



THE NEXUS BETWEEN FREEDOM OF EXPRESSION UNDER THE INDIAN CONSTITUTION AND CREATIVE LIBERTY OF CONTENT CREATORS OVER OTT

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Abstract

It is important to analyse the mutually intertwining and rather entangled contingencies associated with the creative freedom of content distributors and the freedom of speech that is granted by the Indian Constitution. Essentially, this abstract looks at the detail of this relation and how laws and the Constitution pragmatics shape various entertainment content in the contemporary world. According to Article 19(1)(a) of the Indian Constitution, the citizens have the right to freedom of speech and expression, nevertheless, restrictions may be placed on this right. Artistic and creativity freedom are part of this broad categories of freedom of expression. It makes communication, opposition to the power and cultural exchange possible, becoming the cornerstone of democracy. The use of the over-the-top platforms has given the producers an avenue through which they can produce quality and diverse content through their work. There are no mediators and gatekeepers in the processes of content production; everyone, starting with non-affiliated freelance directors and ending with directors of the giant studios, freely creates their works. This freedom has resulted in splendid replication of narration, as well as the proposal of many approaches and stories. Holding Indian autonomies suitable for the protections granted under Article 19, decision-makers are adjusting regulations concerning the content delivered through OTT platforms. Namely, the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 are designed to regulate the over-the-top (OTT) platforms by prescribing the requirements in relation to griev-

ance redressal mechanisms and content classification. However, there are concerns over such notion as censorship and restriction of the freedom of artists from being realised as a consequence of the implementation of these measures. Co-ordinating between applications of artistic permissiveness and general freedom involves a highly involved manipulation of loyalty towards the Constitution and what the numerous concerns dictate the society as a whole. The law makers need to have discussions with the media, business circles, and civil society organizations to create legislative frameworks that would foster creativity, variety, and the production of responsible content for the audiences, maintaining the positive balance in the digital media space while respecting the active use of moderation, transparency and other principles used in modern societies.

Keywords: Creative Liberty, Freedom of Expression, Indian Constitution, OTT Platforms, Regulatory Framework.

Introduction

Of late, the world of entertainment has been inundated with a host of OTT platforms boasting of very distinct, at times even eccentric, range of offerings. Filmmakers or creators, in general, are now coming up with subjects and content that earlier fell under the bracket of prohibited or 'off-limits'. But creative liberty has led to controversies linked with the Indian Constitution, especially freedom of speech and expression. Hence, this paper will go deeper into the complexity of the causality of creative freedom in the manufacture of OTT

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content vis-à-vis Constitutional rights within the legal framework of India.

This freedom of speech and expression is protected as a Constitutional right under the Constitution of India in terms of Article 19(1)(a). While talking about artists, content creators indeed benefit from Constitutional freedom by empowering them to bring ideas, opinions, and narratives into the silver screen through their movies.

However, this freedom is not absolute and is subject to various limitations provided under Article 19(2). Concerning the exercise of freedom in content creation, freedom of creativity and public interest will always be at the threshold. Due to maker's choice, creators are completely free to experiment with themes, brainstorm revolutionary ideas, or even come up with alternative perspectives. This latitude should, however, work within the provisions provided for by the Constitution in as much as freedom of speech that compromises on the order, morality, or security of the State is concerned. Due to this, the Judiciary will find itself at the centre of maintaining this balance of rights.

Freedom in the development of content and freedom as safeguarded by the Indian Constitution for OTT - the two ideas correlate to strike a balance between them. One way, it gives the makers a vast open ground to paint according to their imagination, and on the other hand, the Constitutional dispensation is not entirely colourless for the reason that any such freedom is legally restricted in the interest of preserving the corporate entity. It broaches the proper balance - a complex, continuous contest between creators, regulators and jurisprudence - with an avowed objective to protect the Constitution and foster a rich, diversified filmic offering.

It is, therefore, an attempt on the part of the Institution through this paper to draw out the way in which the Constitution gave the filmmakers a tool for developing and presenting thoughts, views, and stories through the medium of films within the ambit of Article 19(1)(A) of the Constitution of India. It therefore does not leave this intersection without its loophole by introducing Article 19. This move would create a degree of limitation that can be brokered on this freedom, modulating a balance between creative freedom and societal interests. It, in turn, provides background information on the issues

to be talked about, analysed, and developed regarding these freedoms and liberties assigned to filmmakers while practicing their profession within the realms of Constitutional guarantees. The inviolable accord of freedom of expression in India makes for a very thrilling tale of legal dichotomy within the Constitutional fabric of this polity in the framework of Constitutionalism. Article 19(1)(a) is part of the Constitutional fabric of India, and it is one of the basic rights under the Constitution of India for every citizen regarding the right to freedom of speech and expression.

This provision in the Constitution is as much of an advantage to filmmakers, who take on the humongous responsibility of translating presidential aspirants' vision into movies - as to an arbiter who brings their imaginative work into conformity. This canvas of creative expression, therefore, does not come without legal boundaries. Article 19(2) of the Constitution, while enunciating the provision regarding freedom of speech and expression, brings into play the concept of 'reasonable restriction' as to how far and in what extreme this particular artistic liberty can go. Only the left amount of freedom in legislation with reference to permissiveness and prohibition of offending societal morality can be described as a legal labyrinth on the tightrope. The Judiciary itself becomes the central figure, as it is the last word in interpreting binding oneself to the Constitution and its values. Such legislative decisions thereby define a filmmaker's palette with overt and covert regulations of what is acceptable and what is taboo as far as cinemas are concerned. Level-playing-field companies are now ready to be investigated in the background and benchmarks that shaped the legal permissiveness of creative freedom in movie production. Right from the historic *K.A. Abbas v. Union of India*² Case to the present day, they reflect the Constitutional jurisprudence of every single judgment being akin to a stroke on a gradually painting canvas of Constitutional law. The present paper tries to delve into these legal fine details and relate the limitless area of creative freedom with the legal provisions created to protect different sections of society.

Meaning of Freedom of Expression

Article 19 of the Constitution of India puts reasonable restrictions on freedom of speech, in lieu of balancing

2. *K.A. Abbas v. Union of India*, 1 SCC 406 (India)(1970).

rights with obligations. To the aforementioned right, Art. 19(2) adds the following limitations, which no doubt qualifies the above-mentioned right or freedom: interest of sovereignty and integrity of India; public order; friendly relations with foreign states; state security; and decency or morality with respect to contempt of court, defamation, or incitement of an offense. It is the view that recognizes that although free speech itself is important, there are some topics simply inappropriate for discussion or culture in a diverse and tolerant society. Therefore, “reasonable” has never been constant given to the various social changes³. Free speech must be accorded the foremost priority in a democratic society since it provides for social dialogue, gives people a platform to express their ideas and thoughts, and holds people in authority in the nation or in any other field. Article 19(1)(a) of the Indian Constitution clearly gives each citizen the right to freedom of speech and expression. The sentence expresses that freedom of the press and speech are required rights for Indian citizens. Therefore, India’s freedom of speech and expression has been drafted in the Constitution with the historical background of the country’s freedom movement and with the vision to make India a free and liberal nation. The makers of the Indian Constitution realised that it was imperative that this freedom was preserved in so that their freedom and establishment of democracy is not hampered. This principle of freedom of expression has not occurred in a vacuum but has been shaped by several big court cases that have set the characteristics of this vital right. Since the dawn of the Republic, the courts have had a difficult time achieving a balance between the need to respond to the demands of maintaining order and ensuring that the populations’ sense of decency and moral values are met, while vision and speech are protected. There are some precedents, which pioneered in addressing and elaborating freedom of expression in India. On such early landmark case is *Brij Bhushan v. State of Delhi* (1950)⁴, whereby the Supreme Court of India upheld the right of free speech as encompassing the right to criticise government activities and policies considering

it as a right which is indispensable in a democracy. The *Romesh Thappar v. State of Madras* (1950)⁵ is another such case; in this case, the Supreme Court pointed out that freedom of speech and expression is a very wide concept and provided that any restriction on this right must be strictly confined to the grounds mentioned in Article 19(2) of the Constitution.

A key landmark was hit in *Indian Express Newspapers v. Union of India* (1985)⁶, which established press freedom as one of the fundamental rights to freedom of speech and expression necessary for the dissemination of information to the public and for evaluation of Government operations.

In *Kedarnath Singh v. State of Bihar*⁷, the Supreme Court upheld the constitutionality of the sedition law in India. To summarize, one should familiarize themselves with the historical context and the jurisprudential development of said freedom under the Indian Constitution in order to comprehend the scope of freedom of speech and expression as it exists in the legal framework of modern India and its effects on democracy, administration, and freedom.

Creative Liberty on OTT Platforms: A Paradigm Shift in Entertainment Content Creation

Creative Freedom on OTT platforms

OTT platforms allow artists some freedom, unlike other traditional media. This is because of the absence of restrictions imposed by censorship boards and cable networks; hence it is possible to experiment with narrative techniques as well as controversial themes using provocative language. Nevertheless, such a creation may be attractive but not appropriate for presentation on traditional media. Another aspect is that these platforms are designed specifically for niche audiences and therefore allow creators to concentrate on particular categories or consumer segments they are familiar with.

3. Indian Constitution Article 19 (2).

4. *Brij Bhushan v. State of Delhi*, AIR SC 129 (1950).

5. *Romesh Thappar v. State of Madras*, AIR SC 124 (1950).

6. *Indian Express Newspapers v. Union of India*, AIR SC 515(1986).

7. *Kedarnath Singh v. State of Bihar* (1962) AIR 955, 1962 SCR SUPL. (2) 769.

Given its nature, Over-The-Top (OTT) services have been disruptors in the industry lately, upending how viewers get information. Unlike conventional distribution channels such as cable or broadcast networks, over-the-top services carry video content directly to users through the internet. Netflix, Amazon Prime Video, Hulu and Disney+ are some examples of OTT platforms. Their increasing market share along with diverse content offering and growing user base attests their significance today.⁸

Over-the-top (OTT) platforms have one aspect about them which is very striking; they offer incredible creative freedom to content creators. As far as financing and censorship is concerned, OTT platforms serve as a saviour for producers.⁹ However, there are a few exceptions like Netflix and Amazon Prime Video that have made great strides in this area despite the fact they work within a highly regulated market. For instance, streaming companies such as Netflix and Showmax allow subscribers to view exclusive content from various parts of the world (Nkosi). The fundamental difference between traditional media outlets and OTT platforms is the level of censorship enforced by each party. In addition, because TV stations are licensed by governments, they are administered by certain rules.

India, being the country of diversified population and rich cultural heritage, enjoys a complicated legal framework that governs the censorship of television and movies. The legal framework balances the right to freedom of expression with the need to protect public morality, national security, and cultural integrity.

Laws and Important Regulatory Bodies

The main legislation that exists in India with respect to the creation, exhibition, and regulation of films is con-

tained within the Cinematograph Act of 1952. The said Act empowers the Central Board of Film Certification to certify films for public exhibition¹⁰.

The Cable Television Networks (Regulation) Act of 1995 has been promulgated to regulate the cable television channels dissemination in the country. This Act enabled the Ministry of Information and Broadcasting with the powers to specify guidelines on the content of broadcast programmes¹¹.

Guidelines on Censorship

The CBFC, while certifying any film, follows some criteria based on the grounds of¹² :

Public morality: The Board ensures that the content does not demoralize the public or goes against public decency. Such films cannot be certified if they form any kind of threat to national security or public order.

Cultural Integrity: CBFC aims to preserve the cultural heritage and the value system of India.

Welfare of children: The board ensures that films do not exploit or endanger a child.

Censorship practice: Cutting and Muting: Most often, the CBFC orders the filmmakers to cut or mute scenes and dialogues which they consider unsuitable or inappropriate.

Rating Certificates: It issues different ratings like U-Universal, UA universal with parental guidance, A-adult and S-restricted certifying films fit for different age-groups.

Denial of certification: Rarely, CBFC denies certification to any film; hence, it has banned the exhibition of a film in India.

8. D. T. Coyle, *The Over-the-Top Battle for Your TV: A Look at OTT Content Providers*, The Business Journal (2019), <https://www.bizjournals.com/bizjournals/how-to/technology/2019/09/the-over-the-top-battle-for-your-tv-a-look-at-ott.html> (last visited June 5, 2024).

9. A. Jones, *How Over-the-Top (OTT) Platforms Are Disrupting the Television Industry*, Harvard Business Review (2020), <https://hbr.org/2020/02/how-over-the-top-ott-platforms-are-disrupting-the-television-industry> (last visited June 18, 2024).

10. THE CINEMATOGRAPH ACT, 1952. (1952), https://www.cbfcindia.gov.in/cbfcAdmin/assets/pdf/cine_act1952.pdf (last visited Jun. 20, 2024).

11. THE CABLE TELEVISION NETWORKS RULES, (1994), In Official Gazette, <https://tra.gov.in/sites/default/files/CableTelevisionNetworksRules1994.pdf> (last visited Aug. 18, 2024).

12. CBFC. (n.d.). <https://cbfcindia.gov.in/> (last visited Aug. 22, 2024).

Controversies and Challenges

Censorship in India more often has raised a storm of controversy and debate. Critics claim with unmatched fervor that the CBFC is overly restrictive and an interference with the creative expression of an artist. They cite examples of where films have been censored over matters that appear trivial or nondescript. On the other hand, the proponents of censorship support its retention to protect Indian society from grossly inappropriate content. According to them, they are raising very important issues about public morality, national security, and cultural values. Also, the advent of OTT platforms gives new challenges to censorship. While the government has suggested guidelines for OTT content, how it is going to regulate the contents through traditional channels is not precisely envisaged.

There has been an increasing number of creative works on OTT platforms since it allows artists the freedom of expression. These include *Stranger Things*, *The Marvelous Mrs Maisel*, etc. In 1950s New York City “*The Marvelous Mrs. Maisel*” on Amazon Prime Video explores issues relating to gender and identity in relation to cultural expectations at that time. On Netflix one could see “*Stranger Things*”¹³.

In addition, there can be seen a progressive growth of OTT platforms as it has now become as a creative stage for unique content made for specific viewers by using innovative ways of telling stories. For instance, “*The Last Dance*” on ESPN+ and “*Making a Murderer*” on Netflix have received great amount of appreciation which illustrates how OTT platforms can put up diverse voices and perspectives through their shows.¹⁴

Potential Concerns and Regulatory Challenges

Vulgarity and obscenity: It might be hard to decide whether offensive content is a creative expression or a genuine offense to someone. Many people are concerned that there will be violence, nudity, and/or men-

tion of bad words which can be very vivid or loud and might be highly offensive for the younger generation.

Hate Speech and Incitement: Among the publications that propagate hate, violence, or discrimination against a particular group, several have been shown to have a negative impact on the society.

National Security and Defamation: There might be problems with content that concerns the national security and thus is detrimental to some people or organizations. Maintaining the most possible positive image of a country calls for a compromise-dialogue to be struck between the protection of individual reputations and the maintenance of national security with the right to free speech.

OTT platforms are the new generation technology that has taken over the production of entertainment material. They become the favourite platform of fans who can enjoy a variety of extraordinary contents and creative makers where they get the highest level of creative freedom. Investors should consider the legal and regulatory implications of these channels while they go with the flow and change the entertainment industry but at the same time their fight for the essential rights to freedom of speech and the right of art is consistent.

While it should be mentioned that media consumption alone cannot be attributed to criminal behaviour, there have been plenty of occasions where this has been the case, with individuals being inspired by fictitious materials to perpetrate crimes in reality. A few examples are as follows:

Shraddha case: Shraddha Walker Murder: The police said Aftab Poonawala has confessed to drawing inspiration from the US TV series “*Dexter*”, based upon the life of a serial killer who targets other criminals. Poonawala murdered his live-in partner, Shraddha Walker, in Delhi, India, and further mutilated her body.¹⁵

Robbery in “Money Heist”: A gang of robbers in India, taking cue from the scenes of the popular Netflix series

13. S. Gupta, *Content Regulation and OTT Platforms: A Comparative Analysis*, *Journal of Media Law & Ethics* 32, no. 2 (2021), 145-167.
14. C. Smith, *The Rise of Over-the-Top Media Services: Challenges and Opportunities for Traditional Broadcasters*, *International Journal of Digital Television* 9, no. 1: 29-43. (2018).
15. Shraddha murder case: How “*Dexter*” crime show, internet research and much more fueled a criminal mindset. (2022, November 21). *The Times of India*, <https://timesofindia.indiatimes.com/life-style/health-fitness/de-stress/shraddha-murder-case-how-dexter-crime-show-internet-research-and-much-more-fueled-a-criminal-mindset/article-show/95659162.cms>. (last visited Aug. 29, 2024).

“Money Heist”, had planned a robbery. They tried to rob a store that sold jewelry and were apprehended¹⁶.

The “Dhoom” Gang: The Bollywood franchise of ‘Dhoom’ has been associated with various crimes, like robbery and theft.

There were cases of bank robberies and chain snatchings where the motives seemed to have originated from the serials¹⁷.

“Twilight” and Vampire Fantasies: Many have moved into self-injury activities or other harmful behaviours because the fantasy involved in “Twilight” and other vampire-themed literature and movies has led them to drink blood or attempt to become a vampire.

Legal Framework and Regulatory Dynamics of OTT Content in India: Implications for Freedom of Expression and Creative Liberty

Content distribution platform and over-the-top (OTT) service in India are in reality strongly regulated by the laws and rules set by the government. These are designed to strike a balance between the interests of the society values, the right to expression, and the consumer protection of the digital economy. Besides the overview of the legislative framework concerning over-the-top (OTT) content in India, it also aims at tackling the recent policy shifts and its impact on creative freedom and individuals’ freedom of expression at the same time.

Current Legal Structure

In India, a combination of laws, codes, and court decisions makes up the regulatory framework that supervises the over-the-top (OTT) content. The legislations that are the principal force in reference to the management of over-the-top (OTT) content are as follows: The IT Act of 2000 has been mostly functional in governing electronic data, as well as the over-the-top (OTT)

platforms. Section 67B of the Act, is grounded on the fact that the distribution or transmission of material by which minor’s involvement in a sexually explicit manner is shown is prohibited¹⁸.

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Over-the-top (OTT) platforms are the platforms which have led to the revolutionizing of the entertainment industry today by facilitating an extensive variety of content that is open to massive viewership. Nevertheless, it is the much-pondered accessibility that is the cause of the content control and other data compliance issues on these platforms. Section 67B of the Information Technology Act, 2000, provides a specific solution to address this issue by prohibiting the distribution of content depicting children engaged in sexually explicit behaviour.

The intent of the legislature is therefore clear in this regard by the provision under this clause, and that is to prevent the spread of offensive and child-exploitative material. The Act now allows a more direct licensing procedure by the government to monitor distributors and hosts with a view to ensuring that every child is protected from abuse or exploitation following legal support. Section 67B has facilitated the global shift towards the digital sphere as it is considered to be the most innovative and flexible means that victims of sexual assault are currently using to report their experiences. This clause therefore forbids the production, sharing, and use of such illegal content online.

16. In a Money Heist-inspired robbery, bank official lootsRs34cr; arrested (2022, October8), BusinessToday <https://www.businesstoday.in/latest/trends/story/in-a-money-heist-inspired-robbery-bank-official-loots-rs-34-cr-arrested-349351-2022-10-08> (last visited Sept. 11, 2024).
17. Ians. (2013, December 14). ‘Dhoom-inspired’ teenage robbers gang busted in Delhi. India Today. <https://www.indiatoday.in/india/north/story/dhoom-inspired-teenage-robbers-gang-busted-in-delhi-220814-2013-12-13> (last visited Sept. 15, 2024).
18. Information Technology Act, 2000, Acts of Parliament (India) No. 21, Section 67B (2000).

This is an assertive move and part of larger moves to ensure digital safety with a view to safeguarding the rights and dignity of all stakeholders, in particular children, on the internet. Section 67B thus spotlights only one aspect of control over content that is necessarily related to minor children while emphasizing that OTT platforms and creators are liable under due process of law for adhering to legal and ethical norms in their content offerings. In view of this, the OTT platforms are very much required as digital content guardians to preserve their secure and appropriate services for users of all ages.

Recent Regulatory Developments

Fears of unpleasant, pornographic, or detrimental content to social values have built up a growing movement in India during the recent past for regulatory mechanisms over OTT content. Important developments consist of:

With respect to the changing landscape of digital content consumption, OTT platforms have developed self-regulatory bodies to maintain responsible governance. At a larger level, these will adopt two main organizations: the Digital Content Complaints Council and the Internet and Mobile Association of India. These are the organizations that will become very important with regard to deciding on the nature of the standards for board content, propagating accountability, and seeking adherence to local laws wading through the OTT ecosystem.

Notwithstanding the foregoing, IMAI still moves on to be the voice of OTT platforms, ensuring the promotion of best practices in the industry and encouraging communication across stakeholders. In that respect, IMAI hopes to address new issues, influence laws, and advance the welfare of consumers by working together. IMAI helps in the creation of a proportionate and attractive regulatory framework for digital content by its openness and invitation to participation.

The Digital Material Complaints Council acts as another independent body that assists IMAI in handling complaints and finding solutions related to digital material. DCCC enables people and organizations to have a platform to express their concerns and seek redressal, thus continuing to keep the Internet a safe

and responsible medium protecting community values and ensuring protection of user interest. Also, through DCCC, periodic reflections are seen in setting content standards and best practices¹⁹.

The Ministry of Information and Broadcasting then brought out a set of guidelines in the title “Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021” in February 2021. The government explained that these rules bring digital media, including OTT platforms, under the purview of a three-tier regulative mechanism, with provisions for oversight by an interdepartmental committee, self-regulation, and self-classification of content.

Certain important provisions under the Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021, are given below:

A three-tier, each regulatory regime for digital media and OTT platforms will be in place through checks-in-place in the form of an interdepartmental committee, self-regulation, and self-classification of information. The said Rules shall bring accountability and see that effective control over digital content is implemented, defining specific roles and tasks performed at each level of regulation.

There can be mechanisms of self-regulation reaching out with regard to the control of content offerings on OTT platforms. These shall include formulation and implementation of a set of Grievance Redressal Systems, Standards, and Codes related to content and behaviours while addressing the concerns and complaints of the customers. These recommendations allow over-the-top (OTT) platforms to take proactive initiatives in resolving the content-related issues with safeguards built around community standards through self-regulation.

Self-Classification of Content: The OTT platforms will make categories based on age, such as U, U/A 7+, U/A 13+, U/A 16+, and A, based on the type of content and its appropriateness for different audiences. This rating system rescues children from exposure to unwanted information and allows users to make informed choices about the content they view.

Oversight by an Inter- Departmental Committee: The Monitoring, Infringement of Application of Rules and

19. Digital Content Complaints Council (DCCC), *About Us*, <https://www.dccc.co.in/about-us>. (last visited Sept. 25, 2024).

Redressal of Grievances Relating to Digital Media Content is to be done by the members of the Committee from various Government Departments. The Committee being a regulatory body shall look into the compliance with these rules and on that basis initiate appropriate action including the action against the violation under concerned Act or Rules.

The government has shown its commitment to promoting responsible content governance and safety guarding the rights of all users within that space through the new set of rules- Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021. Introduced to balance the needs for sufficient content regulation with the right to free speech, these guidelines will attempt to establish a robust regulatory framework for a safe and friendly digital media climate²⁰.

Broadcasting Services (Regulation) Bill, 2023: In this regard, MIB has brought out legislation to establish a new framework administering the traditional broadcasters and OTT services. This will repeal the Cable TV Act for rationalization of rules pertaining to OTT²¹.

Preamble/Purpose of the Bill: This includes unification of all services of broadcasting under one umbrella repealing the Cable Television Networks regulation, 1995 along with other existing laws, digital content related to news and current affairs and OTT platforms brought under ambit, effort that makes the regulatory experience easier for the broadcasters.

Important clauses

- All network operators and services of broadcasting shall be registered.
- There should be an appropriate classifying material in terms of age and setting limits through a software.
- Provides for observance of the program code and broadcasters self-regulation with adjunct setting up content evaluation committees.

- The newest introduced Three-Tier Regulatory System- that is the Oversight body, central authority, and self-regulatory system.

Possible concerns

Critics argue that the measure can empower the government with powers to curb freedom of speech on digital news media and OTT platforms. Also, there are a lot of apprehensions that the measure is going to throttle flexibility and innovation since OTT services are brought under very close scrutiny, much like traditional broadcasters. The bill may not be differentiating enough on account of the content creators of digital platforms. There is an apprehension about the enhanced quantum of content coming under the government's control.

The bill is currently under the consideration of the government. Public comments were invited in November 2023²². The DoT said that any future telecom bill would be incapable of classifying OTT platforms as any form of telecom services.

Issue of Freedom of Expression and Creative Liberty

While trying to control the problems of consumer protection and quality of content, the restrictions also raise some serious concerns vis-à-vis with these rights. In consequence, artistic expression and the variety that OTT could bring in, will suffer at the hands of the government or self-regulation through law.

Moreover, content providers could create self-censorship because the lines would be blurred while classifying a respective content and its subjective interpretation that will hinder experimentation and innovation.

Countries with Strict Regulation for OTT Platforms

China

The Cyberspace Administration of China (CAC) is a very powerful regulatory body in China, given the task

20. Ministry of Information and Broadcasting, "Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021", Government of India Gazette Notification (February 2021).
21. Press Release, Ministry of Information and Broadcasting, Government of India, *MIB Invites Comments on Draft Broadcasting Services Regulation Bill, 2023* (last visited Sept. 12, 2024).
22. PRSIndia: https://prsindia.org/files/bills_acts/bills_parliament/2024/Legislative_Brief-Draft_Broadcasting_Bill_2023.pdf. (last visited Sept. 19, 2024).

Banani Adhikari

of policing online content in China in Over-the-top and web shows. The CAC has passed tight regulations to ensure online content aligns with the political and ideological objectives of the Communist Party of China.

Key regulations and practices

Content censorship: The CAC strictly controls online content and can issue mandates for the removal or blocking of content it deems harmful, illegal, or against government policy. This would include content that criticizes the government, promotes sensitive topics, or goes against social norms.

The government has banned most foreign OTT platforms operating in China, which include Netflix, Amazon Prime Video, and Disney+. A few of those platforms, like YouTube and Facebook, can be partially accessed but have faced major restrictions.

Domestic platform monitoring: Domestic OTT platforms face strict censorship guidelines where the platforms need to take prior government approval before launching new content. The domestic OTTs also have been asked to install mechanisms for filtering out objectionable content to prevent users from accessing them.

Data localization: The Chinese government has compelled the OTT platforms to store data locally within the country. In this way, it is easy on the part of the government to trace and monitor user data.

Deepfakes regulations: China has enforced a ban on creating and sharing deepfakes, which are artificially generated media for use in the spread of misinformation or to influence popular sentiment.

Content and User Experience Change: There exists content and user experience change.

Limited diversity of content: The strict censorship in China has greatly reduced the diversity of content available to its users. Most popular foreign series and movies are inaccessible, and even local content is produced with a narrow range of perspectives in mind.

Surveillance and censorship could manifest in the form of the government's scrutiny of users' activities online, or the government's control over access to information based on political views or behaviour perceived by it.

Economic Impact: The restrictions have really shackled the competitive capabilities of foreign OTT platforms in the Chinese market, while domestic ones have benefited from the protectionist policy of the government.

Challenges and future trends:

Technological advancements: The development of new technologies, such as virtual private networks (VPNs) and decentralized content distribution networks, may challenge China's censorship efforts.

International pressure: As international pressure on human rights records and media censorship continues to mount, some slack in such restrictions might be expected.

Advancing administrative scene: The administrative framework of the CAC is in a state of constant evolution and appears poised for further changes in the future. In conclusion, China's regulations on OTT platforms and web shows rank among the strictest globally. This regulatory foundation significantly influences the content accessible to Chinese users and shapes their online experiences. In any case, though-probably tough times may just be confronted by the government's censorship effort on its way ahead-yet, China is expected to cling tightly to online content.

China probably has the most stringent regulations that oversee OTT platforms and web shows. The Cyberspace Administration of China watches every online content closely, actioning takedowns to keep it in line with the political and ideological aims of the government. Most foreign OTT platforms are banned or greatly limited, while domestic ones are under strict censorship guidelines²³.

Singapore

Media Development Authority (MDA) is a statutory board of the Singapore government under the Ministry of Communications and Information. It regulates broadcasting and the media industry in the country. Key functions of the MDA include:

Licensing and Regulation: MDA licenses broadcasting stations, cable television operators, and online content providers, and regulates the industry in terms of con-

23. *Cyberspace Administration of China Launches the Initiative on China-Africa Jointly Building a Community with a Shared Future in Cyberspace_* (n.d.). https://www.cac.gov.cn/2021-08/25/c_1631480920680924.htm (last visited Sept. 30, 2024).

tent standards, advertising restrictions, and technical requirements.

Content Grading: MDA has undertaken a content grading system which enables the audience to understand what is suitable for which age group. The rating ranges from G (General) to PG (Parental Guidance), and from PG13 (Parental Guidance Suggested) to NC16 (Not Suitable for Persons Below 16), further up to R21 (Restricted to Persons Aged 21 and above)- with and without parental guidance.

Enforcement: MDA enforces such regulations, from mere light penalties on broadcasters and service providers for infringement of its regulations all the way to cancellation of licenses.

Jurisdiction: MDA exercises jurisdiction over the OTT platforms offering content to the Singapore viewers.

Content standards: For the OTT platforms, content standard has to be of the same standard as in the case of traditional broadcasters- nothing offending, harming, or inappropriate in nature is supposed to be broadcast.

Classification: OTT platforms are required to classify their content according to the classification system devised by MDA.

Media Development Authority of Singapore regulates the broadcasting of television and online content, including Over-the-top platforms. The MDA has put out guidelines on the classification of content and has powers to restrict or impose penalties for non-compliance²⁴.

United Arab Emirates (UAE)

The Telecommunications Regulatory Authority (TRA) is the regulatory body that has been entrusted with the administration of the telecommunication industry in the United Arab Emirates. It undertakes the following roles:

Licensing and regulation: The TRA licenses telecommunications operators and sets regulations for the industry.

Consumer protection: The TRA protects consumers' rights and brings in an element of fair play in the market.

Spectrum management: The TRA regulates the planning and utilization of radio spectrum.

Cybersecurity: The TRA promotes cybersecurity and protects critical infrastructure.

Innovation: The TRA encourages innovation and development in the area of telecommunications. It has played a major role in the development of the UAE's telecom network, which is now recognized as one of the most advanced in the world.

The UAE's TRA is responsible for the regulation of broadcasts, be it on television or online. Thus, the TRA has developed content standards that OTT platforms must adhere to, including restrictions regarding offensive or inappropriate content²⁵.

Saudi Arabia

Saudi Arabia has set up a General Commission for Audiovisual Media (GCAM) that oversees the regulation in TV broadcasting and online content whose major tasks are:

Licensing and regulation: The GCAA licenses audiovisual media services and lays out regulations within the industry.

Content Standards: GCAM sets and enforces content standards for television, radio, and online.

Consumer Protection: GCAM safeguards the consumers' interest and helps toward fair competition in the marketplace.

Innovation: GCAM encourages innovation and expansion in the audiovisual media field.

GCAM has come out with the content standard that the OTT platforms need to follow. These range from:

Religious and Cultural Sensitivity: No content can offend Islamic values and the cultural traditions of Saudi Arabia.

Political content: There should not be any content that advocates for political opinions against the government's policies.

Sexual content: Content cannot be sexually explicit or promote sexual misconduct.

24. *Info-communications Media Development Authority Act 2016 - Singapore Statutes Online.* (2022, January13) <https://sso.agc.gov.sg/Act/IMDA> 2016. (last visited Oct. 2, 2024).

25. TDRA. (n.d.). <https://tdra.gov.ae/en/> (last visited Oct. 2, 2024).

Banani Adhikari

Child protection: Content cannot exploit or endanger children. OTT platforms that breach these standards are likely to be penalized through monetary fines or even license revocation. The GCAM has been criticized because of its high-handed policy on content standard enforcement, while the same has been credited with protecting Saudi Arabian society from harmful content.

The GCAM has issued content standards with which the OTT platforms should comply, regulating contents that are offensive or inappropriate in nature.

Balancing Constitutional Freedoms and Societal Concerns

Government control or self-regulation may throttle the artistic expression and diversity of content that is provided on these OTT platforms. Also, vague guidelines on classification and scope for subjective interpretation may dissuade content providers from self-censorship, probably at the cost of innovation and experimentation.

It is incumbent upon one, especially in the fast-changing digital world, to achieve a fine balance between the right to privacy and human dignity on the one hand and freedom of expression under constitutional rights on the other. Other than best practice and divergent views globally on regulation of content, it consequently deals at some length with the complexities in striking this balance within the Indian legal framework - including the role of courts and regulators in making determinations that balance freedom of expression with social interests.

Article 19(1)(a) in the Constitution guarantees freedom of speech and expression. This freedom is viewed as an integral tenet of democracy, without which it will certainly be very tiring to thrive in the absence of this freedom. Above all, correlated with it comes numerous other fundamental propositions meant to be balanced with it in view, all of which are relative rights interpreted identically at different points in time; for example, the subjective right to privacy and dignity. *Puttaswamy v. Union of India*²⁶ and *Shreya Singhal v. Union of India*²⁷ are recent lessons for how seriously the Judiciary takes these principles while protecting

the right of free speech. Comparative perspectives and international best practice relating to content moderation have much to offer India.

Indeed, models like the European Union's General Data Protection Regulation and the case law under the First Amendment of the United States are valuable precedents on how to go about striking a balance between concerns of privacy and human dignity against a right to free speech. This would, in turn, help improve India's regulatory strategy in the digital realm with respect to striking a harmonic balance between social interest and Constitutional freedoms²⁸.

Controlling Over-The-Top Content: Handling Diverse Stakeholder Opinions

The OTT content platforms have been rapidly evolving over the past few years and have changed the way the business of entertainment used to be run by providing unmatched access to media material to consumers. This growth has similarly witnessed incessant debates about the need for regulation, with different stakeholders from sundry industries pressing for different ways. It views and assesses some of the varied opinions on OTT content regulation in the light of how it may impinge upon free speech and creative liberty.

Most of the content creators view regulations to have two sides. They know how much they would want to be spared from bad information, but at the same time, they are also very scared that overly strict laws may impact artistic expression and thus threaten innovation. The reason for the appeal of OTT platforms, according to content providers, is their ability to hold a great plethora of content material and serve varied tastes of their audience without the consternation of traditional media gatekeepers.

On the contrary, frequently reverted to by industry representatives from media representatives to over-the-top operators, is that of voluntary adherence to industry standards and hence self-regulation. Indeed, extreme government involvement is going to stifle creativity and upset current economic arrangements. there would be clear guidelines for content management and collabo-

26. Justice K.S. Puttaswamy (Retd.) v. Union of India, 10 SCC 1.(2017).

27. Shreya Singhal v. Union of India, 5 SCC 1(2015).

28. Gusti Ngurah Parikesit Widiatedja, Neha Mishra, *Establishing an independent data protection authority in Indonesia: a future-forward perspective*, International Review of Law, Computers & Technology(37), 252-273. (2023).

rative efforts aimed at addressing the challenges posed by harmful content - such as implementing age-based ratings or utilizing parental controls.

There has been growing pressure on governments at the global level to regulate OTT content, mainly regarding hate speech, misinformation, and protection of children. In this respect, while policy thinkers agree on the protection of free speech, the counterargument posed is that ideals in society need regulatory frameworks to protect vulnerable groups and uphold those ideals.

Conclusion

The rapidly expanding digital era has started posing a dilemma before the regulator: how to regulate service providers of OTTs effectively without compromising consumer rights while preserving the essentials of freedom. These diverse perspectives around the regulation of OTT, therefore, raise the question of drawing a balance between being concerned about potentially harmful content and safeguarding individual liberties. Protection needs to ensure that society is not harmed by such content without infringing upon basic rights, freedom of expression, or freedom of creation.

Key Considerations for Effective Regulation

Multi-Stakeholder Consultation: Free and open consultations by government with various stakeholders, such as creators, industry syndicates, NGOs, and legal experts, are desirable. These types of consultations will help the regulatory measures to be fully cognizant of diverse perspectives and insights.

Thresholds from Regulators Should be Clear: The regulatory bodies need to clearly set out the threshold of what is acceptable as far as content is concerned and what is not acceptable in terms of proscribed behaviour. This will give clarity on the legal framework within which both platforms and content developers shall be operating and aid the decision-making process.

Transparency and Accountability: Transparency and accountability are what all industry participants should mean when talking about content moderation processes. It relates to making their policy for content moderation publicly known, having complaint and redressal channels accessible, and doing audits on a regular basis to ensure that everything is according to law provisions.

Tech solutions: Policymakers and industry actors should foster the development and deployment of artificial intelligence technologies and content screening algorithms that can detect and remove harmful content in real time. Meanwhile, such technologies should be open, accountable, human-reviewed in order not to create algorithmic bias and wrongful content take-downs.

Safeguarding Core Rights: Regulatory frameworks must stress the freedom of speech, privacy, and data safety. In other words, the content moderation process should not impinge on key user rights, and strong legislation on data protection should be enforced to keep private information secure.

Media literacy and digital literacy require the necessity of the government and civil society organizations to take steps to make users empowered, able to make critical decisions on what content they consume. This involves funding awareness and education programs in media and digital literacy.

The debate on the regulation of OTT is always very much complex. It will not be easy to draw a line between what is moral and what is exactly immoral to be included as the subject matter of web shows and movies. Consideration of all perspectives, and a balanced approach by the makers would lead to a healthy entertainment environment for the audience and it will also help policymakers to create regulatory frameworks that encourage ethical content creation while protecting fundamental liberties, thus creating a robust, safe, and diverse online community for one and all.

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