be lowered by a special declaration of value at the time of delivery. The Civil Liability for Nuclear Damage Act, 2010 was purportedly adopted to ensure prompt compensation to victims of nuclear incidents through a no-fault liability regime. Section 6 of the Act lays out the total liability of operators (joint and several) for each nuclear incident to 1500 crores in case of large nuclear reactors, 300 crores in case of spent fuel reprocessing plants and 100 crores for smaller research reactors. The maximum amount of liability is capped at 300 million Special Drawing Rights (as decided by the IMF).

span.[15]

Such subsidies, however, do have adverse effects on the rights of other citizens.[16] For example, in the context of the Civil Nuclear Liability Act, 2010 it is very possible that the damage caused by a nuclear accident can be more than the prescribed liability limits in the law. This would automatically limit the compensation made available to the pool of citizens affected by a nuclear accident thereby forcing them to bear the risk and cost of operating a hazardous industry.[17] This practice of transferring the cost or risk from one party to another is in effect a subsidy for private businesses and can be contentious. The furious debate in India over the Civil Nuclear Liability Act when it was being pushed through the Parliament is an example of how contentious these laws can get when the beneficiaries are foreign corporations.[18] There is also a debate on whether such liability caps achieve their policy goals and in some jurisdictions like the United States of America, courts have struck down such legislation for being unconstitutional.[19]

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15 Gideon Parchomovsky and Alex Stein, 'Torts and Innovation' (2008) 107 Michigan Law Review 285 <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1365&context=mlr> accessed 21 April 2019; Meredith L Kilgore, Michael A Morrisey and Leonard J Nelson, 'Tort Law and Medical Malpractice Insurance Premiums' (2006) 43 Inquiry 255 <https://www.ncbi.nlm.nih.gov/pubmed/17176968> accessed 21 April 2019; Paul Heaton, 'How Does Tort Law Affect Consumer Auto Insurance Costs?' (2017) 84 The Journal of Risk and Insurance 691 <https://onlinelibrary.wiley.com/doi/abs/10.1111/jori.12095> accessed 21 April 2019.

16 See Lucinda M Finley, 'The Hidden Victims of Tort Reform: Women, Children and the Elderly' (2004) 53 Emory Law Journal 1263 <https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1197&context=articles>accessed 21 April 2019 for how limitation of liability in medical malpractice cases in the United States of America affects women and children disproportionately.

17 This is because the liability of the manufacturer is capped at 300 million SDR, which means that this 300 million has to be distributed equally amongst all the victims. Not only is this a complex calculation for judges, it also virtually guarantees that some victims will not be compensated to the entire extent of their damages especially if the nuclear accident is a massive one.

18 Siddharth Varadarajan, 'Turn the Nuclear Bill from Liability to Asset' *The Hindu* (22 June 2010) <https://www.thehindu.com/opinion/columns/siddharth-varadarajan/Turn-the-nuclear-bill-from-liability-to-asset/article16262910.ece> accessed 21 April 2019; Siddharth Varadarajan 'Government Diverts Nuclear Bill under US Pressure' *The Hindu* (18 November 2016) <https://www.thehindu.com/opinion/columns/siddharth-varadarajan/Government-dilutes-nuclear-bill-under-U.S.-pressure/article16262911.ece>accessed 21 April 2019; AM Jigeesh, 'Government Pulled up for Diverting Civil Nuclear Liability Rules' *The Hindu Business Line* (New Delhi, 22 November 2017) <https://www.thehindubusinessline.com/economy/Govt-pulled-up-for-diluting-Civil-Nuclear-Liability-Rules/article20490780.ece?css=print>accessed 21 April 2019; PTI, 'US Suppliers unhappy over changes in Nuclear Liability Bill' *The Hindu* (Washington, 5 November 2016) <https://www.thehindu.com/news/international/U.S.-suppliers-unhappy-over-changes-in-Nuclear-Liability-Bill/article15907461.ece> accessed 21 April 2019.

19 Leonard J Nelson, Michael A Morrisey and Meredith L Kilgore, 'Damages Caps in Medical Malpractice Cases' (2007) 85(2) Milbank Quarterly 259 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2690332/> accessed 21 April 2019; David L Hudson Jr, 'More States See Tort Limits Challenged as Unconstitutional' (*ABA Journal*, 1 April 2013) <http://www.abajournal.com/magazine/article/more_states_see_tort_limits_challenged_as_unconstitutional/> accessed 21 April 2019; Thomas Kaplan, 'Lessons for Albany on Malpractice Limits' *The New York Times*

In the late nineties, when the internet had been in existence for just a few years, an infant Silicon Valley was in the process of creating new business models centred around communications products or dissemination of information. The risk for any business dealing with communications or dissemination of information is two fold. The first is a possible liability for copyright infringement under copyright law.[20] The second is possible liability under general laws that prohibit or criminalise the publication of certain content such as defamatory speech, hate speech or child pornography.[21] In countries like India, several other categories of speech are criminalised, such as speech that causes enmity between two communities or speech that hurts religious sentiments. These laws are meant to curb communal tension between the many communities and religions that co-exist in India's diverse population.[22] Criminal liability under these legislations is usually affixed to anybody who speaks or publishes the content in question. For example, in India, not just the editor and owner of a newspaper but also the publisher and printer are presumed to have knowledge of the content published in a newspaper and can hence be liable for damages for publishing defamatory content.[23]

In the context of Silicon Valley, most of the successful business models did not create their own content like traditional media corporations. Rather, they provided search engine services, browsing of third-party content or bulletin board services where users could post

(New York, 24 March 2011) <https://www.nytimes.com/2011/03/25/nyregion/25malpractice.html> accessed 21 April 2019; Ronen Avraham, Leemore S Dafny and Max M Schanzenbach, 'The Impact of Tort Reform on Employer Sponsored Health Insurance Premiums' (2012) 28(4) Journal of Law, Economics and Organizations 657 <https://www.hbs.edu/faculty/Publication%20Files/8_Dafny_Impact%20of%20Tort%20Reform_2012_93c817fc-8837-4430-bf73-e17d651f505e.pdf> accessed 21 April 2019.

20 For a detailed history on the evolution of principles of intermediary liability in the context of copyright infringement, see Niva Elkin-Koren, 'After Twenty Years: Copyright Liability of Online Intermediaries' in Susy Frankel and Daniel J Gervais (eds), *The Evolution and Equilibrium of Copyright in the Digital Age* (Cambridge University Press 2014) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2483877> accessed 21 April 2019 .

21 For a detailed history on the international debate on liability of various internet intermediaries for hate speech dissemination, see Christopher D Van Blarcum, 'Internet Hate Speech: The European Framework and the Emerging American Haven' (2005) 62 Washington and Lee Law Review 781 <http://law2.wlu.edu/deptimages/Law%20Review/62-2VanBlarcum.pdf> accessed 21 April 2019.

22 Cherry Agarwal, 'Seven Laws that Restrict Free Speech and Criminalise it' (*Newslaundry,* 26 October 2018) <https://www.newslaundry.com/2018/10/26/abhijit-iyer-mitra-free-speech-laws-indian-penal-code> accessed 21 April 2019; Neeti Nair, 'Beyond the "Communal" 1920s: The Problem of Intention, Legislative Pragmatism, and the Making of Section 295A of the Indian Penal Code'(2013) 50 The Indian Economic and Social History Review 317 <https://journals.sagepub.com/doi/abs/10.1177/0019464613494622> accessed 21 April 2019.

23 Press and Registration of Books Act 1867, s 5; PTI, 'SC to examine publisher's liability in defamation cases'*The Hindu* (New Delhi, 18 March 2012) <https://www.thehindu.com/news/national/sc-to-examine-publishers-liability-in-defamation-cases/article3008904.ece> accessed 21 April 2019; DH News Service, 'SC for scrutiny if newspaper owner can be liable for defamation' *Deccan Herald* (New Delhi, 5 December 2017) <https://www.deccanherald.com/content/646375/sc-scrutiny-newspaper-owner-can.html> accessed 21 April 2019.

content or aggregator services that again used content developed by others.[24] Those nascent business models faced the threat of secondary liability for the content that was posted by their users or which showed up in search results. As per the principles of secondary liability, although the user has posted content, anyone who has facilitated the publication of such content can be held liable for copyright infringement or defamation depending on the degree of knowledge that can be attributed to those providing services that facilitated the publication and dissemination of the information.[25] This is largely a question of fact.[26] As explained earlier, for traditional media, it was presumed that the publisher had complete knowledge of all the content in their books or papers especially since they are profiting from such content.

In the context of the internet, it was in Silicon Valley's argument that the intermediary should not be attributed any knowledge for all the content that it handles given the volume of information transacted via a single intermediary.[27] If the traditional standard of liability used for the news media was applied to infant internet startups, Silicon Valley would have had to hire armies of content moderators to sift through content being uploaded by users. The issue of legal liability was therefore serious enough for the United States Congress to enact the Electronic Communication Decency Act and the Digital Millennium Copyright Act that provided 'safe harbours' for different categories of intermediaries for the speech of third parties. These safe harbours basically limited the legal liability of intermediaries, provided they fulfilled certain statutory obligations, including taking down content or de-indexing links within a fixed period of time after being informed of the illegal content. The decision to enact such safe harbours was aimed at encouraging new business models on the internet by reducing legal risks. Arguably, the American model of safe harbours for intermediaries did wonders for Silicon Valley and is certainly one of the main reasons for the success of companies like Google, YouTube, Facebook, WhatsApp, Apple, and Instagram. According to some American scholars, these immunities to intermediaries were a key subsidy that was responsible for the 'making' of Silicon Valley.[28]

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24 Steven J Vaughan-Nichols, 'Before the Internet: The Golden Age of Online Services' (*IT World*, 5 April 2012) <https://www.itworld.com/article/2827191/before-the-internet--the-golden-age-of-online-services.html> accessed 20 July 2019.

25 See *Stratton Oakmont Inc v Prodigy Services* (1995) 23 Media L Rep 1794 for an example of a case where a network service provider was held liable.

26 See *Cubby Inc v CompuServe Inc* 776 F Supp 135 (SDNY 1991) for an example of a case where a network service provider was held to be not liable.

27 For an explanation of the legislative history of the Communications Decency Act, see Robert Cannon, 'The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway' (1996) 49 Federal Communications Law Journal 51<https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1115&context=fclj> accessed 21 April 2019.

28 Anupam Chander, 'How Law Made Silicon Valley' (2013) 63(3) Emory Law Journal 639 <http://law.emory.edu/elj/content/volume-63/issue-3/articles/how-law-made-silicon-valley.html> accessed 21 April 2019.

Several jurisdictions across the world have enacted some version of a safe harbour immunity for intermediaries over the last two decades to encourage the growth of e-commerce in their own economies. However, there has been a marked shift over the last few years in the approach of countries to the issue of liability of these platforms with most of the concern being directed towards websites like Facebook, YouTube, and encrypted messaging platforms like WhatsApp. Several countries, especially liberal democracies like Australia, Germany, and the United Kingdom are enacting or proposing legislation to increase the liability of social media websites and video hosting websites for the content they host on their platforms.[29] The threat of higher penalties isa strategy to force these platforms to better moderate the content on their websites. Similarly, countries like Australia are cracking down on encryption-based platforms like WhatsApp.[30] This shift from virtually no liability to a legal framework that threatens them with huge fines is a sign that governments are increasingly exasperated by a certain class of intermediaries, especially social media companies that are performing a poor job of moderating content.[31]

If there is a takeaway from the above discussion, it is that the issue of intermediary liability is complicated and constantly adapting to new circumstances. The current approach of broad immunities under the law is an exception to the general rule of liability and the law on the point will evolve as lawmakers decide on the type of content, behavior, and business models that they would like to encourage online. If the Indian experience over the last few years, as internet access has deepened across the country, demonstrates a need to adapt the liability framework, it is necessary to debate the issue rather than mischaracterise it as an attempt to censor speech.[32]

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29 'Germany starts enforcing hate speech law' *BBC News* (1 January 2018) <https://www.bbc.com/news/technology-42510868> accessed 21 April 2019; Chris Fox, 'Websites to be fined over "online harms" under new proposals' *BBC News* (8 April 2019) <https://www.bbc.com/news/technology-47826946> accessed 21 April 2019; Adam Satariano, 'Britain Proposes Broad New Powers to Regulate Internet Content' *The New York Times* (London, 7 April 2019) <https://www.nytimes.com/2019/04/07/business/britain-internet-regulations.html> accessed 21 April 2019; Francesca Paris, 'Australia to Criminalize Failure to Remove Violent Content from Internet Platforms' (*NPR*, 4 April 2019) <https://www.npr.org/2019/04/04/709751602/australia-criminalizes-failure-to-remove-violent-content-from-internet-platforms> accessed 21 April 2019.

30 Paul Karp, 'Australia's War on Encryption: The Sweeping New Powers Rushed into Law' *The Guardian* (7 December 2018) <https://www.theguardian.com/technology/2018/dec/08/australias-war-on-encryption-the-sweeping-new-powers-rushed-into-law> accessed 21 April 2019.

31 David Ingram, 'Foreign governments are fed up with social media – and threatening prison for tech employees' *NBC News* (12 April 2019) <https://www.nbcnews.com/tech/tech-news/foreign-governments-are-fed-social-media-threatening-prison-tech-employees-n993841> accessed 21 April 2019.

32 Goel (n 3).

III. The Debate on Section 79: What does the Due Diligence Requirement Mean and are the Guidelines Binding?

When India enacted its first 'safe harbour' law for internet intermediaries in the form of section 79 of the IT Act it did not adopt the American model. As per the original version of section 79, enacted in 2000, network service providers were provided immunity if they could prove that 'the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission'. Simply put, this provision shielded intermediaries for activities conducted without their knowledge provided they conducted 'all due diligence' to prevent the commission of the offence in question. The use of the phrase 'due diligence' indicates that the law required some kind of proactive measures by the intermediary to prevent the use of its services in violation of the law. However, the nature of such measures is not quite clear from a reading of the provision and could have only been decided by a court during the course of litigation. Additionally, the original version of section 79 appears to apply only for those acts that may have been offences under the IT Act and not all legislations.[33]

In 2006, the Government of India set up an expert committee to recommend amendments to the existing IT Act.[34] On the basis of the Committee's recommendations, the government introduced an amendment to the law in Parliament.[35] The amendment bill proposed a broad immunity for any third-party information, data or communication link made available by any intermediaries (rather than just network service providers) subject to three conditions. The first condition required the intermediary to play a passive role in that it should not have been responsible for initiating the transmission, selecting the receiver or modifying the content. The second condition required the intermediary to not 'conspire' or 'abet' in the commission of the unlawful act, in which case it would lose its immunity. It was also required to expeditiously take down content on receiving actual knowledge of the same or on being notified by the Government. The third condition required the intermediary to 'observe' guidelines that were issued by the Central Government under section 79.[36]

After its introduction in the Parliament, the new model of intermediary liability was opposed by the Parliamentary Standing Committee to which the bill had been referred for

33 Chinmayi Arun, 'Gatekeeper Liability and Article 19(1)(a)' (2014) 7(2) NUJS Law Review 73, 81https://nujslawreview.org/wp-content/uploads/2016/12/Chinmayi-Arun.pdf accessed 28 June 2019 .

34 Ministry of Electronics and Information Technology, *Report of the Expert Committee: Proposed Amendments to Information Technology Act* (2005) <https://www.meity.gov.in/content/report-expert-committee-amendments-it-act-2000> accessed 21 April 2019 (MeitY Expert Committee Report).

35 The Information Technology (Amendment) Bill 2006 <https://www.prsindia.org/sites/default/files/bill_files/1168510210_The_Information_Technology__Amendment__Bill__2006.pdf> accessed 21 April 2019 (IT Amendment Bill 2006).

36 IT Amendment Bill 2006, cl 38 (proposing an amendment to the Information Technology Act 2000, s 79).

amore detailed examination.[37] The Standing Committee's report observed that the Central Bureau of Investigation (CBI) had argued against providing such wide immunity to all intermediaries and that at the very least online market places where goods could be sold or auctioned should not be given immunity unless they conducted 'due diligence'.[38] When the government was asked why it had proposed dropping the 'due diligence' requirement, the government sought to explain it away by saying that the law needed more clarity and that the scope of due diligence could be better specified in the guidelines that were to be drafted by the Central Government under section 79.[39]

The Standing Committee, however, agreed with the CBI rather than the government. The Committee recorded its objection to dropping the 'due diligence' requirement for online market places and auction sites.[40] It insisted on the government retaining the phrase 'due diligence' in section 79.[41] In the same report, the Standing Committee also pushed for intermediaries to prescreen content and warned the government that the industry was unlikely to regulate itself. It stated the pertinent part, the following:

> The Committee also feels that if the intermediaries can block/ eliminate the alleged objectionable and obscene contents with the help of technical mechanisms like filters and in built storage intelligence, then they should invariably do it. The Committee is of the firm opinion that if explicit provisions about blocking of objectionable material/ information through various means are not codified, expecting self-regulation from the intermediaries, who basically work for commercial gains, will just remain a pipe dream.[42]

The government accepted these recommendations of the Standing Committee and the final version of the bill introduced in the Parliament retained the 'due diligence' requirement, in the text of section 79, for all intermediaries, rather than just online market places and auction sites as recommended by the CBI. The Parliament passed this version of the Bill in 2008 without any further amendments.[43]

A few years later in 2011, the government notified, under section 79, the Information Technology (Intermediaries Guidelines) Rules which included a 'due diligence' clause that was required to be 'observed' by intermediaries in order to avail of the immunities in section 79. These guidelines laid down various requirements to be followed by intermediaries,

37 Lok Sabha, *Standing Committee on Information Technology Report* (2007-08) <https://www.prsindia.org/sites/default/files/bill_files/scr1198750551_Information_Technology.pdf> accessed 21 April 2019 (Standing Committee Report 2007-08).

38 ibid 17 [57].

39 ibid 18 [58].

40 ibid 49, 50.

41 ibid

42 ibid 50.

43 Information Technology (Amendment) Act 2008.

including the terms and conditions to be included in user agreements and the time period within which content had to be taken down once the intermediary was notified.[44] A parliamentary motion moved in the Rajya Sabha to have these guidelines annulled was defeated by the government.[45]

IV. The Requirement of Ensuring 'Due Diligence' and Observing 'Guidelines' in Section 79

When section 79 was amended in 2008, it required intermediaries '…to observe due diligence which discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf'. As explained earlier, the government attempted to define the scope of 'due diligence' in the Information Technology (Intermediary Guidelines) Rules, 2011. It is not very clear as to why the government tried to define 'due diligence' in the guidelines when the Parliament chose to retain the same phrase in section 79 without defining it. This attempt by the government may have led to the impression that an intermediary could meet the requirements of 'due diligence' by following the criteria spelled out in the guidelines. However, a simple reading of the provision, especially the 'and' in the middle of the provision would indicate that the Parliament imposed two different obligations on the intermediary. The first is to 'observe due diligence' requirement which was not defined in the legislation. The second requirement was to 'observe guidelines' drafted by the government. It is, therefore, clear that both obligations are separate.

There is, however, little judicial clarity on the issue because judges have differed in how to interpret the due diligence requirement. A single judge of the Delhi High Court interpreted the phrase 'due diligence' to necessarily mean 'pre-screening' of all content loaded onto a platform despite the guidelines not requiring the pre-screening of all content.[46] This interpretation is in consonance with the recommendation of the Parliamentary Standing Committee that 'if the intermediaries can block/eliminate the alleged objectionable and obscene contents with the help of technical mechanisms like filters and in-built storage intelligence, then they should invariably do it'.[47] While overruling the decision of the Single Judge, a Division Bench concluded that the 'due diligence' requirement could be met as long as an intermediary followed the 'guidelines' laid down by the Central Government.

44 Software Freedom Law Center, 'Report: Information Technology (Intermediaries Guidelines) Rules, 2011: An Analysis' (*SFLC*, 24 July 2014) <https://sflc.in/sites/default/files/wp-content/uploads/2014/07/Information-Technology-Intermediaries-Guidelines-Rules-2011-An-Analysis.pdf> accessed 21 April 2019.

45 P Rajeeve, 'Regulation Yes, Control No' *Outlook India* (17 May 2012) <https://www.outlookindia.com/website/story/regulation-yes-control-no/280960> accessed 21 April 2019; 'Sibal for wider debate on rules for internet content control' *The Hindu BusinessLine* (New Delhi, 17 May 2017) <https://www.thehindubusinessline.com/economy/sibal-for-wider-debate-on-rules-for-internet-content-control/article20435436.ece1> accessed 21 April 2019.

46 *Super Cassettes Industries Limited v Myspace Inc and Another* 2011 (48) PTC 49 (Del).

47 Standing Committee Report 2007-08 50.

The court held in pertinent part:

> The other aspect that needs to be complied with is the 'due diligence' clause under section 79(2)(c). Here once again, the Intermediary Rules are relevant-especially rule 79 (3). MySpace's - website for purposes of viewing does not require user subscription to its terms and conditions. However, for the purpose of uploading, sharing, commenting etc. subscription with MySpace is needed and for this purpose an agreement is entered into between the parties. *To comply with the due diligence procedure specified in the Rules, MySpace has to publish its rules, regulations, privacy policy and user agreement for access of usage.*[48]

The above paragraph gives the impression that 'due diligence' can be met by following the 'guidelines'. There have been other cases which have dealt with section 79 but none of these cases have dealt with the phrase 'due diligence' in adequate detail.[49]

The Supreme Court finally got an opportunity to interpret section 79 in the *Shreya Singhal* case[50]. There were two issues that were in contention in this case, apart from the challenge to section 66A of the IT Act. The first was the constitutionality of the 'actual knowledge' requirement in the context of section 79(3)(b) and the second was the constitutionality of a few of the guidelines drafted by the government under section 79.[51] The constitutionality arguments were based on the fundamental right to free speech in Article 19(1)(a) of the Constitution.

Strangely, the Supreme Court did not deal with the 'due diligence' requirement when it concluded that intermediaries were required to take down content only on the orders of the government or the courts and not in response to individual requests by individual citizens.[52] The only apparent reasoning provided by the court for this conclusion was that it would be 'very difficult for intermediaries like Google, Facebook, etc. to' take down content 'when millions of requests are made and the intermediary is then to judge as to which of such requests are legitimate and which are not'.[53] With all due respect to the court, this is not cogent legal reasoning. If Facebook and Google are not able to meet the standards of liability prescribed by the law, they ought to change their business models. More problematically, the court came to its conclusion without paying any attention to the 'due diligence' requirement imposed on intermediaries by section 79. This is a vital requirement because if 'due diligence' is interpreted as a proactive filtering requirement

48 *Myspace Inc v Super Cassettes Industries Ltd* 2016 SCC OnLine Del 6382.

49 *Christian Louboutin Sas v Nakul Bajaj* 2018 SCC OnLine Del 12215; *Kent Ro Systems Ltd v Amit Kotak* 2017 SCC OnLine Del 7201.

50 *Shreya Singhal v Union of India* AIR 2015 SC 1523.

51 ibid [114] - [115].

52 ibid [117].

53 ibid.

(as was done by the Single Judge in the *Myspace* case) it would be difficult to justify the court's reasoning that it would be 'very difficult for intermediaries' to handle 'millions of requests'. If a private company does not have the legal resources to meet a legal standard, it should change its business model or risk getting bankrupted by adverse judicial orders.

The precedent in *Shreya Singhal* had the effect of making India's intermediary liability regime friendlier to the intermediaries than that intended by the Parliament and downright hostile towards individual citizens. By relieving intermediaries of the necessity to respond to individual take down requests by citizens, as a precondition for maintaining their immunity, the Supreme Court basically transferred the cost of regulation from intermediaries, the biggest of which are Silicon Valley companies worth billions of dollars, to the individual Indian citizen who would now have to secure a judicial order, and spend significant money and time in doing so, before getting content taken down. On the other hand, if 'due diligence' was interpreted as requiring Silicon Valley to proactively monitor content, it would be forced to hire more moderators and make decisions on taking down content.

One of the few subsequent judgments to engage with the 'due diligence' standard was rendered by the High Court of Hyderabad in 2016 where the court, relied on precedents interpreting different legislations, to conclude that 'to avoid its liability… the intermediary has to prove that he has acted as an ordinary reasonable prudent man and it is a question of fact'.[54] Since the facts were not properly pled in the case before it, the court exempted the intermediary from liability for defamatory content but not before concluding that the IT Act needs to be amended by the Parliament to make it possible for citizens to take effective action in cases where they were being defamed. Commenting on the flaws in the existing system, the court made the following pertinent observation:

> …the present law under Information Technology Act is not able to provide such immediate reliefs to the person aggrieved by such defamatory or sexually explicit content or hate speeches etc. Therefore, the Legislature has to take necessary steps to provide safeguard to the interest of public at large on account of such defamatory content, sexually explicit material or pornography etc. by creating fake accounts by the net users and to provide stringent punishment to such net users, who created fake accounts and posted such material, by necessary amendment to the Information Technology Act and Rules.[55]

Viewed in this backdrop, there is certainly a case for overhauling India's intermediary liability framework in order to more appropriately redistribute costs of regulating content on platforms as well as for deciding whether encrypted platforms should be afforded

54 *Google India Private Limited v M/S Visaka Industries Limited and Others* 2016 SCC OnLine 393 (Hyd).

55 ibid [102].

the same degree of immunity as other platforms. Not only is the existing 'due diligence' requirement in section 79 very vague for both law enforcement and the industry, but the guidelines itself were rather vague. Whether MeitY's proposal for amending the existing guidelines is the best way forward is the next issue that will be discussed in this paper.

V. Reforming India's Intermediary Liability Law for The Future

MeitY's strategy to overhaul India's intermediary liability model was aimed at amending the Information Technology (Intermediary Guidelines) Rules, 2011. The content of the proposed amendments radically alters the existing guidelines. Before discussing the content of the amendments, it is first necessary to debate the viability of executing these amendments through Guidelines.

The current title of these guidelines is confusing because it has both words: 'guidelines' and 'rules'. In the language of the law, 'guidelines' and 'rules' are different legal instruments. 'Guidelines' by their very definition are meant to 'guide' and not be binding like 'rules' or 'regulations'. In the context of the Guidelines drafted by the Central Government under section 5B of the Cinematograph Act 1952 to guide the Film Certification Boards on certifying content, the Supreme Court has ruled that guidelines cannot be considered binding. The court had concluded that '[t]he guidelines are broad standards. They cannot be read as one would read a statue.'[56] In another judgment,the Supreme Court interpreted certain guidelines issued by the Reserve Bank of India (RBI) as binding because of a circular issued by the RBI that 'advised' all parties to follow the 'guidelines'.[57] The court was silent on whether the guidelines would have been binding in the absence of a circular.

Interpretation of the present guidelines under the IT Act are complicated by the fact that although section 79 only gives the government the power to make 'guidelines', section 87 which consolidates all the 'rule making' powers of the government under the IT Act gives the Central Government the power to make rules to implement the 'guidelines' under section 79(2).

While the statute is visibly drafted in an abysmal manner, there is a case to argue that the intent of the Parliament, as evident from section 79, was to draft 'guidelines' rather than rules and hence, the guidelines cannot be understood to be 'binding'. This interpretation finds support in the Supreme Court precedent that dealt with the CBFC guidelines. In any event, the above confusion is reason enough to call for the present framework to be replaced by a new legal framework. However, given this confusion on the nature of guidelines/rules, it would not be advisable for the government to use guidelines as an instrument for major policy reform. Rather, if the government is serious about major reform on this issue of intermediary liability, it should consider amending section 79 of the IT Act or perhaps enacting a new standalone law solely on the issue of intermediary liability. There are four

56 *Bobby Art International, Etc v Om Pal Singh Hoon and Others* (1996) 4 SCC 1.

57 *BOI Finance Ltd v The Custodian & Ors* (1997) 10 SCC 488.

major issues that should be at the centre of any future discussion on intermediary liability law. These issues are discussed below:

1. Differentiated responsibility for different classes of intermediaries:

One of the longstanding and well-founded criticisms of India's intermediary liability laws is that it does not distinguish between the various categories of intermediaries that operate on the internet.[58] The current definition of intermediaries in section 2(w) includes '…telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes'. Combining these vastly different services into one definition makes no sense because each of these intermediaries has a completely different business model and their knowledge about the activities of their users differs significantly. For example, internet service providers (ISPs) are not expected to actively monitor behavior by users because that would be construed as an invasion of privacy.[59] Also, increasing the legal liability of ISPs for acts of their users would increase the costs of accessing the internet and would go against the policy goal of bringing more Indians online.[60] However, in context of social media websites or video hosting sites, where content is publicly hosted on mass communication platforms, it may be in public interest to reduce the level of immunity provided to these platforms so as to incentivise them to police their platforms better.

A second basis for distinguishing intermediaries is their size. Startups deserve the subsidy of immunity from legal liability until they reach a particular size after which such immunities should be withdrawn and they should face the same liability as any other entity

58 Ministry of Electronics & IT Government of India, "Public Comments on Draft Intermediary Guidelines Rules 2018" 118, 119 <https://meity.gov.in/writereaddata/files/public_comments_draft_intermediary_guidelines_rules_2018.pdf>accessed 21 April 2019 (Public Comments on Draft Intermediary Guidelines Rules 2018); For an account of Google's request to a Parliamentary Standing Committee that Indian law differentiates between different classes of intermediaries, see Prashant Reddy and Sumathi Chandrashekaran, *Create, Copy, Disrupt: India's Intellectual Property Dilemmas* (OUP 2016) 241; Aparna Viswanathan, 'Big Brother is looking over your shoulders' *The Hindu*, (3 August 2016) <https://www.thehindu.com/opinion/lead/big-brother-is-looking-over-your-shoulders/article2532036.ece> accessed 21 April 2019; Vinay Kesari, 'Intermediaries in India may be on the cusp of a brave new world' (*FactorDaily,* 17 September 2018) <https://factordaily.com/intermediary-liability-in-india-brave-new-world/> accessed 21 April 2019.

59 Prachi Arya and Kartik Chawla, 'A Study of the Privacy Policies of Indian Service Providers and the 43A Rules' (*Centre for Internet and Society Blog*, 12 January 2015) <https://cis-india.org/internet-governance/blog/a-study-of-the-privacy-policies-of-indian-service-providers-and-the-43a-rules> accessed 21 April 2019.

60 Bryan Mercurio, 'Internet Service Provider Liability for Copyright Infringements of Subscribers: A Comparison of the American and Australian Efforts to Combat the Uncertainty' (2002) 9(4) Murdoch University Electronic Journal of Law 63 <http://www5.austlii.edu.au/au/journals/MurUEJL/2002/51.html> accessed 21 April 2019; Matthew Schruers, 'The History and Economics of ISP Liability for Third Party Content' (2002) 88(1) Virginia Law Review 205 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=311685> accessed 21 April 2019.

in the business of disseminating information. The Draft Guidelines announced in 2018 make a case for such an approach when it sought to treat intermediaries with 50 lakh users in a different manner.[61] This proposal of MeitY has received some criticism on the grounds that the figure of 50 lakh users is arbitrary. But then again, fixing any such limits in the law is usually an arbitrary exercise. Therefore, any fresh attempt by the government to roll out a new intermediary liability policy should try creating different categories of intermediaries based on their function, size, and their role in the internet ecosystem while keeping in mind that startups, which are critical to innovation, require broad immunities from liability.

2. The proactive filtering requirement:

One of the new requirements sought to be introduced by MeitY in its Draft Guidelines of 2018 was a proactive requirement on behalf of intermediaries to filter or prescreen all content using artificial intelligence before such content is made available for public viewing.[62]

This requirement of proactive filtering has been strenuously opposed by several stakeholder son the grounds that it would go against the Supreme Court's ruling in *Shreya Singhal* and that AI-based filtering will not always be accurate and that private intermediaries will over-censor in a bid to keep in line with the law.[63]

The first ground of opposition is baseless because the Supreme Court's reasoning on this point, as explained earlier, is exceptionally weak and unlikely to be followed by any future court.[64] The second ground of opposition is fair since AI-based content filtering systems are known to have failed on multiple occasions.[65] The third ground of opposition which claims fears of over-censorship by private intermediaries is over-hyped. In any event, it is no secret that Silicon Valley companies engage in a fair deal of proactive moderation of content on their platforms. This basically means that they take down large amounts of content on their own volition. Such content moderation takes place because platforms are aware that some content, like videos of beheadings or terrorist propaganda, needs to be removed hastily to prevent outrage from users, failing which users may stop using the platform.[66] In fact, some commentators have claimed that the view that the internet is an

61 Draft Intermediary Guidelines 2018, r 3(7).

62 Draft Intermediary Guidelines 2018, r 3(9).

63 Public Comments on Draft Intermediary Guidelines Rules 2018 185, 191, 202, 206.

64 *Shreya Singhal* (n 49) [114]-[117].

65 Kalev Leetaru, 'Why We Still Need Human Moderators In An AI-Powered World' (*Forbes*, 8 September 2018) <https://www.forbes.com/sites/kalevleetaru/2018/09/08/why-we-still-need-human-moderators-in-an-ai-powered-world/#1ca95c4a1412> accessed 21 April 2019.

66 Shane Harris, 'Social Media Companies Scramble to Block Terrorist Video of Journalist's Murder' (*Foreign Policy,* 20 August 2014) <https://foreignpolicy.com/2014/08/20/social-media-companies-scramble-to-block-terrorist-video-of-journalists-murder/> accessed 21 April 2019; Akshaya Asokan, 'WhatsApp Doubles Down On Child Pornography With AI-based Tools' (*Analytics India Magazine,* 11 January 2019) <https://www.analyticsindiamag.com/whatsapp-doubles-down-on-child-pornography-with-ai-based-tools/> accessed 21 April 2019.

'un-intermediated experience' is essentially a myth and that intermediaries have significant influence over the type of content viewed by users.[67] Historically, private parties, be it broadcasters or newspapers, have always hired editors to curate or moderate third-party content without overdoing it because that would be against their business interests. Thus, there are enough market-based reasons for intermediaries to police their platforms.

But beyond these three reasons, it should be pointed out that the main reason that intermediaries sought immunity from legal liability was to ensure they did not have to proactively monitor content. Once the proactive monitoring requirement is imposed on intermediaries there is no point of debating the requirement of immunity from legal liability. With a proactive requirement under the law, intermediaries will be liable for every failure in their proactive monitoring just as is the case with traditional media. Whether that will really force any change in their behaviour remains to be seen given that most Indian laws targeting certain categories of speech are criminal laws and proving the vicarious criminal liability of the management of intermediaries for acts of users is not going to be easy unless the law creates presumptions of knowledge of such intermediaries.

3. Encryption, mass communication and the future of messaging platforms:

New intermediaries like WhatsApp, Telegram, etc. which started of as personal rather than mass communication products, offer some form of encryption for data that they are transmitting. WhatsApp, in particular, offers an 'end to end encryption system' wherein the phone sending the message encrypts the message in a format that can be decrypted only by the receiving phone.[68] This system of encryption reportedly makes it impossible for governments, or for that matter WhatsApp itself, to intercept or monitor messages between two phones. Although widely advertised as infallible it should be noted that some Silicon Valley products like Skype, although, claimed to be protected by end-to-end encryption were compromised by backdoors installed by the product designers.[69]

Tech commentators have marketed WhatsApp's encryption feature as a privacy enabling feature and hence, a virtue without parallel.[70] From a business perspective,

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See also Jeff Kosseff, 'Twenty Years of Intermediary Immunity: The US Experience' (2017) 14(1) SCRIPTed 5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3225773> accessed 21 April 2019 where the researcher finds that 'the largest US intermediaries voluntarily block objectionable and harmful content due to consumer and market demands'.

67 Christopher S Yoo, 'Free Speech and the Myth of the Internet as an Unintermediated Experience' (2010) 78 George Washington Law Review <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1475382&download=yes> accessed 21 April 2019.

68 WhatsApp, 'End-to-end encryption Frequently Asked Questions' <https://faq.whatsapp.com/en/android/28030015/> accessed 21 April 2019.

69 Glenn Greenwald and others, 'Microsoft handed the NSA access to encrypted messages' (*The Guardian,* 12 July 2013) <https://www.theguardian.com/world/2013/jul/11/microsoft-nsa-collaboration-user-data> accessed 21 April 2019.

70 Ian Morris, 'WhatsApp Is About To Get A Great New Feature To Keep Your Chats Safe' (*Forbes*, 3 February 2019) <https://www.forbes.com/sites/ianmorris/2019/02/03/whatsapp-is-about-to-

however, the encryption feature saves WhatsApp millions of dollars in potential costs because it maintains no records of the messages, has no way to read them and thus cannot comply with requests for information from law enforcement or the public. This basically ensures better scalability, more user data, and higher profits. As WhatsApp's penetration increased in the global market, the product has morphed into a mass communication platform given the increasing usage of WhatsApp group feature that enables individuals to communicate with groups of 256 people.

Given the central role that WhatsApp has come to play in not only personal communications but also mass communication (through its group feature), law enforcement authorities in multiple countries including India have expressed frustration with their inability to track messages on WhatsApp for the purposes of lawful investigation as well as maintaining law and order.[71] The incidents that continue to trouble law enforcement agencies range from hyper-localised rumours about child abduction that instigated lynching of people to the sharing and exchanging of child pornography on WhatsApp groups.[72] Given the design of WhatsApp, law enforcement agencies are not able to monitor or trace the flow of information which is essentially being mass broadcasted over the encrypted service. Some countries like Australia have passed legislation to force tech companies to help decrypt and trace messages on encrypted platforms like WhatsApp.[73]

In the Draft Guidelines of 2018, MeitY sought to tackle the encryption issue by including a requirement of 'traceability' in the intermediary guidelines.[74] This requirement

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get-a-great-new-feature-to-keep-your-chats-safe/#4bdccab1384a> accessed 21 April 2019.

71 Hannah Kuchler, 'Facebook defends WhatsApp's end-to-end encryption' *The Financial Times* (San Francisco, 7 May 2018) <https://www.ft.com/content/40e15694-5248-11e8-b3ee-41e0209208ec> accessed 25 April 2019; Surabhi Agarwal, 'Want WhatsApp to cooperate with law enforcement agencies: RS Prasad' (*Economic Times Tech,* 1 November 2018) <https://tech.economictimes.indiatimes.com/news/mobile/want-whatsapp-to-cooperate-with-law-enforcement-agencies-rs-prasad/66448257> accessed 21 April 2019; Jason Scott, 'Australia Set to Spy on WhatsApp Messages With Encryption Law' (*Bloomberg,* 5 December 2018) <https://www.bloomberg.com/news/articles/2018-12-04/australia-set-to-pass-encryption-law-despite-tech-giant-protests?utm_content=tech&utm_medium=social&utm_source=twitter&cmpid%3D=socialflow-twitter-tech&utm_campaign=socialflow-organic> accessed 21 April 2019; Domingo Montanaro, 'WhatsApp, Encryption and the Battle with Law Enforcement' (*Law Journal NewsLetters,* January 2017) <http://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2017/01/01/whatsapp-encryption-and-the-battle-with-law-enforcement/?slreturn=20190316034058> accessed 21 April 2019.

72 'Who can stop India WhatsApp lynchings?' (*BBC News,* 5 July 2018) <https://www.bbc.com/news/world-asia-india-44709103> accessed 21 April 2019; K Deepalakshmi, 'When social media rumours on child abduction trigger mob lynchings' (*The Hindu*,29 June 2018) <https://www.thehindu.com/news/national/when-social-media-rumours-on-child-abduction-trigger-mob-lynchings/article24280603.ece> accessed 21 April 2019; Timothy McLaughlin, 'How WhatsApp Fuels Fake News And Violence In India' (*Wired,* 12 December 2018) <https://www.wired.com/story/how-whatsapp-fuels-fake-news-and-violence-in-india/> accessed 21 April 2019.

73 Draft Intermediary Guidelines 2018, r 3(5).

74 ibid.

was described in the Indian press as an attempt to force WhatsApp to 'break' its encryption systems.[75] This was an incorrect interpretation of the law. Rather than force WhatsApp to 'break' its encryption systems, the guidelines were aiming to set up a system where platforms that could not enable traceability of content would no longer be able to claim immunity under section 79. In other words, platforms like WhatsApp could continue to provide encrypted services but without the benefit of the immunities available to other platforms. The withdrawal of immunity would increase the risk of operating a platform like WhatsApp but the management of the company could continue to provide such services if it is confident of dealing with the risks of possible prosecution or damages.

Separate from the above questionis the issue of whether the government of India should extend to WhatsApp all the immunities from legal liability that it offers other platforms under section 79 of the IT Act.

This is a complex issue with no simple answers. Although initially designed as a personal messaging service, WhatsApp today performs the role of a mass communication and broadcast service that enables individuals to reach out to thousands of people in a matter of minutes. Except unlike other mass communication services, government officials responsible for maintaining law and order have no means to view the content being transmitted unless they are members of these groups themselves. Such mass communication and broadcast services are without precedent and pose a unique challenge for countries like India where a mere rumour is enough to spark communal riots and where police capacity is limited. Anonymous public speech of the sortfacilitated by WhatsApp has no precedent in India. As a rule, all mass communication has been regulated by the state.

One of the first legislation to deal with mass dissemination of printed information was the Press and Registration of Books Act 1867. Section 3 of this legislation requires any book or paper being published in India to carry the name of the printer, place of printing, the name of the publisher, and place of publication. In a case involving the interpretation of this provision, the Madras High Court was categorical in its conclusion that the provision '…does not in any way restrict the freedom of expression'.[76] Explaining the rationale behind this requirement the court stated the following:

> Healthy public presses conducting their affairs above board constitute the bulwark of the State; and secretive and anonymous presses working underground constitute a menace to society. The arms which a publisher

75 'Modi govt working on new IT rules that may force WhatsApp to break privacy protection' *India Today* (New Delhi, 25 December 2018) <https://www.indiatoday.in/technology/news/story/indian-government-new-it-rules-whatsapp-break-privacy-protection-1416187-2018-12-24> accessed 21 April 2019; Pranav Dixit, 'India Wants Tech Platforms To Break Encryption And Remove Content The Government Thinks Is 'Unlawful'*Buzzfeed News* (New Delhi, 25 December 2018) <https://www.buzzfeednews.com/article/pranavdixit/india-wants-tech-platforms-to-break-encryption-and-remove> accessed 21 April 2019.

76 *In Re G Alavandar v Unknown* AIR 1957 Mad 427 [15].

> and printer should carry must be those of a warrior and not that of an assassin. The cloak and dagger type of publishing and printing has no place in our Sovereign Indian Republic where our fundamental rights have been guaranteed by the Constitution.[77]

The High Court's decision captures the essence of the argument against anonymous public speech. Subsequent technological development which led to the radio, cinema, and broadcast industry revolutionised the possibility of truly mass communication to even the unlettered. However, even those services were always licensed by the state thereby preventing the possibility of anonymous speech.[78]

So, traceability has been given in most modes of mass communication. Thus, it is understandable for the government to request encrypted platforms like WhatsApp to make their content traceable. In this backdrop, it is completely within the legitimate interests of the government to not afford WhatsApp the protection of safe harbour protection under section 79.

As explained earlier, this immunity from legal liability is a subsidy since it relieves the private sector of substantial risk and legal costs. In this backdrop, there is virtually no reason for WhatsApp to continue enjoying the subsidy of complete legal immunity and the government is justified in denying encrypted services, the benefits of the safe harbour in section 79 of the IT Act.[79]

4. Ensuring transparency in content moderation on social media platforms:

Even as Silicon Valley receives considerable public support in its battle against MeitY's attempt to alter the intermediary liability framework in India, it is facing increasing scrutiny over its own content moderation practices.[80]

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77 ibid.

78 The Cable Television Networks (Regulation) Act 1995; The Cinematograph Act 1952.

79 Prashant Reddy, 'Liability, Not Encryption, Is What India's New Intermediary Regulations Are Trying to Fix' *The Wire* (28 December 2018) <https://thewire.in/government/liability-not-encryption-is-what-indias-new-intermediary-regulations-are-trying-to-fix> accessed 21 April 2019; Prashant Reddy, 'If WhatsApp Doesn't Regulate Itself, Parliament May Have to Step In' (*The Wire*, 18 July 2018) <https://thewire.in/tech/if-whatsapp-doesnt-regulate-itself-parliament-may-have-to-step-in> accessed 21 April 2019.

80 Sreemoy Talukdar, 'Parliamentary panel summoning Twitter CEO is timely and necessary to ensure fairness of platform, not bullying' (*Firstpost,* 13 February 2019) <https://www.firstpost.com/india/parliamentary-panel-summoning-twitter-ceo-is-timely-and-necessary-to-ensure-fairness-of-platform-not-bullying-6078751.html> accessed 21 April 2019; Amulya Gopalakrishnan, 'How can Twitter be better? By taking a stand and being open about its choices, rather than affecting neutrality' (*Times of India Blogs*, 21 February 2019) <https://timesofindia.indiatimes.com/blogs/to-name-and-address/how-can-twitter-be-better-by-taking-a-stand-and-being-open-about-its-choices-rather-than-affecting-neutrality/> accessed 21 April 2019; Stuti Bhattacharya, 'Why Isn't Twitter Blocking Trolls Abusing Barkha Dutt For Pulwama Reportage?' (*Idiva,* 19 Feb 2019) <https://www.idiva.com/news-work-life/journalist-barkha-dutt-abused-and-harassed-on-twitter-and-whatsapp-for-reporting-kashmirs-pulwama-

Apart from facing an allegation of bias in how they moderate content, these Silicon Valley platforms are often accused of not doing enough to take action against abusive and threatening content on their platforms even after the said content is flagged by users.[81] Another complaint has focused on the lack of transparency in their content moderation practices.[82] The entire content moderation interface is usually designed in a manner that ensures that the user has no information about the decision-making process and authority. Given the importance of these platforms to public speech and the power of social media platforms to throttle free speech, it is in public interest for the state to intervene and regulate the manner in which these platforms moderate content.[83]

To begin with, the government must consider linking any new intermediary liability policy to certain mandatory content moderation practices. These mandatory requirements should include hiring content moderators in India having certain minimum qualifications as prescribed by the law. Second, these content moderators should be hired as employees rather than independent contractors as appears to be the current practice across Silicon Valley, so as to ensure the protection of the labour rights of these content moderators.[84] Third, there needs to be transparency either at the first level of content moderation or at the appellate level in terms of disclosure of the identity of the content moderator to ensure accountability. Since content moderators are the equivalent of editors there is a public interest in disclosing their identities to the public because the ideology of the editor can very often impact the quality of content moderation. The public has a right to know about these editors who are responsible for curating public speech. Many of these recommendations have found mention in academic and journalistic conversations in the United States.[85] It

attack/17079350> accessed 21 April 2019.

81 Tarleton Gillespie, 'How Social Networks Set The Limits Of What We Can Say Online' (*Wired*, 26 June 2018) <https://www.wired.com/story/how-social-networks-set-the-limits-of-what-we-can-say-online/> accessed 21 April 2019.

82 Max Fisher, 'Inside Facebook's Secret Rulebook for Global Political Speech' *The New York Times* (California, 27 December 2017) <https://www.nytimes.com/2018/12/27/world/facebook-moderators.html> accessed 21 April 2019.

83 Kyle Langvardt, 'Regulating Online Content Moderation' (2018) 106 Georgetown Law Journal 1353 <https://georgetownlawjournal.org/articles/268/regulating-online-content-moderation/pdf> accessed 21 April 2019; Paul Armstrong, 'Why Facebook's Content Moderation Needs To Be Moderated' *Forbes* (23 May 2017) <https://www.forbes.com/sites/paularmstrongtech/2017/05/23/why-facebooks-content-moderation-needs-to-be-moderated/#734b36d92999>accessed 21 April 2019; Spandana Singh, 'Pressing Facebook for More Transparency and Accountability Around Content Moderation' (*New America Blog*, 16 November 2018) <https://www.newamerica.org/oti/blog/pressing-facebook-more-transparency-and-accountability-around-content-moderation/> accessed 21 April 2019.

84 Max Read, 'Who Pays for Silicon Valley's Hidden Costs?' (*New York Magazine Intelligencer*, 28 February 2019) <http://nymag.com/intelligencer/2019/02/the-shadow-workforce-of-facebooks-content-moderation.html> accessed 21 April 2019; Jennifer Beckett, 'We need to talk about the mental health of content moderators' (*The Conversation*, 27 September 2018) <http://theconversation.com/we-need-to-talk-about-the-mental-health-of-content-moderators-103830> accessed 21 April 2019.

85 Nicolas P Suzor and others, 'What Do We Mean When We Talk About Transparency? Toward

is rare to hear similar rumblings of dissent against Silicon Valley in India and is perhaps a sign of the Valley's influence on India's technology policy circle.

VI. Conclusion: Enact a New Standalone Legislation on the Regulation of Internet-Based Communications Platforms

Any realistic attempt to reform intermediary law in India will require the government to go beyond tinkering with the guidelines drafted under section 79. The government must look at enacting a new law that is aimed at regulating communications platforms rather than framing the legislation as one that is meant to provide a safe harbour for internet intermediaries. The new law should ideally have three components.

The first component of the law should create different categories of intermediaries based on the role that they play in the dissemination of communications. Platforms like WhatsApp, Signal, and Telegram with encrypted services should be placed in a different category (and subject to stricter regulation) from social media platforms like Facebook or Twitter. Each category should be subject to different standards of regulation depending on the ability of law enforcement to monitor the mass communications on these platforms (as opposed to private communications amongst groups of 5 people or less).

The second component should set down the various conditions that a platform would be required to meet in order to secure immunity from legal liability. Some of the important preconditions that must be considered include the mandatory local presence of the platforms in India, in terms of personnel since Silicon Valley has a history of locating grievance redressal officers (a mandatory requirement under Indian law) in California.[86] This should include the mandatory requirement to hire only Indian citizens as content moderators and house them on Indian territory. These content moderators should be hired as employees and not as contractors.

The third component of the law should include mandatory procedural safeguards that are to be followed by communications platforms while taking down content or sharing information with the government during the course of surveillance. A failure to follow such procedural safeguards would disqualify these platforms from immunity under the law. This is to protect against the abuse of the law.

It is time for Silicon Valley and its companions in other jurisdictions to understand that a safe harbour from legal liability is an extraordinary subsidy and not a right.

Meaningful Transparency in Commercial Content Moderation' (2019) 13 International Journal of Communication 1526 <https://ijoc.org/index.php/ijoc/article/view/9736/2610> accessed 21 April 2019.

86 'After SC criticism, WhatsApp appoints Grievance Officer for India' (*The News Minute*, 24 September 2018) <https://www.thenewsminute.com/article/after-sc-criticism-whatsapp-appoints-grievance-officer-india-88862> accessed 13 July 2019.

THE PRAGMATICS BEHIND 'SEAT' / 'PLACE' AND 'VENUE' IN AN ARBITRATION CLAUSE: IS HARDY A DISCORDANT NOTE?

Adarsh Ramanujan*

The Supreme Court has, over the years, attempted to clarify the difference between the words, 'seat', 'place', and 'venue'. However, confusion still persists and a major debate relates to the implications of the absence of any of these words in an arbitration clause when referring to a territory or location, or alternatively, where the arbitration clause refers to a 'venue' without separately mentioning the 'seat'/'place'. This article shall examine the pragmatic meanings to be drawn from such arbitration clauses taking the recent judgement of the Supreme Court in the Hardy case as its central point. The author critically analyses the judgement in all its dimensions and delves into the position of law arising from a consistent line of cases before Hardy to argue that the decision is per incuriam and should be viewed as a deviation rather than as precedent.

I. Introduction

Semantics and pragmatics do not refer to the same in the study of languages. Both involve the study of words and their meanings, but the former is limited to literal meanings, while the latter concerns the contextual meaning and/or the intended/inferred meaning. Both meanings are relevant to interpreting the law, though pragmatics plays a larger role. In the literal sense, for instance, the words 'seat', 'place' and 'venue' have several possible meanings that do not necessarily overlap. One of the various possible meanings for 'seat' is 'principal site or location'; the primary meaning normally associated with the word 'place' is 'a particular position, point, or area in space; a location'; and the word 'venue' is normally understood to mean 'the place where something happens'.[1]

Yet, in the context of the Arbitration and Conciliation Act, 1996 ("Act"), the Supreme Court of India has held that 'seat' and 'place' are synonymous whereas 'seat' and 'venue'

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1 The Oxford Dictionary of English (3rd edn, OUP 2010).

are distinct.[2] To those initiated in arbitration law, the word 'seat' has significance, even though the word is absent in the Act. The 'seat'/'place' of an arbitration is a proxy to conclude whether Part I or Part II of the Act governs the arbitration and the award. As the current Indian law stands, for agreements governed by the Supreme Court's judgement in *BALCO*, i.e. those after 12.09.2012, where the seat/place is within India, Part I of the Act applies and if not, only Part II of the Act applies. The 'venue', on the other hand, is not determinative of this issue. Even for agreements covered by the pre-*BALCO* position of law, i.e. those before 12.09.2012, which are governed by the judgement of the Supreme Court in *Bhatia International*,[3] if the seat is determined to be outside India, Part I of the Act stands impliedly excluded.

Even to the initiated, however, subtleties remain. One confusion relates to the implication arising from the absence of any of these above words, viz., 'seat' or 'venue' or 'place'in the arbitration clause when referring to a territory or location. Similarly, even though a certain territory or location may be mentioned as the 'venue' without there being a separate territorial reference to the 'seat', the subjective intent could be that the parties intended the 'venue' to be the 'seat' (or not). The recent three-judge bench judgement of Supreme Court in the case of *Union of India v Hardy Exploration and Production (India) Inc* ("*Hardy*"),[4] exemplifies the difficulties that may arise in such cases. In this judgement, the Supreme Court was confronted with an international arbitration award issued in Kuala Lumpur under an arbitration clause that mentioned Kuala Lumpuras the 'venue' without there being a separate territorial reference to a 'seat'/'place'. The Court in that case held that the 'seat'/'place' of arbitration could not be Kuala Lumpur and that the award could be challenged under section 34, Part I of the Act. This judgement was not without controversy and resulted in a flurry of discussions and debates.

In this article, the author intends to examine the pragmatic meanings to be drawn in cases where the arbitration clause does not contain the words 'seat'/'place' or 'venue' in the arbitration clauses when referring to a location or territory, or, alternatively, where the arbitration clause refers to a 'venue' without separately mentioning the 'seat'/'place'. Taking the latest judgement in *Hardy* as its central point, the author intends to examine and critique the judgement in all its dimensions, apart from examining the position of law arising from a consistent line of judgements before *Hardy*. The ultimate objective is to assess whether the judgement in *Hardy* is to be seen as precedent setting or is likely to be ignored as a discordant note.

2 *Bharat Aluminium v Kaiser Aluminium Technical Services Incorporated* (2012) 9 SCC 552.

3 *Bhatia International v Bulk Trading SA* (2002) 4 SCC 105.

4 *Union of India v Hardy Exploration and Production (India) Incorporated* (2018) SCC Online 1640 (SC).

II. Setting the Context

As indicated, the focus of this article are arbitration clauses that do not mention 'seat'/'place' or 'venue', as well as clauses that mention a certain territory to be the 'venue' without a separate territorial reference to a 'seat'. These following illustrations typify the clauses under consideration:

> **SAMPLE A**: '…The arbitration shall be conducted in accordance with the [curial law]. The venue for the arbitration shall be [VENUE] and the arbitration shall be conducted in the English language.'
>
> **SAMPLE B**: '…The arbitration shall be conducted in accordance with the [curial law]. The arbitration shall be conducted at [CITY] and the arbitration shall be conducted in the English language.'

In either case, the 'seat' of arbitration is not mentioned and assuming the arbitral tribunal has itself not determined this issue, it falls upon the court before which an appropriate petition is filed, to determine the same. The arbitration clause in *Hardy* was similar to SAMPLE A. Of course, typical arbitration clauses remain much more complex and sophisticated in vocabulary. Arguably, the choice of law clause could also play an important role and for the purpose of this article, it is presumed that the governing law of contract is Indian law.

III. A Summary of *Hardy*

The judgement in *Hardy* arose in the context of International Arbitration between the *Union of India* and *Hardy* (an American company). The Union of India had lost the arbitration and chose to file a petition under section 34, Part I of the Act to challenge the arbitration award. This challenge was dismissed as withdrawn[5] by a single judge of the Delhi High Court. In this order of the Single Judge, it was recorded that the only averment as to the jurisdiction of the Delhi High Court was that the office of the Union of India was within the territorial limits of the Court.[6] The Union of India appeared to admit that this alone can not trigger the jurisdiction of the Court.

Despite such withdrawal, the Union of India filed an appeal before the division bench of the Delhi High Court and contented that a section 34 petition was maintainable. The division bench of the Delhi High Court dismissed the appeal on merits, holding that Part I of the Act and thus, section 34 of the Act, does not apply to the arbitral award.

On appeal, the case was heard by a two-judge Bench of the Supreme Court.[7] The two-judge bench in *Hardy* indicated that the law was unsettled as regards the situation where

5 *Union of India v Hardy Exploration and Production (India) Inc* (2015) SCC Online 14522 (8) (Del) (Hardy Exploration).

6 ibid [3].

7 *Union of India* v *Hardy Exploration and Production (India) Inc* (2018) 7 SCC 374.

an arbitration agreement incorporates the UNCITRAL Model law as the procedural law governing the arbitration, and specifies the 'venue' but not the 'seat'. On the basis that the 'seat' of arbitration is a key factor to determine the applicability of Part I of the Act, the two-judge bench posted the matter before the Chief Justice of India for reference to a larger appropriate bench. The then Chief Justice of India referred the matter to a three-judge bench of Supreme Court.

The three-judge bench of the Supreme Court noted the concurrence of the counsel of both parties that there was no need to answer the reference since the position of law was clear.[8] Nevertheless, the Supreme Court proceeded to answering the reference and held that the issue was governed by the earlier judgements of the Supreme Court in *BALCO* and *Bhatia International*.[9] According to the Supreme Court, no new principles were required to be settled.

Proceeding to decide the case on merits, the Supreme Court observed that the governing law of the contract was Indian law.[10] After reproducing the arbitration clause, the Court further observed that arbitration proceedings were to be conducted in accordance with UNCITRAL Model Law on International Commercial Arbitration of 1985 and that the 'venue' was agreed upon to be Kuala Lumpur.[11] The Court further noted that under Article 20 of UNCITRAL Model Law, the 'place' of arbitration was to be agreed between the parties and failing such agreement, the 'place' of arbitration was to be 'determined' by the tribunal having regard to the circumstances of the case, including the conveniences of the parties. In the facts of the case, the Court concluded that there was no 'determination' by the arbitral tribunal as to the 'seat' because there was no positive act by the Tribunal to this effect and no such 'determination' was expressed in the award.[12] The Court further noted that the parties in this case had not agreed upon the 'place' of arbitration.[13] Accordingly, in the opinion of the Court, the reference to Kuala Lumpur in the agreement and the factum of the arbitral proceedings having taken place in Kuala Lumpur, did not *stricto sensu* imply that Kuala Lumpur was the 'seat' of arbitration.

Having discarded Kuala Lumpur as the 'seat' of arbitration, the Court proceeded to summarily state that the order of the division bench of the Delhi High Court was liable to be set aside and that a section 34 petition under Part 1 of the Act was maintainable.

8 *Hardy Exploration* (n 4) [7].

9 *Hardy Exploration* (n 4) [27], [28].

10 *Hardy Exploration* (n 4) [29].

11 *Hardy Exploration* (n 4) [30].

12 *Hardy Exploration* (n 4) [37], [38], [40].

13 *Hardy Exploration* (n 4) [37].

IV. The Gaping Holes in the *Hardy* Judgement

In this author's reading, the judgement in *Hardy* suffers from at least three fatal gaping holes in its analysis, as elaborated below.

First, no reason has been provided as to why the 'seat' of arbitration would automatically be India, and in particular, Delhi. It is one thing for the Supreme Court to discard Kuala Lumpur as the 'seat' of arbitration, but it is quite definitely another to presume Delhi as the seat of arbitration.

Second, if *BALCO* and *Bhatia International* are the controlling judgements in this respect, one would have expected the Court to record the date of the arbitration agreement since *BALCO* applies only to arbitration agreements executed after 06.09.2012, whereas prior agreements are governed by *Bhatia International*. This critical finding is entirely missing in the judgement. Fortunately, a related judgement in the United States of America concerning the very same arbitration, which arose in an action by the winning party to confirm the arbitral award in an American court, records that the agreement was of 1997.[14] In other words, the case was to be governed by the principles in *Bhatia International*. There is no clear finding to this effect in the judgement.

Third, under the *Bhatia International* principle, the issue to be decided was whether there was an express or implied exclusion of Part I of the Act.[15] The 'seat' of arbitration was not a criterion specified in the judgement in *Bhatia International*, although several subsequent judgements have held that if the seat of arbitration was outside India, Part I of the Act was impliedly excluded. Nevertheless, it is critical to note that the 'seat' of arbitration was not the sole and exclusive factor to be considered under the regime of *Bhatia International*. For the Supreme Court in *Hardy* to have limited its analysis (even the faulty one) to the alleged 'seat' of arbitration was, therefore, a significant error.

V. If Not Kuala Lumpur...?

Having assessed the faulty reasoning in *Hardy*, it is worth examining whether the application of the correct principles would result in a different outcome in the facts of the case in *Hardy.*

As previously noted, the *Hardy* case was to be governed by the principles in *Bhatia International*. In *Bhatia International*, the Supreme Court had held, primarily based on absence of the word 'only' in section 2 (2) of the Act, that even for arbitration physically held outside India, Part I of the Act would apply unless parties agree to exclude the same, either expressly or by necessary implication.[16] While the judgement in *Bhatia International*

14 *Hardy Exploration & Production (India), Incorporated v Government of India, Ministry of Petroleum & Natural Gas* 314 F Supp 3d 95.

15 *Bhatia International* (n 3) [21].

16 *Bhatia International* (n 3) [32].

arose from an application of section 9 of the Act, the reasoning in *Bhatia International* was adopted to section 34 in Part I of the Act in *Venture Global Engineering v Satyam Computer Services Limited*.[17] There, it was held that a foreign award could also be challenged under section 34 of Part I of the Act, unless the parties excluded the application of Part I of the Act either expressly or by necessary implication. This principle continues to govern arbitration agreements executed before 12.09.2012 since the Supreme Court in *BALCO* only overruled *Bhatia International* prospectively.

In *Harmony Innovations Shipping Limited v Gupta Coal and Others*,[18] the Supreme Court was confronted with an arbitration agreement executed pre-*BALCO* and thus, governed by the principles of *Bhatia International*. On facts, the Court concluded that Part I was excluded since the presumed intent of the parties was for the 'seat' of arbitration to be in London. In express terms, the judgement states that the Court took into account the commercial background, the context of the contract, the context of the parties, and the background in which the contract was executed.[19] This judgement, interestingly, is cited in *Hardy* and that too, approvingly.[20] However, the judgement in *Hardy* does not appear to contain any analysis based on the aforementioned factors, when affirmatively determining the 'seat' of arbitration to be India and Delhi.

It is noteworthy to reiterate the link between the geographical location of the arbitral proceedings and the 'seat'. The following extract from judgement of the Supreme Court of India in *Etizen Bulk v Ashapura Minechem Limited and Another*,[21] would suffice in this respect:

> 34. … The following passage from *Redfern and Hunter on International Arbitration* contains the following explication of the issue:-
>
> 'It is also sometimes said that parties have selected the procedural law that will govern their arbitration, by providing for arbitration in a particular country. This is too elliptical and, as an English court itself held more recently in *Breas of Doune Wind Farm* it does not always hold true. What the parties have done is to choose a place of arbitration in a particular country. That choice brings with it submission to the laws of that country, including any mandatory provisions of its law on arbitration. *To say that the parties have "chosen" that particular law to govern the arbitration is rather like saying that an English woman who takes her car to France has "chosen" French traffic law, which will oblige her to drive on the right-hand side of the road, to give priority to vehicles*

17 (2008) SCC 190.

18 (2015) 9 SCC 172.

19 ibid [50].

20 *Hardy Exploration* (n 4) [19], [21].

21 (2016) 11 SCC 508.

> *approaching from the right, and generally to obey traffic laws to which she may not be accustomed. But it would be an odd use of language to say this notional motorist had opted for "French traffic law". What she has done is to choose to go to France. The applicability of French law then follows automatically. It is not a matter of choice.*
>
> Parties may well choose a particular place of arbitration precisely because its lex arbitri is one which they find attractive. Nevertheless, once a place of arbitration has been chosen, it brings with it its own law. If that law contains provisions that are mandatory so far as arbitration is concerned, those provisions must be obeyed. It is not a matter of choice any more than the notional motorist is free to choose which local traffic laws to obey and which to disregard'.[22]

That said, a line of judgements applying *Bhatia International* reveal a short-cut to decide this issue. Illustratively, one may consider the judgement in *Imax Corporation v E-City Entertainment (India) Private Limited*,[23] again cited in the *Hardy* judgement. That was a case where the governing law of contract was Singaporean law and the arbitration proceedings were to be conducted in accordance with the ICC Rules of Arbitration.[24] The agreement did not specify the seat or even the venue, though the arbitral tribunal had fixed the place of arbitration as London. Factually, this was also a case governed by the principles in *Bhatia* since the agreement was executed pre-*BALCO*. The Court finally concluded that section 34 of Part I of the Act cannot be invoked to challenge the award issued under that arbitration agreement. A thorough reading of the judgement reveals that only one factor moved the Court to this conclusion – the fact that the parties had agreed to the ICC Rules for governing the arbitration proceedings. In the words of the Court:

> 33. *On a true construction of Clause 14 in this case, there is no doubt the parties have agreed to exclude Part I by agreeing that the arbitration would be conducted in accordance with the ICC Rules. The parties were undoubtedly conscious that ICC could choose a venue for arbitration outside India. That is sufficient to infer that the parties agreed to exclude Part I.* ICC could well have chosen a venue in India. The possibility that ICC could have chosen India is not a counter-indication of this inference. It could also be said that the decision to exclude the applicability of Part I was taken when ICC chose London after consulting the parties. Either way Part I was excluded.[25]

In the course of the judgement, the Court also observed two other principles in passing:

22 ibid [34] (emphasis added).

23 (2017) 5 SCC 331.

24 ibid [5].

25 ibid [33], [29] (emphasis added).

a. where the parties have not expressly chosen the law governing the contract as a whole or the arbitration agreement in particular, the law of the country where the arbitration is agreed to be held has primacy;

the law of the country where arbitration is held will govern the arbitration and matters related thereto such as the challenge to the award.[26].

Thus, where the parties chose the procedural law to be a supranational law (or any law other than Indian for that matter), the factum of venue being outside India is considered suggestive of the parties' intention for the seat to not be India. If this principle is applied to the facts of *Hardy* where the UNCITRAL Model law was the procedural law, Kuala Lumpur was intended to be the 'seat' of the arbitration and even if one disagrees with such a definitive conclusion, at the very least, it would be clear that the parties impliedly excluded Part I of the Act, in terms of *Bhatia International*.

This short-cut to determining 'seat'/'place' has been approved by the Supreme Court in *BALCO*. In *BALCO*, the Supreme Court approvingly quoted from the English judgement of *Shashoua v Sharma.*[27] In *Shashoua v Sharma*,[28] the English Court was concerned with a shareholders' agreement that provided that,'the venue of the arbitration shall be London, United Kingdom', while the arbitration proceedings were to be conducted in English in accordance with the ICC Rules, though the governing law of the shareholders' agreement was the law of India. The English Court in *Shashoua* held that though 'venue' was not synonymous with 'seat', in an arbitration clause that provided for arbitration to be conducted in accordance with the Rules of the ICC in Paris (a supranational body of rules), a provision that 'the venue of arbitration shall be London, United Kingdom' amounted to the designation of a judicial seat.

Therefore, if *BALCO* were considered as the controlling law applicable in *Hardy*, it does not appear that sufficient credence has been paid to the observations within *BALCO* as regards how 'seat' was to be decided in a given case.

The importance of the above findings in *BALCO* reiterating the English decision in *Shashoua* cannot be emphasised enough. In the Indian *Shashoua* case,[29] the Supreme Court of India expressly rejected the argument that the English judgement in *Shashoua* is merely an interim order that cannot be considered binding.[30] The Supreme Court of India in *Shashoua,* in an opinion authored by the then Hon'ble Chief Justice Dipak Misra (who incidentally had also authored the *Hardy* judgement) held that the principle from the English judgement in *Shashoua* formed part of the binding *ratio decidendi* of *BALCO*.[31]

26 ibid [34].

27 *Hardy Exploration* (n 4) [108], [110].

28 (2009) 1 CLC 716.

29 *Roger Shashoua v Mukesh Sharma* (2017) 14 SCC 722.

30 ibid [63].

31 ibid.

Therefore, for the Supreme Court in *Hardy* to purportedly follow *BALCO*, and yet choose to ignore the importance of the principle from the English judgement in *Shashoua*, is an *ex facie* inconsistency.

VI. The 'Something Else' Factor in the Indian *Shashoua* Judgement – The Root of The Problem.

In the analysis of this author, the fault in the analysis/conclusion in the *Hardy* judgement can be traced back to the Indian *Shashoua* judgement, which are merely spaced apart by a year and authored by the same judge. It is important to appreciate the import of the following extract from the Indian *Shashoua* judgement in this context:

> 72. It is worthy to note that the arbitration agreement is not silent as to what law and procedure is to be followed. On the contrary, Clause 14.1 lays down that the arbitration proceedings shall be in accordance with the Rules of Conciliation and Arbitration of the ICC. In *Enercon (India) Limited (supra)*, the two-Judge Bench referring to *Shashoua* case accepted the view of Cooke, J. that the phrase 'venue of arbitration shall be in London, UK' was accompanied by the provision in the arbitration clause or arbitration to be conducted in accordance with the Rules of ICC in Paris. The two-Judge Bench accepted the Rules of ICC, Paris which is supernational body of Rules as has been noted by Cooke, J. and that is how it has accepted that the parties have not simply provided for the location of hearings to be in London. *To elaborate, the distinction between the venue and the seat remains. But when a Court finds there is prescription for venue and something else, it has to be adjudged on the facts of each case to determine the juridical seat. As in the instant case, the agreement in question has been interpreted and it has been held that London is not mentioned as the mere location but the courts in London will have the jurisdiction, another interpretative perception as projected by the learned senior counsel is unacceptable*.[32]

The fundamental problem arises from the generalisation used by the Supreme Court of India when it states that 'venue' with '*something else*' would allow a court to consider the 'venue' and the 'seat' to be the same. That is not the ratio of the English judgement in *Shashoua*. Rather, Justice Cooke in the English judgement in *Shashoua*, was prescribing a rule of thumb when he stated the following:

> 26. The Shareholders Agreement provided that 'the venue of arbitration shall be London, United Kingdom' whilst providing that the arbitration proceedings should be conducted in English in accordance with ICC Rules and that the governing law of the Shareholders Agreement

32 ibid [72] (emphasis added).

> itself would be the laws of India. It is accepted by both parties that the concept of the seat is one which is fundamental to the operation of the Arbitration Act and that the seat can be different from the venue in which arbitration hearings take place. *If a venue was named but there was to be a different juridical seat, it would be expected that the seat would also be specifically named*. Notwithstanding the authorities cited by the defendant, I consider that there is great force in this. The defendant submits however that as 'venue' is not synonymous with 'seat', there is no designation of the seat of the arbitration by clause 14.4 and, in the absence of any designation, when regard is had to the parties' agreement and all the relevant circumstances, the juridical seat must be in India and the curial law must be Indian law.
>
> 27. *In my judgement, in an arbitration clause which provides for arbitration to be conducted in accordance with the Rules of the ICC in Paris (a supranational body of rules), a provision that the venue of the arbitration shall be London, United Kingdom does amount to the designation of a juridical seat. The parties have not simply provided for the location of hearings to be in London for the sake of convenience and there is indeed no suggestion that London would be convenient in itself, in the light of the governing law of the Shareholders Agreement, the nature and terms of that agreement and the nature of the disputes which were likely to arise and which did in fact arise (although the first claimant is resident in the UK)*.[33]

The above extract points to three things:

a. The English Court noted the omission to separately specify a seat while expressly choosing to specify a venue;

b. The English Court noted that there was nothing to suggest London being a location specified for the sake of convenience. Evidence was to the contrary, given the close connection to India;

c. As per the English Court, where a venue is specified along with a designation of a supranational law for the conduct of the arbitral proceedings, it amounted to parties' expression of the intent for the venue to be seat.

In other words, the English judgement in *Shashoua* did not create a separate burden of proof on any party to prove a vague and ethereal 'something else' as the Supreme Court seems to have observed in its judgement in *Shashoua*. Instead, the English Court in *Shashoua* was rendering a rule of thumb. This understanding of the English judgement in *Shashuoa* is fully supported by the following observations by the English Court and its

33 *Roger* (n 29) [26], [27].

endorsement of Dicey, Morris and Collins on the Conflict of Laws:

> 32. *In Dicey, Morris and Collins on The Conflict of Laws, the authors at paragraph 16-035 state that the seat 'is in most cases sufficiently indicated by the country chosen as the place of the arbitration. For such a choice of place not to be given effect as a choice of seat, there will need to be clear evidence that the parties…agreed to choose another seat for the arbitration and that such a choice will be effective to endow the courts of that country with jurisdiction to supervise and support the arbitration'.*

Although the concept of the seat of the arbitration is a juridical concept and the legal seat must not be confused with the geographically convenient place chosen to conduct particular hearings, I can see no reason for not giving the express choice made in clause 14.4 full weight.[34]

Therefore, in this author's view, the Indian Supreme Court's judgement in *Shashoua*, with respect, does not provide an accurate statement of the law expressed in the English judgement in *Shashoua*. Given the express finding that the English judgement in *Shashoua* is binding on Indian Courts by virtue of its complete and full endorsement by the 5-judge bench in *BALCO*, the Supreme Court's relatively vague re-formulation of the same in the Indian *Shashoua* case may not be correct.

It is obvious that this vague and incorrect 'something else' factor has also crept into the judgement in *Hardy*, in express terms.[35] This is not a matter of semantics because pragmatically, it implies that there is an increased or additional burden on the party concerned. In practical terms, on both occasions, this 'something else' factor has been mentioned by the Supreme Court as a factor to be assessed on a case-by-case basis and it would become incumbent on the party who alleges the 'venue' to be the same as 'seat' to prove this 'something else'. In contrast, the original principle was more akin to a presumption based entirely on the contract terms, with the party alleging to the contrary (that the venue is not the same as seat) to establish the same. In this author's opinion, this added burden created in the Indian *Shashoua* judgement is not correct and this error has carried forward into the *Hardy* judgement in express terms.

VII. A Case of Undecided 'Seat'?

There is one other alternative to consider if one were to not question the Supreme Court's finding that Kuala Lumpur was not the 'seat' of arbitration in the *Hardy* case. The judgement in the *Hardy* case does not issue an affirmative finding that India and Delhi, in fact, is the 'seat'. At best then, one could perhaps state that the 'seat' is undetermined in

34 *Roger* (n 29) [32].

35 *Hardy Exploration* (n 4) [27].

Hardy.[36] It is clear that even in a post-*BALCO* scenario, only if the seat is decisively in India would Part I of the Act apply; if the seat is decisively outside India, Part I of the Act will not apply. Nothing in *BALCO*, or for that matter in *Bhatia International*, suggests what would happen if the 'seat' is undecided.

Another judgement of the Supreme Court in *Union of India v Reliance Industries Limited & Others,*[37] *("Reliance II")* rendered by a two-judge bench in 2015 appears to address this lacuna. In *Reliance II*, the Court was confronted with an international commercial arbitration where the governing law of the contract was Indian law and the arbitration proceedings were to be conducted in accordance with the UNCITRAL Rules of 1985. The arbitration agreement in that case was governed by the laws of England and the venue was otherwise agreed upon as London. An award passed by the arbitral tribunal in that case was challenged under section 34 of Part I of the Act and the issue before the Supreme Court was whether such a section 34 petition was maintainable at all. Since the arbitration agreement entered into was before the date of pronouncement of the judgement in *BALCO*, the Court concluded that the principles of *Bhatia International* would apply.[38]

The Court in *Reliance II* relied upon a number of precedents, which had found that in the context of the principles enunciated in *Bhatia International*, Part I of the Act is necessarily excluded if the seat of arbitration is outside India or the law governing the arbitration agreement is not Indian law.[39] Since there was a previous finding in an earlier round of litigation that the 'seat' of arbitration was London and since the arbitration agreement was governed by English law, the Court finally concluded that the section 34 petition was not maintainable.

In the course of rendering this judgement in *Reliance II*, the Supreme Court observed the following:

> 21. The last paragraph of *Balco* judgement has now to be read with two caveats, both emanating from paragraph 32 of *Bhatia International* itself – that where the Court comes to a determination that the juridical seat is outside India or where law other than Indian law governs the arbitration agreement, Part I of the Arbitration Act, 1996 would be excluded by necessary implication. *Therefore, even in the cases governed by the Bhatia principle*, it is *only* those cases in which agreements stipulate that the seat of the arbitration is in India or *on whose facts a judgement cannot be reached on the seat of the arbitration as being outside India*

36 To be clear, it is certainly possible to come to a conclusion after a factual and legal analysis, what the 'seat' of arbitration would be even in *Hardy*. However, given the lack of any factual analysis all the way up to the Supreme Court in affirmatively determining the actual 'seat', undertaking this exercise in this article seemed inappropriate.

37 (2015) 10 SCC 213.

38 ibid [17].

39 ibid [18].

> *that would continue to be governed by the Bhatia principle. Also, it is only those agreements which stipulate or can be read to stipulate that the law governing the arbitration agreement is Indian law which would continue to be governed by the Bhatia rule*.[40]

This understanding in *Reliance II* appears to suggest that in a situation where there is no definitive finding that India is the 'seat' or to the contrary, a court would have to examine whether Part I of the Act was expressly or by necessary implication, excluded by the parties.

If, therefore, the Supreme Court in *Hardy* was not overruling any prior judgement, which it admittedly did not, to make Part I and thus, section 34 apply to the award in that case, it was incumbent upon the Supreme Court to either decisively determine India (and Delhi) to be the 'seat' of arbitration in a reasoned manner and in the event it could not affirmatively determine this, examine whether Part I of the Act was expressly or impliedly excluded by the parties. This alternative, it would be seen, is what has been discussed above in this article – where it was suggested based on precedents that where the choice of procedure is something supranational and a venue outside India is chosen, the presumed intention of the parties is to impliedly exclude Part I of the Act. Unfortunately, the Supreme Court has done neither in the *Hardy* case.

VIII. Concluding Thoughts

In conclusion, with utmost respect to the Supreme Court, the judgement in *Hardy* is unjustifiable. In fact, with utmost respect, in this author's view, the judgement in *Hardy* is *per incuriam*. Nevertheless, while the final outcome in the case in itself may be regrettable, judges in subsequent cases may find enough support to consider the *Hardy* judgement as a deviation and thus, confined to be a ruling on facts. Any broader application of the judgement would only invite questions as to its correctness.

In this author's view, subject to the above opinion on the judgement in *Hardy*, the consistent principles arising from several judgements and in particular, the judgements in *Bhatia International, BALCO* and *Reliance II*, may be summarised below:

a. where the 'seat' of arbitration can be decided affirmatively to be India, Part I of the Act would apply; and
b. where the 'seat' of arbitration is decided affirmatively to be outside India, Part I of the Act would not apply; and
c. 'seat' may be expressly agreed between the parties or affirmatively determined by the Arbitral Tribunal; and
d. where none of the above apply, Courts would have to examine the contractual terms and attending circumstances to determine the intent of the parties; and

40 ibid [21] (emphasis added).

e. where a clear finding cannot be reached whether the 'seat' of arbitration is outside India, one must independently assess whether the parties expressly or impliedly excluded Part I of the Act; and

f. a rule of thumb expressly endorsed and forming part of the *ratio decidendi* of *BALCO* is that the 'seat' is not India where the parties have chosen to apply non-Indian law to the arbitration agreement or where the parties have applied a supranational law to govern the arbitration proceeding, with a venue being chosen to be outside India. This rule of thumb is a presumption and a party concerned may establish to the contrary.

STRICT LIABILITY AND ITS MISAPPLICATIONS IN INDIA

Aditya Swarup*

The article critically analyses the development of the principle of 'strict liability' laid down in Rylands v Fletcher, and the manner in which it has been applied by the Indian Supreme Court. The author argues that common law and Indian courts have read in various exceptions to the principle, thereby diluting it to its bare bones. Critiquing the carve-out of the principle in MC Mehta v Union of India, the author argues that the Supreme Court's misinterpretation in recent jurisprudence has made the application of the principle inconsistent with its intended contours and limitations. The paper questions the conflation of 'strict liability' with negligence and the trends that have obscured the answer to pertinent questions regarding strict liability's application in India. In concluding that strict liability in its current form is no longer applicable in India due to such convoluted jurisprudence, the author suggests construing the rule of negligence and absolute liability in a manner so as to absorb strict liability, similar to the approach prescribed by the High Court of Australia in the Burnie case.

I. Introduction

In late 2015, the Incorporated Council of Law Reporting for England and Wales (ICLR) conducted a survey to identify the fifteen most important common law cases of the last 150 years. Notable among the final list of cases was the presence of *Rylands v Fletcher*,[1] the landmark case on the tort of strict liability. In this regard, Lord Neuberger, in an extra-judicial speech commented that despite the decision being 'very well known

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1 *Rylands v Fletcher* (1868) L.R. 3 HL 330.

to law students and practitioners alike',[2] its significance has been 'fading'.[3] In 2003, the House of Lords, while rejecting the submission that the rule was obsolete, held that the rule of strict liability as developed in *Rylands v Fletcher* still has a part, howsoever small, in English law.[4] At the same time, the High Court of Australia has stated that the rule of strict liability no longer exists as an independent head of liability but should instead be regarded as 'absorbed by the principles of ordinary negligence'.[5]

It is then interesting to note that the Supreme Court of India, in the 2016 case of *Vohra Sadikabhai v State of Gujarat,*[6] applied the principle in *Rylands v Fletcher* to hold the respondent liable for damage caused to the property of the appellants by releasing water from the dam maintained by it when the water level became alarmingly high due to heavy rains. While there has been no other case in England[7] since the Second World War that has applied this principle and passed a judgment in favour of the plaintiff, numerous cases have applied it and passed judgment for the plaintiff in India during this time.[8] In the circumstances, it is only apt to analyse the reasons for the existence of this rule and the manner in which the Supreme Court has applied it. At the outset, it is respectfully submitted that while *Sadikabhai Vohra* presented the perfect opportunity for the Court to examine the present day significance of the principle of strict liability, the Hon'ble Court applied the principle in a rather convoluted manner – leading to serious apprehensions about the current position of the law in India.

II. A Taxonomy of the Tort of Negligence in India

The classic exposition of the tort of negligence is stated by Lord Atkin in *Donoghue v Stevenson*[9] wherein his Lordship held that one must take reasonable care to avoid acts or omissions which one can reasonably foresee would be likely to injure their neighbour. Thus, where the law recognises a duty of care and the defendant has breached such duty, the defendant shall be liable for any foreseeable damage caused as a result of breach of such duty.[10]

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2 Lord Neuberger, 'Reflections on the ICLR Top Fifteen Cases: A talk to commemorate the ICLR's 150th Anniversary' (6 October, 2015) <www.supremecourt.uk/docs/speech-151006.pdf> accessed 20 June 2019.

3 ibid.

4 *Transco v Stockport MBC* (2003) UKHL 61.

5 *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42.

6 *Vohra Sadikabhai v State of Gujarat* 2016 SCC 521 (SC).

7 *Transco* (n 4) [39].

8 *Union of India v Prabhakar Vijaya Kumar* (2008) 9 SCC 527; *Delhi Jal Board v Raj Kumar* ILR (2005) II Del 778; *Nagrik Sangarsh Samiti v Union of India* ILR (2010) IV Del 293; *Alamelu v State of Tamil Nadu* (2012) 2 CTC 644; *Indian Council for Enviro Legal Action v Union of India* (1996) 3 SCC 212 (Bichhri case).

9 *Donoghue v Stevenson* [1932] AC 562.

10 See Anthony M Dugdale and others (eds), *Clerk and Lindsell on Torts* (19th edn, Sweet and Maxwell 2006) 8.04. See also *Poonam Verma v Ashwin Patel* (1996) 4 SCC 332; *Nazir Abbas v*

At the same time, one of the hallmarks of the law of torts is that it provides a remedy wherever this is a violation of a legal right or legal injury. The Indian courts, too, have recognised that it would be primitive to 'class strictly' and 'close finally' the ever expanding and growing horizon of tortious liability.[11] In this background, one of the problems that arose with the law of negligence was that it did not address a situation where a person used his land for dangerous purposes (or non-natural purposes) or brought on his land anything likely to do mischief and such thing escaped and caused injury to another despite such person taking precautions. The fact that the person was using the land for a dangerous purpose placed a higher burden of care and the law of torts recognised the principle of strict liability to redress this legal injury.

In *Rylands v Fletcher,*[12] the defendant built a reservoir on his land and the shafts holding the water burst, leading to flooding of the plaintiff's coal mine. The plaintiff initially alleged negligence and on the finding that the defendant had exercised reasonable care, alleged that despite, and even if there was no negligence, the defendant was liable. Blackburn J, speaking for the Exchequer Chamber, held the defendant nevertheless liable on the following principle:

> We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.

The House of Lords,[13] while approving this legal principle, restricted the rule to circumstances where the defendant had made 'a non-natural use' of the land and the damage was not a result of an act of God.[14] Any use of land would not be deemed non-natural if it were permitted under statute.[15] Thereafter, the House of Lords held that while the rule applies to an unforeseeable escape, the defendant would not be liable unless the damage caused was reasonably foreseeable.[16]

> It is submitted that over time, the exceptions to the principle of strict liability have been enlarged to such an extent that the rule is barely applicable in the present day. For instance, with respect to the requirement of a non-natural use, the Privy Council in *Rickards v Lothian*[17] held

Raja Ajam Shah ILR (1947) Nag 555; *Zankarsingh v State* AIR 1957 MP 78.

11 *Jay Laxmi Salt Works (P) Ltd v State of Gujarat* (1994) 4 SCC 1.

12 *Rylands* (n 1) 279.

13 *Rylands* (n 1).

14 ibid 339, 340.

15 *Hammersmith and City Railway Co v Brand* LR 4 HL 171, 196.

16 *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264.

17 *Rickards v Lothian* [1913] AC 263 (PC).

> that '[i]t is not every use to which land is put that brings into play this principle. It must be some special use bringing with it increased danger to others, and must not be merely the ordinary use of the land or such a use as is proper for the general benefit of the community'.

Given that most non-natural uses of land are for the benefit of the community or have some statutory backing, there are very few situations where the strict liability principle will be applicable. The same is true even for Indian law. In *State of Punjab v Modern Cultivators,*[18] the damage was caused to the plaintiffs by the overflowing of water from a breach in the canal belonging to the defendant state government. Hidayatullah J, while noting that this was one of the first cases of its kind in India, held that the strict liability rule in *Rylands v Fletcher* was inapplicable as 'canal systems were essential to the life of the nation and land that is used as canals is subjected to an ordinary use and not to an unnatural use…'.[19] The Court, however, finally held that the defendant was liable because the Government had been negligent in exercising due care in maintaining the canals. In *Modern Cultivators,* the Court did not rule out the existence of strict liability in Indian law but only enlarged the exceptions to the application of the principle.

On the other hand, the High Court of Australia recognised that the rule in *Rylands v Fletcher* no longer existed as an independent head of liability in Australia but should instead be regarded 'as absorbed by the principles of ordinary negligence'.[20] Accordingly, the High Court held that the defendants, who had employed independent contractors to use highly inflammable material, were negligent in not taking due care to guard against fire and hence were liable for damage caused to the plaintiff as a result of the fire.

However, in *Modern Cultivators*, the Supreme Court did not go so far as to do away with the principle of strict liability. At the same time, until 1994, the courts assumed that the principle of strict liability laid down in *Rylands v Fletcher* was 'modified' by the Supreme Court in *Modern Cultivators.*[21] In *Jay Laxmi Salt Works v State of Gujarat,*[22] the High Court proceeded on a similar assumption and the Supreme Court finally held that the ratio in *Rylands v Fletcher* had not been modified by the Indian Supreme Court in *Modern Cultivators.* Rather, the Court had preferred to rely on the principle of 'fault liability' as developed by the American Courts. Fault liability, in essence is liability arising out of negligence – similar to that recognised by the High Court of Australia. However, in *Jay Laxmi Salt Works*, the Court said that the difference between strict and fault liability arises 'from the presence and absence of mental element' and that a 'breach of legal duty wilfully, or deliberately or even maliciously is negligence emanating from fault liability'.[23] With

18 *State of Punjab v Modern Cultivators* AIR 1965 SC 17.

19 ibid [16].

20 *Burnie* (n 5).

21 *Modern Cultivators* (n 18).

22 *Jay Laxmi* (n 11).

23 ibid [8].

respect, it is submitted that the understanding of fault liability by the Court in *Jay Laxmi Salt Works* is misplaced. One may not have wilfully, deliberately or maliciously breached their duty but never the less have not taken the requisite duty of care to prevent a thing from escaping or causing mischief. An intention to cause damage (by malice, or deliberately or wilfully) has never been a prerequisite to prove liability for negligence[24] and the ruling by the Court stating otherwise is incorrect.

Despite the skewed understanding of fault liability by the Supreme Court, it is submitted that the decisions of the Court in *Modern Cultivators* and *Jay Laxmi Salt Works* are significant because they recognised liability arising out of negligence and, at the same time and like the House of Lords in *Transco*, did not rule out the existence of the strict liability rule in Indian law.

The implications of the *Transco* and *Burnie Port Authority* cases have been considered by several commentators. The *Transco* case has been criticised for linking strict liability with the notion of fault through the foreseeability requirement,[25] for being the consequence of misguided intentions,[26] and can be viewed as a consequence of the narrowing gap between doctrine of strict liability and negligence.[27] On the other hand, the *Burnie* case has been viewed as 'replacing one set of uncertainties with another'[28] and shifting the burden onto the victim by requiring proof of fault.[29] Although both approaches may have had similar consequences,[30] they have given rise to two conflicting interpretations of *Rylands v Fletcher* and its place in modern tort law.

At this juncture, it would be pertinent to note that in the *Enviro Legal* case,[31] the Supreme Court considered the applicability of *Burnie Port Authority* to the situation at hand. Acknowledging the divergence between English law and Australian law, the Court chose to adopt the principle laid down in *MC Mehta v Union of India*.[32] Despite this, the

24 *Clerk and Lindsell on Torts* (n 10) 8.02. See also A Lakshminath and M Sridhar (eds), *Ramaswamy Iyer's The Law of Torts* (10th edn, Lexis Nexis 2007) 669-671.

25 Margaret Fordham, 'The Demise of The Rule In Rylands v Fletcher?' (1995) Singapore Journal of Legal Studies 1, 26.

26 Margaret Fordham, 'Surviving against the odds — The rule in Rylands v Fletcher Lives on: Transco Plc. v. Stockport Metropolitan Borough Council' (2004) Singapore Journal of Legal Studies 241, 247.

27 GHL Fridman, 'The Rise and Fall of Rylands v Fletcher' (1956) 34(7) Canadian Bar Review 810.

28 Sheila Dziobon and Richard Mullender, 'Formalism Forever Thwarted: Rylands v. Fletcher in Australia' (1995) 54(1) The Cambridge Law Journal 23, 25.

29 John Murphy, 'The Merits of Rylands v Fletcher' (2004) 24(4) Oxford Journal of Legal Studies 643, 666.

30 Kumaralingam Amirthalingam, 'Strict Liability Restricted: A Critical Commentary on Burnie Port Authority v General Jones Pty Ltd' (1994) 13(2) University of Tasmania Law Review 416.

31 Bichhri case (n 8) 244.

32 (1987) 1 SCC 395 (M C Mehta).

strict liability construct continues to be applicable in India till date.[33] Subsequent decisions have interpreted the *MC Mehta* judgement as 'not foreclose[ing] the application of the rule as a legal proposition.[34] The relationship of strict liability with the principle of absolute liability is contentious and shall be addressed in the next section.

A third head of liability emerged from the occurrence of two tragic incidents in the 1980s; the Bhopal gas disaster and oleum gas leak in Delhi. In *M C Mehta v Union of India*,[35] the escape of poisonous oleum gas from one of the units of Shriram Foods and Fertilizer Industries Ltd. ("Shriram") resulted in the death of one person and injury to others. The incident occurred while the Supreme Court was hearing a matter relating to the closure of various units of Shriram on the ground of they were hazardous to the community and the Supreme Court was also requested to consider awarding compensation for the injured. The Constitution Bench of the Supreme Court was constrained and could not directly apply the principle of strict liability for four reasons. First, the Bench, while considering the grant of compensation under Article 32 of the Constitution had to first determine whether Shriram could be considered a 'State' under Article 12. The Bench held that given that Shriram was producing fertilisers (for a public benefit) and was working within the framework of various statutes, it was a 'State' under Article 12 of the Constitution. Consequently, however, it could not have applied the principle of strict liability as acts for the benefit of the community and undertaken under statute were excepted from the principle. Second, the rule in *Rylands v Fletcher* did not envisage liability or compensation for harm caused to persons or property within the premises because the rule requires 'escape' of a thing. Third, the principle of strict liability only recognised damage caused to property as a result of the escape or mischief and not damage caused to persons.[36] Lastly, just before the oleum gas leak in Delhi, one of the worst industrial disasters in the world occurred in Bhopal, where an explosion at the Union Carbide pesticide plant occurred and the highly toxic methyl isocyanite gas escaped, leading to the immediate death of over 2,500 people and injury to at least 500,000 others.

The last reason mentioned in the above paragraph is particularly important. On the night of 2 December, 1984, a leak of methyl isocyanate gas and other chemicals from the Union Carbide India Ltd. ("Union Carbide") plant at Bhopal resulted, as stated above, in the immediate death over 2,500 people and injury to at least 500,000 others. Union Carbide was a subsidiary of the Union Carbide Corporation ("UCC"), an American Company and the Indian government controlled banks and the public held around 49% of the shares in Union Carbide. Like in the case of Shriram, it could have also been argued

33 *M P Electricity Board v Shail Kumari and Ors* (2002) 2 SCC 162; *Charan Lal Sahu v Union of India* AIR 1990 SC 1480; *Gujarat SRTC v Ramanbhai Prabhatbhai* (1987) 3 SCC 234; *Kaushnuma Begum v New India Assurance Co Ltd* (2001) 2 SCC 9.

34 *Kaushnuma Begum* (n 33).

35 *M C Mehta* (n 32).

36 *Read v J Lyons and Co Ltd* [1947] AC 156.

that the manufacture of pesticides constituted a public benefit. Hence, similar to the reasons applicable in the case of Shriram, it could have been argued that if Union Carbide had not been negligent, it would also not be possible to apply the principle of strict liability because of the exceptions to the rule.

What followed was a situation where the Supreme Court, set out the law not only to decide the *lis* before it, that is the *Shriram* case, but also to render it applicable to the Bhopal gas disaster. Further, in view of the declaratory nature of precedents, the principle would be applicable to Union Carbide even though it wasn't law at the time of the disaster. The Constitution Bench of the Supreme Court held:

> … We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-à-vis the tortious principle of strict liability under the rule in Rylands v. Fletcher.[37]

Thus, the Supreme Court developed a new principle of liability to deal with an unusual situation which had arisen and was likely arise in future instances, and in which the perpetrators could not be held liable on account of the principle of strict liability.[38] The development of this doctrine and similar exercises in 'reactive policy-making' have been criticised, as value judgements on 'insurance and risk allocation based on perceived notions of social welfare' are best left to the legislature.[39] None of the exceptions to the principle of strict liability are applicable to absolute liability. The question then arises whether the principle of strict liability has been subsumed by the absolute liability in India.

III. Relevance of Strict Liability in India

While the Australian and English courts have deliberated on whether the principle of strict liability is relevant or could be considered absorbed by the tort of negligence, in India, the deliberation has also involved the question of whether the principle has now been incorporated as part of absolute liability. In the *Bichhri* case,[40] the Supreme Court proceeded to examine why 'the rule of strict liability is inappropriate or unacceptable in India' – hence assuming that it is inappropriate or unacceptable. Similarly, Courts have

37 *M C Mehta* (n 32) [31].

38 ibid.

39 Kumaralingam Amirthalingam, 'Rylands Lives' (2004) 63(2) The Cambridge Law Journal 273 - 276.

40 *Bichhri case* (n 8) 244.

often applied the principle of 'strict and absolute liability',[41] thereby reading the two kinds of liabilities together. This apparent conflation of the two concepts appears to be based on misinterpretation of Indian and English case law on strict liability- the *Bichhri* case explicitly treated absolute liability as a separate construct[42] and *Read v Lyons* clarified that the doctrine of strict liability would not be applicable to ultra-hazardous activities.[43]

It is submitted that despite the recognition of the principle of absolute liability in India to suit the 'needs of the present day economy and structure',[44] the principle of strict liability as developed in *Rylands v Fletcher* is still relevant in India. This is primarily because the application of the principle of absolute liability is predicated on the enterprise[45] being engaged in 'a hazardous or inherently dangerous industry' which poses a potential threat to the health and safety of persons working or residing in surrounding areas.[46] However, the principle of strict liability is applicable where a person brings and keeps 'anything' that is likely to do mischief when it escapes.[47] Further, such thing must be a non-natural use of the land. Thus, there may be situations where a person uses his property for a non-natural use which is not 'hazardous or inherently dangerous', for instance, building a bund or small dam on the property.

This has been correctly recognised by the Courts in India. In *Union of India v Prabhakaran Vijaya Kumar*,[48] the Supreme Court stated that the rule in *Rylands v Fletcher* had been subsequently interpreted to cover a variety of things likely to do mischief on escape, irrespective of whether they were dangerous *per se*. The Court gave examples such as water, electricity, colliery spoils and flagpoles. Further, though I submit the principle has been misapplied, the courts have applied strict liability to compensate deaths from electrocution by live wires,[49] plaintiffs falling down manholes[50] and even those injured by motor vehicle accidents.[51]

In *Kaushnama Begum v New India Assurance*,[52] the Supreme Court, interpreting *M C*

41 *M C Mehta* (n 32); *Jaipur Golden Gas Victims Association v Union of India* (2009) 164 DLT 346; *Association of Victims of Uphaar Tragedy v Union of India* (2003) 104 DLT 234; *Research Foundation for Science v Union of India* (2005) 13 SCC 186.

42 *Bichhri case* (n 8).

43 *Read v Lyons* (n 36).

44 *M C Mehta* (n 32).

45 The *MC Mehta* case did not mention whether the principle would be applicable to individuals but it is most likely that it is.

46 See *MC Mehta* (n 32) [31].

47 See *Rylands v Fletcher* (n 1).

48 *Union of India v Prabhakaran Vijaya Kumar* (n 8) [27]; See also *Delhi Jal Board v Raj Kumar* (n 8); *Jaipur Golden Gas Victims Association v Union of India* (n 41).

49 *Alamelu v State of Tamil Nadu* (n 8).

50 *Delhi Jal Board v Raj Kumar* (n 8).

51 *Kaushnuma Begum* (n 33); See also *Gujarat SRTC* (n 33).

52 *Kaushnuma Begum* (n 33).

Mehta's case held that the Constitution Bench in that case did not 'disapprove the rule' of strict liability and nor did it 'foreclose the application of the rule as a legal proposition'.[53] In *Rajkot Municipal Corporation v Manjulben Jayantilal*,[54] the Supreme Court acknowledged that the liability may be strict or absolute.[55] More recently, in *MV Kew Bridge v Finolex Industries*,[56] the plaintiff contended that as a result of the defendant's vessel carrying LPG being grounded near the plaintiff's jetty, it had suffered economic loss as other ships could not dock on the jetty (although no physical damage had occurred as the LPG had not escaped). In a motion by the defendant challenging the maintainability of the action on the basis that liability for negligence on the basis of only an economic loss is not allowed, the plaintiff argued that the principle of *Rylands v Fletcher* had been 'disregarded/distinguished' by the Supreme Court and that the defendant was liable on the basis of absolute liability. The Bombay High Court, it is submitted, rightly disregarded the arguments of the plaintiff and held that the strict liability principle is still applicable in India.[57] Further, on the motion of the defendant, it held that given that there was no 'escape' of the LPG gas, the defendant will not be strictly liable.

Thus, the Courts in India have, despite some judgments to the contrary, continued to recognise the strict liability rule and apply it to certain circumstances. However, at the same time, it is respectfully submitted that the rule is being misinterpreted and misapplied in recent times, leading to confusion about the manner in which the rule is to be applied.

IV. Misapplications of the Strict Liability Rule

In *Kaushnama Begum v New India Assurance*,[58] the front tyre of a jeep burst as a result of which the jeep capsized and hit a person who succumbed to the injuries. The Motor Accidents Claims Tribunal dismissed the claims before it on the finding that there was no rashness or negligence.[59] The appellant however argued that the respondent is strictly liable and the Court rightly stated that the question of liability rests upon how far the rule in *Rylands v Fletcher* can apply to motor accident cases.[60] It is also pertinent to mention that the appellant did not contend or claim compensation under Motor Vehicles Act 1988, s 140 that provided for 'no fault' liability, since it provided for a fixed amount of compensation but argued strict liability dehors the provisions of the Motor Vehicles Act 1988. The Hon'ble Supreme Court cited an earlier judgment in *Gujarat SRTC v Ramanbhai*

53 ibid [16].

54 *Rajkot Municipal Corporation v. Manjulben Jayantilal* (1997) 9 SCC 552.

55 The Court, however, also used the words 'special liability' which could be coterminous with absolute liability.

56 *MV Kew Bridge v Finolex Industries* (2014) 7 Bom CR 261.

57 The Court cited *Kaushnama Begum's case* in support of its decision.

58 *Kaushnuma Begum* (n 33).

59 It seems that no policy of third party insurance was taken out by the jeep owners.

60 *Kaushnuma Begum* (n 33) [12].

Prabhatbhai,[61] to hold:

> ….. In view of the fact and constantly increasing volume of traffic, the motor vehicles upon the roads may be regarded to some extent as coming within the principle of liability defined in Rylands v. Fletcher… Where a pedestrian without negligence on his part is injured or killed by a motorist, whether negligently or not, he or his legal representatives as the case may be should be entitled to recover damages if the principle of social justice should have any meaning at all… Like any other common law principle, which is acceptable to our jurisprudence, the rule in Rylands v Fletcher can be followed at least until any other new principle which excels the former can be evolved….[62]

With due respect, it is submitted that the principle in *Rylands v Fletcher* could never have been applied in this case. There was no 'thing' brought on the property of a person,[63] no 'escape', and even otherwise, it cannot be stated that driving a jeep is a non-natural use of property.[64] Further, the principle in *Rylands v Fletcher* only applies to proprietary and not personal injuries.[65] Thus, the application of *Rylands v Fletcher* to motor vehicle accident cases is misplaced.

More recently, *Vohra Sadikabhai v State of Gujarat*,[66] damage was caused to the property of the appellants by releasing water from the dam maintained by the respondent state when the water level became alarmingly high due to heavy rains. The appellants claimed that the damage was due to gross negligence and lack of administration on the part of the respondents – the respondents knew that the monsoons were around the corner

61 *Gujarat SRTC* (n 33).

62 ibid [18].

63 In *Fosbroke - Hobbes v Airwork Ltd* [1937] 1 All ER 108, the English Court held that an aircraft is not a 'thing' to which the principle of *Rylands v Fletcher* applies because it is not inherently dangerous.

64 It may also be argued that the meaning of property in *Rylands v Fletcher* only included immovable property.

65 There is considerable ambiguity surrounding this question under English law. See *Rylands v Fletcher* (n 1) 279; as the *Rylands* rule applied to 'all damage which is the natural consequence of the escape' it can be argued that an interest in land was not envisaged to be a requirement to attract strict liability. For a further understanding of the divergence in case law on this question, refer to John Murphy and Christian Witting, *Street on Torts* (13th edn, OUP 2012) 493; See *Ribee v Norrie* [2001] PIQR P8 [30]; *Re-Source American International Ltd v Platt Service Ltd* [2003] EWHC 1142 (TCC) [171]; *McKenna v British Aluminium Ltd* [2002] Env LR 30 [20]-[28] for the implications of applying a proprietary interest requirement in light of the Human Rights Act 1998; See also *Read v Lyons* for the application of the proprietary rule. R F V Heuston, *Salmond on the Law of Torts* (7th edn, Sweet and Maxwell 1928) 374; Winfield, 'Nuisance as a Tort' (1931) 4(2) The Cambridge Law Journal189, 195; Allen Linden, 'Whatever Happened to Rylands v Fletcher?' in Lewis Klar (ed), *Studies in Canadian Tort Law* (Butterworths 1977) 335.

66 *Vohra Sadikabhai v State of Gujarat* 2016 SCC Online 521 (SC).

and should have kept the water level low at the dam in order to meet the exigencies of the ensuing monsoon. The respondent State stated that the release was prompted by heavy rains which was an act of God and hence it was not liable.

The judgment of the Supreme Court, with respect, is quite convoluted. On the one hand it rightly acknowledges that the principle of strict liability in *Rylands v Fletcher* may not be applicable as the construction of a dam was for the benefit of the community and cannot be termed a 'non-natural' use. Consequently, it proceeded to examine whether the respondent was negligent and whether the damage was physically avoidable. On the other hand, while holding that the respondent was negligent, the Court held:

> 34…. In view of the principle laid down in Rylands v. Fletcher, onus was on the respondents to discharge such a burden and it has miserably failed to discharge the same. On that basis, we are constrained to hold that there is a negligence on the part of the respondents which caused damage to the fields of the appellants.[67]

The question of burden of proof or the defendant discharging any burden is irrelevant to the principle of strict liability as laid down in *Rylands v Fletcher*. At no stage did either Lord Blackburn or the House of Lords in that case ever mention the requirement of a burden of proof or the duty of the defendant to discharge any burden. It is rather surprising that, without any analysis of that case, the Indian Supreme Court stated it as a principle of law. Further, the National Green Tribunal in a recent judgment,[68] awarding □100 crore as environmental compensation, made numerous references to the principle of strict liability and stated that its purpose 'is not only to place the onus upon the Respondents' but also to ensure 'what is proved by the Applicant in relation to damage and degradation of marine environment is restored and restituted…'.[69]

Lastly, there are now various statutes that recognise the principle of strict liability.[70] To this end, the general principle is that where the liability is governed by statute, the principle of *Rylands v Fletcher* and the exceptions therein will not be applicable.[71] Situations arise when some statutes provide for strict liability and, at the same time, fix the quantum of compensation. Thus, in *Kaushnama Begum*,[72] the Supreme Court held that even though the principle of 'no fault' liability is provided for in the Motor Vehicles Act 1988, s 140, a plaintiff may still claim compensation under the principle of strict liability as laid down in *Rylands v Fletcher*. Similarly, the principle of strict liability in torts has been applied

67 ibid.

68 *Samir Mehta v Union of India* MANU/GT/0104/2016.

69 ibid.

70 Railways Act 1989, s 124A; Motor Vehicles Act 1988, s 140; See also Civil Liability for Nuclear Damage Act 2010, s 6(2).

71 *Clerk and Lindsell on Torts* (n 10).

72 *Kaushnuma Begum* (n 33) [20].

in cases under the Railways Act 1989, s 124A.[73] It is respectfully submitted that using strict liability principles existing in tort merely to supplement the compensation provided by statute renders the statutory provisions meaningless. If this be the case, even the controversial Civil Liability for Nuclear Damage Act 2010 that limits the compensation for absolute liability from nuclear damage would be meaningless. The decisions cited above have therefore been wrongly decided.

V. Conclusion

In view of the misapplications and misunderstandings of the strict liability principle in India, it is pertinent to deliberate and consider the existence of the principle in India. As stated earlier, the High Court of Australia in *Burnie Port Authority* stated that the rule of strict liability no longer existed as an independent head of liability but should instead be regarded as 'absorbed by the principles of ordinary negligence'.[74] The rationale being that all that is required is a higher duty of care when a defendant is undertaking a dangerous act or brings on his land a thing capable of doing mischief. On the other hand, in *Transco*, the House of Lords, while at some level agreeing with the High Court of Australia, held that abolition of the strict liability principle 'would be too radical a step to take'.[75] In the author's view, and as recognised by the Hon'ble Supreme Court in *M C Mehta,* the law has to grow in order to satisfy the needs of the society. The principle in *Rylands v Fletcher* was set out in the late 19th century and the law of negligence has come a far way to carefully set out the 'duty of care' required of a defendant – proportionate to the danger of the activity. This aspect was correctly recognised by the Australian High Court and with respect, ought to also have been recognized by the UK Courts. Clarity in Indian law is found wanting on two aspects pertaining to the principle (i) whether the principle should be applicable at all? and (ii) if yes, the circumstances in which the principle must be applied. As shown in this paper, recent decisions of the Indian courts have muddied the waters with respect both these questions. In the author's opinion, in view of the various misapplications of the principle of strict liability and the presence of 'absolute liability' in India, it is apt to do away with strict liability and apply the tests as prescribed by the High Court of Australia. Doing so would bring clarity to the law, including the law of negligence.

73 *Union of India v Prabhakaran Vijaya Kumar* (n 8); *Union of India v Sitabai Vasvane* (2013) 5 Bom CR 763.

74 *Burnie* (n 5).

75 *Transco* (n 4) [43].

WHERE'S THE MONEY?: PATHS AND PATHOLOGIES OF THE LAW OF PARTY FUNDING

Aradhya Sethia*

With an electoral competition involving around 902 million votes, 8049 candidates and more than 2200 registered parties, it is only obvious to expect that Indian General Election would be a staggeringly expensive affair. The 2019 Indian General Election was no different. According to some measures, it was the costliest election in democratic world, with total amount spent being close to □ 6 trillion. Indian electoral democracy, despite its acclaimed successes, faces a serious challenge in the form of its party funding regime. However, party funding has received scant attention in Indian legal scholarship. It is this vacuum that this article intends to fill. In India, party funding is regulated through a complex but disparate set of corporate, election and taxation laws. The article is divided into four parts. The first two parts will deal with two different axes of party funding regime in India – (a) corporate contributors: who can contribute funds to political parties? and (b) disclosures: what, if any, information about these transactions should be disclosed, and to whom should disclosures be made? Party funding reforms have been limited by entrenched practices, culture and political economy that are effects, as well as causes, of the path that party funding regime has traversed in India. I will further explore the constitutional responses to the electoral bonds and other laws that facilitate party funding opacity. I will conclude with a cautionary note. Laying excessive emphasis on electoral bonds in the recent commentary, while ignoring other elements of party funding reform, is missing the forest for the tress. It is not to say that the policy of electoral bonds is insignificant or even desirable. Instead, I argue that if other elements of party funding law are left intact,

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merely doing away with electoral bonds may be far from fixing party finance.

I. Introduction: Paying for the Party

With an electoral competition involving around 902 million votes, 8049 candidates and more than 2200 registered parties, it is only obvious to expect that Indian general election would be a staggeringly expensive affair. 2019 general election was no different. According to some measures, the 2019 Indian General Election was the costliest election in democratic world, with total amount spent being close to □ 6 trillion.[1] Indian electoral democracy, despite its acclaimed successes, faces a serious challenge in the form of its party funding regime. Recognising this problem, in the last decade or so, various reform suggestions have emerged ranging from stricter disclosure requirements to public funding.[2] Party funding reform, however, is one of the most difficult to accomplish. Apart from technical complexities involved, it requires the politicians to regulate themselves – a classic case of fox guarding the hen house.[3] However, despite its complexities and importance to democratic governance, party funding has received scant attention in Indian legal scholarship.

The 2017 Finance Act introduced four major changes introduced to the party funding law, namely (a) introduction of electoral bonds;[4] (b) removal of donation limits of companies;[5] (c) removal of disclosure requirements imposed on companies,[6] and (d) cap of □ 2000 on cash donations.[7] Overall, the amendments, while making a compromise on disclosure requirements, aim at reducing cash donations and facilitating a greater quantity of corporate donations.[8] Although these changes have attracted a few petitions in the Supreme

1 See 'Poll Expenditure, The 2019 Elections', *Centre for Media Studies* <http://cmsindia.org/cms-poll/Poll-Expenditure-the-2019-elections-cms-report.pdf> accessed 20 June 2019.

2 *See* Law Commission of India, *Electoral Reforms* (Report no. 255,2015) <http://lawcommissionofindia.nic.in/reports/Report255.pdf> accessed 29 July 2019.

3 Aradhya Sethia, 'For Cleaner, Fairer Elections' *The Hindu* (21 February 2018) <https://www.thehindu.com/opinion/op-ed/for-cleaner-fairer-elections/article22809421.ece> accessed 20 June 2019.

4 Representation of the People Act 1951, s 29C; Reserve Bank of India Act 1934, s 31 and Income Tax Act 1961, s 13-A as respectively amended by Finance Act 2017, s 137, 135, and 11.

5 Companies Act 2013, s 182 as amended by Finance Act 2017, s 154.

6 ibid.

7 Income Tax Act 1961, s 13-A as amended by Finance Act 2017, s 11; In addition to the above stated amendments, the Parliament also amended s 2(1)(j)(vi), Foreign Contribution (Regulation) Act 2010 via Finance Act 2016, in order to expand the definition of 'foreign source' to further broaden the constituency of donors.

8 Arun Jaitley, Budget Speech 2017-18 (1 February 2017) <http://indiabudget.nic.in/bspeecha.asp> accessed 6 January 2018. '[A]n amendment is being proposed to the Reserve Bank of India Act to enable the issuance of electoral bonds in accordance with a scheme that the Government of India would frame in this regard. Under this scheme, *a donor could purchase bonds from authorised banks against cheque and digital payments only*. They shall be redeemable only in

Court, and significant attention in media, they have evaded a systemic legal analysis.[9]

Before I proceed further, two important caveats. *First*, I do not use the phrase 'political funding' or 'campaign finance', which may involve funding of individual candidates, and may extend to include politically-aligned interest groups and other organizations. Although the recent rise of organisations that are formally separate from parties, but operationally aligned with parties in the form of campaign strategists require us to conduct a serious inquiry into their legal regulation.[10] Instead, the paper focuses only on the law dealing with funding of political parties. *Second*, in this paper, I am only concerned with regulation of how, and from whom, parties receive the funds, not with the expenditure made by parties using that fund, although the regulation of party expenditure is a crucial aspect of campaign finance regime.[11]

In India, party funding is regulated through a complex but disparate set of corporate, election and taxation laws. The article is divided into four parts. The first two parts will deal with two different axes of party funding regime in India – (a) corporate contributors: who can contribute funds to political parties? and (b) disclosures: what, if any, information about these transactions should be disclosed, and to whom should disclosures be made?

In each of these parts, I will *first* discuss the historical development, and the political economy concerns that have shaped the party funding regime. In India, the law governing party funding has never seen a cohesive and comprehensive reform. Bound by a kind of path-dependence, party funding regime has evolved only through incremental reforms – one reform built on another. The present-day law we have is a result of piecemeal amendments introduced to tackle one or the other individual problems plaguing party finance. They are limited by entrenched practices, culture and political economy that are the effects, as well as the causes, of the path that party funding regime has traversed in India. In the *third* part, I will explore the constitutional responses to the electoral bonds and other laws that facilitate party funding opacity. In the *final* part, I will discuss plausible constitutional hurdles in mandating funding disclosures, and the ways those hurdles could be overcome.

I will conclude with a cautionary note. Laying excessive emphasis on electoral bonds in the recent commentary, while ignoring other elements of party funding reform is missing the forest for the tress. This is not to say that the policy of electoral bonds is insignificant

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the designated account of a registered political party. These bonds will be redeemable within the prescribed time limit from issuance of bond….').

9 For a comprehensive account of debate prior to 2017 Amendments: See Law Commission of India, *Electoral Reforms* (Report no. 255, 2015) 17-19 <http://lawcommissionofindia.nic.in/reports/Report255.pdf> accessed 6 January 2018.

10 See Amogh Dhar Sharma, 'How far can political parties in India be made accountable for their digital propaganda' (*Scroll*,10 May 2019) <https://scroll.in/article/921340/how-far-can-political-parties-in-india-be-made-accountable-for-their-digital-propaganda> accessed 29 July 2019.

11 See Representation of the People Act 1951, s 77.

or even desirable. Instead, I conclude by arguing that *if other elements of party funding law are left intact*, merely doing away with electoral bonds may be far from fixing party finance.

II. The Curious Case of Corporate Contributors

One of the most contentious issues in Indian party funding regime is the regulation of corporate donations. After independence, the creation of adult franchise and large electoral constituencies resulted into a greater need for funding.[12] Hence, political parties wanted to attract corporate funding. In return, corporates often sought favours in the form of state patronage. An economy with intense state control, often characterised as license-permit raj meant that politicians could use several regulatory levers to promise benefits to their funders.

1. Corporate Contribution: A Regulatory Void

In the early days of the Republic, the law did not specifically prohibit any corporate donation to political parties. A company could donate to any political party as far its Memorandum of Association (MoA) permitted.[13] In 1957, a year after the enactment of the Companies Act 1956, for the first time, a dispute concerning party funding reached a High Court.[14] In *Koticha*, a company amended its MoA to provide for donations to political associations. Under the Companies Act 1956, a company could amend its MoA only for the purposes of (a) to carry on its business more economically or more efficiently,[15] and (b) to attain its main purpose by new or improved means.[16] A shareholder of the company challenged the above alteration on the grounds that such alteration does not satisfy any of the two statutory grounds.

The company justified this alteration on the grounds that its success is dependent on government's 'industrial policy', and that the return of the Congress government was essential for an industrial policy favourable to the above company.[17] The appellant, a shareholder in the company, objected to this amendment, arguing that a party in power is supposed to determine its policy in 'public interest', not in the interest of its funders.[18] A company should not be allowed to lawfully influence policies in its favour through party

12 Yogendra K Malik, 'Political Finance in India' (1989) 60(1) Political Quarterly 75 (Malik).

13 Companies Act 1956, s 293(1)(e). The provision allowed the companies to contribute to "charitable and other funds not directly relating to the business of the company. In *Re Indian Iron & Steel Co. Ltd* (1957) AIR Cal 234 The Calcutta High Court ruled that this provision encompasses the power to make political donation.

14 *Jayantilal Ranchchoddas Koticha v Tata Iron and Steel Co Ltd* (1958) AIR 1958 Bom 155 (Koticha).

15 Companies Act 1956, s 17(1)(a).

16 Companies Act 1956, s 17(1)(b).

17 *Koticha* (n 14) [7].

18 ibid [8].

funding.[19] Therefore, a corporate donation made to influence the government policy, even if it benefits the company, should not be allowed as a legal business activity of a company. The company then resorted to drawing the distinction between 'influencing the policy' and 'keeping the party in power'.[20] This is to say that the particular policy outcome was already decided by the Congress Party, and that the company was not influencing the policy, *per se*, but only helping the party to remain in power, as their policies are conducive to the company's growth. In other words, the company is not influencing the policy, but only supporting a party whose policies it agrees with.

At the heart of the dispute lay the question – what is the relationship between political contributions and the function that corporate personality is supposed to serve? The validity of the alteration of MoU was dependent on the determination as to whether there is any way in which contributions to political parties help a company carry on its business more efficiently. In this case, the Court held that donating to a party with a preferred policy promotes the ends of the company, and therefore, should be a permissible object for the company. What clinched this case in favour of the company is the principle of equality between natural and corporate persons: in the absence of any law that explicitly prohibits corporate donations, as the Court held, it is 'axiomatic that what an individual can lawfully do can be done by a joint stock corporation.'[21] What the Court held to be 'axiomatic' may not be so when probed further. For instance, unlike natural persons, a company does not have a right to vote. If it does not have a right to vote, should it then be allowed to fund political parties? Or, does it have an independent right to support a candidate? Further, as the question that Chagla CJ raised, but did not satisfactorily answer, '[h]ow is anyone to say that at what point the contribution ceases to merely keep the party in power and begins to influence its policy?'[22] These questions remained unanswered.

2. Ban on Corporate Donations

In 1962, Santhanam Committee, set up by the Government of India, noted the problem of actual and apparent corruption. The Committee observed, 'the reluctance and inability of these parties to make small collections on a wide basis and the desire to resort to short cuts through large donations that constitutes the major source of corruption and even more suspicion of corruption.'[23] Large corporate donations were further facilitated by intense government control on economic activities with several banks and industries nationalised.[24]

19 Ibid [7] It is nothing short of buying over the party so that the party should pursue a policy which would be in the interests of the commercial and industrial concerns to contribute funds to a political party.

20 ibid.

21 ibid [8].

22 ibid [7].

23 Report of the Committee on Prevention of Corruption (1962) 104 (Santhanam Committee Report) <http://cvc.nic.in/scr_rpt_cvc.pdf> accessed 6 May 2019.

24 Devesh Kapur and Milan Vaishnav, *Costs of Democracy: Political Finance in India* (OUP 2018) 18, 19.

The Government could dole out a few permits or licenses in exchange for some donation. This was a crucial period which created path-dependency for any future reforms of party funding regime. While using state patronage to receive corporate donations became the *modus operandi* for political parties and companies alike. Regulatory favours in exchange for political contributions became an essential part of the business for big companies.[25] 'A total ban on all donations by incorporated bodies to political parties', suggested the Santhanam Committee, 'will clear the atmosphere.'[26]

In 1969, following the recommendations of Santhanam Committee, the Indira Gandhi Government introduced an amendment which prohibited any contribution by a company 'to any political party', or 'for any political purpose to any individual or body'.[27] The stated aim of banning corporate donations was to prevent its corrupting influence on Indian politics.[28] However, some commentators have argued that this was only a strategic move by Indira Gandhi either to affirm her strong socialist positioning,[29] or to deprive funds to the emerging free-market-friendly parties, which were increasingly attracting more corporate donations.[30] Whatever may be the motivation, this change had a lasting impact on party funding. Corporate funding was banned without introducing any public financing to replace it. At the same time, election campaign in a vast country like India requires large sums of money. As a result of the ban, parties were deprived of the biggest legal source of their funding, while in need of a lot of money to campaign.[31]

One would expect that the ban of corporate donations democratized funding as the parties turned to individual voters for campaign contributions. However, since corporate funding was illegal, the corporates and politicians created several backdoor routes of channelling the money into the Congress Party, facilitated by large sums of cash holding with businesses.[32] *First*, they continued with the old practice of using bureaucratic

25 ibid 18.

26 Santhanam Committee Report (n 23) 105.

27 Companies Act 1956, s 293-A as inserted by Companies (Amendment) Act 1969.

28 Statement of Objects and Reasons to the Companies (Amendment) Act 1969. The propriety of companies making contributions to any political party or for any political purpose to individual or body has for some time been the subject of discussion both inside and outside the Parliament. A view has been expressed that such contributions have a tendency to corrupt political life and to adversely affect healthy growth of democracy in the country, and it has been gaining ground with the passage of time. It is, therefore, proposed to ban such contributions.

29 Stanley A Kochanek, 'Briefcase Politics in India: The Congress Party and the Business Elite' (1987) 27(12) Asian Survey 1278, 1280 (Kochanek).

30 The Swarajya Party. See MV Rajeev Gowda & E. Sridharan, 'Reforming India's Party Financing and Election Expenditure Laws' (2012) 11(2) Election Law Journal 226, 226 (Gowda & Sridharan).

31 E Sridharan and Milan Vaishnav, 'The Resilience of Briefcase Politics' *Indian Express* (4 February 2015) <http://indianexpress.com/article/opinion/columns/the-resilience-of-briefcase-politics/> accessed 6 January 2018.

32 Bhavdeep Kang, 'Inside Story: How Political Parties Raise Money'(*Yahoo,* 25 September 2013) <https://in.news.yahoo.com/inside-story--how-political-parties-raise-money-091455119.html>

discretion to extort vast sums of money from powerful individuals and corporations.[33] A commentator has called this practice 'Briefcase Politics' referring to a prevalent practice of pricing government permits at number of briefcases of cash that can be supplied.[34] In exchange for doling out benefits to corporates, the party collected large amounts of cash and illicit money, while at the same time depriving opposition parties of legally collecting funds from corporates. Thus, corporate donations continued despite bans; they just became underground.

Second, it devised a new method of legally channelling corporate money into Congress coffers by placing corporate advertisements in party journals. These corporate advertisements were indirect ways of funding the party without violating the law banning corporate donations. Companies could claim that they are paying for a service (advertisement), and not 'donating' to Congress party.[35] In 1978, a shareholder in a contributor company challenged the legality of such advertisements.[36] The Calcutta High Court was required to decide whether the amount paid for advertisements in party souvenirs should be considered as a contribution to a political party? If it is considered a 'contribution', such payments would be prohibited under the law. The Court concluded that since the payments in question were made in exchange for consideration (advertisements), which in turn accrued marketing benefits for the company, they should not be considered to be political contributions.[37] Such practices for raising funds were statutorily prohibited through an amendment introduced in 1985.[38]

3. Legalising Corporate Funding

Why is it important to allow corporate donations? India has witnessed soaring election costs due to many factors such as population growth and resultant increase in the size of

accessed 6 June 2019. An example of various backdoor channels designed to manage party funding: 'They (parties) do not keep too much [cash] at hand, since it is always on call from designated industrial houses. One of the best-known legends in this regard has to do with a prominent businessman who called on then-PM Rajiv Gandhi and ingratiated himself by saying the late Indira Gandhi had entrusted substantial party funds to him for safekeeping'.

33 Vaishnav (n 24) 19.

34 Kochanek (n 29) 1290.

35 Malik (n 12) 79.

36 *Graphite India Ltd. v Dalpat Rai Mehta* (1978) 48 Comp Cas 683 (Cal).

37 ibid [8].

38 Companies Act 1956, s 293-A (3)(b) as inserted by Companies (Amendment) Act 1985; Companies Act 2013, s 182(2)(b).

constituencies,[39] increased competitiveness,[40] and delinking of state and federal elections.[41] Soaring costs coupled with prohibition of corporate donations not only furthered under-the-table transactions between parties and businesses, but also led to a growth of rich or criminal candidates who can self-finance their elections or arrange funds for party's coffers by various illicit activities.[42]

One may see door-to-door fund collection as an ideal alternative that may emerge if corporate donations are discouraged. Instead, in light of soaring costs, the absence of corporate funding leads to greater reliance on personal wealth of candidates, and resultant proliferation of rich and often locally power criminal candidates in politics.[43] Only the candidates who can fund themselves and bring the funds to parties will be able to contest the elections. As Milan Vaishnav argues, while explaining the rise of rich criminal candidates in India with illegal sources of cash, 'a self-financing candidate who covers the costs of his campaign, thereby freeing up party resources for other candidates who really need party funds, is providing an implicit subsidy.'[44]

As David Strauss argues, one of the function of a campaign finance regime is to promote equality of participation.[45] If democratic elections get limited to candidates with personal wealth, it limits opportunities for poorer candidates. Not only does it create and perpetuate inequality in political opportunity, but also creates a 'market for criminality' in politics.[46] The search of campaign funding has led to a growing 'demand' of the criminal candidates in the Indian electoral market.[47] In order to avoid the reliance of political parties on criminal networks for election funding, it is important that major legal sources of funding, corporate funding being one of them, are kept accessible.

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39 Milan Vaishnav, *When Crime Pays: Money and Muscle Power in Indian Politics* (Yale University Press 2017) 127.

40 The early decades of Indian Politics were characterised by what some political scientists have called the 'Congress System' where Congress was the only major party. The system began collapsing in 1970s with the first non-Congress government coming to power in 1978; James Manor, 'Parties and Party System', in Atul Kohli (ed) *India's Democracy: An Analysis* of *Changing State Society Relations* (Princeton University Press, 1988) 62-98.

41 Vaishnav (n 39) 129. In 1971, the Indira Gandhi government, in desire of strategic delinking of state level issues with the federal issues, separated state and federal elections which used to happen together earlier. This separation duplicated several election costs every time.

42 ibid 146, 147.

43 *Association for Democratic Reforms v Union of India* (2002) 5 SCC 294. The big smuggling syndicates having international linkages have spread into and infected the various economic and financial activities, including havala transactions, circulation of black money and operations of a vicious parallel economy causing serious damage to the economic fibre of the country.

44 Milan Vaishnav (n 39) 125.

45 David A Strauss, 'Corruption, Equality, and Campaign Finance Reform' (1994) 94(4) Columbia Law Review 1369.

46 Milan Vaishnav (n 39) 133.

47 ibid.

In 1985, the Rajiv Gandhi government re-introduced corporate funding. Except Government companies, all other companies, subject to approval by the board of directors, and disclosure in the profit and loss statement, were allowed to contribute to political parties or to any person for political purposes.[48] Further, in a financial year, a company could not donate an amount more than five per cent of its average net profits of previous three years.[49] Since 1985, corporate funding has been legal, but the subsequent changes in the funding regime dealt with the conditions and limits on contributions. For example, the new Companies Act introduced in 2013 increased the contribution limit from 5 per cent to 7.5 percent of the average profit of previous three years.[50]

4. Relaxing Conditions for Corporate Contributors

After the Delhi High Court ruled that both major parties (Bhartiya Janata Party and Indian National Congress) violated the Foreign Contribution (Regulation) Act 2010 by receiving donations from a foreign source, the Parliament retrospectively amended the definition of 'foreign source' under section 2 of the FCRA. Although introduced primarily to overrule the Delhi High Court decision, the policy justification given by the Government was to keep up the FCRA with a liberalised economy:

> Now when sectoral caps have been lifted in almost every sector to 74% and 100%, you won't find ten donors in India who won't get covered by that definition. So, for instance, a telecom or tobacco company doing business in India — Indian company doing 100% business in India, but within the meaning of FCRA would be debarred.[51]

Further, the 2017 Finance Act removed the contribution cap that was earlier in place for the company (7.5 per cent of its average net profits of previous three years).[52] Once a company is three years old, it can donate any sum to a political party. The removal of contribution caps, coupled with relaxing the limitations placed on foreign contributions,[53] has made it easier for companies to donate, and expanded the corporate donor constituency.[54]

48 Companies Act 1956, s 293-A as amended by Companies (Amendment) Act 1985.

49 ibid.

50 Companies Act 2013, s 182.

51 Special Correspondent, 'Parties' View Sought on Electoral Bonds' (*The Hindu,* 2 April 2017) <http://www.thehindu.com/news/national/govt-to-launch-electoral-bonds-scheme-to-fund-political-parties-says-jaitley/article17763627.ece> accessed 6 June 2019.

52 Companies Act 1956, s 182 as amended by s. 154. Finance Act, 2017.

53 Foreign Contribution (Regulation) Act 2010, s 2(1)(j)(vi) as amended by Finance Act 2016. See Special Correspondent, 'Parties' View Sought on Electoral Bonds'(*The Hindu,*2 April 2017) <http://www.thehindu.com/news/national/govt-to-launch-electoral-bonds-scheme-to-fund-political-parties-says-jaitley/article17763627.ece> accessed 6 June 2019.

54 ibid. In the Companies Act, a new company cannot give, a company with so much profit can't give, so each of these changes were *narrowing the constituency of donors* and pragmatically, if you narrow the constituency of donors, you won't have five donors left. This doesn't mean that donations won't come, it only means that donations will come in cash (emphasis added).

However, the contribution limits upon companies performed two functions. First, it ensured that new companies are not set up solely to channel the money to political parties, and that companies that decide to donate to parties are indulged in substantial gainful business activities.[55] More importantly, the core principle underlying such limit was anti-corruption principle i.e. it prevents the capture of political parties by a small number of donor companies. As a result of the removal of contribution caps, there is a greater risk of the capture of political parties by a few big companies, which in turn, can provide new avenues for large-scale political corruption.

III. Disclosures: Show Me the Money

1. History of Disclosure Requirements

Despite several developments in the law dealing with corporate donations, there was little progress on the front of disclosure requirements. Although donor companies may be bound to disclose donations to their shareholders, companies or parties were not required to make public disclosures, thus making it impossible for voters to access information regarding funding sources of political parties.

In *Koticha* case, where the alteration of MoU to provide for political donations was challenged, the Court suspicious of corporate donations,[56] imposed disclosure requirements on the company. The company was directed to publish annual details of political donations in two newspapers, apart from declaring it in the profit and loss statements.[57] However, this direction was only imposed on the respondent company as a condition imposed by the court for allowing it to alter its MoU. Other companies were still not required to make such disclosures.[58]

The first major legal development on the disclosure front came in 1979. In order to promote disclosure on the part of political parties, the Income Tax Act was amended to exempt the income of political parties from taxation so far as they fulfil certain conditions. One of the conditions for such exemption was that parties should file income tax returns disclosing the amount, name and address of the persons, for all voluntary contributions above □20,000.[59] Since corporate donations were outlawed then, under-the-table transactions made by the political parties through questionable sources were rarely disclosed, despite the incentive of tax exemption.[60] Parties could escape the reporting obligation by breaking big contributions into multiple smaller donations of □19,999, a practice that continues till

55 *See Rajdeep Marketing Ltd. v Incometax Officer* (2014) 47 Taxmann.com 142 (Pune Trib.); *Incable Net (Andhra) Ltd. v Incometax Officer* (2016) 47 ITR (T) 356 (Hyderabad - Trib.).

56 *Koticha* (n 14) [6].

57 ibid.

58 ibid.

59 Income Tax Act 1961, s 13A.

60 *Gowda & Sreedhar* (n 30) 232.

date.[61]

In order to further these objectives, in 2003, contributions to political parties were made 100 per cent tax deductible on the condition that companies declare the contribution details.[62] This policy was initiated to incentivise companies and individuals to donate sums through formal channels rather than in cash. However, in order to claim deduction, the money transferred to party should be in the nature of donation, and the company should not gain anything in return – for instance, advertisements in a party newspaper.[63]

2. Electoral Trusts

The Tata Group, one of the leading corporate groups in India, comprising over 100 companies, devised a strategy for the group in order to avoid company-specific disclosure. In 1996, The Tata Group of companies established the first electoral trust as a means of facilitating donations by its companies.[64] The trust was a separate entity established by all Tata companies collectively, solely for the purpose of facilitating political donations. Under this scheme, all Tata companies would transfer the donation money to the electoral trust.[65] The companies can internally decide which parties their respective contributions should go to, and the trust will follow the directions given by the specific companies.[66] The trust itself will have an internal management appointed by the group of companies, which will subsequently transfer the money earmarked for various political parties.[67]

On paper, the money to political parties will be transferred on behalf of the trust, not on behalf of any specific company. In this way, the balance sheet of the companies and the account of political parties will only disclose the name of the trust, and one will not be able to trace the donation to the specific company from where the donation actually originated.[68] This facilitates anonymity for companies, who are worried about plausible extortion by opposing political parties, challenges from shareholders, and *quid pro quo* allegations. Driven by the quest to maintain anonymity, the trust model could be seen as an innovation or a legal loophole depending on where one is coming from. The Electoral Trust

61 *Vaishnav* (n 24).

62 Income Tax Act 1961, s 80GGB, 80GGC.

63 *Deputy Commissioner of Income Tax, Circle3, Pune v Smt Anjali Hardikar* (2018) 170 ITD 398 (Pune - Trib.).

64 Samya Chaterjeeand Niranjan Sahoo, 'Corporate Funding of Elections: The Strengths and Flaws' (*Observer Research Foundation Issue Brief no. 69*, 4 Feb 2014) <http://www.orfonline.org/research/corporate-funding-of-elections-the-strengths-and-flaws/> accessed 16 June 2019.

65 V Vekatesan, 'Chequered Relations' (1999) 16(6) Frontline <http://www.frontline.in/static/html/fl1616/16160100.htm> accessed 16 June 2019.

66 P. Visvaksen, 'Trust in Law' *The Hindu Business Line* (15 August 2016), <http://www.thehindubusinessline.com/specials/india-file/trust-in-the-law/article8991299.ece> accessed 16 June 2019.

67 ibid.

68 ibid.

Scheme is a form of partial anonymity system,[69] where donors and donee could know about contributions through coordination among themselves, but voters need not.

However, under this system anonymity has its costs. A company is allowed to claim deductions only when it donates to a political party directly. In case of electoral trusts, the company was instead donating to a separate entity, which in turn, transferred the sum to political parties. This meant that companies that used electoral trusts were unable to claim tax deductions that they would be able to claim if they were transferring directly.[70]

In 2009, the Income Tax Act was amended to enable tax deductions of the contributions made by a company to electoral trusts.[71] In the same year, the income received by electoral trust was also exempted from income tax.[72] However, in 2013, new conditions were specified for the tax exemption of electoral trusts. The most important of those conditions being prohibition of cash donations. All electoral trusts are barred from receiving contributions in cash.[73] The new scheme also imposed several record-keeping requirements but did not mandate public disclosure. While the trust is required to maintain the records of its donors and donees, it was not required to disclose them.[74]

Clearly, the institution of electoral trusts is aimed at addressing the concerns that Gowda and Sridharan identified with loss of anonymity.[75] From a donor's point of view, electoral trust system, by providing certain level of anonymity, protects them from three problems: extortion by political opponents, *quid pro quo* allegations, and shareholder accountability. At the same time, they are able to channel money to political parties through formal sources instead of cash.

The EC disrupted the arrangement struck by Electoral Trust Scheme by introducing new transparency requirements. Earlier, the trust was not required to disclose the record of its donors or donees. After 2014 General Elections, noticing the lack of transparency around electoral trusts, the EC issued transparency guidelines for electoral trusts.[76] The

69 For the concept of partial anonymity, see Hanming Fang, Dmitry Shapiro and Arthur Zillante, 'An Experimental Study of Alternative Campaign Finance Systems: Transparency, Donations and Policy Choices' (2016) 54(1) Economic Inquiry 485 (Fang and others).

70 *Hindalco Industries Ltd. v Assistant Commissioner of Income-tax, Range* 6(3) (2010) 41 SOT 254 (Mum.).

71 Income Tax Act 1961, amendment to s 80GGB.

72 Income Tax Act 1961, s 13B; Income Tax Rules, 2013, rule 17CA. Inserted by Income Tax Notification 308(E), Ministry of Finance, Government of India (31 January 2013) <https://adrindia.org/sites/default/files/CBDT_rules_for_Electoral_Trust.pdf> accessed 6 January 2018.

73 Income Tax Rules 2013, rule 17CA (5).

74 Income Tax Rules 2013, rule 17CA (11).

75 Gowda and Sridharan (n 30) 230.

76 Guidelines for Submission of Contribution Reports of Electoral Trusts (No.56l Electoral Trust/2014/PPEMS, 6 June 2014) <http://eci.nic.in/eci_main1/PolPar/ElectoralTrust_06062014.pdf> accessed 6 June 2019. While the terms of the EC guidelines require the trusts to 'comply', they are issued as guidelines, making their binding nature doubtful.

trust scheme, which was supposed to provide a shield of confidentiality to the donors was, at least to some extent, set back by the disclosure requirements of the EC, as the trusts are now required to disclose these details, not only to the EC, but also to the income tax department, thus rendering it amenable to the scrutiny by the government.[77] However, electoral trusts continue to serve certain utility in that the specific donation of each company to a political party is still protected from public disclosure. Hence, several companies still prefer to contribute through electoral trusts.

3. Electoral Bonds

Furthering the objectives of partial anonymity, the government introduced 'electoral bonds' in 2017. The legal framework for electoral bonds covers three laws – Income Tax Act 1961, Representation of People Act 1951, and Reserve Bank of India Act 1934. The 2017 Amendments to the Income Tax Act 1961 and Representation of the People Act 1951 perform similar function – removing the disclosure requirements for electoral bonds for companies and parties seeking tax exemption.[78] Even if the sum donated by electoral bonds is above the reporting requirements (i.e. 20,000), the parties are not required to disclose any detail about the electoral bonds.[79] Since the bonds will be routed through banking system, the Amendment to the Reserve Bank of India Act 1934 empowers the Central Government to authorise certain banks to issue electoral bonds.[80]

Electoral bond is defined as 'a bearer instrument in the nature of a Promissory Note and an interest free banking instrument'.[81] The bonds can be purchased only by making payment through a bank amount. The instrument will not carry the name of the buyer or the payee to ensure anonymity. At the same time, the instrument can be issued only after fulfilling Know Your Customer (KYC) requirements.[82] It can be redeemed in a pre-designated account of political parties. While the bank will have the details of which bond is redeemed by which political party, the details will not be made public.[83] Furthermore, the companies will not be required to disclose the sum spent on electoral bonds in their balance-sheet.[84] The constitutionality of this scheme is currently under challenge before the Supreme Court of India.[85] Does the scheme violate the Constitution?

77 ibid.

78 Representation of the People Act 1951, s 29C; Income Tax Act 1961, s 13-A as respectively amended by s. 137 and 11, Finance Act 2017.

79 ibid.

80 Reserve Bank of India Act 1934, s 31 as amended by Finance Act, s 137.

81 'The Government of India notifies the Scheme of Electoral Bonds', (Press Information Bureau, Government of India) <http://pib.nic.in/PressReleseDetail.aspx?PRID=1515123> accessed 6 June 2019.

82 ibid.

83 ibid.

84 Companies Act 2013, s 182.

85 'SC Issues Notice To Centre On CPI(M)'s Plea Challenging Electoral Bonds' (*Live La*w, 2 Feburary 2018) <https://www.livelaw.in/sc-issues-notice-centre-cpims-plea-challenging-

IV. Right to Informed Vote: A Constitutional Response to Electoral Opacity?

Since no right is unlimited, in order to establish that the scheme of electoral bonds is unconstitutional on the grounds of violating right to informed vote, we need to answer the following questions. *First*, does the scheme of electoral bonds infringe upon the right to informed vote? *Second*, is such infringement constitutionally justifiable?[86] While this part inquiries into the former question, Part V of the article, however, answers the latter question by inquiring into the primary ground which may pose hurdles in constitutionality challenge of the scheme – right to anonymity.

1. The Doctrine

In 2002, the Supreme Court in a landmark decision *Association for Democratic Reforms v. Union of India*,[87] (*ADR*) mandated the disclosure of information relating to criminal antecedents, personal assets, and educational qualifications of a candidate contesting elections. In particular, the Court directed the Election Commission to call for the following information in the affidavits by candidates:

(1) Whether the candidate is convicted/acquitted/discharged of any criminal offences in the past if any, whether he is punished with imprisonment or fine?
(2) Prior to six months of filing of nomination, whether the candidate is accused in any pending case, of any offence punishable with imprisonment for two years or more, and in which charge is framed or cognizance is taken by the Court of law. If so, the details thereof?
(3) The assets (immovable, movable, bank balance etc.) of a candidate and of his/her spouse and that of dependants.
(4) Liabilities, if any, particularly whether there are any over dues of any public financial institution or Government dues.
(5) The educational qualifications of the candidate.[88]

After the decision of the Supreme Court in *ADR*, which in the absence of a statutory provision, directed the EC to mandate certain candidate disclosures, the Parliament amended the Representation of the People Act 1951 to provide for similar disclosures requirements in the statute. However, the law did away with certain disclosures that were part of the Supreme Court's directions in *ADR*. For instance, the amended law, unlike the *ADR* directions, did not require the candidate to disclose (a) the cases in which she is acquitted or discharged of criminal offence(s); (b) her assets and liabilities; and (c) her

electoral-bonds-read-petition/> accessed 19 June 2019.

86 A more accurate description would be justified under the grounds of Article 19(2). However, as I will argue later, there is a possibility of two penumbral free speech rights under question. In that case, the balancing may not occur under article 19(2).

87 *Association for Democratic Reforms v Union of India* (2002) 5 SCC 294.

88 ibid [48].

educational qualifications, in her election affidavit. This amendment, which reduces the number of disclosure obligations on a candidate, was challenged in *People's Union for Civil Liberties v Union of India*, where the Supreme Court struck down the provisions that exempted candidates from disclosing the information about their assets, liabilities and Probably educational qualifications.[89]

In *ADR*, the Supreme Court concluded that voting itself is a form of expression: 'a voter speaks out or expresses by casting vote.' In order to cast a vote, 'information about the candidate to be selected is a must'.[90] Voter's right to know about the relevant antecedents of the candidate is an extension of her freedom of expression under Art. 19(1)(a) of the Constitution; a voter cannot be said to have *freely* expressed herself (by voting) without having appropriate information about the candidates.[91] Therefore, it is important that they have the opportunity of receiving relevant information to ascertain if 'the person who is contesting the election has a background making him worthy of his vote'.[92]

In 2015, the Court further provided teeth to this right by holding that non-disclosure of the required information or misinformation in the election affidavit will amount to a corrupt practise in the form of 'undue influence' under section 123(2) of the Representation of the People Act 1951, as it 'deprives voters of making informed choice of candidates.'[93] Therefore, suppression or misinformation about candidate's criminal antecedents will make the elections null and void.[94]

In order to understand the import of the doctrine of 'informed vote' for the purpose of party funding laws, we need to first understand the background in which doctrine was formulated. The doctrine of informed vote, first exposited by the Supreme Court in *ADR v Union of India*, and later elaborated in *PUCL v Union of India*, has its antecedents in other penumbral rights under article 19(1)(a) – primarily the right to know *and* the freedom to vote.

2. Freedom to Vote and Right to Know

In Indian constitutional law doctrine, the status of the right to vote or right to elect is ambiguous. While the conventional position of the doctrine is that the right to vote is neither a constitutional right nor a common law right; it is a statutory right.[95] It is totally subject to

89 *People's Union of Civil Liberties v Union of India* (2003) 4 SCC 399.

90 *Union of India v Association for Democratic Reforms* (2002) 5 SCC 294 [46].

91 ibid [317].

92 ibid [302].

93 *Krishnamoorthy v Sivakumar* (2015) 3 SCC 467.

94 ibid.

95 *NP Ponnuswami v Returning Officer* (1952) SCR 218. The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it.

a statute, and hence, its contours are completely subjected to the legislature's discretion.[96] While the majority opinion in *PUCL* conceded to the traditional understanding that right to vote *per se* is a statutory right 'pure and simple', the concurring opinion delivered by PV Reddy, J argued that the right to vote is a constitutional right recognised under article 326.[97] However, both opinions concurred that irrespective of the status of the right to vote *per se*, the act of voting is also a way of 'expressing a political opinion', which is protected by article 19(1)(a) of the Constitution in the form of 'freedom to vote'.[98] In other words, by voting for the candidate or party of her choice, a citizen exercises not only her right to vote, but also her freedom of speech and expression. As a result, procedural or remedial issues and voting procedure is a matter of statutory regulation, but freedom of expression kicks in when the voter actually casts his vote.[99] However, merely because a voter has a right to express, does he also have a right to informed vote? The answer to this lies in the contours of right to know or right to receive information under article 19(1)(a).

The right to know was first articulated as a facet of freedom of speech in cases pertaining to evidentiary privilege under section 123. The Court was faced with the question of whether the State can claim the privilege under section 123 of the Indian Evidence Act 1872. In *State of UP v Raj Narain,*[100] the Court held that the right to know about public or government functionaries is derived from the concept of freedom of speech. It further went on to hold that '[t]he people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries.'[101] In *SP Gupta v Union of India* (the First Judges Case),[102] the government refused to disclose the file that contained the details about appointment process of higher judiciary. The court, relying on the right to know formulated in *Raj Narain*, directed the government to disclose the files.[103]

An even more elaborate exposition of the right to know was carried in another freedom

96 *Jyoti Basu v Debi Ghoshal* (1982) 1 SCC 691. A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a Common Law Right. It is pure and simple, a statutory right. So is the right to be elected.

97 *People's Union of Civil Liberties v Union of India* (2003) 4 SCC 399.

98 For detailed exposition on the meaning of 'expression', see *People's Union of Civil Liberties v Union of India* (2003) 2 SCR 1176, 1216 (concurring opinion).

99 ibid. Here, a distinction has to be drawn between the conferment of the right to vote on fulfilment of requisite criteria and the culmination of that right in the final act of expressing choice towards a particular candidate by means of ballot. Though the initial right cannot be placed on the pedestal of a fundamental right, but, at the stage when the voter goes to the polling booth and casts his vote, his freedom to express arises. The casting of vote in favour of one or the other candidate tantamounts to expression of his opinion and preference and that final stage in the exercise of voting right marks the accomplishment of freedom of expression of the voter. That is where article 19(1)(a) is attracted.

100 *State of UP v Raj Narain* (1975) 4 SCC 428.

101 ibid [453].

102 (1981) Suppl SCC 87.

103 ibid.

of speech case, *Indian Express Newspapers v Union of India*,[104] 'All members of society should be able to form their own beliefs and communicate them freely to others. In sum, the fundamental principle involved here is the people's right to know.'[105] In *Dinesh Trivedi v Union of India*,[106] where the Court had to decide whether the background investigatory reports of Vohra Committee (a committee set up by the government to investigate into political corruption) should be made public. In this case, Ahmadi CJ, reiterating the right to know under the Indian Constitution held, 'in modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the government.'[107]

However, it is in *Secretary, Ministry of Information and Broadcasting Government of India v Cricket of Association of West Bengal*[108] that the Supreme Court, for the first time, definitively established a full-fledged 'right to be informed' under article 19(1)(a) of the Indian Constitution: 'The freedom of speech and expression includes right to acquire information and disseminate it.'[109] Further, the freedom of expression also includes 'the right to be educated, informed and entertained.'[110] 'The right to participate', held the court, 'is meaningless unless the citizens are well-informed.'[111] The roots of a distinct *right to informed vote* lay in this long jurisprudential background – perhaps a suitable example of incremental expansion of penumbral rights.

3. A distinct right?

In the above cases concerning the right to know and the right to receive information, such could be claimed against the government of public officials. Put differently, these cases do not recognise a right to receive any private information or information from a private person. It is this private-public divide that posed a major challenge for the court to extend these penumbral speech rights to include right to know about individual candidates, who before they are elected, do not become government or public officials.

In *ADR*, the Court did not make any distinction between candidates and legislators. Ordinarily, the difference is that while elected or sitting legislators acquire a public office,[112] the candidates who are merely contesting do not. In other words, 'candidature' for legislature is a not a public office *per se*. Thus, PV Reddy J, in his concurring opinion in the *PUCL* case, argued that the right to informed vote should be seen as a distinct right, albeit a part of the larger family of penumbral rights under article 19(1)(a). He drew an apt

104 (1985) 1 SCC 641.
105 ibid 685 [68].
106 *Dinesh Trivedi v Union of India* (1997) 4 SCC 306.
107 ibid.
108 (1995) 2 SCC 161.
109 ibid 213 [43].
110 ibid 224 [75].
111 ibid 229 [82].
112 PV *Narsimha Rao v State* (1998) 4 SCC 626 [162].

distinction between the conventional 'right to know' cases and the right to informed vote evolved by the Supreme Court in *ADR* and *PUCL*. The right to informed vote, he argues, 'is sought to be enforced against an individual who *intends* to become a public figure and the information relates to his personal matter'.[113] Since a candidate, till he gets elected, does not become a state functionary, the conventional right to know is different from the right to informed vote.[114]

4. Contours

Both foundational right to informed vote cases – *ADR* and *PUCL* – were restricted to specific kinds of disclosures that they were required to adjudicate upon. However, the Supreme Court did not formulate any cohesive principle that draws the contours or limits of the right. In fact, Reddy J, in the concurring opinion in PUCL recognises that the 'contours and parameters' of the right cannot be precisely defined. Arguing for an approach that strikes an appropriate balance between the voters' right to know and competing concerns, he warns against stretching the right to informed vote too far.[115]

The contours of the doctrine of informed vote are fraught with uncertainties.[116] Is the doctrine, despite these uncertainties, bound by any principle at all? Where do we draw from when it comes to relevant information? Do the voters have the right to know the height of the candidate, for instance? I will try to distill some principles which should guide further expansion of the right. The first principle is that the test of 'relevant information' is *not* empirical – i.e. what voters actually consider to be the most relevant. Instead, the information that the Court mandated to be disclosed was relevant for voters because the Court expected the voters to act on this information.

Second, ultimately, the contours of right to informed vote are intricately tied to one's constitutional vision of an undesirable candidate – beyond the already stated grounds of disqualification. For some undesirable characteristics in a representative, such as criminal conviction, insanity, insolvency and young age, the law provides for disqualifications. There could be several other undesirable characteristics in a representative – e.g. criminal accusations – for which the law stops short of a consequence as harsh as disqualification. However, despite the absence of disqualification on such grounds, we may want to discourage voters from electing such candidates. It is here that the doctrine of informed

113 *People's Union of Civil Liberties v Union of India* (2003) 4 SCC 399 [1203] (emphasis added).

114 ibid.

115 ibid [1210]. For instance, many voters/citizens may like to have more complete information--a sort of bio-data of the candidate starting from his school days such as his academic career, the properties which he had before and after entering into politics, the details of his income and tax payments for the last one decade and sources of acquisition of his and his family's wealth. Can it be said that all such information which will no doubt enable the voter and public to have a comprehensive idea of the contesting candidate, should be disclosed by a prospective candidate?

116 Graeme Orr argues against the doctrine. See Graeme Orr, 'My Vote Counts: The Basis and Limits of a Constitutional Requirement of Political Disclosure' (2018) 8 Constitutional Court Review 52.

vote steps in. Mandating disclosures about these markers, it is hoped, may discourage candidates from contesting or voters from electing – a way of mildly 'nudging' yet not actively coercing – disclosure becomes a less restrictive means of preventing the election of accused representatives. Thus, the markers of information mandated in *ADR* and *PUCL* – pending criminal charges, undue probably accommodation of assets, financial liabilities, and the lack of education – are the grounds of *discouragement*. It is best demonstrated by the disagreement between majority and minority about educational qualifications in *PUCL*. While the majority, concerned by the large number of uneducated legislators, considered educational qualifications to be an important marker for choosing a candidate, and wanted to discourage uneducated representatives, Reddy J was indifferent to the lack of education in a representative: 'the dividing line between the well-educated and less educated from the point of view of his/her calibre and culture is rather thin.'[117] As it is clear, the disagreement on whether educational information should be disclosed was not based on whether it actually, empirically affects voter decisions, but instead on different visions of an undesirable candidate.

Based on the information about assets and liabilities of candidates, it was found that the assets of several legislators between two elections had multiplied several times over. Many a times this undue accumulation of wealth was not accompanied by declaration of a known or legitimate source of income. Recognising the problem with abnormal wealth of the legislators, the Supreme Court in a recent decision in the case of *Lok Prahari v Union of India*[118] extended the right to informed vote to include information about (a) the sources of income of legislators and 'associates',[119] and (b) 'information about the contracts with appropriate Government and any public company by the candidate, his/her spouse and dependents directly or by Hindu undivided family/trust/partnership firm(s)/ private company (companies) in which the candidate and his spouse and dependents have a share or interest.'[120] Once again, the decision of the Court to extend the informed vote doctrine was based on undesirable characteristics of the candidates – that is disproportionate accumulation of wealth and interest in government contracts – which the Court wanted to discourage by mandating disclosures, in the absence of an alternative, harsher remedy such as disqualification.

5. Does the doctrine apply to Electoral Bonds?

In India, the doctrine of informed vote has not yet been extended to include information regarding party funding. In this part, *first*, I will show why the doctrine of 'informed vote' should be extended to include information about political parties – as electoral bonds apply only to party funding. *Second*, I will show why funding information should be covered

117 *People's Union of Civil Liberties v Union of India* (2003) 2 SCR 1176[1217].

118 *Lok Prahari v Union of India* (2018) 4 SCC 699.

119 ibid [702] a term the Supreme Court used to include his spouse and dependents.

120 ibid [741].

under the doctrine of 'informed vote'.

5.1. Party-Candidate Dichotomy

As we have discussed, in all the above cases, the right to informed vote has been expounded in the context of individual candidates. Interestingly, electoral bonds can be used to donate money to political parties only, but not to candidates. One may argue that the ambit of the right to informed vote is limited to candidate information only, and hence, lack of transparency on party funding details should not be covered by this decision. While that is true of the specific directions in this case, the principle laid down by the Court goes far beyond. It does not matter whose information it is (candidates' or parties'). What matters is that the information should be reasonably relevant for a voter to make voting decisions. Therefore, in assessing electoral bonds against this case, the true question to be asked is: are the funding details of political parties relevant for voters to make their voting decisions? At the heart of this question is a deeper inquiry: *legally*, whom does a voter vote for? Do voters vote for parties or they vote for candidates?[121]

In an electoral system like that of India, a voter, by casting a single ballot for a candidate fielded by a party, may choose representation at two different levels: first, an individual candidate as a representative of that constituency to the legislature, and second, the same party to form the government at the state or national level.[122] Consequently, a candidate so elected may have conflicting obligations to the legislature, the party, and the voters of his territorial constituency.[123] According to the conventional Burkean idea of representation in Westminster parliamentarism, a legislator has a 'free mandate' after getting elected.[124] Hence, there should not be any restriction on the legislator's mandate. Put differently, he is obligated neither to a party nor to his constituency, but only to the legislature he is a member of.[125]

As I have argued elsewhere,[126] irrespective of which part of the representation the voters empirically attach greater significance to – the candidate or the party – the Court legally entrenched the assumption that voters choose parties, not candidates:

> These provisions in the Tenth Schedule give recognition to the role of political parties in the political process. A political party goes before the electorate with a particular programme and it sets up candidates at the election on the basis of such programme. *A person who gets elected as*

121 Aradhya Sethia, 'Where's the Party?: Towards a Constitutional Biography of Political Parties' (2019) 3 (1) Indian Law Review 1, 28 (Sethia).

122 ibid; *Kihoto Hollohan v Zachillu* (1992) Supp (2) SCC 651 [4] (Kihoto).

123 Kihoto (n 122) [46].

124 Csaba Nikolenyi, 'The Adoption of Anti-Defection Laws in Parliamentary Democracies' (2016) 15(1) Election Law Journal, 96-97.

125 ibid.

126 Sethia (n 121) 28.

> *a candidate set up by a political party is so elected on the basis of the programme of that political party*.[127]

Similarly, Rajiv Gandhi, the then Prime Minister, while introducing the anti-defection amendment in Rajya Sabha, argued that the amendment 'recognises the factual position on the ground that one wins one's seat on the ticket of a political party. We try to start with the moral question that the voter is voting for a particular ideology, some principles, a programmes and all that is represented in the election symbol of the party on whose symbol he stands'.[128] Therefore, the constitutional doctrine and history recognize that voters primarily elect political parties. Further, the anti-defection jurisprudence recognises and entrenches parties' extensive control over their elected legislators. Therefore, a party-backed candidate's suitability cannot be judged without knowing the interests that the party may serve. This means that an equally, if not more important piece of information, is the information about parties.[129]

5.2. Is Funding Information Relevant for Informed Vote?

Once we have established that information about political parties is as important, if not more, as that of a candidate, the question that arises is: is *funding* information relevant for voters? The relevance of funding information for voters to make effective political choices was perhaps best articulated in *Buckley v Valeo*, where the Supreme Court of the US was required to decide the constitutionality of statutory disclosure requirements on contributions made to candidates and political committees.[130] Primarily, there are two reasons for disclosure of funding information. *First*, voter information: the information about sources of funds 'alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office'.[131] Further, in line with the 'discouragement rationale' that I have discussed in the previous section,[132] full disclosure about funding information may either deter *quid pro quo* transactions *or* nudge voters against electing candidates who have used or are likely to use their public office for *quid pro quo* arrangements. Therefore, funding information is relevant information for the voters. These two rationales may converge as 'the prospect of voter awareness of a contribution may make the recipient less likely to provide a donor with favors'.[133] Perhaps therefore, the Supreme Court of India has recognised prevention of corruption as one of the

127 Kihoto (n 122) [13] (emphasis added).

128 Rajiv Gandhi, Rajya Sabha Debates (31 January 1985) (emphasis added)

129 Sethia (n 121) 31.

130 *Buckley v Valeo* [1976] 424 US 1 [63].The impugned law in *Buckley* required that if a person's annual contribution aggregate more than $100, the political committees and candidates will be required to disclose donor's name, address, occupation and principal place of business, and date and amount of contribution.

131 ibid [67].

132 See Part IV(4) 'Contours'.

133 Richard Briffault, 'Reforming Campaign Finance Reform: A Review of Voting with Dollars', (2003) 91(3) California Law Review 643, 652.

rationales underlying the right to informed vote, including identifying a positive obligation on the state to check corruption in public life.[134]

The above-stated rationales for transparency exist only when the politicians themselves know about the source of donation. What if we could design a fully anonymous system where donors donate through a government clearing house and neither candidates nor parties could ascertain the source of such funding?[135] If there were no credible way for politicians to figure out who funded them, they will not have any basis for doling out any benefits.[136] Anyone can claim that she has donated to the party, and seek benefits from the party, but if none of them could prove it, the party will have no means of ascertaining that someone has *actually* donated to its campaign. Resultantly, parties will have no credible basis to perform its part of *quid pro quo*.[137] In such a system, claiming that one has donated to a party will be same as claiming that one has voted for a party in a secret ballot system – there is no way to ascertain it. If so, even voters should have no interest in knowing the sources of funds as it will not tell them anything about the party's likely policies or interests. In other words, public disclosure is needed only when politicians know their source of funding; in the absence of politicians' knowledge, the rationale for transparency do not hold water.[138] A study published in 2016 provided empirical support in favour of the fully anonymous campaign finance system suggested by Ackerman and Ayres.[139] The study concluded that such system is likely to reduce the influence of money in politics more effectively than a system with full disclosures or partial disclosures.[140] However, the biggest challenge to the proposal by Ackerman and Ayres arises at the stage of implementation. Is it feasible to design a campaign finance regime where we can prevent a party from knowing the sources of the funding it receives?

A similar kind of arrangement was tried in Chile, where companies could anonymously donate to political parties provided they channeled the sums through Chilean Electoral Service. In this system, the Electoral Service forwards the sum delivered by the donor to the donee party without revealing the identity of the donor.[141] In such a system, although

134 See *People's Union of Civil Liberties v Union of India* (2003) 2 SCR 1176; *Lok Prahari v Union of India* (2018) 4 SCC 699.

135 See Bruce Ackerman & Ian Ayres, *Voting with Dollars: A New Paradigm for Campaign Finance* (1stedn, Yale Law University 2004).

136 ibid 5. Full publicity makes sense only under one assumption — that the candidates themselves know the identity of their contributors…[W]hy *should* candidates know how much money their contributors have provided?

137 ibid 6.

138 ibid 6.

139 Fang and others (n 69).

140 ibid 504.

141 Institute for Democracy and Electoral Assistance, *'Funding of Political Parties and Election Campaigns: A Handbook on Political Finance'* (Elin Falguera and others, International IDEA 2014) 133 <//www.idea.int/sites/default/files/publications/funding-of-political-parties-and-election-campaigns.pdf> accessed 8 June 2019.

the law mandates confidentiality, it is in the interest of corporates and parties to coordinate with each other in such a way that parties will be able to ascertain the donations which are big in volume. For instance, if a corporation donates millions of dollars in one day, and the corporation informs the party that it is going to do so, the party can easily ascertain it once it receives the sum. When it comes to huge corporate donations, it would not be very difficult to flout confidentiality requirements. In this system, while the donor and donee would know the details of donation, no one else would. Due to informal coordination between donors and donees, this *de jure* fully anonymous system turns into a *de facto* partially anonymous system.

Ackerman and Ayres suggest an elaborate mechanism to prevent donees from ascertaining the sources from which they receive donation. If secrecy architecture is properly designed such that donees cannot ascertain, even by means of coordination with donor, as to who all have donated to them, any promise made by donors will not be a credible promise.[142] While in principle this system is desirable, there is no feasible way of working it out in practice; even the elaborate system framed by Ackerman and Ayres is prone to manipulation.[143] Given the difficulty in designing a successful regime where the donations can be hidden from politicians, the troubles with the lack of transparency – corrupt contributions and lack of voter information – persist. As the above mentioned conducted empirical study shows,[144] partial anonymity, where only donor and donee know about the contributions, but the voters do not, is likely to be the most harmful system in terms of the corrupt influence of money on policymaking. Therefore, if full anonymity cannot be implemented, the rationale behind funding disclosures stands.

One may argue that electoral bonds merely *facilitate* but do not mandate anonymity. Even in the case of *ADR*, the law neither prevented nor mandated any disclosure. The Court held that the absence of mandatory disclosure itself resulted into violation of voters' right to know, and went on to direct mandatory disclosure.[145] Therefore, even if electoral bonds only facilitate anonymity and not mandate it, to the extent these bonds *facilitate* anonymity, they infringe upon the right to informed vote. Is such infringement constitutionally justified?

V. Right to Anonymity

1. Why Funding Anonymity Matters?

Once the preliminary inquiry is established that electoral bonds scheme infringes upon right to informed vote, in this part, I will proceed to the question – is such infringement constitutionally justified? The plausible ground of its justification could be that that it seeks

142 Bruce (n 135); Full publicity makes sense only under one assumption - that the candidates themselves know the identity of their contributors…[W]hy should candidates know how much money their contributors have provided?

143 ibid.

144 Fang and others (n 69).

145 *Association for Democratic Reforms v Union of India* (2002) 5 SCC 294 [48].

to protect donor anonymity.

Gowda and Sridharan, in their study based on confidential interviews with politicians and businesspersons, argued that despite tax benefits, disclosures are unfavorable due to 'loss of anonymity'.[146] Public disclosure requires corporations to face both shareholders and political opponents.[147] Politically risk-averse donors still give priority to anonymity over tax deductions. Transparency requirements can not only render donors vulnerable to extortion by opposing parties and private individuals, but may also cause a chilling effect on the donations that may otherwise be made to smaller parties or parties likely to be in opposition (but may be in power in the states). Finally, in the Indian scenario, due to ubiquity and ease of cash transactions, and unwillingness on part of donors to disclose details, strict disclosure rules may shift the method of contribution to under-the-table cash transactions from transactions through formal channels.

2. Constitutional Right to Anonymity?

In *Puttaswamy (I)*, the Supreme Court articulated a general right to anonymity as a facet of right to privacy in India.[148] The Court distinguished between privacy and anonymity as follows: 'Privacy involves hiding the *information*, whereas anonymity involves hiding what makes it *personal*'.[149] For instance, the protection claimed in the context of electoral bonds could only be that of anonymity, not privacy. This is because while political parties are required to disclose aggregated information about total funds received, they are allowed to hide the details about the sources, thus hiding what makes it personal for donors.[150] While there is a general – albeit limited – right to anonymity, does it apply to donations made to political parties?

146 Gowda & Sridharan (n 30) [230].

147 ibid.

148 *K Puttaswamy v Union of India* (2017) 10 SCC 1 [182] (Chandrachud J). If the State preserves the anonymity of the individual it could legitimately assert a valid state interest in the preservation of public health to design appropriate policy interventions on the basis of the data available to it.

149 An example helps introduce the key distinction that has gone unrecognised. Imagine, for instance, that a person's medical file contains a piece of paper with the results from his blood test, but his doctor removes the paper and places it in a blank file. If we subsequently obtained access to this person's medical file, without the test results, we would describe the situation using the concept of privacy: We would say 'the privacy of the person is protected,' or 'the associated information is private.' If, on the other hand, we obtained access to the test results, without the medical file, we would describe the situation using the concept of anonymity: We would say 'the anonymity of the test results is protected,' or 'the associated person is anonymous'.Quoted from Jeffrey M. Spkopek, 'Reasonable Expectations of Anonymity' (2015) 101 Virginia Law Review 691; *K Puttaswamy v Union of India* (2017) 10 SCC 1 [182] (Chandrachud J).

150 Electoral Bond Scheme <http://egazette.nic.in/(S(wt41rplm5lmgvx0oimxjpjoi))/Digital.aspx> accessed 29 July 2019; Association for Democratic Reforms, 'Analysis of Donations from Corporates & Business Houses to National Parties for FY 2016-17 & 2017-18' <https://adrindia.org/content/analysis-donations-corporates-business-houses-national-parties-fy-2016-17-2017-18-0> accessed 30 July 2019.

Perhaps the best articulation of right to secrecy in Indian jurisprudence in the context of political participation occurs in what is commonly referred to as *NOTA* judgment.[151] The Court upheld the right to secrecy of vote – including secrecy of not having voted for any candidate – as a facet of freedom of expression under the Indian Constitution.[152] Secrecy of vote, the Court held, can be removed only when 'there is any conflict between secrecy and higher principle of free elections.'[153]

However, this right to secrecy has not been, and cannot automatically be, extended to political contributions. This is because in Indian constitutional jurisprudence, neither document nor doctrine directly recognises any constitutional right to make political contributions, leave anonymous contributions. Further, even if such a right existed in Indian jurisprudence, it is not clear if the right to secrecy could apply to party donations. This is primarily because while both – voting and contributions – are political expressions, they are fundamentally different in two ways. *First*, unlike voting, where the information is hidden from all parties and candidates, political contribution is only hidden from public and opposing parties, with the donee having the knowledge about such contributions. In other words, there is no 'secret donation booth'[154] like there is a secret voting booth.[155] The selective or partial disclosure (disclosed to donee but not to public) could facilitate *quid pro quo* relationships. Another distinction between votes and contributions is that while right to vote is accompanied by political equality or 'one person one vote' principle, such principle is ordinarily non-existent when it comes to campaign contributions. In other words, unlike one's vote, not everyone has equal money to contribute. This lack of equality makes donations different from the right to vote.[156]

In contrast, under the U.S. constitutional jurisprudence, contributions to candidates and parties are recognised as a facet of freedom of speech[157] and association.[158] It further

151 *People's Union of Civil Liberties v Union of India* (2013) 10 SCC 1.

152 ibid [54]. Free and fair election is a basic structure of the Constitution and necessarily includes within its ambit the *right of an elector to cast his vote without fear of reprisal, duress or coercion.* Protection of elector's identity and affording secrecy is therefore integral to free and fair elections and an arbitrary distinction between the voter who casts his vote and the voter who does not cast his vote is violative of Art. 14. Thus, secrecy is required to be maintained for both categories of persons (emphasis added).

153 *People's Union* (n 151) [33].

154 See Bruce (n 135).

155 See Part IV(5.2) for why designing a completely anonymous funding system on the lines of secret ballot is not feasible or practical.

156 Strauss (n 45) 1383.

157 Buckley (n 130) [21]. Given the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy.

158 Buckley (n 130) [22]. The Act's contribution and expenditure limitations also impinge on protected associational freedoms. Making a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their

recognises that disclosure places burden on such right. Disclosure may expose the donors to harassment or retaliation by their political opponents, thus chilling people from exercising their right to make political contributions.[159] Even if one argues that like in the US, the right to make political contributions could be implied under articles 19(1)(a), 19(1)(c) and 21 of the Indian Constitution, it does not automatically guarantee constitutional protection against disclosures. This is because there may be overriding state interests in burdening such right with disclosure requirements. What are those state interests in transparency that may outweigh the chilling effect disclosures may cost?

As discussed in Part IV.5.2, there are two primary legitimate state interests in mandating disclosures.[160] *First*, supplying information to voters to help them make effective political choices.[161] In India, voter information is not just a legitimate state interest, but also a recognised fundamental right, repeatedly upheld by the Supreme Court.[162] Due to the fundamental nature of the right, it is also a *duty* of the state to protect and facilitate the exercise of such right. Therefore, this ground for imposing disclosure burdens attains an even heightened status in India than in the US, where there is no such right to informed vote. The *second* legitimate state interest in disclosure is deterring[163] (or exposing)[164] corruption (or *quid pro quo* relationships) facilitated by donations to candidates and parties.

Both grounds – voter information and anti-corruption – have been recognised not only as a legitimate state interest, but also as a positive obligation of the Indian State.[165] Therefore, they attain a greater weight in India than in the US in the balancing exercise. Recognising that in some cases disclosures may pose the threat of harassment and retaliation, the law could guarantee a few protections. The US Supreme Court created an exception to mandatory disclosure. A person who does not follow disclosure requirements needs to show a 'reasonable probability that disclosure of its contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties.'[166] This exception was recognised as a constitutional principle, and any

resources in furtherance of common political goals.

159 Buckley (n 130) [66].

160 Buckley (n 130) 68. In *Buckley*, the Court also identified a third state interest in disclosures: enforcing contribution limits disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above. Since there are no contribution limits in India, we can ignore this interest for now.

161 Buckley (n 130) 67. The Court observed that '[s]ources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office'.

162 See Part IV.

163 Buckley (n 130) 67. The prospect of voter awareness of a contribution may make the recipient less likely to provide a donor with favors.

164 ibid. A public armed with information about a candidate's most generous supporters is better able to detect any post election special favors that may be given in return.

165 *PUCL v Union of India* (2002) 3 SCR 294; *Lok Prahari v. Union of India* (2018) 4 SCC 699.

166 *Citizens United v FEC* [2010] 558 U.S. 310, 362; Buckley (n 130) [74].

application of mandatory disclosure rules in such cases would amount to constitutional violation. However, the determination of the existence of reasonable probability of threats, harassment, or reprisals will take place from case to case.[167] In *Brown v Socialist Workers '74 Campaign Committee*,[168] applying the *Buckley* exception, the Court exempted minor parties which can show the evidence of past harassment by government or private entities from campaign disclosure requirements, and a reasonable probability of future reprisals. Perhaps, the Courts could read a similar exception in the Indian law against a general constitutional principle of full disclosure.

As I discuss below, another way of protecting at least small donors is a monetary threshold for disclosure.

3. The ₹20,000 Threshold: Should the Court Read it Down?

While the scheme of electoral bonds has received much attention, another significant facilitator of opacity is an obscure, yet significant provision of the Representation of the People Act 1951, section 29C(1).[169] The provision exempts political parties from disclosing the source of any contribution below ₹20,000. The rationale for exempting the donations below ₹20,000 is twofold. First, minor sums are not likely to create a *quid pro quo* relationship between the donor and the donee party. Ordinarily, the policies of big parties are not likely to be influenced by small donations. Another rationale behind the exemption is that individual citizens or small companies may want to participate in the democratic process by financially supporting a party whose ideas or policies they agree with. However, those small donors, who may be relatively powerless, may also fear retaliation or extortion by other parties. Thus, they may need to maintain privacy around political choices. Similar to a secret ballot, the secrecy in donations here protect the rights of democratic participation of small donors. In this way, the threshold of ₹20,000 strikes a balance between the need for transparency and donor's right to privacy. Although this threshold is irrelevant to electoral bonds as all bonds are completely anonymous, the existence of this threshold, it is submitted, further justifies that electoral bonds are not required to protect ordinary citizens' political participatory rights.

Although an aggregated threshold should exist for mandatory disclosures, in case of the above threshold, there is a small catch. When the *same* donor contributes *multiple* times, each different donation is counted separately for the purposes of disclosure. Further,

167 *Citizens United v FEC* [2010] 558 US 310, 362. However, since this exception imposes a burden of proof on the donor to show the reasonable probability of harassment or reprisal, a few dissenting voices in the US Supreme Court have expressed reservations about the exception. Instead they advocate for complete removal of mandatory disclosure requirements. Eg. (Thomas J., Dissent).

168 *Brown v Socialist Workers' 74 Campaign Committee* (1982) 459 US 87.

169 Aradhya Sethia, 'For Cleaner, Fairer Elections' *The Hindu* (23 February 2018) <https://www.thehindu.com/opinion/op-ed/for-cleaner-fairer-elections/article22809421.ece> accessed 20 June 2019.

there is no mandatory time difference between two donations. This means that I can make multiple smaller donations on the same day which cumulates to a large overall sum. For instance, if I want to donate □19 crore, I can break the sum into 1000 donations of □19,000 each. For the purposes of section 29C(1), the party will not be required to disclose the donations.[170] However, I end up donating the big sum to the party – a contribution likely to have a *quid pro quo* arrangement.

This gives political parties a convenient loophole to hide their funding sources by breaking large contributions into smaller sums, even □19,999 each. As a result, a vast majority of donations to political parties come from sources unknown to voters. Thus, this loophole, perhaps more than even electoral bonds, has become a political funding black box.[171] It is rather surprising that the constitutionality of this exemption has never been challenged.

In order to prevent the abuse of a provision which was meant to provide protection to small donors, this loophole could be fixed through judicial reading down of the provision. The court should read down the word 'contribution' in section 29C(1)(a)[172] to mean 'the aggregate annual contribution'. Similar reading should be adopted for section 29C(1)(b), which provides for similar exemption for contributions by companies.[173] Such construction by the court would mean that an individual or a company cannot contribute more than □20000 in a financial year, which would restore the provision to its limited original purpose of protecting small donors. Therefore, the *Buckley* exception to disclosure (reasonable probability of threats, harassment, or reprisals) coupled with an *annual aggregated monetary threshold* of □20,000, provide adequate protection to donor anonymity, while at the same time, protecting the right to informed vote. Apart from these exceptions, other laws that facilitate opacity about the immediate sources of donation, including the scheme of electoral bonds, violate the right to informed vote, and are thus, unconstitutional.

VI. Concluding: Cautionary Notes and New Paths

1. The Limits of a Cash-based Economy

India is primarily a cash-based economy. According to the Economic Survey of India 2016-17, 98 per cent of consumer transactions (by volume) are carried out in cash.[174] A

170 ibid.

171 Jagdeep S Chhokar, 'Black Money and Politics in India' (2017) 52(7) Economic and Political Weekly 91 (Chhokar).

172 Representation of the People Act 1951, s 29C(1)(a). The contribution in excess of twenty thousand rupees received by such political party from any person in that financial year.

173 Representation of the People Act 1951, s 29C(1)(b). The contribution in excess of twenty thousand rupees received by such political party from companies other than Government companies in that financial year.

174 Government of India, *Economic Survey 2016-17* <https://www.indiabudget.gov.in/budget2017-2018/es2016-17/echapter_vol2.pdf> accessed 29 July 2019. India has a very high predominance of consumer transactions carried out in cash relative to other countries accounting for 68 percent

cash dominated economy, India makes it a fertile ground for flouting black money control, and political finance is no exception. There is very little information available about the ways and means by which black money flows into Indian politics, making it difficult to determine the exact scope and impact of black money in politics.[175] In simple terms, 'black money' or 'illicit money' is defined as the money that is not reported to tax authorities.[176]

Based on rough estimates, cash to check (including other formal ways of transactions) ratio in political contributions and spending is 9:1.[177] Several government reports have recommended the reduction of cash transactions in the electoral space as a means to control black money in India.[178] Recently, the Government has made several amendments to the laws dealing with party funding to curb cash donations. First, in 2013, the Parliament refuses tax deductions to any company for the sum it donates to a political party using cash.[179] Similarly, the Electoral Trusts were required to receive all donations through formal (non-cash) sources in order to enjoy tax exemption.[180] Subsequently, in 2017, the Companies Act 2013 was amended to prohibit corporate entities from donating in cash.[181] Further, any contribution above □2000 should not be received through cash. The consequence of the accepting donation of more than □2000 by cash is that the party will lose their tax-exempt status.[182] This amendment is aimed at bringing party finance within formal economy. However, parties may evade this requirement by breaking up larger contributions into multiple smaller contributions of less than □2000, thus rendering the provisions easily evadable. One would expect that these reforms may solve the problem of lack of legal sources of funding that existed in the previous regime, but the flow of unclean money and cash in politics continued, and arguably increased.[183] Why so? At this juncture, it may be informative to look into the peculiar ways in which political money is amassed in India.

Demonstrating underground mechanisms of political funding, Vaishnav and Kapur, in their study on the linkage between construction industry (being a highly regulated industry) and political funding, argued that the construction industry faces a short-term cash crunch in the elections season, suggesting prevalence of illicit fund transfers from the industry to parties.[184] As one commentator explains, 'land, liquor, and mining' are the biggest source

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of total transactions by value and 98 percent by volume.

175 Chhokar (n 171).

176 Department of Revenue, 'While Paper on Black Money'(2012) <https://dor.gov.in/sites/default/files/FinalBlackMoney.pdf> accessed 21 June 2019.

177 Kang (n32).

178 White Paper on Black Money (n 176).

179 Income Tax Act 1961, s 80GGB.

180 Rule 17CA made under 13B.

181 Companies Act 2013, s 182(3A) as inserted by Finance Act 2017, s 154.

182 Income Tax Act 1961, s 13A.

183 See Chhokar (n 171).

184 Milan Vaishnav and Devesh Kapur, 'Quid Pro Quo: Builders, Politicians and Election Finance

of black money in politics. In part, political funds can be raised by foregoing the revenue that is due as excise duties or royalties on liquor and mines respectively.[185] A part of the revenue foregone is transferred to political parties as bribe – primarily in cash.[186] Change of Land Use (CLU) is another way. Land use regulation classifies several areas of land into agricultural, commercial, etc. As an observer has noted, most of the CLU files are cleared before elections, converting many pieces of low-value agricultural land into high-value commercial land. Thus, a stroke of government's pen becomes a source for extorting contributions to political parties.[187] Most of these transactions are likely to take place in cash. The cash collected by political parties is then parked in a distributed manner with elaborate arrangements involving *hawala* (transfer of cash through a network of money brokers) and money laundering mechanisms.[188]

Often, mandating transparency by the law is seen as a panacea in the field of political funding. This vision is also reflected in the constitutional doctrine. As argued above, constitutionally, electoral bonds should be struck down – to the extent they facilitate anonymity. However, here is a cautionary note for transparency obsession: disclosure requirements do not automatically convert into actual transparency. One may argue that when it comes to political funding, mandating transparency as argued here, will force political money further underground in search of anonymity.[189]

In order to secure anonymity, corporations resort to donations through black money, as the black money route will not carry any record in the official balance-sheet of the company. For instance, section 293A of the Companies Act 1956 required *specific* disclosures by the company in its profit and loss statement about contributions made to political parties. Instead, a company, after making donations to a political party, mentioned it under 'miscellaneous expenses' presumably to hide it from shareholders and opposition parties.[190] Cases like these demonstrate not only the reluctance of companies to make specific disclosures about political funding, but also the willingness of companies to craft creative routes to transfer the money.

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in India' (2011) Working Paper 276 Centre for Global Development <https://www.cgdev.org/publication/quid-pro-quo-builders-politicians-and-election-finance-india-working-paper-276-updated> accessed 6 January 2018.

185 M Rajshekhar, 'How Corruption in Coal is Closely Linked to Political Funding' *The Economic Times* (7 August 2012) <https://economictimes.indiatimes.com/industry/energy/power/how-corruption-in-coal-is-closely-linked-to-political-funding/articleshow/15381252.cms> accessed 6 January 2018.

186 ibid.

187 Kang (n 32).

188 ibid.

189 Aradhya Sethia, 'Anti Corruption Bond' *Indian Express* (7 August 2012) <https://indianexpress.com/article/opinion/columns/an-anti-corruption-bond-finance-minister-arun-jaitley-5013317/> accessed 29 July 2019.

190 *Adani Exports Ltd. v Unknown* (2005) 125 CompCas 686 CLB.

As some scholars have pointed out, if corporations can be assured confidentiality with respect to donations, they would prefer to donate through formal channels, rather than in cash.[191] In this way, there appears to be an inherent conflict between transparency norms and clean money in politics. Put briefly, disclosures mandated by the law do not automatically translate into actual transparency. The shortcomings of legal disclosure requirements are apparent in the active violation of the laws by political parties. Before the introduction of electoral bonds, parties[192] and companies[193] were under legal obligations to disclose their funding and contribution details respectively. However, the parties were actively flouting this obligation by not filing income tax returns. In response to a writ petition filed in 1996, the Supreme Court directed all the parties to file their tax returns.[194]

Black money not only facilitates illegal activity, but depending on the source of funding, may also lead to several criminal networks closely aligning themselves with politicians.[195] At the same time, the problem of black money is a result of a broader political economy of the Indian state. If the large parts of the economy are hit by the problem of illicit money, it would be naïve to think that party funding could be somehow protected from it without reducing the prevalence of cash in general. Even campaign finance works within the entire complex network of financial system which contributes to elaborate arrangements of organising and parking money.[196]

2. Towards New Dimensions

In this paper, I have examined several shortcomings in Indian party funding law. First, the removal of corporate contribution caps poses a major threat of party capture by a few powerful corporations. Second, both electoral bond and the □20,000 threshold – perhaps the latter more than the former – pose major threats to the funding transparency. While the □20,000 threshold should be read down to include only *annual aggregated donation*, the

191 Gowda and Sridharan (n 30).

192 Representation of the People Act 1951, s 29C; Income Tax Act 1961, s 13A.

193 Companies Act 1956, s 293A; Companies Act 2013, s 182; Income Tax Act 1961, s 80GGB.

194 *Common Cause of India v Union of India* 1996 (2) SCC 752.

195 Chhokar (n 171) 91. Why should 'unaccounted or undeclared money' be used in politics? A simple and logical answer is that such money is, and has to be, used when unaccountable and undeclarable activities are undertaken. And if it is used, then it follows that such activities are indeed undertaken, or have to be undertaken, as some will say, while being involved in competitive political and electoral processes.

196 Ruchika Singh, 'Black Money and Elections: Who Will Bell the Cat?' (*The Hindu Centre of Public Policy,* 30 April 2014) <http://www.thehinducentre.com/verdict/commentary/article5959650.ece> accessed on 19 June 2019. The menace of black money cannot be curbed by the limited initiatives of the ECI alone. It is important that a detailed analysis is done on how the provisions of RPA can be made more harmonious with the other financial rules and regulations. This would include looking at the IT Act, the Wealth Tax Act, the Companies Act, the Foreign Exchange Management Act (FEMA), the Prevention of Money Laundering Act, Banking Regulations Act, and Cooperative Society laws and audit standards, so that hidden and illegal funds of parties and candidates can be tracked.

anonymity element of electoral bonds should be declared unconstitutional. I finally argue that despite the constitutional right to informed vote, we should be careful about insisting on excessive disclosure requirements.

While we discussed constitutional responses to certain issues, there are many pathologies in the current party funding regime, which require innovative constitutional responses. One such avenue where the future research could be carried out is the relevance of the constitutional principles of 'political equality' or 'one person one vote' for party funding regime. For instance, in *McCloy v New South Wales*,[197] the Australian High Court, when faced with the question of constitutionality of contribution caps, held that 'guaranteeing the ability of a few to make large political donations in order to secure access to those in power would seem to be antithetical to the great underlying principle of political equality.'[198] The judgment of the High Court insisted on levelling the playing field to preserve the principle of political equality. It needs to be examined if such a principle could be imported into the Indian Constitution.[199] Further, what would be the impact of such principle on the recent amendment which removes contribution caps placed on corporates? Perhaps, the question is better left for further research.

Party funding regulation in India needs not only constitutional responses, but also positive reform programs. Well-principled political funding reforms can easily backfire if they cannot be enforced properly. For example, the experience with expenditure limits has shown that by and large they have remained unenforced.[200] Finally, party funding does not exist in isolation. It interacts with various aspects of economy, society, and politics, being both the cause and the effect of broader structural issues. However, we should not confuse reforming political funding with reforming the entire economy or democracy. As David Straussso elegantly suggested, '[t] he task of campaign finance reform is not so much to purify the democratic process as to try to save it from its own worst failings.'[201]

As Issacaroff and Karlan put it, '[e]lectoral reform is a graveyard of well-intentioned plans gone awry… every reform effort to constrain political actors produces a corresponding series of reactions by those with power to hold onto it'.[202] 'Political money' they argue 'is

197 *McCloy v New South Wales* (2015) 257 CLR 178, 202 [27].

198 ibid [28].

199 Arguably, the principle of one person one vote or political equality has been read into the Indian Constitution *RC Paudyal v Union of India* 1994 Supp (1) SCC 324. In *RC Paudyal*, the delimitation of the constituencies was challenged on the grounds that they do not follow mathematical precision. The Court held that though political equality is embedded as a constitutional principle, it does not guarantee mathematical equality in the exercise of delimitation.

200 One can argue that the law is designed to be unenforceable. It places limits on candidate expenditure, but no limit on expenditure of political party for its propaganda. Often, the candidate expenditure is passed off as party expenditure in accounts to escape the enforcement of the law.

201 Strauss (n 45) 1370.

202 Samuel Issacharoff and Pamela S Karlan, 'The Hydraulics of Campaign Finance Reform' (1999) 77 Texas Law Review 1705.

like water, has to go somewhere. It never really disappears into thin air.'[203] Therefore, striking down of electoral bonds or even laying down the most progressive disclosure requirements may not usher true transparency, if they do not accompany a plan to curb cash donations or preventing political money from going further underground. This is not to say that we should make peace with an opaque party funding system. However, the Supreme Court decisions upholding transparency norms will not suffice. The future studies on party funding in India calls for a more interdisciplinary research where politicians, economists, finance experts, political scientists and lawyers could come together to design a system that is constitutionally sound, but also grounded in the political economic realities of India.

203 ibid 1708.

EXAMINING THE CONSTITUTIONALITY OF THE BAN ON BROADCAST OF NEWS BY PRIVATE FM AND COMMUNITY RADIO STATIONS

By Torsha Sarkar*, Gurshabad Grover**, Rajashri Seal and Neil Trivedi*******

In 1995, the Supreme Court declared airwaves to be public property in the seminal case of The Secretary, Ministry of Information and Broadcasting v Cricket Association of Bengal, and created the stepping stones for liberalization of broadcasting media from government monopoly. Despite this, community radio and private FM channels, in their nearly two decades of existence, have been unable to broadcast their own news content because of the Government's persisting prohibition on the same. In this paper, we document the historical developments surrounding the issue, and analyse the constitutional validity of this prohibition on the touchstone of the existing jurisprudence on free speech and media freedom. Additionally, we also propose an alternative regulatory framework which would assuage the government's apprehensions regarding radicalisation through radio spaces, as well as ensure that the autonomy of these stations is not curtailed.

I. Introduction

While there is no separate chapter in the Constitution of India dealing with the freedom of the press, evolving jurisprudence has led to the understanding that freedom of the press was intended to be included within the ambit of freedom of speech and expression.[1] This

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1 *RP Limited v Indian Express Newspapers* AIR (1989) SC 180.

understanding broadly relies on two facets: *first*, that freedom of expression includes within it the right to disseminate and circulate information;[2] and *second*, the press comprises of individuals who enjoy a fundamental right to free speech in their individual capacity.[3] Thus, the freedom of the press is a manifestation of the freedom of speech and expression accorded to the individuals who constitute the press.

The courts have, on multiple occasions, emphasised the importance of media and its role in the propagation of ideas and information.[4] While the judicial decisions referred to here have focused on the traditional press, i.e. print media, the Supreme Court affirmed in *Secretary, Ministry of Information and Broadcasting v Cricket Association of Bengal*[5] that the same rights extended to electronic media like television and radio.

However, currently, there is a blanket ban on community and private FM channels from curating their own news content. The governing regulations only allow them to broadcast news which has already been aired by All India Radio (AIR) without any 'modifications'.[6] The government has defended these regulations by arguing that these radio channels could sensationalise news and such rights could be misused by radical elements, especially in areas affected by insurgency.[7]

In this paper, we argue that to the extent that community radio channels and private FM channels perform the function of dissemination of news and current affairs, they perform the functions of the press, and thus ought to be subject to the same freedoms and liabilities as the traditional press and other media.

This paper is divided into four parts. In the second part, we document the chronological developments in law, policy and legal challenges surrounding this issue. In the third part, we use these facts and derive from constitutional jurisprudence to examine the constitutionality of the regulations that prohibit community radio and private FM channels from curating and broadcasting their own news content. Specifically, we draw from constitutional jurisprudence to argue that the said prohibition does not fulfil the conditions under Article 19(2) and Article 19(6),[8] and thus is an invalid restriction on the freedom of the press. In

2 *Express Newspapers v Union of India* AIR (1986) SC 872.

3 (1948) 7 Constituent Assembly Debates 780.

4 *Sanjoy Narain, Editor in Chief v Hon'ble High Court of Allahabad* [2011] Cr Appeal No. 1863/2011; *Express Newspapers v Union of India* AIR [1958] SC 578; *Romesh Thapar v State of Madras* [1950] SCR 124, *Sakal Papers v Union of India* [1962] AIR 305.

5 *The Secretary, Ministry of Information and Broadcasting v Cricket Association of Bengal* (1995) SCC (2) 161.

6 Order No.104/103/2013-CRS, Ministry of Information and Broadcasting (2017) <https://mib.gov.in/sites/default/files/Amendment%20in%20policy%20guidelines.pdf> accessed 10 July 2019 (MIB 2017).

7 Karan Kaushik, 'Community Radio Stations Upset With I&B order' (*India Legal,* 18 February 2017) <http://www.indialegallive.com/constitutional-law-news/special-report-news/community-radio-stations-upset-sc-order-20245> accessed 10 July 2019.

8 DD Basu, *Law of the Press* (5th edn, Lexis Nexis 2010).

the fourth part, we suggest a broad regulatory framework for community and private FM channels.

II. The Legal History

1. The Evolution of the Ban on Broadcasting of News by Radio Channels

In 1995, the Supreme Court of India, in *The Secretary, Ministry of Information and Broadcasting v Cricket Association of Bengal*, declared that airwaves and frequencies were public property.[9] Since then, advocates of community radio have been pushing for the democratisation of radio by setting up a system of not-for-profit radio stations which would cater to the specific needs of the multitude of communities across India.[10]

In a parallel development, the AIR commenced FM broadcast, wherein some slots were given to private producers.[11] In 1999, the Government rolled out a policy for 'Expansion of FM Radio Broadcasting Through Private Agencies (Phase I)', which allowed fully-owned Indian companies to set up private FM radio stations.[12]

In 2002, the Government approved a policy to grant license for setting community radio stations in India. This license was given only to certain educational institutions, including the Indian Institutes of Technology (IITs) and the Indian Institutes of Management (IIMs).[13]

Post the Phase I guidelines, the Government sought to reformulate its policy, and accordingly set up the Radio Broadcast Policy Committee in 2003, which *inter alia*, recommended that the ban on curating and broadcasting news imposed on radio stations be waived off on several grounds.[14] *First*, the report noted that the policy in respect of radio broadcasters varied from the policy for print and television broadcasters.[15] *Second*, the Committee pointed out that the objective of privatisation of the radio sphere was to promote diversity of content and provide information, and yet these were being curtailed by the ban.[16]

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9 The Secretary (n 5).

10 Community Radio India, *Community Radio Movement in India* (Internet Archives, 28 May 2013 <https://web.archive.org/web/20130528114539/http://www.communityradioindia.org/cr%20scenario/cr_scenario.html> accessed 10 July 2019.

11 Zohra Chatterji, 'Radio Broadcasting in India', <http://www.skoch.in/images/stories/knowledge_repository/Digital/15-ch-15.pdf> accessed 18 July 2019.

12 ibid.

13 Community Radio Facilitation Centre, *Policy Guidelines for setting up Community Radio Stations in India* (Ministry of Information & Broadcasting, 2002, updated in 2006) (Community Radio Facilitation Centre).

14 Ministry of Information & Broadcasting, *Report of the Radio Broadcast Policy Committee* (2003) <https://www.mib.gov.in/broadcasting/report-radio-broadcast-policy-committee-0> accessed 10 July 2019.

15 ibid.

16 ibid.

These recommendations were echoed in the 2004 Telecom Regulatory Authority of India's (TRAI) Consultation Paper, which noted that the promotion of broadcast of news on radio channels could be a means to promote local content on channels.[17] Additionally, the paper also noted that, as a safety precaution, the channels should be made to adhere to the AIR Code, which lists the types of content that cannot be broadcast through AIR, including criticism of friendly countries, attack on religion or communities, and so on.[18]

Despite these developments, in 2006, when the scope of the policy for setting up community radio stations was broadened to include non-profit organisations, it still expressly excluded individuals from setting up community radio stations and prohibited the existing stations from broadcasting news and current affairs completely.[19] The latter prohibition was also reflected in the Grant of Permission Agreement (GoPA) for community radios.[20]

Similarly, in 2005, the Government liberalised some regulatory aspects of radio broadcast with the Phase II scheme on FM Radio, but retained the blanket ban on broadcast of news and current affairs.[21] The same is reflected in the GoPA for establishing, maintaining and operating community radio stations, released in 2006.[22]

In 2008, TRAI considered the issue again, in greater detail, in its 2008 Consultation Paper deliberating on issues regarding Phase III policies for private FM broadcasting.[23] It was noted that the Federation of Indian Chambers of Commerce and Industry (FICCI) was of the opinion that broadcasters must be allowed a particular slot to broadcast news, on the basis that the same is allowed on private television channels, the internet, and newspapers.[24] FICCI also shed light on concerns of accessibility, highlighting that access to newspapers, TV sets, and/or cable connections require a certain level of literacy.[25]

TRAI, however, also noted that due to the 'exhaustive coverage' possible through FM radio broadcasts, news on the radio had the potential to create an immediate major

17 Telecom Regulatory Authority of India (TRAI), *Consultation Paper on Licensing Issues Related to 2nd Phase of Private FM Radio Broadcasting* (2004) <https://main.trai.gov.in/sites/default/files/consultationFMradio.pdf> accessed 10 July 2019.

18 News Services Division All India Radio,*All India Radio Code*<http://www.newsonair.com/AIR-Code.aspx> accessed 10 July 2019.

19 Community Radio Facilitation Centre (n 13).

20 Grant of Permission Agreement to Establish, Maintain, and Operate Community Radio Station', cl 5(v).

21 Ministry of Information and Broadcasting, *Policy on Expansion of FM Radio Broadcasting Services Through Private Agencies (Phase-II)* (2005) <http://mib.gov.in/sites/default/files/fm3.pdf> accessed 10 July 2019.

22 Grant of Permission (n 20) cl 23.4.

23 TRAI, *Consultation Paper on Issues Relating to 3rd Phase of Private FM Radio Broadcasting* (2008) <https://main.trai.gov.in/sites/default/files/cpaper8jan08_0.pdf> accessed 10 July 2019.

24 ibid.

25 ibid.

impact, which made corrective action and damage control difficult.[26] In light of the same, TRAI recommended that 'news and current affairs must not be permitted till [an] effective monitoring mechanism is put in place'.[27] As a compromise, TRAI suggested that radio broadcasters could be allowed to broadcast the 'exact same news and current affairs content' already aired by AIR or Doordarshan.[28]

The Phase III policies for FM Radio, published in 2011, followed this stance and permitted FM Channels to carry the AIR news bulletin, unaltered, on their channels.[29] The blanket prohibition on news was further relaxed to some extent since the new policy deemed certain items as 'non-news', and thereby permitted FM channels to broadcast the following categories of content:

> (a) Information pertaining to sporting events excluding live coverage. However, live commentaries on local sporting events may be permissible;
> (b) Information pertaining to traffic and weather;
> (c) Information pertaining to coverage of local cultural events and festivals;
> (d) Coverage of topics pertaining to examinations, results, admissions, career counselling;
> (e) Information regarding employment opportunities; and
> (f) Public announcements pertaining to civic amenities like electricity, water supply, natural calamities, health alerts, etc. as provided by the local administration.[30]

Broadcast of other forms of news or current affairs by private FM radio channels was still prohibited.[31]

For community radio stations, in 2013, the Ministry of Information and Broadcasting (MIB) maintained at the 3rd National Community Radio Sammelan that community radios would not be allowed to broadcast news for the foreseeable future, but could be allowed to rebroadcast the AIR news bulletin unedited.[32] This was subsequently confirmed by a notification in 2017 to that effect.[33]

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26 ibid.

27 ibid.

28 ibid.

29 Ministry of Information and Broadcasting, *Policy Guidelines on Expansion of FM Radio Broadcasting Services through Private Agencies* (2011) <https://mib.gov.in/sites/default/files/PolicyGuidelines_FMPhaseIII%20%281%29.pdf.> accessed 10 July 2019 (MIB).

30 ibid.

31 ibid.

32 Krishnadas Rajagopal, 'Why Can't FM Stations Broadcast News, asks SC' *The Hindu* (January 18, 2017) <https://www.thehindu.com/news/national/Why-can%E2%80%99t-FM-stations-broadcast-news-asks-SC/article17042358.ece> accessed 10 July 2019.

33 MIB 2017 (n 6).

Subsequently, there has been a government mandate on the Electronic Media Monitoring Centre (EMMC) to monitor the content on private and community radio channels.[34] This has also been followed up by a government notification which mandated existing committees responsible for monitoring content on television, to also monitor content aired by these channels.[35]

In the minutes of a meeting held by the Community Radio Station (CRS) cell of the MIB, it was noted that an advisory was issued to all CRS to broadcast a message every two hours, which would convey to the listeners that they had the prerogative of filing a complaint with the MIB, should they be 'offended' by the content being broadcast.[36]

2. The Common Cause Petition

In 2013, Common Cause filed a Public Interest Litigation (PIL) in the Supreme Court praying for the quashing of provisions in the policy guidelines which prohibited the broadcast of news and current affairs content on FM and community radio stations.[37] There were two broad arguments that Common Cause had relied on to challenge the aforesaid policy restrictions. *Firstly*, they argued that the provisions of the Policy Guidelines and the GoPA that prohibited such broadcast were violative of article 19(1)(a) of the Constitution, which also includes within its ambit the right to receive diverse interpretations of news, current affairs and other sources of information. *Secondly*, they argued that these Policy Guidelines were arbitrary and discriminatory in nature because no such restrictions were put on TV channels and print media which disseminated news. They argued that in view of such arbitrary discrimination, these Policy Guidelines were thus violative of article 14 of the Constitution.[38]

Common Cause also pointed out the potential harms arising out of such restrictions: in a country like India where radio broadcast can form an accessible source of information for the bulk of the population, clamping down on the medium would be violating these citizens' right to receive information. Further, they argued that community radio should not be restricted to broadcasting only government advertisements or information about Union Government schemes because it was important for these radio stations to engage with local

34 Ministry of Information and Broadcasting, 'EMMC to monitor Indian Community Radio' <http://crfc.in/emmc-to-monitor-indian-community-radio/> accessed 30 July 2019.

35 'Committees monitoring television content asked to also oversee private radio stations' *Firstpost* (6 August 2017) <https://www.firstpost.com/india/committees-monitoring-television-content-asked-to-also-oversee-private-radio-stations-3900841.html> accessed 30 July 2019.

36 Ministry of Information and Broadcasting (CRS Cell), 'Minutes Of The Inter Ministerial Committee (TIWC) Meeting Held On 20.12.2018 Under The Chairmanship Of Secretary (I&B)' <https://mib.gov.in/sites/default/files/Minutes%20of%20IMC%20Meeting%2020-12-2018%20compressed_0.pdf> accessed 19 July 2019.

37 Common Cause, 'The Common Cause Petition- Bar on News Broadcast by Private Radio Stations' (Common Cause) <http://www.commoncause.in/uploadimage/case/134737590144377597SC13-Writ.pdf> accessed 10 July 2019.

38 ibid.

issues as well.[39]

The petition claimed that India may be the only democratic country in the world where private players are barred from airing news or cultural affairs. Common Cause argued that this policy of privileging Prasar Bharti over other players, and according legitimacy to only AIR news over other sources is undemocratic.[40]

Common Cause prayed to the Supreme Court to issue a writ of certiorari or a direction of similar nature to quash the said provisions of the policy, and to issue a writ of mandamus or any other direction to the Government to allow private FM Radio stations and community radio stations to broadcast their own news and current affairs.[41]

On 14 February, 2017, the Supreme Court observed that the Union Government's counter-affidavit highlighted the gradual progress of its policy guidelines in the context of news broadcast by private and community radio channels. The counter affidavit filed by the Government also submitted that the revised guidelines now permitted these stations to broadcast news and current affairs that were sourced exclusively from AIR. The Bench, however, asked why news sourced from AIR should be forced on private radio stations and why they could not be allowed to source content from newspapers and TV channels which existed in the public domain, and were already being regulated by the Government. The Court then granted six weeks' time to the Government Counsel to obtain instructions. The matter was posted for hearing on 5 April, 2017.[42]

However, no documents were filed in the court as of 3 April, 2017 despite the Court's orders. In the hearing dated 18 January, 2018, the Court ordered that the reply of the government should be placed on record. On 12 April, 2018, however, the petition was dismissed due to a technical infirmity. On reaching out to Common Cause, they informed us that the organisation was in the process of filing a restoration application in the court.

III. A Constitutional Analysis of the Prohibition

The Supreme Court, on multiple instances, has held that article 19(1)(a) encompasses not just the right to disseminate information but also the right to receive information.[43] The imparting, as well as receiving of information, have been understood as a fundamental right within the scope of article 19(1)(a).[44] In *State of Uttar Pradesh v Raj Narain*, the Supreme Court held that article 19(1)(a) not only guarantees the freedom of speech and expression

39 ibid.

40 ibid.

41 ibid.

42 Common Cause, 'The Status of the Common Cause Petition' (Common Cause) <http://www.commoncause.in/ppil_details.php?id=30> accessed 10 July 2019.

43 *Hamdard Dawakhana v Union of India* (1960) 2 SCR 671; *Indian Soaps & Toiletries Makers Assn. v Ozair Husain* (2013) 3 SCC 641.

44 *People's Union of Civil Liberties v Union of India* (2002) 3 SCR 294.

but also ensures the right of citizens to receive information regarding matters of public concern.[45] In *Secretary, Ministry of Information and Broadcasting v Cricket Association of Bengal*, the Supreme Court held that the right of dissemination included the right of communication through any media: print, electronic or audio-visual.[46]

The freedom of the press also implies that the choice of what is to be printed in the editorial or the news-columns of a newspaper should rest with the editor of the paper, and not any public official or even the Government.[47] This can be extended to the private FM channels and the community radio stations as well, so far as their news dissemination function is concerned. By dictating the types of information and news items that could be broadcast, the Government is therefore indirectly interfering with the autonomy of these channels; almost akin to an interference with the editorial policies of a newspaper, which in itself is a problematic exercise.

With that note, it is now pertinent to test the current restriction against the touchstone of existing constitutional principles. The first question we must examine is whether the prohibition falls within the scheme of article 19(2), that is whether the prohibition qualifies the constitutional protection rendered to certain instances of speech restriction.

1. Article 19(2): Reasonable Restrictions

A particular restriction on the freedom of expression must pass a dual test of reasonableness and proportionality to be deemed constitutional. We will be discussing the touchstone of these tests in the coming sections.

1.1. The Test of Reasonableness

For a speech restriction to be 'reasonable', it must fulfil two tests.[48] *First*, it ought to fall within the scope of grounds specified under articles 19(2) and 19(6); *second*, the restriction must be rationally or proximately connected to the purported intention of the legislation.[49]

In a counter affidavit in the Common Cause petition, the government had argued that permitting community radio and FM radio channels to broadcast news could threaten national security and public order.[50] So for fulfilling the first prong of the test, it must be seen whether the Government's concerns fall under the ambit of 'public order' and 'security of the State' as interpreted under article 19(2).

45 *State of Uttar Pradesh v Raj Narain* (1975) SCR (3) 333.

46 The Secretary (n 5).

47 *Express Newspapers Pvt Ltd v Union of India* (1959) 1 SCR 12.

48 DD Basu (n 8) 20.

49 ibid.

50 Karan Kaushik, 'Community Radio Stations Upset With I&B order' *India Legal* (18 February 2017) <http://www.indialegallive.com/constitutional-law-news/special-report-news/community-radio-stations-upset-sc-order-20245> accessed 10 July 2019.

We must clarify here that 'public order' and 'security of state' forms a system of concentric circles, where security of state is the innermost circle, followed by public order.[51] The security of state is endangered by crimes committed with the intention of overthrowing the government,[52] levying of war or rebellion against the government.[53]

While the first part of the test would be a factual issue, establishing that a restriction falls within the ambit of article 19(2) means that it must also be tested against the touchstone of the 'proximate link' doctrine. This implies that a hypothetical or remote link of a speech restriction to the plausibility of disturbance to public order or security of state would not be enough to justify the restriction. As has been laid down in the case of *The Superintendent of Prison v Ram Manohar Lohia*, this link must be proximate and/or imminent.[54] Further judicial decisions have clarified the scope of this doctrine. In the case of *S Rangarajan v P Jagjivan,*[55] for instance, the Supreme Court had equated the relationship between speech and consequences akin to a 'spark in a powder keg'.[56] In 2011, the Supreme Court further clarified the scope of the doctrine in the case of *Arup Bhuyam v State of Assam*[57] by limiting state interference in free speech to only instances where it 'incites to imminent lawless action'.[58]

In that light, it would be useful to consider first whether there exists any proximate link between the prohibition and the government's apprehensions. Generally speaking, neither the possibility of abuse nor the difficulty of monitoring a right, are grounds of negating the right itself. More specifically, in terms of broadcast, the broad range of circulation or its greater impact cannot be the rationale for denying the broadcast or restricting its content.[59] The State cannot negate liberty because of its own inability to deal with a hostile audience.[60]

Additionally, in over two decades of the existence of community radio and private FM channels, there does not seem to be a single instance of these spaces misused in the manner posited by the government.[61] There are already some checks in the existing regulatory

51 DD Basu, *Shorter Constitution of India* vol 1 (14th edn, LexisNexis Butterworths Wadhwa, 2011).

52 *Santokh Singh v Delhi Administration* (1973) SCR (3) 533.

53 DD Basu (n 8).

54 *The Superintendent of Prison v Ram Manohar Lohia* (1960) SCR (2) 821.

55 *S Rangarajan v P Jagjivan* (1989) SCR (2) 204.

56 ibid.

57 *Arup Bhuyan v State of Assam* Cr. Appeal 889/2007.

58 ibid; *Clarence Brandenburg v State of Ohio* (1969) 395 US.

59 The Secretary (n 5).

60 S Rangarajan (n 55).

61 'No formal complaint on Community Radio Station misuse: Govt' *The Economic Times* (22 December 2015) <https://economictimes.indiatimes.com/industry/media/entertainment/media/no-formal-complaint-on-community-radio-station-misuse-govt/articleshow/50282020.cms?from=mdr> accessed 18 July 2019.

system which may serve to prevent the possibility of abuse. This includes eligibility norms which dictate organisations wishing to set up a community radio channel having a track record of three years of existence and service to the community to be considered for a license.[62]

These norms, along with other stringent regulatory requirements, which would continue to exist even if the government decides to remove the ban, create a system where any content generated would be subject to a high level of scrutiny. Such a system removes the possibility of these broadcasting spaces being tools of persisting, systematic violations of public order, or situations of upsetting the security of state. The government is yet to show any evidence to the contrary. The argument here must be backed by quantitative evidence; the absence of which makes the submission moot, and hypothetical.

1.2. The Test of Proportionality

The Court, in addition to this, has also included a 'proportionality' test to assess the reasonableness of a restriction. Under this doctrine, while imposing restraints, it needs to be looked into whether the appropriate or the least restrictive choice of measures have been made by the state to achieve the object of the regulation.

As *Chintaman Rao v The State of Madras*[63] notes:

> the phrase "reasonable restriction" connotes that the limitation imposed on a person in the enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. [...] Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in article 19(1)(g) and the social control permitted by clause (6) of article 19, it must be held to be wanting in that quality.[64]

This is echoed in *Mohd. Faruk v State of Madhya Pradesh and Ors*[65]

> The Court must in considering the validity of the impugned law imposing a prohibition on the carrying on of a business or profession, attempt an evaluation of its direct and immediate impact upon the fundamental rights of the citizens affected thereby and the larger public interest sought to be ensured in the light of the object sought to be achieved, [and should ensure that] no case for imposing the restriction is made out [if] that a

62 Community Radio Facilitation Centre (n 13).

63 *Chintaman Rao v State of Madras* (1950) SCR 759.

64 ibid.

65 *Mohd. Faruk v State of Madhya Pradesh and Ors* (1970) SCR (1) 156.

> less drastic restriction may ensure the object intended to be achieved.[66]

Thus, any restriction that is arbitrary or excessive compared to the sought object can be struck down by the court. In the present case, the restrictions imposed by the Government cannot be said to be reasonable under the 'proportionality' test. If the object of the Government is to prevent the sensationalisation of news on private FM channels and community radio, then it could always lay down a code of ethics for these channels to follow, along the lines of News Broadcasters' Association's 'Code of Ethics and Broadcasting Standards' which is a self-regulating code aimed at promoting journalistic standards and ethics for television news. Like regulation for other media shows, there are proportionate methods to regulate the dissemination of news and current affairs. We have further discussed this line of thought in the subsequent sections.

1.3. Prior restraint

The Government, through its regulations that prohibit community radio stations and FM channels from broadcasting certain kinds of information, can also be said to be indulging in 'prior restraint', i.e. 'government action that prohibits speech or other expression before the speech happens.'[67]

As Gautam Bhatia notes:

> Prior restraint [...] is considered one of the most serious infringements of the right to freedom of speech and expression. It vests censorial power in the hands of a non-judicial, administrative body. Unlike subsequent punishment for speech, prior restraint chokes off the marketplace of ideas at its very source. Instead of requiring the government to justify why it wishes to regulate or restrict speech, it places the burden of going to court and having the prior restraint lifted, upon the *speaker*, who wishes to exercise her constitutional rights.[68]

The Supreme Court of India has broadly set precedents against prior restraint, except when exercised in exceptional circumstances.[69] More specifically, in *Brij Bhushan v The State of Delhi,*[70] the Supreme Court clearly stated that 'the imposition of pre-censorship on

66 ibid.

67 Cornell Law School, 'Prior Restraint' (*Legal Information Institute*) <https://www.law.cornell.edu/wex/prior_restraint> accessed 19 July 2019.

68 Gautam Bhatia, *Offend, Shock or Disturb: Free Speech Under the Indian Constitution* (OUP 2016).

69 *Romesh Thappar v State of Madras* is seen as setting a precedent against broad prior restraint. See Gautam Bhatia and Vasudev Devadasan, 'Judicial Censorship, Prior Restraint and the Karnan Gag Order' (*Indian Constitutional Law and Policy*, 9 May 2017) <https://indconlawphil.wordpress.com/2017/05/09/judicial-censorship-prior-restraint-and-the-karnan-gag-order/>. accessed 10 July 2019. Also see *R Rajagopala v State of Tamil Nadu* (1994) SCC (6) 632.

70 *Brij Bhushan v The State of Delhi* (1950) SCR 605.

a journal is a restriction on the liberty of the press which is an essential part of the right to freedom of speech and expression declared by art. 19(1)(a)'.[71] In the case, the Supreme Court declared an order that allowed State scrutiny of the material before it was published as unconstitutional.[72]

However, prior restraint has been permitted in situations with emergencies pertaining to public order.[73]

More pertinently, in *KA Abbas v Union of India,*[74] the Supreme Court notably upheld the provisions of the Cinematograph Act that allow the Government to screen and censor films before they are released to the public.[75] In *Sahara India Real Estate v Securities & Exchange Board of India*, the Supreme Court noted the jurisprudence on prior restraint, and carved out an exception for such restrictions 'only when necessary to prevent real and substantial risk to the fairness.'[76] The case also highlighted that prior restraint has been held permissible when there are chances of appeal, a particular time period within which a decision has to be made by the state, or there are other measures that make the Government accountable.[77] No such circumstances exist in the regulations that prohibit community radio stations and FM channels from broadcasting original news.

Constitutional scholar Gautam Bhatia draws a conclusion from some of these cases that prior restraint 'in the interests of public order is justified under Article 19(2), subject to a test of proximity'.[78] As discussed earlier in this paper, the current restrictions on FM channels and community radio stations do not meet the proximity tests.

Thus, the extent of prior restraint that the State exercises on community radio stations and FM channels, i.e. full and explicit prohibition of broadcast of original news content, is greater than what has been seen as permissible by the courts and is unconstitutional.

1.4. Relaxation of tests based on the medium

The Government's submission to the court in the *Common Cause* petition defended the current policies by also arguing that the accessibility and reach of radio necessitated stricter regulation of speech on the medium, and thereby a more relaxed application of the test of reasonableness.

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71 ibid.

72 *Virendra v State of Punjab* (1958) AIR 896; *Babulal Parate v State of Maharashtra*(1961) SCR (3) 423; *Madhu Limaye v Sub-Divisional Magistrate* (1971) SCR (2) 711.

73 ibid.

74 *KA Abbas v Union of India* (1971) AIR 481.

75 ibid.

76 *Sahara India Real Estate v Securities & Exchange Board of India* (2012) SCC (10) 603.

77 ibid.

78 Gautam Bhatia, 'Free Speech and Public Order' (*Centre for Internet and Society*, 17 February 2016)<https://cis-india.org/internet-governance/blog/free-speech-and-public-order-1> accessed on 19 July 2019*;* Bhatia and Devadasan (n 69).

This issue was squarely addressed in *Secretary, Ministry of Information and Broadcasting v Cricket Association of Bengal,* where the Supreme Court considered 'whether there is any distinction between the freedom of the print media and that of the electronic media such as radio and television, and if so, whether it necessitates more restrictions on the latter media',[79] The Court clearly stated:

> The virtues of the electronic media cannot become its enemies. It may warrant a greater regulation over licensing and control and vigilance on the content of the programme telecast. However, this control can only be exercised within the framework of Article 19(2) and the dictates of public interests. To plead for other grounds is to plead for unconstitutional measures.[80]

This position was later affirmed by the Supreme Court in 2015 in the *Shreya Singhal v Union of India* judgement where the medium in question was the internet. In fact, in the case, the Additional Solicitor General made an argument similar to the one advanced by the Government in the *Common Cause* petition by noting, *inter alia*, that 'rumours having a serious potential of creating a serious social disorder can be spread to trillions of people without any check [on the Internet,] which is not possible in case of other mediums',[81] and thus, 'a relaxed standard of reasonableness of restriction should apply'[82] when it comes to regulating speech on the internet. The Supreme Court, however, rejected this argument. The decision cited *Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal* and unequivocally stated that they did 'not find anything in the features outlined by the learned Additional Solicitor General to relax the Court's scrutiny of the curbing of the content of free speech over the internet.'[83]

Thus, jurisprudence on the issue is clear that while there maybe a valid classification between speech on different media of communication, any law restricting free speech that has the possibility of application for purposes not sanctioned by the Constitution is not permissible.[84] Therefore, the Government's arguments that center around the nature of the medium of radio may be grounds enough for regulations that fit the Government's particular objectives, but to the extent that they seek to restrict constitutionally protected speech, they are not maintainable.

1.5. Issues with a state monopoly on media

In the present case, the regulations and policy guidelines permit private FM channels and community radios to broadcast only certain kinds of information. Specifically, they

79 The Secretary (n 5).

80 ibid.

81 *Shreya Singhal v Union of India* (2015) 5 SCC 1.

82 ibid.

83 ibid.

84 ibid.

are prevented from broadcasting news about politics and current affairs, and can only rebroadcast the AIR news bulletin.

This makes the regulations run contrary to the Supreme Court's opinion in *Secretary, Ministry of Information and Broadcasting v Cricket Association of Bengal*, where it noted that:

> [t]he right to use the airwaves and the content of the programmes [...] needs regulation [...] to prevent monopoly of information and views relayed, which is a potential danger flowing from the concentration of the right to broadcast/telecast in the hands either of a central agency or of few private affluent broadcasters.[85]

Even twenty-three years after the judgment, AIR continues to have a monopoly in the dissemination of news and current affairs on radio. Not only does this infringe on the people's right to know and receive information about local political developments that may not find a place in the national broadcast of AIR, but it also prevents them from engaging with each other in debate and discussion. This is clearly detrimental to the idea of a normative plurality of opinion that the Supreme Court had espoused through its judgment in *Secretary.*

In *Indian Express Newspapers v Union of India*, the Supreme Court had held that 'the freedom of the press rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'[86] Applying this interpretation to the present case, it could be said that AIR's monopoly over news prevents the listeners of private FM and community radio channels from accessing diverse sources of news. This is problematic when one considers that in the Indian context, freedom of speech and expression has always been valued for its instrumental role in ensuring a healthy democracy, and its power to influence public opinion.[87] In the present case, the government, far from facilitating any such condition, is instead actively indulging in guardianship of the public mind by deciding the types of information that could be broadcast on community radio networks.

IV. The Social Context

The government's regulatory response to criticism has been to allow these channels to broadcast the AIR news broadcast verbatim.[88] But, as the facts show, the AIR broadcast

85 ibid.

86 *Indian Express Newspapers v Union of India* (1985) SCR (2) 287.

87 Gautam Bhatia, 'Sakal Papers v Union of India - I: Why do we have the freedom of speech?' (*Indian Constitutional Law and Philosophy*, 2 August 2013) <https://indconlawphil.wordpress.com/2013/08/02/sakal-papers-v-union-of-india-why-do-we-have-the-freedom-of-speech/> accessed 10 July 2019.

88 MIB 2011 (n 29); MIB 2017 (n 6).

is done in 20-30 major languages, through only 47 stations around the country.[89] In terms of reach, the AIR broadcast cannot possibly compete with community radios because of several reasons.

First, community radio stations can curate content that is immediately relevant to the community. For rural communities, these radio stations can broadcast information about local developments and policies that may have more impact on them than nation-wide Government schemes. *Second,* the local community networks are important because they can circulate information in the local dialect(s), which sometimes might change even within small clusters of villages.

One can see that the current Government regulation disproportionately affects particular communities. As the TRAI Consultation Paper pointed out in 2008, acquiring news from newspapers and television channels requires certain levels of literacy. Thus, for the illiterate and socio-economically disadvantaged citizenry, news on community radio may be the only viable source of news. These communities are being forced to rely on a single, centralised and regulated broadcast, which may be carrying irrelevant content in an incomprehensible language.

With the lowered costs of smartphones and internet access, several communities are being connected to new sources of information. While the digital empowerment of communities is commendable and necessary, its unintended consequences need to be battled with local initiatives. Disinformation campaigns and the propagation of misinformation are often successful because of the lack of understanding of how to trust news sources.[90] In such light, freeing up community radio channels to broadcast news can go a long way in battling online misinformation by creating resources in the local context. Often, community radio stations catering to rural communities will be run by locally-recognised faces, creating an inbuilt form of accountability.

The Government's concerns are countered by an example in South Asia itself: in Nepal, 250 community radio stations managed to broadcast news with very little repercussions, even during the period of civil war and monarchical authoritarianism.[91]

In such light, the government's continuous refusal to free up a vital channel of broadcasting can be seen as a persistent attempt to suppress the constitutional guarantees of a significant portion of the Indian populace.

89 Mayank Jain, 'Why India has only 179 community radio stations instead of the promised 4,000' (*The Scroll*, 11 May 2015) <https://scroll.in/article/725834/why-india-has-only-179-community-radio-stations-instead-of-the-promised-4000> accessed 10 July 2019.

90 UNESCO Series on Journalism Education, *Journalism, 'Fake News', and Disinformation* (UNESCO, 2018) <https://en.unesco.org/sites/default/files/journalism_fake_news_disinformation_print_friendly_0.pdf> accessed 27 July 2019.

91 UNESCO Chair on Community Media, *Time to join hands and strengthen CR sector in South Asia* (UNESCO, 15 November 2013) <http://uccommedia.in/tag/supreme-court-of-india/> accessed 10 July 2019.

V. The Way Forward

This section, *first*, for clarity for readers, summarises the existing framework required for setting up a community radio station (CRS). *Second*, we formulate a framework that balances the government's apprehensions vis-a-vis the free speech concerns outlined in the preceding sections.

1. The existing regulatory framework

As of now, an organisation that wants to operate as a community radio station (CRS) should be:

1. Constituted as a non-profit organisation and have a record of at least three years of service to the community
2. Designed to serve a specific well-defined local community
3. Its ownership and management structure should reflect the community it serves
4. The programmes it broadcasts must be relevant to the educational, developmental, social and cultural needs of the community and,
5. It should be a registered legal entity.[92]

Community-based organisations that satisfy the above requirements, as well as educational institutions, are eligible to apply for CRS radio licences. Individuals, political parties and their affiliated organisations, profit-motivated organisations, and organisations banned by the Union and State Governments are not eligible to run a CRS.[93]

The MIB invites applications once a year through national advertisement, but eligible educational institutions as described above can apply during the period between the two advertisements. A processing fee of □2500 is charged. The framework also requires applicants to get a clearance from the Ministry of Home Affairs (MHA), Ministry of Human Resources Development (MHRD) and Ministry of Defence (MoD). The framework creates an exception for universities, deemed universities and government educational institutions, who do not need a separate clearance from MHA and MHRD.[94]

Once the Wireless Planning and Coordination (WPC) wing of the Ministry of Communication allots a frequency, a letter of intent (LoI) is issued. The MIB will, within one month of receipt of the application, either communicate its deficiencies or forward the copies to other ministries, which will communicate clearance within 3 months. In case of failure to do this, the case will be sent to a committee constituted under the chairmanship of the secretary of the MIB, who will decide on the issuance of an LoI.[95]

Within one month of issuance of LoI, the applicant has to apply to the wing of the

92 Community Radio Facilitation Centre (n 13).

93 ibid.

94 ibid.

95 ibid.

Ministry of Communication and IT for frequency allocation and clearance from the Standing Advisory Committee for Frequency Allocation (SACFA). On receipt of SACFA clearance, the LoI holder shall furnish a bank guarantee for a sum of □25,000 after which the LoI holder will sign a Grant of Permission Agreement (GoPA) which will help them seek a wireless operating license. Within 3 months of receiving all clearances, the permit holder needs to set up the CRS and notify the MIB about the date of the commissioning of the CRS. A failure to comply with the time schedules will result in cancellation of the LOI/ GOPA and forfeiture of the Bank Guarantee. The Grant of Permission Agreement is valid for 5 years and is non-transferable.[96]

2. What could the future look like?

The submission of the Additional Solicitor General on behalf of the government, in *Shreya Singhal v Union of India*[97] is a useful starting point. While arguing for the constitutionality of (now struck down) section 66A of the Information Technology Act, he had drawn a demarcation between traditional media and the internet as a medium of speech. This differentiation, according to the Additional Solicitor General, was rooted in, *inter alia*, the former having an institutionalised system of policies to check against abuse. By the government's own logic, the existence of an institutional policy for medium of speech would warrant a lesser restriction on speech.

In that light, we argue that abuse on community and private FM channels can also be kept under check by setting up of a nuanced regulatory framework in a similar vein to those already existing for the print and television media.

As we have discussed previously, there already exists a centralised procedure for setting up of a community radio channel. For additional safeguards, community radio channels and private radio channels can be arranged in a self-regulatory body in the likes of the NBSA, which would administer a code of standards for news aired on these channels. Adherence to the code would be voluntary. To ensure that a uniform standard of journalistic ethos is preserved across all mediums of news, this code would be emulating the existing best practices.[98] Among other things, we recommend the code to contain pointers regarding:

1. Impartial and objective reporting.
2. Ensuring that crime reporting does not titillate or glorify crime and violence.
3. Safeguarding the privacy of the individual subjects of the news.
4. Refraining from advocating superstitions and unscientific beliefs.

96 ibid.

97 *Shreya Singhal v Union of India* (2015) AIR SC 1523.

98 News Broadcasters Association, *Code of Ethics and Broadcasting Standards* <http://www.nbanewdelhi.com/assets/uploads/pdf/code_of_ethics_english.pdf> accessed 19 July 2019; News Service Division, All India Radio 'AIR Code' <http://www.newsonair.com/AIR-Code.aspx> accessed 19 July 2019 (News Service Division).

5. Refraining from any content that pertains to unlawful acts under article 19(2).[99]

Additionally, the code should adhere to reporting best practices during elections, as laid down by the election commission. These include:

1. No coverage of election speeches or other materials that incite violence against one group, based on the group's religion, caste or any other factor.
2. Balanced and objective coverage of political parties.
3. Producers of the show must record a copy of their programme, for reference in the instance of a dispute regarding the content.[100]

At this juncture, we should point out that we recognise the flaws of the existing NBSA model of regulation. Practical issues like cross-media ownership, reporting of inaccurate news, unethical practices, are all problems that are plaguing the broadcasting media and its related regulatory body.[101] The argument here therefore does not assume that the existing systems are flawless; instead, we engage with the arguments made by the Additional Solicitor General, which proclaimed that the government's magnitude of imposition of speech restrictions would be relaxed should the medium in question have an institutional regulatory framework.

We also recognise that there might be particular additional contextual concerns with the content aired on radio channels. Adequate research and engagement with relevant stakeholders would help to address these issues.

With regards to enforcement of this code, there is already parallel, monitoring mechanisms which would be scrutinising the content aired on these channels, the details of which have been discussed in the preceding sections.

With special reference to the meeting held by the CRS cell of the MIB, a two-pronged adjudication system can now be set up. Individual complaints can be placed before the MIB, which would forward them to the independent body. The independent body would also be responsible for formulating the larger norms of content regulation on these channels through its decisions in both individual complaints as well as in inter-channel disputes, in an open, participative manner. This, in the opinion of the authors, would be an effective, preliminary enforcement backbone to the new regulatory system discussed in the preceding sections.

VI. Conclusion

Amartya Sen in his works has compared the conditions and responses of a democratic society with a non-democratic society, in critical times like famines. He picked Botswana

99 ibid.

100 News Service Division All India Radio (n 98).

101 S Sivakumar, *Press Law and Journalists: Watchdog to Guidedog* (Universal Law Publications 2015).

and Zimbabwe as case studies for the former, and Sudan and Ethiopia, for the latter. On the face of a shortage in food supply in both these sets, the latter had massive famines, while Botswana and Zimbabwe did not.[102]

He rationalised this phenomenon on the existence of an open media in the democratic countries, which was absent in the authoritarian countries, Sudan and Ethiopia. Existence of a free media meant that there was a possibility of the governments of the democratic countries facing intense opposition and open criticism in the news in case the shortage went from bad to worse. This, according to Sen, was what kept these governments on their toes.[103]

In a similar vein, he also discussed the case of the Bengal Famine of 1943, which he attributed to the lack of democracy in colonial India, severe restrictions placed on the Indian press, and the practice of voluntary silence imposed by the British press. The aggregated effect of this was that there was not enough public discussion on the famine in Britain, and the policies needed to deal with it were never looked upon.[104]

These ideas, in aggregation, seem to suggest that an open and deregulated media is an essential feature of a democratic society, and blackouts on the dissemination of information may result in the denial of vital socio-economic rights.[105]

Accordingly, we argue that the Indian government's persisting decision to curb the autonomy of private and community radio channels to broadcast their own news, results in a state-sponsored information blackout for communities around India.

This is a problem the Indian democracy should be concerned with. A citizen's right to know is a fundamental liberty under article 21,[106] and this prohibition interferes with it severely. As pointed out, even in times of national crisis, let alone the daily efficient functioning of a democratic institution, what is needed the most is the existence of an open media which can critically examine public affairs. In terms of this ban, therefore, the autonomy of these channels continues to be curbed, with the result that an individual's liberty to disseminate as well as receive varied narratives through radio is infringed, and communities may be left with no other avenue to dissent or oppose the mainstream narrative.

102 Amartya Sen, *Development as Freedom* (OUP 2001).

103 ibid.

104 Amartya Sen, *The Idea of Justice* (Belknapp Press 2011).

105 *Justice Puttaswamy v Union of India* WP 494/2012 [220] (Chandrachud, J).

106 *Reliance Petrochemical Limited v Indian Express Newspapers* (1989) AIR 190.