

REGULATING VIDEO-ON-DEMAND PLATFORMS IN INDIA: A CRITICAL STUDY*Ravi Singh Chhikara***Abhinav Arora*****Abstract**

The exponential growth in the popularity of video-on-demand platforms has resulted in a new regulatory challenge for the legislature. This paper argues that it is time for India's Government to take a paternalistic stance and implement a new pre-publication regulatory framework for Video-on-Demand platforms. The paper first highlights the intention behind the regulatory policies for motion pictures in the Indian context. It then throws light on the real test to determine whether the content should be regulated or not. Further, the paper elucidates how pre-publication regulatory framework would prove better than post-publication regulatory framework. It then considers whether reasonable restrictions are possible under article 19(2) of the Indian Constitution, 1950 and further explains how not regulating VOD platforms is a violation of article 14 of the Indian Constitution, 1950. As a result, the article discusses potential solutions to the existing loopholes.

Keywords: video-on-demand, Cinematography Act, article 19, information, technology.

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I. Introduction

HUMANS ARE thought to be relieved of their stress by watching movies¹. However, they also affect our lives if we watch them unconsciously². Some of the content available on the video-on-demand (hereinafter the ‘VOD’) platforms such as Netflix, Amazon Prime, Disney+ Hotstar *etc.* is inherently dangerous for the children³. Some parents are unaware that very obscene material, seditious material, hate literature, traitorous content, and content that has the potential to influence their children to pursue immoral paths may be found on the internet with reasonable ease and with few limitations⁴. Consider the ideas propagated through these television series:

- 1) Gigolos, an American reality web series is about the lives of five male escorts. In the Episode 7 of Season 1, a character meets a client whose fetish is simulating being dead during sex. In Season 3, one of the characters meets a client and convinces her to have sex in a public restroom.
- 2) Game of Thrones, an American fantasy drama web series has several scenes exhibiting incest including a one where a father does have sex with his own daughters⁵.
- 3) Gandii Baat is a web series featuring a separate erotic-themed story in each episode from rural India. The web series depicts that how people of rural India are deeply affected by their dark fantasies. Apart from men, the web series shows the rural women who would go to any degree for the sake of sex.

What kinds of thoughts do the children come up with when they view this content? Undoubtedly, the effect of motion pictures particularly on children and adolescents is extensive “since their immaturity makes them more willingly suspend their disbelief than the grown-ups”⁶. It has been

¹Janet Singer, How Watching Movies Can Benefit Our Mental Health, *available at*: <https://psychcentral.com/blog/how-watching-movies-can-benefit-our-mental-health/> (last visited on June 18, 2020).

²Franklin Fearing, “Influence of the Movies on Attitudes and Behavior”, 254 *The Annals of the American Academy of Political and Social Science* 70-79 (1947).

³Sidneyeve Matrix, “The Netflix Effect: Teens, Binge Watching, and On-Demand Digital Media Trends” 6(1) *Jeunesse: Young People, Texts, Cultures* 119-138 (2014).

⁴Michael D. Mehta, “Censoring Cyberspace”, 30(2) *Asian Journal of Social Science* 319-338 (2002).

⁵See Season 4, Episode 1 – “The Daughter-Wives of Craster’s Keep”.

⁶Movies, Media, and Children, American Academy of Child and Adolescent Psychiatry, *available at* https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/Children-And-Movies-090.aspx (last visited on June 21, 2020).

observed that they remember the visuals of the motion pictures and try to imitate what they have seen.⁷

Despite these facts, the central issue is that several countries,⁸ including India, do not have any specific guidelines, laws or policies for content regulation on VOD platforms⁹. This has created a regulatory vacuum in this area. The same content which might be censored in cinemas and television, can be viewed uncensored on these platforms by any person including a child. Thus, technological advancements pose new questions that challenge the existing regulatory laws that were enacted before the advent of VOD platforms. Therefore, this paper seeks to urge the Government to enact a separate pre-publication regulatory framework for video-on-demand platforms.

In light of this, it is the objective of the paper to evaluate the best possible policy consideration to regulate VOD platforms in India. Part I of the paper introduces the objective and need for regulations on VOD Platforms. Part II analyses the real intention behind the current regulatory framework and then clarifies that the test for determining whether the content should be regulated or not is the ‘effects test’ and not the ‘control test’. It then proves how courts have erred in interpreting the provisions of the Cinematography Act, 1952. The possibility of bringing VOD platforms under the Cinematography Act has been then examined. Further, it proceeds to examine the inadequacy of the Information Technology Act, 2000 because of its post-publication censorship nature.

Part III argues that VOD platforms cannot be left unregulated in the guise of freedom of speech and expression provided under article 19(1) of the Constitution of India. It can be reasonably restricted under article 19(2) on several grounds which will be discussed in the paper. It shows that how the nature of the content displayed on platforms endangers safety, health and peace and sometimes it can have minacious consequences such as having anxiety, feeling loneliness, withdrawing from friends, having bad dreams, sleeping problems, *etc.* Thus, in the name of

⁷*Ibid.*

⁸Suwon Kim, Daewon Kim “Rethinking OTT regulation based on the global OTT market trends and regulation cases”, 20(6) *Journal of Internet Computing and Services* 143-156 (2019).

⁹Ashok Upadhyay, “No content regulation on online streaming platforms, RTI reveals” *India Today*, October 10, 2019, available at: <https://www.indiatoday.in/television/celebrity/story/riverdale-actor-cole-sprouse-reveals-he-was-arrested-and-zip-tied-during-george-floyd-protest-1684571-2020-06-02> (last visited on July 10, 2020).

creativity, it cannot be protected because it is not a suppression of the creative idea but an attempt to protect the community.

Part IV explains how the absence of any regulatory framework for VOD platforms violates article 14 of the Constitution. It argues that the content that gets categorized as ‘obscene’ when shown on platforms other than VOD platforms, is made available on VOD platforms without any restrictions. It then argues that it would be violative of article 14 if they are subjected to existing regulatory framework. It explains that the VOD platforms stand on a different footing as they, unlike other platforms, provide a complete user control on the sequence of the content. So, it would be violative of article 14, which established the notion that opposites should be treated differently. However, authors suggest that till the legislation is enacted, the courts should examine the content based on the tests propounded by the provisions of the Cinematography Act, 1952 so as to fill the vacuum.

In Part V, the authors attempt to evaluate the best possible alternative to regulate the content on VOD platforms. It also advocates for establishing an autonomous body and a separate Tribunal along with the provision of appeals to the High Court and the Supreme Court. It also suggests for a provision which can facilitate the injured to directly approach the Tribunal for appropriate remedy.

II. Analysis in India’s Context

A. The real test of the regulation – *The Effect test*

The fundamental rationale for not applying the regulatory regulations to platforms other than VOD is that VOD platforms have complete control over the sequencing of content, whereas other platforms have extremely little control. For instance, in the cable service platform, the viewer can at most change the channel when he wishes to skip the particular part of the motion picture. He cannot jump to the next part of the motion picture. However, in VOD platforms, the viewer can skip that particular part whenever he feels so. In other words, he has the choice of skipping to the next scene in the movie. According to the authors, the criteria for whether or not content given by a platform should be regulated is determined by the nature of the impacts that its content will have on its viewers, not by the feature of how much control that platform affords to its users. In other words, it is the ‘effects test’ which is the only deciding factor and not the ‘control test’.

To understand the effects test, it is pertinent to trace the reasons for bringing the regulatory policies for motion pictures. It is necessary to understand that why the duty to censor movies were delegated to authorities and not to the viewers. A report was released in 1928 on the issue of censorship and exhibition of films in India.¹⁰ It was proposed that motion pictures be subjected to statutory censorship because they have a greater impact on the community than any other medium.¹¹ Similarly, the reasons behind regulation can be traced from the “Statement of Objects and Reasons” of the Cable Television Network (Regulation) Act, 1995 which states that “due to cultural invasion in many quarters by the western culture, a lot of undesirable and unregulated programmes as well as advertisements are becoming available to viewers without any kind of censorship.”¹² Thus, it was always the impact of the content on the community that mattered for regulation and not the amount of viewer’s control on the content. The feature of extent of control provided by that particular platform was never taken into consideration. In fact, before the advent of the VOD platforms, motion pictures could be watched on CDs and DVDs. Interestingly, CDs and DVDs provide the same amount of control to viewers as provided by VOD platforms. However, even then, the motion pictures downloaded in CDs and DVDs were subjected to censorship laws.

In the constitutional debates, when the issue arose as to under which list in Schedule 7 the exhibition of the film should be placed, it was agreed by all that the films are regarded as an “important ‘educational medium’ and play a significant role in building the national character.”¹³ Consequently, it was decided that the exhibition of the film was to be made a Union subject. In the landmark judgment of *Secretary, Ministry of Information and Broadcasting, Govt. of India v. Cricket Association of Bengal*¹⁴, the Apex Court held that:

[...] most people obtain the bulk of their information on matters of contemporary interest from the broadcasting medium. The television is unique in a way in which intrudes into our homes. The combination of picture and voice makes it an irresistibly attractive medium of presentation. It has tremendous appeal and influence over

¹⁰Shubhangi Heda, “CMDS Policy Paper: How to Regulate India’s Video Streaming Services” (November 15, 2019).

¹¹*Ibid.*

¹²The Cable Television Network (Regulation) Act, 1995 (Act 7 of 1995).

¹³Constitutional Assembly Debates on August 31, 1947, available at: <http://loksabha.nic.in/writereaddata/cadebatefiles/C31081949.pdf> (last visited on November 29, 2020).

¹⁴AIR1995 SC 1236.

millions of people. Television is shaping the food habits, cultural values, social mores and what not of the society in a manner no other medium has done so far.

It is interesting to note that, the courts did not observe that the regulation in Television platform is necessary because of the limited amount of viewer control on the content. Instead, it emphasized on the 'effects' it produces on the viewers.

The Indian Cinematograph Committee (ICC) setup up in 1928 stated that the public could not be left to decide whether a content is appropriate for the society or not¹⁵. It implies that the mere ability to control the content sequence cannot be used to exclude a control-enabling platform. As the viewers cannot be trusted to discern whether the content is appropriate or not, the authority must determine the nature of the content before it is published and remove any inappropriate content.

A case study was conducted on the censorship policies in India which observed that "cinema is the most alluring-visual medium and has the maximum effect on people. If the effect violates the prescribed norms of authority, the authority censors the effect-producing films."¹⁶ Thus, the regulatory bodies were never concerned with the viewers control on the particular content. Regulatory bodies were always concerned with the 'effects' of the content on the viewer.

The preceding discussion clearly shows that the emphasis has always been only on nature and its effect on the community and not on the amount of viewer's control on the sequence of the content. The discussion always moves around the impact of motion pictures on the viewers.

B. Failure of courts in interpreting the provisions of the Cinematography Act, 1952

Currently, the role of censoring films in India is played by the Central Board of Film Certification (CBFC) *i.e.*, the regulatory body in India, under section 5A and 5B of Cinematographic Act, 1952¹⁷.

Section 5A of the said Act empowers CBFC to certify and classify a film according to its suitability for public exhibition¹⁸. Section 5(B)(1) lays down the grounds for non-certification by CBFC. It

¹⁵*Supra* note 5.

¹⁶ Aditya Kumar Panda, "Case Study: Film Censorship in India", 4(2) *Scholedge International Journal of Business Policy & Governance* 7-11 (2017).

¹⁷The Cinematography Act, 1952 (Act 37 of 1952).

¹⁸*Id.*, s.5A.

empowers the CBFC to stop the broadcast of a film or any part of it, if it is “against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or involves defamation or contempt of court or is likely to incite the commission of any offence.”¹⁹ This mandatory certification acts as a regulatory framework for films to be exhibited publicly in India.

While the films shown in cinemas are subjected to certification under this Act, the video-on-demand platforms do not require such certification under the Act.

Though the authors argue for a separate regulatory framework for VOD platforms (in the latter part of the paper), the authors claim that the courts could bring them under the ambit of the Cinematography Act to give appropriate remedy until the legislature enacts a separate regulatory framework. This can be inferred from the relevant case laws to be discussed hereinafter.

In the case of *Mr. Padmanab Shanker v. Union of India*²⁰, the issue was raised that whether the transmission or broadcast of any films, cinemas, or serials and other multimedia content through the internet will come within the definition of ‘cinematograph’ under clause (c) of section 2²¹ of the Cinematography Act, 1952. It was aptly argued that the definition of ‘cinematograph’ is an inclusive one and it will include the modern gadgets as well.

However, the court stated that the cinematograph is an equipment which includes a camera that creates a film and the machine which exhibits or displays a film. The Court observed that the internet works differently and thus, it is difficult to accept that films or serials exhibited through the internet will constitute films within the meaning of clause (dd) of section 2²² of the said Act. In fact, it is difficult to even accept that there is even an ‘exhibition’ through the internet. The internet contemplates the transfer of files in response to the requests made by the users.

The court went on to say that the petitioners' concerns about content might be addressed under the IT Act's provisions. Guidelines given under the Code for Self-Regulation of Online Curated Content Providers do not create enforceable rights in favour of citizens. Thus, the Court denied to provide any remedy and held that the transmission or broadcast of any films, cinemas, or serials

¹⁹*Id.*, s.5(B)(1).

²⁰ILR 2019 Kar 4630.

²¹S.2(c) - “cinematograph” includes any apparatus for the representation of moving pictures or series of pictures.

²²S.2(dd) - “film” means a cinematograph film.

and other multimedia content through the internet would not come within the definition of ‘cinematograph’ under clause (c) of section 2 of the Cinematography Act, 1952.

The court, on the other hand, recognized the critical nature of the situation. It can be inferred from the fact that the court in the hearing as well as at the time of giving the final order, expressed the concern that this matter should invite the State to examine the issue and find a solution.²³

The authors claim that the above said decision was based upon the wrong interpretations of the provisions of the Cinematograph Act and thus, the decision is patently erroneous. For instance, if pornography or any content which endangers the national security is made available on VOD platforms, then the observation that the ‘internet contemplates the transfer of files in response to the requests made by the user’ and thus, it cannot be regulated seems unreliable. What matters is not whether the content is being provided on the request of the users, but the nature of the content and its effects on the users. Assume a user requests a specific film from a DTH operator, such as Tata Sky, on its own subscription-based channel designed exclusively for its users. The argument that the content was provided at the user's request and hence could not be filtered is therefore erroneous.

Since, the Act does not expressly state about its application to exhibition of films irrespective of any medium, it is crucial to examine the legislature's intention behind its enactment for its correct interpretation.

The intention of enacting the Cinematography Act is clear from its Preamble which says “An Act to make provision for the certification of cinematograph films for exhibition and for regulating exhibitions by means of cinematographs”.²⁴ Section 3 provides the intention of constituting the board which says that the board has been constituted for the purpose of sanctioning films for ‘public exhibition’.²⁵ Section 4 provides that any person wanting to ‘exhibit’ any film has to apply to the Board for the certificate. The board has a duty to examine the film. It may then “sanction the film for unrestricted public exhibition”, or “sanction the film for public exhibition restricted to adults”, or “sanction the film for public exhibition restricted to members of any profession or any

²³*Supra* note 20.

²⁴The Cinematography Act, 1952 (Act 37 of 1952), The Preamble.

²⁵*Id.*, s.3.

class of persons”, or “direct the applicant to carry out modifications in the film before sanctioning the film for public exhibition”; or “refuse to sanction the film for public exhibition”.²⁶

It is clear from these provisions that the interpretation of terms ‘exhibition and ‘public exhibition’ determines the applicability of the Act. However, neither the Act nor any judgment clearly define these terms.

The central issue is what should be the possible and ideal interpretation of the term ‘exhibition’ and following that, whether the video-on-demand platform ‘exhibits’ the films?

The relevant landmark case to find the answers for these questions is *Super Cassettes Industries v. Central Board for Film Certification*²⁷ wherein issue that was framed was whether the DVDs or VCDs made or produced by the Petitioners, and sought to be sold or offered for sale with the label that they are meant for private viewing only, require prior certification by the CBFC under section 5A of the Cinematographic Act. The petitioners contended that the films produced by them were not being sold for ‘public exhibition’ within the meaning of the Cinematographic Act. So, since they are being sold for private home viewing, they do not require certification by the CBFC.

However, it was held that the words “any person desiring to exhibit any film” in section 4 under the Cinematographic Act should be understood as “any person desiring to publicly exhibit any film”. Court took the notice of the case *Garware Plastics and Polyesters Ltd. v. Telelink*²⁸ in which two tests were propounded to determine whether a film can be said to be shown to the public - (a) by determining the character of the audience. (b) determining the nature of the relationship between the owner of the copyright and the audience.

Applying the latter test, it was held that an audience that pays for watching the film “cannot be considered as domestic viewers of the owner of the copyright. They must be considered as members of the public.” It was held that the viewers of a cable TV network may be watching it in the privacy of their homes but would still be considered as a section of the public. The mere labelling by the filmmaker or distributor that the film is “meant for private viewing” will not exempt the film from prior certification under section 5A of the Cinematographic Act.

²⁶*Id.*, s.4.

²⁷2011(46) PTC1(Del).

²⁸AIR 1989 Bom 331.

It was held that “once it leaves the shop where the film is purchased, neither the maker of the film nor its seller, has any control on whether it is viewed by one person or by a hundred, or whether it is viewed in a place to which the public is invited or in the private confines of a home. Therefore, the interpretation of the words 'public exhibition' has to necessarily be contextual, keeping in view the essential purpose of the Cinematographic Act. Even if there is no audience gathered to watch a film in a cinema hall, there are individuals or families watching a film in the confines of their homes, such viewers would still qualify as members of the public and at the point at which they view the film that would be an 'exhibition' of such film.”

The same jurisprudence can be applied to the nature of the exhibition of films by VOD platforms. The audience that pays for viewing content available on the platforms constitutes a section of the public. The mere assertion by platforms that the content is for private viewing will not exempt it from prior certification under section 5A of the Cinematographic Act. Further, the moment the content gets available on the platform, neither the maker nor the platform has any control over it. It can be viewed by one person or by many and it can be viewed by people gathered by invitation in halls or in the private confines of their home. Thus, people or families watching a film on their televisions with the Netflix app installed in their homes function as members of the public, and the screening of that film can be safely referred to as a "film exhibition.". Thus, the motion pictures exhibited through VOD platforms will constitute films within the meaning of clause (dd) of section 2 of the said Act.

A look at the provisions of Draft Cinematograph Bill, 2013²⁹ also reveals the same jurisprudence. Section 2(l) of the bill provides that³⁰ -

"exhibit" or "exhibition" shall include the audio or visual dissemination of a film or part thereof or making available a film or part thereof through use of a public medium, to persons not directly connected with the production, distribution, promotion or certification of that film.

Section 2(t) of the Bill provides that³¹

²⁹The Cinematograph Bill 2013.

³⁰*Id.*, s.2(l).

³¹*Id.*, s.2(t).

“public medium” includes a medium forum or place to which members of the general public have access to with or without the payment of a fee or charge.

Here, the Internet constitutes a public medium. The public having internet access by paying required subscription amount to platforms can easily view the content available on their platforms. Thus, it would be considered as ‘exhibiting’ films under the Draft Bill.

Additionally, under the Cable Television Network (Regulation) Act, 1995 the films shown to viewers at homes are required to be certified by CBFC. This is a strong inference that the term ‘exhibition’ includes the exhibition of films for watching it privately at homes.³²

C. Incompetence of the Information Technology Act, 2000

Section 67, 67A, and 67B of the Information Technology Act (hereinafter the ‘IT Act’), 2000 punishes for publishing or transmitting obscene material, or material containing the sexually explicit act, or material depicting children in the sexually explicit act in an electronic form³³. However, the major problem with the IT Act is that it does not regulate the expression prior to its publication. Rather, it regulates it after the expression has been published.

Authors claim that the need of the hour is pre-publication censorship (prior restraint) and not post-publication censorship (subsequent punishment). While prior restraint is an author's action on objectionable expression *before* its publication³⁴, subsequent punishment, on the other hand, is an action on objectionable expression *after* its publication. Thus, under a subsequent punishment, the harmful expression would have already been published before the authorities take action, whereas under the system of prior restraint, the harmful expression, if banned, never reaches the audience³⁵. The problem with the post-publication censorship is that it takes several days to get an injunction order from courts against the expression. The final order granting an injunction against the broadcasting of such expression becomes redundant as it would have reached viewers already.

³² Jaspreet Grewal, Netflix — is the film censorship law there yet? *available at*:https://www.orfonline.org/expert-speak/netflix-film-censorship-law/#_ednref5 (last visited on July 18, 2020).

³³ The Information Technology Act, 2000 (Act 21 of 2000), s.67, s.67A and s.67B.

³⁴ Thomas I. Emerson, “The Doctrine of Prior Restraint”, 20(4) Law and Contemporary Problems, Autumn 648-671 (1955).

³⁵ *Id.*, at 657.

After that, it becomes impossible to undo the damage. The IT Act empowers only subsequent punishment. Thus, they cannot remedy the injury caused to the viewers.

Additionally, the system of prior restraint affords public greater certainty about the limits of the law with a lesser risk of severe consequences³⁶. In other words, under the prior restraint system, the public would know what is permitted and what is forbidden in law without incurring the consequences of criminal or similar sanctions in the event an erroneous interpretation is made. Under a regime of criminal or civil sanctions, creators can test the limits of freedom of speech and expression only by making the content and risking themselves. Whereas in the pre-restraint process, they have definitive rules to know what is constitutionally protected. Thus, pre-publication censorship is to be preferred over post-publication censorship.

D. Insufficiency of Self-Regulatory Code Signed by Video-On-Demand Players

In a bid to protect themselves from severe regulations, video-on-demand platforms have recently signed a 'self-regulatory code'.³⁷ They have undertaken to not show any content "disrespectful to national symbols and religions". Further, the players are required to ensure that they do not make available any content which shows "children engaged in real or simulated sexual activities", or promotes terrorism or has been banned for distribution by online video service by any court or under any law. It also provides a mechanism for consumer complaints.

There are many issues associated with the self-regulatory codes. Sometimes, creators might even remove the content that possibly is even protected by Freedom of Speech and Expression, simply because of having over cautious or say, to prevent themselves from going into the unlawful zone.³⁸ For instance, some creators are afraid to produce content which speaks against the government. Some may remove merely the illegal content while failing to file a constitutional challenge in court. Some people may even desire to pursue a constitutional challenge, but they may change or cancel their plans due to the fear of being drawn into the legal process.

Thus, it should be the authorities who should be given the task to decide the nature of the content. If the creator is aggrieved by the decision of the authorities, the creator of the expression should

³⁶*Id.*, at 659.

³⁷Netflix, Hotstar, 7 other streaming platforms sign 'self-regulation code', *The Week*, (January 18, 2019), available at: <https://www.theweek.in/news/biz-tech/2019/01/18/netflix-hotstar-7-other-streaming-platforms-sign-self-regulation-code.html> (last visited on July 27, 2020).

³⁸*Speiser v. Randall*, 357 U.S. 513, 526 (1958).

have the opportunity to appeal in the courts. This will protect the viewers and expression if the court decides in favour of it.

III. Enforcing reasonable restrictions under article 19(2)

Article 19(1)(a) of the Constitution of India, 1950³⁹ guarantees Freedom of Speech and Expression.⁴⁰ However, this right is subject to certain reasonable restrictions provided under article 19(2).⁴¹ These restrictions can be imposed “in the interests of sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence”.

Authors claim that the content on Video-on-demand platforms cannot be left unregulated in the guise of freedom of speech and expression or creative freedom. In fact, the Judiciary has also always emphasized on maintaining a balance between the legitimate exercise of the right of freedom of speech and expression and the abuse of freedom of speech and expression. In the case of *S. Rangarajan v. P. Jagjevan Ram*⁴², Court emphasized on the importance of pre-censorship and admitted that:

even though one movie relating to a social issue may not significantly affect the attitude of an individual or group, continual exposure to films of a similar character will produce a change. It can, therefore, be said that the movie has a unique capacity to disturb and arouse feelings. It has as much potential for evil as it has for good. It has an equal potential to instil or cultivate violent or good behaviour. With these qualities and since it caters to mass audience who are generally not selective about what they watch, the movie cannot be equated with other modes of communication. It cannot be allowed to function in a free market, place just as does the newspapers or magazines. Censorship by prior restraint is, therefore, not only desirable but also necessary.

The Court further held that “censorship is permitted mainly on social interests specified under article 19(2) of the Constitution with emphasis on maintenance of values and standards of society.”

A. Why does it not hamper creative freedom?

³⁹The Constitution of India.

⁴⁰*Id.*, art.19(1)(a).

⁴¹*Id.*, art.19(2).

⁴²(1989) 2 SCC 574.

To answer this question, we must ask ourselves whether we want to protect the content showing creativity or the content which corrupts the minds of the young children in the guise of creativity. Consider this. Most of the violent acts shown go unpunished in their shows or films and sometimes even presented as humour. Further, the consequences of human suffering and loss are rarely depicted.⁴³ It has been observed that children of age eight or below are unable to differentiate between reality and fantasy.⁴⁴ It has also been observed that children aged between 8 and 12 years who view violence are often frightened that they may be victims of violence or a natural disaster.⁴⁵

It has also been observed that alcoholic drinks are the most commonly portrayed products on VOD platforms. Rather than showing them in a bad light, they are shown as substances of enjoyment and power. For instance, a British drama series “Peaky Blinders” has in fact, glorified the usage of alcohol and cigarettes. Studies show that “exposure to drinking in movies increases the likelihood that viewers themselves will have positive thoughts about drinking.”⁴⁶

Foregoing discussion shows that the content available on these platforms endangers safety, health and peace. Thus, the regulation of the video-on-demand platforms would filter out the inappropriate content along with the protection of the actual creativity which adds value to the community and protect children from every disturbing content. This kind of content weakens the “children’s moral consciousness and pollute children’s soul and consequently, affects healthy growth of children or even cause adolescent crime”⁴⁷.

Additionally, the same view that the immoral content cannot be protected in the guise of creative freedom was explicated in the case of *K.A. Abbas v. Union of India*.⁴⁸ In this case, censorship of films was challenged in the Supreme Court on the ground that it violates the right to freedom of speech and expression. Petitioner contended that “Freedom of expression cannot, and should not, be interpreted as a license for the cinemagnates to make money by pandering to, and thereby propagating, shoddy and vulgar taste.”

⁴³Kyla Boyse, RN, Television and Children, available at: https://nanopdf.com/download/television-and-children-5aded7e791b95_pdf (last visited on August 2, 2020).

⁴⁴*Ibid.*

⁴⁵*Ibid.*

⁴⁶*Ibid.*

⁴⁷The Advantages of Internet Censorship Media Essay, available at: <https://www.ukessays.com/essays/media/the-advantages-of-internet-censorship-media-essay.php?vref=1> (last visited on July 13, 2020).

⁴⁸AIR 1971 SC 481.

Court held that the classification of films “according to their age groups and their suitability for the unrestricted exhibition is regarded as a valid exercised of power in the interests of public morality, decency, *etc.* This does not violate the freedom of speech and expression”. Most importantly, the court propounded “that the social interest of people overrides individual freedom.” Court further held: ⁴⁹

Further it has been almost universally recognized that the treatment of motion pictures must be different from that of other forms of art and expression. This arises from the instant appeal of the motion picture, its versatility, realism (often surrealism), and its coordination of the visual and aural senses. The art of the cameraman, with trick photography, vista vision and three-dimensional representation thrown in, has made the cinema picture truer to life than even the theatre or indeed any other form of representative article. The motion picture is able to stir up emotions more deeply than any other product of art. Its effect particularly on children and adolescents is very great since their immaturity makes them more willingly suspend their disbelief than mature men and women. They also remember the action in the picture and try to emulate or imitate what they have seen.

Thus, it has to be admitted that censoring a vulgar or disturbing content cannot always be considered as an act of suppression of creative ideas. They are sometimes necessary for human flourishing.⁵⁰

Even the Hon’ble Supreme Court held in the case of *S. Rangarajan v. P. Jagjevan Ram*⁵¹ that the “moral values, in particular, should not be allowed to be sacrificed in the guise of social change or cultural assimilation”. It further clarified that:⁵²

Our country has had the distinction of giving birth to a galaxy of great sages and thinkers. The great thinkers and sages through their life and conduct provided principles for people to follow the path of right conduct. There have been continuous efforts at rediscovery and reiteration of those principles. Besides, we

⁴⁹*Id.* at para 22.

⁵⁰“On the Role of Censorship”, The Book of Life, *available at*: <https://www.theschooloflife.com/thebookoflife/on-the-role-of-censorship/> (last visited on August 19, 2020).

⁵¹(1989) 2 SCC 574.

⁵²*Id.*, at para 21.

have the concept of "Dharam" (righteousness in every respect) a unique contribution of Indian civilization to humanity of the world. These are the bedrock of our civilization and should not be allowed to be shaken by unethical standards.

IV. Violation of article 14

A. VOD platforms form a different class than other platforms

Article 14 of the Constitution of India provides that "*The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India*".⁵³ It ensures that 'equals are treated alike'.⁵⁴ However, it does not mean that 'unequals ought to be treated equally'.⁵⁵ Where persons or groups of persons are not situated equally, to treat them as equals would itself be violative of article 14 as this would itself result in inequality.⁵⁶ Therefore, article 14 allows the classification. However, this classification must be rational, that is to say it must be based on some qualities and characteristics which must have reasonable relation to the object of the legislation⁵⁷.

The authors argue that the VOD platforms are different from other platforms. The creators who express their ideas through the VOD platforms form a different class than the creators who express their ideas through other platforms. The distinguishing factor is the amount of control on the sequence of the content available on platforms. On VOD platforms, viewers have complete control on the sequence of the content. While watching, viewers have complete power over skipping any part(s) of the video. A viewer can only watch the portion of the content that he wishes to watch at the time. Other systems, on the other hand, give you no control over the content's order. Viewers are obligated to watch the content in the order in which its producers directed it. The existing regulatory framework contemplates the features available on other platforms only. It does not contemplate this distinguishing factor. As a result, putting VOD platforms to the existing regulatory framework would be a violation of article 14 because it would be the same as treating unequal's equally.

⁵³The Constitution of India, art. 14.

⁵⁴*M Jagdish Vyas v. Union of India* (2010) 4 SCC 150.

⁵⁵*Ibid.*

⁵⁶M.P Jain, *Indian Constitutional Law* 909 (Lexis Nexis, 8th edn., 2018).

⁵⁷*Vikram Cement v. State of MP* (2015) 11 SCC 708.

B. Existing classification fails to achieve the required goal.

Every legislation comes with a specific goal to achieve. Article 14 empowers the legislative bodies to make classification so as to achieve the required goal. However, the classification, which although can be reasonable, if falls short of achieving the required goal of the legislation would be said to be violative of article 14 of the Constitution of India because of not having any reasonable nexus with the objective of the legislation. The current regulatory framework is to be examined on this premise.

Here, the underlying purpose of the regulation on motion pictures is to protect the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or to prevent contempt of court, defamation or incitement to an offence.

As has already been discussed, VOD platforms and other platforms form a different class because of the amount of user control on the sequence of the content. However, authors argue that even after classification, which although is reasonable, the goal of the classification is not achieved. Complete denial of bringing VOD platform under the regulatory laws indicates the contemplation by the legislature that (a) motion pictures available on VOD platforms don't have the potential to harm the interests that State ought to protect under article 19(2), and (b) motion pictures available on platforms other than VOD platforms have the potential to harm the interests that State ought to protect under article 19(2). However, as stated in the introduction section of this paper, content available on VOD platforms has the potential to harm interests and should be protected by the government. This can be understood by responding to the following question: Would television service providers be permitted to broadcast the web series as depicted by the authors in the introduction section?

The foregoing discussion shows that the legislature has rightly demarcated the line between VOD platforms and other platforms on the factor of the amount of user control on the sequence of the content being shown on respective platforms. However, the objective of the classification would be fulfilled only when both the classes are regulated differently.

V. Recommendations

History has shown that when technology is pushed to its limits, disaster occurs; the government will definitely attempt to introduce legislation for its regulation. Platforms may have accepted the

self-regulatory code but it is the government that would ultimately formulate the regulations and not these platforms.

No doubt, that the regulations on video-on-demand platforms can possibly trigger a snowball effect in the sense that it can force the states to regulate other content available on internet.⁵⁸ Thus, the policy has to be drafted with a long-term approach.⁵⁹

While drafting the policies, the authors believe that the technology or medium, cannot be taken as the sole consideration to determine the policy of regulation because of the reason of they having the different “effects” on and different “responses” by different societies.⁶⁰

Therefore, the authors refute the theories which advocate for technology or medium as the *sole* consideration to determine the regulation policies. The theory called “Technological Determination”, says that it is the ‘technology’ which is a major driver for change and thus, it should be the technology only which should be considered while framing policies.⁶¹ Another theory called “Media Determinism” established by Marshall McLuhan propounded that it is the ‘medium’ through which content is disseminated and affects the viewers rather than the content itself.⁶² These theories erred in not considering the fact that different technologies have different “effects” on and different “responses” by different cultures.⁶³ Thus, a holistic view of both the technological and sociological factors is required.⁶⁴

Age Classification Scheme

The objective of the regulations should not be to curb artistic expression and creative freedom. The objective should be the certification of a film or series and not the censorship of the content except when the content seriously damages the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order or is a contempt of court, defamation

⁵⁸*Supra* note 10.

⁵⁹Roberto Taufick, Over-the-Top Content and Content Regulation (December 25, 2015).

⁶⁰*Supra* note 10.

⁶¹Bruce Bimber, “Karl Marx and the Three Faces of Technological Determinism,” 20(2) *Social Studies of Science* 333–351(1990).

⁶² Marshall McLuhan, *Understanding Media: Extensions of Man* (MIT Press, Cambridge, 1994).

⁶³Caroline Epstein, Technology Shapes Cultures, available at: <http://web.colby.edu/st112wa2018/2018/02/16/technology-shapes-cultures/> (last visited on August 29, 2020).

⁶⁴Ian Hosein, Prodromos Tsiavos & Edgar A. Whitley, “Regulating Architecture and Architectures of Regulation: Contributions from Information Systems” 17(1) *International Review of Law, Computers & Technology* 85–97. (2010).

or incitement to an offence. In this regard, a guiding principle can be extracted from the case of *Charan Shukla v. Provincial Government*⁶⁵ wherein it was held that the content would be adjudged from the viewpoint of a “reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds”. It was held that it should be suppressed only when “the community interest is endangered”. Further, “the anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to public interests”. These should be the exceptional cases. Otherwise, the viewers should have complete freedom of choice in terms of the content they wish to watch.

Authors believe that to achieve this objective, the scheme that would perfectly work is “Age Classification Scheme” which provides that the content should be classified on the basis of the age suitability.

The idea of classifying the content properly can be taken from the Singapore’s regulation policy. In 2018, Singapore’s media regulatory body Infocomm Media Development Authority (IMDA), issued a code of practices for video-on-demand platforms to be followed.⁶⁶ Under these rules, platforms are required to follow the same classification rules which offline service providers follow. For instance, G stands for General, b) PG stands for parental guidance etc. These strict rules provide that NC16 content which stands for ‘no children below 16 years of age’ can be provided only with a parental lock function on their platforms. Further, the R21 content which stands for ‘restricted to people of 21 years and above only’ has to be provided with a default parental lock function and there must a reliable age verification process. Platforms are also required to display the ratings and elements such as theme, nudity, sex, violence, drugs, language etc. Content hosted by these platforms must comply with the prevailing laws and must be properly scrutinized so as to protect the national interest, national security and religious harmony. They are further required to:

- keep a balance between the viewpoints expressed in current affairs, news and educational programs.

⁶⁵AIR 1947 Nagpur 1.

⁶⁶Codes of Practice – Media, *available at*: <https://www.imda.gov.sg/regulations-and-licensing/Regulations/Codes-of-Practice/Codes-of-Practice-and-Guidelines> (last visited on August 29, 2020).

- put reasonable efforts to ensure that the content being shown is accurate.

The advantage of creating an age classification framework is that along with the protection of creative freedom of creators, it protects the mind of the younger children which are open to immoral influence.

Creation of an Autonomous Body

In 1968, a Committee called Khosla Committee was formed to deal with the issues of censorship.⁶⁷ It was meant to recommend the improvements in censorship laws so as to create a balance between creative freedom and censorship. The report suggested for an autonomous and independent body.⁶⁸ The report also suggested a few factors which have degraded the efficiency of the existing CBFC body such as constant fear of interference, lack of responsibility, lack of flexibility, *etc.* This necessitates the creation of an autonomous body which can be free from these factors.

Inspiration can be taken from the self-regulatory body called the British Board of Film Classification (formerly the British Board of Film Censorship) set up by the film industry in United Kingdom. It is an autonomous body. It takes charges from film distributors for the service of classification of films. Its relationship with the government is based upon a 'gentlemen's understanding'. In other words, it classifies the films with the terms acceptable to the government. In return, the government promises to not to interfere in its decisions. In 1984, parliament delegated the duty of classification of videos to BBFC. Resultantly, most of the issues that arise revolve around the age classification only rather than censorship.⁶⁹ It has successfully maintained the creative freedom of artists.

Thus, it is suggested that CBFC is to be delinked from the State and an autonomous body created by a statute should be established. The body, just like BBFC, would be eligible to make cuts but openly and with reasons. It would have to keep a balance between morality and creativity.

Constitution of a Tribunal

Legislature has constituted various tribunals for the adjudication of rights of the respective industries and their employees. The tribunals are preferred because of speedy and cheap

⁶⁷G. D. Khosla, "Report of the Enquiry Committee on Film Censorship" (1969).

⁶⁸Arpan Banerjee, "Political Censorship and Indian Cinematographic Laws: A Functionalist Liberal Analysis", 2 *Drexel Law Review* 557 (2010).

⁶⁹*Ibid.*

adjudication.⁷⁰ Absence of any separate tribunal for the film industry compels the injured to knock the doors of the courts. Constitution of a tribunal would not only release the burden from the courts but also protect the content from getting obsolete. It has been observed that the decision of a court regarding the particular expression takes years and the idea of the content gets obsolete till the final decision of court comes.

Appeals

An appeal against the decision of tribunal should lie to the High Court under articles 226, 227 and then to the Supreme Court under articles 32, 136 of the Constitution of India.

Consumer Complaints framework

The viewers should also be given the option to file complaints before the Tribunal. It would help to maintain the trust between the viewers and the platforms. For instance, if any parent believes that the obscene content has been erroneously classified under a particular class group, he/she should be allowed to submit it to the Tribunal. Similarly, if the government feels that the content having the potential to harm the national security has been published, it should have the option to submit it to the Tribunal.

Parental Lock Security

Undoubtedly, parents are considered to be the best judges to decide as to what is appropriate and inappropriate for their children. It is only the parents who are aware of their children's maturity. So, by providing the mandatory option of parental security on every platform, parents can easily manage access to many aspects of inappropriate content by using this control.

VI. Conclusion

Video-on-Demand (VOD) is a streaming media service offered directly to audience *via* internet. This platform has overtaken the task done by television through cable, satellite, *etc.* There are several different VOD platforms currently working in India such as Netflix, Amazon Prime, Hotstar, Voot, *etc.* The VOD platforms have no regulatory body above them to govern the content provided to its audience as against the presence of respective regulatory bodies for cinemas and televisions.

⁷⁰Hazel Genn, "Tribunals and Informal Justice", 56(3) *Modern Law Review* 393-411 (1993).

Through this article, the significance of censorship of the content provided by VOD platforms is explored in various aspects. The two landmark cases in the Supreme Court of India namely *K.A. Abbas v. Union of India*⁷¹ and *S. Rangarajan v. P Jagjevan Ram*⁷² build up a foundation for the importance of censorship and pre-censorship of VOD content in India. Both the cases were subjected to be in the matrix of hampering and violation, respectively of our Fundamental Right [article 19(1)(a)]. In the case of *K.A. Abbas*, it was held that the classification of films according to the age group and their suitability for the unrestricted exhibition is regarded as a valid exercised of power in the interests of public morality, decency, *etc.* Similarly, in the case of *S. Rangarajan*, the Court emphasized on the importance of pre-censorship and admitted that Censorship by prior restraint is, not only desirable but also necessary in a country like India. The Court further held that “censorship is permitted mainly on social interests specified under article 19(2) of the Constitution with emphasis on maintenance of values and standards of society”.

Even before these two landmark cases were brought to light, a report in 1928 suggested mandatory censorship of motion pictures because of they have a substantial effect on the community than any other media. Keeping this in mind, the article analysed the implication of the unregulated content on the viewers. It established that it is the ‘effects test’ and not the ‘control test’ to decide on the question that whether the platform should be regulated or not.

The type of content available on the VOD platforms is of all kinds and of multiple genres. The content available on these platforms is chosen by an individual and watched on demand. Basis this premise there should be a balance of an individual’s choice and autonomy factors. An autonomy-rich formulation of dignity and educational value, in certain situations, will enable the individual to choose among a pool of more distinguished content. In this sense, the balancing exercise is a combination of subjective (choice) and objective (autonomy) factors, both of which have to be taken into account by the Court.

By viewing the present scenario, the presence of an unbiased autonomous body is a must. A total censorship of the content will do more harm than benefit as it could increase the case of film piracy

⁷¹ AIR 1971 SC 481.

⁷² (1989) 2 SCC 574.

and other violations of the IT Act. Moreover, it would turn a VOD platform into a television or mainstream cinema.

After all, the audience today needs nothing more than the truth about the society that we live in and is searching for that content, however, the content presented to the public requires some scrutiny from an autonomous regulatory body.