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The Censorious Scissors

by

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INTRODUCTION

"If the freedom of speech is taken away then dumb and silent we may be led, like sheep to the slaughter"

—George Washington

Films are one of the greatest sources of entertainment and we are blessed with one of the largest film industries in the world, producing around 1600-2000 films every year.¹ But the world of cinema has undergone a huge transformation from being merely a medium of entertainment to an educational tool. Movies have contributed a lot to social and cultural development and with the development in technology, they have amassed immense outreach. They exhibit diverse views and issues, influencing millions in this country of billions. These millions have great attention and retention capacity and the present generation is fearless in expressing its unconventional views and breaking the stereotypes.

The freedom of speech and expression is believed to be the mother of all the liberties and it is the most vital ingredient of a true democratic state. Article 19(1)(a) of our Constitution gives this right to every citizen of our country and is not only a fundamental right but also a natural right. This is an inalienable right of man under Universal Declaration of Human Rights, as Article 19 states that "everyone has right to freedom of opinion and expression; this right includes freedom to hold opinion without interference and to seek, receive and import information and ideas through media and regardless of frontiers."² This was one of the glorious declarations followed by many international conventions like European Convention on Human Rights and Fundamental Freedoms³ and International Covenant on Civil and Political Rights⁴ which has given it a noble and universal character.



The phrase 'speech and expression' is of very wide connotation, 'expression' naturally presupposes a second party to whom the ideas are expressed or communicated. Freedom of speech and expression means the right to express one's conviction and opinions freely by word of mouth, writing, printing, pictures, photographs, cartoons or any other mode.⁵ While discussing the scope of freedom of speech and expression the Supreme Court has, many times, said that the words 'freedom of speech and expression' must be broadly construed to include the freedom to circulate one's views by word of mouth or in writing or through audio-visual instrumentalities like movies. It is beyond doubt that films are one of the most popular and powerful medium of conveying and expressing different kind of ideas, views etc. Freedom to exhibit movies is an extended hand of freedom of speech and expression. They are enjoyed by the majority of the people in the country and thus its ability to express creativity comes within the ambit of Article 19(1)(a). However, this right is not absolute and is subject to reasonable restrictions under Article 19(2) and

the same has also been emphasized by the courts of this country.

In *S Rangarajan v. P Jagjivan Ram*⁶ (*hereinafter* 'S. Rangarajan') the Supreme Court overruled a High Court decision and upheld the freedom of speech and expression. It stated as follows:

"Movie is the legitimate and the most important medium in which issues of general concern can be treated. The producer may project his own message which the others may not approve of it. But he has a right to 'think out' and put the counter appeals to reason. It is a part of a democratic give-and-take to which no one could complain. The State cannot prevent open discussion and open expression, however, hateful to its policies."

This means that the freedom of speech and expression includes free flow of ideas and gives liberty to express views on various political, social and economic issues. So basically, it helps an individual attain self-fulfilment, discover truth, participate in decision-making and establish a reasonable balance between stability and social change. The right to speak and express freely helps the citizens to expand their ability and develop their potential, which is important for the overall development of their personality and growth of the nation. This right is indispensable to create a well-informed society and to promote the "right to know" of a person which is nothing but the other side of the same coin. It not only includes right of directors and



producers but also of the artists, playwrights etc. who enthusiastically profess the right of free speech and expression.⁷

FILMS AND CENSORSHIP

It is well said that "eternal vigilance is the price of liberty". We cannot imagine the right of free speech and expression without the responsibility to limit it, otherwise it may lead to anarchy. These restrictions are not only desirable but also necessary to preserve the sanctity of this right. There is a need to balance this liberty with the interest of the nation and society. Because of this reason, the concept of prior restraint was introduced, which means any kind of interference or control exercised by the State over the exhibition of movies at any stage prior to its exhibition. In the case of movies, it is exercised in the form of censorship, which means a ban on further publication without "advance approval of an executive official". However, the restriction has to be reasonable. The right given under Article 19(1)(a) of our Constitution can only be restricted when it is in the interest of sovereignty and integrity of India, security of state, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement of offence which form the grounds under Article 19(2). These grounds form the basis of restrictions under the Cinematograph Act, 1952 (*hereinafter* 'the Act'), the Guidelines for Film Certification, 1991 (framed under section 5B of the Act) and the Cinematograph (Certification) Rules, 1983. The Central and State Governments have the power to legislate in order to certify and regulate the exhibition of the movies by cinematographs under Entry 60 of the Union List and Entry 33 of the State List given in the VII Schedule of the Indian Constitution. It is pertinent to note that the expression "in the interest of" is of wide connotation. It authorizes the legislature to restrict an act or utterance which not only produces the mischief aimed at the breach of public order or the security of the state, but also those which have a tendency to cause that effect, but which may or may not actually lead to a breach of the same.

The Central Board of Film Certification (*hereinafter* "the Board") is the statutory

body created under section 3 of the Act and it is vested with the authority to sanction a film for public exhibition. The Board grants adequate certificate to the movie and suggests excisions and modifications, as it thinks necessary, after examination of the film as per section 4 of the Act. The Board has to perform this function within the four corners of section 5B of the Act which provides the guidelines for certification and is the replica of Article 19(2) of the Constitution.



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Before independence, The Indian Cinematograph Act was first implemented by British in 1920 and the Indian Cinematograph Committee was established in 1927 by the British Raj to ensure that motion pictures did not circulate any seditious message among the common masses or prompt a revolution.⁸ But, this 'Colonial Hangover' is still looming in our minds. Now the question that arises is whether in this age of widespread internet and social networks it is necessary to have prior censorship, specifically for the movies and not for other mediums? Is it right for the Censor Board to act as the guardian of public mind and to decide what people should see and what they should not see? The answer to all these questions lies in the form of the medium. Prior restraint in the form of censorship in the movies has been held constitutionally valid in a long line of judgments. The reason given by the Supreme Court in *KA Abbas v. Union of India*⁹ (hereinafter 'K. Abbas') is as follows:

"The motion picture is able to stir up emotions more deeply than any other product of Art. ... One can imagine the results if an unbridled cinema is allowed to cater to the lowest denominator of popular taste, especially in a country, which, after two centuries of political and cultural domination, is still suffering from a confusion and debasement of cultural values."

This decision was followed by *S. Rangarajan v. P. Jagjivan Ram*¹⁰ which held the same that cinema caters for a mass audience who is generally not selective about what they watch; hence a movie cannot be equated with other modes of communication. It cannot be allowed to function freely in a free market-place as does the newspaper or magazine. Censorship by prior restraint is, therefore, not only desirable but also necessary. Also, a heavy burden is on the authorities, therefore, to show that the restrictions are reasonable and permissible in law.

However, the extent of censorship is always a subject matter of debate. The test for judging work should be that of an ordinary man of common sense and prudence and not of an "out of the ordinary or hypersensitive man".¹¹ Though the fate of the creative work lies with the Board, it should be decided in a very reasonable manner, keeping in mind the interest of all the parties and above all, the Constitution. It is necessary to prevent a section of filmmakers who are in the rat race of making a profit, but it should not be misused to hide social reality and fair criticism.



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Also William Mazzarella, in his book called '*Censorium: Cinema and the Open Edge of Mass Publicity*' explained, "Anything may have a tendency for almost anything. A lamp post may be taken as a phallic symbol, a convenient object for canine relief, a

source of light, evidence of civilization, something to lean against when waiting for a bus or something to demolish in order to demonstrate a sense of rebellion or discontent. So, what is the tendency of a lamp post? Hence, so how is one to go about making a list of bad things to be banned?"¹²

PROVISION AND ITS CONSTITUTIONALITY

Provision

The annals of Indian free speech law are filled with film censorship cases, long battles against the censor all the way up to the Supreme Court, whether it is *Bandit Queen* or *Tamas*. They are also filled with heavy-handed censorial actions that have repeatedly suffocated filmmakers in a moralistic and ideological embrace.¹³ Some recent ones include *Lipstick Under My Burkha* and the unforgettable ham-handed, tone-deaf treatment of Anurag Kashyap's *Udta Punjab*. It is therefore important to see the constitutionality of the blunt scissors used by the Certification Board against art and expression.

Specifically, the Act empowers the Board to direct such excisions and modification as it thinks necessary before sanctioning the film for the public exhibition under any of the categories as mentioned in section 4 of the Act.¹⁴

Some people try to distinguish "Certification" from "Censorship" and refer the above-mentioned power as the power to censor. They believe that the Board has only the former power and not the latter as the name of the Board was changed from "Board of Film Censors" to "Board of Film Certification" in 1983. However, this was clarified by the Bombay High Court stating, "It refers to an official performing a statutory duty of certifying films. The word also means "making deletions and changes", but that is inbuilt in the power of certification of films by the board. That is but a part and parcel of the larger power. However, that is not the essential function."¹⁵



During their regime, the British justified censorship and other repressive acts by giving the excuse of the emotional and mental immaturity of the population etc. And this provision continued to find its place in the statutes as we got our independence and is still there as the court referred to the State as a 'parens patriae'.¹⁶ Now the question that arises is that, are we really that immature, specially when we have the right to elect representatives of the state or our life partner or the right career at the age of 18 or 21? Ironically, we still don't have enough maturity to decide what we should watch and what we should not. How valid is it for the state to act as a nurse of its infantile subjects?

Constitutionality

Article 14

Equality is a basic feature of our Constitution. Any restriction imposed must not be arbitrary or of an excessive nature so as to go beyond the requirement of the felt need of society and the object sought to be achieved. Some people believe that this provision is illogical and arbitrary as only filmmakers are forced to jump through this censor board's hoop unlike any other medium, like the internet where the same films can be uploaded uncensored. Given the freedom of the internet, it is becoming increasingly difficult to determine what may realistically corrupt public morals¹⁷. In order to determine whether a particular statute is reasonable, the test of permissible classification has to be looked into which lays down two conditions, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes

persons or things that are grouped together from others left out of the group and (2) that, the differentia must have a rational nexus to the object sought to be achieved by the statute in question.¹⁸

The power to direct excisions and modifications, as *they think necessary*¹⁹, is wide enough to cover restrictions both within and outside the limits of constitutionally permissible legislative action affecting such right. And as per the *Romesh Thappar case*²⁰ the possibility of the Act being applied in an unauthorized and arbitrary manner was sufficient to make it unconstitutional. However, there are guidelines (intelligible differentia) which act as a guide to the Board to exercise its discretion, but if the standard or guide furnished by the statute is vague or uncertain, it amounts to the absence of



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any guide at all and the law must be struck down as conferring unguided power upon the executive to discriminate.²¹

Also in the landmark *Shreya Singhal case*²² it was held that the language used in section 66A of Information Technology Act, 2000 is so vague that neither would an accused person be put on notice as to what exactly is the offence which has been committed nor would the authorities administering the section be clear as to on which side of a clearly drawn line a particular communication will fall.

The Guideline includes points like "Showing involvement of children in violence as victims or as perpetrators or as forced witness to violence"²³ and "scenes degrading or denigrating women in any manner are not presented"²⁴ which are so broad and vague that 'violence' can be a mere slap or something as grave as what is covered under Article 19(2). What if they are showing the social reality as in the Bandit Queen Case or social issues like Child Labour? But they can be easily misused to pester some filmmakers because they are general categorisation and thus are prone to ambiguity in interpretation.²⁵ In *Anwar Ali case*²⁶ the Court also held that even if it be said that the statute on the face of it is not discriminatory, it is to be adjudged unconstitutional if in its effect and operation, it vests in the executive government, unregulated official discretion.

The object and purpose of the impugned clause is regulating²⁷ exhibitions by means of cinematographs, however, the ostensible effect of the provision would be direct infringement of fundamental rights which has no rationale or proximate connection with the object sought to be achieved by the statute because here the Board is chopping out scenes at its whims and fancies which is far from being regulatory. So it is often believed that excessive discretion is given to the Board which is sometimes used unconstitutionally.

On the other hand, the Board is referred to as a body of experts as laid down in *Raj Kapoor v. State*²⁸ that a certificate by a high-powered board of censors with specialised composition and statutory mandate is not a piece of utter inconsequence; it is relevant material, important on its impact though not infallible in its verdict. However, the present procedure for appointment



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of members of the Advisory panel, their eligibility criteria and the quality of such panel is far from satisfactory.²⁹

Although, the power given to the Certification Board cannot be termed as completely arbitrary or conferring unguided or unfettered jurisdiction, but the present set of guidelines are so vague and broad that it cannot be held to be constitutionally valid. However, the law cannot be struck down because of vague guidelines and therefore, taking into consideration the controversies, they need to be amended from time to time. The value system and moral values are dynamic and the law and its caretakers have to work accordingly. Also, the members of the Board do not remain neutral and have personal bias. The central government is also alleged to have excessive control over the appointment and functioning of the Board.

Article 19

The right of the filmmaker to make and exhibit his film is a part of his fundamental right of freedom of speech and expression under Article 19(1)(a) of the Constitution. A film is a medium for expressing and communicating ideas, thoughts, messages, information, feelings and emotions. It may be intended either for public exhibition (commercial or non-commercial) or purely for private use.³⁰ The Constitution protects the right of an artist to portray social reality in all its forms. Some of that portrayal may take the form of questioning values and morals that are prevalent in society.³¹ But the present provisions, rules and guidelines don't protect it.

The important and significant decision in *Bennett Coleman case*³² followed upon by *Rustom Cavasjee Cooper*³³ case, laid down that the true test is whether the **direct** effect of the impugned action is to take away or abridge fundamental rights. Viewed from this light, "the effect and consequence of this provision" has direct control and places restriction on exhibition of the film and in dissemination of information and thereby violates Article 19(1)(a). But it will not be so when the restriction is covered for the grounds spelt out in Article 19(2). Further, section 4(iii) is guided by section 5-B which is nothing but the replica of Article 19(2). But as we see cases like *Udta Punjab, War and Peace* etc., it becomes clear that the discretion provided under the said provision is often used beyond the limits of Article 19(2). It is also argued that Article 19(2) contains broad grounds like decency and morality which are highly subjective. However, this doesn't

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hold water as per the landmark judgment of *Maneka Gandhi*.³⁴ But at the same time, it has also been laid down that "These concepts should not be devalued to suit the hyper-sensitivity of the executive or minimal threats to the State". Hon'ble V.R. Krishna Iyer, J. also says that "liberty can be curtailed only if the grounds listed in the saving sub-articles are directly, specifically, substantially and imminently attracted. And this is contrary to the present-day practice of the Board."

In other words, the expression should be inseparably locked up with the action contemplated, like a "spark in a powder keg".³⁵ A restriction in order to be reasonable must be narrowly tailored or narrowly interpreted so as to abridge or restrict only what is absolutely necessary. But, here the clause is completely silent about the degree and extent of placing the restrictions.

Therefore, if we draw an inference from the principles mentioned above, it is clear that the discretion to direct excisions and modifications is not guided appropriately and leaves too much discretion on the Board members to act beyond and in excess to the scope of restrictions of Article 19(2). Their regulatory power does not enable them to direct uncalled cutting and deleting portions of the work merely because they do not approve of an open and direct presentation.³⁶

In *Shreya Singhal case*³⁷ three concepts were laid down namely: *discussion*, *advocacy* and *incitement*. According to the judgment discussion or even advocacy of a particular cause, howsoever unpopular, is at the heart of Article 19(1)(a). It is only when such discussion or advocacy reaches the level of incitement that Article 19(2) kicks in. But sadly, the Guidelines do not make any difference among the three.

If we take into consideration the Guidelines which lay down the principles for certification of films, it would become very clear that they go beyond the purview of Article 19(2). The Guidelines fail to separate the artistic and the socially valuable from that which is deliberately indecent, obscene, horrifying or corrupting³⁸ and leaves unfettered and excessive discretion in the hands of the Board.

Furthermore, the Court specifically held that under section 66(A) of the Information Technology Act, 2000 a wide net was cast to catch a variety of acts of instigation, ranging from friendly advice to systematic propaganda. This provision also has a chilling effect in as much as any serious



opinion dissenting with the mores of the day would be caught within the ambit of the said provision and hence, it does not withstand the test of Constitutionality.³⁹ In light of the above observation, on an analogy, it can be said that power of Board being very wide, attracts unconstitutionality for the same reasons.

Jurisprudence on the subject also includes judgments like that of *Pankaj Butalia*⁴⁰ case in which the Court upheld the Constitutional validity of 1991 Guidelines as the same attempt to explain the nuances. Having said so, the Court also observed that in case of a conflict, the provisions of Section 5-B(1), which is same as Article 19(2) of the Constitution, will provide the roadmap as to whether a particular disclaimer ought to be ordered or inserted or whether an excision or deletion is mandated. The Court also said that the Guidelines are broad standards and they cannot be read as one would read a statue. Within the breadth of their parameters, the certification authorities have discretion. However, in its actual application filmmakers often fall victim to the conservative and obsolete moralistic prism of board members and dirty politics of the politicians.

CASES OF CONFLICT

Pre-censorship not only destroys the creative activity but also creative thinking.⁴¹ The job of the legislators is not complete by making a good law and securing the rights of the citizen as laws do not automatically implement themselves. In the past few years, we've observed an unhealthy trend in which the Board members are cynically trying to be moral guardians and are exercising this power without any application of mind. Following are a few of these cases:—

Udta Punjab Case

Udta Punjab, a film by Phantom and Balaji Films triggered a controversy in 2016 after the Board directed 13 deletions, including 52 cuts, and passed it with an 'Adult' certificate. The directors and producers responded by filing a writ petition under Article 226 of the Constitution in the High Court of Bombay. Interestingly, the Bombay High Court in its order cleared the film with just one cut and an "A" certificate. It was alleged that the film was victimized because of upcoming elections in the state of Punjab and this fact was observed by the Bench as well.



The film was centred around the drug menace rampant in the State of Punjab. The film depicted the fight of four characters against drugs. Thus the focal and central theme was about the alarming drug addiction and how it brings about one's downfall. The easy accessibility and availability of drugs resulting in addiction of the youth of the state and the need of controlling channels to act strictly was also depicted. Hence, the film dealt with socially and morally relevant subject. However, the deletions included scene of a signboard reading 'Punjab', a close-up shot of injection of a drug and words or abuses which were picked up and taken in isolation amongst others. The reasons presented by the Board for these deletions were protection of the sovereignty and integrity of India and that the film was promoting vulgarity, obscenity or depraving human sensibility, etc. The Court rejected all the reasons and criticized the way the Board failed to apply its mind to the fact that it is considering certification of a feature film.

The Court further stated that if the entire setting and the backdrop is in the State of Punjab and the narrative portrays the drug menace in that State then segregating visuals or a few lines in the dialogues, merely because they contain abusive words, for excision unmindful of the underlying theme, denotes how arbitrarily the Board proceeded in the case.⁴²

Furthermore, the Court clearly laid down that the Board failed to apply the applicable tests and settled principles i.e. to look at the film in its entirety and not in isolation. The regulatory power of the Board does not enable it to direct uncalled-for cutting and deleting portions of the work merely because they do not approve of it or because, in their opinion, some part or portion is unnecessary and not required considering the story of the film. The Court stated that no one can dictate to the filmmaker as to how he should produce or make his film and what should be the contents thereof.⁴³ Additionally, the Court advised that State and particularly the Board cannot, in the garb of alleged public interest or audience taste, try to mold and control public opinion as the same would be disastrous and would strike at the very root of the democracy and the fundamental freedom which is so dearly cherished by all.⁴⁴

Finally, with respect to section 4(c), they left the meaning that is to be ascribed to the words on the authorities in charge of implementing the statute. But stated that every such power is coupled with a duty to uphold and not suppress the Constitutional freedom of speech and expression. And holding up the certificates or suggesting cuts and excisions in virtually every alternate scene would be counterproductive.



War and Peace Case

In 2002, War and Peace, a film by Anand Patwardhan, depicted scenes of nuclear testing and the September 11, 2001 attacks on the World Trade Centre in New York, was asked to make 21 cuts before it was allowed certification for release. Later the Film Certification Appellate Tribunal (*hereinafter* 'FCAT') directed two cuts and one addition in the documentary film and issued "U" Certificate. The director filed a writ petition under Article 226 challenging the said order of the FCAT, claiming violation of Articles 14, 19(1)(a) and 21 of the Constitution, in the Bombay High Court which cleared the film with no cuts after one year.

The documentary traced the journey of peace activism in the face of global militarism and war. It also depicted the destruction caused by war and nuclear weapons and strongly urged to maintain peace. The film had won the Best Film/Video Award as well as the International Jury Award. The deletions under challenge were the slogans "Hindu Bomb Hi Hi" and "Muslim Bomb Hi Hi" along with the sentence "It is your culture" from the speech of an anguished Dalit leader. An addition was recommended in a reference to the Tehelka Tapes.

Some important arguments by the petitioner were that any forceful addition violates the artistic freedom and if the scenes of riots shown in the television series (Tamas) do not affect public order then the occurrence of same by such slogan is unimaginable. The scenes if viewed in its entirety shows as to what is the perception of the bombs in one section of the society and criticizes its manufacturing and spreads the message of peace at the same time.

The court relied on the judgement of *Ramesh v. Union of India*⁴⁵ by the Supreme Court and held the two cuts and one addition to be completely unjustified and as violative of the freedom of speech and expression of the Petitioner under Article 19(1) (a) of the Constitution. The Court observed that the alterations as directed in the order go beyond the parameters prescribed under Sub-section (1) of Section 5B of the Cinematograph Act, 1952.⁴⁶ As per the judgement of the Supreme Court, it is inevitable for people to face the realities of internecine conflicts, inter alia, in the name of religion and what is necessary sometimes is to penetrate behind the scenes and analyse the causes of such conflict which the Board failed to do in this case.



Furthermore, the Court stated that the citizens have a right to put forward their viewpoint towards the various events fully and fearlessly and in the absence of the counter view, the society at large will suffer and negation of counter view runs as an anti-thesis to basic human values, instincts, and creativity.

Films like Kangal Malsat, Gulabi Aaina, Black Friday, The Girl With The Dragon Tattoo, Spectre, NH10, Angry Indian Goddesses, Vishwaroopam, Operation Bluestar, etc. are examples of some other memorable instances where the Board brutally trimmed or chopped the scenes citing the irrational and highly subjective standards enumerated in the Guidelines and the Act. In movies like *Udta Punjab* and *NH-10*, the adult content was trimmed in spite of issuing the "Adult" certificate to the movie which completely obliterated the purpose behind granting of an "A" certificate. Even seemingly obscene cinema is saved if the obscene bits are integral to the communication of a broader, socially useful or beneficial message⁴⁷. The Board wants the people in a fairy world of fantasies which is actually unreal and on the contrary, our present generation doesn't want people to turn a blind eye to the reality.

COMPARATIVE ANALYSIS

In an era of excellent communication technology, censorship is used as a tool in every democratic and non-democratic country e.g. the U.K., the U.S.A., Germany, France, Australia, Singapore and New Zealand. However, the extent of censorship differs from country to country. Thus, it is important to know the censorship provisions in the following two countries:—

United Kingdom

United Kingdom is a host to many film festivals and promote a realistic and creative approach to the movie making procedure. This environment is supported and

controlled by the 'British Board of Film Classification' or the BBFC. It is responsible for the national classification and censorship of films. The Board's legal basis was the Cinematograph Act of 1909 which regulated the film industry till 1912. Presently, BBFC is an independent, non-governmental, not-for-profit, co-regulatory body. They are funded through fees charged to those who submit films and video works for classification.

BBFC in addition to the Cinematograph Act, 1909 is also guided by the 'Classification Guidelines' whose guiding principles aim to protect children and vulnerable adults from potentially harmful or otherwise unsuitable



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media content and to empower consumers, particularly parents and those with responsibility for children, to make informed viewing decisions.

The guidelines regarding the classification of movies by BBFC are very straightforward and organized in nature. There are 3 'General Classification' considerations, firstly, the Context. The BBFC takes notice of the issue of the film like whether it is based on sex, language or violence and other factors such as history, fantasy, and horror. Secondly, the Theme is of prime importance as topics like drug misuse, sexual violence and paedophilia need a close watch. Thirdly, the Tone and Impact regarding any harmful behaviour needs to be on the check. The 'Specific Classification' considerations are based on Discrimination, Drugs, Imitable Behaviour like enactment of suicide language, nudity, sex, violence, etc. The 'Standard Ratings' that serve as age classifications and public advice are U (4 years+), PG (Parental guidance), 12A (12+only), 15 (15+age only), 18 (only 18 yrs), R18 (to be shown only in specially licensed cinemas or licensed sex shops).

With respect to the power to direct excisions and modification, the same is present in Britain too. If a submitted work raises issues or concerns that cannot be addressed by classification under a particular age category, the BBFC may require cuts or other changes as a condition of classification. It has also laid down a certain type of content which is most likely to invite cuts and may refuse to classify a work where the central concept of the work is unacceptable and cannot be resolved by cuts.

Compared to its Indian counterpart BBFC is an independent body with absolutely no government intervention. Secondly, the grounds laid down under Classification Guidelines are minimum and precise, which gives huge area to filmmakers for their creative freedom. One very impressive aspect to note is that the categories are well defined in the sense that under each of the categories the BBFC has laid down the grounds like discrimination, violence etc. and the extent acceptable under each of them.

United States of America

The USA enjoys a liberal environment in the field of Human creativity and originality. The scheme of censorship in the United States is quite different from other countries. It has a body called Motion Pictures Association of America (MPAA) which constitutes six major studios. It was founded and led by William Hays in 1922 in order to protect government's interference in filmmaking which gave the push for self-censorship or what is popularly known as Hays Code. In 1968, Hays Code was replaced by the film rating and classification system which continues to be present till date.

The MPAA format seems to be the most liberal compared to that of any other major jurisdiction as it is advisory and not proscriptive. Anyone can

see any film rated G (general audiences), PG (parental guidance) or PG-13 (not recommended for kids under 13). Only the R and NC-17 ratings can theoretically keep kids out of a movie but the rest are up to parents' decision. Although it is voluntary rating, yet most of the filmmakers opt for it like the major signatory studios. In addition U.S. theatre chains are unwilling to show an unrated film.⁴⁸

The power to put cut in the movies does exist in the U.S. but is a little different as the MPAA states that NC-17 does not mean "obscene" or "pornographic", in the common or legal meaning of those words, and should not be construed as a negative judgment in any sense. The rating simply signals that the content is appropriate only for an adult audience, however, distributors often perceive the awarding of this category as commercial death at the box office. They will frequently fight the decision, and often make as many cuts as is required by the board, to achieve the much more financially desirable R rating which allows them to reach a far wider audience⁴⁹.

Compared to their Indian counterpart the MPAA and BBFC are more ratings specific and in fact, they don't hesitate to consult the public about their job to bring in more transparency. The biggest difference between CBFC and BBFC and MPAA is that CBFC is under the control of the Central Government while the latter are controlled by non-governmental authorities. The aim here is not to blindly follow or adopt other country's policy but to utilize basic principles to improve the process in our country.

SUGGESTIONS

The present-day Cinematograph Act that we use as our guideline for the certification of movies was drafted and passed in 1952 while 21st Century is an era where the societal demands have changed drastically. It's the rule of nature that whatever gets old, has to replenish and the same applies to law and order. It has to be updated to the demands of the people and the society.

In our thoughtful and deep research, we've realized that the field of entertainment has been suffering quite a lot due to the lacunae in the Act as well as the old-fashioned functioning of the Board. This view has been strongly supported and recommended by the Mudgal Committee. The said committee was constituted by the Government of India, Ministry of Information and Broadcasting, dated on 4.02.2013. We would include our suggestions along with the recommendations of the committee.

There are several key problems in the workings of the CBFC which are persistent. These include political appointments of Board members, a vague rating system open to wide interpretation and an appellate panel of limited jurisdiction.⁵⁰

1. As per the committee report, the present procedure for appointment of members of the Advisory panel, their eligibility criteria and the quality of such panel is far from satisfactory. It recommended inviting members from cinematic, aesthetic and artistic background to let the certification of the movie be on professional grounds.

It is also suggested that the people from the film industry itself should work alongside the Board as an independent body like in other countries.

2. As per the report, the present categories of classifications are insufficient,

given the innumerable subjects, complex themes, and content of the movies being produced today. So, it is suggested that like the U.K., categories need to be increased and in each of the categories the extent of the heads like violence needs to be described.

3. Also, since the main problem with the use of the scissors lies with the guidelines, it was recommended by the committee to take a 'middle path' wherein they sought greater freedom to the ideas of the filmmakers and also expected them to observe the standard norms of the society. The committee realized that there existed an age-old debate between tradition and change. Also, the interpretation of terms like obscenity, morality and excessive violence is very subjective.

We would also suggest that for this problem public opinion must be taken and another way to make it more transparent is to decide the gravity or extent of these terms under different categories.

4. Another recommendation by the committee is that the film should be examined in the light of the period depicted in the film, context, content, theme, and people to which the film relates and is judged from the point of view of its overall impact and the 'contemporary standards' of the country. This has been laid down in so many judgements with respect to the power to chop the scenes but its application is lousy.

5. Furthermore, another important concern is that after certification of a film, religious groups/individuals/authorities may demand banning of the film under threat of demonstrations outside theaters or of filing petition. This seriously affects the filmmakers because the films are made with very high budget (*Udta Punjab* was made on the expenditure of approximately Rs. 24,50,00,000) and they also have so many third-party

contracts. This makes them vulnerable. Therefore, it is suggested that state government should make arrangements for peaceful screening and those who dislike the movie or any part of it can easily choose not to purchase the ticket and that there is a need of a tolerant approach to deal with such matters.

6. It was also recommended by the committee to expand the jurisdiction of the Film Certification Appellate Tribunal (FCAT) which would reduce the burden of the court and will prevent the frivolous petitions.

The Mudgal Committee Report, was followed by Shyam Benegal Committee which has recommended that the power to direct excisions and modifications should no longer exist. However, the authors humbly disagree as it may lead to a direct ban of the film even if a small scene is under question. But certainly, we need to regulate this power as censorship is at its most dangerous if those who orchestrate it cannot really explain the reason for the decisions they make.⁵¹

CONCLUSION

"If liberty means anything at all, it means the right to tell people what they do not want to hear."

—George Orwell

Cinema is a powerful medium and is a reflection of the society. The very heart of democracy lies in the freedom to think and act distinctively however, at the same time, we cannot leave a medium like movies unrestricted. The task of the Board is delicate but it should always be mindful of the fact that it is not a moral tailor, setting his own fashions, but a statutory gendarme policing films under Article 19(2) from the

angle of public order, decency or morality.⁵² The power should be exercised in a transparent way without putting any hurdle on the creative freedom of the filmmakers and people's right to know. Therefore, it is important that the legislature and the administrative authority "maintains a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interest of the persons keeping in mind the purpose which they were intended to serve".⁵³ For a long time now Indian free speech jurisprudence has been standing at a crossroads. Which path it will ultimately take continues to remain an open question.⁵⁴

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¹ RS Chauhan, 'Clamping Down on Creativity' *The Hindu* (New Delhi, 30 March 2017) <www.thehindu.com/opinion/op-ed/clamping-down-on-creativity/article17739798.ece> accessed 20 May 2017.

² UNGA Res 217 A (III) (10 December 1948) A/RES/3/217.

³ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁵ *Romesh Thappar v. State of Madras*, AIR 1950 SC 124 : 1950 SCR 594.

⁶ *S Rangarajan v. P Jagjivan Ram*, (1989) 2 SCC 574, 593.

⁷ *FA Picture International v. Central Board of Film Certification* 2004 SCC OnLine Bom 961 : AIR 2005 Bom 145.

⁸ Ashmita Rakhecha, 'Censorship in India' (*Racolb Legal*, 14 June 2016) <www.racolblegal.com/censorship-in-india/> accessed 14 May 2017.

⁹ *KA Abbas v. Union of India*, (1970) 2 SCC 780.

¹⁰ *S Rangarajan* (n 289).

¹¹ *Ajay Gautam v. Union of India* 2015 SCC OnLine Del 6479 : AIR 2015 Del 92.

¹² Usha VT, 'Exploring Cinema, Censorship and its Impact' *The Hindu* (New Delhi, 3 December 2013) <www.thehindu.com/books/books-reviews/exploring-cinema-censorship-and-its-impact/article5415198.ece> accessed 30 May 2017.

¹³ Gautam Bhatia, 'Film Censorship and the Courts' (*Livemint*, 7 May 2017) <www.livemint.com/Sundayapp/6ZZM8m9pHkZ2ECPvOee1jN/Film-censorship-and-the-courts.html> accessed 16 May 2017.

¹⁴ The Cinematograph Act 1952, s 4(1)(c).

¹⁵ *Phantom Films (P) Ltd v. Central Board of Film Certification*, 2016 SCC OnLine Bom 3862 : (2016) 4 AIR Bom R 593.

¹⁶ *KA Abbas* (n 292).

¹⁷ Ursula Smartt, *Media & Entertainment Law* (2nd edn, Routledge 2014) 284.

¹⁸ *Municipal Committee, Patiala v. Model Town Residents Assn*, (2007) 8 SCC 669.

¹⁹ *Ghulam Quadir v. Special Tribunal*, (2002) 1 SCC 33.

²⁰ *Romesh Thappar v. State of Madras*, AIR 1950 SC 124 : 1950 SCR 594.

²¹ *State of WB v. Anwar Ali Sarkar*, AIR 1952 SC 75 : 1952 SCR 284; *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 : AIR 1978 SC 597.

²² *Shreya Singhal v. Union of India*, (2013) 12 SCC 73.

²³ Central Board of Film Certification Guidelines 1991, s 2(iii)(a).

- ²⁴ *Ibid*, s 2(x).
- ²⁵ M/o Information & Broadcasting, *Broad Guidelines for Certification of Films* (2016) para 5.4.
- ²⁶ *Romesh Thappar v. State of Madras*, AIR 1950 SC 124 : 1950 SCR 594.
- ²⁷ *Sakal Papers (P) Ltd v. Union of India* AIR 1962 SC 305.
- ²⁸ *Raj Kapoor v. State*, (1980) 1 SCC 43.
- ²⁹ M/o Information & Broadcasting, *Examine Issues of Certification*, Law Commission (2013) para 13.1.
- ³⁰ *Directorate of Film Festivals v. Gaurav Ashwin Jain*, (2007) 4 SCC 737 : AIR 2007 SC 1640.
- ³¹ *Bobby Art International v. Om Pal Singh Hoon*, (1996) 4 SCC 1 : AIR 1996 SC 1846.
- ³² *Bennett Coleman & Co v. Union of India*, (1972) 2 SCC 788 : AIR 1973 SC 106.
- ³³ *Rustom Cavasjee Cooper v. Union of India*, (1970) 1 SCC 248 : (1970) 3 SCR 530.
- ³⁴ *Maneka* (n 304).
- ³⁵ *S. Rangarajan* (n 293).
- ³⁶ *Phantom Films (P) Ltd v. Central Board of Film Certification*, 2016 SCC OnLine Bom 3862 : (2016) 4 AIR Bom R 593.
- ³⁷ *Shreya Singhal v. Union of India*, (2013) 12 SCC 73.
- ³⁸ *KA Abbas v. Union of India*, (1970) 2 SCC 780.
- ³⁹ *BK Adarsh v. Union of India*, 1989 SCC OnLine AP 154 : AIR 1990 AP 100.
- ⁴⁰ *Pankaj Butalia v. Central Board of Film Certification*, 2015 SCC OnLine Del 9694 : (2015) 221 DLT 29.
- ⁴¹ *BK Adarsh v. Union of India*, 1989 SCC OnLine AP 154 : AIR 1990 AP 100.
- ⁴² *Phantom Films (P) Ltd v. Central Board of Film Certification*, 2016 SCC OnLine Bom 3862 : (2016) 4 AIR Bom R 593.
- ⁴³ *Ibid*.
- ⁴⁴ *Ibid*.
- ⁴⁵ *Ramesh v. Union of India*, (1988) 1 SCC 668 : (1988) 2 SCR 1011.
- ⁴⁶ *Anand Patwardhan v. Central Board of Film Certification*, 2003 SCC OnLine Bom 417 : (2003) 5 Bom CR 58.
- ⁴⁷ Gautam Bhatia, *Offend, Shock, or Disturb: Free Speech Under the Indian Constitution* (OUP 2016) 181.
- ⁴⁸ 'Same Difference? - A Comparison of the British and American film and DVD Rating Systems' (*British Board of Film Classification*, 4 March 2011) <<http://bbfc.co.uk/education-resources/education-news/same-difference>> accessed 20 May 2017.
- ⁴⁹ *Ibid*.
- ⁵⁰ M/o Information & Broadcasting, *Examine Issues of Certification*, Law Commission, (2013) para 13.1.
- ⁵¹ Ursula Smartt, *Media & Entertainment Law* (2nd edn, Routledge 2011) 285.
- ⁵² *KA Abbas* (n 292).
- ⁵³ *Om Kumar v. Union of India*, (2001) 2 SCC 386 : AIR 2000 SC 3689.
- ⁵⁴ Gautam Bhatia, *Offend, Shock, or Disturb: Free Speech Under the Indian Constitution* (OUP 2016) 189.

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