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CONTENTS

‘DE-X-ING’ THE XXX: THE CONSTITUTIONAL VALIDITY OF INDIA’S PORN BAN

Aanchal Kabra and Rohit Gupta*

In 2020, the Government of India controversially banned 857 websites hosting pornography, arguing that their operation was directly proportionate to the number of sexual assaults in the country. This action attracted criticism from scholars and citizens alike. However, in light of recent events, the opinion of liberal scholarship must be re-examined as the need for regulation of pornographic content is more necessary than ever. Preliminarily, this paper undertakes a socio-legal study on the effects of pornography upon the prevalence of sexual violence. As its operative aspect, this paper explores the estranged relationship of such a ban with the fundamental rights under Articles 14, 19, and 21 of the Constitution of India. Recent jurisprudence indicates that not only do adults in India possess a right to sexual privacy, but also that such a right should extend to creating and consuming consensual pornographic content. This paper thus ventures to analyse the legality of the profession of ‘porn stars’, detaching it from the res extra commercium doctrine, and analyses the permissibility of the same in light of the analogous licensing framework imposed upon dance bars and bar dancers. Further, this paper takes on a unique take on the failure of the ban on pornography to comply with Article 14 of the Indian Constitution for want of requirements of an intelligible differentia and rational nexus for the same. Thus, in light of the growing numbers of pornographic films and sexual assaults in the country, this paper first suggests lesser restrictive methods, such as content moderation, and then points towards methods for remodelling the ban such that it is not only intra vires, but also effective.

Keywords: *porn ban – fundamental rights – equality – sexual privacy – intelligible differentia – obscenity*

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I. Introduction

In September 2018, the Uttaranchal High Court ('the High Court') directed the Government of India to ban certain porn sites for being an 'adverse influence on the impressionable minds of children'.[1] This judgement came on the heels of a disturbing gang rape of a minor girl in Dehradun. The High Court blamed the conduct of the teenage convicts on the pornographic material consumed by them before the crime.[2] In light of this, the High Court directed the Government to ban 857 porn sites.[3] Thereafter, the Department of Telecom identified and banned 827 websites which contained pornographic material.[4]

The list containing these 857 sites was originally developed post the 2012 Delhi gang rape and murder, popularly known as the Nirbhaya rape case, by a petitioner praying to the Supreme Court of India ('SC') for a pornography ban to prevent similar horrific rapes in the future.[5] The SC has previously reinforced the rights of citizens to consume adult pornography, holding that it cannot dictate the actions of adults in the privacy of their own homes.[6] Unfortunately, the Government still issued a circular to internet service providers ('ISPs'), directing them to prohibit the list of websites provided.[7] This circular was not fully adhered to, a fact noted by the High Court,[8] and was eventually dropped in the face of ridicule by scholars and citizens alike.[9]

There is no doubt that regulation of porn is required in the country. India is the primary provider of child sexual abuse material, with 11.7% of the total global material originating in India.[10] Many have argued that free access to violent, sadistic porn affects children at the

1 *In Re, In the Matter of, Incidence of Gang Rape in a Boarding School, situated in Bhauwala, District Dehradun v State of Uttarakhand* 2018 SCC OnLineUtt 871 [4].

2 ibid.

3 ibid [21].

4 'Telecom department asks Internet providers to block 827 porn websites' (*The Indian Express*, 30 October 2018) <https://indianexpress.com/article/technology/tech-news-technology/telecom-dept-asks-internet-providers-to-block-827-porn-websites-5418439/> accessed 26 September 2022.

5 Partha Chakrabartty, 'India govt's porn ban is an empty, illusory measure; tackling sexual assault needs real intent and action' (*Firstpost*, 25 February 2020) <https://www.firstpost.com/india/indian-govts-porn-ban-is-empty-illusory-measure-tackling-sexual-assault-needs-real-intent-and-action-5646291.html> accessed 23 May 2021.

6 ibid; India Today Desk, 'CJI HL Dattu says can't ban porn totally, cites right to personal liberty' (*India Today*, 9 July 2015) <https://www.indiatoday.in/india/story/cannot-ban-pornography-cji-hl-dattu-personl-liberty-supreme-court-281437-2015-07-09> accessed 23 May 2021.

7 Chakrabartty (n 5).

8 *In the Matter of, Incidence of Gang Rape in a Boarding School* (n 1) [20].

9 Chakrabartty (n 5).

10 Ramya Kanan, 'Most online content on child sexual content from India' (*The Hindu*, 18 April 2020) <https://www.thehindu.com/news/national/most-online-content-on-child-sexual-abuse-from-india/article31377784.ece> accessed 23 May 2021.

grassroots level, creating mindsets which lead to more rapes in the country.[11] The primary argument against a complete prohibition; however, is that there needs to be a balance, howsoever delicate, between regulation and total prohibition. By making the decision to ban pornography *in toto*, the State interferes with fundamental rights under Articles 14, 19, and 21 of the Constitution of India ('Constitution').

In light of recent events, this argument must be re-examined. The High Court's opinion that proliferation of porn evinces sexual assault may not be as far removed as liberal scholarship suggests. A six-year-old was recently killed for resisting sexual assault by three minors. The accused were addicted to pornography.[12] In Surat, the main accused in the rape and murder of a toddler was claimed to be a porn addict.[13] In December 2021, a Kerala model was gang raped for two days upon refusal to shoot explicit images. She was later blackmailed on the pretext that her images would be leaked if she approached the law enforcement agencies.[14] In another case, the main accused in the gang rape and subsequent murder of a Dalit girl in the Delhi Cantonment area was a porn addict.[15] Another alleged porn addict raped three minors and killed one in Gujarat in November 2021.[16]

This paper further explores the estranged relationship of the Constitution with pornography through the lens of the '21-14-19' golden triad. In doing so, Part II delves into the legality of the porn ban with respect to the fundamental right to sexual privacy envisaged under Article 21 of the Constitution. Subsequently, Part III breaks down the arbitrary manifestation of its implementation due to the absence of an intelligible differentia among banned platforms. Thereafter, Part IV reminisces the memory of the obscenity standards adopted by the Indian judiciary and proposes a more progressive approach. Finally, Part V

11 Mari Marcel Thekaekara, 'Sexual violence is the new normal in India and porn is to blame' (*The Guardian,* 9 August 2018) <https://www.theguardian.com/commentisfree/2018/aug/09/sexual-violence-india-rape-pornography> accessed 23 May 2021.

12 Utpal Parashar, '6-yr-old killed for resisting sexual assault bit by 3 minors, say police' (*Hindustan Times,* 22 October 2021) <https://www.hindustantimes.com/india-news/assam-boys-killed-6-year-old-girl-for-resisting-sexual-assault-police-101634809945913.html> accessed 21 December 2021; News Desk, 'Two porn addict minor boys kill 6-year-old girl in Assam' (*News18,* 23 October 2021) <https://www.news18.com/news/india/two-porn-addict-minor-boys-kill-6-year-old-girl-in-assam-4357091.html> accessed 21 December 2021.

13 Express News Service, 'Surat: 35-year-old man arrested for 'rape and murder' of toddler' (*The Indian Express*, 9 November 2021) <https://indianexpress.com/article/cities/surat/surat-35-year-old-man-arrested-for-rape-and-murder-of-toddler-7613893/> accessed 21 December 2021.

14 HT Correspondent, 'Kerala model gang raped in Kochi: One arrested' (*Hindustan Times,* 7 December 2021) <https://www.hindustantimes.com/india-news/kerala-model-gang-raped-in-kochi-one-arrested-police-101638818569863.html> accessed 21 December 2021.

15 News Desk, 'Delhi Cantonment Rape Case: SIT finds accused priest is a porn addict' (*News18,* 18 August 2021) <https://www.news18.com/news/india/delhi-cantonment-rape-case-sit-finds-accused-priest-is-a-porn-addict-4099415.html> accessed 21 December 2021.

16 Times News Network, 'Gandhinagar: Man arrested for raping 3 minors, killing one of his victims' (*Times of India*, 9 November 2021) <https://timesofindia.indiatimes.com/city/ahmedabad/man-arrested-for-raping-3-minors-killing-one-of-victims/articleshow/87593813.cms> accessed 21 December 2021.

concludes.

In some respects, parts of this paper may be compared to the three existing papers on this subject. In 2011, Vallishree Chandra and Gayathri Ramachandran first discussed the prohibition of pornography in India and its relationship with Article 19.[17] Subsequently, in 2014, Geeta Hariharan wrote a response to Kamlesh Vaswani's petition praying for a pornography ban in the Supreme Court.[18] Finally, in 2019, Siddharth Aatreya discussed the concerns in Vaswani's petition and obscenity under Indian law.[19] However, this paper is neither concerned with the philosophical underpinnings of morality under Indian jurisprudence, nor with Vaswani's petition. It is also not limited to the derived right to privacy from the pre-*Puttaswamy* adjudications. While locating the right to access pornography within Article 19, as also concluded by Chandra and Ramachandaran, this paper advocates for a reinterpretation of the 'morality' clause in Article 19, reading the same from within the Constitution itself. In contrast, Aatreya imports the Canadian 'harms test' to determine morality in India. Additionally, this paper analyses the relationship of the ban with Articles 14 and 21, unaddressed in the aforementioned articles. In this manner, this paper seeks to add to the existing scholarship by providing fresh suggestions for effective regulation of pornographic material.

II. Porn Ban and the Right to Sexual Privacy

The right to privacy is a basic element of human dignity.[20] In 2017, in *Justice K.S. Puttaswamy v Union of India* ('*Puttaswamy*'), a nine-judge bench upheld it as a fundamental right under the right to life and liberty. Despite the lack of a majority judgement, having delivered only concurring and plurality judgements, many broad elements addressed therein overlap to create a firm *ratio decidendi*.[21]

Decisional autonomy is an accepted element of the right to privacy.[22] Almost all opinions

17 Vallishree Chandra and Gayathri Ramachandran, 'The Right to Pornography in India: An Analysis in Light of Individual Liberty and Public Morality' (2011) 4 NUJS Law Review 323.

18 Geeta Hariharan, 'Our Unchained Sexual Selves: A Case for the Liberty to Enjoy Pornography Privately' (2014) 7 NUJS Law Review 89.

19 Siddharth Aatreya, 'Obscenity and the Depiction of Women in Pornography: Revisiting the Kamlesh Vaswani Petition' (2019) 13 NALSAR Student Law Review 1.

20 *Justice KS Puttaswamy v Union of India* (2017) 10 SCC 1.

21 Gautam Bhatia, 'The Supreme Court's Right to Privacy Judgement – II: Privacy, the Individual, and the Public/PrivateDebate' (*Indian Constitutional Law and Philosophy Blog,* 28 August 2017) <https://indconlawphil.wordpress.com/2017/08/28/the-supreme-courts-right-to-privacy-judgment-ii-privacy-the-individual-and-the-publicprivate-divide/> accessed 21 December 2021.

22 Privacy International, 'State of Privacy in India' (*Privacy International,* 26 January 2019) <https://privacyinternational.org/state-privacy/1002/state-privacy-india> accessed 21 December 2021; Bhairav Acharya, 'The Four Parts of Privacy in India' (*Economic and Political Weekly,* 30 May 2015) <https://www.epw.in/journal/2015/22/insight/four-parts-privacy-india.html> accessed 21 December 2021; Bhatia (n 21); Gautam Bhatia, 'The Supreme Court's Right to Privacy Judgement – V: Privacy, Decisional Autonomy' (*Indian Constitutional Law and Philosophy Blog,* 31 August 2017) <https://indconlawphil.wordpress.com/2017/08/31/the-

delivered in *Puttaswamy* reiterated this principle in some form.[23] Justice Chelameswar discusses the right to make autonomous choices on intimate and personal matters as an inviolable element of human personality.[24] Justice Nariman emphasises on 'autonomy over fundamental personal choices'. Similarly, the plurality reiterates the decisional autonomy over 'intimate personal choices' as a vital element of the right to privacy, while Justice Bobde defines the right to privacy as a right to be free of intrusion on one's decisions or actions. Additionally, he notes that the right to a freely and fully informed choice is one of the core notions of a democracy. The right to be free of intrusion while performing an action cannot be separated from the action itself.[25] Hence, the inability to be free of intrusion, whether due to eavesdropping devices or other technological aids,[26] essentially denies an individual her right to privacy.[27] The notion of 'choice' forms an essential element of Justice Kaul's judgement as well, wherein the right to make 'autonomous life choices' without interference from state and non-state actors has been defined as constituting the right to privacy.[28]

In addition to this, Justice Chelameswar cautions against state interference in an individual's personal choices. He despairs that historically states have attempted to shape public opinion by allowing or disallowing certain art and literature while re-emphasising the age old[29] definition of privacy, i.e.'the right to be let alone'.[30] Justice Bobde too discusses the right to enjoy mental seclusion away from societal and state interference. Parallelly, the plurality reiterates the right to not conform to majority opinion as an element of the right to privacy, whether such opinion is legislative or popular.

Thus, in *Puttaswamy*, the SC clearly upheld the rights of individuals to self-determination and non-conformity.

Information is intimate if it concerns matters of sexual nature, and private if it is in regards with one's personal nature.[31] Thus, porn is both intimate and private, protected by one's right to decisional autonomy. Adults have a right to watch porn in the privacy of their own homes.[32] Even if legislative opinion is to the contrary, the right of privacy protects such autonomy and non-conformity. Therefore, the porn ban is an infringement on the right

supreme-courts-right-to-privacy-judgment-v-privacy-and-decisional-autonomy/> accessed 21 December 2021.

23 Bhatia (n 21).

24 *Puttaswamy* (n 20) [168].

25 ibid [260].

26 ibid [257].

27 ibid [260].

28 ibid [496].

29 Louis Brandeis and Samuel Warren, 'The Right to Privacy' (1890) 4 Harvard Law Review 193.

30 *Puttaswamy* (n 20) [169].

31 Acharya (n 22).

32 Chakrabartty (n 5).

to privacy, and to remain *intra vires*, an executive decision to this effect must pass the tests laid down in *Puttaswamy*.

A. Is the porn ban a valid infringement of the right to privacy?

Justice Chandrachud, writing for the plurality, denoted the test for a valid infringement on the right of privacy as:

> An invasion of life or personal liberty must meet the three-fold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them.[33]

In his concurring judgement, Justice Kaul adds a fourth element, which necessitates procedural guarantees against the abuse of procedure.[34] By concurring with the test created by the plurality, Justice Kaul creates the *ratio decidendi*.[35] Hence, *Puttaswamy* places a burden on the State not only to prove the legality of infringement, but also to prove that the means used were proportional to the objective sought to be achieved. The State must use the least restrictive measures effective to gain said objective.[36] Therefore, an infringement is *ultra vires* if the objective sought can be achieved by lesser-infringing means.[37]

The current porn ban is not a new thought. Previously, Kamlesh Vaswani's petition in the SC had argued that pornographic material is severely detrimental to the values of society, leading to sexual assault.[38] Though this petition was dismissed by the SC in favour of autonomy of adults, the Government had directed ISPs to effect a ban.[39] Due to heavy criticism, this policy was later abandoned.[40] However, it is apparent through the High Court's judgement[41] that the legitimate state aim sought to be achieved through this ban is the prevention of sexual assault purportedly caused due to pornography.[42]

B. The objective: Relation between pornography and sexual assault

The consequences of adult access to pornography are inconsistent and often biased.

33 *Puttaswamy* (n 20) [188(H)].

34 ibid [490].

35 Bhatia (n 21).

36 *Arnab Goswami v Union of India* 2020 SCC OnLine SC 462.

37 Bhatia (n 21).

38 Chakrabartty (n 5).

39 ibid.

40 ibid.

41 *In the Matter of, Incidence of Gang Rape in a Boarding School* (n 1) [21].

42 Ramya Chandrasekhar, 'Policing online abuse or policing women? Our submission to the United Nations on online violence against women' (*Internet Democracy,* 7 November 2017) <https://internetdemocracy.in/reports/un-srvaw-report/> accessed 21 December 2021.

Pornography use generally decreases with increasing age.[43] However, the effects of such use are rarely well-researched. Often, research studies rely on anecdotes and personal biases instead of empirical evidence.[44] Questions are frequently raised about the research methodology, since sample sizes are small and not universal in their depiction.[45] The wide variety of pornography available makes it difficult for such studies to make truthful sweeping claims about its apparent degrading depiction of women.[46] Studies indicate that a lot of available pornographic content is non-violent in nature.[47] Here, non-violent pornography is also considered as unvitiated by non-consensual, coerced, or unduly influenced sexual interaction of any nature. A cursory glance at such content showcases deep-rooted flaws and even outright inconsistencies in current research.[48] For example, men are often seen performing oral sex to women, a direct contradiction to statements made by researchers.

43 PJ Wright, 'U.S. males and pornography, 1973–2010: Consumption, predictors, correlates' (2013) 50 The Journal of Sex Research 60; Joseph Price and others, 'How Much More XXX is Generation X Consuming? Evidence of Changing Attitudes and Behaviors Related to Pornography Since 1973' (2015) 53 Journal of Sex Research 1.

44 Margaret E Thompson, Steven H Chaffee and Hayg Oshagan, 'Regulating Pornography: A Public Dilemma' (1990) 40(3) Journal of Communication 73.

45 Augustine Brannigan, 'Pornography and Behavior: Alternative Explanations. A Critique' (1987) 37(3) Journal of Communication 185; Ferrel Christensen, 'Sexual Callousness Revisited. A Critique' (1986) 36(1) Journal of Communication 174; Ferrel Christensen, 'Effects of Pornography: The Debate Continues. A Critique' (1987) 37(1) Journal of Communication 186; Larry Gross, 'Pornography and Social Science Research: Serious Questions. A Critique' (1983) 33(4) Journal of Communication 107; Daniel Linz and Edward Donnerstein, 'The Methods and Merits of Pornography Research. A Critique' (1988) 38(2) Journal of Communication 180; Dolf Zillmann and Jennings Bryant, 'Pornography, Sexual Callousness, and the Trivialization of Rape' (1982) 32(4) Journal of Communication 10; Dolf Zillmann and Jennings Bryant, 'Pornography and Social Science Research: Higher Moralities. A Response' (1983) 33(4) Journal of Communication 111; Dolf Zillmann and Jennings Bryant, 'Sexual Callousness Revisited. A Response' (1986) 36(1) Journal of Communication 184; Dolf Zillmann and Jennings Bryant, 'Pornography and Behavior: Alternative Explanations. A Reply' (1987) 37(3) Journal of Communication 189; Dolf Zillmann and Jennings Bryant, 'The Methods and Merits of Pornography Research. A Response' (1988) 38(2) Journal of Communication 185; Dolf Zillmann and BS Sapolsky, 'What Mediates the Effect of Mild Erotica on Annoyance and Hostile Behavior in Males?' (1977) 35(8) Journal of Personality and Social Psychology 587.

46 Jill Bakehorn, 'Women-made pornography' in Ronald Weitzer (ed), *Sex for sale: Prostitution, pornography, and the sex industry* (Routledge 2010); Dana Collins, 'Lesbian pornographic production: Creating social/cultural space for subverting representations of sexuality'(1988) 43 Berkeley Journal of Sociology 31; Danielle De Voss, 'Women's porn sites'(2002) 6 Sexuality and Culture 75; Carl Stychin, 'Exploring the limits: Feminism and the legal regulation of gay male pornography' (1992) 16 Vermont Law Review 857; Joe Thomas, 'Gay male pornography since Stonewall' in Ronald Weitzer (ed), *Sex for sale: Prostitution, pornography, and the sex industry* (Routledge 2010); Scott Tucker, 'Radical feminism and gay male porn' in Michael Kimmel (ed), *Men confront pornography* (Meridian 1991).

47 Joseph Scott and Steven Cuvelier, 'Sexual violence in Playboy magazine: A longitudinal content analysis' (1987) 25 Journal of Sex Research 534; Joseph Scott and Steven Cuvelier, 'Violence and sexual violence in pornography' (1993) 22 Archives of Sexual Behavior 357.

48 Thompson, Chaffee and Oshagan (n 44); See, for instance, the above discussion on gay porn, porn made by women etc.

Often, porn also depicts consensual activities with partners reciprocating behaviour.[49] Further, there is a currently a growing market of homosexual porn, porn made by women, and alternative porn, which shatters many sweeping claims made about the dehumanizing effects of the industry.[50]

At its best, non-violent pornographic content affects men in a positive way. Males interpret pornographic content as 'fun, beauty, or women's power'.[51] They actively dislike depictions of aggression or non-consensual behaviour.[52] Many viewers are able to separate porn from reality, understanding it to be a virtual fantasy world, interpreting characters as 'unsuitable models for behaviour'.[53] Not only does pornography better perceptions of sex and overall sexual quality of life, but it also provides insight about sexual activities.[54] If such self-perceptions of viewers are valid, pornographic content is far less harmful than assumed.[55]

Sex offenders have also claimed that viewing porn helps prevent real life crimes.[56] Pornography may not necessarily encourage harmful sexism either. In fact, male viewers of pornography may be more liable to partake in 'benevolent sexism', i.e. the belief that females should be protected.[57]

At its worst, viewership of mainstream non-violent pornography may have no effect on its users. Studies have found no causal linkage between porn and crime.[58] The degree of intimacy of viewers, as compared with non-viewers, in relationships does not change,[59] though this may not be true for viewers of violent or fetishist pornography.[60]

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49 Ted Palys, 'Testing the common wisdom: The social content of video pornography' (1986) 27 Canadian Psychology 22.

50 Bakehorn (n 46); Collins (n 46); DeVoss (n 46); Stychin (n 46); Thomas (n 46); Tucker (n 46).

51 David Loftus, *Watching sex: How men really respond to pornography* (Thunder's Mouth 2002).

52 Alan McKee, 'The aesthetics of pornography: The insights of consumers' (2006) 20 Continuum: Journal of Media and Cultural Studies 523; Marty Klein, 'Pornography: What men see when they watch' in Peter Lehman (ed), *Pornography: Film and culture* (Rutgers University Press 2006).

53 Loftus (n 51).

54 Feona Attwood, 'What do people do with porn?' (2005) 9 Sexuality and Culture 65; Karen Ciclitira, 'Researching pornography and sexual bodies' (2002) 15 Psychologist 191.

55 Gert Martin Haldand Neil M Malamuth, 'Self-perceived effects of pornography consumption' (2008) 37 Archives of Sexual Behavior 614.

56 Melinda Wenner Moyer, 'The Sunny Side of Smut' (*Scientific American,* 1 July 2011) <https://www.scientificamerican.com/article/the-sunny-side-of-smut/> accessed 24 September 2022; Robert Bauserman, 'Sexual aggression and pornography: A review of correlational research' (1996) 18 Basic and Applied Social Psychology 405.

57 ibid.

58 US Attorney General, *Commission on Pornography: Final Report* (US Government Printing Office 1986).

59 Moyer (n 56).

60 ibid.

This has, of course, been debated. When rapists imitate porn during their sexual assaults, they may be committing copycat crimes.[61] The United States Attorney General's Commission on Pornography found that most research unanimously depicts a link between porn and sexual assault.[62] This research suffers from the flaws mentioned above and therefore, does not appear to be reliable. Further, as previously discussed, by prohibiting pornography, the State ignores women's agency to consume such material themselves.

It has been argued that viewing pornography is akin to smoking cigarettes.[63] Smoking is one of the many factors which leads to lung cancer and is widely understood to be harmful in that respect. The government is allowed to regulate its use, and similarly, advocates of the ban demand prohibition of pornography.[64] But the government cannot stop adults from making a free and fully informed choice to smoke despite its perceived harm, and should be similarly powerless to fully outlaw pornographic content. The government can distribute information regarding the consequences of such viewership, akin to the warnings on a cigarette box. The government may even ban public viewership, analogous to the ban on public smoking. But, it cannot stop adults from making these choices from the privacy of their homes.[65]

This is not to say that pornography is not in need of regulation.

First, the effects of youth access to pornographic content are concerning.[66] Such content may offend or disturb children, especially when seen unwillingly.[67] Children are also more likely to be unable to separate real life from fantasy and may believe that sexual acts in pornography are acceptable in real life. Therefore, they are likely to adopt such behaviours.[68]

61 Thompson, Chaffee and Oshagan (n 44).

62 ibid; US Attorney General (n 58).

63 Caroline West, 'Pornography and Censorship' (*The Stanford Encyclopedia of Philosophy*, Fall 2018) <https://plato.stanford.edu/archives/fall2018/entries/pornography-censorship/> accessed 26 September 2022.

64 ibid.

65 Chakrabartty (n 5).

66 Michael Flood and Clive Hamilton, 'Regulating Youth Access to Pornography' (*The Australia Institute,* 2003) <https://eprints.qut.edu.au/103829/1/__qut.edu.au_Documents_StaffHome_StaffGroupR%24_rogersjm_Desktop_M%20Flood_AAA%20PDF%20but%20public%20-%20Copies_Flood%20Hamilton%2C%20Regulating%20youth%20access%20to%20porn%2003.pdf> accessed 21 December 2021 (Flood and Hamilton (I)); Michael Flood and Clive Hamilton, 'Youth and Pornography in Australia: Evidence on the extent of exposure and likely effects' (*The Australia Institute,* 2002) <https://eprints.qut.edu.au/103421/1/__qut.edu.au_Documents_StaffHome_StaffGroupR%24_rogersjm_Desktop_M%20Flood_AAA%20PDF%20but%20public%20-%20Copies_Flood%20Hamilton%2C%20Youth%20and%20pornography%20in%20Australia%2003.pdf> accessed 21 December 2021 (Flood and Hamilton (II)); Dick Thornburgh and Herbert S Lin, *Youth, Pornography, and the Internet* (National Academy Press 2002).

67 Thornburgh and Lin (n 66).

68 Flood and Hamilton (I) (n 66); Flood and Hamilton (II) (n 66).

Second, when sex is mixed with violence in sexually explicit content, it has several negative social impacts.[69] After watching violent pornography, respondents have shown a tendency to display aggression against women.[70] Significantly, it has been shown that even non-rapists may be aroused by videos depicting rape, especially if the victim seems to enjoy it.[71] Not only does this perpetuate rape myths, it is incredibly dangerous if these ideals are adopted in reality. Thus, violent pornography has direct negative impacts on society.[72]

Third, child pornography needs to be unequivocally prohibited. The ill-effects of such material have been sufficiently established over past scholarship.[73]

Therefore, though non-violent pornography need not be banned, regulation in content is definitely required to allow for minimal infringement on the right of privacy.

C. Lesser restrictive measures: Content moderation

The Government's porn ban is an *ultra vires* measure which does not translate into real time change. Rather, this should be replaced by policies which fulfil such aims using methods which minimally infringe the right to privacy.

First, youth access to pornography must be regulated through filters applied by ISPs.[74] Adults may choose to opt out of filtering by contacting their ISPs. Filters operate in real time using 'blacklists' or 'whitelists' to regulate access to a website requested by a computer.[75] Parents may also add additional filters to their computers, according to their religious or moral values. In such cases, verification of age is easy when internet is accessed through the mobile. While buying a SIM card, users must already present documents for identity verification.[76] Such documents can also be used for age-verification. This would allow for

69 Neil M Malamuth and Edward Donnerstein, *Pornography and Sexual Aggression* (Academic Press 1984); Edward Donnerstein and Leonard Berkowitz, 'Victim Reactions in Aggressive Erotic Films as a Factor in Violence Against Women' (1981) 41(4) Journal of Personality and Social Psychology 710.

70 Steven Alan Childress, 'Reel "Rape Speech": Violent Pornography and the Politics of Harm' (1991) 25(1) Law and Society Review 177.

71 West (n 63).

72 Ronald Weitzer, 'Pornography's Effects: The Need for Solid Evidence' (2011) 17 Violence Against Women 666; Moyer (n 56).

73 Philip Jenkins, *Beyond Tolerance: Child Pornography on the Internet* (New York University Press 2018); Carissa Byrne Hessick (ed), *Refining Child Pornography Law: Crime, Language, and Social Consequences* (University of Michigan Press 2018).

74 Terry Schilling, 'How to Regulate Pornography' (*First Things,* 2019) <https://www.firstthings.com/article/2019/11/how-to-regulate-pornography> accessed 21 December 2021; Flood and Hamilton (I) (n 66).

75 Flood and Hamilton (I) (n 66).

76 Pranay Parab, 'How to buy a sim card in India' (*NDTV,* 25 December 2017) <https://gadgets.ndtv.com/telecom/features/how-to-buy-sim-card-india-mobile-connection-prepaid-postpaid-1791953> accessed 21 December 2021.

an opt-out system for mobile phones, where phones utilised by majors will be opted out of the filtration process, allowing for stronger regulation. Significantly, the cost of ISP filtering content, an action that many ISPs already undertake to ban currently prohibited content,[77] is low and will be invisible to most consumers.[78] Some types of ISPs filtering have also been proven highly effective in Australia.[79]

A practical problem, however, that may arise in such cases is when purchase of a SIM card may be made for minors. Often, parents or guardians buy SIM cards for their minor children to circumvent the majority age threshold. This is also easily remedied. An option can be provided in the forms regarding whether the phone *may* be used by a minor, and hence must be regulated. This information can later be used by ISPs to filter content for that device.

However, regulation of internet provided for homes may not be that simple. Often, internet may be used by both adults and minors in the same house. Therefore, when adults opt-in for mature content, they risk their child accessing such content. In such cases, requests to opt into such content must be accompanied with age verification walls. Such age verification must be carried out every time such an opt-in is attempted.[80] Alternatively, in such cases, the website itself must implement age verification methods. This may be done through credit card payments or mandating uploads of identification specifying date of birth.[81] Varying parental controls such as time limits, children's mode etc. may also be provided to parents. Unfortunately, the effectiveness of such technologies is mixed, and they may further prove inconvenient to many users.[82] Filters can also be used to universally regulate violent and non-consensual pornography.

The effective utilisation of filters depends on a timely addition to 'blacklists' of banned content and websites.[83] Thus, heavy fines should be levied on ISPs for outdated filtering systems. A number of digressions may even lead to a revocation of licences. ISPs must be liable to undertake methods to proactively identify and remove access to unwanted

77 Scroll staff, 'Internet Service Providers in India have blocked the most number of websites: Study of 10 countries' (*Scroll.in,* 25 April 2018) <https://scroll.in/latest/876817/internet-service-providers-in-india-have-blocked-the-most-number-of-websites-study-of-10-countries> accessed 21 December 2021.

78 Thornburgh and Lin (n 66) [293].

79 ibid [285].

80 Flood and Hamilton (I) (n 66) [17].

81 ibid [20]. Here, necessary privacy regulation with respect to processing and storing personal and sensitive personal data must be mindfully imported in accordance to the current regime laid down under the Information Technology Act 2000 and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011, along with any upcoming data protection legislations.

82 Thornburgh and Lin (n 66) [342].

83 Flood and Hamilton (I) (n 66) [15].

content.[84] Prompt laws and decisions regarding categorisation of sites to be blacklisted must be made. This may call for the creation of a national body under the Department of Telecommunications, much like the Censor Board. This body must also ensure the quick and effective removal of mirror sites and work towards countering technology, such as virtual private networks ('VPNs'), which render filters useless.

Additional enforcement strength can now be linked under Sections 3 and 4 of the Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021 ('Intermediary Rules').[85] Under the rules, intermediaries and ISPs, for instance, would be required to takedown content that is identified as unlawful by a court of law or an appropriate government agency.[86] The 'safe harbour' protection available to intermediaries also depends entirely upon their adherence to the said statutory obligations.[87] To exact further compliance, pornographic websites and ISPs can be required to publish periodic reports similar to those published every month by 'significant social media intermediaries', noting the complaints registered, the action taken thereof and the content removed or disabled as part of their proactive monitoring of their platforms. Since these reports have already been sought to be implemented for a specific class of intermediaries, the requirements may be easily extended to both pornographic websites and ISPs, who similarly experience user traffic as may be notified by the Central Government.

Second, there should be a mandatory installation of an 'instant help' feature on all porn sites.[88] This may be an extension (also called a plug-in) on a browser, an icon on search engines or other websites, or a button on email sites for objecting and reporting particular mails. This can provide a fast and easy solution for reporting problematic material on the internet by directing users to appropriate authorities.[89]

Studies have proven that both men and women express concerns about violent and degrading pornography, and are frequently disgusted by it.[90] Children and youth have expressed concerns about easy access to pornography.[91] Thus, by allowing such users to report these problems to the police or other authorities, such material can be easily removed. Generally, this method has been helpful in reducing child pornography.[92]

Third, the development of web-crawlers must be encouraged. Recent developments have shown that this technology could be effective in finding child pornographic content.

84 ibid [18].

85 See discussions in Part IV.

86 ibid.

87 ibid.

88 Thornburgh and Lin (n 66) [322-326].

89 ibid.

90 Loftus (n 51) [xii].

91 Flood and Hamilton (II) (n 66) [xi].

92 Thornburgh and Lin (n 66) [322-326].

Currently, it can scan one hundred and fifty pages per second.[93] Developments in this field should be incentivised to help create similar technology to eliminate violent pornographic content. Additionally, the unique remedy of dynamic injunctions must be increasingly relied upon as a substitute for simply banning a problematic website. Often websites which are blocked or banned resurface with different IP addresses or URLs, circumventing the specific nature of their injunctions. Dynamic injunctions, on the other hand, allow the right-holder to extend the main injunction order against all mirror websites providing access to the infringing content that were the subject of the main injunction.[94]

Last, it is imperative to realise that despite all efforts, some unwanted pornographic content will slip through the cracks. Therefore, children and adults ought to be prepared for such exposure. It is imperative to make sex education compulsory for school students.[95] Children must be taught media literacy and distinction of online depiction and real life.[96] This is an optimal place to combat rape myths perpetuated by society.[97] Awareness campaigns for parents should also be conducted.[98] Effectiveness of technology such as filters ought to be communicated to parents.[99]

III. Porn Ban and Equality

The SC has often deliberated[100] upon the relationship between Article 14 and Article 21 of the Constitution, noting once that:

> Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must

93 The Canadian Press, 'New web crawler being used to detect and track child pornography' (*CTV News,* 17 January 2017) <https://www.ctvnews.ca/sci-tech/new-web-crawler-being-used-to-detect-and-track-child-pornography-1.3244876> accessed 21 December 2021.

94 *UTV Software Communications Ltd v 1337x.to* 2019 SCC OnLine Del 8002– this was the first dynamic injunction issued in India against websites hosting torrent versions of copyrighted cinematographic films.

95 Biswajit Bhattacharya, 'Regulate pornography, don't obliterate it' (*The New Indian Express,* 25 March 2017) <https://www.newindianexpress.com/thesundaystandard/2017/mar/25/regulate-pornography-dont-obliterate-it-1585921.html> accessed 21 December 2021.

96 VC Strasburger and BJ Wilson, *Children, Adolescents, & the Media* (Sage 2002).

97 Mike Allen and others, 'The role of educational briefings in mitigating effects of experimental exposure to violent sexually explicit material: A meta-analysis' (1996) 33(2) Journal of Sex Research 135.

98 Thornburgh and Lin (n 66) [225-234].

99 ibid [305-310].

100 See *Maneka Gandhi v Union of India* (1978) 1 SCC 248; *EP Royappa v State of Tamil Nadu* (1974) 4 SCC 3; *Shayara Bano v Union of India* (2017) 9 SCC 1.

> be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.[101]

Hence, it is apparent that if the law is to protect the sexual privacy of citizens, then it must remain *intra vires* to Article 14 of the Constitution as well.

Article 14 of the Constitution grants persons the right to equality in all actions of the State. For any discrimination by the State to be *intra vires,* it must satisfy two preconditions: (1) there must be intelligible differentia which distinguishes those discriminated against from the rest of the group, and (2) such differentia must have a rational nexus to the State's objectives.[102] Essentially, there must be a basis for the classification undertaken, which, in turn, must further the aim pursued by the State.[103]

Out of the 857 porn sites directed to be blocked, the Government had supposedly identified 827 sites as containing pornographic material, and thus, directed ISPs to block these sites. Per the Department of Telecom, this is 'for the compliance of the Hon'ble High Court order'.[104] The High Court, in turn, derives the list of 857 websites from a notification issued by the Government in 2015 which noted that these websites must be prohibited as their content infringed morality and decency.[105] It is significant to note, however, that in the present case, the High Court has directed the Government to ban sexually explicit pornographic material and not all apparent immoral or indecent material. The purpose of the ban itself is to prevent sexually explicit material from corrupting the minds of children.[106] ISPs are directed to block obscene, electronic material 'containing sexually explicit act or conduct and also publishing or transmitting of material depicting children in sexually explicit act or conduct'.[107] Due compliance of the same is the onus of the Government.[108] Thus, it is clear that the intelligible differentia distinguishing websites must keep in mind the existence of pornographic content and the interests of vulnerable children. However, the Government's porn ban is an arbitrary and illusory measure because it is without rationale, excessive, and lacks effectiveness.[109] This measure lacks any intelligible differentia or rational nexus and thus, infringes Article 14.

First, contrary to what the Government has claimed, all of the blocked sites do not

101 *Royappa* (n 100) [85].

102 See *Navtej Singh Johar v Union of India* AIR 2018 SC 4321.

103 ibid.

104 Tech Desk, 'Here is the Full List of 827 Porn Websites Blocked by DoT' (*The Indian Express,* 29 October 2018) <https://indianexpress.com/article/technology/tech-news-technology/here-is-the-full-list-of-827-porn-websites-banned-by-the-dot-5421127/> accessed 21 December 2021.

105 *In the Matter of, Incidence of Gang Rape in a Boarding School* (n 1) [19].

106 ibid [20].

107 ibid [21(i)].

108 ibid [21(iii)].

109 Chakrabartty (n 5).

contain pornographic material. On the list are sites such as 'collegehumour.com',[110] a parody site, and 'barstoolsports.com',[111] a site satirising sports. Another site, 'non-vegjokes.com', contains only sexually implicit jokes but no pornographic content.[112] Thus, there exists no rationale to ban these particular sites for having *pornographic material which corrupts the minds of children*.[113]

Second, no reason is provided for banning of some pornographic sites while letting others, such as 'ijavhd', 'PornHat', 'Beeg.porn', and '18porn' flourish. Surely, if the goal of the prohibition is to safeguard children from pornography, no website containing such material must persist.

Further, it is also notable that in its statement, 'Pornhub', which has been banned, has claimed that it uses its larger financial resources to ensure that the porn accessed on its website is safe and legal.[114] The website contains tools for parental control, a non-consensual takedown page, and strict terms and conditions. These resources are conspicuously absent in sites with less financial resources, many of which have not been prohibited.[115] Thus, Article 14 is infringed as there is an arbitrary, unreasonable distinction as to which websites have been banned.

Last, it must be noted that the porn ban is largely ineffective and hence, fails in its objective of safeguarding the interests of children. Soon after the ban, sites such as 'Pornhub' and 'Redtube' were back in business by tweaking their website names and creating mirror sites. By changing its domain name to 'Pornhub.org', the company escaped the stringent scrutiny on '.com' sites.[116] Further, many users continued to access porn using simple browsing techniques, such as the use of Tor networks, free online VPN,[117] Google

110 Tech Desk (n 104).

111 ibid.

112 Abhinav Chandrachud, 'Who decides what pornography to ban? '(*Bloomberg Quint,* 10 February 2019) <https://www.bloombergquint.com/opinion/who-decides-what-pornography-to-ban> accessed 21 December 2021.

113 Mayank Jain, 'Even if India wanted to ban porn, could it actually do it?' (*Scroll.in,* 4 August 2015) <https://scroll.in/article/746046/even-if-india-wanted-to-ban-porn-could-it-actually-do-it> accessed 21 December 2021.

114 Anthony Cuthbertson, 'Porn Ban in India: Pornhub Finds Way to Dodge Country's Block of Adult Websites' (*The Independent,* 31 October 2018) <https://www.independent.co.uk/life-style/gadgets-and-tech/news/porn-ban-pornhub-mirror-sex-websites-block-india-a8609071.html> accessed 21 December 2021.

115 ibid.

116 IANS, 'Despite ban, porn sites back by tweaking their portal names' (*National Herald,* 29 September 2019) <https://www.nationalheraldindia.com/india/despite-ban-porn-sites-back-by-tweaking-their-portal-names> accessed 21 December 2021.

117 Cuthbertson (n 114).

DNS servers[118] etc. Post the ban, consumption of porn in India has spiked.[119] According to Pornhub statistics, India continues to be the third-largest porn watching country in the world.[120] The lack of stringent cyber-security measures following the porn ban, has, in effect, banned certain sites, which may not have the financial resources to resurrect, but has not actualised such a ban through the use of dynamic injunctions or filtration lists. Thus, it is clear that when read with the deliberation on the porn ban and sexual privacy, the ineffectiveness of the porn ban only serves to heighten the disproportionality of the measure, which denies adults sexual privacy in their own homes. When an action is excessive and disproportionate, it is manifestly arbitrary and violative of Article 14, as noted by the Apex Court in *Shayara Bano v Union of India.*[121]

Thus, the current porn ban infringes the right to equality recognized under Article 14. It is manifestly arbitrary in its distinction of the websites worthy of remaining operational and ones which are forced to close shop. Arguably, a total prohibition is meaningless as not all porn is dangerous.[122] Therefore, it is essential to ban pornographic content which is actually detrimental to society and focus government resources on strict enforcement of those cyber security measures. This would ensure that the regulation satisfies the test of Article 14 of the Constitution.

IV. Porn Ban and Sexual autonomy

Obscenity is infamously governed by Victorian-era style legislative provisions contained across six different statutes - the Constitution, the Indian Penal Code, 1860 ('IPC'), the Information Technology Act, 2000 ('IT Act'), the Protection of Children from Sexual Offences Act, 2012 ('POCSO'), and the Indecent Representation of Women (Prohibition) Act, 1986 ('IRWPA').

The Government has been retroactively infused with the authority to regulate obscenity under Article 19(2) of the Constitution. As a ground for imposing reasonable restrictions on the exercise of the right to freedom of speech and expression under Article 19(1)(a), obscenity has been read into the phrase 'decency or morality' by the SC.[123] Over the years, these three words have absorbed various colours from across the world, each supplementing

118 India Today Tech, 'Torrent, Porn sites blocked on Jio, Airtel? Yes, but in practice no as users access them with simple tricks' (*India Today,* 9 January 2019) <https://www.indiatoday.in/technology/features/story/porn-websites-blocked-in-india-but-users-access-them-with-simple-tricks-1423290-2019-01-04> accessed 21 December 2021.

119 Priyanka Chandani, 'Porn sites may be banned in India but consumption of porn has only spiked' (*Deccan Chronicle,* 30 August 2020) <https://www.deccanchronicle.com/sunday-chronicle/cover-story/280820/pornographic-websites-may-be-banned-in-india-but-consumption-of-porn.html> accessed 21 December 2021.

120 ibid; see Part II.

121 *Shayara Bano* (n 100) [101].

122 See Part II.

123 See Part IV.A.

or overriding the other.[124]

Within Section 292 of the IPC, obscenity is defined as any article, including a written representation or a physical object which 'is lascivious or appeals to the prurient interest' or if, taken as a whole, produces an effect 'such as to tend to deprave and corrupt persons' who are likely to interact with the article. The criminalization activates upon the actual or attempted sale, hire, distribution, or public exhibition of obscene articles. It also extends to the intentional possession or import or export, whether knowing or while having reasons to believe so, of such articles for the purposes of the same. Additionally, an individual receiving profits from a business or advertising any person engaged in the production, purchase, storage, or circulation, whether knowingly or while having reasons to believe so, of obscene articles may also be charged under this provision. However, any such article which serves a 'public good', such as scientific, literary, artistic, or other generic value or is kept or used for *bona fide* religious purposes, may be exempted from illegality.[125] Further, Section 293 of the IPC envisages higher criminality for committing such acts against a person under the age of twenty years.

Administering the cyberspace domain, the IT Act governs all offences occurring over telecommunication networks. This special legislation, overriding the IPC in this regard,[126] was adopted keeping in mind the prevalence and ease with which the domestic and transnational production and transmission of obscene material, and notably, pornography, was affected.[127] Issues relating to territorial jurisdiction, content moderation, and intermediary liability arose to occupy the docket of key policy discourse. Without going into an extensive analysis of the substantive and procedural provisions of the IT Act,[128] spotlight may be drawn to provisions criminalizing the publication and transmission of obscene materials,[129] sexually explicit material,[130] and material depicting children committing sexually explicit acts.[131]

The IT Act, along with the rules issued therein,[132] also regulates obligations upon intermediaries with respect to obscene content hosted on their internet servers. Section 69A mandates the compliance of intermediaries with orders issued by the Central or

124 ibid.

125 Indian Penal Code 1860, s 292, exception 6 (IPC).

126 *Sharat Babu Digumarti v Government of NCT of Delhi* 2016 SCCOnline SC 1464.

127 Apar Gupta, *Commentary on Information Technology Act: With Rules, Regulations, Orders, Guidelines, Reports and Policy Documents* (Lexis Nexis 2015).

128 NS Nappinai, *Technology Laws Decoded* (Lexis Nexis 2017).

129 The Information Technology Act 2000, s 67 (IT Act).

130 ibid, s 67B.

131 ibid, s 67A.

132 For a list of the several rules formulated under the IT Act, see India Code, 'Information Technology Act, 2000' <https://www.indiacode.nic.in/handle/123456789/1999> accessed 18 May 2021.

State Government, or agencies authorized thereby, to block access to the public for any information that may be considered against the sovereignty, integrity, defence or security of India, the maintenance of friendly relations with foreign States or public order, and the prevention of cognizable offences. However, since the exceptions of decency and morality of Article 19(2) of the Constitution have not yet been incorporated within Section 69A, the Central or State Government may not directly order a ban on pornographic websites under the IT Act.[133] Owing to the notorious circumstances which led to the decision in *Avnish Bajaj v State*,[134] a 'safe harbour' provision for intermediaries was incorporated under Section 79, which absolves them of liability arising out of 'third party information' hosted by them on their own platforms. Provided that the intermediary itself played no role in initiating, selecting, or promoting the impugned information, due diligence was observed, and that it had taken the content down after acquiring 'actual knowledge'[135] of its illegality. In February 2021, the Ministry of Electronics and Information Technology ('MEITY') also notified the Intermediary Rules. The Intermediary Rules seek to regulate, *inter alia*, intermediaries and social media intermediaries. To this effect, it also creates a separate class for 'significant social media intermediaries', i.e. those with over five million registered users.[136] Most contentiously, the Intermediary Rules amend the powers of the Central or State Government by incorporating Article 19(2) exceptions as grounds for ordering the blocking of websites under Section 69 of the IT Act, thereby providing legislative sanction to the Executive to order porn ban without the need for a court order.[137] Further, in order to avail the 'safe harbour' protection described above, the Intermediary Rules supplant the

133 Under Section 69A of the IT Act, the Central Government is only permitted to issue an order for the blocking of content by any authorized government body or directed intermediary on six grounds:
'[1] interest of sovereignty and integrity of India, [2] defence of India, [3] security of the State, [4] friendly relations with foreign States or [5] public order or [6] for preventing incitement to the commission of any cognizable offence relating to above however, do not encompass obscene or indecent content as one of the grounds legitimizing such an order'.
See the IT Act, s 69A(1).

134 In 2004, an obscene video was listed on 'www.bazeee.com' (now, 'www.ebay.in') which contained footage of two individuals engaging in sexual activity. After the Delhi High Court convicted Avnish Bajaj, the Managing Director of the website, under Section 292 of the IPC and Section 67 of the IT Act, an appeal was preferred to the Supreme Court. In 2012, the Supreme Court held that Avnish Bajaj could not be held vicariously liable under the IT Act since the company was not arraigned as one of the accused. Post the judgement, Section 79 of the IT Act was introduced to provide a 'safe harbour' for intermediaries against liability for third party content. See T Prashant Reddy, 'Back to the Drawing Board: What Should be the New Direction of the Intermediary Liability Law' (2019) 1 NLUD Journal of Legal Studies 38, 46.

135 In 2015, the Supreme Court of India in *Shreya Singhal v Union of India* read down the term 'actual knowledge' and explained that such knowledge on the part of intermediaries can only be attributed to an intermediary provided there was a court order or a notification from an appropriate governmental body intimating and directing the intermediary to takedown certain objectionable content from their platform. See *Shreya Singhal v Union of India* (2015) 5 SCC 1.

136 The Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules 2021, r 2(v) (Intermediary Rules).

137 ibid, r 3(1)(d).

erstwhile Information Technology (Intermediary Guidelines) Rules, 2011 with additional requirements, such as (1) periodically notifying users of changes in privacy policy, terms of user agreement etc.,[138] (2) removing unlawful content within thirty-six hours[139] from receiving a court order or within twenty four hours[140] from receiving a complaint from an individual or a person on their behalf. Significant social media intermediaries, on the other hand, are also obligated to enable the identification of the first originator of unlawful content, provided a requirement to do so by a court or a competent authority under Section 69 of the IT Act.[141] As opposed to the statement by MEITY to reroute these obligations to only apply to content related to 'terrorism and child pornography',[142] the Intermediary Rules merely add 'offence relating to the above or in relation with rape, sexually explicit material or child sexual abuse material'[143] as an additional ground. Lastly, significant social media intermediaries must also deploy automated tools for the identification and moderation of content that depicts 'any act or simulation in any form depicting rape, child sexual abuse' or content which is exactly identical to information that has previously been removed or disabled.[144]

However, this changes the role of an intermediary from that of a passive transmitter of information by imposing a Hobson's choice between failing to effectively administer content filtering mechanisms and gaining 'safe harbour' protections.[145] In effect, not only does it risk the imposition of an obligation to adopt a technologically infeasible requirement,[146] but also introduces an overly cautious, and potentially, free speech restricting attitude upon intermediaries.[147]

Inter alia, the POCSO criminalizes the participation of a child, anyone aged below eighteen years,[148] in a real or simulated enactment of sexual intercourse, including *sans*

138 ibid, r 3(1)(c).

139 ibid, proviso to r 3(1)(d).

140 ibid, r 3(2)(a)-(b).

141 ibid, r 4(2).

142 Surabhi Agarwal, 'In-Built Automated Filering Only for Child Porn: MeitY's Draft Rules' (*The Economic Times,* 12 February 2020) <https://economictimes.indiatimes.com/tech/ites/in-built-automated-filtering-only-for-child-porn-meitys-draft-rules/articleshow/74091469.cms?from=mdr> accessed 21 December 2021.

143 Intermediary Rules (n 136), proviso to r 4(2).

144 ibid, r 4.

145 Vasudev Devadasan, 'Intermediary Guidelines and the Digital Public Sphere' (*Indian Constitution Law and Philosophy Blog*, 5 April 2021) <https://indconlawphil.wordpress.com/2021/04/05/intermediary-guidelines-and-the-digital-public-sphere-automated-filtering/> accessed 21 December 2021.

146 Jack M Balkin, 'Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation' (2018) 51 UCDLR 1149.

147 For a comprehensive legal challenge against the Intermediary Rules, see *Live Law Media Private Limited v Union of India* WP (Civil) No. 6272 of 2021.

148 Protection of Children from Sexual Offences Act 2012, s 2(d) (POCSO Act),.

penetration, and the overall indecent or obscene portrayal of a child.[149] To this effect, the production, facilitation, and circulation of child pornography is outlawed.[150] Additionally, Section 15 of the POCSO also accounts for the possession of child pornographic material with the intent to distribute, in a manner except for the purposes of reporting or presenting evidence and for commercial exploitation of the same. However, the POCSO is not devoid of impracticalities. Teenagers, or adolescents below the age of eighteen, are stripped off of their competence to consent, thus rendering common practices such as 'sexting' amongst adolescents illegal.[151] Recently, the Protection of Children from Sexual Offences (Amendment) Act, 2019 ('POCSO Amendment Act') was also passed by both Houses of the Parliament.[152] The POCSO Amendment Act expands the definition of child pornography to include cases of computer simulated or software manipulated images or films portraying persons indistinguishable from an actual child and those depicting adults pretending to be a child in a sexually explicit context.[153] It goes so far as to criminalize the production of cartoons and pornographic anime, popularly known as 'hentai',[154] which involve the participation of a child in sexual intercourse or its variants. In order to implement these amendments, the Government also notified the Protection of Children from Sexual Offences Rules, 2020 ('POCSO Rules'). *Inter alia*, it prescribes a procedure for the mandatory reporting of child sexual abuse material to a Special Juvenile Police Unit, the police or the cybercrime portal,[155] and for setting up a sensitization training and orientation programme for law enforcement officers dealing with instances envisaged under the Act.[156] Additionally, age-appropriate educational curriculums have been set up for children to educate them about personal safety and privacy, measures to protect their physical and virtual identity, and to eschew from occurrences of sexual offenses.[157]

The IRWPA was enacted amidst an acute demand for action against the indecent portrayal of women in mainstream media.[158] Originally, it targeted advertisements, literary publications, and print illustrations, but with the introduction of the Indecent Representation

149 ibid, s 11(vi) and s 13.

150 ibid, explanation to s 13.

151 ibid, s 11(i) and s 11(ii).

152 The Hindu, 'Rajya Sabha pass POCSO (Amendment) Bill, 2019' (*The Hindu,* 24 July 2019) <https://www.thehindu.com/news/national/rajya-sabha-passes-pocso-amendment-bill2019/article28700223.ece> accessed 21 December 2021.

153 The Protection of Children from Sexual Offences (Amendment) Act 2019, s 2(da).

154 On the harms of such forms of sexualization of minors, see Hedeel Al-Alosi, *The Criminalization of Fantasy Material: Law and Sexually Explicit Representations of Fictional Children* (Routledge 2018).

155 Protection of Children from Sexual Offences Rules 2020, r 11.

156 ibid, r 4-6.

157 ibid, r 3.

158 See Vandita Khanna, 'About Postmodern Feminism and the Law: A Postmodern Feminist Critique of the Indecent Representation of Women (Prohibition) Act, 1986' (2017) 12 NALSAR Student Law Review 59.

of Women (Prohibition) Bill, 2012 ('IRWP Bill'), the IRWPA is intended to address the growing issue of indecent objectification within digital media,[159] such as Short Message Service ('SMS') and Multimedia Messaging Service ('MMS').[160] While the IRWP Bill has been passed by the Rajya Sabha, it is yet to be formalized as law by the Lok Sabha. Nonetheless, the IRWPA and IRWP Bill ignite crucial discussions for the current analysis.

'Indecent representation' was initially defined as a 'depiction in any manner of the figure of a woman, in such a way so as to have the effect of being indecent, derogatory or denigrating to women, or is likely to deprave, corrupt or injure the public morality or morals.'[161] Notably, this definition is cloaked under the one for obscenity since the IRWPA adopts a circular definition for the term 'indecent'. Notwithstanding the SC's passing attempt in *Ajay Goswami v Union of India* to clarify the difference between obscenity and indecency by holding that 'all sex-oriented materials are not always obscene or even indecent or immoral',[162] the distinction still remains clouded in ambiguity. In order to rectify the same, the IRWP Bill amends this definition to refer to any materials depicting women as 'sexual object[s]' in addition to materials which could be categorized as obscene.[163] However, neither of these definitions has escaped the repeated allegations of vagueness.[164]

Auxiliary criticism is mounted by Indian feminists who argue that oversensitivity for nudity[165] and conservative attitudes towards sexually assertive portrayals of women[166] may

159 'Law Against Indecent Representation of Women on Digital Platforms in the Works' (*The Wire,* 5 June 2018) <https://thewire.in/women/indecent-depiction-women-digital-platforms-punishable> accessed 21 December 2021.

160 Moushumi Das Gupta, 'Law Against Indecent Depiction of Women on Anvil; Will Cover WhatsApp, Snapchat, Instagram' (*The Hindustan Times,* 4 June 2018) <https://www.hindustantimes.com/india-news/soon-a-law-against-women-s-indecent-depiction-to-cover-whatsapp-snapchat-instagram-government/story-ZvoelLZsYLLLJAf5ZYU7wM.html> accessed 21 December 2021.

161 The Indecent Representation of Women (Prohibition) Act 1986, s 2(c).

162 *Ajay Goswami v Union of India* (2007) 1 SCC 143 [3].

163 The Indecent Representation of Women (Prohibition) Bill 2012, s 2(c).

164 Disha Chaudhari, 'Analysing the Indecent Representation of Women (Prohibition) Bill, 2012' (*Feminism in India,* 9 February 2017) <https://feminisminindia.com/2017/02/09/indecent-representation-women/> accessed 21 December 2021.

165 *Babban Prasad Mishra v PS Diwan* 2006 Cri LJ 3263. See also *PK Somanath v State of Kerala* 1990 Cri L J 542 and *Maqbool Fida Hussain v Raj Kumar Pandey* 2008 Cri LJ 4107 [99] (holding that mere nudity or sex cannot be regarded as *per se* obscene or indecent). But also, see *Jaykumar Bhagwanrao Gore v State of Maharashtra* 2017 SCC Online Bom 7283 (noting that an '[i]mage exhibiting penis is lascivious, so is covered under section 67 of the IT Act, which is bailable. The obscene image in the present case of erected handled penis is sexually explicit activity contemplated under 67A of the IT Act and hence, directly falls under Section 67-A of the IT Act').

166 See *Vinay Mohan Sharma v Delhi Administration* 2008 Cri L J 1672, which held that the sight of a low-cut blouse or a see-through gown that glimpses at the breasts of a woman is indecent to the extent that it shocks the conscience of the judiciary.

have the untoward effect of confusing sexual expression with obscenity.[167]

Evidently, the aforementioned legislative scheme cracks down on the commercial production of pornography, including consensual adult pornography that does not feature sexual violence. Thus, the porn industry in India is outlawed on the pretext that it produces 'an aggravated form of obscenity'.[168] Similar to the execution related to other legislative enactments and government policies, the judiciary plays a crucial role in interpreting and modifying the operation of these provisions. In the case of obscenity, the qualifications contained within judicial pronouncements have proved to be more important than the text of the statute itself.

A. Obscenity through the eyes of the Supreme Court of India

The obscenity saga in India began beyond the territory of erstwhile colonial India, before the benches of the House of Lords. In *R v Hicklin*,[169] Chief Justice Cockburn promulgated a standard for obscenity which was read verbatim into the *lex lata* of India by the SC in *Ranjit D Udeshi v State of Maharashtra* ('*Ranjit D Udeshi*'). Based on moral harm, rather than actual harm, the test enquired as to 'whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall'.[170] In that case, the SC also classified pornography as an 'aggravated form of obscenity',[171] in that the sole purpose of the same is to arouse sexual desire. However, the Court failed to delineate exactly what it meant by pornography and whether some pornographic depictions were permissible as opposed to others.

This test was then endorsed and clarified in subsequent decisions.[172] In some instances, obscenity was distinguished from vulgarity, explaining that while the former aroused feelings of disgust and revulsion, it was incapable of depravation and corruption in the manner defined under *Ranjit D Udeshi*.[173] This implied that some categories of pornographic content could be characterized as disgusting or repulsive, without necessarily being obscene. Yet, no such explicit illustration was posited. In other cases, the SC has vaguely detailed that terms such as 'prurient interest' referred to an 'excessive interest' in sexual matters, and that a mere reference or depiction of sex did not necessarily constitute obscenity.[174]

167 ibid.

168 *Ranjit D Udeshi v State of Maharashtra* (1965) 1 SCR 65[7].

169 *R v Hicklin* LR 2 QB 360 (1868).

170 ibid.

171 *Ranjit D Udeshi* (n 168) [7].

172 See *Chandrakant Kalyandas Kakoddar v State of Maharashtra* (1970) 2 SCR 8.

173 *Samaresh Bose v Amal Mitra* (1985) 4 SCC 289.

174 The court in *Indian Hotel and Restaurant Association v State of Maharashtra* 2019 SCC OnLine SC 41 [84], picked up such a definition verbatim from the Concise Oxford Dictionary (10th edn, 1999). While dictionaries may be used for treaty interpretation, it is argued that definitions therein should not be considered as an end in themselves if no clarity is achieved upon adopting

While the illegality of child pornography and inappropriate exhibition of pornographic content to minors remained largely settled,[175] the increasing number of judicial precedents casted the status of adult pornography in India into an ocean of doubt.

Without substantive clarity on what constitutes obscenity, procedural edicts on how to identify obscenity are nugatory. Nevertheless, the SC in *Ranjit D Udeshi* accepted the test for the determination to revolve around those 'whose prurient minds take delight and secret sexual pleasure from erotic writings'.[176] Thus, it was individuals that were the most susceptible to falling prey to depravity against whom materials were to be adjudged as obscene.

In *Samaresh Bose v Amal Mitra*,[177] the SC then extended the scope of the application of judicial mind, and stated that a judge was to place himself in the position of the author and the reader (of every practical age group) to 'dispassionately' determine whether the impugned material was obscene. However, in *Ajay Goswami v Union of India* ('*Ajay Goswami'*),[178] it was clarified that a prohibition could not be effected in a manner that resulted in the censorship of content according to the most vulnerable denominator (children and adolescents, in that case), as this would deprive the adult population of entertainment permissible under the decency and morality norms of the society. Bearing the fruit of the seed sown in *Ajay Goswami*, the SC in *Aveek Sarkar v State of West Bengal*,[179] finally deviated from the archaic *R v Hicklin* test, in favour of the 'Community Standards Test',[180] propounded by *Roth v United States*. Now, the determination followed from national contemporary standards rather than those of the most sensitive or vulnerable individuals. Thus, the concept of the 'reasonable man' was inducted.[181]

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another explanatory term.

175 See, *inter alia, Bachpan Bachao Andolan v Union of India* (2011) 5 SCC 1.

176 *Ranjit D Udeshi* (n 168) [28].

177 *Samaresh Bose* (n 173).

178 *Ajay Goswami v Union of India* (2007) 1 SCC 143.

179 *Aveek Sarkar v State of West Bengal* (2014) 4 SCC 257 [24].

180 See *Roth v United States* 354 US 476 (1957) –'The standard for judging obscenity, adequate to withstand the charge of constitutional infirmity, is whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest.'
Note, however, that the test laid down in *Roth v United States* was departed from in *Memoirs of a Woman of Pleasure v Massachusetts* 383 US 413 (1966) and *Miller v California* 413 US 15 (1973), the latter of which adopted a three-pronged test for the judicial determination of obscene depictions – '(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.'

181 On the 'un'reasonability of subsequent judicial interpretation, see, for instance, *DR Tuljapurkar v State of Maharashtra* (2015) 6 SCC 1, where the Supreme Court, while applying the Community Standards Test, contentiously held that – '[w]hen the name of Mahatma Gandhi

However, these tests have proven to be overbroad in their restriction to the effect of invalidating the right to profitably participate in and view pornography in India.

B. Can you be a pornstar in India?

In order to be a pornstar in India, it needs to be determined whether such a trade or profession is protected under Article 19(1)(g) of the Constitution, and if so, what is the degree of restriction that may be imposed on its operation.

1. Scope of the protective effect of Article 19(1)(g) and the restrictive effect of Article 19(6)

Article 19(1)(g) allows the right to practice any 'profession', 'occupation', 'trade', or 'business', which includes any activity undertaken for any purposes other than personal pleasure.[182] The purpose of incorporating an analogous scheme of classification is to holistically cover any modes or methods of exercising the right recognized under Article 19(1)(g).[183] Thus, any activity for which constitutional protection is claimed must fall under any of these labels.

For any activity that is protected under Article 19(1)(g), Article 19(6) prescribes three grounds of restrictions, (1) 'reasonable restriction' imposed in the 'interest of general public', (2) prescription of professional or technical qualification necessary for carrying out the activity, and (3) exclusion of privatization of an activity, in favour of state-run or state-funded operation.[184] Of relevance, the 'reasonable restriction' and 'interest of general

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is alluded or used as a symbol, speaking or using obscene words, the concept of "degree" comes in. To elaborate, the "contemporary community standards test" becomes applicable with more vigour, in a greater degree and in an accentuated manner. What can otherwise pass of the contemporary community standards test for use of the same language, it would not be so, if the name of Mahatma Gandhi is used as a symbol or allusion or surrealistic voice to put words or to show him doing such acts which are obscene.' For a further analysis of the existing shortcomings of *Aveek Sarkar*, see Gautam Bhatia, 'Obscenity: The Supreme Court Discards the Hicklin Test' (*Indian Constitutional Law and Philosophy Blog,* 4 February 2014) <https://indconlawphil.wordpress.com/2014/02/07/obscenity-the-supreme-court-discards-the-hicklin-test/> accessed 21 December 2021.

182 While each of these terms have been distinctly defined, there exist substantial overlaps between them. 'Profession' refers to an activity carried out by a person by virtue of a personal skill or qualification, usually after training to attain a specialization. Originally, 'profession' attempted to represent labor that was delivered intellectually, rather than physically. Understandably, this definition was expanded to include all such applications of training and vocation which could be said to manifest special knowledge. 'Occupation' refers to a continual and systematic indulgence of a 'profession' which forms the principal means of livelihood for an individual. 'Trade', on the other hand, refers generally to any profit-making activity, regardless of whether the same is the principal means of livelihood. It may include the buying and selling of goods, importing and exporting of goods, capital investing etc. Lastly, 'business' is the widest term which may subsume each of the previously mentioned terms. See generally, Durga Das Basu, *Commentary on the Constitution of India* (9th edn, LexisNexis 2017) 555-57.

183 Durga Das Basu (n 182) 557.

184 Constitution of India, art 19(6); *M/S Ramchand Jagadish Chand v Union of India* AIR 1963 SC

public' conditions mandate that a balancing exercise is conducted in order to proportionally curb the right of citizens to enjoy the freedom to partake in any commercial activity and the duty of the state to ensure that the interests of the masses are protected.[185] A restriction may be deemed as 'reasonable' if (1) it is designated to serve a legitimate state aim, (2) there is a rational nexus between the measure adopted and the purpose sought, (3) it does not suppress the exercise of the right in an arbitrary or excessive manner, beyond that which is required in public interest.[186] Herein, a determination of the public interest involves an analysis along the lines of public welfare,[187] public safety,[188] morality,[189] equitable distributions of necessities,[190] the fulfilment of the Directive Principles of State Policy[191] etc. Thus, an analysis of constitutionality under Article 19(6) involves determining whether (1) a law, (2) directly or proximately restricting (3) an activity which has been determined to fall under the constitutional protections of Article 19(1)(g), (4) reasonably restricts the same (5) pursuant to the interest of the general public.

2. Professions falling under the doctrine of *res extra commercium*

Nevertheless, even if an activity may be included under any of these heads under Article 19(1)(g), the same must be tested against the concept of *res extra commercium*. As clarified by the SC,[192] some trades and professions are categorized as inherently illegal, immoral or injurious to the health and welfare of the masses. Thus, there exists no vested right for citizens to practice or profess any trade or profession that has been classified under the concept of *res extra commercium*. Over the years, the SC has apprehended several activities under this category, namely, the manufacture and sale of intoxicating liquors,[193] over-the counter sale of acid,[194] or adulterated foods and beverages,[195] the trafficking of women and children,[196] gambling or betting[197] etc.

563.

185 *RC Cooper v Union of India* (1970) 1 SCC 248; *Nagar Rice & Flour Milling v N Teekappa Gowda* (1970) 1 SCC 575.

186 *Chintaman Rao v State of Madhya Pradesh* (1950) SCR 759; *State of Bihar v Project Uchcha Vidya Sikshak Sangh* (2006) 2 SCC 545.

187 *TB Ibrahim v Regional Transport Authority, Tanjore* AIR 1953 SC 79.

188 *State of Assam v Sristikar Dowerah* AIR 1957 SC 414; *Glass Chatons Importers & Users v Union of India* (1962) 1 SCR 862.

189 *State of Maharashtra v Himmatbhai Narbheram Rao* (1969) 2 SCR 392.

190 *Union of India v Messrs Bhana Mal Gulzari Maland* (1960) 2 SCR 627.

191 *Municipal Corporation of the City of Ahmedabad v Jan Mohammed Usmanbhai* (1986) 3 SCC 20 [19]-[20].

192 *State of Uttar Pradesh v Kartar Singh* AIR 1964 SC 1135.

193 *State of Kerala v Kandath Distillers* (2013) 6 SCC 573.

194 *Laxmi v Union of India* WP (Crl) No 129 of 2006.

195 *Andhra Pradesh Grain and Seeds Merchants' Association v Union of India* (1970) 2 SCC 71.

196 *Cooverjee B Bharucha v Excise Commissioner and the Chief Commissioner, Ajmer* AIR 1954 SC 220.

197 *State of Bombay v RMD Chamarbaugwala* AIR 1957 SC 699; see also, *Krishna Chandra v State*

For these activities, the ability to establish a trade or business in the same is considered a privilege granted by the State, rather than a right.[198] Therefore, these may be subjected to complete prohibition, provided that there are exceptional circumstances warranting the same.[199] Paradoxically, the power to prohibit the same is often sourced from the exception of public interest under Article 19(6) itself. To this effect, reasonable restriction may be extended to prohibition.[200] These may be implemented keeping in mind the nature and extent of social evil propagated by the same, the ratio of the harm caused by the activity to the harm by the prohibition of the same, and the least restrictive measures that may be adopted in public interest for this purpose.[201] However, these prohibitions cannot be implemented as an excuse for the lack of safeguards within the employment scheme of a sector or poor implementation of the same.[202]

In *Khoday Distilleries Ltd v State of Karnataka*, the SC held that 'a citizen has no right to […] carry on business of exhibiting and publishing pornographic or obscene films and literature,' as such activities were inherently pernicious that they were condemned by all civil communities.[203] Thus, regardless of whether they could be organized into a trade or a business, they would be classified as *res extra commercium*. In this manner, Article 19(1)(g) was interpreted as recognizing the right to practice or profess 'any occupation, trade or business which can be legitimately pursued in a civilized society being not abhorrent to the generally accepted standards of its morality.'[204] Resultantly, a porn industry, or a pornstar, would be branded a criminal since there exists no right to produce, participate in, or exhibit pornographic content for commercial purposes.

3. Crackdown of bar dancing in Maharashtra: An analogy

To understand the direction of regulatory policy recently adopted by the SC, an analogy may be constructed between the professions of pornstars and bar dancers. Both these professions exist in a similar sociological spectrum in terms how the lawmakers have perceived their negativities. Each of them has been viewed as (1) transgressing public morality, and has been classified as obscene, (2) being riddled with instances of human trafficking, and (3) resulting in the coercion, through blackmail or allurement, of vulnerable classes of women.[205] Thus, since the legislative policy adopted in response to

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of Madhya Pradesh AIR 1965 SC 307.

198 *State of Punjab v Devan Modern Breweries Ltd* (2004) 11 SCC 26.

199 *Har Shankar v The Deputy Excise and Taxation Commissioner* (1975) 1 SCC 737.

200 *Narendra Kumar v Union of India* AIR 1960 SC 430.

201 ibid.

202 *State of Maharashtra v Indian Hotel & Restaurants Assn* (2013) 8 SCC 519.

203 *Khoday Distilleries Ltd v State of Karnataka* (1995) 1 SCC 574.

204 ibid.

205 For a deeper understanding of the parallels between pornstars and bar dancers, see Jeffrey Escoffier, 'Porn Star/Stripper/Escort: Economic and Sexual Dynamics in a Sex Work Career' (2007) 53(1–2) Journal of Homosexuality 173-200.

each profession is similar, an analysis of the Supreme Court's retaliation in this respect naturally assumes importance.

Amidst a heated crime row, the Maharashtra Prohibition of Obscene Dance in Hotels, Restaurants and Bar Rooms and Protection of Dignity of Women (Working Therein) Act, 2016 ('Bar Dancers' Act') was passed, wherein an 'obscene dance' was defined as:

> […] (8) "obscene dance" means a dance that is obscene within the meaning of section 294 of the Indian Penal Code and any other law for the time being in force and shall include a dance, –
>
> (i) which is designed only to arouse the prurient interest of the audience; and
>
> (ii) which consists of a sexual act, lascivious movements, gestures for the purpose of sexual propositioning or indicating the availability of sexual accesstothe dancer, or in the course of which, the dancer exposes his or her genitals or, if a female, is topless; […][206]

This move by the Maharashtra State Government retracted a decision by the Bombay High Court,[207] subsequently affirmed by the SC,[208] which had declared amendments made to the Maharashtra Police Act, 1951 with similar effects unconstitutional. In fact, the Bar Dancers' Act imposed further restrictions and strictly narrowed the conditions under which the license to run such a bar could be obtained. Yet again, the SC, in 2018, struck down the same on the grounds that it grossly exceeded the permissible level of reasonable restriction that could be imposed under Article 19(6) of the Constitution.[209] The current debate regarding the imposition of undue restrictions upon the right to trade and profession of pornstars may be influenced by the opinions expressed in both these judgements.

In 2013, the SC struck down the amendments under Articles 14, 19(1)(a) and 19(1)(g). In doing so, the court noted that the prosecution had failed to prove any tangible harm caused due to the mere employment of women as bar dancers. While the prosecution asserted that these dances were likely to deprave, corrupt or injure public morality and that the participating women themselves were usually a 'vulnerable lot' which had been trafficked into bar dancing, the court condemned the lack of evidence backing the same. Thus, the court, while reiterating that the degree of scrutiny should be proportional to the degree of restriction, held that the restriction was neither in the interest of general public nor reasonable. The SC found that there was no factual foundation or evidence adduced to the 'direct and inevitable effect' that bar dancing itself was likely to deprave public

206 The Maharashtra Prohibition of Obscene Dance in Hotels, Restaurants and Bar Rooms and Protection of Dignity of Women (Working Therein) Act 2016, s 2(8).

207 *Indian Hotel & Restaurants Assn v State of Maharashtra* (2006) 3 Bom CR 705.

208 *State of Maharashtra v Indian Hotel & Restaurants Assn* (2013) 8 SCC 519.

209 *Indian Hotel & Restaurants Assn v State of Maharashtra* WP (Civil) No 576 of 2016.

morality. It also categorically rejected that bar dancing could be classified as *res extra commercium*, and thus, affirmed that it was protected under Article 19(1)(g). Further, the court highlighted that a systemic rectification of the implementation of existing safeguards, such as the rules prescribed under the Maharashtra Police Act, 1951 could easily eradicate each of the social issues that had been posited by the prosecution. Thus, a prohibition also did not meet the test of necessity and proportionality. On the socio-economic implications of the Amendment, the court also noted that it 'lead to the unemployment of over 75,000 women workers', galvanizing a resort to prostitution for the maintenance of a basic standard of living.

The SC, in its 2018 decision, took the position that while it cannot be doubted that a prohibition on obscene dances would be in public interest, the State could not itself foist a practice, not ordinarily considered immoral by fluctuating societal standards, as immoral according to its own notion of morality. In examining the scope of the Bar Dancers' Act, the court noted that the definition of an 'obscene dance' under Section 2(8) referred to a performance which had or encouraged an 'excessive interest in sexual matters'. While the court, following in the footsteps of its previous judgement, condemned the assumptions made by the State of Maharashtra, it suggested that the same were borne out of an influence of 'moralistic overtones'. However, in contesting each additional restriction against empirical evidence for its enactment, the court failed to adduce any evidence, apart from a hollow reiteration of judicial precedents, as to the social harms propagated by the exhibition of dances defined under this provision.

4. Introducing reasonable restrictions upon pornstars

Importing the above reasoning, it may be concluded that a prohibition on the professional activities of a pornstar is arbitrary, since the sociological circumstances within which both such businesses persist are similar. However, it is imperative that the profession be first detached from categorization as *res extra commercium*. In *State of Punjab v Devans Modern Breweries Ltd*,[210] the SC held that when a statutory regime establishes the contours and competencies of running a business, the subject matter of the same may not be declared as *res extra commercium*, since the legislature was the 'final arbiter' as to the morality or criminality of the underlying trade. To this effect, the establishment of a licensing regime inadvertently confers upon an individual running a business under such a license the right under Article 19(1)(g). Thus, restrictions, in the form of licenses for both pornstars and viewership platforms, represent reasonable impediments for the purpose of minimizing the sociological and mental harms inherent in the industry. Not only are such measures similar to others taken with respect to other *res extra commercium* commodities, they also force prohibitions to avoid adopting an *ex ante* approach to outlawing 'indigestible' practices.

C. Reimagining obscenity and the right to sexual autonomy

210 *State of Punjab v Devans Modern Breweries Ltd* (2004) 11 SCC 26.

Throughout the world, the concept of obscenity has been founded upon two principles – the offense-based approach and the harms-based approach. The former, popularized by the United Kingdom and the United States of America, delves into the mind of the individual interacting with the content in question to determine the effect upon that individual's psyche based on the popular sentiment of decency and morality.[211] The latter, primarily adopted by Canada, embarks upon an attempt to distinguish categories of content based upon the actual harms caused by the production and circulation of the same.[212] Consequently, the harms-based approach adopts an objective standard which is borne out of the depiction and narration of the content itself, rather than the effect it had on the morality of the user or the public at large. As illustrated above, India chose to walk on the antediluvian path of the offense-based approach. The alternate path of what could have been needs to be acknowledged in order to conclude whether *status quo* should still be maintained. If an interpretation more consistent with the 'constitutional morality' of the Constitution exists, the current interpretation must be discarded.

The Canadian judicial scheme of obscenity departed from the superannuated *R v Hicklin* standard in *Towne Cinema Theatres Ltd v The Queen*,[213] where the Supreme Court of Canada rebranded obscenity as an approach of tolerance, rather than offense. The court explained that the mere infliction of offense could not legitimize restrictions on the right to free speech and expression; however, content which Canadians could not tolerate other Canadians coming in contact with could constitutionally vindicate any such restrictions. *Prima facie*, this test seemed to revel in the nostalgia of the offense-based approach read with the community standards perspective.[214] However, the court's complementary decision in *R v Butler* furnished this approach to breed a revolutionary test for obscenity.[215] The court established a standard of 'undue exploitation' which prescribed two tests, namely, the internal necessities test and the degradation or dehumanization test. The internal necessities test was an examination into the need for showcasing depictions of sexual exploitation. In effect, this was to determine whether such content had any retrieving literary, social, political, or scientific value, a reiteration of the three-pronged *Miller v California* test.[216] The degradation or dehumanization test; however, required that the content be free from reinforcing, promoting, or normalizing narratives which were harmful to specific gender roles in a sexually expressive context. For example, pornographic content featuring extreme forms of bondage, bestiality, sadomasochism, or outright rape committed on women or children could act as a source of sexual pleasure which would have substantial tangible harms to women and children in general, regardless of the wilful participation of the actors

211 Michael P Fix, 'Understanding the Mechanisms Driving the Evolution of Obscenity Law in Five Common Law Countries' (2018) 13(2) Journal of Comparative Law 147.

212 ibid.

213 *Towne Cinema Theatres Ltd v The Queen* (1985) 1 SCR 494.

214 *Dominion News & Gifts Ltd v The Queen* (1964) SCR 251.

215 *R v Butler* (1992) 1 SCR 452.

216 *Miller* (n 180).

depicted therein.

Extinguishing the memory of a community standards perspective, the court held that depictions which propagated actual harms, such as the debasement of the sexual autonomy of women, in the manner prescribed by the degradation or dehumanization test could never be tolerated by the Canadian society. Thus, the identification of such content was independent of the geo-social views of the masses. Above all, the Court demarcated pornographic content into those depicting (1) explicit sex with violence, (2) explicit sex without violence, but degrading or dehumanizing treatment, and (3) explicit sex without violence and degrading or dehumanizing treatment.[217] Subsequently, it noted that only the first two situations could be classified as indulging in an 'undue exploitation sex', and thus, depicting obscenity. This balancing exercise, inherent in the requirement of proportionality,[218] adopted the least restrictive measure by only prohibiting content which inflicted actual harm in the form of sexual violence or degrading treatment.

Notably, *R v Butler* did not require that a causal relationship of harm be established based on concrete evidence. A presumption, as mentioned above, was introduced that degrading or dehumanizing treatment would never be tolerated within the Canadian society. However, the actual harm caused by fetishist pornographic material, such as urolagnia and fisting,[219] as a whole, especially those performed in a consensual setting, and the manner in which degrading or dehumanizing depictions could be characterized within such categories remains unclear. Due to this ambiguity, its implementation began predominantly censoring depictions of homosexual interactions and intercourse.[220] In 2005, the Supreme Court of Canada, in *R v Labaye*,[221] condemned the rampant exercise of lower courts of prohibiting non-violent and non-dehumanizing content on the basis of a 'community standard of tolerance'. Noting that this practice had an uncanny resemblance to the *R v Hicklin* test, the Court reinforced *R v Butler* and mandated that the alleged harm be 'objectively shown beyond a reasonable doubt' in order to unequivocally establish the 'causal link between images of sexuality and anti-social behaviour'. *Stricto sensu*, this would nullify the offence of obscenity in its entirety, since no scholarly or scientific consensus exists as to the definitive causal link between non-violent pornography and sexual violence or crime.[222]

217 *R v Butler* (1992) 1 SCR 452.

218 *R v Oakes* (1986) 1 SCR 103 held that the test for proportionality comprised of determinations as to (1) whether the government's purpose is 'pressing and substantial', (2) whether the measure is rationally connected to the government's purpose, (3) whether the measure impairs the right not more than is necessary for the identified purpose, and (4) whether the measure disproportionately impact those whose rights are infringed.

219 Joseph J Fischel, *Sex and Harm in the Age of Consent* (1st edn, University of Minnesota Press 2016); Richard Balon (ed), *Practical Guide to Paraphilia and Paraphilic Disorders* (1st edn, Springer 2016).

220 *Little Sisters Book & Art Emporium v Canada* (2000) 2 SCR 1120; Nadine Strossen, *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights* (1st edn, Scribner 1995) 231.

221 *R v Labaye* (2005) 3 SCR 728.

222 See, *inter alia*, Ronal Weitzer, 'Interpreting the Data: Assessing Competing Claims in

While the harms-based approach retains some of the administrative hardships of the offense-based approach, the overall test involves a much more objective determination. At first glance, the harms-based approach falls under neither the decency nor morality clause, nor under the incitement to an offence clause of Article 19(2). However, as explained above the 'public' understanding of decency and morality must be abandoned. Instead, Article 19(2) must be re-read to accommodate 'constitutional' morality as the qualifier for restricting speech. Constitutional morality imbibes the principle that indecency or immorality stems from an assault on constitutional tenets, understood through judicial interpretation of drafting intent.[223] Pornography, for example, would attract ideals of gender equality, as understood from Article 14 and 15, and holistic, including sexual, emancipation of women. In the context of Article 19(6), too, reasonable restrictions can be imposed upon the right to trade and profession only 'in the interest of the general public'. Minimizing harms produced through the production, propagation or promotion of sexual violence is inherently in the interest of the Indian public. Thus, adopting this harms-based approach is also not barred by the constitutional interpretation imbibed within Article 19(6). Against this backdrop, the categorization introduced in *R v Butler* can be incorporated with an appropriate licensing regime in order to free individuals from actualizing facets of such visual arts. Judicial intervention into such matter must ensure that restrictions are only imposed based on actual harm, through an analysis of psycho-social factual findings. In this regard, however, 'beyond reasonable doubt' cannot be adopted as the requisite standard for such holdings due to the non-exact nature of scientific survey and determination. The judiciary must, thus, decide precisely how to bang its double-edged gavel, be it at the behest of the sentiments of the post-modern society.

V. Conclusion

In light of the above, it is apparent that the porn ban is *ultra vires* when considered in light of Article 14 and 21 of the Constitution. It is arbitrary in its implementation in that it lacks a valid reason for discrimination between similarly-placed porn websites in India. Additionally, it fails to meet the 'least restrictive measures' standard requisite under *Puttaswamy* for any infringement upon the sexual privacy. While, *prima facie*, the ban lies squarely within the understanding of obscenity so adopted by the Indian judiciary, it is inconsistent with judicial attitudes adopted in other such circumstances. While current legislative focus has also shifted towards enacting a specialized data protection regime, as evidence by the introduction of the draft Data Protection Bill, 2021, conversation around regulation of porn has stagnated at the antediluvian crossroads of prohibition. The proposals contained in this paper, such as the introduction of certain licensing regimes for pornstars

Pornography Research', in Lynn Comella and Shira Tarrant (eds), *New Views on Pornography: Sexuality Politics and the Law* (1st edn, Praeger 2015) 257; Andrew Altman and Lori Watson, *Debating Pornography* (1st edn, OUP 2019) 80–98.

223 Gautam Bhatia, *Offend, Shock, or Disturb: Free Speech under the Indian Constitution* (1st edn, OUP 2016) 52; *Naz Foundation v State (NCT of Delhi)* 160 (2009) DLT 277 [130].

and hosting platforms, might thus appear onerous to an administration solely focused on passing overarching legislation, with little emphasis on on-ground implementation through a follow up with specific rules and infrastructure building. Since little has been done to correct the problem-solution mismatch India often encounters while dealing with deeply rooted socio-legal issues, this paper charts a course for an adjusting India, as it is channelled into a more tolerant era.

SKILL OR CHANCE?: THAT IS THE QUESTION

Dinker Vashisht*

In the last fifteen months, three significant High Court judgements from Tamil Nadu, Kerala, and Karnataka have held that games of skill and games of chance are two distinct concepts of constitutional significance. They have also held that State Governments cannot construe games of skill as betting and gambling, and therefore cannot regulate them under the legislative competence granted to them under Entry 34 of List II of Schedule 7 to the Constitution of India.

This presents a predicament for the State Legislatures as well as for the Parliament. Since online gaming was not envisaged at the time of writing of the Constitution, how is it to be regulated now? The answer is of immense significance at a time when the sector has grown rapidly in India, creating several unicorns, getting investments from marquee international investors and being acknowledged as an engine of growth by the Government of India, which in this year has announced the setting up of an Animation, Visuals, Gaming and Comics (AVGC) task force and an Inter-Ministerial Task Force on Gaming.

Certain State Governments have challenged the High Court decisions through Special Leave Petitions in the Supreme Court. When the Apex Court does eventually decide to look into these petitions, it could be reassessing its own decision, given by the Constitution Bench in the famous Chamarbaugwala cases.

Keywords*: skill – chance – res extra commercium – ejusdem generis – locus standi – parens patriae*

'That which we call rose by another name would smell as sweet.' In a Shakespearean world, a Capulet heroine could not care less about her lover's Montague surname. However, naming and categorization have become critical for policy makers as they cudgel their brains to introduce regulations for the fast-growing online skill gaming sector.

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The predicament for the legislature and the executive is that while the country's highest jurisprudence unequivocally states that games of skill (like rummy, fantasy, chess, bridge et cetera) are different from games of chance (gambling), there is no exhaustive list of games of skill.

In that sense, it is a classic case of technology and business developing faster than legislation. The online skill gaming sector has grown rapidly, and attempts by the State Governments to regulate it have been behind the curve. The earliest known law on this issue is the Public Gambling Act, 1867 ('Public Gambling Act'), that provided prohibition and punishment for gambling and chance-based activities. Its provisions were not extended to games of skill. In its true spirit the act was rather disingenuous. It was puritanical to the extent where natives' recreations (card games) were concerned, but kept the amusements of colonial masters (horse racing) outside its ambit. Post-independence, the Constitution of India put Betting and Gambling under the purview of States (Schedule 7, List II) and the Public Gambling Act was adapted by various State Governments.

The sector came in focus during the Covid-19 lockdowns when confined to their homes, people increased the time spent on online gaming, especially real money gaming. This led to concerns about addiction, reckless spending, and the concomitant financial stress. The Deccan and the Southern peninsular states were the dominant markets, and in the beginning of 2017, Telangana, Andhra Pradesh, Tamil Nadu, Kerala, and Karnataka introduced bans of varying natures on games played for money. In doing so, these states created an equivalence of all games played for money, with gambling. Schedule 7 of the Constitution of India, which categorises the legislative competence of Centre and States in three lists viz Union (List I), State (List II) and Concurrent (List III), puts Betting and Gambling as Item 34 in the State List. In their minds, in banning the games played for money, the State Governments were acting within powers bestowed to them by the Constitution. But three of these state bans (Tamil Nadu, Kerala, and Karnataka) were set aside by the respective High Courts, as these were deemed to be *ultra vires* the Constitution. Matters are *sub judice* in Telangana and Andhra Pradesh.

The primary reason these bans were dismissed by the three High Courts, is that these States went against the established jurisprudence of the Supreme Court, which has held that games of skill are not gambling and hence, not *res extra commercium*. If one speaks to the prominent online skill gaming operators of India, and the investors, their main argument is that they started the business and invested in them because of an established clarity on games of skill as legitimate business activity. This clarity is best exhibited in the Apex Court's judgement in the first Chamarbaugwala case, *State of Bombay v R.M.D Chamarbaugwala*. On the difference between games of skill and chance, the three-judge bench held:

> It will not be questioned that competitions in which success depends to a substantial extent on skill and competitions in which it does not

> so depend, form two distinct and separate categories. The difference between the two classes of competitions is as clear cut as that between commercial and wagering contracts.[1]

While this judgement established the difference between the two categories, yardsticks of determining whether a particular game was a game of skill or game of chance were unclear. This answer came in the second *Chamarbaugwala* judgement, *R.M.D. Chamarbaugwala v Union of India*. The Supreme Court used the preponderance test from American jurisprudence, as per which every game has an element of skill and an element of chance. If the element of skill is dominant over the element of chance, then it shall be deemed as a game of skill. Conversely, if the element of chance is dominant over the element of skill, then it shall be considered as a game of chance, and therefore gambling. In his judgement, Chief Justice Sudhi Ranjan Das remarked, 'a competition, in order to avoid the stigma of gambling, must depend to a substantial degree upon the exercise of skill.'[2]

The first practical application of this preponderance test happened almost a decade later, by the Supreme Court in *State of Andhra Pradesh v K Satyanarayana & Others.*

The Division Bench led by Justice M Hidayatullah, examined the game of rummy, and held:

> The game of Rummy is not a game entirely of chance like the three-card game…The 'three card' game which goes under different names such as 'flush', 'brag' etc is a game of pure chance. Rummy on the other hand, requires certain amount of skill because the fall of the cards has to be memorized and the building up of rummy requires considerable skill in holding and discarding cards. We cannot, therefore, say that the game of Rummy is a game of entire chance. It is mainly and preponderantly a game of skill. The chance in Rummy is of the same character as the chance in a deal at a game of bridge.[3]

The idea of the preponderance test was reaffirmed by the Apex Court in the case of *Dr KR Lakshmanan v State of Tamil Nadu*. The three-judge bench, comprising Justice Kuldip Singh, Justice HL Hansaria, and Justice SB Majumdar, held that there is no concept of a game of pure skill i.e., every game will have an element of skill and an element of chance. Giving relevant examples for the both the categories, the court held:

> Games may be of chance, or of skill or of skill and chance combined. A game of chance is determined entirely or in part by lot or mere luck. The throw of the dice, the turning of the wheel, the shuffling of the cards, are all modes of chance. In these games, the result is wholly uncertain and

1 *State of Bombay v RMD Chamarbaugwala* AIR 1957 SC 628 [23].

2 *State of Bombay v RMD Chamarbaugwala* AIR 1957 SC 699 [17].

3 *State of Andhra Pradesh v K Satyanarayana & Ors* AIR 1968 SC 825 [12].

> doubtful. No human mind knows or can know what it will be until the dice is thrown, the wheel stops its revolution, or the dealer has dealt with the cards. A game of skill, on the other hand-although the element of chance necessarily cannot be entirely eliminated-is one in which success depends principally upon the superior knowledge, training, attention, experience, and adroitness of the player. Golf, chess and even rummy are considered to be games of skill.[4]

In this landmark judgement, betting on horse racing was held to be a game of skill—a family that also included golf, chess, and rummy. In a couple of High Court decisions, poker was also held to be a game of skill. More recently, in July 2021, the Supreme Court upheld a decision of the Rajasthan High Court, which had declared Fantasy (the version offered by Fantasy operator Dream11 was under question here) to be a game of skill. While deciding on an SLP in the case of *Avinash Mehrotra v State of Rajasthan & Others*, a Division Bench of Justice Rohinton Nariman and Justice B.R. Gavai held that Fantasy's status as a game of skill is no longer *res integra.*[5]

With such unambiguous verdicts by the Apex Court consistently, it appeared to most legal practitioners, that the blanket bans introduced by states may not be tenable. This view was vindicated, when in three important cases:

i) Junglee Games India Pvt Limited v State of Tamil Nadu,[6]

ii) Play Games 24x7 Private Limited v State of Kerala,[7] and

iii) All India Gaming Federation v State of Karnataka,[8]

the High Courts of Madras, Kerala, and Karnataka respectively set aside the bans imposed by the three State Governments. Matters are *sub judice* in Telangana and Andhra Pradesh.

The Supreme Court's observation in the *Avinash Mehrotra* case, and these three High Court judgements, all came in the seven-month duration between July 2021 and February 2022. These judicial validations gave a fillip to an already rapidly growing sector as it witnessed a fresh spurt of growth and investments. While referring to the skill gaming jurisprudence of the Supreme Court, Chief Justice Ritu Raj Awasthi and Justice Krishna Dixit of the Karnataka High Court, in their judgement in the *All India Gaming Federation* case, described the collective ratio of the multiple cases in the following words:

> A game of chance and a game of skill although are not poles asunder,

4 *Dr KR Lakshmanan v State of TN & Anr* (1996) 2 SCC 226 [3].

5 *Avinash Mehrotra v State of Rajasthan & Ors* SLP (C) No(s) 18478/2020.

6 *Junglee Games India Pvt Limited v State of Tamil Nadu* 2021 SCC Online Mad 2762.

7 *Play Games 24x7 Private Limited v State of Kerala* 2021 SCC Online Ker 3592.

8 *All India Gaming Federation v State of Karnataka* WP 18703/2021 (Karnataka High Court).

> they are two distinct legal concepts of constitutional significance. The distinction lies in the amount of skill involved in the games. There may not be game of chance which does not involve a scintilla of skill, and similarly there is no game of skill which does not involve some elements of chance.[9]

This was also the time when the Central Government, acknowledging the adjacencies of online gaming with several other focus sectors such as telecom, semiconductors, animation, graphics, software and fintech, identified it as an area of growth. This first reflected in the Finance Minister, Ms Nirmala Sitharaman, announcing the setting up of an Animation, Visual Effects, Gaming and Comics ('AVGC') task force in the Union Budget 2022. The Central Government also realized that for the sector to effectively contribute as an economic growth engine, it needed a proper regulatory set up. Accordingly, an Inter-Ministerial Task Force ('IMTF') was set up to examine ways of regulating the sector. The IMTF is yet to submit its final report and it remains to be seen whether the Centre will step in to set up a statutory regulatory authority to govern the online gaming sector, or whether the states will fight their perceived 'right' to regulate the sector. Tamil Nadu and Karnataka have already appealed against the decisions of their respective High Courts in the Supreme Court. The next few months could involve discussions on several interesting legal and constitutional points.

I. Relevance of *Chamarbaugwala* in an Era of Mobile Telephony and Internet

In several High Court cases, it has been argued that the ratio laid down in *Chamarbaugwala* may not be relevant anymore. Back then no one could envisage the internet, mobile phones, data packs, and easy accessibility of online skill games. This doubt was answered in all the three recent judgements. The Karnataka High Court held that games of skill when played virtually do not metamorphose into games of chance. In the Madras High Court judgement, Justice Sanjib Banerjee explains eloquently:

> It is true that broadly speaking, games and sporting activities in the physical form cannot be equated with games conducted on the virtual mode or in cyberspace. However when it comes to card games or board games such as chess or scrabble, there is no distinction between the skill involved in physical form of the activity or in the virtual form. It is true that Arnold Palmer or Severiano Ballesteros may never have mastered how golf is played on the computer or Messi or Ronaldo may be outplayed by a team of infants in a virtual game of football, but Vishwanathan Anand or Omar Sharif would not be so disadvantaged when playing their chosen games of skill on the virtual mode.[10]

9 ibid [7].

10 *Junglee Games* (n 6) [120].

It has also been held that the *Chamarbaugwala* judgements remain relevant and binding under Article 141 of the Constitution, because several decisions by the Apex Court since then have reaffirmed that ratio. The Karnataka High Court judgement specifically called out the cases that have taken the jurisprudence forward.

> Chamarbaugwalas were decided decades ago, but that jurisprudence has been validated time and again by the Apex Court in KR Lakshmanan (1996) and other subsequent cases. In the recent past, several High Courts in the country have followed the same after critical examination viz Varun Gumber (P&H-2017), Gurdeep Singh (Bombay-2019), Ravindra Singh (Rajasthan-2020), Junglee Games (Madras-2021), Head Digital Works (Kerala-2021), supra.[11]

II. *Ejusdem Generis* and Entry 34

Certain State Governments have claimed that while jurisprudence has distinguished between gambling and games of skill, the latter could be construed as betting. After all, Entry 34 empowers states to regulate Betting and Gambling.

Here, it will be pertinent to point to the Apex Court's decision in *State of Madras v Gannon Dunkerley*, where while examining the construction and import of Entry 48 (estate duty in respect of agriculture land) in List II of Schedule 7, the Constitutional Bench held that words and expressions used in the List must be interpreted in legal sense and should not be construed in popular sense.[12]

As per the doctrine of *ejusdem generis,* where particular words are followed by general words, the general words should not be construed in their widest sense but should be held as applying to objects, persons, or things of the same general nature or class as those specifically mentioned. Similarly, the legal principle of *noscitur a sociis* says that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it.

Therefore, it will be wrong to de-hyphenate 'Betting and Gambling' as mentioned in Entry 34 of the State List. Both the Madras and Karnataka High Courts held that the two terms must be read in conjunction and 'Betting' would mean betting only in games of chance. Karnataka's High Court judgement in the matter says:

> When a word or an expression acquires a special connotation in law, it can be safely assumed that the legislature has used such word or expression in its legal sense as distinguished from its common parlance or the dictionary meaning. These legal concepts employed in constitution if construed by courts as such, acquire the constitutional spirit. Further

11 *All India Gaming Federation* (n 8).

12 *State of Madras v Gannon Dunkerley & Co (Madras) Ltd* 1959 SCR 379 [14].

> when such terms are construed by the Apex court to mean a particular thing, other courts cannot venture to interpret the same to mean something else. What we are construing is a constitutional concept i.e. Betting and Gambling, and not just two English words. Learned Advocate General's argument of 'widest amplitude' therefore cannot stretch the contours of a constitutional concept like this to the point of diluting its identity… The two words employed in Entry 34 have to be read conjunctively to mean only betting on gambling activities.[13]

III. Union's *Locus Standi;* If Not Entry 34, Then What?

From the State Government's perspective, one of the two options could be Entry 33 in List II which, among other things, lists sports, entertainments, and amusements. Treating skill gaming as entertainment also allows State Governments to introduce entertainment taxes and possibly license fees, thereby using the popularity of this burgeoning sector to generate revenue. Theoretically, there is an option to regulate it under Entry 26 (List II) as well, which deals with intra-state trade and commerce. But this can be problematic, because evidence suggests that most online skill games are played between participants spread across states. Some states (Nagaland, Skkim, and Meghalaya) introduced regulatory structures for the skill gaming sector, but because they tried to levy license fees as a percentage on the total revenues of gaming companies (across India, instead of only that specific state), these draft proposals have not found many takers. There are also apprehensions that it could create a labyrinth of different license fees, durations, commissions, and tax rates, which goes against the Centre's avowed objective of simplifying the taxation regime.

This inter-state nature of the online skill gaming business opens a possibility for the Centre to regulate the sector under Entry 42 of List I (Union List) i.e., inter-state trade and commerce. Another option is Entry 31 of the Union List, which empowers the Centre to legislate on matters pertaining to Posts, Telegraphs, Telephones, Wireless, Broadcast and other like forms of communication. This could be done by giving a wider amplitude to the term 'Broadcast', thereby putting it under the purview of the Ministry of Information & Broadcasting, or by putting it under the Ministry of Electronics and Information Technology, as gaming platforms are intermediaries, and several of their functional aspects are governed by the Information Technology Act, 2000.

A more assertive Centre could also use the exclusive residuary powers under Article 248 and Entry 97 of the Union List in the Constitution, that empower it to legislate on any matter that is not enumerated in List II or List III of Schedule 7. Previous Union Governments have used these powers to enact legislations such as the Gift Tax Act, the Wealth Tax Act, and the Right to Information Act. With its dominant majority in both the Houses, the incumbent government is comfortably placed to take this route.

13 *All India Gaming Federation* (n 8).

However, while the purpose of residuary powers was to legislate on subjects that could not be anticipated at the time of writing of the Constitution, these powers are regarded as an option of last resort. Therefore, such a step is likely to meet with resistance from states who may see it as an attempt of taxation powers on gaming revenue going away from them and allege 'hegemony' by a dominant Centre. It will also have to meet the test of *pith and substance*, the yardstick used by the judiciary to check trespass by one side into another's legislative domain.

The other pragmatic route is through Article 252 of the Constitution, wherein legislatures of two or more states, through resolution, abdicate their power on an entry in the State List and ask the Union to make a law. The law thus framed has applicability only to the states that have passed this resolution, but other states may adapt it. Previously this *modus operandi* has resulted in the enactment of the Wildlife Protection Act, the Urban Land Ceiling Act, the Water (Prevention and Control of Pollution) Act, and the Prize Competition Act.

IV. *Parens Patriae* for an Activity That is Not *Res Extra Commercium*

In their certiorari writs filed in the High Courts against various State Governments' decisions to ban, the online skill gaming sector's primary contention has been that the State Government is incompetent to legislate on games of skill. The other grounds of challenge were that these decisions are violative of various fundamental rights including:

1) Article 21, since playing games and sports falls within the ambit of the right to life and liberty;

2) Article 19(1)(a), since playing games is a facet of speech and expression, and criminalsing a legitimate activity is tantamount to an unreasonable restriction under Article 19(2);

3) Article 19(1)(g), read with Article 301 i.e. violation of the right to profession and business.

The State Government, in turn, has responded by claiming their right to regulate, and have claimed their action to be necessary in view of certain reported instances of addiction and bankruptcy, allegedly due to skill gaming. The essential question here is whether the State can assume the role of *parens patriae* and determine what is good or bad for society, even for a trade that is not *res extra commercium*. This issue was examined in all the recent judgements, and the contention was dismissed on grounds of manifest arbitrariness, on the State being unable to provide solid evidence or empirical data to substantiate the allegations made, and violation of the doctrine of proportionality.

The Supreme Court has earlier in several cases examined the State's role as 'parent of the nation'. In *Anuj Garg v Hotel Association of India***,** the Apex Court cautioned,

'majoritarian impulses rooted in moralistic tradition…(should) not impinge upon individual autonomy.'[14] In the case of *Shayara Bano v Union of India*, the Supreme Court described manifest arbitrariness in the context of a statute to be something done by the legislature capriciously, irrationally and without adequate determining principle such that it is excessive and disproportionate.[15]

Here, it is pertinent to describe the tests of proportionality described by the Apex Court in two of its seminal cases. In *Modern Dental College & Research Centre v State of Madhya Pradesh*, the Supreme Court gave a four-pronged test – focus on proper purpose, rational connection between purpose and measures taken to fulfil the purpose, availability of alternate measures with lesser limitations, and proportionality *strict sensu,* i.e. a proper relationship should exist between the benefits gained by fulfilling the purpose and harm caused to the constitutional right.[16]

In the case of *Mohammed Faruk v State of Madhya Pradesh*, the Constitution Bench held that validity of a law imposing restrictions should be checked on the yardsticks of its direct and immediate impact on the fundamental rights of citizens affected, the larger public interest in light of the object sought to be achieved, necessity to restrict citizens' freedom, capacity of the prohibition to be harmful to the general public, and possibility of achieving the same object by imposing a less drastic constraint.[17]

In all the three judgements, the Courts have found the respective Governments' decisions to completely ban skill games played for money as arbitrary and disproportionate. The Courts also held that the mere fact that skill games were being played for money did not change their nature. If involvement of monetary gains were to be made the discriminator, then by that token, any tournament that has money involved as prize money will be stigmatised as Betting and Gambling. The Madras High Court remarked:

> A simple game of football or volleyball played for bragging rights between two teams or a tournament which awards any cash prize or even a trophy would by the legal fiction created by the definition, amount to gaming and thereby outlawed…Goodbye to IPL and Test Matches, too, from Tamil Nadu since cash rewards are offered therein.[18]

Conclusion: Let the Games Begin

Traditional business wisdom suggests that any industry goes through four stages—beginning, scaling up, focus and balance, and alliance or maturity. In the pre-internet era, the journey from beginning to maturity could take 25-30 years, but today, this transition

14 *Anuj Garg v Hotel Association of India* (2008) 3 SCC 1 [41].

15 *Shayara Bano v Union of India* (2017) 9 SCC 1 [101].

16 *Modern Dental College & Research Centre v State of Madhya Pradesh* (2016) 7 SCC 353 [60].

17 *Mohammed Faruk v State of Madhya Pradesh* (1969) 1 SCC 853 [10].

18 *Junglee Games* (n 6) [112]-[113].

can happen in less than a decade. The online skill gaming industry is at present in the first stage. Low barriers to entry ensure that there is a surfeit of operators. Estimates suggest that there are close to five hundred gaming startups in India right now – a typical facet of an early-stage industry. A progressive regulatory and policy structure is essential for the maturity of the industry. This structure will need to be based on the distinction between games of skill and games of chance. It is true that games such as rummy, fantasy, chess, poker, bridge have got judicial verdicts upholding their status as games of skill, but that judicial validation is necessary for a game to be treated as a game of skill. Will every skill game need to go through an onerous odyssey for getting a Supreme Court verdict in its favour? To quote from Shakespeare again, will the concept of skill gaming be 'cribbed, cabined and confined' within the doctrinaire limits? Conversely, in the absence of an exhaustive list, will games of chance consortiums, many of which operate from overseas, continue to function and advertise with impunity? These issues will need to be addressed by policy makers and regulators as they determine the way forward for this sunrise sector.

CLIMATE CHANGE, EMISSIONS LIABILITY, AND MULTINATIONAL CORPORATIONS: NOTES FROM *FRIENDS OF THE EARTH V ROYAL DUTCH SHELL*

Pankhuri Gupta and Akshat Jha*

The recent decision of the Hague District Court in Friends of the Earth v Royal Dutch Shell marks the first instance where a duty was cast on a corporation to reduce its carbon emissions. Consequently, this decision is significant in the efforts to create a regime of corporate emissions liability. Little attention; however, has been spent on how this decision treats legal entities. In holding Royal Dutch Shell responsible for Shell subsidiaries' carbon emissions, and the manner in which this responsibility was imposed, the Court radically reconceptualised limited liability. A new enterprise liability regime was inaugurated, with a central focus on the legal entity which exercises decisive influence in creating climate change mitigation measures for the entire corporate group. This new regime assigns responsibility with the agent responsible for creating the emissions policies. It also substantially reduces the incentives of parent corporations to externalise costs. The Hague District Court's liability model is also extendable to the Indian context as it fits well with the historical Indian position with respect to corporate liability for environmental torts. In all, there is a case for this emissions liability model to be generally adopted.

Keywords*: carbon emissions – enterprise liability regime – enterprise and subsidiaries – piercing the corporate veil*

I. Introduction

Climate change presents an unprecedented threat to humankind. Nevertheless, the coordinated global effort required to mitigate this challenge has been lacking. International environmental agreements, for instance, have failed in creating material and enforceable carbon-emissions reduction targets. To prevent catastrophic climate change, much falls on

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the shoulders of individual nation states, and particularly their courts.[1]

This reliance on national courts is arguably even more important when regulating the environmental (mis)conduct of corporations. Because corporations are principally creatures of municipal law, domestic laws remain the primary mode of regulation.[2] However, operations of a typical modern multinational corporation span hundreds of different subsidiaries and jurisdictions. Due to the transnational character of their operations, multinational corporations cannot be brought under the ambit of a single territorial jurisdiction. Consequently, apt regulation of their environmental conduct largely remains absent.

Accordingly, while much progress has been made in determining state responsibility for environmental harms - both via private action and treaty law[3] - liability regimes for corporations are not nearly as developed. This is further compounded by the general reluctance of states to regulate corporate activity due to the fear of harming local business interests. In the rare instances where concerted intent is present on part of the states, the multinational corporation can almost always claim limited liability and argue that the impugned environmentally harmful conduct actually belonged to a subsidiary.[4]

The decision of the Hague District Court ('the Court') in *Friends of the Earth v Royal Dutch Shell* ('*Friends of the Earth*')[5] is a landmark in this regard. It marks the first instance where a corporation was held responsible for its emissions contribution to climate change. The Court found that Royal Dutch Shell ('RDS'), the holding company of the Shell Group, owed a duty of care to Dutch citizens to prevent injury resulting from carbon emissions associated with its operations and its products. This duty of care was sourced from the Dutch citizens' right to life and right to respect for private and family life under Article 2 and Article 8 of the European Convention on Human Rights, as well as the obligations

1 See the decision of the Federal Constitutional Court of Germany in *Neubauer et al v Germany* (2021) BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20; see also the decision of the Supreme Court of Netherlands in *Urgenda Foundation v State of Netherlands* (2019) ECLI:NL:GHDHA:2018:2610.

2 *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* 1970 ICJ 3 (Judgement of February 5) [37]-[38].

3 See Günther Doecker and Thomas Gehring, 'Private or International Liability for Transnational Environmental Damage—The Precedent of Conventional Liability Regimes' (1990) 2(1) Journal of Environment Law 1.

4 See, for instance, the website of Union Carbide Corporation (UCC) dedicated to the Bhopal Tragedy – <www.bhopal.com> accessed 3 October 2022. The website carefully notes that 'the Bhopal plant was owned and operated by Union Carbide India, Limited (UCIL), an Indian company in which UCC held just over half the stock'. Further it notes that '[t]he design, engineering and construction of the Bhopal plant was a UCIL project…UCC did not design, construct or operate the Bhopal plant'.

5 *Friends of the Earth et al v Royal Dutch Shell* (2021) ECLI:NL:RBDHA:2021:5339. An unofficial English translation is available at <www.uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339> accessed 3 October 2022.

owed by the Shell Group under the Paris Agreement. Since RDS had not taken appropriate measures to reduce the Shell Group's carbon dioxide emissions, it was held that RDS had violated the duty of care owed by it to the Dutch citizens. Accordingly, the Court ordered RDS to take measures in reducing Shell Group's emissions by 45 percent by 2030, from the 2019 levels.

The decision in *Friends of the Earth* has been cherished globally. The emphasis on international environmental agreements and human rights allows the Court's decision and reasoning to be emulated across jurisdictions. Prominent litigations on similar issues of law as in *Friends of the Earth* are already underway in many other countries of continental Europe.[6] Clearly, the decision in *Friends of the Earth* has some charm - in an ongoing pandemic, when finances of governments across the world are fiscally stretched, the imposition of corporate emissions liability provides an alternative method of reducing carbon emissions.

Although treatment of corporate structures lies at the very heart of *Friends of the Earth*; nevertheless, no attention has been directed to that aspect of the decision. This comment seeks to remedy that. In this note we attempt to show that the reasoning in *Friends of the Earth* reconceptualises limited liability and establishes an enterprise liability regime. To that end, this note is divided into five additional sections. We first note the departure of *Friends of the Earth* from principles of limited liability, and then subsequently situate it in an enterprise liability regime. The fourth section notes the merits of such a regime, and the fifth analyses the scope of enterprise liability in India.

II. Points of Departure from Limited Liability Regimes

The specific structure, operation, and laws relating to corporations may vary globally, but the basic components remain largely the same. A separate legal personality, limited liability, transferable shares, management by a board of directors, and ownership by investors remain common features of corporations - wherever they are found.[7] As noted previously, *Friends of the Earth* was centrally concerned with the alleged inactions and failures on part of RDS in reducing the Shell Group's carbon emissions. The plaintiffs argued that such inaction violated the unwritten standard of care prescribed in Article 2:162 of the Dutch Civil Code, and hence, constituted a tortious act on part of RDS. However,

6 United Nations Environment Programme, *Global Climate Litigation Report: 2020 Status Report* (2020) 22-23. See the case against Total in France, and against RWE AG, Mercedes Benz AG and BMW in Germany. Similar cases were also instituted in the United States against the major oil and energy companies of the world, but all of them were dismissed on grounds of jurisdiction and non-justiciability.

7 Reinier Kraakman and others, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn, OUP 2017).The concept of limited liability, and of legally incorporated companies as a separate legal entity, are principles of International Law. See the decision in *Barcelona Traction* (n 2) [37]-[44]. Limited liability is also a principle of Dutch law. Arts 2:64 and 2:175 of the Dutch Civil Code formally prescribe limited liability for incorporated companies.

the Shell Group and RDS as such were distinct: the former was a conglomerate consisting of about 1100 subsidiaries - in which the latter was the most important direct (and indirect) shareholder.

Particularly regarding carbon emissions, it was shown that the Shell Group was responsible for 2% of the annual global carbon emissions.[8] However, the defendant, RDS, did not have substantial greenhouse gas emissions of its own. The 2% figure used by the plaintiffs was only true when the emissions of all the Shell Group subsidiaries were considered together. Accordingly, for the plaintiff's claim to succeed, RDS and the other 1100 subsidiaries of the Shell Group needed to be considered a single entity.

It must be recalled that in line with the classical understandings of limited liability, parent corporations and subsidiaries are separate - albeit artificial - personalities, and bear distinct rights and obligations.[9] Accordingly, the actions of subsidiaries are normally unattributable to parent companies. When applied to the facts of *Friends of the Earth*, limited liability would provide that because the Shell Group subsidiaries were distinct legal entities; therefore, they ought to be responsible for their own emissions. Then, RDS as a parent company would, prima facie, not be responsible for the entirety of the Shell Group's carbon emissions. This grave presumption may only be lifted if the Court decided to pierce the corporate veil—which in turn required that it be proven that the subsidiary was merely a façade or that it was effectuated to commit fraud.[10]

However, the Court held RDS to be responsible for all of the Shell Group's carbon emissions. Holding a parent company so responsible has the effect of piercing the corporate veil. But surprisingly, in coming to this conclusion, the Court in *Friends of the Earth* did not refer to any of the conventional reasons for lifting the veil. In fact, the judgement makes no reference to either 'corporate veil', 'limited liability', or 'piercing'. To be fair, the Court *did* observe that the Shell Group's business policies and practices were generally designed by RDS - however, no other form of control was noted. Indeed, the fact that RDS decided the Shell subsidiaries' climate change mitigation measures appears to be the singularly most important reason for holding RDS responsible.[11]

This treatment of corporate structures is not reconcilable with foundational principles of limited liability. Piercing of the corporate veil is not the norm but the exception.[12] Accordingly, even in Dutch law, only very intrusive forms of control - where the subsidiary

8 *Friends of the Earth* (n 5) [4.4.1]-[4.4.4].

9 *Salomon v Salomon and Co Ltd* [1897] AC 22 (HL).

10 Magdalena Kucko, 'Piercing the Corporate Veil – Should English Law Go Dutch' (2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3230296> accessed 3 October 2022.

11 *Friends of the Earth* (n 5) [4.4.4].

12 Stephen M Bainbridge, 'Abolishing Veil Piercing' (2001) 26 Journal of Corporation Law 479; See also Linn Anker-Sørensen, 'Parental Liability for Externalities of Subsidiaries' (2014) Dovenschmidt Quarterly102. Sørensen demonstrates the same point through an extensive, cross-jurisdictional analysis.

is merely a 'façade' or 'instrument' - justify piercing. Mere control over the policies of the subsidiary is usually not sufficient.[13] Moreover, the very structure of group companies, with its attendant parent-subsidiary relationships, assumes a degree of control in favour of the former.[14] Accordingly, *some* control is always present in company groups. But in *Friends of the Earth*, just because some control was exercised by RDS, the Court, seemingly thought it justifiable to disregard the Shell Group's complete corporate structure. *Friends of the Earth* then seems to present an interesting principle of law - once *some* degree of control is proved, the 'pierced' corporate veil is not the exception but the norm.

At any rate, disregard of the independent liabilities of subsidiary companies is only justifiable upon satisfaction of stringent burden of proof - a heavy burden lies on the Courts to justify piercing. It does not suffice to hold parent companies responsible for the acts of subsidiaries without satisfying these strict requirements.[15] The Court in *Friends of the Earth*, however, did not even engage with these requirements. Thus, the treatment meted out in *Friends of the Earth* to corporate structures cannot be explained in a conventional limited liability regime. It is clear that something radical has been undertaken by the Court.

III. Looking Past The Shell: Sketching A New Liability Model

The Court did not properly explain its liability regime. Regardless, there are certain points, which the judgement leaves either unexplained or implicit but that have the effect of articulating the Court's liability framework. In this section we argue that parent company liability for carbon emissions, as sketched in *Friends of the Earth*, sits well with models of enterprise liability.

Parent and subsidiary company relationships, when protected by limited liability, often present morally hazardous outcomes.[16] Enterprise liability provides an alternative framework to address such infirmities.[17] The rationales of the latter are framed in the background of the modern corporate enterprise: enterprise liability recognises that

13 See Kucko (n 10) 18-27; See also Hubert Roelvink, 'Piercing the Corporate Veil—The Netherlands' (1977) International Business Law Review 124.

14 Phillip I Blumberg, 'The Corporate Entity in an Era of Multinational Corporations' (1990) 15 Delaware Journal of Corporate Law 283, 331-332; See also Part III.A.

15 See the famous *Ogoniland* cases regarding oil spills from Shell operated pipelines in the Niger Delta. These cases were against the same defendant i.e. Royal Dutch Shell (RDS), in the same Court i.e. the Hague District Court, and involved similar issues as in *Friends of the Earth* (n 5).The Hague District Court did not hold RDS responsible for the oil spills because although a parent company may owe a duty of care in preventing subsidiaries from committing harms, but only in exceptional circumstances. These exceptional circumstances did not arise for RDS; *Akpan et al v Royal Dutch Shell & Shell Petroleum Development Company of Netherlands* (2013) C/09/337050.

16 Phillip I Blumberg, 'Limited Liability and Corporate Groups' (1986) 11 Journal of Corporation Law 573, 611-630. These morally hazardous outcomes have been more extensively discussed in Part IV.B.

17 Bainbridge (n 12).

modern enterprises are often constituted of hundreds of legally distinct subsidiaries. Notwithstanding these corporate-legal distinctions, the efforts of the entire modern enterprise (including that of the attendant subsidiaries) are directed towards the attainment of a common economic goal.[18] Accordingly, the unit of economic action is the entire enterprise; and the legal distinctions between the constituent companies of an enterprise are formal, pedantic, and do not reflect economic realities.[19]

The project of enterprise liability is to make the boundaries of economic and legal realities coincide. The subject of legal analysis is an enterprise rather than an individual, formally incorporated entity, especially in case of group companies.[20] Taken to its logical limits, enterprise liability argues for abolition of intra-enterprise corporate veils.[21] That is, once an 'enterprise' is identified, the Court should not distinguish between the holding and subsidiary companies—but see them as a unified whole.[22]

(A) 'Control'

A fundamental question is how to identify an enterprise? Many have posited 'control' as an effective standard. That is, legal consequences of the actions of a 'controlled' subsidiary may be assigned to the entire corporate group.[23] But 'control' in itself is a fairly ambivalent term. Parent companies, by definition, have a controlling stock ownership - and inevitably designate the board of directors of group subsidiaries. Thus, some existence of control is already implicit in corporate groups.[24] Whether such control is actually *exercised* in a company-group is a more difficult question. To be sure, many enterprise liability statutes prescribe numerical standards vis-à-vis the extent of stock ownership or voting rights. Once these standards are met by a parent company, an exercise of control is presumed.[25]

18 Adolf A Berle Jr, 'The Theory of Enterprise Entity' (1947) 47 Columbia Law Review 343.

19 Meredith Dearborn, 'Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups' (2009) 97 California Law Review 196, 200.

20 Enterprise liability of this kind finds a comparable expression in the 'Single Economic Entity' doctrine applied in competition law. The doctrine is used to determine whether legal entities, particularly those having a parent-subsidiary relationship, may be subject to competition law either separately or jointly and in EU competition law, the doctrine is also used for attribution of liability in cases of infringement. 'Control' of the subsidiary by the parent company and decisive influence over the subsidiary's conduct in the market are some key-factors considered by the Courts when determining whether multiple legal entities form a single economic entity. See *Viho Europe BV v Commission* [1996] ECR I–5457 for the general EU position on single economic entity and *Copperweld Corp v Independence Tube Corp* (1984) 467 US 752 for the American position.

21 Bainbridge (n 12).

22 Berle (n 18).

23 Bainbridge (n 12) 526-528; Blumberg (n 14) 328-345.

24 Blumberg (n 14) 328-329. Blumberg also notes that the essence of a corporate group is that the constituent companies are not only affiliated by stock ownership but also operate under common control.

25 See, for instance, Stock Corporation Act 1965 (Germany).

However, in absence of legislated standards, a court seeking to impose liability upon the entire enterprise, must record the degree of centralisation and decentralisation in a corporate group on a case-to-case basis. In such enquiries, factors like common directors, officers, or stakeholders are relevant.

Undoubtedly, enterprise liability's investigations into 'control' recall the 'alter ego' and 'agency' justifications of piercing of corporate veil. Both enquire into many of the same considerations. However, a marked difference exists between the two in terms of degree - even a soft degree of control is sufficient to establish enterprise liability; but the same would not do to justify piercing of the corporate veil.[26]

Another key distinction between 'control' in limited liability and enterprise liability exists based on the importance paid to the ability of the parent company to determine policies of the subsidiary.[27] This distinction is particularly important in context of *Friends of the Earth*. In limited liability regimes, for instance, a general ability to design the policy of a subsidiary does not prove that the subsidiary was an 'alter ego' or 'agent' of the parent company. Usually, to lift the corporate veil, an absolute lack of the subsidiary's ability to determine its own policy is required. But in enterprise liability, since legal incorporation is not the distinguishing factor between parent companies and subsidiaries, there do not exist similar preordained and distinct legal entities - boundaries between which may be *ex ante* adjusted by the courts. The first prerogative of an enterprise liability regime is to determine the appropriate legal subject.

Similarly, in economic theory, the *raison d'être* of a 'firm' is to direct and organise production, operations, and allocation of resources.[28] A policy setting ability is the key distinguishing feature of a firm. Enterprise liability echoes many of the similar rationales. Within enterprise liability as well, subservience of the subsidiaries to group objectives remains a key consideration.[29]

Recall the discussions in the previous section vis-à-vis findings of 'control' in *Friends*

26 Dearborn (n 19). Differential standards of control also make moral sense. After all, 'agency' and 'alter-ego' principles present the subsidiary's existence only as an instrument of another entity. This is morally damning. Enterprise liability imposes a less compunctious judgement. It merely notes that a company does not have an absolutely independent existence—that it is *part* of a larger enterprise. See Christopher Stone, 'The Place of Enterprise Liability in the Control of Corporate Conduct' (1980) 90 Yale Law Journal 1, 1-20.

27 *Viho Europe* (n 20).

28 See Ronald H Coase, 'The Nature of the Firm' (1937) 4(16) Economica 386. Coase famously argued that all (production) functions of a firm can be performed through transactions in the market—without the need of an institution such as a firm. Existence of a firm, in that case, only makes sense if it can achieve outcomes which would otherwise not be available through purely market transactions. Coase argued that firms exist because through their organisational and directorial capabilities, they lower the transactional costs associated with production and exchange process—than what would be available through purely individual transactions.

29 Blumberg (n 14) 328.

of the Earth. The Court found that RDS drew the guidelines, for the Shell subsidiaries, which determined how the Shell Group would transition to renewable energy. Similarly, the Shell Group's climate policy, for which RDS' Chief Executive Officer bore ultimate accountability, was designed and adopted by RDS. The companies of the Shell Group were subsequently responsible for implementing this policy. RDS was the face through which Shell Group's climate change policies and strategies were communicated to the public. It also prepared the combined accounts of the carbon emissions of all the subsidiaries. Summarily, RDS was in charge of the climate change mitigation policy of the entire Shell Group.

These findings in *Friends of the Earth* relate to a soft degree of control, which although would ordinarily be insufficient to justify piercing of corporate veil, *would* be sufficient to satisfy the 'control' considerations of enterprise liability.[30] As noted earlier, an ability to set the general policies of a subsidiary is a key factor of 'control' in enterprise liability. Accordingly, *Friends of the Earth* inaugurates a new regime of corporate emissions liability, that transcends legal distinctions between parent companies and subsidiaries, and fixes liability for emissions on *that* company which determined the emissions policy of the entire group.

(B) 'Common Purpose'

Since some degree of control is inevitable in group companies, a liability regime solely based on 'control' may coalesce all the group constituent companies into a single juridical entity.[31] This may have the effect of eliminating intra-group limited liability, and instead impose a uniform group liability. But in corporate groups which do not present a group identity to the public, or where the group subsidiaries operate in discordant economic spheres, mandatory imposition of group liability may seem excessive.

'Common purpose' based considerations to enterprise liability mitigate such inequities. It provides that when a subsidiary behaves as part of a larger economic entity ('the enterprise'), then the subsidiary, together with the enterprise, must be considered a single juridical unit.[32] This is because it is only the complete enterprise that constitutes a unified whole—the constituent companies are merely mobilised towards the attainment of the common purpose of the enterprise.[33] 'Common purpose' also provides the strongest moral justifications for enterprise liability. Since the constituent companies actually fulfil the purpose of a larger economic entity - and the larger economic entity profits from the actions of the constituent companies - accordingly, the larger entity *ought* to be held responsible

30 See the judgement in *Viho Europe* (n 20). The court considered it appropriate to subject, both, the parent and the subsidiary, together to the provisions of EU competition law—and similarly assign liability—when the parent exercised a decisive influence in designing the policy of the subsidiary.

31 Blumberg (n 14) 340-343.

32 Dearborn (n 19) 200-210.

33 Berle (n 18) 343-358.

for the constituent companies' actions.[34]

To that end, specifically in relation of *Friends of the Earth*, understandings of a 'common-purpose' are implicit in the opinions of the Court. It is very clear that the Court sees the Shell subsidiaries to only be fulfilling and implementing the common purpose of the Shell Group.[35] This was particularly true in case of the climate change policies of the Shell Group since the subsidiaries' personal policies towards climate change were adjusted for the Shell Group's general climate change related objectives. However, 'common-purpose' is perhaps most explicit in the way the Court recognises the Shell Group's emissions. Recall that the normative scope of 'common purpose' submits that actions of subsidiaries be attributed to the enterprise. This being in sharp contrast to the exceptions to corporate veil—'piercing' doctrines attribute actions of the subsidiary to the parent company. It must be noted that the Court in *Friends of the Earth* treats carbon emissions by the Shell subsidiaries as emissions of the 'Shell Group'—and not as emissions of RDS[36] and RDS was ordered to reduce the emissions of the Shell Group, and not just its own. This *must* be considered the clinching point in favour of enterprise liability.

IV. Extra Legal Effects of the New Model

Therefore, the Court's reasoning is compatible with models of enterprise liability. The new emissions liability model is seemingly centred around control exercised on behalf of subsidiaries with regard to their climate change policies, as well as the interconnections of the subsidiary with the larger corporate purpose. We now present three reasons why this new liability model may be preferred over conventional limited liability frameworks.

(A) Assigning Responsibility with the Correct Agent

Business enterprises are globally expected to respect human rights.[37] It is their responsibility to mitigate adverse human rights impact caused due to activities they are involved in. They are subsequently not only expected to take measures to prevent such adverse impacts but also control them. The Court, while interpreting the unwritten standard of care that should have been followed by RDS, placed reliance on soft laws like the United Nations Guiding Principles on Business and Human Rights ('UNGP').[38] The Court noted that owing to UNGP's universal endorsement vis-à-vis businesses and their responsibility towards human rights, RDS was under an obligation to conform to UNGP's content, regardless of whether it had specifically committed to the provisions of UNGP.[39]

The Court, in determining the activities that led to such impacts, traced the value chain

34 Berle (n 18) 346-350. See also Dearborn (n 19) 206-210.

35 *Friends of the Earth* (n 5) [2.5.1]- [2.5.7].

36 ibid. Such understanding of emissions is implicit throughout the judgement.

37 *Friends of the Earth* (n 5) [4.4.15].

38 *Friends of the Earth* (n 5) [4.4.11].

39 ibid.

of RDS.[40] It was held that RDS bore responsibility not only for its own activities but also for the activities of the closely affiliated companies of the Shell Group. As noted earlier, in a limited liability regime, extending Shell Group and its subsidiaries' liability to RDS is not so easily allowed for. Nevertheless, the Court extended the liability to RDS because of the kind of 'policy setting influence and the far-reaching control' that RDS exercised over the Shell Group companies; this made RDS responsible for the Shell subsidiaries' emissions as if they were its own.[41]

Accordingly, such an emissions liability regime makes it possible to assign responsibility to the correct agent—an agent who was actually responsible for designing the emissions policy. Assigning responsibility to the subsidiaries, who are merely implementing the said policies, does not correctly recognise the agent in control of framing the lax policies. We believe that the enterprise liability model does not allow the actual wrongdoer, i.e. RDS, to escape liability by incorporating subsidiaries, which is something that is allowed for in limited liability regimes.

(B) Preventing Externalisation of Costs

Throughout its long and storied history, limited liability has been applied in the most haphazard and unprincipled manner. Many scholars have laboured to explain its logic and flaws, and this section synthesizes many of these criticisms.

The objective of limited liability is to separate the personality of the corporation from that of its shareholders. This protects the shareholders from being personally liable for the company's obligations. Here, the shareholders' legal obligations are limited to the sum of their original investments. Alternatively, in a regime of unlimited liability, and in case of a company's default, the shareholder-investor may be potentially asked to provide unlimited funds. Therefore, in absence of limited liability, investors are heavily disincentivised from investing as doing so entails risking all their personal assets on each share of the company.[42] Moreover, in unlimited liability regimes, because the price that the investors are willing to risk is not limited to their share, a need arises for constantly monitoring the activities of the company.[43] Limited liability lessens this need to monitor and hence, reduces operating costs.[44]

40 *Friends of the Earth* (n 5) [4.4.18].

41 *Friends of the Earth* (n 5) [4.4.23].

42 Frank Easterbrook and Daniel Fischel, 'Limited Liability and the Corporation' (1985) 52 University of Chicago Law Review 89. Many consider limited liability to be the foundation of modern commerce. See also HG Manne, 'Our Two Corporation Systems: Law and Economics' (1967) 53 Virginia Law Review 259.

43 Paul Halpern, Michael Trebilcock and Stuart Turnbull, 'An Economic Analysis of Limited Liability in Corporation Law' (1980) 30 University of Toronto Law Journal 117. Monitoring costs arise because investors may lose all of their assets owing to the actions of the agents of the company.

44 Easterbrook and Fischel (n 42).

Limited liability also allows investors to diversify their portfolios. This is because in absence of limited liability, bankruptcy of even one corporation may cause an investor to lose their entire wealth. Rationally then, an investor will spurn their number of holdings. By removing barriers to diversification, limited liability (again) has the effect of encouraging investment.[45] Lastly, limited liability also incentivises unconventional and strategic investment decisions. Companies can undertake riskier (but high return) endeavours when their investors have diversified their holdings. This is because owning shares in multiple companies allows investors to hedge against the failure of one initiative by investing in other companies.[46]

However, these benefits of limited liability do not accrue in case of group companies, particularly in parent-subsidiary relationships. As may be recalled, a key benefit of limited liability is to protect personal assets of shareholders. In group companies, this has the effect of insulating the assets of the parent company. This, as shall be seen subsequently, incentivises parent companies to externalise costs and evade legal responsibilities. Furthermore, in case of most parent-subsidiary relationships, the parent company is also in charge of the management of the subsidiary. Accordingly, the former behaves as both, the investor, and the manager. Consequently, issues of monitoring costs also do not normally arise.

Thirdly, across jurisdictions, most modern formulations of limited liability date back to the nineteenth century.[47] And, in dealing with the modern corporate economy, these (relatively) old formulations have at least two inadequacies. First, the initial focus of this doctrine was on contract and not tort creditors.[48] Accordingly, even in modern-times, limited liability does not do well with involuntary creditors. Secondly, parent-subsidiary relationships were non-existent when limited liability principles were formulated;[49] but undoubtedly, parent-subsidiary relationships are the pre-dominant mode of modern commerce. However, notwithstanding such radically changed realities, the major legal contours of corporate form remain unchanged from a century ago.[50] Limited liability principles are thus somewhat outdated in face of the modern-corporate enterprise.

Specifically in context of torts perpetrated by subsidiaries, limited liability also poses serious moral hazards. As noted earlier, limited liability encourages corporations to

45 Bainbridge (n 12).

46 Harry Markowitz, 'Portfolio Selection' (1952) 7(1) Journal of Finance 77. According to Modern Portfolio Theory, managers should base their decisions on systematic risks when attempting to diversify investments. However, in cases of unlimited liability, it becomes imperative to take consideration of unsystematic risks which in turn can lead to forgoing of profitable investments.

47 See Jose Engracia Antunes, *Liability of Corporate Groups* (Kluwer Law and Taxation Publishers 1994); Mark Roe, 'Corporate Strategic Reaction to Mass Tort' (1986) 72 Virginia Law Review 1.

48 Stone (n 26).

49 Sandra K Miller, 'Piercing the Corporate Veil Among Affiliated Companies in the European Community and in the U.S.' (2008) 36 American Business Law Journal 73.

50 Dearborn (n 19).

undertake high-risk ventures. However, in parent-subsidiary relationships, this incentive has a negative outcome of subsidiarisation to externalize risk.[51] Sequestering risky ventures to a subsidiary insulates the holding corporations from direct liability. Accordingly, holding companies are disincentivised to bear precautionary costs or undertake insurance against risky and hazardous activities. This in turn foists the costs of risky behaviour onto the public.[52] Naturally, risky ventures and hazardous activities are likely to create the most tort victims.

To deal with such externalization of costs, many have proposed enterprise liability as an alternative.[53] The key idea here is to look at the corporate enterprise as an 'economic whole'. Essentially, if a larger economic enterprise profits from the acts of a subsidiary - as the Shell Group was doing from the economic activities of individual Shell subsidiaries - then the former must pay for subsidiary's defaults. And of course, the parent company is considered a legitimate representative of the enterprise. By so extending liabilities to the enterprise, the parent is forced to re-internalize costs. Enterprise liability then provides against immoral outcomes in so much as it prevents externalisation of costs.

(C) Effects on Prescriptive Jurisdiction

Modern multinational enterprises usually consist of a parent company established in a host state, along with a myriad of legally distinct, wholly or partly owned subsidiaries, incorporated in a variety of other states. But corporations are subjects of municipal laws—and prima facie, prescriptive jurisdiction vests with the state in which the corporation was incorporated, organised, or domiciled.[54] Accordingly, the subsidiaries are independently subject to the various laws of each and every state in which they do business.[55] The entire enterprise nevertheless is not by itself subject to any specific jurisdiction. Such fragmentation of jurisdiction is aided by two additional factors. States may not be willing to extend their jurisdiction extraterritorially but for concerns of impeding the sovereignty of other states.[56] Simultaneously, a legal system with weak environmental regulations would be attractive to a multinational enterprise, and a state might choose to implement

51 Henry Hansmann and Reinier Kraakman, 'Toward Unlimited Shareholder Liability for Corporate Torts' (1991) 100 Yale Law Journal 1879, 1890.

52 In this note, the focus is mainly on catastrophic harms such as environmental claims as the outcomes of these are quite significant and the most troubling.

53 Berle (n 18).

54 Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, OUP 2015) 11-16. For instance, the US Supreme Court in *Goodyear Dunlop Tires Operations v Brown* (2011) 131 S Ct 2846 held that general jurisdiction vests over foreign corporations 'when their affiliations with the State are so "continuous and systematic" as to render them essentially at home in the forum State'.

55 Amanda Perry Kessaris, 'Corporate Liability for Environmental Harm' in Malgosia Fitzmaurice, David M Ong and Panos Merkouris (eds), *Research Handbook on International Environmental Law* (Edward Elgar Publishing 2010) 364.

56 Ryngaert (n 54) 49-100; Malcolm Shaw, *International Law* (8th edn, Cambridge University Press 2017) 483-521.

a lax environmental regime precisely in order to obtain increased foreign investment.[57] Firms would then choose where to trade and where to invest based on combined forces of ownership, internalisation, and location advantages.[58] This results in another layer through which corporations may externalise costs.

Curious in that regard are the limits on jurisdiction and admissibility set by the Court. The Court found that the action by Milieudefensie was admissible because it was concerned with effects of climate change for Dutch citizens.[59] In contrast, actions of another NGO-plaintiff, Action Aid, were not admissible because Action Aid claimed to represent the interests of the people of the world - rather than Dutch people specifically.[60] To the contention of RDS that because actual emissions took place in a myriad of legal systems, the applicable law in the proceedings should not be Dutch law;[61] the Court held that as final damage from the Shell Group's emissions occurred within the Netherlands - and at any rate, affected the interests of the Dutch people - applicability of Dutch laws was justified.[62]

The 'effects' doctrine provides that so long as an extraterritorial conduct produces effects within the territorial limits of a state, prescriptive jurisdiction vests with the affected state.[63] The argument of the Court seemingly being that because Shell Group's (global) emissions contribute to climate change, and climate change has an effect within the territories of Netherlands, Dutch courts can exercise jurisdiction over global emissions policies of the Shell Group. But of course, the effects of climate change produced within the Dutch territory are wildly unspecific - the harms to Netherlands and its citizens are a necessary corollary of a global increases in temperatures. Then, so long as a country is affected by climate change, the prescriptive jurisdiction of the affected country over the Shell Groups is justified.

Such 'deterritorialisation' of emissions liability is a necessary feature of the enterprise liability model presented in this note. Since it is the entire enterprise - the parent company together with the subsidiaries, incorporated across jurisdictions - that has been deemed a juridical unit, it is not entirely certain if a single state can provide the nationality of the enterprise - particularly for multinational enterprises. Therefore, fragmentation of prescriptive jurisdiction based on nationality of subsidiaries does not necessarily follow. Having snapped the connection of the subsidiaries with the countries where they are

57 Kessaris (n 55) 363.

58 John Dunning, *Multinational Enterprises and the Global Economy* (Addison-Wesley Publishing 1993).

59 *Friends of the Earth* (n 5) [4.2.1]- [4.2.4].

60 *Friends of the Earth* (n 5) [4.2.2].

61 *Friends of the Earth* (n 5) [4.3.2].

62 *Friends of the Earth* (n 5) [4.3.5] – [4.3.7].

63 See *Case of the SS Lotus (France v Turkey)* Judgment No 9, PCIJ Series A, No 10 (PCIJ 1927); see also Michael Akehurst, 'Jurisdiction in International Law' (1973) 46 British Yearbook of International Law 145.

established, the 'effects' doctrine provides an alternative framework for explaining prescriptive jurisdiction over carbon emissions.

Deterritorialisation of this kind, although undeniably broad, is beneficial for it reduces opportunities of multinational enterprises to externalise costs—by incorporating subsidiaries in states with lax regulatory regimes. In a model centred around the 'enterprise' rather than an 'entity', regardless of where a company is incorporated, citizens of an affected country may file claims against the corporate entity. Whether the jurisdiction of incorporation has a lax regulatory system is immaterial, what matters is whether the affected state has a strict regulatory regime. Such commixture of jurisdictional limits would arguably lead to an upward spiral of stricter emissions regimes globally.[64]

But this mode of democratising jurisdiction also raises two clear concerns. *First*, the principle of comity and the concerns that such a model of jurisdiction would vest concurrent jurisdiction with too many states. But it must be noted that the current models of jurisdiction are not entirely specific either - for a single offence, jurisdiction may still be vested with different countries.[65] Additionally, courts themselves are hesitant about exercising jurisdiction where another forum of another state is more convenient.[66] Given self-regulation by courts, arguably concerns about conflicting jurisdictions are more theoretical than practical.[67]

Second, it may be concerning that such deterritorialisation of jurisdiction, and unilateral actions by Courts of a single state, impose uniform emissions standards for all countries - in violation of the principle of Common But Differentiated Responsibility ('CBDR').[68] But even as critics of climate change unilateralism have noted, unilateral actions should not be

64 See David Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* (Harvard University Press 1997).

65 Ryngaert (n 54). For instance, in international criminal law, it is commonly accepted that it is necessary and sufficient that one constituent element of the act or situation has been consummated in the territory of the State that claims jurisdiction. See also Cedric Ryngaert, 'Territorial Jurisdiction over Cross-Frontier Offences: Revisiting a Classic Problem of International Criminal Law' (2009) 9 International Criminal Law Review 187; *Board of Trade v Owen* [1957] AC 602, 634; *DPP v Stonehouse* [1977] 2 All ER 909, 916.

66 For instance, see the environment related jurisprudence under the Alien Tort Claims Act1989 (United States of America).The Act provides original jurisdiction to American district courts for torts committed by aliens which violates 'the law of the nations'. Though the courts interpret that the Act provides them the ability to police extraterritorial corporate misconduct; nevertheless, environmental claims have been routinely dismissed on grounds *forum non conveniens*, or the Act of State doctrine, or because international law norms were not sufficiently universal. See *Kiobel v Royal Dutch Petroleum Co* (2013) 133 SCt 1659; *Aguinda v Texaco* (2001) 142F Supp 2d 534; and *Sarei v Rio Tinto Plc* (2002) 221 F Supp2d, 1116.

67 Ryngaert (n 54). Distinguishing between prescriptive and enforcement jurisdiction, Ryngaert observes that a court would not be willing to extend its prescriptive jurisdiction extraterritorially, if it is probable that decisions of the court cannot be enforced.

68 Joanne Scott and Lavanya Rajamani, 'EU Climate Change Unilateralism' (2012) 23(2) European Journal of International Law 469, 476-486.

denounced altogether, but adjusted for the principles of CBDR.[69]

V. The Indian Response: An Enterprise Liability Regime for Environmental Torts

In the preceding sections, we sought to present enterprise liability-based regimes as preferable alternatives to limited liability - especially in context of environmental torts. The present section synthesises the scope of a similar liability framework in an Indian context.

(A) Enterprise Liability in General Company Laws

India does not have any recognised statutes that mandate enterprise liability. Accordingly, any enterprise liability regime that maybe constructed in India must emanate from judicial decisions. What follows is a brief analysis of Indian case laws on the subject. Since much deference is paid by Indian courts to English judgements about corporate personalities. Consequently, a cursory reference is made in this section to the common law tradition of enterprise liability.

The leading English case on the subject of corporate personality is *Adams v Cape Industries* ('*Adams*').[70] That case also divides the common law history of enterprise liability into two convenient phases. Before *Adams*, the position on parent company liability for tortious acts of subsidiaries was ambivalent. Although 'enterprise liability' was not specifically used, but nevertheless, such cases as *DHN Food Distributors v Tower Hamlets* ('*DHN Food Distributors*'),[71] seemingly provide for parental liability for torts of subsidiaries - if the two companies were a 'single economic unit'.[72] However, *Adams* categorically rejected these 'single-economic-unit' based arguments. In turn, it laid down very stringent tests for holding parent companies liable.[73] *Adams* understandably led to highly inequitable outcomes, and to address these inequities, English courts have recently taken to 'assumption of responsibility' based doctrines.[74] But these remain remedies emanating from tort law. Company law remedies, for all practical purposes, remain closed to the plaintiffs.

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69 ibid. Alternatively, recourse could be had to emissions standards prescribed in multilateral environment agreements—which arguably are not similarly unilateral. This was done in *Friends of the Earth,* where standards were based on the UN Guiding Principles on Business and Human Rights. See Part IV.A.

70 *Adams v Cape Industries Plc* [1990] 2 WLR 786 (HL).

71 *DHN Food Distributors Ltd. v Tower Hamlets LBC* [1976] 1 WLR 852 (HL).

72 LCB Gower, *Principles of Modern Company Law* (Paul Davies and Sarah Worthington eds, 11th edn, Sweet & Maxwell 2021) 336.

73 *Adams v Cape Industries* required that agency be proved in fact before a parent company be held liable for acts of subsidiaries. Furthermore, no presumption of agency can exist in absence of an express agreement to that effect. Accordingly, the burden created in *Adams* is exceedingly onerous. See also *Atlas Maritime Co SA v Avalon Maritime Limited, The Coral Rose* [1991] 4 All ER 769.

74 See *Chandler v Cape Industries Plc* [2012] EWCA Civ 525.

English jurisprudence has a clear influence on the Indian decisions on corporate personality. In the Indian cases that preceded *Adams* in time, although 'enterprise liability' was (again) never expressly mentioned, nonetheless, the Supreme Court was seemingly agreeable to holding parent companies liable solely on the basis of the existence of a single-economic-unit. For example, *LIC v Escorts* ('*Escorts*') categorically held that parent companies should be held responsible for a subsidiary's actions where 'the associated companies are inextricably connected'.[75] It may be recalled that group liabilities based on (mere) interconnections between companies is the central premise of enterprise liability. Subsequently in time, *Escorts* was approved by *State of UP v Renusagar* ('*Renusagar*').[76] The latter also approvingly cited[77] English cases such as *DHN Food Distributors*.

However, both *Renusagar* and *Escorts* precede *Adams* in time. Ever since *Adams*, Indian judgements have *also* transitioned away from 'economic-unit' based arguments—and increasingly coincide with the post-*Adams* position of law in England. This transition, for example, is clear in *New Horizons v Union of India*,[78] where the Supreme Court held that factual agency must necessarily be proven before parent companies are held liable. Arguments of a single economic entity were impliedly rejected.[79]

The discard of enterprise liability is complete in *Vodafone International Holdings v Union of India*[80] where the Supreme Court recognised parent and subsidiaries to be completely different entities 'irrespective of their actual degree of economic independence'.[81] As a result, application of the 'common purpose' based element of enterprise liability was precluded. Similarly, the fact that a subsidiary company normally complies with the directions of the parent company does not remove the legal distinction between the two entities.[82] According to the Supreme Court, it is in the nature of parent and subsidiary relationships for parent companies to formulate and control the policy and activities of the subsidiaries.[83] Only when the policy set by the parent company is so absolute so as to permit no deviation, *then* the subsidiary would be considered a 'puppet' and the parent and subsidiary be recognised as a single entity.[84] Consequently, 'soft' control prescribed by enterprise liability was expressly rejected for a form of absolute control.

(B) Scope of Enterprise Liability for Environmental Torts

The prevalent Indian jurisprudence, then, does not provide a recognisable space to enterprise liability. However, this situation is demonstrably different in instances of

75 *LIC v Escorts* (1986) 1 SCC 264.

76 *State of Uttar Pradesh v Renusagar* (1988) 4 SCC 59.

77 ibid 55-57.

78 *New Horizons v Union of India* (1995) 1 SCC 478.

79 In so much as *New Horizons* (n 78) adopted a strict test for 'control', the 'soft-control' model of enterprise liability must be considered rejected.

80 *Vodafone International Holdings BV v Union of India* (2012) 6 SCC 613.

81 *Vodafone* (n 80) [72].

82 *Vodafone* (n 80) [101].

83 *Vodafone* (n 80) [73].

84 *Vodafone* (n 80) [101]-[105].

environmental torts. It must be recalled that in the Bhopal Gas Tragedy, India has been the victim of the most egregious of corporate disasters. That frightening experience cast a long shadow on the legal treatment meted out to corporate environmental torts in India.

In its submissions before the United States District Court for the Southern District of New York, the Indian state, while praying for imposition of liabilities on Dow Chemicals for the actions of its Indian subsidiary, famously argued that:

> [I]n reality, *there is but one entity, the monolithic multinational*, which is responsible for the design, development and dissemination of information and technology worldwide, acting through a forged network...for a creation of a 'multinational-enterprise liability'[85]

Many consider these arguments to be the first persuasive case for imposition of enterprise-liability for multinational corporations.[86] At any rate, the Indian state's arguments perfectly summarise the central theses of enterprise-liability theories.

The Indian Courts' engagement with enterprise liability came about only a year later in *Shri Ram Food & Fertilizers*.[87] Of concern was (again) a gas leak incident from a fertilizer facility. As in Bhopal, even in this case, the fertilizer factory which was the subject of the Oleum gas-leak was operated by a subsidiary. The Supreme Court observed that:

> [T]he *enterprise* is permitted to carry on the hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional *on the enterprise absorbing the cost of any accident*[88]

To be sure, the Supreme Court in *Shri Ram Food & Fertilizers* articulated its radical break from precedent merely as the incorporation of a new standard for strict liability. But many commentators see this as introducing an enterprise-liability regime for environmental torts.[89] Such readings are not without reason - the Court *was* trying to create a liability framework, and in that exercise, it very explicitly recognised 'enterprise' as the subject of such liabilities. The very use of term 'enterprise' is value ridden—only a year ago, the Indian state specifically argued for an *enterprise* liability regime, as distinct from a liability regime centred around legal entities.[90]

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85 The text of the plaint is from Upendra Baxi and Thomas Paul, *Mass Disasters and Multinational Liability: The Bhopal Case* (Indian Law Institute 1986) 1-17 (emphasis added).

86 Upendra Baxi, 'Mass Torts, Multinational Enterprise Liability and Private International Law' in *Collected Courses of the Hague Academy of International Law* 400-401 (1999); Dearborn (n 19) 200-210.

87 *MC Mehta v Union of India* (1987) 1 SCC 395.

88 ibid [36] (emphasis added).

89 Baxi (n 86); Usha Ramanathan, 'Liability and Environmental Damage: The Indian Experience' (International Environment Law Research Centre, 26 February 2004) <www.ielrc.org/activities/conference_0402/Assets/kl/040226_UshaRamanathan.pdf> accessed 3 October 2022.

90 As in Bhopal, even in the facts of *MC Mehta v Union of India*, the fertilizer factory which was the subject of the gas-leak was operated by a subsidiary. The use of the word 'enterprise' must be

VI. Conclusion

The situation regarding corporate emissions of greenhouse gasses is dire. As of 2017, more than seventy percent of the world's cumulative carbon emissions since 1988 can be traced to a mere hundred companies[91] and about fifty percent of these emissions were generated by just twenty-five companies.[92] Without effective corporate liability for carbon emissions, it is unlikely that the Paris Agreement's target to limit rise in global temperatures to 'well below 2 degrees Celsius' shall be met. *Friends of the Earth* is remarkable for it seemingly provides a new and stricter model of corporate emissions liability. Thus, we believe this decision to be of great significance in global transitions to renewable energy. More importantly, the reasoning employed by the Court is not peculiar to Dutch law and may be generally replicated across jurisdictions.

Treatment of corporate structures lies at the under-acknowledged centre of *Friends of the Earth* and it determines to a great extent how this decision will be emulated in other jurisdictions. This note engaged with a thematic analysis of that treatment. We argued that the emissions liability imposed on RDS is not recognisable within the general principles of limited liability. Instead, this decision should be considered to be inaugurating a new regime of liability based on principles of enterprise liability. According to this new liability model, the parent company should be held responsible for reducing the subsidiaries' carbon emissions, if the parent company exercises decisive influence in creating emissions reduction policies of the subsidiary. That the subsidiary and parent companies are sufficiently interconnected vis-à-vis their economic purpose, is another important parameter. We further argued that the emissions liability model of *Friends of the Earth* is substantively better than comparable emissions liability models based on principles of limited liability. We believe this new model to be better and sought to show that an enterprise liability-based model is available to be adopted by Indian courts, in cases where torts relating to the environment are of concern.

The decision of the Court has had substantial effects. It has encouraged a spate of litigations against other major corporate carbon emitters, as noted earlier. Moreover, since the decision, RDS has decided to shift its headquarters to London from the Hague. Arguably, this move makes it difficult for Dutch courts to enforce their decision. But this shift also emphasises the need for stricter liabilities for carbon emissions to be emulated more generally, across jurisdictions. To that end is the central purpose of this note - we believe that the emissions liability regime sketched presently, is the one that should be broadly adopted.

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contextualized in such manner.

91 Paul Griffin, 'Carbon Majors Report' (CDP and Climate Accountability Institute, July 2017) <https://cdn.cdp.net/cdp-production/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf?1501833772> accessed 3 October 2022.

92 ibid.

THE LEGALITY REQUIREMENT VIS-À-VIS CONSTITUTIONAL RIGHTS

Shrutanjaya Bhardwaj*

Textually, some fundamental rights in the Indian Constitution can only be restricted 'by law' (the legality requirement), while others have no such requirement. This paper proceeds on the basis that this textual difference is material and, with that in mind, tries to identify what the legality requirement exactly means. Two possible meanings are discussed: the broader 'traceability' view, which only requires that the State action restricting the right be traceable to a statute, and the narrower 'contemplation' view, which would require something more. It is found that a 'traceability' requirement exists even independently of Part III of the Constitution; hence, if the legality requirement merely implied 'traceability', its presence in some provisions of Part III (and not in others) would be redundant. Therefore, this paper rejects the 'traceability' view. Adopting the 'contemplation' view, then, it is proposed that the legality requirement in Part III additionally requires that the law specifically empower the relevant authority to curtail the particular fundamental right in question ('specificity'), and that it must contain sufficient details guiding how and when the restriction may be placed ('guidance'). To conclude, a calibrated approach is proposed in determining if the law contains enough specificity and guidance, depending on the following factors: nature of the law, subject matter of the law, and the degree of invasion into the fundamental right in question.

Keywords: *legality – lawfulness – provided by law – prescribed by law – constitutional rights – traceability – contemplation – specificity – guidance – degree of invasion – rule against redundancy*

Introduction

As per the constitutional text, most fundamental rights can be regulated or restricted only by 'law'. This is called the legality requirement.[1] For example, Article 21 allows life

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1 See, for instance, *KS Puttaswamy (Privacy-9J) v Union of India* (2017) 10 SCC 1 [325] (Chandrachud J for himself and 3 others).

and personal liberty to be infringed under a procedure 'established by law'.[2] Under Article 22, the Parliament may prescribe conditions and outer limits of preventive detention 'by law'.[3] Article 19 freedoms can only be restricted by an 'existing law' or a new 'law'.[4] Article 25(2) allows the State to regulate economic, financial, political or other secular activities associated with religious practices, and also to provide for social welfare or reform or throw open Hindu public institutions, by an 'existing law' or a new 'law'.[5] Article 15(5) allows special provisions (e.g., reservations) to be made in favour of SCs, STs and SEBCs even in private educational institutions, but only 'by law'.[6] Article 16(3) allows Parliament to make 'law' and impose residence requirements for persons seeking public employment in a given State or Union Territory.[7] Under Article 33, the Parliament is empowered to restrict the application of the fundamental rights chapter to members of the Armed Forces, but it may do so only 'by law'.[8]

But not all fundamental rights have this textual protection. For example, the State textually requires no 'law' to restrict the freedom of conscience and religion guaranteed by Article 25(1) or the freedom of religious denominations to manage their own affairs under Article 26.[9] Under Article 23(2), the State can impose compulsory service for public purposes—which presumably infringes the right to personal liberty and the right against exploitation—without a 'law'.[10] None of the affirmative action provisions in Articles 15 and 16 require a 'law', except Articles 15(5) and 16(3) discussed *supra*.[11]

Conversely, the legality requirement is not limited to Part III. For example, the Constitution prohibits the levy or collection of any tax 'except by authority of law',[12] and also the deprivation of any person of property 'save by authority of law'.[13] Some other provisions imposing a legality requirement are beyond the scope of this paper because they do not concern rights.[14]

2 Constitution of India 1950, art 21.

3 Constitution of India 1950, art 22.

4 Constitution of India 1950, arts 19(2) to 19(6). See also, *Kharak Singh v State of UP* (1964) 1 SCR 332 [5]-[6]; *Bijoe Emmanuel v State of Kerala* (1986) 3 SCC 615 [16].

5 Constitution of India 1950, art 25(2).

6 Constitution of India 1950, art 15(5).

7 Constitution of India 1950, art 16(3).

8 Constitution of India 1950, art 33.

9 Constitution of India 1950, arts 25(1) & 26.

10 Constitution of India 1950, art 23(2).

11 Constitution of India 1950, arts 15 & 16.

12 Constitution of India 1950, art 265.

13 Constitution of India 1950, art 300-A.

14 Illustratively, Article 53(2) states that the President's power to command the defence forces shall be regulated 'by law'. Article 82 contemplates the adjusting of territorial boundaries of constituencies for Parliamentary elections by an authority and in a manner prescribed 'by law'. Article 124(5) permits Parliament to prescribe impeachment procedure of a Supreme Court judge 'by law'. The mention of the legality requirement in these provisions seems only obvious

This glaring textual difference indicates that the legality requirement (whatever it means) is not applicable to all rights. It applies to some fundamental rights but not others, and also applies to some non-fundamental rights. It is a settled principle of interpretation that no words in a statute—much less in a constitution—can be considered otiose:

> In the interpretation of statutes, the courts always presume that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have an effect[15]

So, the words 'by law' in the abovementioned provisions cannot be considered otiose. There must be a meaningful normative distinction between provisions that contain the legality requirement and those that do not. This raises the question as to what the legality requirement exactly means. That is the question this paper explores.

I. Two Possible Meanings

The legality requirement could be interpreted in two different ways. Under the broader interpretation (the 'traceability' view), a fundamental right (say, free speech) can be restricted so long as the restriction is traceable to a statute. This is nothing more than an *intra vires* requirement; all it asks is that the governmental action be authorised, directly or indirectly, by *some* Act of Parliament or a State Legislature.

However, under the narrower interpretation (the 'contemplation' view), it is not enough that the state action can be traced to a statute; it must also be shown that the statute contemplates a restriction on the *specific* fundamental right in question. In other words, it must be shown that the legislature consciously decided to empower the executive to restrict that specific fundamental right in the identified circumstances.

Some Supreme Court judgments contain indications of the traceability view. In *Bijoe Emannuel*,[16] the Supreme Court described the legality requirement as under:

> The law is now well settled that any law which be made under clauses (2) to (6) of Article 19 to regulate the exercise of the right to the freedoms guaranteed by Article 19(1)(a) to (e) and (g) *must be 'a law' having statutory force and not a mere executive or departmental instruction.*[17]

Similarly, in *Puttaswamy*,[18] D.Y. Chandrachud J. speaking for a plurality of four judges

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given that it is Parliament alone that is empowered to decide these norms—there is no way other than law-making in which Parliament can act. This is different from Part III which permits the 'State' to impose restrictions, and the definition of 'State' includes not only legislatures but also executive bodies. See Constitution of India 1950, art 12.

15 *V Jagannadha Rao v State of AP* (2001) 10 SCC 401 [18].

16 *Bijoe Emmanuel* (n 4).

17 ibid [16] (emphasis added).

18 *Puttaswamy* (n 1).

stated that any invasion of privacy must meet the requirement of legality, 'which postulates the existence of law'.[19] These statements indicate the view that the legality requirement merely requires that there be *some* statutory authorisation for the State action, such that the rules or regulations imposing the restriction can be described as 'having statutory force'. However, these statements are inconclusive, and no definite Supreme Court judgement exists on this issue.

To appreciate the difference between the two views, consider the following hypothetical. Suppose a state law called the School Education Act establishes a management committee for each school in the State to look after the administration of the concerned school, and grants the State Government the power to prescribe (by regulations) the powers and functions of school management committees. Pursuant to this power, the State Government frames regulations and empowers the school management committees to impose 'any rule' on students 'in the interest of the school or of general decorum' which, if violated, would entail suspension or rustication for the student concerned. The school management committee of School X, a government school, issues the following rules:

1. 'All students must submit their thumb impressions and iris scans at the school gates every morning at the time of entering and leaving the school premises.'

2. 'No student shall criticize the ruling party while on school premises.'

The reasonableness of these rules aside, it is worth asking if the State has restricted the students' rights of privacy and free speech respectively 'by law'. Under the traceability view, the legality requirement is satisfied because these rules are neatly traceable to the School Education Act. Under the contemplation view, however, the legality requirement is not satisfied because neither the Act nor the Regulations contemplate a restriction on speech and privacy rights. It could have been satisfied, e.g., if the Act expressly empowered schools to collect biometrics/bodily samples or regulate speech by and among students.

The remainder of this paper argues against the traceability view and in favour of the contemplation view. Part II discusses the flaw in the traceability view and shows how it renders the legality requirement in the Constitution redundant. Part III charts out the elements of the contemplation view. Part IV offers some suggestions on adopting a calibrated approach under the contemplation view. This is followed by the conclusion.

II. The Flaw in the 'Traceability' View

I propose that the 'traceability' view renders the legality requirement in Part III redundant. This is because the 'traceability' requirement exists independently of Part III, being grounded in the principles of limited government, separation of powers and the rule of law.

19 ibid [325] (Chandrachud J for himself).

If this proposition is correct, some sequiturs follow. For example, even if the words 'by law' were absent in Article 19(2), the Executive would have no power to place restrictions on the freedom of speech without the authority of law. By analogy, statutory authorisation is required to restrict even those fundamental rights that textually do not impose the legality requirement (such as the freedom of religion under Articles 25 & 26).[20] These implications are further discussed in Part II.C below.

But before establishing this proposition, a preliminary question must be answered—what (if anything) can the Executive do *without* the authority of law?

A. Executive power

While the Parliament alone is empowered to legislate at the central level, the Constitution confers a certain 'executive power' on the Central Government, which is co-extensive with the Parliament's power to make laws. Thus, the 'executive power' of the Union exists in the same areas or subject-matters in which Parliament has power to make laws in terms of Schedule VII. A similar 'executive power' is conferred on the State Governments, again co-extensive with the legislative powers of the State Legislatures. But the phrase 'executive power' is not defined. It could refer to a power to *execute* laws or to a more general power of governance and administration even in the absence of laws. While the Constitution makes it clear that the Executive can never contravene an existing law,[21] it does not clarify whether the Executive can act in the absence of law; and if yes, to what extent.

The Supreme Court authoritatively decided this issue in *Ram Jawaya Kapur*.[22] The Petitioner was aggrieved by the monopoly established through 'resolutions' by the State of Punjab in the business of publishing and printing school textbooks, and argued that such a monopoly could not be established without legislative backing.[23] Rejecting the contention, the Constitution Bench held that the Executive is free to make policy and 'carry[…] it into execution'.[24] It rejected the view that 'in order to enable the executive to function there must be a law already in existence and that the powers of the executive are limited merely to the carrying out of these laws'.[25]

But an exception was carved out as follows:

> [W]hen it is necessary to encroach upon private rights in order to enable the Government to carry on their business, a specific legislation

20 I am grateful to the anonymous peer reviewer for prompting this clarification.

21 Constitution of India 1950, art 154.

22 *Rai Sahib Ram Jawaya Kapur v State of Punjab* (1955) 2 SCR 225.

23 ibid [5].

24 ibid [13].

25 ibid [12]. Note that a seemingly contradictory view was taken by a smaller bench in *Chief Settlement Commr. v Om Parkash* (1968) 3 SCR 655 [7].

sanctioning such course would have to be passed.[26]

Therefore, the Executive may not infringe private rights under its executive power without legislative backing. Though there was no occasion for the Court to examine this exception further (because the State action was held as not affecting the Petitioner's freedom to trade),[27] *Ram Jawaya Kapur* is a helpful starting point to understand the 'traceability' view. The judgement clarifies that there is at least one exception to the idea that the Government can act without legislative backing. Yet, it does not conclusively establish that the traceability requirement is located *outside of Part III*, especially since the Court was deciding a challenge under Article 19(6) which expressly contains the legality requirement.

B. The traceability requirement during an Emergency

The best scenario, then, to test the proposition that the traceability requirement exists independently of Part III, is a scenario when Part III stands suspended—i.e., an Emergency.[28] Article 358 of the Constitution empowers the State, during an Emergency, 'to take any executive action which the State would but for the provisions contained in [Part III] be competent to make or to take'.[29] Hence, if the traceability requirement were exclusively contained in Part III, it would disappear during an Emergency. But as we will see below, that is not the case.

In *Bharat Singh*,[30] the Petitioner challenged an Order passed by the State Government directing him to remain within one district of Madhya Pradesh and to report his movements.[31] The Order was passed under Section 3 of the Madhya Pradesh Public Security Act, 1959.[32] However, relevant parts of that section were found unconstitutional and struck down by the High Court.[33] Consequently, there existed no legislation to back the Order. The State of Punjab argued that the Order was nonetheless saved by Article 358, implying that *but for Part III*, the State would be competent to make the Order.[34]

26 ibid [17]. As Seervai notes, this is the correct reading of the 'executive power' clauses, for other provisions of the Constitution also refer to the executive power in a context that makes it clear that a law is not always required for the Government to act. See, for instance, Article 298 prior to its amendment in 1956, which permits the Union and the States to grant, sale, dispose or mortgage any property in their 'executive power', but 'subject to any law made by the appropriate Legislature', implying that where there is no law, the Government may proceed to act in its executive power. HM Seervai, *Constitutional Law of India*, vol 1 (4th edn, Universal 2011) 356.

27 ibid [20].

28 Constitution of India 1950, arts 352, 358 & 359.

29 Constitution of India 1950, art 358(1).

30 *State of MP v Thakur Bharat Singh* (1967) 2 SCR 454.

31 ibid [1].

32 ibid.

33 ibid.

34 ibid [5].

The Court rejected the State's contention and held that any executive action that operates to the prejudice of any person must be traceable to a law:

> *All executive action which operates to the prejudice of any person must have the authority of law to support it,* and the terms of Article 358 do not detract from that rule…. Article 358 does not purport to invest the State with arbitrary authority to take action to the prejudice of citizens and others: it merely provides that so long as the proclamation of emergency subsists laws may be enacted, *and executive action may be taken in pursuance of lawful authority,* which if the provisions of Article 19 were operative would have been invalid.[35]

In other words, the limitation that executive action should be backed by law is not sourced from Part III—at least not exclusively. The Court linked this limitation to the principles of limited government, separation of powers and the rule of law:

> Our federal structure is founded on certain fundamental principles: (1) the sovereignty of the people with limited Government authority i.e. the Government must be conducted in accordance with the will of the majority of the people. The people govern themselves through their representatives, whereas the official agencies of the executive Government possess only such powers as have been conferred upon them by the people; (2) There is a distribution of powers between the three organs of the State — legislative, executive and judicial — each organ having some check direct or indirect on the other; and (3) the rule of law which includes judicial review of arbitrary executive action…. We have adopted under our Constitution not the continental system but the British system under which the rule of law prevails. Every Act done by the Government or by its officers must, if it is to operate to the prejudice of any person must, be supported by some legislative authority.[36]

The Court noted *Ram Jawaya Kapur* and distinguished it on the ground that the State action involved in that case did not operate to the Petitioner's prejudice.[37] But as Seervai notes, there was no need for the Court to 'distinguish' *Ram Jawaya Kapur* because the principle laid down in that case is effectively reiterated in *Bharat Singh*.[38] The dictum in *Bharat Singh* was affirmed by Khanna J. in his dissenting opinion in *ADM Jabalpur,* holding that the requirement of legality was not suspended during the Emergency.[39]

35 ibid (emphasis added).

36 ibid.

37 ibid [6].

38 HM Seervai, *Constitutional Law of India*, vol 2 (4th edn, Universal 2011) 2028.

39 *ADM, Jabalpur v Shivakant Shukla* (1976) 2 SCC 521 [560]-[561] (Khanna J, dissenting).

C. *Summing up: Part III and the 'traceability' view*

A combined reading of *Ram Jawaya Kapur* and *Bharat Singh* reveals the following propositions:

i. The 'executive power' contemplated under Articles 73 & 162 of the Constitution can be used in the absence of law, unless the State action in question operates to the prejudice of any person.

ii. The rule that prohibits the Executive from acting to the prejudice of any person does not stem from Part III, at least not exclusively; rather, it is inherent in the idea of 'executive power' conferred by Articles 73 & 162.

From the second proposition, it follows that if the legality requirement in Part III were understood as merely a 'traceability' requirement, it would be wholly redundant, since traceability is required even *de hors* Part III. The legality requirement in Part III must hence mean something more.

This can be approached from another angle. Consider those fundamental rights that do not contain the words 'by law'— e.g., the freedom of conscience and religion under Article 25. Any governmental measure that restricts this freedom would obviously be said to operate to the prejudice of the concerned persons. Going by *Bharat Singh*, then, it is clear that the right under Article 25 cannot be restricted unless the restriction can be traced to a law. Hence, there must be some other difference between provisions that contain the legality requirement (such as Article 19) and provisions that do not (Article 25).

III. The 'Contemplation' View

Besides the argument on redundancy discussed above, the normative justification for the 'contemplation' view begins at *Bharat Singh* itself: 'the Government must be conducted in accordance with the will of the majority of the people'.[40] Our Constitution recognises legislative sovereignty because only legislatures are elected by the people. By extension, only legislatures are authorised to restrict individual rights in public interest. Rights-restricting measures by any other organ would be illegitimate. Executive governments comprise only of a few ministers and the President or Governor, which is a tiny fraction of the strength of the legislature. The Executive, therefore, cannot be said to represent the legislature for this purpose.

Flowing from this, I submit a two-pronged definition of the contemplation view. *First*, a generic law empowering the Executive to act would not be enough. The law must *specifically* authorise a restriction on the right in question. We can call this the 'specificity' prong. *Second*, the law must contemplate the precise manner and circumstances in which the Government may restrict the right(s) in question. We can call this the 'guidance' prong.

40 *Bharat Singh* (n 30) [5].

A. Specificity

A specific legislative authority is important to ensure that the legislature was conscious of the possibility of the law being applied to restrict that right. When the Government restricts constitutional rights, the bar should be set higher, commensurate with the stakes involved. Hence, the Government's actions should be justifiable only with reference to a law which *specifically* contemplates a restriction on the right in question. In most cases, this would mean a specific reference to the object of the right—e.g., a law contemplating speech restrictions would specifically provide for a prohibition on the circulation of books or pamphlets.

A good illustration of the specificity requirement is the case of *Orient Fabrics,*[41] which concerned the taxing provision in Article 265.[42] The Petitioner had failed to pay the duty leviable under the Additional Duties of Excise (Goods of Special Importance) Act, 1957 ('Additional Duties Act'). The Collector validly passed an order of levy to recover the same. But the Collector also went ahead and, despite there being no specific provision in the Act empowering this, initiated confiscation proceedings and imposed a penalty on the Petitioner.[43] The Petitioner challenged the aspects of confiscation and penalty, arguing that those were resorted to without the authority of law.[44]

The State relied on Section 3(3) of the Act, which stated that the provisions of the Central Excise Act, 1944 ('Excise Act') shall apply to the proceedings under the Additional Duties Act with respect to the 'levy and collection' of the additional duties 'as they apply in relation to the levy and collection of the duties of excise'.[45] It was argued that since the Excise Act provides for confiscation and penalty, those measures are available under the Additional Duties Act as well.[46]

The Court emphatically rejected the State's contention. It was held that Section 3(3) only incorporates the 'procedural' provisions of the Excise Act. The Court held that the legality requirement under Article 265 mandated a clear and specific legal provision authorising the imposition of tax liability, and a general reference to the Excise Act in Section 3(3) did not automatically incorporate the provisions allowing confiscation and penalty:

> Article 265 of the Constitution provides that no tax shall be levied or

41 *CCE v Orient Fabrics (P) Ltd.* (2004) 1 SCC 597.

42 Though the judgement only adverts to Article 265, readers will note that the right to property is also clearly implicated, and the principles applied by the Court will likely also govern the analysis under Article 300-A which similarly requires the 'authority of law'. See Constitution of India 1950, art 300-A.

43 *Orient Fabrics* (n 41) [2].

44 ibid [3].

45 ibid [5].

46 ibid.

> collected except by authority of law. *The authority has to be specific and explicit and expressly provided.* The Act created liability for additional duty for excise, but *created no liability for any penalty.* That being so, the confiscation proceedings against the respondents were unwarranted and without authority of law.[47]

In other words, it is not enough that the authority to impose the levy is traceable to a statute (such as the Excise Act). Unless the Additional Duties Act *specifically* provides that goods can be confiscated or penalty imposed, these measures cannot be taken.

B. Guidance

A specific reference to the object of the right is necessary but not sufficient. The 'contemplation' requirement is not satisfied by a casual, generic and overbroad conferment of power on the Executive to do whatever it wants. The legislature must fill in the details to ensure that the exercise of power by the Executive is canalised. The law must indicate the precise manner and circumstances in which the restriction may be imposed. If these crucial aspects were left to the Executive's whim, it would be incorrect to say that the legislature has provided for restrictions on rights; what the legislature would have effectively done is abdicate its functions in favour of the Executive.

In fact, this principle is already solidly grounded in the Supreme Court's jurisprudence on Article 14. A law which confers unfettered discretion on the Executive allows it to discriminate between similarly-situated persons and *ipso facto* violates Article 14. In *Dalmia*,[48] the *locus classicus* on this point, the Constitution Bench had held that the Court will:

> …strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of selection or classification, on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the Government so as to enable it to discriminate between persons or things similarly situate and that, therefore, the discrimination is inherent in the statute itself.[49]

The 'guidance' prong has similar undertones. The U.K. Court of Appeals recently explained this in *Bridges*.[50] The Appellants therein challenged the use of a facial recognition tool called AFR Locate by the South Wales Police as violative of the right to privacy under the European Convention on Human Rights ('ECHR'). AFR Locate 'involves the deployment of surveillance cameras to capture digital images of members of the public, which are then processed and compared with digital images of persons on a watchlist

47 ibid [6] (emphasis added).

48 *Ram Krishna Dalmia v Justice SR Tendolkar* 1959 SCR 279.

49 ibid [12(iii)].

50 *R (Bridges) v Chief Constable of South Wales Police* [2020] EWCA Civ 1058.

compiled by SWP for the purpose of the deployment'.[51] Though the Appellants argued that the use of AFR Locate failed the legality requirement under the ECHR,[52] it was 'common ground' among all parties before the Court that the requirements of traceability and specificity were satisfied—the use of AFR Locate was 'both authorised under the Police and Criminal Evidence Act 1984 and within the powers of the police at common law'.[53] The question of legality in this case; therefore, was not about traceability or specificity, but about the details provided in the legal framework about the use of AFR Locate.[54]

The Court began by adopting a relativist approach under which the amount of detail required in the legal framework is proportionate to how intrusive the governmental measure is.[55] It also noted the previous judgment in *Gallagher*'s case in which the U.K. Supreme Court had held that a law should contain enough details to avoid conferring 'a discretion so broad that its scope is in practice dependent on the will of those who apply it, rather than on the law itself.'[56] In this light, considering the nature of AFR Locate as a surveillance tool, the Court found two 'fundamental deficiencies' in the legal framework governing it:[57]

1. It was not clarified as to *who* could be placed on the 'watchlist' of AFR Locate.

2. There were no criteria for deciding *where* AFR could be deployed.

In respect of both these aspects, the Court found 'too much discretion' having been left to individual police officers,[58] and concluded that the deployment of AFR Locate was not in accordance with law for the purposes of the ECHR.[59] Therefore, what weighed with the Court was the absence of guidance on critical aspects of the use of AFR Locate.

One caveat may be entered here. Though *Bridges* demonstrates the 'guidance' prong well, the judgement is not solely about primary legislations. Throughout the legality analysis, the Court constantly refers to the entire 'legal framework' rather than only the legislation(s) governing the issue, and it appears that the 'guidance' prong would be satisfied for the Court even if subordinate legislations (regulations, schemes, policies etc.) had contained clear guidelines for police officers on the 'who question' and the 'where question'.[60] This is an understandable approach but it does not detract from the proposition that the legislation must contain adequate details. That proposition, as shown above, flows directly from Article 14. By their very nature, primary and secondary legislations

51 ibid [1].

52 ibid [32].

53 ibid [38].

54 ibid [55]-[56].

55 ibid [82]-[83].

56 See *R (P) v Secretary of State for Justice* [2019] UKSC 3 [17].

57 *Bridges* (n 50) [91].

58 ibid.

59 ibid [210(1)].

60 See the Court's discussion of regulations, codes and policies; ibid [109]-[130].

are capable of carrying—and must carry—different amounts of detail. What is required from a Court, therefore, is a calibrated approach in determining whether the law and legal framework before it contain enough guidance for the personnel in-charge of administering the law.

IV. A Calibrated Approach

By its very nature, the 'contemplation' view requires a flexible test so as to be applicable in multiple contexts. Several factors, including those discussed below, may determine the degree of contemplation to be found in the law.

A. Nature of legislation

As discussed above, primary legislation admits of a different degree of detail than subordinate legislation. This is, in fact, why subordinate legislation exists. The legislature can only provide a broad solution to any given problem, and the finer nuances are left to be supplied by the Government through regulations. Therefore, the contemplation view does not require that all fine details must be contained within the legislation itself. It only requires that the primary legislation contain *adequate* guidance for the Executive, and the secondary legislation contain the other details.

B. Subject matter of the law

The degree of detail expected in a law would also depend on its subject matter. Some laws deal with problems which, by their very nature, demand broad-brush provisions with a vast discretion left to the Executive. For instance, laws designed to deal with public emergencies (such as unrest[61] or a pandemic[62]) must permit the Government to take any action necessary to tackle the emergency. Other laws, such as those prohibiting the display of obscenity[63] or those regulating the processing of personal data[64] can afford to be more specific.

C. Degree of invasion

As observed in *Bridges*, the level of detail required in the legal framework is proportionate to how invasive the State measure is.[65] Extending this principle, the Court may find in any given case that certain State measures are so invasive that the authorisation for them must necessarily come from the legislature. For instance, the Court may refuse to interpret a law allowing collection of 'personal data' as also allowing the collection of fingerprints and iris scans, on the ground that these biometrics are so private to every individual that an authorisation to collect them must come specifically from the legislature.

61 See Code of Criminal Procedure 1973, s 144.

62 See Epidemic Diseases Act 1897.

63 See Indian Penal Code 1860, ss 292 & 294.

64 See Data Protection Bill 2019.

65 *Bridges* (n 50) [82]-[83].

Conclusion

The legality requirement in the Constitution—in Part III and elsewhere—cannot be reduced to a 'traceability' requirement. This is because a traceability requirement anyway exists *de hors* these constitutional provisions by virtue of the principles of legislative supremacy, separation of powers, and the rule of law. Therefore, legality requires something more. It requires that the law in question must (i) specifically contemplate a restriction on the right in question, and (ii) provide sufficient guidance to the Executive as to the manner and circumstances in which the restriction can be imposed. These requirements must be calibrated to suit the facts and circumstances of each dispute, particularly with reference to the degree of detail required in a primary legislation, the subject-matter dealt with by the law in question, and the extent of invasiveness of the governmental measure.

IDENTIFYING AN ACTIONABLE ALGORITHMIC TRANSPARENCY FRAMEWORK: A COMPARATIVE ANALYSIS OF INITIATIVES TO ENHANCE ACCOUNTABILITY OF SOCIAL MEDIA PLATFORMS

Varun Ramdas*

Several harms have renewed interest in the responsibilities of social media platforms. However, policymakers face numerous challenges while they attempt to address these harms. One significant challenge is the creation of a framework to address harms arising from recommender algorithms deployed by social media platforms to manage content. 'Black box' algorithms are opaque and exacerbate harms like privacy concerns, user bias and discrimination, and arbitrary restrictions on free speech. Consequently, regulators demand algorithmic transparency and accountability from social media platforms. This paper contextualises the debate by discussing harms arising out of 'black box' recommender algorithms, their use by social media platforms, and consequent demands for more transparency and accountability. It then identifies and analyses three regulatory approaches to algorithmic transparency- namely, enactment of legal frameworks on algorithmic transparency; voluntary impact assessments and audits; and transparency through stack standardisation, and the drawbacks associated with them. It then highlights the want for an actionable framework that can guide regulators and platforms as they attempt to enhance algorithmic transparency. Finally, it suggests a graded approach that rationalises the benefits and concerns of all three approaches and harmonises regulation and

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innovation as the way forward.

Keywords: *algorithmic transparency – accountability – AI – ML – social media platforms – black-box recommender algorithm*

Introduction

In the early days of internet regulation, researchers believed that the State could not regulate the internet because existing laws did not align with it.[1] According to them, the internet was an 'exception' to the existing legal precedents, because internet networks had their own sovereignty.[2] Hence, countries should not intervene but allow self-regulation. The internet's design as a communication network is exceptional because of its scale, but the important question is whether that would justify immunity from the operation of laws. Internet laws in many countries exempted intermediary platforms from legal action against content hosted on their infrastructure, subject to fulfilling basic legal requirements.[3] The Communications Decency Act, 1996 ('CDA')[4] and the Digital Millennium Copyright Act, 1998 ('DMCA')[5] in the United States, the 2000 E-Commerce Directive in the European Union[6], and India's Information Technology Act, 2000[7] give broad immunity or 'safe harbour' from content hosted by intermediaries.[8] Under these laws, intermediaries including internet service providers ('ISPs'), cloud storage service providers, social media platforms, and e-commerce platforms could follow due diligence obligations under the respective country's laws and exempt themselves from legal actions against content hosted on their platforms. Over the years, this understanding has been nuanced by judicial and legislative action to move from broader to narrower immunity for intermediaries.[9]

1 Tim Wu, 'Is Internet Exceptionalism Dead' in Berin Szoka and Adam Marcus (eds), *The Next Digital Decade: Essays On The Future Of The Internet* (TechFreedom 2010).

2 David R Johnson and David Post, 'Law And Borders: The Rise Of Law In Cyberspace' (1996) 48(5) Stanford L Rev 1367.

3 Kai Jia, 'From Immunity To Regulation: Turning Point Of Internet Intermediary Regulatory Agenda' (2016) The Journal of Law and Technology at Texas <https://jolttx.com/2016/10/08/immunity-regulation-turning-point-internet-intermediary-regulatory-agenda/> accessed 3 June 2022.

4 Communications Decency Act 1996, 47 USC, s 230.

5 Digital Millennium Copyright Act 1998, 17 USC, s 512.

6 E-Commerce Directive 2000/31/EC of the European Parliament and of the Council, art 4.

7 Information Technology Act 2000, s 79.

8 See Rebecca MacKinnon and others, 'Fostering Freedom Online: The Role of Internet Intermediaries' (UNESCO 2014) 40. The report defines three types of intermediary liability – strict liability, safe harbour or conditional liability and broad immunity. The regimes in China and Thailand, where intermediaries are liable for any infringing third-party content regardless of knowledge, are an example of strict liability; the intermediary liability regimes in India and the EU, where platforms have to fulfil conditions for immunity from action against third-party content, are an example of conditional immunity; and the DMCA in the US, which provides unconditional immunity for copyright violations on its platform is an example of broad immunity.

9 In *Doe v Internet Brands, Inc* [2014] (767 F.3d 894 (9th Cir. 2014), the US Court of Appeals for the Ninth Circuit held that Section 230 (c) of the CDA does not permit 'a general immunity

Social media platforms are a subset of intermediaries, and their main function is to facilitate information exchange between two or more users. The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) 2021 ('2021 IT Rules') defines a social media intermediary as an 'intermediary which primarily or solely enables online interaction between two or more users and allows them to create, upload, share, disseminate, modify, or access information using its services'.[10] Of late, regulators are focussing on measures to mitigate harms that arise from content on social media platforms with large user-bases. In 2018, the US amended Section 230 to require platforms to remove content that violates state and federal trafficking laws. The European Union will implement the Digital Services Act which has specific obligations on 'very large online platforms' from 2024. The Digital Services Act ('DSA') proposes higher standards of transparency and accountability on these platforms, especially for content moderation, advertising, and algorithmic processes. The 2021 IT Rules take a similar approach to 'significant social media intermediaries', requiring them to implement an automated content filtering mechanism.[11] The shift from internet self-regulation to a wide immunity approach to entity-based regulation of large social media platforms needs to be assessed in the context of business practices of social media platforms and their inability to address governance concerns caused by content on their platforms.

Regulatory or policy initiatives to address the harms that stem or magnify from algorithms on social media platforms are recent. The main obstacle to regulating algorithms is that Machine Learning ('ML') algorithms are 'black boxes' or opaque algorithms that produce visible outputs, but the process behind the output is indiscernible. Governments are considering varied approaches to address this concern. Governments, research organisations, and inter-governmental bodies such as the Organisation for Economic Cooperation and Development ('OECD') have developed principles on the use and design of Artificial Intelligence ('AI'), but translating these principles into actionable regulatory frameworks is at a nascent stage.

This article looks to contextualise the harms/risks associated with media dissemination on social media platforms and the methods regulators are adopting to demand more transparency and accountability from platforms. This paper will look at the different regulatory approaches to enhance the transparency of algorithms used by social media platforms and analyse these methods. The paper will identify concerns with current

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from liability deriving from third party content', in a matter where Internet Brands, Inc. claimed immunity from the plaintiff's suit against it for not warning users of potential risks that may arise from using the platform. In *Delfi v Estonia* App No. 64569/09 (ECHR 2015), the Grand Chamber of the European Court of Human Rights affirmed the view that Delfi, an internet news portal provided 'content services' and not 'technical services' and should have taken additional steps to prevent publication of overtly unlawful comments on its platform.

10 Information Technology (Intermediary Guidelines and Digital Media Ethics Code) 2021, r 2(1)(w).

11 Information Technology (Intermediary Guidelines and Digital Media Ethics Code) 2021, r 5(4).

approaches and propose a way forward for India, drawing from existing literature on best practices followed by countries or recommended by expert bodies.

In the first section, the article will discuss the harms arising from algorithms used by social media platforms. This part will also clarify the link between the use of AI by social media platforms and their mode of dissemination. Here, the paper will show that the design of social media platforms and their use of AI are opaque and why there is a demand for transparency and accountability from social media platforms. In the next part, the paper will look at the different regulatory approaches to enhance the transparency and accountability of algorithms used by social media platforms. There is sufficient literature on ethical principles that regulators should follow, but there are few actionable frameworks. Finally, the paper will also discuss the concerns with existing approaches and potential methods to circumvent or address them.

I. Use of Algorithms by Social Media Platforms - Design and Concerns

Social media platforms enable content generation, one-to-one personalised information services, and information dissemination.[12] The advent of social media significantly lowered entry barriers for information dissemination, enabled affordable access to diverse and plural opinions,[13] and democratised media dissemination and consumption. Like other media such as print, radio, and television, social media platforms monetise through advertisements.[14] However, the scale and interconnectedness of social media platforms and their ability to supply advertisers with reliable data on user preferences give them an advantage over other media.[15] Platforms seek to optimise two metrics to maintain this advantage – user interaction on the platform and data collected from users. Another pertinent difference is that traditional media disseminates to the 'public at large' while social media enables one-to-one communication.

Social media platforms deploy AI to recommend posts that the user would like to see. Platforms harness data on consumer preferences from likes, comments, and how long a user watches a video to suggest other content to users. It uses this data to inform and help producers create content that is most likely to go viral and suggests filters, edits, and hashtags.[16] The aim is to enhance user interaction on the platform to offer advertisers a lucrative consumer base and share this data with third-party advertisers so that they can

12 Bruce G Vanden Bergh and others, 'The Multidimensional Nature And Brand Impact Of User-Generated Ad Parodies In Social Media' (2011) 30 International Journal of Advertising 103,131.

13 Elda Brogi, 'The Media Pluralism Monitor: Conceptualizing Media Pluralism For The Online Environment' (2020) 29(5) Profesional de la información e290529.

14 ibid.

15 W Glynn Mangold and David J Faulds, 'Social Media: The New Hybrid Element Of The Promotion Mix' (2009) 52(4) Business Horizons 357, 365.

16 Jason Davis, 'The Tiktok Strategy: Using AI Platforms To Take Over The World' (*INSEAD Knowledge*, 19 June 2019) <https://knowledge.insead.edu/entrepreneurship/the-tiktok-strategy-using-ai-platforms-to-take-over-the-world-11776> accessed 1 June 2022.

optimally target consumers. Social media platforms derive revenue through advertisements and algorithms help social media platforms profile users and target advertisements.[17]

AI is trained on large amounts of user data that platforms have collected over the years, and they use this information to amplify content that users would like to see.[18] Specifically, platforms use ML, a subset of AI.[19] Developers enable ML algorithms to learn by themselves and identify patterns and create linkages autonomously, unlike other AI systems where developers determine patterns and train the system to find linkages from a large pool of data.[20] To illustrate, non-ML AI can be trained on many pictures of cats to identify a cat in a picture every time it comes across one. An ML application is equipped to autonomously link whiskers to cats and detect a cat every time it recognises whiskers, without requiring the developer to design a linkage between the two. Social media platforms deploy ML to process user data, create linkages between user behaviour on the platform and preferences, and target content and advertisements to the user.[21]

This design and the incentive structure of social media platforms raise several pertinent questions. *First*, the reliance on user data to support advertising, the main source of revenue for social media platforms, highlights privacy concerns.[22] There is an in inherent trade-off between better recommender systems and privacy.[23] Social media platforms have an incentive to maximise data collection to drive advertising and user interaction on the platform as explained earlier. Further, ML algorithms exacerbate this concern as ML requires substantial amounts of data for training. The autonomous nature of ML also means that platforms cannot predict how the ML application would use user data, raising important privacy concerns. Privacy harms that stem from potential leakage of the vast amount of information that recommender algorithms require is one concern.[24] Further, users are unaware of the extent of data algorithms require, platforms collect, and further inferences that algorithms make. Another concern is the limited scope for removal of data

17 Oana Barbu, 'Advertising, Microtargeting And Social Media' (2014) 163 Procedia - Social and Behavioral Sciences 44, 49.

18 ibid.

19 Balaji TK, Chandra Sekhara Rao Annavarapu and Annushree Bablani, 'Machine Learning Algorithms For Social Media Analysis: A Survey' (2021) 40 Computer Science Review.

20 ibid.

21 Anja Bechmann and Geoffrey C Bowker, 'Unsupervised By Any Other Name: Hidden Layers Of Knowledge Production In Artificial Intelligence On Social Media' (2019) 6(1) Big Data & Society.

22 Barbu (n 17); See also Ganaele Langlois and Greg Elmer, 'The Research Politics Of Social Media Platforms' (2013) 14 Culture Machine <http://svr91.edns1.com/~culturem/index.php/cm/article/download/505/531> accessed 12 July 2022.

23 Arjan Jeckmans and others, 'Privacy in Recommender Systems' in Naeem Ramzan and others (eds) in *Social Media Retrieval* (Springer London 2013).

24 Shyong Lam, Dan Frankowski, and John Riedl, 'Do you trust your recommendations? An exploration of security and privacy issues in recommender systems' in Günter Müller (ed), *Emerging Trends in Information and Communication Security* (Volume 3995 Lecture Notes in Computer Science Springer Berlin / Heidelberg 2006).

collected and input into recommender algorithms.[25] These aspects diminish user autonomy, a core aspect of privacy.[26]

Second, the use of ML to amplify content[27] fits users within filter bubbles, i.e., the ML algorithm identifies consumer preferences, fits consumers within a profile, and tailors their feed to only see content that the algorithm thinks the user prefers.[28] The objective is to maximise user interaction by presenting the user with content that the algorithm understands to be aligned with consumer preferences.[29] Daphne Keller argues that ML-based recommender algorithms[30] exist in a continuum, with search results trying to predict user needs and newsfeed results attempting to predict and rank results based on preferences.[31] Platforms actively recommend content to specific users and curate a personalised feed. This means that a user does not see all views on a particular topic and that all users do not see diverse content on a subject, but view what the algorithm deems as content a user would prefer.[32] Especially in the case of political speech, the use of ML could enhance user bias and polarise them by nudging them further in the direction of their inclinations.[33]A petition filed in the United States District Court of the North District of California alleged that Google's AI is 'digitally profiling' users. The petitioners in *Newman v Google LLC*[34] argue that the use of AI to filter content based on individual preferences is 'unlawfully discriminatory' and 'anticompetitive'.

Misinformation and targeted, and sometimes misleading, political material also

25 Jeckmans (n 23).

26 Karina Vold and Jessica Whittlestone, 'Privacy, autonomy, and personalised targeting: Rethinking how personal data is used' in Carissa Véliz (ed) *Report on Data, Privacy, and the Individual in the Digital Age* (Center for the Governance of Chance 2019).

27 Social media platforms boost content that they feel might be relevant to the consumer. Based on data collected from the user, platforms profile users according to their preferences and promote content that matches this profile.

28 Michael F Cramphorn and Denny Meyer, 'The Gear Model Of Advertising - Modelling Human Response To Advertising Stimuli' (2009) 51(3) International Journal of Market Research 1; See also Shu-Chuan Chu and Yoojung Kim, 'Determinants Of Consumer Engagement In Electronic Word-Of-Mouth (Ewom) In Social Networking Sites' (2011) 30(1) International Journal of Advertising 47.

29 Uthsav Chitra and Christopher Musco, 'Analyzing The Impact Of Filter Bubbles On Social Network Polarization' (2020) Proceedings of the 13th International Conference on Web Search and Data Mining 115.

30 ML algorithms that recommend content to users on social media platforms.

31 Daphne Keller, 'Amplification and its Discontents' (*Knight Columbia*, 8 June 2021) <https://knightcolumbia.org/content/amplification-and-its-discontents> accessed 6 July 2022.

32 Brent Kitchens, Steve L Johnson and Peter Gray, 'Understanding Echo Chambers And Filter Bubbles: The Impact Of Social Media On Diversification And Partisan Shifts In News Consumption' (2020) 44(4) MIS Quarterly 1619.

33 ibid.

34 *Newman v Google LLC* [2021] 20-CV-04011-LHK N.D. Cal.

diminish democratic governance.[35] For instance, Guillaume Chaslot, a former employee of YouTube who worked on the platform's recommendation engine, revealed that the video-sharing platform's ML algorithms push users towards conspiracy theories.[36] According to a report by Global Witness, a human rights group, Facebook's algorithm promoted pro-military propaganda in Myanmar, despite Facebook banning Tatmadaw, Myanmar's armed forces from its platform for misinformation and continued human rights violations.[37] The harm, in this case, is that ML recommender algorithms could radicalise users and nudge soft beliefs towards harmful actions.[38]

Third, platforms also use AI/ML for automated filtering, i.e., the identification of content that violates the platform's content policy and take the content down. Algorithms do not understand the context and only adopt a literal and objective view for content takedowns, which has severe implications on freedom of speech and expression, as it could also censor legitimate speech because an objective interpretation could conclude that it violates platform policy.[39]

II. Transparency as a Principle

The main obstacle to regulating algorithms is that ML algorithms are 'black boxes' or opaque algorithms that produce visible outputs, but the process behind the output is indiscernible.[40] The nature of ML is such that it continuously learns and evolves, and the character of an ML algorithm changes substantially as it receives more data inputs. This makes it even more difficult to trace decisions to the decision-making process.

One method to reduce opacity is the adoption of transparency and accountability of algorithms as an important design principle. For the user, transparency provides an explanation for decisions taken by autonomous decision-making systems and enables

35 Keller (n 31); Joshua A Tucker and others, 'Social Media, Political Polarization, and Political Disinformation: A Review of the Scientific Literature' (*Hewlett Foundation*, March 2018) <https://www.hewlett.org/wp-content/uploads/2018/03/Social-Media-Political-Polarization-and-Political-Disinformation-Literature-Review.pdf> accessed 1 June 2022.

36 Ben Popken, 'As algorithms take over, YouTube's recommendations highlight a human problem', (*NBC News*, 20 April 2018); Zeynep Tufekci, 'YouTube, the Great Radicalizer' (*N.Y. Times*, 10 March 2018); Guillaume Chaslot, 'How YouTube's AI Boosts Alternate Facts' (*Medium*,1 April 2017) <https://guillaumechaslot.medium.com/how-youtubes-a-i-boosts-alternative-facts-3cc276f47cf7> accessed 2 June 2022; Cody Buntain and others, 'YouTube Recommendations and Effects on Sharing Across Online Social Platforms' (2021) 5 (CSCW 1) Proceedings of the ACM on HCI <https://dl.acm.org/doi/10.1145/3449085> accessed 2 June 2022.

37 Global Witness, 'Algorithm of harm: Facebook amplified Myanmar military propaganda following coup' (*Global Witness*, 23 June 2021) < https://www.globalwitness.org/en/campaigns/digital-threats/algorithm-harm-facebook-amplified-myanmar-military-propaganda-following-coup/> accessed 2 June 2022.

38 Keller (n 31).

39 Emma J Llansó, 'No Amount Of "AI" In Content Moderation Will Solve Filtering's Prior-Restraint Problem' (2020) 7 Big Data & Society 1.

40 Bechmann and Bowker (n 21).

informed grievance redressal. For regulators and researchers, transparent design helps trace design flaws in AI/ML decision-making process and look for interventions. 'Transparency' and 'accountability' are imperative ethical principles under most AI Ethics frames.[41] Incorporating these design principles in algorithms used by social media companies would help unpack the design features that amplify content bias and other technological features that culminate in the harms detailed in the section above. However, crystallising AI ethics like 'transparency' and 'accountability' into an actionable regulatory framework poses several challenges.[42]

There are some concerns with pursuing transparency as an end-goal. *First*, algorithms are proprietary information, and 'source codes' can be registered as copyright. Trade secrets protection would also cover algorithms.[43] *Second*, regulators focus their attention on automated content filtering and automated search indexing which focuses on the harms without identifying the cause i.e. opaque algorithms. *Third*, researchers such as Paddy Leerssen highlight that transparency by itself is not useful, given the technical complexity of algorithms and platform design.[44]

To address this concern, researchers suggest enhancing transparency around AI/ML decision-making by making AI explainable.[45] Transparency is a design choice that can help see into this black box, increase accountability, and enhance public trust in AI decision-making. Transparency feeds into explainability and interpretability, or the ability to unpack an algorithmic output into training data, input data, and how the algorithm operates. Technical measures such as Explainable AI ('XAI') created by the Defense

41 National Institute for Transforming India Aayog, 'Discussion Paper: National Strategy for Artificial Intelligence' (NITI Aayog 2019); Organisation for Economic Co-operation and Development, *Recommendations of the Council on Artificial Intelligence* (OECD 2019); High Level Expert Group on AI, 'Ethics Guidelines for Trustworthy AI' (EC 2019); Cabinet Office and others, 'Ethics, Transparency and Accountability Framework for Automated Decision-Making' (Government of United Kingdom, 13 May 2021) <https://www.gov.uk/government/publications/ethics-transparency-and-accountability-framework-for-automated-decision-making/ethics-transparency-and-accountability-framework-for-automated-decision-making> accessed 2 June 2022; IEEE, 'Ethics of Autonomous and Intelligent Systems' (*IEEE Standards Association*) <https://standards.ieee.org/industry-connections/ec/autonomous-systems.html> accessed 2 June 2022.

42 Luciano Floridi, 'Translating Principles into Practices of Digital Ethics: Five Risks of Being Unethical' (2019) 32 Philos Technol 185-193.

43 According to the World Intellectual Property Organization, algorithms can be protected as trade secrets; See World Intellectual Property Organization, 'Frequently Asked Questions: Trade Secrets' (WIPO) <https://www.wipo.int/tradesecrets/en/tradesecrets_faqs.html> accessed 12 June 2022.

44 Paddy Leerssen, 'The Soap Box as a Black Box: Regulating Transparency in Social Media Recommender Systems' (2020) 11(2) EJLT; See also Maayan Perel (Filmar) and Niva Elkin-Koren, 'Black Box Tinkering: Beyond Transparency In Algorithmic Enforcement' (2017) 69(1) Florida L Rev 181.

45 Tim Miller, 'Explanation in artificial intelligence: Insights from the social sciences' (2019) 267 Artificial Intelligence 1.

Advanced Research Projects Agency ('DARPA') in the US seek to address algorithmic opacity by creating ML techniques that are able to explain the rationale behind outcomes to human users.[46] Similarly, Local Interpretable Model Agnostic Explanations ('LIME') is a model-agnostic design solution that provides a qualitative understanding of the connection between variable inputs and AI outcomes.[47]

However, there is no incentive for a social media platform to implement the measures above when their business model is dependent on the AI/ML model, optimising data collection and user interaction. According to researcher Manuel Carabantes, large companies hide the algorithms they use out of security and competitiveness concerns.[48] This calls for regulatory attention and a nuanced approach towards algorithmic accountability that can protect public interest without disproportionately encumbering business models.

III. A Taxonomy of Approaches to Algorithmic Transparency and Accountability

Regulators have adopted varied approaches to get platforms to be transparent about their algorithms. Many countries participate in and contribute to inter-governmental initiatives to define principles for ethical AI. However, the biggest concern with these principles is how they translate into actionable frameworks. There are three approaches that emerge. *First*, countries USA, India, Canada, and the European Union have enacted laws that require transparency from platforms. Some are specific legal instruments on algorithmic transparency while others stipulate the mandate through data protection regulation or platform responsibilities. Data protection and platform responsibility are equally important to address concerns with recommender algorithms. Data protection is important because algorithms learn from vast amounts of data to determine user preferences and platform responsibility is important because platforms deploy the algorithms to curate the user's content feed. The EU and the USA have started processes to address harms that arise from recommender algorithms through regulation. Several countries are parties to inter-governmental initiatives that recommend principles and standards for transparency but there are few regulatory attempts in other countries to create a framework.

Second, voluntary impact assessments and audits are self-regulatory mechanisms that look to enhance transparency and accountability. Some countries also specify conditions that would trigger an impact assessment in their laws. The *third* approach focuses on technological solutions like setting a standard for transparency in algorithmic design. I

46 Dr Matt Turek, 'Explainable Artificial Intelligence' (DARPA) <https://www.darpa.mil/program/explainable-artificial-intelligence> accessed 2 June 2022.

47 Marco Tulio Ribeiro, Sameer Singh and Carlos Guestrin, 'Local Interpretable Model-Agnostic Explanations (LIME): An Introduction' (*O'Reilly,* 12 August 2016) <https://www.oreilly.com/learning/introduction-to-local-interpretable-model-agnostic-explanations-lime> accessed 2 June 2022.

48 Manuel Carabantes, 'Black-Box Artificial Intelligence: An Epistemological And Critical Analysis' (2020) 35 AI & SOCIETY 309.

explain these approaches below.

Legal Frameworks for Algorithmic Transparency

A. Platform responsibility

Internet laws in many countries exempt intermediary platforms from legal proceedings hosted on their infrastructure, subject to fulfilling basic legal requirements.[49] Under these laws, intermediaries including internet service providers, cloud storage service providers, social media platforms, and e-commerce platforms could follow due diligence obligations under the respective country's laws and exempt themselves from legal actions against content hosted on their platforms. Over the years, this understanding has been nuanced by judicial and legislative action to move from broader to narrower immunity for platforms.[50] Now, regulators are focussing on social media platforms with a large user base, following instances of social media content leading to violence.

The European Union will implement the Digital Services Act which has specific obligations on 'very large online platforms' ('VLOPs') before 2024.[51] The proposed Digital Services Act in the European Union looks to standardise rules for digital service providers that act as intermediaries. Among other things, the EU legislation tries to build transparency and accountability obligations as due diligence obligations of intermediaries. This is a departure from the platform responsibility regime under the EU's E-Commerce Directive. Under Article 14 and Article 15 of the E-Commerce Directive, intermediaries have no obligation to monitor user-generated content.[52]

The DSA proposes a framework for enhancing transparency and accountability of VLOPs. Articles 26 and 27 stipulate that large platforms should conduct risk assessments of systemic risks and adopt measures to minimise potential or existing risks. The EU law also proposes mandatory external and independent audits under Article 28. Articles 29 and 30 have a specific obligation for platforms that use recommender (amplification) algorithms. Article 29 of the DSA requires very large platforms that use recommender algorithms to clearly outline the main parameters used for recommendation, give users the option to change parameters, and provide and have at least one option that is not based on profiling. Article 30 requires very large platforms to disclose details of advertisements on the platform, the advertiser, the period of advertisement, whether some individuals or groups were specifically advertised to, and how many users interacted with the advertisement.

The DSA adopts a balanced approach by stipulating obligations based on harm and

49 Jia (n 3).

50 ibid.

51 Commission, 'Proposal for a Regulation Of The European Parliament And Of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC' COM (2020) 825 final.

52 ibid.

network size. It also acknowledges that opaque recommender algorithms are a systemic risk. It categorises intermediaries into four categories– providers of intermediary services, providers of hosting services, online platforms, and VLOPs. The DSA creates a distinction based on the type of services platforms offer and distinguishes VLOPs from online platforms based on their user base. A VLOP is a platform that has more than 45 million active users, which is 10 percent of the 450 million EU consumer base. Subsequent legislation by the European Commission will elaborate the methodology for calculating the user base, so it is unclear whether it is a fixed number or open to interpretation. A concern here is that transparency obligations are applicable only to large platforms while smaller platforms could also amplify harmful content. Perpetrators of shootings in Christchurch, New Zealand, Poway, California, and El Paso, Texas in 2019 published their manifesto on 8chan,[53] an online message board, and conspirators of the 2021 riot at the United States Capitol coordinated on 8kun, the successor to 8chan.[54] Algorithmic transparency may not address risks posed by harmful content on smaller fringe platforms like 8chan and they may require an alternative regulatory approach.

In the aftermath of Christchurch and the Capitol Hill riots, telecom service providers and hosting service providers banned or rescinded agreements with 8chan and 8kun.[55] The US also amended its platform responsibility law in 2018 to remove harmful content.[56] The US amended Section 230 of the Communications Decency Act, 1934 to require platforms to remove content that violates State and Federal trafficking laws. Discussion on further reform to Section 230 also focuses on the role of social media platforms in regulating political discussions, hate speech, and ideological biases. While the 2018 law did not address algorithmic transparency, legislators have introduced legislation to govern algorithms. US Senator Ben Ray Lujan introduced a bill in 2021 to amend Section 230(c) to restrict intermediary immunity of platforms that use algorithms to amplify extremist content.[57] The bill proposed an immunity removal for social media companies with more than 10 million monthly users if they use algorithms, models, or computational processes that recommend content directly relevant to a claim involving (i) interference with civil rights, (ii) neglect to prevent interference with civil rights, or (iii) acts of international terrorism.[58] It is pertinent to note that the bill proposes to waive the immunity of platforms that use algorithms but does not propose measures to improve transparency or accountability.

India also amended its platform responsibility framework in 2021. The 2021 IT Rules

53 Julia Carrie Wong '8chan: the far-right website linked to the rise in hate crimes' *The Guardian* (San Francisco, 5 August 2019).

54 Kari Paul, Luke Harding and Severin Carrell 'Far-right website 8kun again loses internet service protection following Capitol attack' *The Guardian* (15 January 2021).

55 ibid. See Mathew Prince 'Terminating Service for 8chan' (*The Cloudflare Blog*, 5 August 2019) <https://blog.cloudflare.com/terminating-service-for-8chan/> accessed 30 September 2022.

56 Stop Enabling Sex Traffickers Act of 2017.

57 Protecting Americans from Dangerous Algorithms Act.

58 ibid.

in India creates a category of 'significant social media intermediaries' ('SSMI'), and a subsequent notification defines an SSMI as a social media intermediary that has more than 50 lakh (5 million) registered users. The 2021 IT Rules require SSMIs to endeavour to implement an automated content filtering mechanism.[59] The Provisos to Rule 4(4) say that the SSMI should also include a layer of human oversight, a mechanism for periodic review, and evaluate automated tools deployed as per the rule for accuracy, fairness, bias, discrimination, privacy, and security. It is pertinent to note that the 2021 IT Rules do not propose an algorithmic transparency framework for recommender algorithms but opens content filtering algorithms for human oversight and periodic review. However, the 2021 IT Rules do not clarify an enforcement mechanism for this oversight and review. There are discussions on a new framework for the digital ecosystem in India, but it is yet to be seen whether it will create a framework for algorithmic transparency.[60]

B. Data protection

Data protection laws address two aspects of recommender algorithms. First, the general framework for data protection guards against massive data gathering that ML recommender algorithms use to curate user preferences. Second, data protection laws could also create specific obligations that demand algorithmic transparency.

The General Data Protection Regulation ('GDPR') in the EU gives users the right to be informed about any automated decision-making process and receive meaningful information about the consequences of such a decision.[61] It also gives users the right to opt-out of such a process if it could lead to legal or other effects, including profiling.[62]

The Digital Charter Implementation Act, 2020 of Canada proposes a new privacy law called the Consumer Privacy Protection Act. The law requires organisations to disclose the deployment of automated decision-making systems to predict or recommend decisions that have a significant impact on users.[63] Users may also request the organisation to explain the decision by the automated decision-making system.[64]

C. Specific laws on transparency and accountability

The EU proposed a specific AI legislation in 2021 to harmonise rules for the

59 Information Technology (Intermediary Guidelines and Digital Media Ethics Code) 2021, r 4(4).

60 Dia Rekhi 'Govt to roll out new Digital India Act shortly, says Rajeev Chandrasekhar' *ET Tech* (Chennai, 10 April 2022).

61 Council Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, art 13(2)(f) r/w art 15(1)(h).

62 ibid, art 22(1). This is subject to certain exceptions contained in art 22(2). See recital 71 of the GDPR for the examples of situations causing legal effects, or other significant effects.

63 Digital Charter Implementation Act 2020, s 62(2)(c).

64 Digital Charter Implementation Act 2020, s 63(3).

development and use of AI systems, the AI Act.[65] It adopts a risk-based approach and stipulates higher transparency obligations on 'high-risk' AI systems. The AI Act also prohibits certain algorithmic practices.[66] Obligations include information-sharing with users when AI systems detect 'personal characteristics'[67] or generate/manipulates existing persons/objects or places to make them appear authentic.[68] The AI Act also requires 'high-risk AI systems' to share information about performance characteristics, capabilities, and limitations with users.[69]

The Algorithmic Accountability Bill of 2019 ('the Bill')[70] in the US seeks to empower the Federal Trade Commission ('FTC') to conduct automated decision system impact assessments and data protection assessments. The Bill defines 'high risk automated decision systems' as technology that poses a high risk to personal information and security, and could lead to inaccurate, biased, or discriminatory outcomes affecting consumers, considering the novelty of the technology and scope and purpose of the system. The Bill proposes a threshold-based determination of 'high risk automated decision systems' depending on the number of users whose personal data is used and would cover large social media companies. The Bill, if it comes into force, would enable the FTC to create regulation mandating independent audits of high-risk automated decision systems by third-party auditors and technology experts.

In 2021, legislators proposed several bills in the US House of Representatives and the Senate following revelations by Facebook whistle-blower Francis Haugen. These include the (i) Algorithmic Justice and Online Platform Transparency Act; (ii) Filter Bubble Transparency Act; (iii) Social Media DATA Act; and (iv) Platform Accountability and Transparency Act.

Section 4 of the Algorithmic Justice and Online Platform Transparency Act requires platforms that deploy automated decision-making systems to inform users about the collection, processing, and use of data, and maintain detailed records on data collection and AI training. Section 3 of the Filter Bubble Transparency Act requires platforms to disclose the linkage between user data and the content they see and give users the option to opt-out of user-data-based feeds. Section 2 of the Social Media DATA Act requires information sharing with researchers and the FTC on a platform's advertisement library and the methods used to target platform users among other things. The FTC may also form a Working Group for research purposes to evolve best practices and make other suggestions to enhance transparency and accountability. Section 5 of the Platform Accountability and Consumer Transparency Act empowers the US National Institute of Standards and Technology to

65 Artificial Intelligence Act, art 52(2) and (3) (AI Act 2021).

66 AI Act 2021, art 5.

67 AI Act 2021, art 52(2).

68 AI Act 2021, art 52(3).

69 AI Act 2021, art 13(3).

70 Algorithmic Accountability Act 2019.

prepare a voluntary framework for moderation practices and publish biannual transparency reports.

D. Voluntary impact assessments and audits

Researchers and government bodies also recommend impact assessments for enhancing algorithmic transparency and accountability. The AI Now Institute suggests a practical accountability framework that involves public input and participation in assessing the impact of an AI-enabled system on people.[71] The Institute developed this framework based on existing impact assessment frameworks for human rights, environmental protection, data protection, and privacy. Key elements of the assessment include:

- An internal assessment of existing systems and systems under development. An evaluation of the potential impact on fairness, justice, bias, or other concerns of the user/beneficiary community.
- Meaningful review processes by an external/third-party researcher to track the progress of the system and its impact.
- A public notice with an easy-to-understand explanation of the decision-making process the AI/ML application follows, and information on the internal assessment and third-party review process mentioned above.
- Public consultation with affected users/beneficiaries/stakeholders to address concerns and clear doubts.
- A mechanism for the public to raise concerns on the above process or any other substantive concerns.

Alessandro Mantelero argues for an impact assessment model centred on the GDPR and human rights in his Human Rights, Ethical and Social Impact Assessment ('HRESIA').[72] HRESIA is a two-step process involving a questionnaire and a review of the questionnaire by an ad-hoc committee of experts. According to the author, data protection impact assessments are too specific, ethical assessments are too broad to assess the impact of AI, and the HREISA attempts to harmonise both assessments. HRIESA focuses on data protection, its impact on fundamental rights and freedoms as well as the larger social impact of deploying the AI system.

The Ada Lovelace ('the Institute') and DataKind UK focus on audits and impact

71 Dillon Reisman and others, 'Algorithmic Impact Assessments: A Practical Framework for Public Agency Accountability' (*AINow*, April 2018) <https://ainowinstitute.org/aiareport2018.pdf> accessed 2 June 2022; AINow Institute, 'Algorithmic Accountability Policy Toolkit' (*AINow,* October 2018) <https://ainowinstitute.org/aap-toolkit.pdf> accessed 2 June 2022.

72 Alessandro Mantelero, 'AI and Big Data: A Blueprint for a Human Rights, Social and Ethical Impact Assessment' (2018) 34(4) Computer L & Security Rev 754.

assessment as a two-step process to enhance algorithmic transparency and accountability.[73] Under algorithmic audit, the Institute recommends a 'bias audit' and a third-party inspection on compliance with transparency and accountability standards which may be conducted by independent third-party auditors or regulators. The Institute also recommends an algorithmic impact assessment that looks at potential societal impact before the AI/ML application is deployed and an ongoing impact assessment of societal impact after deployment of the application.

The NITI Aayog also suggests a framework for finding failure points in AI/ML algorithms in its National Strategy for Artificial Intelligence.[74] Under the framework, AI developers must conduct a negligence test, like an impact assessment, and seek to make AI explainable to the user. It includes the following measures:

- A negligence test for damages caused by AI-enabled systems, instead of strict liability.[75] This can be achieved through self-regulation by conducting damage impact assessments at each stage of development.
- Safe harbours to insulate or limit liability if proper steps are taken by the entity to design, test, monitor, and improve the system.
- A policy on accountability may include actual harm requirements so that lawsuits are not filed based on speculative damages.

E. Transparency through stack standardisation

India's Department of Telecommunications AI Standardisation Committee invited comments to prepare a standard or model Artificial Intelligence Stack[76] that Indian companies can emulate. The primary purpose of a standardised stack[77] is to grow the ecosystem by supplying a template that developers can use to build their own platforms. It can also be used to prescribe minimum standards for AI infrastructure in India. The discussion paper published by the Standardisation Committee acknowledges that AI/ML

73 Ada Lovelace Institute, 'Examining the Black Box: Tools for assessing algorithmic systems' (*Ada Lovelace Institute,* 29 April 2020) <https://www.adalovelaceinstitute.org/report/examining-the-black-box-tools-for-assessing-algorithmic-systems/> accessed 2 June 2022.

74 NITI Aayog (n 41) 85.

75 Strict liability or absolute liability refers to liability regardless of whether an individual was at fault or negligent. The NITI Aayog Strategy Paper recommends shifting from this approach to holding individuals or companies that deploy AI liable only if they are negligent. In case of intermediaries, strict liability would mean that the intermediary is liable for third-party content as well, as is the case in Thailand (Computer Crimes Act 2007) and China.

76 AI Standardisation Committee, 'Indian Artificial Intelligence Stack' (Department of Telecommunications, 2 September 2020) <https://ourgovdotin.files.wordpress.com/2020/09/paper-for-development-of-indian-artificial-intelligence-stack.pdf> accessed 2 June 2022.

77 A technology stack refers to the back-end to front-end technical infrastructure supporting a system, from source code to user interface. UPI is an example of a standardized stack that operators can use to offer digital payment services.

algorithms are opaque and could lead to unfair outcomes and there is a need to develop or codify procedures that could enhance the transparency of algorithmic decision-making. The paper does not go into the procedures but recommends that an independent body should provide a template of these procedures and monitor compliance. eKYC using Aadhaar is one example of stack standardisation.[78] The government works with private organisations to standardise and increase the uptake of these stacks.

Stack standardisation looks to embed transparency in design through technical measures but in some cases it could lead to regulatory capture of the process by one private player. To address this, stack standardisation should be an open process involving participation from technology experts and civil society. Stacks should also be interoperable to prevent monopolisation. In the case of the UPI stack, researchers raised concerns about how the NPCI, a private body of banks, controlled the progress and rollout of UPI.[79] The NPCI had a monopoly over payments settlement infrastructure and when they rolled out UPI version 2.0, they did not open the version for public comments. There are also concerns about the proprietary ownership of UPI.[80] Attempts to create a standard AI stack should reconcile these concerns.

F. Way forward

Algorithmic transparency has progressed from an ideal into regulatory imagination, but the regulatory frameworks mentioned above have not been implemented yet. The EU DSA will come into force on 1 January 2024. Risk-based and threshold-based strategies in the DSA provide a roadmap for the future of transparency regulations because they balance harms and capabilities with regulatory compliances. Other countries, including India in its 2021 IT Rules, adopt a similar approach by apportioning more responsibility to larger platforms.

However, a concern here is that smaller platforms also follow the same business practices, deploy recommender algorithms, and have similar risks. Here, there is a need to adopt a nuanced approach and a mix of entity-based regulation and activity-based regulation. Contextualising business practices will enable regulators to narrow down on harmful activities and target regulation towards these activities. Policymakers should also ensure that regulatory compliance does not burden smaller platforms and throttle innovation. Here, regulators should adopt a graded approach.

78 Security, Infrastructure, and Trust Working Group 'e-KYC use cases in digital financial services' (*Financial Inclusion Global Initiative*, 2021) <https://figi.itu.int/wp-content/uploads/2021/05/e-KYC-innovations-use-cases-in-digital-financial-services.pdf> accessed 30 September 2022.

79 Shrikant Lakshmanan, 'UPI is a toll road' (*MEDIANAMA*, 18 October 2016) <https://www.medianama.com/2016/10/223-upi-is-a-toll-road/> accessed 30 September 2022.

80 Shrikant Lakshmanan, 'Response To Nandan's Speech At UPI V2 Launch' (*Medium*, 2019) <https://medium.com/cashlessconsumer/response-to-nandans-speech-at-upi-v2-launch-dfc22da8b0fd> accessed 2 June 2022.

At the first level, a standardised stack could stipulate minimum standards, procedures, and a monitoring mechanism to engender fundamental principles of transparency like openness, explainability, and interpretability. Regulators could take the initiative to develop standardised stacks in a consultative manner with participation from industry and civil society stakeholders. Second, the government could follow a risk-based audit and impact assessment mechanism that allows regulators and researchers to trigger these mechanisms based on risk. A legal framework should prescribe parameters and the procedure to evince risk based on potential harms like privacy concerns, user bias, and arbitrary restrictions on free speech. Finally, regulators should prescribe greater transparency obligations on platforms based on their activities and user base in line with the EU DSA and 2021 IT Rules.

Another pertinent point is that most social media companies offer their services globally, so it is easier for them to implement a global strategy with modifications to adapt to regional markets. There is an urgent need to have a wider global commitment toward algorithmic transparency and accountability, given the harms that stem from the use of algorithms by social media platforms.

Conclusion

Social media platforms are public squares where users may express themselves, but once platforms deploy AI/ML algorithms to amplify certain content to certain users, they play an active role in regulating expression at the public square. As discussed in the first section, the design of social media platforms seeks to optimise user interaction and data collection, and leads to harms including unauthorised data collection, user profiling, targeted advertising, and proliferation of illegal or harmful content. The use of AI/ML algorithms to improve these metrics worsens these concerns and the opacity of these algorithms inhibits risk analysis and mitigation. Regulators in the US, EU, Canada, and India acknowledge the harms stemming from social media platforms and have started discussion on regulatory frameworks to mitigate these harms. Addressing the 'social dilemma' requires a nuanced approach that starts regulatory inquiry from the underlying technology that supports social media platforms. Algorithmic transparency and accountability are design principles that support this approach, as acknowledged in the frames for AI ethics developed by the industry, governments, and inter-governmental bodies. The next step is to codify these principles as norms and make them enforceable through impact assessments and third-party audits. Risk-based and threshold-based strategies followed in the EU provide a roadmap for the future of transparency regulations because they seek to balance harms and capabilities with regulatory compliances.

The three approaches mentioned have not been implemented as binding law. From these approaches, we understand that transparent data practices, impact assessments and third-party audits are imperative and regulatory attempts should follow these measures. Here, regulators should decide between a soft-touch approach that prescribes procedural standards and actively conducting or monitoring impact assessments and audits, or a mix of both.

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