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# Content Regulation and Censorship of Online Curated Content Providers in India

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## ABSTRACT

*The Online Curated Content Providers have transformed the Indian society and witnessed a shift from cable operators to these platforms to watch their desired content. However, these platforms are completely different from the existing platforms in numerous ways and thus, the existing the provisions regarding censorship in the country fail to full govern these online providers. This has led to multiple litigations with respect to regulating these platforms somehow due to the controversial content being uploaded by them. Hence, the lack of a specific legislation has created ambiguity with regulation of these platforms. This led to the adoption of a Self-Regulation model by the OCCP. However, there was still discontent after this and this led to the Supreme Court directing the Centre to issue guidelines for the regulations of these online platforms. This paper aims to address the loopholes within the Indian framework with respect to the laws regarding regulation of these online platforms and provide suitable suggestions to overcome this challenge by analyzing the policies and legislation of foreign countries.*

*Keywords: Censorship, OCCP, Democracy, Freedom, Regulation, Guidelines*

## I. INTRODUCTION

A There is a vision that one day India will be a modern society. However, in order to fulfill this vision, the process of modernization has to embrace not only the economy and social institutions, but it must also extend to the sphere of thought, literature and the art.<sup>3</sup> This is recognized by way of Article 19(1)(a)<sup>4</sup> of the Indian Constitution, which provides freedom of speech and expression. There exist restrictions on this right in the form of censorship of films<sup>5</sup> under Article 19(2)<sup>6</sup> of the Constitution. The Oxford Dictionary of English<sup>7</sup> defines censorship

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<sup>3</sup> Bruce M. B., *Film Censorship in India: A "Reasonable Restriction" On Freedom of Speech and Expression*, Journal of the Indian Law Institute, 501, 503 (1972).

<sup>4</sup> INDIA CONST. art. 19, cl. 1(a).

<sup>5</sup> *K. A. Abbas v. Union of India & Another*, AIR (1971) SC 481.

<sup>6</sup> INDIA CONST. art. 19, cl. 2.

<sup>7</sup> "Censorship", Oxford English Dictionary, Oxford University Press (OED online) (2019) <<http://www.oed.com>> (last accessed on 20th January, 2020).

as the suppression or prohibition of any parts of books, films, news, etc. that are considered obscene, politically unacceptable, or a threat to security. Hence, censorship is seen as a necessary evil in order to ensure that there is stability in society.

There already exist laws governing the censorship of films, television and even the internet to an extent. These are governed by the Cinematograph Act, 1952 the Cable Television Network (Regulation) Act, 1995 and the Information Technology Act, 2000 (hereafter referred to as “IT Act”) respectively. However, when it comes to the content generated by Online Curated Content Providers (hereafter referred as “OCCP”) there have been no laws formulated by the Government and the existing provisions fail to cover these providers. OCCP are those platforms which are Over-The-Top (hereafter referred as “OTT”), video-on-demand providers which follow a subscription model, transaction model or an Ad-supported model. Essentially these are platforms which catalogue and curate content, both original and third party and present it to the consumer in an organized and structured manner through an online channel.

The Online Curated Content industry is a recent addition to the Indian socio-economic landscape and is expected to cater to a majority of the Indian population in the coming years. It has been groundbreaking in providing consumers flexibilities in relation to viewing of content at time, place and device of their choice by means of employing advanced technology. These platforms provide consumers with a fully curated content catalogue which is licensed or owned by the individual provider.<sup>8</sup> The sole reason why the existing legislations cannot be applied to these OCCP is that these providers promote viewing in private as opposed to in a theatre and give the user the choice to pick what they wish to watch.

Thus, a need emerged to regulate these OCCP as they cannot be allowed to upload content as per their whims and fancies exceeding the limits of what amounts to reasonable and what does not. This was set into motion through a petition filed before the Delhi High Court which went on to be dismissed.<sup>9</sup> Following this the Supreme Court directed the Centre to issue guidelines for regulation of content by these OCCP.

## II. EXISTING STATUTORY PROVISIONS AFFECTING THE OCCP

In the present scenario, there are no explicit statutory enactments or provisions which exclusively deal with the regulation of content and censorship of OCCP. OCCP consists of

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<sup>8</sup> Internet and Mobile Association of India, *Code of Best Practices For Online Curated Content Providers*, (2019)

<[https://www.viacom18.com/pdfs/Self-Regulation\\_of\\_Online\\_Curated\\_Content\\_Providers.pdf](https://www.viacom18.com/pdfs/Self-Regulation_of_Online_Curated_Content_Providers.pdf)> (Last accessed on 20<sup>th</sup> January, 2020).

<sup>9</sup> *Justice for Rights Foundation v. Union of India*, Writ Petition (Civil) No. 11164/2018 (Delhi High Court).

different domains and are essentially a mixture of them. However, there are individual enactments which address each of these domains separately. As per an RTI filed to the Ministry of Information and Broadcasting (hereafter referred to as “MIB”) in 2018, seeking information about the Licensing authority, Laws, Bye-Laws, Rules and Standing Orders which govern and regulate the content on online web streaming platforms and OCCP, the IT Act, 2000 was the regulating Act<sup>10</sup>.

On prima facie reading of the Act, Section 67-A and 69-A would enforce regulation of Online Content. These two sections deal with the power of the government to regulate publishing of online content with respect to display of sexually explicit act<sup>11</sup> or content which would go against the integrity, sovereignty and security of the Country<sup>12</sup>. The second section which would encompass the regulation is Section 79 which puts onus on the intermediaries to observe due diligence while discharging their duties under the Act and observe guidelines as prescribed by the Central Government<sup>13</sup>.

In order to bring these OCCP under the ambit of the relevant sections of the IT Act, these platforms should come under the purview and scope of the definition of intermediaries as given under the Act. As explained by the Delhi High Court in the case of *MySpace Inc. v. Super Cassettes Industries Ltd*<sup>14</sup>, they would under fall under the definition of intermediaries because they are aggregators of video content, web-series and other films, which when demanded by customers are provided to them and consideration for the same is received by such aggregators through a self-operated and self-designed subscription model<sup>15</sup>. Notwithstanding this, the Information and Technology Act does not provide a comprehensive regulation and censorship guidelines to the OCCP in the present scenario as these platforms stream third party content and at the same time provide self-generated content. For example if we take Netflix individually, as an intermediary it streams movies already censored by the Central Board of Film Certification (hereafter referred to as “CBFC”) such as any Bollywood film and at the same time it streams original, self-produced and exclusive content such as Sacred Games which does not come under the purview of the IT Act as it won’t be acting in the capacity of an intermediary.

The second enactment which deals with censorship of content is the Cinematograph Act, 1952.

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<sup>10</sup> *ibid.*

<sup>11</sup> The Information Technology Act, No. 21 of 2000, A.I.R. Manual (6<sup>th</sup> Edition), Section 69.

<sup>12</sup> The Information Technology Act, No. 21 of 2000, A.I.R. Manual (6<sup>th</sup> Edition), Section 67.

<sup>13</sup> The Information Technology Act, No. 21 of 2000, A.I.R. Manual (6<sup>th</sup> Edition), Section 79.

<sup>14</sup> *MySpace Inc. v. Super Cassettes Industries Ltd*, (2016) Del. SCC 6382: (2017) 236 DLT 478 (DB).

<sup>15</sup> *supra* note 7, at 2.

This was an Act to make provision for the certification of cinematograph films for exhibition and for regulating exhibitions by means of cinematograph, basically for censorship of films which is exhibited through a cinematograph<sup>16</sup>. This essentially regulates the films in Theatres and Television, and therefore the content that is streamed online does not fall under the domain of Cinematograph Act. However on a combined reading on the Information and Technology Act and the Cinematograph Act, it can be understood that the third party content which is provided by the OCCP and Video on Demand platforms, especially those which have been certified by the CBFC has to maintain conformity and is under an obligation to follow it or any other guidelines prescribed by the Government as per section 79 of the IT Act<sup>17</sup>. Notwithstanding this, these provisions haven't been enforced by the any regulatory body due to lack of exclusive statutory provision, however most of these platforms have followed this obligation

Section 3 of the Cinematograph Act provides for the establishment of Central Board of Film Certification, the purpose being to certify films which are intended specifically for public exhibition<sup>18</sup>. The question of interpretation with respect to this arises due to the fact that the term public exhibition has not been defined in the said Act or anywhere in its rules. Public exhibition could either include only to films available for viewing only in public places like theatres or it could also include video content available to public for watching either in private or public depending upon their convenience. The Delhi High Court, when dealing with this question in the case of *Super Cassettes Industries v. Central Board for Film Certification*<sup>19</sup>, held that,

*“Even if there is no audience gathered to watch a film in a cinema hall but there are individuals or families watching a film in the confines of their homes, such viewers would still do it as members of the public and at the point at which they view the film that would be an 'exhibition' of such film.”*

Thus, exhibition of films under the Act with respect to the above judgement means exhibition to the public whether for public or private viewing and therefore includes media content on OCCP. Thus OCCP comes under the ambit of the Central Board of Film Certification and the Cinematograph Act, 1951 in extension, under this interpretation. However, keeping this aside, the MIB had made it clear that the Cinematograph Act doesn't apply to OCCP<sup>20</sup> and has no

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<sup>16</sup> The Cinematograph Act, No. 37 of 1952, A.I.R. Manual (6<sup>th</sup> Edition).

<sup>17</sup> *supra* note 11, at 3.

<sup>18</sup> The Cinematograph Act, No. 37 of 1952, A.I.R. Manual (6<sup>th</sup> Edition), Section 3.

<sup>19</sup> *Super Cassettes Industries v. Central Board for Film Certification*, (2014) Del. SCC 136.

<sup>20</sup> Suneeth Katarki, Tanu Banerjee, Nikita Hemmige, *Censorship: The Current Regulatory Framework and the*

control of content released by them.<sup>21</sup>

The Cable Television Network (Regulation) Act, 1995 is the legislation which governs the cable network operators, and they are required to ensure that the films which can be accessed by their viewers should be certified from CBFC. As mentioned earlier, with this understanding of 'exhibition', films exhibited on OCCP would have to undergo the certification process under the Act<sup>22</sup>.

It would not be right to draw this conclusion without comparing OCCP with cable network operators. The films that are made available by cable network operators must be only those films that have been certified by the CBFC. Cable television networks are however different from OCCP in the way they operate. This is critical because cable television networks are defined under the Cable Television Network Act in terms of their operation<sup>23</sup>. They use satellite signals to distribute content to multiple subscribers while OCCP rides on the networks of telecom and internet service providers to provide the content to its users<sup>24</sup>. Therefore, the cable television regulation and censorship cannot be applied to OCCP.

The last statute which gives the Government the power to regulate and censor content is the Indecent Representation of Women (Prohibition) Act, 1986. This Act currently prohibits indecent representation of women in advertisements, books, films, paintings, and writings<sup>25</sup> but does not any way give power to any authority to regulate online content therefore with respect to OCCP, this Act is essentially redundant. Nonetheless, an amendment has been proposed in Parliament with respect to the said Act, which among other things, seeks to widen the scope of the Statute to include new forms of content and media<sup>26</sup>. Therefore, it is safe to say the presently, in India, there is explicit or implicit statutory authority which governs, regulates and censors OCCP effectively.

### III. CONTROVERSIES SURROUNDING THE CONTENT OF OCCP

Content Providers such as Netflix, Amazon Prime, and Hotstar were made to face the heat for the content uploaded by them in the form of multiple litigations filed against them.

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*Future of Digital Content*, IndusLaw Publications, (November 2018) <<https://induslaw.com>> (Last accessed on 20th January, 2020).

<sup>21</sup> Right to Information application dated October 25, 2016, received online *vide* registration number MOIAB/R/2016/50541 and Ministry of Information and Broadcasting's response dated December 2, 2016.

<sup>22</sup> Cable Television Network (Regulation) Rules, 1994, G.S.R. 729 (E), Rule 6(n).

<sup>23</sup> Cable Television Networks (Regulation) Act, No. 7 of 1995, A.I.R. Manual (6<sup>th</sup> Edition), Section 2(c).

<sup>24</sup> Baccarne, B., Evens, T. and Schuurman, D., *The television struggle: an assessment of over-the-top television evolutions in a cable dominant market*, Communications & strategies, (92), pp.43-61 (2013).

<sup>25</sup> The Indecent Representation of Women (Prohibition) Act, No. 60 of 1986, A.I.R. Manual (6<sup>th</sup> Edition).

<sup>26</sup> Indecent Representation of Women (Prohibition) Amendment Bill, 2012.

The more infamous of these litigations was the writ petition filed against Netflix. In the case of *Nikhil Bhalla v. Union of India*,<sup>27</sup> it was submitted in the petition that in the popular show *Sacred Games* aired by Netflix, the former Prime Minister Rajiv Gandhi is sought to be defamed in the name of artistic freedom. The exact wording of the content that has been up for scrutiny is as follows:

- i) *“In 1985, mother died and her son became the prime minister. He got involved in the Bofors scam. I thought if the Prime Minister was dishonest how could I walk on a straight path.”* - Episode 2 (‘Halahala’).
- ii) *“Rajiv Gandhi did the same thing, he dealt with Shah Bano and the country separately. In 1986, Shah Bano’s husband divorced her. She took him to court and won the case. But our former PM, Rajiv Gandhi, a pussy overturned the court’s judgment and threw Shah Bano to the Mullahs. The Hindus criticized him for this, he had the Ramayan show aired on TV to please them.”*- Episode 4 (‘Brahmahatya’)

It has been contended that firstly, these dialogues wrongly link the Prime Minister to the Bofors scam of which he was cleared by the Indian Courts in 2004. Further, they use derogatory language such as “pussy” to refer to the esteemed Prime Minister a role model to several and incorrectly depict historical facts in relation to Rajiv Gandhi overturning the ruling in the Shah Bano case<sup>28</sup>. These dialogues deeply malign the reputation of Shri Rajiv Gandhi and defame him internationally owing to the fact that millions of users have access to Netflix and are thus enabled to view the content. The petitioner condemns the actions of the producers of stooping to such a level wherein just to earn profits they have projected former prime minister in the bad light when in fact he is a role model to millions of Indians.

This show has been a huge success and has been released across the world with subtitles in different languages including Russian, Spanish, Japanese and Chinese. It is also the very first Netflix original series from India which is opening up avenues to new types of cinematic productions and breaking the existing stereotypes that Bollywood content is nothing more than song and dance sequences.

This show was the starting point for issues with content generated by OCCP and this case did not set any guidelines for these OCCP. Underlining the importance of freedom of expression, the Ministry of Electronics, Information and Technology (hereafter referred to as “MEIT”) has

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<sup>27</sup> *Nikhil Bhalla v. Union of India*, Writ Petition (Civil) Number 2018/7123.

<sup>28</sup> *Mohd. Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 945.

told the Delhi High Court that they cannot ask Netflix to remove the alleged objectionable reference to former Prime Minister Rajiv Gandhi in its Sacred Games series. A forward approach was adopted by the Centre towards freedom of speech and expression wherein they said,

*“The preamble of the Constitution of India inter alia speaks of liberty of thought, expression, belief, faith and worship. It also says that India is a sovereign democratic republic. The liberty of thought and expression is a cardinal value that is of paramount significance under our constitutional scheme”.*

Hence, although this decision supported the fundamental right of freedom of speech and expression, not generating any guidelines for regulating these providers can lead to blatant misuse of this power. Specific guidelines by the Centre and a grievance redressal mechanism to specifically deal with grievances against these OCCP are integral to keep them in check and to ensure that there is peace in society without any sentiments of the people being harmed.

Following this, a similar petition was filed in the Bombay High Court. In *Divya Ganeshprasad Gontia v. Union of India*,<sup>29</sup> the plea was filed seeking regulation of the content of web series. It stated shows like Gandhi Baat on the platform of ALT Balaji and Sacred Games on Netflix. These are both very bold and audacious series which make for controversial content for Indian viewers in comparison to previous content. Gandhi Baat delves deep into the sexual desires of people inhabiting rural India and how people are affected by their dark desires. There is a lot of explicit content in this show which is why there is a lot of discontent about it amongst the public. Sacred games is on an equal footing in terms of controversial content and the plot centers around the doings of criminal overlord Ganesh Gaitonde and the aftermath of his actions. It has been debated that these shows contain obscene, nude and vulgar scenes which are similar to pornography and are cognizable offences under the Cinematograph Act, Indian Penal Code, Indecent Representation of Women (Prohibition) Act and the Information Technology Act. The Bombay High Court issued notices to the MIB in light of this plea seeking regulation of such web series.

There is a huge split in the public with respect to the response to such series. On one hand there is public outcry that such shows ruin the culture of India and go against all the morals and values that have been preserved by society over the years. On the other hand, there are advocates for free speech and expression who feel that with changing times the content must

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<sup>29</sup> *Divya Ganeshprasad Gontia v. Union of India*, Public Interest Litigation No. 127/2018 (High Court of Judicature at Bombay, Nagpur Bench).

also change in order to be modern or up to date and to broaden our horizons. There must be a platform for free display or such content without the fear of the strict confines of censorship. Hence, while regulation is important it must only be done to filter out unnecessary content and not the heart of the content itself. Freedom of speech and expression represents the voice of the people in a Democracy and this right must not be undermined at any cost.

#### IV. THE SELF-REGULATION MODEL

The rise in litigation with respect to the content and the non-regulation of OCCP, the stakeholders realised the importance of adopting a regulatory model which would be instrumental in balancing the interests of Freedom of Speech and Expression, Innovation and the reasonable restrictions which had to be followed.

There are three models through which a sense of regulation can be obtained. The first model would be a Levelling, Licensing and Classification Systems, second would be an explicit legislation or statutory authority which would regulate the platforms and content and lastly the Self- Regulation model, where the stakeholders regulate themselves<sup>30</sup>.

The stakeholders of OCCP in India decided to adopt the model of self-regulation on the same lines as the India Broadcasting Foundation, which was representative body in-charge of the self-regulation of Television Channels<sup>31</sup>. Hotstar, Netflix, Reliance Jio, Alt-Balaji, Zee5, Arre, Viacom 18 and Sony-Liv are some of the platforms who have agreed for this regulation model<sup>32</sup>. The Code for Best Practices for OCCP has been drafted by the Internet and Mobile Association of India (IAMAI). The IAMAI is a not-for-profit industry body coordinated among the aforementioned providers for the formulation and development of the Code<sup>33</sup>. The Code aims to act as guiding principles and regulatory model for OCCP<sup>34</sup>.

The Code can be split into three parts, Part A, Part B and the provision for Grievance Redressal. Part A begins with the Preamble which states that the Code has been jointly formulated and developed by Online Curated Content Provider who would commit themselves to acting in good faith with respect to the community guidelines and endeavouring to ensure that the video content offered and showcased on their services in India specifically would be in accordance

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<sup>30</sup> *The Challenge of Managing Digital Content*, ITU-TRAI Regulatory Roundtable, 21-22 August 2017, New Delhi, India

<sup>31</sup> Megha B and Venkat R., *I&B may endorse self-regulation code for online video player*, Economic Times (18<sup>th</sup> January, 2019) <economictimes.indiatimes.com> (Last accessed on 20th January, 2020)

<sup>32</sup> Rishi Iyengar, *Netflix will regulate its content in India. It swears that's not a bad thing*, CNN Business, (January 21<sup>st</sup>, 2019) <<https://edition.cnn.com>> (Last accessed on 20th January, 2020).

<sup>33</sup> Chanana, N. and Goele *Future of E-commerce in India*. International Journal of Computing & Business Research. 2012.

<sup>34</sup> *supra* note 6, at 2.

with the standards elaborated in the Code<sup>35</sup>. The Code also introduces as to what is Online Curated Content Industry and its key highlights<sup>36</sup>.

The developers of the Code have emphasized on the importance of the balance between Freedom of Speech and Expression and their reasonable restrictions as envisaged in the Constitution<sup>37</sup> as well as other statutes such as the Cinematograph Act, IT Act, Emblems and Names (Prevention of Improper Use) Act, 1950, Indecent Representation of Women (Prohibition) Act, 1986 among other Acts<sup>38</sup>.

Part B of the Code deals with the prohibited and restricted content which the stakeholders and signatories would ensure that they will not intentionally and maliciously provide or make accessible to the consumers. This would include but limited to any content which disrespects the national flag or national emblem or displays a minor engaged in stimulated or real sexual acts. Further prohibited content would include those which outrage religious or communal sentiments of any class, section or a community; those which promote or encourage terrorism and lastly content which would have been banned or prohibited for distribution by any platform under existing law or by any competent Court<sup>39</sup>.

The Code also includes a transparent disclosure framework which will advise and inform the consumer regarding the nature of content. This would be achieved by classifying and categorising the content into distinct and separate categories such as General or Universal Viewing; Content which requires Parental Guidance and those categories of content which would be moderated based upon age appropriateness into further be sub-categorised. Additionally, a guidance or a warning message will be displayed particularly when the content isn't appropriate minors<sup>40</sup>.

The last part of Code addresses the mechanism for Grievance Redressal and provides a platform to initiate complaints. Each of these platforms has agreed to appoint an individual or an entire department internally to receive, record and address any complaint or concern raised by the consumer with respect to the content provided. This department or individual will act as the sole point of contact for receiving and examining all the complaints. The contact information of these departments will be made publicly available and accessible to the

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<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> INDIA CONST. art. 19.

<sup>38</sup> *supra* note 6, at 2.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

consumers.<sup>41</sup>

In the case of a violation or conflict of interest the Code, this department, after deliberating and discussing the complaint will have to communicate to and inform the aggrieved person or the complainant within 30 days, of the cognitive action or precautionary measures incorporated to address and resolve the complaint. MIB, MEIT, and Government of India may forward any complaint to the Department of respective OCCP.

The Code drafted isn't a complete success but at the same time it isn't a complete failure. An analysis of the Code would reveal that even though it puts in a system of checks and balances, there are many loopholes and lacunae which could be used by the OCCP to by-pass the Code or even completely disregard it.

Firstly, the restrictions provided in the Code are simple and concise. Even though they would be effective to a certain extent they would encourage frivolous litigation and complaints since they are not defined and elaborated. Further, the restrictions mentioned in the code avoid the use of words such as 'depravity' and 'morality'<sup>42</sup>. The other statutes responsible for censorship cable networks<sup>43</sup> and the television channels use these words extensively<sup>44</sup>. This suggests that these platforms can stay in consonance with the Code regardless of any content they publish which go against the community guidelines or would be unreasonable for unrestricted access. Due to this lacuna, platforms such as Netflix and Alt-Balaji continue to provide content which would be controversial such as Sacred Games and Gandhi Baat, which on other platforms wouldn't be allowed due to explicit provisions preventing it<sup>45</sup>.

Secondly, the provision regarding the formation and functioning of the Department in each of these platforms are not elaborated. This deficiency can be explained by comparing the Department mentioned in this Code and Broadcasting Content Complaints Council<sup>46</sup> (hereafter referred as "BCCC") which is the body constituted under the mandate of the Indian Broadcasting Foundation which is responsible for the self-regulation of Television Channels. The main distinguishing factor between BCCC and this Code is that the constitution of the Council comprises of 13 members which include a judge, non-broadcast member, and certain

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<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> Cable Television Networks (Regulation) Act, No. 7 of 1995, A.I.R. Manual (6<sup>th</sup> Edition).

<sup>44</sup> Bhat, R., *Television in India: The starting point for digital switchover*. International Journal of Digital Television, 3(1), pp.73-83. (2012).

<sup>45</sup> Asis Panda, *IAMAI's Self-Regulatory Code For Curated Content Providers: Hits And Misses*, NovoJuris Legal, (2019).

<sup>46</sup> Mehta, N., *Ravana's airforce: a report on the state of Indian television*. South Asian History and Culture, 3(4), pp.614-625 (2012).

members from the Statutory Commissions and finally Broadcast Members as well<sup>47</sup>. This makes the Council an independent and a competent body giving its actions and decisions more sanctity and competency which would make the Self-Regulatory Guidelines of the Indian Broadcasting Foundation far more effective. The Department constituted under this Code isn't a general body comprising of members from different platforms but rather specific to each platform independently. The Code, moreover does not effectively explain the mandate of the Department and more doesn't specify any qualifications or minimum requirements for the department or its member<sup>48</sup> giving rise discretionary powers which would in turn nullify the effect and envision of the Code.

Thirdly, the analysis of the remedy of Grievance Redressal would reveal that mechanism is praiseworthy yet it seems to lack authority to compel obedience. A perfect self-regulatory grievance redressal mechanism should essentially consist of platforms to receive and address complaints at two different levels; firstly, at the at the individual organisation level and secondly the, industry level. For example, under the Press Council of India's Norms of Journalistic Conduct a complainant or an aggrieved person may approach the Editor of the concerned newspaper and at the same time approach the Secretary of the Press council of India<sup>49</sup>. The mechanism prescribed by the Code doesn't allow this luxury to complaints whereby providing them an opportunity to raise complaints to a higher authority if it is unreasonably rejected by the Department of an individual Content Provider. Essentially this entails that there is no presence of an appellate body which would be imperative to prevent autocratic nature of regulation and provide a fair redressal mechanism.

Lastly, the Code cannot be said to effective tool for censorship mainly due its failure to define the consequences for non-compliance. Nowhere in the Code is a provision describing a penalty or a certain form of punishment in a case where the grievance or complaint redressal Department does not take adequate cognizance or doesn't respond within the prescribed time period.

Even though the Code as a whole addresses the concerns raised by the previous litigations to some extent, it lacks in the fact that it is a non-enforceable authority with vague provisions with respect to redressal. It should be remembered that self-censorship shouldn't become shelf-censorship; the mere autocratic power shouldn't be allowed to become absolute discretionary

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<sup>47</sup> *Broadcasting Content Complaints Council Content: Self-Regulatory Guidelines for Non-News Channels*, Indian Broadcasting Foundation (2017) <<http://www.ibfindia.com>> (Last accessed on 20<sup>th</sup> January, 2020).

<sup>48</sup> *supra* note 6, at 2.

<sup>49</sup> *Norms of Journalistic Conduct*, Press Council of India, 2010 Edition.

power.

## V. JUSTICE FOR RIGHTS FOUNDATION V. UNION OF INDIA<sup>50</sup>

This petition was a gamechanger for regulation of OCCP. Initially, it was filed before the Delhi High Court by an NGO called Justice for Rights Foundation seeking guidelines in order to regulate the hitherto unregulated, uncertified, sexually explicit, vulgar, profane and legally restricted contents broadcasted on the online platforms including (but not limited to) Netflix, Amazon Prime Video etc. The petition alleges that the content broadcasted on these platforms including shows like Sacred Games, Vikings, Game of Thrones, Spartacus etc. contains content which is full of which is full of vulgarity, sexually explicit, pornographic, profane, virulent, religiously forbidden, morally unethical, depictive of women in objectifying manner, content which is deliberately created with scenes of nudity, scripts containing abusive language in order to attract more subscribers and generate profit. The petition is not limited to certain adult-based content but even went a step ahead to the use of the phrase 'Holy Cow' in Charlie and the Chocolate Factory.<sup>51</sup> The use of one word as such looked at independently is not sufficient grounds for the need for regulation as such. The meaning that the words give on a prima facie reading must be considered and they must not be separated from the rest of the content as this can create unnecessary bias in the minds of the viewers.

On February 8, 2019, a division bench of the Delhi High Court delivered a verdict on the PIL filed by Justice for Rights Foundation dismissing the petition. This was an extremely progressive stance taken by the Court and was hailed as a revolutionary step in breaking the barriers of censorship. This victory must largely be attributed to the positive submissions by MIB and MEIT which pointed that there is no need for further guidelines when sufficiently stringent provisions are already in existence.

The Delhi High Court acknowledged that while there are no separate provisions regulating the online content, the provisions of the IT Act, 2000 are applicable. This decision prevented a heavy, licensing style system from emerging in the video streaming space which would threaten our viewing choices online.

However, the Justice for Rights Foundation did not agree with the rationale given by the Courts and preferred an appeal to the same. This led to the filing of a Special Leave Petition<sup>52</sup> by the NGO before the Supreme Court with the expectation of a different outcome. The Supreme

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<sup>50</sup> *supra* note 7, at 2.

<sup>51</sup> Joanne D C., *Thanks to the Delhi High Court for letting us Netflix and chill*, Internet Freedom Foundation (2019), <<https://internetfreedom.in/take-it-and-go/>> (last accessed on 20<sup>th</sup> January, 2020).

<sup>52</sup> *Justice for Rights Foundation v. Union of India*, Special Leave Petition (Civil) No.10937/2019 (Supreme Court).

Court Bench of Chief Justice of India Ranjan Gogoi and Justice Sanjiv Khanna did fulfill this expectation and ruled in favour of the NGO by issuing a notice to Centre to regulate the content featured on online platforms like Netflix, Amazon Prime and Hotstar.<sup>53</sup> This decision was a step back from the progressive view adopted by the Delhi High Court previously. While censorship may be integral to ensure that there is peace maintained in democracy the Centre must keep in mind the following concerns while framing guidelines to preserve the fundamental right of freedom of speech and expression guaranteed by our Constitution:

- i) Firstly, censoring must be limited to the content that causes a communal rift or affects the peace and dynamics of our country or society. Otherwise, content must not be censored as it merely takes us back to regressive content. With changing times and changing generations, there is a need for online content to change to cater to the needs of the new generation. For content to be relevant it cannot be confined by strict norms. The reality needs to be shown as it is without any sugarcoating. There is a need to depict the pressing social issues that face our society in its rawest form and this is exactly what these online platforms take on to do. The Bombay High Court in the case of *Phantom Films Pvt. Ltd. v. The Central Board of Certification*<sup>54</sup> have observed,

*In today's world, new generation of film makers born in the 80s has entered the scene. We cannot expect that they will present current and live issues and problems in the same manner as the older or earlier generation.*<sup>55</sup>

This only goes on to kill creativity which is not conducive to the growth of various mediums. An apt example of this would be the movie *Uda Punjab* which had 94 cuts<sup>56</sup> which just goes to show that if a similar path is adopted for online platforms it would ultimately kill the creativity of these platforms.

- ii) Secondly, the economic impact that censorship will have on the country must be duly considered before framing of guidelines. According to a joint study by ASSOCHAM-PwC the Indian OTT market is growing at a Compound Annual Growth Rate of about 23 per cent and is expected to rake in Rs 5,595 crore by 2022, pushing India to join the

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<sup>53</sup> Ashmit Kumar, *Supreme Court issues notice to Centre to regulate Netflix, Amazon Prime content*, CNBC TV18 (10<sup>th</sup> May, 2019)

<<https://www.cnbctv18.com>> (Last accessed on 20th January, 2020).

<sup>54</sup> *Phantom Films Pvt. Ltd. v. The Central Board of Certification*, (2016) Bom. SCC 3862.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

top ten OTT markets of the world.<sup>57</sup> Hence, there is a lot of potential for this industry and nothing must be done to jeopardize India's future in this industry.

- iii) Lastly, the guidelines must ensure that the online content isn't going against any existing provisions but at the same time the guidelines must not be too stringent. This will only give way to piracy. Censoring content will encourage piracy as it will push people to turn to uncensored material elsewhere. Hence, the more the number of cuts in a show the more viewers will seek other options. This is especially what happens in the case of celebrated shows like Game of Thrones which has a huge fan base all around the world. This show in particular is known for its bold and sexually explicit content. Now if a show like this were to be censored by these online forums, fans would turn to other illegal websites. This is not the objective of censorship and hence, this aspect must be kept in mind.

India being the largest democracy in the world<sup>58</sup> must take any action only after careful deliberation as it sets an example for the rest of the world as well. Therefore, it is necessary to take into considerations laws of other countries with regards to censorship before framing any guidelines of our own so as to make stronger and long-lasting guidelines that protect our democracy.

## VI. INTERNATIONAL CONTENT REGULATION AND CENSORSHIP MODELS

With the immense proliferation of affordable smartphones and increasingly ubiquitous wireless broadband networks there has been an enormous disruption of traditional content delivery models of Newspapers, broadcasters; both being replaced by digital content providers around the world<sup>59</sup>. However due to the difference of cultures, communal guidelines, socio-economic and political landscapes, constitutional and legal frameworks of different countries, it is obvious that a uniform system of regulation and censorship cannot be formulated<sup>60</sup>. Every Country would adopt a different framework to regulate the content which according to them would be most suitable. It is imperative to understand international models as this could provide us with important frameworks and regulation mechanisms to incorporate in our Country, in a similar manner as to how the Constitution was adopted from different sources.

The regulation model of China can be the first example. The size of the online video market of was estimated to be 596 million at the end of June 2017. This represents 76% of the online

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<sup>57</sup> Press Trust of India, *India to be among top-10 media markets by 2021: Study*, The Economic Times (31<sup>st</sup> March, 2019), <<https://economictimes.indiatimes.com>> (last accessed 20<sup>th</sup> January, 2020).

<sup>58</sup> Guha, R., *India after Gandhi: The history of the world's largest democracy*, Pan Macmillan (2017).

<sup>59</sup> *supra* note 28, at 8.

<sup>60</sup> *Ibid.*

population, emphasizing that that online video viewing is one the most common online activities in China.<sup>61</sup> In 2007, State Administration of Press, Publication, Radio, Film and Television, an executive agency which is in charge of the administration and supervision of enterprises engaged in the Radio and Television Industries, issued the Administrative Provision of the Internet Audio-Video Program Service which came into effect in 2008 and was later amended in 2015.<sup>62</sup>

All online platforms that distribute content online are required to possess an Internet Audio-Video Program Transmission License. Due to the strict criteria for obtaining this, a substantial amount of platforms and content providers are entering into partnerships with, merging or even acquiring companies who already possess the license.<sup>63</sup>

Another distinguishing feature with respect to regulation is the restriction present on foreign content streamed on any online platform. These platforms require permissions or permits to provide such foreign content to the consumers and transmit them via internet. Each separate title would require a separate permit and to obtain that permit the entire show or film must be submitted to the Regulators for review and approval.<sup>64</sup> This would affect the release date of such foreign content to a great extent as it would delay the release in China specifically compared to other Countries. This would inevitably result in an increase of circulation of pirated content.<sup>65</sup>

Secondly the regulation model followed by the United States can be analyzed. In the United States, many parts of the video market are heavily regulated. There are specific regulations governing the Television broadcasters<sup>66</sup>, cable operators<sup>67</sup> and even satellite providers<sup>68</sup>. But so far, the United States lawmakers have largely left OCCP alone. The content provided on these platforms isn't regulated. Apart from content, even matters such as licensing and pricing aren't regulated<sup>69</sup>.

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<sup>61</sup> Online Video Industry China Executive Summary, Asia Video Industry Association (2018) <<https://asiavia.org>> (Last accessed on 20th January, 2020)

<sup>62</sup> Congressional-Executive Commission on China, Annual Report (2018) <<https://www.cecc.gov>> (Last accessed on 20th January, 2020)

<sup>63</sup> Feng, L., *Online video sharing: an alternative channel for film distribution; Copyright enforcement, Censorship, and Chinese independent cinema*. Chinese Journal of Communication, 10(3), pp.279-294 (2017).

<sup>64</sup> Huang, H. and Yeh, Y.Y., *Information from abroad: foreign media, selective exposure and political support in China*, British Journal of Political Science, pp.1-26 (2017).

<sup>65</sup> *Ibid.*

<sup>66</sup> Coase, R.H., The federal communications commission. In *Private and Common Property* (pp. 53-92). Routledge (2013).

<sup>67</sup> Yanich, D., *Does ownership matter? Localism, content, and the Federal Communications Commission*, Journal of Media Economics, 23(2), pp.51-67 (2010).

<sup>68</sup> *supra* note 64, at 17.

<sup>69</sup> Ebru T. B., *Methodology for the Regulation of Over-the-top (OTT) Services: The Need of A Multi-dimensional Perspective*, International Journal of Economics and Financial Issues, 8(1), 101-110. (2018).

The matter of regulations is entirely left to the consumer-base whose collective action dictates the regulation of content. This system in the United States is beneficial in the way that it restricts the creation of a monopoly as it encourages new platforms to be created and enter the market which benefits the consumer itself due to competitive pricing<sup>70</sup>. This is evident as cable networks such as NBC<sup>71</sup> and BBC are now creating OTT platforms to enter the market<sup>72</sup>.

Singapore has taken strides in the area of content regulation as well. In Singapore, the Minister for Communications and Information in 2018 proposed an amendment to the Films Act and the Broadcasting Act to clarify the application of content regulation OTT subscribed video-on-demand platforms<sup>73</sup>. This would mean that strict broadcasting standards such as censoring nudity, references to homosexuality, and extreme language will apply to global players in that market. The amendment to the Act is still underway since the government is considering public and stakeholder opinions.<sup>74</sup>

Therefore it can be understood that different countries have different models of regulation and censorship. The three examples explained above illustrate the broad three levels of censorship; Firstly, China with its heavy censorship and regulation, secondly the United States which has no explicit censorship or regulation and lastly a moderated approach as seen in Singapore where existing censorship regulations are being expanded to accommodate OCCP. It can be thus understood that there cannot be a single global content regulation model and each region should adopt different frameworks and models to regulate content.

## VII. CONCLUSION

India is a developing country<sup>75</sup> and although it has made many strides towards adopting modern ideologies, it is not fully there yet so as to be completely liberal. Hence, due to this censorship would still be required so as to prevent conflict in society and to maintain peace. However, censorship with respect to OCCP must be more liberal as a reasonable differentiation can be created between these online platforms and other platforms such as films and cable operators. We must not adopt the same approach as films as this approach witnesses the continuity of the

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<sup>70</sup> *Ibid.*

<sup>71</sup> Frank Pallotta, *NBC Universal is getting in the streaming business*, CNN Business (14<sup>th</sup> January, 2019). <<https://edition.cnn.com>> (Last accessed on 20th January, 2020).

<sup>72</sup> *BBC to launch US online subscription service next year*, The Guardian, International Edition (17<sup>th</sup> September, 2015) <<https://www.theguardian.com/media>> (Last accessed on 20th January, 2020).

<sup>73</sup> Content Code for Over-The-Top, Video-On-Demand and Niche Services, Infocomm Media Development Authority of Singapore (2018) <<https://www.imda.gov.sg>> (Last accessed on 20th January, 2020).

<sup>74</sup> Kelly N. G., *Broadcasting Act to be updated amid challenges In Media ccene*, Today (2<sup>nd</sup> June 2019) <<https://www.todayonline.com/singapore/>> (Last accessed on 20th January, 2020).

<sup>75</sup> Tara G., Zahra L. and Chi N., *The Obstacles Facing India on Its Journey to Becoming a Developed Country*, The Park Place Economist, Vol. 21 (2013)

traditionally followed norms in India and reinforces the same.<sup>76</sup> These norms have clearly changed with time and hence, any guidelines being framed today must take this into consideration. There have been multiple changes made in terms of decriminalizing homosexuality<sup>77</sup> and adultery<sup>78</sup> and various other progressive changes adopted by our country which must be illustrated by works of films and other online series. It is these works of art that educate the public and really bring about a change as there are the most powerful and effective tool because they are able to stir up emotions more deeply than any other product of art.<sup>79</sup> If they are not able to depict the changes are and bring out these powerful stories in their raw and truthful form, then these platforms are not able to do justice to these stories. At the same time this power must not be misused by these platforms in the screening of explicit pornographic content. Therefore, it becomes important that there must be a monitoring machinery to control such web contents. Further, efforts must be taken not to portray women in a derogatory manner and instead to show them as equals so as to change the existing mindset prevailing in the country.

There will come a point where self-regulation will be the preferred form of regulation for these online platforms much like the United States of America but there is still a long way to go for under the present model there a lot of loopholes which will only lead to increasing litigation at this moment and will thus, defeat the purpose of self-regulation.. The Centre can take the following measures in furtherance of this:

- i) A board under the control of the Central Government can be established for the regulation and censorship of 'Original Content' provided by the Online Curated Content Providers. This Board would be under the mandate of the Central Government but would consist of members from the OCCP Industry, members appointed by the Judiciary and members appointed by the executive to maintain balance between Freedom of Speech and Expression and the its reasonable restrictions and at the same time promote creativity and innovation. This Board would be solely responsible for censorship of content. There should be an appellate board constituted under the same mandate.
- ii) This board can then ensure the implementation of a Uniform Classification Scheme which is either implemented regionally or nationally through the issuing of

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<sup>76</sup> Aditya K. P., *Case Study: Film Censorship In India*, Scholedge International Journal of Business Policy & Governance ISSN 2394-3351 7 (2017).

<sup>77</sup> *Navtej Singh Johar v. Union of India*, (2018) 1 SCC 791.

<sup>78</sup> *Joseph Shine v. Union of India*, AIR 2018 SC 4898.

<sup>79</sup> *supra* note 3, at 1.

certificates to each individual show or film. The classification should be on the basis of an age-verified system which takes in to account components like nudity, sexual content, violence, language, substance abuse. Shows which would affect epileptic suffering persons such as flashing lights, sudden noises should have a uniform warning scheme as well. The different levels of classification should be detailed and in consonance with the progressive thought and at the same time respecting the Constitution of India.

- iii) The focus of this board should be on the preventing content that has the power to incite communal violence and disrupt public order or safety of the country and content portraying verified stories or facts incorrectly or wrongfully from being uploaded.

Therefore, the Centre must carefully frame guidelines to regulate these OCCP whilst maintaining the balance to give them reasonable power to maintain their autonomy and allow the free flow of content for users.