CENSORSHIP IN A DEMOCRACY: AN UNDERSTANDING OF THE ROLE OF ARTICLE 19(1)(a) IN MODERN INDIA

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ABSTRACT

A democracy without dissent is not a democracy at all, and it is around this central idea that this article is written. The author takes a critical approach towards studying the trends of censorship in India, starting from the darkest age of Indian democracy, in 1975 following the declaration of emergency, until as recently as the Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021. Taking reference to recent events and media reports, the article aims to provide the reader with an in depth understanding of where modern India stands in the global arena, when trend studies show that governments of other states are growing increasingly tolerant to content creators. The article studies various facets of censorship ranging from press freedom, film censorship and unreasonable restraints on the freedom of speech of an individual. The term censorship in the title is to be construed broadly, to mean any curtailment of expression. The author briefly studies the role of the central government in India's censorship policies and studies the implications of the recent shift towards increased censorship observed in India. The article concludes with an eye opening comparison between the censorship regime of Indian and North Korea, and the individual's right to freedom of speech and expression, and the role of the Apex Court in protecting the same.

Keywords: Censorship, Freedom of Speech, Film, Press, Contempt of Court and Media

I. DEMOCRACY AND RESTRAINTS ON FREE SPEECH

The foundational principle of a democracy is often considered to be the right of its people to dissent against the government, and the tool that these citizens rely on to do so, is their freedom of speech and expression. The freedom of speech and expression is the right of an individual to express their thoughts, opinions and feelings through words, literature, speech, art or any other medium of communication they are comfortable with, forming an important part of the modern liberal democracy to which India is no exception. The Indian Constitution recognizes under Article 19(1)(a), that every citizen has the right to freedom of speech and expression, which can only be curtailed for any of the grounds laid down under Article 19(2) under the term reasonable restrictions. Censorship is the antidote to this freedom, often used to control expression that may work against the state. The concept of censorship is not new, and dates back to Socrates, who could be considered one of the first victims of this curtailment. Democracies endorse the importance of the contamination of information and citizen's freedom of expression, and acknowledge that press freedom is vital for a society to respect and appreciate different opinions and points of view, and hence censorship laws in democracies have always been a subject of great criticism. While it is understood by the law making bodies of states that the freedom of expression of citizens must be protected, the interest of the state sometimes lies in curtailing this freedom, limiting seditious speech, and upholding public morality.

This Freedom of Speech has been considered so integral to human rights across the globe that apart from domestic legislations, the United Nations has also recognized this right in the form of Article 19 of the Universal Declaration on Human Rights, which states that "everyone has the right to freedom of opinion and expression, this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." In India, however, the trend has shifted towards increasing media censorship, and sedition charges, concerning liberal advocates across the country. In this article, the author will be attempting to study this trend in Print, Broadcast and Social Media. With the help of recent events, the increasing censorship of content and its effect of the underlying principles of democracy will be studied. The central hypothesis of this article will be that India is moving towards an increasingly censored democracy, undermining the Right to Freedom of Speech and Expression that our forefathers considered quintessential to our constitutional values, imposing unreasonable restrictions on the Press and individual citizens'

Right to Free Speech. The focus of this article will be on censorship in films both in theatre and OTT, and individual freedom of speech and expression, in light of the contempt and sedition cases that have exponentially grown in the past few years. This analysis will be made keeping in mind the recent developments to India's censorship laws including the Intermediary Guidelines and Digital Media Ethics Code, 2021 under the Information Technology Act, 2000.

II. CENSORSHIP AND INDIAN CINEMA

The entertainment and film industry in India is probably one of the largest in the world, and with the advent of new modes of distribution of these films, it continues to grow every day. Indian viewers have begun to access their content through different mediums and have caused a paradigm shift in Indian media due to the increased demand for varied content. Pre-censorship of films in India has been prevalent from the 1950s, and has been the subject matter of discussion in the field of media law for decades now. In the landmark case of *K.A. Abbas v. Union of India*[1] the censorship of films was challenged on the grounds that it was violative of the freedom of speech and expression every citizen is entitled to. In such a scenario it becomes imperative to understand the development of the present censorship rules in the country, while tracing the history of the film certification regime.

Film Certification in India: Role of the CBFC

The Central Board of Film Certification, set up under the Cinematograph Act, 1952 is a central body responsible for censorship and categorization of films, with the authority of controlling the public presentation of films under the 1952 Act. The CBFC, erstwhile the Central Board of Film Censors, is governed by the 1952 Act which provides them with specific instructions on certifying films, along with the Cinematograph (Certification) Rules, 1983. The CBFC has been criticized for being the puppet of the Central Government, since the Board of Censors/Certifiers is appointed by the centre that has excessive control over the certification process. Under Section 3 of the Act, the Central Government has the power to constitute a 10 member Board, the officials of which are assisted by an advisory panel, the members of which are also appointed by the Central Government under Section 5. Apart from this, the Central

[1] K.A Abbas v. Union of India, AIR 1971 SC 481.

Government is also the appeal body against decisions of the Board, giving it the power to rescind the Board's decisions.[2] The excessive control of the CBFC by the Central Government has been criticized by the Khosla Committee Report of 1969, but little has been done to change that. In the case of *K.A. Abbas*[3], the Apex Court held that pre censorship of films was justified on the grounds of public morality, decency and in the good interests of the society, and relied on Article 19(2) to support the decision of the CBFC that the Petitioner must edit out scenes from his documentary 'A tale of four cities'. The Shyam Bengal Committee formed in 2016 made certain recommendations to improve film certification in the country, but only some progress has made on this front. Some of the recommendations of the committee are below:

- The CBFC must have the power to deny certifying a film if it is in express contravention of the provisions of the 1952 Act.
- The CBFC must only work on certifying films and the categorization of films to audience based on age and maturity must be limited.
- All applications for certification of a film must include the target audience of the said film.

The CBFC assesses films from the perspective of morality and public order, but has considered to have become excessively controlling in the past few years, more of which is dealt under the topic of OTT censorship. In the case of *S.P. Rangarajan v. P. Jagjivan Ram*[4], the CBFC initially gave a U certificate to the film that dealt with reservation in Tamil Nadu. The Madras HC later revoked the certificate and banned the public exhibition of the movie. Upon appeal it was held by the Apex Court that a movie cannot be restricted from public exhibition on the threat of demonstrations or protests by the general public. The Court, while stressing on the importance of movies in the modern society, held as follows:

> *"Movie is a legitimate and important medium in which issues of general concern can be treated. The producer may present his own message which the others may not approve of. However, he has a right to 'think out' and put the counter appeals to reason. It is a part of a democratic give-and-take to which no one could complain. The State cannot prevent open*

[2] §6 cl.1 The Cinematograph Act (1952).
[3] *Supra* note 1.
[4] (1989) 2 S.C.C. 574.

discussion and open expression, however, hateful to its policies"

The cases of *Sree Raghavendra Films v. Government of Andhra Pradesh*[5] and *Life Insurance Corporation of India v. Prof. Manubhai D. Shah*[6] also showcase the Supreme Court's willingness to quash orders by the CBFC if they believe them to be arbitrary and baseless. The Court held that the burden of proof lies on the regulatory authorities to show that their restrictions are reasonable and permissible under Article 19(2).

The most important judgment, perhaps, regarding film censorship in India is that of *Bobby Art International v. Om Pal Singh Hoon*[7], popularly known as the Bandit Queen case. The judgment marked the recognition of the importance of freedom of expression by way of films under Article 19(1)(a) by the Supreme Court. The CBFC was of the opinion that the film depicts obscenity and that it would appeal to prurient interests and corrupt the minds of the young people in the country. It was the contention of the Petitioner however that in order to accurately depict the life of Phoolan Devi, it is necessary to show the scenes of rape and sexual abuse. Similarly, the scenes in the movie about the Gujjar community are relevant to the story line and hence cannot be edited out. It was held by the Apex court that a film cannot be restricted simply because the content is obscene, immoral or indecent, as long as it is relevant to the story line. The same goes for scenes with nudity and abusive language. This was also upheld by the Khosla Committee that said that as long as the scenes with nudity or sexual acts were relevant and depicted respectfully, there is no need for them to be cut out. The movie was finally provided with an A certificate under Section 5B of the Act, i.e. to be viewed only by adults.[8]A film is merely a way of expressing one's emotions and ideas and falls well within the ambit of Article 19(1)(a), and the conflict that arises from this right is the battle between restriction and freedom. While the state has to protect the rights of its citizens individually, it must also protect the collective good, and this question may be one, that will perhaps forever plague lawmakers in the world.

III. OTT PLATFORMS AND CENSORSHIP GUIDELINES

[5] 1995 (2) A.L.D. 81.
[6] A.I.R. 1993 S.C. 171.
[7] (1996) 4 SCC 1.
[8] Sathyam Rathore, *A Critical Overview of Censorship in Indian Cinema in the light of the Role of the CBFC*, BLR 218 (2016).

There is no denying the fact that Over-the-top (hereinafter "OTT") platforms have taken the world by storm in the past years and more so in the pandemic when people are forced to be inside their houses, separated from theatres and movie screenings. OTT Platforms not only benefit the viewer since they get access to exclusive content from the comfort of their homes, but even for the content creators who are able to bypass some legal procedure by releasing their work on an OTT Platform. While films must adhere to certification rules and television program broadcasters are subject to Program Code and Advertising Code, the owners of films and other content that are released only on digital and OTT platforms have been free from this cumbersome practice. The Ministry of Information and Broadcasting was faced with an RTI in 2005 regarding the same, to which the Ministry replied stating that the CBFC only certifies films for theatrical or public release and that they did not have the authority to control content that will be released solely on digital platforms. Considering that censorship is the enemy of any filmmaker, it is no surprise that content creators adapted to this paradigm shift from theatres to digital platforms quite willingly. Self- regulation has been a prospective solution for this lack of censorship guidelines, since creators often willingly provide disclaimers before scenes with tobacco or alcohol consumption and warnings before films with extreme violence or nudity.

Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021

Controversy arose in 2021, when the government notified the Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021, passed under Section 69A(2), 79(2)(c) and 87 of the Information Technology Act, 2000. With this move, the government changed the position of OTT platforms being self regulated and uncensored, bringing into its ambit OTT platforms, digital news media outlets and messaging applications as intermediaries. A three tier grievance redressal mechanism was put into place, and the concern has been that such mechanism has been implemented without any primary legislation by the parliament, considered to be a bypass of parliamentary procedure and a threat to democracy.

- The first tier of redressal is at the level of each OTT provider, where every complaint has to be addressed within 15 days.

- If not satisfied, the complainant can move up to the level of a self regulatory body

established by these OTTs, which could be headed by a retired judge of the Supreme Court, High Court or some other eminent personality from the field of media, broadcasting etc. What is note-worthy about this body is that the body has censuring powers in case there is any content that they feel could be incriminating to detrimental to public order. In such cases they may modify or delete the content to prevent incitement to the commission of cognizable offence.

- Finally, the most concerning addition by way of these rules is that the government has equipped itself with the powers of an "oversight mechanism". This committee is inter- ministerial in nature and has similar powers to the self regulatory body. The government also has emergency powers where they may block public access to any information, going against multiple constitutional principles with one blow.

India must recognize that we have grown beyond mere consumers of content but have become content creators ourselves and that any traditional film and television regulating regime would be extremely detrimental to digital creators. The guidelines remain a huge topic of controversy, both because of the mode in which they were enacted and because of their content, and without clear legislative backing it is questionable whether this move is constitutional at all, exercising power far beyond that of the parent legislation. The guidelines could not only hamper the freedom of an individual to both express his opinion in the form of film, and his freedom to listen to other people's opinion without extreme censorship, both a right under Article 19(1)(a), but will also cause huge monetary loss to India's entertainment industry.

Press Freedom: North Korea and India

Both India and North Korea do not fare well in the World Press Freedom Index, which is an annual ranking given by the organization Reporters Without Borders, in an attempt to make the world safer for journalists and promote free speech. While India was ranked 142 in the 2021 ranking, North Korea finished at 179 out of a total 180 countries. India's ranking has fallen in the past years, following the internet bans in Jammu and Kashmir and the treatment of protesters and journalists during the NRC issue. It is no news to us that India, specifically with the current government, has tightened the grip on media and has vested itself with high censuring powers. In such a situation, it could be beneficial to study the censorship laws of what is considered one of the most regressive countries in the world,

to use as an example of what not to be.[9] Article 53 of the North Korean Constitution stands for the freedom of press, however, independent news sources are hard to come by in the country. While there exists an Associated Press Bureau (APB), located in headquarters of Korean Central News Agency (KCNA), all these boards are state run and staffed by North Korean officials. This agency KCNA, is responsible for more than 90% of all the content, be it in the 12 newspapers, 20 periodicals or other broadcasters. Any North Korean who seeks independent information, must resort to unlawful means of obtaining the same, particularly through the China border, where they smuggle DVDs, TV signals or phones through which they can access Chinese mobile towers.[10] Internet in the country is restricted both to citizens and visitors and only a few high ranking officials have access to the same, while in some universities, partial access is provided. Journalists have lost their meaning in the country and are essentially propagandists who advocate for the supreme leader. The intranet service in the country, with around 1,000 to 5,000 sites is the Kwangmyong, the leader of internet censorship that prohibits access to Facebook, Twitter and YouTube and other social media messaging services. Although India is a long way from this level of repression, we have been confronted with certain unpleasant realities, such as the frequent internet shutdowns by the government, both during the farmers' protests in 2021 and the landmark human rights violation in Kashmir in 2019, where citizens were denied access to the rest of the world for more than 5 months.

IV. CONTEMPT OF COURT AND ARTICLE 19(1)(a)

While censorship is often a term used while speaking of films or other content, individual expression and freedom is also a key victim of censorship. In the past years, the contempt charges have grown tremendously, and the arbitrary nature of these charges were truly questioned after the case against social activist and lawyer Mr. Prashant Bhushan for two of his tweets, for which he was charged an iconic fine of Re. 1.Contempt of court curbs an individual's freedom of speech and expression in order to save the court from any defamation.[11] Under Article 19(2), it has been recognized as a reasonable restriction of free speech and the Contempt of Court Act, 1976 provides legislative backing for this concept.

[9] Markella Tsichla, *Censorship in Social Media: Political Satire and the Internet's "Oppositionists"*, 3 JHSS 1 (2020).

[10]

[11] In re: Prashant Bhushan v. Supreme Court of India, SMC(Crl) No. 000001 - / 2020.

According to the Act[12], criminal contempt must include three key elements as laid down below:

- Written or spoken words, signs or actions that scandalize and lower the reputation of the court.
- Anything said or done that causes prejudice or interference to court proceedings.
- Finally, anything that interferes and obstructs justice.

The terms used in Section 2(c) of the above Act, are inherently ambiguous conferring wide discretionary powers on the Court. Further, unlike traditional criminal proceedings, the Court itself if party to the proceedings replacing the state. There is a presumption of guilt on the accused before the trial begins, and hence the trial of the accused cannot in anyway be fair. The principles of natural justice are destroyed in criminal contempt proceedings and the recent trend has shown that the judiciary is not hesitant to utilize this loophole to full potential. Prashant Bhushan had resorted to twitter to share his opinion on the infamous photograph of the then CJI Justice SA Bobde on a Harley Davidson bike without a helmet, saying "the Supreme Court is in lockdown mode". This coupled with the usage of the term "destruction of democracy" in another one of his tweets, was enough to convince the judiciary that his intent was in fact to lower the authority of the Court. In his reply, Mr. Bhushan contended that he was simply exercising his right to free speech and expression and that despite disagreeing with him, this cannot call for *suo moto* proceedings of contempt by the Court. While most other countries like the United States of America, Canada and the United Kingdom have recognized the archaic nature of contempt proceedings and have greatly limited if not completely abolished such laws, India travels back in time and continues to rely on these principles to curb individual liberty. A disturbing trend has emerged where the judiciary has begun to criminalize any form of criticism of its working.

In December 2020, the Supreme Court proceeded against stand-up comedian Kunal Kamra[13] and cartoonist Rachita Taneja for criminal contempt cases for their tweets about the Supreme Court and its judges, specifically relating to the matter of interim bail to journalist Arnab Goswami. Goswami was arrested in a case of abetment of suicide, and despite the serious

[12] § 2 cl. c, The Contempt of Court Act (1976).
[13] Shrirang Katneshwarkar and Others v. Kunal Kamra, 2020 SCC OnLine SC 1041.

nature of this allegation, his bail plea was fast tracked, and this struck a chord with both Kamra and Taneja, who resorted to their own forms of expression to share their opinions. Rachita Taneja was considered to be biased against the ruling, Bharatiya Janata Party and Kamra was charged with another count of contempt for a tweet about Justice SA Bobde. While Kamra has denied any apology to both Justice Bobde and the Supreme Court, it is disheartening to see that the judiciary is unable to handle criticism regarding its decisions. Dissent has been considered the foundational principle democracy however, the acts of the judiciary seem to promote censorship of any content that may criticize or disagree with the courts of India.

Considering that these charges have grown in number and the accused in these cases rarely say anything directly offensive or baseless to the Court, let alone anything that has direct implication on the public opinion of Courts, there is a need for a paradigm shift in our judiciary. Our honorable judges have failed to be open-minded while initiating contempt proceedings and have misused their wide discretion to take action against comments that have hurt their personal sentiments, although these comments do not have any effect on public impression of the courts. As a consequence of this move, the court has only gone on to tarnish the Constitution and the civil liberties guaranteed under it. It is important for the judges to differentiate between statements that result in personal injury and those that tarnish the image of the court before initiating such serious proceedings. Furthermore, the rest of the world adopts a liberal approach to contempt, and India must ensure it does not become an authoritarian regime, silencing opinions of the people.

V. PRESS FREEDOM AND THE NEED FOR CENSORSHIP

The Press in any country plays an important role in disseminating information to the public and so it is no surprise that freedom of press is imperative for a democracy to function. While Article 19(1)(a) has not specifically mentioned that the freedom of speech and expression includes the freedom of press, this position has been reiterated by courts in multiple instances such as the case of *Romesh Thapper v. State of Madras*[14] and *Brij Bhushan v. State of Delhi*.[15]Dr. B.R. Ambedkar was also of the same opinion while drafting the constitution stating that there is no need for mentioning the term press freedom since it is understood that

[14] 1950 SCR 594.
[15] 1950 A.I.R 129.

freedom of expression would also apply to the press, i.e. the right to publish and circulate one's ideas and opinions with freedom, of course with the exception of reasonable restrictions to be imposed under Article 19(2). Stressing on the importance of keeping misinformation at bay since it causes democracy to be a mere farce, the Court in the case of *Union of India v. Association for Democratic Reforms*[16], stated that the freedom of speech includes the right to impart and receive information which includes the freedom to hold opinions. The first instance of a landmark judgment pertaining to freedom of press is that of *Sakal Newspapers v. Union of India*[17], where the legislature tried to suppress the freedom of the press by limiting the number of pages that could be published. The case of *Bennett Coleman v. Union of India*[18], saw the striking down of the Newsprint Control Order which set a maximum page limit for newspapers. The press has become the social educator in India and is responsible for most of the informal education in India.[19]

The emergency period marked a difficult time for Indian press, with several problematic legislations being passed and fundamental rights being violated on the daily. Journalists lost their independence and Prime Minister Gandhi resorted to communicating to the public via the All India Radio station. *State of Uttar Pradesh v. Raj Narain*[20], marked the historical judgment that found Prime Minister Indira Gandhi guilty of indulging in election malpractices. A stay order was given to Indira Gandhi and protests ensued in the country that aimed to force her resignation. The Civil Disobedience Movement was headed by Opposition Leader Jayaprakash Narayan (commonly known as JP), and due to the increasing internal disturbance in the country, emergency was signed by President Fakhruddin Ali Ahmed before midnight of 26th June, 1975. This period saw severe press censorship, and the Press Council Act was withdrawn, while the 1975 Censorship Rules were brought into force. The Prevention of Publication of Objectionable Matter Act, 1976, the Press Council (Repeal) Act, 1976; the Parliamentary Proceedings (Protection of Publication) Repeal Act, 1976; and Press Censorship Order were passed that worked together to completely curb an individual's right to freedom of expression. Additionally, the Maintenance of Internal Security Act (MISA) was also brought into force in 1971, causing immense controversy.

There is no doubt that the emergency period was the darkest age India had to witness regarding

[16] 2002 (3) S.C.R. 294.
[17] (1960) 2 S. C. R. 67 1.
[18] (1973) 2 S.C.R. 757.
[19] Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India, 1986 AIR 872.
[20] 1975 AIR 865.

its press. Although modern India has moved away from its dark past, some residue remains today. Between 2010 and 2020, 154 journalists were arrested or were facing government hostility for their work, and more than 40% of these cases were from 2020 alone. Journalists who criticize government moves have always had to face the brunt of their comments, and the most recent example of this is the 2021 farmer laws. In January 2021, as the demonstrations by the farmers turned more serious, the government worked fast to suppress the press and ensure that they do not face international embarrassment. Sedition cases were filed rapidly, including veteran journalist Rajdeep Sardesai. These coupled with internet shutdown trends discussed in the previous chapter, showcase a disturbing trend India has followed. The government must recognize that it is its duty to nurture freedom of press and in turn the freedom of journalists, without whom the press is just a façade.

VI. CONCLUSION

Censorship with the aim of saving public morality and public sentiments is a tricky area. While it is true that the state has a duty to work towards public good, excessive censorship and controlling of content that is published is detrimental to our functioning as a democracy. This move towards a more liberal and less censored society comes from trust that the government must place in its citizens that they are capable of making their own choices and will not be corrupted by all the content they view. In this article, the author has attempted to study all the main modes of censorship that the government uses that could infringe Article 19(1)(a) and the freedom of speech and expression it enshrines upon its citizens. Upon studying recent cases such as that of Prashant Bhushan[21], and Tandav web series censorship issue, it is becoming louder and clearer that the current censorship regime is questionable and is a point of debate. Court's judgments such as in Rangarajan,[22] can serve as inspiration to the judiciary on how they must uphold the importance of freedom of expression and how censorship cannot be used as a tool to protect the Court's and Government's image. In light of these discoveries, India must take its position in the Global Press Freedom Index seriously and work towards creating a more liberal environment for its citizens. Further, some analysis has to be conducted on the Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021 that have been the subject matter of great discussion in the

[21] *Supra* note 10.
[22] *Supra* note 4.

past few months. It is the need of the hour that the government and judiciary both understand that the power to impose restrictions is not a tool to suppress dissent and protect the interests of those in power, but is a tool to be used with great restraint, only to further democratic values that they vowed they would upheld.