INDIAN JOURNAL OF LAW, POLITY AND ADMINISTRATION

THE CURIOUS CASE OF ONLINE STREAMING AND ITS REGULATION

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ABSTRACT

The modern-day conception of entertainment has changed with the change in technology. The conventional cinema halls saw humongous success before the 1980s when television acquired the driving seat in the field. The government took a keen interest in regulating the two and enacted a few legislations for the same. Though these laws were challenged on the grounds of free speech, yet their constitutionality has been upheld by the judiciary. The censor board for films has been attributed with a role to provide certification to films under several categories, similarly, the television is regulated likewise. The advent of the internet and world wide web has changed the face of the entertainment with the rise of online streaming through Online Curated Content Providers on Over the top Platforms. The OCCPs has captured the entertaintment arena by providing curated content on a subscription basis. Since, the web is un-regulated as of now, it has given the creators, more liberalized environment to portray their creative instinct. This feature of internet content has raised brows of many and hence, the debate has been on the table lately, as to whether or not any regulation of the online streaming platforms and content should exist. The argument against the regulation is founded on the grounds of the free flow of speech and expression and thus, the new mechanism of self-regulation is proposed as a good bargain by the stakeholders to maintain the harmony between the free speech and reasonable restrictions. This self regaulatory mechanism is in contrasts with the traditional mechanism and thus, it needs, to be seen from a critical point of view.

BACKGROUND

The era of 1980s is still remembered by many, as the era of television. It was a unique experience for the people to see moving pictures on a small box of wood and metal, which was further replaced by the coloured version of it and came to be known as a 'colour television'. The big antennas on the top of the buildings in those days were nothing more than a luxury, as having a television set at home was not a common feature. It wasn't the case that people had no access to moving pictures before televisions, as cinema halls and theatres were

the first ones to introduce mankind to motion pictures. The success of the cinema soon grabbed the attention of policymakers across the globe. The government(s) all over the world were concerned about the quality and legality of the content which was broadcasted in the cinema halls. The Indian Government enacted central legislation to "… *make provision for the certification of cinematograph films for the exhibition and regulating exhibitions by means of cinematograph".* [2191] This law has introduced the system of pre-requisite certification for films, from Central Board of Film Certification (CBFC) before its public exhibition.[2192] Similarly, the government has also followed the same pattern in regulating the content on television through separate legislation.[2193] The rationale for regulating the content on a public platform like these has its roots in the community values, ethics and other social norms. These norms have culminated into the legal framework of our country and thus, they have to be protected, against such content, which violates these values, ethics or other laws of the country. Although, freedom of speech and expression is an integral part of our Constitutional values and guaranteed to every citizen, [2194] yet, regulation of the entertainment content in balance to the free speech concerns is a must for democracy. Though, we have regulations for the cinema and the television, as discussed above, along with the Indian Penal Code, but, the case of online streaming is still in doubts as to its regulation.

THE ERA OF OCCPs/OTTs

The entertainment and media industry is one of those sectors, which have witnessed a steady growth over the last couple of decades. With the advent of the internet, the entertainment industry has departed from conventional methods to online streaming. The rise of OCCPs (Online Curated Content Providers) or OTTs (Over the top platforms) has taken over significantly all over the entertainment industry across the globe and shares a big chunk of audience and profits. In India alone, the OTTs are expected to shatter the markets, crossing the USD 5 billion by the year 2023.[2195]

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[2191] *See* Preamble of Cinematograph Act, 1952 (Act 37 of 1952)

[2192] Cinematograph Act, 1952 (Act 37 of 1952), s. 3(1).

[2193] Cable Television Network Rules 1994

[2194] Constitution of India, 1950, Art. 19(1)(a)

[2195] 'Video streaming market in India to reach USD 5 billion by 2023: BCG report', (Nov. 2018), available at https://www.livemint.com/Consumer/P9ZSN91tXV9eWM3mXRndrJ/Video-streaming-market-in-India-to-reach-5-billion-by-2023.html (accessed on Sep. 7 2020)

The online curated content providers are the third-party entertainment content providers, which gathers information and present the content online either on their websites or through a mobile phone application. This content can be accessed by the viewer or the subscriber as the case may be, on-demand which will be broadcasted specifically for the viewer on his device such as laptops or smartphones etc. The term 'curated' here signifies that the content providers select a particular kind of content and store them on their database, categorized in a particular genre. This OCCPs offers several subscription models through which a viewer is given access to these content after a subscription fee paid towards the provider. The said model is said to provide the content on-demand of the viewer and thus it is referred, content on the 'pull-basis', opposite to this, is the conventional ' push-basis' content broadcasting, where content is relayed on the public media, irrespective of the viewer demands and thus, the content is said to be 'pushed' to the audience. Thus, the variety of content and the convenience attached to it for the audience to choose has gained momentum in recent times as "*one size fits all"* concept is not fit to be applied in the entertainment, as in the democratic setup, the ability to choose, is of great importance, as it is a part of our freedom to express.[2196] Therefore, talking much of its gained importance and popularity over the short period has encouraged me and others to pose a basic question that, Are these OCCPs /OTTs and the content provided by them is duly regulated by law? if yes, is the current regulatory measures are enough to bring the online content, in parity to the cinematograph films and TV. in terms of its regulation? Thus, it is an attempt to critically analyse the regulatory measures already available and the latest developments respectively.

OVERVIEW OF THE CURRENT LEGAL FRAMEWORK

The current legal framework includes several legislations at the central level, to regulate the content for public exhibition. The paramount law of the country i.e. the Constitution of India, guarantees, the freedom of speech and expression and it also chalks out its restrictions based on several grounds enshrined therein.[2197] Though, Article 19(2) has named several grounds to restrict the freedom of speech accordingly, yet, the interpretation of these grounds and their applicability has not been dealt therein, by the makers of the Constitution, thus, the judicial

[2196] Discussion Paper: Online Curated Content Regulation, strategic and legal issues, (Oct. 20190, available at http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Online-Curated-Content-Regulation.pdf (accessed 6 Sep. 2020)

[2197] *See* Constitution of India, 1950, Art. 19(2)

outlook has become important to understand the provision. From time to time, courts have reiterated that every law of the country aiming to restrict the free speech has to pass the test of 'reasonable restrictions' of Article 19(2). The Apex court has given free speech, the widest interpretation. The present excerpt of a famous judgment says "For *ensuring the free speech, it is necessary that the citizens have the benefit of the plurality of views and a range of opinions on all public issues. A successful democracy posits an 'aware' citizenry'. Diversity of opinions, views, ideas is essential to enable the citizens to arrive at an informed judgment on all issues toughing them".* [2198] This has been a foundation for arguing in favour of broadcasting a variety of content over the platforms be it online or otherwise, as a symbol of expression for both the creator of the content and its viewer.

The Supreme Court of India in its historic has established that there cannot be any additional restrictions, directly or indirectly on the online content, apart from those, mentioned in Article 19(2) and the vigilant authority must conform to these restrictions strictly.[2199] Thus, the government has a history to understand the restriction enshrined in the Constitution with a narrow mindset and on the contrary, the judicial approach has given a ray of hope to the advocates of more liberalized free speech in the country. Akin to Constitution, the Indian Penal Code is also a paramount criminal law of the country, having a grip on content which are obscene[2200], defamatory [2201] or seditious[2202], but the definition of the offences are technical and open to several interpretations, the drafting is not feasible to combat the modern complexities, further, the strict interpretation of the criminal laws to online content is susceptible to compromise the free speech. For instance, the wordings of the section 124A of IPC includes words like "*Whoever by his words, spoken or written or by visual representation or otherwise. Brings or attempt to bring hatred against the government of India…. disaffection, contempt, incitement to commit an offence…"*[2203] , here the words are of general and wide purport and gives the government absolute discretion to adjudge if, the alleged act or content is falling under the ingredient required by the section, thus, the spirit and essence of the section is very much needed in a legal system without a doubt, but its

[2198] Secy. Ministry of Information and Broadcasting, Govt. of India v. Cricket Assn. of Bengal, AIR 1995 SC 1236
[2199] Shreya Singhal v. Union of India, AIR 2015 SC 1523
[2200] *See* Indian Penal Code, 1860 (Act 45 of 1860), s.s. 292,293,294
[2201] Id. at s. 499
[2202] Indian Penal Code, 1860 (Act 45 of 1860), s. 124A
[2203] *See* S.124A of Indian Penal Code, 1860

application to the online curated content, without the proper impact assessment, is not suggested.

The Information Technology Act, 2000 also punishes in case of "publication and transmission of any material which appeals to the prurient interests of a person such as to deprave and corrupt the person"[2204] . The IT Act is a celebrated law in the present scenario, however, like IPC its impact is to be measured likewise, this view has also been endorsed by the Apex court while declaring S. 66A of the IT Act as unconstitutional said that, as the section imposes additional embargos on the free speech, it is against the spirit of the Constitution and hence the section is drafted in a manner to deviate from the Constitutional mandate. [2205] Section 69A of the Act empowers the union government to block the access to content available on the internet, on certain grounds, which are akin to one mentioned in Article 19(2) of the Constitution. The MeITY (Ministry of Electronics and Information Technology) is empowered to take decisions specifically, [2206]as it has the jurisdiction to take decisions on the questions related to internet, thus, being a regulator of the internet, the request can be made to it, for taking down the 'objectionable' content under the Section 69 A or 79 of the IT Act. Thus, OCCPs can be held liable for any allegedly illegal content on their platforms, but, the taking down measures are for 'intermediary' [2207] and as per the current definition of it, the OCCPs are not the intermediary, and hence, these provisions do not apply to them. Therefore, in the absence of amendment in the Act, the only way to take down any content available on OCCPs is through the judicial route i.e. by PIL or otherwise.

As already mentioned above, that the Cinematograph Act is the most important legislation to regulate the content for public exhibition through films, since it was enacted in 1952, it could not accommodate the online content providers in its jurisdiction. In the absence of any amendment, the current draft of the Act is not wide enough to include the online content, as the Act only applies to 'films', which is defined as "means *a cinematograph film*" [2208], where 'cinematograph' is "includes *any apparatus for the representation of moving pictures or series of pictures*" [2209] . The combination of the two signifies that the moving pictures or the series of pictures made from an apparatus for the representation of moving pictures is called

[2204] Information Technology Act, 2000, s. 67
[2205] *Supra.*
[2206] *See* Government of India (Allocation of Business) Rules, 1961
[2207] S. 2(w) of Information Technology Act, 2000
[2208] Cinematograph Act, 1952 (Act 37 of 1952), s. 2(dd)
[2209] Id. at s. 2(c)

film. Based on this, it is doubtful, if the online curated content is covered in the scope of this definition, however, in a recent judgment, of Karnataka High Court has answered the issue as films, serials and the other content available on the online media, and broadcasted by the online content providers like YouTube, Amazon Prime, Netflix cannot be regulated under the Cinematograph Act.[2210] The court noted the fact that the *modus operandi* of the online curated content is based on the demand of the viewer, thus, the applicability of the Act is not feasible in the given circumstances. [2211] In light of the above discussion, it seems that though there, are measures directly or indirectly 'trying' to encompass the subject matter, but policy concerns are still there, interestingly, in an RTI [2212] it was asked from Min. of Information and Broadcasting that:

1. Which authority is responsible to monitor the content on the online services?
2. What is the due diligence that is employed, while registering these services in India?
3. Whether the government is planning to bring these services under the umbrella of accountability, as to their content?

The Min. of I & B stated that there is no system to register any online portal and forwarded the application to MeITY, which responded as: [2213]

1. The Ministry does not undertake tasks to censor any content.
2. It is the responsibility of the intermediaries to follow the due diligence under relevant IT Rules.[2214]
3. There is no information available with Cyber Law and Security Group of this Ministry.

THE MODERN APPROACH OF 'SELF REGULATION'

The OTTs are less regulated in comparison to their offline counterparts, this has given the creative freedom to the content makers, to project their creations in a broad way to the targeted audience. The conventional censorship has nothing to do with OTTs, thus, more and more content makers are shifting towards this platform, having certain advantages like the targeted audience is huge, as, in the era of smartphones and cheap internet services, OTTs

[2210] Padmanabh Shankar v. Union of India and Ors. Writ Petition No. 6050/2019
[2211] Ibid
[2212] MOIAB/R/2019/50364
[2213] Sachet Sahni, ' *Regulating Online Streaming (OTT) Platforms in India'* (Dec. 2019), available at https://cyberblogindia.in/regulating-online-streaming-ott-platforms-in-india/ (accessed 7 Sep. 2020)
[2214] Information Technology (Intermediaries Guidelines) Rules, 2011

have become the prime choice with the 'cherry on the top' is the curated content, which they offer. However, few have raised objections as to the violent, obscene, or anti-religious or anti-national content, projected in many of the shows on such platforms, for instance, a popular series on Netflix called *Sacred Games* was under the radar for having derogatory remarks for the former prime minister of India, again in *Leila,* another popular content on the same provider has been alleged to have fueled the Anti-Hindu feelings through its depiction. Another big shot AltBalaji is also brought under the allegation regarding its nude scenes in one of its series. These allegations were later dragged to the court and judicial outlook was requested respectively, In a recent case, an NGO, Justice for Rights Foundation sought the intervention of the Delhi High Court, seeking regulations to filter the online content, but, the petition was dismissed after the government responded that, there is no legal framework to require these providers to register with the ministry and there is no legal provision binding the ministry to regulate such content.[2215] Aggrieved with the decision, the special leave petition was filed in Supreme Court claiming that these service providers are unregulated and uncertified hence, needs regulation. The Apex court called for the govt. response and the case have to be taken up.[2216] Similar, petitions are filed across different courts in the country.[2217] A major press release in October 2019 from Ministry of I & B, Amit Khare, Secy. to the ministry said that "it *is impossible for any government to view all the data, that is available on the internet... all the time"* [2218] , he also acknowledged that the OTT platforms have encouraged several creators and smaller firms to express themselves, which was earlier seldom available. [2219] However, with regards to its regulation, Khare asserted that "*at the present moment (as it was then) the ministry is uncertain over the type of framework that is needed to be devised....most likely it would be* a self-regulating code, which is acknowledged by the government so as to give legal sanctity".[2220] In March 2020, the ministry gave 100 days to finalise the so-called 'self-regulating' code, along with the clear age ratings and

[2215] Manasvi Tewari, '*What Lies Ahead for Online Media Streaming in India ?,* (Oct. 2019), available at w.thecitizen.in/index.php/en/NewsDetail/index/9/17701/What-Lies-Ahead-for-Online-Media-Streaming-in-India , (accessed 7 Sep. 2020)
[2216] Ibid
[2217] In MP High court, the petition seeking directions has also been filed, till 9th Sep. the judgment of the court was awaited.
[2218] Amit Khare, Secy. Ministry of Info. & Broadcasting at MIB seminar, Mumbai on film regulation and certification. available at https://www.medianama.com/2019/10/223-online-content-regulation-ib-amit-khare/ (accessed 7 Sep. 2020)
[2219] Ibid
[2220] *Supra.*

importantly, the government insisted to have a disciplinary body to hear and solve the grievances related to content on OTT platform. [2221] In compliance with this, IAMAI (Internet and Mobile Association of India), a registered none for profit organization has set up Digital Content Complaints Council (DCCC), has nine members, the decision over any complaint from the user has to be taken by a simple majority of votes within a month. [2222] The council shall entertain the complaints from any body, department, the nodal agency of the Government of India, Ministry of I and B, MeITY and consumers. [2223] It shall be a nine-member body with a retired High Court or a Supreme Court judge as its chairman along with at least three members from national-level statutory commissions like NHRC or NCW. The association has also drafted a second revised self-regulating code after mutual discussion with OCCPs and presented it on 5th February 2020, of which 15 have signed the code till date.[2224] The key highlights of the code are as follows:

1. The said code is only applicable to OCCPs which do not broadcast the content from User Generated Content (UGC), [2225] thus, as of now, the debate is put to rest as to whether or not UGCs would also be covered under the definition of 'intermediary'. But, one major doubt is related to the accountability of those OCCPs, who does not sign the code, as the code is only applicable to the signatories. [2226]
2. The OCCPs is prohibited to relay the content, which is against the sovereignty and integrity of the country or related to child pornography or which promotes terrorism and other forms of violence or which has been banned for exhibition by the order of the competent court.[2227] The code has not provided the exhaustive list of the prohibited content, however, it has made applicable, the other relevant rules on the prohibition of objectionable content, which is a welcome move to eradicate the ambiguities.

[2221] Aroon Deep, '*I and B Ministry gives OTT industry 100 days to create adjudicatory authority'*, (March, 2020), available at https://www.medianama.com/2020/03/223-ib-ministry-gives-ott-industry-100-days-to-create-adjudicatory-authority/ (accessed 7 Sep. 2020)
[2222] Ibid.
[2223] See *Infra* at para. 5.6.3
[2224] A news report of opindia.com available at https://www.opindia.com/2020/09/netflix-amazon-prime-and-disney-hotstar-among-15-ott-platforms-to-sign-self-regulation-and-avoid-censorship/(accessed 7 Sep. 2020)
[2225] Self-Regulation for Online Curated Content Providers, Para.4.2, available at https://www.medianama.com/wp-content/uploads/IAMAI-Digital-Content-Complaint-Council-NEW.pdf
[2226] Id., S 1.
[2227] S. 2.1 of Self-Regulation Code for OCCPs.

3. The new code has added a mandate for the OCCPs to mention the age and maturity ratings, with a short description of the broad theme such as crime, drugs, sex, violence etc. The assistance in providing access and enable parental controls is a must for every content provider in form of a PIN or a password. [2228]
4. As discussed above of DCCC, being the tier I grievance redressal forum, the code also provides for tier II forum at the OCCPs level, which shall be known as OCCPs Governing Council. [2229]
5. The DCCC has jurisdiction over content, incorrect age classification, the incorrect content descriptor and parental and access controls. With the power to impose a maximum penalty of 3 lakhs.

The second code is an efficient successor of its previous version; however, some big wigs of the business have advocated against it, the remarkable difference between the two codes i.e. the introduction of DCCC and OCCP Governing Council is the bone of contention between IAMAI and some OCCPs like Amazon, Youtube Premium etc. Probably, this so, as it provides an additional layer to the accountability. [2230]

CONCLUDING REMARKS

To start with, acknowledging the fact that, nothing in this country can go for public distribution or exhibition, without a limitation is a reality. There has to be something which guides the makers as to their creative boundaries so that they cannot be transgressed. Talking of the issue as to the accountability for the objectionable content on the online platforms, we have IT Act for the reference, where the definition of 'intermediary' [2231] has gathered all the attention. As the definition in its opening words requires that an intermediary should receive, stores etc. *on behalf of another person...* thus, some OCCPs are bound to stay away from the purview of the definition, because providers like Netflix, Amazon Prime Video etc. have now acquired the hybrid status, after their involvement in producing the original content along with receiving and broadcasting content from other sources. However, the Ministry of I and B

[2228] Self-Regulation Code., S. 2.5
[2229] Id. at S. 4
[2230] Shivali Shah and Sahatranshu, '*Regulation of Online Curated Content Platforms in India'*, available at http://rsrr.in/2020/05/09/regulation-of-online-curated-content-platforms-in-india/ (accessed 9 Sep. 2020)
[2231] S. 2(w) Information Technology Act, 2000 *says* "any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, web-housing service providers, search engines, online payment sites, online auction sites, online market places and cyber cafes".

has preferred to bring them under the scope of the definition, probably, it is because of the narrow construction of the definition, that, it is a bit difficult to bring OCCPs under its purview. Section 79, which is known as the 'safe harbour' provision has been modified to protect intermediaries against the content hosted by them, though received by a third party on their platforms if they facilitate the information in merely a technical capacity without modifying or starting the transmission of the data. The said provision has provided blanket protection to intermediaries, thus even if OCCPs are called as intermediaries, they have the protection of section 79, except in the original flagship content transmitted by them. Even further, the 'takedown' provision in Section 79 required an intermediary to take down the content on acquiring the 'actual knowledge' of the content, which in *Shreya Singhal* [2232] , the supreme court has said to mean that "*intermediary upon receiving actual knowledge from a court order or on being notified by the appropriate government or its agency that unlawful acts relatable to Article 19 (2) are going to be committed then fails to expeditiously remove or disable access to such material*". [2233] Thus, an intermediary is bound to take down only on the court's order or the government or its agency, and not bound to apply its discretion. To this, it is submitted that every content on the internet even for a minute can have views in millions, the content being unlawful, have to be taken down immediately to stop its dissemination, thus, there might be a situation, where there is late or no court order at all, a similar effect can be understood concerning the government notification, so what is the use of taking down something illegal, when it is already distributed amongst a big chunk of the citizenry. Therefore, the definition of the term 'intermediary' must be modified in a manner, to include even those OCCPs, which are creating original content, as, it looks like a good loophole to escape from the purview of section 79 as well.

The prime face-off amid this debate is between the pre-censorship and the conventional censorship and self-regulation model. Till now, the entertainment industry has travelled with pre-censorship, of course with some differences, but, the rise of online media and urge to have more creative freedom of expression has posed several challenges to the existing system. The pre-censorship has been given legal and judicial recognition and since then, it has acted as a filtration tool in our entertainment arena. Though, it has been argued that self-regulation code is a model which can create a balance, but, I submit that, from the

[2232] AIR 2015 SC 1523
[2233] Ibid

Constitutional viewpoint, the allowance of self-regulation and moving away from conventional censorship to the OCCPs against their offline counterparts, is an act of discrimination, hence, against the very concept of equality. The labour, creative input, monetary consideration are the common players on both the sides, thus, if the censorship while deleting scenes from a movie or a TV show is flushing out the money, labour, or the expression, that is invested by the producer, then, giving a censorship-free environment to the OCCPs, would be an act of discrimination. The motion pictures are both offline and online, in the same manner, then is it justified to give them playing field which is not levelled? A person making a documentary in today's time on a famous politician having certain dialogues which are supposed to be, controversial, would prefer any online content provider. The anticipation of his movie being trimmed by the censor board has made his decision quite easier. The shift from traditional modes of the public exhibition to online has now become a popular reality. The commerce of the entertainment industry is rapidly changing due to this 'discrimination' as well, for instance, today a movie released in a theatre would cost a family of four in a metropolitan, nothing less than thousand rupees, on the other hand, a consumer having a subscription of five hundred rupees for a month can watch a plethora of content numerous times and by as many as members. Consequently, cinema halls today are turning into a banquet hall and online subscriptions are shattering numbers every day.

Today, online content has gone much far in intensity as to portray sex, nudity, violence, substance abuse, etc. in comparison to films and TV. The advocates for the content makers would say that it is the creative expression which is protected by Article 19 (2), I would say, if broadcasting a type of content which is there online is under free speech, then censor board would probably violate Article 19, next time when they delete a scene or a dialogue from a movie. Whether the self-regulation code is a good bargain or not? In the absence of any legislation or judicial verdict, it is an epitome of *"to have something is always better than nothing"*, but, it is submitted that the structure of the code has been decided after the mutual discussion amongst the 'moguls' of the industry, also, the constitution of DCCC has members from the industry would probably rule out healthy competition. The self-regulation says out rightly that "if *you have a problem then don't watch it",* hence, the OCCPs argue on the basis that the content is curated and the consumer has a choice to avail it or otherwise, but, in a country like India, where there is a huge cultural diversity and rigid social norms, motion pictures in any form has a deep impact on the minds of the viewer in every era, the regulation

has to be taken seriously. It is to suggest that, it is not about the regulation, it is about the timing of it, thus, and a liberalized, modern and wide approach should be adopted in a pre-censorship model to maintain the prosperity and the flourishment of the art. To live in a democracy, where there is a 'free speech', is necessary for the development of a human being, yet, one must figure out when to stop.