ISSN 2582-0311 (Print)
ISSN 2582-0303 (Online)

Volume 3
Issue I

August 2021

VIPS STUDENT LAW REVIEW

VIVEKANANDA INSTITUTE OF PROFESSIONAL STUDIES
ISO 9001:2015 Certified Institution
(Affiliated to GGSIP University & Approved by BCI & AICTE)
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& NBA Accredited for MCA Programme

Volume 3, Issue I August, 2021 ISSN 2582-0311 (Print)
ISSN 2582-0303 (Online)

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Regulating the Unregulated Video-on-Demand Platforms in India

Ravi Singh Chhikara*
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VIPS Student Law Review
August 2021, Vol. 3, Issue 1, 114-129
ISSN 2582-0311 (Print)
ISSN 2582-0303 (Online)
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https://vslls.vips.edu/vslr/

Abstract

The exponential growth of the popularity of video-on-demand platforms has brought a new regulatory challenge for the legislature. This paper ultimately advocates that it is high time that the government of India takes a paternalistic role and enacts a different pre-publication regulatory framework for video-on-demand platforms. The paper first clarifies the real 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 the pre-publication regulatory framework would prove better than the post-publication regulatory framework. It then examines the possibility of reasonable restrictions under Article 19(2) of the Constitution of India, 1950. It clarifies how non-regulation of the VOD platforms is violative of Article 14 of the Constitution of India, 1950. In light of this, the article gives the possible solutions to the existing loophole.

Introduction

It is generally believed that motion pictures relieve the stress of human beings.[1] However, they also affect our lives badly if we watch them unconsciously.[2] Some of the content available on the video-on-demand (hereinafter the 'VOD') platforms such as Netflix,

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1 Janet Singer, *How Watching Movies Can Benefit Our Mental Health*, PsychCentral (December 20, 2018) https://psychcentral.com/blog/how-watching-movies-can-benefit-our-mental-health/.

2 Franklin Fearing, *Influence of the Movies on Attitudes and Behavior*, 254 The Annals of the American Academy of Political and Social Science 70, 71 (1947).

Amazon Prime, Disney+ Hotstar etc. is inherently dangerous for children.[3] Some parents are not acquainted with the fact that highly obscene material, seditious, hate literature, treasonous content having the potential to encourage their children to follow the immoral paths flow through various channels of the internet with relative ease and minimal restrictions.[4] Consider the ideas propagated through these television series: '*Gigolos*', an American reality web series is about the lives of five male escorts. In 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. '*Game of Thrones'*, an American fantasy drama web series has several scenes exhibiting incest including one where a father does sex with his daughters. '*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 kind of ideas are generated when the children watch 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.[5] It has been observed that they remember the visuals of the motion pictures and try to imitate what they have seen.[6] Despite these known facts, the central issue is that several countries[7] including India do not have any specific mandatory guidelines, laws or policies for content regulation on VOD platforms.[8] This has created a regulatory vacuum in this field because the same content which might be censored in cinemas and television can be viewed uncensored on these platforms by any person including a child of any age. Thus, technology advances today pose new and daunting questions that challenge the current state of existing regulatory laws that were enacted before the advent of VOD platforms. Considering its different nature in terms of the amount of user control, this paper ultimately

3 Sidneyeve Matrix, *The Netflix Effect: Teens, Binge Watching, and On-Demand Digital Media Trends* 6(1) Jeunesse: Young People, Texts, Cultures 119, 120 (2014).

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

5 Movies, Media, and Children, American Academy of Child and Adolescent Psychiatry (March 2017), https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/Children-And-Movies-090.aspx.

6 *Id.*

7 Suwon 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, 143 (2019).

8 Ashok Upadhyay, *No content regulation on online streaming platforms, RTI reveals*, India Today (October 10, 2019), 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.

urges the Government to enact a separate pre-publication regulatory framework for video-on-demand platforms.

In this light, it is the objective of the paper to evaluate the best possible policy consideration to regulate VOD platforms in India. This paper 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. This paper also 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. This paper also explains how the absence of any regulatory framework for VOD platforms violates Article 14 of the Constitution.

Analysis in India's Context

The Real Test of the Regulation – The Effect Test

The primary reason for not applying the regulatory laws applicable to platforms other than VOD platforms is because of the unique feature of complete control on the sequence of content in VOD platforms as against very limited control in other platforms. 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 option to jump to the next part of the motion picture. The test that whether the content provided by any platform should be regulated or not is not decided by the feature that how much control that platform offers to its viewers, instead determined by the nature of effects that its content will produce on its viewers. 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 first to trace the reasons for bringing the regulatory policies for motion pictures. It is necessary first to understand that why the duty to censor the movies was delegated to authorities and not to the viewers. A report was released in 1928 on the issue of censorship and the exhibition of films in India.[9] It suggested mandatory censorship of motion pictures because they having a substantial effect on the community than any other media.[10] Similarly, the reasons behind regulation

9 Shubhangi Heda, *CMDS Policy Paper: How to Regulate India's Video Streaming Services*, Centre for Media Data and Society (November 15, 2019), https://cmds.ceu.edu/sites/cmcs.ceu.hu/files/attachment/article/1722/indiaottpaper.pdf.

10 *Id.*

can be traced from the Statement of Objects and Reasons of 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 programs as well as advertisements are becoming available to viewers without any kind of censorship.*"[11] Thus, it was always the effect of the content on the community that mattered for regulation and not the amount of viewer's control on the content. The feature of the 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, motion pictures downloaded on 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.*"[12] Consequently, it was decided that the exhibition of the film is to be made a union subject. In the landmark judgment of *Secretary, Ministry of Information and Broadcasting, Govt. of India and Ors. vs. Cricket Association of Bengal & Others,*[13] Apex Court held that "*[...] most people obtain the bulk of their information on matters of contemporary interest from the broadcasting medium. Television is unique in a way in which it 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 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.*" Interesting to note, the courts did not observe that the regulation in Television platforms is necessary because of the limited amount of viewer control on the content. Instead, it emphasized the effect 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 the content is appropriate for society or not.[14] It indicates that the mere feature of control on the sequence of the content cannot be a reason to accept that it is a control-enabling platform. Because the viewer cannot be left to decide whether the content is appropriate or not, it is the authority that has to determine the nature of the

11 Cable Television Network (Regulation) Act, 1995, Act No. 7, Acts of Parliament (India).

12 Constitutional Assembly Debates (August 31, 1947) http://loksabhaph.nic.in/writereaddata/cadebatefiles/C31081949.pdf.

13 Secretary, Ministry of Information and Broadcasting, Govt. of India vs. Cricket Association of Bengal & Others, AIR1995 SC 1236 (India).

14 Mehta, *supra* note 4.

content prior to its publication and to remove the inappropriate content.

In a case study conducted on the censorship policies in India, it was 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.*"[15] Thus, the regulatory bodies were never concerned with the viewers' control of the particular content. Regulatory bodies were always concerned with the effects of the content on the viewer.

The preceding discussion clearly shows that stress 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, therefore, always moves around the impact of motion pictures on the viewers.

Failure of Courts in Interpreting the Provisions of The Cinematography Act, 1952

Currently, the role of censuring of 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 the Cinematographic Act, 1952.[16]

Section 5A of the said Act empowers CBFC to certify and classify a film according to its suitability for public exhibition.[17] Section 5(B) (1) lays down the grounds for non-certification by CBFC. It empowers the CBFC to stop the broadcast of the 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.*"[18]

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, a separate regulatory framework for VOD platforms is argued, the courts could also bring them under the Cinematography Act to give appropriate remedy until the legislature enacts a separate regulatory framework for them so as to temporarily fix the loopholes in the regulation policies. This can be inferred from the relevant case laws to be

15 Aditya Kumar Panda, Case Study: Film Censorship in India, 4(2) Scholedge International Journal of BusinessPolicy & Governance 7, 7 (2017).

16 The Cinematography Act, 1952, Act No. 37, Acts of Parliament (India).

17 *Id.,* § 5A.

18 *Id.,* § 5(B)(1).

discussed hereinafter.

In the case of *Mr. Padmanab Shanker v. Union of India,*[19] the issue that was raised was 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 2[20] of Cinematography Act, 1952. It was aptly argued that the definition of cinematograph is an inclusive one and it will include modern gadgets as well. However, the court stated that the cinematograph is an equipment that 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 2 of said Act.[21] 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 added that the provisions of the IT Act could take care of content objected by the petitioners. Guidelines placed on 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 and other multimedia content through the internet would not come within the definition of cinematograph under clause (c) of Section 2 of Cinematography Act, 1952. However, the court did understand the gravity of the issue. 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.[22]

This decision was based upon the wrong interpretations of the provisions of said Act and thus, the decision is patently erroneous. It is not even a sound decision. For instance, if pornography or any content which endangers 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 unsound. What matters is not whether the content is being provided at the request of the users, but the nature of the content and its effects on the users. Take another example. Suppose a user requests a particular DTH service such as Tata Sky a specific film on its subscription-based channel specially created only for its customers. Then observation that the content was provided at the request of the user and thus, it cannot be censored seems unsound.

19 Mr. Padmanab Shanker v. Union of India, ILR 2019 Kar 4630 (India).

20 § 2(c) - "cinematograph" includes any apparatus for the representation of moving pictures or series of pictures.

21 § 2(dd) - "film" means a cinematograph film.

22 Mr. Padmanab Shanker v. Union of India, ILR 2019 Kar 4630 (India).

Since the Act does not expressly state its application to the 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.*" [23] 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.[24] Section 4 provides that any person wanting to exhibit any film has to apply to the Board for the certificate. The board has then to 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 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.*" [25]

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 defines these terms.

So, now 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*[26] wherein the 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 CG 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 CG 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*[27] 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

23 The Cinematography Act, 1952, Act No. 37, The Preamble (India).

24 *Id.,* § 3.

25 *Id.,* § 4.

26 Super Cassettes Industries v. Central Board for Film Certification, 2011(46) PTC1(Del) (India).

27 Garware Plastics and Polyesters Ltd. v. Telelink, AIR 1989 Bom 331 (India).

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 CG Act. 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 CG 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 5A of the CG Act. Further, the moment the content gets available on the platform, neither the maker, not 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 a home (since content can now be easily viewed on T. V.)[28] Thus, the individuals or families watching a film on T.V having installed with the Netflix app in the confines of their homes perform it as the members of the public and the viewing of that film can be safely called as exhibition of film. Thus, the motion pictures exhibited through VOD platforms will constitute films within the meaning of Clause (dd) of Section 2 of the said Act.

Incompetence of Information and Technology Act (hereinafter the 'IT'), 2000

Section 67, 67A, and 67B of the IT Act punishes for publishing or transmitting obscene material, or material containing sexually explicit acts, or material depicting children in the sexually explicit act in an electronic form.[29] However, the major problem with the IT Act

28 Netflix Help Centre, *How can I watch Netflix on my TV?*, https://help.netflix.com/en/node/33222.

29 Information and Technology Act, 2000, Act No. 21, § 67, § 67A and § 67B (India).

is that it does not regulate the expression before its publication. Rather, it regulates it after the expression has been published.

The need of the hour is pre-publication censorship (prior restraint) and not post-publication censorship (subsequent punishment). While prior restraint is an authorities required action on objectionable expression *before* its publication, subsequent punishment, on the other hand, is an authorities required action on objectionable expression *after* its publication.[30] 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 audience.[31] The problem with 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 till then. After that, it becomes impossible to undo the damage completely. IT Act empowers only the subsequent punishment. Thus, they cannot remedy the injury caused to the viewers.

Additionally, the system of prior restraint affords the public greater certainty about the limits of the law with a lesser risk of severe consequences.[32] 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 that 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.

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. [33] They have undertaken not to show any content "disrespectful to national symbols and religions." Further, the players are required to ensure that they do not make available any content that shows "children engaged in real or

30 Thomas I. Emerson, The Doctrine of Prior Restraint, 20(4) Law and Contemporary Problems, Autumn 648, 648 (1955).

31 *Id.at* 657.

32 *Id. at* 659.

33 *Netflix, Hotstar, 7 other streaming platforms sign 'self-regulation code*', The Week (January 18, 2019*),* https://www.theweek.in/news/biz-tech/2019/01/18/netflix-hotstar-7-other-streaming-platforms-sign-self-regulation-code.html.

simulated sexual activities", or promotes terrorism or have 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 unwarranted 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 being over cautious or say, to prevent themselves from going into the unlawful zone.[34] This would keep the viewers away from the content which might be useful for it. For instance, some creators are afraid to produce content that speaks against the government. Some may remove only that content, that is prohibited but may fail to raise the constitutional challenge in courts. Some may even want to pursue the constitutional challenge but eventually alter or abandon their content due to fear of indulging in the process of litigation.

Thus, it should be the authorities who should be given the task to decide the nature of the content. Aggrieved by the decision of the authorities, the creator of the expression should have the opportunity to appeal in the courts. This will protect the viewers and expression if the court decides in favor of it.

Reasonable Restrictions can be Imposed under Article 19(2)

Article 19(1)(a) of the Constitution of India, 1950[35] guarantees Freedom of Speech and Expression.[36] However, this right is subject to certain reasonable restrictions provided under Article 19(2).[37] 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."

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 excision of the right of freedom of speech and expression and the abuse of freedom of speech and expression. In the remarkable case of *S. Rangarajan and Ors v. P. Jagjevan Ram and Ors,*[38] Court

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

35 The Constitution of India, 1950 (India).

36 *Id.,* Art.19(1)(a).

37 *Id.,* Art.19(2).

38 S. Rangarajan and Ors v. P. Jagjevan Ram and Ors, (1989) 2 SCC 574 (India).

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 instill or cultivate violent or good behavior. 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.*"

Why does it not Hamper Creative Freedom?

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 are sometimes even presented as humor. Further, the consequences of human suffering and loss are rarely depicted.[39] It has been observed that children of age eight or below are unable to differentiate between reality and fantasy. [40] It makes them learn and adopt as reality whatever they watch. It, in turn, makes them believe that the world is a mean and scary place. Consequences include anxious feelings, loneliness, withdrawal from friends, bad dreams, sleeping problems etc. 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.[41] 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

39 Kyla Boyse, *Television and Children: Your Child*, University of Michigan Health System (July 9, 2010), https://nanopdf.com/download/television-and-children-5aded7e791b95_pdf.

40 *Id.*

41 *Id.*

show that "*exposure to drinking in movies increases the likelihood that viewers themselves will have positive thoughts about drinking*."[42]

Foregoing discussion rather shows that the content available on these platforms endangers safety, health and peace. Would it be a sound policy to protect every content despite its perilous nature? 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.*"[43]

Additionally, the same view that immoral content cannot be protected in the guise of creative freedom was explicated in the case of *K.A Abbas v. Union of India*.[44] 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*."

Court held that the classification of films "*according to their age groups and their suitability for the unrestricted exhibition is regarded as a valid exercise 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 -

> *"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 article. Its effect particularly on children and adolescents is very great since*

42 *Id*.

43 *The Advantages of Internet Censorship Media Essay*, UK ESSAYS (January 1, 1970), https://www.ukessays.com/essays/media/the-advantages-of-internet-censorship-media-essay.php?vref=1.

44 K.A Abbas v. Union of India, AIR 1971 SC 481 (India).

> *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."*[45]

Thus, it has to be admitted that censoring vulgar or disturbing content cannot always be considered as an act of suppression of creative ideas. They are sometimes necessary for human flouring .[46] Moreover, studies show that policymakers cannot trust individuals to determine what's better for them.[47]

Article 14

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.*" [48] It ensures that 'equals are treated alike'.[49] However, it does not mean that 'unequal south to be treated equally'.[50] 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.[51] 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 a reasonable relation to the object of the legislation.[52]

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 over the sequence of the content. While watching, the viewers have full control to skip any part(s) of that specific content. A viewer can watch only that part of the content which he wants to watch at that point of time. On the other hand, other

45 *Id.* at 22.

46 On the Role of Censorship, The School of Life, https://www.theschooloflife.com/thebookoflife/on-the-role-of-censorship/.

47 Gary T. Marx, *Censorship and Secrecy, Social and Legal Perspectives*, International Encyclopedia of the Social and Behavioral Sciences (2001), https://web.mit.edu/gtmarx/www/cenandsec.html.

48 INDIA CONST. art. 14.

49 M Jagdish Vyas v Union of India, (2010) 4 SCC 150 (India).

50 *Id.*

51 M.P Jain, Indian Constitutional Law 909 (8 edn. 2018).

52 Vikram Cement v State of MP, (2015) 11 SCC 708 (India).

platforms do not provide any control over the sequence of the content. Viewers are bound to watch the content in the sequence in which it was directed by its creators. The existing regulatory framework contemplates the features available on other platforms only. It does not contemplate this distinguishing factor. Thus, subjecting VOD platforms to the existing regulatory framework would be violative of Article 14 as it would be equivalent to treating unequal alike.

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 it 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 only.

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 that VOD platforms and other platforms form a different class because of the factor of the amount of user control on the sequence of the content. However, it is argued that even after classification, which although is reasonable, the goal of the classification is not being achieved. The purpose of the regulatory laws is to protect the interests provided under Article 19(2). However, this goal is not being achieved by this classification. 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 illustrated, the content available on VOD platforms does have the potential to harm the interests that ought to be protected by State. This can be understood by answering this question: Whether the Television service providers would be allowed to show the web series as illustrated in the Introduction.

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.

Conclusion

Video-on-Demand (VOD) is a streaming media service offered directly to an audience via the 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.

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*[53] & *S. Rangarajan and Ors v. P Jagjevan Ram* and Ors[54] 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 exercise of power in the interests of public morality, decency etc. Similarly, in the case of *S. Rangarajan,* the Court emphasized 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 they have a substantial effect on the community than any other media. Keeping this in mind, the article analyzed 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 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

53 K.A Abbas v. Union of India, AIR 1971 SC 481 (India).

54 S. Rangarajan and Ors v. P Jagjevan Ram and Ors, (1989) 2 SCC 574 (India).

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.

Looking at the current scenario, the presence of an unbiased autonomous body is a must. Total censorship of the content will do more harm than benefit as it could increase the case of film piracy and other violations of the IT Act. Moreover, it would turn a VOD platform into a television or mainstream cinema.