

# TO CENSOR OR NOT TO CENSOR: REGULATION OF CONTENT ON OTT MEDIA PLATFORMS IN INDIA

—Astha Pandey\* and Pranjal Pandey\*\*

**A***bstract*—A nascent yet revolutionary transformation is brewing in online media in India. Web-series or as addressed colloquially, the shows exclusively meant for streaming over the internet, are turning the heads of Indian audience towards themselves and also that of content producers and advertisers. Traditionally most of these Over-the-top (hereinafter OTT) media platforms started as movie libraries. The focus has now shifted towards creating original content. The plots are relatable and the content is tailor-made for the young, internet-savvy Indian audience. These online curated content platforms have revolutionized the traditional experience of the cable TV audience. At the same time they have created space for laws to be formulated to regulate the content being broadcasted online. Governments all over the world face a choice in the degree of censorship, including its scope and depth, which ranges from allowing the completely unfettered flow of information to prohibiting access to the internet altogether; but the majority hangs somewhere in between these two poles. Looking at the recent stir-ups caused by these platforms in India, the authors in this article talk about regulating the content on the grounds of morality, public order and health. As per the reasonable restrictions on freedom of expression provided under Article 19(2) of the Constitution of India, content regulation is one of the essential features in a country of diverse languages, religions and a large population, in order to balance the interest of all groups. The current boom of the OTT market in the country has created an aura of consumer-embracing media experience

---

\* Student, Maharashtra National Law University, Nagpur.

\*\* Student, Maharashtra National Law University, Nagpur.

*uniquely tailored to personal preferences, contexts and schedules. The dominance of the OTTs in the market attracts content regulation and supervision by an independent body. The authors further argue that apart from self-regulation there is a need of an independent statutory body authorized to take adequate steps when there is non-compliance.*

**Keywords:** OTT(s), Online Curated Content, Freedom of Speech and Expression, Self-regulation, Online Censorship.

## INTRODUCTION

India is a country which has evolved through traditions and customs. With the changing times, customs and values have also been reshaped and remoulded. In this contemporary, high-tech Indian society, where there is access to the internet, social networking and collective communication, the protection of the fundamental right of free speech and expression becomes a sine qua non for the State. The Right of Freedom of Speech and Expression though not absolute, is necessary to strike a balance between the opposing traditional and modern views. This right ensures the free flow of opinions and ideas essential to sustain the collective life of the nation. While an informed citizenry is a pre-condition for meaningful governance, the culture of open dialogue is generally of great societal importance too.<sup>191</sup> Currently, there is no regulation for OTT services and they are free to stream their content without any restrictions or licensing. The discussion of broadcasting rights is beyond the scope of this article. However, the authors focus on the censorship of content available on these platforms.

## INCREASING ACCESS TO INTERNET IN INDIA

Over the last decade, India has witnessed an exponential growth in the penetration of mobile phones. According to the recent statistics, there are eighty-nine mobile phone connections for every hundred individuals.<sup>192</sup> India has the second-largest population of active monthly internet

---

<sup>191</sup> *S Khushboo v Kanniammal* (2010) 5 SCC 600.

<sup>192</sup> 'Highlights of Telecom Subscription Data as on 16 January 2020' (Press Release No 09/2020, Telecom Regulatory Authority of India, 16 January 2020) <[https://main.trai.gov.in/sites/default/files/PR\\_No.09of2020\\_0.pdf](https://main.trai.gov.in/sites/default/files/PR_No.09of2020_0.pdf)> accessed 20 January 2020.

users.<sup>193</sup> Mobile phones are a major channel for accessing the internet in India and approximately 81% of internet users in India access the internet over smartphones.<sup>194</sup> While internet users are growing in urban India, digital adoption is now being propelled in rural India as well, registering a thirty-five percent growth in internet users over the past year. Thus, the rural-urban divide seems to have blurred in terms of internet users.<sup>195</sup>

## BOOMING OTT MARKET IN INDIA

OTT is a term referring to streaming platforms that have emerged in the recent past, providing visual content over the internet as opposed to the traditional cable TV or radio shows. When film and television content is provided directly to users via high-speed internet, instead of a cable or satellite provider, the media streaming service is referred to as Over-The-Top or OTT. There is no legally accepted or literal definition of OTTs. These platforms are not generally bound by the service providers' norms of selling and servicing unlike the traditional service providers. OTT services sidestep traditional media distribution channels such as telecommunications networks or cable television providers.<sup>196</sup>

Streaming platforms such as Netflix, Amazon Prime, Hotstar etc., have taken over the traditional entertainment industry lately. Recently conducted surveys and researches show that there has been a shift in the viewers' preferences. Millennials and GenZ prefer online streaming over traditional cable TV because of the quality of content and the flexibility of consumption.<sup>197</sup>

---

<sup>193</sup> Abhijit Ahaskar, 'India has Second-Largest Population of Monthly Active Internet Users: Report' (*Livemint*, 26 September 2019) <<https://livemint.com/technology/tech-news/india-has-second-largest-population-of-monthly-active-internet-users-report-1569500591581.html>> accessed 15 December 2019.

<sup>194</sup> Neeraj M, 'Mobile Internet Users in India 2016: 371 Mn by June, 76% Growth in 2015' (*Dazeinfo*, 8 February 2016) <<https://dazeinfo.com/2016/02/08/mobile-internet-users-in-india-2016-smartphone-adoption-2015/>> accessed 15 December 2019.

<sup>195</sup> Press Trust of India, 'Internet Users in India to Reach 627 Million in 2019: Report' (*The Economic Times*, 6 March 2019) <<https://economictimes.indiatimes.com/tech/internet/internet-users-in-india-to-reach-627-million-in-2019-report/articleshow/68288868.cms?from=mdr>> accessed 15 December 2019.

<sup>196</sup> Meghan Mcadams, 'What Is OTT? – Understanding the Modern Media Streaming Landscape' (*Tapjoy*, 18 April 2019) <[www.tapjoy.com/resources/what-is-ott/](http://www.tapjoy.com/resources/what-is-ott/)> accessed 20 January 2019.

<sup>197</sup> Shuchi Bansal, 'Why Millennials are Ditching TV for Online Content' (*Livemint*, 26 September 2018) <<https://livemint.com/Consumer/ePS4JiEeb4iVECN7odUu0L/Why-millennials-are-ditching-TV-for-online-content.html>> accessed 2 December 2019; Manali Shah, 'Indian Audiences Welcome Web Series with Open Arms' (*Hindustan Times*, 25 December 2016) <<https://hindustantimes.com/tv/web-series-the-next-big-thing-on-the-internet/story/ZvJqoSdi3ZqtszsZrGMRKL.html>> accessed 13 January 2019.

India is the fastest growing entertainment and media market globally and is expected to keep that momentum.<sup>198</sup> Digital media is driving overall growth at a compound annual growth rate (hereinafter ‘CAGR’) of sixteen per cent over the past two years.<sup>199</sup> OTT platforms let modern day consumer control their media consumption from curating their personal selection of content to picking the smart device they want to watch it on. OTT industry has set the bar on generating compelling content, creating new experiences for both their viewers and advertisers. Netflix and other OTT platforms are slowly but steadily taking over the cable TV business. The research also shows that while these platforms are mostly dependent on advertisements for revenue, the subscription-based market is growing significantly.<sup>200</sup>

## CONTENT SPECIFIC ISSUES

It is relevant to point out that the contemporary consumer is embracing the expanding opportunities to enjoy media experience uniquely tailored to personal preferences, contexts and schedules. Increasingly mobile and never idle, empowered customers around the world want to exert greater control over how and when they experience media. They do so by managing their media consumption via smartphones and an expanding range of devices, by curating their selection of channels via OTT services and by bringing more digital media content into their lives.<sup>201</sup> The key component for the success of an online video platform is the availability of content that resonates well with the audience. Both the quantity and quality of the content is extremely important to attract and retain customers on any online video platform. However, there are instances where the content can be construed as blasphemous, harassing, disparaging or hateful. This content should be subject to reasonable restrictions as well as other allied legislations. The contemporary concern is how to regulate this content without violating Fundamental Rights guaranteeing Freedom of Expression defined under Article 19 of the Constitution. This scenario

---

<sup>198</sup> ‘Explained: The OTT Boom in India’ (*Moneycontrol*, 14 September 2019) <<https://moneycontrol.com/news/india/explained-the-ott-boom-in-india-4435871.html>> accessed 15 January 2020.

<sup>199</sup> Kanchan Samtani and Gaurav Jindal, ‘Entertainment Goes Online’ (The Boston Consulting Group, November 2018) <[http://image-src.bcg.com/Images/Entertainment-Goes-Online\\_tcm21-208006.pdf](http://image-src.bcg.com/Images/Entertainment-Goes-Online_tcm21-208006.pdf)> accessed 3 January 2020.

<sup>200</sup> KPMG and Eros Now, ‘Unravelling the Digital Video Consumer: Looking through the Viewer Lens’ (September 2019) <<https://assets.kpmg/content/dam/kpmg/in/pdf/2019/09/ott-digital-video-market-consumer-india.pdf>> accessed 10 January 2019.

<sup>201</sup> Pricewaterhouse Coopers, ‘Perspectives from the Global Entertainment & Media Outlook 2019-2023: Getting personal: Putting the Me in Entertainment and Media’ (PwC, 7 May 2019) <<https://pwc.com/gx/en/entertainment-media/outlook-2019/entertainment-and-media-outlook-perspectives-2019-2023.pdf>> accessed 10 January 2019.

requires a pragmatic and proficient solution. The crucial question is how to allow for free expression of views on the internet within the framework of what the Constitution defines as ‘reasonable limits’.<sup>202</sup> The issue, therefore, does not concern the content being screened on but whether the material that could be considered objectionable should be streamed by OTT service providers.

## **RIGHT TO FREEDOM OF SPEECH AND EXPRESSION**

Article 19 of the UDHR<sup>203</sup> and ICCPR<sup>204</sup> specifically endorse the right to freedom of expression. However, this right is not absolute in any country and Governments always prohibit certain types of expressions. Under International Law, restrictions on free speech and expression are required to conform to a strict three-part test: restrictions must be provided by law, restrictions must pursue an aim recognised as legitimate, and restrictions must be necessary (i.e., proportionate) for the accomplishment of that aim. It is pertinent to mention that the Entry 60 of the Union List of the Constitution of India reads, ‘Sanctioning of Cinematograph Films for Exhibition.’<sup>205</sup> In the constituent assembly, Dr. B. R. Ambedkar explained that the purpose of inserting this item in the Union List was to ensure ‘a uniform standard’ of censorship and to protect producers whose films ‘may not be sanctioned by any particular province by reason of some idiosyncrasy.’<sup>206</sup> However, over the decades it has been observed that the freedom of speech and expression is occasionally curtailed or rather suppressed in the name of law and order, public sentiment and morality.

## **REASONABLE RESTRICTIONS**

The Constitution of India does not provide freedom of speech and expression as an absolute right.<sup>207</sup> Article 19(1)(a) is read with the reasonable restrictions so provided under Article 19(2). Therefore, unrestricted,

<sup>202</sup> Rishab Bailey, ‘Censoring the Internet: The New Intermediary Guidelines’ (2012) 47(5) Economic Political Weekly <<https://epw.in/journal/2012/05/commentary/censoring-internet-new-intermediary-guidelines.html>> accessed 10 January 2019.

<sup>203</sup> Universal Declaration of Human Rights 1948, art 19.

<sup>204</sup> International Covenant on Civil and Political Rights 1966, art 19.

<sup>205</sup> The Constitution of India 1950, Sch 7, List I, Entry 60.

<sup>206</sup> BR Ambedkar, ‘Discussion on List I: Entry 53’ (Constituent Assembly of India, New Delhi, 31 August 1949).

<sup>207</sup> Dalzell Chalmers and Cyril Asquith, *Outlines of Constitutional Law: With Notes on Legal History* (Sweet and Maxwell 1936) <[https://heinonline.org/HOL/Page?public=true&handle=hein.cow/outlicon0001&div=49&start\\_page=441&collection=cow&set\\_as\\_cursor=0&men\\_tab=srchresults](https://heinonline.org/HOL/Page?public=true&handle=hein.cow/outlicon0001&div=49&start_page=441&collection=cow&set_as_cursor=0&men_tab=srchresults)> accessed 16 December 2019.

uncensored and unregulated content cannot be allowed to circulate over OTT media platforms in the garb of right to free speech and expression. It shall also be subjected to certain restrictions, like not tarnishing the reputation of others, not being against national security or public order, health or morality etc. To put reasonable restrictions is to draw a line with respect to the existing societal norms of civility. The content streamed on such OTT media platforms is unregulated and therefore may be violative of article 19 of the Constitution of India. Even the right to carry on trade or profession is not absolute, and no one is allowed to carry on any business which involves trading in substances endangering the peace, health or safety of the citizens.<sup>208</sup>

## CENSORSHIP OF CINEMATOGRAPHIC FILMS IN INDIA

India produces more motion pictures than any other country. There also exists a parallel art house genre of Indian cinema. In a country where millions of people are passionate about cinema, even a small minority adds up to a numerically large number. Thus it is important to discuss some cases regulating the obscenity in cinematographic films in India.<sup>209</sup> Justice Douglas of the United States Supreme Court, while holding statutory film censorship void, observed, *“If we had a provision in our Constitution for ‘reasonable’ regulation of the press such as India has included in hers, there would be room for argument that censorship in the interests of morality would be permissible.”*<sup>210</sup>

The Supreme Court of India in the celebrated case of *KA Abbas v Union of India*<sup>211</sup> observed the observation of Justice Douglas and opined that *“In spite of the absence of such a provision Judges in America have tried to read the words ‘reasonable restrictions’ into the First Amendment and thus to make the rights it grants subject to reasonable regulation. The American cases in their majority opinions, therefore, clearly support a case of censorship.”*<sup>212</sup> Thus the Court held that film censorship was indeed a reasonable restriction on the freedom of speech under Article 19(2) of the Indian Constitution.<sup>213</sup> Although the film in

---

<sup>208</sup> HM Seervai, ‘The Freedom of Trade and Commerce in the Indian Constitution’ 1963 CLJ 54.

<sup>209</sup> Arpan Banerjee, ‘Political Censorship and Indian Cinematographic Laws: A Functionalist-Liberal Analysis’ (2010) 2 Drexel L Rev 557.

<sup>210</sup> *Kingsley International Pictures Corp v Regents* 1959 SCC OnLine US SC 130 : 3 L Ed 2d 1512 : 360 US 684 (1959).

<sup>211</sup> *KA Abbas v Union of India* (1970) 2 SCC 780.

<sup>212</sup> *KA Abbas* (n 211).

<sup>213</sup> *KA Abbas* (n 211).

dispute here involved a political theme, the case actually revolved around moral censorship.<sup>214</sup>

In *Ranjit D Udhesi*<sup>215</sup> it was held that “*Speaking in terms of the Constitution it can hardly be claimed that obscenity which is offensive to modesty or decency is within the constitutional protection given to free speech or expression, because the article dealing with the right itself excludes it. That cherished right on which our democracy rest is meant for the expression of free opinions to change political or social conditions, or for the advancement of human knowledge. This freedom is subject to reasonable restrictions which may be thought necessary in the interest of the general public and one such is the interest of public decency and morality. Section 292 of the Penal Code, 1860, manifestly embodies such a restriction because the law against obscenity, of course, correctly understood and applied, seeks no more than to promote public decency and morality.*”

At this point it is relevant to point that in the case of *Ramesh v Union of India*<sup>216</sup> it was observed that modern developments both in the field of cinema as well as in the field of national and international politics have rendered it inevitable for people to face realities of internecine conflicts, inter alia, in the name of religion. Even contemporary news bulletins very often carry scenes of pitched battle or violence. What is necessary sometimes is to penetrate behind the scenes and analyse the causes of such conflicts.

The Supreme Court in *Aveek Sarkar v State of W.B.*<sup>217</sup> laid down the community standard test. As per this test, any picture or article shall be deemed to be obscene under sub-section (1) of Section 292 only if:

1. if it is lascivious;
2. it appeals to the prurient interest, and
3. it tends to deprave and corrupt persons who are likely to read, see or hear the matter, alleged to be obscene.

Also, it was held that if the matter is found to be obscene, one needs to look at whether the impugned matter falls within any of the exceptions contained in Section 292. Only those sex-related materials which have a

<sup>214</sup> BR Ambedkar (n 206).

<sup>215</sup> *Ranjit D Udeshi v State of Maharashtra* AIR 1965 SC 881.

<sup>216</sup> *Ramesh v Union of India* (1988) 1 SCC 668.

<sup>217</sup> *Aveek Sarkar v State of WB* (2014) 4 SCC 257.

tendency of ‘exciting lustful thoughts’ can be held to be obscene, but the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards.<sup>218</sup>

Thus, it can be safely concluded that in India, the portrayal of obscenity in a disproportionate manner, without giving proper adherence to the community standards may be censored. It has been categorically laid down by the apex court that censorship of films, their classification according to age groups and their suitability for unrestricted exhibition with or without excisions is regarded as a valid exercise of power in the interests of public morality, decency and cannot be construed as necessarily offending the freedom of speech and expression.

## **REGULATION OF CONTENT ON ONLINE CURATED CONTENT PROVIDERS**

In India, the regulation of films is governed by the Cinematograph Act, 1952 (hereinafter ‘Act’) and Cinematograph Rules, 1983 (hereinafter ‘Rules’). The statutory body which is assigned the task to certify films for exhibition is called the Central Board of Film Certification (hereinafter ‘CBFC’), colloquially known as the Censor Board. It is constituted by the Central Government under Section 3 of the Act. The CBFC is responsible for certification of films as per Section 5 of the Act and the Rules, which lays down the rules and guidelines for giving certification to a film under different categories.

Similarly, the cable TV broadcasting is governed by the Cable Television Networks (Regulation) Act, 1995. The code and conduct to be followed by the service providers for each and every broadcast is regulated by the rules as under the Cable Television Networks Rules, 1994. The CBFC is the parent body that also looks after the certification for the cable TV. No separate mechanism is required as the Cable Television Networks Rules, 1994<sup>219</sup> restrict any program from being broadcasted over cable if it is in contravention of the law laid down in the Act.

Presently, the statutes applicable to films and cable TV broadcast fail to stand on legal ground if applied to online streaming platforms. The problem arises when defining the category within which web series will fall under existing laws. Under the Cable TV Act, cable service means “*the transmission by cables of programs including re-transmission by*

---

<sup>218</sup> *Aveek Sarkar* (n 217).

<sup>219</sup> Cable Television Networks Rules 1994, r 6(n).



*cables of any broadcast television signals.*<sup>220</sup> The cable television network is defined as “*any system consisting of a set of closed transmission paths and associated signal generation, control and distribution equipment, designed to provide cable service for reception by multiple subscribers.*”<sup>221</sup> However, the mode of transmission for OTT platforms is substantially different insofar as the content travels through internet service providers which are difficult to regulate given their expanding nature. This makes the existing broadcasting laws inapplicable to the OTT services.

The Information Technology Act, 2000 (hereinafter ‘IT Act’) prescribes a fine and imprisonment for publishing or broadcasting obscene, explicit and any such other electronic content also involving children under its Sections 67-A, 67-B and 67-C. As per the notification of Department of Electronics and Information Technology, even the bodies which come within the meaning of intermediaries<sup>222</sup>, as defined under the IT Act, can be held accountable for any information being published on any of its digital resource as per the Information Technology (Intermediary Guidelines) Rules, 2011. Additionally, provisions like Sections 295-A, 499 and 500 of the Indian Penal Code, 1860 (hereinafter ‘IPC’) are also applicable to the OTT media platforms. They seek to penalise intentional and malevolent acts deliberated to hurt religious sentiments, and prohibit the broadcasting of derogatory content. Even the Indecent Representation of Women (Prohibition) Act, 1986 criminalises indecent representation of women in any form of publication such as in advertisements, films, books, paintings, etc. It is pertinent to mention that it is still a grey area in terms of applicability of these laws on the OTT content. The apparent problem arises out of the fact that the nature of OTTs in comparison to the subjects on which these laws are applicable is different.

## **REGULATION OF OTT FROM JUDICIAL PERSPECTIVE**

Various Public Interest Litigations (hereinafter ‘PIL’) have been filed in the Delhi High Court seeking framing of guidelines to regulate the functioning of OTT.<sup>223</sup> The first case disposed of was a PIL filed in Delhi High Court by an NGO called Justice for Rights Foundation alleging that the content on OTT being unregulated and uncertified is sexually explicit,

<sup>220</sup> Cable Television Networks (Regulation) Act 1995 (CTNA 1995), s 2(b).

<sup>221</sup> CTNA 1995, s 2(c).

<sup>222</sup> Information Technology Act 2000, s 2(w).

<sup>223</sup> *Justice for Rights Foundation v Union of India* 2019 SCC OnLine Del 10962.

vulgar, inappropriate, religiously forbidden and legally restricted content (hereinafter '*JRF case*').<sup>224</sup> The Hon'ble Delhi Court held that even though there is an absence of general power for regulation in the internet platform, regards must be given to the provisions of the IT Act. The Court dismissed the petition by expressing that if the internet platform is misused for carrying information or material which is not permissible under law deterrent actions provided under the IT Act can be taken by the competent authority. The petitioners being aggrieved with the dismissal appealed to the Supreme Court<sup>225</sup> and the notice was issued to the Government. This case has not made any progress since the issuance of notice in May 2019, and there seems to be no judicial consensus on the status of streaming platforms as OTT service providers.

In another case filed in the same High Court,<sup>226</sup> the basic contention raised was that the portrayal of historical political figures has to be done in a historically accurate manner and creativity cannot be used as a pretext to malign or sully their image. Also, it is reprehensible that only for the sake of TRPs and to earn some profit the producers have come down to such a level that they have projected former prime minister in the bad light when he is a role model to millions of Indians. The petitioners have taken the reference of Secretary, Ministry of Information and Broadcasting, *Govt of India v Cricket Assn of Bengal*, where the court observed that in today's context, electronic media has become the most powerful tool because of its audio visual impact and its widest range covering almost all the sections of the society and can be easily accessible by children at home.<sup>227</sup> This case was also dismissed by relying on the judgement of Delhi High Court in *JRF case*.

Taking a different view, the Bombay High Court has issued directions to the Information and Broadcasting Ministry to initiate effective steps to curb nudity and for setting up a pre-screening body for curbing crudity, sexual or unsavoury language, vulgar actions, nudity, sex and immodesty on web series.<sup>228</sup> In this case, a petition was filed against the depiction of women in an objectifying manner by the content available on OTT. It was submitted by the petitioner that certain web series streamed on these OTTs contained use of highly vulgar language which has been used to depict the underworld environment and the dark side of the society

<sup>224</sup> *Justice for Rights Foundation* (n 223).

<sup>225</sup> Shruti Mahajan, 'SC Issues Notice in Plea Seeking Regulation of Content on Online Streaming Platforms' (*Bar and Bench*, 10 May 2019) <<https://barandbench.com/news/supreme-court-issues-notice-in-a-plea-regulate-online-streaming-platforms>> accessed 4 December 2019.

<sup>226</sup> *Nikhil Bhalla v Union of India* WP(C) 7123 of 2018, order dated 9-4-2019 (Del).

<sup>227</sup> *Ministry of Information and Broadcasting v Cricket Assn of Bengal* (1995) 2 SCC 161.

<sup>228</sup> *Divya v Union of India* PIL No 127 of 2018 (Bom) (Pending).

besides there being certain sexually unpleasant and indecent scenes, which are beyond the permissible limits. The petitioner's stance was that more importance is given to nudity, obscenity and vulgarity than the original plot of the story just to fetch the attention of youth.<sup>229</sup> Moreover, it has often been the case that women have been depicted in a bad light and considered as an object on various online streaming platforms, violating their right to lead a dignified life as enshrined under Article 21 of the Constitution of India.

In essence, the judiciary is facing difficulty in regulating online streaming platforms. The courts in certain cases decided on making Government the final authority for the regulation of online content. It is pertinent to note that the applicability of the existing laws on online content is still a grey area. The focal point of the issue is that the nature of OTTs is different from their offline counterparts, which are the subjects of the existing laws. The issue also extends to online content sharing platforms. Recently, the Bombay High Court ruled that sending offensive personal messages on WhatsApp would not amount to a criminal offence of committing an obscene act under Section 294 of the IPC as the message sent to personal accounts are strictly 'personal' and thus not in the public domain.<sup>230</sup> The bench further clarified that if these messages had been posted on a WhatsApp Group, the same could have been called a public place since all the members of the group would have access to those messages. The decision sets an example of how the same act can or cannot amount to obscenity as the nature of the platform changes. The OTTs are meant for a personal use, however, this ipso facto does not absolve the fact that OTTs cannot have a public use.

## SELF-REGULATORY CODE OF BEST PRACTICES

The OTTs have voluntarily signed a self-regulatory code of best practices and opposed Government intervention. The primary objective is to ensure that the consumer interests are protected, and at the same time, the creativity of the content providers stays intact.<sup>231</sup> It also aims to empower consumers to make informed choices on age-appropriate content. The code advocates for a complaint and redressal mechanism as well, concerning the content made available by respective online curated content providers. The video on demand OTT platforms are cautious of the way their content ownership is being regulated and some of such

<sup>229</sup> *Divya* (n 228).

<sup>230</sup> *Nivrutti Vithoba Aringale v State of Maharashtra* 2018 SCC OnLine Bom 7045.

<sup>231</sup> 'Code of Best Practices for Online Curated Content Providers' (Internet and Mobile Association of India) <[https://viacom18.com/pdfs/Self-Regulation\\_of\\_Online\\_Curated\\_Content\\_Providers.pdf](https://viacom18.com/pdfs/Self-Regulation_of_Online_Curated_Content_Providers.pdf)> accessed 3 December 2019.

platforms came together to form a code for self-regulation. The Internet and Mobile Association of India released a code of best practices for online curated content providers adopted by players such as Netflix, Hotstar, Reliance Jio, Zee5, AltBalaji, Sony-Liv, Viacom 18, Arre, etc., in January 2019. However, several platforms like Amazon and Google are yet to adopt it.<sup>232</sup> This has created a two-sided view on the utility of a voluntary code. One of the main reasons for not adopting such a code is to avoid any kind of self-binding implication on the functioning of the streaming platforms and to maintain their own space of freedom of expression. A code of any form creates binding norms and obligations for the content being circulated on these platforms and any kind of restrictions may not be welcomed by these media platforms.<sup>233</sup>

The Code prohibits the dissemination of content which maliciously and intentionally disregards the national flag or emblem, represents a child engaged in real or simulated sexual activities, is outrageous to the religious feelings of any community or class, promotes terrorism and other forms of violence against the State. Further, it also classifies content into distinct categories such as general/universal viewing, parental guidance, content only meant for age-appropriate audiences, to restrict the viewership of certain content to mature audiences.<sup>234</sup> But the issue with such a voluntary code is that it does not bar the multiplicity of such codes by other alike bodies. Multiple norms on the same subject lead to confusion and inconsistency and hamper the benchmark of content apt for being circulated. Such a situation neither benefits the audience nor serves the interests of the stakeholders.<sup>235</sup>

There is a school of thought that believes that censorship can have adverse effects on the OTT industry in India. Traditional television broadcasting is over-regulated and if OTT media platforms will be subjected to similar laws, they will restrict the single avenue of free expression left. Subscription numbers and, consequently, revenue streams of businesses will immediately suffer because the charm of an OTT

<sup>232</sup> 'Online Content Providers Sign a Voluntary Code of Best Practices for Self-Censorship' *The Hindu Business Line* (New Delhi, 17 January 2019) <<https://thehindubusinessline.com/info-tech/online-content-providers-sign-a-voluntary-code-of-best-practices-for-self-censorship/article26016945.ece>> accessed 15 January 2020.

<sup>233</sup> Suneeth Katarki and others, 'Censorship: The Current Regulatory Framework and the Future of Digital Content' (*Mondaq*, 23 November 2018) <<http://mondaq.com/india/x/757742/broadcasting+film+television+radio/Censorship+The+Current+Regulatory+Framework+And+The+Future+Of+Digital+Content>> accessed 11 December 2019.

<sup>234</sup> Code of Best Practices for Online Curated Content Providers (n 231).

<sup>235</sup> Sohini Chatterjee, 'Self-Regulatory Online Content Code may not Serve Interests of Indian Consumers, Creators' (*Vidhi Centre for Legal Policy*, 31 January 2019) <<https://vidhilegalpolicy.in/2019/01/31/2019-1-31-self-regulatory-online-content-code-may-not-serve-interests-of-indian-consumers-creators/>> accessed 20 January 2019.

subscription is often the fact that viewers have access to specific content that is otherwise unavailable and censored in a traditional exhibition of movies and television. However, it is submitted that the public interest needs to outweigh the consumer choice. No doubt OTT is yielding more unique and out-of-the-box content every day, and such original ideas are a result of the freedom of creation inherent with OTT. Nevertheless, at the same time it is necessary to regulate this content. The suggestion of a redressal mechanism is praiseworthy but in practicality, it is like a jawless shark. The formation of an ideal self-regulatory mechanism is subjective and can consist of multiple stages of regulation.<sup>236</sup>

Recently various streaming platforms opposed the idea of an institutional self-regulatory model similar to traditional media, citing a host of laws that already exist in the country to regulate the content. It includes content such as obscenity, indecent representation of women or anything that may be perceived as anti-national. In subsequent proceedings to the *JRF case* the Government has expressed its inability to regulate internet content; but an institutional self-regulatory model similar to traditional media was suggested by the Government. The idea was to have a Digital Content Complaint Council (DCCC), headed by a retired judge and have representations from industry and the Government.<sup>237</sup> But at least half of the video streaming platforms have refused to be part of the new body, with the main grouse being that it is not fully representative of the industry. The failure to arrive at a consensus, despite multiple rounds of deliberations between the industry players themselves and with the Government has sparked fears that it could prompt the Government to step into the sphere of online content regulation.<sup>238</sup>

## REGULATION OF OFFLINE CONTENT

The greater interest behind content regulation is adherence to the law of the land and not curtailment of freedom of expression. Self-regulatory bodies for offline media such as news and cable TV broadcasters like

<sup>236</sup> Asia Panda, 'IAMA's Self-Regulatory Code for Curated Content Providers: Hits and Misses' (*Mondaq*, 29 January 2019) <<http://mondaq.com/india/x/776522/broadcasting+film+television+radio/IAMAIs+SelfRegulatory+Code+for+Curated+Content+Providers+Hits+and+Misses?login=true>> accessed 27 December 2019.

<sup>237</sup> Megha Mandavia, 'A Self-Regulatory Model Similar to Old Media May Work for OTT Firms: Govt Tells SC' *The Economic Times* (1 March 2020) <<https://tech.economic-times.indiatimes.com/news/internet/a-self-regulatory-model-similar-to-old-media-may-work-for-ott-firms-govt-tells-sc/74409136>> accessed 18 March 2020.

<sup>238</sup> Amrita Nayak Dutta, 'Netflix Differs with Hotstar & SonyLIV as Self-Regulation Body Divides Streaming Industry' (*ThePrint*, 17 March 2020) <<https://theprint.in/india/netflix-differs-with-hotstar-sonyliv-as-self-regulation-body-divides-streaming-industry/381717/>> accessed 17 March 2020.

Indian Broadcasting Foundation (hereinafter 'IBF'), News Broadcasting Standards Authority (hereinafter 'NBSA'), and Broadcasting Content Complaints Council (hereinafter 'BCCC') provide for an alternative platform for people who may have issues with a particular show or channel.<sup>239</sup> These platforms act as a cushioning layer by bringing in mechanisms for redressal of grievances. BCCC provides for redressal mechanisms at the forum level itself, thereby reducing the number of cases being filed in the court.<sup>240</sup> The popularity of this alternative redressal mechanism is gradually increasing, the more omnipresent it becomes, the more cases are likely to go down.

Introducing a similar redressal forum through the self-regulatory code for OTT platforms can aid in the better implementation of the code. The effectiveness also depends on the degree of authority or the power to penalize given to these self-regulatory bodies. The problem also lies in the fact that the provisions of the existing laws are not known to everyone. They generally mandate that the content being aired should not be in bad taste, promote anti-national sentiments, or pose a threat to the security of the country. Self-regulation is merely a way of reinforcement of these laws.

## **VALIDITY OF CENSORSHIP UNDER GENERAL AGREEMENT ON TRADE IN SERVICES**

The General Agreement on Trade in Services (hereinafter 'GATS') was created to provide a credible system of international trade rules ensuring equitable and fair treatment of all its participants and, to strengthen economic activity and promote trade and development. The internet-based services will also be covered under GATS in its entry 'other recreational services' subject to the provisions and country specific schedules.<sup>241</sup>

Under Article XVI of the GATS, member states are prohibited from imposing quantitative restrictions such as limits on the number of service

---

<sup>239</sup> 'Self-Regulatory Content Guidelines for Non-News & Current Affairs Television Channels' (Indian Broadcasting Foundation) <<http://ibfindia.com/sites/default/files/pdf/Self%20Regulatory%20Guidelines%20for%20non-news%20%26%20current%20affairs%20programmes.pdf>> accessed 19 March 2020.

<sup>240</sup> Broadcasting Content Complaints Council, 'Second Status Report' (Indian Broadcasting Foundation, 16 October 2015) <<https://ibfindia.com/sites/default/files/BCCC%20SECOND%20STATUS%20REPORT%20.pdf>> accessed 17 March 2020.

<sup>241</sup> WTO, 'United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services' (WTO, 7 April 2005) DS285 <[https://wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/1pagesum\\_e/ds285sum\\_e.pdf](https://wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds285sum_e.pdf)> accessed 5 January 2020.

suppliers, the total value of service transactions, or limits on the percentage of foreign ownership in areas where they have undertaken such commitments. The question that then arises is whether censorship of the internet service can be regarded as a restriction that is proscribed under the article XVI of the GATS. In a World Trade Organisation (hereinafter 'WTO') ruling, it was held that censorship constitutes a quantitative restriction under article XVI that will be in violation of the GATS in cases where a country has undertaken relevant sectoral market-access obligations.<sup>242</sup> However, in case of a conflict between the obligations and public interests and values, Article XIV provides a list of exceptions to the general obligations contained in the GATS. These exceptions include *inter alia*, for measures necessary to protect public morals or to maintain public order, necessary to protect human, animal or plant life and health. The two exceptions which can be considered relevant for censorship grounds are public morals and the ground of necessity.

The ground used mostly for internet censorship is 'measures necessary to protect public morals or to maintain public order'. Irrespective of the reason for which internet is censored, it is fairly easy for member states to try and justify the motive behind their measure as a matter of public morality. This is because of the subjective nature and lack of unanimity over what constitutes 'public morals' which makes the exception clause easily open to misuse. A disputed measure is necessary under Article XIV(a) provided that no other alternative less inconsistent with provisions of the GATS is reasonably available. The determination of necessity involves the application of a weighing and balancing test of considering the societal value pursued by the measure at issue, the extent to which the measure contributes to the protection of that value and the trade restrictiveness of the measure.

It is submitted that streaming of content on OTT without due certification and regulation frustrates the purpose of the Act and the Rules. Lack of direct regulation and monitoring gives the liberty to the OTT service providers to choose the content available on their respective platforms without giving due regard to the obscenity, vulgarity and moral parameters embedded in the existing legal and societal norms. The authors in the next part emphasize on the need of a co-regulatory model where the content on these platforms is monitored by an independent statutory body.

---

<sup>242</sup> United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services (n 241).

## NEED OF REGULATING ONLINE CURATED CONTENT IN INDIA

The issue of online and digital content is a real challenge, and requires close interaction between stakeholders before a standardised system of regulation can be developed.<sup>243</sup> The fact that the OTT industry generates massive peripheral employment is another relevant factor which needs to be considered. Thus, the employees in the OTT industry are one of the stakeholders as censorship can have an adverse effect upon them. At one such meeting, most participants stressed on the need for the industry to be more responsible and that censorship would not be an optimum solution.<sup>244</sup>

## REGULATING FOR RESPONSIBLE DIGITAL CONTENT

At this point it is necessary to discuss the need to regulate the content of OTT service providers. The very *raison d'être* of having a Self-regulatory Code of Best Practices implies the need to regulate the content. The code, even though voluntary, has been accepted by nine OTT platforms, which can be a sign of willingness to regulate the content streaming on these platforms. Previously, broadcasters, DTH operators, multi-system operators and cable operators were the only players in the market providing TV channels but the entry of OTT services has caused a shift in the trade. This shift is substantial as a national study conducted in prominent Indian cities depicts that around eighty percent of people are expected to switch to online streaming platforms.<sup>245</sup> This survey came after a new set of rules was enacted by TRAI which changes plans, packages, and pricing of TV channels. These new rules were aimed to censure the expensive TV subscription costs in the broadcasting industry and to

---

<sup>243</sup> Ministry of Information & Broadcasting, 'Seminar on Film Certification and Regulation of Online Content Held: Government Calls for Wide Consultations on Regulation of Online Curated Content' (*Press Information Bureau*, 11 October 2019) <<https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1587837>> accessed 24 December 2019.

<sup>244</sup> Neha Alawadhi, 'Focus on Self-Regulation at Meet to Discuss Digital Content Players' *Business Standard* (12 October 2019) <[https://business-standard.com/article/companies/focus-on-self-regulation-at-meet-to-discuss-digital-content-players-119101200057\\_1.html](https://business-standard.com/article/companies/focus-on-self-regulation-at-meet-to-discuss-digital-content-players-119101200057_1.html)> accessed 18 December 2019.

<sup>245</sup> ET Bureau, '80% of People may Switch to Online Streaming Platforms: Study' (*The Economic Times*, 13 March 2019) <[https://economictimes.indiatimes.com/tech/internet/80-of-people-may-switch-to-online-streaming-platformsstudy/articleshow/68392179.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/tech/internet/80-of-people-may-switch-to-online-streaming-platformsstudy/articleshow/68392179.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)> accessed 12 December 2019.



ensure content will be the king and critical divergence.<sup>246</sup> The reasons for this shift can be TV demands a particular schedule, which young people find difficult to adhere to. Also, TV has always been and will always be household device whereas mobile is personal and hence the nature of storytelling on TV will always be ‘family’ oriented rather than ‘personal’ which is possible on mobile phones. Today youngsters want to be entertained with stories made for them and consumed on devices, time and place of their choice.<sup>247</sup> Thus it becomes imperative for the law to adapt to the varying dynamics of the society because about 600 million people, more than half India’s population, are under 25 years of age which makes it the country with the largest youth population.<sup>248</sup> Thus it becomes imperative for the Government to regulate OTTs.

With over thirty OTT players operating in the Indian market, video consumption has moved quickly to digital platforms. Stakeholders operating Cable, DTH and IPTV services have contended that OTT platforms have created a non-level playing field by offering the same shows/channels playing on TV on an app at the same time. This also gives unjust enrichment to OTT platforms over operators and broadcasters which are regulated under the Cable TV Regulation Act, 1995 and TRAI Act, 1997.

## BALANCING EXPRESSION AND REGULATION

The earlier estimation was that the entertainment industry was working on creating a body that can assist in quick disposal of complaints regarding OTT platforms. However, the industry is divided on having such a body, as they equate regulation with censorship.<sup>249</sup> It is argued that with the OTT platforms growing day-by-day, it has become a point of concern for many that whether content must be available in India without any regulation and certification. At present, online streaming is the most viewed and content managed platform which is not controlled by any authority for content regulation. Since there is no regulatory authority on controlling and certifying the contents of these online platforms, therefore the content streamed is free from any censorship. These platforms are streaming content without any licence and a lot of the content streamed

<sup>246</sup> ‘Post TRAI New Rule - Study Shows that 80% of the People Would Switch to Online Streaming platforms’ (*Varindia*, 15 March 2019) <<https://varindia.com/news/post-trai-new-rule--study-shows-that-80-of-the-people-would-switch-to-online-streaming-platforms>> accessed 20 December 2019.

<sup>247</sup> Bansal (n 197).

<sup>248</sup> Ian Jack, ‘India has 600 Million Young People – and they’re Set to Change our World’ *The Guardian* (13 January 2018) <<https://theguardian.com/commentisfree/2018/jan/13/india-600-million-young-people-world-cities-internet>> accessed 19 December 2019.

<sup>249</sup> Alawadhi (n 244).

on these platforms has not been passed by CBFC. In view thereof, in the absence of any regulatory guidelines or certifications, it will be difficult for the authorities to restrict the adult and obscene content streamed by the online platforms.<sup>250</sup>

It is submitted by the authors that the mode of regulation should be sensitive to the creators' right to express their view as well as their freedom to trade. Mere apprehension of a potential threat or archaic ideology should not be a ground to restrain and mould the content. It should be noted that there is industrious labour, extraordinary time and immense capital invested in creating the content. Thousands of workforce earn a livelihood from the creation of this content.<sup>251</sup> The web series available on these OTTs without a doubt underscore the country's shifting social awareness. It is the blunt nature of this content which consists of uncomfortable truths and pitiable social realities which makes OTTs so appealing. Some instances include the social exclusivity among elites and how other classes may perceive their lifestyle,<sup>252</sup> the ragging, toxic masculinity and gender dynamics at college<sup>253</sup> or representation of a Muslim figure in a stereotypical manner as alien and distinct from the secular, modern and progressive Hindus.<sup>254</sup>

At the same time, it is necessary to ensure that there is strict regulation in terms of decency and morality. Out of context intimacy and unnecessary use of vulgar language are often used as market gimmicks to attract or rather induce the youngsters. It is submitted that the blooming business of OTTs should not be allowed to such extent that our integral social and cultural constitutional values are shredded to nullity.

---

<sup>250</sup> SS Rana and Co Advocates, 'Content Regulation of Online Platforms – Supreme Court Issue Notice' (*Mondaq*, 10 September 2019) <<http://mondaq.com/india/x/843750/broadcasting+film+television+radio/Minimum+Modicum+Of+Obscenity+Need+Of+Online+Content+Regulation+In+India>> accessed 12 January 2020.

<sup>251</sup> Darshan Bhatt, 'Entertainment, the Future of Employment – How Emerging Digital and OTT Platforms are Generating More Jobs' (*BW People*, 5 September 2018) <<http://bwpeople.businessworld.in/article/Entertainment-the-future-of-employment-How-emerging-digital-and-OTT-platforms-are-generating-more-jobs/05-09-2018-159267/>> accessed 12 January 2020.

<sup>252</sup> Priya Arora, 'An Indian TV Show Points the Way for a New Generation' (*The New York Times*, 9 April 2019) <<https://nytimes.com/2019/04/09/arts/television/amazon-india-made-in-heaven.html>> accessed 16 January 2020.

<sup>253</sup> Jessica Xalxo, 'Hostel Daze' Review: A Show that Could Stand to Grow Up' (*Rolling Stone India*, 17 December 2019) <<https://rollingstoneindia.com/hostel-daze-review-a-show-that-could-stand-to-grow-up/>> accessed 12 January 2019.

<sup>254</sup> Aakshi Magazine, 'Ghoul: Challenging the Category of the 'Nationalist Muslim'' (2018) 53(45) EPW <<https://epw.in/engage/article/ghoul-challenging-category-nationalist-muslim>> accessed 12 January 2019.

It is one thing to attract the viewers by the use of vernacular language and another to completely obliterate the basic integrity and decency embedded in the Indian social strata. In India, majority of people are being oppressed by the mere lack of knowledge of English language. Thus, companies like Google, Facebook, Microsoft and Samsung are reaching out and providing the tools to the people and the State Governments to advance the local languages.<sup>255</sup> The same approach is adopted by the OTTs where they connect to the viewers by use of vernacular language as well as the by portraying the domestic themes to which viewers can relate. It is here the regulation becomes delicate. The cultural challenge in India is so diverse and complex that things acceptable to one community/state might offend people in another community/state.<sup>256</sup>

Content moderation of social networks is becoming one of those holy-grail hard problems to solve. There is a need for pro-active education and timely reminders to users about the responsibility they hold in making their social network safe for all.<sup>257</sup>

Thus, the dialectic dilemma to regulate content becomes a demanding task where one needs to give adherence to the meticulous context and the Indian social realities. Technology has changed beyond recognition. Old categories have no meaning any longer.<sup>258</sup> However the judicial pronouncements to concerning cinematographic films can be the guiding principles in sketching an appropriate framework for online content regulation. Cyberspace has made it impossible to separate content created in one country from being seen and 'consumed' in another. Taking a pragmatic view, it is not necessary that all the content available on these OTTs may even have the kind of viewership which could be a threat to state or society. However, at the same time the legal and cultural ethos of morality and public health should not be diluted to such an extent that it becomes a volatile concept. The authors in substance argue that while it is undeniably important to preserve and enhance the creative content under Article 19(1)(a) however at the same time it is relevant to give due

---

<sup>255</sup> Sahith Aula, 'The Problem with the English Language in India' (*Forbes*, 6 November 2014) <<https://forbes.com/sites/realspin/2014/11/06/the-problem-with-the-english-language-in-india/#6d00327a403e>> accessed 16 March 2020.

<sup>256</sup> Bharath Shanker, 'The Rise of Vernacular Language Social Network Platforms and Why is it Important to Learn from the West' (*Medium*, 21 November 2018) <<https://medium.com/@bharathshanker/the-rise-of-vernacular-language-social-network-platforms-and-why-is-it-important-to-learn-from-the-fb80a205862>> accessed 16 March 2020.

<sup>257</sup> Shanker (n 256).

<sup>258</sup> Pankaj Butalia, 'Film Censorship is so Outdated' (*The Wire*, 4 June 2015) <<https://thewire.in/culture/film-censorship-is-so-outdated>> accessed 15 January 2020.

adherence to the reasonable restrictions under Article 19(2) in contemporary society.

## SUITABLE STANDARDS OF OTT CONTENT REGULATION

The role of the Government is also moving from that of an ‘inspector’ to a ‘facilitator’, to facilitate the ease of business. A recent example is India’s new Code on Wages, 2019, which provides for the appointment of an ‘Inspector cum Facilitator,’ to carry out inspections and provide information to employers and employees for better compliance. The Government should consider such a facilitator approach to promote OCCPs and such new age businesses in the country.<sup>259</sup> There is a dire need for a monitoring and supervisory authority over the content available on OTT.<sup>260</sup> There can be appropriate synopsis of the content and warning notices and disclaimers about the nature of the content (e.g. violence, nudity) to be displayed before the viewer can choose to play the content. Thus, before the consumer plays the content, the consumer will have the full disclosure of the nature of content. Such information could be made available in as many local languages as possible. Essentially age gating and parental controls should be implemented by adopting appropriate technology. As mandatory in movies and on TV there should be anti-tobacco disclaimer screened on OTTs as well. Within this context, obtaining knowledge about the risks of tobacco consumption and its dimensions is one of the first steps of cognitive behaviour approach for tobacco cessation. The consumers can be made aware of the content so that they can make an informed choice.

## INTERNATIONAL PRACTICES

It becomes imperative to discuss the global practices of online content regulation. By comparing international practices across Singapore, UK, UAE, India, Australia and the US, Kingkaew classifies OTT regulation into four levels of intervention which vary from enhancing OTT access to new OTT regulatory regimes and in extreme cases to OTT blocking.<sup>261</sup>

<sup>259</sup> ‘Discussion Paper: Online Curated Content Regulation’ (Nishith Desai, October 2019) <[http://nishithdesai.com/fileadmin/user\\_upload/pdfs/Research\\_Papers/Online-Curated-Content-Regulation.pdf](http://nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Online-Curated-Content-Regulation.pdf)> accessed 28 December 2019.

<sup>260</sup> DSK Legal, ‘India: Centre to Frame OTT Regulatory Guidelines’ (Mondaq, 2 January 2020) <<http://mondaq.com/india/x/879374/broadcasting+film+television+radio/Centre+T+o+Frame+OTT+Regulatory+Guidelines>> accessed 21 January 2020.

<sup>261</sup> Suthikorn Kingkaew, ‘Regulating the Over-the-Top Industry: A Case Study of Thailand’ (ORF Issue Brief No 315, Observer Research Foundation, September 2019) <<https://orfonline.org/research/>

## Singapore

The media regulatory authority of Singapore, The Infocomm Media Development Authority (hereinafter 'IMDA'), directly regulates the online content. It issued a code of practices for OTT services enforced from March 2018. Online content has to be classified as offline content in the categories such as general, parental guidance, parental guidance for children below 13, no children below 16 years of age, mature audiences (18 and above) only, and content restricted to people of 21 years and above only.<sup>262</sup> The code further requires service providers to display the ratings and the elements in the content, including theme, language, etc., to be clearly displayed to the viewer. The code ensures that the OTT platforms comply with the laws of Singapore. They are not allowed to stream content that undermines national or public interest, national or public security, and racial or religious harmony.

## The United Kingdom

The online steaming services are not covered by any specific regulation in the UK, however, recently, the Director General of the British Broadcasting Corporation suggested regulation of these platforms. These platforms will likely be subjected to similar regulations as other operators. The Government has consulted experts and released a white paper on the threat that unregulated online content poses. It proposes a new regulator and a regulatory framework to ensure the online safety of British citizens. The regulation will oversee and enforce codes of practice and a redressal mechanism for users.<sup>263</sup> Further, the proposal also seeks to impose a duty of care on the service providers to take reasonable steps to tackle illegal and harmful activity on their service and to ensure an effective and easy to access user complaints function among others.

---

[regulating-the-over-the-top-industry-a-case-study-of-thailand-55631/>](#) accessed 15 March 2020.

<sup>262</sup> IMDA, 'Content Code for Over-The-Top, Video-On-Demand and Niche Services' <[www.imda.gov.sg/-/media/Imda/Files/Regulations-and-Licensing/Regulations/Codes-of-Practice/Codes-of-Practice-Media/OTT-VOD-Niche-Services-Content-Code-updated-29-April-2019.pdf](http://www.imda.gov.sg/-/media/Imda/Files/Regulations-and-Licensing/Regulations/Codes-of-Practice/Codes-of-Practice-Media/OTT-VOD-Niche-Services-Content-Code-updated-29-April-2019.pdf)> accessed 15 March 2020.

<sup>263</sup> UK Department for Digital, Culture, Media & Sport, *Online Harms* (White Paper, CP 57, 8 April 2019) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/793360/Online\\_Harms\\_White\\_Paper.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793360/Online_Harms_White_Paper.pdf)> accessed 17 March 2020.

## Kenya

The film certification body of Kenya is the Kenya Film Classification Board (hereinafter 'KBFC'). OTT platforms like Netflix were banned within weeks after their launch because they were alleged to be posing a threat to the security and were against the moral values of the country.<sup>264</sup> This led the KBFC to come up with a plan to make the requirement of a filming licence to stream any content over the internet. This move by the Government hints that these online streaming services will be allowed to carry on their business only with a regulatory oversight.

## Saudi Arabia

In Saudi Arabia, the Anti-Cyber Crime Law (hereinafter 'ACCL') regulates the content circulated over the internet. It also grants the Government censorship powers. While there are no specific laws dealing with online streaming platforms, the ACCL has been used to regulate them.<sup>265</sup> The country has often been criticised for its strict restrictions on expression and curtailment of freedom of expression.

## Thailand

Currently, the OTT industry in Thailand is indirectly regulated by several Government departments. In the absence of direct control over the OTT players, the National Broadcasting Telecommunications Commission started to expand its scope of regulation to OTT streaming services and has started to explore possible regulatory frameworks for the industry. Currently, OTT players have few regulatory requirements, which mostly focus on OTT content and patent regulation.

Notwithstanding local variations, OTT regulations across most countries involve five crucial aspects: content regulation, licensing, net neutrality, taxation, and supporting policy. However, despite Governments being increasingly aware of the need for OTT regulation, there are currently no globally accepted best practices. This is because OTT regulatory developments are in their early stages, and the frameworks are subject to reviews and modifications. Further, there is a lack of industry-specific supporting policies, even though the generic policies do benefit

---

<sup>264</sup> Nakirfai Tobor, 'Kenyans Need a License to Post Videos Online' (*iAfrikan*, 18 May 2018) <<https://iafrikan.com/2018/05/18/kenyans-need-a-license-to-post-videos-on-social-media/>> accessed 15 March 2020.

<sup>265</sup> Anti-Cyber Crime Law 2009 (ACCL 2009) (Saudi Arabia).

the OTT players by supporting nationwide network infrastructure, including creative and quality content.<sup>266</sup>

The OTT content market is still in a very nascent stage across the globe. Most countries are witnessing a sudden spike in the number of consumers in the OTT space. Some countries, either already have laws or are seriously considering laws to regulate the space. The need for the laws also seems to be coming from varied voids which the countries seek to fill. India too appears to have had a tryst with both the streams of thought. Therefore, while contemplating its approach, India will have to carefully study the exact need for the laws before it actually drafts or notifies them. It is pertinent to mention that there should be a difference in treating the television industry vis-a-vis the OTTs. The former involves the content being pushed to consumers while consumers pull their desired content in the latter. With online content, the audience is in greater control of what they choose to finally see from among the many options available. Since the audience has a better say in the latter, a regulatory approach followed for push-based consumption may not necessarily do justice to the mechanics of how online content is offered.<sup>267</sup>

## CONCLUSION

Online curated content is high in demand today and the OTT industry is thriving rapidly. OTTs have rapidly gained popularity and audience prefers it over conventional options. This creates the need for a regulatory body to look after this growing industry. Several of these OTT media portals are stationed in various countries around the world, furthering the need to scrutinise the content being fed to the Indian audience. The content of these streaming platforms has been opposed before courts signalling the requirement of focusing legislature's instant attention to take appropriate measures. These streaming platforms have revamped the viewing experience for the Indian audience and given them a break from the traditional cable TV experience, but this on the other hand also means that the various loopholes and questions that are emerging have to be talked about and dealt with. While censoring online content proportionality, rational nexus with context and creative freedom have to be kept in mind. India is rich in art and culture and in this age of modernisation and liberalisation, creative content must be dealt with progressively and diverse thoughts and ideas must be embraced. Consulting the stakeholders

---

<sup>266</sup> ACCL 2009.

<sup>267</sup> Rishwin Chandra Jethi, 'Online Content Regulation: How is it Done in Other Parts of the World?' (*Ikigai Law*, 30 November 2019) <<https://ikigailaw.com/online-content-regulation-how-is-it-done-in-other-parts-of-the-world/>> accessed 15 March 2020.

and balancing different interests has become a requirement in the successful development of public policy, and the same can be incorporated while regulating online content by ensuring that there is adequate representation from OTT industry in the regulatory body. As George Orwell says, “If liberty means anything at all, it means the right to tell people what they do not want to hear.” The creative freedom over OTT platforms is widely appreciated. However, at the same time the content streamed online should be within the four corners of the law of the land. Freedom of speech and expression cannot exist in a vacuum and have to be balanced with other rights. The current self-regulatory Code of Best Practices for Online Curated Content Providers lays down weak standards as self-regulation eliminates the scope of sanctions. In a diverse country like India where regulation is often flouted by political push, it is important to delicately deal with the content on OTTs. Some of the shows are based on harsh social realities and highlight brutalities. Therefore, there is a need for an independent media regulator.<sup>268</sup> Regulation alone cannot solve the problems persisting in the media and entertainment industry. Content moderation is acceptable only to a reasonable extent. The ultimate say must always lie with the consumers.

---

<sup>268</sup> Anshul Pandey, ‘Event Report: Perspectives on Media Regulation: Lessons from the UK’ (Observer Research Foundation, 5 February 2014) <<https://orfonline.org/wp-content/uploads/2014/02/perspectives-on-media.pdf>> accessed 15 January 2020.