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An analysis of law relating to censorship of literary and cinematographic works

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Abstract---Despite the fact that India produces more films per year than any other country, film certification for public exhibition has always been an arbitrary and politically charged procedure. The fact that the government appoints members of the Central Board of Film Certification (CBFC) rather than an industry or group independent of the government has resulted in the board being used to disburse political patronage. There have been instances when after getting certification of Films by censor board the films had to face violence or threats of violence or disruptions by self-styled protector of Indian values and fringe groups as it happened in the case of *Ae Dil Hai Mushkil*¹ and *Bahubali* ². All these instances lead us to the conclusion that there are unreasonably stringent on the freedom of speech and expression of authors and film-makers.

Keywords---analysis, law relating, cinematographic works.

Introduction

“Censorship reflects society’s lack of confidence in itself. It is a hallmark of an authoritarian regime.” –Potter Stewart

The Supreme Court has called freedom of speech and expression as "the mother of all rights"³:

“The freedom of speech and expression is regarded as the first condition of liberty. It occupies a preferred position in the hierarchy of liberties, giving succour and protection to all other liberties. It has been truly said that it is the mother of all liberties. Freedom of speech plays a crucial role in the formation of public opinion on social, political and economic matters. It has been describes as a ‘basic human right’, a ‘natural right’ and the like...”

The preamble to India's Constitution commits to protect people' freedom of thought, speech, and belief. Article 19 (1) (a) is a basic right that every Indian

citizen is entitled to. According to the Supreme Court, freedom of speech and expression serves four broad social purposes:

- It promotes individuals in achieving self-fulfilment,
- It aids in the finding of truth,

¹ Namrata Joshi, A NEW CENSORSHIP, THE HINDU, <http://www.thehindu.com/todays-paper/tp-opinion/A-newcensorship/article15625642.ece>.

² Indian Express News Desk, BAHUBALI 2 BAN IN KARNATAKA, THE INDIAN EXPRESS

<http://indianexpress.com/article/entertainment/telugu/will-baahubali-2-release-in-karnataka-ss-rajamouli-saystargeting-film-due-to-sathyaraj-not-right-4615406/>

³ In Re Ramlila Maidan Incident, (2012) 5 SCC 1.

- It increases an individual's capacity to participate in decision-making, and
- It offers a mechanism through which a suitable balance between stability and social change may be established.⁴

Article 19 (2) lays forth in detail the reasons for restricting freedom of speech and expression under Article 19 (1) (a). Any restriction that is not expressly stated in Article 19 (2) is not permitted and would be considered a violation of Article 19 (1) (a).⁵

As originally written, Article 19 (2)⁶ linked freedom of speech and expression to the government's ability to act on topics relating to "libel, slander, defamation, contempt of court, any matter insulting decency and morals, or which undermines or tends to overturn the State." The reasonableness test is applied to each instance based on the nature of the right violated, the purpose of the limitation, the scope and character of the evil intended to be suppressed, and the social and other circumstances at the time. There is no such thing as an acceptable abstract pattern.⁷ The Supreme Court decided in *Re Ramlila Incident* that the reasonableness test must be based on the concept of "least invasiveness."

Law Relating To Censorship of Literary Works

Article 19(2), lists out the exceptions guaranteed to freedom of speech and expression, 'decency' & 'morality' is one of the reasonable restrictions from which many law derive justifiability. Some of the laws that limit one's right to free speech and expression in the name of "decency" and "morality" If any book, journal, or document seems to the State Government to contain any matter that is punishable by sedition, the State Government may confiscate it⁸, Promoting Enmity between different groups⁹, Imputations or assertions prejudicial to national integration¹⁰, obscenity¹¹, Outraging the religious feelings by insult¹², then Any police officer not below the rank of sub-inspector may be authorized by a Magistrate to seize any copy of the issue of the newspaper containing such matter, and any copy of such book or other document, wherever found in India,

and any State Government may declare every copy of the issue of the newspaper containing such matter to be forfeited to Government by notification, stating the grounds of opinion, and any police officer not below the rank of sub- inspector may seize the same wherever found in India.¹³

⁴ Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India, (1985) 2 SCR 287.

⁵ Express News Paper Pvt. Ltd v. Union of India, AIR 1958 SC 578; Bennett Coleman v. Union Of India, 1972 (2) SCC 788.

⁶ The Constitution (16th, Amendment Act) 1963.

⁷ MADHAVI GORADIA DIVAN, FACETS OF MEDIA LAW 54 (2013).

⁸ Section 124A, Indian Penal Code, 1860. ⁹ Section 153A, Indian Penal Code, 1860. ¹⁰ Section 153B, Indian Penal Code, 1860. ¹¹ Section 292, Indian Penal Code, 1860. ¹² Section 295A, Indian Penal Code, 1860.

'Decency' and 'morality' are nebulous and ephemeral concepts that alter with time and societal development and vary greatly between cultures. What is considered acceptable by one segment of society may be considered outrageous by another. In Chandrakant's case¹⁴, the Supreme Court noted that such concepts differ from nation to country, based on modern moral norms. However, there are vastly varied levels of moral acceptability even within the same country, particularly one as socially and culturally diverse as India. This makes defining or constraining these notions exceedingly challenging.

The tests for Obscenity

The Hicklin Test & the Aversion Test were some of the old tests which were used for deciding whether a work is moral & decent or not. As they got overruled with time now the *Contemporary National Standards Test* or *Test of Ordinary Men* are being used. *Test of Ordinary Men* states that the standard for assessing a work should be that of a normal man with common sense and caution, rather than an "extraordinary or hypersensitive man¹⁵." As Hidayatullah C.J. observed in K.A.Abbas Case, "if the wicked begins to see more in these things than a normal person would, in much the same manner that it is incorrectly stated a Frenchman sees a woman's leg in everything, it cannot be helped."¹⁶

Law Relating To Censorship of Cinematographic Works

Cinema under Article 19(1)(a)- Cinema, like the press, does not have specific constitutional protection in India, although the right to display films is recognized under Article 19 (1) (a) of the Constitution. Justice Sabyasachi Mukherji remarked in the Odyssey Communication case¹⁷ that citizens' right to show films on the State Channel, Doordarshan, is a component of the basic right protected under Article 19 (1) (a). The Court determined that this right was comparable to a citizen's right to express his or her opinions in any other medium, including newspapers, magazines, advertising, and hoardings. *Right to Portray Historical*

Events and Social Evils- In addition of the right of film maker to entertain, he also has right to educate and inform his audience about historical events or social

¹³ Section 95, Criminal Procedure Code, 1973.

¹⁴ Chandrakant Kalyandas Kakodkar v. State of Maharashtra, (1969) 2 SCC 687.

¹⁵ Ranjit D Udeshi v. State of Maharashtra, AIR 1965 SC 881.

¹⁶ K.A. Abbas v. Union of India, (1970) 2 SCC 780.

¹⁷ Odyssey Communication (P) Ltd. v. Lokvidayan Sangathan, AIR 1988 SC 1642. evils, however unsavoury they may be. In a case related to exhibition of the film Tamas¹⁸, Apex Court struck down a challenge to the exhibition of the film, based on the Hindu- Muslim carnage during the partition of India, the Court underlined the importance of being able to show historical events as they took place.

Impact of the Visual Medium

Article 19 (2) spells out restrictions on the exhibition of films, however the visual medium is considered a far more impactful than the print medium capable of arousing thoughts and passions in a manner that print medium cannot. This distinction has been used a justification for denying the visual medium, the extent of freedom available to the print medium.

Current Process of Certification of Films in India- the Central Board of Film *Certification (CBFC)* performs its certification duties in accordance with the following guidelines:

- a) The Cinematography Act, 1952
- b) The Cinematography (Certification) Rules, 1983
- c) The Guidelines issued in 1991 by the Central Government under the Section 5B of the Cinematography Act, 1952.

A film cannot be certified if any portion of it is harmful to India's sovereignty and integrity, security, friendly relations with other nations, public order, or decency, or contains defamation or contempt of court, or is likely to incite criminal behaviour.¹⁹ The Guidelines were published on December 6, 1991.²⁰

In addition, the CBFC is required to take into consideration the provision of the following Acts, Rules, and Guidelines while certifying films-

- 1) Cable Television Network Regulation Act, 1995 read with Cable Television Network Rules, 1994.
- 2) Prevention of Cruelty to Animals, Act.
- 3) Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution Act, 2003 and Rules of 2004.
- 4) Emblems and Names (Prevention of Improper Use) Act, 1950.
- 5) Prevention of Insults to National Honour Act, 1971.
- 6) Drugs and Magic Remedies Act, 1954.

¹⁸ Ramesh v. Union of India, AIR 1988 SC 775, (Justice Sabyasachi Mukherjee).

¹⁹ Section 5B (1), Cinematograph Act, 1952.

²⁰ CENTRAL BOARD OF FILM CERTIFICATION, Guidelines, <https://www.cbfcindia.gov.in/main/5/certification.html>. (last visited Jun. 21, 2021).

There are four categories of films under the Cinematography Act, 1952²¹

- a) U- Films Considered to be suitable for unrestricted public exhibition.
- b) UA- Films which contain portion considered unsuitable for children below the age of 12 but otherwise suitable for unrestricted public exhibition
- c) A- Film considered suitable for exhibition restricted to adults only
- d) S- Films restricted for exhibition to specialized audiences such as Doctors etc.

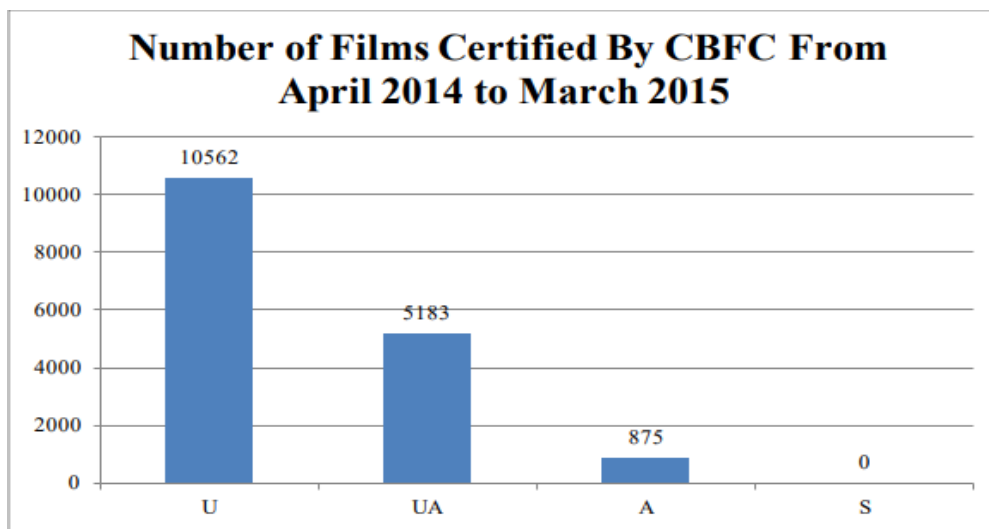


Figure 1: Courtesy Annual Report CBFC²²

The current CBFC structure includes a chairperson and 12 to 25 members. The chairman and other members of the Board are appointed for three years or until the central government directs otherwise.²³ Advisory panels located around the country help the CBFC in film certification through Regional Offices led by Regional Officers. The members of these Advisory Panels, who are selected by the Central Government, represent a diverse range of social interests, and there are no set criteria for their selection. These members are appointed for a period of two years or until the Central Government directs otherwise. Examining Committee, Revising Committee, and Revising Committee members are all selected from the same pool of Advisory Panel members. The Chief Executive Officer, Regional Officers, and Additional Regional Officers, all of whom are appointed by the Central Government, make up the CBFC's officers.

²¹ Section 5A, Cinematograph Act, 1952.

²² CENTRAL BOARD OF FILM CERTIFICATION, MINISTRY OF INFORMATION AND BROADCASTING, ANNUAL REPORT FROM APRIL 2014 TO MARCH 2015 (May 2021), [https://121.240.9.25/main/CBFC_English/Attachments/AR%202014-2015%20English\(1\).pdf](https://121.240.9.25/main/CBFC_English/Attachments/AR%202014-2015%20English(1).pdf) (last visited Jun. 22, 2021).

²³ Section 3, Cinematograph Act, 1952.

Test for Obscenity

Test of Ordinary Man-The standard for assessing a work should be that of a normal man with common sense and caution, rather than an "extraordinary or hypersensitive guy."²⁴ The Supreme Court ruled in the case of Ramesh²⁵, commonly known as Tamas, that the picture must be assessed from the perspective of a rational man, not a hypersensitive or weak man.

Judging the Work as a Whole- The publication as a whole should be assessed, and the problematic parts should be reviewed independently to see if they are so egregiously offensive that they are likely to deprave and corrupt.²⁶ *Opinion of Experts*- In *Raj Kapoor's case*²⁷, when the showing of the film Satyam Shivam Sundaram was challenged on obscenity grounds. *Clear and Present Danger Test*- Governments sometimes exploit the danger of law and order as a pretext to prohibit films or books that represent unpopular or unpleasant viewpoints. The state government of Uttar Pradesh attempted to ban the film *Aarakshan*, which dealt with the controversial topic of Dalit reservation, in *Prakash Jha film*²⁸.

OTT Platforms & their Regulations in India

Over the last half-decade, online streaming systems known as *Over The Top* (OTT) media providers have risen in popularity. OTT providers like as Amazon Prime, Netflix, Hotstar, and others saw a 30 percent rise in paying consumers as a result of the Covid 19-led Lockdown. Nowadays, OTT platforms are attracting a large number of users. They are supporting a wide range of viewpoints and ideas. On OTT platforms, Indian directors and producers are producing material that competes with international programming. OTT censorship may deter investment and varied content. As a result, in the case of OTT platforms, self-regulation code is far superior to censorship.²⁹

²⁴ S Rangrajan v. P Jagjivan Ram, (1989) 2 SCC 574, ¶26.

²⁵ Ramesh v. Union of India, (1988) 1 SCC 668.

²⁶ Ranjit D Udeshi v. State of Maharashtra, AIR 1965 SC 881; Chandrakant Kalyan Das Kakodkar v. State of Maharashtra, AIR 1970 SC 1390.

²⁷ Raj Kapoor v. State, AIR 1980 SC 258.

²⁸ Prakash Jha Productions v. Union of India, (2011) 8 SCC 372.

Conclusion & Suggestions

As part of the freedom of speech and expression, Literary and Cinematographic works are protected by Article 19(1) (a). However, they are subjected to unjustified

limitations as a result of governmental machinery's arbitrary actions, as well as violence and threats of violence from fringe sections of society.

Freedom of speech and expression serves primarily four social purposes:

- It helps individuals in achieving self-fulfilment,
- It aids in the finding of truth,
- It strengthens an individual's capacity to participate in decision-making, and
- It provides a mechanism by which a reasonable balance between stability and social change can be established.

When it comes to freedom of speech and expression, H.M Seervai has said that a harm to one person is an injury to all people. Article 19 (1) guarantees rights that are not absolute in nature; they are subject to reasonable limitations enumerated in Article 19 (2). These rights may be curtailed and controlled by the state by legislation, as long as they are reasonable within the sense of Article 19 (2). Through its wide reading of Article 19 (1) (a), the Supreme Court has recognized many aspects of freedom of speech and expression. The legislation imposing reasonable limits on freedom of speech and expression must pass the procedural and substantive reasonableness tests.

The Supreme Court has employed a variety of criteria to decide whether a piece of content is obscene or not. *Hicklin's test* was one of the first, although it has since been superseded by the *Contemporary National Standards Test*. Other considerations include assessing the work as a whole, as well as the opinions of literary and artistic experts. In the Second Chapter, these standards set by the Supreme Court to determine whether the contents of a book might be granted protection under Article 19(1) (a) are explored in further depth. Society must guard against state prescribed morality. As Justice Krishna Iyer stated in *Raj Kapoor v. State*²⁹: *“Art morals and law’s manacles on aesthetics are a sensitive subject where jurisprudence meets other social sciences and never goes alone to bark and bite because State made straight jacket is an inhibitive prescription for a free country unless enlightened society actively participates in the administration of justice to aesthetics. The world’s greatest paintings, sculptures, songs and dances, India’s lustrous heritage, the Konaraks and Khajurahos, lofty epics, luscious in patches, may be asphyxiated by law, if prudes and prigs and State moralists prescribe paradigms and proscribe heterodoxies.”* So, we come to the conclusion that that the current legislative framework governing literary and Cinematographic works censorship is excessively strict and thus should be reframed according to the current scenario and current standards of the society.

²⁹ Censorship of OTT platforms – Right or Wrong?, available at <<https://www.groupdiscussionideas.com/censorship-of-ott-platforms-right-or-wrong/>> (last visited Jun. 22, 2021).

Suggestions with regard to Censorship of Literary Works

- There is meant to be a presumption in favour of free speech and expression as intended under Article 19(1)(a) of the Constitution of India until a court of law decides differently as being within the scope of a reasonable limitation under Article 19(2) of the Constitution of India.
- Non-State actors cannot be allowed to choose what is lawful and what is not, and the State's responsibility to maintain peace and order would exclude any use of force to persuade the artists to change their minds.
- When it comes to art and culture, the matter cannot be left exclusively in the hands of the police or the local administration, especially when there is a surge in such conflicts.
- When a section of the public targets such authors and artists, the government must give appropriate police protection.
- Authorities should be educated on problems related to aesthetic and literary appreciation conflicts on a regular basis.
- Despite the fact that the Hicklin's Test was expressly overturned in Aveek Sarkar's case, the Contemporary National Standards test has to be liberalized in order to be consistent with Canadian and US free speech laws.

³⁰ (1980) 1 SCC 43, ¶8-9.

Suggestions with regard to Cinematographic Works Censorship Regime

- **CBFC Role:** The owner of a film has complete control over it. Any modifications or additions to the film must be made by or with the consent of the owner. The CBFC's current approach of suggesting modifications and alterations to a film should be abandoned, and the Board should merely act as a film certification body, according to the recommendation.
- **Changes to the 1991 guidelines** include the following: In 1991, the Cinematograph Act of 1952, Section 5B, issued recommendations. A film will not be allowed if a portion of it or the entire film is harmful to the country's sovereignty and integrity, decency or morality, or other considerations, according to Section 5B.
- Existing certification categories are divided into subcategories.
- *Criteria for Certification:* The Shyam Benegal Committee's suggested certification guidelines, which are riven into three categories: (i) general, (ii) issue-related, and (iii) category-specific, should be implemented.
- *Functions of the CBFC:* The CBFC's responsibilities should be limited to: (i) submitting an annual report to the central government, which should include an analytical study of the film industry's trends and be tabled in Parliament each year; (ii) prescribing the manner in which the Board's records and accounts will be kept; and (iii) reviewing the work of regional officers and the Regional and Central Advisory Panels.
- The Shyam Benegal Committee's suggestion of a new set of guidelines should be accepted in this respect. The rules have the following goals: (i) filmmakers' artistic expression and creative freedom are safeguarded by

objective parameters, (ii) viewers are enabled to make informed watching decisions, and (iii) the certification process is sensitive to societal change. The rules further say that an applicant must specify (i) the type of certification he wants and (ii) the intended audience in his application. Furthermore, depending on the certification he requires for his film, any changes in the film can only be made by the applicant.

Suggestions with regard to OTT Platform

A self-regulatory agency cannot supervise the streaming of online content, and the body must distinguish between content accountability across whole platforms. To resolve this issue once and for all, the government and self-regulatory organizations must work together. The general public currently seeks knowledge that will reveal the truth about society, address political issues, and offer us with regionally diverse content that will not offend a certain group of people.

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